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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendant.

Case No. 15-cv-03186-MEJ

DEFENDANT'S OPPOSITION TO PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Date: May 19, 2016
Time: 10:00 a.m.
Courtroom: SF Federal Courthouse, Courtroom B, 15th Floor
Judge: Hon. Marina-Elena James

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I. INTRODUCTION

In its combined Cross Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment, Dkt. No. 23 ("Plaintiff's Motion" or "Pl. Mot.") Plaintiff Electronic Frontier Foundation ("Plaintiff") does not dispute that Defendant United States Department of Justice ("Defendant") conducted a reasonable search for responsive records. Nor does Plaintiff challenge the sufficiency of Defendant's *Vaughn* index or Ms. Myrick's supporting declaration. Plaintiff even concedes that Defendant properly withheld employee identifying information under Exemptions 6, 7(C), and 7(F). Pl. Mot. at 9, fn. 10F[1].

Rather than challenging Defendant's search efforts, *Vaughn* index, or supporting declaration, Plaintiff seems to argue that the information it seeks is important. However, that so-called "factual" argument is immaterial to the Freedom of Information Act ("FOIA") Exemptions asserted by Defendant – Exemptions 5 (civil litigation privileges), 7(A) (interference with law enforcement proceedings), 7(D)(confidential law enforcement sources), and 7(E) (law enforcement techniques) that Plaintiff contests. Plaintiff's Motion also contains numerous misstatements about the facts and the law, and speculates that criminals already know enough about Hemisphere to evade detection. Demonstrating that it harbors some doubts about the legal correctness of its position, Plaintiff concludes by asking the Court to conduct an *in camera* review.

FOIA balances the public's right to know with the government's legitimate interest in keeping certain information confidential, especially information that could reasonably be expected to interfere with law enforcement. Defendant's response to Plaintiff's FOIA request struck the appropriate balance. It provided Plaintiff with some general information about "Hemisphere" (Pl. Mot. at 9-12) but did not provide Plaintiff (and the public) with the particulars of the program that could help drug dealers and other criminals evade detection. As Defendant has made the requisite showing for all claimed Exemptions, and released all reasonably segregable information, the Court should grant Defendant's Motion for Summary Judgment and deny Plaintiff's Motion for Summary Judgment.

[1] All page references to the parties' summary judgment motions are to the Pacer page numbers.

II. ARGUMENT

A. Plaintiff's "Factual Statements" Are Immaterial and Inaccurate.

Plaintiff's inflammatory description of Hemisphere (Pl. Mot. at 9-12) does nothing to help the Court determine whether Defendant properly withheld information under the claimed Exemptions. Whether Hemisphere raises "profound Fourth Amendment questions" (Pl. Mot. at 9) is not relevant. "A requestor's purpose for requesting the documents or his intended use of the information sought does not matter under the FOIA." *Yonemoto v. Department of Veterans Affairs*, 686 F.3d 681, 691 (9th Cir. 2011). The legal standards governing the FOIA Exemptions whose application Plaintiff disputes do not require the Court to balance public and private interests. *Parker v. Dep't of Justice*, 934 F.2d 375, 380 (D.C.Cir. 1991). Although some information regarding Hemisphere may be known, "[t]here is no principle ... that requires an agency to release all details concerning [its] techniques simply because some aspects of them are known to the public[.]" *Barnard v. Dep't of Homeland Sec.*, 598 F.Supp.2d 1, 23 (D.D.C. 2009). Similarly, Plaintiff cannot (and apparently does not) argue that Defendant waived its right to withhold exempt information because entities other than DEA already disclosed the same or similar information. The release of information by one agency does not constitute an official release by another agency. *See Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999); *Hunt v. CIA*, 981 F.2d 1116, 1120 (9th Cir. 1992); *Abbotts v. NRC*, 766 F.2d 604, 607 (D.C. Cir. 1985); *Nielsen v. BLM*, 252 F.R.D. 499, 519 (D. Minn. 2008); *Talbot v. CIA*, 578 F.Supp.2d 24, 29 (D.D.C. 2008); *Van Atta v. Def. Intelligence Agency*, No. 87-1508, 1988 WL 73856, at *2 (D.D.C. July 6, 1988).

Plaintiff's Motion also contains a number of factual misstatements: First, Plaintiff's use of the phrase "DEA information" (Pl. Mot. at 10) is misleading. Although the subject records are in DEA's possession, DEA did not create most of the records.

Second, Plaintiff's statement that "DEA . . . is one of the most frequent Hemisphere requesters" (Pl. Mot. at 11) is not supported by the record. Footnote 12 of Plaintiff's Motion refers to pages 2, 4, and 16. The only statement on page 4 that refers to DEA is "Hemisphere is most often used by DEA and DHS in the Northwest HIDTA to identify replacement/additional phones." This statement does not say that "DEA is one of the most frequent Hemisphere requesters." Instead, the statement purports to

describe the most common reasons why DEA and DHS use Hemisphere in the Northwest HIDTA. The purportedly authentic graph on page 16 is clearly titled "Hemisphere Requests By Agency Northwest HIDTA 2012-2013." In other words, the statements on page 16 only purport to go to a specific period of time and a specific HIDTA and not more broadly as Plaintiff claims [2].

