UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff, v. THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Defendant.	)	Civil Action No. 1:11-cv-02261-JDB **DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Plaintiff Electronic Privacy Information Center ("Plaintiff" or "EPIC") has sued under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for agency records related to the use of social media websites monitoring by law enforcement agencies. The Defendant responded by conducting an adequate search of agency records and producing all responsive documents that are not exempt from release under FOIA. Accordingly, this Court should grant Defendant's Motion for Summary Judgment.

BACKGROUND

In April, 2011, EPIC submitted a FOIA request to the Department of Homeland Security ("DHS"), seeking disclosure of documents related to the use of social-networking websites for investigative or data gathering purposes. Specifically, EPIC requested five categories of documents:

1. all contracts, proposals, and communications between the federal government and third parties, including, but not limited to, H.B. Gar Federal, Palantir Technologies, and/or Berico Technologies, and/or parent or subsidiary companies, that include provisions concerning the capability of social media monitoring technology to capture, store, aggregate, analyze, and/or match personally-identifiable information;

2. all contracts, proposals, and communications between DHS and any states, localities, tribes, territories, and foreign governments, and/or their agencies or subsidiaries, and/or any corporate entities, including but not limited to H.B. Gary Federal, Palantir Technologies,

and/or Berico Technologies, regarding the implementation of any social media monitoring initiative;

3. all documents used by DHS for internal training of staff and personnel regarding social media monitoring, including any correspondence and communications between DHS, internal staff and personnel, and/or privacy officers, regarding the receipt, use, and/or implementation of training and evaluation of documents;

4. all documents detailing the technical specifications of social media monitoring software and analytic tools, including any security measures to protect records of collected information and analysis; and

5. all documents concerning data breaches of records generated by social media monitoring technology.

A. DHS Processing of EPIC's FOIA Request

By letter dated April 28, 2011, DHS Privacy Office acknowledged receipt of EPIC's FOIA request and denied EPIC's requests for expedited processing and for status of a representative of the news media. James Holzer Decl. ¶ 10. DHS Privacy Office then tasked five of component agencies to conduct a complete search. Id. ¶¶ 12-14. These component agencies were the Management Directorate (MGMT), the Office of Operations Coordination and Planning (OPS), Immigration and Customs Enforcement (ICE), United States Citizenship and Immigration Services (USCIS), Federal Emergency management Agency (FEMA), the United States Coast Guard (USCG). Later, in January 2012, DHS also tasked the United States Secret Service (USSS) to conduct a complete search for records responsive to EPIC's FOIA request. Id. at ¶ 14.

Of all the components initially tasked to search, only DHS Privacy Office, USCIS, and OPS located responsive documents. Holzer Decl. ¶ 19. On January 10, 2012, the DHS completed the review of 341 pages of responsive records. Id. ¶ 15. Of those pages, the DHS released 175 pages in full and 110 pages partially released. Id. The DHS informed EPIC that it was withholding 56 pages in their entirety under FOIA exemptions 3, 4, 5, 6, 7(C), and 7(E). ¶ 15. On February 6, 2012, DHS produced its second interim response consisting of 39 pages, of

which 24 pages were released in full and 15 pages were released with minor redactions pursuant to FOIA exemptions 6, 7(C), and 7(E). ¶ 17.

After the DHS forwarded EPIC's FOIA request to the OPS with instructions to search for responsive records and to forward the documents to the DHS Privacy Office for a consolidated response, the OPS FOIA Office reviewed the request and determined that two of its offices are most likely to contain responsive records. Id. ¶ 26. The OPS provides decisions support and assists the Secretary in carrying out her responsibilities throughout the homeland security department. Id. at ¶ 21. The two OPS program offices most likely to have responsive records were the National Operation Center (NOC) and the Contracting Office. Id. at ¶ 26. The OPS personnel searched these offices, including the Media Monitoring Center systems and emails. Id. at ¶ 27. They also searched for contracts by using search terms, including "H.B. Gary Federal," "Palantir Technologies," and "Berico Technologies." Id. As a result of its searches, the OPS located 161 pages of responsive documents and provided them to the DHS Privacy Office for processing. Id. DHS produced the non-exempt records on January 10 and February 6, 2012.

The USCIS also searched for and located some responsive records. The USCIS oversees the lawful immigration to the United States. See Holzer Decl. ¶ 29. After reviewing EPIC's request, the USCIS determined that seven of its program offices are most likely to maintain records. Id. at ¶ 31. These offices were the Office of Contracting (CNT); Fraud Detection and National Security (FDNS); Office of Information Technology (OIT); Field Operations Directorate (FOD); Office of Security and Integrity (OSI); Office of Human Capital and Technology (HCT); and Office of Communication (OCOMM). Id. USCIS personnel searched these offices, including the FDNS Enterprise Collaboration Network (ECN), which is an electronic database, and the outlook e-mails and paper files. Id. at ¶ 32. They also searched for contracts, using the search terms "H.B. Gary Federal", "Palantir Technologies", "Berico Technologies," and "social

media." Id. ¶ 33. As a result of its searches, the USCIS located some responsive records and forwarded them to the DHS Privacy Office for processing. These records were processed and non-exempt documents were produced to Plaintiff as part of the first interim response.

