UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION LAWYERS ASS'N,	)	
Plaintiff	)	
v.	)	**Civil Action No. 16-2470 (TNM) (ECF)**
DEP'T OF HOMELAND SEC., *et al*.	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56(c) and LCvR 7(h), the Department of Homeland Security, *et al*. ("Defendants" or "CBP"), by and through the undersigned counsel, respectfully submit this Opposition to the Motion for Summary Judgment filed by American Immigration Lawyers Association ("Plaintiff") in this action under the Freedom of Information Act, 5 U.S.C. § 552, *et seq*. ("FOIA").

In support, Defendants submit the attached Counter Statement of Material Facts, a Memorandum in Support of their Opposition as well as the Third Declaration Patrick Howard, which demonstrates that Defendant conducted an adequate search, produced segregable non-exempt records, and lawfully withheld records squarely within FOIA exemptions. Thus, Plaintiff's motion for summary judgment should be denied.

February 14, 2019

Respectfully submitted,

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By: /s/
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[PROPOSED] ORDER

After considering this motion, the record herein, and applicable law, it is this ____ day of _____, 201_, hereby

ORDERED, that Plaintiff's Motion for Summary Judgment is denied.

FURTHER ORDERED, that Defendants' search was adequate and FOIA Exemption Withholdings were lawful.

HON. TREVOR N. McFADDEN
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing Defendants' Opposition to Plaintiff's Motion for Summary Judgment to be served upon Plaintiff's counsel via ECF.

/s/
KENNETH ADEBONOJO
Assistant United States Attorney

UNITED STATES DISTRICT COURT
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AMERICAN IMMIGRATION LAWYERS ASS'N,	)	
Plaintiff	)	
v.	)	**Civil Action No. 16-2470 (TNM) (ECF)**
DEP'T OF HOMELAND SEC., *et al*.	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56(c) and LCvR 7(h), the Department of Homeland Security, *et al*. ("Defendants" or "CBP"), by and through the undersigned counsel, respectfully submit this Memorandum of Points and Authorities in Support of Defendants' Opposition to the Motion for Summary Judgment filed by the American Immigration Lawyers Association ("AILA" or "Plaintiff") in this action under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA").

INTRODUCTION AND SUMMARY

Plaintiff submitted a FOIA request for a set of records that are no longer in use and its replacement, which has not been finalized. Given the distinct and discreet nature of the records sought, Defendants engaged its subject matter experts to retrieve the requested records. Of the 371 records, Defendants produced 363 and withheld three as exempt and referred 5 other documents. Plaintiff has moved for summary judgment on the grounds that Defendants' search was not adequate because they did not get all the records Plaintiff believed they should receive.

Regardless, the adequacy of a search is not measured by its "fruits," but by the reasonableness of the methods used. Defendants' methods were reasonable under the circumstances and Plaintiff's motions should be denied. Finally, Plaintiff has not challenged Defendants' withholding under FOIA Exemptions 6 and 7(C), but challenges 7(E). Defendants properly withheld law enforcement records pertaining to investigative technique and procedures that, if released, could reasonably be expected to risk circumvention of the law. Thus, Plaintiff's motion should be denied.

BACKGROUND

On July 10, 2013, AILA submitted a FOIA request to CBP "for records related to CBP's discontinuation of the use of the Inspectors Field Manual ("IFM") and the implementation of the Officer's Reference Tool ("ORT") in its place, and for a copy of the finalized and implemented portions of the ORT." ECF No. 36-2, Plaintiff's Statement of Material Facts Not in Genuine Dispute ("Pl's SOMF"); ECF No. 2 at 3, ¶ 6 ("Pl's Complt."); ECF No. 23, Exhibit A, Supplemental Declaration of Patrick Howard ("Supplmt. Howard Decl."). In its "Complaint for Declaratory and Injunctive Relief" Plaintiff seeks, *inter alia*, an order that CBP conduct a search and refrain from withholding records responsive to their 2013 request. Pl's Complt. at 11; *see also* Pl's SOMF at 2, ¶ 8; Plaintiff's Proposed Summary Judgment Order, ECF No. 36-10 ("Defendants conduct an adequate search for responsive records" and "produce all improperly withheld or redacted records.").

