GREGORY G. KATSAS
Assistant Attorney General
JOSEPH P. RUSSONIELLO
United States Attorney
JOHN R. TYLER
Assistant Director, Federal Programs Branch
JOHN R. COLEMAN (Va. Bar # 70908)
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Room 6118
Washington, D.C. 20530
Telephone: (202) 514-4505
Facsimile: (202) 616-8460
John.Coleman3@usdoj.gov

Attorneys for Defendant

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ASIAN LAW CAUCUS AND ELECTRONIC FRONTIER FOUNDATION Plaintiffs, v. DEPARTMENT OF HOMELAND SECURITY Defendant.	Civil Action No. 3:08-0842 CW **DEFENDANT'S OPPOSITION TO PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT** **AND** **REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** Date: December 4, 2008 Time: 2:00 p.m.

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INTRODUCTION

This case arises from plaintiffs' Freedom of Information Act (FOIA), 5 U.S.C. § 552, request for records concerning United States Customs and Border Protection (CBP) policies and procedures for the questioning and searching of individuals seeking to enter the United States. Defendant has identified and produced all responsive, non-exempt records and moved for summary judgment pursuant to Fed. R. Civ. P. 56. In support of its motion, defendant has provided a detailed declaration and *Vaughn* index describing the bases for the information it has withheld pursuant to FOIA's exemptions, and demonstrating its compliance with FOIA's requirement to provide all reasonably segregable information. 5 U.S.C. § 552(b).

Plaintiffs oppose defendant's motion for summary judgment and cross move for summary judgment on their own behalf, arguing that defendant's publicly filed declaration and *Vaughn* index fail to support defendant's redactions made pursuant to Exemptions 2, 5, and 7(E), 5 U.S.C. § 552(b)(2), (5), & 7(E). Plaintiffs' arguments in support of their opposition and cross motion cannot withstand scrutiny. First, plaintiffs contend that, because general information about CBP law enforcement procedures is already publicly available, specific operational details about these procedures cannot be withheld under FOIA Exemptions 2 (high) and 7(E) because the release of such information would purportedly not pose any risk of circumvention of the law. Common sense, however, reveals the artifice in this argument. For example, there is an obvious difference between generally knowing that the state police utilize sobriety checkpoints, and knowing when and where such sobriety checkpoints will be utilized. The public's general awareness of the former type of information might help deter drunk driving, but public disclosure of the latter type of information will surely result in easy circumvention of the state police's efforts by drunk drivers. In exactly the same way, there is a clear difference between knowing that CBP utilizes government watchlists or databases to guard our nations' borders and knowing how and under what circumstances CBP utilizes government watchlists or databases. The rest of plaintiffs' arguments likewise concern information that, if disclosed, would provide

those seeking to circumvent the law with specific details concerning CBP's operations, and are therefore properly exempt.

Moreover, the redaction of this information is appropriate in any event because the statutory text and legislative history of 5 U.S.C. § 552(b)(7)(E) demonstrate that defendant need not show a risk of circumvention of the law in order to withhold from disclosure law enforcement techniques and procedures.

The remainder of plaintiffs' arguments, which concern a relatively small amount of information, are equally without merit. For example, the location of information on an internal network and the name of an obsolete database is purely internal information for which the public has no genuine interest, and therefore this information is properly redacted pursuant to Exemption 2 (low). Likewise, plaintiffs' arguments with respect to the small amount of information redacted under FOIA Exemption 5 pursuant to the deliberative process privilege simply ignore the relevant portions of the declaration and *Vaughn* index demonstrating that this small amount of information is both deliberative and pre-decisional. Finally, the record before the Court demonstrates that defendant has observed FOIA's command to release all reasonably segregable information. Accordingly, defendant respectfully requests that the Court grant defendant's motion for summary judgment and deny plaintiffs' cross motion for summary judgment.

ARGUMENT

A. Defendant Properly Withheld Agency Records Pursuant to Exemptions 2 and 7(E)

The *Vaughn* index[1] and supporting declaration attached to defendant's motion for summary judgment demonstrate that disclosure of the material withheld pursuant to Exemptions 2 (high) and 7(E) risks circumvention of the law. Accordingly, under any understanding of the prevailing legal standard, defendant is entitled to judgment as a matter of law regarding its withholding of this material. In the alternative, the Court may also uphold defendant's withholdings of law enforcement techniques and procedures pursuant to Exemption 7(E) without finding a risk of circumvention, because such information is categorically exempt. Finally, defendant's redaction of the name of a database that was formerly used by the Tucson Field Office and the location of information on an internal network pursuant to Exemption 2 (low) is appropriate because it is purely internal and the public could have no legitimate interest in this information.

