

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

**AMERICAN IMMIGRATION
LAWYERS ASSOCIATION,**

Plaintiff,

v.

**U.S. DEPARTMENT OF
HOMELAND SECURITY, *et al.***

Defendants.

Civil Action No. 16-2470-TNM

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

I. INTRODUCTION1

II. BACKGROUND.....1

III. STANDARD OF REVIEW4

IV. ARGUMENT5

A. CBP Failed to Conduct an Adequate Search and Should Be Required to Do So on an Expedited Basis......5

B. Because CBP Has Improperly Withheld Records, It Should Be Required to Produce Unredacted Versions of Responsive Documents or a *Vaughn* Index on an Expedited Basis......8

V. CONCLUSION.....11

TABLE OF AUTHORITIES

Cases

**ACLU v. U.S. Dep’t of Def.*, 628 F.3d 612 (D.C. Cir. 2011).....9
Dep’t of State v. Ray, 502 U.S. 164 (1991)4
Dep’t of the Interior v. Klamath Water User Protective Ass’n, 532 U.S. 1 (2001).....8
Founding Church of Scientology, Inc. v. Bell, 603 F.2d 945 (D.C. Cir. 1979).....9
Freedom Watch, Inc. v. NSA, 49 F. Supp. 3d 1 (D.D.C. 2014).....5
Goldberg v. Dep’t of State, 818 F.2d 71 (D.C. Cir. 1987)5
**Iturralde v. Comptroller of Currency*, 315 F.3d 311 (D.C. Cir. 2003).....6
King v. U.S. Dep’t of Justice, 830 F.2d 210 (D.C. Cir. 1987).....9
**Mead Data Ctr., Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242 (D.C. Cir. 1977).....9
Nation Magazine, Washington Bureau v. U.S. Customs Serv., 71 F.3d 885 (D.C. Cir. 1995)3
**Neuman v. United States*, 70 F. Supp. 3d 416 (D.D.C. 2014)4
NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978)4
Oglesby v. U.S. Dep’t of Army, 920 F.2d 57 (D.C. Cir. 1990)6, 8
Reporters Comm. For Freedom of the Press v. FBI, 877 F.3d 399 (D.C. Cir. 2017)6
SafeCard Servs., Inc. v. S.E.C., 926 F.2d 1197 (D.C. Cir. 1991).....6
Weisburg v. Dep’t of Justice, 705 F.2d 1344 (D.C. Cir. 1983)5
Wiener v. F.B.I., 943 F.2d 972 (9th Cir. 1991).....9

Statutes

5 U.S.C. § 552(a)(3)(A).....4
 5 U.S.C. § 552(a)(4)(B).....4, 9
 *5 U.S.C. § 552(b)8, 9
 5 U.S.C. § 552(b)(6).....4, 9
 5 U.S.C. § 552(b)(7)(C).....4, 9
 *5 U.S.C. § 552(b)(7)(E).....4, 9, 10

Rules

Fed. R. Civ. P. 56.....4

I. INTRODUCTION

In 2013, the American Immigration Lawyers Association (AILA) filed a Freedom of Information Act (FOIA) request seeking documents related to U.S. Customs and Border Protection's (CBP) Officer's Reference Tool (ORT), which provides guidelines for admissibility determinations at ports of entry nationwide. Faced with years of government delay, AILA brought this action against the U.S. Department of Homeland Security (DHS) and CBP (collectively, Defendants) to compel their compliance with AILA's FOIA request.

More than five years after AILA submitted the FOIA request and two years after this litigation began, Defendants have yet to conduct an adequate search, produce all responsive records, or adequately justify the redactions in the records that they have produced. Indeed, Defendants did not even file a motion for summary judgment by the court-ordered December 10, 2018 deadline and, therefore, have entirely failed to provide the Court with evidence of an adequate search or proper redactions. For the reasons stated below, the Court should grant AILA's motion for summary judgment and require Defendants to comply with FOIA.

II. BACKGROUND

The Inspector's Field Manual (IFM) was previously a primary reference tool that CBP officers used during the inspection and admission process. Following FOIA requests, CBP publicly released a redacted copy of the manual. *See* ECF No. 12 ¶ 12. Subsequently, CBP phased out the use of the IFM and replaced it with the ORT. *See, e.g.*, ECF 16-2, Exh. A ¶¶ 4-5. However, CBP did not make any portion of the ORT available to the public.

