UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| AMERICAN CIVIL LIBERTIES UNION FOUNDATION,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF JUSTICE, including its component the Federal Bureau of Investigation,<br><br>Defendant. | : | 12 Civ. 7412 (WHP)<br><br>ECF Case |

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

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Defendant the United States Department of Justice ("DOJ") respectfully submits this memorandum of law in further support of its motion for summary judgment pursuant to Federal Rule of Civil Procedure 56, as against the claims filed by plaintiff the American Civil Liberties Union Foundation ("ACLU") under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), and in opposition to the ACLU's cross-motion for summary judgment.

**PRELIMINARY STATEMENT**

DOJ has fully complied with its obligations under FOIA and properly withheld information from the Responsive Memoranda that is exempt from public disclosure under Exemption 5, 5 U.S.C. § 552(b)(5), and Exemption 7(E), 5 U.S.C. § 552(b)(7)(E).[1] DOJ previously filed three non-conclusory declarations describing its response to the ACLU's FOIA Request and now submits the Second Declaration of John E. Cunningham III, dated May 17, 2013 (the "Second Cunningham Declaration"), to further detail the Criminal Division's appropriate application of FOIA's exemptions.

The ACLU bases its cross-motion for summary judgment on speculation as to what the Responsive Memoranda could be and not on what, as described in DOJ's declarations, the documents actually are. As the Cunningham Declarations make clear, the Responsive Memoranda are attorney work product prepared because of ongoing and prospective litigation in cases involving GPS tracking devices and certain other investigative techniques used by DOJ. They are litigation aids that suggest potential arguments, practices, and litigating positions that federal prosecutors may consider in their cases following the Supreme Court's decision in *United States v. Jones*, 132 S. Ct. 945 (2012). The Responsive Memoranda are not directives and do

[1] Capitalized terms not otherwise defined herein have the meaning provided in DOJ's opening memorandum of law in support of its motion for summary judgment, Docket No. 9.

not, as the ACLU surmises, set forth "the government's official interpretation of its Fourth Amendment obligations." *See* Memorandum of Law in Support of Plaintiff's Cross-Motion for Summary Judgment ("ACLU Br."), 7. Information from the Responsive Memoranda was properly withheld pursuant to Exemption 5, and the ACLU has not shown that they are "working law" or expressly adopted policy subject to public disclosure.

DOJ has also demonstrated that it properly withheld information from the Responsive Memoranda pursuant to Exemption 7(E) and produced to the ACLU all reasonably segregable, non-exempt information. While the Court may exercise its discretion to review the Responsive Memoranda *in camera*, DOJ respectfully submits that *in camera* review is not necessary here because the record is sufficient to adjudicate the pending motions for summary judgment. Because DOJ has sustained its burden of demonstrating that the material withheld from the Responsive Memoranda is exempt from public disclosure under FOIA, the Court should deny the ACLU's cross-motion for summary judgment and grant summary judgment in favor of DOJ.

## ARGUMENT

### I. DOJ Has Demonstrated That the Responsive Memoranda Are Attorney Work Product Exempt from Disclosure Under Exemption 5

#### A. DOJ Prepared the Responsive Memoranda Because of Ongoing and Prospective Litigation

After the Supreme Court issued its opinion in *Jones*, the Criminal Division prepared the Responsive Memoranda to aid federal prosecutors in current and future litigation. Declaration of John E. Cunningham III, dated February 28, 2013 ("First Cunningham Decl."), ¶ 16. The Responsive Memoranda discuss potential legal strategies, defenses, and arguments for prosecutors to consider in their cases involving GPS tracking devices and other specified

investigative techniques. Second Cunningham Decl. ¶ 5. They outline possible arguments or litigation risks that prosecutors could encounter in the context of defendants' motions to exclude or suppress evidence in such cases, and they assess the strengths and weaknesses of alternative litigating positions. *Id.* ¶ 5. The Memoranda were prepared because of ongoing litigation and the prospect of future litigation, *id.* ¶ 6, and accordingly satisfy the criteria for privileged attorney work product in this Circuit.

