UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FREEDOM OF THE PRESS FOUNDATION and KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY,

Plaintiffs,

- against -

DEPARTMENT OF JUSTICE, NATIONAL SECURITY AGENCY, CENTRAL INTELLIGENCE AGENCY, and OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE,

Defendants.

No. 17 Civ. 9343 (JGK)

MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

ARGUMENT 1

I. The DOJ Criminal Division Properly Withheld Information Under Exemption 5 and the Deliberative Process Privilege 2

II. The FBI Has Satisfied the Requirements of FOIA 4

A. The FBI Conducted an Adequate Search 4

1. The Agency Has Described Its Search in Sufficient Detail 5

2. The Agency Searched Appropriate Custodians 6

3. Plaintiff's Speculation about the Existence of Additional Documents is Unavailing 8

4. The Agency Need Not Disclose the Extent to Which It Relied on § 552(c) 8

B. The FBI Properly Withheld FOIA-Protected Information from the Challenged Records 10

1. The FBI Properly Applied Exemption 7(E) 10

a. Training Materials 13

b. Operational Directives 14

2. The FBI Did Not Officially Acknowledge Information Withheld Under Exemptions 1, 3, and 7(E) 17

III. The DOJ Criminal Division and the FBI Released All Reasonably Segregable Material and *In Camera* Review of Records is Unwarranted 18

CONCLUSION 19

TABLE OF AUTHORITIES

CASES **PAGE**

ACLU Foundation v. DOJ,
No. 19-cv-290, 2019 WL 6117421 (N.D. Cal. Nov. 18, 2019) 13

ACLU v. Dep't of Defense,
No. 17-cv-3391 (PAE), 2020 WL 419757 (S.D.N.Y. Jan. 27, 2020) 17

ACLU v. Dep't of Homeland Security,
243 F. Supp. 3d 393 (S.D.N.Y. 2017) 13

Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.,
626 F.3d 678 (2d Cir. 2010) 13, 14

Alliance Defending Freedom v. IRS,
No. 15-cv-525, 2017 WL 4325615 (D.D.C. Sep. 27, 2017) 7

Am. Civil Liberties Union v. DOJ,
210 F. Supp. 3d 467 (S.D.N.Y. 2016) 19

Assadi v. USCIS,
No. 12-cv-1374, 2014 WL 4804785 (S.D.N.Y. Sep. 26, 2014) 15

Bigwood v. U.S. Dep't of Defense,
132 F. Supp. 3d 124 (D.D.C. 2015) 6, 7

Bishop v. Dep't of Homeland Sec.,
45 F. Supp. 3d 380 (S.D.N.Y. 2014) 14

Blackwell v. FBI,
646 F.3d 37 (D.C. Cir. 2011) 10

Carney v. DOJ,
19 F.3d 807 (2d Cir. 1994) 8

Center for Public Integrity v. U.S. Dep't of Commerce,
401 F. Supp. 3d 108 (D.D.C. 2019) 18

Coastal States Gas Corp. v. Dep't of Energy,
617 F.2d 854 (D.C. Cir. 1980) 3

Coffey v. Bureau of Land Management,
277 F. Supp. 3d 1 (D.D.C. 2017) 7

Dillon v. DOJ,
102 F. Supp. 3d 272 (D.D.C. 2015) 19

Doherty v. DOJ,
775 F.2d 49 (2d Cir. 1985) 14

General Elec. Co. v. Johnson,
No. 00-cv-2855, 2006 WL 2616187 (D.D.C. Sep. 12, 2006) 2

Grand Cent. Partnership, Inc. v. Cuomo,
166 F.3d 473 (2d Cir. 1999) 5

Heartland Alliance for Human Needs & Human Rights v. USCIS,
406 F. Supp. 3d 90 (D.D.C. 2019) 5, 6

Heffernan v. Azar,
317 F. Supp. 3d 94 (D.D.C. 2018) 3

Iturralde v. Comptroller of Currency,
315 F.3d 311 (D.C. Cir. 2003) 8

Knight First Amendment Institute at Columbia Univ. v. U.S. Dep't of Homeland Security,
407 F. Supp. 3d 311 (S.D.N.Y. 2019) 11, 12, 17

Light v. DOJ,
968 F. Supp. 2d 11 (D.D.C. 2013) 9, 10

Milner v. Dep't of the Navy,
562 U.S. 562 (2011) 17

Mobley v. CIA,
924 F. Supp. 2d 24 (D.D.C. 2013) 9

Muslim Advocates v. DOJ,
833 F. Supp. 2d 92 (D.D.C. 2011) 15, 16

Nation Magazine v. United States Customs Serv.,
71 F.3d 885 (D.C. Cir. 1995) 8

National Day Laborer Organizing Network v. ICE,
877 F. Supp. 2d 87 (S.D.N.Y. 2012) 7

National Immigration Law Center v. ICE,
No. 14-cv-9632, 2015 WL 12684437 (C.D. Cal. Dec. 11, 2015) 2

Natural Resources Defense Council v. EPA,
403 F. Supp. 3d 270 (S.D.N.Y. 2019) 3, 4

