IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,	)	
Plaintiff,	)	
v.	)	Civil Action No. 14-cv-269 (CKK)
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS and UNITED STATES DEPARTMENT OF JUSTICE	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION
FOR LEAVE TO FILE A REPLY AND A SURREPLY

INTRODUCTION

Under the guise that Defendants' Reply (ECF No. 20) raised "new facts and additional arguments for the first time," Plaintiff seeks leave to file a fourth brief in this case to have the last word on whether the Federal Criminal Discovery Blue Book ("FCD") is exempt from disclosure under FOIA, an issue on which Defendants have the burden of proof. Plaintiff requests leave to file both a Reply in support of its Cross-Motion for Summary Judgment and a Surreply in support of its Opposition to Defendants' Motion for Summary Judgment. Both requests should be denied.

First, it is unnecessary for Plaintiff to file a Reply because it has conceded that its Cross-Motion for Summary Judgment is baseless. Plaintiff cross-moved for summary judgment on the basis that the FCD could not be withheld under a claim of attorney work-product privilege because it was "working law" that had to be affirmatively disclosed under 5 U.S.C. § 552(a)(2).

Plaintiff has now admitted that "DOJ correctly notes that agency working law can be withheld from production under the work-product privilege." Pl.'s Mot. for Surreply (ECF No. 22) at 3. Because Plaintiff has conceded that its sole basis for cross-moving for summary judgment is meritless, and that the dispositive issue in this case is whether the FCD constitutes attorney work product, which Defendants have the burden to prove and which has been fully briefed, it is unnecessary for Plaintiff to file a Reply.

Second, there is no basis for Plaintiff to file a Surreply because Defendants did not raise any issues for the first time in their Reply, nor did the Reply go beyond the scope of the issues raised by Plaintiff in its Opposition to Defendants' Motion for Summary Judgment and Cross Motion for Summary Judgment ("Plaintiff's Opposition") (ECF No. 16-1). Defendants did nothing more than respond to Plaintiff's arguments. That is the very purpose of a reply memorandum. Under these circumstances, Plaintiff should not be allowed to file a fourth and final brief bolstering arguments it has already made.

ARGUMENT

I. A REPLY IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT IS UNECESSARY

This is Plaintiff's second attempt to file a fourth and final brief. On May 2, 2014, Plaintiff requested the Court to allow it to file a "Reply" in support of its Cross-Motion for Summary Judgment, *see* Joint Proposed Briefing Schedule (ECF No. 10) at 1-2, which Defendants opposed. In resolving this dispute, the Court in its Scheduling and Procedures Order chose not to allow Plaintiff to file a Reply, stating that it would "determine whether it is necessary for Plaintiff to file a Reply" following the filing of Defendants' Opposition to Plaintiff's Cross-Motion for Summary Judgment. Scheduling and Procedures Order (ECF No. 11) at 4. Plaintiff in its current submission fails for the second time to demonstrate why it is

allegedly necessary for it to file a reply memorandum in support of its Cross-Motion for Summary Judgment.

Plaintiff's sole basis for cross-moving for summary judgment was that the FCD was adopted agency policy or "working/secret law" that must allegedly be disclosed under 5 U.S.C § 552(a)(2), and which could not be withheld under a claim of attorney work-product privilege. *See* Pl.'s Cross-Mot. for Summ. Judgment and Opp'n to Defs.' Mot. for Summ. Judgment ("Pl.'s Opp'n") at 9 ("NACDL's Motion for Summary Judgment should be *granted* because . . . the Blue Book constitutes adopted agency policy or is secret law that cannot be withheld under a claim of attorney work product privilege."). *See also id*. at 18 ("DOJ's claim of attorney work product must fail because, as explained above in Section I.B [of Cross-Motion for Summary Judgment], the Blue Book constitutes agency secret law, and Exemption 5 does not apply to agency secret law.").[1] In their Reply, Defendants explained why Plaintiff's argument was wrong as a matter of law. *See* Defs.' Reply at 2-5. As it must, Plaintiff now concedes that point. *See* Pl.'s Mot. for Surreply ("DOJ correctly notes that agency working law can be withheld from production under the work-product privilege."). Accordingly, because Plaintiff has conceded that its Cross-Motion for Summary Judgment is meritless, and that the dispositive issue in this case is whether the FCD constitutes attorney work product – an issue that Defendants have the burden to prove and that has been fully briefed – there is no need for Plaintiff to file a Reply in support of its admittedly baseless Cross-Motion for Summary Judgment.

