

SLR:SDE:KMA; 2019V03293

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

CLEAR, AMERICAN CIVIL LIBERTIES UNION,
and AMERICAN CIVIL LIBERTIES FOUNDATION,

Plaintiffs,

Civil Action No. 19-CV-07079

-against -

(Reyes, M.J.)

UNITED STATES CUSTOMS AND BORDER
PROTECTION,

Defendant.

-----X

MEMORANDUM OF LAW IN FURTHER SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION
FOR SUMMARY JUDGMENT

SETH D. DuCHARME
Acting United States Attorney
Eastern District of New York
271-A Cadman Plaza East, 7th Floor
Brooklyn, New York 11201
January 21, 2021

KATHLEEN A. MAHONEY
Assistant U.S. Attorney
(Of Counsel)

TABLE OF CONTENTS

PRELIMINARY STATEMENT.....1

ARGUMENT.....2

PLAINTIFFS ARE NOT ENTITLED
TO ANY RELIEF UNDER THE FOIA

A. CBP Adequately Supported its Withholdings and Redactions.3

B. CBP Properly Asserted Exemption 7(E)..... 5

1. CBP Has Met the Threshold Requirements of Exemption 7.....6

2. The Withheld Materials Are Exempt Under 5 U.S.C. § 552(b)(7)(E).....8

3. Disclosure of the Withheld Materials Risks Circumvention of the Law.....10

C. CBP Properly Asserted Exemption 3.....13

D. CBP Released the Reasonably Segregable Information..... 14

CONCLUSION.....16

TABLE OF AUTHORITIES

Cases

Allard K. Lowenstein International Human Rights Project v. Department of Homeland Security, 626 F.3d 678 (2d Cir. 2010)10

American Civil Liberties Union v. U.S. Department of Justice, 901 F.3d 125 (2d Cir. 2019).....2

American Immigration Lawyers Association v. U.S. Department of Homeland Security, 2020 WL 5231336 (D.D.C. Sept. 2, 2020).....4, 5, 7, 13

Beechwood Restorative Care Center v. Leeds, 436 F.3d 147 (2d Cir. 2006).....14

Bishop v. U.S. Department of Homeland Security, 45 Fed. Supp. 3d 380 (S.D.N.Y. 2014).....3

Blackwell v. Federal Bureau of Investigation, 646 F.3d 37 (D.C. Cir. 2011).....10, 11

Brennan Center for Justice at New York University School of Law v. Department of Homeland Security, 331 F. Supp. 3d 74 (S.D.N.Y. 2018).....6, 8

Campbell v. U.S. Department of Justice, 164 F.3d 20 (D.C. Cir. 1998).....6

Carney v. U.S. Department of Justice, 19 F.3d 807 (2d Cir. 1994)2

Clevenger v. U.S. Department of Justice, 2020 WL 1846565 (E.D.N.Y. Apr. 3 2020).....14

Cruz v Liberatore, 582 F. Supp. 2d 508, 522 (S.D.N.Y. 2008).....14

Doherty v. U.S. Department of Justice, 775 F.2d 49, 52 (2d Cir. 1985).....5

Gonzalez v. U.S. Citizenship and Immigration Services, 2020 WL 4343872 (S.D.N.Y. July 29, 2020).....5

Grand Central Partnership, Inc. v. Cuomo, 166 F.3d 473 (2d Cir. 1999).....3

Inner City Press/Community on the Move v. Board of Governors of the Federal Reserve System, 463 F.2d 239 (2d Cir. 2006).....14

