Chief District Judge Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

COUNCIL ON AMERICAN-ISLAMIC RELATIONS-WASHINGTON, Plaintiff, v. UNITED STATES CUSTOMS AND BORDER PROTECTION, *et al.*, Defendants.	Case No. 2:20-cv-0217-RSM **CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** NOTE ON MOTION CALENDAR: August 21, 2020 **ORAL ARGUMENT REQUESTED**

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INTRODUCTION

Plaintiff Council on American-Islamic Relations—Washington (CAIR) cross-moves for summary judgment with respect to Defendants' failure to provide responsive documents to Plaintiff's request under the Freedom of Information Act (FOIA). Between January 4 and January 5, 2020, U.S. Customs and Border Protection (CBP) detained and interrogated scores of people of Iranian heritage returning to the United States after visiting British Columbia, Canada. *See, e.g.*, Dkt. 16-7 (directing detention and secondary inspection of all adult Iranians, Palestinians, and Lebanese born after 1961). U.S. citizens and lawful permanent residents (LPRs) were detained, questioned and held for hours—including with their small children or throughout most of the night—at the Port of Entry in Blaine, Washington. Maltese Decl. Ex A (CBP FOIA production) at 84 (detailing vetting to conduct of "Iranian National[s]"); *id.* Exs. B-H (news articles, including firsthand accounts, of Iranians' hours' long detention at U.S.-Canadian border). All were detained, not based on an individualized suspicion that they were unauthorized to enter the country nor based on concerns they were transporting contraband, but instead based solely on their national origin, in violation of their constitutional rights and in violation of this country's most basic principles. *See* Dkt. 16-7; *see also* Maltese Decl. Ex A at 12 (noting that high-level CBP official needed to inform CBP officials in the Seattle Field Office not to target individuals based on nationality).

A public outcry soon followed that garnered national attention, provoking a swift outcry from lawmakers and community advocates. *See, e.g.*, Maltese Decl. Ex. I (press release from Congresswoman Pramila Jayapal's office). Despite the documented detention of dozens of Iranian-Americans, as well as other individuals born in select countries in the Middle East, CBP officials—including officials from CBP Headquarters—denied that any directive had been issued

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relating to the detention of these persons be detained for further screening. Instead, the agency repeatedly denied that Iranian-Americans had been detained or subjected to interrogations. Indeed, CBP issued a statement on January 5, 2020, declaring that "[s]ocial media posts that CBP is detaining Iranian-Americans and refusing their entry into the U.S. because of their country of origin are false. Reports that DHS/CBP has issued a related directive are also false." Maltese Decl. Ex A at 145.

There can be no serious question that CBP lied to the American public about its actions targeting persons of Iranian heritage. Not only did dozens of individuals personally report their detention at the Blaine Port of Entry by CBP, media outlets subsequently reported the leaked memorandum issued by CBP's Seattle Field Office, which directed officers at the border to detain and question individuals based solely on their place of birth. *See* Maltese Decl. Ex. B-H (new articles); Dkt. 16-7 (CBP detention directive). A month later, on February 11, Acting Commissioner Mark Morgan, the agency's top official, finally acknowledged that CBP officials should not have detained Iranian-Americans at the border, asserting that the agents acted in a way "that was not in line with our direction," and adding, "I would say in that one instance leadership got a little overzealous, and we corrected that right away." *See* Maltese Decl. Ex. B.

Yet to this day CBP has not acknowledged that the agency misled the public about the targeting of Iranians and others, despite the fact that CBP's directive was previously leaked to the media. In light of the government's repeated statements denying the occurrence of these events and denying that any directive was issued, Plaintiff Council on American-Islamic Relations—Washington (CAIR) filed a request under the Freedom of Information Act (FOIA) requesting a copy of any directive and related instructions and responses both from local officials and CBP Headquarters and officials within the Department of Homeland Security (DHS), the

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agency that oversees CBP. *See* Dkt. 15 ¶¶ 25-26. CAIR filed the request in order to promote government accountability and in an effort to safeguard the constitutional rights of persons in their community who were unlawfully detained and interrogated because of their national origin.

After CBP and DHS (Defendants) failed to respond to the request within the statutory timeframe, CAIR filed the instant action to enforce the organization's rights under FOIA. Dkt. 1. Two months later, in response to the lawsuit, CBP responded by providing four, partially redacted pages, while acknowledging that it was withholding over 129 pages of material. Dkts. 16-2, 16-3. CAIR amended its complaint to explicitly address the agency's decisions to withhold responsive documents unlawfully. Dkt. 15. CBP subsequently identified 19 additional pages and released portions of the resulting 148 total documents. *See* Dkt. 22-3; *see also* Maltese Decl. Ex. A. However, the agency continues to withhold key documents at the center of this action, including the directive that unlawfully instructed field agents to detain and interrogate U.S. citizens and LPRs, among others, based solely on their national origin. Moreover, the agency has failed to perform an adequate search that would produce other responsive documents detailing who issued the directive, as well as CBP Headquarters' response to the unlawful directive.

CAIR now submits this cross-motion for summary judgment, as Defendants have failed to not only respond within the statutory timeframe to its request under FOIA, but have continued to unlawfully withhold responsive documents. Those documents are at the core of informing the public of the unprecedented CBP actions targeting U.S. citizens and LPRs for detention and interrogation based solely on their national origin. In addition, Defendants have failed to perform an adequate search that would even encompass the requested materials from CBP Headquarters. Similarly, the documents they have already released provide clear, unmistakable leads regarding other places to search. Furthermore, the declaration and *Vaughn* index that Defendants have

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submitted to justify their redactions and withholding of documents fail to provide the level of specificity required. Indeed, the documents that Defendants have produced and other publicly available information confirm that Defendants were not entitled to withhold specified documents. Accordingly, CAIR respectfully submits that it is entitled to summary judgment.