ICE also received a copy of Plaintiff's FOIA request, conducted a comprehensive search and found no responsive records. Holzer Decl. ¶¶ 36-46. ICE is the principal investigative arm of DHS and the second largest investigative agency in the federal government. Id. at ¶ 36. Its primary mission is to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration. Id. After reviewing Plaintiff's FOIA request, the ICE FOIA Office determined that the ICE program offices most likely to maintain responsive records were the Office of Homeland Security Investigations (HIS), Office of Acquisitions (OAQ), and Privacy Office. Id. at ¶ 39. ICE personnel searched these offices. Id. at ¶¶ 40-46. They also conducted electronic searches, including searching the PRISM system that tracks and manages procurement operations and Federal Procurement Data System (a public database containing information on most Federal Government contracts). Id. at ¶¶ 42-46. The search terms used were "H.B. Gary Federal", "Palantir Technologies", and "Berico Technologies," "social media," "Facebook," "LinkedIn," "Twitter," and "MySpace." Id. at ¶¶ 43-44. These searches located some contracts, but they were determined to be non-responsive after a review. Id. at ¶ 44.

Furthermore, the MGMT searched for responsive records and found none. Id. at 47-54. MGMT is a major operational component of DHS and has several responsibilities. Id. at ¶¶ 47-48. Upon MGMT's review of Plaintiff's FOIA request, it determined that two of its program offices were most likely to maintain responsive records. Id. at ¶ 51. These offices were the Chief Information Officer (OCIO) and Office of Procurement Operations (OPO). Id. MGMT staff conducted a search of the computer systems SOC On-Line and Security Incident Database, the

PRISM computer system in which contracts information are stored, using search terms "social media monitoring" and "media monitoring." Id. at ¶¶ 52-53. No responsive records were located. Id.

Additionally, the USCG also conducted a comprehensive search and did not locate any responsive records. Id. at ¶¶ 55-66. The USCG is the only military organization within the Department of Homeland Security, and is responsible to safeguard the Nation's maritime interests and environment around the world. Id. at ¶ 55. Upon reviewing Plaintiff's FOIA request, the USCG FOIA Office determined that two of its program offices were most likely to maintain responsive records. Id. at ¶ 59. The offices were the Office of Public Affairs and Office of Intelligence. Id. USCG staff conducted a search of these offices' electronic databases and email files, but no responsive records were located. Id. at ¶¶ 60-61.

B. The United States Secret Service's Processing of Plaintiff's FOIA Request

On January 12, 2012, the Secret Service received a copy of Plaintiff's FOIA request from the DHS Privacy Office. Julie Ferrell Decl. ¶ 5. After reviewing the request, the Secret Service FOIA/PA Office determined that seven of its programs offices were most likely to have responsive records. Id. at ¶ 8. These offices were the Office of Investigations ("INV"); the Criminal Investigative Division ("CID"); the Procurement Division ("PRO"); the James J. Rowley Training Center ("JJRTC"); the Office of Chief Counsel ("LEG"); the Information Resource Management Division ("IRMD"); and the Strategic Intelligence and Information Division ("SII"). Id. The staffs of these offices searched for records, including searching their respective databases and emails, using such search terms as Palantir Technologies", "Berico Technologies", "media monitor," "social media," "monitoring", "internet", and "Facebook."

Given that the request asked for contracts and agreements, the Secret Service tasked PRO to search for responsive records. PRO is the contracting branch of the Secret Service and is

responsible for the acquisition of all goods and services for the protective, investigative, and administrative missions of the Secret Service. Id. ¶ ¶ 13-15. Contracts entered into by the Secret Service are held in the division. Id. PRO conducted an electronic search of an internal database, called PRISM, to determine if any relevant contract actions existed. Id. PRISM contains, among other information, a record of all finalized contracts, as well as information on requests for certain proposals and requests for quotes that have been entered into the system. Id. PRO staff performed electronic queries using various terms including "Palantir Technologies", "Berico Technologies", and "media monitor". Id. ¶ 14. After reviewing the search results, PRO determined that one contract and one contract modification were potentially responsive to the request. Id.