New York Times Co. v. DOJ,
806 F.3d 682 (2d Cir. 2015) 18

New York Times Co. v. FBI,
297 F. Supp. 3d 435 (S.D.N.Y. 2017) 18

New York Times Co. v. U.S. Secret Service,
No. 17-cv-1885, 2018 WL 722420 (S.D.N.Y. Feb. 5, 2018) 12

Osen LLC v. U.S. Cent. Command,
375 F. Supp. 3d 409 (S.D.N.Y. 2019) 17

Osen LLC v. U.S. Dep't of State,
360 F. Supp. 3d 258 (S.D.N.Y. 2019) 16

PHE, Inc. v. DOJ,
983 F.2d 248 (D.C. Cir. 1993) 19

Pinson v. DOJ,
177 F. Supp. 3d 56 (D.D.C. 2016) 6

Poitras v. Dep't of Homeland Security,
303 F. Supp. 3d 136 (D.D.C. 2018) 14

SafeCard Servs., Inc., v. SEC,
926 F.2d 1197 (D.C. Cir. 1991) 5

Sorin v. DOJ,
280 F. Supp. 3d 550 (S.D.N.Y. 2017) 19

Steinberg v. DOJ,
No. 93-cv-2409, 1997 WL 349997 (D.D.C. June 18, 1997) 9

Sussman v. U.S. Marshals Serv.,
494 F.3d 1106 (D.C. Cir. 2007) 18

Valencia-Lucena v. U.S. Coast Guard,
180 F.3d 321, (D.C. Cir. 1999) 5

Vento v. IRS,
714 F. Supp. 2d 137 (D.D.C. 2010) 11, 14

Wash. Post v. U.S. Dep't of Defense,
766 F. Supp. 1 (D.D.C. 1991) 16

White Coat Waste Project v. Dep't of Veterans Affairs,
404 F. Supp. 3d 87 (D.D.C. 2019) 17

Wilson v. CIA,
586 F.3d 171 (2d Cir. 2009) 17

STATUTES

5 U.S.C. § 552(b) 9

5 U.S.C. § 552(c) 5, 9, 10

REGULATIONS

28 C.F.R. § 50.10 2

The Defendant agencies (collectively, the "Government"), by their attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, respectfully submit this reply memorandum of law in further support of their motion, and in opposition to the cross-motion of Plaintiffs Freedom of the Press Foundation and Knight First Amendment Institute at Columbia University, for summary judgment in this Freedom of Information Act ("FOIA") matter.

ARGUMENT

Plaintiffs' opening brief ("Pls.' Br.") [Dkt. No. 51] advances a series of conclusory assertions about the purported vagueness of the Government's declarations, unfounded speculation about the contents of withheld information, inaccurate and misleading descriptions of the records in general, and misapplications of well-settled FOIA law. By contrast, for the reasons stated in the Government's first brief [Dkt. No. 46] and as further explained below, the Department of Justice ("DOJ") Criminal Division and the Federal Bureau of Investigation ("FBI") have provided detailed and sufficient explanations of the reasonable searches they undertook and the appropriate withholdings they made under applicable FOIA Exemptions.[1] Accordingly, the Court should grant the Government's motion for summary judgment in its entirety.

[1] Plaintiffs do not challenge the search, review, and production of records by Defendant agencies the Central Intelligence Agency, the National Security Agency, and the Office of the Director of National Intelligence. Accordingly, these defendants and any claims against them should be dismissed from the action.

I. The DOJ Criminal Division Properly Withheld Information Under Exemption 5 and the Deliberative Process Privilege

The DOJ Criminal Division properly withheld in full a slide from an internal PowerPoint presentation and withheld in part an agency form used by DOJ attorneys, both related to agency deliberations around the use of certain law enforcement tools under 28 C.F.R. § 50.10. Plaintiffs' arguments to the contrary, relying on inaccurate characterizations of the information at issue, are of no merit.

Plaintiffs' primary basis to assail the application of Exemption 5 to the slide is the contention that the slide merely contains the agency's formal or informal guidelines. Pls.' Br. at 6. But as the agency's declarant explained, while the slide may contain certain guidelines for making a consultation request under § 50.10, it does so only as part of its larger purpose: conveying "preliminary assessments," "opinions," and "recommendations" of DOJ lawyers about the use of § 50.10 consultation requests in various hypothetical situations. Declaration of Gail Brodfuehrer ("Brodfuehrer Decl.") [Dkt. No. 48] ¶ 20. Thus, precisely as described by a case cited by Plaintiffs, the slide contains "an agency's internal deliberations over policy or legal issues (such as suggestions or recommendations)," the type of material that the deliberate process privilege is meant to shield. *National Immigration Law Center v. ICE*, No. 14-cv-9632, 2015 WL 12684437, at *9 (C.D. Cal. Dec. 11, 2015). Rather than containing mere "hypothetical factual situations" constituting "straightforward explanations" of regulations, the slide at issue "provide[s] advice" from the author to other personnel as part of a "consultative process" attempting to arrive at a policy-oriented decision. *General Elec. Co. v. Johnson*, No. 00-cv-2855, 2006 WL 2616187, at *5 (D.D.C. Sep. 12, 2006) (citations omitted). Moreover, contrary to Plaintiffs' assertion, that advice is expressly tied to a "specific decision," whether to make a consultation request or not as provided by § 50.10. *See* Brodfuehrer Decl. ¶ 20 (explaining that

the withheld information "precedes decisions by the Criminal Division regarding approval of requests made pursuant to [§] 50.10").

