

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

MICHIGAN IMMIGRANT RIGHTS))	
CENTER, <i>et al.</i> ,))	
)	
Plaintiffs,))	Civil Action No. 5:16-cv-14192
)	
v.))	HON. John Corbett O’Meara
)	Mag. Judge Elizabeth A. Stafford
U.S. DEPARTMENT OF))	
HOMELAND))	
SECURITY, <i>et al.</i> ,))	
)	
Defendants.))	
_____))	

DEFENDANTS’ MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to the Court’s December 14, 2017 Order, Defendants United States Department of Homeland Security (“DHS”) and United States Customs and Border Protection (“CBP”) hereby move for partial summary judgment on Plaintiffs’ claims that CBP improperly withheld information from records responsive to Categories A and B of their FOIA request. For the reasons set forth in Defendants’ attached memorandum, CBP properly redacted information pursuant to FOIA Exemption (7)(E), 5 U.S.C. § 552(b)(7)(E) (law enforcement techniques and procedures).

Accordingly, Defendants’ Motion for Partial Summary Judgment should be granted.

DATED this 14th day of February, 2018.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs
Branch

/s/ Emily B. Nestler
EMILY B. NESTLER (DC Bar No.
973886)
Trial Attorney
United States Department of Justice,
Civil Division
Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20001
Tel: (202) 616-8489
Fax: (202) 616-8470
emily.b.nestler@usdoj.gov

Counsel for Defendants

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**DEFENDANTS’ MEMORANDUM IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT**

CHAD A. READLER
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

EMILY B. NESTLER (DC Bar No. 973886)
Trial Attorney
United States Department of Justice, Civil
Division
Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20001
Tel: (202) 616-8489
Fax: (202) 616-8470
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Counsel for Defendants

CONCISE STATEMENT OF ISSUES

- (1) Whether CBP properly withheld information that discloses locations where CBP apprehensions and seizures occur, pursuant to FOIA Exemption 7(E), 5 U.S.C. § 552(b)(7)(E)?

- (2) Whether CBP properly withheld information that would disclose station-level statistics for CBP apprehensions and seizures, pursuant to FOIA Exemption 7(E), 5 U.S.C. § 552(b)(7)(E)?

CONTROLLING AND MOST APPROPRIATE AUTHORITIES

Defendants United States Department of Homeland Security (“DHS”) and United States Customs and Border Protection (“CBP”) rely on Federal Rule of Civil Procedure 56, and the law cited in their Memorandum in Support, including:

5 U.S.C. § 552(b)(7)(E)

John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989)

FBI v. Abramson, 456 U.S. 615 (1982)

Rugiero v. Dep’t of Justice, 257 F.3d 534 (6th Cir. 2001)

Jones v. FBI, 41 F.3d 238 (6th Cir. 1994)

Lowenstein v. Dep’t of Homeland Sec., 626 F.3d 678 (2d Cir. 2010)

United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972)

ACLU of Michigan v. FBI, 2012 WL 4513626 (E.D. Mich. Sept. 30, 2012)

Gilman v. U.S. Dept’ of Homeland Sec., 32 F. Supp. 3d 1 (D.D.C. 2014)

Families for Freedom v. U.S. Customs & Border Prot., 797 F. Supp. 2d 375 (S.D.N.Y. 2011)

Elec. Frontier Found. v. Dep’t of Homeland Sec., No. 12-5580-PJH, 2014 WL 1320234 (N.D. Cal. Mar. 31, 2014)

Ohio State Univ. v. CBP, No. 3:15-cv-0833-JZ, ECF No. 45 (N.D. Ohio June 1, 2016)

Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958 (C.D. Cal. 2003)

I. INTRODUCTION

This action concerns a Freedom of Information Act (“FOIA”) request by Plaintiffs Michigan Immigrant Rights Center, Dr. Geoffrey Alan Boyce, Dr. Elizabeth Oglesby, and American Civil Liberties Union (ACLU) of Michigan (“Plaintiffs”) to U.S. Customs and Border Protection (“CBP”), a component of the Department of Homeland Security (“DHS”), for documents relating to U.S. Border Patrol’s (“USBP”) interior enforcement operations in the Detroit, Buffalo, and Tucson Sectors.

Pursuant to the Court’s December 14, 2017 Order, the only issue currently presented for summary judgment is whether CBP properly redacted information from its law enforcement records that would reveal the locations of USBP’s apprehension and seizure activities. CBP properly redacted that information from the released records pursuant to FOIA exemption (b)(7)(E) (law enforcement techniques and procedures).

