UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION FOUNDATION Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, including its component the Federal Bureau of Investigation Defendant.	No. 12-cv-7412 (WHP) ECF Case

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

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INTRODUCTION

Plaintiff American Civil Liberties Union ("ACLU") filed a Freedom of Information Act ("FOIA") request seeking the release of two United States Department of Justice ("DOJ") memoranda providing guidance regarding the Supreme Court's decision in *United States v. Jones*, 132 S. Ct. 945 (2012), and its implications for GPS surveillance and other location-tracking technologies. In releasing the memoranda to the ACLU, DOJ redacted all but a handful of paragraphs from the documents' combined 111 pages. DOJ argues that the memoranda are not subject to disclosure because they are attorney work-product, which is exempt from disclosure under FOIA Exemption 5, and because they contain protected investigative techniques, procedures, and guidelines, which are exempt from disclosure under FOIA Exemption 7(E). Neither exemption applies.

The location-tracking memoranda requested by the ACLU contain DOJ's interpretation of a landmark Fourth Amendment decision issued by the United States Supreme Court. Nothing about that information is privileged. DOJ contends that the documents are protected as attorney work-product. But the work-product doctrine was designed to "preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998). It was never meant to immunize from public scrutiny the government's official interpretation of its own constitutional obligations. And, even if the documents otherwise qualified as attorney work-product, they would still be subject to disclosure under FOIA because they serve as DOJ's working law on the use of location-tracking technologies.

DOJ also maintains that the location-tracking memoranda cannot be disclosed because they contain sensitive law enforcement techniques, procedures, and guidelines. But the

protection afforded by Exemption 7(E) does not encompass DOJ's near-total redaction of the memoranda's contents. Although the exemption protects non-public law enforcement techniques, procedures, and guidelines, it does not shield publicly known information or the government's interpretation of its own constitutional obligations; nor does it permit the government to withhold reasonably segregable, non-exempt information. DOJ's conclusory affidavits do not demonstrate that its redactions exclude this material.

Because DOJ has failed to justify its redaction decisions, the Court should grant summary judgment for the ACLU. Alternatively, the Court should order DOJ to submit the location-tracking memoranda for *in camera* review, so that it may determine whether DOJ's claimed exemptions adequately support its withholdings.

FACTUAL BACKGROUND

In *United States v. Jones*, the Supreme Court held that attaching a GPS device to a car and tracking its movements is a search under the Fourth Amendment. 132 S. Ct. at 949. *Jones*, however, left unresolved whether such GPS tracking is the sort of search that requires a warrant based on probable cause. Moreover, the Court did not discuss how its holding would apply to other types of location tracking, such as cell phone tracking, license plate readers, and drone surveillance.

On February 24, 2012, FBI General Counsel Andrew Weissmann spoke at a University of San Francisco Law Review symposium. In response to a question about DOJ's reaction to *Jones*, he acknowledged that "[t]he *Jones* decision . . . really changes the landscape," and held up a draft memorandum, which he said would be issued either that day or the following Monday, February 27, 2012. He then proceeded to list numerous GPS tracking issues raised by the decision in *Jones*: "Is it going to apply to boats? Is it going to apply to airplanes? Is it going to apply at the border? What's it mean for the consent that's given by an owner? What's it mean for

the consent if it's given by the possessor?" He explained that the draft memorandum would state DOJ's position on "when can you use GPS going forward and what kind of arguments can you make if there are challenges." Mr. Weissmann also described a second memorandum, which he said would provide "guidance about what [*Jones*] means for other types of [location-tracking] techniques beyond GPS."[1]

Consistent with Mr. Weissmann's statements at the symposium, DOJ issued the first memorandum on February 27, 2012. It issued the second memorandum on July 5, 2012. Both memoranda were authored by the Chief of the Criminal Division's Appellate Section and directed to all federal prosecutors. Aside from heading information and a brief description of the Justices' opinions in *Jones*, the contents of the memoranda have been entirely redacted.

