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 **NO HEARING DATE SET** **ORAL ARGUMENT REQUESTED**

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT AND
OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Pursuant to Rule 56 of the Federal Rules of Civil Procedure and this Court's Scheduling Order of May 5, 2014, Plaintiff, the National Association of Criminal Defense Lawyers ("NACDL"), hereby submits its Cross Motion for Summary Judgment and its Opposition to the Motion for Summary Judgment filed by Defendants, the United States Department of Justice and the Executive Office for United States Attorneys (collectively "DOJ").

INTRODUCTION

"Society wins not only when the guilty are convicted," the Supreme Court has observed, "but when criminal trials are fair[.]" *Brady v. Maryland*, 373 U.S. 83, 87 (1963). As DOJ itself has acknowledged, "even a single lapse [in its compliance with *Brady*] . . . could call the integrity of our criminal justice system into question" with "devastating consequences." Declaration of Kerri L. Ruttenberg ("Ruttenberg Decl.") Ex. H, *Statement for the Record from the Department of Justice: Hearing on the Special Counsel's Report on the Prosecution of Senator Ted Stevens Before the S. Comm. on the Judiciary*, 112th Cong. 2–3 (Mar. 28, 2012) ("*Statement for the Record*").

In 2009, the "integrity of the criminal justice system" was called into question during the public furor over DOJ's failure to turn over exculpatory information in the prosecution of Senator Ted Stevens. Congress, and the public, demanded answers. DOJ responded with an adamant defense of its ability to self-police discovery abuses through "improve[d] disclosure policies and practices." *Id.* at 3. The creation and distribution of the Federal Criminal Discovery Blue Book (the "Blue Book") was part of this effort. Pl.'s Statement of Add'l Material Facts As To Which There Is No Genuine Dispute ¶¶ 23–26 ("*SAMF*"); *Statement for the Record* at 4.

The Blue Book was created and distributed to "prosecutors nationwide in 2011." *SAMF* ¶ 27; *Statement for the Record* at 4. Accordingly, at the time that both Deputy Attorney General

James Cole and DOJ itself made statements for the record to Congress in 2012, their representations about the Blue Book were not speculative. And, their descriptions of the Blue Book were the same:

> 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.

SAMF ¶¶ 26–31; Ruttenberg Decl. Ex. I, *Statement of James M. Cole, Deputy Attorney General: Hearing on S. 2197 Ensuring that Federal Prosecutors Meet Discovery Obligations Before the S. Comm. on the Judiciary,* 112th Cong. 3 (June 6, 2012) ("*Cole Testimony*"); *Statement for the Record* at 4. The Blue Book was thus a part of DOJ's *policy* solution to the problem of its discovery failures.

Now, in this litigation, DOJ paints a very different picture of the Blue Book. While DOJ does not dispute that, as it told Congress, the Blue Book contains advice to prosecutors on their discovery *obligations*, *Vaughn* Index at 1 (emphasis added), DOJ now says that the Blue Book contains "arguments and authority *to defeat discovery claims*," Def.'s Mem. of P. & A. in Supp. of Defs.' Mot. for Summ. J. 9 ("*MSJ*") (emphasis added), as well as advice on how to "delay or limit disclosure" of exculpatory information, *id.*, "strategic and logistical concerns" and "risk assessments" regarding disclosure, *id.* at 12, and "DOJ's general strategic and tactical approach to dealing with different discovery issues," *id.* at 15.

With its newly revised description of the Blue Book, DOJ tries to hide the Blue Book behind a veil of privilege, trumpeting a laundry list of doom-and-gloom outcomes should the public actually see what DOJ believes are a "prosecutors' disclosure obligations." While in the abstract this parade of horribles, from "national security" to witness safety to evidence tampering, indeed would be a serious concern, DOJ baldly relies on these buzzwords without

providing any logical explanation for how disclosure of the Blue Book, a document explaining the requirements for the Government to meet its constitutional obligations to disclose exculpatory information, would remotely cause any of those outcomes.

NACDL is entitled to judgment as a matter of law for any of three independent reasons. One, the Blue Book is a statement of adopted agency policy and therefore must be published under 5 U.S.C. § 552(a)(2). Two, the Blue Book constitutes DOJ's effective law and policy regarding criminal discovery and as such is "secret law" which must be disclosed. And three, NACDL made a proper Freedom of Information Act ("FOIA") request under 5 U.S.C. § 552(a)(3), and no exemption applies to shield the Blue Book from disclosure.

DOJ's claims for exemption should be denied. DOJ claims that two FOIA exemptions shield the Blue Book from disclosure: (1) an exemption under § 552(b)(5) ("Exemption 5") for attorney work product, and (2) an exemption under § 552(b)(7)(E) ("Exemption 7(E)") for records compiled for law enforcement purposes that contain "techniques, procedures, and guidelines for criminal investigations and prosecutions." *MSJ* at 1–2. Neither claim holds.

As a threshold matter, because the Blue Book is DOJ's effective law and policy regarding criminal discovery, it is "secret law" and so Exemption 5 is inapplicable. In addition, the Blue Book does not qualify as attorney work product because it was not prepared in anticipation of litigation in the manner required by the attorney work product privilege. Nor would disclosure of the Blue Book provide criminal defendants with an unfair litigation advantage. Moreover, Exemption 7(E) does not apply because the Blue Book was not prepared for law enforcement purposes, and disclosure of any material in the Blue Book could not reasonably be expected to risk circumvention of the law. Finally, to the extent DOJ now claims that the Blue Book contains material that is different from what DOJ told Congress, and to the extent this new

material might be exempt from disclosure under FOIA, an *in camera* review is appropriate to determine whether any material in the Blue Book can be withheld under either exemption, and to what extent that information is reasonably segregable.

BACKGROUND

In 2009, a court-appointed investigator found that the prosecution of former Senator Ted Stevens had been "permeated by the systematic concealment of significant exculpatory evidence." *SAMF* ¶¶ 12–13; Ruttenberg Decl. Ex. F, Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated Apr. 7, 2009 at 1, *In Re Special Proceedings*, No. 09-0198 (EGS) (D.D.C. Mar. 15, 2012). Exposure of the widespread discovery abuses that marred the Stevens prosecution sparked a national furor. Dozens of major news outlets closely followed the story and issued calls for reform. *See, e.g.*, *SAMF* ¶ 14; Editorial: *Justice After Senator Stevens*, The New York Times, Mar. 18, 2012, available at http://goo.gl/CJlTAl; *Federal Prosecutors Need to Play Fair with Evidence*, Washington Post, Mar. 18, 2012, available at http://goo.gl/f1Lr2u.

In the wake of the Stevens fiasco, Congress proposed new legislation to address the failure of federal prosecutors to fully comply with their discovery obligations. This legislation was intended to standardize DOJ's interpretation of its constitutional discovery obligations in criminal cases, ensure timely disclosure of exculpatory evidence to criminal defendants, and establish consequences for future violations. *See SAMF* ¶¶ 15–16; Ruttenberg Decl. Ex. G, Press Release, United States Senator Lisa Murkowski, Senator Introduces Bipartisan Bill to Enforce Ethical Legal Prosecutions, Mar. 15, 2012 ("*Murkowski Press Release*"). A bi-partisan coalition of senators, the American Bar Association, the U.S. Chamber of Commerce, the American Civil Liberties Union, and The Constitution Project expressed their strong support for this new

legislation governing the disclosure of exculpatory material. *SAMF* ¶ 17; *Murkowski Press Release*.

Serious reform of DOJ's discovery practices was necessary because, contrary to DOJ's assertions in this case, the mishandling of the Stevens prosecution was not an "aberration." *See MSJ* at 6 (quoting Gerson Decl. ¶ 17). As Judge Kozinski of the Ninth Circuit has explained, "*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 this unsettling trend." *Id*. (collecting twenty-six federal and state court cases). Numerous cases illustrate the prevalence of *Brady* violations prior to DOJ's creation of the Blue Book. *See, e.g.*, *Smith v. Cain*, — U.S.—, 132 S.Ct. 627, 630 (2012) (holding that prosecutors violated *Brady* by failing to disclose material evidence that was favorable to the defense); *United States v. Sedaghaty*, 728 F.3d 885, 892 (9th Cir. 2013) ("We conclude that the government violated its obligations pursuant to *Brady* . . . by withholding significant impeachment evidence relevant to a central government witness."); *Aguilar v. Woodford*, 725 F.3d 970, 985 (9th Cir. 2013) (finding that the prosecutor's failure to disclose evidence violated *Brady*), *cert. denied*, 134 S. Ct. 1869 (2014).

