

District Judge Ricardo S. Martinez

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

COUNCIL ON AMERICAN-ISLAMIC  
RELATIONS-WASHINGTON,

Plaintiff,

v.

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

Defendants.

CASE NO. 20-cv-00217 RSM  
DEFENDANTS' RESPONSE TO  
CAIR'S CROSS-MOTION FOR  
SUMMARY JUDGMENT AND REPLY  
IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT

Noted for Consideration on:  
August 21, 2020

1 **I. INTRODUCTION**

2 Defendant United States Customs and Border Protection (“CBP”), by and through  
 3 undersigned counsel of record, Brian T. Moran, United States Attorney for the Western District  
 4 of Washington, and Michelle Lambert, Assistant United States Attorney for said District, hereby  
 5 responds to Plaintiff Council on American-Islamic Relations-Washington’s (“CAIR”) cross-  
 6 motion for summary judgment, Dkt. No. 23 (“Cr. Mot.”), and also replies in support of CBP’s  
 7 motion for summary judgment. Dkt. No. 20 (“Mot.”). CBP submits a declaration of Patrick  
 8 Howard, dated August 14, 2020, in support of its response.  
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11 CAIR seeks documents from CBP pertaining to screening or secondary inspection of  
 12 individuals of Iranian heritage at the United States border between January 1, 2020 and January  
 13 8, 2020. Pursuant to CAIR’s request under the Freedom of Information Act (“FOIA”), 5 U.S.C.  
 14 § 552, CBP searched all locations likely to have responsive records and identified 148 pages of  
 15 records as responsive to CAIR’s request. In addition, CBP produced a *Vaughn* index and a  
 16 declaration explaining its withholdings pursuant to FOIA Exemption (b)(5), Exemption (b)(6),  
 17 Exemption (b)(7)(C), and Exemption (b)(7)(E). Because CBP performed an adequate search and  
 18 lawfully withheld portions of records protected from disclosure, CBP respectfully requests that  
 19 the Court grant summary judgment in its favor.<sup>1</sup>  
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22 **II. ARGUMENT**

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

24 CAIR wrongly asserts that CBP conducted an inadequate search. Cr. Mot., at 8-12. The  
 25 parties agree that the reasonableness of the search is judged by the adequacy of the search  
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28 <sup>1</sup> The facts are set forth in CBP’s motion for summary judgment. Mot., at 3-6.

1 process rather than the search's results. *See* Cr. Mot., at 8. CAIR mainly criticizes the locations  
2 of CBP's search, alleging that CBP did not search all locations with responsive records.

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4 First, relying on this Court's recent decision in *Davis Wright Tremaine LLP v. U.S. CBP*,  
5 No. C19-334 RSM, 2020 WL 3258001 (W.D. Wash. June 16, 2020), CAIR alleges that Patrick  
6 Howard's declaration, Dkt. No. 21, Search Declaration, did not sufficiently establish that all  
7 locations were searched because it only stated that the Office of Field Operations ("OFO") was  
8 the office most likely to maintain responsive records. Cr. Mot., at 9-10. However, the Search  
9 Declaration clearly sets forth the locations searched, the reasons why those locations were  
10 searched, the search terms and methods used, and avers that all files likely to contain responsive  
11 materials were searched. *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)  
12 (describing a reasonably detailed affidavit affording a FOIA requester "an opportunity to  
13 challenge the adequacy of the search and to allow the district court to determine if the search was  
14 adequate in order to grant summary judgment"). Agency affidavits, like the Search Declaration,  
15 "enjoy a presumption of good faith that withstand[] purely speculative claims about the existence  
16 and discoverability of other documents." *Chamberlain v. U.S. Dept. of Justice*, 957 F. Supp.  
17 292, 294 (D.D.C. 1997), *aff'd*, 124 F.3d 1309 (D.C. Cir. 1997) (internal quotation marks and  
18 citations omitted); *SafeCard Servs. Inc. v. S.E.C.*, 926 F.2d 1197, 1200 (D.C. Cir. 1991).

