UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,	)	Civil Action No: 14-1217 (RBW)
Plaintiff,	)	ECF
v.	)	
U.S. CUSTOMS AND BORDER PROTECTION,	)	
Defendant.	)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, Defendant U.S. Customs and Border Protection (CBP), a component of the United States Department of Homeland Security, by and through undersigned counsel, respectfully moves the Court to enter summary judgment in its favor in this action brought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended, because there is no genuine issue as to any material fact, and Defendant is entitled to judgment as a matter of law. In support of this motion, CBP respectfully refers the Court to the accompanying memorandum of points and authorities and statement of material facts as to which there is no genuine issue. A proposed Order consistent with this motion is attached hereto.

Respectfully submitted,

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DEFENDANT'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE

Pursuant to Local Civil Rule 7(h)(1), Defendant U.S. Customs and Border Protection (CBP), hereby submits the following Statement of Material Facts as to Which There Is No Genuine Dispute in Support of Defendant's Motion for Summary Judgment in this action brought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended.

PLAINTIFF'S FOIA REQUEST TO CBP

1. Plaintiff submitted a FOIA request to CBP dated April 8, 2014, for four categories of information, primarily regarding CBP's Analytical Framework for Intelligence (AFI). See Exhibit A.

2. AFI is a CBP system which "enhances DHS's ability to identify, apprehend, and prosecute individuals who pose a potential law enforcement or security risk; and it aids in the enforcement of customs and immigration laws, and other laws enforced by DHS at the border." *See* 77 Fed. Reg. 33753, 33753 (June 7, 2012). AFI also "improves the efficiency and

effectiveness of CBP's research and analysis process by providing a platform for the research, collaboration, approval, and publication of finished intelligence products." *Id.*

3. CBP did not provide a response to Plaintiff's FOIA request to CBP dated April 8, 2014, prior to the filing of this litigation on July 18, 2014. Burroughs Decl. at ¶ 7.

CBP'S RESPONSE TO PLAINTIFF'S REQUEST

4. CBP responded to Plaintiff's FOIA request on February 5, 2015. Burroughs Decl. at ¶ 8. CBP conducted searches in response to the request and a total of 358 pages of responsive records were located. *Id.* Of those pages, 89 were released in full, 267 were partially released, and two pages were withheld in full. *Id.* The Privacy Compliance Report requested by Plaintiff was also withheld in full (34 pages). *Id.* Of the pages that were partially released or withheld in full, information was withheld pursuant to FOIA Exemptions 3, 4, 5, 6, 7(C) and 7(E), 5 U.S.C. § 552(b)(3), (b)(4), (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). *See* Exhibit B.

5. CBP has released, in whole or in part, 356 pages of records to Plaintiff, withholding certain information pursuant to FOIA exemptions (b)(3), (b)(4), (b)(6), (b)(7)(C), and (b)(7)(E). Burroughs Decl. at ¶ 15. A two page record and the Privacy Compliance Report requested by Plaintiff were withheld in full pursuant to FOIA Exemption 5. *Id.* The Privacy Compliance Report is no longer being withheld. *Id.*

SEGREGABILITY

6. Plaintiff has been provided with all responsive records pursuant to its request. Burroughs Decl. at ¶ 36. Where appropriate, CBP asserted FOIA exemptions in the released records. *Id.* All information withheld is exempt from disclosure pursuant to a FOIA exemption or is not reasonably segregable because it is so intertwined with protected material that segregation is not possible or its release would have revealed the underlying protected material. *Id.* CBP

reviewed the documents determined to be responsive, line-by-line, to identify information exempt from disclosure or for which a discretionary waiver of exemption could apply. *Id.* CBP has determined that all reasonably segregable portions of the relevant records have been released to the Plaintiff in this matter and that any further release of the exempted materials could reasonably lead to the identification of the individuals or other items that are properly protected by the exemptions asserted. *Id.*

Respectfully submitted,

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Acting United States Attorney, D.C. Bar #471489

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Chief, Civil Division

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This case arises under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended, and pertains to the request of plaintiff Electronic Privacy Information Center for records maintained by Defendant U.S. Customs and Border Protection (CBP). As set forth in the accompanying *Vaughn* declaration, CBP has conducted a reasonable search of agency records, has disclosed all non-exempt responsive records, and has not improperly withheld any responsive records. Thus, there is no genuine issue as to any material fact, and defendant is entitled to judgment as a matter of law.

STATEMENT OF FACTS

Defendant hereby incorporates the Statement of Material Facts Not In Genuine Dispute (SOF), and the declarations and exhibits referenced therein, filed contemporaneously with this Memorandum.

ARGUMENT

I. LEGAL STANDARDS.

Summary judgment is appropriate when the pleadings and evidence "show[] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). The party seeking summary judgment must demonstrate the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 322. A genuine issue of material fact is one that "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. Once the moving party has met its burden, the nonmoving party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Id.*

In a FOIA action, a district court has jurisdiction only when an agency has improperly withheld agency records. 5 U.S.C. § 552(a)(4)(B). FOIA, however, does not allow the public to have unfettered access to government files. *McCutchen v. United States Dep't of Health and Human Services*, 30 F.3d 183, 184 (D.C. Cir. 1994). Although disclosure is the dominant objective of FOIA, there are several exemptions to the statute's disclosure requirements. *Department of Defense v. FLRA*, 510 U.S. 487, 494 (1994). The FOIA requires that an agency release all records responsive to a properly submitted request unless such records are protected from disclosure by one or more of the Act's nine exemptions. 5 U.S.C. § 552(b); *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150-51 (1989). To protect materials from disclosure, the agency must show that they come within one of the FOIA exemptions. *Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 904 (D.C. Cir. 1999).

