UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ORGANIZED COMMUNITIES AGAINST DEPORTATIONS, IMMIGRANT DEFENSE PROJECT, and CENTER FOR CONSTITUTIONAL RIGHTS,	)	
Plaintiffs,	)	No. 21 C 2519
v.	)	Judge J.R. Blakey
UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT,	)	
Defendant.	)	

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

ARGUMENT

I. Plaintiffs Have Substantially Complied With Local Rule 56.1.

Plaintiffs have substantially complied in both letter and spirit with Local Rule 56.1, which requires that "[w]hen addressing facts, the memorandum must cite directly to specific paragraphs in the LR 56.1 statements or responses," and which provides instructions for respondents to admit or deny facts asserted by the opposing party. Local Rule 56.1(g), (e). "Motions to strike all or portions of an opposing party's LR 56.1 submission are disfavored." Local Rule 56.1(e)(2).

A. Plaintiffs' Citations to Facts and Exhibits Are Proper.

Plaintiffs submitted L.R. 56.1 Response & Statement of Material Facts in Opposition to Defendant's Motion for Summary Judgment & In Support of Plaintiffs' Cross-Motion for Summary Judgment (Dkt. 77) ("PSOF"). The PSOF contained 13 exhibits, including an affidavit and supporting materials relied upon to support the facts set forth in the PSOF (Dkt. 77-1-13). In Plaintiffs' accompanying memorandum of law, (Dkt. 76), Plaintiffs cite to paragraphs in the PSOF as well as to specific citations to exhibits included in the PSOF. The exhibits to the PSOF are part of the PSOF, just as Defendant's declarations from ICE representatives are part of the Defendant's 56.1 Statement of Facts (Dkt. 69) ("DSOF"). Thus, a citation to an exhibit to the PSOF is in every meaningful way a citation to the PSOF and compliant with Local Rule 56.1(g). Defendant does not cite to any case law supporting its contention that citations to exhibits in a statement of facts are improper, much less that they should cause the entirety of Plaintiffs' motion to be rejected.

It is true that in some instances in their accompanying memorandum of law (Dkt. 76), Plaintiffs cited directly to ECF filings on PACER instead of directly to the PSOF. But in every instance, the underlying statement of fact and citation to the record was also included in the PSOF. *Compare, e.g.,* Pls. Mem. at 3 (Dkt. 76) ("Defendant began producing documents in February

2022, nineteen months after the Request was submitted. Mar. 31, 2022 Joint Status Report, ECF No. 35 at ¶ 1.") *with* PSOF Section B ¶ 12 (Dkt. 77) ("Defendant ICE began producing documents in February 2022, nineteen months after Plaintiffs submitted their Request. Mar. 31, 2022 Joint Status Report, ECF No. 35 at ¶ 1."). Nowhere does Defendant claim that Plaintiffs' PACER citations are cause for confusion or that statements in the PSOF are unsupported. Nor can it, given that almost all these citations are either to documents produced by ICE and cited in the parties' statements of fact or to public filings in this case. Their existence is not disputed, much less an attempt, as Defendant suggests, to "sneak" improper or unexamined facts into the memorandum of law. D's Reply at 2 (Dkt. 79).

Should these citations cause any inconvenience to the Court, Plaintiffs are ready to refile their memorandum of law with citations to the corresponding fact statements in the PSOF. But none of the substance of Plaintiffs' memorandum would change as a result because all of the citations to the record are included, described, and incorporated in the PSOF.

B. Defendant is the Party with Exclusive Access to Almost All the Material Facts.

Summary judgment decisions in FOIA litigation are distinct from other civil actions due to the nature of FOIA litigation. *E.g., Struth v. F.B.I.*, 673 F.Supp. 949, 953-54 (E.D. Wis. 1987) (citing *Hemenway v. Hughes*, 601 F.Supp. 1002, 1004 (D.D.C. 1985)) ("[U]nlike in other civil actions, a decision to grant or deny summary judgment in a FOIA suit does not hinge on the existence of a genuine issue of material fact."). To succeed on a summary judgment motion, the agency "must show that it made a good faith effort to conduct a search for the requested records." *Rubman v. U.S. Citizenship & Immigration Servs.,* 800 F.3d 381, 387 (7th Cir. 2015). In FOIA cases, where the government is the party with sole and exclusive access to almost all the material facts – how searches were conducted, why exemptions were claimed – it is the government's

statement of facts and their justifications for their actions that are the focus of court evaluation.[1] Plaintiffs' truthful and good-faith style of response to facts almost entirely in control of the government is not material to the analysis of whether ICE conducted an adequate search.

