UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

COLOR OF CHANGE AND CENTER FOR CONSTITUTIONAL RIGHTS, Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Defendant.	:	Civil Action No. 16-CV-8215 (WHP)

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT GRANTING ACCESS TO DEFENDANT DEPARTMENT OF HOMELAND SECURITY "RACE PAPERS"

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INTRODUCTION

Plaintiffs Color of Change and the Center for Constitutional Rights ("Plaintiffs") respectfully submit this memorandum of law in opposition to Defendant Department of Homeland Security's ("DHS") cross-motion for partial summary judgment and in reply to Defendant's opposition to Plaintiffs' motion for summary judgment. The documents in dispute are both responsive to Plaintiffs' Request for records regarding constitutionally-protected protests of police violence and yet, according to Defendant, address domestic terrorist acts driven by "race-related extremist ideologies" and the coopting of peaceful political activity by "violent ideological actors." These are issues of pressing public interest. Even if these records contain information that is sensitive to the government, FOIA requires that segregable non-exempt information be disclosed. Because the Defendant cannot justify its attempt to hide these documents in their entirety, the Court should order the release of the last version of the Race Paper and segregable portions of earlier versions. In the alternative, the Court should order in camera review of the contested materials.

I. Defendant's Declaration

Defendant's Memorandum of Law in Support of its Cross Motion for Partial Summary Judgment and in Opposition to Plaintiffs' Motion for Partial Summary Judgment ("Def's Brief") disavows the preliminary *Vaughn* index on which Plaintiffs based their opening motion. Defendant now justifies its decision to withhold the records in dispute based solely on the assertions in the April 18, 2018 Declaration of Arthur Sepeta ("Sepeta Declaration"). In comparison to the preliminary *Vaughn*—plainly deficient as it was—the Sepeta Declaration provides Plaintiffs with more information

than has so far been available in this litigation. First, the Sepeta Declaration explains that the Race Papers' full title is "Growing Frequency of Race-Related Domestic Terrorist Violence" and that the records "contemplated a survey of violent, terroristic acts that were driven by race-related extremist ideologies …" Sepeta Decl. ¶22. The Declaration also offers insight into DHS Intelligence and Analysis Office's ("I&A") administrative processes, its drafting and internal review protocols, and the significant, statutorily mandated role it plays in the intelligence community, though some of that information has little bearing on this dispute. Second, the Sepeta Declaration further explains Defendant's reliance on FOIA Exemptions 3 and 5. But Defendant still relies on sweeping assertions to defend its decision to withhold each of the records *in their entirety*. For example, DHS argues that the Race Papers include "incremental revisions that reflect the deliberative process," Sepeta Decl. ¶33, and that "[b]ecause the development of one draft to another is part of the deliberative process …, there is no reasonably segregable non-exempt information that can be disclosed from the drafts," Sepeta Decl. ¶37. The Declaration further stresses that "release of I&A's preliminary assessments, particularly in a manner exposing the back-and-forth development and evolution of I&A's assessment would hinder" internal agency discussions. *Id.* at ¶35.

Defendant's essential claim that the records can be withheld because the public will reconstruct its intelligence deliberations through side-by-side comparison of unredacted versions of the Race Papers—or any of the even factual information they contain—misapprehends what FOIA exemptions allow. Plaintiffs seek only disclosure of the last version of the assessment and segregable portions of the preceding versions or, in the alternative, *in camera* review and disclosure of only properly segregable information

in the records. Indeed, the Sepeta Declaration says comparatively little to undercut Plaintiffs' alternative request for relief that the Court exercise its discretion to review the documents at issue *in camera*. What the Declaration does say, however, suggests *in camera* review is essential to check Defendant's independent judgement that FOIA permits the agency to withhold records in full despite the presence of facially segregable information. Specifically, the Declaration states that the Race Papers contain "certain factual information," *Id.* at ¶34, including possibly "open source documents of a publicly–available nature," *Id.* at ¶45, and that DHS's internal review "determined that some non-exempt information in these drafts *could be segregated and released* in the event that no other exemption applied …," Sepeta Decl. ¶46 (emphasis added). As argued below, these assertions actually support Plaintiffs' request for *in camera* review. Here, *in camera* review holds the added benefit of shortcutting the parties' dispute over the sufficiency of Defendant's submissions. *New York Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309, 315 (S.D.N.Y. 2012)("[A]ny *in camera* inspection guides a court's evaluation of the Government's reliance on exemptions from FOIA's disclosure requirement.")

