UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PROJECT SOUTH, CENTER FOR CONSTITUTIONAL RIGHTS,

Plaintiffs,

v.

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, UNITED STATES DEPARTMENT OF STATE,

Defendants.

21 Civ. 8440 (BCM)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Defendants United States Immigration and Customs Enforcement ("ICE"), United States Department of Homeland Security ("DHS"), United States Citizenship and Immigration Services ("USCIS"), United States Department of Justice Executive Office for Immigration Review ("EOIR"), and United States Department of State ("State") respectfully submit this memorandum of law in support of their motion for summary judgment in this action brought by Plaintiffs Project South and the Center for Constitutional Rights (together, "Plaintiffs"), pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

PRELIMINARY STATEMENT

This action concerns two[1] FOIA requests directed by Plaintiffs to Defendants seeking records relating to the detention and deportation of Cameroonian migrants from late 2020 to early 2021. As explained further below and in the declarations accompanying this memorandum,[2] Defendants conducted a reasonable search for responsive records and properly withheld information in the challenged records pursuant to FOIA Exemptions 3, 5, 6, 7(c), and 7(e). Defendants ICE, DHS, and State are therefore entitled to summary judgment. The remaining Defendants are also entitled to summary judgment, as Plaintiffs do not challenge any of their searches or withholdings.

[1] A third FOIA request, directed solely at USCIS, is no longer at issue in this litigation. *See infra*.

[2] Courts in this district have deemed the submission of statements pursuant to Local Rule 56.1 to be unnecessary in FOIA matters. *See, e.g.*, *N.Y. Times Co. v. DOJ*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012) ("The general rule in this Circuit is that in FOIA actions, agency affidavits alone will support a grant of summary judgment, and Local Civil Rule 56.1 statements are not required." (brackets and quotation marks omitted)). In accordance with this practice, Defendants have not submitted a Rule 56.1 statement in this matter.

BACKGROUND

A. The FOIA Requests

On April 26, 2021, Plaintiff submitted two sets of FOIA requests to each of the Defendants. The first, the "Data Request," sought several sets of data as well as certain policy documents relating to Cameroonian migrants. (*See* ECF No. 1-1, Exhibit 1 to the Complaint at ECF pages 2-14 (the "Data Request").) The second, the "Communications Request," sought communications relating to Cameroonian migrants. (*See* ECF No. 1-1, Exhibit 1 to the Complaint at ECF pages 15-21 (the "Data Request"; together with the Communications Request, the "Requests").) Plaintiffs submitted a third request to USCIS on June 17, 2021, seeking data relating to credible fear interviews. (*See* ECF No. 1-1, Exhibit 1 to the Complaint at ECF pages 22-27 (the "Credible Fear Request").) USCIS produced the data requested in the Credible Fear Request, and Plaintiffs do not challenge that search or production. (*See* ECF No. 34 (April 18, 2022 Joint Status Report) at 4.)

On October 13, 2021, Plaintiffs filed a Complaint initiating this action. (ECF No. 1 ("Compl.").) Prior to the filing of Plaintiffs' complaint, EOIR had provided certain data in response to the Data Request. (*See* Compl. ¶¶ 40, 50, 53.) While Plaintiffs had exchanged correspondence with the defendant agencies, no other documents had been produced. (*See id.* ¶¶ 39-101.)

B. The Instant Action and Defendants' Search and Production of Responsive Records

After the filing of the instant action, the parties negotiated about the scope of the requests. The Defendant agencies all conducted searches and produced responsive records. Plaintiffs do not challenge any of EOIR or USCIS's searches or withholdings.

1. ICE

ICE tasked various components to search for relevant policy documents and data in response to the Data Request. (*See* Declaration of Fernando Pineiro ("Pineiro Decl.") ¶¶ 20-46.

Based upon the substance of the requests, ICE determined that the Office of Public Affairs ("OPA"), the Office of Enforcement and Removal Operations ("ERO"), Homeland Security Investigations ("HSI"), and the Office of Regulatory Affairs and Policy ("ORAP") were most likely to have records responsive to the Data Request. (*Id.* ¶ 20.) ICE instructed these program offices to conduct a search for records. (*Id.*) HSI, based upon its responsibilities and the subject matter of the requests, determined that it would not have responsive documents, and ultimately determined that the FALCON system would not contain records related to Cameroonian removals as well. (*Id.* ¶¶ 43-44.)

Enforcement and Removal Operations (ERO)

ERO conducted a search for responsive records within the ERO Policy Database system for previous FOIA releases relating to Cameroonians, and specifically in response to a FOIA request made by Citizens for Responsibility and Ethics in Washington (CREW). The Management and Program Analyst used the search terms "Cameroon" and "Citizens for Responsibility and Ethics in Washington." (*Id.* ¶ 25.) No responsive records were found.

ERO's Information Disclosure Unit further identified, based on the substance of the requests, that the following units were most likely to have responsive records: Enforcement Division, Removals Division, Custody Management Division, Law Enforcement System Analysis Division, ERO Field Operations Division, and the Non-Detained Management Division. (*Id.* ¶ 24.) Each of these units were tasked with determining whether they might have responsive documents and, if so, conducting appropriate searches. (*Id.* ¶¶ 23-24.)

The Enforcement Division, the Custody Management Division, Field Operations Division, and Non-Detained Management Division determined that, based upon their mission and the subject

matter of the requests, they would not have information responsive to the Data Request. (*Id.* ¶¶ 27-28; 35; 37-38.)

The Removals Division conducted extensive searches in response to the Data Request. A Unit Chief with ICE Air Operations Removals searched the shared dive using the flight and mission numbers and identified manifests for the two removal flights. (*Id.* ¶ 30.)

