20-3837

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 20-3837

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY,

—v.—

Plaintiff-Appellee,

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, UNITED STATES DEPARTMENT OF STATE, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT,

Defendants-Appellants,

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES CUSTOMS AND BORDER PROTECTION,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, **Plaintiff.**	**1:17-cv-7572 (ALC)**
-v.-	**OPINION & ORDER**
U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL., **Defendants.**	

ANDREW L. CARTER, JR., United States District Judge

Plaintiff the Knight First Amendment Institute at Columbia University (the "Knight Institute" or "Institute") filed this action under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), seeking several categories of documents from the United States Immigration and Customs Enforcement ("ICE"), the Office of Legal Counsel ("OLC") within the Department of Justice ("DOJ"), the Department of State ("DOS"), the United States Citizenship and Immigration Services ("USCIS"), Customs and Border Protection ("CBP"), Department of Homeland Security ("DHS"), Department of Justice Office of Public Affairs ("OPA"), and Office of Information Policy ("OIP") (collectively "Defendants"). Specifically, Plaintiff filed identical FOIA requests (the "Request") seeking records relating to the government's authority to exclude or remove individuals from the United States based on their speech, beliefs, or associations—including its authority to conduct the kind of "extreme ideological vetting" President Trump threatened during his 2016 presidential campaign and delivered shortly after taking office. ECF. No. 1. The parties' cross-motions for partial summary judgment are now

pending before the Court. This Opinion and Order addresses Plaintiff's challenges to the searches conducted by ICE and OLC, and the withholding determinations made by the DOS.

FOIA actions are typically resolved by summary judgment. *Families for Freedom v. U.S. Customs and Border Protection,* 797 F. Supp. 2d 375, 385 (S.D.N.Y. 2011). Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where parties file cross-motions for summary judgment, "'each party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration.'" *New York Times Co. v. U.S. Dep't of Def.*, 499 F.Supp.2d 501, 509 (S.D.N.Y. 2007) (citing *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001)).

Having carefully considered the parties' submissions, the Court concludes that (1) ICE failed to prove as a matter of law it conducted an adequate search; (2) OLC conducted an adequate search; (3) DOS properly withheld documents pursuant to Exemption 5; (4) DOS did not properly withhold documents pursuant to Exemption 7(E).

BACKGROUND

I. Immigration and Nationality Act

The Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq., establishes how individuals are ineligible to enter or remain in the United States. Certain INA provisions permit or require government officials to assess an individual's admissibility on the basis of her speech, beliefs, and associations—regardless of whether her speech, beliefs, or associations would be protected by the First Amendment.

The INA provisions relevant here make inadmissible any individual who "endorses or espouses terrorist activity" or whose presence in the United States may pose foreign policy concerns.[1] The INA also provides that any "alien whose entry or proposed activities in the United States . . . would have serious adverse foreign policy consequences . . . is inadmissible," even when that determination is based on "beliefs, statements or associations [that] would be lawful within the United States." 8 U.S.C. §§ 1182(a)(3)(C)(i), (a)(3)(C)(iii).[2]

II. Executive Orders 13769 and 13780

On January 27, 2017, the president issued Executive Order ("E.O.") 13769, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." 82 Fed. Reg. 8977.[3] After the Ninth Circuit upheld a temporary restraining order enjoining portions of E.O. 13769,[4] the president promised to "go[ ] further" with a new executive action, and assured that "[e]xtreme vetting will be put in place," and that "it already is in place in many places." The president then issued E.O. 13780; rescinding E.O. 13769 in its entirety. 82 Fed. Reg. 13209, 13218 (March 6, 2017).[5]

After declaring that only individuals who "want to love our country" should be admitted into the United States,[6] the president ordered the Secretary of State, the Attorney General, the

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[1] Specifically, the INA provides that "[a]ny alien who . . . endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization," 8 U.S.C. § 1182(a)(3)(B)(i)(VII), or who "is a representative of . . . a political, social, or other group that endorses or espouses terrorist activity," 8 U.S.C. § 1182(a)(3)(B)(i)(IV)(bb), is inadmissible. *See also* 8 U.S.C. § 1225(c) (expedited removal of arriving aliens on same grounds); 8 U.S.C. § 1227(a)(4)(B) (removal of admitted aliens on same grounds); 8 U.S.C. § 1158(b)(2)(A)(v) (removal of refugees otherwise qualified for asylum on similar grounds) (collectively, the "endorse or espouse provisions" of the INA).

[2] *See also* 8 U.S.C. §§ 1225(c)(1), 1227(a)(4)(C) (removal on same grounds) (together, the "foreign policy provisions" of the INA).

[3] *See Wagafe v. Trump*, No. C17-0094-RAJ, 2017 WL 2671254, at *2 (W.D. Wash. June 21, 2017).

[4] *See Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

[5] Stephen Miller, the president's Senior Advisor stated that E.O.13780 would have "the same basic policy outcome for the country." *Wagafe*, 2017 WL 2671254, at *2. The president's Press Secretary stated that the goal of E.O. 13780 was "obviously to maintain the way we did it the first time." *Id*.

[6] *Trump Defends Immigration Restrictions, Wants People "Who Love Our Country,"* Chi. Trib. (Feb. 6, 2017), http://trib.in/2vIQeuw

Secretary of Homeland Security, and the Director of National Intelligence to develop a more robust vetting program for visa applicants and refugees seeking entry into the United States, involving, among other things, "collection of all information necessary for a rigorous evaluation of all grounds of inadmissibility." Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,215 (Mar. 6, 2017); *see also* Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

III. The Knight Institute's Requests

On August 7, 2017, following E.O. 13780, the Knight Institute filed identical FOIA requests with the Defendants. Am. Compl. Ex. B, at 2–3, ECF No. 42-2. The Knight Institute initially sought six categories of information relating to the Trump Administration's "extreme vetting policies", as well as the government's past and ongoing reliance on the "endorse" or "espouse" INA provisions. *Id.* at 3–5. After negotiating with Defendants, the Knight Institute narrowed the Request to seek the following information:

> **Item 1**: All directives, memoranda, guidance, emails, or other communications sent by the White House to any federal agency since January 19, 2017, regarding consideration of individuals' speech, beliefs, or associations in connection with immigration determinations, including decisions to exclude or remove individuals from the United States;
>
> **Item 2:** All final memoranda written since May 11, 2005 concerning the legal implications of excluding or removing individuals from the United States based on their speech, beliefs, and associations;
>
> **Item 3**: All final legal or policy memoranda written since May 11, 2005 concerning the endorse or espouse provisions or the foreign policy provisions of the INA as they relate to "beliefs, statements or associations";
>
> **Item 4**: All final records created since May 11, 2005 containing policies, procedures, or guidance regarding the application or waiver of the endorse or espouse provisions or the foreign policy provisions as they relate to "beliefs, statements or associations";
>
> **Item 5**: All final Foreign Affairs Manual sections (current and former, created since May 11, 2005) relating to the endorse or espouse provisions or the foreign policy provisions as they relate to "beliefs, statements or associations," as well as

records discussing, interpreting, or providing guidance regarding such sections;

Item 6(a): All statistical data or statistical reports created since January 19, 2012, regarding the application, waiver, or contemplated application or waiver of the endorse or espouse provisions, or of the foreign policy provisions as they relate to "beliefs, statements or associations," to exclude or remove individuals from the United States; and

Item 6(e): All notifications or reports created since May 11, 2005 from the Secretary of Homeland Security or the Secretary of State concerning waivers of the endorse or espouse provision pursuant to 8 U.S.C. § 1182(d)(3)(B)(ii).

See Joint Status Report ("JSR") ¶ 2, ECF No. 48; Decl. of Carrie DeCell ("DeCell Decl.") ¶¶ 7–8. The parties agreed that Defendants would search for records responsive to each item with the following exceptions: 1) Defendants would search only White House systems for records responsive to Item 1, providing "an explanation of the White House record retention policy so the Knight Institute could assess the comprehensiveness of the response to this Item of the Request," (JSR ¶ at 2(a)); 2) only DOS would search for records responsive to Item 5; and 3) only DHS and DOS would search their respective Office of the Secretary systems for records responsive to Item 6(e). *Id*. at ¶ 2.

IV. Defendants' Responses

Defendants produced records by July 2018. In August 2018, the Knight Institute requested that Defendants provide draft search descriptions and *Vaughn* indices explaining these records.[7] ECF No. 79; DeCell Decl. ¶ 24. Defendants' responses are detailed below:

ICE: On September 29, 2017, ICE sent the Knight Institute a "final response" letter quoting language in Item 1. ECF No. 42-3. ICE also released 1,666 pages of records but

[7] *Vaughn* indices "require[] agencies to itemize and index the documents requested, segregate their disclosable and non-disclosable portions, and correlate each non-disclosable portion with the FOIA provision which exempts it from disclosure." *Brennan Ctr. for Justice v. U.S. Dep't of State*, 300 F. Supp. 3d 540, 547 (S.D.N.Y. 2018) (quotation omitted); *see also ACLU v. U.S. Dep't of Justice*, 844 F.3d 126, 129 n.4 (2d Cir. 2016); *Vaughn v. Rosen,* 484 F.2d 820, 826-28, 157 U.S. App. D.C. 340 (D.C. Cir. 1973). Thus, agencies submit *Vaughn* indexes listing withheld documents and claimed exemptions, along with *Vaughn* affidavits that describe the withheld documents and the rationale for withholding them. *See ACLU v. DOJ*, No. 13 Civ. 7347, 2017 U.S. Dist. LEXIS 44597, 2016 WL 5394738, at *4 (S.D.N.Y. Sept. 27, 2016).

withheld 1,653 of those pages in full. *Id*. Following an administrative appeal, ICE determined that "new search(s) or modifications to the existing search(s) . . . could be made," and remanded the Request to ICE's FOIA Office for further processing and retasking. DeCell Decl. at ¶¶ 10–15. On February 13, 2018, ICE informed the Knight Institute that ICE located approximately 14,000 pages of "potentially responsive documents," (ECF No. 42-7), based on the initial Request. On March 7, 2018, ICE informed the Knight Institute that it processed 560 pages for release. ECF No. 42-8. ICE referred eighty-seven of those pages to other agencies for processing and released the remaining 463 pages with redactions. JSR ¶ 25. On April 30, 2018, ICE informed the Knight Institute that it processed an additional 1,124 pages of responsive records. It released 395 pages in full or in part, and referred 728 pages to other agencies. DeCell Decl. ¶ 21.

To expedite ICE's processing of the remaining records, the Knight Institute agreed that ICE could process only records responsive to a narrowed Request. DeCell Decl. ¶ 22. After re-reviewing its responsive records to the initial Request, ICE identified ninety-nine pages of records as responsive to the Narrowed Request. *Id.* at ¶ 23. ICE referred forty-nine of those pages to DHS and USCIS, both of which withheld all referred pages in full, and released an additional fifty pages in part or in full to the Knight Institute. ECF No. 77.

In total, ICE produced 2,677 pages of responsive records, withholding most of those pages in part or in full. ECF No. 78. In October 2018, ICE sent the Knight Institute a draft search description and agreed to produce a draft Vaughn index by December 4, 2018. DeCell Decl. ¶ 25.

DOJ: OLC identified 128 pages of responsive records but withheld them all in full pursuant to Exemption 5. It did not refer any pages to other agencies for review. DeCell Decl. ¶¶ 27–28. OLC produced a draft search description and draft *Vaughn* index on November 2, 2018. *Id*. at ¶ 29.

DOS: DOS identified 243 records, totaling 1,719 pages, responsive to the Request. It released ninety records in full, withheld 126 records in part, and withheld 16 records in full, invoking FOIA Exemptions 1, 3, 5, 6, and 7(E). It referred eleven records to other agencies for review. Stein Decl. ¶ 6. On November 9, 2018, and February 26, 2019, DOS re-released documents, explaining that it determined that additional information could be released, additional exemptions could be applied to portions previously withheld, and certain information was inadvertently released. *Id.*; DeCell Decl. ¶¶ 31, 34. DOS withheld numerous records in full or in part under Exemptions 5 and Exemption 7(E). Stein Decl. ¶¶ 44, 50.

V. Procedural Background

ICE, OLC and DOS filed the instant motion for summary judgment on February 26, 2019. ECF No. 89. Plaintiff filed a Cross Motion for Partial Summary Judgment in its Opposition. ECF No. 100. In addition to the moving papers, the Court heard the parties'

claims in oral argument on July 31, 2019. ECF No. 128.

As to ICE and OLC, Plaintiff claims each agency failed to establish the adequacy of their searches for responsive records. Specifically, Plaintiff challenges the adequacy of ICE's search methods and affidavits, but only challenges OLC's decision not to search the White House for responsive records. ICE and OLC contend they conducted reasonable and diligent searches, searching multiple offices, components and locations reasonably likely to have records responsive to Plaintiff's FOIA request. On August 7, 2019, ICE submitted supplemental information regarding the searches conducted by ICE's Office of the Director and the ERO.[8] ECF No. 132. The Knight Institute filed a letter in response on August 14, 2019. ECF No. 136.

As to DOS, Plaintiff argues the agency failed to justify its withholding of responsive records pursuant to FOIA Exemptions 5 and 7(E). DOS claims it justifiably withheld certain documents in full or in part pursuant to FOIA Exemptions 5 and/or 7(E), and thus is entitled to summary judgment. 5 U.S.C. §§ 552(b)(5), (b)(7)(E).

STANDARD OF REVIEW

I. Summary Judgment

Summary judgment is the usual mechanism for resolving a FOIA action. *Families for Freedom,* 797 F. Supp. 2d at 385. Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp.*, 477 U.S. at 322, 106 S.Ct. 2548. There is no issue of material fact where the facts are irrelevant to the

[8] This included a declaration of Alexander Choe ("Choe Decl."), Administrative Specialist in the Office of the Director and the declaration of Eliman Jussara Solorzano ("Solorzano Decl."), Special Assistant in the Enforcement, Removal and Operations office. ECF Nos. 133-134.

disposition of the matter. *Chartis Seguros Mexico, S.A. de C.V. v. HLI Rail & Rigging, LLC*, 967 F.Supp.2d 756, 761 (S.D.N.Y. 2013); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. Where parties file cross-motions for summary judgment, "'each party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration.'" *New York Times Co.*, 499 F.Supp.2d at 509 (citing *Morales*, 249 F.3d at 121).

II. FOIA

A federal agency responding to a FOIA request must (1) conduct an adequate search using reasonable efforts, (2) provide the information requested, unless it falls within a FOIA Exemption, and (3) provide any information that can be reasonably segregated from the exempt information. *DiGirolamo v. Drug Enf't Admin.*, No. 1:15-CV-5737, 2017 WL 4382097, at *3 (S.D.N.Y. Sept. 29, 2017) (citations omitted). *See also Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) (citing 5 U.S.C. § 552(a)(4)(B) and *EPA v. Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973)). Affidavits or declarations providing "reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden" and are "accorded a presumption of good faith." *Id*. (citing *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)).

Furthermore, in the national security context, courts "'must accord substantial weight to an agency's affidavit concerning the details of the classified status of the

disputed record.'" *Am. Civil Liberties Union v. Dep't of Justice*, 681 F.3d 61, 69 (2d Cir. 2012) (citing *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)). Agency affidavits, however, must describe with reasonable specificity the nature of the documents at issue and the justification for nondisclosure—conclusory assertions are insufficient. *Bloomberg LP v. Bd. of Governors of Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 271 (S.D.N.Y. 2009) (citing *Halpern v. F.B.I.*, 181 F.3d 279, 291 (2d Cir. 1999)).[9]

In sum, courts may award summary judgment on the basis of agency affidavits that "[1] describe the justifications for nondisclosure with reasonably specific detail, [2] demonstrate that the information withheld logically falls within the claimed exemption, and [3] are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 73 (2d Cir. 2009). Conversely, "[s]ummary judgment in favor of the FOIA plaintiff is appropriate when an agency seeks to protect material which, even on the agency's version of the facts, falls outside the proffered exemption." *N.Y. Times Co. v. United States Dep't of Justice*, No. 14CIV03776ATSN, 2016 WL 5946711, at *5 (S.D.N.Y. Aug. 18, 2016) (citing *Bloomberg*, 649 F.Supp.2d at 271).

