UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACQUELINE STEVENS, *Plaintiff,* v. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *Defendant.*	))))))))))	Civil Action No.: 1:17-cv-2853 Judge Rebecca R. Pallmeyer Magistrate Judge Gilbert

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION & FACTUAL BACKGROUND

This is a Freedom of Information Act ("FOIA") case involving Plaintiff Jacqueline Stevens' attempt to obtain agency records from Defendant U.S. Immigration and Customs Enforcement ("ICE") about the government's handling of claims to U.S. citizenship. As part of her work directing the Deportation Research Clinic at Northwestern University, Professor Stevens regularly requests through FOIA and receives from ICE memoranda documenting facts and analysis that inform ICE's citizenship determinations. Stevens LR. 56.1 Stmt at #. These memoranda are commonly referred to as "USC Claims Memos." Stevens L.R. 56.1 Stmt at #. Since 2010, Professor Stevens has filed nearly identical FOIA requests for USC Claims Memos. Stevens L.R. 56.1 Stmt at #. By analyzing the non-exempt portions of the USC Claims Memos she receives through FOIA, Professor Stevens and her students in the Deportation Research Clinic document and expose flaws in ICE's handling of citizenship claims that have led to the unlawful detention and deportation of U.S. Citizens. Stevens L.R. 56.1 Stmt at #.

In February of 2017, Professor Stevens filed a FOIA request with ICE seeking records from its USC Claims e-mail box. ECF No. 1, Compl. After she filed suit, ICE assigned her FOIA request a tracking number and conducted a search. ECF No. 20-1, Pavlik-Keenan Decl. Over the ensuing twelve months, ICE released more than 6,000 pages of response documents, including finalized USC Claims Memos. Unlike in previous FOIA requests, Stevens L.R. 56.1 Stmt at #, ICE chose to withhold in full the contents of finalized USC Claims Memos that have been approved by ICE Enforcement and Removal Operations ("ERO") officers and adopted as the agency's final position. It is this decision alone that Professor Stevens challenges at the summary judgment stage.[1]

ICE is not entitled to summary judgment because it unlawfully withheld the contents of finalized USC Claims Memos that have been approved and adopted by ICE as the agency's final opinion regarding an individual's U.S. citizenship. According to ICE's binding policy, USC Claims Memos must be submitted to and reviewed by supervisory officials, who then adopt an decision. The finalized USC Claims Memos reflecting that decision must be documented in both ICE officers' databases and the case management systems of their attorneys. Consequently, these memos fall outside the scope of Exemption (b)(5). Moreover, ICE's blanket redactions of the factual portions of the memos fail to satisfy FOIA's demand that the agency reasonably segregate non-exempt portions of agency records.

II. LEGAL STANDARD

"[D]isclosure, not secrecy, is the dominant objective" of the FOIA. *Department of Air Force v. Rose,* 425 U.S. 352, 361 (1976). Because of the "asymmetrical distribution of knowledge" in

[1] Professor Stevens does not challenge, and expressly stipulates to, entry of partial summary judgment on: (1) the adequacy of ICE's search; (2) ICE's withholdings in the body of all emails; and (3) ICE's withholding of pre-final USC Claims Memos and any attachments thereto.

FOIA cases, "where the agency alone possesses, reviews, discloses, and withholds the subject matter of the request," *Judicial Watch, Inc. v. FDA,* 449 F.3d 141, 146 (D.C. Cir. 2006) (cleaned up), the agency bears the burden of establishing that its search was adequate and its asserted withholdings are proper. *See also Chambers v. U.S. Dep't of Interior,* 568 F.3d 998, 1003 (D.C. Cir. 2009); *Patterson v. IRS,* 56 F.3d 832, 835–36, 840 (7th Cir. 1995) *See also* 5 U.S.C. § 552(a)(4)(B). The Court must view the facts, and all reasonable inferences therefrom, in a light most favorable to the FOIA requester. *Becker v. IRS*, 34 F.3d 398, 405 (7th Cir. 1994) (citing *Zemansky v. United States EPA*, 767 F.2d 569, 571 (9th Cir. 1985)). The FOIA carries with it a strong presumption in favor of disclosure. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). All exemptions must thus therefore be "narrowly construed." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). *See also Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1037 (7th Cir. 1998). Consequently, whenever the agency invokes a FOIA exemption, the burden is on the defendant agency to demonstrate, and not the requestor to disprove, that the material sought may be withheld due to an exemption. *Ray*, 502 U.S. at 173.

