IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CLEAR; AMERICAN CIVIL LIBERTIES UNION; and AMERICAN CIVIL LIBERTIES UNION FOUNDATION, *Plaintiffs*, v. UNITED STATES CUSTOMS AND BORDER PROTECTION, *Defendant*.	No. 1:19-cv-07079-RER

PLAINTIFFS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This Freedom of Information Act ("FOIA") lawsuit seeks records relating to Tactical Terrorism Response Teams ("TTRTs")—secretive Customs and Border Protection ("CBP") units that operate at U.S. ports of entry and routinely target travelers who present no security risk. The Court should grant summary judgment in favor of Plaintiffs because CBP has failed to justify its withholdings as FOIA requires. CBP continues to rely on a declaration that is patently inadequate because it contains only generalized, conclusory assertions in support of its Exemption 7(E) claims. In addition, CBP cannot justify its Exemption 3 claim because it lacks the authority to invoke 50 U.S.C. § 3024(i)(1) as a withholding statute.

THE WITHHOLDINGS AT ISSUE

Plaintiffs challenge sixteen documents withheld in full and thirteen redacted documents. *See* Pls.' MSJ 4–6 & n.3. These withholdings fall into four categories: (1) training materials; (2) policies; (3) data on TTRT interactions with travelers; and (4) a map of TTRT locations. *Id*.

ARGUMENT

I. CBP'S DECLARATION IS INADEQUATE UNDER FOIA.

On a motion for summary judgment in a FOIA case, "[t]he burden is on the agency to demonstrate, not the requester to disprove, that the materials . . . have not been improperly withheld." *DOJ v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989). An agency may meet this burden "by submitting a detailed affidavit showing that the information logically falls within the claimed exemptions." *Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009). The affidavit must "contain *reasonable specificity* of detail rather than merely conclusory statements." *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999). A "vague or sweeping" affidavit, or one that rests predominantly on a recitation of "statutory standards," is insufficient. *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009). Courts review the legality of the agency's withholdings *de*

novo and "construe FOIA exemptions narrowly, resolving doubts in favor of disclosure." *Cook v. Nat'l Archives & Rec. Admin.*, 758 F.3d 168, 173 (2d Cir. 2014).[1]

A. CBP's Declaration Fails to Justify the Challenged Withholdings.

CBP's declaration and Vaughn index cannot carry the agency's burden for the simple reason that they do not explain how the exemptions apply to the challenged withholdings. This lacuna is fatal—an agency declaration must apply the exemptions "to the specific facts of the documents at hand." *Halpern v. FBI*, 181 F.3d 279, 293 (2d Cir. 1999). Multiple circuits have rejected declarations that attempt to justify withholdings as CBP has done here—by describing broad categories of information purportedly exempt from disclosure, without engaging with the specific withholdings. *See id*. at 293; *accord Church of Scientology Int'l v. DOJ*, 30 F.3d, 224, 231 (1st Cir. 1994) (rejecting declarations that "treat the documents . . . as a group, without referring to specific documents"); *King v. DOJ*, 830 F.2d 210, 219–25 (D.C. Cir. 1987).

CBP's response is to try and flip its burden. It asserts that "Plaintiffs have not rebutted the presumption of good faith accorded to the agency declaration or provided tangible evidence that summary judgment is otherwise inappropriate." Def.'s Opp. 3. But an agency cannot submit just any declaration—no matter how "vague or sweeping"—and then insist that the burden is on the plaintiff to demonstrate that summary judgment in favor of the agency is inappropriate. *Larson*, 565 F.3d at 862. Rather, CBP must justify its withholdings and it must do so by tailoring its declaration to the actual withholdings at issue.

