IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

FREEDOM OF THE PRESS FOUNDATION and KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, Plaintiffs, v. DEPARTMENT OF JUSTICE, NATIONAL SECURITY AGENCY, CENTRAL INTELLIGENCE AGENCY, and OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, Defendants.	No. 1:17-cv-9343-JGK

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Anna Diakun (AD-0327)
Leena Charlton (5622147)
Alex Abdo (AA-0527)
Knight First Amendment Institute
at Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
anna.diakun@knightcolumbia.org
(646) 745-8500

Counsel for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. DOJ-Crim has failed to justify its withholding of two final agency records under the deliberative process privilege. 1

A. DOJ-Crim has improperly withheld an official agency training slide. 2

B. DOJ-Crim has improperly redacted instructions from an official agency form. 3

II. The FBI's search was inadequate. 4

A. The FBI has failed to establish the adequacy of its search for records responsive to Category 1(e). 4

1. The FBI has failed to identify the potential custodians it searched. 5

2. The FBI has failed to explain its search methods. 6

B. If the FBI believes that the existence or non-existence of records responsive to Category 1(e) is a protected fact under § 552(c), it must publicly justify this. 8

III. The FBI improperly withheld information under Exemption 7(E). 9

A. First Amendment Training Slides 9

B. Other Slides 11

C. FBI Policy Guides 13

D. Documents Withheld Under Exemptions 1, 3, and 7(E) 15

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

ACLU Found. v. DHS, 243 F. Supp. 3d 393 (S.D.N.Y. 2017) 12

ACLU v. CIA, 710 F.3d 422 (D.C. Cir. 2013)..... 11, 16

ACLU v. DOD, No. 17-cv-3391-PAE, 2020 WL 419757 (S.D.N.Y. Jan. 27, 2020)..... 16

Alliance Defending Freedom v. IRS, No. 15-525-EGS, 2017 WL 4325615 (D.D.C. Sept. 27, 2017) 6, 7

Allard K. Lowenstein Int'l Human Rights Project v. DHS, 626 F.3d 678 (2d Cir. 2010) 14

Am. Immigration Council v. DHS, 905 F. Supp. 2d 206 (D.D.C. 2012) 2

Bigwood v. DOD, 132 F. Supp. 3d 124 (D.D.C. 2015) 6

Brennan Ctr. for Justice v. DOJ, 697 F.3d 184 (2d Cir. 2012) 1

Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854 (D.C. Cir. 1980)..... 2, 4

Coffey v. Bureau of Land Mgmt., 277 F. Supp. 3d 1 (D.D.C. 2017) 5

Davis v. City of New York, No. 10-cv-0699 SAS, 2011 WL 1742748 (S.D.N.Y. May 5, 2011)..... 2

Florez v. CIA, 829 F.3d 178 (2d Cir. 2016)..... 8, 9

Gen. Elec. Co. v. Johnson, No. 00-cv-2855, 2006 WL 2616187 (D.D.C. Sept. 12, 2006) 2, 3

Heartland Alliance for Human Needs & Human Rights v. USCIS, 406 F. Supp. 3d 90 (D.D.C. 2019) 4, 7

Knight First Am. Inst. at Columbia Univ. v. DHS, 407 F. Supp. 3d 311 (S.D.N.Y. 2019) 10, 11

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

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) 13, 14

N.Y. Times Co. v. DOJ, 756 F.3d 100 (2d Cir. 2014) 9, 16

N.Y. Times Co. v. DOJ, 806 F.3d 682 (2d Cir. 2015) 15

Nat'l Day Laborer Org. Network v. ICE, 877 F. Supp. 2d 87 (S.D.N.Y. 2012) 5, 6, 7

Nat'l Immigration Law Ctr. v. ICE, No. 14-cv-9632, 2015 WL 12684437 (C.D. Cal. Dec. 11, 2015) 1, 2

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

Urban Air Initiative, Inc. v. EPA, 271 F. Supp. 3d 241 (D.D.C. 2017) 7

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

Wilner v. NSA, 592 F.3d 60 (2d Cir. 2009) 8, 9

Plaintiffs the Freedom of the Press Foundation and the Knight First Amendment Institute at Columbia University respectfully submit this reply memorandum of law in further support of their cross-motion for partial summary judgment against Defendant Department of Justice.

