

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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CLEAR, AMERICAN CIVIL LIBERTIES )  
UNION; AMERICAN CIVIL LIBERTIES )  
UNION FOUNDATION, )

Plaintiffs, )

v. )

UNITED STATES CUSTOMS AND )  
BORDER PROTECTION )

Defendant. )

Civil Action No. 19-CV-07079 (EK)(RER)

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**DECLARATION OF PATRICK HOWARD**

1. I am a Branch Chief in the Freedom of Information Act (FOIA) Division at U.S. Customs and Border Protection (CBP). I have been a Branch Chief in the FOIA Division in Washington, D.C. since February 8, 2015. In this capacity, I oversee a staff of Government Information Specialists and FOIA assistants as well as the processing of FOIA requests submitted to CBP and, thus, am familiar with CBP's procedures for responding to FOIA requests. I provide technical and administrative supervision and direction to a group of FOIA specialists in processing FOIA requests, assist with FOIA/Privacy Act (PA) litigation matters, and am personally familiar with the processing of FOIA/PA responses including, at times,

directly reviewing responses for adequacy and adherence to federal laws and regulations. The purpose of this declaration is to explain the handling of Plaintiffs' Request by CBP.

2. This declaration summarizes the relevant facts and releases made by CBP.

3. The statements I make in this declaration are based on my personal knowledge, which includes knowledge acquired through information furnished to me in the course of my official duties as Branch Chief in CBP's FOIA Division, and agency files that I personally reviewed in the course of my official duties.

### **CBP Standard Procedure for Initiating Searches in Response to FOIA Requests**

4. Broadly, the FOIA Division at CBP reviews FOIA requests, determines whether responsive records exist and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the FOIA Division consults with CBP component agencies, CBP personnel and, when appropriate, with other components within DHS, as well as other Executive Branch agencies.

5. CBP is the largest federal law enforcement agency in the United States and is charged with keeping terrorists and their weapons out of the United States, while facilitating lawful international travel and trade.

6. CBP is comprised of more than 60,000 employees charged with enforcing hundreds of federal statutes. Approximately 45,000 of those employees are armed law enforcement officers engaged in carrying out CBP's expansive border security mission. CBP is comprised of three law enforcement components: Office of Field Operations (OFO), United States Border Patrol (USBP), and Air and Marine Operations (AMO).

7. There are a number of operational and policy offices within CBP. Upon receiving the request, CBP FOIA staff evaluate the request and consider which components, offices, databases, and personnel are likely to have responsive information. Such offices include but are

not limited to, the Office of Field Operations (OFO), the Office of Professional Responsibility (OPR), and Labor and Employee Relations (LER).

8. Despite the large size of CBP as an organization, the FOIA Division currently consists of 29 full-time staff and FOIA processors, 6 FOIA assistants, and 4 supervisory employees.

9. A Government Information Specialist (GIS), also known as a FOIA processor, is tasked with reviewing information and providing assistance to managers and employees concerning FOIA issues, policies, and procedures. He or she is also responsible for processing FOIA requests for CBP records. A GIS is responsible for reviewing and preparing draft responses to requests for releases of information and, in so doing, must apply relevant statutes, regulations, agency rules, and/or executive orders as they pertain to FOIA requests.

10. A Branch Chief is responsible for managing policy formulation, advising agency management, and ensuring compliance with federal laws governing the release of information. Branch Chiefs oversee the release of CBP documents and information, assist with FOIA litigation matters, and oversee the processing of FOIA responses and adherence to federal laws and regulations.

11. As published in the DHS FOIA Annual Reports, during fiscal year 2017, FOIA received 88,840 requests and processed 87,623 requests. During fiscal year 2018, FOIA received 87,388 requests and processed 74,894 requests. During fiscal year 2019, FOIA received 86,133 requests and processed 88,230 request.

12. Where the FOIA Division has no direct access to records that may be responsive to a request, it must determine which CBP component offices are likely to have responsive information and work with those offices to gather any potentially responsive records. Based on

the FOIA Division's familiarity, experience and knowledge with the types of records that each office maintains, an assessment is made as to where responsive records are likely to be maintained based on a review of the content of the request itself and the nature of the records sought, as well as discussions with knowledgeable agency personnel. Accordingly, when CBP receives a FOIA request that reasonably describes the records requested and complies with the Agency's rules governing the procedures for FOIA requests, the office likely to have responsive information is tasked with searching for and retrieving potentially responsive records.

