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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF CALIFORNIA

ALTON JONES,

Plaintiff,

vs.

U.S. BORDER PATROL AGENT GERARDO HERNANDEZ, et al.

Defendants.

UNITED STATES OF AMERICA,

Counter-Claimant,

vs.

ALTON JONES,

Counter-Defendant.

Case No. 16-cv-1986-W (WVG)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS ON THE FREEDOM OF INFORMATION ACT CAUSE OF ACTION

Date: July 23, 2018
Court: Hon. Thomas J. Whelan

[No oral argument; L.R. 7.1(d)(1)]

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FEDERAL REGULATIONS

I. INTRODUCTION

On the afternoon of August 9, 2014, Alton Jones—a U.S. citizen and former Navy SEAL—was subjected to an unlawful seizure and search and excessive use of force by the U.S. Border Patrol and five individual Border Patrol agents ("Damages Defendants"). *See* MSJ Opp., ECF No. 104. To try to understand this ordeal, Jones filed a Freedom of Information Act (FOIA) request with the Department of Homeland Security (DHS), seeking any information about the incident held by DHS or its component agencies, including U.S. Customs and Border Protection (CBP).

DHS and CBP ("FOIA Defendants") ignored Jones's FOIA request, flouting the statutory deadlines and improperly withholding significant critical information, including a video the government now (incorrectly) claims is "conclusive" evidence regarding Jones's damages claims. *Two years* passed between Jones's FOIA request and the FOIA Defendants' first production of responsive records; by this time, Jones had commenced the present litigation.

Jones's attempts to obtain information necessary to establish his claims have been thwarted by CBP's apparent belief that it may raise vague, unspecific, and overblown security concerns to earn a blanket exemption from disclosure obligations under both civil discovery and the FOIA. Jones has suffered not only from the beating and unlawful arrest he endured, but also from Defendants' consistent and improper delays, concealment, and withholding of information.

To this day, the FOIA Defendants have yet to establish that they conducted an adequate search for records responsive to Jones's FOIA request or to explain their unlawful delay in producing such records. They have failed to provide enough information for Jones or this Court to assess whether they have conducted an adequate search for documents *related to Jones's FOIA request.* Rather than fulfill their statutory obligations to respond to the FOIA request, FOIA Defendants rest entirely on the Damages Defendants' efforts—themselves evasive, selective and woefully inadequate—to locate records for the purposes of *civil discovery*. Civil

discovery responses, however, cannot substitute for FOIA's search requirements.

FOIA Defendants cannot even identify for Jones what the relevant universe of records responsive to his FOIA request are, because they have failed to undertake an independent and reasonable search. Further, where DHS and CBP continue to withhold information from Jones, they have failed to establish that the withheld information fits within one of FOIA's nine limited statutory exemptions. Instead, they rely on vague and conclusory statements that the information implicates the deliberative process or law enforcement techniques or procedures.

FOIA Defendants now move for summary judgment, ignoring both their statutory obligations and the well-established law differentiating FOIA's requirements from civil discovery and ignoring the statutory obligations Congress created. Their motion should be denied.

II. BACKGROUND

A. Incident at Border Field State Park

As set forth in Jones's opposition to the Damages Defendants' merits summary judgment motion, on August 9, 2014 Defendants tackled, assaulted, and held Jones for over sixteen hours when he went for a jog on a trip to the beach with his family. Opp. to Damages Defs.' Combined MSJ. *See* ECF No. 104 (Mem. of P. & A.), at 3–14. These facts are incorporated herein. As a result of Defendants' unwarranted actions, Jones has suffered both physical injuries and severe mental trauma.

B. Jones's Attempts to Obtain Information About the Incident

On November 12, 2014, counsel for Jones sent a litigation hold letter to CBP's Assistant Chief Counsel for San Diego Sector, which includes Imperial Beach station.[1] Declaration of Mitra Ebadolahi ("ME Dec.") ¶ 2 & Ex. A. CBP was thus put on notice of its obligation to preserve information concerning Border

[1] *See* http://1.usa.gov/1lxpfAT (last visited June 25, 2018).

Patrol's assault upon and detention of Jones. *Id.* CBP did not respond to this letter.

On March 17, 2015, Jones submitted a FOIA request to DHS.[2] ECF No. 72 ("TAC") ¶ 73 & Ex. C. Jones's FOIA request specified nine categories of information, seeking records (including video) describing or referring to: (1) the incident;[3] (2) the names, ranks, and agent numbers of any DHS personnel who were in any way involved in the incident; (3) any investigation or disciplinary action taken in relation to the incident against any individual identified in Item 2; (4) any medical treatment administered to Jones during the incident; (5) Jones's personal property; (6) any criminal investigation(s) of Jones on or after August 9, 2014; (7) any DHS surveillance or monitoring of Jones; (8) guidelines, procedures, or policies in effect on August 9, 2014 describing the detention, transport, custody, or care of any individual by CBP and/or Border Patrol in the San Diego Sector; and (9) guidelines, procedures, and policies in effect on or after August 9, 2014 relating to medical care of individuals while in CBP and/or Border Patrol custody. TAC, Ex. C at 6–7. Neither agency responded to the FOIA request within the statutory twenty-day deadline. 5 U.S.C. § 552(a)(6)(A). ME Dec. ¶ 6.

On October 4, 2016, Assistant U.S. Attorneys Sam Bettwy and Dave Wallace spoke by telephone with counsel for Jones. *Id.* ¶ 7. During the call, Mr. Bettwy represented that the United States possessed video evidence that he (incorrectly) claimed "undermined" Jones's constitutional and tort claims for damages. *Id.* Although this video was directly responsive to Jones' FOIA request—*seventeen months earlier*—it had never been produced to Jones, despite the statutory

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[2] Upon receipt, DHS referred Jones's FOIA request to CBP. Jones has not pursued FOIA litigation against the DHS Office of Inspector General (OIG) or Immigration and Customs Enforcement (ICE). Therefore, only CBP is referenced here.

