

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

EDWARD HASBROUCK,)	
)	
Plaintiff,)	
)	
v.)	Civ. No.: C10-03793 RS
)	
UNITED STATES CUSTOMS)	
AND BORDER PROTECTION,)	
)	
Defendant.)	
_____)	

SUPPLEMENTAL DECLARATION OF SHARI SUZUKI

I, Shari Suzuki, declare as follows:

1. I incorporate by reference each and every one of the statements made in my initial declaration as though fully set forth herein. I submit this supplemental declaration in support of Defendant's Motion for Summary Judgment and as a rebuttal of many of the allegations made by Plaintiff in his Cross Motion for Summary Judgment and supporting Declaration.
2. This Supplemental Declaration consists of: (i) a summary and rebuttal of the allegations made by Plaintiff regarding the adequacy of the searches CBP made in response to his requests and appeals in his Declaration and Cross Motion for Summary Judgment (ii) a rebuttal and further elaboration about the justification for withholding information under Exemption (b)(7)(E) of the FOIA; and, (iii) a supplemental statement regarding the segregability of the pages withheld in full.

I. SUMMARY AND REBUTTAL OF THE ALLEGATIONS MADE BY PLAINTIFF REGARDING THE ADEQUACY OF CBP'S SEARCH IN HIS DECLARATION AND CROSS MOTION FOR SUMMARY JUDGMENT

3. By way of background information my branch considered more than eight hundred (800) cases in Fiscal Year ("FY") 2010 and the FOIA Division answered more than eighteen thousand (18,000) requests in the same timeframe (see <http://www.dhs.gov/xlibrary/assets/foia/privacy-rpt-foia-2010.pdf>).

4. Despite Plaintiff's assertions to the contrary, CBP conducted a reasonable search and CBP's responses to his appeals were both adequate and reasonable.

Plaintiff is correct that we did not run a Soundex search. There was nothing in either the Plaintiff's request or the results obtained from the searches run that suggested a need for such a search. We ran his first name, last name and date of birth and found the records that, based upon his requests, emails and telephone conversations, it appeared he was seeking. There was nothing in Plaintiff's request or records that suggested that there ought to be more records. Furthermore, there was nothing in Plaintiff's request or records that suggested that more expansive searches needed to be conducted. Indeed, we repeated those searches given the Plaintiff's claims in his motion and declaration. No other records exist.

5. In this regard we note that several courts have recognized that there are limits to the obligations of agencies to respond to FOIA requests:

FOIA does not require an agency to create records that do not exist. *DeBold v. Stimson*, 735 F.2d 1037, 1040 (7th Cir. 1984); see *Borom v. Crawford*, 651 F.2d 500 (7th Cir.1981). "FOIA does not require agencies to provide explanations or answers in response to questions disguised as FOIA requests or to create documents or opinions in response to an individual's request for information." *Sands [v. United States]*, 1995 U.S.

Dist. LEXIS 9252, 1995 WL 552308, *3 (S.D. Fla. 1995), 1995 U.S. Dist. LEXIS 9252, *5 (citing *Hudgins v. Internal Revenue Service*, 620 F. Supp 19, 21 (D.D.C. 1985)). “FOIA creates a right of access to records, not a right to personal services.” *Sands*, 1995 U.S. Dist. LEXIS 9252, 1995 WL 552308, *5 (citing *Hudgins v. Internal Revenue Service*, 620 F.Supp 19, 21 (D.D.C. 1985)). *Smith v. Hedgpeth*, 2008 U.S. Dist. LEXIS 4500, 11-12 (E.D. Cal. Jan. 10, 2008).

