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) ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' COMBINED CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs Adelante Alabama Worker Center, Detention Watch Network, Greater Birmingham Ministries, Immigrant Defense Project, and Southerners on New Ground seek summary judgment on their claim that defendants Department of Homeland Security (DHS) and the Office for Civil Rights and Civil Liberties (CRCL) (together, the agencies) improperly withheld information requested by plaintiffs under the Freedom of Information Act (FOIA). Although the agencies produced limited responsive records seventeen months after plaintiffs filed their FOIA request, they continue improperly to withhold four categories of responsive records: factual findings and observations, report standards and methodologies, the names of government contractors, and information that has previously been publicly disclosed. These withholdings are not justified under the law, and the agencies' supporting declaration is contradicted by information already disclosed and CRCL's earlier report to Congress. Accordingly, the Court should grant plaintiffs' motion for summary judgment, deny defendants' motion for summary judgment, and order the agencies to disclose the withheld information.

BACKGROUND

CRCL is the component within DHS responsible for reviewing and assessing civil rights and civil liberties abuses by DHS employees and officials; overseeing compliance with constitutional, statutory, regulatory, policy, and other requirements relating to civil rights and civil liberties of individuals affected by DHS programs and activities; and investigating possible abuses of civil rights and civil liberties, among other duties. 6 U.S.C. § 345(a). In fulfilling this role, CRCL conducts on-site investigations at Immigration and Customs Enforcement (ICE) and ICE-contracted immigration detention facilities to examine alleged violations of civil rights and civil liberties related to immigration detention. Holzer Decl. ¶ 16 (Doc. 40). Via a competitive award

process, CRCL contracts with experts in the areas of medical care, mental health care, correctional security and operations, use of force, and environmental health and safety to conduct reviews as part of these on-site investigations. *Id.* ¶ 17. Based on their reviews, these consulting subject-matter experts may issue reports reflecting their factual findings, observations, and recommendations. *See id.* ¶¶ 20(c)(i)–(iv), 25.

Each year, CRCL submits to Congress an annual report detailing allegations of abuses of civil rights and civil liberties by DHS employees and officials, as well as actions taken by DHS in response. 6 U.S.C. § 345(b). In its Fiscal Year 2015 Annual Report to Congress (2015 Report)—issued on June 10, 2016—CRCL described its actions in response to "numerous complaints" about a detention facility operated by ICE in Alabama, Vosburgh Decl. Ex. 1 at 42, which has subsequently been identified as the Etowah County Detention Center (ECDC), Holzer Decl. ¶ 20. The 2015 Report states that, in response to over fifty complaints received since 2012, CRCL sent a "super-recommendations memorandum" to ICE in May 2015 (2015 Super-Recommendations Memo), "formally notifying them of our long-standing and continuing concerns" regarding ECDC. Vosburgh Decl. Ex. 1 at 42. As described in the 2015 Report, the 2015 Super-Recommendations Memo discussed "the seriousness of problems found in previous investigations, the continued receipt of additional correspondence raising similar concerns, and CRCL's belief that … prior recommendations are likely not being fully implemented." Vosburgh Decl. Ex. 1 at 35–36, 42. According to the 2015 Report, the 2015 Super-Recommendations Memo also included recommendations that "ICE develop a comprehensive plan to address the deficiencies at [ECDC], address the issues raised in the complaints … and either transition [ECDC] to the 2011 Performance Based National Detention Standards or cease use of [ECDC]." Vosburgh Decl. Ex. 1

at 42; *see also id.* at 36 ("CRCL made significant and far-reaching recommendations to fix identified problems, including a request that ICE no longer use the facility to house detainees.").

