UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION LAWYERS ASSOCIATION, Plaintiff, v. U.S. DEPARTMENT OF HOMELAND SECURITY, *et al*. Defendants.	Civil Action No. 16-2470-TNM

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

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I. INTRODUCTION

In July 2013, the American Immigration Lawyers Association (AILA) submitted a Freedom of Information Act (FOIA) request to U.S. Customs and Border Protection (CBP), a component of the Department of Homeland Security (collectively, the "Government"), seeking documents pertaining to any instructions disseminated to officers at United States ports of entry about the discontinuation of the Inspector's Field Manual (IFM), the implementation of the Officer's Reference Tool (ORT), as well as the "portions of the ORT that have been finalized and implemented for use in the field/ports-of-entry." ECF No. 1-1 at 3.

Faced with years of government inaction, in December 2016, AILA brought this action against the Government to compel its compliance with AILA's FOIA request. Even after this action was filed, the Government's response to AILA's FOIA request was subject to repeated delays corrected only after action by this Court:

- In a March 30, 2018 Memorandum Order, this Court rejected the Government's position—that it was only required to provide the indices to ORT chapters 11 and 12, and was not obligated to produce the underlying documents referenced in those indices—as "too clever by half," "hyper-technical" and "incongruous with the Government's obligation to conduct 'a search reasonably calculated to uncover all relevant documents'"—and ordered the Government to review and produce responsive document subject to any FOIA exemptions. ECF No. 30 at 4, n.3;

- In an August 10, 2018 Minute Order, based on the parties' joint status report, this Court ordered the Government to complete its production of ORT chapter 11 records, subject to redactions, by November 9, 2018. Minute Order (Aug. 10, 2018);

- In a March 15, 2019 Order denying AILA's motion for summary judgment without prejudice, this Court ordered the Government to file a supplemental declaration describing in detail the search methods used to locate responsive IFM and ORT records and to produce a *Vaughn* index for the redactions and withholdings applied to responsive records. ECF No. 45.

Now, the Government's production of records from ORT chapters 11 and 12 contains significant redactions based on alleged exemptions specified at 5 U.S.C. § 552(b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). With respect to 71 of those records, the Government's *Vaughn* index is deficient and does not substantiate the asserted FOIA exemptions. The specific deficiencies related to each of the 71 records are discussed in detail in AILA's Statement of Material Facts (hereinafter, Plaintiff's Findings of Facts (PFOF), which accompanies this filing.

For the reasons set forth in detail in the PFOF and below, this Court should grant AILA's cross-motion for summary judgment, deny the Government's motion for summary judgment, and order the production of the improperly withheld portions of the 71 records at issue.

II. BACKGROUND

The IFM was previously a primary reference tool that CBP officers used during the inspection and admission process. Following FOIA requests, CBP publicly released a redacted copy of the manual. *See* ECF No. 12 ¶ 12. Subsequently, CBP phased out the use of the IFM and replaced it with the ORT. *See, e.g.*, ECF No. 53-1 ¶ 1; ECF No. 16-2, Exh. A ¶¶ 4-5. However, CBP did not make any portion of the ORT available to the public.

On July 10, 2013, AILA submitted a FOIA request to CBP for records related to CBP's discontinuation of the use of the IFM and the implementation of the ORT in its place, and for a copy of implemented portions of the ORT. *See* ECF No. 1-1 at 1-2. On June 10, 2015, having received no substantive response, AILA filed an administrative appeal of its FOIA request. ECF No. 1-3. CBP also failed to respond to this administrative appeal, aside from a determination that the fee waiver request was not applicable. *See* ECF No. 1-4.

On December 19, 2016, AILA filed this action. *See* ECF No. 1.

In response, the Government produced records responsive to AILA's FOIA request for the first time. On March 1, 2017, the Government produced two documents: (1) a 25-page online index of ORT Chapter 11 with some of document titles redacted, and (2) a one-page online index of ORT Chapter 12. ECF No. 19 ¶ 2 & Exhs. A-C. The ORT Chapter 11 index contains links to 371 memos, musters, guides, Standard Operating Procedures, and other documents related to admissibility policy, which are listed alphabetically by title. *Id*. at Exh. B. The ORT Chapter 12 index is entitled "Laws, Regulation and Systems" and contains links directed to those topics, including to the CBP Policy Online Document Search (PODS). *Id*. at Exh. C. On April 19, 2017, the Government produced two additional pages of records, which both related to CBP's discontinuation of the use of the IFM as a reference tool. *Id*. at ¶ 3 & Exh. D.

On June 7, 2017, the Government filed a motion for summary judgment, which AILA opposed. *See* ECF Nos. 16, 17. On March 30, 2018, this Court denied the motion, finding the Government failed to show that it had conducted an adequate search for responsive records. ECF No. 30 at 2. This Court ordered the Government to "review and disclose" responsive records that were linked to in the online indices of chapters of the ORT unless the records were exempt from disclosure. ECF No. 30 at 4-5.