John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989).....6

<i>Local 3, International Brotherhood of Electrical Workers, AFL-CIO v. National Labor Relations Board</i> , 845 F.2d 1177 (2d Cir. 1988).....	5
<i>Mayer Brown LLP v. Internal Revenue Service</i> , 562 F.3d 1190 (D.C. Cir. 2009).....	11, 13
<i>Mead Data Central, Inc. v. U.S. Dep’t of Air Force</i> , 566 F.2d 242 (D.C. Cir. 1977).....	14, 15
<i>Montgomery v. Internal Revenue Service</i> , 2021 WL 39605 (D.D.C. Jan. 5, 2021).....	5
<i>New York Times Company v. U.S. Department of Justice</i> , 939 F.3d 479 (2d Cir. 2019).....	6
<i>Robbins Geller Rudman & Down LLP v. U.S. Securities and Exchange Commission</i> , 419 F. Supp. 3d 523 (E.D.N.Y. 2019).....	6
<i>Schneider v. U.S. Department of Justice</i> , 2020 WL 6318407 (D.D.C. Oct. 28, 2020).....	11
<i>Whittaker v. U.S. Department of Justice</i> , 2020 WL 6075681 (D.D.C. Oct. 15, 2020).....	4, 5
<i>Williams v. Federal Bureau of Investigation</i> , 730 F.2d 882 (2d Cir. 1984).....	6

Statutes

5 U.S.C. § 552.....	1
5 U.S.C. § 552(a)(4)(B)	4
5 U.S.C. § 552(b)	14
5 U.S.C. § 552(b)(3)	2, 13, 14
5 U.S.C. § 552(b)(7).....	6
5 U.S.C. § 552(b)(7)(E)	2, 8
6 U.S.C. § 211(c).....	7
6 U.S.C. § 211(g).....	7
50 U.S.C. § 3024(i).....	13, 14

Rules

Fed. R. Civ. P. 56.....	1
Local Civil Rule 56.1.....	1
Local Civil Rule 56.1(b).....	1
Local Civil Rule 56.1(c).....	1
Local Civil Rule 56.1(d).....	1

PRELIMINARY STATEMENT

Defendant United States Customs and Border Protection (“CBP”) respectfully submits this memorandum of law in further support of its motion for summary judgment and in opposition to Plaintiff’s cross-motion for summary judgment in this action brought under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.

This action arises out of Plaintiff’s FOIA request dated November 7, 2019, which sought ten numbered categories (with subcategories) of agency records pertaining to CBP’s Tactical Terrorism Response Teams (“TTRTs”).¹ Plaintiffs filed this action five weeks after submitting the FOIA request.² CBP conducted a thorough search for responsive records and provided interim responses. In the end, 1,726 pages of responsive records were located, and CBP released 875 pages to Plaintiffs either in full or with portions redacted pursuant to various FOIA exemptions, and withheld 32 documents (851 pages) in full. *See* Def. 56.1 ¶¶ 6-8, 10-12; *see also* Howard Decl. Ex. C to Ex. L, Ex. M.³ After receipt of CBP’s final response, Plaintiffs indicated that they disputed CBP’s withholding in full of 16 documents and redaction of portions of 93 pages (in ten documents) responsive to their FOIA request. *See* Declaration

¹ *See* Defendant’s Statement Pursuant to Local Civil Rule 56.1 (“Def. 56.1”) ¶ 3; Plaintiffs’ Response to Defendant’s Statement of Facts Pursuant to Local Civil Rule 56.1 ¶ 3. Defendant notes that Plaintiffs’ disputes with the undisputed facts in Defendant’s 56.1 Statement are disagreements with CBP’s application of the legal standards and not actual factual disputes. Plaintiffs did not cite to admissible evidence establishing a dispute of fact as required by Fed. R. Civ. P. 56(c) and Local Civil Rule 56.1(d) and, therefore, Defendants’ statements are deemed admitted pursuant to Local Civil Rule 56.1(c). Plaintiffs did not provide their own Local Rule 56.1(a) statement with their cross-motion.

² CBP received 86,133 FOIA requests in 2019, and processed 88,230 requests. Declaration of Patrick Howard dated October 16, 2020 (“Howard Declaration”) ¶ 11.

³ Exhibit M to the Howard Declaration is the “*Vaughn* index” that CBP provided to Plaintiffs on August 14, 2020. *See* Def. 56.1 ¶ 12.

of Assistant U.S. Attorney Kathleen A. Mahoney dated October 23, 2020 (“AUSA Mahoney Declaration”) Ex. B at 1, 5.

