[ARGUMENT NOT YET SCHEDULED]

No. 15-5051

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS; and UNITED STATES DEPARTMENT OF JUSTICE,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (NO. 14-269 (CKK))

JOINT APPENDIX

VOLUME I OF I (A1-A123)

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APPEAL,CLOSED,TYPE-I

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:14-cv-00269-CKK

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS v. EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS et al
Assigned to: Judge Colleen Kollar-Kotelly
Demand: $0
Case in other court: USCA, 15-05051
Cause: 05:552 Freedom of Information Act

Date Filed: 02/21/2014
Date Terminated: 12/18/2014
Jury Demand: None
Nature of Suit: 895 Freedom of Information Act
Jurisdiction: U.S. Government Defendant

Plaintiff

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Defendant

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Date Filed	#	Docket Text
02/21/2014	1	COMPLAINT *of NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS* against EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES DEPARTMENT OF JUSTICE (Filing fee $ 400 receipt number 0090-3629293) filed by NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Civil Cover Sheet, # 7 Summons to United States Attorney General, # 8 Summons to United States Department of Justice, # 9 Summons to Executive Office for United States Attorneys, # 10 Summons United States Attorney for the District of Columbia)(Ruttenberg, Kerri) (Entered: 02/21/2014)
02/21/2014	2	LCvR 7.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (Ruttenberg, Kerri) (Entered: 02/21/2014)
02/21/2014		Case Assigned to Judge Colleen Kollar-Kotelly. (sth,) (Entered: 02/21/2014)
02/21/2014	3	ELECTRONIC SUMMONS (4) Issued as to EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES DEPARTMENT OF JUSTICE, U.S. Attorney and U.S. Attorney General (Attachments: # 1 Summons, # 2 Summons, # 3 Summons, # 4 Summons)(sth,) (Entered: 02/21/2014)
02/24/2014	4	ORDER Establishing Procedures for Filing for Cases Assigned to Judge Colleen Kollar-Kotelly, signed on February 24, 2014. (SM) (Entered: 02/24/2014)
03/07/2014	5	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to the United States Attorney. Date of Service Upon United States Attorney on 3/4/2014. Answer due for ALL FEDERAL DEFENDANTS by 4/3/2014. (Attachments: # 1 Declaration of Lindsay Reimschussel)(Ruttenberg, Kerri) (Entered: 03/07/2014)
03/07/2014	6	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed on United States Attorney General. Date of Service Upon United States Attorney General 3/4/2014. (Attachments: # 1 Declaration of Lindsay Reimschussel) (Ruttenberg, Kerri) (Entered: 03/07/2014)
03/07/2014	7	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS served on 3/4/2014; UNITED STATES DEPARTMENT OF JUSTICE served on 3/4/2014

		(Attachments: # 1 Declaration of Lindsay Reimschussel)(Ruttenberg, Kerri) (Entered: 03/07/2014)
04/03/2014	8	ANSWER to Complaint by EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES DEPARTMENT OF JUSTICE.(Bladuell, Hector) (Entered: 04/03/2014)
04/04/2014	9	ORDER. The parties shall confer and propose a briefing schedule for proceeding in this matter, as well as a schedule for filing a Vaughn index. The parties shall file the schedule not later than May 4, 2014. Signed by Judge Colleen Kollar-Kotelly on 4/4/2014. (lcckk3) (Entered: 04/04/2014)
04/04/2014		Set/Reset Deadlines: Parties shall file a schedule by 5/4/2014. (dot) (Entered: 04/08/2014)
05/02/2014	10	Joint MOTION for Briefing Schedule by EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES DEPARTMENT OF JUSTICE (Bladuell, Hector) (Entered: 05/02/2014)
05/05/2014	11	ORDER. Defendants shall file their Motion for Summary Judgment and Vaughn Index by no later than June 11, 2014; Plaintiff shall file its Opposition to Defendants' Motion for Summary Judgment and its Cross-Motion for Summary Judgment by no later than July 23, 2014; Defendants shall file their Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment and their Opposition to Plaintiff's Cross-Motion for Summary Judgment by no later than August 13, 2014; Following the filing of Defendants' Opposition to Plaintiff's Cross-Motion for Summary Judgment, the Court will determine whether it is necessary for Plaintiff to file a Reply in support of its Cross-Motion for Summary Judgment. Signed by Judge Colleen Kollar-Kotelly on 5/5/2014. (lcckk3) (Entered: 05/05/2014)
05/05/2014		Set/Reset Deadlines: Plaintiff's Cross Motion due by 7/23/2014. Response to Cross Motions due by 8/13/2014. Defendants' Summary Judgment motion due by 6/11/2014. Response to Motion for Summary Judgment due by 7/23/2014. Reply to Motion for Summary Judgment due by 8/13/2014. Vaughn Index due by 6/11/2014. (dot) (Entered: 05/06/2014)
06/11/2014	12	Vaughn Index . (Bladuell, Hector) (Entered: 06/11/2014)
06/11/2014	13	MOTION for Summary Judgment by EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES DEPARTMENT OF JUSTICE (Attachments: # 1 Memorandum in Support, # 2 Exhibit Ex. 1 Gerson Declaration, # 3 Exhibit Ex. 2 Goldsmith Declaration, # 4 Statement of Facts, # 5 Text of Proposed Order)(Bladuell, Hector) (Entered: 06/11/2014)
06/23/2014	14	NOTICE of Appearance by John Russell Tyler on behalf of All Defendants (Tyler, John) (Entered: 06/23/2014)
07/23/2014	15	Memorandum in opposition to re 13 MOTION for Summary Judgment filed by NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS. (Attachments: # 1 Declaration of K. Ruttenberg, # 2 Statement of Facts) (Ruttenberg, Kerri) (Entered: 07/23/2014)
07/23/2014	16	Cross MOTION for Summary Judgment by NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (Attachments: # 1 Memorandum in Support, #

		2 Declaration of K. Ruttenberg, # 3 Statement of Facts, # 4 Text of Proposed Order)(Ruttenberg, Kerri) (Entered: 07/23/2014)
07/28/2014	17	Unopposed MOTION for Extension of Time to File Response/Reply *in support of Defendants' Motion for Summary Judgment* by EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES DEPARTMENT OF JUSTICE (Attachments: # 1 Text of Proposed Order)(Bladuell, Hector) (Entered: 07/28/2014)
07/28/2014	18	ORDER granting 17 Motion for Extension of Time to File Response/Reply. Defendants must file their Reply in support of their Motion for Summary Judgment and their Opposition to Plaintiff's Cross-Motion for Summary Judgment by 9/2/2014. Signed by Judge Colleen Kollar-Kotelly on 7/28/14. (dot) (Entered: 07/28/2014)
08/21/2014	19	NOTICE OF SUPPLEMENTAL AUTHORITY by NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E)(Ruttenberg, Kerri) (Entered: 08/21/2014)
09/02/2014	20	REPLY to opposition to motion re 16 Cross MOTION for Summary Judgment , 13 MOTION for Summary Judgment filed by EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES DEPARTMENT OF JUSTICE. (Attachments: # 1 Exhibit Second Goldsmith Declaration, # 2 Statement of Facts Opposition to Plaintiff's Statement of Facts, # 3 Text of Proposed Order, # 4 Certificate of Service)(Bladuell, Hector) (Entered: 09/02/2014)
09/02/2014	21	Memorandum in opposition to re 16 Cross MOTION for Summary Judgment filed by EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES DEPARTMENT OF JUSTICE. (See Docket Entry 20 to view document). (znmw,) (Entered: 09/03/2014)
09/11/2014	22	MOTION for Leave to File *Plaintiff's Motion for Leave to File Reply in Support of Its Cross-Motion for Summary Judgment and Surreply In Opposition to Defendants' Motion for Summary Judgment* by NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (Ruttenberg, Kerri) (Entered: 09/11/2014)
09/17/2014	23	Memorandum in opposition to re 22 MOTION for Leave to File *Plaintiff's Motion for Leave to File Reply in Support of Its Cross-Motion for Summary Judgment and Surreply In Opposition to Defendants' Motion for Summary Judgment* filed by EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES DEPARTMENT OF JUSTICE. (Bladuell, Hector) (Entered: 09/17/2014)
10/06/2014		MINUTE ORDER (paperless). Upon consideration of Plaintiff's 22 Motion for Leave to File Reply in Support of its Cross-Motion for Summary Judgment, the Court hereby GRANTS Plaintiff's Motion. Plaintiff shall file a short Reply only in support of its Cross-Motion (not a surreply) by no later than October 13, 2014. Plaintiff's Reply shall not exceed ten (10) pages. Signed by Judge Colleen Kollar-Kotelly on 10/6/2014. (lcckk3) (Entered: 10/06/2014)
10/06/2014		Set/Reset Deadlines: Plaintiff's Reply to Cross Motions due by 10/13/2014. (dot) (Entered: 10/08/2014)
10/13/2014	24	REPLY to opposition to motion re 16 Cross MOTION for Summary Judgment

		NACDL's Reply in Support of Cross-Motion for Summary Judgment filed by NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Ruttenberg, Kerri) (Entered: 10/13/2014)
10/22/2014		MINUTE ORDER (paperless). The Court is presently reviewing the parties' cross-motions for summary judgment. The Court understands that the parties are in disagreement about the contents of the "Federal Criminal Discovery Blue Book" and that the parties' respective characterizations of the Blue Book's contents potentially lead to different outcomes under the FOIA exemptions invoked by the Government for withholding the Blue Book's disclosure. In order to resolve this disagreement, the Court finds it is necessary to review ex parte and in camera the actual Blue Book. Accordingly, the Court hereby ORDERS the Government to contact Chambers by no later than OCTOBER 24, 2014, at 5 P.M., to discuss the best method for making the Blue Book available to the Court for ex parte in camera review. Signed by Judge Colleen Kollar-Kotelly on 10/22/2014. (lcckk3) (Entered: 10/22/2014)
10/23/2014	25	NOTICE by EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES DEPARTMENT OF JUSTICE re Order,,, (Bladuell, Hector) (Entered: 10/23/2014)
10/23/2014	26	NOTICE by EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES DEPARTMENT OF JUSTICE re 25 Notice (Other), Order,,, (Bladuell, Hector) (Entered: 10/23/2014)
12/18/2014	27	ORDER. For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that Defendants' 13 Motion for Summary Judgment is GRANTED;IT IS FURTHER ORDERED that Plaintiff's 16 Cross-Motion for Summary Judgmentis DENIED. Accordingly, judgment is entered for Defendants. Signed by Judge Colleen Kollar-Kotelly on 12/18/2014. (lcckk3) (Entered: 12/18/2014)
12/18/2014	28	MEMORANDUM AND OPINION. Signed by Judge Colleen Kollar-Kotelly on 12/18/2014.(lcckk3) (Entered: 12/18/2014)
02/12/2015	29	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 27 Order on Motion for Summary Judgment,,, by NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS. Filing fee $ 505, receipt number 0090-3991636. Fee Status: Fee Paid. Parties have been notified. (Ruttenberg, Kerri) (Entered: 02/12/2015)
02/13/2015	30	Transmission of the Notice of Appeal, Order Appealed, and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid this date re 29 Notice of Appeal to DC Circuit Court. (znmw,) (Entered: 02/13/2015)
02/23/2015		USCA Case Number 15-5051 for 29 Notice of Appeal to DC Circuit Court, filed by NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS. (rd) (Entered: 02/23/2015)

Transaction Receipt

06/30/2015 11:55:26			
PACER Login:	juliasheketoff:4398406:3923676	**Client Code:**	535927-600003
Description:	Docket Report	**Search Criteria:**	1:14-cv-00269-CKK
Billable Pages:	4	**Cost:**	0.40

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS 1660 L St. NW, 12th Floor Washington, DC 20036 Plaintiff, v. EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS and UNITED STATES DEPARTMENT OF JUSTICE 950 Pennsylvania Avenue, NW Washington, DC 20530 Defendants.	CIVIL ACTION NO. 14-CV-269 COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, for declaratory, injunctive, and other appropriate relief, and seeking the expedited processing and release of agency records requested by Plaintiff, the National Association of Criminal Defense Lawyers ("NACDL"), from the Executive Office for United States Attorneys ("EOUSA") and the United States Department of Justice ("DOJ") (collectively, "Defendants").

2. Plaintiff brings this action to compel Defendants to produce or make available for public inspection and copying the Office of Legal Education publication entitled "Federal Criminal Discovery." On information and belief, this publication is generally referred to as the "Federal Criminal Discovery Blue Book" (the "Blue Book").

3. DOJ created the Blue Book in response to the public furor over its flawed prosecution of the late Senator Ted Stevens, whose conviction was vacated after post-trial

investigations revealed that prosecutors had withheld significant exculpatory evidence from the defense. In a series of Congressional hearings convened to address "the egregious misconduct by prosecutors in the *Stevens* case," Letter from John Cornyn and Sheldon Whitehouse, U.S. Senators, to Eric Holder, U.S. Attorney General (May 30, 2012), available at http://www.judiciary.senate.gov/resources/transcripts/upload/060612Record Submission-Leahy.pdf, DOJ asserted that federal legislation was unnecessary to prevent future discovery abuses because it had instituted various internal reforms. During the hearings, DOJ asserted it had implemented "rigorous enhanced training" to ensure that "prosecutors and agents [have] a full appreciation of their responsibilities" under federal law. *Statement for the Record from the Department of Justice: Hearing on the Special Counsel's Report Before on the Prosecution of Senator Ted Stevens Before the S. Comm. on the Judiciary*, 112th Cong. 3 (2012) ("*Statement for the Record*"). As part of this effort, DOJ stated that it had created a "Federal Criminal Discovery Bluebook" that "comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations" under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny. *Id.* at 4. According to DOJ, the Blue Book was "distributed to prosecutors nationwide in 2011" and "is now electronically available on the desktop of every federal prosecutor and paralegal." *Id.*

4. On December 20, 2012, NACDL filed a FOIA request with EOUSA seeking disclosure of the Blue Book. Disclosure of the Blue Book is vital to ensuring (1) that DOJ has in fact implemented the reforms it promised after the *Stevens* case, and (2) that such reforms are sufficient to prevent a recurrence of the same types of discovery abuses that marred the *Stevens* prosecution. Restoring public confidence in the integrity of federal prosecutions requires full transparency regarding the policies and procedures DOJ has adopted with respect to criminal

discovery. Indeed, because *Brady* violations are, by their very nature, difficult to discover, the public has a particularly compelling interest in knowing the steps DOJ has taken to prevent such violations. Moreover, because DOJ claimed that distribution of the Blue Book—a key component of its post-*Stevens* internal reforms—obviated the need for any discovery legislation, it should not now be permitted to shield the Blue Book from public scrutiny.

5. On February 28, 2013, EOUSA improperly denied NACDL's FOIA request in full. EOUSA cited 5 U.S.C. § 552(b)(5) and (b)(7)(E) as its basis for withholding the Blue Book, but offered no further details or information explaining its decision. On April 26, 2013, NACDL filed an administrative appeal. On June 25, 2013, DOJ denied the appeal in full, this time citing only 5 U.S.C. § 552(b)(5).

6. The Blue Book is either a "statement[] of policy" or an "administrative staff manual[] . . . that affect[s] a member of the public." 5 U.S.C. § 552(a)(2). Accordingly, Defendants are required to make the Blue Book "available for public inspection and copying" under 5 U.S.C. § 552(a)(2). Alternatively, Defendants are required to produce the Blue Book in response to NACDL's proper FOIA request under 5 U.S.C. § 552(a)(3). Because the Blue Book is not exempt from disclosure under any of the exemptions listed under 5 U.S.C. § 552(b)(1)–(9), Defendants' failure to produce the Blue Book or make it available for public inspection and copying violates FOIA.

7. Having exhausted its administrative remedies, NACDL now brings this lawsuit to compel Defendants to produce the Blue Book and to defend the public's right "to know what [its] Government is up to." *NARA v. Favish*, 541 U.S. 157, 171 (2004) (internal quotations and citations omitted).

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 704, and 28 U.S.C. § 1331.

9. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

10. Plaintiff NACDL is a professional bar association organized as a 501(c)(6) non-profit corporation that is dedicated to promoting a rational and humane criminal justice policy for America. Its 10,000 direct members and 40,000 state, local, and international affiliate members include public defenders, private criminal defense lawyers, active-duty military defense counsel, judges, and law professors who support NACDL's mission to promote the proper and fair administration of criminal justice; ensure justice and due process for persons accused of crime; and foster the integrity, independence and expertise of the criminal defense profession.

11. A significant aspect of NACDL's mission is to ensure that the American public is informed about the conduct of its government in matters that affect criminal justice. As part of this effort, NACDL publishes a monthly magazine called "The Champion" that features timely and informative articles on the latest developments in criminal law, procedure, and policy. The magazine directly circulates to approximately 10,000 recipients, including lawyers, law libraries, law professors, federal and state judges, members of the news media, and members of the public interested in the administration of justice. NACDL also publishes a monthly electronic newsletter and daily news brief, both of which are distributed to NACDL members via e-mail. Additionally, NACDL regularly issues news releases to the press and public that are widely disseminated through e-mail, Facebook, and Twitter, and posted on NACDL's website, www.nacdl.org. NACDL has a long history of publishing reports about governmental activity

and criminal justice issues that are broadly circulated and available to the public at little or no cost, including manuals and government reports obtained through FOIA. *See, e.g.*, *Nat'l Ass'n of Criminal. Def. Lawyers v. U.S. Dep't of Justice*, 182 F.3d 981 (D.C. Cir. 1999).

12. Defendant DOJ is a Department of the Executive Branch of the United States government and is an agency within the meaning of 5 U.S.C. § 552(f)(1). DOJ is in possession and/or control of the records requested by NACDL which are the subject of this action.

13. Defendant EOUSA is a component of DOJ. It is responsible for providing administrative support for the 93 United States Attorneys located throughout the 50 states, the District of Columbia, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. EOUSA is an agency within the meaning of 5 U.S.C. § 552(f)(1) and is in possession and/or control of the records requested by NACDL which are the subject of this action.

STATUTORY FRAMEWORK

14. The Freedom of Information Act "reflects 'a general philosophy of full agency disclosure' and protects 'the public's right to know the operations of its government.'" *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 755 (D.C. Cir. 1978) (en banc) (quoting S.Rep. No. 813, 89th Cong., 1st Sess. 3, 8 (1965)). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

15. "The first part of the statute—subsection (a) —mandates the disclosure of records by government agencies. It is divided into three parts, setting forth three methods by which agencies must make information available to the public." *Jordan*, 591 F.2d at 755–56.

16. Paragraph (a)(1) requires agencies to publish certain types of material in the Federal Register. 5 U.S.C. § 552(a)(1).

17. Paragraph (a)(2) requires agencies to make certain other types of material available for public inspection and copying. 5 U.S.C. § 552(a)(1). Specifically, under 5 U.S.C. § 552(a)(2), "[e]ach agency, in accordance with published rules, shall make available for inspection and copying (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases; (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; [and] (C) administrative staff manuals and instructions to staff that affect a member of the public . . . ."

18. Paragraph (a)(3)—sometimes described as a "catch-all" provision, *Ginsburg, Feldman & Bress v. Fed. Energy Admin.*, 591 F.2d 717, 740 (D.C. Cir. 1978)—requires agencies to disclose, upon request, all other records not already subject to disclosure under paragraphs (a)(1) and (a)(2). The agency must make the records "promptly available to any person" as long as the request "reasonably describes such records" and is made in accordance with specified procedures. 5 U.S.C. § 552(a)(3).

19. The second part of the statute—subsection (b)—exempts from disclosure nine specific categories of information. *See* 5 U.S.C. § 552(b)(1)–(9). "These exemptions are explicitly made exclusive, and must be narrowly construed." *Milner v. U.S. Dep't of the Navy*, 131 S. Ct. 1259, 1262 (2011) (citations and internal quotation marks omitted). FOIA's "strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). "That burden remains with the agency when it seeks to justify the redaction of identifying information in a particular document as well as when it seeks to withhold an entire document." *Id.*

20. Any member of the public may make a request for records to any agency of the United States. *See generally Favish*, 541 U.S. at 172. An agency that receives a FOIA request must respond in writing to the requestor within 20 business days. 5 U.S.C. § 552(a)(6)(A)(i). The agency must inform the requestor whether or not it intends to comply with the request, provide reasons for its determination, and notify the requestor of his right to appeal any adverse determination. *Id.* If an agency claims a statutory exemption, it is required to identify the exemption under which the withholding is made, provide any reasonably segregable portion of non-exempt information to the requestor, and specify the amount of information withheld. 5 U.S.C. § 552(b).

21. A FOIA requestor who has been denied records may appeal the denial to the agency. The agency must make a determination on the appeal within 20 business days. 5 U.S.C. § 552(a)(6)(A)(ii).

22. "Exhaustion of administrative remedies is generally required before filing suit in federal court so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision." *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 61 (D.C. Cir. 1990). A FOIA requestor who has completed the administrative appeal process following an agency's denial of his FOIA request has exhausted his administrative remedies. *See, e.g.*, *id.*; *Jean-Pierre v. Federal Bureau of Prisons*, 880 F. Supp. 2d 95, 104 (D.D.C. 2012).

23. A district court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). A district court has jurisdiction to compel DOJ to make the Blue Book available for public inspection and copying under 5 U.S.C. §§ 704 and 706.

FACTUAL ALLEGATIONS

Prosecutorial Misconduct in the Trial of Senator Ted Stevens

24. On July 29, 2008, a District of Columbia grand jury returned a seven-count indictment charging then-United States Senator Theodore F. Stevens with failure to report the receipt of benefits and other items of value on his United States Senate Public Financial Disclosure Form. U.S. Dep't of Justice, Office of Prof'l Responsibility, Report: Investigation of Allegations of Prosecutorial Misconduct in United States v. Theodore Stevens, Crim. No. 08-231 (D.D.C. 2009) (EGS) 1 (2011), http://www.leahy.senate.gov/imo/media/doc/052412-081511Report.pdf ("OPR Report"). Following a trial in the fall of 2008, a jury found Senator Stevens guilty on all counts. *Id.* at 17.

