

HUGH HANDEYSIDE (*pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: 212-549-2500
Fax: 212-549-2583
hhandeyside@aclu.org

MATTHEW CAGLE (CA Bar No. 286101)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
Telephone: 415-621-2493
Fax: 415-255-1478
mcagle@aclunc.org

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO-OAKLAND DIVISION

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION, *et al.*,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, *et al.*,

Defendants.

Case No. 19-CV-00290-EMC

**PLAINTIFFS' NOTICE OF CROSS-
MOTION; MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT AND IN SUPPORT OF
CROSS-MOTION FOR PARTIAL
SUMMARY JUDGMENT WITH
RESPECT TO CBP, ICE, AND USCIS**

Hearing date: May 20, 2021
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Judge: Hon. Edward M. Chen

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INTRODUCTION

1
2 This Freedom of Information Act (FOIA) lawsuit concerns the extent to which the federal
3 government can conceal its monitoring of the American public's online speech. Numerous
4 federal agencies have invested heavily in surveillance of social media, contracting with vendors
5 for powerful technologies that search, scrape, aggregate, and filter social media content for a
6 variety of purposes—visa processing, immigration benefits and enforcement, and border
7 screening in particular. Defendants U.S. Customs and Border Protection (CBP), U.S.
8 Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services
9 (USCIS) have expanded their use of social media surveillance through various programs and
10 initiatives that include subjecting entire populations of visa holders to continuous monitoring of
11 their social media activity for the duration of their time in the United States. This pervasive
12 surveillance of online speech adversely impacts immigrants, refugees, asylum seekers, and
13 visitors by prompting undue law enforcement scrutiny, baseless denial or revocation of visas or
14 immigration benefits, or placement on watchlists. It also inevitably extends to the speech and
15 associations of citizens and lawful permanent residents of the United States.

16 Because the public has a vital interest in understanding the nature, extent, and effects of
17 surveillance of social media, Plaintiffs American Civil Liberties Union Foundation and
18 American Civil Liberties Union Foundation of Northern California (together, the ACLU)
19 submitted requests for records under FOIA to seven federal agencies. Plaintiffs filed this lawsuit
20 after agencies failed to respond as FOIA requires.

21 Since then, Defendants CBP, ICE, and USCIS have produced numerous records that
22 illuminate aspects of their use of social media surveillance. However, they have withheld
23 significant information on agency policies that govern such surveillance, whether it is effective
24 or necessary, which populations it targets, and its impact on individual privacy and free
25 expression. This information is not exempt from disclosure under FOIA, and its value to the
26 public is self-evident: Citizens and noncitizens alike have immense interests in understanding
27 Defendants' justifications for conducting and expanding surveillance of social media, and
28 whether safeguards exist to protect privacy, civil liberties, and civil rights.

1 Defendants have failed to justify withholdings under Exemptions 4, 5, and 7(E), and CBP
2 and ICE have failed to establish the adequacy of their searches for responsive records. The Court
3 should deny Defendants’ motion for summary judgment and grant Plaintiffs’ cross-motion.

4 **FACTUAL BACKGROUND**

5 **I. Social Media Surveillance Conducted by CBP, ICE, and USCIS**

6 The Department of Homeland Security (DHS)—of which CBP, ICE, and USCIS are
7 components—promotes itself as “at the forefront among Federal agencies in developing the
8 capability to incorporate social media data in its screening and vetting processes.”¹ In 2015, DHS
9 convened a “Social Media Vetting Task Force” to examine the “current and future use of social
10 media in the DHS vetting process for operational and intelligence purposes.”² The DHS
11 Secretary stated in a 2016 memorandum that DHS components were using social media “for over
12 30 different operational or investigative purposes.”³ As of April 2018, DHS was “developing,
13 testing, and operationalizing the use of social media in various pilots and programs” and in “use-
14 cases” including “[a]ssessment of eligibility . . . for immigration benefits”; “[a]dmissibility
15 determinations, *i.e.* to identify or confirm an applicant’s identity, occupation, previous travel
16 and/or other relevant information”; and “[c]riminal and administrative immigration law
17 enforcement activities.”⁴ DHS also developed “tools and processes” towards its “long term
18 objective of deploying a semi-automated, bulk screening capability for social media.”⁵

19 CBP, ICE, and USCIS have been at the center of DHS’s efforts to ramp up social media
20 surveillance and screening. As of 2016, CBP stated that “Social Media has become a critical
21 element for vetting travelers” and that social media was already being “used in a multitude of
22 ways during the vetting process,” including “to assist in the vetting of travelers before they arrive

23
24 ¹ Department of Homeland Security Social Media Talking Points and Issue Paper 3, Apr. 2018,
attached as Ex. C to the Second Declaration of Hugh Handeyside (“Handeyside Decl.”) at 1155.
All exhibits are to the Handeyside Declaration unless otherwise indicated.

25 ² Email from David J. Palmer, DHS Associate General Counsel, to multiple recipients, Dec. 17,
26 2015, ECF No. 34–8.

27 ³ Memorandum from Secretary Johnson to Component Heads Regarding Social Media, Feb. 11,
2016, Ex. C at 1954.

28 ⁴ DHS Talking Points, *supra* note 1, Ex. C at 1155, 1153.

⁵ *Id.*, Ex. C at 1155.

1 in the United States” and to evaluate “other factors related to an individual who seeks to
 2 immigrate, visit the United States, or otherwise obtain a benefit subject to CBP’s vetting.”⁶ In
 3 September 2016, despite opposition from privacy and civil rights groups, CBP began asking
 4 citizens and nationals of countries participating in the Visa Waiver Program to provide social
 5 media identifiers before traveling to the United States.⁷ CBP has made clear that any such
 6 information “may be used for national security and law enforcement purposes,” and that if an
 7 applicant chooses not to provide social media information as part of an application, CBP “may
 8 employ tools and search techniques in an attempt to locate and identify public social media
 9 accounts and profiles belonging to the applicant, for use in the screening and vetting process.”⁸
 10 Separately, CBP uses “publicly available search engines and content aggregators” to “monitor[]
 11 content on social media sites for information that informs Agency situational awareness.”⁹

12 CBP’s policy is to continue expanding its use of social media for operational purposes. In
 13 late 2016, CBP’s Office of Field Operations wrote that “[d]espite incorporating social media into
 14 many aspects of its operational mission, CBP aims to further enable and empower its officers,
 15 agents, and analysts to further integrate social media throughout their operational functions,”
 16 despite “challenges in screening nongovernment maintained databases, including the dynamic
 17 nature and magnitude of social media information.”¹⁰

18 ICE surveils social media extensively. In September 2014, ICE established an “Open
 19 Source Team” that it describes as “the first Program within ICE to leverage open source/social
 20 media exploitation to . . . utilize government and law enforcement databases in the investigation
 21 of national security and public safety concerns that exploit vulnerabilities in the U.S.
 22

23 ⁶ CBP Use of Social Media Paper, May 25, 2016, Ex. A at CBP 5; CBP Use of Social Media
 24 Paper, Sept. 26, 2016, Ex. A at CBP 9; DHS Social Media Talking Points and Issue Paper 3,
 Mar./Apr. 2018, Ex. C at 1130.

25 ⁷ DHS, Privacy Compliance Review of the U.S. Customs and Border Protection Electronic
 26 System for Travel Authorization 1, 2017, ECF No. 34–10; CBP Information Issue Paper, Oct. 6,
 2016, Ex. A at CBP 1.

⁸ DHS Privacy Compliance Review, *supra* note 7.

27 ⁹ DHS, Privacy Impact Assessment for the Publicly Available Social Media Monitoring and
 Situational Awareness Initiative 1, Mar. 25, 2019, ECF No. 34–11.

28 ¹⁰ CBP Issue Paper, *supra* note 7 at CBP 1; Social Media Briefing Paper, Ex. A at CBP 13.

1 immigration system.”¹¹ Under a separate social media pilot program formalized as the Visa
 2 Lifecycle Vetting Initiative (VLVI), ICE “continuously monitor[s] . . . non-immigrant visa
 3 holders through the use of an automated social media vetting platform . . . throughout the
 4 lifecycle of the visa’s validity”—meaning “from the time they file their visa application to the
 5 time they depart from the United States.”¹² If, during this surveillance, ICE “uncovered derogatory
 6 information about a visa applicant,” it coordinates with CBP and the State Department for
 7 follow-up action.¹³ If the applicant has already entered the United States, ICE analysts request an
 8 investigation that is “coordinated through the Joint Terrorism Task Force (‘JTTF’).”¹⁴ According
 9 to ICE, the VLVI contract for social media surveillance results in “recommended visa refusals,
 10 watchlist nominations, [and] criminal and administrative arrests.”¹⁵ The documents are silent on
 11 efforts to ensure these actions are not arbitrary, discriminatory, or groundless.

12 ICE documents also show the extent of its reliance on contracts with private entities for
 13 technology to assist in analyzing massive volumes of social media content. It licenses Giant
 14 Oak’s “GOST” tool, which enables ICE personnel “to access and utilize mission critical open
 15 source search and triage capabilities when screening visa applicants, to include continuous
 16 monitoring through custom alert services.”¹⁶ ICE also uses Giant Oak’s “Social Locator” tool,
 17 which combines social media information on potentially hundreds of thousands of individuals
 18 with “publicly available information” from “credit bureau, utilities, real estate, and criminal
 19 databases,” along with “proprietary and purchased data.”¹⁷ According to ICE, these tools enable
 20 it “to leverage data sources in powerful ways to search for persons of interest.”¹⁸

21 USCIS collects and evaluates social media for various immigration screening-related

22 _____
 23 ¹¹ DHS, Homeland Security Investigations (HSI), Shared Services for Vetting Board
 Recommendation 2, ECF No. 34–12.

24 ¹² HSI, “Extreme Vetting-Visa Security Program-PATRIOT,” Ex. B at 1349; HSI, “The Visa
 Life Cycle,” Ex. B at 1240.

25 ¹³ HSI, “Extreme Vetting,” *supra* note 12 at 1347–49.

26 ¹⁴ *Id.*

27 ¹⁵ HSI, “FY2018 TEOF Request, HSI National Security Investigations Division, Visa Lifecycle
 Vetting Initiative Contract - Funding Shortfall,” Ex. B at 1713.

28 ¹⁶ HSI, “Giant Oak Contract – 5W’s,” June 6, 2018, Ex. B at 772.

¹⁷ HSI PowerPoint Presentation, Ex. B at 246.

¹⁸ HSI, “5W’s,” *supra* note 16 at 772.

1 purposes. In 2014, its Fraud Detection and National Security (FDNS) Directorate established a
2 Social Media Division that conducts “enhanced FDNS review” for certain asylum and refugee
3 applicants.¹⁹ USCIS also established at least five separate pilot programs for expanded social
4 media screening of immigration applicants.²⁰ During the course of immigration benefits
5 determinations, FDNS searches and can collect information on applicants from social media
6 platforms that ranges from “[s]tated relationships” and “[b]iographical data” to travel and
7 location information.²¹ Content collected through these initiatives—including “social media
8 handles, aliases, associated identifiable information, and search results”—can be retained in the
9 Alien Files system, which USCIS maintains and CBP and ICE can access.²² Again, these
10 documents seem to lack any consideration of the harms that can flow from the long-term
11 retention of information that can easily be misinterpreted, mistranslated, or misattributed.

