UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES, AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, ANNE LAI, and SAMEER ASHAR,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, and UNITED STATES CUSTOMS AND BORDER PROTECTION,

Defendants.

CASE NO. 8:15-cv-00229-JLS-RNB

ORDER GRANTING IN PART AND DENYING IN PART CROSS-MOTIONS FOR SUMMARY JUDGMENT AND REQUESTING IN CAMERA REVIEW OF BORDER PATROL ACADEMY RECORDS (Docs. 38, 50)

Before the Court are Cross-Motions for Summary Judgment. After carefully reviewing the briefs, requesting supplemental briefing, ordering *in camera* review of a particular document, and hearing oral argument twice, the Court GRANTS IN PART and DENIES IN PART the parties' cross-motions and ORDERS production for *in camera* review of the Border Patrol Academy records.

I. BACKGROUND

On July 3, 2014, Plaintiffs submitted a Freedom of Information Act (FOIA) request to the United States Department of Homeland Security (DHS) and United States Customs and Border Protection (CBP) seeking records related to "U.S. Border patrol's 'roving patrol' operations in the San Diego and El Centro Sectors, including relevant agency policies, stop data, and complaint records." (Compl. ¶ 2, Doc. 1.) This request sought:

> U.S. Border Patrol records pertaining to "roving patrol" operations in the San Diego Sector and El Centro Sector, construed to include any field operations involving roving vehicle or pedestrian stops by Border Patrol agents (including any allegedly consensual encounters), as well as any related records held by CBP or other agencies within DHS for these two Border patrol sectors.

(CBP FOIA Request, Exh. A, Doc. 40-1; DHS FOIA Request, Exh. A, Doc. 42-1.) After receiving no response to their FOIA request for seven months, Plaintiffs filed suit in February 2015, seeking the immediate release of agency records withheld by the Government. (Compl.) In their Complaint, Plaintiffs allege that the Government's failure to produce the requested documents violates FOIA and "impedes Plaintiffs' efforts to educate the public" on "the full extent and impact of wide-ranging roving patrol operations" conducted by CBP. (*Id.* ¶ 20.)

In August 2016, the Government filed a Motion for Summary Judgment, and, in October 2016, Plaintiffs filed an Opposition and a Cross-Motion for Summary Judgment. (Gov. Mot., Doc. 38; Plaintiffs' Mot., Doc. 50.) After hearing oral argument, the Court

denied the parties' cross-motions for summary judgment on whether DHS should have searched the Office of Policy and Planning (OPP). The Court also ordered supplemental briefing on: (1) the adequacy of the Government's search; (2) CBP's former use of non-deadly force policy memorandum; (3) the withholding of personnel names—requesting specifically for Plaintiffs to provide a list of all records that they contend are not compiled for law enforcement purposes and to identify the public interest in disclosure of this information; (4) Border Patrol Academy records; and (5) the segregability of the Enforcement Law Course (ELC). Additionally, the Court ordered *in camera* review of the ELC to determine whether the work product privilege applies. (Order, Doc. 74.) In response, both parties filed supplemental briefs on April 5, 2017 (Gov. Supp., Doc. 81; Plaintiffs' Supp., Doc. 82.) and supplemental reply briefs on April 19, 2017. (Gov. Supp. Reply, Doc. 85; Plaintiffs' Supp. Reply, Doc. 84.) After reviewing the supplemental briefing, the Court requested a second oral argument, which was held on August 18, 2017.

A. Adequacy of the Search

Plaintiffs continue to challenge the adequacy of the Government's search. (Plaintiffs' Supp. Reply at 10.)

1. Search Terms

In response to the Court's First Summary Judgment Order, the Government elaborated on the terms used in its searches, explaining that it used different search terms depending on whether the searched CBP component was likely to contain documents prepared by the public. (Third Tell Decl. ¶¶ 6–7, Doc. 81-1.) Variations of "roving patrol" were used when searching CBP components that receive documents prepared internally, rather than by the general public. (*Id.*) Additional search terms, such as "traffic stop," "automobile stop," "forcibly removed," and "without consent," were used in components such as the former Office of Internal Affairs (IA), the Situation Room, and the Office of Public Affairs (OPA), where some content is generated or written by members of the public who may not refer to a roving patrol using that particular term. (*Id.*) Also, the

Office of Civil Rights and Civil Liberties (CRCL), the Office of the Inspector General (OIG), and the Office of the Executive Secretariat (OES) conducted supplemental searches using a greater variety of search terms. (*Id*. ¶ 12; Second Tyrell Decl. ¶ 8, Doc. 81-2; Roselle Decl. ¶ 10, Doc. 81-3.) CRCL conducted its supplemental search with terms similar to those used in the components that receive documents generated by the public (Second Tyrell Decl. ¶ 8), OIG used "roving" combined with "San Diego" and "El Centro" (Roselle Decl. ¶ 10), and OES used terms proposed by Plaintiffs such as "pedestrian," "complaint," and "profiling" (Third Tell Decl. ¶ 12). See Appendix A, "Search Terms Chart" for a detailed list of these search terms.

CBP agreed to use all six of Plaintiffs' requested search terms in the search of the Office of Policy and Planning (OPP) in addition to sixteen search terms proposed by two OPP employees. (Gov. Suppl. at 6; Third Tell Decl. ¶ 13.) After reviewing the Government's declaration confirming the OPP search methodology and terms used (Third Tell Decl. ¶¶ 13–15), Plaintiffs do not challenge the adequacy of OPP's search. (Plaintiffs' Supp. Reply at 10.)

2. Components Searched

Although the search the Office of Policy and Planning (OPP) is no longer at issue, Plaintiffs continue to challenge the Government's decision not to search the Discipline Review Board (DRB), an entity within the Office of Human Resources Management (HRM). (Plaintiffs' Supp. at 1; Second Tell Decl. ¶ 3, Doc. 73.) Plaintiffs assert that CBP should have conducted an independent search of the DRB in addition to the search of HRM. (Plaintiffs' Supp. at 1.) The DRB reviews a "limited subset" of cases involving alleged misconduct handled by specialists within HRM's Division of Labor and Employee Relations. (Second Tell Decl. ¶ 4.) The Government asserts that its search of HRM's Division of Labor and Employee Relations would have included any records of cases that went before the DRB because the search included the Human Resources Business Engine (HRBE), the case tracking system used by the DRB. (Gov. Supp. Reply at 1-2.) To

confirm this, the Government searched this case tracking system a second time using the terms "roving" and "roving patrol" for "records pertaining to cases that went before the DRB." (*Id*.) The Government also manually reviewed summaries of factual allegations and disciplinary charges in all cases from the San Diego and El Centro Sectors that came before the DRB from 2011 through January 2017 for any relation to roving patrols. (*Id*.) The first search located 162 pages of "potentially responsive records." (Second Tell Decl. ¶ 4.) The latter searches did not locate any additional responsive records. (Gov. Supp. Reply at 2.) *See* Search Terms Chart, Append. A.

B. Propriety of the Withholdings

Following the filing of this action, the Government released to Plaintiffs 7,012 pages, largely consisting of incident forms, memoranda, and complaints. (Gov. Mot. at 2; Plaintiffs' Mot. at 4.) Since the Court's Summary Judgment Order, the Government has released: (1) 53 pages of the ELC; (2) four documents found through supplemental searches of the OPP and OIG; (3) partially redacted Border Patrol Academy records; and (4) a memorandum and excerpt on CBP's former use-of-nondeadly-force policy.

Plaintiffs contest the withholding of employees' names in about 1,000 records. (Plaintiffs' Supp. at 5.) Plaintiffs separate the public interest in the disclosure of this information into four categories: (1) CBP officials engaged in actual or alleged misconduct; (2) CBP officials responsible for investigating actual or alleged misconduct, and/or enforcing disciplinary action; (3) CBP officials who may have received reports of misconduct by virtue of their leadership positions or supervisory roles; and (4) high-ranking CBP officials with supervisory and/or public relations responsibilities. (*Id*. at 5-14.) Plaintiffs also challenge whether around 170 of these documents were compiled for law enforcement purposes. (Plaintiffs' Supp. at 4; *see* Second Ebadolahi Decl., Privacy Challenges Chart, Exh. B Doc. 82-4.)

1. The Enforcement Law Course ("ELC")

According to the Government's Revised *Vaughn* Index, the ELC constitutes

attorney work product and attorney-client communication regarding the various areas of law relevant to the agency's law enforcement mission. (*See* Third Tell Decl., Exh. A "Revised *Vaughn* Index for Documents Other than Incident Forms" No. 42, Doc. 81-1.) The *Vaughn* Index also asserts that the ELC discusses procedures and techniques for law enforcement investigations. (*Id*.) After analyzing the ELC for nonexempt sections, the Government released 53 pages out of the 1,133 page ELC. (Second Ebadolahi Decl., Exh. F, Doc. 82-8.) These pages include the Declaration of Independence, the U.S. Constitution, common legal citations and abbreviations in CBP regulations, geographic boundaries of U.S. judicial districts and circuits, legal advice related to specific issues that CBP officers encounter when interacting with foreign diplomats while on duty, information relating to diplomatic, consular, internal organization, and United Nations personnel, a directory of foreign embassies and consulates in the U.S., information regarding the constitutional rights afforded to individuals under the Fourth, Fifth, and Sixth Amendments, and a list of companies that issue travelers' checks. (Fourth Tell Decl. ¶¶ 11-20, Doc. 81-5.) Plaintiffs challenge the withholding of the remainder of the ELC. (Gov. Supp. at 9-12; Plaintiffs' Supp. Reply at 8.)