25. Months after the trial, a new team of prosecutors assigned to conduct post-trial litigation discovered that significant exculpatory and impeachment evidence had been withheld from Stevens' defense team in violation of federal law. In light of this discovery, DOJ moved to set aside the verdict and to dismiss the indictment. Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009 at 32, *In Re Special Proceedings*, No. 09-0198 (EGS) (D.D.C. Mar. 15, 2012), http://www.dcd.uscourts.gov/dcd/sites/www.dcd.uscourts.gov.dcd/files/Misc09-198.pdf ("Schuelke Report"). United States District Judge Emmet G. Sullivan granted the government's motion on April 7, 2009.

26. An investigation conducted by a court-appointed Special Counsel concluded that "[t]he investigation and prosecution of U.S. Senator Ted Stevens were permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated Senator Stevens' defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness." Schuelke Report at 1. An independent

investigation conducted by DOJ's Office of Professional Responsibility similarly concluded that the prosecution had violated its obligations under *Brady* and *Giglio* by failing to disclose significant exculpatory and impeachment evidence to the defense. OPR Report at 24–28.

Reaction to the *Stevens* Trial and DOJ's Response

27. Exposure of the widespread discovery abuses that had marred the *Stevens* prosecution sparked a national outcry. Dozens of major news outlets closely followed the story and issued calls for reform. *See, e.g.*, Editorial: *Justice After Senator Stevens*, The New York Times, March 18, 2012, available at http://www.nytimes.com/2012/03/19/opinion/justice-after-senator-stevens.html?_r=0; *Federal prosecutors need to play fair with evidence*, Washington Post, March 18, 2012, available at http://www.washingtonpost.com/opinions/federal-prosecutors-need-to-play-fair-with-evidence/2012/03/16/gIQADXTMLS_story.html. Senator Lisa Murkowski introduced legislation—the "Fairness in Disclosure of Evidence Act," S. 2917—designed to create a national standard for disclosure of exculpatory evidence to defendants in federal cases. *See* Press Release, United States Senator Lisa Murkowski, Senator Introduces Bipartisan Bill to Enforce Ethical Legal Prosecutions, Mar. 15, 2012, available at www.murkowski.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=5b41d548-ab47-464f-a627-8b1702b75145. The American Bar Association endorsed Senator Murkowski's proposed legislation and called for "a clear and uniform standard for disclosure of favorable evidence by the prosecution in federal criminal cases." *See* Letter from Thomas M. Susman, Director of the ABA's Government Affairs Office, to Chairman Leahy and Ranking Member Grassley, June 5, 2012, attaching "A Call to Congress to Reform Federal Criminal Discovery," available at http://www.judiciary.senate.gov/resources/transcripts/upload/060612RecordSubmission-Leahy.pdf.

28. In a series of three Congressional hearings convened to address misconduct in the *Stevens* case and proposed discovery reforms, DOJ asserted that federal discovery legislation was unnecessary because it had instituted a series of internal reforms designed to prevent future discovery abuses. Among other things, DOJ claimed it had "created and distributed . . . to prosecutors nationwide" a "Federal Criminal Discovery Blue Book" that "comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations." *Statement for the Record* at 4. The Blue Book, DOJ asserted, was an important part of its effort to implement "rigorous enhanced training" and "provide[] prosecutors with key discovery tools such as online manuals and checklists." *Id.* at 3. It was designed, DOJ claimed, to ensure that "prosecutors and agents [have] a full appreciation of their responsibilities" under federal law. *Id*. at 1. According to DOJ, the Blue Book is now "electronically available on the desktop of every federal prosecutor and paralegal." *Id.* at 4.

Public Need for Disclosure of the Blue Book

29. The prosecution violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to either guilt or punishment. *Smith v. Cain*, 132 S. Ct. 627, 630 (2012). This is true irrespective of the good faith or bad faith of the prosecution and regardless of whether a defendant requests disclosure of such evidence. *Brady*, 373 U.S. at 87; *United States v. Agurs*, 427 U.S. 97, 107 (1976).

30. By DOJ's own admission, "even a single lapse" in the prosecution's compliance with its discovery obligations "could call the integrity of our criminal justice system into question" with "devastating consequences." *Statement for the Record* at 2–3. It is therefore of vital importance that the public be fully informed regarding the policies and procedures DOJ has implemented to ensure that exculpatory evidence is disclosed to the defense.

31. This is especially true given that *Brady* violations, by their very nature, are difficult to discover. As Representative Robert C. Scott observed in a statement to Congress, "[g]enerally a defendant will have no way to know of or learn of exculpatory evidence known to the government unless the government discloses it." Prosecution of Former Senator Ted Stevens: Hearing Before the H. Comm. on the Judiciary, 112th Cong. 4 (2012) (Statement of Rep. Robert C. "Bobby" Scott), available at http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg73861/pdf/CHRG-112hhrg73861.pdf. Thus, only full transparency will restore public confidence that prosecutors are fulfilling their obligations and administering justice fairly.

32. As one federal judge recently wrote, "*Brady* violations have reached epidemic proportions in recent years." *United States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, J., dissenting from denial of petition for rehearing en banc). "[T]he federal and state reporters bear testament" to the fact that prosecutorial discovery abuse remains an ongoing problem even after the *Stevens* trial. *Id.* (collecting cases). The public requires access to the Blue Book to ensure (1) that DOJ has implemented the reforms it promised after the *Stevens* case, and (2) that those reforms are sufficient to safeguard each defendant's right to due process. Moreover, since DOJ relied on the Blue Book in resisting calls for remedial legislation, it cannot now be heard to complain that the Blue Book should not be available for public inspection.

FOIA Request

33. On December 20, 2012, NACDL served EOUSA with a FOIA request for "the Office of Legal Education publication entitled 'Federal Criminal Discovery.'" *See* Ex. A at 1. The request specified that, on information and belief, this publication "was published and/or distributed in March 2011 and may also be referred to as The Federal Criminal Discovery Blue Book." *Id.*

34. NACDL sought expedited processing of its request and a waiver of fees.

Exhaustion of Administrative Remedies

35. On February 28, 2013, EOUSA denied NACDL's FOIA request in full. *See* Ex. B. EOUSA cited, without elaboration, 5 U.S.C. § 552(b)(5) and (b)(7)(E) as its basis for withholding the Blue Book. EOUSA offered no further details or information explaining its decision.

36. On April 26, 2013, NACDL sent DOJ an administrative appeal letter challenging EOUSA's decision to withhold the Blue Book. *See* Ex. C. In the letter, NACDL asserted that EOUSA is required to produce the Blue Book because it does not fall under either of the claimed exemptions. NACDL also explained why the claimed exemptions do not apply.

37. By letter dated May 17, 2013, DOJ acknowledged receipt of NACDL's appeal. *See* Ex. D.

38. On June 25, 2013, DOJ's Office of Information Policy ("OIP") denied NACDL's appeal. *See* Ex. E. OIP cited only 5 U.S.C. § 552(b)(5) as the basis for its decision, specifically referencing the "attorney work-product privilege." *Id.* at 1.

The Blue Book is Not Exempt From Disclosure Under Section 552(b)(5)

39. The Blue Book is not exempt from disclosure under section 552(b)(5) ("Exemption 5") as an "inter-agency or intra-agency memorandum[] or letter[] which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 shields from disclosure "those documents, and only those documents, normally privileged in the civil discovery context," *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975), including documents protected under "the attorney-client privilege, the attorney work-product privilege, [and] the executive 'deliberative process'

privilege," *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (citations omitted). None of these privileges applies in this case.

40. The attorney-client privilege does not shield the Blue Book from disclosure because the Blue Book does not include "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc. v. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977).

41. The attorney-client privilege also does not shield the Blue Book from disclosure because, on information and belief, the Blue Book has been widely disseminated throughout DOJ, including to the Associate Attorney General; the Assistant Attorneys General for the Criminal Division, National Security Division, Civil Rights Division, Antitrust Division Environmental and Natural Resources Division, and Tax Division; to all United States Attorneys; and to officials in the Federal Bureau of Investigation, the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the United States Marshals Service and the Bureau of Prisons. *See* Memorandum from James M. Cole, Deputy Attorney General, to the Associate Attorney General, *et al.*, 4 n.4, 6 (Mar. 30, 2011), available at http://www.fd.org/docs/select-topics/discovery/doj-memo-on-preservation-and-discovery-of-electronic-communications.pdf?sfvrsn=4 (citing the "Discovery BlueBook" sections on "Opinion or Reputation Evidence Regarding Veracity" and "Information Not Subject to Disclosure by the Government"). And, as DOJ stated, the Blue Book was distributed "nationwide" to "every federal prosecutor and paralegal." *Statement for the Record* at 4. Such broad dissemination would separately defeat any claim to confidentiality that Defendants might raise. *See Coastal States*, 618 F.2d at 863.

42. Nor does the attorney work-product privilege shield the Blue Book from disclosure. *See PHE, Inc. v. U.S. Dep't of Justice*, 983 F.2d 248, 251 (D.C. Cir. 1993). "The 'testing question' for the work-product privilege . . . 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." *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998) (internal quotation marks omitted). Since "'the prospect of future litigation touches virtually any object of' a prosecutor's attention," this Circuit has rejected an overbroad reading of the privilege that could "preclude almost all disclosure from an agency with substantial responsibilities for law enforcement." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1203 (D.C. Cir. 1991). Rather, it has "drawn a line between 'neutral, objective analyses of agency regulations' and 'more pointed documents' that recommend 'how to proceed further with specific investigations' or 'advise the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome.'" *American Immigration Council v. DHS*, 905 F. Supp. 2d 206, 221–22 (D.D.C. 2012) (quoting *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987) ("*Delaney*")). "'[N]eutral, objective analyses of agency regulations [resembling] question and answer guidelines which might be found in an agency manual'" that "flesh[] out the meaning of the [law]" do not qualify for protection under the work-product privilege. *Delaney*, 826 F.2d at 127 (quoting *Coastal States*, 617 F.2d at 863); *see also Jordan*, 591 F.2d at 775 (refusing to accord work-product protection to a manual "contain[ing] specific guidelines and criteria which Assistant United States Attorneys [were] expected to consider in handling certain offenses" and a set of guidelines "set[ting] forth the criteria for eligibility" in a pre-trial diversion program because they were not "prepared in anticipation of a particular trial" and "[did] not include

factual information, mental impressions, conclusions, opinions, legal theories or legal strategies relevant to any on-going or prospective trial"); *Judicial Watch, Inc. v. United States Dep't of Homeland Security*, 926 F. Supp. 2d 121, 142–43 (D.D.C. 2013) (holding that the work-product privilege does not exempt from disclosure documents "promulgated as 'general standards' to instruct [agency] attorneys in determining whether to exercise prosecutorial discretion in specific categories of cases").

43. Based on DOJ's own public statements regarding the reasons for the Blue Book's creation and its anticipated use, the Blue Book is an agency manual that contains "neutral, objective analyses" of prosecutors' legal obligations under *Brady* and *Giglio* and provides general guidance regarding how prosecutors should comply with the law. *Delaney*, 826 F.2d at 127 (D.C. Cir. 1987). It does not "recommend how to proceed . . . with specific investigations" or "advise the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome." *American Immigration Council*, 905 F. Supp. 2d at 221–22 (D.D.C. 2012) (internal quotation marks omitted). Nor does it include "factual information, mental impressions, conclusions, opinions, legal theories or legal strategies" whose disclosure would undermine the "integrity of the adversary trial process." *Jordan*, 591 F.2d at 775. To the contrary, disclosure of the Blue Book is required to ensure the integrity of the adversary trial process.

44. The deliberative process privilege does not shield the Blue Book from disclosure because the Blue Book reflects DOJ's settled policies and legal interpretations rather than its pre-decisional "recommendations and deliberations." *Nat'l Labor Relations Bd.*, 421 U.S. at 150.

The Blue Book is Not Exempt From Disclosure Under Section 552(b)(7)(E)

45. The Blue Book is not exempt from disclosure under section 552(b)(7)(E) ("Exemption 7(E)"). The Blue Book does not constitute a "record[] . . . compiled for law enforcement purposes" that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E).

46. Disclosure of the Blue Book will not risk circumvention of the law. To the contrary, it will ensure that prosecutors adhere to their legal obligations, which was the very impetus for the Blue Book's creation. *See Public Emples. for Envtl. Responsibility v. United States Section Int'l Boundary & Water Comm'n*, No. 12–5158, 2014 U.S. App. LEXIS 1158, at *18 n.4, 2014 WL 228650, at *6 n.4 (D.C. Cir. Jan. 22, 2014) ("This Court has applied the 'risk circumvention of the law' requirement both to records containing guidelines and to records containing techniques and procedures."); *Blackwell v. FBI*, 646 F.3d 37, 41–42 (D.C. Cir. 2011).

47. Moreover, the Blue Book does not contain "techniques and procedures" designed to facilitate the investigation and prosecution of individuals accused of violating the law. Rather, it addresses DOJ's own obligations to comply with law and, by DOJ's admission, is a means to make certain that "prosecutors and agents [have] a full appreciation of their responsibilities" under laws designed to ensure that accused individuals receive fair trials. *Statement for the Record* at 1.

48. Further, Exemption 7(E) does not apply to "garden-variety legal analysis," which includes discussion and digests of case law. *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1194 n.1

(D.C. Cir. 2009). Nor does this exemption apply to materials within the scope of 5 U.S.C. § 552(a)(2), such as administrative staff manuals.

FIRST CAUSE OF ACTION

Violation of 5 U.S.C. § 552(a)(2) for Failure to Make the Blue Book Available for Inspection and Copying

49. NACDL realleges and incorporates by reference paragraphs 1–48.

50. Under 5 U.S.C. § 552(a)(2), "[e]ach agency, in accordance with published rules, shall make available for inspection and copying . . . (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; [and] (C) administrative staff manuals and instructions to staff that affect a member of the public . . . ."

51. The Blue Book, which has not been published in the Federal Register, contains statements of policy and interpretations which have been adopted by DOJ.

52. The Blue Book is an administrative staff manual that affects members of the public.

53. Defendants violated 5 U.S.C. § 552(a)(2) by failing to make the Blue Book available to the public for inspection and copying. A district court has jurisdiction to compel defendants to make the Blue Book available for public inspection and copying under 5 U.S.C. §§ 704 and 706.

SECOND CAUSE OF ACTION

Violation of 5 U.S.C. § 552(a)(3) for Failure to Promptly Release the Blue Book in Response to NACDL's FOIA Request

54. NACDL realleges and incorporates by reference paragraphs 1–53.

55. Under 5 U.S.C. § 552(a)(3), agencies must disclose, upon request, all records not already subject to disclosure under paragraphs (a)(1) and (a)(2). The agency must make the records "promptly available to any person" as long as the request "reasonably describes such records" and is made in accordance with specified procedures. 5 U.S.C. § 552(a)(3).

56. NACDL's properly submitted FOIA request reasonably described the Blue Book as the Office of Legal Education publication entitled "Federal Criminal Discovery," believed to be published and/or distributed in March 2011 and possibly referred to as The Federal Criminal Discovery Blue Book.

57. Defendants violated 5 U.S.C. § 552(a)(3) by failing to disclose the Blue Book in response to NACDL's FOIA request.

REQUESTS FOR RELIEF

WHEREFORE, NACDL respectfully requests that the Court:

(A) Declare that defendants' withholding of the Blue Book is unlawful;

(B) Order defendants to make the Blue Book available for public inspection and copying;

(C) Order defendants to produce the Blue Book to NACDL;

(D) Award NACDL its costs and reasonable attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E); and

(E) Grant all other appropriate relief.

Dated: February 21, 2014

Respectfully submitted,

/s/ Kerri L. Ruttenberg

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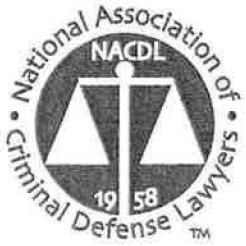
Attorney for Plaintiff
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

EXHIBIT A



December 20, 2012

Susan B. Gerson, Acting Assistant Director
FOIA/Privacy Unit
Executive Office for United States Attorneys
Department of Justice
Room 7300, 600 E Street, N.W.
Washington, DC 20530-0001

Re: REQUEST UNDER FREEDOM OF INFORMATION ACT/Expedited Processing Requested

Dear Ms. Gerson:

This letter constitutes a request ("Request") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, and the Department of Justice Implementing Regulations, 28 C.F.R. § 16.1 *et seq*. The Request is submitted by the National Association of Criminal Defense Lawyers ("NACDL").[1] This request seeks the Office of Legal Education publication entitled "Federal Criminal Discovery." On information and belief, this publication was published and/or distributed in March 2011 and may also be referred to as *The Federal Criminal Discovery Blue Book*.

I. Background

Following the exposure of discovery abuse in the prosecution of the late Senator Ted Stevens, the Department of Justice (DOJ) convened a working group to review the policies, practices, and training relating to discovery practices. One of the steps that the DOJ has taken to improve discovery practices is the availability of a Federal Criminal Discovery reference book, "which comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations."[2] NACDL believes that every

[1] The National Association of Criminal Defense Lawyers (NACDL) is a 501(c)(6) non-profit organization that is "primarily engaged in disseminating information" within the meaning of 5 U.S.C. § 552(a)(6)(E)(v)(II) and 28 C.F.R. 16.5(d)(1)(ii).

[2] Cole, James M. Statement to the Senate Judiciary Committee. Hearing, June 6, 2012. Available at: http://www.justice.gov/iso/opa/dag/speeches/2012/dag-speech-120606.html; Accessed: 12/06/12.

American citizen is entitled to know the steps that DOJ has taken to ensure that federal prosecutors abide by the federal discovery rules. As the Federal Criminal Discovery reference book is part of DOJ's efforts to improve prosecutors' legal education pertaining to discovery rules, NACDL requests the book.

II. Requested Records

This Request seeks the Federal Criminal Discovery reference book in its entirety distributed in 2011 by the Office of Legal Education within the Executive Office for United States Attorneys to federal prosecutors nationwide.

III. Application for Expedited Processing

NACDL requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(d). There is a "compelling need" for these records because the information requested is urgently required by an organization "primarily engaged in disseminating information" to "inform the public concerning actual or alleged Federal Government activity," 5 U.S.C. 552(a)(6)(E)(v); 28 C.F.R. § 16.5(d)(1)(ii). *See Am. Civil Liberties Union v. Dep't of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit, public interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" to be "primarily engaged in disseminating information") (quoting *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003)). In addition, the request is of widespread and exceptional media interest and the information sought involves possible questions about the government's integrity which affect public confidence. 28 C.F.R. § 16.5(d)(1)(iv).

NACDL is a 501(c)(6) non-profit organization that is "primarily engaged in disseminating information" within the meaning of 5 U.S.C. § 552(a)(6)(E)(v)(II) and 28 C.F.R. 16.5(d)(1)(ii). NACDL publishes a monthly magazine called *The Champion* that features timely and informative articles on the latest developments in criminal justice. The magazine directly circulates to approximately 10,000 recipients, including lawyers, law libraries, law professors, federal and state judges, members of the news media, and members of the public interested in the administration of justice. NACDL also publishes a monthly electronic newsletter and daily news brief, both of which are distributed to NACDL members via e-mail. Additionally, NACDL regularly issues news releases to the press and public that are widely disseminated through e-mail, Facebook, and Twitter, and posted on NACDL's website, www.nacdl.org. Finally, NACDL has a long history of publishing reports about governmental activity and criminal justice issues that are broadly circulated and available to the public at little or no cost, including manuals and government reports obtained through FOIA. *See, e.g., Nat'l Ass'n of Crim. Def. Law. v. Dept. of Justice*, 182 F.3d 981 (D.D.C. 1999).

NACDL urgently requires the information sought by this Request in order to inform the public of federal government activity that concerns the general public interest. See 5 U.S.C. 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(d)(1)(ii). In addition, the request is of widespread and exceptional media interest and the information sought involves possible questions about the government's integrity which affect public confidence. 28 C.F.R. § 16.5(d)(1)(iv). The records directly relate to a highly public and controversial

debate over federal prosecutorial discovery practices. Discovery-related misconduct in the high-profile prosecution of the late Senator Ted Stevens led, in 2012, to a court-ordered investigation, a Justice Department Office of Professional Responsibility investigation, and three congressional hearings. In the last year alone, efforts to identify and address misconduct by the Stevens prosecutors have been the subject of dozens of stories in major news outlets ("widespread and exceptional media interest"), including: *Two Prosecutors in Stevens Case Appeal Disciplinary Action*, The Blog of Legal Times, June 27, 2012, *available at* http://bit.ly/UMMStK; Jon May, *Government's Response to Brady Reform Relies on Fear Not Fact*, White Collar Crime Prof Blog, June 15, 2012, *available at* http://bit.ly/RAs1gH; Ginny Sloan, *Congress Must Act to End Prosecutorial Misconduct*, Huffington Post, April 11, 2012, *available at* http://huff.to/SH3YNo; Elizabeth Murphy, *Schuelke: Congress Should Consider Discovery Legislation*, Main Justice, March 28, 2012, *available at* http://bit.ly/VMd0DT; Jordy Yager, *Prosecutors compromised Stevens case*, The Hill, March 28, 2012, *available at* http://bit.ly/UMMBai; *Senate Judiciary Committee To Hold Hearings On Ted Stevens Report*, The Blog of Legal Times, March 21, 2012, *available at* http://bit.ly/TsiDJ8; *Editorial: Justice After Senator Stevens*, The New York Times, March 18, 2012, *available at* http://nyti.ms/XAOMht; Carrie Johnson, *Making Prosecutors Share: Stevens' Case Prompts Bill*, NPR, March 18, 2012, *available at* http://n.pr/ZFlp2W; *Federal prosecutors need to play fair with evidence*, Washington Post, March 18, 2012, *available at* http://wapo.st/ZFlhk0; Charlie Savage and Michael S. Schmidt, *A Call to Fire Prosecutors in Botched Stevens Trial*, The New York Times, March 17, 2012, *available at* http://nyti.ms/UMM7B2; John Bresnahan and Josh Gerstein, *Report blasts prosecutors in Ted Stevens case*, Politico, March 15, 2012, *available at* http://politi.co/ZFkYWp; Charlie Savage and Michael S. Schmidt, *Inner Workings of Senator's Trouble Trial Detailed*, The New York Times, March 15, 2012, *available at* http://nyti.ms/12wfADU; *How to Rein In Rogue Prosecutors*, The Wall Street Journal, March 15, 2012, *available at* http://on.wsj.com/U83Llk; *Ted Stevens Report: The Concealed Evidence and the Prosecutors*, The Blog of Legal Times, March 15, 2012, *available at* http://bit.ly/XANUcx; Carrie Johnson, *Report: Prosecutors Hid Evidence In Ted Stevens Case*, NPR, March 15, 2012, *available at* http://n.pr/Tsi9CA; Amanda Coyne, *Reactions to the report on Ted Stevens corruption trial*, Alaska Dispatch, March 15, 2012, *available at* http://bit.ly/UEyq69; *Ted Stevens Report: Stevens' Defense Attorneys Rip Prosecutors*, The Blog of Legal Times, March 15, 2012, *available at* http://bit.ly/UMLSWH; GW Rastopsoff, *Schuelke Report Released on Stevens Trial, Senator Murkowski Introduces Legislation*, Alaska Native News, March 15, 2012, *available at* http://bit.ly/WjMpEo; Meredith Shiner, *Lisa Murkowski Challenges DOJ on Ted Stevens Case*, Roll Call, March 13, 2012, *available at* http://bit.ly/TWzCBS; Sen. Lisa Murkowski, *Justice, not convictions, more important*, Anchorage Daily News, March 10, 2012, *available at* http://bit.ly/UMN6kB. More news stories related to the Stevens case are available at www.nacdl.org/discoveryreformnews/.