[3] "Incident" is defined as the period encompassing "Jones's initial stop by a Border Patrol agent on foot at the State Park on the afternoon of August 9, 2014, through his overnight detention at the Imperial Beach Border Patrol Station and eventual release on August 10, 2014, as well as any post-release investigations regarding Jones conducted by DHS, CBP, and/or U.S. Border Patrol, from August 9, 2014 to the present." TAC ¶ 73 & Ex. C at 4.

obligation to provide it. The AUSAs had no defense, claiming only they did not represent DHS or CBP for FOIA purposes. *Id.* ¶ 9 & Ex. C. Even worse, the government *continued* to withhold the video for *seven more months*. *Id.* ¶ 10.

C. Commencement of Litigation

Jones filed his damages suit on August 8, 2016. ECF No. 1. He moved for leave to amend the complaint to add FOIA claims against the FOIA Defendants on February 17, 2017, ECF No. 12, and amended the notice of motion on March 29, 2017, ECF No. 15. After leave was granted, Jones filed his second amended complaint on June 23, 2017. ECF No. 38.

D. Responses to Jones's FOIA Request

More than two years after Jones's FOIA request—and only when facing this lawsuit—CBP finally produced records responsive to Jones's request. On May 2, 2017, CBP produced thirty-six partially redacted pages of records, consisting of emails between Border Patrol agents discussing the incident and official agency forms. ME Dec. ¶ 11 & Ex. D. On May 12, 2017, CBP produced twenty-three of the same partially redacted pages, this time adding Bates numbering. *Id.* ¶ 14 & Exs. F & F-1. On June 23, 2017, CBP produced two agency policy memoranda. *Id.* ¶ 16 & Ex. G.

CBP did not mark any of the materials produced through *civil discovery* as responsive to any aspect of Jones's *FOIA request*. Now, for the first time, the FOIA Defendants claim that an unspecified portion of records produced in civil discovery are responsive to Jones's FOIA request. None of these records have been previously provided to Jones in FOIA productions.

The records at issue in this motion thus include (1) emails appearing at USA-Jones-000151–68, *see* ECF No. 101-4, Declaration of Rebecca Church ("Church Dec."), Ex. 15 ("Vaughn"), Nos. 1–8; (2) additional emails included in the Damages Defendants' production of Electronically Stored Information ("ESI"), Vaughn Nos. 9–33; (3) the Imperial Beach Station Threat Activity Shift Report ("TAS Report")

and attendant email, Vaughn Nos. 34, 35; (4) a memorandum describing CBP's Hold Room and Short-Term Custody policy ("HRSTC policy"), Vaughn No. 40; and (5) an RVSS Camera Operator Log, Vaughn No. 41.

E. Pre-Summary Judgment Conference of Counsel

Between May 2017 and April 2018, the parties corresponded to clarify and narrow the FOIA issues ultimately presented to this Court for decision. ME Dec. ¶ 17. In a January 10, 2018 letter, counsel for Jones identified a number of documents received through civil discovery that Damages Defendants had designated "confidential" subject to the protective order ("PO").[4] *Id.* ¶ 18 & Ex. H. Because some of these documents appeared responsive to Jones's FOIA request, counsel for Jones asked counsel for the FOIA Defendants whether these documents were no longer subject to the protective order, as FOIA requires. ME Dec. ¶ 18; *see Stonehill v. IRS*, 558 F.3d 534, 538 (D.C. Cir. 2009) (records produced under FOIA "must be disclosed to the general public"). In response, the FOIA Defendants stated that the Damages Defendants agreed to "de-designate" certain documents produced in civil discovery from the protective order. Church Dec. ¶ 18; ME Dec. ¶ 19 & Ex. I. But the FOIA Defendants did *not* specify which of these documents were *actually responsive* to the FOIA request; in fact, some de-designated documents are not responsive to that request. *Id.*[5]

III. ARGUMENT

To prevail on summary judgment on a FOIA claim, a government agency must show (1) it conducted an adequate search for records responsive to a FOIA request, and (2) one or more of FOIA's nine exemptions apply to any withheld information. Because the submissions on which CBP relies do not describe an

[4] *See* ECF No. 35.

[5] *See, e.g.*, Church Dec. ¶ 18, Ex. 8 (ECF No. 101-12) (de-designating Imperial Beach Border Patrol station phone records, medical reports, and Jones's own military record). These documents do not correspond with any of the categories of information Jones sought via the FOIA. *See* TAC ¶ 73, Ex. C at 6–7.

adequate search or provide the information necessary to evaluate the propriety of the agency's withholdings, summary judgment should be denied.

A. Purpose of FOIA and Governing Legal Principles

Congress enacted FOIA to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). FOIA is designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Air Force v. Rose*, 425 U.S. 352, 361 (1976). Agencies must respond to FOIA requests within twenty days of receipt. 5 U.S.C. § 552(a)(6)(A)(i). Upon receipt of a FOIA request, a federal agency "shall make reasonable efforts to search for [responsive] records." *Id.* § 552(a)(3)(C)–(D). Responsive records must be disclosed unless one or more of FOIA's limited, "narrowly construed" exemptions apply. *Milner v. Navy*, 562 U.S. 562, 565 (2011). The agency bears the burden of establishing that an exemption applies. *Lahr v. NTSB*, 569 F.3d 964, 973 (9th Cir. 2009).

Here, the FOIA Defendants have relied on Exemptions 5 and 7(E) to withhold responsive information from Jones. Exemption 5 applies to documents "that would not be available by law to a [private] party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 7(E) applies to "records or information compiled for law enforcement purposes," but only to the extent that production "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." *Id.* § 552(b)(7)(E).