The attorney work product privilege protects the mental impressions of attorneys "prepared in anticipation of litigation." *A. Michael's Piano, Inc. v. Fed'l Trade Comm'n*, 18 F.3d 138, 146 (2d Cir. 1994). Under the law of the Second Circuit, the "anticipation of litigation" element is satisfied where, "in light of the 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). The privilege recognizes that protection is required because documents "reflecting [an entity]'s litigation strategy and its assessment of its strengths and weaknesses cannot be turned over to litigation adversaries without serious prejudice to [its] prospects in the litigation." *Id.* at 1200. There is no requirement that litigation exist at the time a protected document is created. *See United States v. Adlman*, 68 F.3d 1495, 1501 (2d Cir. 1995) ("[T]here is no rule that bars application of work product protection to documents created prior to the event giving rise to litigation."); *A. Michael's Piano*, 18 F.3d at 146 ("The courts have taken a flexible approach in determining whether the work product doctrine is applicable, asking not whether litigation was a certainty, but whether the document was created 'with an eye toward litigation.'" (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947))).

The Second Circuit standard for determining when documents are prepared in anticipation of litigation is easily met here. Indeed, the ACLU does not and cannot meaningfully contend otherwise. Rather, the ACLU asks this Court to disregard binding Second Circuit precedent, and instead apply a more stringent standard for determining when a document has been prepared in anticipation of litigation that the ACLU derives from two D.C. Circuit cases. ACLU Br. 8-10. As an initial matter, it is the Second Circuit's standard that governs in this case. But the more fundamental problem with the ACLU's argument is that its interpretation of the D.C. Circuit case law it cites has been repudiated by the D.C. Circuit itself.

Specifically, the ACLU attempts to read *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.C. Cir. 1980), and *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991), as requiring that documents must be prepared "with a specific claim supported by concrete facts which would likely lead to litigation in mind" before work product protection can attach. ACLU Br. 9 (quoting *Coastal States*, 617 F.2d at 865). Accordingly, the ACLU argues that the Responsive Memoranda cannot be protected by the work product privilege without evidence that they were prepared in response to "specific claims." ACLU Br. 9-10. As the D.C. Circuit has explained, however, this language from *Coastal States* has been taken out of context, and does not abrogate the well-established principle that documents prepared in anticipation of the reasonable prospect of litigation are entitled to work product protection, even if such documents were not prepared in response to a specific claim. *See, e.g.*, *In re Sealed Case*, 146 F.3d 881, 885 (D.C. Cir. 1998); *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987). In both *Coastal States* and *SafeCard*, the Court was attempting to delineate when documents prepared by agency lawyers in connection with an active investigation into

potential wrongdoing would qualify for the work product privilege. *Sealed Case*, 146 F.3d at 885. In *Coastal States*, the Court was confronted with two different types of documents prepared in connection with a government audit—documents that were "neutral, objective analyses of agency regulations" similar to those found in an agency manual, and documents that advised government auditors how to proceed with specific investigations of suspected wrongdoers. *Coastal States*, 617 F.2d at 863. As the D.C. Circuit later explained, the "specifc claims" language of *Coastal States* was merely an attempt by the Court to distinguish between the function of the two different types of audit documents at issue in that case, and to explain why the first category was not subject to work product protection while the second category of documents, even though prepared as part of a government audit, nonetheless were prepared in reasonable anticipation of litigation and thus were entitled to work product protection. *Delaney*, 826 F.2d at 127. The language in *Coastal States* was "not intend[ed] to lay down [a] blanket rule" regarding the work product privilege generally. *Id.*

