UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

KELLEY AMADEI, et al.,

Plaintiffs,

-against-

KIRSTJEN NIELSEN, et al.,

Defendants.

Civil No. 17 Civ. 5967 (NGG) (VMS)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION OBJECTING TO THE MAGISTRATE JUDGE'S DISCOVERY ORDER

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INTRODUCTION

Defendants' appeal of Magistrate Judge Scanlon's order rejecting their attorney-client and work-product privilege claims over U.S. Customs and Border Protection (CBP) training materials should be rejected. While Defendants acknowledge that the burden to substantiate the privilege claims rests with them, they have failed to meet that burden. Despite Plaintiffs' repeated demands, Defendants have failed to produce *any* privilege log, let alone one with sufficient detail or other evidence so as to allow Plaintiffs to assess the privilege claims. Nor do they offer any justification for their failure.

Moreover, even as described by Defendants, the training materials are not fact-specific legal advice, but rather appear to be general-purpose guidance of the type courts have held not to be privileged. These kinds of materials are not subject to the attorney-client privilege or work product protection because they merely teach CBP officers about the laws they enforce and the constitutional and statutory constraints they must follow. Defendants' submission of a conclusory declaration by a CBP official—nearly identical to a declaration they submitted in another case where the court rejected their privilege assertion regarding training materials on a different subject—does nothing to cure their defective assertion here.

Defendants do not identify any error, much less clear error, in the Magistrate Judge's ruling and offer no valid reasons to overturn it. Defendants' motion should be denied.

STATEMENT OF FACTS

Plaintiffs were passengers on a February 22, 2017 Delta Air Lines Flight 1583 from San Francisco to New York City. Compl. ¶¶ 1, 11-19. After Flight 1583 landed at John F. Kennedy International Airport and taxied to the gate, the flight crew—at the direction of U.S. Customs and Border Protection ("CBP") officers—told Plaintiffs and the other Flight 1583 passengers that they would not be permitted to deplane until they had produced government-issued

identification. *Id.* ¶¶ 1-7, 34-40. Two uniformed CBP officers, partially blocking the plane's exit, met Plaintiffs and other Flight 1583 passengers and carefully reviewed each passenger's identification document, permitting the passengers to proceed only after they completed their review (the "Incident"). *Id.* ¶¶ 41-42, 44-47. Plaintiffs, all of whom are U.S. citizens, did not consent to their detention or to the identification search. *Id.* ¶ 51. The CBP officers did not possess a valid judicial warrant authorizing the seizure of all Flight 1583 passengers or their documents. *Id.* ¶ 54; Declaration of Samantha J. Choe ("Choe Decl."), Exs. 4 (Rey Rivera-Perez Dep. Tr. 82:9-15) and 5 (Christian Schultz Dep. Tr. 96:7-9). They also did not disclose or appear to have a reasonable suspicion that the Delta Flight 1583 passengers they detained (*i.e.*, all of them) had engaged in criminal activity, much less probable cause to believe that they had committed a crime. Compl. ¶ 54.

During and after the Incident, Defendants acknowledged that the search and seizure on February 22, 2017 was a regular practice or policy. When Plaintiff Kelley Amadei asked one of the CBP officers who detained the Flight 1583 passengers why they had been searched, the officer responded, "[w]e do it from time to time." *Id.* ¶¶ 49-50. On February 23, 2017, the day after the search and seizure, Defendant Frank Russo, CBP's JFK Port Director, emailed the New York Civil Liberties Union to say that "[w]e do this every day." Compl. Ex. A. Agency spokespersons told the media that the Flight 1583 identification checks are "not a new policy," *id.* ¶ 63, but were instead "routine," *id.* ¶ 64. CBP claimed that the Incident resulted from a request to CBP by U.S. Immigration and Customs Enforcement ("ICE") to locate a person subject to a removal order whom ICE wrongly thought was on Flight 1583. *Id.* ¶ 57. CBP explained that it "often receives requests from our law enforcement partners to assist in various ways, including identifying a person of interest" and that "CBP will assist when able to." *Id.*

Plaintiffs are regular travelers on domestic flights who intend to take (and have since taken) other domestic flights. *Id.* ¶ 74. Plaintiffs reasonably fear that when they travel again, they will be subject to another warrantless search and seizure, in light of CBP's repeated assertions of its authority to conduct such searches and its claims that it does so routinely. *Id.* ¶¶ 75-76.

