

purely historical occurrence; new stories surface frequently of egregious rights violations resulting in the detention or deportation of U.S. Citizens.⁴ In recent years, lawsuits and public reporting has increasingly revealed the systemic breakdowns by U.S. Immigration Customs Enforcement (“ICE”) and other Department of Homeland Security (“DHS”) personnel.⁵

All indications point to this trend increasing in the near future. The current President of the United States explicitly campaigned on an immigration enforcement program modeled after the one implemented President Dwight D. Eisenhower under the name “Operation Wetback” that similarly dispossessed thousands of American citizens through rapid-fire, militarized deportations

⁴ See, e.g., Caitlin O’Kane, “U.S. citizen detained for a month by immigration officials being released, law firm says,” CBS News (Jul. 23, 2019) available at <https://www.cbsnews.com/news/a-united-states-citizen-has-been-detained-by-immigration-authorities-for-nearly-a-month/>; Anna Hopkins, “Marine vet with PTSD held by ICE for 3 days before agency realized he was a citizen,” Fox News (Jan. 19, 2019) available at <https://www.foxnews.com/us/marine-vet-with-ptsd-held-by-ice-for-3-days-before-agency-realized-he-was-citizen>; Gwen Filosa, “This Keys man was nearly deported to Jamaica. The problem? He’s from Philly,” Miami Herald, (Dec. 3, 2018) available at <https://www.miamiherald.com/news/local/community/florida-keys/article222557500.html>; Gabrielle Bluestone, “ICE detained a U.S. citizen for almost 3 weeks,” Vice News (Mar. 31, 2017) available at https://www.vice.com/en_us/article/bjd4nz/ice-detained-a-u-s-citizen-for-almost-three-weeks; Jeremy Redmon, “Georgian arrested in immigration raid says she is U.S. citizen,” The Atlanta Journal-Constitution, (Mar. 8, 2017) available at <https://www.ajc.com/news/national-govt--politics/georgian-arrested-immigration-raid-says-she-citizen/nKgMWkmAPCrLbSOBObTrpM/>.

⁵ See, e.g., *Citizens on Hold: A Look at ICE’s Flawed Detainer System in Miami-Dade County*, ACLU of Florida (Mar. 20, 2019) available at https://www.aclufl.org/sites/default/files/field_documents/aclufl_report_-_citizens_on_hold_-_a_look_at_ices_flawed_detainer_system_in_miami-dade_county.pdf (documenting 420 ICE detainer requests lodged against individuals listed as U.S. Citizens in 24-month period a Miami-Dade County); David Bier, *U.S. Citizens Targeted by ICE: U.S. Citizens Targeted by Immigration and Customs Enforcement in Texas*, Imm. Research and Policy Br. No. 8, Cato Institute (Aug. 29, 2018) available at <https://www.cato.org/publications/immigration-research-policy-brief/us-citizens-targeted-ice-us-citizens-targeted> (documenting 814 detainer requests targeting U.S. Citizens jailed in Travis County, Texas over a 12-year period).

to Mexico.⁶ Making good on that promise, in July 2019, the Department of Homeland Security (“DHS”) published a Notice in the Federal Register purporting to give ICE officials the authority to deport vast numbers of suspected non-citizens without the benefit of any opportunity for administrative or judicial review. U.S. Department of Homeland Security, Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (Jul. 23, 2019). As the numbers of ICE encounters with potential U.S. Citizens continue to increase and ICE sharply curtails access to reviewing deportation orders, systematic inspection of ICE’s procedures that result in the arrest and release of U.S. Citizens is increasingly vital to the integrity of American democracy and the Constitution. and ICE seeks to reduce the time and independent review avenues individuals will have to challenge their deportations, interrogating the effectiveness of the process ICE uses to assess whether the targets of its enforcement operations are U.S. Citizens becomes increasingly important.

That is precisely what Plaintiff Jacqueline Stevens endeavored to do when she filed the Freedom of Information Act (“FOIA”) request that is the subject of this lawsuit. Because ICE has failed to conduct an adequate search and improperly withheld agency records, she now seeks summary judgment enjoining the agency’s unlawful withholdings.