STANDARD OF REVIEW

As Defendants acknowledged in their motion for summary judgment, "[t]he primary purpose of FOIA is to 'ensure an informed citizenry, [which is] vital to the functioning of a democratic society, [and] needed to check against corruption and to hold the governors accountable to the governed.'" Dkt. 20 at 7 (alterations in original) (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989)). The Supreme Court has interpreted the disclosure provisions of FOIA broadly, noting that the Act was animated by a "philosophy of full agency disclosure." *John Doe Agency,* 493 U.S. at 152 (citation omitted); *see also Dep't of the Air Force v. Rose,* 425 U.S. 352, 361 (1976) ("[D]isclosure, not secrecy, is the dominant objective of the Act."). The FOIA request at issue here amply demonstrates the need for such open access.

This Court conducts de novo review of an agency's response to a FOIA request. 5 U.S.C. § 552(a)(4)(B); *see also U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 755 (1989). "Summary judgment is the procedural vehicle by which nearly all FOIA cases are resolved." *Shannahan v. I.R.S.*, 637 F. Supp. 2d 902, 912 (W.D. Wash. 2009) (citation omitted). In such cases, courts generally "follow a two-step inquiry." *Id.* "First, courts must evaluate 'whether the agency has met its burden of proving that it fully discharged its obligations under the FOIA.'" *Id.* (quoting *Los Angeles Times Commc'ns, LLC v. Dep't of the Army*, 442 F. Supp. 2d 880, 893 (C.D. Cal. 2006). Second, the Court must determine whether the agency has properly invoked any exemptions. Here too, "FOIA's 'strong presumption in favor of disclosure'

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means that an agency that invokes one of the statutory exemptions to justify the withholding of any requested documents or portions of documents bears the burden of demonstrating that the exemption properly applies to the documents." *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 973 (9th Cir. 2009) (quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)).

ARGUMENT

I. CBP Failed to Comply with the Statutory Timeline for Responding to FOIA Requests.

As an initial matter, the agency's failure to provide responsive documents, or to even invoke the statutory extensions available, violated Plaintiff's right to a timely response to documents. Section 552(a)(6)(A)(i) of Title 5 mandates that an agency make a determination on a FOIA request within twenty business days. An agency may extend this statutory time period by ten business days when there are "unusual circumstances." 5 U.S.C. § 552(a)(6)(B)(i). Here, Defendants concede that they failed to comply with the statutory timeline. Dkt. 20 at 21. Moreover, Defendants continue to unlawfully withhold responsive documents. *See infra* Sec. II-III. As such, Plaintiffs have demonstrated they are entitled to summary judgment on their first cause of action.

On January 8, 2020, CAIR electronically submitted the FOIA request to Defendant CBP. Defendants confirm they received it that same day. Dkt. 21 ¶¶ 18-19. After receiving no determination within the statutory time period, CAIR sought relief by filing a complaint under FOIA in federal district court on February 12, 2020. Dkt. 1. On April 15, 2020—two month later and over three months after a response was due—CBP provided an initial response to CAIR's undersigned counsel. *See* Dkt. 16-1, Email from Michelle Lambert, AUSA, to Aaron Korthuis (Apr. 15, 2020); *see also* Dkt. 16-2, CBP FOIA Response Letter. In its response, CBP provided four partially redacted pages and a link to a one-page online bulletin. Dkt. 16-3, CBP Redacted

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FOIA Response Request; Dkt. 16-4, Online Bulletin. However, the CBP response letter stated that the agency had identified an additional 125 pages that it was refusing to release in their entirety. Dkt. 16-2. Subsequently, on April 30, 2020, CBP provided a second notice advising that the agency had identified 19 additional documents, but released only 5 partially redacted pages. Dkt. 22-2. On June 17, 2020, Defendants submitted a "final response" to Plaintiff's FOIA request, "partially releasing all of the 147 pages of responsive documents." Dkt. 22-3 at 2.

Plaintiffs are entitled to summary judgment on their First Count alleging that Defendants failed to provide a timely determination to the FOIA request as mandated by the statute. *See* Dkt. 15, ¶¶ 40-45. As a federal district court explained earlier this week,

> [The agency]'s conduct violates FOIA. Congress made a choice to include in the statute an express 20-day requirement, with limited exceptions. No doubt, the proliferation of electronic records, growth of the federal government, and a more politicized environment make compliance with that requirement herculean. But the challenge of complying with FOIA is not an excuse for non-compliance. The law applies to federal agencies like [CBP] just like it does to everyone else.

Manat v. U.S. Dep't of Homeland Security, No. 19-cv-011163-JDW, 2020 WL 4060277, at *3 (E.D. Penn. July 20, 2020).

