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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	Case No. 4:17-cv-03571-JSW **DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT** Hearing: November 17, 2017, 9 a.m. Hon. Jeffrey S. White Courtroom 5, 2nd Floor Oakland Courthouse

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SUMMARY OF ARGUMENT

This case is simple, despite Plaintiffs' efforts to muddy the waters. At issue are two memoranda written by U.S. Department of Justice ("Justice Department" or "DOJ") attorneys to provide legal analysis and strategic considerations to other DOJ attorneys to use in litigation. Courts have consistently held that such attorney-authored documents offering legal theories and litigation strategy are protected from disclosure as attorney work product. *See, e.g.*, *Nat'l Ass'n of Criminal Defense Lawyers* ("*NACDL*") *v. Dep't of Justice*, 844 F.3d 246, 251 (D.C. Cir. 2016); *ACLU v. Dep't of Justice*, 210 F. Supp. 3d 467, 482 (S.D.N.Y. 2016); *ACLU of N. Cal. v. Dep't of Justice*, 70 F. Supp. 3d 1018, 1033–34 (N.D. Cal. 2014) (appeal docketed); *Soghoian v. Dep't of Justice*, 885 F. Supp. 2d 62, 72 (D.D.C. 2012). Caselaw indicates that such documents are also privileged attorney-client communications if they provide legal advice to the client agency. *See, e.g.*, *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996); *CP Salmon Corp. v. Pritzker*, 238 F. Supp. 3d 1165, 1174 (D. Alaska 2017). Thus, the Justice Department properly withheld the two memoranda under Exemption 5 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5), as attorney work product and privileged attorney-client communications.

Plaintiffs essentially ignore these holdings and instead respond with discredited legal theories and plainly inapplicable caselaw. In particular, Plaintiffs argue that the memoranda constitute DOJ "working law" and that the Justice Department has "adopted" them as its final policy. Such actions, however, would only undermine an assertion of the deliberative process privilege, not attorney work product protection or the attorney-client privilege. *See, e.g.*, *Fed. Open Market Comm. of Fed Reserve Sys. v. Merrill*, 443 U.S. 340, 360 n.23 (1979). Moreover, the DOJ memoranda were not used as working law or adopted: they are not sufficiently definite or authoritative to constitute working law, and the Justice Department has never invoked the memoranda's reasoning as the basis for its policy so as to adopt them. *See Elec. Frontier Found. v. Dep't of Justice*, 739 F.3d 1, 9 (D.C. Cir. 2014). The Justice Department has therefore demonstrated that it properly withheld the memoranda, and the Court should grant its motion for summary judgment.

STATEMENT OF ISSUES

1. Whether the Justice Department properly withheld in full two related memoranda in which Justice Department attorneys present legal analysis and suggest litigation strategy under FOIA Exemption 5 as attorney work product?[1]

2. Whether the Justice Department properly withheld these memoranda in full under FOIA Exemption 5 as attorney-client communication?

STATEMENT OF FACTS[2]

Plaintiffs seek to compel the release of two related documents created by Justice Department attorneys for use in litigation: (1) an internal memorandum entitled "Determining Whether Evidence Is 'Derived from' Surveillance under Title III or FISA" ("the FISA Memo"), and (2) and a two-page cover memorandum to the FISA Memo, dated November 23, 2016 ("the Cover Memo"), which summarizes the purpose and content of the FISA Memo. *See* Defs' Mot. for Summ. J., Ex. 1, Declaration of Susan L. Kim ("Kim Decl.") ¶¶ 3–7. The memoranda describe relevant legal frameworks and provide strategic considerations to help litigating DOJ attorneys assess whether evidence related to electronic surveillance is "derived from" that surveillance within the meaning of Title III of the Omnibus Crime Control and Safe Streets Acts of 1968, 18 U.S.C. § 2510 *et seq.* ("Title III"), and the Foreign Intelligence Surveillance Act of 1978 ("FISA"), 50 U.S.C. § 1801 *et seq.*, which in turn assists these attorneys with fulfilling their statutory notice obligations during litigation. Kim Decl. ¶¶ 4–7.

Plaintiffs filed a FOIA request seeking these memoranda, and, when the Justice Department withheld them in full under FOIA Exemption 5, subsequently brought this case to compel their production. Kim Decl. ¶¶ 2–3; Compl., ECF No. 1. The Justice Department moved for summary judgment on September 1, 2017, explaining that the memoranda were protected from disclosure as attorney work product and under the attorney-client privilege. ECF No. 25.

[1] Of course, if the Court determines that the documents were properly withheld in full as attorney work product (or attorney-client communication), it need not reach the other issue.

[2] For a more detailed discussion of the facts in this case, see Defendants' Motion for Summary Judgment, ECF No. 25, filed September 1, 2017, at 2–5.

On September 29, 2017, Plaintiffs opposed and cross-moved for summary judgment. ECF No. 26 ("Pls.' Mem.").

ARGUMENT

I. THE JUSTICE DEPARTMENT PROPERLY WITHHELD ITS MEMORANDA AS ATTORNEY WORK PRODUCT UNDER EXEMPTION 5.

A. The Justice Department Memoranda Consist of Legal Analysis and Strategy Prepared in Anticipation of Litigation, and Thus Are Attorney Work Product.

The Justice Department properly withheld the Cover Memo and FISA Memo in full under Exemption 5 as attorney work product, as explained in Defendant's opening memorandum. In the Ninth Circuit, "[t]o qualify for work-product protection, documents must: (1) be 'prepared in anticipation of litigation or for trial' and (2) be prepared 'by or for another party or by or for that other party's representative.'" *United States v. Richey*, 632 F.3d 559, 567 (9th Cir. 2011) (quoting *In re Grand Jury Subpoena, Mark Torf/Torf Envtl. Mgmt.* ("*In re Grand Jury Subpoena*"), 357 F.3d 900, 907 (9th Cir. 2004)). "[D]ocuments are deemed prepared because of litigation 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." *Richey*, 632 F.3d at 568 (citations omitted). When applying this standard, "courts must consider the totality of the circumstances and determine whether the document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of litigation." *Id*. (citations omitted).

The Cover Memo and FISA Memo clearly satisfy this standard. They consist of a mix of legal analysis and strategic considerations regarding a question that arises in litigation—when information is "derived from" Title III or FISA surveillance—and are designed for DOJ attorneys' use in this litigation. Kim Decl. ¶¶ 4–7. Thus, the Cover Memo and FISA Memo were created "because of" this anticipated litigation, and would not exist "in substantially similar form but for" the inevitability of such litigation. As such, under the plain meaning of the Ninth Circuit's caselaw, the Justice Department properly withheld the Cover Memo and FISA Memo under Exemption 5 as attorney work product.

1. A Document May Be Prepared "in Anticipation of Litigation" Even if the Legal Issues Addressed Do Not Arise in Every Case.