The Memorandum of Law in Support of Defendant’s Motion for Summary Judgment (“Defendant’s Memorandum”) demonstrated that Plaintiffs are not entitled to any relief under the FOIA because CBP properly asserted FOIA Exemptions 3 and 7(E), 5 U.S.C. §§ 552(b)(3) & (7)(E), with respect to the challenged withholdings, and did not improperly withhold responsive records.⁴ Plaintiffs’ Memorandum of Law in Support of Cross-Motion for Summary Judgment and in Opposition to Defendant’s Motion for Summary Judgment (“Plaintiff’s Memorandum”) fails to show that CBP did not properly assert FOIA Exemptions 3 and 7(E). Plaintiffs’ arguments are posturing with little to no substance. Accordingly, CBP is entitled to summary judgment dismissing this action.

ARGUMENT

PLAINTIFFS ARE NOT ENTITLED TO ANY RELIEF UNDER THE FOIA

CBP provided reasonable explanations for why the withheld documents and information fall within FOIA Exemptions 3 and 7(E), and is entitled to summary judgment dismissing this action. *See American Civil Liberties Union v. U.S. Department of Justice*, 901 F.3d 125, 133-34 (2d Cir. 2018) (The agency’s justification is sufficient if it appears logical and plausible); *Carney v. U.S. Department of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) (“Affidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonable explanations why any withheld documents fall within

⁴ Defendant reserved the right to respond to any other arguments or challenges that Plaintiffs might present in their cross-motion. Def. Mem. at 6 n.2.

an exemption are sufficient to sustain the agency's burden."); *see Bishop v. U.S. Department of Homeland Security*, 45 Fed. Supp. 3d 380, 387 (S.D.N.Y. 2014) ("The issue before us is whether DHS has provided reasonably detailed explanations that justify its reliance on Exemption 7(E)." (internal quotation marks and citation omitted)). Plaintiffs have not rebutted the presumption of good faith accorded to the agency declaration or provided tangible evidence that summary judgment is otherwise inappropriate. *See Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999) (citations omitted); *Carney*, 19 F.3d at 812 (citations omitted). As shown below, Plaintiffs offer, at most, only an unconvincing attack on the agency's supporting declaration and speculation about the withheld materials.

A. CBP Adequately Supported its Withholdings and Redactions

Plaintiffs devote much argument to what they view as deficiencies in CBP's supporting declaration (the Howard Declaration) and *Vaugh* index. See Pls. Mem. at 1, 7-12; *see also id.* at 19, 20, 23-24. These arguments are unavailing.

Plaintiffs' assertion that the declaration is "completely untethered" from the withholdings essentially is a disagreement with how CBP chose to structure the declaration. *See* Pls. Mem. at 8-9. The reasons for the challenged withholdings of documents withheld in their entirety or in part (redacted) are set forth in paragraphs 43-51 of the Howard Declaration.⁵ The applicability of these withholdings is further explicated in Defendant's Memorandum at 6-20.

⁵ Plaintiff pettily points out that the Howard Declaration (¶¶ 32-42) also included FOIA exemptions that they are not challenging. Pl. Mem. at 8. CBP's supporting declaration provided this discussion as part of its complete recitation about the processing of Plaintiffs' FOIA request.

In addition, Plaintiffs' assertion that the *Vaughn* index does not "save" the "inadequate" declaration because it did not include the redacted documents is disingenuous. *See* Pls. Mem. at 10-11. The *Vaughn* index listed only the documents withheld in full because that is what was agreed to by the parties. *See* Dkt. #17 at 2. In any event, Plaintiffs have the partially redacted documents and should not require "contextual descriptions" of them. *See* Def. 56.1 ¶¶ 7-9; Howard Decl. Ex. D, Ex. F, Ex. H.