Partly in response to the Stevens case, discovery legislation has been introduced in the Senate, and the Justice Department's internal efforts to ensure discovery compliance have been at issue throughout this legislative debate. There is no doubt that public and media interest in the seriousness and efficacy of any Justice Department efforts to ensure that prosecutors meet their discovery obligations is extremely high ("questions about the government's integrity which affect public

confidence"), and that the public and media have an urgent and compelling need for the information requested herein.

IV. Application for Waiver or Limitations of All Fees

NACDL requests a waiver of all search, review, and duplication fees associated with this Request. The requester is eligible for a waiver of search and review fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.11(c)(3), (d), and for a waiver of all fees, including duplication fees, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.11(k)(1).

* * *

Pursuant to applicable statute and regulations, we will expect a determination regarding expedited processing within 10 calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(d)(4).

If the Request is denied in whole or in part, please justify all withholdings or redactions by reference to specific exemptions under the FOIA and provide all segregable portions of otherwise exempt material. NACDL reserves the right to appeal a decision to withhold any information or to deny a waiver of fees.

NACDL also requests that you provide an estimated date on which you will complete processing of this request. *See* 5 U.S.C. §552(a)(7)(B).

Thank you for your prompt attention to this matter. Please furnish the applicable records to:

Kyle O'Dowd
Associate Executive Director for Policy
National Association of Criminal Defense Lawyers
1660 L St. N.W., 12th Floor
Washington, D.C. 20036

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. 552(a)(6)(E)(vi).

Sincerely yours,

Kyle O'Dowd
Associate Executive Director for Policy

EXHIBIT B

U.S. Department of Justice
Executive Office for United States Attorneys
Freedom of Information & Privacy Staff
600 E Street, N.W., Suite 7300, Bicentennial Building
Washington, DC 20530-0001
(202) 252-6020 FAX: 252-6047 (www.usdoj.gov/usao)

Requester: Kyle O'Dowd Request Number: 13-377

Subject of Request: Federal Criminal Discovery Bluebook

Dear Requester:

FEB 2 8 2013

Your request for records under the Freedom of Information Act/Privacy Act has been processed. This letter constitutes a reply from the Executive Office for United States Attorneys, the official record-keeper for all records located in this office and the various United States Attorneys' Offices.

To provide you the greatest degree of access authorized by the Freedom of Information Act and the Privacy Act, we have considered your request in light of the provisions of both statutes.

The records you seek are located in a Privacy Act system of records that, in accordance with regulations promulgated by the Attorney General, is exempt from the access provisions of the Privacy Act. 28 CFR § 16.81. We have also processed your request under the Freedom of Information Act and are making all records required to be released, or considered appropriate for release as a matter of discretion, available to you. This letter is a [ ] partial [X] full denial.

Enclosed please find:

_____ page(s) are being released in full (RIF);
_____ page(s) are being released in part (RIP);
_____ page(s) are withheld in full (WIF). **The redacted/withheld documents were reviewed to determine if any information could be segregated for release.**

The exemption(s) cited for withholding records or portions of records are marked below. An enclosure to this letter explains the exemptions in more detail.

Section 552			Section 552a
[ ] (b)(1)	[ ] (b)(4)	[ ] (b)(7)(B)	[ ] (j)(2)
[ ] (b)(2)	[X] (b)(5)	[ ] (b)(7)(C)	[ ] (k)(2)
[ ] (b)(3)	[ ] (b)(6)	[ ] (b)(7)(D)	[ ] (k)(5)
_____	[ ] (b)(7)(A)	[X] (b)(7)(E)	[ ] _____
_____		[ ] (b)(7)(F)	

[ ] In addition, this office is withholding grand jury material which is retained in the District.

[ ] A review of the material revealed:

[ ] Our office located records that originated with another government component. **These records were found in the U.S. Attorney's Office files and may or may not be responsive to your request.** These records will be referred to the following component(s) listed for review and direct response to you:_____

[ ] There are public records which may be obtained from the clerk of the court or this office, upon specific request. If you wish to obtain a copy of these records, you must submit a new request. These records will be provided to you subject to copying fees.

[ ] Please note that your original letter was split into separate files ("requests"), for processing purposes, based on the nature of what you sought. Each file was given a separate Request Number (listed below), for which you will receive a separate response:

_____

[ ] See additional information attached.

This is the final action on this above-numbered request. You may appeal this decision on this request by writing to the **Office of Information Policy, United States Department of Justice, 1425 New York Avenue, Suite 11050, Washington, D.C. 20530-0001**. Both the letter and envelope should be marked "FOIA Appeal." Your appeal must be received by OIP within 60 days from the date of this letter. If you are dissatisfied with the results of any such administrative appeal, judicial review may thereafter be available in U.S. District Court, 28 C.F.R. § 16.9.

Sincerely,

Susan B. Gerson
Assistant Director

Enclosure(s)

EXHIBIT C

National Association of Criminal Defense Lawyers

FREEDOM OF INFORMATION ACT APPEAL

April 26, 2013

Office of Information Policy
United States Department of Justice
1425 New York Avenue NW
Suite 11050

Re: Appeal of Request for Federal Criminal Discovery Bluebook, FOIA Request # 13-377

Dear Sir or Madam:

This is an appeal from the February 28, 2013, decision to withhold records responsive to Freedom of Information Act Request No. 13-377. That request was dated December 20, 2012, and filed by Kyle O'Dowd, Associate Executive Director for Policy, National Association of Criminal Defense Lawyers (NACDL). NACDL requested the Office of Legal Education publication entitled "Federal Criminal Discovery," believed to be published and/or distributed in March 2011 and possibly referred to as *The Federal Criminal Discovery Blue Book*. A copy of NACDL's request is attached as Exhibit A.

By letter dated February 28, 2013, Susan B. Gerson denied NACDL's request in its entirety. A copy of the denial letter is attached as Exhibit B. The denial letter purports that information responsive to NACDL's request is exempt from disclosure under 5 U.S.C. 552(b)(5) and 5 U.S.C. 552(b)(7)(E).

NACDL asserts that the requested document is required to be made public under FOIA and does not fall under either of the claimed exceptions:

(1) 5 U.S.C. 552(b)(5). The requested document is not exempted under (b)(5) as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The denial letter did not explain how this exemption was relevant to its decision to withhold the requested document, and NACDL asserts that none of the grounds for this exemption apply here. The document does not constitute attorney's work product, attorney-client

communications, or "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."

a. Work Product: The requested document was not prepared for litigation. *PHE, Inc. v. DOJ*, 983 F.2d 248, 251 (D.C. Cir. 1993). The attorney work product privilege protects documents prepared by an attorney revealing the theory of the case or litigation strategy. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 154. Because the purpose of the privilege is to protect the adversarial trial process by shielding the attorneys' preparation from scrutiny, *Jordan v. Dep't of Justice,* 591 F.2d 73, 775 (D.C. Cir. 1978) (*en banc*), this exemption is clearly inapplicable.

b. Attorney Client Privilege: NACDL believes that the requested document was disseminated widely within the agency and/or without restrictions, and that no confidentiality exists and the privilege cannot apply. In addition, the document is not the type of confidential legal counsel protected by the privilege. The requested document does not constitute "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc. v. Dep't of the Air Force,* 566 F.2d 242 (D.C. Cir. 1977).

c. Deliberative Process: The requested document is neither predecisional nor deliberative. This privilege protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Nat'l Labor Relations Bd.,* 421 U.S. at 150 (quoting *Stiftung v. V.E.B.*, 40 F.R.D. 318, 324 (D.D.C. 1966). The requested document likely reflects interpretations of current law and not discussions of proposed policies.

(2) 5 U.S.C. 552(b)(7)(E). The requested document is not "records or information compiled for law enforcement purposes," that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." There is no logical way in which the requested document could "create a risk of circumvention of the law." This exemption does not apply to "garden-variety legal analysis," which includes discussion and digests of caselaw. *Mayer Brown LLP v. IRS*, 562 F.3d 1190 (D.C. Cir. 2009). Nor does this exemption apply to materials within the scope of 5 U.S.C. § 552(a)(2), such as administrative staff manuals.

For the forgoing reasons, NACDL requests that this office reconsider the unjustified denial and require that the requested documents be provided.

Sincerely,

Kyle O'Dowd
Associate Executive Director for Policy

EXHIBIT D

U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

May 17, 2013

Kyle O'Dowd, Esq.
National Association of Criminal Defense Lawyers
12th Floor
1660 L Street, NW
Washington, DC 20036

Re: Request No. 13-377

Dear Mr. O'Dowd:

This is to advise you that your administrative appeal from the action of the Executive Office for United States Attorneys was received by this Office on April 26, 2013.

The Office of Information Policy has the responsibility of adjudicating such appeals. In an attempt to afford each appellant equal and impartial treatment, we have adopted a general practice of assigning appeals in the approximate order of receipt. Your appeal has been assigned number **AP-2013-03081**. Please mention this number in any future correspondence to this Office regarding this matter. Please note that if you provide an e-mail address or another electronic means of communication with your appeal, this Office may respond to your appeal electronically even if you submitted your appeal to this Office via regular U.S. mail.

We will notify you of the decision on your appeal as soon as we can. If you have any questions about the status of your appeal, you may contact me at the number above. If you have submitted your appeal through this Office's online electronic appeal portal, you may also obtain an update on the status of your appeal by logging into your portal account.

Sincerely,

Priscilla Jones
Supervisory Administrative Specialist

EXHIBIT E

U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

June 25, 2013

Kyle O'Dowd, Esq.
National Association of Criminal
Defense Lawyers
12th Floor
1660 L Street, NW
Washington, DC 20036

Re: Appeal No. AP-2013-03081
Request No. 13-377
AMJ:MWH

VIA: U.S. Mail

Dear Mr. O'Dowd:

You appealed from the action of the Executive Office for United States Attorneys (EOUSA) on your request for access to the "Federal Criminal Discovery Blue Book."

After carefully considering your appeal, I am affirming, on partly modified grounds, EOUSA's action on your request. The Freedom of Information Act provides for disclosure of many agency records. At the same time, Congress included in the FOIA nine exemptions from disclosure that provide protection for important interests such as personal privacy, privileged communications, and certain law enforcement activities. EOUSA properly withheld this information in full because it is protected from disclosure under the FOIA pursuant to 5 U.S.C. § 552(b)(5). This provision concerns certain inter- and intra-agency communications protected by the attorney work-product privilege.

Please be advised that this Office's decision was made only after a full review of this matter. Your appeal was assigned to an attorney with this Office who thoroughly reviewed and analyzed your appeal, your underlying request, and the action of EOUSA in response to your request.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road,

College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 301-837-1996; toll free at 1-877-684-6448; or facsimile at 301-837-0348.

Sincerely,

Sean R. O'Neill
Chief
Administrative Appeals Staff

By: Anne D. Work

Anne D. Work
Senior Counsel
Administrative Appeals Staff

CIVIL COVER SHEET

JS-44 (Rev. 7/13 DC)

I. (a) PLAINTIFFS

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ("NACDL")

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF 11001
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS ("EOUSA"); UNITED STATES DEPARTMENT OF JUSTICE ("DOJ")

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT 11001
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Kerri L. Ruttenberg, JONES DAY
51 Louisiana Avenue, N.W., Washington, DC 20001-2113
Telephone: (202) 879-3939; Facsimile: (202) 626-1700
kruttenberg@jonesday.com

ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION
(PLACE AN x IN ONE BOX ONLY)

- ○ 1 U.S. Government Plaintiff
- ○ 3 Federal Question (U.S. Government Not a Party)
- ◉ 2 U.S. Government Defendant
- ○ 4 Diversity (Indicate Citizenship of Parties in item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) **FOR DIVERSITY CASES ONLY!**

	PTF	DFT		PTF	DFT
Citizen of this State	○ 1	○ 1	Incorporated or Principal Place of Business in This State	○ 4	○ 4
Citizen of Another State	○ 2	○ 2	Incorporated and Principal Place of Business in Another State	○ 5	○ 5
Citizen or Subject of a Foreign Country	○ 3	○ 3	Foreign Nation	○ 6	○ 6

IV. CASE ASSIGNMENT AND NATURE OF SUIT
(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

○ **A. *Antitrust***

- ☐ 410 Antitrust

○ **B. *Personal Injury/ Malpractice***

- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Medical Malpractice
- ☐ 365 Product Liability
- ☐ 367 Health Care/Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Product Liability

○ **C. *Administrative Agency Review***

- ☐ 151 Medicare Act

Social Security
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

Other Statutes
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 890 Other Statutory Actions (If Administrative Agency is Involved)

○ **D. *Temporary Restraining Order/Preliminary Injunction***

Any nature of suit from any category may be selected for this category of case assignment.

(If Antitrust, then A governs)

○ **E. *General Civil (Other)*** OR ○ **F. *Pro Se General Civil***

Real Property
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent, Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

Personal Property
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

Bankruptcy
- ☐ 422 Appeal 27 USC 158
- ☐ 423 Withdrawal 28 USC 157

Prisoner Petitions
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Conditions
- ☐ 560 Civil Detainee – Conditions of Confinement

Property Rights
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

Federal Tax Suits
- ☐ 870 Taxes (US plaintiff or defendant)
- ☐ 871 IRS-Third Party 26 USC 7609

Forfeiture/Penalty
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

Other Statutes
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 430 Banks & Banking
- ☐ 450 Commerce/ICC Rates/etc.
- ☐ 460 Deportation
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions
- ☐ 470 Racketeer Influenced & Corrupt Organization

- ☐ 480 Consumer Credit
- ☐ 490 Cable/Satellite TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes
- ☐ 890 Other Statutory Actions (if not administrative agency review or Privacy Act)

○ G. *Habeas Corpus/ 2255* ☐ 530 Habeas Corpus – General ☐ 510 Motion/Vacate Sentence ☐ 463 Habeas Corpus – Alien Detainee	○ H. *Employment Discrimination* ☐ 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	◉ I. *FOIA/Privacy Act* ☒ 895 Freedom of Information Act ☐ 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	○ J. *Student Loan* ☐ 152 Recovery of Defaulted Student Loan (excluding veterans)
○ K. *Labor/ERISA (non-employment)* ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 740 Labor Railway Act ☐ 751 Family and Medical Leave Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act	○ L. *Other Civil Rights (non-employment)* ☐ 441 Voting (if not Voting Rights Act) ☐ 443 Housing/Accommodations ☐ 440 Other Civil Rights ☐ 445 Americans w/Disabilities – Employment ☐ 446 Americans w/Disabilities – Other ☐ 448 Education	○ M. *Contract* ☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholder's Suits ☐ 190 Other Contracts ☐ 195 Contract Product Liability ☐ 196 Franchise	○ N. *Three-Judge Court* ☐ 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN

◉ 1 Original Proceeding ○ 2 Removed from State Court ○ 3 Remanded from Appellate Court ○ 4 Reinstated or Reopened ○ 5 Transferred from another district (specify) ○ 6 Multi-district Litigation ○ 7 Appeal to District Judge from Mag. Judge

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)
5 U.S.C. § 552: improper withholding

VII. REQUESTED IN COMPLAINT CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND $** 000 **JURY DEMAND:** Check YES only if demanded in complaint YES ☐ NO ☒

VIII. RELATED CASE(S) IF ANY (See instruction) YES ☐ NO ☒ If yes, please complete related case form

DATE: February 21, 2014 **SIGNATURE OF ATTORNEY OF RECORD** Kevin L Ruthrauff

INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.

III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.

IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.

VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.

VIII. RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,	)	
Plaintiff,	)	
v.	)	Civil Action No. 14-cv-269 (CKK)
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS and UNITED STATES DEPARTMENT OF JUSTICE	)	
Defendants.	)	

ANSWER

Defendants Executive Office for United States Attorneys ("EOUSA") and United States Department of Justice ("DOJ"), through their undersigned counsel, hereby answer Plaintiff's Complaint in the above-captioned matter as follows:

INTRODUCTION

1. This paragraph consists of Plaintiff's characterization of its Complaint, to which no response is required.

2. The first sentence of this paragraph consists of Plaintiff's characterization of its Complaint, to which no response is required. Defendants lack knowledge or sufficient information to form a belief as to the truth of the second sentence, but admit that DOJ personnel have referred to the Office of Legal Education's book entitled "Federal Criminal Discovery" as the "Federal Criminal Discovery Blue Book."

3. The first sentence of this paragraph does not concern facts showing that Plaintiff is entitled to relief under FOIA, as required under Fed. R. Civ. P. 8(a)(2), so no response is required. The remaining sentences consist of quotations from public documents, which speak for themselves and do not require a response.

4. Defendants admit that Plaintiff's FOIA request was dated December 20, 2012, although it was received by DOJ on December 27, 2012. The remaining sentences of this paragraph consist of Plaintiff's arguments and legal conclusions, to which no response is required.

5. Defendants admit that Plaintiff's FOIA request was denied by a letter dated February 28, 2014, but deny that this denial was improper. The second, third, and fourth sentences are admitted.

6. This paragraph consists of Plaintiff's arguments or legal conclusions, to which no response is required.

7. This paragraphs consists of Plaintiff's arguments, statements of law, or legal conclusions, to which no response is required.

JURISDICTION AND VENUE

8. This paragraph asserts legal conclusions regarding jurisdiction, to which no response is required.

9. This paragraph asserts legal conclusions regarding venue, to which no response is required.

PARTIES

10. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

11. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

12. Defendants admit that DOJ is a Department of the Executive Branch of the United States government and that it has possession of the records requested by Plaintiff. The remaining allegations in this paragraph consist of Plaintiff's characterization of its lawsuit or legal conclusions, to which no response is required.

13. The first and second sentences are admitted. Defendants also admit that EOUSA is in possession of the records requested by Plaintiff. The remaining allegations in this paragraph consist of Plaintiff's characterization of its lawsuit or legal conclusions, to which no response is required.

STATUTORY FRAMEWORK

14-23. These paragraphs consist of statements of law or legal conclusions, to which no response is required.

FACTUAL ALLEGATIONS

24-28. The allegations in these paragraphs do not concern facts showing that Plaintiff is entitled to relief under FOIA, as required under Fed. R. Civ. P. 8(a)(2). Accordingly, no response is required.

29. This paragraph consists of statements of law or legal conclusions, to which no response is required.

30. This paragraph consists of Plaintiff's argument or legal conclusions, to which no response is required.

31. The first and third sentences of this paragraph consist of Plaintiff's arguments or legal conclusions, to which no response is required. The second sentence does not concern facts

showing that Plaintiff is entitled to relief under FOIA, as required under Fed. R. Civ. P. 8(a)(2), so no response is required.

32. The first two sentences of this paragraph do not concern facts showing that Plaintiff is entitled to relief under FOIA, as required under Fed. R. Civ. P. 8(a)(2), so no response is required. The third and fourth sentences consist of Plaintiff's arguments or legal conclusions, to which no response is required.

33. Defendants admit that Plaintiff's FOIA request was dated December 20, 2012, but deny that it was served that day. The FOIA request was received by DOJ on December 27, 2012. The remaining allegations in this paragraph consist of Plaintiff's characterization of its FOIA request, to which no response is required.

34. Admitted.

35. Admitted.

36. Defendants admit that Plaintiff's FOIA administrative appeal letter was dated April 26, 2013, and that it was received by DOJ that day, but Defendants lack sufficient information to know when this letter was sent. The second and third sentences consist of Plaintiff's characterization of its FOIA administrative appeal letter, to which no response is required.

37. Admitted.

38. Admitted.

39. This paragraph consists of Plaintiff's arguments, statements of law, or legal conclusions, to which no response is required.

40. This paragraph consists of Plaintiff's argument, statements of law, or legal conclusions, to which no response is required.

41. The first sentence of this paragraph consists of Plaintiff's argument or a legal conclusion, so no response is required. The second sentence consists of quotations from a public document, which speaks for itself and does not require a response. The third paragraph consists of Plaintiff's argument or legal conclusions, to which no response is required.

42-48. These paragraphs consist of Plaintiff's argument, statements of law, or legal conclusions, to which no response is required.

FIRST CAUSE OF ACTION

49. This paragraph re-alleges and incorporates by reference all preceding paragraphs. To the extent a response is deemed required, Defendants refer the Court to their responses to the preceding paragraphs.

50. This paragraph consists of statement of law, to which no response is required.

51. Defendants admit that the book "Federal Criminal Discovery" has not been published in the Federal Register. The remaining allegations in this paragraph consist of Plaintiff's argument and legal conclusions, to which no response is required.

52. This paragraph consists of Plaintiff's arguments or legal conclusions, to which no response is required.

53. This paragraph consists of Plaintiff's argument, statements of law, or legal conclusions, to which no response is required.

SECOND CAUSE OF ACTION

54. This paragraph re-alleges and incorporates by reference all preceding paragraphs. To the extent a response is required, Defendants refer the Court to their responses to the preceding paragraphs.

