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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 BRIEF REGARDING THE NINTH CIRCUIT'S DECISION IN *ACLU OF NORTHERN CALIFORNIA V. DEPARTMENT OF JUSTICE*, NO. 14-17339 (JAN. 18, 2018)** No Hearing Scheduled Hon. Jeffrey S. White Courtroom 5, 2nd Floor Oakland Courthouse

Defendant the U.S. Department of Justice ("Justice Department" or "DOJ) submits this supplemental brief regarding the significance of the Ninth Circuit's decision in *ACLU of Northern California v. Department of Justice ("ACLU")*, No. 14-17339, 2018 WL 455857 (9th Cir. Jan. 18, 2018), to this case pursuant to the Court's order of January 23, 2018, ECF No. 38.

ARGUMENT

This case is a simple one, as set forth in Defendant's motion for summary judgment and reply (ECF Nos. 25, 29). The Ninth Circuit's decision in *ACLU* makes it even simpler. *ACLU* reaffirms—in the form of binding precedent—that attorney-authored materials offering legal analysis and litigation strategy about recurring legal issues, like the memoranda at issue in this case, are protected from disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as attorney work product. *See* 2018 WL 455857 at *8–9. *ACLU* also explicitly rejects Plaintiffs' primary legal arguments, ruling that documents need not relate to a specific claim to be withheld as attorney work product, and ruling that the "working law" exception to FOIA withholding only applies to documents withheld under the deliberative process privilege, not attorney work product. *Id*. at *8–9, 11. Thus, *ACLU* confirms that the Justice Department properly withheld the memoranda at issue here, and that the Court should grant the Justice Department's motion for summary judgment.[1]

It should be noted, however, that this case and *ACLU* involve fundamentally different types of documents, even if they implicate some of the same legal doctrines. In this case, Plaintiffs seek to compel the release of two related attorney-authored memoranda (the "Cover Memo" and "FISA Memo") analyzing particular legal frameworks and providing strategic considerations to help DOJ attorneys assess during litigation whether evidence related to electronic surveillance is "derived from" that surveillance. *See* Def.'s Mot. for Summ. J. (ECF No. 25), Ex. 1, Declaration of Susan L. Kim ("Kim Decl.") ¶¶ 3–7.

The materials at issue in the Ninth Circuit's *ACLU* decision were not so straight-forward, instead consisting of two narrative sections of the USABook, "an internal DOJ resource manual

[1] *ACLU* does not address the attorney-client privilege, the second, independent basis on which the Justice Department withheld the memoranda.

for federal prosecutors." *Id.*[2] Unlike legal memoranda, "the USABook is a generic resource" for attorneys with portions addressing a variety of different topics, from "technical information" about electronic surveillance to "general resources for staff attorneys concerning legal developments." *Id.* at *10. Thus, the USABook presented the Ninth Circuit with the more complicated task of determining to what extent the disparate portions of the USABook had been prepared in anticipation of litigation. *See, e.g., id.* at *8. Such a challenge is not presented by the Cover Memo and FISA Memo, which consist entirely of legal analysis and strategy on a particular set of legal issues for use in litigation. *See* Kim Decl. ¶¶ 4–7, 10. Put simply, this is a much easier case than *ACLU*.

ACLU nonetheless usefully clarifies a number of issues. It reaffirms that the Government may withhold as attorney work product attorney-authored documents prepared in anticipation of litigation, *i.e.*, documents that "would not have been created in substantially similar form but for the prospect of . . . litigation." 2018 WL 455857 at *7–8 (quoting *In re Grand Jury Subpoena*, 357 F.3d 900, 907–08 (9th Cir. 2004)). This includes documents, like the Cover Memo and FISA Memo, "that reflect the legal theories of DOJ's attorneys" and are intended "to assist prosecutors faced with defending in court the government's position." *Id.* at *8; *see also id.* at *9 ("detailed legal analysis regarding frequent litigating positions of a law enforcement agency" is protected attorney work product).