Once the court determines that an agency has released all non-exempt material, it has no further judicial function to perform under the FOIA and the FOIA claim is moot. *Perry v. Block,* 684 F.2d 121, 125 (D.C. Cir. 1982); *Muhammad v. U.S. Customs & Border Prot.*, 559 F. Supp. 2d 5, 7-8 (D.D.C. 2008). Accordingly, summary judgment is appropriate in a FOIA action, such as this one, where the pleadings, together with the declarations, demonstrate that there are no material facts in dispute and the requested information has been produced or is exempted from disclosure, and the agency, as the moving party, is entitled to judgment as a matter of law. Fed. R Civ. P. 56(a); *Students Against Genocide v. Department of State*, 257 F.3d 828, 833 (D.C. Cir. 2001); *Weisberg v. United States Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980); *Fischer v. U.S. Dep't of Justice*, 596 F.Supp.2d 34, 42 (D.D.C. 2009) ("summary judgment may be granted to the government if 'the agency proves that it has fully discharged its obligations under the FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester'") (citation omitted).

The "vast majority" of FOIA cases are decided on motions for summary judgment. *See Brayton v. Office of U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011); *Media Research Ctr. v. U.S. Dep't of Justice*, 818 F. Supp. 2d 131, 136 (D.D.C. 2011) ("FOIA cases typically and appropriately are decided on motions for summary judgment."); *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Labor*, 478 F. Supp. 2d 77, 80 (D.D.C. 2007) ("*CREW*"). To meet its burden, a defendant may rely on reasonably detailed and non-conclusory declarations. *See McGehee v. C.I.A.*, 697 F.2d 1095, 1102 (D.C. Cir. 1983); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert denied*, 415 U.S. 977 (1974); *Media Research Ctr.*, 818 F. Supp. 2d at 137. "[T]he Court may award summary judgment solely on the basis of information provided by the department or agency in declarations when the declarations describe 'the

documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *CREW*, 478 F. Supp. 2d at 80 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)).

Here, defendant submits the declaration of Sabrina Burroughs, who is the Director of the Freedom of Information Act Division, Privacy and Diversity Office, Office of the Commissioner, U.S. Customs and Border Protection. As such, she is the official responsible for the overall supervision of the processing of FOIA requests submitted to CBP. Prior to joining CBP, Burroughs served as the Director of Disclosure Policy and FOIA Program Development for the Department of Homeland Security (DHS). Burroughs Decl. at ¶ 1. She has been Director of CBP's FOIA Division in Washington, D.C., since May 20, 2013. *Id.*

Finally, "an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Media Research Ctr.*, 818 F. Supp. 2d at 137 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)). As demonstrated below, CBP has satisfied its obligation to conduct adequate searches for records responsive to plaintiff's FOIA request, has disclosed all non-exempt responsive records, and has sufficiently justified its withholding of exempt information pursuant to FOIA exemptions 3, 4, 5, 6, 7(C), 7(D) and 7(E), 5 U.S.C. § 552(b)(3), (b)(4), (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). Thus, there is no genuine issue as to any material fact, and defendant is entitled to judgment as a matter of law.

II. CBP CONDUCTED AN ADEQUATE SEARCH OF ITS RECORDS SYSTEMS.

In responding to a FOIA request, an agency must conduct a reasonable search for responsive records. *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Weisberg*

v. United States Dep't of Justice, 705 F.2d 1344, 1352 (D.C. Cir. 1983). An agency is not required to search every record system, but need only search those systems in which it believes responsive records are likely to be located. *Oglesby*, 920 F.2d at 68. "An agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Fischer*, 596 F.Supp.2d at 42 (quoting *Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (internal citation and quotation marks omitted)).

Thus, an agency may conduct an adequate search under FOIA without locating any responsive records. Furthermore, even when a requested document indisputably exists or once existed, summary judgment will not be defeated by an unsuccessful search for the document so long as the search was diligent and reasonable. *See Nation Magazine, Washington Bureau v. U.S. Customs Service*, 71 F.3d 885, 892 n.7 (D.C. Cir. 1995). Thus, "[t]he search need only be reasonable; it does not have to be exhaustive." *Miller v. United States Dep't of State*, 779 F.2d 1378, 1383 (8th Cir. 1985) (citing *Nat'l Cable Television Ass'n v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973)).

The burden rests with the agency to establish that it has "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby*, 920 F.2d at 68; *see also SafeCard Services v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). "An agency may prove the reasonableness of its search through affidavits of responsible agency officials so long as the affidavits are relatively detailed, non-conclusory and submitted in good faith." *Miller*, 779 F.2d at 1383; *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980). Although the agency has the burden of proof on the adequacy of its search, the "affidavits submitted by an agency are

'accorded a presumption of good faith,'" *Carney v. United States Dep't of Justice*, 19 F.3d 807, 812 (2d Cir.), *cert. denied*, 513 U.S. 823 (1994) (quoting *SafeCard Services*, 926 F.2d at 1200).

Thus, once the agency has met its burden regarding the adequacy of its search, the burden shifts to the requester to rebut the evidence by a showing of bad faith on the part of the agency. *Miller*, 779 F.2d at 1383. A requester may not rebut agency affidavits with purely speculative allegations. *See Carney*, 19 F.3d at 813; *SafeCard Services*, 926 F.2d at 1200; *Maynard v. CIA*, 986 F.2d 547, 559-60 (1st Cir. 1993). As discussed below, CBP met the reasonableness standard in conducting its search for records requested by Plaintiff and is therefore entitled to summary judgment.