And yet, DOJ strongly objected to the new legislation. *Cole Testimony* at 1 ("We have very serious concerns with [the] draft legislation."); *SAMF* ¶¶ 21–22. In objecting to the passage of new legislation, DOJ insisted that ensuring compliance with existing criminal discovery obligations should be handled through a series of internal DOJ reforms. *SAMF* ¶¶ 23–25; *Cole Testimony* at 2–4. These reforms, DOJ claimed, would "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." *SAMF* ¶ 23; *Statement for the Record* at

1. Indeed, DOJ boasted that these internal reforms would "mak[e] sure that its prosecutors understand and comply with their existing obligations." *SAMF* ¶ 24; *Cole Testimony* at 1. One of the internal reforms touted by DOJ was DOJ's newly created Blue Book. *SAMF* ¶ 26; *Cole Testimony* at 3.

In the end, Congress failed to pass new legislation. DOJ would be responsible for "ensur[ing] that the existing rules and policies [were] followed," through the "enhanced guidance, training, and supervision" that DOJ would provide to its prosecutors and agents. *Cole Testimony* at 2–4.

The Blue Book and DOJ's other internal reforms did not, however, have their promised effect. Since the creation of the Blue Book, prosecutorial discovery abuse remains an ongoing problem. *See, e.g.*, *United States v. Tavera*, 719 F.3d 705, 708 (6th Cir. 2013) ("[N]ondisclosure of *Brady* material is still a perennial problem, as multiple scholarly accounts attest. This case shows once again how prosecutors substitute their own judgment of the defendant's guilt for that of the jury.") (footnote omitted); *United States v. Toilolo*, CR. No. 11-00506 LEK, 2014 U.S. Dist. LEXIS 34571, at *32 (D. Haw. Mar. 17, 2014) (finding that prosecutors committed multiple discovery violations); *see also United States v. Nelson*, 979 F. Supp. 2d 123, 135 (D.C. Cir. 2013) ("[B]ecause the prosecution suppressed exculpatory evidence before [defendant] pled guilty, [defendant's] due process rights were violated to his prejudice and his guilty plea was not voluntary and knowing."); *United States v. Bartko*, 728 F.3d 327, 342 (4th Cir. 2013) (holding that nondisclosed evidence would not have affected the verdict, but "urg[ing] the district court in the Eastern District of North Carolina to meet with the United States Attorney's Office of that district to discuss improvement of its discovery procedures so as to prevent [discovery] abuses"), *cert. denied*, 134 S. Ct. 1043 (2014).

Sadly, because "[a] *Brady* violation, by its nature, causes suppression of evidence beyond the defendant's capacity to ferret out," *Connick v. Thompson*, 131 S. Ct. 1350, 1385 (2011) (Ginsburg, J., dissenting), these reported cases are likely just the tip of the iceberg.

In this context, NACDL seeks access to the Blue Book. Far from an "attempt to gain an unfair advantage in litigation against the Government," *MSJ* at 2, NACDL seeks access to the Blue Book to understand why *Brady* violations continue at "epidemic proportions," *Olsen*, 757 F.2d at 631, despite DOJ's assurances to Congress that its internal reforms, including the Blue Book, would "mak[e] sure that its prosecutors understand and comply" with their *Brady* obligations, *Cole Testimony* at 1.

PROCEDURAL HISTORY

On December 20, 2012, NACDL submitted a FOIA request to EOUSA seeking disclosure of "the Office of Legal Education publication entitled 'Federal Criminal Discovery.'" *See* Ruttenberg Decl. Ex. A at 1. On February 28, 2013, EOUSA denied NACDL's FOIA request in full. *See* Ruttenberg Decl. Ex. B. On April 26, 2013, NACDL sent DOJ an administrative appeal letter challenging EOUSA's decision to withhold the Blue Book. *See* Ruttenberg Decl. Ex. C. On June 25, 2013, DOJ's Office of Information Policy ("OIP") denied NACDL's appeal. *See* Ruttenberg Decl. Ex. E.

Having exhausted its administrative remedies, NACDL filed a Complaint in this Court on February 21, 2014. NACDL claimed that DOJ had violated two separate provisions of FOIA: (1) 5 U.S.C. § 552(a)(2), by failing to make the Blue Book available for inspection and copying; and (2) 5 U.S.C. § 552(a)(3), by failing to release the Blue Book in response to NACDL's proper FOIA request. Compl. ¶¶ 49–57. NACDL also claimed that none of the exemptions cited by DOJ applied to shield the Blue Book from disclosure. *Id.* ¶¶ 39–48.

On April 3, 2014, DOJ filed an Answer acknowledging that it has possession of the Blue Book, but denying that the decision to withhold the Blue Book was improper. *See* Answer ¶¶ 5, 12, 13.

On June 11, 2014, DOJ filed a *Vaughn* Index and a Motion for Summary Judgment.

SUMMARY JUDGMENT STANDARD

A party is entitled to summary judgment if the record shows 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). "A genuine issue of material fact is one that is determinative of the claim or a defense and could thus affect the outcome of the case." *Ehrman v. United States*, 429 F. Supp. 2d 61, 66 (D.D.C. 2006). Conversely, "any factual dispute that does not constitute a genuine issue of material fact is immaterial for summary judgment purposes . . . ." *Id.*; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The court "must view the evidence in the light most favorable to the nonmoving party, [and] draw all reasonable inferences in his favor." *Montgomery v. Chao*, 546 F.3d 703, 706 (D.C. Cir. 2009). Summary judgment is not appropriate where "the evidence presented on a dispositive issue is subject to conflicting interpretations, or reasonable persons might differ as to its significance . . . . " *Greenberg v. Food & Drug Admin*., 803 F.2d 1213, 1216 (D.C. Cir. 1986).

In the context of FOIA litigation, "the burden is on the agency to justify withholding requested documents," and summary judgment is only appropriate "after an agency has proven that it has fully discharged its disclosure obligations." *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 926 F. Supp. 2d 121, 132 (D.D.C. 2013) (internal quotation marks omitted). FOIA exemptions "must be narrowly construed in favor of disclosure." *Dickstein Shapiro LLP*

v. U.S. Dep't of Def., 730 F. Supp. 2d 7, 9 (D.D.C. 2010). "[T]he 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." *Judicial Watch*, 926 F. Supp. 2d at 132 (internal citations omitted).

A court may decide to conduct an *in camera* review of disputed records. *See, e.g.*, *Physicians for Human Rights v. U.S. Dep't of Def.*, 675 F. Supp. 2d 149, 167 (D.D.C. 2009). *In camera* review is particularly appropriate when the dispute centers on a small number of documents, agency affidavits are insufficiently detailed, there is a strong public interest in disclosure, and the dispute centers around the contents of the documents. *Id.* (citing *Allen v. Cent. Intelligence Agency*, 636 F.2d 1287, 1297–99 (D.C. Cir. 1980)).

ARGUMENT

NACDL's Motion for Summary Judgment should be *granted* because the undisputed facts show that the Blue Book constitutes adopted agency policy or is secret law that cannot be withheld under a claim of attorney work product privilege. DOJ's Motion for Summary Judgment should be *denied* because the two FOIA exemptions it claims are legally inapplicable to the Blue Book are supported by nothing but conclusory statements that are in dispute. If, however, this Court finds that some of DOJ's new descriptions of the Blue Book's contents might warrant protection under FOIA exemptions 5 or 7(E), these portions would be segregable, and an *in camera* review is appropriate.

I. NACDL IS ENTITLED TO SUMMARY JUDGMENT BECAUSE DOJ HAS AN AFFIRMATIVE OBLIGATION TO DISCLOSE THE BLUE BOOK.

Separate from NACDL's FOIA request, DOJ has an affirmative obligation to publish the Blue Book. DOJ must make the Blue Book available to the public because it is a statement of adopted agency policy. This is reflected in DOJ's own representations to Congress and in this

litigation regarding the Blue Book's purpose and dissemination, and by the fact that DOJ has already publicly disclosed similar material. Moreover, the Blue Book constitutes "secret law" that cannot be withheld based on claims of privilege. Further, the very nature of *Brady* disclosure decisions—and violations—means that the policies in the Blue Book will forever remain hidden from the public unless the Blue Book is made public.

A. DOJ Must Make the Blue Book Available for Inspection and Copying Under Section 552(a)(2).

Because the Blue Book contains statements of adopted agency policy, DOJ must make the Blue Book available for inspection and copying under 5 U.S.C. § 552(a)(2). Paragraph (a)(2) of FOIA requires each agency to "make available for inspection and copying . . . those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." 5 U.S.C. § 552(a)(2)(B). Policy statements and guidelines can be "adopted by the agency" even if they are not binding on government personnel. *See Tax Analysts v. IRS* ("*Tax Analysts I*"), 96-1 USTC 83,780, 83,781 (D.D.C. 1996).

