

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**AMERICAN IMMIGRATION
LAWYERS ASS'N,**

Plaintiff

v.

DEP'T OF HOMELAND SEC., *et al.*

Defendants.

**Civil Action No. 16-2470 (TNM)
(ECF)**

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY
JUDGMENT AND REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

The Department of Homeland Security and its component, Customs and Border Protection ("Defendants" or "CBP"), respectfully submit this Opposition to the Cross-Motion for Summary Judgment filed by the American Immigration Lawyers Association ("Plaintiff") and Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment.

The parties have made significant progress narrowing or eliminating some issues in dispute to the point where it appears that most of the parties' remaining dispute centers around the extent of Defendants' Exemption 7(E) claims under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* ("FOIA"). In fact, as recently as today, March 10, 2020, Defendant believes it has taken even further steps at narrowing these issues with full and partial releases of an additional twenty-nine (29) records after further unredactions. *See* Reply Exhibit A ("Supplmt'l *Vaughn*"). The undersigned understand that these records will be released to Plaintiff directly out of Defendants' FOIA office. Defendants believe that these additional unredactions will eliminate any dispute that Plaintiff might have to the extent of Defendants'

unredactions before now regarding those specific records.¹

At the time that Plaintiff filed its Cross-Motion and Opposition, “[w]hat remain[ed] at issue [was] the Government’s decision to withhold 71 records in full or in part pursuant to FOIA Exemptions, 5, 6, 7(C), and 7(E).” ECF No. 55 at 4 (“Pl’s X Mot./Opp’n”). Furthermore, as indicated earlier, Plaintiff has not disputed most of the material facts posited by Defendants except that Plaintiff contests the extent of Defendants FOIA Exemption 6, 7(C), and 7(E) claims. *See generally* Plaintiff’s Responses to Defendants’ Statement of Material Facts, ECF No. 55-1. Generally, Plaintiff argues “that the Government has failed to establish that it properly withheld Records 1-71 through its *Vaughn* index or Fourth Howard Declaration” and the Court should “order the Government to produce the improperly withheld records.” Pl’s X Motion/Opp’n at 11.² More specifically, regarding Plaintiff’s FOIA Exemption 7(E) claims and a certain record titled “Forwarding Form I-275 to the U.S. Department of State,” Plaintiff asserts that “the redacted information does not appear to be information collected for law enforcement purposes.” *Id.* at 13. Citing other records, Plaintiff further argues that the record “I-94 Automation Guidelines for Processing Travelers” “do not offer specialized guidance, techniques or procedures that would allow an individual to circumvent the law. *Id.* at 15. Finally, while it does not appear that Plaintiff are challenging Defendants’ specific Exemptions 6 and 7(C) claims, it appears that Plaintiff is arguing that Defendants have relied on these exemptions to

¹ Only one record, Sigma Release 41 has been withheld in its entirety under FOIA Exemption 7(E).

² An agency should ordinarily provide an itemized index correlating each withheld document (or portion) with a specific exemption justification was fashioned only in connection with the adjudication of a defendant agency's motion for summary judgment. *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973).

withhold information beyond Defendants' legitimate exemption claims. *See generally id.* at 17-19.

a. Defendants Statements Satisfy FOIA Exemption 7(E)'s Low Threshold

Exemption 7 protects from disclosure "records or information compiled for law enforcement purposes," but only to the extent that disclosure of such records would cause an enumerated harm. 5 U.S.C. § 552(b)(7). To properly assert Exemption 7, an agency must first establish the records at issue were compiled for law enforcement purposes. If this showing is made, an agency must then satisfy the requirements of one of the sub-parts of Exemption 7. *See Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 926 (D.C. Cir. 2003). Exemption 7(E) covers "records or information compiled for law enforcement purposes" that "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).

