UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, Plaintiff, v. U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS AND BORDER PROTECTION, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF JUSTICE, and U.S. DEPARTMENT OF STATE, Defendants.	17 Civ. 7572 (ALC)

REPLY MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF UNITED STATES DEPARTMENT OF STATE, IMMIGRATION AND CUSTOMS ENFORCEMENT AND UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES FOR CLARIFICATION AND PARTIAL RECONSIDERATION OF THE COURT'S OPINIONS AND ORDERS GRANTING IN PART AND DENYING IN PART CROSS-MOTIONS FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Defendants ICE, State, and USCIS respectfully submit this reply memorandum of law in support of their motion, pursuant to Federal Rule of Civil Procedure 60(b) and Local Civil Rule 6.3, for clarification and reconsideration in part of the Court's September 16 and 23 Orders.[1]

Plaintiff ignores two crucial aspects of the Government's motion. First, ICE has identified facts in the record that the Court appears to have overlooked – namely, that the Supplemental Fuentes Declaration, dated May 3, 2019, Dkt. No. 113, provides the exact information about ICE's search that the Court concluded was missing. Second, State and USCIS do not seek to relitigate determinations previously made by the Court, but rather seek clarification of those determinations and, to the extent the Court ordered the agencies to produce certain information and in light of the significant national security concerns implicated, respectfully request that the agencies be permitted to conduct a further segregability analysis and supplement the record with information the Court concluded was lacking.

ARGUMENT

I. Reconsideration Regarding the Adequacy of the Searches Conducted by Four ICE Components Is Warranted Because the Court Appears to Have Overlooked Facts in the Record

Plaintiff misconstrues the Government's reliance on *Human Rights Watch v. DOJ Federal Bureau of Prisons*, No. 13 Civ. 7360 (JPO), 2016 WL 3541549, at *1 (S.D.N.Y. June 23, 2016), and *Nat'l Council of La Raza v. DOJ*, No. 03 Civ. 2559 (LAK), 2004 WL 2314455, at *1 (S.D.N.Y. Oct. 14, 2004). While those cases do not address motions for reconsideration regarding an agency's searches, the Government cites them for the basic principle at issue here, that reconsideration is appropriate where a court "overlooked" facts or arguments, *Human Rights*

[1] This reply memorandum of law employs the same abbreviations defined in the Government's initial memorandum of law, Dkt. No. 144.

Watch, 2016 WL 3541549, at *2, or where "important public interests" are at stake, *Nat'l Council of La Raza*, 2004 WL 2314455, at *1. As explained below, the Court overlooked material facts set forth in the Supplemental Fuentes Declaration – an entirely proper basis on which to seek reconsideration. Local Civ. R. 6.3; *see also Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) (district court did not abuse its discretion when reconsidering an order that had not addressed the statute's legislative history or relevant case law). Specifically, in reaching the conclusion that four ICE components did not conduct adequate searches, the Court, citing the Fuentes Declaration dated February 26, 2019, Dkt. No. 91, determined that ICE failed to provide three pieces of information, all of which were in fact provided in the Supplemental Fuentes Declaration dated May 3, 2019, Dkt. No. 113, which the Court did not cite in the relevant portions of the orders.

First, the Court concluded that "ICE provided no description of the search terms used by custodians in the ILPD and NSLS," citing paragraphs 20 and 22 of the initial Fuentes Declaration, Dkt. No. 91. September 16 Order at 13. But to the contrary, the Supplemental Fuentes Declaration identified the search terms used by custodians in the ILPD and NSLS. *See* Dkt. No. 113 at ¶ 13 ("ILPD tasked the entire division to search for responsive records. Consistent with ICE's practice, and as was the case here, when a plaintiff does not suggest search terms, the ICE FOIA Office suggests search terms and individual employees then use their knowledge and experience to choose among the suggested terms and to determine if there are other search terms which would be helpful. ILPD attorneys and staff searched their government computers (including personal and shared drives) and Outlook e-mail accounts, using the following electronic search terms: "endorse," "espouse," "espouses," "speech," "beliefs," and/or "association."); *id.* at ¶ 14 ("NSLS tasked the entire division to search for responsive records. Consistent with ICE's practice, and as was the

