

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

**AMERICANS FOR IMMIGRANT  
JUSTICE, INC.,**

**Plaintiff,**

**v.**

**UNITED STATES CUSTOMS AND  
BORDER PROTECTION AND UNITED  
STATES DEPARTMENT OF  
HOMELAND SECURITY,**

**Defendants.**

**Case No.: 1:14-cv-20945**

**Hon. Kathleen M. Williams**

**PLAINTIFF’S MOTION FOR SUMMARY JUDGEMENT<sup>1</sup>**

Plaintiff Americans for Immigrant Justice (“AI Justice”) brings this action against Defendants United States Department of Homeland Security (“DHS”) and United States Customs and Border Protection (“CBP”), a component of DHS, under the Freedom of Information Act, 5 U.S.C. §552 et seq., (“FOIA”), for Defendants’ failure to timely and fully respond to AI Justice’s FOIA request submitted in July 2013, seeking disclosure of records concerning CBP’s enforcement operations and activities related to detention of immigrants in the Rio Grande Valley Sector. As of the date of this motion, Defendants have yet to satisfy their obligations with respect to AI Justice’s request by failing to reasonably search for and produce all responsive, non-exempt information to which AI Justice is entitled and by improperly redacting releasable responsive documents and information.

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<sup>1</sup> Plaintiff submits this Motion due to the current deadline in the Scheduling Order (D.E. 19) for filing dispositive motions, however, as indicated in the Joint Motion for Extension of Time to File Dispositive Motions (D.E. 22), the parties are in the ongoing process of collaborating in order to resolve their disagreements relating to the propriety of exemptions claimed and the adequacy of Defendants’ record searches.

No genuine issue of material fact exists. Thus, AI Justice respectfully moves the Court, pursuant to Fed. R. of Civ. P. 56 and L.R. 56.1, for summary judgment as to the claims asserted.

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION**

AI Justice suit under the Freedom of Information Act, 5 U.S.C. §552 et seq., (“FOIA”) seeks disclosure of records concerning the enforcement operations and activities of CBP, related to detention of immigrants in the Rio Grande Valley Sector in Texas. Defendants have failed to timely and fully respond to AI Justice’s request and have yet to satisfy all of their obligations with respect to FOIA by failing to produce all responsive, non-exempt information to which AI Justice is entitled by law and by improperly redacting releasable responsive documents and information. CBP’s failure to produce the requested records violates the FOIA and is impeding AI Justice’s efforts to educate the public regarding CBP enforcement operations in general and to educate the immigration bar regarding CBP’s detention practices in particular. CBP is also hindering AI Justice’s ability to effectively advocate for justice and fairness for non-citizens subjected to these inhumane practices.

Thus, the issues are whether Defendants conducted adequate searches in response to the FOIA request, whether they produced all responsive information, and whether they properly invoked FOIA exemption (b)(7)(E) in withholding relevant information contained in disclosed responsive records. In sum, Defendants have failed to meet their burden under FOIA, thus, pursuant to Fed. R. Civ. P. 56, the Motion for Summary Judgment must be granted as to AI Justice.

**BACKGROUND**

CBP has the authority to secure the borders of the United States. In furtherance of this mission, CBP officers routinely admit or exclude individuals seeking entry to the United States, make arrests, issue charging documents and detain non-citizens, among other activities. Many non-

citizens who are arrested by CBP are held in CBP-operated facilities known as “holding stations” that are comprised of numerous “hold rooms.”

On January 31, 2008, CBP issued an internal directive, entitled “Hold Rooms and Short Term Custody.” *See* U.S. Border Patrol Policy, ECF 1 at Exhibit A (hereinafter “Short-Term Custody Policy” or “Policy”). The express purpose of the Short-Term Custody Policy is stated as follows:

This directive establishes national policy for the short-term custody of persons arrested or detained by Border Patrol Agents and detained in hold rooms at Border Patrol Stations, checkpoints, processing facilities, and other facilities that are under the control of U.S. Customs and Border Protection (CBP).

CBP Short-Term Custody Policy ¶ 1. In pertinent part, the Policy provides that:

All persons arrested or detained by the Border Patrol will be held in facilities that are safe, secure, and clean. Detainees will be provided food, water, properly equipped restrooms and hygiene supplies as set forth in this directive. *Id.* ¶ 5.1.

Whenever possible, a detainee should not be held for more than 12 hours. Every effort will be made to promptly process, transfer, transport, remove, or release those in custody as appropriate and as operationally feasible. *Id.* ¶ 6.2.1.

