UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

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COLOR OF CHANGE, et ano.,

16cv8215

Plaintiffs,

MEMORANDUM & ORDER

-against-

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et ano.,

Defendants.

WILLIAM H. PAULEY III, Senior United States District Judge:

After considering the parties' briefing and statements made at the May 17, 2018 oral argument, this Court directs the Department of Homeland Security ("DHS") to submit the documents undergirding the parties' cross motions for summary judgment to this Court for in <a href="mailto:camera">camera</a> review. This Court recognizes that "[i]n camera review is considered the exception, not the rule." Local 3 v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988). But the "propriety of such review is a matter entrusted to the district court's discretion." Local 3, 845 F.2d at 1180.

Here, an <u>in camera</u> review will aid this Court's resolution of the pending motions. DHS acknowledges that portions of the documents Plaintiffs seek are factual in nature. (<u>See</u> Declaration of Arthur R. Sepeta, ECF No. 60 ("Sepeta Decl."), ¶ 34.) Under the Freedom of Information Act, "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b). DHS contends that even those factual portions reveal its deliberative process, as they demonstrate how DHS weighed those facts. (Sepeta Decl., ¶ 34.)

DHS took a similar position in Ferrigno v. United States Department of

Homeland Security, 2011 WL 1345168 (S.D.N.Y. Mar. 29, 2011). There, Judge Sullivan noted that "[b]efore approving the application of a FOIA exemption, [a] district court must make specific findings of segregability regarding . . . documents to be withheld. Ferrigno, 2011 WL 1345168, at \*10 (citing Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1116 (D.C. Cir. 2007)). The court held that although DHS's declaration lent credence to its assertion that non-exempt and exempt portions of the memorandum at issue were intertwined, "Defendant's submission of the [documents] for in camera review w[ould] aid the Court in evaluating the segregability of any non-exempt information contained in the documents." Ferrigno, 2011 WL 1345168, at \*10. Therefore, the court ordered DHS to provide the documents for in camera review.

This Court has previously held that "[a]ny <u>in camera</u> inspection guides a court's evaluation of the Government's reliance on exemptions from FOIA's disclosure requirement."

N.Y. Times Co. v. U.S. Dep't of Justice, 872 F. Supp. 2d 309, 315 (S.D.N.Y. 2012).

Additionally, "<u>in camera</u> review is particularly appropriate where, as here, the number of documents is relatively small." N.Y. Times Co., 872 F. Supp. 2d 309 at 315 (citation and quotation marks omitted); see also Phillips v. Immigration & Customs Enforcement, 385 F. Supp. 2d 296, 301 (S.D.N.Y. 2005) (directing submission for <u>in camera</u> review "[a]s a matter of judicial economy").

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At this time, this Court makes no judgment as to the adequacy of the Sepeta Declaration, and is mindful that its "inspection prerogative is not a substitute for the government's burden of proof." Halpern v. FBI, 181 F.3d 279, 295 (2d Cir. 1999). Accordingly, DHS shall provide this Court with the documents underlying the parties' cross motions for summary judgment for in camera review by June 6, 2018.

Dated: May 23, 2018

New York, New York

SO ORDERED:

WILLIAM H. PAULEY III

U.S.D.J.