Plaintiffs' arguments as to the second DOJ Criminal Division record are equally unavailing for much the same reasons. The record in question is entitled "News Media Policy Consultation" and is designed to be consulted by DOJ attorneys "draft[ing] recommendation memorand[a]" as part of § 50.10 consultation requests. *See* Declaration of Leena Charlton ("Charlton Decl.") [Dkt. No. 52] at Ex. 2. While Plaintiffs insist that the redacted portion cannot consist of recommendations or other subjective content preceding a specific decision, Pls.' Br. at 8, the public part of the document indicates that the withheld portion lays out the specific analyses that the author of the document believes other attorneys should be advised to undertake as they make consultation-request decisions. *See* Chartlon Decl. at Ex. 2. Thus, unlike the purely factual memoranda at issue in *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980), the record in question here again very much consists of "suggestions or recommendations" provided as "one step" of a decision-making process surrounding making (or not making) consultation requests under § 50.10. *Id*. at 868; *see also Heffernan v. Azar*, 317 F. Supp. 3d 94, 118 (D.D.C. 2018) ("A document is predecisional if it was prepared in order to assist an agency decisionmaker in arriving at his decision.") (citation and internal quotation marks omitted). Consequently, this redaction, like the withholding of the slide, was proper under Exemption 5 and the deliberate process privilege.

In addition, the DOJ Criminal Division has adequately explained the foreseeable harm that would result if the withholdings at issue were made public. "To satisfy the 'foreseeable harm' standard . . . an agency must explain how a particular Exemption 5 withholding would harm the agency's deliberative process." *Natural Resources Defense Council v. EPA*, 403 F.

Supp. 3d 270, 285 (S.D.N.Y. 2019) (citation and internal quotation marks omitted). Here, the agency has articulated how release of the information would reveal DOJ attorneys' subjective assessments about aspects of the § 50.10 decision-making process, which were made in order to engender "free and open discussion" about various potential scenarios in which the issue may arise. *See* Brodfuehrer Decl. ¶ 21. Subjecting such thought processes to disclosure would disincentive agency lawyers from providing comprehensive advice, for fear that tentative suggestions made in the context of training hypotheticals are misinterpreted by the public as definitive DOJ policy. Accordingly, just as in *Natural Resources Defense Council*, the agency has sufficiently articulated the "chilling effect" on "internal discussions and consultations" that disclosure would create. 403 F. Supp. 3d at 285. The DOJ Criminal Division's application of Exemption 5 should be upheld.

II. The FBI Has Satisfied the Requirements of FOIA

For its part, the FBI has also established that it is entitled to summary judgment. As explained in further detail below, the agency conducted an adequate and reasonable search and applied only those withholdings required by law under the applicable FOIA exemptions.

A. The FBI Conducted An Adequate Search

Plaintiffs do not challenge the adequacy of the FBI's search with respect to the vast majority of their requests, contesting only the agency's efforts as to Section 1(e) of the Final Processing List, which sought "requests or statistical information concerning requests for approval to issue" National Security Letters ("NSLs") related to the news media. *See* Ex. A to Stipulation and Order ("Request 1(e)") [Dkt. No. 26] at 5-6. Plaintiffs attack the FBI's search process for Request 1(e) on four fronts: that the agency (1) has not described in detail the scope of the search, (2) has not searched appropriate custodians, (3) has not released purportedly

relevant records, and (4) improperly relied on a FOIA exclusion under 5 U.S.C. § 552(c). *See* Pls.' Br. at Section III. Each of these arguments lacks merit.

1. The Agency Has Described Its Search in Sufficient Detail

As an initial matter, the FBI's declaration establishes that the agency carried out a reasonable, good faith search. "[W]hen a plaintiff questions the adequacy of the search an agency made in order to satisfy its FOIA request, the factual question it raises is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant." *Grand Cent. Partnership, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999) (quoting *SafeCard Servs., Inc., v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)). Here, contrary to Plaintiffs' allegations of a lack of detail, the FBI declaration explained that because the subject matter of the request (seeking a discrete category of specialized records) made a digital search of the agency's Central Records System and other databases ineffective, the most practical means to locate responsive records was to query a subject matter expert in the Office of General Counsel ("OGC"). Declaration of Michael G. Seidel ("Seidel Decl.") [Dkt. No. 47] ¶ 19.