Accordingly, the D.C. Circuit has repeatedly affirmed that *Coastal States* and *SafeCard* should not be read to create a generally applicable "specific claim" requirement. *See, e.g.*, *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992) ("Mr. Schiller contends that the work product doctrine required that the documents be created in anticipation of litigation over a specific claim. But we have already rejected that argument."), *abrogated on other grounds by Milner v. Dep't of Navy*, 131 S. Ct. 1259 (2011); *Delaney*, 826 F.2d at 127 (refusing to apply "specific claim" requirement in determining that memoranda advising an agency of likely legal challenges to a proposed program, potential defenses, and the likely outcome of such challenges qualified for work product privilege, as such a requirement "would conflict with well established

rules of discovery"). To the extent that the "specific claim" test even still exists in the D.C. Circuit,[2] its application is limited to those situations in which a government lawyer prepares documents as part of an active investigation into potential wrongdoing. *Sealed Case*, 146 F.3d at 885. Outside of this context, courts in the D.C. Circuit, as in the Second Circuit, extend work product protection to documents "prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated." *Schiller*, 964 F.2d at 1208; *see also, e.g.*, *Sealed Case*, 146 F.3d at 885 (declining to apply *Coastal States*' "specific claim" test in situation where "legal advisors [are] protecting their agency clients from the possibility of future litigation"). This includes documents prepared by DOJ attorneys that, as in the instant case, address "the legal strategies and issues" that "relate to foreseeable litigation arising out of the government's criminal investigations." *Soghoian v. DOJ*, 885 F. Supp. 2d 62, 72 (D.D.C. 2012).

Even if this Court were to apply the "specific claim" test, the Responsive Memoranda would still be protected under the attorney work product privilege and exempt from disclosure pursuant to Exemption 5. Although the Responsive Memoranda do not specifically identify each of the cases in which GPS tracking devices and other specified investigative techniques have been or may be employed, because it would have been impractical to do so, Second Cunningham Decl. ¶ 6, they do pertain to specific types of existing and prospective claims, First Cunningham Decl. ¶ 16; Second Cunningham Decl. ¶ 6. The ACLU itself provides an example of one such case, *United States v. Oladosu*, 887 F. Supp. 2d 437 (D.R.I. 2012), in which a defendant moved

[2] The D.C. Circuit has questioned "whether the *Coastal States/SafeCard* specific claim test has any continued vitality where government lawyers act as prosecutors or investigators of specific wrongdoers," *Sealed Case*, 146 F.3d at 885, but has yet to resolve this issue.

to suppress evidence obtained by virtue of a warrantless utilization of a GPS tracking device, ACLU Br. 12.

Disclosing the Responsive Memoranda would undermine the very purpose of the attorney work product privilege, which exists because documents "reflecting [an entity]'s litigation strategy and its assessment of its strengths and weaknesses cannot be turned over to litigation adversaries without serious prejudice to [its] prospects in the litigation." *Adlman*, 134 F.3d at 1200. The Responsive Memoranda reflect DOJ's potential legal strategies in light of *Jones* and are protected attorney work product that DOJ properly withheld pursuant to Exemption 5.

**B. The Responsive Memoranda Are Not DOJ's "Working Law"**

The ACLU speculates that the Responsive Memoranda are the secret, working law of DOJ, and as such must be disclosed even if they are protected attorney work product. ACLU Br. 10-13, 18. The ACLU is wrong.

The concept of "secret law" or "working law" has developed as an exception to Exemption 5 and the abrogated "High 2" Exemption (not at issue here). *New York Times Co. v. DOJ*, 872 F. Supp. 2d 309, 317 (S.D.N.Y. 2012). Under this principle "[i]f an agency's memorandum or other document has become its 'effective law and policy,' it will be subject to disclosure as the 'working law' of the agency." *Brennan Ctr. for Justice at N.Y.U. School of Law v. DOJ*, 697 F.3d 184, 199 (2d Cir. 2012) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975)). Documents may be working law when they resemble "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." *Id.* at 201 (internal quotation marks omitted).

