UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DETENTION WATCH NETWORK and CENTER FOR CONSTITUTIONAL RIGHTS,

Plaintiffs,

v.

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT and UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendants.

14 Civ. 583 (LGS)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION

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PRELIMINARY STATEMENT

Defendant United States Immigration and Customs Enforcement, by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submits this reply memorandum of law in further support of its cross-motion for partial summary judgment ("ICE Br.") and in opposition to Plaintiffs' motion for partial summary judgment and reply ("Pl. Reply") in this FOIA case.[1] Plaintiffs challenge ICE's invocation of FOIA Exemptions 4 and 7(E), 5 U.S.C. § 552(b)(4), (b)(7)(E), to justify the withholding of unit pricing and staffing plans contained in its agreements with private contractors that operate detention centers. As explained in ICE's moving papers and below, as well as in the declarations submitted with both submissions, Plaintiffs' criticisms are misplaced.[2]

ARGUMENT

I. ICE Properly Redacted the Pricing and Staffing Information Under Exemption 4

ICE correctly concluded that redacted information satisfied the requirements of Exemption 4. *See* ICE Br. at 9-21. Plaintiffs fail to rebut ICE's showing that the information at

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[1] This memorandum uses capitalized terms defined in the Government's opening brief.

[2] Filed with this reply brief are supplemental declarations from Fernando Pineiro, ICE's Deputy FOIA Officer ("Supp. Pineiro Decl.") and David Venturella of GEO ("Supp. Venturella Decl."), as well as a reply declaration from Steven Conry of CCA ("Conry Decl."). Plaintiffs criticize the declarations submitted with ICE's opening brief by arguing that they are "contradict[ed] [by] evidence in the record." Pl. Reply at 2 (quoting *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013)). The "evidence" Plaintiffs are apparently referring to consists almost exclusively of reports prepared by Plaintiffs or other organizations and articles published in newspapers or academic journals. *See* Schwartz Decl. [Docket No. 76] Exs. 1, 3, 4, 6, 7. The Government indicated in its opposition that while it does not dispute these documents' authenticity, it does dispute their characterization by Plaintiffs and their relevance to this action, *see* ICE Br. at 7 n.4, to say nothing of their purported treatment as "evidence." With respect to Plaintiffs' Rule 56.1 statement, which contains much of Plaintiffs' characterization of these documents, the Government specifically did not admit the accuracy or the materiality of any purported fact asserted by Plaintiffs. *See id.* The Government's brief did discuss the one potentially relevant government document cited by Plaintiffs (a GAO report) and explained why it does not undercut ICE's argument. *See id.* at 18 n.9.

issue was "obtained from a person," *see* Pl. Reply at 3-7, and that its disclosure would cause substantial competitive harm to the contractors, *see id.* at 7-17.

A. The Information Redacted from the Contracts Was "Obtained" from the Private Contractors

As explained in the Government's opening papers, the threshold requirement for Exemption 4 is that the information at issue was "obtained" from a private party. *See* ICE Br. at 9-10. "Consistent with this purpose, 'portions of agency-created records may be exempt if they contain information that was either supplied by a person outside the government or that could permit others to extrapolate such information.'" *NRDC v. U.S. Dep't of Interior*, 36 F. Supp. 3d 384, 400 (S.D.N.Y. 2014) (quoting *S. Alliance for Clean Energy v. U.S. Dep't of Energy*, 853 F. Supp. 2d 60, 67 (D.D.C. 2012), citing *Gulf & W. Indus. v. United States*, 615 F.2d 527, 529-30 (D.C. Cir. 1979)). "Courts have explained [that] 'information in an agency-generated [document] is still obtained from a person if such information was supplied to the agency by a person or could allow others to extrapolate such information.'" *Ctr. for Auto Safety v. U.S. Dep't of Treasury*, No. 11 Civ. 1048 (BAH), 2015 WL 5726348, at *9 (D.D.C. Sept. 30, 2015) (quoting *S. All. for Clean Energy*, 853 F. Supp. 2d at 68, citing *Gulf & W. Indus.*, 615 F.2d at 529-30) (internal quotation marks omitted). "[W]hen 'information was initially obtained from outside the agency and then was modified through negotiations,' the negotiations do not change the fact that the information was 'obtained from a person' and qualifies for exemption." *Id.* (quoting *S. All. for Clean Energy*, 853 F. Supp. 2d at 68).

