

District Judge Ricardo S. Martinez

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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COUNCIL ON AMERICAN-ISLAMIC
RELATIONS-WASHINGTON,

Plaintiff,

v.

UNITED STATES CUSTOMS AND BORDER
PROTECTION, UNITED STATES
DEPARTMENT OF HOMELAND
SECURITY,

Defendants.

CASE NO. 20-cv-00217 RSM
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

Noted for Consideration on:
August 21, 2020

1 Defendant United States Customs and Border Protection (“CBP”),¹ by and through
2 undersigned counsel of record, Brian T. Moran, United States Attorney for the Western District
3 of Washington, and Michelle Lambert, Assistant United States Attorney for said District, hereby
4 moves the Court to enter summary judgment pursuant to Rule 56 of the Federal Rules of Civil
5 Procedure. CBP is entitled to judgment as a matter of law. CBP submits two declarations of
6 Patrick Howard, dated June 23, 2020 (“Exemption Decl.”) and dated July 2, 2020 (“Search
7 Decl.”), in support of its motion.
8

9 **I. INTRODUCTION**

10 Plaintiff Council on American-Islamic Relations-Washington (“CAIR”) seeks documents
11 from CBP pertaining to screening or secondary inspection of individuals of Iranian heritage at
12 the United States border between January 1, 2020 and January 8, 2020. Pursuant to CAIR’s
13 request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, CBP searched all
14 locations likely to have responsive records and identified 148 pages of records as responsive to
15 CAIR’s request. Of those records, CBP properly withheld 147 pages in full or in part from
16 disclosure as duplicative or pursuant to various FOIA exemptions, such as FOIA Exemption
17 (b)(5), Exemption (b)(6), Exemption (b)(7)(C), and Exemption (b)(7)(E). In this lawsuit, CAIR
18 challenges (1) the timeliness of CBP’s response, (2) the adequacy of CBP’s search, and (3)
19 CBP’s withholdings. While CBP may have not met the statutory deadline for responding to
20 CAIR’s request, this alone should not preclude summary judgment. Because CBP performed an
21 adequate search and lawfully withheld portions of records protected from disclosure, CBP
22 respectfully requests that the Court grant summary judgment in its favor.
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26 ¹ Plaintiff names both CBP and the Department of Homeland Security (“DHS”) as defendants. CBP is a component
27 within DHS. CBP is the proper defendant to this litigation as Plaintiff directed its FOIA request to CBP and this
28 litigation challenges CBP’s response to that request. *See* Dkt. 15, First Am. Compl., ¶¶ 5-6. No factual allegations
have been alleged against DHS. Accordingly, CBP submits this motion for summary judgment on behalf of both
Defendants.

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II. FACTS

On or about January 8, 2020, Plaintiff submitted to CBP via FOIA Online the following FOIA request:

Please provide records of all directives, orders, guidance, briefings, instructions, musters, e-mail, other electronic communications or any other communications, whether issued verbally or in writing, issued by the Seattle Field Office Director *or any other* Department of Homeland Security (DHS) or Customs and Border Protection (CBP) official, officer, or employee to *any* CBP officer, port director, or CBP Seattle Field Officer or Blaine Sector or Blaine Port of Entry employee regarding the screening of individuals of Iranian heritage or any other changes in screening or secondary inspection procedures between January 1, 2020, and January 8, 2020, including, but not limited to, any changes based on the ‘current threat environment,’ or the need for ‘enhanced vigilance,’ ‘additional caution,’ or an ‘enhanced posture.’

In addition, please provide records of any directives, orders, guidance, briefings, instructions, e-mails, other electronic communications or any other communications, whether issued verbally or in writing, sent by DHS or CBP headquarters to the Seattle Field Office or the Blaine Sector of CBP in response to the reports of secondary screenings, vetting, detention, or denial of entry or exit of individuals of Iranian heritage at the Blaine Port of entry, issued between January 3, 2020 and January 8, 2020.

Finally, please also provide records of any statements provided to any press or media outlet regarding the secondary inspection and enhanced vetting of individuals of Iranian heritage at the Blaine Port of Entry on January 3 and 4 from the Relevant Time Period....

Search Decl., Ex. 1. The CBP FOIA Division received CAIR’s FOIA request and assigned the request a tracking number on or about the same day. Search Decl., ¶ 19.

The FOIA Division reviews FOIA requests, determines whether responsive records exist, and, if so, whether the FOIA Division may release the records in accordance with FOIA. *Id.*, ¶ 6.

Upon initial evaluation of a FOIA request, the FOIA Division assigns it to appropriate subcomponents within CBP for searches. *Id.*, ¶ 7. The FOIA Division identifies the subcomponent(s) likely to possess responsive records based upon the description provided in the request and the FOIA Division’s knowledge of the various CBP subcomponents’ missions. *Id.*,

1 ¶ 9. In relation to CAIR’s request, a FOIA Division subject matter expert (“SME”) determined
2 that the Office of Field Operations (“OFO”) would most likely maintain responsive records. *Id.*,

3 ¶ 20. The SME made this determination on the basis that OFO is responsible for all activity,
4 including reviewing applicants for admission, at the port-of-entry along international borders,
5 airports, and seaports. *Id.* Because CAIR’s request seeks information about the “screening of
6 individuals of Iranian heritage or any other changes in screening or secondary inspection
7 procedures,” the search fell under the purview of OFO. *Id.* It was further determined that the
8 Seattle Field Office (“SFO”) would be the geographical office within OFO because CAIR’s
9 FOIA request specifically refers to the “Seattle Field Office” and/or “Blaine port-of-entry,”
10 which both fall within SFO’s jurisdiction. *Id.* Additionally, as explained below, SFO would
11 have received any responsive records issued by DHS, CBP, or OFO. *Id.* Due to FOIA’s later
12 awareness that a public statement was made by a Public Affairs officer, the request was also
13 tasked to the Office of Public Affairs (“OPA”) for an additional search. *Id.*, ¶ 21.