55. This paragraph consists of statements of law, to which no response is required.

56. This paragraph consists of Plaintiff's characterization of its FOIA request, to which no response is required.

57. The paragraph consists of a legal conclusion, to which no response is required.

REQUEST FOR RELIEF

The remaining paragraphs of the Complaint contain Plaintiff's requested relief, to which no response is required. To the extent a response is deemed necessary, Defendants deny the allegations contained in the remaining paragraphs of the Complaint and aver that Plaintiff is not entitled to any relief.

Defendants hereby deny all allegations in Plaintiff's Complaint not expressly admitted or denied.

WHEREFORE, having fully answered Plaintiff's Complaint, Defendants assert that Plaintiff is not entitled to the relief requested, or to any relief whatsoever, and that the information Plaintiff seeks is protected from disclosure by one or more statutory exemptions. Accordingly, Defendants request that this action be dismissed in its entirety with prejudice and that Defendants be given such other relief as this Court deems proper, including costs and disbursements.

Dated: April 3, 2014

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

JOHN R. TYLER
Assistant Director
Federal Programs Branch

/s/ *Héctor G. Bladuell*
HECTOR G. BLADUELL
Trial Attorney (DC Bar # 503277)
United States Department of Justice
Civil Division, Federal Programs Branch

20 Massachusetts Avenue N.W.
Washington, D.C. 20001
Telephone: (202) 514-4470
Fax: (202) 616-8470
hector.bladuell@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that on this 3rd day of April 2014, I caused a copy of the foregoing Answer to be filed electronically and that the document is available for viewing and downloading from the ECF system.

/s/ Héctor G. Bladuell

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Plaintiff, v. EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS and UNITED STATES DEPARTMENT OF JUSTICE Defendants.	)	Civil Action No. 14-cv-269 (CKK)

***Vaughn* Index**

Pursuant to the Court's Order of May 6, 2014, Defendants submit the following *Vaughn* Index.

Document	Date	Exemption	Description
Federal Criminal Discovery ("FCD")	2011	5	The FCD is a litigation manual that is part of DOJ's Office of Legal Education's Litigation Series. It consists of approximately 340 pages and is electronically available to DOJ personnel only. It constitutes attorney work product because it was prepared by DOJ attorneys in anticipation of litigation to advise federal prosecutors on the legal sources of their discovery obligations as well as the types of discovery related claims and issues that they would confront in criminal investigations and prosecutions. The FCD contains the recommendations and litigation strategies of DOJ attorneys with expertise on criminal discovery issues. Among other things, it encourages certain practices and discourages others; identifies factors prosecutors should consider in making particular decisions; describes the types of claims/tactics defense counsel raise/employ and provides advice and authority to counter those

			claims/tactics; evaluates the merits of arguments prosecutors can make; and illustrates with cases pitfalls for prosecutors to avoid, including arguments available in case prosecutors fall into those pitfalls. These confidential legal analyses and strategies are offered to support the Government's investigations and prosecutions.
FCD	2011	7(E)	The FCD is exempt under Exemption 7(E). It was compiled for law enforcement purposes inasmuch as it was created for the use of federal prosecutors in criminal investigations and prosecutions. In addition, it contains law enforcement techniques, procedures, and guidelines that prosecutors may and do employ during the course of criminal proceedings. The disclosure of this information could risk circumvention of the law. For example, the FCD describes techniques and procedures for protecting witnesses and evidence, for properly handling statements of defendants and witnesses, for determining the scope and timing of disclosures, for obtaining electronic and other forms of evidence, and for handling shortcomings in discovery, among others. In addition, the FCD includes guidelines for prosecutors to fulfill their discovery obligations, to handle discovery issues, avoid discovery disputes, and litigate discovery-related claims. While some of these techniques, procedures, and guidelines, are set out as Practice Notes, Caveats, Strategic and Logistical Concerns, or Practical Considerations, many are interspersed within the legal analysis. The totality of these techniques, procedures, and guidelines are not generally known to the public. Disclosure of this information, which would reveal how prosecutors conduct investigations and prosecutions as well as the candid assessments of DOJ attorneys regarding discovery rules, cases, and practices, could allow individuals to modify their behavior in order to avoid detection, hide information, and defeat proper law enforcement efforts.

Dated: June 11, 2014

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

JOHN R. TYLER
Assistant Director

/s/ *Héctor G. Bladuell*_____
HECTOR G. BLADUELL
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-4470
Facsimile: (202) 616-8460
Email: hector.bladuell@usdoj.gov

Counsel for Defendants

Certificate of Service

I HEREBY CERTIFY that on June 11, 2014, I filed the foregoing pleading electronically through the CM/ECF system and that the document is available for viewing and downloading from the ECF system.

/s/ Héctor G. Bladuell
Héctor G. Bladuell
Trial Attorney

Department of Justice

STATEMENT FOR THE RECORD

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING ON THE SPECIAL COUNSEL'S REPORT
ON THE PROSECUTION OF SENATOR TED STEVENS

MARCH 28, 2012

Statement for the Record from the Department of Justice

Committee on the Judiciary
United States Senate

Hearing on the Special Counsel's Report
on the Prosecution of Senator Ted Stevens
March 28, 2012

1. Introduction

The Department of Justice respectfully submits this statement for the record of today's hearing before the Senate Judiciary Committee on the Special Counsel's Report on the Prosecution of Senator Ted Stevens.

When concerns were first raised about the handling of the prosecution of Senator Stevens, the Department immediately conducted an internal review. The Attorney General recognized the importance of ensuring trust and confidence in the work of Department prosecutors and took the extraordinary step of moving to dismiss the case when errors were discovered. Moreover, to ensure that the mistakes in the *Stevens* case would not be repeated, the Attorney General convened a working group to review discovery practices and charged the group with developing recommendations for improving such practices so that errors are minimized. As a result of the working group's efforts, the Department has taken unprecedented steps, described more fully below, to ensure that prosecutors, agents, and paralegals have the necessary training and resources to fulfill their legal and ethical obligations with respect to discovery in criminal cases. These reforms include a sweeping training curriculum for all federal prosecutors and the requirement – for the first time in the history of the Department of Justice – that every federal prosecutor receive refresher discovery training each year.

In light of these internal reforms, the Department does not believe that legislation is needed to address the problems that came to light in the *Stevens* prosecution. Such a legislative proposal would upset the careful balance of interests at stake in criminal cases, cause significant harm to victims, witnesses, and law enforcement efforts, and generate substantial and unnecessary litigation that would divert scarce judicial and prosecutorial resources. As was recently recognized by the Advisory Committee on Criminal Rules of the Judicial Conference of the United States ("Criminal Rules Committee"), which in 2010-11 considered and rejected changes to Rule 16, true improvements to discovery practices will come from prosecutors and agents having a full appreciation of their responsibilities under their existing obligations, rather than by expanding those obligations.

2. The Schuelke Report and the OPR Investigation

As Mr. Schuelke acknowledged in his report, the Department cooperated fully with Mr. Schuelke's inquiry into the prosecution of former Senator Ted Stevens. The Department's Office of Professional Responsibility ("OPR") separately investigated allegations of professional

misconduct by prosecutors in the *Stevens* case. Although OPR and Mr. Schuelke worked together and shared information throughout the investigative process, OPR is required to make an independent assessment of the allegations of misconduct. The entire Department misconduct review involves various steps, and the process is not finished until all the necessary steps have been completed. No formal action is taken against a Department employee until the disciplinary process is final.

The Department seeks to be as transparent as possible with respect to decisions involving our attorneys. Nonetheless, the Department must also comply with the provisions of the Privacy Act, and disclosures of information from OPR and Office of Inspector General investigations that examine the conduct of individual Department employees have significant Privacy Act implications. The Department's misconduct review process is in its last stages. To the extent it is appropriate and permissible under the law, we will endeavor to make the OPR findings public when that review is final.

The Department acknowledges the wide variety of discovery failures that occurred in the *Stevens* case. These failures are core topics of the Department's training regimen. The discovery training and resources that have been put in place over the past three years are designed, in part, to minimize the likelihood that the types of failures that occurred in *Stevens* will happen again.

3. The Department's response to the discovery failures that occurred in *Stevens*

Attorney General Holder, who had taken office shortly after the *Stevens* trial, acted swiftly and decisively after learning of the discovery failures that occurred in that case. A new team of seasoned prosecutors was assigned to review the matter, and they determined that Senator Stevens and his attorneys had not been provided access to information they were entitled to receive. Because the undisclosed information could have affected the outcome of the case, the Attorney General took the extraordinary and appropriate step of dismissing the prosecution of Senator Stevens. He also ordered a comprehensive review of all discovery practices and related procedures across the country to reduce the likelihood of future discovery failures.

The discovery failures in the *Stevens* case were not typical and must be considered in their proper context. Over the past 10 years, the Department has filed over 800,000 cases involving more than one million defendants. In the same time period, only one-third of one percent (.33 percent) of these cases warranted inquiries and investigations of professional misconduct by the Department's Office of Professional Responsibility. Less than three-hundredths of one percent (.03 percent) related to alleged discovery violations, and just a fraction of these resulted in actual findings of misconduct. Department regulations require DOJ attorneys to report any judicial finding of misconduct to OPR, and OPR conducts computer searches to identify court opinions that reach such findings in order to confirm that it examines any judicial findings of misconduct, reported or not. In addition, defense attorneys are not reticent to raise allegations of discovery failures when they do occur.

Our prosecutors and agents work hard to keep our country and communities safe and to ensure that criminals are brought to justice honorably and ethically. Nonetheless, when there is even a single lapse, we must, and we do, take it seriously, because it could call the integrity of our

criminal justice system into question and could have devastating consequences. In April 2009, within days after the *Stevens* case was dismissed, the Criminal Discovery and Case Management Working Group was created to review the Department's policies, practices, and training concerning criminal case management and discovery, and to evaluate ways to improve them. Our comprehensive review of discovery practices identified some areas where the Department could improve, and we have undertaken a series of reforms which have since been institutionalized.

In January 2010, the Office of the Deputy Attorney General issued three memoranda to all criminal prosecutors: "Issuance of Guidance and Summary of Actions Taken in Response to the June 2009 Report of the DOJ Criminal Discovery and Case Management Working Group," "Requirement for Office Discovery Policies in Criminal Matters," and "Guidance for Prosecutors Regarding Criminal Discovery." These memoranda provide overarching guidance on gathering and reviewing potentially discoverable information and making timely disclosure to defendants; they also direct each U.S. Attorney's Office and Department litigating component to develop additional, district- and component-specific discovery policies that account for controlling precedent, existing local practices, and judicial expectations. Subsequently, the Office of the Deputy Attorney General has issued separate guidance relating to discovery in national security cases and discovery of electronic communications.

Later in January 2010, the Deputy Attorney General appointed a long-serving career prosecutor as the Department's first full-time National Criminal Discovery Coordinator to lead and oversee all Department efforts to improve disclosure policies and practices. Since January 2010, the Department has undertaken rigorous enhanced training efforts, provided prosecutors with key discovery tools such as online manuals and checklists, and continues to explore ways to address the evolving nature of e-discovery. These steps have included:

- All federal prosecutors are now required to undertake annual update/refresher discovery training. Roughly 6,000 federal prosecutors across the country – regardless of experience level – receive the required training annually on a wide variety of criminal discovery-related topics.

- During 2010-11, the Department's National Criminal Discovery Coordinator traveled to approximately 40 U.S. Attorney's Offices throughout the country to present four-hour blocks of training on prosecutors' disclosure obligations under *Brady*, *Giglio*, the Jencks Act, Rule 16, and the U.S. Attorneys' Manual ("USAM"), as well as on the discovery implications of electronically stored information ("ESI"). He also conducted numerous training sessions for prosecutors and other law enforcement officials at Main Justice in Washington, D.C. – including a series of training sessions for attorneys at OPR and the Department's Professional Responsibility Advisory Office – and at the National Advocacy Center in Columbia, South Carolina.

- Since 2010, the Department has held several "New Prosecutor Boot Camp" courses, designed for newly hired federal prosecutors, which include training on *Brady*, *Giglio*, and ESI, among other topics.

- These training requirements were institutionalized through their codification in the USAM. Specifically, USAM § 9-5.001 was amended in June 2010 to make training mandatory for all prosecutors within 12 months after hiring, and requiring two hours of update/refresher training on an annual basis for all other prosecutors.

- In 2011, the Department provided four hours of training to more than 26,000 federal law enforcement agents and other officials – primarily from the FBI, DEA, and ATF – on criminal discovery policies and practices. The Department is currently developing annual update/refresher training for these agents.

- In late February 2012, the Department held "train-the-trainer" programs in Washington, D.C., to begin training the next round of federal law enforcement agencies, including Department of Homeland Security agencies such as ICE, various OIGs, and other federal agencies.

- The Department has held several Support Staff Criminal Discovery Training Programs, including one session earlier this month. In addition, the Department has produced criminal discovery training materials for victim/witness coordinators.

- A Federal Criminal Discovery Blue Book – which comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations – was created and distributed to prosecutors nationwide in 2011. It is now electronically available on the desktop of every federal prosecutor and paralegal.

- One of the most challenging issues for prosecutors in meeting their discovery obligations in the digital age is the explosion of ESI. The Department developed – in collaboration with representatives from the Federal Public Defenders and counsel appointed under the Criminal Justice Act – a ground-breaking criminal ESI protocol. The protocol was distributed to prosecutors, defense attorneys, and members of the federal judiciary in February 2012. It is designed to:

    - promote the efficient and cost-effective production of ESI discovery in federal criminal cases;
    - reduce unnecessary conflict and litigation over ESI discovery by encouraging the parties to communicate about ESI discovery issues;
    - create a predictable framework for ESI discovery; and
    - establish methods for resolving ESI discovery disputes without the need for court intervention.

  The protocol has already received praise from the judiciary and defense bar. The Department is in the process of developing training on the protocol for prosecutors, defense attorneys, and the judiciary.

- In order to ensure consistent long-term oversight of the Department's discovery practices, the Department moved the National Criminal Discovery Coordinator position into the Office of the Deputy Attorney General and made it a permanent executive-level position.

The Department's own policies require federal prosecutors to go beyond what is required to be disclosed under the Constitution, statutes, and rules. For example, under the USAM, prosecutors are directed to take a broad view of their obligations and resolve close calls in favor of disclosing exculpatory and impeaching evidence. The USAM requires prosecutors to disclose information beyond that which is "material" to guilt as articulated by the U.S. Supreme Court, and prosecutors must disclose exculpatory or impeachment information "regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime." USAM § 9-5.001. In addition, pursuant to the January 2010 memoranda issued by then-Deputy Attorney General David Ogden, prosecutors have been instructed to provide broader and more comprehensive discovery than the law requires, and to be inclusive when identifying the members of the prosecution team for discovery purposes. (The Department's policies do recognize that the requirement that prosecutors disclose more than the law requires may not be feasible or advisable in some national security cases where special complexities arise.)

Despite these and other robust efforts, prosecutors – like other professionals – will never be immune to mistakes. As a matter of policy, we strive to be perfect, even though we know perfection is impossible. We require our prosecutors to strictly obey the law in both letter and spirit, and we work to ensure that isolated mistakes are detected early, corrected, and do not prevent justice from being done.

4. Legislation in this area is unnecessary

With the release of the Schuelke Report, some have argued that legislation is necessary to alter federal criminal discovery practice. The Department does not share that view. As detailed above, since *Stevens*, the Department has addressed vulnerabilities in the Department's discovery practices. In light of these efforts, and the high profile nature of the discovery failures in *Stevens*, Department prosecutors are more aware of their discovery obligations than perhaps ever before. Now, of all times, a legislative change is unnecessary.

Moreover, legislation along the lines that some have suggested, would upset our system of justice by failing to recognize the need to protect interests beyond those of the defendant. It would radically alter the carefully constructed balance that the Supreme Court and lower courts, the Criminal Rules Committee, and Congress have painstakingly created over decades – a balance between ensuring the protection of a defendant's constitutional rights and, at the same time, safeguarding the equally important public interest in a criminal trial process that reaches timely and just results, safeguards victims and witnesses from retaliation or intimidation, does not unnecessarily intrude on victims' and witnesses' personal privacy, protects on-going criminal investigations from undue interference, and recognizes critical national security interests.

Unfortunately, witness safety concerns are more than merely theoretical. Even under the current system's careful balance between a defendant's right to a fair trial and witnesses' privacy and

safety interests, we have had witnesses intimidated, assaulted, and even murdered after their names were disclosed in pretrial discovery. Legislation requiring earlier and broader disclosures would likely lead to an increase in such tragedies. It would also create a perverse incentive for defendants to wait to plead guilty until close to trial in order to ensure that they learn the identities of all the people who would have testified against them.

The Department is also concerned that one such legislative proposal would require disclosure of information that is not substantially related to the defendant's guilt, even in cases where the defendant is pleading guilty. This requirement would result in the unnecessary and harmful disclosure of national security-related information and would compromise intelligence and law enforcement sources and methods. For example, despite the existence of the Classified Information Procedures Act, a new discovery standard could result in the disclosure of investigative steps taken, investigative techniques or trade craft used, and the identities of witnesses interviewed during counterterrorism and counterespionage investigations. Moreover, in cases involving guilty pleas – where a defendant is necessarily prepared to admit facts in open court that establish he or she committed the charged offense(s) – such legislation would require the unnecessary disclosure of the identity of undercover employees or confidential human sources, scarce investigative assets who, once revealed, may no longer be used to covertly detect and disrupt national security threats. Currently, in the national security context, we tell other countries that we will keep the information they share with us confidential unless we absolutely need to disclose it because of its exculpatory nature. Under such a bill, we would have to disclose an increased volume of information and disclose it more frequently, thus discouraging cooperation from our foreign partners.

In cases involving criminal charges against a defendant for child exploitation, impeachment information on the child-victim would need to be disclosed without regard to either admissibility or the substantial policy interests in keeping this information private, even if the evidence against the defendant included his own confession and videotapes of the defendant committing the abuse. In rape cases, information about a sex-crime victim's sexual history, partners, and sexual predisposition would need to be disclosed to the defense – again, regardless of admissibility. The disclosures required by the current legislative proposal cut against the important policy aims of child protection and rape shield laws.

Such legislation would also invite time-consuming and costly litigation over discovery issues not substantially related to a defendant's guilt, resulting in delayed justice for victims and the public and greater uncertainty regarding the finality of criminal verdicts. Inclusion of a provision for awarding attorney's fees would provide a significant incentive to engage in such collateral litigation. These concerns, among others, recently led the Criminal Rules Committee – a body populated by federal judges who are intimately familiar with these discovery issues – to reject a proposed amendment to Rule 16 to expand prosecutors' discovery obligations.

5. Conclusion

The *Stevens* case was deeply flawed. But it does not represent the work of federal prosecutors around the country who work for justice every day. And it does not suggest a systemic problem warranting a significant departure from well-established criminal justice practices that have

contributed to record reductions in the rates of crime in this country while at the same time providing defendants with due process. The *Stevens* case is one in which the current rules governing discovery were violated, not one in which the rules were complied with but shown to be inadequate.

The objective of the criminal justice system is to produce just results. This includes ensuring that the processes we use do not result in the conviction of the innocent, and likewise ensuring that the guilty do not unjustifiably go free. It also includes an interest in ensuring that other participants in the process – *i.e.*, victims, law enforcement officers, and other witnesses – are not unnecessarily subjected to physical harm, harassment, public embarrassment, or other prejudice.

For nearly fifty years, a careful reconciliation of these interests has been achieved through the interweaving of constitutional doctrine (*i.e.*, *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419, 439 (1995)), statutory directives (*i.e.*, the Jencks Act and the Crime Victims' Rights Act), and Federal Rules (*i.e.*, Rule 16; Rule 26.2). Legislation in this area would disturb this careful balance without a demonstrable improvement in either the fairness or reliability of criminal judgments and in the absence of a widespread problem. The rules of discovery do not need to be changed. Rather, prosecutors and other law enforcement officials need to recognize fully their obligations under these rules, must apply them fairly and uniformly, and must be given tools to meet their discovery obligations rigorously. This is what the Department has done since the Attorney General directed the dismissal of the conviction in *Stevens*. And it is what the Department will continue to do in the future, under the policies and procedures that have been implemented and institutionalized during the past three years.

Department of Justice

STATEMENT OF

JAMES M. COLE
DEPUTY ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ENTITLED

"ENSURING THAT FEDERAL PROSECUTORS MEET DISCOVERY OBLIGATIONS"

PRESENTED

JUNE 6, 2012

Statement of James M. Cole
Deputy Attorney General
U.S. Department of Justice

Before the
Committee on the Judiciary
United States Senate

"Ensuring That Federal Prosecutors Meet Discovery Obligations"
June 6, 2012

1. Introduction

Chairman Leahy, Ranking Member Grassley, and distinguished Members of the Committee, I appreciate the opportunity to appear before you to discuss the Department's commitment to criminal discovery efforts that will result in fair trials, the serious public safety risks that would result from proposed legislation in this area, and the process by which the Department recently imposed discipline on two prosecutors responsible for discovery failures in the prosecution of former Senator Ted Stevens. As someone who spent over a dozen years as a prosecutor and then nearly twenty more as a defense attorney, I know firsthand the importance that discovery plays in ensuring criminal defendants fair trials. But, at the same time, I am acutely aware of the other critical interests – such as the safety and privacy of witnesses and victims – that our criminal justice system properly takes into account.

What occurred in the *Stevens* case is unacceptable. But it is not representative of the work of the Department of Justice. And it does not suggest a systemic problem warranting a significant departure from longstanding criminal justice practices that have contributed to record reductions in the rates of crime in this country while at the same time providing defendants with a fair and just process. The *Stevens* case is one in which the well-established rules governing discovery were violated, not one in which the rules themselves were found insufficient to ensure a fair trial. The lesson from *Stevens* was not that the scope of existing discovery obligations needed to change, but rather that the Department needed to focus intently on making sure that its prosecutors understand and comply with their existing obligations. Since *Stevens*, the Department has done just that, by enhancing the supervision, guidance, and training that it provides its prosecutors and by institutionalizing these reforms so that they will be a permanent part of the Department's practice and culture.

