

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

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

**DEFENDANTS’ MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF
THE CROSS-MOTION FOR SUMMARY JUDGMENT & OPPOSITION TO
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

The United States Department of Homeland Security (“DHS”), and the United States Citizenship and Immigration Services (“USCIS;” collectively, “Defendants”), a DHS subdivision, by and through undersigned counsel, respectfully submit this memorandum in support of Defendants’ cross-motion for summary judgment and opposition to the cross-motion of the American Immigration Lawyers Association (“AILA” or “Plaintiff”):

SUMMARY OF ARGUMENT

AILA brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, as amended, seeking records related to investigation and adjudication of H1-B visa fraud. In response to several FOIA requests (collectively, “Requests”) AILA submitted, the USCIS has uncovered and released, in part, responsive records in accordance with the FOIA. The searches undertaken by the USCIS were exhaustive and FOIA-compliant. Pursuant to three FOIA

Exemptions – (b)(5), (b)(6),¹ and (b)(7)(E) – the USCIS has properly withheld sensitive information the disclosure of which would stymie law-enforcement activities and empower fraudsters. The USCIS has released all reasonably segregable, non-exempt information subject to the FOIA to which AILA is entitled. Because this action contains no disputed issue of material fact, the USCIS is entitled to summary judgment on AILA’s FOIA claims.²

FACTUAL & PROCEDURAL BACKGROUND

I. THE USCIS’S ROLE IN OVERSEEING LAWFUL IMMIGRATION TO THE UNITED STATES

As the agency that oversees lawful immigration to the United States, the USCIS is charged with disseminating accurate and needful information regarding immigration issues, granting immigration and citizenship benefits, promoting awareness and understanding of citizenship, and ensuring the integrity of the United States immigration system. See United States Citizenship & Immigration Servs., “About Us,” available at <http://www.uscis.gov/aboutus>. Among its responsibilities, the USCIS processes H-1B temporary visa petitions filed by United States employers seeking to hire non-immigrant alien workers on a temporary basis. See id.

II. THE USCIS’S FOIA PROCEDURES

The USCIS’s National Records Center (“NRC”) routinely processes FOIA requests in compliance with DHS implementing regulations found at 6 C.F.R. Part 5 and Management Directive No. 0460.1. Substitute Declaration of Jill A. Eggleston (“Sub. Eggleston Decl.”) ¶ 5. Upon receiving a FOIA request, the NRC sends the requestor an acknowledgement letter that includes the request’s control number and describes the processing-fee arrangement, estimated

¹ AILA has not challenged any withholding made pursuant to Exemptions (b)(5) or (b)(6) and has therefore conceded any opposition to exercise of those Exemptions.

² AILA does not argue its claim that USCIS violated the Administrative Procedure Act, 5 U.S.C. § 501, et seq., and has therefore waived that claim. See Compl. ¶¶ 43-44.

response time, processing options, contact information, and addresses any collateral requests the requestor raised. Id. ¶ 5(c). After determining the nature and scope of the FOIA request, the NRC conducts a preliminary search to locate potentially responsive records. Id. ¶ 5(a). During any abeyance in processing, periodic system inquiries are conducted to maintain updated information concerning the disposition of agency records subject to a pending FOIA request. Id. ¶ 5(d). If the NRC determines that responsive records are in the possession of an office or agency other than the responding office, a request for the production of records is sent to the appropriate custodian of records. Id. ¶ 5(e).

In an effort to process FOIA requests in a fair and expeditious manner, the NRC maintains a “first-in-first-out” processing policy. Id. ¶ 6. This process has been enhanced by the implementation of a regulation providing for expedited processing of requests under particular circumstances, and by the adoption of a multi-track processing system that not only allows the NRC to process requests on a first-in-first-out basis within each track, but also facilitates responses to relatively simple requests more quickly than to complex or voluminous requests. Id. The NRC’s first-in-first-out and multi-track processing techniques comport with the guidelines set forth in Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976) and Exner v. FBI, 612 F.2d 1202 (9th Cir. 1980).

III. AILA’S FOIA REQUESTS

A. The February 6, 2009, Request & March 18, 2009, Supplemental Request

By letter dated February 6, 2009, Robert Deasy, AILA’s Director of Liaison and Information, submitted a FOIA request (“February 6 Request”) to the USCIS on behalf of AILA for:

Copies of any and all guidance, including, but not limited to memoranda, standard operating procedures, and templates used for Request [sic] for Evidence regarding

adjudicating H-1B petitions issued as a result of, in connection with, in light of, or related to the Benefits [sic] Fraud [Compliance] Assessment Report.³

Id. ¶ 7. The NRC received this request on February 11, 2009. Id. ¶ 8. By letter dated February 18, 2009, the NRC acknowledged receipt of the February 6 Request in accordance with its normal operating procedures, advised AILA that all FOIA requests are processed by the USCIS in the approximate order of their receipt, and stated that AILA's request had been assigned control number NRC2009007831. Id.