13. The CBP FOIA office addresses a broad variety of FOIA requests. Approximately 85% of requests received are internally referred to as "traveler" requests, from individuals or their registered representatives asking for records of entry and exit, records of inspection, apprehension, etc. The requests are focused on the activities of a single person, or multiple persons/family and are processed internally within CBP FOIA, with no other office involvement.

14. The remaining 15% of requests are internally referred to as "Non Traveler" requests and essentially encompass anything that does not fall into the first category. A frequent characteristic of Non Traveler requests is the need for CBP FOIA to reach out to other offices for records, as CBP FOIA does not have access to all systems within CBP. Some examples of other types of requests that CBP handles which fall into this category:

- a. Human Resources requests – dealing with job applications and selections, applicants resumes, etc.
- b. Office of Professional Responsibility (OPR) – Internal Affairs investigations into employee misconduct, etc.

- c. Import/Export or FP&F requests – dealing with seizures, fines, penalties, and other topics for commercial imports/exports.
- d. Procurement requests, dealing with contracts CBP has entered into with providers of goods and services, building contractors, and other third party payments.
- e. Commercial/Media/Other - a general type of request where the requester is defined by their fee type, other special interest groups, members of the media, etc.

These requests have a broad range of topics, i.e. Migrant Caravan, the proposed Border Wall Construction, various Executive Orders that have affected CBP operations, Agency technology, etc. These are generally complex requests and require substantial efforts and voluminous responses.

#### **Plaintiffs' FOIA Request**

15. I am familiar with the FOIA requests at issue in this litigation, as made by the Plaintiffs in the above-captioned case.

16. On November 13, 2019, Plaintiffs filed the instant FOIA request via CBP's online FOIA system. The request was dated November 7, 2019. *See Exhibit A.*

17. Plaintiffs' FOIA sought disclosure of records related to CBP's Tactical Terrorism Response Team (TTRT). More explicitly, Plaintiffs' FOIA sought ten (10) separate categories of information related to the same.

18. CBP's TTRT is comprised of officers who are specifically trained in counterterrorism response. They are responsible for the examination of travelers identified within the Terrorist Screening Database (TSDB) as well as other travelers, their associates, or co-travelers who arrive at the Ports of Entry and are suspected of having a nexus to terrorist activity.

TTRT officers work closely with analysts to utilize information derived from targeting and inspection to mitigate any possible threat.

19. Plaintiffs' FOIA request sought expedited processing and a waiver or limitation of associated fees.

20. On November 14, 2019, CBP acknowledged receipt of Plaintiffs' request and assigned it tracking number CBP-2020-012037. *See Exhibit B.*

21. On December 18, 2019, Plaintiffs filed a lawsuit, *CLEAR; ACLU; and ACLU Foundation v. United States Customs and Border Protection*, No. 19-cv-07079 (EDNY). The subject of the lawsuit was the above FOIA request.

22. In litigation, via e-mail, Plaintiffs agreed to a "narrowing Category 9 of the FOIA request." The narrowed request included a demand for "records concerning investigations of and/or disciplinary action related to TTRT officers" based on three categories: (1) profiling, (2) First Amendment concerns, (3) recording, retaining and disseminating information, and (4) misuse or abuse of TTRT/TTRP (Tactical Terrorism Response Program).

23. In response to Plaintiffs' request, CBP conducted searches and released information to the Plaintiffs.

24. CBP has released to Plaintiffs non-exempt records and reasonably segregable portions of records that are responsive to Plaintiffs' FOIA request.

25. On March 13, 2020, CBP made its initial production releasing 11 pages of records in full, 15 pages of records partially released pursuant to 5 U.S.C. § 552 (b)(6), (B)(7)(C), and (B)(7)(E), and 10 pages of records that were determined to be public documents<sup>1</sup>. *See Exhibit C and Exhibit D.*

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<sup>1</sup> The cover letter accompanying this release erroneously tabulated the page totals to 35 instead of 36.

