

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X	<b>Docket#</b>
CLEAR, ET AL.,	: 19-cv-07079(RER)
	:
Plaintiffs,	:
	:
- versus -	: U.S. Courthouse
	: Brooklyn, New York
U.S. CUSTOMS AND BORDER PATROL,	:
	: April 26, 2021
Defendant	:
-----X	

TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING  
BEFORE THE HONORABLE RAMON E. REYES, JR.  
UNITED STATES MAGISTRATE JUDGE

**A P P E A R A N C E S:**  
**(VIA VIDEO/AUDIO)**

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1 THE COURT: We are recording.

2 Good morning. This is Magistrate Judge Reyes.  
3 We are holding a video oral argument in *CLEAR v. The*  
4 *United States Customs and Border Protection*, docket  
5 number 19-cv-7079.

6 Counsel for the plaintiffs, please state your  
7 name for the record starting with the most senior  
8 attorney as far as responsibility is concerned, not as  
9 far as age or years of practice.

10 MS. KIM: Good morning, your Honor. Scarlet  
11 Kim from the ACLU for plaintiffs.

12 THE COURT: Who else is on for plaintiffs?

13 MR. TOOMEY: This is Patrick Toomey, your  
14 Honor, also from the ACLU.

15 MR. ISMAIL: And Tarek Ismail from CLEAR, your  
16 Honor. Good morning.

17 THE COURT: Good morning. Counsel for Customs  
18 and Border Protection?

19 MS. MAHONEY: Assistant United States Attorney  
20 Kathleen Mahoney. Good morning, everyone.

21 THE COURT: Good morning. So we have dueling  
22 motions for summary judgment and the plaintiffs asked for  
23 oral argument, so why don't we start with them?

24 MS. KIM: Thank you, your Honor. I'd like to  
25 cover three points today but before I do so I thought it

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1 would be useful just to briefly remind the Court what  
2 this case is about.

3 This case seeks records from CBP on their  
4 technical -- excuse me, tactical --

5 THE COURT: It's a tongue twister. I know.

6 MS. KIM: On their tactical terrorism response  
7 teams, or TTRTs. TTRTs are secretive CBP units that  
8 target travelers, including U.S. citizens who are not  
9 known security threats as they arrive at U.S. ports of  
10 entry.

11 Since 2017, TTRTs have targeted over 600,000  
12 travelers including approximately 180,000 U.S. citizens  
13 subjecting them to detention, searches, and  
14 interrogations. They've also refused thousands of  
15 travelers arriving with valid admission documents entry  
16 into this country. Yet despite the significant and  
17 sometimes devastating ways that TTRTs impact travelers,  
18 the public has virtually no insight into the nature of  
19 their activities whether they comport with the law or are  
20 subject to adequate safeguards.

21 Plaintiffs seek this basic information. At  
22 this stage they've identified a subset of withholdings  
23 consisting predominantly of policies and training  
24 materials which they believe will help illuminate these  
25 issues for the public.

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1 CBP has refused to disclose this subset of  
2 challenged withholdings citing Exemption 7(E) which  
3 protects law enforcement techniques and procedures or  
4 guidelines. But its justification consists of little  
5 more than a recitation of the statutory standard and the  
6 generic assertion that disclosing such materials would  
7 correct its investigations. These statements are  
8 patently insufficient to sustain the agency's burden at  
9 summary judgment.

10 The three points I like to address our first  
11 the inadequacy of CBP's declaration and bond index and  
12 the Second Circuit's repudiation of the exact approach  
13 that CBP has chosen to explain its withholdings.

14 Second, how the declaration and indexes and  
15 inadequacies permeate the specific showing CBP must make  
16 in the Exemption 7(E) context.

17 And finally, I'd like to conclude by offering  
18 plaintiff's view on how as a practical matter the Court  
19 should respond to CBP's failures at summary judgment.