II. Facts

A. ICE’s Epidemic of Lawlessly Detaining and Deporting U.S. Citizens.

Nearly every day, in nearly every community where ICE conducts immigration enforcement activities, U.S. government officials erroneously—and unlawfully—request or otherwise cause the

⁶ See Dara Lind, “Operation Wetback, the 1950s immigration policy Donald Trump loves, explained,” Vox.com (Nov. 11, 2015) available at <https://www.vox.com/2015/11/11/9714842/operation-wetback> (last visited Aug. 13, 2019).

detention of United States Citizens (“USCs”). Plaintiff’s L.R. 56.1 Statement (“Pl.’s 56.1”), ¶ 1. These detentions range in time and legal consequence from relatively brief extensions of federal, state, or local criminal custody pursuant to ICE detainer requests before ICE officials realize their error, to years-long ordeals spent in federal immigration prisons or abroad while executive branch officials and federal courts adjudicate the deportation proceedings ICE initiates and prosecutes. Pl.’s 56.1 ¶ 2. In the most egregious cases, ICE deports or denies re-entry into the United States at least hundreds and, more likely, thousands of citizens of the United States of America. Pl.’s 56.1 ¶ 3; n.3 *supra*.

Though ICE has created a formal process aimed at identifying potential U.S. Citizens and promptly making threshold jurisdictional decisions about whether to detain or initiate deportation proceedings against them, the agency keeps no known, publicly available tally of how many U.S. Citizens its enforcement activities ensnare for detention, deportation, and permanent exclusion each year. Pl.’s 56.1 ¶ 4. While detention or deportation of a U.S. Citizen represents a systemic failure by ICE to operate within the bounds of its Constitutional and statutory authority, as well as a misuse of taxpayer dollars, ICE offers the public and policymakers no comprehensive data shedding light on how often this waste and misuse occurs. Pl.’s 56.1 ¶ 4.

B. Professor Stevens’ Work Documenting the Epidemic.

Professor Stevens has engaged in extensive, groundbreaking research, documentation, and writing on ICE’s unlawful detention and deportation of U.S. Citizens for nearly a decade. Pl.’s 56.1 ¶ 5. Based in part on the exposure by Professor Stevens of U.S. Citizens detained and deported first in articles in *The Nation* magazine and then on her blog, States Without Nations (<https://stateswithoutnations.blogspot.com>), that produced real-time reports of endemic and widespread pattern of ICE unlawfully detaining and deporting U.S. Citizens as “aliens”, ICE

formalized a reporting and review process for evaluating whether those in ICE custody had indicia of U.S. citizenship. Pl.'s 56.1 ¶ 6. Because of the public role Professor Stevens plays in documenting and exposing erroneous detention and deportation of U.S. Citizens by ICE, she is frequently contacted by affected immigration attorneys, civil litigators, and immigration judges who encounter detained or deported U.S. Citizens, and, nearly as often, by the affected individuals or their families. L.R. 56.1 ¶ 7. Professor Stevens estimates she has been contacted by scores of apparent U.S. Citizens who were arrested, detained, or deported, and in some cases, even criminally prosecuted by the Department of Justice for crimes like illegal re-entry and even making a false claim to U.S. citizenship. Pl.'s 56.1 ¶ 7

Government records obtained through FOIA shedding light on ICE's responses to indicia of U.S. citizenship have been vital to Professor Stevens' research, writing, and scholarship. For instance, in February 2010, Professor Stevens filed a FOIA request seeking the contents of the U.S. Citizenship claims e-mail inbox maintained by ICE. Pl.'s 56.1 ¶ 8. After negotiating with ICE to receive the 100 most recent pages in exchange for a prompt release, ICE on May 10, 2010, produced USC claims memoranda that contained some redactions for (b)(5), but left significant portions of the Facts Sections unredacted, and the legal analysis reasonably segregated. *Id.* That data, in turn, fed into her scholarly and popular writings on the issue, which have helped to shape the public debate. Pl.'s 56.1 ¶ 4-6.

