UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:15-cv-00229-JLS-RNBx Date: February 10, 2017
Title: American Civil Liberties Union of San Diego and Imperial Counties et al. v. United States Department of Homeland Security et al.

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero	N/A
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANT:
Not Present	Not Present

PROCEEDINGS: (IN CHAMBERS) ORDER (1) DENYING IN PART CROSS-MOTIONS FOR SUMMARY JUDGMENT, (2) ORDERING SUPPLEMENTAL BRIEFING, AND (3) ORDERING THAT THE ENFORCEMENT LAW COURSE BE SUBMITTED FOR IN CAMERA REVIEW (Docs. 38, 50)

Before the Court are cross-motions for summary judgment filed by Plaintiffs—the American Civil Liberties Union of San Diego and Imperial Counties, the American Civil Liberties Union of Southern California, Anne Lai, and Sameer Ashar—and Defendants, the United States Department of Homeland Security and United States Customs and Border Protection. (Gov. Mot., Doc. 38; Plaintiffs' Mot., Doc. 50.) For the following reasons, the Court DENIES IN PART both parties' motions for summary judgment, ORDERS supplemental briefing, and ORDERS the Enforcement Law Course to be submitted for *in camera* review.

I. 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). Recently, however, in *Animal Legal Defense Fund*, the Ninth Circuit sitting *en banc* clarified that the same summary judgment principals apply in 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). By contrast, "if there are genuine issues of material fact in a FOIA case, the district court should proceed to a bench trial or adversary hearing." *Id.* 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 . . . .").

II. DISCUSSION

On July 3, 2014, the Plaintiffs submitted a FOIA request to both the DHS and CBP seeking:

> 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.) DHS and CBP did not respond to Plaintiffs' FOIA request until Plaintiffs filed this suit on February 2, 2015. (*See* FAC ¶¶ 37-39, Doc. 12.)

Now—two years after this FOIA complaint was filed and more than two-and-a-half years after Plaintiffs submitted their FOIA request—this Court is troubled that the parties seem to be using motion practice not to litigate clearly framed disputes but to discover their points of disagreement. Much ink has been spilled on issues that could have been resolved through the meet-and-confer process. And, because the parties did not

fully crystalize their points of disagreement before filing their summary judgment briefs, the Court has had to read between the lines of the parties' reply briefs to decipher what disputes remain open. While the Court very much understands the government's limited resources, after more than two-and-a-half years, the Court must ensure resolution of this case without undue delay.

A. Adequacy of the Search

To satisfy its FOIA obligations, a responding agency must "demonstrate that it has conducted a search reasonably calculated to uncover *all* relevant documents." *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 986 (9th Cir. 2009) (emphasis added). A court's inquiry, therefore, turns on "whether the search for those documents was adequate." *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985) (citation omitted) (emphasis omitted). "An agency can demonstrate the adequacy of its search through reasonably detailed, nonconclusory affidavits submitted in good faith." *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 770 (9th Cir. 2015) (citation omitted).

i. Search Terms

Plaintiffs contend that most of DHS and CBP components[1] used unreasonably narrow search terms—specifically, variants of the term "roving patrol"—thereby excluding a substantial amount of responsive records. (Plaintiffs' Mem. at 6-11; Plaintiffs' Reply at 2-7.) Defendants, in contrast, contend that their search was adequate. (Gov. Mem. at 4-9; Gov. Reply at 2-14.)

A FOIA petitioner has no general right to dictate what search terms an agency must use, *Bigwood v. United States Dep't of Def.*, 132 F. Supp. 3d 124, 140 (D.D.C. 2015), and an agency need not use identical search terms for all of its offices, *Fox News Network, LLC v. U.S. Dep't of The Treasury*, 739 F. Supp. 2d 515, 535 (S.D.N.Y. 2010).

[1] In keeping with the parties' terminology, the Court uses "component" to refer to organizational entities within DHS and CBP.