This Litigation

Plaintiffs filed this action on October 12, 2017, naming the heads of CBP, ICE, and the Department of Homeland Security in their official capacities. *See id.* ¶¶ 77-95. The Complaint alleges that CBP's searches and seizures of Plaintiffs on February 22, 2017 violated the Fourth Amendment and that CBP's policy or practice authorizing identification searches like those of the Flight 1583 passengers constitutes final agency action and is arbitrary, capricious, or contrary to rights and statutory authorities in violation of the Administrative Procedure Act ("APA"). *Id.* ¶¶ 77-88, 89-95. Plaintiffs seek declaratory and injunctive relief; they do not seek money damages. *Id.*, Prayer for Relief ¶¶ 1-5.

Defendants' Repeated Failure to Substantiate Their Privilege Claims

A key issue in this case is whether and to what extent the search Plaintiffs endured is likely to recur. Defendants assert this issue is relevant to Plaintiffs' standing, and Plaintiffs seek discovery of the issue to support their allegation that CBP has a policy or routine practice permitting such searches. Magistrate Judge Scanlon has carefully guided discovery in this matter to balance the nationwide scope of Plaintiffs' allegations and the need to support their standing with Defendants' concerns regarding undue burden.

Plaintiffs' document request that forms the basis for Defendants' appeal narrowly targets the likelihood of recurrence of a suspicionless search of domestic air passengers by CBP.

Specifically, on September 21, 2018, as part of their Fourth Request for Production of Documents, Plaintiffs sought:

> Request No. 1: All documents, including ESI, created, used, or in effect since January 1, 2015, pertaining to training of new and existing CBP officers as regards compliance with the Fourth Amendment to the U.S. Constitution in locations within the United States other than within a Customs security area.

Choe Decl., Ex. 1 (ECF No. 86-1).

Plaintiffs' request was prompted by inconsistent testimony by CBP witnesses concerning the Fourth Amendment training they received. Frank Gulin, CBP Supervisor at JFK Airport, testified that he did not receive any Fourth Amendment training or any training with respect to domestic passengers. Choe Decl., Ex. 2 (Gulin Dep. Tr. 18:13-17, 36:5-37:9.) In contrast, Francis J. Russo, CBP JFK Port Director, [redacted] Choe Decl., Ex. 3 [redacted] CBP Officer Rey Rivera Perez testified that he believed that any training he received pertained to international flights only because he was only trained to process international flights as a measure of border protection. Choe Decl., Ex. 4 (Rivera Perez Dep. Tr. 48:11-49:2). Finally, CBP Officer Christian Schultz [redacted] Choe Decl., Ex. 5 [redacted] He also testified that the training he received on how to conduct identification checks of passengers on air flights did not distinguish between domestic and international flights. *Id.* at 47:16-21. Given the conflicts among the witnesses' testimony, Plaintiffs sought the

training materials to understand whether or how CBP officers are trained on the limits of their authority.

Defendants responded on October 24, 2018, refusing to produce any responsive materials:

> Response No. 1: Defendants object to this request as overbroad, not relevant to the claims and defenses in this matter, and not proportionate to the needs of this case. Defendants also object on the grounds that the information requested is protected by the attorney-client privilege and the law enforcement privilege. Documents are being withheld on the basis of these objections.

Choe Decl., Ex. 6 (ECF No. 86-2).

In violation of Local Rules 26.2(a)(2)(A) and 26.2(b), Defendants did not furnish a privilege log "at the time of the responses to the requests" setting forth: (i) the type of document, (ii) the general subject matter of the document, (iii) the date of the document, and (iv) the author, addressees, and any other recipients of the documents so that Plaintiffs may evaluate the claims of privilege. Local Civ. Rule 26(a)(2)(A).

By letter dated November 16, 2018, Plaintiffs called attention to CBP's deficiency and requested that Defendants confirm by November 21, 2018 that they would produce the required privilege log. Choe Decl., Ex. 7 (ECF No. 86-3). Defendants did not so confirm. Instead, Defendants responded on November 27, 2018, without acknowledging their failure to produce a privilege log and stating with respect to Request No. 1:

> Without waiving any objections, Defendants state that CBP Officers are trained generally on the Fourth Amendment. Training for these officers is created and administered by CBP counsel. Further, this request is overbroad and should be limited to documents pertaining to training concerning domestic flights.