Between June and November of 2018, the Government produced 363 documents from ORT Chapter 11 of the ORT, subject to redactions. *See* ECF No. 36-3 ¶¶2-8.

Subsequently, AILA filed a motion for summary judgment. *See* ECF No. 36. This Court denied the motion without prejudice but ordered the Government to provide further detail about portions of its search for records and to produce a *Vaughn* index and, absent justification for withholding, certain withheld documents from ORT Chapter 11. *See* ECF No. 45. This Court

further ordered the parties to confer regarding, inter alia, the Government's search for responsive records from the PODS database in ORT Chapter 12. *Id.*

On May 30, 2019, the Government produced 30 documents from the PODS database in ORT Chapter 12, as well as three additional documents from ORT Chapter 11. ECF No. 48 ¶ 2-3. On July 15, 2019, the Government produced two *Vaughn* indices, one for ORT Chapter 11 records and one for ORT Chapter 12 PODS records. *See* ECF No. 53-3, Attach. B.[1] On July 31, 2019, the Government produced an additional six documents. ECF No. 53-3 ¶ 11.

Subsequently, the parties worked to narrow the scope of disputed issues. AILA agreed not to challenge the adequacy of the Government's search for responsive records or any partial withholding of approximately 250 of the records that had produced. AILA asked the Government to re-review over 140 records that appeared to be over-redacted. *See* ECF No. 53-3 ¶12. The Government then re-reviewed roughly half of those records and released less redacted versions of many of them. *Id.* ¶13. AILA agreed not to challenge the remaining redactions in 68 of the 72 re-reviewed records. *Id.*

What remains at issue is the Government's decision to withhold 71 records in full or in part pursuant to FOIA Exemptions 5, 6, 7(C), and/or 7(E).[2] These records are described in the attached Index of Documents, and are referred to by their record number (*i.e.*, Records 1-71).

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[1] Attachment B to the Fourth Howard Declaration contains two *Vaughn* indices, the pages of which are separately numbered. Citations to the *Vaughn* index for ORT Chapter 11 (the first index in Attachment B) are cited as "ECF No. 53-3, Attach. B at #," while citations to the *Vaughn* index for the PODS records (the second index) are cited as "ECF No. 53-3, Attach. B at PODS #."

[2] These records consist of:

- Record 1, from ORT Chapter 11, withheld in full, *see* PFOF ¶¶ 15-16.
- Records 2-3, from PODS, withheld in full, *see* PFOF ¶¶ 17-18;
- Record 4, from PODS, referred to another agency, *see* PFOF ¶¶ 19-20;
- Records 5-8, from ORT Chapter 11, withheld in part, *see* PFOF ¶¶ 21-38;

III. STANDARD OF REVIEW

Summary judgment is appropriate when no genuine issue of material fact exists and the moving party establishes its entitlement to judgment as a matter of law. Fed. R. Civ. P. 56.

"The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). FOIA requires agencies to disclose records responsive to a request "unless the documents fall within enumerated exemptions." *U.S. Dep't of the Interior v. Klamath Water User Protective Ass'n*, 532 U.S. 1, 7 (2001) (citing 5 U.S.C. § 552(b)). Thus, "[i]n the FOIA context, a district court reviewing a motion for summary judgment conducts a de novo review of the record, and the responding federal agency bears the burden of proving that it has complied with its obligations under the FOIA." *Neuman v. United States*, 70 F. Supp. 3d 416, 421 (D.D.C. 2014) (citing 5 U.S.C. § 552(a)(4)(B)).

IV. ARGUMENT

FOIA's "strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991); *see also Am. Civil Liberties Union v. U.S. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011). If the government cannot "carry its burden of convincing the court that one of the statutory exemptions appl[ies]," the requested records must be released to the plaintiff. *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987). The court is empowered to "order the production of any agency records improperly withheld," and "may examine the contents of such

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- Records 9-71, from ORT Chapter 11, withheld in part, *see* PFOF ¶¶39-302.

agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions" set forth in the statute. 5 U.S.C. § 552(a)(4)(B). Even if portions of the redacted records are subject to the Government's asserted FOIA exemptions, agencies must release "[a]ny reasonably segregable portion of a record . . . to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). In the D.C. Circuit, a document's non-exempt portions must be disclosed unless those portions "are inextricably intertwined with exempt portions." *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

A. The Government's Declaration and *Vaughn* Index Are Inadequate.

Agencies "withholding responsive documents from a FOIA release bear[] the burden of proving the applicability of claimed exemptions." *Am. Civil Liberties Union*, 628 F.3d at 619. Where, as here, agencies seek to establish the applicability of FOIA exemptions through a declaration and *Vaughn* index, these materials must "describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and [not be] controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009) (internal quotation omitted). The Government has failed to meet that standard here.