The privacy concerns implicated by GPS tracking are of immense public significance. GPS monitoring "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Id.* at 955 (Sotomayor, J., concurring). The government can store this information and mine it for years into the future, avoiding entirely the significant costs and community hostility that constrain more conventional surveillance techniques. *Id.* at 955-56. Even if the potential abuses engendered by this "unrestrained power to assemble data that reveal private aspects of identity" remain unrealized, the public's very "[a]wareness that the Government may be watching chills associational and expressive freedoms." *Id.* at 956. "The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate

[1] Mr. Weissmann's comments are available on YouTube at the following addresses: http://www.youtube.com/watch?v=3PCj3cqSxx8 (Part 1); http://www.youtube.com/watch?v=pEBH11utdUo (Part 2); and http://www.youtube.com/watch?v=C5f6VDUbGXs (Part 3). The comments quoted here begin around minute 27 of Part 2.

information about any person whom the Government, in its unfettered discretion, chooses to track—may 'alter the relationship between citizen and government in a way that is inimical to democratic society.'" *Id.* (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

GPS device tracking is, however, only the beginning. "Recent years have seen the emergence of many new devices that permit the monitoring of a person's movements." *Jones*, 132 S. Ct. at 963 (Alito, J., concurring in the judgment); *see also United States v. Pineda-Moreno*, 617 F.3d 1120, 1125 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of rehearing en banc). Closed-circuit television video monitoring is becoming prevalent in many locales. *See Jones*, 132 S. Ct. at 963 (opinion of Alito, J.). Electronic toll collection systems create precise records of the movements made by toll-paying motorists. *Id.* Many cars are now equipped with stolen vehicle and roadside assistance devices, such as LoJack or OnStar, that permit service providers to monitor the car's location in real time, and private companies are saving that location information in massive databases that allow for increasingly targeted advertising. *Pineda-Moreno*, 617 F.3d at 1125 (opinion of Kozinski, C.J.). Federal, state, and local law enforcement agencies have experimented with domestic drone surveillance programs. *See, e.g.*, Brian Bennett, *Police employ Predator drone spy planes on home front*, L.A. Times (Dec. 10, 2011), *available at* http://articles.latimes.com/2011/dec/10/nation/la-na-drone-arrest-20111211. And the government now has the technical capability, with the assistance of mobile phone carriers, to track continuously the location of any of the 322 million wireless devices in use in the United States. *See Jones*, 132 S. Ct. at 963 (opinion of Alito, J.) (citing CTIA Consumer Info, 50 Wireless Quick Facts, http://www.ctia.org/consumer_info/index.cfm/AID/10323).

While the judiciary struggles to keep up with the rapid development of surveillance technology, the scope of Americans' privacy rights will be determined by law enforcement agencies, particularly the United States Department of Justice. DOJ and its constituent agencies engage in surveillance activities throughout the nation. When the Court issued its decision in *Jones*, the FBI alone turned off roughly 3,000 GPS tracking devices then in use. Julia Angwin, *FBI Turns Off Thousands of GPS Devices After Supreme Court Ruling*, Wall St. J. Digits (Feb. 25, 2012, 3:36 PM), http://blogs.wsj.com/digits/2012/02/25/fbi-turns-off-thousands-of-gps-devices-after-supreme-court-ruling. Partly as a result of the scope of these activities, and partly because of the influence it wields over state and local law enforcement agencies, DOJ's Criminal Division has become—in the words of its outgoing chief, former Assistant Attorney General Lanny Breuer—"the center of criminal law enforcement, both in prosecutions and policy." Ben Protess, *Breuer Reflects on Prosecutions That Were, And Weren't*, N.Y. Times Dealb%k (Feb. 28, 2013, 8:49 PM), http://dealbook.nytimes.com/2013/02/28/breuer-reflects-on-prosecutions-that-were-and-werent/. Memoranda authored by the Chief of DOJ's Criminal Appellate Section and purporting to interpret the Department's constitutional obligations under a new landmark Supreme Court decision are therefore likely to determine the scope of government surveillance activities in the United States.

PROCEDURAL HISTORY

The ACLU does not dispute DOJ's presentation of the procedural history in this case.

ARGUMENT

I. DOJ Has Not Demonstrated That The Withheld Portions Of The Responsive Memoranda Are Exempt From Disclosure Under FOIA.