On September 8, 2016, plaintiffs submitted a FOIA request to CRCL seeking the 2015 Super-Recommendations Memo. Vosburgh Decl. ¶ 1. After receiving no response, on October 20, 2016, plaintiffs submitted an administrative appeal of the constructive denial of their FOIA request. Vosburgh Decl. ¶ 3. On October 24, 2016, DHS responded to plaintiffs' FOIA request, stating that the agency had found five responsive pages but was withholding all in their entirety pursuant to FOIA exemption 5. Vosburgh Decl. ¶ 4. On November 10, 2016, plaintiffs submitted an administrative appeal challenging the withholding of responsive records under exemption 5. Vosburgh Decl. ¶ 5. On February 2, 2017, plaintiffs' first administrative appeal was dismissed as moot due to DHS's October 24, 2016 response. Vosburgh Decl. ¶ 6. On March 13, 2017, plaintiffs' second administrative appeal was granted to the extent that the FOIA request was remanded to DHS to provide "an adequate explanation" for its invocation of exemption 5. Vosburgh Decl. ¶ 7. On May 23, 2017, after being contacted by a representative of one of the requesters, the government official responsible for remanding the FOIA request to DHS sent a letter stating that she had been unable to determine the status of the remand and that DHS's "lack of action must be viewed as final, giving [plaintiffs] the right to pursue an appeal in the appropriate United States District Court. This decision is the final action of DHS concerning your initial FOIA request … and FOIA [a]ppeal …." Vosburgh Decl. ¶ 8.

After Plaintiffs initiated this lawsuit, defendants released 127 pages of responsive records containing significant redactions throughout. *See* Released Records (Doc. 40-2). Pursuant to an order of the Court, the parties filed a joint letter on April 18, 2018, explaining the parties'

respective positions on the withholdings and proposing a briefing schedule for summary judgment. Joint Letter (Doc. 36).

LEGAL STANDARD

Summary judgment is appropriate when "there is no 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 deciding a motion for summary judgment, the Court draws all reasonable inferences in the non-movant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). "Summary judgment is the procedural vehicle by which most FOIA actions are resolved." *Seife v. U.S. Dep't of State*, --- F. Supp. 3d ---, No. 1:16-cv-7140-GHW, 2018 WL 1517196, at *3 (S.D.N.Y. Mar. 26, 2018). Where, as here, an agency has withheld responsive information, the agency has the burden of proving that the withheld information comes within one of FOIA's nine statutory exemptions. *Id.*; 5 U.S.C. § 552(a)(4)(B). The agency may satisfy its burden by declarations so long as they are "sufficient to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Seife*, 2018 WL 1517196, at *4 (quoting *Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998)). Summary judgment based on declarations is appropriate if they "describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Id.* at *6 (quoting *Wilner v. NSA*, 592 F.3d 60, 73, (2d Cir. 2009)). This Court reviews the agency's claimed exemptions *de novo*. *Id.* at *5; 5 U.S.C. § 552(a)(4)(B).

ARGUMENT

"Congress intended FOIA to permit access to official information long shielded unnecessarily from public view." *Seife*, 2018 WL 1517196, at *4 (quoting *Milner v. Dep't of Navy*,

562 U.S. 562, 565 (2011)). "FOIA thus mandates that an agency disclose records on request, unless they fall within one of nine exemptions." *Id.* (quoting *Milner*, 562 U.S. at 565). FOIA's exemptions are exclusive and "must be narrowly construed." *Id.* (quoting *Milner*, 562 U.S. at 565).

Four types of withheld information remain at issue in this case: (1) recommendations previously publicly disclosed in CRCL's 2015 Report to Congress, (2) standards and/or methodologies utilized by the consulting subject-matter experts, (3) the experts' factual findings and observations, and (4) the experts' names and professional backgrounds. As to the first three categories of information, the agencies offer conclusory and vague justifications that are insufficient to justify withholding under exemption 5. As to the last category, the experts have, at most, a *de minimis* privacy interest in their identities and professional backgrounds that is outweighed by the public interest in disclosure of this information; exemption 6 thus does not justify withholding here.

I. The Agencies Have Not Shown that Exemption 5 Justifies Withholding Previously Disclosed Information, the Consulting Subject-Matter Experts' Factual Findings and Observations, or Their Standards and Methodologies.

Under exemption 5, an agency may withhold "inter-agency or intra-agency memorandums or letters that would not be available to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 incorporates the deliberative process privilege, which covers records that are "(1) predecisional, *i.e.*, prepared in order to assist an agency decisionmaker in arriving at his decision, and (2) deliberative, *i.e.*, actually related to the process by which policies are formulated." *Seife*, 2018 WL 1517196, at *12 (quoting *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 356 (2d Cir. 2005)). "The deliberative process privilege 'does not, however, as a general matter, cover "purely factual" material.'" *Id.* (quoting *Hopkins v. HUD*, 929 F.2d 81, 85 (2d Cir. 1991)).