15 Once the FOIA Division determines the appropriate subcomponents for a given request,
16 it assigns the request to the person of contact (“POC”) in each subcomponent and instructs them
17 to conduct a search for records. *Id.*, ¶ 12. The POC(s) then review the FOIA request, along with
18 any case-specific instructions provided by the FOIA Division, and based on their experience and
19 knowledge of their subcomponent’s practices and activities, forward the request and instructions
20 to the individual employee(s) or office(s) within the subcomponent that they believe are
21 reasonably likely to have responsive records, if any. *Id.* Because subcomponents use various
22 systems to store records, and CBP employees maintain records in several ways, the
23 determination of which locations need to be searched in response to a particular FOIA tasking, as
24 well as how to conduct any necessary searches, is based on the manner in which the employee
25 maintains his/her files. *Id.*, ¶ 14.

1 Relevant here, the FOIA Division sent CAIR's FOIA Request directly to the FOIA POC
2 for SFO on January 9, 2020. *Id.*, ¶ 22. After the SFO POC informed management of the request,
3 a SFO supervisor was tasked with overseeing collection of potentially responsive records. *Id.*,
4 ¶ 23. SFO determined that Outlook would be the record system to contain any responsive
5 records because the seven-day span of CAIR's FOIA Request limited the types of documents
6 that would have been created prior to the January 8, 2020 request. *Id.* Furthermore, Outlook
7 would contain any directive, orders, guidance, briefings, instructions or policies issued. *Id.*

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9 Three SFO managers in the Border Security Division, which oversees Passenger
10 Processing, searched their Outlook files for responsive documents to CAIR's FOIA Requests.
11 *Id.*, ¶ 24. They were chosen as custodians because their email would likely contain all
12 responsive documents as policy is distributed from management down to staff. *Id.* SFO
13 management selected key-word search terms based on a review of CAIR's FOIA Request and
14 consideration of what terms SFO reasonably anticipated would "hit" upon potentially responsive
15 documents and because of terminology used by the subcomponent. *Id.*, ¶ 25. In addition, the
16 SFO Border Security Managers that conducted the search had knowledge of Passenger
17 Processing during the period January 1, 2020 to January 8, 2020. *Id.*, ¶ 27. As a result, the
18 management officials also located additional responsive documents that the search terms did not
19 hit. *Id.* In total, SFO uploaded to FOIA Online for the FOIA Division's review 129 pages of
20 potentially responsive to CAIR's FOIA Request. *Id.*, ¶ 28.

21
22 On April 21, 2020, the FOIA Division tasked CBP's Office of Public Affairs ("OPA") in
23 Headquarters with searching for responsive records because it sought records concerning
24 statements made to the media or press. *Id.*, ¶ 29. OPA determined that all responsive media
25 statements from January 3, 2020 through January 8, 2020 came from the Public Affairs
26 Specialist ("PAS") in SFO, not OPA Headquarters. *Id.* Therefore, a FOIA senior staff member
27 tasked the SFO PAS with searching for responsive records. *Id.* On April 22, 2020, after
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1 reviewing CAIR's FOIA Request and instructions, the PAS searched his Outlook for responsive
2 emails and electronic documents. *Id.*, ¶ 30. When conducting the Outlook search, the PAS
3 reviewed all emails sent and received from January 3, 2020 to January 8, 2020 for responsive
4 emails. *Id.* The PAS only searched email because he primarily communicates about media
5 statements via email. *Id.* Based on the knowledge of his records, this was the only system that
6 would contain responsive information. *Id.*, ¶ 31. In total, the search by the SFO PAS resulted in
7 19 pages of potentially responsive documents being uploaded to FOIA Online for further review
8 by the FOIA Division. *Id.*, ¶ 32.

10 Based on the initial SFO search and the SFO PAS search, all files likely to contain
11 records responsive have been searched. *Id.*, ¶ 33. Additionally, no other subcomponents within
12 CBP would reasonably have responsive records. *Id.* Accordingly, CBP's search for potentially
13 responsive records was complete.

14 The FOIA Division prepared three productions in response to CAIR. By letter dated
15 April 14, 2020, out of the 129 pages found by SFO's search, CBP released four documents in
16 part and withheld 124 pages pursuant to Exemptions 6, 7(A), 7(C) and 7(E). Exemption Decl.,
17 ¶ 7. CBP also directed CAIR to a public website for one page. *Id.* Resulting from the SFO PAS
18 search, CBP produced in part 5 of 19 pages, withholding the remaining pages pursuant to
19 Exemptions 6, 7(C), and 7(E). *Id.*, ¶ 9. CBP initially applied Exemption 7(A) to withhold
20 documents due to an ongoing investigation; however, this investigation ended and CBP
21 withdrew its application of this exemption. Accordingly, on June 18, 2020, CBP produced 147
22 pages with exemptions applied and duplicate documents redacted. *Id.*, ¶¶ 11-12. The FOIA
23 Division withheld portions of the pages pursuant to Exemptions 5, 6, 7(C), and 7(E). *Id.*, ¶ 15;
24 *see also* Ex. 4, *Vaughn* Index.
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III. LEGAL STANDARD