DISCUSSION

I. Search Adequacy

A. Legal Standard

An agency bears the burden to "show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." *Nat'l Day Laborer Org.*

[9] "[C]onclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not, standing alone, carry the government's burden," *Larson v. Dep't of State*, 565 F.3d 857, 864, 385 U.S. App. D.C. 394 (D.C. Cir. 2009).

Network v. U.S. Immigration & Customs Enf't Agency, 877 F. Supp. 2d 87, 95 (S.D.N.Y. 2012) (citation omitted); *see also Carney*, 19 F.3d at 812 (burden of establishing the adequacy of a search is on the agency). To demonstrate search adequacy, an agency must submit "relatively detailed and nonconclusory" affidavits. *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 488–89 (2d Cir. 1999) (citation omitted). "[A]n agency affidavit or declaration must describe in reasonable detail the scope of the search and the search terms or methods employed." *Gelb v. Fed. Reserve Bank of N.Y.*, No. 1:12-cv-4880-ALC, 2014 WL 4402205, at *4 (S.D.N.Y. Sept. 5, 2014) (quoting *Davis v. U.S. Dep't of Homeland Sec.*, No. 11-cv-203-ARR-VMS, 2013 WL 3288418, at *6 (E.D.N.Y. June 27, 2013)); *see also Garcia v. U.S. Dep't of Justice Office of Info. & Privacy*, 181 F. Supp. 2d 356, 366 (S.D.N.Y. 2002) (citation omitted) (ruling that agencies must prove their searches were adequate by showing "a good faith effort to search for the requested documents, using methods 'reasonably calculated' to produce documents responsive to the FOIA request.") Applying this reasonableness standard, courts consider: 1) the search terms and the type of search performed; 2) the nature of the records system or database searched; and 3) whether the search was "logically organized". *See Schwartz v. DOD*, No. 15-CV-7077 (ARR) (RLM), 2017 U.S. Dist. LEXIS 2316, at *16 (E.D.N.Y. Jan. 6, 2017).[10] Agency searches need not be perfect. *Conti v. United States Dep't of Homeland Sec.*, 2014 U.S. Dist. LEXIS 42544, at *29-30 (S.D.N.Y. Mar. 24, 2014). "[A]n agency 'is not expected to take extraordinary measures to find the requested records, but only to conduct a search reasonably designed to identify and locate responsive documents.'" *Id.* (citing *Adamowicz v. I.R.S.*, 672 F. Supp. 2d 454, 462 (S.D.N.Y. 2009), aff'd, 402 F.

[10] *See also Amnesty Int'l USA v. C.I.A.*, No. 07 Civ. 5435, 2008 U.S. Dist. LEXIS 47882, 2008 WL 2519908, at *11 (S.D.N.Y. June 19, 2008).

App'x 648 (2d Cir. 2010). Speculation that other documents exist, without more, "does not undermine [a] finding that the agency conducted a reasonable search." *Conti,* 2014 U.S. Dist. LEXIS 42544, at *30 (quoting *Garcia*, 181 F. Supp. 2d at 366).

B. Application: ICE's Search

ICE contends it identified four components within the agency likely to have records responsive to Plaintiff's FOIA request – Enforcement and Removal Operations ("ERO"), Office of Principal Legal Advisor ("OPLA"), Office of Policy, and the Office of the Director – because those components relate to the crux of Plaintiff's FOIA request: operations concerning the exclusion or removal of individuals. ECF No. 91("Fuentes Decl.") ¶¶ 16-30. OPLA also directed five additional offices or divisions to search for responsive records: Immigration Law and Practice Division ("ILPD"), National Security Law Section ("NSLS"), Enforcement and Removal Operations Law Division ("EROLD"), Field Legal Operations ("FLO") and Deputy Principal Legal Advisor ("DPLA"). *Id*. at ¶¶ 18-24. In each office or division a point of contact ("POC") determined the locations likely to contain responsive documents; attorneys, senior staff members, and in some cases the entire division then conducted the searches. *Id*. ICE searched government computers either manually or with various search terms. *Id*. at ¶¶ 17-30.[11]

ICE believes these facts entitle it to summary judgment since it reasonably identified multiple offices within the agency likely to possess responsive records, reasonably

[11] ICE used the following search terms: "Association," Foreign Affairs Manual," "Gang Association," "Foreign Policy Provision," "Beliefs," "Speech," "Memorandum," "waiver," "White House," and "ICE Policy." The documents found to be responsive were provided to ICE FOIA on December 6, 2017. Additionally, Special Counsel to the DPLA searched the DPLA's government computer (including personal and shared drives) and Outlook e-mail account, using the following search terms: "endorse," espouse," and "eop.gov." Fuentes Decl. ¶ 17-30.

calculated searches of those offices' electronic files to discover responsive records and located 99 pages of records responsive to the Narrowed Request. The Court disagrees.

ICE's search was inadequate for several reasons. First, an agency must search all locations likely to contain responsive records; not simply where the records are "most likely" to be found. *See Schwartz*, 2017 U.S. Dist. LEXIS 2316, at *19-20; *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency*, 877 F. Supp. 2d 87, 98 (S.D.N.Y. 2012) ("[T]he government is not required to search only the files…'most likely' to have responsive records; it must also search other locations that are reasonably likely to contain records.")(citations omitted) *DiBacco v. United States Army*, 795 F.3d 178, 190(D.C. Cir. 2015) ("'[M]ost likely' is not the relevant metric")(citations omitted); *Mobley v. C.I.A.*, 806 F.3d 568, 582, 420 U.S. App. D.C. 108 (D.C. Cir. 2015) ("Had the [agency] only searched the record systems 'most likely' to contain responsive records, its search would be inadequate.")

Here, the Fuentes affidavit states that EROLD did not search a certain component because it determined the component was not likely to have responsive records. Fuentes Decl. ¶¶ 20–22. ICE defended its decision by contending that two attorneys "concluded that if EROLD were involved in the subjects requested by the FOIA requests, they would have been the individuals involved," and that "they had had no interaction with anything related to policies, procedures, or guidance related to the exclusion or removal of individuals based on their 'beliefs, statements or associations.'" Suppl. Fuentes Decl. ¶ 16. This explanation is inadequate. Plaintiff's Request seeks records from 2005. Nothing indicates those attorneys are the only EROLD employees who would have handled relevant matters over the past fourteen years. Moreover, FOIA requires agencies to search

for responsive records, not rely on memories. *See* 5 U.S.C. § 552(a)(3); Am. Compl. Ex. B, at 3.

ICE cites *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991) to defend its search. There, the D.C. Circuit found a search adequate where the agency actively looked for responsive records, investigated the accidental destruction of some records, and conducted an "unavailing room-to-room search for the box of missing documents" anyway. 926 F.2d at 1201. Here, EROLD did not perform a similar hunt, raising "serious doubts as to the completeness of the agency's search." *Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at 96 (citation omitted). Thus, *SafeCard Services, Inc.* is inapposite.

Furthermore, ICE's affidavits provide an inadequate amount of detail. *See Gelb*, 2014 WL 4402205, at *4 (explaining that an agency's affidavit "must describe in reasonable detail the scope of the search and the search terms or methods employed"). Specifically, ICE provided no description of the search terms used by custodians in the ILPD and NSLS. Fuentes Decl. ¶¶ 20–22.

Moreover, ICE also failed to establish that the search terms used were expansive. The searches run by the Office of the Director and ERO were too restrictive to be reasonably calculated to uncover all responsive records. *See Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at 95.

For example, The Office of the Director's use of search terms "endorse provision" and "espouse provision," was unreasonably narrow given the breadth of Plaintiff's request. Fuentes Decl. ¶ 28. Plaintiff points out that it used its own defined shorthand phrases—specifically, the "endorse or espouse provisions"—to refer to numerous statutory provisions collectively throughout the Request. *See* ECF No. 42-2, at 3; *id*. at 3

nn.1–2. The Knight Institute did not borrow those phrases from ICE or other government records, and the Court has no reason to believe ICE uses these phrases to refer to the relevant provisions. Thus, the Office of the Director's search using the phrases "endorse provision" and "espouse provision" are underinclusive and unduly restrictive. The search leaves out, for example, records discussing the exclusion or removal of an individual who purportedly endorsed or espoused terrorist activity but did not explicitly mention the "endorse provision" or "espouse provision." Therefore, searches limited to Plaintiff's shorthand phrases verbatim are not reasonably calculated to uncover all relevant documents. *See Amnesty Int'l*, 2008 U.S. Dist. LEXIS 47882, 2008 WL 2519908, at *15 ("[A] search that is designed to return documents containing the phrase 'CIA detainees' but not 'CIA detainee' or 'detainee of the CIA' is not 'reasonably calculated to uncover all relevant documents.'" (emphasis omitted) (quoting *Truitt*, 897 F.2d at 542)).

ICE contends "the search need not be 'perfect' in Plaintiffs' estimation (or even the Court's), so long as the agency has provided logical explanations for each of the decisions it made as to search terms to be used and how to conduct the searches…'" Def.'s Rep. Mem. 9, ECF No. 117 (quoting *Immigrant Def. Project*, 208 F. Supp. 3d at 527-28). Indeed, "an agency is not required to search for all possible variants of a particular name or term". *Conti*, 2014 U.S. Dist. LEXIS 42544, 2014 WL 1274517, at *15. However, it must use search terms reasonably calculated to yield responsive records. *Schwartz,* 2017 U.S. Dist. LEXIS 2316, at *24. ICE failed to demonstrate how using these underinclusive and unduly restrictive search terms is reasonably likely to yield responsive records. *See Garcia*, 181 F. Supp. 2d 356, 368 ("In order to fulfill the adequate search requirement, the Government should 'identify the searched files' and

'recite facts which enable the District Court to satisfy itself that all appropriate files have been searched.'" (quotations omitted). Therefore, because the Office of the Director failed to search for additional terms the agency itself would have used in referring to the relevant statutory provisions—and offers no reasonable justification to support its decision—ICE has not established the adequacy of the Office of the Director searches.

Similarly, ERO's search was unreasonable because it did not include keywords—like "endorse" and "espouse"—from the INA. *See Id*. at ¶ 30. Furthermore, ERO's use of terms such as "removal policies," "removal terrorist," "removal speech," "removal belief," and "removal association" are not reasonably calculated to return relevant records. ERO's search terms seem especially deficient when compared to the terms used by DOS and OLC. *See* Stein Decl. ¶¶ 19, 22–23; Colborn Decl. ¶ 10, ECF No. 92.

Finally, ICE's contention that its search returned responsive documents holds little weight since a FOIA search's adequacy is not determined "by the fruits of the search". *Schwartz,* 2017 U.S. Dist. LEXIS 2316, at *26 (quoting *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315, 354 U.S. App. D.C. 230 (D.C. Cir. 2003)).

In sum, ICE's affidavit fails to establish adequacy by omitting key details about the search terms used, how the agency handled the administrative remand, and how the agency narrowed its search results. It is "patently incomplete." *See Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at 96 (citation and internal quotation marks omitted). Additionally, the searches run by the Office of the Director and ERO were not calculated to uncover all relevant documents. *See Id*. at 95. Thus, ICE's motion for partial summary judgment is DENIED and Plaintiff's cross motion for partial summary judgment is GRANTED. ICE must conduct new searches. The parties should meet and confer and

submit a joint status report regarding the new search terms within twenty-one days of this Order.

C. OLC's Search

Unlike ICE, OLC meets its summary judgment burden as a matter of law. Plaintiff does not challenge the adequacy of OLC's search of its own records, but rather, asserts that OLC should have searched the White House's records instead of its own. Plaintiff's assertion is based on Defendants' proposal to search the White House's systems as a more efficient means of gathering records responsive to Item 1. DeCell Decl. ¶ 9. Plaintiff contends it conditionally agreed to minimize Defendants' burden in this way, as detailed in a Joint Status Report prepared by both parties. ECF No. 48.[12] Despite OLC's apparent failure to abide by its word, FOIA does not allow the Court to compel it to do so.

As an initial matter, the White House and OLC are distinct entities. When not referring to the building itself, the term "White House" generally refers to the President's advisors working in the White House Office, one of the components of the Executive Office of the President ("EOP").[13] OLC operates within the DOJ, is led by an Assistant Attorney General who reports to the Attorney General of the United States, and provides legal advice to the president and all executive branch agencies. *See* 28 C.F.R. § 0.25. (establishing the OLC under the DOJ).

Accordingly, the OLC cannot be compelled to search records possessed by other

[12] The Joint Status Report reads: the parties agreed that Defendants would "[s]earch only White House systems for the records sought as Counsel for Defendants indicated that searching each recipient agency would be a slower and duplicative process," and that Defendants would "provide an explanation of the White House record retention policy so the Knight Institute can assess the comprehensiveness of the response to this Item of the Request." Joint Status Report ¶ 2(a), ECF No. 48

[13] *See* Exec. Order No. 8248, 3 C.F.R., 1938-1943 Comp., p. 576 (Sept. 8, 1939) (establishing EOP and, inter alia, the White House Office); 3 U.S.C § 105 (providing for the hiring of employees of the White House Office).

agencies. *Jones-Edwards v. Appeal Bd. of NSA*, 196 F. App'x 36, 38 (2d Cir. 2006).[14] FOIA applies to "agency records." 5 U.S.C. § 552(a)(4)(B); *see also DOJ v. Tax Analysts*, 492 U.S. 136, 142 (1989); *FLRA v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 508 (2d Cir. 1992). Under FOIA, agency records are materials "created or obtained by the agency to which the FOIA request was made" and "under that agency's control at the time the FOIA request is made". *Bloomberg*, 649 F. Supp. 2d at 275 (citing *Tax Analysts*, 492 U.S. at 144-45)), aff'd, 601 F.3d 143 (2d Cir. 2010). Since FOIA "only obligates [agencies] to provide access to [agency records] it in fact has created and retained," *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980), an agency is not required to search for records outside its possession or control". *Jones-Edwards* 196 F. App'x at 38. Indeed, as a practical matter, one agency does not have access to another agency's records systems. Therefore, as a matter of law, OLC was not obliged to search White House records. *See Jones-Edwards*, 196 F. App'x at 38 (finding an agency conducted an adequate search and the agency was not obligated to expand its search to encompass "domestic and international networks" outside its control).

Furthermore, the Colborn Declaration demonstrates that OLC conducted an adequate search regarding Plaintiff's Narrowed Request. The affidavit pointed out that OLC searched the central storage system containing "all final unclassified written legal advice," which, since "OLC attorneys use this database to perform internal research," is kept "as complete as possible." Colborn Decl. ¶¶ 8, 10. Moreover, after receiving one document from the State Department, OLC staff "revisited the search of [the] Perceptive

[14] *Sonds v. Huff*, 391 F. Supp. 2d 152, 160 (D.D.C. 2005), aff'd, 2006 WL 3093808 (D.C. Cir. 2006) (agency is "not required to respond to a FOIA request that should be directed to another agency.")

[database] to ensure that nothing had been missed." *Id*. at ¶ 12. These facts demonstrate that OLC's search was "reasonably calculated to discover" responsive documents. *Grand Cent. P'ship*, 166 F.3d at 489.

Accordingly, OLC satisfied its burden in demonstrating it conducted an adequate search of the records it possessed. Therefore, OLC's partial motion for summary judgment is GRANTED. Plaintiff's cross motion for partial for summary judgment is DENIED.