Prior to Plaintiff's request, CBP issued a memorandum to its Field Operations directors "instructing them to stop using the IFM as a source of information for passenger processing and delete from their local webpages all links and references to the IFM." ECF No. 16, Exhibit A,

Declaration of James Ryan Hutton, Deputy Executive Director, Office of Field Operations ("OFO") in support of Defendants' First Motion for Summary Judgment, ("Hutton Decl.") at 2, ¶ 4; *see also* Pl's SOMF at 2, ¶ 10 ("On April 19, 2017, Defendants produced two pages of records related to the CBP's discontinuation of the use of the IFM as a reference tool."); Pl's Complt. at 2-3, ¶ 5 ("In 2013, CBP began to phase out the IFM and indicated its intention to replace the IFM with the ORT.").[1] "The ORT was intended to be a 'living' online repository available on the CBP intranet page where new policies and documents could be uploaded on an ongoing basis" "as a comprehensive 'how to' manual detailing official CBP policies and procedures for CBP's admissibility mission." ECF No. 23, Exhibit B, Supplemental Declaration of James Ryan Hutton, at ¶¶ 5-6. Only "ORT chapters 11 and 12 were considered 'final' when the corresponding CBP intranet webpage was ready and capable to upload documents." *Id.*, ¶ 6. "The ORT was never officially published to CBP employees. Although the internal website was live, CBP has not issued an organization-wide announcement that the ORT was made available to CBP employees." *Id.* at ¶ 7.

The ORT consists of "a collection of policies that CBP has issued and implemented at various times in the past. In other words, Chapter 11 and 12 list and refer to records that existed independently at the time of creation of the ORT. Further, no records were created specifically for the purpose of including them to the ORT." 3d Howard Decl. at 4, ¶ 13. In other words,

[1] "[T]he IFM contained policies and operational procedures on entry and processing of travelers at ports of entry. For years, it was used by CBP officers in the field in conjunction with the Immigration and Nationality Act ("INA"), Title 8 of the Code of Federal Regulations, and other official CBP directives in fulfilling CBP's admissibility." Third Declaration of Patrick Howard at 3, ¶ 8, attached hereto as Exhibit A ("3d Howard Decl.").

"[t]he ORT does not currently contain any original content created specifically for it." *Id.* "To date, only two chapters of the ORT have ever been developed, Chapters 11 and 12. CBP has never created Chapters 1 through 10. 3d Howard Decl. at 3, ¶ 12. The "IFM and ORT were never intended to be used together." *Id*. at 3, ¶ 10.[2]

The Admissibility and Passenger Program ("APP") Office within CBP's Office of Field Operations ("OFO") is the primary office at CBP headquarters handling all OFO programs related to the admissibility and processing of passengers at ports of entry. 3d Howard Decl. at 4, ¶ 16. "APP is responsible for developing policies and disseminating uniform guidance to all CBP field offices, ports and preclearance locations. The IFM and the ORT were developed at the APP. The decision to discontinue the IFM was made at the APP." *Id*. "As APP was the office that developed the ORT, the individuals at APP searching the records had the firsthand knowledge that only two chapters of the ORT had ever been created. *Id*., at 5, ¶ 19. "Chapters 11 and 12 of the ORT are located on CBP's internal website accessed from computers connected to CBP network. The internal website is the only place housing Chapters 11 and 12. The individuals at APP searching the records accessed the internal website to access Chapter 11 and downloaded the hyperlinked content in PDF files." *Id*. at 5-6, ¶ 20. In other words, Chapters 1 through 10 do not exist, and thus CBP did not have records to release to plaintiff[]. *Id*., at 5, ¶ 19. The internal website contains blank placeholder pages where chapter 1 through 10 would

[2] "Chapter 11[]is an index that provides a list of various policies, memoranda, guides, manuals, musters and other related documents that are independent of the underlying content of the future chapters. Hutton Decl. at 2, ¶ 7. "Chapter 12[] is an index that lists the laws, regulations and government systems that govern the admissibility of passengers at our ports of entry and may assist Officers during the course of their employment. *Id*. at 2, ¶ 8.

be. *Id*.