As the FBI further explained, this subject matter expert was "familiar with the NSL process" and possessed the requisite knowledge of where and with whom any responsive records (which would be relatively discrete in number) might be located. *Id*.; *see also id*. ¶ 20 (subject matter experts "are knowledgeable on all matters related to the use of NSLs within the FBI"). Such a process was "reasonably calculated to uncover all relevant documents." *Heartland Alliance for Human Needs & Human Rights v. USCIS*, 406 F. Supp. 3d 90, 110 (D.D.C. 2019) (adding that "the agency does not need to search every record system") (citation and internal quotation marks omitted); *see also Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 328, (D.C. Cir. 1999) ("[A]gency personnel should be contacted if there is a close nexus, as here,

between the person and the particular record."). Accordingly, because the FBI carried out a "good faith, reasonable search of those systems of records likely to possess the requested records," Plaintiff's challenge on this front is meritless. *Heartland Alliance*, 406 F. Supp. 3d at 110 (quoting *Pinson v. DOJ*, 177 F. Supp. 3d 56, 80 (D.D.C. 2016)).

2. The Agency Searched Appropriate Custodians

Plaintiffs' contention that the FBI has not "searched all custodians who were reasonably likely to possess responsive documents" fares no better. Pls.' Br. at 17. This assertion rests solely on Plaintiffs' belief that the agency was required to provide the specific names of custodians searched and that the agency somehow overlooked a "list of potential custodians" included in the text of Request 1(e). *Id*. at 17-18. Neither premise is valid.

To begin with the latter, while Plaintiffs suggest that the FBI somehow missed possible custodians, that allegation is directly belied by the agency's declaration, as described above. *See* Seidel Decl. ¶ 19 (describing how the search identified all potential custodians within the requisite office via consultation with expert in OGC, National Security Cyber Law Branch and related possible custodians). The declaration, which directly contradicts Plaintiffs' insinuation that the FBI somehow overlooked the individuals listed in Request 1(e) (who, in any event, were not identified as custodians in the Final Processing List but rather merely as the officials to whom relevant records may have been submitted or would have been addressed), *see* Request 1(e), is entitled to a presumption of good faith. *See Bigwood v. U.S. Dep't of Defense*, 132 F. Supp. 3d 124, 136 (D.D.C. 2015) ("Provided that the agency affidavits or declarations are relatively detailed and non-conclusory, they are accorded a presumption of good faith, which can only be rebutted with clear evidence of bad faith, and not by purely speculative claims about the existence and discoverability of other documents.") (citation and internal quotation marks

omitted). As the agency's supplemental declaration explains in more detail, all potential custodians of records responsive to Request 1(e) were queried. Declaration of David M. Hardy ("Hardy Decl.") ¶ 4.

Moreover, Plaintiffs offer no authority in support of the notion that the FBI was required to provide more information about the custodians identified in the agency's initial declaration. The two cases they do advance are inapposite. In *Coffey v. Bureau of Land Management*, 277 F. Supp. 3d 1 (D.D.C. 2017), the court agreed that a defendant agency may be required to provide the names of any custodians queried, but only because the plaintiff in that case had "identified a specific 'gap'" in the search, namely the lack of basic information provided about the process with respect to numerous offices outside of Washington, D.C. *Id*. at 11. Similarly, in *National Day Laborer Organizing Network v. ICE*, 877 F. Supp. 2d 87 (S.D.N.Y. 2012), the court faulted the FBI for an inadequate search only to the extent that it was clear that an entire relevant component office within the agency had been left off the search. *Id*. at 100. Here, by contrast, where the FBI has adequately explained that there would only be a narrow group of custodians within a discrete agency component based on the narrow type of record at issue, should any documents exist at all, and that those custodians were searched, there is no comparable "gap" or other oversight that would prompt further scrutiny of custodian names. *See generally Alliance Defending Freedom v. IRS*, No. 15-cv-525, 2017 WL 4325615, at *5 (D.D.C. Sep. 27, 2017) ("[T]o the extent that . . . contention that other custodians are likely to have responsive record rises beyond mere speculation, the Court finds that [agency] attestation that [it] is not aware of any other custodian or system of records likely to maintain records responsive to plaintiff's FOIA request to be sufficient.") (citation and internal quotation marks omitted); *Bigwood*, 132 F. Supp. 3d at 142 (rejecting demand for further information "either by name or by position" of

agency personnel involved in search). The FBI has therefore satisfied its burden of establishing it conducted a reasonable search.

3. Plaintiffs' Speculation About the Existence of Additional Documents Is Unavailing

Next, Plaintiffs argue that the fact that the search did not turn up the quantity of records they anticipated calls into question the adequacy of the search. Pls.' Br. at 18. "But it is long settled that the failure of an agency to turn up one specific document in its search does not alone render a search inadequate." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003) (citing *Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 892 n. 7 (D.C. Cir. 1995)). Here, Plaintiffs merely point to the uncontested existence of rules governing NSLs as "evidence" that certain other specific records must exist, but under FOIA, Plaintiffs' own belief of "implausib[ility]" does not constitute extrinsic proof of an inadequate search. *See Carney v. DOJ*, 19 F.3d 807, 812-13 (2d Cir. 1994) ("[P]urely speculative claims about the existence and discoverability of other documents" are insufficient to overcome the good faith presumption afforded to an agency's declaration."). Plaintiffs therefore also fail to demonstrate any inadequacy to the search on this basis.