Even though the Cover Memo and FISA Memo were prepared for use in litigation, Plaintiffs nonetheless argue that the Cover Memo and FISA Memo were not created "because of" litigation. Pls.' Mem. at 19–21. Plaintiffs' theory is apparently that, for the purposes of work product protection, "litigation" does not include all legal issues that arise in legal proceedings, but only those legal issues that are specifically contested. *Id*. Thus, according to Plaintiffs, even though the subjects addressed by the Cover Memo and FISA Memo—legal analysis and litigation strategies related to when evidence is obtained or "derived from" electronic surveillance under 18 U.S.C § 2518(9) and 50 U.S.C. § 1806(c), and the Government's resulting obligation to provide notice before that evidence may be used in trial or other such proceedings, Kim Decl. ¶¶ 4–7—only arise in the context of these proceedings, these issues are not part of that litigation unless the opposing party in a case actually disputes whether evidence was "derived from" surveillance or whether the Government correctly complied with its statutory notice obligations. Pls.' Mem. at 20.

Needless to say, Plaintiffs offer no legal support for this novel approach to work product protection, *id*. at 19–21, an approach that was recently explicitly rejected by the Southern District of New York in an essentially identical context:

> [T]he Court understands the ACLU to be arguing that the issue of [FISA] notice itself must be actually litigated for work product protection to attach to documents prepared by lawyers to analyze that issue. The Court cannot accept that argument. That the documents were prepared in anticipation of criminal prosecutions (*i.e.*, litigation) is sufficient. Work product protection covers analyses of possible legal issues that may arise in a litigation even if those specific issues are not ultimately joined in the anticipated litigation.

ACLU v. Dep't of Justice, No. 13-cv-7347, 2017 WL 1658780, *6 n.2 (S.D.N.Y. May 2, 2017).

Plaintiffs' approach would also be completely unworkable: under Plaintiffs' standard, an attorney would not necessarily know whether his thoughts or mental impressions on a legal issue would be protected until after all related litigation was concluded, and he knew whether or not that legal issue had been contested. Plaintiffs' approach thus conflicts with Ninth Circuit caselaw, which warns against "eviscerating work product protection" by being too eager to

conclude attorneys had non-litigation reasons for creating documents. *See In re Grand Jury Subpoena*, 357 F.3d at 908. Under this precedent, a purported "independent purpose" for creating a document only undermines work product protection if that "purpose is truly separable from the anticipation of litigation." *Id*. at 909. Here—where whether evidence is "derived from" surveillance will depend on the details of evidence at issue in the litigation—the memoranda's intended use in litigation cannot be separated from any other purpose that might have motivated their creation. The memoranda's inclusion of litigation strategy, Kim Decl. ¶ 5, makes this especially obvious, regardless of how one defines "litigation": they would not have been created in a form that included litigation strategy if they were not created in anticipation of legal disputes in legal proceedings.[3]

2. A Document May Be Prepared "in Anticipation of Litigation" Even if It Does Not Concern "Specific Claims."

Plaintiffs also ask the Court to supplement the Ninth Circuit's attorney work product standard with an additional requirement, what they call the "specific-claim test." Pls.' Mem. at 15. Plaintiffs argue that whenever "the government is acting in its sovereign capacity to enforce or apply the law," a government document is not necessarily attorney work product even if it was prepared by an attorney in anticipation of litigation. *Id*. Rather, according to Plaintiffs, the Government must also show that the document it seeks to withhold was "prepared with a *specific claim* supported by *concrete facts* which would likely lead to litigation in mind." *Id*.

This is not the first time FOIA plaintiffs (including Plaintiffs themselves) have argued for such a "specific-claim test," but such arguments have been repeatedly rejected by courts, most

[3] Plaintiffs also note that the Title III/FISA notice obligation extends to "other" proceedings and accordingly argue that the Cover Memo and FISA Memo cannot be work product because such proceedings are not "litigation." Pls.' Mem. at 20 n.26. Courts, however, have consistently held that attorney work product protection is not confined to documents prepared for court litigation and extends to other proceedings as well. *See, e.g.*, *Schoenman v. FBI*, 573 F. Supp. 2d 119, 143 (D.D.C. 2008) (upholding protection of documents "created by an attorney in the context of an ongoing administrative proceeding that eventually resulted in litigation"); *Samuels v. Mitchell*, 155 F.R.D. 195, 200 (N.D. Cal. 1994) (holding "arbitrations are adversarial in nature and can be fairly characterized as 'litigation'" for the purpose of work product protection); *Nevada v. Dep't of Energy*, 517 F. Supp. 2d 1245, 1260 (D. Nev. 2007) (noting that work product protection applies to administrative proceedings, at least as long as the proceedings are adversarial).

notably the D.C. Circuit, on whose caselaw Plaintiffs purport to rely. The D.C. Circuit uses the same standard as the Ninth Circuit to determine whether a document was created in anticipation of litigation and thus may be withheld as attorney work product. *See, e.g.*, *NACDL*, 844 F.3d at 251. In undertaking this inquiry, the D.C. Circuit has sometimes found whether or not documents were created in contemplation of a specific claim to be relevant, but only in a narrow context: when the documents at issue were the records of a particular government investigation, and the court was trying to determine whether those investigation records had been created with an eye toward litigation or not. *Id*. at 254 ("[T]he point of the specific-claim inquiry . . . was to differentiate between audits as to which enforcement litigation might well never take place, and active investigations with an enforcement action foreseeably at hand. In those cases, looking at whether agency attorneys were contemplating a specific claim proved useful in assessing the likelihood that litigation would ever come to pass.") (internal citations omitted).

The D.C. Circuit's specific-claim inquiry has no application outside of the unique context of such investigation records. *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121, 136 (D.D.C. 2012) ("[T]he specific-claim requirement only applies when the documents at issue have been prepared 'in connection with active investigations of potential wrongdoing' and the attorney (or agent thereof) preparing the document acted 'as a prosecutor or investigator of suspected wrongdoers.'") (citation omitted); *ACLU Found. v. Dep't of Justice*, No. 12-cv-7412, 2014 WL 956303, *5 (S.D.N.Y. Mar. 11, 2014) (same); *Feshbach v. SEC*, 5 F. Supp. 2d 774, 782 (N.D. Cal. 1997) (concluding that documents generally may be withheld as attorney work product "even if no specific claim is contemplated," but that "a document [prepared] in the course of an investigation" by an investigating attorney should only be withheld as attorney work product if the investigation is "based upon a suspicion of specific wrongdoing"); *ACLU of San Diego & Imperial Ctys. v. Dep't of Homeland Sec.*, No. 15-cv-229, 2017 WL 2889682, *4 (C.D. Cal. Feb. 10, 2017) ("Depending on the circumstances, the work product privilege may apply even if no specific claim is contemplated. Courts have tended to apply a specific claim requirement when agency lawyers act as prosecutors or investigators of suspected wrongdoers

because such a rule helps identify when the risk of litigation was sufficiently in mind.") (citations omitted); *ACLU*, 210 F. Supp. 3d at 482 (concluding DOJ memoranda regarding how to determine whether information was FISA-derived could be withheld notwithstanding the Government's inability to identify related specific claims because "whether a 'specific case' or 'specific claim' has arisen" was not the appropriate standard).