Yet, an agency must have "logical explanations for each of the decisions it made as to the search terms to be used and how to conduct the searches." *Id.*; *Immigrant Def. Project v. United States Immigration*, No. 14-CV-6117 (JPO), 2016 WL 5339542, at *3 (S.D.N.Y. Sept. 23, 2016). These explanations need not be a model of clarity or fully detailed, but the agency's rationale must be reasonably discernable from the affidavits it provides. *See id.* at 3-5.

Defendants have provided no "logical explanation" for the wide variation in search terms used by the DHS and CBP components. Several components—including the DHS Office of the Inspector General and the Office of Human Resources Management—used only variants of the word "roving." (Marwaha Decl. ¶¶ 13, 17, 25-26, Doc. 42; Tell Decl. ¶ 11, Doc. 61.) Other components, such as the DHS Office of Civil Rights and Civil Liberties, employed variants of the word "roving" along with geographic search terms. (Tyrell Decl. ¶ 13, Doc. 41.) And some components—particularly the Office of Internal Affairs and the Situation Room selected substantially broader search terms, including "vehicle stop," traffic stop," "without consent," "questionable inspection," "unauthorized search," and "forcibly removed." (Burroughs Decl. ¶¶ 22, 24.) The record is lacking a sufficient explanation for why different components chose such varying search terms. Instead, in their reply affidavits, Defendants attack Plaintiffs' proposed search terms. (*See, e.g.*, Marwaha Suppl. Decl. ¶ 11, Doc. 63.) But Plaintiffs' proposed search terms may be overbroad, and Defendants may still fail to satisfy their burden of demonstrating that they conducted a reasonable search for "*all* relevant documents." *Lahr*, 569 F.3d at 986 (citation omitted) (emphasis added).[2]

Perhaps, as Defendants seemed to suggest in their Reply brief and at oral argument, they chose more narrow terms—even though these terms would not be likely capture all relevant documents—because a broader search would impose an undue burden on the agencies. (*See* Gov. Reply at 4-5.) To support this argument, Defendants

[2] For example, the subcomponents in the Office of the Inspector General seem to have been provided specific search terms by OIG's FOIA Unit and limited their searching to these terms. (Marwaha Decl. ¶¶ 13, 17, 25-26.) The declarations do not indicate how OIG's FOIA Unit developed these search terms.

must adduce "a detailed explanation by the agency regarding the time and expense of a proposed search in order to assess its reasonableness." *Pinson v. U.S. Dep't of Justice*, 80 F. Supp. 3d 211, 216 (D.D.C. 2015) (quoting *Wolf v. CIA*, 569 F.Supp.2d 1, 9 (D.D.C. 2008)). Defendants' conclusory criticisms of Plaintiffs' search terms do not demonstrate an undue burden, especially considering that several of Defendants' subcomponents used broader search terms without experiencing any apparent hardship.

Because the Court believes that this issue may be resolvable on summary judgment, the Court will afford Defendants one last opportunity to demonstrate the adequacy of their search. Alternatively, if Defendants determine they cannot make a sufficient showing of undue burden, they should apprise the Court and revise their search terms.

ii. Components Searched

The Court has reviewed the Supplemental Tell Declaration, which the government offered at the hearing on the parties' summary judgment motions. (Second Supp. Tell Decl., Doc. 73.) The Court will give Plaintiffs an opportunity to respond to the declaration before determining whether DHS should have searched the Discipline Review Board.

On whether DHS should have searched the Office of Policy and Planning, Tell states in her First Supplemental Declaration that "OPP is not likely to have materials responsive to Plaintiffs' FOIA request" because its "products are broad and cross-cutting, at the strategic level" and "OPP has not worked on roving patrol[s] generally." (Tell Suppl. Decl. ¶¶ 20-21, Doc. 61.) In contrast, Plaintiffs have provided a declaration from James Tomsheck, a former CBP Assistant Commissioner for the Office of Internal Affairs, asserting that the Office of Policy and Planning would have responsive records. (Tomsheck Decl. ¶¶ 4-6, Doc. 70.) Tomsheck attests that the CBP Commissioner assigned to OPP the task of reviewing the recommendations of the Police Executive Research Forum ("PERF"), which reviewed CBP's use of force practices and policies. (*Id.* ¶ 4.) PERF developed a report, called the PERF Report, which "examined and evaluated Border Patrol use of force incidents, including incidents that took place during