1. Defendant Has Properly Withheld Agency Records Pursuant to Exemptions 2 (High) and 7(E) Because Release of Such Records Risks Circumvention of Agency Law

Plaintiffs concede that the material withheld pursuant to Exemptions 2 (high) and 7(E) was "compiled for law enforcement purposes,"[2] and therefore base their cross motion for summary judgment on the contention that defendant has failed to adequately explain how disclosure of four categories of information risks circumvention of the law. The four categories of information consist of: (1) the names of databases and information relating to the use of government watchlists; (2) "specific topics for questioning" individuals seeking to enter the United States; (3) information relating to CBP's coordination with other law enforcement

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[1] *See* Exhibit A to Declaration of Shari Suzuki (hereinafter "*Vaughn* index") (Document 5).

[2] *See* Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment and Memorandum of Points and Authorities in Support of Cross Motion for Summary Judgment ("Pl. Mem.") at 7.

agencies; and (4) the redaction of information in records concerning an "Interim Guidance for Border Search/Examination of Documents, Paper and Electronic Information." *See* Pl. Mem. at 10-13. For the reasons that follow, plaintiffs' contentions with respect to each of these categories of information are meritless. Even assuming such a requirement exists for all records withheld pursuant to Exemptions 2 (high) and 7(E), *but see* Part A.2, defendant's *Vaughn* index has provided as "much detail as possible on the public record" without "reveal[ing] the very information the government claims is exempt from disclosure" to demonstrate the risk of circumvention of the law that would result from the release of this information. *Lion Raisins, Inc. v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1083-84 (9th Cir. 2004). Accordingly, defendant's withholdings are proper and defendant is entitled to summary judgment.

a. Plaintiffs challenge defendant's redaction of what they inaccurately describe as "information in a number of documents that identified watchlists or databases that are accessed by border agents in questioning or searching travelers seeking to enter the United States." Pl. Mem. at 10 & n.2. Plaintiffs misleadingly group this information together and suggest that it only concerns the proper names of databases and government watchlists. In fact, plaintiffs identify documents that concern several different types of information: "names of specific database reports,"[3] "names of specific database modules,"[4] "information related to the operation of government watchlists,"[5] and "names of databases."[6] Plaintiffs' erroneous grouping of this disparate information in the category "names of databases" Pl. Mem. at 10, is central to their argument that because the Privacy Act requires agencies to publish "the name and location" of any "system of records" in the Federal Register, it allegedly follows that disclosure of the

[3] *See Vaughn* Index (Document 5).

[4] *See Vaughn* Index (Document 28, 35, 36, 37)

[5] *See Vaughn* Index (Documents 20, 22, 23, 25, 29, 31, 32, 34, 43).

[6] *See Vaughn* Index (Documents 2, 4, 8, 9, 10, 13, 14, 17, 18, 24, 39, 41)

redacted information could not risk circumvention of the law. Pl. Mem. at 10-11 (citing 5 U.S.C. § 552a(e)(4)(A)).[7]

This argument is without merit for several reasons. First, because the Privacy Act does not require that the "names of specific database reports," the "names of specific database modules," or "information related to the operation of government watchlists" be published in the Federal Register, the underlying basis for plaintiffs' argument fails at the outset. Furthermore, with respect to the first two types of information, disclosure of "the names of specific database reports would reveal which databases and reports are used in particular circumstances" – specifically, in the context of specific operational instructions for "Responding to Potential Terrorists Seeking Entry Into the United States" – and, therefore, "could lead to circumvention of CBP law enforcement efforts or facilitate improper access to the database for the purpose of frustrating CBP law enforcement functions." *Vaughn* index (Document 5). Thus, this information was not redacted in a vacuum but from documents that describe how these database reports or modules are used in CBP's law enforcement efforts. Such information is properly exempt. *See Boyd v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 496 F.Supp.2d 167, 171 (D.D.C. 2007) (concluding that information identifying how data is retrieved from a computer system "could provide information on the structure of the mainframe system used and expose the system to circumvention" or "facilitate unauthorized access" and was therefore properly withheld under Exemption 2).