The agencies rely solely on the deliberative process privilege to justify three of the four categories of withheld information. In support of its invocation of the privilege, the agencies offer only conclusory and vague justifications. Moreover, the agencies' position is contradicted by the record, including the information it has already produced. Accordingly, this information cannot be withheld under exemption 5.

A. The agencies cannot withhold information that they have previously, specifically disclosed.

"Voluntary disclosures of all or part of a document may waive an otherwise valid FOIA exemption." *N.Y. Times Co. v. DOJ*, 756 F.3d 100, 113 (2d Cir. 2014). In particular, the "deliberative [process] privilege, in the context of Exemption 5, may be lost by disclosure." *Id.* Where a requester seeks disclosure of withheld information previously disclosed, the information must be disclosed to the requester "if it (1) 'is as specific as the information previously released,' (2) 'matches the information previously disclosed,' and (3) was 'made public through an official and documented disclosure.'" *N.Y. Times v. FBI*, 297 F. Supp. 3d 435, 449 (S.D.N.Y. 2017) (quoting *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009)).[1] The "matching" aspect of this test does not "require absolute identity" between the previous disclosure and the information sought. *N.Y. Times v. DOJ*, 756 F.3d at 120.

Here, there can be no question that all three parts of the test are satisfied as CRCL made the disclosure in its official report to Congress and described the contents of the 2015 Super Recommendations Memo. In CRCL's Fiscal Year 2015 Report to Congress, the agency stated:

> [I]n May 2015 CRCL sent a "super-recommendations" memorandum to ICE formally notifying them of our long-standing and continuing concerns [about

[1] The Second Circuit has not firmly established whether this three-part test applies to the previous-disclosure waiver analysis for all FOIA exemptions or only for exemption 1. *See N.Y. Times v. DOJ*, 756 F.3d at 120 (describing as "[t]he three-part test for 'official' disclosure, relevant to Exemption 1").

> ECDC]. This memorandum also recommended that *ICE develop a comprehensive plan to address the deficiencies at the facility, address the issues raised in complaints since the 2012 site visit, and either transition the facility to the 2011 Performance Based National Detention Standards or cease use of the facility*.

Vosburgh Decl. Ex. 1 at 42 (emphasis added). Although the specific recommendations stated above have been publicly disclosed, the portions of the released 2015 Super-Recommendations Memo disclosed to plaintiffs include no such recommendations; in fact, the entire section labeled "Recommendations" and most of the section labeled "Conclusions" have been withheld. *See* Released Records 1–5. The agencies do not argue that these recommendations have not previously been publicly disclosed. Rather, the agencies now contend that CRCL's 2015 Report to Congress was simply false, and that the 2015 Super-Recommendations Memo "does not contain any recommendations relating to ICE's continuing use of ECDC in the future to house detainees," Holzer Decl. ¶ 29, and do not address the other recommendations.

The contradiction between the Holzer Declaration and CRCL's statement to Congress "raises question regarding the presumption of good faith that the Court otherwise affords to [government] submissions." *Seife*, 2018 WL 1517196, at *24. Although "[*i*]*n camera* review is considered the exception, not the rule," *Local 3, Int'l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988), because the agencies' assertions are "challenged by contrary evidence," the Court should conduct an *in camera* review to determine whether this non-exempt information is contained within the super-recommendations memorandum, *see Halpern v. FBI*, 181 F.3d 279, 292 (2d Cir. 1999). Any recommendation that the agencies (1) "develop a comprehensive plan to address the deficiencies at the facility," (2) "address the issues raised in complaints since the 2012 site visit," (3) "transition the facility to the 2011 Performance Based National Detention Standards," or (4) "cease use of the facility" must be produced.

B. The agencies have failed to provide specific information to justify their redactions in the standards and methodology sections of the experts' reports.

