

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

CASE NO. 14-20945-CIV-WILLIAMS

AMERICANS FOR IMMIGRANT
JUSTICE, INC.,

Plaintiff,

v.

UNITED STATES CUSTOMS
AND BORDER PROTECTION; and
UNITED STATES DEPARTMENT
OF HOMELAND SECURITY,

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, United States Customs and Border Protection and the United States Department of Homeland Security (collectively, "CBP"), by and through their respective undersigned counsel and pursuant to Rule 56, Federal Rules of Civil Procedure, hereby move for summary judgment on Plaintiff, Americans for Immigrant Justice, Inc.

INTRODUCTION

In this action, Plaintiff seeks relief under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* ("FOIA"). FOIA allows a Court to enjoin an agency from improperly withholding agency records in response to a FOIA request. As indicated in the parties recent Joint Motion for Extension of the Court's deadline for dispositive motions, the parties have been in regular contact and negotiation, in hopes of narrowing, and possibly eliminating altogether, the issues requiring judicial intervention. To allow that process to continue and to avoid an inefficient use

of the Court's resources, the parties jointly sought a 60-day extension of the current deadline for filing dispositive motions. In the absence of an order extending the Court's deadline for the filing of dispositive pretrial motions, however, CBP files this Motion for Summary Judgment knowing that many of the issues addressed herein will be affected by the parties' ongoing negotiations. CBP respectfully requests leave to amend this Motion as needed to account for progress in the parties' efforts toward resolution.

STATEMENT OF UNDISPUTED FACTS

1. The FOIA request underlying Plaintiff's action generally seeks "any and all records that were prepared, received, transmitted, collected and/or maintained by [the] U.S. Department of Homeland Security (DHS) and/or U.S. Customs and Border Protection that describe, refer to or relate to CBP's national policy for the short-term custody of persons arrested or detained by Border Patrol agents/officers and detained in hold rooms/ detention cells at Border Patrol Stations, checkpoints, processing facilities, and any other facilities that are under the control of CBP and used to detain persons for any period of time." A copy of Plaintiff's FOIA request is attached hereto as Exhibit "A".

2. Specifically, Plaintiff's FOIA request seeks documents described in 33 categories (not including subcategories) related to CBP's operations in CBP's Rio Grande Valley sector. *See Ex. A.*

3. Broadly construed, the request covers potentially hundreds of thousands of pages of material, and possibly more.

4. Following completion of its initial search for responsive records, CBP issued a formal written response to Plaintiff's FOIA request on March 9, 2015. A copy of CBP's March 9, 2015 letter to Plaintiff is attached hereto as Exhibit "B."

5. CBP's response indicated that the agency had found and produced 3,620 pages of records responsive to parts 1, 2, 3, 5, 6, 10, 12 through 30, and part 33 of Plaintiff's request. The response further advised Plaintiff that it had identified, but not yet processed for production approximately 14,400 additional pages records responsive to the request. The agency's letter indicated that it anticipated production of those additional records by April 17, 2015. *See* Ex. B.

6. Additionally, CBP's March 9, 2015 response informed Plaintiff that portions of some records produced were redacted pursuant to FOIA exemptions 6, 7(C) and 7(E). *See* 5 U.S.C. § 552 (b)(6), (b)(7)(C) and (b)(7)(E). FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. FOIA Exemption 7(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. And FOIA Exemption 7(E) protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or 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.

7. CBP's March 9, 2015 response further advised Plaintiff that part 9 of Plaintiff's request (seeking a copy of every alien booking record (I-385) generated for detainees in the Rio Grande Valley between January of 2008 and June of 2013) was denied in full, as responsive

records could number over one million pages of records, creating an undue burden on agency resources. *See* Exhibit “A” hereto.