In this case Defendants have not even asserted a basis for their delay. To the contrary, Defendants conceded that they had failed to comply with the statutory deadline. Dkt. 20 at 21 ("CBP does not deny that it did not meet the 20-day period."). Nevertheless, Defendants contend that CAIR should not be granted summary judgment based solely on their failure to comply with the timelines imposed by Congress, *id.* at 21, citing to *Community Association for Restoration of the Environment, Inc. v. U.S. E.P.A.*, 36 F. Supp. 3d 1039 (E.D. Wash. 2014). In that case, the Court held that where the agency produced all requested documents, the plaintiff may not "challenge the individual timeliness of production or the Agency's compliance with statutory or regulatory guidelines with respect to documents that have been produced." 36 F. Supp. 3d at

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1048. But in *Community Association*, the agency not only produced the required documents, but it invoked the "unusual circumstances" extension and worked closely with the plaintiff in providing the responses. *Id.* at 1041-45, 1052. Other cases that Defendants cite address similar claims where an agency produced all responsive documents, *see Hainey v. U.S. Dep't of the Interior*, 925 F. Supp. 2d 34, 42 (D.D.C. 2013) (denying summary judgment where the plaintiff sought "relief based solely on the timing and delay of the Department's response—indeed, the entirety of the arguments set forth in her summary judgment briefing relate to these issues"), or addressed the separate question of whether "a FOIA requester must exhaust administrative appeal remedies before filing suit," *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 184 (D.C. Cir. 2013).

However, other courts, like *Manat*, have held that the failure to comply with the statutory timeline provides a basis for summary judgment for a plaintiff. *See, e.g.*, *Oregon Nat. Desert Ass'n v. Gutierrez*, 409 F. Supp. 2d 1237, 1248 (D. Or. 2006) (granting summary judgment and holding that "an untimely response is a violation of FOIA, regardless of the final outcome of the request"); *Gilmore v. U.S. Dep't of Energy*, 33 F. Supp. 2d 1184, 1187-88 (N.D. Cal. 1998) (untimely determination constituted an improper withholding in violation of FOIA, even though the documents were later correctly determined not to be subject to disclosure); *Sierra Club v. U.S. E.P.A.*, No. 18-CV-03472-EDL, 2018 WL 10419238, at *5 (N.D. Cal. Dec. 26, 2018) (citing to *Oregon Nat. Desert Ass'n* and *Gilmore* in granting partial summary judgment for failure to make timely determination regardless of subsequent productions).

Moreover, even if the Court adopts Defendants' position on this issue, Defendants have still failed to complete an adequate search as outlined below. *See infra* Sec. II. And even with respect to the documents Defendants have identified, have failed to produce many of those

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documents. *See infra* Sec. III. As a result, they continue to withhold documents in violation of the 20-day statutory deadline. As such, Plaintiff is able to demonstrate entitlement to relief under Count I for Defendants' failure to comply with 5 U.S.C. § 552(a)(6)(A)(i).

II. CBP Has Not Conducted an Adequate Search.

In addition to failing to comply with the statutory deadline, CBP's search for documents has several evident shortcomings that demonstrate the agency failed to fulfill its FOIA obligations. The applicable standard here favors CAIR. Where a plaintiff challenges the agency's search, "FOIA requires an agency . . . to 'demonstrate that it has conducted a search reasonably calculated to uncover all relevant documents.'" *Lahr*, 569 F.3d at 986 (quoting *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985)). As this Court recently observed, "FOIA places the burden 'expressly . . . on the agency to sustain its action.'" *Davis Wright Tremaine LLP v. U.S. CBP*, No. C19-334 RSM, 2020 WL 3258001, at *5 (W.D. Wash. June 16, 2020) (alteration in original) (quoting *Reporters Comm.*, 489 U.S. at 755). Accordingly, when a requester challenges a search's adequacy, "the facts must be viewed in the light most favorable to the requestor." *Zemansky*, 767 F.2d at 571; *see also Davis Wright Tremaine LLP*, 2020 WL 3258001, at *5. "The issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Zemansky*, 767 F.2d at 571 (emphasis omitted). But when "an agency becomes reasonably clear as to the materials desired, FOIA's text and legislative history make plain the agency's obligation to bring them forth." *Truitt v. Dep't of State*, 897 F.2d 540, 544 (D.C. Cir. 1990).

A plaintiff can demonstrate an inadequate search through several means. For example, the agency conducting the search must establish that the agency searched *all* locations that may contain responsive documents. To that end, the U.S. Court of Appeals for the District of

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Columbia has explained that "[i]t is well-settled that if an agency has reason to know that certain places may contain responsive documents, it is obligated under FOIA to search barring an undue burden." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999). As a result, where an agency affidavit detailing a search claims only that it searched the place "most likely to maintain responsive records," the agency has not established its search was adequate. *Davis Wright Tremaine LLP*, 2020 WL 3258001, at *5 (internal quotation marks omitted). That is because other location may also have responsive records. *Id.*

A plaintiff can also demonstrate that the agency failed to follow leads for additional documents to demonstrate that a search was inadequate. An agency "cannot ignore 'clear leads . . . [that] may indicate . . . other offices that should have been searched." *Anguiano v. U.S. Immigration & Customs Enf't*, No. 18-CV-01782-JSC, 2018 WL 5923451, at *5 (N.D. Cal. Nov. 13, 2018) (alterations in original) (emphasis omitted) (quoting *Rollins v. U.S. Dep't of State*, 70 F. Supp. 3d 546, 550 (D.D.C. 2014)); *see also Reporters Comm. for Freedom of Press v. FBI*, 877 F.3d 399, 407 (D.C. Cir. 2017) (agency must pursue lead where "the record reveals an agency office directly and conspicuously weighing in on a pointedly relevant, highly public controversy to which a FOIA request expressly refers"); *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998) ("An agency has discretion to conduct a standard search in response to a general request, but it must revise its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its inquiry."); *cf. Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 772 (9th Cir. 2015) (distinguishing *Campbell* because agency search had not turned up meaningful new leads).