In the disclosed records, the agencies have redacted some portions of the experts' reports that are labeled either "Relevant Standards," "Methodology," or "Applicable Standards." *See* Released Records 24, 46, 47. The agencies also appear to have withheld from the background section of the medical expert's report a paragraph concerning the standards he or she applied. *See* Released Records 91. They do not argue that the methodologies employed or standards applied by the experts are covered by the deliberative process privilege; rather, they argue that plaintiffs are "mistaken" that such information has been withheld. Defs. Br. 15. The agencies offer no explanation other than to say that the withheld information relates to "a separate issue concerning standards, then under consideration by ICE and DHS." Holzer Decl. ¶ 27.

The agencies' cursory explanation is insufficient to meet its 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*, 2018 WL 1517196, at *4 (quoting *Campbell*, 164 F.3d at 30). They do not identify even the general subject matter of this "separate issue," how this "separate issue" and the experts' discussion of it was part of any deliberative process, or why deliberative discussion of this issue would be contained in sections devoted to standards and methodologies. Given the agencies' concession that standards and methodologies are generally not subject to the deliberative process privilege, the meager assertion in the agencies' affidavit is insufficient to carry the agencies' burden. Accordingly, the Court should order disclosure of this information.

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

As previously noted, "[t]he deliberative process privilege 'does not … as a general matter, cover "purely factual" material.'" *Seife*, 2018 WL 1517196, at *12 (quoting *Hopkins*, 929 F.2d at 85). The privilege is designed only to protect the "give-and-take" in agency policy decisionmaking. *See Fox News Network, LLC v. Dep't of Treasury*, 911 F. Supp. 2d 261, 272 (S.D.N.Y. 2012) (citing *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980), and *EPA v. Mink*, 410 U.S. 73, 91 (1973)). As such, the deliberative process privilege "does not protect factual findings and conclusions, as opposed to opinions and recommendations." *Resolution Trust Corp. v. Diamond*, 137 F.R.D. 634, 641 (S.D.N.Y. 1991).

In justifying its withholding of material in the "Findings" sections of the experts' reports, the agencies do not dispute this principle. Instead, it argues that (1) the "Findings" sections of the experts' reports contain material that is not purely factual and (2) revealing the factual information contained within the "Findings" sections of the experts' reports would "'reveal the deliberative process of selection' by demonstrating which facts in the record were 'considered significant.'" Defs. Br. 17 (quoting *Lead Indus. Ass'n, Inc. v. OSHA*, 610 F.2d 70, 85 (2d Cir. 1979)).

As to the first point, the agencies' position is at odds with both the organization of the reports themselves, and also some of the descriptions in the agencies' submissions. In general, the experts divided their reports into fairly specific subsections. *See* Released Records 27–39 (corrections expert's report with "Allegation," "Finding," "Analysis," and "Recommendation" subsections); 47–59 (environmental health and safety expert's report with "Allegation," "Findings," "Applicable Standards," "Analysis," "Conclusion," and "Recommendations" subsections); 71–85 (mental health expert's report containing background factual section and "Analysis and Recommendations" section); 93–94 (medical expert's report containing

"Allegation," "Findings," and "Conclusion" sections). The specificity of the headings is in tension with the agencies' argument. Furthermore, some of the disclosed information within these sections also indicates that the agencies are attempting to stretch exemption 5 to cover purely factual material. For example:

1) in an "Analysis" section of the correction expert's report, the phrase "Staff interviewed reported that the" was disclosed but the remainder, *i.e.* what the staff reported, was withheld, Released Records 39;
2) in another "Analysis" section of the correction expert's report, the phrase "ECDC's Telephone Policy provides" was disclosed but the remainder, *i.e.* what the policy says, was withheld, Released Records 39;
3) in a "Findings" section of the environmental health and safety expert's report, the phrase "ECDC issues all detainees" was disclosed but the remainder, *i.e.* what items ECDC issues detainees, was withheld, Released Records 51;
4) in an "Analysis" section of the environmental health and safety expert's report, the phrase "ECDC provides each detainee" was disclosed but the remainder, *i.e.* what hygiene items ECDC provides to detainees, was withheld, Released Records 57;
5) in another "Analysis" section of the environmental safety and health expert's report, the sentence "ACA standards clearly define the minimum encumbered and unencumbered space required for each detainee." was disclosed but what followed, *i.e.* the clearly defined standard for the amount of space each detainee requires, was withheld.

