

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

_____	)	
ELECTRONIC PRIVACY	)	
INFORMATION CENTER,	)	Civil Action No: 14-1217 (RBW)
	)	
Plaintiff,	)	ECF
	)	
v.	)	
	)	
U.S. CUSTOMS AND BORDER	)	
PROTECTION,	)	
	)	
Defendant.	)	
_____	)	

**DEFENDANT’S CONSOLIDATED REPLY AND OPPOSITION TO  
PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT**

Defendant U.S. Customs and Border Protection (CBP), a component of the United States Department of Homeland Security, by and through undersigned counsel, respectfully replies to Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment (Pl.’s Mem.) (ECF No. 21-1) in this action brought under the Freedom of Information Act (FOIA), as amended, 5 U.S.C. § 552. Defendant also responds to Plaintiff’s Cross-Motion for Summary Judgment, which was filed contemporaneously with its Opposition (ECF No. 20-1) (same as Pl.’s Mem.).

Defendant has established in its moving papers and in this reply and opposition to Plaintiff’s cross-motion for summary judgment that it has properly asserted FOIA exemptions to withhold material contained in documents responsive to Plaintiff’s FOIA request, and that it has disclosed all responsive, nonexempt records to Plaintiff. Summary judgment in favor of Defendant is therefore appropriate because there is no genuine issue as to any material fact, and Defendant is entitled to judgment as a matter of law. For the same reasons, the Court should deny Plaintiff’s cross-motion for summary judgment.

**ARGUMENT**

**I. PLAINTIFF HAS CONCEDED THAT CBP PROPERLY WITHHELD INFORMATION UNDER FOIA EXEMPTIONS 3, 4, 5, 6 & 7(C).**

Defendant's summary judgment motion demonstrated that CBP conducted a reasonable search of the components likely to have records responsive to Plaintiff's FOIA request for information regarding CBP's Analytical Framework for Intelligence (AFI) and that CBP properly withheld some of the records, in whole or part, under FOIA Exemptions 3, 4, 5, 6, 7(C), and 7(E). 5 U.S.C. §§ 552(b)(3)-(6), (b)(7)(C), (b)(7)(E).

Where a party files an opposition to a motion and addresses only certain arguments raised by the movant, this Court routinely treats the unaddressed arguments as conceded pursuant to Local Rule 7(b). *See Hayes v. Sebelius*, 762 F. Supp. 2d 90, 100 (D.D.C. 2011). In its opposition and cross-motion for summary judgment, Plaintiff challenges only CBP's assertion of FOIA Exemption 7(E) to withhold information contained in 314 pages of documents including "screen shots of the AFI system and specific information regarding how to navigate and use AFI as well as to descriptions of law enforcement techniques and procedures regarding the use of the AFI system, AFI's capabilities, and CBP's processing of international travelers." Pl.'s Mem. 6 (quoting Declaration of Sabrina Burroughs at ¶ 32). Plaintiff does not challenge (and therefore concedes) the adequacy and reasonableness of Defendant's search for records responsive to Plaintiff's FOIA request. Plaintiff expressly concedes Defendant's assertion of FOIA Exemptions 3, 4, 5, 6, and 7(C) to withhold responsive records in full or in part. *See* Pl.'s Mem. 6.

As explained in greater detail below, CBP has sufficiently justified its withholding of exempt information pursuant to Exemptions 7(E), the sole contested exemption asserted by

CBP.<sup>1</sup>

**II. DEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE ALL NON-EXEMPT RESPONSIVE MATERIAL HAS BEEN RELEASED.**

This Court has jurisdiction in a FOIA action, such as this, only when an agency has “improperly withheld” agency records. 5 U.S.C. § 552(a)(4)(B). The Supreme Court has interpreted this section of the statute to mean that jurisdiction only exists “upon a showing that an agency has (1) ‘improperly’; (2) ‘withheld’; (3) ‘agency records.’” *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150 (1980). “The [p]laintiff must show that the agency ‘contravened all three components of this obligation’ in order for jurisdiction to be valid.” *Kuffel v. U.S. Bureau of Prisons*, 882 F. Supp. 1116, 1120 (D.D.C. 1995) (citing *Kissinger*, 445 U.S. at 150). Absent such a showing, FOIA confers no “judicial authority to devise remedies and enjoin agencies.” *Kissinger*, 445 U.S. at 150.