roving patrols and other interior enforcement operations." (*Id.* ¶ 6.) Although not explicitly referenced in the PERF Report, one of the use-of-force incidents the PERF examined occurred in Chula Vista. (*Id.*) During meetings hosted by the OPP, the office shared "documents and materials regarding their review of the PERF Report," including a detailed Excel spreadsheet that the OPP used to track and respond to the PERF's recommendations. (*Id.* ¶ 5.)

As *Animal Legal Defense Fund* instructs, a FOIA suit is not so special that the Court can ignore generally applicable rules of civil procedure. Except in rare circumstances not applicable here, a declaration based on personal knowledge is sufficient to create a genuine issue of material fact. *See, e.g.*, *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497 (9th Cir. 2015). Accordingly, the Court DENIES both Plaintiffs and Defendants' request for summary judgment on whether the OPP should have been searched. If Defendants cannot reach an agreement with Plaintiffs on whether to search the OPP, the Court will have to conduct an evidentiary hearing where the Court will hear live testimony and the parties' witnesses will be subject to cross-examination. *See Animal Legal Def. Fund*, 836 F.3d at 988.

B. Propriety of Defendants' Withholdings

i. Law Enforcement Course

Plaintiffs assert that CBP has improperly withheld its 1,133-page "Internal CBP Enforcement Law Course" under exemptions 5 and 7(E). (*See Vaughn II* No. 42.) CBP describes the Enforcement Law Course as:

> designed to address the major areas of law relevant to CBP's law enforcement mission. It serves as a framework for the legal training provided by CBP's Office of Chief Counsel attorney-instructors and as a legal resource for CBP enforcement personnel. It advises on the legal authority of CBP's law enforcement personnel and issues they would confront in investigations and prosecutions, encouraging certain practices and discouraging others with

> a view towards claims and defenses that would be employed in litigation. The document advises of potential challenges, defenses, and outcomes. It was prepared in anticipation of foreseeable litigation, including to protect the agency from the possibility of future litigation, because individuals in immigration removal proceedings and defendants in criminal proceedings commonly litigate the propriety of detentions, searches, and apprehensions, and claims sometimes arise that CBP enforcement personnel have allegedly violated civil rights.

(Burroughs Decl. ¶ 38, Doc. 40.) Defendants contend that the Course is protected under the attorney-client and work product privileges. (Gov. Mem. at 22; Gov. Reply at 16-18.)

Under Exemption 5, an agency may withhold "inter-agency or intra-agency memorandums or letters that 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). The Supreme Court has construed "this somewhat Delphic provision" as exempting "those documents, and only those documents, normally privileged in the civil discovery context." *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 11 (1988) (citation omitted). Thus, the exemption covers the attorney-client privilege, the work produce privilege, and the deliberative process privilege. *Maricopa Audubon Soc. v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997).

1. Work Product Privilege

In determining whether the work product privilege applies, 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." *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998). Depending on the circumstances, the work product privilege may apply "even if no specific claim is contemplated." *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992), *abrogated on other grounds by Milner v. Dep't of Navy*, 562 U.S. 562 (2011). Courts have tended to apply a specific claim requirement when agency lawyers act "as prosecutors or

investigators of suspected wrongdoers" because such a rule helps identify when the risk of litigation "was sufficiently in mind." *Nat'l Ass'n of Criminal Def. Lawyers v. Dep't of Justice Exec. Office for United States Attorneys*, 844 F.3d 246, 255 (D.C. Cir. 2016); *In re Sealed Case*, 146 F.3d at 885. By contrast, when lawyers act "as legal advisors protecting their agency clients from the possibility of future litigation" no specific claim need be contemplated for the work product privilege to apply. *Id.* at 885.