In this case, several facts demonstrate that Defendants' search was inadequate. First, just like in *Davis Wright Tremaine LLP*, CBP's search affidavit "do[es] not adequately establish that

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CBP searched for 'all relevant documents.'" 2020 WL 3258001, at *5. Instead, like in that case, "Mr. Howard testifies only that [the Office of Field Operations (OFO)] was the office 'most likely' to 'maintain' responsive records[, and] CBP does not establish that other component offices were unlikely to possess responsive records." *Id.*; *see also* Dkt. 21 ¶ 20 (using identical language). While Mr. Howe later claims that "all files that are likely to contain records responsive to Plaintiff's FOIA requires have been searched," that assertion is not plausible. Dkt. 21 ¶ 33. CAIR has requested "all directives, orders, guidance, briefings, instructions, musters, e-mail, other electronic communications or any other communications" from *any* CBP officer, including "any . . . communications issued by DHS or CBP headquarters or national officials." Dkt. 21-1. Yet inexplicably, CBP decided to search only the emails of "[t]hree [Seattle Field Office (SFO)] managers in the Border Security Division." Dkt. 21 ¶ 24. Mr. Howard attempts to justify this narrow focus by claiming that "SFO would have received any responsive records by DHS, CBP, or OFO." *Id.* ¶ 20. But CAIR's request is not simply limited to any directives issued by higher level officials regarding the screening of Iranians—it plainly encompasses *any* communications regarding this incident, not just communications from higher-level officials to lower level ones. CBP's failure to search the emails of any emails above the manager level thus strongly suggests it did not conduct an adequate search.

Second, the agency's production to date vindicates these concerns and provides evidence of obvious additional leads among high level officials. Three examples stand out in particular. As noted above, the agency selected only three lower-level managers to look for responsive records. But even these records make clear that other, higher-level officials likely have responsive records that would not be duplicative of those already produced. CBP's production notes that the SFO Director at the time—Adele Fasano—disseminated information from high-level CBP and DHS

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officials to lower level officers implementing the agency's response to Iranian General Soleimani's killing. *See* Maltese Decl. Ex. A at 1-2, 10-11. Ms. Fasano also acted to approve procedures and "work flow" for SFO. *Id.* at 3. In other words, she was likely the *most* critical player in implementing SFO's response, yet her email was not searched. A similar rationale exists for searching the email of the SFO Assistant Director. CBP's records reveal that the Assistant Director played a critical role in disseminating the SFO's operating procedures. *See, e.g.*, Maltese Decl. Ex. A at 43, 47-50, 109-20. In addition, CBP's production demonstrates that national CBP officials communicated with the SFO Assistant Director to "provide[] further clarification . . . for the field [officers] to not target people based on nationality." *Id.* at 12. That fact strongly suggests that the SFO Assistant Director played a critical role in implementing a policy that appears to have targeted U.S. citizens and LPRs for detention based on their nationality. *See* Dkt. 16-7. Despite that fact, Defendants did not search their emails. That failure is glaring. Indeed, if there had been any rebuke or admonition from CBP Headquarters regarding SFO's detention directive, *see id.*, it is likely that any such communications would have been sent directly to the SFO Director and Assistant Director, not to their subordinates.

Similarly, the record makes clear that high-level CBP and DHS officers played a role in crafting CBP's response to a U.S. air strike targeting Iranian general Soleimani and in addressing SFO's implementation of that response. For example, and critically, one record shows that Randy Howe—who at the time was the Executive Director of the Office of Field Operations for CBP—instructed SFO not to target individuals based on nationality. Maltese Decl. Ex. A at 12. But the agency has not conducted a search of Mr. Howe's email. Other records of communications from national officials are also in the record, yet Defendants have never searched the emails of national officials. *See id.* at 6-9. Given the volume of email traffic

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regarding the SFO's response, CBP's failure to search Mr. Howe's email or that of any other national officials means its search was not "reasonably calculated to uncover all relevant documents." *Hamdan*, 797 F.3d at 770 (citation omitted). To the contrary, the Fasano emails, references to the Assistant Director and Howe, and other communications from national officials are "clear leads . . . [that] may indicate . . . other offices [or emails] that should have been searched." *Anguiano*, 2018 WL 5923451, at *5 (alterations in original) (emphasis and citation omitted); *see also Davis Wright Tremaine LLP*, 2020 WL 3258001, at *6 ("[D]rawing presumptions in Plaintiff's favor, it was unreasonable to not search additional component offices."). Indeed, searching only low-level officials "leads to an unfortunate appearance of an agency hand picking the documents to provide." *Davis Wright Tremaine LLP*, 2020 WL 3258001, at *6. That is true here because of substantiated, serious allegations regarding the underlying conduct that CBP records address. As a result, the Court should order Defendant to conduct a further, more robust search for responsive records to guarantee that CBP fulfills its obligations under FOIA.[1]

III. CBP Has Not Met Its Burden to Justify the Exemptions it Cites to Withhold Documents.

In addition to conducting an inadequate search, many of the exemptions that Defendants cite to withhold documents or portions of document do not appear to be justified. CAIR addresses each of the exemptions in turn.

[1] Defendants assert that only CBP is a proper Defendant, but as they note, "CBP is a component within DHS." Dkt. 20 at 2 n.1. The record makes clear that DHS was heavily involved in crafting CBP's response both to the Solemani air strike *and* after the SFO's detention directive became public knowledge. *See, e.g.*, Maltese Decl. Ex. A at 6-9 (memo from high-level DHS officials); *id.* at 145 (stating that "[r]eports that DHS/CBP has issued a related directive are also false"); *id.* Exs. B, J (describing how CBP's Acting Commissioner and SFO Field Director acknowledged CBP made mistakes). Given these high-level communications, it is reasonable to expect that communications exist between DHS and CBP that are responsive to CAIR's FOIA request.