C. Professor Stevens' FOIA Request.

To assess how ICE was responding to U.S. citizenship claims received after January 2017, and to compare that assessment with records from the previous administration, Professor Stevens filed a nearly identical FOIA request in February 2017. Specifically, on February 13, 2017, Professor Stevens submitted a FOIA request for "all correspondence on the detention or removal proceedings

for people claiming or proving U.S. citizenship since January 1, 2017.” Compl. ¶ 12. The request “includes, *but is not limited to* email received by or sent to an email address established by ICE for the purpose of assessing claims of U.S. citizenship.” (emphasis added). *Id.* Professor Stevens specifically requested “all correspondence as well as attachments and referenced reports, notes, text messages, or any other information maintained in any medium associated with the reported cases.” *Id.*

D. ICE’s Search.

“On March 4, 2017, ICE’s FOIA office determined that the Office of Principal Legal Advisor (“OPLA”) and ICE Enforcement and Removal Operations (“ERO”) were the offices reasonably likely to have records responsive to the request and that no other ICE program offices were likely to have responsive records.” Pl.’s 56.1 ¶ 9. On March 22, 2017, the ICE FOIA Office tasked OPLA to search for records responsive to Prof. Stevens’ requests. Pl.’s 56.1 ¶ 10 (ECF No. 20-1 Pavlik-Keenan Decl. ¶ 27). An OPLA point-of-contact determined that the Field Legal Office (“FLO”) and the Immigration Law and Practice Division (“ILPD”) were the only offices within OPLA likely to have responsive records and tasked these offices with the searches. Pl.’s 56.1 ¶ 11. IPLD tasked all line attorneys and FLO tasked all 26 ICE Office of Chief Counsel (“OCC”) locations with conducting searches for records responsive to Plaintiff’s FOIA request. Pl.’s 56.1 ¶ 12.

Also on March 22, 2017, ICE tasked ERO’s Information Disclosure Unit (“IDU”) with responding to Plaintiff’s request. Pl.’s 56.1 ¶ 13. The IDU point of contact, in turn, determined that ERO’s search should be conducted at the headquarters level and tasked the Unit Chief of Domestic Operations Division who monitors the USC Claims Inbox. Pl.’s 56.1 ¶ 14. Apparently determining that either (a) the scope of Plaintiff’s FOIA request for correspondence about U.S. Citizenship claims was limited to her request for contents of the USC Claims inbox; or (b) no other

ERO records responsive to her request would be reasonably likely to be located outside the USC Claims inbox, the Unit Chief of Domestic Operations informed the ICE FOIA Office on May 7, 2017 that because OPLA shares monitoring of the USC Claims inbox, separate review and production by ERO would be “an unnecessarily duplicative effort.” Pl.’s 56.1 ¶ 15.

ICE ERO operates a Law Enforcement Support Center (“LESC”) that employs deportation officers who “help coordinate law enforcement actions, create actionable leads for field offices *and investigate U.S. citizenship claims*, serving as checks and balances for the agency.” Pl.’s 56.1 ¶ 16. Based in Williston, Vermont, the LESC serves as a “central point of contact for a number of special information requests,” including “investigation of ICE detainee claims to U.S. citizenship.” Pl.’s 56.1 ¶ 17. ICE and the LESC have created a hotline for detained individuals to call if they believe they are U.S. citizens. Pl.’s 56.1 ¶ 18. The LESC’s SOP dictate that if “a caller made a United States citizen claim . . . the caller’s information must immediately be forwarded to the ERO field office victim/witness email inbox with the specific subject heading of ‘Immediate review needed: USC claim.’” Pl.’s 56.1 ¶ 19. The LESC’s victim/witness email inbox list provides separate email addresses for 24 separate ICE field offices. Pl.’s 56.1 ¶ 20.