To prevail at the summary judgment stage in a FOIA case, the defending agency bears the burden of demonstrating that its search for the requested material was adequate and that any

withheld material is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B); *Carney v. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). Although the agency may satisfy this burden by producing "[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption," *id.*, these documents must be "relatively detailed and nonconclusory, and . . . submitted in good faith," *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 488-89 (2d Cir. 1999) (internal quotation marks omitted). This Court reviews the agency's withholding determination *de novo*, 5 U.S.C. § 552(a)(4)(B), according a presumption of good faith to declarations submitted by the defending agency in support of summary judgment, *Carney*, 19 F.3d at 812. Here, although DOJ asserts that the responsive memoranda may be withheld pursuant to FOIA Exemptions 5 and 7(E), it has failed to establish that the memoranda are protected under those provisions. Accordingly, this Court should deny DOJ's motion for summary judgment and grant the ACLU's cross-motion for summary judgment. Alternatively, the Court should order DOJ to submit the location-tracking memoranda for *in camera* review. *See Albuquerque Publ'g Co. v. Dep't of Justice*, 726 F. Supp. 851, 857-58 (D.D.C. 1989).

A. The Responsive Memoranda Are Not Exempt From Disclosure Under Exemption 5.

FOIA Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" from the disclosure otherwise required under the Act. 5 U.S.C. § 552(b)(5). "Courts have interpreted Exemption 5 to encompass traditional common-law privileges against disclosure, including the work-product doctrine, and executive, deliberative process and attorney-client privileges." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356 (2d Cir. 2005); *see also, e.g.*, *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (stating that Exemption 5 "exempt[s] those

documents . . . normally privileged in the civil discovery context"). DOJ maintains that the location-tracking memoranda are protected by the work-product doctrine, but that doctrine simply does not protect DOJ's interpretation of its constitutional obligations under the Fourth Amendment. And even if the documents did constitute attorney work-product, they still would not enjoy protection under Exemption 5, because they serve as DOJ's working law with respect to location-tracking technologies.[2]

1. DOJ's Location-Tracking Memoranda Are Not Attorney Work-Product.

DOJ maintains that the location-tracking memoranda qualify for work-product protection because they were prepared to advise government attorneys and investigators regarding issues that might arise in ongoing and anticipated litigation. DOJ is wrong. The government's official interpretation of its Fourth Amendment obligations under a landmark Supreme Court decision is not attorney work-product.

"The work-product rule does not extend to every written document generated by an attorney; it does not shield from disclosure everything that a lawyer does. Its purpose is more narrow, its reach more modest." *Jordan v. Dep't of Justice*, 591 F.2d 753, 775 (D.C. Cir. 1978) (en banc), *disapproved on other grounds by Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc). The doctrine is designed "to encourage effective legal representation within the framework of the adversary system by removing counsel's fears that his thoughts and information will be invaded by his adversary." *Id.* Because "the privilege focuses on the integrity of the adversary trial process itself," it is limited to "materials prepared in anticipation of litigation or trial." *Id.* (internal quotation marks omitted); *see also* Fed. R. Civ. P. 26(b)(3). A document is deemed to prepared in anticipation of litigation if "in light of the

[2] Notably, DOJ does not contend that the location-tracking memoranda are protected by the deliberative process privilege.

nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (emphasis in original) (internal quotation marks omitted).

An agency-wide directive to law enforcement officials offering an objective analysis of governing law does not qualify for work-product protection, even if the legal issues analyzed therein arise in the agency's litigation. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980). In *Coastal States*, for example, the Department of Energy ("DOE") invoked Exemption 5's work-product protection to withhold numerous memoranda prepared by DOE attorneys in response to questions raised by agency auditors investigating firms for compliance with petroleum pricing and allocation regulations. 617 F.2d at 858-60. Although a few of the withheld documents advised DOE auditors how to proceed with specific investigations where illegal violations had been uncovered, most were "neutral, objective analyses of agency regulations," resembling "question and answer guidelines which might be found in an agency manual." *Id.* at 863. The D.C. Circuit rejected DOE's blanket assertion of the work-product doctrine with respect to the documents, holding that the agency could assert work-product protection only where it had established that "a specific claim had arisen, was disputed . . . and was being discussed in the memorandum." *Id.* at 866; *see also Jordan*, 591 F.2d at 775-76 (holding that Exemption 5's work-product doctrine did not protect a DOJ Manual and Guidelines regarding the decision whether to bring an individual to trial). Were it otherwise, the government could claim work-product protection—against both FOIA *and* discovery requests—for almost any legal manual, treatise, guidance, or memorandum authored by one of its attorneys.