Accordingly, Defendants’ Motion for Partial Summary Judgment should be granted.

II. FACTUAL BACKGROUND

A. Plaintiff’s 2015 FOIA Request and Initiation of this Lawsuit

On May 21, 2015, Plaintiffs submitted a request under the FOIA to CBP for records related to USBP’s interior enforcement operations. ECF No. 1-2 (the

“FOIA request”). The FOIA request sought four categories of documents for

Fiscal Years 2012 through 2014, including:

1. Category A sought “Daily Apprehension Logs for the Detroit, Buffalo and Tucson Sectors.” Specifically, this included “data and statistics relating to: (a) sex; (b) adult/juvenile age; (c) status at entry; (d) arrest landmark; (f) arrest method (e.g., other agency, patrol border); (g) deportable; (h) status when found; (i) time in U.S.; (j) port of entry; (k) disposition; (l) nationality/country of citizenship; (m) remarks – principal/smuggled; (n) apprehending officer name(s); (o) apprehending officer’s assigned station; (p) complexion; (q) criminal record; and (r) event number.” FOIA Req. at 6-7.
2. Category B sought Documents “Showing Individual Stops and Detentions” for the Detroit Sector, specifically “copies of all Form I-213s (“Record of Deportable/Inadmissible Alien” and “copies of all Form I-44s (“Report of Apprehension or Seizure”), for (a) each individual detained or taken into custody; and (b) for each individual transferred to [CBP] by state or local law enforcement officials.” *Id.* at 7-8.
3. Category C sought “Documents Related to Interior Enforcement” for the Detroit Sector, specifically documents “setting forth policies and procedures” regarding same. *Id.* at 8-9.
4. Category D sought “Documents Related to Complaints” for the Detroit Sector, and specifically “complaints alleging misconduct with respect to apprehension, arrest and/or seizure, detention and/or custody, racial profiling, and collaborations with state and local law enforcement.” *Id.* at 9.

On January 12, 2016, CBP sent a letter to Plaintiffs, partially responding to their FOIA Request. *See* Ex. A, Declaration of Robert Lewandowski ¶ 6 & Ex. 6 (“Lewandowski Decl.”). As detailed in the letter, CBP released 4,624 pages of records in response to Category A of Plaintiffs’ FOIA request, and withheld some

information pursuant FOIA Exemptions (b)(6), (b)(7)(C), and (b)(7)(E), 5 U.S.C. § 552 (b)(6), (b)(7)(C) & (b)(7)(E). *Id.*¹ The records CBP released in response to Category A consisted of Daily Apprehension Logs from FY 2012-2014 in the form of spreadsheets, and a legend for disposition and complexion codes. *See* Lewandowski Decl. ¶ 6. The spreadsheets were comprised of sixteen columns: 1) Fiscal Year; 2) Gender; 3) Birthdate; 4) Age; 5) Status at Entry; 6) Port of Entry; 7) Arrest Method; 8) Deportable; 9) Status When Found; 10) Time in US; 11) Sector; 12) Disposition; 13) Citizenship; 14) Smuggled; 15) Complexion; and 16) Criminal. *Id.* CBP redacted some information from the Port of Entry column pursuant to FOIA Exemption 7(E). *Id.* CBP also excluded the following five columns of information from the spreadsheet in their entirety, including: (1) entry landmark; (2) arrest landmark; (3) apprehending officer's assigned station; (4) event number; (5) apprehending officer names; and (6) ports of entry. *Id.* In the same letter, CBP further explained that, because Plaintiffs had requested a large

¹ Exemption (b)(6) exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. Exemption (b)(7)(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. Exemption (b)(7)(E) protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. Only Exemption (b)(7)(E) is at issue in this motion.

volume of documents, the agency's efforts to respond to the remaining parts of their request (Categories B, C and D) were ongoing. *Id.*, Ex. 6.²

On November 30, 2016, Plaintiffs filed the instant lawsuit, seeking declaratory and injunctive relief. *See* ECF No. 1. Plaintiffs claimed that Defendants had failed to timely respond to their FOIA Request and to conduct a reasonable search, and that Plaintiffs had withheld information that is not exempt under the FOIA. *Id.* ¶¶ 24-74.

B. CBP's Continuing Response to Plaintiffs' Request for Category B Documents

Following initiation of this lawsuit, CBP continued its effort to respond to Category B of Plaintiffs' FOIA request, which seeks "[c]opies of all Form I-213s ('Record of Deportable/Inadmissible Alien')" and "Copies of all form I-44s ('Report of Apprehension or Seizure')" for USBP's Detroit Sector spanning Fiscal Years 2012 through 2014. ECF No. 1-2; *see also* Lewandowski Decl. ¶ 7.