Courts have also repeatedly rejected the argument that the D.C. Circuit's specific-claim inquiry should be expanded to apply to all cases involving law enforcement or government investigations. *See*, *e.g.*, *NACDL*, 844 F.3d at 254 (prior cases "did not hold that, in *any* case involving documents prepared by or for prosecutors, the work-product privilege could apply only if the documents had been created in anticipation of a specific claim"); *ACLU*, 2014 WL 956303 at *6 (concluding that the fact that "the memoranda at issue were written for prosecutors and discuss criminal investigations" was immaterial and did not implicate the specific-claim inquiry because "it is the *function* of the documents that is critical, not their intended audience"); *Soghoian v. Dep't of Justice*, 885 F. Supp. 2d 62, 72 (D.D.C. 2012) (concluding that the Government properly withheld documents "discussing legal strategies in [criminal] investigations involving electronic surveillance" as attorney work product, notwithstanding the Government's inability to identify any "specific litigation for which the withheld documents were prepared").

Hence, "[a] specific claim requirement would make little sense in the context of . . . [a document] *entirely* about the conduct of litigation. [Such a document] is aimed directly for use in (and will inevitably be used in) litigating cases." *NACDL*, 844 F.3d at 254[4]; *cf. Judicial*

[4] Plaintiffs highlight the concurring opinion in *NACDL*, Pls.' Mem. at 18, which, while acknowledging that a specific claim test had been rejected by binding precedent, nonetheless suggests that such a test would be more consistent with "the purpose of FOIA and the longstanding value of justice." *NACDL*, 844 F.3d at 258–59 (Sentelle, J., concurring). Aside from generally noting that Exemption 5 should be "narrowly construed," however, the concurring opinion offers no legal basis for this position; indeed, its author acknowledges that his concerns are instead "normative" and "perhaps ethical." *Id*. at 258. If Plaintiffs have policy concerns about protecting Government work product, they should petition Congress to amend FOIA, not ask this Court to create a new attorney work product standard applicable only to the Government. *Cf. United States v. Nobles*, 422 U.S. 225, 238 (1975) (noting that protecting the "thorough preparation and presentation of each side of the case"—*i.e.*, both the Government and the accused—through work product protection was necessary to advance the "interests of society

Watch v. Reno, 154 F. Supp. 2d 17, 18 (D.D.C. 2001) ("[I]f litigation was inevitable, there is no need to identify a specific claim."). Thus, the D.C. Circuit's specific-claim inquiry has no application in this case: the Cover Memo and FISA Memo are compilations of legal analysis and strategy aimed directly for use in litigation, not records prepared by government investigators examining particular instances of potential wrongdoing.

None of the cases Plaintiffs cite are to the contrary. *See* Pls.' Mem. at 17. The case on which Plaintiffs most prominently rely, *In re Sealed Case*, 146 F.3d 881 (D.C. Cir. 1998), actually questioned whether the specific-claim inquiry had "any continued vitality" at all in light of subsequent precedent; to the degree it does, it only applies to documents "prepared by government lawyers in connection with active investigations of potential wrongdoing." *Id*. at 885. Indeed, *In re Sealed Case* directly warns against over-expanding the specific-claim inquiry, as doing so "would undermine lawyer effectiveness at a particularly critical stage of a legal representation. It is often prior to the emergence of specific claims that lawyers are best equipped either to help clients avoid litigation or to strengthen available defenses should litigation occur." *Id*. at 886. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980), also heavily relied on by Plaintiffs, only applied the specific-claim inquiry to documents prepared as part of a government audit and never claimed that this inquiry should be applied outside this context. *See id*. at 865.[5]

Plaintiffs also cite *Jordan v. Department of Justic*e, 591 F.2d 753 (D.C. Cir. 1978), and *Judicial Watch v. Department of Homeland Security*, 926 F. Supp. 2d 121 (D.D.C. 2013), but these cases did not deny work product protection because the memoranda in those cases were unrelated to a "specific claims": they denied work product protection because the Government

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and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence.").

[5] Subsequent decisions have repeatedly held that *Coastal States* should not be applied more broadly. *See, e.g.*, *NACDL*, 844 F.3d at 254 (noting *Coastal States* only applied to "audit documents"); *ISS Marine Serv.*, 905 F. Supp. 2d at 135–36 (understanding *Coastal States* to only apply to active investigations); *In re Sealed Case*, 146 F.3d at 885–86 (concluding that to the extent *Coastal States* remained valid, it only controlled documents prepared as part of active investigations of wrongdoing).

had failed to show that the general instructions regarding prosecutorial discretion at issue were "even prepared in anticipation of trials in general." *Jordan*, 591 F.2d at 775; *see also Judicial Watch*, 926 F. Supp. 2d at 143 (rejecting work product protection because the memoranda conveyed "policies and instructions" rather than "mental impressions, conclusions, opinions, or legal theories."). Indeed, D.D.C. Judge Kollar-Kotelly, who wrote *Judicial Watch*, emphasized in a later opinion that reading *Jordan* and *Judicial Watch* to impose a specific claim test was "misguided": attorney-authored memoranda providing "guidelines and strategies" for use in litigation were still protected as work product even though they were not prepared for a specific case because, unlike the prosecution discretion standards at issue in *Jordan* and *Judicial Watch*, they were directly related to the conduct of litigation. *NACDL v. Exec. Office for U.S. Attorneys*, 75 F. Supp. 3d 552, 559 (D.D.C. 2014).[6]

Finally, Plaintiffs rely on one decision from this district, *ACLU of Northern California v. Department of Justice*, as supporting their theory that the Government can only withhold work product prepared for a specific claim or case. *See* Pls.' Mem. at 16 (citing 70 F. Supp. 3d 1018 (N.D. Cal. 2014)). *ACLU of Northern California*, however, squarely rejected Plaintiffs' theory, at least as it applies to Government memoranda concerning legal analysis or strategies designed for use in litigation. 70 F. Supp. 3d at 1033–34. Among other documents, the case involved "memoranda . . . created to assist [assistant U.S. attorneys] with recurring litigation issues." *Id*. Plaintiffs argued, as they do here, that these memoranda were not attorney work product because they were not "case-specific," but the court found this argument "unpersuasive." *Id*. "Where, as here, the purpose of the documents is to convey litigation strategy, rather than convey routine

[6] *American Immigration Council v. Department of Homeland Security*, 905 F. Supp. 2d 206 (D.D.C. 2012), also cited by Plaintiffs as supporting a specific-claim test, Pls.' Mem. at 16, is similar. There, the court specifically acknowledged that a document may be protected as work product "even if no specific claim is contemplated," and that memoranda (like the Cover Memo and FISA Memo) that consider how courts are likely to react to agency interpretations of the law in future litigation may be withheld as work product. 905 F. Supp. 2d at 221–22. The court held, however, that the Government had offered "no hint" that the memorandum in dispute, offering an interpretation of an agency regulation, had been in any way "influenced by litigation, let alone . . . written 'because of' litigation.'" *Id*. at 222 (citation omitted).

agency policy, they are entitled to work product protection," even if they are not case-specific. *Id*.

Thus, Plaintiffs' "specific-claim test" has no legal support, and in fact directly conflicts with well-established caselaw. The Court should accordingly reject this theory, and hold that the Cover Memo and FISA Memo are attorney work product, even though they were prepared in anticipation of numerous cases rather than one specific case.

B. The Justice Department Memoranda Were Neither Used as Working Law nor Adopted as Agency Policy, But Would Have Remained Protected as Attorney Work Product Even if They Had Been.