Like the advisory memoranda denied work-product protection in *Coastal States*, the location-tracking memoranda provide analyses of applicable law to personnel engaged in ongoing investigations and prosecutions of suspected wrongdoers, much as one might expect to find in an agency manual or set of guidelines. According to DOJ's own declaration, they "analyze the possible implications of [*United States v. Jones*] on ongoing federal criminal prosecutions and investigations that could result in litigation." Cunningham Decl. ¶ 16. DOJ asserts that the memoranda touch on investigative techniques and legal strategies that may arise in litigation, but that is not sufficient to bring the documents within the scope of the work-product doctrine. *See Coastal States*, 617 F.2d at 865. To invoke work-product protection, DOJ must demonstrate that the documents were prepared "with a specific claim supported by concrete facts which would likely lead to litigation in mind." *Id.* In other words, guidance documents purporting to interpret governing law outside the context of a particular case, like those at issue here and in *Coastal States*, do not qualify as attorney work-product.

Failing to even acknowledge *Coastal States*, DOJ argues that the work-product doctrine protects documents prepared in anticipation of litigation "even if no specific claim is contemplated." Def.'s Mem. Supp. Summ. J. at 12 (internal quotation marks omitted). But the non-binding D.C. Circuit cases on which DOJ relies to support this proposition are inapposite. They concerned documents prepared in the civil defense context—where government attorneys acted "not as prosecutors or investigators of suspected wrongdoers, but as legal advisors protecting their agency clients from the possibility of future litigation." *In re Sealed Case*, 146 F.3d 881, 885 (D.C. Cir. 1998); *see Delaney, Migdail & Young, Chartered v. I.R.S.*, 826 F.2d 124, 126-27 (D.C. Cir. 1987) (holding that the work-product doctrine protected documents prepared to advise the IRS of the types of legal challenges likely to be mounted against a

proposed auditing program); *Schiller v. N.L.R.B.*, 964 F.2d 1205, 1208 (D.C. Cir.1992) (holding that the work-product doctrine protected National Labor Relations Board documents discussing how to handle Equal Access to Justice Act issues in litigation), *abrogated on other grounds by Milner v. Dep't of Navy*, 131 S. Ct. 1259 (2011).

In the law enforcement context, on the other hand, even the D.C. Circuit confers work-product protection only on documents prepared with a particular case in mind. *See In re Sealed Case*, 146 F.3d at 885; *see also SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1202-03 (D.C. Cir. 1991). Indeed, the particular claim requirement imposes an especially important limitation on the work-product doctrine's reach in the law enforcement context. Because "the prospect of future litigation touches virtually any object of a prosecutor's attention," a decision relaxing the particular claim requirement with respect to law enforcement documents would cause the work-product doctrine to "preclude almost all disclosure from an agency with substantial responsibilities for law enforcement." *SafeCard Servs.*, 926 F.2d at 1203.

2. The Memoranda Serve As Agency Working Law.

Even if the memoranda at issue here were attorney work-product, Exemption 5 still would not protect them from FOIA's disclosure requirements, because they constitute DOJ's working law with respect to location-tracking technologies. A document otherwise protected by Exemption 5 is nevertheless subject to FOIA's disclosure requirements if it serves as the agency's working law or policy. *Sears*, 421 U.S. at 152-53; *see also Brennan Center v. Dep't of Justice*, 697 F.3d 184, 195 (2d Cir. 2012). As the Court explained in *Sears*, the "affirmative portion of [FOIA], expressly requiring indexing of final opinions, statements of policy and interpretations which have been adopted by the agency, and instructions to staff that affect a member of the public, represents a strong congressional aversion to secret agency law, and . . . an affirmative congressional purpose to require disclosure of documents which have the force and

effect of law," regardless of how those documents are designated. 421 U.S. at 153 (quoting 5 U.S.C. § 552(a)(2)) (citations and internal quotation marks omitted). In other words, "an agency will not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'" *Coastal States*, 617 F.2d at 867.