4. The Agency Need Not Disclose the Extent to Which It Relied on § 552(c)

Finally with respect to the search, Plaintiffs challenge the FBI's possible reliance on a law enforcement proceeding-related FOIA exclusion provided by § 552(c), contending that any potentially responsive documents "implicate none of the . . . categories of information" meant to be protected by the exclusion. Pls.' Br. at 19. Plaintiffs offer no reasoning in support of this contention, instead insisting in conclusory fashion that disclosing responsive records would not reveal protected information, to the extent it exists. *Id*. Plaintiffs misapprehend the nature and purpose of the FOIA exclusion at issue.

Section 552(c) "permits agencies to treat . . . records as 'not subject to the requirements' of the FOIA," *Light v. DOJ*, 968 F. Supp. 2d 11, 30 (D.D.C. 2013), where, *inter alia*, a "request involves access to records or information compiled for law enforcement purposes" and such records "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. § 552(b). Under this provision, "an agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a FOIA exemption." *Light*, 968 F. Supp. 2d at 30. Without citing any authority and simply ignoring the contrary cases advanced by the Government, Plaintiffs seek to force the FBI to do just that, acknowledge the existence or non-existence of records, which is protected information in its own right. Plaintiffs' speculations about the possible existence of records or their prognostication on the limited effect of acknowledgment, Pls.' Br. at 19-20, are beside the point. Section 552(c) squarely forestalls the response they seek to compel. *See Steinberg v. DOJ*, No. 93-cv-2409, 1997 WL 349997, at *1 (D.D.C. June 18, 1997) ("[T]he Government need not even acknowledge the existence of excluded information.").

Plaintiffs also argue that to the extent the FBI seeks to support any reliance on Section 552(c) through an *in camera* declaration, such a procedure is improper. Pls.' Br. at 20-22. The Court should reject this argument out of hand. As courts have long recognized, there is nothing about such a declaration, where necessary, that is inconsistent with the dictates of FOIA. *See Light*, 968 F. Supp. 2d at 30 ("[W]here a § 522(c) exclusion is used, the *in camera* declaration asserts that it was justified; where a § 522(c) exclusion is not used, the *in camera* declaration states that fact."); *Mobley v. CIA*, 924 F. Supp. 2d 24, 71-73 (D.D.C. 2013) (using *ex parte in camera* submission to review propriety of possible § 552(c) exclusion). Indeed, as *Light* explained, "[b]ecause the very purpose of the exclusions is to keep a requester from knowing"

§ 522(c)-protected information, "it is vital to the integrity of the application of exclusions that requesters not be able to deduce whether an exclusion was or was not employed at all in any given case." 968 F. Supp. 2d at 30 (quoting with approval *ex parte in camera* declaration). Accordingly, FOIA does not require the FBI to disclose whether it excluded information under Section 552(c). Given Plaintiffs' challenge, however, the Government has submitted an *in camera* declaration which will set forth whether or not the exclusion was relied upon in the instant case. *See In Camera* Declaration of David M. Hardy.

B. The FBI Properly Withheld FOIA-Protected Information From the Challenged Records

1. The FBI Properly Applied Exemption 7(E)

Turning to the substance of the FBI's redactions, Plaintiffs fail to cast any doubt on the plausible and logical explanations for the withholdings provided by the agency's declarant. The FBI has satisfied its burden of demonstrating how the materials in question, which directly touch on the FBI's methodologies and strategies, fall squarely in the ambit of Exemption 7(E). *See Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (agencies have "a relatively low bar . . . to justify withholding" under Exemption 7(E)).[2] Founded on speculation and misapplication of governing law, each of Plaintiffs' arguments, discussed in turn below, are unavailing.

[2] Plaintiffs do not challenge the FBI's application of the exemption "to withhold 'sensitive file numbers,' the names of or roles related to 'specialized FBI units or squads,' or email addresses and non-public web addresses," Pls.' Br. at n.3, nor withholdings made on two further pages initially included in their list of contested redactions, *id*. at n.6. These withholdings should be upheld as uncontested.

a. Training Materials

To begin, Plaintiffs contend that Exemption 7(E) was inappropriately applied on various training materials broadly related to legal issues arising in the context of law enforcement activity and the media or use of social media tools. *See* Pls.' Br. at Sections II(A)-(B). However, this contention is premised solely on Plaintiffs' conjecture: that "[m]ost of these slides *seem* to contain First Amendment doctrine" or other "broad statements of law," "*appear* to describe issues and obstacles the FBI has previously faced," and "*appear* . . . to refer to" a known law enforcement technique. Pls.' Br. at 10, 11, 12 (emphases added). As a threshold matter, Plaintiffs' conjecture about the content of redactions are in no way sufficient to overcome the FBI's detailed explanation of their actual content. *See Vento v. IRS*, 714 F. Supp. 2d 137, 154 (D.D.C. 2010) (courts may not find "exemption was improperly withheld on mere speculation").

