UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADELANTE ALABAMA WORKER CENTER, et al., Plaintiffs, v. DEPARTMENT OF HOMELAND SECURITY, and OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES, Defendants.	No. 17 Civ. 9557 (GHW)

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

INTRODUCTION

Following the filing of plaintiffs' Cross-Motion for Summary Judgment, defendants Department of Homeland Security (DHS) and the Office for Civil Rights and Civil Liberties (CRCL) (together, the agencies) made a supplemental release of records. As a result, the agencies claim "[m]ost of this challenge is mooted." Mem. of Law in Further Support of Defs. Mot. for Summ. J. 6 (Doc. 48) (Defs. Reply Br.). Although the agencies have disclosed a few additional lines of non-exempt information, they continue to withhold the majority of responsive information addressed in plaintiffs' opening brief, which plaintiffs contend is non-exempt and must be disclosed. As to this information, the agencies' arguments move them no closer to carrying their burden of justifying their withholdings.

ARGUMENT

I. The Agencies Have Not Justified Their Reliance on Exemption 5.

A. The agencies continue to withhold information that has been previously, specifically disclosed.

The agencies agree that information which has been previously, specifically disclosed is not protected by the deliberative process privilege. Defs. Reply Br. 6–7. The agencies' supplemental release consisted mostly of three recommendations in the 2015 Super Recommendations Memo from CRCL to ICE which had previously and specifically been disclosed in CRCL's Fiscal Year 2015 Report to Congress: (1) ICE should develop a comprehensive plan to address the deficiencies identified at the Etowah County Detention Center (ECDC), (2) ICE should address the issues raised in the complaints opened since 2012, and (3) ICE should transition ECDC to the 2011 Performance Based National Detention Standards (PBNDS). Suppl. Release 5 (Doc. 49-1); *see* Vosburgh Decl. Ex. 1 at 42 (Doc. 44-1) (CRCL FY 2015 Report to Congress).

Notably absent in the supplemental release is any information concerning the recommendation, noted in CRCL's report to Congress, that ICE "cease use of the facility." Vosburgh Decl. Ex. 1 at 42. The agencies continue to claim that no such recommendation is in the 2015 Super Recommendations Memo. Defs. Reply Br. 9. Incredibly, the agencies support their position by arguing that "Plaintiffs' papers provide no evidence to the contrary, *other than the statement in the CRCL Report to Congress*." *Id.* (emphasis added). An official agency report to Congress is precisely the type of "contrary evidence in the record" that "raises questions regarding the presumption of good faith" typically accorded to agency declarations. *Seife v. U.S. Dep't of State*, 298 F. Supp. 3d 592, 607, 627 (S.D.N.Y. 2018). Accordingly, the Court should conduct an *in camera* review to determine whether the records contain this information and, if so, order its disclosure.

B. The agencies have not provided any support for their continued withholding of information in the standards and methodology sections of the experts' reports.

In the supplemental release, the agencies disclosed information in the standards and methodology sections of the experts' reports concerning the transition of ECDC to the 2011 PBNDS, recognizing this transition was previously disclosed. *See* Second Holzer Decl. ¶ 6 (Doc. 49); Suppl. Release at 24, 46, 47, 91. However, the agencies continue to withhold other information regarding the standards and methodologies applied by the experts. *See* Suppl. Release at 24, 46, 47, 91. Thus, plaintiffs' challenges to these withholdings are not "largely moot." Defs. Reply Br. 9.

The agencies do not argue that the standards or methodologies are themselves subject to the deliberative process privilege but instead contend that "[a]ny additional information that remains redacted concerns a separate issue concerning standards then under consideration" such that "it does not 'match' the information in the CRCL Report to Congress, and thus need not be

disclosed." Defs. Reply Br. 9–10 (quoting *N.Y. Times Co. v. DOJ*, 756 F.3d 100, 120 (2d Cir. 2014)). But plaintiffs do not argue that the standards and methodology sections of the experts' reports must be disclosed because they were previously disclosed to Congress; rather, plaintiffs argue that the deliberative process privilege does not apply to this information. *See* Mem. of Law in Supp. of Pls. Cross-Mot. for Summ. J. 5–6, 8 (Doc. 42) (Pls. Br.). Moreover, as plaintiffs previously explained, the agencies' cursory justification that the remaining withheld information in these sections "concerns a separate issue concerning standards then under consideration"—without any explanation of what this issue is whatsoever—is insufficient to meet their burden and "afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Seife*, 298 F. Supp. 3d at 606. Accordingly, the agencies must disclose this information.