Guidance documents issued to agency personnel constitute agency working law if they "express the settled and established policy" of the issuing agency. *Jordan*, 591 F.2d at 774. In *Coastal States*, for example, the D.C. Circuit held that "memoranda from regional counsel to auditors working in [the Department of Energy's] field offices, issued in response to requests for interpretations of regulations within the context of particular facts encountered while conducting an audit of a firm," constituted agency working law because the "opinions were routinely used by agency staff as guidance in conducting their audits, and were retained and referred to as precedent." 617 F.2d at 858, 869; *see also Public Citizen, Inc. v. Office of Mgmt. and Budget*, 598 F.3d 865, 875 (D.C. Cir. 2010). Although such guidance documents are often not "absolutely binding" on agency personnel, they may nevertheless qualify as agency working law if they contain "positive rules that create definite standards" for agency personnel to follow. *Jordan*, 591 F.2d at 774 (D.C. Cir. 1978) (applying the "working law" exception to prosecutorial guidelines issued by the U.S. Attorney's Office). Indeed, even documents that do not reflect the agency's "final *programmatic* decisions" may nevertheless constitute working law subject to disclosure under FOIA, so long as they represent the agency's "final *legal* position" concerning its official responsibilities and constraints. *Brennan Center*, 697 F.3d at 201 (emphasis in original) (quoting *Tax Analysts v. I.R.S.*, 294 F.3d 71, 81 (D.C. Cir. 2002).

Applying these precedents to the circumstances of this case, the memoranda at issue resemble the sorts of documents subject to disclosure under the working law doctrine. As with the prosecutorial guidelines in *Jordan*, the memoranda here are intended "to be used as an aid for federal prosecutors" in the fulfillment of their official duties and apparently set forth specific instructions for handling certain issues that may arise in the course of criminal investigations and prosecutions. Cunningham Decl. ¶ 16. Moreover, there is strong reason to believe that the memoranda are routinely used by prosecutors as guidance in both their investigations and their legal representation, like the DOE memoranda in *Coastal States*. In *United States v. Oladosu*, Cr. No. 10–056-01S, 2012 WL 3642851 (D.R.I. 2012), for example, the government, in a brief identical in parts to the disclosed portions of the February 27, 2012 memorandum, abandoned previously raised arguments regarding the reasonableness of warrantless GPS location-tracking based on reasonable suspicion or probable cause "[f]ollowing guidance from the Department of Justice Criminal Appellate Section," *See* Government's Third Supplemental Memorandum in Support of its Objection to Defendant's Motion to Suppress at 2 n.1, *United States v. Oladosu*, Cr. No. 10-056-01S (D.R.I. Feb. 14, 2012), ECF No. 71. And Andrew Weissmann, who is currently serving as General Counsel for the FBI, stated at the University of San Francisco Law Review Symposium that the memoranda set forth DOJ's position on "when can [law enforcement officials] use GPS going forward" and "what [*Jones*] means for other types of techniques beyond GPS." Cunningham Decl. ¶ 18. Taken together, these statements demonstrate that the location-tracking memoranda have been serving as DOJ's working law on the appropriate use of location-tracking technologies. Alternatively, the Court may conduct an *in camera* inspection of the documents to determine whether they fall within the working law

exception. *See* 5 U.S.C. § 552(a)(4)(B); *Founding Church of Scientology v. N.S.A.*, 610 F.2d 824, 830 (D.C. Cir. 1979).[3]

B. DOJ's Invocation of Exemption 7(E) Is Overbroad.

DOJ also contends that the documents have been appropriately redacted in accordance with Exemption 7(E). That exemption protects from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). Here, DOJ has withheld information that fails to meet this standard. First, it has withheld information concerning publicly known law enforcement techniques, procedures or guidelines. Second, it has withheld guidelines for law enforcement investigations or prosecutions without demonstrating that disclosure of such information could reasonably be expected to risk circumvention of the law. Third, it has withheld "secret law" regarding the government's constitutional obligations. Finally, even if some information in the location-tracking memoranda may be withheld pursuant to Exemption 7(E), DOJ's near-total redaction of the documents exceeds the scope of the exemption's protections.

