

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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AMERICAN IMMIGRATION)
LAWYERS ASSOCIATION)
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	Plaintiff,)
)
v.)
)
UNITED STATES DEPARTMENT OF)
HOMELAND SECURITY <i>et al.</i> ,)
)
	Defendants.)
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No. 1:10-cv-01224 (EGS)

**PLAINTIFF’S REPLY MEMORANDUM IN SUPPORT OF
ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
DEFENDANTS’ CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff American Immigration Lawyers Association (“AILA”) respectfully submits this reply memorandum in support of its motion for summary judgment and in opposition to Defendants’ cross-motion for summary judgment.

SUMMARY

Defendants continue to withhold public information without any reasonable justification. Failing to meet their burdens under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, the government has improperly withheld records that are not subject to FOIA exemption.

In particular, Defendants continue to withhold, in-part, an H-1B Petition Fraud Referral Sheet and a Compliance Review Report Form (identified in pages 5-8 of the Revised *Vaughn* Index, attached as Exhibit 21, Dkt. No. 23-24). These documents must be disclosed in full in view of: (1) the availability of their content in the public domain;

(2) Defendants' official acknowledgement of such documents in their own FOIA responses and FOIA production; and (3) Defendants' failure to meet their burden to provide a specific explanation for why and how information that is already in the public domain would risk circumvention of the law so as to deserve exemption under 5 U.S.C. § 552(b)(7)(E).

In addition, Defendants continue to withhold segregable portions of at least a Memorandum dated October 31, 2008 from Donald Neufeld, which are also in the public domain (identified in pages 1-4 of the Revised *Vaughn* Index, attached as Exhibit 21, Dkt. No. 23-24). Defendants' sweeping view of what records may be sheltered from disclosure is contrary to settled FOIA law. The government should be ordered to release segregable portions of documents that include contents found in the public domain and thus are not entitled to FOIA protection.

AILA respectfully requests that its motion for summary judgment be granted and Defendants' cross-motion for summary judgment be denied.

ARGUMENT

PLAINTIFF'S MOTION SHOULD BE GRANTED AND DEFENDANTS' CROSS-MOTION SHOULD BE DENIED

I. DEFENDANTS ARE NOT ENTITLED TO THE ASSERTED EXEMPTIONS AND THEIR WITHHOLDINGS ARE NOT JUSTIFIED

Defendants admitted that the information withheld from the H-1B Petition Fraud Referral Sheet and the Compliance Review Report Form is in the public domain. *See* Joint Response to Minute Order on Motion to File Exhibits Under Seal (Dkt. No. 16) ("Defendant's position is that Exhibits 7, 8, and 15 are publicly available and are therefore not appropriately filed under seal."). Defendants themselves placed the H-1B Petition Fraud Referral Sheet in the public domain by including it in a court filing, and

Defendants released another version of the Compliance Review Report Instructions in full (*see* Exhibit 29, Dkt. No. 23-32).

Defendants now argue that the withheld information was not officially acknowledged. Such an argument is without merit.

A. Defendants Failed to Meet Their Burden to Justify Nondisclosure.

Defendants failed to meet their burden to justify nondisclosure of the withheld material. *See Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989) (“Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden ‘on the agency to sustain its action’ and directs the district courts to ‘determine the matter de novo.’”) (quoting 5 U.S.C. § 552(a)(4)(B)); *see also Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) (“[T]he burden is on the agency to demonstrate, not the requester to disprove, that the materials sought . . . have not been improperly withheld.”). Consistent with the Act’s dominant policy of disclosure rather than secrecy, the exemptions to FOIA are to be narrowly construed. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

Defendants merely argue that the withheld information was not officially disclosed. However, as demonstrated below, Defendants officially acknowledged the existence of the withheld information through their own FOIA responses and FOIA production. In addition, even assuming the absence of official disclosure, such absence is not dispositive in determining whether nondisclosure is justified. In *Washington Post v. U.S. Dept. of Defense*, this court found that:

Our Court of Appeals has never held that unofficial disclosures of information or official disclosures of similar yet not identical information may be ignored by an agency

in making its classification decisions. To the contrary, although it has never explicitly required such an explanation, our Court of Appeals has only allowed the withholding of information already in the public domain based upon *a specific explanation* for continued withholding of that information, supported by appropriate agency declarations, of why formal release of information already in the public domain threatens the national security.

766 F. Supp. 1, 10 (D.D.C. 1991) (citing *Abbotts v. Nuclear Regulatory Comm'n*, 766 F.2d 604, 608 n. 4 (D.C. Cir. 1985); *Afshar v. Dep't of State*, 702 F.2d 1125, 1131 n. 7, 1131-32 (D.C. Cir. 1983); *Salisbury v. United States*, 690 F.2d 966, 971-72 (D.C. Cir. 1982); *Military Audit Project v. Casey*, 656 F.2d 724, 741 (D.C. Cir. 1981); *Phillippi v. Central Intelligence Agency*, 655 F.2d 1325, 1332 & n. 22 (D.C. Cir. 1981); *Hayden v. National Security Agency/Central Security Service*, 608 F.2d 1381, 1388 (D.C. Cir. 1979)) (emphasis added).