Plaintiffs fail to acknowledge that disclosing more specific details in the declaration about the contents of the withheld documents and information would defeat the purposes of the asserted FOIA exemptions. In order to avoid revealing the techniques and procedures and guidelines being withheld, CBP is constrained from providing precisely detailed descriptions in publicly available filings. Howard Decl. ¶ 43; *see American Immigration Lawyers Association v. U.S. Department of Homeland Security*, No. 16-CV-02470 (TNM), 2020 WL 5231336, at *4 (D.D.C. Sept. 2, 2020) ("*AILA*") (CBP "must walk a fine line" and "cannot reveal the details of these techniques and procedures because doing so would allow those seeking to circumvent [the law] to extrapolate what to avoid and how to prepare"); *see also Whittaker v. U.S. Department of Justice*, No. 18-CV-01434 (APM), 2020 WL 6075681, at *3 (D.D.C. Oct. 15, 2020) ("The FBI applies a categorical withholding policy in part because revealing the underlying information could compromise the techniques and procedures that produce that information.").

Contrary to Plaintiffs' contention, CBP's offer to submit unredacted copies of the disputed materials to the Court for *in camera* review was not improper. *See* Pls. Mem. at 10-11. It is within the Court's discretion to determine whether to conduct *in camera* review of the documents withheld, in whole or part. *See* 5 U.S.C. § 552(a)(4)(B) (the court "may examine

the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions”); *see also Local 3, International Brotherhood of Electrical Workers, AFL-CIO v. National Labor Relations Board*, 845 F.2d 1177, 1180 (2d Cir. 1988) (“*In camera* review is considered the exception, not the rule, and the propriety of such review is a matter entrusted to the district court’s discretion.” (citations omitted)); *Doherty v. U.S. Department of Justice*, 775 F.2d 49, 52 (2d Cir. 1985) (“Congress left it to the Court’s discretion to determine whether or not to undertake *in camera* review.”). However, *in camera* review is unnecessary if the agency has met its burden of proof by means of a sufficiently detailed declaration or affidavit. *See Local 3*, 845 F.2d at 1180.

Similarly, if the Court determines that it requires additional information, it may ask for it or give CBP an opportunity to provide a supplemental declaration.⁶ *See, e.g., AILA*, 2020 WL 5231336, at *1 (The court ordered the Government to file a supplemental declaration and produce a *Vaughn* index); *see also Montgomery v. Internal Revenue Service*, No. 17-918 (JEB), 2021 WL 39605, at *4 (D.D.C. Jan. 5, 2021) (“the IRS relies on an array of declarations submitted over the course of this litigation”); *Whittaker*, 2020 WL 6075681 (granting renewed motion for summary judgment based on submission of supplemental declaration).

B. CBP Properly Asserted Exemption 7(E)

As set forth in Defendant’s Memorandum at 6-7, FOIA Exemption 7 applies to records or information compiled for law enforcement purposes. Information falling within any

⁶ CBP notes that if the Court determines that it requires additional information, the submission may need to be made *ex parte*. *See, e.g., Gonzalez v. U.S. Citizenship and Immigration Services*, 475 F. Supp. 3d 334, 345 (S.D.N.Y. 2020) (“There is a sound basis in this case for the Government’s submission of supplemental declarations and a *Vaughn* index ex parte and in camera based on the nature of the documents withheld and the nature of the FOIA Exemptions asserted.”).

subsection of Exemption 7 is “given absolute protection as a consequence of Congress’ judgment that the efficient operation of federal law enforcement agencies would be impaired by the disclosure of such information.” *Williams v. Federal Bureau of Investigation*, 730 F.2d 882, 885 (2d Cir. 1984). There is no requirement that records be compiled at a specific time, or that that they originally have been compiled for law enforcement purposes. *John Doe Agency v. John Doe Corporation*, 493 U.S. 146, 153-54 (1989). Where an agency specializes in law enforcement, its decision to invoke Exemption 7 is entitled to deference. *See Campbell v. U.S. Department of Justice*, 164 F.3d 20, 32 (D.C. Cir. 1998).