E. ICE’s Response and Withholdings.

In May 2017, ICE received 6,042 pages of responsive documents from the agency. Pl.’s 56.1 ¶ 21. After conferral, ICE subsequently released an additional waiver of attachments that were not previously produced between January 23, 2018 and April 23, 2018. *Id.* In total, ICE released 5,121 pages of records to Professor Stevens. An additional 922 of pages have been withheld in full, including 158 pages identified as “duplicates” and 17 pages ICE referred to other agencies. *Id.* The responsive records consist primarily of draft and finalized U.S. Citizenship Claims Memoranda

(“USC Claims Memos”), email correspondence between OPLA attorneys and other unknown recipients, and attachments to email correspondence. Pl.’s 56.1 ¶ 22.

ICE’s production contains a total of 348 USC Claims Memos. Pl.’s 56.1 ¶ 3. Professor Stevens endeavored to identify duplicate versions of the same memorandum based on details such as dates, locations, and document appearance. Pl.’s 56.1 ¶ 23. Within this dataset, 31 dated USC Claims Memos when de-duplicated, appear to represent the cases of 14 separate, unique individuals. L.R. 56.1 ¶ 24. After de-duplication, Professor Stevens identified 14 dated and 26 undated memos, encompassing a total of 40 unique cases for which ICE released a total of 148 USC Claims Memos. Pl.’s 56.1 ¶ 25. *See* Table 1 Below. Because the remaining 200 USC Claims Memos in the 348-Memo dataset do not appear to be duplicates, Professor Stevens believes ICE’s release involves the cases of 240 separate individuals whose U.S. Citizenship Claims OPLA analyzed from the period specified in her request, which begins on January 1, 2017 or January 17, 2017, depending on how ICE construed her request.⁷ Pl.’s 56.1 ¶ 26.

Table 1: De-Duplicated USC Claims Memos – Dated and Undated			
Type of USC Claims Memo	Total Number	Apparent Individual Cases	Apparent Duplicates
Dated	31	14	17
Undated	117	26	91
Totals	148	40	108

⁷ The language of Plaintiff’s FOIA request is ambiguous as to the date range she requested ICE to begin its search on: While the opening paragraph specifies a date range of January 1, 2017, later in the request she specifies January 17, 2017 as the requested beginning date.

ICE thus appears to have produced a total of 240 unique individual USC Claims Memos during the roughly 128-day period from January 17, 2017 to May 24, 2017. *See* Table 2. This averages out to a total of 1.87 individual cases per day and 2.71 USC Claims Memos per day. It is unclear at this point how many of the released Memos are drafts and how many are finalized and approved versions. Pl.'s 56.1 ¶ 27.

Table 2: Unique USC Claims Memos January 17, 2017 – May 24, 2017 (128 days)				
Individual Cases with Duplicate Memos	Individual Cases without Duplicate Memos	Total USC Claims Memos	Average Individual Cases / Day	Average Memos / Days
40	200	240	1.875	2.71875

The remaining records ICE released are composed of sometimes heavily redacted email correspondence, often with the domain names for senders and receipts completely redacted, as well as attachments to emails that vary in the levels of redaction.

ICE has filed three declarations to date describing its search for and withholding of responsive records, including one following this Court's February 20, 2019, Order on ICE's Motion for Summary Judgment. *See* ECF No. 20-1 Pavlik-Keenan Decl.; ECF No. 35-1, Second Pineiro Decl.; ECF No. 41-1 Supp. Pine[i]ro Decl..

F. The ILPD Records Obtained Through a Separate FOIA Request.

After the Court issued its February 2019 Order in this case, Professor Stevens obtained records from ILPD through a separate FOIA request and litigation that she believes reflect a significant volume of responsive records that are missing from ICE's production. Pl.'s 56.1 ¶ 28. Specifically, ICE provided professor Stevens documents reflecting ILPD's analysis of the time it takes government lawyers to review USC Claims Memos. Pl.'s 56.1 ¶ 29. These records indicate that according to ILPD's analysis, between January 1, 2017 and March 31, 2017, ILPD reviewed

a total of 243 individual cases of potential US Citizens. Pl.’s 56.1 ¶ 30. That is, during this 80-day period, ICE produced individual USC Claims Memos at a rate of 3.0375 per day. Elsewhere in the ILPD FOIA documents, government officials report reviewing the claims of 675 individuals between October 1, 2016 and June 30, 2017 – a total of 273 per day. Pl.’s 56.1 ¶ 31.