Several Secret Service directorates located responsive records. After reviewing the potentially responsive records, the Secret Service determined that 365 pages of records received from LEG, CID, PID, SII, and the Protective Intelligence and Assessment Division ("PID") were responsive to the Plaintiff's request. Id. at ¶ 26. The Secret Service FOIA/PA Office processed these responsive records. Id. On July 2, 2012, through the DOJ and on behalf of DHS, the Secret Service released fifty-five pages of records with no exemptions claimed to the Plaintiff. Id. at ¶27. After completing its review, on July 9, 2012, the Secret Service produced 32 additional pages of records in full without redactions, 48 pages partially redacted pursuant to FOIA exemptions (b)(4), (b)(6), (b)(7)(C) and (b)(7)(E), and informed Plaintiff that 230 pages were withheld in their entirety pursuant to FOIA exemptions (b)(4), (b)(5), (b)(6), (b)(7)(C) and (b)(7)(E). Id. at ¶ 28.

ARGUMENT

A. Statutory Background and Standard of Review

FOIA generally mandates disclosure, upon request, of government records held by an agency of the federal government, except to the extent that such records are protected from disclosure by one of nine statutory exemptions. The "fundamental principle" behind FOIA is "public access to Government documents." John Doe Agency v. John Doe Corp., 493 U.S. 146, 151 (1989). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). At the same time, Congress recognized "that legitimate governmental and private interests could be harmed by release of certain types of information and provided nine specific exemptions under which disclosure could be refused." FBI v. Abramson, 456 U.S. 615, 621 (1982); see also 5 U.S.C. § 552(b). While these exemptions are to be "narrowly construed," Abramson, 456 U.S. at 630, courts must not fail to give the exemptions "meaningful reach and application." John Doe Agency, 493 U.S. at 152. The FOIA thus "represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 925 (D.C. Cir. 2003).

Summary judgment is the procedure by which courts resolve nearly all FOIA actions. See Reliant Energy Power Generation, Inc. v. FERC, 520 F. Supp. 2d 194, 200 (D.D.C. 2007). As with non-FOIA cases, summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Diamond v. Atwood, 43 F.3d 1538, 1540 (D.C. Cir. 1995). For a defendant agency to prevail on a motion for summary judgment in FOIA litigation, it must satisfy two elements. First,

it must "demonstrate that [it] conducted an adequate search which was reasonably calculated to uncover all relevant documents. . . . Second, materials that are withheld must fall within a FOIA statutory exemption." Leadership Conference on Civil Rights v, Gonzales, 404 F. Supp. 2d 246, 252-53 (D.C. Cir. 2005) (citations omitted). A court reviews an agency's response to a FOIA request *de novo*. See 5 U.S.C. § 552(a)(4)(B). As discussed below, Defendant has satisfied both elements in this case because its components conducted adequate searches and released all responsive materials, except those that fall within a statutory exemption.

B. Defendant Conducted a Reasonable and Adequate Search for Responsive Documents

The Defendant should prevail on summary judgment because it undertook a search that was "reasonably calculated to uncover all relevant documents." Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983). On summary judgment in a FOIA case, the agency must demonstrate that it has conducted an adequate search – that is, "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990). "There is no requirement that an agency search every record system." Id. "[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*." Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984); see also Meeropol v. Meese, 790 F.2d 942, 952-53 (D.C. Cir. 1986) ("A search is not unreasonable simply because it fails to produce all relevant material."); Perry v. Block, 684 F.2d 121, 128 (D.C. Cir.1982).

The process of conducting a reasonable search requires "both systemic and case-specific exercises of discretion and administrative judgment and expertise," and "is hardly an area in which the courts should attempt to micromanage the executive branch." Schrecker v. U.S. Dept't of Justice, 349 F.3d 657, 662 (D.C. Cir. 2003) (internal quotation marks and citation omitted).

Therefore, in evaluating the adequacy of a search, courts accord agency "a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir.1991) (quoting Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 771 (D.C. Cir. 1981)). The statute does not require "meticulous documentation [of] the details of an epic search." Perry, 684 F.2d at127. "[A]ffidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA." Id.

As described in the attached James Holzer Declaration, the DHS's search was reasonably calculated to uncover all documents responsive to EPIC's request. Shortly after receiving EPIC's FOIA request, the DHS Privacy Office initiated its search. See Holzer Decl.¶¶ 12-14. First, the DHS Privacy Office identified six components within the agency that were likely to contain responsive records. Id. It forwarded EPIC's request to these components with instructions to conduct a comprehensive search for records. Id. Second, each component identified the subcomponents reasonably likely to have responsive records and directed them to search their files. See Holzer Decl. ¶¶ 21-65. Third, the subcomponents then identified the individuals with subject-matter expertise to review EPIC's request and to search for responsive records. Id. Fourth, the agency's staffs conducted manual and electronic searches, using broad search terms deriving directly from EPIC's FOIA request. Thus, the searches conducted were tailored to the particular request, and were targeted to those sections and individuals within the various components of DHS that would be expected to have responsive records. The steps that DHS took to identify responsive records, as documented in detail in the James Holzer Declaration, constituted an adequate search meeting the Defendant's FOIA obligations