[3] The *Oladosu* brief's reliance on the location-tracking memoranda to explain changes in its legal position, considered together with Mr. Weissmann's public comments, could also be construed as an express adoption or incorporation by reference of those documents. *See Sears*, 421 U.S. at 161 ("[I]f an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum . . . that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5."); *Brennan Center*, 697 F.3d at 205 (Although an "agency is not required to explain its reasons publicly" for adopting a particular course of action, "where it determines there is an advantage to doing so by referencing a protected document as authoritative, it cannot then shield the authority upon which it relies from disclosure.").

1. DOJ Has Improperly Withheld Information Pertaining To Location-Tracking Techniques, Procedures, or Guidelines Already Well Known To The Public.

Exemption 7(E) protects only investigative techniques, procedures, or guidelines that are "not generally known to the public." *Rosenfeld v. Dep't of Justice*, 57 F.3d 803, 815 (9th Cir. 1995); *see also, e.g.*, *Lamont v. Dep't of Justice*, 475 F. Supp. 761, 780 (S.D.N.Y. 1979). In *Albuquerque Publishing Co.*, for example, the court stated that the government should release "information pertaining to techniques that are commonly described or depicted in movies, popular novels, stories or magazines, or on television," including techniques such as eavesdropping, wiretapping, and surreptitious tape recording and photographing. 726 F. Supp. at 857. Disclosure of such routine investigative techniques does not increase the risk of circumvention of the law, because potential violators are already aware that the techniques are regularly employed by law enforcement officials.

In this case, much of the information withheld by DOJ likely pertains to location-tracking techniques, procedures, or guidelines already well known to the public. The February Memorandum, for example, examines the government's use of GPS tracking devices in federal criminal investigations. Cunningham Decl. ¶¶ 9, 16, 24. The government's use of GPS tracking devices is, of course, broadly known to the public. *See, e.g.*, Adam Cohen, *The Government Can Use GPS to Track Your Moves*, Time Magazine (Aug. 25, 2010), *available at* http://www.time.com/time/magazine/article/0,9171,2015765,00.html. The Supreme Court's much-discussed *Jones* decision described in some detail the FBI's installation and monitoring of the GPS tracking device on the defendant's vehicle. *See* 132 S. Ct. at 948. Popular magazines have disassembled and examined the component parts of GPS tracking devices. *See, e.g.*, Kim Zetter, *FBI Vehicle-Tracking Device: The Teardown*, Wired (May 9, 2011, 7:00 AM), *available at* http://www.wired.com/threatlevel/2011/05/gps-gallery/. And prominent web forums offer

expert advice on where to look for GPS trackers on personal vehicles. Brandon Gregg, *How Can You Tell If Your Car Is Bugged Or Tracked With GPS?*, Quora (March 23, 2011), http://www.quora.com/How-can-you-tell-if-your-car-is-bugged-or-tracked-with-GPS. In short, there is no dearth of publicly available information on GPS surveillance techniques.[4]

DOJ asserts that it need not provide all information relating to GPS and other location-tracking techniques merely because some aspects of those techniques are known to the public. Def.'s Mem. Supp. Summ. J. at 18. But the converse is also true: The government is not entitled to redact all information pertaining to a particular investigative technique simply because some aspects of its use of that technique are not commonly known. Rather, it must demonstrate that the withheld material contains investigative techniques, procedures, or guidelines not generally known to the public—an especially heavy burden, given the vast amount of public knowledge regarding GPS surveillance and other government location-tracking techniques. *See, e.g.*, *Elec. Frontier Found. v. Dep't of Defense*, No. C-09 05640 SI, 2012 WL 4364532, at *6 (N.D. Cal. Sept. 24, 2012) ("[I]f the FBI intends to maintain the 7(E) designation, the FBI must declare that, for each specific redaction of a technique or procedure, that the information withheld goes beyond a generally known technique or procedure.").