C. The experts' factual findings and observations are not protected from disclosure by the deliberative process privilege.

As this Court and the Second Circuit have made clear, "[t]he deliberative process privilege 'does not … as a general matter, cover "purely factual" material.'" *Id.* at 614 (quoting *Hopkins v. HUD*, 929 F.2d 81, 85 (2d Cir. 1991)). The agencies concede that the experts' reports contain factual material. Defs. Reply. Br. 11. However, the agencies argue that this factual material is nevertheless exempt because it is interwoven with the experts' opinions and recommendations, Defs. Reply Br. 10–13, and because its disclosure would reveal the experts' "determinations of which facts were worthy of inclusion," *id.* at 13 (quoting *Color of Change v. DHS*, No. 16 Civ. 8215 (WHP), 2018 WL 3350327, at *5 (S.D.N.Y. July 9, 2018)). Neither argument is persuasive.

The agencies' first argument—that the factual findings and observations in the experts' reports contain "the experts' ultimate professional opinions and recommendations," Defs. Reply Br. 11—is inconsistent with the reports themselves. As previously explained, *see* Pls. Br. 9–10,

the experts divided their reports into fairly specific subsections, with "Findings" or factual backgrounds as separate and distinct portions of the reports from the "Recommendations" and "Conclusion" sections. Unless these subdivisions are meaningless, the experts' "subjective application of a professional standard," Defs. Reply Br. 11, would be found in their "Analysis," "Recommendations," and/or "Conclusion" sections, not the "Findings" sections. That the "Findings" sections of the experts' reports were described as determining whether alleged conduct occurred as a matter of fact, Pls. Br. 11 (citing Initial Release 25), further bolsters this conclusion. Additionally, information already disclosed demonstrates that the agencies have been overzealous in withholding purely factual material; plaintiffs previously provided five specific examples of clearly factual material being withheld, *see* Pls. Br. 10, and the agencies have no explanation for these examples. The agencies also failed to respond to or provide any additional justification for the withholdings in sections of the experts' reports identified as "Observations." Pls. Br. 11–12. Accordingly, the agencies' argument that the experts' factual findings and observations reflect properly-withheld "personal opinions of the writer," Defs. Reply Br. 12 (quoting *Brennan Ctr. for Justice v. DOJ*, 697 F.3d 184, 194 (2d Cir. 2012)), rather than purely factual material is "controverted by … contrary evidence in the record" and must be rejected, *Seife*, 298 F. Supp. 3d at 607.

The agencies' second argument—that disclosure of factual findings and observations in the experts' reports would reveal which facts the experts believed were "worthy of inclusion"—is also unavailing. The agencies insist that because "the experts 'selected facts for inclusion' in their reports from a 'larger group of facts they considered' during their review of conditions and policies," all of this factual material is deliberative. Defs. Reply Br. 11 n.4 (quoting Holzer Decl. ¶ 28 (Doc. 40)). The Court should reject this argument for three reasons. First, as plaintiffs have

previously noted, *every* government report involves *some* judgment as to what facts to include. Pls. Br. 13. The agencies overstate plaintiffs' reliance on *Playboy Enterprises, Inc. v. DOJ*, 677 F.2d 931 (D.C. Cir. 1982). Plaintiffs simply note that the D.C. Circuit correctly identified the problem with recognizing a stand-alone "deliberative process" of simple fact selection: "Anyone making a report must of necessity select the facts to be mentioned in it; but a report does not become part of the deliberative process merely because it contains only those facts which the person making the report thinks material." *Id.* at 935. Accepting the agencies' argument that some fact selection alone is enough to render factual material exempt under the deliberative process privilege "would result in the protection of much (if not most) factual material … contrary to *Mink*'s clear approval of the factual/deliberative distinction." *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1229 (10th Cir. 2007) (citing *EPA v. Mink*, 410 U.S. 73, 89 (1973)). Given that FOIA's exemptions "must be narrowly construed," *Seife*, 298 F. Supp. 3d at 605 (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011)), the Court should reject the agencies' attempt to expand exemption 5's coverage to virtually all factual material.