In each of these cases, withheld information is plainly factual, not deliberative.

Moreover, the experts' descriptions of their "Findings" sections indicate that such sections were concerned with whether an allegation was substantiated or not, or, in other words, whether

the conduct alleged occurred as a matter of fact. *See, e.g.*, Released Records 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."). Accordingly, the agencies' declarant's claim that these materials are not factual is "controverted by … contrary evidence in the record." *Seife*, 2018 WL 1517196, at *6.

Additionally, the agencies have simply not addressed sections of the experts' reports that are identified as "observations" and contain significant redactions. *See* Released Records 39–40 (section of corrections expert's report for "Other Issues and Observations"); 60–62 (section of environmental health and safety expert's report labeled "Other Observations"); 86 (section of medical expert's report containing "general observations"). The agencies appear to correctly concede that "observations" are factual material not subject in general to the deliberative process privilege. *See* Defs. Br. 17 (arguing that "disclosing observations or *other factual material*" would reveal selection of significant facts (emphasis added)). But the declarant's statements and the *Vaughn* index itself indicate that the agencies withheld information on the basis that observations are somehow deliberative. *See* Holzer Decl. ¶ 25 (indicating information was withheld because it contained "subjective observations, opinions, suggestions and recommendations of the experts"); *Vaughn* Index 1, 9 (justifying exemption 5 redaction based on record containing "subjective observations and opinions of the subject matter experts"); 4 ("Redactions were made to those portions of the memorandum containing the subjective observations, analysis, and recommendations of the subject matter experts"); 5, 6, 7, 8 ("Redactions were made to those

portions of the report containing the expert's subjective observations, opinions, and recommendations."), further undercutting the contention that at least some of the sections do not contain purely factual material.

Finally, the agencies are incorrect that disclosure of such interspersed factual information would "reveal the deliberative process of selection" of "significant" facts. Importantly, the agencies' main support for this proposition, *Lead Industries*, dealt with an entirely different situation. There, the Second Circuit was concerned with the "process of [factual] summarization" that resulted in the creation of shortened factual summaries from a "massive rule-making record." *Lead Indus.*, 610 F.2d at 85. The agencies, though, have not argued that these facts would reveal anything about a "process of [factual] summarization." Moreover, disclosure of the factual material here would not reveal those found to be "significant, key, or worth focusing on," *N.Y. Times Co. v. DOJ*, No. 16 Civ. 6120 (RMB), 2017 WL 4712636, at *20 (S.D.N.Y. Sept. 29, 2017) (internal quotation marks omitted), given that the factual findings and observations follow specific factual allegations made by detainees. In other words, the allegations have themselves already revealed the "key" facts the experts were "focusing on," and disclosure of their observations and factual findings would only add detail to these facts. For example, where the corrections expert was reviewing whether detainees in a particular unit were "subject to being locked down in their cell during their free time when commissary orders are distributed," Released Records 29, the factual material will focus on what occurs in that particular unit during commissary distribution; where the environmental health and safety expert was reviewing the quality of uniforms provided to detainees, Released Records 51, the factual material will focus on the condition and sanitary conditions of the uniforms provided.

It cannot be that the exercise of *any* judgment as to what facts to put into a report renders that factual material exempt, because such an approach "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 *Mink*, 410 U.S. at 89). As the D.C. Circuit has explained, "[a]nyone making a report must of necessity select the facts to be mentioned in it; but a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material. If this were not so, every factual report would be protected as part of the deliberative process." *Playboy Enters., Inc. v. DOJ*, 677 F.2d 931, 935 (D.C. Cir. 1982); *see also Resolution Trust Corp.*, 137 F.R.D. at 641 ("The exercise of judgment in the formulation of a factual statement is not sufficient to lift it to the level of deliberation.").

Accordingly, because disclosure of the experts' observations and factual findings will not itself infringe on the deliberative process, exemption 5 cannot justify withholding this information.