In like fashion, plaintiffs' representation that CBP has "redacted information in a number of documents that identified watchlists," Pl. Mem. at 10, is incorrect. As the *Vaughn* index states, CBP has redacted "information related to the *operation* of government watchlists," *see Vaughn* index (Documents 23, 25, 29, 32, 34, 43) (emphasis supplied), not merely "the names of

[7] A "system of records" does not necessarily include every database maintained by an agency, but is defined as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5).

such watchlists." Pl. Mem. at 10. Release of the precise operational details regarding how watchlists are utilized in particular circumstances "would permit persons to devise strategies designed to circumvent the examination and inspection procedures developed by CBP." *Vaughn* Index (Documents 23, 25, 29, 32, 34, 43). Further, the fact that it is publicly known that CBP utilizes watchlists has no bearing on whether the release of information concerning when a watchlist is utilized, or by whom, or for what reason, would risk circumvention of the law if disclosed. *See Gordon v. FBI*, 388 F. Supp. 2d 1028, 1035-37 (N.D. Cal. 2005) (upholding pursuant to Exemptions 2 and 7(E), the withholding of (1) watch list selection criteria; (2) procedures for dissemination of watch lists; (3) procedures for handling potential/actual name matches; (4) raising/addressing perceived problems in security measures; and (5) compilation of watch lists (involving such things as the adding or removing of names)).

Finally, plaintiffs' argument is no more successful with respect to the "names of databases" that the agency has redacted pursuant to Exemptions 2 (high) and 7(E). While it is true that defendant has published numerous "Systems of Records" Notices (SORNs) pursuant to the Privacy Act,[8] the mere publication of the "name and location" of a "system of record" – even assuming all of the databases at issue here are subject to the Privacy Act – is not the same as revealing *which* database is utilized in particular circumstances, *who* is responsible for utilizing the database, or *how* the database is utilized in specific circumstances. It is precisely these details – that have not been disclosed to the public – that would be revealed if defendant were

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[8] *See, e.g.,* 73 Fed. Reg. 43,462 (July 25, 2008) (SORN relating to the Non-Federal Entity Data System); 73 Fed. Reg. 43,457 (July 25, 2008) (SORN relating to the Border Crossing Information (BCI) database); 73 Fed. Reg. 32,720 (June 10, 2008) (SORN relating to the Electronic System for Travel Authorization (ESTA) database); 72 Fed. Reg. 48,349 (Aug. 23, 2007) (SORN relating to Advanced Passenger Information System (APIS)); 72 Fed. Reg. 43,650 (Aug. 6, 2007) (SORN relating to the Automated Targeting System (ATS)); 68 Fed. Reg. 69,414 (Dec. 12, 2003) (SORN relating to the Enforcement Operational Immigration Records (ENFORCE/IDENT) system); 68 Fed. Reg. 69,412 (Dec. 12, 2003) (SORN relating to the Arrival and Departure Information System (ADIS)); 66 Fed. Reg. 52, 984 (Oct. 11, 2001) (SORN relating to over 90 systems of records maintained by CBP's predecessor agency, the United States Customs Service).

forced to disclose the names of databases redacted from the responsive records because the "names of databases" are presented in the context of specific law enforcement procedures. As defendant has explained, disclosure of this information – the precise way in which CBP uses a specific database in particular circumstances – "could lead to circumvention of CBP law enforcement efforts or facilitate improper access to the databases for purposes of frustrating CBP law enforcement functions." *See Vaughn* index (Documents 2, 4, 8, 9, 10, 13, 14, 17, 18, 24, 39, 41); *see Cozen O'Connor v. Dep't of Treasury*, 570 F. Supp. 2d 749, 786 (E.D. Pa. 2008) (upholding the redaction pursuant to Exemption 7(E) of "material regarding government and non-government databases and information services," reasoning that "[t]errorist organizations and hostile nations could avoid or misdirect Treasury's sanctions investigations and implementation if they knew what databases . . . were being used to gather information about them.").[9]

Other courts have recognized the distinction between publicly available information of a high degree of generality and information that would reveal specific operational details if disclosed, and have rejected arguments similar to plaintiffs. *See, e.g., Berman v. C.I.A.*, 501 F.3d 1136, 1144 (9th Cir. 2007) (rejecting a similar argument in the context of Exemption 3 that the public availability of "similar if not identical information" requires disclosure because, in part, the publicly available documents were "written at a greater level of generality."); *Coastal Delivery Corp. v. U.S. Customs Serv.*, 272 F. Supp. 2d 958, 964 (C.D. Cal. 2003) (refusing to disclose pursuant to the FOIA the number of containers examined at the Los Angeles/Long Beach seaport notwithstanding public disclosure of "CET Hold" forms that contain similar information). Indeed, contrary to plaintiffs' logic, the fact that so much information regarding CBP's law enforcement databases has been published in the Federal Register could only amplify