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22 Second, CAIR asserts that the search was inadequate because CBP did not search the  
23 emails above the level of manager. Cr. Mot., at 10. CBP's search processes, as explained in the  
24 Search Declaration, were reasonably calculated to locate any records responsive to CAIR's  
25 FOIA Request. First, upon review of the request, CBP determined that the San Francisco Field  
26 Office ("SFO") and the Office of Public Affairs ("OPA") were the only entities that would  
27 reasonably have potentially responsive information because of each subcomponents' cognizance  
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1 over certain CBP activities and the subject matter of CAIR’s FOIA Request. *See* Search Decl.,  
2 ¶¶ 20, 21, 29. Specifically, a FOIA subject matter expert (“SME”) determined that OFO was the  
3 office most likely to maintain responsive records because OFO is responsible for all activity,  
4 including reviewing applicants for admission, at the port-of-entry along international borders,  
5 airports, and seaports, and CAIR’s FOIA Request inquires about the “screening of individuals of  
6 Iranian heritage or any other changes in screening or secondary inspection procedures.” *Id.*,  
7 ¶ 20. A FOIA SME further determined that SFO would be the office most likely to maintain  
8 responsive information to CAIR’s FOIA Request because it refers specifically to the “Seattle  
9 Field Office” and/or “Blaine port-of-entry,” which both fall within SFO’s jurisdiction. *Id.* The  
10 FOIA Division tasked OPA with the search due to CAIR’s request for statements to the media or  
11 the press. *See id.*, ¶ 21.

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14 Next, CBP identified three custodians (“SFO Custodians”) based on their position as SFO  
15 Border Security Division<sup>2</sup> Managers. *Id.*, ¶ 24. These SFO custodians were determined to be the  
16 people most likely to have responsive records to CAIR’s FOIA Request because, as upper  
17 management, they would most likely have any records concerning border screening/inspection  
18 policies or directives because of CBP’s policy distribution process in which management sends  
19 policy down to subordinates. *See id.* CAIR’s FOIA Request specifically sought “directives,  
20 orders, guidance, briefings, instructions, musters, e-mail, other electronic communications,”  
21 which would reasonably fall within this distribution process.

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24 As for the searches themselves, the custodians searched Outlook for responsive  
25 documents. For the SFO Custodians, it was determined that Outlook would be the record system  
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<sup>2</sup> The Border Security Division oversees Passenger Processing. Search Decl., ¶ 24.

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

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19 Although, CBP performed a search reasonably calculated to uncover all relevant  
20 documents in regards to CAIR's FOIA Request, *see Zemansky*, 767 F.2d at 571, CBP  
21 acknowledges CAIR's concerns about the emails of Adele Fasano, the SFO Assistant Director,  
22 and Randy Howe. *Cr. Mot.*, at 10-12. In an act of good faith and full transparency, CBP will  
23 supplement its search to include these three custodians' email accounts. *See Third Decl. of*  
24 Patrick Howard, dated August 14, 2020.  
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1 **B. CBP properly withheld documents pursuant to FOIA Exemptions.**

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

3 CBP appropriately withheld information on five documents pursuant to 5 U.S.C. §  
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5 552(b)(5), as subject to the deliberative process privilege. *See* Dkt. No. 22, Decl. of Patrick  
6 Howard, Exemption Decl., Ex. 4, Doc. Nos. 52, 54, 55, 56, 57. CAIR alleges that CBP  
7 improperly redacted materials regarding press inquiries.<sup>3</sup> *Cr. Mot.*, at 13-14. The redacted  
8 emails contain deliberations between CBP staff members to assist the decision makers in how to  
9 respond to media and public inquiries. Exemption Decl., ¶ 18.

