UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION FOUNDATION Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, including its component the Federal Bureau of Investigation Defendant.	No. 12-cv-7412 (WHP) ECF Case

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Catherine Crump
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: 212.549.2500
Facsimile: 212.549.2651
Email: ccrump@aclu.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

I. DOJ Has Not Demonstrated That The Location-Tracking Memoranda Are Exempt From Disclosure Under Exemption 5. 2

A. The Work-Product Doctrine Does Not Protect The Location-Tracking Memoranda. 2

B. The Location-Tracking Memoranda Serve As DOJ's Working Law. 4

II. DOJ Has Not Demonstrated That The Withheld Information Is Exempt From Disclosure Under Exemption 7(E). 7

III. *In Camera* Review Is Appropriate Under These Circumstances. 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

A. Michael's Piano v. F.T.C., 18 F.3d 138 (2d Cir. 1994) 2, 3

Arthur Andersen & Co. v. I.R.S., 679 F.2d 254 (D.C. Cir. 1982).....7

Brennan Ctr. for Justice at N.Y.U. Sch. of Law v. Dep't of Justice, 697 F.3d 184 (2d Cir. 2012).....4, 5

Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854 (1980) 2, 4

Delaney, Migdail & Young, Chartered v. I.R.S., 826 F.2d 124 (D.C. Cir. 1987).....3

Dent v. Exec. Office for U.S. Attorneys, --- F. Supp. 2d ---, Civil Action No. 12-0420 (EGS), 2013 WL 782625 (D.D.C. Mar. 2, 2013) 8

Elec. Frontier Found. v. Dep't of Defense, No. C-09 05640 SI, 2012 WL 4364532 (N.D. Cal. Sept. 24, 2012).....8

Feshbach v. S.E.C., 5 F. Supp. 2d 774 (N.D. Cal. 1997).....8

Founding Church of Scientology v. N.S.A., 610 F.2d 824 (D.C. Cir. 1979).....4

In re Sealed Case, 146 F.3d 881 (D.C. Cir. 1998).....3, 4

Jordan v. Dep't of Justice, 591 F.2d 753 (D.C. Cir. 1978).....5

Milner v. Dep't of Navy, 131 S. Ct. 1259 (2011).....9

N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132 (1975).....4, 6

Natural Res. Def. Council, Inc. v. E.P.A., 581 F. Supp. 2d 491 (S.D.N.Y. 2008).....3

New York Times Co. v. Dep't of Justice, 872 F. Supp. 2d 309 (S.D.N.Y. 2012).....8, 9

People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284 (D.D.C. 2007).....9

PHE, Inc. v. Dep't of Justice, 983 F.2d 248 (D.C. Cir. 1993).....8, 9

SafeCard Servs., Inc. v. S.E.C., 926 F.2d 1197 (D.C. Cir. 1991) 3, 4

Schiller v. N.L.R.B., 964 F.2d 1205 (D.C. Cir.1992).....3

Senate of P.R. v. Dep't of Justice, Civ. A. No. 84–1829 (CRR), 1993 WL 364696 (D.D.C. Aug. 24, 1993).....4

United States v. Adlman, 134 F.3d 1194 (2d Cir. 1998).....2

Statutes

5 U.S.C. § 552(a)(4)(B) 4

5 U.S.C. § 552(b)(5) 1

5 U.S.C. § 552(b)(7)(E) 1

INTRODUCTION

Although DOJ has now submitted four declarations in support of its motion for summary judgment, it has nevertheless failed to justify its decision to withhold the contents of the location-tracking memoranda pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5), or Exemption 7(E), 5 U.S.C. § 552(b)(7)(E).[1] With respect to Exemption 5, DOJ has not provided adequate information to support its conclusory assertion that disclosure of the location-tracking memoranda would severely compromise the government's litigating position in specific prosecutions, nor has DOJ carried its burden of demonstrating that the location-tracking memoranda are not the agency's working law with respect to the installation and use of GPS devices and other location-tracking technologies. With regard to Exemption 7(E), DOJ has not provided sufficiently specific information to support its assertion that the location-tracking memoranda contain non-public investigatory techniques, procedures, and guidelines whose disclosure could reasonably lead to circumvention of the law. DOJ accuses the ACLU of speculating as to the contents of the location-tracking memoranda and their function in the administrative process, but the ACLU has predicated its "speculation" on the public comments of the FBI's General Counsel, which contradict DOJ's assertions in this litigation. In any event, speculation is all that is available where, as here, the agency refuses to provide any concrete information regarding the withheld documents. This Court cannot adjudicate on such a bare—and contradictory—factual record. It should therefore order DOJ to submit the location-tracking memoranda for *in camera* review.

