UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER Plaintiff, v. U.S. CUSTOMS AND BORDER PROTECTION Defendant.	)	Case No. 1:14-cv-01217-RBW

PLAINTIFF'S REPLY IN SUPPORT OF THE CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Electronic Privacy Information Center ("EPIC") respectfully submits the following Reply in Support of the Cross-Motion for Summary Judgment. In this case, Defendant United States Customs and Border Protection ("CBP") has withheld non-exempt records relating to the Analytical Framework for Intelligence ("AFI"). The agency has failed to show that these withholdings meet the standard for Exemption 7(E). CBP has also failed to describe and justify withholdings of responsive records and release reasonably segregable portions of records.

ARGUMENT

The Court should grant EPIC's Motion for Summary Judgment for the reasons set out below and contained in EPIC's Combined Opposition to Defendant's Motion for Summary Judgment and Cross-Motion for Summary Judgment. Pl.'s Mot. for Summ. J. (ECF No. 20). CBP's Consolidated Reply and Opposition ("Opposition"), Def.'s Opp'n (ECF No. 23), merely restates language from the Burroughs Declaration and the legal standard for Exemption 7(E). That is an insufficient basis to side with the agency in a FOIA case.

The agency has failed to respond to EPIC's arguments. This Court should accordingly grant EPIC's motion for summary judgment. First, CBP has not provided evidence to show that the agency uses AFI for "investigations" or "prosecutions." Second, CBP has not demonstrated that the release of screenshots and navigation instructions for AFI would risk circumvention of the law. Third, CBP has not described and justified withholdings for the records in Exhibit 3. Finally, CBP has not shown that all reasonably segregable portions of records have been released.

I. CBP Has Not Met Its Burden to Justify the Withholdings Under Exemption 7(E)

CBP has failed to carry its burden of establishing that the records sought by EPIC were properly withheld under Exemption 7(E). *See* 5 U.S.C. § 552(a)(4)(B) (stating that "the burden is on the agency to sustain its action"). First, CBP has provided no new arguments to support the conclusion that AFI is used for investigations or prosecutions; instead, the agency merely echoed language from the Burroughs Declaration. *See* Def.'s Opp'n 6. To withhold a record under Exemption 7(E), an agency must show that disclosure would reveal techniques and procedures for "investigations or prosecutions." § 552(b)(7)(E). As EPIC previously explained in detail,

CBP has failed to make this showing. *See* Pl.'s Mot. for Summ. J. 10–11. The agency failed to rebut this argument in the combined opposition and reply; courts routinely treat the unaddressed arguments as conceded pursuant to Local Rule 7(b). *See Hayes v. Sebelius*, 762 F. Supp. 2d 90, 100 (D.D.C. 2011).

In its Opposition, the agency unpersuasively argued that the disclosure of AFI screenshots would risk circumvention of the law. In order to sustain an Exemption 7(E) claim, the agency must "demonstrate logically how the release of the requested information might create a risk of circumvention of the law." *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (quoting *Mayer Brown LLP v. IRS*, 563 F.3d 1190, 1194 (D.C. Cir. 2009)). Although the circumvention requirement sets a "relatively low bar for the agency to justify withholding," *id.*, it still requires the agency to go beyond unsupported conclusions and simple recitations of the statute.

CBP also states, "The first clause of Exemption 7(E) affords 'categorical' protection for 'techniques and procedures' used in law enforcement investigations or prosecutions." Def.'s Opp'n 5 (citing *Ortiz v. DOJ*, 67 F. Supp. 3d 109, 122 (D.D.C. 2014)). The agency seemingly implies that when it withholds "techniques and procedures," it is relieved of 7(E)'s "circumvention of the law" requirement. The D.C. Circuit, however, has made clear that it "applie[s] the 'risk circumvention of the law' requirement *both* to records containing guidelines and to records containing techniques and procedures." *Pub. Employees for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico*, 740 F.3d 195, 205 n.4 (D.C. Cir. 2014) (emphasis added) [hereinafter "*PEER*"].