Under Exemption 7(E), the government must demonstrate: (1) that the withheld information would disclose techniques; procedures or guidelines for law enforcement investigations and (2) that the disclosure would reasonably "risk circumvention of the law." *Id.*; *see also Blackwell v. FBI*, 646 F.3d 37, 41-42 (D.C. Cir. 2011). If the agency's function is law enforcement, courts are "more deferential" to the agency's claimed purpose for the particular records. *Campbell v. DOJ*, 164 F.3d 20, 32 (D.C. Cir. 1998) (citing *Pratt v. Webster*, 673 F.2d 408, 419 (D.C. Cir. 1982)). The D.C. Circuit has said that "[l]aw enforcement entails more than just investigating and prosecuting individuals after a violation of the law . . . the ordinary understanding of law enforcement includes . . . proactive steps designed to prevent criminal activity and to maintain security." *Pub. Employees for Env't'l. Responsibility v. U.S. Section*,

Int'l Boundary & Water Comm'n, U.S.-Mexico, 740 F.3d 195, 203 (D.C. Cir. 2014).

CBP “is a law enforcement agency with enforcement responsibilities for over 400 Federal statutes, on behalf of over 40 different federal agencies” and its “mission is to protect the borders of the United States against terrorists and the instruments of terror, enforce the customs and immigration laws of the United States, and foster our Nation’s economy by facilitating lawful international trade and travel.” *Barnard v. DHS*, 598 F. Supp. 2d 1, 15 (D.D.C. 2009) (“There is no question that the records identified . . . bear the appropriate nexus between . . . CBP’s law enforcement activities and a possible violation of federal law.”); *see also Gilman v. DHS*, 32 F.Supp.3d 1, 19 (D.D.C. 2014) (“CBP is indisputably a law enforcement agency and is entitled to deference in its determination that the records were compiled for a law enforcement purpose[.]” where “the challenged redactions relate to its risk and vulnerabilities assessment of illicit cross-border activity in order to assess fencing needs[.]”); *see also Concepcion v. CBP*, 907 F.Supp.2d 133, 140 (D.D.C 2012) (“The Directorate of Board and Transportation Security within the Department of Homeland Security performs number law enforcement function, including preventing the entry of terrorists and the instruments of terrorism into the United States, security the borders, and carrying out immigration enforcement functions.”). Thus, “because CBP is an enforcement agency, it is entitled to deference in its determination that record were compiled for a law enforcement purpose. *Ctr. For Biological Diversity v. Army Corps of Eng’rs*, 405 F.Supp.3d 127, 148 (D.D.C. 2019).

Furthermore, the D.C. Circuit has held that “an agency may seek to block the disclosure of internal agency materials relating to guidelines, techniques, sources, and procedures for law enforcement, investigations and prosecutions, even when the material have not be compiled in the course of a specific investigation.” *Tax Analysts v. IRS*, 294 F.3d 71, 78 (D.C. Cir. 2002).

The purpose of Exemption 7(E) is to prevent publication of information that would “train potential violators to evade the law or instruct them how to break the law,” and to protect information that, if disclosed, “increase[s] the risks that a law will be violated or that past violators will escape legal consequences.” *Mayer Brown v. I.R.S.*, 562 F.3d 1190, 1193 (D.C. Cir. 2009). Exemption 7(E) sets a “relatively low bar” for an agency to justify withholding information, but the government must “demonstrate logically how the release of the requested information might create a risk of circumvention of the law.” *Blackwell*, 646 F.3d at 42 (quoting *Mayer Brown*). “[A] highly specific burden of showing how the law will be circumvented” is not required; instead, “[E]xemption 7(E) only requires that [the agency] demonstrate[] logically how the release of information might create a risk of circumvention.” *Mayer Brown*, 562 F.3d at 1194.

Even if withheld documents “are not ‘how-to’ manuals for law-breakers, the exemption is broader than that.” See *Mayer Brown*, 562 F.3d at 1192-93 (“settlement strategies and objectives, assessments of litigating hazards, [and] acceptable ranges of percentages for settlement” were exempt under 7(E) because, although not a “blueprint for tax shelter schemes, it could encourage decisions to violate the law or evade punishment.”). “Information that relates to law enforcement techniques, policies, and procedures is properly withheld under this exemption.” *Showing Animals Respect & Kindness v. Dep’t of Interior*, 730 F.Supp.2d 180, 199 (D.D.C. 2010) (citing *Boyd v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 570 F. Supp. 2d 156, 158 (D.D.C. 2008)). In *Gilman*, the court found that “although the information in the challenged records [were] not styled as formal guidelines or procedures for CBP officials, the records refer to information, including how CBP officials assesses vulnerable areas along the border, that could be used to encourage decisions to violate the law or evade punishment.” *Gilman*, 32 F.