As an initial matter, despite repeated orders to provide a complete *Vaughn* index, certain documents at issue in this case still are not included. *See* PFOF ¶ 18 (Records 2-3, two PODS documents from ORT Chapter 12, withheld in full and never identified by name); ¶ 20 (Record 4, one PODS document, referred to another agency and never identified by name); ¶ 236 (Record 55, entitled "Use of the Inspector's Field Manual," withheld in part pursuant to Exemption 7(E));

¶ 268 (Record 63, entitled "Hidden I-94 Class of Admission Code (COA)," withheld in full pursuant to Exemptions 6, 7(C) and 7(E)).[3] *See also* ECF No. 53-3, Attach. B (failing to mention any of these records).

Furthermore, other records in the *Vaughn* index have descriptions that fail to discuss exemptions that the Government has applied to those records. *See* PFOF ¶¶ 101, 169 (discussing Records 23 and 38, which are annotated with, inter alia, Exemption 5, but for which the *Vaughn* index entries do not include information about Exemption 5). The D.C. Circuit has recognized that "[a] withholding agency must describe *each* document or portion thereof withheld . . . ." *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223 (D.C. Cir. 1987) (emphasis in original). Where, as here, the Government excludes records from its *Vaughn* index entirely, it cannot meet this standard.

The Fourth Declaration by Patrick Howard and the *Vaughn* indices are not sufficient to justify the Government's failure to produce the remainder of the Index Documents in full. *See* ECF No. 53-3. The adequacy of a *Vaughn* index turns on whether "the requester and the trial judge [are] able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure." *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1050 (3d Cir. 1995) (internal citation omitted). "Thus, when an agency seeks to withhold information, it must provide 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant *and correlating those claims with the particular part of a withheld document to which they apply*.'" *King*, 830 F.2d at 219 (quoting *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973)) (emphasis added); *see also Mead Data*

[3] This is distinct from Record 62, Hidden I-94 Class of Admission Code, which *is* included in the *Vaughn* index. *See* PFOF ¶¶ 262-66.

Central, Inc., 566 F.2d at 251 (same).

As to the Fourth Howard Declaration, it does not specifically refer to or describe any record at issue in this case; instead, it consists of broad statements regarding general reasons that records might be withheld pursuant to Exemptions 6, 7(C), and 7(E). ECF No. 53-3 at ¶¶ 15-21.[4] These broad statements, especially those describing Exemption 7(E), are frequently repeated verbatim and at length in the *Vaughn* index. For example, the declaration states that, for records containing "Information Related to Targeting":

> CBP applied Exemption (b)(7)(E) to information which relates to CBP's process for assessing risk on travelers seeking to enter the United States. This includes information regarding ongoing investigations or investigative techniques and procedures. Disclosure of such information would advise potential violators of CBP's law enforcement techniques and procedures for assessing risk, thereby enabling them to circumvent the law, avoid detection, and evade apprehension. Moreover, revealing information regarding ongoing investigations would thwart CBP's law enforcement efforts and risk individuals circumventing CBP's future efforts.

Id. ¶ 21(v). This language is repeated in nearly identical form in several entries in the *Vaughn* index. *See, e.g.*, PFOF ¶¶ 85, 220 (describing the *Vaughn* index entries for Records 20 and 51, which contain nearly identical language). Similarly, the declaration states that "disclosure of the information withheld pursuant to [Exemption 7(E) in this case] would advise potential violators of CBP law enforcement guidelines, techniques and procedures, thereby enabling them to circumvent the law, avoid detection, and evade apprehension." ECF No. 53-3 ¶ 20. This language is repeated throughout the *Vaughn* index. *See, e.g.*, PFOF ¶¶ 44, 52, 158, 162, 195, 203, 290, 295 (describing *Vaughn* index entries for Records 10, 12, 36, 37, 45, 47, 69, and 70, which

[4] The Fourth Howard Declaration does not address records withheld pursuant to Exemption 5. *See* ECF No. 53-3.

contain nearly identical language). The declaration provides no detail as to why these statements apply to particular records or portions of records withheld. *See* ECF No. 53-3.

Although the Government's *Vaughn* index is lengthy,[5] it has glaring deficiencies. For example, conclusory claims simply reiterating the statutory standards for exemptions are insufficient to sustain a summary judgment motion. *See Defenders of Wildlife*, 623 F. Supp. 2d at 90-91. Here, many entries are padded with text paraphrasing the relevant exemption. *See, e.g.*, ECF No. 53-3, Attach. B at 127 (describing 7(E) redaction in Record 1 as including "law enforcement techniques and internal agency investigative practices and could adversely affect future investigations and operations. Disclosure could reasonably be expected to risk the circumvention of law and regulations . . ."). Beyond that, the entries consist largely of the same generalities described in the Fourth Howard Declaration.