II. Exemption 6 Does Not Justify Withholding the Names and Professional Backgrounds of the Consulting Subject-Matter Experts.

The agencies argue that withholding the names and background information of the subject-matter experts they hired is justified under exemption 6.[2] Defs. Br. 20–23. Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The agencies have not met their burden of showing that disclosure of the information would constitute a clearly unwarranted invasion of privacy, and it would not.

[2] Plaintiffs do not concede the propriety of but do not challenge the withholding of the experts' contact information.

Exemption 6 "is intended to protect individuals from the injury and embarrassment that can result from unnecessary disclosure of personal information." *Seife*, 2018 WL 1517196, at *20 (quoting *Wood v. FBI*, 432 F.3d 78, 86 (2d Cir. 2005)). The exemption "creates a heavy burden" for the government as "the presumption in favor of disclosure is as strong as can be found anywhere in the Act." *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (internal quotation marks omitted); *Associated Press v. U.S. Dep't of Def.*, 410 F. Supp. 2d 147, 155 (S.D.N.Y. 2006) ("Exemption 6 … on its face, creates a presumption in favor of disclosure.").

To evaluate whether records fall within the scope of exemption 6, the Court first must "determine whether disclosure of the files would compromise a substantial, as opposed to *de minimis*, privacy interest, because if no significant privacy interest is implicated FOIA demands disclosure." *Cook v. Nat'l Archives & Records Admin.*, 758 F.3d 168, 175–76 (2d Cir. 2014). In other words, where disclosure would involve only a *de minimis* privacy interest, the exemption does not apply and the information must be disclosed. *Seife*, 2018 WL 1517196, at *22 (citing *Cook*, 758 F.3d at 176; *Fed. Labor Relations Auth. v. U.S. Dep't of Veteran Affairs*, 958 F.2d 503, 510 (2d Cir. 1992)). If the disclosure implicates more than a *de minimis* invasion of privacy, the Court then proceeds to "balance the public need for the information against the individual's privacy interest in order to assess whether disclosure would constitute a clearly unwarranted invasion of privacy." *Cook*, 758 F.3d at 174; *see also Associated Press v. U.S. Dep't of Def.*, 554 F.3d 274, 291 (2d Cir. 2009) ("An invasion of more than a *de minimis* privacy interest protect by Exemption 6 must be shown to be 'clearly unwarranted' to prevail over the public interest in disclosure.").

Here, both parts of the exemption 6 balancing weigh in favor of disclosure: Any privacy interest is *de minimis* and is easily outweighed by the public interest in the identities and

backgrounds of the agencies' experts. Accordingly, exemption 6 does not apply.

A. The consulting subject-matter experts have no more than a *de minimis* privacy interest in their identities and backgrounds.

Exemption 6 "does not categorically exempt individuals' identities." *Seife*, 2018 WL 1517196, at *22. Individuals performing work for the government generally retain a significant privacy interest only "where public disclosure would expose those individuals to 'embarrassment and harassment in the conduct of their official duties.'" *Id.* (quoting *Halpern*, 181 F.2d at 296–97). Where the government relies on such consequences as the basis of an asserted privacy interest, the government must show that the threat to the individuals' privacy is "real rather than speculative." *Id.* (quoting *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 116 (D.D.C. 2005)).

After a lengthy recitation of case law, the agencies' argument on this point can be distilled to one line: "[T]he disclosure of the Consultants' identities could subject them to harassment or other hostility from immigrant detainees, ECDC staff, or others, who may have objected to their investigation of the conditions at the facility, or their recommendations." Defs. Br. 22 (citing Holzer Decl. ¶ 36 (Doc. 40)). Neither the agencies' brief nor the attached declaration, however, "provide[] evidence of a 'real' threat of harassment." *Seife*, 2018 WL 1517196 at *22. As an initial matter, the only potential harassers the agencies have identified are detainees and detention center staff, but these people *already know the identities of the consulting subject-matter experts*. *See* Released Records 2 ("CRCL conducted site visits to ECJ on three separate occasions …. Medical, mental health, corrections, and environmental health and safety experts assisted CRCL during these site visits. As a result of *detainee and staff interviews*, document and records reviews, and *direct onsite observations*, the subject-matter experts identified a number of concerns …. (emphases added)); 7 (same); 25–27 (explaining corrections expert's actions and methodology, including interviews and meetings with detainees and detention center staff); 46 (explaining