III. ARGUMENT

A. ICE Fails to Justify Its Categorical Withholding Finalized USC Claims Memos.

ICE's motion for summary judgment must be denied in part because the Pavlik-Keenan Declaration and accompanying *Vaughn* index do not justify withholding finalized USC Claims Memos. *See* ECF No. 20-1 at 12-20, ¶¶ 40-63.[2] To carry its burden at the summary judgment

[2] Prior to ICE's filing of its Motion for Summary Judgment, counsel for both parties conferred and agreed that ICE may use a representative sample of the more than 6,000 pages of documents it released to create a *Vaughn* index. The parties further agreed upon the specific sample ICE could use. To the extent ICE's Declaration and *Vaughn* index inadequately explain the agency's withholding of finalized USC Claims Memos because none are included in the agreed upon sample, Plaintiff does not oppose submission by ICE of a supplemental *Vaughn* index providing

stage, an agency must submit a reasonably detailed nonconclusory affidavit containing establishing a connection between the exemptions the agency invokes and the documents it withholds. *See, e.g.*, *Rubman v. U.S. Citizenship & Immigration Services*, 800 F.3d 381, 388 (7th Cir. 2015). An affidavit or *Vaughn* index that provides too general a description of records and fails to specifically explain the rationale for withholding fails. *See, e.g.*, *Santos v. DEA*, 357 F. Supp. 2d 33, 37-48 (D.D.C. 2004); *Cozen O'Connor v. U.S. Dep't of Treasury*, 570 F. Supp. 2d 749, 771 (E.D. Pa. 2008).

Here, the Pavlik-Keenan Declaration and *Vaughn* index address only the withholding of "draft versions of legal memos created by ICE attorneys." Decl. ¶ 44. *Vaughn Index*, ECF No. 20-1 at 3. Though ICE released a significant number of finalized USC Claims Memos, the agency makes no attempt to justify its categorical withholding of their contents under Exemption (b)(5). Without such justification, the Court cannot grant summary judgment as to this category of withheld records. *Enviro Tech Int'l, Inc. v. EPA*, 371 F.3d 370, 374 (7th Cir. 2004).

B. Finalized USC Claims Memos Are Not Exempt under (b)(5).

Even assuming ICE's declaration and *Vaughn* index are sufficiently broad to encompass finalized USC claim memos, the agency fails to demonstrate that Exemption (b)(5) properly applies to the entirety of each document, as claimed.

1. *The Deliberative Process Privilege Does Not Apply to USC Claims Memos.*

ICE contends USC Claims Memos fall within the deliberative process privilege and properly withheld under Exemption (b)(5). ECF No. 20-1 at 13-14, Pavlik-Keenan Decl. ¶¶ 42-44; *Vaughn Index* at 3-4. To fall within the deliberative process privilege, the material in question

additional detail or justification for these withholdings. *See Beltranena v. U.S. Dep't of State*, 821 F. Supp. 2d 167, 178 (D.D.C. 2011).

must satisfy two prongs: (1) it must be pre-decisional, meaning that the material is "antecedent to the adoption of an agency policy"; and (2) it must be deliberative, that is "actually ... related to the process by which policies are formulated." *Id*. (*quoting Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (*en banc*) (internal alterations omitted)). The agency "bears the burden of proving what deliberative process was involved and what role the document played in that process." *King v. Internal Revenue Serv*., 684 F.2d 517, 519 (7th Cir. 1982).

As set forth in ICE Policy Directive 16001.2, USC Claims Memos are not an agency policymaking enterprise. *See* ECF No. 20-, Ex. 3 - ICE Policy Directive at 1. ("Policy: It is ICE policy to carefully and expeditiously investigate and analyze the potential U.S. citizenship of individuals encountered by ICE.") *See also id. at* 3 ("3.2 Probative Evidence of U.S. Citizenship. A unique policy standard adopted by ICE meaning that the evidence before the agency tends to show that the individual may, in fact, be a U.S. citizen.") Rather, they are the reflection, and, in the case of finalized USC Claims Memos, the culmination, of the agency's application of law to facts. *See id.* ("4.2 [ICE Supervisory Officials] . . . are responsible for providing appropriate supervisory oversight to ensure officers, agents and attorneys in their respective offices **comply with the policy** (see section 2) and procedures (see section 5) prescribed in this Directive." USC Claims Memos are not policymaking documents, but rather, the mandated result of a post-decisional policy process. *See Stevens v. United States Dep't of Homeland Security,* No. 13-c-3382, 2014 WL 5796429 (N.D. Ill. Sept. 4, 2014) (Castillo, J.) ("The Court cannot discern how the [records] at issue in this case pertain to the adoption of any agency policy."). Accordingly, they are not exempt under the deliberative process privilege.