Section A of the PSOF specifically responds to each numbered paragraph set forth in DSOF in accordance with Local Rule 56.1(e)(1). In instances where the Defendant's stated facts characterize the internal operations or capacity of ICE or DHS, Plaintiffs indicate that they are without knowledge to admit or deny. This style of response seems appropriate in FOIA litigation where the responding party lacks knowledge to admit or deny. Indeed, Defendant ICE, represented by the same United States Attorney's Office representing the agency here, has availed itself of similar language in recent FOIA cases in the Northern District of Illinois. *E.g., Stevens v. ICE,* Case No. 17 C 2853, Dkt. 67, filed Oct. 18, 2019 at ¶¶ 3-5 ("ICE takes no position on the quality or accuracy of Professor Stevens' research and estimates"; "ICE takes no position on the quality and accuracy of Stevens' research and publications"). Defendant cites no relevant case law suggesting that Plaintiffs' response is improper.

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In sum, Defendant's stated alarm over Plaintiffs' style of admissions and denials – style similar to what Defendant itself has used in FOIA cases – does not merit paragraphs of outrage, much less the extreme and unprecedented remedy proposed: loss of Plaintiffs' dispositive motion.

II. Defendant's Search Was Plainly Inadequate and Raises Fundamental Questions As To Whether It Was Conducted in Good Faith.

A. ICE Failed to Uncover Material Known To Be in Its Possession and Failed to Search Key Offices and Custodians Central to Plaintiffs' Request.

[1] In fact, there is a question regarding the utility of a 56.1 Statement in FOIA litigation generally, given that summary judgment decisions most often turn on the agency's affidavit. For example, the Second Circuit does not require 56.1 Statements for FOIA litigation. *See e.g.*, *Doyle v. Dep't of Homeland Sec.*, 331 F. Supp. 3d 27, 44 n.11 (S.D.N.Y. 2018), *aff'd*, 959 F.3d 72 (2d Cir. 2020) ("'[T]he general rule in this Circuit is that in FOIA actions, agency affidavits alone will support a grant of summary judgment,' and Local Civil Rule 56.1 statements are not required.").

Defendant's failure to uncover material known to be in its possession or to follow obvious leads demonstrates the inadequacy of its search. For example, Plaintiffs identified to ICE a letter from the director of the Chicago Field Office on ERO Field Office letterhead soliciting applications to the Chicago Academy. PSOF Section B ¶ 18. Defendant's search failed to produce this letter until after Plaintiffs identified it as a document known to be in Defendant's possession. Pls.' Resp. to D.'s L.R. 56.1(b)(3) Statement of Additional Facts (Dkt. 82) ¶ 54. In response to this evidence, Defendant goes on to speculate, *without any supporting facts*, that the signed letter "may never have been sent" and perhaps ICE never "actually solicited any applications for the Chicago Academy." D.'s Reply at 5. The speculation that no applications for the Chicago Academy were ever solicited is belied by ICE's own public statements. ICE announced the Chicago Academy in a press release dated July 13, 2020, which specifically stated: "Interested applicants should email CommunityRelations.Chicago@ice.dhs.gov to receive an application. Applications must be received by Thursday, July 30."[2] PSOF Section B ¶ 11; PSOF, Ex. 4 (Dkt. 77-4). A news article published in the *Chicago Sun-Times* on September 3, 2020 states: "ICE said it wouldn't accept any more applications for the [Chicago] Citizens Academy and would reach out to people who had applied to see if they were available in the spring." PSOF, Ex. 1 ¶ 10 (Dkt. 77-1) (citing the article). Defendant's assertion that "plaintiffs have not presented any evidence that ICE ever actually solicited any applications for the Chicago academy" is thus false. D's Reply at 5.

Defendant also fails to provide a compelling explanation for why ICE did not produce any applications, training materials, or schedules for the Chicago Academy. In response, Defendant makes another procedural rather than substantive argument: that Plaintiffs' citation to a news

[2] It is also unclear to Plaintiffs whether ICE custodians in Chicago ever searched their inboxes for the email "CommunityRelations.Chicago@ice.dhs.gov" or whether the inbox where emails sent to this email address were received was ever searched by ICE.

article reporting that ICE announced the postponement of the academy is not admissible evidence. D.'s Reply at 7. This argument is wrong. First, this Court may take judicial notice of information in the public record. FOIA litigants commonly rely on the media to alert them to records that may be in the government's possession; indeed, the concept is a cornerstone of FOIA litigation. If Plaintiffs already possessed all responsive records, this litigation would not be necessary. Second, an opposing party statement is not hearsay under Fed. R. Evid. 801(d)(2) and is admissible.