The cases CBP cites to justify its burden shifting are inapposite. Def.'s Opp. 3. In both

[1] CBP notes that "Plaintiffs did not provide their own" Rule 56.1 statement. Def.'s Opp. 1 n.1. Rule 56.1 statements are not required in FOIA cases in this Circuit, as the Department of Justice has acknowledged. *See* Pls.' Rule 56.1 Resp. 1 n.1. Because CBP submitted a statement anyway, Plaintiffs submitted a response in case the Court found it helpful. Contrary to CBP's assertion, Plaintiffs have cited to admissible evidence for each factual dispute. *See id*. at ¶¶ 2, 7, 14–20.

cases, the relevant discussion concerned the legal standard for a motion to compel discovery. In *Carney v. DOJ*, 19 F.3d 807 (2d. Cir. 1994), the Court explained that "[i]n order to justify discovery *once the agency has satisfied its burden*, the plaintiff must make a showing of bad faith . . . or provide some tangible evidence" that summary judgment is inappropriate. *Id.* at 812 (emphasis added); *accord Grand Cent. P'ship*, 166 F.3d at 488 (discovery generally unnecessary "if the agency's submissions are adequate on their face"). Neither case alters the well-settled proposition that on a summary judgment motion, the "agency has the burden of showing that . . . any withheld documents fall within an exemption to the FOIA." *Carney*, 19 F.3d at 812.

CBP defends its boilerplate declaration by claiming that disclosing any more information "would defeat the purposes of the asserted FOIA exemptions." Def.'s Opp. 4. Here, the relevant exemption is 7(E), which protects certain law enforcement "techniques and procedures" or "guidelines."[2] CBP argues that "more specific details" would undermine Exemption 7(E) by "revealing the techniques and procedures and guidelines being withheld." *Id*. This argument presumes that the declaration discusses *any* details about the withholdings, which it does not.[3] Moreover, if accepted, it would nullify the requirement that the agency declaration "contain *reasonable specificity* of detail." *Grand Cent. P'ship*, 166 F.3d at 478. Under FOIA, it is the court, not CBP, that determines CBP's compliance with FOIA, and the court's *de novo* review necessitates some detail about what the agency is withholding and why. *See Halpern*, 181 F.3d at 295 ("Absent a sufficiently specific explanation from an agency, a court's *de novo* review is not possible . . . ."). Thus, in the Exemption 7(E) context, "the agency must at least provide *some*

[2] CBP also invokes Exemption 3 for one record, the Watchlisting Reference Guide. *See infra* 10.

[3] CBP claims that it provided "[t]he reasons for the challenged withholdings . . . in paragraphs 43–51 of the Howard declaration." Def.'s Opp. 3. Nowhere do these paragraphs address the specific withholdings at issue in this case.

explanation of what procedures are involved and how they would be disclosed." *Citizens for Resp. & Ethics in Wash. v. DOJ*, 746 F.3d 1082, 1102 (D.C. Cir. 2014).

As Plaintiffs have explained, CBP's Vaughn index cannot save the declaration because (1) it does not address any of the challenged redactions, and (2) it consists of vague and conclusory statements that do not support CBP's asserted exemptions. Pls.' MSJ 10. Remarkably, CBP addresses only the first argument, effectively conceding the second. Def.'s Opp. 4. In terms of the redactions, CBP says that the parties agreed the Vaughn index would address only the documents withheld in full. But that misses the point: Plaintiffs' argument is that the Vaughn index cannot cure the declaration's deficiencies as to the redactions because *neither* document addresses those redactions. *See Halpern*, 181 F.3d at 293 (affidavit that gave "no contextual description either of the documents subject to redaction or of the specific redactions" was inadequate).

B. CBP Should Not Be Permitted to Provide "Additional Information."

In its opening brief, CBP vaguely proposed to "provide additional information" *ex parte*. Def.'s MSJ 13 n.4. It now claims that it offered "to submit unredacted copies of the disputed materials to the Court for *in camera* review." Def.'s Opp. 4. Regardless, the Second Circuit has emphasized that a FOIA "court should only consider information *ex parte* and *in camera* that the agency is unable to make public if questions remain after the relevant issues have been identified by the agency's public affidavits and have been tested by plaintiffs." *Wilner*, 592 F.3d at 76. Such review is therefore appropriate only where the declaration provides sufficient specificity for the plaintiff to address the agency's asserted bases for withholding. For the reasons explained, CBP's declaration does not remotely meet that threshold.[4]