A. FOIA

FOIA provides that any person has the right to obtain access to federal records subject to the Act, unless such records or portions of records are protected from public disclosure by one of nine exemptions. *See* 5 U.S.C. § 552. The primary purpose of FOIA is to “ensure an informed citizenry, [which is] vital to the functioning of a democratic society, [and] needed to check against corruption and to hold the governors accountable to the governed.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). A requestor’s “rights under FOIA are neither increased nor decreased by reason of the fact that it claims an interest . . . greater than that shared by the average member of the public: The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants.” *Maricopa Audubon Soc. v. U.S. Forest Serv.*, 108 F.3d 1082, 1089 (9th Cir. 1997) (internal quotation omitted).

The public’s interest in government information is not absolute. “Congress recognized, however, that public disclosure is not always in the public interest.” *C.I.A. v. Sims*, 471 U.S. 159, 166-67 (1985). FOIA’s overall structure reflects this balance by mandating disclosure of government records unless the requested information falls into one of nine exemptions. 5 U.S.C. § 552(b). “These exemptions reflect Congress’ recognition that the Executive Branch must have the ability to keep certain types of information confidential.” *Hale v. U.S. Dept of Justice*, 973 F.2d 894, 898 (10th Cir. 1992). FOIA exemptions must be given a fair reading as they serve important interests and “are as much a part of [FOIA’s] purpose[s and policies] as the [statute’s disclosure] requirement.” *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (internal quotation marks and citation omitted).

B. Summary Judgment

The ultimate issue in a FOIA action is whether the agency in question has “improperly” withheld agency records. 5 U.S.C. § 552(a)(4)(B); *Kissinger v. Reporters Comm. for Freedom of*

1 | *the Press*, 445 U.S. 136, 150 (1980). This is typically a question of law for the court, rather than
2 | a question of fact, and thus, “[s]ummary judgment is the procedural vehicle by which nearly all
3 | FOIA cases are resolved.” *Shannahan v. I.R.S.*, 637 F. Supp. 2d 902, 912 (W.D. Wash. 2009)
4 | (citation omitted). The answer to that question turns on whether one or more of the FOIA’s
5 | specifically enumerated statutory exemptions apply to the document at issue. *See U.S. Dep’t of*
6 | *Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989).
7 |

8 | Summary judgment is appropriate if there is no genuine issue as to any material fact, and
9 | the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving
10 | party has the initial burden of demonstrating that summary judgment is proper. *Adickes v. S.H.*
11 | *Kress & Co.*, 398 U.S. 144, 157 (1970). In relation to summary judgment in FOIA litigation, the
12 | agency must demonstrate that it “conducted a search reasonably calculated to uncover all
13 | relevant documents.” *Zemansky v. E.P.A.*, 767 F.2d 569, 571 (9th Cir. 1985). In meeting this
14 | burden, an agency must show that it conducted a diligent search for the requested documents in
15 | places where they reasonably could be found. *Chamberlain v. U.S. Dept. of Justice*, 957 F.
16 | Supp. 292, 294 (D.D.C. 1997), *aff’d*, 124 F.3d 1309 (D.C. Cir. 1997) (internal citations omitted).
17 | If the agency withheld any records, the agency also must demonstrate that such information fell
18 | within one of the FOIA exemptions. *Shannahan*, 637 F. Supp. 2d at 912.
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20 | “Once the agency has shown that its search was reasonable, the burden shifts to [plaintiff]
21 | to rebut [defendant’s] evidence by a showing that the search was not conducted in good faith.”
22 | *Moore v. F.B.I.*, 883 F. Supp. 2d 155, 162 (D.D.C. 2012). “In considering a motion for summary
23 | judgment, the Court may not weigh the evidence or make credibility determinations, and is
24 | required to draw all inferences in a light most favorable to the non-moving party.” *Freeman v.*
25 | *Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997). A district court reviews questions under the FOIA,
26 | based on the administrative record, using a *de novo* standard of review. 5 U.S.C. § 552(a)(4)(B).
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IV. ARGUMENT

A. CBP conducted adequate searches to uncover all responsive documents.

The material facts demonstrate that CBP conducted searches reasonably calculated to uncover all relevant documents in regards to CAIR’s FOIA Request. *See Zemansky*, 767 F.2d at 571; *Shannahan*, 637 F. Supp. 2d at 913; (an agency’s search for records is adequate if it was “reasonably calculated to uncover all relevant documents”). The reasonableness of the search is judged by the *process*, and not the fruits of the search. *See Zaldivar v. U.S. Dep’t of Veterans Affairs*, 2016 WL 4429657, at *3 (D. Ariz. Aug. 22, 2016), *aff’d*, 695 F. App’x 319 (9th Cir. 2017). “There is no requirement that an agency search every record system;” rather, the agency must only conduct a good-faith, reasonable search of those systems or records likely to possess the requested information. *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

Patrick Howard’s Search Declaration sets forth CBP’s search process in response to CAIR’s FOIA Request. “An agency can demonstrate the adequacy of its search through ‘reasonably detailed, nonconclusory affidavits submitted in good faith.’” *Hamdan v. U.S. Dep’t of Justice*, 797 F.3d 759, 770 (9th Cir. 2015) (quoting *Zemansky*, 767 F.2d at 571). Agency affidavits “enjoy a presumption of good faith that withstand[] purely speculative claims about the existence and discoverability of other documents.” *Chamberlain*, 957 F. Supp. at 294 (internal quotation marks and citations omitted); *SafeCard Servs. Inc. v. S.E.C.*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). Declarations are found sufficient where, as here, they “provide[] detail as to the actual search [including] file[s] reviewed, locations searched, and manner and procedure for selecting and searching files.” *Rodriguez v. McLeod*, 2008 WL 5330802, at *5 (E.D. Cal. Dec. 18, 2008).

