
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:15-cv-00229-JLS-RNB

Date: April 19, 2018

Title: American Civil Liberties Union of San Diego and Imperial Counties et al. v. United States
Department of Homeland Security et al.

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero
Deputy Clerk

N/A
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF: ATTORNEYS PRESENT FOR DEFENDANT:

Not Present

Not Present

**PROCEEDINGS: (IN CHAMBERS) (1) SUPPLEMENTAL SUMMARY
JUDGMENT ORDER; AND (2) REQUEST FOR
PREPARATION OF FINAL JUDGMENT**

As part of the Court’s Summary Judgment Order, the Court directed the Government to produce the Border Patrol Academy Records, *Vaughn* Nos. 1–49, 55, and 56, for *in camera* review. (MSJ Order at 41, Doc. 90.) The Government thereafter produced those records and the Court has completed its review. The Court now **ORDERS** the Government to produce all records or portions of records that were improperly withheld, as identified below.

Because the full factual background of this case is set forth in the Summary Judgment Order, the Court briefly summarizes the parties’ dispute regarding the Border Patrol Academy Records still at issue. The Government withheld *Vaughn* Nos. 1–48 in their entirety under Exemptions 5 and 7(E), using “broad, conclusory recitations of the elements” of these exemptions, “combined with highly general categorizations of the law enforcement procedure[s].” (MSJ Order at 30.) Accordingly, the Court concluded that meaningful review of the Government’s exemption claims was impossible and granted Plaintiffs’ request for *in camera* review of these records. (*Id.*) As to *Vaughn* Nos. 49, 55, and 56, the Government produced to Plaintiffs versions of these records that were redacted pursuant to Exemption 7(E), but the Court agreed with Plaintiffs that these versions were “so heavily redacted as to preclude meaningful review of the propriety” of

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the Government’s withholdings. (*Id.*) Thus, the Court determined that it would conduct an *in camera* review of those records as well. (*Id.*)

I. DISCUSSION

The Government continues to seek to withhold *Vaughn* Nos. 1–48 in their entirety under Exemption 5. (Notice of Lodging, Doc. 93.) However, the Government now claims the 7(E) Exemption as to only portions of those records. (*Id.* at 2.) As to *Vaughn* Nos. 49, 55, and 56, the Government continues to assert all Exemption 7(E) withholdings that were previously claimed. Finally, the Government claims Exemptions 6 and 7(C) as to portions of all records that reveal identification information of certain individuals. (*Id.*)

A. Exemption 5

After reviewing *Vaughn* Nos. 1–48 *in camera*, the Court determines that only limited, segregable portions of these documents consist of material that is protected by Exemption 5.

“Exemption 5 encompasses records normally privileged in the civil discovery context.” *ACLU of N. Cal. v. United States Dep’t of Justice*, 880 F.3d 473, 483 (9th Cir. 2018). “These include records that would be protected in litigation by the attorney work-product, attorney-client, and deliberative process privileges.” *Id.*

Vaughn Nos. 1–7 and 12 are slideshow presentations that instruct agents on the legal requirements and suggested procedural steps for conducting an investigative detention. They also briefly reference the statutes authorizing investigative detentions and review general practical pointers for investigative encounters. (*See, e.g., Vaughn* No. 7 at 6997-2, Doc. 92-6.) The information contained in these records “assists investigators in the conduct of their investigations. It does not include the ‘mental impressions, conclusions, opinions, or legal theories of a party’s attorney’ that were ‘prepared in anticipation of litigation for trial.’” *ACLU of N. California*, 880 F.3d at 484. Because these materials “serve[] no cognizable adversarial function,” Exemption 5 is inapplicable to *Vaughn* Nos. 1–7 and 12. *Id.* at 486.