Here, the Blue Book is just the sort of "adopted agency policy" that must be disclosed under 5 U.S.C. § 552(a)(2). First, the Blue Book has not been published in the Federal Register. *See* Goldsmith Decl. ¶ 7 ("[I]n addition to federal prosecutors, the only group to receive access to the Blue Book has been . . . other federal law enforcement officials.") Second, DOJ's undisputed statements both to Congress and in this litigation show that the Blue Book is a statement of adopted policy and interpretation. In describing the Blue Book to Congress in an effort to avoid new legislation related to its discovery obligations, DOJ said the Blue Book "comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations." *Statement for the Record* at 4. Likewise, in this litigation Andrew Goldsmith, who "spearhead[ed]" the creation of the Blue Book, explained that "the Blue Book was designed to . . . serve as a litigation manual to

be used by all DOJ prosecutors and paralegals." Goldsmith Decl. ¶ 5. Mr. Goldsmith goes on to say that the Blue Book describes "the law and practice of federal prosecutors' discovery disclosure obligations." *SAMF* ¶ 32; *id.*

Without disputing this description of the contents of the Blue Book, DOJ claims in cursory fashion that the policies in the Blue Book were not adopted by the agency because the Blue Book "does not create a set of rigid rules for prosecutors to follow in every single case." *MSJ* at 13. As an initial matter, this argument fails as a matter of law because the Blue Book need not be a "rigid set of rules" followed "in every case" to qualify as "statements of policy and interpretations which have been adopted by the agency" within the meaning of § 552(a)(2). In *Tax Analysts I*, this Court held that IRS Field Service Advice memoranda were "statements of policy" that had been adopted by the IRS, even though they were not binding on IRS personnel, because they were "routinely used by agency staff as guidance" and applied in the IRS's "dealings with the public." *Tax Analysts I*, 96-1 USTC at 83,781; *see also Bailey v. Sullivan*, 885 F.2d 52, 62 (3d Cir. 1989) (noting that a Social Security Ruling providing examples of medical conditions that should be treated as "per se nonsevere" fell under subsection (a)(2)(B)); *Pa. Dep't of Pub. Welfare v. United States*, No. 99-175, 2001 U.S. Dist. LEXIS 3492, at *90 (W.D. Pa. Feb. 7, 2001) (holding that HHS documents that advised regional offices of the agency's view on policy matters pertaining to certain welfare programs were "interpretations adopted by the agency"); *Pub. Citizen v. Office of U.S. Trade Rep.*, 804 F. Supp. 385, 387 (D.D.C. 1992) (concluding that agency submissions to a trade panel that contained an agency's interpretation of U.S. international legal obligations were "statements of policy and interpretations adopted by [the agency]").

Furthermore, the claim that the Blue Book is not "followed in every case" is contradicted by one of DOJ's own declarants in this case, Mr. Goldsmith, the editor of the Blue Book and the National Criminal Discovery Coordinator for DOJ. He states that the Blue Book "was designed" "to serve as a litigation manual *to be used by all DOJ prosecutors* and paralegals." Goldsmith Decl. ¶¶ 1, 5 (emphasis added). Indeed, DOJ has not identified or even suggested that there are any categories of cases or even a specific case where prosecutors are free to ignore the policies set forth in the Blue Book.

DOJ's treatment of similar documents also shows that the Blue Book is a statement of policy and interpretation that should be public. For instance, the United States Attorneys' Manual ("USAM") contains information that is very similar to the type of information contained in the Blue Book, and DOJ has made the USAM available to the public for over 30 years pursuant to 5 U.S.C. § 552(a)(2). *See SAMF* ¶ 33–35; Ruttenberg Decl. Ex. J, 42 Fed. Reg. 15,347, 15,348 (Mar. 21, 1977) (noting that the USAM was being revised, and the new version would be made publicly available in DOJ reading rooms); Ruttenberg Decl. Ex. K, 1988 USAM § 1-1.410 ("All materials contained in the U.S. Attorneys' Manual . . . are subject to the provisions of Title 5, U.S.C., Sec. 552(a)(2).").[1]

The USAM "contains general policies and some procedures relevant to the work of the United States Attorneys' offices" relating to "the prosecution of violations of federal law." Ruttenberg Decl. Ex. L. at 001, USAM § 1-1.100 Purpose; Ruttenberg Decl. Ex. L. at 001, USAM § 1-1.200 Authority. Like the Blue Book, the USAM contains sections advising prosecutors on DOJ's policies regarding criminal discovery. *See, e.g.*, Ruttenberg Decl. Ex. L. at 003, USAM § 9-5.001 Policy Regarding Disclosure of Exculpatory and Impeachment

[1] *See also* http://www.justice.gov/usao/eousa/foia_reading_room/usam (current version of the USAM).

Information (2010); Ruttenberg Decl. Ex. L. at 008, USAM § 9 Criminal Resource Manual 165 Guidance for Prosecutors Regarding Criminal Discovery (2010). And, like the Blue Book, these USAM sections do not contain "rigid rules" but rather provide "prospective guidance," Ruttenberg Decl. Ex. L. at 008, USAM § 9 Criminal Resource Manual 165, and advise prosecutors on issues of "prosecutorial judgment and discretion," Ruttenberg Decl. Ex. L. at 003, USAM § 9-5.001.

Similarly, DOJ has affirmatively disclosed the "Criminal Discovery" edition of the United States Attorneys' Bulletin ("CDB"). The CDB contains similar advice and guidelines related to criminal discovery. In 2012, DOJ added the CDB to its FOIA Reading Room. *See SAMF* 36–38; Ruttenberg Decl. Ex. M, *Criminal Discovery*, United States Attorneys' Bulletin, Sept. 2012, http://www.justice.gov/usao/eousa/foia_reading_room/usab6005.pdf ("CDB"). By publishing the CDB, DOJ has implicitly acknowledged that the kind of information it contains must be disclosed to the public.

The Blue Book and the CDB, by DOJ's own accounts, were created for similar purposes and contain similar categories of information on criminal discovery. According to DOJ, the Blue Book was created to "advise federal prosecutors on the legal source of their discovery obligations as well as the types of discovery related claims and issues that they would confront." *Vaughn* Index at 1. Similarly, the CDB was created to "achieve goals" of "complying with [prosecutorial] disclosure responsibilities" by "providing topical guidance on a wide array of [discovery] issues" including "*Brady* and *Giglio* implications . . . [the] scope of the prosecution team . . . the potential conflict between *Brady* and the attorney-client privilege; and discovery implications of the Crime Victims' Rights Act." *SAMF* ¶ 38; CDB at 1.

Just as the Blue Book contains "the recommendations and litigation strategies of DOJ attorneys with expertise in criminal discovery issues," *Vaughn* Index at 1, the CDB provides "topical guidance on a wide array of issues" and offers "practical advice" from DOJ attorneys, including Mr. Goldsmith, the editor of the Blue Book. *SAMF* ¶ 39; CDB at 1. The advice in both documents explicitly "encourages certain practices and discourages others." *Compare Vaughn* Index at 1, *with*, *e.g.*, *SAMF* 41; CDB at 17–18 (telling prosecutors to avoid certain practices when making materiality determinations). Both documents also "identif[y] factors prosecutors should consider in making particular decisions." *Compare Vaughn* Index at 1, *with e.g.*, *SAMF* 42; CDB at 22–25 (identifying specific factors prosecutors should consider when determining whether to disclose law enforcement impeachment evidence under *Giglio v. United States*, 405 U.S. 150 (1972)). And, both the Blue Book and the CDB provide tips for prosecutors to use during the course of criminal proceedings. For example, DOJ claims that the Blue Book contains "techniques and procedures" that prosecutors "employ during the course of criminal proceedings" for "protecting witnesses and evidence," "determining scope and timing of disclosures," and "obtaining electronic and other forms of evidence," among other things. *Vaughn* Index at 2. Similarly, the CDB discusses "the interplay" between "discovery demands" and the "need to protect" the "safety of victims and witnesses," *SAMF* at 45; CDB at 49, redactions, non-disclosure, and delayed disclosure, *SAMF* at 40; CDB at at 56–57, and best practices related to Criminal ESI Discovery, *SAMF* at 48; CDB at 5–11.

Because DOJ has already disclosed information about its discovery policies, it has implicitly acknowledged that this kind of information should not be withheld from the public. If, however, DOJ contends that the Blue Book's contents differ from its publicly disclosed policies, then disclosing the Blue Book is even more necessary. Under that scenario, DOJ has kept its

working law a secret, and the public has an incomplete picture of DOJ's adopted discovery policies.

B. The Blue Book Constitutes Agency "Secret Law" Which Must Be Disclosed.

In *National Labor Relations Board v. Sears, Roebuck, & Co.*, the Supreme Court declared that "all opinions and interpretations which embody the agency's effective law and policy," also known as the agency's "working law," cannot be withheld from the public based on privilege assertions. 421 U.S. 132, 153 (1975). The D.C. Circuit has also recognized that "a strong theme of our [FOIA] opinions has been that an agency will not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege.'" *Coastal States v. U.S. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980); *see also Tax Analysts v. IRS* ("*Tax Analysts II*"), 117 F.3d 607, 619 (D.C. Cir. 1997) (denying the IRS's attempts to shield "a growing body of agency law from disclosure to the public"); *Schlefer v. United States*, 702 F.2d 233, 235 (D.C. Cir. 1983) (requiring disclosure of documents that "interpret[ed] statutes relevant to the Agency's dealings with the public; . . . address[ed] questions of Agency policy, or deal[t] with internal Agency activities.").