Third, Plaintiff's assertion that "Between 2007 and 2013, the Hemisphere Regional Center in Los Angeles alone processed over 4,400 requests involving over 11,200 phone numbers" (Pl. Mot. at 12) lacks factual support. This asserted fact has nothing to do with DEA. Plaintiff's footnote 14 ("Los Angeles Hemisphere at 4") is supposed to be the reference supporting this statement. Page 4 of Exhibit 1, however, does not say what Plaintiff claims it says; page 4 does not provide support for the time period "between 2007 and 2013." The page only states, "Since its inception in September 2007." There is no date on the first page of Exhibit 1 nor is there a date on the last page of Exhibit 1. In short, Plaintiff appears to have taken it upon itself to make up the time period.

Fourth, Plaintiff's claim that "The DEA has disseminated a model administrative subpoena form for Hemisphere" (Pl. Mot. at 11) is not established. Footnote 16 of Plaintiff's Motion is supposed to support this statement, but it does not. There is no indication on page 75 of Exhibit 7, nor, in fact, on any page in Exhibit 7, that "DEA … disseminated" anything.

Finally, Jennifer Lynch's Declaration purports to authenticate *The New York Times* article repeatedly cited by Plaintiff. Lynch states, "Attached … is a true and correct copy of a document titled, 'Los Angeles Hemisphere.' *The New York Times* published this record on September 1, 2013, and it is available on the Times website …" Although Lynch may state that the document appears on the *Times* website, she lacks personal knowledge to testify that the document is an actual document by the Office of National Drug Control Policy; nor can she authenticate the content of the document despite her statement under penalty of perjury that "I have personal knowledge of the matters stated in this

[2] Footnote 12 also inaccurately states, "the DEA was 'the lead agency' in a task force that provided Hemisphere training in 2013. *See* Ex. 5 (email of 8/5/13, from the Southern California Drug Task Force, Titled 'LA HIDTA Supervisor Training,' discussing a 'training day' including Hemisphere"). However, there is no e-mail dated "8/5/13" in Exhibit 5; the-mail is dated August 15, 2013. More importantly, there is nothing in Exhibit 5 to support Plaintiff's allegation that "the DEA was 'the lead agency' in a task force that provide Hemisphere training in 2013" -- the words "the lead agency" do not even appear on this page.

declaration. If called upon to do so, I am competent to testify to all matters set forth herein." The document is also inadmissible hearsay if offered for the truth of its content [3].

B. Plaintiff Misstates the Summary Judgment Standard

It is true that Defendant bears the burden of proving that records have been properly withheld, and courts review de novo the agency's withholdings. 5 U.S.C. Section 552(a)(4)(B). However, that does not mean that the Court must view the "facts" presented by Plaintiff in the light most favorable to Plaintiff. Plaintiff has filed its own cross motion for summary judgment. As to Plaintiff's cross motion for summary judgment, the "facts" upon which Plaintiff relies must be construed in the light most favorable to Defendant. Where parties file cross motions for summary judgment, courts apply the same summary judgment standard to each motion. *Pintos v. Pac. Creditors Ass'n.*, 605 F.3d 665, 674 (9th Cir.2010), cert. denied sub nom. *Experian Info. Solutions, Inc. v. Pintos*, 131 S.Ct. 900 (2011); *Ingram v. AAA Fire & Cas. Co.*, No. 6:12–cv–01215–AA, 2013 WL 1826350, at *2 (D.Or. Apr. 28, 2013).

C. Defendant Properly Withheld Records Under Applicable FOIA Exemptions

1. Exemption 5

a. Threshold

Plaintiff incorrectly contends that Defendant must allege and prove, as a threshold matter, that the withheld records "were not shared outside the executive branch . . . ." Pl. Mot. at 15. In *Center for International Environmental Law v. Office of the U.S. Trade Representative*, 237 F.Supp.2d 17, 25 (D.D.C. 2002), a case cited by Plaintiff, the court stated: "The terms 'inter-agency and intra-agency,' however, are not meant to be 'rigidly exclusive terms.' … The D.C. Circuit therefore has recognized that agencies often need 'to rely on the opinions and recommendations of temporary consultants' and that '[s]uch consultations are an integral part of [the agency's] deliberative process.'" Under Exemption 5, Courts have allowed agencies to protect advice generated by a wide range of outside experts providing their assistance, creating what courts call the "consultant corollary." This case fits within the "consultant corollary" recognized by the Supreme Court in *Dep't of the Interior v. Klamath Water Users*

[3] Plaintiff states that it filed an administrative appeal (Pl. Mot. at 13) but failed to inform the Court of the result of that appeal. Plaintiff's appeal was denied. *See* First Supplemental Declaration of Katherine L. Myrick in Support of Defendant's Motion for Summary Judgment.