Choe Decl., Ex. 8 (ECF No. 86-4.) The parties met and conferred on December 3, 2018. Plaintiffs reiterated their demand for a log and reiterated their objection to Defendants'

categorical assertion of privilege regarding the training documents. Defendants indicated they stood on their categorical privilege assertion but represented that they would produce a privilege log for Request No. 1 shortly.

On February 6, 2019, having not received the privilege log promised by Defendants, Plaintiffs moved to compel Defendants to produce documents in response to Request No. 1 (along with other requests that are not at issue in this appeal). Notwithstanding that Defendants' production of a privilege log was overdue by more than three months, Defendants opposed the request, repeating and resting on boilerplate relevance, overbreadth, and privilege objections, stating that they "have offered to produce a privilege log concerning Fourth Amendment training materials." Ex. 9 (ECF No. 92).

At the February 12, 2019 conference, the Court rejected CBP's privilege claims and ordered it to produce the training materials. Magistrate Judge Scanlon held that training materials to instruct officers on "what is and isn't lawful" under the Fourth Amendment was "equivalent of business documents," not privileged communications. Choe Decl., Ex. 10 (Feb. 12, 2019 Hr'g Tr. 26:14-27:3; 28:10-29:20). Judge Scanlon rejected Defendants' privilege argument, which "would suggest that anything an attorney touched with regard to instructing employees about the law is still privileged." *Id.* at 27:4-7. The Court held that training provided to as many as 10,000 CBP officers to teach them how to apply legal standards and advising them to act within the law is not privileged. *Id.* at 28:22-29:20. This appeal followed.

STANDARD OF REVIEW

Magistrate judges have "broad discretion" in resolving discovery issues, and review of a magistrate judge's order on a nondispositive matter is "highly deferential." *Commodity Futures Trading Comm'n v. Standard Forex, Inc.*, 882 F. Supp. 40, 42 (E.D.N.Y. 1995). Federal Rule of Civil Procedure 72(a) provides that a district court may modify or set aside a magistrate judge's

decision on a nondispositive matter "only if it is clearly erroneous or contrary to law." *Cendant Mortg. Corp. v. Saxon Nat'l Mortg.*, 492 F. Supp. 2d 119, 124 (E.D.N.Y. 2007). Under the clearly erroneous standard, "the magistrate judge's findings should not be rejected merely because the court would have decided the matter differently." *Id.* Rather, the district court must affirm unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). "An order is contrary to law 'when it fails to apply or misapplies relevant statutes, case law or rules of procedure.'" *Travel Sentry, Inc. v. Tropp*, 669 F. Supp. 2d 279, 283 (E.D.N.Y. 2009) (citing *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F. Supp. 2d 70, 74 (N.D.N.Y. 2000).

ARGUMENT

I. The Magistrate Judge Correctly Required Defendants To Produce The Responsive Training Materials.

Defendants offer no justification for neglecting their burden to substantiate the privilege claims for over four months. This failure, by itself, is grounds for finding a waiver of privilege. The Court should therefore deny Defendants' appeal.

A. Defendants Failed to Produce a Privilege Log as Required by Local Rule 26.2.

Defendants served responses to Plaintiffs' Fourth Set of Requests for Production over four months ago, on October 24, 2018. Defendants, however, did not serve a privilege log with the responses, violating Local Rule 26.2, which requires that a privilege log "be furnished in writing at the time of the response to" the requests. Local Civ. Rule 26.2(b). Since that time, Defendants have twice represented that they would produce a privilege log, but as yet have not done so. Defendants' declaration in support of the instant motion—replete with vague overgeneralizations and lacking identification of *any* documents, let alone the number of