Plaintiffs' argument that the pricing and staffing information at issue was not "obtained" from the private contractors relies on a misreading of *Bloomberg, L.P. v. Board of Governors of the Federal Reserve System*, 601 F.3d 143 (2d Cir. 2010), and is not supported by the facts of this case. According to Plaintiffs, *Bloomberg* stands for the proposition that a document

representing a final agency action is categorically precluded from containing information "obtained" from a private party for purposes of Exemption 4, even if it is shown that this is factually the case. *See, e.g.*, Pl. Reply at 5 (arguing that the contracts at issue "reflect Executive decision-making for which Exemption 4 protection does not apply" (footnote omitted)). But the relevant question is not whether *the document overall* represents an agency action or a submission by a private party, but rather whether *the specific withheld information* originated from the Government or the private party: "portions of agency-created records may be exempt if they contain information that was either supplied by a person outside the government or that could permit others to extrapolate such information." *NRDC*, 36 F. Supp. 3d at 400 (internal quotation marks omitted).

A close look at *Bloomberg* dispels Plaintiffs' proposed reading. In that case, the plaintiff sought (and obtained) certain information regarding loans made by the Federal Reserve Bank to private banks — specifically, "the identity of the borrowing bank, the dollar amount of the loans, the loan origination and maturity dates, and the collateral securing the loan" — over the Fed's and the banks' objections. 601 F.3d at 147. The court of appeals distinguished between the information submitted by the loan applicants, which was protected by Exemption 4, and the information regarding the loans made by the Fed, which was government-created information. *See id.* at 148-49. The court cited with approval cases in which Exemption 4 protected "information collected and slightly reprocessed by the government." *Id.* at 148 (citing *OSHA Data/CIH, Inc. v. U.S. Dep't of Labor*, 220 F.3d 153, 166-67 (3d Cir. 2000), and *Gulf & W. Indus.*, 615 F.2d at 530). But the court of appeals rejected for lack of factual support in that case the argument that information submitted by the applicants was merely reiterated in the final loan documents. *See id.* at 149.

The *Bloomberg* case simply did not address the situation here, where the lengthy agreements between ICE and the private contractors contain not only information describing the government's action (the identity of the contractors, the dollar amount of the contracts, the date range of the contracts), but also detailed contractor-provided information regarding unit pricing and staffing plans that were incorporated or reproduced in the contracts either unchanged or slightly modified through negotiations between ICE and the contractor. ICE is not arguing that the ICE contracts themselves, or any information about them, should be withheld in their entirety under Exemption 4. Rather, the sole question is whether Exemption 4 protects specific and limited information included within those contracts that was either incorporated verbatim from the contractors' submissions or modified slightly from those submissions through negotiation. *See* Adams Decl. ¶¶ 17-19; Gates Decl. ¶ 13; Venturella Decl. ¶ 13. Because this information is either "information in an agency-generated [document] . . . [that] was supplied to the agency by a [private] person," or "information [that] was initially obtained from outside the agency and then was modified through negotiations," it is protected by Exemption 4. *Ctr. for Auto Safety*, 2015 WL 5726348, at *9 (internal quotation marks omitted).

B. Release of the Withheld Pricing and Staffing Information Will Likely Cause Substantial Competitive Harm to the Contractors

Plaintiffs' first criticism of the competitive harm element — that there is no competitive market — is incorrect for several reasons, including Plaintiffs' overly restrictive view of the relevant market. *See* Pl. Reply at 7-10. Plaintiffs' other assertions of a purported lack of showing of competitive harm, regarding supposedly uniform disclosures and reverse-engineering, *see id*. at 10-17, are also misplaced.

1. There Is Actual Competition for SPCs, CDFs, and IGSAs

With respect to the competitive market for ICE contracts, Plaintiff's overarching argument is that since ICE is a single purchaser of immigration-detention services, there cannot by definition be a competitive market among its suppliers. *See* Pl. Reply at 7 (citing a law review article for the proposition that there can be competition among government suppliers only when the same product or service is also offered to non-government purchasers). There are many problems with Plaintiffs' position. First, since Exemption 4 concerns the competitive harm suffered by suppliers of goods and services *to the government*, it would be illogical to conclude that the applicable definition of competition should categorically exclude a substantial portion of government contractors: those that supply goods or services unique to the government.