"[I]t is well established that under the FOIA, ‘once the records are produced the substance of the controversy disappears and becomes moot, since disclosure which the suit seeks has already been made.’” *Trueblood v. U.S. Dep’t of Treasury*, 943 F. Supp. 64, 67 (D.D.C. 1996) (quoting *Crooker v. U.S. State Dep’t*, 628 F.2d 9, 10 (D.C. Cir. 1980)); *see also Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982). Thus, summary judgment is appropriate in a FOIA case where the pleadings, together with the declaration, demonstrate that there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law. *See Fed. R Civ. P. 56(a); Weisberg v. U.S. Dep’t of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980); *Fischer v. United States Dep’t of Justice*, 596 F. Supp. 2d 34, 42 (D.D.C. 2009) (“summary judgment may be granted to the government if ‘the agency proves that it has fully

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<sup>1</sup> Defendant notes that it has asserted Exemptions 6 and 7(C) in conjunction with Exemption 7(E) on a number of occasions and, to the extent that material has also been withheld under the former exemptions, the withholdings are conceded.

discharged its obligations under the FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester”) (citation omitted).

The agency may carry its burden by relying on the declaration of a government official because courts normally accord a presumption of expertise in FOIA as long as the declaration is sufficiently clear and detailed and submitted in good faith. *See, e.g., Oglesby v. U.S. Department of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Hayden v. National Security Agency*, 608 F.2d 1381, 1387 (D.C. Cir. 1979). A court may therefore award summary judgment in a FOIA case solely on the basis of information provided by the department or agency affidavits or declarations. *See id.* Here, Defendant supported its motion for summary judgment with the Declaration of Sabrina Burroughs. As Defendant established in its moving papers, this declaration meets the requirements of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), and provides the Court with the requisite bases to grant Defendant’s motion. *See* Def.’s Mem. of Points and Authorities in Support of Def.’s Motion for Summary Judgment (“Def.’s Mem.”) (ECF No. 18) at 12-27. Specifically, the declaration identifies and describes the documents responsive to Plaintiff’s FOIA request, and sets forth the justification for the exemptions claimed for the withholding of certain documents. *See generally* Burroughs Decl. (ECF No. 18-1). Defendant is therefore entitled to summary judgment because it has met its burden and demonstrated that it has not improperly withheld any responsive, non-exempt records.

**A. Defendant Properly Applied FOIA Exemption 7(E) to Withhold Information Protected From Disclosure.**

In its moving papers, Defendant demonstrated that CBP properly withheld documents under Exemption 7(E). *See* Def.’s Mem. 25-27; Burroughs Decl. ¶¶ 30-35. In response, Plaintiff

contends that the Government cannot rely on Exemption 7(E) because CBP has failed to demonstrate the harm cause by disclosure, i.e., “how disclosure of the redacted information would risk circumvention of the law.” *See* Pl.'s Mem. 12-13. Plaintiff's contention lacks merit.

5 U.S.C. § 552(b)(7) exempts from disclosure certain records or information that are “compiled for law enforcement purposes.” Plaintiff does not contest that the records at issue in this case were compiled for law enforcement purposes in that the information is created and used by CBP in its law enforcement mission to secure the border of the United States. *See* Pl.'s Mem. at 10; *see also* Burroughs Decl. at ¶ 30.

Section 552(b)(7)(E) exempts from disclosure law enforcement records or information that “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). The first clause of Exemption 7(E) affords “categorical” protection for “techniques and procedures” used in law enforcement investigations or prosecutions. *Ortiz v. United States Department of Justice*, 67 F. Supp. 3d 109, 122 (D.D.C. 2014); *Smith v. Bureau of Alcohol, Tobacco and Firearms*, 977 F. Supp. 496, 501 (D.D.C. 1997) (citing *Fisher v. United States Dep't of Justice*, 772 F. Supp. 7, 12 n. 9 (D.D.C. 1991) (upholding the FBI's decision to withhold information about law enforcement techniques where disclosure would impair effectiveness and, within context of documents, “could alert subjects in drug investigations about techniques used to aid the FBI”), *aff'd*, 968 F.2d 92 (D.C. Cir. 1992)). “Information that relates to law enforcement techniques, policies, and procedures is properly withheld under this exemption.” *Showing Animals Respect & Kindness v. U.S. Dep't of the Interior*, 730 F. Supp. 2d 180, 199 (D.D.C. 2010) (citing *Boyd v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 570 F.