By letter dated March 18, 2009, AILA submitted a supplemental FOIA request ("March 18 Supplemental Request"), in which he requested a document entitled "H1-B PROCESSING FRAUD REFERRAL SHEET" ("H1-B Petition Fraud Referral Sheet") and petitioned for expedited processing. Id. ¶ 9. AILA also sent an email to the DHS's Administration and Privacy Office ("APO") on that date asking for assistance in expediting its FOIA requests. Id. The March 18 Supplemental Request and the request to expedite were received and acknowledged by the NRC on March 20, 2009. Id. ¶ 10. The NRC denied AILA's request for expedited handling of the FOIA Requests. Id. On March 20, 2009, the DHS's Office of Disclosure Policy & FOIA Program Development responded on behalf of the APO to AILA's March 18, 2009, request for assistance in expediting the February 6 Request and the March 18 Supplemental Request, advising AILA that its requests would be processed as expeditiously as possible. Id. ¶ 11.

B. The April 13, 2009, Request

On April 13, 2009, AILA submitted another FOIA request ("April 13 Request") to the USCIS, this time seeking "THE COMPLIANCE REVIEW WORKSHEET MENTIONED IN

³ Defendants refer to the Benefit Fraud Compliance Assessment Report herein as the "BFCA Report."

COMMENT REQUEST FOR COMPLIANCE REVIEW WORKSHEET, 74 FR 15999 (APRIL 8, 2009)” (“Compliance Review Report”). Id. ¶ 30. The NRC received the April 13 Request on April 27, 2009. Id. ¶ 31. On April 28, 2009, in accordance with its normal operating procedures, the NRC acknowledged receipt of the April 13 Request in a letter to AILA, advising that the request had been assigned control number NRC2009023483. Id. On May 8, 2009, AILA submitted a request to expedite the April 13 Request. Id. ¶ 32. By letter dated May 28, 2009, the NRC denied AILA’s request for expedited processing. Id. ¶ 36.

IV. THE USCIS’S SEARCH FOR, AND DISCLOSURE OF, RECORDS RESPONSIVE TO AILA’S FOIA REQUESTS

Because AILA’s Requests sought access to program records – as opposed to records pertaining to a particular individual – they were assigned to the NRC’s Significant Interest Team (“SIT”) for processing. Id. ¶ 12 & n.1. Typically, a member of the SIT will determine the precise nature and scope of a request upon receipt, and identify all USCIS program offices potentially possessing records responsive to the request. Id.⁴ Each USCIS component potentially implicated by the FOIA request is tasked to forward all documents responsive to the request, if any, to the NRC for centralized processing pursuant to the FOIA and, to the extent known, identify any other USCIS components that may possess records responsive to the request so that these offices can be similarly notified. Id.

⁴ USCIS FOIA analysts consult a variety of sources containing organizational and operational information about the DHS and its various components, including a reference guide entitled “USCIS Functional Profiles” in an effort to identify all DHS offices and functions affected by a particular FOIA request. Sub. Eggleston Decl. ¶ 12 & n.2. USCIS Functional Profiles provides, for example, detailed descriptions of the various USCIS directorates and program offices and the specific missions and responsibilities of each. Essentially, the focus of a given FOIA request is compared to the various USCIS components’ assigned areas of responsibility in search of matching, comparable, and compatible subject matter. The FOIA request is then sent to any USCIS component charged with responsibilities in the FOIA requestor’s stated areas of interest. Id.

Because the February 6 Request sought “guidance...related to the Benefits [sic] Fraud Assessment report,” the USCIS broadly interpreted it as seeking any internal guidance memoranda, operational field manuals, and other instructions to staff focusing on any policy development, implementation, strategic planning, anti-fraud initiatives, or internal procedural aspects associated with the adjudication of H-1B non-immigrant temporary foreign worker visas that had been undertaken since September 2008, the date of the BFCR Report. Id. ¶ 13 (quoting Def.’s Exh. A at 1). Given the nature of the February 6 Request, the SIT concluded that documents responsive to it may be located within the USCIS’s Fraud Detection and National Security Division (“FDNS”),⁵ Service Center Operations (“SCOPS”),⁶ Office of Field Operations (“OFO”),⁷ and the Office of Policy and Strategy (“OPS”).⁸ Id.

