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IN THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JEFFREY MARTINS, Plaintiff, v. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, an agency of the United States Department of Homeland Security; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; ALEJANDRO MAYORKAS, in his official capacity as Director of United States Citizenship and Immigration Services; JANET NAPOLITANO, in her official capacity as Secretary of the Department of Homeland Security, Defendants.	Case No. C 13-00591 LB **PLAINTIFF JEFFREY MARTINS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** Assigned to the Hon. Magistrate Judge Laurel Beeler Courtroom C, 15th Floor 450 Golden Gate Avenue, San Francisco, CA Action Filed: February 11, 2013 **[Supporting Declarations of Jeffrey Martins with Exhibits A-O and Thomas R. Burke with Exhibits A-E filed concurrently]**

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I. INTRODUCTION

This lawsuit seeks to end the federal Government's policy and practice of withholding Asylum Officer "interview notes" from asylum seekers and their legal representatives. Through this motion, Plaintiff Jeffrey Martins – an immigration attorney and former Asylum Officer – seeks immediate access to sets of these notes that he urgently needs for his clients who are seeking asylum in removal proceedings that are pending before the Immigration Court. Without the notes, his representation of these clients is severely hampered. The Ninth Circuit has already recognized the serious due process violation that results when such material is withheld. *Dent v. Holder*, 627 F.3d 365, 368-372 (9th Cir. 2010). Here, the stakes could not be higher – the wrong outcome in these proceedings can mean persecution, torture, and even death.

Asylum Officers take the notes that the Government is withholding to document their interviews of applicants for asylum. Under the Government's own guidelines, the notes "must accurately reflect what the applicant says as well as what the Asylum Officer asks" over the course of the interviews. *See* Declaration of Thomas R. Burke ("Burke Decl.") ¶ 4, Ex. B, at 5 (Asylum Officer Basic Training Course ("AOBTC") training module on note-taking) (capitalization altered from original). Asylum Officers are specifically trained to make thorough, detailed interview notes – free of subjective thoughts or analysis – to create an accurate, objective record that permits the reader to reconstruct the interviews and understand the questions asked and the answers given. *Id*. Because the interviews are not otherwise recorded or transcribed in any way, the interviewing Asylum Officer's notes offer the only official record of the testimony that the applicant has given. When an applicant's attorney is not present and able to take his or her own notes, as is often the case, the Asylum Officer's notes are literally the only record of what transpired during the interview.

When asylum is not granted by the Asylum Office and the individuals seeking asylum face removal proceedings, Mr. Martins and other immigration attorneys around the country require access to the interview notes on a timely basis to prepare their clients' cases for presentation to the Immigration Court, where the asylum applicant can seek asylum anew and have his or her claim

adjudicated *de novo*. Declaration of Jeffrey Martins ("Martins Decl.") ¶¶ 5-6, 17. The notes provide crucial information that in many cases has made the life-or-death difference for Mr. Martins' clients in prevailing against removal and gaining asylum in this country. *Id.* ¶¶ 24-27, 29. Without access to the notes, particularly for clients who were interviewed without being represented by counsel, Mr. Martins is left to guess about the factual aspects of his clients' application that should be explained or strengthened. *Id.* ¶¶ 19, 28-29.

For many years, Mr. Martins has made it his practice to seek the interview notes for his asylum clients by submitting requests under the Freedom of Information Act ("FOIA") for clients' Alien Files ("A-Files"), which contain the notes. *Id.* ¶ 30; *see, e.g.*, *Dent*, 627 F.3d at 368 & n.4 , 372 & nn. 11-12, 373 & n.16 (explaining nature, contents, and control of A-Files). In response to these requests, the Government used to provide the interview notes. Beginning around March 2012, however, Defendant U.S. Citizenship and Immigration Services ("USCIS") ceased to disclose the notes as a categorical matter, including in the ten cases outlined in the Complaint and Mr. Martins' Declaration. Martins Decl. ¶¶ 31, 37-46. Despite the objective, factual nature of the notes, the Government's stated ground for withholding them is that the notes fall under the deliberative process privilege and are therefore covered by FOIA Exemption 5. *Id.* ¶¶ 37-46, Exs. F-O. Since the Government changed course and began withholding these records, Mr. Martins has not received interview notes in response to any of the approximately two dozen requests he has submitted for the A-Files of asylum-seeking clients. *Id.* ¶ 31. All the while, the trial attorneys who prosecute removal cases for Immigration and Customs Enforcement (ICE, an agency of Defendant Department of Homeland Security) employ the very same notes in proceedings *against* asylum seekers after withholding the notes from these individuals and their attorneys. *Id.* ¶¶ 20, 32. By the time Mr. Martins becomes aware of the contents of the notes mid-hearing, if at all, irreparable damage has already been done to him and his clients (*id.* ¶¶ 22-23), justifying preliminary injunctive relief by this Court for the following reasons:

First, Mr. Martins is likely to succeed on the merits of his FOIA and Administrative Procedures Act claims. In *Dent v. Holder*, the Ninth Circuit held that *even in the absence of a FOIA request*, the immigration statute's "mandatory access" provision entitles the individual in

proceedings to his A-File, which includes Asylum Officer interview notes. 627 F.3d at 374. The Ninth Circuit found that the Government's refusal to disclose that material denies the individual subject to removal proceedings "an opportunity to fully and fairly litigate his" claims. *Id*. *Dent* obliterates the deliberative process privilege claim of the Government here. Exemption 5 applies to documents that the Government is privileged to withhold in litigation. But the Government obviously cannot claim Exemption 5 when *Dent requires* the Government to disclose the contents of an A-File, including the Asylum Officer notes. *See id*. Moreover, the Exemption 5 deliberative process privilege does not apply to notes that by design are intended to provide a written *factual* record of the interviews. Burke Decl. ¶ 4, Ex. B. The controlling authority of *Dent* and the factual nature of the documents are more than enough to show that Mr. Martins is likely to prevail on the merits. *See* Section IV.A, *infra*.[1]

Second, in pending cases with removal hearings looming, Mr. Martins' clients face irreparable harm – an unnecessarily and impermissibly heightened risk of deportation to countries where they may be subjected to persecution, torture, and even death – because the Government continues to refuse to disclose the Asylum Officer notes for these individuals. Martins Decl. ¶¶ 2, 37-44, 46. Delaying disclosure here of the Asylum Officer notes for these cases that are the subject of this Motion is effectively a denial of disclosure altogether. This unique situation also plainly favors preliminary injunctive relief. *See* Section IV.B.1, *infra*.

Third, while Mr. Martins' clients are subjected to unbalanced removal proceedings and deprived of key information that could enable counsel to identify information and evidence that can make or break their cases, the Government obtains an unfair tactical advantage by holding on to the notes illuminating why the asylum seeker did not gain asylum initially. The balance of equities thus tilts sharply in favor of Mr. Martins. *See* Section IV.B.2, *infra*.

Finally, the Government's refusal to comply with *Dent* and its obligations under FOIA

[1] Because the Court need not address the illegality of the challenged policy to rule that the specified sets of notes must be produced to Plaintiff for his preparation of clients' cases to be presented in upcoming Immigration Court hearings, this Memorandum focuses on Plaintiff's likelihood of prevailing on the merits of his FOIA claim. Plaintiff reserves the right to brief his claims about the policy under FOIA and the Administrative Procedure Act at a later point in these proceedings as well as issues concerning the notes, if necessary.

harms the strong public interest in a procedurally fair and accurate asylum process. *See* Section IV.B.3, *infra*. For all these reasons, Mr. Martins respectfully moves to enjoin Defendants from relying on Exemption 5 to withhold the Asylum Officer notes in the immigration matters at issue in this litigation. *See* Martins Decl. ¶¶ 37-46.

II. STATEMENT OF FACTS

The United States offers asylum protection to individuals who have suffered past persecution or who have a well-founded fear of future persecution in their home countries. Those who believe they qualify can apply for asylum by filling out a Form I-589, Application for Asylum and Withholding of Removal, and sitting for an interview, in which an Asylum Officer questions the applicant under oath on matters ranging from relatively mundane issues, like address and work history, to information central to the claim, including details about his homeland and persecution. *See* Martins Decl. ¶¶ 9-11. Although language, cultural barriers and the impact of trauma may impede communication, the Asylum Officer aims to determine whether the applicant is telling the truth about his past experiences and fears of returning to his home country. *Id*. ¶¶ 11-12. Throughout the hearing, the Asylum Officer acts as the examiner, the judge and – most relevant here – the court reporter. *Id*. ¶¶ 13-14. It is the Asylum Officer's job to type or write down the questions and answers and, since the hearing is not taped, to make the notes an "accurate and objective record of the interview." *See* Burke Decl. ¶ 4, Ex. B, at 5-6. Indeed, according to the Asylum Officer Basic Training Course, available on the USCIS website:

> It is essential for asylum officers to take clearly written and comprehensive notes during the interview. Interview notes must accurately reflect what transpired during the interview so that a reviewer can reconstruct the interview by reading the interview notes. In addition, the interview notes should substantiate the asylum officer's decision.