A. CBP's Search for Records Responsive to Plaintiff's Requests and Disclosures under FOIA.

Part one of Plaintiff's request asked for "[a]ll AFI Training modules, request forms and similar final guidance documents that are in, or will be used in, the operation of the program." *See* Exhibit A. CBP's FOIA Division referred this portion of the request to the Targeting and Analysis Systems Program Directorate (TASPD) within CBP's Office of Information and Technology. Burroughs Decl. at ¶ 9. As TASPD is responsible for the maintenance of the AFI system, it maintains the associated training for use of the system and is the office within CBP that is reasonably likely to maintain all information responsive to this portion of the request. *Id.* As TASPD's search for responsive documents encompassed both part one and part three of Plaintiff's request, a description of TASPD's search is included in the description of part three below to address both portions of Plaintiff's request. *Id.* Fifty-one responsive documents, including AFI training modules and other documents regarding AFI and AFI training, were located in response to part one of the request. *Id.*

Part two of Plaintiff's request broadly asked for "[a]ny records, memos, opinions, communications, or other documents that discuss potential or actual sources of information not currently held in DHS databases, or potential or actual uses of information not currently held in DHS databases." *See* Exhibit A. A FOIA request is unduly broad if an agency is unable to locate the record with a reasonable amount of effort. An agency "need not honor a request that requires 'an unreasonably burdensome search.'" *American Fed. Of Gov't Employees, Local 2782 v. United States Dep't of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990) (quoting *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1978). Under FOIA and agency regulations, the initial determination whether a particular request is valid is made solely by the Director of the Office of Disclosure or his or her delegate. *Dale v. IRS*, 238 F. Supp. 2d 99, 103 (D.D.C. 2002). Accordingly, agencies are under no obligation to release records that have not been reasonably described. The linchpin inquiry is whether "the agency is able to determine precisely what records are being requested." *Tax Analysts v. IRS*, 117 F.3d 607, 610 (D.C. Cir. 1997) (quoting *Yeager v. DEA*, 678 F.2d 315, 326 (D.C. Cir. 1982). That evaluation turns on whether a "description of a requested document would be sufficient [to] enable . . . 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." *Truitt v. Dep't of State*, 897 F.2d 540, 545 n. 36 (D.C. Cir. 1990) (internal citation and quotation marks omitted); *see also Freedom Watch, INC. v. Dep't of State*, 925 F. Supp. 2d 55, 61 (D.D.C. 2013). Broad sweeping requests lacking specificity are not sufficient. *Dale*, 238 F. Supp. 2d at 104 (quoting *American Fed. Of Gov't Employees v. Dep't of Commerce*, 632 F. Supp. 1272, 1277 (D.D.C. 1986) *aff'd AFGE*, 907 F.2d at 209); *see also Freedom Watch*, 925 F. Supp. 2d at 61 (internal citations omitted).

CBP's FOIA Division reviewed part two of Plaintiff's FOIA request and correctly determined that it was overly broad and unduly burdensome as it requested all documents discussing potential or actual sources and uses of information not currently held in DHS databases. Burroughs Decl. at ¶ 10. Search terms to locate records in response to this request, as submitted by Plaintiff, could not be formulated given the breadth of the request, the large number of DHS databases, and the immeasurable number of potential or actual sources and uses of information not currently held in DHS databases. *Id.* A comprehensive search in response to such an overly broad request for information potentially would have involved a large number of CBP offices and employees combing line by line through voluminous CBP records regarding all DHS databases for any discussion of such potential or actual sources or uses of information not currently held in DHS databases with little likelihood of locating responsive records. *Id.* The FOIA Office therefore concluded that such a search would have been clearly unreasonably and overly burdensome. *Id.*

The FOIA Office nevertheless considered that the remainder of Plaintiff's request (parts one, three and four) focused largely on AFI and referred this portion of Plaintiff's request to appropriate CBP subject matter experts, i.e., individuals with knowledge of the AFI program, to determine whether any potentially responsive information could be reasonably located. Burroughs Decl. at ¶ 11. These experts reviewed records contained in the files relating to AFI and located two documents not otherwise deemed responsive to the other requests: a meeting minutes document, which was provided in part; and a two page document regarding maps, which was withheld in full under 5 U.S.C. § 552(b)(5) as a pre-decisional and deliberative draft. *Id.* The meeting minutes document appeared to be responsive as it discussed whether to include certain information and functionality within AFI. *Id.* The maps document appeared to be responsive as it

addressed potential sources of information in AFI. *Id.* The experts' review of the two documents did not suggest that additional records might be located in other locations within the agency and did not conduct a record-by-record review of agency records because the agency had determined that such a search was unreasonable and unduly burdensome. *Id.*

Part three of Plaintiff's request asked for "[a]ny records, contracts, or other communications with commercial data aggregators regarding the AFI program." *See* Exhibit A. CBP's FOIA Division referred this portion of Plaintiff's request to the Procurement Directorate within CBP's Office of Administration, as this office would be the office within CBP to maintain contracts and related records regarding AFI. Burroughs Decl. at ¶ 12. The Procurement Directorate searched for documents regarding AFI using "AFI" as a search term, but the documents located were determined not to be responsive as, upon further review, they were not related to commercial data aggregators. *Id.* TASPD also searched for records responsive to this portion of the request, as TASPD is responsible for the maintenance of the AFI system. *Id.* Nine contract documents determined to be responsive were located and provided in part in response to this portion of Plaintiff's request. *Id.*

In response to parts one and three of the request, TASPD searched all AFI contracts, all program documentation related to acquisition decisions (to include documentation related to privacy threshold analyses, privacy impact assessments, and the systems security plan that identifies system connections), all training documents maintained by the program, CBP's internal network, TASPD's and CBP's intranet websites, and e-mail accounts. Burroughs Decl. at ¶ 13. Keywords used included "AFI training," "AFI," "Analytical Framework," "commercial data aggregator," "commercial data," "commercial," "source," "Lexis," "data aggregator," and "aggregator." *Id.*