Once this boilerplate language is set aside, each entry in the *Vaughn* index contains only a brief snippet explaining why the particular record at issue is covered by the cited exemption(s), which often amounts to nothing more than a restatement of the document's title. *See, e.g.*, PFOF ¶¶ 39-41 (asserting that Record 9, "Guidance on the Use of Interpreters and Interpreter Services," withholds "CBP's procedures and policies regarding the use of interpreters and interpreter services"); ¶¶ 55-57 (asserting that Record 13, "Trade NAFTA (TN) Computer Systems Analysts (CSA)," withholds "information regarding admissibility of Trade NAFTA computer systems analysts").[6] But a brief description of a document, followed by a lengthy but

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[5] A significant portion of the *Vaughn* index describes records no longer at issue in this action. Specifically, the index includes entries for more than 300 records, which AILA does not challenge. *See supra* Section II. Additionally, many of entries for the records still at issue in this action address withholdings pursuant to Exemptions 6 and 7(C), which AILA does not dispute.

[6] *See also* PFOF ¶¶ 28, 32, 36, 45, 49, 53, 61, 69, 73, 77, 81, 99, 104, 108, 121, 131, 136, 140, 145, 154,159, 163, 167, 172, 176, 180, 188, 192, 196, 200, 204, 208, 212, 224, 246, 264,

general description of potential bases for withholding documents under FOIA, does not establish that the particular document at issue is properly withheld. Instead, for records withheld pursuant to Exemption 7(E), the government must provide "a relatively detailed justification for each record that permits the reviewing court to make a meaningful assessment of the redactions and to understand how disclosure would create a reasonably expected risk of circumvention of the law." *Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 950 F. Supp. 2d 221, 246 (D.D.C. 2013) (quoting *Strunk v. U.S. Dep't of State*, 845 F. Supp. 2d 38, 47 (D.D.C. 2012)). Courts generally have found that the government carries its evidentiary burden under Exemption 7(E) when it provides:

> 1) a description of the technique or procedure at issue in each document, 2) a reasonably detailed explanation of the context in which the technique is used, 3) an exploration of why the technique or procedure is not generally known to the public, and 4) an assessment of the way(s) in which individuals could possibly circumvent the law if the information were disclosed.

Id. at 247 (citing *Skinner v. U.S. Dep't of Justice*, 893 F. Supp. 2d 109, 113-14 (D.D.C. 2012) and *Strunk*, 905 F. Supp. 2d at 147).

Here, the Government does not meet that standard. For example, the Government withholds records relating to access to interpreters or admissibility requirements for Canadian computer systems analysts on the ground that releasing such records would "advise potential violators of CBP's law enforcement techniques and procedures, thereby enabling them to circumvent the law, avoid detection, and evade apprehension." PFOF ¶¶ 40, 56 (Records 9 and 13). The problem is that the Government has not explained *how* releasing the records at issue

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271, 279, 283, 291, 296 (addressing similarly limited descriptions of Records 6, 7, 8, 10, 11, 12, 14, 16, 17, 18, 19, 23, 24, 25, 28, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 47, 48, 49, 52, 58, 62, 64, 66, 67, 69 and 70).

here could possibly have those consequences. Contrary to this Circuit's precedent, the Government fails to specify with particularity "the reasons why a particular exemption is relevant" to the records at issue. *King*, 830 F.2d at 219.[7]

Furthermore, the Government failed to "correlate[e]" the descriptions in its *Vaughn* index about the applicability of exemptions "with the particular part of a withheld document to which they apply." *King*, 830 F.2d at 219. Instead, each entry in the *Vaughn* index apparently applies to the entirety of the withheld information from the relevant record, regardless of the record's length or the extent to which it has been withheld. *See, e.g.*, PFOF ¶¶ 24, 37, 109, 114, 168, 185, 217, 257, 276, 284, 292, 297 (providing same general basis for all 7(E) redactions in Records 5, 8, 25, 16, 38, 42, 50, 60, 65, 67, 69, and 70, heavily-redacted and generally lengthy records).

Thus, this Court should hold that the Government has failed to establish that it properly withheld Records 1-71 through its *Vaughn* index or the Fourth Howard Declaration and order the Government to produce the improperly withheld records. This Court may "order the production of any agency records improperly withheld," and "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" set forth in the statute. 5 U.S.C. § 552(a)(4)(B).

[7] The Government re-reviewed the redactions in approximately 70 out of 145 records that AILA stated that they would challenge in this case. The vast majority of the records that remain at issue are those which were not re-reviewed. This is important because, despite entries in the *Vaughn* index generally stating wide-ranging applicability of Exemption 7(E), when the government re-reviewed those documents in this case, it generally found that additional portions of the records could be released. For example, after withholding portions of a document entitled "Legal Representation During Inspection" pursuant to Exemption 7(E), ECF No. 53-3, Attach. B, at 134-35, the government released an unredacted version of the document. *Compare* Second Declaration of Kristin Macleod-Ball Decl., Exh. LLL *with id*., Exh. MMM (original and less redacted versions of the document). The Vaughn index for the remaining records which the Government has not re-reviewed likely contain similar insufficiencies.