case here, when a plaintiff does not suggest search terms, the ICE FOIA Office suggests search terms and individual employees then use their knowledge and experience to choose among the suggested terms and to determine if there are other search terms which would be helpful. NSLS staff searched their government computers (including personal and shared drives) and Outlook e-mail accounts, using the following electronic search terms: "endorse," "espouse," "foreign policy," "212(a)(3)(B)(i)(VII)," "212(a)(3)(C)," and/or "200715919.").

Second, the Court concluded that ICE failed to explain "how the agency handled the administrative remand," September 16 Order at 15, but the Supplemental Fuentes Declaration again provides that information. Despite plaintiff's attempt to obscure the timeline, Ms. Fuentes was very clear. She explained that in August 2017, ICE directed DPLA (a component of OPLA) and Policy to search for records responsive to plaintiff's FOIA request, but only Policy searched for records. Dkt. No. 113 at ¶¶ 6-8. Instead of filing an administrative appeal, plaintiff filed the instant suit in October 2017. *See id.* at ¶ 10. When plaintiff filed this action, ICE: (1) reviewed its initial search and determined that it was inadequate; (2) communicated its view to plaintiff that plaintiff had failed to exhaust administrative remedies; (3) understood that plaintiff would file an administrative appeal and, in return, dismiss ICE from this action without prejudice; and (4) in response to the lawsuit and in anticipation of the administrative appeal, directed (and in DPLA's case, redirected) components to search for records responsive to the FOIA request. *See id.* at ¶¶ 10-20.

To the extent plaintiff argues that ICE is somehow mischaracterizing the record before the Court, *see* Dkt. No. 147 (arguing that ICE had not "previously attempted to frame" the second searches as a preemptive grant of an administrative appeal), plaintiff is mistaken. ICE has indeed explained that it conducted the second round of searches because ICE acknowledged that its first

round was inadequate, and thus conducted the second search in anticipation of being directed – by this Court or the ICE FOIA Appeals Office – to do it again. As Ms. Fuentes outlined, ICE conducted initial searches in August 2017; reviewed those searches when this suit was filed in October 2017; and conducted other searches from October 2017 through January 2018. Dkt. No. 113 at ¶¶ 8-20. Plaintiff filed its administrative appeal on December 22, 2017, *see* Dkt. No. 28, when ICE's second searches were well underway, *see* Dkt. No. 113 at ¶¶ 13-20. Contrary to plaintiff's characterization, therefore, it is indeed "a matter of logic," Dkt. No. 147 at 4, that ICE conducted a second round of searches in anticipation of being directed to do just that.

This second search demonstrates ICE's good faith in this matter. That ICE – in response to this lawsuit and without waiting for an administrative appeal – voluntarily reviewed its initial search, concluded it must conduct a more comprehensive one, and then did conduct a more comprehensive search, underscores, rather than undermines, ICE's good faith search efforts in this case. Indeed, courts have consistently held that agencies demonstrate good faith where, as here, an agency recognizes a mistake and voluntarily attempts to address it. *See, e.g., Maynard v. CIA*, 986 F.2d 547, 565 (1st Cir. 1993) ("Rather than bad faith, we think the forthright disclosure by the INS that it had located the misplaced file suggests good faith on the part of the agency.") (citing *Meeropol v. Meese*, 790 F.2d 942, 953 (D.C. Cir. 1986) ("what is expected of a law-abiding agency is that it admit and correct error when error is revealed")); *Cuban v. SEC*, 795 F. Supp. 2d 43, 49 (D.D.C. 2011) (concluding that a supplemental declaration explaining "that the files can be searched electronically" and "recogniz[ing] that the SEC did not realize this earlier" has "no bearing on the evaluation of the SEC's good faith," and finding the SEC's search for documents responsive to one category of documents adequate) (citing *Nat'l Inst. of Military Justice v. DOD*, 404 F. Supp. 2d 325, 333-34 (D.D.C. 2005) ("Although the agency was not initially diligent, that