B. Standard of Review

The "typical standard for summary judgment is not sufficient in a FOIA proceeding," which instead "generally requires a two-stage inquiry." *L.A. Times Commc'ns, LLC v. Army*, 442 F. Supp. 2d 880, 893 (C.D. Cal. 2006) [hereinafter

L.A. Times]. First, the Court "must determine whether the agency has met its burden of proving that it fully discharged its obligations under FOIA." *Id.* (citing *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985)). To do so, the agency must demonstrate "that it has conducted a search reasonably calculated to uncover all relevant documents." *Id.* Second, if so, the Court "examines whether the agency has proven that the information that it did not disclose falls within one of the nine FOIA exemptions." *Id.* at 894. The Court must review *de novo* the agency's response to a records request. 5 U.S.C. § 552(a)(4)(B).

"Courts must apply [the agency's] burden with an awareness that the plaintiff, who does not have access to the withheld materials, is at a distinct disadvantage in attempting to controvert the agency's claims." *Maricopa Audubon Soc'y v. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997) (internal quotation marks omitted). For this reason, "the underlying facts and possible inferences are construed in favor of the FOIA requester" in FOIA litigation. *L.A. Times*, 442 F. Supp. 2d at 894.

C. The FOIA Defendants Have Failed to Establish that They Conducted an Adequate Search

To show that it has conducted an adequate search, an agency may submit affidavits on summary judgment. *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996). In evaluating a search *de novo*, a court must view all facts "in the light most favorable to the requester." *Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The agency's search must be "reasonably [] expected to produce the information requested"; there is no "good faith" exception to FOIA's reasonable search requirements. *Nation Mag. Wash. Bureau v. USCIS*, 71 F.3d 885, 890 (D.C. Cir. 1995) [hereinafter *Nation Mag.*]

The FOIA Defendants' submissions do not allow this Court to assess the adequacy of CBP's search, for at least three reasons. *First*, most of the affidavits on which CBP relies address searches conducted in response to either a litigation hold

letter or civil discovery. *See* ECF Nos. 101-20, 101-24–101-28.[6] Yet CBP has not established that *any* of these searches were connected in *any* way to the specific categories of information Jones sought through his FOIA request. *Second*, CBP's affidavits do not provide sufficient information about search terms or search methodology to allow the Court to assess the adequacy thereof. *Third*, even the limited information in the agency's affidavits indicates the searches were inadequate because (a) CBP unreasonably omitted key components and agency repositories from its searches, and (b) the record indicates that responsive materials were overlooked.

1. Searches Conducted in the Process of Civil Discovery Are Not Necessarily Adequate for the Purposes of FOIA

The Damages Defendants' searches for records responsive to Jones's discovery requests do not discharge *the FOIA Defendants'* independent obligation to conduct an adequate FOIA search. The adequacy of a FOIA search is assessed with reference to the underlying FOIA request itself. *Weisberg*, 745 F.2d at 1485. A search completed at the request of an attorney responsible for representing defendants against damages claims will not have the same focus as a search conducted at the request of an agency's FOIA officers for the purpose of responding to a FOIA request. *See Playboy Enters., Inc. v. DOJ*, 677 F.2d 931, 936 (D.C. Cir. 1982) ("[T]he issues in discovery proceedings and the issues in the context of a FOIA action are quite different."). Courts routinely acknowledge that "the FOIA disclosure regime . . . is distinct from civil discovery." *Stonehill*, 558 F.3d at 538 (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 144 (1975)).

To discharge their burden, each of an agency's declarants "needs to attest to

[6] Hereinafter, the affidavits on which FOIA Defendants rely are cited collectively as "CBP-" or "agency affidavits." *See* ECF No. 101-20 (Wallace Dec.); ECF No. 101-24 (Flores Dec.); ECF No. 101-25 (Stecher Dec.); ECF No. 101-26 (Yamasaki Dec.); ECF No. 101-27 (Dismuke Dec.); and ECF No. 101-28 (Tetreault Dec.).

his or her personal knowledge of the procedure for handling a [FOIA] request and his or her familiarity with the documents at issue." *Gov't Accountability Project v. DOJ*, 852 F. Supp. 2d 14, 24–26 (D.D.C. 2012) (internal quotation marks and citation omitted). Recognizing FOIA's distinct demands, CBP, like many other agencies, has a FOIA Division staffed by FOIA officers with special FOIA expertise. *See* 5 U.S.C. 552(j)(1)–(2) (directing agencies to designate Chief FOIA Officers); 6 C.F.R. § 5(A), App. I (naming CBP FOIA Officer and Public Liaison). Here, none of the affidavits on which the FOIA Defendants rely are from CBP FOIA Division personnel. *See generally* CBP's affidavits, ECF Nos. 101-20, 101-24–101-28.

If an agency fails to conduct a search *specific to the FOIA request*, the Court cannot evaluate the adequacy of the agency's response, and summary judgment must be denied. *See, e.g.*, *Rodriguez v. DOD*, 236 F. Supp. 3d 26, 28, 38–39 (D.D.C. 2017). "FOIA clearly contemplates that an agency will undertake a focused search for records *in response to a particular request* for documents." *Id.* (emphasis added). Where FOIA Defendants have "primarily cobbled together the results of various document reviews . . . previously undertaken (by request) in a different context," the record "strongly suggests that [the agency] failed to undertake any diligent or targeted search for records at all." *Id*.