environmental health and safety expert's actions, including interviews and meetings with facility staff and detainees); 68–69 (explaining mental health expert's actions and methodology, including interviews and meetings with detainees and detention center staff); 91–92 (explaining medical expert's actions and methodology, including interviews and meetings with detainees and detention center staff). For this reason, disclosure of the consulting subject-matter experts' identities and backgrounds through FOIA could not be the cause of harassment from these persons. *See Seife*, 2018 WL 1517196, at *22 ("The link connecting the disclosure of these [persons]' identities and the alleged harassment is missing.").

Moreover, the agencies provide no evidence of a real threat of harassment. First, the agencies assume the existence of individuals who "objected to [the experts'] investigation of the conditions at the facility, or their recommendations." Defs. Br. 22. They offer no evidence that such people exist, but even if they did, there is no evidence such people would harass the experts. For example, the agencies have not provided any examples of previous consulting subject-matter experts being harassed by detainees or detention center staff for their reports, much less that these experts in particular would face these threats. Instead, "the [Holzer] Declaration relies on conclusory statements … to explain the potential invasion of privacy." *Seife*, 2018 WL 1517196, at *22; *see also Associated Press v. U.S. Dep't of Def.*, 410 F. Supp. 2d at 157 (explaining government's claims of embarrassment or fear of retaliation "must be supported by at least a modicum of competent evidence").

Further, the agencies have not shown that these experts expected that their identities would remain private. *Cf. Seife v. NIH*, 874 F. Supp. 2d 248, 261 (S.D.N.Y. 2012) (lack of "affirmative pledge of confidentiality" or any evidence from an affected person regarding their understanding of confidentiality weighs against finding substantial privacy interest). Far from being unknown

law enforcement officers working on sensitive matters, *see Halpern*, 181 F.3d at 296–97; *Rojas-Vega v. ICE*, --- F. Supp. 3d ---, No. 16-2291 (ABJ), 2018 WL 1472494, at *7–8 (D.D.C. Mar. 26, 2018); *Long v. ICE*, 279 F. Supp. 3d 226, 244 (D.D.C. 2017); *Robert v. DOJ*, No. 99-CV-3649, 2001 WL 34077473, at *6 (E.D.N.Y. Mar. 22, 2001); the experts in this case were selected through "competitively awarded contract[s]," Holzer Decl. ¶ 17; performed open investigations of the detention center that included meetings and interviews with detainees and staff, Released Records 2, 7, 25–27, 46, 68–69, 91–92; and are already well-known within their fields generally, *see id.* 24 (noting that corrections expert has provided expert reports and testimony" in Hawaii, Pennsylvania, and California, and "testified in over 300 California Senate and Assembly legislative hearings"), 68 (noting that mental health expert has publications that include "over fifty peer-reviewed journal articles, book chapters, and other publications").

In fact, at least one of the consulting subject-matter experts states on her publicly available CV that she worked on the report. *See* Vosburgh Decl. Ex. 2 at 88, (listing experience with CRCL as "Environmental Health and Safety Consultant," including "May 2012: Etowah County Detention Center, Gadsden, Alabama"). The CV establishes that the expert has no privacy interest in her identity and background as one of the consulting subject-matter experts, because, to be sure, "[o]ne can have no privacy interest in information that is already in the public domain, especially when the person asserting his privacy is himself responsible for placing that information into the public domain." *Citizens for Responsibility & Ethics in Wash. v. DOJ*, 840 F. Supp. 2d 226, 233 (D.D.C. 2012). In addition, her public acknowledgment of this work undermines the agencies' argument that the experts' identities must be kept secret. The CV also reflects the obvious point that, in contrast to the agencies' counter-intuitive position, experts in their field would want to

highlight, not hide, that fact that they were selected by DHS through the award of a competitive consulting contract.