2. Documents Arising out of Supplemental Searches of the OPP and OIG

The Government's supplemental search of the OPP using Plaintiffs' requested search terms located two responsive documents, both of which were already available online. The Government produced these documents to Plaintiffs in full on April 4, 2017. (Gov. Supp. at 6.) The Government's supplemental search of OIG located two records responsive to Plaintiffs' request, one of which had previously been made public in response to an unrelated FOIA request. (Roselle Decl. ¶ 11.) Both records were complaints handled by OIG personnel regarding alleged civil rights violations and unlawful activity by law enforcement personnel. (*Id*.) The Government produced both records in part to Plaintiffs on April 4, 2017, withholding the names of CBP law enforcement personnel. (Gov. Supp. at 7.)

3. Border Patrol Academy ("BPA") Records

The BPA records consist of student and instructor guides for the Border Patrol Academy in New Mexico. (*See* Third Tell Decl, Exh. C, Revised *Vaughn* Index for Border Patrol Academy Documents.) According to the Government's *Vaughn* Index, these documents discuss various areas of the law relevant to the agency's law enforcement mission as well as law enforcement procedures and techniques. (*Id*.) The Government has entirely withheld some portions of the BPA records and partially released others. (Plaintiffs' Supp. at 1-2.) Plaintiffs request that the Court undertake *in camera* review of the BPA records that the Government has withheld entirely. Plaintiffs no longer seek disclosure of all but four of the remaining BPA records that the Government partially released. (Plaintiffs' Supp. Reply at 7.) These four partially released BPA records in dispute are all Instructor Guides. (*See* Third Tell Decl, Exh. C; Revised *Vaughn* Index for Border Patrol Academy Documents, Nos. 49, 50, 55, and 56.)

4. Policy Memoranda

In the initial round of briefing, six policy memos were at issue. The Government has released CBP's former use-of-nondeadly-force policy memorandum in full and an excerpt from that policy in part. (Gov. Suppl. at 12.) According to the Government, the excerpt consists of "investigative findings compiled by CBP in determining whether a Border Patrol Agent exercised an appropriate amount of force when questioning an individual [with] a stated disability." (*Id*.) The remaining five policy memos are internal CBP memorandum regarding: (1) procedures for narcotics seizures; (2) procedures pertaining to drug residue and plants; (3) collection of intelligence and information; (4) transportation check operations; and (5) enforcement actions around certain communities. (Wong Decl., Exh. A, "Revised *Vaughn* Index for Documents Other than Incident Forms" Nos. 32, 33, 40, 41, 43, Doc. 85-1.) Plaintiffs challenge the Government's withholding of these remaining memos.

II. Legal Standard

"Most FOIA cases are resolved by the district court on summary judgment, with the district court entering judgment as a matter of law." *Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 988 (9th Cir. 2016) (en banc). Yet ordinary principles of summary judgment apply to FOIA cases. *See id.* at 989. Thus, summary judgment is appropriate only if, after viewing the evidence in the light most favorable to the non-moving party, there are no genuine disputes of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "[I]f there are genuine issues of material fact in a FOIA case, the district court should proceed to a bench trial or adversary hearing." *Animal Legal Def. Fund*, 836 F.3d at 990. This ensures that factual disputes are resolved "through the usual crucible of bench trial or hearing, with evidence subject to scrutiny and witnesses subject to cross-examination." *Id.*; *see also Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 839 F.3d 750, 751 (9th Cir. 2016) (reversing the district court's decision because "[a]pplying the usual summary judgment standard, . . . there is a genuine issue of material fact in this case . . . .").

III. DISCUSSION

The Freedom of Information Act evinces "a general philosophy of full agency disclosure" to "help ensure an informed citizenry, vital to the functioning of a democratic society." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (citations omitted). "But 'FOIA contemplates that some information may legitimately be kept from the public' if it falls into one of nine enumerated exemptions in the statute." *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 770 (9th Cir. 2015) (quoting *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 973 (9th Cir.2009)). "These exemptions are explicitly made exclusive . . . and must be narrowly construed." *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (citations omitted).

Plaintiffs challenge both the adequacy of the DHS and CBP's search as well as the

propriety of these entities' withholdings. The Court will first consider the Government's search before analyzing the disputed withholdings in turn.

A. Adequacy of the Search

In response to a FOIA request, an agency must conduct a search "reasonably calculated to uncover all relevant documents." *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 986 (9th Cir. 2009) (quoting *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985)). Under this standard, the adequacy of a search does not necessarily depend on whether all relevant documents are actually found. *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 770 (9th Cir. 2015); *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C.Cir.1991); *Meeropol v. Meese*, 790 F.2d 942, 953–54 (D.C. Cir. 1986); *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982). An agency "may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith" to demonstrate that a search was adequate. *Zemansky*, 767 F.2d at 571. These affidavits or declarations must "set[] forth the search terms and type of search performed and aver[] that all files likely to contain responsive materials (if such records exist) were searched . . . ." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). "Affidavits submitted by an agency to demonstrate the adequacy of its response are presumed to be in good faith[,]" *Hamdan*, 797 F.3d at 770, and "[w]ithout contrary evidence, such affidavits or declarations are sufficient to show that an agency complied with FOIA." *Coffey v. Bureau of Land Management*, No. 16-508, 2017 WL 1411465, at *6 (D.D.C. Apr. 20, 2017). Such affidavits or declarations are insufficient where "the agency's response[s] raise[] serious doubts as to the completeness of the agency's search," are "patently incomplete," or are "for some other reason unsatisfactory." *Immigrant Def. Project v. U.S. Immigration and Customs Enf't*, 208 F. Supp. 3d 520, 527 (S.D.N.Y. 2016) (citations omitted).

1. Search Terms

A FOIA petitioner has no right to dictate what search terms an agency should use in response to a FOIA request. *Bigwood v. United States Dep't of Def.*, 132 F. Supp. 3d 124,

140 (D.D.C. 2009); *see DiBacco v. U.S. Army*, 795 F.3d 178, 192 (D.C. Cir. 2015). An agency need not use identical search terms for all of its components, *Fox News Network, LLC v. U.S. Dep't of The Treasury*, 739 F. Supp. 2d 515, 535 (S.D.N.Y. 2010), and "is not required to search for all possible variants of a particular name or term." *Immigrant Def. Project*, 208 F. Supp. 3d at 527. Yet the agency must articulate a "logical explanation" for the terms used and the components searched, "evincing a good faith effort to design a comprehensive search." *Immigrant Def. Project*, 208 F. Supp. 3d at 527; *see Oglesby*, 920 F.2d at 68.

In *DiBacco v. U.S. Army*, the D.C. Circuit found that the Army's search was adequate even though two search terms were omitted, concluding that the Army "need not knock down every search design advanced by every requester." 795 F.3d at 191. The panel likewise rejected as speculative the requester's belief that additional records about secret meetings "must exist" because two newspaper articles mentioned that prisoners were held and interrogated at a particular fort. *Id.* at 190–91.

Similarly, in *Immigrant Defense Project*, the district court rejected the requester's objections to the omission of certain search terms (such as "warrant" or "consent") and the use of varied terms in different offices. 208 F. Supp. 3d at 527–30. Where an agency does not use certain terms provided in a FOIA request or otherwise proposed by a plaintiff, the district court concluded, the agency should provide "an explanation as to why the search term was not used (such as, the futility of the term to narrow the field of documents or an office's failure to use the term in question in its records or record keeping)." *Id*. The court relied on the Government's declarations to conclude that the use of different search terms in different offices did not undermine the adequacy of the search, because the Government explained that the searched terms varied "based on . . . the differing responsibilities of offices." *Id.*

Here, Plaintiffs contend that the Government conducted an inadequate search because obvious search terms were supposedly ignored, search terms varied across

different offices, and responsive materials were overlooked. In response to Plaintiffs' concerns, the Government has submitted fourteen declarations explaining its search. (*See generally* Burroughs Decl., Doc. 40-1; Tyrell Decl., Doc. 41; Marwaha Decl., Doc. 42; Piniero Decl., Doc. 43; Tell Decl., Doc. 61; Jackson Decl., Doc. 62; Supp. Marwaha Decl., Doc. 63; Supp. Tyrell. Decl., 64; Supp. Tell Decl., Doc. 65; Second Supp. Tell Decl., Doc. 73; Third Supp. Tell Decl., Doc. 81-1; Second Supp. Tyrell Decl., Doc. 81-2; Supp. Roselle Decl., Doc. 81-3; Wong Decl., Doc. 85.) These declarations detail the search terms used and type of search performed, explain any omitted or varying search terms, and aver that all files likely to contain responsive materials were searched. *See Ogelsby*, 920 F.2d at 68; *DiBacco*, 795 F.3d at 192; *Immigrant Def. Project*, 208 F. Supp. 3d at 527–29.

Plaintiffs focus on the exclusive use of variants of the phrase "roving patrol" in some components, in contrast to the use of a broader array of search terms in others. The term "roving patrol," Plaintiffs contend, is too narrow a search term to reasonably locate all relevant documents because members of the public are unlikely to use that term. Like in *Immigrant Defense Project*, however, the Government provides a detailed explanation asserting that in devising search terms it separated agency components into two groups: those likely to contain documents prepared by the general public and those that contain only documents prepared internally by government personnel. (Third Suppl. Tell Decl. ¶ 4.) Where components contained documents prepared by the public (the Office of Internal Affairs, the Situation Room, and the Office of Public Affairs), the Government used terms such as "traffic stop," "automobile stop," "forcibly removed," and "without consent," in addition to variants of the phrase "roving patrol." (*Id.*) For agency components that do not contain documents submitted by the public, only variants of "roving patrol" were used. (*Id.*) The Government avers that it is not aware of any other terms used by agency personnel internally or within agency records to describe "roving patrols" other than the term itself, so "use of the term 'roving patrol' or variations of that term is . . . reasonably likely to retrieve all responsive documents." (*Id.*) To buttress its search, the Government

conducted supplemental searches using a broader set of search terms in components previously identified as unlikely to contain documents prepared by the public, such as the Office of Civil Rights and Civil Liberties (CRCL), the Office of the Inspector General (OIG), and the Office of the Executive Secretariat (OES). These additional searches uncovered only one additional responsive document, and even this find appears attributable to the component's enhanced search functionality, rather than the difference in terminology. (Roselle Decl. ¶ 11; Second Suppl. Tyrell Decl. ¶ 9; Third Tell Decl. ¶ 12.) Accordingly, the Government's varying search terms do not undermine the adequacy of the Government's search.