II. Withholding Responsive Records under FOIA Exemptions

An agency may withhold records responsive to a FOIA request if the withheld information is exempt under FOIA. 5 U.S.C. § 552(b). Defendants withheld various responsive records pursuant to Exemptions 5 and 7(e). Plaintiff, however, contends that DOS failed to justify these withholdings in its *Vaughn* index. *See* ECF No. 93-1.[15]

FOIA exemptions are exclusive and narrowly construed. *Am. Civil Liberties Union v. Dep't of Def.*, 543 F.3d 59, 66 (2d Cir. 2008), vacated on other grounds, 558 U.S. 1042, 130 S. Ct. 777, 175 L. Ed. 2d 508 (2009). "[A] district court must review *de novo* an agency's determination to withhold information requested under the FOIA." *Florez v. C.I.A.*, 829 F.3d 178, 182 (2d Cir. 2016) (citing 5 U.S.C. § 552(a)(4)(B)). The agency has the burden of persuasion; "[d]oubts, therefore, are to be resolved in favor of disclosure." *Am. Civil Liberties Union*, 543 F.3d at 66. To justifiably withhold responsive records, an agency must provide "reasonably detailed explanations why any withheld documents fall within an exemption." *Carney*, 19 F.3d at 812. Essentially, "agency affidavits . . . must

[15] In its moving papers, DOS agreed that its *Vaughn* index was inadequate and provided more detail in a supplemental declaration. Decl. of Eric R. Stein ("Suppl. Stein Decl.") ¶¶ 5–8, ECF No. 112. However, Plaintiff argues DOS still fails to carry its burden.

describe with reasonable specificity the nature of the documents at issue and the justification for nondisclosure—conclusory assertions are insufficient." *N.Y. Times Co. v. CIA*, 314 F. Supp. 3d 519, 525 (2018).

A. Exemption 5 and The Deliberative Process Privilege: Legal Standard

Exemption 5 permits agencies to withhold "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); *Dep't of Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8, 121 S. Ct. 1060, 149 L. Ed. 2d 87 (2001). Agencies may withhold documents that originate from a government agency and are susceptible to normal discovery rule privileges. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 800, 104 S. Ct. 1488, 79 L. Ed. 2d 814 (1984); *Spadaro v. United States Customs & Border Prot.*, No. 16-cv-16 (RJS), 2019 U.S. Dist. LEXIS 50273, at *14 (S.D.N.Y. Mar. 26, 2019) (citing *Grand Cent. P'ship*, 166 F.3d at 481)

An apparently privileged document may nevertheless be subject to disclosure "if it closely resembles that which FOIA affirmatively requires to be disclosed: 'final opinions . . . made in the adjudication of cases,' 'statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register,' and 'administrative staff manuals and instructions to staff that affect a member of the public.'" *Seife v. United States Dep't of State*, 298 F. Supp. 3d 592, 613 (S.D.N.Y. 2018) (quoting *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep't of Justice*, 697 F.3d 184, 195 (2d Cir. 2012) (quoting 5 U.S.C. § 552(a)(2)(A)-(C)).

FOIA requires "final opinions," "statements of policy and interpretations which have been adopted by the agency," and "instructions to staff that affect a member of the public" to be indexed. 5 U.S.C. § 552(a)(2). These provisions reflect a "strong congressional aversion to secret (agency) law and [represent] an affirmative congressional purpose to require disclosure of documents which have the force and effect of law." *Sears*, 421 U.S. at 153. The deliberative process privilege, however, protects records that are: (1) pre-decisional, i.e., prepared to assist an agency decisionmaker in arriving at a decision, and (2) deliberative, i.e., related to the policy forming process. *See Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 356 (2d Cir. 2005) (internal quotation marks omitted). Pre-decisional, deliberative documents include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency," as well as "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Grand Cent. P'Ship*, 166 F.3d at 482 (citation omitted); *see also Hopkins v. HUD*, 929 F.2d 81, 84-85 (2d Cir. 1991).

To determine whether a document is deliberative, courts consider whether the document: "(i) formed an essential link in a specified consultative process, (ii) 'reflect[s] the personal opinions of the writer rather than the policy of the agency,' and (iii) if released, would 'inaccurately reflect or prematurely disclose the views of the agency.'" *Seife*, 298 F. Supp. 3d at 630 (quoting *Schiller v. City of New York*, 04-cv-7922 (KMK) (JCF), 2007 U.S. Dist. LEXIS 4285, 2007 WL 136149, at *12 (S.D.N.Y. Jan. 19, 2007)).

To determine if a document is pre-decisional, courts consider whether the government can: (i) pinpoint the specific agency decision related to the document, (ii) establish its

author prepared the document to assist the agency official charged with making the decision, and (iii) verify that the document precedes the related decision. *Seife*, 298 F. Supp. 3d at 630 (quoting *Nat'l Congress for Puerto Rican Rights ex rel. Perez v. City of New York*, 194 F.R.D. 88, 92 (S.D.N.Y. 2000).

The deliberative process privilege does not apply to documents that embody law and policy. *Sears*, 421 U.S. at 152–53, 161; *Civil Liberties Union v. Nat'l Sec. Agency*, 925 F.3d 576, 593 (2d Cir. 2019) ("*ACLU v. NSA*").[16] The theoretical distinction between pre-decisional advice and post-decisional explanation may not be clear in practice. For example, a document advising an agency leader how to interpret a statute may seem identical to a letter informing an agency subordinate how to interpret a statute. *See Id*. Realizing this potential conflation, The Second Circuit recently explained the following doctrines to help courts determine if a document is privileged under Exemption 5: "working law" describes post-decisional material, and "express adoption" and "incorporation by reference describe two methods by which pre-decisional material can become post-decisional." *Id*.[17] "[I]t is the government's burden to prove" that the Exemption 5 privileges apply. *Brennan Ctr*., 697 F.3d at 201–02.

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[16] The deliberative process privilege protects "communications received by the decisionmaker on the subject of the decision prior to the time the decision is made" to ensure that the subsequent decision will be fully informed. *ACLU v. NSA*, 925 F.3d at 593 (quoting *Sears*, 421 U.S. at 151-53, 95 S.Ct. 1504). By contrast, there is little need to preserve the confidentiality of discussions rendered as the agency's "effective law and policy." *Id*. A record "more properly characterized as an opinion or interpretation which embodies the agency's effective law and policy" is considered "working law" and, given "a strong congressional aversion to secret agency law" and "an affirmative congressional purpose to require disclosure of documents which have the force and effect of law," is not privileged. *Id.*; *see also Brennan*, 697 F.3d at 195, 196 (internal quotation marks, alterations, and citations omitted).

[17] The Second Circuit also offered the following guideline principles to determine if a document constitutes "working law": whether agency officials feel free to disregard the document's instructions; whether an agency superior distributes the document to subordinates (rather than vice versa); whether agency superiors direct their subordinates to follow the document's instructions; whether the document is applied in the agency's dealings with the public; and whether failure to follow a document's instructions provides cause for professional sanction. *ACLU v. NSA*, 925 F.3d at 595. These factors indicate whether a document has become binding on agency officials and therefore represents an agency's "effective law and policy." *Id.*

B. Application

Here, the DOS contends it withheld the following documents pursuant to the deliberative process privilege: 1) legal memorandum concerning "Inadmissibility Based on Endorsing or Espousing Terrorist Activity: First Amendment Concerns," dated August 22, 2017 (C06534021) ("First Amendment Concerns"); 2) (a) portions of an Action Memorandum entitled "Travel Sanctions Against Persons Who Participate in Serious Human Rights Violations and Other Abuses," dated February 22, 2011 (C06569352), (b) Tab 2 to the memorandum in full entitled "Proposed Implementation Procedures" (C06569347), and (c) Tab 3 to the memorandum in full entitled "Background on Sanctions Authority" (C06569349) (collectively, "Travel Sanctions"); 3) an OLC memorandum entitled "Informal Legal Opinion on Section 212(d)(3)(B)(i) of the Immigration and Nationality Act" (C06568577) ("Section 212(d)(3)(B)(i)"); and 4) "Memorandum for Michele T. Bond Acting Assistant Secretary," dated June 4, 2015 (C06570336) ("AAS Memo").

These documents appear to be pre-decisional. DOS argues the First Amendment Concerns memorandum contains legal analysis that "has not been publicly adopted formally or informally" and "offers a legal analysis of a range of possible policy options" and "explicitly assesses the litigation risk for policy decisions." Suppl. Stein Decl. ¶ 5. DOS also contends that The Travel Sanctions memorandum offers "proposals [that were] not binding on the Department or the President" in the furtherance of policy announced by Presidential Proclamation 8697, and "presents . . . options to the President" concerning "legal options for barring entry into the United States to aliens who participate in serious human rights and humanitarian law violations." *Id*. at ¶ 6.

Similarly, DOS claims the Section 12(d)(3)(B)(i) legal opinion provided "non-binding" analysis and presents "different viable legal interpretations" (*Id*. at ¶ 7), and the AAS Memo contains analysis of the NSC's "legal views on a proposed exemption under INA § 212(d)(3)(B) for material support provided to a terrorist organization under duress," and analysis that "did not bind the Department to take an action" *Id*. at ¶ 8.

Despite each document's pre-decisional appearance, Plaintiff claims DOS failed to demonstrate the documents are not "working law". Specifically, Plaintiff claims DOS's statements do not allow the Court to determine whether DOS or the President adopted the reasoning provided in these records as their own, or whether DOS treats the records as having the force and effect of law. However, Plaintiff expands the boundaries of the "working law" doctrine too far. The Second Circuit considers a document as "working law" only when it operates as functionally *binding* authority on agency decision-makers. Here, the Stein declaration repeats similar language for each record at issue: "To the best of my knowledge, the analysis has not been publicly adopted formally or informally. The document offers legal analysis of a range of possible policy options, and this analysis was not binding on the Department or the President" Suppl. Stein Decl. ¶ 5–8. Indeed, the withheld documents may have been persuasive, but nothing indicates they were persuasive enough to have operative effect. Accordingly, DOS demonstrated the withheld documents were drafted as legal advice rather than binding authority; they were not "post-decisional". Therefore, the withheld documents were not "working law".

Furthermore, nothing indicates that the government expressly adopted these documents or incorporated them by reference. Because the adoption process is usually internal and hidden from public view, "express adoption" cases in this Circuit generally

involve external evidence that such adoption has occurred. *See New York Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 121 (2d Cir.), opinion amended on denial of reh'g, 758 F.3d 436 (2d Cir. 2014), supplemented, 762 F.3d 233 (2d Cir. 2014) (holding that an initially confidential and advisory memorandum was no longer privileged after senior government officials invoked the memorandum and declared it binding authority); *La Raza,* 411 F.3d at 356 (holding that an OLC memorandum was not privileged since the Attorney General and his senior staff repeatedly invoked the OLC memorandum not just to defend its own policy, but as embodying this new policy) *Brennan Ctr.*, 697 F.3d at 196 (holding that an OLC memorandum was disclosable since a senior agency official confirmed that the OLC's determination had effectively *dictated* the agency's new binding authority); *ACLU v. NSA*, 925 F.3d at 595-97. Similarly, a document is subject to disclosure under the "incorporation by reference" doctrine only when an agency's formal opinion or determination of law or policy expressly references and relies on that document *and* its reasoning as the basis for a decision. *Id* at 32 (emphasis added); *see also Sears,* 421 U.S. at 135 (limiting "incorporation by reference" to circumstances where the government relies on a disputed memorandum in a "final opinion" or "ruling").

Here, there are no external statements indicating the President or other senior government executives adopted or enacted the disputed documents. Plaintiff suggests the reasoning and views expressed within these documents may be consistent with the Trump Administration's highly publicized immigration policy. However, reflection is not adoption. Reports or recommendations that have "no operative effect" do not need to be disclosed even where the agency action agrees with the conclusion of the report or recommendation. *Brennan Ctr.*, 697 F.3d at 196 (quoting *Renegotiation Bd. v. Grumman*

Aircraft Eng'g Corp., 421 U.S. 168, 184, 95 S. Ct. 1491, 44 L. Ed. 2d 57 (1975)); *see also ACLU v. NSA*, 2017 U.S. Dist. LEXIS 44597, at *27 (S.D.N.Y. Mar. 27, 2017). There is no evidence the government adopted these advisory opinions as binding or explicitly relied upon them in a final decision. Essentially, nothing indicates the purported advice mutated into law.

In sum, the evidence suggests the government did not create the disputed documents as working law, never adopted them as working law, and never incorporated them by reference. *Sears*, 421 U.S. at 153 (emphasis added) (internal quotation marks and citation omitted); *see also Brennan Ctr.*, 697 F.3d at 201. Therefore, the deliberative process privilege applies to the disputed documents, and the DOS properly withheld them under Exemption 5.[18]

III. DOS 7(e) Withholdings

A. Legal Standard

Exemption 7 protects the government from disclosing records or information "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). This includes records with "a rational nexus to the agency's law-enforcement duties, including the prevention of terrorism and unlawful immigration." *Chivers v. United States Dep't of Homeland Sec.*, 45 F. Supp. 3d 380, 387 (S.D.N.Y. 2014) (citation omitted).[19] Exemption 7(E) exempts from disclosure records that: 1) "would disclose techniques and procedures for

[18] The DOS also claimed the First Amendment Concerns Memorandum was protected by other privileges under Exemption 5. However, "the Court need not make redundant findings to justify non-disclosure." *Spadaro*, 2019 U.S. Dist. LEXIS 50273, at *7-8.

[19] "As the D.C. Circuit has explained, 'Law enforcement entails more than just investigating and prosecuting individuals after a violation of the law.' The 'ordinary understanding' of the term 'includes . . . proactive steps designed to prevent criminal activity and maintain security.'" *Human Rights Watch v. Dep't of Justice Fed. Bureau of Prisons*, No. 13 Civ. 7360, 2015 U.S. Dist. LEXIS 123592, 2015 WL 5459713, at *5 (S.D.N.Y. Sept. 16, 2015) (citation omitted) (quoting *Public Emples. for Envtl. Responsibilty v. United States Section, Int'l Boundary & Water Comm'n*, 740 F.3d 195, 203, 408 U.S. App. D.C. 61 (D.C. Cir. 2014)).

law enforcement investigations or prosecutions"; or 2) "would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E); *See also Allard K. Lowenstein Int'l Project v. DHS*, 626 F.3d 678, 681 (2d Cir. 2010).[20]

A record discloses "techniques and procedures" if it refers to how law enforcement officials may investigate a crime. *Allard*, 626 F.3d at 682. Guidelines are "indication[s] or outline[s] of future policy or conduct," and generally refer "to resource allocation." *Id.* Guidelines are exempt "from disclosure only if public access to such guidelines would risk circumvention of the law." *Id.* at 681.

B. Application

DOS invokes Exemption 7(E) to withhold versions of three Foreign Affairs Manual ("FAM") Sections: 9 FAM 302.6, 9 FAM 40.32, and 9 FAM 302.14. As a threshold matter, it is not clear that the FAM was "compiled for law enforcement purposes," even if some sections of the FAM may serve those purposes. There is no dispute that DOS is a mixed-function agency; it performs both "law enforcement and administrative functions." *Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C. Cir. 2002) (citation omitted); Suppl. Stein Decl. ¶ 9. Accordingly, the Court must "scrutinize with some skepticism the particular purpose claimed for disputed documents redacted under FOIA Exemption 7." *Id*.

DOS claims the FAM sections at issue reflect its mixed functions – certain released portions recite statutes and background and the withheld portions contain specific techniques for applying those statutes. *See* ECF. No. 102 at 15 (reciting Section 212(a)(3)(B)(i) and describing the background of agency enforcement); *Id*. at 21

[20] Such techniques and procedures are categorically exempt from disclosure, without any need for inquiry into the harm that would result from their disclosure. *Id.*

(redacting techniques used to check for terrorism-related ineligibilities). DOS contends that the purpose of the redacted FAM sections is to help enforce the INA and therefore "falls squarely within the Department's law enforcement functions" – specifically, its responsibilities to process visa applications. Suppl. Stein Decl. ¶ 9. Plaintiff contends the redacted sections appear to contain definitions and broad statements of law, which fall outside of the techniques, procedures, and guidelines subject to Exemption 7(E). *See* 5 U.S.C. § 552(b)(7)(E); *see also ACLU v. Dep't of Homeland Sec.*, 243 F. Supp. 3d 393, 403–04 (S.D.N.Y. 2017). The Court agrees with Plaintiff.