Two Deputy Assistant Directors of ERO Removals further conducted searches for responsive policies based upon their subject matter expertise. (*Id.* ¶ 31.) The first searched his emails using the search terms "Cameroon," "conflict," "policy," "charter," and "death flights." (*Id.*) The second searched his emails using the terms "areas of conflict"; "retention of identity documents"; "Cameroon" and "retention of identity documents"; and "Cameroon" and "areas of conflict." (*Id.*) Three Unit Chiefs for Removals also conducted searches of their emails for responsive policies, the first using the terms "areas of conflict" and "suspension of removal"; the second using the terms "Cameroon" and "areas of conflict"; and the third using the terms "Cameroon," "guidance," "guidance communication," and "conflict." (*Id.* ¶ 33.) No responsive records were found in response to these email searches. (*Id.* ¶¶ 31, 33)

In response to the Communications Request ERO Removals conducted additional searches. One of the Assistant Attachés for Removals during the time period of the Request searched his emails using the term "Cameroon" and identified potentially responsive records. (*Id.* ¶ 32.) The Unit Chief for ERO's Removal and International Operations Division for Africa determined that the other ICE Attaché for Cameroon during the relevant period was Francis Kemp, and searched his email and the shared drive on his computer for "Kemp," "Francis Kemp," and "Cameroon." (*Id.* ¶ 34.) Mr. Kemp also manually searched his emails for documents pertaining to

removal of Cameroonians. (*Id.*) In total, 2,249 pages of potentially responsive records from Mr. Kemp's emails were sent to the ICE FOIA Office for review and processing. (*Id.*).

In addition, the Law Enforcement System Analysis Division conducted a targeted search for responsive records in the ICE Integrated Decision Support Systems and identified responsive records relating to removal of Cameroonian migrants that were sent to ICE FOIA Office for review and processing. (*Id.* ¶ 36.)

In total, 2,393 pages of potentially responsive records and three spreadsheets were identified by ERO and sent to the ICE FOIA Office for review and processing. (*Id.* ¶ 39.)

Office of Regulatory Affairs and Policy (ORAP)

Based upon the subject matter of the Data Request, an ORAP Management Program Analyst searched the ICE Intranet, the ICE Policy manual, and the ORAP shared drive using the terms "areas of conflict," "identity documents," "Cameroonian deportations," and "retention of documents." (*Id.* ¶ 40.) In total, ORAP identified 121 pages of potentially responsive records and sent them to the ICE FOIA Office for review and processing. (*Id.* ¶ 42.)

Office of Public Affairs (OPA)

OPA first conducted a search of their shared drive database using broad search terms—"Cameroon," "Cameroonian," "Africa" and "African"—and identified 168 pages of potentially responsive records, which were sent to the ICE FOIA Office for review and processing. (*Id.* ¶ 46.)

In response to the Communications Request, based upon negotiations between the parties, OPA then applied agreed-upon search terms to the emails of former ICE Press Secretary Bryan Cox:

- (Cameroon w/5 remove) OR (Cameroon w/5 removal) OR (Cameroonian w/5 remove) OR (Cameroonian w/5 removal)

- (Cameroon w/5 repatriation) OR (Cameroonian w/5 repatriation) OR (Cameroon w/5 repatriate) OR (Cameroonian w/5 repatriate) OR (Cameroon w/5 repatriating) OR (Cameroonian w/5 repatriating)
- (Cameroon w/5 manifest) OR (Cameroonian w/5 manifest)
- (Cameroon w/5 Omni) OR (Cameroonian w/5 Omni)
- (Cameroon w/5 illegal) OR (Cameroon w/5 illegals) OR (Cameroonian w/5 illegal) OR (Cameroonian w/5 illegals)
- (Cameroon w/5 alien) OR (Cameroon w/5 aliens) OR (Cameroonian w/5 alien) OR (Cameroonian w/5 aliens)
- "N225AX" OR "N207XA" OR "ET 501" OR "ET 905"

(*Id.* ¶¶ 47.) In total, 1,827 pages of potentially responsive records were found in Mr. Cox's emails and sent to the ICE FOIA Office for review and processing. (*Id.* ¶ 48.)

In total, ICE identified 4,509 pages and 3 spreadsheets of records potentially responsive to the Requests. (*Id.* ¶¶ 39, 42, 46, 48.) ICE ultimately produced 1,761 pages and 3 spreadsheets of responsive records, subject to withholdings under FOIA Exemptions 3, 5, 6, 7(C), and 7(E). (*Id.* ¶¶ 51-52.)

ICE produced an initial *Vaughn* index to Plaintiffs on March 28, 2023, explaining the bases for the withholdings. On April 27, 2023, Plaintiffs identified the withholdings that they intended to challenge. Attached as Exhibit A to the Pineiro Declaration is a final *Vaughn* index identifying the bases for the challenged withholdings under Exemptions 3, 5, 6, 7(C), and 7(E). (Pineiro Decl. Ex. A ("ICE *Vaughn* Index").)

2. DHS

In response to the Data Request, DHS determined that it did not maintain databases likely to have information responsive to the request. (Declaration of Catrina M. Pavlik-Keenan ("Pavlik-Keenan Decl.") ¶ 9.) In particular, with regard to the databases identified by Defendants, CHIVe

and FALCON are systems managed by Immigration and Customs Enforcement (ICE), and LeadTrack is managed by ICE and Homeland Security Investigations (HSI). (*Id.)*

DHS further determined that the Office of General Counsel ("DHS OGC") and the Office of Policy were the components most likely to have policy documents responsive to the Data Request. (*Id.* ¶ 10.)

DHS OGC further provided its Immigration Law Division, Operations and Enforcement Law Division, and its Executive Secretary with relevant parts of the FOIA request for a potential search for responsive records. (*Id.* ¶ 11.) Each of these offices determined that, based upon the subject matter of the requests, they were unlikely to have responsive records. (*Id.*)

The Office of Policy directed custodians in the Office of International Affairs in the Office of Strategy, Policy, and Plans ("PLCY") including the Director for the Middle East, Africa, and Southwest Asia and the PLCY Executive Secretary, to manually search any applicable computer files, hard copy work folders, or email systems for records potentially responsive to the request. (*Id.*) The Office of Policy located 6 pages of potentially responsive records, which were determined to be either non-responsive, duplicative of previously produced pages, or publicly available. (*Id.*)

In response to the Communications Request, DHS proposed six potentially relevant custodians: Emily Hymowitz, Deputy Assistant Secretary for the House (Acting), Office of Legislative Affairs; Marsha Espinosa, Assistant Secretary, Office of Public Affairs; David Shahoulian, Assistant Secretary for Border Security and Immigration; Jeff Readinger, Deputy Assistant Secretary (Acting), Office of Legislative Affairs; Angela Kelley, Senior Counselor for Immigration and Border to the Secretary; and Joseph Joh, Assistant Director of Legislative Affairs. (*Id.* ¶ 12.) Plaintiffs proposed an additional 6 custodians: Kyle P. Egan, Legislative Advisor; Robert T. Goad, Deputy Assistant Secretary; John Richard Lange, Chief of Staff; Jeffrey T.