ACLU also flatly rejects Plaintiffs' argument that only materials prepared in anticipation of a specific claim may be attorney work product: with regard to materials that "reflect the drafting attorney's mental impressions and analysis and were prepared in anticipation of recurring challenges in litigation . . . no specific claim is necessary . . . to sufficiently anticipate

[2] At the district court level, *ACLU* also had included documents similar to the Cover Memo and FISA Memo: "three [DOJ] Criminal Division legal memoranda analyzing the implications of recent case law regarding GPS location tracking." 2018 WL 455857 at *4. A magistrate judge of this Court determined that these three legal memoranda were entirely "attorney work product protected by Exemption 5, because they provide legal theories and strategies for use in criminal prosecutions." *Id.*; *see also ACLU of N. Cal. v. Dep't of Justice*, 70 F. Supp. 3d 1018, 1034 (N.D. Cal. 2014) ("The memoranda at issue here were created to assist AUSAs with recurring litigation issues . . . that have arisen in current litigation, and thus are protected as work product."). This ruling was not appealed, and *ACLU* nowhere suggests that it was incorrect. *See* 2018 WL 455857 at *4.

litigation and thus warrant attorney work-product protection." *Id*. at *10. "Like attorneys preparing for a specific case, agency attorneys anticipating potentially recurring legal issues must be free to 'work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.'" *Id.* at *8 (quoting *Hickman v. Taylor*, 329 U.S. 495, 510 (1947)).[3]

Additionally, *ACLU* eliminates Plaintiffs' argument that Government documents cannot be withheld as attorney work product if they constitute "working law." As the Ninth Circuit stated, the working law exception to FOIA withholding "has been applied only to documents that would otherwise be exempt under the deliberative process privilege . . . And the premises underlying the working law exception have no application in the attorney work-product context." 2018 WL 455857 at *11.[4] Thus, the Government "need not segregate and release agency working law from [documents] withheld in their entirety [as] attorney work product." *Id*. (quoting *Tax Analysts v. IRS*, 294 F.3d 71, 76 (D.C. Cir. 2002)).

ACLU also reaches a number of conclusions irrelevant to the Cover Memo and FISA Memo, but that nonetheless warrant brief discussion. First, the Ninth Circuit concluded that "routine DOJ communications to its many staff attorneys concerning new legal developments—essentially, continuing legal education messages" were not attorney work product: such "general sources for staff attorneys concerning legal developments," including "objective descriptions of cases" that "more closely resemble continuing legal education resources for DOJ attorneys," are not attorney work product because they are prepared to generally inform attorneys of the law, not in anticipation of litigation. 2018 WL 455857 at *9. This is in contrast to documents consisting of "particularized arguments, strategies, or tactics generated in anticipation of litigation, even if

[3] In reaching this conclusion, the Ninth Circuit relied heavily on the D.C. Circuit's decision in *National Association of Criminal Defense Lawyers v. Department of Justice* ("*NACDL*"), 844 F.3d 246, 251 (D.C. Cir. 2016), and emphasized that *ACLU* is "consistent with the law of the D.C. Circuit." 2018 WL 455857 at *7. As discussed in prior filings, under the standard of *NACDL* and related precedent, the Justice Department's withholding of the Cover Memo and FISA Memo was plainly appropriate. *See, e.g.*, Defs' Mot. for Summ. J. at 9–12.

[4] *ACLU* does not explicitly address the interaction of the attorney-client privilege and the working law exception. The opinion's statement that the exception has "only" been applied to documents withheld under the deliberative process privilege, 2018 WL 455857 at *11, however, suggests that the exception does not apply to documents withheld under the attorney-client privilege.

not for a particular claim," including materials "that contain legal analyses and specific arguments that DOJ attorneys can make in response to suppression motions," which may be withheld as attorney work product. *Id*.