20 With respect to the declaration and bond index,  
21 it's canonical that the agency bears the burden of  
22 showing that its withholdings fall within its claimed  
23 exemptions. And it's equally well established that where  
24 an agency submits a declaration to sustain its burden it  
25 must describe the withholdings and its justifications for

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1 non-disclosure with reasonably specific detail. But the  
2 declaration and index together explain the withholdings  
3 in a manner that the Second Circuit explicitly repudiated  
4 as failing the reasonable specificity standard in *Halpern*  
5 *v. FBI*. There, just as CBP has done here, the FBI  
6 submitted the declaration describing broad categories of  
7 information and then asserted that information falling  
8 into those categories would be subject to its claimed  
9 exemption. And the court found there that the agency's  
10 failure to apply the exemption to the specific facts of  
11 the documents at hand meant that it was not reasonably  
12 specific.

13           Here, CBP's approach is even more egregious.  
14 In *Halpern*, the FBI actually correlated each of its  
15 withholdings to the broad categories in its declaration.  
16 The court still rejected the declaration as inadequate.

17           Here, CBP does not even correlate any of the  
18 withholdings to the broad categories outlined in its  
19 declaration. Thus the categories essentially float  
20 untethered to any withholding, nor are they mapped at all  
21 to the Vaughn Index. Those categories are therefore  
22 essentially meaningless.

23           CBP even concedes at paragraph 43 of its  
24 declaration that the broad categories it's outlined will  
25 capture all the withholdings and it admits that it's

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1 categories are not an all inclusive rendering of all  
2 withheld information.

3           *Halpern* also dictates that the Vaughn Index  
4 must fail under the reasonable specificity standard.  
5 Even though the index lists the documents withheld in  
6 full, it uses identical boilerplate language to justify  
7 every single one of those withholdings. If the agency  
8 can submit the same generic justification across every  
9 single withholding that would essentially render the de  
10 novo scrutiny that FOIA requires a dead letter.

11           And notably, the justification that CBP uses in  
12 the index is similar to the categorical justification  
13 that the FBI provided and the court rejected in *Halpern*.  
14 In *Halpern*, the FBI argued that disclosing the withheld  
15 information would reveal FBI intelligence methods and  
16 activities which would allow hostile entities to develop  
17 countermeasures and thereby disrupt FBI intelligence  
18 gathering.

19           CBP offers essentially the same justification  
20 for every withholding. It says that disclosing the  
21 withholdings would reveal law enforcement procedures and  
22 practices which would enable individuals to effectuate  
23 countermeasures and thereby corrupt CBP investigations.

24           In *Halpern*, the court found this language  
25 conclusory and failing to provide the kind of fact

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1 specific justification necessary to demonstrate  
2 reasonable specificity. And plaintiffs submit that this  
3 Court should come to the same conclusion with respect to  
4 CBP's boilerplate justifications.

5 Plaintiffs also note that courts have  
6 specifically rejected the type of boilerplate explanation  
7 that CBP has provided as inadequate in the Exemption 7(E)  
8 context.

9 For example, in *ACLU v. ODNI* (SDNY 2011) the  
10 ACLU sought information on the implementation of a  
11 foreign intelligence surveillance statute. There the  
12 court rejected an FBI declaration which invoked Exemption  
13 7(E) on the basis that the information withheld would  
14 disclose and enable -- that if disclosed would enable  
15 targets to avoid detection or develop countermeasures.  
16 And the court rejected that as a generic assertion and  
17 boilerplate insufficient to carry the agency's burden.

18 Here CBP uses a nearly identical justification  
19 for every one of its withholdings namely that disclosure  
20 would enable individuals to effectuate countermeasures  
21 and it should therefore similarly --

22 THE COURT: Ms. Kim, how much specificity does  
23 the declaration need to have and how can the agency not  
24 disclose the content of documents by being more specific?

25 MS. KIM: Yes, your Honor. So in terms of the

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1 specificity, I'd just like to make clear that either the  
2 declaration or the index can satisfy the reasonable  
3 specificity standard. So the point here is that at least  
4 one of those documents needs to both describe the records  
5 with reasonable specificity and provide a sufficient  
6 justification, and neither of those documents viewed  
7 alone or together satisfies that standard.

8           With respect to how that standard applies,  
9 particularly in the Exemption 7(E) context, I would point  
10 the Court to a D.C. Circuit case, *Citizens For*  
11 *Responsibility and Ethics*, which provided that in the  
12 Exemption 7(E) context, the agency must provide two sets  
13 of information. First, it must describe with some  
14 specificity exactly what techniques and procedures are at  
15 play and it must also explain how the document would  
16 disclose those techniques and procedures.