The Justice Department has not waived attorney work product protection over the Cover Memo and FISA Memo. A party only waives work product protection when it discloses otherwise protected information in a manner "inconsistent with the adversary system." *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 328 (N.D. Cal. 1985); *accord United States v. Bergonzi*, 216 F.R.D. 487, 497–98 (N.D. Cal. 2003) ("Work product protection is waived where disclosure of the otherwise privileged documents is made to a third party, and that disclosure enables an adversary to gain access to the information."). The Cover Memo and FISA Memo have not been disclosed: their contents have been kept confidential, circulated only within the Executive Branch and accessed only by Government lawyers working on issues addressed by the Cover Memo and FISA Memo. Kim Decl. ¶ 12. Thus, no waiver has occurred, and the memoranda remain protected as attorney work product.

1. An Agency's Adoption of Attorney Work Product or Its Use of Work Product as Working Law Does Not Waive or Undermine the Work Product's Protection.

Plaintiffs nonetheless argue that the Justice Department waived work product protection over the Cover Memo and FISA Memo by using the memoranda as "working law" or "adopting" them as authoritative policy. *See* Pls.' Mem. at 8–10. A document's use as working law or its adoption as official policy defeats the deliberative process privilege because such actions indicate that the document is final, not predecisional. *See, e.g.*, *Assembly of State of Cal. v. Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992) (noting the "working law" of the agency

does "not enjoy the protection of the deliberative process privilege."). But a document's use as working law or its adoption has no bearing on attorney work product protection. *See, e.g.*, *Iglesias v. CIA*, 525 F. Supp. 547, 559 (D.D.C. 1981) ("It is settled that even if a document is a final opinion or is a recommendation which is eventually adopted as the basis for agency action, it retains its exempt status if it falls properly within the work-product privilege"); *Exxon Corp. v. FTC*, 476 F. Supp. 713, 726 (D.D.C. 1979) ("[A] document may be exempt as attorney 'work product' under exemption (b)(5) notwithstanding that it is also a 'final opinion,' or has been incorporated into a 'final opinion.'") (internal citations omitted); *ACLU*, 210 F. Supp. 3d at 478 ("It has been clearly established for nearly forty years that documents disclosable under FOIA as agency working law may nevertheless be withheld if they are protected by the attorney work product privilege."); *NACDL*, 75 F. Supp. 3d at 561 (notwithstanding plaintiff's allegation that the Blue Book was working law, "as long as the Blue Book is considered attorney work-product, . . . FOIA Exemption 5 still protects the book from disclosure"); *Tax Analysts v. IRS*, 152 F. Supp. 2d 1, 29 (D.D.C. 2001) ("[A]gency working law is exempt under the Exemption 5 attorney work product privilege.").[7]

In response, Plaintiffs cite *National Labor Relations Board v. Sears*, 421 U.S. 132 (1975), in which the Supreme Court required the disclosure of certain purportedly "advisory"

[7] The one recent contrary decision is *New York Times Co. v Department of Justice*, 138 F. Supp. 3d 462 (S.D.N.Y. 2015), which extended Second Circuit precedent regarding the attorney-client privilege, discussed below, to hold that the express adoption of documents as final policy prevented an agency for protecting them as work product. *Id*. at 473–74. In reaching this conclusion, the court acknowledged that it was departing from adoption's basis in the deliberative process privilege and reaching a decision contrary to other courts, but decided such a result was compelled by Second Circuit precedent. *Id*. at 473. There is no reason to so depart from adoption's logical and legal basis here. Moreover, as held by a subsequent decision in the same court, *New York Times Co.* is limited to circumstances where an agency "publicly adopt[ed] a document or justif[ied] agency action on the basis of a document," and in the process effectively waived protection over the document by directly or indirectly disclosing its contents, a circumstance not present here. *See ACLU*, 210 F. Supp. 3d at 481 (citation omitted). In *Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967 (7th Cir. 1977), the Seventh Circuit also indicated that express adoption can waive attorney work product protection when a memorandum's reasoning is incorporated into a decision that operates to "foreclose" any litigation at all—there, the decision not to seek an indictment of President Nixon. *Id*. at 974. Obviously, such a situation is not at issue here, and *Niemeier* is best understood as limited to its facts. *See Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598, 603 (D.C. Cir. 2001) (distinguishing *Niemeier* based on its unique circumstances).

Government memoranda because they nonetheless functioned as "final opinions" that "represent the 'law' of the agency." *Id*. at 158–59. As the Supreme Court itself noted in *Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340 (1979), however, the relevant holding in *Sears* concerned only "the privilege for predecisional communications" — *i.e.*, the deliberative process privilege—not protection of attorney work product. *Id*. at 360 n.23. Indeed, it "should be obvious" that "the kind of mutually exclusive relationship" that exists between government documents functioning as final policy and the deliberative process privilege "does not necessarily exist between final statements of policy and other Exemption 5 privileges." *Id*. The Supreme Court further noted that *Sears* itself had held that the Government could withhold attorney work product even though it had what *Sears* described as a "real operative effect." *Id*. (referencing *Sears*, 421 U.S. at 160). Thus, *Sears* actually supports the conclusion that the attorney work product can be withheld even if it is working law or has been adopted by an agency.[8]

Moreover, once the Government shows that information is otherwise protected, the burden shifts to the opposing party to show that the information has been used as working law or adopted in such a manner as to waive or undermine that protection. *See Ball v. Bd. of Governors of Fed. Res. Sys.*, 87 F. Supp. 3d at 33, 52 (D.D.C. 2015) ("[I]t is [the opposing party's] . . . burden to establish that predecisional records have been adopted as policy.") (citation omitted); *Trans Union LLC v. FTC*, 141 F. Supp. 2d 62, 70–71 (D.D.C. 2001) ("The agency does not have the burden of establishing that a document was not adopted by the agency. Rather, where it is

[8] Plaintiffs try to distinguish *Sears*'s work product analysis by arguing that, in *Sears*, the work product at issue was not authoritative, Pls.' Mem. at 9 n.17, in that it "did not finally decide anything" because the law it discussed "will ultimately be made [by] the courts." *Sears*, 421 U.S. at 160. Plaintiffs read this to suggest that the Supreme Court would not have allowed the work product to be withheld in *Sears* if it had been authoritative. *Sears*, however, also noted that the work product at issue had "many of the characteristics of" a final determination and that the district court had understood it to provide "instructions to staff." *Id*. Despite these qualities, *Sears* concluded that the document must be protected in light of the "attorney's work-product policies which Congress clearly incorporated into Exemption 5." *Id*. Admittedly, although *Sears* certainly did not hold that a document's use as working law or its adoption waived work product protection, it also did not fully address the issue. Any ambiguity in *Sears*'s application to work product, however, was "clarified" by the Supreme Court in *Merrill*, which indicated that such actions need not waive work product protection. *NACDL*, 75 F. Supp. 3d at 561.

unclear whether a recommendation provided the basis for the regulation, the recommendation is exempt from disclosure.") (citing *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184–185 (1975)). Plaintiffs cannot meet this burden, as the Cover Memo and FISA Memo are not working law and have not been adopted as final policy.[9]

