

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 08-00842 CW

ASIAN LAW CAUCUS and ELECTRONIC
FRONTIER FOUNDATION,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND
SECURITY,

Defendant.

ORDER GRANTING
DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT
AND DENYING
PLAINTIFFS' CROSS-
MOTION FOR SUMMARY
JUDGMENT

Defendant Department of Homeland Security (DHS) filed a motion for summary judgment. Plaintiffs Asian Law Caucus and Electronic Frontier Foundation opposed the motion and filed a cross motion for summary judgment. Having considered all of the parties' papers, the Court hereby grants Defendant's motion for summary judgment and denies Plaintiffs' cross-motion for summary judgment.

BACKGROUND

Plaintiffs Asian Law Caucus (ALC) and Electronic Frontier Foundation (EFF) filed this suit under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. They seek records concerning Customs

1 and Border Protection's (CBP)¹ policies and procedures on the
2 questioning, search and inspection of travelers entering or
3 returning to the United States at ports of entry.

4 On October 31, 2007, Plaintiffs submitted a FOIA request
5 seeking disclosure of the following records generated from
6 September 11, 2001 to the present:

- 7 (1) Policies and procedures on the questioning of travelers,
8 specifically as follows:
- 9 (a) Policies and procedures on the questioning of travelers
10 regarding political views, religious practices, and other
11 activities potentially covered by the First Amendment;
 - 12 (b) Policies and procedures for responding to a traveler's
13 refusal to answer questions;
 - 14 (c) Policies and procedures for permitting a traveler to
15 access legal counsel or invoke a right to remain silent
16 during inspection at the border; and
- 17 (2) Policies and procedures on inspections and searches of
18 travelers' property, specifically as follows:
- 19 (a) Policies and procedures on the photocopying,
20 reproduction, and retention of written materials obtained
21 through the border searches, including documents that CBP
22 officers have found not to violate the law;
 - 23 (b) Policies and procedures on conducting searches and
24 duplicating files from laptop computers, MP3 players,
25 digital cameras, cell phones, and other electronic
26 devices;
 - 27 (c) Copies of the two 1986 Customs Directives, Review,
28 Copying and Seizure of Documents (Customs Directives
3300-04) and Restrictions on Importation of Seditious
Matter (Customs Directive 2210-01), and any amendments or
revisions to these materials;
 - (d) Policies and procedures on the protection of confidential
information in travelers' possession, such as information
covered by trade secrets, attorney-client privilege,
health privacy laws, or other legal protection.

Suzuki Dec., Ex. B. Defendant acknowledged receipt of Plaintiffs'

¹CBP is a component of the Department of Homeland Security (DHS).

1 request and stated that "due to the broad and expansive nature of
2 your request and the 'voluminous' amount of records that must be
3 located, compiled, and reviewed, a time extension is required."
4 Suzuki Dec., Ex. C. Defendant noted that it would "disseminate the
5 information you requested as quickly as possible." Id. Plaintiffs
6 filed the instant lawsuit on February 7, 2008, seeking an order to
7 compel Defendant to process the requested records. Docket no. 1.

8 After Plaintiffs filed their FOIA claim, the parties entered
9 into an agreement, under which Defendant produced an initial
10 release of responsive records on June 26, 2008, and a final release
11 of responsive records on July 30, 2008. After reviewing the
12 records, Plaintiffs agreed to limit their challenge. Plaintiffs do
13 not challenge the adequacy of Defendant's search, or the agency's
14 designation of any material as non-responsive to Plaintiffs'
15 request. Suzuki Dec., Ex. F. However, Plaintiffs continue to
16 challenge exemptions made pursuant to 5 U.S.C. § 552(b)(2), (b)(5)
17 and (b)(7)(E) in the following documents:

- 18 (1) Responding to Potential Terrorists Seeking Entry into the
19 United States, CBP Directive No. 3340-021B (Bates No.
135-159)
- 20 (2) Responding to Potential Terrorists Seeking Entry into the
21 United States (Prior Version), CBP Directive No. 3340-
021A (Bates No. 160-175);
- 22 (3) Standard Operating Procedures of Regional Ports regarding
23 Responding to Potential Terrorists Seeking Entry into the
United States (Bates No. 238-248, 269-282, 498-515, 517-
521);
- 24 (4) Port of Buffalo, Weekly Muster dated December 12, 2007
25 (Bates No. 191-192)
- 26 (5) Los Angeles Field Office, Weekly Muster dated March 12,
27 2007 (Bates No. 284-85);
- 28 (6) San Francisco Field Office, Guidance on Pornographic
Materials (Bates No. 516);

- 1 (7) Tucson Field Office Memoranda (Bates No. 549-580);
2 (8) Documents Relating to Border Search/Examination of
3 Documents, Papers, and Electronic Information (Bates No.
4 596-661); and
5 (9) Documents Relating to a Concept of Operations regarding
6 document and electronic media screening (Bates No. 662-
7 689).