17           And I think one way to consider how this would  
18 apply in practice is to look at *Whitaker v. Department of*  
19 *Justice* which is actually a case that CBP cited in its  
20 own briefing, a district court for D.C. case. That  
21 case --

22           THE COURT: Let me --

23           MS. KIM: Yes, your Honor.

24           THE COURT: Let's stop there. So with respect  
25 to the law enforcement methods for inspecting travelers



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1 at ports of entry which was one of the sort of  
2 categories, if you will, of documents that were withheld  
3 under 7(E), Howard says CBP withheld under exemption  
4 (b)(7)(E) law enforcement techniques and procedures  
5 including officer instructions not generally known to the  
6 public that CBP uses at ports of entry for examination  
7 and inspection of international travelers. For example,  
8 CBP withheld instructions for CBP officers on specific  
9 topics for questioning travelers seeking admission into  
10 the United States, criteria CBP uses to determine which  
11 travelers require further scrutiny, inspecting  
12 individuals who are identified as posing a  
13 counterterrorism or national security risk, detecting  
14 fraudulent travel documents or identifying individuals  
15 who seek admission into the United States using  
16 fraudulent schemes, detecting individuals engaging in  
17 criminal activity such as human trafficking and alien  
18 smuggling or smuggling illegal substances.

19 CBP also withheld specific operational plans  
20 utilized at different ports of entry. If those are  
21 released, it would allow bad actors to work around CBP  
22 efforts to stop them. And it goes on in another  
23 paragraph.

24 How more specific do you want them to be?

25 MS. KIM: Your Honor, here the specificity

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1 question is about which documents would actually contain  
2 this information. This language is essentially  
3 meaningless because the declaration states that the  
4 withholdings in general contain this information, but it  
5 doesn't identify which specific documents include this  
6 information. And therefore, those descriptions fall  
7 entirely untethered to any of the withholdings. Nor are  
8 those descriptions mapped onto the index at all. So even  
9 though the index might list at least the documents  
10 withheld in full, the declaration doesn't identify which  
11 of the documents withheld in full in the index also map  
12 onto those descriptions.

13           We would also submit, your Honor, that in some  
14 instances those descriptions may not necessarily meet the  
15 reasonable specificity standard as the courts have  
16 explained in the Exemption 7(E) context. And again, I'd  
17 like to return to the example of *Whitaker v. Department*  
18 *of Justice* which is the District Court of D.C. case  
19 that's been cited by CBP repeatedly in its own briefing.

20           There what's notable is that the court actually  
21 rejected the agency's initial declaration as insufficient  
22 but the declaration there was significantly more detailed  
23 than the information that CBP has provided here. And  
24 there the court explained that again what the agency  
25 needs to explain is exactly what procedures are at stake,

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1 techniques and procedures, and how disclosure would  
2 reveal them. And there the agency explained that the  
3 withheld material would disclose results from a specific  
4 background check, the national agency check, and by  
5 disclosing those results would reveal the information  
6 that the FBI reviews when conducting the check and also  
7 information that the FBI would consider relevant to the  
8 check. And the court there stated that it was still  
9 unclear exactly what techniques and procedures were  
10 disclosed by releasing those results and exactly how  
11 disclosure would work. Were the techniques and  
12 procedures referenced directly by the withheld material  
13 or were they implicitly revealed by revealing the  
14 material?

15           And here, CBP has provided significantly less  
16 information. And in fact, in the declaration itself, the  
17 language that your Honor mentioned again is not pinned to  
18 any of the specific withholdings. So even if that  
19 language in and of itself could be reasonably specific,  
20 it must still indicate which of the withholdings itself  
21 contains that information.

22           One word note with respect to the declaration  
23 and index, your Honor, is that even though the index and  
24 the declaration address the documents withheld, even  
25 though the index at least lists the documents withheld in

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1 full, neither of the index nor the declaration at all the  
2 partially withheld documents. And CBP has argued that  
3 there's no need to describe them or justify any of the  
4 redactions contained within them because plaintiffs  
5 actually have the documents. But this was an argument  
6 that was explicitly rejected by the Second Circuit in  
7 *Halpern*. There the court found that the agency's  
8 declaration was deficient in part because there was no  
9 contextual description either of the document subject to  
10 redaction or the specific redactions made to the various  
11 documents and it argued that the agency had to submit an  
12 itemized description of the context of specific  
13 redactions. So CBP's failure to provide any description  
14 or explanation of those documents also falls afoul of  
15 *Halpern*.