Here, DOJ told Congress that the Blue Book was a substitute for Senator Murkowski's proposed legislation concerning the Government's disclosure obligations in criminal discovery. Moreover, the details and contours of this substitute law will never come to light absent disclosure because the very nature of *Brady* disclosure decisions is that they are made in secret without the benefit of an adversarial system. Accordingly, the Blue Book is DOJ's final, secret law on criminal discovery, so it must be disclosed.

1. The Blue Book Is DOJ's Substitute for Legislation On Criminal Discovery.

In the wake of DOJ's admitted disclosure violations in the Stevens prosecution, Congress proposed legislation to codify DOJ's obligation to disclose exculpatory information to criminal defendants. *See Murkowski Press Release*. DOJ called the new legislation "unnecessary." *Cole Testimony* at 2. Legislation was unnecessary, DOJ insisted, because DOJ had instituted a series of internal steps "to improve disclosure policies and practices." *Statement for the Record* at 3. These internal steps began in January of 2010 and "provided prosecutors with key discovery tools such as online manuals and checklists." *Id.* One of these online manuals is the Blue Book. *Id.* at 4. According to DOJ, these internal materials, including the Blue Book, would help prosecutors "recognize fully their obligations under [criminal discovery] rules" and "apply them fairly and uniformly." *Id.* at 7. As such, the Blue Book operates as agency secret law.

The Blue Book, which directly and expressly took the place of public law, is now DOJ's agency "working law" because it instructs prosecutors on the "law, policy, and practice of prosecutors' disclosure obligations." *Id.* at 4. These instructions about disclosure obligations "serve as a litigation manual *to be used* by all DOJ prosecutors and paralegals." Goldsmith Decl. ¶ 5 (emphasis added). They are not merely anecdotes or suggestions, they are statements of DOJ's policy and thus "embody [DOJ's] effective law and policy . . . ." *See NLRB v. Sears, Roebuck, & Co.*, 421 U.S. at 153. And now, by refusing to disclose the Blue Book to the public, DOJ has created "secret law."

2. The Policies Described in the Blue Book Will Not Come to Light Absent Disclosure.

DOJ asserts that the Blue Book cannot constitute agency secret law because its policies and arguments "will be borne out in the courts." *MSJ* at 13. Not so. "A *Brady* violation, by its nature, causes suppression of evidence beyond the defendant's capacity to ferret out." *Connick*,

131 S. Ct. at 1385 (Ginsburg, J., dissenting). Prosecutors conduct their *Brady* disclosure analyses in secret, and any evidence they decide to withhold is by definition kept secret from courts and defendants. As a result, there is little chance that DOJ's policies and practices—or any *Brady* disclosure decisions based on the policies set forth in the Blue Book—will ever be discovered.

Moreover, DOJ's suggestion that the Blue Book's contents will be litigated in court is a red herring. *Actual disclosure violations* will be litigated in court, based on specific facts and without any reference to the DOJ policy behind the disclosure decision. But the *policies* in the Blue Book have little to no chance of reaching any court's attention. Therefore, the Blue Book is the final, completely secret, agency working law on criminal discovery.

II. DOJ'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THE BLUE BOOK IS NOT EXEMPT FROM DISCLOSURE UNDER SECTION 552(B)(5).

Exemption 5 is a limited FOIA exemption that allows agencies to withhold "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); *see also Fed. Trade Comm'n v. Grolier, Inc.*, 462 U.S. 19, 23 (1983) ("[i]n keeping with the Act's policy of the fullest responsible disclosure . . . Congress intended Exemption 5 to be as narrow as is consistent with efficient Government operations") (internal citations omitted). Courts have held that Exemption 5 shields from disclosure "only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 149. This exemption includes documents protected under "the attorney-client privilege, the attorney work-product privilege, [and] the executive 'deliberative process' privilege," but it does *not* extend to documents that function as agency "secret law." *Coastal States*, 617 F.2d at 862, 867 (internal citations omitted).

A. The Blue Book Is Not Work Product.

DOJ's claim of attorney work product must fail because, as explained above in Section I.B., the Blue Book constitutes agency secret law, and Exemption 5 does not apply to agency secret law.

DOJ's claim must also fail because the Blue Book was not prepared "because of litigation" in the manner the privilege requires. The attorney work product privilege protects materials "prepared in anticipation of litigation or for trial by or for another party or its representative." Fed. R. Civ. P. 26(b)(3)(A). "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) (emphasis added and internal quotation marks omitted).

The D.C. Circuit has recognized two ways in which a document like the Blue Book can fulfill the "because of litigation" test and therefore qualify as attorney work product. *Id.* at 885–86. The two ways are distinguished by the government lawyer's role. If government lawyers are acting "as prosecutors or investigators of suspected wrongdoers," *Judicial Watch*, 926 F. Supp. 2d at 141, then a document can be protected as attorney work product only if it was "prepared by government lawyers in connection with active investigations of potential wrongdoing." *In re Sealed Case*, 146 F.3d at 885; *see also SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1202–03 (D.C. Cir. 1991); *Coastal States*, 617 F.2d at 864–66. To meet this test, there must be "a *specific* claim supported by concrete facts which would likely lead to litigation." *Judicial Watch*, 926 F. Supp. 2d at 138 (emphasis added and internal quotations omitted).

The second way a document can meet the "because of litigation" test is if its authors acted "as legal advisors *protecting their agency* clients from the possibility of future litigation."

In re Sealed Case, 146 F.3d at 885–86 (emphasis added); *see also Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992), *abrogated on other grounds by Milner v. Dep't of Navy*, 131 S. Ct. 1259 (2011); *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 126–28 (D.C. Cir. 1987).

1. The Blue Book Was Not Created in Connection with Active Investigations.

The D.C. Circuit has rejected an overly broad reading of the attorney work product privilege that would "preclude almost all disclosure from an agency with substantial responsibilities for law enforcement." *SafeCard*, 926 F.2d at 1203. The touchstone of work product in this context is case or claim specificity. *See Coastal States*, 617 F.2d at 866. "The 'prospect of litigation' cannot be read over-broadly to be so divorced from any specific legal claim such that it renders this fundamental criterion for invocation of the work product doctrine meaningless." *Shapiro v. U.S. Dep't of Justice*, 969 F. Supp. 2d 18, 34 (D.D.C. 2013). "[I]f an agency were entitled to withhold any document prepared by any person in the Government with a law degree simply because litigation might someday occur, the policies of the FOIA would be largely defeated." *Coastal States*, 617 F.2d at 865. Indeed, the D.C. Circuit has "drawn a line between 'neutral, objective analyses of agency regulations' and 'more pointed documents' that recommend 'how to proceed further with *specific* investigations.'" *Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 905 F. Supp. 2d 206, 221–22 (D.D.C. 2012) (emphasis added) (quoting *Delaney,* 826 F.2d at 127). The attorney work product privilege does not shield "'neutral, objective analyses of agency regulations [resembling] question and answer guidelines which might be found in an agency manual'" or documents that "flesh[] out the meaning of a [law] the agency is authorized to enforce." *Delaney*, 826 F.2d at 127 (quoting *Coastal States*, 617 F.2d at 863).

Moreover, just because the agency policies conveyed in the documents "happen to apply in agency litigation," they will not be shielded from disclosure. *Judicial Watch*, 926 F. Supp. 2d at 143. As this Court explained in *Judicial Watch*, "[t]o hold otherwise would constitute an over-broad reading of the work-product exemption which, in view of the fact that the prospect of future litigation touches virtually every object of a prosecutor's attention, could preclude almost all disclosure from an agency with responsibilities for law enforcement." *Id.* (internal quotation marks and citation omitted); *see also Shapiro*, 969 F. Supp. 2d at 34–37 (denying work product protection to documents created as "a tool for use in anticipated FOIA litigation" that discussed "legal issues arising in agency litigation" but were "untethered to any particular claim in litigation" because they did not reveal any "legal strategy or other case-specific legal considerations").

Jordan v. U.S. Department of Justice is instructive. 591 F.2d 753 (D.C. Cir. 1978). In *Jordan*, a FOIA requester "sought (1) ten paragraphs [within a] manual that contain[ed] specific guidelines and criteria which Assistant United States Attorneys [were] expected to consider in handling certain offenses"; and (2) a memorandum of guidelines "set[ting] forth the criteria for eligibility" in a pre-trial diversion program. *Id.* at 757. The D.C. Circuit held that these documents were not "prepared in anticipation of a particular trial." *Id.* at 775–76. Rather, "the[] documents were promulgated as general standards to guide the Government lawyers in [exercising their prosecutorial obligations]" and were "established prior to and independently of a prosecutorial decision in any particular case." *Id.* Also, they "[did] not include factual information, mental impressions, conclusions, opinions, legal theories or legal strategies *relevant to any on-going or prospective trial*." *Id.* at 776 (emphasis added); *see also*, *e.g.*, *Am. Immigration Council*, 905 F. Supp. at 221–22 (holding that PowerPoint presentations prepared

by DHS attorneys to teach employees how to interact with private attorneys were "literally 'in anticipation of litigation'—the agency proceedings before adjudicators," but they did "not anticipate litigation in the manner that the privilege requires" because their creators "were not worrying about litigation ensuing from any 'particular transaction[]' . . . or planning strategy for USCIS's case" in any particular suit; rather they were "convey[ing] agency policy") (internal citations omitted).

