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)

REPLY IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs Mijente Support Committee and Detention Watch Network sought summary judgment on Defendant Immigration and Customs Enforcement's (ICE) withholding of an agency handbook—an April 10, 2017, document entitled "Criminal Street Gangs Investigations Handbook" (hereinafter, the "Handbook")—based largely on the conclusory nature of ICE's justifications for its withholdings under Freedom of Information Act (FOIA) exemptions 5 and 7(E). In its opposition, ICE provides some additional explanation but still falls well short of carrying its burden. Accordingly, the Court should grant summary judgment to Plaintiffs.

ARGUMENT

I. ICE has not justified its exemption 5 withholdings.

Exemption 5 permits the withholding of government documents that would be privileged in civil litigation against an agency, *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2002), which includes the deliberative process, *Abtew v. DHS*, 808 F.3d 895, 898 (D.C. Cir. 2015)—the sole privilege relied upon by ICE. The deliberative process

privilege applies only to documents that are both "pre-decisional" and "deliberative," *id.*, and it does not include documents that either reflected agency policy at the time they were created or that were adopted as agency policy subsequent to creation, *Elec. Frontier Found. v. DOJ* (*EFF*), 739 F.3d 1, 7–8, 10 (D.C. Cir. 2014).

As evidence that the Handbook was adopted by the agency as its policy, Plaintiffs pointed to the fact that the Handbook was cited as one of two sources for a training provided to agency employees. Pls. Mem. 5–6; Llewellyn Decl. Ex. A at 12 (Doc. 34-2). In other words, although the document was labeled as a "draft," the agency treated the Handbook as a statement of agency policy, as evidenced by its reliance on the Handbook in creating the training.

ICE's responses rely on distinctions that are legally irrelevant and, in any event, unpersuasive. *First*, ICE points to differences between the Handbook at issue—dated April 10, 2017—and a subsequent Handbook dated August 13, 2018. ICE Opp'n at 1–2 (Doc. 36); *See* Second Pineiro Decl. ¶ 10 (Doc. 36-2). Because certain material was removed or revised from the April 2017 version and the two versions "differ[] significantly," ICE argues that disclosure "would have the potential of causing public confusion and would also reveal the agency's deliberative process in developing the manual and determining what should, and should not be, included in the final product." *Id.* at 2. ICE's argument misses the point. If the April 2017 Handbook had operative effect and reflected agency policy based on its adoption and use in creating an agency training, then its disclosure would not cause confusion or reveal the agency's deliberative process. Rather, disclosure of the Handbook would reveal ICE policy as of April 2017. That the agency may have changed its policy in August 2018 is of no moment. Instead of revealing the "deliberative process in developing the manual," disclosure would show changes in effective agency policy from April 2017 to August 2018. Because FOIA was "[e]nacted to pierce

the veil of administrative secrecy and to open agency action to the light of public scrutiny," *Pub. Citizen, Inc. v. OMB*, 598 F.3d 865, 869 (D.C. Cir. 2010) (internal quotation marks omitted) (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360–61 (1976)), this is precisely the outcome required by the statute. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975) (explaining "the public interest in knowing the reasons for a policy actually adopted by an agency supports" conclusion that document explaining adopted policy is not exempt from disclosure under exemption 5).

Second, ICE argues that case law concerning the adoption of a document as agency policy is limited to circumstances where "an agency has 'publicly' adopted the reasoning set forth in a privileged document in its dealings with the public." ICE Opp'n 3 (quoting *EFF*, 739 F.3d at 11). That is not the law. The express-adoption doctrine originated in the Supreme Court's decision in *Sears*, where the Court considered internal memoranda produced by staff of the NLRB during the agency's administrative process for determining whether an administrative complaint will be filed. 421 U.S. at 138–42. The Court first held that memoranda issued in connection with a decision to *not* file a complaint explained the agency's final "legal or policy decision" on that matter and, therefore, were not protected by the deliberative process privilege and not exempt from disclosure under exemption 5. *Id.* at 155–59. The Court then held that where these memoranda "incorporated by reference" other potentially previously exempt documents, those additional documents were no longer exempt. *Id.* at 161. As the Court explained, "when adopted, the reasoning becomes that of the agency and becomes its responsibility to defend." *Id.*