Id., Ex. B at 3. This emphasis on objectivity allows for supervisory review of Asylum Officer recommendations and ensures that, if asylum is not granted and the applicant is referred to the Immigration Court for adversarial removal proceedings, there exists some record of information provided (and missed) during the interview. *Id*.

Until the Government changed course in about March 2012, Plaintiff followed a routine

process spelled out by the agency of submitting FOIA requests to receive his clients' immigration files – including the interview notes. *See* Martins Decl. ¶¶ 7, 30. He used the notes to evaluate the information elicited during the interview, identifying questions the Asylum Officer neglected to ask or answers given by the applicant that with clarification or corroboration would substantiate the claim for asylum. *Id.* ¶¶ 17, 24-27. In these and additional ways, the notes provide information that allow Mr. Martins to assess what led to the decision not to grant asylum and then to make more informed decisions about how best to prepare a client's case for presentation to the Immigration Court. *Id.* ¶¶ 24-27. Unfortunately, Mr. Martins' clients themselves, despite having been the subjects of the interviews, are in no position to fill in the information that Mr. Martins lacks without the notes. They are hamstrung because they are not allowed to take any written notes during the interview. They also face the stress of the interview and instances of miscommunication and misunderstandings that occur. *Id.* ¶ 18.

The Referral letters from the Asylum Office, sending his clients' cases to the Immigration Court, are not substitutes for the notes, either. The letters provide the reasons for the decision not to grant asylum in the broadest of terms: for example, stating the applicant has "not established that any harm [she] experienced in the past is on account of one of the protected characteristics in the refugee definition," or stating that the applicant was deemed not credible on the basis of "[m]aterial inconsistencies" within the testimony or between the testimony and the written application and supporting documents. Without further detail that might point toward the specific issues the Asylum Office had with the testimony and other evidence it had before it, the Referral letters simply do not fill the information void caused by the Government's withholding of the notes. *Id.* ¶ 17, Ex. E.

The notes that Plaintiff seeks often made a difference for his clients in resisting removal and gaining asylum. For example, interview notes revealed that an Asylum Officer did not grant asylum based on the erroneous belief that the Kenyan refugee camp where the applicant said she stayed did not exist. *Id.* ¶ 14. After Mr. Martins proved to the Immigration Judge that the refugee camp had in fact existed, his client secured asylum. *Id.* Similarly, interview notes revealed that an Asylum Officer declined to grant asylum to a gay man from Georgia based on a change in country

conditions – that Georgia had elected a new president. *Id.* ¶ 25. But Mr. Martins was able to secure asylum for his client in removal proceedings by showing that the police in Georgia continued to target and threaten gay men even after the change in presidents. *Id.* And in another case, interview notes revealed that an Asylum Officer declined to find an exception to the bar to asylum for a late filer from Uzbekistan without asking any questions about the psychological impact of past persecution. *Id.* ¶ 26. While difficult for an unrepresented layperson to understand and document, the notes made clear to Mr. Martins that this area had to be investigated. *Id.* With adequate time to prepare, Mr. Martin was able to prevail for his client in the removal proceedings that ensued by documenting the impact of trauma upon the man, which is recognized as a basis for an exception to meeting the filing deadline. *Id.*; 8 C.F.R. § 1208.4(a)(5).

These examples show the importance of access to the notes to ensure full and effective representation of asylum seekers in removal proceedings. The Government's new policy of refusing to release the interview notes leaves Mr. Martins lacking key information about his clients' cases, especially in the pending cases where removal proceedings are imminent, and invaluable evidence is likely to be lost with the passage of time.

III. LEGAL STANDARDS

A preliminary injunction is appropriate where the moving party establishes: (1) he is likely to succeed on the merits; (2) irreparable harm will likely result in the absence of preliminary relief; (3) the balance of equities tips in his favor, and (4) the injunction is in the public interest. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1289 (9th Cir. 2013) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008)). The Ninth Circuit takes a "sliding scale" approach to the four prongs, "under which a preliminary injunction could issue where the likelihood of success is such that serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011) (holding that this approach survives the U.S. Supreme Court's decision in *Winter*) (quotations omitted). In other words, the moving party must "make a showing on all four prongs." *Id.* at 1132. But where, as here, an injunction is in the public interest, and a likelihood of irreparable harm exists without it, the Court may grant relief upon finding that serious questions

go to the merits of the case and the balance of hardships tips sharply in Plaintiff's favor. *Id*. at 1135.