[9] Plaintiffs' speculation that the government has redacted the name of the same database as both "high 2" and "low 2" is unfounded. Pl. Mem. at 12. As Ms. Suzuki's declaration states, the single "low 2" redaction of a database name occurred with respect to "a local database that is no longer in use." Suzuki Decl. ¶ 20. In short, the redactions involve different databases.

the risk of circumvention of the law that would accompany the disclosure of these details, because those intent on circumventing the law could combine the information the agency is seeking to protect with publicly available information to better understand – and thwart – the agency's law enforcement efforts. As courts have long-recognized, "'bits and pieces' of data 'may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself.'" *Center for Nat. Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003) (quoting *C.I.A. v. Sims*, 471 U.S. 159, 178 (1985)). And, "'[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.'" *Sims*, 471 U.S. at 178 (quoting *Halkin v. Helms*, 598 F.2d 1, 9 (1978)); *see also Coastal Delivery Corp. v. U.S. Customs Serv.*, 272 F. Supp. 2d. 958, 965 (C.D. Cal. 2003) ("[T]he information is not of obvious importance in itself; but, it were released to plaintiff and combines [sic] with other known data, in a 'mosaic' analysis, it could lead to identification of substantive information in the file which has been withheld." (quoting *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1064-65 (3d Cir. 1995)). Thus, defendant's redaction of the names of certain databases pursuant to Exemptions 2 and 7(E) is proper.

b. The second category of exemptions plaintiffs challenge consists of "specific topics for questioning" individuals attempting to enter the United States. *See* Pl. Mem. at 12-13. Plaintiffs do not challenge the logic of defendant's withholding – that release of questions used during border inspection could allow persons to devise strategies for circumvention of the law – but argue instead that the information should be disclosed because plaintiffs seek only a "limited segment of interview topics" – "policies and procedures on the questioning of travelers regarding political views, religious practices, and other activities potentially covered by the First Amendment." Pl. Mem. at 12. Even if one were to accept plaintiffs' dubious contention that their request is "limited," plaintiffs provide no legal basis for excepting this material from the ambit of Exemptions 2 (high) and 7(E), and, indeed, none exists. *See, e.g., Moayedi v. U.S.*

Customs & Border Prot., 510 F. Supp. 2d 73, 85 (D.D.C. 2007).[10] Furthermore, if plaintiffs' argument were to prevail, there would be no grounds for withholding other self-described "limited" requests for topics of questioning at the border, *see Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1082, 1088 (9th Cir. 1997) ("FOIA does not permit selective disclosure of information only to certain parties"), and soon the entire universe of questions used by CBP for its law enforcement mission would be disclosed, with predictably detrimental effect on CBP's law enforcement efforts.

c. Third, plaintiffs challenge defendant's redaction of information relating to CBP's "procedures for coordination with other law enforcement agencies" in certain specific law enforcement circumstances. *See Vaughn* index (Documents 4, 10, 13, 14, 17, 39). In support of this contention plaintiffs cite two unpublished opinions in which district courts ordered the release of such information after the government in each case failed to explain the risk of circumvention. *See Shearson v. Dep't of Homeland Sec.*, Case No. 06-cv-1478, 2007 WL 764026, at *5 (N.D. Ohio Mar. 9, 2007); *Hamilton v. Weise*, Case No. 95-cv-1161, 1997 U.S. Dist. LEXIS 18900, at *32 (M.D. Fla. Oct. 1, 1997). These decisions are not persuasive. Disclosure of CBP's "procedures for coordination with other law enforcement agencies" risks circumvention of the law because it would permit persons to know what or who triggers an alert to another specific law enforcement agency (*i.e.*, when does CBP consider a threat serious enough to involve other law enforcement agencies). Obviously, knowledge of this information would permit those seeking to circumvent the law to know what or who *doesn't* trigger coordination with another law enforcement agency, and devise strategies to avoid these triggers.

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[10] Plaintiffs' *cf.* cite to *Crooker v. Bureau of Alcohol, Tobacco, & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981), is curious. In that case the Court of Appeals for the District of Columbia Circuit upheld the redactions of portions of a law enforcement manual that concerned "investigatory techniques" pursuant to Exemption 2 (High), and that such information, despite having "some effect at the public at large," "involves no 'secret law' of the agency." 670 F.2d at 1073; *see also id.* at 1074 & n. 60 ("It is not up to this court to balance the public interest in disclosure against any reason for avoiding disclosure" nor "to decide which disclosures are in the public interest."). In short, *Crooker* supports defendant's redaction of all topics of questioning.