Protective Ass'n, 532 U.S. 1, 2 (2001). *See Electronic Privacy Information Center v. DHS*, 892 F.Supp.2d 28, 45-46 (D.D.C. 2012) (consultant corollary applied to outside contractor providing security scanning equipment to the government); *Sakamoto v. EPA*, 443 F.Supp.2d 1182, 1191 (N.D. Cal. 2006) (consultant corollary applied to private contractor hired to perform audit for agency); *Citizens for Responsibility & Ethics in Wash.*, 514 F.Supp.2d 36, 44-45 (D.D.C. 2007) (protecting documents obtained from emergency management officials in Mississippi and Louisiana).

b. Attorney-Client Privilege

Defendant properly applied the attorney-client privilege prong of Exemption 5 to three documents. Defendant's description that the records contain "confidential legal advice" about Hemisphere issues is sufficiently specific and concrete to demonstrate that the privilege applies. *See*, e.g., *Performance Coal Co. v. U.S. Dep't of Labor*, 847 F.Supp.2d 6, 15 (D.D.C. 2012) (upholding an assertion of Exemption 5 based on a declaration providing a comparable level of detail); *Judicial Watch, Inc. v. U.S. Dep't of the Treasury*, 802 F.Supp.2d 185, 202 (D.D.C. 2011) (same); *Ctr. for Medicare Advocacy, Inc. v. U.S. Dep't of Health & Human Servs.*, 577 F.Supp.2d 221, 238 (D.D.C. 2008) (same); *Odland v. FERC*, Civil Action No. 13-141 (RMC), 2014 WL 1244773, at *9 (D.D.C. Mar. 27, 2014) (upholding an assertion of Exemption 5 and finding that the agency attorneys and staff involved in the communications did not have to be identified by name); *Murphy v. Exec. Office for U.S. Att'ys*, 789 F.3d 204, 209 (D.C. Cir. 2015) (noting that an agency only needs to provide "reasonably specific detail" to support application of a FOIA exemption, and the "agency's task is not herculean"); *Touarsi v. U.S. Dep't of Justice*, 78 F.Supp.3d 332, 345 (D.D.C. 2015) (rejecting an argument that an agency invoking the attorney-client privilege needed to identify the attorneys and the recipients of the advice); *Judicial Watch, Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 20 F.Supp.3d 247, 258 (D.D.C. 2014) (finding that the agency's description of a document as an "email chain in which attorneys are discussing and weighing approaches to take in possible forthcoming litigation" was specific enough to support application of the attorney client privilege).

Defendant's Motion for Summary Judgment, Dkt. No. 19 ("Defendant's Motion" or Def. Mot.") adequately addressed the documents withheld under this Exemption. Def. Mot. at 17-11. The pages of

Document 1 (pages 1-12) are covered by the attorney-client privilege because they contain confidential legal advice (albeit preliminary advice) regarding features of the Hemisphere program and do not themselves establish final policy. Document 4 (pages 16-27) is a draft memorandum prepared by an attorney in the DEA Office of Chief Counsel analyzing legal issues regarding the procedures used to obtain information through Hemisphere, intended to assist senior DEA management, and containing comments added by the same attorney regarding the same topics. This document contains a draft of confidential legal advice to the DEA and does not itself establish a final policy. Finally, the responsive portions of Document 28 (pages 256-257) consists of internal DEA e-mails dated November, 2007 entitled "Hemisphere Subpoenas" concerning Hemisphere and subpoenas to and/or from DEA attorneys. The e-mails are covered by the attorney client privilege because they contain confidential legal advice from DEA attorneys to the DEA.

c. Attorney Work-Product Doctrine

Defendant properly applied the attorney work-product prong of Exemption 5 to four records containing a total of 27 pages. Defendant did not need to identify the litigation for which the documents were prepared. *See Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 126–27 (D.C. Cir. 1987) (finding that "two memoranda analyzing the legal ramifications" of an IRS statistical sampling program were prepared in anticipation of litigation and protected by the work-product doctrine even though no specific claim had arisen at the time the memoranda were prepared). To be withheld under the attorney work-product prong of Exemption 5, a document must have been prepared by an attorney or his or her agent in anticipation of litigation. *Id.* at 126. The phrase "in anticipation of litigation" extends beyond an attorney's preparation for an existing case, and includes "documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated." *ACLU of N. Cal. v. DOJ*, 70 F.Supp.3d 1018, 1027 (N.D. Cal. 2014) (citing *Feshbach v. Sec. and Exch. Comm'n*, 5 F.Supp.2d 774, 782 (N.D. Cal. 1997), citing *Schiller v. NLRB*, 964 F.2d 1205, 1208, 296 U.S. App. D.C. 84 (D.C. Cir. 1992)), abrogated on other grounds by *Milner v. Dep't of the Navy*, 562 U.S. 562, 131 S.Ct. at 1259 (2001).

Defendant's Motion adequately addressed the documents which were withheld under this prong of Exemption 5. Def. Mot. at 9-11. Document 1 (pages 1-12) contains messages covered by the attorney work-product doctrine because they were prepared by DOJ attorneys in anticipation of litigation relating to features of the Hemisphere program and the use of Hemisphere in law enforcement investigations. Document 4 (pages 16-27) is a draft memorandum, which is covered by the attorney work-product doctrine because it was prepared by a DEA attorney in anticipation of litigation relating to the use of Hemisphere in law enforcement. Document 25 (page 110) is an e-mail concerning legal issues related to the use of Hemisphere and subpoenas. This document is covered by the attorney work-product doctrine because its creation was initiated by a DEA attorney in anticipation of litigation relating to the use of Hemisphere in law enforcement. Lastly, Document 27 (pages 253-254) consists of an internal DEA e-mail entitled "Hemisphere Subpoenas" concerning Hemisphere and subpoenas to and/or from DEA attorneys. The e-mails are covered by the attorney work-product doctrine because it was prepared by a DEA attorney in anticipation of litigation relating to the use of Hemisphere in law enforcement.

