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 9 UNITED STATES DISTRICT COURT  
 10 NORTHERN DISTRICT OF CALIFORNIA  
 11 SAN FRANCISCO DIVISION

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 14 AMERICAN CIVIL LIBERTIES UNION  
 FOUNDATION, et al.,

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 16 Plaintiffs,

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 18 v.

19 UNITED STATES DEPARTMENT OF  
 20 JUSTICE, et al.,

21 Defendants.  
 22

Case No. 3: 19-cv-00290-EMC

**DEFENDANTS' ADMINISTRATIVE  
 MOTION TO REDACT PORTIONS OF  
 SEPT. 17, 2021 EX PARTE HEARING  
 TRANSCRIPT**

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 25 **DEFENDANT'S ADMINISTRATIVE MOTION**  
 26 **TO REDACT PORTIONS OF EX PARTE HEARING TRANSCRIPT**  
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1 In accordance with the instructions set forth in this Court’s September 24, 2021 clerk’s  
 2 notice, Defendants submit the attached, limited proposed redactions to the September 17, 2021  
 3 *ex parte* hearing transcript for this Court’s review. Clerk’s Notice, ECF No. 147. Defendants  
 4 propose to redact only the information this Court found to be protected under Exemptions 5 and  
 5 7(E) of the Freedom of Information Act, 5 U.S.C. § 552. *See* Order on Summary Judgment, ECF  
 6 No. 149; *see also* Oct. 8, 2021 Decl. of Vinita B. Andrapalliyal ¶ 8.

7 The proposed redactions do not warrant release under the First Amendment because  
 8 public access of information protected from release under FOIA would not “play a ‘significant  
 9 positive role in the functioning of the particular process in question,’” *Cal-Almond, Inc. v. U.S.*  
 10 *Dep’t of Agric.*, 960 F.2d 105, 109 (9th Cir. 1992) (quoting *Press–Enterprise II*, 478 U.S. 1, 8  
 11 (1986)). After all, Congress crafted the FOIA exemptions to reflect the fact that “legitimate  
 12 governmental and private interests could be harmed by release of certain types of  
 13 information.” *Wickwire Gavin, P.C. v. U.S. Postal Serv.*, 356 F.3d 588, 592 (4th Cir. 2004)  
 14 (cleaned up). Similarly, release is unwarranted under the common-law right of access because  
 15 information protected from release under FOIA “”have traditionally been kept secret for  
 16 important policy reasons.” *In re Copley Press, Inc.*, 518 F.3d 1022, 1029 (9th Cir. 2008) (quoting  
 17 *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989)). Therefore, Defendants  
 18 respectfully request that this Court release the *ex parte* hearing transcript with Defendants’  
 19 recommended redactions.

20 Dated: October 8, 2021

Respectfully submitted,

21 BRIAN M. BOYNTON  
 22 Acting Assistant Attorney General

23 ELIZABETH J. SHAPIRO  
 24 Deputy Director, Federal Programs Branch

25 */s/ Vinita B. Andrapalliyal*  
 26 VINITA B. ANDRAPALLIYAL  
 27 U.S. Department of Justice, Civil Division

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19 UNITED STATES DEPARTMENT OF  
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21 Defendants.  
 22

Case No. 3: 19-cv-00290-EMC

**DECLARATION OF  
 VINITA B. ANDRAPALLIYAL**

- 1 1. I am a Trial Attorney at the Department of Justice, Civil Division, Federal Programs  
2 Branch. I represent the Defendants in the above-referenced matter.
- 3 2. I have personal knowledge of the contents of this declaration, and I could and would testify  
4 competently thereto if called upon to do so.
- 5 3. On July 2, 2021, this Court held a hearing on the parties' cross motions for partial summary  
6 judgment. Minute Entry of July 6, 2021, ECF No. 137. The parties' motions concerned  
7 three federal agency components' responses to Plaintiffs' Freedom of Information Act  
8 (FOIA) request: U.S. Customs and Border Patrol (CBP), U.S. Citizenship & Immigration  
9 Services (USCIS), and Immigration and Customs Enforcement (ICE). *See* ECF Nos. 98,  
10 108, 126, 133. After the hearing, this Court ordered Defendants to submit for *in camera*  
11 *review* the unredacted records relating to the contest withholdings Defendants made under  
12 FOIA Exemptions 5 and 7(E). *See* Minute Entry of July 6, 2021.
- 13 4. On September 17, 2021, this Court held an *ex parte* hearing to further discuss Defendants'  
14 Exemption 5 withholdings with the help of the unredacted documents submitted for *in*  
15 *camera* review. Clerk's Notices ECF Nos. 140, 141.
- 16 5. Later that day, Plaintiff moved for partial public release of the *ex parte* hearing transcript.  
17 Pl.'s Admin. Mot. for Public Release, ECF No. 142.
- 18 6. On September 22, 2021, this Court ruled on the parties' cross-motions for partial summary  
19 judgment, granting in part and denying in part both motions. Order on Summ. J., ECF No.  
20 145. This Court upheld Defendants' redactions with two exceptions. *See* Amended Order  
21 on Summ. J., ECF No. 150. First, this Court ordered CBP to release in full a document  
22 initially withheld under Exemption 7(E), located at pages 125–36 of its production. *Id.* at  
23 6–7. Second, this Court ordered CBP to release certain information withheld under  
24 Exemption 5 from pages 2, 7, and 19 of its production. *Id.* at 11–12.
- 25  
26  
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- 1 7. On September 24, 2021, this Court granted Plaintiff’s motion for partial public release of  
2 the *ex parte* hearing transcript and ordered Defendants to propose redactions to the  
3 transcript within 14 days and according to the district’s sealing procedures. Clerk’s Notice,  
4 ECF No. 147.
- 5 8. CBP, USCIS, and ICE have reviewed the transcript and propose limited redactions therein.  
6 The redactions correspond to withholdings that this Court upheld in its order on summary  
7 judgment. *See* Order on Summ. J at 6–12. The unredacted transcript portions generally  
8 relate the proposed redactions to easily identifiable withholdings in the productions. *See,*  
9 *e.g.*, Sept. 17, 2021 Hearing Tr. 9:4–5 (proposing to redact information withheld on page  
10 1 of CBP’s production); *id.* 18:8–9 (proposing to redact information withheld on page 26  
11 of CBP’s production).
- 12 9. Defendants’ summary-judgment briefing and the declarations of Patrick Howard, Terri  
13 White, and Fernando Piniero also describe in further detail the reasons for protecting this  
14 information. Defs.’ Mot. for Partial Summ. J, ECF No. 98; Defs.’ Opp’n to Pl.’s Mot. for  
15 Summ. J. and Reply in Support of Mot. for Partial Summ. J., ECF No. 126; Decl. of Patrick  
16 Howard, ECF No. 98-3; Suppl. Decl. of Patrick Howard, ECF No.127; Decl. of Fernando  
17 Piniero, ECF No. 98-1; Suppl. Decl. of Fernando Piniero, ECF No. 128; Decl. of Terri  
18 White, ECF No. 98-5; Suppl. Decl. of Terri White, ECF No. 129.

