

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.)
_____)

No. 1:19-cv-00977-LM

UNITED STATES CUSTOMS AND BORDER PROTECTION’S OBJECTION
TO PLAINTIFF’S MOTION TO COMPEL DEFENDANT
TO PRODUCE ADEQUATE VAUGHN INDEX

INTRODUCTION

On December 16, 2019, Plaintiff filed an Amended Complaint in this action, seeking declaratory and injunctive relief based on an alleged violation of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.* DN 7. This action arises out of two separate FOIA requests sent by Plaintiff to United States Customs and Border Protection (“CBP”). *Id.* Plaintiff sent the first request on March 25, 2019, *id.* at ¶ 14, and the second request on October 17, 2019. *Id.* at ¶ 17. In response to these requests, CBP produced documents to Plaintiff on December 4, 2019 and April 8, 2020, as well as a supplemental production on January 12, 2021. DN 16.

On May 14, 2021, CBP provided Plaintiff with three separate *Vaughn*¹ Indices. The indices addressed three separate and distinct categories of documents: documents partially withheld from the initial production; documents partially withheld from the supplemental production; and documents withheld in full. DN 16, Exhibits A, B, C. On August 17, 2021,

¹ *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

Plaintiff filed a motion to compel CBP to produce an adequate *Vaughn* Index. DN 16. However, the three *Vaughn* Indices produced by CBP adequately address each withheld document, or portion of a document withheld, by providing a specific FOIA exemption and the Agency's relevant justification for each withholding, as required by established caselaw. *See Vaughn*, 484 F.2d at 827. As a result, CBP's *Vaughn* Indices are adequate, and this Court should deny Plaintiff's Motion to Compel.

ARGUMENT

I. CBP DID NOT DISCLOSE 94 OF THE I-213 FORMS BECAUSE THEY ARE NOT RESPONSIVE TO PLAINTIFF'S FOIA REQUESTS.

In its motion, Plaintiff takes issue with the fact that 94 I-213 Forms were not produced in full by CBP in response to Plaintiff's FOIA requests. This argument appears to go to the adequacy of the search conducted by CBP in response to the FOIA requests, rather than the sufficiency of the *Vaughn* Indices produced by CBP. That is an issue best addressed at the summary judgment stage of the litigation, and not in a motion for a more detailed *Vaughn* Index. However, even if this were an appropriate time in the litigation to make this argument, the argument is a red herring, as the documents at issue are not being withheld pursuant to any FOIA exemption that would be detailed in a *Vaughn* Index, but simply because they are not responsive to Plaintiff's FOIA requests.

On March 25, 2019, Plaintiff submitted a FOIA request to CBP, seeking records regarding CBP non-checkpoint patrol operations conducted in New Hampshire. DN 7-1. The FOIA Division processed 17,930 pages in response to this request. *See* Declaration of Patrick Howard ("Howard Dec."), attached as Exhibit A, ¶ 9. On December 4, 2019, the FOIA Division produced 17,842 partially redacted pages in response to this request and withheld in full (WIF) 88 pages. *Id.*

On October 17, 2019, Plaintiff submitted a subsequent FOIA request. DN 7-2. The FOIA Division processed 305 pages in response to this request. Howard Dec., ¶ 10. On April 8, 2020, the FOIA Division produced 215 additional pages, in part or in full, and 90 pages were WIF. *Id.* In response to this request, CBP produced, among other materials, in partially redacted form, the first page of 108 I-213 Forms. *Id.*

Thereafter, during the course of this litigation, counsel for the parties met and conferred regarding the scope of Plaintiff's demand for information relating to the I-213s. DN-12. As a result of these discussions, the Defendant agreed to supplement its productions by January 15, 2021. *Id.* Specifically, the Defendant agreed to produce additional I-213 information. *Id.*

The October 17, 2019 request sought I-213 records pertaining to roving patrol operations in New Hampshire. *See* DN 7-2 at ¶ 6 & 7. Responsive records were located for fourteen (14) subjects that were questioned, stopped, searched, detained and/or arrested in roving patrol operations in New Hampshire. Howard Dec., ¶ 11. However, after additional review of the documents previously produced, CBP determined that 94 of the 108 I-213 documents produced on April 8, 2020 did not pertain to roving patrol operations conducted in New Hampshire. *Id.* Therefore, they were determined to be non-responsive. *Id.* The FOIA Division processed 260 pages for this supplemental production. *Id.* On January 12, 2021, the FOIA Division produced 195 additional pages, in part or in full, and 65 pages were WIF. *Id.*