B. The Government Improperly Applied Exemption 7(E).

An agency is permitted to exempt documents from disclosure when they are "records or information compiled for law enforcement purposes, but only to the extent that the production . . . would disclose techniques and procedures . . . 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). While the court is deferential to a law enforcement agency's application of Exemption 7(E), the standard of review is not "vacuous." *Long v. U.S. Immigration and Customs Enforcement*, 149 F. Supp. 3d 39, 53 (D.D.C. 2015) (quoting *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 32 (D.C. Cir. 1998)); *see also id*. ("Courts have a responsibility to ensure that an agency is not simply manufacturing an artificial risk and that the agency's proffered risk assessment is rooted in facts.").

Courts have found that agency records cannot be withheld under Exemption 7(E) if they are not compiled for law enforcement purposes. A record is "compiled for a law enforcement purpose" if there "is (1) a rational 'nexus' between the record and the agency's law enforcement duties and (2) a connection between the subject of the record and a possible security risk or violation of federal law." *Long*, 149 F. Supp. 3d at 48-49 (citing *Campbell*, 164 F.3d at 32). In addition, Exemption 7(E) is improperly applied if the records do not describe "guidelines," "procedures" or "techniques," *Am. Civil Liberties Union Found. v. U.S. Dep't of Homeland Security,* 243 F. Supp. 3d 393, 403-05 (S.D.N.Y. 2017) (questions immigration officials asked immigrant minors suspected of smuggling were not "a specialized, calculated technique"), that risk of violation of the law, *Long*, 149 F. Supp. 3d at 49 (a connection between the records and the possible violations of the law must exists "to establish that the agency acted within its principal function of law enforcement") (quoting *Pratt v. Webster*, 673 F.2d 408, 420 (D.C. Cir.

1982)). Agencies also may not withhold documents under Exemption 7(E) if the techniques and procedures already are well known to the public. *See Founding Church of Scientology of D.C. v. Nat'l Sec. Agency*, 610 F.2d 824, 832 n.67 (D.C. Cir. 2004) (noting that "routine techniques and procedures already well known to the public" should not be protected) (internal quotation omitted).

Here, the Government continues to withhold records under Exemption 7(E) and either provides no explanation for doing so or provides only template language to justify withholding. The Government groups the contested documents into the following categories: "Codes and Functionalities of CBP Systems"; "Training Materials for Users of CBP Systems"; "Email Addresses of Group Listserves"; "Law Enforcement Methods for Processing Passengers at Ports of Entry; and "Information Related to Targeting." ECF No. 53-3 ¶ 21.

The D.C. Circuit has cautioned against creating sweeping categories of nondisclosure. *PHE, Inc. v. U.S. Dep't of Justice*, 983 F.2d 248, 250 (D.C. Cir. 1993) ("Because only the agency knows the substance of the withheld information, the agency affidavits have immense significance in a FOIA case. . . . Consequently, an affidavit that contains merely a 'categorical description of redacted materials coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate.'").

In several instances, the redacted information does not appear to be information collected for law enforcement purposes. For instance, the Government withheld sections of a document titled, "Forwarding Form I-275 to the U.S. Department of State," asserting that the redacted portions would "advise potential violators of CBP's law enforcement techniques and procedures, thereby enabling them to circumvent the law, avoid detection, and evade apprehension." PFOF ¶ 80. The Government added that "revealing information regarding ongoing investigations would

thwart CBP's current law enforcement efforts and risk individuals circumventing CBP's future efforts." *Id*. The partially redacted document, however, is a two-page agency memorandum instructing Directors of CBP Field Operations on the procedures for sending a Form I-275, Withdrawal of Application for Admission/Consular Notification, to the U.S. Department of State. *Id*. at ¶¶ 79-83. Information about this same process available on the U.S. Department of State's website does not indicate any law enforcement function related to the Form itself or the process for forwarding the form. *See id.* at ¶ 83. Nothing about CBP's agency-wide memorandum detailing the process of distributing the I-275 Form to the U.S. Department of State implicates "ongoing investigations" that would "thwart CBP's current law enforcement efforts." *Id*. ¶ 80. *See Campbell*, 164 F.3d at 32-33 (FBI did not demonstrate records were compiled for law enforcement purposes when numerous documents generally related to an investigation were redacted without demonstrating each related to a "particular law enforcement purpose").[8]

Similarly, other redacted records do not appear to have been compiled for law enforcement purposes. *See, e.g.*, PFOF ¶¶ 43-46 (Record 10, explaining how biographic and class of admission errors can be corrected); ¶¶ 47-50 (Record 11, describing procedures for correcting erroneous records such as a misspelled name or an incorrect date-of-birth); ¶¶ 51-54 (Record 12, explaining when a person is entitled to an I-94 correction such as after being admitted in an incorrect class of admission or admitted for an incorrect period of time); ¶¶ 75-78

[8] Another indication that the memorandum does not include information about "ongoing investigations" is the fact that it was later superseded by new guidance regarding the process for forwarding a Form I-275 to the Department of State. *See* U.S. Customs and Border Protection, Electronic I-275 (Jun. 6, 2012), https://www.aila.org/infonet/cbp-releases-memo-muster-electronic-form-i275.