On February 23, 2009, the NRC forwarded the February 6 Request to the FDNS and requested a point of contact within that office who could search for responsive documents. Id. ¶

⁵ The FDNS’s mission is to protect the legal immigration system from fraud and abuse, and to ensure the security and integrity of the United States immigration system and its specific functions by developing and directing capabilities, techniques, and initiatives that focus on the national-security aspects of the USCIS’s mission, as well as deterring, preventing, detecting, intervening, and eliminating immigration fraud. Sub. Eggleston Decl. ¶13.

⁶ The SCOPS is an operational division within the USCIS’s Domestic Operations Division (“DOMO”) tasked with direct oversight and support of USCIS service centers located within the United States that adjudicate, manage, and deliver immigration decisions and benefits. Sub. Eggleston Decl. ¶13.

⁷ The OFO is an operational division within the DOMO that performs the same function as the SCOPS, but does so at various field offices located throughout the United States, as opposed to service centers. Sub. Eggleston Decl. ¶13.

⁸ The OPS’s mission includes: (1) recommending and developing national immigration policy; (2) developing and coordinating immigration regulation initiatives; (3) performing research, evaluation, and analysis on immigration-services issues; (4) developing and coordinating strategic plans; and (5) liaising with DHS and sister agencies on immigration-policy issues. Sub. Eggleston Decl. ¶13.

14. On February 26, 2009, Don Crocetti, an Associate Director with FDNS, assigned the search of FDNS records for responsive documents to Immigration Officer Charles Pratt and, in the interim, notified the NRC that SCOPS had been identified as another possible custodian of records relating to the H-1B BFCA report distributed among service center immigration adjudicators. *Id.* ¶ 15. Pratt searched the HQ FDNS computer shared drive, as well as his own personal computer drive and hard copy files, but found no documents responsive to AILA's FOIA request.⁹ The terms Officer Pratt would have used in his search included "H1B," "H1B BFCA," "Employment Fraud," "Memos," "RFEs," "fraud referrals," and permutations on these titles and themes. *Id.*

On February 24, 2009, the NRC forwarded the February 6 Request and search time tracking forms to the OFO. *Id.* ¶ 16. The OFO referred the NRC to the FDNS as the keeper of benefit fraud analysis documents. *Id.* Otherwise, the OFO had no responsive documents to contribute. *Id.*

On March 4, 2009, the NRC forwarded the February 6 Request and search time tracking forms to the SCOPS and requested responsive documents and referrals to other offices that may have records relating to the Request. *Id.* ¶ 17. The SCOPS then forwarded the February 6 Request to the OPS for processing. *Id.*

On March 6, 2009, the NRC received a four-page memorandum from the OPS identified as responsive to the February 6 Request. *Id.* ¶ 18. The memorandum ("Neufeld Memorandum"), entitled "H-1B Anti-Fraud Initiatives – Internal Guidance and Procedures in

⁹ All final guidance regarding operations assigned to the various areas of FDNS responsibility are sorted and downloaded to the HQ FDNS computer shared drive where such guidance is maintained and retrieved by reference to subject matter; the shared drive is searchable by reference to subject matter, document name or other identifier, and key words and phrases. Sub. Eggleston Decl. ¶ 15 n.4.

Response to Findings Revealed in H-1B Benefit Fraud and Compliance Assessment,” was issued on October 31, 2008, by Donald Neufeld, Acting Associate Director of USCIS Domestic Operations. Id.

On March 10, 2009, the NRC was advised by the SCOPS that it was not aware of any other USCIS offices affected by the February 6 Request other than the FDNS and the SCOPS. Id. ¶ 21. Subsequently, on March 19, 2009, the SCOPS reported that it had no additional records responsive to the February 6 Request. The FDNS, however, advised the NRC that records responsive to the February 6 Request may be located at the Fraud Detection Units at the California and Vermont Service Centers because those units had been adjudicating H-1B filings since 2005. Id. ¶ 23. Accordingly, on March 19, 2009, the NRC forwarded the February 6 Request to the Fraud Detection Units of the California and Vermont Service Centers for processing under the FOIA. Id.

On May 18, 2009, the NRC forwarded the March 18 Supplemental Request to the FDNS. Id. ¶ 24. On that same day, the FDNS forwarded a copy of the sole responsive document, the two-page H-1B Petition Fraud Referral Sheet, to the NRC in response. Id.