ARGUMENT

I. DOJ-Crim has failed to justify its withholding of two final agency records under the deliberative process privilege.

DOJ-Crim has withheld two records—an agency training slide and an official form—claiming that they are predecisional and deliberative. But the government has not cited a single case holding that records like these may be withheld under the deliberative process privilege. It also ignores several cases Plaintiffs cited showing the opposite.

On their face, these documents fall outside the bounds of the privilege. At one point, there surely were drafts of these documents, sent from subordinate to superior and, perhaps, a red-lined version sent back. For those, the agency may have a colorable argument that they "reflect[] the personal opinions of the writer rather than the policy of the agency." *Brennan Ctr. for Justice v. DOJ*, 697 F.3d 184, 202 (2d Cir. 2012). But Plaintiffs do not seek those documents. Plaintiffs challenge the withholding of final documents that are used by the agency to explain policies their employees must follow.

The government claims that Plaintiffs "rely[] on inaccurate characterizations" of these documents, Gov't Opp. 2, but it is the government's *own* characterizations that show that the records fall outside the privilege. The government says both consist of "agency guidelines," Decl. of Gail Brodfuehrer ("Brodfuehrer Decl.") ¶ 20; yet "documents that merely reflect an agency's formal or informal guidelines or understanding of its own policies should be produced." *Nat'l Immigration Law Ctr. v. ICE*, No. 14-cv-9632, 2015 WL 12684437, at *9 (C.D. Cal. Dec. 11, 2015). The government says that one record "consists of training hypotheticals," Gov't Opp. 4;

courts have rejected the withholding of training materials and of hypotheticals used to explain policies. *See, e.g.*, *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980); *Gen. Elec. Co. v. Johnson*, No. 00-cv-2855, 2006 WL 2616187, at *5 (D.D.C. Sept. 12, 2006); *Am. Immigration Council v. DHS*, 905 F. Supp. 2d 206, 218 (D.D.C. 2012); *Davis v. City of New York*, No. 10-cv-0699 SAS, 2011 WL 1742748, at *6 (S.D.N.Y. May 5, 2011).

As explained further below, the government's attempts to shoehorn these records into the scope of the privilege should be rejected.

A. DOJ-Crim has improperly withheld an official agency training slide.

The government claims that a training slide consisting of "agency guidelines" merely conveys "preliminary assessments" and "recommendations." Gov't Opp. 2; Brodfuehrer Decl. ¶ 20. This defies reality. *See* Pls.' Br. 6. But even if it could be characterized that way, in the loose sense that training materials are forward-looking, the slide is not a "recommendation" protected by the deliberative process privilege. As the Second Circuit has explained, the "recommendations" that may be withheld are those "reflect[ing] the personal opinions of the writer rather than the policy of the agency." *Tigue v. DOJ*, 312 F.3d 70, 80 (2d Cir. 2002). And even though the government characterizes this slide as "'advice' from the author to other personnel," Gov't Opp. 2, it still has not explained how an agency-approved training slide could contain "personal opinions," rather than policy. *See Gen. Elec. Co.*, 2006 WL 2616187, at *4. Nor has the government stated that employees were free to disregard its instructions—in fact, the rest of the presentation suggests the opposite. *See* Pls.' Br. 6.[1]

[1] The government's reliance on *National Immigration Law Center*, 2015 WL 12684437, is also unavailing. That case highlights a distinction the government tries to elide: between

The government also claims that the slide relates to a "specific decision," *Tigue*, 312 F.3d at 80, but the "decision" the government points to is an entire class of hypothetical future consultation requests. *See* Gov't Opp. 2. This is not a "specific decision" for the purposes of the deliberative process privilege. The Second Circuit decision addressing this requirement is illustrative: there, the record in question was provided to help a commission decide what a specific policy should be. *Tigue*, 312 F.3d at 73. Here, the training slide is designed to convey what the decided-upon policy *is.* Brodfuehrer Decl. ¶ 20.

B. DOJ-Crim has improperly redacted instructions from an official agency form.

The government also withholds instructions on an official agency form, arguing that they are subjective and reflect only what "the author of the document believes other attorneys" should do. Gov't Opp. 3. This characterization should not be credited.