Federal courts are empowered to issue preliminary injunctions in FOIA cases. *See*, *e.g*., *Elec*. *Privacy Info*. *Ctr*. *v*. *Dep't of Justice*, 416 F. Supp. 2d 30, 35 (D.D.C. 2006) ("On numerous occasions, federal courts have entertained motions for a preliminary injunction in FOIA cases and, when appropriate, have granted such motions."). Indeed, "[t]he FOIA imposes no limits on courts' equitable powers in enforcing its terms." *Payne Enterprises v*. *United States*, 837 F.2d 486, 494 (D.C. Cir. 1988). In a case like this one, where the Government persists in disregarding its statutory obligations and on-point Ninth Circuit case law, preliminary injunctive relief is especially warranted. *See Electronic Frontier Foundation v*. *Office of the Director of Nat'l Intelligence*, 2007 U.S. Dist. Lexis 89585, at *11 (N.D. Cal. Nov. 27, 2007).

IV. ARGUMENT

A. Mr. Martins Is Likely To Prevail On The Merits.

As explained below, Mr. Martins is highly likely to prevail on the merits of his claims, given the Ninth Circuit's decision in *Dent* compelling the release of the A-File, which includes the Asylum Officer interview notes, to an individual in removal proceedings and the lack of any colorable basis for the Government's assertion of Exemption 5 in its FOIA denial.

1. The Ninth Circuit Requires Release Of A-Files, Including Asylum Officer Interview Notes.

Nothing in Exemption 5 permits the withholding of records like interview notes that must be – and for years have been – "available by law to a party other than" the Government in litigation. 5 U.S.C. § 552(b)(5). That is to say, Exemption 5 permits agencies to withhold only documents that are "normally privileged in the civil discovery context." *NLRB v*. *Sears, Roebuck & Co*., 421 U.S. 132, 149 (1975). Until its change in policy, the Government routinely provided asylum seekers and their representative with Asylum Officer interview notes requested under FOIA before ICE trial attorneys squared off against them in Immigration Court, and it continues to this day to use the notes when it suits its purposes to do so in removal proceedings. *See* Martins Decl. ¶¶ 30-32. As the Ninth Circuit found in *Dent*, 627 F.3d at 374, the Government cannot

withhold asylum officer notes if removal proceedings are to be fair and satisfy an asylum seeker's due process rights.

In *Dent*, Sazar Dent was a convicted felon facing removal who claimed in defense that he was an American citizen, and that with the right paperwork he could prove it. *Id*. at 368. But his adoptive mother's birth certificate was lost in a fire at the county courthouse in Kansas, and he was unable to locate her passport in Honduras, where she had died. *Id*. at 369. As his case bounced back and forth between an Immigration Judge and the Board of Immigration Appeals (BIA), the Government had in his A-File his childhood naturalization applications, which corroborated his claim of citizenship. *Id*. at 370. Dent asked for help getting papers relevant to his case, but these were never shared with him – or raised with the IJ and the BIA. *Id*.

The Ninth Circuit agreed with Dent that, "because he was not provided with the documents in his A-file, he was denied an opportunity to fully and fairly litigate his removal and his defensive citizenship claim." *Id*. at 373. The court noted that federal immigration law requires that an alien in removal proceedings, to meet the burden of proof, "'*shall have access*' to his entry document '*and any other records and documents,* not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.'" *Id*. at 374 (quoting 8 U.S.C. § 1229a(c)(2)(B)) (emphasis added). "This mandatory access law entitled Dent to his A-File[,]" the Court concluded. *Id*.

In a richly ironic twist, the Government in *Dent* claimed that Dent had an adequate remedy: the FOIA process. The Government relied on an administrative regulation requiring an alien to submit a FOIA request to receive material from the A-File. *Dent*, 627 F. 3d at 374. But the Ninth Circuit rejected the argument, stating that Dent did not have to suffer through the FOIA process because FOIA requests "often take a very long time, continuances in removal hearings are discretionary, and aliens in removal hearings might not get responses to their FOIA requests before they were removed." *Id*. To construe the statute and the regulation to entitle Dent to his A-File, but "den[y] him access to it until it was too late to use it … would unreasonably impute to

Congress and the agency a Kafkaesque sense of humor about aliens' rights." *Id.*[2] Dent had asked the agency for records that were in his A-File, and he had a right to receive them even without a FOIA request as a matter of federal law and fundamental due process. This holding in *Dent* directly contradicts the Government's position here that it does not have to provide A-Files even through the FOIA process because of its invocation of Exemption 5.