Although all documents determined responsive to the February 6 Request and to the March 18 Supplemental Request had been received by the NRC on or before May 18, 2009, expedited processing of those documents was not possible because AILA’s request to expedite had been officially denied on March 18, 2009. Id. ¶ 25. Accordingly, the February 6 Request and March 18 Supplemental Request were subject to the agency’s first-in-first-out processing policy. Id. At that time there were over 200 significant-interest cases ahead of the February 6 Request and the March 18 Supplemental Request in the queue awaiting processing. Id.

Consequently, the February 6 Request and the March 18 Supplemental Request were not processed until the second week of January 2010. Id.

Believing that a thorough search had been conducted of all locations where records responsive to the February 6 Request and March 18 Supplemental Request could reasonably be expected to be found, and that the most knowledgeable individuals assigned to those locations had been consulted regarding the Requests, the NRC proceeded to determine whether the six pages of responsive documents, or parts thereof, could be released to AILA. Id. ¶ 26. After a line-by-line review, the NRC determined that the documents should be withheld and that there were no reasonably segregable portions appropriate for release. Id. The NRC completed review of the documents at issue and, on January 12, 2010, denied the AILA's Requests in full pursuant to FOIA Exemptions (b)(2), (b)(5), and (b)(7)(E). Id.

By letter dated March 11, 2010, AILA administratively appealed the USCIS's adverse determination. Id. ¶ 27. By letter dated March 15, 2010, the NRC acknowledged receipt of the appeal; advised AILA that FOIA appeals are processed in the approximate order of their receipt; and notified AILA that its appeal had been assigned control number APP2010000375. Id. ¶ 28.

In response to Plaintiff's March 11, 2010, FOIA appeal, on October 26, 2010, the USCIS partially reversed its earlier decision to withhold in full both the H-1B anti-fraud initiatives memorandum and the H-1B Petition Fraud Referral Sheet. Id. ¶ 29. The agency's search for documents responsive to the February 6 Request and March 18 Supplemental Request uncovered two (2) responsive documents consisting of six (6) pages. Id. ¶ 41. The first was a four-page memorandum, dated October 8, 2008, issued by Donald Neufeld, Acting Associate Director (Domestic Operations), to Field Leadership regarding H-1B anti-fraud initiatives developed in response to the now-public H-1B Benefit Fraud and Compliance Assessment. Id. The second

was a two-page preprinted USCIS form entitled H-1B Petition Fraud Referral Sheet. Id. These documents were originally withheld from disclosure in full by the USCIS on January 12, 2010 pursuant to FOIA exemptions (b)(2), (b)(5) and (b)(7)(E). Id.

The search for documents responsive to the April 13 Request uncovered one (1) responsive document consisting of two (2) pages. Id. ¶ 42. This two-page preprinted USCIS form, entitled Compliance Review Report, was originally withheld from disclosure in full by the USCIS on June 9, 2009 pursuant to FOIA exemptions (b)(2) and (b)(7)(E). Id.

Further research and more critical scrutiny of the eight pages of documents discussed here revealed that previously unknown circumstances, i.e., prior disclosures, had rendered much of the withheld information disclosable. Id. ¶ 43. For example, much, but not all, of the information contained in the 10/8/08 Neufeld Memorandum has been disclosed with the publication of the H-1B Benefit Fraud and Compliance Assessment, which is posted on the internet at <http://www.ieeeusa.org/policy/reports/DHSH1BFraudRpt.pdf>. Id. Moreover, the Neufeld memorandum was issued in September 2008 as a final agency determination, rendering FOIA exemption (b)(5) inapplicable as authority for withholding that document from public viewing. Id.

Regarding the Compliance Review Report and H-1B Petition Fraud Referral Sheet, experimentation revealed that, with the deletion of all fraud indicators, references to referral criteria and tolerances, these documents could be effectively rendered innocuous and, consequently, safe for public dissemination. Id. ¶ 44. All fraud indicators, however, were still entitled to the protection of FOIA exemptions (b)(2) and (b)(7)(E) under then-prevailing case law.¹⁰

¹⁰ Since the time that final agency determinations were rendered regarding Robert

As a consequence of the foregoing analyses, it was determined that these documents contained reasonably segregable portions that were not previously recognized as such. Consistent with these findings and then-prevailing case law, the USCIS released all reasonably segregable, nonexempt, non-privileged portions of the subject documents to AILA under cover letter dated October 27, 2010. *Id.* ¶ 45

V. CLARIFICATION OF AILA’S FOIA REQUESTS DURING LITIGATION

The instant litigation commenced on July 20, 2010. The typical array of pleadings followed, leading to Plaintiff’s January 14, 2011, Memorandum in Opposition to Defendant’s Motion for Summary Judgment and in Support of Plaintiff’s Cross-motion for Summary Judgment (hereafter, “Plaintiff’s Memorandum in Opposition”). It was not until this filing was analyzed that the USCIS realized it may have missed documents potentially responsive to Plaintiff’s February 6 Request. *Id.* ¶ 47.

