

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

**DIOCESAN MIGRANT & REFUGEE
SERVICES, INC.,**

Plaintiff,

v.

**UNITED STATES IMMIGRATION
AND CUSTOMS ENFORCEMENT,**

Defendant.

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EP-19-CV-00236-FM

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On October 5, 2020 this court held a bench trial to resolve Plaintiff Diocesan Migrant & Refugee Services Inc.’s (“DMRS”) request for declaratory and injunctive relief pursuant to the Freedom of Information Act (“FOIA”) 5 U.S.C. § 552(a)(4)(B). After due consideration of the evidence and arguments presented, the court granted DMRS’s oral motion for judgment as a matter of law. In accordance with Federal Rule of Civil Procedure 52, the court enters the following findings of fact and conclusions of law.¹

I. PROCEDURAL BACKGROUND

On July 1, 2019, DMRS submitted a request for information to United States Immigration and Customs Enforcement (“ICE”) seeking records related to the Migrant Protection Protocols (“MPP”) pursuant to FOIA, 5 U.S.C. §§ 552 *et seq.*² ICE failed to produce

¹ See FED. R. CIV. P. 52(a)(1) (“In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately.”).

² “Plaintiff’s Original Complaint” (“Compl.”) 3, ECF No. 1, filed Aug. 22, 2019; “FOIA Request,” Ex. 1.

responsive documents within the twenty-day statutory deadline.³ DMRS filed suit to compel production on August 22, 2019.⁴

On December 16, 2019, ICE notified DMRS it identified ninety-two pages of potentially responsive records.⁵ Ten pages were provided in full, twenty-eight pages contained redacted information, fourteen pages were deemed non-responsive or duplicates, and the remaining forty pages required “consultation with other agencies or components” and ICE stated they would “be produced at a later date.”⁶

On May 29, 2020, ICE forwarded the pages requiring consultation to other agencies for review.⁷ ICE states an administrative error prevented timely referral of these documents.⁸ On June 25, 2020, ICE produced thirty-three of those forty pages as responsive.⁹ DMRS challenged redactions to the thirty-three pages produced.

On October 5, 2020 this court held a bench trial to resolve two issues: 1) whether ICE conducted a search reasonably calculated to uncover responsive records; and 2) whether redactions pursuant to 5 U.S.C. § 552(b)(5) (“exemption (b)(5)”) to the thirty-three pages produced June 25, 2020 were exempt from disclosure. The parties were present and represented by counsel. During ICE’s case-in-chief, it called Toni Fuentes (“Fuentes”), the former Deputy

³ 5 U.S.C. § 552(a)(6)(A)(i).

⁴ *See generally* Compl.

⁵ Joint Ex. J-6, 2.

⁶ *Id.*

⁷ Testimony of Toni Fuentes (“Fuentes Test.”), Oct. 5, 2020; Joint Ex. J-8, 5 ¶ 9.

⁸ Fuentes Test.

⁹ *Id.*; Joint Ex. J-9, 2.

FOIA Officer for ICE.¹⁰ Upon conclusion of ICE's case, DMRS moved for a judgment as a matter of law as to both issues. The court granted the motion.

II. FINDINGS OF FACT

The court now enters its findings of fact:

1. The United States government implemented a policy titled the Migrant Protection Protocols. Pursuant to the MPP, selected asylum seekers must remain in Mexico while they wait for U.S. immigration judges to hear their asylum cases.¹¹
2. The MPP was first implemented at the San Ysidro port of entry in January 2019. It was then implemented at the El Paso port of entry in May 2019 and at the Laredo and Brownsville later in 2019.¹²
3. DMRS is a non-profit organization based in El Paso, Texas that provides know-your-rights information to asylum seekers prior to their appearance in front of an immigration judge.¹³
4. DMRS submitted a FOIA request to ICE by email on July 1, 2019 seeking:
 1. Any policies, rules, interpretations, instructions, procedures, or guidance documents that were created, modified, or disseminated in June 2019 that are applicable to access to counsel pursuant to the Migrant Protection Protocols, specifically regarding the one hour prior to the scheduled hearing time in immigration court that affords respondents an opportunity to meet in-person with attorneys.
 2. Any policies, rules, interpretations, instruction, procedures, or guidance documents that were created, modified, or disseminated between December 1, 2018 and the date of processing of this request that are

¹⁰ Fuentes Test.