2. The Memoranda Are Not Working Law Because They Are Not Authoritative.

As the name "working *law*" implies, the *sine qua non* of working law is authority. Even a document that "bears . . . indicia of a binding legal decision" and is "customarily follow[ed]" is not working law if it is not an authoritative statement of an agency's policy. *Elec. Frontier Found. v. Dep't of Justice*, 739 F.3d 1, 9 (D.C. Cir. 2014). A document cannot be working law if it concerns a matter on which the agency lacks authority to set policy, *id*., and hence DOJ memoranda that "provide legal strategies or guidelines . . . or discuss strategies, defenses, risks, and arguments that may arise in litigation" are not working law because "[t]hey involve legal issues that will ultimately be decided by the Court, not the DOJ." *ACLU*, 70 F. Supp. 3d at 1028; *accord ACLU*, 2014 WL 956303 at *7 (DOJ memorandum distributed to all federal prosecutors and offering legal analysis was not working law because the Justice Department's interpretation of the relevant legal issue "has no legal effect; the results of the DOJ's arguments will be borne out in the courts.").[10]

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[9] Plaintiffs also note that FOIA, 5 U.S.C. § 552(a)(2), directs the disclosure of "statements of policy and interpretations which have been adopted by the agency," which Plaintiffs interpret to require the disclosure of working law and adopted opinions notwithstanding the applicability of FOIA exemptions. Pls.' Mem. at 7, 10, 24. Plaintiffs' interpretation, however, is contrary to the plain statutory language of FOIA, 5 U.S.C. § 552(b), which states that "[t]his section does not apply to matters that are" subject to withholding under a FOIA exemption. *See, e.g., Renegotiation Bd.*, 421 U.S. at 184 n.21 (even if a documents are "expressly made disclosable" under Section 552(a)(2), "a conclusion that the documents are within Exemption 5 would be dispositive in the Government's favor, since the Act 'does not apply' to such documents."); *Merrill*, 443 U.S. at 360 n.23 ("[A] memorandum subject to the affirmative disclosure requirement of § 552(a)(2) was nevertheless shielded from disclosure under Exemption 5.") (citation omitted).

[10] Plaintiffs try to distinguish the instant case by suggesting that courts will never have an opportunity to consider whether evidence is "derived from" FISA or Title III surveillance, making the Cover Memo and FISA Memo effectively the final word on the subject. *See* Pls.' Mem. at 9 n.17. But this is plainly wrong, as attested by court opinions regarding when evidence is "derived from" surveillance under Title III or FISA or whether the Government has otherwise complied with their requirements. *See, e.g., United States v. Smith*, 155 F.3d 1051, 1059–63 (9th

The FISA Memo and Cover Memo thus are not working law: the FISA Memo notes that the law it summarizes remains the ultimate authority for determining when evidence is "derived from" surveillance under Title III and FISA, and that some courts could conceivably disagree with the memoranda's advice. Kim Decl. ¶ 7. Similarly, the Cover Memo states that the FISA Memo is not intended to provide comprehensive guidance regarding Title III or FISA, but rather to provide an overview of relevant legal and strategic considerations for attorneys' use. *Id*. The Cover Memo and FISA Memo are to be used as a starting point for determinations of whether information is "derived from" surveillance, to be supplemented by attorneys' own updated legal research and consultation with DOJ attorneys knowledgeable about such matters. *Id*. In contrast to the documents in the cases cited by Plaintiffs, the Cover Memo and FISA Memo accordingly do not represent "the settled and established policy" of the Justice Department, consisting of "positive rules that create definite standards." *Jordan*, 591 F.2d at 774. They are not a "decision[s] regarding the agency's legal position," *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997), or "definitive rulings" that carry "the force of internal Agency law," *Schlefer v. United States*, 702 F.2d 233, 237 (D.C. Cir. 1983). To the contrary, these memoranda simply provide guidance and information—both legal analysis and strategic advice—for attorneys' use during litigation. The law, not the memoranda, remains authoritative.

3. The Memoranda Have Never Been Adopted as Agency Policy.

For similar reasons, Plaintiffs have not shown that the Justice Department has adopted the Cover Memo or FISA Memo as final policy in such a way to vitiate or waive its ability to assert privilege over them. A document otherwise protected by the deliberative process privilege loses that protection if "an agency chooses expressly to adopt or incorporate [it] by reference"

Cir. 1998) (analyzing meaning of "derived therefrom" in Title III context); *United States v. Mohamud*, 843 F.3d 420, 436–37 (9th Cir. 2016) (appeal docketed) (considering whether the Government had satisfied its FISA obligations and the impact of its late provision of FISA notice). Such cases typically arise when a criminal defendant moves to suppress evidence that the defendant contends has been obtained through illegal electronic surveillance, which of course can occur regardless of whether the Government actually provides notice of any surveillance. Thus, as the Cover Memo and FISA Memo themselves recognize, the courts, not the Justice Department, remain the authority on how Title III and FISA should be interpreted, and the legal analysis the memoranda summarize may need to be updated as courts issue additional decisions in this area. *See* Kim Decl. ¶ 7.

into the agency's authoritative policy. *Sears*, 421 U.S. at 161. Thus, to some extent, the adoption inquiry overlaps with the working law inquiry: Plaintiffs must show that the Justice Department expressly treated the Cover Memo and FISA Memo as binding and authoritative in its actions or communications to show that it adopted them. *See Brinton v. Dep't of State*, 636 F.2d 600, 605 (D.C. Cir. 1980) ("Advisory materials of this sort can become final opinions only if the agency expressly adopts or incorporates them as working law."). "Adoption . . . hinges on the extent to which an agency relies on the document's reasoning to justify its actions. . . . The touchstone of the express adoption inquiry is whether the agency uses the reasoning contained in a document, and the authority provided by the document, to 'justify' its actions to the public." *N.Y. Times Co.*, 138 F. Supp. 3d at 475.

Moreover, because adoption involves the setting of authoritative policy, only agency officials with the authority to set policy can adopt predecisional materials as policy. *See Ball*, 87 F. Supp. 3d at 52 (suggesting statements and actions of "subordinate employees" do not suffice to adopt advisory materials as policy). And courts are wary of too readily concluding that adoption has occurred, as "a robust express adoption doctrine could create incentives for public officials to reveal less about the reasons for decisions, rather than more, arguably in tension with the goals of FOIA." *N.Y. Times Co.*, 138 F. Supp. 3d at 478.

Plaintiffs have not shown any express adoption here. Plaintiffs rely primarily on two instances in which the Cover Memo and FISA Memo were supposedly expressly adopted by the Justice Department through public statements—a statement made by the acting attorney general for the DOJ National Security Division, John Carlin, during a 2014 nomination hearing; and a statement made by a federal prosecutor in a 2014 criminal filing. *See* Pls.' Mem. at 13 (citing Diakun Decl., Exs. 19, 21). But these statements could not have adopted the Cover Memo and FISA Memo because the memoranda did not exist at the time. The memoranda were not finalized and disseminated until November 2016, Kim Decl. ¶¶ 4–5 , and thus the Justice Department could not have been relying on them to justify its actions in 2014.[11]

[11] Plaintiffs argue that the 2014 statements refer to an unwritten DOJ policy or draft memorandum that was later incorporated into the Cover Memo and FISA Memo, *see* Pls.' Mem.