At one point, of course, "the author of the document" drafted a subjective list of "specific analyses" that he "believe[d] other attorneys should undertake." *Id.* But that draft has since been approved, and these instructions are now "agency protocol." *Gen. Elec. Co.*, 2006 WL 2616187, at *5. "At the very instant that an agency aligns its policy or program congruently with the views expressed in a particular document, that document is no longer seen as 'reflect[ing] the personal opinions of the writer'; rather, it reflects the position of the *agency*." *Id.* at *4 (citation omitted). This is reflected by the form's header, which lists the "Policy and Statutory Enforcement Unit" as

---

documents "reflect[ing] an agency's formal or informal guidelines or understanding of its own policies" (like this training slide), and documents "address[ing] an agency's internal deliberations over policy or legal issues." *Id.* at *9.

the originator, *see* Charlton Decl., Ex. 2; by the agency's current use of this form, Brodfuehrer Decl. ¶ 20; and by the government's admission that it constitutes "agency guidelines," *id*.

Additionally, the government misapplies *Coastal States* to argue that this form is just "'one step' of a decision-making process." Gov't Opp. 3. There, the D.C. Circuit explained that a document recommending initiating administrative proceedings was just "one step" in the deliberative process because it would lead to "a final disposition which would more accurately reflect the agency's views." 617 F.2d at 867. The blank form here is nothing like that document.

Coastal States might be apt if Plaintiffs sought a filled-out version of the form and its accompanying memorandum, analyzing the facts relevant to a particular case. Such a memorandum would reflect the drafter's views prior to consultation. But Plaintiffs ask only for the instructions listed on a blank template, which do not convey tentative conclusions about any case and cannot possibly "reveal DOJ attorneys' subjective assessments." *See* Gov't Opp. 4.

II. The FBI's search was inadequate.

A. The FBI has failed to establish the adequacy of its search for records responsive to Category 1(e).

Although the FBI had an opportunity to cure its deficient declaration and meet its burden of "show[ing] that it 'conduct[ed] a good faith, reasonable search,'" its supplemental declaration largely repeats the conclusory assertions of the first. *See Heartland Alliance for Human Needs & Human Rights v. USCIS*, 406 F. Supp. 3d 90, 110 (D.D.C. 2019) (citation omitted); Decl. of David M. Hardy ("Hardy Decl.") ¶ 4, ECF No. 54. The government relies on mischaracterizations of the cases Plaintiffs cited, without offering any cases that refute Plaintiffs' position. And even the government's authority states that declarations must "denote which files were searched, [and] by whom" and "reflect a systematic approach to document location." *Heartland*, 406 F. Supp. 3d at 110. The government's declarations fail to do so.

1. The FBI has failed to identify the potential custodians it searched.

The government has yet to sustain its burden of establishing that it "searched all custodians who were reasonably likely to possess responsive documents." *Nat'l Day Laborer Org. Network v. ICE*, 877 F. Supp. 2d 87, 96 (S.D.N.Y. 2012); Pls.' Br. 17. While it summarily states that it did not "overlook[]" potential custodians, Hardy Decl. ¶ 4, it still never states *whose* records were searched—by name or title—or even if it searched obvious potential custodians identified in the Final Processing List. *See* Seidel Decl. ¶ 19; Hardy Decl. ¶ 4 (same); Ex. A, ECF No. 26. This conclusory response is not enough to justify its search.

The government's attempts to distinguish Plaintiffs' cases demonstrating that the agency has not sustained its burden fail. First, it argues that in *Coffey v. Bureau of Land Management*, the court held that the agency had to provide names of custodians "only because the plaintiff in that case had 'identified a specific "gap"' in the search." Gov't Opp. 7 (citing 277 F. Supp. 3d 1, 10–11 (D.D.C. 2017)). But Plaintiffs have identified such a gap here: the FBI has failed to list or describe the searches of potential custodians. *See Coffey*, 277 F. Supp. 3d at 11.