Second, the cases the agencies principally rely upon—*Lead Industries Ass'n v. OSHA* and *Color of Change*—are not analogous to this case. In *Lead Industries*, the Second Circuit concluded that "[d]isclosing factual segments" of reports that summarized facts in a "massive rule-making record" would "reveal the deliberative process of [factual] summarization." 610 F.2d 70, 85 (2d Cir. 1979). Importantly, the underlying factual information contained in those summaries was already publicly available in the "massive rule-making record"; thus, disclosure of the factual summaries would *only* reveal "the facts considered significant by the decisionmaker and those assisting her." *Id.* Similarly, in *Color of Change*, the court held that certain factual portions of a DHS analyst's assessments were properly withheld because they involved "an exercise of

judgment in extracting pertinent material from a vast number of documents." 2018 WL 3350327, at *5 (quoting *Mapother v. DOJ*, 3 F.3d 1533, 1539 (D.C. Cir. 1993)).[1] As there is no claim by the agencies that the factual findings and observations in the experts' reports resulted from any similar process, disclosure here would not reveal any deliberative process of factual summarization.

The additional cases the agencies rely on are also readily distinguishable. In *Bishop v. DHS*, 45 F. Supp. 3d 380, 384, 392–94 (S.D.N.Y. 2014), the court addressed whether exemption 7(E) protected factual information contained within records from Customs and Border Protection's (CBP) Automated Targeting System used for identifying high-risk travelers. Exemption 7(E) relates to certain "records or information compiled for law enforcement purposes," 5 U.S.C. § 552(b)(7)(E), and protects interests wholly distinct from the deliberative process privilege. In that context, the *Bishop* court held that revealing the factual information sought would disclose the factors considered by CBP in identifying high-risk travelers and that "such disclosure could reasonably be expected to risk circumvention of law," and was, thus, protected by exemption 7(E). 45 F. Supp. 3d at 394. In *Shinnecock Indian Nation v. Kempthorne*, 652 F. Supp. 2d 345, 351–53, 370–73 (E.D.N.Y. 2009), the court held the withholding of factual material contained in an earlier draft of a memorandum was proper where all of the factual material contained in a subsequent draft was disclosed, such that disclosing the material from the prior draft would reveal the "evaluative process" as it would make clear which facts were removed between drafts. That issue is not present in this case, which solely concerns factual information in a final draft. Lastly, in *Hamilton Securities Group Inc. v. HUD*, 106 F. Supp. 2d 23, 25, 32–33 (D.D.C. 2000), the court

[1] *Mapother* itself, unlike this case, also concerned "factual summaries" by staff members who first had to "cull the relevant documents[] [and] extract pertinent facts," which involved "comb[ing] various archives inside and outside of the United States and examin[ing] papers submitted by" the person who was the subject of the report. 3 F.3d at 1536, 1538–39.

determined that factual material in an early draft of an audit report, which was never finalized and which the agency declarant stated was inconsistent and conflicted with other portions of the audit, was protected from disclosure. Here, the experts' reports are not early, unreviewed drafts, and the agencies have made no claim that the withheld factual findings and observations were untrustworthy or otherwise rejected by the agencies.[2]