documents or pages—does nothing to cure Defendants' failure. *See In re Grand Jury Subpoena*, 750 F.2d 223, 224–225 (2d Cir. 1984) (holding that burden of establishing existence of privilege cannot "be discharged by mere conclusory or *ipse dixit* assertions").Defendants' failure to timely substantiate the privilege claims is, by itself, grounds for finding waiver. Courts have found waiver of the privilege where, as here, a party has failed to timely produce a privilege log. *See McNamee v. Clemens*, No. 09 CV 1647 (SJ), 2013 WL 6572899, at *3 (E.D.N.Y. Sept. 18, 2013), *clarified on denial of reconsideration*, No. 09 CV 1647 (SJ), 2014 WL 12775660 (E.D.N.Y. Jan. 30, 2014) (holding that Defendant "waived his claims of privilege and work product protection by virtue of his failure to timely submit a privilege log" and rejecting defendant's argument that assertion of privilege over broad categories of documents as part of discovery response was sufficient); *Smith v. Franklin Hosp. Med. Ctr.*, No. 04-CV-3555(LDW)(ARL), 2005 WL 2219294, at *2 (E.D.N.Y. Sept. 13, 2005) ("[G]iven the plaintiff's failure to provide a privilege log in compliance with Local Rule 26.2 and the court's August 2, 2005 order for requests numbered 46 and 57, the court finds that he has waived the work-product privilege with respect to these documents."); *Kitevski v. City of New York*, No. 04 Civ. 7402 RCC RLE, 2006 WL 680527, at *4 (S.D.N.Y. Mar. 16, 2006) ("The City has failed to provide a privilege log, and has failed to present any justification for that failure. It has, therefore, waived any privilege with respect to the . . . records by failing to properly identify the documents, and assert the privilege."); *see also Certain Underwriters at Lloyd's, London v. Nat'l R.R. Passenger Corp.*, No. 1:14-cv-04717-FB-RLM, 2017 WL 9487190, at *9 (E.D.N.Y. Jan. 20, 2017), *report and recommendation adopted as modified sub nom. Certain Underwriters at Lloyd's v. Nat'l R.R. Passenger Corp.*, No. 14-CV-4717 (FB), 2017 WL 1232526 (E.D.N.Y. Feb. 17, 2017) ("[W]here a party has been severely derelict in its obligation to offer support for its privilege

claims, a court may find that inadequate log entries operate as a waiver of the privilege entirely, thereby requiring production of the underlying documents.")

Defendants have had ample opportunity to support the claims of privilege over the training materials by producing a privilege log with sufficient detail or other evidence so as to allow Plaintiffs to assess the privilege claims. They have failed to do so and offered no justification for their failure. Judge Scanlon correctly compelled production of the requested training materials. The Court should not disturb that ruling.

II. The Magistrate Judge Correctly Ruled That The Training Materials Are Not Protected By The Attorney-Client Privilege.

Because the attorney-client privilege "stands in derogation of the public's 'right to every man's evidence, . . . it ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.'" *United States v. Int'l Bhd. of Teamsters*, 119 F.3d 210, 214 (2d Cir. 1997) (quoting *In re Horowitz*, 482 F.2d 72, 81 (2d Cir.1973)). The privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862-63 (D.C. Cir. 1980) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)).

Defendants acknowledge, as they must, that the party claiming the protection of a privilege bears the burden to provide evidence sufficient to establish the essential elements of the privileged relationship. *See S.E.C. v. NIR Group, LLC*, 283 F.R.D. 127, 131 (E.D.N.Y. 2012) (citing *In re Grand Jury Subpoena*, 750 F.2d at 224–25). In support of their appeal, Defendants produced a declaration from M. Bennett Courey, Associate Chief Counsel (Enforcement and Operations) of CBP ("Courey Declaration"). The Courey Declaration does not identify a single purportedly privileged, training document by title. Nor does it provide the number of documents or pages over which the privilege is being claimed. Instead, it avers that the training materials

are "premised upon confidential information shared by the institutional client, including but not limited to, active CBP enforcement operations, law-enforcement-sensitive investigative techniques, and other procedures that are confidential and not otherwise available to the public." (ECF No. 104-2, ¶ 12.) The Courey Declaration also asserts that "[t]hese trainings memorialize and consolidate legal advice pertaining to these situationally specific and often recurring issues and fact patterns." *Id.*

Defendants' scant submission, together with the absence of a privilege log, significantly hampers Plaintiffs' ability to assess or rebut the privilege claims. Nevertheless, there are objective indicia that Defendants' privilege claim is simply a rehash of arguments they advanced unsuccessfully elsewhere. The statements contained in the Courey Declaration here are nearly identical to those contained in another Courey Declaration submitted in a different case in which CBP unsuccessfully resisted the production of legal training materials, arguing that they were protected by the attorney-client privilege. *Am. Civil Liberties Union of San Diego & Imperial Ctys. (ACLU) v. U.S. Dep't of Homeland Sec.*, No. 8:15-cv-00229-JLS-RNB, 2017 WL 9500949, at *11 (C.D. Cal. Nov. 6, 2017).[1] In *ACLU*, CBP identified and produced *in camera* a document titled Enforcement Law Course ("ELC"). Like here, CBP submitted a Courey Declaration which asserted that "the ELC is based on 'confidential information shared by the client involving CBP