¹¹ Joint Ex. J-12, 1-2.

¹² Fuentes Test.

¹³ Compl. 2 ¶ 6.

applicable to access to counsel pursuant to the Migrant Protection Protocols, and that discuss, describe, reference or otherwise refer to:

- A. Know Your Rights presentations or other orientations or general information sessions provided to respondents subjected to the Migrant Protection Protocols, during the one hour prior to their scheduled hearing time in immigration court;
 - B. Individuals serving as Friend of the Court during removal proceedings for respondents pursuant to the Migrant Protection Protocols;
 - C. The location(s) in which respondents subjected to the Migrant Protection Protocols shall be seated or otherwise restricted to, during the one hour prior to the scheduled hearing time in immigration court that affords respondents an opportunity to meet in-person with attorneys;
 - D. The handling of respondents subjected to the Migrant Protection Protocols by EOIR security personnel, ICE ERO, or contractors associated therewith, during the one hour prior to the scheduled hearing time in immigration court that affords respondents an opportunity to meet in-person with attorneys; and
 - E. The provision of information to attorneys, accredited representatives, or others—and any restrictions or prohibitions thereof—regarding the EOIR docket of upcoming hearing dates for respondents subjected to the Migrant Protection Protocols, including but not limited to any redactions of respondents' A-numbers.
3. Any correspondence, memoranda, reports, notes, meeting notes, calendars, telephone logs, or other records—whether in proposed, draft, or final form, and whether paper or electronic (including e-mail or cables)—that discuss, describe, reference, or otherwise refer or apply to the subject areas listed in categories a and b above.¹⁴
5. ICE was on notice that DMRS's request sought all communications between ICE Enforcement and Removal Proceedings ("ERO") agents and their contractors at the field office level wherever the MPP was implemented.¹⁵

¹⁴ Joint Ex. J-1.

¹⁵ *Id.*; Fuentes Test.

6. ICE was on notice that DMRS's request sought correspondence to ICE ERO officers and their contractors who were responsible for movement and custody of respondents subjected to the MPP in El Paso and elsewhere.¹⁶
7. ICE was on notice that DMRS's request would include emails by or between ERO field offices where the MPP was implemented—including the ERO field offices of El Paso, San Diego, and San Antonio.¹⁷
8. ICE was on notice that DMRS's request sought emails of guidance between officers and contractors at the field office level regarding the MPP participants' access to counsel and where they will be seated, and how they were handled before their immigration court hearing.¹⁸
9. At all times relevant to this claim, Fuentes was the Deputy Officer of the ICE FOIA Office. In this role, she was the official immediately responsible for supervising ICE responses to requests for records under FOIA.¹⁹
10. Due to administrative error, ICE did not become aware of DMRS's FOIA request until December 2019. Fuentes assisted in locating DMRS's FOIA request, at which time Fuentes assigned the request to the litigation team of the ICE FOIA Office for expedited processing of the request.²⁰

¹⁶ Joint Ex. J-1; Fuentes Test.

¹⁷ Joint Ex. J-1; Fuentes Test.

¹⁸ Joint Ex. J-1; Fuentes Test.

¹⁹ Fuentes Test.

²⁰ *Id.*

11. The ICE FOIA Office has no centralized record keeping system. It did not issue any guidelines to program offices for how to either store records or conduct searches for records responsive to FOIA requests.²¹
12. No employee of the ICE FOIA Office conducted any centralized search.²²
13. Each program office within ICE has its own guidelines for record keeping, retention schedule, and records liaison officers.²³
14. The ICE FOIA Office staff identified the following program offices as reasonably likely to possess records responsive to DMRS's FOIA request: the ICE Office of Policy, ICE Office of the Principal Legal Advisor ("OPLA"), and ICE ERO.²⁴
15. The ICE FOIA Office instructed the points of contact ("POC") at the ICE Office of Policy, OPLA, and ERO to conduct a search for responsive records and return these records to the ICE FOIA Office for review.²⁵
16. POCs are individuals employed in each program office trained on what FOIA is and tasked with the responsibility of conducting searches for responsive documents within program offices. POCs may search themselves or identify other individuals who may possess responsive documents to search.²⁶

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Fuentes Test.

