IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

American Civil Liberties Union Foundation of Arizona, et al.,

Plaintiffs,

v.

United States Department of Homeland Security,

Defendant.

No. CV-14-02052-TUC-RM (BPV)

REPORT & RECOMMENDATION

Pending before the Court are: (1) Defendant's Motion for Summary Judgment ("MSJ") (Doc. 39); and (2) Plaintiffs' Cross-Motion for Summary Judgment ("XMSJ") (Doc. 47). This matter has been referred to the undersigned Magistrate Judge for all pretrial proceedings and a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) and LRCiv. 72.1, 72.2. (Doc. 14). For the following reasons, the Magistrate Judge recommends that the District Court grant each motion in part and deny each motion in part.

I. BACKGROUND

Plaintiffs[1] bring this action under the Freedom of Information Act ("FOIA"), 5

[1] Plaintiff American Civil Liberties Union Foundation of Arizona ("ACLU") is a state affiliate of National ACLU which is "dedicated to protecting civil rights and human rights in the United States." (Complaint (Doc. 1) at ¶15). Individual Plaintiffs are Derek E. Bambauer and Jane Yakowitz Bambauer. Derek E. Bambauer is a Professor of Law whose areas of scholarship include Internet law, governmental transparency, and censorship. (*Id.* at ¶17). His "research utilizes data from Freedom of Information Act requests to inform the public, legal scholars, and lawmakers about governmental transparency, Internet regulation, and the politics of intellectual property policy." (*Id.*). Jane Yakowitz Bambauer is an Associate Professor of Law who has written on topics of data privacy and criminal procedure, and "has used data previously collected using public records requests. . . ." (*Id.* at ¶18).

U.S.C. § 552, with regard to two requests ("Requests") they submitted in January 2014 to Defendant, the United States Department of Homeland Security ("DHS"), seeking agency records. (Complaint (Doc. 1) at ¶¶ 1, 2, 20). One request sought records concerning Border Patrol checkpoint operations in the Tucson and Yuma Sectors ("Checkpoint Request"), and the other sought records concerning Border Patrol roving patrols in the Tucson and Yuma Sectors ("Roving Patrol Request"). (*Id.* at ¶20; Complaint at Exhs. A, B). "Plaintiffs seek the requested records in order to shed light on Border Patrol's extensive but largely opaque interior enforcement operations." (Complaint, ¶2).

According to the allegations in the Complaint, after the statutory deadline passed for Defendant to respond to the requests and no response was forthcoming, Plaintiffs administratively appealed Defendant's failure to produce the requested records. (*Id.* at ¶¶23-24). Plaintiffs allege that Defendant has not issued a determination in response to Plaintiffs' administrative appeals, and the statutory deadline for rendering a determination has passed. (*Id.* at ¶¶26-27).

Plaintiffs allege that Defendant has violated FOIA by failing to: make a reasonable effort to search for the requested records; promptly make the records sought available; process Plaintiffs' Requests as soon as practicable; and grant Plaintiffs' request for wavier of search, review, and duplication fees. (*Id.* at ¶¶33-36).

II. DISCUSSION

A. INTRODUCTION

"FOIA recognizes that 'an informed citizenry [is] vital to the functioning of a democratic society.'" *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 769-70 (9th Cir. 2015) (quoting *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 16 (2001)). "FOIA 'was enacted to facilitate public access to Government documents.'" *Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 973 (9th Cir. 2009) (quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)). In discussing FOIA, the Ninth Circuit has recognized that "[g]overnment transparency is critical to maintaining a functional democratic polity, where the people have the information needed to check public

corruption, hold government leaders accountable, and elect leaders who will carry out their preferred policies. Consequently, FOIA was enacted to facilitate public access to [g]overnment documents by establish[ing] a judicially enforceable right to secure [government] information from possibly unwilling official hands." *Hamdan,* 797 F.3d at 769-70 (internal quotation marks and citations omitted). To this end, FOIA requires federal agencies to disclose public information upon a citizen's request unless the information falls within nine enumerated exemptions from disclosure identified at 5 U.S.C. § 552(b). *Id.* at 770; *see also* 5 U.S.C. § 552(a)(1), (2) and (3). Moreover, even where an exemption applies, FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b).

"As a general rule, withholding information under FOIA cannot be predicated on the identity of the requester[,]" rather, "if the information is subject to disclosure, it belongs to all." *National Archives and Records Admin. v. Favish,* 541 U.S. 157, 170, 172 (2003); *Lahr,* 569 F.3d at 977 n.12 (in light of *Favish,* disclosure under FOIA is viewed as release of "the information to the general public and not just to the individual requester."). Further, in most instances, the requesting citizen need not offer a reason for requesting the information. *Favish,* 541 U.S. at 170 (but noting exception with regard to analysis under Exemption 7(C)).

Where an agency refuses to produce requested information, FOIA permits an aggrieved party to file a civil action in federal district court requesting that the court order the agency to produce the information. *See* 5 U.S.C. 552(a)(4)(B). To prevail on a FOIA claim, a plaintiff must show that an agency has improperly withheld agency records. *See Kissinger v. Reporters Comm. for Freedom of the Press,* 445 U.S. 136, 150 (1980); *see also Light v. Dep't of Justice,* 968 F. Supp. 2d 11, 23 (D.D.C. 2013). In turn, the defendant agency can establish compliance with FOIA by showing that: its search for responsive documents was adequate; claimed exemptions actually apply; and any reasonably segregable portions of records have been disclosed after redaction of exempt

portions.[2] *See e.g., Hamdan,* 797 F.3d at 769-70, 779-80; *Light,* 968 F. Supp. 2d. at 23.

This action was stayed from August 2014 to September 2015 to facilitate settlement discussions. (*See* MSJ at 4; Plaintiffs' Statement of Facts ("PSOF") (Doc. 48) at ¶3; Defendant's Controverting Statement of Facts ("DCSOF") (Doc. 57) at ¶3). Defendant asserts that while the case was stayed, it produced more than 13,000 pages to Plaintiffs in full or in part. (MSJ at 5). According to Defendant, its response to Plaintiffs' Requests is now complete and summary judgment should be entered in Defendant's favor.

Plaintiffs contend that Defendant failed to conduct an adequate search for documents responsive to the Requests and that Defendant is improperly withholding information from Plaintiffs. Plaintiffs request that the Court grant summary judgment in their favor, concluding as a matter of law that the search was inadequate, or in the alternative, order Defendant to prepare a revised declaration and allow Plaintiffs to engage in discovery about the searches. (XMSJ at 39). Plaintiffs also request that the Court grant summary judgment in their favor, concluding that the asserted withholdings are unlawful, or in the alternative, order Defendant to produce revised *Vaughn* indices and affidavits. (XMSJ at 39; *see also* Plaintiffs' Reply at 20).

B. STANDARD

"Most FOIA cases are resolved by the district court on summary judgment, with the district court entering judgment as a matter of law." *Animal Legal Defense Fund v. U.S. Food & Drug Admin.,* 836 F.3d 987, 989 (9th Cir. 2016) (adopting a *de novo* standard of review for summary judgment decisions in FOIA cases.") (citation omitted). Summary judgment is appropriate when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). The party seeking summary judgment "bears the initial responsibility of informing the district court

[2] As discussed in further detail, *infra,* to assist with making this showing, agencies usually submit a document referred to as a "*Vaughn* index" which identifies the document withheld, the statutory exemption claimed, and provides an explanation of how disclosure of the document would damage the interest protected by the claimed exemption. *Hamdan,* 797 F.3d at 769 n.4 (citation omitted).

of the basis for its motion, and identifying those portions of [the record]...which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The nonmoving party's evidence is presumed true and all reasonable inferences are to be drawn in the light most favorable to that party. *Eisenberg v. Insurance Co. of North Amer.*, 815 F.2d 1285, 1289 (9th Cir. 1987); *Villiarimo v. Aloha Air, Inc.,* 281 F.3d 1054, 1065 n. 10 (9th Cir. 2002).

Only disputes over facts that might affect the outcome of the suit will prevent the entry of summary judgment, and the disputed evidence must be "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Thus, if the record taken as a whole "could not lead a rational trier of fact to find for the nonmoving party," summary judgment is warranted. *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 988 (9th Cir.2006) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

The Ninth Circuit instructs that "[w]hen parties file cross-motions for summary judgment, we consider each motion on its merits." *American Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1043 (9th Cir. 2014) (citing *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001)). Further, the district "court must consider the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them." *Fair Housing Council of Riverside County, Inc.,* 249 F.3d at 1134.

C. ADEQUACY OF DEFENDANT'S SEARCH

Defendant asserts that it has complied with FOIA by conducting an adequate search for records responsive to Plaintiffs' Requests. (MSJ at 6-10). Plaintiffs contest the adequacy of the search conducted at U.S. Custom and Border Protections ("CBP")[3]

[3] Defendant conducted searches within four separate agencies: CBP; Office of the Inspector General ("OIG"); Office for Civil Rights and Civil Liberties ("CRCL"); and U.S. Immigration and Customs Enforcement ("ICE"). (*See* MSJ at 7-10; Defendant's Reply in Support of its Motion for Summary Judgment and Cross-Motion for Summary Judgment ("Defendant's Opp.") (Doc. 56) at 2). For purposes of the instant motions, Plaintiffs contest the adequacy of the searches only with regard to CBP. (XMSJ at 5).

on the grounds that the declarations submitted fail to establish the search was adequate with regard to the databases searched, and that the agency's failure to produce responsive documents, combined with the faulty declarations, demonstrates that the search was inadequate.

To prevail on summary judgment on this issue, Defendant must establish that "it has conducted a 'search reasonably calculated to uncover all relevant documents.'" *Zemansky v. U.S. E.P.A.* 767 F.2d 569, 571 (9th Cir. 1985) (quoting *Weisberg v. U.S. Dept. of Justice,* 745 F.2d 1476, 1485 (D.C. Cir. 1984)). "This showing may be made by 'reasonably detailed, nonconclusory affidavits submitted in good faith.'" *Lahr,* 569 F.3d at 986 (quoting *Zemansky,* 767 F.2d at 571). "'[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate.*'" *Zemansky,* (quoting *Weisberg,* 745 F.2d at 1485) (emphasis in original). The adequacy of the search is judged by a standard of reasonableness and depends upon the facts of each case. *Id.* In considering the issue upon the agency's motion for summary judgment, the facts must be viewed in the light most favorable to the requester. *Id.* Once the agency establishes through sworn affidavits that the search as adequate, the FOIA plaintiff "is obligated to controvert that showing." *Marks v. Dep't of Justice,* 578 F.2d 261, 263 (9th Cir. 1978). "[I]f a review of the record raises substantial doubt, particularly in view of well defined requests and positive indications of overlooked materials, summary judgment [in favor of the agency] is inappropriate." *Iturralde v. Comptroller of the Currency,* 315 F.3d 311, 314 (D.C. Cir. 2003) (internal quotation marks and citations omitted).

1. ELECTRONIC DATABASES AND SYSTEMS SEARCHED

Defendant submits in support of its MSJ several declarations describing the search for documents responsive to Plaintiffs' Requests. Among the submitted declarations is a statement from Shari Suzuki, who is the FOIA Appeals Officer, and Chief of the FOIA Appeals, Policy and Litigation Branch, Regulations and Rulings, Office of International Trade, U.S. CBP, U.S. DHS ("FAPL Branch"). (Suzuki Declaration, ("Suzuki Dec.")

(Doc. 39-1) at ¶1, attached to Defendant's MSJ as Exh. A). The FAPL Branch is the office within DHS/CBP charged with establishing FOIA policy, and managing and responding to administrative appeals of initial responses to FOIA requests made within CBP. (*Id.*). Ms. Suzuki indicates that Border Patrol's Enforce Integrated Database ("EID"), which is accessed by a software application called ENFORCE Apprehension Booking Module ("ENFORCE"), was searched with regard to Plaintiffs' Requests for records relating to apprehensions, canine alerts, and property seizures at each checkpoint, by month from 2011 to 2013.[4] (Suzuki Dec. at ¶18). Ms. Suzuki states that Border Patrol "determined that querying ENFORCE was the most reasonable way to locate. . ." the records at issue. (*Id.*).

Plaintiffs contend that the search was inadequate because Defendant "'cannot limit its search to only one record system if there are others that are likely to turn up the information requested.'" (XMSJ at 8 (quoting *Oglesby v. U.S. Dep't of Army,* 920 F.2d 57, 68 (D.C. Cir. 1990), *superseded in part on other grounds by the* Electronic Freedom of Information Act Amendments of 1996, Pub.L. 104-231, 110 Stat. 3048, 3049 (codified as amended at 5 U.S.C. § 552(f)(2))). According to Plaintiffs, "[t]o meet its burden, CBP would 'at a minimum, have to aver that it has searched all its files likely to contain relevant documents.'" (*Id.* (quoting *American Immigration Council v. U.S. Dep't of Homeland Sec.*, 950 F. Supp. 2d 221, 230 (D.C. Cir. 2013) (emphasis omitted)).

Although there is no requirement that an agency search every record system, the government has been required "[a]t the very least, . . . to explain in its affidavit that no other record system was likely to produce responsive documents." *Oglesby*, 920 F.2d at 68. In response to Plaintiffs' objection on this point, Defendant submits a supplemental

[4] After extracting data, "Border Patrol created a series of spreadsheets reflecting the numbers of (a) deportable subjects; (b) nondeportable subjects; (c) property seizures; and (d) canine-assisted property seizures, at each checkpoint, by month, from 2011 to 2013." (MSJ at 8 (citing Suzuki Dec. at ¶¶19-21)). "[T]o locate records regarding individuals 'stopped, questioned, searched, detained, and/or arrested' at checkpoints, . . . the Border Patrol queried EID for encounters that resulted either in the generation of a Form I-213 ('Record of Deportable/Inadmissible Alien') or Form I-44 ('Report of Apprehension or Seizure') and extracted those forms. (*Id.* (citing Suzuki Dec. at ¶¶ 22-23)).

declaration from Ms. Suzuki indicating that Border Patrol "determined that querying ENFORCE was the best way to locate. . ." the records at issue "because EID is the only repository or system likely to contain those records." (Suzuki Supplemental Declaration ("Suzuki Supp. Dec.) (Dc. 56-1) at ¶3, attached to Defendant's Opp.). Ms. Suzuki also explained that information concerning the basis for stops that do not result in an apprehension or seizure "is not recorded in any other system of records." (Suzuki Dec. at ¶ 22). Ms. Suzuki goes on to state that "EID, through ENFORCE, is the only system of records that USBP utilizes to log or enter details regarding individual enforcement activity. No other repository or system of records is likely to contain the information requested by Plaintiffs."[5] (Suzuki Supp. Dec. at ¶3). Defendant may carry its burden of establishing the adequacy of the search by submitting detailed affidavits in good faith. *Lahr,* 569 F.3d at 986. Based on Ms. Suzuki's statements, the evidence of record demonstrates no issues of material fact with regard to the adequacy of Defendant's search limited to EID/ENFORCE. Defendant is entitled to summary judgment on this point.