[4] If the court determines that it would be appropriate to review the challenged withholdings *in*

It would be equally improper for the Court to permit CBP "to provide a supplemental declaration." Def.'s Opp. 5.[5] Plaintiffs identified the withholdings at issue in August 2020, and CBP has had months of motion practice to justify them. It has failed to do so. The Court should not reward its failures with yet another bite at the apple. Doing so would send a dangerous signal that agencies may drag out FOIA litigation with impunity by submitting declarations that are inadequate on their face because the courts will allow them to cure their defects later.

II. CBP IMPROPERLY WITHHELD INFORMATION UNDER EXEMPTION 7(E).

Even if CBP's declaration addressed the challenged withholdings, the agency's reliance on Exemption 7(E) is wrong. First, CBP has not established that the withholdings meet the threshold requirement that they were "compiled for law enforcement purposes," nor that they contain "techniques and procedures" or "guidelines" within the meaning of FOIA. 5 U.S.C. § 552(b)(7). Indeed, several categories of the withholdings cannot, by their very nature, disclose "techniques and procedures" or "guidelines." Finally, CBP has failed to establish that disclosing the withholdings would risk circumvention of the law.

A. CBP Has Failed to Show that the Withheld Information Was Compiled for Law Enforcement Purposes.

As a threshold matter, CBP "bears the burden of demonstrating that the . . . information withheld w[as] 'compiled for law enforcement purposes.'" *Schwartz v. DOD*, No. 15-cv-7077, 2017 WL 78482, at *12 (E.D.N.Y. Jan. 6, 2017). CBP asserts that "[w]here an agency specializes in law enforcement," its decision to invoke Exemption 7 "is entitled to deference." Def.'s Opp. 6. However, the one case CBP cites in support—*Campbell v. DOJ*, 164 F.3d 20

camera, Plaintiffs respectfully request an opportunity to propose a representative sample.

[5] CBP's suggestion that a supplemental declaration "may need to be made *ex parte*" is also inappropriate for the reasons explained above. Def.'s Opp. 5.

(D.C. Cir. 1998)—simply reinforces the agency's burden. There, the D.C. Circuit stated that when an agency invokes Exemption 7, its declarations must "establish a rational nexus between the *withheld material* and a legitimate law enforcement purpose." *Id*. at 32 (emphasis added). If the declarations "'fail to supply facts' in sufficient detail" to establish a rational nexus, the court "may not grant summary judgment for the agency." *Id*.

Although CBP acknowledges that it must demonstrate a rational nexus between the withholdings and a law enforcement purpose, it makes no effort to do so. Def.'s Opp. 6. Instead, it doubles down on the argument that because CBP "is a law enforcement agency," its Exemption 7(E) withholdings were *per se* compiled for law enforcement purposes. *Id*. at 7. Courts have repeatedly rejected such a sweeping claim. *See Roth v. DOJ*, 642 F.3d 1161, 1173 (D.C. Cir. 2011) ("FBI records are not law enforcement records under FOIA simply by virtue of the function that the FBI serves."); *Nat'l Day Laborer Org. Network v. Immig. & Customs Enf't Agency*, 811 F. Supp. 2d 713, 744 (S.D.N.Y. 2011) ("While ICE, DHS and FBI . . . are . . . federal law enforcement agencies, not every document produced by those agencies' personnel has been 'compiled for law enforcement purposes' under FOIA."); Pls.' MSJ 13.

CBP's blanket assertion that the records relate to "TTRTs' core operational activities," and thus were compiled for law enforcement purposes, is another version of this discredited argument. Def.'s Opp. 6–8. What matters is not the agency's function, but its purpose in compiling the specific withholdings at issue. CBP only illustrates this point when it cites to *N.Y. Times Co.*, where the agency explained that the *specific withholdings* were "analogous to records found in investigatory files," and the court found that "*the withheld records* . . . relate to one or more . . . enforcement proceedings." 390 F. Supp. 3d 499, 515 (S.D.N.Y. 2019) (emphasis added).