Part four of Plaintiff's request asked for "[t]he Privacy Compliance Report initiated in August of 2013." *See* Exhibit A. The requested Privacy Compliance Report was withheld in full pursuant to 5 U.S.C. § 552(b)(5) as it was a draft and therefore deliberative and pre-decisional. Burroughs Decl. at ¶ 14. As explained further below, this document is no longer being withheld as it has been finalized and published on the DHS website. *Id.*

B. Sufficiency of the Agency's *Vaughn* Declarations.

Summary judgment in FOIA cases, as stated, may be awarded "based solely on the information provided in [agency] affidavits or declarations when the affidavits or declaration describe 'the justifications for non-disclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *Fischer*, 596 F.Supp.2d at 42 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). Typically, the agency's declarations or affidavits are referred to as a *Vaughn* index, after the case of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). The purpose of a *Vaughn* index is "to permit adequate adversary testing of the agency's claimed right to an exemption." *NTEU v. Customs*, 802 F.2d 525, 527 (D.C. Cir. 1986) (citing *Mead Data Central v. United States Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977), and *Vaughn*, 484 F.2d at 828). Thus, the index must contain "an adequate description of the records" and "a plain statement of the exemptions relied upon to withhold each record." *NTEU*, 802 F.2d at 527 n.9. An agency may therefore prove the adequacy of its search through a reasonably detailed declaration. *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982).

In accordance with *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), Ms. Burroughs has prepared a declaration to support defendant's motion for summary judgment. The declaration

provides the Court and plaintiff with an explanation of the procedures used to search for, review, and process the records responsive to plaintiff's FOIA request and of CBP's justification for withholding records in full or in part pursuant to FOIA Exemptions 3, 4, 5, 6, 7(C), and 7(E), 5 U.S.C. §§ 552 (b)(3), (b)(4), (b)(5), (b)(6), (b)(7)(C) and (b)(7)(E). *Id.*

The Burroughs declaration also demonstrates that CBP carefully reviewed responsive records, and properly withheld information subject to FOIA exemptions. The declaration demonstrates that all material withheld by CBP is exempt from disclosure pursuant to the cited FOIA exemptions, or is so intertwined with protected material that segregation is not possible without revealing the underlying protected material. *Id.* Thus, the *Vaughn* declaration is "adequate to inform Plaintiff of the nature of the information withheld and to permit the Court to determine the applicability of each exemption claimed." *See Fischer*, 596 F.Supp.2d at 43-44. Specifically, Judge Huvelle ruled that:

> The D.C. Circuit has approved the use of such coded indices. *See Keys v. U.S. Dep't of Justice*, 830 F.2d 337, 349-50 (D.C. Cir. 1987). The Hardy declarations also discuss in detail the types of information that were redacted pursuant to each exemption. . . . Accordingly, defendant's index is sufficient.

Id. at 44. Any more specificity would result in disclosure of the very information withheld." *Id*. The Court should therefore find that the declaration is sufficient under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

The Burroughs declaration therefore establishes that CBP has made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested, and therefore has conducted a search of all locations that are likely to yield documents responsive to Plaintiff's FOIA request. All responsive documents located have been released, or to the extent information has been withheld under FOIA exemptions, are described in the Burroughs declaration. Thus, CBP's search for records was

adequate. See *Nation Magazine*, 71 F.3d at 892 n.7; *Miller*, 779 F.2d at 1383 ("the search need only be reasonable; it does not have to be exhaustive.") (citing *Nat'l Cable Television Ass'n v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973)).

III. CBP PROPERLY APPLIED FOIA EXEMPTIONS 3, 4, 5, 6, 7(C), and 7(E).

The *Vaughn* declaration, as stated, provides the Court and Plaintiff with an explanation of the procedures used to search for, review, and process the records responsive to Plaintiff's FOIA request, and of CBP's justification for withholding records in full or in part pursuant to FOIA Exemptions 3, 4, 5, 6, 7(C) and 7(E). Because no non-exempt responsive records have been improperly withheld from Plaintiff, summary judgment should be entered in favor of Defendant CBP.

Exemption 3

Section 552(b)(3) of Title 5 of the U.S. Code exempts from disclosure matters that are "specifically exempted from disclosure by statute" if that statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." The sole issue for decision "is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Morley v. CIA*, 508 F.3d 1108, 1126 (D.C. Cir. 2007).

In this case, Exemption 3 was applied to taxpayer identification numbers appearing in the contract related documents located in response to Plaintiff's request. Burroughs Decl. at ¶ 17. Release of the taxpayer identification numbers is prohibited by 26 U.S.C. § 6103, which prohibits the release of tax returns and return information, including the taxpayer's identifying number, by officers or employees of the United States. *See id.* Thus, CBP employed, in conjunction with Exemption 3, a qualifying non-disclosure statute under 26 U.S.C. § 6103(a),

which mandates that tax return information be held confidential subject to a number of strictly construed exemptions. *See Church of Scientology v. IRS*, 484 U.S. 9, 10 (1987); *Lehrfeld v. Richardson*, 132 F.3d 1463, 1465 (D.C Cir. 1998); *Tax Analysts v. IRS*, 117 F.3d 607, 611 (D.C. Cir.1997);*Western Center for Journalism v. IRS*, 166 F. Supp. 2d 1, 14-15 (D.D.C. 2000). Return information includes:

> a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, or is being examined, or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition or offense.

26 U.S.C. § 6103(b)(2)(A). Because Section 6103's prohibitions apply here, CBP may not release to the public a third party's tax return information. *See* 26 U.S.C. § 6103(a).