Plaintiffs next contend, like in *DiBacco* and *Immigrant Defense Project*, that the Government's search is inadequate because certain search terms were omitted. In their view, the Government has ignored obvious search terms relating to pedestrian and public transit stops. (Plaintiffs' CMSJ Reply at 4.) But the Government has now explained these omissions in its several declarations. The Government attests that "as a matter of agency practice, roving patrols are not conducted exclusively by vehicle[,]" so the term "roving patrol" is reasonably likely to locate records of pedestrian stops and stops of passengers on public transportation. (Gov. Supp. at 3; Suppl. Roselle Decl. ¶ 7; Third Tell Decl. ¶ 10.) Like *DiBacco*, 30 pages of records relating to pedestrian stops and stops of public transportation vehicles were identified after searching the El Centro Sector using only the term "roving patrol," thus supporting the Government's declaration and further substantiating the search's adequacy. (Third Tell Decl. ¶ 10.) Additionally, after its original search using the terms "roving patrol" and "automobile stop," the Office of the Executive Secretariat (OES) conducted a supplemental search using the term "pedestrian" and retrieved no additional responsive documents. (*Id.* ¶ 12.) As such, the Government's omission of search terms relating to pedestrian and public transit stops does not render its search inadequate.

Finally, like in *DiBacco*, Plaintiffs assert that responsive materials have been

overlooked. To support their assertion, Plaintiffs argue that more documents should have been recovered in the searches of DHS' Office of the Inspector General (OIG) and Office of Civil Rights and Civil Liberty's Compliance Branch based on the listed responsibilities of both of these components. Plaintiffs present no evidence that these alleged overlooked materials actually exist. Such speculation "does not undermine the determination that the agency conducted an adequate search for the requested records." *DiBacco*, 795 F.3d at 191; *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 316 (D.C. Cir. 2003).

To be sure, the Government's declarations provided in the first round of summary judgment briefing left doubts about the adequacy of its search. *See Am. Civil Liberties Union of San Diego & Imperial Ctys.*, 2017 WL 2889682, at *2–3. But after the Government's supplemental searches and additional declarations explaining its search strategy, Plaintiffs' objections are insufficient to withstand summary judgment. *See Hamdan*, 797 F.3d at 772 ("Plaintiffs [are] entitled to a reasonable search for records, not a perfect one.").

2. Components Searched

Rather than searching every possible records system, an agency may use its expertise to pinpoint which records systems are likely to store responsive materials. *Oglesby*, 920 F.2d at 68; *Broemer v. FBI*, No. CV 08-05515 MMM (RZx), 2011 WL 13142587, at *8 (C.D. Cal. Apr. 22, 2011); *see also Marks v. U.S. Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978); *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 497 (S.D.N.Y. 2010). Nonetheless, an agency must construe FOIA requests liberally when deciding which offices or components are likely to contain responsive materials. *See Nation Magazine, Washington Bureau v. U.S. Customs Service*, 71 F.3d 885, 889 (D.C. Cir. 1995); *Ogelsby*, 920 F.2d at 68; *Immigrant Defense Project*, 208 F. Supp. 3d at 531–32. Because "[a]ffidavits submitted by an agency . . . are presumed to be in good faith[,]" *Hamdan*, 797 F.3d at 770, an agency's affirmation that it "searched the relevant record system as well as any field records likely to contain responsive information" and "that no

other record system was likely to produce responsive documents" may be sufficient to find the agency's search adequate. *Oglesby*, 920 F.2d at 68; *Pusa v. FBI*, No. CV 13-04658 BRO (PLAx), 2015 WL 10939781 at *6 (C.D. Cal. Mar. 30, 2015).

In *Hamdan*, the Ninth Circuit rejected the plaintiff's argument that the State Department's search was inadequate because the agency failed to search the Bureau of Political–Military Affairs. 797 F.3d at 771. The panel concluded that there was no reason to doubt the good faith of the State Department's declaration that "there is no apparent connection" between the FOIA request and the types of documents contained in that Bureau. *Id*. Likewise, the panel rejected the plaintiff's contention that the FBI should have searched its Southern California field offices, because the FBI affirmed it searched the databases it used in investigations and used many variations of terms suggested by requesters to account for spelling and other inconsistencies, and the FBI's searches did not result in any leads suggesting a need to search other databases. *Id*. at 771–72.

In their Motion for Summary Judgment, Plaintiffs identify seven unsearched components that they assert are likely to contain responsive records: the CBP Office of Policy and Planning (OPP), DHS Privacy Office, CBP Office of Training, Office of Human Resources Management: Discipline Review Board (DRB), DHS Office of Inspector General: Office of Investigations, CBP Office of Internal Affairs: Investigative Operations Division, and CBP Office of Internal Affairs: Joint Intake Center. (Plaintiffs' CMSJ at 6.) As noted already, the search of OPP is no longer in dispute, but the Government's decision not to search the other six components remains contested. As required, the Government has provided persuasive explanations for why each component in question was unlikely to produce responsive records.

DHS Privacy Office. The Government asserts that the DHS Privacy Office is not likely to have any records responsive to Plaintiffs' FOIA request, because this office has undertaken no investigation pertaining to U.S. Border Patrol or "roving patrol" operations. (Suppl. Tyrell Decl. ¶ 6, Doc. 64). The Government notes that only one out of the three

privacy investigations the DHS Privacy Office has performed since 2006 concerned CBP, and that this investigation centered on whether Internal Affairs breached DHS's privacy policy or information sharing policy by releasing employees' personally identifiable information outside of DHS. (*Id.*)

CBP Office of Training. The Government concluded that the only portion of the Office of Training likely to contain responsive records is the Border Patrol Academy. (Tell Decl. ¶¶ 22–25, Doc. 61.) The Government searched the portion of a shared drive that contains all Academy courseware developed by the Office of Chief Counsel from 2011 to the present using the term "roving patrol." (*Id*. ¶ 22.) In addition, leadership in each of the six Academy departments manually searched their respective departments, based on personal knowledge, for any materials potentially responsive to Plaintiffs' FOIA request. (*Id*.) The Government affirms that, within the Border Patrol Academy, "all repositories or record systems likely to contain materials responsive to Plaintiffs' FOIA request were searched" and therefore the Office of Training and Development is not likely to have records responsive to Plaintiffs' FOIA request. (*Id*. ¶ 25.)

Office of Human Resources Management: Discipline Review Board (DRB). The Government asserts that DRB reviews only a limited subset of cases that are handled by specialists within the Office of Human Resources Management's Division of Labor and Employee Relations (LER). (Wong Decl. ¶ 5, Doc. 85.) Because these cases are stored in the Human Resources Business Engine (HRBE), the Government asserts that its search of the HRM's Division of Labor and Employee Relations would have included any records of cases that went before the DRB. (Gov. Supp. Reply at 1–2.) Nevertheless, the Government searched this case tracking system a second time using the terms "roving" and "roving patrol" for records pertaining to cases that went before the DRB. (Wong Decl. ¶ 6.) The Government also manually reviewed all cases from the San Diego and El Centro Sectors from 2011 through January 2017 that went before the DRB for any relation to roving patrols. (*Id*. ¶ 7.) The initial search of LER located 162 pages of "potentially

responsive records." (Second Supp. Tell Decl. ¶ 4.) The supplemental searches did not locate any additional responsive records. (*Id*. ¶ 6; *see* Search Terms Chart, Appendix A.)

DHS OIG Office of Investigations (INV). The Government attests that the responsibilities of the Office of Integrity and Quality Oversight (IQO) "supplement the work of OIG's Office of Investigations" and that "the sole records repository and management system used by IQO and INV to track allegations received and/or adjudicated and investigations initiated" was searched during the search of IQO. (Suppl. Marwaha Decl. ¶¶ 5–8, Doc. 63.) The Government asserts that INV is not likely to hold responsive records outside of this records system and thus a search of INV would have been duplicative. (*Id*.)

Office of Internal Affairs (IA): Investigative Operations Division (IOD) and Joint Intake Center. The Government avers that IOD investigators and the Joint Intake Center use the Joint Integrity Case Management System (JICMS). Because IA conducted a search of JICMS, a separate search of IOD and the Joint Intake Center would have been duplicative and not likely to return any additional responsive records. (Tell Decl. ¶¶ 15, 19.)

As its detailed declarations show, the Government has now searched all relevant components and no other records system is likely to contain responsive documents. Because Plaintiffs have not provided evidence to rebut the Government's explanations, there is no reason to doubt the Government's good faith. Accordingly, the Government conducted an adequate search for all responsive material.

B. <u>Adequacy of the Disclosures</u>

The Government is withholding the remainder of the Enforcement Law Course (ELC) pursuant to Exemption 5 and the remainder of the Border Patrol Academy (BPA) records pursuant to Exemptions 5 and 7(E). The Government is also withholding personnel information from a number of documents under Exemptions 6 and 7(C). "An agency that invokes one of the statutory exemptions to justify the withholding of any

requested documents or portions of documents bears the burden of demonstrating that the exemption properly applies to the documents." *Lahr*, 569 F.3d at 973.