Table 3: ICE’s FOIA Production vs. IPLD Records			
ICE’s Production in this Case		ILPD’s Production in <i>Stevens v. BBG</i>	
Total Individual USC Claims	Average USC Claims Per Day (1/17/2017-5/24/2017)	Total Individual USC Claims	Average USC Claims per Day (1/1/2017-3/30/2017)
240	1.875	243	3.0375

Based on the data in the ILPD production and the average number of daily claims ILPD reviewed during the 80-day period from January 1, 2017 – March 30, 2017, Professor Stevens extrapolates that a total of roughly 388.8 individual cases would be expected during the 128-day period from January 17, 2017 through May 24, 2017 encapsulated in her request. Pl.’s 56.1 ¶ 32. It thus appears from the data Professor Stevens has been provided that as many as four in ten of the USC Claims Memos responsive to her request were not produced. *See* Table 4 below.

Table 4: Expected Number of Individual USC Claims vs. Individual USC Claims ICE Produced			
Expected (1.87/day x 128 days)	Produced	Difference in Expected vs. Produced	% of Expected USC Claims Produced
388.8	240	148.8	61.7284%

Professor Stevens also compared the total number of individual USC Claims ILPD reported from the 273-day period beginning October 1, 2016 and continuing through June 30, 2017, which ILPD’s records note is 675, against the total number of individual USC claims produced during

the search period in this case. ILPD's records reflect an average of 2.47 individual USC Claims reviewed per day for that period. On the other hand, the records produced by ICE in this case reflect a total of only 1.87 per day.

Table 5: Expected Number of Individual USC Claims vs. Individual USC Claims Processed by ILPD in FY17 through 6/30/2017				
USC Claims ILPD Reviewed between 10/1/16 and 6/30/17	USC Claims ILPD Reviewed per day between 10/1/16 and 6/30/17	Expected Individual Claims During 1/17/17-5/24/17 based on FY17 ILPD Averages	Number of Individual USC Claims Produced by ICE for 1/17/17-5/24/17	% Difference between Claims Expected and Claims Produced
675	2.47	316.16	240	75.91%

Based on these two metrics, Professor Stevens estimates that between 25% and 40% of the expected Individual USC Claims Memos for the relevant time period are absent from ICE's production in this case.

III. Legal Standard

To prevail on her motion for summary judgment, Professor Stevens bears the burden of demonstrating the absence of any genuine issue of material fact and that she is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Because of the "asymmetrical distribution of knowledge" in 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), ICE bears the burden of establishing that its search was adequate and each of its asserted withholdings are proper. *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). ICE bears this burden notwithstanding the fact that it is Plaintiff who has moved for partial summary judgment. *See* 5 U.S.C. § 552(a)(4)(B). At this stage of the proceedings, 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)).

There is a strong presumption in favor of disclosure under the FOIA. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). Consequently, each of the nine categories of exemptions under the FOIA pursuant to which agency records may be redacted or withheld in their entirety must be “narrowly construed.” *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Consequently, whenever the agency invokes a FOIA exemption, the burden is on the defendant agency to demonstrate, not the requestor to disprove, that the materials sought may be withheld due to an exemption. *Ray*, 502 U.S. at 173. *See also AquAlliance v. U.S. Bureau of Reclamation*, 856 F.3d 101, 102–03 (D.C. Cir. 2017). “The agency’s decision that the information is exempt from disclosure receives no deference; accordingly, the district court decides de novo whether the agency has sustained its burden.” *Bloomberg, L.P. v. Board of Governors of the Federal Reserve System*, 601 F.3d 143, 147 (2d Cir. 2010).