16 I'd like your Honor now to turn to Exemption  
17 7(E) and illustrate how the inadequacies of the  
18 declaration and index just explained permeate analysis of  
19 this specific exemption. And I'd like to walk the Court  
20 through two elements of CBP's burden in the Exemption  
21 7(E) context.

22 First, the requirement that the withholdings  
23 reveal techniques and procedures of guidelines. And I  
24 hope here perhaps to further buttress the response that I  
25 provided to your question earlier.

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1           And then second, I'd like to walk also through  
2 CBP's burden of demonstrating that the disclosure of the  
3 withholdings would risk circumvention of the law.

4           With respect to demonstrating that the  
5 withholdings reveal techniques and procedures or  
6 guidelines, CBP fails here because in many cases  
7 throughout the index the agency simply repeats the  
8 language of the exemption itself in describing the  
9 withheld document. And plaintiffs here would point the  
10 Court to notable examples at documents 4, 16, 28, and 29  
11 of the Vaughn Index. In those examples, the agency  
12 essentially says nothing more than the information would  
13 reveal law enforcement techniques and procedures. And  
14 courts have established that this near verbatim  
15 recitation of the statutory standard fails reasonable  
16 specificity.

17           And again, I would point the Court to *Citizens*  
18 *For Responsibility and Ethics in Washington*, the D.C.  
19 Circuit case. There the court rejected a similar  
20 declaration by DOJ which simply stated that the withheld  
21 material contained techniques and procedures used by the  
22 FBI during the investigation. And again in that case, as  
23 mentioned, the D.C. Circuit explained that there are  
24 really two elements that the agency must explain when  
25 describing withheld information in the Exemption 7(E)

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1 context. Number one, what procedures are at stake and  
2 number two, how disclosure could reveal such procedures.  
3 And the examples that the court cited to there where the  
4 agencies had submitted sufficient information were quite  
5 instructive.

6           So in one example the court pointed to a case  
7 where the FBI had properly withheld procedures which  
8 describe the forensic examination of a computer. And in  
9 another example, the court provided the IRS had withheld  
10 information related to settlement strategies, assessments  
11 of litigating hazards, and acceptable ranges for  
12 settlement. And plaintiffs believe that those examples,  
13 you know, set against those examples, CBP's near verbatim  
14 recitation of the statutory standard across the  
15 withholdings in the Vaughn Index clearly fails.

16           And while it's CBP's burden to establish that  
17 the withholdings reveal techniques and procedures or  
18 guidelines, plaintiff had pointed in their briefing to  
19 several examples of withholdings where it does not appear  
20 on the face of those withholdings that they would reveal  
21 such techniques and procedures or guidelines.

22           And one example that plaintiffs would like to  
23 point the Court to is document number 11 in the Vaughn  
24 Index which is titled Culture and Religious Awareness  
25 Class. The purpose of this document is clearly to train

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1 TTRT officers on their cultural and religious competency.  
2 And there's really no obvious reason on the face of such  
3 a document why this training material should reveal  
4 techniques and procedures or guidelines. And plaintiffs  
5 would also like to note that CBP actually disclosed a  
6 quite similar document in another litigation which it  
7 cited repeatedly throughout its briefing. That's  
8 *American Immigration Lawyers Association v. DHS*, (D.D.C.  
9 2020). There the requestor sought disclosure of a CBP  
10 reference manual detailing CBP policies and procedures.  
11 And amongst the disclosures that CBP actually provided in  
12 that litigation was a memo entitled Processing of  
13 Passengers with Religious, Cultural, or Privacy  
14 Considerations. That memo obviously bears a striking  
15 similarity to the document that plaintiffs have pointed  
16 to here and undermines the argument that CBP should have  
17 withheld this document in its entirety.

18           The briefing provides numerous other examples  
19 where plaintiffs believe that on their face the documents  
20 do not appear to reveal techniques and procedures or  
21 guidelines. Plaintiffs would point the Court to pages 15  
22 to 19 of its brief in support of its motion for summary  
23 judgment. And significantly in the briefing, CBP has  
24 offered no rebuttal whatsoever to these specific  
25 examples.