Readinger, Deputy Assistant Secretary (Acting); Natalie Nguyen McGarry, Deputy Assistant Secretary, Senate; and Harlan C. Geer, Deputy Assistant Secretary for Legislative Affairs. (*Id.*)

DHS agreed to search all 12 of the custodians, using search terms agreed to by the parties:

- ("Cameroon" or "Cameroonian") w/5 ("remove" or "removal")
- ("Cameroon" or "Cameroonian") w/5 ("repatriate" or "repatriation")
- ("Cameroon" or "Cameroonian") w/5 ("flight" or "charter" or "manifest")
- ("Cameroon" or "Cameroonian") w/5 ("Omni")
- ("Cameroon" or "Cameroonian") w/5 ("illegal" or "illegals")
- ("Cameroon" or "Cameroonian") w/5 ("alien" or "aliens")

(*Id.*)

These searches identified 661 pages of records potentially responsive to the Communications Request. (*Id.*) DHS ultimately produced 62 pages of responsive records in whole and withheld 56 pages in part and 118 pages in full pursuant to FOIA Exemptions 5 and 6. (*Id.* ¶ 13.)[3]

DHS produced an initial *Vaughn* index to Plaintiffs on March 15, 2023, explaining the bases for the withholdings. On April 18, 2023, Plaintiffs identified the withholdings that they intended to challenge. One of those withholdings was a draft letter; the Government was ultimately able to find and released the final letter, and Plaintiffs withdrew that portion of the challenge. Attached as Exhibit A to the Pavlik-Keenan Declaration is a final *Vaughn* index identifying the bases for the remaining challenged withholdings under Exemption 6. (Pavlik-Keenan Decl. Ex. A ("DHS *Vaughn* Index").)

[3] DHS also processed 21 pages of documentation referred to it by ICE, releasing 9 in full and withholding 12 in part pursuant to Exemptions 5, 6, and 7(c); Plaintiffs do not challenge those withholdings.

3. State

State searched the shared files of the U.S. Embassy in Cameroon for documents relating to ICE, removal, or deportation, as well as identifying several relevant embassy officials and having them search their own emails. (Declaration of Susan C. Weetman ("Weetman Decl.") ¶¶ 15-20.) State additionally utilized its centralized eRecords archive to search for all permanent electronic records, including emails and diplomatic cables, of three Bureaus for responsive policies, data, and communications: the Bureau of African Affairs, the Bureau of Consular Affairs, and the Bureau of Population, Refugees, and Migration. (*Id.* ¶ 21-22.) State utilized detailed search terms consisting of variations of Cameroon or Cameroonian and removal, repatriation, manifest, Omni, illegal, and alien, as well as four search terms reflecting the flight numbers of flights involved in planned or executed removals of Cameroonians during the relevant period. (*Id.* ¶ 22.) State ultimately retrieved 476 pages of potentially responsive records, releasing 65 in full and withholding 349 in part and 7 in full under FOIA Exemptions 5, 6, and 7(c). (*Id.* ¶ 37.)

State produced an initial *Vaughn* index to Plaintiffs on March 15, 2023, explaining the bases for the withholdings. On April 14, 2023, Plaintiffs identified the withholdings that they intended to challenge. Attached as Exhibit A to the Weetman Declaration is a final *Vaughn* index identifying the bases for the challenged withholdings under Exemptions 5, 6, and 7(C). (Weetman Decl. Ex. A ("State *Vaughn* Index").)

For the reasons explained below, ICE, DHS, and State are entitled to summary judgment on the adequacy of their searches and their withholding decisions.

STANDARD OF REVIEW

FOIA represents a balance struck by Congress "between the right of the public to know and the need of the Government to keep information in confidence." *John Doe Agency v. John*

Doe Corp., 493 U.S. 146, 152 (1989); *N.Y. Times*, 872 F. Supp. 2d at 314. Thus, while FOIA requires disclosure under certain circumstances, the statute recognizes "that public disclosure is not always in the public interest," *Cent. Intel. Agency v. Sims*, 471 U.S. 159, 166-67 (1985), and mandates that records need not be disclosed if "the documents fall within [the] enumerated exemptions," *U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001); *see also Martin v. U.S. Dep't of Justice*, 488 F.3d 446, 453 (D.C. Cir. 2007) ("Recognizing . . . that the public's right to information was not absolute and that disclosure of certain information may harm legitimate governmental or private interests, Congress created several exemptions to FOIA disclosure requirements.") (internal quotations omitted); *John Doe Agency*, 493 U.S. at 152 (FOIA exemptions are "intended to have meaningful reach and application"). "Exemption Five excepts from disclosure '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.'" *Nat. Res. Def. Council v. U.S. Env't Prot. Agency*, 19 F.4th 177, 184 (2d Cir. 2021) (quoting 5 U.S.C. § 552(b)(5)). "This exemption … incorporates the deliberative process privilege." *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021).

Most FOIA actions are resolved by summary judgment. *See, e.g.*, *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994); *see also Knight First Amend. Inst. at Columbia Univ. v. Centers for Disease Control & Prevention*, No. 20 Civ. 2761, 2021 WL 4253299, at *3 (S.D.N.Y. Sept. 17, 2021). Summary judgment is warranted if "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). In FOIA cases, the government meets its burden of demonstrating that it properly withheld documents "by submitting declarations giving reasonably detailed explanations why any withheld documents fall within an exemption, and such declarations are accorded a presumption of good faith." *Florez v.*

Cent. Intel. Agency, 829 F.3d 178, 182 (2d Cir. 2016) (quotation omitted). Finally, an "agency's justification is sufficient if it appears logical and plausible." *ACLU v. U.S. Dep't of Defense*, 901 F.3d 125, 133 (2d Cir. 2018) (citing *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 119 (2d Cir. 2014)).[4]

ARGUMENT

I. ICE, DHS, and State's Searches for Responsive Records Were Reasonable and Adequate

"In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate." *Long v. Off. of Pers. Mgmt.*, 692 F.3d 185, 190 (2d Cir. 2012) (quoting *Carney*, 19 F.3d at 812). A search is adequate if it was "reasonably calculated to discover the requested documents." *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999). A search is judged by the efforts the agency undertook, not by its results. *Id.* The searches undertaken by the agencies, as set forth in the agency declarations, more than meet this reasonableness standard.