20 Dated: October 7, 2021

Respectfully submitted,

21 BRIAN M. BOYNTON  
22 Acting Assistant Attorney General

23 ELIZABETH J. SHAPIRO  
24 Deputy Director, Federal Programs Branch

25 /s/ Vinita B. Andrapalliyal  
26 VINITA B. ANDRAPALLIYAL  
27 U.S. Department of Justice, Civil Division

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

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

*Plaintiffs,*

v.

DEPARTMENT OF JUSTICE, *et al.*,

*Defendants.*

Case No. 19-CV-00290-EMC

**[PROPOSED] ORDER**

Upon review of Defendants' proposed redactions to the September 17, 2021 *ex parte* hearing transcript in their administrative motion to seal, the motion is GRANTED.

IT IS SO ORDERED.

Dated: \_\_\_\_\_, 2021

\_\_\_\_\_  
Hon. Edward M. Chen  
United States District Judge



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

AMERICAN CIVIL LIBERTIES UNION )  
FOUNDATION, et al., )  
 )  
 Plaintiffs, )

VS. )

NO. C 19-00290 EMC

U.S. DEPARTMENT OF JUSTICE, et )  
al., )  
 )  
 Defendants. )  
\_\_\_\_\_ )

San Francisco, California  
Friday, September 17, 2021

**SEALED TRANSCRIPT OF VIDEOCONFERENCE PROCEEDINGS**

**APPEARANCES:**

For Defendants:

U.S. DEPARTMENT OF JUSTICE  
Civil Division - Federal Programs Branch  
P.O. Box 883 - Benjamin Franklin Street  
Washington, D.C. 20044

**BY: VINITA ANDRAPALLIYAL, ATTORNEY AT LAW**

REPORTED BY: Marla F. Knox, CSR No. 14421, RPR, CRR, RMR  
United States District Court - Official Reporter

**SEALED PROCEEDINGS**

Friday - September 24, 2021

10:29 a.m.

P R O C E E D I N G S

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(The following transcript was placed under seal by  
Order of the Court.)

**THE CLERK:** Court is now in session. The Honorable  
Edward M. Chen is presiding.

Calling civil action 19-290, American Civil Liberties  
Union Foundation, et al. versus Department of Justice, et al.

This is a sealed ex parte in-camera hearing.

Counsel, please state your appearance.

**MS. ANDRAPALLIYAL:** Good morning, Vinita Andrapalliyal  
from the U.S. Department of Justice on behalf of Defendants.

**THE COURT:** All right. Thank you, Ms. Andrapalliyal.

Actually, we are not all here. Are we all here?

Yeah, I guess we are all here since this is an ex parte  
proceeding.

Okay. I thought it would be helpful if we could go over  
the documents. I think I have an understanding of the  
Exemption 7 documents, but the Exemption 5 is a -- sometimes a  
little bit more amorphous.

I start with the premise that -- with an understanding  
that documents to be exempt are more than -- have to be  
pre-decisional. It can't be final documents.

And something that even if it is -- even if it is labeled

## SEALED PROCEEDINGS

1 a draft, if it actually manifests the final version, it may not  
2 be deemed, you know, an interim pre-final document.

3 And the other requirement, of course, is that there has to  
4 be a document that's deliberative, which means that the  
5 materials must bear on the formulation or exercise of agency's  
6 policy according to judgment revealing either the formulation  
7 or exercise of policy implicating judgment.

8 And that's the question that probably is where there is a  
9 lot of gray area in some of these cases. And so I wanted to  
10 hear the Government's explanation about the documents in  
11 question here and how you think it falls within -- meets those  
12 two criteria.

13 So, in my minute order, the first set of documents are the  
14 issue -- I guess, they are called issue papers.

15 **MS. ANDRAPALLIYAL:** Yes, Your Honor.

16 **THE COURT:** And maybe you can give me a background of  
17 what those are. And then it is the -- there are so many  
18 different colors here. It's the blue -- the blue portions are  
19 the -- and I forget which one is Exemption 7 and which one  
20 Exemption 5; do you recall?

21 **MS. ANDRAPALLIYAL:** Your Honor, I understand it  
22 doesn't actually depend on the color of the box.

23 The color just means, you know, someone else went through  
24 the document.

25 And so, I do have, you know, the redacted version as well

## SEALED PROCEEDINGS

1 as my notes of which particular boxes were redacted under  
2 (b) (5).

3 **THE COURT:** Okay. I had an understanding -- and maybe  
4 I'm wrong -- that blue was for (b) (5) and red was for (7) or  
5 vice verse is or something. Are you saying that that's not  
6 correct?

7 **MS. ANDRAPALLIYAL:** Right, Your Honor, yeah, the color  
8 of the boxes do not denote which exemption was applied.

9 **THE COURT:** Oh, all right.

10 Do you -- I wonder, maybe if you have the documents, you  
11 could put it up on screen-share; and then you could just walk  
12 me through.

13 **MS. ANDRAPALLIYAL:** Your Honor, I do apologize. I  
14 don't have the technology to do that. I'm on an iPad, and our  
15 office doesn't have the bandwidth to conduct these hearings on  
16 desktop.

17 And so I don't have -- I have the hard copy, but I don't  
18 have the soft copy up to share with you.

19 **THE COURT:** Well, let me see. Angie, do you know if  
20 we have on OneDrive -- now, I'm trying to find OneDrive here.

21 **THE CLERK:** I will check.

22 (Pause in proceedings.)

23 **THE CLERK:** The in-camera submission?

24 **THE COURT:** Yeah, why am I not getting OneDrive? Hold  
25 on.

## SEALED PROCEEDINGS

1 (Pause in proceedings.)

2 **THE CLERK:** Would you like for me to screen-share  
3 that, the in-camera submission?

4 **THE COURT:** Well, let me see if I can find it. This  
5 is under today.

6 **THE CLERK:** It is under hearings for today.

7 **THE COURT:** Yeah, I got it. And you are looking at.

8 **THE CLERK:** USCIS in-camera submission. It is the  
9 last thing.

10 **THE COURT:** Oh, let me see if this is it.

11 (Pause in proceedings.)

12 **THE CLERK:** And there is also an in-camera review  
13 chart.

14 **THE COURT:** I think these are the -- this is not the  
15 one I was -- it's --

16 **THE CLERK:** There is a chart -- a couple of documents  
17 above that one on One Drive.

18 **THE COURT:** Okay. Hold on for a second.

19 (Pause in proceedings.)

20 **THE COURT:** In-camera review chart. I think that's  
21 what was done internally; but the binder that has the couple  
22 hundred pages, I don't see in here. Let me look.

23 (Pause in proceedings.)

24 **THE COURT:** Yeah, it's just the chart.

25 Well, if you have it in front of you and I have it in

## SEALED PROCEEDINGS

1 front of me, I guess maybe that's the best we can do.

2 **MS. ANDRAPALLIYAL:** Yes, Your Honor.

3 I do believe the soft copy, if you hover over the box, it  
4 may pop up what the redaction was.

5 But I hope that that sort of went through when we  
6 submitted the PDF version to the Court.

7 **THE COURT:** Do you know -- do you know, by chance,  
8 whether -- what the docket number of this submission was, the  
9 binder?