Of the 371 preexisting records linked to Chapter 11, Pl's SOMF at 3, ¶¶ 19-20, by November 9, 2018, "CBP released 363 documents." 3d Howard Decl. at 6, ¶ 23. Of the balance of records not produced, three (3) were withheld pursuant to FOIA Exemption 7(E) and five (5) were referred because they originated from other agencies that had equities in the disclosure of the records. *Id*. at ¶ 24. Chapter 12 also provides hyperlinks to external government systems, such as the Consular Consolidation Database, Consolidated Lead Evaluations and Reports, Law Enforcement Online, the Person Centric Query System, the Ship Arrival Notification System, the Student and Exchange Visitor Information System, and US-VISIT." *Id*. at ¶ 26. These websites and resources are publicly available. Access to these systems is restricted to authorized users. *Id*.

It also includes links to publicly available records like the INA and a list of laws amending it, Bureau of Immigration Appeals, Canadian Legal Information Institute, the Foreign Affairs Manual, Social Security Number Verification, and the Department of Justice's Virtual Law Library. *Id*., at 6, ¶ 27. It also includes "online libraries of historic CBP and DHS rulings, legal opinions, and policy memoranda. Each of the libraries hyperlinked under this category could contain tens of thousands of documents. CBP did not produce all of the documents from the libraries because those documents are not part of the ORT themselves, but the hyperlinks were included in Chapter 12 as only references generally available to officers. *Id*., ¶ 28. Thus, CBP has no records to produce for Chapter 12. *Id*. "Requesting the information behind the hyperlinks would be the equivalent of AILA requesting all contents of CBP and other government databases." *Id*. at 7-8, ¶ 30. "Just one of the CBP databases, TECS . . . contains

information on every single traveler who has ever entered the United States and presented themselves for inspection at a port of entry" just to mention a small part of what it entails. *Id*. Requesting that CBP provide content behind the links to chapter 12, i.e., contents of 17 U.S. government databases, is unreasonable to the point of absurdity and unduly burdensome to the point of impossibility. *Id*. As such, CBP provided the list of hyperlinks alone. *Id*.; Pl's SOMF at 2, ¶ 9; *see also id*. at ¶ 22 ("Defendant did not produce any documents from Chapter 12 of the ORT."). CBP withheld records pursuant to FOIA Exemptions 6, 7(C), and 7(E). *See* 3d Howard Decl. at ¶¶ 31-37.

STANDARD OF REVIEW

a. General Summary Judgment Standard

Where no genuine dispute exists as to any material fact, summary judgment is required. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A genuine issue of material fact is one that would change the outcome of the litigation. *Id.* at 247. "The burden on the moving party may be discharged by 'showing' -- that is, pointing out to the [Court] -- that there is an absence of evidence to support the non-moving party's case." *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 1563 (Fed. Cir. 1987). In *Celotex Corp. v. Catrett*, the Supreme Court held that, in responding to a proper motion for summary judgment, the party who bears the burden of proof on an issue at trial must "make a sufficient showing on an essential element of [his] case" to establish a genuine dispute. 477 U.S. 317, 322-23 (1986).

b. Summary Judgment Standard as Applied to FOIA Cases

FOIA cases are appropriately resolved at summary judgment. *See Brayton v. Office of U.S. Trade Rep*., 641 F.3d 521, 527 (D.C. Cir. 2011). For purposes of summary judgment, an

agency's decision to withhold information from a FOIA requester is subject to *de novo* review by the Courts. *Hayden v. National Security Agency Cent. Sec. Serv*., 608 F.2d 1381, 1384 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980). In a FOIA suit, an agency is entitled to summary judgment once it demonstrates that no material facts are in dispute and, if applicable, that each document that falls within the class requested has been produced, is unidentifiable, or is exempt from disclosure. *Students Against Genocide v. Dept. of State*, 257 F.3d 828, 833 (D.C. Cir. 2001); *Weisberg v. U.S. Dept. of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980).