(Record 18, memorandum memorializing the time period in which I-192 applications must be forwarded to the Headquarters Admissibility Review Office).

Still other withheld records do not offer specialized guidance, techniques or procedures that would allow an individual to circumvent the law. For example, the document titled, "I-94 Automation Guidelines for Processing Travelers at Primary and Secondary Inspection," describes the process for issuing, revalidating and reusing an I-94 at ports of entry. PFOF ¶¶ 21-25 (describing Record 5). There is no indication that the information shared in the guidelines relates to "databases not known to the public, internal system codes, screenshots, functionalities, and information on how to use CBP's law enforcement systems." *Id.* ¶ 23. If withheld information describes what the subtitles in the document indicate–CBP's process for issuing, revalidating and reusing an I-94–then the Government's warnings that disclosure will compromise the agency databases and risk circumvention by disclosing "codes, case numbers, and . . . computer information" across law enforcement databases is unfounded. *See* ECF No. 53-2 at 14 (citing *McRae v. U.S. Dep't of Justice*, 869 F. Supp. 2d 151, 168-69 (D.D.C. 2012)). If anything, the withheld information would complement guidance already available on the Department of State and CBP websites related to processes impacting travelers seeking entry to the United States. PFOF ¶ 25. The fact that the I-94 automation guidelines are labeled "law enforcement sensitive" is not dispositive. *Campbell*, 164 F.3d at 32 ("The fact that information is stored in a [document] with an official-sounding label is insufficient standing alone to uphold nondisclosure."). In addition, as the D.C. Circuit has pointed out, records that include discussion of relevant law compiled by the agency should not be withheld under Exemption 7(E). *PHE, Inc.*, 983 F.2d at 251-252 (finding that records withheld by the agency including "discussion of

search and seizure law" and a "digest of useful caselaw" were "precisely the type of information appropriate for release").

Several documents withheld under Exemption 7(E) appear to include descriptions of agency processes or compilations of current immigration law that if disclosed would not give specialized information to an individual that would allow circumvention of the law. *See, e.g.*, PFOF ¶ 29 (Record 6, citing provisions of the Immigration and Nationality Act); ¶ 33 (Record 7, providing eligibility requirements for the Visa Waiver Program); ¶ 58 (Record 13, describing how information in Appendix 1603.D.1 of the North American Free Trade Agreement relates to computer systems analysts); ¶ 66 (Record 15, quoting provisions of the Inspector's Field Manual); ¶ 86 (Record 20, outlining meaning of "expiration of the period of stay authorized" for certain individuals admitted to the United States); ¶¶ 90-91 (Record 21, redacting the name of the database "SIGMA" though it is a well-known database and the title "SIGMA" is included in the Vaughn Index to describe this document); ¶ 96 (Record 22, describing when a CBP officer may find the validity dates of the I-129 petition); ¶ 164 (Record 37, referring to or describing legal requirements for B-1 nonimmigrant admission); ¶ 181 (Record 41, describing process for local ICE counsel to reach out to ICE Field Offices to pursue prosecutorial discretion in a particular case); *see also* PFOF ¶¶ 46, 70, 78, 132, 189, 201, 205 (addressing Records 10, 16, 18, 30, 43, 46, 47).

The Government also improperly applied Exemption 7(E) to withhold records publicly available or otherwise known to the public. It withheld in full Record 1 ("Instruction 044-01-001 Implementing Department of Homeland Security") because it "implements DHS policies for apprehension, detention and removal of aliens in the United States and lays out priorities for enforcement." PFOF ¶ 15. Though withheld in its entirety, the same document appears to have

been released in response to a FOIA from a well-known organization devoted to government transparency whose FOIA productions are organized chronologically and easily accessed on its website. *See* PFOF ¶ 16; *see also* ¶ 74 (discussing Record 17, which was released in part in litigation, *see Al Otro Lado v. Wolf*, No. 3:17-cv-02366-BAS-KSC (S.D. Cal.)); ¶¶ 287-88 (discussing Record 68, which is publicly available on DHS' website). For other records, Defendants have withheld elements of the record that are publicly available elsewhere or discuss publicly available documents. *See, e.g.*, *¶¶* 194-97 (Record 45,"Amendment to Memorandum to the Field Regarding Lawful Permanent Resident's (LPRs) Evidence of LPR Status at Ports of Entry, Dates August 12, 2008, Muster, and IFM Chapter 13.2," including redacted text from the publicly available Inspector's Field Manual); *see also* ¶ 225 (Record 52 appears to redact information about vetting protocols already known to the public); ¶ 100 (Record 23 appears to address publicly available DHS memorandum); ¶ 128 (Record 29 appears to address publicly available interim final rule and website).