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1           In addition to demonstrating that the withheld  
2 information must reveal techniques and procedures or  
3 guidelines, CBP must, but also fails to establish that  
4 disclosing the withheld information would risk  
5 circumvention of the law which is the standard CBP  
6 concedes must apply across all of its Exemption 7(E)  
7 withholdings because it has failed to differentiate  
8 between techniques and procedures and guidelines.

9           And as noted earlier in the discussion  
10 regarding CBP's use of identical boilerplate language for  
11 every single withholding, plaintiffs noted that courts  
12 have specifically rejected the boilerplate that CBP  
13 offers as insufficient in the Exemption 7(E) context to  
14 demonstrate that disclosure would risk circumvention of  
15 the law. And I believe I pointed the Court there to *ACLU*  
16 *v. ODNI* (SDNY 2011) where the FBI provided a nearly  
17 identical justification for withholding material under  
18 Exemption 7(E), namely that disclosure would enable  
19 individuals to develop countermeasures. And the Court  
20 described that as a generic assertion and boilerplate  
21 insufficient to carry the agency's burden.

22           Again, while it's CBP's burden to establish the  
23 risk of circumvention of the law, in their briefing  
24 plaintiffs have also cited to several examples of  
25 withholdings where it's also clear on their face that



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1 disclosure would not entail such risks. And here the  
2 plaintiffs would point the Court to the example of  
3 document number five entitled TTRT Officer Reference Job  
4 Aid 2020 which appears to be a reference manual for TTRT  
5 officers. And plaintiff's believe that disclosure would  
6 not risk circumvention of the law is compellingly  
7 demonstrated by CBP's disclosure of substantial portions  
8 of an analogous reference manual. Again, in *American*  
9 *Immigration Lawyers Association v. DHS*, a case repeatedly  
10 cited by CBP in its own briefing, there the requestor  
11 sought what was called an officer's reference tool which  
12 are described as a comprehensive how-to manual detailing  
13 CBP policies and procedures. And over the course of that  
14 litigation, CBP ended up producing approximately 400  
15 documents consisting of memos and mustards and standard  
16 operating procedures.

17           And what's notable here is that many of those  
18 documents seem to have included interpretation or  
19 application of the laws and regulations governing CBP  
20 activities as would be reasonable for a reference manual.  
21 And the disclosure of that kind of information is  
22 consistent with findings by courts that such descriptions  
23 of laws and regulations governing CBP activities cannot  
24 be subject to Exemption 7(E). And here the plaintiffs  
25 would point the Court, as an example, to *Knight First*

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1 *Amendment Institute v. DHS* (SDNY 2019) where the  
2 requestor also sought similarly a reference manual.  
3 There are sections of the State Foreign Affairs Manual  
4 relating to how to enforce the grounds for admissibility  
5 including situations that might trigger a check for  
6 terrorism related ineligibilities. And the court there  
7 said that that information had to be disclosed because it  
8 included the interpretation and application of laws and  
9 regulations, and that's just not protected under  
10 Exemption 7(E). And it also specifically rejected the  
11 argument that bad actors could use this information to  
12 circumvent security checks to enter the U.S. and noted  
13 that it was unclear how revealing the grounds for  
14 admissibility could help circumvention of the law.

15           And here at the document, going back to the  
16 document which I pointed the Court two, number 5, TTRT  
17 Officer Reference Job Aid, this document is also clearly  
18 a reference manual. We believe on that basis it's also  
19 likely to contain interpretation and application of laws  
20 and regulations. And the fact that CBP has already  
21 disclosed substantial portions of an analogous reference  
22 manual seems to suggest that this manual also is not  
23 reasonably subject to Exemption 7(E).

24           Again, plaintiffs have provided in their  
25 briefing numerous other examples of documents and

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1 information withheld where it seems clear that their  
2 disclosure would not risk circumvention of the law and  
3 that's contained in pages 19 to 21 of plaintiff's brief  
4 in support of its motion for summary judgment. Again  
5 significantly, CBP has offered no rebuttal to those  
6 specific examples.

7 I'd like to conclude by offering plaintiff's  
8 view on how we believe the Court should respond to CBP's  
9 failures at summary judgment.