CBP’s search processes, as explained in the Search Declaration, were reasonably calculated to locate any records responsive to CAIR’s FOIA Request. First, upon review of the request, CBP determined that SFO and OPA were the only entities that would reasonably have

1 potentially responsive information because of each subcomponents' cognizance over certain
2 CBP activities and the subject matter of CAIR's FOIA Request. *See* Search Decl., ¶¶ 20, 21, 29;
3 *see also* Ex. 1. Specifically, a FOIA SME determined that OFO was the office most likely to
4 maintain responsive records because OFO is responsible for all activity, including reviewing
5 applicants for admission, at the port-of-entry along international borders, airports, and seaports,
6 and CAIR's FOIA Request inquires about the "screening of individuals of Iranian heritage or any
7 other changes in screening or secondary inspection procedures." *Id.*, ¶ 20. A FOIA SME further
8 determined that SFO would be the office most likely to maintain responsive information to
9 Plaintiff's FOIA Request because it refers specifically to the "Seattle Field Office" and/or
10 "Blaine port-of-entry," which both fall within SFO's jurisdiction. *Id.* The FOIA Division tasked
11 OPA with the search due to CAIR's request for statements to the media or the press. *See id.*,
12 ¶ 21.

14 Next, CBP identified three custodians ("SFO Custodians") based on their position as SFO
15 Border Security Division² Managers. *Id.*, ¶ 24. These SFO custodians were determined to be the
16 people most likely to have responsive records to CAIR's FOIA Request because, as upper
17 management, they would most likely have any records concerning border screening/inspection
18 policies or directives because of CBP's policy distribution process in which management sends
19 policy down to subordinates. *See id.* CAIR's FOIA Request specifically sought "directives,
20 orders, guidance, briefings, instructions, musters, e-mail, other electronic communications,"
21 which would reasonably fall within this distribution process.

23 CBP also identified the SFO PAS as a custodian in relation to CAIR's FOIA Request
24 concerning "any statements provided to any press or media outlet regarding the secondary
25 inspection and enhanced vetting of individuals of Iranian heritage at the Blaine Port of Entry on
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28 ² The Border Security Division oversees Passenger Processing. Search Decl., ¶ 24.

1 January 3 and 4.” Search Decl., ¶¶ 18, 29. OPA identified the SFO PAS as having been the
2 person that made any such statements. *Id.*, ¶ 29.

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4 As for the searches themselves, the custodians searched Outlook for responsive
5 documents. For the SFO Custodians, it was determined that Outlook would be the record system
6 to contain any responsive records because CAIR’s request, received on January 8, 2020, only
7 sought records related to the previous seven days. Thus, only limited the types of documents
8 would have been created. *Id.*, ¶ 23. Furthermore, any directive, orders, guidance, briefings,
9 instructions are issued via email and would include those issued by OFO Headquarters or OFO
10 SFO. *Id.* OFO Headquarters sets OFO policy which is distributed to Field Office Management
11 via Outlook. As such, any policies distributed from OFO HQ would be located in an Outlook
12 search. *Id.* The SFO Custodians used key-word search terms selected by SFO management
13 based on CAIR’s FOIA Request, consideration of what terms SFO reasonably anticipated would
14 “hit” upon potentially responsive documents, and terminology used by the subcomponent. *Id.*,
15 ¶ 25. These search terms were “current threat environment,” “enhanced vigilance,” “additional
16 caution,” “enhanced posture,” “Iran,” “Iranian,” and “Iranian American.” *Id.* A document only
17 needed to contain one of these search terms to be identified as potentially responsive. *See id.*,
18 ¶ 26. The SFO Border Security Managers also located additional responsive documents that the
19 search terms did not hit based on their knowledge of Passenger Processing during the period
20 January 1, 2020 to January 8, 2020. *Id.*, ¶ 27.

21
22 The SFO PAS searched his Outlook for responsive emails and electronic documents
23 because he primarily communicates about media statements via email. *Id.*, ¶ 31. When
24 conducting the Outlook search, the SFO PAS reviewed all emails sent and received from January
25 3, 2020 to January 8, 2020. *Id.*, ¶ 30.

1 A total of 148 pages of responsive records were produced (with exemptions applied in
 2 full or part³) as a result of the searches. *Id.*, ¶ 32. CBP searched all files likely to contain
 3 records responsive to CAIR’s FOIA Request. *Id.*, ¶ 33. No other subcomponents within CBP
 4 would reasonably have responsive records. *Id.* Accordingly, CBP performed a search
 5 reasonably calculated to uncover all relevant documents in regards to CAIR’s FOIA Request.
 6 *See Zemansky*, 767 F.2d at 571. CAIR’s request for an order requiring CBP to conduct a search
 7 is moot. Am. Compl., Count III.

