

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**MICHIGAN IMMIGRANT RIGHTS
CENTER, et al.,**

Plaintiffs,

vs.

**UNITED STATES DEPARTMENT
OF HOMELAND SECURITY, et al.,**

Defendants.

Case No. 16-cv-14192

Judge John Corbett O'Meara

Magistrate Judge Elizabeth A. Stafford

**PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO
DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

Defendants provide no new, let alone compelling, arguments for withholding location information. Defendants first misstate the standard for what constitutes “techniques and procedures” and then – after admitting that locations are not “techniques and procedures” – argue that Exemption 7(E) still applies under the “mosaic theory”, an approach that would effectively eviscerate FOIA. The Court should reject these arguments, and hold that location information does not constitute “techniques and procedures” and Exemption 7(E) therefore does not apply.

Assuming, for the sake of argument, that location information is a “technique or procedure,” Defendants fail to meet their burden of establishing a reasonable risk of circumvention of the law or harm to law enforcement. Law enforcement agencies routinely release geographic information and Defendants have released a significant amount of such information. The fact that Defendants seek to withhold information about potentially warrantless stops far from the border means that the Court should review the agency’s claim to withholding under Exemption 7(E) with special care. Finally, Defendants’ unwillingness to provide even very general location information at the city/township level, shows they have not released all reasonably segregable information.

I. Defendants Misconstrue the Relevant Standard for “Techniques and Procedures” Subject to Exemption 7(E).

Exemption 7(E) is clear: it applies only to information 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.” 5 U.S.C. § 552(7)(E). Courts have held that “techniques and procedures” refers “to how law enforcement officials go about investigating a crime.” *Lowenstein Int’l Human Rights Project v. Dep’t of Homeland Sec.*, 626 F.3d 678, 682 (2d Cir. 2010). *See also Hamdan v. U.S. Dep’t. of Justice*, 797 F.3d 759, 777-78 (9th Cir. 2015) (describing techniques in terms of methods of conducting investigation). As set out in Plaintiffs’ opening brief, Exemption 7(E) simply does not apply in circumstances where the responsive information does not constitute a technique or procedure. Plaintiffs’ Brief, ECF 32, Pg.ID# 885-888.

Unable to shoehorn geographic information into the “techniques and procedures” language of Exemption 7(E), Defendants invent a new standard for determining when that exemption applies: a “substantive effect” standard. Def’s Brf, ECF 34, Pg.ID# 1105 (“[FOIA] does not simply protect techniques, procedures, and guidelines themselves from disclosure, but allows for withholding where releasing records and information would have the substantive effect of disclosing those techniques, procedures, and guidelines.”). The Sixth Circuit has never adopted such a test, which is entirely untethered from the statutory language.¹ Such ad hoc inventiveness flies in the face of the foundational

¹ Defendants rely on a single, unpublished, district court opinion, *Elec. Frontier Found. v. Dept of Homeland Sec.*, No. 12-5580 PJH, 2014 WL 1320234, at *4 (N.D. Cal. Mar. 31, 2014)). The district court there elides over any analysis of

principles of FOIA, which require courts to construe exemptions narrowly. *See Vaughn v. United States*, 936 F.2d 862, 865 (6th Cir.1991) (“In enacting FOIA, Congress codified “a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.”).

II. Defendants Would Use The “Mosaic Theory” to Eviscerate FOIA.

Unable to squeeze geographic information into the language of Exemption 7(E), the government concedes that “a single location is not a technique or a procedure.” Defs’ Brf., ECF 34, Pg.ID# 1106. To salvage their argument, Defendants propose an unprecedented and unjustified extension of the “mosaic theory”, claiming that any information which – if aggregated – would provide insight into how an agency operates may be withheld pursuant to Exemption 7(E). While a location is not a technique or procedure, the government argues, “neither is a pixel a portrait, but the disclosure of thousands of pixels would surely have the effect of disclosing the image itself.” Defs’ Brief, ECF 34, Pg.ID# 1106. Plaintiffs filed the FOIA Requests precisely because disclosure of the requested information would provide the public with a more complete picture of the government’s activities. That, after all, is the core purpose FOIA, a statute specifically designed as “a means for citizens to know what their Government is up to. This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy.” *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004).

whether or not the location of drones qualifies as “techniques and procedures,” and instead focuses its analysis on the potential risk of circumvention. *Id.* at *4.