ARGUMENT

[1] Capitalized terms not defined in this document have the meaning provided in the ACLU's initial memorandum opposing DOJ's motion for summary judgment and supporting the ACLU's cross-motion for summary judgment, Docket No. 15.

I. DOJ Has Not Demonstrated That The Location-Tracking Memoranda Are Exempt From Disclosure Under Exemption 5.

A. The Work-Product Doctrine Does Not Protect The Location-Tracking Memoranda.

As the ACLU explained in its first memorandum of law, the work-product doctrine does not protect agency-wide DOJ guidance regarding the government's Fourth Amendment obligations. Pl.'s First Mem. Opp'n Summ. J. at 8–9. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (1980), is directly on point. There, the government withheld a number of memoranda prepared by Department of Energy attorneys in response to questions raised by agency auditors investigating firms for compliance with petroleum pricing and allocation regulations, on the ground that the documents qualified as attorney work-product. *Id.* at 858–60. Although nearly all of the documents discussed issues likely to arise in ongoing government litigation, the court refused to extend work-product protection to memoranda containing "neutral, objective analyses of agency regulations" or resembling "question and answer guidelines which might be found in an agency manual," holding that the government could invoke the work-product doctrine only where it had demonstrated that the documents were prepared "with a specific claim supported by concrete facts which would likely lead to litigation in mind." *Id.* at 863, 865.

DOJ asserts that *Coastal States* is inapposite, and that the Second Circuit's decisions in *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998), and *A. Michael's Piano v. Federal Trade Commission*, 18 F.3d 138 (2d Cir. 1994), govern the resolution of this dispute. Those cases, however, stand only for the proposition that the work-product doctrine protects documents prepared with an eye towards a specific claim, even if the claim itself or the actions giving rise to the claim have yet to occur. *See Adlman*, 134 F.3d at 1202 (extending work-product protection to

documents prepared in anticipation of tax litigation likely to arise from a proposed merger); *A. Michael's Piano*, 18 F.3d at 146–47 (holding that the work-product doctrine protected investigative reports and recommendations submitted before any final decision was made as to the course of an investigation). Neither decision addressed whether general law enforcement guidance documents, such as the location-tracking memoranda, qualify as attorney work-product. Given the absence of binding Second Circuit authority, it is entirely appropriate for this Court to consider the established practice of other Circuits. *See, e.g.*, *Natural Res. Def. Council, Inc. v. E.P.A.*, 581 F. Supp. 2d 491, 497 n.7 (S.D.N.Y. 2008) ("[T]he Second Circuit has evidenced a willingness to look to the law of other circuits—particularly the D.C. Circuit—in the area of FOIA, even when it has not specifically adopted other circuits' law.") (collecting cases).

DOJ alternatively contends that *Coastal States* was not intended to "create a generally applicable 'specific claim' requirement." Def.'s Second Mem. Supp. Summ. J. at 5. To be sure, the D.C. Circuit has not imposed a specific claim requirement on documents prepared by attorneys for the purpose of "protecting their agency clients from the possibility of future litigation." *In re Sealed Case*, 146 F.3d 881, 885 (D.C. Cir. 1998); *see Delaney, Migdail & Young, Chartered v. I.R.S.*, 826 F.2d 124, 126–27 (D.C. Cir. 1987); *Schiller v. N.L.R.B.*, 964 F.2d 1205, 1208 (D.C. Cir.1992), *abrogated on other grounds by Milner v. Dep't of Navy*, 131 S. Ct. 1259 (2011). But, because "the prospect of future litigation touches virtually any object of a prosecutor's attention," *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1203 (D.C. Cir. 1991) (citation and internal quotation marks omitted), the court has consistently maintained that general guidance documents prepared by law enforcement officials do not enjoy work-product

protection. *See In re Sealed Case*, 146 F.3d 881, 885 (D.C. Cir. 1998); *Safecard*, 926 F.2d at 1202–03; *Coastal States*, 617 F.2d at 864–66.[2]