Furthermore, as is often the case when discussing market structure for assessing competition, there is a question of how narrowly to define the market. Plaintiffs argue that the market is limited to ICE's contracts relating to immigration detainees, but Plaintiffs' market definition is unduly narrow and result-oriented. The relevant market is more appropriately viewed as one for private detention services, which may be procured by ICE, the Bureau of Prisons ("BOP"), the U.S. Marshals Service ("USMS"), and any number of other federal, state, and local law-enforcement and corrections agencies. *See* Venturella Decl. ¶ 19 (BOP, USMS, and other federal and state agencies also contract with CDFs to house inmates and detainees); Verhulst Decl. ¶ 13 (describing how CCA converted CDF contracted with BOP to CDF contracted with ICE after BOP declined to renew contract); *cf. Colonial Med. Grp., Inc. v. Catholic Healthcare W.*, No. 09 Civ. 2192 (MMC), 2010 WL 2108123, at *4 (N.D. Cal. May 25, 2010) (in antitrust case, rejecting argument that relevant market consisted only of local facilities that provide medical care to federal and state prisoners, but excluded those facilities providing medical care to "inmates incarcerated in city and county jails, to persons detained in county jails

pending the outcome of criminal proceedings, to military personnel held in [a naval] detention facility . . . , and to persons detained or confined by various federal, state, and local government agencies as a result of orders of civil confinement or commitment"), *aff'd*, 444 F. App'x 937 (9th Cir. 2011).

Regardless of the market definition, Plaintiffs' argument about the supposed lack of competition does not contend with the evidence the Government submitted regarding the competitive landscape in the three types of detention facility contracts. At SPCs, which are ICE-owned detention facilities in which contractor employees provide services such as staffing (*i.e.*, guards), transportation, and supervisory personnel, *see* Gates Decl. ¶ 2; Adams ¶ 6 & n.1, there is vibrant competition among a number of private contractors for the opportunity to provide these services to ICE, *see* Adams Decl. ¶ 13; Gates Decl. ¶¶ 8-9. Specifically, there are at least five or six entities that regularly compete for these contracts, *see* Adams Decl. ¶ 13; Gates Decl. ¶ 9, there is steep competition in price and otherwise for these contracts, and price is the most important factor ICE considers when awarding these contracts, *see* Adams Decl. ¶¶ 12-13; Gates Decl. ¶ 18. The incumbent provider has little to no advantage in bidding over other contractors. *See* Adams Decl. ¶¶ 13-14; Gates Decl. ¶ 21. Plaintiffs all but admit that the competition among SPC contractors is sufficient to satisfy this requirement. *See* Pl. Reply at 8.

ICE currently contracts with seven CDFs — privately run detention facilities with which ICE contracts to house detainees and at which the private contractors (and their subcontractors) provide all staffing, *see* Adams Decl. ¶ 6 & n.4; Verhulst Decl. ¶ 7 — operated by two private contractors, GEO and CCA, *see* Adams Decl. ¶ 6 & n.4; Verhulst Decl. ¶ 10. Other private contractors in addition to GEO and CCA operate CDFs, just not any that are currently contracting with ICE. *See* Venturella Decl. ¶ 18 (listing several other CDF operators:

Management and Training Company, Community Education Centers, Emerald Correctional Management, LaSalle Corrections, and MVM Inc.); Verhulst Decl. ¶ 5 (similar list). CDF operators compete for detention services contracts with ICE and other federal and state agencies interchangeably, and indeed facilities are transitioned from one agency to another if contracts are not renewed. *See* Adams Decl. ¶¶ 14-15; Venturella Decl. ¶ 17; Verhulst Decl. ¶ 13. Plaintiffs argue that competition among CDF operators is limited because building such facilities is capital-intensive and the contracting agencies' need is geographically specific. *See* Pl. Reply at 8-9. While these are indeed factors that may limit competition to some degree, there has nevertheless been active competition among CDF operators for some of these contracts, *see* Adams Decl. ¶¶ 14-15; Venturella Decl. ¶¶ 21-22 (listing examples of competitively bid CDF contracts); Verhulst Decl. ¶ 6 (same); *see also id.* ¶ 4, and indeed ICE has taken steps recently to further increase competition for these contracts, including re-competing them well ahead of their scheduled termination date to enable operators who do not have an existing facility in the area to propose construction or acquisition of a suitable facility in order to compete for the contract, *see* Adams Decl. ¶ 15; Supp. Venturella Decl. ¶¶ 3-5.