12 USCIS’s own reviews of its operational use of social media identified significant
13 limitations, including “labor intensive and time consuming” manual review of content identified
14 through automated tools, difficulty confirming that social media accounts are associated with
15 specific applicants, and inadequate translation and language support.²³ The reviews also suggest
16 that as of March 2017, despite extensive operational use of social media, USCIS lacked “[p]olicy
17 and guidelines on the use of social media in adjudications” and on “what constitutes a national
18 security indicator in the context of social media,” raising pressing questions about whether
19 USCIS lacks safeguards against arbitrary or discriminatory use social media.²⁴

21 ¹⁹ *Refugee Admissions FY 2018: Hearing Before the Subcomm. on Immigr. and Border Sec. H.*
22 *Comm. on the Judiciary*, 115th Cong. (2017) (written testimony of L. Francis Cissna, Director,
23 USCIS), <https://t.ly/xyAn9>.

24 ²⁰ DHS Off. of Inspector Gen., *DHS Pilots for Social Media Screening Need Increased Rigor to*
25 *Ensure Scalability and Long-term Success*, Feb. 27, 2017, ECF No. 34–9 at 3, 6–9. The DHS
26 Inspector General concluded that the pilot programs lacked “measurement criteria” and were “of
27 limited use in planning and implementing an effective, department-wide future social media
28 screening program.” *Id.* at 3, 6.

²¹ DHS, *USCIS/FDNS Operational Use of Social Media*, Jan. 25, 2017, Ex. C at 210–11.

²² DHS, *Privacy Act of 1974; System of Records*, 82 Fed. Reg. 43,557 (Sept. 18, 2017).

²³ “USCIS Social Media & Vetting: Overview & Efforts to Date” 3-4, Mar. 2, 2017, Ex. C at
333-34.

²⁴ *Id.*, Ex. C at 333.

II. The ACLU's FOIA Request and Defendants' Responses

Plaintiffs submitted identical FOIA requests to CBP, ICE, and USCIS on May 24, 2018. *See* White Decl., Ex. A, ECF No. 98–6. The request sought the release of five categories of records, including social media surveillance-related policies and guidance, records concerning the acquisition of social media surveillance-related technologies, and records related to the use of social media content in algorithmic decision making and machine-learning processes. *Id.* After Defendants failed to produce responsive records, Plaintiffs exhausted their administrative remedies and filed this lawsuit on January 17, 2019. *See* Compl., ECF No. 1.

CBP ultimately produced 358 pages of records in five tranches between June and October of 2019, and it withheld four pages entirely. Defs.' Mot., ECF No. 98 at 3. ICE produced records between May and August of 2019, with a supplemental production in February 2020, for a total of 2,169 pages. *Id.* USCIS produced 2,645 pages of records in July and August 2019, and April 2020. *Id.* It produced reprocessed versions of these records in October 2020. *Id.*

III. Procedural Background and Withholdings at Issue

Following the completion of productions by CBP, ICE, and USCIS, the Court ordered the parties to meet and confer to establish a proposed timeline for partial summary judgment briefing as to those Defendants. ECF No. 52. As a result of that conferral process, and after CBP and ICE produced draft Vaughn indices, Plaintiffs agreed not to challenge certain redactions in each of the three Defendants' productions. Plaintiffs have now further narrowed the redactions and withholdings subject to challenge for the purpose of this cross-motion.²⁵ A full list of challenged withholdings, with exemptions at issue, is attached below as an Appendix.

LEGAL STANDARD

Congress enacted FOIA to “pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Muchnick v. Dep't of Homeland Sec.*, 225 F. Supp. 3d 1069, 1072 (N.D. Cal. 2016) (quoting *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)). “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic

²⁵ In declining to further challenge certain redactions and withholdings, Plaintiffs do not imply that all of those redactions and withholdings were appropriate under FOIA.

1 society, needed to check against corruption and to hold the governors accountable to the
 2 governed.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (citation omitted).
 3 The Supreme Court has observed that “[w]ithout question, [FOIA] is broadly conceived” and is
 4 animated by a “philosophy of full agency disclosure.” *Id.* at 151 (quoting *Env’tl. Prot. Agency v.*
 5 *Mink*, 410 U.S. 73, 80 (1973) and *Dep’t of Air Force v. Rose*, 425 U.S. 352, 360–61 (1976)). It
 6 therefore sets a “strong presumption in favor of disclosure.” *Ray*, 502 U.S. at 173.

7 Consistent with that presumption, FOIA exemptions are “explicitly made exclusive and
 8 must be narrowly construed,” and doubts are resolved in favor of disclosure. *Milner v. Dep’t of*
 9 *Navy*, 562 U.S. 562, 565 (2011) (cleaned up). The government always bears the burden to show
 10 that records are subject to an exemption and can be withheld. 5 U.S.C. § 552(a)(4)(B); *Rosenfeld*
 11 *v. Dep’t of Justice*, 57 F.3d 803, 1443 (9th Cir. 1995). Government declarations in support of
 12 withholdings “must describe the justifications for nondisclosure with reasonably specific detail,
 13 demonstrate that the information withheld logically falls within the claimed exemptions, and
 14 show that the justifications are not controverted by contrary evidence in the record or by
 15 evidence of bad faith.” *Hamdan v. Dep’t of Justice*, 797 F.3d 759, 769 (9th Cir. 2015).

16 ARGUMENT

17 I. Defendants Improperly Withheld Information Under FOIA Exemption 7(E).

18 Exemption 7(E) encompasses “records or information compiled for law enforcement
 19 purposes,” but only where disclosure “would disclose techniques and procedures for law
 20 enforcement investigations or prosecutions, or would disclose guidelines for law enforcement
 21 investigations or prosecutions if such disclosure could reasonably be expected to risk
 22 circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). “Techniques and procedures” are “technical
 23 method[s]” for “how law enforcement officials go about investigating a crime,” whereas
 24 guidelines are “indication[s] or outline[s] of future policy or conduct” and refer “to resource
 25 allocation.” *Allard K. Lowenstein Int’l Human Rts. Project v. Dep’t of Homeland Sec.*, 626 F.3d
 26 678, 682 (2d Cir. 2010). The Ninth Circuit has held that the “circumvention of the law” qualifier
 27 modifies “guidelines” and not “techniques and procedures.” *Hamdan*, 797 F.3d at 778.

28 Exemption 7(E) only exempts investigative techniques not generally known to the public

1 and “which are so unique as to warrant the exemption.” ECF No. 39 at 6 (citations omitted);
 2 *ACLU of N. Cal. v. Dep’t of Justice*, 880 F.3d 473, 491 (9th Cir. 2018) (“*ACLU*”). A technique
 3 or procedure must be truly “specialized” and “calculated” to qualify as exempt. *See ACLU v.*
 4 *Dep’t of Homeland Sec.*, 243 F. Supp. 3d 393, 404 (S.D.N.Y. 2017) (“*ACLU v. DHS*”). The
 5 Ninth Circuit has found a “detailed, technical analysis” of investigatory techniques exempt but
 6 not “basic technical information” about a known technique or procedure. *ACLU*, 880 F.3d at 492
 7 (quoting *Bowen v. Food & Drug Admin.*, 925 F.2d 1225, 1228 (9th Cir. 1991)). Similarly,
 8 “Exemption 7(E) cannot be used to withhold information about a technique that is generally
 9 known to the public when what is at issue is a specific application of that technique to a specific
 10 context,” whereas the exemption “protects specific means by which an agency uses a technique
 11 where the general technique is known, but the specific means of employing that technique are
 12 not.” ECF No. 39 at 16–17 (citing *Hamdan*, 797 F.3d at 777–78, and *Rosenfeld*, 57 F.3d at 815).

13 Conclusory assertions that withheld information would reveal “specifics about how and
 14 when the technique at issue is used” are inadequate “if the technique itself is otherwise generally
 15 known to the public.” *ACLU v. Dep’t of Justice*, 2015 WL 3793496, at *12 (N.D. Cal. 2015).

16 **A. CBP Wrongly Withheld Information in Policies, Issue Papers, Privacy**
 17 **Analyses, and Contract Documents.**

18 Policy on Operational Use of Social Media. CBP withheld content from a set of rules
 19 governing how officers use social media to monitor the online speech of internet users, both
 20 covertly and overtly. *See* Ex. A at CBP 125–36 (purpose of policy is to “assign responsibilities
 21 and establish general rules of behavior for the operational uses of social media.”). CBP redacted
 22 information under the headings “Masked Monitoring” and “Undercover Engagement of Social
 23 Media,” both of which are defined in unredacted passages. *Id.* at CBP 126, 128, 134–36.

24 CBP has failed to justify withholding this information. The withheld content appears to
 25 contain high-level policy rules for the government’s covert use of social media accounts through
 26 masked monitoring and undercover engagement, including requirements for obtaining use
 27 approvals and re-approval periods—not the kind of specialized, non-public techniques or
 28 procedures that courts have found exempt. *See ACLU v. DHS*, 243 F. Supp. 3d at 403–04. FOIA,

1 moreover, is hostile to efforts to withhold information constituting the rules under which
2 agencies operate. It “represents a strong congressional aversion to secret (agency) law, and . . .
3 an affirmative congressional purpose to require disclosure of documents which have the force
4 and effect of law.” *Nat’l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 153
5 (1975) (cleaned up). To the extent the redactions set forth limitations on CBP’s operational use
6 of social media, such limitations are neither techniques nor procedures. *See* ECF No. 39 at 19
7 (incapacity not clearly cognizable under Exemption 7(E)); *Schwartz v. Drug Enf’t Admin.*, 2016
8 WL 154089 at *15 (E.D.N.Y. 2016) (limitations do not appear to fall within exemption).

9 CBP’s Vaughn index does nothing to place these redactions within the exemption. It
10 identifies two boilerplate categories of withholdings, neither of which is sufficient to support the
11 redactions, from CBP’s master list of such categories.²⁶ ECF Nos. 98–4 at 27–28, 98–3 at 13–15.

12 Issue papers and summaries. CBP redacted content in seven programmatic summaries of
13 CBP’s collection and screening of travelers’ social media. Ex. A at CBP 1–22. The withheld
14 content includes factual descriptions of policies, summaries of “Current Social Media Use” and
15 pilot initiatives, broad policy outlines and rationales for screening social media, and even the
16 CBP office responsible for two of the summaries (*see id.* at 5, 8).

17 This content falls outside Exemption 7(E). First, CBP has failed to meet its threshold
18 burden to demonstrate that the redacted records were compiled for law enforcement purposes.
19 *See ACLU of N. Cal. v. Fed. Bureau of Investigation*, 881 F.3d 776, 780 (9th Cir. 2018). To meet
20 that requirement, CBP must “establish a rational nexus between the withheld [content] and its
21 authorized law enforcement activities.” *See id.* at 781. Although CBP is a law enforcement
22 agency, not all CBP records are compiled for law enforcement purposes. *See id.* (FBI records
23 may or may not meet threshold requirement); *Roth v. Dep’t of Justice*, 642 F.3d 1161, 1173
24 (D.C. Cir. 2011) (“FBI records are not law enforcement records under FOIA simply by virtue of
25 the function that the FBI serves.”). Here, rather than being compiled for law enforcement
26 purposes, the issue papers include basic background information and talking points (“Watch Out
27 For/If Asked”) and appear oriented toward justifying CBP’s social media collection programs to

28 ²⁶ Plaintiffs challenge the sufficiency of CBP’s entire Vaughn index. *See infra* Section IV.

1 external audiences or high-level policy officials. *See* Ex. A at CBP 3, 13–15, 17, 19, 21. CBP’s
 2 conclusory statements that the papers were compiled for law enforcement purposes fail to supply
 3 the required rational nexus. *See* ECF No. 98–4 at 1–11.