Applying the “mosaic theory” in cases like this one would not simply frustrate the purpose of FOIA, it would gut the Act entirely, allowing government agencies to hide behind that theory whenever requestors could analyze agency data to provide the public with a more informed picture of how their government operates.² The “mosaic theory” would justify withholding virtually all CBP records, indeed all government records. If information could be withheld under that theory merely because the information would contribute to a more complete picture of the agency’s knowledge or activities, then CBP would have carved out for itself the very categorical exemption from the FOIA that Congress has repeatedly rejected.

FOIA was enacted specifically to require agencies to respond substantively to public requests for information about their activities, so as to ensure that the American public has the opportunity to assess the policies of its government. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989). Congress enacted FOIA

² To understand just how radical Defendants’ proposed application of the mosaic theory to Exemption 7(E) is, one must understand that the mosaic theory was developed to protect state secrets. The government, for example, relies on *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972). But that case concerned an effort by the Central Intelligence Agency to prevent dissemination of classified information through pre-publication review of a book by a former CIA operative. A few courts have since entertained the mosaic theory when considering national security issues under FOIA, either under Exemption 1, 5 U.S.C. § 552(b)(1) – which involves national security or foreign affairs matters authorized by Executive Order to be kept secret – or Exemption 3, 5 U.S.C. § 552(b)(3) – which involves matters specifically exempted from disclosure by statute. *See, e.g. American Civil Liberties Union v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24, 37 (D.D.C. 2004) (applying the mosaic theory to national security documents under Exemption 1). Both Exemptions 1 and 3 – which are the typical exemptions asserted for national security – are narrow and require specific executive or congressional authorization. The government has not, and could not, assert Exemptions 1 or 3 here.

“to ensure an informed citizenry, vital to the functioning of a democratic society, needed . . . to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). In keeping with FOIA’s purpose, courts enforce a “strong presumption in favor of disclosure.” *DOS v. Ray*, 502 U.S. 164, 173 (1991). The statute requires disclosure of responsive records unless a specific exemption applies, and the exemptions are given “a narrow compass.” *Milner v. Dep’t of Navy*, 562 U.S. 562, 571 (2011) (quotation marks omitted). FOIA’s “limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *John Doe Agency*, 493 U.S. at 152 .

Defendants present no limiting principle that courts can invoke in future circumstances to prevent the mosaic theory from barring the release of virtually all government data. Analysis of “pixels” of government data will almost always paint a “portrait” of what the government is doing. Defendants do not explain why, if the mosaic theory could be used here, it could not be used to deny the public access to virtually all law enforcement data.

III. Geographic Law Enforcement Information is Routinely Disclosed Without Adverse Consequences, and CBP Itself Discloses Such Information.

As set out in Plaintiffs’ opening brief and nine accompanying declarations, law enforcement agencies routinely provide geographic information in response to public record requests. ECF 32, Pg.ID# 879-881, 888-894. The government tries to argue that somehow CBP is different from all these other agencies. Defendants claim they would be harmed if the public knows even the cities and townships

where CBP conducts stops of individuals suspected of committing immigration violations. But CBP fails to explain why such generalized information poses any risk of circumvention, given that local law enforcement agencies have no problem releasing pinpoint street address information about stops of individuals suspected of committing crimes. *See, e.g.* Cohn Decl., ECF 32-3, Pg.ID# 1021-23 (Texas Department of Public Safety); Sheley Decl., ECF 32-14, Pg.ID# 1026-29 (Chicago Police Department); Wessler Decl., ECF 32-15, Pg.ID# 1036-39 (Tallahassee Police Department; Milwaukee Police Department; Baltimore Police Department; Erie County, New York Sheriff's Office; San Diego Police Department); Aukerman Decl., ECF 32-19, Pg.ID#1091-95 (Grand Rapids Police Department).