²⁶ *Id.*

17. Fuentes received the results of searches either conducted or overseen by POCs but did not conduct any search herself. Fuentes's knowledge of searches is secondary and based on search forms returned by POCs.²⁷
18. No uniform set of search terms was used across the various ICE program offices.
19. POCs did not describe to what extent, if any, they took into consideration the particular record keeping practices of their respective program offices in searching for responsive documents.
20. The Office of Policy identifies, develops, and communicates agency priorities and policies to ICE employees. It also oversees the regulatory process of the agency and leads strategic policy projects requiring interagency coordination.²⁸
21. The POC at the Office of Policy tasked a policy analyst with searching for records responsive to DMRS's FOIA request.²⁹
22. The policy analyst searched the ICE online policy manual, the policy library, the Office of Policy shared drive, his own computer, and his own Outlook email account for the terms: "MPP," "Know Your Rights," and "Migrant Protection Protocol."³⁰
23. OPLA provides legal services to all ICE programs and offices.³¹

²⁷ *Id.*

²⁸ Joint Ex. J-8, 13 ¶ 37.

²⁹ Fuentes Test.

³⁰ *Id.*

³¹ *Id.*; Joint Ex. J-8, 14 ¶ 40.

24. The POC at OPLA tasked the Chief Counsel of OPLA San Antonio and the Chief Counsel of OPLA El Paso to conduct searches.³²
25. The Chief Counsel of OPLA San Antonio searched within her Outlook email account for the terms: “counsel,” “attorney,” “public,” “access,” “media,” “Laredo,” and “MPP.” It is unclear from testimony whether this search was within a single folder titled “MPP,” or whether she reviewed the folder titled “MPP” in addition to the search.³³
26. Chief Counsel of OPLA El Paso searched within his Outlook email account and his desktop computer for the terms: “SOP” and “Know Your Rights.” It is unclear from testimony whether this search was within a single folder titled “MPP,” or whether he reviewed the folder titled “MPP” in addition to the search.³⁴
27. The POC in the Information Disclosure Unit (“IDU”) of ERO forwarded the FOIA request to four subdivisions within ERO: ERO Policy, ERO Field Operations (“FOPS”), ERO Removal Operations, and ERO Enforcement.³⁵
28. ERO Policy coordinates the development, review, clearance, and cancellation of ERO policy and policy-related documents.³⁶

³² Fuentes Test.

³³ See Fuentes Test.; Joint Ex. J-8, 14 ¶ 42.

³⁴ See Fuentes Test.; Joint Ex. J-8, 15 ¶ 43.

³⁵ Fuentes Test.

³⁶ *Id.*; Joint Ex. J-8, 10 ¶¶ 29–30.

29. Within ERO Policy, a policy analyst searched the ERO Policy Library, ERO Policy SharePoint site, and ERO Policy Manual for the terms “MPP,” “Know Your Rights,” and “Migrant Protection Protocol.”³⁷
30. FOPS provides guidance to and coordination among all ERO field offices throughout the United States.³⁸
31. Within FOPS, the Field Office Directors in San Antonio, El Paso, and San Diego were in charge of providing guidance to employees regarding implementation of the MPP.³⁹
32. FOPS determined the requested information did not fall in its area of responsibility and did not conduct any search for responsive documents.⁴⁰
33. The ERO Removal Division facilitates the processing of aliens through the immigration court system. It also coordinates the departure from the United States of aliens subject to a final order of removal issued by an immigration court or following administrative removability review.⁴¹
34. Within ERO Removal Operations, the Chief of Staff searched only his own Outlook email account for the term “MPP.”⁴²

³⁷ Fuentes Test.

³⁸ *Id.*; Joint Ex. J-8, 11 ¶ 31.

³⁹ Fuentes Test.

⁴⁰ *Id.*

⁴¹ Joint Ex. J-8, 12 ¶ 35.

⁴² Fuentes Test.

