

SLR:SDE:KMA; 2019V03293

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CLEAR, AMERICAN CIVIL LIBERTIES UNION,
and AMERICAN CIVIL LIBERTIES FOUNDATION,

Plaintiffs,

Civil Action No. 19-CV-07079

-against -

(Reyes, M.J.)

UNITED STATES CUSTOMS AND BORDER
PROTECTION,

Defendant.

-----X

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Defendant United States Customs and Border Protection (“CBP”) respectfully submits this memorandum of law in support of its motion pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment dismissing this action brought under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.

Plaintiffs Creating Law Enforcement Accountability & Responsibility (CLEAR) Project and American Civil Liberties Union and American Civil Liberties Union Foundation (together ACLU) are challenging CBP’s response to their FOIA request for agency records pertaining to CBP’s Tactical Terrorism Response Teams (“TTRTs”). As is relevant to this motion, CBP asserted Exemption 7(E), 5 U.S.C. § 552(b)(7)(E), to withhold records in full or in part to protect information about law enforcement techniques, procedures, and guidelines. CBP also asserted Exemption 3, 5 U.S.C. § 552(b)(7)(3), to redact information exempted from disclosure by statute from a partially released document.

As shown below, CBP properly asserted Exemptions 3 and 7(E) and did not improperly withhold responsive records from Plaintiffs. Accordingly, Plaintiffs cannot demonstrate that they are entitled to any relief under the FOIA, and CBP is entitled to summary judgment dismissing this action.

STATEMENT OF THE CASE

Defendant incorporates by reference Defendant’s Statement Pursuant to Local Civil Rule 56.1 (“Def. 56.1”) and the Declaration of Patrick Howard dated October 16, 2020 (“Howard Declaration”) and the exhibits annexed thereto, which set forth in detail the procedural history and undisputed facts concerning Plaintiffs’ FOIA request and CBP’s responses to that request.

In brief, Plaintiffs filed this action 35 days after CBP received their FOIA request for ten categories (some with multiple subparts) of records pertaining to the TTRTs. *See* Def. 56.1 ¶¶ 3-5; *see also* Howard Decl. Ex. A. CBP conducted a thorough search and located approximately 1,726 pages of responsive records. *See* Def. 56.1 ¶¶ 6-8, 10-11. The agency released 875 pages to Plaintiffs either in full or with portions redacted pursuant to various FOIA exemptions. *See id.*; *see also* Howard Decl. Ex. C through Ex. L. CBP withheld 32 documents (851 pages) in full. Def. 56.1 ¶ 12; *see* Howard Decl. Ex. M.¹ As of August 7, 2020, CBP had released all non-exempt and reasonably segregable records to Plaintiffs. Howard Decl. ¶ 24; *see id.* ¶ 29.

APPLICABLE LEGAL STANDARDS

A. The FOIA

The FOIA requires United States government agencies to disclose agency records upon receiving a properly submitted written request for them. 5 U.S.C. § 552(a)(3)(A). However, there are nine categories of agency records that are exempted from release by 5 U.S.C. § 552(b), and three categories of records that are excluded from the FOIA by 5 U.S.C. § 552(c). Agency information that falls within the terms of the FOIA exemptions need not be disclosed. *Halpern v. Federal Bureau of Investigation*, 181 F.3d 279, 287 (2d Cir. 1999) (citations omitted); *see Natural Resources Defense Council v. U.S. Environmental Protection Agency*, 954 F.3d 150, 154 (2d Cir. 2020) (“FOIA thus requires an agency to disclose records on request, unless they fall within one of nine exemptions.”) (citation and internal quotation marks

¹ Exhibit M to the Howard Declaration is the “*Vaughn* index” that CBP provided to Plaintiffs on August 14, 2020. *See* Def. 56.1 ¶ 12. A “*Vaughn* index” is a list that itemizes and indexes the agency’s reasons for withholding documents. *See Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C. Cir. 1973); *see also Halpern*, 181 F.3d at 290-91.

omitted); *New York Times Company v. U.S. Dep't of Justice*, 939 F.3d 479, 488 (2d Cir. 2019) (“These exemptions are as much a part of FOIA’s purposes and policies as the statute’s disclosure requirements”) (citation and internal quotation marks omitted); *see also John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (“There are, to be sure, specific exemptions from disclosure set forth in the [FOIA]. . . . [T]his Court has recognized that the statutory exemptions are intended to have meaningful reach and application.”).