Finally, because this information appears in the context of business relationship between the agencies and these consulting subject-matter experts, any privacy interest in the existence of the relationship is *de minimis*. As the D.C. Circuit has explained, "Exemption 6 was developed to protect intimate details of personal and family life, not business judgments and relationships. Surely it was not intended to shield matters of such clear public concern as the names of those entering into contracts with the federal government." *Sims v. CIA*, 642 F.2d 562, 575 (D.C. Cir. 1980); *see also Fuller v. CIA*, No. 04-253 (RWR), 2007 WL 666586, at *4 (D.D.C. Feb. 28, 2007) (concluding CIA had failed to show "a substantial, as opposed to *de minimis*, privacy interest" where records revealed names only in the context of professional or business relationships). Here, disclosure would reveal only that the consulting subject matter experts had been hired in their professional capacity to perform work within their fields of expertise, which does not implicate a substantial privacy interest.

For these reasons, "whatever privacy interest the [consulting subject-matter experts] have in controlling dissemination of their names [and professional backgrounds] is *de minimis* and does not trigger the need to balance that interest with the public interest in disclosure." *Seife*, 2018 WL 1517196, at * 22. The Court should order disclosure of this information.

B. The public interest in disclosure outweighs any minimal privacy interest.

Because the privacy interest is at best *de minimis*, the Court need not consider the public interest in disclosure. The public interest however, reinforces the conclusion that exemption 6 does not apply here.

Here, disclosure of the names and professional backgrounds of the consulting subject-matter experts will shed light on whether CRCL is fulfilling its statutory obligations to review, assess, and investigate potential civil rights and civil liberties abuses. Shah Decl. ¶ 6. In particular, this information will show whether DHS is utilizing and relying on the advice and recommendations of competent, qualified, and unbiased experts, rather than third parties that will rubber stamp the agency's policy preferences. *Id.* ¶¶ 6–7. Moreover, because the consulting subject-matter experts were hired through "competitively awarded contract[s]," Holzer Decl. ¶ 17, disclosure of their names and professional backgrounds will shed light on DHS's expenditure of public resources, Shah Decl. ¶ 7. Both of these interests "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) (internal quotation marks omitted).

The agencies disagree that disclosure of this information would reveal how the agencies conducts their operations, Defs. Br. 22, but the cases on which they rely concern government personnel, not outside experts. *See Wood*, 432 F.3d at 82, 87 (explaining the affected individuals were low-level "government employees" investigating FBI agents); *Halpern*, 181 F.3d at 297–98 (discussing privacy interests of "government employees and officials" and "third parties [that] had at one time been subject to criminal investigation"); *cf. Rojas-Vega*, 2018 WL 1472494, at *7 (concluding plaintiff "fail[ed] to articulate" public interest in disclosure of ICE employee names). The rationale of these cases is that knowing which "low rank" employees were "performing their jobs as ordered" would do little to illuminate how the agency operated. *Wood*, 432 F.3d at 88–89. But the consulting subject-matter experts play a different role than low-level government employees because their utilization requires the expenditure of additional agency resources. *See*

Holzer Decl, ¶ 17. Accordingly, whatever privacy interest exists in this information, the public interest in disclosure is greater, such that the information must be disclosed.

III. The Agencies Should Conduct an Additional Segregability Review in Light of Their Unlawful Withholdings.

As explained above, the agencies improperly withheld the factual findings and observations of the consulting subject-matter experts under exemption 5. Plaintiffs have identified some specific examples and particular portions of the experts' reports where this nonexempt information is located, based on the disclosed portions of the records. *See* Part I.C. However, the agencies' *Vaughn* index indicates that the experts' factual findings and observations were withheld throughout the experts' reports, not just the findings, analysis, and background sections identified by plaintiffs. Because this information is not exempt under exemption 5 pursuant to the deliberative process privilege, the agencies should conduct a renewed segregability analysis as their view of the "inextricably intertwined" nature of exempt and non-exempt information is necessarily incorrect. *See* Defs. Br. 18–19.

CONCLUSION

For the reasons stated above, the Court should grant plaintiff's motion for summary judgment and deny the agencies' motion for summary judgment.

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Respectfully submitted

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CERTIFICATE OF SERVICE

I certify that on June 8, 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:

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