The redacted portions are within the FAM's "Definitions" section. DeCell Decl. Ex. B at 7. Furthermore, other portions of the FAM appear to contain "recitations of statutes and background" not subject to Exemption 7(E). For example, 9 FAM 302.6-2(B)(3) references nine examples of material support, including a "safe house," "[t]ransportation," and "[c]ommunications." This list derives from the INA definition for "engage in terrorist activity," which includes "to commit an act that the actor knows, or reasonably should know, affords material support." 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). Yet DOS completely withholds the context for these nine examples in the FAM, claiming that this paragraph "identif[ies] the situations that trigger the process of checking for terrorism-related ineligibilities and reveal[s] the techniques used during that process." *Vaughn* Index 1. The similarity between the withheld information and the INA's text, however, suggests Exemption 7(E) does not apply.

Moreover, DOS admits the FAM generally consists of "policy." The mere descriptions of codified law and policy, even those including "interpretation and application of immigration laws and regulations," *Vaughn* Index 1, are not protected

under Exemption 7(E). To be "compiled for law enforcement purposes," the information must go a step further and describe "proactive steps" for preventing criminal activity and maintaining security. *Milner v. Dep't of the Navy*, 562 U.S. 562, 582 (2011) (Alito, J., concurring). DOS failed to satisfy its burden of showing that the withheld FAM sections do so.

DOS similarly withheld information in other sections of the FAM containing interpretive information characterized as "guidelines." For example, DOS withheld a section under 9 FAM 302.6-3(B) (C06533909) titled "Not a Permanent Bar" and described it as "guidelines for situations in which an individual may cease to be inadmissible," *Vaughn* Index 2. DeCell Decl. Ex. B at 44. DOS claims that, "terrorists and other bad actors could use [this information] to conceal derogatory information, provide fraudulent information, or otherwise circumvent the security checks put in place to ensure that terrorists and other bad actors cannot gain visas to enter into the United States," *Id*. at 3. However, it is unclear how explaining to the public what may constitute grounds for inadmissibility—essentially a legal interpretation—may potentially help an individual circumvent the law. Indeed, knowledge of the law always enables individuals to avoid committing a crime. Thus, DOS is not entitled to withhold documents under Exemption 7(e) on these grounds.

Accordingly, Defendants' motion for summary judgment as to the documents withheld pursuant to Exemption 7(e) is DENIED and Plaintiff's cross motion for partial summary judgment is GRANTED. Defendants are Ordered to turnover these categories of documents.

C. *In Camera* Review Request

Plaintiff also asks the Court to conduct an *in camera* review of Defendants' withheld and redacted documents to determine whether the claimed exemptions are reasonable. Courts should only conduct *in camera* review of undisclosed records as a last resort. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224, 98 S. Ct. 2311, 57 L. Ed. 2d 159 (1978). Records should not be reviewed *in camera* as a substitute for requiring an agency to explain its claimed exemptions in accordance with *Vaughn. Am. Civil Liberties Union v. United States Dep't of Justice*, 210 F. Supp. 3d 467, 485 (S.D.N.Y. 2016) (quoting *Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 997, 331 U.S. App. D.C. 178 (D.C. Cir. 1998)). The Court finds that *in camera* review is unnecessary and Orders the Government to supplement its submissions in accordance with this Opinion.

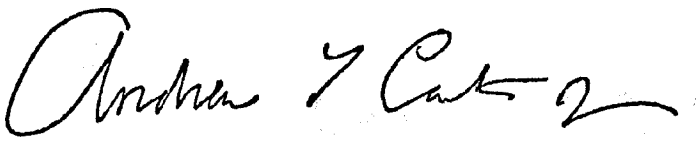
CONCLUSION

For the foregoing reasons, Defendants' partial motion for summary judgment is GRANTED in part and DENIED in part. Plaintiff's Cross Partial Motion for Summary Judgment is GRANTED in part and DENIED in part. The Clerk of Court is respectfully directed to terminate the Motion at docket entry 100.

SO ORDERED.

Dated: September 13, 2019

New York, New York



ANDREW L. CARTER, JR.
United States District Judge

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DATE FILED: 9-23-19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY,	:	
	:	**1:17-cv-7572 (ALC)**
Plaintiff.	:	
	:	**OPINION & ORDER**
-v.-	:	
U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL.,	:	
Defendants.	:	

ANDREW L. CARTER, JR., United States District Judge

Plaintiff the Knight First Amendment Institute at Columbia University (the "Knight Institute" or "Institute") filed this action under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") against the United States Immigration and Customs Enforcement agency ("ICE"), the Office of Legal Counsel ("OLC") within the Department of Justice ("DOJ"), the Department of State ("DOS"), the United States Citizenship and Immigration Services ("USCIS"), Customs and Border Protection ("CBP"), Department of Homeland Security ("DHS"), Department of Justice Office of Public Affairs ("OPA"), and Office of Information Policy ("OIP") (collectively "Defendants") seeking records relating to the government's authority to exclude or remove individuals from the United States based on their speech, beliefs, or associations. ECF. No. 42. Pending before the Court are USCIS and ICE motions for summary judgment and Plaintiff's cross-motion for summary judgment. For the reasons set forth below, Defendants' motions are granted in part and denied in part and Plaintiff's cross-motion is granted in part and denied in part.

BACKGROUND

The Court assumes familiarity with the previous summary judgment opinion (the "Opinion") in this matter, which provides a more complete background, and discusses here only those facts necessary for its disposition of the instant motions. *See* ECF No. 140. In short, Plaintiff seeks information relating to communications between government agencies and the White House concerning its authority to exclude or remove individuals from the United States based on certain beliefs and associations. Am. Compl. ¶ 4, ECF No. 42. The President addressed these concerns in Executive Order 13,780 ("E.O. 13,780"), which directed the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence to develop a more robust vetting program for visa applicants and refugees seeking entry into the United States. Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,215 (Mar. 6, 2017).[1] In the Opinion, the Court addressed the parties' arguments regarding the adequacy of certain agencies' searches, as well as the lawfulness of certain withholdings and redactions. ECF No. 140.[2] Defendants and Plaintiff now cross-move for summary judgment regarding the following agency withholdings:

1. ICE

In response to Plaintiff's original FOIA request, ICE produced 2,574 pages of responsive records and withheld certain pages pursuant to Exemptions 5, 6, 7(C), and 7(E). March 15, 2019 Fuentes Declaration ¶ 11 & Exhibit A (*Vaughn* Index). Thereafter, ICE re-reviewed the collected documents to identify materials responsive to the Narrowed Request. *See* ECF. No. 64. Upon re-

[1] The Executive Order called for, among other things, the "collection of all information necessary for a rigorous evaluation of all grounds of inadmissibility or grounds for the denial of other immigration benefits." *Protecting the Nation From Foreign Terrorist Entry Into the United States*, 82 FR 13209.
[2] Specifically, the Opinion held that: 1) ICE's searches were inadequate; 2) OLC was not required to search the White House for responsive records; The DOS properly withheld documents pursuant to FOIA's exemption 5; and 3) ICE improperly withheld documents pursuant to FOIA's Exemption 7. *See* ECF No. 140

review, ICE determined that 99 pages of documents were responsive to the Narrowed Request and released 50 pages in whole or in part applying withholdings pursuant to Exemptions 5, 6, 7(C), and 7(E), and referred 49 pages to other agencies, which were released in whole or in part on August 3, 2018.[3] *See* ECF. No. 77; Fuentes Decl. ¶¶ 9-11.

2. USCIS

USCIS determined that documents responsive to the Narrowed Request would include "records related to [USCIS'] enforcement of the Immigration and Nationality Act (INA), particularly its provisions on terrorism-related inadmissibility grounds (TRIG), found in INA § 212, codified in 8 U.S.C. § 1182[.]" Declaration of Jill A. Eggleston, dated March 14, 2019 ("Eggleston Decl."), ¶ 9. USCIS initially compiled over 2,200 pages of potentially responsive documents and determined that 1,278 pages were responsive to the Narrowed Request. *Id.* ¶ at 11. On May 30, 2018, and June 29, 2018, USCIS produced 957 pages in their entirety, and withheld 357 pages in part. *Id.* Specifically, USCIS partially withheld 17 pages pursuant to FOIA Exemption 5, and 256 pages and 33 slides pursuant to FOIA Exemption 7(E). *Id.* ¶¶ at 11-41. USCIS did not withhold any document in full. *Id.*

STANDARD OF REVIEW

A moving party is entitled to summary judgment when no material facts are in genuine dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). FOIA cases are generally resolved by cross motions for summary judgment. *See NRDC v. United States DOI*, 73 F. Supp. 3d 350, 355 (S.D.N.Y. 2014) (citation omitted); *Intellectual Prop. Watch v. United States Trade Representative*, 344 F. Supp. 3d 560, 567 (S.D.N.Y. 2018). To prevail on a

[3] Plaintiff does not challenge ICE's withholdings pursuant to Exemption 6.

motion for summary judgment in a FOIA case, the defending agency has the burden of showing that any withheld documents fall within a FOIA exemption. *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994) (citations omitted). When a requestor challenges an agency decision to withhold responsive records, a district court may review the agency's decision *de novo*. 5 U.S.C. § 552(a)(4)(B); *A.C.L.U. v. U.S. Dep't of Justice*, 229 F. Supp. 3d 259, 264 (S.D.N.Y. 2017). "[A]ll doubts as to the applicability of the exemption must be resolved in favor of disclosure." *N.Y. Times Co. v. DOJ*, 756 F.3d 100, 112 (2d Cir. 2014) (quoting *Wilner v. NSA*, 592 F.3d 60, 69 (2d Cir. 2009)).

An agency can prevail on summary judgment by submitting affidavits that "describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *Wilner*, 592 F.3d at 73 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862, 385 U.S. App. D.C. 394 (D.C. Cir. 2009)). These affidavits "are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *Intellectual Prop. Watch,* 344 F. Supp. 3d at 567 (quoting *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1200, 288 U.S. App. D.C. 324 (D.C. Cir. 1991) (quotation marks omitted)).[4]

DISCUSSION

In the September 13, 2019 Opinion, the Court discussed in detail the statutes relevant to this dispute, including the relevant provisions of FOIA and the Immigration and Naturalization

[4] Second Circuit courts follow *Vaughn v. Rosen*, where the Court of Appeals for the D.C. Circuit held that to adequately justify an alleged exemption, the Government should provide "a relatively detailed analysis in manageable segments." 484 F.2d 820, 826, 157 U.S. App. D.C. 340 (D.C. Cir. 1973). Thus, agencies submit *Vaughn* indexes listing withheld documents and claimed exemptions, along with *Vaughn* affidavits that describe the withheld documents and the rationale for withholding them. *See ACLU v. DOJ*, No. 13 Civ. 7347, 2017 U.S. Dist. LEXIS 44597, 2016 WL 5394738, at *4 (S.D.N.Y. Sept. 27, 2016).

Act ("INA"), 8 U.S.C. § 1101 *et seq*. The Court assumes familiarity with the Opinion but will briefly outline prevailing law.

I. FOIA Exemption 5

A. Deliberative Process Privilege

The deliberative process privilege under FOIA Exemption 5 protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8, 121 S. Ct. 1060, 149 L. Ed. 2d 87 (2001). To be protected by the deliberative process privilege, a document must be: 1) pre-decisional, that is, prepared to assist an agency decisionmaker in arriving at his decision; and 2) deliberative, that is, related to the process by which policies are formulated. *See Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991).

B. Segregability

FOIA also provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Accordingly, the agency must provide a detailed justification for its decision that non-exempt material is not segregable. *Conti v. United States Dep't of Homeland Sec.*, 2014 U.S. Dist. LEXIS 42544, at *72 (S.D.N.Y. Mar. 24, 2014); *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 261, 184 U.S. App. D.C. 350 (D.C. Cir. 1977). Agencies are entitled to a presumption that it disclosed reasonably segregable material. *Sussman v. U.S. Marshals Service*, 494 F.3d 1106, 1117, 377 U.S. App. D.C. 460 (D.C. Cir. 2007). A district court "must make specific findings of segregability regarding the documents to be withheld" before ruling that an agency properly invoked a FOIA exemption. *Sussman*, 494 F.3d at 1116. An agency may only withhold a document's non-exempt portions if they are

"inextricably intertwined" with the exempt portions. *Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 249 n.10 (2d Cir. 2006).

II. Defendants' Exemption 5 Withholdings

A. ICE

Plaintiff challenges ICE's withholdings of several sets of records; [5] arguing that ICE improperly invoked Exemption 5 to withhold records "bearing on concerns at the heart of the Request—that the government is exercising immigration powers in ways that burden First Amendment rights." *See* Pl.'s Cross-Mot. Br. 8 n.7. ICE claims that the Fuentes Declarations and accompanying *Vaughn* Indices justify their application of Exemption 5. ICE further argues that the deliberative process privilege applies to all the challenged records, but the attorney-client and work product privileges only apply to the INA § 235c and First Amendment Concerns Memos. *See* ECF. No. 118. The Court will address ICE's application of Exemption 5 to each document.

1. Extreme Vetting Memo

ICE withheld portions of the Extreme Vetting Memo that included proposals for "initiatives to meet executive mandates concerning future capabilities of the VSP PATRIOT program," as well as "funding information and a recommended approach toward any expansion." *See* Suppl. *Vaughn* Index at 3. ICE argues this information is pre-decisional because the memo is a draft and

[5] Plaintiff Challenges ICE's withholdings of the following six records: (1) "Removal of National Security Threat Aliens" and accompanying emails ("INA § 235(c) Memo") (2018-ICAP-00118, at 298–306), *see* ICE *Vaughn* Index 26–28; (2) "Inadmissibility Based on Endorsing or Espousing Terrorist Activity: First Amendment Concerns" ("First Amendment Concerns Memo") (2018-ICAP-00118, at 307–19, 515–23, 698–706, 711–30, 736–54, 758–61), *see Id.* at 28–30, 32–34, 41–43; (3) "ICE Ability to Use 212(a)(3)(C) Foreign Policy Charge" ("Foreign Policy Provision Memo") (2018-ICAP-00118, at 870–73), *see Id.* at 45– 46; 1; (4) "Extreme Vetting – Visa Security Program (VSP) – Pre-Adjudication Threat Recognition and Intelligence Operations Team", *see Vaughn* index accompanying May 17 2019 Fuentes Declaration ("Suppl. *Vaughn* Index"), 4; (5) "ICE Implementation Plan for Executive Orders." (the "EO Implementation Memo"), *see Id.* at 4; and, (6) a memorandum regarding "several ICE Homeland Security Investigations (HSI) Programs, including the Counterterrorism and Criminal Exploitation Unit, the National Counterterrorism Center, the Visa Security Program, and the Biometric Identification Transnational Migration Alert program (collectively, the "HSI Updates Memo") *Id.* at 2. ICE also applied FOIA Exemption 7 to withhold the HSI Updates Memo. *See* discussion *infra* Part IV.A.

contains proposals for implementing the program, and deliberative because it contains proposals that are "under consideration and may be changed as ICE offices and ICE employees deliberate." *Id.* Plaintiff argues the memo should be disclosed in full because the relevant *Vaughn* Index indicates the memo contains descriptions of existing visa vetting policies in addition to the "proposals". *See* Suppl. *Vaughn* Index at 3. Ultimately, ICE presents a valid concern, but that concern fails to outweigh the case law supporting disclosure. *See Brennan Ctr. for Justice at New York Univ. Sch. of Law v. U.S. Dep't of Justice*, 697 F.3d 184, 201 (2d Cir. 2012).