The Responsive Memoranda are not "secret law" or "working law" because they discuss strategies, defenses, risks, and arguments that may arise *in litigation*. First Cunningham Decl. ¶ 16; Second Cunningham Decl. ¶¶ 5, 12-13. In other words, any final decisions or law with respect to the issues addressed in the Responsive Memoranda will be generated in the course of the adjudicative process, not by an agency decision. It is ultimately the courts that will decide the law in this area, not the DOJ attorneys who prepared the Responsive Memoranda.

The Supreme Court in *Sears, Roebuck & Co.* came to this conclusion when it determined that memoranda from the NLRB's general counsel recommending filing a complaint with the Board were properly withheld under Exemption 5 and did not constitute agency law because "[t]he case will be litigated before and decided by the Board; and the General Counsel will have the responsibility of advocating the position of the charging party before the Board." *Sears, Roebuck & Co.*, 421 U.S. at 159-60. The Court reasoned that the memoranda were protected by the work product privilege because they "contain the General Counsel's theory of the case and . . . will also have been prepared in contemplation of the upcoming litigation." *Id.* The Court concluded that "the public's interest in disclosure is substantially reduced by the fact . . . that the basis for the General Counsel's legal decision will come out in the course of litigation before the Board; and that the 'law' with respect to these cases will ultimately be made not by the General Counsel but by the Board or the courts." *Id.* Here too, the ultimate position taken by the DOJ prosecutor in a particular case, even if suggested by the Responsive Memoranda, will not constitute law, but rather an argument that will be adjudicated by the court. Accordingly, the "working law" doctrine is not applicable to the Responsive Memoranda. *See also Families for Freedom v. U.S. Customs & Border Prot.*, 797 F. Supp. 2d 375, 396 (S.D.N.Y. 2011) ("[T]he

secret law doctrine in FOIA cases generally arises in contexts in which agencies are *rendering decisions* based on non-public analyses. I am aware of no precedent for evaluating whether law enforcement *policies* constitute secret law.").

Moreover, the Responsive Memoranda do not bear any indicia 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." *Brennan Center*, 697 F.3d at 201 (internal quotation marks omitted). The Responsive Memoranda are not directives, and they are explicitly framed in terms of what prosecutors *may* argue in response to possible arguments they could encounter regarding the exclusion or suppression of evidence, and practices that *may* increase or decrease litigation risk following the *Jones* decision. Second Cunningham Decl. ¶ 12. They do not provide an exhaustive list of all potential arguments, and neither memorandum instructs DOJ attorneys to make any particular argument or follow any particular course of conduct. *Id.* ¶ 13. Ultimate decisions about what arguments, practices, and litigating positions to employ are left to the discretion of the prosecutor who will make judgments on a case-by-case basis. *Id.*

The ACLU misconstrues the Responsive Memoranda when it speculates that they contain the "government's official interpretation of its Fourth Amendment obligations" and "DOJ's working law on the appropriate use of location-tracking technologies." ACLU Br. 7, 12. In fact, the Responsive Memoranda do not provide any official interpretation of DOJ's Fourth Amendment obligations, do not set forth, analyze, or interpret DOJ regulations, rules, or policies, and do not contain reasoning or conclusions that have been adopted as official DOJ policy or opinions. Second Cunningham Decl. ¶ 14.

**C. The Express Adoption Doctrine Does Not Apply to the Responsive Memoranda**

In a footnote, the ACLU asserts that references to the Responsive Memoranda by FBI General Counsel Andrew Weissmann during a law school panel discussion and in an Assistant United States Attorney's brief opposing a motion to suppress evidence, "could also be construed as an express adoption or incorporation by reference of those documents," suggesting that this would be grounds for disclosure. ACLU Br. 13, n.3. Presumably, the ACLU does not develop this argument more fully because the express adoption doctrine is not applicable to the Responsive Memoranda.