EFF and similar cases are consistent with this principle and simply concern factual circumstances not present here. In *EFF*, the D.C. Circuit considered whether a legal opinion

prepared for the Federal Bureau of Investigation (FBI) by the Office of Legal Counsel (OLC) in the Department of Justice was protected by the deliberative process privilege and, thus, exempt from disclosure under exemption 5. 739 F.3d at 3. The court started from the recognition that the deliberative process privilege does not cover documents that explain "the basis for an agency policy," notwithstanding whether such documents are "not designated as 'formal,' 'binding,' or 'final.'" *Id.* at 8 (quoting *Sears*, 421 U.S. at 152–53, and *Schlefer v. United States*, 702 F.2d 233, 244 (D.C. Cir. 1983)). "Because OLC cannot speak authoritatively on the FBI's policy," the court then considered whether the FBI had adopted the OLC opinion as FBI policy. *Id.* at 8–10. In support of its argument that the FBI had adopted the OLC opinion, the plaintiff pointed to "approving public references in non-privileged agency documents … and reliance in congressional testimony," and relied on two Second Circuit cases where that court held "an agency waived the privilege by referencing an OLC memorandum in its dealings with the public." *Id.* at 11 (brackets omitted); *see Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. DOJ*, 697 F.3d 184, 204 (2d Cir. 2012); *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 357 (2d Cir. 2005). The *EFF* court rejected the plaintiff's argument because, unlike *Brennan Center* and *La Raza*, "the public references to the OLC Opinion did not come from the FBI itself," thus there was no evidence the FBI had, in fact, adopted the OLC opinion as agency policy. *EFF*, 739 F.3d at 11–12.

Plaintiffs have not relied on any public references by ICE or other entities as evidence that it adopted the Handbook as agency policy. Rather, Plaintiffs have demonstrated that ICE itself relied on the Handbook as a source of agency policy in crafting its own training for staff based on the Handbook. *See* Llewellyn Decl. Ex. A at 12. Because the question is whether the Handbook represented or was adopted as ICE policy, *see Public Citizen*, 598 F.3d at 875

(explaining that "[d]ocuments reflecting [an agency's] formal or informal policy on how it carries out its responsibilities" are not protected by the deliberative process privilege), not whether Plaintiffs have identified a "'public' invocation of the draft Handbook," ICE Opp'n at 4, ICE's argument is inapposite.

Third, and relatedly, ICE repeatedly references the "purely internal" nature of the Handbook as supporting its withholding under exemption 5. ICE Opp'n 3–4 & n.1. But there is no privilege for "purely internal" agency documents. Indeed, the "internal" nature of a document is relevant only to exemption 2, which covers records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). ICE has not relied on exemption 2 here—nor could it, given that exemption 2's reach is limited to records that "relate 'solely' to … mundane and bureaucratic records" that are not "'subject to a genuine and significant public interest.'" *Shapiro v. DOJ*, 153 F. Supp. 3d 253, 280 (D.D.C. 2016) (ellipsis omitted) (quoting *Rose*, 425 U.S. at 369). If the Handbook reflects agency policy, it is irrelevant for exemption 5 purposes whether it is "purely internal."

Fourth, ICE argues without evidentiary support that the Handbook did not represent "*de facto* agency policy." ICE Opp'n 5–6. Indeed, ICE acknowledges, as it must, that the agency "did utilize the definition of 'gang' and identifying criteria for gang members in the draft Handbook as a source for training material," immediately contradicting its assertion that "there is no basis in the record for" Plaintiffs' contention that "ICE relied on the April version of the purportedly 'draft' Handbook to train its personnel." *Id.* at 5. ICE appears to argue that, because Plaintiffs have not identified other trainings utilizing the redacted portions of the Handbook, its reliance on exemption 5 for those portions of the Handbook is justified. *Id.* But ICE is inappropriately attempting to flip the burden: Plaintiffs do *not* have the burden of proving

exemption 5 does not apply; rather, ICE has the burden of proving that it does apply. 5 U.S.C. § 552(a)(4)(B); *Summers v. DOJ*, 140 F.3d 1077, 1080 (D.C. Cir. 1998). ICE may carry its burden by relying on agency affidavits, provided that such 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). But ICE cites no evidence for this argument whatsoever. *See* ICE Opp'n 5–6. Moreover, review of the Second Declaration of Fernando Pineiro filed in support of ICE's opposition makes clear that ICE has focused solely on disclosure of information in the Handbook that overlapped with the training. *See* Second Pineiro Decl. ¶¶ 6, 9 (explaining ICE conducted a "side-by-side review" of the Handbook and the training and "released all information adopted from" the Handbook and that none of the remaining pages were "incorporated into" that training).