AI Justice attorneys regularly conduct “Know Your Rights” presentations at immigrant detention facilities operated by United States Immigrant and Customs Enforcement (“ICE”), a component of DHS. In 2013, these attorneys interviewed more than one hundred (100) immigrant detainees who had been apprehended by CBP in Texas in a territory that CBP designates as the Rio Grande Valley Sector (“RGVS”). Subsequently, the detainees were transferred to ICE detention facilities in Florida, where AI Justice encountered them. CBP operates nine holding stations in the RGVS. *See* Answer to the Complaint, ECF 14 at ¶ 4. The detainees described prolonged periods of detention—as long as two weeks for some individuals—in inhumane and unlawful conditions.

Specifically, detainees consistently reported that, upon arrest, they were told by CBP agents that they were being taken to what the agents referred to as “hieleras,” which is Spanish for “icebox.” The *hieleras* are extremely cold concrete holding rooms located inside CBP holding stations. Detainees stated that the temperature in the cells was kept so cold that their lips chapped and split, their fingers and toes turned blue and their faces became chapped and throbbled with pain. The majority of detainees reported being kept in cells with no bedding, no chairs and a single toilet sitting in plain view located in the corner of the cell. Lights remained on twenty-four hours a day.

Detainees, including women and young children, reported sleeping, what little they could, on the frigid concrete floor, frequently huddling together for warmth. So many detainees were placed in the cells that became grossly overcrowded. Detainees described being held with as many as sixty others in one cell, having to share a single toilet. Some detainees indicated that the cells were so crowded they could not stretch out their arms without touching others and that there was not enough room to lie down on the floor, forcing them to attempt to sleep while sitting.

Because the *hieleras* have no shower or bathing facilities, detainees described being held for days—and in some cases as long as two weeks—without being able to bathe. This was particularly difficult for female detainees menstruating during their detention. Many detainees reported that when they ran out of toilet paper in the overcrowded cells, CBP agents took hours to provide more and typically did so only after repeated requests. Detainees were not provided with the most basic hygiene products, such as toothbrushes, toothpaste, soap or a change of clothing, thus having to remain in the clothing they were apprehended in for days or even weeks.

The majority of detainees described being fed only once every twelve hours. Many reported that the “meal” they received consisted of a single bologna sandwich that was either freezing or

partially frozen. As a result, many reported experiencing constant hunger and suffering continuous headaches. Many detainees also indicated that the only water provided was contained in a single thermos shared by all the detainees and no cups were provided. Detainees described the water as smelling like bleach and burning their throats when they drank it.

No medical facilities existed at the *hieleras*. And detainees who arrived with prescription medications had them confiscated, remaining without access to them for days. Several detainees, including a diabetic whose insulin and other medications were confiscated, reported experiencing medical emergencies while in the *hieleras* but having received no or inadequate medical attention.

Many of the detainees stated that during their detention CBP officers told them they would be released if they signed documents provided to them in English, which the vast majority could neither read nor understand. While many initially refused to sign, after days of suffering, almost all eventually succumbed. The documents the detainees signed turned out to be acknowledgment of and agreement with allegations that support a finding of inadmissibility, providing for expedited removal from the U.S., despite the fact that the factual allegations were frequently inaccurate or entirely false and that the detainee had no meaningful opportunity to review them or consult with counsel.

### **STATEMENT OF FACTS**

1. On July 3, 2013, AI Justice submitted a FOIA request to CBP seeking:

[D]isclosure of 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 (CBP) that describe, refer 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/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.

Letter from AI Justice to CBP FOIA Division (July 3, 2013) (“FOIA Request”), a copy of which is attached hereto at **Exhibit A**.

2. The FOIA Request identified thirty-three non-exclusive categories of records. *See* Exhibit A. The requested items fall into the three categories of documents maintained by DHS and CBP relevant to: (1) policies governing the short-term custody and detention of persons arrested or detained by CBP; (2) CBP’s compliance/non-compliance with the Short-Term Custody Policy; and (3) actual conditions of detention in CBP holding stations in the RGVS, including but not limited to duration of detention for those held between January 1, 2008 and June 30, 2013.

3. Each part of the FOIA Request reasonably described the records sought and provided sufficient information for CBP to conduct a reasonable search for documents responsive, as required by 5 U.S.C. § 552(a)(3)(A). *See, e.g.*, Ex. A at 1-6. And CBP never requested clarification or re-statement of any part of the request before the filing of this action.