"Under the Federal Rules of Civil Procedure, a motion for summary judgment cannot be 'conceded' for want of opposition. The burden is always on the movant to demonstrate why summary judgment is warranted. The nonmoving party's failure to oppose summary judgment does not shift that burden. The District Court must always determine for itself whether the record and any undisputed material facts justify granting summary judgment." *Winston & Strawn, LLP v. McLean*, 843 F.3d 503, 505 (D.C. Cir. 2016) (internal quotations omitted).

An agency may defeat the summary judgment requirements in a FOIA case by providing the Court and the Plaintiff with affidavits or declarations and other evidence, which show that the documents in question were produced or are exempt from disclosure. *Hayden v. NSA*, 608 F.2d 1381, 1384, 1386 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *Church of Scientology v. U.S. Dep't of Army*, 611 F.2d 738, 742 (9th Cir. 1980); *Trans Union LLC v. FTC*, 141 F.Supp.2d 62, 67 (D. D.C. 2001) (summary judgment in FOIA cases may be resolved solely on the basis of agency affidavits "when the affidavits describe 'the documents and the justifications for non-disclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the

record nor by evidence of agency bad faith.'") (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). *See also Public Citizen, Inc. v. Dep't of State*, 100 F.Supp.2d 10, 16 (D. D.C. 2000), *aff'd in part, rev'd in part*, 276 F.3d 634 (D.C. Cir. 2002).

ARGUMENT

a. CBP Conducted an Adequate Search for Responsive Records

Plaintiff's FOIA request sought "any and all documents related to the discontinuation by CBP of the use of the IFM as a reference tool, the implementation of the ORT as a reference tool, and an actual copy of the finalized and implemented portions of the ORT." Pl's Complt. at 3, ¶ 6; *see also* Pl's SOMF, ¶ 1; 3d Howard Decl., ¶ 6. As the Court already rightly noted "the Government liberally construed [Plaintiff's ORT] request as seeking a working substitute[,]" ECF No. 30 at 3, and conducted a reasonable search for responsive records that returned the only finalized portions of the ORT – Chapters 11 and 12. In prejudging CBP's search, Plaintiff focused almost exclusively on the "fruits" of the search to question to adequacy of the search. ECF No. 36-1 at 5-8. They also admit that "Defendants produced a significant number of responsive records[,]" but argue, *inter alia*, that Defendants "failed to produce at least eight (8) known records." *Id*. Because Plaintiff's challenge to CBP's search focuses almost exclusively on the "fruits of the search," they cannot demonstrate that CBP's search was inadequate or that Plaintiff is entitled to summary judgment.

Under the FOIA, an agency must undertake a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) ("[T]he agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be

reasonably expected to produce the information requested."). A search is not inadequate merely because it failed to "uncover[] every document extant." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); *see Judicial Watch v. Rossotti*, 285 F.Supp.2d 17, 26 (D. D.C. 2003) (noting that "[p]erfection is not the standard by which the reasonableness of a FOIA search is measured"). Rather, a search is inadequate only if the agency fails to "show, with reasonable detail, that the search method . . . was reasonably calculated to uncover all relevant documents." *Oglesby*, 920 F.2d at 68. An agency, moreover, is not required to examine "virtually every document in its files" to locate responsive records." *Steinberg v. Dep't of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1994); *see also Hall v. U.S. Dep't of Justice*, 63 F.Supp.2d 14, 17-18 (D. D.C. 1999) (finding that agency need not search for records concerning subject's husband even though such records may have also included references to subject).

To demonstrate that it has performed an adequate search for responsive documents, an agency must submit a reasonably detailed affidavit describing the search. *Hunton & Williams LLP v. United States EPA*, 2017 U.S. Dist. Lexis 48907 *28 (finding that the government performed a reasonable search and granting summary judgment as to its adequacy). An affidavit is "reasonably detailed" if it "set[s] forth the search terms and the type of search performed, and aver[s] that all files likely to contain responsive materials (if such records exist) were searched." *Oglesby*, 920 F.2d at 68; *see also Defs. of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 92 (D. D.C. 2009) (finding declaration deficient where it failed to detail the types of files searched, the filing methods, and the search terms used). To meet these requirements, the affidavit must at least include the agency's "rationale for searching certain locations and not others." *Defs. of Wildlife*, 623 F.Supp.2d at 92; *Hodge v. FBI*, 703 F.3d 575, 580 (D.C. Cir.