“[A]n agency ‘has no obligation to produce information that is not responsive to a FOIA request’” *Wilson v. U.S. Dep’t of Transp.*, 730 F. Supp. 2d 140, 156 (D.D.C. 2010); *see e.g., Ctr. For Biological Diversity v. Office of Mgmt. & Budget*, No. 07-04997, 2009 WL 1246690, at *5 (N.D. Cal. May 5, 2009); *Cal. ex rel. Brown v. Nat’l Highway & Traffic Safety Admin.*, No. 06-2654, 2007 WL 1342514, at *2 (N.D. Cal. May 8, 2007); *see also Cozen O’Connor v. U.S.*

Dept. of Treasury, No. 05-4332, 2008 WL 5093379, at *2 (E.D. Pa. Dec. 2, 2008). As stated, generally, Plaintiff's FOIA requests sought records related to non-checkpoint patrol operations conducted in New Hampshire. DNs 7-1, 7-2. More specifically, the October 17, 2019 request sought I-213 records pertaining to roving patrol operations in New Hampshire. *See* DN 7-2 at ¶¶ 6 & 7. As described above, the 94 documents at issue in Plaintiff's motion are not responsive to their FOIA requests. *See* DN 7-2, *see also*, DN 12; *see generally*, Howard Dec., ¶ 11. Because these 94 documents were not responsive to the requests, CBP had no legal obligation to provide them to Plaintiff, or to address them in the *Vaughn* Indices. Accordingly, this Court should deny Plaintiff's motion to compel a more detailed *Vaughn* Index as it relates to these 94 documents.

II. THE *VAUGHN* INDICES ESTABLISH THAT CBP TOOK APPROPRIATE STEPS TO SEGREGATE EXEMPT INFORMATION FROM NON-EXEMPT INFORMATION.

Plaintiff's motion alleges that the Indices provided by CBP fail to explain the efforts made to segregate exempt information from non-exempt information on the 14 partially redacted I-213 Forms that were produced. DN 16. A cursory review of the documents produced by CBP, as well as the Indices, however, indicates that CBP carefully reviewed the contents of each document and did segregate and produce the non-exempt information contained within those documents. *See generally*, DN 16-6, Exhibit E; *see also*, DN 16-2, Exhibit B. These documents were not withheld in full. *Id.* The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt." 5 U.S.C. § 552(b) (2012 & Supp. V 2017). Because of this requirement, added as part of the 1974 FOIA amendments,² an agency cannot "justify withholding an entire

² Pub. L. No. 93-502, 88 Stat. 1561.

document simply by showing that it contains some exempt material.” *Mead Data Cent., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). Rather, this provision generally requires agencies to apply exemptions to specific segments of information within a record, instead of to the document as a whole. *See Mo. Coal. For the Env’t Found. v. U.S. Army Corps of Eng’rs*, 542 F.3d 1204, 1211-12 (8th Cir. 2008). The produced documents, along with the *Vaughn* Indices, establish that CBP did exactly what the law requires – it explained the exemptions that are applicable to redacted sections of the documents that were actually produced. *See generally*, DN 16-6, Exhibit E; *see also*, DN 16-2, Exhibit B. In short, the four corners of these 14 partially redacted I-213 Forms show that CBP performed a segregability analysis and produced non-exempt information. Again, these documents were not withheld in full. As a result, this Court should deny Plaintiff’s motion to compel as it relates to the 14 redacted I-213 Forms.

In its motion, Plaintiff appears not to take issue with the appropriateness of CBP’s withholding of certain information, reserving that question for summary judgment proceedings, but instead alleges that CBP did not explain *how* it made the determinations as to what information was exempt from disclosure. DN 18, at 8. There is no set formula for a *Vaughn* Index, however, and courts have found that it is the function, and not the form that is important. *See Jones v. FBI*, 41 F.3d 238, 242 (6th Cir. 1994) (indicating there is no “precise form ... dictated by these affidavits”). The D.C. Circuit has observed that “a *Vaughn* index is not a work of literature; agencies are not graded on the richness or evocativeness of their vocabularies.” *Landmark Legal Found. v. IRS*, 267 F.3d 1132, 1138 (D.C. Cir. 2001). Likewise, the sufficiency of a *Vaughn* Index is not determined by reference to the length of the document descriptions. *See Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 146 (D.C. Cir. 2006) (“[W]e

focus on the functions of the *Vaughn* index, not the length of the document descriptions, as the touchstone of our analysis.”). What “is required is that the requester and the trial judge be able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure.” *Manna v. DOJ*, 832 F. Supp. 866, 873 (D.N.J. 1993) (quoting *Hinton v. DOJ*, 844 F.2d 126, 129 (3d Cir. 1988)). The Defendant asserts that the *Vaughn* Indices produced in this case provide Plaintiff with exactly the information required by law. The fact that the non-exempt information contained in the 14 partially redacted I-213 Forms was produced to Plaintiff by its very nature establishes that CBP conducted a detailed analysis, segregated exempt information, and produced non-exempt information. *See generally*, DN 16-6, Exhibit E. Had CBP not conducted a proper segregability analysis, the documents would have been withheld in full. Therefore, this Court should deny Plaintiff’s motion to compel as it relates to the 14 partially redacted I-213 Forms.