With the concurrence of Plaintiff, on March 29, 2011, a renewed search for documents responsive to the AILA FOIA request was initiated. *Id.* ¶ 48. Once again, FDNS, SCOPS, OPS, and OFO, the USCIS components most likely to have records responsive to the FOIA requests, were instructed to renew their search efforts. In addition to conducting further searches within the relevant and affected program areas, senior access professionals at the USCIS National Records Center revisited the store of documents compiled in connection with the document production in TechServe Alliance v. DHS, Civil Action No. 10-00353-HKK, in an effort to identify any documents that might be responsive to AILA’s FOIA request. *Id.* The renewed

Deasy’s FOIA appeals of August 7, 2009, and March 11, 2010, the Supreme Court issued a decision in Milner v. U.S. Dep’t. of the Navy, No. 09-1163, which effectively abrogated the Executive Branch’s reliance on the so-called “high-2” aspect of FOIA exemption (b)(2). Accordingly, the USCIS withdraws all assertions of FOIA exemption (b)(2). Sub. Eggleston Decl. ¶ 44 n.4.

search focused on any and all guidance to H-1B adjudicators (to include memoranda, standard operating procedures, and document templates), regarding benefit fraud referrals, developed in connection with the Benefit Fraud and Compliance Assessment Report of September 2008. Id.

On March 23, 2011, Danielle Lee, Acting Center Director, California Service Center (“CSC”), and a former CFDO unit manager, indicated that, while the CSC plays a role in fraud detection and referrals, the CSC is not responsible for issuing guidance on the processing of H1-B petitions. Id. ¶ 49. That responsibility was assumed by the Vermont Service Center. Lee was, in fact, a principal directly involved in the H1-B BFCOA study and resultant report while at USCIS Headquarters, but that was the full extent of her involvement and that of the CSC. She provided a copy of the four page memorandum, entitled, H-1B Anti-Fraud Initiatives – Internal Guidance and Procedures in Response to Findings Revealed in H-1B Benefit Fraud and Compliance Assessment, issued by Donald Neufeld on October 31, 2008. Id.

On March 24, 2011, Greg Richardson, now-Chief, Adjudications Division, reported that SCOPs conducted searches in email records and a local USCIS network “Share Drive” with individual folders containing the written work product of each Service Center employee. Id. ¶ 50. An internet search was performed, as well as searches within DHSONLINE (an internal DHS electronic information sharing system) and the USCIS public website. Richardson reported that SCOPs’s renewed searches uncovered two (2) additional documents that heretofore had not been considered in connection with Plaintiff’s FOIA requests. Id. Both documents were retrieved from the USCIS network Share Drive, and addressed the use of the Fraud Referral Sheet, among other things. Id. The first, a seven (7) page document entitled, “H-1B Primary Fraud Indicators for Referral,” was developed by Center Fraud Detection Operations (“CFDO”), California Service Center (“CSC”); it is further identified as “FRS H-1B Referral Process SOP

D15.” Id. This particular document was developed and implemented by CFDO without the involvement and concurrence of SCOPs HQ. Id. The second, a two (2) page document entitled, “H & L Fraud Referral Sheet,” was also developed and implemented by CFDO without SCOPs HQ involvement. Id.

During the first week of April 2011, Roger Andoh and Marcia McDaniel, Supervisory Paralegal Specialists, both highly trained access professionals with several years of disclosure experience, scoured the store of documents compiled in connection with the TechServe production and uncovered an additional 229 pages of documents responsive to the AILA FOIA requests. Id. ¶ 51. In addition, McDaniel expanded her search to include the DHS intranet websites for FDNS, OFO, OPS, and SCOPs for any yet-undiscovered documents responsive to this request or evidence of their existence. Id. ¶ 52. Search terms used were “H-1B Petitions,” “fraud referral,” “RFE,” “BFCA,” “Benefit Fraud Compliance and Assessment,” “Request for Evidence,” and permutations of these terms. Id. The only documents found that had not been previously uncovered and considered were:

- A two-page, blank, very early version of a Fraud Referral Sheet, not otherwise marked, which is earmarked for release to Plaintiff in full; and
- A 19-page memorandum dated January 8, 2010, from Donald Neufeld, Associate Director, Service Center Operations, to Service Center Directors, entitled, Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements, which is already in the public domain at: <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf>.

Id. No other responsive documents were found on the FDNS, OFO, OPS, or SCOPs intranet websites. Id.

