

**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-269 (CKK)

**DEFENDANTS’ STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to Local Civil Rule 7(h) of the United States District Court for the District of Columbia, in connection with their Motion for Summary Judgment under Fed. R. Civ. P. 56, Defendants U.S. Department of Justice (“DOJ”) and the Executive Office for United States Attorneys (“EOUSA”), a component of DOJ, submit the following statement of material facts as to which there is no genuine dispute:

1. By letter dated December 20, 2012, Kyle O’Dowd, on behalf of the National Association of Criminal Defense Lawyers (“NACDL”), submitted a FOIA request to the EOUSA for the disclosure of “the Office of Legal Education publication entitled ‘Federal Criminal Discovery.’” Declaration of Susan B. Gerson (“Gerson Decl.”) ¶ 5.

2. EOUSA received the NACDL’s FOIA request on December 27, 2012. Gerson Decl. ¶ 5.

3. The Office of Legal Education (“OLE”) is a part of the EOUSA that provides training on management skills and the management of legal operations to DOJ attorneys and staff. OLE publishes and distributes the *OLE Litigation Series*, which are often called “Bluebooks” because of the color of their covers. These books are written by DOJ attorneys and are usually not distributed outside the federal law enforcement community. Gerson Decl. ¶¶ 6, 7.

4. In April 2009, following the dismissal of the case against the late Senator Theodore Stevens, DOJ created a Criminal Discovery and Case Management Working Group to review DOJ’s policies, practices, and training concerning criminal case management and discovery, and to evaluate ways to improve it. In addition, in January 2010, a long-serving career prosecutor was appointed as DOJ’s first full-time National Criminal Discovery Coordinator to lead and oversee all DOJ efforts to improve disclosure policies and practices. Gerson Decl. ¶ 17.

5. One of the key initiatives of the Criminal Discovery and Case Management Working Group was the creation of the book *Federal Criminal Discovery (“FCD”)* in 2011. This step was taken to advise prosecutors nationwide about the legal bases of their discovery obligations, as well as the types of discovery-related claims and issues that they would inevitably confront in the investigations and prosecutions that they handle in the course of fulfilling their law enforcement duties. Under the direction of DOJ’s National Criminal Discovery Coordinator and other senior DOJ officials, several DOJ attorneys with expertise in particular subjects related to discovery were selected to write the nine chapters of the FCD. Gerson Decl. ¶¶ 18, 19; Declaration of Andrew D. Goldsmith (“Goldsmith Decl.”) ¶ 5.

6. The FCD is part of the *OLE Litigation Series*. Gerson Decl. ¶¶ 6, 7. The title page of the FCD includes a notice that DOJ intends the book to be “used by federal prosecutors for training and law enforcement purposes” as an internal resource, treated confidentially. *Id.* ¶ 7. The FCD has only been distributed in DOJ and to other federal law enforcement officials. *Id.* ¶ 22; Goldsmith Decl. ¶ 7.

7. To respond to the NACDL’s FOIA request, EOUSA attorneys conducted a comprehensive review of the contents of the FCD to determine whether any FOIA exemptions were applicable and whether there was any nonexempt information that could be segregated and released to the NACDL. Gerson Decl. ¶ 8. To assist and inform this review, EOUSA consulted with other DOJ attorneys familiar with the contents of the FCD. *Id.* ¶ 9.

8. EOUSA determined that the FCD was exempt in its entirety under 5 U.S.C. § 552(b)(5) as attorney work product because it was prepared by DOJ attorneys for the use of federal prosecutors in conducting law enforcement investigations and prosecutions. In addition, EOUSA determined that the FCD was exempt in its entirety under 5 U.S.C. § 552(b)(7)(E) because it was compiled for law enforcement purposes and contained techniques, procedures, and guidelines to be used in the course of conducting criminal prosecutions. EOUSA also determined that there were no reasonably segregable, nonexempt portions that could be released to the NACDL. Gerson Decl. ¶¶ 10, 35

9. By letter dated February 28, 2013, EOUSA responded to the NACDL’s FOIA request, indicating that the request was denied in full because the records requested were exempt from disclosure under FOIA Exemptions 5 and 7(E). Gerson Decl. ¶ 11.

10. By letter dated April 26, 2013, the NACDL appealed EOUSA's denial of its FOIA request to the Office of Information Policy ("OIP"). Gerson Decl. ¶ 12.

11. By letter dated June 25, 2013, OIP affirmed EOUSA's denial of the NACDL's FOIA request on the grounds that the FCD constituted attorney work product exempt under 5 U.S.C. § 552(b)(5). Gerson Decl. ¶ 13.

Dated: June 11, 2014

Respectfully submitted,

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