Supp. 3d at 19-23 (This explanation was sufficient because the assessment of border vulnerabilities was directly related to potential violations of federal immigration laws).

Defendants' declaration satisfy this "relatively low" bar by establishing a logical link between disclosure and circumvention of the law. "Here, disclosure of the information withheld pursuant to this exemption would advise potential violators of CBP law enforcement guidelines, techniques and procedures, thereby enabling them to circumvent the law, avoid detection, and evade apprehension." *See* Declaration of Patrick Howard attached to Defendants' Motion for Summary Judgment, ECF No. 53.3 Specifically, Defendants withheld five (5) types of categories of information that sufficiently describe the risks posed by disclosure: (i) Codes and Functionalities of CBP Systems and "names of certain databases not known to public, internal system codes, screenshots, functionalities, and information on how to use CBP's law enforcement systems[]"; (ii) Training Materials for Users of CBP Systems that Office of Field Operations provides to CBP Officers on how to use CBP's law enforcement systems; (iii) Email Addresses of Group Listserves and email addresses of group list serves which are not known to the public and only used within the agency; (iv) Law Enforcement Methods for Processing Passengers at Ports of Entry CBP withheld law enforcement techniques and procedures, including officer instructions not generally known to the public; and (v) information related CBP's process for assessing risk on travelers seeking to enter the United States. *Id.* at 6-8.

In addition, the Howard declaration, Defendants included a *Vaughn* index as well as

³ "The discussion below thus aims to fairly represent the Exemption (b)(7)(E) withholdings but does not purport to be an all-inclusive rendering of all withheld information." Howard Decl. at 6, ¶ 19.

another supplemental *Vaughn* filed today. Although Defendants believe that the initial *Vaughn* satisfied FOIA Exemption 7(E)'s low threshold, the supplement, *see* Exhibit A, is also submitted here as additional support as well as to set forth the records that have been further redacted.

One of the withholdings that Plaintiff challenges relate to the Form I-94 and, specifically that the “redacted records do not appear to have been compiled for law enforcement purposes.”

However, as demonstrated above, Defendants are entitled to deference regarding its pronouncement that these records are law enforcement records. Plaintiff's rationale appears to be that the records cannot be law enforcement records simply because it merely explains biographic and class admission errors or where a person is entitled to an I-94 correction because they might have been admitted under an incorrect class. However, Plaintiff's speculative downplaying of the significance of these record does not establish that these are not law enforcement records worthy of protection under FOIA Exemption 7(E). *See Reporters Comm. for Freedom of the Press v. FBI*, 236 F. Supp. 3d 268, 270 (D.D.C. 2017) (mere speculation is not enough to overcome the presumption of good faith accorded agency affidavits).

The I-94 records withheld under FOIA Exemption 7(E) are law enforcement records related to guidelines and procedures that if disclosed would risk circumvention of the law. *See generally* Exhibit A. Specifically, the I-94 records are “training materials for its internal systems used by CBP officers and agents. This document includes names of databases, internal system codes and information related to CBP system interfaces. Disclosure of such information could be used to locate, access, and navigate internal law enforcement computer systems and/or databases and risk compromising the integrity of CBP systems.” Supplmt'l *Vaughn* at 1. Also, “CBP withheld under exemption (b)(7)(E) [] law enforcement techniques and procedures related to determining admissibility of aliens at ports of entry. Disclosure of the information withheld

pursuant to this exemption would advise potential violators of CBP law enforcement guidelines, techniques and procedures, thereby enabling them to circumvent the law, avoid detection, and evade apprehension.” *Id.* at 15. The training and other records are properly protected under FOIA Exemption 7(E). *See Citizens for Responsibility & Ethics in Wash. v. DOJ*, 160 F. Supp. 3d 226, 243 (D.D.C. 2016) (“[The agency] explained that releasing information about training and the associated equipment procedures ‘is tantamount to releasing information about the actual employment of the procedures and techniques themselves.’ The Court agrees . . .”).⁴