4. On July 3, 2013, AI Justice received an email from CBP acknowledging receipt of the FOIA request and assigning it “File Number 2013F27556.” *See* CBP email, ECF 1 at Exhibit B.

5. On September 13, 2013, having received no substantive response, AI Justice, requested that CBP make a determination sufficient to satisfy the requirements of 5 U.S.C. § 552(a)(6)(A)(i). *See* AI Justice correspondence, ECF 1 at Exhibit C.

6. On December 18, 2013, having received no response to its September 13, 2013 letter, AI Justice submitted an appeal of CBP’s constructive denial of its FOIA request. *See* AI Justice correspondence, ECF 1 at Exhibit D.

7. Three months later, on March 13, 2014, after still receiving no response to its request or administrative appeal, and no records in response, AI Justice filed this lawsuit. *See* ECF 1.

8. AI Justice asserted FOIA claims seeking an order for production of the requested records and a waiver of fees associated with processing the request. *Id.* at 11-12.

9. CBP admits that “it did not respond to [the] FOIA request until after this lawsuit was filed.” *See* Defendants’ Answer to the Complaint, ECF 14 at ¶ 11.

10. On March 9, 2015 CBP finally submitted a written response to AI Justice’s FOIA request. *See* CBP correspondence, attached hereto as **Exhibit B**.

11. CBP’s response is admittedly incomplete as it states that “[t]he records CBP has produced are responsive, in whole or in part, [only] to parts 1, 2, 3, 5, 6, 10, 12 through 30, and part 33 of [AI Justice’s FOIA] request.” *See id.*

12. CBP did not respond in writing, object to, produce responsive documents to or provide an explanation regarding any search relating to request part 4 (documents regarding translation services provided to detainees), 8 (logs recording physical inspections of holding cells), 31 (data regarding detainees suffering from communicable diseases) and 33 (documents relating to segregating detainees). *Id.*; *see* Ex. A at 2, 3 and 6.

13. As of the date of this Motion, CBP produced a total of 8,318 partially redacted pages.

14. The vast majority of CBP’s production, 7808 pages, consist of “Detention Dashboard” documents purportedly responsive to request parts 1 and 6, for the following periods: February 27-28, 2013; March 2013; April 2013; July 2013; August 2013; September 2013; October 2013; November 1-15; 2013, and December 2013. *Id.*

15. Other than for the periods of February 27-28, 2013; March 2013 and April 2013, CBP did not produce any “Detention Dashboard” documents for the period requested, from January 1, 2008 to June 30, 2013. *Id.*; *see* Ex. A at 2-3, Parts 1 and 6.

16. All of the “Detention Dashboards” include redactions made pursuant to 5 U.S.C. § 552(b)(7)(E) (hereinafter “Exemption (7)(E)”). These redactions withhold all data in the columns labeled “Sector Station.” As a result, it is impossible to determine the specific holding station associated with the daily populations and other information otherwise provided in the documents.

17. CBP’s production also includes 394 pages consisting of I-216 forms for the months of February and March 2013, which are responsive to request part 7. *See* Ex. A at 3, Part 7; Ex. B at 5.

18. CBP did not produce I-216 forms for the remainder of the request period, from January 1, 2008 to January 30, 2013, and from April 1, 2013 to June 30, 2013. *Id.*

19. The version of the Short-Term Custody Policy CBP produced includes multiple improper redactions made pursuant to Exemption (7)(E). *See* Exhibit B at 4.

20. The FOIA request also sought a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(iii). *See* Ex. A at 7-8.

21. In their Answer to the Complaint, Defendants asserted that “a fee waiver has been granted,” and they have thus far produced documents to AI Justice at no cost. *See* Answer to the Complaint, ECF 14 at ¶¶ 32 and 42.

### **STANDARD OF REVIEW**

Summary judgment is appropriate when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. FOIA’s “strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.” *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991). If the government cannot “carry its burden of convincing the court that one of the statutory exemptions appl[ies],” the requested records must be released to the plaintiff. *Goldberg v. Dep’t of State*, 818 F.2d 71, 76 (D.C. Cir. 1987).