10 There are lots of declarations, and it would take me  
11 forever to try to figure out --

12 **MS. ANDRAPALLIYAL:** Yeah, I believe, Your Honor, that  
13 we did not submit it on the docket. We submitted it to --

14 **THE COURT:** Oh, okay.

15 **MS. ANDRAPALLIYAL:** -- because it was --

16 **THE COURT:** Okay. Well, that makes sense. It  
17 wouldn't be docketed.

18 **THE CLERK:** And Louise held that directly.

19 **THE COURT:** So we never uploaded it, Angie?

20 **THE CLERK:** No, not that I am aware of.

21 **THE COURT:** All right. Okay.

22 Well, let's -- why don't we talk about -- and maybe, you  
23 know, I will look and you will look -- it is called information  
24 issue papers.

25 **MS. ANDRAPALLIYAL:** Right.

## SEALED PROCEEDINGS

1           **THE COURT:** Maybe -- and it goes on and it talks about  
2 various aspects. Maybe you can tell me why this is covered by  
3 the deliberative process. And those span through page, I  
4 think, 22 --

5           **MS. ANDRAPALLIYAL:** Right.

6           **THE COURT:** -- of the CBP submission.

7           **MS. ANDRAPALLIYAL:** That's right, Your Honor.

8           And I do want to point out at the outset that, you know,  
9 most of the redactions in these issue papers were made under  
10 (b) (7) (E).

11           And so I'm going to focus on (b) (5) --

12           **THE COURT:** Yes, yes.

13           **MS. ANDRAPALLIYAL:** -- redactions.

14           **THE COURT:** All right.

15           **MS. ANDRAPALLIYAL:** And so, you know, I guess just to  
16 take a step back and talk about the issue papers as a whole,  
17 you know, they were submitted to senior leadership at CBP at  
18 leadership's request.

19           And, you know, each paper discusses a particular issue,  
20 for example. You know, the sort of common theme is [REDACTED]

21 [REDACTED]

22 [REDACTED].

23           And so, you know, these were prepared for internal review.  
24 We did release a lot of this sort of factual information that  
25 we did determine could be severed from the, you know,

## SEALED PROCEEDINGS

1 deliberative communications.

2 But in sort of isolated incidents, we did redact forward  
3 looking -- forward looking thoughts and discussions of sort of  
4 things in the works.

5 And so I can -- would it be helpful if I sort of walked  
6 through each document? Or -- yeah, I want to be as helpful as  
7 possible.

8 **THE COURT:** Yeah, well, let's take the issue papers.  
9 In the first 22 pages, is that all from one -- that's one issue  
10 paper, right, information issue paper?

11 **MS. ANDRAPALLIYAL:** No, Your Honor, it's --

12 **THE COURT:** It's not?

13 **MS. ANDRAPALLIYAL:** Yeah, it should be -- I have the  
14 number here -- seven -- there were seven different documents.  
15 And they correspond to the way that you broke -- the Court  
16 broke it out in a minute order in your 1 to 4 is one document,  
17 4 to 8 --

18 **THE COURT:** Oh, I see.

19 **MS. ANDRAPALLIYAL:** -- and then 9 to 12 and then 13 --

20 **THE COURT:** Okay, I see. So these are separate papers  
21 that came to staff from leadership. Did they all -- well, why  
22 don't you tell me, you know, when was it and what did it lead  
23 to and why is it -- why is it deliberative?

24 **MS. ANDRAPALLIYAL:** So, Your Honor, you know,  
25 I believe that the documents were drafted between 2016 and



## SEALED PROCEEDINGS

1 2017; and, you know, there were a number of different  
2 initiatives that were being discussed.

3 You know, for example, on page 1, you know, CBP is talking  
4 about [REDACTED],  
5 [REDACTED] and [REDACTED].

6 And so, you know, some of the issue papers talk about more  
7 discrete issues. You know, in this particular first document,  
8 you know, the issue was outlining CBP's efforts to modify the  
9 ESTA application and, you know, things that had happened and  
10 things that this particular doctor expected to happen.

11 Other documents like, you know, the next two documents  
12 talk about -- you know, I guess it is called the [REDACTED], which is  
13 [REDACTED]. That is, you know, an effort  
14 that CBP undertook to [REDACTED]  
15 [REDACTED].

16 So, you know, sort of each document talks about something  
17 different; but as a whole they were drafted, you know, during  
18 this discrete time period to inform senior leadership as CBP  
19 was considering ways to [REDACTED]  
20 [REDACTED].

21 **THE COURT:** So for these issue papers, when was the  
22 final policy or procedure enacted or formulated?

23 **MS. ANDRAPALLIYAL:** Your Honor, I can't answer that.  
24 Some of these initiatives, you know, were never finalized. And  
25 some of them were.

## SEALED PROCEEDINGS

1 But, you know, the case law supports our position that,  
2 you know, the agency is not required to identify a particular  
3 specific policy decision made, you know, in the context of  
4 these -- or -- made ultimately as a result of this information  
5 paper.

6 You know, this is just reflecting the sort of give and  
7 take of the deliberative process where staff level folks are  
8 informing senior leadership and also suggesting, you know,  
9 different approaches or ways to respond to follow-up questions.

10 **THE COURT:** Are you saying that all of these are -- as  
11 a matter of being self evident, that these are not final?

12 **MS. ANDRAPALLIYAL:** Well, Your Honor, you know, I  
13 think in some instances it appears that the documents are sort  
14 of referencing factual sort of will happen scenarios.

15 I believe it is in one of the declarations; but I can sort  
16 of confirm for you here that, you know, all of these documents  
17 were staff level to senior leadership.

18 And they were not intended as sort of the final word from  
19 the Agency on any of these issues that were subject to feedback  
20 from senior leadership and, you know, sort of the rest of the  
21 policymaking process.

22 **THE COURT:** Can you identify for me then -- since I  
23 guess I had a misunderstanding about the colors -- which of  
24 these were Exemption 5 redactions?

25 If you look at the first -- let's just take the first one.

1 I think it's 1 through 4. Are there any Exemption 5 redactions  
2 there?

3 **MS. ANDRAPALLIYAL:** Yes, Your Honor. The first two  
4 redactions -- I guess the first three redactions are (b) (5) and  
5 redactions 2 and 3 also assert (b) (7) (E).

6 And then the first, second and fourth and fifth redactions  
7 on page 2 are also (b) (5) redactions as well as (7) (E).

8 **THE COURT:** When you say the second, I'm looking at  
9 page 2.

10 **MS. ANDRAPALLIYAL:** Page 2, yeah.

11 **THE COURT:** Why don't you just tell me -- like, read  
12 to me what it is, which one. I don't know what you mean by  
13 second, first. There are so many blocks and some blocks are  
14 just two words, and I don't know what you mean.

15 So just look at page 2, there is a little -- there is a  
16 bullet item that says: The social media working group drafted  
17 blah, blah, blah. Is that one?

18 **MS. ANDRAPALLIYAL:** Yes, that's (b) (5) and (b) (7) (E).

19 **THE COURT:** So let's just take that as an example.  
20 Tell me why that falls within the deliberative process  
21 privilege.