The search conducted by the Secret Service was also reasonably calculated to locate all records responsive to EPIC's FOIA request. As described in the Julie Ferrell Declaration, on January 12, 2012, the Secret Service FOIA Office received a copy of EPIC's FOIA request from the DHS Privacy Office. See Julie Ferrell Decl. ¶ 5. Upon review of EPIC's request, the Secret Service identified seven of its divisions that may potentially have responsive records. Id. at ¶ 8. These divisions then tasked their employees with subject-matter expertise to conduct manual and electronic searches, including searches of emails and databases, for responsive records. See Id. ¶¶ 9-25. The search terms used included "social media," "monitoring," "internet," "Facebook," "Palantir Technologies," "Berico Technologies," and "media monitoring." Id. at ¶¶ 14, 20. As demonstrated in the Julie Ferrell Declaration, the Secret Service performed searches at the locations most likely to house responsive documents by directing personnel to search for responsive material. The steps and methods the Secret Service used to locate the information sought by Plaintiff met its obligations under FOIA. Lawyers' Comm. for Civil Rights of San Francisco Bay Area v. U.S. Dep't of Treasury, 534 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008) (noting that an agency demonstrates the adequacy of its search by "'describ[ing] what records were searched, by whom, and through what processes.'" (citation omitted).

In sum, the DHS and its components searched all sources they identified as reasonably likely to contain responsive documents. Therefore, DHS satisfied the search requirements of FOIA.

II. DHS AND THE SECRET SERVICE PROPERLY WITHHELD RECORDS UNDER APPLICABLE FOIA EXEMPTIONS

In order to obtain summary judgment, an agency bears the burden of justifying its decision to withhold records pursuant to FOIA's statutory exemptions. See 5 U.S.C. § 552(a)(4)(B). To satisfy that burden, the agency must provide declarations that identify the information at issue and the bases for the exemptions claimed. See Summers v. Dep't of Justice, 140 F.3d 1077, 1080

(D.C. Cir. 1998). Courts review *de novo* the agency's use of a FOIA exemption to withhold documents. Wolf v. CIA, 473 F.3d 370, 374 (D.C. Cir. 2007). But as this Court has noted:

> [T]he Court may grant summary judgment based solely on information provided in an agency's affidavits or declarations if they are relatively detailed and when they describe "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith."

Strunk v. U.S. Dep't of Interior, 752 F. Supp. 2d 39, 42-43 (D.D.C. 2010) (quoting Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C.Cir.1981)). Again, agency declarations are accorded "a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" SafeCard Servs., 926 F.2d at 1200 (quoting Ground Saucer Watch, 692 F.2d at 771); see also Strunk, 2010 WL 4780845, at *2. "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." Wolf, 473 F.3d at 374-75 (internal quotation marks and citations omitted).

As explained in detail below and in the attached Declarations, DHS and the Secret Service processed the responsive documents in accordance with FOIA and withheld certain information pursuant to FOIA Exemptions 4, 5, 6, 7(C), and 7(E). Each component properly invoked these exemptions, and processed and released all reasonably segregable information from the responsive records. Therefore, Defendant is entitled to summary judgment.

A. The USSS Properly Withheld Documents Pursuant to Exemption 4

FOIA exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552b(4) ("Exemption 4"). To withhold information under Exemption 4, the government agency must demonstrate that it is "(1) commercial and financial information, (2) obtained from a person or by the government, (3) that is privileged or confidential." GC Micro Corp. v. Def. Logistics Agency, 33 F.3d 1109, 1112 (9th Cir.1994). Commercial or financial matter is "confidential" for purposes of the exemption "if

disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." Id.

The Secret Service withheld information in documents 1, 2, 3, 4, 5, 6, 11, 14, 16, 17, 28, 29, 32, 33, and 35 on the basis of FOIA Exemption 4. (Ferrell Decl. ¶¶ 32-33; USSS Vaughn Index at pp. 1-4, 7-10, 15, 17-18.) A company prepared these documents as part of a contract bid submitted to the USSS. Id. They contain information regarding the pricing, technical specifications, and performance capabilities of the company. Id. It is information that is not customarily disclosed to the public by the company, and the company provided this information with the expectation that it would not be disclosed outside of the government. Id. Therefore, the Secret Service properly withheld this information because releasing it would impair the ability of the government to obtain necessary information from commercial suppliers in the future and impact the accuracy and full availability of such information.

B. DHS Properly Redacted Information Pursuant to Exemption 4

DHS redacted proprietary and confidential business information in several documents under Exemption 4. See DHS Vaugh Index pp. at 2-4 As demonstrated in the Vaughn Index attached to James Holzer Declaration, DHS redacted commercial information provided by a company in a contract bid submitted to OPS. Id. These documents contain the company's pricing information and its proposed evaluation plan. Id. This information is protected by trade secret and commercial or financial information obtained from a company that is privileged or confidential. Id. Disclosing this information would discourage other companies from providing confidential, accurate, and reliable business information to the government. Therefore, the DHS properly redacted this information to ensure that it obtains confidential business information in the future and to protect the submitters from competitors.