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a. Exemption 5

First, Defendants have improperly redacted materials regarding press inquiries pursuant to FOIA Exemption 5. *See* Maltese Decl. Ex. A at 129-47. Under that exemption, an agency does not need to release "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." 5 U.S.C. § 552(b)(5). Exemption 5 "shields 'those documents, and only those documents, normally privileged in the civil discovery context.'" *Carter v. U.S. Dep't of Commerce*, 307 F.3d 1084, 1088 (9th Cir. 2002) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)). As the Ninth Circuit has explained, "[i]n light of the strong policy of the FOIA that the public is entitled to know what its government is doing and why, exemption 5 is to be applied as narrowly as consistent with efficient Government operation." *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1093 (9th Cir. 1997) (internal quotation marks omitted). Here, Defendants invoke the deliberative process privilege of Exemption 5. Dkt. 20 at 13. "To qualify for exemption 5 under the 'deliberative process' privilege, a document must be *both* (1) 'predecisional' or 'antecedent to the adoption of agency policy' and (2) 'deliberative," meaning 'it must actually be related to the process by which policies are formulated.'" *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988) (quoting *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978)). In short, the process protects "frank discussion of legal or policy matters" among agency employees. *Sears, Roebuck & Co.*, 421 U.S. at 150 (citation omitted).

Exemption 5 is inappropriate for the press inquiry-related emails for two reasons. First, "where there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied, on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government."

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In re Sealed Case, 121 F.3d 729, 738 (D.C. Cir. 1997). As CAIR explains below, *see infra* Sec. II(b), that rationale applies here because SFO targeted U.S. citizens and LPRs for detention based on their Iranian heritage. Despite strong public evidence of such illegal targeting, *see* Dkt. 16-7, CBP denied that a directive was issued, raising the strong possibility that Defendants lied to the public. Thus, both the underlying agency detentions and CBP's response to the press raise the possibility of misconduct and bar application of Exemption 5.

Second, even if there was no misconduct, Exemption 5 does not apply to an agency's formulation of a press statement, especially where that statement does not come in response to any particular inquiry. Courts have repeatedly refused to allow agencies to cite Exemption 5 to shield from disclosure discussions regarding a public-facing statement where that statement "does [not] appear to have been prepared in order to assist in the making of any decision." *First Resort, Inc. v. Herrera*, No. CV 11-5534 SBA (KAW), 2014 WL 988773, at *4 (N.D. Cal. Mar. 10, 2014); *see also Mayer, Brown, Rowe & Maw LLP v. IRS*, 537 F. Supp. 2d 128, 139 (D.D.C. 2008) (draft press releases related to a public notice subject to disclosure because they did not "bear on policy formulation" (citation omitted)); *Chattler v. United States*, No. C–07–4040 MMC (EMC), 2009 WL 1313227, at * 2 (N.D. Cal. May 12, 2009) (questioning assertion of the deliberative process privilege in preparing statements related to testimony before Congress because the decisions addressed in the records "do not seem to be decisions akin to policymaking"). Here, the same rationale applies. Defendants have not explained how the withheld records deliberate the making of policy, nor does the statement respond to any particular, individual press inquiry. Instead, it is a general statement regarding the non-existence of a document—a statement about an alleged state of facts, and nothing more. Full release of these records is therefore warranted.

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b. Exemptions 6 & 7(C)

Many of the records in Defendants' production redact the names of Assistant Directors and Port Directors implementing a policy mandating the detention of U.S. citizens and LPRs based on their national heritage. Because of the underlying agency misconduct at issue here, the public interest outweighs the privacy interests these individuals have and does not warrant the application of these Exemptions 6 and 7(C).

Exemptions 6 and 7(C) allow an agency to redact or withhold documents that "constitute an unwarranted invasion of personal privacy." The language in Exemption 6 allows an agency to withhold "personnel and medical files" that "clearly" constitute an invasion of privacy. 5 U.S.C. § 552(b)(6) By contrast, language in Exemption 7(C) does not specify that records must be "personnel or medical files" or that the invasion of privacy must be "clear[]."[2] *Id.* § 552(b)(7)(C). In light of the similarities, comparable standards apply to each exemption's application. Under each, "the agency [must] balance the relevant individual privacy rights against the public interest in disclosure." *Council on Am.-Islamic Relations, California v. F.B.I.*, 749 F. Supp. 2d 1104, 1119 (S.D. Cal. 2010); *see also Reporters Comm.*, 489 U.S. at 776; *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985 (9th Cir. 1985). As Defendants note, low-level CBP officers have a privacy interest in preventing the disclosure of their names. *See* Dkt. 20 at 16; *see also Ctr. for Biological Diversity v. U.S. Army Corps of Engineers*, 405 F. Supp. 3d 127, 143-44 (D.D.C. 2019). But "[h]igh-level public officials are usually afforded lesser privacy interests than

[2] In addition, records under Exemption 7(C), must also be "compiled for law enforcement purposes." *Wiener v. F.B.I.*, 943 F.2d 972, 983 (9th Cir. 1991). Plaintiff does not challenge that designation for most of the records here. However, CAIR disagrees that emails from individuals in the CBP's Public Affairs Division qualify as records "compiled for law enforcement purposes," as CBP claims in its exemptions. *See* Maltese Decl. Ex. A at 129-147. To the extent that any high-level officials weighed in on the press response, CAIR requests that those names also be released. *See infra*. pp. 15-18.