Similarly, Defendants still have the burden to justify nondisclosure and to provide *a specific explanation* for why and how information that is already in the public domain would risk circumvention of the law so as still to deserve exemption under 5 U.S.C. § 552(b)(7)(E).¹ Defendants generically argued that disclosure of the withheld information would risk circumvention of the law. However, Defendants failed to explain why the withheld information deserves exemption from disclosure *when accounting for the fact that the withheld information is already known to the public*.

¹ See *PHE, Inc. v. DOJ*, 983 F.2d 248, 250 (D.C. Cir. 1993) (stating that under Exemption 7(E), an agency “must establish that releasing the withheld material would risk circumvention of the law”); *Judicial Watch, Inc. v. U.S. Dep’t of Commerce*, 337 F. Supp. 2d 146, 179 (D.D.C. 2004) (recognizing the exemption's protection for techniques “not well-known to the public”).

B. Defendants' Argument that the Withheld Information was not Officially Disclosed is Without Merit.

As discussed above, Defendants failed to carry their burden of demonstrating that certain records identified in their *Vaughn* Indexes are exempt from disclosure. In addition, even if Defendants could credibly claim exemption for the unreleased information, that information is in the public domain and was officially acknowledged. When, as here, information has been "officially acknowledged," its disclosure may be compelled even over an agency's otherwise valid exemption claim. *Fitzgibbon v. C.I.A.*, 911 F.2d 755, 765 (D.C. Cir. 1990) (citing *Afshar v. Department of State*, 702 F.2d 1125 (D.C. Cir. 1983)).

Defendants argue that the withheld information was not officially disclosed. However, this argument is remarkable given that Defendants themselves officially acknowledged the withheld information through their own FOIA responses and production. Defendants released another version of the Compliance Review Report Instructions *in full* (see Exhibit 29, Dkt. No. 23-32). In addition, Defendants themselves placed the H-1B Petition Fraud Referral Sheet in the public domain by including it in a court filing. This court has recognized that responses to FOIA requests are official. *Valfells v. C.I.A.*, 717 F. Supp. 2d 110, 118 (D.D.C. 2010) (stating the official nature of responses to FOIA requests).

Contrary to the government's sweeping generalization, AILA does not have the burden to provide an official and public version of the withheld documents. If such official disclosures existed, AILA would not be seeking to compel production of the withheld or partially withheld documents in the present action. In addition, if such was

the burden on FOIA requesters, no FOIA plaintiff would ever prevail in compelling disclosure of such improperly withheld documents.

To prove “official disclosure,” Plaintiff need only demonstrate that: (1) the information requested is as specific as the information previously released; (2) the information requested matches the information previously disclosed; and (3) the information requested has been made public through an official and documented disclosure. *Fitzgibbon*, 911 F.2d at 765.

1. The Compliance Review Report Form.

Defendants produced a redacted version of the Compliance Review Report Form (Exhibit 12, Dkt. No. 23-15) and the full version of the Compliance Review Report Instructions Sheet (Exhibit 29, Dkt. No. 23-32). Defendants cannot deny that these documents were officially disclosed. *See Valfells*, 717 F. Supp. 2d at 118.

The redacted portions of the Compliance Review Report Worksheet (Exhibit 12, Dkt. No. 23-15) can be easily and specifically deduced from the Compliance Review Report Instructions (Exhibit 29, Dkt. No. 23-32). The detailed content of the instructions directly corresponds to the Compliance Review Report Worksheet produced by Defendants in redacted form. *Compare* Exhibit 12 (redacted Compliance Review Report Form as produced by Defendants to Plaintiff on October 27, 2010, Dkt. No. 23-15), and Exhibit 29 (Compliance Review Report Instruction Sheet dated July 22, 2009 as produced by Defendants on May 9, 2011, Dkt. No. 23-32). Still further, the questions covered in the instructions also correspond to Defendants’ publicly available description of information to be sought by inspectors during site visits. *See*

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?>

vgnextoid=836d7b8a96aa7210VgnVCM100000082ca60aRCRD&vgnnextchannel=66965ddca7977210VgnVCM100000082ca60aRCRD (Exhibit 6, Dkt. No. 23-9).²

Defendants' argument suggesting that that the information does not match because the July 22, 2009 Compliance Review Report Instruction Sheet postdates the redacted June 19, 2009 Compliance Review Report Form is not credible. One need only compare the questions from the publicly available Compliance Review Report Instructions Sheet dated December 5, 2008 (Exhibit 8, Dkt. No. 23-11) and the July 22, 2009 Compliance Review Report Instructions Sheet (Exhibit 29, Dkt. No. 23-32), as presented below. The questions are almost identical, thus refuting any suggestion that the questions in the redacted June 19, 2009 Compliance Review Report Form (i.e. between December 5, 2008 and July 22, 2009) are not substantially similar to and do not match the December 5, 2008 or to the July 22, 2009 Compliance Review Report Instruction Sheets.

