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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ASIAN LAW CAUCUS AND
ELECTRONIC FRONTIER FOUNDATION

Plaintiffs,

v.

DEPARTMENT OF HOMELAND
SECURITY

Defendant.

Civil Action No. 3:08-0842 CW

**NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT**

AND

**MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
THEREOF**

Date: December 4, 2008
Time: 2:00 p.m.

TABLE OF CONTENTS

<u>NOTICE OF MOTION</u>	1
<u>MOTION FOR SUMMARY JUDGMENT</u>	1
<u>MEMORANDUM OF POINTS AND AUTHORITIES</u>	1
INTRODUCTION	1
FACTUAL AND PROCEDURAL BACKGROUND	2
ARGUMENT	4
I. FOIA AND THE STANDARD OF REVIEW	4
II. DEFENDANT PROPERLY WITHHELD INFORMATION THAT	
IS EXEMPT UNDER THE FOIA	
A. Defendant Properly Withheld Information Pursuant to FOIA	
Exemptions (b)(2) and (b)(7)(E)	5
B. Defendant Properly Withheld Information Pursuant to FOIA	
Exemption (b)(5)	12
C. Defendant Has Produced All Reasonably Segregable Portions of	
Responsive Records	14
CONCLUSION	16

TABLE OF AUTHORITIES

PAGE(S)

CASES

<i>Assembly of the State of California v. U. S. Dep't of Commerce,</i> 968 F.2d 916 (9th Cir. 1992)	13
<i>Baker & Hostetler LLP v. U.S. Dep't of Commerce,</i> 473 F.3d 312 (D.C. Cir. 2006)	14
<i>Baldrige v. Shapiro,</i> 455 U.S. 345 (1982)	4
<i>Church of Scientology of California v. U.S. Dep't of the Army,</i> 611 F.2d 738 (9th Cir. 1979)	5
<i>Coastal Delivery Corp. v. U.S. Customs Serv.,</i> 272 F. Supp. 2d 958 (C.D. Cal. 2003)	8, 11
<i>Crooker v. Bureau of Alcohol, Tobacco & Firearms,</i> 670 F.2d 1051 (D.C. Cir. 1981)	6
<i>Delta Ltd. v. U.S. Customs & Border Prot.,</i> 384 F. Supp. 2d 138 (D.D.C. 2005)	10
<i>Dirksen v. U.S. Dep't of Health & Human Servs.,</i> 803 F.2d 1456 (9th Cir. 1986)	6
<i>Fisher v. U.S. Dep't of Justice,</i> 772 F.Supp. 7 (D.D.C. 1991), <i>aff'd</i> , 968 F.2d 92 (D.C. Cir. 1992)	7
<i>Hammes v. U.S. Customs Serv.,</i> Case No. 94-cv-4868, 1994 WL 693717 (S.D.N.Y. Dec. 9, 1994)	11
<i>Hardy v. Bureau of Alcohol, Tobacco & Firearms,</i> 631 F.2d 653 (9th Cir. 1980)	6, 8
<i>Hilken v. Dep't of Def.,</i> 521 F. Supp. 2d 1047 (N.D. Cal. 2007)	6
<i>Hunt v. CIA,</i> 981 F.2d 1116 (1992)	5
<i>John Doe Agency v. John Doe Corp.,</i> 493 U.S. 146 (1989)	4
<i>Judicial Watch, Inc. v. U.S. Dep't of Commerce,</i> 337 F. Supp. 2d 146 (D.D.C. 2004)	7