8 Upon review of the moving papers, and in light of the nature of
9 Defendant's claimed exemptions, the Court directed Defendant to
10 produce all withheld records for the Court's review. See docket
11 no. 26.

12 LEGAL STANDARD

13 Summary judgment is properly granted when no genuine and
14 disputed issues of material fact remain, and when, viewing the
15 evidence most favorably to the non-moving party, the movant is
16 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
17 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
18 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
19 1987).

20 The moving party bears the burden of showing that there is no
21 material factual dispute. Therefore, the Court must regard as true
22 the opposing party's evidence, if supported by affidavits or other
23 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815
24 F.2d at 1289. The Court must draw all reasonable inferences in
25 favor of the party against whom summary judgment is sought.
26 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
27 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
28 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment
are those which, under applicable substantive law, may affect the

1 outcome of the case. The substantive law will identify which facts
2 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
3 (1986).

4 The Freedom of Information Act

5 "FOIA entitles private citizens to access government records."
6 Minier v. Central Intelligence Agency, 88 F.3d 796, 800 (9th Cir.
7 1996). "The Supreme Court has interpreted the disclosure
8 provisions broadly, noting that the act was animated by a
9 'philosophy of full agency disclosure.'" Lion Raisins v. U.S. Dep't
10 of Agriculture, 354 F.3d 1072, 1079 (9th Cir. 2004) (quoting John
11 Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989). However,
12 to prevent disclosure of a limited number of sensitive government
13 documents, FOIA contains nine statutory exemptions. 5 U.S.C. §
14 552(b)(1)-(9). "Unlike the disclosure provisions of FOIA, its
15 statutory exemptions 'must be narrowly construed.'" Lion Raisins,
16 354 F.3d at 1079, (quoting John Doe Agency, 493 U.S. at 152.

17 The Court reviews the government's withholding of agency
18 records de novo, and the government bears the burden of justifying
19 non-disclosure. 5 U.S.C. § 552(a)(4)(B). "The agency may meet its
20 burden by submitting a detailed affidavit showing that the
21 information 'logically falls within one of the claimed
22 exemptions.'" Minier, 88 F.3d at 800. "However, the government
23 may not rely upon conclusory and generalized allegations of
24 exemptions." Kamman v. IRS, 56 F.3d 46, 48 (9th Cir. 1995).

25 I. Exemptions (b)(2) and (b)(7)(E)

26 Exemption 2 protects from FOIA disclosures "matters that are
27 . . . related solely to the internal personnel rules and practices
28 of an agency." This exemption excludes "law enforcement materials,

1 disclosure of which may risk circumvention of agency regulation"
2 (high 2). Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d
3 653, 656 (9th Cir. 1980); see Schiller v. NLRB, 964 F.2d 1205, 1207
4 (D.C. Cir. 1992). Exemption 2 also excludes matters "in which the
5 public could not reasonably be expected to have an interest" (low
6 2). Dep't of Air Force v. Rose, 425 U.S. 352, 369-70 (1976); see
7 Schiller, 964 F.2d at 1207.

8 Exemption (b)(7)(E) protects from disclosure "records or
9 information compiled for law enforcement purposes" where release of
10 such information "would disclose techniques and procedures for law
11 enforcement investigations or prosecutions, or would disclose
12 guidelines for law enforcement investigations or prosecutions if
13 such disclosure could reasonably be expected to risk circumvention
14 of the law." 5 U.S.C. § 552(b)(7)(E). Plaintiffs do not challenge
15 the nexus between the documents withheld and a "law enforcement
16 purpose." The parties dispute the interpretation of this statute.
17 Plaintiffs argue that the phrase "if such disclosure could
18 reasonably be expected to risk circumvention" applies to law
19 enforcement techniques, procedures and guidelines. Defendants
20 assert that the "circumvention" phrase only applies to
21 "guidelines," and that law enforcement "techniques and procedures"
22 are categorically exempt from FOIA disclosures.