In any event, closer inspection of the training slides reveals that Plaintiffs' surmises do not bear scrutiny. For instance, nothing about the redactions in question, which appear under headings such as "Is This Protected Speech?," "Hypothetical," "Still Protected Speech?," "Examples of Recent Activity," "Obstacles," and "Mitigating Privacy & 1st Amendment Concerns," *see, e.g.*, Charlton Decl. Exs. 3-5, 8, 12, gives any indication that the withheld information consists of "mere descriptions of codified law and policy." *Knight First Amendment Institute at Columbia Univ. v. U.S. Dep't of Homeland Security*, 407 F. Supp. 3d 311, 333 (S.D.N.Y. 2019). *Knight First Amendment Institute*, the sole case on which Plaintiffs rely, is therefore inapposite. There, the district court held that non-withheld portions of documents like headers, which appeared to be derived directly from the language of a federal statute, specifically suggested that the reacted information constituted descriptions of law rather than information

more specifically compiled for law enforcement purposes. *Id*.[3] No such indication that the content in question closely tracks statutory language is present here.[4]

Next, Plaintiffs' conclusory assertion that the slides are not FOIA exempt to the extent they contain descriptions of previous "issues and obstacles" faced by the FBI, hypotheticals, and references to known law enforcement techniques, is similarly unavailing. *See* Pls.' Br. at 10-12.[5]

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[3] The court in *First Amendment Knight Institute* also approached the withholdings in question with greater skepticism because the custodian agency, the Department of State, had only limited law enforcement functions. *Id*. at 332. By contrast, there is no such cause for scrutiny in the context of the FBI.

[4] Plaintiffs suggest that information on one slide was previously disclosed because a separate slide appears "similar." Pls.' Br. at 13. But even a cursory glance at the slides in question reveal that aside from sharing a generic title reflecting the same broad subject, the slides are not similar, have redacted content of different length, and otherwise bear no indication that they include the same information. *Compare* Charlton Decl. Ex. 12 *with id.* Ex. 13.

[5] Plaintiffs describe some of the withheld information as consisting of descriptions of "previous[ly]" occurring issues, apparently in an effort to invoke the proposition that Exemption 7(E)-protected information "cannot merely be a recitation of something that has already happened." Pls.' Br. at 11 (quoting *New York Times Co. v. U.S. Secret Service*, No. 17-cv-1885, 2018 WL 722420, at *7 (S.D.N.Y. Feb. 5, 2018)). But Plaintiffs have invented that characterization out of whole cloth; nowhere in the FBI's declaration are the contents described as recitations of previous events. *See* Seidel Decl. ¶ 52. In any event, the principle Plaintiffs cite applies only to law enforcement guidelines, not techniques and procedures as relevant here. *See*

As explained by the agency's declarant, the withheld portions of training slides are comprised of various scenarios, possible factual circumstances, and hypothetical situations, to which the materials supply trainees with recommended responses as well as anticipated obstacles—in other words, forward-thinking law enforcement strategies. Seidel Decl. ¶ 52. The slides also contain direct references to certain cyber products that FBI and partner agency personnel utilize. *Id*. ¶ 53. Plaintiffs offer no authority in support of their assertion that such information, despite its obvious nexus to law enforcement techniques and procedures, falls outside Exemption 7(E).[6]

Instead, Plaintiffs rely on two inapposite cases that rejected Exemption 7(E) redactions because they involved specifically identifiable law enforcement techniques that were already known to the public. *ACLU Foundation v. DOJ*, No. 19-cv-290, 2019 WL 6117421, at *9 (N.D. Cal. Nov. 18, 2019) (holding Government may not withhold discussion of social media monitoring as law enforcement technique); *ACLU v. Dep't of Homeland Security*, 243 F.Supp.3d 393, 404 (S.D.N.Y. 2017) (agency cannot shield well-known law-enforcement arrest questions). By contrast, there is no identifiable, publically-known technique at issue in these redactions. Plaintiffs can point to no evidence in support of their assertion that one of the slides "likely contains a brief summary" of social media surveillance. Pls.' Br. at 12. In essence, Plaintiffs hazard a guess at the law enforcement technique that may be at issue, but such speculation does

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New York Times, 2018 WL 722420, at *7 (citing *Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 682 (2d Cir. 2010)).

[6] Plaintiffs question why the FBI would need to redact portions of titles of slides to protect information, Pls.' Br. at n.4, but they attempt no explanation, based on authority or otherwise, for why information reflecting a law enforcement technique or procedure could not be found in titles.

not suffice to overcome the presumption of good faith accorded to the agency's declarations. *See Vento*, 714 F. Supp. 2d at 154. The protected information represents the kind of "sensitive strategic decisions" that courts routinely maintain are confidential. *Poitras v. Dep't of Homeland Security*, 303 F. Supp. 3d 136, 159 (D.D.C. 2018) (upholding withholding of law enforcement tactics). The redactions of the training materials under Exemption 7(E) were therefore proper.[7]

b. Operational Directives

With respect to redactions regarding certain operational directives, Plaintiffs assert in conclusory fashion that the FBI's declaration is "too vague" and lacking "other context." Pls.' Br. at 13. This contention is belied, not just by the substance of the Seidel declaration, but by comparing Seidel's explanation with the actual documents: the unredacted portions indicate that the policy directives at issue lay out specific FBI procedures in a number of contexts, including law enforcement investigations and subpoenas of news media members, arrest of armed forces personnel, certain types of searches, and certain sensitive and national security matters. Charlton Decl. at Exs. 14-16. As Seidel explains, such information provides a literal "playbook" of the FBI's procedures, techniques, and guidelines for investigating numerous specific types of criminal activity. Seidel Decl. ¶ 54. As at least one court has previously held in assessing the