1	<i>Keys v. Dep't of Homeland Sec.,</i>	
2	510 F. Supp. 2d 121 (D.D.C. 2007)	7
3	<i>Klamath Siskiyou Wildlands Ctr. v. U.S. Dep't of the Interior,</i>	
4	Case No. 07-cv-325, 2007 WL 4180685 (D.Or. Nov. 21, 2007)	15
5	<i>Lane v. Dep't of Interior,</i>	
6	523 F.3d 1128 (9th Cir. 2008)	4
7	<i>Lawyers' Comm. for Civil Rights of San Francisco Bay Area v. U.S. Dep't of the Treasury,</i>	
8	534 F. Supp. 2d 1126 (N.D. Cal. 2008)	5
9	<i>Lewis v. I.R.S.,</i>	
10	823 F.2d 375 (9th Cir.1987)	5
11	<i>Lion Raisins Inc. v. U.S. Dep't of Agric.,</i>	
12	354 F.3d 1072 (9th Cir. 2004)	5
13	<i>Maricopa Audubon Soc'y v. U.S. Forest Serv.,</i>	
14	108 F.3d 1082 (9th Cir. 1997)	6
15	<i>Maricopa Audubon Soc'y v. U.S. Forest Serv.,</i>	
16	108 F.3d 1089 (9th Cir. 1997)	12, 14
17	<i>Minier v. CIA,</i>	
18	88 F.3d 796 (9th Cir. 1996)	5
19	<i>Moayedi v. U.S. Customs & Border Prot.,</i>	
20	510 F. Supp. 2d 73 (D.D.C. 2007)	10
21	<i>NLRB v. Robbins Tire & Rubber Co.,</i>	
22	437 U.S. 214 (1978)	4
23	<i>NLRB v. Sears, Roebuck & Co.,</i>	
24	421 U.S. 132 (1975)	12, 13
25	<i>NYC Apparel FZE v. U.S. Customs & Border Prot.,</i>	
26	484 F. Supp. 2d 77 (D.D.C. 2007) (emphasis added)	12
27	<i>Nat'l Sec. Archive Fund, Inc. v. CIA,</i>	
28	402 F. Supp. 2d 211 (D.D.C. 2005)	14
	<i>Peter S. Herrick's Customs & Int'l Trade Newsletter v. Customs and Border Prot.,</i>	
	No. 1:04-cv-00377, 2006 WL 1826185 (D.D.C. June 30, 2006)	7, 8, 10
	<i>Poulsen v. U.S. Customs & Border Prot.,</i>	
	Case No. 06-cv-1743, 2006 WL 2788239 (N.D. Cal. Sept. 26, 2006)	12
	<i>Rosenfeld v. U.S. Dep't of Justice,</i>	
	57 F.3d 803 (9th Cir. 1995)	8
	<i>Safecard Servs., Inc. v. SEC,</i>	

1	926 F.2d 1197 (D.C. Cir. 1991)	5
2	<i>Schiller v. NLRB</i> ,	
3	964 F.2d 1205 (D.C. Cir. 1992)	6, 11
4	<i>Smith v. Bureau of Alcohol, Tobacco & Firearms</i> ,	
5	977 F. Supp. 496 (D.D.C. 1997)	7
6	<i>Suzhou Yuanda Enterprise, Co. v. U.S. Customs & Border Prot.</i> ,	
7	404 F. Supp. 2d 9 (D.D.C. 2005)	11
8	<i>The Buffalo Evening News, Inc. v. U.S. Border Patrol</i> ,	
9	791 F. Supp. 386 (W.D.N.Y. 1992)	11
10	<i>Vaughn v. Rosen</i> ,	
11	484 F.2d 820 (D.C. Cir.1973)	passim

STATUTES

12	5 U.S.C. § 552	passim
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RULES

13	Fed. R. Civ. P. 56	2, 4
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NOTICE OF MOTION

Please take notice that the following Motion for Summary Judgment will be heard by the Honorable Claudia Wilken, United States District Judge, on December 4, 2008, at 2:00 p.m.

MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and the briefing schedule set by Order of the Court (Doc. #18), defendant Department of Homeland Security hereby moves for an order granting summary judgment for defendant in this action. The grounds in support of this motion are set out in the memorandum of points and authorities and the declaration of Shari Suzuki submitted herewith. This motion is accompanied by a proposed order granting summary judgment in favor of defendant.

MEMORANDUM OF POINTS AND AUTHORITIES**INTRODUCTION**

Plaintiffs Asian Law Caucus (ALC) and Electronic Frontier Foundation (EFF) bring this action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking records of United States Customs and Border Protection (CBP), a component of defendant Department of Homeland Security (DHS), concerning CBP's policies and procedures on the questioning, search, and inspection of travelers entering the United States at ports of entry.

In response to plaintiffs' request, defendant identified 689 pages of documents in its possession that are responsive to plaintiffs' request, including 352 pages released in their entirety, 309 pages withheld in part, and 28 pages withheld in full. As a result of negotiations between the parties, plaintiffs have agreed to limit their challenge to defendant's withholding of information in 257 pages of records pursuant to FOIA Exemptions (b)(2), (b)(5), and (b)(7)(E), 5 U.S.C. § 552(b)(2), (5), & (7)(E). The information withheld pursuant to these exemptions consists almost entirely of CBP's internal memoranda related to the collection, processing, and analysis of information about potential violations of the laws enforced by CBP at the nation's border, the release of which would facilitate circumvention of the law. Accordingly, the vast

majority of the exemptions still at issue in this action concern defendant's withholding of information pursuant to 5 U.S.C. § 552(b)(2) and (b)(7)(E). As the detailed declaration and *Vaughn* index¹ accompanying this memorandum demonstrate, this information has been validly withheld. In addition, plaintiffs challenge defendant's redaction of a small amount of information pursuant to the deliberative process privilege. This information, which consists of hand-written notes and recommendations for further action, is pre-decisional and deliberative, and therefore properly withheld pursuant to 5 U.S.C. § 552(b)(5). Accordingly, defendant is entitled to summary judgment in this case pursuant to Fed. R. Civ. P. 56.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs submitted the FOIA request at issue in this case on October 31, 2007, seeking disclosure of the following records generated from September 11, 2001, to the present:

- (1) Policies and procedures on the questioning of travelers, specifically as follows:
 - (a) Policies and procedures on the questioning of travelers regarding political views, religious practices, and other activities potentially covered by the First Amendment;
 - (b) Policies and procedures for responding to a traveler's refusal to answer questions;
 - (c) Policies and procedures for permitting a traveler to access legal counsel or invoke a right to remain silent during inspection at the border; and
- (2) Policies and procedures on inspections and searches of travelers' property, specifically as follows:
 - (a) Policies and procedures on the photocopying, reproduction, and retention of written materials obtained through the border searches, including documents that CBP officers have found not to violate the law;
 - (b) Policies and procedures on conducting searches and duplicating files from laptop computers, MP3 players, digital cameras, cell phones, and other electronic devices;
 - (c) Copies of the two 1986 Customs Directives, *Review, Copying and Seizure of Documents* (Customs Directives 3300-04) and *Restrictions on Importation of*

¹A *Vaughn* index is a document that describes withheld or redacted documents and explains why each withheld record is exempt from disclosure. *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir.1973).

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.

See Declaration of Shari Suzuki ("Suzuki Decl.") ¶ 6; Ex. B to Suzuki Decl. Pursuant to an agreement between the parties, defendant produced 190 pages of responsive records on June 26, 2008, and the remainder of the responsive, non-exempt records on July 30, 2008. Suzuki Decl. ¶¶ 11, 12; Exs. D & E to Suzuki Decl. After reviewing the records produced by defendant and the draft *Vaughn* index provided to plaintiffs on September 24, 2008, plaintiffs agreed to limit their challenge to defendant's withholdings. Suzuki Decl. ¶¶ 13-15; Ex. F to Suzuki Decl. As a result, the withholdings currently disputed by plaintiffs are include information and documents that have been withheld pursuant to 5 U.S.C. § 552(b)(2), (b)(5) & (b)(7)(E) in the following documents:

- (1) Responding to Potential Terrorists Seeking Entry into the United States, CBP Directive No. 3340-021B (Bates No. 135-159);
- (2) Responding to Potential Terrorists Seeking Entry into the United States (Prior Version), CBP Directive No. 3340-021A (Bates No. 160-175);
- (3) Standard Operating Procedures of Regional Ports regarding Responding to Potential Terrorists Seeking Entry into the United States (Bates No. 238-248, 269-282, 498-515, 517-521);
- (4) Port of Buffalo, Weekly Muster dated December 12, 2007 (Bates No. 191-192)
- (5) Los Angeles Field Office, Weekly Muster dated March 12, 2007 (Bates No. 284-85);
- (6) San Francisco Field Office, Guidance on Pornographic Materials (Bates No. 516)
- (7) Tucson Field Office Memoranda (Bates No. 549-580);
- (8) Documents Relating to Border Search/Examination of Documents, Papers, and Electronic Information (Bates No. 596-661); and

(9) Documents Relating to a Concept of Operations regarding document and electronic media screening (Bates No. 662-689).
See Ex. F to Suzuki Decl. In addition, plaintiffs are challenging the redaction pursuant to 5 U.S.C. § 552(b)(2) (low) of the names of certain databases in a Tucson Field Office Memorandum (Bates No. 575-80). *Id.* Plaintiffs do not challenge the adequacy of defendant's search for responsive records, nor do plaintiffs challenge CBP's determination that certain information is not responsive to their request. *Id.* Accordingly, the only issue to resolve in this case is whether CBP has presented an adequate basis for the Court to uphold its redactions pursuant to 5 U.S.C. § 552(b)(2), (5), & (7)(E).

ARGUMENT

I. FOIA AND THE STANDARD OF REVIEW

"The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, 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)). To further this purpose, FOIA generally requires disclosure of agency records upon the request of any person. 5 U.S.C. § 552(a)(3)(A). "The Act expressly recognizes, however, that public disclosure is not always in the public interest and consequently provides that agency records may be withheld from disclosure under any one of the nine exemptions defined in 5 U.S.C. § 552(b)." *Baldrige v. Shapiro*, 455 U.S. 345, 352 (1982). Thus, the inclusion of these exemptions in the FOIA reflects Congress' intention to achieve "'a workable balance between the right of the public to know and the need of the Government to keep information in confidence.'" *John Doe Agency*, 493 U.S. at 152 (quoting H.R. Rep. 89-1497, 89th Cong., 2d Sess. 6 (1966)). Accordingly, the statutory exemptions must be construed "to have meaningful reach and application." *Id.*

