

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE**

**AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF NEW HAMPSHIRE**

**Plaintiff,**

**v.**

**UNITED STATES CUSTOMS AND  
BORDER PROTECTION**

**Defendant.**

**Case No.: 1:19-cv-977-LM**

**PLAINTIFF ACLU-NH'S MOTION TO COMPEL DEFENDANT CBP TO PRODUCE  
ADEQUATE VAUGHN INDEX**

## INTRODUCTION

Plaintiff American Civil Liberties Union Foundation of New Hampshire (“ACLU-NH”) moves this Court to compel Defendant Customs and Border Protection (“CBP”) to produce an adequate *Vaughn* Index with respect to various information.<sup>1</sup>

On March 25, 2019 and October 17, 2019, Plaintiff ACLU-NH submitted two FOIA Requests seeking records related to the “roving patrol” operations of Defendant CBP in New Hampshire, including but not limited to agency policies, stop data, and complaint records (“Request”). The ACLU-NH seeks to enforce the Request through this action. In this action, the ACLU-NH alleges that CBP has violated FOIA by (1) failing to provide a complete response to ACLU-NH’s Request and (2) failing to timely search for, process, and/or release all responsive records. Here, much of what CBP is withholding concerns 108 I-213 forms—a key government record that tracks immigration enforcement encounters with members of the public. As Plaintiff ACLU-NH’s Amended Complaint explains, production of these forms depicting these law enforcement encounters is in the public interest for various reasons:

For example, CBP recently conducted multiple patrols and raids in Lebanon area (nearly 100 miles from the Canadian border), which led detention of many noncitizens. In March 2019, CBP followed and detained a noncitizen in Lebanon, New Hampshire. In April 2019, CBP officers in plainclothes and an unmarked vehicle detained an immigrant. Further, a state court decision also found violations of the federal and state constitutions based in part on collaboration between CBP and local law enforcement.

*See* Am. Compl. at p. 2 (DN 7) (citations omitted).

CBP’s production concerning these I-213 forms is flawed in two ways. *First*, and germane to this Motion to Compel, CBP has produced 108 I-213s as a response to the ACLU-NH’s Request;

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<sup>1</sup> Prior to summary judgment briefing, the agreed-upon schedule in this case permits Plaintiff ACLU-NH to file a “motion to challenge the adequacy of that Index and/or to compel a new Index.” *See* DN 12 (proposed discovery plan), 15 (seeking extension of deadlines).

however, to date, 94 of these 108 I-213s only contain the first page of each I-213 instead of all of the pages. *E.g., compare Exhibit D* at 5 (108 I-1-213s containing only the first page of I-213) *with Exhibit E* (14 of these 108 I-213s containing full pages). Thus, CBP has not even produced in redacted form the narratives for these remaining 94 I-213s. The Index does not appear to indicate the basis for omitting these subsequent pages of these 94 I-213s—an error that needs to be corrected in a revised Index, as explained below.

*Second*, for the remaining 14 of these 108 I-213 forms, while CBP produced subsequent pages on January 12, 2021, CBP has still redacted the narratives depicting how immigration encountered and handled members of the public. In withholding this information in these 14 I-213 forms, the Index lists FOIA Exemptions 6 (governing disclosure of personnel or medical files), 7(C) (governing disclosure of records compiled for law enforcement purposes that implicate personal information that could invade privacy), and 7(E) (governing disclosure of records compiled for law enforcement purposes that implicate law enforcement techniques or procedures). As will be addressed in future summary judgment briefing, these exemptions are inapplicable.<sup>2</sup> Indeed, the inapplicability of these exemptions is demonstrated by the fact that, in prior FOIA requests, CBP has produced I-213 forms in a far less redacted fashion to requesters. In is unclear why CBP appears to be adopting a more secretive approach in this case.

As this Motion to Compel explains, CBP's *Vaughan* Indexes in this case are deficient. At the outset, courts ordinarily resolve FOIA cases through motions for summary judgment.