On July 10, 2013, AILA submitted a FOIA request to CBP for records related to CBP's discontinuation of the use of the IFM and the implementation of the ORT in its place, and for a copy of finalized and implemented portions of the ORT. *See* ECF No. 1-1 at 1-2. With

regard to production of implemented portions of the ORT, AILA specified that its request should “be treated as a ‘rolling’ request and that copies of future sections of the ORT be released as they are finalized and implemented.” *Id.* at 2.

On June 10, 2015, having received no substantive response, AILA filed an administrative appeal of its FOIA request. ECF No. 1-3. CBP also failed to respond to this administrative appeal, aside from a determination that the fee waiver request was not applicable. *See* ECF No. 1-4.

On December 19, 2016, AILA filed this action. *See* ECF No. 1.

In response, Defendants produced records responsive to AILA’s FOIA request for the first time. On March 1, 2017, Defendants produced two documents: (1) a 25-page online index of Chapter 11 of the ORT with some of document titles redacted, and (2) a one-page online index of Chapter 12 of the ORT. ECF No. 19 ¶ 2 & Exhs. A-C. The ORT Chapter 11 index contained links to 371 memos, musters, guides, Standard Operating Procedures, and other documents related to admissibility policy, which are listed alphabetically by title. *Id.* at Exh. B. The ORT Chapter 12 index is entitled “Laws, Regulation and Systems” and contains links directed to those topics. *Id.* ¶ 2 & Exh. C.

On April 19, 2017, Defendants produced two additional pages of records, which both related to CBP’s discontinuation of the use of the IFM as a reference tool. *Id.* at ¶ 3 & Exh. D. On June 15, 2017, Defendants produced a second version of the ORT Chapter 11 index, with revisions to the redaction of certain document titles. *Id.* at ¶ 4 & Exhs. E-F.

On June 7, 2017, Defendants filed a motion for summary judgment, which AILA opposed. *See* ECF Nos. 16, 17.

On March 30, 2018, the Court denied Defendants' motion, finding Defendants had "not 'demonstrate[d] beyond material doubt that [their] search was reasonably calculated to uncover all relevant documents.'" ECF No. 30 at 2 (quoting *Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995)). The Court ordered Defendants to "review and disclose" responsive records that were linked to in the online indices of chapters of the ORT unless the records were exempt from disclosure under FOIA or another legal basis. ECF No. 30 at 4-5.

On April 18, 2018, Defendants agreed to produce "all the content linked in Chapter 11, subject to redactions, by July 18, 2018," including "any documents that are added to, or referenced in, Chapter 11 as of July 18, 2018," and to make an interim production of documents from Chapter 11 on June 18, 2018. ECF No. 32 at 2.

On June 18, 2018, Defendants produced 17 documents from Chapter 11. *See* Declaration of Kristin Macleod-Ball (Macleod-Ball Decl.) ¶ 2. On July 18, 2018, Defendants produced an additional 30 documents, *id.* ¶ 3, but informed AILA that the agencies had not produced all remaining documents from Chapter 11, ECF No. 35 at 2.

Following an August 9, 2018 status report, the Court ordered Defendants to produce all remaining documents from Chapter 11 of the ORT by November 9, 2018 and file any motion for summary judgment by December 10, 2018. *See* August 10, 2018 Minute Order. The Court also ordered AILA to file any cross-motion for summary judgment by December 28, 2018. *Id.*

On September 10, 2018, Defendants produced 20 documents from Chapter 11. Macleod-Ball Decl. ¶ 4. On October 9, 2018, Defendants produced 30 additional documents. *Id.* ¶ 5. Between November 7 and 9, 2018, Defendants produced 266 additional documents. *Id.* ¶¶ 6-8.

Defendants did not file a motion for summary judgment with the Court on December 10, 2018 or provide AILA with a *Vaughn* index or declaration or other document explaining their searches or redactions. *See* Macleod-Ball Decl. ¶ 9. AILA now moves for summary judgment regarding both the adequacy of Defendants' search and their decision to withhold records in part or in full pursuant to 5 U.S.C. § 552(b)(6), (7)(C), and (7)(E).

III. STANDARD OF REVIEW

Summary judgment is appropriate when no genuine issue of material fact exists and the moving party establishes its entitlement to judgment as a matter of law. Fed. R. Civ. P. 56.

