IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS Plaintiff, v. EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS and UNITED STATES DEPARTMENT OF JUSTICE Defendants.	CIVIL ACTION NO. 14-cv-00269-CKK **NO HEARING DATE SET** **ORAL ARGUMENT REQUESTED**

NACDL'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

NACDL asserted arguments in its cross-motion for summary judgment that were not raised in DOJ's motion—*i.e.*, purely affirmative reasons for granting summary judgment in NACDL's favor.[1] NACDL explained that the Blue Book must be disclosed under section 552(a)(2) as a statement of adopted agency policy, as reflected in DOJ's description of the Blue Book to Congress and the fact DOJ already publicly disclosed similar material. And, NACDL argued that the Blue Book constitutes "secret" or "working" law, which cannot be withheld as work product because the Blue Book does not qualify for such protection.

In further support of its affirmative arguments for summary judgment, NACDL filed a notice of supplemental authority regarding the *Pedersen* case in the District of Oregon. (Dkt. 19.) That court reviewed the Blue Book *in camera* before a hearing on egregious discovery violations by the Government. *Pedersen* rejected the Government's work product claims and ordered production of the Blue Book.

NACDL hereby replies in support of the affirmative grounds for summary judgment raised in its cross-motion, and responds to DOJ's cursory dismissal of the *Pedersen* case.

I. THE *PEDERSEN* COURT'S FINDINGS ARE PERSUASIVE AUTHORITY.

In *United States v. Pedersen*, the court found "systemic" *Brady* and other discovery violations by the prosecution team, including the United States Attorney's Office for Oregon, which it said were "likely to recur absent corrective action." 2014 U.S. Dist. LEXIS 106227 at *5 (D. Or. Aug. 6, 2014) (Dkt. 19-1) (further noting that "the testimony adduced during the evidentiary hearing and the arguments made at that hearing"—including by the U.S. Attorney for Oregon, herself—"suggest to the court that the USAO does not understand how this case was

[1] Separately, NACDL opposed DOJ's motion for summary judgment, explaining why the Blue Book is not work product and is not exempt from disclosure under sections 552(B)(5) or (7)(E). *See* Plfs' Mem. at 17-39. Those arguments are not repeated in the instant reply.

mishandled. Without such an understanding, the court does not believe these issues should remain unaddressed."). The court also found it "disturbing" that "the government took a *laissez faire* approach to its obligations to provide discovery." *Id.* at *67.

In preparation for the hearing on the Government's violations, the defendant sought the Blue Book. *Id*. at *27 n. 11. The Government opposed, arguing that the Blue Book was not DOJ policy, was not material to the issue at hand, and was protected by the work product privilege.[2] The Government did *not* assert in *Pedersen*—as it has in this case—that production of the Blue Book would threaten national security, jeopardize witness protection, or risk circumvention of the law by criminal defendants or their counsel. Nor did the Government assert that the Blue Book was created to delay or limit discovery disclosures, or to defeat defendants' discovery challenges. The court reviewed the Blue Book *in camera* and held that it was not work product created in anticipation of litigation in the manner the privilege requires, and thus ordered disclosure. *See* Order at 5 (Dkt. 19-3) (attached for convenience hereto as Exhibit B).[3]

DOJ largely ignores the *Pedersen* case in its opposition, asserting in a footnote that the court's work product analysis was "incorrect" because it "fails to even mention *Delaney*, *Schiller*, or *In re Sealed Case*," and because it "employed the same flawed 'specific claim' rationale that the D.C. Circuit has 'repeatedly rejected.'" Defs' Opp. at 14 n. 8. But *Pedersen* did not rely on the specific claim test. Rather, the court expressly analyzed "the totality of the circumstances," found that the Blue Book "was not created with this case, or any other, in mind," and noted that

[2] *See* Gov't Resp. to Def's Req. for Access to Blue Book in *Pedersen*, No. 3:12-cr-00431-HA (Mar. 7, 2014) (Dkt. 19-2) (attached for convenience hereto as Exhibit A).