The government similarly argues that in *National Day Laborer*, 877 F. Supp. 2d 87, the FBI's search was faulted "only to the extent that it [excluded] an entire relevant component office." Gov't Opp. at 7. This is incorrect. The court also rejected the search of a specific FBI unit, both because the FBI did not search former employees' files and because it did not provide specific information about the searches. *Nat'l Day Laborer*, 877 F. Supp. 2d at 101–02, 107; *see also id.* at 112 (ordering new searches). The court was able to determine that the FBI had not searched all appropriate custodians because the FBI had disclosed the number and titles of employees searched. *See* Seventh Declaration of David Hardy ¶¶ 16, 19, *Nat'l Day Laborer*, 877 F. Supp. 2d 87 (No.

10-cv-3488-SAS), ECF No. 180. Here, the FBI has not provided the same information necessary to make that determination.[2]

The government has not cited a single case granting summary judgment on the basis of declarations as sparse as these. Instead, it cherry-picks quotes from cases that do not support its position. For example, the government cites a case in which the court accepted a declarant's attestation that he was unaware of other custodians. *See* Gov't Opp. 7. But the court did so only *after* the agency first identified other custodians by name and title. *Alliance Defending Freedom v. IRS*, No. 15-525-EGS, 2017 WL 4325615, at *4–5 (D.D.C. Sept. 27, 2017). The government also cites *Bigwood v. DOD*, 132 F. Supp. 3d 124, 142 (D.D.C. 2015), as a case rejecting demands for the names or positions of "agency personnel involved in [the] search," Gov't Opp. 7–8. But that case rejected the request for names and positions of personnel who *supervised and conducted* the search, not those of the *custodians* searched. *See Bigwood*, 132 F. Supp. 3d at 142–43.

2. The FBI has failed to explain its search methods.

The FBI has also failed to adequately explain its search methods. It explained why a digital database search would not be effective, but then only stated that a Subject Matter Expert used "his knowledge" and that he and others "were queried." Seidel Decl. ¶ 19; Gov't Opp. 5. It does not explain how those individuals actually carried out their searches—whether in physical files, email, or drives; and if electronically, with what search terms. *See* Seidel Dec. ¶ 15–19. More is required:

[2] The information the FBI does provide—that it searched individuals who "would be the 'gatekeepers' of any statistical and/or reporting data," Seidel Decl. ¶ 20—suggests it did not search the proper custodians. Only part of Category 1(e) sought statistical data, which Plaintiffs no longer challenge; the other part sought the NSL requests themselves. *See* Pls.' Br. 17 & n.9.

"[C]ustodians cannot 'be trusted to run effective searches,' without providing a detailed description of those searches, because FOIA places a burden on defendants to *establish* that they have conducted adequate searches." *Nat'l Day Laborer*, 877 F. Supp. 2d at 106, 108; *see also Urban Air Initiative, Inc. v. EPA*, 271 F. Supp. 3d 241, 256 (D.D.C. 2017) (rejecting declaration that did not list search terms or describe searches).

The government's own cases undercut its argument that it need not provide this detail. In *Heartland*, the court denied the agency summary judgment on the adequacy of certain searches because of deficiencies in its declarations. 406 F. Supp. 3d at 177 & n.3. In particular, the agency failed to explain why separate offices used different search terms. *Id.* at 117 n.3. But here, the FBI has not even said *whether* custodians used search terms. And in *Alliance Defending Freedom*, the agency's declaration provided detailed descriptions of where specific custodians searched and how. *See, e.g.*, Decl. of Kirk M. Paxson ¶ 15, ECF No. 28-2, *Alliance Defending Freedom,* 2017 WL 4325615 (explaining "[Ms. Giuliano] maintained a folder in Microsoft Outlook entitled 'FFRF' which she reviewed in two ways . . .").

The Court should therefore find that the FBI has failed to meet its initial burden of "provid[ing] a 'reasonably detailed' declaration describing its search." *Heartland*, 406 F. Supp. 3d at 110.[3]

[3] The FBI's search is also inadequate because it is implausible that no responsive records exist. Pls.' Br. 18. This argument is neither "purely speculative" nor based on the FBI's failure "to turn up one specific document." Gov't Opp. 8 (citations omitted). The FBI failed to identify even a *single* news media NSL request, despite agency rules governing their issuance and training slides about such requests. Pls.' Br. 18.

B. If the FBI believes that the existence or non-existence of records responsive to Category 1(e) is a protected fact under § 552(c), it must publicly justify this.