4 Even if the issue papers met the threshold requirement, CBP still has not shown that they
 5 are exempt. As with the policies described above, such high-level summaries do not include the
 6 kind of specialized, calculated, or detailed technical information that plausibly constitutes
 7 exempt techniques or procedures. The content, moreover, relates to CBP’s use of social media to
 8 screen travelers, including those from Visa Waiver Program countries through the Electronic
 9 System for Travel Authorization (ESTA)—all of which is widely known. At most, some of the
 10 content describes the application of a known technique—collection and review of social media—
 11 to specific contexts. *See, e.g.*, Ex. A at CBP 6 (“examples” of use), 8 (which ESTA applicants
 12 subjected to review), 10 (“general” scenarios for use). *See also Hamdan*, 797 F.3d. at 777–
 13 78 (noting that surveillance of a particular place would not qualify for exemption under 7(E)).

14 Finally, by definition, a CBP office or unit is not a technique or procedure, and this Court
 15 has repeatedly rejected similar attempts to withhold the identity of agency units under Exemption
 16 7(E). *See, e.g., Elec. Frontier Found. v. Dep’t. of Justice*, 2016 WL 7406429, at *18 (N.D. Cal.
 17 2016) (“*EFF v. DOJ*”); *ACLU v. Fed. Bureau of Investigation*, 2013 WL 3346845, at *9 (N.D.
 18 Cal. 2013) (“*ACLU v. FBP*”); *Elec. Frontier Found. v. Cent. Intelligence Agency*, 2013 WL
 19 5443048, at *23 (N.D. Cal. 2013) (“*EFF v. CIA*”).

20 Privacy Threshold Analyses. CBP redacted information in six Privacy Threshold
 21 Analyses (PTAs) for various social media surveillance programs and pilots. *See* Ex. A at CBP
 22 23–39, 48–57, 149–60, 296–306, 337–48, 349–58. CBP has failed to meet its burden for these
 23 withholdings. According to DHS, PTAs are “[t]he first step in the process for DHS seeking to
 24 implement or update a system or program.”²⁷ PTAs are often precursors to publicly available
 25 privacy impact assessments (PIAs), which contain the kinds of summary program descriptions,
 26 assessments of privacy risks, and “mitigation strategies” that CBP withheld in the PTAs. Indeed,
 27

28 ²⁷ <https://www.dhs.gov/compliance>.

1 multiple PIAs correspond to the programs and pilots described in the PTAs.²⁸ Because
 2 equivalent information is already public, CBP cannot justify the withholdings in the PTAs.

3 Even if public analogs to the PTAs did not exist, the information CBP withheld from the
 4 PTAs reflects the application of well-known techniques to the specific contexts described in the
 5 PTAs, such as collection of social media information through visa application systems that CBP
 6 administers, or the use of social media to assess potential threats to personnel and facilities. As
 7 such, they fall outside the exemption. *See Hamdan*, 797 F.3d at 777–78. Nor does the withheld
 8 information appear to include the kind of technical, unique, or specialized methods that may
 9 warrant withholding as techniques or procedures. *See* ECF No. 39 at 6; *Lowenstein*, 626 F.3d at
 10 682; *ACLU v. DHS*, 243 F. Supp. 3d at 403–04. Finally, data retention periods (*see* Ex. A at CBP
 11 33), names of contractors (*id.* at CBP 50–51, 298–99), and project names and offices (*id.* at CBP
 12 49, 62, 150, 296, 338, 350) do not constitute techniques or procedures. Neither CBP’s Vaughn
 13 index nor the Howard Declaration demonstrates otherwise, nor has CBP made any showing that
 14 disclosing the withheld content could risk circumvention of the law.

15 Social Media Operational Use Templates. CBP withheld information in three “SMOUTs”
 16 related to “Border Encounter Research,” “Operational Awareness,” and “Border Patrol
 17 Intelligence.” *See* Ex. A at CBP 161–69, 170–77, 178–91. Here again, CBP has wrongly
 18 withheld basic descriptive information about known applications of social media collection in
 19 specific contexts such as “situational awareness.” *See id.* at CBP 164–65, 172, 182–84; *see supra*
 20 n.6–9. Like the issue papers and PTAs, such information falls outside Exemption 7(E).

21 CBP also withheld from the SMOUTs information reflecting policy limits for the specific
 22 operational uses at issue, including rules for how CBP officers use online screen names and
 23 identities, the extent of interaction with the public, and whether they observe privacy settings.
 24 *See id.* at CBP 166, 173–74, 185. As set forth above regarding CBP’s policy on the operational

25 _____
 26 ²⁸ Compare Ex. A at CBP 23–39 (PTA for Electronic Visa Update System) with Privacy Impact
 27 Assessment for the Electronic Visa Update System, DHS/CBP/PIA–033 (Aug. 25, 2016),
 28 <https://bit.ly/3vLM40u>; CBP 48–57, 149–60 (PTAs for border security–related pilot and
 program) with Situational Awareness Initiative PIA, *supra* note 9; and CBP 296–306, 337–48,
 349–58 (ESTA-related PTAs) with Privacy Impact Assessment for the Electronic System for
 Travel Authorization, DHS/CBP/PIA-007(g) (Sept. 1, 2016), <https://bit.ly/3eZIGcK>.

1 use of social media, these policy limits do not constitute exempt techniques or procedures, and
 2 their redaction is at odds with FOIA. *See Sears*, 421 U.S. at 153. CBP’s Vaughn entries for these
 3 withholdings repeat generalized, boilerplate language and fall far short of meeting CBP’s burden.

4 Contract documents. Finally, CBP withheld what appear to be basic product names,
 5 requisitioning offices, delivery dates, and periods of performance from contract-related
 6 documents. Ex. A at CBP 197–249. This information is non-exempt. The government publishes
 7 spending information online, including information that appears to identify the contractors,
 8 services, and data CBP redacted here.²⁹ Even so, such skeletal information does not constitute a
 9 non-public technique or procedure. As with its other withholdings, CBP’s Vaughn index offers
 10 no valid, non-conclusory justification for these redactions that would satisfy its burden.

11 **B. ICE Improperly Withheld Program Summaries and Presentation Material.**

12 Program summaries. ICE withheld content from multiple memoranda or briefing papers
 13 summarizing social media collection and surveillance programs. *See* Ex. B at 1347–49, 1680–81,
 14 1812–13, 1818–26. ICE has not met its burden of demonstrating that this content is exempt.

15 First, a memorandum titled “Extreme Vetting-Visa Security Program-PATRIOT,” *see id.*
 16 at 1347–49, appears to correspond to a document the U.S. District Court for the Southern District
 17 of New York already concluded was not exempt under Exemption 7 and ordered released.
 18 *Knight First Amendment Inst. v. Dep’t of Homeland Sec.*, 407 F. Supp. 3d 334, 351–52
 19 (S.D.N.Y. 2019).³⁰ Notably, although ICE in its Vaughn index states that the redacted material
 20 includes “challenges particular law enforcement programs have in implementation,” ECF No.
 21 98–2 at 29, the unredacted document shows that the content actually pertains to administrative
 22 and budget issues, not law enforcement techniques or procedures. In any event, because the
 23 content appears to be available publicly, it cannot be withheld here.

24 Similarly, ICE withheld an entire document on the VLVI, despite the availability
 25 elsewhere of information describing that initiative and explaining that it entails continuous

26 ²⁹ Compare Ex. A at CBP 197–212 (information related to contract HSHQDC-12-D-00013) with
 27 Contract Summary, <https://bit.ly/3eXx7Tb> (same contract); CBP 213–34, 235–41 (information
 28 related to contract HSHQDC-13-D-00027) with Contract Summary, <https://bit.ly/2NFDBeo>
 (same contract).

³⁰ The unredacted version is available at <https://knightcolumbia.org/documents/9ac34446b4>.

1 surveillance of the online speech of populations of visa holders in the United States. Ex. B at
2 1680–81. ICE’s justification for withholding the two-page document is that it summarizes
3 “investigative steps taken in law enforcement investigations where the resulting subjects were
4 eventually arrested as a result of the investigation.” ECF No. 98–2 at 43. But because the VLVI
5 relies on the collection and monitoring of social media and open-source information, ICE
6 provides no basis to conclude that any of those “investigative steps” involve non-public
7 techniques or procedures. ICE’s Vaughn entry therefore describes the kind of application of
8 known techniques to specific contexts that the Ninth Circuit has held is non-exempt. *See* ECF
9 No. 39 at 16–17. Additionally, the title of the document is “Visa Lifecycle Initiative Summary,”
10 which implies a broader description of the program, consistent with content elsewhere in ICE’s
11 production. *See* Ex. B at 530, 534, 771–72, 921, 1017, 1046–47, 1239–40, 1349, 1712–14.

12 ICE failed to meet its burden as to two other programmatic documents that pertain to
13 publicly known techniques and procedures. *See id.* at 1812–13, 1818–26. Both documents, which
14 ICE withheld in full, relate to “Open Source/Social Media Exploitation”—a well-known
15 technique that simply involves the collection or monitoring of publicly available information.
16 *See* ECF No. 98–2 at 50, 53. And nothing in ICE’s Vaughn index suggests that the withheld
17 content includes the truly unique, specialized, or detailed technical methods that could justify
18 withholding under Exemption 7(E). *See* ECF No. 39 at 6; *ACLU v. DHS*, 243 F. Supp. 3d at
19 403-04. Other ICE documents describe ICE’s exploitation of open source and social media
20 information—including “for locating and researching law enforcement suspects” and a range of
21 other investigative purposes (*see* ECF No. 98–2 at 53)—further indicating that ICE cannot
22 validly withhold these records. *See, e.g.*, Ex. B at 774–98 (Performance Work Statement for
23 Open Source/Social Media Data Analytics). At the very least, ICE has failed to segregate non-
24 exempt material from these program summaries. *See* 5 U.S.C. § 552(a)(8)(A)(ii)(II).

25 Finally, ICE improperly redacted from two emails a list of the U.S. government’s
26 overseas posts that issue visas to which ICE applies the VLVI program’s automated, continuous
27 monitoring of visa holders’ social media activity. Ex. B at 921, 1017. The latter email, dated
28 March 27, 2018 (*id.* at 1017), does not appear to have been compiled for law enforcement

1 purposes. Rather, it was drafted in response to a request from ICE’s deputy director for
2 information on how ICE uses Facebook information in its operations, in light of a news article
3 that ICE’s chief of staff stated “could stay in the news.” *Id.* at 1008–16. Because the information
4 in that email was compiled for the purpose of fielding media inquiries, not for law enforcement
5 purposes, ICE has failed to satisfy Exemption 7’s threshold requirement as to that redaction.

6 In any event, the overseas posts that issue visas to which ICE applies the VLVI program
7 are not exempt under 7(E). As noted above, this Court has repeatedly held that locations subject
8 to law enforcement programs are not exempt as techniques or procedures. *See, e.g., EFF v. DOJ*,
9 2016 WL 7406429 at *18 (cities or states involved in DEA program); *EFF v. CIA*, 2013 WL
10 5443048, at *23 (N.D. Cal. 2013) (“particular geographic areas” and FBI field offices). *See also*
11 *ACLU Found. of Ariz. v. Dep’t of Homeland Sec.*, 2017 WL 8895339, at *27 (D. Ariz. 2017)
12 (locations of smuggling routes). ICE, moreover, has failed to show that disclosure of these
13 locations would risk circumvention of the law, not least because the monitoring of applicants
14 from those issuing posts is only “part” of ICE’s social media surveillance program, *see* Ex. B at
15 1017, and other applicants have reason to believe that their social media is still subject to
16 monitoring. *See* ECF No. 39 at 19 (that many agencies collect and share social media
17 information reduces any risk associated with disclosure of surveillance).