December 2008 Compliance Review Report Instructions Sheet (Exhibit 8, Dkt. No. 23-11)	July 2009 Compliance Review Report Instructions Sheet (Exhibit 29, Dkt. No. 23-32)
1: Does the facility visually appear to be that of the organization?	1: Does the facility visually appear to be that of the business or organizational entity?
2: Was an organizational representative authority present?	2: Was contact made with the signatory or other management representative?
3: Did results of site visit suggest the presence of a legitimate organization?	3: Did results of site visit suggest the presence of an organization or business?

² In fact, these are the same questions that immigration officers sought answers to during site inspections carried out as part of the H1-B Benefit Fraud & Compliance Assessment (BFCA). See BFCA Report at 5-6 (Exhibit 2, Dkt. No. 23-5). USCIS's disclosure of these questions in the BFCA Report further demonstrates that the content of the worksheet is in the public domain.

4: Did the organization have knowledge of the beneficiary and the petition filed on behalf of the beneficiary?	4: Did the individual interviewed have knowledge of the beneficiary and the petition filed on behalf of the beneficiary?
5: Was the beneficiary working for the organization?	5: Was the beneficiary working for the organization or business?
6: Were you able to identify and speak to the beneficiary?	6: Were you able to identify and speak to the beneficiary?
7: Was the beneficiary knowledgeable, cooperative, and forthcoming with questions posed?	7: Was the beneficiary knowledgeable, cooperative, and forthcoming with questions posed?
8: Was the beneficiary being paid the salary as indicated?	8: Was the beneficiary being paid the salary as indicated?
9: Was the beneficiary performing the duties as indicated?	9: Was the beneficiary performing the duties as indicated?
10: Do you recommend further inquiry?	10: Do you recommend further inquiry?

It is clear that the withheld information from the Compliance Review Report Form specifically matches information that is in the public domain, was officially acknowledged, and thus must be disclosed in its entirety.

2. *The H-1B Petition Fraud Referral Sheet.*

The H-1B Petition Fraud Referral Sheet (Exhibit 11, Dkt. No. 23-14) was partially released to AILA in this case (see pages 05-06 of the Revised *Vaughn* Index, attached as Exhibit 21, Dkt. No. 23-24). Thus, Defendants officially acknowledged the existence of this document through their own FOIA production. *See Valfells*, 717 F. Supp. 2d at 118.

In addition, the H-1B Petition Fraud Referral Sheet is part of a judicial record and as such, it is in the public domain. *See Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) (“Therefore, until destroyed or placed under seal, tapes played in open court and admitted into evidence-no less than the court reporter’s transcript, the parties’ briefs, and the judge’s orders and opinions-remain a part of the public domain.”).

In particular, the H-1B Petition Fraud Referral Sheet is attached as part of Exhibit A (Exhibit 15, Dkt. No. 23-18) to a Declaration signed by Jill A. Eggleston which was filed on June 24, 2010 in the *TechServe Alliance v. Napolitano* case (D.D.C. Docket No. 1:10-cv-00353-HHK) (Exhibit 13, Dkt. No. 23-16). The government itself in the *TechServe* case made the H-1B Petition Fraud Referral Sheet a court record and disclosed the contents of the H-1B Petition Fraud Referral Sheet. That document has been available to the public through PACER for nearly one year.

Defendants' argument that the H-1B Petition Fraud Referral Sheet was first published by AILA is without merit. AILA posted the document online after it was left by a USCIS employee at a member's location, but AILA removed the document upon request by USCIS. AILA's online posting for a few days is in no way comparable to Defendants' official republication of the document by filing it with the District Court.³

The officially but partially disclosed H-1B Petition Fraud Referral Sheet (Exhibit 11, Dkt. No. 23-14) can be easily and specifically matched with the publicly available version (Exhibit 15, Dkt. No. 23-18). Defendants' argument that the publicly available version is an earlier version does not absolve Defendants from their obligations to disclose the content which is similar and not entitled to FOIA protection.

Because the withheld information from the H-1B Petition Fraud Referral Sheet specifically matches information that is in the public domain, and was officially acknowledged, this document must be disclosed in its entirety.

³ Additionally, official disclosure would not be necessary were this Court to find that defendants failed to meet their burden of showing that the information – which is indisputably known to the public – would not result in risk of circumvention of the law. *See* Section I(A).