35. The ERO Enforcement Division manages the enforcement initiatives and components through which ERO identifies and arrests removable aliens.⁴³
36. The ERO Enforcement Deputy Assistant Director searched only his own Outlook email account for the terms: “MPP” and “Migrant Protection Protocol.”⁴⁴
37. In total, five individuals within ICE searched their email accounts or sub-folders of their email accounts using different search terms.⁴⁵
38. ICE did not produce any emails from any of the field offices where ICE implemented the MPP.⁴⁶
39. Each person who conducted a search completed a search form stating the date of the search, search terms used, time spent, documents located, and any recommendations for withholding. Each searching individual then signed and certified a search form.⁴⁷
40. Fuentes’s sole sources of information about search procedure are the search forms and the documents returned as responsive.⁴⁸
41. ICE identified a total of ninety-two pages of potentially responsive records. Ten pages were provided in full, twenty-eight pages contained redacted information, twenty-one pages were deemed non-responsive or duplicates, and the remaining

⁴³ Joint Ex. J-8, 11 ¶ 32.

⁴⁴ Fuentes Test.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

thirty-three pages required consultation with or referral to other agencies or components.⁴⁹

42. Responsive records require referral to other agencies when the record originates within ICE but contains information either produced by or of interest to other agencies.⁵⁰

43. Responsive records require consultation with other agencies when the record originates within that agency.⁵¹

44. ICE produced to DMRS the thirty-eight responsive pages not requiring consultation with or referral to other agencies.⁵²

45. Due to a second administrative error, ICE did not send the thirty-three pages it withheld for consultation to other agencies until May 29, 2020.⁵³

46. ICE sent twelve of the thirty-three withheld pages to the Department of Homeland Security Office of Privacy (“DHS PRIV”) for a consultation. ICE forwarded the remaining pages to DHS PRIV as a referral.⁵⁴

47. In addition, ICE sent twelve of the thirty-three withheld pages to Customs and Border Patrol (“CBP”) for a consultation.⁵⁵

⁴⁹ *Id.*

⁵⁰ Fuentes Test.

⁵¹ *Id.*

⁵² Fuentes Test.; Joint Ex. J-6, 2.

⁵³ Fuentes Test.; Joint Ex. J-8, 5 ¶ 9.

⁵⁴ Fuentes Test.; Joint Ex. J-8, 5 ¶ 9.

⁵⁵ Fuentes Test.; Joint Ex. J-8, 5 ¶ 9.

48. DHS PRIV and CBP each applied redactions and returned the records to ICE.⁵⁶
49. ICE produced versions of the thirty-three pages sent to DHS PRIV and CBP redacted pursuant to FOIA exemptions (b)(5), (b)(6), and (b)(7).⁵⁷
50. Each redacted portion of a produced document is marked with the statutory exemption under which ICE is withholding information.⁵⁸
51. ICE provided a letter to accompany the produced documents. Two paragraphs in the letter address the redactions made pursuant to exemption (b)(5).⁵⁹
52. These paragraphs define exemption (b)(5) and the three privileges most frequently invoked to support (b)(5) exemptions: the deliberative process privilege, the attorney-client privilege, and the attorney work-product privilege.⁶⁰
53. The letter states that the portions of the documents redacted under exemption (b)(5) qualify for protection under one or more of the three named privileges.⁶¹
54. ICE did not identify which privilege supports each redaction made under exemption (b)(5).⁶²
55. ICE did not provide DMRS with any factual basis for the application of exemption (b)(5) to any individual redaction.⁶³

⁵⁶ Fuentes Test.

⁵⁷ *See generally* Joint Ex. J-10.

⁵⁸ Fuentes Test.; *See generally* Joint Ex. J-10.

⁵⁹ Fuentes Test. *See* Joint Ex. 9, 2.

⁶⁰ Fuentes Test. *See* Joint Ex. 9, 2.

⁶¹ Fuentes Test. *See* Joint Ex. 9, 2.

⁶² Fuentes Test. *See* Joint Ex. 9, 2.

⁶³ Fuentes Test. *See* Joint Ex. 9, 2.