See Vaughn index (Documents 4, 10, 13, 14, 17, 39). Accordingly, this level of detail regarding CBP's law enforcement procedures is clearly protected by Exemptions 2 and 7(E). *See Morley v. C.I.A.*, 508 F.3d 1108, 1128-29 (D.C. Cir. 2007) (upholding the redaction pursuant to Exemption 7(E) of "certain techniques and procedures used by law enforcement agencies in coordination with CIA" during background investigations); *Cozen O'Connor v. Dep't of Treasury*, 570 F. Supp. 2d 749, 785-86 (E.D. Pa. 2008) (upholding the redaction pursuant to Exemption 7(E) of information relating to "the timing and the level of governmental cooperation," reasoning that "[t]errorist organizations and hostile nations could avoid or misdirect Treasury's sanctions investigations and implementation if they knew . . . what government sources were being used to gather information about them."); *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1035-36 (N.D. Cal. 2005) (upholding the redaction pursuant to Exemptions 2 and 7(E) of information relating to "procedures for dissemination of watchlists").

d. Finally, plaintiffs contest the redaction of information from various versions of a document entitled "Interim Guidelines for Border Search/Examination of Documents, Paper and Electronic Information," *see Vaughn* index (Documents 20, 22, 23, 29), on the ground that it has been "superceded" by a document entitled "Policy Regarding Border Search of Information" that has been made available to the public. Pl. Mem. at 13. Plaintiffs' argument is flawed. First, the publicly available document does not state that it "supercedes" the interim guidance, and therefore doesn't foreclose the possibility that specific operational procedures not directly addressed by the new "Policy Regarding Border Search of Information" remain in effect or may be adopted again in the future. In addition, as a cursory review of the documents at issue indicates,[11] the agency redacted a small amount of information from these documents. This information concerns "the scope and focus of certain law enforcement techniques" the release of which "would permit persons to devise strategies designed to circumvent the examination and

[11] *See* Exhibit 8 to the Declaration of Marcia Hofmann (hereinafter "Hofmann Decl.").

inspection procedures developed by CBP." *See Vaughn* index (Documents 20, 22, 23, 29).[12] This information has not been made publicly available, and plaintiffs' argument is without merit.

2. Law Enforcement Techniques and Procedures are Categorically Exempt

As the foregoing demonstrates, defendant has adequately described how disclosure of material it withheld pursuant to Exemptions (2) (high) and (7)(E) risks circumvention of the law, and defendant therefore is entitled to summary judgment even under plaintiff's view of the law. As is clear from the statute's text and legislative history, however, and as has been recognized by several recent decisions, the Court may also uphold defendant's redaction of law enforcement "techniques and procedures" without finding that disclosure risks circumvention of the law. Plaintiffs' argument to the contrary is not persuasive, and should, if necessary, be rejected.

As with any issue of statutory interpretation, the appropriate starting point is the text of the statute itself. *K & N Engineering, Inc. v. Bulat*, 510 F.3d 1079, 1081 (9th Cir. 2007). The relevant statutory text provides that the FOIA –

> does not apply to . . . records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. . . .

5 U.S.C. § 552(b)(7)(E). Subpart (E) contains two distinct clauses separated by a disjunctive. The required showing of harm – "risk of circumvention of the law" – follows the second clause without a comma, which supports the inference that this condition applies only to the second clause concerning guidelines for law enforcement investigations or prosecutions. *See Wright v. Lubinko*, 515 F.2d 260, 263-64 (9th Cir. 1975). If, as plaintiffs contend, the harm requirement were meant to apply to all three types of records, Congress would have drafted the subsection in a single clause, such as: "(E) would disclose techniques, procedures, and guidelines for law

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[12] As stated in the *Vaughn*, "CBP is unable to further describe these techniques, methods and guidelines without revealing that which it seeks to protect." *Vaughn* index (Documents 20, 22, 23, 29).

enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." Congress did not enact this provision, and it must be presumed that Congress did not intend for the additional language (*i.e.*, the second clause) to be superfluous. *See Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 58-59 (1878) ("[T]he admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every world in a statute."); *United States v. Watkins*, 278 F.3d 961, 966 (9th Cir. 2002).