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11 While the Ninth Circuit “has defined the ambit of the deliberative process privilege under  
12 Exemption 5 narrowly,” *Sierra Club, Inc. v. United States Fish & Wildlife Serv.*, 925 F.3d 1000,  
13 1011 (9th Cir. 2019), *cert. granted*, 140 S. Ct. 1262 (2020), CAIR too narrowly defines the  
14 privilege to only apply to policymaking deliberations. *See Cr. Mot.*, at 14.

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16 “The deliberative process privilege protects the internal decision making processes of  
17 government agencies, including documents reflecting advisory opinions, recommendations and  
18 deliberations comprising part of a process by which governmental decisions and policies are  
19 formulated.” *Am. Civil Liberties Union of N. California v. United States Dep’t of Justice*, 880  
20 F.3d 473, 490 (9th Cir. 2018) (internal quotation marks and citations omitted). “It applies only  
21 if disclosure of the materials would expose an agency’s decision-making process in such a way as  
22 to discourage candid discussion within the agency and thereby undermine the agency’s ability to  
23 perform its functions.” *Sierra Club, Inc.*, 925 F.3d at 1011 (internal quotation marks and citation  
24 omitted).  
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28 <sup>3</sup> CAIR’s assertions that CBP “lied” to the public do not support the disclosure of the privileged material.

1 CAIR wrongly applies the law to the facts here. CAIR asserts that press statements  
2 released in response to no particular inquiry are not exempt pursuant to the deliberative process  
3 privilege. Here, the deliberations were in response to specific press and public inquiries.  
4 Exemption Decl., ¶ 18; see also Ex. 4, Doc. 52 “CBC News Request.” Furthermore, CBP has  
5 provided sufficient reason as to why disclosure of these deliberations would undermine CBP’s  
6 ability to respond to press inquiries in a timely manner. Exemption Decl., ¶ 19. As these  
7 deliberations precede the finalization of the press release related to specific inquiries, *see*  
8 Exemption Decl., Ex. 4, Doc. 60, CAIR’s argument is not relevant here.

11 **2. CBP properly withheld information under Exemptions 6 and 7(C).**

12 CBP appropriately withheld names and other identifying information of government  
13 employees and other third parties under 5 U.S.C. §§ 552(b)(6) and (b)(7)(C). *See* Exemption  
14 Decl., ¶¶ 20-27. Exemption 6 serves to protect personal privacy, permitting an agency to  
15 withhold “personnel and medical files and similar files the disclosure of which would clearly  
16 constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). “Disclosures  
17 that would subject individuals to possible embarrassment, harassment, or the risk of mistreatment  
18 constitute nontrivial intrusions into privacy under Exemption 6.” *Cameranesi v. United States*  
19 *Dep’t of Def.*, 856 F.3d 626, 638 (9th Cir. 2017). The term “similar files” is to be interpreted  
20 broadly, covering all “Government records on an individual which can be identified as applying  
21 to that individual.” *U.S. Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 595, 602 (1982);  
22 *see also Lepelletier v. Fed. Deposit Ins. Corp.*, 164 F.3d 37, 47 (D.C. Cir. 1999) (“The Supreme  
23 Court has interpreted the phrase ‘similar files’ to include all information that applies to a  
24 particular individual.”).

1 Exemption 7(C) allows agencies to withhold information compiled for law enforcement  
2 purposes that “could reasonably be expected to constitute an unwarranted invasion of personal  
3 privacy.” 5 U.S.C. § 552(b)(7)(C). This exemption is similar to Exemption 6, but broader in  
4 scope. Unlike Exemption 6, Exemption 7(C) does not feature the word “clearly,” thereby easing  
5 the burden on the agency. *Cong. News Syndicate v. DOJ*, 438 F. Supp. 538, 541 (D.D.C. 1977).