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 9 **B. CBP properly withheld documents pursuant to FOIA Exemptions.**

10 CBP properly withheld information pursuant to the specified FOIA exemptions. FOIA
 11 requires that an agency release responsive information unless it is protected from disclosure by
 12 one or more of the Act’s nine exemptions. *See* 5 U.S.C. § 552(b); *see also U.S. Dep’t of Justice*
 13 *v. Tax Analysts*, 492 U.S. 136, 150-51 (1989). The agency bears the burden of demonstrating
 14 that any withheld information falls into one or more of those exemptions. 5 U.S.C.
 15 § 552(a)(4)(B); *see also Natural Res. Defense Council, Inc. v. Nuclear Regulatory Comm’n*, 216
 16 F.3d 1180, 1190 (D.C. Cir. 2000).

17 An agency may meet its burden to establish the applicability of an exemption by
 18 providing a *Vaughn* index that “permit[s] adequate adversary testing of the agency’s claimed
 19 right to an exemption.” *National Treasury Employees Union v. U.S. Customs Service*, 802 F.2d
 20 525, 527 (D.C. Cir. 1986); *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973). The index
 21 must contain “an adequate description of the records” and “a plain statement of the exemptions
 22 relied upon to withhold each record.” *National Treasury*, 802 F.2d at 527 n.9.

24 Although a *Vaughn* index is a common device used by agencies to meet their burden of
 25 proof, “the Court may award summary judgment solely on the basis of information provided by
 26 the department or agency in declarations when the declarations describe ‘the documents and the
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28 ³ Documents that were duplicates of previously produced documents were also redacted.

1 justifications for nondisclosure with reasonably specific detail, demonstrate that the information
2 withheld logically falls within the claimed exemption, and are not controverted by either contrary
3 evidence in the record nor by evidence of agency bad faith.” *Citizens for Responsibility and*
4 *Ethics in Washington v. U.S. Dep’t of Labor*, 478 F. Supp. 2d 77, 80 (D.D.C. 2007) (quoting
5 *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)); *see also Spirko v. U.S.*
6 *Postal Service*, 147 F.3d 992, 998 n.4 (D.C. Cir. 1998) (“The form of the *Vaughn* index is
7 unimportant and affidavits providing similar information can suffice.”) (citing *Gallant v. NLRB*,
8 26 F.3d 168, 172-73 (D.C. Cir. 1994)). Here, CBP has provided both an Exemption Declaration
9 and detailed *Vaughn* index for the Court’s review. Exemption Decl., Ex. 4.

11 **1. CBP properly withheld information under Exemption 5.**

12 In response to CAIR’s FOIA Request, CBP partially withheld information on five
13 documents under 5 USC § 552(b)(5) subject to the deliberative process privilege. *See*
14 Exemption Decl., Ex. 4, Doc. Nos. 52, 54, 55, 56, 57. Exemption 5 protects from disclosure
15 “inter-agency or intra-agency memorandums or letters that would not be available by law to a
16 party other than an agency in litigation with the agency, provided that the deliberative process
17 privilege shall not apply to records created 25 years or more before the date on which the
18 records were requested.” 5 U.S.C. § 552(b)(5). To qualify as exempt under Exemption 5, a
19 document must “satisfy two conditions: its source must be a Government agency, and it must fall
20 within the ambit of a privilege against discovery under judicial standards that would govern
21 litigation against the agency that holds it.” *Dep’t of Interior v. Klamath Water Users Protective*
22 *Ass’n*, 532 U.S. 1, 8, (2001). The redacted information is limited to email communications
23 between CBP employees; therefore, the source of the withheld information is a government
24 agency. Exemption Decl., ¶ 18. Regarding the second condition, courts interpret “this
25 exemption to encompass the protections traditionally afforded certain documents pursuant to
26 evidentiary privileges in the civil discovery context, including materials which would be
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1 protected under the attorney-client privilege, the attorney work-product privilege, or the
2 executive deliberative process privilege.” *Ctr. for Biological Diversity v. U.S. Army Corps of*
3 *Engineers*, 405 F. Supp. 3d 127, 140 (D.D.C. 2019) (internal quotation omitted).

4 The deliberative process privilege “shields certain intra-agency communications from
5 disclosure to allow agencies freely to explore possibilities, engage in internal debates, or play
6 devil’s advocate without fear of public scrutiny.” *Lahr v. Nat’l Transp. Safety Bd.*, 569 F.3d
7 964, 979 (9th Cir. 2009) (internal quotation omitted). In order to be exempt, a document must be
8 both “predecisional” and “deliberative.” *Id.* The Ninth Circuit holds that:
9

10 A “predecisional” document is one prepared in order to assist an agency
11 decisionmaker in arriving at his decision, and may include recommendations, draft
12 documents, proposals, suggestions, and other subjective documents which reflect
13 the personal opinions of the writer rather than the policy of the agency. A
14 predecisional document is a part of the “deliberative process,” if the disclosure of
15 the materials would expose an agency’s decisionmaking process in such a way as
16 to discourage candid discussion within the agency and thereby undermine the
17 agency’s ability to perform its functions.

18 *Id.*, at 979-80.