Defendant's interpretation of this subsection is confirmed by the legislative history. Prior to 1986, Exemption 7(E) had permitted withholding of only "investigative techniques and procedures." 5 U.S.C. § 552(b)(7)(E) (1982); *Crooker*, 670 F.2d at 1053 n.2. In 1986, Congress amended Exemption (7)(E), along with the rest of 5 U.S.C. § 552(b)(7), as part of a general effort to broaden the scope of information that could be withheld pursuant to this subsection. *See* Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Title I, § 1802(a), 100 Stat. 3207-48 (1986); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 n.9 (1989). First, the amendment "changed the threshold requirement for withholding information under [E]xemption 7: the exemption formerly covered 'investigatory records compiled for law enforcement purposes'; it now applies more broadly to 'records or information compiled for law enforcement purposes.'" *North v. Walsh*, 881 F.2d 1088, 1098 n. 14 (D.C. Cir. 1989). Second, Congress amended the first clause of subsection 7(E) to "make clear that 'techniques and procedures for law enforcement investigations and prosecutions' can be protected, regardless of whether they are 'investigative' or non-investigative." *See* S. Rep. No. 98-221, at 24 (Exhibit 1 to the attached Declaration of John R. Coleman). Finally, "Congress also amended Exemption 7(E) to permit withholding of '*guidelines* for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. . . .'" *Tax Analysts v. I.R.S.*, 294 F.3d 71, 79 (D.C. Cir. 2002) (citing 5 U.S.C. § 552(b)(7)(E); S.Rep. No. 98-221, at 24 (1983)). The addition of the second

clause regarding "guidelines" was "intended to address some confusion created by the D.C. Circuit's en banc holding in *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 771 (D.C. Cir. 1978)," which had found guidelines for drug prosecutions ineligible for withholding under Exemption 2, while still requiring that guidelines only be withheld when their disclosure could risk circumvention of the law. *See* S. Rep. No. 98-221, at 25; *see also* Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (citing S. Rep. No. 221, 98th Cong. 1st Sess. 25 (1983)), *available at* http://www.usdoj.gov/oip/86agmemo.htm. Thus, the legislative history confirms that defendant must demonstrate "a risk of circumvention of the law" only with respect to "guidelines."

The district court's contrary view in *Feshbach v. SEC*, 5 F. Supp. 2d 774, 786 n.11 (N. D. Cal. 1997), presented in a footnote, is not persuasive and should be disregarded. The other decisions cited by plaintiff, and relied on by *Feshbach*, do not directly address the issue, but simply assumed without analysis that the harm requirement applied to both clauses. In sum, the statute's text and legislative history, and the numerous, recent decisions adopting defendant's position cited in defendant's opening brief, demonstrate that "Exemption 7(E) provides categorical protection for techniques and procedures used in law enforcement investigations or prosecutions." *Keys v. Dep't of Homeland Sec.*, 510 F. Supp. 2d 121, 129 (D.D.C. 2007) (quoting *Judicial Watch v. Dep't of Commerce*, 337 F. Supp. 2d 146, 181 (D.D.C. 2004)); *see also Am. Civil Liberties Union v. Dep't of Defense*, 543 F.3d 59, 79 (2d Cir. 2008) ("Exemption 7(E) was expanded [in 1986] to allow agencies to withhold information that would disclose law enforcement guidelines – in addition to the already protected techniques and procedures – if disclosure of the guidelines 'could reasonably be expected to risk circumvention of the law.'").[13]

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[13] Contrary to plaintiffs' suggestion, the Court should have little trouble distinguishing "techniques and procedures" from "guidelines" should the need arise. Many of the documents containing redactions are explicitly labeled as providing "standard operating procedures" at the border, *see Vaughn* index, and most if not all of the documents are substantively distinct from the guidelines for the exercise of prosecutorial discretion at issue in *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 771 (D.C. Cir. 1978), which was the impetus for including the second

3. Defendant Properly Withheld Agency Records Pursuant to Exemption 2 (Low)

Exemption 2 (low) protects from disclosure "[p]redominantly internal documents that deal with trivial administrative matters" of no genuine public interest. *Schiller v. N.L.R.B.*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). Pursuant to this exemption, defendant redacted "the location of information stored on an internal network." Suzuki Decl. ¶ 20; *see also* Ex. 8 to Hofmann Decl. at Bates No. 000575. As defendant explained, this information is "purely internal" and because "access to the file and computer system is restricted from the public, the public has little or no interest in this information." *Id.* In addition, defendant redacted the name of a database that was formerly used by the Tucson Field Office, but is no longer in use. Suzuki Decl. ¶ 20; *see also* Ex. 8 to Hoffman Decl. at Bates No. 000578.