FOIA actions are typically resolved through summary judgment motions pursuant to Fed. R. Civ. P. 56. *See Lane v. Dep't of Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008). Under FOIA,

1 courts conduct *de novo* review to determine whether the government properly withheld records
2 under any of the FOIA's nine statutory exemptions. 5 U.S.C. § 552(a)(4)(B). The government
3 bears the burden of justifying non-disclosure. *Id.* "The agency may meet its burden by
4 submitting a detailed affidavit showing that the information 'logically falls within one of the
5 claimed exemptions.'" *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996). (quoting *Hunt v. CIA*,
6 981 F.2d 1116, 1119 (1992)). And, the court must accord a presumption of good faith to an
7 agency affidavit submitted in support of claimed exemptions. *Safecard Servs., Inc. v. SEC*, 926
8 F.2d 1197, 1200 (D.C. Cir. 1991); *see also Lawyers' Comm. for Civil Rights of San Francisco*
9 *Bay Area v. U.S. Dep't of the Treasury*, 534 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008). "If the
10 affidavit[] contain[s] reasonably detailed descriptions of the documents and allege[s] facts
11 sufficient to establish an exemption, 'the district court need look no further'" and the agency will
12 be entitled to summary judgment. *Lewis v. I.R.S.*, 823 F.2d 375, 378 (9th Cir.1987) (quoting
13 *Church of Scientology of California v. U.S. Dep't of the Army*, 611 F.2d 738, 742 (9th Cir.
14 1979)).

15 As explained below, the declaration and *Vaughn* index submitted by defendant provide as
16 "much detail as possible on the public record" to justify the withholdings pursuant to 5 U.S.C.
17 § 552(b)(2), (5), and (7)(E), without "reveal[ing] the very information the government claims is
18 exempt from disclosure," and are therefore sufficient grounds for granting defendant's motion
19 for summary judgment. *Lion Raisins Inc. v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1083-84 (9th
20 Cir. 2004). At the Court's request, however, defendant is prepared to submit for *in camera*
21 review unredacted versions of any of the documents at issue, as well as an *ex parte* declaration
22 explaining more fully the basis for any redactions in those documents. *Id.*

II. DEFENDANT PROPERLY WITHHELD INFORMATION THAT IS EXEMPT UNDER THE FOIA

A. Defendant Properly Withheld Information Pursuant to FOIA Exemptions (b)(2) and (b)(7)(E)

Title 5 U.S.C. § 552(b)(2) (Exemption 2) provides that FOIA “does not apply to matters that are . . . related solely to the internal personnel rules and practices of an agency.” Thus, an agency may withhold information under Exemption 2 if it is “used for predominantly internal purposes.” *Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (quoting *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1073 (D.C. Cir. 1981)). Exemption 2 has been held to exempt two types of information: (1) information the release of which would risk circumvention of agency regulations or statutes, *see Dirksen v. U.S. Dep’t of Health & Human Servs.*, 803 F.2d 1456, 1458 (9th Cir. 1986), and (2) “routine matters of merely internal interest.” *Crooker*, 670 F.2d at 1069 (citation omitted). The former application of the exemption is known as “high 2,” while the latter is known as “low 2.” *See Hilken v. Dep’t of Def.*, 521 F. Supp. 2d 1047, 1059 (N.D. Cal. 2007).

The Ninth Circuit has upheld the withholding of information pursuant to the “high 2” exemption when, as here, the withholdings concern law enforcement methods, and disclosure of the information risks circumvention of agency regulations. Thus, in *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653 (9th Cir. 1980), a case in which the defendant sought to withhold portions of a training manual for raids and searches by its agents, *id.* at 654-55, the Ninth Circuit held that “law enforcement materials, disclosure of which may risk circumvention of agency regulation, are exempt from disclosure” pursuant to Exemption 2 (high). *Id.* at 657. Likewise, in *Dirksen*, the Ninth Circuit applied the “high 2” exemption to Medicare claims-processing guidelines that could have been used by health care providers to avoid audits. 803 F.2d at 1458-59. This holding was premised on concerns that disclosure of the guidelines could “hinder investigations” and “enable violators to avoid detection.” *Id.* at 1458 (quoting *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, 545 (2d Cir. 1978)); *compare Maricopa*

1 *Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1082, 1087 (9th Cir. 1997) (map of goshawk nest
2 sites not within Exemption 2 because “the requested information does not tell the Forest Service
3 how to catch lawbreakers; nor does it tell lawbreakers how to avoid the Forest Service’s
4 enforcement efforts.”).