IV. Argument

A. ICE Failed to Conduct an Adequate Search.

Professor Stevens is entitled to summary judgment on her claim that ICE violated the FOIA by failing to conduct an inadequate search. She seeks an injunction requiring ICE to re-task searches to all likely custodians of records. ICE must show “beyond material doubt that its search was reasonably calculated to uncover all relevant documents.” *Valencia-Lucena v. U.S. Coast Guard*, 180 F.2d 321, 325 (D.C. Cir. 1999). To obtain summary judgment on the adequacy of ICE’s search, Plaintiff Stevens must demonstrate that ICE “might have discovered a responsive document had the agency conducted a reasonable search.” *Patterson v. I.R.S.*, 56 F.3d 832, 841 (7th Cir. 1995) (quoting *Maynard v. CIA*, 986 F.2d 547, 559 (1st Cir. 1993)). If Stevens can show

“some reason to think that the document would have turned up if the agency had looked for it,” ICE must re-task its search. *Patterson v. I.R.S.*, 56 F.3d at 841 (quoting *Weisberg v. U.S. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). While mere speculation by a requestor typically will not suffice to demonstrate the agency’s search was inadequate, *see, e.g., Wilber v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004), evidence of that additional responsive documents actually exist necessitates an inquiry into whether the search itself was diligent. *See Miller v. Dep’t of State*, 779 F.2d 1378, 1382 (8th Cir. 1982).

In this case, the ILPD records regarding ICE’s processing of claims to U.S. citizenship during the search period that Professor Stevens obtained through a separate FOIA request reflect significantly more USC Claims Memos were created by ICE than the number disclosed to Professor Stevens in this litigation. This indication of a substantial number of memoranda missing from ICE’s production calls into question the reasonableness of the agency’s search. So too does ERO’s failure to task the LESC with searching for any responsive records, despite Standard Operating Procedures reflecting LESC’s unique role in receiving and tasking ERO Field Offices with investigations into indicia of U.S. citizenship. The Declarations submitted by ICE thus far do not account for the discrepancy in expected individual U.S. citizenship claims or the decision not to task the LESC. Consequently, the agency cannot bear its burden of proving it tasked a search reasonably calculated to produce responsive records. Professor Stevens is thus entitled to summary judgment on her search adequacy claim.

B. ICE Improperly Withheld Agency Records.

- i. The Supplemental Pineiro Declaration and Vaughn Index Do Not Satisfy the Requirements of Fed. R. Civ. P. 56(c)(4).

To rely on the Supplemental Pineiro Declaration and *Vaughn* Index, ECF No. 41-1, to prove it properly withheld responsive agency records—and particularly, that ICE’s redactions to portions

of finalized USC Claims Memos are proper under Exemptions b(5), b(6), and b(7)(C)—ICE must establish that Mr. Pineiro based his statements on personal knowledge, that the facts set forth therein would be admissible in evidence at trial, and that Mr. Pineiro is competent to testify on the matters stated. Fed. R. Civ. P. 56(c)(4). Particularly with respect to descriptions of the USC Claims Memo and USC Claims process, ECF No. 41-1 ¶¶ 6-18, ICE fails to establish the factual assertions of Mr. Pineiro are based on personal knowledge, and fails to put forward evidence that would be admissible in court.⁸ Unlike his explanations of the ICE FOIA Office’s procedures, Mr. Pineiro does not meaningfully attempt to explain the basis of his personal knowledge regarding the averments about the purposes and uses of finalized USC Claims Memos. *See Katzman v. CIA*, 903 F. Supp. 2d 434, 438-39 (E.D.N.Y. 1995); *Homer J. Olsen, Inc. v. U.S. DOT Fed. Transit Admin.*, No. 02-00673, 2002 WL 31738794, at *5 n.4 (N.D. Cal. Dec. 2, 2002).

ii. ICE Failed to Reasonably Segregate Non-Exempt information from Finalized USC Claims Memos.