The FOIA authorizes a court only to enjoin an agency from improperly withholding agency records from a person who has made a proper written request for the records. 5 U.S.C. § 552(a)(4)(B). A court cannot provide relief under the FOIA unless the agency has (1) improperly (2) withheld (3) agency records that are not exempt or excluded. *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150 (1980). “Only when each of these criteria is met may a district court ‘force an agency to comply with the FOIA’s disclosure requirements.’” *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999) (quoting *Reporters Committee*, 445 U.S. at 150).

B. Summary Judgment in FOIA Actions

Summary judgment is the preferred procedural vehicle for resolving FOIA actions. *See Clevenger v. U.S. Dep't of Justice*, No.18-CV-1568 (LB), 2020 WL 1846565, at *7 (E.D.N.Y. Apr. 3, 2020) (citation omitted); *Robbins Geller Rudman & Down LLP v. U.S. Securities and Exchange Commission*, 419 F. Supp. 3d 523, 530 (E.D.N.Y 2019); *see also Platsky v. Food & Drug Administration*, No. 13-CV-6250 (SLT)(RLM), 2014 WL 7391611, at *3 (Dec. 24, 2014) (citation omitted), *aff'd*, 642 Fed. Appx. 63 (2d Cir. 2016).

A court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.

R. Civ. P. 56(a); *see Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247-48 (1986) (discussing the standard, which previously was set forth in former Rule 56(c)). To dispute an asserted fact, the non-moving party must establish that there is a genuine dispute by citing to particular parts of admissible evidence in the record or show that the admissible evidence cited by the moving party does not establish the absence of genuine dispute or that the moving party cannot produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c)(1). For a fact to be material, it must affect the outcome of the action under the governing substantive law; a dispute about an irrelevant fact cannot preclude entry of summary judgment. *Anderson*, 477 U.S. at 248. A dispute of fact must also be "genuine." *Id.* at 248. This means it must be supported by evidence on which the jury could reasonably find for the non-moving party. *Id.* at 252. The mere existence of a "scintilla of evidence" in support of the non-moving party's position cannot forestall summary judgment. *Id.* at 252.

To obtain summary judgment in a FOIA action, the defendant agency must show that it conducted an adequate search for responsive records and that any withheld documents fall under a FOIA exemption or exclusion. *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994); *see Minkovski v. U.S. Dep't of Treasury*, 385 F. Supp. 3d 244, 250 (E.D.N.Y. 2019) ("The defending agency has the burden of showing that its search was adequate or that the document is exempt from production under the FOIA."). "A district court in a FOIA case may grant summary judgment in favor of an agency on the basis of agency affidavits if they contain *reasonable specificity* of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith." *Grand Central Partnership*, 166 F.3d at 478 (internal quotation marks and citation

omitted) (emphasis in original); *see Zhao v. U.S. Dep't of State*, 320 F. Supp. 3d 505, 509 (E.D.N.Y. 2018), *aff'd*, 776 Fed. Appx. 733 (2d Cir. 2019).

“Affidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonable explanations why any withheld documents fall within an exemption are sufficient to sustain the agency’s burden.” *Carney*, 19 F.3d at 812 (footnote and citations omitted). “Affidavits submitted by an agency are accorded a presumption of good faith.” *Id.* (internal quotation marks and citation omitted); *see Wilner v. National Security Agency*, 592 F.3d 60, 69 (2d Cir. 2009); *see also Minkovski*, 384 F. Supp. 3d at 250; *Zhao*, 320 F. Supp. 3d at 510. The agency’s justification is sufficient if it appears logical and plausible. *American Civil Liberties Union v. U.S. Dep't of Justice*, 901 F.3d 125, 133-34 (2d Cir. 2018) (citations omitted); *Wilner*, 592 F.3d at 73.

Once the agency satisfies its burden, the plaintiff must “make a showing of bad faith on the part of the agency sufficient to impugn the agency’s affidavits or declarations, . . . or provide some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is otherwise inappropriate.” *Carney*, 19 F.3d at 812 (internal and other citations omitted); *see Anderson v. U.S. Dep't of Justice*, 326 Fed. Appx. 591, 592-93 (2d Cir. 2009); *see also Flores v. U.S. Dep't of Justice*, 712 Fed. Appx. 107, 108 (2d Cir. 2018).