23 The Ninth Circuit has not squarely addressed this issue. The
24 courts that have reviewed Exemption 7(E) disclosures have come out
25 on both sides of the issue. Some assert that law enforcement
26 "techniques and procedures" are categorically exempt under 7(E).
27 See e.g., Keys v. Dep't of Homeland Sec., 510 F. Supp. 2d 121, 129
28 (D.D.C. 2007); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337

1 F. Supp. 2d 146, 181 (D.D.C. 1997); Smith v. Bureau of Alcohol,
2 Tobacco & Firearms, 977 F. Supp. 496, 501 (D.D.C. 1997) ("Exemption
3 7(E) provides categorical protection to information related to law
4 enforcement techniques"); Fisher v. U.S. Dep't of Justice, 772 F.
5 Supp. 7, 12 n.9 (D.D.C. 1991) ("Law enforcement agencies'
6 'non-investigatory' law enforcement records, to the extent that
7 they can be fairly regarded as reflecting techniques or procedures,
8 are now entitled to categorical protection under Exemption 7").
9 However, other courts apply the "circumvention" phrase to all of
10 Exemption 7(E). See e.g., Davin v. U.S. Dep't of Justice, 60 F.3d
11 1043, 1064 (3d Cir. 1995) ("Exemption 7(E) applies to law
12 enforcement records which, if disclosed, would risk circumvention
13 of the law"; PHE, Inc. v. Dep't. of Justice, 983 F.2d 248, 249-50
14 (D.C. Cir. 1993) ("Thus, under both the (b)(2) and the (b)(7)(E)
15 exemptions, the agency must establish that releasing the withheld
16 materials would risk circumvention of the law"); Billington v.
17 Dep't of Justice, 69 F. Supp. 2d 128, 140 (D.D.C. 1999) (the (7)(E)
18 analysis "requires a defendant to show that disclosure would
19 frustrate enforcement of the law"). The Court need not take a side
20 in this debate because, even under the interpretation that applies
21 the "circumvention" phrase to all of exemption 7(E), Defendant
22 carried its burden to justify non-disclosure.

23 Of the more than one hundred documents challenged by
24 Plaintiffs, in all but five documents, Defendant invokes both
25 Exemptions high 2 and 7(E). Plaintiffs assert that Defendant
26 failed to meet its burden properly to withhold four categories of
27 documents under the Exemptions: (1) the names of databases, names
28 of database reports and modules, and information relating to the

1 use of government watchlists; (2) specific topics for questioning
2 individuals attempting to enter the United States; (3) information
3 relating to CBP's coordination with other law enforcement agencies;
4 and (4) information and records concerning an "Interim Guidance for
5 Border Search/Examination of Documents, Paper and Electronic
6 Information."

7
8 A. Database Names, Reports and Modules, and Watchlist
Information

9 Plaintiffs first argue that because the use of watchlists to
10 screen travelers is a matter of common knowledge, Defendant should
11 release more detailed information about these watchlists and the
12 databases that relate to the watchlists. Plaintiffs assert that
13 this information falls under the "routine technique exception to
14 Exemption 7(E)," which states, "It would not serve the purposes of
15 FOIA to allow the government to withhold information to keep secret
16 an investigative technique that is routine and generally known."
17 Rosenfeld v. U.S. Dep't of Justice, 57 F.3d 803, 815 (9th Cir.
18 1995). This argument is unpersuasive. The public does not already
19 have routine and general knowledge about any investigative
20 techniques relating to watchlists. The public merely knows about
21 the existence of watchlists. Knowing about the general existence
22 of government watchlists does not make further detailed information
23 about the watchlists routine and generally known.

24 Plaintiffs also argue that the Privacy Act of 1974 requires
25 the government to release this information. The statute requires
26 agencies that maintain a system of records to publish "the name and
27 location of the system" in the Federal Registrar. 5 U.S.C
28 § 552a(e)(4)(A). Plaintiffs assert that because the names and

1 locations of systems are required to be published in the Federal
2 Registrar, Defendant should again produce this information in the
3 withheld documents. Alternatively, Plaintiffs suggest that
4 Defendant will not release this information because it never
5 published the names in the Federal Registrar in the first place as
6 required by statute. Although in some circumstances, simply
7 withholding the names of databases would be improper, in this case,
8 the names of the databases, reports, modules and information about
9 the operation of watchlists appear within a context in the withheld
10 documents, such that disclosure "could lead to circumvention of CBP
11 law enforcement efforts or facilitate improper access to the
12 database for the purpose of frustrating CBP law enforcement
13 functions." Suzuki Dec., Ex. A (Document 5). Therefore, Defendant
14 has met its burden to withhold these documents.