C. USSS Properly Withheld Documents Under Exemption 5 Attorney-Client Privilege

Exemption 5 exempts from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). In particular, it "exempt[s] those documents . . . [that are] normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). Exemption 5 incorporates the common law and executive privileges, including the deliberative process privilege, the attorney-client privilege, and the work product doctrine. In this case, the Secret Service has withheld materials in whole under Exemption 5 because they are protected under the attorney-client privilege.

The attorney-client privilege protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." Mead Data Cen., Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977). The attorney-client privilege is not limited to the context of litigation. Rein v. U.S. Patent & Trademark Office, 553 F. 3d 353, 377 (4th Cir. 2009) (noting that privilege "extends beyond communications in contemplation of particular litigation to communications regarding 'an opinion on the law"'). The attorney-client privilege "'protects a client's confidences to her attorney so that the client may have uninhibited confidence in the inviolability of her relationship with her attorney.'" Nat'l Res. Def. Council v. U.S. Dept. of Def., 388 F. Supp. 2d 1086, 1099 (C.D. Cal. 2005). To withhold a document under Exemption 5 pursuant to the attorney-client privilege, "'an agency must demonstrate that the document it seeks to withhold (1) involves confidential communications between an attorney and his client and (2) relates to a legal matter for which the client has sought professional advice.'" Id.

The Secret Service withheld documents 7, 8 and 9 on the basis of attorney-client privilege under FOIA Exemption 5. (Ferrell Decl. ¶ 35; USSS Vaughn Index at pp. 4-5). These documents, which are also being withheld under Exemption 7(E), are handwritten notes of attorneys within the Office of General Counsel ("OGC") and an email communication between

Agency employees and Agency counsel. Id. They are about confidential facts supplied by the Secret Service Protective Intelligence and Assessment Division and its contractor working within the agency at various meetings with OGC counsel. Id. They contain information regarding data retention capabilities of a system utilized in identifying and analyzing threats against Secret Service protectees. Id. These notes also contain USSS attorneys' legal advice to the client agency based on those facts. Id. Because these documents reflect confidential communications between Agency counsel and their client relating to a legal matter for which the client sought professional advice, they are protected from disclosure under the attorney-client privilege. Releasing these documents would intrude upon the attorney-client relationship and discourage frank and open discussions between the Secret Service and agency counsel. See Schlefer v. United States, 702 F.2d 233, 244 n.26 (D.C. Cir. 1983).

D. DHS Properly Withheld Documents Under Exemption 5 Deliberative Process Privilege

The DHS properly withheld documents under Exemption 5 deliberative process privilege. Documents subject to the deliberative process privilege and therefore exempt from release include those "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." NLRB, 421 U.S. at 150. As the Supreme Court has explained:

> The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government.

Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001) (internal quotation marks and citations omitted). "[E]fficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to 'operate in a fishbowl.'" EPA v. Mink, 410 U.S. 73, 87 (1973) (abrogated by statute on other grounds, Pub. L. No. 93-502, 88 Stat. 1561 (1974)).

"In deciding whether a document should be protected by the privilege [courts] look to whether the document is 'predecisional' [—] whether it was generated before the adoption of an agency policy

[—] and whether the document is 'deliberative' [—] whether it reflects the give-and-take of the consultative process." Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). "To establish that a document is predecisional, the agency need not point to an agency final decision, but merely establish what deliberative process is involved, and the role that the documents at issue played in that process." Judicial Watch v. Export-Import Bank, 108 F. Supp. 2d 19, 35 (D.D.C. 2000) (citing Formaldehyde Inst. v. HHS, 889 F.2d 1118, 1223 (D.C. Cir. 1989)). In addition, "[t]here should be considerable deference to the [agency's] judgment as to what constitutes . . . 'part of the agency give-and-take — of the deliberative process — by which the decision itself is made.'" Chemical Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. 114, 118 (D.D.C. 1984) (quoting Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975)). The agency is best situated "to know what confidentiality is needed 'to prevent injury to the quality of agency decisions.'" Id. at 118 (quoting NLRB, 421 U.S. at 151).