[1] *ACLU* was a Freedom of Information Act ("FOIA") case in which CBP claimed that CBP's Enforcement Law Course was exempted from disclosure under Exemption 5, which protects from disclosure "inter-agency or intra-agency memorand[a] or letters which would not be available by law to a party other than an agency in litigation with the agency. . . ." 5 U.S.C. § 552(b)(5). Exemption 5 covers records that would be "normally privileged in the civil discovery context," *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975), and allows the government to withhold records from FOIA disclosure under at least three privileges: the deliberative-process privilege, the attorney-client privilege, and the attorney work-product privilege. *See Coastal States Gas Corp.*, 617 F.2d at 862. The scope of Exemption 5 is co-extensive with the bounds of civil litigation privileges. *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 11 (1988) (holding that Exemption 5 "exempt[s] those documents, and only those documents, normally privileged in the civil discovery context.").

enforcement activities and procedures that are confidential and not otherwise available to the public.'" *Id.* (quoting Courey Decl. ¶10, Doc. 81-4). CBP also averred that the ELC "'memorializes and consolidates information in response to . . . specific and often recurring issues and fact patterns.'" *Id.*

After *in camera* review, the court in *ACLU* observed that the ELC contains no "'fact-specific legal advice and communication' and functions as a general-purpose legal manual, teaching CBP officials about the laws they enforce and the constitutional and statutory constraints they must follow" and that the "examples included in the ELC are taken from case law, not any identifiable agency communications." *Id.* (citing *Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 905 F. Supp. 2d 206, 221 (D.D.C. 2012)). "Because the Government [failed to] demonstrate[] that the document contain[ed] any fact-specific legal advice, and the Court could not identify any potentially confidential material through its *in camera* review," the court held that Chapters 1-15 and 18-20 of the ELC could not be withheld under the attorney-client privilege. *Id.*

Because Defendants have failed to produce a privilege log, Plaintiffs cannot know whether the ELC is among the documents withheld by Defendants here. What is known, however, is that Defendants' conclusory assertions are legally insufficient to sustain their burden of establishing that an entire category of training materials is privileged.

The cases cited by Defendants do not establish otherwise. In *Cty. of Erie*, the documents subject to the privilege dispute were emails between an assistant county attorney and county officials that (1) analyzed possible liability of Erie County and its officials stemming from the existing strip search policy, (2) proposed changes to existing strip search policy to make it constitutional, and (3) provided guidance to executive officials within sheriff's department to

take steps to implement the new policy. *In re Cnty. of Erie*, 473 F.3d 413, 422 (2d Cir. 2007). As is apparent from the Second Circuit's descriptions, the emails at issue in *County of Erie* contained specific legal advice concerning the types of legal challenges likely to be mounted against the government client and recommendations for making changes to the policy to comply with constitutional requirements. *See id.* Thus, the documents at issue in *County of Erie* appear fundamentally different in character from CBP's training materials that Defendants seek to withhold here, which likely function as a "general purpose legal manual, teaching CBP officials about the laws they enforce and the constitutional and statutory constraints they must follow." *ACLU*, 2017 WL 9500949, at *11.

Defendants also rely on *Families for Freedom v. U.S. Customs & Border Protection*, 797 F. Supp. 2d 375, 383 (S.D.N.Y. 2011), which upheld CBP's privilege claim over two training memoranda on agency policies regarding racial profiling and conduct of agents during transportation checks. Defendants' reliance is misplaced. Unlike here, where Defendants seek to withhold an entire category of documents based on nothing more than conclusory assertions that the documents contain legal advice, the *Families for Freedom* court addressed the privilege claim over *two* documents described as training memoranda. Unlike here, the court was further aided by a *Vaughn* index, an itemized listing of non-disclosed records, describing each record and portion withheld, and providing a detailed justification for the agency's withholding. *Id.* at 386. Even if the analysis in *Families for Freedom* supports Defendants' position, however, it would merely establish that a court may reach a different result. In light of other courts finding that training materials are not privileged, as set forth above, the Court would not be "left with [a] definite and firm conviction that a mistake has been committed." *U.S. Gypsum Co.*, 333 U.S. at 395. The Court must therefore affirm the Magistrate Judge's ruling.