Plaintiffs rely on— and stretch the reasoning of — a decision by a magistrate judge in the District of Oregon to argue that there is no competition in the CDF market. *See* Pl. Reply at 9 (citing *Raher v. BOP*, 749 F. Supp. 2d 1148 (D. Or. 2010)). In the *Raher* case, BOP — which, as mentioned above, also contracts with CDFs — sought to withhold virtually all pricing information from its CDF contracts, including "the total price for each of the four base years" of the contracts, and not just the bed-day rates (referred to in the decision as "the Fixed Incremental Unit Price (FIUP) Per Inmate Day"). *Raher*, 749 F. Supp. 2d at 1158. The court reviewed the parties' submissions, and found that — unlike in this case — with respect to the BOP contracts at

issue, there was no evidence presented that there had ever been "any unsuccessful bidders, that the submitters bid against each other, or that unidentified potential contractors exist that could compete in the . . . procurement process." *Id.* at 1157. The court thus concluded that there was no evidence of competition for those BOP contracts and denied BOP's invocation of Exemption 4 with respect to those contracts. *Id.* By contrast here, ICE and the private contractors have provided declarations to the Court attesting to the nature and extent of competition in the CDF market for contracts with federal and state agencies, including ICE, and ICE has limited its invocation of Exemption 4 to the most sensitive pricing information, the bed-day rate and the staffing plans. *See supra*.

With respect to IGSAs — agreements between ICE (or another agency) and a state or local government to house detainees at a local facility, *see* Adams Decl. ¶ 6 & n.2 — Plaintiffs seize upon the acknowledged fact that these contracts are not subject to formal competition in the sense of solicitation of bids in response to a formal RFP. *See* Pl. Reply at 9 (citing Venturella Decl. ¶ 23). But, as ICE's declarant explained, the agency awards IGSAs based on informal proposals from local authorities, often in combination with private subcontractors. *See* Adams Decl. ¶ 16. There is no requirement in Exemption 4 that the competition must be of a formal bidding-contest variety. Moreover, the declarations describe instances when agencies have decided not to renew an IGSA in favor of a competitor's facility proposal. Plaintiffs attempt to dismiss these because some relate to IGSAs with other federal agencies such as BOP or to "unusual" ICE facilities, *see* Pl. Reply at 10 (citing Venturella Decl. ¶ 21), again erroneously insisting that the market for such contracts must be considered separately agency by agency. But again, Plaintiffs have no reasoned basis to limit the market in this manner, and ICE has met its burden of showing that there is competition for such contracts.

2. The Contractors Would Suffer Substantial Competitive Harm from the Release of Bed-Day Rates and Staffing Plans

Plaintiffs make several arguments as to why there would be no substantial competitive harm from the release of the pricing and staffing information at issue. *See* Pl. Reply at 11-17. They are all incorrect. Plaintiffs first assert that there can be no competitive harm from the disclosure of unit prices and staffing plans from the contracts at issue because "all competitors will be subject to the same disclosure requirements." *Id.* at 11. This is incorrect for several reasons. As a preliminary matter, it assumes incorrectly that the private contractors that are party to the particular contracts at issue in this FOIA request — those who have entered into an SPC, CDF, or IGSA with ICE between June 2006 and February 2014 — represent the entire universe of potential bidders for these contracts in the future. This is demonstrably wrong for the reason discussed above: there are contractors in these categories who were not awarded ICE contracts during the relevant time period. *See, e.g.*, Venturella Decl. ¶ 18 (listing other CDF contractors); Gates Decl. ¶ 9 (listing other SPC contractors); *see also* Supp. Venturella Decl. ¶ 22. Further, as one declaration explains, forcing all bidders to reveal their pricing strategies would effectively result in an unofficial reverse-auction in which bidders' profits would diminish. *See* Supp. Venturella Decl. ¶ 22. More importantly, were such reasoning correct, a FOIA requester would be able to circumvent Exemption 4 in nearly every case by asking for sensitive competitive information not just from one market participant but from all of them. In that way, the requester could argue, there will be no competitive harm since all market participants will be required to reveal their competitive information to the same extent and thus none of them will be at a competitive disadvantage. Such an argument is at sharp odds with the protection afforded by Exemption 4 for commercially sensitive information.