An agency may satisfy its burden of demonstrating an adequate search through "[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search." *Carney*, 19 F.3d at 812 (footnote omitted); *Gonzalez v. U.S. Citizenship & Immigr. Servs.*, 475 F. Supp. 3d 334, 347 (S.D.N.Y. 2020) ("The reasonableness of a search may be established solely on the basis of the Government's relatively detailed, non-conclusory affidavits that are submitted in good faith."). Where an agency's declaration demonstrates that it has conducted a reasonable

[4] Defendants have not submitted a Local Rule 56.1 statement, as "the general rule in this Circuit is that in FOIA actions, agency affidavits alone will support a grant of summary judgment," and a Local Rule 56.1 statement "would be meaningless." *Ferguson v. Fed. Bureau of Investigation*, No. 89 Civ. 5071, 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995), *aff'd*, 83 F.3d 41 (2d Cir. 1996); *see also N.Y. Times*, 872 F. Supp. 2d at 314 (noting Local Civil Rule 56.1 statement not required in FOIA actions in this Circuit).

search, "the FOIA requester can rebut the agency's affidavit only by showing that the agency's search was not made in good faith." *Maynard v. Cent. Intel. Agency*, 986 F.2d 547, 560 (1st Cir. 1993); *see also Carney*, 19 F.3d at 812. Thus, a court may award summary judgment if the affidavits provided by the agency are "adequate on their face." *Carney*, 19 F.3d at 812.

As set forth in the agencies' detailed declarations, and as described in more detail above, ICE, DHS, and State made extensive inquiries with relevant offices to obtain the data and policies sought in the Data Request. (*See generally* Pineiro Decl. (ICE) ¶¶ 19-46; Pavlik-Keenan Decl. (DHS) ¶ 11; Weetman Decl. ¶¶ 12-22.)

ICE tasked six different divisions with determining whether they were likely to have responsive documents and, if so, to conduct appropriate searches. The Enforcement and Removals Division (ERO)—understandably the most central to the Requests—then undertook extensive further searches, tasking multiple Unit Chiefs and Deputy Assistant Directors with performing targeted searches within their areas of responsibility and expertise. DHS similarly undertook diligent search efforts through its Office of Legal Counsel and its Office of Policy, though these searches were understandably less fruitful given DHS components' (e.g. ICE and USCIS) primary role with respect to the subject matter of the Requests. And State conducted extensive searches through the systems of the U.S. Embassy in Yaounde as well as through the eRecords archive of the relevant Bureaus for responsive policy documents.

In response to the Communications Request, ICE applied agreed-upon (or broader) search terms to the emails of Bryan Cox as well as both relevant Assistant Attachés for Removals, identifying thousands of pages of potentially responsive records. DHS similarly applied agreed-upon search terms to the twelve agreed-upon custodians, identifying hundreds of pages of potentially responsive records.

And State searched the centralized files of the United States Embassy in Cameroon, emails of several embassy officials, and all permanent records of three potentially relevant Bureaus. While the parties reached agreement on almost all the relevant search terms, there was one area of disagreement. Plaintiffs sought terms reflecting "Cameroon" or "Cameroonian" in proximity to "flight" or "plane"; State, concerned that these searches would turn up too many non-responsive records, instead searched for the four specific flight manifest numbers at issue: N225AX, N207XA, ET 501, or ET 905. This more specific search was an entirely appropriate response to a narrow and targeted FOIA request that dealt with a small subset of the business of the State Department and the United States Embassy in Cameroon; Plaintiffs' wish for a handful of broader terms is far from sufficient to show that State's search "was not made in good faith," *Maynard*, 986 F.2d at 560. *See Immigrant Defense Project v. U.S. Immigration and Customs Enforcement*, 208 F. Supp. 3d 520, 528 (S.D.N.Y. 2016) ("[T]he omission of certain search terms or keywords does not alone demonstrate that Defendants' search was inadequate."); *Bigwood v. U.S. Dep't of Defense*, 132 F. Supp. 3d 124, 140 (D.D.C. 2015) ("In general, a FOIA petitioner cannot dictate the search terms for his or her FOIA request. Rather, a federal agency has discretion in crafting a list of search terms that they believe to be reasonably tailored to uncover documents responsive to the FOIA request.").

II. ICE Properly Withheld Information Protected by FOIA Exemption 3

ICE withheld limited identifying information relating to Cameroonian applicants for relief from deportation pursuant to Exemption 3, including names and a spreadsheet contains the names of detainees, their alien numbers, their birthdates, sex, country of citizenship, criminal charge, the final order from the Immigration Judge, and their appeal status. (Much of this information is also subject to withholding under Exemptions 6 and 7(C).) *See* ICE *Vaughn* Index at 1120-1123, 1204-

1208, 1212-1215; 1161-1167; 1237.[5] ICE withheld this information pursuant to 8 U.S.C. § 1367(a)(2). Under this statute, applicants for, and recipients of, immigration relief under the Violence Against Women Act of 1994 (VAWA) and the Victims of Trafficking and Violence Prevention Act of 2000 (T and U nonimmigrant status for victims of trafficking and other serious crimes) are entitled to special privacy and confidentiality protections. *See* Pineiro Decl. ¶ 53. The statute prohibits the unauthorized disclosure of any information about applicants for, and beneficiaries of, VAWA, T-, and U-related benefits to anyone other than an officer or employee of the Department of Homeland Security (DHS), the Department of Justice (DOJ), or the Department of State (DOS). DHS has implemented this requirement through 8 C.F.R. § 208.6, which, in order to ensure compliance with the statutory requirements, prohibits disclosure of "[i]nformation contained in or pertaining to any application for refugee admission, asylum, withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, records pertaining to any credible fear determination conducted pursuant to § 208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 208.31," except under particular circumstances.

