UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, CENTER FOR CONSTITUTIONAL RIGHTS, and AMICA CENTER FOR IMMIGRATION RIGHTS, Plaintiffs, – *versus* – UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendant.	No. 25 Civ. 5292 (JSR)

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

JAMES M. MCDONALD
United States Attorney
Southern District of New York
Counsel for Defendant
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone: (212) 637-2525
ilan.stein@usdoj.gov

Of Counsel:

ILAN STEIN
Assistant United States Attorney

TABLE OF CONTENTS

PAGE

PRELIMINARY STATEMENT 1

BACKGROUND 2

ARGUMENT 3

I. Standard of Review 3

II. HHS Has Property Asserted Exemption 5 5

1. HHS Has Properly Asserted Exemption 5 to Withhold Information Exempt Under the Attorney-Client Privilege 5

2. HHS Has Properly Asserted Exemption 5 to Withhold Attorney Work Product ..10

3. HHS Has Properly Asserted Exemption 5 to Withhold Information Exempt Under the Deliberative-Process Privilege 12

III. HHS Properly Segregated Releasable Portions of the Redacted Records 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Amnesty Int'l USA v. CIA,
728 F. Supp. 2d 479 (S.D.N.Y. 2010) 14

Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.,
160 F.R.D. 437 (S.D.N.Y. 1995) 8

Brinton v. Dep't of State,
636 F.2d 600 (D.C. Cir. 1980) 13

Carney v. DOJ,
19 F.3d 807 (2d Cir. 1994) 4, 5

Chen-Oster v. Goldman, Sachs & Co.,
293 F.R.D. 547 (S.D.N.Y. 2013) 11

CIA v. Sims,
471 U.S. 159 (1985) 4

Community Legal Services in East Palo Alto, et al. v. HHS,
No. 3:25-cv-2847 (N.D. Cal) 3

Dep't of the Interior v. Klamath Water Users Protective Ass'n,
532 U.S. 1 (2001) 4

Doherty v. DOJ,
775 F.2d 49 (2d Cir. 1985) 15

Elec. Privacy Info. Ctr. v. DHS,
384 F. Supp. 2d 100 (D.D.C. 2005) 6

Ferguson v. FBI,
No. 89 Civ. 5071 (RPP), 1995 WL 329307 (S.D.N.Y. June 1, 1995) 2

Flores v. Reno,
No. CV 85-4544-RJK (C.D. Cal. 1997) 7

Fox News Network, LLC v. Dep't of the Treasury,
739 F. Supp. 3d 515 (S.D.N.Y. 2010) 8