CBP's affidavits describe searches undertaken in response to litigation hold correspondence or civil discovery, *not* Jones's FOIA request. *See*, *e.g.*, Stecher Dec. ¶¶ 3–4 (November 2014 search *four months before* Jones submitted his request and *five days after* counsel for Jones sent a spoliation letter to CBP, ME Dec. ¶ 2); Wallace Dec. ¶¶ 5–9, 17–19 (searches undertaken in furtherance of the parties' Joint Discovery Plan); Flores Dec. ¶¶ 3–7, 12 (August 2014 document collection completed "as part of [declarant's] ordinary duties" *a year before* "bec[oming] aware of [Jones's] FOIA request" in August 2015); Tetreault Dec. ¶ 4 (August 2017 search for each Individual Defendant's "disciplinary and performance records" in

response to civil discovery request); Dismuke Dec. ¶¶ 5–7 (CBP eDiscovery team searched for discoverable ESI in response to civil discovery requests); Yamasaki Dec. ¶ 3 (leaving unclear whether search for "certain guidelines, policies, or procedures" was in response to Jones's FOIA request).

Significantly, the scope of Jones's FOIA request is broader than his civil discovery requests. As an example, Items Two and Three of the FOIA request sought names, ranks, and agent numbers of *any* DHS personnel involved in the incident, and records referring to any investigation or disciplinary action taken in relation to this incident against *any* of them. TAC ¶ 73, Ex. C at 6. By contrast, the individual tasked with completing civil discovery searches limited her search to the five Individual Defendants. Tetreault Dec. ¶¶ 3–5. This overly narrow search does not discharge CBP's obligation to complete an adequate search in response to Jones's FOIA request.

Where *not* undertaken in response to Jones's FOIA request, Damages Defendants' searches are legally inadequate. *See Rodriguez*, 236 F. Supp. 3d at 39 ("FOIA clearly contemplates that an agency will undertake a focused search for records *in response to a particular request* for documents." (emphasis added, citation omitted)). Because CBP has thus failed to discharge its burden of establishing an adequate search in response to Jones's FOIA request, summary judgment must be denied. *See L.A. Times*, 442 F. Supp. 2d at 893.

2. CBP's Submissions Do Not Provide Sufficient Detail to Assess the Adequacy of the Search

Even if the agency's limited submissions *did* describe targeted searches for records related to the FOIA request, the record is insufficient to allow the Court to assess, *de novo*, whether CBP "conducted a search reasonably calculated to uncover all relevant documents." *L.A. Times*, 442 F. Supp. 2d at 893. To establish a sufficient search, an agency's affidavits "must be reasonably detailed, setting forth the search terms and the type of search performed, and averring that all files likely

to contain responsive materials (if such records exist) were searched." *Nation Mag.* 71 F.3d at 890 (quotation marks, alteration and citation omitted); *Nat'l Day Laborer Organizing Network v. ICE*, 877 F. Supp. 2d 87, 107–08 (S.D.N.Y. 2012) [hereinafter *NDLON*] (discussing detail required to evaluate adequacy of agency searches when, given "electronic searches, custodians never actually [physically] look at the universe of documents they are searching").

The FOIA Defendants have not satisfied this standard.

First, the agency's affidavits barely describe a search at all, much less the methods and search terms used or repositories searched. For example, Mr. Wallace asserts that, in connection with the *damages* claims, he spoke to fourteen of the forty individuals identified in the Damages Defendants' Initial Disclosures, and that "an email was sent" to certain other Border Patrol employees asking whether they possessed documents about this incident. Wallace Dec. ¶¶ 3–4, 7. Mr. Wallace does not explain why these individuals were selected for interviews, nor whether they were asked anything relevant to *Jones's FOIA request*. Other agency declarations likewise omit specific descriptions of any search. *See, e.g.*, Stecher Dec. ¶ 3 (providing only that he "was tasked only with receiving records related to Alton Jones and saving them to a central location," apparently in response to the litigation hold letter, ME Dec. ¶ 2); *see also* Dismuke Dec. ¶¶ 3–4 (describing in vague and general terms how the CBP eDiscovery Team searches employees' emails).

Second, for most searches, CBP has not identified search terms used. *See, e.g.*, Yamasaki Dec. ¶ 7 ("I do not recall the exact search terms that I used"); Wallace Dec. (no discussion of search terms); Flores Dec. ¶ 5 (search "using a combination of Alton Jones's name, date of birth, and fingerprints"); Dismuke Dec. ¶ 4 (noting that a "search can be run . . . using . . . keywords," but failing to specify which keywords she used). It is impossible to "establish the adequacy of the searches for which [the agency] ha[s] specified no search terms." *NDLON*, 877 F. Supp. 2d at 110.

Third, certain agency component offices with "files likely to contain responsive materials" were not searched. *Nation Mag.*, 71 F.3d at 890. For example, Jones's FOIA request sought records referring to any investigation or disciplinary action taken in relation to this incident against any of the individuals involved, and policies and guidelines related to CBP's arrest and detention procedures. TAC ¶ 73, Ex. C at 6 (Items 3, 8–9). But at least four agency subcomponents responsible for developing policy, investigating complaints, or pursuing disciplinary measures were not searched at all: the DHS Privacy Office; CBP's Office of the Commissioner's Office of Policy and Planning; CBP's Internal Affairs' Investigative Operations Division; and CBP's Internal Affairs' Joint Intake Center. ME Dec. ¶ 20. Likewise, although CBP's Office of Human Resources Management (HRM) supervises matters involving personnel actions and employee relations, *Id.* ¶ 21, FOIA Defendants have not explained why, within HRM, only the Division of Labor and Employee Relations was searched. Tetreault Dec. ¶ 4–5. Given the function of each of these entities and the specific items Jones requested, FOIA Defendants' failure to search these agencies was improper. ME Dec. ¶¶ 20–21. *See Valencia-Lucena v. Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999) ("It 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 [them] barring an undue burden." (citations omitted, emphasis added)).