The Supreme Court has adopted "a two-pronged approach to evaluating an agency's invocation of FOIA Exemption 3: First, the court must consider whether the statute identified by the agency is a statute of exemption as contemplated by Exemption 3. Second, the court must consider whether the withheld material satisfies the criteria of the exemption statute." *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 72 (2d Cir. 2009) (citing *Sims*, 471 U.S. at 167). As the D.C. Circuit has observed, "Exemption 3 differs from other FOIA exemptions in that its applicability

[5] For the ICE *Vaughn* Index, entries are identified by the Bates-Stamp Suffix column.

depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Ass'n of Retired R.R. Workers v. U.S. R.R. Retirement Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987).

As a threshold matter, 8 U.S.C. § 1367(a)(2) is a withholding statute. The statute prohibits the unauthorized disclosure of any information about applicants for, and recipients of, immigration relief under the Violence Against Women Act of 1994 (VAWA) and the Victims of Trafficking and Violence Prevention Act of 2000 (T and U nonimmigrant status for victims of trafficking and other serious crimes). The statutory language is exceedingly clear: no employee or official of the Departments of Justice, State, or Homeland Security may "permit use by or disclosure to *anyone* (other than a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau, or agency purposes) of *any information* which relates to an alien who is the beneficiary of an application for relief . . . ." 8 U.S.C. § 1367(a)(2) (emphases added). Although no federal court that the Government is aware of has expressly determined that 8 U.S.C. § 1367 is a withholding statute within the meaning of Exemption 3, at least one court has noted "that Section 1367(a)(2) is manifestly a non-disclosure provision intended to shield sensitive information from the eyes of all but a select few." *Roy v. County of Los Angeles*, No. CV129012BROFFMX, 2016 WL 11783814, at *3 (C.D. Cal. Nov. 18, 2016) (quashing subpoena for civil discovery).

Second, the withheld information is covered by the statute. As noted above, the statutory language prohibits disclosure "to anyone" of "any information" relating to aliens who are the beneficiaries of applications for certain forms of relief. ICE has implemented 8 U.S.C. § 1367(a)(2) by broadly prohibiting the disclosure of identifying information about applicants for

refugee status absent written consent of the applicant except under certain conditions not applicable here. (Pineiro Decl. ¶ 53); 8 C.F.R. § 208.6. This regulatory framework is a reasonable interpretation of the coverage of the statute's nondisclosure provisions and is entitled to deference, and ICE's withholdings fall within that regulatory framework. *See* ICE *Vaughn* Index at 1120-1123, 1204-1208, 1212-1215; 1161-1167; 1237. Accordingly, ICE's limited withholdings under Exemption 3 should be upheld.

III. ICE and State Properly Withheld Information Protected by FOIA Exemption 5

ICE and State withheld certain information under Exemption 5, which protects the Government's internal deliberative processes. Pursuant to this exemption, ICE withheld certain internal deliberations relating to organization of removal flights as well as internal ICE discussions regarding how to respond to press inquiries. (ICE *Vaughn* Index at 1007-1031; 1161-1167; 1302-130.) State withheld certain internal deliberations relating to response to Congressional inquiries; deliberations relating to policy issues surrounding sanctions and removals; deliberations relating to interagency discussions and memorialization of those interagency discussions around policy issues; and discussion of policy concerns around upcoming removal flights. (State *Vaughn* Index at A-00000563174, A-00000520221, A-00000520216, A-00000520244, A-00000520268.) These withholdings fall within the core of Exemption 5.

Exemption 5 protects from disclosure "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Nat. Res. Def. Council v. U.S. Env't Prot. Agency*, 19 F.4th 177, 184 (2d Cir. 2021) (quoting *Sierra Club*¸ 141 S. Ct. 785 (quotation marks omitted)). This privilege is intended to "safeguard and promote agency decisionmaking policies in at least three ways." *Grand Cent. P'ship*, 166 F.3d at 481. First, it 'encourage[s] candor, which improves agency decisionmaking,' by 'blunt[ing] the chilling effect that accompanies the prospect of disclosure.'"

Nat. Res. Def. Council, 19 F.4th at 184 (quoting *Sierra Club*, 141 S. Ct. at 785). Second, it "protect[s] against [the] premature disclosure of proposed policies before they have been finally formulated or adopted." *Grand Cent. P'ship*, 166 F.3d at 481 (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). Third it, "protect[s] against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." *Id.* Following from these rationales "underlying the deliberative process privilege, it applies only to 'predecisional, deliberative documents.'" *Nat. Res. Def. Council*, 19 F.4th at 184 (quoting *Sierra Club*, 141 S. Ct. at 785).

To be protected by the deliberative process privilege, the agency record "must be both 'predecisional' and 'deliberative.'" *Grand Cent. P'ship*, 166 F.3d at 482 (citations omitted). An agency record "is predecisional if it relates to a specific decision *or a specific decisionmaking process* and was generated before the conclusion of that decision or process." *Nat. Res. Def. Council*, 19 F.4th at 192 (emphasis in original). An agency record may still be considered predecisional even when "'nothing else follows it'" as "'[s]ometimes a proposal dies on the vine' and 'documents discussing such dead-end ideas can hardly be described as reflecting the agency's chosen course.'" *Id*. at 184 (quoting *Sierra Club*, 141 S. Ct. at 786). So long as the agency record is "prepared in order to assist an agency decisionmaker in arriving at his decision" it can be considered predecisional. *Immigrant Def. Project v. U.S. Dep't of Homeland Sec.*, No. 20-CV-10625 (RA), 2023 WL 1966178, at *6 (S.D.N.Y. Feb. 13, 2023) (R.A.) (quoting *Hopkins v. U.S. Dep't of Hous. & Urb. Dev.*, 929 F.2d 81, 84 (2d Cir. 1991)).

An agency record is deliberative where it was "prepared to help the agency formulate its position," which can be determined by "by analyzing 'if it reflects the give-and-take of the

consultative process . . . .'" *Nat. Res. Def. Council*, 19 F.4th at 184 (quoting *Sierra Club*, 141 S. Ct. at 786; *Nat. Res. Def. Council v. U.S. Env't Prot. Agency*, 954 F.3d 150, 156 (2d Cir. 2020)). Predecisional and deliberative documents protected by privilege 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." *Grand Cent. P'ship*, 166 F.3d at 482 (internal quotation marks omitted). As outlined below, the documents withheld by ICE and State were both predecisional and deliberative and are thus protected by the deliberative process privilege.