Grand Cent. P'ship v Cuomo,
166 F.3d 473 (2d Cir. 1999) 5, 12

Halpern v. FBI,
181 F.3d 279 (2d Cir. 1999) 4

Hickman v. Taylor,
329 U.S. 495 (1947)..... 11

Hopkins v. HUD,
929 F.2d 81 (2d Cir. 1991) 5, 12, 13

In re Country of Erie,
473 F.3d 413 (2d Cir. 2007) 6, 8

In re Grand Jury Investigation,
399 F.3d 527 (2d Cir. 2005) 6, 8

In re Grand Jury Subpoena Dated July 6, 2005,
510 F.3d 180 (2d Cir. 2007) 11

In re Six Grand Jury Witnesses,
979 F.2d 939 (2d Cir. 1992) 6

John Doe Agency v. John Doe Corp.,
493 U.S. 146 (1989)..... 3, 4

Martin v. DOJ,
488 F.3d 446 (D.C. Cir. 2007)..... 4

N.Y. Times Co. v. DOJ,
939 F.3d 479 (2d Cir. 2019) 11

N.Y. Times Co. v. DOJ,
872 F. Supp. 2d 309 (S.D.N.Y. 2012) 2, 4

N.Y. Times Co. v. DOJ,
915 F. Supp. 2d 508 (S.D.N.Y. 2013) 4

Nat'l Broad. Co. v. SBA,
836 F. Supp. 121 (S.D.N.Y. 1993) 6

Nat'l Council of La Raza v. DOJ,
411 F.3d 350 (2d Cir. 2005) 10

NLRB v. Sears, Roebuck & Co.,
421 U.S. 132 (1975) 12, 13

Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.,
421 U.S. 168 (1975) 12

Sussman v. U.S. Marshals Serv.,
494 F.3d 1106 (D.C. Cir. 2007) 15

Tax Analysts v. IRS,
117 F.3d 607 (D.C. Cir. 1997) 5, 6

Tigue v. DOJ,
312 F.3d 70 (2d Cir. 2002) 5, 12, 14

United States v. Adlman,
134 F.3d 1194 (2d Cir. 1999) 11

Wilner v. NSA,
592 F.3d 60 (2d Cir. 2009) 4

Statutes

5 U.S.C. § 552(b) 14

5 U.S.C. § 552(b)(5) 5

Rules

Fed. R. Civ. P. 56(a) 4

Defendant the United States Department of Health and Human Services ("HHS") respectfully submits this memorandum of law in support of its motion for summary judgment in this action brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

PRELIMINARY STATEMENT

This FOIA request, directed to HHS, seeks records relating to "policies, guidance, and legal assessments of which kinds and forms of services are sufficient to satisfy HHS' obligations to provide access to legal counsel for unaccompanied children." *See* ECF No. 1-1 (the "FOIA Request") at 2. Plaintiffs claim that they submitted this request after "hav[ing] heard reports that HHS plan[ned] to stop funding legal services for unaccompanied non-citizen children and replace those services with 'Know Your Rights' videos . . . ." *Id.* In response to the FOIA Request, HHS made three productions of records on November 28, 2025, January 27, 2026, and June 15, 2026, totaling 2,131 pages, some of which were redacted in part or withheld in full under FOIA Exemptions 4, 5, and 6. As relevant to this motion, HHS asserted Exemption 5 over portions of these records because they are protected from disclosure under three privileges.

First, portions of the records are protected by the attorney-client privilege, consisting of records—including emails, draft documents, and spreadsheets—that reflect confidential communications among HHS attorneys, or between HHS attorneys and HHS employees, made for the purpose of seeking or providing legal advice. Second, portions of these records consist of attorney work product prepared in connection with anticipated or pending litigation and are therefore protected from disclosure under the attorney work-product privilege. Third, portions of these records are protected by the deliberative process privilege because they reveal HHS's predecisional deliberations that relate to decisions concerning the provision of legal services to unaccompanied children.

As explained further below and in the declaration accompanying this memorandum, these exemptions are proper, and the Court accordingly should grant the Government's motion for summary judgment.

BACKGROUND[1]

On March 12, 2025, Plaintiffs submitted a FOIA request seeking records concerning HHS policies, guidance, and legal assessments regarding the provision of legal services to unaccompanied children. August 27, 2026 Declaration of Brandon L. Lancey ("Lancey Decl.") ¶ 4. The request sought various categories of records, including a legal memorandum issued by the HHS Office of General Counsel ("HHS-OGC") addressing whether "Know Your Rights" presentations satisfy relevant requirements (the "OGC Memo"); communications, draft documents, legal memoranda, and related records concerning the OGC Memo; records concerning the issuance, revision, and rescission of the Office of Refugee Resettlement ("ORR")/ACF Field Guidance #8; records concerning revisions to portions of the ORR Unaccompanied Alien Children Bureau Policy Guide addressing legal services; and policies, guidance, and memoranda concerning the minimum legal services required for unaccompanied children. *Id.* ¶ 5.

HHS made three productions of responsive records in November 2025, January 2026, and June 2026. *Id.* ¶¶ 5, 9. Certain records were withheld in part and certain others were withheld in full under FOIA exemptions 4, 5, and 6. At issue here are certain withholdings that HHS made pursuant to FOIA Exemption 5 in order to protect attorney work product, the attorney-client

[1] HHS has not submitted a Local Rule 56.1 statement, as "the general rule in this Circuit is that in FOIA actions, agency affidavits alone will support a grant of summary judgment," and a Local Rule 56.1 statement "would be meaningless." *Ferguson v. FBI*, No. 89 Civ. 5071 (RPP), 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995), *aff'd*, 83 F.3d 41 (2d Cir. 1996); *N.Y. Times Co. v. DOJ*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012) (noting Local Civil Rule 56.1 statement not required in FOIA actions in this Circuit).