18 PowerPoint presentation content. ICE also withheld content from a series of presentation
19 slides on language translation and open-source, or publicly available, images. Ex. B at 432–48.
20 The material includes an “Image Guide” that ICE’s Homeland Security Investigations (HSI)
21 defines as “a reference guide created to identify images and symbols commonly associated with
22 terrorist and criminal organizations or other groups of interest.” *Id.* at 434. It also includes
23 content related to an “Arabic Translation Manual” and “[r]ecognizing the differences between
24 ‘derogatory’ and legitimate uses of Islamic or Arab culture.” *Id.* at 444–53.

25 ICE has failed to show that the redacted content is exempt. The use of images and
26 symbols in open-source research is a commonly known technique. That law enforcement
27 agencies conduct open-source investigations, examine images, and translate content is no great
28 mystery. Similarly, the identities of terrorist groups and criminal organizations are not techniques

1 or procedures, nor, plainly, are “Islamic symbols.” *See id.* at 437–41, 446–48. And even if the
2 withheld content could qualify as techniques or procedures, its use here would at most reflect
3 their non-exempt application to specific contexts. *See Hamdan*, 797 F.3d. at 777–78.

4 ICE’s Vaughn index brings it no closer to meeting its burden. It provides only a generic
5 description that applies to over a hundred pages of content, without any explanation specific to
6 these presentation slides. Nor can ICE show any plausible likelihood that disclosure of the
7 content could lead to circumvention of the law. As the unredacted material indicates, the image
8 guide “is not a comprehensive list of all the symbols that might be encountered during [open-
9 source] analysis.” Ex. B at 443. Similarly, the slides labeled “Terrorists” indicate that “the Guide
10 *includes* groups currently designated on US terrorist lists” and “*includes* some lesser known
11 terrorist groups,” *id.* at 437–38 (emphasis added), confirming that the redacted content cannot be
12 interpreted as an actual roadmap of HSI’s investigative priorities.

13 **C. USCIS Improperly Withheld Policies, Program Reviews, and Privacy**
14 **Compliance Documents.**

15 Guidance and policy documents. USCIS withheld content from policy memoranda
16 describing its “Refugee Social Media Vetting Expansion” (Ex. C at 443–44), “Social Media
17 Use” (*id.* at 1954–55), and “Fraud Detection and National Security Use of Social Media” (*id.* at
18 2031–32). USCIS has not met its burden as to these withholdings. Each is a short memorandum
19 issued by a senior official describing social media collection programs at the highest level of
20 generality. And each pertains to programs—refugee social media screening, the DHS Social
21 Media Task Force, vetting specific to Syrian refugees—that are already publicly known and
22 reflect the application of known techniques to specific contexts.

23 The explanations in USCIS’s Vaughn index are not to the contrary. Wholly absent from
24 those explanations is any indication that the redacted content implicates specialized or unique
25 non-public techniques or procedures. *See* ECF No. 98–6, Ex. F at 82, 199, 220–21. Rather, the
26 index invokes justifications that courts have rejected, such as “coordination information
27 regarding other law enforcement agencies,” *id.* at 83, “which employees within USCIS are
28 authorized to search social media information,” *id.* at 199, and “a specific authority . . . to begin

1 screening certain applicants,” *id.* at 220–21. *See, e.g., ACLU of Wash. v. Dep’t of Justice*, 2011
2 WL 1900140, at *2 (W.D. Wash. 2011) (Vaughn statement regarding “information describing
3 the coordination among federal agencies” did not place content within Exemption 7(E)); *ACLU*
4 *v. FBI*, 2013 WL 3346845, at *9 (insufficient showing that offices and agency units were
5 exempt); *Knight First Amendment Inst. v. Dep’t of Homeland Sec.*, 407 F. Supp. 3d 311, 332–33
6 (S.D.N.Y. 2019) (legal and policy limits on authority “are not protected under Exemption 7(E)).

7 USCIS also withheld content from two documents titled “Draft Guidance for Use of
8 Social Media in Field Operations Directorate Adjudications,” and “Guidance for Use of Social
9 Media in Syrian Refugee Adjudications by the USCIS’s Refugee Affairs Division.” Ex. C at
10 1267–78, 2344–53. The redacted content lists questions and “suggested lines of inquiry”
11 regarding social media for USCIS adjudicating officers. *Id.* at 1275–78, 2351–53. But multiple
12 courts have held that such questions are not exempt techniques or procedures, particularly where,
13 as here, the questions are disclosed when posed to individuals. *See, e.g., ACLU v. DHS*, 243 F.
14 Supp. 3d at 403; *Knight*, 407 F. Supp. 3d at 353; *ACLU of Ariz.*, 2017 WL 8895339 at *28. As in
15 those cases, USCIS’s questions are not specialized, unique, or non-public techniques or
16 procedures, nor would their disclosure risk circumvention of the law.

17 Program summaries and reviews. USCIS withheld content from reviews and summaries
18 of various social media surveillance pilot programs, including redactions of the titles and subject
19 matter of the programs, the identities of vendors or contractors, summary data on outcomes, and
20 lessons learned. Ex. C at 277–88, 293–300, 301–18, 331–34, 335–38. Such information does not
21 constitute exempt techniques, procedures, or guidelines, nor does its disclosure raise a plausible
22 risk of circumvention of the law. The DHS inspector general already made public significant
23 information regarding USCIS’s pilot programs and the outcomes of these reviews.³¹ While the
24 reviews note limitations and challenges encountered in the pilot programs, such limitations are
25 not of themselves exempt techniques or procedures. *See* ECF No. 39 at 19; *Schwartz*, 2016 WL
26 154089 at *15. USCIS has not shown, moreover, that the identities of vendors or private
27 companies involved with its initiatives fall within Exemption 7(E). *See, e.g., EFF v. Dep’t of*

28 ³¹ *See* Inspector General report, *supra* note 20.

1 *Justice*, 2016 WL 7406429 at *17 (government failed to show how disclosing identities of
2 companies involved in program would risk circumvention of the law); *Elec. Privacy Info. Ctr. v.*
3 *Drug Enf't Admin.*, 2016 WL 3557007, at *13 (D.D.C. 2016) (same). It is widely known,
4 including through the federal government's own spending and acquisition information, that
5 numerous vendors provide social media surveillance-related technology to federal agencies.³²
6 The disclosure of specific vendors or products reveals no non-public technique or procedure.

7 Similarly, USCIS withheld summary data from a spreadsheet containing the results of its
8 program reviews, including whether it located any "derogatory information" about applicants for
9 immigration benefits. Ex. C at 1119–20. This high-level statistical information includes the total
10 results for specific data fields, including the "Total Number of Matches" and summary results for
11 the field "Derogatory Found (Y/N/Maybe)." *Id.* It does not appear to include the actual key
12 words or personal information officers used when analyzing applicants' social media information
13 during the course of the pilot projects—data that USCIS states is present in the remainder of the
14 spreadsheet. *See* ECF No. 98–6, Ex. F at 94–95. Courts have concluded that summary statistical
15 data of this sort is not exempt. *See Families for Freedom v. Customs & Border Prot.*, 797 F.
16 Supp. 2d 375, 391 (S.D.N.Y. 2011) (statistics on "the total number of all arrests made . . . are
17 neither techniques or procedures nor guidelines" (cleaned up)); *Am. Immig. Council v. Immig. &*
18 *Customs Enf't*, 464 F. Supp. 3d 228, 243 (D.D.C. 2020) (spreadsheet data not exempt under
19 7(E)). The same is true here: USCIS has failed to show that retrospective summary data on its
20 evaluations of pilot programs constitutes an exempt technique, procedure, or guideline.

21 USCIS also improperly withheld in its entirety an issue paper titled "USCIS Screening
22 and Vetting." Ex. C at 1541–42. USCIS states in its Vaughn index that the issue paper includes
23 "detailed information about which applications and petitions could be subject to this screen[ing],
24 summaries of future plans," and "outstanding issues to be resolved." ECF No. 98–6, Ex. F at
25 154–55. But again, information on the kinds of applications or populations USCIS has subjected

26 _____
27 ³² Detailed award and spending information is available at www.usaspending.gov. Indeed, that
28 USCIS contracted with vendor Babel Street for pilot programs has already been made public in
FOIA disclosures. *See* USCIS Presidential Transition Records, *available at*
<https://www.dhs.gov/publication/presidential-transition-records>, at 198–99.

1 to social media screening is already publicly available. *See, e.g.*, Ex. C at 1920 (letter from DHS
 2 secretary noting USCIS social media reviews of Syrian refugees and K-1 visa holders seeking to
 3 adjust status).³³ Such high-level applications of USCIS’s known use of social media screening
 4 are not exempt from disclosure.

5 Privacy and First Amendment compliance information. USCIS withheld content from a
 6 presentation by the Office for Civil Rights and Civil Liberties on “Protecting the First
 7 Amendment in Social Media Research.” Ex. C at 1878–1906. USCIS has not demonstrated that
 8 this material is exempt. The withheld slides appear to contain interpretation of First Amendment
 9 doctrine and explanations of legal and policy limits that fall outside the scope of Exemption 7(E).
 10 *See ACLU*, 880 F.3d at 492 (instructions to investigators regarding “how to lawfully obtain
 11 electronic location information” not exempt);³⁴ *ACLU of Maine Found. v. Dep’t of Homeland*
 12 *Sec.*, 2019 WL 2028512, at *2 (D. Me. 2019) (interpretation of Supreme Court decisions “do not
 13 fall within the ambit of Exemption 7(E)”). Similarly, USCIS cannot validly withhold content on
 14 various hypothetical “scenarios” posed in the presentation. *See* Ex. C at 1895–1905. Such
 15 scenarios reflect USCIS’s application, for instructive purposes, of known techniques. *See Knight*,
 16 407 F. Supp. 3d at 332 (“[M]ere descriptions of codified law and policy, even those including
 17 interpretation and application of immigration laws and regulations, are not protected under
 18 Exemption 7(E).”); *ACLU of San Diego & Imperial Counties v. Dep’t of Homeland Sec.*, 2017
 19 WL 9500949, at *12 (C.D. Cal. 2017) (“synthesis of the governing case law” and “practical
 20 pointers” not exempt because they stem from publicly known legal requirements).

21 Finally, USCIS withheld nearly all the substantive content from two privacy compliance
 22 documents: a DHS “Operational Use of Social Media” form and a privacy threshold analysis. Ex.
 23 C at 1308–21, 2258–69. USCIS has not supported its withholding of this material. As noted
 24 above, “SMOUTs” and PTAs contain high-level summaries of agency programs and serve as
 25 precursors to public-facing privacy impact assessments. *See supra* section I.A. As such, they

26 ³³ *See also* USCIS Presidential Transition Records, *supra* note 31, at 198–202 (describing
 27 specific targets of various social media pilot programs).

28 ³⁴ The documents reprocessed and released in accordance with the Ninth Circuit’s opinion in that
 case are available here: <https://www.aclunc.org/our-work/legal-docket/aclu-foundation-northern-california-v-doj-location-tracking>.

1 reflect privacy-compliance processes and policy limits that are not exempt as techniques or
2 procedures, and their redaction is contrary to FOIA. USCIS, moreover, made no attempt to
3 segregate non-exempt content from anything in the documents that is plausibly exempt.

4 **II. Defendants Wrongly Withheld Information Under Exemption 5.**

5 Under Exemption 5, the government may withhold “inter-agency or intra-agency
6 memorandums or letters that would not be available by law to a party other than an agency in
7 litigation with the agency.” 5 U.S.C. § 552(b)(5). The government relies on two Exemption 5
8 privileges: the deliberative process and attorney-client privileges.