Under the express adoption doctrine, a pre-decisional agency document may lose its privileged status under Exemption 5 if the agency adopts it as its official policy. *Sears, Roebuck & Co.*, 421 U.S. at 132. The Supreme Court and the Second Circuit have emphasized that such adoption must include both the conclusion and the reasoning of the otherwise privileged document. *See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 179, 184-85 (1975) (when "it is not possible to know whether the [decisionmaker] agreed with the reasoning of the [report] or just its conclusion," the document remains protected by Exemption 5); *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 357 n.5, 359 (2d Cir. 2005) (stressing that "express adoption or incorporation by reference [must have] occurred" and holding that speculation that a decisionmaker has adopted the reasoning of a document will not suffice).

This doctrine arose in the context of the deliberative process privilege, *Grumman*, 421 U.S. at 184-85, and the Second Circuit has extended it to pre-decisional documents that consist of privileged attorney-client communication, *La Raza,* 411 F.3d at 360. Significantly, the Second Circuit has declined to address the question of whether express adoption or incorporation

by reference "would require the disclosure of otherwise exempt attorney work-product." *Wood v. FBI*, 432 F.3d 78, 84 (2d Cir. 2005); *accord Brennan Center*, 697 F.3d at 199 n.10.

The rationale underpinning the express adoption doctrine simply does not apply to the Responsive Memoranda which were prepared to address possible arguments or litigation risks that prosecutors could encounter and do not set forth agency policy. *See* Second Cunningham Decl. ¶¶ 5, 14. The Memoranda do not analyze or interpret DOJ policies, and do not contain reasoning or conclusions that have been adopted as official DOJ policy or opinions. *Id.* ¶ 14. They were prepared in anticipation of litigation and are unlike the pre-decisional policy documents that have been reviewed in cases applying the express adoption rationale for assessing protection under Exemption 5. *See, e.g.*, *Brennan Center*, 697 F.3d at 189-90; *La Raza*, 411 F.3d at 352-53.

Finally, the passing references to the existence of the Responsive Memoranda cannot be understood to be DOJ "referencing a protected document as authoritative." *Brennan Center*, 697 F.3d at 205; *see also La Raza*, 411 F.3d at 359 ("a casual reference to a privileged document does not necessarily imply that an agency agrees with the reasoning contained in those documents"). Mr. Weissmann merely mentioned that two memoranda were being prepared; he did not rely on them as the basis of any assertion or reference their conclusions or reasoning. Declaration of Andrew Weissmann, dated March 1, 2013 ¶ 6. Nor did the footnote in the Government's memorandum in support of its objection to defendant's motion to suppress in a criminal case in the District of Rhode Island, *United States v. Oladosu*, Cr. No. 10-056-S (D.R.I. 2012), Docket No. 71, 2 n.1, profess to adopt any particular reasoning or conclusion in the Responsive Memoranda, *see Tigue v. DOJ*, 312 F.3d 70, 81 (2d Cir. 2002) (concluding that "the

citation to and publication of an excerpt" of the documents at issue were "minor references" that "cannot be said to be an express adoption or incorporation"). Moreover, the ACLU seems to interpret the word "following" as meaning "adhering to" in the sentence in the brief's footnote which states, "Following guidance from the Department of Justice Criminal Appellate Section, the government no longer presses this argument," rather than giving the word its more likely meaning—"after." *Compare id. with* ACLU Br. 13 n.3. The Responsive Memoranda have not been adopted as DOJ policy, and the ACLU has not shown otherwise.

## II. DOJ Has Demonstrated That the Responsive Memoranda Contain Information Exempt from Disclosure Under Exemption 7(E)

The ACLU's assertion that the public is aware that DOJ employs GPS tracking devices is insufficient to remove the Responsive Memoranda from the protections of Exemption 7(E). ACLU Br. 14-15. As described in DOJ's opening memorandum of law, the Criminal Division properly withheld information from the Responsive Memoranda pursuant to Exemption 7(E) because the information would disclose (1) techniques and procedures for law enforcement investigations or prosecutions, and (2) 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).