In this case, the DHS identified three draft documents that are protected under the deliberative process privilege and withheld them on the basis of FOIA Exemption 5. See James Holzer Decl. ¶¶ 69-71; DHS Vaughn Index at pp.6-8, 17. The first document is a draft concept of operations that describes the characteristics of the proposed social medial monitoring and situational awareness from the viewpoints of the users of the system. Id. The second is a draft internal handbook discussing how the department will engage in social media monitoring and situational awareness. Id. The third document is a draft memorandum analyzing guidelines for use of Remote Retrievable Disposable Desktop. James Holzer Decl. ¶ 71; DHS Vaughn Index at p.17. These draft documents are protected under the deliberative process privilege because draft materials, and the drafting process itself are inherently predecisional and deliberative. See, e.g., Dudman Comms. Corp. v. Dep't of Air Force, 815 F.2d 1565, 1569 (D.C. Cir. 1987) (disclosure of "decisions to insert or delete material or to change a draft's focus or emphasis — would stifle the creative thinking and candid exchange of ideas necessary to produce good historical work"); Marzen v. HHS, 825 F.2d 1148, 1155 (7th Cir. 1987) (Exemption

5 "protects not only the opinions, comments and recommendations in the draft, but also the process itself"); In re Apollo Group, Inc. Sec. Litig., 251 F.R.D. 12, 31 (D.D.C. 2008) ("[D]raft documents by their very nature, are typically predecisional and deliberative, because they reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors.") (non-FOIA case) (quotations omitted); Citizens for Resp. and Ethics in Washington v. DHS, 514 F. Supp. 2d 36, 46 (D.D.C. 2007) (applying privilege to draft "situation reports"); People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 303 (D.D.C. 2007) ("drafts are commonly found exempt under the deliberative process exemption."); Exxon Corp. v. Dep' t of Energy, 585 F. Supp. 690, 697-98 (D.D.C. 1983) ("[d]raft documents by their very nature, are typically predecisional and deliberative"). Disclosure of draft materials would expose individual employees' contributions to the drafting process to public scrutiny, which would likely inhibit deliberations, and, ultimately, inhibit the frank and candid exchange of information and expression of ideas, both within DHS and its component agencies. see, e.g., Russell v. Dep't of Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (recognizing that disclosure of draft manuscript could stifle candor in the drafting process and lead to confusion of the public). Therefore, the DHS properly withheld these draft documents under Exemption 5 deliberative process privilege.

E. The USSS Properly Withheld and Redacted Documents Pursuant to Exemptions 6 and 7(C)

The Secret Service properly invoked Exemption 6 and Exemption 7C to withhold names and identifying information of its (1) law enforcement personnel and (2) third parties mentioned in law enforcement records.

Exemptions 6 and 7(C) protect the privacy of individuals from unwarranted invasion. The applicability of both of these exemptions requires the agency to balance the relevant individual privacy rights against the public interest in disclosure. Exemption 6 allows the withholding of information about individuals in "personnel and medical files and similar files" when the disclosure of such information would constitute a "clearly unwarranted invasion of personal

privacy." 5 U.S.C. § 552(b)(6). For this exemption to apply, the information at issue must be maintained in a government file and "appl[y] to a particular individual." United States Dep't of State v. Wash. Post Co., 456 U.S. 595, 602 (1982). Once this threshold requirement is met, Exemption 6 requires the agency to balance the individual's right to privacy against the public's interest in disclosure. See Reed v. NLRB, 927 F.2d 1249, 1251-52 (D.C. Cir. 1991).

Exemption 7(C) is similar, permitting the withholding of "records or information compiled for law enforcement purposes" to the extent that disclosure of such information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7). Thus, where, as here, information or records at issue were compiled for law enforcement purposes, the balancing test tilts further in favor of non-disclosure. Exemption 7(C) has been applied in this case, together with Exemption 6, to protect personal identifying information, because the records at issue were all compiled for a law enforcement purpose. The information at issue here was compiled in connection with the Secret Service's and certain DHS component's protective mission and under their authority to conduct law enforcement activities, and thus was compiled for a law enforcement purpose. See Ferrell Decl. ¶ 38. The Secret Service and other DHS components, as law enforcement entities, are entitled to deference in this assessment. See Campbell v. Dep't of Justice, 164 F.3d 20, 32 (D.C. Cir. 1998).

Courts have adopted a broad construction of the privacy interests protected by these two exemptions, rejecting a "cramped notion of personal privacy" and emphasizing that "privacy encompass[es] the individual's control of information concerning his or her person." Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989) (construing Exemption 7(E)). Privacy is of particular importance in the FOIA context because a disclosure required by FOIA is a disclosure to the public at large. See, e.g., Painting & Drywall Work Pres. Fund, Inc. v. HUD, 936 F.2d 1300, 1302 (D.C. Cir. 1991). In contrast, "the only relevant public

interest in the [Exemption 6] balancing analysis [is] the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties' or otherwise let citizens know what their government is up to." Dep't of Defense v. Fed. Labor Relation Auth., 510 U.S. 487, 497 (1994) (internal quotation marks omitted).