The Court does not have sufficient information to determine whether the Enforcement Law Course was prepared in anticipation of litigation. As is apparent both from the Burroughs Declaration and oral argument on these motions, Defendants have "been unable to describe the document[] at issue meaningfully without disclosing [its] contents." *Am. Civil Liberties Union Found. v. U.S. Dep't of Justice*, No. 12 CIV. 7412 WHP, 2014 WL 956303, at *3 (S.D.N.Y. Mar. 11, 2014). Accordingly, *in camera* review of the Enforcement Law Course is appropriate. *See id.*; *see, e.g.*, *Nat'l Ass'n of Criminal Def. Lawyers*, 844 F.3d at 252 (conducting *in camera* review to determine whether the work product privilege applies).[3]

2. 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

[3] At oral argument, Defendants requested to submit a supplemental declaration because they suggested that the applicability of the work product privilege may not be apparent from examining the Course on its own. The Court questions whether any additional supplemental declaration could help because Defendants have been unable to describe the Course in any meaningful sense as of yet and, if the applicability of the work product privilege is not apparent from examining the Course, the more likely inference is that the work product privilege simply does not apply. But, in an abundance of caution, the Court will grant Defendants' request to file a supplemental declaration. Any declaration must be filed publicly, so Plaintiffs will have an opportunity to respond.

government agencies, "the 'client' may be the agency and the attorney may be an agency lawyer." *Tax Analysts v. I.R.S.*, 117 F.3d 607, 618 (D.C. Cir. 1997). Because the Enforcement Law Course is a communication from the attorney to the client, the attorney-client privilege applies only to the extent that the document "rest[s] on confidential information obtained from the client." *Am. Immigration Council*, 905 F. Supp. 2d at 223. Defendants' current description of the Enforcement Law Course does not indicate that the Course is based on confidential information imparted by the agency to the agency's attorneys. Thus, based on the description Defendants have provided of the Course, the Court cannot conclude that the Course falls within the attorney-client privilege.

ii. Policy Memos

CBP has withheld six "policy memos" under Exemption 7(E), listed in *Vaughn II* as records 32, 33, 40, 41, 43, 86, and 100. (*See Vaughn II* Nos. 32, 33, 40, 41, 43, 86, and 100.) Earlier, CBP withheld another policy memo before realizing this was "error." (Gov. Reply at 19.) The Court has questions regarding CBP's withholding of the former use-of-nondeadly-force policy, identified as record 100 in *Vaughn II*, and the excerpt from this policy withheld from record 86.

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). As the statute plainly provides, the government may withhold "guidelines" only if they would "reasonably be expected to risk circumvention of the law," while the government has no such burden if it the documents qualify as "techniques or procedures." *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 778 (9th Cir. 2015). As used in Exemption 7(E), "guidelines" refers 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).

Defendants' explanation of how CBP's prior use-of-nondeadly-force policy qualifies for Exempt 7(E) is confusing and, at times, contradictory. At the top of page 19 in their Reply brief, Defendants claim that their *Vaughn II* Index "clearly state[s]" that they asserted record 100 was 7(E) exempt as a "law enforcement procedure[]—for which no showing regarding circumvention is necessary." (Gov. Reply at 19.) Yet, at oral argument on these motions, Defendants stated that they were not claiming that the former use-of-nondeadly-force policy was exempt as a law enforcement procedure, but rather as a guideline. The Court is concerned that Defendants seem to be unable even to articulate what prong of Exemption 7(E) they believe applies to this memo.