Indeed, the purported "proposals" and "recommendations" describing how to meet mandates appear to be deliberative material. However, the portions of the memo that describe existing policy undoubtedly "reflect [the agency's] formal or informal policy on how it carries out its responsibilities," which "fit comfortably within the working law framework." *Brennan Ctr.*, 697 F.3d at 201 (citation omitted). Documents explaining precedent are not protected by Exemption 5. *See Id*; *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 199 U.S. App. D.C. 272 (D.C. Cir. 1980); *Tax Analysts v. IRS*, 294 F.3d 71, 352 U.S. App. D.C. 273 (D.C. Cir. 2002) (holding that documents "explaining whether certain tax exemptions applied to specific taxpayers" constituted "working law" because their "tone . . . indicate[d] that they simply explain[ed] and appl[ied] established policy"); *Public Citizen, Inc. v. Office of Management and Budget*, 598 F.3d 865, 389 U.S. App. D.C. 356 (D.C. Cir. 2010) (documents that "summariz[ed]" an agency's policy understandings were not protected by Exemption 5).

ICE also argues that the memo is protected by Exemption 5 because it was a draft yet to reach final, authoritative, "working law" status. However, "working law" documents do not have to "reflect the final programmatic decisions of the program officers who request them. It is enough that they represent [the agency's] final legal position". *Brennan Ctr.*, 697 F.3d at 201

(quoting *Tax Analysts*, 294 F.3d at 80-81). Therefore, ICE failed to prove that the entire document "more closely resemble[s] the type of internal deliberative and predecisional document[] that Exemption 5 allows to be withheld, or the type[] of document[] that section 552(a)(2) requires be disclosed." *Brennan Ctr.*, 697 F.3d at 202. Accordingly, any reasonably segregable sections of the record reflecting that working law must be released. *Id.*

2. The First Amendment Concerns Memo

ICE claims the First Amendment Concerns Memo is pre-decisional because it contains recommendations concerning a potential decision "about expanding any reliance on [Section 212(a)(3)(B)(i)(VII) as a ground of] inadmissibility," and deliberative because it was related to the process by which the government evaluated "concerns that may arise when applying the security-related ground of inadmissibility under Section 212(a)(3)(B)(i)(VII) of the INA." Def.'s Rep. Br. 3. Plaintiff contends that ICE fails to demonstrate that all versions of the First Amendment Concerns Memo are pre-decisional since ICE considered at least one version "final". *See Id.* at 3, 4 n.4; May 17 Fuentes Decl. ¶ 18. The Court disagrees.

ICE released an email referencing a "final version" of the memorandum sent back to DHS. Apr. 16 DeCell Decl. Ex. B, at 10 (2018-ICAP-00118, at 693), ECF No.109. Plaintiff argues this "final version" represents a "final agency decision" and therefore is not pre-decisional. However, the fact that there is a "final version" of the First Amendment Concerns memo does not necessarily remove it from the deliberative process. According to the declarations, all versions of the memo reflect "advisory opinions, recommendations and deliberations" that potentially assisted the governmental decision-making process. *Klamath Water Users Protective Ass'n*, 532 U.S. at 8. A "final version" of a recommendation is no more binding than its preceding incarnations. Therefore, ICE proved Exemption 5 applies to the First Amendment Concerns

Memo.

3. Foreign Policy Provision Memo

ICE contends the Foreign Policy Provision Memo (withheld in part) is pre-decisional because it was prepared to assist the Secretary of State in determining whether Section 212(a)(3)(C) of the INA can be used to render an alien inadmissible, and deliberative because it provides factors for the Secretary's consideration and "the employee's opinion." May 17 2019 Fuentes Decl. ¶¶ 25-27; *Vaughn* Index at 45. Plaintiff argues the memo should be released in full because it "likely reflect[s] ICE's understanding of the State Department's authority to make immigration decisions based on the Foreign Policy Provision" and its *Vaughn* entry fails to establish the record was deliberative. The Court agrees. *See* ICE *Vaughn* Index 45–46.

ICE failed to demonstrate the Foreign Policy Provision Memo was pre-decisional. The record does not indicate that the memo "formed an essential link in a specific consultative process, reflects the personal opinions of the writer *rather than* the policy of the agency, [or] if released, would inaccurately reflect or prematurely disclose the views of the agency." *Brennan Ctr.*, 697 F.3d at 202 (emphasis added). ICE's description of the memo suggests the withheld portions are more akin to opinions regarding how to *interpret* policy rather than recommendations as to how to *make* policy. Indeed, the withheld portions of the memo do not seem to contain the "personal opinions" or deliberative material the law seeks to keep out of the public eye. *See Sears*, 421 U.S. at 152–53, 161 (ruling that the deliberative process privilege does not apply to documents that embody law and policy). Furthermore, the relevant *Vaughn* entry does not detail the record's deliberative nature beyond boilerplate justifications. *See* ICE *Vaughn* Index 46. Thus, ICE failed to demonstrate that the withheld portions of the memo reflect "pre-decisional" advice as opposed to "post-decisional explanation". *See Civil Liberties Union v. Nat'l Sec. Agency*, 925 F.3d 576,

593 (2d Cir. 2019) ("*ACLU v. NSA*"). Accordingly, ICE is ordered to disclose reasonably segregable portions of the Foreign Policy Provision Memo that reflect current immigration policy.

4. EO Implementation Memo

ICE also claims it withheld in part, pursuant to the deliberative process privilege, a ten-page draft memorandum with the subject heading, "ICE Implementation Plan for Executive Orders." Suppl. *Vaughn* Index at 4. Plaintiff contends ICE failed to demonstrate it properly applied Exemption 5 to this record since the *Vaughn* Index implies that at least some portions of the memo are final. The Court disagrees.

First, the memo is pre-decisional because it "proposes implementation plans for ICE regarding Executive Orders entitled 'Border Security and Immigration Enforcement Improvements' and 'Enhancing Public Safety in the Interior of the United States' issued by the President on January 25, 2017," and deliberative because the proposed "plans and edits [] were under review and being changed as ICE offices and ICE employees provided edits, comments, and recommendations on the proposed draft." May 17 2019 Fuentes Decl. at ¶¶ 39-40. Furthermore, not only is the document "watermarked 'DRAFT'…[it also] contains comment bubbles, red-lines, track changes, [and] newly proposed language." *Id.* This evidence implies the withheld documents were far from final, and Plaintiff offers no additional evidence suggesting otherwise. *See Tigue*, 312 F.3d at 76 (opinions, recommendations, and deliberations satisfy Exemption 5); *Coastal States Gas Corp.*, 617 F.2d at 866 ("recommendations, draft documents, proposals, [and] suggestions" subject to the deliberative process privilege); *Grand Central Partnership*, 166 F.3d 473, 482 (2d Cir. 1999). Accordingly, ICE demonstrated it properly applied the deliberative process privilege to the EO Implementation Memo.

5. The INA § 235c Memo

a. Deliberative Process Privilege

According to ICE, the INA § 235c Memo (withheld in part) is pre-decisional because it discusses proposed revisions to Section 235(c), and deliberative because it contains opinions and analyses by OPLA attorneys recommending certain courses of action. *See* ECF No. 121, Fuentes Decl. at ¶¶ 7-11. However, the record suggests otherwise.

ICE states that the INA § 235(c) Memo was drafted around 2010 and recirculated in 2017 as the agency's "interpretation and implementation of Section 235(c)," including "recommendations on whether to use the provision for removals." May 17 2019 Fuentes Decl. ¶ 7. Thus, apparently, the agency relied on the memo for at least seven years when considering removals pursuant to INA § 235(c). *See Coastal States Gas Corp.*, 617 F.2d at 869 (an agency's legal department's memoranda constituted working law because the memoranda "were routinely used by agency staff as guidance in conducting their audits, and were retained and referred to as precedent"). Furthermore, this memo's reoccurring appearance over seven years constitutes "contrary evidence in the record" to ICE's claim it is not post-decisional working law. *See Wilner*, 592 F.3d at 73. Accordingly, ICE failed to establish that portions of the INA § 235(c) are protected by the deliberative process doctrine.

b. Attorney Client Privilege

However, the deliberative process privilege is not the only shield an agency may wield in the face of disclosure. ICE also asserts the attorney client privilege to partially withhold the INA § 235(c) Memo. "The attorney-client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice." *United States v. Mejia*, 655 F.3d 126, 132 (2d

Cir. 2011); *see also Brennan Ctr.*, 697 F.3d at 207–08. An agency invoking the attorney-client privilege bears "[t]he burden . . . to demonstrate that confidentiality was expected in the handling of these communications and that it was reasonably careful to keep this confidential information protected from general disclosure." *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 519 (S.D.N.Y. 2010).

Plaintiff criticizes ICE's *Vaughn* index and declarations as insufficient to justify attorney-client privilege because they "fail to list the identities of all those who received the records" and do not assert that the memo was intended to be or remained confidential. The Court disagrees.

Though the *Vaugh* Index is not as detailed as Plaintiff would like, it is sufficiently detailed for the Second Circuit. *See ACLU v. NSA*, 925 F.3d at 589. First, the Section 235(c) memo was drafted by an attorney (the Acting Deputy Chief of the ICE National Security Law Section of the Office of the Principal Legal Advisor) for a client (the Chief of the National Security Law Section). May 17 2019 Fuentes Decl. at ¶ 10. Thus, the communication is between attorney and client.

Second, the memorandum was explicitly marked as "privileged" and "attorney-client communication," and Toni Fuentes declared that the memo was, to the best of her knowledge, intended to be and was kept confidential. May 17 2019 Fuentes Decl. at ¶ 10. The Court cannot identify, and Plaintiff fails to provide, any additional information ICE would need to provide to establish the memo's confidentiality. Third, the memo apparently "advised" Executive Branch personnel about the potential impact changes to Section 235(c) would have on the agency. Essentially, the memo "provide[d]…legal advice as to what a department or agency is permitted to do." *ACLU v. NSA*, 925 F.3d at 589. Thus, the memo provided legal assistance. Thus, ICE demonstrated that "the communications between client and attorney were made in confidence

and have been maintained in confidence." *Brennan Ctr.*, 697 F.3d at 207 (internal quotation marks and citation omitted).

Therefore, ICE justified its application of Exemption 5 to the 235(c) Memo.

6. HSI Updates Memo

ICE claims this document is pre-decisional because it is a draft detailing "options being considered to expand the[] implementation" of several HSI programs, and deliberative because it formed part of the agency's process of deciding the continuance of pilot programs. *Id.* Plaintiff claims the "draft" designation does not make it pre-decisional, and the *Vaughn* Index descriptions imply that at least some portions of the memo are final. The Court agrees.

Along with the opinions and analysis from HSI components, ICE declares the withheld information contains "statistics, success stories, and the most recent status of the projects". May 17 2019 Fuentes Decl. ¶ 17. This information reflects the factual, segregable information Exemption 5 does not protect. Watermarking the memorandum as a "Draft" does not change the finality of the facts within it. Indeed, Exemption 5 "does not . . . cover 'purely factual' material." *Grand Cent. P'ship.*, 166 F.3d at 482.[6]

Here, ICE did not establish that the withheld factual information—namely the statistics and status of the projects—demonstrate ICE's deliberative process. Based on the declarations, certain facts do not appear to be interwoven with the proposals and policy judgments within the draft. The dividing line between factual and deliberative can be thin. "[T]he key question . . . [is] whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's

[6]"Where . . . disclosure of even purely factual material would reveal an agency's decision-making process Exemption (b)(5) applies." *Russell v. Dep't of Air Force*, 221 U.S. App. D.C. 96, 682 F.2d 1045, 1048 (1982).

ability to perform its functions." *Color of Change v. United States Dep't of Homeland Sec.*, 325 F. Supp. 3d 447, 455 (S.D.N.Y. 2018) (quoting *Dudman Communications Corp. v. Department of Air Force*, 815 F.2d 1565, 1568, 259 U.S. App. D.C. 364 (D.C. Cir. 1987). Nothing in the record indicates that revealing the factual information would also reveal the author's protected judgments. *See Mapother v. Dep't of Justice*, 303 U.S. App. D.C. 249, 3 F.3d 1533, 1539 (1993) (denying privilege to section of report that was "in substance an inventory, presented in chronological order"); *Leopold v. CIA*, 89 F. Supp. 3d 12, 22 (D.D.C. 2015) ("[s]traightforward, mechanical recitations of fact . . . will generally fall outside of the privilege.") ICE was obligated to establish that it reviewed the withheld material and disclosed all non-exempt information that reasonably could be segregated and disclosed. However, its failure to provide an adequate segregability analysis for the HSI Updates Memo weighs in favor of disclosure. *See Schwartz v. United States DEA*, No. 13-CV-5004 (CBA) (ST), 2019 U.S. Dist. LEXIS 34165, at *19 (E.D.N.Y. Mar. 1, 2019) (quoting *Elec. Privacy Info. Ctr. v. United States Dep't of Homeland Sec.*, 892 F. Supp. 2d 28, 51 (D.D.C. 2012)).

Accordingly, ICE is ordered to conduct a segregability review of the HSI Updates Memo for segregable disclosable content. *See ACLU v. NSA*, 2017 U.S. Dist. LEXIS 44597, at *52 (S.D.N.Y. Mar. 27, 2017).

B. USCIS

USCIS partially withheld three records pursuant to the deliberative process privilege: (1) "Briefing Memo for the Acting Director: Recommendations to Eliminate the USCIS Terrorism-Related Inadmissibility Grounds (TRIG)" ("Acting Director Memo"), *see* Eggleston Decl. ¶ 23; Apr. 16 DeCell Decl. Ex. C, at 1–5; (2) "Senior Policy Council—Briefing Paper: TRIG Exemptions & INA § 318" ("Senior Policy Council Paper"), *see* Eggleston Decl. ¶ 24; Apr. 16

DeCell Decl. Ex. C, at 6–10; and (3) "Options Paper: Exercise of Authority Relating to the Terrorism-Related Inadmissibility Grounds" ("TRIG Options Paper"), *see* Eggleston Decl. ¶ 25. The Court will address USCIS' Exemption 5 application to each document.

1. Acting Director Memo and Senior Policy Council Paper

USCIS argues that the Acting Director Memo is pre-decisional because it contains "discussions and recommendations from USCIS staff to senior agency management regarding a proposed revision to the USCIS TRIG implementation policy," and deliberative because it provides information "regarding cases currently being held by USCIS pursuant to the existing USCIS TRIG hold policy and a review of relevant considerations for determining whether these cases should continue to be held or released for adjudication." May 2019 Eggleston Decl. ¶ 5. The agency further explains that the "withheld portions do not reflect binding positions on the agency, but rather, contain recommendations and analyses concerning revisions to TRIG exceptions and the possible application of such revisions to certain asylum applications." *Id.* Similarly, USCIS claims the Senior Policy Council Paper is pre-decisional because it is an "internal agency briefing paper…prepared by agency personnel for senior agency management and discusses specific TRIG exemptions and how they could be interpreted and applied to specific types of applicants who seek immigration benefits from USCIS," and deliberative because it "contains a recommendation for senior agency management concerning agency policy." *Id.* at ¶ 6. Plaintiff argues the declarations suggest that some withheld portions of each document reflect current policy and thus constitute disclosable "working law". The Court agrees.