19 As detailed on the *Vaughn* index and the Exemption Declaration, CBP redacted emails
20 pursuant to Exemption 5 because they concerned deliberations between staff members to assist
21 decision makers in how to respond to media and public inquiries concerning the alleged
22 detention of Iranian-Americans at the Canadian Border. Exemption Decl., ¶ 18 & Ex. 4, Doc.
23 Nos. 52, 54, 55, 56, 57. The withheld information also includes partial drafts of a media
24 statement embedded within the emails. Exemption Decl., ¶ 18. The emails contain frank and
25 open discussion among CBP employees. These communications occurred prior to the
26 formulation of CBP’s official response to the public and media inquiries. *Id.* The official
27 response by CBP has been released to CAIR. *Id.*, Ex. 4, Doc. No. 50.

28 Public and media inquiries require time-sensitive responses. To do so, CBP staff
members must be able to deliberate openly and frankly through email to draft a response that can

1 be approved quickly for release. CBP has determined that the release of this information would
2 stifle future deliberations about CBP responses to media and public inquiries because staff
3 members may not want to have their personal views disclosed to the public prior to a finalized
4 response. Moreover, as many of the deliberations contain the views or opinions of the
5 employees, and not CBP, the public may be confused by the disclosure of earlier deliberations
6 and drafts that do not encompass the final agency position.
7

8 **2. CBP properly withheld information under Exemption 6.**

9 CBP appropriately withheld names and other identifying information of government
10 employees and other third parties under 5 USC § 552(b)(6). *See* Exemption Decl., ¶¶ 20-24.
11 Exemption 6 serves to protect personal privacy, permitting an agency to withhold “personnel and
12 medical files and similar files the disclosure of which would clearly constitute an unwarranted
13 invasion of personal privacy.” 5 U.S.C. § 552(b)(6). “Disclosures that would subject individuals
14 to possible embarrassment, harassment, or the risk of mistreatment constitute nontrivial
15 intrusions into privacy under Exemption 6.” *Cameranesi v. United States Dep’t of Def.*, 856 F.3d
16 626, 638 (9th Cir. 2017). The term “similar files” is to be interpreted broadly, covering all
17 “Government records on an individual which can be identified as applying to that individual.”
18 *U.S. Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 595, 602 (1982); *see also Lepelletier*
19 *v. Fed. Deposit Ins. Corp.*, 164 F.3d 37, 47 (D.C. Cir. 1999) (“The Supreme Court has
20 interpreted the phrase ‘similar files’ to include all information that applies to a particular
21 individual.”).

22
23 CBP asserted Exemption 6 to redact the names, signatures, phone numbers, email
24 addresses, and personally identifiable information of government employees and other third
25 party individuals. Exemption Decl., ¶ 21. However, CBP released the names of all high-ranking
26 officials. *Id.* CBP determined that the redacted information, if disclosed, would constitute an
27 unwarranted invasion of privacy. Government employees, including CBP law enforcement
28

1 officers, and vendor employees have a protectable privacy interest in their identities that would
2 be threatened by disclosure. *Id.*, ¶ 22; *see also Cameranesi*, 856 F.3d at 639 (describing privacy
3 interests of firefighters). CBP applied Exemption 6 to protect individuals from unwanted
4 contact, annoyance, or harassment in their personal lives. *Id.* That is particularly applicable here
5 because the underlying incident has garnered significant media interest and it is foreseeable that
6 the government employees could be harassed in their personal lives for actions taken in regards
7 to border security. *Id.* In addition, release of CBP employee names could subject them to
8 pressure in the future to make favorable decisions concerning admissibility of persons to the
9 United States. *Id.*

11 In *Center for Biological Diversity v. U.S. Army Corps of Engineers*, 405 F. Supp. 3d 127,
12 143-44 (D.D.C. 2019), “[The agency,] pursuant to Exemption 6, redacted names of low-level
13 employees who appear on documents concerning the United States-Mexico border . . . The
14 redacted documents largely consist[ed] of internal agency emails between [the agency’s] offices
15 coordinating the collection of records in response to specific requests from the Presidential
16 Transition Team.” *Id.* The court held that the “civilian federal employees have a right to control
17 information related to themselves and to avoid disclosures that could conceivably subject them to
18 annoyance or harassment in either their official or private lives.” *Id.* at 144 (internal quotation
19 omitted); *see also Gosen v. United States Citizenship & Immigration Servs.*, 75 F. Supp. 3d 279,
20 289 (D.D.C. 2014) (“the significant privacy interest at stake when it comes to the identifying
21 information of government employees in the context of FOIA requests is beyond dispute.”).

23 Once the government identifies a cognizable privacy interest, the burden shifts and “the
24 requester bears the burden of showing (1) that the public interest sought to be advanced is a
25 significant one, an interest more specific than having the information for its own sake, and (2)
26 that the information is likely to advance that interest,” otherwise the invasion of privacy is
27 unwarranted. *Tuffly v. U.S. Dep’t of Homeland Sec.*, 870 F.3d 1086, 1094 (9th Cir. 2017)

1 (internal quotation omitted). In considering whether the public interest is significant, “the *only*
2 relevant public interest in the FOIA balancing analysis is the extent to which disclosure of the
3 information sought would she[d] light on an agency’s performance of its statutory duties or
4 otherwise let citizens know what their government is up to.” *Cameranesi*, 856 F.3d at 639-40
5 (internal quotation omitted) (emphasis in original). “This inquiry focuses not on the general
6 public interest in the subject matter of the FOIA request, but on the additional usefulness of the
7 specific information withheld.” *Tuffly*, 870 F.3d at 1094 (internal quotation and citation
8 omitted).
9