[3] Because the instant case was pending, the court also placed the Blue Book under seal and precluded its dissemination. *See* Dkt. 19 at 2. Nevertheless, the Blue Book's contents were repeatedly discussed, read into the record and displayed in open court during the hearing, with no objection or request to seal the courtroom by the Government. *Id*. at 3. DOJ concedes (though tries to minimize) all of these facts in a footnote of its opposition. *See* Defs' Opp. at 17 n.11.

work product protection only applies "when it can fairly be said that the 'document was created because of anticipated litigation'[.]"[4] Ex. B at 5. The court also noted the D.C. Circuit's caution that "[b]ecause 'the prospect of future litigation touches virtually any object of a prosecutor's attention, . . . the work product exemption, read over-broadly, could preclude almost all disclosure from an agency with substantial responsibilities for law enforcement.'" *Id*. (quoting *SafeCard Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1203 (D.C. Cir. 1991)).

DOJ's assertion that *Pedersen* is "incorrect" because it does not mention several D.C. Circuit cases also falls flat. Not surprisingly, the District of Oregon in *Pedersen* relied on Ninth Circuit precedent in its opinion, and that precedent is entirely consistent with the work product standard in the D.C. Circuit. Ex. B at 4-5 (citing *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 907-08 (9th Cir. 2003)). Just as the D.C. Circuit did in *In re Sealed Case*, the Ninth Circuit in *Torf* "consider[ed] the totality of circumstances" surrounding the document's creation and purpose to determine whether "the document can be fairly said to have been prepared or obtained because of the *prospect* of litigation." 357 F.3d at 908 (emphasis added). *Torf* held that work product protection applied where documents were created under the

[4] Citing *In re Sealed Case*, DOJ asserts that the D.C. Circuit rejected the "specific claim" test. Defs' Opp. at 14 n. 8. But *In re Sealed Case* expressly *declined* to do so, stating that it "need not decide whether the . . . specific claim test has any continued vitality where government lawyers act as prosecutors or investigators of suspected wrongdoers." 146 F.3d 881, 885 (D.C. Cir. 1998). The court even explained that its cases applying the specific claim test (*Coastal States* and *SafeCard*) "are not in conflict" with the cases examining the totality of the circumstances and applying the "in anticipation of litigation" test (*Delaney and Schiller*). *Id*. After discussing the facts of each case, the court explained that each lawyer was rendering legal advice to protect his or her client from *either* specific claims or "future litigation about a particular transaction, even though at the time [there was not] any specific claim." *Id*. And, the court noted that the *absence* of a specific claim may suggest that the lawyer did not prepare materials in anticipation of litigation. *Id*. at 887. Again, however, DOJ's assertion that *Pedersen* was decided in conflict with the D.C. Circuit's so-called "rejection" of the specific claim test is a red herring, as *Pedersen* considered the totality of the circumstances to determine whether the Blue Book was prepared "in anticipation of litigation" or "because of the prospect of litigation." Ex. B at 5.

direction of an attorney hired to "assess the company's civil and criminal liability" and "avoid litigation with the government," and where the documents were "prepared for the overall purpose of anticipated litigation." *Id*. at 907-909.

Although not precedential, *Pedersen*'s factual findings and legal analyses persuasively undermine DOJ's assertions here that (a) the Blue Book is work product, (b) that it "does not establish DOJ policy" and therefore need not be disclosed under 552(a)(2) (Defs' Opp. at 6), (c) that it was created to defeat, delay and limit discovery (and not, as DOJ told Congress, to ensure compliance with its constitutional discovery obligations), and (d) that the Blue Book's distribution would jeopardize national security and witness protection (arguments DOJ did not make before Congress or in *Pedersen*). In particular, the court noted the following:

- "The Discovery Blue Book is a comprehensive publication concerning the government's *discovery obligations* and incorporates numerous sources of *official Department of Justice policy* as well as legal analysis pertaining to *those obligations*." Ex. B at 3 (emphasis added).
- "As noted in the first page of the introduction to the Discovery Blue Book, '[t]his manual is a resource for assessing the government's (and the defendant's) *discovery obligations*, to help *ensure full and timely compliance* with them.'" *Id*. (emphasis added).
- "While Pedersen may be able to access similar information from disparate sources, the Discovery Blue Book is a relatively *comprehensive guide* to the Department of Justice's *policies and procedures* regarding the *provision* of criminal discovery." *Id*. at 3-4 (emphasis added).
- "What content is, and is not, found in the Discovery Blue book is plainly relevant to assessing Pedersen's allegations of bad faith even if the manual itself provides no substantive or procedural rights." *Id*. at 4.
- "The Discovery Blue Book was created as a *training tool* to assist the government in meeting its *discovery obligations* in criminal cases." *Id*. at 5.

At minimum, *Pedersen* underscores the critical need for *in camera* review of the Blue Book by this Court. *In camera* review is particularly appropriate when the dispute centers on a small number of documents, the agency affidavits are insufficiently detailed, there is a strong

public interest in disclosure, and the dispute centers around the contents of the document. *Physicians for Human Rights v. U.S. Dep't of Def.* 675 F. Supp. 2d 149, 167 (D.D.C. 2009) (citing *Allen v. Cent. Intelligence Agency*, 636 F.2d 1287, 1297-99 (D.C. Cir. 1980)). Here, all of these factors militate in favor of *in camera* review. Plf's Mem. at 39-40. And, DOJ already stated it does not object to an *in camera* review of the Blue Book if needed. Defs' Opp. at 25.

II. DOJ HAS AN AFFIRMATIVE DUTY TO DISCLOSE THE BLUE BOOK BECAUSE IT CONSTITUTES ADOPTED AGENCY POLICY.

NACDL argued in its cross-motion for summary judgment that DOJ must disclose the Blue Book because it is a statement of adopted agency policy that does not fall within a FOIA exemption. Plf's Mem. at 9-15 (citing 5 U.S.C. § 552(a)(2)). As discussed above, the *Pedersen* court's descriptions of the Blue Book following its *in camera* review support NACDL's argument. *See* Ex. B at 3-5 (noting the Blue Book "incorporates numerous sources of official Department of Justice policy" and constitutes a "relatively comprehensive guide" to DOJ's "policies and procedures regarding the provision of criminal discovery").

Additionally, NACDL explained that DOJ's representations to Congress about the Blue Book's contents and purpose, and the fact DOJ has already publicly disclosed similar materials, further demonstrate that the Blue Book is a statement of adopted agency policy. *See* Plf's Mem. at 9-15. DOJ's opposition to these arguments is inadequate, and each issue is addressed below.

A. DOJ's Statements to Congress Show the Blue Book is Agency Policy.

Relying on the Congressional Record and DOJ's *Vaughn* Index in this litigation, NACDL showed that DOJ's own description of the Blue Book's contents and purpose reflect that the Blue Book is a statement of agency policy. Plf's Mem. at 1-2, 10-11. Specifically, DOJ had consistently stated that the Blue Book "comprehensively covers the law, policy and practice of prosecutors' disclosure obligations." *Id*. This description served DOJ well when it testified

before Congress to prevent new legislation that would standardize DOJ's interpretation of its constitutional discovery obligations and ensure timely disclosure of exculpatory evidence, establishing consequences for future violations. *Id*. at 4. DOJ insisted that it could handle its own discovery reforms, which would ensure that prosecutors, agents and paralegals would fulfill their legal and ethical obligations regarding discovery in criminal cases. *Id*. at 5-6.