Regardless of whether ICE admits that it postponed the Academy, ICE has admitted that it was soliciting applications as of July 13, 2020 and that the Chicago Academy was scheduled to begin September 15, 2020. PSOF Section B ¶ 11; PSOF Ex. 4 (Dkt 77-4). In fact, the letter from then-director of the Chicago Field Office Robert Guadian sets forth a detailed schedule: "The ECA will be held every Tuesday from 2 – 6 p.m.; it will commence on Tuesday, Sept. 15, 2020, and conclude on Tuesday, October 20, 2020.… After completion of the ECA, a graduation ceremony will be held on Friday, Oct. 23, 2020." PSOF Section B ¶ 18; PSOF, Ex. 6 (Dkt. 77-6). Presumably, the Chicago ERO Field Office was involved in developing this schedule; yet no records related to planning the Chicago Academy were produced. This appears to be due in part to the fact that ICE limited its search to the Chicago ERO Field Office and did not search the full ERO. D.'s 56.1(b)(3) Statement of Additional Facts (Dkt. 81) ("DSAF") ¶ 55 (stating only that "[a] management and program analyst at ICE . . . searched . . . the [Chicago Field] office's shared drive and emails.").

Defendant also fails to account for the almost total lack of budgetary records produced. Defendant states that the "Office of the Chief Financial Officer is not reasonably likely to have records responsive to plaintiffs' FOIA request but does not explain why or provide any other likely sources of this information. DSAF ¶¶ 56-58. To date, Plaintiffs have received no records specific to the budget of the proposed Chicago Academy, and minimal documents related to the budget

overall, despite the national scope of the program. If neither the OPA nor the CFO have budgetary records, then the records must exist in another key office that ICE failed to search.

B. Defendant Concedes the Impropriety of ICE's Search Terms for Budgetary Information and Fails to Justify the Exclusion of Crucial Search Terms.

Defendant admits that the phrase "national budget for all ICE citizen academy programs" is "not an ideal search term for identifying records relating to the budget for the citizens academy program." D.'s Reply at 8. Given that this eight-word search term is the only one that appears to seek budget information, it is unsurprising that Defendant produced few records related to the costs and expenses of Citizens Academy programs. The Court must look to whether an agency's search "appears designed to return all relevant records." *Immigr. Def. Project v. U.S. Immigr. & Customs Enf't*, 208 F.Supp.3d 520, 527 (S.D.N.Y. 2016). In the case of ICE's search for budgetary documents, ICE's search seems designed to *avoid* uncovering responsive records.

Defendant also states that it would have been "ridiculous" to search for the words "Chicago," "New York," or "Puerto Rico." D.'s Reply at 8. But Defendant's initial search included the words "presentations," "materials," "staff," and "memo," among others. DSOF ¶¶ 22, 24, 28, 29. It is unclear why searching for "Chicago" would be more burdensome than searching for the word "staff" or "materials," or how those terms would yield more responsive records than "Chicago." Moreover, ICE's declarations do not make clear whether common Boolean operators (such as "AND" or "w/4") were used with these search terms, or that ICE considered using common Boolean connectors to conduct more precise searches. These failures justify a court order for new, precise searches reasonably calculated to uncover all responsive information.

III. Defendant Has Not Met Its Burden for Withholding Information.

A. Exemption (6) Does Not Protect Identities of Citizens Academy Participants, and the Public Interest in this Information Outweighs Any Privacy Interest.

Defendant has not shown that disclosure of the names, much less the employers or job titles, of participants would invade individual participants' rights to privacy. Even if it did, the public interest in knowing the private companies and prominent individuals whom ICE seeks to influence outweighs any purported privacy interest.

Exemption 6 protects "'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.'… [T]he court must balance an individual's right to privacy against the Act's policy of opening agency action to the light of public scrutiny." *Henson v. Dep't of Health & Hum. Servs*., 892 F.3d 868 at 878 (7th Cir. 2018) (quoting 5 U.S.C. § 552(b)(6).). "Exemption 6's requirement that disclosure be 'clearly unwarranted' instructs us to 'tilt the balance (of disclosure interests against privacy interest) in favor of disclosure.'" *Morley v. C.I.A*., 508 F.3d 1108, 1127 (D.C. Cir. 2007) (citation omitted).

The purpose of Exemption 6 is "to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *U. S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). But the employers, job titles, and names of participants in a government public relations initiative are not "similar" to "personnel and medical files" that Exemption 6 is designed to protect. Defendant justifies ICE's use of Exemption 6 to redact participant information by claiming that "third-party individuals have a privacy interest in not being publicly associated with law enforcement organizations through the release of records compiled for law enforcement purposes." D.'s Reply at 10. But Academy participant applications are not "records compiled for law enforcement purposes," and the Citizens Academy program is not a law enforcement program; it is a public relations program run by ICE, and volunteer participants in the program willingly applied to be associated with it.