Here, the only evidence provided by the agency is the conclusory statement that disclosure of AFI screenshots would allow individuals to "improperly access the system, facilitate navigation or movement through the system, allow manipulation or deletion of data and interfere with enforcement proceedings." Def.'s Opp'n 6 (citing Burroughs Decl. ¶ 33). While such unauthorized access to the AFI system would likely be criminal, the agency has provided no explanation as to how the disclosure of screenshots would "risk circumvention of the law." There is no evidence that the screenshots themselves would enable access to the system. Indeed, if the CBP system is so insecure that a mere screenshot would provide a method for unauthorized access, then the agency has much bigger problems than failure to comply with the FOIA.

CBP also argues in the Opposition that the records withheld are "precisely the type" that courts in this district have protected from disclosure under Exemption 7(E). *See* Def.'s Opp'n 6. But, rather than bolster the agency's claim, these cases highlight how far afield the agency's withholdings are from records that courts have determined may be properly withheld under 7(E).

In *PEER*, the D.C. Circuit upheld this Court's ruling that 7(E) exempted portions of an emergency action plan for two dams located on the U.S.- Mexico border. 740 F.3d at 199. The information withheld in *PEER* contained investigative guidelines for emergency personnel on "manag[ing] a dam failure . . . from 'event detection to termination,'" "surveillance and detection" of a dam failure's cause, and the "evaluating the dam failure." *Id.* at 71. Because "such investigations may constitute 'law enforcement investigations' when there is suspicion of criminal sabotage or terrorism," the D.C. Circuit concluded that the emergency action plans contained guidelines "for law enforcement investigations or prosecutions." *Id.* The court also concluded that because bad actors "could use the information in the emergency action plans to thwart rescue operations following a dam failure or obstruct attempts to investigate the source of

such failure," disclosure of the emergency action plans would risk circumvention of the law. *Id.* at 71.

The contrast between the records in *PEER* and this case is stark. First, unlike the records at issue here, the emergency action plans in *PEER* related to law enforcement activities *after* or *during* the commission of a crime and, thus, contained information for "law enforcement investigations." *See* Pl.'s Mot. for Summ. J. 10–11. Second, the agency in *PEER* established how disclosure of procedures to investigate the cause of a dam failure could reasonably risk circumvention of the law. CBP has failed to make a similar showing in this case.

The other cases the agency cites are similarly unavailing. In *Strunk v. Department of State*, the court held that computer codes relating to a law enforcement database were properly withheld under 7(E). 905 F. Supp. 2d 142, (D.D.C. 2012). The codes "show[ed] precisely how information is retrieved from the database," and "reflect[ed] exact keys and keystrokes used for navigating" the system. Because the codes "could reveal the names of law enforcement databases that were queried," their disclosure could permit individuals to circumvent the government's security screening procedures. *Id.* at 148. In *Soghoian v. Department of Justice*, 885 F. Supp. 2d 62 (D.D.C. 2012), the court held that records regarding electronic surveillance that describe "what information is collected, how it is collected, and . . . when it is *not* collected, is information that . . . might reasonably expect to lead would-be offenders to evade detection." *Id*. at 75. Similarly, in *Blackwell v. FBI*, 680 F. Supp. 2d 79 (D.D.C. 2010), the court held that disclosure of FBI procedures "used in the forensic examination of a computer" "potentially would aid others in circumventing future FBI investigations," and thus exempt under 7(E). *Id*. at 92. The court in *Showing Animals Respect and Kindness v. United States Department of the Interior*, 730 F. Supp. 2d 180 (D.D.C. 2010), held that the government properly withheld

"specific details of surveillance techniques including equipment used, and location and timing of use, the revelation of which could compromise [the government's] ability to conduct future investigations . . . ." *Id*. at 200.

In all of these cases, the agencies provided evidence that disclosure of the records at issue could logically results in a risk of circumvention of the law. Because CBP has not established how disclosure of AFI screenshots would logically risk circumvention of the law, the agency has not satisfied its burden under Exemption 7(E).