10 There is not a significant public interest in disclosure of the redacted names or other
11 information withheld pursuant to Exemption 6 here. This is especially true, as CBP has not
12 withheld the identities of high-ranking officials. CAIR has not articulated a public interest for
13 this information in its Complaint. Accordingly, the significant privacy interests of the
14 individuals greatly outweigh any minimal public interest in disclosure of the redacted names or
15 other identifying information. *See Tuffly*, 870 F.3d at 1093 (“Absent a showing of a significant
16 public interest under step two, the invasion of privacy is unwarranted, and the information is
17 properly withheld.”).
18

19 **3. CBP properly withheld information under Exemption 7.**

20 Exemption 7 protects from disclosure “records or information compiled for law
21 enforcement purposes, but only to the extent that the production of such records or information”
22 would result in one of six specified harms.⁴ 5 U.S.C. § 522(b)(7). CBP invokes two of those

23 ⁴ The six harms are listed as follows: “(A) could reasonably be expected to interfere with enforcement
24 proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could
25 reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably
26 be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or
27 authority or any private institution which furnished information on a confidential basis, and, in the case of
28 a record or information compiled by criminal law enforcement authority in the course of a criminal
investigation or by an agency conducting a lawful national security intelligence investigation, information
furnished by a confidential source, (E) 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, or (F)

1 harms: (1) an unwanted invasion of personal privacy under 7(C); and (2) disclosure of law-
2 enforcement techniques and procedures under 7(E).

3
4 *a. The Threshold for Exemption 7*

5 Exemption 7 requires an agency to demonstrate that the records it withheld were
6 compiled for law-enforcement purposes *and* that disclosure would result in one of the six types
7 of harm. *See FBI v. Abramson*, 456 U.S. 615, 622 (1982). Courts give great deference to a
8 criminal law enforcement agency's assertion that its records were for law-enforcement purposes
9 because government agencies "typically go about their intended business." *Pratt v. Webster*, 673
10 F.2d 408, 420-21 (D.C. Cir. 1982). In light of that deference, the D.C. Circuit has opined that an
11 agency need only show that the nexus between the agency's activity and its law-enforcement
12 duties "must be based on information sufficient to support at least 'a colorable claim' of its
13 rationality." *Keys v. U.S. Dep't of Justice*, 830 F.2d 337, 340 (D.C. Cir. 1987) (quoting *Pratt*,
14 673 F.2d at 421); *see also Tax Analysts v. I.R.S.*, 294 F.3d 71, 79 (D.C. Cir. 2002) (noting that
15 the Exemption 7 threshold may be satisfied even where the records in question do not relate to a
16 particular investigation).

17 Here, the records withheld under Exemption 7 were compiled by CBP for the purposes of
18 fulfilling its law enforcement mission to secure the border of the United States. Exemption
19 Decl., ¶ 25. As such, those records were compiled for law-enforcement purposes and are subject
20 to withholding under Exemption 7 if the other criteria thereunder are met. *See Amer. Immigr.*
21 *Council v. U.S. Dep't of Homeland Sec.*, 30 F. Supp. 3d 67, 74 (D.D.C. 2014) (finding CBP
22 documents satisfied the law enforcement purposes requirement where "the withheld records
23 ha[d] a rational nexus to the agency's law-enforcement duties, including the prevention of
24 terrorism and unlawful immigration").

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27 could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S. 552(b)(7).
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1 **b. Exemption 7(C)**

2 Exemption 7(C) allows agencies to withhold information compiled for law enforcement
3 purposes that “could reasonably be expected to constitute an unwarranted invasion of personal
4 privacy.” 5 U.S.C. § 552(b)(7)(C). This exemption is similar to Exemption 6, but broader in
5 scope. Unlike Exemption 6, Exemption 7(C) does not feature the word “clearly,” thereby easing
6 the burden on the agency. *Cong. News Syndicate v. DOJ*, 438 F. Supp. 538, 541 (D.D.C. 1977).
7 Further, the Freedom of Information Reform Act of 1986 lowered the risk-of-harm standard from
8 “would” to “reasonably be expected to” result in harm, further easing the standard for evaluating
9 a potential privacy invasion. *See Stone v. FBI*, 727 F. Supp. 662, 665 (D.D.C. 1990), *aff’d*, No.
10 90-5065 (D.C. Cir. Sept. 14, 1990).

11 CBP invoked Exemption 7(C) to withhold the same information that it also withheld
12 under Exemption 6: identifying information of government employees and third parties.
13 Exemption Decl. ¶¶ 25-27, Ex. 4, *Vaughn* Index. CBP has determined that the individual
14 privacy interests in withholding the redacted information outweighs the public interest in
15 disclosure. Specifically, CBP balanced the invasion of the individual’s right to privacy with the
16 extent to which the information in question would inform the public about the government’s
17 performance of its mission to enforce border security. *Id.*, ¶ 27. As such, the information is
18 exempt from disclosure under Exemption 7(C). *See Schrecker v. DOJ*, 349 F.3d 657, 661 (D.C.
19 Cir. 2003) (holding that Exemption 7(C) protects the privacy interests of any third party
20 mentioned in law enforcement records, unless there is an overriding public interest in
21 disclosure); *Nation Magazine, Wash. Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir.
22 1995) (holding that, as a general rule, “third party identifying information contained in law
23 enforcement records is categorically exempt from disclosure”).
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1 c. Exemption 7(E)