1. CPB Has Met the Threshold Requirement of Exemption 7

Contrary to Plaintiffs’ arguments (Pls. Mem. at 12-15), the information that CBP withheld (whether through redaction or withholding of the entire document) satisfies the threshold requirement of 5 U.S.C. § 552(b)(7) that it have been compiled for law enforcement purposes. *See John Doe Agency*, 493 U.S. at 148, 153. To show that documents qualify, the agency must establish “a rational nexus between the agency’s activity in compiling the records and its law enforcement duties.” *Brennan Center for Justice at New York University School of Law v. Department of Homeland Security*, 331 F. Supp. 3d 74, 97 (S.D.N.Y. 2018) (internal quotation marks and citation omitted). Plaintiffs’ restrictive interpretation of the statute notwithstanding (*see* Pls. Opp. at 13), courts construe the terms “law enforcement” and “compiled” as used in the FOIA broadly. *See Robbins Geller Rudman & Down LLP v. U.S. Securities and Exchange Commission*, 419 F. Supp. 3d 523, 531 (E.D.N.Y. 2019). In addition to matters related to criminal and criminal proceedings, law enforcement purposes include an agency’s proactive steps designed to prevent criminal activity and maintain security. *Id.* (collecting cases); *see also New York Times Company v. U.S. Department of Justice*, 390 F.

Supp. 3d 499, 513-15 (S.D.N.Y. 2019) (finding that correspondence generated in course of DOJ unit's performance of its core operational activities were records compiled for law enforcement purposes).

It cannot reasonably be disputed that the TTRTs are engaged in activities that have law enforcement purposes, including but not limited to the prevention of criminal activity and maintaining national security. CBP is a law enforcement agency charged with keeping terrorists and their weapons out of the United States while facilitating lawful international travel and trade. Def. 56.1 ¶ 1. *See* 6 U.S.C. §§ 211(c), (g). CBP's principal mission is to protect the borders, enforce federal immigration law, and facilitate international trade and travel. *See AILA*, 2020 WL 5231336, at *6. The officers who comprise the TTRTs are specifically trained in counterterrorism response and are responsible for examination of travelers arriving at the ports of entry into the United States who have been identified within the Terrorist Screening Database, as well as other travelers, their associates, or co-travelers, suspected of having a nexus to terrorist activity. Def. 56.1 ¶ 2; *see* Howard Decl. ¶ 18.

In responding to Plaintiffs' multipart FOIA request, CBP released hundreds of pages of records about TTRTs that did not fall within the protections of Exemption 7. However, CBP withheld the documents and information that would disclose investigative techniques and procedures, as well as guidelines that, if disclosed, would enable potential violators to circumvent the law, avoid detection and evade apprehension. Def. 56.1 ¶ 14; *see* Howard Decl. ¶ 44. Plaintiffs do not refute CBP's averment that it compiled the withheld materials for law enforcement purposes by showing that they in fact were not. Rather, Plaintiffs primarily repeat their meritless argument regarding purported deficiencies of the Howard Declaration and *Vaughn* index and offer only speculation as to the significance and contents of two documents

that were withheld in their entireties. Pls. Mem. at 14. However, the declaration and *Vaughn* index establish that all of the withheld documents and information -- including officer instructions for examining, inspecting and assessing international travelers, and information concerning databases and sharing and communicating law enforcement information -- fall squarely within the agency's law enforcement activities and the TTRTs' core operational activities. *See* Howard Decl. ¶¶ 45-49, Ex. M (*Vaughn* index; Def. 56.1 ¶¶ 15-19; *see also* Def. Mem. at 10-17.

2. The Withheld Materials Are Exempt Under 5 U.S.C. § 552(b)(7)(E)

Subsection (E) of FOIA Exemption 7 exempts from disclosure matters that are “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . 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). “Exemption 7(E) does not require withheld materials to be related to a particular investigation or prosecution.” *Brennan Center*, 331 F. Supp. 3d at 99 (citation omitted).

Without any factual basis, Plaintiffs assert that three “categories of information” that were withheld do not disclose law enforcement techniques and procedures or guidelines.⁷ Pls. Mem. at 15-19. Plaintiffs’ arguments are unavailing.