Finalized U.S.C. Claims Memoranda are not exempt from disclosure under Exemption b(5) because they are not covered by the deliberative process privilege (“DPP”). *Cf.* ECF No. 41-1 at 9, ¶¶ 25-26.⁹ FOIA’s protection for deliberative materials exists to encourage frank, open discussions on matters of policy between subordinates and superiors; protect against premature disclosure of proposed policies, and protect against public confusion. *Russell v. Dep’t of the Air Force*, 682 F.2d 1048 (D.C. Cir. 1982). It covers internal, pre-decisional discussions about policy decisions that have yet to be made. To qualify for the deliberative process privilege, an intra-

⁸ Plaintiff does not content the sufficiency of the Supplemental Declaration as to his description of the steps ICE took to respond to Plaintiff’s request.

⁹ Plaintiff anticipates that ICE will file a fourth declaration and *Vaughn* Index in its Response addressing the specific concerns raised in her Motion, and setting forth the agency’s justifications for why it has met its burden under the FOIA to justify each withholding. She reserves the right to address averments in those new materials in the context of her Reply Brief.

agency memorandum must be both pre-decisional and deliberative. *See Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C.Cir.1980). “A document is ‘pre-decisional’ if it precedes, in temporal sequence, the ‘decision’ to which it relates.’ *Senate of the Commonwealth of Puerto Rico v. Department of Justice*, 823 F.2d 574, 585 (D.C. Cir.1987). And a document is deliberative if it is ‘a part of the agency give-and-take—of the deliberative process—by which the decision itself is made.’ *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975).

In this case, finalized USC Claims Memos are not protected by the deliberative process privilege because they are neither pre-decisional nor are they discussions regarding matters of agency policy. Section 5.1 ICE Policy Directive 16001.2 requires that Headquarters make a determination for how ICE will proceed in each individual’s case – i.e., whether to continue detention and/or prosecution of a person – based on the analysis in the USC Claims Memos, and to then take and document specific, immediate action regarding that determination. The memorandum, once approved by Headquarters, thus reflects the decision the agency made, not the deliberations about the decision. Moreover, the analysis USC Claims Memos do not reflect ICE’s deliberations regarding agency policy as to treatment of U.S. Citizens or how ICE as an agency will determine whether a person meets the necessary criteria to become as U.S. Citizen. Rather, the analysis is, or at least should be, an application of pre-existing agency law and policy to facts— not a deliberation regarding what the agency law and policy will be. *See, e.g.*, ECF No. 30 at 58-59. In sum, the finalized USC Claims Memos do not fall within the deliberative process privilege.

The Supplemental Pineiro Declaration similarly fails to carry the agency’s burden of showing it has reasonably segregated non-exempt material that is not subject to withholding under Exemption b(5) pursuant to the attorney-client privilege and the attorney work-product doctrine. As to attorney-client privilege, the factual matter in the USC Claims Memos comes not just from

ICE attorneys' 'clients' – i.e., ERO field officers – but far more often, from the potential U.S. Citizen him or herself. *See, e.g.*, ECF No. 30 at 11, 14, 17-18, 22-23, 26-27, 30, 33, 37-38, 40, 45-46, 51, 56. Further, as ICE Policy Directive 16001.2 lays out, the purpose of USC Claims Memos is to expeditiously determine whether the agency will continue pursuing enforcement action against an individual with indicia of U.S. citizenship. The fact that these memos may be used in subsequent litigation does not mean that this was their purpose. Indeed, ICE frequently releases its USC Claims Memos in the context of litigation – a practice at odds with Mr. Pineiro's statements regarding privilege and internal agency use. Finally, the databases listed in Section 6, Recordkeeping, of ICE Policy Directive 16001.2 as the locations where ICE will store finalized USC Claims Memos are not limited to internal agency use. Rather, as the System of Records Notices for the Alien File, Index, and National Tracking System, GEMS, and ENFORCE reflect, officials outside ICE will have access to the finalized USC Claims Memos once they are uploaded to these systems as required by the Policy.

ICE's three declarations fail to meaningfully weigh the public interest in releasing portions of USC Claims Memos that implicate individual privacy interests in the Exemption b(6) and b(7)(C) justifications. The dire personal and public policy implications of ICE consistently getting the analysis in USC Claims Memos wrong, combined with the apparently high error rate in ICE's enforcement activities against potential U.S. Citizens and the practical reality that ICE's ramped up expedited removal regime will remove both immigration courts and federal judges as an automatic check against the agency's legal analysis, means that the public interest weighs heavily in favor of the fulsome disclosure and narrow construction of exemptions that the FOIA requires.