A. ICE Properly Withheld Deliberative Records

ICE properly redacted discussions between ICE employees regarding various logistical options for removal flights (all of which was also withheld pursuant to Exemption 7(E)). (ICE *Vaughn* Index at 1007-1031; Pineiro Decl. ¶¶ 55-60.) This discussion is pre-decisional, as it relates to a specific decision—logistical arrangements for a removal flight—and occurred before those final arrangements were determined. It is also deliberative in that it involves a give-and-take regarding various flight options that does not represent the agency's final position. Disclosure of this discussion would harm ICE's interest in candid exchange of information to lead to an informed decision (*see* Pineiro Decl. ¶ 59; ICE *Vaughn* Index at 1007-1031), precisely the interest that Exemption 5 seeks to protect.

ICE also properly redacted discussions regarding how to respond to press inquiries regarding the status of a particular deportee (ICE *Vaughn* Index at 1161-1167) and allegations that two Cameroonians were being forced to sign deportation papers (*id.* at 1302-130). Those documents reflect an exercise of policy-oriented judgment in communicating ICE's policy position with respect to certain issues surrounding Cameroonian migrants. "An agency exercises policy-

oriented judgment when communicating its policies 'even when [the] underlying decision or policy has already been established by the agency.'" *Nat. Res. Def. Council*, 19 F.4th at 186 (quoting *Seife v. U.S. Dep't of State*, 298 F. Supp. 3d 592, 616 (S.D.N.Y. 2018)). "[T]he communications decision implicates the agency's policymaking role and remains 'delicate and audience-sensitive, susceptible to distortions and vulnerable to fudging when the deliberators fear or expect public reaction.'" *Id.* (quoting *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992)). "Applying the deliberative process privilege to records reflecting deliberations about these issues ensures that agency staff can consider communications decisions candidly and thereby promotes efficient government operation." *Id.* (internal quotation omitted). "In the context of a messaging record, … the relevant 'consultative process' includes the agency's effort to determine what to say about a policy and how to formulate that message. Records designed to contribute to those decisions are deliberative." *Id.* at 189; *see also ACLU v. U.S. Dep't of Justice*, 844 F.3d 126, 133 (2d Cir. 2016) ("[S]et of suggested talking points concerning the legal basis for drone strikes … is predecisional and need not be disclosed.").

The messaging records at issue include "draft talking points prepared for senior agency staff about agency policies and internal discussions and draft responses relating to inquiries from the press and from members of Congress." *Nat. Res. Def. Council*, 19 F.4th at 185. Here, just as in *NRDC*, the Pineira Declaration and amended *Vaughn* index entry "for each of these records demonstrate[] that it was created as part of [ICE]'s efforts to communicate with people outside the agency about specific policies *and* that the document reflects discussions about what to say about the policy or how to formulate that message." *Id.* at 190 (emphasis in original).

Moreover, the specific withholdings at issue also relate to sensitive internal information. One inquiry involved sensitive discussions with the Canadian government, while another related

to an investigation by ICE's Office for Civil Rights and Civil Liberties. If agency employees felt themselves unable to have candid discussions about negotiations with foreign governments or ongoing investigations, the quality of ICE's internal deliberations would be severely hampered—precisely the injury sought to be avoided by Exemption 5. Accordingly, these records were properly withheld under Exemption 5.

B. State Properly Withheld Deliberative Records

The State Department properly redacted email chains regarding an interagency policy call; email chains regarding policy and sanctions issues relating to a removal flight; and email chains regarding a congressional letter and media coverage of removal flights. (State *Vaughn* Index at A-00000563174, A-00000520221, A-00000520216, A-00000520244, A-00000520268.)

The email chain regarding an interagency call between high-level State and DHS officials regarding policy issues relating to State-DHS cooperation is both predecisional and deliberative. (*Id.* at A-00000520244). The redacted portions of these records contain discussions of policy options, both within the State Department in preparation for the call and between the State Department and DHS. These communications are predecisional because they "predate any final determination about the policy that DAS Fitzsimmons would have approved" (*id.*); as such, they were created "in order to assist an agency decisionmaker in arriving at [her] decision," *Grand Cent. P'ship*, 166 F.3d at 482 (quoting *Hopkins*, 929 F.2d at 84). These agency records are deliberative because they are "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Id.*; *see Nat. Res. Def. Council*, 19 F.4th at 192 (holding that if an agency record is part of a "*specific decision making process*" it is deliberative). The release of the redacted text would harm the State Department's "deliberative processes by chilling the open and frank discussions in which officials engage when

confronted by policy questions, decisions, and how the Department should proceed." (State *Vaughn* Index at A-00000520244.) Additionally, release of this information would chill frank and candid interagency exchange of information between State and DHS.

The redacted portions of the email chain regarding an upcoming ICE removal flight to Cameroon are also properly protected as both predecisional and deliberate. The email contains State Department officials commenting on policy issues related to sanctions and ICE removal orders, and potential responses the Department should consider. (*Id.* at A-00000520216.) These discussions are predecisional "in that they predate any final determination about the emergent flight." (*Id.*) The redacted text is likewise "deliberative" in that "they reflect ongoing discussion of the policy concerns and proposals to inform the department's approach." *Id*. The redacted text discusses policy issues relating to dealing with Cameroon, DHS, and ICE; these constitute deliberations that are part of a "*specific decisionmaking process*" for how the State Department approached the pending removal flight to Cameroon. *Nat. Res. Def. Council*, 19 F.4th at 192. The release of these internal State Department policy deliberations on this issue would inhibit the frank and open exchange of viewpoints and ideas essential to the State Department's decisionmaking process.

Finally, the redacted portions of email chains regarding policy responses and approaches to a Congressional letter and media coverage of the removal flights are also properly protected under the deliberative process privilege. (State *Vaughn* Index at A-00000520216.) The redacted text in these agency records is predecisional because they "'were generated before the agency's final decision' regarding how to communicate its policies" and how to approach the issue from a policy perspective. *Nat. Res. Def. Council*, 19 F.4th at 185 (quoting *Sierra Club*, 141 S. Ct. at 786). The redacted text in these agency records is also deliberative in that the text "reflect[s] an ongoing

discussion of the policy implicated in the article" and an "ongoing discussion of the policy concerns and proposals to determine the appropriate response." (State *Vaughn* Index at A-00000520216.) Similar to the ICE documents discussed above, the Second Circuit has recognized that because "an agency's decision regarding how to communicate its policies and actions to Congress, the public, and other stakeholders can have substantial consequences," such communications decisions "involve 'the formulation or exercise of policy-oriented judgment.'" *Nat. Res. Def. Council*, 19 F.4th at 185 (quoting *Grand Cent. P'ship*, 166 F.3d at 482). These policy discussions regarding how to approach and respond to Congressional inquiries and media coverage regarding the removal flights of Cameroonians therefore are "policy-oriented judgements" that are deliberative. *Id.* Accordingly, these records were properly withheld under Exemption 5.