“The basic purpose of FOIA is 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). Toward that end, FOIA provides that agencies “shall make . . . records promptly available to any person” who submits a request that “(i) reasonably describes such records and (ii) is made in accordance with [the agency's] published rules” 5 U.S.C. § 552(a)(3)(A). FOIA is “broadly conceived,” and its “basic policy” is in favor of disclosure. *Robbins Tire*, 437 U.S. at 220 (quotations omitted).

Thus, “[i]n the FOIA context, a district court reviewing a motion for summary judgment conducts a de novo review of the record, and the responding federal agency bears the burden of proving that it has complied with its obligations under the FOIA.” *Neuman v. United States*, 70 F. Supp. 3d 416, 421 (D.D.C. 2014) (citing 5 U.S.C. § 552(a)(4)(B)). 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).

IV. ARGUMENT

CBP continues to delay complying with its FOIA obligations. Despite producing documents from one chapter of the ORT, there is evidence that CBP's search was inadequate. Moreover, the Court set a deadline for Defendants to file a motion for summary judgment by mid-December, in which they could substantiate the adequacy of their search and the basis for redacting records, and Defendants ignored that deadline. For the reasons stated below, AILA's motion should be granted, and Defendants should be required to perform an adequate search, produce all responsive records, and substantiate their redactions on an expedited basis.

A. **CBP Failed to Conduct an Adequate Search and Should Be Required to Do So on an Expedited Basis.**

“To meet its FOIA obligations, an agency must show that it ‘conducted a search reasonably calculated to uncover all relevant documents.’” *Freedom Watch, Inc. v. NSA*, 49 F. Supp. 3d 1, 5 (D.D.C. 2014) *aff'd and remanded*, 783 F.3d 1340 (D.C. Cir. 2015) (*quoting Weisburg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). Following Defendants' previous motion for summary judgment, this Court expressly found that Defendants had not made that showing. Subsequently, Defendants failed to provide this Court with any further information regarding their search for records or to produce responsive records that an adequate search would have uncovered. This Court should therefore find Defendants' search inadequate.

In its March 30, 2018 order, this Court stated that Defendants had “utterly failed to describe the systems searched, much less why [their] method is reasonably calculated to uncover all relevant documents.” ECF No. 30 at 3 (quotation omitted); *see also id.* at 2 (“With respect to

AILA's request about the discontinuation of the IFM and implementation of the ORT, the Government's affidavits, which I afford a 'presumption of good faith,' are not 'reasonably detailed' so that it can be determined that the search methods used were 'reasonably expected to produce the information requested.'" (quoting *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1200 (D.C. Cir. 1991); *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)); *id.* at 5 (stating that Defendants had "not explained [their] search methodology 'with the specificity [that] precedent requires'" (quoting *Reporters Comm. For Freedom of the Press v. FBI*, 877 F.3d 399, 403 (D.C. Cir. 2017)). Additionally, in analyzing Defendants' failure to produce records listed in the indices of Chapters 11 and 12 of the ORT, the Court found that, to comply with their FOIA responsibilities, Defendants were "obligated to review and disclose responsive records—to include the underlying policies or documents that make up the ORT—unless the records fall into one of FOIA's statutory exemptions or there is another recognized legal objection to this disclosure." ECF No. 30 at 4-5.

Subsequently, Defendants produced a significant number of responsive records from Chapter 11 of the ORT. But they did not produce any other responsive records, and they have not provided AILA or this Court with *any* evidence of their search methods, the records systems they searched, or how those methods and systems could reasonably be expected to lead to all records responsive to AILA's request. *See* ECF No. 32 at 2 (joint status report noting Defendants' position that they "need to describe the search that was performed more adequately"). Thus, the record is devoid of any detailed evidence establishing that Defendants have conducted an adequate search.

Rather, the record supports the conclusion that Defendants failed to conduct an adequate search. *See Iturralde v. Comptroller of Currency*, 315 F.3d 311, 314 (D.C. Cir. 2003) (noting

that a FOIA requester can present “countervailing evidence as to the adequacy of the agency’s search” (quotation omitted)). For example, even as to the portion of AILA’s FOIA request to which Defendants have provided responsive records—Chapter 11 of the ORT—Defendants have failed to produce *all* the records requested. According to the index of Chapter 11, that chapter contains 371 documents. *See* ECF No. 19-6. However, Defendants produced 363 Chapter 11 documents. *See* Macleod-Ball Decl. ¶¶ 2-8. Defendants failed to produce at least 8 known records.¹ Additionally, Defendants failed to produce any records from the index of Chapter 12 of the ORT.² Finally, as AILA previously explained, the indices of Chapters 11 and 12 show links to other portions of the ORT, including a home page and additional chapters. *See* ECF No. 17 at 11-12; ECF No. 26 at 5-7. Defendants’ failure to produce any documents related to these other provisions also indicates the inadequacy of their search.³