**I. Defendants' Failure to Timely Respond to AI Justice's Request Violated the Freedom of Information Act (5 U.S.C. § 552(a)(6)(A)(i)).**

Pursuant to FOIA, an agency such as CBP, must determine whether it will comply with a request for records within twenty (20) business days of its receipt, and immediately notify the requester of the agency's decision, the reasons for such decision, and the applicable appeal procedures for adverse determinations. 5 U.S.C. § 552(a)(6)(A)(i). AI Justice submitted its FOIA request to CBP on July 3, 2013 (Ex. A), the receipt of which CBP acknowledged on the same date. *See* CBP email, ECF 1 at Ex. B. Thus, CBP had until August 1, 2013, at the latest, to timely respond to the request, but failed to do so. Further, Defendants did not request an extension of time within which to respond. After the expiration of the response period, AI Justice requested that CBP make a determination sufficient to satisfy the requirements of 5 U.S.C. § 552(a)(6)(A)(i), however, CBP failed to do so. *See* ECF 1 at Ex. C. Receiving no response to its further request, AI Justice submitted an appeal of CBP's constructive denial of its request on December 18, 2013. *See* ECF 1 at Ex. D.

Defendants' admitted failure to comply with the applicable time provisions resulted in AI Justice's automatic exhaustion of administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i); *see* Answer to the Complaint, ECF 14 at ¶ 11 ("CBP admits that . . . it did not respond to [the] FOIA request until after this lawsuit was filed.") Accordingly, this Court has jurisdiction to enjoin CBP's withholding of records and to order the production of such records. 5 U.S.C. § 552(a)(4)(B).

**II. Failing to Conduct a Reasonable Search for and Disclose All Responsive Records Constitutes a Violation of the Freedom of Information Act (5 U.S.C. § 552(a)(3)).**

Pursuant to 5 U.S.C. § 552(a)(3), Defendants must conduct a reasonable search for and disclose all records responsive to AI Justice's FOIA request.<sup>2</sup> Only months after the filing of this

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<sup>2</sup>Due to Defendants' failure to respond in writing to the FOIA request, their failure to produce responsive documents to a

lawsuit did Defendants sporadically begin disclosing limited documents in response to the FOIA request, in August 2014. And only recently, on March 9, 2015, did CBP submit a formal written response<sup>3</sup> to the FOIA request. Ex. B. However, “[t]he records CBP has produced are [only] responsive, in whole or in part, to [a portion of the request] parts 1, 2, 3, 5, 6, 10, 12 through 30, and part 33 of [the] request.” *See id.* CBP did not object to and failed to otherwise respond in writing or by production, to request part 4 (documents regarding translation services provided to detainees), part 8 (logs recording physical inspections of holding cells), part 31 (data regarding detainees suffering from communicable diseases) and part 33 (documents relating to segregating detainees). *Id.*; *see* Ex. A at 2, 3 and 6. Additionally, CBP’s response did not include any assertion regarding any specific search conducted in relation to these four request parts (4, 8, 31 and 33).

In a supplemental written response dated April 1, 2015, CBP merely stated with regard to part 4, that it “has no responsive information,” with no additional details regarding what if any search was in fact conducted. CBP Letter, attached hereto as **Exhibit D**.<sup>4</sup> Similarly, regarding parts 8<sup>5</sup> and 33<sup>6</sup>, CBP reported that it was “not able to locate any information responsive” to the request, which

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majority of the request parts, their claims that some responsive documents were in the possession of other agencies (*see* Defendants’ Answer to the Complaint, ECF 14 at ¶¶ 17-18), and in an ultimate attempt to avoid filing this dispositive motion, AI Justice served a limited set of eight (8) substantive Interrogatories seeking to determine the extent of Defendants’ efforts to conduct reasonable searches and produce responsive documents under the applicable FOIA requirements. Defendants objected to all of the Interrogatories and refused to provide any substantive responses. *See* Defendants’ Objection to Plaintiff’s First Set of Interrogatories, March 23, 2015, attached hereto as **Exhibit C**.

<sup>3</sup> The response includes a two page list of the paginated documents produced with the purported corresponding responsive request part identified for each document. Ex. B at 4-5.

<sup>4</sup> Pursuant to a conference between the parties held on April 3, 2015, Defendants agreed to conduct a search and produce all responsive documents, however, as of the date of this Motion, AI Justice has not yet reviewed such production.

<sup>5</sup> Pursuant to a conference between the parties held on April 3, 2015, Defendants will conduct a search for responsive documents and on April 10, 2015 report to AI Justice the dates for which it has electronic information available. Thereafter the parties intend to confer further regarding what items will be produced.