Thus, this Court should hold that the Government has failed to establish that Exemption 7(E) justifies its failure to produce records and require the Government to produce the improperly withheld records. *See* PFOF ¶¶ 15-302.

C. The Government Improperly Applied Exemptions 6 and 7(C).

An agency may apply Exemption 6 to exempt "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The court must balance the "privacy interest that would be compromised by disclosure again any public interest in the requested information." *Multi AG Media LLC v. U.S. Dep't of Agric.*, 515 F.3d 1224, 1228 (D.C. Cir. 2008). The D.C. Circuit has emphasized that "under Exemption 6, the presumption in favor of disclosure is as strong as can

be found anywhere in the Act." *Id.* at 1227 (internal quotation omitted). Where the agency cannot meet the first prong by demonstrating that the redacted information is "personnel, medical, or similar files," the privacy interest analysis does not take place and Exemption 6 does not apply. *Schonberger v. Nat'l Transp. Safety Bd.*, 508 F. Supp. 941, 942 (D.D.C. 1981). Exemption 7(C) may exempt information compiled for law enforcement purposes and personal information when disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

AILA does not challenge the Government's application of Exemptions 6 and 7(C) to withhold portions of records containing names of individuals or contact information. In several instances, however, the Government misapplied the exemptions to improperly redact information such as the subject lines of memos. *See* PFOF ¶¶ 122-24 (discussing Record 28 at 4, 14). In other cases, the Government improperly redacted large swaths of information that do not appear to correspond to the stated justification that the redacted information relates to the "signatures, names, email addresses, and/or Identifying Information of CBP Personnel." *See* PFOF ¶¶ 247-48 (Record 58, "Guidance on Correcting Class of Admission for Certain Refugee/Asylee Follow to Join Foil Pilot Cases"); ¶¶ 251-52 (Record 59, "Successful Primary Inspection"); ¶¶ 265-66 (Record 62, "Hidden I-94 Class of Admission Code"); *see also id.*at ¶ 267 (Record 63, "Hidden I-94 Class of Admission Code (COA)"). It is implausible that large sections of agency policy memos contain personal, medical or similar files that would result in an invasion of personal privacy.

Thus, this Court should hold that the Government has failed to establish that Exemptions 6 and 7(C) support its withholding, in full or in part, of Records 28, 58, 59, 62, and 63 and require the Government to produce those records.

D. The Government Improperly Applied Exemption 5.

Pursuant to 5 U.S.C. § 552(b)(5), agencies may withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . . ." *Id.* An agency has the burden of establishing that application of the exemption is warranted, and to do so, it must show that the withheld material is "generally protected in civil discovery for reasons similar to those . . . in the FOIA context." *Burka v. U.S. Dep't of Health and Human Servs.*, 87 F.3d 508, 517 (D.C. Cir. 1996). As to the two records that the Government may have withheld in part pursuant to Exemption 5, it failed to meet its burden. The Government marked portions of Records 23 and 38 as subject to Exemption 5 but failed to provide any explanation for doing so in the *Vaughn* index. *See* PFOF ¶¶ 101, 169. With regard to each of these records, the Government failed to meet its obligation to "state the exemption claimed for each deletion or withheld document, and explain why the exemption is relevant." *Founding Church of Scientology, Inc. v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

Thus, this Court should hold that the Government has failed to establish that Exemption 5 justifies its failure to produce Records 23 and 38 and require the Government to produce the improperly withheld records.

E. The Government Did Not Release All Reasonably Segregable Information.

Even if portions of the redacted information in Records 1-71 are subject to the Government's asserted FOIA exemptions, agencies must release "[a]ny reasonably segregable portion of a record . . . to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see also Stolt-Nielsen Transp. Group LTD v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008) ("[A]n agency cannot justify withholding an entire document simply by showing that it contains some exempt material.") (internal quotation

omitted). A document's non-exempt portions must be disclosed unless those portions "are inextricably intertwined with exempt portions." *Mead Data Central*, *Inc.*, 566 F.2d at 260. Agencies must provide "a more detailed justification" rather than mere "conclusory statements" to establish that non-exempt material was not reasonably segregable. *Id.* at 261.

Here, the Government makes only conclusory assertions regarding segregability. The Fourth Howard Declaration states that "CBP analysts and attorneys reviewed each release of records line-by-line to confirm that any withholdings were proper, examine whether any discretionary waiver of an exemption was warranted, and determine whether any segregable, non-exempt information could further be released." ECF No. 53-3 ¶ 22. The Government's brief repeats the assertions from the declaration. ECF No. 53-2 at 18-19.