Plaintiff argues that the agency "must identify the litigation for which the document was created (either by name or through factual description) and explain why the work-product privilege applies to all portions of the document." Pl. Mot. at 18 (citing *Church of Scientology v. DOJ*, 30 F.3d 224, 237 (1st Cir. 1994)). However, Plaintiff is citing a First Circuit case, which is not binding. Despite a diligent search, Defendant could not locate any cases in the Ninth Circuit that have followed *Church of Scientology v. DOJ*. The cases cited by Defendant are more persuasive, and Defendant has sufficiently met the burden under the attorney work-product doctrine for Exemption 5 to withhold the relevant documents.

"[W]here government lawyers act 'as legal advisors protecting their agency clients from the possibility of future litigation,' the work product privilege can apply to documents advising the agency as to potential legal challenges." *ACLU of N. Cal. v. DOJ*, 70 F. Supp. 3d 1018, 1032 (N.D. Cal. 2014) (citing *In re Sealed Case*, 146 F.3d 881, 885 (D.C.Cir.1998) (citing *Schiller v. NLRB*, 964 F.2d 1205, 1208, and *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127)). As stated in *In re Sealed*

Case, 146 F.3d at 885, "the 'testing question' for the work-product privilege, we have held, is 'whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" (citing *Senate of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 586 n. 42 (D.C.Cir. 1987) (quoting 8 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2024 at 198 (1970)). Furthermore, "for a document to meet this standard, the lawyer must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable." *In re Sealed Case*, 146 F.3d at 885, *see Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir. 1993) (noting that "anticipation of litigation" inquiry is both subjective and objective).

d. Deliberative Process Privilege

Defendant properly claimed the deliberative process privilege to five records consisting of 32 pages. Plaintiff contends that the deliberative process privilege is not applicable because Defendant has failed to show the withheld documents are pre-decisional and deliberative. This is similar to the argument advanced by *Electronic Privacy Information Center v. U.S. Department of Homeland Security*, 928 F.Supp.2d 139 (D.D.C. 2013), appeal dismissed, No. 13-5113, 2014 WL 590977 (D.C. Cir. Jan 21, 2014), which the court properly rejected. *See id*. at 151–52.

As the court noted, the Supreme Court has made clear that documents may be protected by the deliberative process privilege even if they are not connected to any published final decision:

> Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 n.18 (1975), quoted in *id*. In this case, the disputed records are protected by the deliberative process privilege because they were prepared to facilitate development of policies and procedures regarding use of Hemisphere and did not itself establish a final agency position. *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014).

One of the documents withheld under Exemption 5 as part of the deliberative process privilege, Document 4, Pages 16-27, is a draft. Plaintiff has argued that because the document is a draft, that does not "automatically trigger proper withholding," citing *Defenders of Wildlife v. Agric. Dept*., 311 F.Supp.2d 44, 58 (D.D.C. 2004). Pl. Mot. at 18. However, Defendant has properly demonstrated why Exemption 5 applies to this document, and has not applied this exemption simply because of the document's draft status. As stated in the declaration of Katherine L. Myrick, the draft memorandum is covered by the deliberative process privilege because it was intended to facilitate or assist development of the agency's final position on policies and procedures regarding use of Hemisphere and does not itself establish a final policy. A case cited in Plaintiff's Motion further supports the withholding of a draft document under Exemption 5. Pl. Mot. at 17-18. "Draft documents, by their very nature, are typically predecisional and deliberative." *Exxon Corp. v. Dep't of Energy*, 585 F.Supp. 690, 698 (D.D.C. 1983). *See also Gerstein v. CIA*, No. 06-4643, 2008 WL 4415080, at *16 (N.D. Cal. Sept. 26, 2008) (protecting draft letters) [4].

Furthermore, Plaintiff has attempted to use *Exxon Corp. v. Dep't of Energy* to argue that where Defendant has failed to identify a specific decision to which the disputed records preceded and contributed, the disputed records should be treated as final agency positions and must be disclosed. Pl. Mot. at 17-18. However, in *Exxon Corp.* this notion only applied "in some instances where DOE has failed to identify a final document corresponding to a putative draft." *Exxon Corp*, 585 F.Supp. at 698 (emphasis added). Additionally, this decision in *Exxon Corp.* applied only to drafts, not to other types of pre-decisional documents.

In addition, Plaintiff argues that the agency "must identify a specific decision to which the document is predecisional." Pl. Mot. at 17 (citing *Ibrahim v. DHS*, 2013 WL 1703367, *6 (N.D. Cal. 2013), quoting *Maricopa Audubon Soc. v. Forest Service*, 108 F.3d 1089, 1094 (9th Cir. 1997)).

[4] It is true that Defendant does not have "final" versions of information on several pages withheld under deliberative process. However, Defendant may still withhold the draft versions of those pages as reflecting the deliberative process, and because Defendant cannot determine that any "final" version of them exists from which to cull deliberative material as opposed to material adopted by the final decision maker. *See Electronic Frontier Foundation v. U.S. Dep't of Justice*, 739 F.3d 1, 11 (D.C. Cir. 2014) ("EFF cannot point to any evidence supporting its claim that the FBI expressly adopted the OLC Opinion as its reasoning.").