9 **A. Defendants Improperly Applied the Deliberate Process Privilege.**

10 To establish that the deliberative process privilege applies, an agency must show that a
11 document meets two requirements. First, that it is “predecisional,” *i.e.*, “prepared in order to
12 assist an agency decisionmaker in arriving at [their] decision.” *Assembly of State of Cal. v. Dep’t*
13 *of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992) (citations omitted). Second, an agency must
14 show that it is “deliberative,” which means “it must actually be related to the process by which
15 policies are formulated.” *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1118–19 (9th
16 Cir. 1988) (quotation omitted). The key question is whether the “the disclosure of materials
17 would expose an agency’s decisionmaking process in such a way as to discourage candid
18 discussion within the agency and thereby undermine the agency’s ability to perform its
19 functions.” *Assembly of Cal.*, 968 F.2d at 920. To meet its burden, the agency should, at a
20 minimum, describe: (1) the roles of the author and recipient of each document; (2) the
21 document’s function and significance in a decision-making process; and (3) the document’s
22 subject matter and the nature of the deliberative opinion. *See Maricopa Audubon Soc’y v. U.S.*
23 *Forest Serv.*, 108 F.3d 1089, 1094–95 (9th Cir. 1997); *Cal. Native Plant Soc’y v. Envtl. Prot.*
24 *Agency*, 251 F.R.D. 408, 413 (N.D. Cal 2008) (citing *Senate of P.R. ex rel. Jud. Comm v. Dep’t*
25 *of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987); *Coastal States Gas Corp. v. Dep’t of Energy*, 617
26 F.2d at 868 (D.C. Cir. 1980). A document is non-exempt where it “is more properly
27 characterized as an opinion or interpretation which embodies the agency’s effective law and
28 policy” and thus constitutes the agency’s “working law.” *Sears*, 421 U.S. at 153.

1 **1. CBP Improperly Withheld Information in Issue Papers, Privacy Documents,
and Use Templates.**

2 Privacy Threshold Analyses. In addition to redactions under Exemption 7(E), CBP
3 withheld information in PTAs—including “risk mitigation strategies” and “recommendations”—
4 as deliberative-process privileged. ECF No. 98–4, Ex. A at 12–13; Ex A at CBP 23–39, 48–57,
5 296–306, 337–48, 349–58. As noted above, *see supra* section I.A, PTAs are part of DHS’s
6 process to implement or update a program. Their purpose is to help an agency identify and
7 address the privacy implications raised by a course of policy. “Exemption 5 does not protect . . .
8 communications that promulgate or implement an established policy of an agency.” *Brinton v.*
9 *Dep’t of State*, 636 F.2d 600, 605 (D.C. Cir. 1980). And it “does not protect a document which is
10 merely peripheral to actual policy formation; the record must bear on the formulation or exercise
11 of policy-oriented judgment.” *Habeas Corpus Res. Ctr. v. Dep’t of Justice*, 2008 WL 5000224, at
12 *1 (N.D. Cal. 2008) (quoting *Tigue v. Dep’t of Justice*, 312 F.3d 70, 80 (2d Cir. 2002)).

13 Here, recommendations in the PTAs from the CBP Privacy Office to the DHS Privacy
14 Office are not predecisional. Rather, they are a mechanism for identifying privacy issues and
15 directing how to address those issues in the course of implementing policies—in this context,
16 various forms of immigration-related social media monitoring. Indeed, each PTA includes an
17 unredacted page titled “Privacy Threshold Adjudication” noting the agency’s concurrence and
18 identifying additional privacy measures the implementing agency should follow. As
19 adjudications, these determinations are not predecisional. *See Ecological Rts. Found. v. Fed.*
20 *Emergency Mgmt. Agency*, 2017 WL 24859, at *4–5 (N.D. Cal. Jan. 3, 2017) (letters from
21 FEMA and National Marine Fisheries Service staking out each agency’s position on the
22 Endangered Species Act were not predecisional). Accordingly, information about the privacy
23 issues raised by a program’s implementation is “peripheral” to the policymaking process. *See*
24 *Habeas Corpus*, 2008 WL 5000224 at *1.

25 Issue Papers and summaries. CBP also withheld from issue papers content describing the
26 current status and future plans for CBP’s social media surveillance activities. Ex. A at CBP 1–4,
27 8–12, 13–15, 16–17, 18–19, 20–22. CBP has not met its burden of demonstrating that the
28

1 redacted portions of these records are deliberative or predecisional. As described above, *see*
 2 *supra* section I.A, these are programmatic summaries of CBP’s collection and screening of
 3 travelers’ social media. CBP’s Vaughn index asserts, among other things, that the redacted
 4 portions contain “[d]escriptions of analyses being conducted,” “descriptions of recommended
 5 future uses and techniques . . . being evaluated and considered,” and “[r]ecommended responses
 6 to hypothetical questions” to questions about CBP’s use of social media. ECF No. 98–4, Ex. A at
 7 1, 3–6. Yet many of the unredacted portions of these records strongly suggest these documents
 8 are filled with “the factual, segregable information Exemption 5 does not protect.” *See Knight*,
 9 407 F. Supp. 3d at 347–48 (ICE “Updates Memo” sections summarizing status of pilot programs
 10 were not deliberative). In each informational paper, the redacted information primarily appears in
 11 the documents’ two main sections summarizing past and future steps for the programs (*e.g.*,
 12 “Background,” “Current Social Media Use,” and “Future Actions”), indicating that the redacted
 13 content contains straightforward factual summaries, not deliberations about a course of policy.
 14 CBP’s hypothetical questions and answers explain current policy and practices and therefore are
 15 not deliberative. *See ACLU of N. Cal. v. Fed. Bureau of Investigation*, 146 F. Supp 3d 1161,
 16 1168–69 (N.D. Cal 2015) (documents providing FBI personnel with frequently asked questions
 17 and answers on current policy are working law and non-exempt); *see also ACLU v. Immig. &*
 18 *Customs Enf’t*, 448 F. Supp. 3d 27, 38 (D. Mass 2020) (talking points non-exempt where agency
 19 failed to show they were more than an explanation of current policy).

20 **2. ICE Improperly Withheld Contract-Related Information.**

21 Contract-related language. ICE withheld under the deliberative process privilege an email
 22 that includes contract language related to Giant Oak, a social media surveillance vendor. Ex. B at
 23 62–63. The email, however, is untethered to any decision or policy. To establish that information
 24 is subject to the deliberative process privilege, “the agency must identify a specific decision to
 25 which the document is predecisional.” *Maricopa Audubon Soc’y*, 108 F.3d at 1094. ICE’s
 26 explanation for withholding the email fails to demonstrate that it was part of a deliberative
 27 process rather than addressing solely factual matters. ICE’s Vaughn index entry for the email
 28 primarily summarizes the deliberative process privilege and what it protects but does not

1 meaningfully identify a policy process the redacted information implicates. *See* ECF No. 98–2,
2 Ex. A at 2; *see Cal. Native Plant Soc’y*, 251 F.R.D. at 413 (citation omitted) (declarations
3 “generally attesting to the fact that the documents are deliberative and pre-decisional” were not
4 sufficient because they “merely assert conclusory statements in a boilerplate format”). ICE’s
5 Vaughn index fails to establish that a discussion of draft contract language for the purchase
6 social media monitoring software is not simply the implementation of a decision or “merely
7 peripheral to actual policy formation.” *See Habeas Corpus*, 2008 WL 5000224 at *1; *see also*
8 *Sears*, 421 U.S. at 152 (“communications made after the decision and designed to explain it”
9 may not be withheld under the deliberative process privilege). Contract language that explains or
10 implements a policy decision is not exempt.

11 Vendor-related language for third party software. ICE also withheld information in two
12 sets of emails from February and March 2018 regarding the agency’s social media monitoring
13 practices and vendors. Ex. B at 1012 (first paragraph), 1014, 1761. Unredacted contextual
14 information and ICE’s Vaughn index, however, strongly suggest that the redacted information in
15 both sets of emails involves the recitation of non-deliberative facts. “The deliberative process
16 privilege does not . . . protect material that is purely factual, unless the material is so inextricably
17 intertwined with the deliberative sections of documents that its disclosure would inevitably
18 reveal the government’s deliberations.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997);
19 *see Assembly of Cal.*, 968 F.2d at 922 (census population information subjected to internal
20 agency adjustment is “purely factual” and nonexempt). The February 2018 email contains the
21 subject line “Companies for Market Research” and includes redacted content that, per ICE’s
22 Vaughn index, sets forth “potential recommendations on which companies should be solicited by
23 ICE to provide contracts.” Ex. B at 1761; ECF No. 98–2, Ex. A at 45. Yet that description is at
24 odds with the content of the email itself, which includes a block redaction followed by the text,
25 “[w]e *have decided* that we will send solicitations to all nine of the above companies.” Ex. B at
26 1761 (emphasis added). Thus, the content appears neither deliberative nor pre-decisional.

27 The March 2018 emails begin with an unredacted message asking for “accurate
28 information” about how HSI and Enforcement and Removal Operations (ERO), two primary

1 components of ICE, “use Facebook data” for a “briefing paper.” Ex. B at 1009–10, 1014. The
2 redacted responses to that email, *id.* at 1012 (first paragraph), presumably include the facts
3 responsive to the request for “accurate information,” not a “give-and-take of the consultative
4 process” protected by the privilege. *See Ecological Rights Found.*, 2017 WL 24859 at *5.
5 Indeed, ICE’s Vaughn index states that the redacted information is a “Request for information
6 from the Deputy Director of ICE on how ERO and HSI use Facebook data,” further suggesting
7 the redactions contain wholly factual, non-deliberative information. ECF No. 98–2, Ex. A at 19.
8 For both sets of emails, ICE has failed to meet its burden of establishing that the withheld
9 information is both deliberative and predecisional, rather than simply factual or descriptive.

10 Performance Work Statement for Visa Lifestyle Vetting Initiative. ICE completely
11 withheld multiple records titled “Performance Work Statement, Visa Lifestyle Vetting
12 Initiative.” Ex. B at 596–640.³⁵ ICE’s Vaughn and declaration states that this document “is an
13 initial, non-final draft” that was “in the process of being reviewed by divisions within the Office
14 of Homeland Security Investigations,” ECF No. 98–2, Ex. A at 11–12, that they are watermarked
15 “DRAFT,” *id.*, and that drafts are predecisional “by their very nature.” ECF No. 98–1 ¶ 43. Yet
16 “[w]atermarking the memorandum as a ‘Draft’ does not change the finality of the facts within
17 it.” *Knight*, 407 F. Supp. 3d at 347. Consequently, even if parts of the challenged records contain
18 information protected by the deliberative process privilege, the agency must segregate and
19 release non-exempt information. 5 U.S.C. § 552(a)(8)(A)(ii)(II). *See also Mead Data Cent., Inc.*
20 *v. Dep’t of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) (“The focus of the FOIA is
21 information, not documents, and an agency cannot justify withholding an entire document simply
22 by showing that it contains some exempt material.”). Courts have repeatedly recognized that
23 simply because a record contains *some* predecisional and deliberative material, that does not
24 render the *entire record* exempt. *See e.g., Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598
25 F.3d 865, 876 (D.C. Cir. 2010) (“Only those portions of a predecisional document that reflect the
26 give and take of the deliberative process may be withheld.”). Here, it is simply implausible that

27 ³⁵ ICE produced but fully withheld six versions of the same Performance Work Statement.
28 Although Plaintiffs maintain that ICE has failed to meet its burden for withholding any of the
versions, Plaintiffs are willing to limit their challenge to whichever is the most recent version.

1 every piece of information in the Performance Work Statement is deliberative and predecisional.
 2 Another similar but publicly available Performance Work Statement from ICE relating to data
 3 analysis services is illustrative. Ex. B at 774–98. It contains significant content primarily
 4 focused on factual material and demonstrates that ICE is capable of segregating factual content
 5 from information it believes is exempt under the deliberative process privilege. *Id.* ICE must
 6 reprocess these records and ensure it has segregated and released all non-exempt information.