Even if this Court accepted ICE's invitation to assume that the agency makes agency policy affecting each individual's citizenship on a case-by-case basis, finalized USC Claims Memos are

post-decisional, and thus, not subject to withholding under Exemption (b)(5). *See NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 152 (1975). ECF No. 20-1 at 8, Pavlik-Keenan Decl. ¶¶ 25, 33.

2. *The Attorney Work-Product Privilege Does Not Categorically Apply to Finalized USC Claims Memos*.

The work-product privilege does not categorically apply to finalized USC Claims Memos because the memos are not prepared in anticipation of litigation, but rather, as a result of a mandatory policy process by which ICE assesses its own jurisdiction to engage in enforcement action against an individual. The mere fact that litigation might occur as a result of ICE's improper targeting of U.S. Citizens is insufficient to trigger the protections of the work-product privilege. *Senate of Puerto Rico v. Dep't of Justice*, 823 F.2d 574, 587 (D.C. Cir. 1987).

Documents created pursuant to ICE Policy Directive 16001.2 are created in the ordinary course of business, and thus, are not work-product protected. *See Hennessy v. U.S. AID*, No. 97-1113, 1997 WL 537998 at * 6 (4th Cir. Sept. 2, 1997); *Zander v. DOJ*, 885 F. Supp. 2d. 1, 11 (D.D.C. 2012); *Hill Tower, Inc. v. Dep't of the Navy*, 718 F. Supp. 562 (N.D. Tex. 1988). To convert any mandatory document implementing ICE policy and procedure into work-product simply because it may one day be litigated would substantially expand the scope of the work-product doctrine and Exemption (b)(5). Because FOIA exemptions must be construed narrowly, such expansion is impermissible.

3. *The Attorney-Client Privilege Does Not Justify Categorical Withholding of Finalized USC Claims Memos*.

In addition to not satisfying the contemplated-litigation requirement necessary to trigger attorney-client privilege protection, finalized USC Claims Memos are at least partially disclosable notwithstanding Exemption (b)(5) for at least three other reasons. First, it is axiomatic that purely factual material is not covered by the attorney-client privilege. *Upjohn Co.*

v. U.S., 449 U.S. 383, 395 (1981). Consequently, ICE's attempt to withhold the entirety of the factual sections of finalized USC Claims Memos, including facts obtained from third parties, fails to comport with the requirement that Exemption (b)(5) withholdings be given the "same meaning" in "both discovery and FOIA contexts." *Zander v. DOJ*, 885 F. Supp. 2d 1, 15 (D.D.C. 2012). *See also FTC v. Grolier, Inc.*, 462 U.S. 19, 26 (1983). In this respect, as with ICE's other (b)(5) withholdings, the agency has failed to demonstrate that all reasonably segregable non-exempt material responsive to Professor Stevens' request has been disclosed. *See Nickerson v. United States*, No. 95-C-7395, 1996 WL 563465 *3 (N.D. Ill. Oct. 1, 1996) (requiring segregation of factual information).

Second, finalized USC Claims Memos become, according to the ICE's terms, the "resulting decision" of the agency's process. That decision has practical consequences for individuals targeted by ICE, and it is the law and facts contained within the final decision that will ICE will subsequently use as the agency's policy toward these individuals. Consequently, the finalized memoranda are converted into agency positions, which are not subject to withholding. *See Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967, 971-73 (7th Cir. 1977); *Rockwell Int'l Corp. v. DOJ*, 235 F.3d 598, 603 (D.C. Cir. 2001). *See also Judicial Watch, Inc. v. HHS*, 27 F. Supp. 2d 240, 245 (D.D.C. 1998).

Third, the policy considerations underlying the attorney-client privilege are inapplicable in the USC Claims Memos context. That is because ICE has a mandatory legal duty to avoid engaging in enforcement activity against U.S. Citizens. The guarantee of disclosure, and of continued public scrutiny from Professor Stevens, the Deportation Research Clinic, and others with whom she collaborates, will ensure that patently inadequate or disingenuous legal interpretations are not advanced and allowed to fester within the agency's USC claims process.

IV. CONCLUSION

For the foregoing reasons, ICE's motion for summary judgment should be DENIED in PART. In the alternative, the Court should enter and Order requiring ICE to submit a supplemental Declaration and *Vaughan* Index justifying its withholding of finalized USC Claims Memos.

Dated: June 8, 2018

Respectfully submitted,

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