<sup>6</sup> Pursuant to a conference between the parties held on April 3, 2015, Defendants will conduct an expanded search for responsive documents and produce such items on April 10, 2015. However, as of the date of this Motion, AI Justice has not yet reviewed such production.

suggests, but fails to explain any search that was undertaken. *Id.* at 2. And with regard to part 31, CBP claimed that it has no responsive records, while simultaneously admitting that no search was in fact conducted, rather, CBP explains that the search would consist of an “unreasonably large amount of work” of manual searching. *Id.* Nevertheless, such response evidences a clear failure to search, as required. Thus, as to these request parts (4, 8, 31 and 33), CBP patently failed to comply with the requirements of 5 U.S.C. § 552(a)(3). The clear absence of entire categories of responsive documents from CBP’s production evidences significant deficiencies in its search process.

As of the date of this Motion, CBP has produced a total of 8,318 partially redacted pages. Ex. B at 1. The vast majority of such production, 7808 pages, are “Detention Dashboard” documents purportedly responsive to request parts 1 and 6, for the periods of: February 27-28, 2013; March 2013; April 2013; July 2013; August 2013; September 2013; October 2013; November 1-15; 2013 and December 2013. *Id.* at 4-5. However, other than for the periods of February 27-28, 2013; March 2013 and April 2013, CBP did not produce “Detention Dashboard” documents for the period specifically included in the request, from January 1, 2008 to June 30, 2013. *Id.*; *see* Ex. A at 2-3, Parts (1) and (6). Thus, CBP has thus far failed to produce responsive documents for an extensive period of time identified in the request, in violation of the FOIA. 5 U.S.C. § 552(a)(3). And while CBP asserts in the response that it has “identified additional batches of records . . . which may be responsive” to the request, including, among a number of other category of documents, additional “Detention Dashboards,” CBP has not established the extent of the corresponding search and further, whether all responsive documents for the entire request period will be included in the additional documents. Ex. B at 2. In its supplemental response, CBP indicated that it will continue to process

additional “Detention Dashboards” for May and June (Ex. C at 1), however, such documents have yet to be produced and CBP has not provided an estimated scheduled date for production.

The majority of the remaining documents included in CBP’s production, 394 pages, is comprised of I-216 forms, which are responsive to request part 7. *See* Ex. A at 3, Part 7; Ex. B at 5. The I-216 forms CBP produced correspond only to the months of February and March 2013. Ex. B at 5. However, the FOIA request asks for the disclosure of such forms for the period from January 2008 to June 2013. *See* Ex. A at 3, Part 7. Thus, CBP’s production for just two months out of the entire requested time period is incomplete, CBP failed to produce I-216 forms for the periods from January 2008 through January 2013, and from April 2013 through June 2013. *Id.* Ex. B at 5. Accordingly, CBP has failed to comply with 5 U.S.C. § 552(a)(3), as to request part 7.

Although CBP’s response asserts that included among the purportedly forthcoming documents are additional I-216 forms, it did not establish the extent of the corresponding search and further, whether the documents to be produced respond to the whole of the remaining request period. Ex. B at 2. Moreover, such documents have not been produced yet, despite their purported identification as of over one full month ago. *Id.* In its supplemental response CBP further indicated that it is processing additional records for the months of February and March 2013, however such documents have not yet been produced. *See* Ex. C at 1. Additionally, CBP asserts that, based on an estimated/extrapolated number of responsive records it believes it may possess, the request requires an “unreasonable amount of effort.” *Id.* Nevertheless, an estimated number of documents without evidence of an actual search does not satisfy the search requirement under FOIA.

In the response, CBP stated that it intends to produce additional documents. Ex. B at 2. With regard to CBP’s anticipated production of documents concerning guidance and policy on

unaccompanied juveniles, property disposition procedures, MedPar and pharmacy benefits for aliens in custody, and the Trafficking Victims Protection Reauthorization Act, such items do not appear to be responsive to the referenced request parts admittedly not addressed in CBP's response or production, parts (4, 8, 31 and 33). *Id.* And the anticipated production date for additional documents is particularly problematic as it is scheduled for April 17, 2015, *after* the deadline for filing dispositive motions in this action.<sup>7</sup>

Based on CBP's limited and incomplete production, it is clear that reasonable searches were not conducted as to all the request parts, resulting in the failure to produce all responsive documents. This fact is clearly evidenced by the documents that CBP *did* produce. Other than the "Detention Dashboards" and the I-216 forms, the rest of the production, 115 pages, consists of a few policies, while the majority of the remainder of the documents relate to just two RGVS holding stations, McAllen and "MCS." The production regarding the two holding stations includes, among other items, multiple diagrams of the facilities, floor plans, records regarding the number of detainees held there on particular days, holding cell capacity, dimensions of rooms therein, and multiple air temperature readings.<sup>8</sup> *See* Ex. B at 4-5. Thus, it is reasonably expected that similar documents exist as to the remaining seven (7) RGVS holding stations, however, no such items were produced and CBP fails to assert whether a search for these was even conducted.