Now, however, DOJ's description of the Blue Book has changed. In this litigation (but not in *Pedersen*), DOJ says the Blue Book contains advice on how to "defeat discovery claims" and "delay or limit disclosure" of exculpatory information. *See, e.g.*, Defs' Mem. in Supp. of Mot. for Summ. J. (Dkt. 13-1) at 9-12.[5] DOJ also says the Blue Book describes case law, rules and *DOJ policies* to provide legal advice, strategies and "tactics" prosecutors can use "to protect the Government's interests." Defs' Opp. at 10; *see also id*. at 16 (stating the Blue Book provides "strategies to protect the Government's interest in litigation and defend against discovery-related challenges by criminal defendants"). And, DOJ claims that public disclosure of the Blue Book—which it previously argued to Congress should take the place of public legislation—would result in a parade of horribles ranging from jeopardizing national security and witness safety to enabling evidence tampering. *Id*. at 22-24.

DOJ's explanation for the differences between its description of the Blue Book to Congress and the description it presents to this Court is wholly inadequate. DOJ's explanation, relegated to a footnote in its opposition, is that in testifying before Congress under oath, DOJ "was neither requested nor required to provide a full and detailed description of the contents of

[5] In its Complaint, NACDL set forth DOJ's descriptions of the Blue Book to Congress. (Dkt. 1, ¶¶24-28). DOJ did not address these descriptions in its Motion for Summary Judgment; instead, it painted a different picture of the Blue Book to this Court. (*See* Dkt. 13-1). NACDL then raised affirmative arguments in its cross-motion regarding the implications of DOJ's changing descriptions of the Blue Book. DOJ opposed this argument, and NACDL hereby replies.

the [Blue Book] to Congress." *Id*. at 10 n. 5. At a minimum, this explanation calls for *in camera* review of the Blue Book to understand how DOJ can accurately (if not fully) describe the same book in such divergent manners. Further, DOJ fails entirely to explain why it did not raise these or similar arguments in the *Pedersen* case when it sought to protect the Blue Book from disclosure. Tellingly, DOJ does not contest the *Pedersen* court's factual findings regarding the Blue Book's contents, which are entirely consistent with DOJ's representations to Congress. *See* Ex. B at 3-5 (quoting from the Blue Book and describing its contents as comprehensively concerning the government's "discovery obligations," policy and legal analysis concerning those obligations, and "help[ing] ensure full and timely compliance" with those obligations).[6] In *Pedersen*, neither the Government nor the court raised a single concern about national security or witness safety risks if the Blue Book were publicly disclosed, and neither expressed concern about defendants tampering with evidence or otherwise gaining an unfair litigation advantage.

DOJ's present assertion that it did not fully describe the Blue Book to Congress because Congress failed to ask—aside from being a puzzling admission and position for DOJ to take—entirely misses the point in NACDL's cross-motion. As DOJ described the Blue Book to Congress, and as the *Pedersen* court described the Blue Book in its opinion, the Blue Book is not work-product protected and DOJ has an affirmative obligation to disclose it as adopted agency

[6] As required by Local Rule 7(h) and this Court's Order Establishing Procedures, NACDL provided a statement of material facts in numbered paragraphs with its cross-motion for summary judgment. (Dkt. 16-3.) DOJ was required to respond "to each paragraph with a correspondingly numbered paragraph, indicating whether that paragraph is admitted or denied." (Dkt. 4 at 6). DOJ failed to do so, and instead it responded with two bullet points baldly asserting that NACDL's statements were "not material to resolving this case . . . and [DOJ] need not respond to these allegations." Defs' Opp. to Plfs' Stmt. Facts (Dkt. 20-2) at 2. DOJ is incorrect, and under Rule 7(h)(1), NACDL's factual statements must be deemed admitted by DOJ. Thus, DOJ has conceded, *inter alia*, that when describing the Blue Book in 2012, it did not tell Congress that the Blue Book constituted attorney work product, that it was created for law enforcement purposes, or that it would be kept secret. Plf's Stmt. Facts (Dkt. 16-3) at ¶¶ 29-31.

policy. To the extent DOJ now contends that the Blue Book contains something different, *in camera* review by this Court is the only available and appropriate means of resolving this dispute.