7 CBP asserted Exemptions 6 and 7(C) to redact the names, signatures, phone numbers,  
8 email addresses, and personally identifiable information of government employees and other  
9 third party individuals. Exemption Decl., ¶¶ 21, 25-27. Both parties agree that low-level CBP  
10 employees have a privacy interest in preventing the disclosure of their names. Cr. Mot., at 15.  
11 However, CBP released the names of all high-ranking officials. Exemption Decl., ¶ 21. CAIR  
12 contests the redactions of the names of assistant directors and port directors, who do not fall  
13 within the category of high-ranking officials for CBP’s redaction purposes. Cr. Mot., at 15. In  
14 contrast, CBP disclosed the name of SFO’s Director Adele Fasano.

17 While CAIR continues to allege that CBP’s actions amounted to misconduct, the  
18 arguments do not demonstrate how the public interest’s in the names of the government  
19 employees’ outweighs the government employees’ privacy interests. These government  
20 employees have a protectable privacy interest in their identities that would be threatened by  
21 disclosure. Exemption Decl., ¶ 22; *see also Cameranesi*, 856 F.3d at 639. CBP applied  
22 Exemption 6 to protect individuals from unwanted contact, annoyance, or harassment in their  
23 personal lives. *Id.* That is particularly applicable here because the underlying incident has  
24 garnered significant media interest and it is foreseeable that the government employees could be  
25 harassed in their personal lives for actions taken in regards to border security. *Id.* In addition,  
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1 release of CBP employee names could subject them to pressure in the future to make favorable  
2 decisions concerning admissibility of persons to the United States. *Id.*

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4 In considering whether the public interest is significant, “the *only* relevant public interest  
5 in the FOIA balancing analysis is the extent to which disclosure of the information sought would  
6 she[d] light on an agency’s performance of its statutory duties or otherwise let citizens know  
7 what their government is up to.” *Cameranesi*, 856 F.3d at 639-40 (internal quotation omitted)  
8 (emphasis in original). “This inquiry focuses not on the general public interest in the subject  
9 matter of the FOIA request, but on the additional usefulness of the specific information  
10 withheld.” *Tuffly*, 870 F.3d at 1094 (internal quotation and citation omitted). Thus, CAIR has to  
11 demonstrate the usefulness of disclosure of the names themselves, which it has not done.  
12

### 13 **3. CBP properly withheld information under Exemption 7(E).**

14 Under Exemption 7(E), agencies may withhold information “which would disclose  
15 techniques and procedures for law enforcement investigation or prosecutions . . . if such  
16 disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C.  
17 § 552(b)(7)(E). This exemption applies broadly and allows agencies to withhold information  
18 that “would provide insight into its investigatory or procedural techniques.” *Techserve Alliance*  
19 *v. Napolitano*, 803 F. Supp. 2d 16, 28-29 (D.D.C. 2011). “The government must show that the  
20 technique or procedure at issue is not well known to the public, *see Rosenfeld v. U.S. Dep’t of*  
21 *Justice*, 57 F.3d 803, 815 (9th Cir. 1995), and must describe the general nature of the technique  
22 or procedure at issue, although it need not provide specific details, *see Judicial Watch, Inc. v.*  
23 *U.S. Dep’t of Commerce*, 337 F. Supp. 2d 146, 181 (D.D.C. 2004).” *Shannahan v. IRS*, 08-cv-  
24 452-JLR, 2009 U.S. Dist. LEXIS 99665, \*24 (W.D. Wash. 2009).  
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1 CBP invoked Exemption 7(E) to withhold non-public information used for official  
2 purposes by law enforcement personnel, including law enforcement terminology, techniques, and  
3 procedures used to determine admissibility and other similar information that directly relates to  
4 CBP's law enforcement mission to protect the border. Exemption Decl. ¶¶ 28-29, Ex. 4, *Vaughn*  
5 Index. Disclosure would provide the public with information that is not generally known or  
6 publicly disclosed. *Id.*, ¶ 29. Armed with this information, persons seeking to enter the United  
7 States could rely on this law enforcement sensitive information to alter their patterns of conduct,  
8 adopt new methods of operations, and/or effectuate other countermeasures to avoid detection  
9 thereby interfering with CBP's law enforcement efforts by avoiding detection or circumventing  
10 the law. *Id.* Disclosure of this information would interfere with the efforts aimed at developing  
11 law enforcement techniques and CBP's ability to protect the border. *Id.* Consequently, the  
12 information is exempt from disclosure under Exemption 7(E).  
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16 First, CAIR asks the Court to order CBP to supplement its entries in the *Vaughn* index  
17 applicable to Exemption 7(E). Cr. Mot., at 19. Such supplementation is unnecessary, as the  
18 *Vaughn* index, the unredacted portions of the documents, and the Exemption Declaration provide  
19 more than adequate information for CAIR and this Court to test the appropriateness of the  
20 application of the exemption. CBP cannot provide more information without revealing the very  
21 law enforcement techniques and procedures it seeks to protect.  
22