Plaintiffs also take issue with Ms. Suzuki's reference to keyword searches of "an internal shared drive" at Border Patrol Headquarters, "electronic files" at Tucson Sector Headquarters and stations, and "shared drives" at Yuma Sector Headquarters and stations. (XMSJ at 9 (citing Suzuki Dec. at ¶¶17, 25, 26)). According to Plaintiffs, it is unclear which electronic systems were searched and which were not. (*Id.*).

An agency's failure "to describe in any detail what records were searched, by whom, and through what process[]" is fatal to its request for summary judgment. *Steinberg v. U.S. Dep't of Justice,* 23 F.3d 548, 552 (D.C. Cir. 1994); *see also Weisberg v. Dept. of Justice,* 627 F.2d 365, 371 (D.C. Cir. 1980) (rejecting agency affidavits that "do not denote which files were searched or by whom, do not reflect any systematic

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[5] Generally, where new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the non-movant an opportunity to respond. *See Provenz v. Miller,* 102 F.3d 1478, 1483 (9th Cir. 1996). Here, because Defendant submitted a combined reply in support of its MSJ and response in opposition to Plaintiffs' XMSJ, Plaintiffs had a full and fair opportunity to respond with regard to that evidence in their Reply brief.

approach to document location, and do not provide information specific enough to enable [the requester] to challenge the procedures utilized."). In defending its description of the searches at Border Patrol Headquarters, Defendant points to Ms. Suzuki's Declaration explaining that all official records are "generally kept electronically, on an internal shared drive, and printed out when a hard copy is required." (Suzuki Dec. at ¶17 (describing terms searched and results); *see also* Defendant's Opp. at 4). Defendant also cites Ms. Suzuki's statement that emails of Sector management were also searched using keywords. (*See* Suzuki Dec. at ¶¶ 30-31). In light of Ms. Suzuki's declaration, Defendant has satisfied its burden with regard to the search of the internal shared drive Border Patrol Headquarters.

However, the search of allegedly "relevant. . . electronic files" at the Tucson Sector (Suzuki Dec. at ¶25) is not specific as to which electronic files were actually searched or how their relevancy was determined. *See Zemansky,* 767 F.2d at 573 ("[a]ffidavits describing agency search procedures are sufficient for purposes of summary judgment only if they are relatively detailed in their description of the files searched and the search procedures . . . ") (internal quotation marks and citation omitted). Likewise, although Ms. Suzuki indicates that in the Yuma Sector, files are generally stored electronically and that a keyword search of "shared drives" was conducted, there is no explanation why the "shared drives" as opposed to any other drives were the only drives searched. Defendant's explanation that "in the Yuma sector, files are 'generally stored electronically' on internal 'shared drives'" is not borne out by the portion of Ms. Suzuki's Declaration cited in support. (Defendant's Opp. at 4 (citing Suzuki Declaration at ¶26)). Although Ms. Suzuki indicated that Yuma Sector "files are generally stored electronically. . ." and that "shared drives" were searched (Suzuki Dec. at ¶26), she did not indicate that no other drives were "likely to produce responsive documents." *Oglesby*, 920 F.2d at 68 At bottom, Ms. Suzuki's declaration, "does not show, with reasonable detail, that the search method [here] . . . was reasonably calculated to uncover all relevant documents." *Id.* Because Ms. Suzuki's declaration did not adequately

describe the agency's search, Defendant is not entitled to summary judgment on the adequacy of the search with regard to the electronic files at the Tucson and Yuma Sectors. Instead, Defendant should be required, at the least, to submit a revised declaration addressing the adequacy of the search in further detail. Alternatively, Defendant should be required to search for the requested records and disclose same or produce a *Vaughn* index and accompanying affidavits setting out whatever exemptions it contends applies.

2. OMISSION OF NATIONAL CHECKPOINT DATA FROM 1976 TO PRESENT

Plaintiffs' Checkpoint Request seeks, among other things, "[r]ecords sufficient to show the maximum number and geographical location of all U.S. Border Patrol checkpoints—permanent and tactical—in operation nationwide during each of the years 1976 to present." (Complaint, Exh. A at 6). According to Plaintiffs, the only responsive documents CBP produced are Tucson and Yuma Sector checkpoint apprehension data, from which location information was redacted. (XMSJ at 10). Further according to Plaintiffs, DHS provided no records regarding the other 18 Border Patrol Sectors, and the agency's declarations make no mention of any effort to search for those records. (*Id.*). Plaintiffs argue that Defendant appears to have "wholly ignored" the request and, thus, cannot satisfy its burden to show that a reasonable search was conducted for this data. (*Id.* at 10-11).

It is undisputed that Defendant provided Plaintiffs with apprehension data for checkpoints within the Tucson and Yuma Sectors[6], but redacted checkpoint locations as exempt from disclosure under FOIA because, according to Ms. Suzuki, if apprehension rates at particular checkpoints "became known, smugglers would essentially have a road map identifying areas where they are less likely to be apprehended and checkpoints that

[6] In addition to Plaintiffs' request for national checkpoint information discussed here, Plaintiffs also requested records relating to the total number of arrests at each checkpoint in the Tucson and Yuma Sectors, for each of the years 2011, 2012 and 2013. (*See* Complaint, Exh. A at 5).

may be more vulnerable to attack."[7] (Suzuki Dec. at ¶69). Ms. Suzuki goes on to state that "revealing the number and location of checkpoints in other sectors would likewise enable smugglers to construct a road map identifying areas and states where they are less likely to be apprehended, defeating USBP's enforcement strategy." (Suzuki Supp. Dec. ¶4). Defendant concedes that no search was conducted for national checkpoint data. (Defendant's Opp. at 6). According to Defendant, such search is unnecessary because the records would be exempt under 7(E).[8] (Defendant's Opp. at 6 (citing *Blackwell v. F.B.I,* 646 F.3d 37, 42 (D.C. Cir. 2011); *Black v. DOJ,* 69 F.Supp.3d 26, 40 (D.D.C. 2014); *Lewis v. DOJ,* 609 F.Supp.2d 80, 85 (D.D.C. 2009)).

The cases Defendant relies upon stand for the proposition that the agency need not search for records that are categorically exempt from disclosure. *Blackwell,* 646 F.3d at 42 (because search for requested information "would have added only information that . . ." is exempt under FOIA, no search was necessary); *Black,* 69 F.Supp. 3d at 40 (no search necessary where "all of the records Plaintiff requested only contained information . . . exempt from disclosure under [FOIA]."); *Lewis,* 609 F.Supp.2d at 84-85 (where information sought was "categorically exempt", "whether defendant actually searched for

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[7] As discussed in further detail, *infra,* Defendant claims that apprehension rates for particular checkpoint locations within the Tucson and Yuma Sectors is exempt under 5 U.S.C. § 552(b)(7)(E) and, thus, has declined to disclose checkpoint location information for those sectors. (Suzuki Dec. at ¶69). Defendant contends that Plaintiffs have not disputed that exemption 7(E) applies to Tucson and Yuma Checkpoint locations. (*See* Defendant's Opp. at 6); however, Plaintiffs' briefing indicates otherwise as Plaintiffs have steadfastly requested disclosure of national checkpoint locations, with no explicit exception of the Tucson and Yuma Sectors. While Plaintiffs may not have objected to redaction of references to checkpoint location information appearing in particular records, it does not follow that Plaintiffs acquiesce in Defendant's decision not to disclose all national checkpoint locations as Plaintiffs requested.

[8] Exemption 7(E) pertains to records or information compiled for law enforcement purposes which would disclose techniques and procedures for law enforcement investigation 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).

The government need not show that disclosure "risk[s] circumvention of the law" with regard to "techniques" and "procedures" as that requirement applies only to "guidelines". *Hamdan,* 797 F.3d at 778. As discussed further, *infra,* Exemption 7(E) protects investigative techniques that are generally unknown to the public. *Hamdan,* 797 F.3d at 777.

records . . . is immaterial . . . because that refusal deprived [plaintiff] of nothing to which he is entitled.") (internal quotation marks and citation omitted). However, as discussed below, Ms. Suzuki's Declaration falls short from establishing that a search for the requested national checkpoint information would have revealed *only* information that is exempt from disclosure.

Because Defendant claims that the information is a "technique or procedure[,]" protected under Exemption 7(E), (Suzuki Supp. Dec. at ¶4), whether its disclosure would "risk circumvention of the law" is not at issue. *Hamdan,* 797 F.3d at 778. Rather, the issue is whether checkpoint locations are generally known. *See e.g., id.; Rosenfeld v. U.S. Dep't of Justice,* 57 F.3d 803, 815 (9th Cir. 1995) ("pretext phone call constitutes an investigative technique generally known to the public."). Moreover, Ms. Suzuki's opinion that disclosure of apprehension information for the Tucson and Yuma Sectors justifies non-disclosure of checkpoint locations in those areas involves a leap in logic that is not supported by the record. *Cf. Hamdan,* 797 F.3d at 774 (an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible). There is no indication that the apprehension rates disclosed are related to particular checkpoint locations, other than that they are in either the Tucson or Yuma Sectors. Nor is there any support in the record for Ms. Suzuki's presumption that smugglers are not aware of their own success/failure rates.

As to whether checkpoint locations are generally known to the public, Plaintiffs assert that the location of some checkpoints is "common knowledge[]", (XMSJ at 10 n. 11 (citing a newspaper article mentioning some checkpoint locations in California, and a Border Patrol website[9] indicating that the San Clemente Border Patrol Station maintains a full-time traffic checkpoint on the north bound lanes of Interstate 5 at mile marker 67 I-5), and thus cannot be exempt under 7(E). (*Id.* at 10-11).

Defendant's argument that nationwide checkpoint locations should not be

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[9] https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/san-diego-sector-california/san-clemente-station

disclosed in order preserve the element of surprise does not support application of exemption 7(E) because risk of circumvention of the law has no bearing on whether to disclose techniques or procedures. *See Hamdan,* 797 F.3d at 778. In any event, such an argument is not only unpersuasive, but it is contrary to Supreme Court case law establishing the constitutionality of checkpoints. In upholding the constitutionality of checkpoints, the Supreme Court has relied, in part on their visibility[10] to motorists, thus lessening "the fear and surprise engendered in law-abiding motorists" in relation to Fourth Amendment concerns of subjective intrusiveness of the stop. *See Michigan Dep't of State Police v. Sitz,* 496 U.S. 444, 453 (1990) (citing *Untied States v. Martinez-Fuente,* 428 U.S. 543, 558 (1976)). Defendant's attempts to argue that the requested disclosure precludes the element of surprise surrounding checkpoints subvert one of the very reasons why checkpoints are constitutionally permissible in the first instance. Moreover, knowledge of checkpoint locations does not necessarily mean that smugglers will go undetected. Instead, the Supreme Court has recognized, "the prospect of such [checkpoint] inquiries forces other[] [smugglers] onto less efficient roads that are less heavily traveled, slowing their movement and making them more vulnerable to detection by roving patrols." *Martinez-Fuente,* 428 U.S. at 557.

In this day and age, with the use of cell phones, other electronic means, and even drones, the location of a checkpoint can hardly be secret. Checkpoints are visible and self-evident to travelers and observers on the roads. Even Border Patrol's own website announces the location of at least one checkpoint and nothing prohibits media or others from reporting locations as well. Defendant has failed to establish that the location of checkpoints nationwide qualify for exemption under 7(E). This conclusion, in turn, creates substantial doubt as to the reasonableness of the search, or in this instance, to

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[10] "At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." *Martinez-Fuente,* 428 U.S. at 558. *See also United States v. Hernandez,* 739 F.2d 484, 488 (9th Cir. 1984) (citing "visible evidence of authority" as one factor supporting constitutionality of the temporary checkpoint at issue).

Defendant's decision not to search for responsive records. Consequently, Defendant's request for summary judgment on this issue is denied. Defendant must search for the requested data[11] with regard to checkpoint locations and either disclose it or produce a *Vaughn* index and accompanying affidavits, raising whatever exemptions it contends may be appropriate. *See e.g., ACLU of No. Calif. v. Dep't of Justice,* 2014 WL 4954121, *9 (N.D. Cal. Sept. 30, 2014) ("[T]he agency must conduct an adequate search *and* justify any exemptions.") (emphasis in original).

3. CANINE RECORDS

Plaintiffs also challenge the adequacy of Defendant's search with regard Plaintiffs' requests concerning canine records. Plaintiffs assert that Defendant turned over too "few" documents in light of the information requested and number of complaints of false canine reports. (XMSJ at 11-17). Plaintiffs argue that compliance with the request is not overly burdensome despite Defendant's claim to the contrary, and even if some information is exempt, non-exempt information from those same records should still be disclosed. (*Id.*).

a. THE REQUESTS

In pertinent part, Plaintiffs' Checkpoint Request seeks:

> 1.) All records relating to Border Patrol tactical and permanent vehicle checkpoint operations in Tucson and Yuma Sectors from January 2011 to present, including but not limited to:
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> a. Internal memoranda, legal opinions, guidance, directives, criteria, standards, rules instructions, advisories, training materials, and any other written policies or procedures pertaining to checkpoint operations in Tucson and Yuma sectors, including but not limited to:
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> ***
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> 2. All documents related to service canines, including all information related to training, certification, qualifications, and performance of service canines and service canine handlers, and any policies or procedures related to canines that falsely alert to the

[11] *See* item 2 at page 6 of Plaintiff's Checkpoint Request attached to Complaint at Exhibit A.

presence of contraband or concealed persons; . . . .