6. This paragraph relates to Plaintiff’s assertions on pages 16 and 17 of his Combined Cross Motion for Summary Judgment and Opposition to Defendant’s Motion For Summary Judgment (“Cross Motion for Summary Judgment”). As I declared in my initial declaration, I provided the best evidence that demonstrates why I believe a reasonable search was conducted. See Suzuki Initial Declaration, Paragraphs 16- 22, incorporated by reference herein. Plaintiff has not articulated which specific records he believes exists that CBP has not provided to him. I also explained in my initial declaration that the decision to treat the appeals as FOIA appeals (for the benefit of Plaintiff) and the justification for not searching databases specified by the Plaintiff. CBP searched the only possible place that responsive records were likely to be located. My initial declaration addressed items 1- 5 of the elements articulated in Steinberg v. Dep’t of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994) and referenced by Plaintiff’s at page 17 of his Cross Motion for Summary Judgment. With respect to item number 6 relating to an indication of how long the searches took to perform, I do not consider the amount of time taken to complete searches to be relevant because we usually do not charge fees at the appellate level. The FOIA Division did not charge fees because most requests for travel-related records fall within the “2 hours free search time” and “first 100 pages free” provisions of the FOIA. See 5 U.S.C. 552 (a)(4)(A)(iv)(II). Fees were not assessed in Plaintiff’s case. Nevertheless, to the best of my recollection, I and my staff attorney

spent approximately ten (10) hours searching for responsive records in this case.

7. This paragraph relates to Plaintiff's assertions on page 18 of his Cross Motion for Summary Judgment. As previously explained, the CBP Office of Field Operations conducted a search in 2007 under case number 2007F4114, CBP's FOIA Division performed a separate search in December 2009, and that I and my FAPL Branch performed searches as well. Although no record of the search conducted was kept by OFO, a review of the records indicates that ATS was searched using Plaintiff's name and date of birth. I considered every suggestion made by Plaintiff regarding where CBP might search for responsive records as I explained in CBP's decision letter dated August 2010 and my initial declaration. In the end, however, it is my responsibility to search where I believe that responsive records were likely to be located.

8. This paragraph relates to Plaintiff's assertions on pages 19 – 20 of his Cross Motion for Summary Judgment relating to the adequacy of searches. Plaintiff contends the search was inadequate because CBP did not search according to his dictates. The FOIA requires that a reasonable search be performed to produce responsive records. We ran his first name, last name and date of birth and found the records that, based upon his requests, emails and telephone conversations, it appeared he was seeking. Based on my experience a search using the first name, last name and date of birth is most likely to retrieve all responsive records about an individual. Using the middle name would be an additional search term which would only limit the search and is normally not included – this allows us to capture as many potentially responsive records as possible. Misspellings, similar pronunciations and transpositions are used when there is a likelihood for misspelling or transposition and/or when the request or records suggest that

other records should exist. There was nothing in Plaintiff's request or records that suggested that there ought to be more records. The name search that CBP performed produced responsive records and satisfied the agency's obligations under the FOIA. While CBP endeavored to search with as many of the criteria Plaintiff requested, there was not need to do so in this instance because CBP located the responsive records as explained in my initial declaration. See Suzuki Initial Declaration, paragraphs 16 – 19. This confusion may be related to the fact that, as I explained in the initial declaration, APIS and BCI reside on the TECS platform. We searched TECS for this API and BCI data and the "passenger activity" and "API data" records clearly show that the data was provided.

9. This paragraph relates to Plaintiff's assertions on pages 22- 24 of his Cross Motion for Summary Judgment relating to Plaintiff's belief that "numerous responsive records must exist." At the time in question I worked approximately forty feet from Mr. Castelli. My recollection is that I forwarded Plaintiff's email containing the appeal letter to Mr. Castelli.¹ To put this in perspective, one must remember that Plaintiff sent multiple copies, both "hard" and electronic versions, to multiple offices (for example, identical copies of the four 2009 "appeal" letters were received by FAPL and the FOIA Division) within CBP, as well as to DHS, simultaneously. Additionally, given that Plaintiff captioned the letters "FOIA/Privacy Act Appeal", I reviewed the letters and consulted with Laurence Castelli to determine which of our branches, based on the records requested within the letters, would be better able to reply to the requests.

