Chief District Judge Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

COUNCIL ON AMERICAN-ISLAMIC RELATIONS-WASHINGTON,

Plaintiff,

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION, *et al.*,

Defendants.

Case No. 2:20-cv-0217-RSM

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

NOTE ON MOTION CALENDAR:
August 21, 2020

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INTRODUCTION

Plaintiff Council on American-Islamic Relations—Washington (CAIR) filed this lawsuit under the Freedom of Information Act (FOIA) to hold officials working for Defendants Customs and Border Protection (CBP) and the Department of Homeland Security (DHS) accountable. Indeed, the "basic purpose of FOIA is to ensure an informed citizenry, [which is] vital to the functioning of a democratic society, [and] needed to check against corruption and to hold the governors accountable to the governed." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). That is especially true in this case. CAIR has demonstrated through a leaked document, the FOIA results released to date, firsthand accounts from the press, and statements from members of Congress that on January 4 and 5, 2020, CBP detained dozens of individuals (including U.S. citizens and lawful permanent residents) at the U.S.-Canadian border in Blaine, Washington, based solely on those individuals' national origin. Following those illegal detentions, CBP covered up what happened, denying that the agency had issued a directive mandating this illegal activity. As the FOIA results CAIR has now obtained demonstrate, that denial occurred even while high-level CBP officials told officials within CBP's Seattle Field Office (SFO) to *stop* targeting individuals based on nationality.

Despite producing this voluminous evidence of unlawful government activity, Defendants have refused to release key records regarding what occurred in early January 2020. Instead, in their response and reply, Defendants simply repeat their conclusory assertions that they conducted an adequate search for records, that privacy interests outweigh knowing which high-level officials in SFO implemented this scheme, and that the documents mandating the unlawful detentions should remain secret. Yet notably, Defendants' opposition does not even

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attempt to dispute Plaintiff's allegation that the withheld information demonstrates unlawful government conduct illegally targeting people for detention and interrogation on the basis of national origin. Defendants also seek to avoid CAIR's arguments that the unlawful activity and government misconduct at issue make clear the release of the documents at issue is appropriate. Those arguments are deeply rooted in decades of FOIA case law. Defendants have also effectively conceded that their search was inadequate by agreeing to conduct an additional search *after* CAIR's cross-motion for summary judgment. Accordingly, the Court should order Defendants to conduct an adequate search and to make available to CAIR the documents that Defendants have improperly withheld and redacted.

I. Summary Judgment Is Appropriate on CAIR's Statutory Timeline Claim.

There is no dispute in this case that Defendants failed to abide by the 20-day statutory deadline for providing a response to CAIR's FOIA request. *See* Dkt. 25 at 11 ("CBP does not deny that it did not meet the 20-day period."). While Defendants assert that this alone is not enough for this Court to grant summary judgment, Defendants ignore that they waited several months to provide any meaningful response to CAIR's FOIA request. As CAIR detailed in its motion for summary judgment, CBP provided an initial response to CAIR's FOIA nearly two months after the organization's request, providing four partially redacted pages and an online bulletin. Dkt. 23 at 5-6. Another two months later, Defendants finally released portions of 147 pages of documents—long after CAIR had filed its request. Dkt. 23 at 6. Moreover, Defendants have continued to fail in conducting an adequate search and release responsive records—further exacerbating their violation of the statutory deadline. Defendants never respond to or address this latter argument. Dkt. 25 at 11. Such "conduct violates FOIA." *Manat v. U.S. Dep't of Homeland Sec.*, No. 19-cv-011163-JDW, 2020 WL 4060277, at *3 (E.D. Penn. July 20, 2020). "Congress

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made a choice to include in the statute an express 20-day requirement, with limited exceptions," none of which apply here. *Id.* Accordingly, this Court should grant CAIR summary judgment on its claim that Defendants failed—and continue to fail—in abiding by the 20-day deadline, just as other courts have done. *See* Dkt. 23 at 7 (citing cases granting summary judgment to a plaintiff for the agency's failure to abide by the statutory deadline).