(Complaint, Exh. A at 4).

With regard to Plaintiffs' Checkpoint Request, Defendant contends that Plaintiffs did not request "all" documents related to service canines, but only sought documents "pertaining to checkpoint operations." (Defendant's Opp. at 7) (emphasis omitted). Plaintiff asserts that "[t]he meaning of 'all' is plain: it covers both checkpoint-specific information and more general canine-related information that affects checkpoint operations." (Plaintiffs' Reply at 6).

Plaintiffs' Roving Patrol Request seeks "all records relating to Border Patrol 'roving patrol' operations in Tucson and Yuma sectors [from January 2011 to present]." (Complaint, Exh. B at 5). Similar to Plaintiffs' Checkpoint Request, the Roving Patrol Request also sets out subsets of types of information that the records should include, although not be limited to; however, the Roving Patrol Request does not explicitly mention records related to service canines.

b. DOCUMENTS DISCLOSED

According to Defendant, the documents produced include the following: "Canine Unit Policy and Procedures"[12] and a memo from the Chief of the Border Patrol implementing that policy; a memo from the Chief of the Border Patrol regarding the "Deployment of . . . Canine Teams at Border Patrol Checkpoints," including training and certification "guidelines and requirements [that] must be met; a report proposing that Border Patrol canine handlers be authorized to issue citations for misdemeanor marijuana offenses at checkpoints; and, "by Plaintiffs' own count, 'more than forty complaints' related to false alerts." (Defendant's Opp. at 8-9 (citation to Bates' numbers omitted)).

[12] According to Defendant, this document "sets forth Border Patrol policy and procedures for the training, certification, and deployment of Border Patrol canines throughout the entire agency. . . As that document makes clear, Border Patrol canines are used not just at checkpoints and during roving patrols, but also for '[f]reight train and train yard searches,' '[o]pen areas searches,' [i]nterior and exterior building searches,' [l]uggage and freight searches,' '[s]earches in support of other specialized units or programs,' '[s]earches in support of other law enforcement agencies,' and '[s]earch and rescue for lost, trapped, or deceased persons.'" (Defendant's Opp. at 9 (citation to Bates' numbers omitted)).

"CBP also created a spreadsheet reflecting the number of canine assisted property seizures at each checkpoint, by month, from 2011 to 2013, . . . and explained that it did not collect the other canine data that Plaintiff sought." (*Id.*). "In addition, CBP produced more than 80 significant incident reports that reference canines, CBP 4862-5180, 11035-11701, and canines are also repeatedly referenced in the thousands of pages of Forms I-213 and I-44 produced." (*Id.*). Defendant stresses that "canine certification and training are broad-based—not specific to checkpoints[]" and that the Border Patrol's canine policy references "'checkpoints' only once in its 23 pages. CBP 10514. It is checkpoints, not canines, that were the subject of Plaintiffs' request." (*Id.* at 9; *see also id.* at 9 ("Canine training is not specific to checkpoints, and . . . canine certification is not based on field performance at checkpoints, but instead on tests conducted in a controlled environment." (internal quotation marks and citation omitted)).

Even though Defendant contends that Plaintiffs did not specifically request "training, certification, qualification, and performance records of individual canines and canine handlers," Defendant nonetheless considered the feasibility of producing this information and determined production would be overly burdensome. (Suzuki Dec. at ¶28 (emphasis omitted); *see also* Defendant's Opp. at 9-12).

c. ANALYSIS

The party submitting a FOIA request must "reasonably describe[]" the records sought. 5 U.S.C.§ 552(a)(3). "A description 'would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.'" *Marks*, 578 F.2d at 263 (quoting H.Rep.No. 93-8769 93rd Cong., 2d Sess. 6 (1974), U.S. Code Cong. & Admin. News, 1971, p. 6271). Accordingly, "broad, sweeping requests lacking specificity are not permissible." *Id.* (citations omitted).

The agency has a duty to construe a FOIA request liberally and although it is not obliged to look beyond the four corners of the request for leads to the location of responsive documents, it must pursue any "clear and certain" lead it cannot in good faith

ignore. *Kowalczyk v. Dep't of Justice,* 73 F.3d 386, 389 (D.C. Cir. 1996) (citations omitted). With regard to the Checkpoint Request, Plaintiffs persuasively point out that Defendant's position that "most canine policies and procedures will be broad-based . . . doesn't make those documents any less relevant, since they affect how canines operate at checkpoints, and because they document policies and procedures that are in effect at checkpoints, even if they are also in effect elsewhere." (Plaintiffs' Reply at 6 (internal citation omitted)). To satisfy its obligation under FOIA in this instance, Defendant should be required to search for records responsive to Plaintiffs' request that affect service canines used at checkpoints, regardless wherever else it may also apply to a service canine.

Plaintiffs' Checkpoint Request also sought "information related to training, certification, qualifications, and performance of service canines and service canine handlers. . . ." (Complaint, Exh. A at 4). Thus, they are entitled to that information unless Defendant provides a valid reason why it should not be produced.

The Roving Patrol Request lacks any request specific to service canines. Even a liberal construction of the request would not support the conclusion that Plaintiffs sought the range of canine-related records that they requested with regard to checkpoints. However, Plaintiffs did request seek "[i]nternal memoranda, legal opinions, guidance, directives, criteria, standards, rules, instructions, advisories, training materials, and any other written policies or procedures pertaining to roving patrol operations generally" or to searches and seizures made pursuant to roving patrol operations. (Complaint, Exh. B at 5). As Plaintiffs point out, "canines are inarguably involved in roving patrols and in the searches and seizures that Border Patrol makes as a result of them, and thus canine-related materials fall within the scope of the requests." (Plaintiffs' Reply at 6). To the extent that any of these records pertain to service canines used during roving patrol operations, Defendant should have searched for and produced them. Like the records regarding the canines used at checkpoints, records qualify for production that pertain to canines used on roving patrol even if they also apply to canines used in other operations,

as well.

d. UNDULY BURDENSOME

Defendant argues that retrieving and processing training records for individual canines and handlers is unreasonably burdensome and, thus, need not be done. An agency need not honor a FOIA request that requires an unreasonably burdensome search. *See American Federation of Gov't. Employees v. U.S. Dep't of Commerce,* 907 F.2d 203, 209 (D.C. Cir. 1990) (citation omitted) (finding requests unduly burdensome where they required searching virtually every file contained in over 356 offices); *Nation Magazine v. U.S. Customs Serv.,* 71 F.3d 885, 892-93 (D.C. Cir. 1995) (request requiring "search through 23 years of unindexed files for records. . .impose[d] an unreasonable burden on the agency"; however, search through same files, which were arranged in chronological order, for a 1981 memo was not unreasonably burdensome on facts presented). "In considering an agency's motion for summary judgment in a FOIA case, the court may rely upon affidavits of agency officials describing [the agency's] search procedures and explaining why a more thorough investigation would have been unduly burdensome. If the record leaves substantial doubt as to the sufficiency of the search, summary judgment for the agency is not proper." *Kowalczyk,* 73 F.3d at 388 (internal quotation marks and citations omitted).

Defendant submits Ms. Suzuki's Declaration discussing the feasibility of producing training, certification, qualification, and performance records of individual canine and canine handlers at the Tucson and Yuma Sectors for the past five years.[13] (Suzuki Dec. at ¶28). According to Ms. Suzuki, satisfying the request for the Tucson Sector would require review of approximately 45,500 pages of records and take approximately 980 hours to complete, which she indicates is the equivalent of 122 business days, or nearly 6 calendar months. (*Id.*). For the Yuma Sector, which does not maintain the records electronically, 16,900 pages would need to be reviewed and,

[13]There are 140 canines in service in Tucson and 52 in Yuma. (Suzuki Dec. at ¶28).

estimating 3 minutes per page, Ms. Suzuki "predict[s] that it would take one full-time employee. . .[]390[] business days, or more than eighteen . . ." calendar months to process the records. Thus, a total of approximately 62,400 pages of record would require review. (*Id.*).

Ms. Suzuki also asserts that these records "would largely be exempt from disclosure under FOIA[]" because "[s]core sheets and counseling forms, in particular, contain a variety of sensitive information about law enforcement techniques, including the locations and environments in which canines are trained and tested (*e.g.* types of vehicles, buildings, and landscapes), the odors they are trained to detect (*e.g.* types of drugs or chemicals and their amounts), and the types of packaging and concealment strategies used to train them, and the ways that handlers control, read, and reward their canines." (*Id.* at ¶29). According to Ms. Suzuki, this information would be exempt from disclosure because it would enable smugglers to avoid detection and would reveal law enforcement strategies "which would enable smugglers to develop their own well-trained canines to test the effectiveness of their concealment efforts[.]" (*Id.* (citing exemptions b(6), (b)(7)(C), (b)(7)(E)). Ms. Suzuki stresses that searching for the records "would be unreasonably burdensome, as it would exhaust the manpower of" the agency and, in light of the applicable exemptions, "it would be insensible to expend agency manpower on such a search." (*Id.* at ¶¶28, 29.).

At the outset, as discussed *supra*, that *some*[14] of the information may fall within an

[14] Plaintiffs point out that in asserting that documents would be exempt, Defendant cites score sheets and counseling forms, but fails to explain how numerical scores would indicate anything other than how a dog fared in its certification tests, and Defendant fails to explain what information counseling sheets contain that would be exempt. (*See* XMSJ at 16). Plaintiffs' position regarding score sheets finds support in Ninth Circuit case law where the court has discussed scores received during performance evaluations without jeopardizing any of the information Defendant seeks to protect here. *See U.S. v. Thomas*, 726 F.3d 1086, 1096 (9th Cir. 2013) (recognizing that handler's logs, training records and score sheets, certification records, and training standards and manuals are "crucial to the [criminal] defendant's ability to assess the dog's reliability[]" and must be disclosed in criminal cases when the government seeks to rely on a canine alert as the evidentiary basis for its search.) Moreover, although Defendant "lists certain canine-related records it included in its 'feasibility' study, it provides no other information about responsive records (beyond score sheets and counseling forms), which comprise all information related to training, certification, qualifications, and performance of service canines and

exemption, does not excuse Defendant from searching for the records in first instance. FOIA is clear that "[a]ny reasonably segregable portion of a record shall be provided. . . after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b). Defendant has neither shown nor suggested that all requested records would be exempt. Unless the request is found to be overly burdensome, the proper course is for Defendant to search for the requested information and disclose it or produce a *Vaughn* index with appropriate affidavits raising whatever exemptions it contends are appropriate.[15] *See e.g., ACLU of No. Calif. v. Dep't of Justice,* 2014 WL 4954121, *9 (government's contention that documents would be exempt from disclosure "does not discharge the Government's duty to first undertake its search.").

As to whether the requests impose an undue burden on Defendant, Plaintiff points out that in other FOIA cases, the government has searched through more documents than the amount at issue here and on tighter time frames, sometimes requiring the employment of additional staff and outside contractors to process the documents. (XMSJ at 13-14 (citations omitted); Plaintiffs' Reply at 7 & Exh. A attached to Reply (Doc. 63-1) (July 1, 2016 status report filed by government in *ACLU v. Office for Civil Rights and Civil Liberties,* No. CV-15-247-PHX-JJT (D. Ariz.)), where the government indicated that it was procuring a contractor to assist with a FOIA request, and that in other litigation it was processing approximately 230,000 pages)). Plaintiffs also point out that the number of records sought has increased because of Defendant's non-compliance in the first instance, arguing that "[i]t would be perverse if DHS could leverage its delay in

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service canine handlers, and any policies or procedures related to canines that falsely alert." (XMSJ at 16-17).

[15] The cases Defendant cites to support an argument that some canine records may be exempt are not to the contrary. (*See* Defendant's Opp. at 13 & n. 6 (citing cases decided under FOIA or state freedom of information statutes which approving redaction of certain records pertaining to canines used in law enforcement)). However, while redaction was proper in those circumstances, the agencies were not excused from searching for the information in the first instance; nor was there any indication that the agencies could withhold segregable portions of those records. *Ebersole v. United States,* 2007 WL 2908725, *4, *9 (D. Md. Sept. 24, 2007); *Tex. Appleseed v. Spring Branch Indep. Sch. Dist.,* 388 S.W.3d 775, 784 (Tex. App. 2012); *O'Donnell v. Donadio,* 259 A.D.2d 251, 252 (N.Y. App. 1999).

responding to Plaintiffs' requests, in violation of FOIA, to justify further violation of its statutory obligations." (XMSJ at 14 (although Plaintiffs' original request was for records from 2011 through the date of the 2014 request, Defendant's calculation took into account the past five years, which includes time during this litigation)).

The government has been excused from searching manually, "page-by-page. . . through 84,000 cubic feet of [unindexed] documents. . ." to determine whether documents responsive to a FOIA request existed, essentially because it was not clear that such a burdensome search would turn up responsive documents. *Goland v. Central Intelligence Agency,* 607 F.2d 339, 353-55 (D.C. Cir. 1978). In contrast, the government has been required to manually search through 25,000 paper files to determine whether responsive documents existed despite the agency's assertion that the search would be "costly and take many hours to complete." *Public Citizen, Inc. v. Dep't of Educ.,* 292 F.Supp.2d 1, 6 (D.D.C. 2003). The parties cite additional cases in support of their respective position on this issue. At the end of the day, determination of the reasonableness of Defendant's search turns upon the facts of the case at bar. *Zemansky,* 767 F.2d at 571.