The agency identified approximately 2,482 responsive Form I-213 and Form I-44s, which total approximately 7,446 pages. ECF No. 21, at 4. In order to release those records, CBP would need to redact portions of the I-44 and I-213

² CBP further noted that some categories of Plaintiffs' requests were extremely broad and suggested approaches to narrow those requests. *Id.* The narrowing of Plaintiffs' requests, including sample sets of form documents and search terms for policy documents, has been the subject of successful negotiations between the parties and, thus, is not at issue in this motion. Accordingly, Defendants do not provide further details on those issues here.

forms that it releases to Plaintiffs, which are exempt under the FOIA Exemptions (b)(6), (b)(7)(C), and (b)(7)(E), 5 U.S.C. §§ 552 (b)(6), (b)(7)(C) & (b)(7)(E). *Id.* Since the format of each Form I-44 and I-213 is the same, the nature of much of the redacted information likely also would be the same across the approximately 2,482 Category B documents at issue. *Id.* at 5. In light of these facts, the parties determined that it would be most efficient to resolve any known disputes about the Category B documents prior to the agency going through the lengthy effort of processing the full universe of responsive records. *Id.*³ To that end, the parties agreed that CBP would produce a sample of fifty redacted Form I-213s and fifty redacted Form I-44s. *Id.* Plaintiffs would then review the redactions and, to the extent there were disputes about the propriety of those redactions, the parties would litigate the disputed redactions from the sample forms. *Id.*; *see also* Lewandowski Decl. ¶ 7. The parties further agreed that Defendants would not produce any additional Category B documents until disputed issues about the redactions of the samples were resolved, and that they would negotiate the production of additional Form I-213s and I-44s at that time. Lewandowski Decl. ¶ 7; *see also* ECF No. 23 ¶ 8.

³ For example, were CBP first to produce the approximately 2,482 Category B documents, only thereafter to be required to unredact some portion(s) thereof, CBP would have to re-process all 2,482 documents. *Id.*

On May 8, 2017, in accordance with the parties' agreement, CBP released a sample production of documents responsive to Section B of Plaintiffs' FOIA request. CBP produced fifty Form I-213s and fifty Form I-44s, totaling 376 pages. *See* Lewandowski Decl. ¶ 7 & Ex. 5. CBP redacted some information from those forms, pursuant to FOIA Exemptions (b)(6), (b)(7)(C), and (b)(7)(E), 5 U.S.C. § 552 (b)(6), (b)(7)(C) & (b)(7)(E). *Id.* CBP also released an additional seven pages containing codes and corresponding explanations for data fields found in the Form I-213s and I-44s. *Id.*⁴

C. Plaintiffs' 2017 FOIA Request

On May 3, 2017, while this lawsuit was pending and while Defendants' response to Plaintiffs' FOIA request was ongoing, Plaintiffs submitted a second, related FOIA request (the "2017 FOIA request"). ECF No. 22-18. Plaintiffs' 2017 FOIA request seeks exactly the same four categories of documents as Plaintiffs' prior FOIA Request, but does so for the period from January 1, 2015 through the date of production. *Id.* The only substantive difference between the 2015 FOIA and the 2017 FOIA is that the former seeks documents for 2012-2014 and the latter seeks documents from 2015 forward. *Id.* On July 28, 2017, Plaintiffs filed an

⁴ CBP also released over 800 pages of Category C and D documents on April 6, April 7, and on March 10, collectively. Because the Category C and D documents are not at issue in this motion, further detail about those productions is not material to the discussion here.

Amended Complaint, which expanded their claims to cover the 2017 FOIA request. *See* ECF No. 22.

On July 25, 2017, CBP released 5,648 pages of records in response to Category A of Plaintiffs' 2017 FOIA request, and withheld some information pursuant to FOIA Exemptions (b)(6), (b)(7)(C), and (b)(7)(E), 5 U.S.C. § 552 (b)(6), (b)(7)(C) & (b)(7)(E). Lewandowski Decl. ¶ 6 & Ex. 7. These were the same categories of information CBP had withheld from its Category A release in response to Plaintiffs' 2015 FOIA Request. *Id.*

With respect to the remainder of Plaintiffs' 2017 FOIA Request, the parties agreed that Defendants would not produce any additional documents until disputes associated with the 2015 FOIA Request have been resolved. *See* ECF No. 21 at 9; ECF No. 23 ¶ 10.⁵