More broadly, assuming that Defendants are now claiming that the former use-of-nondeadly-force policy is a "guideline," the Court needs more information to understand Defendants' risk-of-circumvention argument. Defendants' current use of force policy is readily accessible on CBP's website, and Defendants have not adequately explained how the risk of circumvention would increase by disclosure of the former policy. (*See Vaughn II* No. 100.) It would seem that one could determine what is not authorized under the current, publicly available policy simply by examining that policy. Although Exemption 7(E)'s risk-of-circumvention standard is a "relatively low bar," *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011), it still imposes a hurdle that Defendants must exceed. Further, as Defendants acknowledged at oral argument, their risk-of-circumvention argument would make sense only if the former use-of-nondeadly-force policy is not publicly available, which Defendants do not assert in their affidavits.

iii. Withholding of Names

The parties' dispute over the withholding of personnel names under Exemptions 6 and 7(C) needs to be much more concrete for the Court to address this issue. Exemptions 6 and 7(C) are importantly distinct: Exemption 6 is limited to personnel, medical, or "similar files,"[4] and provides a lesser degree of privacy protection than Exemption 7(C). *See Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 973-74 (9th Cir. 2009). Accordingly, the Court will first have to determine what documents do not satisfy Exemption 7's threshold requirement—namely, that the record has been compiled for law enforcement purposes. *See* 5 U.S.C. § 552(b)(7). Defendants appear to concede that at least two sets of documents that they claimed in their *Vaughn II* Index were exempt under Exempt 7(C)—an internal reprimand and organizational charts—do not actually qualify for the exemption. (Gov. Reply at 28-29.) If so, Defendants should so state, and update their *Vaughn II* index accordingly. Otherwise, Defendants must indicate what reasonable basis they have for asserting that Exemption 7(C) applies to these records. And, considering Defendants' assertion of Exemption 7(C) may have been erroneous for these documents, Defendants must confirm that no other withholdings under Exemption 7(C) are erroneous.

The Court also has serious concerns with how Plaintiffs have chosen to litigate this issue. Plaintiffs appear to be challenging every withholding of an employee's name on every record but only provide what they consider to be a "representative sample" of the withholdings. (Plaintiffs' Reply at 18 n.24.) Although in some circumstances a court can make categorical determinations about the balance of interests under Exemptions 6

[4] Unlike district courts in the D.C. Circuit, the Ninth Circuit has expressed some skepticism about construing "similar file" in Exemption 6 to encompass every mention of a person's name. *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).

and 7(C), *see, e.g.*, *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 780 (1989), the Court cannot make broad pronouncements here, because the proper balance of interests may vary based on context. Accordingly, to make this dispute sufficiently crystalized for judicial resolution, Plaintiffs must provide a list of all records that they contend do not satisfy Exemption 7's threshold requirement. Separately, for each withholding of an employee's name that Plaintiffs are challenging, Plaintiffs need to identify with particularity the public interest in disclosure of this information. To conserve everyone's resources, Plaintiffs should group their challenges based on the context of the withholding and how they believe the public interest would be served by disclosure of the information.

iv. Border Patrol Academy Records

The Court expects that the parties have been conferring over Defendants' Border Patrol Academy withholdings. To the extent that there are additional challenges specific to these withholdings, Plaintiffs must raise them in their supplemental briefing.

v. Segregability

Under the FOIA, any "reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). In this case, the main segregability dispute is over the Enforcement Law Course. Although Defendants assert in their Reply brief that no segregability showing is needed for the Enforcement Law Course if the course is protected under the work product rule (Gov. Reply at 24), the D.C. Circuit recently held that in "cases involving voluminous or lengthy work-product records" a district court should "make at least a preliminary assessment of the feasibility of segregating nonexempt material." *Nat'l Ass'n of Criminal Def. Lawyers*, 844 F.3d at 256–57. In addition, Defendants must clarify whether they are asserting that the *entire* 1,133-page Enforcement Law Manual is exempt under 7(E).

III. CONCLUSION

In sum, the Court DENIES the parties' cross-motions for summary judgment on whether the DHS Office of Policy and Planning should have been searched. The Court ORDERS Defendants to provide a copy of the Enforcement Law Course to the Court for *in camera* review. The Court ORDERS both parties to submit supplemental briefing to address each of the issues raised by the Court in this Order, to be submitted no later than **thirty days** after the date of this Order. Briefing shall not exceed twenty pages. An optional ten-page reply brief may be submitted within **forty-four days**.

Initials of Preparer: tg