II. Defendants Failed to Perform an Adequate Search.

Defendants also effectively concede that CAIR is correct that they failed to conduct an adequate search. As an initial matter, Defendants do not contest that "FOIA places the burden 'expressly . . . on the agency to sustain its [search]." *Davis Wright Tremaine LLP v. U.S. C.B.P.*, No. C19-334 RSM, 2020 WL 3258001, at *5 (W.D. Wash. June 16, 2020) (first alteration in original) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 755 (1989)). Nor do Defendants object to the principle that when weighing whether a search is adequate, "the facts must be viewed in the light most favorable to the requestor." *Zemansky v. E.P.A.*, 767 F.2d 569, 571 (9th Cir. 1985). Instead, Defendants simply assert that their affidavit from Declarant Patrick Howard demonstrates the search was adequate. Dkt. 25 at 3. But as CAIR has explained, in *Davis Wright Tremaine LLP*, this Court rejected a nearly identical declaration from Mr. Howard as inadequate. In that case, the Court noted that Defendant CBP had not searched *all* locations likely to have responsive documents and ordered Defendants to conduct an adequate search. 2020 WL 3258001, at *5-6. The language that the Court found lacking in Mr. Howard's declaration in *Davis Wright Tremaine LLP* is the same language as that he used in this case. *Compare* 2020 WL 3258001, at *5 *with* Dkt. 21 ¶ 20; *see also* Dkt. 23 at 9-10. This alone makes clear Defendants have not performed the search that FOIA requires. Indeed, Defendants do nothing more than assert in conclusory fashion that their search was adequate, even when

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Davis Wright Tremaine LLP says otherwise. Dkt. 25 at 3. Specifically, Defendants do not attempt to distinguish how the declaration in that case is different from the one here (it is not), or why the facts in this particular declaration warrant a different result. As a result, it is clear that Defendants have failed to perform an adequate search.

Defendants also have failed to pursue leads by searching the emails of higher-level CBP officials whom the FOIA response makes clear were heavily involved in the January 4 and 5 detentions and response. As CAIR explained in its motion and response, failing to pursue such leads is a reason to conclude a search was inadequate. *See, e.g.*, Dkt. 23 at 9; *Reporters Comm. for Freedom of Press v. F.B.I.*, 877 F.3d 399, 407 (D.C. Cir. 2017); *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998); *Rollins v. U.S. Dep't of State*, 70 F. Supp. 3d 546, 550 (D.D.C. 2014). Defendants do not contest these principles. Instead, they just again explain why they searched the emails of three "Border Security Division Managers." Dkt. 25 at 3-5.[1] But Defendant's explanation of why they searched these three emails entirely misses the point. These (limited) searches revealed obvious *additional* leads that Defendants have not bothered to pursue. As CAIR noted before, the FOIA results demonstrate that SFO Director Adele Fasano and the SFO Assistant Director were heavily involved in planning and implementing the unlawful Iranian detentions. Dkt. 23 at 11. Despite that fact, Defendants never searched their emails—a clear oversight and clear lead. Nor would searching the emails of the three "Border

[1] In its cross-motion for summary judgment, CAIR submitted a copy of the entire FOIA response in support of its motion. To make the document more accessible to the Court, Plaintiff's counsel used Adobe Acrobat Pro's text recognition software to render the document's text searchable. That process resulted in turning pages that were fully redacted with a FOIA exemption marker into blank pages. As a result, CAIR has included with this filing a version of the FOIA response that is not text-searchable, but which includes Defendants' exemption markings on the fully redacted pages. *See* Third Maltese Decl. Ex. A. This document is otherwise identical to Exhibit A of the Second Maltese Declaration (Dkt. 24-1).