1. Enforcement Law Course

Exemption 5 protects from disclosure "inter-agency or intra-agency memorand[a] 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) (2016). The Supreme Court has construed Exemption 5 to "exempt those documents, and only those documents, normally privileged in the civil discovery context," *U.S. Dept. of Justice v. Julian*, 486 U.S. 1, 11 (1988), such as those covered by the deliberative process privilege, the attorney client privilege, and the attorney work-product privilege. *Nat'l Ass'n of Criminal Def. Lawyers ("NACDL") v. Dep't of Justice Exec. Office for United States Attorneys*, 844 F.3d 246, 249 (D.C. Cir. 2016). Yet, because FOIA requires an agency to release "any reasonably segregable" and nonexempt portions of a record, 5 U.S.C. § 552(b), the Government cannot withhold entire documents under Exemption 5 "simply by showing that [they] contain some exempt material." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). If a record is found to be fully protected under an exemption or to have portions that contain non-exempt information "encompassed within (and integrated with)" protected portions of the document so that the document is not "logically divisible," "there is no portion of the work that is reasonably segregable." *NACDL*, 844 F.3d at 256–57.

The Government has withheld all of the substantive chapters of the ELC under Exemption 5 as attorney work product and attorney-client communication and under Exemption 7(E) as "procedures and techniques for law enforcement investigations." (Gov. Supp. at 7-12; Burroughs Decl. ¶ 38; Wong Decl., Exh. A; Revised *Vaughn* Index for Documents Other than Incident Forms, *Vaughn* No. 45.) The Court has reviewed the ELC *in camera* review to determine whether the claimed exemptions apply and, if so, whether there are any logically segregable portions of the document. *See NACDL*, 844 F.3d at 256–57 ("In cases involving voluminous or lengthy work-product records we think it

generally preferable for courts to make at least a preliminary assessment of the feasibility of segregating nonexempt material.").

i. Exemption 5: Attorney Work-Product Privilege

"Courts have long recognized that materials prepared by one's attorney in anticipation of litigation are generally privileged from discovery by one's adversary." *Nat'l Ass'n of Criminal Def. Lawyers*, 844 F.3d at 250; *see Hickman v. Taylor*, 329 U.S. 495, 510–12 (1947). In determining whether the work-product privilege applies to Government records, courts consider whether "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *NACDL*, 844 F.3d at 251. But the "mere possibility of litigation is not enough." *Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 905 F. Supp. 2d 206, 221 (D.C. Cir. 2012). "If [an] agency were allowed to withhold any document prepared by any person in the Government with a law degree simply because litigation might someday occur, the policies of FOIA would be largely defeated." *Id*. (quoting *Senate of P.R. v. Dep't of Justice*, 823 F.2d 574, 587 (D.C. Cir. 1987). In some circumstances, the document need not contemplate a specific legal claim for Exemption 5 to apply. *Schiller v. N.L.R.B.*, 964 F.2d 1206, 1208 (D.C. Cir. 1992), *abrogated on other grounds by Milner v. Dep't of Navy*, 562 U.S. 562 (2011). Where "lawyers act[] not as prosecutors or investigators of suspected wrongdoers, but as legal advisors protecting their agency clients from the possibility of future litigation," a specific claim is not needed for the privilege to apply. *NACDL*, 844 F.3d at 254; *In re Sealed Case*, 146 F.3d 881, 885–86 (D.C. Cir. 1998). In contrast, a specific claim is generally required when "the documents at issue [have] been prepared by Government lawyers in connection with active investigations of potential wrongdoing." *Id*. "The applicability of the work-product doctrine can turn in significant measure on a document's function." *Id*. at 255. For example, materials serving no clearly identifiable adversarial function, such as policy manuals, generally do not constitute work-product. *Id*.

In *NACDL*, the D.C. Circuit held that an internal Department of Justice publication known as the Federal Criminal Discovery Blue Book constituted attorney work-product because it was "aimed directly for use in litigating cases." *Id*. at 249. The Blue Book exclusively addresses a specific aspect of the litigation process, namely discovery. *Id*. It contains "information and advice for prosecutors about conducting discovery in their cases, including guidance about the Government's various obligations to provide discovery to defendants." *Id.* at 249, 252. The Blue Book, the D.C. Circuit stressed, does not "merely pertain to the subject of litigation in the abstract[;] instead it addresses how attorneys on one side of an adversarial dispute—federal prosecutors—should conduct litigation." *Id*. at 255. As such, the court held that a specific claim was not required and that the Blue Book "can fairly be said to have been prepared . . . because of the prospect of litigation." *Id*. at 252, 254.

NACDL represents the outer reaches of Exemption 5's reformulation of the work product privilege. Two members of the panel wrote a concurrence emphasizing that they joined the opinion only because they felt "compelled to do so by precedent[,]" in particular the D.C. Circuit's decisions in *Schiller v. NLRB*. *Id.* at 258 (Sentelle, J., joined by Edwards, J., concurring). These judges concluded that *Schiller* is inconsistent with the guiding purposes of the FOIA and the work product privilege as applied in ordinary private civil litigation. *Id.* at 258 –59. It is doubtful, they noted, that "a secret treatise passed around . . . on how to defend—for example—defective product cases" would be privileged. *Id* at 259. That the work product privilege embodied in Exemption 5 is interpreted more broadly than the same privilege would be in ordinary civil litigation contradicts the Supreme Court's admonition that Exemption 5 should not be construed to extend beyond conventional civil litigation privileges. *Julian*, 486 U.S. at 11. Nevertheless, because district courts in the Circuit have consistently applied *Schiller*,[1] the

[1] *See, e.g., Am. Civil Liberties Union of N. California v. DOJ*, No. 13-CV-03127-MEJ, 2015 WL 3793496, at *9 (N.D. Cal. June 17, 2015); *Am. Civil Liberties Union of N. California v.*

Ninth Circuit has often looked to the D.C. Circuit for its expertise in FOIA litigation, and no party has asked the Court to take a different approach, the Court will follow the *Schiller* line of cases, including *NACDL*.

In *American Immigration Council*, the district court held that a PowerPoint slideshow prepared by USCIS's Office of the Chief Counsel "to teach USCIS employees how to interact with private attorneys during USCIS proceedings before adjudicators" did not "anticipate litigation in the manner that the [work-product] privilege requires[,]" even though the slides were prepared "literally in anticipation of litigation." 905 F. Supp. 2d at 222. The panel reasoned that the slides were used for "general trainings by USCIS lawyers" to "convey routine agency policies" and contained "generally applicable legal advice." *Id*. The court noted that the D.C. Circuit distinguishes between documents containing neutral, objective analyses, "like an agency manual, fleshing out the meaning of the law, and thus . . . not prepared in anticipation of litigation" and documents containing "more pointed advice" that recommend "how to proceed further with specific investigations or advise the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome." *Id*. at 221–22 (quoting *Delaney, Migdail & Young, Charted v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987)).

Because of the Government's assertion of the attorney work product and attorney-client privilege, the Court cannot discuss these documents at length or with much detail in this public order. The Government argues that the ELC is "quite similar to the Blue Book in *NACDL*" because it "provides a foundational legal understanding, as well as specific legal advice germane to particular CBP functions, all of which constitutes legal guidance from the Office of Chief Counsel in anticipation of the litigation that foreseeably results from CBP officers' duties." (Gov. Supp. at 10.) The ELC, as a whole, includes

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Dep't of Justice, 70 F. Supp. 3d 1018, 1032 (N.D. Cal. 2014); *Feshbach v. SEC*, 5 F. Supp. 2d 774, 782 (N.D. Cal. 1997).

characteristics of both the Blue Book in *NACDL* and the PowerPoint slideshow in *American Immigration Council*.

Chapters 16 and 17 of the ELC, titled "Courtroom Testimony" and "Personal Lawsuits," are aimed "directly" towards litigation because provide strategic guidance on CBP officers' role on one side of the litigation process itself. *See NACDL*, 844 F.3d at 256; *see also ACLU v. U.S. Dep't of Justice*, 210 F. Supp. 3d 467, 484 (S.D.N.Y. 2016). Like the Blue Book in *NACDL*, Chapters 16 and 17 of the ELC advise CBP agents how to act as a witness affiliated with the Government or a defendant in a personal lawsuit. The Blue Book and Chapters 16 and 17 of the ELC convey litigation strategy. These chapters "do[] not merely pertain to the subject of litigation in the abstract," but instead address how CBP agents "on one side of an adversarial dispute" should conduct themselves *during* litigation. *NACDL*, 844 F.3d at 255. Although these chapters may also have an educational or training purpose, these secondary purposes do "not negate the document's adversarial use in (and its preparation in anticipation of) litigation." *Id*. Accordingly, the Government properly withheld Chapters 16 and 17 as attorney work product.[2]

In contrast to the "more pointed advice" about the litigation process itself found in Chapters 16 and 17, Chapters 1–15 and 18–20 contain a synthesis of the case law and other legal authorities on various topics that CBP officers may encounter while carrying out their mission, such as "Search and Seizure," "Border Authority," "Rights of the Suspect and Accused," "Border Patrol Enforcement Operations," "Conspiracy," and "Immigration Crimes." (Fourth Suppl. Tell Decl. ¶¶ 29, 33, 41, 45, 64, 85, Doc. 81-5.) Of course, a CBP officer's disregard of the Course's guidance on the applicable constitutional and

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[2] Plaintiffs' invocation of the "working law doctrine" is misplaced. This doctrine provides that information otherwise privileged under Exemption 5 is not protected if it becomes "effective law and policy." *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep't of Justice*, 697 F.3d 184, 199 (2d Cir. 2012). The doctrine is premised on the notion that the government cannot amass a secret body of decisions that it uses "in the discharge of its regulatory duties." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980). The ELC simply serves as a guide to educate CBP officials about the law, as articulated in statutes and judicial decisions; nothing suggests that it functions as a quasi-authoritative and independent body of precedent.

statutory constrains may result in the suppression of evidence, civil liability, or other legal consequences. But these chapters cannot be fairly said to impart strategy about "one side of an adversarial dispute," because they focus on explaining laws that CBP has the authority to enforce and case law on the officers' constitutional and statutory constraints, aimed at educating officers on their proper behavior, rather than any strategic, adversarial use in litigation. *See id.* at 222; *NACDL*, 844 F.3d at 255 (the document in question cannot "merely pertain to the subject of litigation *in the abstract*" (emphasis added)). In other words, like in *American Immigration Council*, these chapters resemble an "agency manual, fleshing out the meaning of the law[,]" and therefore "do not anticipate litigation in the manner that the privilege requires." *Id.*; *see Delaney*, 826 F.2d at 127.