privilege, and the deliberative process privilege. *Id.* ¶ 10.[2] The records that were withheld in part or in full pursuant to Exemption 5 include internal email communications, draft documents, legal analyses, attorney communications, and other internal records concerning contracts for legal services to unaccompanied children, a February 2025 stop-work order concerning a legal services contract, subsequent contracting and programmatic issues, and legal and policy questions related to the provision of legal services to unaccompanied children. *Id.* The subject matter of some of the requested records also overlapped with separate litigation concerning federally funded legal services for unaccompanied children. *Id.* ¶ 7. In *Community Legal Services in East Palo Alto, et al. v. HHS, et al.*, No. 3:25-cv-2847 (N.D. Cal.), plaintiffs challenged government action affecting funding for legal representation and related services for unaccompanied children. *Id.* There, plaintiffs alleged that, on March 21, 2025, the Department of the Interior issued a notice terminating contract line items through which HHS and ORR had funded legal services for unaccompanied children and directed providers to stop work on funded representations. *Id.*

In connection with this motion, HHS has produced a Vaughn index that describes the withholdings that Plaintiffs now challenge, as well as the justification for those withholdings (the "Vaughn Index"). *Id.* ¶ 2.

ARGUMENT

I. Standard of Review

The Freedom of Information Act, 5 U.S.C. § 552, represents a balance struck by Congress "between the right of the public to know and the need of the Government to keep information in confidence." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep.

[2] The Government previously met and conferred with Plaintiffs' counsel and confirmed that Plaintiffs do not intend to challenge the adequacy of the searches conducted by HHS in connection with this matter.

89-1497, 89th Cong., 2d Sess. 6 (1966)); *see also N.Y. Times Co. v. DOJ*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012). Thus, while FOIA requires disclosure under certain circumstances, the statute recognizes "that public disclosure is not always in the public interest," *CIA v. Sims*, 471 U.S. 159, 166-67 (1985), and mandates that records need not be disclosed if "the documents fall within [the] enumerated exemptions," *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001); *see also Martin v. DOJ*, 488 F.3d 446, 453 (D.C. Cir. 2007) ("Recognizing, however, that the public's right to information was not absolute and that disclosure of certain information may harm legitimate governmental or private interests, Congress created several exemptions to FOIA disclosure requirements."); *John Doe Corp.*, 493 U.S. at 152 (FOIA exemptions are "intended to have meaningful reach and application").

FOIA actions that do not settle are typically resolved by summary judgment. *See, e.g.*, *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994); *N.Y. Times Co. v. DOJ*, 915 F. Supp. 2d 508, 531 (S.D.N.Y. 2013). Summary judgment is warranted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In FOIA cases, the government meets its burden of demonstrating that it properly withheld documents if it produces declarations "giving reasonably detailed explanations why any withheld documents fall within an exemption." *Carney*, 19 F.3d at 812. An agency's declarations in support of its withholdings are "accorded a presumption of good faith." *Id.*; *see also Halpern v. FBI*, 181 F.3d 279, 295 (2d Cir. 1999). "[A]n agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009) (citation and internal quotation marks omitted). If the agency's submissions are facially adequate, summary judgment is warranted unless the plaintiff can make a showing of bad faith on the part of the agency

or present evidence that the exemptions claimed by the agency do not apply. *Carney*, 19 F.3d at 812.

II. HHS Has Properly Asserted Exemption 5

As further explained in the Lancey Declaration and the accompanying Vaughn index, HHS has properly asserted Exemption 5 to withhold information that is protected by the attorney-client privilege, the work-product doctrine, and the deliberative process privilege.

FOIA's fifth exemption protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). "By this language, Congress intended to incorporate into the FOIA all the normal civil discovery privileges." *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991). "Stated simply, agency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules (*e.g.*, attorney-client, work-product, [the deliberative process] privilege) are protected from disclosure under Exemption 5." *Tigue v. DOJ*, 312 F.3d 70, 76 (2d Cir. 2002) (quoting *Grand Cent. P'ship v Cuomo*, 166 F.3d 473, 481 (2d Cir. 1999)).