Fourth, some of the agency's affidavits leave unclear whether the agency improperly restricted its searches to limited repositories. *See, e.g.*, Yamasaki Dec. ¶ 7 (referring generally to "agency server databases"); Wallace Dec. (no discussion of databases or repositories searched). Without such attestations, it is impossible to evaluate whether all "all files likely to contain relevant documents" were searched. *AIC v. DHS*, 950 F. Supp. 2d 221, 230 (D.D.C. 2013). Additionally, a Border Patrol employee, at the request of a Supervisory Border Patrol Agent on the day of the incident, retrieved a specifically identified video and audio files, Flores Dec. ¶ 7, but

CBP's submissions do not establish whether footage from other cameras or audio from other radio frequencies were also searched, and if not, why they were omitted. *See* Declaration of Alton Jones, ECF No. 104-2, ¶ 29 (identifying additional camera not referenced in CBP's search affidavits).

Because an agency "cannot limit its search to only one record system if there are others that are likely to turn up the information requested," *Oglesby v. Army*, 920 F.2d 57, 68 (D.C. Cir. 1990), the agency "at a minimum ha[s] to aver that it has searched all files likely to contain relevant documents. . . . Where the government has not made such an attestation, courts have typically found that an issue of material fact exists as to the adequacy of the search." *AIC v. DHS*, 950 F. Supp. 2d 221, 230 (D.D.C. 2013) (collecting cases).

With these affidavits, the FOIA Defendants do not even endeavor to "show with reasonable detail" that CBP conducted searches "using methods which can be reasonably expected to produce the information requested." *Oglesby*, 920 F.2d at 68 (quotation and citation omitted). Summary judgment must, therefore, be denied.

3. CBP's Limited Submissions Indicate That Responsive Materials Have Been Overlooked

Where "the record itself reveals positive indications of overlooked materials," an agency's search is legally inadequate and it is not entitled to summary judgment. *Valencia-Lucena*, 180 F.3d at 327 (quotation marks and citation omitted); *Weisberg*, 705 F.2d at 1351 ("[E]vidence that relevant records have not been released may shed light on whether the agency's search was indeed inadequate . . . .").

Here, even the paltry information FOIA Defendants do provide indicates that materials responsive to Jones's FOIA request have been overlooked.

For example, Items One, Four, and Six of Jones's FOIA request sought, respectively, any records referring to the incident; records mentioning any medical treatment administered to Jones during this incident; and any records "referring to any criminal investigation(s) of Jones on or after August 9, 2014." TAC ¶ 73, Ex. C

at 6. In response, CBP produced emails from just two individuals' accounts. *See* ME Dec. ¶¶ 11 & 14, Exs. D & F. In civil discovery, however, the Damages Defendants identified forty individuals who would have knowledge of the incident. *Id.* ¶ 12 & Ex. E.

D. The FOIA Defendants Are Improperly Withholding Responsive Materials Pursuant to Exemptions 5 and 7(E)

FOIA Defendants have withheld records without establishing that any exemption applies. An agency bears the burden of establishing that an exemption applies to withheld information, *Lahr*, 569 F.3d at 973, and that it has released all reasonably segregable material. 5 U.S.C. § 552(b). "The focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Mead Data Central, Inc. v. Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). That information was once exempt also does not make it permanently so. *Cottone v. Reno*, 193 F. 3d 550, 554 (D.C. Cir. 1999) ("Under [the] public-domain doctrine, materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record.").

FOIA Defendants have not shouldered their burden of establishing that Exemption 5 or 7(E) apply to the withheld information, and summary judgment should therefore be denied.

1. FOIA Exemption 5 Does Not Apply to the Withheld Information

Exemption 5 allows withholding of documents or information "which a private party could not discover in litigation with the agency." *NLRB*, 421 U.S. at 148 (citation omitted). The Supreme Court has construed this exemption to apply to "only those documents[] normally privileged in the civil discovery context." *Id.* at 149.

Here, CBP invokes two privileges in withholding information from thirty-

seven emails: (1) deliberative process privilege ("DPP") and (2) the work product doctrine. MSJ at 14–16 & Vaughn Nos. 1–33, 36–39. CBP does not, however provide any declarations in support of its Exemption 5 claims.[7] Thus, as the FOIA Defendants have failed to establish that either privilege or work product justifies withholding this information, they are not entitled to summary judgment.

(a) *FOIA Defendants Have Not Established that Redacted Information in the Emails Is Protected by the DPP*

CBP invokes the DPP to withhold information contained in two sets of emails responsive to Jones's FOIA request. The first set consists of emails that Judge Gallo reviewed *in camera* were the subject of a discovery order related to the damages claims, ECF No. 45 ("Order"), Vaughn Nos. 1–8. These emails were originally produced as FOIA productions at USA-Jones-000128–50 and later re-produced by Damages Defendants in civil discovery at USA-Jones-000151–68 ("first set"). The second set consists of emails that Damages Defendants produced in civil ESI discovery, which Judge Gallo never reviewed. *See* Wallace Dec. ¶ 23; Vaughn Nos. 9–13, 15, 17–20, 22–33, 36–39 ("second set"). In both sets of emails, the Damages Defendants redacted specific information. Now, the FOIA Defendants are withholding that same information under Exemption 5.