According to the record, USCIS appears to be withholding information that "is more properly characterized as an opinion or interpretation which embodies the agency's effective law and policy" and thus constitutes the agency's "working law." *Brennan Ctr.*, 697 F.3d at 195. For the

Acting Director Memo, the *Vaughn* entry indicates that the memo "contain[s] discussions and recommendations from USCIS staff to senior agency management regarding the *current* and future posture of the USCIS TRIG Hold Policy." *See* Eggleston Decl. ¶ 23 (emphasis added). Likewise, the Senior Policy Council Paper is described as "discuss[ing] specific TRIG exemptions and how they could be interpreted and applied to specific types of applicants who seek immigration benefits from USCIS." Eggleston Decl. ¶ 24. If the records contain explanations of USCIS's current policies and approaches to immigration decisions, the records contain "working law". *See Brennan Ctr.*, 697 F.3d at 202; *Tax Analysts*, 294 F.3d at 80–81. USCIS failed to establish that the policy explanations were nevertheless undisclosable. USCIS did not, for example, demonstrate that the policy discussions were so intertwined with the policy judgments and suggestions that revealing them may simultaneously "expose [USCIS'] decision making process" or the authors' judgment in "cull[ing] the relevant documents, extract[ing] pertinent facts, [and] organiz[ing] them to suit a specific purpose." *See Color of Change*, 325 F. Supp. 3d at 455 (quoting *Nat'l Sec. Archive v. CIA*, 410 U.S. App. D.C. 8, 13, 752 F.3d 460, 465 (2014)). Accordingly, USCIS must release the reasonably segregable sections of these records reflecting USCIS current immigration policy.

2. TRIG Options Paper

USCIS argues the TRIG Options Paper is pre-decisional because it is an "internal agency memorandum [] prepared by agency personnel for senior agency management [regarding] implementing an Executive Order that directed the Secretaries of State and DHS to consider rescinding the TRIG exemptions permitted by Section 212 of the INA," and deliberative because it discusses three options for such implementation. May 2019 Eggleston Decl. ¶ 7. Plaintiff speculates that USCIS failed to disclose reasonably segregable material because it nearly entirely

withheld the paper's lengthy "Background" and "Methodology" sections. *See* Apr. 16 DeCell Decl. Ex. C, at 11–14. Despite Plaintiff's reservations, USCIS met its burden on this record.

Unlike its justifications for the Acting Director Memo and Senior Policy Council Paper, USCIS established that the disclosable material in the TRIG Options Paper "is inextricably intertwined with deliberative material and analysis such that it cannot reasonably be segregated and released." May 2019 Eggleston Decl. at ¶ 7. The Eggleston Declaration points out that, "in the 'Background' and 'Methodology' sections of the [TRIG] Options Paper, the drafters discuss specific asylum applications and the agency's various methods for analyzing those applications, thus intertwining the facts of specific cases with the agency's deliberations and analyses." *Id.* This demonstrates that an attempt to segregate and release any disclosable material would "result in incomplete, unintelligible and fragmented sentences," *id.*, and therefore disclosure is not required under FOIA. *See Inner City Press/Community on the Move v. Fed. Reserve*, 463 F.3d 239, 249 n.10 (2d Cir. 2006); *Carney*, 19 F.3d at 812; *ACLU v. United States DOJ*, 252 F. Supp. 3d 217, 229 (S.D.N.Y. 2017). Therefore, unlike the Acting Director Memo and Senior Policy Council Paper, USCIS justified withholding information in the TRIG Options Paper pursuant to Exemption 5 and established that all reasonably segregable factual material was released. Accordingly, USCIS' motion for summary judgment as to the TRIG Options Paper is granted.

III. FOIA Exemption 7

FOIA Exemption 7(E) shields from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552

(b)(7)(E); *see also Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 681 (2d Cir. 2010).

IV. Defendants' Exemption 7 Withholdings

A. ICE: HSI Updates Memo

ICE withheld a draft memorandum containing four questions and corresponding answers regarding recent updates of several HSI Programs. May 17 2019 Fuentes Decl. ¶ 17. Under the *Vaugn* Index's "Exemption(s) Applied" column, ICE identifies Exemption 5 as a justification for withholding the HSI Updates Memo but provides an Exemption 7(E) explanation in the "Description" column. Suppl. *Vaughn* Index. Nevertheless, ICE fails to carry its burden regarding either exemption.

1. Exemption 7 Does Not Apply to the HSI Updates Memo

ICE failed to demonstrate it properly applied Exemption 7(E) to the HSI Updates Memo. ICE claims the document was compiled for law enforcement purposes. To show certain records qualify as "'information compiled for law enforcement purposes,' an agency must establish a rational nexus between the agency's activity in compiling the documents and its law enforcement duties." *Brennan Ctr.*, 331 F. Supp. 3d at 97(internal citation omitted). Under Exemption 7, the term "law enforcement" is broad and "includes . . . proactive steps designed to prevent criminal activity and maintain security." *Milner v. Dep't of the Navy*, 562 U.S. 562, 582, 131 S. Ct. 1259, 179 L. Ed. 2d 268 (2011) (Alito, J., concurring)); *see also N.Y. Times Co. v. United States DOJ*, No. 1:18-cv-02095 (SDA), 2019 U.S. Dist. LEXIS 121522, at *19-20 (S.D.N.Y. July 22, 2019) ("[law enforcement] requires only 'that a document be created, gathered, or used by an agency for law enforcement purposes at some time before the agency invokes the exemption'") (quoting *Schwartz v. Dep't of Def.*, No. 15-CV-07077 (ARR) (RLM), 2017 U.S. Dist. LEXIS 2316, 2017

WL 78482, at *12 (E.D.N.Y. Jan. 6, 2017) (quoting *PEER*, 740 F.3d at 203).

ICE contends the withheld memo was compiled for law enforcement purposes because it contains "sensitive information about several HSI programs," including "information regarding evaluating and/or methods for accessing certain social media platforms," while also "informing such parties the current limitations of the programs." Supp. *Vaughn* Index, 2; *see also* May 17 2019 Fuentes Decl. ¶ 40. ICE also points out its status as "the largest investigative arm of DHS" further demonstrates the memo was withheld to enforce the law. *Id.* Despite ICE's status, the agency fails to carry its burden.

ICE's law enforcement authority is not in dispute. However, just because ICE is the Executive Branch's designated immigration enforcement arm does not mean ICE compiles *all* its documents for law enforcement purposes. *N.Y. Times Co*, 2019 U.S. Dist. LEXIS 121522, at *21. (citing *Families for Freedom v. U.S. Customs & Border Prot.*, 797 F. Supp. 2d 375, 397 (S.D.N.Y. 2011) ("While ICE is unquestionably a federal law enforcement agency, not every document produced by ICE personnel has been 'compiled for law enforcement purposes' under FOIA.") *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1173, 395 U.S. App. D.C. 340 (D.C. Cir. 2011) ("FBI records are not law enforcement records under FOIA simply by virtue of the function that the FBI serves") (internal quotations and brackets omitted). Indeed, "[c]ourts have generally interpreted Exemption 7 as applying to records that pertain to specific investigations conducted by agencies, whether internal or external, and whether created or collected by the agency—in other words, investigatory files." *Families for Freedom*, 797 F. Supp. 2d at 397 (citing cases).

ICE fails to establish the HSI Updates Memo constitutes the "investigatory files" protected by Exemption 7(e). Specifically, the Court is unaware of the rational nexus ICE attempts to make

between a memo regarding social media practices and the perceived threats of immigration. *See Brennan Ctr.*, 331 F. Supp. 3d at 97. ICE cites *Long v. ICE*, 149 F. Supp. 3d 39, 50 (D.D.C. 2015) for support, but to no avail. In *Long*, plaintiffs challenged defendant ICE's withholdings of certain responsive records pursuant to Exemption 7(e). *Id.* The D.C. District Court found that ICE established both 1) a rational "nexus" between the records withheld under Exemption 7(E) and the agency's law enforcement duties; and, 2) a connection between the subject of the record and a possible security risk or violation of federal law. *Id.* at 49 (quoting *Pratt v. Webster*, 673 F.2d 408, 420 (D.C.Cir.1982)). The agency satisfied the second prong by showing it more "than merely engag[ed] in a general monitoring of individuals' activities,'" and demonstrated a "clear connection between the records and possible security risks or violations of the law." *Long,* 149 F. Supp. 3d at 50. *Long* emphasized the fact that the records were not "compiled for generalized snooping of individuals' lives." *Id.*

Here, the connection between the targeted "social media platforms" and "possible security risks" is unclear. Neither the declarations nor the relevant *Vaughn* Index indicate how releasing the withheld information may lead an individual to circumvent the INA or law enforcement practices. Essentially, ICE's descriptions suggest the withheld information was compiled less for law enforcement purposes and more to facilitate the "generalized snooping of individuals' lives." Therefore, ICE failed to demonstrate that the withheld information is protected by Exemption 7. Furthermore, Second Circuit cases where an agency properly applied Exemption 7 involve more detailed, clear declarations and *Vaughn* Indices that justified the withholdings. *See, e.g. Brennan Ctr.*, 331 F. Supp. 3d at 98 ("Sepeta Declaration similarly clarifies that the information withheld by I&A pursuant to Exemption 7 is related to law enforcement purposes because it concerns a source that 'provided information on social media use to assist counterterrorism and law

enforcement officials in understanding the threat posed by Syria-based foreign fighters and US-based extremists'"); *N.Y. Times Co. v. United States DOJ*, 2016 U.S. Dist. LEXIS 139885, at *22 (S.D.N.Y. Aug. 18, 2016) (report regarding ongoing counter-terrorism investigation had rational nexus to the agency's law-enforcement duties and was, therefore, compiled for law enforcement purposes); *Bishop v. U.S. Dep't of Homeland Sec.*, 45 F. Supp. 3d 380, 387 (S.D.N.Y. 2014) (Customs and Border Patrol documents regarding agency's attempts to control the borders and identify potential criminal activity or illegal immigration satisfied "law enforcement purposes" requirement).

Accordingly, ICE is ordered to re-assess its Exemption 7(E) application to the HSI Updates Memo, using this Opinion as guidance, and to disclose all responsive non-exempt materials that can reasonably be segregated from exempt materials.

B. **USCIS 7(E) Withholdings**

USCIS claims the withheld information—various manuals, guides, and presentations regarding TRIG under the INA and training manuals from the Refugee, Asylum and International Operations Directorate ("RAIO") used to screen immigrant applicants—are the "techniques and procedures" or "guidelines" protected by Exemption 7(E). Defs.' Opp'n Br. 14. [7] Plaintiff claims this information contains lists of questions ("TRIG Questions") to be asked of applicants for immigration benefits improperly withheld under Exemption 7(E).

In addition to records compiled for law enforcement purposes, Exemption 7(E) also covers

[7] Specifically, Plaintiff challenges the applicability of Exemption 7(E) to the following records: USCIS BASIC Instructor Guide on TRIG, versions dated Nov. 2015, 2012, and 2010, *see* Eggleston Decl. ¶¶ 22, 32, 36; USCIS BASIC Participant Guide on TRIG, versions dated 2012 and 2010, *see Id.* at ¶¶ 33, 37; USCIS TRIG Training PowerPoint, Course 234, versions dated Mar. 21, 2017, Nov. 2015, May 9, 2012, and May 2010, *see Id.* at ¶¶ 30–31, 34–35, 38; USCIS TRIG Instructor Guide, versions dated May 2017 and Mar. 2017, *see Id.* at ¶¶ 28, 39; USCIS TRIG Participant Guide, versions dated May 2017 and Mar. 2017, *see Id.* at ¶¶ 29, 40; TRIG Exemptions – Group-Based Exemptions / Situational Exemptions (officer training manual or "TRIG Exemptions"), *see Id.* at ¶ 26; USCIS RAIO Office Training – Combined Training Manual on National Security, versions dated Jan. 24, 2013 and Oct. 26, 2015, *see Id.* at ¶¶ 27, 41.

"investigatory records that disclose investigative techniques and procedures not generally known to the public," *Doherty v. U.S. Dep't of Justice*, 775 F.2d 49, 52 n.4 (2d Cir. 1985), and "requires that the material being withheld truly embody a specialized, calculated technique or procedure…" *ACLU Found. v. Dep't of Homeland Sec.*, 243 F. Supp. 3d 393, 404 (S.D.N.Y. 2017) ("*ACLUF*"). Thus, USCIS must prove that disclosing its immigrant screening practice materials would show a "technique" or "procedure" unknown to the public.

1. TRIG Questions

USCIS acknowledges that the practice of questioning applicants for "possible terrorist ties" is well known, but argues the specific questions and techniques used during the screening are not. May 2019 Eggleston Decl. ¶ 12. Specifically, USCIS claims that the "particular information the questions and follow-ups were designed to elicit includes information that would shed light on terrorist organizations' activities and help determine whether the applicant had any ties to such terrorist organizations and activities." Def.'s Rep. Br. 15. Despite its claims, USCIS failed to establish these are the investigatory "techniques" and "procedures" protected by Exemption 7. *See*, e.g., Apr. 16 DeCell Decl. Ex. C, at 18, ECF No. 109-3.

As a threshold matter, the cases cited by USCIS are inapposite. The agency mistakenly relies on *Barouch v. U.S. Department of Justice*, where the district court found the withholding of information relating to law enforcement questions proper pursuant to Exemption 7(E). 87 F. Supp. 3d 10, 30 n.13 (D.D.C. 2015). The court highlighted, however, the "plaintiff's failure to object to" the government's offered justifications. *Id.* In contrast, Plaintiff challenges USCIS' application of Exemption 7(E). USCIS also relies on *Asian Law Caucus v. Department of Homeland Security,* No. 08-cv-00842-CW, 2008 WL 5047839, at *5 (N.D. Cal. Nov. 24, 2008). However, USCIS fails to observe that the *Asian Law Caucus* court significantly relied on its *in*

camera review of the withheld documents to determine the government met its burden.

Furthermore, USCIS does not demonstrate its methods are necessarily special or technical, and *ACLUF* is more relevant than USCIS would lead the Court to believe. 243 F. Supp. 3d at 403. In *ACLUF*, the government failed to establish that withheld questions asked by immigration agents were technical in nature, that any special method or skills were used, or that those subject to questioning would not inevitably learn the withheld techniques. *Id.* Here, USCIS falls short of the same bar. The agency asserts that it withheld "model," "sample," or "suggested" questions without explaining how they reflect any specific techniques. *See* Def.'s Rep. Br. 14–15.

Moreover, additional case law suggests the Exemption 7 bar is even further out of USCIS' reach. *See Chivers v. United States Dep't of Homeland Sec.*, 45 F. Supp. 3d 380 (S.D.N.Y. 2014) (the government properly applied Exemption 7 to shield records relating to questioning techniques used during airport passenger screenings from disclosure); *Am. Immigration Lawyers Ass'n v. DHS*, 852 F. Supp. 2d 66, 77 (D.D.C. 2012) (Agency met their burden of demonstrating that the disclosure of fraud indicators reasonably could lead to circumvention of laws or regulations). In *Chivers*, the CBP withheld "databases [it] considers in its targeting process" and how such information can "trigger[] additional security screening." *Chivers*, 45 F. Supp. 3d 391. *Chivers* allowed the agency to withhold certain internally applied techniques when, even after the agency used those techniques, the interviewee did not know how the technique worked.[8]

[8] Moreover, *Chivers* involved a challenge to the redaction of different types of information. First, it involved redacted data fields, a complex system to query multiple databases and track individuals. *Chivers*, 45 F. Supp. 3d at 388-92. Second, it involved secondary inspection and "Automated Targeting System" database records, the revelation of which would not only show how law enforcement database bases worked, but also how CBP uses this technology to determine which of the many travelers in airports should be subject to additional screening. *Id.* at 390-91, 93. USCIS does not contend it withheld similar information.

Here, other than stating so, USCIS failed to demonstrate that its screening methods are comparably protectable. USCIS claims the withheld questions are calculated techniques because they "reflect specialized methods" it "refined" over "decades of enforcing United States immigration laws" in search of terrorist ties. May 2019 Eggleston Decl. ¶ 11. However, unlike the methods in *Chivers,* this only suggests USCIS' screening questions are susceptible to widespread dissemination. USCIS submits no evidence suggesting its methods are so special that the interviewees cannot parrot them to whomever they choose. Indeed, like the "smuggling" related questions asked to children in *ACLUF,* it is safe to assume immigration applicants will remember and report questions related to terrorism to other people.