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<sup>2</sup> With respect to Exemptions 6 and 7(C) governing invasion of privacy, Plaintiff ACLU-NH is willing to allow limited and narrow redactions of any private person's name, address, and identifying information. (Race, however, should not be redacted as this information, by itself, cannot lead to a person's identification.) In an effort to narrow this dispute, Plaintiff, while reserving its rights, is also not challenging any redactions concerns the names of agents. *See Villar v. FBI*, No. 15-cv-270-LM, 2018 DNH 141, 2018 U.S. Dist. LEXIS 122246, at \*23 (D.N.H. July 23, 2018) (“the court finds that the law enforcement personnel and government agents referenced in Villar’s FBI file possess a privacy interest in not having their identities revealed”).

Nonetheless, this Court should address CBP's failure to produce adequate Indexes prior to the summary judgment proceedings for judicial efficiency, to ensure that the summary judgment record is complete, and to ensure that Plaintiff ACLU-NH can meaningfully respond to Defendant CBP's motion for summary judgment where CBP has the burden to justify its withholding of information. *See Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973) (under FOIA, "when the Government declines to disclose a document [or portion thereof] the burden is upon the agency to prove de novo in trial court that the information sought fits under one of the exemptions to the FOIA. Thus the statute and the judicial interpretations recognize and place great emphasis upon the importance of disclosure."). Here, CBP's Indexes are deficient because, for various information, CBP has failed to indicate how it made efforts to segregate non-exempt information from purported exempt information. CBP produced the following three Indexes to ACLU-NH on May 13, 2021: (i) Partial Redaction Production Index; (ii) Partial Redaction Supplemental Production Index; and (iii) Withheld in Full Production Index. *See Exhibit A* (Partial Redaction Production Index); *Exhibit B* (Partial Redaction Supplemental Production Index); *Exhibit C* (Withheld in Full Production Index). However, for certain information, the Indexes do not explain whether CBP made efforts to segregate non-exempt portion from purported exempt information. For the reasons explained below, this failure renders the Indexes deficient.

### **PROCEDURAL HISTORY**

On March 25, 2019, the ACLU-NH submitted the FOIA request to CBP. DN 7 at ¶14. The FOIA request was to seek all records and communications relating to CBP's non-checkpoint patrol operations in New Hampshire from January 1, 2017, until the date when CBP completed an adequate search for responsive records. *Id.* at ¶15. On October 17, 2019, the ACLU-NH submitted the supplemental FOIA request to CBP. *Id.* at ¶17.

As responses to these requests, CBP produced documents on December 6, 2019, April 8, 2020, and January 12, 2021. Among these documents, CBP included 108 I-213 forms. Exhibit D. A form I-213 is a record of deportable/inadmissible noncitizen that is very similar to police reports in criminal proceedings, which includes “the circumstances of the arrest.” *Union Leader Corp. v. United States Dep’t of Homeland Security*, 749 F.3d 45, 48 (1st Cir. 2014). However, these 108 I-213s only contained the first page of each I-213 form. *E.g., compare Exhibit D* at 5 (containing only the first page) *with Exhibit E* at 3-6 (containing full four pages of the same I-213).

Subsequently, CBP produced the full (albeit redacted) pages of 14 of these 108 I-213s along with other related documents (Warrant for Arrest of Alien, Travel Document Information, Notice to Appear, etc.). Exhibit E. These full pages of I-213s are 14 of the original 108 I-213s. Exhibit D at 5 (File 4(1)), 8 (File 7(1)), 26 (File 25(1)), 27 (File 26(1)), 53 (File 52(1)), 55 (File 54(1)), 60 (File 59(1)), 69 (File 68(1)), 78 (File 77(1)), 83 (File 82(1)), 85 (File 84(1)), 92 (File 91(1)), 99 (File 98(1)), and 106 (File 105(1)); *cf. Exhibit E* at 3-6 (File 4(1)), 21-23 (File 7(1)), 35-37 (File 25(1)), 51-54 (File 26(1)), 69-72 (File 52(1)), 86-90 (File 54(1)), 96-99 (File 59(1)), 113-116 (File 68(1)), 131-134 (File 77(1)), 141-144 (File 82(1)), 150-153 (File 84(1)), 167-170 (File 91(1)), 184-187 (File 98(1)), and 194-197 (File 105(1)). However, CBP still has not produced the full pages of the remaining 94 I-213s and has not provided any explanation for why it is not producing these documents.