In sum, Professor Stevens is entitled to summary judgment that ICE has failed to reasonably segregate non-exempt portions of the finalized USC Claims Memos.

iii. Email Materials

Professor Stevens also challenges the sufficiency of ICE's present justifications for withholding reasonably segregable, non-exempt portions of agency records from emails and attachments. For example, ICE has apparently withheld the domain names following all email addresses (e.g., @ice.dhs.gov), making it impossible to determine whether recipients of responsive documents were agency employees, and thus, testing ICE's assertion that USC Claims Memoranda are for "internal use only." ICE also makes blanket redactions on hundreds of pages of emails that appear from their context to include segregable material. Plaintiff therefore seeks an order requiring

iv. Attachments

Professor Stevens further challenges ICE's decision to withhold in full and to not segregate attachments pursuant to Exemptions b(5), b(6), and b(7)(C). She will address specific justifications put forward by ICE in the context of her Reply.

C. Professor Stevens Did Not Waive Her Right to Ensure ICE Fulfills Its Obligations under the FOIA.

Professor Stevens anticipates ICE may contend she has waived any challenge to the agency's search and the resulting productions because she did not raise these issues in opposition to ICE's first motion for summary judgment. This contention is incorrect. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Rubman v. USCIS*, 800 F.3d 381, 392 (7th Cir. 2015) (quoting *Johnson v. Zerbst*, 304 U.S. 458 (1938)). As the Seventh Circuit has observed, "[a] strict waiver rule would be inappropriate in the FOIA context" because "the statute is supposed to be administered with minimal procedural formality and 'in the spirit of cooperation, recognizing that agencies are servants of the public.'" *Rubman*, 800 F.3d at 392 (quoting Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg.

4683 (Jan. 21, 2009)). Moreover, the conclusion that Professor Stevens is somehow barred from putting the agency to its burden because she elected not to do so previously would be inconsistent with the well-established, independent obligation of courts to scrutinize the agency's withholdings even where a requestor may not specifically challenge them.

To conclude otherwise would inject an irrational asymmetry between FOIA requestors and agencies. This is because agencies are free to raise FOIA exemptions and advance arguments supporting those exemptions at almost any stage, even if they do not assert those exemptions at the administrative phase, or in other proceedings that may seek their release. *See, e.g., Young v. CIA*, 972 F.2d 536, 538-39 (4th Cir. 1992) (“[A]n agency does not waive FOIA exemptions by not raising them during the administrative process.”); *Stonehill v. IRS*, 558 F.3d 534, 535 (D.C. Cir. 2009) (agency may invoke FOIA exemptions notwithstanding its failure to assert the same underlying privilege claims” in a non-FOIA discovery dispute). And while agencies may not invoke new, previously un-briefed exemptions after a court rules in a requestor's favor, *Senate of P.R. v. DOJ*, 823 F.2d 574, 580 (D.C. Cir. 1987), and so perhaps requestors should not have that option, either, that is not the procedural posture of this case.

Professor Stevens proceeded with limited-scope summary judgment briefing in the hopes that obtaining a reasonably complete set of properly redacted, finalized USC Claims Memoranda like those she previously obtained from ICE would allow her to complete and publish her latest round of research, and to arrive at meaningful conclusions about how ICE's approach to adjudicating claims to U.S. citizenship may have changed under the new regime. But given the additional, conflicting information in the Supplemental Pineiro Declaration and the additional information regarding apparent discrepancies in the numbers of USC Claims Memoranda produced during the

search period, putting the agency to its burden on both search adequacy and withholdings is the course of action most likely to serve her research needs.

V. Conclusion

For the foregoing reasons, the Court should GRANT Plaintiff's motion for summary judgment, ORDER ICE to conduct an adequate search, and ENJOIN ICE's improper withholdings in violation of the Freedom of Information Act.

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Respectfully submitted,

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