Here, neither the declaration nor the Vaughn index establish that the withholdings were compiled for law enforcement purposes. Pls.' Opp. 14. Moreover, Plaintiffs have identified withholdings that, on their face, bear no rational nexus to a law enforcement purpose. *Id*. at 14–15. One example is "Culture and Religious Awareness Class," Howard Decl. Ex. M, at 9, which appears to train TTRT officers on cultural and religious competence. Another example is "TTRT Officer Reference Job Aid 2020," which appears to be a directive "regarding the general execution of tasks by agency personnel," and therefore cannot be compiled for law enforcement purposes. *Families for Freedom v. Customs & Border Prot.*, 797 F. Supp. 2d 375, 397 (S.D.N.Y. 2011). CBP offers no rebuttal to these and other examples Plaintiffs have highlighted.

B. CBP Has Failed to Show that the Withheld Information Contains "Techniques and Procedures" or "Guidelines."

Even if CBP can establish that its Exemption 7(E) withholdings were compiled for law enforcement purposes, it has failed to establish that they contain "techniques and procedures" or "guidelines" within the meaning of FOIA. The declaration and Vaughn index do not adequately address the Exemption 7(E) withholdings, let alone explain why they constitute "techniques and procedures" or "guidelines." *See* Pls.' MSJ 10. Moreover, Plaintiffs have identified three categories of information that cannot, by definition, disclose "techniques and procedures" or "guidelines": (1) legal authorities and safeguards governing TTRT activities, (2) data on TTRT interactions with travelers, and (3) a map of TTRT locations. *See id*. at 15.[6]

CBP asserts that it cannot disclose legal authorities and safeguards because they are "summaries or recitations of . . . confidential internal guidelines." Def.'s Opp. 9. What distinction CBP seeks to draw between legal authorities and safeguards and "confidential internal

[6] Because it is CBP's burden to establish that it has properly invoked Exemption 7(E), Plaintiffs have not "concede[d] that all other types of withheld information are law enforcement techniques and procedures or guidelines." Def.'s Opp. 8 n.7.

guidelines" is unclear. It cites no supporting cases and provides virtually no factual description. By contrast, Plaintiffs have identified numerous examples of legal authorities and safeguards withheld by CBP. Pls.' MSJ 15–16. They have further explained why this information cannot constitute techniques and procedures or guidelines, and why these withholdings defy FOIA's "purpose to require disclosure of documents which have 'the force and effect of law.'" *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975); Pls.' MSJ 16–17.

Separately, CBP claims that disclosing basic types of data—(1) the number of times TTRTs encountered travelers at each port of entry, (2) the number of TTRT encounters by class of admission, and (3) the total number of TTRT exams—"would reveal sensitive information relating to targeting and operations" and "enable potential violators to take evasive actions." Def.'s Opp. 9. But CBP's response collapses two Exemption 7(E) requirements. CBP must *first* show that a withholding constitutes a "technique and procedure" or "guideline," *before* showing that disclosure would risk circumvention of the law. CBP never explains how disclosing these types of data could divulge how TTRTs "go about investigating a crime" (technique or procedure) or an "outline of future policy" (guideline). *Lowenstein Int'l Hum. Rts. Project v. DHS*, 626 F.3d 678, 682 (2d Cir 2010); Pls.' MSJ 17–18. Likewise, CBP provides no such explanation for the map of TTRT locations. *Id*. at 18–19.

C. CBP Has Failed to Show that Disclosing the Withheld Information Would Risk Circumvention of the Law.

Even if CBP had met the basic requirements of Exemption 7(E), it has failed to show that disclosing the withholdings "would risk circumvention of the law." *Lowenstein*, 626 F.3d at 681. CBP concedes that it must demonstrate such risk to justify its Exemption 7(E) withholdings. Def.'s Opp. 11–12; Def.'s MSJ 13 n.5. Yet it fails to apply this standard to the specific withholdings. Rather, CBP simply points to "categorical description[s]" in its declaration, while

making generic claims about the "anticipated consequences of disclosure." *King*, 830 F.3d at 219–25. This attempt to justify the Exemption 7(E) withholdings "is clearly inadequate." *Id*.