ARGUMENT

PLAINTIFFS ARE NOT ENTITLED TO ANY RELIEF UNDER THE FOIA

Defendant is entitled to summary judgment as a matter of law because Plaintiffs cannot establish that they are entitled to any relief under the FOIA. Plaintiffs are challenging CBP's assertion of FOIA Exemptions 3 and 7(E) to withhold in full or in part some of the records responsive to their FOIA request. *See* Declaration of Assistant U.S. Attorney Kathleen A. Mahoney dated October 23, 2020 ("AUSA Mahoney Declaration") Ex. B at 1, 5. As shown below, CBP properly asserted these exemptions,² and has not improperly withheld any responsive records.

A. CBP Properly Asserted Exemption 7(E)

1. Exemption 7(E)

FOIA Exemption 7, 5 U.S.C. § 552(b)(7), was enacted because "Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their case." *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). As originally enacted in 1966, Exemption 7 authorized an agency to withhold "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." *See id.* at 221-22. However, in 1974, Congress modified Exemption 7 to limit its protection to six specified dangers set forth in subsections (A) through (F) of 5 U.S.C. § 552(b)(7). *Id.*; *see Federal Bureau of Investigation v. Abramson*, 456 U.S.

² Defendant reserves the right to respond to any other arguments or challenges that Plaintiffs may present in their cross-motion.

615, 622 (1982); *see also John Doe Agency*, 493 U.S. at 156-57. Information falling within any subsection of Exemption 7 is “given absolute protection as a consequence of Congress’ judgment that the efficient operation of federal law enforcement agencies would be impaired by the disclosure of such information.” *Williams v. Federal Bureau of Investigation*, 730 F.2d 882, 885 (2d Cir. 1984).

An agency invoking a subsection of Exemption 7 must meet the threshold requirement of demonstrating that the materials are records or information compiled for law enforcement purposes. *See John Doe Agency*, 493 U.S. at 148; *Schwartz v. Dep’t of Defense*, 15-CV-7077 (ARR) (RLM), 2017 WL 78482, at *12 (E.D.N.Y. Jan. 6, 2017) (citations omitted) (Exemption 7(F)); *see also Robbins Geller*, 419 F. Supp. 3d at 531 (citations omitted) (Exemption 7(A)). As this Court has recognized, “[c]ourts construe the terms ‘law enforcement’ and ‘compiled’ broadly. Law enforcement purposes may consist of either civil or criminal matters, or an agency’s ‘proactive steps designed to prevent criminal activity and maintain security.’” *Robbins Geller*, 419 F. Supp. 3d at 531 (citations omitted). “The act of compiling records for law enforcement purposes requires only that a document be created, gathered, or used by an agency for law enforcement purposes at some time before the agency invokes the exemption.” *Id.* (citations and internal quotation marks omitted).

The subsection of Exemption 7 at issue here is 7(E), which protects information compiled for law enforcement purposes where the release of the information “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E).

Exemption 7(E) provides categorical protection to techniques and procedures without any requirement that harm be demonstrated. *Allard K. Lowenstein International Human Rights Project v. Dep't of Homeland Security*, 626 F.3d 678, 681 (2d Cir. 2010) (citations omitted).

The phrase techniques and procedures “refers to how law enforcement officials go about investigating a crime.” *Id.* at 682; see *Gonzalez v. U.S. Citizenship and Immigration Services*, 19-CV-2911 (JGK), 2020 WL 4343872, at *11 (S.D.N.Y. July 29, 2020). Even commonly known techniques and procedures may be protected if their disclosure could reduce or nullify their effectiveness. See *Bishop v. U.S. Dep't of Homeland Security*, 45 Fed. Supp. 3d 380, 387 (S.D.N.Y. 2014); *Vazquez v. U.S. Dep't of Justice*, 887 F. Supp. 2d 114, 116-17 (D.D.C. 2012).