D. Scope of Dispute Presently Before the Court

Over the course of several months, the parties have conferred in an effort to limit the disputed issues in this litigation. *See* Lewandowski Decl. ¶ 4, 6-9. To facilitate those discussions and narrow the scope of this dispute, Defendants agreed

⁵ In light of the fact that the 2017 FOIA Request seeks the same categories of information as the prior 2015 request, any responsive documents likely will give rise to the same issues regarding propriety of redactions. Accordingly, the parties agreed that it would be most efficient to resolve any known disputes prior to the production of thousands of additional documents. *See* ECF No. 21 at 9.

to provide a draft *Vaughn* Index to Plaintiffs. *See* ECF No. 21 at 9; Lewandoski Decl. ¶ 4. On September 8, 2017, in response to Defendants' draft *Vaughn* Index, Plaintiffs sent a letter specifying, *inter alia*, which of Defendants' withholdings pursuant to the FOIA Exemptions they would, and would not, dispute. *See* Lewandowski Decl., Ex. 3.⁶ Plaintiffs subsequently confirmed that they do not challenge the adequacy of Defendants' search for Category A and B records. *See* ECF No. 27 ¶ 3. In response, Defendants agreed, in an exercise of discretion, to unredact four of the challenged fields in the I-44s and I-213s, including: method of location/apprehension; location of residence of "deportable/inadmissible alien"; locations to which aliens were traveling for work; and sector information. *Id.*; *see also* Lewandowski Decl. ¶ 9.

As a result of these negotiations, the following are the only remaining Category B redaction fields that are in dispute: (1) USBP station involved in incident; (2) place of apprehension or seizure of affected individual; (3) latitude and longitude of apprehension or seizure event; (4) USBP Station involved in incident; (5) location name related to incident; (6) location code; (7) at/near; (8)

⁶ Plaintiffs' letter also challenged aspects of CBP's response to Category C of their request, including both the scope of CBP's search and CBP's withholdings. *See id.*, Ex. 3 at 3. In response, on September 26, 2017, Defendants released several previously-withheld records, as an exercise of discretion, in response to Category C of Plaintiff's 2015 FOIA Request. *See id.*, Ex. 4. Defendants also agreed to conduct supplemental searches for Category C records, *see* ECF No. 27, which search is ongoing. No issues arising from Category C are before the Court in this motion.

latitude and longitude of initial detention; (9) U.S. state whose highway patrol officer was involved in the incident; (10) location of initial traffic stop. *See id.* All of these fields were withheld pursuant to FOIA Exemption 7(E). *Id.*

In addition, there are four types of Category A redactions subject to challenge: (1) partial redactions of ports of entry; (2) arrest landmarks; (3) apprehending officers' assigned stations; and (4) event numbers. *See id.* ¶ 6. All of these challenged fields were withheld pursuant to FOIA Exemption 7(E). *Id.*

On November 29, 2017, the parties submitted a Joint Status Report to the Court, expressing their agreement to partition the briefing on the Category A and B records, for purposes of summary judgment. ECF No. 27 ¶ 6. As explained therein, the parties agreed that this staggered approach will allow for a more efficient and expeditious resolution of this matter, because a ruling on redaction to the Category A and B documents will inform the processing of similar information contained in the remaining Category C documents. *Id.* The Court adopted the parties' Joint Status Report on December 14, 2017, and entered a schedule for partial summary judgment briefing on the limited issue of the challenged redaction of the Category A and B documents. Minute Order (Dec. 14, 2017).

III. LEGAL STANDARD

FOIA cases are typically and appropriately decided on motions for summary judgment, and summary judgment is proper where the pleadings and evidence on

file show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Rugiero v. Dep't of Justice*, 257 F.3d 534, 543-44 (6th Cir. 2001). Under the FOIA, a court conducts a *de novo* review to determine whether the government properly withheld records under any of the FOIA's nine statutory exemptions. 5 U.S.C. § 552(a)(4)(B). In a FOIA case, the Court may award summary judgment solely on the basis of information provided by the agency in declarations, which are entitled to a presumption of good faith. *See Rugiero*, 257 F.3d at 544. "Unless evidence contradicts the government's affidavits or establishes bad faith, the court's primary role is to review the adequacy of the affidavits and other evidence." *Id.* "If the government fairly describes the content of the material withheld and adequately states its grounds for nondisclosure, and if those grounds are reasonable and consistent with the applicable law, the district court should uphold the government's position." *Id.*

IV. ARGUMENT

The only issue currently before the Court is whether CBP has properly redacted documents responsive to Category A and Category B of Plaintiff's FOIA request⁷ pursuant to Exemption 7(E). It has.