Ibrahim, however, is not even a FOIA case – it is a civil discovery case. Moreover, Defendant has met the standard set forth in *Maricopa Audubon Soc. v. Forest Service*, 108 F.3d 1089. In *Maricopa Audubon Soc.*, the Court found that the documents withheld under Exemption 5 "were not merely part of a routine and ongoing process of agency self-evaluation" but rather they were prepared for the purpose of advising Jack Ward Thomas, Chief of the United States Forest Service, on how he may respond to specific allegations of unethical and illegal conduct. *Id.* at 1094. "The documents were 'predecisional' because Thomas relied on them in deciding what action, if any, he was obligated to take in response to the particular allegations." *Id*. The documents withheld by Defendant were also not simply part of a "routine and ongoing process of agency self-evaluation" but rather were pre-decisional. The documents withheld by Defendant under the deliberative process prong of Exemption 5 meet the standard discussed in *Maricopa Audubon Soc*., because, as discussed in Defendant's *Vaughn* index and in the declaration of Katherine L. Myrick, they were prepared for the purpose of advising agency management on the policies and procedures regarding the use of Hemisphere in order to assist in decisions concerning the development of the agency's final policy position, but do not themselves establish a final policy.

In *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.18 (1975), the Supreme Court stated: "Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process."

Thus, pages 16 through 27 are protected because those records are part of a decision making process even if that process did not produce an actual decision by the agency [5].

[5] That the withheld documents may contain some factual content is not dispositive. In *Nat'l Wildlife Fed'n v. U.S. Forest Serv*., 861 F.2d 1114, 1118 (9th Cir. 1988), the Ninth Circuit rejected the simplistic fact/opinion distinction, and instead focused on whether the documents in question play role in agency's deliberative process. When the author of a document selects specific facts out of a larger group of facts, this very act is deliberative in nature. *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974). Factual information may also be withheld as deliberative material when it is so thoroughly integrated with deliberative material that its disclosure would expose or cause harm to the agency's deliberations. *Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 13 (D.C. Cir. 2014).

2. Exemption 7(A)

Plaintiff's chart (Pl. Mot. at 20) is misleading to the extent it suggests that Defendant withheld all of these documents in full, which it did not. Plaintiff also incorrectly implies (Pl. Mot. at 21) that Defendant withheld some documents only under Exemption 7(A). Defendant, in fact, always applied at least one other appropriate Exemption to justify the withholding.

Plaintiff argues that Defendant has failed to provide specific information about the impact of the disclosures on actual law enforcement proceedings. However, a court may accept an Exemption 7(A) assertion based on generic determinations that disclosure of certain types of documents are likely to interfere with enforcement proceedings; that is, an agency need not identify specific harms likely to follow from disclosure for each individual document withheld. *See Lewis v. IRS*, 823 F.2d 375, 380 (9th Cir. 1987); *see also Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007) (explaining that "enforcement proceedings need not be currently ongoing; it suffices for them to be 'reasonably anticipated'").

As explained in Defendant's Motion, it is clear from the responsive records provided that Hemisphere is a law enforcement tool used by various law enforcement agencies. Def. Mot. at 14-15. The responsive records demonstrate, among other things, the scope of Hemisphere, how Hemisphere supports existing investigations, and Hemisphere's issuance of subpoenas. The release of information about the scope of Hemisphere could reasonably be expected to assist suspects who could then use this information to evade law enforcement and thwart open investigations.

Plaintiff states that "Hemisphere … processes requests from other federal agencies, including FBI and DHS; state agencies such as the Washington department of Corrections; and local agencies, including police departments in Montclair and Redondo Beach, California, and Tacoma, Washington. Between 2007 and 2013, the Hemisphere Regional Center in Los Angeles alone processed over 4,400 requests involving over 11,200 phone numbers." Pl. Mot. at 11. Yet, Plaintiff argues that "[t]he Index does not provide any specific information about the alleged proceedings, such as whether they are current or prospective, and if prospective whether they are concrete." Pl. Mot. at 21-22. Plaintiff cannot have it both ways.

Further, Plaintiff acknowledges that law enforcement agencies access Hemisphere with an administrative subpoena. Pl. Mot. at 11. Law enforcement's use of an administrative subpoena, virtually by definition, means that there is an active law enforcement proceeding or investigation. Thus, Plaintiff admits the "concreteness" it states is required under *Bevis v. Dep't of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986). *See also* Pl. Mot. at 22 ("Defendant's brief … argues (and plaintiff agrees) that Hemisphere is a law enforcement tool used by multiple law enforcement agencies to support existing investigations.")

Plaintiff cites *Sussman v. Marshals Service*, 494 F.3d 1106, 1114 (D.C. Cir. 2007) for the proposition that "it is not sufficient for an agency merely to state that disclosure would reveal the focus of an investigation; it must rather demonstrate how disclosure would reveal that focus." Pl. Mot. at 21. *Sussman* does not require an agency to demonstrate how disclosure would reveal the focus of an investigation. In *Sussman*, the Marshals' Declaration stated that "Release of this information could reasonably be viewed as revealing the focus of the grand jury investigation." *Sussman*, 494 F.3d at 1114. The Court's words quoted by Plaintiff are in the context of that Marshals' Declaration and the specific reference to a grand jury investigation.