DOJ attempts to distinguish *Jordan* in a footnote by claiming that the Blue Book differs from the documents at issue in *Jordan* because the Blue Book "was prepared for the prosecutors' use in actual criminal investigations and prosecutions" and "contains mental impressions, opinions, legal analysis and strategies." *MSJ* at 11 n.3. This distinction fails. Like the Blue Book, the documents at issue in that case were also prepared for prosecutors' use in actual criminal investigations and prosecutions; for example, they addressed how prosecutors should interpret the results of a criminal investigation, determine whether to bring charges, and select which charges to bring. *Jordan*, 591 F.2d at 757. Moreover, the documents in *Jordan* contained opinions, legal analysis, and strategies on topics such as "the selection of appropriate charges," "selective prosecution," and "situations warranting certain internal prosecutorial action." *Id.* The D.C. Circuit held that the documents did not qualify for protection from disclosure because they were "established prior to and independently of a prosecutorial decision in any particular case." *Id.* at 776.[2] Therefore, they did not satisfy the "because of" litigation test. So too, the Blue Book was established independently of any prosecutorial decision in any particular case.

DOJ's attempts to distinguish *Judicial Watch* are similarly unavailing. DOJ argues that the documents in *Judicial Watch* merely contained a "neutral analysis of the law," while the Blue

[2] DOJ also claims that *Jordan* is distinguishable because disclosure of the Blue Book could provide criminal defendants with an unfair litigation advantage. *MSJ* at 11 n.3. This argument is addressed *infra* at Sec. II.B.

Book should receive protection as a litigation manual that "advises [prosecutors] on the types of claims defense counsel raise" and "the arguments prosecutors can make in response to such tactics"; thus it contains the opinions, mental impressions, and recommendations of its authors. *MSJ* at 12 (citing Gerson Decl. ¶ 21). The facts of *Judicial Watch* do not support such a distinction. The memorandum and manual at issue in *Judicial Watch* were far more than just a "neutral analysis of the law." The documents contained pointed advice and guidelines to DHS attorneys regarding the exercise of their prosecutorial duties—including specific advice to DHS attorneys deciding when to dismiss certain types of cases. *Judicial Watch*, 926 F. Supp. 2d at 142–43 (noting the documents "describe[d] advice and direction . . . on how to handle" specific types of cases and "issue[d] instructions on steps to take in [two types of] cases"). Such specific advice on the exercise of prosecutorial discretion necessarily contained the "opinions, mental impressions, and recommendations" of the DHS attorneys who authored the manual and memorandum. This Court rejected DHS's claim of work product, finding the manual and memoranda were "generally applicable" because they were not created "relevant to any specific, ongoing or prospective case or cases," even though they discussed types of claims and classes of cases. *Id.* at 143 (citing *Jordan*, 591 F.2d at 775–76).

Like the documents in *Jordan* and *Judicial Watch*, the Blue Book conveys general standards to government attorneys regarding categories of claims or classes of cases, but not advice related to specific claims or cases. The Blue Book offers prosecutors a "comprehensive[] cover[age] [of] the law, policy, and practice of prosecutors' disclosure obligations." *Statement for the Record* at 4. The advice contained in the Blue Book focuses on "types of discovery related claims and issues," rather than specific cases. *Vaughn* Index at 1; *see also* Gerson Decl. ¶ 20–21 (stating that the Blue Book contains "advice on how to handle different scenarios" and

"discusses the circumstances under which broad and early disclosure is advised and when it is not advised . . . and identifies factors prosecutors should consider before making particular discovery and litigation decisions"); Goldsmith Decl. ¶ 14 (describing the Blue Book's contents as "guidelines for federal prosecutors to follow in conducting the discovery phase of law enforcement prosecutions"); Gerson Decl. ¶ 20 (stating that "the Blue Book . . . describe[es] the nature and scope of [a prosecutor's] discovery obligations under applicable constitutional provisions, caselaw, and the Federal Rules of Criminal Procedure"). Because the Blue Book conveys general guidelines regarding prosecutorial obligations, it "simply does not anticipate litigation in the way the work-product doctrine demands." *Judicial Watch*, 926 F. Supp. 2d. at 143.

2. The Blue Book Was Not Created To Shield the Agency From Future Litigation.

In the D.C. Circuit, a document may also satisfy the "because of litigation" test when its authors "acted not as prosecutors or investigators of suspected wrongdoers, but as legal advisors protecting their agency clients from the possibility of future litigation." *In re Sealed Case*, 146 F.3d at 885–86. This "legal advisor" test is not satisfied, however, by "documents akin to an agency manual, fleshing out the meaning of the statute [the agency] was authorized to enforce." *Judicial Watch*, 926 F. Supp. 2d at 141 (internal quotations omitted) (citing *Delaney*, 826 F.2d at 127). Rather, the documents must be "more pointed documents which 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." *Id.* In this context, "the primary purpose for the creation of the document is the critical issue." *Id.* (internal citations omitted).

This Court has rejected attempts to place manuals created to instruct prosecutors on their obligations, like the Blue Book, in this *Delaney/Schiller* framework. In *Judicial Watch*, DHS

based its work product claim on *Schiller*. *Judicial Watch*, 926 F. Supp. 2d at 140. This Court noted that in *Schiller*, the documents at issue were entitled to work product protection because their authors acted as "legal advisors protecting their agency clients from the possibility of future litigation," but the Court found that the authors of DHS's manual and memorandum on the exercise of prosecutorial discretion were not acting in such a role. *Id.* at 140–41 (quoting *In re Sealed Case*, 146 F.3d at 885). Rather, the Court concluded that "the evident purpose of the memorandum [and manual] was to convey agency policies and instructions" on the exercise of prosecutorial functions. *Id.* at 143.

Like the manual and memorandum in *Judicial Watch*, the Blue Book was created to convey DOJ's general policies on, and interpretations of, laws it is already charged with enforcing—namely its constitutional *Brady* obligations. As DOJ told Congress, the Blue Book was created as part of "training efforts" to "provide[] prosecutors with key discovery tools." *Statement for the Record* at 3. DOJ explained that the Blue Book "comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations." *Id.* at 4. In its *Vaughn* Index, DOJ admits that the Blue Book was "prepared" to "advise federal prosecutors on the legal sources of their discovery obligations and types of discovery related claims and issues." *Vaughn* Index at 1. Mr. Goldsmith, who "spearhead[ed] DOJ's effort" to create the Blue Book, stated that the Blue Book was "designed to provide advice regarding the law and practice of federal prosecutors' discovery disclosure obligations and serve as a litigation manual," and that it contains "practical 'how-to' advice for federal prosecutors." Goldsmith Decl. ¶ 5. Unlike the materials in *Delaney* and *Schiller*, 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. Rather, all of DOJ's assertions prove that the Blue Book should

be disclosed because its primary purpose was to flesh out the meaning of prosecutors' constitutionally-mandated criminal discovery obligations. It is not enough that "the attorneys who wrote the chapters of the [Blue Book] were acting as advisors of DOJ prosecutors," *MSJ* at 15, because they were not acting to protect DOJ from the possibility of future litigation.

The other cases relied upon by DOJ are easily distinguishable because the attorneys that created the documents at issue in those cases *were* trying to shield DOJ from future litigation, rather than convey general agency policy. Specifically, in *American Civil Liberties Union Foundation*, the documents at issue were created to assist government attorneys in *defending* the government's position against claims that a program of government surveillance techniques violated the Fourth Amendment. *ACLU Found. v. U.S. Dep't of Justice*, No. 12-cv-7412, 2014 U.S. Dist LEXIS 32615, at *16 (S.D.N.Y. Mar. 11, 2014). Consistent with this purpose, the documents were targeted memoranda given only to "criminal chiefs and appellate chiefs." *Id*. at *2–3. The court specifically distinguished those memoranda from documents discussing "how prosecutors should interpret and apply the laws they are charged with enforcing." *Id.* at *16. In contrast, the Blue Book—widely disseminated to "every federal prosecutor and paralegal" and even some unspecified "law enforcement officials" (*Statement for the Record* at 4; Gerson Decl. ¶ 16)—was created to "provide advice regarding the law and practice of federal prosecutors' discovery disclosure obligations," Goldsmith Decl. ¶ 5, and focuses on DOJ's interpretation of laws that prosecutors are already charged with enforcing—their constitutional obligations under *Brady*.