⁷ Because Category A and Category B of Plaintiffs' 2015 and 2017 FOIA requests are substantively identical other than the date range of the requests, all references to Plaintiffs' "FOIA Request" in this section should be construed to encompass both requests unless otherwise specified.

The FOIA represents a balance struck by Congress “between the right of the public to know and the need of the Government to keep information in confidence.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (citation omitted). Congress recognized “that legitimate governmental and private interests could be harmed by release of certain types of information and provided nine specific exemptions under which disclosure could be refused.” *FBI v. Abramson*, 456 U.S. 615, 621 (1982); *see also* 5 U.S.C. § 552(b). Although these exemptions are to be “narrowly construed,” *Abramson*, 456 U.S. at 630, courts must not fail to give them “meaningful reach and application,” *John Doe*, 493 U.S. at 152.

“An agency that has withheld responsive documents pursuant to a FOIA exemption can carry its burden to prove the applicability of the claimed exemption by affidavit” *Larson v. Dep’t of State*, 565 F.3d 857, 862 (D.C. Cir. 2009). “[S]ummary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail . . . and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.” *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (citation omitted). “Ultimately, an agency’s justification for invoking a FOIA exemption is sufficient if it appears logical or plausible.” *Elec. Privacy Info. Ctr. v. NSA*, 678 F.3d 926, 931 (D.C. Cir.2012) (quoting *Larson*, 565 F.3d at 862).

Defendant is entitled to summary judgment with regard to its application of

FOIA Exemption 7(E), because the Lewandowski Declaration provides detailed justifications for the withholding of information. *See* Lewandowski Decl. ¶¶ 10-20. The Lewandowski Declaration details the nature of information withheld pursuant to FOIA Exemption 7(E), provides a summary of the content of the records, and provides a detailed explanation of the bases for withholdings. *See id.* Courts regularly accept similar submissions from federal agencies. *See ACLU of Michigan v. FBI*, 2012 WL 4513626, at *5 (E.D. Mich. Sept. 30, 2012) (explaining that the Court will review the agency declaration and “uphold the government’s position if it ‘[1] fairly describes the content of the material withheld, . . . [2] adequately states its ground for nondisclosure, and [3] those grounds are reasonable and consistent with the applicable law.’”) (quoting *Rugiero v. Dep’t of Justice*, 257 F.3d 534, 544 (6th Cir. 2001)).⁸

Exemption 7(E) protects from disclosure: (1) “records or information compiled for law enforcement purposes” when; (2) production of the records or information “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to

⁸ *See, e.g., Jones v. FBI*, 41 F.3d 238, 242-43 (6th Cir. 1994); *Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007); *Keys v. DOJ*, 830 F.2d 337, 349-50 (D.C. Cir. 1987); *Maynard v. CIA*, 986 F.2d 547, 559 & n.13 (1st Cir. 1993); *Queen v. Gonzales*, No. Civ. A. 96-1387 (JAR), 2005 WL 3204160, at *3 (D.D.C. Nov. 15, 2005).

risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). The disputed Category A and Category B information withheld by CBP clearly meets this standard.

A. The Withheld Materials are “Records or Information Compiled for Law Enforcement Purposes”

When analyzing Exemption 7, the Court must make a threshold determination as to whether the documents have a law enforcement purpose. “The Sixth Circuit has adopted a *per se* rule that designates any documents compiled by a law enforcement agent . . . as being ‘compiled for law enforcement purposes.’” *ACLU of Michigan v. FBI*, 2012 WL 4513626, at *8 (citing *Jones v. FBI*, 41 F.3d 238, 245-46 (6th Cir. 1994)).

CBP clearly has a law enforcement mandate. CBP’s primary mission is to protect the borders of the United States against terrorists and the instruments of terror, to enforce the customs and immigration laws of the United States, and to foster the United States economy by facilitating lawful international trade and travel. *See* Lewandowski Decl. ¶ 1. CBP Officers are tasked with protecting America’s borders at official ports of entry, and CBP’s Border Patrol agents are tasked with preventing people and contraband from illegally entering into the United States between the ports of entry. *Id.*; *see also Gilman v. U.S. Dept’ of Homeland Sec.*, 32 F. Supp. 3d 1, 19 (D.D.C. 2014) (CBP “indisputably a law enforcement agency”); *Barnard v. Dep’t of Homeland Sec.*, 598 F. Supp. 2d 1, 15 (D.D.C. 2009) (“[T]here is no question that ICE and CBP perform law

enforcement activities.”).