10. Due to the nature of his request it is unlikely that his 2007 request would have been reported as significant. The appeal was handled as a Privacy Act appeal so no

¹ As indicated in my appeal decision, I was later unable to retrieve that email.

reporting requirement was applicable. It is my understanding that the three (3) initial requests in 2009 were not reported as significant. I did not report any of the appeals as significant.

11. With respect to system access logs, the access logs are internally generated and are used to “police” the use of ATS (there is a similar internal auditing function for policing the use of TECS). This function is neither intended nor designed to be used to generate reports to memorialize the terms used search for records in response to FOIA and Privacy Act requests.

12. With respect to records and or communications with DHS personnel, the records of communications with DHS personnel are possessed and “owned” by DHS. CBP has neither the access nor the authority to search for or disclose DHS records. Those records must be requested from DHS. With respect to telephone logs, there are no such records.

13. This paragraph relates to Plaintiff’s assertions on pages 24 – 25 of his Cross Motion for Summary Judgment relating to CBP’s description of its record-keeping systems. In the initial declaration, I described in detail the systems that CBP searched and I incorporate by reference paragraphs 23-25. With respect to Plaintiff’s request for “more than just user guides,” I did not search for software specifications.

14. The ATS and TECS User’s Guides are the primary teaching resources at CBP. Given the fact that the requester sought information on how CBP retrieves information from its systems, I felt the record responsive to his request was the user’s guides (which encompass the “user manuals, training manuals or materials, reference materials, query format guide, search protocols or instructions, interpretation guidelines and standard operating procedures” stated in the request). I did not believe that technical

specifications would be responsive to the request since they would not explain how to retrieve information from the system.

(II) FURTHER ELABORATION ABOUT THE JUSTIFICATION FOR WITHHOLDING INFORMATION UNDER EXEMPTION (B)(7)(E) OF THE FOIA

15. With regard to my reliance upon Exemption (b)(7)(E) to withhold the portions of the ATS and TECS User's Manuals, Plaintiff opines that:

With respect to this navigational information, unless CBP has devised some especially labyrinthine navigational scheme as an added layer of security against hackers, this withheld information is likely to be the type of routine, instructional material to which the exemption does not apply. How to use drop-down menus, perform searches and read search results are well known to anyone who has used computer software with database capabilities. Any withheld information that describes such routine navigational techniques is not exempt under exemption (7)(E).

16. As I stated in the original declaration:

In response to Plaintiff's appeal request I located fifty-two (52) pages from the TECS User Guide that describes and instructs personnel in the function and use of the law enforcement information collection, analysis, and sharing tool, and one hundred nineteen (119) pages from the ATS User's Guide that provides specific instructions concerning the operation of a computer program that assists CBP officers in all facets of customs, border and immigration law enforcement. Initially I looked at the tables of contents for the portions of the user's guides that dealt with searching for records to narrow my search and then read through those sections. (There was no "key word" search.) Then I read through the relevant sections of the user's guides page-by-page and line-by-line searching for information about how to search the systems identified by Plaintiff (and set forth in paragraph 21, above). All files likely to contain responsive material were searched. These excerpts comprise the pages entirely withheld (000017-187) described in the *Vaughn* Index. I withheld the excerpts from the user's guides in full because they provide detailed and precise road maps of how to search and navigate CBP's law enforcement databases. Release of this information would reveal step-by-step instructions on how to access and utilize the databases. The user guides were protected to prevent unauthorized access to information which could

result in alteration, loss, damage or destruction of data contained in the computer systems.