In the criminal law context, the government often cites the reliability of canines used not only at checkpoints or on roving patrol, but in a myriad of other ways, including search warrant applications. In criminal cases, where the government relies on a canine alert as the evidentiary basis for a search, the Ninth Circuit has recognized that handler's logs, training records and score sheets, certification records, and training standards and manuals are "crucial to the [criminal] defendant's ability to assess the dog's reliability[]" and must be disclosed. *Thomas,* 726 F.3d at 1096. As long as the government asserts that its canines are reliable, it should not be able to avoid producing records about their reliability. FOIA serves the public interest of opening "'agency action to the light of public scrutiny,' to inform the citizenry 'about what their government is up to[]'" and how successful/unsuccessful it is at doing so. *Rosenfeld,* 57 F.3d at 811 (quoting *Dep't of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749, 772, 773

(1989)). Searching for information like that requested by Plaintiffs is nothing new for the government. Moreover, it is undisputed that the records at issue are likely to contain information responsive to Plaintiffs' requests. However, the Court recognizes that search for records for *all* canines in service from 2011 is different from searching through records for one dog in a particular case. To this end, Defendant has sustained its burden of establishing that the search for records as requested is overly burdensome in part. However, Defendant should be required to search for handler's logs and other records, including score sheets, indicating success/failure rates in testing and specific search requests whether in the field or at agency stations for canines who are currently active back to 2011. The Court does not believe the government keeps records of canine benign passes on number of cars in line at a checkpoint.

Ms. Suzuki's declaration suggests that the individual canine files contain similar records for each canine, thus record review for each canine would be fairly standardized. Likewise, similar redactions would presumably apply across the board, reducing the number of documents that would require a line-by-line review. *See e.g., ACLU of No. Calif.*, 2014 WL 4954121 at *8 (search not overly burdensome where, among other things, the number of matters [the agency]. . . must search will shrink further, as [the agency] . . . need not conduct a line by line review . . . to determine whether they are responsive to Plaintiffs' request.").

On the instant record, with regard to Defendant's MSJ, Defendant's failure to search the files pertaining to individual canines and canine handlers supports the conclusion that the search for records responsive to Plaintiffs' request was inadequate. Defendant must search for the requested documents delineated above and either disclose them or produce a *Vaughn* index and accompanying affidavits indicating whatever exemptions it contends are appropriate.

4. ELECTRONIC RECORDS: AUDIO TAPES, VIDEOTAPES AND EMAILS

Plaintiffs' FOIA requests define "records" to include "videotapes" and "audio tapes." (Complaint, Exhs. A at 4, B at 4). Plaintiffs complain that Defendant's

"production is almost entirely devoid of electronic records, particularly videotapes and audio tapes." (XMSJ at 17). Defendant counters that production of tapes would be overly burdensome and the information they contain would be largely exempt.

a. AUDIO TAPES

Defendant located 367 "potentially responsive audio files." (Suzuki Dec. at ¶42). Only one office, the Visual Communications Bureau in the Office of Public Affairs ("OPA/Visual Comm") has "the technological capacity or expertise" to process the files for release. (*Id.*). That office, however, "lacks the manpower and equipment to process the potentially responsive audio files, as it has only one staff member with the expertise to redact audio files, and that employee[]," is charged with a multitude of day-to-day responsibilities. (*Id.*). "[E]ven if the OPA Visual Comm had the manpower to process the potentially responsive audio files, only one of two editing stations is available to process the audio files. In addition, the information that would need to be withheld or altered in the audio files adds complexity to the editing process, which would include altering voices so individuals could not be identified and bleeping out or otherwise withholding personally identifiable information of individuals mentioned or interviewed in the audio files or other information exempt from release under the FOIA." (*Id.*). Ms. Suzuki further points out that because "these audio files are largely interviews or witness statements, relevant portions of them already appear in transcribed or summary form in reports of investigation or other records that have already been released." (*Id.*).

Plaintiffs have not disputed that Defendant would need to "bleep[] out" exempt information and alter voices to protect individuals' identities, nor have they addressed the practicalities involved in making such alterations. They have indicated a willingness to accept disclosure on a "rolling basis." (*See* XMSJ at 17; Plaintiffs' Reply at 15).

As discussed above, the government need not honor a request that requires an unreasonably burdensome search. *American Federation of Gov't. Employees,* 907 F.2d at 209. "'The rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requestors.'" *ACLU of Northern Calif.,*

2014 WL 4954121 at *7 (quoting *Assassination Archives and Research Center, Inc. v. CIA*, 720 F.Supp. 217, 219 (D.D.C. 1989)). Defendant has located 367 audio tapes it contends are potentially responsive. However, Ms. Suzuki avows that relevant information contained on the tapes has primarily been included in other records disclosed. Plaintiffs' assertion that Ms. Suzuki cannot know the information is duplicative of other records without first listening to the tapes does not undermine Defendant's position given that Defendant is certainly aware of the types of interactions it tapes. (*See* Suzuki Dec. at ¶42 (identifying the audio files as "largely interviews or witness statements")). The record supports Defendant's assertion that search of the audio tapes is overly burdensome. Defendant is entitled to summary judgment on this issue and Plaintiffs' cross-motion should, in turn, be denied on this point.

b. VIDEOTAPES

It is undisputed that Defendant produced three videotapes. (XMSJ at 17; Defendant's Opp. at 16). However, Plaintiffs argue that Defendant failed to disclose "'Checkpoint Authority' videos created with the assistance of CBP's Training Division", that were mentioned in an e-mail that was disclosed. (XMSJ at 17 (citing XMSJ, Exh. B (Doc. 47-1) at CBP00001555-56)). Nor were the videos mentioned in the *Vaughn* index. (XMSJ, at 17). Defendant counters that it is "'not required . . . to chase rabbit trails that may appear in documents uncovered during [its] search.'" (Defendant's Opp. at 16 (citing *Rein v. PTO,* 553 F.3d 353, 365 (4th Cir. 2009)). Defendant goes on to assert that the videos would be protected under Exemptions 5 and 7(E). (*Id.* at n.9 (citing Suzuki Dec. at ¶¶ 56, 69 (describing generally attorney-client privilege and types of documents that fall within exemption 7(E))).

The e-mail at issue refers to a "video of the several scenarios that Communications Division created (in close collaboration with the Training Division & Office of Chief Cousel [sic]). Once finalized it will be available for you to use as additional training for your agents." (XMSJ, Exh. B (Doc. 47-1) at CBP0001555-56 (containing a "video link")). While an agency is not required to speculate about potential leads, *Kowalczyk,*

73 F.3d at 389, "[i]t is well-settled that if an agency has reason to know that certain places may contain responsive documents, it is obligated under FOIA to search barring an undue burden." *Valencia-Lucena v. U.S. Coast Guard,* 180 F.3d 321, 325 (D.C. Cir. 1999). For example, an agency's search may be found "inadequate when it was evident from the agency's disclosed records that a search of another of its records systems might uncover the documents sought." *Id.* at 326 (citing *Campbell v. U.S. Dep't of Justice,* 164 F.3d 20, 29 (D.C. Cir. 1998)).

It is puzzling that Defendant's search did not turn up the video and Defendant does not provide an explanation as to why it did not. While, an agency's failure to "turn up one specific document in its search does not alone render a search inadequate[,]" *Iturralde,* 315 F.3d at 315, the video appears to exist and the e-mail provides not only a clear lead, but a link to it, as well. The parties have negotiated for over one year about the instant requests and, yet, Defendant has neither disclosed the video nor included it in the *Vaughn* index. Defendant has not cited to any portion of Ms. Suzuki's declaration specifically discussing the video. This is not a case where the requesting party relies on mere speculation that relevant documents exist but were not disclosed. *See e.g. Lahr,* 569 F.3d at 987. Here, there is no dispute that a link to the video exists. Nor does Defendant contend that the video is not responsive. While the video may fall within an exemption, Defendant's failure to include discussion of the video in Ms. Suzuki's declaration and/or the *Vaughn* index precludes that analysis. On the instant record, Defendant must search for and process the video at issue and either disclose it or provide a supplemental declaration explaining why it cannot. *See e.g. Valencia-Lucena,* 180 F.3d at 327 ("what causes us to conclude that the search was inadequate arises from the fact that the record itself reveals positive indications of overlooked materials.") (internal quotation marks and citations omitted).

c. E-MAILS

With regard to checkpoints, Plaintiffs requested

1.) All records relating to Border Patrol tactical and permanent vehicle checkpoint operations in Tucson and Yuma Sectors from January 2011 to

present, including but not limited to:

a. Internal memoranda, legal opinions, guidance, directives, criteria, standards, rules instructions, advisories, training materials, and any other written policies or procedures pertaining to checkpoint operations in Tucson and Yuma sectors, including but not limited to:

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3. All documents related to citizen complaint procedures at checkpoints;

h. All complaints related to Border Patrol operations in Tucson and Yuma sectors received by any Border Patrol, CBP, or DHS official from any person, organization, agency, tribal government, consular office, or any other entity, whether verbal or written, and all documents related or responding to any such complaints; and

i. All disciplinary records resulting from agent misconduct or alleged violation of Border Patrol, CBP, and/or DHS rules and regulations related to checkpoint operations in Tucson and Yuma sectors.

(Complaint, Exh. A at 4-5, 6).

With regard to e-mails responsive to Plaintiff's request, CBP searched for e-mails with the terms "checkpoint" along with one of the following four terms: "guidance", "policy", "procedure", or "protocol". (Suzuki Dec. at ¶¶30-31). While Plaintiffs agree that Defendant need not produce all e-mails with the term "checkpoint"[16], they contend that the search unreasonably excluded "e-mails related to complaints, disciplinary actions, and other matters specifically requested. . . ." (XMSJ at 18 & n.15). Defendant counters that CBP's centralized e-mail search was "more than reasonable" because "CBP and other agencies already conducted extensive searches of relevant offices to retrieve complaints and disciplinary records." (Defendant's Opp. at 15-16 (citing Suzuki Dec. at ¶¶36, 38-39 (Office of Internal Affairs[17], Office of Human Resource Management);

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[16] According to Ms. Suzuki, "'checkpoint' was too common to use as a keyword." (Suzuki Dec. at ¶30 (searches for the e-mails with the terms "checkpoint" and "roving" returned more than 560,000 records)).

[17] According to Ms. Suzuki, the Office of Internal Affairs ("IA") "is responsible for ensuring compliance with all CBP-wide programs and policies relating to corruption, misconduct, or mismanagement. IA conducted a search of their case tracking system. . ."

Declaration of Aneet Marwaha ("Marwaha Dec.") (Doc. 39-2) at ¶ 11 attached to Defendant's MSJ at Exh. B (OIG[18] search of complaints database, including uploaded e-mails for investigated complaints); Declaration of Kevin Tyrrell ("Tyrell Dec.") (Doc. 39-4) at ¶10 attached to Defendant's MSJ as Exh. C (CRCL search for complaints including e-mails); (Declaration of Fernando Pineiro) ("Pineiro Dec.") (Doc. 39-5 at ¶¶ 7, 13 attached to Defendant's MSJ as Exh. D (ICE[19] search of complaints database)).

While review of the declarations submitted by Defendant support the conclusion that Defendant attempted to locate records responsive to Plaintiffs' requests at issue, Defendant falls short of demonstrating full compliance with FOIA. Although Defendant establishes what was searched, Defendant has not averred that "all files likely to contain responsive materials (if such records exist) were searched. . . ." *Oglesby,* 920 F.2d at 68. While some of the offices searched e-mails, CBP did not and that is what is at issue here. There is no basis on the instant record for concluding that CBP e-mails would not contain records responsive to Plaintiffs' request. *See id.* Defendant should be required to search

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that resulted in 1,478 potentially responsive pages of records and ultimately resulted in release of 1,106 pages [comprising 25 cases] to Plaintiffs. (Suzuki Dec. at ¶¶36, 38). IA indicated that "the 'disciplinary records' requested by Plaintiffs are not kept by IA and suggested that FAPL Branch reach out to the office of Human Resources Management [("HRM")] to retrieve any disciplinary records associated with the cases." (*Id.*). The Division of Labor and Employee Relations ("LER"), within the HRM, "establishes policies, programs, and procedures to facilitate effectiveness and operational consistency in areas such as performance management, grievances and complaints, and fitness for duty. LER also provides support, advice, guidance, and training to supervisors, managers, and executives at CBP regarding disciplinary actions. LER conducted a search of their case tracking system . . . using the case numbers of the twenty-five (25) cases provided by IA determined to be responsive to Plaintiffs' requests." (Suzuki Dec. at ¶38). LER located records for 11 of the cases. (*Id.*). LER also searched its database using the terms "checkpoint" and "roving" to identify other records where disciplinary action was taken or the matters were closed without action, which are also included in the *Vaughn* index. (*Id.* at 38-39).

[18] OIG "conducts independent investigations, audits, inspections, and special reviews of U.S. Department of Homeland Security personnel, programs, and operations to detect and deter waste, fraud, and abuse, and to promote integrity, economy, and efficiency within the Department." (Marwaha Dec. at ¶3).

[19] "Complaints about ICE or CBP employees may be sent to the Joint Intake Center, where they are recorded in the Joint Integrity Case Management System (JICMS)." (Pineiro Dec. at ¶7). Defendant searched the JICMS for records responsive to Plaintiffs' requests. (*Id.* at ¶13).

CBP e-mails for responsive records and either disclose the records or produce a *Vaughn* index and accompanying affidavit raising whatever exemptions it contends are applicable.

5. TRAINING MATERIALS

Plaintiffs requested "training materials" related to checkpoint and roving patrol operations. (Complaint Exh. A at 4, Exh. B at 5). Plaintiffs challenge the adequacy of Defendant's search for training materials because Defendant "makes no mention of searching the Training Department." (XMSJ at 19). Plaintiffs also assert that Defendant "produced a scant handful of training materials, none related to roving patrols", e-mails referencing training materials were not produced, and at least one "key CBP training document that the government has already identified as responsive in related FOIA litigation (over an ACLU FOIA request for records related to roving patrols in southern California) . . ." was not produced in this case. (*Id.* at 18-19 (footnote omitted)).