1. HHS Has Properly Asserted Exemption 5 to Withhold Information Exempt Under the Attorney-Client Privilege

HHS has properly asserted exemption 5 over those portions—but only those portions—of the responsive records that are protected by the attorney-client privilege. "The attorney-client privilege protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services." *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997). The purpose of the privilege "is to encourage attorneys and their clients to communicate fully and frankly and thereby to promote broader public interests in the observance of law and administration

of justice." *In re Country of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (citation and internal quotation marks omitted). "In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer." *Tax Analysts*, 117 F.3d at 618. Indeed, "the traditional rationale for the [attorney-client] privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law . . . be encouraged to seek out and receive fully informed legal advice." *County of Erie*, 473 F.3d at 419 (quoting *In re Grand Jury Investigation*, 399 F.3d 527, 534 (2d Cir. 2005)).

The attorney-client privilege protects factual matter provided or solicited for the purpose of obtaining legal advice, legal reasoning and advice itself, and discussion among lawyers about developing legal opinions. *See, e.g.*, *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005) ("Although [attorney-client privilege] principally applies to facts divulged by a client to his attorney, this privilege also encompasses any opinions given by an attorney to his client based on, and thus reflecting, those facts as well as communications between attorneys that reflect client-supplied information."); *Nat'l Broad. Co. v. SBA*, 836 F. Supp. 121, 125 (S.D.N.Y. 1993) (under exemption 5, "the attorney-client privilege includes not only information provided by a client to a lawyer, but also 'professional advice given by an attorney that discloses such information'" (quoting *In re Six Grand Jury Witnesses,* 979 F.2d 939, 944 (2d Cir. 1992)).

Nearly all of the redactions at issue here are justified by the attorney-client privilege alone. HHS redacted the following categories of documents that are protected from disclosure by the attorney-client privilege: (1) a spreadsheet and related emails drafted by HHS attorneys conveying their confidential legal analysis of a legal services contract with the Vera Institute; (2) email communications involving HHS attorneys discussing contracts governing the provision of legal services to unaccompanied children; (3) proposed edits to, and emails with agency counsel

regarding, draft decision memoranda that pertain to contracts governing the provision of legal services to unaccompanied children; and (4) proposed revisions and comments of HHS-OGC attorneys to draft versions of policy documents relating to services provided to unaccompanied children, as well as to draft decision memoranda relating to specific contracts. *See generally* Vaughn Index.

a. Spreadsheet (and Related Emails) Assessing Legal Services Contract

HHS has withheld in full a spreadsheet (the "Spreadsheet") created by agency attorneys in February 2025 as part of their analysis of a legal services contract with the Vera Institute. The Spreadsheet identifies various tasks that the Vera Institute was obligated to perform under the contract, and assesses whether those tasks are legally required under either the TVPRA or a settlement agreement entered in *Flores v. Reno*, No. CV 85-4544-RJK (C.D. Cal. 1997). Vaughn Index 1-2. The Spreadsheet—which appears several times in the HHS productions (*see* Bates 10-12, 143-145, 160-162, and 177-179)—was sent by HHS attorneys to HHS staff to provide legal advice regarding possible effects of a proposed policy decision, including litigation risk associated with that decision. *Id.* HHS has also withheld in part ten emails[3] among HHS-OGC attorneys, and between HHS-OGC attorneys and HHS staff, in which HHS-OGC attorneys describe the Spreadsheet's contents and purpose, provide additional analysis as to whether specific tasks under the Vera contract were required by statute, and make legal recommendations relevant to a proposed policy decision, including potential litigation risk. *See id.* at 2, 4, 8-11, 16.

[3] The emails are at Bates 135 (one email dated February 2, 2025); Bates 169-170 (one email dated February 3, 2025); Bates 150 (one email dated February 6, 2025); Bates 42-43, 135-136 (two emails dated February 7, 2025); Bates 382-383 (two emails dated February 18, 2025); Bates 19-22 (two emails dated July 17, 2025); and Bates 17-18 (one email dated July 20, 2025). Vaughn Index 2, 4, 8-11, 16.