Plaintiffs do not explain why the location of information on a purely internal network or the name of an obsolete database, would be of "genuine public interest," *Schiller*, 964 F.2 at 1207 (quoting *Schwaner v. Dep't of Air Force*, 898 F.2d 793, 794 (D.C. Cir. 1990)), but again argue that the Privacy Act's requirement that agencies publish in the Federal Register, "the name and location" of any system of records, 5 U.S.C. § 552a(e)(4)(A), somehow demonstrates the public interest in this purely internal information. This argument is meritless. First, plaintiffs incorrectly label the information redacted from Bates No. 000575, as a "name" of the database. Pl. Mem. at 14. In fact, this information consists of the location of the information on an internal network, not the name of a database. *See* Suzuki Decl. ¶ 20. Second, defendant redacted the name of an obsolete database pursuant to "low 2," because the public has no legitimate interest in the name of a local database that is no longer in use. As a result, plaintiff's argument based on the Privacy Act – meritless in any case – has no application here, and the cases relied on by defendant do support redaction of this type of trivial, administrative information pursuant to Exemption 2 (low). *See NYC Apparel FZE v. U.S. Customs & Border Prot.*, 484 F. Supp. 2d 77,

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clause of Exemption 7(E) in the 1986 amendments. *See* S. Rep. No. 98-221, at 25; *see also Crooker*, 670 F.2d at 1075 (distinguishing the guidelines at issue in *Jordan* from the law enforcement manual at issue in *Crooker*).

93 (D.D.C. 2007); Ex. 9 to Hofmann Decl.; *Changzhou Laosan Group v. U.S. Customs & Border Prot*., Case No. 04-cv-1919, 2005 WL 913268, at *3 (D.D.C. April 20, 2005); Ex. 10 to Hofmann Decl.; *Poulsen v. U.S. Customs & Border Prot.*, Case No. 06-cv-1743, 2006 WL 2788239 (N.D. Cal. Sept. 26, 2006).

B. Defendant Properly Withheld Agency Records Pursuant to Exemption 5

Pursuant to Exemption 5, 5 U.S.C. § 552(b)(5), defendant redacted information in two documents on the ground that the information is subject to the deliberative process privilege. As is required, this information is both "'predecisional," which means that it has been "prepared in order to assist an agency decisionmaker at arriving at his decision," and "deliberative," which means that disclosure "would expose an agency's decision-making process in such a way as to discourage candid discussion with the agency and thereby undermine the agency's ability to perform its functions." *Assembly of the State of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992) (internal quotations and citations omitted).

First, the agency redacted hand written notes from a document entitled "Interim Procedures for Border Search/Examination of Documents, Papers, and Electronic Information [Redacted]." Suzuki Decl. ¶ 26; *Vaughn* Index (Document 29); Hofmann Ex. 8 (Bates No. 625-26). As defendant explained, disclosure of these handwritten notes "would reveal how one CBP employee prioritized different facts, what he considered to be important and his interpretation of certain provisions" as he reviewed these "Interim Procedures." Suzuki Decl. ¶ 26. Such information is predecisional because it "reflect[s] the personal opinions of the writer rather than the policy of the agency." *Assembly of the State of Cal.*, 968 F.2d at 920; *see also Electronic Privacy Information Center v. Dep't of Homeland Sec.*, 384 F. Supp. 2d 100, 113 n.18 (D.D.C. 2005) (information is predecisional if it "reflect[s] the preliminary thoughts of . . . agency personnel."). Thus, "these notations were the private thoughts and opinions of one individual and do not reflect an agency decision or policy." Suzuki Decl. ¶ 27. And, an important purpose of the deliberative process privilege is "to prevent public confusion that might be caused by

disclosure of reasons and rationales that were not ultimately the grounds for the agency's action." *Krikorian v. Dep't of State*, 984 F.2d 461, 466 (D.C. Cir. 1993) (quoting *Fisher v. Dep't of Justice*, 772 F. Supp. 7, 10-11 (D.D.C. 1991)). Further, the document itself states that the procedures are "Interim" and Ms. Suzuki's declaration states that the handwritten notes were made "in order to assist in later deliberations." Suzuki Decl. ¶ 26; *Vaughn* Index (Document 29). Accordingly, the record demonstrates that these notes were predecisional and deliberative and therefore appropriately redacted pursuant to Exemption 5.