With regard to the remaining request parts, CBP offers no explanation as to the search for corresponding responsive documents, including request parts 3 (guidance, guidelines, directives, rules, policies, procedures or other documents that address the documentation of detainee concerns

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<sup>7</sup>This is additionally challenging where CBP previously agreed to produce its remaining documents by March 6, 2015 in order for the parties to have sufficient time to assess the responsiveness of the production and contemplate the need for dispositive motions.

about cell conditions and/or detainee health concerns at RGVS stations), 5 (all memoranda, reports, correspondence, communications, or other documents regarding compliance with and application of CBP detention standards, including standards regarding notifications of detentions exceeding 24 hours, 72 hours and relating to unaccompanied minors), 21 (all memoranda, reports, correspondence, communications, or other documents concerning the temperature at which detention cells, search rooms and hold rooms are maintained, 24 (all memoranda, reports, correspondence, communications or other documents regarding the square footage, size and/or dimensions of detention cells and hold rooms; 25 (all memoranda, reports, correspondence, communications, or other documents regarding the number of detainees that can be detained in detention cells and hold rooms in the RGVS, including but not limited to all documentation reflecting compliance with the detention standard requiring that detention space capacity not be exceeded).

A reasonable search for responsive documents was not conducted as to request part 27, where a single two-page email<sup>9</sup> responding to this specific FOIA request item directly was produced. *See* Ex. B at 5. The request part seek the following documents for the period from January 2008 through June 2013: the total number of detainee injuries, including attempted suicides, and including all documentation reflecting compliance with detention standard 6.6(j), which requires that the Alien Booking Record will be created and include an annotation regarding suicidal appearance). Ex. A at 6, Part 27. The email produced in response merely states the number of attempted suicides, with no reporting regarding any other detainee injuries, and includes no documents relating to compliance with the relevant detention standard nor are the corresponding Alien Booking Records disclosed. Thus, CBP evidently failed to conduct a reasonable search and production for such documents.

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<sup>8</sup> CBP production pages 1-3, 34-37, 67, 70-79, 81-87, 89-93, 101-103.

With regard to CBP's purported denial in full to request part 9, which seeks production of Alien Booking Records (I-385), the response is simply insufficient. CBP fails to specifically state how the request creates an undue burden, instead, it vaguely asserts that an Alien Booking Record is generated for the "majority" of aliens and speculates that the request "could potentially" generate over a million pages of records. Ex. B. Based on such generalizations, it is clear that CBP failed to conduct an appropriately reasonable search and a corresponding response. Further, in its supplemental response, CBP suggests that AI Justice narrow its request to a "single date" as a "sampling" for the *entire* request period, which is unacceptable due to the extremely limited nature of the proposed period and would undoubtedly lack sufficient representativeness.

Thus, Defendants' general refusal to disclose responsive records to which AI Justice is entitled, directly violates 5 U.S.C. § 552(a)(3)(A), (a)(3)(C) and (a)(6)(A), as well as regulations promulgated thereunder. Accordingly, injunctive relief is warranted pursuant to 5 U.S.C. § 552(a)(4)(B) because Defendants continue to improperly withhold records in violation of FOIA. AI Justice will continue to suffer irreparable injury due to Defendant's illegal withholding of documents unless this Court enjoins such actions and orders the requisite production.

### **III. Defendants' Asserted Exemptions Are Inapplicable to Information Compiled for Purposes Other Than Law Enforcement.**

In addition to not disclosing all responsive documents, CBP's production also includes numerous redactions. AI Justice does not seek categories of records withheld under any exemption. All of the "Detention Dashboards" contain redactions made pursuant to 5 U.S.C. § 552(b)(7)(E) (hereinafter "Exemption (7)(E)"). These redactions withhold the data in a column with the heading "RGV Sector - Station." As a result, it is impossible to determine the station associated with the listed daily

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<sup>9</sup> CBP production pages 3619-3620.

population and other relevant information otherwise provided on those documents.<sup>10</sup> Exemption (7)(E) redactions are also improperly asserted as to several sections of the memorandum entitled “Hold Rooms and Short Term Custody”<sup>11</sup> where the redacted sections relate to mere definitions of policy terms (§3.6 at 00053 and §6.24.12 at 00063), exceptions to detention (§6.3 at 00055-00056), unspecified subject area (§6.5.3 at 00057), and medical issues (§6.7.1 at 00058). ). *See* Ex. B at 4.