Plaintiffs dispute the withholding of what they categorize as “descriptions of legal authorities and safeguards,” maintaining that the statutes and rules under which the agency

⁷ In advancing this argument, Plaintiffs effectively concede that all other types of withheld information are law enforcement techniques and procedures or guidelines.

operates are not subject to Exemption 7(E). Pls. Mem. at 15-17. However, the items to which Plaintiffs cite are not merely legal citations; they are summaries or recitations of particular confidential internal guidelines, including portions of the “Watchlisting Reference Guide.” If disclosed, these materials would reveal information that is not generally known or publicly disclosed about the kinds of information that are considered important to the exercise of officer discretion and information about CBP’s priorities, which could enable individuals to thwart the agency’s efforts to execute its mission to secure the border of the United States and enforce customs and immigration laws and other federal laws that CBP enforces or administers. *See* Howard Decl. ¶¶ 47-48.

Plaintiffs also dispute the withholding of what they categorize as data and statistics. Pls. Mem. at 17-18. Plaintiffs challenge the redaction of: (1) names of the Ports of Entry from four documents, including the two newly identified ones;⁸ (2) several classes of admission and the numbers of encounters for all classes in one document; and (3) total numbers of exams conducted in two documents.⁹ *Id.* Although this information may be data, it is not statistics. In any event, disclosure of the information -- the locations where encounters with TTRTs occur, certain specific classes of admission examined, and the numbers of encounters -- would reveal sensitive information relating to targeting and operations, and would enable potential violators to take evasive actions, including avoiding or using other specific Ports of Entry, and thwart CBP’s future efforts to secure the border and enforce customs and immigration laws and other

⁸ Despite not having previously identified these two redacted documents as disputed, Plaintiffs now claim that they meant to challenge the redactions in these documents that were included CBP’s initial release dated March 13, 2020. Pls. Opp. at 4 n.3 and Appx. at 1; *see* Def. 56.1 ¶ 7.

⁹ The numbers of denials of admissions were not redacted. *See* Howard Decl. Ex. H at 20, 52.

federal laws that the agency enforces or administers. *See* Def. 56.1 ¶¶ 18, 19; *see also* Howard Decl. ¶¶ 45(iv), 45(v), 49.

The third disputed “category” encompasses a single document – a map of TTRT locations. Pls. Mem. at 18-19; *see* Howard Decl. Ex. M at 8 (Document 10). Plaintiffs argue that CBP improperly withheld this map showing where TTRTs operate because the map cannot reveal the tactics TTRTs employ to conduct investigations or a future policy. Pls. Mem. at 18-19. As stated in the *Vaughn* index, CBP withheld the map because it details the specific locations of certain TTRT enforcement teams and enforcement actions. Howard Decl. Ex. M at 8. Such information would reveal how TTRT law enforcement resources are employed and where they are focused. Further, the hearing testimony to which Plaintiffs cite states only that TTRTs are deployed at the 46 largest Ports of Entry; those specific locations are not, and have not been, identified.

In conclusion, the disputed redactions fall within scope of Exemption 7(E).

3. Disclosure of the Withheld Materials Risks Circumvention of the Law

Exemption 7(E) provides categorical protection to techniques and procedures (how law enforcement officials go about investigations) and guidelines (indications of how the agency allocates resources in planning future policy or conduct) if disclosure could reasonably be expected to risk circumvention of the law. *See Allard K. Lowenstein International Human Rights Project v. Department of Homeland Security*, 626 F.3d 678, 681-82 (2d Cir. 2010). *See also* Def. Mem. at 7-9. “Exemption 7(E) sets a relatively low bar for the agency to justify withholding.” *Blackwell v. Federal Bureau of Investigation*, 646 F.3d 37, 42 (D.C. Cir. 2011); *see also Schneider v. U.S. Department of Justice*, No. 18-CV-2294 (DLF), 2020 WL 6318407, at *4 (D.D.C. Oct. 28, 2020). Exemption 7(E) “looks not just for circumvention of the law, but

for a risk of circumvention; not just for an actual or certain risk, but for an expected risk; not just for an undeniably and universally expected risk, but for a reasonably expected risk; and not just for certitude of a reasonably expected risk, but for the chance of a reasonably expected risk.” *Blackwell*, 646 F.3d at 42 (citing *Mayer Brown LLP v. Internal Revenue Service*, 562 F.3d 1190, 1193 (D.C. Cir. 2009)).