Accordingly, the records at issue in this litigation were compiled for law enforcement purposes within the meaning of Exemption 7.

B. CBP Properly Withheld Information that Would Disclose Techniques and Procedures for Law Enforcement Pursuant to FOIA Exemption 7(E)

Exemption 7(E) authorizes withholding of information compiled for law enforcement purposes if release of the information “would disclose techniques and procedures for law enforcement investigations or prosecutions,” or would “disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E); *see also Jones*, 41 F.3d at 249. This exemption protects techniques that are not well-known to the public as well as non-public details about the use of publicly-known techniques and procedures. *Id.*

Courts are divided as to whether the phrase “if such disclosure could reasonably be expected to risk circumvention of the law” applies only to “guidelines” or also applies to “techniques and procedures.” *See, e.g., Asian Law Caucus v. DHS*, No. C 08-00842 CW, 2008 WL 5047839, at *3 (N.D. Cal. Nov. 24, 2008) (noting that courts “have come out on both sides of the issue.”) However, this Court has held that “[n]o such showing of harm is required for the withholding of law enforcement ‘techniques or procedures’” and that “these

materials receive categorical protection from disclosure.” *ACLU of Michigan v. FBI*, 2012 WL 4513626, at *9 (Sept. 30, 2012) (citing *ATF*, 977 F.Supp. 496, 501 (D.D.C.1997) (citing *Fisher v. DOJ*, 772 F. Supp. 7, 12 n. 9 (D.D.C.1991), *aff’d*, 968 F.2d 92 (D.C.Cir.1992)); *see also Lowenstein v. Dep’t of Homeland Sec.*, 626 F.3d 678, 681 (2d Cir. 2010).⁹

Here, CBP withheld information from the Category A and Category B documents that would reveal techniques and procedures used by USBP during the agency’s patrolling and enforcement activities. The information withheld falls into two categories: (1) information that would reveal data showing locations where CBP apprehensions and seizures occur; and (2) information that would disclose USBP’s station-level statistics. As detailed below and in the Lewandowski Declaration, for each of these categories, CBP concluded that disclosure of this information would reveal its law enforcement techniques and procedures, and could reasonably be expected to impede CBP’s effectiveness in enforcing the law. Accordingly, CBP properly withheld this information under Exemption 7(E).

⁹ Even courts that require a showing of “risk of circumvention of the law” also recognize that the text of exemption 7(E) is much broader” than other exemptions that “set a high standard.” *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1194 (D.C. Cir. 2009). “It does not present “a highly specific burden of showing how the law will be circumvented,” but, rather “only requires that the [agency] ‘demonstrate[] logically how the release of [the requested] information might create a risk of circumvention of the law.’” *Id.* In other words, 7(E) “exempts from disclosure information that could *increase the risks* that a law will be violated or that past violators will escape legal consequences.” *Id.* at 1193 (emphasis in original).

1. CBP Properly Withheld Information that Would Reveal Data Showing Specific Locations Where CBP Apprehensions and Seizures Occur

Plaintiffs challenge CBP's redaction of information that would show the locations where USBP apprehensions and seizures have occurred both throughout the entire Detroit Sector (as to all redacted fields), and throughout the entire Tucson and Buffalo sectors (as to some redacted fields). Specifically, Plaintiffs challenge redaction of the following fields on the I-213 and I-44 forms, and USBP's apprehension logs: (1) "latitude and longitude of apprehension or seizure event," which provides the event's geographic coordinates; and (2) "place of apprehension or seizure of affected individual," "location of initial traffic stop," "location name related to incident," which fields provide a description of where an incident occurred – *i.e.*, the street address, a landmark, or the combination of highway/town where an event occurred; (3) "at/near," which field provides the specific city and state where the event occurred; and (4) "arrest landmarks," which are zones that USBP designates based on CBP's determination that they have the highest threat for illegal activity. *See* Lewandowski Decl. ¶¶ 6-9. Information that reveals the location of law enforcement activities qualifies as CBP's techniques and procedures, which are exempt from disclosure pursuant to Exemption 7(E). *See Elec. Frontier Found. v. Dep't of Homeland Sec.*, No. 12-5580-PJH, 2014 WL 1320234, at *4 (N.D. Cal. Mar. 31, 2014) ("The location of

CBP's drone operations do qualify as 'techniques and procedures,' and thus are entitled to the exemption's protections without any further showing."); *Ohio State Univ. v. CBP*, No. 3:15-cv-0833-JZ, ECF No. 45, at *6 (N.D. Ohio June 1, 2016) (holding that CBP properly withheld arrest and entry landmarks from I-213s and I-44s under exemption 7(E)); *see also Lewis-Bey v. Dep't of Justice*, 595 F. Supp. 2d 120, 138 (D.D.C. 2009) (details of ATF electronic surveillance techniques, including the specific location where they were employed, were exempt from disclosure pursuant to exemption (7)(E)).