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Vaughn Nos. 8–10 and 46–48 constitute “legal update training” for instructors and students. The majority of the content, though not all of it, is a general summary of legal authority pertaining to the Fourth and Fifth Amendments. As such information is “[m]aterial that simply lists relevant case law and recites case holdings,” it “is not protected by the attorney work-product privilege or Exemption 5.” *ACLU of N. Cal.*, 880 F.3d at 488. However, pages 70–83 of *Vaughn* No. 8 provide strategic legal guidance for agents who are defendants in private lawsuits.¹ Similar to Chapters 16 and 17 of the Enforcement Law Course, these identified pages “convey litigation strategy” and advise agents on how to “conduct themselves during litigation.” (MSJ Order at 21.) Therefore, as these pages are “aimed directly towards litigation,” they were properly withheld under Exemption 5. (*Id.*)

Vaughn No. 11 is a memo from the CBP Office of Chief Counsel regarding the Supreme Court’s holding in *Arizona v. Gant*. The memo provides a general summary of the case and an objective explanation of what areas of the law it affects; thus, the memo “more closely resemble[s] continuing legal education resources ... than attorney work product.” *ACLU of N. Cal.*, 880 F.3d at 488. Accordingly, Exemption 5 is not applicable to *Vaughn* No. 11.

Vaughn Nos. 13–38 are instructor and student training guides entitled “Applied Authorities” that discuss relevant legal authority for law enforcement and investigations. Some of these records, specifically *Vaughn* Nos. 13–16, generally discuss the potential consequences to agents for exceeding their authority, including the suppression of unlawfully obtained evidence and personal liability. However, unlike the discussion of personal liability on pages 70–83 of *Vaughn* No. 8, the discussion of personal liability in these documents is limited to generic, brief summaries of the case law that authorizes private causes of action against agents. (*See, e.g., Vaughn* No. 13 at 12–13.) Thus, *Vaughn* Nos. 13–38 contain generally applicable legal advice and, “like an agency

¹ The Court notes for clarity that pages 98–103 of *Vaughn* Nos. 46–48 are not entitled to exemption, although they are included in the “Personal Liability” section of the slideshows. These pages provide objective summaries of general legal principles. They do not serve any “cognizable adversarial function,” nor do they implicate “the integrity of the trial process.” *See ACLU of N. Cal.*, 880 F.3d at 486.

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manual, flesh[] out the meaning of the law.” (MSJ Order at 22.) Accordingly, no portion of these documents may be withheld under Exemption 5.

Finally, *Vaughn* Nos. 39–45 constitute various educational guides. Specifically, *Vaughn* Nos. 39–41 and 44 are flow charts that provide general guidance regarding the level of suspicion legally necessary to detain a moving vehicle. *Vaughn* Nos. 42 and 43 are fact patterns based on Supreme Court cases that invite students to apply certain legal propositions to specific factual situations. None of these records constitute information “prepared in anticipation of litigation for trial.” *ACLU of N. California*, 880 F.3d at 484. Because these materials “serve[] no cognizable adversarial function,” Exemption 5 is inapplicable. *Id.* at 486.

B. Exemption 7(E)

Under Exemption 7(E), “an agency may withhold ‘records or information compiled for law enforcement purposes’ if they ‘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.’” (MSJ Order at 24, *quoting* 5 U.S.C. § 552(b)(7)(E).)

1. *Vaughn* Nos. 1–48

The Government has identified specific lines of text on *Vaughn* Nos. 1–7, 12, 22–23, and 36–38 that it proposes to redact pursuant to Exemption 7(E), as this text references particular law enforcement search techniques and procedures. (Notice of Lodging at 2–3.) Through its *in camera* review, the Court has verified that the specified text constitutes “discernable law enforcement techniques and procedures that are not generally known to the public.” (MSJ Order at 26.) Therefore, the Government may redact references to these techniques and procedures as identified on the face of the records. (*See* Notice of Lodging at 2–3.)

2. *Vaughn* Nos. 49, 55–56

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The Government has also withheld in part *Vaughn* Nos. 49, 55, and 56 pursuant to the 7(E) Exemption. (Notice of Lodging at 2.) These records constitute different versions of a presentation entitled “Vehicle Stops,” and all three contain similar content regarding enforcement techniques and procedures for officers to utilize in connection with vehicle detentions. The Court’s *in camera* review confirms that the Government has redacted information regarding techniques and procedures that are not generally known to the public. Moreover, the exempt information is too intertwined with potentially non-exempt information to allow for a more limited redaction. (*See* MSJ Order at 25–26.) Accordingly, *Vaughn* Nos. 49, 55, and 56 were properly redacted pursuant to Exemption 7(E), with the exception of the information redacted on pages 6 and 7 of each record. As to pages 6 and 7, the Government redacted the slides titled “Enabling Learning Objectives,” which generally describe the goals of the presentation but do not provide any information regarding techniques or procedures. Thus, this information may not be withheld under Exemption 7(E).