22 **MS. ANDRAPALLIYAL:** Well, Your Honor, the bullet point  
23 explains that, you know, there's a social media working group  
24 that drafted a particular paper. It's been reviewed but is  
25 still under final review.

## SEALED PROCEEDINGS

1 And -- you know, it proposes a draft strategy. You know,  
2 it proposes a way forward in draft form.

3 And so, that -- that is, you know, a non-final  
4 recommendation or proposal that falls comfortably within the  
5 deliberative process privilege as part of the give and take of  
6 the consultative process.

7 **THE COURT:** Well, and then when it says "future  
8 actions," is the next line also a (b) (5) [REDACTED]

9 [REDACTED] ?

10 **MS. ANDRAPALLIYAL:** Yes, Your Honor. That particular  
11 line was redacted solely under (b) (5). And, you know, it  
12 reveals the Agency process, who we consulted with; and, you  
13 know, who we didn't consult with.

14 And so that was protected because it shed light on the  
15 sort of internal workings of the deliberative process.

16 **THE COURT:** So it is your position that revealing who  
17 participated in the discussion is part of the deliberative  
18 process privilege?

19 **MS. ANDRAPALLIYAL:** Yes, Your Honor. It broadly  
20 falls -- it falls within the broader, you know, description of  
21 the privileges as something that protects the quality of the  
22 Agency decision-making; protects, you know, intermediate level  
23 folks who are involved in the decision from -- from public  
24 scrutiny and allows all the stakeholders to provide sort of  
25 frank and candid thoughts on, you know, a proposal.

1           **THE COURT:** So that's answering the question. Without  
2 revealing what was said and who took what position and the back  
3 and forth, just revealing who was in the room is a (b) (5)  
4 exemption?

5           **MS. ANDRAPALLIYAL:** Yes, Your Honor. Here, you know,  
6 the Department determined that this information would chill --  
7 if released, would chill the Agency deliberation process.

8           And so it withheld that information for that reason.

9           **THE COURT:** Is that the same reason why the bullet  
10 item says: Social media working group drafted a social media  
11 strategy which has been reviewed and signed by -- and it lists  
12 a bunch of initials there -- those are all agencies within or  
13 subagencies or something within CBP or some branch of  
14 government?

15           **MS. ANDRAPALLIYAL:** Yes, they are all -- I believe  
16 they are all federal agencies. I'm not familiar with all of  
17 these acronyms, but I think USBP stands for U.S. Border Patrol.  
18 But I'm not sure about that, Your Honor.

19           **THE COURT:** All right. Do you happen to have at hand  
20 what case law interpreting (b) (5) supports your position best  
21 on the question of who -- not what was said but who  
22 participated in some decision-making; that that is privilege  
23 under (b) (5)?

24           **MS. ANDRAPALLIYAL:** Your Honor, I refer the Court to  
25 the D.C. Circuit's case *Coastal States* as well as the Ninth

1 Circuit's decision in *National Wildlife Federation*.

2 I can provide the cites for you if you like.

3 *National Wildlife Federation versus U.S. Forestry Service*,  
4 861 F.2d 1114, it cites *Coastal States* extensively.

5 But, you know, the focus of the deliberative process  
6 privilege inquiry is process oriented. You know, what was the  
7 sort of -- what was the role that this document played or its  
8 underlying information played in the deliberative process.

9 And so even if a particular piece of information is, you  
10 know, quote-unquote, factual, if that information would itself  
11 reveal the inner workings of Agency decision-making or reflects  
12 the personal opinions of, you know, the writer, that  
13 information is properly protected.

14 **THE COURT:** All right. Well, do these cases actually  
15 talk about the identification of the participants as being part  
16 of that privilege or -- I know the general principle you are  
17 articulating, but do these cases address the "who" question as  
18 opposed to the "what was said" question?

19 **MS. ANDRAPALLIYAL:** Your Honor, I'm not certain if  
20 they address this exact factual scenario; but they do provide  
21 the sort of guiding principles to make this analysis here.

22 **THE COURT:** Okay. So let's continue. What is the  
23 next (b) (5) exemption after the one I just mentioned? The [REDACTED]  
24 [REDACTED], is that a (7) or a (5)?

25 **MS. ANDRAPALLIYAL:** That's (7), Your Honor.

1 The next redaction is in the paragraph starting with:  
2 Subsequently CBP will continue the test and development  
3 capabilities.

4 The next line, you know, in a deliberative and responsible  
5 manner by -- and the rest of that information is redacted under  
6 (b) (5) and (b) (7) (E).

7 **THE COURT:** Okay. Does -- that substantively explains  
8 the methodology they are going to go through?

9 **MS. ANDRAPALLIYAL:** Right. Exactly, Your Honor.

10 **THE COURT:** Okay. And then is there another one on  
11 this page?

12 **MS. ANDRAPALLIYAL:** Yes. It's -- the next redaction:  
13 Prepared social media strategy and then [REDACTED]  
14 [REDACTED].

15 **THE COURT:** Okay. And then the other two redactions  
16 about [REDACTED], that is a (7)?

17 **MS. ANDRAPALLIYAL:** That's a (7), yes, Your Honor.

18 **THE COURT:** By the way, is that set forth somewhere  
19 which redaction is -- I mean, which exemption applies to which  
20 redaction because I --

21 **MS. ANDRAPALLIYAL:** The redactions are identified in  
22 the -- in the redacted filings that I believe Plaintiff put on  
23 the docket. So ECF 134-1 are sort of CBP withholdings.

24 **THE COURT:** So that will show which redaction is  
25 attributable to which exemption?

## SEALED PROCEEDINGS

1           **MS. ANDRAPALLIYAL:** Yes, Your Honor.

2           **THE COURT:** Okay.

3           **MS. ANDRAPALLIYAL:** And I believe that if you do have  
4 a soft copy of the in-camera submission, I believe, when you  
5 hover a particular box, you should be able to see the  
6 redaction.

7           I'm not completely sure that that capability sort of was  
8 included in the final submission, but that was what we hoped  
9 the Court would receive.

10           **THE COURT:** All right. Let's go to the PTAs privacy  
11 threshold analysis. Explain to me generally why that's  
12 Exemption 5 or parts of that are Exemption 5.

13           **MS. ANDRAPALLIYAL:** Okay, Your Honor, just a moment.  
14 Let me just pull up the documents section.

15   (Pause in proceedings.)

16           **MS. ANDRAPALLIYAL:** Okay. Yes, Your Honor. So these  
17 privacy threshold adjudications -- I want to take a step back  
18 and talk about DHS's privacy compliance process in general and  
19 the role that the PTAs play within that process.

20           This information is publicly available, Your Honor,  
21 I believe, on [dhs.gov/compliance](https://www.dhs.gov/compliance).

22           But the privacy threshold analysis is just the first step  
23 in DHS's privacy compliance process. DHS is required by  
24 statute to make publicly available information about the PII  
25 that it is collecting from individuals, the rationale for doing



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1 so, and its privacy mitigation techniques.

2 And it does so in either a privacy impact assessment or in  
3 a system of records notice.

4 And so the -- every three years, I believe, DHS reviews  
5 particular information collection with the help of the -- you  
6 know, the Agency component that is responsible for collecting  
7 the information.