Defendant points to Ms. Suzuki's statement that "[t]he search of Tucson and Yuma sectors did, in fact, include searches of their training departments for responsive records. . . . The network drives contain all training records as requested by Plaintiffs to the extent that a training record exists."[20] (Suzuki Supp. Dec. at ¶7). Defendants also assert, and Plaintiffs do not dispute, that CBP located materials including: "the instructor's guide to CBP's field training program for checkpoint operations, CBP 1505-1510, a power point presentation on checkpoint operations, CBP 1416-43, an agenda for checkpoint training, CBP 1511, a checklist for conducting checkpoint operations, CBP 1677-79, a checklist for vehicle stops, CBP 1190-91, guidance on uncooperative

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[20] Ms. Suzuki indicates that a search was conducted of the training departments for the Tucson and Yuma Sectors and that their "shared drives" were searched for training materials. (Suzuki Supp. Dec. at ¶7). As discussed earlier, while the search of the "shared drives" was generally not adequate to establish the sufficiency of Defendant's search, here with specific regard to the training materials, Ms. Suzuki's statement that "the network drives contain all training records as requested by Plaintiffs to the extent training records exists[]" on its face, at least, can suffice to establish the adequacy of the search for the particular records at issue. *See Valencia-Lucena,* 180 F.3d at 321 ("The agency 'cannot limit its search' to only one or more places if there are additional sources 'that are likely to turn up the information requested.'") (quoting *Oglesby,* 920 F.2d at 68).

motorists, CBP 1142-43, 1479-81, checkpoint authority guides, CBP 1144-45, 1376, training on personal radiation detectors, CBP 1212-15, 1488, 1492, and Z Backscatter Van job aids, CBP 1377-1415." (Defendant's Opp. at 17).

As for Plaintiffs' objection that Defendant produced no training materials related to roving patrol (XMSJ at 18), it is troubling that Defendant argues that "CBP conducted a thorough, largely electronic search for records related to checkpoint operations[,]" because this statement omits mention of records related to roving patrol. (Defendant's Opp. at 17). Further, the majority of the materials Defendant located, as set out above, appear to primarily pertain to checkpoints. Nonetheless, Ms. Suzuki indicates that "roving patrol" was a term searched when looking for training materials and that the network drives searched "contain all training records as requested by Plaintiffs to the extent that a training record exists." (Suzuki Supp. Dec. at ¶7).

"[I]f a review of the record raises substantial doubt, particularly in view of well defined requests and positive indications of overlooked materials, summary judgment is inappropriate." *Valencia-Lucena,* 180 F.3d at 321 (internal quotation marks and citations omitted). Plaintiffs' request is certainly well-defined: "training materials . . . pertaining to roving patrol operations generally. . . [and] to all searches and seizures (including arrests) made pursuant to roving patrol operations." (Complaint, Exh. B at 5). It defies logic and reason that there is absolutely no available training manual, such as a field manual, encompassing roving patrol operations. Perhaps this situation is like the canines, where Defendant improperly omitted searching for materials pertaining to canines at checkpoints because the materials were also applicable to non-checkpoint scenarios. The fact that Defendant's search did not turn up training materials, including a field manual, pertaining to roving patrol operations leaves the Court with substantial doubt as to the sufficiency of the search. Further, it is not clear at all from Ms. Suzuki's declarations whether posters and videos (such as those mentioned in the April 16, 2013 e-mail) (*see* XMSJ, Exh. B (Doc. 47-1) at CBP 00001555-56), would necessarily be contained on the

shared drives searched.[21] Defendant is obligated under FOIA to "conduct[] a search reasonably calculated to uncover all relevant documents." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see also Zemansky*, 767 F.2d at 571 (adopting *Weisberg* standard). Defendant should be required to revise its search terms to locate the requested training materials and to expand the areas searched if the shared drives would not contain training manuals for roving patrol, videos or posters and, even if they do, Defendant is reminded that it "'cannot limit its search' to only one or more places if there are additional sources 'that are likely to turn up the information requested[]'" as Plaintiffs' evidence and argument suggest. *Valencia-Lucena*, 180 F.3d at 321 (quoting *Oglesby*, 920 F.2d at 68).

Ms. Suzuki does clear up any concern with regard to the "key" training document located during the California litigation, by stating CBP's position that the document is privileged, attorney work product and attorney-client communication and, importantly, "is not used to train USB[order]P[atrol] personnel in Tucson or Yuma sectors." (Suzuki Supp. Dec. at ¶6). Thus, the document is not responsive to the Requests at issue and has no bearing on the adequacy of Defendant's.

6. BORDER PATROL INCIDENT REPORTS, APPREHENSION LOGS AND SHIFT REPORTS

Plaintiffs claim that the "CBP failed to search for numerous additional categories of responsive records, including Border Patrol incident reports, apprehension logs, and shift reports, all of which can contain checkpoint and roving patrol-related information." (XMSJ at 19). Defendant finds Plaintiffs' claim "mystifying" given that: "CBP searched 'all Significant Incident Reports (SIR) in the SIR tracking system using the search terms 'checkpoint' and 'roving' and produced 352 reports, totaling 1,013 pages[]" (Defendant's

[21] It may well be that the posters and the video mentioned in the April 2013 e-mail no longer exist, but that is not the point. This does not appear to be a situation where a few isolated records have not been located. *Lahr*, 569 F.3d at 964. The fact that categories of materials, such as those pertaining to roving patrol, posters, and videos are missing from Defendant's disclosure and the *Vaughn* index, coupled with lack of evidence that the electronic files searched would have all of that information in the first place, creates material doubt about the adequacy of the search.

Opp. at 18 (citing Suzuki Dec. at ¶34)); Plaintiffs did not request apprehension logs, rather they requested "the agency to provide apprehension information 'by *month*' Compl. Ex. A ¶1(g)(1)-(3) (emphasis added), and the agency did so (*id.* (citing Suzuki Dec. at ¶¶18-19)); and Plaintiffs' "requests did not seek 'shift reports,' and they do not explain what they mean by that term. CBP's search did locate a number of Daily Unit Assignment Logs and Duty Assignment Sheets, from which staffing and assignment information were withheld under Exemption 7(E)." (*Id.* (citing Suzuki Dec. at ¶71)). Defendant's arguments, which are supported by the record, are well taken. Plaintiffs have failed to raise substantial doubt about the adequacy of Defendant's search for the materials at issue here. Defendant is entitled to summary judgment in its favor on this point and Plaintiffs cross-motion on this issue should be denied.

D. *VAUGHN* INDEX

The Ninth Circuit has recognized that unlike other civil cases where the "rules of discovery give each party access to the evidence upon which the court will rely in resolving the dispute between them", the issue in a FOIA case "is whether one party will disclose documents to the other, [and] only the party opposing disclosure will have access to all the facts." *Weiner v. F.B.I.,* 943 F.2d 972, 977 (9th Cir. 1991). Thus, "[t]he party requesting disclosure must rely upon his adversary's representations as to the material withheld, and the court is deprived of the benefit of informed advocacy to draw its attention to the weaknesses in the withholding agency's arguments." *Id.* (citation omitted). As a result, agencies seeking to withhold documents requested under FOIA typically provide the opposing party and the court, as Defendant did here, with a "'*Vaughn* index,'[22] identifying each document withheld, the statutory exemption claimed, and a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption." *Id.* (footnote and citations omitted); *see also Citizens Comm'n on Human Rights v. Food and Drug Admin.,*

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[22] "The term derives from the D.C. Circuit's decision in *Vaughn v. Rosen,* 484 F.3d 820 (D.C. Cir. 1973)." *Hamdan,* 797 F.3d at 769 n.4.

45 F.3d 1325, 1328 (9th Cir. 1995) ("The agency must disclose as much information as possible without thwarting the purpose of the exemption claimed."); *cf. Fiduccia v. U.S. Dep't of Justice,* 185 F.3d 1035, 1043 (9th Cir. 1999) (although, in some circumstances a *Vaughn* index may not be necessary because the agency submitted affidavits or other information sufficient to support withholding, where documents are withheld in their entirety, "the requester needs a *Vaughn index* of considerable specificity. . . .").

The purpose of the *Vaughn* index "is to 'afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Weiner,* 943 F.2d at 977-78 (also noting that the "index functions to restore the adversary process to some extent, and to permit more effective judicial review of the agency's decision."); *see also King v. U.S. Dep't of Justice,* 830 F.2d 210, 219 (D.C. Cir. 1987) (the *Vaughn* index enables "the District Court to make a rational decision whether the withheld material must be produced without actually viewing the documents themselves, as well as to produce a record that will render the District Court's decision capable of meaningful review on appeal.") (internal quotation marks and citation omitted). "'There is no fixed rule establishing what a *Vaughn* index must look like, and a district court has considerable latitude to determine its requisite form and detail in a particular case.'" *Hamdan,* 797 F.3d at 769 (quoting *ACLU v. CIA,* 710 F.3d 422, 432 (D.C. Cir. 2013)). Rather, a *Vaughn* index suffices if "the substantive adequacy of the disclosures . . . enable the requester to make an intelligent judgment whether to contest claims of nondisc[losure] and the court to decide them." *Fiduccia,* 185 F.3d at 1044.

To prevail on a motion for summary judgment, the agency must prove, by way of its *Vaughn* indices, that each document that falls within the class requested either has been produced, is unidentifiable, or is exempt from production under FOIA. *Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State,* 818 F.Supp. 1291, 1295 (N.D. Cal. 1992) (citing *Goland,* 607 F.2d at 352). "Agency affidavits that are sufficiently detailed are presumed to be made in good faith and may be taken at face

value." *Hamdan,* 797 F.3d at 779 (citation omitted).

Plaintiffs challenge the adequacy of the *Vaughn* indices provided by Defendant, arguing that Defendant fails to identify information withheld with sufficient specificity that would sufficiently justify withholding the information.[23]

It is undisputed that CBP's *Vaughn* index consists of 111 pages and discusses 80 different categories of records by providing the corresponding Bates' number, total number of pages, a document description, disposition (whether the item was withheld in full or in part), FOIA exemption asserted, and an explanation section setting out Defendant's reason(s) why the withheld material falls within the exemption claimed. (*See* Defendant's Opp. at 20; *see also* Suzuki Dec. at Exh. E (Doc. 39-1)). Additionally, Ms. Suzuki's declarations provide discussion of the exemptions claimed.

Plaintiffs contend that portions of CBP's *Vaughn* index are too vague to allow Plaintiffs to meaningfully contest withholdings or to "provide the court with a meaningful ability to evaluate their lawfulness[.]" (XMSJ at 21). According to Plaintiffs, "[t]his lack of context or tailoring makes it impossible to know what is being withheld, and the repetition of the same descriptions undercuts confidence that the government is accurately representing the missing information." (*Id.* at 21-22). To support their argument, Plaintiffs point to Defendant's use of "boilerplate descriptions" and "recycle[ing of] the same bulleted list of withheld materials throughout the CBP *Vaughn* index. . . . " (*Id.* at 22).

Plaintiffs first challenge what they characterize as "boilerplate descriptions, with no link to specific withheld material, for exemptions (b)(6), (b)(7)(c), (b)(7)(e)." (XMSJ at 22 (citing as examples Suzuki Dec., Exh. E at 62-65 (entry 43) and 84-88 (entry 63)).

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[23] Plaintiffs also initially challenged the "aggressive[] redact[ion]" of I-44 and I-213 forms, which essentially resulted in a "near total blackout of information" with no way to surmise the reason for the redaction from the explanation provided in the *Vaughn* index. (XMSJ at 20, 24-25). Defendant responds that a technical issue with the redaction software caused the redactions "to 'bleed,' obscuring some text that was not intended to be redacted." (Suzuki Supp. Dec. at ¶10). Defendant has remedied the problem and submitted the corrected version of the documents along with Ms. Suzuki's supplemental declaration. (Defendant's Opp. at 21).

Entry 43 pertains to Reports and Memorandum of investigations (Forms G-166, G-166C, G-166F) and DHS Record of Sworn Statement in Affidavit Form (Form I-215B) and consists of over 400 pages from which some of the information was "withheld in part." (Suzuki Dec., Exh. E at 62 (entry 43)). Entry 63 pertains to Significant Incident Reports consisting of over 1,000 pages from which information was withheld in part. (Suzuki Dec., Exh. E at 84).

Defendant is correct that, in general, courts have allowed agencies to employ category and coding systems to describe documents withheld under FOIA, as well as summarize volumes of materials rather than individual pages. (*See* Defendant's Opp. at 20 (citing *Citizens Comm'n on Human Rights,* 45 F.3d at 1328; *Judicial Watch, Inc. v. FDA,* 449 F3d 141, 147 (D.C. Cir. 2006); *Heeney v. FDA,* 1999 WL 35136489, *6 (C.D. Cal. Mar 16, 1999)). Moreover, additional information may be unnecessary where the requester is able "to figure out from context just what sort of information is being withheld." *Fiduccia,* 185 F.3d at 1043. However, even though "[n]o rule of law precludes the [agency] from treating common documents commonly[,]" *Judicial Watch, Inc.,* 449 F.3d at 147, the agency must "tailor the explanation to the specific document withheld[.]" *Weiner,* 943 F.2d at 978-79. *See e.g., Judicial Watch Inc.,* 449 F.3d at 147 (*Vaughn* index was sufficient where accompanying affidavit "linked the substance of each exemption to the documents' common elements."). Always, the focus must remain "on the functions served by the *Vaughn* index: to organize the withheld documents in a way that facilitates litigant challenges and court review of the agency's withholdings." *Judicial Watch Inc.,* 449 F.3d at 148 (citation omitted).

Defendant's decision to group together similar documents, like those at entries 43 and 63, is not improper in and of itself given the common purpose served by the documents in each respective category.[24] *See Judicial Watch, Inc.,* 449 F.3d at 148.

[24] Nonetheless, Plaintiffs point out that although the documents grouped together serve similar purposes, they do vary "in the actual events involved in Border Patrol operations at checkpoints and roving patrols[]" and the facts and circumstances are unique to each investigation at issue. (Plaintiffs' Reply at 18-19 (describing various topics covered in each record)).

Moreover, Defendant's blanket reliance on Exemptions b(6) and (b)(7)(C) to withhold a variety of identifying information is not improper as the type of information withheld can readily be determined from the context.[25] *See e.g. Fiduccia,* 185 F.3d at 1043. What is problematic are Defendant's attempts to identify exemptions based on Exemption (7)(E). In each entry at issue, Defendant states that: "The information withheld pursuant to Exemption (b)(7)(E) pertains to law enforcement techniques, procedures, and guidelines used by CBP in the course of immigration enforcement, such as:" followed by a bullet point list of various types of information running the gamut from procedures relating to performing a records check, to identification of circumstances in which Border Patrol partners with other agencies to guidelines for type and quantum of evidence sought to apprehend or pursue charges against a suspect. (Suzuki Dec., Exh. E. at 62-65 (listing 10 bullet points in addition to a narrative descriptions of other information withheld pursuant to Exemption 7(E); *id.* at 85-88 (listing 9 bullet points[26] in addition to a narrative description of information withheld pursuant to Exemption 7(E)). At entry 63, Defendant concludes the explanation by stating: "On most pages, the nature of the withheld information can be determined from the unredacted information that surrounds it." (*Id.* at 88; *see also id.* at 13-17 (entry 3) (same for 7,402 pages of records consisting of I-213 and I-44 forms)).