alone does not demonstrate bad faith, especially in light of the subsequent efforts to search for responsive records once the parties engaged in discussions about the specific type of documents the plaintiff was seeking"), *aff'd*, 512 F.3d 677 (D.C. Cir. 2008)); *cf. Protect Democracy Project, Inc. v. U.S. Dep't of Energy*, 330 F. Supp. 3d 515, 523 (D.D.C. 2018) (ordering agency to conduct another search across additional custodians where the agency "never reconsidered its initial decision to limit its search to [one custodian's] files"). To the extent plaintiff finds fault with ICE's conducting supplemental searches before plaintiff filed an administrative appeal, plaintiff exalts form over substance; on October 2017, after reviewing its initial search, ICE directed all components which might have responsive documents to search for documents responsive to the entirety of plaintiff's FOIA request – the full extent of the relief plaintiff could receive through an appeal.

Third, contrary to the September 16 Order, ICE did explain "how it narrowed its search" after collecting documents responsive to plaintiff's original, non-narrowed FOIA request. Again, this information was provided in the Supplemental Fuentes Declaration, which was not cited by the Court. *See* Dkt. No. 113 at ¶¶ 23-24 (explaining that after plaintiff agreed to narrow the FOIA request, the Government Information Law Division manually reviewed the remaining pages that had been collected for final policy memoranda or guidance).

Because the Court appears to have overlooked these facts in the record, ICE respectfully requests that the Court reconsider its rulings that ILPD, NSLS, DPLA and FLO conducted inadequate searches.

II. State and USCIS Request Clarification of the Court's Rulings Concerning Exemption 7(E), and Reconsideration if the Court Has Ordered Disclosure

While plaintiff assails State and USCIS for seeking clarification of the Court's orders regarding information the agencies withheld pursuant to FOIA Exemption 7(E), it is axiomatic that

a party cannot comply with a Court order that it does not understand. State respectfully seeks clarification regarding whether the Court has ordered the agency to produce the information withheld pursuant to Exemption 7(E), as the Court appears to have ordered in one portion of the opinion, *see* September 16 Order at 28, or to provide supplemental submissions on this issue, as the Court also appears to have ordered in another portion of the opinion, *see id.* at 29. Similarly, USCIS respectfully seeks clarification regarding (1) whether the Court has ordered USCIS to produce certain information withheld under Exemption 7(E) or to provide supplemental submissions on this point, and (2) which information the Court has defined as "TRIG Questions" not subject to Exemption 7(E).[2] *See* September 23 Order at 24-26. If the Court has ordered the State Department and/or USCIS to produce material withheld pursuant to Exemption 7(E), the Government respectfully requests that the Court reconsider this ruling and permit the agencies to supplement the record with additional declarations or review the relevant documents *in camera*.

Plaintiff does not contest that district courts commonly allow the Government to make supplemental submissions, rather than ordering disclosure, where they find an agency's submissions insufficiently detailed to justify application of a FOIA exemption. *See, e.g., N.Y. Legal Assistance Grp. v. U.S. Dep't of Educ.*, No. 15 Civ. 3818 (LGS), 2017 WL 2973976, at *7-8, 10 (S.D.N.Y. July 12, 2017) (denying summary judgment as to certain documents, but allowing the agency to make supplemental submissions and then renew its motion); *ACLU v. U.S. DOJ*, 210 F. Supp. 3d 467, 485-86 (S.D.N.Y. 2016) (same); *Intellectual Prop. Watch v. U.S. Trade Representative*, 134 F. Supp. 3d 726, 746-47 (S.D.N.Y. 2015) (directing the agency to supplement "purely . . . conclusory statements" so that the Court could "make itemized findings, ideally with respect to specific documents or redactions, but at least at such a level of detail as to permit