Plaintiffs also claim that there is a "double standard" in ICE's withholding of sensitive pricing information for its contracts with private contractors but not those with state and local governments who do not subcontract with private entities. *See* Pl. Reply at 12-13. But it is far from illogical to distinguish between government entities and private companies for the purposes of applying a FOIA exemption that relies on a showing of "substantial competitive injury" in order to apply.

Plaintiffs next argue — citing a non-FOIA case involving a contractor seeking to enjoin a federal contract auction — that in order to demonstrate substantial competitive harm from a potential disclosure, an agency must show that the disclosure would "*improperly affect[]*" competition, and that merely enabling a competitor to underbid a contractor is not sufficient to satisfy Exemption 4. Pl. Reply at 12-13 (citing *MTB Group v. United States*, 65 Fed. Cl. 516, 531-32 (2005) (emphasis added by Plaintiffs)). The *MTB* case concerned a government reverse-auction procedure in which the agency proposed disclosing the bidders' bids; one of the contractors sought to enjoin the auction as illegal, arguing that it violated federal contracting laws and regulations. *See* 65 Fed. Cl. at 516-20. While the opinion mentions Exemption 4 by analogy and discusses case law applying it, it does so only in the context of determining whether the pricing information was voluntarily or compulsorily provided to the Government. *See id.* at 526-29. Later in the opinion, in the section applying the standard for injunctive relief requiring a weighing of the parties' respective claimed harms, the court states its reasoning for denying the requested injunction:

> While plaintiff, as a revenue-seeking business, properly is concerned with competition and competitive balance, *nothing in the reverse auction procurements administered by [the agency] improperly affects plaintiff's competition with fellow bidders*. Plaintiff, in essence, is asking the court to endorse a procurement process that would be more advantageous to plaintiff. The court cannot do this.

Id. at 531-32 (emphasis added). This is plainly not a formulation of the standard for the application of Exemption 4, under which if "it would be to [a] competitor's advantage to receive [a government contractor's] line item price information," then "it follows that [the contractor] will be competitively harmed by that disclosure." *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303, 306-07 (D.C. Cir. 1999); *see also MTB*, 65 Fed. Cl. at 526-29 (discussing *McDonnell Douglas* and other Exemption 4 cases). Simply put, nothing in Exemption 4 limits its application to "improper" competition; the statute affords protection to information that would cause competitive harm, period.

Further, Plaintiffs erroneously claim that a decision by a Tennessee state correctional agency to release a handful of CCA staffing plans under the state open-records law somehow undercuts ICE's position in this case. *See* Pl. Reply at 13. It does not. To begin with, it does not appear that Tennessee's statute contains any exception to disclosure along the lines of Exemption 4. *See generally* Tenn. Code Ann. § 10-7-504(a)-(n); *cf. Schneider v. City of Jackson*, 226 S.W.3d 332, 343 (Tenn. 2007) ("[T]he [Tennessee] Public Records Act [is] distinct from [federal] FOIA and the open records laws of other states . . . ."). The Tennessee agency apparently gave no consideration to this question, and even if it had, a state agency's application of a state statute would have no bearing on this Court's application of FOIA. Moreover, the fact that there has been a limited disclosure of certain information by a party unconnected with the federal government does not mean that Exemption 4 ceases to apply to similar information in ICE's possession. "Although confidential commercial information is not subject to disclosure under Exemption 4, the exemption does not apply if *identical information* is otherwise in the public domain." *Inner City Press/Cmty. on the Move v. Bd. of Governors of Fed. Reserve Sys.*, 463 F.3d 239, 244 (2d Cir. 2006) (emphasis added). Though courts have not yet decided

whether the disclosure of such information into the public domain must be from an official (federal) government source in order to supplant Exemption 4, it is clear that the law requires that the information disclosed be "identical" to that sought to be withheld. *See N.Y. Civil Liberties Union v. DHS*, 771 F. Supp. 2d 289, 291 n.3 (S.D.N.Y. 2011). Here, ICE is not seeking to withhold under Exemption 4 the bed-day rates from the private contractors' agreements with the Tennessee Department of Correction, but rather from its own contracts. The information is thus not "identical" to the information previously disclosed.