8 And, of course, agencies sometimes -- or Agency components  
9 sometimes request authority to collect additional information.

10 And so those first level reviews are undertaken in these  
11 privacy threshold analyses.

12 And you can see that at the end of the document, DHS  
13 privacy weighs in on the -- on the -- you know, on what it  
14 believes to be a way forward.

15 But, you know, that's not necessarily the end of the  
16 process. If DHS determines that a new privacy impact analysis  
17 or assessment needs to be made or updated or a new systems of  
18 record notice needs to be issued, that's another step in this  
19 compliance process.

20 And so we -- again, Your Honor, a lot of these redactions  
21 are under (7)(E), but I can tell you that we redacted the CBP  
22 recommendations under (b)(5). And we left in tact DHS's  
23 privacy office comments with the exception of very limited  
24 references to, you know, other policies in the works and so on.

25 So --

## SEALED PROCEEDINGS

1           **THE COURT:** Okay. So, again, I don't know why my copy  
2 is non-informative. If we look at the first privacy PTA, that  
3 starts at page 23.

4           **MS. ANDRAPALLIYAL:** Right.

5           **THE COURT:** Where is the first Exemption 5 redaction?

6           **MS. ANDRAPALLIYAL:** So the first Exemption 5 redaction  
7 is on page 26. It's that block towards the middle of the -- of  
8 the page, [REDACTED]

9 [REDACTED] --

10           **THE COURT:** Okay. So explain to me -- yeah, maybe put  
11 that in context for me, why this is a --

12           **MS. ANDRAPALLIYAL:** Yes. Your Honor, so, you know,  
13 this is -- this particular analysis concerns the Electronic  
14 Visa Update System --

15           **THE COURT:** Yeah.

16           **MS. ANDRAPALLIYAL:** -- EVUS. And, you know, CBP is  
17 requesting that -- you know, we are requesting to implement  
18 EVUS in its operations as well and to collect social media.  
19 I guess, here the update is to collect social media identifiers  
20 within that EVUS process.

21           **THE COURT:** Yeah.

22           **MS. ANDRAPALLIYAL:** And so the block that was redacted  
23 under (b) (5) sets forth CBP's proposals for how to, you know,  
24 mitigate privacy risk. And ultimately, you know, that's  
25 subject to review from DHS privacy.

1           **THE COURT:** Okay. So, for instance, [REDACTED]

2 [REDACTED]  
3 [REDACTED] [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6           Blah-blah, will [REDACTED] [REDACTED]  
7 [REDACTED]

8           So, is this something that's already been decided or is  
9 this deliberative? I guess that's my question. Is this a  
10 proposal?

11           **MS. ANDRAPALLIYAL:** Right, Your Honor. No, this has  
12 not been decided yet.

13           This is CBP's proposal to DHS privacy. It's explaining  
14 what it wants to do and what risk mitigation measures it has  
15 identified. And as you -- as we sort of go along --

16           **THE COURT:** Okay.

17           **MS. ANDRAPALLIYAL:** -- you know, at the end there is,  
18 you know, the ultimate component privacy output recommendation,  
19 which was CBP's bottom line recommendation/proposal for DHS  
20 privacy. And that's on page 36, redacted under (b) (5).

21           **THE COURT:** Page 36, and that's at the bottom.

22           **MS. ANDRAPALLIYAL:** That's correct, Your Honor. A  
23 component privacy office recommendation.

24           **THE COURT:** Okay.

25           **MS. ANDRAPALLIYAL:** And I just want to point out in

1 this -- you know, in this block of text, CBP is [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]

8 And, you know, DHS privacy is -- ultimate adjudication is  
9 unredacted on page 38.

10 **THE COURT:** And so the only things that are redacted  
11 are the two things -- there is one thing, it looks like, on  
12 page 33.

13 **MS. ANDRAPALLIYAL:** Yes.

14 **THE COURT:** There is a line -- that is also a (b) (5)  
15 redaction?

16 **MS. ANDRAPALLIYAL:** That is a (b) (5) redaction,  
17 Your Honor. Let me just make sure that's the only other one.

18 (Pause in proceedings.)

19 **MS. ANDRAPALLIYAL:** Yeah, that should be the only  
20 other one to go through in this particular document.

21 **THE COURT:** And I take it, if I looked at this similar  
22 PTAs on page 48, 57, it would be a similar -- well, let's  
23 see --

24 **MS. ANDRAPALLIYAL:** Yes, Your Honor.

25 **THE COURT:** If I look at page 50, which redactions --

1 are there (b) (5) redactions on page 50?

2 **MS. ANDRAPALLIYAL:** There is only one, Your Honor; and  
3 that is the third line, you know, at the very end, it says:  
4 This pilot will assess the -- and then that block is redacted  
5 under (b) (5) and (7) regarding that particular tool and, you  
6 know, what is -- what CBP is hoping to test in this pilot.

7 **THE COURT:** You see -- this is on page 50?

8 **MS. ANDRAPALLIYAL:** Yes, 50.

9 **THE COURT:** And where is the sentence?

10 **MS. ANDRAPALLIYAL:** So, it starts on line 4, but the  
11 sentence itself begins at the very end of line 3 of box 1.

12 So --

13 **THE COURT:** Oh, I see. This pilot will assess

14 [REDACTED]

15 **MS. ANDRAPALLIYAL:** Yes.

16 **THE COURT:** Okay, because it explains what the plan  
17 is, what they are going to do. That's the idea.

18 **MS. ANDRAPALLIYAL:** Exactly, yes.

19 **THE COURT:** All right. And then on the next page, on  
20 page 51, is the -- because now it is sort of lining up. I see  
21 a red box around -- toward the bottom in box number 4, which  
22 says, possibly may include -- and then it is redacted -- [REDACTED]

23 [REDACTED]

24 [REDACTED] Is that a (b) (5) redaction?

25 **MS. ANDRAPALLIYAL:** No, Your Honor, those are both

1 (7) (E) redactions.

2 **THE COURT:** Oh, okay. All right. Well, is there  
3 another (5) -- (b) (5) redaction in this document?

4 **MS. ANDRAPALLIYAL:** Yes, Your Honor.

5 On page 54, again, you have the component privacy office  
6 recommendation.

7 **THE COURT:** I see.

8 **MS. ANDRAPALLIYAL:** That is withheld on (b) (5), and it  
9 goes onto the next page as well.

10 **THE COURT:** Okay.

11 **MS. ANDRAPALLIYAL:** And, I believe, both of them are  
12 actually also redacted -- I'm sorry. This block is also  
13 redacted under (7) (E).

14 **THE COURT:** Okay.

15 **MS. ANDRAPALLIYAL:** So, yeah.

16 **THE COURT:** All right. Okay. All right. So let's  
17 go --

18 **MS. ANDRAPALLIYAL:** For completeness, Your Honor --  
19 sorry.

20 **THE COURT:** Yeah.

21 **MS. ANDRAPALLIYAL:** -- there is another block -- there  
22 is -- the very last redaction on page 56 is also under (b) (5),  
23 and that's --

24 **THE COURT:** Which one is that?