The documents at issue in *Soghian* are similarly distinguishable from the Blue Book. The presentations and notes in *Soghian* contained discussions relating to methods of obtaining evidence in a criminal investigation, and they provided advice on "foreseeable litigation arising

out of the government's criminal investigations." *Soghian v. U.S. Dep't of Justice*, 885 F. Supp. 2d 62, 72 (D.D.C. 2012). The Blue Book was created for a wholly different purpose. DOJ's statements to Congress show that the Blue Book was not created to help prosecutors gather evidence or structure criminal investigations to protect DOJ in later litigation, but rather to help prosecutors comply with their constitutional obligations once prosecutions have already begun. *See, e.g.*, *Statement for the Record* at 4.

The same logic that compelled the courts in *Jordan*, *Judicial Watch*, *American Immigration Council*, and *Shapiro* to reject the agencies' claims of attorney work product privilege dictates the outcome here. The Blue Book was created to "advise federal prosecutors on the legal sources of their discovery obligations as well as the types of discovery related claims and issues they would confront in criminal investigations and prosecutions." *Vaughn* Index at 1. Accordingly, the Blue Book's contents were "promulgated as general standards to guide the Government lawyers," *Jordan*, 591 F.2d at 775, and the Blue Book was not created to protect the agency "from the possibility of future litigation," *In re Sealed Case*, 146 F.3d at 885–86.

Indeed, DOJ has already affirmatively disclosed documents that contain pointed advice and litigation strategy on discovery obligations, implicitly acknowledging that such advice is different from the types of documents at issue in *ACLU Foundation* and *Soghian.* For example, DOJ already determined that the CDB is not work product when it published the CDB in its FOIA reading room. *See Criminal Discovery*, http://www.justice.gov/usao/eousa/foia_reading_room/usab6005.pdf. DOJ argues that the Blue Book was created to shield DOJ from the possibility of future litigation, and thus was prepared in anticipation of litigation, because it gives "practical 'how-to' advice and litigation strategies" to federal prosecutors. *MSJ*

at 15. But, like the Blue Book, the CDB also contains "highly instructive" "practical advice" to prosecutors regarding their discovery obligations. CDB at 1.

In fact, almost every argument that DOJ makes to withhold the Blue Book as attorney work product could equally be advanced regarding the CDB, which DOJ has already disclosed. For example, in addition to the similarities between the Blue Book and the CDB discussed in Part I above, the Blue Book "describes the types of claims defense counsel have raised . . . and the arguments prosecutors can make to respond to [them]," and "illustrates with cases potential pitfalls to avoid and arguments available in case prosecutors fall into those pitfalls." *MSJ* at 9–10. The CDB also describes likely claims that defense counsel could make to obtain discovery from a federal agency and then explains with caselaw why those claims should be rejected. *SAMF* ¶ 43; CDB at 39. And, the CDB discusses pitfalls that could occur when *Brady* obligations conflict with the attorney client privilege, summarizing case law as guidance. *SAMF* ¶ 44; CDB at 45–47. By publishing the CDB, DOJ has implicitly acknowledged that the advice in the CDB is not the kind of advice that is protected as attorney work product. After already disclosing this information in the CDB, DOJ should not be permitted to withhold the Blue Book's advice on the same topics.

Simply stated, the Blue Book does not qualify for the attorney work product privilege because it was not created to shield DOJ from the possibility of future litigation. Its authors did "not anticipate litigation in the manner that the privilege requires." *Am. Immigration Council*, 905 F. Supp. 2d at 221–22.

B. Disclosure of the Blue Book Would Not Provide an Unfair Litigation Advantage to Criminal Defendants.

Separately, DOJ argues that disclosure of the Blue Book would unfairly advantage criminal defendants by giving them access to "DOJ's general strategic and tactical approach."

MSJ at 15. This argument is a distraction. Even if disclosing the Blue Book would unfairly advantage criminal defendants, which it would not, it still must have been created "because of litigation" to be withheld under Exemption 5. *See, e.g.*, *In re Sealed Case,* 146 F.3d at 884 ("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.") (internal quotations omitted).

Moreover, DOJ's argument ignores the reality that *Brady* is a constitutional obligation, not a litigation "tactic." *Brady* and its progeny are a "departure from a pure adversary model." *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985). When prosecutors exercise their constitutional disclosure obligations, their role "transcends that of an adversary." *Id.* (internal citations omitted). Because *Brady* obligations operate outside of the traditional adversarial system, disclosing DOJ's interpretations of these non-adversarial obligations will not provide an unfair litigation advantage to criminal defendants.

DOJ also argues that public disclosure of the Blue Book could "undermine Government efforts" at "ensuring just results." *MSJ* at 15–16. Just the opposite. As explained above, there has been an "epidemic" of *Brady* violations even since DOJ promised Congress that its internal reforms, including the Blue Book, would "mak[e] sure that its prosecutors understand and comply" with their *Brady* obligations. *Cole Testimony* at 1. Without access to the Blue Book, criminal defendants and the public will not be able to evaluate if this epidemic stems from rogue prosecutors or from dutiful prosecutors following flawed policies.

Finally, publicizing the Blue Book will not deter prosecutors from "creating and retaining work product" including "critical thoughts on litigation strategies," *MSJ* at 16, because the Blue Book does not contain the type of case-specific litigation strategies that the attorney work

product privilege is intended to protect. The Blue Book, as a statement of agency policy on DOJ's non-adversarial constitutional obligations, is different from documents containing "critical litigation strategies" that were created in response to specific claims or to shield the agency from future litigation. Documents that satisfy either prong of the "because of litigation" test will still be protected from disclosure under the attorney work product doctrine.

C. Any Properly Withheld Attorney Work Product is Reasonably Segregable.

Certainly, "[i]f a document is *fully protected* as work product, then segregability is not required." *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005) (emphasis added); *Tax Analysts II*, 117 F.3d at 620 ("Any *part of* a [memorandum] prepared in anticipation of litigation . . . is protected by the work product doctrine.") (emphasis added). However, this protection does not apply to "neutral, objective analyses" and "question and answer guidelines which might be found in any agency manual." *Delaney*, 826 F.2d at 127. The portions of the Blue Book that do not meet the threshold "because of litigation" requirement are reasonably segregable. In *ACLU Foundation*, relied on by DOJ, DOJ segregated and disclosed portions of memoranda that were neutral analyses of law while withholding other, more pointed, legal advice that was prepared to protect the agency from future litigation. *ACLU Found.*, 2014 U.S. Dist LEXIS 32615 at *5. In *Schiller*, also relied on by DOJ, the D.C. Circuit found that the documents contained work product, but then remanded the case to the district court with specific instructions "to determine whether or not the documents contain[ed] passages that c[ould] be segregated." 964 F.2d at 1210.

Here, DOJ's statements show that at least portions of the Blue Book were not prepared "because of litigation," and those parts are segregable from any properly withheld material. First, the Blue Book was created by multiple different attorneys and is divided into nine separate chapters on diverse topics. Goldsmith Decl. ¶ 5; Gerson Decl. ¶ 21. Those chapters are further

broken up into discrete sections. Goldsmith Decl. ¶ 9 (noting chapters contain "Practice Notes," "Caveats," "Strategic and Logistical Concerns," and "Practical Considerations"). The discrete nature of these sections strongly suggests the Blue Book is readily subject to segregation. Second, the Blue Book contains "guidelines" and sections on the "nature and scope of . . . discovery obligations under applicable constitutional provisions, caselaw, and the Federal Rules of Criminal Procedure." Gerson Decl. ¶¶ 10, 20. Accordingly, even if parts of the Blue Book do qualify as attorney work product, the "neutral, objective analyses" and "question and answer guidelines" do not qualify for attorney work product protection and must be segregated and then disclosed.

III. DOJ'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THE BLUE BOOK IS NOT EXEMPT FROM DISCLOSURE UNDER SECTION 552(B)(7)(E).

Exemption 7(E) applies to "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement 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).

Exemption 7(E) does not shield the Blue Book from disclosure for at least four separate reasons. First, the Blue Book was not compiled for law enforcement purposes. Second, disclosure of the Blue Book could not "reasonably be expected to risk circumvention of the law." Third, similar information in other DOJ manuals has already been disclosed. Fourth, any information that could reasonably risk circumvention of the law is segregable.