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Security Division Managers" turn up all responsive records. For example, any email communications between CBP Headquarters and the SFO—such as a rebuke or reprimand of the illegal detention directive—would likely go to the SFO Director. *See* Dkt. 23 at 11. Indeed, other documents in the record reveal that higher-level officials at CBP Headquarters were involved in responding to the SFO's unlawful directive and providing instructions to SFO. *Id.* Yet it is clear that Defendants have yet to search the emails or documents of anyone at CBP Headquarters, despite their involvement and the national media attention focused on the illegal detentions. *See, e.g.*, Dkt. 25 at 4 (describing how CBP searched only three email addresses of low-level managers); Dkts. 24-2 – 24-10 (national news articles and statements from Congresswoman Pramila Jayapal); Dkt. 24-1 at 145 (CBP Office of Public Affairs statement to members of press). Failing to search these emails violates FOIA's mandate that Defendants conduct a reasonable search. And here, where Defendants conspicuously avoided searching the emails of *any* high-level officials, it "leads to an unfortunate appearance of an agency hand picking the documents to provide." *Davis Wright Tremaine LLP*, 2020 WL 3258001, at *6.

Ultimately, Defendants effectively concede these arguments. In a supplemental declaration filed *after* CAIR briefed the shortcomings in their search, Defendants explained that they will search the emails of Adele Fasano, the SFO Assistant Director, and Randy Howe, who was the Executive Director of the Office of Field Operations for CBP in early January 2020. Dkt. 26 ¶ 3. Accordingly, it should be clear that Defendants have failed to conduct an adequate search, and that summary judgment in CAIR's favor is appropriate.[2]

[2] Moreover, Defendants' new search may well turn up additional leads. Should Defendants' new search turn up further responsive documents and leads, Plaintiff may seek leave to file additional argument regarding the results of the new search.

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III. Defendants Have Not Met Their Burden to Justify Withholding and Redacting Responsive Documents.

a. Defendants Have Misapplied Exemption 5.

Defendants also have not born their burden to justify many, if not most, of the exemptions that they applied in this case. *See Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 973 (9th Cir. 2009). First, Defendants have not justified their use of the deliberative process privilege to redact certain parts of emails among members of CBP's Office of Public Affairs. According to Defendants, redaction was appropriate here because (1) agency officials were responding to specific press inquiries and (2) "disclosure of these deliberations would undermine CBP's ability to respond to press inquiries in a timely manner." Dkt. 25 at 7. These rationales are unavailing, and more importantly, are unresponsive to CAIR's arguments.

Defendant's first assertion—that CBP's press response did not respond to any particular inquiry—misses the point. CAIR cites several cases in its motion for summary judgment holding that discussions leading up to public-facing statements or press releases may not be redacted if the agency does not show "what deliberative process the withheld [emails] concerned or [their] role in the formulation of policies or recommendations for policy change." *Heffernan v. Azar*, 317 F. Supp. 3d 94, 126 (D.D.C. 2018). If Defendants cannot show there was a deliberative process "bear[ing] on . . . policy formulation," then its redactions are improper. *Mayer, Brown, Rowe & Maw LLP v. I.R.S.*, 537 F. Supp. 2d 128, 139 (D.D.C. 2008). Courts have repeatedly adopted similar positions, and Defendants offer no case law to contrary. *See* Dkt. 23 at 14 (citing cases). Such a limitation on the privilege Defendants claim is necessary, or else all discussions that any government actor makes about any sort of decision would be exempt from FOIA. *See, e.g.*, *Heffernan*, 317 F. Supp. 3d at 126 (rejecting "defendant's broad-sweeping descriptions[, because they] do not demonstrate how the draft press release's disclosure would expose an

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agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions" (internal quotation marks omitted)).