7 **3. USCIS Improperly Withheld Policy, Privacy, and Procurement Information.**

8 Guidance and policy documents. USCIS also withheld content under the deliberative
 9 process privilege from the two “Guidance for Use of Social Media” documents described above,
 10 *see supra* section I.C. Ex. C at 1267–78, 2344–53. USCIS failed to establish that this content is
 11 predecisional and deliberative. As their titles indicate, the documents are plainly designed to
 12 provide guidance to employees implementing social media policies. Each begins by stating that
 13 the “purpose of this guidance” is to give officers an understanding of how to use the results of
 14 social media checks in adjudications. Ex. C at 1269, 2346. In both documents, redacted content
 15 appears under a section labeled “Adjudicative aid for cases involving social media results” and
 16 unredacted text describing the section as “designed solely to provide a framework for
 17 interviewing officers.” *Id.* at 1275–78, 2351–2353. USCIS asserts that the withheld content
 18 “focuses on the types of questions and issues that adjudicators may want to look for when
 19 reviewing an application or interviewing an applicant related to social media information.” ECF
 20 No. 98–6, Ex. F at 115, 287. But such information constitutes the implementation of a policy
 21 decision rather than deliberation preceding it. *See Brinton*, 636 F.2d at 605; *ACLU of N. Cal.*,
 22 146 F. Supp 3d at 1168–69 (privilege does not apply to documents advising FBI personnel about
 23 how to apply FBI policy to threat assessments). Lists of “what questions to ask . . . are more
 24 related to the discovery of facts than they are to the deliberative process leading to a policy or
 25 ultimate agency decision.” *Equal Emp’t Opp. Comm’n v. Swissport Fueling, Inc.*, 2012 WL
 26 1648416, at *16–17 (D. Ariz. 2012). Together, the unredacted text and Vaughn index suggest the
 27 redacted information in both documents is a post-decisional guide for how to implement policy.

28 Email regarding First Amendment and USCIS’s authority to collect social media

1 information. USCIS withheld content from an email exchange regarding its authority to collect
2 or use social media information relating to the exercise of First Amendment-protected activities.
3 Ex. C at 1571. USCIS states that the emails are between USCIS Office of Chief Counsel
4 attorneys, and that because they include a summary of legal issues and draft responses, they are
5 deliberative and predecisional. ECF No. 98–6, Ex. F at 158. USCIS has failed to establish that
6 the emails are privileged. First, the unredacted portion of the exchange states that the redacted
7 text has been “cleared” and is presumably ready for distribution, strongly suggesting it is post-
8 decisional. Ex. C at 1571. Second, to the extent information in the email contains guidance on
9 “USCIS’s authority,” it constitutes the agency’s working law and is not subject to Exemption 5.
10 *See Tax Analysts v. Internal Revenue Serv.*, 294 F.3d 71, 81 (D.C. Cir. 2002)) (holding that
11 documents explaining tax law and whether certain tax exemptions applied to specific taxpayers
12 constituted “working law,” because their “tone . . . indicate[d] that they simply explain[ed] and
13 appl[ied] established policy”); *Public Citizen*, 598 F.3d at 868, 876 (documents that
14 “summariz[ed]” an agency’s “existing policy” understandings were not protected by protected by
15 Exemption 5). USCIS’s interpretation of First Amendment law applicable to social media
16 surveillance is not protected by the deliberative process privilege.

17 Privacy Threshold Analysis for Social Media Tool Pilot Evaluation. USCIS withheld an
18 entire PTA titled “S&T Social A2356Media Tool Pilot Evaluation.” Ex. C at 2258–2269. As
19 noted above, the role of PTAs is to help USCIS identify and address the privacy implications
20 raised by a pilot that USCIS plans to undertake, and they therefore “promulgate or implement an
21 established policy of an agency.” *See Brinton*, 636 F.2d at 605. USCIS asserts that the
22 “privileged information consists of a review of process challenges, concerns, and
23 recommendations.” ECF No. 98–6, Ex. F at 264. But it is implausible that the entire PTA
24 consists of such information. CBP, for instance, produced multiple PTAs that are not completely
25 redacted in this manner, demonstrating that such documents contain sections focused on factual
26 material (*e.g.*, “Background,” “Tasks”). *See, e.g.*, Ex. A at CBP 23–39, 48–57. USCIS cannot
27 withhold the entire PTA because it asserts that some of the PTA’s content is subject to the
28 deliberative process privilege. *See Pub. Citizen*, 598 F.3d at 876 (documents explaining “existing

1 policy” are not deliberative); *Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1127 (D.C.
 2 Cir. 2007) (“Factual material that does not reveal the deliberative process is not protected by this
 3 exemption.”). USCIS should segregate and disclose any portions of the PTA not within the
 4 privilege unless it can establish “that non-exempt portions . . . are inextricably intertwined with
 5 exempt portions.” *See Krikorian v. Dep’t of State*, 984 F.2d 461, 466 (D.C. Cir. 1993).

6 Email regarding DHS’s procurement of social media services. USCIS also withheld a
 7 series of emails discussing social media surveillance services, with the subject line “DHS
 8 procurement of [social media] services in Enhanced Vetting initiative.” Ex. C at 1711–12.
 9 USCIS states that the emails include “pending process decisions,” yet the unredacted final email
 10 in the exchange strongly suggests that the redacted information pertains to a public letter DHS
 11 received six days prior opposing the use of “unreliable and discriminatory social media
 12 monitoring techniques” against immigrants.”³⁶ ECF No. 98–6, Ex. A at 174. This email
 13 context—a discussion about public opposition to the acquisition of surveillance technology by
 14 DHS, not USCIS—strongly suggests the redacted information is “merely peripheral to actual
 15 policy formation.” *See Habeas Corpus*, 2008 WL 5000224 at *1–2 (document summarizing
 16 issues raised by outside groups and not reflecting deliberations is non-exempt). USCIS has failed
 17 to establish that the redacted information involves policy deliberation protected by the privilege.

18 **B. USCIS Improperly Applied the Attorney-Client Privilege.**

19 The attorney-client privilege applies only under limited circumstances: “(1) When legal
 20 advice of any kind is sought (2) from a professional legal adviser in his or her capacity as such,
 21 (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are,
 22 at the client’s instance, permanently protected (7) from disclosure by the client or by the legal
 23 adviser (8) unless the protection be waived.” *United States v. Martin*, 278 F.3d 988, 999 (9th Cir.
 24 2002). Boilerplate recitation of attorney-client privilege elements does not justify this exemption.
 25 *Ecological Rts. Found. v. Fed. Emergency Mgmt. Agency*, 2017 WL 5972702 *6–7 (N.D. Cal.

26 ³⁶ The redacted text and last email in the email exchange reads: “Regarding the CDT letter . . .
 27 noted with interest, not much.” Ex. C at 1711. Six days before that email, on April 3, 2018, the
 28 Center for Democracy and Technology (CDT) had sent a letter to DHS regarding DHS’s
 selection of a surveillance vendor. *See* <https://cdt.org/wp-content/uploads/2018/04/CDT-ltr-HS-re-DHS-Visa-Lifecycle-Vetting.pdf>.

1 Nov. 30, 2017) (Vaughn index insufficient where agency failed to provide meaningful
2 information that records contained legal advice or would reveal confidential communications).
3 “Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly
4 construed.” *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981).

5 Summary Paper: “Vetting of Aliens in the United States.” USCIS improperly withheld in
6 full a document titled “Impediments to Proposed Expanded Immigration Vetting of Aliens in the
7 United States.” Ex. C at 1475–77. USCIS has failed in at least three ways to meet its burden to
8 establish that this record is covered by the attorney-client privilege.

9 First, USCIS has failed to specify who the “client” is in the purported attorney-client
10 relationship. If the party invoking the privilege fails to provide sufficient information to establish
11 the identity of the client and the existence of an attorney-client relationship, it cannot rely on the
12 privilege. *See Ctr. for Biological Diversity v. Off. of Mgmt. & Budget*, 625 F. Supp. 2d 885, 892–
13 93 (N.D. Cal. 2009) (“OMB cannot rely on the attorney-client privilege for the challenged
14 documents” in part because “the declarations do not identify which of [the] stated parties is the
15 attorney.”). USCIS’s Vaughn index identifies no client, simply stating that the Summary Paper
16 was “drafted by Department of Justice (DOJ) Attorneys.” ECF No. 98–6, Ex. F at 144–45.
17 USCIS’s declaration does not specify any client for the Summary Paper, nor does it identify any
18 attorney-client relationship with DOJ at all. ECF No. 98–5 ¶ 32. But an email thread elsewhere
19 in USCIS’s production purportedly refers to the Summary Paper and suggests DOJ drafted it at
20 the request of the National Vetting Center, a separate component of DHS. Ex. C at 70, 1471–74.
21 Without specific information identifying a client, no basis exists to conclude an attorney-client
22 relationship existed between the authors of the Summary Paper and the purported client. *See,*
23 *e.g., Elec. Privacy Info. Ctr. v. Dep’t of Justice*, 584 F. Supp. 2d 65, 79-80 (D.D.C. 2008)
24 (declining to hold privilege applied in part because the “declarations do not indicate what agency
25 or executive branch entity is the client”).

26 Second, because USCIS has not identified a client, it has not established that the
27 Summary Paper was actually maintained in confidence. The fundamental purpose of the
28 attorney-client privilege is the “protection of confidential facts,” which cannot be “made known

1 to persons other than those who need to know them.” *Coastal States*, 617 F.2d at 863. USCIS’s
2 failure to “submit[] evidence that substantiates its claim that the communications were
3 confidential in fact” precludes reliance on the attorney-client privilege. *See ACLU of N. Cal.*, 146
4 F. Supp. 3d at 1168. USCIS has failed to explain how the Summary Paper—which plainly has
5 been circulated beyond DOJ to USCIS—has remained confidential as required to establish the
6 attorney-client privilege. ECF No. 98–6, Ex. F at 144–45.

7 Finally, USCIS has failed to establish that a client sought legal, rather than policy, advice,
8 and, relatedly, that the “attorney” in the purported attorney-client relationship was acting in a
9 capacity as a professional legal adviser, rather than as a policymaker. *See Martin*, 278 F.3d at
10 999 (“The fact that a person is a lawyer does not make all communications with that person
11 privileged.”). Instead, in order to qualify for the privilege, the “primary purpose” of the
12 consultation must have been to obtain legal advice. *See North Pacifica LLC v. City of Pacifica*,
13 274 F. Supp. 2d 1118, 1128 (N.D. Cal. 2003). Thus, when an attorney conveys advice on policy
14 issues, the communication is not protected by the attorney-client privilege. *Nat’l Imm. Project of*
15 *the Nat’l Lawyers Guild v. Dep’t of Homeland Sec.*, 842 F. Supp. 2d 720, 729 n.10 (S.D.N.Y.
16 2012) (“FOIA prohibits agencies from treating their policies as private information.”); *ACLU of*
17 *N. Cal.*, 146 F. Supp. 3d at 1169 (concluding that the FBI had not established attorney-client
18 privilege in part because it “ha[d] not provided sufficient information to determine whether the
19 [documents] consist of advice about specific legal questions and situations, or whether they
20 clarify broadly applicable FBI policies”). USCIS’s Vaughn index classifies the document as a
21 “DOJ Summary Paper,” ECF No. 98–6, Ex. F at 144, and an email exchange apparently referring
22 to the document states that it is “not really a formal memo.” Ex. C at 68, 1471–74. The relevant
23 portion of USCIS’s declaration says nothing about DOJ’s involvement with this record and
24 whether it contains bona fide legal, rather than policy, advice. *See* ECF No. 98–5 ¶ 32. While the
25 Vaughn index states that the document contains “legal analysis and opinion” on the “specific
26 impediments to proposed expanded immigration vetting of aliens in the United States,” that
27 assertion alone does not establish that its primary purpose in this context is legal advice or that
28 the entire Summary Paper constitutes legal advice sought by a client, rather than DOJ’s “broadly

1 applicable [agency] policies.” ECF No. 98–6, Ex. F at 144–45; *ACLU of N. Cal.*, 146 F. Supp. 3d
2 at 1169 (ordering production of segregable portions of FAQ documents where agency failed to
3 provide evidence substantiating they were privileged in their entirety).