Accordingly, the Department does not believe that legislation is needed to alter the way discovery is provided in federal criminal cases. While we fully share Senator Murkowski's goal of ensuring that what occurred in the *Stevens* case is never repeated, we have very serious concerns with her draft legislation. We understand Senator Murkowski's strong views; but in reacting to the *Stevens* case, we must not let ourselves forget the very real dangers to safety and privacy that victims and witnesses often face in the criminal justice system; the national security interests implicated by discovery rules; and the strong public interest in ensuring not only that defendants receive a fair trial but also that the guilty be held accountable for their crimes. As

was recently recognized by the Advisory Committee on Criminal Rules of the Judicial Conference of the United States ("Criminal Rules Committee"), which in 2010-11 considered and rejected changes to Rule 16 not dissimilar to Senator Murkowski's proposals, true improvements to discovery practices will come from prosecutors and agents having a full appreciation of their responsibilities under their existing obligations and the tools and oversight to fulfill those obligations, rather than by expanding those obligations. In other words, new rules are unnecessary. What is necessary, and what the Department has been vigorously engaged in providing since the *Stevens* dismissal is enhanced guidance, training, and supervision to ensure that the existing rules and policies are followed.

2. The Department's enhanced discovery efforts

The Department's own policies require federal prosecutors to go beyond what is required to be disclosed under the Constitution, statutes, and rules. The United States Attorneys' Manual (USAM) was amended in 2006 – several years before the *Stevens* case – to mandate broader disclosure of exculpatory and impeachment evidence than the Constitution requires. The USAM requires prosecutors to disclose information beyond that which is "material" to guilt as articulated by the U.S. Supreme Court, and prosecutors must disclose exculpatory or impeachment information "regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime." USAM § 9-5.001. While the Department has had this policy in place since 2006, it was as a result of the *Stevens* case that we have significantly increased our focus on providing prosecutors and agents with the improved guidance, training, and resources necessary to comply with this policy and meet their discovery obligations. After the Attorney General sought the dismissal of the conviction of Senator Stevens, he ordered a comprehensive review of all discovery practices and related procedures to reduce the likelihood of future discovery failures. That review identified areas where the Department could improve, and we have undertaken a series of reforms.

In January 2010, the Office of the Deputy Attorney General issued three memoranda to all criminal prosecutors: "Issuance of Guidance and Summary of Actions Taken in Response to the June 2009 Report of the DOJ Criminal Discovery and Case Management Working Group," "Requirement for Office Discovery Policies in Criminal Matters," and "Guidance for Prosecutors Regarding Criminal Discovery." Through these memoranda, prosecutors have been instructed to provide broader and more comprehensive discovery than before, to provide more than the law requires, and to be inclusive when identifying the members of the prosecution team for discovery purposes. (The Department's policies do recognize that the requirement that prosecutors disclose more than the law requires may not be feasible or advisable in some national security cases where special complexities arise.) These memoranda also provide overarching guidance on gathering and reviewing potentially discoverable information and making timely disclosure to defendants; they also direct each U.S. Attorney's Office and Department litigating component to develop additional, district- and component-specific discovery policies that account for controlling precedent, existing local practices, and judicial expectations. Subsequently, the Office of the Deputy Attorney General has issued separate guidance relating to discovery in national security cases and discovery of electronic communications.

Later in January 2010, the Deputy Attorney General appointed a long-serving career prosecutor as the Department's first full-time National Criminal Discovery Coordinator to lead and oversee all Department efforts to improve disclosure policies and practices. Since January 2010, the Department has undertaken rigorous enhanced training efforts, provided prosecutors with key discovery tools such as online manuals and checklists, and continues to explore ways to address the evolving nature of e-discovery. These steps have included:

- All federal prosecutors are now required to undertake annual update/refresher discovery training. Roughly 6,000 federal prosecutors across the country – regardless of experience level – receive the required training annually on a wide variety of criminal discovery-related topics.

- Starting in 2010, each United States Attorney's Office and Main Justice litigating component has appointed one or more criminal discovery coordinators, who are responsible for working with the National Criminal Discovery Coordinator to provide the necessary training and resources to line prosecutors to help them fulfill their disclosure obligations on a daily basis.

- The Department has held several "New Prosecutor Boot Camp" courses, designed for newly hired federal prosecutors, which include training on *Brady*, *Giglio*, and electronically stored information (ESI), among other topics.

- These training requirements were institutionalized through their codification in the USAM. Specifically, USAM § 9-5.001 was amended in June 2010 to make training mandatory for all prosecutors within 12 months after hiring, and requiring two hours of update/refresher training on an annual basis for all other prosecutors.

- In 2011, the Department provided four hours of training to more than 26,000 federal law enforcement agents and other officials – primarily from the FBI, DEA, and ATF – on criminal discovery policies and practices. The Department is currently developing annual update/refresher training for these agents.

- In late February 2012, the Department held "train-the-trainer" programs in Washington, D.C., to begin training the next round of federal law enforcement agencies, including Department of Homeland Security agencies such as ICE, various OIGs, and other federal agencies.

- The Department has held several Support Staff Criminal Discovery Training Programs, including one session this past March. In addition, the Department has produced criminal discovery training materials for victim/witness coordinators.

- A Federal Criminal Discovery Blue Book – which comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations – was created and distributed to prosecutors nationwide in 2011. It is now electronically available on the desktop of every federal prosecutor and paralegal.

- The Department developed – in collaboration with representatives from the Federal Public Defenders and counsel appointed under the Criminal Justice Act – a ground-breaking protocol issued in February 2012 concerning discovery of ESI. The principal purpose of the protocol, which has already received praise from both the judiciary and the defense bar, is to ensure that prosecutors are complying with their disclosure obligations in the digital era by providing the defense with ESI in a usable format in a timely fashion.

- In order to ensure consistent long-term oversight of the Department's discovery practices, the Department moved the National Criminal Discovery Coordinator position into the Office of the Deputy Attorney General and made it a permanent executive-level position.

3. Legislative reform is unnecessary and will create substantial problems

Since the public release in mid-March 2012 of the *Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009* ("Schuelke Report"), some have argued that legislation is necessary to alter federal criminal discovery practice. The Department does not share that view.

Legislation along the lines being proposed by Senator Murkowski in S.2197 would upset our system of justice by failing to recognize the need to protect not only the interests of the defendant but those of victims, witnesses, national security and public safety. It would radically alter the carefully constructed balance that the Supreme Court and lower courts, the Criminal Rules Committee, and Congress have painstakingly created over decades – a balance between ensuring the protection of a defendant's constitutional rights and, at the same time, safeguarding the equally important public interest in a criminal trial process that reaches timely and just results, safeguards victims and witnesses from retaliation or intimidation, does not unnecessarily intrude on victims' and witnesses' personal privacy, protects ongoing criminal investigations from undue interference, and recognizes critical national security interests.

Unfortunately, witness safety concerns are more than merely theoretical. Even under the current system's careful balance between a defendant's right to a fair trial and witnesses' privacy and safety interests, we have had witnesses intimidated, assaulted, and even killed after their names were disclosed in pretrial discovery. Law enforcement officials throughout the nation repeatedly confront chilling situations where witnesses are murdered to prevent them from testifying – or in retaliation for providing testimony. Just a few of the many examples include the following:

- In the District of Maryland, prosecutors provided broad discovery, including a 10-page interview report for a potential witness, to the defense attorneys for two defendants in a narcotics case. The defendants pled guilty, so the witness was never called to testify. Nevertheless, in violation of the discovery agreement, one of the defense attorneys turned over a copy of the interview report to the mother of his client. Copies of the interview report were later found in a number of state and federal prison cells. After the interview report was produced, a drug dealer named in the report shot the witness in front of a half-dozen people. The shooter was convicted; his case is presently on appeal.

- In federal court in the District of Columbia, a defendant was recently convicted of heading a violent drug organization. At trial, the government proved that the homicide of a witness – who was killed by a co-defendant before the start of a Superior Court narcotics and firearms trial at which the witness was scheduled to testify – was committed in furtherance of the drug organization's illicit activities. Prosecutors had disclosed the witness's identity in a court filing two weeks before trial. The witness was shot to death as she walked out of a halfway house at 8:30 a.m., next to a busy street during rush hour. Her murderer did not speak to her before shooting her, and nothing was taken from her. Because of her death, the Superior Court case was dismissed.

- In the Eastern District of Pennsylvania, a defendant has been charged with ordering the murders of four children and two women from his federal jail cell. The six murder victims, who were killed in the firebombing of a North Philadelphia row house, included the mother and infant son of a cooperating witness. The defendant is also charged with plotting to kill family members of other witnesses and with maintaining a list of their names and addresses.

- In the Central District of California, witness statements were ordered produced in a gang prosecution shortly after indictment. After the materials were produced, a cooperator was beaten by several gang members at the local detention center, a female cooperator was assaulted by the girlfriend of a gang member, a car was fire-bombed, and the sole eyewitness to a murder was approached at the day care center she uses for child care and asked whether she thought the government could keep her family safe.

Legislation requiring earlier and broader disclosures would likely lead to an increase in such tragedies. It would also create a perverse incentive for defendants to wait to plead guilty until close to trial in order to see whether they can successfully remove identified witnesses from testifying against them.

The proposed legislation would also negatively impact our must vulnerable crime victims. In cases involving criminal charges against a defendant for child exploitation, impeachment information on the child-victim would need to be disclosed without regard to either admissibility or the substantial policy interests in keeping this information private, even if the evidence against the defendant included his own confession and videotapes of the defendant committing the abuse. In rape cases, information about a sex-crime victim's sexual history, partners, and sexual predisposition would need to be disclosed to the defense – again, regardless of admissibility. The disclosures required by the current legislative proposal cut against the important policy aims of child protection and rape shield laws.

The Department is also concerned that Senator Murkowski's legislative proposal would result in the unnecessary and harmful disclosure of national security-related information and would compromise intelligence and law enforcement sources and methods. Although the bill prescribes that classified information be treated in accordance with the Classified Information Procedures Act (CIPA), it nonetheless creates a substantial risk that classified information will be unnecessarily disclosed and that our country's most sensitive investigative sources and methods will be compromised during the prosecution of criminal national security cases. In

cases involving guilty pleas – where a defendant is necessarily prepared to admit facts in open court that establish he or she committed the charged offense(s) – such legislation would require the unnecessary disclosure of the identity of undercover employees or confidential human sources, scarce investigative assets who, once revealed, may no longer be used to covertly detect and disrupt national security threats. Currently, in the national security context, we tell other countries that we will keep the information they share with us confidential unless we absolutely need to disclose it because of its exculpatory nature. Under such a bill, we would have to disclose an increased volume of information and disclose it more frequently, thus discouraging cooperation from our foreign partners.

Such legislation would also invite time-consuming and costly litigation over discovery issues not substantially related to a defendant's guilt, resulting in delayed justice for victims and the public and greater uncertainty regarding the finality of criminal verdicts. Inclusion of a provision for awarding attorney's fees would provide a significant incentive to engage in such collateral litigation. These concerns, among others, recently led the Criminal Rules Committee – a body populated by federal judges who are intimately familiar with these discovery issues – to reject a proposed amendment to Rule 16 to expand prosecutors' discovery obligations.

The primary objective of the criminal justice system is to ensure fair trials and produce just results. Fair trials and just results ensure that the innocent are not wrongly convicted, and that the guilty do not go free. A fair and just criminal justice system should also ensure that other participants in the process – *i.e.*, victims, law enforcement officers, and other witnesses – are not unnecessarily subjected to physical harm, harassment, public embarrassment or other prejudice, or the fear that they might be subjected to such consequences. The bill ignores the very substantial costs the legislation's additional disclosure requirements would impose – costs to the reputational and privacy interests of witnesses, and, if witnesses become less willing to step forward, costs to society from the loss of the just conviction of the guilty. In national security cases, such results could have devastating consequences with respect to the government's ability to protect the American people, an ability that depends upon obtaining the cooperation of confidential human sources. These are real costs and ones that both the Supreme Court and Congress have taken great pains to avoid incurring. Unfortunately, they are costs that the bill fails to recognize.

4. The *Stevens* case

The misconduct that occurred during the *Stevens* prosecution has now been well documented, both in the report of the Special Counsel to District Court Judge Emmet Sullivan and in the report of the Office of Professional Responsibility. The Department's failures in that case were serious and the Attorney General's decision to dismiss the case reflected that seriousness. Nonetheless, it is important to recognize that the misconduct involved in the Stevens case was an aberration. The men and women who make up the prosecutor corps at the Department of Justice are among the best lawyers in the country. They work hard every day to keep Americans safe, to hold criminals accountable for their actions, to ensure that victims and witnesses are treated with the respect and care they deserve, and to do justice for all in every case.

Nevertheless, prosecutors – like other professionals – will never be immune to mistakes. As a matter of policy, we strive to be perfect, even though we know perfection is impossible. We require our prosecutors to strictly obey the law in both letter and spirit, and we work to ensure that isolated mistakes are detected early, corrected, and do not prevent justice from being done. Over the past 10 years, the Department has filed over 800,000 cases involving more than one million defendants. In the same time period, only one-third of one percent (.33 percent) of these cases warranted inquiries and investigations of professional misconduct by the Department's Office of Professional Responsibility ("OPR"). Less than three-hundredths of one percent (.03 percent) related to alleged discovery violations, and just a fraction of these resulted in actual findings of misconduct. Department regulations require DOJ attorneys to report any judicial finding of misconduct to OPR, and OPR conducts computer searches to identify court opinions that reach such findings in order to confirm that it examines any judicial findings of misconduct, reported or not. In addition, defense attorneys are not reticent to raise allegations of discovery failures when they do occur.

On those rare occasions when discovery failures do occur, the Department takes steps to hold individual prosecutors accountable. Late last month, the Department provided to the Senate and House Judiciary Committees a copy of OPR's investigative report and documents relating to the Department's disciplinary process in connection with the federal prosecution of Senator Stevens. OPR issued its 672-page final report on August 15, 2011. That report reflects that OPR thoroughly examined multiple allegations of misconduct that arose during the course of the proceedings in the *Stevens* case. OPR concluded that the government violated its obligations under constitutional *Brady* and *Giglio* principles and Department of Justice policy (USAM § 9-5.001) by failing to disclose exculpatory statements by prosecution witnesses during trial preparation sessions and law enforcement interviews and by failing to disclose a witness's alleged involvement in securing a false sworn statement. OPR found that the government violated D.C. Rule of Professional Conduct 4.1(a) by misrepresenting to the defense certain facts in a September 2008 disclosure letter. In other words, OPR found that the government violated rules that were already in place, thus depriving Senator Stevens of a fair trial.

With respect to the individual prosecutors, OPR concluded that two prosecutors committed professional misconduct by acting in reckless disregard of their disclosure obligations and forwarded the report to the Professional Misconduct Review Unit (PMRU) for consideration of disciplinary action. After evaluating the prosecutors' conduct and the factors mandated by *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), the Chief of PMRU proposed that one prosecutor be suspended without pay for 45 days and that the other be suspended without pay for 15 days, noting that OPR had found that neither prosecutor had acted intentionally. On May 23, 2012, the deciding official in the Office of the Deputy Attorney General – a long-term career employee – determined that the first prosecutor should be suspended for 40 days without pay and that the second prosecutor should be suspended for 15 days without pay. In doing so, the deciding official sustained the OPR findings of misconduct against both prosecutors but rejected an additional OPR finding that the first prosecutor exercised poor judgment by failing to inform his supervisors that the representations in a *Brady* letter were inaccurate and misleading. Both the PMRU Chief and the deciding official agreed that OPR's findings of reckless professional misconduct were supported by the law and the facts and were serious. Although the decisions of the deciding official represent the Department's final actions in this matter, the

prosecutors are entitled by law and regulation to appeal his decisions to the Merit Systems Protection Board.

The proposal for discipline and the disciplinary decision set forth those factors that the disciplinary officials considered in assessing the appropriate punishment. In short, OPR determined that the prosecutors acted recklessly rather than intentionally, and the disciplinary officials also considered that both AUSAs had previously unblemished records with the Department. Additionally, the disciplinary officials were required to consider the consistency of the penalty with those imposed on other employees for the same or similar offenses, and while the discipline did not result in dismissal, we are not aware of any case within the Department where an employee with a record similar to the subject AUSAs was terminated after OPR found that the employee engaged in something less than intentional misconduct

5. Conclusion

The objective of the criminal justice system is to produce just results. This includes ensuring that the processes we use do not result in the conviction of the innocent, and likewise ensuring that the guilty do not unjustifiably go free. It also includes an interest in ensuring that other participants in the process – *i.e.*, victims, law enforcement officers, and other witnesses – are not unnecessarily subjected to physical harm, harassment, public embarrassment, or other prejudice.

For nearly fifty years, a careful reconciliation of these interests has been achieved through the interweaving of constitutional doctrine (*i.e.*, *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419, 439 (1995)), statutory directives (*i.e.*, the Jencks Act and the Crime Victims' Rights Act), and Federal Rules (*i.e.*, Rule 16; Rule 26.2). The legislation proposed by Senator Murkowski would disturb this careful balance without a demonstrable improvement in either the fairness or reliability of criminal judgments and in the absence of a widespread problem. The rules of discovery do not need to be changed – and the *Stevens* case does not prove otherwise. Rather, it demonstrates that prosecutors and other law enforcement officials need to recognize fully their obligations under these rules, must apply them fairly and uniformly, and must be given guidance, tools, and training to meet their discovery obligations rigorously. This is what the Department has done since the Attorney General directed the dismissal of the conviction in *Stevens*. And it is what the Department will continue to do in the future, under the policies and procedures that have been implemented and institutionalized during the past three years.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID JOSEPH PEDERSEN,

Defendant.

Case No. 3:12-cr-00431-HA

ORDER

FILED UNDER SEAL

HAGGERTY, District Judge:

Defendant David Joseph Pedersen (Pedersen) is charged in a fifteen count indictment. Pedersen is charged in Count One with Racketeering, in violation of 18 U.S.C. § 1962(c); in Count Two with participating in a Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, in violation of 18 U.S.C. § 1962(d); and the remaining thirteen counts relate to acts of violence, use and possession of firearms, and other criminal activity alleged to have been

committed during a nine-day period in Washington, Oregon, and California, from September 26, 2011 through October 5, 2011. Pedersen's co-defendant, Holly Ann Grigsby (Grigsby), pleaded guilty to Count One of the indictment on March 11, 2014. Pedersen has requested access to the Federal Criminal Discovery Blue Book in anticipation of a hearing set for April 7-10, 2014, concerning Pedersen's oral motion for a finding of bad faith. For the following reasons, the government shall provide counsel to Pedersen with a copy of the Discovery Blue Book pursuant to a protective order.

BACKGROUND

During the pendency of this case, there has been evidence suggesting that the government has not adhered to its discovery obligations and has violated Pedersen's Sixth Amendment rights by interfering with and intercepting attorney-client communications. During oral argument on October 16, 2013, both Pedersen and Grigsby made oral motions requesting that the court find the government had acted in bad faith. Following the hearing on October 16, 2013, there has been considerable discovery and litigation concerning the government's conduct in this case, much of it handled by what has come to be known as "Filter Team Two." On January 16, 2014, the prosecution team requested [347] an evidentiary hearing prior to any findings from this court concerning the government's conduct. That hearing is scheduled to begin April 7, 2014.

The Discovery Blue Book is a publication of the U.S. Department of Justice Office of Legal Education. It was produced in 2011 after prosecutorial misconduct was uncovered in the corruption trial of Senator Ted Stevens. In preparation for the "bad faith" hearing, Pedersen requested access to the Discovery Blue Book, "believing that compliance, or lack thereof, would be relevant to any finding of bad faith on the discovery issues." Joint Status Report Reply on

Evidentiary Hearing Protocol at 2. The government, through Filter Team Two, opposes disclosure of the Discovery Blue Book and has provided a copy of it to the court for *in camera* review. Presently, there is litigation concerning a Freedom of Information Act request for access to the Discovery Blue Book pending in the U.S. District Court for the District of Columbia.[1]

BACKGROUND

Filter Team Two asserts that the Discovery Blue Book is not relevant or material to Pedersen's allegations of bad faith and is protected by the work product doctrine.

a. Relevance and Materiality

The cover sheet to the Discovery Blue Book notes that the book "is not intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter by any prospective or actual witness or parties." (citing *United States v. Caceres*, 440 U.S. 741 (1979)). The Discovery Blue Book is a comprehensive publication concerning the government's discovery obligations and incorporates numerous sources of official Department of Justice policy as well as legal analysis pertaining to those obligations. It is provided to Assistant United States Attorneys and law enforcement personnel as a training manual. As noted in the first page of the introduction to the Discovery Blue Book, "[t]his manual is a resource for assessing the government's (and the defendant's) discovery obligations, to help ensure full and timely compliance with them." While Pedersen may be able to access similar information from disparate sources, the Discovery Blue Book is a relatively comprehensive guide to the Department of Justice's policies and procedures regarding the

[1] *Nat'l Ass'n of Criminal Defense Lawyers v. Exec. Office for U.S. Attorneys*, Case No. 14-cv-269 (D.D.C. 2014)

provision of criminal discovery. What content is, and is not, found in the Discovery Blue Book is plainly relevant to assessing Pedersen's allegations of bad faith even if the manual itself provides no substantive or procedural rights. The prosecution's adherence, or lack thereof, to the suggestions in the manual is informative and "is material to preparing the defense" for the upcoming hearing. Accordingly, the only basis to withhold the Discovery Blue Book is if it is privileged.

b. Work Product Doctrine

The work product doctrine protects "from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation." *Admiral Ins. Co. v. Dist. St.*, 881 F2d 1486, 1494 (9th Cir. 1989)(citing Fed. R. Civ. P. 26(b)(3)). In order "to qualify for protection under Rule 26(b)(3), documents must have two characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they must be prepared by or for another party or by or for that other party's representative." *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 907 (9th Cir. 2004) (citations and quotations omitted). When a document has dual purposes, the Ninth Circuit employes the "because of" standard:

> This formulation states that a document should be deemed prepared 'in anticipation of litigation' and thus eligible for work product protection . . . if 'in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation.'

Id. (quoting Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 Federal Practice & Procedure § 2024 (2d ed. 1994)). This standard does not "consider whether litigation was a primary or secondary motive behind the creation of the document" but instead "considers the

totality of the circumstances and affords protection when it can fairly be said that the 'document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of *that* litigation." *Id.* at 908 (quoting *United States v. Adlman*, 134 F.3d 1194, 1195 (2nd Cir.1998) (emphasis added)).