Plaintiffs' opening brief argued that "if the FBI has relied on an exclusion to protect the fact of the existence or nonexistence of records, it has done so in a procedurally improper manner." Pls.' Br. 20. The government misses a critical nuance in Plaintiffs' argument: Plaintiffs do *not* "seek to force the FBI to . . . acknowledge the existence or non-existence of records." Gov't Opp. 9. They merely ask the government to state whether it "believes the existence or nonexistence of Category 1(e) records" is *itself* a protected fact. Pls.' Br. 22.

Answering this question would not reveal whether the FBI actually possesses responsive records. *Id.* This is precisely the point of the *Glomar* response: an agency may refuse to confirm or deny the existence or nonexistence of records *if* doing so would itself reveal protected information. *Wilner v. NSA*, 592 F.3d 60, 70 (2d Cir. 2009). But in *Glomar* cases, as here, the government must inform the requester that it is issuing such a response, and justify that response to the fullest extent possible on the public record. *See Florez v. CIA*, 829 F.3d 178, 187 (2d Cir. 2016). Here, for example, this could involve the government's explanation about how the scope of the Request could be read to overlap with any of the exclusions. [4]

[4] Although unclear, one clause of the government's opposition brief could be read as an acknowledgment that the government does consider the existence or non-existence of these records itself to be a protected fact. Gov't Opp. 9 ("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."). If so, the government has failed to provide any justification for this on the public record. And while the government cites two district court cases where courts permitted the government to use solely an *in camera* declaration to address the *Glomar* response permitted under § 552(c),

The government still does not explain why the *Glomar* process—as Congress anticipated and as laid out in several Second Circuit opinions—would not be appropriate here. *See, e.g.*, *Wilner*, 592 F.3d at 70; *Florez*, 829 F.3d at 184–87; *see also* Pls.' Br. 21. This process protects the government's interests while also maximizing transparency and permitting meaningful adversarial testing.

Finally, the government baldly asserts that "Plaintiffs offer no reasoning in support" of their claim that any potentially responsive records do not implicate the exclusion categories. Gov't Opp. 8. This is wrong: Plaintiffs explained their position at length, reasoning from the nature of the request and the types of information implicated by Category 1(e). *See* Pls.' Br. 19–20.

III. The FBI improperly withheld information under Exemption 7(E).

As explained in Plaintiffs' opening brief, the government has improperly withheld information from several documents under Exemption 7(E). *See* Pls.' Br. 9–16. The government's response misunderstands the scope of Exemption 7(E), mischaracterizes the records, and fails to show that the withholdings are logical and plausible. *N.Y. Times Co. v. DOJ*, 756 F.3d 100, 119 (2d Cir. 2014).

A. First Amendment Training Slides

Exemption 7(E) does not protect statements of law or policy, or the "interpretation and application" of law or policy. *See Knight First Am. Inst. at Columbia Univ. v. DHS*, 407 F. Supp.

Light v. DOJ, 968 F. Supp. 2d 11, 30 (D.D.C. 2013); *Mobley v. CIA*, 924 F. Supp. 2d 24, 72 (D.D.C. 2013), the Second Circuit has never approved of this approach. It has instead instructed courts in the *Glomar* context "to create as complete a public record as is possible." *Florez*, 829 F.3d at 187.

3d 311, 332–33 (S.D.N.Y. 2019). And yet the FBI appears to have redacted precisely those kinds of statements from training slides on First Amendment doctrine. Pls.' Br. 10; *see* Charlton Decl., Exs. 3, 4, 6, 7.

The government asserts that "nothing about the redactions . . . gives any indication that the withheld information consists of 'mere descriptions of codified law and policy,'" claiming instead that they describe law enforcement techniques and procedures. Gov't Opp. 11 (quoting *Knight*, 407 F. Supp. 3d at 333). This is implausible, as is clear from the slides and their context. For example, Exhibit 3 is part of a presentation titled "Legal Issues: First Amendment Protected Activity." Charlton Decl., Ex. 3, FBI 4. Only the slide's title, "Is this protected speech?," is unredacted. Ex. 3, FBI 12. Plaintiffs cannot fathom how an illustrative example of what is or isn't protected speech is a law enforcement "technique or procedure," Gov't Opp. 12 n.5, let alone one that "describe[s] 'proactive steps' for preventing criminal activity and maintaining security," *Knight*, 407 F. Supp. 3d at 333 (citation omitted). Rather, the slide appears to convey an "interpretation and application" of the First Amendment and so cannot be withheld. *Id.* Exhibits 4, 6, and 7 are similar. *See* Charlton Decl., Ex. 4, FBI 34–35 (slides titled "Hypothetical" and "Still protected speech?," following slides explaining First Amendment doctrine, *see* Supplemental Charlton Decl., Ex. 1, FBI 25–33); Ex. 6, FBI 905 ("[Redacted] are 1st Amend. protected speech,