FDNS’s renewed search uncovered no new guidance regarding the adjudication of H-1B petitions, which was not unexpected given the parameters of Plaintiff’s request, i.e. documents

related to the BFCR Report of September 2008. Id. ¶ 53. No additional documents were found within OFO or OPS since neither OPS nor OFO have issued any guidance on the adjudication of H-1B petitions. Id. ¶ 57.

VI. VAUGHN INDEX

The USCIS describes responsive documents released in part and withheld in part in a Vaughn index, submitted herewith. Id. ¶ 60 (citing Exh. Z). The FOIA Exemption pursuant to which each portion of each document was withheld is specified therein and the rationale underlying the withholding is fully explained.

STANDARD OF REVIEW

Summary judgment is proper where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine issue of material fact. See Celotex, 477 U.S. at 323.

FOIA cases are typically and appropriately decided on motions for summary judgment. See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Labor, 478 F. Supp. 2d 77, 80 (D.D.C. 2007) (“CREW”). An agency is entitled to summary judgment in a FOIA case if it demonstrates that no material facts are in dispute, it has conducted an adequate search for responsive records, and each responsive record located either has been produced or is exempt from disclosure. See Weisberg v. Dep’t of Justice, 627 F.2d 365, 368 (D.C. Cir. 1980). To meet its burden, the agency may rely on reasonably detailed and non-conclusory declarations. See McGehee v. CIA, 697 F.2d 1095, 1102 (D.C. Cir. 1983); see also Vaughn v. Rosen, 484 F.2d

820 (D.C. Cir. 1973), cert denied, 415 U.S. 977 (1974). “[T]he Court may award summary judgment solely on the basis of information provided by the department or agency in declarations when the declarations describe ‘the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.’” CREW, 478 F. Supp. 2d at 80 (quoting Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981)). Here, the USCIS has submitted the Declaration of Jill Eggleston, which is reasonably detailed and accompanied by a supporting Vaughn index to explain and justify the USCIS’s responses to the AILA’s FOIA Requests.

ARGUMENT

I. THE USCIS PROPERLY RELEASED ALL RESPONSIVE, NONEXEMPT RECORDS IN RESPONSE TO AILA’S FOIA REQUESTS.

An agency must release all records responsive to a properly submitted FOIA request unless the records are protected from disclosure by one or more of the FOIA’s nine exemptions. See 5 U.S.C. § 552(b); see also U.S. Dep’t of Justice v. Tax Analysts, 492 U.S. 136, 150-51 (1989). Once the Court determines that an agency has released all non-exempt material, the FOIA claim is moot. See Perry v. Block, 684 F.2d 121, 125 (D.C. Cir. 1982) (quoting Crooker v. United States State Dep’t, 628 F.2d 9, 10 (D.C. Cir. 1980)); see also Muhammad v. U.S. Customs & Border Prot., 559 F. Supp. 2d 5, 7-8 (D.D.C. 2008) (“[O]nce the Court determines that the agency has...released all nonexempt material, [it has] no further judicial function to perform under the FOIA.”).

As shown below, the USCIS conducted an adequate search for records responsive to the AILA’s FOIA Requests and properly withheld information pursuant to Exemption (b)(7)(E).

A. The USCIS's search was reasonably calculated to uncover all documents responsive to the AILA's FOIA Requests.

The FOIA requires an agency to undertake a search that is “reasonably calculated to uncover all relevant documents.” Weisberg v. Dep’t of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Such searches are “adequate” as a matter of law. Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 325 (D.C. Cir. 1999); see Oglesby v. Dep’t of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (“[T]he agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.”). A search is not rendered inadequate merely because it failed to “uncover[] every document extant.” SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991). Instead, a search is inadequate only if the agency cannot “show, with reasonable detail, that the search method...was reasonably calculated to uncover all relevant documents.” Oglesby, 920 F.2d at 68. Once the agency demonstrates the adequacy of its search, the FOIA requestor must show “that the agency’s search was not made in good faith.” Maynard v. CIA, 986 F.2d 547, 560 (1st Cir. 1993). Unsupported assertions of bad faith are insufficient to raise a material question of fact with respect to the adequacy of an agency’s search for purposes of summary judgment. See Oglesby, 920 F.2d at 67 & n.13. Moreover, “[a]gency affidavits enjoy a presumption of good faith that withstands purely speculative claims about the existence and discoverability of other documents.” Chamberlain v. U.S. Dep’t of Justice, 957 F. Supp. 292, 294 (D.D.C. 1997), aff’d, 124 F.3d 1309 (D.C. Cir. 1997).