ICE's own documents contradict its unsupported assertion that there is a "stigmatizing connotation" to volunteering and being selected for a public relations initiative, D.'s Reply at 10, because ICE has previously publicly and proudly disclosed the names, employers, and even photographs of Citizens Academy "graduates" in press releases and "alumni" newsletters. PSOF Section B ¶¶ 27-28, Exs. 9, 10 (Dkt. 77-9; 77-10). Exposing this purportedly private information to the public undermines any argument that ICE truly believes the information is "stigmatizing."

Even if there were participant identities did implicate privacy interests, the public benefit in knowing whom ICE seeks to influence through the Citizens Academy program outweighs these interests. As Defendant itself points out, "many … participants had notable and unique job titles with prominent employers." DSAF ¶ 60. Participants have included "lawyers, entrepreneurs, bank anti-money laundering specialists and city officials," as well as journalists and non-profit employees. PSOF ¶ 29. In similar cases, "courts have required the disclosure of names and addresses in connection with a private citizen's statements or views when the private citizen *voluntarily* relayed this information to the government and the requester identified a public interest." *Gilman v. U.S. Dep't of Homeland Sec*., 32 F. Supp. 3d 1, 16 (D.D.C. 2014) (emphasis added). In *Gilman*, a requester sought names and addresses of landowners impacted by border wall construction; the court found that while landowners did have a privacy interest in protecting their identities and addresses, this interest was outweighed by the "public interest in how CBP negotiated with private citizens." 32 F. Supp. 3d at 18. *See also, e.g*., *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 305-06 (D.D.C. 2007) (ordering release of the names of individuals who submitted email comments regarding a Lincoln Memorial display).

Defendant has withheld far more than names and addresses here, redacting employer and job-related information of Citizens Academy participants in numerous spreadsheets. *See, e.g.*,

PSOF Section B ¶ 26, Ex. 8. (Bates Nos. 702A, 764A) (Dkt. 77-8). There is simply no justification for hiding the fact that prominent individuals are participating in these programs, and the public has a right to know how ICE is using Citizens Academies to influence the opinions of elected officials, private actors, and non-profit advocates.

Exemption 6 does not apply, and the court should order release of names, employers, and job titles of participants in the Citizens Academy programs.

B. Information ICE has Disclosed to Hundreds of Civilians is Not Properly Withheld Under Exemption (7)(E).

Exemption 7(E) protects only those law enforcement techniques and procedures that are "not generally known to the public." *Doherty v. United States Dep't of Justice*, 775 F.2d 49, 52 n. 4 (2d Cir. 1985). It requires "that the material being withheld truly embody a specialized, calculated technique or procedure and that it not be apparent to the public." *ACLU v. U.S. Dep't of Homeland Sec.*, 243 F. Supp. 3d 393, 404 (S.D.N.Y. 2017). Defendant's arguments fail on both counts. The PowerPoint presentations, topic summaries, and other basic information provided in the Citizens Academy program are not specialized techniques, and the fact that they have been shared with hundreds of civilians for years shows that they are not confidential or sensitive.

Defendant argues that it did not waive Exemption 7(E) by disclosing information to Citizens Academy participants, because ICE requires participants to undergo a background check. D.'s Reply at 13; DSAF ¶ 61. But millions of Americans undergo background checks every year. Presumably, ICE would not disclose sensitive law enforcement information to all these people. If disclosure of such information truly ran the risk of circumvention of the law, ICE's dissemination of it to hundreds of volunteer participants over several years would be troubling indeed.

A close look at the explanations for withholding training documents in the *Vaughn* index makes this clear. In one example, ICE partially withheld the contents of a Power Point presentation

titled, "Welcome, Introductions, Overview of the Firearms Program." DSOF Ex. A, Attachment A at 53 (describing claimed exemptions in Bates No. 5672-5690 for "law enforcement techniques for rescue missions and illustrating said techniques."). It is hard to understand how ICE could be releasing truly sensitive "rescue" techniques, rather than general statements or summaries, to hundreds of civilians. In another, an email providing "an overview of key topics discussed at Citizens Academy training," the description of the document itself suggests a high level of generality, not a "sensitive" law enforcement technique. DSAF Ex. A, Attachment A at 54.

Nothing in Defendant's Response justifies characterizing general information designed for, and released to, members of the public, as law enforcement techniques protected by Exemption 7(E). The Court should order the release of this information.

CONCLUSION

For all these reasons, Plaintiffs respectfully request that the Court deny Defendant's Motion for Summary Judgment, grant Plaintiffs' Cross-Motion, and order Defendant to (1) confer with Plaintiffs to plan for new searches using appropriate custodians and search terms; and (2) lift improperly applied redactions under Exemptions 6 and 7(E) from materials already produced.

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Respectfully submitted,

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