II. Defendant's Declaration Does Not Obviate Need for *In Camera* Review

Defendant argues that *in camera* review is an exception. *See* Def's Br. at 24 (citing *Local 3, Int'l Bhd. Of Elec. Workers, AFL-CIO v. N.L.R.B.*, 845 F. 2d 1177 (2d Cir. 1988)). But, as Defendant acknowledges, whether *in camera* review is called for in any given instance is "a matter entrusted to the district court's discretion." *Id.* Courts routinely conduct *in camera* review of contested documents. This Court has conducted *in camera* review in circumstances where the apparent security and intelligence stakes were

high. *See New York Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309, 315 (S.D.N.Y. 2012) (ordering *in camera* review of a report regarding foreign intelligence collection where the report was classified). Defendant is hard-pressed to argue *in camera* review is inappropriate; the weight of authority it cites in its opposition demonstrates that *in camera* review is commonplace, even where the defendant agency submits a declaration to justify its claimed exemptions. *See Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473 (2d Cir. 1999) (ordering *in camera* review despite submission of *Vaughn* and affidavit); *MacNamara v. City of New York*, 249 F.R.D. 70 (S.D.N.Y. 2008) (ordering *in camera* review even with multiple declarations submitted by law enforcement officials); *Nat'l Day Laborer Organizing Network v. U.S. Immigration & Customs Enforcement Agency*, 811 F. Supp. 2d 713 (S.D.N.Y. 2011) (ordering *in camera* review despite a *Vaughn* and declarations provided by DHS, FBI, and ICE among others); *New York Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309 (S.D.N.Y. 2012) (ordering *in camera* review even with declarations provided); *Ferrigno v. DHS*, 2011 WL 1345168, at *10 (S.D.N.Y. Mar. 29, 2011) (ordering *in camera* review for segregable information even though the court found DHS's *Vaughn* sufficiently detailed).

More specifically, this court has deemed *in camera* review appropriate where "the number of documents is relatively small[.]" *New York Times Co.*, 872 F. Supp. 2d at 315 (quoting *Twist v. Ashcroft*, 329 F.Supp.2d 50, 54 (D.D.C.2004), aff'd sub nom., *Twist v. Gonzales*, 171 Fed. App'x. 855 (D.C.Cir. 2005)). In *New York Times Co.*, not unlike this case, there was just one brief report in question for the court to review. *Id*. *In camera* review is similarly appropriate here because it would impose a minimal burden on the Court.

Plaintiffs' demand for *in camera* review is strengthened by Defendant's admission that the Race Papers include information that even it deems segregable, but that it nonetheless elects not to disclose because it has determined that Exemptions 5 applies. *See* Sepeta Decl. at ¶34. However detailed Defendant believes its declaration, it should not displace the Court's independent determination about whether segregable information that undisputedly exists within the Race Papers ought to be disclosed to Plaintiffs. Furthermore, *in camera* review is warranted in light of the heightened public interest in the subject matter of the Race Papers. *Nat'l Day Laborer Organizing Network*, 811 F.Supp. 2d at 738 ("The Court exercised its discretion to conduct in camera review … in the interests of judicial economy and in consideration of *the strong public interest in disclosure*…) (emphasis added) (citations omitted). *See also Ferguson v. F.B.I.*, 752 F.Supp. 634, 636 (S.D.N.Y. 1990).

Defendant argues that the Sepeta Declaration is "sufficiently detailed" and, therefore, Plaintiffs' request for *in camera* review should be denied. Def.'s Br. 24. To support this claim, Defendant relies on two district court cases, *New York Times Co. v. National Security Agency*, 205 F. Supp. 3d 374 (S.D.N.Y. 2016) and *Garcia v. U.S. Dep't of Justice, Office of Info. & Privacy*, 181 F. Supp. 2d 356 (S.D.N.Y. 2002). Both are distinguishable. In *New York Times*, the records sought—bulk phone records collection activities, bulk internet metadata, and the NSA's records collection activities—were classified, some at the Top Secret level and entirely unavailable to the public. 205 F. Supp. 3d at 376, 379. Here, the Sepeta Declaration itself acknowledges that the Race Papers may include "publicly available" information that is not classified. *See* Sepeta Decl. ¶¶ 22, 45. And unlike *Garcia*, where 421 pages were sought to be reviewed *in*

camera (regarding FBI investigative reports about a federal criminal conviction), here, Plaintiffs seek review of nine records, totaling roughly 63 pages—much of which is likely duplicative. 181 F. Supp. 2d at 364.