56. ICE did not provide a *Vaughn* index in support of the redactions.⁶⁴
57. Fuentes did not participate in redacting the thirty-three pages returned to DMRS. However, she conducted a line-by-line review of the redactions prior to signing an affidavit for use in this litigation and again before testifying.⁶⁵
58. At the time of the bench trial, Fuentes could not say which privilege the redactor relied upon to support any given application of exemption (b)(5).⁶⁶
59. At the time of the bench trial, Fuentes also could not identify the factual basis for individual exemptions.⁶⁷
60. At the time of the bench trial, Fuentes's confidence in the redactions came solely from context clues in the redacted documents and confidence in the process ICE applies to all FOIA requests.⁶⁸
61. Fuentes has no legal training other than as a paralegal. She has no education or training with which to form an opinion about the validity or appropriateness of any claim of privilege.⁶⁹

III. CONCLUSIONS OF LAW

"The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the government accountable

⁶⁴ See *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) (requiring the agency to itemize and index documents in such manner as to correlate justifications for refusal to disclose with actual portions of document claimed to be exempt).

⁶⁵ Fuentes Test.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

to the governed.”⁷⁰ As such, FOIA requires federal agencies to make their records promptly available to any person who makes a proper request for records.⁷¹ “[T]he threshold question in any FOIA suit is whether the requester can even *see* the documents the character of which determines whether they can be released.”⁷² Accordingly, the FOIA statute provides that, when the government withholds information from disclosure, the agency has the initial burden to prove *de novo* that the information is exempt from disclosure.⁷³

A. *Reasonably Calculated Search*

“Even when an agency does not deny a FOIA request outright, the requesting party may still be able to claim ‘improper’ withholding alleging the agency has responded in an inadequate manner.”⁷⁴ An agency’s search is adequate if it is “reasonably calculated to uncover all relevant documents.”⁷⁵ “The adequacy of an agency’s search is measured by a standard of reasonableness and is dependent upon the circumstances of the case.”⁷⁶ The focus is on the reasonableness of the search, not the result.⁷⁷ An agency must “make more than perfunctory searches and, indeed, [] follow through on obvious leads to discover requested documents.”⁷⁸

⁷⁰ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

⁷¹ 5 U.S.C. § 552(a)(3)(A).

⁷² *Cooper Cameron Corp. v. U.S. Dep’t of Labor, OSHA*, 280 F.3d 539, 543 (5th Cir. 2002).

⁷³ 5 U.S.C. § 552(a)(4)(B); *Batton v. Evers*, 598 F.3d 169, 175 (5th Cir. 2010).

⁷⁴ *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 151 n.12 (1991) (citations omitted). *See also Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) (recognizing the judicial authority conferred by the FOIA to devise remedies for agencies contravening the statute through improper withholdings).

⁷⁵ *Weisberg v. U.S. Dep’t. of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *Batton v. Evers*, 598 F.3d 169, 176 (5th Cir. 2010).

⁷⁶ *Id.*

⁷⁷ *Steinberg v. U.S. Dep’t of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994).

⁷⁸ *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999).

ICE failed to meet its burden to show it conducted a search reasonably calculated to uncover all responsive documents. Testimony about ICE's search was inconsistent and generalized. Fuentes described general ICE procedure for responding to FOIA requests without knowledge of the specifics. Fuentes did not conduct any search herself. Nor could she testify as to the precise search procedure. Fuentes conceded her knowledge was limited to responsive records and information on search forms POCs provided to her office.⁷⁹

ICE conducts no centralized agency-wide search for responsive records and has no central database where such a search could take place. In explanation, Fuentes stated the agency was young and "playing catch-up," seemingly acknowledging deficiencies in this system.⁸⁰ In an apparent contradiction, she then said the reason for the lack of uniformity was to honor the subject-matter expertise within individual program offices.⁸¹ Record keeping practices vary across program offices.⁸² Therefore, Fuentes reasoned, ICE conducts a decentralized search. Fuentes further testified the lack of centralization was inconsequential to the quality of the search as individuals know best how they keep their own records.⁸³

Due to this decentralized model, Fuentes could not testify as to the record keeping practices of the program offices or their subdivisions as POCs did not provide that information in their search forms.⁸⁴ Fuentes could not say with any level of certainty which program offices

⁷⁹ Fuentes Test.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

have centralized document management systems and which do not.⁸⁵ The returned search forms indicate a variety of different search terms were used across program offices without any apparent reason for the lack of uniformity. Fuentes could not say whether a given search was reasonable in the context of the recordkeeping practices of a program office as she was not familiar with those practices and the POCs provided no explanation.⁸⁶ ICE's deference to the subject-matter expertise of individuals within each program office is neither strategic nor efficient. It shows indifference to the purpose of the search. Without testimony about each program office's record keeping practices, ICE cannot show its search process was reasonably calculated to uncover all responsive documents.