Additionally, these 2014 statements are merely broad references to changes in the DOJ's "practice" or "determinations" regarding how to treat a particular issue arising under FISA's notice provision.[12] Neither statement refers to or treats as authoritative any DOJ memoranda on the subject. *See* Diakun Decl. Exs., ECF No. 27-1, at 158–159, 193. Even if they had, neither statement explains or relies upon the reasoning of any DOJ documents, *id*., and courts have consistently held that mere references to predecisional documents or endorsements of their bottom-line recommendations are not enough to adopt them. *See, e.g., Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 358 (2d Cir. 2005) ("Mere reliance on a document's conclusions does not necessarily involve reliance on a document's analysis; both will ordinarily be needed before a court may properly find adoption or incorporation by reference."); *Elec. Frontier Found.*, 739 F.3d at 10 ("[T]he Court has refused to equate reference to a report's conclusions with adoption of its reasoning, and it is the latter that destroys the privilege") (citation omitted).[13]

Finally, adoption only prevents the Government from withholding those portions of a document that were actually adopted. *La Raza*, 411 F.3d at 360 n.7 ("[W]e acknowledge that an agency may adopt or incorporate only part of an otherwise-protected document."); *N.Y. Times Co*., 138 F. Supp. 3d at 478–79 ("DOJ should not be required to disclose those portions of the

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at 13; but even if true, this would not constitute adoption of the Cover Memo and FISA Memo. Adoption is tied to specific documents, not unwritten policies or related documents.

[12] *See* Diakun Decl. Exs., ECF No. 27-1, at 158–159 (stating the Justice Department had "determined that information obtained or derived from Title I or Title III FISA collection may, in particular cases, also be derived from prior Title VII collection, such that notice concerning both Title I/III and Title VII collections should be given in appropriate cases with respect to the same information"), 193 (the Justice Department's "change in practice had to do with a particular set of circumstances when there was an instance where information obtained from one prong of the FISA statute 702 was used and led to information that led to another prong of FISA, Title I FISA, being used, and that when the notice was given to the defendant, that notice was referring to one type of FISA but not both types of FISA, and that is the practice that we reviewed and changed, so that now, defendants are receiving notice in those instances of both types of FISA.").

[13] Plaintiffs also argue that the Cover Memo adopted the FISA Memo because the Cover Memo was disseminated by two high-ranking DOJ attorneys to prosecutors throughout the Justice Department and summarized the FISA Memo. Pls.' Mem. at 13-14. Plaintiffs, however, do not cite any case showing that the mere distribution or summation of a document by officials is enough to adopt it as authoritative agency policy.

memorandum that do not support the reasoning on which the Attorney General publicly relied."). Here, the Cover Memo and FISA Memo contain a combined thirty-four pages of legal analysis and strategy regarding a number of distinct legal issues related to when evidence is "derived from" surveillance under Title III and FISA. Kim Decl. ¶¶ 4–5. Thus, even if the brief 2014 discussions Plaintiffs cite—as noted, focused on one particular legal issue regarding FISA surveillance—had somehow adopted any related analysis that might be in the 2016 Cover Memo and FISA Memo, they would only have adopted a small portion of the memoranda, leaving the remainder of the Cover Memo and FISA Memo protected.

Therefore, whether the Justice Department adopted the Cover Memo and FISA Memo as authoritative policy or used them as working law is irrelevant, because they would be protected from disclosure as attorney work product regardless. But even if these issues were relevant, the Justice Department still properly withheld the memoranda because Plaintiffs have not shown that they were ever used as working law or adopted as DOJ policy.

II. THE JUSTICE DEPARTMENT PROPERLY WITHHELD ITS MEMORANDA AS ATTORNEY-CLIENT COMMUNICATION UNDER EXEMPTION 5.

A. The Justice Department's Memoranda Provide Confidential Legal Advice in the Context of an Attorney-Client Relationship and Thus Are Privileged Attorney-Client Communications.

The Justice Department has also demonstrated that the Cover Memo and FISA Memo are protected by the attorney-client privilege and thus properly withheld under FOIA Exemption 5. A core purpose of the attorney-client privilege is protecting lawyers' ability to confidentially "provide candid legal advice" to their clients, *United States v. Christensen*, 828 F.3d 763, 802 (9th Cir. 2015), and the Cover Memo and FISA Memo constitute such advice. Both memoranda reflect the authoring attorneys' advice to other DOJ attorneys about how they should determine if information is derived from surveillance, comply with Title III's and FISA's notice provisions, and otherwise confront related issues in the course of litigation. Kim Decl. ¶¶ 4–7, 12. This legal advice was created in response to confidential, internal discussions and information from DOJ officials seeking advice on this topic, circulated only within the Executive Branch and accessed only by lawyers working on issues addressed by the memoranda. *Id*. ¶¶ 6–7, 12. Its

disclosure thus would represent an intrusion into the attorney-client relationship between the attorneys who wrote the memoranda and the Justice Department.

Plaintiffs claim to have identified four ways the Justice Department failed to substantiate its assertion of the attorney-client privilege, but none of their arguments stand up to scrutiny. First, Plaintiffs claim the Justice Department has failed to identify the client in the applicable attorney-client relationship, Pls.' Mem. at 22–23, but the client is of course the Justice Department itself, acting through its officials and attorneys. *See* Kim Decl. ¶ 12. After all, the attorney-client privilege is possessed by the client, *United States v. Partin*, 601 F.2d 1000, 1009 (9th Cir. 1979), *abrogation on other grounds recognized in United States v. Rewald*, 889 F.2d 836, 858 (9th Cir. 1989), and it is in its capacity as the client that the Justice Department asserts the privilege here. This is not unusual: "In the government context, the 'client' may be the agency, and the attorney may be an agency lawyer." *Tax Analysts*, 117 F.3d at 618.

Second, Plaintiffs incorrectly claim that the Justice Department must show that the Cover Memo and FISA Memo contain "the client's confidential information" to be privileged, and that the Kim Declaration does not adequately establish that the Cover Memo and FISA Memo contain such information. Pls.' Mem. at 23. The attorney-client privilege, however, protects both "confidential disclosures made by a client to an attorney . . . to obtain legal advice . . . as well as an attorney's advice in response to such disclosures." *Christensen*, 828 F.3d at 802 (quoting *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996)). Accordingly, a party seeking to withhold legal advice under the attorney-client privilege need not show that the legal advice incorporates specific confidential client communications, just that the advice was given in response to such communications, a result not inconsistent with the case cited by Plaintiffs, *In re Fischel*, 557 F.2d 209 (9th Cir. 1977). *In re Fischel* notes that the ultimate purpose of the attorney-client privilege is to protect client confidences but also states:

> Ordinarily the compelled disclosure of an attorney's communications or advice to the client will effectively reveal the substance of the client's confidential communication to the attorney. To prevent this result, the privilege normally extends both to the substance of the client's communication as well as the attorney's advice in response thereto. It also extends to those papers prepared by an attorney or at an attorney's request for the purpose of advising a client,

> provided the papers are based on and would tend to reveal the client's confidential communications.

Id. at 211 (citation omitted). The Kim Declaration demonstrates that the Cover Memo and FISA Memo were created in response to "confidential, internal discussion to obtain legal advice" and that the advice they contain is "based in part on confidential information provided by the DOJ attorneys who sought [their] creation." Kim Decl. ¶ 12. This more than suffices to show that the Cover Memo and FISA Memo were created in response to—and thus would tend to reveal—confidential client disclosures, and accordingly that they are protected by the attorney-client privilege.