Third, the detainees' allegations already reveal the "key" facts the experts were "focusing on." Pls. Br. 12. The agencies assert that plaintiffs' argument on this point "is founded only in speculation," Defs. Reply Br. 13, but both the organization of the reports, Pls. Br. 9–10, and the experts' own descriptions of their "Findings" sections, *id.* 10–11, support plaintiffs' position. *See also, e.g.*, Suppl. Release 25 ("In the context of this report, a finding of 'substantiated' means an allegation that was investigated and determined to have occurred; a finding of 'not substantiated' means an allegation that was investigated and the investigation produced insufficient evidence to make a final determination as to whether or not the event occurred; and a finding of 'unfounded' means an allegation that was investigated and determined not to have occurred."). The agencies' explanation that the experts' role was more than "conduct[ing] an investigation into specific complaints made by individual detainees" and included "conduct[ing] a broad inspection of the facility and mak[ing] recommendations concerning policies and conditions," Defs. Reply Br. 13–14, is simply not responsive. While the experts' properly exempt policy recommendations may be broader than recommendations specific to the treatment of particular detainees with open

[2] To the extent *Hamilton Securities Group*'s relatively brief discussion of this issue stands for the proposition that simple fact selection renders factual material part of the deliberative process, it is wrongly decided for the reasons discussed above.

complaints, the experts' factual findings and observations—the basis of plaintiffs' challenge—were clearly "focused on" the specific allegations already revealed in the reports.[3]

Finally, plaintiffs note the courts' determinations in several of the agencies' cases followed an *in camera* review of the records. *See Color of Change*, 2018 WL 3350327 at *2, 5; *Bishop*, 45 F. Supp. 3d at 385, 393; *Shinnecock Indian Nation*, 652 F. Supp. 2d at 351, 372–73; *see also Hopkins*, 929 F.2d at 85–86 (ordering district court to conduct *in camera* review after determining inspector reports were deliberative). Because the agencies have failed to meet their burden of justifying their withholdings, the Court should grant summary judgment to plaintiffs and, thus, no *in camera* review is needed. However, to the extent the Court concludes the briefing does not resolve the application of exemption 5 to these materials, the agencies' proffered case law firmly supports the Court's utilization of *in camera* review as an efficient method of resolving the dispute.

II. The Agencies Have Not Justified Their Reliance on Exemption 6.

The agencies continue to rely on vague and speculative assertions of harassment to support withholding the experts' names and professional backgrounds under exemption 6. Moreover, in assessing the public interest at stake, the agencies continue to fail to distinguish between subject-matter experts hired through a competitive award process and low-level government employees. Because any *de minimis* privacy interest in the experts' names and professional backgrounds is outweighed by the substantial public interest in disclosure, this information must be disclosed.

[3] The agencies complain that specific examples identified by plaintiffs as illustrating this principle are "unhelpful," and yet provide no response to those specific examples.

A. The agencies have not established that the experts have any more than a *de minimis* privacy interest in their names and professional backgrounds.

While the agencies rely on the general principle that "an individual has a *general* privacy interest in preventing dissemination of his or her name and home address," Defs. Reply Br. 17 (emphasis added) (quoting *Assoc. Press v. DOD*, 554 F.3d 274, 292 (2d Cir. 2009)),[4] they fail to acknowledge that this Court and the Second Circuit have explicitly held that disclosure of "[n]ames and other identifying information do[es] not always present a significant threat to an individual's privacy interest," *Seife*, 298 F. Supp. 3d at 625 (quoting *Wood v. FBI*, 432 F.3d 78, 88 (2d Cir. 2005)). The *only* basis the agencies have put forward as supporting a greater than *de minimis* privacy interest is "the risk of potential harassment," Defs. Reply Br. 18, but again the agencies ignore that, for such an argument to have any weight, the government "must show that the threat to employees' privacy is real rather than speculative," *Seife*, 298 F. Supp. 3d at 625.

Contrary to the government's suggestion, plaintiffs do not argue that the government must show "a *certainty* that such harassment would occur," Defs. Reply Br. 19 n. 8; plaintiffs simply contend that the agencies must do more than rely on "conclusory" and "vague" statements to carry their burden, *Seife*, 298 F. Supp. 3d at 607 (quoting *Quinon v. FBI*, 86 F.3d 1222, 1227 (D.C. Cir. 1996)), which they have failed to do here. The agencies submit no more than rank speculation that disclosure of the experts' names and professional backgrounds would result in "possible harassment and unwanted contact from ICE staff, ECDC staff, or detainees who may have taken exception with how the on-site investigation was conducted or with the experts' recommendations," and that such "potential harassment or unwanted contact could, in turn, foreseeably make it difficult for CRCL to hire contractors to participate in on-site investigations

[4] Plaintiffs note that at no point in this lawsuit have they sought—nor is it apparent that the records even contain—the subject-matter experts' home addresses.

in the future." Holzer Decl. ¶ 36. The agencies have provided no evidence to support this hypothesis, such as any examples of past harassment of experts following the issuance of their reports or of potential experts requiring confidentiality, or even any evidence that ICE Staff, ECDC staff, or detainees that objected to the experts' reports exist.