"To fall within the [DPP], a document must be both 'predecisional' and 'deliberative.'" *Carter v. Dep't of Commerce*, 307 F.3d 1084, 1089 (9th Cir. 2002) (quoting *Assembly of the State of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992)). Here, FOIA Defendants have not established either. CBP has not averred that the emails were generated before an agency action or policy was finally adopted, *Pub. Citizen, Inc. v. OMB*, 598 F.3d 865, 874 (D.C. Cir. 2010), or

[7] CBP listed Exemption 5 in Vaughn Nos. 34 & 35 but omits any discussion of the applicability of Exemption 5 to these records from its submissions. *See* MSJ at 14–16. Jones assumes that the agency listed Exemption 5 in Vaughn Nos. 34 & 35 in error.

that the information is "a direct part of the deliberative process in that it makes recommendations or expresses opinion on legal or policy matters," *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). Moreover, the DPP is a qualified privilege which does not apply where a litigant establishes that its need for the information outweighs the government's interest in preventing disclosure of the information. *FTC v. Warner Commc'ns Inc.*, 742, F.2d 1156, 1161 (9th Cir. 1984). In making this determination, courts consider, among other factors, the relevance of the information. *Id.* Even if, however, the court finds that the DPP applies, it may order the information released when the information may shed light on government misconduct. *See id.*; *see also Lahr*, 569 F.3d at 980.

Not Predecisional. The FOIA Defendants' submissions do not establish that the withheld information is predecisional; indeed, the record suggests that at least some of it is not. *See, e.g.*, Vaughn No. 8 (August 11, 2014 post-release email considering "whether the prosecution could proceed through the U.S. Attorney's Office," although it was confirmed at 7:45 AM on August 10, 2014 that "FED prosecution was declined," ME Dec. ¶ 14 & Ex. F at 69); Vaughn No. 9 (email "discussing deliberation of whether to prosecute" was sent on August 12, 2014, after it had already been confirmed that neither federal nor state charges would be pursued, ME Dec. ¶ 14 & Ex. F at 69, 71).

Not Deliberative. The FOIA Defendants' submissions also fail to establish that the withheld information is deliberative. An agency invoking the DPP must establish "the role played by the documents at issue in the course of" the deliberative process. *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 868 (D.C. Cir. 1980). That standard is not met here, for any withheld information. For example, FOIA Defendants describe one email as addressing "the finality of Bullock's decision." Vaughn No. 1. That a decision made was final is not itself a deliberation; it is a fact, and is therefore not protected by the DPP. *Mink*, 410 U.S. at 91 (privilege does not extend to "factual material"); *see also Hajro v. USCIS*, No. 08-1350, 2011

U.S. Dist. LEXIS 117964, at *44 (N.D. Cal. Oct. 12, 2011) (requiring agency to "isolate the [specific] factual information requested and disclose it").[8]

(b) *The FOIA Defendants Improperly Rely on Judge Gallo's Order as to the First Set of Emails to Withhold Both Sets of Emails.*

Rather than providing affidavits or a Vaughn index establishing that the redacted information was predecisional and deliberative, the FOIA Defendants rely solely on a narrow prior ruling in a civil discovery dispute. MSJ at 15. In civil discovery, Damages Defendants produced emails, redacting information they claimed constituted deliberation of whether to prosecute Jones, including "consideration of whether the prosecution could proceed through the U.S. Attorney's office or through the District Attorney." ECF No. 44 at 1.

Jones moved to compel information redacted from the first set of emails appearing at USA-Jones-000151–68. ECF No. 44. After *in camera* review of this set of emails, Judge Gallo denied the motion. Order at 1. In doing so, Judge Gallo relied explicitly on the fact that this set of emails contained *no* "reasons behind the ultimate decision not to recommend charges" against Jones and were therefore not relevant to the merits of the United States' counterclaim against Jones, ECF No. 19, or Jones's damages claims. Order at 7.

Although Judge Gallo reviewed only the first set of emails, the FOIA Defendants rely on his Order to withhold information from both sets of emails identified in their Vaughn index. MSJ at 15; Vaughn Nos. 1–13, 15, 17–21–33, 36–39. This is improper for three distinct reasons.

First, with respect to the withheld information in Vaughn Nos. 1–8, which Judge Gallo reviewed *in camera*, the FOIA Defendants ask this Court to abandon its

[8] Furthermore, the Damages Defendants have repeatedly represented that Agent Gregory Bovino, *not* Agent Bullock, made the decision not to prosecute Jones. ECF No. 44, at 3; ECF No. 85-2, Ex. C, at 30-31 (Herrera Depo Tr.). CBP has not explained whether Agent Bullock made some other "final decision" that was a direct part of the deliberative process.

responsibility to conduct a *de novo* review of an agency's response to a records request, 5 U.S.C. § 552(a)(4)(B). "A "claim of privilege…sustained in discovery proceedings…[should not be] given 'controlling weight' [in FOIA litigation]." *Playboy Enters. v. DOJ*, 677 F.2d at 936 (ordering release of a report previously withheld in civil discovery to a FOIA litigant). Just as an agency may not present a previous search unrelated to the FOIA request as evidence of an adequate FOIA search, neither may it present previously claimed privileges as evidence of proper withholdings under FOIA. *See, e.g., id.* ("That for one reason or another a document may be exempt from discovery does not mean that it will be exempt from a demand under FOIA."). Notably, the FOIA Defendants cite *no* authority to the contrary.

Second, even assuming *arguendo* that after conducting a *de novo* review of the FOIA record this Court agrees with Judge Gallo's determination as to the first set of emails, such a determination is not dispositive of the propriety of the withholdings in the second set of emails. *See* Vaughn Nos. 9–13, 15, 17–20, 22–33, and 36–39. In this respect, the FOIA Defendants improperly ask this Court to *extend* the scope of Judge Gallo's ruling to apply to emails Judge Gallo never reviewed and which were not even at issue in the parties' previous discovery dispute. Order at 7. This extension is improper, because Judge Gallo's ruling related explicitly to the *content* of the eight emails he reviewed *in camera*. He determined those particular emails were predecisional, deliberative, and only marginally relevant to Jones's claims, because they contained no substantive discussion of the decision whether to prosecute Jones. Documents which *do* contain substantive discussion of that decision are far *less* likely to be privileged, because the DPP is a qualified privilege which does not bar discovery where the "government's intent is at issue," such as this case. *See Lake County Bd. of Comm'rs*, 233 F.R.D. 523, 526 (N.D. Ind. 2005) (collecting cases). The Order cannot be extended to all information the FOIA Defendants now withhold under the vague and conclusory claim that they are "investigatory communications." MSJ at 15.