10 The law is clear at summary judgment the agency  
11 bears the burden of demonstrating that its withholdings  
12 fall within the claimed exemptions. Neither the  
13 declaration or the index address the withholdings with  
14 the specificity required by law. Nevertheless, the  
15 agency has defended that declaration and index over six  
16 months of briefing. And the legal consequence of the  
17 agency's failure should be for it to disclose the  
18 withholdings. And we would respectfully request the  
19 Court order CBP to do so.

20 However, if the Court is not prepared to order  
21 disclosure of the challenged withholdings at this stage,  
22 plaintiffs submit that the most efficient and effective  
23 alternative would be for the Court to review the  
24 withholdings in camera. Upon such review, the Court may  
25 be able to order the disclosure, the challenged

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1 withholdings and order their disclosure in its entirety  
2 with full confidence. It may also be able to identify  
3 specific questions to pose to CBP to address, or it may  
4 wish to order CBP to conduct a reasonable segregability  
5 analysis across all or some portion of the withholdings.

6 Plaintiffs submit that the Court would know  
7 which avenue is most appropriate by looking directly at  
8 the documents. And if it were to, for example, permit  
9 CBP to submit further declaration or further information  
10 at this stage without directly looking at the documents  
11 in camera, the parties could easily return in a few  
12 months litigating the same issues with marginally more  
13 information.

14 So plaintiffs submit that even though we  
15 believe that the legal consequence of CBP's failure  
16 should be for it to disclose the challenged withholdings  
17 in their entirety, it would be most efficient for the  
18 Court, if it's unprepared to do so at this stage, to look  
19 directly at the documents in camera as that would ensure  
20 and guarantee some progress in the litigation at this  
21 stage. Thank you, your Honor.

22 THE COURT: Ms. Mahoney, would you like to  
23 respond?

24 MS. MAHONEY: Yes, just briefly, your Honor.  
25 One thing we're sort of losing a little focus

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1 of here is what exactly the tactical terrorism response  
2 teams do. They're specially trained in counterterrorism  
3 response. They're responsible for examining travelers  
4 who want to enter the United States to make sure our  
5 borders remain safe. They work with information  
6 available in the terrorist screening database and other  
7 information as provided to them by analysts, information  
8 and techniques they have garnered through their training  
9 and their experience.

10           The documents that plaintiffs are seeking are  
11 essentially -- well initially they wanted pretty much  
12 everything about the tactical terrorism response teams.  
13 Now they're looking -- you know, these documents,  
14 although they're claiming they're not identified on the  
15 Vaughn index, there is a description. And I guess maybe  
16 I've been in government too long because I can glean what  
17 these documents are fairly easily, they're about  
18 training. They're data. They're records concerning  
19 targeting. And the agency's declaration made clear the  
20 harms that would be encountered if this kind of  
21 information is made public. It's going to totally thwart  
22 the tactical terrorism response teams and CBP itself from  
23 effectuating its operational needs and it's operations  
24 that it needs to carry out in order to protect the  
25 borders of this country.

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1           And I disagree with counsel that these  
2 submissions by the government are insufficient. And  
3 again, maybe I've been in government too long being able  
4 to say well, reading that this is a training, reading  
5 that it's a PowerPoint, seeing what it is with regard to  
6 the redacted documents tells me what's in the markings up  
7 as to what the exemptions are tells me what's there.  
8 Tells me, well not the specifics of it because again, we  
9 have to work a very very fine line between disclosing  
10 this information and keeping it protected. And counsel  
11 may not like the fact that in their opinion insufficient  
12 information has been given. The government does not  
13 agree. The government has been as careful as it could be  
14 to describe what these materials are, what the harms  
15 would be. And there's five different categories of types  
16 of information. Your Honor read off the most important  
17 one about the law enforcement methods for inspecting  
18 travelers at port of entry. And each of those concerns  
19 and each of those activities should be protected.

20           The information relating to targeting also  
21 relates to that. There's a couple of the others go with  
22 the systems that are used by CBP for tracking information  
23 and databases and I think we all know with recent  
24 incidents how important it is to protect our government  
25 databases to the extent possible and to keep them from

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1 any hackers, not just people who are looking to thwart  
2 CBP's mission.