While the public may be generally aware that DOJ employs GPS tracking devices and other investigative techniques, it is not aware of the details regarding those techniques as reflected in the Responsive Memoranda. Second Cunningham Decl. ¶ 8. The February Memorandum discloses techniques and procedures related to GPS tracking devices and the July Memorandum discloses techniques and procedures related to approximately a dozen investigative techniques other than GPS tracking devices. *Id.* The Responsive Memoranda

discuss such non-public details as where, when, how, and under what circumstances GPS tracking devices and other specified investigative techniques are used. *Id.* The Memoranda also disclose certain entities with whom federal investigators may coordinate in employing certain investigative techniques. *Id.* Accordingly, information from the Responsive Memoranda was properly withheld under the first clause of Exemption 7(E). *See, e.g.*, *New York Civil Liberties Union v. Dep't of Homeland Sec.*, 771 F. Supp. 2d 289, 292 (S.D.N.Y. 2011); *Barnard v. Dep't of Homeland Sec.*, 598 F. Supp. 2d 1, 23 (D.D.C. 2009) ("[t]here is no principle . . . that requires an agency to release all details concerning . . . techniques simply because some aspects of them are known to the public."); *Boyd v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 570 F. Supp. 2d 156, 159 (D.D.C. 2008) (although monitoring techniques are generally known, information that would disclose the "manner and method" of installing monitoring equipment is protected by Exemption 7(E)).

DOJ also properly withheld information from the Responsive Memoranda pursuant to the second clause of Exemption 7(E) because the details about GPS tracking devices and other investigative techniques disclosed in the Memoranda could reasonably be expected to risk circumvention of the law. 5 U.S.C. § 552(b)(7)(E). As described in the Second Cunningham Declaration, if would-be wrongdoers could access the information in the Responsive Memoranda regarding where, when, how, and under what circumstances GPS tracking devices and other investigative techniques are used by federal investigators, they could also learn when and where certain investigatory techniques are *not* employed, and would be able to conform their activities to times, places, and situations where they know that unlawful conduct will not be detected. Second Cunningham Declaration ¶ 9. Such information is routinely exempt from public

disclosure under FOIA. *See Soghoian*, 885 F. Supp. 2d at 85 ("Knowing what information is collected, how it is collected, and more importantly, when it is *not* collected, is information that law enforcement might reasonably expect to lead would-be offenders to evade detection." (emphasis in original)); *Morley v. CIA*, 508 F.3d 1108, 1129 (D.C. Cir. 2007) (information regarding CIA's security clearance procedures "could render those procedures vulnerable and weaken their effectiveness at uncovering background information on potential candidates"); *Lewis-Bey v. DOJ*, 595 F. Supp. 2d 120, 138 (D.D.C. 2009) (withholding proper under Exemption 7(E) where disclosing "details of electronic surveillance techniques" would "illustrate the agency's strategy in implementing these specific techniques" and "could lead to decreased effectiveness in future investigations by allowing potential subjects to anticipate . . . and identify such techniques as they are being employed").

**A. The ACLU Has Not Shown a "Working Law" Exception to Exemption 7(E)**

ACLU attempts to redeploy its "working law" argument to assert that the Responsive Memoranda cannot be withheld under Exemption 7(E). ACLU Br. 18. As a threshold matter, it is not clear that there is any "working law" exception to Exemption 7(E), and in any event, as discussed in Section I.B., the Responsive Memoranda are not DOJ's "working law."

This Court has recognized that "there is no textual basis in FOIA for a freestanding 'secret law doctrine'" and the concept arose within the context of Exemption 5 and the "High 2" Exemption. *New York Times Co.*, 872 F. Supp. 2d at 317. In support of its position, the ACLU cites to *PHE, Inc. v. DOJ*, 983 F.2d 248 (D.C. Cir. 1993), a case in which the court found an agency affidavit regarding the application of Exemption 7(E) insufficient. The court noted in dicta that documents described in the affidavit seemed like documents deemed to be "secret law"

in other cases involving Exemption 2, but made no holding as to that doctrine's applicability to Exemption 7(E) generally. *PHE, Inc.*, 983 F.2d at 251-52. The ACLU cites to no case in which documents otherwise protected under Exemption 7(E) were required to be disclosed as agency law. *See* ACLU Br. 18. As in *New York Times Co.*, this Court should not here "read a 'secret law' exception into the FOIA exemptions without a statutory tether." *New York Times Co.*, 872 F. Supp. 2d at 317.