In a further challenge to Defendants’ I-94 withholdings, specifically, the record titled “Automation Guidelines for Processing Travelers at Primary and Secondary Inspection,” Plaintiff speculates that “the withheld information would complement guidance already available on the Department of State and CBP websites related to processes impacting travelers seeking entry into the United States.” Pl’s X-Mot./Opp’n at 15. While Plaintiff’s agenda might be disclosure, Defendants do not have the luxury of risking a disclosure of this information that might result in circumvention of the law. CBP states clearly that these are “training materials for its internal systems used by CBP officers and agents. This document includes names of databases, internal system codes and information related to CBP system interfaces. Disclosure of such information could be used to locate, access, and navigate internal law enforcement computer systems and/or databases and risk compromising the integrity of CBP systems.”

⁴ Defendants also withheld Electronic I-94 Processing for Air and Sea Ports of Entry, *see* Supplmt’l *Vaughn* at 25, which is related to “guidance to CBP officers on how to complete certain fields in CBP systems. This includes the names of databases, internal system codes, functions and information related to CBP system interfaces. Disclosure of such information could be used to locate, access, and navigate internal law enforcement computer systems and/or databases and risk compromising the integrity of CBP systems.” This withholding is also proper under FOIA.

Supplmt'l *Vaughn* at 1. This clear statement establishes that disclosure has this attendant risk. *Citizens for Responsibility & Ethics in Wash. v. DOJ*, 160 F. Supp. 3d 226, 243 (D.D.C. 2016) ("The Court agrees that the training and equipment information, if disclosed, would reveal law enforcement techniques and procedures, which, as discussed previously, could reasonably be expected to risk circumvention of the law."); *Elec. Privacy Info. Ctr. v. Customs & Border Prot.*, 248 F. Supp. 3d 12, 19 (D.D.C. 2017) ("The Court agrees that the disclosure of records detailing the function, access, navigation, and capabilities of the AFI system, which "enhances [DHS's] ability to identify, apprehend, and prosecute individuals who pose a potential law enforcement or security risk, and aids in the enforcement of customs and immigration laws," presents a risk that could facilitate circumvention of the law that is logically connected to the content of the withheld documents). Plaintiff's response amounts to more than an uninformed disagreement over the policy of lawful withholding of records versus unlimited disclosure.

Furthermore, Plaintiff appear to believe that the record "Interim Update – Visa Waiver Program Restrictions and the Visa Waiver Program Improvement & Terrorist Travel Prevention Act of 2015" is just a "compilation of current immigration law that if disclosed would not give specialized information to an individual that would allow circumvention of the law." Pl's X Mot./Opp'n at 16. Defendants clearly state that it "withheld . . . information related to law enforcement procedures related to vetting international travelers, in particular as it relates to processes for waiving ineligibility for entry under the Visa Waiver Program. Disclosure of such information would advise potential violators of CBP's law enforcement techniques and procedures, thereby enabling them to circumvent the law, avoid detection, and evade apprehension." Supplmt'l *Vaughn* at 61. Defendants' averment establishes a logical relationship between disclosure of this information and circumvention of the law. *Ibrahim v.*

Dep't of State, 311 F. Supp. 3d 134, 143 (D.D.C. 2018) (disclosure of the Refugee Application Assessment “techniques could reasonably be expected to risk circumvention of the law by enabling applicants for refugee status to plan strategic but inaccurate answers to questions that are material to the USCIS's decisions); *Techserve Alliance v. Napolitano*, 803 F. Supp. 2d 16, 29 (D.D.C. 2011) (“This Court finds that USCIS properly withheld all of these documents . . . to prevent immigration fraud [because] disclosing any of the aforementioned documents would reveal the selection criteria, fraud indicators, and investigative process that USCIS and other agencies use in fraud investigations during the H-1B visa process). Similarly, Defendants have lawfully withheld information that, if disclosed, creates a risk of individuals attempting to circumvent the visa waiver program.