2 Under Exemption 7(E), agencies may withhold information “which would disclose
3 techniques and procedures for law enforcement investigation or prosecutions . . . if such
4 disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C.
5 § 552(b)(7)(E). This exemption applies broadly and allows agencies to withhold information
6 that “would provide insight into its investigatory or procedural techniques.” *Techserve Alliance*
7 *v. Napolitano*, 803 F. Supp. 2d 16, 28-29 (D.D.C. 2011). “The government must show that the
8 technique or procedure at issue is not well known to the public, *see Rosenfeld v. U.S. Dep’t of*
9 *Justice*, 57 F.3d 803, 815 (9th Cir. 1995), and must describe the general nature of the technique
10 or procedure at issue, although it need not provide specific details, *see Judicial Watch, Inc. v.*
11 *U.S. Dep’t of Commerce*, 337 F. Supp. 2d 146, 181 (D.D.C. 2004).” *Shannahan v. IRS*, 08-cv-
12 452-JLR, 2009 U.S. Dist. LEXIS 99665, *24 (W.D. Wash. 2009).

13 CBP invoked Exemption 7(E) to withhold non-public information used for official
14 purposes by law enforcement personnel, including law enforcement terminology, techniques, and
15 procedures used to determine admissibility and other similar information that directly relates to
16 CBP’s law enforcement mission to protect the border. Exemption Decl. ¶¶ 28-29, Ex. 4, *Vaughn*
17 *Index*. Disclosure would provide the public with information that is not generally known or
18 publicly disclosed. *Id.*, ¶ 29. Armed with this information, persons seeking to enter the United
19 States could rely on this law enforcement sensitive information to alter their patterns of conduct,
20 adopt new methods of operations, and/or effectuate other countermeasures to avoid detection
21 thereby interfering with CBP’s law enforcement efforts by avoiding detection or circumventing
22 the law. *Id.* Disclosure of this information would interfere with the efforts aimed at developing
23 law enforcement techniques and CBP’s ability to protect the border. *Id.* Consequently, the
24 information is exempt from disclosure under Exemption 7(E).
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1 *d. CBP released all reasonably segregable portions of responsive records.*

2 FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to
3 any person requesting such record after deletion of the portions which are exempt under this
4 subsection.” 5 U.S.C. § 552(b). As discussed above, 148 pages of responsive records were
5 located, processed, and all segregable, non-exempt material was released to CAIR. The FOIA
6 Division analyzed and processed the potentially responsive documents to disclose as much
7 responsive, non-exempt information as possible, and to only withhold or redact information
8 exempted from disclosure. Exemption Decl., ¶ 14. No responsive, reasonably segregable, non-
9 exempt information has been withheld from CAIR. *Id.*

10
11 **C. The Court should dismiss Count I of the Complaint.**

12 CAIR asserts that CBP violated FOIA by failing to respond to its FOIA request within 20
13 days. Am. Compl., ¶¶ 40-45. CBP does not deny that it did not meet the 20-day period.
14 However, many federal courts have held that untimeliness is not an automatic basis for violation
15 of FOIA for purposes of summary or declaratory judgment. *See, e.g., Cmty. Ass’n for*
16 *Restoration of the Env’t. v. U.S. Env’t Prot. Agency*, 36 F. Supp. 3d 1039, 1047-1054 (E.D.
17 Wash. 2014) (ruling there is no cause of action for violation of statutory provisions for timeliness
18 under FOIA where delays were not egregious); *Carmody & Torrance v. Def. Contract Mgmt.*
19 *Agency*, 11-cv-1738, 2014 WL 1050908, at *7 (D. Conn. Mar. 13, 2014) (“While the long
20 unexplained delays present here dismay this court, Carmody’s statutory remedy *is* the instant
21 suit.”); *Citizens for a Strong New Hampshire, Inc. v. I.R.S.*, 14-cv-487, 2015 WL 5098536, at *5-
22 7 (D.N.H. Aug. 31, 2015) (untimeliness entitles the requester to “to seek a remedy in the form of
23 judicial relief”); *Hainey v. United States DOI*, 925 F. Supp. 2d 34, 42 (D.D.C. 2013) (stating that
24 the government’s “untimely responses, in and of themselves, do not entitle Hainey to judgment
25 in her favor”); *Citizens for Resp. & Ethics in Wash. v. FEC*, 711 F.3d 180, 189 (D.D.C. 2013)
26 (stating in dicta, “If the agency does not adhere to FOIA’s explicit timelines, the ‘penalty’ is that
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1 the agency cannot rely on the administrative exhaustion requirement to keep cases from getting
2 into court.”).

3
4 A valid reason for denying Count I of the Complaint is that § 552(a)(C)(i) provides for
5 constructive exhaustion, and “Congress contemplated the scenario in which an agency fails to
6 respond to a FOIA request within the allotted time” and provided a remedy in the form of
7 judicial relief. *Citizens*, 2015 WL 5098536, at *6. Section 552(a)(C)(i) cannot, however, “be
8 read to automatically merit the entry of summary judgment in the requester's favor. Indeed, such
9 a reading would effectuate an additional remedy beyond that which Congress expressly created.”

10 *Id.*

11 Accordingly, the Court should dismiss Count I as CAIR has already received its relief for
12 CBP’s delayed response through this litigation.

13 **CONCLUSION**

14 For the reasons explained herein, CBP respectfully requests that the Court grant summary
15 judgment in its favor.

16 DATED this 3d day of July, 2020.

17 Respectfully Submitted,

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