26. On April 10, 2020, CBP made its second production releasing 34 pages of records partially released pursuant to 5 U.S.C. § 552 (b)(6), (b)(7)(C), and (b)(7)(E). Additionally, five pages of records were determined to be withheld in full pursuant to 5 U.S.C. § 552 (b)(7)(E). *See Exhibit E and Exhibit F.*

27. On May 29, 2020, CBP made its third production releasing 135 pages of records partially released pursuant to 5 U.S.C. § 552 (b)(3), (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). Further, CBP identified 846 pages of records that were determined to be withheld in full pursuant to 5 U.S.C. § 552 (b)(7)(E). Finally, four pages of records were determined to be publicly available and an electronic link to the same was provided to Plaintiffs. *See Exhibit G and Exhibit H.*

28. On July 31, 2020, CBP made its fourth production of records releasing 280 pages of records that were partially released pursuant to 5 U.S.C. § 552 (b)(6), (b)(7)(C), and (b)(7)(E). *See Exhibit I and Exhibit J.*

29. On August 7, 2020, CBP made its fifth and final production releasing 386 pages of records that were partially released pursuant to 5 U.S.C. §§ 552(b)(3), (5), (6), (7)(C), (7)(E). *See Exhibit K and Exhibit L.*

30. In accordance with a joint scheduling order proposed by the parties via letter on April 16, 2020, CBP compiled a *Vaughn* Index identifying the documents that were withheld in full in the above productions. The same was provided to Plaintiffs on August 14, 2020. *See Exhibit M.*

31. CBP did not charge fees to Plaintiffs for these responses.

### **CBP Withholdings Pursuant to FOIA Exemption (b)(5)**

32. The documents withheld in full under Exemption (b)(5) and those withheld in part fall under the following categories: (1) communications between attorneys and the client relating to a legal matter; and (2) legal training provided by Agency attorneys to the client.

33. FOIA Exemption 5 exempts from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5).

34. Exemption 5 has been construed to exempt documents or information normally privileged in the civil discovery context and incorporates, *inter alia*, the attorney work product, attorney-client, and deliberative process privilege. The attorney-client privilege protects confidential communications from a client to an attorney and from an attorney to a client for the purpose of seeking and providing legal advice.

35. In order to apply Exemption 5, agencies must first satisfy the threshold requirement – i.e. show that the information protected was “inter-agency or intra-agency.” Once the threshold is satisfied, agencies must satisfy the element of the pertinent privilege. With respect to the attorney work product privilege, agencies must show that the withheld information was created by, or for, an attorney in reasonable anticipation of litigation. With respect to the attorney-client privilege, agencies must show that the withheld information concerns confidential information shared by a client with an attorney for the purpose of obtaining legal advice or assistance, or legal advice or assistance provided by an attorney to a client reflecting confidential information.

36. Category (1) covers the withholding in part of certain information from pages 1-2 in the May 29, 2020 production. This information contains correspondence from a client to



Agency attorneys relating to a legal matter for which the client has sought legal advice. Routine disclosure of information protected by attorney-client and or attorney work product privilege would shake the very foundation of the legal profession, as clients would not feel comfortable asking for advice and attorneys would not feel comfortable providing it.

37. Category (2) covers a confidential training provided to the client by CBP attorneys. Further, CBP attorneys created the identified training in response to CBP employees seeking legal advice. The training was a means by which CBP attorneys provided advice on the specific topic. Such information and advice reflect litigation risk assessments, mental impressions of attorneys, and recommendations. Further, this is information that was created by agency attorneys and are categorized as attorney work product. Routine disclosure of information protected by attorney-client and or attorney work product privilege would shake the very foundation of the legal profession, as clients would not feel comfortable asking for advice and attorneys would not feel comfortable providing it.

#### **CBP Withholdings Pursuant to FOIA Exemption (b)(6) and (b)(7)(C)**

38. CBP withheld the names of all non-public facing CBP employees, including the names of law enforcement officers, as well as their email addresses and phone numbers (PII). Disclosure of this employee PII would constitute unwarranted invasion of privacy. The right of these non-public facing employees to have their identity withheld from disclosure outweighs the public interest, if any, in releasing their names.

39. The identification of an individual in association with the performance of their duties at a law enforcement agency creates a safety threat and risks unwarranted attribution and attention to the employee beyond the confines of his or her job and into his or her personal life.

