UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5078
(C.A. No. 14-1217)

ELECTRONIC PRIVACY
INFORMATION CENTER, Appellant,

v.

U.S. CUSTOMS & BORDER PROTECTION, Appellee.

APPELLEE'S REPLY IN SUPPORT OF MOTION FOR SUMMARY AFFIRMANCE

Appellant Electronic Privacy Information Center ("EPIC")'s opposition to the motion for summary affirmance fails to identify a genuine issue in this case that would benefit from further briefing and a published decision. Despite going beyond the two issues it initially identified for appeal, EPIC's response also disregards this Court's precedents applying the Freedom of Information Act, 5 U.S.C. § 552, ("FOIA")'s Exemption 7(E) and reasonable segregability requirement. Because the "merits of this appeal are so clear", the Court should grant the motion. *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir. 1980) (*per curiam*).

EPIC's Response raises three issues. First, EPIC contends that U.S. Customs and Border Protection ("CBP") may not apply Exemption 7(E) because the records were not related to a criminal investigation. Resp. to Mot. at 3-4.

Second, EPIC argues specifically that CBP's withholding of computer program training modules pursuant to Exemption 7(E) was improper. *Id*. at 4-6. Third, EPIC asserts that the District Court's grant of summary judgment after denying CBP's initial motion for summary judgment presents "inconsistencies" that EPIC claims "undercut the court's conclusions regarding segregability and risk of circumvention." *Id*. at 6-7. EPIC's arguments are without merit.

1. **To Apply Exemption 7(E), Records Must Be Compiled for Law Enforcement Purposes But Not Necessarily Connected With Criminal Investigations**

Section 7 of the FOIA requires records to "be compiled for law enforcement purposes" and sub-section 7(E) permits agencies to withhold 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). EPIC misunderstands this Court's decisions in *Sack v. DOD*, 823 F.3d 687 (D.C. Cir. 2013), *Blackwell v. FBI*, 646 F.3d 37 (D.C. Cir. 2011), and *Mayer Brown LLP v. IRS*, 562 F.3d 1190 (D.C. Cir. 2009), to limit "Exemption 7(E) only to techniques, procedures, and guidelines used in criminal investigations and prosecutions". Resp. to Mot. at 4. CBP's motion for summary affirmance cited the Court's decisions recognizing that law enforcement purposes encompass more than existing criminal investigations, and include both

national security and maintaining the security and integrity of government computer systems like AFI. *See* Mot. at 6-7, citing *Jefferson v. Dep't of Justice*, 284 F.3d 172, 176-77 (D.C. Cir. 2002), *Sack v. U.S. Dep't of Defense*, 823 F.3d 686, 694 (D.C. Cir. 2016), and *Nat'l Treasury Employees Union v. Customs Serv.*, 802 F.2d 525, 530 (D.C. Cir. 1986). That EPIC's Response fails to mention, let alone distinguish, these cases reveals the weakness of EPIC's argument for limiting Exemption 7(E).

This Court squarely rejected EPIC's argument for limiting Exemption 7(E) in to criminal investigations in *Public Employees for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n*, 740 F.3d 195 (D.C. Cir. 2014): "[l]aw enforcement entails more than just investigating and prosecuting individuals after a violation of the law" and that "steps by law enforcement officers to prevent terrorism surely fulfill 'law enforcement purposes.'" *Id*. at 203 (quotation omitted). EPIC's contention should also be rejected because the language of the statute does not require a nexus to criminal investigations. *See Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1264-66 (2011) (FOIA should be read literally); *North v. Walsh*, 881 F.2d 1088, 1098 (D.C. Cir. 1989) (stating that the 1986 amendment of FOIA "changed the threshold requirement for withholding information under exemption 7" so that "it now applies more broadly"); *Tax Analysts v. I.R.S.*, 294 F.3d 71, 79 (D.C. Cir. 2002) (explaining that the legislative history of the 1986

amendment shows that it was intended "to protect investigatory and non-investigatory materials"); *Mittleman v. OPM*, 76 F.3d 1240, 1243 (D.C. Cir. 1996).

This Court has also recognized that "law enforcement" within the meaning of Exemption 7 can extend beyond traditional realms into realms of national security and homeland security-related government activities. *Ctr. For Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 926, 929 (D.C. Cir. 2003) (holding that names of post-9/11 detainees could be withheld based on the needs of homeland security even though the Government would ordinarily make such information publicly available). CBP's mission falls squarely within this scope because its mission is to prevent terrorists, their weapons, and other dangerous items from entering the United States. *See* R. 32-1 (Supp. Burroughs Decl. ¶ 9).

Contrary to EPIC's view, the Court in *Sack* found that "Exemption 7 uses the term 'law enforcement' to describe 'the act of enforcing the law, both civil and criminal.'" *Sack*, 823 F.3d at 694 (quoting *Public Employees for Environmental Responsibility*, 740 F.3d at 202). As part of the Department of Homeland Security and charged with enforcement of numerous statutes, CBP satisfies the threshold for Exemption 7. *See also EPIC v. DHS*, 777 F.3d 518, 522-23 (D.C. Cir. 2015) (records compiled for purposes of DHS' law enforcement mission satisfied Exemption 7's threshold).

Although it is undisputed that the FOIA request in *Blackwell* was for records related to a criminal investigation, EPIC's suggestion that *Blackwell* supports limiting Exemption 7(E) to criminal investigations is misguided. *See* Resp. to Mot. at 4; *Blackwell*, 646 F.3d. at 37. The absence of discussion of the scope of records other than criminal investigations "compiled for law enforcement purposes" is unsurprising because the nature of the request did not raise it as an issue in *Blackwell*. Similarly, EPIC's citation to *Mayer Brown* fails to support limiting Exemption 7(E) to criminal investigations because that case concerned I.R.S. settlement guidelines which the Court found were protected from disclosure under Exemption 7(E). *Mayer Brown,* 562 F.3d at 1190-91. As in *Blackwell*, the Court in *Mayer Brown* had no occasion to, and did not hold, that Exemption 7(E) only applied in the criminal context. *Id*.