even though publicly available.")[5]; Ex. 7, FBI 909 ("Washington Post collects publicly available [redacted] why can't FBI?").[6]

The government also criticizes Plaintiffs for making educated guesses about what "appear[s]" to lie behind the government's redactions. *See, e.g.*, Gov't Opp. 11. But this is common in FOIA litigation, as requesters generally cannot know precisely what the government has withheld. And courts have never required more. Even in the official-acknowledgment context, where plaintiffs bear the burden of production, plaintiffs must only "point[] to specific information in the public domain that *appears* to duplicate that being withheld." *ACLU v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013) (emphasis added).

In any event, Plaintiffs' arguments for disclosure are not based on "mere speculation." Gov't Opp. 11. The government cites a case in which requesters "object[ed] generally" to the invocation of the privilege "without naming specific documents." *Vento v. IRS*, 714 F. Supp. 2d 137, 153–54 (D.D.C. 2010). But here, Plaintiffs have identified specific records and tailored their arguments to each, based on unredacted portions, context, and official disclosures.

B. Other Slides

As for the remaining slides, the government's declaration is too vague to establish that Exemption 7(E) applies. The government disputes this, citing one paragraph of the agency's

[5] As previously explained, and unrefuted by the government, the redaction in Exhibit 6 likely refers to information collected from social media websites. *See* Pls.' Br. 12.

[6] The government claims that *Knight* is "inapposite," reading into it a requirement that "the content in question closely track[] statutory language" to fall outside Exemption 7(E). Gov't Opp. 11–12. There is no basis for this limitation. *See Knight*, 407 F. Supp. 3d at 333.

declaration. Gov't Opp. 13 (citing Seidel Decl. ¶ 52). But this paragraph is the source of the problem: it collectively describes the various types of information withheld from a group of documents, without connecting those descriptions to a particular document—even though it is clear, based on context, that not every part of the paragraph applies to every document. *Compare, e.g.*, Seidel Decl. ¶ 52 (referring to "the levels of review required") *with* Ex. 6, FBI 905. Without tailored explanations, the government has failed to show that the redacted material "truly embod[ies] a specialized, calculated technique or procedure" as required to rely on Exemption 7(E). *ACLU Found. v. DHS*, 243 F. Supp. 3d 393, 404 (S.D.N.Y. 2017).[7]

The government also fails to meaningfully respond to Plaintiffs' argument that information redacted on a challenged slide has already been released on another slide. Pls.' Br. 13; Gov't Opp. 12 n.4. The slides have the same title, and both contain a bullet point conveying the same information, albeit phrased differently. *Compare* Charlton Decl., Ex. 12 (explaining when "information may be manually transferred to FBINet") *with* Charlton Decl., Ex. 13 (explaining when "information" may "be manually transferred to FBINet"). Given the similarities, Plaintiffs suggested that additional information on Exhibit 13 was improperly redacted from the challenged slide. *See* Pls.' Br. 13. The government does not deny this, saying instead that there is "no indication that [the slides] include the same information." Gov't Opp. 12 n.4. That assertion is false.

[7] Plaintiffs argued that some slides "appear to describe issues and obstacles the FBI has previously faced." Pls.' Br. 11. The government accuses Plaintiffs of "invent[ing] that characterization out of whole cloth," Gov't Opp. 12 n.5—even though, for example, one redacted section is titled "[e]xamples of recent activity." *See* Charlton Decl., Ex. 5, FBI 40.

C. FBI Policy Guides

Plaintiffs argued that the FBI improperly redacted portions of the Domestic Investigations Operations Guide ("DIOG") and the Counterintelligence Division Policy Directive and Policy Guide ("CDPG"). Although the FBI makes four main arguments in response, each fails.