Location data showing where USBP apprehensions and seizures occur is collected and used by the agency for purposes of measuring operational effectiveness and devising USBP law enforcement techniques and procedures. *Id.*

¶ 13. USBP bases its decisions about resource allocation and placement of technology and manpower on this information. *Id.* Correspondingly, this information also shows where USBP is present and identifies areas of concentrated patrolling and enforcement activities. *Id.* ¶ 11. Making this information publicly available, even just in the Detroit Sector alone (but even more so when it includes two additional sectors), would give an advantage to those seeking to avoid encounters with USBP. It would aid individuals who seek to cross the border illegally, or who seek to remain in the country illegally, to develop countermeasures to evade detection, inspection and examination. *Id.* ¶¶ 11-14. It would also reveal

the locations of USBP agents, which could put them in jeopardy due to individuals who would bring harm to the agents once they know where the agents are deployed. *Id.* ¶ 13.

These concerns are especially pronounced here, where Plaintiffs have sought location information across three sectors over the course of a five-year period. *Id.* ¶ 12. Under these circumstances, disclosure of incident location information cannot be considered on a mere case-by-case basis. Rather, the impact of disclosing this information must take into account its “mosaic effect.” In other words, bad actors could piece together the location information and deduce USBP’s areas of strength and vulnerability. *Id.*; see also *Coastal Delivery Corp. v. U.S. Customs Serv.*, 272 F. Supp. 2d 958, 963-65 (C.D. Cal. 2003) (protecting number of examinations at seaport because information could be used in conjunction with other publicly available information to discern rates of inspection at that port, thereby allowing for identification of “vulnerable ports” and target selection). Public release of this information would facilitate the identification of the best routes to penetrate these sectors’ boundaries. See Lewandowski Decl. ¶ 12. Thus, once this information is public, those seeking to evade USBP will have a greater chance of circumventing border protection efforts by avoiding the primary enforcement zones. *Id.*; see generally *ACLU of Mich. v. FBI*, 2012 WL 4513626, at *10-11 (devices, methods, and tools used for surveillance and

monitoring of illegal activity were properly withheld under Exemption (7)(E), where disclosure of such techniques would allow criminals to develop countermeasures to nullify effectiveness of law enforcement investigations).¹⁰

2. CBP Properly Withheld Information that Would Reveal USBP's Station-Level Statistics

As explained in the Lewandowski Declaration, CBP properly redacted information that would reveal which USBP station performed the action associated with the apprehensions or seizures documented in the I-213 and I-44 forms, and in the apprehension logs. *See* Lewandowski Decl. ¶¶ 15-20. Disclosure of this information is proper under FOIA exemption 7(E) because it would show where, and how frequently, USBP apprehends persons or contraband in the various areas it patrols. *See id.*; *see also Families for Freedom v. U.S. Customs & Border Prot.*,

¹⁰ Plaintiffs have attempted to make much of the fact that CBP released some location information in response to a distinguishable FOIA request. *See* Lewandowski Decl. ¶ 20. Specifically, Plaintiffs have pointed to a FOIA lawsuit brought by their ACLU affiliate, *Am. Civ. Liberties Union of San Diego & Imperial Cty. v. United States*, 2017 WL 2889682 (C.D. Cal. Feb. 10, 2017), as an example of a situation in which CBP released some location information. Lewandowski Decl., Ex. 3 at 1. Plaintiffs fail to recognize that the information in the San Diego case did not present the same law enforcement concerns that are present here. In the San Diego case, not all the I-213s for the California sectors were requested for the given years. *Id.* ¶ 20. Rather, CBP only released several hundred I-213s, out of hundreds of thousands of apprehensions that occurred in the California sectors. *Id.* Thus, the information disclosed in the San Diego case did not provide the same opportunity for bad actors to extrapolate USBP's areas of strength and vulnerability in the region at issue there. *Id.*

797 F. Supp. 2d 375, 391 (S.D.N.Y. 2011).

Several of the redacted fields directly name which USBP station is associated with an apprehension or seizure, including: “BP station involved in incident,” “apprehending officers’ assigned stations,” “location code” (which is an abbreviation that denotes a specific station), and “event numbers” (which are alpha-numerical codes assigned by stations that include an abbreviation of the station name). *See* Lewandowski Decl. ¶ 15.