Third, the FOIA Defendants provide no evidence whatsoever—only unsworn summaries of counsel in the Vaughn index—to establish the nature of the withheld information. This is legally insufficient to support even a *prima facie* privilege claim, much less to establish that Judge Gallo's Order applies to these additional communications. *See, e.g.*, *Judicial Watch v. DHS*, 857 F. Supp. 2d 129, 137–38 (D.D.C. 2012) (disregarding unsworn factual assertions). This Court should, at a minimum, conduct an *in camera* review to determine whether the DPP applies to any of the emails here at issue.

(c) *The FOIA Defendants' Submissions Are Insufficient to Establish that Exemption 5 Applies to the Emails*

In addition to the deficiencies described above, the CBP's submissions—particularly their vague and conclusory Vaughn index—are "patently inadequate." *Coastal States*, 617 F.2d at 861. "To justify withholding, the government must provide tailored reasons in response to a FOIA request. It may not respond with boilerplate or conclusory statements." *Shannahan v. IRS*, 672 F.3d 1142, 1148 (9th Cir. 2012) (citation omitted); *see also Weiner v. FBI*, 943 F.2d 972, 979 (9th Cir. 1991) ("Specificity is the defining requirement of the *Vaughn* index"; without it, "the adversarial process is unnecessarily compromised" (quotation marks and citation omitted)).

Here, CBP improperly withholds both sets of emails based on counsel's unsworn statement that "[a]ll of these records were created in the course of a law enforcement investigation or in anticipation of potential litigation," MSJ at 15, and on a series of vague and conclusory descriptions. The FOIA Defendants have not established, therefore, that either DPP or attorney work product applies to any of the withheld information.

As to the DPP, the FOIA Defendants withhold emails relating to "Bullock's decision" without establishing his role in the deliberation of whether to prosecute Jones, and further withhold emails vaguely described as describing the potential

prosecution without establishing whether these discussions occurred before a final decision was made. *See* Vaughn Nos. 1–13, 15, 17–20, 22–33, 36–39.

As to attorney work product, CBP is withholding four emails as attorney work product based solely on an unsworn assertion that each email is "concerning Litigation Hold Notice." Vaughn Nos. 14, 16, 20–21. The attorney work product doctrine exists to provide "a working attorney with a 'zone of privacy' within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories." *Coastal States*, 617 F.2d at 864. CBP's submissions, however, do not establish that the withheld information contains an attorney's "legal theories," "strateg[ies]," "mental impressions," or "opinions." *Judicial Watch v. DOJ*, 432 F.3d 266, 370–71 (D.C. Cir. 2005). This is legally inadequate.

2. CBP Has Failed to Establish that Emails and Other Responsive Records Are Exempt Under 7(E)[9]

Exemption 7(E) protects "records or information compiled for law enforcement purposes," but only to the extent that production "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).

To rely on Exemption 7(E), an agency must first establish that the *specific* record withheld was "compiled for law enforcement purposes." *Rosenfeld v DOJ*, 57 F.3d 803,808 (9th Cir. 1995). To establish this threshold requirement, the agency must provide the Court with sufficient detail as to the purpose of the agency actions that led to the creation of the documents. *See, e.g., Patterson v. IRS*, 56 F.3d 832, 837–38 (7th Cir. 1995). "Where documents are withheld altogether, the requester

[9] FOIA Defendants listed Exemption 7(E) in Vaughn Nos. 1–33 and 36–39, yet put forth no discussion or argument as to this exemption's applicability to these records, *see* MSJ at 17–19.

needs a *Vaughn* index of considerable specificity to know what the agency possesses but refuses to produce." *Fiduccia v. DOJ*, 185 F.3d 1035, 1043 (9th Cir. 1999).

As a threshold matter, CBP has not established that *any* of the withheld records were "compiled for law enforcement purposes." *Rosenfeld*, 57 F.3d at 808. To the contrary, this prerequisite is not even mentioned in the FOIA Defendants' motion, Vaughn index, or supporting affidavits. *See* MSJ at 17–19. Even if, however, CBP had established this prerequisite, the agency's submissions are inadequate for this Court to evaluate *de novo* the merits of the Exemption 7(E) withholdings.

(a) *CBP Has Not Established that the TAS Report or Related Email are Subject to Exemption 7(E)*

CBP justifies withholding both the TAS Report, which is withheld in full, and the related email based on a single boilerplate sentence. Vaughn Nos. 34 & 35 (describing records as "law enforcement sensitive regarding specific law enforcement techniques and procedures involved in a Threat Activity Shift Report"). Apart from this one phrase, CBP relies only on counsel's unsworn argument that the records "constitute protected information regarding law enforcement techniques and procedures for surveillance tactics and suspect threat detention." MSJ at 18. This is insufficient to allow this Court to assess the agency's withholdings, especially where the TAS Report has been withheld in full. *See Fiduccia*, 185 F.3d at 1043 (additional record evidence needed to justify withholding in full). Although the FOIA Defendants cite to cases describing various types of information other courts have found exempt under 7(E), *id.*, they do not provide any detail about the information they are withholding in *this case*, making it impossible for this Court to assess whether those cases are at all instructive or relevant to the specific information at issue here. Therefore, this Court should order CBP to release these records to Jones—or, at a minimum, review them *in camera* to assess *de novo* CBP's Exemption 7(E) withholdings.