The Sepeta Declaration also raises a number of practical concerns attendant to disclosure, including the potential for revealing intelligence sources and methods and chilling candid government discourse regarding national security.[1] None of these concerns are implicated by *in camera* review. No doubt the Court is properly concerned with protecting DHS I&A's desired confidentiality within the bounds of FOIA. But FOIA requires balancing. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). The Court is better equipped to appropriately balance DHS's interest in privacy and Plaintiffs' (and the public's) desire for transparency concerning the Race Papers. *Id.* This is particularly so where, as here, the content of records in dispute have the potential to cause embarrassment leading Defendant to over-rely on FOIA's exemptions to conceal information that otherwise ought to be disclosed. *Nat'l Day Laborer Org. Network*, 811 F. Supp. 2d at 749 (embarrassment is not a relevant consideration under FOIA).

In sum, the Court should evaluate Defendant's segregability determinations *in camera*, particularly because Defendant acknowledges that the Race Paper contains factual information that is segregable. Sepeta Decl. ¶46.

[1] In its opposition, Defendant claims that it is withholding the disputed records in partial reliance on Exemption (b)(6). That position is new; neither Defendant's draft *Vaughn* nor, importantly, the redacted documents themselves indicate that Defendant believed Exemption 6 applied to any records Plaintiffs' challenge other than the March 3 email. While Plaintiffs have no interest in personal identifying initials of DHS I&A personnel, *see* Def.'s Br. at 21, the late reliance on Exemption 6—after the parties' extended pre-litigation negotiations regarding the Race Papers—raises questions about the appropriateness of Defendant's invocation of FOIA exemptions in this case and further suggests the Court should order *in camera* review to determine what additional information, if any, Plaintiffs are entitled to from the records in question.

III. Defendant Concedes That Its Review of the Race Papers Found Segregable Information That It Nonetheless Unilaterally Determined To Withhold

Defendant points to the Sepeta Declaration to argue that none of the information in the versions of the Race Papers is "reasonably segregable." Def. Br. 17. The Sepeta Declaration does not support that conclusion. To the contrary, DHS concedes that its review of the Race Paper "determined that some non-exempt information in these drafts *could be segregated and released*," but that Defendant has not done so because it believes Exemption 5 applies. Sepeta Decl. ¶46 (emphasis added). The Declaration further raises the possibility that the non-exempt information in the Race Papers comes from "open source documents of a publicly-available nature …" Sepeta Decl. ¶45. That is significant; the parties' dispute is not whether there is segregable information at issue—clearly there is—but only whether Defendant can withhold that information because in its own, unchecked judgment, Exemption 5 relieves DHS from its statutory obligation to release that information to Plaintiffs. But Defendant's justifications for withholding admittedly non-exempt portions of the Race Paper are unpersuasive. The Court should not defer to Defendant's judgment.

As an initial matter, Defendant's obligation to disclose segregable information applies equally to Defendant's reliance on Exemption 3 as it does to Exemption 5. *See e.g.*, *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007) (holding that the "rule of segregation applies to all FOIA exemptions"). Indeed, the Sepeta Declaration concedes that Defendant's reliance on Exemption 3 is insufficient to justify withholding the disputed records in full. *See* Sepeta Decl. ¶46 ("some non-exempt information in these drafts could be segregated and released" but for purported applicability of Exemption 5). Defendant thus relies exclusively on Exemption 5 to withhold the records

in full, despite the segregagble information they contain. Defendant's reading of Exemption 5, however, goes too far.