3. *The Neufeld Memorandum.*

At least some of the redacted content in the Neufeld Memorandum (*see* Exhibit 10, Dkt. No. 23-13, and pages 01-04 of the Revised *Vaughn* Index, Exhibit 21, Dkt. No. 23-24) is also in the public domain and releasable under FOIA. Defendants officially acknowledged the existence of this document through their own FOIA production.

The withheld information appears from the document itself to relate to primary fraud indicators. The BFCR Report—readily available in the public domain as a result of public release by USCIS⁴—identified “several primary fraud or technical violation(s) indicators”: (1) firms with 25 or fewer employees; (2) firms with an annual gross income of less than \$10 million; (3) firms in existence less than 10 years; (4) H-1B petitions filed for accounting, human resources, business analysts, sales, and advertising occupations; and (5) beneficiaries with only bachelor’s degrees. BFCR Report at p. 15 (Exhibit 2, Dkt. No. 23-5).

The Neufeld Memorandum, dated October 31, 2008, was issued subsequent to the BFCR Report and clearly makes reference to it when introducing the guidance concerning fraud indicators. Disclosure in the Neufeld Memorandum (Exhibit 10, Dkt. No. 23-13) thus appears to be improperly redacted.

4. *Newly-Identified Documents.*

As discussed above, Defendants have a sweeping view of what deserves FOIA exemption. Defendants should be ordered to release segregable portions which are in the public domain and which are not entitled to FOIA protection, under the properly

⁴ *See, e.g.,* http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=17622 (Exhibit 14, Dkt. No. 23-17).

formulated standard above, i.e. whether the withheld information deserves exemption from disclosure *when taking into account that the withheld information is already in the public domain.*

Because the documents were withheld or partially withheld, AILA cannot point to specific portions of the newly-identified documents that should be disclosed. However, to the extent Defendants' newly-identified documents (Exhibits 22-25, Dkt. Nos. 23-25 to 23-28) also include segregable portions that are in the public domain, as discussed above with respect to the Neufeld Memorandum, Defendants should be ordered to release such portions.

C. Reasonably segregable information was withheld.

Contrary to Defendants' representation, all reasonably segregable information was not released. Compare, for instance, the H-1B Petition Fraud Referral Sheet as produced by Defendants in redacted form (Exhibit 11, Dkt. No. 23-14) and as publicly available (Exhibit 15, Dkt. No. 23-18). The H-1B Petition Fraud Referral Sheet includes information relating to several primary fraud or technical violation(s) indicators which are readily available in the public domain as a result of public release by USCIS, including the gross income of a company, the number of employees, the number of years the company has been in existence, and the occupation of the petitioner. *See* BFCA Report at p. 15 (Exhibit 2, Dkt. No. 23-5). Such information is discrete and reasonably segregable in the H-1B Petition Fraud Referral Sheet but was not released.

Defendants failed to meet their burden to demonstrate that all reasonably segregable information has been disclosed.

II. CONCLUSION

Defendants failed to carry their burden of demonstrating that certain records identified in their *Vaughn* Indexes are exempt from disclosure. Moreover, disclosure of withheld information should be compelled because the information is in the public domain and was officially acknowledged. Accordingly, AILA respectfully requests that the Court grant its motion for summary judgment and deny Defendants' cross-motion for summary judgment.

Dated: July 25, 2011

Respectfully submitted,

/s/ Seth A. Watkins

Seth A. Watkins (D.C. Bar # 467470)

Charles F. Schill (D.C. Bar # 230326)

Houda Morad (D.C. Bar # 992567)

STEPTOE & JOHNSON LLP

1330 Connecticut Avenue, NW

Washington, DC 20036-1795

Telephone: (202) 429-3000

Facsimile: (202) 429-3902

Attorneys for Plaintiff

American Immigration

Lawyers Association

Of Counsel:

Mary Kenney

Emily Creighton

AMERICAN IMMIGRATION COUNCIL

1331 G Street, NW, Suite 200

Washington, DC 20005-3141

Telephone: (202) 507-7500

Facsimile: (202) 742-5619

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **Plaintiff's Reply Memorandum in Support of Its Motion for Summary Judgment and in Opposition to Defendants' Cross-Motion for Summary Judgment**, as well as **Plaintiff's Response to Defendants' Statement of Material Facts Not in Genuine Dispute and Plaintiff's Statement of Genuine Material Issues** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

David Cotter Rybicki
U.S. ATTORNEY'S OFFICE
555 4th Street, NW
Washington, DC 20530
(202) 353-4024
Email: david.rybicki@usdoj.gov

This the 25th day of July, 2011.

/s/ Seth A. Watkins
Seth A. Watkins

STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, D.C. 20036
Telephone: (202) 429-3000
Facsimile: (202) 429-3902
Email: sethwatkins@steptoe.com