Third, Plaintiffs argue that the Justice Department has failed to show that the Cover Memo and FISA Memo have been kept confidential. Pls.' Mem. at 23. The Kim Declaration, however, plainly establishes that they have been. Generally speaking, a communication is confidential so long as it has not been released to third parties unrelated to the client or attorney, *see, e.g.*, *Chesapeake Bay Found., Inc. v. Army Corps of Eng'rs*, 722 F. Supp. 2d 66, 73 (D.D.C. 2010), and Plaintiffs do not claim that the memoranda have been publicly released or otherwise distributed outside the Government. Pls.' Mem. at 23. Plaintiffs cite a case concluding that, when the client is an organization, a document remains confidential so long as the document was only disseminated "among those members of the organization who are authorized to speak or act for the organization in relation to the subject matter of the communication." *ACLU of N. Cal. v. FBI*, 146 F. Supp. 3d 1161, 1168 (N.D. Cal. 2015). But the Kim Declaration establishes that this standard, if in fact applicable, is satisfied. The Kim Declaration notes that the Cover Memo and FISA Memo were "accessed only by Government lawyers working on the issues addressed by the memoranda," most notably federal prosecutors. Kim Decl. ¶¶ 4, 12. Thus, the dissemination of the Cover Memo and FISA Memo were limited to individuals authorized to speak and act on behalf of the Government—attorneys—on the matters discussed in the Cover Memo and FISA Memo, and the memoranda thereby remained confidential.[14]

[14] The possibility that some of these Government attorneys may have been outside the Justice Department in other parts of the Executive Branch does not weaken this confidentiality. Even if other Executive Branch agencies or offices are viewed as distinct from the Justice Department for purposes of accessing the privilege, Executive Branch agencies share a common interest on

Finally, Plaintiffs argue that the Cover Memo and FISA Memo contain "policy advice" rather than legal advice and thus are not privileged. Pls.' Mem. at 23–24. As the Kim Declaration makes clear, however, these memoranda contain legal analysis, guidance, and litigation strategy regarding when evidence is derived from Title III and FISA surveillance, Kim Decl. ¶¶ 4–7, 12, matters clearly best described as legal advice. The Ninth Circuit has rejected attempts to narrow the plain meaning of "legal advice" and affirmed that advice given by an attorney to his or her client regarding that client's legal duties should be considered "legal advice," regardless of what other labels or characterizations might also be attached to such communications. *United States v. Bauer*, 132 F.3d 504, 509 (9th Cir. 1997) ("[N]o reasonable interpretation of [an attorney's] communications with [his client] regarding the legal obligations involved in filing a . . . petition would characterize them as anything other than legal advice. As legal advice, given . . . within the scope of the attorney-client relationship, those statements were protected by the attorney-client privilege."); *see also Chen*, 99 F.3d at 1502 (in determining privilege, what matters is not how the advice at issue is characterized, but "whether the lawyer was employed with or without reference to his knowledge and discretion in the law") (citation omitted); *Families for Freedom v. U.S. Customs & Border Prot.*, 837 F. Supp. 2d 287, 302 (S.D.N.Y. 2011) (holding that "a legal opinion on legal standards applicable to immigration checks conducted by the Border Patrol" was protected legal advice).[15]

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these issues, and the "attorney-client privilege [can be extended] to multiple parties who share a common interest in a legal matter." *Ctr for Biological Diversity v. OMB*, No. C 07-04997, 2009 WL 1246690, *10 (N.D. Cal. May 5, 2009).

[15] The D.C. Circuit has adopted a somewhat stricter standard for "legal advice," holding that an attorney is not providing legal advice for the purpose of the attorney-client privilege if he or she "in effect is making law"—*i.e.*, if what the attorney writes is authoritative rather than advisory. *Tax Analysts*, 117 F.3d at 619. Even if this standard were to apply here, however, the Cover Memo and FISA Memo would still be privileged because, as discussed above, their legal analysis is truly advisory, not authoritative. Moreover, the holding in *Tax Analysts* is limited: the D.C. Circuit held it does not require the disclosure of "client confidences" even if this information is part of otherwise authoritative documents. *Id*. at 620. Such "confidences . . . are clearly covered by the attorney-client privilege" and thus the Government "may still assert the privilege with respect to particular portions of [otherwise authoritative agency law] containing this sort of confidential government information." *Id*. Thus, even were the Court to conclude that the Cover Memo and FISA Memo were authoritative agency law and followed *Tax Analysts* to conclude that this prevented the Justice Department from entirely withholding them under the attorney-client privilege, the Justice Department could still withhold any portions of them that

Indeed, under Ninth Circuit precedent, "[i]f a person hires a lawyer for advice, there is a rebuttable presumption that the lawyer is hired 'as such' to give 'legal advice,'" a presumption only rebutted by a showing that the lawyer was "employed without reference to his knowledge and discretion in the law." *Chen*, 99 F.3d at 1501 (citation omitted).[16] Here, Plaintiffs have offered nothing that would rebut this presumption: their only evidence that the Cover Memo and FISA Memo represent "policy advice" comes from a 2015 declaration describing other, previous memoranda on the Government's notice obligations under Title III and FISA as "contain[ing] legal advice, including policy advice regarding the government's best practices for implementation of its obligations, prepared by government attorneys for other government personnel who represent the client, the United States of America." *See* Bradley Decl. ¶ 19 (ECF No. 27-1 at 227). Of course, this declaration does not directly concern the Cover Memo and FISA Memo, which were not completed when it was written; but, even if it did, this declaration is far from a concession that such memoranda do not contain legal advice. To the contrary, it asserts that they do contain "legal advice," even if the document characterizes some of this legal advice as also being "policy advice." *Id*. Regardless, as discussed above, it is the attorney's role, not how his or her advice is characterized, that determines whether the advice is privileged, and the attorneys who prepared the Cover Memo and FISA Memo clearly were acting in their capacity as lawyers—providing an analysis of legal duties and litigation guidance—when they prepared the memoranda.

Thus, as further explained in the Defendant's Motion to Dismiss and the Kim Declaration, the Justice Department has demonstrated that the Cover Memo and FISA Memo are

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contained "client confidences." *See* Kim Decl. ¶ 12 (noting the Cover Memo and FISA Memo were "based in part on confidential information provided by the DOJ attorneys who sought [their] creation.").

[16] Plaintiffs also suggest a lawyer's advice is only legal advice if it concerns "specific legal questions and situations." Pls.' Mem. at 24. The Ninth Circuit, however, has made clear that the privilege is not limited to specific claims: the attorney-client privilege, for instance, extends to advice offered by an attorney "in a counseling and planning role" or "to bring their clients into compliance with the law." *Chen*, 99 F.3d 1501–02.

protected by the attorney-client privilege, and, as such, that they were properly withheld under FOIA Exemption 5.

B. The Justice Department Has Neither Directly Nor Indirectly Disclosed the Content of Its Memoranda, and Thus Has Not Waived Its Attorney-Client Privilege Over Them.