The second category of information protected by Exemption 7(E) is guidelines for law enforcement investigations or prosecutions if disclosure could reasonably be expected to risk circumvention of the law. 5 U.S.C. § 552(b)(7)(E). Guidelines are indications of how the agency allocates resources in planning future policy or conduct. See *Allard K. Lowenstein*, 626 F.3d at 682; *Gonzalez*, 2020 WL 4343872, at *11. Exemption 7(E) “looks not just for circumvention of the law, but for a risk of circumvention; not just for an actual or certain risk, but for an expected risk; not just for an undeniably and universally expected risk, but for a reasonably expected risk; and not just for certitude of a reasonably expected risk, but for the chance of a reasonably expected risk.” *Blackwell v. Federal Bureau of Investigation*, 646 F.3d 37, 42 (D.C. Cir. 2011) (citation omitted). “Exemption 7(E) clearly protects information that would *train* potential violators to evade the law or *instruct* them how to break the law,” and “exempts information that could *increase the risks* that a law will be violated or that past violators will escape legal consequences.” *Mayer Brown LLP v. Internal Revenue Service*, 562 F.3d 1190, 1193 (D.C. Cir. 2009) (emphasis in original).

“Under Exemption 7(E), Courts have “set[] a relatively low bar for [an] agency to justify withholding.” *Clevenger* at *13 (citing *Blackwell*, 646 F.3d at 42); see *Brennan Center for Justice at New York University School of Law v. Dep’t of Homeland Security*, 331 F. Supp. 3d 74, 98-99 (S.D.N.Y. 2018) (same). “Exemption 7(E) does not require withheld materials to be related to a particular investigation or prosecution.” *Brennan Center*, 331 F. Supp. 3d at 99 (citation omitted). Where an agency specializes in law enforcement, its decision to invoke exemption 7 is entitled to deference. See *Campbell v. U.S. Dep’t of Justice*, 164 F.3d 20, 32 (D.C. Cir. 1998).

2. CBP Properly Asserted Exemption 7(E)

CBP satisfies the threshold requirement of Exemption 7(E). CBP is a law enforcement agency charged with keeping terrorists and their weapons out of the United States while facilitating lawful international travel and trade. Def. 56.1 ¶ 1. See 6 U.S.C. §§ 211(c), (g). CBP’s principal mission is to protect the borders, enforce federal immigration law, and facilitate international trade and travel. See *American Immigration Lawyers Association v. U.S. Dep’t of Homeland Security*, No. 16-CV-02470 (TNM), 2020 WL 5231336, at *6 (D.D.C. Sept. 2, 2020) (“*AILA*”).

Plaintiffs’ FOIA request essentially sought all records concerning the TTRTs, which consist of officers who are specifically trained in counterterrorism response. Def. 56.1 ¶ 2; see Howard Decl. ¶ 18. TTRTs are responsible for examination of travelers arriving at the ports of entry into the United States who have been identified within the Terrorist Screening Database, as well as other travelers, their associates, or co-travelers, suspected of having a nexus to terrorist activity. *Id.* TTRT officers work closely with analysts to utilize information derived from targeting and inspection to mitigate any possible threat. *Id.* Plaintiffs’ FOIA request

expressly sought CBP records about: how the TTRTs screen and/or target travelers for interview or inspections and compile information; data about TTRT activities (numbers of and demographic information concerning individuals denied entry into the United States or targeted for interview or inspection); training of TTRT officers; effectiveness of TTRTs; and watchlists. *See* Def. 56.1 ¶ 3; Howard Decl. Ex. A.

CBP asserted Exemption 7(E) to protect documents and information about investigative techniques and procedures, as well as guidelines that if disclosed would enable potential violators to circumvent the law, avoid detection and evade apprehension. Def. 56.1 ¶ 14; *see* Howard Decl. ¶ 44.

a. The Disputed Withholdings

Plaintiffs have advised they are challenging CBP's withholding in full of sixteen of the documents listed in the agency's "*Vaughn* index" (Howard Decl. Ex. M). AUSA Mahoney Decl. Ex. B at 1, 5; *see* Howard Decl. Ex. M at 1-3, 7-9, 12-13, 15-16, 21-25. Plaintiffs also are challenging CBP's assertion of Exemption 7(E) to redact portions of nine other documents. AUSA Mahoney Decl. Ex. B at 1, 5.

As stated forth in the *Vaughn* index, CBP asserted Exemption 7(E) to withhold in full fourteen documents containing information that is not generally known or publicly disclosed:³

(4) Tactical Terrorism Response Team Curriculum v2 - details, training techniques and objectives that are law enforcement sensitive; law enforcement terminology, techniques and procedures used to assess the admissibility of a person trying to enter the United States (Howard Decl. Ex. M at 2).