8. CBP’s March 9, 2015 response further advised Plaintiff that part 11 of Plaintiff’s response (for “any and all plans on communications enacted in response to any inspection or review of the operations of any CBP station in the Rio Grande Valley Sector”) was unreasonably broad and did not describe in enough detail what is being requested. *Id.*

9. On March 20, 2015, Plaintiff responded to CBP’s March 9, 2015 response to its FOIA request. A copy of Plaintiff’s letter is attached hereto as Exhibit “C.” Plaintiff challenged the propriety of the FOIA exemptions asserted, particularly CBP’s reliance on Exemption 7(E), and the adequacy of CBP’s search for records that were not located as well as for categories of documents that were not specifically addressed in the response or production.

10. On April 1, 2015, CBP replied to Plaintiff’s March 20, 2015 letter. A copy of CBP’s April 1, 2015 letter to Plaintiff is attached hereto as Exhibit “D”. CBP elaborated upon the agency’s invocation of FOIA Exemption 7(E), and clarified that the agency had searched but not found records responsive to items in the original FOIA request which were not specifically addressed in CBP’s March 9, 2015 response. *See* Ex. D.

11. In addition to the exchange of letters described above, representatives of the parties have met by telephone in an attempt to resolve their issues and minimize the number of issues remaining in dispute. As indicated in the parties’ April 6, 2015, Joint Motion for Extension of Time to File Dispositive Motions and For Removal of the Case from the Court’s Trial Calendar (DE 22), the Parties have agreed to continue meeting regularly in hopes of rendering Plaintiff’s claims moot.

12. As of this writing, Defendants have produced to Plaintiff 8,601 pages of responsive records. The responsive records have been Bates labeled and indexed for Plaintiff, to identify the documents produced and the paragraph(s) within Plaintiff's request to which the records respond. A copy of CBP's index of records produced as of this date is attached hereto as Exhibit "E."

ARGUMENT

FOIA requires federal agencies to make records and documents publicly available upon request, unless they fall within one of several statutory exemptions. *See* 5 U.S.C. § 552(b). Pursuant to FOIA, a court is authorized to enjoin an agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. *See* 5 U.S.C. § 552(a)(4)(B). FOIA cases should generally be resolved on motions for summary judgment. *Miscavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993); *St. Andrews Park, Inc. v. U.S. Dept. of Army Corps of Engineers*, 299 F. Supp. 2d 1264, 1267 (S.D. Fla. 2003). Defendants is entitled to summary judgment in this case because it has not improperly withheld any records from Plaintiff. CBP has conducted an adequate search for the records Plaintiff requested and appropriately invoked FOIA exemptions applicable to information redacted from responsive records.

"The adequacy of an agency's search for documents requested under FOIA is judged by a reasonableness standard." *See Lee v. U.S. Attorney for Southern District of Florida*, 289 Fed. Appx. 377, 380 (11th Cir. 2008) (citation omitted). "The search need not be exhaustive." *Id.* "Rather, the agency must show beyond material doubt . . . that it has conducted a search reasonably calculated to uncover all relevant documents." *Id.* . This burden can be met by producing affidavits that are "relatively detailed, nonconclusory, and submitted in good faith." *Id.* (quotation omitted). Once the agency meets its burden to

show that its search was reasonable, the burden shifts to the requester “to rebut the agency's evidence by showing that the search was not reasonable or was not conducted in good faith.” *Id.*

Where, as here, an agency has invoked a FOIA exemption to redact information from records produced under FOIA, the defendant government agency bears the burden of showing that it properly invoked the FOIA exemption as a basis for the withholding. *See Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235, 1258 (11th Cir. 2008). Affidavits or declarations may be used to meet the agency's burden so long as they provide an adequate factual basis for the Court's decision. *Id.*; *Del Rio v. Miami Field Office of the FBI*, No. 08-21103, 2009 WL 2762698, at *6 (S.D. Fla. Aug. 27, 2009). The affidavits submitted by an agency are accorded a presumption of good faith. *Del Rio*, 2009 WL 2762698, at *6.