The Discovery Blue Book was created as a training tool to assist the government in meeting its discovery obligations in criminal cases. Because those using the manual are frequently involved in litigation, and it was prepared for their use, it will often be used in preparation for litigation. It can fairly be said that it would not have been produced but for the prospect of future litigation. However, when analyzing the totality of the circumstances of this case, it is obvious the book was not created with this case, or any other, in mind. Because "the prospect of future litigation touches virtually any object of a prosecutor's attention, . . . the work product exemption, read over-broadly, could preclude almost all disclosure from an agency with substantial responsibilities for law enforcement." *SafeCard Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1203 (D.C. Cir. 1991) (citation and quotations omitted). In order to avoid the overbroad application of the work product doctrine, the D.C. Circuit has held that only "where an attorney prepares a document in the course of an active investigation focusing upon specific events and a specific possible violation by a specific party, it has litigation sufficiently 'in mind' for that document to qualify as attorney work product." *Id.* This court adopts the test utilized in the D.C. Circuit and concludes that the Discovery Blue Book does not constitute protected work product as it was not created with this litigation "in mind" and must be provided to the defense.

Nevertheless, the court is mindful that there is ongoing litigation in the District Court for the District of Columbia concerning this topic. Because that court will have an opportunity to

render a decision concerning the applicability of any privilege to the Discovery Blue Book after full summary judgment briefing, this court is ordering that the Discovery Blue Book be provided to Pedersen pursuant to a protective order. The parties are ordered to confer regarding language for an appropriate protective order. Pursuant to that order, the defense will not be entitled to copy or in any way disseminate the contents of the Discovery Blue Book to any person not on the defense team, and will not be permitted to maintain a copy of the Discovery Blue Book after litigation concerning Pedersen's motion for a finding of bad faith has been resolved. The parties may also wish to confer regarding the propriety of any cross-examination utilizing substantive material from the Discovery Blue Book.

CONCLUSION

For the reasons provided, the government shall provide a copy of the Discovery Blue Book to Pedersen's defense team on March 31, 2014, assuming that the parties have conferred regarding the appropriate language of the protective order.

IT IS SO ORDERED.

Dated this 27 day of March, 2014.

ANCER L. HAGGERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Plaintiff, v. EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS and UNITED STATES DEPARTMENT OF JUSTICE Defendants.	Civil Action No. 14-cv-269 (CKK)

DECLARATION OF SUSAN B. GERSON

I, Susan B. Gerson, declare as follows:

1. I am the Assistant Director in the Freedom of Information Act ("FOIA")/Privacy Act ("PA") Staff of the Executive Office for United States Attorneys ("EOUSA"). I have held this position since 2011. Prior to that time, I served as an Assistant General Counsel in the EOUSA General Counsel's Office. I have been employed by the United States Department of Justice ("DOJ") since 2001.

2. The FOIA/PA Staff is responsible for processing FOIA/PA requests seeking information from the EOUSA. When a request is received, FOIA/PA Staff determines whether the EOUSA maintains the records responsive to request and, if so, whether they can be released in accordance with the FOIA/PA. In processing such requests, the FOIA/PA Staff consults with personnel in other Sections of EOUSA and other components of DOJ if appropriate.

3. In my capacity as Assistant Director of EOUSA's FOIA/PA Staff, I supervise the handling of FOIA/PA requests directed at the EOUSA and the 94 United States Attorneys' Offices. I also supervise attorneys in my office who provide assistance to Assistant United States Attorneys and Civil Division Trial Attorneys who represent EOUSA in lawsuits brought under FOIA, 5 U.S.C. § 552, and the PA, 5 U.S.C. § 552a, stemming from requests for EOUSA records.

4. Due to the nature of my official duties, I am familiar with, and was personally involved in, the processing of the FOIA request submitted by Plaintiff National Association of Criminal Defense Lawyers ("NACDL") in this case. I am submitting this Declaration in support of Defendants' Motion for Summary Judgment. All information contained in this declaration is based on my personal knowledge as well as information that I have acquired during the course of my official duties.

Plaintiff's FOIA Request and EOUSA's Response

5. By letter dated December 20, 2012, Kyle O'Dowd, on behalf of the NACDL, submitted a FOIA request addressed to me for the disclosure of "the Office of Legal Education publication entitled 'Federal Criminal Discovery.'" EOUSA received this FOIA request on December 27, 2012. A true and correct copy of this FOIA request is attached as Exhibit A.

6. Within the EOUSA organization is the Office of Legal Education ("OLE"). As a part of EOUSA, OLE's principal mission is to provide training on advocacy skills and the management of legal operations to the attorneys and support staff of USAOs, as well as lawyers and support staff throughout the various other divisions of DOJ. OLE has a Publication Unit that coordinates, edits, produces and disseminates the

OLE Litigation Series (often called "Blue Books" because of the color of their covers). DOJ attorneys who prepare the Blue Books are usually, but not always, OLE instructors in the subject matter, and the text is usually (but not always), adapted from course materials they have used at OLE.

7. The paperback hard copy versions of the Blue Books generally are not distributed outside the federal law enforcement community and otherwise are posted in electronic format on an internal DOJ intranet (*i.e.*, non-public) site called DOJNet. The title page of these Blue Books, including the title page of the 'Federal Criminal Discovery' Blue Book, routinely include a notice that OLE intends these Blue Books to be "used by federal prosecutors for training and law enforcement purposes" as an internal resource, treated confidentially.

8. After receiving Plaintiff's FOIA request, attorneys under my supervision began processing the request. Specifically, FOIA/PA staff attorneys, including myself, located the Blue Book Federal Criminal Discovery and conducted a comprehensive review of its contents to determine whether any FOIA exemptions were applicable to the information contained therein and, if so, whether any nonexempt information could be segregated and released to Plaintiff.

9. To assist and inform the FOIA/PA Staff's review process, my office consulted with other DOJ attorneys who were familiar with and were involved in the drafting of the book Federal Criminal Discovery. Specifically, my office consulted with the DOJ National Criminal Discovery Coordinator Andrew Goldsmith of the Office of the Deputy Attorney General. I incorporate by reference the declaration filed by Mr. Goldsmith.

10. Based on the FOIA/PA Staff's review of the Blue Book Federal Criminal Discovery, as well as the input received from Mr. Goldsmith, I determined both that the Blue Book as a whole was prepared by DOJ attorneys for the use of federal prosecutors in conducting law enforcement prosecutions. As such, I determined that it constituted attorney work-product exempt from disclosure under 5 U.S.C. § 552(b)(5). I also determined that the Blue Book as a whole was compiled for law enforcement purposes and contained techniques and procedures, as well as guidelines, to be used in the course of conducting criminal prosecutions and thus was also exempt from disclosure under 5 U.S.C. § 552(b)(7)(E). Because the Blue Book was protected in its entirety under the attorney work-product privilege there was no reasonably segregable, non-exempt information that could be released. Likewise, the entirety of the document constituted law enforcement techniques, procedures, and guidelines to be used in the course of criminal investigations and prosecutions. As a result, I withheld the document in full under both Exemption 5 and Exemption 7(E) of the FOIA.

11. By letter dated February 28, 2013, I responded to Plaintiff's FOIA request, indicating that the request was denied in full because the records requested were exempt from disclosure under FOIA Exemptions 5 and 7(E). A true and correct copy of this letter is attached as Exhibit B.

12. By letter dated April 26, 2013, Plaintiff appealed EOUSA's denial of its FOIA request to the Office of Information Policy ("OIP"). A true and correct copy of this letter is attached as Exhibit C.

13. By letter dated June 25, 2013, OIP affirmed, on partially modified grounds, EOUSA's denial of Plaintiff's FOIA request. A true and correct copy of this letter is attached as Exhibit D.

Application of FOIA Exemption 5

14. FOIA Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letter which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 encompasses inter-or-intra-agency materials protected under the attorney work product doctrine, in addition to other privileges.

15. EOUSA invoked Exemption 5 in denying Plaintiff's FOIA request because the Federal Criminal Discovery Blue Book as a whole constituted attorney work-product. The attorney work-product doctrine shields materials prepared by an attorney in reasonable anticipation of litigation. The anticipated litigation can include criminal matters as well as civil and administrative proceedings. In addition, litigation need not come to fruition in order for this privilege to apply. The privilege extends to documents prepared in anticipation of both pending litigation and foreseeable litigation even when no specific claim has arisen at the time the attorney prepared the material. The privilege protects any part of a document prepared in anticipation of litigation, not just the portions concerning opinions and legal theories, and it is intended to protect an attorney's opinions, thoughts, impressions, interpretations, analyses, and strategies.

16. The Federal Criminal Discovery Blue Book was created by DOJ attorneys and distributed within DOJ in 2011 for use by federal prosecutors. It has not been distributed outside of DOJ, except to some federal law enforcement officials with whom

federal prosecutors work in criminal investigations and prosecutions. See Declaration of Andrew D. Goldsmith, at ¶7 (hereinafter, "Goldsmith Decl. at ¶__."). Inasmuch as the Federal Criminal Discovery Blue Book was created and exchanged within DOJ, it is an "intra-agency" document and thus falls within the threshold of Exemption 5.

17. The Blue Book also was created in anticipation of reasonably foreseeable litigation. In April 2009, following the dismissal of the case against the late Senator Theodore Stevens, DOJ created a Criminal Discovery and Case Management Working Group to review DOJ's policies, practices, and training concerning criminal case management and discovery, and to evaluate ways to improve it. In addition, in January 2010, the Deputy Attorney General appointed a long-serving career prosecutor as DOJ's first full-time National Criminal Discovery Coordinator to lead and oversee all DOJ efforts to improve disclosure policies and practices. See id. at ¶5. Although the discovery failures that occurred in the prosecution against the late Senator Theodore Stevens were an aberration, after the Attorney General moved to dismiss the case in April 2009 he immediately directed DOJ to take steps to address those failures and to ensure that similar problems did not arise in future investigations and prosecutions. See id. at ¶8.

18. One of the key initiatives of the Criminal Discovery and Case Management Working group was the creation of the Federal Criminal Discovery Blue Book. This step was taken to advise prosecutors nationwide about the legal bases of their discovery obligations, as well as the types of discovery-related claims and issues that they would inevitably confront in the investigations and prosecutions that they handle in the course of fulfilling their law enforcement duties. See id. at ¶¶5-7.

19. Under the direction of DOJ's National Criminal Discovery Coordinator and other senior DOJ officials, several DOJ attorneys with expertise in particular subjects related to discovery were selected to write the different chapters of the book. See id. at ¶5. The author(s) of each chapter are identified at the end of each chapter.

20. The Federal Criminal Discovery Blue Book was prepared in anticipation of litigation and its contents constitute attorney work product protected from disclosure under Exemption 5. The Blue Book is specifically directed to federal prosecutors, describing the nature and scope of their discovery obligations under applicable constitutional provisions, caselaw, and the Federal Rules of Criminal Procedure, as well as offering advice on how to handle different scenarios and problems so that investigations and prosecutions are not compromised by discovery problems and litigation. See id. at ¶¶5-7, 9-11, 14.

21. In providing advice to federal prosecutors, the Blue Book discusses the circumstances under which broad and early disclosure is advised and when it is not advised. It also explicitly discourages certain practices and encourages others, and identifies factors prosecutors should consider before making particular discovery and litigation decisions, such as seeking protective orders. In addition, it describes the types of claims defense counsel have raised and could raise regarding different discovery issues, or the tactics they could employ in litigation against the Government, and the arguments prosecutors can make to respond to these claims and the steps they should take to counter defense counsel tactics and protect Government investigations and prosecutions. In doing so, the Blue Book explains the limitations of certain arguments that prosecutors could make. The Blue Book also offers compilations of cases that

prosecutors can use to support different arguments. Cases illustrating potential pitfalls that prosecutors should avoid are also described, and arguments prosecutors could make if they fall into these pitfalls are identified. And since each chapter was written by one or more DOJ attorneys, the Blue Book necessarily contains the opinions, mental impressions, and recommendations of individual DOJ attorneys that were selected to advise federal prosecutors regarding discovery issues. Therefore, while the Blue Book endeavors to accurately describe the prosecutor's discovery obligations, it does not simply provide a neutral analysis of the law. Rather, the Blue Book is a litigation manual for prosecutors containing confidential legal analysis and strategies to support the Government's investigations and prosecutions. Disclosure of the Blue Book would reveal the analyses, recommendations, and strategies that a group of DOJ attorneys have prepared for, and have provided to, federal prosecutors. This would allow criminal defense counsel to use this privileged information in litigation against the Government as well as undermine law enforcement efforts. See id. at ¶¶5-7, 9-14.

22. DOJ intended the Blue Book to be confidential. Indeed, the title page of the Blue Book states that DOJ makes no public release of it and that recipients it should "treat it confidentially." The Blue Book was created for internal DOJ use only and it is only accessible electronically to DOJ personnel on their official work computers, and only other law enforcement officials with whom federal prosecutors work on criminal investigations and prosecutions have been given access to it. See id. at ¶7.

23. Given that the Blue Book as a whole constitutes attorney work-product, there is no reasonably segregable, non-exempt information that could be released. Moreover, attempting to segregate factual material would risk disclosing protected

information, as privileged material is intertwined with factual material throughout the book.

Application of FOIA Exemption 7(E)

24. Exemption 7 of the FOIA pertains to records or information compiled for law enforcement purposes, to the extent that the production of such information could result in one of six enumerated harms. In this instance, the Blue Book is protected in full by Exemption 7(E) of the FOIA, which protects from disclosure records that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." See 5 U.S.C. § 552(b)(7)(E).

Threshold

25. FOIA Exemption 7(E) protects from disclosure records or information compiled for law enforcement purposes to the extent that the production of such records or information would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. 5 U.S.C. § 552(b)(7)(E).

26. As a threshold matter, Exemption 7(E) protects "records or information compiled for law enforcement purposes." See 5 U.S.C. § 552(b)(7). DOJ has as its principal function the enforcement of criminal law. The Criminal Discovery Blue Book was compiled by DOJ to assist and advise federal prosecutors in the course of prosecuting parties for violation of criminal law. See Goldsmith Decl. at ¶¶5-7, 9-11, 14.

27. The Federal Criminal Discovery Blue Book was compiled for law enforcement purposes. Indeed, the title page of the Blue Book Federal Criminal Discovery includes a notice that OLE intends it to be "used by federal prosecutors for training and law enforcement purposes" as an internal, confidential resource.

28. Moreover, the Federal Criminal Discovery Blue Book was a key initiative of DOJ's Criminal Discovery Working Group, and DOJ trial attorneys and federal prosecutors across the country wrote the different chapters of the book. DOJ is an agency whose primary function involves law enforcement. In addition, the purpose of the Blue Book was to assist and advise federal prosecutors in carrying out their law enforcement duties. See id. at ¶5.

29. Accordingly, the Federal Criminal Discovery Blue Book provides advice and strategy to criminal prosecutors to aid them in the course of their work investigating and prosecuting crimes. Criminal prosecutions are inherently conducted for a law enforcement purpose. The document at issue is an essential tool used by prosecutors in the course of their work and so satisfies the threshold requirement of Exemption 7. Federal prosecutors, in conducting criminal investigations and prosecutions, will inevitably deal with the discovery issues addressed in the Blue Book, as discovery is an integral part of every investigation and prosecution. Therefore, I determined that the Blue Book was compiled for law enforcement purposes and meets the threshold requirement for FOIA Exemption 7.

Investigative Techniques and Procedures

30. The first prong of Exemption (7)(E) provides for the withholding of records where the release of such records "would disclose techniques and procedures for

law enforcement investigations or prosecutions." This exemption affords categorical protection to non-public techniques and procedures used in law enforcement investigations or prosecutions.

31. The Federal Criminal Discovery Blue Book was created for the internal use of criminal prosecutors and consists of a comprehensive set of strategies and procedures for conducting criminal prosecutions. The Blue Book analyzes applicable law and contains strategic concerns and logistical considerations in light of the applicable legal principles. Some of these are specifically set out as "Practice Notes," "Caveats," or "Strategic and Logistical Concerns," but many are interspersed within the legal analysis. The totality of the strategies and procedures set forth in this litigation manual are not generally known to the public. See id. at ¶¶5-7, 9-11, 14.

32. If this information were to be released to the public, it would give defense counsel an unfair advantage over the prosecution as it would reveal internal details of the prosecution's strategy for the handling and development of criminal prosecution cases. For example, disclosing procedures for protecting witnesses and obtaining evidence, or how prosecutors manage the timing and scope of disclosures, may allow criminal defendants to obtain premature or broader discovery than they are entitled to, which could allow them to modify their behavior in other to circumvent the law and escape punishment. There could be an increased risk of compromise of ongoing investigations, including witness intimidation and retaliation, breaches of national security, and other possible harms. See id. at ¶¶9-14.

33. For all of these reasons, the Criminal Discovery Blue Book therefore is protected in full pursuant to the first prong of Exemption 7(E) of the FOIA.

Guidelines

34. The second prong of Exemption 7(E) of the FOIA provides for the withholding of "guidelines for law enforcement investigations or prosecutions if disclosure could reasonably be expected to risk circumvention of the law." This second prong of Exemption 7(E) of the FOIA also protects the Blue Book, which constitutes "guidelines for law enforcement investigations or prosecutions" and the release of these guidelines "could reasonably be expected to risk circumvention of the law." Specifically, the Blue Book consists entirely of guidelines for federal prosecutors to follow in conducting the discovery phase of law enforcement prosecutions. As noted above, these guidelines consist not only of an exposition of the many legal principles applicable to criminal discovery, but also the interpretation and analysis of those principles by DOJ attorneys, legal strategy, practice tips, and logistical considerations. In other words, the Blue Book is a litigation guide intended to offer strategy and advice to prosecutors. It is also intended to assist prosecutors in defending against discovery-related challenges by criminal defendants. The Blue Book offers comprehensive guidelines for this phase of criminal federal prosecutions, and is relied upon heavily by federal prosecutors across the entire country to conduct criminal discovery. Disclosure of the Blue Book would give criminal defendants unprecedented insight into the thought process of federal prosecutors in conducting criminal discovery, investigations, and prosecutions, which presents a reasonably expected risk that future prosecutions could be undermined and weakened by criminal defendants and their attorneys. Some of these harms were articulated above in the discussion of the "techniques and procedures" prong

of Exemption 7(E). For all of these reasons, the Blue Book is protected in full pursuant to the second prong of Exemption 7(E) of the FOIA. See id. at ¶¶5-7, 9-14.

Segregation of Non-Exempt Information

35. I have carefully reviewed the document withheld from plaintiff pursuant to Exemptions 5 and 7(E) to determine whether there was any reasonably segregable, non-exempt information that could be released. Because the document is protected by the attorney work-product privilege in its entirety, and given that the facts selected for and contained within it are part of protected attorney work-product material, no segregation was possible. Disclosure of any portion of the Federal Criminal Discovery Blue Book would undermine the core legal advice and analysis that the privilege is meant to protect by revealing attorneys' assessments of what is deemed significant in the course of federal criminal prosecutions and what strategies and options are considered. In addition, because the Blue Book as a whole consists of law enforcement guidelines, and many of the law enforcement techniques, procedures, and guidelines described are interspersed within the legal analysis throughout the book, no part of the book can be segregated for disclosure under Exemption 7(E). See id. at ¶9. Thus, the Blue Book is protected in full and contains no reasonably segregable information.

I declare under penalty of perjury that to the best of my personal knowledge the foregoing is true and correct.

Susan B. Gerson

Executed this 11th day of June 2014.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Plaintiff, v. EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS and UNITED STATES DEPARTMENT OF JUSTICE Defendants.	)	Civil Action No. 14-cv-269 (CKK)

DECLARATION OF ANDREW D. GOLDSMITH

I, Andrew D. Goldsmith, declare the following to be true and correct:

(1) I am the National Criminal Discovery Coordinator for the U.S. Department of Justice (DOJ), having been appointed in January 2010 by the Deputy Attorney General as the first person to occupy this position. In November 2011, this position was elevated to a career SES-level position in the Office of the Deputy Attorney General (ODAG), which is the position I currently have. In this role, I oversee a wide range of national initiatives designed to provide federal prosecutors and other law enforcement officials with training and resources relating to criminal discovery.

(2) I have been an attorney for over 30 years, all but six years of which have been spent as a prosecutor. I began my career in 1983 at the Manhattan District Attorney's Office, and have also worked as an Assistant U.S. Attorney in the District of New Jersey;

as a supervisor in the New York Attorney General's Office; and as the First Assistant Chief of DOJ's Environmental Crimes Section.

(3) I make the statements herein on the basis of personal knowledge, as well as based on information I have acquired in the course of performing my official duties.

(4) On December 20, 2012, plaintiff submitted a Freedom of Information Act (FOIA) request to the Department's Executive Office for United Attorneys (EOUSA) for a copy of a DOJ document entitled "Federal Criminal Discovery," also referred to as "the Federal Criminal Discovery Blue Book." Plaintiff's initial request, the administrative processing of that request, and correspondence between EOUSA and plaintiff, including EOUSA's final determination on plaintiff's request on behalf of DOJ, are described in detail in the declaration of Susan Gerson, Assistant Director, FOIA/Privacy Act Staff, EOUSA (Gerson Declaration). This declaration supplements and incorporates by reference the Gerson Declaration.

Description of the Withheld Document

(5) Upon my appointment as National Criminal Discovery Coordinator in early 2010, one of my first responsibilities was to spearhead DOJ's effort to create a Federal Criminal Discovery Blue Book (Blue Book). The Blue Book was designed to provide advice regarding the law and practice of federal prosecutors' discovery disclosure obligations and to serve as a litigation manual to be used by all DOJ prosecutors and paralegals. The Blue Book contains nine chapters, written by DOJ prosecutors with expertise in a wide range of discovery-related topics, covering subjects such as Rule 16, *Brady*, *Giglio*, the Jencks Act, items protected from disclosure, protective orders, and *ex parte* or *in camera* submissions, among others. From the outset – indeed, this was something I addressed during my very first week on the job – I advised the authors that

the Blue Book should contain practical "how-to" advice for federal prosecutors across the nation. From early 2010 up to and including March 2011, when the Blue Book was distributed to federal prosecutors in electronic and hard copy format, I was directly involved in the review and editing of all of its chapters. I engaged in numerous conversations with authors of the various chapters, and was responsible for drafting the bulk of the chapter concerning Rule 16.