Accordingly, CBP has improperly withheld information directly responsive to the request in claiming that it is subject to redaction under Exemption (7)(E) where none of the criteria for application of such exemption applies. Application of Exemption (7)(E) is limited to “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or 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.” 5 U.S.C. § 552(b)(7)(E). Generally, courts have held that information is protected under Exemption 7(E) only where the agency can provide: (1) a description of the technique or procedure at issue in the document, (2) a reasonably detailed explanation of the context in which the technique is used, (3) an assessment of why the technique or procedure is not generally known publicly, and (4) an explanation of how a person could potentially circumvent the law if such information were disclosed. *Am. Immigration Council v. U.S. Dep’t of Homeland Sec.*, No. 12-856 (JEB), 2013 WL 3186061, at \*23 (D.D.C. June 24, 2013) (citing *Skinner v. U.S. Dep’t of Justice*, 893 F. Supp. 2d 109, 113-14 (D.D.C. 2012); *Strunk v. U.S. Dep’t of State*, 905 F. Supp. 2d 109, 142, 147 (D.D.C. 2012)). CBP’s response fails to provide any specific information as to why Exemption (7)(E) applies

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<sup>10</sup> AI Justice will provide a sample redacted “Detention Dashboard” for review if the Court desires.

to its decision to withhold the redacted information and fails to provide any indication that it can demonstrate that disclosure will reveal law enforcement guidelines, techniques and/or procedures “generally unknown to the public,” *Albuquerque Pub. Co. v. United States Dep’t of Justice*, 726 F. Supp. 851, 857 (D.D.C. 1989), and that disclosure of these techniques could “reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E).

A border patrol station (name) is not a “technique,” “procedure,” or “guideline,” just as a definition of a term fails to qualify as such. The Supreme Court has made clear that FOIA exemptions must be “narrowly construed” in accordance with the plain meaning given them by Congress. *Milner v. Department of the Navy*, 131 S.Ct. 1259, 1266 (2011) (“Our reading instead gives the exemption the ‘narrower reach’ Congress intended, [ ], through the simple device of confining the provision’s meaning to its words.”) (internal citations omitted). The plain meaning of the terms technique, procedure, and guideline does not encompass basic information such as a border patrol station (name) or a definitional term. Instead, courts consistently have applied Exemption (7)(E) to actual law enforcement *activity* within the parameters of one of these terms. *See, e.g., James v. U.S. Customs and Border Protection*, 549 F. Supp.2d 1, 10 (D.D.C. 2008) (considering techniques used in CBP’s search of a suspect for contraband); *Miller v. DOJ*, 562 F.Supp.2d 82, 124 (D.D.C. 2008) (law enforcement technique of using psychological profiles); *Edmonds v. FBI*, 272 F.Supp.2d 35, 56 (D.D.C. 2003) (polygraph exams, including questions asked).

Additionally, Exemption (7)(E) only permits withholding when production would disclose guidelines, techniques, or procedures “for law enforcement *investigations or prosecutions*,” 5 U.S.C. § 552(b)(7)(E) (emphasis added), *not* other information or policies related to custodial functions. *See*

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<sup>11</sup> CBP production 00051 – 00066.

*Raher v. Fed. Bureau of Prisons*, CV-09-526-ST, 2011 WL 2014875 (D. Or. May 24, 2011) (rejecting (b)(7)(E) withholdings based on security concerns related to custodial functions because withheld records did not provide techniques, procedures, or guidelines for “law enforcement investigations or prosecutions”); *see also Cowsen-El v. U.S. Dept. of Justice*, 826 F.Supp. 532, 534 (D.D.C. 1992) (Bureau of Prisons could not withhold document based on fear inmates would use the disclosed document “for the purposes of circumventing the procedure” and agency could not withhold information under (7)(E) “unrelated to investigations or prosecutions”). Here, the station names do not relate to any “investigations or prosecutions.” *Accord, Judicial Watch, Inc. v. U.S. Secret Service*, 570 F. Supp.2d 182, 188 (D.D.C. 2008) (“[I]t is difficult to imagine how disclosing a visitor’s name, the dates of his visits, and the persons visited would reveal how the Secret Service decided to investigate that visitor or the way in which the investigation was conducted.”). Similarly, the Exemption (7)(E) redactions made to the “Hold Rooms and Short Term Custody” memorandum fail to meet the requisite law enforcement “investigations or prosecutions” standard where the redactions are to definitions of terms and in on way associated with either process. *See Ex. B at 4.*