Even if the "working law" doctrine applied to documents withheld under Exemption 7(E), however, the Responsive Memoranda are not agency law for the reasons described in Section I.B.

## III. DOJ Has Produced All Reasonably Segregable, Non-Exempt Information From the Responsive Memoranda and No *In Camera* Review is Necessary

The Criminal Division carefully reviewed both Responsive Memoranda and produced all reasonably segregable, non-exempt information to the ACLU. First Cunningham Decl. ¶¶ 19, 26; Second Cunningham Decl. ¶ 10.

With respect to the application of Exemption 5, after concluding that the Responsive Memoranda are privileged attorney work product, DOJ had no obligation to segregate or produce any factual material therein because "[b]oth deliberative and factual materials are protected by the attorney work product doctrine." *Williams v. McCausland*, No. 90 Civ. 7563 (RWS), 1994 WL 18510, at *9 (S.D.N.Y. Jan. 18, 1994) (citing *Martin v. Office of Special Counsel, Merit Sys. Prot. Bd.*, 819 F.2d 1181, 1187 (D.C. Cir. 1987)); *United Techs. Corp. v. NLRB*, 632 F. Supp. 776, 781 (D. Conn.), *aff'd*, 777 F.2d 90 (2d Cir. 1985); *see also Judicial Watch, Inc. v. DOJ*, 432 F.3d 366, 371 (D.C. Cir. 2005) ("[F]actual material is itself privileged when it appears within

documents that are attorney work product. If a document is fully protected as work product, then segregability is not required.").

Nevertheless, DOJ elected to make a discretionary release of the material from each document that was not otherwise exempt under Exemption 7(E) and could be reasonably segregated from the documents. First Cunningham Decl. ¶ 19; Second Cunningham Decl. ¶ 10. After carefully reviewing the Responsive Memoranda, DOJ determined that the specific investigative techniques available to federal prosecutors and the details related to the use of such techniques are reflected throughout the Responsive Memoranda. First Cunningham Decl. ¶¶ 24-25; Second Cunningham Decl. ¶ 10. The discussions of potential legal strategies, defenses, and arguments that might be considered by federal prosecutors in cases involving GPS tracking devices and other investigative techniques are intertwined with facts regarding those techniques and not reasonably segregable. Second Cunningham Decl. ¶ 10. The Criminal Division concluded that the material on pages 1 and 6-8 of the February Memorandum and page 1 of the July Memorandum is not exempt under Exemption 7(E) and could reasonably be segregated from the rest of the document. *Id.* This material, though otherwise exempt from disclosure pursuant to Exemption 5, was released to the ACLU. *Id.*

The ACLU has requested that the Court undertake an *in camera* review of the Responsive Memoranda to determine whether DOJ's claimed exemptions adequately support its withholdings. FOIA permits, but does not require, courts to undertake an *in camera* review of withheld documents. *See Associated Press v. DOJ*, 549 F.3d 62, 67 (2d Cir. 2008). Such review "is considered the exception, not the rule." *New York Times Co.*, 872 F. Supp. 2d at 315. While the Court may exercise its discretion here to review the memoranda *in camera*, DOJ respectfully

submits that *in camera* review is unnecessary because the record is sufficient to meaningfully adjudicate the pending motions for summary judgment.

**CONCLUSION**

For the foregoing reasons, and those in its opening memorandum of law, the United States Department of Justice respectfully requests that the Court grant its motion for summary judgment under Federal Rule of Civil Procedure 56 and deny the American Civil Liberties Union Foundation's cross-motion for summary judgment.

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Respectfully submitted,

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