Hemisphere is not owned by DEA; it is an ONDCP program, as Plaintiff's exhibits admit. *See* Plaintiff's exhibit 1, page 1. Thus, DEA is not in a position to provide specific information about the number of, or the types of, on-going investigations that would be impacted by the release of the information withheld under 7A. Revealing the particular scope, parameters, uses, and functionality of a law enforcement technique would render that law enforcement technique worthless which, in turn, could reasonably be expected to interfere with all of the enforcement proceedings currently using Hemisphere.

3. Exemption 7(D)

Plaintiff starts with a misleading statement: "Defendant has withheld the identity of private-sector companies from 25 records …." Pl. Mot. at 22. Instead of using the word "records," it would be more accurate to use the word "pages." Defendant properly withheld information from these pages.

Plaintiff argues that Defendant failed to show those companies shared information with the agency under an assurance of confidentiality. This claim effectively reads into Exemption 7(D) a

requirement that corporate sources must have relied on express assurances of confidentiality to be protected as confidential. Such a rule has no basis in the language of the statutory Exemption, and had Congress intended to include one, it would have done so explicitly.

Defendant has not simply relied on a presumption that any source that provides information to law enforcement has done so under an assurance of confidentiality, which is what the Supreme Court forbade in *U.S. Department of Justice v. Landano*, 508 U.S. 165, 174–78 (1993). Rather, Defendant's assertion is based on information provided by Defendant personnel familiar with Hemisphere that pertains specifically to the companies whose identities are at issue. That is enough to establish the applicability of Exemption 7(D). *Cf. Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 34 (D.C. Cir. 1999) (noting that "the personal knowledge of an official familiar with the source" can support application of Exemption 7(D)).

Plaintiff argues that "the public has known for two and a half years that AT&T is part of Hemisphere . . . yet defendant proffers no evidence that AT&T suffered any resulting retaliation." Pl. Mot. at 24. That AT&T has yet to suffer retaliation for its alleged involvement in the Hemisphere project does not mean that the records should be released under FOIA. That is not what Exemption 7(D) states nor allows. The involvement of AT&T or any other private-sector company has not been disclosed nor confirmed by Defendant; as such, it is pure speculation by Plaintiff that these private-sector companies would not suffer retaliation if Defendant revealed this information. Furthermore, as a public policy matter, private-sector companies would be reluctant to cooperate or work with federal agencies if Exemption 7(D) did not protect their identities. As Defendant's Motion explains, based on information from DEA personnel familiar with Hemisphere, the private-sector companies provide information to law enforcement with the express expectation that both the source and the information will be afforded confidentiality and under circumstances where confidentiality can be inferred because providing the information can lead to retaliation against the companies. Def. Mot. at 16.

Furthermore, Plaintiff argues that "defendant's declaration does not assert personal knowledge or any other factual basis for its assertion about any company's expectations." Pl. Mot. at 24. This is not accurate. Ms. Myrick states in her Declaration at paragraph 4: "The statements I make in this

Declaration are made on the basis of my review and analysis of the file in this case, of my own personal knowledge, or of information acquired by me through the performance of my official duties." *See also* paragraph 5 of the First Supplemental Declaration of Katherine L. Myrick Declaration ("Further, I am clarifying paragraph 4 of my Declaration dated February 17, 2016, to state explicitly that the statements I made in my Declaration dated February 17, 2016, were made on the basis of my review and analysis of the file in this case, of my own personal knowledge, or of information acquired by me through the performance of my official duties, including information I acquired from DEA personnel who are familiar with Hemisphere.").

4. Exemption 7(E)

Defendant properly withheld material based on FOIA Exemption 7(E). Plaintiff argues that Defendant has not explained how disclosure of the identities of companies instrumental in the operation of Hemisphere would assist efforts to circumvent the law. All of the material withheld under Exemption 7(E) in this case pertains to a single set of law enforcement techniques, procedures, guidelines—Hemisphere and its use by law enforcement authorities to obtain access to telephone records in the course of law enforcement investigations.

Hemisphere and the use of Hemisphere clearly qualify as law enforcement techniques and procedures, and guidelines covered by Exemption 7(E). Defendant is not required to break down the techniques, procedures, and guidelines at issue in a more fine-grained way. Courts have upheld invocations of Exemption 7(E) when the techniques, procedures, and guidelines at issue were specified at an even higher level of generality. *See*, e.g., *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 251 (D.C. Cir. 1993) (holding that information about "documents, records and sources of information" available to investigators could be withheld under Exemption 7(E)).

The D.C. Circuit explained in *Mayer Brown LLP v. IRS*, 562 F.3d 1190, (D.C. Cir. 2009), that Exemption 7(E) does not require an agency to show an "actual or certain risk of circumvention":

> [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. at 1193. *Mayer Brown* also contradicts the argument that Defendant must spell out in greater detail how disclosure of the material would aid circumvention of the law. The court in *Mayer Brown* explained, "Rather than requiring a highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the [agency] 'demonstrate[] logically how the release of [the requested] information might create a risk of circumvention of the law.'" *Id*. at 1194 (quoting *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 251 (D.C. Cir. 1993) (third and fourth alterations in original).