Finally, CBP has failed to provide the requisite nexus between the station names, term definitions and CBP’s law enforcement duties. *See Pratt v. Webster*, 673 F.2d 408, 420-421 (D.C. Cir. 1982) (agency must *specifically* identify nexus between the redacted information and agency’s law enforcement duties as well as possible risks of violations of law resulting from disclosure); *Am. Immigration Council v. U.S. Dep’t of Homeland Sec.*, 950 F. Supp. 2d 221, 242, 245 (D.D.C. 2013) (law enforcement agencies must satisfy the requirements set forth in *Pratt* and cannot generally assert that existence of law enforcement duties justify withholding). Thus, such exemptions are improper, should be withdrawn accordingly, unredacted copies of affected items already disclosed

should be produced, and forthcoming productions of the same category of documents should not include the improper Exemption (7)(E) redactions.

#### **IV. AI Justice Is Entitled to a Public Interest Fee Waiver, Which Has Been Granted.**

AI Justice is entitled to a waiver of all costs because disclosure of the information sought is “. . . likely to contribute significantly to public understanding of the operation or activities of the government and is not primarily in [its] commercial interest.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 6 C.F.R. § 5.11(k) (Records furnished without charge or at a reduced rate if the information is in the public interest, and disclosure is not in commercial interest of institution.). AI Justice is a non-profit legal service organization that aims to protect the basic human rights of immigrants through free services, impact litigation, policy reform and public education. Thus, AI Justice has no commercial interest that could be furthered by any FOIA request and it offers information at no cost to the public.

Immigration reform issues currently make up a major segment of the public discourse and border security matters, including the increasing number of CBP officers, surrounds much of the dialogue. Disclosure of the requested information will contribute significantly to the public understanding of CBP stations and detention conditions. Such information will inform attorneys, members of the public concerned with detention conditions, and non-citizens themselves, about these conditions.

Additionally, waiver of fees are appropriate where AI Justice has the capacity to widely disseminate the information sought. *See Judicial Watch v. Rossoti*, 326 F.3d 1309 (D.C. Cir. 2013) (holding a fee waiver appropriate when requester explained, in detailed and non-conclusory terms, how and to whom it would disseminate information). AI Justice intends to publicly share and circulate the information obtained by posting summary information on its website, drafting a report and disseminating such information to other immigration advocacy group and members of Congress.

Moreover, AI Justice is further entitled to a waiver of fees because an agency may not assess fees if it fails to comply with any statutory time limit, and no unusual or exceptional circumstances apply. 5 U.S.C. § 552(a)(4)(A)(vii). Defendants admit failing to satisfy the time limit for responding and do not assert any unusual or exceptional circumstances. *See Answer to the Complaint*, ECF 14 at ¶ 11 (CBP “did not respond to [the] FOIA request until after this lawsuit was filed.”).

Finally, after the initiation of this litigation, Defendants began producing documents pursuant to the FOIA request at no cost, thereby implicitly granting a fee waiver request. Further, in the *Answer to the Complaint*, Defendants assert that “a fee waiver has been granted.” *See Answer to the Complaint*, ECF 14 at ¶¶ 32 and 42. Thus, the Second Cause of Action is deemed resolved.

### CONCLUSION

Based on the foregoing, Defendants have failed to conduct reasonably adequate searches for responsive documents, produce all responsive non-exempt documents, and establish that all redacted information is exempt from disclosure. Accordingly, AI Justice respectfully requests that the Court grant its motion for summary judgment and enter an Order (1) confirming that Defendants’ failure to timely respond to the FOIA request violated 5 U.S.C. § 552(a)(6)(A)(i)); (2) confirming that Defendants’ failure to conduct a reasonable search for and disclose all responsive records violated 5 U.S.C. § 552(a)(3)); (3) directing Defendants to conduct a reasonable search for all records responsive to the FOIA request and to disclose the requested records in their entirety, without the identified improper redactions; (4) confirming that AI Justice’s public interest fee waiver is deemed granted; (5) awarding AI Justice reasonable attorneys’ fees and other litigation costs in accordance with 5 U.S.C. § 552(a)(4)(E); and (6) granting all other relief deemed just and proper.

Dated: April 10, 2015

Respectfully submitted,

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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, which will send a notification of such filing to the following:

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And I hereby certify that I mailed the foregoing document by U.S. Mail to the following non-filing user:

None

/s/ Jennie Santos-Bourne  
Jennie Santos-Bourne