In sum, it remains unclear as to how the questions at issue embody a specialized, calculated technique or procedure. Therefore, USCIS fails to justify its application of Exemption 7(E) to the TRIG Questions.

2. TRIG Exemption Qualifications

Unlike the TRIG Questions, USCIS properly withheld information related to the TRIG Exemption Qualifications. *See* Eggleston Decl. ¶¶ 26, 36. USCIS claims that if an applicant reviewed the criteria the agency considers in granting exemptions, "applicants could tailor their testimony to meet [the] requirements." May 14 2019 Eggleston Decl. ¶ 13. Plaintiff argues the listed criteria mirror the TRIG statute and merely reflect knowledge of the law. Pl.'s Mot. 21. However, the declarations indicate "the criteria provide guidance for how to interpret the statute in various factual circumstances." May 14 2019 Eggleston Decl. ¶ 13. For example, USCIS withheld a "non-exhaustive list of appropriate factors" to evaluate in such a "discretionary analysis," ECF. No. 109-3 at 68, noting that the factors are not "requirements" but rather "factors to be considered." Therefore, these criteria appear to be applied on a discretionary basis and thus

reflect more than mere "knowledge of the law". As USCIS contends, "[r]eleasing those factors would enable applicants to tailor their answers to meet such criteria – criteria which is not otherwise available and known to the public." May 14 2019 Eggleston Decl. at ¶ 13. Furthermore, USCIS contends the withheld information contains "examples of factual scenarios where an applicant has demonstrated that he or she reasonably did not know that a certain organization was a terrorist organization," and "is not definitional or a legal interpretation, and its release would provide applicants with guidance as to how to tailor their testimony." *Id.* at ¶ 14. These detailed and cautionary statements constitute a plausible and logical justification for withholding information related to TRIG exemptions qualifications. Accordingly, USCIS properly applied Exemption 7(E) to this information.

V. Parties' Remaining Arguments

A. Defendants' Unchallenged Withheld Documents

Defendants' submitted arguments supporting decisions to withhold several responsive documents that Plaintiff failed to challenge.[9] Furthermore, Defendants carried their burden of proof to justify withholding these records. Therefore, Defendants' motions for summary judgment as to these records are granted. *See Estate of AbdulJaami v. U.S. Dep't of State*, No. 14 Civ. 7902, 2016 U.S. Dist. LEXIS 1835, 2016 WL 94140, at *7 (S.D.N.Y. Jan. 7, 2016) (collecting cases granting summary judgment for the government when the plaintiff failed to "challenge [the] agency's justifications for withholding certain information" (citing, *inter alia*, *Augustus v. McHugh*, 870 F. Supp. 2d 167, 171-73 (D.D.C. 2012)).

B. Plaintiff's *In Camera* Request

[9] These include: 1) Immigration Systems History Report, dated July 17, 2016, prepared by a Branch Chief with the USCIS Fraud Detection and National Security Directorate (FDNS) Intelligence Division, *see* Viker Decl. ¶¶ 21-22; and, 2) A twelve-page law enforcement memorandum prepared by FDNS. *See Id.* at ¶ 22.

Plaintiff also requests the Court to review the withheld documents *in camera* as permitted by 5 U.S.C. § 552(a)(4)(B). However, the Court does not believe such a review is warranted. Though *in camera* review "is appropriate when agency affidavits are not sufficiently detailed to permit meaningful assessment of the exemption claims," it is "generally disfavored." *PHE, Inc. v. DOJ*, 983 F.2d 248, 252-53 (D.C. Cir. 1993); *Sorin v. U.S. Dep't of Justice*, 280 F. Supp. 3d 550, 567 (S.D.N.Y. 2017), aff'd sub nom. *Sorin v. United States Dep't of Justice*, 758 F. App'x 28 (2d Cir. 2018), cert. denied sub nom. *Sorin v. Dep't of Justice*, 139 S. Ct. 2674 (2019). "[A] district court should not undertake *in camera* review of withheld documents as a substitute for requiring an agency's explanation of its claimed exemptions in accordance with *Vaughn*." *Seife v. United States Dep't of State*, 298 F. Supp. 3d 592, 630 (S.D.N.Y. 2018) (quoting *Spirko v. U.S. Postal Service*, 147 F.3d 992, 997, 331 U.S. App. D.C. 178 (D.C. Cir. 1998).

CONCLUSION

For the foregoing reasons, Defendants' Motions for Summary Judgment are GRANTED in part and DENIED in part, and Plaintiff's Cross-Motion for Summary Judgment is GRANTED in part and DENIED in part as follows:

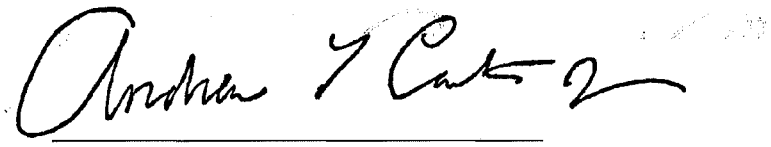
(1) ICE's Motion is granted and Plaintiff's Cross-Motion is denied with respect to its application of Exemption 5 to the First Amendment Concerns Memo, the 235(c) Memo, the EO Implementation Memo.
(2) Plaintiff's Cross-Motion is granted and ICE's Motion is denied with respect to the Extreme Vetting Memo, the Foreign Policy Provisions Memo, and the HSI Updates Memo. ICE must re-assess its applied exemptions to these records, using this Opinion as guidance, and disclose all responsive non-exempt materials that can reasonably be segregated from exempt materials.
(3) USCIS' Motion is granted and Plaintiff's Cross-Motion denied with respect to the TRIG Options Paper and TRIG Exemptions.
(4) Plaintiff's Cross-Motion is granted and USCIS' motion is denied with respect to the Acting Director Memo and Senior Policy Council Paper. USCIS must release the reasonably segregable information in these records.
(5) The government's motions for summary judgment regarding the unchallenged documents

are granted.

SO ORDERED.

Dated: September 23, 2019

New York, New York



ANDREW L. CARTER, JR.
United States District Judge

USDC SDNY
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DOC#: _____
DATE FILED: 9/13/20

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KNIGHT FIRST AMENDEMENT INSTITUTE AT COLUMBIA UNIVERSITY,

Plaintiffs,

-against-

U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL.

Defendants.

1:17-cv-7572 (ALC)
OPINION & ORDER

ANDREW L. CARTER, JR., United States District Judge:

Defendants United States Immigration and Customs Enforcement ("ICE"), the Office of Legal Counsel ("OLC") with the Department of Justice ("DOJ"), the Department of State ("DOS"), United States Citizenship and Immigration Services ("USCIS"), United States Customs and Border Protection ("CBP"), the Department of Homeland Security ("DHS"), the Department of Justice Office of Public Affairs ("OPA"), and Office of Information Policy ("OIP") (collectively "Defendants) seek clarification and reconsideration of this Court's September 13, 2019 opinion and order, *Knight First Amendment Institute at Columbia University v. U.S. Department of Homeland Security, et al*, 407 F.Supp.3d 311 (S.D.N.Y. 2019), and September 23, 2019 opinion and order, *Knight First Amendment Institute at Columbia University v. Department of Homeland Security et al*, 407 F.Supp.3d 334 (S.D.N.Y. 2019). Specifically, Defendants ask the Court to reconsider its determination that ICE's search in response to Plaintiff's FOIA request was inadequate, and to clarify and reconsider its ruling that FOIA Exemption 7(E) was inapplicable to several records Defendants withheld.

For the reasons set forth below, Defendants' motion for reconsideration is hereby DENIED.

BACKGROUND

Familiarity with the facts and procedural history of this case as set forth fully in this Court's September 13, 2019 opinion, is presumed here. *See* 407 F. Supp. 3d 311 (S.D.N.Y. 2019). However, I will summarize briefly the matters relevant to this decision.

Through Executive Order 13,780, President Trump directed the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence to develop a more robust vetting program for visa applicants and refugees seeking entry into the United States. Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,215 (Mar. 6, 2017). The Executive Order called for, among other things, the "collection of all information necessary for a rigorous evaluation of all grounds of inadmissibility or grounds for the denial of other immigration benefits." *Id.*

After the President issued E.O. 13,780, Plaintiff filed FOIA requests with various government agencies, the Defendants, seeking information relating to the consideration of individuals' speech, beliefs, or associations in connection with immigration determinations such as decisions to exclude or remove individuals from the United States. ICE's production process particularly is relevant to the instant motion and is therefore outlined here in more detail.

One of Plaintiff's requests from ICE was the production of:

> 1. All directives, memoranda, guidance, emails, or other communications sent by the White House to any federal agency since January 19, 2017, regarding consideration of individuals' speech, beliefs, or associations in connection with immigration determinations, including decisions to exclude [sic] or remove individuals from the United States…ICE released 1,666 pages of records

> responsive to this request, but withheld 1,653 of those pages in full, invoking FOIA exemptions.

(ECF No. 106 at ¶ 7).

ICE initially responded to that request by searching its Office of Policy and DPLA only. (ECF No. 113 at ¶¶ 7-8; ECF No. 114 at 2-3). Instead of filing an appeal challenging this limited response, Plaintiff filed the instant complaint on October 4, 2017. "Anticipating that plaintiff would file…an administrative appeal challenging the sufficiency of ICE's initial search, and further anticipating that ICE would grant such an appeal, ICE proactively conducted another search between October 2017 and January 2018." (ECF 144 at 8-9 (citing ECF No. 113 at ¶¶ 13-20)). Plaintiff filed an administrative appeal seeking review of ICE's initial response on January 5, 2018. (ECF No. 113 at ¶ 11). "That is, ICE in effect *granted* plaintiff's administrative appeal before plaintiff even filed one." (ECF No. 144 at 9 (emphasis in original)). On January 11, 2018, the parties filed a stipulation of voluntary dismissal without prejudice as to ICE in this action. (ECF Nos. 30-31). On March 14, 2018, Plaintiff filed an amended complaint adding ICE back as a defendant. (ECF No. 42).

ICE's subsequent searches resulted in approximately 14,000 pages of potentially responsive documents (including those originally identified) based on Plaintiff's initial request. (ECF No. 106 at ¶ 11; ECF No. 42-7). On March 7, 2018, ICE informed Plaintiff that it had processed 560 pages for release. (ECF 42-8). ICE referred 87 of those pages to other agencies for processing and released the other 463 pages with redactions. (JSR at ¶ 25). On April 30, 2018, ICE reached out again, informing Plaintiff it had processed an addition 1,124 pages. It released 395 pages in full and referred 728 to other agencies. (ECF No. 106 at ¶¶ 14, 21).

To expedite the release of the remaining ICE documents, the parties agreed to narrow the request to only final policy guidance or memoranda, court filings and opinions, and email correspondence. (*Id.* at ¶ 15; ECF No. 113 at ¶ 23; ECF No. 42 at ¶ 23). ICE "identified only ninety-nine pages of records responsive to the provisionally narrowed Request. ICE referred forty-nine pages to other agencies for processing and released fifty pages to [Plaintiff][.]" (ECF No. 106 at ¶ 16).

Plaintiff claimed that the agencies had performed inadequate searches under FOIA and had improperly withheld certain documents in reliance on inapplicable FOIA exemptions. *See* (ECF No. 42).

On February 26, 2019, OLC, ICE, and DOS moved for partial summary judgment. (ECF No. 90). Specifically, OLC and ICE moved for summary judgment on Plaintiff's claims that they had performed inadequate searches, and DOS moved for summary judgment on Plaintiff's claim challenging its withholding determinations pursuant to FOIA Exemptions 5 and 7. (*Id.*) Plaintiff cross-moved for summary judgment on the same claims. (ECF No. 101). I resolved these motions in my September 13, 2019 opinion, holding that ICE's searches were inadequate, OLC's searches were adequate, and DOS was entitled to withhold documents pursuant to FOIA exemption 5, but not 7. *See Knight First Amendment Institute at Columbia U. v. Dep't of Homeland Security, et al*, 407 F. Supp. 3d. 311 (S.D.N.Y. 2019).

On March 15, 2019, ICE and USCIS moved for partial summary judgment on Plaintiff's claims challenging both agencies' decisions to withhold certain documents pursuant to FOIA exemptions 5 and 7(C), and/or 7(E). (ECF No. 96). Plaintiff cross moved for summary judgment. (ECF No. 105, corrected by ECF No. 108). I resolved

these motions in my September 23, 2019 opinion and order, holding that both ICE and USCIS had properly relied on exemptions to justify the withholding of portions of some documents, but improperly withheld portions of other documents citing inapplicable FOIA exemptions. *See Knight First Amendment Institute at Columbia U. v. Dep't of Homeland Security, et al*, 407 F. Supp. 3d 334 (S.D.N.Y. 2019).

On September 30, 2019, Defendants filed a motion for reconsideration and clarification. (ECF No. 144). Defendants specifically moved for (1) reconsideration of my September 13 determination that ICE's searches were inadequate; (2) clarification as to which material I determined USCIS to have improperly withheld in reliance on Exemption 7(E); and (3) clarification as to whether DOS and USCIS are required to turn over immediately to Plaintiff the documents I determined the agencies improperly to have withheld pursuant to Exemption 7(E), or alternatively, whether the September opinions and orders directed the agencies to provide supplemental submissions explaining further the appropriateness of the withholdings. (*Id.* at 2). Defendants do not ask that I reconsider my determination that DOS and USCIS failed to justify adequately their 7(E)-based withholdings. However, Defendants ask that if my September orders were intended to direct the agencies to produce the improperly withheld documents to Plaintiff right away, I reconsider this decision and allow DOS and USCIS to provide supplemental materials justifying further the withholdings and/or provide me with these documents for an in camera review. (*Id.* at 3).

ANALYSIS

I. Legal Standard

Local Rule 6.3 provides the standard for a motion for reconsideration, "an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Sigmon v. Goldman Sachs Mortgage Co.*, 229 F. Supp. 3d 254, 257 (S.D.N.Y. 2017) (internal citations omitted). "A motion for reconsideration should be granted only when the [movant] identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 104 (2d Cir. 2013) (internal quotation marks omitted).

Where a movant seeks only to present "the case under new theories" or take "a second bit at the apple," a motion for reconsideration should be denied. *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012) (citation omitted); *see also Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995).

II. ICE Search

The agency served with a FOIA request bears the burden of "show[ing] beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency*, 877 F. Supp. 2d 87, 95 (S.D.N.Y. 2012) (internal citation omitted); *see Seife v. United States Dep't of State*, 298 F. Supp. 3d 592, 606 (S.D.N.Y. 2018). "[T]he defending agency [also] has the burden of showing that its search was adequate…" *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994)).

ICE was required to "establish the adequacy of its searches by showing that [it] made a good faith effort to search for the requested documents, using methods reasonably calculated to produce documents responsive to the FOIA request." *Adamowicz v. I.R.S.*, 672 F.Supp.2d 454, 461-62 (S.D.N.Y. 2009) (internal quotation marks omitted). "Reasonableness must be evaluated in the context of each particular request," *Amnesty Int'l USA v. C.I.A.*, 728 F.Supp.2d 479, 497 (S.D.N.Y. 2010), and demands consideration of the search terms and the type of search performed, the nature of the records system or database searched, and whether the search was "logically organized." *See Schwartz v. DOD*, No. 15-CV-7077, 2017 WL 78482, at *6 (E.D.N.Y. Jan. 6, 2017). "Although an agency is not required to search every record system, the agency must set forth in an affidavit why a search of other some record systems, but not others, would lead to the discovery of responsive documents." *Amnesty Int'l USA*, 728 F.Supp.2d at 497.