The Cover Memo and FISA Memo clearly are litigation, not "legal education," materials. The FISA Memo does discuss particular cases and their holdings, but as part of its legal analysis and litigation strategies. *See* Kim Decl. ¶¶ 5, 10. The Ninth Circuit's admonition that "[m]aterial that simply lists relevant case law and recited case holdings" for attorneys' information should be segregated from attorney work product and released, 2018 WL 455857 at *9, *11, does not apply to caselaw that forms part of legal analysis itself. To the contrary, *ACLU* repeatedly affirms that legal analysis prepared for litigation is entirely protected as attorney work product, *id*. at *8–10, a conclusion that would be meaningless if the caselaw forming the backbone of such legal analysis had to segregated and released.[5]

Finally, "given the age" of the USABook material at issue in *ACLU*, the Ninth Circuit noted that this material may have found its way into court filings, such that the Justice Department had publicly disclosed the information and thereby waived attorney work product protection. 2018 WL 455857 at *12. No such waiver has occurred here. The Cover Memo and FISA Memo are far more recent: the relevant section of the USABook in *ACLU* was drafted in 2009 and revised in 2011, *id*., whereas the Cover Memo and FISA Memo were not finalized and disseminated until November 2016. Kim Decl. ¶¶ 4–5. More importantly, the information in the Cover Memo and FISA Memo has been kept confidential—accessed only by Government lawyers working on issues the Memos address. *Id*. ¶ 12. Of course, Justice Department

[5] *ACLU* bases much of its segregation analysis on *NACDL*. *See* 2018 WL 455857 at *11. *NACDL* more fully explains that "compilations of cases . . . with a seeming air of neutrality" are nonetheless attorney work product if they occur in the context of legal analysis intended for use in litigation because "disclosure of the publicly-available information a lawyer has decided to include in a litigation guide—such as citations of (or specific quotations from) particular judicial decisions and other legal sources—would tend to reveal the lawyer's thoughts about which authorities are important and for which purposes." 844 F.3d at 256. *ACLU* also followed *NACDL* to conclude documents consisting in part of attorney work product need not be segregated line-by-line, but only to the extent that documents contain "logically divisible sections" without any attorney work product. 2018 WL 455857 at *11 (quoting 844 F.3d at 257). The Cover Memo and FISA Memo do not contain any such logically divisible sections without attorney work product. *See* Kim Decl. ¶¶ 4–10, 13.

attorneys may have used the Memos to help them craft legal arguments in court—that is, after all, one of their primary purposes. But such use does not publicly disclose the content of the Cover Memo and the FISA Memo. As *Cottone v. Reno*, 193 F.3d 550 (D.C. Cir. 1999), the case on which *ACLU* relies, 2018 WL 455857 at *12, emphasizes, disclosure can waive FOIA exemption over "no more than what is publicly available," *i.e.*, there must be "specific information in the public domain that appears to duplicate that being withheld." 193 F.3d at 555–56 (citation omitted). Moreover, it is the FOIA requestor who bears the burden of showing public disclosure, *id*. at 555, and Plaintiffs have provided no evidence that any portion of the Cover Memo or FISA Memo have ever been disclosed through court filings or otherwise. Thus, there is no reason to conclude that any Government attorney has ever directly or indirectly publicly disclosed the specific content of the Memos in litigation or otherwise waived the Justice Department's ability to withhold them as attorney work product.

CONCLUSION

The Ninth Circuit's decision in *ACLU* reaffirms that FOIA protects from disclosure attorney-authored materials offering legal analysis and litigation strategy about recurring legal issues, like the Cover Memo and FISA Memo. For this reason and those discussed in Defendant's Motion for Summary Judgment, its attached Kim Declaration, and Defendant's Reply, the Court should grant summary judgment to the Justice Department on all claims, and deny Plaintiffs' Motion for Summary Judgment.

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Respectfully submitted,

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