The search was too narrow to be expected to uncover all responsive documents. Only five individuals in an agency of several thousand searched their email accounts for responsive correspondence.⁸⁷ These individuals used a variety of inconsistent search terms. The entirety of the search within the ERO Enforcement Division records was for a single search term within the Deputy Assistant Director's email account: the acronym "MPP."⁸⁸ Fuentes could not say with any level of assurance that this search uncovered responsive documents containing the spelled-out acronym.⁸⁹ Some individuals may have searched only within specific folders.⁹⁰ Some may

⁸⁵ Fuentes Test.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See Fuentes Test.; Joint Ex. J-8, 14 ¶ 42–15 ¶ 43.

have excluded deleted, archived, or sent emails by searching only within their inboxes.⁹¹

Fuentes could not be sure and could only interpret the returned search forms.⁹²

ICE failed to show it conducted a reasonable search within ERO FOPS. DMRS's request sought communications about guidance and instruction to employees regarding day-to-day movement of MPP participants wherever the MPP was established.⁹³ FOPS is responsible for providing guidance and coordination to the twenty-four ERO field offices.⁹⁴ ERO field offices are responsible for the custody of all MPP participants from the port of entry to the immigration court.⁹⁵ A publicly available memorandum by the Acting Executive Associate Director of ICE instructs field office directors to assign a lead POC for MPP issues within their offices.⁹⁶ The memorandum tasks these POCs with issuing local operational guidance applicable to the MPP.⁹⁷ These facts conclusively indicate FOPS is reasonably likely to have records responsive to DMRS's FOIA request. They also indicate ICE was aware that field offices possess records responsive to FOIA requests for information related to the MPP. Inexplicably, FOPS determined DMRS's FOIA request did not fall within its area of responsibility and declined to conduct any search.⁹⁸ It is troubling FOPS disregarded the plain language of a publicly available memo in determining it had no records responsive to DMRS's FOIA request. ICE did not meet its burden to show the reasonableness of its failure to conduct such a search.

⁹¹ *See* Fuentes Test.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Fuentes Test.; Joint Ex. J-8, 11 ¶ 31.

⁹⁵ *Id.*

⁹⁶ *See* Joint Ex. J-12, 2.

⁹⁸ Fuentes Test.

B. *Redactions Pursuant to Exemption (B)(5)*

Where it is undisputed that an agency possesses documents, but the applicability of a given exemption is in dispute, an agency is required to provide more than broad categorical statements in defense of an exemption.⁹⁹ The agency must provide a detailed justification for exemption claims in such manner as to correlate justifications for refusal to disclose with actual portions of records claimed to be exempt.¹⁰⁰ This procedure makes clear the factual nature of the information sought and whether it falls within the statutory exemption asserted.¹⁰¹ This approach is preferred to in camera review.¹⁰²

Under FOIA exemption (b)(5), an agency can withhold information covered by a recognized evidentiary or discovery privilege.¹⁰³ Exemption (b)(5) protects from disclosure:

“inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.”¹⁰⁴

Thus, “[e]xemption 5 incorporates the privileges which the government enjoys under the relevant statutory and *case law* in the pretrial discovery context.”¹⁰⁵ Three common law privileges

⁹⁹ *Batton v. Evers*, 598 F.3d 169, 175 (5th Cir. 2010) (citing *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)).

¹⁰⁰ *Id.*

¹⁰¹ *Stephenson v. IRS*, 629 F.2d 1140, 1144 (5th Cir. 1980).

¹⁰² *See id.* (discussing the methods for evaluating produced documents and the “disadvantages of in camera review”).

¹⁰³ *Judicial Watch, Inc. v. U.S. Dep’t of Def.*, 847 F.3d 735, 738–39 (D.C. Cir. 2017).

¹⁰⁴ 5 U.S.C. § 552(b)(5).

