

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.

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DEFENDANT’S STATEMENT
PURSUANT TO LOCAL CIVIL RULE 56.1

Pursuant to Local Civil Rule 56.1(a) of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, Defendant, United States Customs and Border Protection (“CBP”), sets forth this statement of material facts as to which there is no genuine issue to be tried with respect to the claims remaining at issue in this action pursuant to the Freedom of Information Act (“FOIA”):

1. CBP is a federal law enforcement agency and is charged with keeping terrorists and their weapons out of the United States while facilitating lawful international travel and trade. Declaration of Patrick Howard dated October 16, 2020 (“Howard Decl.”) ¶ 5; *see* 6 U.S.C. § 211.

2. CBP’s Tactical Terrorism Response Teams (“TTRTs”), which comprise officers specifically trained in counterterrorism response, are responsible for examination of travelers identified within the Terrorist Screening Database, as well as other travelers, their associates,

or co-travelers who arrive at the ports of entry into the United States and are suspected of having a nexus to terrorist activity. Howard Decl. ¶ 18. TTRT officers work closely with analysts to utilize information derived from targeting and inspection to mitigate any possible threat. *Id.*

3. In a letter to the CBP FOIA Officer dated November 7, 2019, which was filed via CBP's online FOIA system, Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (together "ACLU") and the Creating Law Enforcement Accountability & Responsibility ("CLEAR") Project requested ten numbered Categories, with subcategories, of agency records pertaining to CBP's TTRTs. Howard Decl. ¶¶ 16-17 and Ex. A; *see* Complaint ¶ 26 (Dkt. #1) and Ex. A (Dkt. #1-1); Answer ¶ 26 (Dkt. #12).

4. Plaintiffs' FOIA request sought the following records:

- (1) Formal or informal policies, guidance, procedures, bulletins, memoranda, and/or legal opinions pertaining to TTRTs, including but not limited to, records concerning:
 - a. How travelers are screened and/or targeted for interviews or inspection by TTRTs;
 - b. Profiling based on race, religion, ethnicity, and/or national origin and their proxies, such as name or appearance;
 - c. Whether and how a watchlist nomination may result from TTRT interviews or inspection;
 - d. The retention, storage, sharing, and/or deletion of information about travelers subject to TTRT interviews or inspection;
- (2) Training and/or course materials for TTRT officers, whether developed by CBP or by other agencies, including but not limited to materials related to reliance on race, religion, ethnicity, and/or national origin and their proxies;
- (3) Formal or informal reports, evaluations, audits, or analyses concerning the effectiveness of TTRTs;

- (4) Records sufficient to show, since January 1, 2017:
- a. The number of individuals denied entry as a result of TTRT activities and their immigration status and/or basis for application for admission;
 - b. The races, ethnicities, and/or national origins of the individuals denied entry as a result of TTRT activities;
- (5) Records sufficient to show, since January 1, 2017:
- a. The number of individuals targeted for interview or inspection by TTRTs and their immigration status and/or basis for application for admission;
 - b. The races, ethnicities, and/or national origins of the individuals targeted for interview or inspection by TTRTs;
 - c. The number of individuals targeted for interview or inspection by TTRTs for the purpose of gathering information about third parties, including watchlisted persons;
- (6) Records sufficient to show the number of individuals nominated to a watchlist by TTRTs since January 1, 2017;
- (7) Records sufficient to show, since January 1, 2017:
- a. The number of individuals targeted for interview or inspection by TTRTs who were asked to but declined to sign Form I-275, "Withdrawal of Application for Admission";
 - b. The number of individuals targeted for interview or inspection by TTRTs who signed Form I-275;
 - c. The number of individuals targeted for interview or inspection by TTRTs for whom Forms I-867A, which contains a record of the basis for CBP's determination that an individual is subject to Expedited Removal, and/or I-867B, which consists of questions designed to assess whether a traveler has a fear of returning to his or her country, were prepared;
 - d. The number of individuals targeted for interview or inspection by TTRTs for whom Form I-870, "Notice and Order of Expedited Removal," was prepared;

- (8) Records concerning complaints, grievances, and/or concerns raised by CBP officers or other government officials related to TTRTs;
- (9) Records concerning investigations of and/or disciplinary action related to TTRT officers;
- (10) All records created, sent, received, referenced, and/or used in fulfilling and/or responding to this Request.

Howard Decl. Ex. A; *see* Complaint Ex. A

5. On November 14, 2019, CBP acknowledged that it had received Plaintiffs' FOIA request on November 13, 2019, and informed Plaintiffs that it had been assigned FOIA Tracking Number CBP-2020-012037. Howard Decl. ¶ 20 and Ex. B; *see* Complaint ¶ 30 and Ex. B; Answer ¶ 30.

6. On December 18, 2019, Plaintiffs filed this action pursuant to the FOIA seeking to compel CBP to "immediately conduct a thorough search for all responsive records" and "immediately process and release all responsive records." Dkt. #1 at 9; *see* Howard Decl. ¶ 21.

7. On March 13, 2020, CBP provided Plaintiffs with an initial release for 36 pages of records. Howard Decl. ¶ 25, Ex. C, Ex. D. CBP released 26 pages in full and ten pages with portions redacted pursuant to FOIA Exemptions 6, 7(C), and/or 7(E), 5 U.S.C. §§ 552(b)(6), (7)(C), (7)(E). *Id.*

8. CBP provided a second interim response regarding 39 pages of documents on April 10, 2020. Howard Decl. ¶ 26, Ex. E, Ex. F. CBP released 17 pages in full and 17 pages with portions withheld pursuant to FOIA Exemptions 6, 7(C), and/or 7(E), 5 U.S.C. §§ 552(b)(5), (7)(C), (7)(E). *Id.* CBP withheld the other five pages in full pursuant to Exemption 7(E), 5 U.S.C. § 552(b)(7)(E). Howard Decl. ¶ 26, Ex. E.