Plaintiffs contend that Defendant's *Vaughn* index leaves them "guessing twice: first to pick the right bullet point from Defendant's list, and then to hazard how to combine it with other unredacted information to arrive at an estimate of what the agency has withheld." (Plaintiffs' Reply at 17). Plaintiffs' argument is well-illustrated by the following example taken from one Form G-166C: "b6, b7C admitted that he knew that he was transporting narcotics, and even mentioned how strong in [sic] smelled inside the

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[25] This is not to say at this point that the information withheld in fact falls within the exemption claimed, as that issue is discussed *infra*.

[26] Entry 63 omitted "guidelines for the exercise of enforcement discretion not to apprehend or pursue charges against a suspect under certain circumstances", which was included in entry 43. (Suzuki Dec. Exh. E at 63).

vehicle. B6, b7C, b7E [redacted information goes on for more than one line of typed text]. (Suzuki Supp. Dec., Att. B at CBP00008931 (Doc. 56-4) attached to Defendant's Opp.). Another Form G-166C reflects: ". . . I noticed b7E [redaction consists of over one line of typed text]. . . I as b6, b7C, b7E yielding no anomalies or further results. (*Id.* at CBP00008933).

"The agency must disclose as much information as possible without thwarting the purpose of the exemption claimed." *Citizens Comm'n on Human Rights,* 45 F.3d at 1328. "Categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate." *King,* 830 F.2d at 224. As such, the court "'should not be required to speculate on the precise relationship between each exemption claim and the contents of the specific documents.'" *Yonemoto v. Dep't of Veterans Affairs,* 686 F.3d 681, 696 (9th Cir. 2011), *overruled on other grounds by Animal Legal Defense Funds,* 836 F.3d 987, (quoting *Weiner,* 943 F2d at 988). Where no effort has been "made to tailor the explanation to the specific document withheld[,]" the *Vaughn* index is insufficient. *See Weiner,* 943 F.2d at 978-79 (*Vaughn* index insufficient where agency's explanation indicated that the "information *may*. . ." contain certain details, but did not link specific information to the exemption) (emphasis in original); *King,* 830 F.2d at 219 (stating that the agency "must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply[]" and finding that *Vaughn* index at issue failed to meet this standard) (internal quotation marks and citation omitted).[27]

[27] Not all instances of Defendant's reliance on Exemption 7(E) are deficient. As Defendant points out, in some instances, Plaintiffs have been able to glean enough information to either waive objection to some of Defendant's claimed exemptions or to narrow their objections. (*See* Defendant's Opp. at 21). For example, redaction of event numbers is clear from the context and Defendant has explained its reason for the claimed exemption on that point. (*See* Suzuki Dec. Exh. E at 65). Plaintiffs also agree that in some instances, "CBP describes with some specificity its withholdings under Exemption 7(e). . . ." (XMSJ at 22 (citing Suzuki Dec., Exh. E at 92-95 (entry 65)). Plaintiffs succinctly summarize the situation: "The government is plainly capable of supplying specific descriptions of what it redacted and why–it just regularly decided not to do so." (*Id.* (footnote omitted)).

Defendant "must bear in mind that the purpose of the index is not merely to inform the requester of the agency's conclusion that a particular document is exempt from disclosure under one or more of the statutory exemptions, but to afford the requester an opportunity to intelligently advocate release of the withheld documents and to afford the court an opportunity to intelligently judge the contest." *Weiner,* 943 F.2d at 979. In those records where CBP has invoked exemption 7(E) because the information pertains to law enforcement techniques, procedures and guidelines "such as:" followed by a list of bullet points, the District Court should require Defendant to revise the *Vaughn* index and accompanying affidavits to tailor the explanation to the specific information withheld.

E. EXEMPTIONS

Despite FOIA's "mandate[] [of] broad disclosure", *Citizens Comm'n on Human Rights,* 45 F.3d at 1328, Congress recognized that "some information may legitimately be kept from the public." *Lahr,* 569 F.3d at 973. In this regard, the statute sets out "nine enumerated exemptions allowing the government to withhold documents or portions of documents." *Id.* (citing 5 U.S.C. § 552(b)(1)-(9)). "FOIA's 'strong presumption in favor of disclosure' means that an agency that invokes one of the statutory exemptions to justify the withholding of any requested documents or portions of documents bears the burden of demonstrating that the exemption properly applies to the documents." *Id.* (quoting *Ray*, 502 U.S. at 173). Additionally, "in light of FOIA's purpose of encouraging disclosure, [the Ninth Circuit has]. . . held that 'its exemptions are to be interpreted narrowly.'" *Id.* (quoting *Assembly of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir.1992)). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Hamdan,* 797 F.3d at 774 (internal quotation marks and citation omitted). Plaintiffs challenge Defendant's invocation of several exemptions as discussed below.

1. EXEMPTION 4: Z BACK SCATTER VAN

Exemption 4 protects against disclosure of "'trade secrets and commercial or financial information obtained from a person and privileged and confidential.'" *Watkins*

v. U.S. Bureau of Customs and Border Protection, 643 F.3d 1189, 1194 (9th Cir. 2011) (quoting 5 U.S.C. § 552(b)(4)). To invoke this exemption, Defendant must demonstrate that the information it seeks to protect is "'(1) commercial and financial information, (2) obtained from a person or by the government, (3) that is privileged or confidential.'" *Id.* (quoting *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1112 (9th Cir.1994), *overruled on other grounds by Animal Legal Defense Fund,* 836 F.3d 987). The Ninth Circuit has held explained that

> commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.' *GC Micro Corp*., 33 F.3d at 1112 (adopting the standard from *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C.Cir.1974)). . . .
>
> Information is "confidential" for the purposes of the "trade secrets" exemption where disclosure of that information could cause "substantial harm to the competitive position of the person from whom the information was obtained." *GC Micro Corp*., 33 F.3d at 1112–13 (9th Cir.1994) (citing *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C.Cir.1974)). The government need not show that releasing the documents would cause "actual competitive harm." *Id.* at 1113. Rather, the government need only show that there is (1) actual competition in the relevant market, and (2) a likelihood of substantial competitive injury if the information were released. *Id*.

Id.[28]

Defendant relies on Exemption 4 to support withholding the entire 219-page operator's manual for a Z Backscatter Van ("ZBV"), which is "a type of nonintrusive inspection technology[]" manufactured by "American Science & Technology

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[28] Plaintiffs explain that since the D.C. Circuit decided *National Parks & Conservation Ass'n,* which enunciated the test adopted by the Ninth Circuit, the D.C. Circuit has altered the test for information that has been submitted voluntarily. (XMSJ at 27 n.19 (citing *Critical Mass Energy Project v. NRC,* 975 F.2d 871, 879-80 (D.C. Cir. 1992)). According to Plaintiffs, "[t]he Ninth Circuit has not adopted this alteration. . . ." (*Id.*) However, because Ms. Suzuki states that the manual was provided pursuant to contract and not voluntarily submitted, this Court need not decide whether the Ninth Circuit would adopt the *Critical Mass* test. (*Id.*).

('AS&E')".[29] (MSJ at 14; *see also* XMSJ at 27). Defendant asserts the manual is protected confidential information and disclosing it would impair the government's ability to obtain necessary information in the future. (Suzuki Dec. at ¶¶52-53; *see also* Suzuki Supp. Dec. at ¶8 (the "Manual expressly states that it 'may not be reproduced displayed, modified or distributed' without 'express prior written permission' of AS&E.")). Defendant further contends that disclosure would cause substantial competitive harm to AS&E as competitors could use the information to improve their products or offer better prices in bidding for government contracts. (Suzuki Dec. at ¶¶52-53). Plaintiffs counter that Exemption 4 is inapplicable because the information at issue is publicly available.

"Although confidential commercial information is not subject to disclosure under Exemption 4, the exemption does not apply if identical information is otherwise in the public domain." *Inner City Press/Community on the Move v. Board of Governors of the Fed. Reserve Sys.,* 463 F.3d 239, 244 (D.C. Cir. 2006) (citations omitted); *see also Watkins,* 643 F.3d at 1196 (recognizing that "[w]hether information is already in the public domain, *i.e.,* waiver of an exemption, is a proposition that if true would give victory [to plaintiff] independent of whether Exemption 4 properly applies.") (internal quotation marks and citations omitted). "Indeed, the 'purpose of Exemption 4 is []to protect the confidentiality of information which is obtained by the Government . . . but which would customarily not be released to the public by the person from whom it was obtained.'" *Watkins,* 643 F.3d at 1196 (quoting *Herrick v. Garvey,* 298 F.3d 1184, 1193 (10th Cir. 2002)). In other words, "in some circumstances, the public availability of information renders the exemption inapplicable at the outset."[30] *Prison Legal News v.*

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[29] Documents cited by Plaintiffs suggest that the manufacturer is American Science & Engineering, which is consistent with the acronym used by Defendant.

[30] "[I]f the information is publicly available, one wonders, why is it burning up counsel fees to obtain it under FOIA? But the logic of FOIA compels the result: if identical information is truly public, then enforcement of an exemption cannot fulfill its obligation." *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy,* 169 F.3d 16, 19 (D.C. Cir. 1999) (citation omitted).

Executive Office for U.S. Attorneys, 628 F.3d 1243 (10th Cir. 2011); *see also Inner City Press,* 463 F.3d at 244 ("'if identical information is truly public, then enforcement of an exemption cannot fulfill its purposes.'") (quoting *Niagara,* 169 F.3d at 19). The information must be "freely available." *Reporters Comm'n Freedom of the Press,* 489 U.S. at 764.

On this issue, the party asserting that material is publicly available carries "the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Davis v. U.S. Dep't of Justice,* 968 F.2d 1276, 1279 (D.C. Cir. 1992); *see also Inner City Press,* 463 F.3d at 249. "The ultimate burden of persuasion, to be sure, remains with the government, but a party who asserts that material is publicly available carries the burden of *production* on that issue. . . . This is so because the task of proving the negative—that information has not been revealed—might require the government to undertake an exhaustive, potentially limitless search." *Davis,* 968 F.2d at 1279 (emphasis in original) (citations omitted).

To support their position, Plaintiffs cite a YouTube video, which appears to be posted by a private citizen, product brochures, U.S. patents, popular media, government agencies (NASA website), and the scientific literature.[31] (XMSJ at 28-29 nn. 21-26). Plaintiffs argue that, "at minimum . . . ." Defendant's reasons for withholding the manual requires greater specificity than provided here, "especially since the government bears the burden of segregating—and disclosing—information not covered by one of FOIA's exemptions." (*Id*. at 29 (citations omitted)).

Defendant counters that Plaintiffs fail to demonstrate that the "*same* manual at issue here" is publicly available. (Defendant's Opp. at 24). Defendant's point is well

[31] In undertaking this analysis, courts generally look to whether the government or the owner of the submitter of the document at issue, here AS&E, made the information public. *See e.g. Watkins,* 643 F.3d at 1196 (government); *Herrick,* 298 F.3d at 1194 (submitter or owner of the documents). Courts have also considered whether the disclosure was made by the same agency from which the information is being sought. *See e.g. Frugone v. CIA,* 169 F.3d 772, 774-75 (D.C. Cir. 1999); *Valfells v. CIA,* 717 F.Supp.2d 110, 117 (D.D.C. 2010). In any event, because as discussed below, Plaintiffs do not carry their burden on this issue as to any of the materials they cite, the Court has not distinguished among the sources.

taken that Plaintiff has not shown that the specific information they cite is likely to be included in the manual at issue. For example, there is, for the most part[32], no showing that the information cited addresses the specific model of the ZBV at issue here. Rather it is as if Plaintiffs have various bits of information, most if not all of which is generalized, about the vans and technology but very little that they can show is specific to the vans used by CBP. The evidence on which Plaintiffs rely does not create a genuine issue of fact that the information in the manual is publicly available.

"While a showing of public availability renders the FOIA exemptions inapplicable, the converse does not follow. If a requester is unable to establish that the material he seeks is in the public domain, the government, to continue withholding the information, still must prove that it falls within a statutory exemption." *Davis,* 968 F.2d at 1280. Defendant asserts that disclosure of the manual falls within the exemption because it would: (1) impair the government's ability to obtain necessary information in the future; and (2) cause substantial harm to the vendor, AS&E. (MSJ at 14).

As to the first point, Defendant contends that disclosure of the manual would "likely 'impair the Government's ability to obtain necessary information in the future'".

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[32] An article form *Popular Mechanics,* entitled "The Border Patrol's Go-To Gadgets" contains quotes about the ZBV from a Border Patrol agent who was interviewed for the article. In pertinent part, he stated: "'[T]hat machine can cover up to about a 15-mile radius. . . . Now you have three agents out here, where before you had to have 15.'" The articles sets out the following descriptions: "After agents search a car, a white van pulls up alongside. The Z Backscatter Van looks unassuming, but this $750,000 piece of equipment carries a mobile Z backscatter X-ray machine mounted on a Ford F550 chassis. 'We have to clear the vehicle of any smuggled humans, first,' one operator told Popular Mechanics—although the X-rays are not harmful to humans during one exposure, the Border Patrol does not scan people. Organic materials such as hidden drugs, even if hidden beneath false floors or in barrels, show up as bright shapes on a screen in the cabin. . . . Inside the Z Backscatter Van, a monitor displays a map of the area, flecked with green dots where the radar detects movement. An operator tells [Popular Mechanics] that based on the location and size of spots [sic] potential trouble, he can radio other agents to investigate and then either transmit GPS coordinates to responding agents or guide them in by radio." http://www.popularmechanics.com/military/a9612/the-border-patrols-go-to-gadgets-16082896/. It is arguable that some concepts, including the 15-mile radius of coverage, may be discussed in the manual at issue given that the information in this article comes directly from Border Patrol, but it does not reasonably follow that this one detail vitiates application of Exemption 4 to the entire manual, especially when the precise details and circumstances about when the 15-mile radius may come into play are not specific.