C. Exemption 7(C)

The Government seeks to redact the names, contact information, and photos of certain CBP employees that appear on *Vaughn* Nos. 1–5, 9, 10, 46–49, and 55–56, as well as the photo and identifying information of an individual who appears to be the subject of a CBP investigation on *Vaughn* Nos. 1–5. (Notice of Lodging at 3–4.) Because the Court concludes that this information may be withheld pursuant to Exemption 7(C), it does not separately determine whether it may also be withheld under Exemption 6. (*See* MSJ Order at 31, “[I]f the Exemption 7 threshold has been satisfied, all information that would fall within the scope of Exemption 6 would also be immune from disclosure under Exemption 7(C).”)

Exemption 7(C) “protects from disclosure ‘records or information compiled for law enforcement purposes that could *reasonably* be expected to constitute an unwarranted invasion of personal privacy.’” (MSJ Order at 30, *quoting* 5 U.S.C. § 552(b)(6).) The threshold requirement for Exemption 7(C) is that the document at issue “must have been compiled for law enforcement purposes.” (*Id.* at 31.) If this threshold

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requirement is satisfied, then the Court performs a two-step balancing test: First, the Government must establish that disclosure of the record would “lead to the invasion of a non-trivial personal privacy interest”[;] second, the Court balances the severity of the privacy intrusion against “the extent to which disclosure of the information sought would shed light on an agency’s performance of its statutory duties.” (*See* MSJ Order at 31–33.)

The Border Patrol Academy records satisfy Exemption 7(C)’s threshold requirement because they are documents that arise out of “investigatory activity related to the enforcement of federal laws.” (MSJ Order at 31.) As to the names and photos of individual agents, there is clearly a non-trivial privacy interest at stake. (*Id.* at 34.) Moreover, disclosure of the names of these agents and their contact information would not reveal any “government malfeasance.” (*Id.* at 35.) Thus, the “marginal additional usefulness” of disclosure of these employees’ identities is not sufficient to overcome the privacy interests at stake. (*Id.* at 36.)

As to the photos and identifying information of the investigatory subject, the CBP may properly invoke the privacy interests of subjects of its investigations and detentions. *Fiduccia v. U.S. Dep’t of Justice*, 185 F.3d 1035, 1047 (9th Cir. 1999). The privacy interests of this individual categorically outweigh the FOIA purpose of “contributing significantly to understanding of the operations or activities of the government.” *Id.* at 1048. *Cf. Rosenfeld v. U.S. Dep’t of Justice*, 57 F.3d 803, 812 (9th Cir. 1995) (finding that the public interest in “knowing whether and to what extent the FBI investigated individuals for participating in political protests, not federal criminal activity,” outweighed the individuals’ privacy interests).

Accordingly, the Government properly withheld the identifying information of its employees and the investigatory subject pursuant to Exemption 7(C).

II. CONCLUSION

The Court finds that the Government properly withheld under Exemption 5 pages 70–83 of *Vaughn* No. 8. The Government properly withheld under Exemption 7(E) the investigative techniques identified in *Vaughn* Nos. 1–7, 12, 22–23, 36–38, 49, and 55–56.

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Finally, the Government properly withheld under Exemption 7(C) the photos and personal information in *Vaughn* Nos. 1– 5, 9–10, 46–49, 55, and 56.

The Exemptions are inapplicable to the records or portions of the records that are not identified above. Accordingly, the Government is ORDERED to produce to Plaintiffs the records that were improperly withheld.

Finally, the parties are ORDERED to prepare a proposed final judgment so that judgment may be entered and this case closed. The proposed judgment should be filed within **seven (7) days** of entry of this Order.

Initials of Preparer: tg