Faced with multiple examples of law enforcement agencies releasing location information, Defendants respond with bald, conclusory statements.³ Def. Brief, ECF 34, Pg.ID#1112 (discounting declarations related to local law enforcement agencies merely because those records requests were not made under the federal FOIA statute); Lewandowski Decl., ECF 34-1, Pg.ID#1128-29 (dismissing

³ Defendants also suggest that they may not need to show a reasonable risk of circumvention of the law. Def's Brief, ECF 34, Pg.ID#1107. The Sixth Circuit has yet to decide whether the phrase "could reasonably be expected to risk circumvention of the law" in Exemption 7(E) applies to "techniques and procedures" or just to "guidelines." *See* Plaintiffs' Brief, ECF 32, Pg.ID# 889. What the Sixth Circuit has clearly held, however, is that Exemption 7 only applies if "the agency [can] demonstrate that disclosure of a law enforcement investigatory record would cause one of [the] specific harms" set out in the subsections to 5 U.S.C. § 552(7), *Jones v. FBI*, 41 F.3d 238, 246 (6th Cir. 1994), and that the mere fact that something is a "technique or procedure" is insufficient by itself invoke Exemption 7(E), where disclosure would not cause harm, *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 551 (6th Cir. 2001). Thus, absent harm, Exemption 7(E) does not apply.

local law enforcement responses as “not analogous” because the requests did not seek the exact same information requested here).

Defendants ask the Court to blindly credit their self-serving assertions that releasing CBP location information presents a risk, even though location information is routinely released by other law enforcement agencies. Def. Brief, ECF 34, Pg.ID#1108. Such conclusory statements are insufficient. “FOIA expressly places the burden ‘on the agency to sustain its action.’” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989) (quoting 5 U.S.C. § 552(a)(4)(B)). “The agency’s decision that the information is exempt from disclosure receives no deference.”⁴ *Bloomberg , L.P. v. Board of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010). The government cannot just speculate about harm; it has to prove its case. *See Davin v. U.S. Dep’t of Justice*, 60 F.3d 1043, 1064 (3d Cir. 1995) (“[I]f the government submits evidence that specific documents it has withheld contain secret information about techniques for recruiting informants, it will have to establish that the release of this information would risk circumvention of the law. The speculation provided in the government’s brief of political groups’ increased ability to detect informants within their ranks is not supported by evidence.”); *PHE, Inc. v.*

⁴ The government points instead to language in *Shannahan v. I.R.S.*, 672 F.3d 1142, 1148 (9th Cir. 2012), suggesting deference to agency declarations. But *Shannahan* itself emphasizes that “[t]o justify withholding, the government must provide tailored reasons in response to a FOIA request. It may not respond with boilerplate or conclusory statements.” *Id.*

Dep't of Justice, 983 F.2d 248, 250 (D.C. Cir. 1993) (governmental affidavit that contains merely a “categorical indication of anticipated consequences of disclosure is clearly inadequate.”).

Defendants also try to distinguish the repeated instances where CBP or its sister agency, Immigration and Customs Enforcement, have released the exact information request here, arguing that in those cases the agencies released less documents covering (allegedly) smaller geographic areas. But the principle is exactly the same. If the defendants could release a statistical sampling of I-213s with location information for the New York sector, why can they not do so for the Detroit sector? *See* Morawetz Decl., ¶ 9, ECF 32-17, Pg.ID#1063. If defendants could release location information about operations in 13 counties in California, which covered an area of approximately 19,280 square miles and a population almost equivalent to that of Michigan, why can they not do so for the state of Michigan? *See* Mass Decl., ECF 32-12, Pg.ID#1012-15; *American Civil Liberties Union of Northern California v. U.S. Immigration and Customs Enforcement*, 08 Civ. 2744, Complaint, Dkt. No. 1 (N.D. Cal.).⁵

⁵ U.S. Census figures for 2017 indicate that the sum of the populations of the 13 California counties listed in the complaint – Alameda, Contra Costa, Fresno, Marin, Napa, San Benito, San Francisco, San Mateo, Santa Clara, Santa Cruz, Solano, Sonoma, and Tulare Counties – is 9,041,896 residents. Annual Estimates of the Resident Population, U.S. Census Bureau, <https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2017/PEPANNRES/0400000US06.05000>. 2017 U.S. Census figures indicate that the population for the state of Michigan was approximately 9,962,231 residents. Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico, U.S. Census Bureau,