Exemption 4

Section 552(b)(4) of Title 5 of the U.S. Code exempts from disclosure matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Commercial or financial information obtained from a person involuntarily "is 'confidential' for purposes of the exemption if disclosure [would either] ... impair the Government's ability to obtain necessary information in the future; or ... cause substantial harm to the competitive position of the person from whom the information was obtained." *Canadian Commercial Corp. v. Department of the Air Force*, 514 F.3d 37, 39 (D.C. Cir. 2008) (quoting *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C.Cir.1974)); *see also Critical Mass Energy Project v. NRC*, 975 F.2d 871, 880 (D.C.Cir.1992) (en banc) (adhering to *National Parks* with regard to commercial or financial information involuntarily submitted to the

Government). In *Canadian Commercial,* the Court of Appeals noted that it has "long held the Trade Secrets Act, 18 U.S.C. § 1905, a criminal statute that prohibits Government personnel from disclosing several types of confidential information unless 'authorized by law,' is "at least co-extensive with ... Exemption 4 of FOIA." 514 F.3d at 39 (quoting *CNA Fin. Corp. v. Donovan,* 830 F.2d 1132, 1151 (D.C.Cir.1987)). "The upshot is that, unless another statute or a regulation authorizes disclosure of the information, the Trade Secrets Act requires each agency to withhold any information it may withhold under Exemption 4 of the FOIA." *Id.* (citing *Bartholdi Cable Co., Inc. v. FCC,* 114 F.3d 274, 281 (D.C.Cir.1997)).

In *Canadian Commercial,* the Court of Appeals affirmed that "[c]onstituent or line-item pricing information in a Government contract falls within Exemption 4 of the FOIA if its disclosure would "impair the government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* (quoting *Nat'l Parks,* 498 F.2d at 770). In this case, consistent with Circuit precedent, CBP applied Exemption 4 to line-item pricing information. Burroughs Decl. at ¶ 19. Line-item pricing information is the pricing breakdown per descriptive line-item included on purchase orders or contracts. *Id.* Line-item pricing information is non-public commercial information. *Id.* The agency determined that disclosure of this information would inappropriately disclose the vendor's competitive pricing structure and strategy. *Id.* Exemption 4 was also properly applied to taxpayer identification numbers, in addition to Exemption 3, as release of this information could cause significant harm to the company and could be used for fraudulent purposes if released to the public. *See id.*

Exemption 5

Section 552(b)(5) of Title 5 of the U.S. Code exempts from disclosure matters that are "inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." In this case, two documents were withheld under exemption 5 based upon the deliberative process privilege that is incorporated into exemption 5. Burroughs Decl. at ¶ 20. In addition, a portion of a meeting minutes document was withheld pursuant to exemption 5. *Id.*

Exemption 5 exempts documents that would not ordinarily be available to an agency's opponent in civil discovery and incorporates all evidentiary privileges that would be available in discovery. *See United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984); *FTC v. Grolier, Inc.*, 462 U.S. 19, 26 (1983); *Martin v. Office of Special Counsel, Merit Systems Protection Board*, 819 F.2d 1181 (D.C. Cir. 1987). Thus, Exemption 5 protects from disclosure documents that "fall within the ambit of a privilege" such that they would not be "routinely or normally" disclosed in civil discovery. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). An agency may therefore invoke traditional civil discovery privileges, including the attorney-client privilege, attorney work-product privilege, and the executive deliberative process privilege, to justify the withholding of documents that are responsive to a FOIA request. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

The deliberative process privilege is incorporated into FOIA Exemption 5. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). This privilege protects the "quality of agency decisions." *Id.* The content or nature of the document is the focus of the inquiry into the privilege as opposed to the manner in which the exemption is raised in a particular situation. *See Dow Jones & Co., Inc. v. Dep't of Justice*, 917 F.2d 571, 575 (D.C. Cir. 1990). The policy underlying

this privilege is to encourage open, frank discussions of policy matters between government employees, consultants and other officials, to protect against premature disclosure of proposed policies before they become final, and to protect against public confusion by disclosing reasons and rationales that were not in fact the ultimate grounds for the agency's action. *See, e.g.*, *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

In order for a record to be protected by the deliberative process privilege, it must be: (1) an inter-agency or intra-agency document, and (2) pre-decisional and deliberative. *See Klamath*, 532 U.S. at 8-9. Records are predecisional if they are "generated before the adoption of an agency policy" and deliberative if they "reflect[] the give-and-take of the consultative process." *See Coastal States*, 617 F.2d at 866. "Drafts" and "briefing materials" are therefore similar to advisory opinions, recommendations, and deliberations, and are generally exempt from disclosure under the deliberative process privilege. *Coastal States Gas Corp.*, 617 F.2d at 866 ("The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency."); *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)) (The deliberative process privilege covers documents "reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated."); *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C.Cir.1974) (memorandum summarizing testimony prepared for agency official before that official renders final judgment).

Thus, CBP correctly understands the general purpose of this exemption and the underlying privilege as to prevent injury to the quality of agency decisions. *See* Burroughs Decl.

at ¶ 21. In the instant case, exemption 5 was initially applied to protect two draft documents, a two page document regarding maps and the Privacy Compliance Report requested by Plaintiff, which had not been finalized when FOIA Division's search for this document was conducted. *Id.* These documents were therefore determined to be deliberative and pre-decisional. *Id.* In the course of preparing this declaration, however, CBP discovered that DHS had finalized and issued the Privacy Compliance Report regarding AFI (published on December 19, 2014). *Id.* It is a public document, available at http://www.dhs.gov/publication/privacy-compliance-review-analytical-framework-intelligence. As such, it is no longer being withheld as a draft pursuant to exemption 5. *Id.*

The two page map document, however, continues to be a deliberative and pre-decisional draft, which is still being withheld pursuant to exemption 5. Burroughs Decl. at ¶ 22. Release of the two page draft map document withheld pursuant to exemption 5 would be harmful as the document would reveal the thought and decision-making processes of the drafters and the individuals responsible for editing the document and may not reflect the agency's final decisions. *Id.* The withheld map document is clearly a draft as it includes edits to the text, indicating that certain text was being deleted and added to the document. *Id.* Such information was properly withheld as pre-decisional and deliberative pursuant to exemption 5. *Id.*