Courts have readily found in the FOIA context that Exemption 5 is unavailable where federal law elsewhere compels the Government to share materials with an opposing party in court. For instance, in *Department of Justice v. Julian*, 486 U.S. 1 (1988), the Supreme Court held that Exemption 5 did not cover a prisoner's presentence report, since the Federal Rules of Criminal Procedure and the Parole Act both required the Government to hand it over to a criminal defendant during the sentencing process. *Id.* at 10, 15. Notably, the Government had argued that presentence reports were not "routinely or normally" disclosed because courts had prohibited the disclosure of presentence reports to *third parties*. *Id.* at 13-14. The Court rejected this argument, treating the prisoner's request for his own presentence report as different from a requester who was a third party. *Id.* at 14. A criminal defendant was routinely provided with the report in court; the Parole Commission could hardly withhold it in response to the individual's request under FOIA. *Id.*

Dent and the existence of federal law compelling access to A-File records control the result for Mr. Martins in this case, and require production of the asylum interview notes even in the absence of a FOIA request. The Government may invoke Exemption 5 when FOIA requesters are seeking documents that the Government may permissibly refuse to turn over in litigation. That circumstance is not present here, where under *Dent*, the Government *must* disclose the contents of an A-File. For the immediate purposes of this motion, the existence of Ninth Circuit authority

[2] The Ninth Circuit stated that if FOIA "applied to removal proceedings, a serious due process problem would arise" because of FOIA's cumbersome and drawn out process. *Dent*, 627 F.3d at 374. The concern the *Dent* Court expressed about FOIA requests taking too long for individuals in removal proceedings is particularly notable for the present case, where the Government is refusing altogether to produce asylum interview notes in advance of hearings. When the hearings take place, the Government is providing them, if at all, only *after* it has used them to its own advantage and effectively deprived asylum seekers of using them in making their affirmative cases for asylum.

compelling the release of the records at issue in this case provides sufficient grounds to show that Plaintiff is likely to prevail on the merits.

2. The Deliberative Process privilege does not apply to these documents.

Even without the decision in *Dent*, Plaintiff would prevail on the merits because the records at issue here are simply not ones that Congress intended to shield from production under FOIA. Congress enacted FOIA to provide the public with a clear entitlement to a vast expanse of agency records. Government oversight was a driving concern, but the Act is also an essential procedural tool for people to procure administrative records that affect their individual lives. *See*, *e.g.*, *Julian v. United States Dep't of Justice*, 806 F.2d 1411, 1414 (9th Cir. 1986), aff'd 486 U.S.1 (1988) (inmates sought under FOIA copies of their presentence investigation reports); *Pickard v. United States Dep't of Justice*, 653 F.3d 782, 784-85 (9th Cir. 2011) (Plaintiff sought records related to confidential informant who testified against him at trial). Such is the case here.

Until last year, the Asylum Officer's interview notes were generally produced with A-File records when Mr. Martins requested them under FOIA. *See* Martins Decl., ¶¶ 30-31. Now, the Government insists, across the board, that it need not disclose these notes because they fall under the FOIA exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The Government maintains that these "objective," studiously factual notes – which are intended to "accurately reflect what transpired during the interview" and are *not* to include subjective impressions, opinions, analysis, or recommendations – are protected under the deliberative process privilege. Martins Decl. ¶ 49, Ex. N; Burke Decl. ¶ 4, Ex. B.[3]

In a FOIA action, the agency bears the burden of establishing that an exemption applies to the requested records – that they are, in the case of the deliberative process privilege, (1) pre-

[3] Defendants have yet to offer an explanation for this change in policy and practice and, to date, despite being served with this action and appearing through counsel at the April 18, 2013 initial Case Management Conference, Defendants have failed to file an Answer to Plaintiff's Complaint. In responses to Plaintiff's administrative appeals, USCIS has relied on *Phillips v. Immigration and Customs Enforcement*, 385 F.Supp.2d 296 (S.D.N.Y. 2005), in invoking Exemption 5 to withhold the interview notes, but that case cannot bear the weight the Government places on it for a number of reasons, including that the documents at issue there were of a different nature than the notes Plaintiff seeks.