A. The Blue Book Was Not Compiled For Law Enforcement Purposes.

Federal agencies "must meet the threshold requirements of Exemption 7 before they may withhold requested documents on the basis of any of its subparts." *Pratt v. Webster*, 673 F.2d 408, 416 (D.C. Cir. 1982). One of the threshold requirements of Exemption 7(E) is that the records be compiled "for law enforcement purposes." *See Schoenman v. FBI*, 575 F. Supp. 2d 136, 162 (D.D.C. 2008) (finding that the agency did not meet the threshold requirement when it "failed to establish" law enforcement purpose). The D.C. Circuit employs a two-part test to determine whether records were compiled for law enforcement purposes. *Gilman v. U.S. Dep't of Homeland Sec.*, No. 09-0468, 2014 U.S. Dist. LEXIS 33128, at *42 (D.D.C. Mar. 14, 2014). First, "the investigatory activity that gave rise to the documents [must be] 'related to the enforcement of federal laws.'" *Id.* (citing *Tax Analysts v. IRS*, 294 F.3d 71, 78 (D.C. Cir. 2002)). Second, there must be a "rational nexus between the investigation at issue and the agency's law enforcement duties. " *Id.* Therefore, the agency must show that "the nexus between the agency's activity . . . and its law enforcement duties [is] based on information sufficient to support at least a colorable claim of its rationality." *Keys v. U.S. Dep't of Justice*, 830 F.2d 337, 340 (D.C. Cir. 1987) (internal quotation marks omitted); *see also e.g.*, *Schoenman*, 575 F. Supp. 2d at 162 ("a claim that any [agency] document inherently relates to a law enforcement purpose will not suffice"); *Miller v. U.S. Dep't of Justice*, 562 F. Supp. 2d 82, 118 (D.D.C. 2008) (holding that the State Department did not meet the Exemption 7 threshold when it "neither explain[ed] adequately the manner and circumstances under which the telegrams were compiled nor link[ed] these telegrams to any enforcement proceeding").

"Law enforcement entails . . . investigating and prosecuting individuals *after* a violation of the law . . . [and] proactive steps designed to prevent criminal activity and to maintain security." *Pub. Emps. for Envtl. Responsibility v. U.S. Section Int'l Boundary & Water Comm'n,*

U.S.-Mexico, 740 F.3d 195, 203 (D.C. Cir. 2014) (emphasis in original). It includes "detection and punishment of violations of the law." *Tax Analysts*, 294 F.3d at 77 (internal citations omitted). Therefore, DOJ must show a rational nexus between the Blue Book's discussions of criminal discovery obligations and investigating, prosecuting, or preventing violations of the law.

For example, in *Gilman v. U.S. Department of Homeland Security*, the court found that the records at issue were compiled for a law enforcement purpose because they related to U.S. Customs and Border Protection's ("CBP") "risk and vulnerabilities assessment of illicit cross-border activity in order to assess fencing needs . . . which 'inform[s CBP's] decisions relating to fence placement.'" No. 09-0468, 2014 U.S. Dist. LEXIS 33128, at *43 (internal citations omitted). The records at issue were created by CBP in order to assess the need for, and location of, border fencing. Such records were compiled for law enforcement purposes because controlling "border vulnerabilities" was directly related to CBP's law enforcement duties, namely "deter[ring] illegal immigration" and "apprehend[ing] illegal immigrants." *Id.* at *44.

Here, there is no nexus between the Blue Book's stated purpose—helping prosecutors comply with their constitutional obligations—and any actual law enforcement purpose. DOJ argues that "[t]he criminal discovery process is directly related to the law enforcement function carried out by DOJ[.]" *MSJ* at 19 (citing Goldsmith Decl. ¶ 7). It is not. "Discovery" is the "[c]ompulsory disclosure, at a party's request, of information that relates to the litigation." Black's Law Dictionary 212 (3d pocket ed. 2006). While discovery takes place in the context of a prosecution, DOJ does not disclose exculpatory evidence in order to aid its prosecution of a criminal defendant. Rather, it does so to comply with its constitutional obligations. *Brady* disclosures also have no bearing on investigating a crime that has taken place, or on preventing a future crime. And unlike the records in *Gilman*, the Blue Book was not created to help DOJ

enforce federal laws. Rather, it was created to inform prosecutors of their own disclosure obligations. *Statement for the Record* at 4; *see also* Gerson Decl. ¶¶ 18, 20. Complying with the Constitution is not law enforcement. While the Blue Book was compiled by a law enforcement agency, it was not compiled for "law enforcement purposes." Therefore, it fails the threshold requirement for Exemption 7(E).

B. Disclosure Of The Blue Book Could Not Reasonably Be Expected To Risk Circumvention Of The Law.

Even if the Blue Book was compiled for law enforcement purposes, DOJ has not shown that its disclosure could reasonably be expected to risk circumvention of the law. Records compiled for law enforcement purposes are only exempt from disclosure under Exemption 7(E) if their production "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) (emphasis added). Therefore, a law enforcement agency must establish a law enforcement purpose, "as well as a connection between an individual or incident and a possible security risk or violation of federal law." *Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 950 F. Supp. 2d 221, 245 (D.D.C. 2013) (internal quotations and citations omitted).

In its Motion for Summary Judgment, DOJ incorrectly claims that law enforcement techniques and procedures "are protected [are exempt under 7(E)] regardless of whether their disclosure would create a risk of circumvention of the law." *See MSJ* at 21. Just this year, the D.C. Circuit affirmed that this Circuit has applied the "risk circumvention of the law" requirement to records containing guidelines *and* to records containing techniques and

procedures. *See Pub. Emps.*, 740 F.3d at 204 n.4.[3] Accordingly, in order to invoke Exemption 7(E), DOJ must show that disclosure of the Blue Book "could reasonably be expected to risk circumvention of the law." *Id.*

To meet this burden, DOJ offers nothing but a laundry list of buzzwords and bad outcomes with no connection to the actual contents of the Blue Book. *See MSJ* at 24–25. DOJ does not offer a single example of how a *specific* portion of the Blue Book actually relates to even one of these bad outcomes. Rather, DOJ offers general descriptions of Blue Book material such as "legal strategies that in-the-field prosecutors may and do employ," and then leaps to the conclusion that, if disclosed, "some criminal defendants may circumvent the law." *MSJ* at 24.

For instance, DOJ baldly asserts that "individuals could use the information in the book" to support a host of bad outcomes involving "confidential informants," "witness intimidation," and "national security." *MSJ* at 24–25. These are not magic terms that the government can use to defend any decision to withhold documents. *See, e.g.*, *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) ("Simply saying 'military secret,' 'national security' or 'terrorist threat' or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the [state secrets] privilege."). Rather, DOJ must prove that there is a

[3] *See also Blackwell v. FBI*, 646 F.3d 37, 41–42 (D.C. Cir. 2011); *PHE, Inc. v. U.S. Dep't of Justice*, 983 F.2d 248, 250 (D.C. Cir. 1993); *Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, No. 12-856, 2014 U.S. Dist. LEXIS 27737, at *41 (D.D.C. Mar. 5, 2014); *Am. Immigration Council*, 950 F. Supp. 2d at 245; *Skinner v. U.S. Dep't of Justice*, 744 F. Supp. 2d 185, 214 (D.D.C. 2010) ("Courts have held that information pertaining to law enforcement techniques and procedures properly is withheld under Exemption 7(E) where disclosure reasonably could lead to circumvention of laws or regulations."); *Piper v. U.S. Dep't of Justice*, 294 F. Supp. 2d 16, 30 (D.D.C. 2003) (advising that the test for proper withholding under Exemption 7(E) includes finding that the release of information could reasonably be expected to risk circumvention of the law), *aff'd per curiam*, 222 F. App'x 1 (D.C. Cir. 2007); *Billington v. U.S. Dep't of Justice*, 69 F. Supp. 2d 128, 140 (D.D.C. 1999) (finding that Exemption 7(E) analysis "requires defendant to show that disclosure would frustrate enforcement of the law"), *aff'd in pertinent part, vacated in part & remanded on other grounds*, 233 F.3d 581 (D.C. Cir. 2000).

"chance of a *reasonably expected* risk" of a threat of witness retaliation or a threat to national security. *See Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009) (emphasis added). Here, there is no rational connection between disclosure of a manual that sets forth constitutional discovery obligations, and a criminal defendant's ability to obtain evidence that should be protected – or any of the other vague and extreme outcomes DOJ predicts.[4]

DOJ also claims that disclosing the Blue Book could allow criminal defendants to "'get disclosures prematurely'" or to "'obtain discovery beyond that to which they are entitled.'" *MSJ* at 24 (quoting Goldsmith Decl. ¶ 11). DOJ fails to explain how this could occur, but even if true, these arguments fail because neither scenario circumvents the law. *Brady* requires the prosecution to produce all favorable evidence to the defense. *Brady*, 373 U.S. at 87 ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). Moreover, there is no premature disclosure of exculpatory evidence under *Brady*, only evidence that is disclosed too late. *See, e.g.*, *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976) (noting that "[d]isclosure by the government must be made at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure.").