Finally, regarding Defendants’ 7(E) exemption claims, Plaintiffs argue that Defendants are withholding records that are already public information. First, Plaintiff has failed to demonstrate that the purportedly public information is the exact same information that Defendants are withholding as the official disclosure doctrine requires. *Davis v. DOJ*, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (party bears the “initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld.”). Secondly, if Plaintiff is to be taken at its word that the records are already publicly available, then Defendants are not obligated to disclose records that are already in the public domain. *See Nat’l Sec. Counselors v. CIA*, 206 F. Supp. 3d 241, 251 (D.D.C. 2016); *Niagara Mohawk Power Corp. v. Dep’t of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999) (“[I]f the information is publicly available, one wonders, why is [anyone] burning up counsel fees to obtain it under FOIA?”).

b. Defendants Rely on Exemptions 6 and 7(C) to Protect Employees’ Privacy

Plaintiff “does not challenge the Government’s application of Exemptions 6 and 7(C) to

withhold portions of records containing the names of individuals or contact information . . . however, the Government misapplied the exemptions to improperly redact information such as subject lines of memos.” Pl’s X Mot./Opp’n at 17-19. Specifically, Plaintiff challenges “Records 28, 58, 59, 62, and 63.” *Id.*

Regarding Plaintiff’s challenge to Record Number 28, Guidance Regarding Admissibility of Aliens Who Violate the Terms of Special Registration, Defendants “withheld . . . the signatures, names and/or Identifying Information of CBP Personnel because the identification of an individual in association with the performance of duties in an operational context risks the unwarranted attribution and attention to the employee beyond the confines of their job and into their personal life, and disclosing the identities of specific individuals would not meaningfully shed light on how the government performs its duties. To reveal the withheld information would constitute an unwarranted invasion of personal privacy.” Suppl’t *Vaughn* at 25-26. In that document, Defendants invoked mostly FOIA Exemption 7(E) to protect the information contained in that August 12, 2003 memo, and as the document clearly shows, invoked FOIA Exemptions 6 and 7(C) merely to protect the names of individual employees. Therefore, Plaintiff’s assertion that Defendants have “improperly redacted large swaths of information that do not appear to correspond to the stated justification” is factually wrong and legally untenable.

Regarding Plaintiff’s challenge to Defendants’ reliance on FOIA Exemptions 6 and 7(C) to protect names and signatures on the document titled “Guidance on Correcting Class of Admission for Certain Refugee/Asylee Follow to Join Foil Pilot Cases,” Plaintiff’s challenge is again flawed. The indication on the pages of where the exemptions are flagged clearly suggest that it is invoked to protect names and signatures of individuals who issued the memos. Based on Plaintiff’s assertions, it is clear that Plaintiff is not really challenging the FOIA Exemption 6

and 7(C) *per se* as Plaintiff appears to be challenging only five (5) records. Rather, it appears that Plaintiff is attempting to use its assertion of this challenge to also collaterally attack FOIA Exemption 7(E) also. Plaintiff's real gripe appears to be that FOIA Exemption 7(E) is invoked along with FOIA Exemptions 6 and 7(C), which resulted in less access than Plaintiff would like. Defendants stand by their FOIA Exemptions 6 and 7(C) claims for the five records that Plaintiff challenges. ECF No. 53. As for the remainder, Plaintiff has waived any challenges to the other claims. When a plaintiff files an opposition addressing only certain arguments raised by the defendant, "a court may treat those arguments that the plaintiff failed to address as conceded." *Hopkins v. Women's Div., Bd. of Global Ministries*, 238 F. Supp. 2d 174, 178 (D.D.C. 2002) ("It is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded."); *Rosenblatt v. Fenty*, 734 F. Supp. 2d 21, 22 (D.D.C. 2010) ("[A]n argument in a dispositive motion that the opponent fails to address in an opposition may be deemed conceded.").

Thus, for the foregoing reasons as well as those posited in Defendants' dispositive motion, the Court should grant Defendants' motion and deny Plaintiff's cross-motion.

March 10, 2020

Respectfully submitted,

TIMOTHY J. SHEA, D.C. Bar #437437
United States Attorney

DANIEL F. VAN HORN, D.C. Bar #924092
Chief, Civil Division

By: _____/s/_____

KENNETH ADEBONOJO

Assistant United States Attorney

Judiciary Center Building

555 4th Street, N.W. – Civil Division

Washington, D.C. 20530

Telephone: (202) 252-2562

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing Defendants' Opposition/Reply to be served upon Plaintiff's counsel via ECF.

/s/

KENNETH ADEBONOJO
Assistant United States Attorney