Although DOJ insists that disclosure of the location-tracking memoranda would reveal key elements of its litigation strategy, the declarations submitted in support of its motion for summary judgment state only that the memoranda "describe the general facts common to these types of cases, and address possible legal arguments that may have already arisen in such cases or could arise in the future." Second Declaration of John E. Cunningham III ("Second Cunningham Decl.") ¶ 6. These vague and speculative assertions "are insufficient, as a matter of law, to bring the [memoranda] within the attorney work product exemption." *Senate of P.R. v. Dep't of Justice*, Civ. A. No. 84–1829 (CRR), 1993 WL 364696, at *6 (D.D.C. Aug. 24, 1993); *see also Coastal States*, 617 F.2d at 866. The Court should therefore review the documents *in camera* to determine whether they qualify for work-product protection. *See* 5 U.S.C. § 552(a)(4)(B); *Founding Church of Scientology v. N.S.A.*, 610 F.2d 824, 830 (D.C. Cir. 1979).

B. The Location-Tracking Memoranda Serve As DOJ's Working Law.

Even if the location-tracking memoranda otherwise qualified as attorney work-product, they still would not merit protection under Exemption 5, because they constitute agency working law. *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 152–53 (1975); *see also Brennan Ctr. for Justice at N.Y.U. Sch. of Law v. Dep't of Justice*, 697 F.3d 184, 195 (2d Cir. 2012). Nonbinding guidance documents may still constitute agency working law if they contain "positive rules that create definite standards" for agency personnel to follow, *Jordan v. Dep't of Justice*, 591 F.2d

[2] DOJ identifies only one case in which a court extended work-product protection to a law enforcement document prepared outside the context of a particular investigation or prosecution. *See* Def.'s Second Mem. Supp. Summ. J. at 6 (citing *Soghoian v. Dep't of Justice*, 885 F. Supp. 2d 62, 72 (D.D.C. 2012)). *Soghoian*, however, was litigated by the plaintiff *pro se*, and the court's decision failed to address *In re Sealed Case*, *SafeCard*, and *Coastal States*.

753, 774 (D.C. Cir. 1978) (applying the working law exception to prosecutorial guidelines issued by the U.S. Attorney's Office), or represent the agency's "final *legal* position" concerning its official responsibilities or constraints, *Brennan Ctr.*, 697 F.3d at 201 (emphasis in original) (quoting *Tax Analysts v. I.R.S.*, 294 F.3d 71, 81 (D.C. Cir. 2002)).

DOJ now avers that the location-tracking memoranda "do not contain reasoning or conclusions that have been adopted as official DOJ policy or opinions and do not provide any official interpretation of DOJ's Fourth Amendment obligations." Second Cunningham Decl. ¶ 14. But, as the ACLU pointed out in its first memorandum of law, several factors support the conclusion that the location-tracking memoranda do in fact articulate DOJ's effective law and policy regarding the use of GPS devices and other location-tracking technologies. First, a previous declaration authored by Mr. Cunningham states that the memoranda provide "guidelines for law enforcement investigations and prosecutions" and discuss "[t]he specific techniques available to prosecutors, the circumstances in which such techniques might be employed, and the legal considerations related to such techniques." First Declaration of John E. Cunningham III ("First Cunningham Decl.") ¶ 24. Second, FBI General Counsel Andrew Weissmann publicly stated that the memoranda set forth DOJ's position on "when can [law enforcement officials] use GPS going forward" and "what [*Jones*] means for other types of techniques beyond GPS." *Id.* ¶ 18. Finally, in *United States v. Oladosu*, Cr. No. 10–056-01S, 2012 WL 3642851 (D.R.I. 2012), the government filed a brief, identical in parts to the February 27, 2012 memorandum, in which it abandoned a previously raised argument regarding the reasonableness of warrantless GPS tracking "[f]ollowing guidance from the Department of Justice Criminal Appellate Section." *See* Government's Third Supplemental Memorandum in Support of its Objection to Defendant's Motion to Suppress at 2 n.1, ECF No. 71. Taken

together, these statements cast considerable doubt on DOJ's assertion that the location-tracking memoranda are purely advisory in nature.[3]