5 Exemption 7(E) protects from disclosure “records or information compiled for law
6 enforcement purposes” where release of such information “would disclose techniques and
7 procedures for law enforcement investigations or prosecutions, or would disclose guidelines for
8 law enforcement investigation or prosecutions if such disclosure could reasonably be expected to
9 risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). Thus, this exemption is comprised of
10 two clauses: the first relating to law enforcement “techniques or procedures,” and the second
11 relating to “guidelines for law enforcement investigations or prosecutions.” *Id.* The latter
12 category of information may be withheld only if “disclosure could reasonably be expected to risk
13 circumvention of the law.” *Id.* No such showing of harm is required for the withholding of law
14 enforcement “techniques or procedures,” however, which receive categorical protection from
15 disclosure. *See Keys v. Dep’t of Homeland Sec.*, 510 F. Supp. 2d 121, 129 (D.D.C. 2007) (citing
16 *Peter S. Herrick’s Customs & Int’l Trade Newsletter v. Customs and Border Prot.*, No.
17 1:04-cv-00377, 2006 WL 1826185, at *7 (D.D.C. June 30, 2006)); *Judicial Watch, Inc. v. U.S.*
18 *Dep’t of Commerce*, 337 F. Supp. 2d 146, 181 (D.D.C. 2004); *Smith v. Bureau of Alcohol,*
19 *Tobacco & Firearms*, 977 F. Supp. 496, 501 (D.D.C. 1997) (citing *Fisher v. U.S. Dep’t of*
20 *Justice*, 772 F.Supp. 7, 12 n.9 (D.D.C. 1991), *aff’d*, 968 F.2d 92 (D.C. Cir. 1992)). In an
21 abundance of caution, and because CBP has also asserted Exemption 2 (high) – which clearly
22 requires a showing of a risk of circumvention – for all information claimed to be exempt
23 pursuant to Exemption 7(E), the declaration and *Vaughn* index attached hereto not only
24 demonstrate that all information that has been withheld is “law enforcement material,” but also
25 that disclosure of that information “could reasonably be expected to risk circumvention of the
26 law.” 5 U.S.C. § 552(b)(7)(E).

1 There can be little dispute that the material withheld by CBP is “law enforcement
2 material.” “CBP is a law enforcement agency with enforcement responsibilities for over 400
3 federal statutes, on behalf of over 40 different agencies.” Suzuki Decl. ¶ 2. “CBP’s mission is to
4 protect the borders of the United States against terrorists and instruments of terror, enforce the
5 customs and immigration laws of the United States, and foster our Nation’s economy by
6 facilitating lawful international trade and travel.” *Id.*; see also *Peter S. Herrick’s*, 2006 WL
7 1826185, at *6 (recognizing CBP’s law enforcement function); *Coastal Delivery Corp. v. U.S.*
8 *Customs Serv.*, 272 F. Supp. 2d 958, 963 (C.D. Cal. 2003) (recognizing the Customs Service’s
9 law enforcement function). Because CBP “has a clear law enforcement mandate,” it “need[s]
10 only [to] establish a ‘rational nexus between enforcement of a federal law and the document[s]
11 for which [a law enforcement] exemption is claimed.” *Rosenfeld v. U.S. Dep’t of Justice*, 57
12 F.3d 803, 808 (9th Cir. 1995).

13 Plaintiff’s FOIA request is for records concerning CBP’s policies and procedures for
14 questioning travelers or searching travelers’ property at the border – activities CBP engages in
15 only in furtherance of its law enforcement mission. Suzuki Decl. ¶ 2. Accordingly, the
16 responsive records identified in this case – including the responsive material withheld –
17 necessarily concern CBP’s law enforcement mandate and are therefore law enforcement
18 materials. This logical conclusion is buttressed by the detailed descriptions of the responsive
19 documents and the redacted information that is set forth in the attached declaration and *Vaughn*
20 index. See Suzuki Decl. ¶¶ 21, 29; Ex. A to Suzuki Decl. Accordingly, because the information
21 withheld that remains at issue in this case was “compiled for law enforcement purposes,” 5
22 U.S.C. § 552(b)(7)(E), and is also “law enforcement material[],” *Hardy*, 631 F.2d at 657, the
23 first prong of both Exemption 2 (high) and Exemption 7(E) is satisfied.