Supp. 2d 156, 158 (D.D.C. 2008)).

In this case, CBP has applied FOIA Exemption (7)(E) to screen shots of the AFI system and specific information regarding how to navigate and use AFI as well as to descriptions of law enforcement techniques and procedures regarding the use of the AFI system, AFI's capabilities, and CBP's processing of international travelers. Burroughs Decl. at ¶ 32. Ms. Burroughs explained in her declaration that CBP applied Exemption (7)(E) to withhold this information because public disclosure may enable an individual knowledgeable in computer systems to improperly access the system, facilitate navigation or movement through the system, allow manipulation or deletion of data and interfere with enforcement proceedings. *Id.* at ¶ 33. Ms. Burroughs further stated that disclosure of the withheld information would provide a detailed roadmap to individuals looking to manipulate AFI or to evade detection by law enforcement, thereby circumventing the law and potentially resulting in alteration, loss, damage or destruction of data contained in CBP's computer system. *Id.* Ms. Burroughs further explained that CBP properly withheld the descriptions of law enforcement techniques and procedures regarding the use of the AFI system, AFI's capabilities, and CBP's processing of international travelers under Exemption (7)(E) because this information would reveal CBP targeting and inspection techniques used in the processing of international travelers. *Id.* at ¶ 34. Thus, with respect to law enforcement investigative techniques and procedures, the CBP has determined that disclosure would reveal not only particular techniques and procedures regarding the use of the AFI system and AFI's capabilities, but it would also reveal CBP targeting and inspection techniques used in the processing of international travelers. Burroughs Decl. ¶ 30-35.

Indeed, CBP has withheld precisely the type of law enforcement information routinely found by courts to be protected from disclosure under Exemption 7(E). *See, e.g., Pub. Emps. for*

*Env'tl. Responsibility v. U.S. Section Int'l Boundary & Water Comm'n*, 839 F. Supp. 2d 304, 327 (D.D.C. 2012) (USIBWC properly asserted Exemption 7(E) to justify withholding various guidelines for law enforcement contained in the Emergency Action Plans for two dams and power plants including “descriptions of surveillance plans, logistics and conclusions meant for use by the USIBWC and emergency management personnel as guidelines and procedures in the event of an emergency such as a terrorist attack”), *aff'd in part and reversed in part and remanded on other grounds*, 740 F.3d 195 (D.C. Cir. 2014) (Exemptions 7(E) and 7(F) affirmed); *Strunk v. U.S. Dep't of State et al.*, 905 F. Supp. 2d 142, 147–49 (D.D.C. 2012) (CBP properly withheld information about the Treasury Enforcement Communication System (TECS) and operating programs under Exemption 7(E)); *Soghoian v. U.S. Dep't of Justice*, 885 F.Supp.2d 62, 75 (D.D.C. July 31, 2012) (“Knowing what information is collected, how it is collected, and more importantly, when it is *not* collected, is information that law enforcement might reasonably expect to lead would-be offenders to evade detection”); *Blackwell v. FBI*, 680 F. Supp. 2d 79, 92 (D.D.C. 2010) (“The manner in which ChoicePoint data is searched, organized, and reported to the FBI is an internal technique, not known to the public . . . Because the information relates solely to the FBI’s internal practices, disclosure would not serve a public purpose, and disclosure potentially would aid others in circumventing future FBI investigations, the information is exempt from disclosure under Exemptions (b)(2) and 7(E)”); *Showing Animals Respect & Kindness*, 730 F. Supp. 2d at 199–200 (stating the Fish and Wildlife Service properly withheld its surveillance techniques that could compromise its ability to conduct future investigations at wildlife refuges).