decisional and (2) deliberative. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152-53 (1975) (deliberative process privilege does not protect communications made after a decision and designed to explain the decision) (internal quotations and citations omitted). Documents are "pre-decisional" if they were prepared before, and with the purpose of helping the agency reach, a final decision on some matter. *Judicial Watch of Florida v. U.S. Dep't of Justice*, 102 F. Supp. 2d. 6, 16 (D.D.C. 2000). "Deliberative" agency documents are those in which the writer makes recommendations or expresses opinions on legal or policy matters. *See Vaughn v. Rosen,* 523 F.2d 1136, 1144 (D.C. Cir. 1975). Emphatically, factual information is *not* deliberative. *See*, *e.g.*, *Nat'l Res. Def. Council v. United States Dep't of Defense*, 388 F. Supp. 2d 1086, 1098, 1106-07 (C.D. Cal. 2005) (recognizing that the privilege generally does not protect factual material); *North Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003) (recognizing rule); *Dean v. FDIC*, 389 F. Supp. 2d 780, 794 (E.D. Ky. 2005). This privilege, and FOIA exemption (b)(5), do not permit the Government to withhold "factual material otherwise available on discovery merely [on the basis that] it was placed in a memorandum with matters of law, policy, or opinion." *EPA v. Mink*, 410 U.S. 73, 91 (1973).

The principle that factual material is not covered by the deliberative process privilege is firmly rooted in the case law examining Exemption 5 and the privilege. *See, e.g., Martin v. Naval Criminal Investigative Service*, 2012 U.S. Dist. Lexis 178258, at *12 (S.D. Cal. Dec. 14, 2012); *Doerbecker v. County of Nassau*, 2013 U.S. Dist. Lexis 71990, at *6 (E.D.N.Y. May 21, 2013) (the privilege "does not protect from disclosure purely factual material"). In *Kubik v. U.S. Fed. Bureau of Prisons*, for example, the Court found that the deliberative process privilege did not protect a summary of interviews conducted with staff members to record their accounts of and responses to a prison riot. 2011 U.S. Dist. Lexis 71300, at *21-22 (D. Or. July 1, 2011). While the privilege did cover a committee's assessment of prison conditions at the time of the riot, and recommended findings on whether it was handled properly, the interview summary was factual, and its production was accordingly required. Similarly in *McGrady v. Mabus*, the Court found that "Master Sheet Briefs," used by the U.S. Navy's Selection Board to determine which officers

to promote, were not deliberative. 2009 WL 2170141, at *25-26 (D.D.C. July 22, 2009). Although the briefs were "a tool in the decision-making process, and serve[d] as an important factor in the final promotion decision, … they reveal only the data used during the process, and not the substance of the deliberations." *Id*. at 25.

Given these authorities, the Government's newfound position that the "deliberative" label applies to Asylum Officer interview notes – which are factual *by design* – is bound to fail. USCIS trains Asylum Officers to:

> take care their notes will be perceived by others as an *accurate and objective record* of the interview. For example, even an exclamation point placed in reaction to a portion of the applicant's testimony may appear as a judgment of the applicant's claim.

Burke Decl. ¶ 4, Ex. B, at 5-6 (emphasis added). As Plaintiff explains in his concurrently filed declaration and demonstrates with examples, an Asylum Officer's interview notes are very much like a transcript, Martins Decl. ¶ 14, Exs. B-D, as one would expect given the instructions to officers that notes "must accurately reflect what the applicant says as well as what the Asylum Officer asks." *See also* Burke Decl. ¶ 4, Ex. B, at 5 (capitalization altered from original). Misunderstandings and miscommunications are common, as Mr. Martins explains, and this compounds the need for him to have access to the notes to represent his clients, but at bottom, the notes – even with their typos, abbreviations, and the like – are a written embodiment of the questions asked and answers given in the asylum interview. Martins Decl. ¶ 14. In other words, they are factual.

The notes are the antithesis of a document subject to the deliberative process privilege. The interview notes are supposed to convey as nearly as possible the literal content of the interview, so that later on "a reviewer can reconstruct the interview by reading the interview notes." Burke Decl. ¶ 4, Ex. B, at 3. They may include an occasional objective observation, such as that the applicant nodded or shook his or her head or that the individual was unable to answer a question, but they do not include the Asylum Officer's subjective impressions, opinions, or analysis of the claim or recommendation. Burke Decl. ¶ 4, Ex. B, at 5-6. Officers are explicitly instructed to keep their "subjective opinions, suppositions, and personal inferences" *out* of the

notes. Burke Decl. ¶ 4, Ex. B, at 5 (capitalization altered from original). Instead, under the Government's procedures, a separate document – the assessment – is the place for their analysis of the claim and recommendation as to whether or not to grant the asylum application. *Id*., Ex. C at 6-7. Mr. Martins is also familiar with how the notes are prepared based on his extensive experience as an Asylum Officer and from his more than decade-long review of the notes while in private practice. Martins Decl. ¶¶ 3, 30. It is Mr. Martins' experience that the notes provide the factual content of the interviews, and subjective matters, including the Asylum Officer's reflections, assessments, and recommendations, go into the separate "assessment." *Id*. ¶ 6.