More importantly, Defendants never respond to CAIR's primary argument: that disclosure is required because of the underlying misconduct here and the strong indications that the agency attempted to mislead public. As CAIR explained in its motion, *see* Dkt. 23 at 13-14, "where there is reason to believe the documents sought may shed light on government misconduct, the [deliberative process] privilege is routinely denied, on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government." *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997) (internal quotation marks omitted); *see also, e.g.*, *Tax Reform Research Grp. v. I.R.S.*, 419 F. Supp. 415, 426 (D.D.C. 1976) (holding that documents relating to White House efforts to use IRS against its political enemies "simply cannot be construed as being part of any proper governmental process"). CAIR has provided substantial evidence of "governmental misconduct" in this case through a leaked directive, firsthand accounts in the press, congressional statements, evidence in the released FOIA documents, and case law. *See, e.g.*, Dkt. 23 at 17-18; *see also* Dkt. 16-7; Dkts. 24-1 – 24-10. Further, that same evidence suggests an agency attempt to mislead the public. *Compare, e.g.*, Dkt. 16-7 (CBP directive mandating detention of U.S. citizens and lawful permanent residents with a nexus to Iran); Dkt. 24-1 at 12 (instructing SFO not to target individuals based on nationality) *with* Dkt. 24-1 at 145 (asserting that "[r]eports that DHS/CBP has issued a . . . directive [mandating the detention of Iranian-Americans] are . . . false"). The exception that *In re Sealed Case* noted thus applies in this case. Indeed, Defendants do not cite any law to the contrary, respond to CAIR's arguments, contest that the agency misconduct was

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unlawful, or offer any other defense in response to CAIR's case law and argument. *See* Dkt. 25 at 6-7. The Court should therefore order that Defendants supplement their production to remove these redactions.

b. Defendants Have Not Justified Their Application of Exemptions 6 and 7(C).

Defendants have also failed to meet their burden with respect to high-level officials within the SFO whose names are redacted. As CAIR laid out in its motion, a court assessing Exemptions 6 and 7(C) must weigh a government employee's privacy interest with the public interest in disclosure of those names. Significantly, a requester may overcome a privacy interest if "the public interest being asserted is . . . that responsible officials acted negligently or otherwise improperly in the performance of their duties." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). As noted above, in its motion, CAIR laid out the evidence of a widespread but brief effort to systematically deprive U.S. citizens and lawful permanent residents of certain civil rights. Dkt. 23 at 17-18. Accordingly, the public interest here weighs in favor of eliminating the redactions for the key high-level officials in SFO that implemented this policy.

Once again, Defendants offer no meaningful response to this argument. Defendants never address CAIR's evidence of misconduct, and significantly, they never contest that CAIR has submitted evidence "that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Favish*, 541 U.S. at 174. Instead, Defendants state in conclusory fashion that CAIR's argument "do not demonstrate how the public interest's [sic] in the names of the government employees[] outweighs the government employees' privacy interests." Dkt. 25 at 8. This response is confusing: by introducing the evidence of significant misconduct, that is precisely what CAIR *has* done. Case after case recognizes that there is a

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strong "public interest in ensuring the integrity and reliability of [government activities] where there is some evidence of wrongdoing on the part of the government official." *Lissner v. U.S. Customs Serv.*, 241 F.3d 1220, 1223 (9th Cir. 2001) (citation omitted). Here, the record shows that Assistant Port Directors and Port Directors played a critical role in implementing the unlawful directive. Those same records do not indicate that these officials raised objections to a brazenly unlawful policy. These Port Directors and Assistant Port Directors play key roles in overseeing the entry and exit of thousands of individuals from this country everyday (at least prior to the current pandemic) across much of the northern border. As a result, there is a strong public interest in holding them accountable, an interest that outweighs any privacy interest in keeping their names redacted.

c. Defendants Have Not Met Their Burden as to Exemption 7(E).

