UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DETENTION WATCH NETWORK, CENTER FOR CONSTITUTIONAL RIGHTS,

Plaintiffs,

v.

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

Defendants.

DOCKET NO.: 14-CV-583 (LGS)

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

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ARGUMENT

I. ICE's Strategic Release of Private Contractors' Bed Day Rates to the Press Shows the Unlikelihood of Imminent, Substantial Competitive Harm

ICE cannot withhold unit prices or bed day rates in government detention contracts, because these rates were previously released to the public without causing contractors substantial competitive harm and are now in the public domain. In 2010, as part of a public relations effort to tout reforms in immigration detention, ICE officials revealed, and the *Houston Chronicle* published, that the bed-day rate for the CCA-operated Houston Detention Center was $99. *See* Schwarz Sur-Reply Decl. Exhibit 16, Bates No. 23181-85, at 23184. Despite ICE's official release of bed day rates to the public, private contractors have not suffered substantial competitive harm, defined by courts in the Second Circuit as "imminent" harm, *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d. 262, 280 (S.D.N.Y. 2009), *aff'd*, 601 F.3d 143 (2d Cir. 2010), and understood near-universally to mean not simply increased competition, as Defendants suggest, but rather, losses due to improper competitive advantage.[1]

[1] Defendants cite *McDonnell Douglas Corp. v. NASA,* 180 F.3d 303, 306-07 (D.C. Cir. 1999) to support their argument that any loss of "competitive position" constitutes competitive harm. Defs. Br. at 10-11. That is not the standard in the Second Circuit, nor does it appear to be followed in recent cases in the D.C. District Courts. *See, e.g.*, *Biles v. HHS*, 931 F. Supp. 2d 211, 224-25 (D.D.C. 2013 (citing *National Parks & Conservation Ass'n v. Kleppe*, 572 F.2d 672, 678 (D.C. Cir. 1976) for the proposition that the "'harm' aspect of 'competitive harm' is an *unfair* commercial advantage by way of disclosure, and stating that "'asymmetric' disclosure [where only some competitors' information is released] or lack thereof... is valid evidence that can help establish or nullify a claim of substantial competitive harm.") (emphasis in original)). It would undermine foundational American economic principles and public policy to hold that FOIA endorses avoidance of competition itself, while other areas of American law view competition as an unalloyed good. *See, e.g.*, *Cargill, Inc. v. Monfort of Colorado, Inc.,* 479 U.S. 104, 115 (1986) (internal citations and quotation marks omitted) ("it is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition"); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) ("The antitrust laws … were enacted for 'the protection of competition, not competitors.'") (internal citations omitted).

Under Exemption 4, courts must consider whether "the availability of similar information belies the defendants' assertion about the risk of substantial competitive injury from the release of the documents." *Ctr. For Auto Safety v. U.S. Dep't of Treasury*, No. 11-1048, 2015 U.S. Dist. LEXIS 133220, *18 (D.D.C. Sept 30, 2015). ICE released CCA's bed day rates to the public more than five years ago, and CCA, GEO and other contractors have not pointed to any harm from that disclosure. The public availability of bed day rates – resulting in no harm at all to private contractors – "defeats an argument that the disclosure of the information would likely cause competitive harm." *Nat'l Cmty. Reinvestment Coal. v. Nat'l Credit Union Admin.*, 290 F. Supp. 2d 124, 134 (D.D.C. 2003) (citing *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987)). Moreover, "[v]oluntary disclosures of all or part of a document may waive an otherwise valid FOIA exemption." *N.Y. Times v. Dep't of Justice*, 756 F.3d 100, 120 (2d Cir. 2014). For Exemption 4, courts consider information to be in the "public domain" where "identical information … is freely available." *Inner City Press/Community on the Move v. Bd. of Governors of the Federal Res. Sys.*, 463 F.3d 239, 244 (2d Cir. 2006). Importantly, even in the context of Exemption 1, which protects properly classified information, the Second Circuit does not require previously disclosed information to have "absolute identity" with the information sought. *N.Y. Times*, 756 F.3d at 120. "Indeed, such a requirement would make little sense. A FOIA requester would have little need for undisclosed information if it had to match precisely information previously disclosed." *Id*. In 2010, then-Assistant Director of ICE disclosed a contractor's bed day rates in order to promote ICE's reforms, Schwarz Sur-Reply Decl. Exh. 16, and ICE cannot now claim that Exemption 4 applies.

II. Defendants Do Not Even Attempt to Demonstrate that Staffing Plans – Particularly Health Care and Social Service Staffing Plans – Contain Techniques or Procedures for Investigations or Prosecutions

Defendants' invocation of Exemption 7E presents a straightforward legal question: whether staffing plans for facilities holding immigrants contain information that, if disclosed, would reveal "the techniques and procedures of law enforcement *investigations or prosecutions*." 5 U.S.C. §552 (b)(7)(E) (emphasis added). Defendants do not even attempt to demonstrate that information in staffing plans is related to investigations or prosecutions; neither word appears in their reply brief. The only mention of the concept of "investigatory techniques" appears in passing, inside a quotation from a decision authorizing disclosure of information. *See* Defs. Br. at 12-13 (citing *ACLU v. DOJ*, No. 12 Civ. 7412 (WHP), 2014 WL 956303, at *7). Defendants' avoidance of this central element of 7E is fatal. In the Second Circuit, "techniques and procedures" must be connected to "how law enforcement officials go about investigating a crime." *Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec*., 626 F.3d 678, 682 (2d Cir. 2010). Defendants thus cannot meet their burden to withhold staffing plans under Exemption 7E, because they have not even established a link a between the private detention center staffing and techniques and procedures for law enforcement investigations.