25 **MS. ANDRAPALLIYAL:** -- that's discussing -- sure,

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1 it's -- so bottom of page 56 where you see "the system covered  
2 by existing PIA," that --

3 **THE COURT:** Yeah.

4 **MS. ANDRAPALLIYAL:** -- that second sentence is  
5 redacted under (b) (5) because it is discussing a potentially  
6 forthcoming [REDACTED], which to my knowledge has  
7 not been issued [REDACTED].

8 **THE COURT:** Okay. All right. Let's go to the next  
9 category, which is ICE contracts. So I'm looking at page 62.

10 **MS. ANDRAPALLIYAL:** Right.

11 **THE COURT:** I can't really tell what this is. Can you  
12 explain that?

13 **MS. ANDRAPALLIYAL:** Sure, Your Honor, just one moment.

14 (Pause in proceedings.)

15 **MS. ANDRAPALLIYAL:** I want to make sure I have the  
16 right information here.

17 (Pause in the proceedings.)

18 **MS. ANDRAPALLIYAL:** So, yes, Your Honor. This is sort  
19 of one -- the two paragraphs that are redacted on page (b) (5)  
20 on this page.

21 And, you know, this discussion is between HSI employees  
22 and contractors who are in the process of developing standard  
23 operating procedures and training manuals with respect to --  
24 you know, there is -- there is a Ghost -- Giant Oak is a social  
25 media surveillance company, I believe, that HSI contracted with

1 for this tool called Ghost.

2 And I believe we have released those contracts and  
3 information about Ghost elsewhere in our production.

4 But, you know, in the middle of finalizing these standard  
5 operating procedures and training manuals, we have an employee  
6 providing some draft contract language to another employee.

7 **THE COURT:** So this is all internal?

8 **MS. ANDRAPALLIYAL:** Yes.

9 **THE COURT:** This is internal to contract negotiations?

10 **MS. ANDRAPALLIYAL:** Yes -- well, Your Honor, I --  
11 yeah, CTR, I'm not sure. I think it's between a -- an employee  
12 and a contractor or multiple contractors.

13 But, yes, internal to the negotiations -- internal with  
14 respect to how to move forward with contract negotiations  
15 with --

16 **THE COURT:** Right. But this document -- this document  
17 is not a communication from the Government to a contractor but  
18 within the Government about how to negotiate with the  
19 contractor; is that right?

20 **MS. ANDRAPALLIYAL:** So, I believe that it is between  
21 an employee and a contractor; but it is in -- it is -- the sort  
22 of subject matter is how to negotiate with or what sort of  
23 contract language ultimately to settle on with Giant Oak.

24 **THE COURT:** Giant Oak being?

25 **MS. ANDRAPALLIYAL:** A separate company, Your Honor,



1 that HSI contracted with to provide additional social media  
2 monitoring.

3 **THE COURT:** So, maybe I'm -- I'm a little confused.  
4 This is a memo from -- I can't read it -- Rajewski to somebody  
5 at CTR and to Michelle Anderson; right?

6 **MS. ANDRAPALLIYAL:** Right, Your Honor. I don't know  
7 for certain if those two individuals are employees or if they  
8 are contractors.

9 So, I'm not entirely sure about that. But, yes, it's from  
10 this person to Michelle, and it's providing draft contract  
11 language.

12 **THE COURT:** Well, so, negotiations or advice to an  
13 outside contractor or back and forth, I'm not sure that  
14 that's -- I thought (b) (5) is to cover sort of internal things,  
15 you know, analogous to attorney-client discussions or  
16 intra-agency policy discussions.

17 If this is sort of -- I don't know -- sort of negotiations  
18 with the contractor, I'm not sure why that would be covered by  
19 (b) (5).

20 **MS. ANDRAPALLIYAL:** Your Honor, I apologize if I was  
21 unclear. This -- this language is not -- was not sent to Giant  
22 Oak, which was the contractor -- which was the company with  
23 whom HSI was hoping to finalize this particular Ghost contract.

24 **THE COURT:** Yeah.

25 **MS. ANDRAPALLIYAL:** But it's to another contractor as

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1 CBP -- I'm sorry -- as ICE is preparing to, you know, get back  
2 to Giant Oak.

3 And so, you know, I believe the consultant corollary would  
4 apply here, Your Honor, where even if this particular -- either  
5 of these particular individuals are not employees, they are,  
6 you know, being consulted as part of this deliberative process.

7 **THE COURT:** All right. So they are almost like an  
8 attorney hired by the Government?

9 **MS. ANDRAPALLIYAL:** Similar, Your Honor, yes.

10 **THE COURT:** Okay. But instead of using an internal  
11 consultant, they use an external consultant in negotiating the  
12 contract is what you are saying.

13 And that they should be treated as if they were an  
14 internal part of the Agency because they were -- they were a  
15 vendor; but, I mean, presumably subject to the same NDA and  
16 confidentiality clauses?

17 **MS. ANDRAPALLIYAL:** Exactly, Your Honor, yes.

18 **THE COURT:** Is that stated somewhere in your filings?

19 **MS. ANDRAPALLIYAL:** Let me see.

20 (Pause in the proceedings.)

21 **MS. ANDRAPALLIYAL:** I believe it is in ICE's index,  
22 which is -- let me see. If you can hold on for a minute.

23 **THE COURT:** Sure.

24 (Pause in proceedings.)

25 **MS. ANDRAPALLIYAL:** Okay. This is document 98.2, ECF

1 Number 98.2, ICE's Vaughn index.

2 **THE COURT:** Okay.

3 **MS. ANDRAPALLIYAL:** Yes. So this is on page 2 of that  
4 Vaughn index, and ICE is explaining that this is protecting  
5 internal discussions discussing draft contract language  
6 regarding serial locator technology.

7 **THE COURT:** All right. Okay. And the other -- the  
8 other communication at pages 1012 through 1014 --

9 **MS. ANDRAPALLIYAL:** Yes.

10 **THE COURT:** -- seems like it is a similar one. Okay.

11 **MS. ANDRAPALLIYAL:** Yes.

12 **THE COURT:** I understand that.

13 **MS. ANDRAPALLIYAL:** Your Honor, this is actually -- if  
14 I may?

15 **THE COURT:** Yeah.

16 **MS. ANDRAPALLIYAL:** Pages 1012 to 1014, they are  
17 different. This is actually involving, you know, a tasking  
18 request.

19 It was, I believe, from the Deputy Director of ICE's  
20 office down to staff level folks and sort of soliciting views  
21 on what information to release about, you know, Homeland  
22 Security's investigations use of Facebook for social media  
23 monitoring purposes.

24 And so this information was a rough draft of the summary  
25 that was going up to higher level folks, and senior leadership

1 would decide what information to ultimately provide to the  
2 public.

3 And so this is a draft set of essentially talking points,  
4 Your Honor; and that is protected under (b) (5) but for a  
5 slightly different reason because it's a draft. It reflects,  
6 you know, these particular facts selected for inclusion by this  
7 particular author, you know, that's that -- that employee's  
8 personal view of what should be included in forward facing  
9 communications. And it's subject to final review.

10 **THE COURT:** Well, that's an interesting question. So  
11 if what is being talked about is what should be disclosed, as  
12 you put it, in forward facing communications with the public,  
13 is that -- is that part of a process that exercises policy  
14 implicating judgment?