¹ This number is likely too low: it appears that some of the documents produced from Chapter 11 are not included in the Chapter 11 index produced to AILA. *Compare* Macleod-Ball Decl. ¶ 7 (noting the production of documents entitled “Class of Admission Code – Redacted” and “Class of Admission Code (COA) – Redacted”) *with* ECF No. 19-6 at 5 (not including those titles in an alphabetized index of Chapter 11).

² Of the records or websites listed in Chapter 12 of the ORT, AILA only seeks production of those in the “PODS CBP’s Policy Online Document Search.” Defendants may attempt to claim that they need not produce documents in the Chapter 12 index because, as they alleged in a status report, those records are “public information” or “a voluminous database of millions of individual records, which contain personal information, for which it would be too burdensome for Defendants to produce and are covered by FOIA exemptions.” ECF No. 32 at 1-2. However, any such claim would be erroneous and, moreover, Defendants have not produced any evidence in support of these allegations.

³ Even if Defendants were correct that, as of August 2017, “[o]nly two chapters of the ORT [were] finalized” and “[t]he remainder of the ORT ha[d] not been drafted,” ECF No. 23-1, Exh. A ¶ 5; *but see* ECF No. 26 at 5 (noting that Defendants failed to explain the links to other portions of the ORT in either their initial or supplemental declarations), AILA requested a “rolling” production of sections of the ORT “as they are finalized and implemented.” ECF No. 1-1 at 2. Notably, Defendants themselves note that “[t]he ORT was intended to be a ‘living’ online repository . . . where new policies and documents could be uploaded on an ongoing basis.” ECF

Thus, the Court should order Defendants to conduct an adequate search and produce the remaining responsive records, including the remaining documents from Chapter 11 of the ORT, responsive records from the “PODS CBP’s Policy Online Document Search” in Chapter 12 of the ORT, any documents from additional chapters of the ORT that Defendants have finalized and implemented, and any additional records related to instructions to the field or ports of entry regarding discontinuation of the IFM or implementation of the ORT. At a minimum, the Court should order Defendants to “to submit a reasonably detailed affidavit upon which the reasonableness of its search can be judged.” *Oglesby*, 920 F.2d at 68.

B. Because CBP Has Improperly Withheld Records, It Should Be Required to Produce Unredacted Versions of Responsive Documents or a *Vaughn* Index on an Expedited Basis.

Having failed to move for summary judgment, Defendants thus have refused to provide any justification—in a *Vaughn* index, declaration, or other format—for the application of statutory exemptions to the vast majority of the documents that they have withheld in whole or in part. Even if portions of the withheld documents may be properly subject to statutory exemptions, Defendants have not produced reasonably segregable portions of the documents. Thus, this Court should require Defendants to produce the withheld records or, at a minimum, a detailed *Vaughn* index.

FOIA requires agencies to disclose records responsive to a request “unless the documents fall within enumerated exemptions.” *Dep’t of the Interior v. Klamath Water User Protective Ass’n*, 532 U.S. 1, 7 (2001) (citing 5 U.S.C. § 552(b)). Agencies “withholding responsive documents from a FOIA release bear[] the burden of proving the applicability of

23-1, Exh. B ¶ 6.

claimed exemptions.” *ACLU v. U.S. Dep’t of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011). The Court is empowered to “order the production of any agency records improperly withheld,” and “may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions” set forth in the statute. 5 U.S.C. § 552(a)(4)(B). However, the Court should not consider in camera review of withheld documents as an acceptable substitute for an inadequate *Vaughn* index; instead it should merely “supplement” a sufficiently detailed *Vaughn* index. *Wiener v. F.B.I.*, 943 F.2d 972, 979 (9th Cir. 1991). Furthermore, even if portions of the redacted records are subject to Defendants’ asserted FOIA exemptions, agencies must release “[a]ny reasonably segregable portion of a record . . . to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). In the D.C. Circuit, a document’s non-exempt portions must be disclosed unless those portions “are inextricably intertwined with exempt portions.” *Mead Data Ctr., Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