Given the insufficiency of the *Vaughn* index discussed *supra*, these statements do not provide a sufficient basis to presume that the Government has released all segregable, non-exempt portions of the documents. *See, e.g.*, *Ctr. For Biological Diversity v. U.S. Envtl. Prot. Agency*, 369 F. Supp. 3d 1, 26-27 (D.D.C. 2019) (reviewing "fairly lengthy presentations" with "'logically divisible sections,' that may be 'amenable to segregation and disclosure'" and ordering release of portions of ten records) (quoting *Nat'l Ass'n of Criminal Def. Lawyers v. U.S. Dep't of Justice*, 844 F.3d 246, 257 (D.C. Cir. 2016)). The Government has failed to provide any information about several documents withheld in full in the *Vaughn* index, let alone sufficient information to determine that all reasonably segregable information was released. *See* PFOF ¶¶ 18, 20, 268 (discussing Records 2, 3, 4, 63); *see also id.* ¶¶ 101, 169 (discussing Records 23, 38 and the Government's failure to include a basis for Exemption 5 in the *Vaughn* index).

More frequently, the Government has redacted substantial portions of records and provided justifications that consist only of a brief description of the topic of the document (often

only a rephrasing of the document's title) and a lengthy recitation of the text of the relevant exemption and/or legal holdings related to the text. *See , e.g.*, PFOF ¶¶ 39-41 (discussing Record 9 and redactions Defendants allege are justified simply because information relates to "CBP's procedures and policies regarding the use of interpreters and interpreter services"); *see also* PFOF ¶¶ 28, 32, 36, 45, 49, 53, 57 61, 65 69, 73, 77, 81, 85, 99, 104, 108, 121, 131, 136, 140, 145, 154,159, 163, 167, 172, 176, 180, 188, 192, 196, 200, 204, 208, 212, 224, 246, 256, 264, 271, 279, 283, 291, 296 (addressing similarly limited descriptions of Records 6-8, 10-20, 23-25, 28, 30-33, 35-41, 43-49, 52, 58, 60, 62, 64, 66, 67, 69 and 70).

For other documents, the Government's descriptions in the *Vaughn* index seem unlikely to describe the entirety of the withheld information. *See, e.g.*, PFOF ¶ 24 (describing significant redactions in Record 5, a 19-page document, as consisting only "names of databases, internal system codes and information related to CBP system interfaces" and "guidance to CBP officers on how to use CBP law enforcement systems as well as scre[e]nshots"); *see also id. ¶¶* 113, 117, 127, 149, 184, 216, 220, 229, 233, 238, 242, 251, 260, 275, 300 (describing Records 26, 27, 29, 34, 42, 50, 51, 53, 54, 56, 57, 59, 61, 65 and 71). This is insufficient to meet the Government's burden of establishing that it has produced all reasonably segregable information.

Furthermore, the Government's conclusory assertions on segregability are belied by the fact that it has withheld portions of records that are publicly available. *See Hardy v. Bureau of Alcohol*, 243 F. Supp. 3d 155, 177 (D.D.C. 2017) (attestation that agency "conducted a 'line-by-line review' and 'has released all reasonably segregable non-exempt information'" was "undermined by the withholding of the entire document, despite the publicly available information"). As discussed *supra* in Section IV.B, part or all of Records 1, 17, and 68 are publicly available. *See* PFOF ¶¶ 15-16, 74, 287-88. Furthermore, the Government has failed to

recognize that information it made publicly available *in this action* is reasonably segregable from the withheld information in the Index Documents. For example, the Government withheld in part the titles of several records—yet the full titles of those documents were produced in the Table of Contents to ORT Chapter 11. *See* PFOF ¶¶ 91, 142, 156, 286, 302 (discussing Records 21, 32, 35, 67, and 71); *see also* PFOF ¶¶ 150-51 (discussing Record 34, which does not include the database name TECS unredacted, although the name of the database appears in that record's *Vaughn* index entry).[9] Furthermore, as demonstrated by the considerably less redacted versions the Government eventually released of many documents originally withheld in this case, records that the Government originally failed to release reasonably segregable information from records withheld for reasons similar to those records that remain at issue in this case. *See supra* at Section IV.A n.7. It is likely that their initial review of the remaining documents similarly failed to sufficiently assess reasonably segregable information.

This Court should hold that the Government has not complied with FOIA's segregability requirement and has asserted FOIA exemptions too broadly.[10]

V. CONCLUSION

Because the Government has failed to show that Records 1-71 are exempt from disclosure, AILA's cross-motion for summary judgment should be granted, the Government's

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[9] Given that the improperly withheld words appear in the title of those records, it is likely they also appear in, at a minimum, the text of those documents and potentially in other documents with similar subject matter. *See, e.g.*, PFOF ¶¶ 119-24 (Record 28, addressing the National Security Entry Exit Registration System (NSEERS)).

[10] The D.C. Circuit Court has recognized that a district court may find it necessary to conduct an in camera review of documents to determine whether an agency has released all reasonably segregable information. *See, e.g.*, *Stolt-Nielsen Transp. Group LTD*, 534 F.3d at 734-35.

motion for summary judgment should be denied, and the Government should be ordered to produce Records 1-17 in unredacted form.

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Respectfully submitted,

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