IV. ICE, DHS, and State Properly Withheld Information Protected by FOIA Exemption 6

All three agencies also properly withheld the names of government employees and third parties, as well as their phone numbers, email addresses, or other contact information, as such information is protected under FOIA Exemption 6. Exemption 6 permits the withholding of privacy information, the release of which would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6).

"Whether the names and other identifying information about government [employees] may be withheld under Exemption 6 is a two part inquiry." *Wood v. FBI*, 432 F.3d 78, 86 (2d Cir. 2005). First, the court "must determine whether the personal information is contained in a file similar to a medical or personnel file." *Id.* "The phrase "similar files" sweeps broadly and has been interpreted by the Supreme Court to mean 'detailed Government records on an individual which can be identified as applying to that individual.'" *Cook v. Nat'l Archives & Records Admin.*, 758

F.3d 168, 174 (2d Cir. 2014); *see also Seife*, 298 F. Supp. 3d at 624 ("The Supreme Court has made clear that any government record that can be identified as applying to the individual in question meets the threshold requirement under Exemption 6."). Given this broad construction of "similar files," emails that "contain the names and email addresses of agency officials, and, thus, can be identified as applying those officials" are considered "'similar files' under Exemption 6." *Seife*, 298 F. Supp. 3d at 623; *see Cook*, 758 F.3d at 174 (finding that emails, which contained names, titles, offices, and phone numbers, qualified as similar files). Additionally, "proposed talking points, draft opening statements, and draft rollout schedules—are also similar files." *Seife*, 298 F. Supp. 3d at 623.

If this threshold step of the information being contained in a "similar file" is satisfied, "the Court must determine whether disclosure of the personal information would result in a 'clearly unwarranted invasion of personal privacy'" by "balanc[ing] the privacy concerns of the agency officials with the public's interest in disclosure." *Seife*, 298 F. Supp. 3d at 624 (quoting 5 U.S.C. § 552(b)(6)). To be protected, the individual's privacy interest must only be more than *de minimis*. *See Long*, 692 F.3d at 190 ("[T]he bar is low: 'FOIA requires only a measurable interest in privacy to trigger the application of the disclosure balancing tests.'" (quoting *Fed. Lab. Rels. Auth. v. U.S. Dep't of Veterans Affs.*, 958 F.2d 503, 510 (2d Cir. 1992)). "An individual's privacy concerns "encompass[ ] all interests involving 'the individual's control of information concerning his or her person.'" *Wood*, 432 F.3d at 88 (quoting *Hopkins*, 929 F.2d at 88). Substantial privacy interests cognizable under FOIA "includes such items as a person's name, address, place of birth, employment history, and telephone number." *Adelante Ala. Worker Ctr. v. U.S. Dep't of Homeland Sec.*, 376 F. Supp. 3d 345, 366 (S.D.N.Y. 2019) (quoting *Lewis v. U.S. Dep't of Justice*, 867 F. Supp. 2d 1, 17 (D.D.C. 2011)).

If a privacy interest is found, it "must be weighed against the public interest that would be advanced by disclosure." *Long*, 692 F.3d at 190. The "only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of FOIA, which is contribut[ing] significantly to public understanding of the operations or activities of the government." *U.S. Dep't of Defense v. Fed. Lab. Rels. Auth.*, 510 U.S. 487, 495 (1994) (quoting *U.S. Dep't of Just. v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989) (quotation marks omitted)). If the public interest is negligible, "something, even a modest privacy interest, outweighs nothing every time." *Nat'l Ass'n of Retired Fed'l Emps. v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989).

The agencies withheld the names of low-level employees of the responding agencies and of other agencies, and third parties, as well as phone numbers, email addresses, or other contact information. (*See* ICE *Vaughn* Index; Pineiro Decl. ¶¶ 64-73; DHS *Vaughn* Index; Pavlik-Keenan Decl. ¶ 16; State *Vaughn* Index; Weetman Decl. ¶¶ 29-36.) This information falls within the core of Exemption 6, and Plaintiffs cannot show any countervailing public interest in their disclosure. Accordingly, Defendants properly withheld information pursuant to Exemption 6.

V. ICE and State Properly Withheld Information Protected by FOIA Exemption 7

ICE and State also withheld certain information protected by Exemption 6 under FOIA Exemption 7(C), and ICE withheld certain additional information under Exemption 7(E). FOIA Exemption 7 exempts from disclosure certain "records or information compiled for law enforcement purposes." Accordingly, "[a] threshold requirement for the application of Exemption 7(E)," or Exemption 7(C), "is that the documents must be 'compiled for law enforcement purposes.'" *Bishop v. U.S. Dep't of Homeland Sec.*, 45 F. Supp. 3d 380, 386 (S.D.N.Y. 2014).

Here that threshold requirement is met. As explained in the Pineiro Declaration, DHS and ICE are "charged with the administration and enforcement of laws relating to the immigration and

naturalization of aliens." (Pineiro Decl. ¶ 62 (citing 8 U.S.C. § 1103).) As another Court in this District recently noted,

> ICE acts pursuant to the Immigration and Nationality Act to administer and enforce the immigration laws and naturalization of aliens. Further, ERO oversees programs and operations to identify removable individuals, detain them when necessary, and remove them from the United States, while HSI investigates domestic and international activities that arise from the illegal movement and peoples and goods into, within, and out of the United States. These agencies are clearly law enforcement agencies within the meaning of Exemption 7(E) and 7(F) under the broad definition of "law enforcement" used at the threshold inquiry.

Gonzalez, 475 F. Supp. 3d at 350 (internal citations omitted) (citing *Brennan Ctr. for Just. at N.Y. Univ. Sch. of L. v. Dep't of Homeland Sec.*, 331 F. Supp. 3d 74, 97-98 (S.D.N.Y. 2018) (collecting cases discussing broad application of "law enforcement" at threshold inquiry)).