(5) TTRT Officer Reference Job Aid 2020 - law enforcement techniques and procedures, including internal CBP systems and category codes; and information related to different interview and vetting methods and techniques,

³ The numbers in parentheses correspond to Plaintiffs' numbering in Exhibit B to the AUSA Mahoney Declaration, page 5.

including law enforcement terminology, techniques and procedures used to assess a person's admissibility when trying to enter the United States (Howard Decl. Ex. M at 3).

(9) 2.CTD TTRT101 - information explaining law enforcement techniques and procedures, enforcement unit structures and chains of command; details of locations of certain enforcement teams and enforcement actions; and information related to specific inspections by CBP with individual of interest to the agency (Howard Decl. Ex. M at 7).

(10) Map of TTRT Locations - information explaining law enforcement techniques and procedures, detailing locations of certain enforcement teams and enforcement actions (Howard Decl. Ex. M at 8).

(11) Culture and Religious Awareness Class - information explaining law enforcement techniques and procedures, including information related to different interview and vetting methods and techniques, and specific information related to inspections completed by CBP with persons of interest (Howard Decl. Ex. M at 9).

(14) CND 101 20200205 - information explaining law enforcement techniques and procedures, including how CBP utilizes information to determine what individuals and/or information will be subject to relevant inspections (Howard Decl. Ex. M at 12).

(15) CTD 10 TTRT Orientation 20200305 - information explaining law enforcement techniques and procedures, enforcement unit structures, and chains of command; details of locations of certain enforcement teams and enforcement actions; and information related to specific inspections by CBP with persons of interest to the agency (Howard Decl. Ex. M at 12).

(16) Memorandum – Importance of Targeting Rules - information explaining law enforcement techniques and procedures, including how CBP addresses certain threats (Howard Decl. Ex. M at 13).

(18) Muster – Updated Guidance [redacted] - information explaining law enforcement techniques and procedures, including how CBP addresses certain threats and how CBP processes individuals should the circumstances arise (Howard Decl. Ex. M at 15).

(19) Nomination Referrals - information explaining law enforcement techniques and procedures, including how CBP addresses certain threats, including known and suspected terrorists, internal CBP systems and category codes, and how CBP processes individuals should specific circumstances arise (Howard Decl. Ex. M at 16).

(27) TOC Watchlisting Overview - information explaining law enforcement techniques and procedures, including how CBP addresses certain threats, and how CBP target certain individuals for relevant inspection (Howard Decl. Ex. M at 21).

(28) TTP [redacted] Presentation - information explaining law enforcement techniques and procedures, including how CBP addresses certain threats and how certain enforcement actions can be utilized by CBP to meet mission critical challenges (Howard Decl. Ex. M at 22).

(29) TTRT [redacted] SOP [redacted] BSI 2018 - information explaining law enforcement techniques and procedures, including how CBP addresses certain threats and how certain enforcement actions can be utilized by CBP to meet mission critical challenges, and information on internal CBP codes and processes (Howard Decl. Ex. M at 23).

(32) Enhanced Communication Courts - information explaining law enforcement techniques and procedures, specifically questioning techniques, and instruction regarding the detection of deceptive indicators (Howard Decl. Ex. M at 25).

The other two documents that CBP withheld in full contain law enforcement data and statistics related to terrorist linked inspections, including both location of inspection and information collected, which is information that is not generally known or publicly disclosed. Howard Decl. Ex. M at 1 (Doc. (1) Encounters at Ports of Entry Identify Individuals with Potential Links to International Terrorism), 24 (Doc. (30) TTRT [redacted] Accomplishments).

CBP asserted Exemption 7(E) to redact the same types of information (as in the sixteen withheld documents) from the partially released documents:

- four class codes/categories and all TTRT encounter counts in Dataset: TTRT Encounters by class of admission (Howard Decl. Ex. F at 1-3);
- the locations of the ports of entry in Dataset: TTRT Encounters by Port of Entry (*id.* at 4-8);
- the number and portions of CBP Directive “Passenger Analytical Unit Procedures for Targeting High-Risk Travelers” (Howard Decl. Ex. H at 7-19);

- information about TTRT training and operations (*id.* at 20);
- one slide and portions of seven other slides in a PowerPoint presentation about TTRT and the Terrorist Screening Database (TSDB) (*id.* at 22-30);
- portions of TTRT Standard Operating Procedures (*id.* at 31-35);
- portions of a Memorandum from the National Targeting Center (NTC), Office of Field Operations regarding TTRT Responsibilities (*id.* at 40-42);
- 17 slides and information in another 15 slides (and an email about one slide) in a PowerPoint presentation about the TTRT and the NTC (*id.* at 43-80); and
- portions of the “Watchlisting Reference Guide” (*id.* at 86-93).