4 Even if the Court concludes that the Summary Paper is attorney-client privileged, it is
5 non-exempt working law, because it embodies the agency’s legal position on expanded vetting of
6 aliens in the United States. FOIA’s statutory purpose is reflected in the “working law doctrine,”
7 which is intended to prevent agencies from conducting official government business pursuant to
8 secret rules and interpretations. *See Assembly of Cal.*, 968 F.2d at 920 (“working law” doctrine
9 “insures that the agency does not operate on the basis of ‘secret law’”). Even if a document is
10 otherwise protected by the deliberative process or attorney-client privileges, under the “working
11 law” doctrine, agencies cannot rely on Exemption 5 to withhold the rules, interpretations, and
12 opinions that embody their formal or informal law or policy. *Brennan Ctr. for Justice v. Dep’t of*
13 *Justice*, 697 F.3d 184, 195–96, 199–202, 208 (2d Cir. 2012); *Tax Analysts v. Internal Revenue*
14 *Serv.*, 117 F.3d 607, 619 (D.C. Cir. 1997). As such, “Exemption 5, properly construed, calls for
15 ‘disclosure of all ‘opinions and interpretations’ which embody the agency’s effective law and
16 policy.” *Sears*, 421 U.S. at 153.

17 The Summary Paper contains key indicia of working law in two respects. First, it is a
18 “summary” of “specific impediments” identified by DOJ attorneys to a particular course of
19 action—in other words, the paper identifies specific reasons why a particular course of action
20 cannot be taken, with effects on policy going forward. *See Schlefer v. United States*, 702 F.2d
21 233, 242–43, (D.C. Cir. 1983) (legal memoranda interpreting statutes and “provid[ing] important
22 guidance” to the Chief Counsel for future cases were working law, even though not required to
23 be “rigidly followed”); *see also Tax Analysts*, 117 F.3d at 617 (“considered statements of the
24 agency’s legal position” are working law, even if “nominally non-binding”). Second, the
25 Summary Paper emanates from DOJ, suggesting that this central authority has transmitted the
26 document to an audience of agencies charged with enforcing the law. *See Sears*, 421 U.S. at 141,
27 158 (final memoranda used by agency to formulate “a coherent policy” and “some measure of
28 uniformity” were agency law subject to disclosure); *Coastal States*, 617 F.2d at 860 (illustrating

1 the precedential value of documents by noting they were “circulated among the area offices”).

2 Email regarding First Amendment and USCIS’s authority to collect social media
3 information. USCIS also withheld an email described above, *supra* section II.A.3, regarding the
4 agency’s “authority to collect and/or use social media information relating to the exercise of First
5 Amendment protected activities.” Ex. C at 1571. USCIS states that the emails are “between
6 USCIS OCC attorneys” and that “[t]he information in the emails contains the detailed legal
7 opinions on two specific issues.” ECF No. 98–6, Ex. F at 158. The email has been “cleared,”
8 according to unredacted text. Ex. C at 1571. This context and the email’s apparent purpose—to
9 convey USCIS’s legal authority to collect and use social media information—strongly suggest
10 that it represents the agency’s “coherent policy” on this constitutional question and thus contains
11 non-exempt working law. *See Sears*, 421 U.S. at 141. USCIS cannot withhold “secret agency
12 law” that explains its interpretation or understanding of the First Amendment. *Id.* at 153.

13 Regardless, USCIS has failed to meet the elements of the attorney-client privilege. First,
14 neither USCIS’s Vaughn index nor its declaration identifies a client for this record. Rather, the
15 sole mention of email in the relevant paragraph of the agency’s declaration is the vague
16 statement that USCIS’s general production contains “emails from agency counsel to their clients,
17 in particular, agency policy makers, agency decision makers, and agency employees
18 implementing policy.” ECF No. 98–5 ¶ 32. Second, USCIS has not established that this email
19 was in fact kept confidential. Indeed, the email appears to have been circulated widely. Its
20 subject line includes “FW,” indicating the initial recipient forwarded it, potentially waiving any
21 privilege that attached to the initial communication. Ex. C at 1571. That, along with USCIS’s
22 failure to “submit[] evidence that substantiates its claim that the communications were
23 confidential in fact,” precludes reliance on the attorney-client privilege. *See ACLU of N. Cal.*,
24 146 F. Supp. 3d at 1168.

25 Email regarding DHS’s procurement of social media services. USCIS asserts attorney-
26 client privilege over the series of emails described above, *see supra* section II.A.3, discussing
27 “DHS’s potential procurement of social media services as part of the Enhanced Vetting
28 initiative.” ECF No. 98–6, Ex. A at 174. USCIS states that the emails contain a “summary of . . .

1 legal issues and thoughts about pending process decisions” and “information related to OCC’s
2 legal opinions regarding the potential courses of actions being considered.” *Id.* USCIS’s Vaughn
3 index, however, fails to specify a client for the purpose of the privilege, nor does it establish that
4 the “primary purpose” of the exchange related to providing legal advice rather than, as described
5 above, the participants’ interest in and policy views on the letter sent to DHS by a third party.
6 *See City of Pacifica*, 274 F. Supp. 2d at 1128.

7 **III. CBP Improperly Withheld Information Under Exemption 4.**

8 Exemption (b)(4) encompasses materials that constitute “trade secrets and commercial or
9 financial information obtained from a person and privileged or confidential.” 5 U.S.C. §
10 552(b)(4). Information is “confidential” within the meaning of Exemption 4 where commercial
11 or financial information is both customarily and actually treated as private by its owner and
12 provided to the government under an assurance of privacy. *Food Mktg. Inst. v. Argus Leader*
13 *Media*, 139 S. Ct. 2356, 2366 (2019). Only information originating from the companies
14 themselves can be considered information that they customarily and actually treated as private
15 during their ordinary course of business. *Am. Small Bus. League v. Dep’t of Def.*, 411 F. Supp.
16 3d 824, 830 (N.D. Cal. 2019). Accordingly, government assessments and evaluations cannot be
17 considered confidential for purposes of Exemption 4. *Id.* Evidence that withheld information is
18 publicly available or is ordinarily released by competitors may support a finding that the
19 information is not “customarily and actually kept confidential.” *Id.*

20 CBP withheld information in a privacy threshold analysis that is not confidential within
21 the meaning of Exemption 4. *See* Ex. A at CBP 50, 53. CBP contends that the content includes
22 “the name of the company providing unique, proprietary services to CBP,” and has been
23 withheld pursuant to Exemption 4 because the contractor would not customarily make such
24 information available to the public. ECF No. 98–4 at 15. However, internal evaluations
25 conducted by government agencies do not constitute information that belongs to a private
26 company rather than the government. *Am. Small Bus. League*, 411 F. Supp. 3d at 830
27 (government’s evaluation of a contractor’s compliance with regulatory requirements must be
28 disclosed). Because the PTA was generated by CBP, a government agency, the information

1 stems from the government, and therefore must be disclosed.

2 CBP has also failed to demonstrate that it provided the relevant vendor with either an
3 express or implied assurance of privacy with respect to their company name. *See* ECF No. 98–4
4 at 15. “[O]nce shared with the government . . . information might *lose* its confidential quality
5 without the government’s assurance of privacy.” *Am. Small Bus. League*, 411 F. Supp. 3d. at 829
6 (emphasis in original). The federal government regularly includes vendor names on entries
7 posted to its own spending and acquisition portal.³⁷ *See Ctr. for Inv. Reporting v. Dep’t of Labor*,
8 470 F. Supp. 3d 1096, 1117 (N.D. Cal. 2020) (agency’s regular practice of releasing information
9 at issue precludes finding of assurance of privacy). CBP has not demonstrated that it extended
10 any express assurances of privacy to the vendor, nor does it describe any circumstances
11 consistent with an implied assurance of privacy, such as provision of information by the vendor
12 through a secure portal. *See Besson v. Dep’t of Commerce*, 2019 WL 8267696, at *1 (D.D.C.
13 2019) (Exemption 4 burden not met where declarant does “not say so expressly” that information
14 was disclosed under assurance of privacy).

15 **IV. CBP’s Vaughn Index Is Insufficient.**

16 “Specificity is the defining requirement of the *Vaughn* index.” *Wiener v. Fed. Bureau of*
17 *Investigation*, 943 F.2d 972, 979 (9th Cir. 1991). Its purpose “is to afford the FOIA requester a
18 meaningful opportunity to contest, and the district court an adequate foundation to review, the
19 soundness of the withholding,” and it must contain “a particularized explanation of how
20 disclosure of the particular document would damage the interest protected by the claimed
21 exemption.” *Id.* at 977–78. “Categorical description of redacted material coupled with
22 categorical indication of anticipated consequences of disclosure is clearly inadequate.” *King v.*
23 *Dep’t of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987). Similarly, “boilerplate explanations,” that
24 do not “tailor the explanation to the specific document withheld,” are insufficient and pose an
25 “obvious obstacle to effective advocacy.” *Weiner*, 943 F.2d at 978–79. In short, an agency “must
26 disclose as much information as possible without thwarting the purpose of the exemption
27 claimed.” *Citizens Comm’n on Human Rts. v. Food & Drug Admin.*, 45 F.3d 1325, 1328 (1995).

28 ³⁷ Detailed award and spending information is available at www.usaspending.gov.

1 CBP failed to meet this standard. Throughout its Vaughn index, CBP repeats non-specific
 2 recitations of the standard for the FOIA exemptions at issue, followed by multiple non-specific
 3 bullets drawn from a master list of reasons for withholding content that are set forth in the
 4 Howard Declaration. *See* ECF Nos. 98–4, 98–3 ¶¶ 37–41 (Exemption 5 list), 46 (Exemption 7(E)
 5 list). The bulleted reasons are vague and wide-ranging. They include, for instance, “descriptions
 6 of the scope and investigatory focus of CBP’s operational use of social media”; “descriptions of
 7 specific law enforcement techniques and types of analysis that CBP does or does not utilize
 8 when using publicly available social media information”; and “descriptions of vulnerabilities and
 9 limitations in CBP’s operational use of social media.” ECF No. 98–3 at 13–14. This à la carte
 10 invocation of general categories of withholdings is neither particularized nor tailored, *see*
 11 *Weiner*, 943 F.2d at 977–78, and it leaves Plaintiffs and the Court guessing, both as to which
 12 bullet applies to any given redaction and how to combine the bullets with unredacted information
 13 to ascertain the nature of the information withheld.

14 Notably, CBP has been faulted for using exactly this approach in other instances. The
 15 court in *ACLU of Arizona* noted that CBP’s Vaughn index in that case repeated, “in each entry at
 16 issue,” the same general Exemption 7(E) standard “followed by a bullet point list of various
 17 types of information running the gamut from procedures relating to performing a records check .
 18 . . to guidelines for type and quantum of evidence sought to apprehend or pursue charges against
 19 a suspect.” 2017 WL 8895339, at *17. The court found that that format did not “afford the
 20 requester an opportunity to intelligently advocate release of the withheld documents and to
 21 afford the court an opportunity to intelligently judge the contest.” *Id.* at *19 (quoting *Weiner*, 943
 22 F.2d at 979). For the same reasons, CBP’s Vaughn index is insufficient here.