On May 14, 2021, CBP produced three Indexes. Exhibit A (Partial Redaction Production Index); Exhibit B (Partial Redaction Supplemental Production Index); Exhibit C (Withheld in Full Production Index). Because the ACLU-NH assessed that the Indexes were deficient, the ACLU-NH submitted a letter to CBP to explain inadequacies in the context of two types of documents: I-213s and Operations Order Reports. Exhibit F (June 7, 2021). *First*, for the I-213s, the ACLU-

NH explained that the Indexes did not contain any explanation as to why CBP withheld the full pages of 94 I-213s other than the first page for each I-213. Exhibit F at 4. *Second*, the ACLU-NH also contested that CBP categorically redacted the narrative sections of the more fully produced 14 I-213s without explaining its efforts to segregate any non-exempt portion from any purported exempt information. Exhibit F at 4-5. For Operations Order Reports, the ACLU-NH explained that CBP withheld these reports in full but without explaining its efforts for segregability.

On June 15, 2021, the ACLU-NH submitted a supplemental response letter to CBP to share an example of an Operations Order Report that CBP previously disclosed in another ACLU FOIA lawsuit. Exhibit G at 3-9. The ACLU-NH explained that this example demonstrated that CBP must explain why all information in the Operations Order Reports must be withheld in full since it was obvious that CBP disclosed substantial information in the example. Exhibit G at 1.

Because this issue remains unresolved, this issue requires this Court's intervention.

### **ARGUMENT**

#### **I. THE VAUGHN INDEXES ARE DEFICIENT BECAUSE THEY FAIL TO DEMONSTRATE HOW CBP MADE EFFORTS TO SEGREGATE NON-EXEMPT INFORMATION FROM EXEMPT INFORMATION.**

CBP's Indexes are deficient because they fail to demonstrate how CBP made efforts to segregate non-exempt information from purported exempt information. It is a well-established rule that a *Vaughn* Index must address whether the agency has reviewed the documents to identify reasonably segregable information. *See Villar v. FBI*, No. 15-cv-270-LM, 2018 DNH 141, 2018 U.S. Dist. LEXIS 122246, at \*9 (D.N.H. July 23, 2018) ("In practical terms, this means that when an agency withholds a document in full or several pages of a document in full, it must explain why the withheld material does not contain any other segregable and disclosable material."); *Am. Immigr. Laws. Ass'n v. DHS*, 852 F. Supp. 2d 66, 80-81 (D.D.C. 2012) (ordering the agency to

produce revised *Vaughn* index because the agency “fail[ed] to describe the portion of exempt to non-exempt information and fail[ed] to establish that any non-exempt information is ‘inextricably intertwined’ with exempt information); *Elec. Frontier Found. V. DOJ*, 826 F. Supp. 2d 157, 175 (D.D.C. 2011) (“The agency should, for example, describe what proportion of the information in the documents, if any, is non-exempt and how that material is dispersed through the documents.”) (internal quotations and brackets omitted). Should this Court find that the Indexes are deficient on segregability, the proper remedy is to “direct the agency to revise their *Vaughn* submissions, taking into account the deficiencies identified by the Court.” *Elec. Frontier Found.*, 826 F. Supp. 2d at 175.

In this case, the ACLU-NH challenges CBP’s Indexes based on three deficiencies concerning segregability: (A) the Indexes do not explain why CBP has withheld the full pages of 94 I-213s in full; (B) the Indexes do not explain whether and how CBP made efforts to segregate non-exempt information from purported exempt information on the narrative sections of the 14 I-213s in which full (but redacted) pages were produced; and (C) the Indexes do not explain whether and how CBP made efforts to segregate non-exempt information from purported exempt information on Operations Order Reports that CBP is withholding in full.

**A. The Indexes Do Not Explain Why CBP Has Withheld the Full Pages of 94 I-213 Forms in Full.**

The Indexes are deficient because they do not explain why CBP has withheld the full pages of 94 I-213s in full. While CBP produced the first page of these 94 I-213s, it has failed to produce the remaining pages of each I-213. When an agency withholds a requested document in full, the agency must explain why the document is being withheld in full. *See Linn v. United States DOJ*, Civil Action No. 92-1406, 1995 U.S. Dist. LEXIS 9302, at \*69 (June 6, 1995) (“Defendant is reminded . . . that the FOIA places the burden on the government to justify nondisclosure . . .”).