As to the documents produced following this Court’s March 30, 2018 order, Defendants have not provided any explanation for their application of the statutory exemptions at 5 U.S.C. § 552(b)(6), (b)(7)(C), and (b)(7)(E). They simply have not complied with their obligation to “describe *each* document or portion thereof withheld,” *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223 (D.C. Cir. 1987) (emphasis in original), and “state the exemption claimed for each deletion or withheld document, and explain why the exemption is relevant,” *Founding Church of Scientology, Inc. v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

Even a cursory review of the documents without the benefit of this required explanation makes clear that Defendants have withheld records that are not properly subject to the statutory exemptions. For example, Defendants have withheld portions of documents that are already

publicly available. *Compare, e.g.,* Macleod-Ball Decl., Exh. A (DHS memoranda entitled Enforcement of the Immigration Laws to Serve the National Interest and Implementing the President’s Border Security and Immigration Enforcement Improvements Policies) *with* DHS Memorandum, Enforcement of the Immigration Laws to Serve the National Interest and Implementing the President’s Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017), <https://tinyurl.com/gqjvkw7>. Additionally, Defendants have withheld portions of certain records pursuant to 5 U.S.C. § 552(b)(7)(E), which applies to information compiled for law enforcement purposes that “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” Context indicates that certain redactions are unrelated to law enforcement techniques and procedures and that their disclosure would not risk circumvention of the law. For example, in the DHS memorandum entitled Implementing the President’s Border Security and Immigration Enforcement Improvements Policies, Defendants have withheld information regarding what information DHS must report to the public regarding noncitizens entering the United States without authorization—which, as information that necessarily will be made public, seems unlikely to risk circumvention of the law if disclosed through FOIA. *See* Macleod-Ball Decl., Exh. B at 12-13. Similarly, in the CBP memorandum entitled Consolidated Appropriations Act of 2016 (H-1B and L-1 Fee Increased), a page regarding L-1 Petitions is entirely withheld—but it is unclear how information related to legislation to increase fees for immigration petitions could relate to law enforcement techniques. *See id.*, Exh. D.

Defendants did provide an explanation for the application of 5 U.S.C. § 552(b)(7)(E) to the index for Chapter 11 of the ORT in briefing for the prior motion for summary judgment.

They withheld the titles of thirty-one documents listed in the index, *see* ECF No. 30 at 2 n.2, stating that revealing the redacted names would reveal enforcement vulnerabilities or CBP partners or methods, ECF No. 16-2, Exh. A ¶¶ 9-12. However, Defendants subsequently made public many of the document titles that were redacted from the index when they produced the documents themselves in subsequent productions. *Compare* Macleod-Ball Decl. ¶¶ 3, 8 (discussing documents entitled “Access to the Department of State Diplomatic Clearance Application System (DCAS)” and “Inadmissible Aliens with Medical Conditions and Family Units”) *with* ECF No. 19-6 at 1, 11 (indicating that those titles were redacted from the alphabetized Chapter 11 index). This suggests that redactions of the same information from the index is not necessary for law enforcement purposes.

For these reasons, the Court should recognize that Defendants have improperly withheld in whole or in part documents produced to AILA and require Defendants to produce the responsive records without improper redactions. At a minimum, the Court should require Defendants to produce a detailed *Vaughn* index or other explanation for each application of a statutory exemption to the responsive records.

V. CONCLUSION

For the foregoing reasons, AILA’s motion for summary judgment should be granted.

December 28, 2018

Respectfully submitted,

s/ Emily Creighton
Emily Creighton
D.C. Bar No. 1009922
AMERICAN IMMIGRATION COUNCIL
1331 G Street, NW, Suite 200
Washington, DC 20005
Telephone: (202) 507-7514

Fax: (202) 742-5619
ecreighton@immcouncil.org

Kristin Macleod-Ball*
AMERICAN IMMIGRATION COUNCIL
1318 Beacon Street, Suite 18
Brookline, MA 02446
Telephone: (857) 305-3722
kmacleod-ball@immcouncil.org

Naikang Tsao*
FOLEY & LARDNER LLP
150 East Gilman Street
Madison, WI 53703
Telephone: (608) 258-4250
Fax: (608) 258-4258
ntsao@foley.com

Attorneys for Plaintiff

**Admitted Pro Hac Vice*