(Defendant's Opp. at 23 (quoting *GC Micro Corp.*, 33 F3d at 1112). Defendant stresses that under this consideration, which protects the government's "'compelling interest in ensuring that the information it receives is of the highest quality and reliability . . . ', companies might be 'less forthcoming' if their submissions would be publicly disclosed. . . ." (*Id.* (quoting *Judicial Watch, Inc. v. Export-Import Bank*, 108 F.Supp. 2d 19, 30 (D.C. Cir. 2000)). According to Defendant, "CBP's concern that disclosure would have a 'chilling effect on [its] ability to obtain necessary information in the future' because vendors might 'reconsider setting forth innovative products' falls squarely within that interest." (*Id.* (citing Suzuki Dec. at ¶52[33])).

According to Plaintiffs, "[t]he argument that AS&E will risk lucrative government contracts by withholding technical information simply is not credible[]" in light of the fact that 49% of AS&E's sales in 2016 were to the U.S. government or it contractors: (Plaintiffs' Reply at 14 (citing XMSJ at 27-28 & n.20); *see also* XMSJ at 28 n.20 (AS&E's 2016 Form 10K reflects "that the Company is heavily dependent upon sales to agencies of the U.S. government . . . .") (internal quotation marks omitted)).

The record is clear that AS&E did not voluntarily disclose the manual, but did so because the government required it to. AS&E has made efforts to protect against widespread disclosure of the manual. (*See* Suzuki Supp. Dec. at ¶8). It may well be that at this time AS&E presently does a large amount of business with the government, but that does not necessarily mean that it would not cease doing such business if its confidential information was jeopardized by disclosure in violation of contract. On the instant record, it logically and plausibly follows that disclosure of the manual would impair the government's ability to obtain necessary information in the future. *Hamdan*, 797 F.3d at 774 ("an agency's justification for invoking a FOIA exemption is sufficient if

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[33] According to Ms. Suzuki, "when the withheld information is paired with publicly available information concerning U.S. government contract awards, the withheld information would enable a competitor to determine what AS&E offers to CBP at what price. Disclosure of this information would also have a chilling effect on CBP's ability to obtain necessary information in the future as vendors may reconsider setting forth innovative products in fear that the cost of doing business will be too high." (Suzuki Dec. at ¶52).

it appears logical or plausible.") (internal quotation marks and citation omitted).

Alternatively, even if Defendant had been unable to satisfy the first test, Defendant satisfies the alternative test, that disclosure would result in substantial harm to AS&E.

> Competitive harm analysis "is ... limited to harm flowing from the affirmative use of proprietary information by competitors. Competitive harm should not be taken to mean simply any injury to competitive position...." *Pub. Citizen Health Research Group* [*v. Food and Drug Admin.*], 704 F.2d [1280,] 1291–92 & n. 30 [D.C. Cir. 1983] (quotation omitted; emphasis in original). Although "the court need not conduct a sophisticated economic analysis of the likely effects of disclosure[,] ... [c]onclusory and generalized allegations of substantial competitive harm ... are unacceptable and cannot support an agency's decision to withhold requested documents." *Id*. at 1291 (internal citation omitted).

Watkins, 643 F.3d at 1195. Other than arguing that some of the information in the manual is freely available as discussed and rejected above, Plaintiffs have not disputed Ms. Suzuki's statements that the manual provides "a detailed explanation of every aspect of AS&E's ZBV, including a comprehensive overview of its capabilities and characteristics that are unique to AS&E's ZBV." (Suzuki Dec. at ¶52). Competitors could certainly use the information to improve their product designs to better compete against AS&E on future contracts. *See Hamdan,* 797 F.3d at 774 ("an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible.") (internal quotation marks and citation omitted). No material issue of fact is in dispute on this point, and summary judgment should be entered in favor of Defendant to the extent that the operator's manual for the ZBV is exempt from disclosure under Exemption 4.[34] Nonetheless, as with other detection methods used by the government such as intoxilyzers and even canines, information about the reliability of the ZBV such as records showing it is inspected and certified for use, calibration records, and records indicating success/failure rates should still be subject to disclosure if properly requested.

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[34] Because the information at issue falls within Exemption 4, the Court need not address whether Exemption 7(E) applies. Should exemption 7(E) come into play upon the District Court's consideration of objections, the record at this point is not sufficient to make a determination on that issue. For example, Defendant has not explained how the manual was "compiled for law enforcement purposes," 5 U.S.C. § 552(b)(7)(E).

2. EXEMPTIONS 6 AND 7(C) WITH REGARD TO CITIZENSHIP, NATIONALITY, COMPLEXION, AND NARRATIVES

"Plaintiffs are particularly interested in responsive documents that can help the public understand whether Border Patrol operations north of the Mexican border primarily focus on general law enforcement rather than national security goals. [They] also requested these records to help the public understand whether Latino citizens and legal residents are disproportionately burdened by Border Patrol roving patrol and checkpoint operations." (XMSJ at 42 (citations omitted)). According to Plaintiffs, [i]nformation about the citizenship, nationality, and complexion of seized persons is routinely collected in Forms 213 and I-44 and offers a rare resource for these analyses. But the Government has redacted these fields[]" on the grounds of privacy protections afforded by Exemptions (b)(6) and (b)(7)(C).[35] (*Id.*). Plaintiffs argue that the information sought is not personally identifying on its own, nor can it "realistically be used in combination with other information on the forms to link the records to individual identities." (*Id.* at 31). Plaintiffs also point out that "DHS has disclosed precisely this information in response to near-identical FOIA requests[]" at issue in a California FOIA case where the plaintiffs seek similar information with regard to Border Patrol operations in California. (*Id.* (citing XMSJ, Exh. D at ¶¶7-8).

Plaintiffs concede that within their Requests, they stated, in pertinent part: "'Should any responsive record contain the *personal identifying information* of any third party, Requesters *ask that the agencies redact* that information. This Request seeks

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[35] Exemption 6 allows the government to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

Exemption 7(C) allows the government to withhold investigatory records compiled for law enforcement purposes which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

Of the two exemptions, Exemption 7(C) sets out a lower threshold for the government to meet. *Lahr,* 569 F.3d at 974. Defendant asserts that here "the proper test is supplied not by Exemption 6, but by the more expansive Exemption 7(C)." (Defendant's Opp. at 26). Accordingly, the Court does not consider the issue under Exemption 6. *See e.g. Lahr,* 569 F.3d at 974 ("as the government claimed both exemptions [6 and 7(C)] for each disputed redaction, it need meet only the lower threshold of Exemption 7(C).").

aggregate stop data and records relevant to Border Patrol . . . operations, *not* any personal or identifying information about any specific individual.'" (Defendant's Opp. at 25 (quoting Complaint, Exh. A at 5, Exh. B at 5) (emphasis added by Defendant); *see also* XMSJ at 31 n. 28 (arguing that while Plaintiffs requested DHS to redact identifying information of third parties to protect their privacy interests, they did not "concede the applicability or propriety of any particular FOIA exemption claimed with respect to DHS's redactions of names of government officials."). Defendant contends that "the agency cannot have been expected to surmise that Plaintiffs intended for some personal identifiers, but not others, to be released—and then to guess which ones." (Defendant's Opp. at 26).

While the parties agree that "personally identifying" information should be redacted, they disagree about what type of information is deemed to be "identifying." (*See* Plaintiffs' Reply at 9 & nn.5-6 (citing standards Plaintiffs contends are employed in the federal education and health privacy contexts)). The matter remains that Defendant relies on Exemption 7(C) to redact information and the question is whether Defendant has satisfied its burden of establishing that the exemption applies to the redactions at issue.

To evaluate the propriety of redactions made pursuant to Exemption 7(C), the court must "balance the privacy interests of the individuals protected by the nondisclosure against the public interest at stake." *Rosenfeld*, 57 F.3d at 811 (citing *Reporters Comm. for Freedom of the Press,* 489 U.S. at 762. "The sole cognizable public interest for FOIA is the interest 'to open agency action to the light of public scrutiny,' to inform the citizenry 'about what their government is up to.'" *Id.* (quoting *Reporters Comm.*, 489 U.S. at 772, 773). In addition to demonstrating a significant public interest, (*i.e.,* "an interest more specific than having the information for its own sake…"), the requester must also show that "the information is likely to advance that interest." *Favish,* 541 U.S. at 172; *see also Lane v. Dep't of Interior,* 523 F.3d 1128, 1137 (the usual rule that a citizen need not offer a reason for requesting the information is inapplicable to

analysis under Exemption 7(C)). Defendant does not contest the public interest in the information sought. As stated by Plaintiffs, disclosure of the requested information would likely shed light on the conduct of Border Patrol activities at checkpoints and on roving patrol and would likely assist the public with understanding whether Border Patrol operations north of the Mexican border primarily focus on general law enforcement rather than national security goals and whether Latino citizens and legal residents are disproportionality burdened by roving patrol and checkpoint operations. (*See* XMSJ at 30).

The primary question in the instant case is whether the information falls within Exemption 7(C) in the first place given that the government has not shown how release of citizenship, nationality and complexion without use of names, addresses, birth dates, gender, social security numbers, or other combination of information that would make the subject unique or vulnerable to identification, could logically or plausibly "be reasonably expected to constitute an unwarranted invasion of personal privacy." *See Hamdan,* 797 F.3d at 774 ("Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible.") (internal quotation marks and citations omitted); *cf.* XMSJ at 33 n.29 (citing Department of Health and Human Services guidance document under HIPPA "explaining that information is at risk of re-identification when subjects' information is distinguishable from other people who may be described in the data." (emphasis omitted)). Moreover, even if the information falls within Exemption 7(C), the Ninth Circuit has upheld a district court's determination that the test weighed in favor of disclosure of a police officer's first name based upon the finding "that the information was not likely to identify the party, in part because it would be impracticable to conduct an identity search more than twenty-five years later." *Rosenfeld,* 57 F.3d at 813 (finding "[t]he district court accommodated, not disregarded, the subjects' privacy."). As Plaintiffs point out, the cases relied upon by Defendant essentially involve disputes over redaction of names along with other potentially identifying information, which is not the case here. (Plaintiffs' Reply at 10-11). While

less time has transpired since the records were made in this case in comparison to the twenty-five-year time lapse in *Rosenfeld*, the impracticality of determining the identity of persons from reference to their citizenship, nationality and/or complexion referenced in the records at issue, especially in light of the fact that other identifying information will remain redacted, is as attenuated in this case at is was in *Rosenfeld.* Consequently, Defendant's reliance on Exemption 7(C) to redact information as to citizenship, nationality and complexion with regard to the I-213 and I-44 Forms, and the narrative portion of these forms as well as Form I-831 and formal complaints against Border Patrol agents (*see* XMSJ at 33), is not supported by the record. On the instant record, Plaintiffs are entitled to summary judgment on this issue.

Plaintiffs also seek the canine names referenced in the records at issue. Defendant redacted canine names and other identifying information because "[e]ach canine is assigned to a particular agent. . . . Which canines are assigned to which agents is often known to agency personnel, and sometimes to members of the public. Thus, revealing canine names in these records would effectively reveal the agents' names, disclosing their personnel records to the public." (Suzuki Supp. Dec. at ¶5). The risk of disclosure of agents' personnel records or other privacy concerns that Defendant's attempt to invoke is too attenuated to uphold redaction of canine names.[36]

3. EXEMPTION 7(E) WITH REGARD TO NARRATIVES

In addition to relying on Exemptions 6 and 7(C), Defendant has also cited Exemption 7(E)[37] to support redaction of portions of the narratives recorded in I-44, 213,

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[36] In the criminal law context, names of law enforcement officers and the canines they handle are often reported in published case law. *See e.g. Florida v. Harris,* _ U.S. _, 122 S.Ct. 1050 (2013); *Thomas,* 726 F.3d at 1086. Moreover, criminal defendants routinely receive such information through disclosure. (*See* Plaintiffs' XMSJ at 35 n.31 & Exh. C).

[37] Exemption 7(E) applies to

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement 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 risk circumvention of the

and I-831 Forms and formal complaints against Border Patrol agents. (XMSJ at 33). Although Plaintiffs agree that names and other "direct identifiers" are properly redacted, they otherwise challenge the redactions to the extent that they involve "investigations and the events leading up to them" because this information does "not pose any realistic risk of inference about the identity of third parties." (*Id.* at 34-35). Plaintiffs contend that the redactions prevent members of the public from learning "what basis Border Patrol had for making a stop." (*Id.* at 33; *see also id.* at 34 (the redactions "diminish the value that these records have for illustrating how suspicion is built up and for enabling public oversight.")). Consequently, Plaintiffs challenge Defendant's redactions of information that Defendant contends would reveal:

- "'techniques for identifying and investigating violations of law, including . . . vehicle characteristics and motorist behaviors that may be indicative of illegal activity'"
- "'questioning techniques used during traffic stops'"
- known smuggling routes
- "'techniques, procedures, and guidelines for the use of canines[]'"[38]

(XMSJ at 35 (quoting Suzuki Dec. at ¶69); *see also id.* at 37).

To support the redactions, Ms. Suzuki explains, in pertinent part:

Disclosure of this information would risk circumvention of the law. For

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law.

5 U.S.C. § 552(b)(7)(E). In Ninth Circuit, "the government must show that disclosure risks 'circumvention of the law' for law enforcement 'guidelines' but not 'techniques' or 'procedures.'" *Muchnick v. Dep't of Homeland Sec.* 2016 WL 7101507,*1 (N.D. Cal. Dec. 6, 2016) (citing *Hamdan*, 797 F.3d at 778).

Where guidelines are at issue, the government must demonstrate "logically how the release of [the requested] information might create a risk of circumvention." *Mayer Brown LLP v. IRS,* 562 F.3d 1190, 1194 (D.C. Cir. 2009). A showing of an actual or certain risk is not required, rather the statute is satisfied with a showing of the chance of a reasonably expected risk. *Blackwell,* 646 F.3d at 42.