[2] Absent further clarification from the Court, USCIS will make a good faith effort to differentiate between "TRIQ Questions" on the one hand and "TRIG Exemptions" on the other.

effective *de novo* review, if required, in the future") (quotation marks and citation omitted); *N.Y. Times Co. v. U.S. DOJ*, 915 F. Supp. 2d 508, 545-46 (S.D.N.Y. 2013) (directing government to submit supplemental declaration where court found initial declaration "wholly conclusory"), *supplemented by* 2013 WL 238928 (S.D.N.Y. Jan. 22, 2013) (upholding deliberative process assertion based on supplemental declaration), *aff'd in relevant part, rev'd in part on other grounds*, 756 F.3d 100 (2d Cir. 2014).

Plaintiff argues that the Court reached a substantive decision that the asserted exemptions do not apply, but the Court appears to have concluded that the agencies' declarations in support of these withholdings were insufficiently detailed, because the relevant rulings noted the absence of certain information in the agencies' submissions and speculated about the contents, nature and purpose of the withheld information. *See* September 16 Order at 26 ("it is not clear that the FAM was 'compiled for law enforcement purposes'") (citation omitted); *id.* at 27 (agreeing with plaintiff that "the redacted sections appear to contain definitions and broad statements of law"); *id.* (the "similarity between the withheld information and the INA's text . . . suggests Exemption 7(E) does not apply"); *id.* at 28 (finding that State "failed to satisfy its burden of showing that the withheld FAM sections" "describe 'proactive steps' for preventing criminal activity and maintaining security"); *id.* ("it is unclear how" the withheld information "may potentially help an individual circumvent the law"); *see also* September 23 Order at 24 ("other than stating so, UCSIS failed to demonstrate that its screening methods" are specialized); *id.* (the declaration "suggests USCIS's screening questions are susceptible to widespread dissemination"); *id.* ("USCIS submits no evidence"); *id.* (concluding that "it remains unclear as to how the questions at issue embody a specialized" technique or procedure).

Supplemental submissions and/or further segregability analyses can cure these deficiencies. *See ACLU v. Office of the Dir. of Nat. Intelligence*, No. 10 CIV. 4419 (RJS), 2011 WL 5563520, at *13 (S.D.N.Y. Nov. 15, 2011) (supplemental submissions "forc[e] the government to analyze carefully any material withheld" and "enabl[e] the trial court to fulfill its duty of ruling on the applicability of the exemption") (quoting *Keys v. DOJ*, 830 F.2d 337, 349 (D.C. Cir. 1987)). Indeed, State has already conducted a further segregability analysis of the FAMs and is prepared forthwith to reproduce the documents to plaintiff and submit a further declaration to the Court regarding the remaining withholdings.

While "FOIA requires prompt disclosure of non-exempt information relevant to the public interest," *ACLU v. DOD*, 357 F. Supp. 2d 708, 712 (S.D.N.Y. 2005), the statute balances that interest with the public's interest in protecting confidential information the disclosure of which could adversely impact law enforcement and national security. *See, e.g., Elec. Privacy Info. Ctr. v. DOJ*, 15 F. Supp. 3d 32, 48 (D.D.C. 2014) (noting "tension between the public's interest in an agency complying with its statutory mandate to release certain documents and the public's interest in security, which Congress recognized when it enacted laws that prohibit an agency from freely disseminating certain documents"); *see also John Doe Agency v. John Doe Corp*., 493 U.S. 146, 152 (1989) ("Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.'") (citation omitted); *Judicial Watch, Inc. v. U.S. Dep't of State*, 282 F. Supp. 3d 338, 344-45 (D.D.C. 2017) (granting motion for reconsideration despite agency's belated assertion of an exemption in part "because disclosure of the information would pose a significant risk to national security").