III. The Magistrate Judge Correctly Ruled That The Training Materials Are Not Protected By The Attorney Work-Product Doctrine.

The work-product doctrine aims primarily to protect "the integrity of the adversary trial process itself." *National Ass'n of Criminal Defense Lawyers (NACDL) v. Dep't of Justice Exec. Office for U.S. Attorneys*, 844 F.3d 246, 251 (D.C. Cir. 2016) (quoting *Jordan v. Dep't of Justice*, 591 F.2d 753, 775 (D.C. Cir. 1978)). "Analysis of one's case 'in anticipation of litigation' is a classic example of work product, and receives heightened protection under Fed. R. Civ. P. 26(b)(3)." *U.S. v. Adlman*, 134 F.3d 1194, 1196-97 (2d Cir. 1998). A document is prepared in anticipation of litigation if it is "created because of the prospect of litigation, analyzing the likely outcome of that litigation," and does not lose protection because "it is created in order to assist with a business decision." *Id.* at 1202. In contrast, a document that is "prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation" is not work product even if "such documents might also help in preparation for litigation . . . because it could not fairly be said that they were created 'because of' actual or impending litigation." *Id.* To be entitled to work product protection, a document cannot "merely pertain to the subject of litigation in the abstract." *NACDL*, 844 F.3d at 255. Materials serving no clearly identifiable adversarial function, such as policy manuals, generally do not constitute work product. *Id.*

The training materials sought here are precisely what courts have held are not subject to the work product protection. According to Defendants, the training materials were prepared "with an eye towards litigation" to shape "conduct such that it will mitigate litigation risk or survive challenges during subsequent litigation that may occur against the Agency and/or its employees." (Defs.' Mot. at 8; Courey Decl. ¶ 11.) These assertions only show that the materials might help in preparation for litigation or to reduce the risk of litigation, not that the

materials were prepared "because of" litigation. To the contrary, it seems clear that the materials were created in the ordinary course of CBP's business to train CBP officers and would have been prepared in "similar form irrespective of the litigation" because the purpose of the training was to ensure that CBP officers' "actions are lawful." (Defs.' Mot. at 8; Courey Decl. ¶ 11.) Defendants' submissions are also devoid of any claims that the training materials contain lawyers' legal strategies or theories of the case. Training materials aimed at "educating officers on their proper behavior, rather than any strategic, adversarial use in litigation" are like agency manuals "fleshing out the meaning of the law," which are not entitled to work-product productions. *ACLU*, 2017 WL 9500949, at *10 (citing *Am. Immigration Council*, 905 F. Supp. 2d at 222; *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987).

Defendants thus fail to demonstrate that Magistrate Judge Scanlon committed clear error by rejecting their claim of attorney work-product privilege. Defendants' objections should, therefore, be set aside.

* * *

Finally, the Courey Declaration asserts that public disclosure of the training materials would inhibit the candor and free flow of attorney-client communications and may "help[] criminals and other violators to ascertain how best to structure their operations or actions to avoid detection."[2] These concerns are misplaced, given the protective order in this case; if produced, the training materials will only be available to Plaintiffs and their counsel.

[2] The Courey Declaration also claims that "the possibility that CBP officers might be required to defend, in litigation or otherwise externally, policy or operational decisions as measured against the legal advice given in the form of these Fourth Amendment trainings or otherwise, would likely have a dramatic chilling effect on the attorney-client relationship and frustrate the overall purpose of these trainings." (Courey Decl. ¶ 13.) To the extent that Defendants are contending that CBP officers would be chilled from seeking legal advice because their failure to comply with the training on how to lawfully perform their duties could result in legal proceedings, it is

CONCLUSION

For the reasons set forth above, Defendants' objections to the Magistrate Judge's discovery order should be overruled.

Respectfully submitted,

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not well taken. The notion that CBP officers would refrain from seeking legal advice or CBP would cease training its officers for fear that officers would be sued for acting beyond their authority is perverse and should not be countenanced.

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