In arguing that CBP has failed to establish that disclosing the withheld documents and information would risk circumvention of the law, Plaintiffs simply fall back on their ineffective argument concerning the adequacy of the Howard Declaration, maintaining that the description of the withheld information “make[s] it impossible to discern what risk, if any, disclosing such information would invite.” Pls. Mem. at 19-20. Plaintiffs ignore that their FOIA request specifically sought records about CBP’s law enforcement techniques and procedures and guidelines concerning TTRTs. The request asked for information about, *inter alia*, how TTRTs screen and/or target travelers for interview or inspection and compile information, their training, their effectiveness, and watchlists. *See* Def. 56.1 ¶ 3; Howard Decl. Ex. A.

As discussed in Defendant’s Memorandum at 10-17, most of the withheld documents and information concern CBP’s law enforcement methods for examination and inspection of travelers at ports of entry and information related to targeting (*i.e.*, assessing risk with respect to travelers seeking to enter the United States), and information regarding ongoing investigations or investigative techniques. *See* Howard Decl. ¶¶ 45(iv), 45(v), Ex. M; Def. 56.1 ¶¶ 18, 19. These materials include specific operational plans utilized at different ports of entry and officer instructions not generally known to the public regarding specific topics for questioning, criteria for determining which travelers require further scrutiny, inspecting individuals who are identified as posing a counterterrorism or national security risk, detecting

fraudulent travel documents, identifying individuals who seek admission into the United States using fraudulent schemes, and detecting individuals engaging in criminal activity. Def. 56.1 ¶ 18; Howard Decl. ¶ 45(iv). The other withheld documents and information concern CBP's law enforcement systems and training materials on how to use them. *See* Howard Decl. ¶¶ 45(i)-(iii).

As set forth in the Howard Declaration, disclosure of the withheld documents and information could risk law enforcement techniques and procedures. *See* Def. Mem. at 14-17. Disclosure would revealing the kinds of information CBP considers in conducting law enforcement activities, as well as CBP's priorities when conducting these activities. Howard Decl. ¶ 47. Disclosure would reveal the kinds of information that is considered important to the exercise of officer discretion, the relative weight given to the factors, and the types and location of information CBP gathers, analyzes and utilizes within such databases. *Id.* Disclosure would also reveal information about inspectional activities generally, such as the kind of information considered important to the exercise of officer discretion, and the relative weight given different factors. *Id.* Disclosure of this sensitive information pertaining to targeting and operations would have the unintended and undesirable effect of placing CBP's law enforcement techniques and strategies in the public domain. Howard Decl. ¶ 48. As a result, potential violators would be educated about the techniques used by the TTRTs, and enabled and assisted in devising methods to evade detection and apprehension; ultimately, the effectiveness of these law enforcement techniques would be impaired, and CBP's future efforts to secure the border and perform its core law enforcement functions would be thwarted. Howard Decl. ¶¶ 45(iv), 45(v), 48.

“Exemption 7(E) clearly protects information that would *train* potential violators to evade the law or *instruct* them how to break the law,” and “exempts information that could *increase the risks* that a law will be violated or that past violators will escape legal consequences.” *Mayer Brown*, 562 F.3d at 1193 (emphasis in original). To require disclosure of the very information that would create a risk that the law will be circumvented would be untenable. *See AILA*, 2020 WL 5231336, at *5.

In conclusion, the withheld documents and information fall squarely within the protection of Exemption 7(E), and CBP properly asserted the exemption.

C. CBP Properly Asserted Exemption 3

Plaintiffs maintain that CBP did not justify assertion of FOIA Exemption 3 to partially redact one document, the “Watchlisting Reference Guide.” Pls. Mem. at 22-25. CBP made the redactions pursuant to 50 U.S.C. § 3024(i) after consultation with the Office of the Director of National Intelligence (“ODNI”). Def. 56.1 ¶ 19; *see* Howard Decl. ¶¶ 51-52.