[1] Plaintiff's arguments that the FCD did not constitute attorney work product protected under Exemption 5 or sensitive law enforcement material protected under Exemption 7(E) were part of its Opposition to Defendants' Motion for Summary Judgment, not of its Cross-Motion for Summary Judgment.

II. A SURREPLY IS UNWARRANTED BECAUSE DEFENDANTS' REPLY DID NOT RAISE ANY ISSUE FOR THE FIRST TIME

"The Local Rules of this Court contemplate that there ordinarily will be *at most* three memoranda associated with any given motion: (i) the movant's opening memorandum; (ii) the non-movant's opposition; and (iii) the movant's reply." *Crummey v. Social Security Admin.*, 794 F. Supp. 2d 46, 62 (D.D.C. 2011) (citing LCvR 7) (emphasis supplied), *aff'd*, 2012 WL 556317 (D.C. Cir. Feb. 6, 2012); *Glass v. Lahood*, 786 F. Supp. 2d 189, 230 (D.D.C. 2011) (same). While courts in this Circuit may allow a non-movant to seek leave to file a surreply "when the nonmovant is deprived of the opportunity to contest matters raised for the first time in the movant's reply[,] … surreplies are generally disfavored[.]" *Id.* (citing *Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003); *Kitafi v. Hilton Hotels Retirement Plan*, 763 F. Supp. 2d 64, 69 (D.D.C. 2010)). A surreply is not appropriate "[w]here the movant's reply does not expand the scope of the issues presented[.]" *Crummey*, 794 F. Supp. 2d at 63. It is also not appropriate to file a surreply to amplify issues already discussed. *Glass*, 786 F. Supp. 2d at 231. Granting leave to file a surreply under these circumstances would allow "briefing [to] become an endless pursuit." *Crummey*, 794 F. Supp. 2d at 63.

Plaintiff's request to file a fourth brief is premised on its misunderstanding of this standard. Plaintiff argues that Defendants first addressed in their Reply Plaintiff's arguments that: (1) there was an alleged discrepancy between DOJ's statements to Congress regarding the FCD and the description of the book that DOJ offered in this lawsuit; and (2) the FCD was allegedly similar to some documents that DOJ has made public. While Defendants may have addressed for the first time these arguments in their Reply, this does not justify Plaintiff's filing of a Surreply because it is quite clear that these issues were not *raised* for the first time in Defendants' Reply. Defendants simply responded to the arguments Plaintiff made in its

Opposition to Defendant's Motion for Summary Judgment, which is the very purpose of a reply memorandum. Where, as here, a reply offers a "direct response to a factual allegation raised by [a plaintiff] in his opposition[,]" there is no legitimate basis to seek leave to file a surreply. *Crummey*, 794 F. Supp. 2d at 63 n.13. *See id*. at 63 (surrreply not warranted where reply does not go beyond the scope of issues raised in opposition); *Banner Health v. Sebelius*, 905 F. Supp. 2d 174, 188 (D.C.C. 2012) ("As Courts consistently observe, when arguments raised for the first time in reply fall 'within the scope of the matters [the opposing party] raised in opposition,' and the reply 'does not expand the scope of the issues presented, leave to file a surreply will rarely by appropriate.'" (citing *Crummey*, 794 F. Supp. 2d at 63)).

Plaintiff also seeks to address in a fourth filing the manner in which DOJ responded to Plaintiff's Statement of Material Facts. This is obviously not a matter raised for the first time in Defendants' Reply, so it does not support Plaintiff's request for leave to file another brief. And, in any event, DOJ appropriately responded to Plaintiff's Statement of Material Facts by admitting or denying only those statements that pertained to the contents of the FCD.

1. <u>The Alleged Discrepancy Between DOJ's "Description" of the FCD to Congress and Its Description of the Book in this Lawsuit is not a Matter Raised for the First Time in Defendants' Reply</u>

As Plaintiff acknowledges, it included in its Complaint statements DOJ made to Congress regarding the FCD, and it argued in its Opposition that DOJ's alleged "description" of the FCD to Congress was different from the description of the book DOJ provided in this lawsuit. *See* Pl.'s Mot. for Surreply at 2. Quite clearly, then, this is not an issue that Defendants raised for the first time in their Reply. Defendants simply contested Plaintiff's argument that there was such a discrepancy, explaining that they were not required or intended to offer a comprehensive account

of the contents of the FCD to Congress. Since this was a direct response to an argument Plaintiff made in its Opposition, it is not a legitimate basis on which to seek leave to file a surreply.