3 CBP has said from the beginning that if your  
4 Honor wants to see the materials, they would like to  
5 produce them. If your Honor wants more information in a  
6 more detailed declaration that can't be made public, they  
7 would like to submit something. But we would say that we  
8 believe that on papers that have been submitted, CBP has  
9 met its burden showing that the materials that were  
10 withheld are protected under Exemption 7(E).

11 THE COURT: Okay. Ms. Kim, do you have  
12 anything else?

13 MS. KIM: Yes, your Honor. I'd just like to  
14 briefly respond to several of the points made by  
15 government's counsel.

16 First, I think the government relies a lot on  
17 what we would admit is scary language, the use of the  
18 word terrorism in the tactical terrorism response team's  
19 title, the fact that CBP is a law enforcement agency that  
20 works to help secure our borders.

21 But first of all, I think that throwing those  
22 words around, while it's scary, that language is belied a  
23 bit by what we actually know about TTRTs which is that  
24 they target travelers from whom they have no pre-existing  
25 suspicion or underlying factual basis to believe they

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1 pose a security threat.

2           But in addition, I'd like to emphasize again  
3 that it's not enough that CBP is a law enforcement agency  
4 or that the specific unit has terrorism in the title.  
5 The label of the unit, the label of the agency is not  
6 enough to exempt information. What the Court must do is  
7 look to the substance of the specific withholdings and  
8 explain why those specific withholdings fall within the  
9 exemptions. And I think it's notable here, your Honor,  
10 that again the government falls back on these broad  
11 categories in its declaration which as mentioned are not  
12 tied to any of the specific withholdings at all nor are  
13 they mapped in any way to the index which in any event on  
14 its own is not enough to sufficiently describe the  
15 withholdings or to sufficiently justify them.

16           And again also in describing the documents,  
17 your Honor, the government states in some cases that  
18 their training materials are PowerPoints. I mean those  
19 descriptions in and of themselves clearly fail to  
20 demonstrate that the withholdings fall into the specific  
21 exemption that the government has claimed where it must  
22 demonstrate with reasonable specificity that the  
23 documents are either techniques and procedures or  
24 guidelines and that they would risk circumvention of the  
25 law.



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1 THE COURT: So what if they would submit a  
2 revised Vaughn Index that said that this PowerPoint, I  
3 don't know which document it is on the Vaughn Index,  
4 contains law enforcement techniques, training and all of  
5 the other buzzwords. That still wouldn't be enough for  
6 the plaintiffs.

7 MS. KIM: I think your --

8 THE COURT: You would want them to explain  
9 exactly what techniques and things like that. Correct?

10 MS. KIM: Your Honor, yes. I think --

11 THE COURT: Thereby disclosing protected  
12 information.

13 MS. KIM: I think, your Honor, there are myriad  
14 examples where both CBP and other agencies have provided  
15 enough information to give the Court a sense, and the  
16 requestor a sense of what techniques and procedures are  
17 at stake without revealing the sensitive nature, or the  
18 purported sensitive nature, of the techniques and  
19 procedures.

20 And just as one example, your Honor, I would  
21 cite the case of *Bishop v. Department of Homeland*  
22 *Security* which is a case that CBP actually cited in its  
23 briefing. CBP contends, for example, that it's enough to  
24 say that the information would reveal internal CBP  
25 databases and codes. In *Bishop v. Department of Homeland*

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1 *Security*, there the agency actually redacted the data  
2 fields resulting from the searches of specific passengers  
3 on the CBP text and automated targeting system databases.  
4 I think what's notable in that case was the agency had no  
5 qualms whatsoever identifying specific systems it was  
6 using noting the type of information that it was refusing  
7 to disclose. And finally, the agency understood that it  
8 could only redact some of that information. It couldn't  
9 withhold the material in its entirety.

10 I think that gives you an example, your Honor,  
11 of the type of specificity that the agency can strive for  
12 and has obviously failed to do so here without revealing  
13 the sensitive nature, or the purported sensitive nature  
14 of the techniques and procedures at issue.

15 THE COURT: Okay.

16 MS. KIM: No, your Honor, I was actually going  
17 to cite the case of *Bishop v. DHS* in rebuttal just as an  
18 example of the type of specificity that the agency has  
19 obviously failed to meet here.