A. ICE and State Properly Withheld Information Protected by FOIA Exemption 7(C)

The documents that ICE and State withheld under FOIA Exemption 6 were also withheld under FOIA Exemption 7(C). *See generally* ICE *Vaughn* Index; State *Vaughn* Index at A-00000520244. Exemption 7(C) permits the withholding of privacy information compiled for law enforcement purposes, the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Exemption 7(C) is the law enforcement counterpart to Exemption 6. *See Seized Prop. Recovery, Corp. v. U.S. Customs & Border Prot.*, 502 F. Supp. 2d 50, 56 (D.D.C. 2007). Exemption 7(C) protects records or information compiled for law enforcement purposes and "is more protective of privacy" than Exemption 6. *Associated Press v. U.S. Dep't of Justice*, No. 06 Civ. 1758 (LAP), 2007 WL 737476 at *4 (S.D.N.Y. Mar. 7, 2007) (L.P.). Exemption 7(C) requires a court to "balance the public interest in disclosure against the [privacy] interest Congress intended the Exemption to protect." *Associated Press v. U.S. Dep't of Defense*, 554 F.3d 274, 284 (2d Cir. 2009) (quoting *Reporters Comm.*, 489 U.S. at 776). "It is well established that identifying information such as names,

addresses, and other personal information falls within the ambit of privacy concerns under FOIA." *Id.* at 285.

The information compiled by ICE that was withheld under Exemption 6, *see supra*, is therefore also subject to withholding under Exemption 7(C) because it was compiled for law enforcement purposes. Similarly, the names of law enforcement officers, withheld by State under both Exemptions 6 and 7(C), were properly withheld.

B. ICE Properly Withheld Information Protected by FOIA Exemption 7(E)

ICE withheld in full intelligence reports (*see* ICE *Vaughn* Index at 131-254, 387-510) and redacted portions of email discussions relating to scheduling and logistical arrangements of removal flights (*see id.* at 1007-1031) and discussions with a foreign law enforcement agency (*see id.* at 1161-1167) pursuant to Exemption 7(E).

Exemption 7(E) protects 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). Once the threshold showing of a "law enforcement purpose" is met, *see supra*, "Exemption 7(E) protects from disclosure 'either (1) techniques and procedures for law enforcement investigations, or (2) guidelines for law enforcement investigations if disclosure of such guidelines could reasonably be expected to risk circumvention of the law.'" *Bishop*, 45 F. Supp. 3d at 387 (quoting *Ahmed v. U.S. Citizenship & Immigration Servs.*, 11-cv-6230 (CBA), 2013 WL 27697, at *4 (E.D.N.Y. Jan. 2, 2013)).

Here, the withheld information qualifies for withholding under the first prong of Exemption 7(E). The fully withheld record consists of an intelligence report that "contains detailed information on how the intelligence data was collected and techniques and procedures that were used in collecting such data, including various law enforcement databases and coordination with other intelligence communities." (ICE *Vaughn* Index at 131-254, 387-510; *see also* Pineiro Decl. ¶ 79.)

The withheld information contains detailed information on how ICE carries out removal operations as well as how ICE gathers intelligence, assesses threats, and combats countersurveillance operations. (*See* Pineiro Decl. ¶¶ 76-78.) One redacted email chain contains sensitive discussions about logistical arrangements for removal flights. (*See* ICE *Vaughn* Index at 1007-1031.) This information constitutes law enforcement techniques or procedures because "[m]uch of the information pertaining to charter flight itineraries, scheduling of locations, and other details are repeated with future flights . . . ." (Pineiro Decl. ¶ 77.) The final redacted email chain redacts a portion of the discussion regarding negotiations and discussions between ICE Enforcement and Removal Operations (ERO) and the Canadian government relating to procedural issues surrounding the release or deportation of a particular Cameroonian migrant. (*See* ICE *Vaughn* Index at 1161-1167.) In addition to obvious sensitivities around disclosure of intergovernmental discussions, this information constitutes law enforcement techniques or procedures relating to ICE's removal operations when the interests of multiple governments are involved.

Finally, while the first prong of Exemption 7(E) contains no requirement of a showing of risk of circumvention of the law, *see Allard K. Lowenstein Int'l Hum. Rts. Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 681-82 (2d Cir. 2010), the Pineiro Declaration further identifies the

harm from disclosure of ICE's removal and intelligence-gathering techniques and procedures. (*See* Pineiro Decl. ¶¶ 77-80.)

Accordingly, ICE has properly withheld information under FOIA Exemption 7(E).

VI. Defendants Properly Segregated Releasable Portions of the Redacted Records

FOIA 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). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). "[T]he law is clear that the reasonable segregation requirement of FOIA does not require [an agency] to commit significant time and resources to a task that would yield a product with little, if any, informational value." *Amnesty Int'l USA v. Cent. Intel. Agency*, 728 F. Supp. 2d 479, 529 (S.D.N.Y. 2010) (quotation marks and citation omitted). If "factual materials are 'inextricably intertwined' with policy making recommendations so that their disclosure would compromise the confidentiality of deliberative information that is entitled to protection under Exemption 5, the factual materials themselves fall within the exemption." *Lead Indus. Ass'n, Inc. v. Occupational Safety & Health Adm.*, 610 F.2d 70, 85 (2d Cir. 1979) (internal quotation and citation omitted). "[T]he legitimacy of withholding does not turn on whether the material is purely factual in nature or whether it is already in the public domain, but rather on whether the selection or organization of facts is part of an agency's deliberative process." *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011).

Here, the agencies reasonably segregated factual material in their responses by carefully reviewing all responsive documents and segregating all exempt from non-exempt information where reasonably possible. For all challenged records, the agencies conducted a line-by-line review and determined that there is no additional, meaningful non-exempt information that could

be reasonably segregated and released without disclosing information that is warranted protection under the law. (*See* Pineiro Decl. ¶¶ 80-82; Pavlik-Keenan Decl. ¶ 16; Weetman Decl. ¶ 38.) Accordingly, the Court should find that all reasonably segregable portions of the responsive records have been provided to Plaintiffs.

CONCLUSION

For the reasons stated herein, the Government's motion for summary judgment should be granted.

Dated: New York, New York
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