b. The Withheld Information is Protected Under Exemption 7(E)

The Howard Declaration and the agency’s *Vaughn* index (Exhibit M to the Howard Declaration) establish that the withheld materials fall within the protection of Exemption 7(E). As explained in the Howard Declaration, in order to avoid revealing information that is not generally known to the public, CBP is constrained in describing in publicly available filings (*i.e.*, the agency declaration and this memorandum of law)⁴ the techniques and procedures and guidelines being withheld.⁵ Howard Decl. ¶ 43. Courts have recognized that CBP “must walk a fine line,” and have concluded, in similar circumstances, that CBP chose a legitimate way to describe the basis for its withholdings in the *Vaughn* index and agency declaration in general terms. *AILA*, 2020 WL 5231336 at *4 (reiterating that Exemption 7(E) sets a relatively low

⁴ CBP can provide additional information in an *ex parte* submission if the Court requires it.

⁵ This constraint also makes it difficult to differentiate between techniques and procedures (entitled to absolute protection) and guidelines that would require CBP to demonstrate disclosure could reasonably be expected to risk circumvention of the law. *See* 5 U.S.C. § 552(b)(7)(E). Consequently, risk is discussed with respect to all withheld records and information.

bar), *5 (“CBP cannot reveal the details of these techniques and procedures because doing so would allow those seeking to circumvent [the law] to extrapolate what to avoid and how to prepare”).

The majority of the disputed documents that CBP withheld in full and in part concern its law enforcement methods for examination and inspection of travelers at ports of entry and information related to targeting (*i.e.*, assessing risk with respect to travelers seeking to enter the United States), including information regarding ongoing investigations or investigative techniques. Howard Decl. ¶¶ 45(iv), 45(v), 46; *see also id.* Ex. M; Def. 56.1 ¶¶ 18, 19. The documents and information that CBP withheld include officer instructions not generally known to the public on specific topics for questioning travelers seeking admission into the United States, the criteria CBP uses to determine which travelers require further scrutiny, inspecting individuals who are identified as posing a counterterrorism or national security risk, detecting fraudulent travel documents, identifying individuals who seek admission into the United States using fraudulent schemes, and detecting individuals engaging in criminal activity, such as human trafficking, alien smuggling, or smuggling illegal substances. Def. 56.1 ¶ 18; Howard Decl. ¶ 45(iv). CBP also withheld specific operational plans utilized at different ports of entry. *Id.*

In addition, the documents and information that CBP withheld include training materials that the Office of Field Operations provides to CBP Officers on how to use CBP’s law enforcement systems. Def. 56.1 ¶ 16; *see* Howard Decl. ¶ 45(ii). These materials contain, *inter alia*, detailed instructions on how to enter information, navigate, conduct queries and use CBP systems. *Id.* Disclosure of this information would reveal the kinds of information that is considered important to the exercise of officer discretion, the relative weight given to the

factors, and the types and location of information CBP gathers, analyzes and utilizes within such databases. Def. 56.1 ¶ 16; Howard Decl. ¶¶ 43(ii), 47. Disclosure of these records would also reveal information about CBP's priorities and could enable individuals to thwart efforts to execute its mission to secure the border of the United States and enforce customs and immigration laws and other federal laws that CBP enforces or administers. *Id.*

Disclosure of the withheld information, including the training materials, could risk law enforcement techniques and procedures by revealing the kinds of information CBP considers in conducting law enforcement activities, as well as CBP's priorities when conducting these activities. *See* Howard Decl. ¶ 48. The withheld records and information would also reveal information about inspectional activities generally, such as the kind of information considered important to the exercise of officer discretion, and the relative weight given different factors. *Id.* ¶ 47. Disclosure of this sensitive information pertaining to targeting and operations would have the unintended and undesirable effect of placing CBP's law enforcement techniques and strategies in the public domain. *Id.* ¶ 48. As a result, potential violators would be educated about the techniques used by the TTRTs, and enabled and assisted in devising methods to evade detection and apprehension (*e.g.*, alter behavior, change associations, or develop countermeasures), and ultimately, the effectiveness of these law enforcement techniques would be impaired. Def. 56.1 ¶¶ 18, 19; *see* Howard Decl. ¶¶ 45(iv), 45(v), 48. If unprotected, such information could enable individuals to thwart CBP's future efforts to secure the border and enforce customs and immigration laws and other federal laws that the agency enforces or administers Def. 56.1 ¶¶ 18, 19; *see* Howard Decl. ¶¶ 45(iv), 45(v),