Finally, while citing no legal authority, DOJ describes the *Brady* standard as a "'carefully constructed balance'" between the "defendant's constitutional rights" and a timely, just trial that "safeguards victims and witnesses from retaliation or intimidation . . . [and] protects on-going criminal investigations." *MSJ* at 25 (citing Goldsmith Decl. ¶ 11). This "carefully constructed

[4] If the Blue Book contains tactical advice on how DOJ can obtain reciprocal discovery from criminal defendants, that information is reasonably segregable as explained below in Sec. II.D.4.

balance" is a complete fiction. *Brady* requires no balancing of interests; the government has a constitutional obligation to share all material exculpatory evidence with the accused. DOJ's descriptions of *Brady* throughout its pleadings in this case affirm the Third Circuit's concern that "so long after *Brady* became law [prosecutors] still play games with justice and commit constitutional violations by secreting and/or withholding exculpatory evidence." *Breakiron v. Horn*, 642 F.3d 126, 133 n.8 (3d Cir. 2011). DOJ has not, and cannot, establish a nexus between disclosure of the Blue Book and any reasonable risk of circumvention of the law. On the contrary, disclosure of the Blue Book will help the public ensure that federal prosecutors and other DOJ personnel understand and comply with their own legal obligations.

C. The Blue Book Contains Information Similar to Other Manuals that DOJ Has Already Disclosed.

While DOJ warns of supposed disastrous consequences that will result from public release of the Blue Book, as discussed above the USAM and the CDB (the latter available to the public since 2012), appear to contain similar techniques and procedures to those DOJ is now claiming it cannot release to the public.

For instance, DOJ claims that the Blue Book should be withheld because it contains techniques and procedures "for protecting 'witnesses from retaliation and intimidation." *MSJ* at 20–21 (citing Goldsmith Decl. ¶¶ 6, 9). But the already publicly disclosed USAM and CDB contain techniques and procedures for protecting witnesses from retaliation and intimidation. *See, e.g.*, Ruttenberg Decl. Ex. L at 006–007, USAM § 9-6-200 Pretrial Disclosure of Witness Identity; Ruttenberg Decl. Exl. L. at 017–023 USAM § 9 Criminal Resource Manual 2054 Synopsis of Classified Information Procedures Act (CIPA); Ruttenberg Decl. Exl. L. at 008–015 USAM Criminal Resource Manual 165 Guidance for Prosecutors Regarding Criminal Discovery; Ruttenberg Decl. Exl. L. at 016, USAM Criminal Resource Manual 1737 Civil Action to Enjoin

the Obstruction of Justice; *see also* CDB at 49, 52, 56 (discussing "the critical need to protect the privacy, dignity, and of course, safety of victims and witnesses . . . [and advice on] "redactions and non-disclosure" of witness information).

Likewise, DOJ claims the Blue Book should be withheld because it contains techniques and procedures "for determining the scope and timing of disclosures." MSJ at 20–21 (citing Goldsmith Decl. ¶¶ 6, 9). But, both the USAM and the CDB discuss the timing and scope of disclosures. The USAM contains a section entitled "Considerations Regarding the Scope and Timing of the Disclosures," Ruttenberg Decl. Exl. L. at 013, and the CDB contains an article discussing "redactions and non-disclosure" of evidence related to victims and witnesses, and "delayed disclosure" of witness information, *SAMF* ¶ 40; CDB at 56–58. The CDB also provides "tips that prosecutors should keep in mind when responding to overly broad and unduly burdensome discovery requests." *SAMF* ¶¶ 46–47; CDB at 16, 27–31.

DOJ also claims that it cannot disclose techniques and procedures in the Blue Book regarding "protective orders relating to potentially discoverable information." MSJ at 21. And yet, techniques and procedures regarding protective orders are in both USAM and the CDB. *See* Ruttenberg Decl. Ex. L. at 017–018 USAM Criminal Resource Manual 2054 Synopsis of Classified Information Procedures Act (containing advice on when and how to obtain a protective order for sensitive information); Ruttenberg Decl. Ex. L. at 016 USAM Criminal Resource Manual 1737 (explaining how to obtain a protective order to protect witnesses); *see also* CDB at 11 (discussing how to seek a protective order for electronically stored information); *id*. at 22, 25 (discussing *ex parte* reviews, motions *in limine*, and protective orders in the context of *Giglio*).

Therefore, to the extent that the Blue Book contains techniques and procedures, those techniques and procedures cover many of the same topics as the techniques and procedures that have already been disclosed in the USAM and the CDB. Because those categories of techniques and procedures have already been disclosed, disclosing them again in the Blue Book could not reasonably be expected to risk circumvention of the law. Therefore, they are not protected by Exemption 7(E).

D. Any Material Properly Withheld Under Exemption 7(E) is Reasonably Segregable.

Any material properly withheld under Exemption 7(E) is reasonably segregable from the other, non-exempt material in the Blue Book. Sections that contain "garden-variety legal analysis" do not "fall under exemption 7(E)." *Mayer Brown*, 562 F.3d at 1194 n.1 (citing *PHE, Inc. v. U.S. Dep't of Justice*, 983 F.2d 248, 251–52 (D.C. Cir. 1993)). In *PHE*, the agency claimed that Exemption 7(E) applied to a manual that included "a simple discussion of search and seizure law . . . and a digest of useful caselaw." *Id.* at 251. The D.C. Circuit found that this material was "precisely the type of information appropriate for release under the FOIA," although other material in the manual could qualify for Exemption 7(E). *Id.* at 252. Like the manual in *PHE*, the Blue Book also contains a discussion of prosecutors' legal obligations, as well as a digest of caselaw. For example, DOJ states that the Blue Book contains "guidelines for prosecutors to fulfill their discovery obligations," *Vaughn* Index at 2; advises "prosecutors on the legal sources of their discovery obligations," *id.* at 1; and "offers compilations of cases that prosecutors can use," Gerson Decl. ¶ 21. Therefore, DOJ's claim that the entire 340-page Blue Book qualifies for Exemption 7(E) protection is contradicted by DOJ's own statements in the record. Like the discussion and digest of caselaw in *PHE*, these portions of the Blue Book do not qualify for protection under Exemption 7(E); rather, they are "precisely the type of

information appropriate for release," *PHE*, 983 F.2d at 252, and they are reasonably segregable from any portions of the Blue Book that are properly withheld.

IV. *IN CAMERA* REVIEW MAY BE WARRANTED TO RESOLVE MATERIAL FACTUAL DISPUTES OVER THE CONTENTS OF THE BLUE BOOK.

If the Court believes that DOJ may be entitled to withhold portions of the Blue Book under either Exemption 5 or Exemption 7(E), *in camera* review is necessary due to material factual disputes over the contents of the Blue Book. Although FOIA cases can be decided without *in camera* review, such review is warranted in cases where "agency affidavits are not sufficiently detailed to permit meaningful assessment of the exemption claims," *id.*, when cases involve a small number of documents, *Allen*, 636 F.2d at 1298, and when there is a strong interest in public disclosure, *id.* at 1298–99. *In camera* review is especially warranted when the dispute "centers on the actual contents of the document." *Id.* at 1298.

Here, DOJ has not established that the contents of the Blue Book are protected by either Exemption 5 or Exemption 7(E). Therefore, DOJ should disclose the Blue Book. However, if the Court determines that portions of the Blue Book might properly be withheld under either exemption, the Blue Book should be reviewed *in camera* because DOJ has not provided enough detail to prove its claims of exemption, there is only one document at issue, and the public outcry that sparked the creation of the Blue Book demonstrates that there is a strong public interest in preventing *Brady* violations and ensuring the integrity of our justice system.

Furthermore, because the dispute between the parties largely centers on the contents of the Blue Book, ruling on an exemption would be difficult without a factual finding. In this motion, NACDL has demonstrated that there are marked, material inconsistencies between DOJ's public statements to Congress regarding the contents of the Blue Book and DOJ's affidavits in this case. For example, in its representations to Congress and in its Motion for

Summary Judgment, DOJ admits that the Blue Book describes "the nature and scope of [a prosecutor's] discovery obligations under applicable constitutional provisions, caselaw, and the Federal Rules of Criminal Procedure." Gerson Decl. ¶ 20. However, now DOJ also claims that the Blue Book contains "arguments and authority to defeat discovery claims," *MSJ* at 9, advice on how to "delay or limit disclosure" of exculpatory information, *id.*, "strategic and logistical concerns" and "risk assessments" regarding disclosure, *id.* at 12, "DOJ's general strategic and tactical approach to dealing with different discovery issues," *id.* at 15, as well as techniques and procedures for protecting witnesses, handling defendant and witness statements and "obtaining electronic and other forms of evidence," *id.* at 20. If the Court finds that these latter descriptions of the Blue Book might merit withholding under Exemption 5 or 7(E), these descriptions are a material discrepancy from other descriptions of the Blue Book's contents, so an *in camera* review may be warranted to resolve them.

CONCLUSION

For the foregoing reasons, NACDL respectfully requests that the Court grant its Cross Motion for Summary Judgment; deny DOJ's Motion for Summary Judgment and order DOJ to produce the Blue Book, either to NACDL or to the Court for *in camera* review.

Dated: July 23, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was filed with the Court via the CM/ECF system. The foregoing was served this 23rd day of July, 2014, on the following filing users by the CM/ECF system:

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