Defendant argues that it can rightfully withhold segregable information under Exemption 5 "because the development of one draft to another is part of the deliberative process." Sepeta Decl. ¶37. That contention appears overstated. Plaintiffs have not sought full disclosure of each version of the Race Paper, without which a comparative analysis that would allow the public to discern DHS's deliberative process is impossible. Plaintiffs do, however, seek disclosure of all "reasonably segregable" portions of the Race Papers. And the mere development of successive versions of the records does not automatically insulate Defendant from its obligation to disclose even segregable information under Exemption 5. That would circumvent the segregability analysis FOIA requires and would logically permit blanket withholding of *any* information contained in a draft document. But FOIA demands reasonably segregable information—even that contained in drafts—be disclosed to Plaintiffs, Exemption 5 notwithstanding. *See Hopkins v. U.S. Dep't of Hous. & Urban Dev.*, 929 F.2d 81, 89 (2d Cir. 1991) (ordering *in camera* review for segregable facts though deliberative process applied to the withheld document); *see also Natural Resources Defense Council, Inc. v. Nat'l Marine Fisheries Serv.*, 409 F.Supp.2d 379, 385 (S.D.N.Y. 2006) (holding that even "preliminary findings as to objective facts are not shielded" under Exemption 5 deliberative process privilege) (internal citations omitted).

Second, the Sepeta Declaration contends that "throughout the assessment drafting and revision process, I&A personnel necessarily reviewed the universe of facts arising on a topic at hand, and then selected those facts and issues they deemed appropriate to

include." Sepeta Decl. ¶34. On this basis, DHS argues that even the specific, factual instances of domestic terrorism at issue in the Race Papers are by their very nature exempt as part of the deliberative process. *See* Def.'s Br. at 17. The Court should be skeptical of that conclusion. By that reasoning, Defendant would be justified, for example, in withholding open-source, public information about any (or all) of the Movement for Black Lives protests in the eleven locales Plaintiffs specified in their FOIA Request precisely *because* that information is factual in nature. Indeed, one can scarcely conceive of any factual information FOIA would then require a defendant-agency to disclose; whenever agency drafting implicates factual information, surely determinations must be made as to what facts to include and to omit. That does not, however, mean that all facts are concealable—even in the context of an intelligence assessment. *Sussman*, 494 F.3d at 1116 ("rule of segregation applies to all FOIA exemptions"); *ACLU v. F.B.I.*, No. 11-CV-7562, 2015 WL 1566775 at *2 (S.D.N.Y. Mar. 31, 2015). FOIA's requirement that defendant agencies segregate and disclose factual information cannot be avoided so easily.

Defendant's reliance on *Tigue* to defend its refusal to disclose factual information in the Race Papers is unavailing. *See* Def. Br. 17 (citing *Tigue v. U.S. Dep't of State*, 312 F. 3d 70, 82 (2d Cir. 2002)). *Tigue* stands for the limited and uncontroversial point that in some instances factual information can be too intertwined with agency policy decisions to require disclosure under FOIA. It says nothing to support Defendant's sweeping argument that its mere decision to include some facts in the Race Papers (and not others) justifies nondisclosure. Moreover, while the court in *Tigue* determined that the facts at

issue there could be withheld, it did so only *after* conducting an *in camera* review. *Tigue*, 312 F. 3d at 82.

The acknowledgment that the Race Papers include facially segregable information counsels the Court to conduct *in camera* review. It is for the Court to determine whether Defendant is correct in its legal conclusion that FOIA does not require the disclosure of the factual information the records contain. This remains true even if the Court finds the Sepeta Declaration persuasive. *See Ferrigno* 2011 WL 1345168, at *10 (ordering *in camera* review after concluding DHS's declaration supported its claimed exemptions and segregability determinations because "*in camera* review will aid the Court in evaluating the segregability of any non-exempt information contained in the documents.").

Independent judicial oversight is particularly appropriate given the content of the contested documents. Whether sensitive, potentially controversial information of public interest is segregable is better determined by the Court than the government agency whose interest in secrecy may run counter to FOIA's statutory preference for transparency. *Nat'l Day Laborer Org. Network*, 811 F. Supp. 2d at 758 ("The purpose of FOIA is to shed light on the operation of government, not to shield it from embarrassment.").

CONCLUSION

For the foregoing reasons, Plaintiffs' respectfully request that the Court grant Plaintiffs' motion for summary judgment seeking access to the Race Papers.

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New York, NY

Respectfully submitted,

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