17. By way of further explanation, both Users' Guides discuss in detail and in conjunction with the operation of the data systems the observations, assessments, methodologies, programs and capabilities of those systems, all of which are inextricably intertwined with the instructions to the user. The reason computer program functions, specific data bases and the interrelationship of those databases and the computer codes used by law enforcement personnel were withheld is that the integrity of both of CBP computer systems is at issue, because the disclosure of this and other information in the hands of a computer "hacker" could jeopardize the integrity of the databases. Such disclosure could enable unauthorized users to gain access to the agency's law enforcement databases and alter, add, or delete information altogether, or alter an individual's patterned behaviors under surveillance, thus destroying the integrity of an investigation. In addition to indexing, storing, locating, retrieving, and distributing information in the agency's law enforcement records, some of the numbers and markings may indicate various aspects of an enforcement case, *e.g.*, type and location of the case, the status of a case, and the administrative actions that have been taken with a case. The disclosure of internal operating systems that identify certain parameters or functions within the databases could further enable such unauthorized users to disrupt or destroy the systems at worst; or to evade detection and or make unauthorized changes to law enforcement records which could go unnoticed and become permanent. In addition, if the system were to be hacked it would put at risk ongoing investigations, including the exposure of informants, witnesses and other highly sensitive information that could lead

to intimidation of witnesses, destruction of evidence and other actions designed to thwart investigative and law enforcement activities. Because of the interconnectivity between the agency's law enforcement databases and those of other agencies, such distortion of the information contained in the database could have far-reaching effects and could impair other agencies' law enforcement operations or missions. Knowledge of this information "in the wrong hands" would increase the risk of circumvention of laws and regulations, compromise the electronic records system, facilitate improper access to sensitive investigatory and other law enforcement records, impede effectiveness of law enforcement activities, and endanger agency investigatory practices and techniques.

18. I cannot provide more details regarding the information in the handbooks without revealing the precise steps and instructions that I am trying to protect. The instructions consist of exact instructions advising the user of what keystrokes to use, what drop down menus to select, what submenus to select, what icons to click on, what tabs to click, and other similar navigational instructions. Even knowing when to click on an icon versus when to select a drop down menu or when to enter information would reveal how CBP officers use the system to search for information. This information would instantly aid a hacker with valuable information on the structure, pattern and sequence of the law enforcement queries facilitating both unauthorized access to and utilization of the system. After deleting both the navigational information (*e.g.*, "click", "select", "enter", etc.) and the substantive information ("find", "port", "secondary referrals", "arrivals", etc.), in order to protect how CBP performs its searches, all that would be left would be meaningless words or phrases ("the", "choose", "perform the following"). It is estimated that such information would be less than 2 percent of each page. It would also require a large

amount of effort to parse out these words dispersed throughout the page and would only result in unintelligible gibberish.

19. These are not administrative manuals. These are extraordinarily detailed instruction manuals – that is why they are called “user’s guides.” They are used to teach CBP employees how to perform queries as part of their daily law enforcement responsibilities. These are detailed keystroke by keystroke instructions on how to perform a query that reveals the structure of the law enforcement system. For example, they state step by step first click here, then select from these, then select from these, then enter values. The user guides also contain screenshots of the databases including drop-down menus. These are not generic or basic drop-down menus but rather menus that show specific law enforcement queries. Release of this information to the wrong person would enable that person to retrieve a record on an individual, allow them to review the investigatory information that CBP has on that individual and facilitate the deletion or modification of the record.

20. The user guides are the responsive records to a request for records about how to retrieve information from TECS and ATS. The user guides are comprehensive in nature and provide detailed instructions on how to use the system including how to “retrieve information.” I am not aware of any other responsive records.

21. By explaining the systems that were searched, CBP did explain how the records are stored. We explained how we searched TECS for BCI, API and information on primary and secondary processing. We explained how we searched ATS for PNR. We also referenced the SORNs which detail the information that is kept. CBP explained that it searched for information covered by each of the SORNs for TECS, BCI, APIS and

ATS. We searched every possible repository reasonably likely to maintain responsive records. This should not be lost on the Plaintiff since he holds himself out to be an expert on the SORNs and consistently points to them in arguing where CBP should be looking for responsive information.