The Spreadsheet and related emails fall squarely within the attorney-client privilege. HHS-OGC is the HHS legal office employing lawyers who advise other parts of the agency and individual employees on the agency's legal obligations, including the obligations to provide legal services to unaccompanied minors. Because the spreadsheet and the relevant emails identify those legal obligations, interpret the Vera Institute contract, and compare HHS's legal obligations to the tasks set forth in the contract, all in order to convey legal advice regarding a contemplated policy decision, *see* Vaughn Index 1-2, 4, 8-11, 16, the records necessarily convey legal advice, *see In re County of Erie*, 473 F.3d 413, 420 (2d Cir. 2007) (attorney-client privilege applies where a communication's "predominant purpose . . . is to render or solicit legal advice"); *Fox News Network, LLC v. Dep't of the Treasury*, 739 F. Supp. 3d 515, 562 (S.D.N.Y. 2010) (email chains discussing "legal consequences of a course of action" and legal impact of contractual provisions protected by attorney-client privilege). Disclosure would reveal counsel's confidential legal analysis and assessment of potential litigation risks attendant to the possible termination of the Vera contract. Vaughn Index 1-2, 4, 8-11, 16. Release of this information would undermine the ability of agency officials to seek and receive legal advice, which would discourage candid discussions between agency counsel and decisionmakers regarding legal risks of contemplated actions. *Id.* That would frustrate "the underlying purpose of the privilege": "to encourage free communication between attorney and client." *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 443 (S.D.N.Y. 1995). That rationale "applies with special force in the government context," because "[i]t is crucial that government officials, who are expected to uphold and execute the law . . . be encouraged to seek out and receive fully informed legal advice." *In re Grand Jury Investigation*, 399 F.3d at 534.

b. Emails with Counsel Regarding Legal Services Contracts

Plaintiffs also challenge withholdings in two email chains between HHS-OGC attorneys and HHS staff, and an attachment to a third email among HHS-OGC attorneys, discussing legal services contracts for unaccompanied children, unrelated to the Spreadsheet. In the first email chain—dated July 11 and July 14, 2025 (Bates 95-97)—HHS-OGC attorneys convey legal analysis and legal advice to the Head of Contracting Activity in the Office of Mission Acquisition Solutions ("OMAS"). Vaughn Index 7. In that exchange, an HHS-OGC attorney addresses legal risks associated with a contemplated decision with respect to the provision of legal services to unaccompanied children. *Id.* In the second email chain—dated July 21 and July 22, 2025 (Bates 28-30), HHS-OGC attorneys seek information from the Head of Contracting Activity in the OMAS in order to provide legal advice regarding a contemplated legal services contract. *Id.* at 3. Finally, Plaintiffs challenge withholdings to a 1-page attachment to an email among HHS-OGC attorneys (Bates 55). The attachment contains language describing a legal services contract and legal advice concerning a contractual matter. *Id.* at 5. These records are prototypical examples of communications that are protected by the attorney-client privilege. On their face, they involve confidential communications in which a client seeks legal advice from their attorneys.

c. Emails with Counsel Regarding Draft Decision Memoranda

Plaintiffs challenge withholdings in two emails exchanged among HHS-OGC attorneys, and between HHS-OGC attorneys and HHS staff, concerning proposed decision memoranda for legal services contracts. In the first email, dated June 24, 2025 (Bates 71), one HHS-OGC attorney sends to other HHS-OGC attorneys, sharing a redline of a decision memorandum concerning a legal services contract, and discusses in the email specific advice that the attorney intends to provide to HHS staff regarding the decision memorandum and its connection to ongoing litigation.

Vaughn Index 5. In the second email, dated June 18, 2025 (Bates 81-82), a policy official in the Division of Budget Planning and Analysis reaches out to HHS-OGC attorneys and expressly seeks legal review relating to a legal services contract for unaccompanied children. *Id.* at 6. For the same reasons discussed above, these emails are protected from disclosure by the attorney-client privilege.

d. Proposed Edits and Comments of HHS-OGC Attorneys to Draft Decision Memoranda

Plaintiffs also seek the disclosure of HHS-OGC attorneys' proposed edits and comments to draft decision memoranda regarding legal services contracts. Various of the draft decision memoranda relate to the modification of contracts or the streamlining of the provision of legal services to unaccompanied children, including drafts dated March 3, 2025 (Bates 266-272), March 7, 2025 (Bates 218-221), March 12, 2025 (Bates 244-265, 286-293), and March 17, 2025 (Bates 229-231, 233-238, 240-242). Vaughn Index 12-15. The redlines contain HHS-OGC attorneys' proposed edits and comments in which counsel explains the legal rationale for their proposed edits. *Id.* The drafts were attached to emails from HHS-OGC attorneys to agency staff, and were sent for the purpose of conveying legal advice. *Id.* For that reason, these redline versions of draft decision memoranda were properly withheld under the attorney-client privilege.