The application of Exemption 7(E) is "self-evident" for documents containing details for determining admissibility at ports of entry, law enforcement tactics and procedures geared

to identifying and detecting violators of immigration law, and techniques utilized at ports of entry to determine whether further scrutiny is needed. *AILA*, 2020 WL 5231336, at *4-*5. Courts also have routinely protected law enforcement documents that contain information used for the purpose of identifying potential targets of investigations. *Bishop*, 45 Fed. Supp. 3d at 393 (collecting cases and upholding the assertion of Exemption 7(E) to protect information that would identify factors that CBP weighs in targeting travelers and deciding which should be subjected to additional screening because those matters would disclose law enforcement techniques and procedures, and the information could be used by potential violators to develop countermeasures to evade detection, inspection, and targeting methods, thus significantly compromising CBP's effectiveness in detecting and preventing violations of law). Courts have also have upheld the assertion of Exemption 7(E) to withhold information, including training slides, that could provide information about vulnerabilities concerning law enforcement techniques and contribute to circumvention. *See Sack v. Central Intelligence Agency*, 53 F. Supp. 3d 154, 174-75 (D.D.C. 2014). Exemption 7(E) also protects guidelines if their disclosure could reasonably expected to jeopardize ongoing investigations and operations and assist those seeking to violate or circumvent the law. *See, e.g., Freedom of the Press Foundation v. Dep't of Justice*, No. 17-CV-9343 (JGK), 2020 WL 5992282, at *13 (S.D.N.Y. Oct. 9, 2020).

CBP also asserted Exemption 7(E) to withhold information about its law enforcement systems and databases (internal system and category codes, screenshots, functionalities, and how to use them) and internal group list serve email addresses. Def. 56.1 ¶¶ 15, 17; *see* Howard Decl. ¶¶ 45(i), 45(iii). Disclosure of systems and database information could be used to locate, access, and navigate internal law enforcement computer systems and/or databases, reveal the

results of database queries that CBP officers perform. Def. 56.1 ¶ 15; *see* Howard Decl. ¶ 45(i). The email addresses of group list serves are not known to the public and only used within CBP, and were withheld because disclosing them would reveal the means by which CBP communicates law enforcement information.⁶ Def. 56.1 ¶ 17; *see* Howard Decl. ¶ 45(iii). “Courts frequently find that . . . personally identifiable information pertaining to Government agents and third parties as well as case event codes and URLs of internal law enforcement databases, [are] properly withheld under Exemption 7(E). *Gonzalez*, 2020 WL 4343872, at *12 (collecting cases); *see also* *Bishop*, 43 F. Supp. 3d at 387-89 (redaction of fields from computer query printouts pursuant to Exemption 7(E) was proper to protect information that would disclose CBP procedures for law enforcement and inspection techniques).

Finally, to the extent that the records at issue pertaining to targeting and operations integrate or reference data belonging to third-party agencies or departments, disclosure of such information would threaten efforts to foster open communication across agencies and cohesive law enforcement and national security efforts. Howard Decl. ¶ 49. Disclosure of this information could have far-reaching effects, impairing other agencies' law enforcement operations or their ability to effectively carry out their respective missions. *Id.* Knowledge of this information would increase the risk of circumvention of laws and regulations, impede effectiveness of law enforcement activities, and endanger agency investigative practices and techniques. *Id.*

In sum, CBP properly asserted Exemption 7(E) to withhold or redact the disputed documents.

⁶ Email addresses were also withheld pursuant to FOIA Exemptions 6 and 7(C). *See* Howard Decl. ¶¶ 38, 41.

B. CBP Properly Asserted Exemption 3

Plaintiffs are also challenging the CBP's partial redaction of one document, the "Watchlisting Reference Guide," pursuant to FOIA Exemption 3, 5 U.S.C. § 552(b)(3). *See* AUSA Mahoney Decl. Ex. B; *see also* Howard Decl. ¶ 51, Ex. G, Ex. H at 87-93. CBP's redactions were made as required by 50 U.S.C. § 3024(i), after consultation with the Office of the Director of National Intelligence. Def. 56.1 ¶ 19; *see* Howard Decl. ¶¶ 51-52.