Plaintiff does not raise meaningful objections to the Defendant's withholding of information identifying law enforcement agencies that have access to Hemisphere. Because every law enforcement agency has its own respective focus and sphere of authority, knowing which particular law enforcement agencies have access to Hemisphere would help criminals tailor their activities to avoid apprehension. The information that would be revealed is the fact that the named law enforcement agencies have access to Hemisphere. The information would be helpful to criminals and criminal organizations whose activities fall in areas policed by those law enforcement agencies -- those criminals and criminal organizations would be better informed about the capabilities of their pursuers. *See Elec. Privacy Info. Ctr. v. Office of the Dir. of Nat'l Intelligence*, 982 F.Supp.2d 21, 30 (D.D.C. 2013) ("There is little doubt that the names of particular datasets and the agencies from which they originate would allow interested onlookers to gain important insight into the way ODNI and its partners operate.").

Additionally, Plaintiff argues that "criminals already know that police across the nation have access to Hempisphere and can use it to trace their replacement phones and social networks." Pl. Mot. at 29. There is no statistical or even anecdotal evidence before the Court as to what criminals know, and do not know, about Hemisphere. The Court should not assume that all criminals have already altered their behavior to circumvent Hemisphere. That some criminals may know some information about Hemisphere does not mean that all criminals know everything about it.

Plaintiff makes broad and misleading arguments regarding "Cities and States," as if Defendant withheld all city and state information. Pl. Mot. at 25. In fact, Defendant released many pages containing city and state information: *See* pages 40, 47, 63-68, 72, 73, 74, 86-90, 94, 149-153, 252, 259,

269-273, 277, 288-290, 305.

Plaintiff argues that "Companies" have released some information about Hemisphere. Pl. Mot. at 25-26. But that doesn't justify requiring Defendant to release all information about Hemisphere. As previously noted, "[t]here is no principle ... that requires an agency to release all details concerning [its] techniques simply because some aspects of them are known to the public[.]" *Barnard v. Dep't of Homeland Sec.*, 598 F.Supp.2d 1, 23 (D.D.C.2009). Defendant has not waived the right to claim this Exemption because entities other than DEA may have already disclosed the same information. *See Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999); *Hunt v. CIA*, 981 F.2d 1116, 1120 (9th Cir. 1992); *Abbotts v. NRC*, 766 F.2d 604, 607 (D.C. Cir. 1985); *Nielsen v. BLM*, 252 F.R.D. 499, 519 (D. Minn. 2008); *Talbot v. CIA*, 578 F.Supp.2d 24, 29 (D.D.C. 2008); *Van Atta v. Def. Intelligence Agency*, No. 87-1508, 1988 WL 73856, at *2 (D.D.C. July 6, 1988).

As to Plaintiff's "Agencies" argument (Pl. Mot. at 26-27), Plaintiff's attempt to distinguish *Light* and *Pons* is unpersuasive. Concerning *Pons*, Plaintiff argues that the records in *Pons* identified the particular agencies that helped the Customs Service prosecute the particular FOIA requester, but did not address how any agency investigated any specific person. Pl. Mot. at 26-27. When looking at *Pons* more closely, the Court focuses on the reasoning for withholding information under Exemption 7(E), particularly information that concerns the cooperative arrangements between Customs and other law enforcement agencies. The Court determined that Customs properly withheld records, given that "Customs relies in part on the secrecy of its cooperative efforts to fulfill its law enforcement purpose, disclosure of these efforts could compromise the effectiveness of the agency, and could facilitate circumvention of the law." *Pons v. United States Customs Serv.*, 1998 U.S. Dist. LEXIS 6084, *20 (D.D.C. Apr. 23, 1998). Additionally, the Court found that Customs properly withheld documents under Exemption 7(E) where disclosure of law enforcement techniques "could betray some of the secrets of the agency, and could aid would-be lawbreakers in evading the law." *Id*. Similarly, Defendant properly withheld records under Exemption 7(E) because their disclosure would compromise effectiveness of the agency, facilitate circumvention of the law, and betray secrets of the agency, ultimately helping criminals tailor or adapt their activities to evade apprehension.

Moreover, in *Light v. DOJ*, 968 F.Supp.2d 11, 29 (D.D.C. 2013), the FBI properly withheld documents under Exemption 7(E) where the agency "adequately explained the nature of the records it withheld and its reasons for doing so." The FBI was permitted to withhold, under Exemption 7(E): "the location, identity, and expertise of the investigating FBI units; information contained in FOIA processing notes; internal nonpublic telephone numbers and web site addresses used frequently by personnel to exchange investigative information; database information and search results; information collection and analysis information describing techniques; and intelligence analyst procedures used by the Central Florida Intelligence Exchange to conduct national security investigations" all because the "release of such information would enable criminals to discover techniques and procedures and the effectiveness of law enforcement would suffer." *Id*. Plaintiff argues that because the records in *Light* disclosed the location, identity, and expertise of the FBI's own investigative units, *Light* is distinguishable. Pl. Mot. at 26. However, the focus in *Light*, much like that in Pons and the subject case, is withholding information that could help criminals tailor or adapt their activities to evade apprehension. Therefore, both *Pons* and *Light* are relevant and applicable in our present case.

Plaintiff then addresses the issue of "Requests, processing, responses, and capabilities." Pl. Mot. at 27-29. Here, again, Plaintiff asks, since information about Hemisphere was released by others, what additional harm could result if DEA also released the information? It is unclear whether Plaintiff actually has a copy of the withheld pages in unredacted form from another source. Presumably, they do not, which is why they filed this action. If Plaintiff does not actually know what DEA withheld, Plaintiff cannot credibly argue that the release of the information will not cause harm. Stated differently, Plaintiff faces a dilemma: If it does not have a copy of the withheld pages in unredacted from, then it cannot argue that the release of information will be harmless. If it does already have this information, then why is it fighting so hard to obtain this information in this case?