The agencies put forward two arguments as to why their conclusory statement is sufficient to establish a privacy interest, but neither is persuasive. First, the agencies attempt to analogize the role of the experts to that federal employees whose "occupation alone could subject the employee to harassment or attack." *Long v. OPM*, 692 F.3d 185, 192 (2d Cir. 2012). But unlike in *Long*, the agencies have offered no evidence that these experts work in a "sensitive occupation" that makes them particularly "vulnerable to harassment or attack." *Id.* Nor have the agencies explained how the subject-matter experts are similarly situated to "employees who worked on the regulatory approval of a controversial drug," *id.* (citing *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 153 (D.C. Cir. 2006)),[5] or "law enforcement agents who participated in an investigation," *id.* (citing *Wood*, 432 F.3d at 86–89 and *Nix v. United States*, 572 F.2d 998, 1006 (4th Cir. 1978)).

Instead, the agencies rely on the fact that because plaintiffs have released to the public other information concerning ECDC that was obtained through FOIA, these records will be released as well and result in "harassment" from the media. *See* Defs. Reply Br. 18–19. As an initial matter, not even the agencies' own declarant identified contact from the media as a source of the experts' privacy interest, *see* Holzer Decl. ¶ 36, so the Court need not credit this argument. But even so, the agencies' argument rests on a misunderstanding of a material difference between the low-level government employees typically at issue in exemption 6 cases and the subject-matter

[5] Indeed, the FDA in *Judicial Watch* submitted evidence of "websites that encourage readers to look for [the drug's] manufacturing locations and then kill or kidnap employees once found," 449 F.3d at 153, a far cry from what the agencies have provided here.

experts here: The experts want to highlight, not hide, the fact that they were selected by DHS to do this work through the award of a competitive consulting contract. Indeed, subsequent to the filing of plaintiffs' previous brief, plaintiffs discovered that *all* of the subject-matter experts publicly disclose their work for DHS. *See* Llewellyn Decl. Ex. 1 at 7 (expert's CV listing "Expert Consultant, Department of Homeland Security, Office for Civil Rights and Civil Liberties," and describing work as "conduct[ing] detainee civil rights and conditions of confinement investigations including sexual assaults in jails and prepare expert reports of findings and recommendations"); Ex. 2 at 5 (expert's CV listing "Correctional Health Care Consultant," and including as past work "Consultant to the U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties. Providing investigative support and expert medical services pursuant to complaints regarding care received by immigration detainees in the custody of U.S. Immigration and Customs Enforcement"); Ex. 3 at 2 (expert report to the Nevada state government listing as qualification "consultations to the U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties regarding civil rights and mental health services for inmates and patients in detention facilities"). Thus, whatever increased media "embarrassment and harassment in the conduct of their official duties and personal affairs" low-level government employees would be subject to from the disclosure of their identities, *Seife*, 298 F. Supp. 3d at 625 (quoting *Halpern v. FBI*, 181 F.3d 279, 296–97 (2d Cir. 1999)), the same cannot be said of the subject-matter experts here who publicly disclose this work, including in press releases[6] and media interviews.[7]

---

[6] *See* University of Massachusetts Medical School, *Kenneth Appelbaum to Receive National Commission on Correctional Health Care Award*, (Oct. 20, 2016), https://www.umassmed.edu/news/news-archives/2016/10/kenneth-appelbaum-to-receive-national-commission-on-correctional-health-care-award/ (expert's work includes "consult[ing] … with the U.S. Department of Homeland Security on mental health services in immigrant detention facilities").