Plaintiffs have demonstrated how CBP's declaration and Vaughn index fail to show any genuine risk of circumvention and provided specific examples from the withholdings, including a side-by-side comparison of CBP's inconsistent redactions. Pls.' MSJ 19–21. Remarkably, CBP addresses none of Plaintiffs' arguments, nor does it refute any of the specific examples. Instead, it relies doggedly on its declaration—which does not mention a single Exemption 7(E) withholding—for the boilerplate proposition that "disclosure of the withheld . . . information could risk law enforcement techniques and procedures." Def.'s Opp. 11–12. This conclusory statement is insufficient to carry the agency's burden. *See ACLU v. Off. of the Dir. of Nat'l Intel.*, No. 10-cv-4419, 2011 WL 5563520, at *11 (S.D.N.Y. Nov. 15, 2011) (rejecting "generic assertion that disclosure 'could enable targets . . . to avoid detection or develop countermeasures to circumvent' law enforcement efforts").

CBP does suggest that the withheld data and map could reveal where it deploys its resources. But CBP has already described where TTRTs operate—at the nation's "46 largest [ports of entry]." Kim Decl. Ex. 4, at 16. And contrary to CBP's assertion, those locations are readily available to the public. *See, e.g.*, Dep't of Transp., Transportation Statistics Annual Report 2018, 3-28 (2018), http://bit.ly/3jUQ6hU (map depicting 48 largest ports of entry).[7] Moreover, disclosing the redacted information poses no genuine risk of circumvention because the number of TTRT encounters is dictated by many factors, most obviously the overall volume of travelers and the types of admissions at any given port of entry.[8]

[7] CBP has also redacted certain classes of admission, which are public. *See* Pls.' MSJ 18 n.10.

[8] CBP's redaction of the total number of TTRT exams cannot square with CBP's prior disclosure of the total number of TTRT encounters. *See id.* at 18.

III. CBP IMPROPERLY WITHHELD INFORMATION UNDER EXEMPTION 3.

CBP redacted portions of the Watchlisting Reference Guide under Exemption 3, which permits an agency to withhold information "specifically exempted" by a statute other than FOIA. 5 U.S.C. § 552(b)(3). CBP relied on 50 U.S.C. § 3024(i)(1), which authorizes the "Director of National Intelligence" ("DNI") to protect "intelligence sources and methods from unauthorized disclosure." CBP concedes that the DNI has not, in fact, invoked this statute; it argues that CBP itself has the "authority" to invoke it. Def.'s Opp. 13. This argument defies the plain language of the statute. That CBP vaguely claims to have "consulted with ODNI" is no matter; nor is it relevant that "[t]he document . . . is a CBP document" or that "ODNI is not a party to this action." Def.'s Opp. 13 & n.10. None of these facts can override the text of Section 3024(i)(1).[9]

IV. CBP MUST RELEASE ALL SEGREGABLE, NON-EXEMPT INFORMATION.

Even where an agency has properly invoked an exemption over a document, it may only withhold those specific "portions which are exempt," and must provide "[a]ny reasonably segregable portion of a record." 5 U.S.C. § 552(b). CBP thus bears the burden of establishing that it has segregated and released non-exempt portions of each record by "provid[ing] the reasons behind [its] conclusions" and "describ[ing] what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document." *Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977). CBP's declaration and Vaughn index make no such showing. *See* Def.'s Opp. 15.

CONCLUSION

For these reasons, Plaintiffs' cross-motion for summary judgment should be granted.

[9] CBP offers nothing to show that the withheld information is an intelligence source or method, *see* Pls.' MSJ 23–24, nor does it rebut Plaintiffs' argument that the information has already been officially acknowledged, given the government's extensive public disclosures, *id.* at 24–25.

Dated: February 19, 2021

Respectfully submitted,

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