First, the government disputes that the FBI's declaration is too vague. Gov't Opp. 14. Just as with the slides addressed in Section III.B., the government points to a single paragraph of the declaration that collectively describes several subsections, without distinguishing between them or tailoring its arguments to the subsections' different topics. *See* Seidel Decl. ¶ 54. Plaintiffs thus cannot assess whether the information is properly withheld. And while the government claims that the justifications are clear if compared to the documents, Gov't Opp. 14, a number of the subsections are entirely redacted, *see* Pls.' Br. 14. The government cites *Muslim Advocates v. DOJ*, 833 F. Supp. 2d 92 (D.D.C. 2011), to argue that its declaration is sufficient, but this comparison fails. There, the agency's declaration was significantly more detailed, *see id.* at 103–04 (describing ten separate categories of information withheld from the DIOG), and the court still required a supplemental affidavit about an entirely withheld chapter, *id.* at 105.

Second, the government argues that Plaintiffs "badly mischaracterize[d] the nature of the redacted information," Gov't Opp. 15, referring to the subsections that Plaintiffs contend discuss "preliminary authorization process[es]." Pls.' Br. 14. This includes six DIOG subsections and one CDPG subsection. *Id.*

The government cites three subsections to make this point, but only one is even on Plaintiffs' list. *See* Pls.' Br. 14 (not listing DIOG § 18.6.6.3.4 or § 18.6.6.3.5). And in that subsection—"Use of Subterfuge"—the released portions *do* concern preliminary approval processes: the necessary consultations before approval of a request. DIOG § 18.5.6.4.8.2, Charlton

Decl., Ex. 14, FBI 384. And for the other subsections Plaintiffs listed, their headings (and other information) show that they concern authorization processes. *See, e.g.*, DIOG § 18.5.6.4.8.1, Ex. 14, FBI 383–84 (titled "Approval Requirements"). *See* Pls.' Br. 14.

Third, the government argues that even if Plaintiffs' characterizations are correct, Plaintiffs do not explain why approval processes would not fall within Exemption 7(E). Gov't Opp. 17. But as Plaintiffs *did* explain, the exemption protects only techniques and procedures relating to the conduct of the investigation or prosecution *itself*, that is, "how law enforcement officials *go about investigating a crime*." *Allard K. Lowenstein Int'l Human Rights Project v. DHS*, 626 F.3d 678, 682 (2d Cir. 2010) (emphasis added). It does not protect bureaucratic requirements for the *authorization to use* techniques and procedures. While such subsections may discuss the techniques being authorized, Gov't Opp. 16, this is not a concern when the technique is generally known or identified in the heading. *See, e.g.*, "Use of Subterfuge," Ex. 14, FBI 384.[8]

Finally, the government disputes Plaintiffs' contention that the FBI has inappropriately withheld generally known legal standards in a DIOG subsection titled "Standards for Issuing NSLs." *See* Gov't Opp. 16–17; DIOG § 18.6.6.3.4., Ex. 14, FBI 387–88. It has withheld this entire section even though many NSL standards are codified in statutes or otherwise available. *See* Pls.' Br. 15. This includes, among others:

- The information sought must be "relevant to an authorized investigation" provided that U.S. person investigations are "not conducted solely upon the basis of activities protected by the first amendment." 18 U.S.C. § 2709 (b)(1), (b)(2).

[8] The government cites *Muslim Advocates* for the proposition that "approval limitations" are withholdable under Exemption 7(E). Gov't Opp. 15–16. But there, the court noted that the plaintiff "[did] not challenge the applicability of Exemption 7(E)" to "approval limitations." 833 F. Supp. 2d at 104.

- "NSLs may not be used to obtain a full credit report in counterintelligence investigations" without "an international terrorism nexus." Charlton Decl., Ex. 19.

- Information is "relevant" for the purposes of NSLs if it "tends to make a fact more or less probable." Supplemental Charlton Decl., Ex. 2.