Even more damaging to the government's position is the fact that a significant amount of information about the Detroit Sector's "primary enforcement zones" is already in the public domain, much of it released by the Defendants themselves. The CBP website has detailed pages for each of the five stations located in the Detroit Sector: Detroit, Marysville, Sault Ste. Marie, Gibraltar, and Sandusky Bay (Ohio).⁶ The website publishes extensive information about each station, including station addresses, patrol practices, and descriptions of the stations' area of responsibility. For instance, the Sault Sainte Marie station page states that, "[t]he station's area of responsibility is approximately 420 miles of international boundary between the United States and Canada, consisting of Lake Superior on the north and the St. Mary's River to the east. The station's area consists of the entire Upper Peninsula of Michigan and 15 counties in the northern Lower Peninsula."⁷ The CBP website includes similar details for each of the stations within the Detroit Sector.⁸ These CBP websites also publish descriptions

<https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. Calculations of counties' aggregate size are based on the figures listed in the U.S. Census Bureau Counties Data Excel File. Land Area, U.S. Census Bureau, <http://www2.census.gov/prod2/statcomp/usac/excel/LND01.xls>.

⁶ See Detroit Sector Michigan, U.S. Customs and Border Protection, <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/detroit-sector-selfridge-angb-michigan>.

⁷ Sault Sainte Marie Station, U.S. Customs and Border Protection, <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/detroit-sector-selfridge-angb-michigan/sault-sainte-marie-station>

⁸ Marysville Station, U.S. Customs and Border Protection, <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/detroit-sector-selfridge-angb-michigan/marysville-station> ("The station's

of the stations' enforcement techniques and priorities. For example, CBP's website reports that "Sault Ste. Marie agents primarily conduct marine patrol on the St. Mary's River during the summer, and snowmobile patrol in the shoreline areas during the winter. They also patrol Interstate 75, which is the area's main route of egress from the border."⁹ Other stations have similar descriptions.¹⁰ Additional

geographic area of responsibility consists of 19 Michigan counties, and is predominantly rural outside of the Marysville/Port Huron area. The Blue Water Bridge, as well as a freight train tunnel that runs under the St. Clair River, are located within the station's patrol area."); Gibraltar Station, U.S. Customs and Border Protection, <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/detroit-sector-selfridge-angb-michigan/gibraltar-station> ("A significant part of Gibraltar station's focus is on marine patrol during the spring, summer, and fall seasons. Agents patrol the many state and county roads in the area... In addition, agents patrol the Interstate highways running through the area (I-75, I-94, I-69, I-80, and I-90)."); Sandusky Bay Station, U.S. Customs and Border Protection, <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/detroit-sector-selfridge-angb-michigan/sandusky-bay-station> ("The Sandusky Bay station's area of responsibility includes western and central Lake Erie, along with five border counties along Lake Erie."); Detroit Station, U.S. Customs and Border Protection, <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/detroit-sector-selfridge-angb-michigan/detroit-station> ("Detroit Station is responsible for 70 miles of international border, made up of the Detroit River and Lake St. Clair. The Ambassador Bridge and the Detroit/Windsor, Ontario Tunnel are located in the station's area, along with a freight train tunnel that runs under the Detroit River.").

⁹ Sault Sainte Marie Station *supra* note 7.

¹⁰ See Marysville Station, *supra* note 8 ("A major focus of Marysville Station's operations is marine patrol on the St. Clair River during the busy boating season. During the winter months the river and lake freeze, and agents patrol the shoreline to prevent foot or snowmobile crossings."); Gibraltar Station, *supra* note 7 ("The Gibraltar Station's area has traditionally been comprised of the southeastern corner of the state of Michigan, to include the southern half of Wayne County, from River Rouge, Michigan to Luna Pier/Erie, Michigan."); Sandusky Bay Station, *supra* note 7 ("Sandusky Bay Agents will perform marine patrol on Lake Erie, linewatch duties along the shoreline, and patrol the area's routes of egress from the border, such as Interstate 80 and 90."); Detroit Station, *supra* note 7 ("Agents assigned to

information related to stations staffing, surveillance infrastructure, and patrol areas is also available from news reports.¹¹ The government's hyperbolic assertions that the public must be kept in the dark about where in Michigan CBP operates is fatally undercut by the amount of information already publicly available about CBP's areas of operation, the vast majority of it released by CBP itself.

The government's position is weakened still further by the fact that it provides location information at the sector level. The government claims that releasing similar information at any greater level of detail would be risky.¹² In

the Detroit Station conduct marine operations during the boating season, along with freight train check, and anti-smuggling activities. During the non-boating season, agents patrol the shorelines.”)