The Secret Service has redacted or withheld the names of law enforcement personnel and other personally identifying information in documents 6, 9, 11, 12, 13, and 15 to 42. See Ferrell Decl. ¶ 39. It also withheld the names, personal contact information and other identifying information of third parties who appear on the documents 1, 2, 3, 5, 6, 9 to 15, and 17 to 42. The Secret Service is withholding portions of these documents after concluding that disclosure would cause a clearly unwarranted invasion of personal privacy, which would not be counterbalanced by any public interest in the information. Id. Document 23 has been withheld in full because this twenty-four page-document consists of access forms that have been filled in by various individuals and contain such personally identifiable information as names, social security numbers, and dates of birth. Id. at ¶ 43. If this personally identifiable information was redacted from the document, all that would remain would be empty standard forms. Id. Therefore, the Secret Service is withholding this document in full pursuant to exemptions (b)(6) and (b)(7)(C).

The Secret Service has properly applied Exemption 6 and 7(C) to law enforcement records that identify law enforcement personnel and third parties. "The names of and identifying information about law enforcement officers are routinely withheld under Exemption 7(C) on the ground that such disclosure could reasonably be expected to constitute an unwarranted invasion of the officers' personal privacy." Concepcion v. FBI, 699 F. Supp. 2d 106, 112 (D.D.C. 2010). Privacy considerations support protecting the law enforcement personnel and private individuals, from unnecessary, unofficial questioning as to the conduct of this or other investigations, which could "subject them to annoyance or harassment in either their official or private lives.'"

Lewis-Bey v. Dep't of Justice, 595 F. Supp. 2d 120, 134-35 (D.D.C. 2009) (quoting Lesar v. Dep't of Justice, 636 F.2d 472, 487 (D.C. Cir. 1980)). When weighed against the lack of public interest in the identities of these individuals, this privacy interest justifies withholding.

F. DHS Properly Withheld and Redacted Documents Pursuant to Exemptions 6 and 7(C)

Applying the legal principles mentioned above, the DHS properly invoked exemptions 6 and 7(C) to redact the names of its law enforcement personnel, email tracking information, and other personal contact information of these employees and third parties to protect their privacy interests. See John Holzer Decl. ¶¶ 72-76; DHS Vaughn Index at pp. 2-5, 7-12, 13-18. Releasing this personally identifiable information would constitute a clearly unwarranted invasion of the individuals' privacy. Id. Furthermore, the redacted information was compiled for law enforcement purpose, because the records were created by DHS law enforcement agencies during the course of a law enforcement activity. Id. Because of the strong privacy interest in law enforcement records, releasing the personal identifiable information could reasonably constitute an unwarranted invasion of personal privacy, as such disclosure might subject the third parties to negative harassment, criticism and suspicion. The personal privacy interest is stronger when disclosing the information would not serve the "core purpose" of the FOIA, i.e., to "shed light on an agency's performance of its statutory duties." DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989). Therefore, the names and contact information were properly redacted pursuant to FOIA Exemptions 6 and 7(C).

G. The USSS Properly Withheld Documents Under FOIA Exemption 7(E)

FOIA protects from mandatory disclosure "records or information compiled for law enforcement purposes" when that 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). Congress intended that Exemption 7(E) protect from disclosure techniques and procedures used to prevent and protect against crimes, as well as techniques and procedures used to investigate crimes after they have been committed. See, e.g., PHE, Inc. v. Dep't of Justice, 983 F.2d 248, 250–51 (D.C. Cir. 1993) (holding that portions of FBI manual describing patterns of violations, investigative techniques, and sources of information available to investigators were protected by Exemption 7(E)). This exemption applies even when the identity of the techniques has been disclosed, but the manner and circumstances of the techniques are not generally known, or the disclosure of the details could reduce their effectiveness. See Blanton v. U.S. Dep't of Justice, 63 F. Supp. 2d 35, 49–50 (D.D.C. 1999); Coleman v. FBI, 13 F. Supp. 2d 75, 83 (D.D.C. 1998).

Exemption 7(E) is comprised of two clauses: the first relating to law enforcement "techniques or procedures," and the second relating to "guidelines for law enforcement investigations or prosecutions." 5 U.S.C. § 552(b)(7). The latter category of information may be withheld only if "disclosure could reasonably be expected to risk circumvention of the law." Id. No such showing of harm is required for the withholding of law enforcement "techniques or procedures," however, which receive categorical protection from disclosure. See Keys v. DHS, 510 F. Supp. 2d 121, 129 (D.D.C. 2007) (stating that first clause of Exemption 7 (E) '"requires no demonstration of harm or balancing of interests"'); Smith v. Bureau of Alcohol, Tobacco & Firearms, 977 F. Supp. 496, 501 (D.D.C. 1997); but see PHE, Inc. v. DOJ, 983 F.2d 248, 250 (D.C.Cir. 1993) (stating that under Exemption 7 (E), agency "must establish that releasing the withheld material would risk circumvention of the law."); Piper v. DOJ, 294 F. Supp.2d 16, 30 (D.D.C. 2003).