[7] Plaintiffs assert that the FBI's fear of harm from disclosure does not "appear credible." Pls.' Br. at 12. In the Second Circuit, an agency need not establish harm from disclosure in order to sustain withholding of a law enforcement technique. *See Allard K. Lowenstein Int'l Human Rights Project*, 626 F.3d at 681. Nonetheless, Seidel's explanation that revealing the techniques at issue would result in harm, Seidel Decl. ¶ 52, is fully consistent with similar findings routinely made by courts. *See Doherty v. DOJ*, 775 F.2d 49, 52 & n.4 (2d Cir. 1985); *see also Bishop v. Dep't of Homeland Sec.*, 45 F. Supp. 3d 380, 391 (S.D.N.Y. 2014).

very same type of document, similarly released with partial withholdings, the explanation provided here by the FBI gives "enough context to conclude that the FBI fairly and accurately described the withheld material and the potential danger created by its release." *Muslim Advocates v. DOJ*, 833 F. Supp. 2d 92, 105 (D.D.C. 2011) (upholding Exemption 7(E) withholdings in Domestic Investigations Operations Guide).

Plaintiffs next argue that Exemption 7(E) could not apply to withheld sections because they only describe "preliminary approval processes" or "administrative antecedents," not actual law enforcement techniques or procedures. Pls.' Br. at 13-14. This contention too is meritless. First, it badly mischaracterizes the nature of the redacted information, which, from the headings and other released portions, concern far more than "administrative antecedents," including substantive sections on investigating members of the news media, "Use of Subterfuge," "Standards for Issuing NSLs ["National Security Letters"]," and "Special Procedures For Requesting Communication Subscriber Information." *See* Charlton Decl. at Ex. 14. According to these headings, these sections self-evidently include substantive information about specific FBI techniques, a fact which was attested to by the FBI declarant. Seidel ¶ 54. Second, even to the extent that discrete portions of the withheld information relate to approval procedures for certain law enforcement techniques, Plaintiffs make no effort to explain why this aspect of technique-related information is not entitled to the same protection under Exemption 7(E). The sole case they cite, *Assadi v. USCIS*, No. 12-cv-1374, 2014 WL 4804785 (S.D.N.Y. Sep. 26, 2014), simply stated that immigration background check information fell under Exemption 7(E), and hardly supports the notion that "approval process" information categorically falls outside Exemption 7(E)'s protection of law enforcement techniques. *Id.* at *8. Quite to the contrary, courts have found "approval limitations on techniques or procedures that may be used in certain types of

investigations" to fall under the scope of the Exemption. *Muslim Advocates*, 833 F. Supp. 2d at 105. After all, as the FBI explained and as a matter of common sense, the subsections related to approval requirements also expressly discuss the underlying unknown techniques at issue. Seidel ¶ 54.[8]

Lastly, as with the training materials, Plaintiffs contend that some of the operational directive withholdings consist of publicly known or available information. They posit that the redacted information under "Standards for Issuing NSLs" is already available either in the relevant statutes or related collateral guidance documents, such as for termination procedures, and that other directive information may be "embodied" in regulations or a DOJ manual to some "extent." Pls.' Br. at 15. As before, Plaintiffs offer no support for this hunch, which ignores the fact that, as described in the FBI declaration, the information in question goes beyond just recitation of law found elsewhere, but provides specific guidance on techniques and procedures for implementing standards in future situations. *See* Seidel Decl. ¶ 54. Accordingly, the agency

[8] Plaintiffs cite a "leaked version" of a purportedly analogous document in support of their self-serving characterization of the records at issue. Pls.' Br. at n.7. The Court should disregard this inappropriate effort to bypass the merits of the Government's attested justification for withholding. As one court in this District recently held in the context of the effect of leaked information on an assertion of Exemption 1: "courts have . . . treated agency justifications for withholding information already in the public domain with the same deference they accord to all agency justifications . . . . Holding otherwise would afford unwarranted power to leakers . . . [and], in effect, reward theft." *Osen LLC v. U.S. Dep't of State*, 360 F. Supp. 3d 258, 266 (S.D.N.Y. 2019) (quoting *Wash. Post v. U.S. Dep't of Defense*, 766 F. Supp. 1, 9 (D.D.C. 1991) (internal quotation marks omitted)).

has satisfactorily explained that these withholdings are not "mere descriptions of codified law," but go a step further and describe "proactive steps" for preventing criminal activity and maintaining security. *Knight First Amendment Institute*, 407 F. Supp. 3d at 350 (citing *Milner v. Dep't of the Navy*, 562 U.S. 562, 582 (2011) (Alito, J., concurring)). For the foregoing reasons, the redactions in the operational directives should be upheld.