In this case and with the instant Motion, Mr. Martins exclusively seeks the interview notes, which fit squarely within the category of factual material that the deliberative process privilege does not reach. If any subjective material found its way into a set of interview notes, despite the explicit direction that such material not be included there, it could be redacted, and the rest released. Because the deliberative process privilege provides no bar to disclosure of the records, the Government has no grounds for withholding the Asylum Officer interview notes, and Mr. Martins is likely to prevail on the merits.

B. The remaining *Winter* elements of a preliminary injunction are satisfied.

1. Mr. Martins and his clients are likely to suffer irreparable harm without the Asylum Officer interview notes.

In the Ninth Circuit, "[i]t is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). The Court in *Dent* recognized that the deprivation of A-File materials raises constitutional due process concerns, because it cuts off the individual's ability to meet his evidentiary burden and establish his claims and defenses. *Dent*, 627 F.3d 365 at 374. Mr. Martins' claim sounds in his clients' constitutional rights; his ability to prepare their cases for asylum is being irreparably harmed by the refusal of USCIS to release these interview notes. While the harm to his clients is his greatest concern, the withholding of the notes also harms Mr. Martins, as he must work in the dark while trying to stop his clients from being deported. Martins Decl. ¶¶ 18-19.

Without access to the Asylum Officer's notes, Mr. Martins has to rely on a client's memory of the interview to glean key information about a case. *Id.* ¶ 18. This is a time consuming and unreliable method, given the length and stress of interviews, and how quickly memories fade. *Id.* Mr. Martins is left to guess which issues mattered to the Asylum Officer and may waste time chasing down an aspect of the record that turns out to be irrelevant. *Id.* at ¶ 19. In other instances, because his client may not recall an earlier question or may have thought it to be irrelevant, Mr. Martins may be surprised to hear of an issue for the first time in the midst of a merits hearing. *Id.*

With cases set years out – some as far as 2016 and 2017 – the time is now for Mr. Martins to identify and secure needed evidence, not down the road when it may be too late to obtain the evidence. *Id.* ¶ 22. However, with the Government withholding the notes, by the time a matter has proceeded to a hearing, Mr. Martins already has lost the ability to assess and strengthen the parts of the record that, without access to the notes, he was not in a position to know about or anticipate. As with any drawn-out legal case, evidence gets lost or destroyed or becomes too difficult to secure from a foreign land, and witnesses are increasingly likely to forget facts or become unavailable. On top of these problems, when a Government attorney seeks to introduce Asylum Officer interview notes as evidence (or simply relies on them but without introducing them), typically to discredit Plaintiff's client by pointing to a perceived inconsistency in the record, Plaintiff can request and may, in the Court's discretion, obtain a continuance. Martins Decl. ¶¶ 20-21. But this option is wholly inadequate. Obviously it does not address Mr. Martins' position of being forced to prepare his clients' cases without having access to key information about what transpired in the interview that led to the application not being granted. *Id.* ¶¶ 18-19. It also puts Plaintiff in an impossible situation: If he takes (and the Court grants) the continuance, it can mean for his clients months to years of *additional* delay before a resolution of their asylum claims, a protracted period during which his clients' families face political peril in their home countries. *Id.* ¶¶ 2, 22-23. This waiting only exacerbates the problems of delay caused by the schedule at the Immigration Court, and it adds to the harm that Mr. Martins' clients suffer. On the other hand, if Plaintiff presses ahead with a merits hearing when a Government attorney

suddenly introduces excerpts of the interview notes, his clients face a serious risk of losing their cases and being deported to countries where they and their families will face persecution, mental or physical torture, or even death. *Id.* ¶ 2.

Either way, the Government's change in policy and practice unnecessarily places Mr. Martins and his clients in an impossible position. Not having the interview notes irreparably harms his ability to represent clients whose asylum cases are pending *right now*. For obvious reasons, this damage cannot be repaired months down the line *after* the asylum seekers' removal proceedings already have taken place or even as further time passes and their hearings draw ever closer.