23 **V. CBP and ICE Failed to Establish That They Conducted Adequate Searches for**
 24 **Responsive Records.**

25 To prevail on summary judgment in a FOIA case, a defendant must establish that “it has
 26 conducted a search reasonably calculated to uncover all relevant documents.” *Zemansky v. Envtl.*
 27 *Prot. Agency*, 767 F.2d 569, 571 (9th Cir. 1985). An agency can demonstrate the adequacy of
 28 its search through “reasonably detailed, nonconclusory affidavits submitted in good faith.” *Id.* at

1 571. “[A]ffidavits describing agency search procedures are sufficient for purposes of summary
2 judgment only if they are relatively detailed in their description of the files searched and
3 the search procedures, and if they are nonconclusory and not impugned by evidence of bad
4 faith.” *Id.* at 573. Although an agency is not required to search every record system, it must “[a]t
5 the very least . . . explain in its affidavit that no other record system was likely to produce
6 responsive documents.” *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). In
7 assessing the adequacy of the agency’s search, courts construe facts in the light most favorable to
8 the requestor. *Zemansky*, 767 F.2d at 571.

9 CBP has not demonstrated that it conducted a reasonable search. The Howard
10 Declaration states that CBP referred Plaintiffs’ request to the Office of Field Operations (OFO),
11 which consulted with “subject-matter experts,” conducted a manual search for records, and
12 “searched the electronic record repository identified as likely to contain responsive records,
13 using keyword searches and knowledge of the types of documents maintained in such locations.”
14 ECF No. 98–3 ¶ 20. It further states that OFO identified responsive records “by reviewing
15 documents provided in response to previous similar requests” and through “the professional
16 knowledge and experience of the CBP personnel responsible for the programs/offices most likely
17 to create and/or maintain such documents.” *Id.* The declaration states that the request was also
18 referred to other CBP offices, which conducted searches “based on the types of records
19 requested, a review of repositories where such records would reasonably expected to be located,
20 and consultations with subject-matter experts.” *Id.* ¶ 21–22.

21 What the Howard Declaration lacks, however, is any clear indication that CBP attempted
22 to search for records outside central document repositories, or “common locations on the CBP
23 network.” *Id.* ¶ 20. One result of CBP’s apparent failure to search outside such repositories is the
24 near-complete absence of any correspondence in CBP’s production. CBP produced only a single
25 email, between a Facebook employee and the Director of Cybersecurity and Innovation in the
26 DHS Private Sector Office, regarding CBP’s creation of “fake profiles” to surveil social media,
27 in apparent violation of Facebook’s policies. Ex. A at CBP 147–48. Even this solitary email did
28 not involve a CBP employee. Thus, CBP’s search failed to identify *any* correspondence to or

1 from CBP employees whatsoever, even though multiple parts of the ACLU’s request plainly
2 implicate such correspondence. *See* ECF No. 98–6, Ex. A at 6–7. It is utterly implausible that
3 CBP generated no correspondence related to the products and systems at issue in the request, and
4 its failure to locate such correspondence underscores the inadequacy of its search.

5 ICE has also failed to demonstrate that its search was adequate. According to the Pineiro
6 Declaration, ICE distributed the request to four components: HSI, the Office of Acquisition
7 Management (OAQ), the Office of Policy, and the Office of Enforcement and Removal
8 Operations (ERO). ECF No. 98–1 ¶ 18. The Pineiro Declaration states that HSI employees
9 “conducted searches of their computers, shared drives, and Outlook” using a set of specific
10 search terms, *id.* ¶ 23, but the other offices’ searches did not extend beyond a central document
11 repository or a single custodian’s files. A section chief in a subdivision of OAQ conducted a
12 manual search, without search terms, of a shared folder relevant to a specific contract, *id.* ¶ 26—
13 a search that would not appear to encompass parts 3 and 4 of Plaintiffs’ request. *See* ECF No.
14 98–6, Ex. A at 6. Similarly, a single employee in the Office of Policy searched a shared drive but
15 did not incorporate other employees’ systems or mail files. ECF No. 98–1 ¶ 28. ERO’s search
16 was similarly scant: A single senior detention and deportation officer within a subdivision of
17 ERO conducted a manual search of her paper files and her own email folders. *Id.* ¶ 31.

18 The results of these isolated searches by single employees demonstrate their inadequacy.
19 While HSI located 1,944 pages of responsive records, OAQ, Policy, and ERO located only 133
20 pages, 47 pages, and 45 pages, respectively. *Id.* ¶¶ 10, 26, 28, 31. ERO’s search in particular was
21 starkly insufficient, given that ERO has six major divisions and 24 field offices and plainly uses
22 social media surveillance for operational purposes. *See* Ex. B at 4–45 (expenditures of hundreds
23 of thousands of dollars by ERO on monitoring technology). ERO, OAQ, and the Office of Policy
24 did not conduct searches reasonably calculated to uncover all relevant documents.

25 CONCLUSION

26 Plaintiffs respectfully request that the Court deny Defendants’ Motion for Summary
27 Judgment with respect to CBP, ICE, and USCIS and grant Plaintiffs’ Cross-Motion for Summary
28 Judgment as to those Defendants.

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Respectfully submitted,

/s/Hugh Handeyside
Hugh Handeyside
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: 212-549-2500
hhandeyside@aclu.org

Matthew Cagle
American Civil Liberties Union Foundation of
Northern California
39 Drumm Street
San Francisco, CA 94111
Telephone: 415-621-2493
mcagle@aclunc.org

Attorneys for Plaintiffs

APPENDIX: INDEX OF PLAINTIFFS' CHALLENGED WITHHOLDINGS

CBP Records and Withholdings		
Document Bates No.	Document description	Exemption(s) at issue
1-4	Information Issue Paper (Oct. 6,2016)	(b)(5), (b)(7)(E)
5-7	CBP Use of Social Media Paper (May 25, 2016)	(b)(7)(E)
8-12	CBP Use of Social Media Paper (Sept. 26, 2016)	(b)(5), (b)(7)(E)
13-15	Social Media Briefing Paper	(b)(5), (b)(7)(E)
16-17	Information Issue Paper (June 2,2016)	(b)(5), (b)(7)(E)
18-19	Information Issue Paper (Aug. 30, 2016)	(b)(5), (b)(7)(E)
20-22	Information Issue Paper (Apr. 20, 2017)	(b)(5), (b)(7)(E)
23-39	Privacy Threshold Analysis: Electronic Visa Update System (EVUS)	(b)(5), (b)(7)(E)
48-57	Privacy Threshold Analysis: Pilot Evaluation	(b)(5), (b)(4), (b)(7)(E)
125-36	Policy on Operational Use of Social Media	(b)(7)(E)
149-60	Privacy Threshold Analysis: Office of Intelligence and the Office of Professional Responsibility, July 2, 2018	(b)(7)(E)
161-69	DHS Operational Use of Social Media: Office of Intelligence and Investigative Liaison	(b)(7)(E)
170-77	DHS Operational Use of Social Media: Office of Intelligence and Investigative Liaison	(b)(7)(E)
178-91	DHS Operational Use of Social Media: U.S. Border Patrol, November 27, 2017	(b)(7)(E)
197-212	Contract Number HSHQDC-12-D-00013, Order Number 70B04C18F00001093	(b)(7)(E)
213-34	Award Contract Number HSHQDC13D00027, Order Number 70B04C18F00001257	(b)(7)(E)
235-41	Delivery Order 70B04C18F00000377	(b)(7)(E)
242-49	Contract Number HSHQDC-13-D-00026, Order Number HSBP1017J000831	(b)(7)(E)
296-306	Privacy Threshold Analysis: Office of Field Operations (July 8, 2016)	(b)(5), (b)(7)(E)
337-48	Privacy Threshold Analysis: Office of Field Operations, July 8, 2016	(b)(5), (b)(7)(E)
349-58	Privacy Threshold Analysis: Office of Field Operations, January 5, 2018	(b)(5), (b)(7)(E)

ICE Records and Withholdings		
Document Bates No.	Document description	Exemption(s) at issue
62-63	Email titled "Social Locator for OST SOP"	(b)(5)
437-48	Homeland Security Investigations PowerPoint presentation	(b)(7)(E)
596-640 957-1001 1264-1308 1356- 1400 1717-1760 1983-2027	Document titled "Procurement Sensitive: Performance Work Statement Visa Lifecycle Vetting Initiative"	(b)(5)
921	Email titled "VLVI language"	(b)(7)(E)
1008-20	Email titled "TASKING REQUEST – HSI NSID USE OF FACEBOOK"	(b)(5) (at 1012 top), (b)(7)(E) (at 1017)
1347-49	Document titled "Extreme Vetting-Visa Security Program-PATRIOT"	(b)(7)(E)
1680-81	Document titled "Visa Lifecycle Initiative Summary"	(b)(7)(E)
1761	Email titled "Companies for Market Research"	(b)(5)
1812-13	Document titled "Open Source/Social Media Exploitation"	(b)(7)(E)
1818-26	Document titled "Counterterrorism and Criminal Exploitation Unit Open Source/Social Media Exploitation"	(b)(7)(E)

USCIS Records and Withholdings		
Document No.	Document description	Exemption(s) at issue
277-88	Review of the Defense Advanced Research Projects Agency 2.0 Social Media Pilot	(b)(7)(E)
293-300	Review of Refugee Screening Social Media Pilot	(b)(7)(E)
301-18	Review of K-1 Adjustment of Status Pilots	(b)(7)(E)
331-34	USCIS Social Media & Vetting: Overview and Efforts to Date	(b)(7)(E)
335-38	DHS Secretary Briefing Binder – Social Media	(b)(7)(E)
443-44	Memorandum from DHS Undersecretary for Intelligence and Analysis to the USCIS Deputy Secretary, "U.S. Citizenship and Immigration Services Social Media Vetting Expansion," dated April 1, 2016	(b)(7)(E)
1119-20	Concluding pages from "Key Word Spreadsheet"	(b)(7)(E)

1267-1278	Draft Guidance for Use of Social Media in Field Operations Directorate Adjudications, dated October 27, 2017	(b)(5), (b)(7)(E)
1308-21	DHS Operational Use of Social Media, Privacy Compliance memorandum, January 25, 2017	(b)(7)(E)
1475-77	Memorandum titled "Impediments to Proposed Expanded Immigration Vetting of Aliens in the United States"	(b)(5)
1541-42	Document titled "IP - USCIS Screening and Vetting"	(b)(7)(E)
1571	Email, FW: USCIS authority to collect/use social media information relating to the exercise of First Amendment protected activities (draft), dated June 22, 2016	(b)(5)
1711-1712	Email, RE: DHS procurement of SM services in Enhanced Vetting initiative, dated April 9, 2018	(b)(5)
1878-1906	PowerPoint training presentation, "Protect the First Amendment in Social Media Research," presented to USCIS's FDNS by the Office for Civil Rights and Civil Liberties	(b)(7)(E)
1954-55	Memorandum from DHS Secretary Johnson to Component Heads, "Social Media Use," dated February 11, 2016	(b)(7)(E)
2031-32	Memorandum from USCIS Director to FDNS and RAIIO, "Fraud Detection and National Security Use of Social Media"	(b)(7)(E)
2258-69	Privacy Threshold Analysis, version number 01-2014, "S&T Social A2356Media Tool Pilot Evaluation"	(b)(5), (b)(7)(E)
2344-53	USCIS's Refugee Affairs Division, Guidance for Use of Social Media in Syrian Refugee Adjudications, dated September 25, 2018	(b)(5), (b)(7)(E)