22. Exemption (b)(7)(E) exempts from disclosure information that would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. 5 U.S.C. § 552(b)(7)(E). Release of the CBP ATS or TECS manuals would increase the risk that a law will be violated and could encourage individuals to violate the customs or immigration laws.

23. Information from the user's manuals for TECS and ATS were withheld because they provide a road map of how to use the law enforcement databases. The information withheld includes step-by-step instructions on how to navigate a law enforcement database, step-by-step instructions on how to retrieve records from a law enforcement database, specific drop down menus and instructions for querying and navigating the database, names of specific modules within a law enforcement database, computer query codes, precise details of query screens, query screen field descriptions that would reveal law enforcement techniques of how system can be queried, navigation buttons, instructions on how to read results screens, system capabilities with respect to records that would reveal law enforcement techniques, and information about querying abilities and results that would reveal capabilities of system. These codes, prompts and instructions invariably refer to law enforcement techniques, observations, considerations, variables, goals and concerns. See paragraph 17, *supra*. This information was withheld

because release would facilitate unlawful access to law enforcement databases and disclose precise procedures followed by CBP officers when conducting law enforcement queries to determine the admissibility of international travelers and would disclose scope of investigations and techniques/procedures for border law enforcement and investigations, thereby risking circumvention of the law.

**(III) SUPPLEMENTAL STATEMENT REGARDING THE
SEGREGABILITY OF THE DOCUMENTS WITHHELD IN FULL**

24. In his Cross Motion for Summary Judgment, Plaintiff contends with regard to segregability of records that:

To justify a claim that segregation is impossible, an agency must supply a “relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.” *King v. Dep’t of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987) (quoting *Mead Data*, 566 F.2d at 261). See also *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 578 (D.C. Cir. 1996) (requiring “reasonable specificity” in explaining nonsegregability). The government’s justifications must not be conclusory; a blanket statement that exempt and nonexempt portions of a record are so intertwined as to prevent disclosure is insufficient to justify nonsegregability. *Pac. Fishers, Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir. 2008); *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 90 (D.D.C. 2009). The agency must also describe “what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document.” *Nat’l Res. Def. Council v. Dep’t of Educ.*, 388 F. Supp. 2d 1086, 1097 (C.D. Cal. 2005).

25. All information withheld is exempt from disclosure pursuant to a FOIA exemption or is not reasonably segregable because it is so intertwined with protected material that segregation is not possible or its release would have revealed the underlying protected material. The information contained therein is not comprised of mere drop-down menus or simple instructions; the information presented in both manual are comprised of explicit and detailed instructions, descriptions, justifications, strategies,

considerations and analyses of the information those systems are designed to store and analyze. I have reviewed the records that have been released to Plaintiffs in response to this litigation and determined the released documents are responsive. I have reviewed the documents line-by-line, to identify information exempt from disclosure or for which a discretionary waiver of exemption could apply, and I am satisfied that all reasonably segregable portions of the relevant records have been released to the Plaintiff in this matter. In my determination, any further release of the exempted materials could reasonably lead to the identification of law enforcement information and techniques that are properly protected by the exemptions asserted. See paragraph 17, above.

26. To the extent that there is any non-exempt information in the documents referenced in the *Vaughn* Index (Bates Stamp numbers 000001 through 000187), I reaffirm my previous position and assert that after conducting a page-by-page, line-by-line review, it is inextricably intertwined with the exempt information and therefore no portions can be segregated and disclosed. The few non-exempt words and phrases that are dispersed throughout the records withheld in full, if disclosed, would be meaningless and would not serve the purpose of FOIA--to open agency action to the light of public scrutiny.

JURAT CLAUSE

I declare under penalty of perjury that the statements made in the forgoing Declaration are true and correct to the best of my knowledge, information and belief.

Signed this 7 day of 15th, 2011 in Washington, D.C.



Shari Suzuki, Chief
FOIA Appeals, Policy and Litigation Branch
Regulations and Rulings
Office of International Trade
U.S. Customs and Border Protection
U.S. Department of Homeland Security