Notably, the Government offers no limiting principle that would distinguish the Enforcement Law Course from any other Government legal training. A failure to comply with, for example, the guidance in an equal opportunity training course could just as easily—if not far more often—result in legal proceedings, such as a civil lawsuit. But that does not mean that all government legal training given by an attorney is exempt from disclosure as attorney work product simply because a failure to comply with it could have legal repercussions. At oral argument on this Motion, Counsel for the Government essentially urged the Court to trust that the Government will not abuse this exceedingly broad interpretation of the work product privilege. Yet the FOIA is premised on accountability, not blind trust, and it is vitally important that government training of its employees about "what the law is" stays squarely within the Act's reach. Improper or inadequate training of law enforcement officials on their constitutional and statutory duties can have a grave impact on the public. Conversely, if the training itself is sound, repeated failures to follow it could speak volumes about a law enforcement agency's culture or supervision and discipline of its officers.

In short, FOIA requires an agency to release "any reasonably segregable" and non-exempt portions of a record "after deletion of the portions which are exempt . . . ." 5

U.S.C. § 552(b). Because Chapters 1–15 and 18–20 are not attorney-work product and can be easily segregated from the privileged chapters, these chapters cannot be withheld under this privilege.[3]

ii. Exemption 5: Attorney-Client Privilege

"The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice, . . . as well as an attorney's advice in response to such disclosures." *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996). For Government agencies, "the client may be the agency and the attorney may be an agency lawyer." *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997). Because the ELC is a communication from the agency's attorneys to the client (CBP), the attorney-client privilege applies "only if that communication is based on confidential information provided by the client." *Ctr. for Biological Diversity v. OMB*, 625 F. Supp. 2d 885, 892 (N.D. Cal. 2009) (quoting *Mead Data Central Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242 (D.C.Cir.1977)); *Am. Immigration Council*, 905 F. Supp. 2d at 222–23. "Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed" and "[b]lanket assertions are 'extremely disfavored.'" *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002) (quoting *Weil v. Inv./ Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir.1981); *Clarke v. Am. Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir.1992)).

In *ACLU v. FBI*, the district court rejected the Government's assertion of the attorney-client privilege where the withheld documents consisted of short memos applying agency policy to general factual scenarios. 146 F. Supp. 3d 1161, 1168 (N.D. Cal. 2015). Although the agency claimed that the documents were created in response to specific employee questions, the district court found the privilege inapplicable because the short

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[3] Under *NACDL*, certain, brief passage of Chapter 12 that mention DOJ policy on what arguments the Government should make in litigation may also qualify as work product. But the Court does not reach the issue, because it finds the entire chapter exempt under 7(E). *See infra*, at section III.B.1.iii.

memos were "more akin to a 'resource' opinion about the applicability of existing policy to a certain state of facts, like examples in a manual, to be contrasted to a factual or strategic advice giving opinion." *Id.* at 1168 (quoting *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 868 (D.C.Cir.1980)). By contrast the court found that one document qualified for the exemption because it functioned "less like a resource opinion and contains fact-specific advice and communications." *Id.*

Here, the Government asserts that the ELC is based on "confidential information shared by the client involving CBP enforcement activities and procedures that are confidential and not otherwise available to the public." (Courey Decl. ¶ 10, Doc. 81-4.) The ELC, the Government avers, "memorializes and consolidates information in response to . . . specific and often reoccurring issues and fact patterns." (*Id.*) Yet, just like the memos at issue in *ACLU v. FBI*, the ELC contains no "fact-specific legal advice and communication" and functions as a general-purpose legal manual, teaching CBP officials about the laws they enforce and the constitutional and statutory constraints they must follow. The examples included in the ELC are taken from case law, not any identifiable agency communications. "[S]uch generally applicable legal advice will rest on none of the factual particularities conveyed in a typical confidential communication by a client." *Am. Immigration Council*, 905 F. Supp. 2d at 223. Because the Government has not demonstrated that the document contains any fact-specific legal advice, and the Court could not identify any potentially confidential material through its *in camera* review, Chapters 1–15 and 18–20 cannot be withheld under this privilege.

iii. Exemption 7(E)

Under Exemption 7(E), an agency may withhold "records or information compiled for law enforcement purposes" if they "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). Hence, the Government may

withhold "techniques or procedures" without demonstrating a risk of circumvention, but the withholding of guidelines require such a showing. *Hamdan*, 797 F.3d at 778. As used in Exemption 7(E), "guidelines" refer to how the agency prioritizes its investigative resources, while "techniques and procedures" cover "how law enforcement officials go about investigating a crime." *Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 682 (2d Cir. 2010). Even though the Government need not show that disclosure of a law enforcement technique or procedure would be reasonably likely to result in circumvention of the law, the technique or procedure at issue must not be "generally known to the public." *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 815 (9th Cir. 1995). "The Government must provide sufficient facts and context to allow the reviewing court to deduce something of the nature of the techniques in question." *Am. Immigration Council*, 30 F. Supp. 3d 67, 76 (D.D.C. 2014). "Generic portrayals of categories of documents and vaguely formulated descriptions will not suffice." *Id*.

To the preserve the confidentiality of the Government's claimed withholdings, the Court's descriptions must again be general. The Government asserts that Chapters 6, 9, 10, 12, 18, and 19 and sections from Chapters 2, 3, 5, 7, 8, 14, and 20 are protected from disclosure under Exemption 7(E) because they discuss procedures and techniques for investigations and law enforcement actions, the disclosure of which would reasonably be expected to risk circumvention of the law. (Fourth Supp. Tell Decl. ¶¶ 95-96.) A careful review of both the ELC and the the Fourth Supplemental Tell Declaration, confirms that some portions of the claimed materials are exempt under Exemption 7(E), while other portions are not.

The Government provides sufficient facts and context "to deduce something of the nature of the alleged procedures and techniques" for section 3.1010. *See Am. Immigration Council*, 30 F. Supp. 3d at 76. This section contains information relating to various law enforcement computer systems used during different law enforcement investigations. (*Id*. ¶ 98.) The Government avers that "[d]isclosure creates a risk that individuals will use the

information to develop methods to circumvent law enforcement investigations, and it could compromise the security of the computer systems." (*Id.* ¶ 98.) Through its *in camera* review, the Court has verified that the declaration accurately describes the section. Although the Fourth Supplemental Tell Declaration's description of sections 5.540, 6.210 (including all subsections), 6.630d, 6.420a, 6.530, 7.264, 7.610, 7.612, 7.1500, 8.866, 8.900, 12.126 (including all subsections), 14.950, 18.347, 18.351b, 18.351c, 18.348, and 20.300 and Chapter 12 is too conclusory to support with holding under 7(E), the Court's *in camera* review reveals that these sections include discernable law enforcement techniques and procedures that are not generally known by the public. Although these sections may also contain other information (such as discussions of case law, statutes, or regulations), the law enforcement procedures and non-exempt information are too intertwined to segregate. The Government has therefore properly withheld these sections under Exemption 7(E).

For the other chapters and sections, the Government still has failed to provide non-conclusory information about the supposed technique or procedure to support their withholding under Exemption 7(E), and the Court's *in camera* review confirms that these portions are not 7(E) exempt. For instance, the Government avers that "[s]ections 2.124, 2.211, and 2.213 contain specific advice regarding law enforcement procedures, considerations, and techniques relating to searches and seizures." (*Id.* ¶ 97.) Similarly, the Tell Declaration asserts that "5.610 contain[s] specific advice regarding procedures, considerations, and techniques related to law enforcement questioning and interrogations." (*Id.* ¶ 99.) These conclusory explanations are insufficient to support their withholding, and the Court's *in camera* shows that—like most of the ELC—these sections simply include a synthesis of the governing case law, followed occasionally by a few practical pointers. Even if they could qualify as law enforcement procedures, they are not 7(E) exempt because anyone advising CBP officers would make the same recommendations based on generally available information—specifically, federal search, seizure, and interrogation

jurisprudence. Any risk of circumvention stems from the legal requirements themselves (which are publicly known), not any unknown law enforcement procedures. Chapters 9, 10, and 19 are even less plausibly law enforcement procedures because they merely describe the elements of various money laundering, controlled substance, and immigration offenses based on statutes and judicial opinions. (*See id.* ¶¶ 58–59, 61–62, 85–86.) A review of the relevant case law and statutes would apprise someone of the same information. Chapter 18 is a hybrid of these two aforementioned categories: it provides basic information about the legal limitations on CBP's authority to conduct extraterritorial law enforcement operations and criminal offenses related to such operations. (*See id.* ¶¶ 82–83.) Except for the sections identified earlier (18.347, 18.351b, 18.351c, and 18.348), this chapter contains merely a summary of pertinent constitutional clauses, statutes, legal decisions, and regulations, none of which is 7(E) exempt.

This Court provided the Government with two opportunities to support its Exemption 7(E) withholdings in the ELC (specifically, the original summary judgment briefing and the supplemental briefing), and affording the Government yet another chance would be inappropriate. In ordinary civil litigation, parties cannot redo a summary judgment motion if they lose the first time, and FOIA cases are not so different that the Government should receive limitless opportunities to meet its burden. Plaintiffs' have been waiting for the requested information for more than three years, and another round of summary judgment briefing would further delay Plaintiffs' access to the information. At any rate, the Court's *in camera* review confirms that another round of briefing would be futile because what the Government seeks to withhold under 7(E) simply does not qualify for the exemption.

2. Border Patrol Academy Records

The Government has withheld around 900 pages of Border Patrol Academy records under Exemption 5 and 7(E). (*See* Third Tell Decl., Exh. C, Revised BPA Records *Vaughn* Index Nos. 1–48.) Plaintiffs have requested that the court conduct *in camera*

review of these records.