2013) (affirming the grant of summary judgment where the agency provided a detailed declaration articulating the search process). Agency affidavits attesting to a reasonable search "are accorded a presumption of good faith," *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991), that can be rebutted "with evidence that the agency's search was not made in good faith," *Trans Union LLC v. FTC*, 141 F.Supp.2d 62, 69 (D. D.C. 2001), or when a review of the record raises substantial doubt about the adequacy of the search effort. *Valencia-Lucena*, 180 F.3d at 326.

An agency's declarations "need not 'set forth with meticulous documentation the details of an epic search for the requested records,'" *Defs. of Wildlife*, 623 F.Supp.2d at 91 (quoting *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982), but they should "describe what records were searched, by whom, and through what processes." *Id*. (quoting *Steinberg v. DOJ*, 23 F.3d 548, 552 (D.C. Cir. 1994). Conclusory assertions about the agency's thoroughness are not sufficient. *See Morley v. CIA*, 508 F.3d 1108, 1121-22 (D.C. Cir. 2007). "'The issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate.' The adequacy of an agency's search is measured by a 'standard of reasonableness,' and is 'dependent upon the circumstances of the case.'" *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)).

It bears noting that the adequacy of an agency's search for documents requested under FOIA "is judged by a standard of reasonableness and depends, not surprisingly, upon the facts of each case." *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984); *Greenberg v. Dep't of Treasury*, 10 F.Supp.2d 3, 13 (D. D.C. 1998) (It is appropriate for an agency to search for responsive records in accordance with the manner in which its records are maintained.).

Here, it is notable that the IFM is defunct, *see* 3d Howard Decl. at 3, ¶ 10, and the ORT, which replaced it "is a collection of policies that CBP had issued and implemented at various times in the past. *Id*. at 4, ¶ 13. "The ORT does not currently contain any original content created specifically for it . . . no records were created specifically for the purpose of including them in the ORT." *Id*. It consists of only a Paragraph 11 and a Paragraph 12. *Id*. at 3, ¶¶ 11-12. To conduct its search, CBP engaged its "subject matter experts . . . that developed the ORT . . . [and] had firsthand knowledge that only two chapters of the ORT had ever been created and Chapters 1 through 10 do not exist. . . ." *Id*. at 5, ¶ 19. The ORT is located on CBP's intranet and can be accessed from computers connected to the CBP network. CBP's intranet is the only location that houses Chapters 11 and 12. *Id*. at 5-6, ¶ 20. The subject matter experts "searching the records accessed the internal website to access Chapter 11 and download the hyperlinked content to PDF" or Portable Document Format. *Id*. The vast majority of the ORT's Chapter 11 was released to Plaintiff. Pl's SOMF at ¶¶ 19-20. As for Chapter 12, given the circumstances of this case, Plaintiff's request is "unreasonable to the point of absurdity and unduly burdensome" because they are requesting records that "would be the equivalent of . . . all contents of CBP and other government databases." *Id*. at 7-8, ¶ 30.

The thrust of Plaintiff's motion thus appears to be not that Defendants' search was unreasonable, but that they have not received as many records as they would like. The adequacy of a FOIA search generally turns not on the actual search results, but on the appropriateness of the methods the agency has used to conduct the search. *See Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). Moreover, the agency's methodology must only be reasonable; it need not be exhaustive. *Oglesby*, 920 F.2d at 68.

Thus, the proper inquiry is not whether additional documents possibly responsive to a request might exist, but whether the agency conducted a search reasonably calculated to locate responsive documents. *See id*.; *see also Iturralde*, 315 F.3d at 315.