2. HHS Has Properly Asserted Exemption 5 to Withhold Attorney Work Product

HHS has properly asserted Exemption 5 over those portions of the responsive records that contain attorney work product. *See Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 356 (2d Cir. 2005). The qualified privilege for attorney work product "prohibits one party in litigation from discovering from its adversary any 'document and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative,' absent a showing of substantial

need." *N.Y. Times Co. v. DOJ*, 939 F.3d 479, 489 (2d Cir. 2019) (quoting Fed. R. Civ. P. 26(b)(3)). "Not only an attorney's mental impressions and opinions about a case but also the results of the attorney's factual investigations in anticipation of the case may constitute attorney work product." *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183-84 (2d Cir. 2007). Its purpose is "to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1999) (quoting *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947)).

The attorney work-product doctrine applies to the Spreadsheet and related emails discussed in Section 1(a) above,[4] as well as the dated July 11 and July 14, 2025 emails (Bates 95-97) discussed in Section 1(b). The spreadsheet and related emails contain HHS-OGC attorneys' confidential assessments of the tasks required under the Vera Institute contract, the legal requirements that HHS was obligated to meet with respect to legal services to unaccompanied children, and the litigation risk attendant to the policy decision to which HHS-OGC attorneys were responding when they created the spreadsheet and sent the related emails. Vaughn Index 1-2, 4, 7-12, 16. HHS-OGC attorneys created the spreadsheet in anticipation of litigation to analyze HHS's legal obligations and assess litigation risks associated with the contemplated changes to the contract. *Id.* They are therefore protected from disclosure by the attorney work-product privilege. *See Chen-Oster v. Goldman, Sachs & Co.*, 293 F.R.D. 547, 553 (S.D.N.Y. 2013) (risk management qualifies as anticipation of litigation when there is an identifiable potential adversary and defined legal claim). That the records may have been intended to inform an HHS policy decision does not

[4] Specifically, Bates 10-12, 17-22, 42-43, 95-97, 135-136, 143-145, 150, 160-162, 169-170, 177-179, and 382-383. *See* Vaughn Index 1-2, 4, 7-11, 16.

preclude application of the work-product privilege. *See, e.g.*, *United States v. Adlman*, 134 F.3d 1194, 1197 (2d Cir. 1998).

3. HHS Has Properly Asserted Exemption 5 to Withhold Information Exempt Under the Deliberative-Process Privilege

Exemption 5 also incorporates the "'deliberative process' or 'executive' privilege, which protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions." *Hopkins*, 929 F.2d at 84; *accord NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 150-51 (1975) ("those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision making process" (quotation marks omitted)).

An agency record must satisfy two criteria to qualify for the deliberative process privilege: it "must be both 'predecisional' and 'deliberative.'" *Grand Cent. P'ship*, 166 F.3d at 482 (citations omitted). A document is "predecisional" when it is "prepared in order to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). The government need not "identify a specific decision" made by the agency to establish the predecisional nature of a particular record, *Sears*, 421 U.S. at 151 n.18; *accord Tigue*, 312 F.3d at 80. So long as the document "was prepared to assist [agency] decisionmaking on a specific issue," it is predecisional. *Id*.

"A document is 'deliberative' when it is actually related to the process by which policies are formulated." *Grand Cent. P'ship*, 166 F.3d at 482 (quotation marks and alteration omitted). In determining whether a document is deliberative, courts inquire whether it "formed an important, if not essential, link in [the agency's] consultative process," whether it reflects the opinions of the author rather than the policy of the agency, and whether it might "reflect inaccurately upon or

prematurely disclose the views of [the agency]." *Id.* at 483; *accord Hopkins,* 929 F.2d at 84. The privilege "focus[es] on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Hopkins*, 929 F.2d at 84-85 (quoting *Sears*, 421 U.S. at 150).