Relying on the Supreme Court's decision in *Sears*, 421 U.S. at 159–60, DOJ alternatively contends that the location-tracking memoranda do not constitute working law, because they discuss issues that "may arise" in litigation. Def.'s Second Mem. Supp. Summ. J. at 8. In *Sears*, the Supreme Court held that a memorandum prepared by the N.L.R.B. General Counsel's office recommending the filing of a complaint before the Board did not constitute agency working law, even though the memorandum "explain[ed] a decision already reached by the General Counsel which ha[d] real operative effect." *Sears*, 421 U.S. at 160. The Court made clear, however, that it reached this conclusion "*only* because the decisionmaker—the General Counsel—*must* become a litigating party to the case with respect to which he has made his decision." *Id.* (emphases added). As the Court explained, the public's interest in disclosure of the memorandum was in that case "substantially reduced by the fact . . . that the basis for the General Counsel's legal decision will come out in the course of litigation before the Board." *Id.*

Here, by contrast, it is far from clear that DOJ's guidance regarding the installation and use of location-tracking technologies will ever be revealed in litigation. DOJ's argument on this point assumes that the location-tracking memoranda address only the legal arguments prosecutors might make in response to post-*Jones* Fourth Amendment challenges. As discussed above, however, Mr. Weissmann's public statements and the assertions of DOJ's own declarants strongly suggest that the documents also contain guidance regarding the installation and use of

[3] DOJ does not dispute that the government's brief in *Oladosu* referred to the location-tracking memoranda, but argues that it used the word "following" to mean "after," rather than "adhering to." Def.'s Second Mem. Supp. Summ. J. at 12. Even assuming that DOJ's unsupported interpretation is correct, the government's explicit reference to the location-tracking memoranda in explaining a significant change to its litigating position demonstrates the considerable authority possessed by the documents.

various location-tracking technologies, including GPS devices. Much of that guidance will likely prove irrelevant to a defendant's Fourth Amendment challenge. For example, because defendants will challenge only the evidence actually presented against them in court, guidance counseling prosecutors not to rely on evidence obtained through certain investigative techniques—or concluding that the warrantless use of such techniques likely violates the Fourth Amendment—will not come to light through litigation. DOJ has therefore failed to carry its burden of demonstrating that the location-tracking memoranda do not serve as the agency's working law. *See, e.g.*, *Arthur Andersen & Co. v. I.R.S.*, 679 F.2d 254, 258 (D.C. Cir. 1982).

II. DOJ Has Not Demonstrated That The Withheld Information Is Exempt From Disclosure Under Exemption 7(E).

The ACLU argued in its first memorandum of law that DOJ's vague and conclusory declarations do not demonstrate that its extensive redactions of the location-tracking memoranda are justified under Exemption 7(E). DOJ has failed to address those concerns. First, in response to the ACLU's contention that much of the information contained in the location-tracking memoranda is already public knowledge, DOJ maintains that the documents "discuss such non-public details as where, when, how, and under what circumstances GPS tracking devices and other investigative techniques are used" and "disclose certain entities with whom federal investigators may coordinate in employing certain investigative techniques." Second Cunningham Decl. ¶ 8. But, as the ACLU previously explained, many of these details are already known to the public. *See* Pl.'s First Mem. Opp'n Summ. J. at 14–15. Moreover, Mr. Cunningham's averment that the location-tracking memoranda contain non-public investigative techniques and procedures is too general and conclusory to support the massive amount of information withheld pursuant to Exemption 7(E). *See, e.g., Dent v. Exec. Office for U.S. Attorneys*, --- F. Supp. 2d ---, Civil Action No. 12-0420 (EGS), 2013 WL 782625, at *12 (D.D.C.

Mar. 2, 2013); *Elec. Frontier Found. v. Dep't of Defense*, No. C-09 05640 SI, 2012 WL 4364532, at *6 (N.D. Cal. Sept. 24, 2012). Exemption 7(E) was meant to be used like a scalpel; DOJ is using it like a sledgehammer.