Summary judgment for the federal agency is proper “[i]f the affidavits provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith.” *Florida Immigrant Advocacy Center v. NSA*, 380 F. Supp. 2d 1332, 1338 (S.D. Fla. 2005)(quoting *Hayden v. NSA*, 608 F.2d 1381, 1384 (D.C. Cir. 1979)), *cert. denied*, 446 U.S. 937 (1980); *see also Inter Ocean Free Zone, Inc. v. U.S. Customs Service*, 982 F. Supp. 867, 871 (S.D. Fla. 1997); *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980); *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

CBP submits the Declaration of Patrick Howard, Acting CBP FOIA Branch Chief, “to inform the Court and Plaintiff of CBP’s actions since receiving the request and to provide an explanation of the procedures used in review and processing of CBP records that are responsive to the request and subject to the FOIA.” *See* Exhibit “F” hereto. Mr. Howard explains that, in response to Plaintiff’s request, which comprised 33 separate items, one of which contained 5 subparts, CBP employees with jurisdiction over the subject matter mentioned in the request conducted a comprehensive search. *See* Ex. F. Records identified through that search were then were provided to CBP’s FOIA office for evaluation, redaction, and response. *Id.* “Specifically, a search for documents was conducted at the Rio Grande

Valley Sector and all stations under the Sector.” *Id.* “Searching was done using hardcopy records as well as electronic databases including CBP SharePoint, email accounts, CBP’s FOIA library, CBP’s Policy Online Document Search, and the DHS Enforcement Integrated Database .” *Id.*

As Mr. Howard’s declaration indicates, CBP’s search for records was reasonably calculated to uncover all documents relevant to Plaintiff’s request. Given the topical breadth of Plaintiff’s request, the search for records was undertaken by the CBP employees with jurisdiction over the areas identified in the 33 categories set forth in the request, and encompassed records of all nine stations within CBP’s Rio Grande Valley Sector. The search covered not only physical “hardcopy” files, but also records electronically maintained within CBP’s Sharepoint database system and on CBP’s email servers. In addition to those searches, CBP employees searched the agency’s FOIA library, its Policy Online Document Search database and the Department of Homeland Security’s Enforcement Integrated Database. As a result of these searches and the ongoing discussions between the parties, CBP has produced 8,601 pages of records and anticipates the production of more. CBP’s search has been reasonable and the agency is, therefore entitled to summary judgment in its favor regarding the adequacy of its search for responsive records.

With regard to information redacted from the records produced, CBP has invoked FOIA Exemptions 4, 6, 7(C) and 7(E). FOIA Exemption 4 applies to “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). According to Mr. Howard, CBP invoked FOIA Exemption 4 in redacting certain information within contracts produced as responsive to Plaintiff’s request.

FOIA Exemption 6 applies to “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). Similarly, FOIA Exemption 7(C) applies to information compiled for law enforcement purposes, to the extent that the production of such information could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(7)(C). CBP invoked FOIA Exemptions 6 and 7(C) to redact personally identifiable information from numerous pages of records produced.

FOIA Exemption 7(E) applies to information compiled for law enforcement purposes, to the extent that production of such information “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” CBP invoked FOIA 7(E) to redact information that CBP considers law enforcement sensitive. Regarding CBP’s invocation of FOIA Exemption 7(E), Mr. Howard explains that “it is the policy of the CBP FOIA office, in conjunction with the Office of Border Patrol, to release Border Patrol data at the Sector level only.” “Releasing data at the station level will potentially show station capabilities, which stations are better equipped to apprehend individuals, which stations are better staffed. Release of this information will potentially allow circumvention of Border Patrol’s techniques, procedures, and ability to enforce the law.” *Id.*

CBP’s reliance on FOIA exemptions 4, 6, 7(C) and 7(E) was limited and appropriate. The exemptions were invoked in good faith on the basis that disclosure of the information redacted from production was subject to the exemptions invoked.

CONCLUSION

Because CBP conducted a search that was reasonably calculated to find all relevant documents, and because its redactions were appropriate under the FOIA exemptions invoked, summary judgment should be entered in favor of CBP.

Dated: April 10, 2015
Miami, Florida

Respectfully submitted,

WIFREDO A. FERRER
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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2015, I filed the foregoing document with the Clerk of the Court, using the CM/ECF system.

/s/ Carlos Raurell

CARLOS RAURELL

Assistant United States Attorney