23 Second, CAIR argues that CBP over-redacted the records because the information is  
24 already publicly known and will not result in harm to the agency, and because CBP has allegedly  
25 redacted information to shield wrongdoing. Cr. Mot., at 20. CAIR only speculates that the  
26 information is publicly known. It fails to cite to any specific redaction to show that the  
27 information is publicly known. Instead, CAIR relies on generalities, ignoring the information  
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1 provided, the Exemption Declaration, and the *Vaughn* index. For instance, the mere fact that  
 2 there have been accounts of detention in Blaine does not undermine Exemption 7(E) protection  
 3 for all of the law enforcement techniques or procedures utilized by CBP. Cr. Mot., at 21.  
 4 CAIR’s argument overreaches in an attempt to disqualify all of CBP’s redactions based on  
 5 speculation.  
 6

7 While an *in camera* inspection of the documents is not necessary to determine the  
 8 appropriateness of the applied exemptions, CBP will not object to such an order.  
 9

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

11 CAIR asserts that CBP violated FOIA by failing to respond to its FOIA request within 20  
 12 days. Cr. Mot., at 5-8. CBP does not deny that it did not meet the 20-day period. However,  
 13 many federal courts have held that untimeliness is not an automatic basis for violation of FOIA  
 14 for purposes of summary or declaratory judgment. *See, e.g., Cmty. Ass’n for Restoration of the*  
 15 *Env’t. v. U.S. Env’t Prot. Agency*, 36 F. Supp. 3d 1039, 1047-1054 (E.D. Wash. 2014) (ruling  
 16 there is no cause of action for violation of statutory provisions for timeliness under FOIA where  
 17 delays were not egregious); *Carmody & Torrance v. Def. Contract Mgmt. Agency*, 11-cv-1738,  
 18 2014 WL 1050908, at \*7 (D. Conn. Mar. 13, 2014) (“While the long unexplained delays present  
 19 here dismay this court, Carmody’s statutory remedy *is* the instant suit.”); *Citizens for a Strong*  
 20 *New Hampshire, Inc. v. I.R.S.*, 14-cv-487, 2015 WL 5098536, at \*5-7 (D.N.H. Aug. 31, 2015)  
 21 (untimeliness entitles the requester to “to seek a remedy in the form of judicial relief”); *Hainey v.*  
 22 *United States DOI*, 925 F. Supp. 2d 34, 42 (D.D.C. 2013) (stating that the government’s  
 23 “untimely responses, in and of themselves, do not entitle Hainey to judgment in her favor”);  
 24 *Citizens for Resp. & Ethics in Wash. v. FEC*, 711 F.3d 180, 189 (D.D.C. 2013) (stating in dicta,  
 25 “If the agency does not adhere to FOIA’s explicit timelines, the ‘penalty’ is that the agency  
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1 cannot rely on the administrative exhaustion requirement to keep cases from getting into court.”).

2 CBP requests that the Court not find summary judgment on the basis of untimeliness.

3 **CONCLUSION**

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5 For the reasons explained herein, CBP respectfully requests that the Court grant summary  
6 judgment in its favor and deny CAIR’s cross-motion for summary judgment.

7 DATED this 14th day of August, 2020.

8 Respectfully Submitted,

9  
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