24 The declaration and *Vaughn* index also demonstrate that disclosure of the withheld
25 material risks circumvention of the laws CBP enforces. For example, CBP has redacted from
26 several responsive records information such as: “specific topics for questioning” known or
27 suspected terrorists; “examination and inspection methods” and “certain law enforcement

1 techniques” employed by CBP in furtherance of its law enforcement function at the border;
2 “advanced targeting procedures used to identify individuals of interest prior to their arrival in the
3 United States;” and information that would reveal “the scope and focus” and “strength and
4 weaknesses” of certain law enforcement methods. *See* Suzuki Decl. ¶¶ 21, 29; Ex. A to Suzuki
5 Decl. As explained in the declaration and *Vaughn* index, disclosure of such information presents
6 the obvious risk that persons intent on circumventing the laws enforced by CBP will be able to
7 devise strategies to counter CBP’s methods and frustrate enforcement of the law. *Id.*

8 CBP has also redacted certain information relating to internal procedures used by CBP in
9 its law enforcement mission, including: the names of special teams activated in certain
10 circumstances; the names of databases, software, or database queries used in particular
11 circumstances; procedures for internal processing of information and for sharing information
12 with other law enforcement agencies; procedures for escorting suspected terrorists while in
13 custody; and the physical or network location of certain law enforcement resources. *Id.* This
14 information is also properly withheld pursuant to (b)(2) (high) and/or (b)(7)(E), as its disclosure
15 would reveal how the agency employs human and technological resources to respond to certain
16 threats and, therefore, permit persons to identify and exploit potential weaknesses in the
17 agency’s procedures for responding to certain threats. *Id.* Further, revealing the name (which
18 often reveals the subject matter expertise) or location of certain law enforcement resources –
19 both human and technological – could reasonably be expected to risk circumvention of CBP’s
20 law enforcement efforts, either by allowing individuals to use this information in conjunction
21 with other publicly available information to understand and exploit weaknesses in those
22 resources, or by facilitating direct attacks (including cyber-attacks) on those resources. *Id.* In
23 short, as the declaration and *Vaughn* index attached to this memorandum make clear, the
24 agency’s redactions of law enforcement material in the responsive records was proper because
25 disclosure of this information “could reasonably be expected to risk circumvention of the law.”
26 5 U.S.C. § 552(b)(7)(E).

1 Courts have routinely upheld redactions of similar information by CBP or its predecessor
 2 agencies² pursuant to 5 U.S.C. § 552(b)(2) and/or (b)(7)(E). In *Moayed v. U.S. Customs &*
 3 *Border Prot.*, 510 F. Supp. 2d 73 (D.D.C. 2007), the district court held that “disclosure of the
 4 CBP’s procedures for detentions and interrogations conducted at airports ‘may benefit those
 5 attempting to violate the law and avoid detection by Customs’” and therefore “qualifies as ‘High
 6 2’ material.” *Id.* at 85 (quoting *Suzhou Yuanda Enterprise, Co. v. U.S. Customs & Border Prot.*,
 7 404 F. Supp. 2d 9, 12 (D.D.C. 2005)). Likewise, in *Peter S. Herrick’s Customs & Int’l Trade*
 8 *Newsletter v. U.S. Customs & Border Prot.*, Case No. 04-cv-00377, 2006 WL 1826185 (D.D.C.
 9 June 30, 2006), the district court upheld the withholding pursuant to exemption (b)(2) (high) of
 10 information describing CBP’s procedures governing the seizure of assets at the border, reasoning
 11 that “[i]f the information became publicly known, then individuals seeking to evade capture by
 12 customs officials . . . or to harm customs officials or impede operations would be privy to the
 13 most effective ways in which to do so.” *Id.* at *5. The district court found similar information to
 14 be exempt under exemption 7(E) because “disclosure would . . . present a significant danger that
 15 the information could be used to circumvent the laws that Customs is responsible for enforcing.”
 16 *Id.* at *7.

17 The district court’s decision in *Delta Ltd. v. U.S. Customs & Border Prot.*, 384 F. Supp.
 18 2d 138 (D.D.C. 2005), *reconsidered on other grounds*, 393 F. Supp. 2d 15 (D.D.C. 2005), is
 19 particularly instructive. In *Delta*, the plaintiff sought, among other things, “the manuals,
 20 guidelines, directives, etc. relied upon by Customs” related to the seizure of some of Delta’s
 21 cargo. *Id.* at 142. The district court upheld the withholding pursuant to Exemption 2 (high) of –
 22 such things as the administrative procedures in regard to the operational
 23 responsibilities discussed and assigned to CBP personnel (*e.g.*, storage of seized
 24 property, financial accounting for seized property and appraisal of
 25 merchandise, processing forfeiture case, etc.), how information was handled in an
 operational context by CBP enforcement officers, SEACATS narrative input, and
law enforcement team or operation names and nomenclature.

26
 27 ² See Suzuki Decl. ¶ 1 n.1 (explaining that both the Customs Service and the United
 States Border Patrol are predecessor agencies of CBP).