¹⁰⁵ *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984) (citations omitted) (emphasis in original).

encompassed in exemption (b)(5) include: (1) the attorney work-product privilege; (2) the attorney-client privilege; and (3) the governmental deliberative process privilege.¹⁰⁶

ICE failed to meet its burden to support exempting any information redacted pursuant to exemption (b)(5) from disclosure. Simply put, no evidence supplied the factual or legal basis for any application of exemption (b)(5) as no Vaughn index was generated. The letter accompanying the thirty-three pages of responsive documents at issue makes only broad categorical statements. It defines the exemption and the three privileges invoked without any attempt to correlate refusal to disclose with actual portions of document claimed to be exempt. This disconnect is fatal.

Witness testimony shed no more light on the factual basis for the exemptions. Fuentes admitted she was not involved in redacting the documents at issue and therefore had no personal knowledge to speak of. Nor did she seem to have secondary knowledge on which the court could rely due to her role as agency representative. Fuentes stated she reviewed the exemptions claimed and agreed with them.¹⁰⁷ However, when asked directly about why entire pages had been subject to exemption (b)(5), she stated she did not know what the pages contained.¹⁰⁸ When asked about a specific redacted page, she could not say whether it was the end of the preceding document, an attachment, or part of a subsequent document.¹⁰⁹

Fuentes's lack of knowledge regarding the substance of the redactions often led her to speculate to fill in the gaps. When asked whether redacted emails were sent to agents executing

¹⁰⁶ *Tax Analysts v. IRS.*, 294 F.3d 71, 76 (D.C. Cir. 2002).

¹⁰⁷ Fuentes Test.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

the MPP on-the-ground, she responded, “they do not appear that way as redacted.”¹¹⁰ In reference to another redacted email, Fuentes stated that, as two attorneys were included among other undisclosed recipients, she believed the email to contain legal advice.¹¹¹ She later admitted she did not know who else received the email and was aware that just because an attorney is included in an email chain does mean the emails are privileged.¹¹²

Fuentes was not only uncertain of the content of responsive records, she was also uncertain and inconsistent in providing underlying reasons for redactions. She alternated between identifying the specific privilege applied and admitting she could not state with any confidence which privilege supported each redaction.¹¹³ She openly speculated about which privilege may have applied based on context clues in the released portions. More than once, she equivocated, stating perhaps the redactor had relied on one of the three privileges cited or perhaps on all three.¹¹⁴ Even had Fuentes confidently testified as to the privileges relied upon by the redactors, she is not a lawyer.¹¹⁵ She therefore does not have the education or training to provide an explanation as to *why* a particular privilege was invoked.

While Fuentes was knowledgeable about the procedure ICE uses to apply exemptions generally, she was unable to bridge the gap between that procedure and the factual basis for exemptions applied in this case. Both the fundamental principle of public access to government documents and the general principle of full agency disclosure require agency representatives to

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *See Fuentes Test.*

¹¹⁴ *See id.*


¹¹⁵ *Id.*

have more than mere confidence in the procedure followed. They require clear statements of both the factual nature of the information withheld and whether it falls within a specific statutory exemption.¹¹⁶ Without either, the explanation is legally insufficient to meet the agency's burden. To permit the government to withhold documents despite its failure to adequately explain why, risks creating a secret body of law.¹¹⁷ Here, ICE asks the court to take its word that it properly withheld and redacted records. To do so would undermine both the spirit and the letter of the law. Therefore, ICE must produce all contested records withheld or redacted pursuant to exemption (b)(5) to DMRS.

IV. CONCLUSION

ICE failed to meet its initial burden as to both issues before the court. First, it did not demonstrate it conducted a reasonable search for documents responsive to DMRS's FOIA request. Second, ICE failed to meet its burden to prove the information at issue is exempt from disclosure.

SIGNED AND ENTERED this 19 day of October, 2020.


FRANK MONTALVO
UNITED STATES DISTRICT JUDGE

¹¹⁶ See *Batton v. Evers*, 598 F.3d 169, 176 (5th Cir. 2010) (“The central issue . . . is whether the [evidence] submitted by [the agency] . . . sufficiently identif[ies] the documents at issue, including the relevant information contained in each document, and explain[s] why the asserted exemptions justify withholding.”)

¹¹⁷ *Tax Analysts v. IRS*, 117 F.3d 607, 617–18 (D.C. Cir. 1997) (citing *Coastal States Gas Corp.*, 617 F.2d at 866).