Unable to meet the Second Circuit's standard, Defendants instead resort to further scaremongering, asserting additional unsupported security threats that will result from disclosure. *See, e.g.*, Conry Decl. at ¶ 14 (speculating, without a single example, that "detainee/inmate populations" may engage in "hostage-taking," "assaults/homicides," and "escapes"); Pineiro Supplemental Declaration at ¶ 3 (characterizing civil immigration detention facilities as intended to confine those with "a documented history of violent conduct")[2]. These "merely conclusory

[2] Defendants' smear of detained persons as dangerous is both irrelevant and inaccurate. Persons detained by ICE include refugee women and children in family detention centers; individuals seeking asylum; and undocumented persons with no criminal record. Non-citizens with criminal records, including lawful permanent residents, are placed in immigration detention *after* serving their sentences, and would be released into the community if not for lack of citizenship.

statements," which lack "reasonable specificity of detail," cannot be the basis for summary judgment. *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013). *See also* Dkt. 96, Pls. Opp. Br. at 1-2. Further, these speculations have no relevance to the question of whether staffing plans are "techniques and procedures for law enforcement investigations and prosecutions"; unlike the "guidelines" prong of 7E, the "techniques and procedures" prong does not require the government to show "risk of circumvention of the law." *Allard K. Lowenstein*, 626 F.3d at 682. Defendants' sensational assertions aim to distract from the fact that shift assignments and staffing numbers are not investigative or prosecutorial techniques, but rather aspects of general detention facility operations. Exemption 7E, like all other exemptions, must be narrowly construed, *Am. Civil Liberties Union v. U.S. Dep't of Homeland Sec.,* 973 F. Supp. 2d 306, 312 (S.D.N.Y. 2013) (citing *Associated Press v. Dep't of Defense,* 554 F.3d 274, 283 (2d. Cir. 2009)), and thus does not exempt every administrative aspect of detention operation.

Notably, Defendants' imaginative list of potential dangers omits the real threat to health and safety in immigration detention: inadequate and substandard medical and mental health care that has caused serious and lasting harm, and even death, to significant numbers of people detained in private facilities. Multiple reports have documented injury and death in private detention facilities and prisons, pointing to inadequate staffing as a direct cause. For example, a recent review of deaths in immigration detention quoted ICE investigators faulting inadequate medical staffing and excessive vacancies in health care positions.[3]

[3] *See Fatal Neglect: How ICE Ignores Deaths in Detention* (February, 2016) (American Civil Liberties Union, Detention Watch Network, & the National Immigrant Justice Center) (available at http://immigrantjustice.org/publications/FatalNeglect). The report quotes ICE's Office of Detention Oversight as finding private contractors' medical staffing levels "inadequate to meet the health care needs of the detainee population." *Fatal Neglect* at 12,19. *See also, e.g.,* Nina Bernstein, "Officials Hid Truths of Immigrant Deaths in Jail," New York Times, January 9, 2010 (available at http://www.nytimes.com/2010/01/10/us/10detain.html?_r=0)

In the context of this continuing scandal, the government's attempt to shield staffing plans, at the very least those related to health care and social services, is less related to threats of "hostage-taking" than to fear of further embarrassment or exposure. No part of the staffing plans merits protection under Exemption 7E. But health care and social services in particular have no link whatsoever to "law enforcement investigations or prosecutions." Given the importance of educating the public about these detention services, and in the interest of narrowing the issue before the Court, Plaintiffs limit their demand for unredacted staffing plans to those related to health and medical care, typically known as "Medical Staffing,"[4] or social services, sometimes known as "Programs."[5] Disclosing health care and social-service staffing plans, far from causing any threat to safety, in fact promotes the welfare of detained persons, by "pierc[ing] the veil of administrative secrecy and … open[ing] agency action to the light of public scrutiny." *Am. Civil Liberties Union v. DHS*, 973 F. Supp. 2d at 312, citing *Associated Press,* 554 F.3d at 283.[6]

CONCLUSION

For all these reasons, Plaintiffs are entitled to partial summary judgment, and unit prices, bed day rates, and health care and social service staffing plans must be disclosed.

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[4] Because Defendants did not invoke Exemption 7E until after briefing began, the sample staffing plan selected for the Court's review did not include "Medical Staff." Plaintiffs therefore respectfully include an additional plan specific to "Medical Staffing" for the purpose of demonstrating to the Court the type of positions about which Plaintiffs seek information. *See* Schwarz Sur-Reply Decl. Exh.17 (Adelanto Medical Staffing Plan). The positions listed in this plan include "Registered Nurse," "Dentist," "Physician," "Psychologist," and "Psychiatrist."

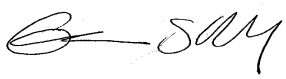
[5] The sample staffing plan selected for briefing included a category entitled "Programs," which lists the following positions: Recreation Supervisor, Recreation Coordinator, Library Aide, Chaplain, Administrative Aide, and Contract Attorney. *See* Pineiro Decl. Exh. 1 at 9 (Dkt 88-1).

[6] Given Plaintiffs' limitation of the staffing information sought, Defendants' claims to Exemption 4 protection of staffing plans are further weakened, because with fewer variables disclosed, accurate reverse-engineering that Defendants claim will lead to substantial competitive harm becomes even more unlikely.

Date: March 4, 2016

New York, New York

Respectfully submitted,



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