15 I mean, it is not about forming the policy. It is about  
16 what should we disclose about the policy.

17 **MS. ANDRAPALLIYAL:** Yes, Your Honor. It does fall  
18 within (b) (5) deliberative process privilege because, again,  
19 it's a back-and-forth between folks within the Agency about  
20 what to communicate to the public.

21 That is a policy decision because obviously, you know,  
22 what can be publicly disclosed can impact sort of the efficacy  
23 of these operational techniques as well as, you know, the  
24 public's information about it.

25 So, yes, that is protected. And I have a cite to *CREW*

1    *versus DHS*, 648 F.Supp.2d, 152, out of the District of Columbia  
2    recognizing --

3           **THE COURT:** I'm sorry, 648 F.Supp; did you say?

4           **MS. ANDRAPALLIYAL:** Yes, F.Supp.2d 152, District of  
5    Columbia, protecting draft talking points.

6           And I do, again, want to come back to *National Wildlife*  
7    *Federation* and *Coastal States*. You know, again, the question  
8    is not whether this particular information is factual.

9           The question is whether revealing this information would  
10   thereby reveal the deliberative process and what someone thinks  
11   about what should be included and what -- you know, in an  
12   intermediate step before things are finalized and released to  
13   the public.

14           **THE COURT:** Well, in other words, the decision whether  
15   to disclose and how much to disclose is itself a policy  
16   decision that is subject to the (b) (5) analysis even though it  
17   is not -- there are two policies. One is a substantive policy.  
18   Like, let's do X.

19           **MS. ANDRAPALLIYAL:** Right.

20           **THE COURT:** And the next question is: How much do we  
21   tell the public about X or --

22           **MS. ANDRAPALLIYAL:** Right.

23           **THE COURT:** -- what we did to get to X. And you are  
24   saying that *CREW* stands for the proposition that that itself --  
25   talking points, for instance -- would be -- is there any

1 other -- is there any contrary case law that distinguishes  
2 between sort of what to tell the press versus what do we decide  
3 to do substantively?

4 **MS. ANDRAPALLIYAL:** Your Honor, I'm not aware of any.  
5 I know that there is a distinction between what is factual and  
6 can be segregated out of otherwise -- you know, an otherwise  
7 deliberative communication and what is so interwoven or, you  
8 know, do particular facts themselves reveal information about  
9 the way the Agency was thinking about something or what -- you  
10 know, what is appropriate for inclusion in a forward facing  
11 document. And so --

12 **THE COURT:** Okay.

13 **MS. ANDRAPALLIYAL:** So the question sort of turns on  
14 whether this can be segregated out. And here it can't.

15 **THE COURT:** All right. Let's go to the next thing,  
16 Performance Work Statement Visa Lifecycle Vetting Initiative,  
17 page 569. Let's see. Why don't I have that?

18 **MS. ANDRAPALLIYAL:** Plaintiffs -- is it 596, Your  
19 Honor?

20 **THE COURT:** Oh, maybe 596. Maybe it is a  
21 transposition error. It should be 596?

22 **MS. ANDRAPALLIYAL:** It should be.

23 **THE COURT:** Yeah, okay. Tell me about this document.

24 **MS. ANDRAPALLIYAL:** Yes, Your Honor. This is a draft  
25 document. You know, the watermark makes that clear. It is a

1 draft performance work statement regarding the Visa Lifecycle  
2 Vetting Initiative.

3 To my knowledge this was never finalized and never went  
4 out, and it's a draft. And if you look through it, it is what  
5 it sounds like. As the Court said in *National Wildlife*  
6 *Federation*, you know, it is non-final, subject to final review;  
7 was never ultimately finalized.

8 **THE COURT:** What was this supposed to be for? What is  
9 this a draft of? This is like a procurement document?

10 **MS. ANDRAPALLIYAL:** Well, just a second. Let me see  
11 if I can get more information about it.

12 **THE COURT:** Because it talks about [REDACTED]  
13 [REDACTED] It sounds like something that would ultimately go  
14 as a [REDACTED]. Is it an [REDACTED] or something. Is that  
15 what it is?

16 **MS. ANDRAPALLIYAL:** Your Honor, my understanding is  
17 that this is something that was drafted for -- [REDACTED]

18 [REDACTED]  
19 [REDACTED].

20 **THE COURT:** Because in the very beginning, of course,  
21 the page says is [REDACTED]. I assume it is in the  
22 [REDACTED] -- part of the [REDACTED].

23 **MS. ANDRAPALLIYAL:** I think that's right, Your Honor.  
24 I'm not totally familiar with that process.

25 **THE COURT:** Okay.

1           **MS. ANDRAPALLIYAL:** That sounds correct. I do want to  
2 refer this Court to paragraph 43 of the Pineiro declaration,  
3 which was ICE's original declaration, explaining the  
4 withholding of certain documents including this one.

5           And it does go into a little bit more detail about how  
6 this is a draft and about how releasing this draft could, you  
7 know, impair the decision-making process and also cause  
8 confusion by, you know, by disseminating something non-final  
9 about work responsibilities into the --

10           **THE COURT:** Do you have the docket number for that  
11 declaration by chance?

12           **MS. ANDRAPALLIYAL:** Yes, Your Honor, just a moment.

13                           (Pause in proceedings.)

14           **MS. ANDRAPALLIYAL:** So that's 98.1 --

15           **THE COURT:** Okay.

16           **MS. ANDRAPALLIYAL:** -- for the original declaration.  
17 And then Docket Number 128 for the supplemental declaration.

18           And I just want to -- I have it up in front of me, but I  
19 will just quote from paragraph 11, that supplemental  
20 declaration.

21           "The draft document contains an unfinalized version of a  
22 performance work statement which includes draft  
23 responsibilities, draft scope and objectives, and various  
24 personnel responsibilities."

25           So that was the content that was protected in this



1 particular --

2 **THE COURT:** All right. And what is sought is to  
3 redact the entirety of this document?

4 **MS. ANDRAPALLIYAL:** Yes, Your Honor, it was withheld  
5 in full.

6 **THE COURT:** All right. Let's go to the USCIS, there  
7 is an e-mail at 17 -- let's see, 1571.

8 **MS. ANDRAPALLIYAL:** Yes.

9 **THE COURT:** Maybe you can tell me the context of this  
10 and who DEA is or what DEA is.

11 **MS. ANDRAPALLIYAL:** Yes. So, Your Honor, I'm not  
12 entirely sure who DEA is.

13 I can tell you that this document was sent from USCIS's  
14 Office of Chief Counsel; and it was, you know, in response to a  
15 question it received from the operations side about whether  
16 USCIS may collect publicly available information relating to,  
17 you know, Petitioners' or Requester's exercise of First  
18 Amendment protected activities.

19 And this was cleared by one level of review, but it went  
20 on to another level of internal review at OCC.

21 And the Agency withheld this information under both the  
22 deliberative process privilege and the attorney-client  
23 privilege because these were Office of Chief Counsel  
24 employees -- attorneys providing legal advice about what was  
25 permissible to collect in this space.