The implication of ICE's unsupported argument is that one portion of the Handbook was adopted as agency policy and had operative effect, while the remainder did not. ICE's argument is illogical—it would be unusual and atypical, to say the least, for one section of a Handbook or a "manual," *see, e.g.*, ICE Opp'n 1, 2, 6, to reflect agency policy and other sections to not—and is entirely unexplained by the agency. In the face of record evidence and the agency's concession that a portion of the Handbook indisputably had operative effect, the burden was on ICE to provide a sufficiently detailed, logical explanation for why that portion of the Handbook was unique from the remainder. Its failure to do so is fatal to its reliance on exemption 5.

Fifth, ICE has now, for the first time, attempted to satisfy the required heightened withholding standard under 5 U.S.C. § 552(a)(8)(A)(i)(I), of showing that disclosure would harm

an interest protected by exemption 5. Its showing is insufficient. ICE's declarant does little more than articulate "[g]eneric, across-the-board articulations of harm" that "are insufficient" to satisfy ICE's obligation. *Rosenberg v. U.S. Dep't of Def.*, No. 17-cv-00437 (APM), 2020 WL 1065552, at *10 (D.D.C. Mar. 5, 2020) (quoting *Judicial Watch, Inc. v. DOJ*, No. CV 17-0832 (CKK), 2019 WL 4644029, at *5 (D.D.C. Sept. 24, 2019)); *see* Second Pineiro Decl. ¶ 15 (stating that disclosure would "harm the deliberative process privilege" and "harm the expression of candid opinions and the free and frank exchange of information among agency personnel" without further detail). Attempting to "connect the harms in a meaningful way to the information being withheld," *Rosenberg*, 2020 WL 1065552, at *10 (quoting *Ctr. for Investigative Reporting v. U.S. Customs & Border Prot.*, — F. Supp. 3d —, No. 18-2901 (BAH), 2019 WL 7372663, at *9 (D.D.C. Dec. 31, 2019)), ICE states that disclosure of a draft "containing un-finalized information" could cause public confusion "regarding ICE's mission and law enforcement activities," Second Pineiro Decl. ¶ 15. That statement does not make a showing of harm, however, because, as explained above, disclosure of the Handbook would reveal only a prior agency policy. *See supra* pp. 2–6. Moreover, even were the Handbook found to be covered by the deliberative process privilege, ICE's purported concern would support withholding only those portions of the Handbook that were ultimately revised or changed, not those that were, in fact, retained in the August 2018 Handbook.

II. ICE has not justified its exemption 7(E) withholdings.

Exemption 7(E) permits the withholding of records compiled for a law enforcement purpose if disclosure "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). ICE repeatedly misrepresents "uncertainty within this Circuit as to whether the 'risk of circumvention' requirement also must be considered" for the withholding of law enforcement techniques and procedures. ICE Opp'n 7. In fact, the law of this Circuit is clear: "[T]he Government must show that the withheld records or information would disclose techniques and procedures for law enforcement investigations *and* that their disclosure would reasonably risk circumvention of the law." *Long v. ICE*, 279 F. Supp. 3d 226, 234 (D.D.C. 2017) (emphasis added) (internal quotation marks omitted) (quoting *Sack v. U.S. Dep't of Def.*, 823 F.3d 687, 694 (D.C. Cir. 2016) (quoting 5 U.S.C. § 5552(b)(7)(E))).[1]

As Plaintiffs explained in their cross-motion for summary judgment, an agency's justification for withholding records under exemption 7(E) "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.'" Pls. Mem. 7 (quoting *Citizens for Responsibility & Ethics in Wash. v. DOJ*, 746 F.3d 1082, 1102 (D.C. Cir. 2014)). Because ICE had done no more than simply repeat the statutory standard for categorical withholdings, Plaintiffs explained that the agency had failed to satisfy its burden, particularly with respect to specific portions of the Handbook—the "Introduction," "Definitions," "Authorities/References," "Responsibilities," and "Funding Mechanisms for Gang Investigations" chapters, as well as the appendices—that seemed particularly unlikely to reveal any law-enforcement procedures or guidelines or to risk circumvention of law if disclosed. *Id.* at 7–9. In response, ICE has done little more than simply insist that the Handbook must be exempt under exemption 7(E) because it concerns investigations of criminal street gangs. ICE Opp'n 7–8. ICE thus fails to move the ball forward with respect to its exemption 7(E) withholdings.