Second, defendant redacted from Document 40 (Bates Stamp No. 679) information that "reflects deliberations and potential courses of action that were discussed as the agency moved towards a decision on drafting a standard operating procedure." Suzuki Decl. ¶ 27. The *Vaughn* Index describes this document as a "January 18, 2008 e-mail regarding 'Conference Call,'" and the redacted information, in particular, as a "recommendation."' *Vaughn* index (Document 40). Furthermore, Ms. Suzuki explains in her declaration that the material withheld "reveals internal agency deliberations about the possibility of drafting a standard operating procedure." Suzuki Decl. ¶ 27. Accordingly, plaintiffs' reliance on *Coastal States Gas Corp. v. Dep't of Energy*, 67 F.2d 854 (D.C. Cir. 1980), is misplaced. The legal memoranda at issue in *Coastal States* were themselves effectively creating binding agency policy, *see* 67 F.2d at 860, and "were not suggestions or recommendations as to what agency policy should be." *Id.* at 868. By contrast, the information redacted from Document 40 was a "recommendation" and defendant has clearly met its burden for withholding this material pursuant to Exemption 5.

C. Defendant Has Released All Released All Reasonably Segregable Portions of Responsive Records

Finally, defendant has met its burden of producing all reasonably segregable portions of responsive records. 5 U.S.C. § 552(b). As explained in Ms. Suzuki's declaration, defendant identified 689 pages of records responsive to plaintiffs' request. Suzuki Decl. ¶ 17. Of this total, defendant produced 352 pages in full, and 309 pages with redactions. *Id.* Defendant's care in releasing all segregable material is demonstrated throughout these pages. *See* Ex. 8 to Hofmann

Decl. The redactions from within these documents are most often comprised of single sentences or clauses, and in many instances single words. *See id.* Finally, defendant withheld 28 pages of responsive records in full. Suzuki Decl. ¶ 17. Defendant described in detail the basis for the redactions from these 28 pages of documents in its *Vaughn* Index, and explained that "[t]o the extent that there is any non-exempt information in Bates Stamp numbers 662-689, we assert that after conducting a line-by-line review, it is inextricably intertwined with the exempt information and therefore no portions can be segregated and disclosed." Suzuki Decl. ¶ 32. Further, "[t]he few non-exempt words and phrases that are dispersed throughout the [twenty-eight pages of] records withheld in full, if disclosed, would be meaningless . . . ." Agencies are not required to produce records that, after redaction of exempt material, consist of only such meaningless fragments. *See Nat'l Sec. Archive v. CIA*, 402 F. Supp. 2d 211, 220-21 (D.D.C. 2005); *Klamath Siskiyou Wildlands Ctr. v. U.S. Dep't of the Interior*, Case No. 07-cv-325, 2007 WL 4180685, at *8 (D. Or. Nov. 21, 2007); *see also NRDC v. Dep't of Defense*, 388 F. Supp. 2d 1086, 1097 (C.D. Cal. 2005) ("'[I]f only ten percent of the material is non-exempt and it is interspersed line-by-line throughout the document, an agency claim that it is not reasonably segregable because the cost of line-by-line analysis would be high and the result would be a meaningless set of words and phrases might be accepted.'") (quoting *Mead Data Ctr., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977)).

Thus, with respect to the twenty-eight pages withheld in full, defendant has "provide[d] a 'statement of its reasons' for not segregating and 'describe[d] what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document.'" *NRDC*, 388 F. Supp. 2d at 1105 (quoting *Mead*, 566 F.2d at 261). Accordingly, the record before the Court establishes that defendant has disclosed all reasonably segregable portions of responsive records, and is therefore entitled to summary judgment.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that the Court grant its motion for summary judgment and deny plaintiffs' cross motion for summary judgment.

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Respectfully submitted,

GREGORY G. KATSAS
Assistant Attorney General

JOSEPH P. RUSSONIELLO
United States Attorney

JOHN R. TYLER
Assistant Director, Civil Division

/s/ John R. Coleman
JOHN R. COLEMAN (Va. Bar # 70908)
Civil Division, Federal Programs Branch
U.S. Department of Justice
20 Massachusetts Ave., N.W., Room 6118
Washington, D.C. 20530
Telephone: (202) 514-4505
Fax: (202) 616-8460
Email: john.coleman3@usdoj.gov

Attorneys for Defendants