The record of this case makes clear and cannot be disputed that Plaintiff made a discreet and distinct request for records and the Defendants dispatched their subject matter experts who had knowledge of exactly what Plaintiff was requesting to retrieve the records from the only place the records are located in CBP electronic infrastructure. It is indisputable that the "fruits of the search" is an improvised rather than "finalized" ORT. FOIA does not require agencies to create records that do not exist, and it is not a tool for requesters to improve agencies' internal practices and procedures. *Tracy v. DOJ*, 191 F.Supp.3d 83, 93 (D.C. Cir. 2016); *Coleman v. DEA*, 134 F.Supp.3d 294, 304 (D. D.C. 2015) ("[T]he mere absence of emails, without more, does not render the DEA's search inadequate."). Here, the OFO "confirmed that only two parts of the ORT exist-Chapters 11 and 12[,]" which have since been disclosed to AILA. *See generally* 3d Howard Decl.; *Dillon v. DOJ*, 102 F.Supp.3d 272, 285-86 (D. D.C. 2015) ("As the FBI's declarations "exclude the possibility that records potentially responsive to [the] [p]laintiff's request are reasonably likely to be found in locations outside of the CRS," the Court concludes that its search was adequate.). Thus, based on the foregoing, CBP respectfully requests that the Court deny Plaintiff's motion and conclude that Defendant's search was adequate.

Plaintiff further argues that CBP failed to search for records related to the discontinuation of the IFM and the implementation of the ORT. *See generally* ECF No. 36-1. As described in further detail in Howard Declaration, Defendants conducted a reasonable search for these

records. 3d Howard Decl. at 5, ¶ 17. Specifically, The subject matter experts at the APP who had first-hand knowledge of when and why the IFM was discontinued, reviewed their records related to the discontinuation of the IFM and guidance to begin using the ORT, and located a memorandum dated April 4, 2013 and an accompanying muster. CBP determined that this record was responsive to plaintiff's request related to the instructions to the field on discontinuation of the IFM. *See Id.* Further, the APP searched and determined that it did not send instructions to the field to begin using the ORT. As such, CBP did not have any records responsive to plaintiff's request for records related to the implementation of the ORT. *Id.* at ¶ 18.

b. CBP Properly Redacted Information under FOIA Exemption (b)(7)(E)

One of the fundamental principles behind FOIA "is public access to government documents," requiring "agencies to make more than perfunctory searches and, indeed, to follow through on obvious leads to discover requested documents." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (citing *John Doe Agency v. John Doe Corp*., 493 U.S. 146, 151 (1989) and *Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1998).

Although the records that an agency locates in response to an adequate search for records ordinarily must be produced, FOIA authorizes agencies to withhold certain documents and information; namely, those that satisfy the requirements of any of the nine statutory exemptions. *See Milner v. Dep't of Navy*, 562 U.S. 562, 564 (2011). Here, CBP applied FOIA Exemption (b)(7)(E) to redact information that is not currently publicly known, which would provide insight into particularized law enforcement and immigration processes, which taken in the aggregate would provide insight into overall methods utilized by CBP. *See* Hutton Decl. at 3, ¶ 10.

Exemption 7(E) protects law enforcement records or information when disclosure "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). CBP is a law enforcement agency for FOIA Exemption (b)(7)(E) purposes. *McRae v. DOJ*, 869 F.Supp.2d 151, 169 (D. D.C. 2012) (holding that CBP "codes, case numbers, and other computer information pertaining to the TECS, NCIC, and databases…are techniques and procedures for law enforcement investigation."); *Touarsi v. DOJ*, 78 F.Supp.3d 332, 349 (D. D.C. 2015) (same); *Gamboa v. Exec. Office for United States Attys.*, 65 F.Supp.3d 157, 169 (D. D.C. 2014) (same).

This exemption generally protects information that would reveal law enforcement techniques and procedures that are not well known to the public as well as non-public details about the use, application, or deployment of well-known techniques and procedures. *See, e.g.*, *Soghoian v. DOJ*, 885 F.Supp.2d 62, 75 (D. D.C. 2012) (protecting non-public details about use of electronic surveillance because disclosing what information is collected during surveillance, how it is collected, and when it is not collected could allow criminals to evade detection); *McGehee v. DOJ*, 800 F.Supp.2d 220, 236-37 (D.D.C. 2011) (finding that Exemption 7(E) does not require that techniques be unknown to public where release of non-public details of such techniques would allow them to be circumvented).