[1] Although cited in Plaintiffs' memorandum, *see* Pls. Mem. 7, ICE wholly ignores the D.C. Circuit's decision in *Sack*.

ICE's discussion of *PHE, Inc. v. DOJ*, 983 F.2d 248 (D.C. Cir. 1993), is likewise unavailing. There, the D.C. Circuit analyzed the Department of Justice's withholding of portions of its "Obscenity Prosecution Manual," which "provide[d] a step by step analysis of the [relevant] law." *Id.* at 249, 251. The court relied in part on both the titles of the withheld chapters and the agency's minimal description of their contents in its "vague and conclusory" affidavit in holding that the agency had failed to "establish[] a legitimate basis for its decision" to withhold significant portions of that manual, and in particular failed to show "why releasing each withheld section would create a risk of circumvention of the law." *Id.* at 251–52. ICE's opposition focuses on distinguishing the factual circumstances present in *PHE* from those present here. ICE Opp'n 9–10. As ICE notes, the subject matter of the manual at issue in *PHE*—largely a summary of case law—was clearly attenuated from the disclosure of information that risks circumvention of the law. *Id.* at 9. Nonetheless, the court's discussion of the various subjects contained in that manual and the agency's conclusory justifications is plainly relevant here.[2] There, as here, the agency had relied primarily on "vague conclusions" about the harm from disclosure without providing specific support as to the need to withhold particular portions of the manual, which was made apparent by the titles of the withheld chapters. *PHE*, 983 F.3d at 251–52.

Moreover, in *PHE*, the court chastised the agency for its blanket withholding of chapters where they plainly contained at least some non-exempt information: For example, as the court explained, the agency failed to explain "why the agency could not release at least the portions of" a chapter "containing the discussion of search and seizure law and the digest of useful caselaw." *Id.* The same failure to distinguish between exempt and non-exempt material is

[2] ICE contends that the holding in *PHE* turned on the lack of any "apparent relation between the withheld chapters and investigative techniques and procedures," ICE Opp'n 9, but the court's discussion is clear that the dispositive issue was whether disclosure would "create a risk of circumvention of law," *PHE*, 983 F.3d at 250, 252.

apparent in this case. Plaintiffs do not contest that the Handbook *may* contain *some* information that could be properly withheld under exemption 7(E), such as certain information in, for example, the chapters entitled "Investigative Strategies" and "Criminal Laws and Investigative Techniques." *See* First Pineiro Decl. Ex. 1 at 4 (Doc. 32-2). The problem is that ICE has failed to provide the Court and Plaintiffs with sufficiently detailed bases supporting its withholdings of any portions of the Handbook. For example, exemption 7(E) "does not ordinarily protect routine techniques and procedures already well known to the public." *Shapiro v. DOJ*, 393 F. Supp. 3d 111, 117 (D.D.C. 2019) (internal quotation marks omitted) (quoting *Elec. Frontier Found. v. DOJ*, 384 F. Supp. 3d 1, 9 (D.D.C. 2019) (quoting *Founding Church of Scientology of Wash., D.C. v. NSA*, 610 F.2d 824, 832 n.67 (D.C. Cir. 1979))). There has been significant press on various investigative techniques used by ICE, including as a result of other documents produced in this case. *See, e.g.*, McKenzie Funk, *How ICE Picks Its Targets in the Surveillance Age*, N.Y. Times Mag. (Oct. 2, 2019), https://www.nytimes.com/2019/10/02/magazine/ice-surveillance-deportation.html (detailing various ICE investigative techniques, including "surveillance of detainees' voice and video calls at ICE facilities and [use of] state D.M.V. databases and information products like CLEAR"); Caitlin Dickerson, *U.S. Government Plans to Collect DNA from Detained Immigrants*, N.Y. Times (Oct. 2, 2019), https://www.nytimes.com/2019/10/02/us/dna-testing-immigrants.html (discussing use of DNA collection and testing by DHS broadly, including "a pilot program conducted this summer along the southwestern border, in which ICE agents used rapid DNA sampling technology"); Spencer Woodman, *Palantir Provides the Engine for Donald Trump's Deportation Machine*, The Intercept (Mar. 2, 2017), https://theintercept.com/2017/03/02/palantir-provides-the-engine-for-donald-trumps-deportation-machine/ (detailing ICE's use of "a new intelligence system called Investigative Case

Management," including guidance to ICE employees of the steps required to input data into the system). In neither of ICE's supporting declarations does its declarant state whether or to what extent the techniques and/or procedures contained in the Handbook are secret or previously undisclosed. *Cf. Shapiro*, 393 F. Supp. 3d at 117–18 (finding exception for "routine techniques and procedures already well known" did not apply because FBI's declarant "stated explicitly that the investigative technique that would be revealed is unknown").