Consequently, Plaintiff’s argument that CBP has failed to demonstrate that disclosure could reasonably be expected to risk circumvention of the law lacks merit. CBP has explained

that disclosure of the information at issue “would provide a detailed roadmap to individuals looking to manipulate AFI or to evade detection by law enforcement” and “enable potential violators to design strategies to circumvent the law enforcement procedures developed by CBP.” Burroughs Decl. at ¶¶ 33-34. The withholdings therefore fall squarely within the scope of Exemption 7(E) because release of the information about the AFI system withheld in this case by CBP would enable potential violators to design strategies to circumvent the law enforcement procedures developed by CBP. *Id.* at ¶ 35. Protecting and maintaining the integrity of CBP computer systems is imperative in assisting CBP to meet its mission to prevent terrorists, their weapons, and other dangerous items from entering the United States. *Id.* As previously noted, AFI “enhances DHS’s ability to identify, apprehend, and prosecute individuals who pose a potential law enforcement or security risk; and it aids in the enforcement of customs and immigration laws, and other laws enforced by DHS at the border.” *See* 77 Fed. Reg. 33753, 33753 (June 7, 2012). As an important law enforcement tool, there is a great need to defend AFI against any threatened or real risk of threat or compromise to ensure CBP is able to effectively carry out its mission. *Id.* CBP has therefore properly withheld material relating to the AFI system under Exemption 7(E).

**B. Defendant Described and Justified All Withholdings of Responsive Records.**

In addition to the specific challenges addressed above, Plaintiff generally claims that the CBP’s *Vaughn* declaration was inadequate because it did not provide particularized justifications for withholdings. *See* Pl.’s Mem. 13-15. However, under each exemption category, CBP identified the information/type of information it was withholding. With respect to Exemption 7(E), the sole contested exemption, CBP specifically explained why disclosure of information concerning the AFI system could undermine the effectiveness or utility of the related law

enforcement techniques or procedures and/or risk circumvention of the law. Thus, consistent with its obligations under FOIA, CBP's supporting declaration "reveal[ed] as much detail as possible as to the nature of the document, without actually disclosing information that deserves protection." See *Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996).

**C. Defendant Released All Reasonably Segregable Material.**

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). This provision does not require disclosure of records in which the non-exempt information that remains is meaningless. See *Nat'l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 220-21 (D.D.C. 2005). "The question of segregability is by necessity subjective and context-specific, turning upon the nature of the document in question and the information contained therein. *Schoenman v. FBI*, 763 F. Supp. 2d. 173, 202 (D.D.C. 2011). An agency need not, for instance, 'commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content.'" *Id.* (quoting *Mead Data v. Dep't of the Air Force*, 566 F.2d 242, 261 n. 55 (D.C.Cir. 1977)). Ultimately, to meet its burden, the agency must provide a reasonably detailed justification to support its claim that the non-exempt material in a document is not reasonably segregable. *Mead Data*, 566 F.2d at 261. However, the justification need not be so detailed so as to compromise the nature of the withheld information. *Id.*

Defendant has demonstrated that it released reasonably segregable material to Plaintiff. CBP has submitted a declaration explaining that "[a]ll information withheld is exempt from disclosure pursuant to a FOIA exemption or is not reasonably segregable because it is so intertwined with protected material that segregation is not possible or its release would have

revealed the underlying protected material.” Burroughs Decl. at ¶ 36. A court “may rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated.” *Juarez v. Dep’t of Justice*, 518 F.3d 54, 61 (D.C. Cir. 2008) (citation omitted).

The efforts described by CBP to segregate releasable materials are all that is required. *See, e.g., Loving v. U.S. Dep’t of Defense*, 496 F. Supp. 2d 101, 110 (D.D.C. 2007) (holding that “government’s declaration and supporting material are sufficient to satisfy its burden to show with ‘reasonable specificity’ why the document cannot be further segregated,” where declaration averred that agency had “released to plaintiff all material that could be reasonably segregated”) (quoting *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002)). Defendant is therefore entitled to summary judgment and the Court should deny Plaintiff’s cross-motion for summary judgment.

### **CONCLUSION**

WHEREFORE, for the foregoing reasons, and those stated in the Defendant’s moving papers, the Court should enter judgment in favor of the Defendant and deny Plaintiff’s cross-motion for summary judgment.

Respectfully submitted,

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