III. THE VAUGHN INDICES ESTABLISH THAT THE OPERATIONS ORDER REPORTS WERE PROPERLY WITHHELD IN FULL.

On December 4, 2019, the FOIA Division produced 17,842 partially redacted pages in response to this request and withheld in full (WIF) 88 pages. *See* Howard Dec., ¶ 9. The 88 WIF pages consist of eight Operations Orders. *Id.* The FOIA Division considered the possibility of segregating non-exempt information within these Operations Orders, and each page was meticulously examined. *Id.* However, after review of the contents of each Operations Order and, in consultation with the originating component, CBP determined that these eight Operations Orders should be WIF pursuant to 5 U.S.C. § 552 (b)(5), (b)(6), (B)(7)(C), and (B)(7)(E). *Id.* This decision was made after careful review and individualized assessment of the contents of each of the Operations Orders. *Id.*

CBP's *Vaughn* Index relating to the WIF Operations Orders clearly establishes why those withholdings were lawful. *See* DN 16-3. "A *Vaughn* Index must: (1) identify each document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure would damage the interests protected by the claimed exemption." *Citizens Comm'n on Human Rights v. Food & Drug Admin.*, 45 F.3d 1325, 1326 n.1 (9th Cir, 1995). The *Vaughn* Index produced by CBP for the WIF Operations Orders in this case does exactly that. It clearly and unequivocally establishes which of the statutory exemptions apply and how and why disclosure of the withheld information would damage the interests protected by each of those exemptions. DN 16-3. Procedurally, an agency must in its declaration demonstrate that the withheld materials are wholly exempt from disclosure, "with reasonable specificity." *Armstrong v. Exec. Off. Of the President*, 97 F.3d 575, 580 (D.C. Cir. 1996). Additionally, agencies need not "commit significant time and resources to the separation of disjointed words, phrases or even sentences which taken separately or together have minimal or no information[al] content" in order to comply with the segregation requirement. *Mead Data*, 566 F.2d at 261 n.55. CBP asserts that the *Vaughn* Index provided for the Operations Order Reports completely satisfies these requirements. Further, the Defendant incorporates the WIF explanation provided in the Howard Declaration, more particularly described above, by reference. *See* Howard Dec., ¶ 9. Therefore, the Court should deny Plaintiff's motion with respect to the WIF Operations Orders.

Plaintiff also alleges that because CBP produced a redacted Operations Order, DN 16-9, to a FOIA requester more than a decade ago, it should now be required to produce Operations Order Reports in this case. DN 16, at 9. However, the Defendant asserts that Plaintiff's reliance on the release of a completely unrelated Operations Order in a different case is misguided. That Operations Order is factually distinguishable from those at issue in this case. It is one exhibit,

more than a decade old, from Yuma, Arizona – a different Area of Responsibility than the present case. The WIF *Vaughn* Index specifically identifies the applicable exemptions for each category of information contained within the WIF documents and establishes why withholding in full in this case is appropriate and lawful. The comparison and reliance on an outdated Operations Order from a different location, disclosed under unknown circumstances, during a previous administration, is, in short, irrelevant. In this case, CBP properly identified the justifications for withholding the Operations Orders in full. As a result, this Court should deny Plaintiff’s motion to compel as it relates to the WIF Operations Orders.

CONCLUSION

For these reasons, CBP respectfully requests that this Court deny Plaintiff’s Motion to Compel Defendant CBP to Produce an Adequate *Vaughn* Index.

Respectfully submitted,

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Dated: November 5, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

AMERICAN CIVIL LIBERTIES UNION)
FOUNDATION OF NEW HAMPSHIRE,)

Plaintiff,)

v.)

No. 1:19-cv-00977-LM

UNITED STATES CUSTOMS AND)
BORDER PROTECTION,)

Defendant.)

DECLARATION OF PATRICK HOWARD IN SUPPORT OF
DEFENDANT’S OBJECTION TO PLAINTIFF’S
MOTION TO COMPEL DEFENDANT TO PRODUCE ADEQUATE VAUGHN INDEX

I, PATRICK HOWARD, pursuant to 28 U.S.C. § 1746, declare and state as follows:

1. I am a Branch Chief within the Freedom of Information Act Division (FOIA Division) at U.S. Customs and Border Protection (CBP), U.S. Department of Homeland Security (DHS). I have been a Branch Chief in the FOIA Division since February 8, 2015. In this capacity, I oversee a staff of Government Information Specialists (GIS), involved in the processing of requests for records submitted to CBP pursuant to FOIA, 5 U.S.C. § 552, the Privacy Act (PA), 5 U.S.C. § 552a, and other activities conducted pursuant to applicable records access provisions.