Courts are divided as to whether the phrase "if such disclosure could reasonably be expected to risk circumvention of the law" applies only to "guidelines" or also applies to "techniques and procedures." *See Pub. Empl. For Envtl. Responsibility v. Int'l Boundary Water Comm'n ("PEER")*, 740 F.3d 195, 204 & n.4 (D.C. Cir. 2014). However, the better-reasoned

decisions recognize that providing categorical protection to "techniques and procedures" (*i.e.*, not requiring a showing that "disclosure could reasonably be expected to risk circumvention of the law") is consistent with both the plain meaning of the statute and the history of the amendments to Exemption (7)(E) in 1986. *See Allard K. Lowenstein Int'l Human Rights Project v. DHS*, 626 F.3d 678, 681 (2d Cir. 2010) (finding that the "sentence structure of Exemption (b)(7)(E)" and "basic rules of grammar and punctuation dictate that the qualifying phrase modifies only the . . . 'guidelines' clause" and that "[a]ny potential ambiguity in the statute's plain meaning is removed . . . by the history of the statute's amendments"). *See also, e.g.*, *Durrani v. DOJ*, 607 F. Supp. 2d 77, 91 (D.D.C. 2009) (techniques and procedures entitled to categorical protection under (7)(E)) (citation and quotation omitted); *Jewett v. U.S. Dep't of State*, Civil Action No. 11-cv-1852 (RLW), 2013 WL 550077, at *9 (D.D.C. Feb. 14, 2013); *Labow v. DOJ*, 66 F.Supp.3d 104 (D.D.C. 2014).

Even if a showing that "disclosure could reasonably be expected to risk circumvention of the law" were required to protect these "techniques and procedures" from disclosure, the "risk circumvention of the law" requirement presents a "low bar." *See PEER*, 740 F.3d at 204 n.4 (saying that "it is not clear" that the issue of whether an agency needs to show that disclosure of a technique or procedure could reasonably be expected to risk circumvention of the law "matters much in practice" given the "low bar" for the circumvention requirement). "[T]he text of exemption 7(E) is much broader" than other exemptions that "set a high standard." *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1194 (D.C. Cir. 2009). "Rather than requiring a highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the [agency] 'demonstrate[] logically how the release of [the requested] information might create

a risk of circumvention of the law.'" *See id*. (citation omitted). Therefore, Exemption 7(E) "exempts from disclosure information that could increase the risks that a law will be violated or that past violators will escape legal consequences." *See id*. at 1193.

Here, according to the Howard Declaration CBP redacted "information titles of memorandums, musters, and associated documents that would reveal CBP's internal techniques, methods, procedures, and other sensitivities, to include the names of internal systems, law enforcement tools, and applications that are employed during the course of certain law enforcement actions." Howard Decl. at 3, ¶ 9. The disclosure of these titles could allow third parties to circumvent CBP operations and undermine CBP's law enforcement role. *Id*. Specifically, CBP redacted information that would "provide insight about particular types of programs that are not publicly known…[that] focus on particular categories of vulnerable populations or targeted populations that pose a national security or law enforcement risk, and would reveal where CBP focuses its resources and targets its law enforcement actions. *Id*., ¶ 11; *see also* 3d Howard Decl. at 9-10, ¶¶ 34-36. Programs that focus on particular categorizes of individuals would further reveal where CBP may have enforcement vulnerabilities and would allow individuals potentially to circumvent CBP processes and actions by exploiting those populations. *Id*. "Releasing information about training and the associated equipment procedures 'is tantamount to releasing information about the actual employment of the procedures and techniques themselves.'" *Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, 160 F.Supp.3d 226, 243 (D. D.C. 2016); *Elec. Privacy Info. Ctr. v. Customs & Border Prot*., 2017 U.S. Dist. Lexis 42800 **10-11 (D. D.C. 2017) (noting that it was sufficient that there is a logical connection between the disclosure of records detailing the function, access,

navigation, and capabilities that aid in the enforcement of customs and immigration laws and the risk that disclosure could facilitate circumvention of the law.). Thus, because the information in the index was properly withheld under FOIA Exemption (b)(7)(E), Plaintiff's summary judgment motion should be denied and hold that CBP conducted an adequate search and lawful withholdings.

CONCLUSION

For the foregoing reasons, Plaintiff is not entitled to summary judgment regarding the adequacy of its search and withholding information under FOIA Exemption (b)(7)(E).

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Respectfully submitted,

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