Toni Fuentes, the Deputy Officer of ICE's FOIA Office submitted three declarations explaining ICE's response to Plaintiff's FOIA request. *See* (ECF Nos. 91, 98, and 113). Fuentes provided that four of ICE's offices were identified as those reasonably likely to have responsive records, the Office of Principal Legal Advisor ("OPLA"), Office of Policy, Enforcement and Removal Operations ("ERO"), and Office of the Director. (ECF No. 91 at ¶ 17). Five additional divisions within OPLA were directed to perform searches including the Immigration Law and Practice Division ("OLPD"), National Security Law Section ("NSLS"), Enforcement and Removal Operations Law Division ("EROLD"), Field Legal Operations ("FLO"), and Deputy Principal Legal Advisor ("DPLA"). (*Id.* at ¶¶ 17, 19).

Based on these affidavits, I concluded that ICE had not demonstrated the adequacy of its searches. In particular, I expressed concern with respect to four major issues. First, ICE failed to provide an adequate explanation as to why its EROLD component was not searched, raising "'serious doubts as to the completeness of the agency's search' as a whole." 407 F. Supp. 3d at 324 (quoting Nat'l Day Laborer Org. Network, 877 F. Supp. 2d at 96) (citation omitted). Second, ICE's affidavits lacked sufficient detail regarding the scope of the searches, the search terms and methods employed, how the agency handled an administrative remand, and how the agency narrowed its search results. *Id.* at 325-26. In particular, ICE provided no description of the search terms used by custodians in the ILPD and NSLS. *Id.* at 325.Third, the searches run by the Officer of the Director and ERO were too narrow and failed to use critical keywords. *Id.* at 325-26.

In their motion for reconsideration, Defendants challenge only the second basis for finding the search inadequate. (ECF No. 144). Specifically, they argue that I overlooked the third, supplemental declaration submitted by Fuentes, which demonstrates that ICE provided the factual details I found lacking. In particular, Defendants note that the supplemental Fuentes declaration explains the search process and terms both ILPD and NSLS underwent and used, how ICE handled the administrative remand, and how ICE narrowed its search after collecting documents responsive to the original FOIA request. (*Id.* at 6-10). Defendants are right that the September 13 opinion overlooks the descriptions of ILPD's and NSLS's searches provided in the supplemental declaration. However, those descriptions do not alter the conclusion that ICE's overall search was patently inadequate. The September 13 opinion did not overlook the supplemental

declaration with respect to its conclusion that ICE failed to provide sufficient detail regarding how the agency handled the administrative remand and narrowed its search results.

In stating that ICE failed to provide a description of the search terms used by custodians in ILPD and NSLS, the September 13 opinion did not account for paragraphs 14 and 15 of the supplemental Fuentes declaration providing that ILPD conducted the following search:

> Between October and November 2017, 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."

(ECF No. 113 at ¶ 14). It also omitted consideration of paragraph 15, which explains:

> In October 2017, 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."

(*Id.* at ¶ 15).

Defendants argue that both sets of terms were reasonably calculated to return responsive records, which suggests that ICE's search was adequate. Defendants are correct that ICE's provision of these descriptions indicates that ICE's overall search was more adequate than the Court recognized in its September 13 opinion. However, this new

information is not enough to tip the scale. ICE's overall search, considered in full, is inadequate still.

For one, although these search terms are better than none, they do not, as Defendants erroneously argue, mirror the terms used by OLC and DOS, which I cited with approval. *See* (ECF No. 144 at 7 (citing 407 F. Supp. at 325–26)). OLC used the terms "endorse and espouse," "endorse or espouse," "espouse and endorse," "espouse or endorse," "1st Amendment," "First Amendment," "would have potentially serious adverse foreign policy consequences," "freedom of speech," "freedom of belief," "freedom of association," "freedom of expression," or "protected speech," "potentially serious adverse," "serious adverse foreign," "speech," "express," "belief," "member," "association," "waiver," "Visa Inadmissibilities," and "Visa Sanctions," (ECF No. 93 at ¶¶ 19-23). DOS used the terms "endorse w/3 espouse," "potentially serious adverse foreign policy," "(beliefs OR statements OR associations) w/5 'would be lawful,'" "8 w/3 1182," "8 w/3 1158," "8 w/3 1225," "('first amendment' OR speech OR belief OR association) w/10 (immigrat* OR exclu* OR remov*)." (ECF No. 92 at ¶ 10).

In addition to including more terms, OLC's and DOS's searches also permitted for variations of key words to turn up results by searching, for example, the singular of the word "belief" and adding asterisks to the roots of important terms.

But even if ILPD's and NSLS's terms had been as comprehensive as OLC's and DOS's, they still would not have remedied the other problems I identified with ICE's overall search. They would not remedy, for instance, the discussed deficiencies with the Office of the Director's and ERO's search terms, or the fact that EROLD failed to justify its decision not to conduct a search.

Defendants argue that the September 13 opinion's finding that ICE "omit[ted] key details about…how the agency handled the administrative remand, and how the agency narrowed its search results" is erroneous because it failed to consider relevant sections of the supplemental Fuentes declaration. (ECF No. 144 at 5). With respect to remand, Defendants' position is fundamentally flawed. By Defendants' own admission, ICE conducted all searches by January 2018, before the administrative remand was requested let alone granted. Accordingly, the information provided in the supplemental declaration does not address ICE's response to the remand.

Defendants additionally take issue with the September 13 opinion's finding that ICE "omit[ed] key details about…how the agency narrowed its search results." Defendants contend that the supplemental Fuentes declaration explained how ICE's "Government Information Law Division ('GILD') manually reviewed" documents searching for "final policy memoranda or guidance, thus removing emails, the vast majority of collected documents," and ultimately identified only ninety-nine pages responsive to the narrowed Request." (ECF No. 113 at ¶¶ 21, 23-24). Defendants point out that the supplemental declaration further provides:

> This "narrowing" of records resulted in a corruption of the electronic files within the database containing the records; as a result, ICE requested plaintiff to provide CDs of the produced documents for comparison purposes when drafting the Vaughn indices. GILD determined that 99 pages were responsive to the narrowed request. On July 3, 2018, ICE produced in full or in part 50 pages, and referred 49 pages to DHS and USCIS. On August 3, 2018, DHS and USCIS responded to plaintiff, withholding those pages in full.

(ECF No. 144 at 10 (quoting *Id.* at ¶ 24)).

Defendants' reconsideration argument here is that the information provided by Fuentes is a detailed enough description of how ICE narrowed its search and was

overlooked by the Court. The parties briefed this issue in their summary judgment memos. Plaintiff argued that ICE did not explain adequately why it did not review email attachments in its narrowed search, which Plaintiff argues could have contained documents responsive to the narrowed requests. (ECF 117 at 3). I agree with Plaintiff that ICE's search description was inadequate. Although the supplemental Fuentes declaration explains the physical processes ICE took to locate responsive documents, it does not explain how choices were made regarding where to look for those documents. A more detailed description was needed.

Defendants' motion for reconsideration as to the inadequacy of ICE's searches is DENIED.

III. DOS and USCIS Withholdings

Defendants seek clarification regarding my findings that DOS and USCIS failed to justify adequately their withholding of documents pursuant to FOIA exemption 7(E). Defendants inquire as to whether the September 13 and September 23 opinions directed them to turnover immediately the improperly withheld materials, or alternatively, to submit supplemental submissions to the Court further explaining why withholding is appropriate. (ECF No. 144 at 11). In the event the decisions ordered the first directive, Defendants ask that I reconsider this ruling and permit DOS and USCIS to supplement the record with additional declarations or review the relevant documents in camera. (*Id.* at 12). With respect to USCIS, Defendants also seek clarification regarding which documents and information the September 23 order concluded constitute improperly withheld "TRIG questions." (*Id.* at 11).

A. DOS 7(E) Exemptions

DOS invoked Exemption 7(E) to withhold sections of its Foreign Affairs Manual. The September 13 opinion denied Defendants' motion for summary judgment as to these withheld documents, granted Plaintiffs cross motion and stated: "Defendants are Ordered to turnover these categories of documents." 407 F.Supp.3d at 332. Defendants argue that this clear directive was confused by later language in the opinion addressing Plaintiff's request for an in camera review of Defendants' withheld and redacted documents. (ECF No. 144 at 11). In denying this request, the opinion found "that *in camera* review is unnecessary and [o]rder[ed] the Government to supplement its submissions in accordance with [the] Opinion." 407 F. Supp. 3d at 333–34. Defendants argue this sentence is at odds with the Court's previous directive to State to turn over the withheld documents. (ECF No. 144 at 11). It is not. As explained, the latter directive appears in a completely different section of the opinion than the first and simply orders the Defendants to comply with all submission directives provided in the above opinion, including the order for DOS to turn over the improperly withheld documents.

In short, the September 13 opinion ordered DOS to turn over the disputed sections of the Foreign Affairs Manual promptly because, based on the information Defendants provided, application of Rule 7(E) was not appropriate.

USCIS withheld 256 pages of records and 33 PowerPoint slides pursuant to FOIA Exemption 7(E). (ECF No. 97 at ¶ 11-41). Plaintiff challenged Defendants' application of Exemption 7(E) to many of these documents, including the various versions of the USCIS BASIC Instructor Guide on TRIG, USCIS BASIC Participant Guide on TRIG, USCIS TRIG Training PowerPoint Course 234, USCIS TRIG Instructor Guide, USCIS

TRIG Participant Guide, the officer training manual entitled TRIG EXEMPTIONS—Group-Based Exemptions/Situations Exemptions; and the manual entitled USCIS RAIO Officer Training –Combined Training Manual on National Security.[1] (ECF 108 at 17 n. 11). Specifically, Plaintiff challenged the withholding of two categories of information contained in these records: (1) questions that should be asked in immigration interviews to assess whether applicants had TRIG bars to admission; and (2) information related to determining whether applicants qualify for exemptions to TRIG bars. (*Id.* at 17-21).

The September 23 opinion concluded that USCIS was not entitled to rely on Exemption 7(E) to withhold the TRIG questions, but that the agency had properly withheld information related to the TRIG exemption qualifications in reliance on the same. 407 F. Supp. 3d at 353-54.

In their motion for clarification and reconsideration, Defendants assert that they are unclear how to differentiate between improperly withheld information concerning TRIG Questions and properly withheld information concerning TRIG exemptions. Defendants contend that, often, the two sets of information overlap because "[i]mmigration officers ask questions to elicit an applicant's terrorist ties in order to determine whether an exemption to the terrorist bar applies. While the agency can isolate 'questions' in the materials, it is not always clear how questions designed to determine

[1]USCIS BASIC Instructor Guide on TRIG, versions dated Nov. 2015, 2012, and 2010, see Eggleston Decl. ¶¶ 22, 32, 36; USCIS BASIC Participant Guide on TRIG, versions dated 2012 and 2010, see Eggleston Decl. ¶¶ 33, 37; USCIS TRIG Training PowerPoint, Course 234, versions dated Mar. 21, 2017, Nov. 2015, May 9, 2012, and May 2010, see Eggleston Decl. ¶¶ 30–31, 34–35, 38; USCIS TRIG Instructor Guide, versions dated May 2017 and Mar. 2017, see Eggleston Decl. ¶¶ 28, 39; USCIS TRIG Participant Guide, versions dated May 2017 and Mar. 2017, see Eggleston Decl. ¶¶ 29, 40; TRIG Exemptions – Group-Based Exemptions / Situational Exemptions (officer training manual), see Eggleston Decl. ¶ 26; USCIS RAIO Office Training – Combined Training Manual on National Security, versions dated Jan. 24, 2013 and Oct. 26, 2015, see Eggleston Decl. ¶¶ 27, 41.

the existence, extent, and nature of an applicant's terrorist ties can be neatly categorized as reflecting 'TRIG questions' as opposed to 'TRIG Exemptions." (ECF 144 at 12). Thus, Defendants ask the court to clarify which materials the court defines as "TRIG Questions" as opposed to "TRIG Exemptions."

I understand TRIG Questions to be "the questions and follow-ups" "designed to *elicit*" information from applicants "that would shed light on…whether the applicant[s] ha[ve] any ties to terrorist organizations and activities." (ECF No. 118 at 15) (emphasis added)). TRIG Exemptions, by contrast, are the criteria USCIS uses to *evaluate* applicants' answers. The latter material is internal to the agency and protectable, whereas the former material is, by definition shared, specifically with applicants. *See* 407 F. Supp. 3d at 353-54.

Although the September 23 opinion did not order as clearly as the September 13 opinion Defendants to turn over the improperly withheld records, it also did not provide for supplemental submissions and was intended to order USCIS to turnover these records, the TRIG Questions, to Plaintiff.

Defendants cite no intervening changes in controlling law, newly available evidence, or clear error warranting reversal of my decisions to order production of improperly withheld FOIA materials as opposed to permitting supplemental agency submissions attempting to further support withholding. Instead, Defendants cite several cases to support their argument that "[d]istrict courts typically 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." (ECF No. 144 at 12-13) (citing *N.Y. Legal Assistance Grp. v. U.S. Dep't of Educ.*, No. 15

Civ. 3818, 2017 WL 2973976, at *7-8, 10 (S.D.N.Y. July 12, 2017); *ACLU v. U.S. DOJ*, 210 F. Supp. 3d 467, 485-86 (S.D.N.Y. 2016); *Intellectual Prop. Watch v. U.S. Trade Representative*, 134 F. Supp. 3d 726, 746-47 (S.D.N.Y. 2015); *N.Y. Times Co. v. U.S. DOJ*, 915 F. Supp. 2d 508, 545-46 (S.D.N.Y. 2013), *supplemented by* 2013 WL 238928 (S.D.N.Y. Jan 22, 2013); *Adm. Civil Liberties Union v. Office of the Dir. of Nat. Intelligence*, No. 10 CIV. 4419, 2011 WL 5563520, at *13 (S.D.N.Y. Nov. 15, 2011).

Defendants misunderstand the grounds upon which I found the agencies' 7(E) withholdings to be justified inadequately. DOS and USCIS submitted sufficiently detailed justifications for withholding the FAM sections and TRIG questions respectively. I understood the agencies' arguments and was not persuaded. In the majority of cases cited by Defendants, supplemental submissions were requested where courts determined that they did not have enough information to decide whether an exemption applied. *See, e.g. American Civil Liberties Union v. United States Dep't of Justice*, 210 F. Supp. 3d 467, 483, 485-86 (S.D.N.Y. 2016) (where section of DOJ asserted deliberative process privilege and attorney work product privilege to justify withholding document but failed to "provide the Court with sufficient information to determine whether work product protection applies" the court granted DOJ opportunity to enhance its submissions regarding work product privilege and deferred ruling on the applicability of the deliberative process exception); *Intellectual Property Watch v. U.S. Trade Representative*, 134 F. Supp. 3d 726, 745-47 (S.D.N.Y. 2015) (to justify exemption, agency provided conclusory statements that were not document-specific so court asked for supplemental submissions "in order to provide 'a sufficient degree of detail' as to withholdings and redactions"); *N.Y. Times Co. v. U.S. DOJ*, 915 F. Supp. 2d

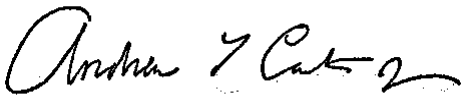
508, 545-46 (S.D.N.Y. 2013) (requiring additional submissions from agency where court did not have enough information to reach a conclusion about the duplicative process privilege); *Am. Civil Liberties Union v. Office of the Dir. of Nat. Intelligence*, No. 10 CIV. 4419, 2011 WL 5563520, at *13 (S.D.N.Y. Nov. 15, 2011) (ordering supplemental submissions where "faced with conclusory or otherwise insufficient agency affidavits").

I had enough information from DOS's and USCIS's affidavits to conduct the required *de novo* review of the agencies' withholdings. I determined that the 7(E) exemption did not apply to certain sections of the FAM and the TRIG questions. No supplemental submissions or in camera review is necessary. Defendants have not met the burden to warrant reconsideration of these determinations.

CONCLUSION

Defendants' motion for reconsideration is DENIED in full.

SO ORDERED.
Dated: September 13, 2020 New York, New York



ANDREW L. CARTER, JR.
United States District Judge