15 B. Specific Topics for Questioning Individuals Attempting to
16 Enter the United States

17 Plaintiffs challenge Defendant's withholding of specific
18 topics for questioning that CBP uses regarding political views,
19 religious practices, and other activities potentially covered by
20 the First Amendment. Plaintiffs do not request release of the
21 actual questions used during border inspections. Cf. Perrone v.
22 FBI, 908 F. Supp. 24, 28 (D.D.C. 1995) (information properly
23 withheld under Exemption 7(E) that would have disclosed "the exact
24 questions to be asked and their sequence" on a polygraph exam).
25 Releasing the subset of topics for questioning would not permit
26 persons to devise strategies to circumvent the law in the same way
27 that releasing the questions themselves would. However, after in
28 camera review of the documents, the Court concludes that, in this

1 instance, releasing the specific topics for questioning could
2 reasonably be expected to risk circumvention of the law.

3 C. Procedures for Coordination With Other Law Enforcement
4 Agencies

5 Defendant asserts that disclosure of procedures for
6 coordination with other law enforcement agencies risks
7 circumvention of the law because it would permit persons to know
8 what or who triggers an alert to another specific law enforcement
9 agency. Knowing this information would allow individuals to devise
10 strategies to avoid these triggers. See Cozen O'Connor v. Dep't of
11 Treasury, 570 F. Supp. 2d 749, 786 (E.D. Pa. 2008) (exempting
12 material under 7(E) that contains information regarding the timing
13 and the level of governmental cooperation because "terrorist
14 organizations and hostile nations could avoid or misdirect
15 Treasury's sanctions investigations and implementation if they knew
16 what databases and what government sources were being used to
17 gather information about them"). Thus, Defendant carried its
18 burden to exempt this information from disclosure.

19 D. Interim Documents

20 Plaintiffs assert that disclosure of "Interim Guidance for
21 Border Search/Examination of Documents, Paper and Electronic
22 Information" issued to CBP field offices in July, 2007 is warranted
23 because the policy has been superceded by a publicly released
24 document, and therefore, disclosure of an outdated policy could not
25 enable circumvention of the law. Defendant counters that the newer
26 version of the policy does not render the interim policy valueless.
27 Defendant notes that there may be aspects of the interim policy
28 that are still in effect or may be adopted again in the future.

1 The Court reviewed the documents in question and concludes that
2 Defendant properly withheld these documents. The information in
3 the interim policy documents reveals the scope and focus of certain
4 law enforcement techniques, disclosure of which could reasonably be
5 expected to risk circumvention of the law.

6 E. Exemption 2 Low

7 As noted earlier, Exemption 2 low also excludes internal
8 personnel rules and practices "which the public could not
9 reasonably be expected to have an interest." Rose, 425 U.S. at
10 369-70; see Schiller, 964 F.2d at 1207. Plaintiffs challenge the
11 redaction of information on two documents under Exemption 2 low.
12 The first document in question, Bates No. 575, contains information
13 about the electronic storage location on Defendant's computer
14 network of interviewing procedures and data from interviews of
15 persons of interest. The electronic storage location of these data
16 on an internal network is precisely the type of internal agency
17 information that Exemption 2 contemplates. In the second document
18 in question, Bates No. 578, Defendant redacted the name of a
19 database that was formerly used by the CBP Tucson Field Office, and
20 is no longer in use. The Court concludes that the public has no
21 legitimate interest in the name of this obsolete database.

22 II. Exemption 5

23 Under Exemption 5, Defendant can refuse to disclose "inter-
24 agency or intra-agency memorandums or letters which would not be
25 available by law to a party other than an agency in litigation with
26 the agency." 5 U.S.C. § 552(b)(5). This section "entitles an
27 agency to withhold from the public 'documents which a private party
28 could not discover in litigation with the agency.'" Maricopa

1 Audubon Soc'y v. U.S. Forest Serv., 108 F. 3d 1089, 1092 (9th Cir.
2 1997) (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148
3 (1975)). Exemption 5 includes the executive "deliberative process"
4 privilege, the purpose of which, "'is to prevent injury to the
5 quality of agency decisions' by ensuring that the 'frank discussion
6 of legal or policy matters' in writing, within the agency, is not
7 inhibited by public disclosure." Id. (quoting Sears, Roebuck, 421
8 U.S. at 150-51.