40. Specifically, CBP employees have been subject to harassment, discrimination, and have received threats of physical harm solely because of their employment at CBP. For example, in July of 2019, at the CBP Tucson Field Office, multiple marked CBP vehicles, parked in a non-government parking lot, were vandalized overnight. Further, in June of 2019, Border Patrol Agents in Idaho received threats via fax. Also in June 2019, the group “Antifa” posted threats to law enforcement on social media threatening to use “acid milkshakes” to inflict chemical burns. CBP employees also regularly receive threats on government phones by callers using altered numbers and spoofed voices and have been harassed on public transportation solely for their perceived affiliation with the DHS or CBP. As a result of these types of incidents, the Office of Personnel Management designated CBP a “Security Agency” exempting all CBP employees, not just front-line law enforcement, from OPM’s salary information disclosure policy. As OPM recognized, in this current environment, disclosing a non-public facing CBP employee’s name (and related information), absent a compelling public interest to do so, risks unnecessarily exposing that individual employee to potential safety threats.

41. Finally, with regard to email addresses, disclosure of an individual’s email address could subject that individual and CBP as a whole to cybersecurity vulnerabilities. If an employee’s email address is publicized, malicious actors can engage in various forms of deception, such as phishing and spear-phishing, to manipulate the individual into divulging confidential work-related or personal information that such actors subsequently use for malicious purposes. Malicious actors may also engage in other tactics such as publishing individuals’ private information, harassing individuals, and or sending ransomware, presenting additional cybersecurity threats for CBP.

42. CBP also withheld the names of travelers/the public where that information arose in the relevant documents. The right of these travelers to have their identity withheld from disclosure outweighs the public interest, if any, in releasing their names.

**CBP Withholdings Pursuant to FOIA Exemption (b)(7)(E)**

43. Exemption (b)(7)(E) exempts from mandatory disclosure “records or information compiled for law enforcement purposes” that, if released, “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.” CBP is constrained in describing the techniques, procedures, and guidelines by its Exemption (b)(7)(E) withholdings, so as to avoid revealing information CBP seeks to protect, which is not generally known to the public. The discussion below thus aims to fairly represent the Exemption (b)(7)(E) withholdings but does not purport to be an all-inclusive rendering of all withheld information. If the Court requires additional information, CBP could provide it in an ex parte submission.

44. Under Exemption (b)(7)(E), investigative techniques and procedures are afforded categorical protection; guidelines are protected when their disclosure could reasonably be expected to risk the circumvention of law and regulations, impede effectiveness of law enforcement activities or associations, or endanger CBP investigatory practices and techniques. Even commonly known techniques and procedures may be protected where the circumstances of their usefulness are not widely known. Here, disclosure of the information withheld pursuant to this exemption would advise potential violators of CBP law enforcement guidelines, techniques and procedures, thereby enabling them to circumvent the law, avoid detection, and evade apprehension.

45. CBP invoked Exemption (b)(7)(E) to withhold the following types of information:

*(i) Codes and Functionalities of CBP Systems*

CBP withheld under Exemption (b)(7)(E) internal system codes, screenshots, functionalities, and information on how to use CBP's law enforcement systems. Disclosure of such information could be used to locate, access, and navigate internal law enforcement computer systems and/or databases.

*(ii) Training Materials for Users of CBP Systems*

CBP withheld under Exemption (b)(7)(E) training materials that Office of Field Operations provides to CBP Officers on how to use CBP's law enforcement systems. Such materials contain detailed instructions on how to enter information, navigate, conduct queries and use CBP systems. Such information would reveal types and location of information CBP gathers, analyzes and utilizes within such databases.

*(iii) Email Addresses of Group Listserves*

CBP withheld email addresses of group list serves which are not known to the public and only used within the Agency, because disclosure of that information would reveal the means by which CBP communicates law enforcement information.

*(iv) Law Enforcement Methods for Inspecting Travelers at Ports of Entry*

CBP withheld under Exemption (b)(7)(E) law enforcement techniques and procedures, including officer instructions not generally known to the public, that CBP uses at ports of entry for examination and inspection of international travelers. For example, CBP withheld instructions for CBP officers on (1) specific topics for questioning travelers seeking admission into the United States, (2) criteria CBP uses to determine which travelers require further scrutiny, (3) inspecting individuals who are identified as posing a counterterrorism or

national security risk, (4) detecting fraudulent travel documents, or identifying individuals who seek admission into the United States using fraudulent schemes, (5) detecting individuals engaging in criminal activity, such as human trafficking, alien smuggling, or smuggling illegal substances. CBP also withheld specific operational plans utilized at different Ports of Entry. If those are released it would allow bad actors to work around CBP efforts to stop them.