Here, however, DOJ has averred only that the memoranda "describe[] law enforcement techniques and procedures, as well as guidelines for law enforcement investigations and prosecutions that are not publicly known." Cunningham Decl. ¶¶ 24, 25. This blanket assertion is "patently inadequate to permit a court to decide whether the exemption was properly claimed." *Albuquerque Publ'g Co.*, 726 F. Supp. at 857 n.9 (citation and internal quotation marks omitted);

[4] Several other location-tracking surveillance techniques are also well known. *See, e.g.*, *Pineda-Moreno*, 617 F.3d at 1125-26 (opinion of Kozinski, C.J.) (citing news articles describing various government location-tracking technologies).

see also, e.g., *Nat'l Sec. Archive v. F.B.I.*, 759 F. Supp. 872, 885 (D.D.C. 1991); *Fitzgibbon v. United States Secret Serv.*, 747 F. Supp. 51, 60 (D.D.C. 1990). Because DOJ has done "nothing but parrot the statutory language," it has failed to carry its burden of demonstrating that the material may be withheld pursuant to Exemption 7(E). *Brown v. F.B.I.*, 873 F. Supp. 2d 388, 407 (D.D.C. 2012); *see also, e.g.*, *Dent v. Exec. Office for U.S. Attorneys*, --- F. Supp. 2d ----, Civil Action No. 12-0420 (EGS), 2013 WL 782625, at *12 (D.D.C. March 2, 2013) ("Notwithstanding the categorical protection to law enforcement techniques and procedures afforded under the first clause of Exemption 7(E), no agency can rely on a declaration written in vague terms or in a conclusory manner." (citation and internal quotation marks omitted)).

2. DOJ Has Not Demonstrated That Disclosure Of Guidelines Related To Investigations Or Prosecutions Could Reasonably Be Expected To Risk Circumvention Of The Law.

DOJ has also failed to support adequately its contention that disclosure of law enforcement guidelines contained in the location-tracking memoranda could reasonably be expected to create a circumvention risk. "[L]aw enforcement guidelines may only be withheld if their disclosure 'could reasonably be expected to risk circumvention of the law.'" *Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 680 (2d Cir. 2010) (quoting 5 U.S.C. § 552(b)(7)(E)). DOJ must therefore "demonstrate, by detailed affidavit or other evidence, that release [of the material at issue] would reasonably risk circumvention of the law." *Elec. Frontier Found.*, 2012 WL 4364532, at *3; *see also, e.g.*, *Feshbach v. S.E.C.*, 5 F. Supp. 2d 774, 787 (N.D. Cal. 1997) ("In order to justify non-disclosure, the Commission must provide non-conclusory reasons why disclosure of each category of withheld documents would risk circumvention of the law.").

DOJ has failed to satisfy this obligation. The declaration accompanying its motion for summary judgment simply states that disclosure of the material contained in the location-tracking memoranda "could provide individuals with information that would allow them to violate the law while evading detection by federal law enforcement." Cunningham Decl. ¶¶ 24, 25. Courts have repeatedly held that this sort of conclusory statement does not suffice to demonstrate that disclosure of law enforcement guidelines could reasonably be expected to risk circumvention of the law. In *Friedman v. United States Secret Service*, for instance, the court held that the government's "conclusory statement of its decision to withhold information"—which amounted to nothing more than a statement that disclosure of the material "would reveal 'guidelines for law enforcement investigations or prosecutions that could reasonably be expected to risk the circumvention of the law'"—failed to justify its decision to withhold information pursuant to Exemption 7(E). *Friedman v. United States Secret Serv.*,--- F. Supp. 2d ----, Civil Action No. 06-2125 (RWR), 2013 WL 588228, at *21 (D.D.C. Feb. 14, 2013); *see also, e.g.*, *PHE, Inc. v. Dep't of Justcie*, 983 F.2d 248, 252 (D.C. Cir. 1993); *Davis v. F.B.I.*, 770 F. Supp. 2d 93, 100 (D.D.C. 2011); *Voinche v. F.B.I.*, 412 F. Supp. 2d 60, 69 (D.D.C. 2006); *Feshbach*, 5 F. Supp. 2d at 786-87. Similarly here, the perfunctory assertions contained in the declaration submitted by DOJ cannot justify its decision to withhold the location-tracking memoranda pursuant to Exemption 7(E).[5]

[5] DOJ argues in its memorandum supporting summary judgment that disclosure of guidelines contained in the location-tracking memoranda could create a circumvention risk because it would tip suspects off as to what information is collected, how it is collected, and when it is not collected. Def's Mem. Supp. Summ. J. at 20. But arguments unsupported by record evidence cannot sustain the government's burden of demonstrating a risk of circumvention. *See Davin v. Dep't of Justice*, 60 F.3d 1043, 1064 (3d Cir. 1995). Moreover, DOJ's entirely abstract argument is insufficient to demonstrate that withholding is justified under Exemption 7(E). *See Hidalgo v. F.B.I.*, 541 F. Supp. 2d 250, 252-54 (D.D.C. 2008).