B. DOJ Has Disclosed Similar Material to the Public, and Should Likewise Disclose the Blue Book.

In its cross-motion for summary judgment, and in support of its argument that the Blue Book is adopted agency policy, NACDL discussed two documents similar to the Blue Book that DOJ has already affirmatively disclosed under section 552(a)(2). *See* Plf's Mem. at 12-14 (discussing United States Attorneys' Manual ("USAM") and "Criminal Discovery" edition of the United States Attorneys' Bulletin ("CDB")). Pursuant to Rule 7(h)(1), DOJ must be deemed to have admitted that these documents have contents, functions, and purposes similar to DOJ's descriptions of the Blue Book in this case. *See* Plf's Stmt. Facts (Dkt. 16-3) at ¶¶ 25-50. By publishing the USAM and CDB, DOJ has implicitly acknowledged that the Blue Book, like other policy documents on criminal discovery, does not qualify for any FOIA exemption and should be made public. Plf's Mem. at 14.

In opposing this argument, DOJ distinguishes the Blue Book from other, similar publicly disclosed materials because the Blue Book was created with the intent that the public never see it. That may be, but whether the work product privilege applies depends on whether the document was prepared *in anticipation of litigation*, not on whether the document was intended to be kept secret. Indeed, if DOJ created five documents constituting agency policies but chose to publish four and keep the fifth a secret, that document would not somehow become work-product protected *simply because* it was not made public. The entire purpose of FOIA is to give citizens a statutory right to information as a "check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The Government cannot create secret law or adopt agency policy outside the context of

anticipating litigation and somehow cloak it with work product protection merely by stamping it "confidential" or otherwise manifesting an intent to hide the document from public view.

In further distinguishing the publicly-disclosed USAM and CDB from the Blue Book, DOJ contends that these public documents are like those issued by private law firms discussing legal issues. Defs' Opp. at 9 n.3. DOJ then contends that just because it (or a private firm) publishes documents containing legal analysis, "that does not mean that internal materials prepared by these law firms and DOJ *in anticipation of litigation* discussing similar issues should be made public." *Id*. (emphasis added). Of course not, and NACDL has never contended otherwise. (Indeed, NACDL did not make a waiver argument at all.) Obviously, DOJ publishing an agency policy or a law firm publishing an article about a legal issue would not somehow waive work product protection for internal materials on those same topics *that are prepared in anticipation of litigation*. But that is not what is at issue here. The Blue Book, as described to Congress by DOJ and as described by the *Pedersen* court, was not prepared in anticipation of litigation any more than the USAM and CDB were, and like those documents the Blue Book constitutes agency policy and working law. NACDL's point—not addressed in DOJ's opposition—is simply that DOJ's public treatment of similar documents (including documents like the Holder Memorandum, Ogden Memorandum, etc.) shows that the Blue Book, too, is a statement of agency policy that should be made public.[7]

[7] DOJ's law firm analogy also reveals the flaws in its argument that because defendants might be "unfairly advantaged" by knowing DOJ's general discovery strategies in the Blue Book, the work-product privilege should apply. Defs' Opp. at 17-19. A private firm's opponents also might be "unfairly advantaged" by reading the firm's published legal research and reasoning. But this omnipresent and obvious risk of publication does not convert a document that was not prepared in anticipation of litigation into attorney work product.

CONCLUSION

For the reasons discussed herein, as well as those set forth in NACDL's motion for summary judgment and during any hearing on this matter, this Court should grant summary judgment in favor of Plaintiff NACDL.

Dated: October 13, 2014

Respectfully submitted,

/s/ Kerri L. Ruttenberg

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CERTIFICATE OF SERVICE

A copy of the foregoing was filed with the Court via the CM/ECF system. The foregoing was served this 13th day of October, 2014, on the following filing users by the CM/ECF system:

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