District courts have broad discretion in deciding whether to conduct *in camera* review. *Quinon v. FBI*, 86 F.3d 1222, 1227 (D.C. Cir. 1996). Yet, "the statutory duty to make a responsible *de novo* determination [on the claims of exemption] places limits on the District Court's . . . broad discretion." *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 392 (D.C. Cir. 1987). If the Government's affidavits "provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith," *Quinon*, 86 F.3d at 1227, "*in camera* review is neither necessary nor appropriate." *Larson v. Dep't of State*, 565 F.3d 857, 870 (D.C. Cir. 2009). But if the Government's claims are "conclusory, merely reciting statutory standards, or if they are too vague or sweeping[,]" affidavits will not suffice and *in camera* review will be required. *Quinon*, 86 F.3d at 1227. *In camera* review is "particularly appropriate when . . . the agency affidavits are insufficiently detailed to permit meaningful review of exemption claims . . . ." *Id*. at 1228; *see also Dickstein Shapiro LLP v. Dep't of Def.*, 730 F. Supp. 2d 6, 10 (D.C. Cir. 2010).

In response to the concerns raised by Plaintiffs regarding the sufficiency of the Government's descriptions of the withheld BPA records in the original BPA Records *Vaughn* Index, the Government created a revised BPA Records *Vaughn* Index that, they assert, offers "individualized" descriptions of each of the fifty-six BPA documents in which information was withheld. (*See* Third Tell. Decl., Exh. C, Revised BPA Record *Vaughn* Index.) But the descriptions the Government has provided in this revised *Vaughn* Index and within their Supplemental Brief are nearly identical across all fifty-six records, making the Government's claims generic and sweeping. (*Id*.; Gov. Supp. at 13–17.) In addition, most of this general description "merely parrot[s] the language of the statute and [is] drawn in conclusory terms[,]" which frustrates "the court's responsibility to conduct *de novo* review." *Carter*, 830 F.2d at 893. Specifically, every document withheld under Exemption 5 has the following description:

> The agency withheld the document in full under the (b)(5) exemption because this document, prepared by CBP's Office of Chief Counsel, constitutes attorney work product and attorney-client communication regarding searches under the Fourth Amendment, an area of law relevant to the agency's law enforcement mission. The confidentiality of this document has been maintained throughout its existence, as it has not been released outside of the agency. This document advises on the legal authority of Border Patrol Agents and issues they may confront in relation to searches they may conduct during their investigations, and thus counsels certain practices based on the type of encounter with a view towards claims and defenses that would be employed in litigation. The document also includes a legal training exercise designed to reinforce these issues, which may be raised in foreseeable litigation.

(Third Tell. Decl., Exh. C, Revised BPA Record *Vaughn* Index.) And every document withheld under Exemption 7(E) has a version of this description:

> The agency examined this document and determined that it discusses procedures and techniques for law enforcement investigations, the disclosure of which could reasonably be expected to risk circumvention of the law. The document addresses techniques used by Border Patrol Agents in connection with procedures for searches, procedures for canine sniffs, operational details of training scenarios, and details of technological devices used in interdiction. Disclosure of this information could risk undermining the effectiveness of such procedures, and could result in smugglers, and others violating the law, utilizing such information to evade interdiction and circumvent laws that Border Patrol Agents enforce. It would also make public how Border Patrol Agents are trained regarding these techniques and procedures in the context of different factual circumstances and scenarios, as

> well as the agency's views regarding the legal constraints that might apply and what techniques might or might not support prosecutions. This could thus give smugglers and others violating the law a playbook of potential vulnerabilities that could be exploited to evade interdiction and circumvent laws that Border Patrol Agents enforce.

(Third Tell. Decl., Exh. C; Revised BPA Record *Vaughn* Index.) The only variation in the *Vaughn* Index's 7(E) descriptions relates to the categories listed in the second sentence. (*See id.*) Because the Government's descriptions of the BPA Records are broad, conclusory recitations of the elements of the work product privilege or 7(E) requirements combined with highly general categorizations of the law enforcement procedure, meaningful review of the Government's exemption claims is impossible. Accordingly, the Court grants Plaintiffs' request for *in camera* review of the documents withheld in full (Revised BPA *Vaughn* Nos. 1–48).

The Government uses the same broad and conclusory language to describe the BPA records it has partially withheld. (Revised BPA *Vaughn* Nos. 49–56.) Plaintiffs do not request *in camera* review of these documents, but they do challenge the Exemption 7(E) withholdings taken in Revised BPA *Vaughn* Nos. 49, 55, and 56, because the Government's "block redactions, and limited explanatory submissions" prevent Plaintiffs from assessing the Government's Exemption 7(E) claims. (Plaintiffs' Supp. Reply at 16–17.) These documents are so heavily redacted as to preclude meaningful review of the propriety of the Government's withholdings. Thus, the Court will conduct *in camera* review of *Vaughn* Nos. 49, 55, & 56 as well.

3. Withholding of Names

Exemptions 6 and 7(C) protect those identified in public records against an unwarranted invasion of their privacy. *Lahr*, 569 F.3d at 973. Both exemptions require a balancing of "the privacy interest protected by the exemptions against the public interest in Government openness that would be served by disclosure" in order to determine whether

the information in question is properly withheld. *Id*. Exemption 7(C), however, offers a broader degree of privacy protection than Exemption 6 does. *Id*. at 974. Exemption 7(C) protects from disclosure "records or information compiled for law enforcement purposes . . . [that] could *reasonably* be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) (emphasis added), and Exemption 6 protects "personnel or medical files and similar files" which would constitute "a *clearly* unwarranted invasion of personal privacy" if disclosed. 5 U.S.C. § 552(b)(6) (emphasis added). Thus, if the Exemption 7 threshold has been satisfied, "all information that would fall within the scope of Exemption 6 would also be immune from disclosure under Exemption 7(C)." *Roth v. Dep't of Justice*, 642 F.3d 1161, 1173 (D.C. Cir. 2011). Accordingly, the Court will first consider whether the withholdings properly fall under Exemption 7(C).

i. Exemption 7(C)

a. Threshold Requirement

"The threshold requirement for . . . Exemption 7(C) is that the document at issue must have been compiled for law enforcement purposes." *Schoenman v. FBI*, 575 F. Supp. 2d, 136, 158 (D.D.C. 2008). Documents arising out of investigatory activity related to the enforcement of federal laws meet the threshold if there is a rational nexus between the investigation and the agency's law enforcement duties. *Tax Analysts v. IRS*, 294 F.3d 71, 78-79 (D.C. Cir. 2002) (quoting *Pratt v. Webster*, 673 F.2d 408, 420–21 (D.C. Cir. 1982)); *see also Quinon v. FBI*, 86 F.3d 1222, 1228 (D.C. Cir. 1996). But the document need not be investigatory. *See Tax Analysts*, 294 F.3d at 78–79. Documents "designed to prevent criminal activity and maintain security" may also meet the threshold. *See Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 777 F.3d 518, 522 (D.C. Cir. 2015); *see also Pub. Emps. for Envtl. Responsibility v. U.S. Section, Int'l Boundary and Water Comm'n*, 740 F.3d 195, 204 (D.C. Cir. 2014).

When the documents in question arise out of internal agency investigations, courts distinguish between documents based on "allegations that could lead to civil or criminal

sanctions" and documents "maintained in the course of general oversight of Government employees." *Jefferson v. Dep't of Justice, Office of Professional Responsibility*, 284 F.3d 172, 177 (D.C. Cir. 2002); *see also Stern v. FBI*, 737 F.2d 84, 89 (D.C. Cir. 1984). "[A]n agency's general internal monitoring of its own employees to insure compliance with the agency's statutory mandate and regulations is not protected from public scrutiny under Exemption 7." *Stern*, 737 F.2d at 89. But, if an agency's investigation of its own employees "focuses directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions[,]" documents related to the investigation are considered to be compiled for law enforcement purposes. *Id.*; *Rural Housing Alliance v. U.S. Dep't of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1973); *Kimberlin v. Dep't of Justice*, 139 F.3d 944, 947 (D.C. Cir. 1998). Under this standard, records relating to agency investigations into civil rights violations may be compiled for law enforcement purposes. *See Sinsheimer v. U.S. Dep't of Homeland Security*, 437 F. Supp. 2d 50, 55 (D.D.C. 2006); *see also Sakamoto v. EPA*, 443 F. Supp. 2d 1182, 1195 (N.D. Cal. 2006).