9 To qualify for the deliberative process privilege, the
10 information must be "'predecisional' in nature and must also form
11 part of the agency's 'deliberative process.'" Id. (quoting Sears,
12 Roebuck, 421 U.S. at 151-52) (emphasis in original). Predecisional
13 means that the information has been "prepared in order to assist an
14 agency decisionmaker at arriving at his decision," and
15 "deliberative" means that disclosure "would expose an agency's
16 decisionmaking process in such a way as to discourage candid
17 discussion within the agency and thereby undermine the agency's
18 ability to perform its functions." Assembly of the State of Cal.
19 v. U.S. Dep't of Commerce, 968 F.2d 916, 920 (9th Cir. 1992)
20 (internal quotations and citations omitted).

21 Defendant seeks to redact hand-written notes on a document
22 entitled "Interim Procedures for Border Search/Examination of
23 Documents, Papers, and Electronic Information [Redacted]" (Bates
24 No. 625-26) under Exemption 5. These hand-written notes are
25 predecisional because they were made while reviewing the document
26 and recorded what the author thought "was significant in order to
27 assist in later deliberations." Suzuki Dec. ¶ 26. They reveal the
28 private deliberations and "personal opinions of the writer rather

1 than the policy of the agency." Assembly of the State of Cal., 968
2 F.2d at 920. These notes are deliberative because releasing them
3 would "undermine the agency's ability to perform its functions."
4 Id.

5 Similarly, DHS properly invoked Exemption 5 to withhold
6 information in an email (Bates No. 679) concerning "internal agency
7 deliberations about the possibility of drafting a standard
8 operating procedure." Suzuki Dec. ¶ 27. The information redacted
9 states a recommendation and would reveal the agency's deliberations
10 and decision-making process.

11 III. Segregable Portions of Responsive Records

12 The FOIA statute states, "Any reasonably segregable portion of
13 a record shall be provided to any person requesting such record
14 after deletion of the portions which are exempt under this
15 subsection." 5 U.S.C. 552(b). To satisfy this burden, an agency
16 is "required to provide the court with its reasons -- as opposed to
17 its simple conclusion -- for its inability to segregate non-exempt
18 portions of the documents, and also to provide the court with a
19 description of 'what proportion of the information in a document is
20 non-exempt, and how that material is dispersed throughout the
21 document.'" Lawyers' Comm. for Civil Rights of San Francisco Bay
22 Area v. Dep't of the Treasury, No. 07-2590, 2008 WL 4482855, at *14
23 (N.D. Cal.) (emphasis original) (quoting Mead Data Ctr., Inc. v.
24 Dep't of the Air Force, 556 F.2d 242, 261 (D.C. Cir. 1977)).
25 Plaintiffs assert that Defendant did not carry its burden of
26 segregating all non-exempt from exempt information. The Court
27 disagrees. Throughout the Vaughn index and the accompanying
28 affidavit, Defendant explained which information was non-exempt and

1 took care to redact only the exempt information. In many
2 instances, the redactions consist of single sentences, clauses, or
3 single words. The twenty-eight pages withheld in full contain
4 small portions of non-exempt material and these portions are
5 inextricably intertwined with the exempt information. See Mead
6 Data Ctr., 556 F.2d at 261 ("If only ten percent of the material is
7 non-exempt and it is interspersed line-by-line throughout the
8 document, an agency claim that it is not reasonably segregable
9 because the cost of line-by-line analysis would be high and the
10 result would be an essentially meaningless set of words and phrases
11 might be accepted").

12 CONCLUSION

13 For the foregoing reasons, the Court grants Defendant's motion
14 for summary judgment (docket no. 19) and denies Plaintiff's cross
15 motion for summary judgment (docket no. 20). The hearing scheduled
16 for December 4, 2008 at 2:00 p.m. is vacated. The clerk shall
17 enter judgment and close the file.

18 IT IS SO ORDERED.

19 Dated: 11/24/08



CLAUDIA WILKEN
United States District Judge