2. The FBI Did Not Officially Acknowledge Information Withheld Under Exemptions 1, 3, and 7(E)

In addition to challenging the withholdings under Exemption 7(E) discussed above, Plaintiffs argue that withholdings on two documents under Exemptions 1, 3, and 7(E), were waived because the information protected has already been officially acknowledged. Pls.' Br. at 16. This argument is meritless.

The Second Circuit has explained that information is no longer shielded by FOIA once it has been officially disclosed, but "only if it (1) [is] as specific as the information previously released," (2) "match[es] the information previously disclosed," and (3) was "made public through an official and documented disclosure." *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009). Importantly, "[p]rior disclosure of similar information does not suffice; instead, the specific information sought by the plaintiff must already be in the public domain by official disclosure." *ACLU v. Dep't of Defense*, No. 17-cv-3391 (PAE), 2020 WL 419757, at *9 (S.D.N.Y. Jan. 27, 2020) (quoting *Osen LLC v. U.S. Cent. Command*, 375 F. Supp. 3d 409, 421 (S.D.N.Y. 2019)). "The plaintiff bears the burden of identifying [such] specific information," and in this regard the mere "fact that information exists in some form in the public domain" is insufficient. *White Coat Waste Project v. Dep't of Veterans Affairs*, 404 F. Supp. 3d 87, 108 (D.D.C. 2019) (citations omitted).

Plaintiffs do not come close to satisfying the relevant test. Plaintiffs merely point out the existence of regulations and a DOJ manual generally related to the subject matter of the records, repeating their conclusory assumption that withheld portions of documents must simply recite known legal standards. But this conjecture completely ignores the different contexts of the documents in question, which as Seidel explains, reflects FBI-specific guidance on future application of general standards, and the alleged prior disclosures, which are merely the standards themselves as found in sources like the Code of Federal Regulations. *See New York Times Co. v. FBI*, 297 F. Supp. 3d 435, 450 (S.D.N.Y. 2017) (courts must "take[ ] care to consider the context of any withheld information, as context itself may convey information that has not been disclosed"); *see also New York Times Co. v. DOJ*, 806 F.3d 682, 686–87 (2d Cir. 2015) (emphasizing the importance of assessing "differences in context" between previously disclosed and requested records as part of FOIA waiver analysis). Indeed, Plaintiffs make no effort to demonstrate, as they must, in what form the withholdings in question specifically match sections of the publicly available sources invoked, simply suggesting that "[i]f" and "to the extent" that any information has been officially acknowledged, it should be released. Pls.' Br. at 19. Accordingly, Plaintiffs' reliance on the official acknowledgment doctrine is of no moment.

III. The DOJ Criminal Division and the FBI Released All Reasonably Segregable Material and *In Camera* Review of Records Is Unwarranted

Finally, Plaintiffs' attempt to contest the Government's efforts at segregating the responsive information, Pls.' Br. at 23, should be rejected. "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material, which must be overcome by some 'quantum of evidence' from the FOIA requester." *Center for Public Integrity v. U.S. Dep't of Commerce*, 401 F. Supp. 3d 108, 116 (D.D.C. 2019) (quoting *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007) (internal quotation marks

omitted)). Plaintiffs offer no such evidence to support their characterization of the withholdings as "sweeping," Pls.' Br. at 23, a description which is belied by a review of the documents, which indicate careful, line-by-line review, as described by the Defendant agencies' declarants. *See* Brodfuehrer Decl. ¶ 22; Seidel Decl. ¶¶ 57-58. What is more, Plaintiffs present no basis to suggest *in camera* review of documents is required. Not only is such review "generally disfavored," it is particularly inappropriate where, as here, a plaintiff offers nothing but a conclusory claim that the affidavits are "not sufficiently detailed." *Sorin v. DOJ*, 280 F. Supp. 3d 550, 567 (S.D.N.Y. 2017) (quoting *PHE, Inc. v. DOJ*, 983 F.2d 248, 252-53 (D.C. Cir. 1993)). Accordingly, the Government has met its burden of demonstrating that it has segregated all reasonably segregable material, and *in camera* review is not warranted. *See, e.g.*, *Am. Civil Liberties Union v. DOJ*, 210 F. Supp. 3d 467, 485 (S.D.N.Y. 2016); *Dillon v. DOJ*, 102 F. Supp. 3d 272, 298 (D.D.C. 2015).[9]

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion, and deny Plaintiffs' cross motion, for summary judgment.

[9] Plaintiffs argue that the FBI failed to segregate responsive material because a prior release of one document did not include one line of redaction included in the production to Plaintiffs. That one-line discrepancy was made inadvertently and the agency will make an updated production with the discrete redaction in question removed. *See* Hardy Decl. ¶ 5. Plaintiffs point to no authority for the proposition that this inadvertent, one-line redaction casts into doubt the FBI's segregability review of the over one-thousand pages that the agency processed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 2(D) of the Individual Practices of the Honorable John G. Koeltl, the undersigned counsel hereby certifies that both this and the opening brief filed by the Government comply with word limitation and formatting requirements set by the Court.

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