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lower-level public officials because 'the actions or misconduct of lower-level public officials . . . reveals little about the Government's operations." *ACLU of San Diego & Imperial Ctys. v. U.S. Dep't of Homeland Sec.*, No. 8-15-cv-00229-JLS-RNB, 2017 WL 9500949, at *16 (C.D. Cal. Nov. 6, 2017) (second alteration in original) (citation omitted).[3]

Even when the government identifies a legitimate privacy interest, the public interest may overcome the privacy issues at stake. Specifically, the Supreme Court has explained that a requester may overcome a privacy interest if "the public interest being asserted is . . . that responsible officials acted negligently or otherwise improperly in the performance of their duties." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004); *see also Lissner v. U.S. Customs Serv.*, 241 F.3d 1220, 1223 (9th Cir. 2001) ("[T]he public interest in ensuring the integrity and reliability of government investigation procedures is greater where there is some evidence of wrongdoing on the part of the government official." (quoting *Hunt v. FBI*, 972 F.2d 286, 289 (9th Cir. 1992))). Where a requester can make such a showing, there is a strong public interest in "shed[ing] light 'on an agency's performance of its statutory duties or otherwise let[ting] citizens know what their government is up to.'" *Muchnick v. Dep't of Homeland Sec.*, 225 F. Supp. 3d 1069, 1075 (N.D. Cal. 2016) (quoting *U.S. Dep't of Defense v. Fed. Labor Rel. Auth.*, 510 U.S. 487, 497 (1994)). To make such this required showing, a "requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Favish*, 541 U.S. at 174.; *see also Lane v. Dep't of Interior*, 523 F.3d 1128, 1138 (9th Cir. 2008) (citation omitted).

[3] As CAIR explains in further detail below, it is asking only that the Court hold the exemption should not apply to higher level officials, and specifically, Assistant Directors at SFO and Port Directors within the SFO. CAIR does not ask that the agency un-redact portions of any records that would reveal the name of line officers implementing the directive.

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CAIR has made such a showing here. Both documents in CBP's own production and additional, outside evidence that CAIR has submitted demonstrate this point. Specifically, these documents suggest that SFO leadership set out to systematically violate the rights of certain individuals based on their national origin. As outlined above, following the Soleimani strike, news reports indicate that CBP officers working under the SFO's authority detained dozens of U.S. citizens and LPRs with Iranian heritage at the port of entry in Blaine, Washington. A leaked document later revealed that SFO issued a directive requiring the secondary inspection—in other words, detention—of "[*a*]*ll* persons born after 1961 and born before 2001 with links ([place of birth], travel, Citizenship) [or] any Nexus to the following countries: Palestinians and Lebanese . . . Iranian and Lebanese Nationals." Dkt. 16-7 (emphasis added). And CBP's production similarly raises a strong inference that SFO ordered the detention of U.S. citizens and LPRs based on their national origin. For example, one email with the subject line "Iranian Vetting Process" provides officers with a "good example of the questions officers should be asking" of "Iranian National[s]." Maltese Decl. Ex. A at 84. And as noted above, a high-level official had to instruct the SFO to stop targeting individuals based on their nationality. *Id* at 12. Following that high-level communication, SFO appears to have rescinded the detention directive and instructed officers at the border that they could now "admit on primary [inspection]" "USCs, US LPR[s], and Canadian Citizens." *Id.* at 48, 63, 92 ("There is no need to refer a USC, LPR, or Canadian citizens merely because they have a nexus to Iran."). That instruction strongly implies that *prior* to those instructions, certain U.S. citizens and LPRs were referred to secondary inspection in all cases for additional vetting.

As a result, CAIR has easily made a "meaningful evidentiary showing." *Favish*, 541 U.S. at 175. The "forcible [detention] of U.S. citizens . . . solely and explicitly on the basis of race, is

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objectively unlawful." *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). Discrimination on the basis of national origin is similarly unlawful, or at least requires strict scrutiny. *See, e.g.*, *Tiwari v. Mattis*, 363 F. Supp. 3d 1154, 1162 (W.D. Wash. 2019). And Congress has forbidden CBP from detaining a United States citizen except pursuant to an Act of Congress. *See* 18 U.S.C. § 4001(a). As a result, clear indicia exist here of a widespread, if brief, CBP policy to violate the civil rights of certain U.S. citizens and LPRs by mandating their detention based on impermissible and unconstitutional criteria. The Court should accordingly order that the names of Assistant Directors and Port Directors playing a key role in implementing this policy be released under FOIA.

c. Exemption 7(E)

The primary exception that Defendants cite in this case is 5 U.S.C. § 552(b)(7)(E), which allows an agency to withhold records that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." According to Defendants, the information redacted under Exemption 7(E) could potentially empower persons seeking to enter the United States to "avoid[] detection or circumvent[] the law." Dkt. 20 at 20.