Finally, as to Exemption 7(E), Defendant's arguments are again conclusory in nature and again never address many of CAIR's arguments. First, and most importantly, CAIR argued in its motion that Exemption 7(E) cannot be invoked to shield from disclosure government techniques or procedures that are clearly unlawful. Such "unauthorized or illegal investigative tactics may not be shielded from the public by use of FOIA exemptions." *Kuzma v. I.R.S.*, 775 F.2d 66, 69 (2d Cir. 1985); *see also Weissman v. C.I.A.*, 565 F.2d 692, 694-96 (D.C. Cir. 1977) (rejecting claimed law enforcement exception where CIA had exceeded its statutory authority); *Wilkinson v. F.B.I.*, 633 F. Supp. 336, 349 (C.D. Cal. 1986) (reasoning that Exemption 7(E) cannot apply to techniques that are "illegal or of questionable legality"). CAIR then went on to explain that this is true because where a technique or procedure is clearly unlawful, it was never valid in the first place and thus cannot be a "technique or procedure" covered by FOIA. Dkt. 23 at 23. Defendants never respond to this line of reasoning or case law. And as CAIR has already repeatedly noted in

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this reply, Defendants also do not contest that the agency engaged in unlawful activity. As a result, release of the directive that mandated the detention of individuals based on national origin is appropriate, along with the release of any communications discussing, implementing, criticizing, or withdrawing that directive.

In addition, CAIR has established that much of the redacted information is publicly known. As a result, Defendants must release the unlawful detention directive and communications regarding the directive, as well as possibly release whatever new directive replaced the detention directive. *See Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 815 (9th Cir. 1995). While Defendants claim that CAIR "relies on generalities, ignoring the information provided . . . [in] the *Vaughn* index," Dkt. 25 at 10-11, some of CAIR's arguments are general precisely because Defendants failed to fulfill their obligation of providing detailed information, *see* Dkt. 23 at 18-20. Moreover, many of CAIR's arguments are not mere generalities. CAIR provided specific evidence that even in the detention directive, most of the screening information is publicly known. For example, CAIR pointed to the leaked directive itself, as well as other publicly available documents (including those released in the FOIA response) and the firsthand accounts of detained persons of Iranian heritage to demonstrate that the detention directive's screening criteria are publicly known. Dkt. 23 at 21-22. This is not "speculat[ion]," as Defendants claim. Dkt. 25 at 10. Instead, it is evidence directly responsive to the Exemption that Defendants have applied and the limited information CAIR has about those redactions. Notably, Defendants do not respond to CAIR's evidence regarding the publicly known nature of the directive and its contents, and instead simply mischaracterize CAIR's argument. For example, Defendants bizarrely criticize CAIR for "fail[ing] to cite to a specific redaction to show how that information is publicly known" without explaining how CAIR is supposed to know what is

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behind a specific redaction beyond the general description in the *Vaughn* index. Dkt. 25 at 10. As a result, Defendants have not met their burden to justify their exemptions. The Court should review Defendants' redactions to ensure that only those techniques or procedures that truly are not publicly know are exempted from disclosure.[3]

Last, Defendants' arguments regarding Exemption 7(E) make clear why either supplementation of the *Vaughn* index or *in camera* review is appropriate. On the one hand, Defendants critique CAIR for relying on generalities, while on the other hand they vigorously defend their right to refuse to release any more specific information about the documents they have withheld. *See* Dkt. 25 at 10-11. As CAIR explained in its motion for summary judgment, supplementing the *Vaughn* index is necessary for CAIR to more effectively understand and oppose the agency's designations. Dkt. 23 at 18-20. But if the Court determines that supplementing is not necessary here, then *in camera* review is appropriate to "compensate for th[e] imbalance of knowledge as between the plaintiff[] and the government." *Islamic Shura Council of S. California v. F.B.I.*, 635 F.3d 1160, 1165 (9th Cir. 2011). That is especially true in light of the uncontested evidence that CAIR has submitted of government misconduct and Defendants' non-opposition to *in camera* review. *See, e.g.*, *Jones v. F.B.I.,* 41 F.3d 238, 243 (6th Cir. 1994).

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion for summary judgment and grant CAIR's cross-motion for summary judgment.

[3] In addition, as CAIR explain in its cross-motion for summary judgment, to the extent that other 7(E) exemptions beyond the detention directive and the communications about that directive mandate broad, general categories for vetting, those redactions should also be lifted. *See* Dkt. 23 at 22 n.4.

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Respectfully submitted on this 21st day of August, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

DATED this 21st day of August, 2020.

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