Nor does the absence of a documented competitive harm suffered by CCA based on the Tennessee disclosure detract from ICE's claim here. As GEO's supplemental declaration explains, based on the Tennessee documents, it is now possible for GEO to reverse-engineer CCA's cost structure, *see* Supp. Venturella Decl. ¶¶ 6-20, 22,[3] just as one of the declarations submitted with ICE's opposition brief explained how the same could be done for an SPC contract if bed-day rates were made public, *see* Gates Decl. ¶¶ 23-24. The fact that GEO (or other CDF operators) have not publicly acknowledged using this information to date in an attempt to underbid CCA for a CDF contract does not eliminate the "likelihood of 'substantial' competitive injury if the information were released," which is all that is required to substantiate Exemption 4. *NRDC*, 36 F. Supp. 3d at 402; *accord Essex Electro Eng'rs, Inc. v. U.S. Sec'y of Army*, 686 F. Supp. 2d 91, 94 (D.D.C. 2010) ("When determining whether Exemption 4 applies, actual harm does not need to be demonstrated; evidence supporting the existence of potential competitive injury or economic harm is enough for the exemption to apply.").

[3] Plaintiffs criticize the contractors' initial submission for not explaining in sufficient mathematical detail the methodology by which a competitor could reverse-engineer an incumbent contractor's costs in a facility other than an SPC. *See* Pl. Reply at 13-16. GEO's supplemental declaration shows exactly how such reverse-engineering would work. *See* Supp. Venturella Decl. ¶¶ 6-20, 22.

It is also not necessary for establishing substantial competitive harm from the release of pricing information, as Plaintiffs suggest, that price be the sole factor ICE uses to award the contracts at issue. *See* Pl. Reply at 16. As the declarations establish, price is generally the most important factor in awarding these contracts. *See* Adams Decl. ¶¶ 12-13 (SPCs); Gates Decl. ¶ 18 (SPCs); Adams Decl. ¶ 22 (CDFs); Venturella Decl. ¶¶ 15-16 (CDFs); Adams Decl. ¶ 16 (IGSAs); Harper Decl. ¶¶ 7-8 (IGSAs). That is sufficient, as the D.C. Circuit has made clear:

> [R]elease of the option year prices in the present contract would likely cause McDonnell Douglas substantial competitive harm because it would significantly increase the probability McDonnell Douglas's competitors would underbid it in the event the Air Force rebids the contract. Because price is the only objective, or at least readily quantified, criterion among the six criteria for awarding government contracts, submitting the lowest price is surely the most straightforward way for a competitor to show its bid is superior.

McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d 1182, 1189 (D.C. Cir. 2004) (citation omitted) (reverse-FOIA case).

Finally, Plaintiffs reiterate the point from their opening brief that, in their view, there can be no competitive harm from the disclosure of pricing and staffing information from older ICE contracts. *See* Pl. Reply at 16. But, as explained in the contractors' declarations, since they use the same proprietary pricing and staffing model for all of their facilities, release of the information at issue in one contract, even one that is a few years old, would enable a competitor to underbid the contractor in a future contract with ICE or another agency. *See* Venturella Decl. ¶ 27; Verhulst Decl. ¶¶ 20, 23, 25 ("[B]ecause CCA uses the same proprietary algorithm to predict costs at all facilities, the release of confidential and proprietary information regarding CCA's pricing models and staffing patterns from any one contract (such as a contract with ICE) may be used to determine to a fair degree of accuracy CCA's bid in future procurement processes at other facilities, or in contracts with other federal and state agencies.").

Plaintiffs have thus failed to rebut ICE's assertion of Exemption 4 with regard to the withheld information.

II. ICE Properly Redacted the Staffing Information Under Exemption 7(E)

Plaintiffs make three arguments with regard to ICE's assertion of Exemption 7(E) to protect the staffing plans: that the staffing plans are not "compiled for a law enforcement purpose," that they do not constitute law enforcement techniques or procedures, and that the information at issue is already publicly known. None of these arguments is correct.