II. CBP Has Failed to Describe and Justify All Withholdings of Responsive Records

This Court should also grant EPIC's summary judgment motion because CBP has failed to provide the requisite level of detail describing and justifying all withheld records. As EPIC previously described, the Burroughs Declaration fails to identify, describe, and justify 60 pages of (7)(E) withholdings. *See* Pl.'s Mot. for Summ. J. 14; Burroughs Decl. ¶ 32 (ECF 18-1). In the Opposition, CBP fails entirely to address the failure to provide adequate detail to justify the withholdings in Exhibit 3, and this Court should now consider the issue conceded under Local Rule 7(b). *See Hayes v. Sebelius*, 762 F. Supp. 2d 90, 100 (D.D.C. 2011).

III. CBP Has Failed to Release All Reasonably Segregable, Non-exempt Portions of the Responsive Records

In the Opposition, CBP again repeats the legal standard for segregability and quotes the Burroughs Declaration, but fails entirely to provide any detail or evidence to support its claim of segregability. The case cited by the agency is also unavailing, and this Court should grant EPIC's motion for summary judgment on this issue.

CBP cites *Loving v. U.S. Dep't of Defense* as an example of an agency upholding its segregability obligations. Def's Opp'n 10. In *Loving*, the Court found that "the government's

declaration and supporting material [were] sufficient to satisfy its burden to show with 'reasonable specificity' why the document cannot be further segregated." *Loving v. U.S. Dep't of Def.*, 496 F. Supp. 2d 101, 110 (D.D.C. 2007) (quoting *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002)). But the facts in this case are not at all similar. In *Loving*, the Department of Defense provided both a detailed *Vaughn* Index and declaration to justify its assertions that it had released all reasonably segregated material. *Loving,* 496 F. Supp. 2d at 105, 108. Here, CBP did not provide a detailed *Vaughn* Index, and the declaration only included a short, boilerplate paragraph stating that "[a]ll information withheld 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." Burroughs Decl. ¶ 36. The declaration "is insufficient, because it 'does not "show with reasonable specificity why the documents cannot be further segregated" and additional portions disclosed.'" *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 91 (D.D.C. 2009) (quoting *Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 90 (D.D.C. 2003)).

Indeed, this Circuit has rejected "blanket declaration[s] that all facts are so intertwined to prevent disclosure under the FOIA does not constitute a sufficient explanation of non-segregability . . . . Rather, for *each* entry the defendant is required to 'specify in detail which portions of the document are disclosable and which are allegedly exempt.' " *Wilderness Soc. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 1, 19 (D.D.C. 2004) (quoting *Animal Legal Defense Fund v. Dep't of the Air Force,* 44 F.Supp.2d 295, 301-302 (D.D.C.1999)). CBP's sparse declaration is unlike the detailed *Vaughn* Index and declaration in *Loving,* and otherwise fails to uphold CBP's burden to "provide a detailed justification for its non-segregability." *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (internal quotation marks omitted). As EPIC

explained in detail, this Circuit has previously rejected unsubstantiated claims of segregability and should do so in this case. *See Judicial Watch, Inc. v. DHS*, 841 F. Supp. 2d 142, 161 (D.D.C. 2012) (finding "empty invocation of the segregability standard" is not permitted under the FOIA). The CBP declaration is simply insufficient to justify the (b)(7)(E) redactions.

CONCLUSION

For the foregoing reasons, the Court should grant EPIC's Cross-Motion for Summary Judgment in part.

Dated: August 10, 2015

Respectfully submitted,

MARC ROTENBERG (DC Bar # 422825)
EPIC President

ALAN JAY BUTLER
EPIC Senior Counsel (DC Bar # 1012128)

/s/ Khaliah N. Barnes
KHALIAH N. BARNES (DC Bar # 1013978)
EPIC Administrative Law Counsel
Electronic Privacy Information Center
1718 Connecticut Ave., NW
Suite 200
Washington, DC 20009

Counsel for Plaintiff