In addition, two other fields were redacted because they would indirectly disclose the USBP station associated with an apprehension or seizure, and thus USBP’s station-level statistics. *See id.* ¶ 16. First, CBP redacted some ports of entry (POE) from the Category A spreadsheets (which compile Apprehension Log data for the Buffalo, Detroit and Tucson Sectors), which column indicates the nearest POE where USBP believes the subject entered the country illegally. *Id.* CBP only redacted POEs for the Tucson Sector, and not the Detroit and Buffalo Sectors, because the POEs located in the Tucson Sector are so closely affiliated with specific USBP stations that disclosure of this information would be tantamount to disclosing the station where the subject was apprehended. *Id.* Second, for similar reasons, CBP redacted the name of the state highway patrol involved in the incidents documented by the I-44 and I-213 Forms. *Id.* Because Sandusky Bay is the only station located in Ohio in the Detroit Sector, any

indication that the Ohio State Police are involved in an incident necessarily indicates that Sandusky Bay is the apprehending station. *Id.*¹¹

CBP properly withheld this station-level information pursuant to Exemption 7(E) because its disclosure would reveal the agency's law enforcement techniques and procedures. *See Gilman*, 32 F. Supp. 3d at 20 (holding that exemption 7(E) applied to information that discloses agency "operations and vulnerabilities, which are not readily accessible public information," because their disclosure could risk circumvention of the law and, thus, they are the functional equivalent of a "technique, procedure, or guideline" for purposes of the exemption). Whereas CBP regularly discloses statistics about USBP's enforcement activities on a broader *sector*-specific level, *id.* ¶ 17, CBP does not disclose information that would reveal *station*-level statistics such as staffing levels and apprehension rates, because knowledge of this information would reveal the law enforcement priorities of CBP and USBP, as well as techniques for supporting law enforcement investigations, *id.* ¶ 18. This important distinction has been recognized by Courts. *See Families for Freedom v. U.S. Customs & Border Prot.*, 797 F. Supp. 2d 375, 391 (S.D.N.Y. 2011) (allowing withholding of station-level, but not sector-level

¹¹ By contrast, the same is not true if the Michigan Police are involved, as there are four USBP stations in Michigan. However, if CBP were to redact only Ohio State Police and not Michigan State Police, the public could deduce Sandusky Bay enforcement activities. *Id.*

arrest data for Customs border entry checkpoints because station-level data could tell wrongdoers about relative activity levels and arrest success rates between stations).

As explained in the Lewandowski Declaration, releasing data at the station level has the potential to show station capabilities by revealing which stations are better equipped to apprehend individuals and which stations have more staff within their respective area of responsibility. *See* Lewandowski Decl. ¶¶ 18-19. It would also show the frequency throughout the year that USBP agents operate in a given geographic location. *Id.* Like the location information discussed *supra* in Part IV.A, possession of such station-level data would have a “mosaic effect,” *i.e.*, allowing bad actors to piece together station-level information and deduce areas of strength and vulnerability throughout a particular sector. *Id.* Armed with this information, such persons could make meaningful inferences about the specific locations on the border that are most vulnerable. *Id.*; *see also United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972) (“The significance of one item of information may frequently depend upon knowledge of many other types of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.”). Once such USBP techniques and procedures for carrying out its mission are understood by those they are designed

to interdict, they become useful to those very people to avoid apprehension by USBP and to otherwise circumvent U.S. immigration laws and border enforcement. *See* Lewandowski Decl. ¶ 18. This would present a serious threat to future law enforcement by CBP and USBP. *Id.*

V. CONCLUSION

Accordingly, for the foregoing reasons, Defendants' Motion for Partial Summary Judgment should be granted.

DATED this 14th day of February 2018.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

/s/ Emily B. Nestler
EMILY B. NESTLER (DC Bar No. 973886)
Trial Attorney
United States Department of Justice, Civil
Division
Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20001
Tel: (202) 616-8489
Fax: (202) 616-8470
emily.b.nestler@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2018, I filed the foregoing with the Clerk of Court using the ECF system, which will send notification of such filing to all attorneys of record.

/s/ Emily B. Nestler
EMILY B. NESTLER (DC Bar No. 973886)
Trial Attorney
United States Department of Justice, Civil
Division
Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20001
Tel: (202) 616-8489
Fax: (202) 616-8470
emily.b.nestler@usdoj.gov

Counsel for Defendants