2. The balance of equities plainly tips in favor of Mr. Martins.

This Court need not weigh the balance of harms because Mr. Martins has identified an injury that amounts to the deprivation of a constitutional right and, as the *Dent* court recognized, the violation of a federal law designed to protect due process rights. *See* 8 U.S.C. § 1229a(c)(2)(B)). In such a case, generally no further showing of harm is required: The loss of a constitutional right is, in itself, an injury that the law will not tolerate. *Associated General Contractors of Cal., Inc. v. Coalition for Economic Equality*, 950 F.2d 1401, 1412 (9th Cir. 1991); *Citicorp Services, Inc. v Gillespie*, 712 F. Supp. 749, 753 (N.D. Cal. 1989). Similarly, courts recognize that "where a defendant has violated a civil rights statute, we will presume that the plaintiff has suffered irreparable injury from the fact of the defendant's violation." *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001).

On one side of the balance is the litany of injuries described above and in Mr. Martins' concurrently filed declaration, including Mr. Martins' clients facing deportation through an unbalanced process where to date they have been deprived of access to key documents that can enable them to make their cases. On the other side, the Government's chief interest in withholding Asylum Officer interview notes appears to be that they give Government attorneys the upper hand in removal proceedings. Mr. Martins would like to advise and represent his clients effectively; the Government hopes to protect its unfair advantage in the adversarial setting. The harms that Mr. Martins' clients suffer – that materially inhibit his ability to effectively defend them – greatly

outweigh anything the Government might claim here.

3. An injunction is in the public interest.

A preliminary injunction would serve the strong public interest in an immigration process that fairly and accurately affords the protection of asylum to deserving non-citizens, who have suffered past persecution and who are at risk of future persecution in their home countries. Martins Decl. ¶¶ 24-28. The Ninth Circuit has recognized that "public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). Given the nation's commitment to providing a safe haven to those who face persecution and the risk of violating the principle of non-refoulement with unfair proceedings, the public interest is all the more served here by preliminary injunctive relief. *See Delgado v. Holder*, 648 F.3d 1095, 1101 (9th Cir. 2011) (recognizing the prohibition against the refoulement of refugees). The public interest is also furthered by a preliminary injunction that ensures that federal statutes are construed and implemented in a manner that avoids serious constitutional questions. *Rodriguez v. Robbins*, 2013 U.S. App. LEXIS 7565, at *51 (9th Cir. 2013). "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002) (internal quotation marks and citation omitted). *See also Electronic Privacy Information Center v. Dep't of Justice*, 416 F. Supp. 2d 30, 42 (D.D.C. 2006) (finding the public interest prong met in a FOIA case in part because of "an overriding public interest … in the general importance of an agency's faithful adherence to its statutory mandate[,]" and finding an injunction would "further[] FOIA's core purpose of 'shedding light on an agency's performance of its statutory duties'") (citations omitted).

Here, the Government's unilateral change in position raises serious constitutional concerns. *Dent* made clear that the Government cannot skew the removal process by raising procedural and substantive obstacles to asylum seekers obtaining their A-Files, which include Asylum Officer interview notes. The Ninth Circuit even recognized that if the FOIA regulations allowed an asylum seeker to obtain his A-File, but denied actual access in fact because of the delays attendant with the FOIA process, that "would indeed be unconstitutional." *Dent*, 627 F.3d

at 374. With its repeated and consistent refusal to turn over these crucial records, the Government has thumbed its nose at *Dent* and trampled on the due process rights of Mr. Martins' clients. The experiences of Mr. Martins and his clients are being replicated around the Ninth Circuit and the rest of the country. Burke Decl., ¶ 7, Ex. E. Because the public interest favors a balanced, equitable, and fair process of adjudicating individuals' requests for asylum, this factor also sharply leans in favor of the preliminary injunction.

V. CONCLUSION

An injunction by this Court is necessary and appropriate here. Plaintiff has demonstrated a strong likelihood of success on the merits. Moreover, because both he and his clients are likely to suffer irreparable injury without immediate access to the notes at issue here, the balance of equities tips sharply in Plaintiff's favor, and the requested injunction is in the public interest. Given the unique and compelling circumstances presented, Mr. Martins respectfully requests that the Court enjoin Defendants from asserting Exemption 5, and require the Government to promptly process the interview notes that Mr. Martins needs to prepare for the pending cases with imminent removal hearings.

DATED this 29th day of May, 2013.

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