In addition, a portion of a meeting minutes document was also withheld pursuant to exemption 5 as the portions of the document asked whether certain information and functionality should be included within AFI. *Id.* Release of the text withheld pursuant to exemption 5 in the meeting minutes document would reveal the deliberations of those at the meeting regarding a decision that was not made. *Id.* Release of this information would be harmful to the deliberative process as it would have a chilling effect on future internal discussions and the record keeping of

those discussions. *Id.* Exemption 5 protects not merely documents, but also the integrity of the deliberative process itself where the exposure of that process would result in harm. The document is therefore pre-decisional and deliberative, and the draft information has been properly withheld pursuant to FOIA Exemption 5. *Coastal States Gas Corp.*, 617 F.2d at 866.

Exemption 6

Exemption 6 of FOIA protects "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). The term "similar files" is broadly construed and includes "Government records on an individual which can be identified as applying to that individual." *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982); *Lepelletier v. Fed. Deposit Ins. Corp.*, 164 F.3d 37, 47 (D.C. Cir. 1999) ("The Supreme Court has interpreted the phrase 'similar files' to include all information that applies to a particular individual."); *Govt. Accountability Project v. U.S. Dep't of State*, 699 F. Supp. 2d 97, 105-06 (D.D.C. 2010). The Supreme Court has also emphasized that "both the common law and the literal understanding of privacy encompass the individual's control of information concerning his or her person." *United States Dep't of Justice v. Reporters Committee For Freedom of Press*, 489 U.S. 749, 763 (1989).

The Supreme Court has found that "[i]ncorporated in the 'clearly unwarranted' language is the requirement for ... [a] 'balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information.'" *Lepelletier*, 164 F.3d at 46 (citing *United States Dep't of Defense v. FLRA*, 964 F.2d 26, 29 (D.C. Cir. 1992) (quoting *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976)). In determining how to balance the private and public interests involved, the Supreme Court has sharply limited the notion of "public interest" under the FOIA: "[T]he only

relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *Lepelletier*, 164 F.3d at 47 (quoting *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994)) (alterations in original); *Beck v. Dep't of Justice*, 997 F.2d 1489, 1492 (D.C. Cir. 1993) (quoting *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

Thus, information that does not directly reveal the operation or activities of the federal government "falls outside the ambit of the public interest that the FOIA was enacted to serve." *Reporters*, 489 U.S. at 775; *see also Beck*, 997 F.2d at 1492. Further, "something, even a modest privacy interest, outweighs nothing every time." *National Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989); *but see Lepelletier*, 164 F.3d at 48 (in extraordinary circumstance where the individuals whose privacy the government seeks to protect have a "clear interest" in release of the requested information, the balancing under Exemption 6 must include consideration of that interest). No such extraordinary circumstances are present here.

CBP has properly determined that the redacted documents contained information exempted from disclosure under exemption 6, because the privacy interests in that information outweigh the public interest in its disclosure. Burroughs Decl. at ¶ 23.[1] Specifically, in this case, exemption 6 has been applied to phone numbers and e-mail addresses for government and vendor employees, names of government and vendor employees, signatures of government and vendor employees, and personally identifiable information and other identifying details of third party individuals. *Id.* at ¶ 24.

[1] In *Fischer*, because the Court determined that the FBI properly withheld information under FOIA Exemption 7(C), the Court did "not address defendant's claim that the information was also properly withheld under Exemption 6." 596 F. Supp. 2d at 47 n.17. Although the Court's reasoning applies as well to the information withheld in this case under these exemptions, Defendant addresses both exemptions in this motion.

Exemption 6 has been applied to such information because its release would constitute a clearly unwarranted invasion of privacy. *Id.* at ¶ 25. Government employees, including CBP law enforcement officers, and vendor employees have a protectable privacy interest in their identities that would be threatened by disclosure. *Id.* Similarly, government and vendor employees have a protectable privacy interest in their phone numbers, e-mail addresses, and personal signatures that would also be threatened by disclosure. *Id.* Release of this information would not shed light on the actions of CBP and there is no public interest in the disclosure of this information. *Id.* In addition, the redacted names were not of high-ranking government officials. *Id.* Accordingly, the individual's right to privacy outweighs whatever public interest, if any, might exist in knowing this information. *Id.*

Exemption 6 has also been applied to the personally identifiable information (such as names) and other identifying details of third party individuals because release of this information would constitute a clearly unwarranted invasion of privacy. *Id.* at ¶ 25. Third party individuals have a protectable privacy interest in their identities and personally identifiable information that would be threatened by disclosure. *Id.* Release of this information would not shed light on the actions of CBP and there is no public interest in the disclosure of this information. *Id.* Accordingly, the individual's right to privacy outweighs whatever public interest, if any, might exist in knowing the information. *Id.*

Exemption 7(C)

Section 552(b)(7) of Title 5 of the U.S. Code exempts from disclosure certain records or information that are "compiled for law enforcement purposes." The records at issue in this case were compiled for law enforcement purposes in that the information is created and used by CBP in its law enforcement mission to secure the border of the United States. *Id.* at ¶ 27. Section

552(b)(7)(C) of Title 5 of the U.S. Code exempts from disclosure law enforcement records or information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

The Supreme Court affirmed the broad scope of Exemption 7(C) in *National Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004). Accordingly, once the agency has demonstrated that the records were compiled for law enforcement purposes, the Court must next consider whether the release of information withheld "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). This determination necessitates a balancing of the individual's right to privacy against the public's right of access to information in government files. *See, e.g., Reporters Committee*, 489 U.S. at 776-780; *Oguaju v. United States*, 288 F.3d 448 (D.C. Cir. 2002), *vacated* 124 S.Ct. 1903 (2004), *reinstated*, 378 F.3d 1115 (D.C. Cir.), *modified*, 386 F.3d 273 (D.C. Cir. 2004); *Beck v. Department of Justice*, 997 F.2d 1489, 1491 (D.C. Cir. 1993). The plaintiff bears the burden of establishing that the "public interest in disclosure is both significant and compelling in order to overcome legitimate privacy interests." *Perrone v. FBI*, 908 F. Supp. 24, 26 (D.D.C. 1995) (citing *Senate of Puerto Rico v. Department of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987)). *Accord SafeCard Services*, 926 F.2d at 1206 (public interest in disclosure of third party identities is "insubstantial").