As an initial matter, the *Vaughn* index is inadequate with respect to the claimed 7(E) exemptions. Defendants provide highly similar rationale each time they claim the exemption. In some instances, Defendants claim generally that the redacted information "reveals law enforcement techniques and procedures used during an enhanced security posture situation" or during a "possible high threat alert situation." *See, e.g.*, Dkt. 22-4 at 7-8, 10-11, 12-13, 15-16, 23. For other exemptions, the agency provides slightly more detail, explaining that the information

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might allow an individual to learn how CBP assesses "a person's admissibility" or how CBP decides when to make a "referral to secondary inspection." *See, e.g.*, *id.* at 4-5, 11-12. But the agency offers nothing more. Such "'boilerplate' explanations for why whole categories of documents should be exempt" mean "that neither the adversary process nor the Court can perform its function." *ACLU of Washington v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011 WL 887731, at *2 (W.D. Wash. Mar. 10, 2011); *see also Wiener*, 943 F.2d at 986 (ordering FBI to produce more detailed *Vaughn* index because "[w]ithout . . . further details" the plaintiff could not "effectively argue that the claimed law enforcement purpose was in fact a pretext"). In light of these concerns, courts regularly order agencies to "supplement [a] *Vaughn* index in order to describe more fully the information that [the agency] has withheld as related to law enforcement techniques whose disclosure would 'risk circumvention of the law.'" *Clemente v. F.B.I.*, 741 F. Supp. 2d 64, 88 (D.D.C. 2010); *see also Shannahan v. IRS*, No. C08-452JLR, 2009 WL 4051078, at *11 (W.D. Wash. 2009) (ordering agency to supplement *Vaughn* index with additional materials).

Here, an order requiring Defendants to supplement the *Vaughn* index is appropriate. CBP has not "provided [any] insight into the particular techniques or procedures at issue, nor offered any discussion regarding whether the techniques or procedures are well known." *Shannahan*, 2009 WL 4051078, at *8. Instead, the agency states in conclusory fashion that the information subject to 7(E) "is not generally known or publically [sic] disclosed." Dkt. 22 ¶ 29. Defendant's descriptions offer little opportunity for CAIR to oppose the agency's designations. *See Clemente*, 741 F. Supp. 2d at 88 ("[T]he FBI cannot rely upon the vaguely worded categorical description it has provided. It must provide evidence from which the Court can deduce something of the nature of the techniques in question."). Because Defendants have not identified the nature of the

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documents nor provided a detailed basis for their exclusion, CAIR is limited to arguing by inference based on what Defendants have chosen to release.

However, even if the Court determines that the current *Vaughn* index is sufficient, Defendants have over-redacted the documents at issue. This is true for two primary reasons: (1) the redacted information is publicly known and will not "result in the harm exemption 7(E) seeks to avoid," *Perrone v. FBI*, 908 F. Supp. 24, 28 (D.D.C. 1995), and (2) several sources indicate that the agency has redacted information to shield illegal activity from public disclosure.

First, further disclosure is warranted because "Exemption 7(E) only exempts investigative techniques not generally known to the public." *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 815 (9th Cir. 1995). Pursuant to this rule, the Ninth Circuit has explained that the particular "application" of a known technique is not exempt under 7(E), while a "specific means" or "detailed, technical analysis of the techniques" may be exempt. *ACLU of N. California v. U.S. Dep't of Justice*, 880 F.3d 473, 491 (9th Cir. 2018) (citations omitted). Thus, in *Rosenfeld*, the Ninth Circuit rejected the government's attempt to use 7(E) to shield records regarding a pretextual phone call to a particular individual. 57 F.3d at 815. The Court reasoned that the call was an application of a known technique—pretextual phone calls. *Id.* Similarly, in *ACLU of N. California*, the Court of Appeals rejected the government's efforts to shield from disclosure "documents [that] describe generally methods for using various technologies to obtain a suspect's location information, including from wireless carriers, mobile tracking devices, vehicle telematics systems, and Internet Protocol (IP) addresses." 880 F.3d at 492. As the Court explained, "the withheld documents in this case do not reveal details or means of deploying law enforcement techniques." *Id.* By contrast, in *Hamdan*, the Ninth Circuit concluded that the FBI properly withheld FBI "techniques and procedures related to surveillance and credit searches."

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797 F.3d at 777. "In order to justify a deletion under Exemption 7(E), the government will have the burden of proving that these techniques are not generally known to the public." *Wilkinson v. F.B.I.*, 633 F. Supp. 336, 349 (C.D. Cal. 1986).

Here, CBP has not met its burden to demonstrate that the records to which it has applied 7(E) are exempt. While CAIR is forced is speculate regarding the redactions and withheld documents, other evidence in the record strongly implies that much of these materials are public. Significantly, while CBP has continued to refuse to acknowledge if the detention directive is genuine, its release and the widespread news coverage of the directive mean that the information in that directive is "generally known to the public." *Rosenfeld*, 57 F.3d at 815. While "prior agency disclosures do not necessarily result in an agency's waiver to subsequent claims of exemption," *Bowen v. FDA*, 925 F.2d 1225, 1228 (9th Cir. 1991), courts have noted that prior, public release still weakens the agency's claimed exemption in similar contexts, *see Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983) ("A number of courts have shown a willingness to accept the argument that publicly known information cannot be withheld under exemptions 1 and 3."). Similarly, several public accounts of the detentions in Blaine on January 4 and 5 recount that CBP used the criteria reflected in the directive at Dkt. 16-7 to screen people. *See* Maltese Decl. Ex B-H (new articles). In this sense too, the directive's information is already public knowledge, and not a "technique" or "procedure" subject to Exemption 7(E).