Relying on a newly produced declaration, DOJ also argues that disclosure of the location-tracking memoranda's contents could reasonably be expected to risk circumvention of the law because would-be wrongdoers could use information about when certain investigative techniques are *not* employed "to conform their activities to times, places, and situations where they know that unlawful conduct will not be detected." Second Cunningham Decl. ¶ 9. Although this statement provides slightly more information than Mr. Cunningham's previous declaration—which merely parroted the statutory language, *see* First Cunningham Decl. ¶¶ 24, 25—it is still too vague and conclusory to support DOJ's extensive redactions. *See, e.g.*, *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 252–53 (D.C. Cir. 1993); *Feshbach v. S.E.C.*, 5 F. Supp. 2d 774, 787 (N.D. Cal. 1997). Had DOJ "submitted a more specific affidavit containing more precise descriptions of the nature of the redacted material and providing reasons why releasing each withheld section would create a risk of circumvention of the law, or had [DOJ] clearly indicated why disclosable material could not be segregated from exempt material, it might have established a legitimate basis for its decision." *PHE*, 983 F.2d at 252. As things stand, the agency has failed to demonstrate that disclosure of the redacted material could reasonably be expected to create a circumvention risk.

Finally, DOJ maintains that there is no textual basis for a working law exception to Exemption 7(E). Def.'s Second Mem. Supp. Summ. J. at 14–15 (citing *New York Times Co. v. Dep't of Justice*, 872 F. Supp. 2d 309, 317 (S.D.N.Y. 2012)). In *New York Times Co. v. Department of Justice*, this Court held that the working law doctrine does not compel the

disclosure of classified national security information protected by Exemptions 1 or 3, noting that the doctrine "arose in the different context of Exemption 5 . . . and the now-abrogated exemption known as High 2, which shielded predominantly internal materials whose disclosure would significantly ris[k] circumvention of agency regulations or statutes." 872 F. Supp. 2d 309, 317 (S.D.N.Y. 2012) (alteration in original) (citation and internal quotation marks omitted). Exemption 7(E) provides for law enforcement records precisely the protections previously afforded by the High 2 Exemption to all predominantly internal materials. *See Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1268 (2011). It therefore stands to reason that the working law doctrine previously applied to materials withheld pursuant to Exemption High 2 also applies to materials withheld under Exemption 7(E). *See PHE*, 983 F.2d at 251-52 (citing *Hawkes v. I.R.S.*, 507 F.2d 481 (6th Cir. 1974)). As discussed above, DOJ has failed to demonstrate that the location-tracking memoranda do not qualify as agency working law.[4]

III. *In Camera* Review Is Appropriate Under These Circumstances.

In camera review is appropriate where "agency affidavits are insufficiently detailed to permit meaningful review of exemption claims; the number of records involved is relatively small; a discrepancy exists between an agency's affidavit and other information that the agency has publicly disclosed; and when the dispute turns on the contents of the documents, and not the parties' interpretations of the documents." *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 307 (D.D.C. 2007) (internal punctuation and quotation marks omitted); *see also, e.g.*, *New York Times*, 872 F. Supp. 2d at 315 (stating that "*in camera* inspection is

[4] DOJ points out that *PHE* did not order the disclosure of documents otherwise protected under Exemption 7(E). Def.'s Second Mem. Supp. Summ. J. at 15. But the court did hold that DOJ failed to demonstrate the inapplicability of the working law exception to documents, including a digest of search and seizure case law, withheld pursuant to Exemption 7(E). *PHE*, 983 F.2d at 252. Those are precisely the circumstances at issue here.

particularly appropriate where, as here, the number of documents is relatively small" (citation and internal quotation marks omitted)). Every one of those factors applies here. As described above, DOJ's supporting declarations are vague and conclusory. The case involves only two documents, totaling 111 pages. Mr. Cunningham's two declarations in this case are in tension with both each other and public statements made by FBI General Counsel Andrew Weissmann. And the factual dispute here largely turns on whether the location-tracking memoranda provide general instructions to prosecutors and investigators regarding the government's Fourth Amendment obligations. In short, *in camera* review is both appropriate, given the woefully deficient factual record, and eminently feasible.

CONCLUSION

For these reasons, the Court should order DOJ to submit the location-tracking memoranda for *in camera* review.

DATED: June 19, 2013

Respectfully submitted,

/s/ Catherine Crump
Catherine Crump
Attorney Bar Code: cc4067
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: 212.549.2500
Facsimile: 212.549.2651
Email: ccrump@aclu.org