Plaintiffs contend that approximately 170 records involving complaints of alleged misconduct do not satisfy Exemption 7's threshold requirement. (Plaintiffs' Supp. at 3–4; *See* Second Ebadolahi Decl., Exh. B, Privacy Challenges Chart, Doc. 82-4.) Plaintiffs aver these records do not satisfy the threshold requirement because the submissions for the records are "insufficient to establish that they were compiled for law enforcement purposes" or because "the records on their face appear not to have been compiled for law enforcement purposes." (Plaintiffs' Supp. at 4.) Plaintiffs assert that the Government's descriptions of these records are too vague and general to determine whether the records discuss specific alleged illegal acts. (*Id*. at 3–4.) The Government is no longer asserting the (b)(7)(C) Exemption on bates numbers 39–44, 84–86, 87–88, 92–104, 106, 4844, 5674–5688, 5690–5692, 5700–5702. (*See* Wong Decl., Exh. A, Revised *Vaughn* Index for Documents Other than Incident Forms; Second Ebadolahi Decl., Exh. B, Privacy

Challenges Chart.) The documents that the Government continues to withhold under Exemption (b)(7)(C) were purportedly "generated as a result of specifically alleged illegal acts and were not created as part of any internal audit or customary surveillance." (Gov. Supp. Reply at 3.) According to the Government, "CBP collects and retains such records in order to assess the allegations made therein, conduct appropriate internal investigations, and issue guidance and/or take disciplinary action as necessary to prevent such occurrences from happening again in the future." (Wong Decl. ¶ 8.) A review of both Plaintiffs' Privacy Challenges Chart and the Government's Revised *Vaughn* Index confirms that all documents for which Exemption 7's threshold requirement is contested relate to complaints about alleged illegal acts of identified CBP agents. These complaints allege civil rights violations (racial profiling, stops without reasonable suspicion, or excessive force) or other unlawful activity such as stealing. (*See* Second Ebadolahi Decl., Exh. B, Privacy Challenges Chart.) Because these documents focus on specific and potentially unlawful activity by particular employees that could, if proven, result in criminal or civil sanctions, these documents were compiled for law enforcement purposes.

b. Balancing Test

For the records that meet the Exemption 7 threshold, the CBP officers' interest in personal privacy must be balanced against the public interest in Government openness that would be served by disclosure. *Lahr*, 569 F.3d at 973. The balancing test involves two steps: First, the Government must establish "that disclosing the contested information would lead to the invasion of a non-trivial personal privacy interest protected by Exemption [7]." *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 694 (9th Cir. 2012), *overruled by Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987 (9th Cir. 2016). If the Government fails to meets its burden, the document must be disclosed. *Id.* Second, if disclosure of the document would implicate a nontrivial privacy interest, the severity of the intrusion must be balanced against "the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties'

or otherwise let citizens know 'what their government is up to." *Bibles v. Oregon Nat. Desert Ass'n*, 519 U.S. 355, 355–56 (1997).

Under step one, the Government clearly has shown that disclosure of border patrol agents' names on these documents would invade a non-trivial privacy interest. Personal privacy interests include "an individual's control of information concerning his or her person and an interest in keeping personal facts away from the public eye." *Lahr*, 569 F.3d at 974 (quoting *U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 763 (1989)). Federal employees "generally ha[ve] a privacy interest in any file that reports on an investigation that could lead to . . . discipline or censure." *Hunt v. FBI*, 972 F.2d 286, 288 (9th Cir. 1992); *see Stern*, 737 F.2d at 91–92; *Bartko v. DOJ*, 128 F. Supp. 3d 62, 70 (D.D.C. 2015). This privacy interest is particularly significant where the individuals in question "have been investigated but never publicly charged . . . ." *Bartko*, 128 F. Supp. 3d at 70 (quoting *ACLU v. DOJ*, 655 F.3d 1, 7 (D.C. Cir. 2011)). High-level public officials are usually afforded lesser privacy interests than lower-level public officials because "the actions or misconduct of lower-level public officials . . . reveals little about the Government's operations." *Bartko*, 128 F. Supp. 3d at 70; *Stern*, 737 F.2d at 92–94; *Jefferson*, 284 F.3d at 180. As noted already, these documents relate to allegations of illegal activity by Border Patrol agents, the highest-level employees being supervising agents or chief patrol agents. (Second Ebadolahi Decl., Exh. B, Privacy Challenges Chart.) Because the records in question involve allegations of unconstitutional or criminal activity by lower to middle-level federal employees, much of which has not been proven or publicly charged, the privacy interests at stake here are substantial.

As the Government has established that disclosure would intrude upon border patrol agents' significant privacy interests, Plaintiffs must show that disclosure of the border patrol agents' names would advance the public interest enough to outweigh the intrusion upon the agents' privacy. In *National Archives & Records Administration v. Favish*, the Supreme Court held that, "where there is a privacy interest protected by Exemption 7(C)

and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, ... the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." 541 U.S. 157, 174 (2004); *see Lahr*, 569 F.3d at 974, 978. Even if a requester proffers such information, the D.C. Circuit has held "categorically that, unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure." *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991); *see Concepcion*, 907 F. Supp. 2d 133 at 141.

The only information that the Government has withheld from the complaints is the border patrol agent's name. To warrant disclosure, then, Plaintiffs must show how the disclosure of border patrol agents' *names* would enable them to ferret out government malfeasance. While Plaintiffs divide the public interest into four categories, Plaintiffs essentially argue that each category would enable them to determine whether CBP employs inadequate supervision and discipline practices—or, as Plaintiffs characterize it, whether there is a "CBP-wide pattern or practice of ignoring agency misconduct." (*See* Plaintiffs Supp. at 13.) For instance, Plaintiffs claim that revealing agents' names will enable them to determine how many agents engaged in misconduct, whether agents committed multiple acts of misconduct, how many senior officers received reports of misconduct, and whether officers with disciplinary records were nonetheless promoted within the agency. Although Plaintiffs' intent aligns with the FOIA's purpose of promoting governmental accountability, Plaintiffs have adduced no evidence that the San Diego and El Centro sectors regularly disregard complaints about civil rights violations or criminal activity. Plaintiffs must produce more than just "unsubstantiated assertions of Government wrongdoing" to establish a meaningful evidentiary showing. *Boyd v. Criminal Div. of the Dep't of Justice*, 475 F.3d 381, 388 (D.C. Cir. 2007) (citing *Favish*,

541 U.S. at 175). Further, without any way to verify the allegations made in complaints, the names of border patrol agents would shed little light on CBP's supervisory and disciplinary practices.

On the other side of the balance, the privacy interests of the border patrol agents are truly weighty. Because the names of border patrol agents in the complaints could only illuminate CBP's disciplinary and supervision practices if released in mass, the privacy interests of every border patrol agent identified in the complaints must be considered together. Border patrol agents "do not waive all privacy interests in information relating to them simply by taking an oath of public office." *Lissner v. U.S. Customs Serv.*, 241 F.3d 1220, 1223 (9th Cir. 2001). Although their "privacy interests may be diminished in cases where information sought under FOIA would likely disclose 'official misconduct[,]'" as noted already, Plaintiffs have not made the requisite evidentiary showing as to CBP agents' names. *See Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1025–26 (9th Cir. 2008) (citation omitted). In fact, border patrol agents have a significant interest in not being associated with unsubstantiated allegations of wrongdoing. *See, e.g.*, *Sakamoto*, 443 F. Supp. 2d at 1196. Further, the border patrol agents identified are all low to mid-level employees, who generally have greater privacy interests than senior officials. *See Forest Serv. Employees for Envtl. Ethics*, 524 F.3d at 1025 ("[L]ower level officials . . . generally have a stronger interest in personal privacy than do senior officials.").

At bottom, Plaintiffs have received "a substantial amount of the information they seek," and this Court will not order the "disclosure of the employees' identities unless the 'marginal additional usefulness' of such information is sufficient to overcome the privacy interests at stake." *Id.* at 1027 (citation omitted). Considering the large number of border patrol agents included in the complaints, the lack of any confirmation that many of these agents committed any wrongdoing, and the low rank of these officials, the "incremental value stemming from the disclosure" of the border patrol agents' identifies "is small," and

the "public interest in this case does not outweigh the serious risks that would result from disclosure." *See Cameranesi v. DOD*, 856 F.3d 626, 645 (9th Cir. 2017).

ii. Exemption 6

Exemption 6 permits the Government to withhold personal, medical, or "similar files" if disclosure would constitute "a *clearly* unwarranted invasion of personal privacy" if disclosed. 5 U.S.C. § 552(b)(6) (emphasis added). Thus, the threshold inquiry under Exemption 6 is whether a record qualifies as a personnel, medical, or similar file. *Multi Ag Media LLC v. Dep't of Agriculture*, 515 F.3d 1224, 1228 (D.C. Cir. 2008). If so, courts apply the same two-step balancing test as under Exemption 7(C), although the calculus is weighed more towards disclosure. *See Lahr*, 569 F.3d at 974.

a. Personal, Medical, or Similar File

The Supreme Court has broadly interpreted Exemption 6 to cover "detailed Government records on an individual which can be identified as applying to that individual." *See U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 395, 602 (1982). The DC Circuit has held that Exemption 6 encompasses "all information that applies to a particular individual[,]" *Lepelletier v. FDIC*, 164 F.3d 37, 46 (D.C. Cir. 1999), including "bits of personal information, such as names and addresses, the release of which would "create[ ] a palpable threat to privacy." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152 (D.C. Cir. 2006) (quoting *Armstrong v. Executive Office of the President*, 97 F.3d 575, 582 (D.C.Cir.1996)). By contrast, the Ninth Circuit has expressed some doubt that Exemption 6 covers every mention of a person's name, but has never squarely resolved the issue. *See, e.g., Prudential Locations LLC v. U.S. Dep't of Hous. & Urban Dev.*, 739 F.3d 424, 429–30 (9th Cir. 2013), *abrogated on other grounds by Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987 (9th Cir. 2016); *Elec. Frontier Found. v. Office of the Dir. of Nat. Intelligence*, 639 F.3d 876, 886 (9th Cir. 2010), *abrogated on other grounds by Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987 (9th Cir. 2016).

The Government has relied solely on Exemption 6 to redact personnel information

in various organizational charts and three disciplinary records relating to an incident where a CBP agent allowed a driver to dispose of three marijuana cigarettes. (*See* Wong Decl. Exh. A, Revised *Vaughn* Index for Documents Other than Incident Forms, *Vaughn* Nos. 16 (El Centro Sector organizational structure charts), 36 (summary of oral reply), 38 (reprimand letter), 39 (San Diego Sector organizational structure charts), 142 (El Centro Station organizational structure charts), and 143 (Indio Station organizational charts), 144 (San Diego Sector Station organizational structure charts); Proposed Reprimand, Exh. J-4, Doc. 53-4; Second Ebadolahi Decl., Exh. B, Privacy Challenges Chart.)