2. I am familiar with CBP’s procedures for responding to FOIA requests. I provide technical and administrative supervision and direction to a group of FOIA specialists in processing FOIA requests, and I assist with FOIA/PA litigation matters. I am personally familiar with the processing of FOIA/PA responses, including, at times, by directly reviewing for adequacy and compliance with federal laws and regulations. The statements I make in this

declaration are based upon my personal knowledge, which includes knowledge acquired through information furnished to me in the course of my official duties and agency files that I personally reviewed in the course of my official duties.

3. CBP is a law enforcement agency comprised of more than 60,000 employees charged with enforcing hundreds of Federal statutes. Approximately 45,000 of those employees are armed law enforcement officers engaged in carrying out CBP's expansive border security mission (U.S. Border Patrol Agents, CBP Officers, and CBP Air and Marine Agents).

4. Broadly, the FOIA Division at CBP reviews FOIA requests, determines whether responsive records exist, and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the FOIA Division consults with CBP personnel and, when appropriate, with other components in the Department of Homeland Security (DHS), as well as other Executive Branch agencies.

5. Generally speaking, when CBP receives a FOIA request that reasonably describes the records requested and complies with the Agency's rules governing the procedures for FOIA requests, CBP initially must search for, and retrieve, potentially responsive records.

6. Once CBP has completed its search and located potentially responsive records, it must process them for release. Processing records requires: (1) reviewing records for responsiveness to the request, and (2) reviewing responsive records to excise and withhold information that falls within any one of the FOIA's nine statutory exemptions from disclosure. *See* 5 U.S.C. § 552(b).

7. In order to review responsive records for information exempt from disclosure, a CBP FOIA processor must (1) meticulously examine, line-by-line, each responsive page to

identify potential redactions, (2) apply redactions (if necessary), and (3) individually label each redaction (which could be a name, email address or phone number, a single word or phrase, or substantial portions of a document), with the applicable exemption or exemptions.

8. Where records potentially implicate the equities of another agency or component of DHS, CBP is required to consult with that agency or component before such records are released. The timing of these inter- and intra-agency consultations are not within the control of CBP.

9. On March 25, 2019, Plaintiff submitted a FOIA request to CBP, seeking records regarding CBP non-checkpoint patrol operations conducted in New Hampshire. The FOIA Division processed 17,930 pages in response to this request. On December 4, 2019, the FOIA Division produced 17,842 partially redacted pages in response to this request and withheld in full (WIF) 88 pages. The 88 WIF pages consist of eight (8) Operations Orders. The FOIA Division considered the possibility of segregating non-exempt information within these Operations Orders, and each page was meticulously examined. However, after review of the contents of each Operations Order and, in consultation with the originating component, CBP determined that these 8 Operations Orders should be WIF pursuant to 5 U.S.C. § 552 (b)(5), (b)(6), (B)(7)(C), and (B)(7)(E). This decision was made after careful review and individualized assessment of the contents of each of the Operations Orders.

10. On October 17, 2019, Plaintiff submitted a subsequent FOIA request. The FOIA Division processed 305 pages in response to this request. On April 8, 2020, the FOIA Division produced 215 additional pages, in part or in full, and 90 pages were WIF. In response to this request, CBP produced, among other materials, in partially redacted form, the first page of 108 I-213 Forms.

11. I am informed that, during the course of this litigation, counsel for the parties met and conferred regarding the scope of Plaintiff's demand for information relating to the I-213s. As a result of these discussions, the Defendant agreed to supplement its productions by January 15, 2021. Specifically, the Defendant agreed to produce additional I-213 information. The October 17, 2019 request sought I-213 records pertaining to roving patrol operations in New Hampshire. *See* DN 7-2 at ¶ 6 & 7. Responsive records were located for fourteen (14) subjects that were questioned, stopped, searched, detained and/or arrested in roving patrol operations in New Hampshire. However, after additional review of the prior production documents, CBP determined that 94 of the 108 I-213 documents produced on April 8, 2020 did not pertain to roving patrol operations conducted in New Hampshire. Therefore, they were determined to be non-responsive. The FOIA Division processed 260 pages for this supplemental production. On January 12, 2021, the FOIA Division produced 195 additional pages, in part or in full, and 65 pages were WIF.

I declare under the penalties of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Patrick Howard

Patrick Howard

Dated: November 3, 2021