The records that CBP has already produced and other public records further underscore the conclusion that the "techniques" that CBP is exempting are publicly known. As described above, the agency's production strongly implies that officers were instructed to target individuals based on their national origin. Despite revealing that fact, Defendants still claim that the directive at Dkt. 16-7—which orders CBP officers to detain U.S. citizens and LPRs based on their national

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origin—is not a publicly known technique. Similarly, to the extent that CBP is instructing officers to screen people for "extremist ideology" or "suspicious behavior," Dkt. 16-7, such techniques are publicly known. Indeed, DHS provides far more detailed instructions for such techniques on its website. Maltese Decl. Ex. K. CAIR's Exhibit K is linked on a form that CBP released to Plaintiff as part of the response to its FOIA request. *See* Dkt. 16-4.

Release of the redacted records is also unlikely to result in the harm that agency claims will result here. As one court has explained, "[r]eleasing the subset of topics for questioning would not permit persons to devise strategies to circumvent the law in the same way that releasing the questions themselves would." *Asian Law Caucus v. U.S. Dep't of Homeland Sec.*, No. C 08-00842 CW, 2008 WL 5047839, at *5 (N.D. Cal. Nov. 24, 2008). While CBP need not show that the information would result in circumvention of the law, *see Hamdan*, 797 F.3d at 778, the agency nevertheless claims that the information it has redacted could allow people "to alter their patterns of conduct, adopt new methods of operations, and/or effectuate other countermeasures to avoid detection thereby interfering with CBP's law enforcement efforts by avoiding detection or circumventing the law." Dkt. 22 ¶ 29. But it is generally known that CBP officers (unlawfully) detained persons based on their national origin, and the other categories referenced in Dkt. 16-7 are also well-known general criteria for screening individuals.[4] Moreover, at least with respect to the directive at Dkt 16-7, that directive no longer appears to be agency policy, as detailed above. Because it is not a *current* technique, any harm the agency must suffer from its release is considerably diminished. *See, e,g.*, *Families for Freedom v. CBP*,

[4] To the extent that other claimed 7(E) exemptions are similar to the directive, the same rationale applies to them. Plaintiff contends that in so far as the criteria for screening provides broad, general categories for vetting, such information is general public knowledge and will not result in harm to CBP's law enforcement duties.

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837 F. Supp. 2d 287, 300 (S.D.N.Y. 2011) ("[R]isks [of circumvention] are lowest in the context of historical information.").

Second, as CAIR has already repeatedly detailed, the record provides unmistakable signs of systematic civil rights violations resulting from an agency policy. Other courts have created an exception to Exemption 7(E) where the agency uses that provision to shield evidence of unlawful activity. As one court explained, "[b]ecause the policy behind [Exemption 7(E)] is to shield effective and little-known law enforcement techniques from potential violators so that they may not be circumvented, Exemption 7(E) may not be used to withhold information regarding investigative techniques that are illegal or of questionable legality." *Wilkinson*, 633 F. Supp. at 349; *see also Kuzma v. IRS*, 775 F.2d 66, 69 (2d Cir. 1985) ("[U]nauthorized or illegal investigative tactics may not be shielded from the public by use of FOIA exemptions."). That reasoning makes sense: an agency cannot claim the law enforcement "techniques or procedures" exception where those technique or procedures were never valid in the first place because they were unlawful. The Ninth Circuit has made clear that agency misconduct may be a reason that a claimed 7(E) exemption might be inapplicable, but has not explicitly resolved the question. *Hamdan*, 797 F.3d at 778. Thus, the Court should not allow Exemption 7(E) to apply to any materials where strong indicia of unlawful agency techniques are present. As explained above, in this case, that would include materials mandating secondary vetting and detention based on a U.S. citizen or LPR's national origin. *Supra* p. Sec. II(b).

IV. *In Camera* Review Is or Will Be Warranted.

Finally, CAIR respectfully requests that the Court conduct an *in camera* review of CBP's redactions in this case. *See* 5 U.S.C. § 552(a)(4)(B); *Islamic Shura Council of S. California v. FBI*, 635 F.3d 1160, 1165 (9th Cir. 2011) (*in camera* review appropriate "[t]o compensate for

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th[e] imbalance of knowledge as between the plaintiffs and the government"). *In camera* review is particularly warranted if this Court declines to order Defendants to supplement the *Vaughn* index. *See Weiner*, 943 F.2d at 979. However, even once the Court considers Defendants' *Vaughn* index and search complete, *in camera* review may be critical to ensure that Defendants have not redacted materials shielding unlawful agency conduct from disclosure. This is especially true if Defendants continue to insist on withholding documents as to the illegal directive and records from high-level officials detailing the response to that directive. Courts have recognized that *in camera* review is especially appropriate where an agency may be shielding illegal or unlawful activity from disclosure. *See, e.g.*, *Jones v. F.B.I.*, 41 F.3d 238, 243 (6th Cir. 1994) (noting that *in camera* review will be more important "where the effect of disclosure or exemption clearly extends to the public at large, such as a request which may surface evidence of corruption in an important government function" (citation omitted)); *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 543 (6th Cir. 2001); *Samahon v. F.B.I.*, 40 F. Supp. 3d 498, 521 (E.D. Pa. 2014) ("Plaintiff has produced evidence of potentially improper conduct by the FBI; the *in camera* review has confirmed that disclosure exposes likely illegal or unethical conduct.") Moreover, i*n camera* review is also particularly appropriate where the record is small enough that the Court can view all the redacted and withheld materials. *See Lane*, 523 F.3d at 1136. For these reasons, *in camera* review is also appropriate here after Defendants have performed an appropriate search and the Court considers the *Vaughn* index complete.

CONCLUSION

For the foregoing reasons, CAIR asks that the Court grant it summary judgment.

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Respectfully submitted on this 24th day of July, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

DATED this 24th day of July, 2020.

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