(6) The Blue Book contains comprehensive legal analysis and advice on criminal discovery practices, potential strategic and logistical concerns, interpretations of law and risk assessments in light of relevant legal authority, as well as precedent, practice notes, techniques, procedures, and legal strategies that in-the-field prosecutors may and do employ during the course of criminal proceedings. The Blue Book, as a matter of course, contemplates facts that may arise in judicial proceedings and an evaluation of how a court would likely consider those facts. As explained in subsequent paragraphs, revealing the content of the Blue Book would essentially provide a road map to the strategies federal prosecutors employ in criminal cases.

Law Enforcement Nature of the Blue Book

(7) The criminal discovery process is directly related to the law enforcement function carried out by DOJ, as further described in paragraph 8. In addition to helping federal prosecutors handle discovery-related challenges in the course of prosecuting federal criminal cases, the Blue Book is also used by prosecutors during their work with other law enforcement officials – including special agents from the Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), and Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) – to conduct federal criminal investigations. In both the investigative and prosecution stages of federal crimes, the Blue Book functions as a critical law enforcement tool. The advice

and strategies provided in the book are meant to ensure that discovery-related issues do not compromise DOJ investigations and prosecutions. Importantly, in addition to federal prosecutors, the only group to receive access to the Blue Book has been the other federal law enforcement officials with whom federal prosecutors work on criminal investigations and prosecutions.[1]

(8) In early January 2010, shortly before my appointment, then DAG David Ogden issued three memoranda to all criminal prosecutors: "Issuance of Guidance and Summary of Actions Taken in Response to the June 2009 Report of the DOJ Criminal Discovery and Case Management Working Group," "Requirement for Office Discovery Policies in Criminal Matters," and "Guidance for Prosecutors Regarding Criminal Discovery." These memoranda, which are publicly available, provide guidance on gathering and reviewing potentially discoverable information and making timely disclosure to defendants. Pursuant to the memoranda, prosecutors are instructed to provide broader and more comprehensive discovery than the law requires. Before making disclosures, however, the memoranda direct prosecutors to consider countervailing law enforcement-related concerns, such as "protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts at obstruction; protecting national security interests; [and] investigative agency concerns . . ."

[1]In the one criminal case where a court ordered disclosure of the Blue Book, over the Government's objection that the Blue Book constituted attorney work product, the court (in a sealed order) required a protective order that prohibited the defense from copying the Blue Book, disseminating its contents to anyone outside the defense team, or maintaining a copy of it after the motion relevant to the Blue Book had been resolved.

Potential Ramifications if the Blue Book is Released

(9) The Criminal Discovery Blue Book was created for the internal use of criminal prosecutors and contains, in addition to legal analysis, a comprehensive set of strategic considerations, procedures, and practical advice for conducting criminal prosecutions. Some of these are specifically set out as "Practice Notes," "Caveats," "Strategic and Logistical Concerns," or "Practical Considerations," but many are interspersed within the legal analysis. For example, the Blue Book is replete with guidance where prosecutors are urged to "exercise caution," "take care," "be mindful," or to "be aware" when exercising their discretion in this area. It also describes techniques and procedures for prosecutions and investigations, such as how to protect witnesses from retaliation and intimidation; how (and when) to disclose documents and other objects; how (and when) to disclose reports of examinations and tests and reports relating to expert witnesses; a wide variety of guidance relating to handling statements of defendants and lay witnesses; practical considerations concerning law enforcement witnesses; how to obtain electronic and other forms of evidence; how to ensure that the Government receives appropriate discovery from the defense; procedures for dealing with subpoenas seeking information that may be discoverable; and how, why, and when to seek protective orders relating to potentially discoverable information (or materials protected from disclosure), among others. The totality of the techniques, procedures, guidelines, strategic considerations, and practical advice set forth in the Blue Book are not generally known to the public. Indeed, the Department has steadfastly maintained the confidentiality of this document, as described above in paragraph 7.

(10) Additionally, release of the Criminal Discovery Blue Book would give defense counsel an unfair advantage over the prosecution as it would reveal internal details of the

prosecution's strategy for the handling and development of criminal cases. Many factors affect the manner and timing of disclosure by the prosecution in criminal cases. A prosecutor may be able to take a broad approach to discovery in one case, yet may seek to delay or limit disclosure in another case with different facts and circumstances. If defense counsel were aware of the myriad legal, strategic, and tactical considerations that go into this analysis, they would have unfair – and potentially dangerous – insight into the prosecution's approach to discovery in criminal cases. When Deputy Attorney General James Cole testified before the Senate Judiciary Committee in June 2012, he described

> the carefully constructed balance that the Supreme Court and lower courts, the Criminal Rules Committee, and Congress have painstakingly created over decades – a balance between ensuring the protection of a defendant's constitutional rights and, at the same time, safeguarding the equally important public interest in a criminal trial process that reaches timely and just results, safeguards victims and witnesses from retaliation or intimidation, does not unnecessarily intrude on victims' and witnesses' personal privacy, protects on-going criminal investigations from undue interference, and recognizes critical national security interests.

If the Blue Book were released and defense counsel nationwide knew how the Government would likely litigate discovery-related motions, that balance could be disturbed.

(11) Moreover, if this insight enables defense attorneys nationwide to know the procedures that prosecutors use to protect witnesses and to obtain certain evidence, or to use the Blue Book to obtain discovery beyond that which they are entitled (even under DOJ's liberal discovery policy), some criminal defendants may circumvent the law and escape punishment by modifying their behavior, hiding incriminating evidence, or worse. Some criminal defendants may obtain discovery earlier than appropriate, some may receive it in unredacted format (where it otherwise would have been redacted), and others yet may obtain discovery where that material would otherwise have been protected. As a result, ongoing investigations could be compromised, such as by disclosing the identity of undercover officers and confidential informants; there may

be a greater likelihood of witness intimidation and retaliation; there could be an increased likelihood that documents, electronically stored information, and other evidence might be destroyed by criminals who become aware of ongoing investigations; and a higher risk that national security will be breached, whether perpetrated domestically or abroad.

(12) Timely and just results in the criminal justice system require that both sides are able to perform their duties on equal footing with their counterparts. Disclosure of a DOJ prosecutorial litigation manual such as the Blue Book would upset the balance inherent in the adversarial process by revealing the core attorney work-product that is essential to effective federal prosecutions, providing unprecedented insight into the thought processes of federal prosecutors. The Blue Book does not simply provide legal analysis; it is a comprehensive litigation guide intended to offer strategy and advice to prosecutors in defending against discovery-related challenges by criminal defendants.

(13) Disclosure of the Blue Book would also undermine the criminal trial process by revealing the internal legal decision-making, strategies, procedures, and opinions critical to the Department's handling of federal prosecutions. Disclosure would severely hamper the adversarial process as DOJ attorneys would no longer feel free to memorialize critical thoughts on litigation strategies for fear that the information might be disclosed to their adversaries to the detriment to the government's current and future litigating positions.

(14) The Blue Book consists of guidelines for federal prosecutors to follow in conducting the discovery phase of law enforcement prosecutions. As noted above, these guidelines consist not only of an exposition of the many legal principles applicable to criminal discovery, but also interpretation and analysis of those principles by DOJ attorneys, legal

strategy, practice tips, and logistical considerations. In other words, the Blue Book is a litigation guide intended to offer strategy and advice to prosecutors. It is also intended to assist prosecutors in defending against discovery-related challenges by criminal defendants. The Blue Book offers a set of comprehensive guidelines for this phase of criminal federal prosecutions, and is relied upon heavily by federal prosecutors across the entire country to conduct criminal discovery. Disclosure of the Blue Book would provide unprecedented insight into the thought processes of federal prosecutors in conducting criminal discovery, investigations, and prosecutions, which would create a reasonably expected risk that future prosecutions could be undermined and weakened by criminal defendants and their attorneys.

I declare under penalty of perjury that the foregoing is true and correct.

Andrew D. Goldsmith

Executed this 11th day of June 2014.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Plaintiff, v. EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS and UNITED STATES DEPARTMENT OF JUSTICE Defendants.	)	Civil Action No. 14-cv-269 (CKK)

SECOND DECLARATION OF ANDREW D. GOLDSMITH

I, Andrew D. Goldsmith, declare the following to be true and correct:

(1) I am the National Criminal Discovery Coordinator for the U.S. Department of Justice (DOJ or Department), having been appointed in January 2010 by the Deputy Attorney General. I have been an attorney for over 30 years, roughly twenty-four of which have been spent as a prosecutor and the balance working at a law firm in New York City.

(2) I make the statements herein on the basis of personal knowledge, as well as based on information I have acquired in the course of performing my official duties.

(3) On June 11, 2014, I submitted a declaration in this case in support of Defendants' Motion for Summary Judgment (Goldsmith Decl. I). I incorporate that declaration by reference.

(4) On July 23, 2014, Plaintiff filed its Cross Motion for Summary Judgment and Opposition to Defendants' Motion for Summary Judgment. I submit this declaration to provide information in response to some of the issues Plaintiff raised in that filing regarding the DOJ

document entitled Federal Criminal Discovery, also referred to as "the Federal Criminal Discovery Blue Book" (Blue Book).

The Blue Book Is Legal Advice Rather than DOJ Policy

(5) The Department's policies regarding federal prosecutors' obligations concerning criminal discovery are publicly available and reflect the Department's strong commitment to ensuring that federal prosecutors not just meet, but exceed, their constitutional obligations. In 1988, DOJ published the "United States Attorneys' Manual" (USAM). The USAM was intended to establish DOJ policy regarding a range of issues, including federal criminal discovery. Accordingly, the USAM was "prepared under the general supervision of the Attorney General and under the direction of the Deputy Attorney General[.]" USAM § 1-1.200. The USAM states that it "is intended to be comprehensive" and that it controls in the event that it "conflicts with earlier Department statements, except for Attorney General's statements[.]" USAM § 1-1.200. The USAM was amended in 1996 to add Section 9-5.001, which requires federal prosecutors to surpass their constitutional obligations when it comes to disclosing exculpatory or impeaching information:

> [A] fair trial will often involve examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or . . . make the difference between guilt and innocence. As a result, this policy requires disclosure by prosecutors of information beyond that which is "material" to guilt . . . .

USAM § 9-5.001(C). Under the policies set forth in the USAM, federal prosecutors must go further than the Constitution requires in several other ways. For exculpatory information, prosecutors "must disclose information that is inconsistent with any element of any crime charged . . . or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal. .

. .” *Id.* § 9-5.001(C)(1). Similarly, for impeachment information, prosecutors “must disclose information that either casts a substantial doubt upon the accuracy of any evidence—including . . . witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence . . . . regardless of whether it is likely to make the difference between conviction and acquittal . . . .” *Id.* § 9-5.001(C)(2). Also, unlike *Brady* and its progeny, which focus on evidence, the USAM requires prosecutors to disclose information regardless of whether that information would itself constitute admissible evidence. *Id.* § 9-5.001(C)(3).

(6) As stated in my previous declaration, in early January 2010, then-Deputy Attorney General David Ogden issued three memoranda to all federal prosecutors that provide overarching guidance on gathering and reviewing potentially discoverable information and making timely disclosure to defendants. Goldsmith Dec. I ¶ 8. The memoranda specifically reference the USAM and reiterate its policies providing for “broader disclosures of exculpatory and impeachment information than *Brady* and *Giglio* require.” *See* “Guidance for Prosecutors Regarding Criminal Discovery,” January 4, 2010 (“”[P]rosecutors should be aware that Section 9-5.001 details the Department’s policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by *Brady* and *Giglio*.”); “Issuance of Guidance and Summary of Actions in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group” (“the United States Attorney’s Manual (USAM) sets forth broad discovery policies that establish the Department’s minimum expectations for prosecutors handling criminal cases in all jurisdictions.”); *see also* “Requirement for Office Discovery Policies in Criminal Matters” (directing each U.S. Attorney’s Office and each Department litigating component to develop its

own district-specific discovery policy to account for controlling precedent, existing local practices, and judicial expectations).

(7) In contrast to these various documents setting forth Department policy on criminal discovery, the Blue Book has a different function. The Blue Book does not establish new rules or policies that prosecutors have an obligation to follow in all investigations and prosecutions. Indeed, the very first chapter of the Blue Book, entitled "Department of Justice Policy, Positions, and Guidance," identifies the two primary sources of DOJ criminal discovery policy as the USAM and the Ogden Memo entitled "Guidance for Prosecutors Regarding Criminal Discovery." Rather than establishing Department policy, the Blue Book was written by DOJ attorneys to assist prosecutors in meeting their disclosure obligations, as established in rules and precedent, and in complying with existing DOJ policies, as set forth in in the USAM, the Ogden memoranda, and their office's discovery policy, while at the same time safeguarding legitimate law enforcement concerns and advancing the Government's interests in litigation. The Blue Book describes discovery-related rules, precedent, and existing DOJ policies in order to provide "legal strategies that in-the-field prosecutors may and do employ during the course of criminal proceedings" and to "ensure that discovery-related issues do not compromise investigations and prosecutions." Goldsmith Decl. I ¶¶ 6, 7. Factual information about disclosure obligations in the Blue Book is interspersed with practice notes, risk assessments, strategies, and other legal advice. *See* Goldsmith Decl. I ¶ 9, 14.

(8) The Blue Book advises prosecutors on the types of challenges they may encounter in the course of prosecutions and potential responses and approaches to those challenges that they are encouraged to consider. Prosecutors at the different United States Attorneys' Offices around the country, as well as in other DOJ components, are called upon to make strategic decisions

regarding discovery and all other matters related to investigations and prosecutions according to the particular circumstances of their cases. The Blue Book anticipates the challenges that may arise and provides advice for prosecutors to consider in addressing them. *See* Goldsmith Decl. I ¶ 9 ("the Blue Book is replete with guidance where prosecutors are urged to 'exercise caution',' 'take care,' 'be mindful,' or to 'be aware' when exercising their discretion in this area."). The Blue Book also encourages prosecutors to consult with the designated criminal discovery coordinator in their offices and, if appropriate, with the National Criminal Discovery Coordinator, in deciding if and how to apply the recommendations and strategies offered in the book.

The Blue Book Is Different From the United States Attorney Bulletin

(9) The United States Attorneys' Bulletin (USAB) is a document published on a bimonthly basis by the Office of Legal Education (OLE) of the Executive Office for United States Attorneys (EOUSA). It was first published in August 1953. The USAB is currently made available in electronic format through posting on DOJ's internal Intranet. An electronic version is also available to the public on the Department's publicly-accessible website.

(10) In my role as National Criminal Discovery Coordinator, I was directly involved in the creation of the "Criminal Discovery Issue" of the USAB (CDI). I solicited authors for the CDI, edited the various articles submitted, and co-authored an article regarding Electronic Discovery. The CDI is analogous to an edition of a law review journal focused on criminal discovery, with the articles designed to reflect prosecutors' perspectives on discovery-related topics of interest to other prosecutors as well as the public.[1] Accordingly, I sent out an email in

[1]An even better analogy would be publications issued by a law firm on topics relevant to its various areas of practice. Much as the Department makes the United States Attorneys' Bulletin available to the public on the internet, law firms – such as Jones Day – make certain publications

February 2012 seeking potential authors (and topics) for the CDI, and suggested "connect[ing] a broad area (e.g., *Brady*, agent-*Giglio*) to something topical – such as an important case or two, a trend, a new statute, etc." I specifically advised potential authors that they should keep in mind the public nature of the USAB when preparing their articles and should not include within them anything that was sensitive. Similarly, the guidelines sent by OLE to authors of USAB articles explicitly state: "Authors should be aware that the articles will be posted on both the Intranet and the Internet. Consequently, they will be available to the public. Any material that should not be disseminated publically should be omitted."

(11) The CDI, which contains seven articles written by different DOJ attorneys, was published in September 2012. It was made available to the public by being posted on the publicly-accessible DOJ website at roughly the same time it was electronically distributed to federal prosecutors.

(12) The CDI and the Blue Book cover issues related to criminal discovery, but their purpose and contents are distinguishable. As stated above, the CDI was designed to reflect prosecutors' perspectives on certain discovery-related topics of interest to other prosecutors as well as the public. From its commencement, the CDI was intended to be publically available, and its authors were advised of this fact. In contrast, the Blue Book was designed to serve as a confidential litigation manual comprehensively covering the law and practice of a prosecutors' discovery obligations as well as offering legal analysis and strategies to protect the Government's interest in litigation and defend against discovery-related challenges by criminal

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available on their firm website (see, e.g., http://www.jonesday.com/newsknowledge/publicationresults.aspx?type=27). Yet, the fact that a law firm chooses to issue publications concerning particular practice areas (e.g., antitrust, environmental, pharmaceutical, etc.) does not mean that its internal guidance and strategy memoranda on the same topics are – or should – be available to the public.

defendants. *See* Goldsmith Decl. I ¶¶ 5, 6, 9, 12, 14. It was never intended to be public, and the Department has steadfastly maintained its confidentiality. *See id.* ¶¶ 7, 9.

(13) While the CDI does include some practical advice for prosecutors to fulfill their disclosure obligations and addresses certain arguments by defense counsel, it does not include attorney work product and other sensitive law enforcement information, which is included in the Blue Book. *See* Goldsmith Decl. I ¶¶ 10-14. Unlike the CDI, the Blue Book essentially provides a blueprint to the strategies federal prosecutors employ in criminal cases, advising prosecutors on every aspect of the criminal discovery process. *See id.* ¶¶ 5, 6. It contains information to represent the Government in litigation, such as a comprehensive set of strategic considerations and procedures, extensive compilations of cases to support different arguments and contrary authority, the limitations of some of these arguments, specific recommendations to obtain electronic and other kinds of evidence, advice for avoiding discovery disputes and falling into some pitfalls, potential consequences of some practices, circumstances under which sanctions against the Government are likely, and circumstances under which prosecutions should consider taking certain steps, among others. *See* Goldsmith Decl. I ¶¶ 6, 9-11. *See also* Declaration of Susan Gerson ¶ 21. Disclosure of this information would provide defense counsel an unfair advantage in litigation by revealing law enforcement procedures and litigation strategies, risks, and vulnerabilities. *See* Goldsmith Decl. I ¶ 10. It would also hamper the adversarial process by undermining DOJ's ability to counsel its prosecutors, would limit the ability of prosecutors to safeguard legitimate law enforcement objectives, and would increase the risk that criminal defendants escape punishment and circumvent the law. *See id.* ¶¶ 10-14.

Disclosure of the Blue Book Would Undermine DOJ's Law Enforcement Function

(14) Clearly, the responsibilities of a prosecutor go beyond those of an ordinary litigant. Yet, in many situations, the prosecutor must function as an advocate of the United States. If the defense knew ahead of time what the likely litigation strategies and tactics the prosecution would employ, it stands to reason that the defense would be more likely to prevail – and gain access to discovery to which it would not otherwise be entitled. For example, if the defense knew how the prosecution would seek to protect the identity of confidential informants,[2] this would adversely affect the public's interest in protecting the anonymity – and safety – of citizens who report criminal activity to law enforcement officials. There are similar safety risks from premature disclosure of the identity of cooperating witnesses and undercover agents. In circumstances concerning organizational defendants, knowledge of the prosecution's approach to disclosure under Rule 16 could provide all defendants – including the organization *and* the individual defendants – with premature identification of Government witnesses. And providing the defense the arguments and strategies that prosecutors use to protect sensitive law enforcement techniques, such as the type and precise location of equipment used in electronic surveillance, could thwart the prosecutors' ability to protect this information. All of these and other results can be anticipated if the defense had a roadmap laying out the Government's approach to handling discovery in prosecutions nationwide. *See* Goldsmith Decl. I ¶¶ 9-14.

I declare under penalty of perjury that the foregoing is true and correct.

Andrew D. Goldsmith

Executed this 2nd day of September 2014.

[2] *See Roviaro v. United States*, 353 U.S. 53 (1957).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

Plaintiff,

v.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS *et al.*,

Defendants.

Civil Action No. 14-269 (CKK)

ORDER
(December 18, 2014)

For the reasons stated in the accompanying Memorandum Opinion, it is, this 18th day of December, 2014, hereby

ORDERED that Defendants' [13] Motion for Summary Judgment is GRANTED;

IT IS **FURTHER ORDERED** that Plaintiff's [16] Cross-Motion for Summary Judgment is DENIED;

Accordingly, judgment is entered for Defendants;

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

Plaintiff,

v.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS *et al.*,

Defendants.

Civil Action No. 14-269 (CKK)

MEMORANDUM OPINION
(December 18, 2014)

The National Association of Criminal Defense Lawyers ("NACDL") filed a FOIA request for the Department of Justice's ("DOJ") Federal Criminal Discovery Manual, also known as the "Blue Book." The DOJ denied NACDL's request in full, claiming that the entire Blue Book is exempt under Exemption 5 and Exemption 7(E) of the Freedom of Information Act ("FOIA"). NACDL subsequently filed suit against the Executive Office for United States Attorneys ("EOUSA") and the DOJ on February 21, 2014, seeking release of the Blue Book. Presently before the Court is Defendants' Motion for Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment. Upon consideration of the pleadings,[1] the relevant legal authorities, and the record as a whole, the Court finds that the Blue Book is attorney work-

[1] Vaughn Index, ECF No. [12]; Defendants' Motion for Summary Judgment ("Defs.' Mot."), ECF No. [13]; Plaintiffs' Cross-Motion for Summary Judgment and Opposition to Defendants' Motion for Summary Judgment ("Pl.'s Cross-Mot."), ECF No. [16]; Defendants' Reply to Opposition to Defendants' Motion for Summary Judgment and Opposition to Plaintiff's Cross-Motion for Summary Judgment ("Defs.' Reply"), ECF No. [20]; Plaintiff's Reply in Support of Cross-Motion for Summary Judgment ("Pl.'s Reply"), ECF No. [24]; Plaintiff's Notice of Supplemental Authority ("Notice of Supp. Authority"), ECF No. [19].

product protected from disclosure pursuant to FOIA Exemption 5. Accordingly, the Court GRANTS Defendants' Motion for Summary Judgment and DENIES Plaintiff's Cross-Motion for Summary Judgment.