¹¹Jim Bloch, *U.S. Border Patrol gets new headman at Marysville station*, The Voice, April 11, 2014, http://www.voicenews.com/news/u-s-border-patrol-gets-new-headman-at-marysville-station/article_33d21fc9-0e55-529f-8d9f-8e82e07acb20.html (citing patrol agent in charge of the Marysville Station as reporting that there were “86 uniformed men and women of the U.S. Border Patrol agents stationed at the Marysville Border Patrol station”); Nicole Hayden, *Federal officers secure border with Canada*, Times Herald, Sept. 27, 2014, <https://www.thetimesherald.com/story/news/local/2014/09/27/federal-officers-secure-border-canada/16343001/> (“The Border Patrol has 11 camera towers along the St. Clair River that were installed within the past four years. The cameras span the river from Port Huron to Gull Island in Lake St. Clair.”); Melissa Nann Burke, *Feds won't replace Alpena customs agent*, The Detroit News, Nov. 27, 2016, <https://www.detroitnews.com/story/news/politics/2016/11/27/feds-replace-alpena-customs-agent/94524920/> (“The decision also leaves a considerable geographic area unstaffed by the Customs agency — roughly 250 nautical miles between the Sault Ste. Marie and Port Huron marinas, and 250 air miles between the CBP-staffed airports in Sault Ste. Marie and Pontiac... The group said an agent stationed in Alpena could also report to the Sault office, allowing them to better handle ‘what would otherwise be an enormously underserved shoreline.’”).

¹² Defendants rely on a selective excerpt from *Families for Freedom*, 797 F. Supp. 2d 375 (S.D.N.Y. 2011), to argue that the key difference between the FOIA Requests here and the other FOIAs is one of scale. Def. Brief, ECF 34,

Defendants' view, sector level location information does not reveal a "technique or procedure", but anything more detailed suddenly does because that would reveal CBP's geographic priorities for enforcement. Def's Brief, ECF 34, Pg.ID# 1115. Logically, the same argument could just as easily apply to sector-level information. Yet CBP already publishes statistics that allow the public to compare, for example, how many apprehensions occur in the Detroit versus Tucson sectors.¹³ The same information allows the public to gauge the relative resources of any of the CBP stations on the Northern border. For instance, CBP data shows that the Detroit Sector is the most heavily resourced sector on the Northern border, while the CBP Sector based in Houlton, Maine is the least resourced.¹⁴ The government does not appear concerned that would-be border crossers poring over these statistics might

Pg.ID#1115-16. But the court in *Families for Freedom* did not reach the issue of whether releasing arrest data at the station level presents a reasonable risk of circumvention of the law. 797 F. Supp. 2d at 391 (stating that release of arrest statistics for each station within the Buffalo sector "could theoretically aid circumvention of the law by publicizing the relative activity or success of Border Patrol agents in effecting apprehensions at each station", but not reaching that question of whether it would in fact risk circumvention of the law because the plaintiffs were not seeking such statistics and, in any event, such station-level data does not constitute "techniques or procedures" that fall under Exemption 7(E)) (emphasis added). The court here should find, like the court in *Families for Freedom*, that since the requested information is not a "technique or procedure", Exemption 7(E) does not apply. *See* Section I. If this court reaches the "circumvention of the law" issue, then it would be addressing an issue the *Families for Freedom* court declined to decide.

¹³ United States Border Patrol Sector Profile - Fiscal Year 2017, <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/USBP%20Stats%20FY2017%20sector%20profile.pdf> (reporting 1,070 apprehensions in the Detroit Sector and 38,657 apprehensions in the Tucson Sector).

¹⁴ *Id.* (reporting that the Detroit Sector had 408 agents and the Houlton Sector had 173 agents).

decide to try their luck in Maine, rather than Michigan, based on sector data. But the government claims it would be risky if the public were to find out, say, how many apprehensions there have historically been in Wayne County, versus, Ingham County, versus Kent County. The effect of withholding such information is not to keep unauthorized immigrants from figuring out where they might illegally cross a border. (After all, Ingham and Kent are not even on the border.) Rather, the effect is to keep Michigan's citizens from learning whether CBP in fact considers the entire state of Michigan to be within the "100 mile zone," where it asserts that it can act without a warrant. FOIA is designed precisely to ensure that the public gets information about such issues of pressing public concern.