The Substitute Eggleston Declaration establishes that the USCIS’s search method was reasonably calculated to uncover all records in its possession responsive to the AILA’s FOIA Requests. The Requests sought: (1) information regarding adjudication of H1-B petitions issued as a result of the BFCA Report; (2) the H1-B Petition Fraud Referral Sheet; and (3) the

Compliance Review Report. See Sub. Eggleston Decl. ¶¶ 7, 9 & 30. The USCIS forwarded the February 6 Request, the March 18 Supplemental Request, and the April 13 Request to agency subdivisions that could reasonably to expected to possess relevant, responsive information. See id. ¶¶ 12-13 & 34-35. Each agency subdivision then conducted a meticulous search for responsive documents and dispatched referrals to other agency subdivisions as necessary in order to ensure that all responsive information would be uncovered. See id. ¶¶ 14-26, 34-35. The USCIS's renewed search has uncovered all additional, responsive documents. See id. ¶¶ 47-57.

As the Substitute Eggleston Declaration describes, the USCIS conducted an adequate search for records in response to the AILA's FOIA Requests. See, e.g., Oglesby, 920 F.2d at 68 (holding that a search need only "us[e] methods which can be reasonably expected to produce the information requested"). In searching the FDNS, SCOPS, OFO, ORM, and OPS, as well as the agency's Fraud Detection Units located in its California and Vermont Service Centers, the agency searched all locations where information responsive to the AILA's Requests would reasonably be expected to be found and conferred with individuals who were reasonably expected to possess information responsive to the AILA's Requests. See id. ¶¶ 14-26, 34-35, 47-57. In light of the above, the USCIS undertook an adequate FOIA search.

B. The USCIS properly asserted Exemption (b)(7)(E).

FOIA Exemption (b)(7) protects from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such records or information" would result in one of six enumerated harms. See 5 U.S.C. § 522(b)(7)(A)-(F). The threshold requirement for invoking Exemption (b)(7) – that the withheld information was "compiled for law enforcement purposes" – is satisfied here. See Tax Analysts v. IRS, 294 F.3d 71, 77 (D.C. Cir. 2002) (noting that in assessing whether the threshold requirement of 5 U.S.C. §

552(b)(7) is satisfied “the FOIA makes no distinction between agencies whose principal function is criminal law enforcement and agencies with both law enforcement and administrative functions”). As the Substitute Eggleston Declaration establishes, the USCIS engages in significant activities through its FDNS, SCOPS, OFO, and OPS units to detect and combat immigration fraud. Sub. Eggleston Decl. ¶ 13. Exemption (b)(7) thus applies.

Here, the USCIS redacted certain information pursuant to FOIA Exemption (b)(7)(E), which permits an agency to withhold information compiled for law-enforcement purposes if release “would disclose techniques and procedures for law enforcement investigations or prosecutions.” 5 U.S.C. § 552(b)(7)(E). Specifically, the USCIS invokes Exemption (b)(7)(E) to protect sensitive information contained in: (1) a document entitled “H-1B Primary Fraud Indicators for Referral” (rev. 08-28-2008); (2) a document entitled “H-1B Q&A;” (3) the Fraud Referral Sheet; (4) a later version of the “H-1B Primary Fraud Indicators for Referral” document; and (5) the Compliance Review Report. See Sub. Eggleston Decl. Exh. Z. The information contained in those documents and withheld pursuant to Exemption (b)(7)(E) was compiled for law-enforcement purposes and reflects the techniques, guidance, and other information used by FDNS officials and other agency personnel in combating immigration fraud. See id.

These records fall within the category of investigatory and prosecutorial guidelines and procedures that courts have found to be protected under Exemption (b)(7)(E). See, e.g., Tax Analysts, 294 F.3d at 79 (holding that an agency may seek to block the disclosure of internal agency materials relating to “guidelines, techniques, sources, and procedures for law enforcement investigations and prosecutions, even when the materials have not been compiled in the course of a specific investigation”); PHE, Inc. v. Dep’t of Justice, 983 F.2d 248, 250-51 (D.C. Cir. 1993) (holding that portions of an FBI manual describing patterns of violations,

investigative techniques, and sources of information available to investigators were protected by Exemption (b)(7)(E)); Allard K. Lowenstein Int'l Human Rights Project v. U.S. Dep't of Homeland Sec., 603 F. Supp. 2d 354, 365 (D.D.C. 2009) (stating that disclosure of “criteria used to rank the cases” by priority level “would disclose law enforcement techniques” and assist those seeking “to evade future immigration enforcement operations”); Tran v. Dep't of Justice, 2001 WL 1692570 at *3 (D.D.C. Nov. 20, 2001) (concluding that agency form used in sharing information contained on immigration records was properly withheld because it would reveal law-enforcement techniques) (unpublished); Hammes v. U.S. Customs Serv., 1994 WL 693717 at *1 (S.D.N.Y. Dec. 9, 1994) (protecting Customs Service criteria used to determine which passengers to stop and examine) (unpublished).