Consequently, in order to trigger the balancing of public interests against private interests, a FOIA requester must (1) "show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake," and (2) "show the information is likely to advance that interest." *Boyd v. Criminal Division of United States Dep't of Justice*, 475 F.3d 381, 366, (D.C. Cir. 2007) (citing *Favish*, 541 U.S. at 172). It

is the "interest of the general public, and not that of the private litigant" that the Court considers in this analysis. *Ditlow v. Schultz*, 517 F.2d 166, 171-72 (D.C. Cir. 1975).

Finally, only where the requester can produce meaningful evidence – "more than a bare suspicion" – which would cause a reasonable person to believe that the government had engaged in impropriety should the Court even consider balancing the privacy interests against the public interest in disclosure. *Favish*, 124 S. Ct. at 1581. Plaintiff here cannot allege any such impropriety.

Exemption 7(C) has been held to protect the identity of a number of categories of individuals identified in law enforcement records. First, the names of law enforcement officers (and support staff) who work on criminal investigations have traditionally been protected against release by Exemption 7(C). *Davis v. U.S. Dept. of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992); *Lesar v. United States Dep't of Justice*, 636 F.2d 472, 487-488 (D.C. Cir. 1980); *Fischer*, 596 F.Supp.2d at 46-47; *Ray v. FBI*, 441 F. Supp. 2d 27, 34-35 (D.D.C. 2006); *Truesdale v. U.S. Dept. of Justice*, No. 03-1332, 2005 WL 3294004, at *6 (D.D.C. Dec. 5, 2005). Releasing their identities and information pertaining to these individuals would place each of these persons in such a position that they may suffer undue invasions of privacy, harassment and humiliation from disclosure of their identities in a law enforcement investigatory file. *See Keys*, 510 F.Supp.2d at 128 ("One who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives."). *See also* Burroughs Decl. at ¶ 28.

Second, disclosure of the identities of third-party individuals who were of investigative interest to law enforcement because of their criminal activities is also protected. Not only could these third parties face reputational harm if their identities were disclosed, but they could also face acts of reprisal. *Russell v. FBI*, No. 03-0611, 2004 WL 5574164, at *6 (D.D.C. Jan. 9, 2004); *Blanton v. Dep't of Justice*, 63 F.Supp.2d 35, 46 (D.D.C. 1999). Moreover, the "[d]isclosure of [the third parties'] identities would not shed light on the FBI's performance o[f] its statutory duties to enforce the law." *Russell*, 2004 WL 5574164, at *6.

Third, "[t]he names and identities of individuals of investigatory interest to law enforcement agencies and those merely mentioned in law enforcement files have been consistently protected from disclosure." *See Russell*, 2004 WL 5574164 at *5; *Coleman v. FBI*, 13 F.Supp.2d. 75, 80 (D.D.C. 1998) ("The categorical withholding of any law enforcement records that identify third parties has been repeatedly upheld") (citations omitted).

Fourth, individuals who provide information to law enforcement authorities, like the law enforcement personnel themselves, have protectable privacy interests in their anonymity. *Computer Professionals for Social Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 904 (D.C. Cir. 1996); *Nation Magazine*, 71 F.3d at 893; *Lesar*, 636 F.2d at 487-88; *Fischer*, 596 F.Supp.2d at 47-48; *Farese v. United States Dep't of Justice*, 683 F. Supp. 273, 275 (D.D.C. 1987). Accordingly, the privacy interests of third parties mentioned in law enforcement files are "substantial," while "[t]he public interest in disclosure [of third-party identities] is not just less substantial, it is insubstantial." *SafeCard Services*, 926 F.2d at 1205; *Ray*, 441 F. Supp. 2d at 35 ("Exemption 7(C) recognizes that the stigma of being associated with a law enforcement investigation affords broad privacy rights to those who are connected in any way with such an investigation . . . ."). Our court of appeals has held "categorically" that "unless access to names

and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure." *SafeCard Services*, 926 F.2d at 1206.

Thus, CBP correctly applied exemption 7(C) to phone numbers and e-mail addresses for government employees, names of government employees, and personally identifiable information and other identifying details of third party individuals because release of this information could reasonably be expected to constitute an unwarranted invasion of personal privacy. Burroughs Decl. at ¶ 29. Exemption 7(C), as stated, is designed to protect, among other things, law enforcement personnel from harassment and annoyance in the conduct of their official duties and in their private lives, which could conceivably result from the public disclosure of their identity. The privacy interest in the identity of an individual in the redacted documents outweighs any public interest in disclosure of that information.