Yet, here, the Indexes do not contain such explanations with respect to the withholding of these 94 I-213s. In fact, CBP indicated in the partial redaction index that I-213s were “[p]artially [r]edacted[,]” not fully withheld. *See Exhibit A* at 5. Even for the remaining Indexes, CBP did not explain why it was withholding the remaining pages of the 94 I-213s in full (whereas CBP elected to produce more information for 14 of the 108 I-213s). *See Exhibit B and C*. Because of the absence of any explanations, CBP must re-produce the Indexes to reflect its position on the remaining pages of these 94 I-213 forms.

**B. The Indexes Do Not Explain Whether and How CBP Made Efforts to Segregate Non-Exempt Information From Purported Exempt Information on the Narrative Sections of 14 I-213 Forms.**

The Indexes do not explain whether and how CBP made efforts to segregate non-exempt information from purported exempt information on the narrative sections of the more complete (yet still redacted) 14 I-213 forms that CBP produced.

While CBP produced full pages of 14 of the 108 I-213 forms, CBP heavily redacted the narrative sections of these 14 I-213 forms. *See, e.g., Exhibit E* at 115. While the question of whether CBP properly withheld the partial information on the narrative sections will be resolved through the summary judgment proceedings, CBP must revise its Indexes to reflect how it made efforts to segregate this redacted information. For example, for the narrative section of File 68(1) I-213, CBP categorically redacted three sentences under Exemptions 6, 7(C), and 7(E) without specifying which parts of these sentences fall under each Exemption. *Exhibit E* at 115. Thus, for the Indexes, CBP must have indicated segregability for these 14 I-213s. However, such efforts are absent from the Indexes. *See Exhibit B* at 14-15. Thus, as a proper remedy for this Motion, the Court should instruct CBP to revise the Indexes to reflect how it made efforts to segregate non-exempt information from purported exempt information in these 14 I-213s. This is especially

important where, in response to FOIA requests from others, CBP has produced *more* information in I-213 forms than it is electing to provide the ACLU-NH in this case. *Exhibit I* (Sample I-213s from other CBP FOIA cases)<sup>3</sup>.

**C. The Indexes Do Not Explain Whether and How CBP Made Efforts to Segregate Non-Exempt Information from Purported Exempt Information on Operations Order Reports that CBP Withheld in Full.**

Finally, the Indexes do not explain whether and how CBP made efforts to segregate non-exempt information from purported exempt information with respect to Operations Order Reports. CBP withheld Operations Order Reports in full. *See Exhibit C* at 1-12. For these full redactions, CBP applied Exemptions 7(E), 6, 7(C), and 5. However, there is no explanation as to how CBP made efforts to segregate non-exempt information from its proposed exempt information. *See id.* This absence of any explanation is further demonstrated with the sample of Operations Order Reports<sup>4</sup> that CBP previously produced in another FOIA case. *See Exhibit H* (Sample Operations Order Report). As this sample shows, CBP disclosed substantial amount of information. *Id.* While it is unclear why CBP is taking a more secretive approach in this case, this disclosure in another case establishes that, at a minimum, CBP must have previously made efforts to segregate non-exempt information from exempt information with respect to these Operations Order Reports. *Cf. Exhibit C* at 1-12. Because CBP failed to indicate these efforts in this case, this Court should instruct CBP to revise the Indexes to reflect segregability with respect to these Operations Order Reports.

WHEREFORE, Plaintiff ACLU-NH respectfully requests that this Court grant the following relief:

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<sup>3</sup> ACLU-NH obtained this sample through another ACLU affiliate's FOIA lawsuit against CBP.

<sup>4</sup> ACLU-NH obtained this sample through another ACLU affiliate's FOIA lawsuit against CBP.

1. Grant Plaintiff's Motion to Compel Defendant to Produce an Adequate *Vaughn* Index with respect to the categories of information specified; and

2. Grant and other relief that is just or equitable

### CONCURRING STATEMENT

On June 7, 2021, counsel for Plaintiff wrote counsel for Defendant on the issue presented in this Motion where Plaintiff asked for a revised *Vaughn* Index. *Exhibit F*. On June 15, 2021, counsel for Plaintiff supplemented their letter. *Exhibit G*. The parties have not been able to resolve this dispute.

Respectfully submitted,

THE AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF NEW HAMPSHIRE,

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