[7] Kate Wheeling, *Poor Care Played a Role in the Deaths of Immigrants in ICE Custody*, Pacific

Finally, the agencies misconstrue plaintiffs' reliance on the experts' voluntary disclosure of the work at issue in this case. Plaintiffs do not argue that the privacy interest is diminished either simply because the experts "*might* want to voluntarily disclose" this information publicly, Defs. Reply Br. 21 (emphasis added) (quoting *Assoc. Press v. DOD*, 554 F.3d at 287), or as a result of plaintiffs' ability "to figure out the individuals' identities through other means," *id.* (quoting *Judicial Watch, Inc. v. FBI*, No. 00-745 (TFH), 2001 WL 35612541, at *6 (D.D.C. Apr. 20, 2001)). Rather, this evidence undercuts the sole basis the agencies have put forward for withholding this information: that disclosure would cause the experts to face unwanted harassment. If disclosure would cause unwanted harassment that would "make it difficult for CRCL to hire contractors to participate in on-site investigations in the future," Holzer Decl. ¶ 36, then why would *all* of the subject-matter experts both publicize this work and continue working for the agencies for several years? The only answer can be that the premise of the agencies' position is flawed.

Because the experts have no more than a *de minimis* privacy interest in their identities and professional backgrounds, the information must be disclosed. *Seife*, 298 F. Supp. 3d at 625.

B. There is a substantial public interest in disclosure of the experts' names and professional backgrounds.

The agencies argue that plaintiffs have not identified a "cognizable public interest" in the disclosure of the experts' identities and professional backgrounds and that such information would not "shed light on *government* operations." Defs. Reply Br. 21. But the agencies' argument still

---

Standard (June 20, 2018), https://psmag.com/social-justice/poor-care-played-a-role-in-the-deaths-of-immigrants-in-ice-custody (explaining expert had "previously investigated health care in ICE detention facilities for the Department of Homeland Security"); Marisa Lagos, *S.F.'s Probation Chief Has Unlocked A New Era for Offenders*, SF Gate (Dec. 30, 2014), https://www.sfgate.com/politics/article/S-F-s-probation-chief-has-unlocked-a-new-era-5985998.php (expert also "juggl[es] work at the Department of Homeland Security, where she conducts civil rights investigations into allegations of mistreatment of immigrant detainees").

rests on the mistaken assumption that these subject-matter experts here are identically situated to low-level government employees. *See id.* (citing *Long*, 692 F.3d at 193; *Ferrigno v. DHS*, No. 09 Civ. 5878 (RJS), 2011 WL 1345168, at *9 (S.D.N.Y. Mar. 29, 2011)). The experts' roles are materially distinct from those of low-level government employees because the experts' utilization requires expending additional agency resources through the award of competitive contracts, Pls. Br. 19–20 (citing Holzer Decl. ¶ 17), rather than merely assigning an employee to a particular task. Disclosure of this information will show whether the agencies are relying on the recommendations of competent, qualified, and unbiased experts, and will shed light on the agencies' expenditure of public resources, Shah Decl. ¶¶ 6–7 (Doc. 45), both of which "serve the core purpose of the FOIA, which is contributing significantly to public understanding *of the operations or activities of the government*," *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994).

In response, the agencies first claim that the already disclosed information is sufficient "to assess [the experts'] relevant competencies." Defs. Reply Br. 22. But for two of the four experts, the only information already provided is their educational degrees or professional certifications, Defs. Reply Br. 22 n.9, and simply possessing the necessary educational background or licensing does little to establish that these persons are competent and qualified to be hired as "subject-matter experts" to provide analysis and recommendations that form the basis of CRCL's policy recommendations, Holzer Decl. ¶¶ 17, 18, 23, 24. For the other two experts, while the additional released information on their backgrounds provides some information about experience, the lack of details concerning the positions they held in their field and their past background makes a fair assessment of their qualifications difficult.