Plaintiff contends that it has not had an opportunity to address DOJ's explanation of this alleged discrepancy because, despite that it set forth in its Complaint "the description of the Blue Book that DOJ provided" to Congress, DOJ did not address these allegations in its Motion for Summary Judgment. Pl.'s Mot. for Surreply at 2. But the fact remains that the alleged discrepancy between DOJ' s statement to Congress regarding the FCD and its description of the book in this case is not an issue raised for the first time in Defendants' Reply; it was Plaintiff who first raised this issue in its Opposition and thus Defendants appropriately responded to it in their Reply. In addition, Defendants were not required to address in their Motion for Summary Judgment every single allegation in Plaintiff's Complaint; they simply had to explain, based on agency declarations, why the FCD is exempt from disclosure under FOIA. Moreover, as Defendants stated in their Answer, Plaintiff's characterization of DOJ's statements to Congress about the FCD are irrelevant to whether the book is exempt from disclosure under FOIA. *See* Answer (ECF No. 8) ¶¶ 24-28. Finally, as Plaintiff acknowledges, it has already "raised affirmative arguments regarding DOJ's representations to Congress, its [alleged] inconsistent description of the Blue Book in this litigation, and the implications of those discrepancies." Pl.'s Mot. for Surreply at 2. Thus, Plaintiff's attempt to amplify these arguments in a "reply" or surreply is improper and should not be allowed.

2. <u>The Alleged Similarity Between the FCD and Documents DOJ Has Made Public is not a Matter Raised for the First Time in Defendants' Reply</u>

In arguing that DOJ allegedly had to affirmatively disclose the FCD under § 552(a)(2) and that the FCD was not attorney work-product or sensitive law enforcement material, Plaintiff compared the FCD to documents DOJ has made public. *See* Pl.'s Opp'n at 12-13, 26-27, 36-37.

Defendants appropriately responded to this argument in their Reply, including a declaration from Andrew D. Goldsmith, who participated in the creation of the FCD and the other documents Plaintiff referenced. The Reply was the first time Defendants could address this issue, as Plaintiff compared the FCD to these documents in opposing Defendants' Motion for Summary Judgment. Because this was a response to Plaintiff's argument, rather than a matter raised for the first time in Defendants' Reply, it is not a basis for Plaintiff to file a surreply.

Plaintiff contends that its argument that the FCD is similar to documents DOJ has made public was part of its Cross-Motion for Summary Judgment and thus it should be afforded an opportunity to file a reply on this issue. But, as explained above, because Plaintiff has conceded that its sole basis for cross-moving for summary judgment – that the FCD could not be withheld under a claim of attorney work-product privilege because it was "working law" – is meritless, it is pointless for Plaintiff to file a reply in support of an admittedly baseless Cross-Motion for Summary judgment. In addition, because the dispositive issues here are whether the FCD is protected from disclosure under Exemption 5 or 7(E), and Defendants have the burden of proof on these issues, it is not proper for Plaintiff to file the final brief in this case.

3. <u>Defendants' Response to Plaintiff's Statement of Material Facts is Not a Basis to Seek to File Another Brief.</u>

Clearly, Defendants' response to Plaintiff's Statement of Material Facts is not a matter raised for the first time in Defendants' Reply and thus this response does not justify Plaintiff's request to file another brief. In addition, Defendants' response was appropriate. Defendants did not dispute those statements that related to the contents of the FCD. However, they contested Plaintiff's assertion that some statements that were not related to the contents of the FCD were "material." Defendants should not be required to admit or deny allegations that do not relate to the contents of the FCD and are thus not material to deciding whether the FCD is protected under

Exemptions 5 and 7(E). This is especially the case here because in FOIA cases an agency can meet its burden of showing that the documents are exempt from disclosure by submitting declarations or affidavits describing the justification for nondisclosure and how the information withheld logically falls within the claimed exemptions. *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). Defendants have submitted three declarations explaining in detail why the FCD is exempt from disclosure. Accordingly, Defendants' response to Plaintiff's Statement of Material Facts was proper and does not provide any basis for Plaintiff to file a fourth brief.

CONCLUSION

For the foregoing reasons, Plaintiff's motion seeking leave to file a Reply and a Surreply should be denied.

Dated: September 17, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this day of September 17, 2014, I caused a copy of Defendants' Opposition to Plaintiff's Motion for Leave to File a Reply and a Surreply to be filed electronically and that the document is available for viewing and downloading from the ECF system.

/s/ Héctor G. Bladuell