20 I think, sorry, my apologies, your Honor, I  
21 don't I answered your question about -- there was a  
22 portion of your question about why you couldn't simply  
23 ask the agency to submit an additional Vaughn Index. And  
24 plaintiffs would note that practically speaking, if the  
25 Court were simply to order CBP to submit a new

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1 declaration or a new Vaughn Index, again we could easily  
2 return in a few months litigating the same issues with  
3 marginally more information. And as noted we believe it  
4 will be most efficient and effective for the Court to  
5 simply review the withholdings in camera as an  
6 alternative to having CBP submit further information.

7           And we would also argue that this makes sense  
8 on principle because FOIA does not contemplate that CBP  
9 can submit any declaration no matter how vague or  
10 conclusory and that the Court will automatically grant it  
11 a second bite at the apple especially after it's had the  
12 benefit of seeing plaintiff's arguments in the briefing.  
13 This would produce an unsustainable tension with the  
14 agency's burden at summary judgment. It would also be  
15 fundamentally unfair that CBP's failure should work to  
16 its own advantage after having seen all the arguments to  
17 then be able to craft its declaration and index in  
18 response to those arguments.

19           And finally, it would incentivize the agencies  
20 to drag out litigation if they were simply allowed to put  
21 in any type of declaration whatsoever and know that the  
22 courts would essentially allow them to submit another  
23 declaration. And here specifically the submission of  
24 more information really comes much too late to be  
25 justifiable. Plaintiffs identified the challenged

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1 withholdings last August. The agency has defended the  
2 declaration and index over six months of briefing and has  
3 had numerous opportunities to sufficiently address the  
4 withholdings including if it wanted to by submitting  
5 additional information in opposition to plaintiff's  
6 motion for summary judgment.

7 THE COURT: Give me one second.

8 (Pause in proceedings)

9 THE COURT: So you want me to look at 850 pages  
10 of documents. That's what you want me to do. And figure  
11 it out myself.

12 MS. KIM: Your Honor, we did anticipate that it  
13 might make sense to point to a representative sample  
14 where the Court could focus at least its initial  
15 attention. And that representative sample that we would  
16 point to would be documents number 5, 11, 28, and 30 of  
17 the Vaughn Index. And amongst the partially redacted  
18 documents, a PowerPoint presentation located at pages 43  
19 to 61 of Exhibit H of CBP's declaration.

20 THE COURT: What was that again?

21 MS. KIM: Pages 43 to 61.

22 THE COURT: Hold on.

23 MS. KIM: My apologies, your Honor. Should I  
24 begin with the documents withheld in full?

25 THE COURT: 5, 11, 28, and 30.

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1 MS. KIM: Yes, your Honor.

2 THE COURT: Correct? Then what's the  
3 PowerPoint?

4 MS. KIM: At pages 43 to 61 of Exhibit H of the  
5 CBP declaration.

6 THE COURT: Ms. Mahoney, are there any -- so I  
7 don't have to look at 850 pages of documents, are there  
8 any in particular that the government would like me to  
9 focus on to see if the declaration and the Vaughn index  
10 are sufficient?

11 MS. MAHONEY: I don't know, your Honor. I  
12 wasn't looking at this with that eye. I can ask and  
13 consult with CBP if you'd like. You know, we would not  
14 say everything else.

15 THE COURT: I would hope not. Why don't you do  
16 that and by the end of this week let me know which  
17 documents it is you want me to look at and focus on. I  
18 will take an in camera review of them and what the  
19 plaintiffs have cited to and make my conclusion.

20 I will ask you, Ms. Mahoney, to provide paper  
21 copies of the documents. I don't want to look at them on  
22 my computer. All right? Both paper copies -- obviously  
23 you're the one with the documents so you have to give me  
24 everything. And you can follow up with the documents  
25 themselves by the following Wednesday. And if you want

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1 to arrange to have them handed to me, we can do that as  
2 well.

3 MS. MAHONEY: Okay.

4 THE COURT: All right? And I'll reserve  
5 decision.

6 MS. KIM: Thank you, your Honor.

7 THE COURT: Okay? Anything else?

8 MS. KIM: No, your Honor.

9 THE COURT: All right. Thank you.

10 MS. KIM: Thank you.

11 (Matter concluded)

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C E R T I F I C A T E

I, MARY GRECO, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 21st day of March, 2022.

  
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