1           **THE COURT:** All right. So, it is being held under  
2 both the attorney-client and the deliberative process  
3 privilege?

4           **MS. ANDRAPALLIYAL:** That's correct, Your Honor.

5           **THE COURT:** And this is a non --

6           **MS. ANDRAPALLIYAL:** I do want to point out --

7           **THE COURT:** It is a non-final document.

8           **MS. ANDRAPALLIYAL:** Exactly. It is a non-final  
9 document. And I refer this Court to paragraphs 7 and 11 of the  
10 supplemental USCIS declaration.

11           I can get you a pin site for that. That's ECF Number 129,  
12 and it goes into the detail about the deliberative process and  
13 the attorney-client privilege.

14           **THE COURT:** What paragraph of -- what paragraph of  
15 that declaration?

16           **MS. ANDRAPALLIYAL:** So paragraph 7 of that declaration  
17 explains in further detail the deliberative process privilege  
18 withholding, and then paragraph 11 talks about the reason why  
19 it withheld the information under DHS as well.

20           **THE COURT:** Okay. And do you know who Christina is?  
21 "I plan to send to Christina in the morning."

22           **MS. ANDRAPALLIYAL:** I don't, Your Honor; but I do want  
23 to point out in paragraph 7 of the supplemental-wide  
24 declaration, the e-mail -- I'm quoting here -- the e-mail  
25 contains a sentence indicating that this draft version had been

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1 cleared, but the subject indicates that it is a draft; and it  
2 had only been cleared by one individual, which would be sent to  
3 another individual -- which, I believe, you know, may be  
4 Christina -- the Division Chief for the National Security and  
5 Benefits Division of the USCIS for her review in the revision  
6 prior to sending to USCIS leadership to review.

7 So this is, you know, sort of multiple steps removed from  
8 being the final decision.

9 **THE COURT:** All right. Okay. And then USCIS 11 --  
10 1711 through 12 is an e-mail chain.

11 **MS. ANDRAPALLIYAL:** Yes, Your Honor.

12 **THE COURT:** And my understanding is that the quote at  
13 the top of 1712 from the Center of Democracy and Technology, is  
14 a -- that quote is public.

15 **MS. ANDRAPALLIYAL:** Yes, Your Honor. My understanding  
16 is that USCIS is in the middle of re-processing this document  
17 and will release the underlying URL at the bottom of 1712 as  
18 well as that particular block of text.

19 The other -- the other statements are sort of USCIS  
20 employees' impressions of this particular lifecycle vetting  
21 initiative and also opines on some of the technology's  
22 limitations.

23 So, I do apologize for not having that ready for this  
24 Court right now, but I understand that USCIS is working on it  
25 and expect to --

1           **THE COURT:** Okay, but you are still asserting the  
2 privilege for an exemption with respect to the kind of comments  
3 on that public document from the Center?

4           **MS. ANDRAPALLIYAL:** Yes, Your Honor.

5           **THE COURT:** And the theory is this is -- reveals  
6 policy implicating sort of mode of the Agency?

7           **MS. ANDRAPALLIYAL:** Well, Your Honor, I believe that  
8 these e-mails were sent between employees that are part of a  
9 social media monitoring working group.

10           And so, you know, this information was communicated to  
11 members of that group; and they are opining on the -- on what  
12 they think about this particular ICE initiative.

13           And, you know, I believe that they all -- let me see. So,  
14 these are e-mails between the USCIS Office of Chief Counsel  
15 attorneys and the Fraud Detection and National Security Office.

16           And all of these employees are apparently part of USCIS's  
17 social media working group, and they would meet periodically to  
18 discuss sort of the current state of social media monitoring  
19 and potential future initiatives.

20           **THE COURT:** Did they have some role in the -- in this  
21 DHS screening thing that -- this program, the RMA processes, to  
22 generate, you know, investigations, et cetera, et cetera? What  
23 is their role in ICE -- over ICE?

24           **MS. ANDRAPALLIYAL:** Your Honor, USCIS is a separate  
25 Agency component. But my understanding, from the supplemental

1 White declaration on paragraph 9, is that these statements  
2 relate to upcoming decisions that the working group was  
3 considering. And, you know, it's a statement regarding a  
4 specific technology request, employees' thoughts about pending  
5 process decisions.

6 And so I'm not entirely certain the way all the pieces fit  
7 together, Your Honor; but I do refer this Court to paragraph 5  
8 of the supplemental White declaration for more information.

9 **THE COURT:** Okay. Again, what is the document number  
10 for that declaration?

11 **MS. ANDRAPALLIYAL:** Yes, that's ECF 129.

12 **THE COURT:** ECF 129, and this one is paragraph --  
13 which one?

14 **MS. ANDRAPALLIYAL:** Paragraph 9.

15 **THE COURT:** Nine, okay. It is your understanding that  
16 these folks were sort of commenting, somewhat snidely, are part  
17 of a decision-making process that will affect the  
18 implementation or not of this 10,000 investigative leads  
19 program?

20 **MS. ANDRAPALLIYAL:** So my understanding is that, yeah,  
21 they are opining on, you know, this particular ICE technology  
22 request. But, you know, because DHS is one department, I  
23 believe that -- my understanding is that the views of CNS are  
24 relevant to sort of the ultimate decision-making process.

25 Again, I don't want to speak out of turn. I do want to

1 refer this Court to page 9 of the supplemental White  
2 declaration.

3 **THE COURT:** That's helpful. I understand that. I am  
4 reminded, however, that the burden of proof on establishing  
5 exemption lies with the Government.

6 So, I will have to see -- it does -- my gut reaction is  
7 that if these are folks that are part of the deliberative  
8 process and will have some power over the implementation or not  
9 or mode of implementation of this program that is talked about  
10 in the CDT level -- letter, that at least makes for an argument  
11 that that is part of the deliberative process.

12 If they are sort of outside the process and they are  
13 poking fun or whatever, may not be part of the -- I will look  
14 at the declaration.

15 **MS. ANDRAPALLIYAL:** Yes, Your Honor. And I will  
16 submit the reprocessed document to this Court to see what  
17 was -- what was --

18 **THE COURT:** All right. That will be helpful. Is that  
19 the only change, the only reprocess document? Everything else  
20 remains?

21 **MS. ANDRAPALLIYAL:** Yes.

22 **THE COURT:** Okay. All right. Well, this has been  
23 helpful. I was surprised. I thought the blue and the red  
24 meant something.

25 **MS. ANDRAPALLIYAL:** I do apologize, Your Honor. I

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1 thought so initially as well. It ultimately did not reflect  
2 the category being applied.

3 **THE COURT:** All right. Okay. I will get out a ruling  
4 hopefully shortly on all of this. Appreciate your help.

5 **MS. ANDRAPALLIYAL:** Appreciate it. Thank you,  
6 Your Honor.

7 **THE COURT:** All right. Thank you.

8 (Proceedings adjourned at 11:28 a.m.)

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CERTIFICATE OF REPORTER

We certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Saturday, September 25, 2021

A handwritten signature in blue ink that reads "Marla Knox". The signature is written in a cursive style and is positioned above a horizontal line.

Marla F. Knox, CSR No. 14421, RPR, CRR, RMR  
United States District Court - Official Reporter