Moreover, the record indicates that even the sections most likely to contain exempt information contain non-exempt information. For example, ICE's declarant states that the chapters entitled "Investigative Strategies," "Disruption Strategies," and "Criminal Laws and Investigative Techniques" contain information on "investigation and disruption strategies" *and* "the applicable criminal laws." First Pineiro Decl. ¶ 24. But he does not explain how disclosure of "the applicable criminal laws" would either reveal law enforcement procedures or techniques or risk circumvention of the law. Similarly, for the chapter entitled "Reporting," ICE's declarant states it "discusses reporting obligations, details of database coding and tracking of gang investigations, the purpose of certain codes, how to enter codes in certain databases, etc." *Id.* Although the disclosure of certain technical aspects of an ICE database *might* be properly exempt, *see Long*, 279 F. Supp. 3d at 233–38 (finding genuine disputes of material fact prevented court from determining whether disclosure of certain metadata and databased schema from ICE was subject to exemption 7(E)), there is no logical reason why the "reporting obligations" of an ICE employee should be treated similarly.

The shortcomings of ICE's explanations are brought into even clearer focus when considering the chapters whose titles lack any logical connection between law enforcement procedures or techniques and a risk of circumvention of the law. *See* Pls. Mem. 9. As to these

chapters, ICE's declarant has now additionally stated that "these chapters lay the foundation for the subsequent chapters in the Draft Handbook, including the exact terms, authorities, references and responsibilities that are more fully discussed in later chapters" and contends that such chapters "are essentially a road map or outline for the remaining chapters, which, using the earlier chapters as a foundation, go into even more detail" about ICE investigations. Second Pineiro Decl. ¶ 13. Again, though, ICE's declarant fails to establish the crucial logical link between disclosure of the "terms, authorities, references and responsibilities" related to ICE investigations and the disclosure of either law enforcement procedures or techniques or a risk of circumvention of the law. Indeed, while of course terms defined early in the Handbook—and authorities cited as the basis of ICE's actions—will be referenced throughout chapters discussing the underlying investigative techniques, it does not follow that those terms and authorities "provide a roadmap" for such techniques, much less that disclosure of those definitions or authorities would somehow risk circumvention of the law.

The D.C. Circuit's recent decision in *Evans v. Federal Bureau of Prisons*, — F.3d —, No. 18-5068, 2020 WL 1144613 (D.C. Cir. Mar. 10, 2020), is instructive. There, the plaintiff had requested, among other things, surveillance footage of an attack against him in a prison dining hall. *Id.* at *1. In response, the agency withheld the footage under exemptions 7(C) and 7(E). *Id.* Addressing these withholdings, the court began by "remind[ing] the government" that affidavits sufficient to support summary judgment "'must show, with reasonable specificity, why the documents fall within the exemption.'" *Id.* at *6 (quoting *Hayden v. NSA/Cent. Sec. Serv.*, 608 F.2d 1381, 1387 (D.C. Cir. 1979)). Turning to the agency's justification for invoking exemption 7(E), the court concluded the affidavit suffered from "vagueness and lack of specificity," even though the agency's declarant stated that "releasing the footage would reveal the specific law

enforcement methods employed in responding to and/or conducting the investigation into the prohibited conduct," including by "demonstrat[ing] the location of the video cameras," such that "prisoners could modify their criminal behavior to prevent detection and circumvent the methods law enforcement officers use to discover the existence of and investigate the conduct of prisoners." *Id.* at *7 (internal quotation marks and brackets omitted). Specifically, the court noted the agency failed to explain whether the video cameras were "visible to inmates in the prison dining hall," such that disclosure would reveal something secret rather than something obvious about the cameras, and even if so, whether disclosure of footage from "one specific camera" would even implicate these concerns. *Id.* Thus, while "Exemption 7(E) sets a relatively low bar for the agency to justify withholding," *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011), that does not mean the Court simply defers to the agency. It must still "demonstrate logically how the release of the requested information might create a risk of circumvention of the law." *Id*. (quoting *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009)). Because, as explained above, ICE has provided few specifics as to the risk of circumvention of law from disclosure of the withheld chapters and appendices from the Handbook, it has not carried its burden here.