3. Exemption 7(E) Does Not Protect The Government's Interpretation Of Its Constitutional Obligations.

Additionally, DOJ has inappropriately withheld information pertaining to the government's interpretation of its constitutional obligations under the Fourth Amendment. As discussed above, *supra* pp. 11-12, the "affirmative portion of [FOIA] . . . represents a strong congressional aversion to secret agency law, and . . . an affirmative congressional purpose to require disclosure of documents which have the force and effect of law." *Sears*, 421 U.S. at 153 (discussing Exemption 5) (citations and internal quotation marks omitted). Thus, in *PHE, Inc.*, the D.C. Circuit stated that the discussion of relevant Fourth Amendment search and seizure caselaw in the DOJ's *Obscenity Manual* "is precisely the type of information appropriate for release under the [Act]," and indicated that such materials would not likely receive protection under Exemption 7(E). 983 F.2d at 251-52.

As in *PHE*, the location-tracking memoranda at issue here provide guidance regarding the Fourth Amendment obligations of federal law enforcement officials. The documents are entitled "Guidance Regarding the Application of [*Jones*] to GPS Tracking Devices" and "Guidance Regarding the Application of [*Jones*] to Additional Investigative Techniques." Cunningham Decl. ¶ 9. They "incorporate DOJ attorneys' opinions and impressions of *Jones*" and "analyze the possible implications of [*Jones*] on ongoing federal criminal prosecutions and investigations that could result in litigation." *Id.* ¶ 16. In short, the location-tracking memoranda reflect DOJ's interpretation of governing Fourth Amendment caselaw. Although Exemption 7(E) may protect the government's discussion of specific investigative techniques, to the extent such techniques are not commonly known, it does not protect the government's official interpretation of its constitutional obligations.

4. DOJ Has Not Adequately Demonstrated That It Has Released All Reasonably Segregable, Non-Exempt Information.

Finally, DOJ has failed to meet its burden of demonstrating that it has released all reasonably segregable, non-exempt information from the location-tracking memoranda. FOIA provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). "Non-exempt portions of a document may only be withheld if they are 'inextricably intertwined' with the exempt portions." *New York Times Co. v. Dep't of Justice*, --- F. Supp. 2d ----, No. 11 Civ. 9336 (CM), 2013 WL 50209, at *17 (S.D.N.Y. Jan. 3, 2013). Although an agency is entitled to a presumption that it complied with its obligation to release reasonably segregable, non-exempt material, *id.*, it must provide the reasons behind its segregability determinations and should also describe the amount and distribution of non-exempt material throughout the responsive documents, *Mead Data Cent. v. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977). The district court retains the discretion to conduct an *in camera* review of any withheld document to analyze the Government's segregability decisions. *New York Times*, 2013 WL 50209, at *17. The district court must make a specific finding regarding segregability before approving the application of a FOIA exemption. *Id.*

Here, DOJ states simply that "[a]ll reasonably segregable, non-exempt information maintained in the responsive records has been released." Cunningham Decl. ¶ 26. That assertion is highly dubious, given that DOJ has released less than ten paragraphs from the combined 111 pages of information contained in the location-tracking memoranda. *See, e.g.*, *Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State*, 818 F. Supp. 1291, 1300 (N.D. Cal. 1992) (stating, in the Exemption 5 context, that it "appears improbable that long documents are *entirely* 'analytical,' and do not contain any segregable *factual* material" (emphases in original)). DOJ's

"boilerplate, conclusory" statement of compliance "provides no facts from which the Court can evaluate that assertion, and thus fails to provide the Court with the information necessary for it to make its decision." *Id.*

CONCLUSION

For the foregoing reasons, the Court should deny the deny DOJ's motion for summary judgment and grant the ACLU's cross-motion for summary judgment. Alternatively, the Court should order DOJ to submit the location-tracking memoranda for *in camera* review.

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Respectfully submitted,

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