Disclosure of such information would allow individuals to circumvent CBP's efforts, alter behavior, change associations, or develop countermeasures to thwart the effectiveness of CBP's law enforcement efforts. In addition, such information 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 evade apprehension.

*(v) Information Related to Targeting*

CBP applied Exemption (b)(7)(E) to information which relates to CBP's process for assessing risk on travelers seeking to enter the United States. This includes information regarding ongoing investigations or investigative techniques and procedures. This further includes information that assists CBP in identifying unknown high-risk travelers—that is, travelers for whom U.S. government entities do 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 thus warrant additional scrutiny. Disclosure of such information 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 evade apprehension. Moreover, revealing information regarding ongoing investigations would thwart CBP's law enforcement efforts and risk individuals circumventing CBP's future efforts. Even commonly known techniques and procedures may

be protected where the circumstances of their usefulness are not widely known.

46. A large number of the documents withheld in full from production fall under sections (iv) and (v) identified above. This is because the essence of Plaintiffs' request in certain sections requests information squarely within these exemptions. For example, section (1) of Plaintiffs' requests documents related to "how travelers are screened and/or targeted for interviews or inspection by TTRTs." Additionally, Plaintiffs' request in section (2) asks for "[t]raining 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." Finally, section (3) of Plaintiffs' request asks for "[f]ormal or informal reports, evaluations, audits or analyses concerning the effectiveness of TTRTs."

47. Disclosure of information pertaining to targeting and law enforcement operations and the training of TTRT officers could risk law enforcement techniques and procedures by revealing the information CBP considers in conducting law enforcement activities, as well as CBP's priorities when conducting these activities. These records would 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. Such information if unprotected, can enable individuals to thwart efforts to secure the border and enforce customs and immigration laws and other federal laws enforced or administered by CBP.

48. The release of the sensitive information contained in records 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 and at the disposal of other similarly situated individuals; educating them as to the investigative techniques used and thereby assisting

them to devise methods to evade detection and apprehension; and, ultimately, impairing the effectiveness of those law enforcement techniques.

49. The records at issue pertaining to targeting and operations integrate or reference data belonging to third-party agencies or departments. As a preliminary matter, disclosure of such information threatens efforts to foster open communication across agencies and cohesive law enforcement and national security efforts. Disclosure of the information contained in these records could have far-reaching effects, impairing other agencies' law enforcement operations or their ability to effectively carry out their respective missions. 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.

#### **Consultations and Referrals**

50. While processing records responsive to Plaintiffs' requests, CBP identified documents which originated with or contained other governmental agencies information and/or equities. Specifically, CBP identified documents that contained equities and information from the Office of the Director of National Intelligence (ODNI). Pursuant to established procedures, CBP consulted with this agency and asked them to make disclosure determinations with respect to their information.

51. *ODNI* - CBP identified one (1) document, beginning on page 86 of the May 2020 production, which contained ODNI information and/or equities. Following consultations between CBP and ODNI, it was determined that certain information contained in this document was exempt from disclosure pursuant to FOIA Exemption (b)(3) under 50 U.S.C. 3024(i)(1). This statute states, "The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure."

### **Determination Regarding Segregability**

52. All information CBP has withheld is either exempt from disclosure pursuant to a FOIA exemption or does not contain nonexempt material that is reasonably segregable from exempt material, whether because it is so intertwined with protected material that segregation is not possible, or its release would have revealed the underlying protected material, or segregation is not required because the withheld material is attorney work product. In responding to Plaintiffs' requests in this case, CBP personnel and attorneys reviewed each release of records page by page to confirm that any withholdings were proper, examine whether any discretionary waiver of an exemption was warranted, and determine whether any segregable, non-exempt information could further be released. All reasonably segregable portions of the relevant records have been released to the Plaintiffs.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed: October 16, 2020

*Patrick Howard*

PATRICK HOWARD  
FOIA Division  
Privacy and Diversity Office  
Office of the Commissioner  
U.S. Customs and Border Protection  
U.S. Department of Homeland Security