I. BACKGROUND

On December 20, 2012, NACDL filed a FOIA request with the DOJ seeking "the Office of Legal Education publication entitled 'Federal Criminal Discovery'" which "may also be referred to as *The Federal Criminal Discovery Blue Book*." Compl. ¶ 33; Ex. A (FOIA Request). On February 28, 2013, the DOJ denied NACDL's FOIA request in full citing FOIA Exemptions 5 and 7(E) as the basis for its denial. Compl. ¶ 35; Ex. B (Denial of FOIA Request). NACDL appealed the DOJ's denial of its FOIA request on April 26, 2013. Compl. ¶ 36; Ex. C (FOIA Appeal). NACDL's appeal was denied on June 25, 2013. Compl. ¶ 38; Ex. E (Denial of FOIA Appeal). In denying NACDL's appeal, the Office of Information Policy affirmed the DOJ's initial denial of Plaintiff's FOIA request on partly modified grounds, citing only to FOIA Exemption 5's protection of attorney work-product as the proper basis for the DOJ's withholding of the Blue Book. *Id.*

On February 21, 2014, NACDL filed suit in this Court claiming that the DOJ improperly withheld the Blue Book under FOIA Exemptions 5 and 7(E). Compl. ¶¶ 39, 45. Defendants subsequently filed a Motion for Summary Judgment arguing that the Blue Book is exempt from disclosure in its entirety under FOIA Exemptions 5 and 7(E). Specifically, Defendants invoke Exemption 5's attorney work-product privilege. Plaintiff then filed a Cross-Motion for Summary Judgment. Both motions have been fully briefed and are now ripe for review.

II. LEGAL STANDARD

Congress enacted FOIA to "pierce the veil of administrative secrecy and to open agency

action to the light of public scrutiny." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation and internal quotation marks omitted). Congress remained sensitive to the need to achieve balance between these objectives and the potential that "legitimate governmental and private interests could be harmed by release of certain types of information." *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 872 (D.C. Cir. 1992) (en banc) (citation and internal quotation marks omitted), *cert. denied*, 507 U.S. 984 (1993). To that end, FOIA "requires federal agencies to make Government records available to the public, subject to nine exemptions for specific categories of material." *Milner v. Dep't of Navy*, 131 S.Ct. 1259, 1261-62 (2011). Ultimately, "disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361. For this reason, the "exemptions are explicitly made exclusive, and must be narrowly construed." *Milner*, 131 S.Ct. at 1262 (citations and internal quotation marks omitted).

When presented with a motion for summary judgment in a FOIA case, the district court must conduct a "de novo" review of the record, which requires the court to "ascertain whether the agency has sustained its burden of demonstrating that the documents requested . . . are exempt from disclosure under the FOIA." *Multi Ag. Media LLC v. Dep't of Agriculture*, 515 F.3d 1224, 1227 (D.C. Cir. 2008) (citation omitted). The burden is on the agency to justify its response to the plaintiff's request. 5 U.S.C. § 552(a)(4)(B). "An agency may sustain its burden by means of affidavits, but only if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith." *Multi Ag. Media*, 515 F.3d at 1227 (citation omitted). "If an agency's affidavit describes the justifications for withholding the information with specific detail, demonstrates that the information withheld logically falls within the claimed exemption,

and is not contradicted by contrary evidence in the record or by evidence of the agency's bad faith, then summary judgment is warranted on the basis of the affidavit alone." *Am. Civil Liberties Union v. Dep't of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011) (citations omitted). "Uncontradicted, plausible affidavits showing reasonable specificity and a logical relation to the exemption are likely to prevail." *Ancient Coin Collectors Guild v. Dep't of State*, 641 F.3d 504, 509 (D.C. Cir. 2011) (citation omitted). Summary judgment is proper when the pleadings, the discovery materials on file, and any affidavits or declarations "show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). With these principles in mind, the Court turns to the merits of the parties' motions.

III. DISCUSSION

As an initial matter, the parties dispute the nature of the contents of the Blue Book. NACDL contends that the Blue Book contains only statements of agency policy and general, neutral guidelines regarding prosecutors' disclosure obligations. NACDL describes the Blue Book as a manual "which comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations." Pl.'s Cross-Mot. at 2. The DOJ, on the other hand, contends that the manual contains legal advice, strategies, and arguments for defeating discovery claims. The DOJ describes the Blue Book as follows:

> This book was created exclusively for federal prosecutors to provide them advice and guidance regarding discovery-related issues that arise in criminal investigation and prosecutions. In specific part, it advises federal prosecutors about how to comply with their discovery obligations, how to avoid and handle discovery disputes, and how to protect and represent the Government's interests in litigation. In so doing, the [Blue Book] describes law enforcement techniques, procedures, and guidelines, the disclosure of which could create a risk of circumvention of the law.

Defs.' Mot. at 1. The parties' differing descriptions of the Blue Book's contents affect the

applicability of Exemption 5 and 7(E) to the Blue Book. Accordingly, on October 22, 2014, the Court requested that the Blue Book be provided for *in camera* review. Based on the Court's *in camera* review, the Court finds, for the reasons given below, that the Blue Book constitutes attorney-work product and is exempt in its entirety under FOIA Exemption 5. As the Court finds the Blue Book is exempt from disclosure pursuant to FOIA Exemption 5, the Court need not reach the DOJ's alternative basis for withholding the Blue Book—Exemption 7(E).

Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 contains two main privileges, the attorney work-product privilege and the deliberative process privilege. The Court shall exclusively focus on the attorney work-product privilege as this is the only privilege that the DOJ has invoked. The attorney-work product privilege covers material that "can fairly be said to have been prepared or obtained because of the prospect of litigation." *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998) (internal citation and quotation marks omitted). The privilege's purpose is to protect the adversarial trial process by insulating attorneys' preparations from scrutiny. *See Judicial Watch, Inc. v. Dep't of Homeland Sec.*, 926 F.Supp.2d 121, 142 (D.D.C. 2013) (quoting *Jordan v. Dep't of Justice*, 591 F.2d 753, 775 (D.C. Cir. 1978) ("[T]he purpose of the privilege is to encourage effective legal representation *within the framework of the adversary system* by removing counsel's fears that his thoughts and information will be invaded by his adversary." (emphasis in original)). Accordingly, the attorney work-product privilege "should be interpreted broadly and held largely inviolate." *Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005).

The District of Columbia Circuit has recognized two categories of documents as

"prepared in anticipation of litigation" and thus protected by the attorney work-product privilege. *Shapiro v. Dep't of Justice*, 969 F.Supp.2d 18, 27, 30 (D.D.C. 2013). Documents are protected if they are "prepared by government lawyers in connection with active investigations of potential wrongdoing," and there is "a *specific* claim supported by concrete facts which would likely lead to litigation in mind." *In re Sealed Case*, 146 F.3d at 885, 887 (internal citations and quotation marks omitted) (emphasis added). Documents will also be considered "prepared in anticipation of litigation" and protected if they are prepared by an attorney "render[ing] legal advice in order to protect the client from future litigation about a particular transaction." *Id.* at 885. In such a situation, no specific claim is needed. *Id.* In the context of a government agency, a document will be protected if its authors acted "as legal advisors protecting their agency clients from the possibility of future litigation." *Id.*; *see also Delaney, Migdail &Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987) (memoranda protected which "advise[d] the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome"). Conversely, documents "like an agency manual, fleshing out the meaning of the statute [the agency is] authorized to enforce" and offering "mere neutral objective analyses of agency regulations" are not protected by the attorney work-product privilege. *Delaney*, 826 F.2d at 127. The operative test is a functional test: "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." *In re Sealed Case*, 146 F.3d at 30-31; *Delaney*, 826 F.2d at 127 (identifying "the function of the documents as the critical issue").

Importantly, "[i]f a document is fully protected as work product, then segregability is not required." *Judicial Watch*, 432 F.3d at 371 ("factual material is itself privileged when it appears

within documents that are attorney work product"); *see also Tax Analysts v. IRS*, 117 F.3d 607, 620 (D.C. Cir. 1997) ("[a]ny part of [a document] prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and the like, is protected by the work product doctrine and falls under exemption 5."). This is true even if portions of an attorney work-product contain agency working law. The agency working law need not be released if the function of the document in which the working law is contained makes it attorney work-product. *See Tax Analysts v. IRS*, 294 F.3d 71, 73 (D.C. Cir. 2002) (affirming district court's judgment that the "IRS need not segregate and release agency working law from [Technical Assistance memoranda] withheld pursuant to Exemption 5's attorney work product privilege").

Plaintiff argues that the Blue Book is not covered by the attorney work-product privilege because "it was created to convey DOJ's general policies on, and interpretations of, laws it is already charged with enforcing—namely its constitutional *Brady* obligations." Pl.'s Cross-Mot. at 24. Plaintiff contends that the "DOJ has made no showing that the purpose of the Blue Book was to shield the agency from future litigation related to a particular transaction or specific government program or policy." *Id.* In other words, Plaintiff believes the Blue Book is not protected by the attorney work-product privilege because it simply conveys "general agency policy" divorced from potential litigation. *Id.* at 25. Having conducted an *in camera* review of the book, the Court respectfully disagrees with Plaintiff's analysis and finds that the Blue Book was prepared by attorneys "in anticipation of litigation" as defined by courts in this Circuit.

The Blue Book is a "litigation manual" available only to DOJ personnel that "advise[s] federal prosecutors on the legal sources of their discovery obligations as well as the types of discovery related claims and issues that they would confront in criminal investigations and prosecutions." Vaughn Index at 1. As such, the Blue Book is most likely to fall into the second

category of protected documents—i.e. documents prepared in anticipation of foreseeable litigation against the agency—and not the category of documents related to active investigations of potential wrongdoing that require specific claims. *See ACLU Foundation v. Dep't of Justice*, No. 12-7412, 2014 WL 956303, at *6 (S.D.N.Y. Mar. 11, 2014) (rejecting argument that "because the memoranda at issue were written for prosecutors and discuss criminal investigations, the specific claim requirement applies"). Specifically, the Blue Book

> encourages certain practices and discourages others; identifies factors prosecutors should consider in making particular decisions; describes the types of claims/tactics defense counsel raise/employ and provides advice and authority to counter those claims/tactics; evaluates the merits of arguments prosecutors can make; and illustrates with cases pitfalls for prosecutors to avoid, including arguments available in case prosecutors fall into those pitfalls.

Vaughn Index at 1-2. The Court finds the function of the Blue Book analogous to other agency manuals and memoranda which courts in this Circuit have found to be "prepared in anticipation of litigation." For example, in *Schiller v. National Labor Relations Board*, the United States Court of Appeals for the District of Columbia Circuit found that documents containing "tips for handling unfair labor practice cases that could affect subsequent EAJA [(Equal Access to Justice Act)] litigation," and "advice on how to build an EAJA defense and how to litigate EAJA cases" fell within the attorney work-product privilege because they were "prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated." 964 F.2d 1205, 1208 (D.C. Cir. 1992).

Similarly, in *Soghoian v. Department of Justice*, District Court Judge Amy Berman Jackson found DOJ documents "discussing legal strategies in investigations involving electronic surveillance" and an "internal manual . . . contain[ing] legal guidance for attorneys conducting investigations" that recommended "certain legal approaches and strategies over others" were

protected by the attorney work-product privilege because they "present the legal strategies of the DOJ attorneys who will be required to litigate on behalf of the government." 885 F.Supp.2d 62, 72-73 (D.D.C. 2012). *See also ACLU*, 2014 WL 956303, at *1, *6 (protecting memoranda "discuss[ing] the ways in which GPS tracking devices are employed in federal criminal investigations" because they "discuss not how prosecutors should interpret and apply the laws they are charged with enforcing—the criminal code—but how to defend the Government against accusations of unlawful searches or seizures"); *Automobile Imports of America, Inc. v. FTC*, No. 81-3205, 1982 WL 1905, *1 (D.D.C. Sept. 28, 1982) (protecting memorandum prepared by an FTC staff attorney that examined the merits of possible remedies in automobile defect cases). Likewise, here, the Blue Book provides background information and instructions on discovery practices and advice, strategy, and defenses for litigation related to the government's discovery obligations to attorneys who will be required to litigate on the government's behalf. Just like the documents protected in *Schiller*, the Blue Book is a " 'how to' manual[ ] for building defenses and litigating cases under the [relevant discovery statutes] and disclose[s] explicit agency strategy." *Shapiro*, 969 F.Supp.2d at 37.

Plaintiff's attempts to liken the Blue Book to the documents rejected by the court as attorney work-product in *Jordan v. Department of Justice* and *Judicial Watch, Inc. v. Department of Homeland Security* are unavailing. Both cases involved agency memoranda providing general standards to guide government lawyers in the exercise of their prosecutorial discretion. While Plaintiff correctly notes that each case held that the memoranda were not attorney work-product because they were not "prepared in anticipation of a particular trial," but were "promulgated as general standards to guide the Government lawyers," Plaintiff's narrow focus on this language is misguided. *Jordan*, 591 F.2d at 775; *see also Judicial Watch, Inc.*, 926

F.Supp.2d at 142. The *Jordan* and *Judicial Watch* courts ultimately found that the memoranda were not attorney work-product, not simply because they weren't prepared for a particular case, but because "they were not even prepared in anticipation *of trials in general*." *Jordan*, 591 F.2d at 777 (emphasis added); *see also Judicial Watch*, 926 F.Supp.2d at 142 (same). The *Jordan* and *Judicial Watch* courts reasoned that the attorney work-product "privilege focuses on the integrity of the *adversary trial process* itself." *Jordan*, 591 F.2d at 775 (emphasis added); *Judicial Watch*, 926 F.Supp.2d at 142. Since "the guidelines and instructions set forth in the [memoranda] d[id] not relate to the conduct of either on-going *or prospective trials*," the courts found the attorney work-product privilege could not be invoked to preclude their disclosure. *Jordan*, 591 F.2d at 775-76 (emphasis added); *Judicial Watch*, 926 F.Supp.2d at 142. The Blue Book, by contrast, directly relates to conduct in the adversary trial process since it provides guidelines and strategies for government prosecutors to consider in disclosing discovery and litigating against challenges to their discovery practices. The Blue Book is entirely focused on a bedrock transaction in the adversarial trial process—discovery.

Plaintiff also cites to *American Immigration Council v. Department of Homeland Security* and *Shapiro v. Department of Justice*. In the former case, District Court Judge James E. Boasberg held that PowerPoint presentations prepared by Department of Homeland Security attorneys "to teach USCIS employees how to interact with private attorneys" in agency proceedings before adjudicators, were not protected by the attorney work-product privilege because their creators "were not worrying about litigation ensuing from any 'particular transaction[]' . . . or planning strategy for USCIS's case" in a specific suit; instead they were "convey[ing] routine agency policies." *Am. Immigration Council v. Dep't of Homeland Security*, 905 F.Supp.2d 206, 222 (D.D.C. 2012). Similarly, in *Shapiro*, District Court Judge Beryl

Howell denied work-product protection to documents "summari[zing] cases and key issues in certain cases" in a "FOIA Brief Bank" because they were "untethered to any particular claim in litigation" and did not reveal any "legal strategy or other case-specific legal considerations." *Shapiro*, 969 F. Supp. 2d at 34–37. The Blue Book is unlike either of these sets of documents because it deals specifically with discovery transactions in criminal litigation with the goal of preventing litigation arising from these transactions. *See ACLU*, 2014 WL 956303, at *6 ("It is immaterial that these claims often arise in the context of suppression motions by criminal defendants instead of lawsuits filed against the Government."). Although the Blue Book does contain general background information and agency policies regarding the government's discovery obligations, the Court finds that it contains sufficient advice and litigation strategy for use in actual litigation to qualify as attorney work-product, especially in light of the fact that the overarching purpose driving the contents and structure of the book was to prevent discovery violations and litigation arising from discovery transactions. *See* Defs.' Ex. 1 (Gerson Decl.), ¶¶ 17-18 (describing the Blue Book as a step taken to "address [discovery] failures and to ensure that similar problems did not arise in future investigations and prosecutions").

During the course of the briefing of the present cross-motions for summary judgment, Plaintiff filed a Notice of Supplemental Authority citing to a recent decision by Judge Ancer L. Haggerty of the District of Oregon-Portland Division in criminal case *United States v. Pederson*, Case No. 12-431-HA. Over the government's objection, Judge Haggerty ordered the government to produce the Blue Book to the defense pursuant to a protective order in anticipation of a hearing concerning defendant's motion for a finding of bad faith. Notice of Supp. Authority, Ex. C at 2. Judge Haggerty rejected the government's argument that the attorney work-product privilege protected disclosure of the Blue Book to defendant, reasoning

that "the D.C. Circuit has held *only* 'where an attorney prepares a document in the course of an active investigation focusing upon specific events and a specific possible violation by a specific party, it has litigation sufficiently 'in mind' for that document to qualify as attorney work product.' " *Id.* at 5 (emphasis added). Respectfully, this Court will not follow the District of Oregon's reasoning because the Court finds the analysis incomplete. As discussed above, the District of Columbia Circuit has recognized *two* scenarios in which a document will be considered prepared "in anticipation of litigation." Judge Haggerty's decision appears to operate on the understanding that only one of these scenarios is a viable scenario for a document to be characterized as prepared "in anticipation of litigation." Judge Haggerty found—just like the Court finds here —that the Blue Book was not prepared "in the course of an active investigation" with a "specific possible violation by a specific party" in mind. *Id.* Accordingly, Judge Haggerty concluded that the Blue Book was not protected by the attorney work-product privilege. *Id.* However, Judge Haggerty did not evaluate whether the Blue Book was a privileged attorney work-product because it was prepared to "protect [ ] agency clients from the possibility of future litigation"—the operative category here. *In re Sealed Case*, 146 F.3d at 885. Accordingly, the Court is not persuaded by the reasoning in the District of Oregon decision.

Finally, the Court rejects Plaintiff's argument that the Blue Book must be disclosed pursuant to 5 U.S.C. § 552(a)(2) because it constitutes the DOJ's "working law" or "secret law" with respect to the government's discovery obligations.[2] Pl.'s Cross-Mot. at 9-10. In arguing that the Blue Book constitutes agency working law, Plaintiff relies on DOJ officials' testimony

[2] The "working law" concept reflects "aversion to 'secret (agency) law.'" *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152-53 (1975). Plaintiff uses "working law" and "secret law" interchangeably. *See* Pl.'s Cross-Mot. at 15. For the sake of clarity, the Court will only refer to "working law."

before Congress that the Blue Book was intended as a substitute for Congressional legislation concerning the government's disclosure obligations in criminal discovery. *Id.* at 15-16. First, simply because the DOJ decided to police discovery obligations internally instead of through passage of federal legislation does not transfer the agency's internal policing manual into agency working law. Second, even if the Blue Book constitutes or contains the DOJ's working law,[3] which, pursuant to § 552(a)(2), must proactively be disclosed, FOIA "expressly states . . . that the disclosure obligation 'does not apply' to those documents described in the nine enumerated exempted categories listed in § 552(b)," which includes Exemption 5.[4] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 137 (1975); *see also Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 n.21 (1975) (even if a document is "expressly made disclosable" under § 552(a)(2), "a conclusion that the document [is] within Exemption 5 would be dispositive in the Government's favor, since the Act 'does not apply' to such documents"). It is true that in *Sears* the Supreme Court stated that it would be "reluctant" to hold that the Exemption 5 privilege would apply to documents covered by § 552(a)(2). *Sears*, 421 U.S. at 153-154. However, in *Federal Open Market Committee of Federal Reserve System v. Merrill*, the Supreme Court clarified that "these observations . . . were made in the course of a discussion of the privilege for predecisional communications" and "the kind of mutually exclusive relationship between final opinions and statements of policy, on one hand, and predecisional communications, on the other, does not necessarily exist between final statements of policy and other Exemption 5 privileges."

[3] The Court acknowledges that Defendants argued in their briefs that the Blue Book is not working law. *See* Defs.' Reply at 5-9. The Court need not reach this issue, however, because the Court has found that Exemption 5 protects the Blue Book from disclosure even if it constitutes or contains agency working law.

[4] The Supreme Court in *Sears* did, however, hold that "with respect . . . to 'final opinions' [which must be proactively disclosed pursuant to § 552(a)(2)], Exemption 5 can never apply." *Sears*, 421 U.S. at 153-54.

443 U.S. 340, 360 n.23 (1979). The Court went on to "note that *Sears* itself held that a memorandum subject to the affirmative disclosure requirement of § 552(a)(2) was nevertheless shielded from disclosure under Exemption 5 because it contained a privileged attorney's work product." *Id.* Accordingly, as long as the Blue Book is considered attorney work-product, which the Court has already found that it is, FOIA Exemption 5 still protects the book from disclosure. *See id.* ("Our conclusion that the Domestic Policy Directives are at least potentially eligible for protection under Exemption 5 does not conflict with the District Court's finding that the Directives are "statements of general policy . . . formulated and adopted by the agency," which must be "currently publish[ed]" in the Federal Register pursuant to 5 U.S.C. § 552(a)(1)."). In addition, there is no obligation on the DOJ to segregate and release any working law the Blue Book contains. *See Tax Analysts v. IRS*, 391 F. Supp. 2d 122, 128 (D.D.C. 2005).

IV. CONCLUSION

For the reasons set forth above, the Court finds that the Department of Justice's Blue Book is attorney work-product protected from disclosure pursuant to FOIA Exemption 5. As the Blue Book is fully protected, Defendants are not required to evaluate whether all reasonably segregable portions of the requested document have been released. Accordingly, Defendants' Motion for Summary Judgment is GRANTED and Plaintiff's Cross-Motion for Summary Judgment is DENIED. An appropriate Order accompanies this Memorandum Opinion.

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/s/
COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS 1660 L St. NW, 12th Floor Washington, DC 20036 Plaintiff, v. EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS and UNITED STATES DEPARTMENT OF JUSTICE, 950 Pennsylvania Avenue, NW Washington, DC 20530 Defendants.	CIVIL ACTION NO. 14-cv-00269-CKK

PLAINTIFF'S NOTICE OF APPEAL

Notice is hereby given that the Plaintiff in the above-referenced case, the National Association of Criminal Defense Lawyers, appeals to the United States Court of Appeals for the District of Columbia Circuit from the Final Order entered in this action on December 18, 2014.

Dated: February 12, 2015

By: /s/ Kerri L. Ruttenberg

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CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of July 2015, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. Pursuant to this Court's order, I also caused seven copies of the foregoing document to be filed, by hand delivery, with the clerk of this Court.

July 15, 2015

/s/ Julia Fong Sheketoff

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