[38] For purposes of this discussion, these records are referred to as "canine-related records".

> example, if details about Border Patrol's investigative techniques —such as knowledge of smuggling routes or concealment tactics—became known, smugglers would change their behavior to avoid detection. Similarly, if specific procedures and questioning techniques used during traffic stops became known, smugglers would have a script of what to expect, and could adjust their behavior accordingly. . . .These techniques, procedures, and guidelines cannot be further described by CBP without identifying and revealing that which it seeks to protect.

(Suzuki Dec. at ¶69).

"Exemption 7(E) only exempts investigative techniques not generally known to the public." *Hamdan,* 797 F.3d at 777. Further, in general, the government is not required to disclose all details concerning law enforcement techniques simply because some aspect of it is known to the public. *Bishop v. U.S. Dep't of Homeland Security,* 45 F.Supp.3d 380, 391 (S.D.N.Y. 2014) (collecting cases); *Barnard v. Dep't of Homeland Sec,* 598 F.Supp.2d 1, 23 (D.D.C. 2009).

For purposes of the instant motions, the Ninth Circuit's applications of the 7(E) analysis are best illustrated by its decisions in *Rosenfeld* and *Hamdan*. In *Rosenfeld,* the Ninth Circuit held that "a pretext phone call was a generally known law enforcement technique[]" and went on to reject the government's argument "that the technique at issue involved the specific *application* of a pretext phone call, because it used 'the identity of a particular individual, Mario Savio, as the pretext.'" *Hamdan,* 797 F.3d at 777 (quoting *Rosenfeld,* 57 F.3d at 815) (emphasis added). The *Rosenfeld* court reasoned that accepting the government's argument "would allow anything to be withheld under Exemption 7(E) because any specific application of a known technique would be covered." *Id*. In contrast, the court in *Hamdan*, upheld the government's reliance on Exemption 7(E) even though

> credit searches and surveillance [which were used] are publicly known law enforcement techniques. . ., [because] "[t]he affidavits say that the records reveal techniques that, if known, could enable criminals to educate themselves about law enforcement methods used to locate and apprehend persons. This implies a specific *means* of conducting surveillance and credit searches rather than an application. By contrast, withholding, for example, records under Exemption 7(E) by claiming that they reveal the

> satellite surveillance of a particular place would be an *application* of a known technique under *Rosenfeld*. . . . We conclude that the affidavits, which state that further detail would compromise the very techniques the government is trying to keep secret, are sufficient to satisfy the FBI's burden. *Cf. Bowen v. FDA*, 925 F.2d 1225, 1229 (9th Cir. 1991) (holding that additional details of law enforcement techniques were exempt from disclosure under 7(E) even where some information about those techniques had been disclosed.).

797 F.3d. at 777-78. In *Hamdan*, the government's affidavits also indicated that one document contained "'a stratagem, the details of which if revealed would preclude its use in future cases.'" *Id.* at 777.

Generally, the information Plaintiffs seek is most often at issue in motions to suppress in the criminal law context. While courts have authority to seal proceedings in the right circumstances, there can be no dispute that publicly available case law from the district court level through the appellate courts and the U.S. Supreme Court discuss at length the various factors giving rise to reasonable suspicion or probable cause in cases involving Border Patrol. *See United States v. Arvizu*, 534 U.S. 266, 273 (2002) (in such instances the courts "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing."). For example, the Supreme Court has:

> listed factors which officers might permissibly take into account in deciding whether reasonable suspicion exists to stop a car. Those factors include: (1) the characteristics of the area in which they encounter a vehicle; (2) the vehicle's proximity to the border; (3) patterns of traffic on the particular road and information about previous illegal border crossings in the area; (4) whether a certain kind of car is frequently used to transport contraband or concealed aliens; (5) the driver's "erratic behavior or obvious attempts to evade officers;" and (6) a heavily loaded car or an unusual number of passengers. [*United States v. Brignoni-Ponce*,] 422 U.S. [473] at 884–85, 95 S.Ct. 2574 [(1975)]. With time, however, "[s]ubsequent interpretations of these factors have created a highly inconsistent body of law," and we have given them varying weight in varying contexts. *United States v. Hernandez–Alvarado*, 891 F.2d 1414, 1416 (9th Cir. 1989).

United States v. Montero-Camargo, 208 F.3d 1122, 1130 & n.12 (9th Cir. 2000) ("sometimes conduct that may be entirely innocuous when viewed in isolation may

properly be considered in arriving at a determination that reasonable suspicion exists."). The Supreme Court has also recognized the reality that "reasonable suspicion determinations are 'not readily, or even usefully, reduced to a neat set of legal rules' or, for that matter, single determinative factors." *Id.* at 1130 n.12 (quoting *United States v. Sokolow,* 490 U.S. 1, 7 (1989)). Nonetheless, it cannot be disputed that factors considered in the reasonable suspicion calculus are generally known.

As Plaintiffs point out, the redacted narratives in this case "describe particular instantiations, or applications, of known techniques for observing and profiling drivers in the immigration context (much like the specific name used for pretextual calls in *Rosenfeld*)." (XMSJ at 37). The narratives at issue merely reflect what the agents observed and what happened. For example, one I-44 Form reflects in part:

> At approximately 3:30 PM, we observed a white Chevrolet Tahoe traveling north on Sierrita Mountain Road. As the vehicle passed our unmarked service vehicle we could see that the [redacted text citing Exemption 7(E)] We have consistently patrolled this area [over a lone of redacted text citing Exemption 7(E)] As we turned around to further investigate and follow the vehicle northbound on Sierrita Mountain Road, [about two lines of redacted text citing Exemption 7(E)]. In our experience this behavior is common in drivers involved in illicit activity as they are concerned with law enforcement detection and apprehension rather than safe driving."

(XMSJ, Exh. B (Doc. 47-1) at CBP0000085)[39]).

Another narrative reflects in part: "Once removing the glove box . . . I noticed [over a line of redacted text citing Exemption 7(E)]. Agent [name redacted citing b(6), b(7)(C)] removed the air bag cover exposing the air bag [which led to the discovery of small bricks of marijuana]." (Suzuki Supp. Dec., Att. B, (Doc. 56-4) at CBP00008933 (Form G-166C (Memorandum of Investigation).

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[39] Plaintiffs quote a slightly different version of this document in their XMSJ:

> As the vehicle passed our unmarked service vehicle we could see that the rear window was entirely broken out. We also noticed that the Chevy Tahoe was bearing a [redacted]. We have consistently patrolled this area and have become familiar with most of the local commuter traffic [redacted] As we turned around to further investigate and follow the vehicle northbound on Sierrita Mountain Road, the driver [redacted].

(Plaintiffs' XMSJ at 34 (indicating that Plaintiffs are quoting XMSJ, Exh. B at CBP0000085)).

Because Defendant improperly grouped together its reasons supporting application of Exemption 7(E) for many documents, including those above, without specifically tailoring the particular redactions to a specific explanation, it is difficult to know what reason Defendant posits for the redactions in the cited examples. As discussed above, Defendant's *Vaughn* index is insufficient for this reason. Additionally, at this point, Defendant has made no showing how or why redacted information, like the examples cited here, reveals an unknown technique or procedure that would support redaction under Exemption 7(E). Instead, on the instant record, Defendant's affidavits and arguments, like those raised by the government in *Rosenfeld,* do not justify invocation of Exemption 7(E) to protect purported "'techniques for identifying and investigating violations of law, including . . . vehicle characteristics and motorist behaviors that may be indicative of illegal activity'" (Suzuki Dec. at ¶69), which in essence are more specific applications of known techniques.

Likewise, the Court agrees with Plaintiffs that Defendant has not established that questions asked during traffic stops as reflected in the narratives are protected by Exemption 7(E). The records generally appear to include unredacted instances of questions asked by agents and responses received. Within the briefing, Defendant has pointed to no specific instance justifying application of Exemption 7(E) to questions asked during traffic stops.

As to redaction of references to "known smuggling routes", Defendant has not made clear how this information falls within Exemption 7(E). In light of *Rosenfeld* and *Hamdan,* analysis under Exemption 7(E) supports Plaintiffs' position that the information is not exempt. See *e.g. Hamdan,* 797 F.3d. at 777-78 (surveillance of a particular place would not qualify for exemption under 7(E)). Many of the narratives already include unredacted names of roads where the activity at issue is observed. Further, the reality is, as Plaintiffs point out, that "[s]ince seized smugglers and illegal entrants described in the[] records will generally have access to unredacted . . . forms [at issue], smuggling rings and career criminals will already know what the government has redacted." (XMSJ

at 38).

With regard to canine-related information, as discussed above, it was improper for Defendant not to search for this information in reliance on a blanket exemption under 7(E). While some of this information may fall within the exemption, some may not and the burden is on Defendant to establish both that the exemption applies and that there is no disclosable information that can be segregated. Accordingly, before the Court determines whether Exemption 7(E) applies, Defendant should be required to submit a *Vaughn* Index and accompanying affidavits with regard to the canine-related records, providing individualized, tailored explanations as to why the records fall within the exemption. *See Weiner*, 943 F.2d at 978-79. Because Defendant has not provided evidence demonstrating that the canine-related records were properly withheld, Defendant is not entitled to summary judgment with regard to those records.

F. OIG REPORTS

Plaintiffs object to Defendant's failure to disclose "any documents related to complaints that OIG decided not to accept for investigation." (XMSJ at 38 (objection raised under the caption: "DHS Has Improperly Withheld OIG Reports In Their Entirety")). Defendant counters that: "'For all potentially responsive complaints'—that is, those [OIG] . . investigated, and those it did not—'OIG released case summary reports.'" (Defendant's Opp. at 28 (quoting Marwaha Dec. at ¶10) (emphasis omitted)). "Those reports 'contain details of the complainant, the employee at issue, a narrative description of the allegations, the category of complaint (e.g., 'rude or discourteous conduct'), the date and location of the incident, the date of the complaint, and the disposition of the complaint." (*Id.* (quoting Marwaha Dec. at ¶10)). Although "OIG also released the 'final report of investigation for the subset of complaints that it investigated, [Marwaha Dec. at ¶10] . . ., there is obviously no such report for complaints that it did not investigate." (*Id.*). In their Reply brief, Plaintiffs do not challenge Defendant's position; instead, they make no mention of this issue. Defendant's evidence is sufficient to show that Plaintiffs received responsive information with regard to complaints that OIG

decided not to investigate. Nor is there a showing that OIG reports with regard to complaints that were not investigated were withheld in their entirety, given that no such reports exist. Defendant is entitled to summary judgment on this issue.

G. NON-RESPONSIVE INFORMATION

Plaintiffs objected to CRCL's redaction of information the agency deemed non-responsive to Plaintiffs' FOIA Requests. (XMSJ at 39). Although Defendant contends that it is not legally required to provide non-response materials under FOIA, in response to Plaintiffs' objection, CRCL processed the material it previously redacted as nonresponsive "and made a supplemental release to Plaintiffs." (Holzer Supp. Dec. at 5; *see also id.* at ¶¶3-4 (Doc. 56-7) attached to Defendant's Response/Reply). The issue is moot.

III. CONCLUSION

Plaintiffs request that the Court order that Defendant produce the improperly withheld materials, or in the alternative, order Defendant to produce a revised *Vaughn* index and supporting affidavits. (Plaintiffs' Reply at 20).

In general, where questions exist as to the adequacy of the government's search, *Vaughn* index, or invocation of an exemption (including issues of segregability), courts may request a supplemental declaration, a revised *Vaughn* index, or an *in camera* review of the document. *See Hamdan,* 797 F.3d at 780 n. 9; *Kowack v. U.S. Forest Serv.*, 766 F.3d 1130, 1137 (9th Cir. 2014); *Weiner,* 943 F.2d at 979 (noting that because "[*i*]n *camera* review does not permit effective advocacy. . . , resort to *in camera* review is appropriate only after the government has submitted as detailed public affidavits and testimony as possible.") (internal quotation marks and citation omitted). As discussed above with regard to each area of dispute, the appropriate remedy at this point is to require Defendant to either produce the documents or submit a revised *Vaughn* index with accompanying affidavits to shed further light on the issues in question. [40]

[40] In their opening brief, Plaintiffs alternatively sought leave to conduct discovery, but they did not extend that request in their Reply. Discovery is not usually permitted in a FOIA case and whether to permit discovery is a within the district court's discretion.

IV. RECOMMENDATION

For the foregoing reasons, the Magistrate Judge recommends that the District Court: (1) grant in part and deny in part Defendant's Motion for Summary Judgment (Doc. 39) as discussed within the body of this Report and Recommendation; and (2) grant in part and deny in part Plaintiffs' Cross-Motion for Summary Judgment (Doc. 47) as discussed within the body of this Report and Recommendation.

Pursuant to 28 U.S.C. §636(b) and Rule 72(b)(2) of the Federal Rules of Civil Procedure and LRCiv 7.2(e), Rules of Practice of the U.S. District Court for the District of Arizona, any party may serve and file written objections within **FOURTEEN (14) DAYS** after being served with a copy of this Report and Recommendation. A party may respond to another party's objections within **FOURTEEN (14) DAYS** after being served with a copy. Fed.R.Civ.P. 72(b)(2). No replies to objections shall be filed unless leave is granted from the District Court to do so. If objections are filed, the parties should use the following case number: **CV 14-2052-TUC-RM.**

Failure to file timely objections to any factual or legal determination of the Magistrate Judge may be deemed a waiver of the party's right to review.

Dated this 26th day of January, 2017.

Bernardo P. Velasco
United States Magistrate Judge

See Lawyers' Comm. for Civil Rights of San Francisco v. U.S. Dep't of Treasury, 534 F.Supp.2d 1126, 1131-32 (N.D. Cal 2008). Discovery "is 'sparingly granted,' and is most often limited 'to investigating the scope of the agency search for responsive documents, the agency's indexing procedures, and the like.'" *Id.* (quoting *Jones v. FBI*, 41 F.3d 238, 242 (6th Cir. 1994)). Discovery may also be warranted where the plaintiff makes a sufficient showing that the agency has acted in bad faith. *Id.* On the instant record, there has been no showing of bad faith so as to impugn the declarations submitted. Instead, Plaintiffs have made no showing how discovery is necessary at this point.