(b) *CBP Has Not Established that the HRSTC Policy is Subject to Exemption 7(E)*[10]

Even if CBP had established that the HRSTC Policy was "compiled for law enforcement purposes," it has not established that the withheld information includes "techniques and procedures for law enforcement investigations or prosecutions" or "guidelines for law enforcement investigations or prosecutions," the disclosure of which "could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). CBP's discussion of the HRSTC Policy contains solely conclusory statements unrelated to either the HRSTC's specific content or the connection of that content to law enforcement techniques or procedures. MSJ at 18–19.

The agency's vague Vaughn index sheds no light on whether most of the withheld information constitutes "techniques and procedures" or "guidelines."[11] One redaction is classified as a "procedure," but the FOIA Defendants have not established that it is "for law enforcement investigations or prosecutions."[12] Where the agency identifies guidelines,[13] it does not address how disclosure of such "guidelines . . . could reasonably be expected to risk circumvention of the law," *Hamdan v. DOJ*, 797 F.3d 759, 778 (9th Cir. 2015) (citation omitted). *See* MSJ at 18 (one conclusory statement that "if revealed, [the policy] could reasonably be expected to risk circumvention of the law"). Without making such a showing, CBP cannot establish that this information is exempt under 7(E). *Hamdan*, 797 F.3d at

[10] Without conceding the propriety of the withholdings in the HRSTC Policy, Jones does not seek the names and contact information of agency personnel withheld pursuant to Exemptions 6 and 7(C), *see* Vaughn Nos. 40(a) and 40(n), or internal tracking numbers withheld pursuant to Exemption 7(E), *see* Vaughn Nos. 40(b)–(c).

[11] *See, e.g.*, Vaughn No. 40(d); *id.* Nos. 40(e)–40(f), 40(m) ("unit of time"); *id.* Nos. 40(f) ("list of exceptions to short-term detention in Border Protection [sic] hold rooms and parameters and considerations for exceptions"); *id.* 40(g) ("parameters and considerations for monitoring of a category of detainees").

[12] *See, e.g.*, Vaughn No. 40(i) ("procedure for detainees with certain medical conditions").

[13] *See* Vaughn Nos. 40(f)–40(h), 40(j)–40(m).

778; *see Morley v. CIA*, 508 F.3d 1108, 1115 (D.C. Cir. 2007) ("[C]onclusory and generalized allegations of exemptions are unacceptable" in justifying redactions).

In any case, as noted, an agency cannot invoke any FOIA exemption as to information that has already been released to the public. *See Cottone*, 193 F.3d at 554; *Stonehill*, 558 F.3d at 538 (records produced under FOIA available to the public). Here, most of the redactions in the HRSTC Policy are especially egregious because CBP has previously released the same policy memorandum with fewer redactions in response to other FOIA requests. Declaration of Mary Kenney ¶ 3; ME Dec. ¶ 22.

(c) *CBP Improperly Relies on Exemption 7(E) to Withhold the RVSS Camera Operator Log in Full*

CBP improperly withholds in full an RVSS Camera Operator Log based on a vague description that the document contains "shift information for cameras which monitor the border as well as noting activity." *See* Vaughn No. 41. This is legally inadequate, because it fails to identify what "shift information" or "noting activity" mean, or how they are connected to law enforcement activity. Further, the FOIA Defendants note that in the context of civil discovery, this Court opined that "disclosure of the capabilities of the surveillance system protecting the United States border," would inhibit CBP, ECF No. 96 at 6, but they fail to establish that the information in this operator log includes the "capabilities" of the RVSS system.

3. CBP Must Produce More Detailed Justifications For Withholdings

Because the FOIA Defendants have not satisfied their burden to prove Exemptions 5 and 7(E) were correctly applied, they should—at a minimum—be ordered to produce more detailed justifications for information withheld pursuant to these exemptions. This Court should then conduct an *in camera* review of the materials and an independent assessment of the FOIA Defendants' claimed exemptions. *Weiner*, 943 F.2d at 979 ("*In camera* review does not permit effective

advocacy" and is thus "appropriate only *after* the government has submitted as detailed public affidavits and testimony as possible" (quotation marks and citations omitted; emphasis added)).

4. CBP Is Unlawfully Withholding Certain Information Without Invoking Any Exemption

In addition to the redactions identified in the agency's Vaughn index, CBP has withheld miscellaneous information from the emails here at issue either without explanation or as "not responsive to the FOIA request." MSJ at 6 n.4; *Cf.* USA-Jones-000147–150. This is not permissible under FOIA. "Once an agency identifies a record it deems responsive to a FOIA request, the statute compels disclosure of the responsive record—i.e., as a unit—except insofar as the agency may redact information *falling within a statutory exemption*." *AILA v. EOIR*, 830 F.3d 667, 677 (D.C. Cir. 2016) (emphasis added). "[N]on-responsive redactions . . . find no home in FOIA's scheme." *Id.*; *see also North v. Walsh*, 881 F.2d 1088, 1093–94 (D.C. Cir. 1989).

Therefore, this Court should order the FOIA Defendants to either release this information or justify the withholdings under one of FOIA's exemptions.

IV. CONCLUSION

For the foregoing reasons, this Court should deny the FOIA Defendants' motion for summary judgment and order then to produce responsive records to Jones immediately. Additionally, this Court should order FOIA Defendants to conduct an adequate search in response to Jones's FOIA request. The FOIA Defendants should also be ordered to file supplemental affidavits and a revised Vaughn index with information sufficient to establish whether one or more FOIA exemption applies to withheld information. Finally, after these supplemental affidavits and revised Vaughn index are filed, this Court should conduct an *in*

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camera review of the documents here at issue to assess the propriety, *de novo*, the propriety of any withholdings.

DATED: June 25, 2018

Respectfully submitted,

By: */s/ Zoë McKinney*

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