The records provided in response to Plaintiff's request were compiled for law enforcement purposes in that the information contained within these records is created and used by CBP in its mission to secure the borders of the United States. *Id*. The holders of the redacted government phone numbers and e-mail addresses and the named government employees have a protectable privacy interest in their identities that would be compromised by the release of this information. *Id.* Similarly, the third party individuals whose personally identifiable information and other identifying details appear in the records have a protectable privacy interest in their identities that would be compromised by the release of this information. *Id.* Release of this information would not shed light on the actions of CBP, and there is no public interest in the disclosure of this information. *Id.* In addition, the redacted names were not of high-ranking

government officials. *Id.* Accordingly, the individual's right to privacy outweighs whatever public interest, if any, might exist in knowing this information. *Id.*

Consequently, the Burroughs declaration demonstrates that, when withholding personal information pursuant to Exemptions 6 and 7(C), CBP properly balanced the privacy interests of the individual mentioned in the document against any public interest in disclosure. *See* Burroughs Decl. at ¶¶ 23-29. In asserting Exemptions 6 and 7(C) in this case, each piece of information was scrutinized by CBP to determine the nature and strength of the privacy interest of any individual whose name and/or identifying information appeared in the documents at issue. *See id.* CBP then analyzed the public interest to determine if disclosure of the personal information at issue would shed light on the CBP's performance of its mission. *See id.* After balancing the personal privacy interests in non-disclosure against the public interests in disclosure, CBP determined that the individuals' privacy interests outweighed any public interest in disclosure, and concluded that the information should be withheld under Exemptions 6 and 7(C). *See id.* Every effort has been made to release all segregable information contained in these records without invading the privacy interests of these individuals. *See id.* at ¶ 36.

Exemption 7(E)

As noted above, 5 U.S.C. § 552(b)(7) exempts from disclosure certain records or information that are "compiled for law enforcement purposes." The records at issue in this case were compiled for law enforcement purposes in that the information is created and used by CBP in its law enforcement mission to secure the border of the United States. *Id.* at ¶ 30. Section 552(b)(7)(E) exempts from disclosure law enforcement records or information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could

reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). The first clause of Exemption 7(E) affords "categorical" protection for "techniques and procedures" used in law enforcement investigations or prosecutions. *Smith v. Bureau of Alcohol, Tobacco and Firearms*, 977 F. Supp. 496, 501 (D.D.C. 1997) (citing *Fisher v. United States Dep't of Justice*, 772 F. Supp. 7, 12 n. 9 (D.D.C. 1991), *aff'd*, 968 F.2d 92 (D.C. Cir. 1992)).

In this case, exemption (b)(7)(E) has been applied to screen shots of the AFI system and specific information regarding how to navigate and use AFI as well as to descriptions of law enforcement techniques and procedures regarding the use of the AFI system, AFI's capabilities, and CBP's processing of international travelers. *Id.* at ¶ 32. Exemption (b)(7)(E) has been applied to screen shots of the AFI system and specific information regarding how to navigate and use AFI because this information may enable an individual knowledgeable in computer systems to improperly access the system, facilitate navigation or movement through the system, allow manipulation or deletion of data and interfere with enforcement proceedings. *Id.* at ¶ 33. The information regarding how to navigate and use the AFI system which has been redacted in the records provided to Plaintiff would provide a detailed roadmap to individuals looking to manipulate AFI or to evade detection by law enforcement, thereby circumventing the law and potentially resulting in alteration, loss, damage or destruction of data contained in CBP's computer system. *Id.* Descriptions of law enforcement techniques and procedures regarding the use of the AFI system, AFI's capabilities, and CBP's processing of international travelers are withheld under exemption (b)(7)(E) because this information would reveal CBP targeting and inspection techniques used in the processing of international travelers. *Id.* at ¶ 34.

Release of this information would enable potential violators to design strategies to circumvent the law enforcement procedures developed by CBP. *Id.* Protecting and maintaining

the integrity of CBP computer systems is imperative in assisting CBP to meet its mission to prevent terrorists, their weapons, and other dangerous items from entering the United States. *Id.* at ¶ 35. As previously noted, AFI "enhances DHS's ability to identify, apprehend, and prosecute individuals who pose a potential law enforcement or security risk; and it aids in the enforcement of customs and immigration laws, and other laws enforced by DHS at the border." *See* 77 Fed. Reg. 33753, 33753 (June 7, 2012). As an important law enforcement tool, there is a great need to defend AFI against any threatened or real risk of threat or compromise to ensure CBP is able to effectively carry out its mission. *Id.*

IV. ALL REASONABLY SEGREGABLE MATERIAL HAS BEEN RELEASED TO PLAINTIFF.

Under the FOIA, if a record contains information exempt from disclosure, any "reasonably segregable," non-exempt information must be disclosed after redaction of the exempt information. 5 U.S.C. § 552(b). Non-exempt portions of records need not be disclosed if they are "inextricably intertwined with exempt portions." *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977); *Fischer*, 596 F.Supp.2d at 44. To establish that all reasonably segregable, non-exempt information has been disclosed, an agency need only show "with 'reasonable specificity'" that the information it has withheld cannot be further segregated. *Armstrong v. Executive Office of the President*, 97 F.3d 575, 578-79 (D.C. Cir. 1996); *Canning v. Dep't of Justice*, 567 F. Supp. 2d 104, 110 (D.D.C. 2008). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material," which must be overcome by some "quantum of evidence" by the requester. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). Moreover, the agency is not required to "commit significant time and resources to the separation of disjointed words,

phrases, or even sentences which taken separately or together have minimal or no information content." *Mead Data*, 566 F.2d at 261, n.55.

CBP has processed and released all segregable information from the responsive documents pursuant to Exemptions 3, 4, 5, 6, 7(C), and 7(E). As explained in the Burroughs declaration, CBP carefully examined each of the responsive documents and released all reasonably segregable, nonexempt information to Plaintiff in response to Plaintiff's FOIA request. Given the nature of the withholdings, it is clear that CBP properly analyzed these documents and determined that no additional non-exempt material can be segregated and released. *See* Burroughs Decl. at ¶ 36.

CONCLUSION

For the foregoing reasons, Defendant CBP requests entry of summary judgment in its favor.

Respectfully submitted,

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