As a threshold issue, the court must make a determination as to whether the documents have a law enforcement purpose, which, in turn, requires examination of whether the agency serves a

"law enforcement function." Church of Scientology Intern. v. I.R.S., 995 F.2d 916, 919 (9th Cir. 1993) (internal quotation marks and citation omitted). However, a government agency with a clear law enforcement mandate "'need only establish a rational nexus between enforcement of a federal law and the document for which [a law enforcement] exemption is claimed.'" Rosenfeld v. U.S. Dept. of Justice, 57 F.3d 803, 808 (9th Cir. 1995) (citation omitted). Under the "rational nexus test," courts "accord a degree of deference to a law enforcement agency's decisions to investigate" and will not second-guess the agency's investigative efforts "if there is a plausible basis for the decision.'" Id. (quoting Pratt v. Webster, 673 F.2d 408, 421 (D.C. Cir.1982)).

In this case, there is no doubt that the Secret Service and DHS have clear law enforcement mandates. See Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Enforcement Agency, 811 F. Supp. 2d 713, 744 (S.D.N.Y. 2011) (stating that ICE and DHS are "unquestionably federal law enforcement agencies"); U.S. News & World Report v. Dep't of the Treasury, No. 84–2303, 1986 U.S. Dist. LEXIS 27634, at *5 (D.D.C. Mar. 26, 1986) (stating that while "[t]he Secret Service is unique in that its law enforcement efforts are geared primarily towards prevention rather than apprehension," there "can be no doubt that they are directly related to the agency's statutory mandate"). As law enforcement agencies, the Secret Service's and DHS's decisions to invoke exemption 7 (E) are entitled to deference. Campbell v. DOJ, 164 F.3d 20, 32 (D.C. Cir. 1998).

The Secret Service withheld portions of documents 12, 13, 15, 18, 21-23, 26-28, 30, 32-35, 37 and 48 that are responsive to Plaintiff's request, and withheld in full documents 1-11, 14, 16, 17, 19 and 20 on the basis of Exemption 7(E). See Ferrell Decl. ¶ 44. The withholdings relate to information on a technique utilized by USSS in identifying, analyzing, and investigating potential threats against the President, Vice-President, and other Secret Service protectees, the specific guidelines used to identify potential threats, and information regarding systems and technology

used as part of that technique, including the name of the system and information on system vulnerabilities. Id. The release of this information would reveal techniques and methodologies used by the Secret Service that are not generally known to the public, and could nullify the future effectiveness of protective and investigative measures designed to identify and investigate threats, rendering them operationally useless. Id. at ¶ 45. Disclosure of this type of information, therefore, could impede the Secret Service's efforts to protect the President, Vice-President, and other protectees in the future. Id. For these reasons, the Secret Service is withholding in full 205 pages of material pursuant to exemption (b)(7)(E).

H. DHS Properly Withheld Information Under FOIA Exemption 7(E)

Having met the threshold of a law enforcement agency, DHS properly invoked Exemption 7 (E) to redact passwords, codes, and other information that would allow access to its databases and law enforcement computer systems, which contain law enforcement information about investigations or prosecutions. Holzer Decl. ¶¶ 77-78; DHS Vaughn Index at pp. 6, 7, 9, 11, 12, 14, 15, and 23. These access codes information are not known to the public and are used by law enforcement personnel to access the agency's electronic databases that have information on individuals subject to criminal investigations or prosecutions. Having concluded that the release of this information would allow unauthorized access to critical law enforcement information, which could result in tampering or other manipulation of information and thus inhibit investigative efforts, this information should be given categorical protection as information related to law enforcement techniques or procedures and are protected from disclosure under Exemption 7(E). See Keys v. DHS, 510 F. Supp. 2d at 129 (the agency needs to show only that the information would reveal a law enforcement technique that is unknown to the public)

Although it is unnecessary for DHS to demonstrate that the release of the law enforcement systems access information could reasonably be expected to risk the circumvention of the law, id,

that standard is satisfied in any event. Exemption 7(E) "exempts from disclosure information that *could increase the risks* that a law will be violated or that past violators will escape legal consequences." Mayer Brown LLP v. IRS, 562 F.3d 1190, 1193 (D.C. Cir. 2009). Moreover, "[t]he exemption looks not just for circumvention of the law, but for a risk of circumvention; not just for an actual or certain risk of circumvention, but for an expected risk; not just for an undeniably or universally expected risk, but for a reasonably expected risk; and not just for certitude of a reasonably expected risk, but for the chance of a reasonably expected risk." Id. This "relatively low bar . . . 'only requires that the [agency] demonstrate logically how the release of the requested information might create a risk of circumvention of the law.'" Blackwell v. FBI, 646 F.3d 37, 42 (D.C. Cir. 2011) (quoting Mayer Brown, 562 F.3d at 1194). Because it is possible that criminals could use this information, if disclosed, to gain access to the agency's law enforcement files and thereby evade detention, or that violators could use it to tamper with the source of information and thus inhibit investigative efforts, DHS properly withheld that information under Exemption 7(E). See PHE, Inc., 983 F.2d at 251.

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