D. The Withheld Information is not Reasonably Segregable.

"Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." *Sussman v. U.S. Marshals Serv*., 494 F.3d 1106, 1117 (D.C. Cir. 2007); accord *Hodge v. FBI*, 703 F.3d 575, 582 (D.C. Cir. 2013). For an agency to establish that it has

met the requirement, it is enough for an agency to provide a *Vaughn* submission describing the material withheld and a declaration attesting that the agency conducted a proper segregability analysis on all the withheld material. *See Johnson v. Exec. Office for U.S. Att'ys*, 310 F.3d 771, 776 (D.C. Cir. 2002) ("The combination of the *Vaughn* index and the affidavits . . . [is] sufficient to fulfill the agency's obligation to show with 'reasonable specificity' why a document cannot be further segregated."); *Loving v. Dep't of Def.*, 550 F.3d 32, 41 (D.C. Cir. 2008) ("Here the district court relied on the very factors that we have previously deemed sufficient for this determination, i.e., the description of the document set forth in the *Vaughn* index and the agency's declaration that it released all segregable material.").

In this case, the Defendant submitted a detailed *Vaughn* submission, and the Declaration of Katherine L. Myrick states that the agency reviewed each page of the responsive documents and confirmed that the agency reviewed the responsive materials to ensure that reasonably segregable information was released. Defendant processed and released all reasonably segregable information from the responsive records, indicated where material was redacted, and marked each redaction with the reasons for the redaction, providing this information thoroughly in its *Vaughn* index and the declaration of Katherine L. Myrick. Review of the released pages shows that Defendant conducted a word-by-word review toward ensuring that the portions of each page that could be released under FOIA were so released. That is sufficient.

E. *In Camera* Review is Unnecessary.

Courts generally reserve *in camera* review for exceptional cases, see *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978); *Lane v. Dep't of Inter*., 523 F.3d 1128, 1136 (9th Cir. 2008), as it circumvents the adversarial process and overburdens judicial resources. *See Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978); *Powell v. DOJ*, 584 F.Supp. 1508, 1515 (N.D. Cal. 1984). District courts have discretion to determine whether it is appropriate to conduct an in camera review of documents the government is withholding pursuant to applicable FOIA Exemptions. *See* 5 U.S.C. § 552(a)(4)(B); *Lion Raisins, Inc. v. USDA*, 354 F.3d 1072, 1079 (9th Cir. Cal. 2004). *In camera* inspection, however, should "not be resorted to lightly," *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987), and is "disfavored" where "the government sustains its burden of proof by way of its testimony or affidavits." *Lion Raisins*, 354

F.3d at 1079.

In *Allen*, the court "outline[d] some of the considerations that trial courts should take into account in exercising" their discretion whether to conduct an *in camera* review of the documents at issue. *Allen v. CIA*, 636 F.2d 1287, 1297 (D.C. Cir. 1980). The court listed "strong public interest in disclosure" as one of five considerations, the others being judicial economy, the conclusory nature of agency affidavits, agency bad faith, and agency concurrence for an *in camera* inspection. *Id*. at 1298-99. Plaintiff has not demonstrated that these considerations are present here. And, with regard to the consideration involving a strong public interest in disclosure, the *Allen* Court observed that the "need for *in camera* inspection is greater" in those "instances" where the agency "deems it in its best interest to stifle or inhibit" a requester's efforts to "ascertain whether" the agency "is properly serving its public function." *Allen*, 636 F.2d at 1299. There is no indication that is the case here.

Because Defendant has shown that an adequate search was conducted, all non-exempt records were promptly released, and all non-exempt information were sufficiently detailed in the Declaration of Katherine L. Myrick, Declaration of James A. Scharf, and the accompanying *Vaughn* index, Defendant respectfully submits that an *in camera* review is unnecessary. *See Lewis v. IRS*, 823 F.2d at 378; *Lane v. Dep't of Interior*, 523 F.3d 1128, 1135-36 (9th Cir. 2008) (district court "need look no further" when the "affidavits contain reasonably detailed descriptions of the documents and allege facts sufficient to establish an exemption") (citation omitted) [6].

If, however, the Court is inclined to order some of the records released, Defendant respectfully requests the opportunity to submit those records (and only those records) for *in camera* review before being ordered to release them. *See Lane v. Department of Interior*, 523 F.3d at 1136 (*in camera* review "may be appropriate if the 'preferred alternative to *in camera* review - government testimony and detailed affidavits - has first failed to provide a sufficient basis for a decision'") (citation omitted).

[6] As noted in Defendant's Motion, the U.S. Dist. Court for the District of Columbia is considering many of the same issues raised in this case in the *EPIC* case. Def. Mot. at 13. Should the Court require additional information, rather than conducting a burdensome *in camera* review of all disputed documents, it may wish to defer ruling on the parties' cross motions for summary judgment until the U.S. District Court for the District of Columbia renders its ruling in the *EPIC* case.

III. CONCLUSION

Because Defendant has fully satisfied its obligations under the FOIA, the Court should grant Defendant's Motion for Summary Judgment and deny Plaintiff's Cross Motion for Summary Judgment without conducting an *in camera* review.

Respectfully submitted,

Dated: April 7, 2016

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