All of the redacted records at issue contain predecisional and deliberative information and are therefore protected from disclosure by the deliberative-process privilege. As discussed above, almost all of these documents contain HHS-OGC attorneys' analyses, recommendations, proposed edits, internal comments, and other input provided to HHS policy staff in connection with HHS's deliberations regarding contemplated changes to contracts governing the provision of legal services to unaccompanied children. This is true of the Spreadsheet[5] and related emails,[6] emails between HHS-OGC attorneys and HHS staff regarding legal services contracts other than the one described in the Spreadsheet,[7] emails with HHS-OGC attorneys related to draft decision memoranda,[8] and HHS-OGC attorneys' proposed edits and comments to draft decision memoranda.[9] Thus, in addition to being protected by the attorney-client privilege, this information is also clearly encompassed by the deliberative process privilege. *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980) (holding that legal advice, like other advisory opinions, "fits exactly within the deliberative process rationale for Exemption 5"). The release of such internal debate regarding HHS's legal obligations to provide legal services to unaccompanied children, and how the agency would meet that obligation, would chill communications between HHS personnel,

[5] Bates 10-12, 143-145, 160-162, 177-179. *See* Vaughn Index 1-2.
[6] Bates 17-22, 42-43, 135-136, 150, 169-170, 382-383. *See* Vaughn Index 2-4, 8-11, 16.
[7] Bates 28-30, 55, 95-97. *See* Vaughn Index 3, 5, 7-8.
[8] Bates 71, 81-82. *See* Vaughn Index 5-6.
[9] Bates 218-221, 229-231, 233-238, 240-242, 244-265, 266-272, 286-293. *See* Vaughn Index 12-15.

including attorneys, and would therefore seriously inhibit HHS's ability to weigh the advantages and disadvantages of proposed policy decisions. *See* Vaughn Index 1-16.

HHS has also withheld portions of a July 14, 2025 decision memorandum (Bates 90-94) sent from the Acting Director of ORR to the Acting Assistant Secretary for Children and Families requesting approval to award a 12-month bridge contract to the Acacia Center for Justice to provide legal services to unaccompanied children. Vaughn Index 7. In particular, HHS has withheld the total amount of requested funding, the estimated costs for each of four cost elements, and an explanation as to why ORR was requesting a 12-month bridge contract. *Id.* The redacted information is predecisional insofar as it constitutes a recommendation by ORR for the agency to take a particular course of action, but it does not constitute a final decision. *Id.*; *see Tigue*, 312 F.3d at 73 (memorandum outlining an Assistant U.S. Attorney's opinions and recommendations as to how an agency should conduct investigations was protected from disclosure under the deliberative process privilege). It is also deliberative because it consists of internal cost estimates and a subjective rationale for the recommendation. Vaughn Index 7. Release of this information would tend to discourage candid discussions by HHS staff about estimated costs and contracting options. *Id.*

III. HHS Properly Segregated Releasable Portions of the Redacted Records

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). FOIA requires only "reasonable" segregation; thus, "the law is clear that the reasonable segregation requirement of FOIA does not require [an agency] to commit significant time and resources to a task that would yield a product with little, if any, informational value." *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 529 (S.D.N.Y. 2010) (quotation marks

omitted); *see Doherty v. DOJ*, 775 F.2d 49, 53 (2d Cir. 1985). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007).

HHS conducted a line-by-line analysis of the responsive records for segregability purposes, and concluded that no further segregation could be made without disclosing exempt information. Lancey Decl. ¶¶ 31-32. And the Lancey Declaration, as supplemented by the Vaughn index, makes clear that significant portions of each of the records have been released without redactions. Thus, HHS has satisfied its obligations pursuant to section 552(b).

CONCLUSION

For all of the foregoing reasons, the Court should grant the Government's motion for summary judgment.

Dated: August 27, 2026
New York, New York

Respectfully submitted,

JAMES M. MCDONALD
United States Attorney
Southern District of New York

By: /s/ Ilan Stein
ILAN STEIN
Assistant United States Attorney
86 Chambers Street, Third Floor
New York, New York 10007
Telephone: (212) 637-2525
E-mail: ilan.stein@usdoj.gov

CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.1(c), the above-named counsel hereby certifies that this memorandum complies with the word-count limitation of this Court's Local Civil Rules. As measured by the word processing system used to prepare it, this memorandum contains 5,174 words.