Exemption 3 exempts from disclosure matters that are that specifically exempted from disclosure by statute (other than the Privacy Act) if the statute affords the agency no discretion on disclosure, or establishes particular criteria for withholding information or refers to the particular types of materials to be withheld.⁷ 5 U.S.C. § 552(b)(3); *see Central Intelligence Agency v. Sims*, 471 U.S. 159, 167-68 (1985); *New York Times v. Central Intelligence Agency*, 965 F.3d 109, 115 (2d Cir. 2020); *American Civil Liberties Union v. Dep't of Justice*, 681 F.3d 61, 72 (2d Cir. 2012); *Wilner*, 592 F.3d at 71. Under Exemption 3, "[t]he Court's assessment of the applicability of this exemption 'depends less on the detailed factual contents of specific documents' than with the other FOIA exemptions; rather, 'the sole issue for decision is the existence of a relevant statute and the inclusion of the withheld material within the statute's coverage.'" *Clevenger*, at *18 (quoting *Amnesty International USA v. Central Intelligence Agency*, 728 F. Supp. 2d 479, 501 (S.D.N.Y. 2010) (citation omitted)).

In addressing an agency's claim that Exemption 3 applies, the court first must determine whether the statute cited by the agency is a withholding statute and then whether

⁷ There is an additional requirement, not applicable here, that if the statute was enacted after October 28, 2009 (enactment of the OPEN FOIA Act of 2009), it specifically cites to Exemption 3. 5 U.S.C. § 552(b)(3)(B).

the withheld information satisfies the requirements of that statute. *See Sims*, 471 U.S. at 167; *see also Spadaro v. U.S. Customs and Border Protection*, -- F.3d --, 2020 WL 6140623, at *4 (2d Cir. Oct. 20, 2020).

Here, the relevant statute is Section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, 50 U.S.C. § 3024(i) (“Section 3024(i)”). Section 3024(i) “instructs the Director of National Intelligence to protect intelligence sources and methods from unauthorized disclosure, regardless of classification, and qualifies as an Exemption 3 statute.” *Larson v. Dep’t of State*, 565 F.3d 857, 868 (D.C. Cir. 2009); *see DiBacco v. U.S. Army*, 795 F.3d 178, 197 (D.C. Cir. 2015) (“DiBacco does not dispute, nor could she, that Section 3024(i)(1) is a valid Exemption 3 statute.”) (*citing Sims*, 471 U.S. at 167)); *Lindsey v. Federal Bureau of Investigation*, No. 16-2032 (CKK), 2020 WL 5593935, at *6 (D.D.C. Sept. 18, 2020) (“It is undisputed that 50 U.S.C. § 3024(i)(1) is an ‘exemption statute.’”); *Leopold v. Central Intelligence Agency*, 380 F. Supp. 3d 14, 17 (D.D.C. 2019) (“multiple courts in this circuit have recognized that the National Security Act is an exemption statute for purposes of Exemption 3.”).

CBP consulted with the Office of the Director of National Intelligence (“ODNI”) regarding equities and information from the ODNI contained in the Watchlisting Reference Guide, and asked ODNI to make the disclosure determination for its information. Def. 56.1 ¶ 19; *see* Howard Decl. ¶ 50. As a result, CBP redacted information redacted pursuant to FOIA Exemption 3, as required by 50 U.S.C. § 3024(i)(1). Def. 56.1 ¶ 19; *see* Howard Decl. ¶ 51. As is evident from the Watchlisting Reference Guide (Howard Decl. Ex. H at 86-93), the redacted material is information that implicates intelligence sources and methods that could be damaged by disclosure. The guide contains information about two important counterterrorism

tools -- the Terrorist Screening Database (TSDB) and the Terrorist Identities Datamart Environment (TIDE) -- used by intelligence agencies and law enforcement agencies, including CBP. *Id.* 42. Accordingly, Exemption 3 was properly asserted in conjunction with 50 U.S.C. § 3024(i) to redact protected information from the Watchlisting Reference Guide.

In conclusion, Defendant did not improperly withhold responsive records. Accordingly, Plaintiffs are not entitled to any relief under the FOIA, and this action should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should grant Defendant's motion for summary judgment and dismiss this action.

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Respectfully submitted,

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