The Justice Department has not waived the attorney-client privilege over the Cover Memo or the FISA Memo. The attorney-client privilege is waived by disclosing the documents to third parties not in a confidential relationship with the client or attorney, *see Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992), and, as discussed above, the Justice Department has maintained the Cover Memo and FISA Memo in confidence, disseminating them only to Government attorneys working on the issues they address. *See* Kim Decl. ¶ 12.

As with attorney work product protection, however, Plaintiffs argue that the Justice Department has waived its ability to assert the attorney-client privilege over the Cover Memo and FISA Memo on the theory that they are the Justice Department's working law and that they have been adopted as its final policy. Pls.' Mem. at 8–14. Plaintiffs' arguments have no more force with regard to the attorney-client privilege than they do with regard to attorney work product protection. First, as described above, a document's use as working law or its adoption only waives the deliberative process privilege (by showing the document is not predecisional), not any other privilege. Indeed, as a court in this Circuit recently concluded, holding that the attorney-client privilege could be so waived would dangerously undermine it:

> A rule requiring disclosure of internal legal memos if the legal advice contained within is somehow embraced by the agency would eviscerate the attorney-client privilege by making any adhered-to legal advice fair game for disclosure. Such a situation would clearly frustrate the safe harbor that the attorney-client privilege provides to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.

CP Salmon Corp., 238 F. Supp. 3d at 1172 (citation omitted). Second, even if the adoption of legal advice or its use as working law could waive the attorney-client privilege, Plaintiffs have not shown that the Cover Memo and FISA Memo were adopted as DOJ policy or used as working law, for the reasons discussed above.

These conclusions are not altered by the two Second Circuit cases cited by Plaintiffs, *National Council of La Raza v. Department of Justice*, 411 F.3d 350 (2d Cir. 2005), and *Brennan Center for Justice v. Department of Justice*, 697 F.3d 184, 208 (2d Cir. 2012). These cases concluded that, under certain circumstances, an agency's public reliance on the reasoning of documents otherwise protected by the attorney-client privilege waived the privilege. Both cases involved repeated public statements by Government officials relying on the authority of purportedly privileged memoranda. *Brennan*, 697 F.3d at 204; *La Raza*, 411 F.3d at 357. The Second Circuit concluded that these public invocations of the memoranda had amounted to "waiver by implication": because the documents' reasoning was being publicly invoked, they were no longer being held in confidence, and thus the attorney-client privilege had been waived. *Brennan*, 697 F.3d at 207–08; *see also La Raza*, 411 F.3d at 360 (concluding that the rationale for maintaining the confidentiality of the communications had "evaporated" once they had been publicly invoked as agency policy). Thus, although the Second Circuit linked its conclusions in *La Raza* and *Brennan* with prior deliberative process "adoption" cases, *Brennan* and *La Raza* are analytically distinct from them—based on a waiver of the attorney-client privilege via disclosure, rather than an undermining of the deliberative process privilege.

As such, subsequent cases considering *Brennan* and *La Raza* have held that they only apply to situations in which the Government has aggressively and publicly invoked the reasoning of the otherwise privileged documents as authoritative in such a way as to waive the attorney-client privilege via disclosure—in particular, by using the documents to persuade third parties outside the Government to take action. *See, e.g.*, *ACLU*, 210 F. Supp. 3d at 481 (concluding that because *La Raza* and *Brennan* were based on the idea that "public adoption of documents by an agency is akin to waiver of a privilege," they only apply if a document is "pointed to publicly, or relied upon by the agency to assert a claim or defense"); *CP Salmon Corp.*, 238 F. Supp. 3d at 1172–73 (distinguishing *La Raza* as limited to situations in which legal memoranda were widely circulated beyond the agency and used to persuade third parties to take action); *ACLU v. Dep't of Justice*, 70 F. Supp. 3d 1018, 1029 n.4 (N.D. Cal. 2014) (distinguishing *La Raza* as limited to

situations in which an agency uses a legal memorandum as a basis for instructing third parties outside the agency on their legal duties). Clearly, the Justice Department has not used the Cover Memo and FISA Memo in such a manner: as discussed above, the Justice Department has merely provided the Cover Memo and FISA Memo to its attorneys as a source of legal analysis and litigation strategy; it has not adopted the Cover Memo and Final Memo at all, much less used them as a tool for persuading third parties to change their behavior or in a manner that would effectively disclose their contents to the public. In sum, unlike in *Brennan* and *La Raza*, the Justice Department has kept these memoranda confidential. *See* Kim Decl. ¶ 12. Thus, even if these cases were binding precedent, they would not apply here.

Therefore, the Justice Department has not waived its attorney-client privilege over the Cover Memo and FISA Memo, either by adoption that amounted to a "waiver by implication" or any other form of disclosure. The Justice Department is accordingly entitled to withhold them under FOIA Exemption 5.

III. THE JUSTICE DEPARTMENT'S DECLARATION DEMONSTRATES THAT THE MEMORANDA WERE PROPERLY WITHHELD, MAKING *IN CAMERA* REVIEW UNNECESSARY.

Plaintiffs request that the Court conduct an *in camera* review of the Cover Memo and FISA Memo, Pls.' Mem. at 25, but *in camera* review is unnecessary to resolve this case: the Kim Declaration establishes that the Justice Department properly withheld the memoranda under Exemption 5 as protected attorney work product and privileged attorney-client communications, and Plaintiffs have not presented any evidence indicating that the Justice Department has waived its ability to withhold these documents. Because *in camera* review is unnecessary, it should not be ordered: in FOIA cases, courts should conduct *in camera* review only as a last resort—"when the issue before the District Court could not be otherwise resolved." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978); *accord Lane v. Dep't of Interior*, 523 F.3d 1128, 1136 (9th Cir. 2008) ("[I]n camera review [in FOIA cases] is discretionary and is to be rarely exercised.").

Here, the Kim Declaration provides the Court sufficient information to decide this case. Were the Court to disagree, moreover, the appropriate response would not be to order *in camera* inspection of the Cover Memo and the FISA Memo—much less to order their disclosure to Plaintiffs. Rather, were the Court to require additional information, the Court should identify what additional details it requires to resolve the case and provide the Justice Department with the opportunity to supply those details in a supplemental filing. *See, e.g., Wiener v. FBI*, 943 F.2d 972, 979 (9th Cir. 1991) (remanding for submission of a more detailed Vaughn index, where agency, in the original Vaughn index, "did not disclose all it could"); *Gerstein v. CIA*, No. C 06-4643, 2008 WL 4415080, *13 (N.D. Cal. Sept. 26, 2008) ("Where an agency's affidavit is determined to be insufficient, and it appears that a more detailed affidavit could be presented, the court should permit the agency to provide a more detailed affidavit."). Such a procedure is unnecessary here, however, because the Kim Declaration provides more than enough information to demonstrate that the Justice Department properly withheld the Cover Memo and FISA Memo under FOIA Exemption 5 as attorney work product and as subject to the attorney-client privilege.

CONCLUSION

For the foregoing reasons, and as further discussed in Defendants' Motion for Summary Judgment and its attached Kim Declaration, the Court should grant summary judgment to the Justice Department on all claims, and deny Plaintiffs' motion for summary judgment.

Dated: October 20, 2017

Respectfully submitted,

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