Here, the State Department has stated in two sworn declarations that release of the withheld information in the Foreign Affairs Manuals would compromise national security. *See* Dkt. No. 93 at ¶ 54 ("The release of information about the techniques at issue in this case could enable terrorists and other bad actors to avoid detection or develop countermeasures to circumvent the ability of the Department to effectively use these important law enforcement techniques, thereby allowing circumvention of the law."); Dkt. No. 112 at ¶ 9 ("The withheld information details investigation techniques used to assess the core national security concerns that arise in processing visa applications."); *see also* Dkt. No. 93, Exhibit 1, Vaughn Index at 4 (9 FAM 302.14-7(B)(3)(1) provides "guidelines for evaluating/investigating coursework and intent to return to Iran"). Similarly, USCIS affirmed that the withheld materials "are used to train USCIS immigration officers how to screen for possible terrorism ties and terrorism-related inadmissibility grounds pursuant to the INA when interviewing applicants[.]" Dkt. No. 97 at ¶ 20; *see also id.* at ¶ 32 (the "withheld information . . . could be used by future applicants to tailor their testimony and applications when seeking immigration benefits so they could hide possible terrorism ties . . . thus posing a risk to national security").[3]

In light of the particularly sensitive nature of the withheld information, and consistent with FOIA litigation practice in this District, State and USCIS respectfully request the opportunity to

[3] Indeed, other courts have concluded that similar questions properly fall under Exemption 7(E), noting their relevance to national security. *See Ibrahim v. U.S. Dep't of State*, 311 F. Supp. 3d 134, 143 (D.D.C. 2018) (finding USCIS officer questions in refugee application assessment were exempt under Exemption 7(E) because they "illustrate lines of questioning that law enforcement officials use to probe possible concerns for credibility, national security, and public safety"; concluding that "disclosure could reasonably be expected to risk circumvention of the law:); *Iraqi Refugee Assistance Project v. U.S. Dep't of Homeland Sec.*, No. 12-CV-3461 (PKC), 2017 WL 1155898, at *6-7 (S.D.N.Y. Mar. 27, 2017) (determining that withheld portions of USCIS record that included, among other things, "subject areas that Refugee Officers should probe with these applicants during interviews" was properly withheld under Exemption 7(E) because they "could help applicants evade investigator techniques and thus circumvent the law").

provide the Court with supplemental submissions concerning this sensitive, national security-related material. As noted above, State has now conducted a re-review of the withheld material and conducted a further segregability analysis; as a result, State is prepared forthwith to re-produce these documents with a substantially reduced number of redactions, which remain necessary to protect sensitive law enforcement techniques and guidelines. State thus respectfully requests that, after producing the re-processed documents to plaintiff, it be permitted to submit a supplemental declaration detailing the justifications for the narrowed withholdings. With any clarification from the Court regarding the distinction between "TRIG Questions" and "TRIG Exemptions," USCIS is similarly prepared to conduct a re-review and segregability analysis consistent with the September 23 Order, and provide a supplemental declaration to further justify its remaining withholdings. Alternatively, State and USCIS respectfully request the opportunity to provide the materials to the Court *in camera*, along with supplemental submissions providing additional information about the bases for the withholdings. *See La Raza*, 2004 WL 2314455, at *1.

CONCLUSION

The Court should reconsider its September 16 Order insofar as it ordered ICE to conduct another search across all components; clarify its September 16 and 23 Orders regarding whether State and USCIS are directed to produce certain material or submit supplemental declarations; and, to the extent the Court ordered State and/or USCIS to produce material withheld under Exemption 7(E), permit the agencies to provide supplemental declarations further justifying the withholdings and/or conduct an *in camera* review.

Dated: New York, New York
October 22, 2019

Respectfully submitted,

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