Finally, attempting to improperly flip the burden, ICE argues that "Plaintiffs have cited no authority to suggest that the FOIA Improvement Act of 2016 effectuated a change to the standard for applying Exemption 7(E)." ICE Opp'n 11. The burden is on ICE to justify its withholdings, 5 U.S.C. § 552(a)(4)(B), and, by its own terms, the heightened withholding standard applies to all of FOIA, *see id*. § 552(a)(8)(A)(i)(I) ("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)[.]" (emphasis added)).

The only exception is where "disclosure is prohibited by law," *id.* § 552(a)(8)(A)(i)(II), which ICE has not argued is the case here.

As to application of the heightened standard set forth in section 552(a)(8)(A)(i)(I), ICE largely repeats the same bases for its invocation of exemption 7(E) as the foreseeable harm for disclosure. ICE Opp'n 11; Second Pineiro Decl. ¶ 16. For the same reasons that these justifications fail to sustain ICE's reliance on exemption 7(E), they are similarly unavailing in establishing that the agency reasonably foresees harm from disclosure.

III. ICE's misapplication of exemption 5 and exemption 7(E) undermines its segregability determination.

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided" after the redaction of exempt information. 5 U.S.C. § 552(b); *see id.* § 552(a)(8)(A)(ii)(II) ("An agency shall … take reasonable steps necessary to segregate and release nonexempt information."). In their summary judgment motion, Plaintiffs explained that ICE's conclusory statement that it had "conducted a 'line-by-line review' of the Handbook and that 'all information not exempted from disclosure pursuant to a FOIA exemption specified above were [sic] correctly segregated and non-exempt portions were released'" was insufficient to satisfy its segregability obligation. Pl. Mem. 13 (quoting First Pineiro Decl. ¶¶ 27–28); *see Stolt-Nielsen Transp. Grp. Ltd. v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008) (agency's "conclusory affidavit" that it had "reviewed each page line-by-line to assure [itself] that [it] was withholding from disclosure only information exempt pursuant to [FOIA]" was insufficient to satisfy segregability obligation).

ICE relies on only the supplemental declaration of Mr. Pineiro as support for its argument that it complied with its segregability obligation. ICE Opp'n 11 (citing Second Pineiro Decl. ¶¶ 17–18). Specifically, for the first time, ICE states that it conducted multiple "line-by-line

reviews" and that any non-exempt material that was not "inextricably intertwined" with exempt information was already provided. Second Pineiro Decl. ¶ 18. As explained above, however, the agency's broad invocation of exemption 5 and exemption 7(E) is unjustified. ICE's misapplication of those exemptions dooms its segregability determination as well.

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If the Court determines that ICE has demonstrated that *some* exempt material may exist amidst the broad withholdings, the best course would be for the Court to review the Handbook *in camera*. *See Evans*, 2020 WL 1144613, at *8 (noting that *in camera* inspection is not necessary "in every FOIA case" but is an appropriate option where government claims "more detailed and specific [affidavit] … might reveal information protected by FOIA exemptions"). The Handbook is less than 50 pages long, and *in camera* inspection will provide the most efficient process for bringing this case to a close should the Court have any lingering concerns. ICE should not, however be given yet another chance to satisfy its burden through another round of briefing in this case, which has been pending since 2017. As the D.C. Circuit reiterated in *Evans*, "serial summary judgment motions after the government's first loss" are "discouraged" in FOIA cases. *Id*. at *6 (citing *Maydak v. DOJ*, 218 F.3d 760, 769 (D.C. Cir. 2000)). Moreover, this case does not present a "novel experience"—the need to process and potentially segregate exempt and non-exempt material from a "videotape rather than printed data," *id.*—that potentially could justify giving the government another bite at the apple.

CONCLUSION

For the above-stated reasons and those in Plaintiffs' cross-motion for summary judgment, the Court should grant summary judgment to Plaintiffs. To the extent the Court concludes ICE

has shown that some portion of the material withheld may be properly exempt, the Court should conduct an *in camera* review of the Handbook to determine which portions must be disclosed.

March 23, 2020

Respectfully submitted,

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