Id. at 147-48 (emphasis added). Similarly, in *Coastal Delivery Corp. v. U.S. Customs Serv.*, 272 F. Supp. 2d 958 (C.D.Cal. 2003), the district court held that information relating to the number of examinations of merchandise performed by the United States Customs Service (predecessor of CBP) at the Los Angeles/Long Beach seaport was exempt from disclosure under Exemptions (b)(7)(E) and (b)(2) (high). *Id.* at 963-65. *See also Suzhou Yuanda Enterprise, Co. v. U.S. Customs & Border Prot.*, 404 F. Supp. 2d 9, 12 (D.D.C. 2005) (holding proper high (b)(2) exemption for information relating to CBP's seizure of material at the border); *Hammes v. U.S. Customs Serv.*, Case No. 94-cv-4868, 1994 WL 693717, at *1 (S.D.N.Y. Dec. 9, 1994) ("Plaintiff seeks disclosure under the Freedom of Information Act of the criteria used by Customs officers to determine which passengers to stop and examine. This information is expressly exempted from disclosure by 5 U.S.C. § 557(b)(7)(E)."); *The Buffalo Evening News, Inc. v. U.S. Border Patrol*, 791 F. Supp. 386, 393 & n.6 (W.D.N.Y. 1992) (holding information relating to Border Patrol's "method of apprehension" of suspected illegal aliens exempt under Exemptions 2 (high) and 7(E), because "this information would clearly disclose the USBP's techniques for apprehending excludable aliens."); *id.* (holding information relating to the ultimate disposition of the apprehension of a suspected illegal alien exempt under Exemption 2 (high)). As this long litany of cases presenting facts similar to the instant matter demonstrate, the material withheld by CBP pursuant to Exemptions 2 (high) and 7(E) in this case is precisely the sort of information for which these exemptions are designed. Defendant is therefore entitled to summary judgment with respect to this information.

Finally, plaintiffs challenge the redaction of the names of certain computer databases in document 18 (Bates No. 575-80), pursuant to Exemption 2 (low). The "low 2" exemption protects "[p]redominantly internal documents that deal with trivial administrative matters" with little public interest. *Schiller v. N.L.R.B.*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information redacted as "low 2" concerns the location of information on an internal network and the name of a local database that had been used at one time by the Tucson Field Office, but is no longer utilized. Suzuki Decl. ¶ 20. The public could have little legitimate interest in this

information, as it pertains to purely internal matters that do not affect the public. *Id.* As many other courts have recognized, this material is precisely the sort of information properly withheld as “low 2.” *See NYC Apparel FZE v. U.S. Customs & Border Prot.*, 484 F. Supp. 2d 77, 93 (D.D.C. 2007) (“Computer function codes, internal file numbers, [and] *computer system and report identity* . . . are . . . properly withheld [as ‘low 2’ information].”) (quoting *Changzhou Laosan Group v. U.S. Customs & Border Prot.*, Case No. 04-cv-1919, 2005 WL 913268, at *3 (D.D.C. April 20, 2005)) (emphasis added); *Poulsen v. U.S. Customs & Border Prot.*, Case No. 06-cv-1743, 2006 WL 2788239, at *8 (N.D. Cal. Sept. 26, 2006) (finding that “names or other specific identifying information for databases” is properly withheld pursuant to the “low 2” exemption). Accordingly, defendant is entitled to summary judgment with respect to these withholdings as well.

B. Defendant Properly Withheld Information Pursuant to FOIA Exemption (b)(5)

Under Exemption 5, the FOIA’s disclosure requirements do not apply to “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). This exemption “entitles an agency to withhold from the public ‘documents which a private party could not discover in litigation with the agency.’” *Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975)). “Exemption 5 thus covers the attorney-client privilege, the attorney work-product privilege, and the executive ‘deliberative process’ privilege.” *Id.* (citing *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980)).

CBP has withheld a limited amount of information in a few of the documents still at issue in this motion for summary judgment pursuant to the deliberative process privilege. *See Suzuki Decl.* ¶¶ 23-27. The deliberative process privilege is intended “to prevent injury to the quality of agency decisions’ by ensuring that the ‘frank discussion of legal or policy matters’ in writing, within the agency, is not inhibited by public disclosure.” *Maricopa*, 108 F.3d at 1092 (quoting

1 *Sears, Roebuck*, 421 U.S. at 150-51); *see also* *Assembly of the State of California v. U. S. Dep't*
2 *of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992) (purpose of deliberative process privilege “is to
3 allow agencies freely to explore possibilities, engage in internal debates, or play devil’s advocate
4 without fear of public scrutiny.”). The privilege generally protects “advisory opinions,
5 recommendations and deliberations comprising part of a process by which governmental
6 decisions and policies are formulated.” *Sears, Roebuck*, 421 US. at 150 (quoting *Carl Zeiss*
7 *Stiftung v. E.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff’d*, 384 F.2d 979 (D.C.
8 Cir.), *cert. denied*, 389 U.S. 952 (1967)). It is premised upon the notion that “[h]uman
9 experience teaches that those who expect public dissemination of their remarks may well temper
10 candor with a concern for appearances . . . to the *detriment of the decision making process*.” *Id.*
11 at 150-51 (quoting *United States v. Nixon*, 418 U.S. 683, 705 (1974)).