Moreover, contrary to the agencies' second argument, disclosure of the identities and professional backgrounds of the experts is necessary to evaluate whether the experts are unbiased

or simply third parties who will rubber stamp the agencies' policy preferences. Shah Decl. ¶¶ 6–7. Even if the experts possess the requisite qualifications, training, and experience, the details of their past experiences will reveal whether the public can trust the soundness of CRCL's reliance on them to fulfill its oversight role. For example, if CRCL is hiring experts that predominantly consult for or testify on behalf of private prison companies, disclosure of that information would clearly shed light on CRCL's satisfaction of its statutory obligations to investigate civil rights and civil liberties abuses and to assist DHS in developing and implementing policies and procedures to ensure the protection of civil rights and civil liberties. *See* 6 U.S.C. § 345(a). This case is different from cases concerning government "misfeasance" or "misconduct." Defs. Reply Br. 23. Here, plaintiffs do not claim that there is any "theft of government property," *Conti v. DHS*, No. 12 Civ. 5827 (AT), 2014 WL 1274517, at *19 (S.D.N.Y. Mar. 24, 2014); or insufficient investigation of supervisor harassment, *Ferrigno*, 2011 WL 1345168, at *1, 8–9; or "negligent" performance of official duties, *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). In other words, plaintiffs do not claim the agencies took any unlawful action by hiring these experts, such that information about the experts is "necessary in order to confirm or refute" the action. *Conti*, 2014 WL 1274517, at *19 (quoting *Davis v. DOJ*, 968 F.2d 1276, 1282 (D.C. Cir. 1992)). Instead, disclosure of this information will shed light on the backgrounds CRCL found important and meaningful in choosing subject-matter experts, as well as the experience underlying the expert reports that form the basis of CRCL's recommendations.

Finally, the agencies continue to improperly rely on cases that discuss the limited public interest in disclosure of the identities of low-level government employees. Where the identities at issue are those of "low rank" employees "performing their jobs as ordered," it may be that disclosure of their names "would not reveal anything about … supposed bias." *Wood*, 432 F.3d at

88–89. But the experts at issue are not "low rank" government employees simply assigned to a particular investigation. Instead, the experts are chosen through the award of competitive contracts, requiring additional agency expenditures, to produce reports that form the backbone of CRCL's policy recommendations. Holzer Decl. ¶¶ 17, 18, 23, 24. Thus, there is a clear "link between the information sought … and the government activity at issue," *Seife*, 298 F. Supp. 3d at 628, as any bias of the subject-matter experts would certainly color the ultimate recommendations of CRCL and the development of DHS policy.

Accordingly, because a substantial public interest in disclosure outweighs any privacy interest in non-disclosure, the experts' names and professional backgrounds must be disclosed.

III. The Unlawful Withholdings Undermine the Agencies' Segregability Review.

The agencies contend that because they have engaged "in a substantial line-by-line review," they have satisfied their segregability obligation. Defs. Reply Br. 15–16. This assertion is only correct if the information the agencies consider to be exempt is, in fact, exempt. Upon conducting a supplemental review and agreeing with plaintiffs that certain prior disclosures were not exempt, the agencies conducted a supplemental segregability review and released the prior disclosures that were contained throughout the records, not just in the exact locations identified by plaintiffs. Second Holzer Decl. ¶¶ 4–6. Because the agencies have unlawfully withheld the categories of information discussed above, the agencies must conduct an additional, supplemental segregability review to disclose all instances of such information in the records, not just the most obvious.

CONCLUSION

For the above stated reasons and those in plaintiffs' opening memorandum, the Court should grant plaintiffs' motion for summary judgment and deny the agencies' motion.

Dated: August 17, 2018

Respectfully submitted

/s/ Patrick D. Llewellyn
Patrick D. Llewellyn*
Adam R. Pulver
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Jessica Vosburgh*
National Day Labor Organizing Network
Adelante Alabama Worker Center
2104 Chapel Hill Road
Birmingham, AL 35216
(205) 317-1481

*Admitted Pro Hac Vice

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on August 17, 2018, I filed the foregoing through the Court's CM/ECF system, which causes a copy to be served on counsel for the defendants below by ECF and electronic mail:

Samuel Dolinger
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
samuel.dolinger@usdoj.gov

/s/ Patrick D. Llewellyn
Patrick D. Llewellyn