In addition to the declaration previously submitted, *see* Pineiro Decl. ¶¶ 23-27, as explained in more detail in ICE's supplemental declaration accompanying this memorandum, the staffing plans are most decidedly complied for law enforcement purposes:

> ICE uses the information contained in the staffing plans to make law enforcement operational decisions related to the posting of staff within the facilities to maintain security and to coordinate detainee transportation. ICE continually reviews and revises the staffing plans (or works with its contractors to revise them) in order to ensure that the staffing level at each detention facility is adequate given the fluctuation in detainee populations. . . . [¶] The staffing plans at issue are thus compiled for law enforcement purposes because ICE uses the information in these documents to determine the specific number of personnel during each shift to be able to support ICE's detention operations, which include ensuring the safety of detainees and staff alike and securing the detention facilities (both ICE- and contractor-operated) from internal and external threats.

Supp. Pineiro Decl. ¶¶ 5-6.

Plaintiffs claim that ICE may use the staffing plans only in connection with its administrative responsibilities and not its law enforcement duties, *see* Pl. Reply at 19, but this is simply not correct. "The staffing plans serve more than a purely administrative purpose because ICE relies on these documents to achieve its law enforcement mission which includes arresting and removing individuals who violate federal immigration law. . . . The staffing plans that ICE requires and collects from the private detention facilities are intimately to related to ICE's law enforcement mission, as they allow the detention facilities to work with ICE to determine the

specific number of personnel needed to operate the facility and how and where such persons are to be posted within the facility to ensure the safety of the detention facility and thus guarantee that detainees do not escape and can appear at their immigration hearings." Supp. Pineiro Decl. ¶ 9.

The staffing plans also reflect law enforcement procedures, "to wit, how ICE implements detention facility security standards for the use and allocation of personnel at detention facilities." *Id.* ¶ 7. "ICE continually relies on these plans to guarantee that detention facilities have the correct number of staff members on duty at any given time to prevent detainee-on-detainee assaults, ensure that detainees have access to medical care, ensure that attorneys and staff members are able to visit detainees, and meet other requirements in a safe and secure manner." *Id.* ¶ 9.

The sample staffing plan selected in this case contains a great deal of information that implicates law enforcement concerns:

> [It] reveals how many management/support, security/operations, unit management, maintenance, services, programs, health services, and education personnel are on duty at the facility 24 hours a day, 7 days a week, broken down by shift. The Staffing Plan further reveals specific information indicating where personnel are posted at critical locations within the detention/correctional facility to include staffing by number of days per week and number of posts per shift for CCA facility entrances, administration buildings, administrative offices, visitation facilities, facility perimeters, armories, central control, housing unit control, housing pod control, detainee/inmate housing units/pods, recreation yards, vehicle sally ports, transportation services, dining halls, facility kitchens, medical departments, and programming buildings/offices. The Staffing Plan also discloses how many inmates are housed in each living unit and how many security personnel are assigned to the unit on a per-day and per-shift basis.

Conry Decl. ¶ 9.

Plaintiffs dismiss the potential harm that could come from the public disclosure of such information as speculative. *See* Pl. Reply at 20-21. But it is hardly unduly speculative to say that "public disclosure of staffing plans would compromise the security of the detention facility,

as well as that of the detainees and personnel therein, as knowledge of the specific allocation of personnel within the detention facility would allow potential bad actors and groups to effectively disrupt a facility by knowing the specific locations and shifts where the detention facility has minimal personnel, and is thus more vulnerable." Supp. Pineiro Decl. ¶ 10. "Disclosure of Staffing Plans would allow the public and detainee/inmate populations to determine how many days a week and on which shifts critical command and emergency response personnel will be present at the detention facility to include staffing for . . . personnel most critical for coordinating response and management of critical incidents . . . [as well as] the specific schedule and staffing of [medical staff], and thus [to] determine the facility's overall capacity to respond (or not respond) to medical emergencies in cases of staff assaults, inmate assaults or large scale facility disturbances." Conry Decl. ¶ 10; *see also id.* ¶¶ 11-12.