In sum, where law enforcement agencies routinely release location information and where Defendants have previously done so in response to other FOIAs, Defendants cannot sustain their burden of proving that Exemption 7(E) applies.

IV. Plaintiffs Do Not Challenge CBP's State-Wide Application of Warrantless Search Authority Here, But the Significance and Questionable Legality of That Policy Undermine Defendants' Claim for Secrecy.

Defendants also misconstrue the Plaintiffs' arguments regarding the legality of the underlying 100-mile zone policy as an attempt to litigate the validity of warrantless non-border searches through FOIA. Def. Brief, ECF 34, Pg.ID#1116. Plaintiffs are not asking this Court to rule on whether the Fourth Amendment prohibits CBP from conducting warrantless searches far from the border or on whether such searches are authorized under 8 U.S.C. §1357(a)(3), which permits warrantless searches only "for the purpose of patrolling the border". Rather, Plain-

tiffs seek information about **where** CBP is conducting such searches. How close or far from the border is CBP patrolling? If Defendants are indeed conducting warrantless searches far from the border, then any **future** case challenging such actions would require access to information that is presently only within the Defendants' possession. That is precisely the information they refuse to provide.

The questionable legality of warrantless searches far from the border is relevant to the FOIA analysis in two ways. First, transparency and public accountability are at the heart of FOIA. There is intense public interest in understanding where CBP is operating in Michigan, and whether it is acting unlawfully by patrolling the entire state. *See e.g.* Lara Moehlman, *The Entire State of Michigan Is a "Border Zone" and Here's What That Means*, Michigan Radio, April 3, 2018, <http://michiganradio.org/post/entire-state-michigan-border-zone-and-heres-what-it-means>; Catherine E. Shoichet, *The US Border is Bigger Than You Think*, CNN, May 24, 2018, <https://www.cnn.com/2018/05/23/us/border-zone-immigration-checks/index.html>; Tanvi Misra, *Inside the Massive Border Zone*, CityLab, May 14, 2018, <https://www.citylab.com/equity/2018/05/who-lives-in-border-patrols-100-mile-zone-probably-you-mapped/558275/>.

Second, courts look more carefully at Exemption 7(E) where the techniques and procedures an agency seeks to conceal are of dubious legality. *See Wilkinson v. FBI*, 633 F. Supp. 336, 349 (C.D. Cal. 1986); *Jones*, 41 F.3d at 246. Defendants not only seek to redact locations for stops near the border, they also claim that such

information should be withheld regardless of where in the state the stop occurs.

Given the questionable legality of such warrantless searches, the Court should scrutinize Defendants' claims that Exemption 7(E) applies with special care.

V. Defendants Have Failed to Prove There Is No Segregable Location Information That Can Be Disclosed.

As discussed above, the question here is not whether location information can be disclosed—Defendants already release it at the sector level—but whether more specific location information qualifies as a technique or procedure, and if so, whether it presents a reasonable risk of circumvention of the law. Even if CBP could show—and it has not—that releasing pinpoint location data would cause harm that would at most justify redacting pinpoint location information, not **all** location information, CBP would still have a duty under FOIA to segregate and release more general location information, such as city or township information. 5 U.S.C. § 552(b). That is precisely the compromise that Plaintiffs proposed, but Defendants rebuffed.¹⁵ Defendants refusal to provide even the most basic city-level geographic information, especially given that they have provided such information in response to other FOIAs and other law enforcement agencies routinely provide it, raises real questions about what Defendants are trying to hide.

¹⁵ Defendants' brief suggests that Defendants released segregable information in response to Plaintiffs' proposal. Def. Brief, ECF 34, Pg.ID# 1119. They did not. Defendants merely informed Plaintiffs what information was redacted (in effect supplementing their *Vaughn* index), and stated that they would no longer redact the sector name, since all of the records requested come from the Detroit sector.

Respectfully submitted,

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Fund of Michigan

/s/ Samuel C. Damren
Samuel C. Damren (P25522)
Corey Q. Wheaton (P80202)
Dykema Gossett PLLP

Dated: June 6, 2018

CERTIFICATE OF SERVICE

Corey Q. Wheaton deposes and states that on June 6, 2018, my assistant electronically filed the foregoing with the Clerk of the Court using the electronic filing system.

/s/ Corey Q. Wheaton

Samuel C. Damren (P25522)

Corey Q. Wheaton (P80202)

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