9. CBP provided a third interim release regarding an additional 985 pages of records on May 29, 2020. Howard Decl. ¶ 27, Ex. G, Ex. H. In the response, CBP provided the electronic link to four pages that were publicly available, released 14 pages of records in full, and released 121 pages with portions withheld pursuant to FOIA Exemptions 3, 5, 6, 7(C), and/or 7(E), 5 U.S.C. §§ 552(b)(3), (5), (6), (7)(C), (7)(E). *Id.* CBP stated that it was withholding the remaining 846 pages in full pursuant to FOIA Exemption 7(E), 5 U.S.C. § 552(b)(7)(E). Howard Decl. ¶ 27, Ex. G.

10. On June 18, 2020, Plaintiffs consented to narrowing Category #9 in their FOIA request to “records concerning investigations of and/or disciplinary actions related to TTRT officers with respect to the three categories proposed ((1) profiling, (2) First Amendment concerns, and (3) recording, retaining and disseminating information) on the condition that CBP also add a fourth category: misuse or abuse of TTRT/TTRP (Tactical Terrorism Response Program).” Declaration of Assistant U.S. Attorney Kathleen A. Mahoney dated October 22, 2020, Ex. A at 1; *see* Howard Decl. ¶ 22.

11. In a fourth release dated July 31, 2020, CBP provided another 280 pages – 21 pages in full and 259 pages with portions redacted pursuant to FOIA Exemptions 3, 6, 7(C) and/or 7(E), 5 U.S.C. §§ 552(b)(3), (5), (6), (7)(C), (7)(E). Howard Decl. ¶ 28, Ex. I, Ex. J.

12. CBP provided its fifth and final release on August 7, 2020, which concerned 386 pages of records. Howard Decl. ¶ 29, Ex. K, Ex. L. CBP released 75 pages in full and the remaining 311 pages with portions withheld pursuant to FOIA Exemptions 3, 6, 7(C) and/or 7(E), 5 U.S.C. §§ 552(b)(3), (5), (6), (7)(C), (7)(E). *Id.*

13. On August 14, 2020, Plaintiffs were provided with a “*Vaughn* index” that CBP had compiled for the records (32 documents) that were withheld in full. Howard Decl. ¶ 30, Ex. M.

Exemption 7(E)

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

15. CBP asserted Exemption 7(E) to withhold internal system codes, screenshots, functionalities, and information about how to use CBP’s law enforcement systems. Howard Decl. ¶ 45(i). CBP withheld these materials and information because if disclosed, they could be used to locate, access, and navigate internal law enforcement computer systems and/or databases. *Id.*

16. CBP also asserted FOIA Exemption 7(E) to withhold training materials that the Office of Field Operations provides to CBP officers on how to use CBP’s law enforcement systems. Howard Decl. ¶ 45(ii). These materials contain detailed instructions on how to enter information into, navigate, conduct queries in, and use CBP systems. *Id.* CBP withheld these material because disclosure of them would reveal the types of information that CBP gathers, analyzes, and utilizes within the databases, and if not protected, would enable individuals to thwart the agency’s efforts to secure the border and enforce customs and immigration laws and other federal laws enforced or administered by CBP. Howard Decl. ¶¶ 45(ii), 47.

17. CBP also asserted FOIA Exemption 7(E) to withhold the email addresses of group listserves that are not known to the public and used only within the agency. Howard Decl.

¶ 45(iii). CBP withheld these electronic emailing lists because disclosure of the information would reveal the means by which CBP communicates law enforcement information. *Id.*

18. CBP also asserted FOIA Exemption 7(E) to withhold law enforcement techniques and procedures, including officer instructions not generally known to the public and specific operational plans utilized at different ports of entry, which if released would allow bad actors to work around CBP efforts to stop them. Howard Decl. ¶ 45(iv). The withheld instructions include: specific topics for questioning travelers seeking admission into the United States; criteria that 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 or identifying individuals seeking admission into the United States using fraudulent schemes; and detecting individuals engaging in criminal activity (e.g., human trafficking, alien smuggling or smuggling of illegal substances). *Id.* CBP also withheld specific operational plans used at different ports of entry. *Id.*

19. CBP also asserted FOIA Exemption 7(E) to withhold information related to the agency's process for assessing risk with respect to travelers seeking to enter the United States. Howard Decl. ¶ 45(v). CBP withheld information about ongoing investigations and investigative techniques or procedures and information that assists CBP in identifying unknown high-risk travelers (travelers for whom the United States Government does not have available derogatory information directly linking them to terrorist activities or any other actions that would make them potentially inadmissible to the United States, but who may present a threat and warrant additional scrutiny). *Id.* CBP withheld this information because disclosure of it would advise potential violators of CBP's law enforcement techniques and procedures for assessing risk, thereby enabling them to circumvent the law, avoid detection

and/or evade apprehension. *Id.* CBP also withheld information concerning ongoing investigations; disclosure of this information would thwart CBP's law enforcement efforts and risk individuals circumventing CBP's future efforts. *Id.*

Exemption 3

20. CBP consulted with the Office of the Director of National Intelligence for a disclosure determination regarding documents that contained equities and information that originated from ODNI. Howard Decl. ¶ 50. Following that consultation, CBP asserted FOIA Exemption 3 to withhold information exempted from disclosure by statute, specifically 50 U.S.C. § 3024(i), from one document, the Watchlisting Reference Guide. Howard Decl. ¶ 51; *see id.* Ex. M.

Dated: Brooklyn, New York
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