Moreover, "[d]etainees/inmates may attempt — and succeed — to carry out major incidents undetected by facility personnel to include introduction of dangerous contraband (drugs, weapons, cell phones, escape materials) into a facility (or transferred within the facility) through visitation, materials deliveries, smuggling onto recreation yards or through facility perimeters, and detainee/inmate-to-detainee/inmate transfer if the detainee/inmate population (and the smuggling accomplices from the public) knew when, where, and how many facility personnel are on duty based upon public access to a Staffing Plan." *Id.* ¶ 14. This is especially true considering that certain ICE detainees have "prior felony convictions; a history or pattern of engaging in assaultive behavior; a documented history of violent conduct such as murder, rape, assault, intimidation involving a weapon, or arson; gang affiliations; a suspicion or a conviction for drug trafficking; a documented or reasonable suspicion of making terrorist threats; or a

conviction for engaging in terrorist activity or crimes." Supp. Pineiro Decl. ¶ 3; *accord* Conry Decl. ¶ 6.

Finally, contrary to Plaintiffs' claim, *see* Pl. Reply at 21-22, the staffing plan information has not been publicly disclosed either by virtue of the detainees' ability to observe the staff in their facilities or because of the disclosure of other staffing plans by the Tennessee agency. To begin with, the fact that the public knows generally that detention facilities employ staff, including security staff, does not obviate the application of Exemption 7(E). As courts have acknowledged, "Exemption 7(E) applies even when the identity of the techniques has been disclosed, but the manner and circumstances of the techniques are not generally known, or the disclosure of additional details could reduce their effectiveness." *Bishop v. DHS*, 45 F. Supp. 3d 380, 391 (S.D.N.Y. 2014) (citations and internal quotation marks omitted).

With respect to the detainees' own observations, while they "may be able to personally observe and study staffing for the particular housing unit they live in, such information is discernable only for the area in which the specific detainee/inmate resides, and such observations would not provide them with access to the overall facility staffing levels and locations that includes specified facility shifts, numbers of specified personnel posted per shift and coverage days for critical safety, security and medical staff to include facility command/management personnel, medical personnel, control personnel, perimeter personnel, etc." Conry Decl. ¶ 12.

As for the Tennessee disclosure, the public disclosure doctrine applicable to Exemption 4, discussed above, is also applicable to Exemption 7(E). *See N.Y. Civil Liberties Union*, 771 F. Supp. 2d at 291 n.3 (requiring that the "identical" information be publicly disclosed, but not deciding of whether the disclosure must be made officially by the federal government). Plaintiffs claim that once information is publicly revealed, any "equivalent information, with the

same level of specificity" cannot remain protected by Exemption 7(E). Pl. Reply at 21 (citing *ACLU v. DOJ*, No. 12 Civ. 7412 (WHP), 2014 WL 956303, at *7 (S.D.N.Y. Mar. 11, 2014)). But the *ACLU* case does not stand for that proposition. The case concerned a Department of Justice memorandum to federal prosecutors discussing a Supreme Court decision on the use of GPS surveillance. *See ACLU*, 2014 WL 956303, at *1 (citing *United States v. Jones*, 132 S. Ct. 945 (2012)). The court reviewed the memorandum *in camera*, and determined that its discussion of GPS surveillance "d[id] not reveal any investigative techniques not generally known to the public," that "*Jones* itself describes the use of GPS tracking in a way that is comparable to the . . . memo," and thus that Exemption 7(E) did not protect the memorandum from disclosure. *See id.* at *7. The *ACLU* case thus did not concern the question of when a public disclosure vitiates Exemption 7(E).

The standard for a public disclosure is, and remains, that only if the "identical" information is publicly revealed is the exemption's protection potentially lost. That is not the case here, as the information revealed in Tennessee is the staffing plans from the contracts of a state correctional agency with CDF operators, while the information sought to be protected in this case is the staffing plans in ICE's contracts involving *entirely different facilities*. "Each specific staffing plan addresses the specific security needs of each detention facility, as no two facilities are identical. The disclosure of a detention facility's staffing plan would make that facility more vulnerable to security breaches, but would not endanger other facilities." Supp. Pineiro Decl. ¶ 8. It is simply illogical to suggest that release of staffing plans for three state facilities in Tennessee obviates the security risks flowing from release of staffing information for entirely separate federal facilities in other locations.

Plaintiffs have thus failed to rebut ICE's invocation of Exemption 7(E) to protect the staffing plans.

CONCLUSION

For the foregoing reasons and the reasons in ICE's moving papers, ICE respectfully requests that the Court grant its cross-motion for partial summary judgment and deny Plaintiffs' motion.

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Respectfully submitted,

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