The government argues that the withheld information "goes beyond just recitation of law found elsewhere." Gov't Opp. 16. Although perhaps true for parts, it is inconceivable that no public information appears in the redacted section.[9]

D. Documents Withheld Under Exemptions 1, 3, and 7(E)

The government similarly argues that it has not improperly withheld officially acknowledged information from documents titled "Best Practices for Media Policy," Charlton Decl., Ex. 21, and "National Security Letters," Charlton Decl., Ex. 18. The government does not directly dispute that public information appears in the documents in some form, but instead argues that the "differences in context" between the official acknowledgments and the withheld information precludes the information's disclosure. *See* Gov't Opp. 18.

This argument is meritless. In the Second Circuit case the government cites, the court held that "differences in context" between the contested memorandum and official "public explanations" precluded the memorandum's disclosure. *N.Y. Times Co. v. DOJ*, 806 F.3d 682, 686

[9] As Plaintiffs previously noted, Pls.' Br. 15 n.8, a leaked version of the 2011 DIOG confirms this. *See* Charlton Decl., Ex. 20. Plaintiffs note that they do not ask the court to rule that the existence of a leaked document in the public domain waives any privilege. Plaintiffs' arguments regarding the inadequacy of the government's justifications stand on their own; they reference the document only to underscore that their assertions are not speculative, as the government claims.

(2d Cir. 2015) . Those differences in context were stark: the memorandum was written eight years before the public statements; the memorandum concerned Executive Order 12,333, which the statements did not mention; and the memorandum concerned different "actions and governing legal standards." *Id.* at 686–87.

Here, in contrast, the withheld portions appear to discuss the very statutes, regulations, and guidelines Plaintiffs point to. The re-packaging of publicly known standards in agency documents does not allow the government to escape its disclosure obligations. *Cf. ACLU v. DOD*, No. 17-cv-3391-PAE, 2020 WL 419757, at *19 (S.D.N.Y. Jan. 27, 2020) (mentions of public legal standards that apply to all raids could not be withheld from a military order about a particular raid). Of course, if the documents contain additional agency-specific procedures, the FBI may be permitted to withhold that information—provided that its disclosure could cause harm, even considering information already public. *See N.Y. Times Co.*, 756 F.3d at 120 (requiring disclosure of new information because it "add[ed] nothing to the risk").

Citing no case, the government also argues that Plaintiffs "must" demonstrate "in what form the withholdings in question specifically match sections of the publicly available sources invoked." Gov't Opp. 18. It is unclear how a typical plaintiff could do so, since requesters cannot know in what precise form the information appears. Instead, Plaintiffs bear the burden of production, and must "point[] to specific information in the public domain that appears to duplicate that being withheld." *ACLU*, 710 F.3d at 427. Plaintiffs have done so.

The first document, "Best Practices for Media Policy," concerns the implementation of DOJ's Media Policy, 28 C.F.R. § 50.10. But either a "Best Practices" document only devotes two sentences to the content of the policy itself, or the government has failed to segregate and release all public information. Similarly, the document does not contain any unredacted references to the

DOJ manual containing Media Policy guidance. JM 9-13.400. Because the FBI must comply with that manual, it beggars belief that its "Best Practices" guide does not reflect the guidelines set out in the manual.

The government also appears to have improperly redacted information from a document titled "National Security Letters." *See* Charlton Decl., Ex. 18, FBI 1066–67; Pls.' Br. 16. For example, the document contains a chart appearing to redact the individuals involved in the NSL approval process, Ex. 18, FBI 1066, though another released document reveals that information. *See* Charlton Decl., Ex. 14, FBI 387 (approval by CDC, ADC, or NSLB attorney). If the redacted text includes this information, it must be disclosed.

CONCLUSION

Respectfully, the Court should deny the government's motion for summary judgment and grant Plaintiffs' cross-motion for partial summary judgment.

Dated: April 17, 2020

Respectfully submitted,

s/ *Anna Diakun*

Anna Diakun (AD-0327)
Leena Charlton (5622147)
Alex Abdo (AA-0527)
Knight First Amendment Institute
at Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
anna.diakun@knightcolumbia.org
(646) 745-8500

Counsel for Plaintiffs

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 2(D) of the Individual Practices of the Honorable John G. Koeltl, I hereby certify that this document complies with the word limit and formatting requirements set by the Court. In accordance with the Parties' Scheduling Order, ECF No. 43, this reply brief contains 4,998 words.

Dated: April 17, 2020

s/ *Anna Diakun*
Anna Diakun