The disciplinary records clearly qualify as "similar files," if not personnel records as well. *See Forest Service Employees for Environmental Ethics*, 524 F.3d at 1024; *Wood v. FBI*, 432 F.3d 78, 86 (2nd Cir. 2005). As for the organizational charts, while not every mention of a person's name may satisfy the Exemption 6 threshold, these charts would reveal where these CBP employees work and what duties they perform. (Gov. Supp. Reply at 9.) Unlike, for example, an email signature, where additional information about an employee' place of employment or position could be redacted (or vice versa), disclosing personnel names on these organizational charts would necessarily reveal additional information about their job duties and whereabouts. Considering the Supreme Court's broad conception of "similar files," the five organizational structure charts, like the two disciplinary records, therefore qualify as "similar files."

b. Balancing Test

Having concluded the documents qualify as "similar files," the Court must consider whether disclosure would compromise a nontrivial privacy interest and, if so, whether the harm resulting from disclosure outweighs the public interest. For the disciplinary records relating to the improper disposal of three marijuana cigarettes, the presiding agents and the accused have an undeniable interest in maintaining their anonymity. And, because the incident involves a relatively minor infraction by a low-level official, the public interest in knowing who was involved is negligible. As such, the Government properly withheld this

names of the border patrol agents under Exemption 6.

Although the disclosure of the mid-level officials listed on the organizational charts may be less intrusive, investigative personnel have an "interest against possible harassment and embarrassment . . . that must be weighed against the public's interest in disclosure." *Wood*, 432 F.3d at 88. For employees who have identified themselves publicly, CBP has released their names. Plaintiffs contend that the disclosure of the names listed on charts will enable them "to identify the officials with ultimate supervisory responsibility for Border Patrol activities in their particular community" and, "in combination with the other information Plaintiffs seek, may clarify whether officers with records of misconduct have been elevated to leadership positions . . . ." (Plaintiffs' Suppl. at 13–14.) The first justification is not even really a reason; it merely describes the information Plaintiffs seek. As for the second proffered reason, Plaintiffs lack even allegations of wrongdoing against the officials named, and a mere hunch that these law enforcement officials have committed or tolerated malfeasance does not warrant potentially subjecting them to harassment. Accordingly, the Government may withhold the agents' names on the organizational charts as well.

4. Policy Memos

The five policy memos still at issue are five internal CBP memoranda regarding: (1) procedures for narcotics seizures; (2) drug residue and plants; (3) collection of intelligence and information; (4) transportation check operations; and (5) enforcement actions at or near certain locations. (Wong Decl., Exh. A, Revised *Vaughn* Index for Documents Other than Incident Forms at Nos. 32, 33, 40, 41, and 43.)

Based on the *Vaughn* index provided, the Government has satisfied its burden in demonstrating that entries nos. 32, 33, 40, 41, and 43 are exempt under 7(E). Two of these policy memos address CBP procedures regarding drug seizures: Entry no. 32 outlines CBP procedures for seizing narcotics, including "the treatment of particular substances, and the handling of seized substances." (*Id.* at No. 32.) And entry no. 33 addresses "law

enforcement procedures pertaining to drug residues and plants," including "processing seized drugs and use of a law enforcement tracking database." (*Id.* at No. 33.) Another policy memo—entry No. 40—discusses procedures regarding "inter-agency coordination" on the "collection[] of intelligence and information." (*Id.* at No. 40.) While this *Vaughn* entry is somewhat less detailed than the Government's description of the drug seizure memos, this imprecision is understandable given the nature of the document. Entry no. 43 identifies "particular locations of concern and particular practices and precautions to be followed in conducting enforcement actions in such locations." (*Id.* at No. 43.) The only "guideline" among these policy memos, entry no. 41, focuses on improving "transportation check operations" through "effective methods, resource allocation, and inter-agency coordination, . . . with reference to particular areas of operation." (*Id.* at No. 41.) This explanation satisfies the "relatively low bar" an agency must meet to demonstrate that disclosure "might create a risk of circumvention of the law." *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (quoting *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1194 (D.C. Cir. 2009)). As such, the Government properly withheld the five policy memos under Exemption 7(E).

V. CONCLUSION

For the aforementioned reasons, the Court GRANTS summary judgment in favor of Defendants (1) on the adequacy of the search; (2) the withholding of Chapters 16 and 17 of the Enforcement Law Course as attorney work-product under Exemption 5; (3) Sections 3.1010, 5.540, 6.210 (including all subsections), 6.630d, 6.420a, 6.530, 7.264, 7.610, 7.612, 7.1500, 8.866, 8.900, 12.126 (including all subsections), 14.950, 18.347, 18.351b, 18.351c, 18.348, and 20.300 and Chapter 12 of the Enforcement Law Course under Exemption 7(E); (4) all withholdings of CBP personnel names under Exemption 6 and 7(C); and (5) the five policy memos under Exemption 7(E). The Court GRANTS summary judgment in favor of Plaintiffs on the remainder of the Enforcement Law Course. Where the Court has granted summary judgment to one side, the cross-motion is DENIED.

The Court ORDERS the Government to produce the Border Patrol Academy Records, *Vaughn* Nos. 1–49, 55 and 56 for *in camera* review. The Government may amend its *Vaughn* index descriptions of the BPA documents submitted for *in camera* review. Once the Court reviews the BPA records, the Court will issue a supplemental summary judgment order and request the preparation of a final judgment.

DATED: November 06, 2017

HON. JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE

APPENDIX A

Search Terms Chart

Component	Subcomponent(s)	Search Process	Responsive Documents
DHS Office of Civil Rights and Civil Liberties (CRCL)	Compliance Branch	Entellitrak database search using "roving patrol," "El Centro," "Centro," "San Diego," and "Diego"	206 pages
		Additional search using "vehicle stop," "traffic stop," "without consent," and "forcibly removed"	0
US Immigration and Customs Enforcement (ICE)	Office of Professional Responsibility	JICMS database search using "roving," "patrol," "CBP" Border Patrol," "roving patrol," "patrol stop," "El Centro," and "San Diego"	43 pages
DHS Office of Inspector General (OIG)	Office of Audits (AUD)	Outlook and TeamMate database search using "roving patrol stop," "roving patrol," "roving patrol operation," "roving border patrol," and "roving vehicle"	0
		Supplemental search of Outlook email accounts using "roving" combined with "San Diego" and "El Centro"	2 records across AUD, ISP, and IQO
	Office of Inspections (ISP)	Outlook and shared network folder searches using "roving border patrol," "roving patrol," "roving patrol operations," "roving patrol stop," and "roving vehicle"	0
		Supplemental search of Outlook email accounts using "roving" combined with "San Diego" and "El Centro"	2 records across AUD, ISP, and IQO
	Office of Integrity and Quality Oversight (IQO)	Enforcement Data System (EDS) database search using "roving"[4]	1 record
		Additional EDS database search using "roving," "roving patrol," and "roving border patrol"	0
		Supplemental search of Outlook email accounts using "roving" combined with "San Diego" and "El Centro"	2 records across AUD, ISP, and IQO

[4] IQO noted that, because "roving" was the broadest term, it encompassed variants such as "roving patrol."

US Customs and Border Protection (CBP)	USBP Headquarters (also known as Office of Border Patrol)	Shared drive search for "roving patrol"	39 pages
	San Diego Sector	ENFORCE database search for "roving patrol(s)"; Shared drive search for "roving patrol," and "complaint"; Manual search of incident log and corresponding files	4,378 pages from ENFORCE; 26 pages from other sources
	El Centro Sector	ENFORCE database search for "roving patrol(s)"; Shared drive search for "roving patrol," "vehicle stop," "authority," "training," and "complaint"; Manual search of complaint log and physical case files	1,308 pages from ENFORCE; 252 pages from other sources
	Office of the Commissioner (OC): Non-Governmental Organization Liaison Office	Email and shared drive search for "roving patrol"; Manual search based on NGO Liaison's knowledge	5 pages
	Office of the Commissioner (OC): Office of the Executive Secretariat (OES)	Correspondence database search for "roving patrol" and "automobile stop"	0
		Additional search for "pedestrian," "complaint," "civil rights," "profiling," "force," "constitutional," and "misconduct"	0
	Office of the Commissioner (OC): Situation Room	Significant Incident Reports (SIR) tracking system search for "roving patrol," "vehicle stop," "traffic stop," "forcibly removed," and "without consent"	1,244 pages
	Office of Public Affairs (OPA)	The Branch Chief conducted a search of OPA's complaint management database for all complaints involving San Diego Sector and El Centro Sector. The Branch Chief then reviewed all documents that mentioned "roving patrol" and "automobile stop" and flagged documents that appeared that they could be responsive even if they did not contain those terms	42 pages

		Additional search using "traffic stop," "automobile stop," "forcibly removed," and "without consent"	
	Office of Internal Affairs (IA)	JICMS database search for "roving patrol(s)," "vehicle stop," "warrantless stop," "warrantless seizure," "questionable inspection," "unauthorized search," "forcibly removed," "without consent," and "traffic stop"	81 pages
	Office of Human Resources Management (HRM): Division of Labor and Employee Relations	HRBE database search for "roving patrol"	162 pages
	Office of Human Resources Management (HRM): Discipline Review Board (DRB)	Manual review of factual allegations made and disciplinary charges that employees faced in all cases from the San Diego and El Centro Sectors from 2011 through January 2017 for any relation to roving patrols	0
		Follow up search of HRBE database using "roving patrol"	0
	Office of Policy and Planning	Shared drive search for "roving patrol," "roving operations," "roving patrol policy," "vehicle stops," "PERF," "Police Executive Research Forum," "Chula Vista," "San Diego," "El Centro," "Border Patrol policy," "BP policy," "USBP directives," "USBP complaints," "USBP memo," "USBP memorandum," "complaints," "use of force," and "force"	2 publicly available records
		Additional shared drive search for "civil rights," "profiling," "constitutional," and "misconduct"	0

	Border Patrol Academy/ Office of Training and Development	Shared drive search for "roving patrol"; manual search	618 pages
		Search of all repositories or record systems likely to contain responsive materials	1,186 pages