As set forth in Defendant’s Memorandum at 18, matters that are that specifically exempted from disclosure by statute (other than the Privacy Act) are exempted from disclosure by FOIA Exemption 3 if the statute affords the agency no discretion on disclosure, or establishes particular criteria for withholding information or refers to the particular types of materials to be withheld. 5 U.S.C. § 552(b)(3). Plaintiffs incorrectly assert that CBP lacked authority to assert Exemption 3 and that a declaration from ODNI is required.¹⁰ *See* Pls. Mem. at 22-23. The document at issue is a CBP document. However, because it contained information from ODNI, CBP consulted with ODNI for a disclosure determination regarding

¹⁰ ODNI is not a party to this action.

its information. Def. 56.1 ¶ 19; *see* Howard Decl. ¶ 50. Following consultations between CBP and ODNI, it was determined that the information was exempt from disclosure under 50 U.S.C. § 3024(i)(1) and that Exemption 3 should be asserted by CBP. Def. 56.1 ¶ 19; *see* Howard Decl. ¶ 51. CBP was authorized to assert Exemption 3 in conjunction with 50 U.S.C. § 3024(i) to redact protected information from the Watchlisting Reference Guide, and as discussed in Defendant’s Memorandum at 18-20, properly did so.¹¹

D. CBP Released the Reasonably Segregable Information

Finally, Plaintiffs maintain that because they suspect there may be reasonably segregable information that was improperly withheld, CBP failed to establish that it segregated and released non-exempt information. Pls. Mem. at 25. This argument is unavailing.

The FOIA requires disclosure of “[a]ny reasonably segregable portion” of a responsive record after deletion of the exempt portions. 5 U.S.C. § 552(b) (text following exemptions). However, an agency need not disclose non-exempt portions of records that “are inextricably intertwined with exempt portions.” *See Inner City Press/Community on the Move v. Board of Governors of the Federal Reserve System*, 463 F.2d 239, 249 n.10 (2d Cir. 2006); *Mead Data Central, Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

¹¹ Plaintiff’s other argument, that CBP is barred from invoking Exemption 3 by the official acknowledgment doctrine, is based solely on speculation about the information that was redacted. *See* Pls. Mem. at 24-25. “Conclusory allegations, conjecture and speculation . . . are insufficient to create a genuine issue of fact.” *Clevenger v. U.S. Department of Justice*, 18-CV-1568 (LB), 2020 WL 1846565, at *6 (E.D.N.Y. Apr. 3 2020) (citations omitted); *see also Beechwood Restorative Care Center v. Leeds*, 436 F.3d 147, 155 (2d Cir. 2006) (“[M]ere conclusory allegations, speculation or conjecture will not avail a party resisting *summary judgment*.” (citation omitted) (alteration and emphasis in original); *Cruz v Liberatore*, 582 F. Supp. 2d 508, 522 (S.D.N.Y. 2008) (same).

Here, CBP released all reasonably segregable portions of records responsive to Plaintiffs' FOIA request. Howard Decl. ¶¶ 24, 52. CBP withheld only information that either is exempt from disclosure or, if non-exempt, is so intertwined with protected material that segregation was not possible. *Id.* ¶ 52. Although CBP was not required to "commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content,"¹² CBP personnel and attorneys nevertheless reviewed each page of the responsive record in making the segregability determinations. *Id.*

In conclusion, CBP properly withheld documents and information responsive to Plaintiffs' FOIA request based on FOIA Exemptions 3 and 7(E). CBP did not improperly withhold responsive records, and Plaintiffs are not entitled to any relief under the FOIA. Accordingly, this action should be dismissed.

¹² *Mead Data*, 566 F.2d at 261 n.55.

CONCLUSION

For the foregoing reasons and those set forth in Defendant’s Memorandum dated October 23, 2020, the Court should grant Defendant’s motion for summary judgment, deny Plaintiffs’ cross-motion for summary judgment, and dismiss this action.

Dated: Brooklyn, New York
January 21, 2021

Respectfully submitted,

SETH D. DuCHARME
Acting United States Attorney
Eastern District of New York
Attorney for Defendant
271-A Cadman Plaza East, 7th Floor
Brooklyn, New York 11201
(718) 254-6026

s/Kathleen A. Mahoney
KATHLEEN A. MAHONEY
Assistant U.S. Attorney
kathleen.mahoney@usdoj.gov
(Of Counsel)