Because the record here demonstrates that the records EPIC requested were compiled for law enforcement purposes, the Court should find that CBP satisfies the threshold for Exemption 7.

2. CBP's Particular Withholdings Satisfy Exemption 7(E)

Pursuant to FOIA Exemption 7(E), CBP withheld training modules and records relating to its Analytical Framework for Intelligence ("AFI") system. *See* Mot. at 3. Exemption 7(E) allows agencies to withhold documents if the release of said documents would "disclose techniques and procedures for law enforcement

investigations or prosecutions" and that "such disclosure would reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). EPIC challenges the withholding on both prongs of Exemption 7(E).

The first prong of Exemption 7(E) requires that the documents contain information regarding law enforcement techniques or procedures used in investigations or prosecutions. *Id*. EPIC claims that "[n]one of the… records in dispute could logically reveal aspects of investigatory techniques." Resp. to Mot. at 5. The design and use of the AFI system themselves are law enforcement techniques. As argued above, FOIA does not require the technique to be investigatory, and the information relates directly to a group of law enforcement procedures, *i.e.,* inspecting individuals and goods crossing the border of the United States.

The second prong of Exemption 7(E) requires showing that release of the documents would reasonably risk allowing individuals to circumvent the law. U.S.C. § 552(b)(7)(E). Conversely, EPIC argues that, if released, the training modules and AFI records would not risk circumvention of the law. Resp. to Mot. at 5. EPIC's semantics are insufficient to alter the standard cited in the motion for summary affirmance (at 5): "To clear that relatively low bar, an agency must demonstrate only that release of a document might increase the risk 'that a law will be violated or that past violators will escape legal consequences.'" *Public*

Employees for Environmental Responsibility, 740 F.3d at 205 (quoting *Mayer Brown*, 562 F. 3d at 1193).

The Supplemental Burroughs Declaration and accompanying *Vaughn* index easily overcome the low bar described in *Public Employees*. *Public Employees*, 740 F.3d at 195; *Judicial Watch, Inc. v. F.D.A.*, 449 F.3d 141, 146 (D.C. Cir 2006) (agencies can show the risk through sufficiently detailed declarations that demonstrate how the records at issue would pose a threat to law enforcement or prosecution if released); R.32-1 (Suppl. Burroughs Dec. ¶¶ 10, 13-16); R.32-2 (*Vaughn* index). The declaration states that release of information regarding AFI would "provide a roadmap" that criminals could use to "evade detection by law enforcement, thereby *circumventing* the law." *Id*. ¶ 10 (emphasis added). Ms. Burroughs goes on to explain that release of the training modules could allow criminals "to circumvent the law by developing countermeasures aimed at defeating the effectiveness of these search techniques" and that "[r]elease of this information would enable potential violators to design strategies to circumvent the law enforcement techniques and measures developed by CBP." *Id*. ¶ 13. The declaration describes the documents withheld and, more importantly, a "logical" explanation for why each document would pose a threat to law enforcement or prosecution if released. *Blackwell*, 646 F.3d at 42. That is enough to apply Exemption 7(E).

Accordingly, CBP properly withheld documents related to the AFI pursuant to FOIA Exemption 7(E).

3. EPIC's Segregability Argument Does Not Warrant Denying Summary Affirmance

Finally, EPIC asserts that the District Court's case management "presents issues concerning the segregability of non-exempt information in the specific documents at issue." Resp. at 6. After finding that CBP's initial declaration did not support an affirmative finding that all reasonably segregable information had been released, the District Court required CBP to supplement the record. *See* R.28, 29. On the expanded record, the District Court found that CBP had satisfied the segregability requirement. *See* R.41. Different rulings on distinct records of evidence are not inconsistent. *E.g., Jones v. Exec. Office for U.S. Attorneys*, No. 13-5336 (Dec. 3, 2015 Order remanding for additional evidence about a search for responsive records under FOIA, and June 15, 2016 Judgment affirming summary judgment based on the entire record including the supplemental evidence).

Nothing about this mode of resolving a FOIA case is remarkable. *See id.* If anything, rather than undercutting the District Court's final conclusion as EPIC suggests (Resp. at 7), requiring more detailed evidence from CBP to grant summary judgment demonstrates that the District Court evaluated the evidence skeptically and carefully. Significantly, the Court has found that "agencies are entitled to a presumption that they compiled with the obligation to disclose

reasonably segregable material[,]" *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007), and the Supplemental Burroughs Declaration demonstrates that CBP carefully conducted a thorough review of the records at issue and provided all of the non-exempt information that was reasonably segregable. R.32-1 (Suppl. Burroughs Dec. ¶ 36). Because EPIC's Response fails to identify any evidence that overcomes that presumption, the Court should apply the presumption and affirm the District Court's finding that CBP disclosed all reasonably segregable material.

CONCLUSION

The issues the EPIC raises in its Response to Motion for Summary Affirmance are not novel. As such, and for the reasons above and in Customs' motion for summary affirmance, the Court should grant the motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
(Fed. R. App. P. 27(d)(2)(A))

The text of the foregoing Appellee's Reply in Support of Motion for Summary Affirmance was prepared using Times New Roman, 14-point font and contains 1,815 words, as counted by counsel's word processor (Microsoft Word 2016).

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 2017, the foregoing Appellee's Reply in Support of Motion for Summary Affirmance has been served via the Court's ECF system.

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