12 To come within the scope of the deliberative process privilege, “a document must be both
13 ‘predecisional’ and ‘deliberative.’” *Assembly of the State of California*, 968 F.2d at 920 (quoting
14 *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988)). A document is
15 “predecisional if it was ‘prepared in order to assist an agency decisionmaker in arriving at his
16 decision.’” *Id.* (quoting *Formaldehyde Inst. v. Dep’t of Health & Human Serv.*, 889 F.2d 1118,
17 1122 (D.C. Cir. 1989)). Information withheld by an agency is “deliberative” if “disclosure of
18 materials would expose an agency’s decision-making process in such a way as to discourage
19 candid discussion within the agency and thereby undermine the agency’s ability to perform its
20 functions.” *Id.*

21 The information withheld by CBP falls well within the scope of this privilege.
22 Handwritten notes in the margins of a document describing Interim Procedures for Border
23 Search/Examination of Documents Papers and Electronic Information for the Port of Champlain
24 were redacted pursuant to the deliberative process privilege. Suzuki Decl. ¶ 26; Exhibit A to
25 Suzuki Decl (Doc. #29). The handwritten notes are predecisional because they were made by an
26 agency employee “while reviewing the document and noting what he thought was significant in
27 order to assist in later deliberations” and “reveal questions that the employee had in his mind on

the issues raised in the guidance.” Suzuki Decl. ¶ 26. The handwritten notes are deliberative because the notes would reveal a single individual’s opinion about what portions of the document he or she thought were important, and that individual’s thoughts or summary of particular portions of this document. *Id.* Accordingly, FOIA permits redaction of these handwritten notes from this particular document. *See Baker & Hostetler LLP v. U.S. Dep’t of Commerce*, 473 F.3d 312, 321 (D.C. Cir. 2006) (“Notes generally are selective and deliberative – and routine public disclosure of meeting notes and other notes would hinder government officials from debating issues internally, deter them from giving candid advice, and lower the overall quality of the government decisionmaking process.”) (citing cases).

The only other redaction made pursuant to 5 U.S.C. § 552(b)(5) at issue in this motion for summary judgment occurred in an email that concerned the agency’s drafting of a standard operating procedure for document and media screening at the border. Suzuki Decl. ¶ 27; Exhibit A to Suzuki Decl. (Doc. # 40). The information from within this email that was redacted as deliberative process information consists of “deliberations and potential courses of action that were discussed as the agency moved towards a decision on drafting a standard operating procedure.” Suzuki Decl. ¶ 27. “Release of this information would reveal the decision-making process within CBP.” *Id.* Thus, this information is also both predecisional and deliberative and, therefore, exempt from disclosure pursuant to 5 U.S.C. § 552(b)(5). *See Maricopa*, 108 F.3d at 1093.

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

The FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). This provision does not require disclosure of records in which the non-exempt information that remains is meaningless. *See Nat’l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 220-21 (D.D.C. 2005) (concluding that no reasonably segregable information exists because “the non-exempt information would produce only

1 incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words.”);
2 *see also Klamath Siskiyou Wildlands Ctr. v. U.S. Dep’t of the Interior*, Case No. 07-cv-325, 2007
3 WL 4180685, at *8 (D.Or. Nov. 21, 2007) (“In cases where nonexempt material is inextricably
4 intertwined with exempt material and the deletion of the exempt material would leave only
5 meaningless words and phrases, the entire document is exempt.”). CBP has reviewed each
6 document line-by-line and produced all reasonably segregable information. Suzuki Decl. ¶ 31.
7 With respect to the 28 pages withheld in full, CBP conducted a line-by-line review of these
8 documents and determined that “no portions can be segregated and disclosed.” *Id.* at ¶ 32. In
9 addition, “[t]he few non-exempt words and phrases that are dispersed throughout the records
10 withheld in full, if disclosed, would be meaningless and would not serve the purpose of FOIA –
11 to open agency action to the light of public scrutiny.” *Id.* Accordingly, the agency has produced
12 all “reasonably segregable portion[s]” of the responsive records. 5 U.S.C. § 552(b).

CONCLUSION

For the foregoing reasons, defendant respectfully requests that the Court grant its motion for summary judgment.

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Respectfully submitted,

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