Moreover, the protected information need not detail a specific law-enforcement technique or procedure – although the fraud indicators described above certainly satisfy this showing – but may also simply shed light on an agency’s “internal assessment of the usefulness of various well-known techniques and procedures,” as do the documents at issue here. ACLU v. Dep't of Justice, 698 F. Supp. 2d 163, 167-68 (D.D.C. 2010) (concluding that the agency properly invoked Exemption (b)(7)(E) to redact information that would reveal the limitations of a particular law-enforcement technique and the technique’s uses for purposes that were not obvious); see also Span v. Dep't of Justice, 696 F. Supp. 2d 113 (D.D.C. 2010) (affirming agency’s withholding of its “own internal assessment of the usefulness of various well-known techniques and procedures in a particular case”). On this record, the USCIS’s invocation of Exemption (b)(7)(E) to withhold the records at issue was proper.

Nor, pace AILA, is the information well known to the general public. See Pl.’s Cross-Motion at 17. The application and interpretation of the fraud indicators at issue are in fact

generically distinct from obvious techniques like wiretapping, use of a post-office box, or pretextual telephone calls that are well known outside the realm of law enforcement. See, e.g., Rosenfeld v. Dep't of Justice, 57 F.3d 803, 815 (9th Cir. 1995) (telephone calls); Billington v. Dep't of Justice, 69 F. Supp. 2d 128, 140 (D.D.C. 1999) (wiretap and use of post-office box); see also Struth v. FBI, 673 F. Supp. 2d 949, 970 (E.D. Wis. 1987) (“garden variety ruse” not protected). In contrast, the information for which USCIS seeks protection here is the type of internal law enforcement data that Exemption (b)(7)(E) was designed to protect. See, e.g., Barnard v. Dep't of Homeland Sec., 598 F. Supp. 2d 1, 23 (D.D.C. 2009) (recognizing that “[t]here is no principle...that requires an agency to release all details of techniques simply because some aspects are known to the public”); Windels, Marx, Davies & Ives v. Dep't of Commerce, 576 F. Supp. 405, 409-10 (D.D.C. 1983) (protecting under Exemptions 2 and 7(E) computer program designed to detect possible law violation).

1. H-1B Fraud Indicators for Referral (revs. 08-28-2008 & 09-23-2008)

The agency has withheld certain information pursuant to Exemption (b)(7)(E), which protects from disclosure all information compiled for law enforcement purposes 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 law.” 5 U.S.C. § 552(b)(7)(E). The document at issue here reveals particular and sensitive criteria – the fraud indicators – used by adjudicators to determine which cases of suspected fraud to refer for further investigation. The precise nature of each fraud indicator is presented in clear, unequivocal language designed to be readily understood by the user. Anyone in possession of this document with the intent to defraud the government by illegally exploiting the H-1B program would have, essentially, a roadmap by

which they could follow to avoid attracting attention and close scrutiny by either “doctoring” their H-1B applications (or associated forms); “staging” places of employment; manufacturing employment records; or engaging in any number of other ploys designed to deceive immigration and law enforcement authorities. See Sub. Eggleston Decl. Exh Z.

This document does far more than simply assist in fraud detection; it is also a vital national security weapon in the war against international terrorists seeking, ostensibly, legitimate ways to enter the country. Accordingly, the information being withheld is sensitive homeland security information. Inasmuch as disclosure of this list would reveal guidelines for law enforcement investigations and prosecutions and, thereby, undermine the usefulness of those guidelines, it is entitled to categorical protection from disclosure pursuant to FOIA exemption (b)(7)(E). Id.

2. H-1B Q&A

The withheld portion of this document contains a list of entitled “instances and types of abuse in the H-1B program.” Id. This list reveals where the agency will concentrate its fraud detection efforts and describes precisely what the agency will be looking at. Id. In the same vein, anyone in possession of this document will also know where the agency will be concentrating its fraud detection efforts and, thereby, know precisely what behaviors to avoid and how to escape detection. The reasons for citing exemption (b)(7)(E), here, are the same as those for citing this exemption to withhold the H-1B Fraud Indicators for Referral. Id.

3. Fraud Referral Sheet

With respect to the H1-B Petition Fraud Referral Sheet, the protected information it contains is, quite literally, a checklist of fraud indicators to which agency adjudicators are required strictly to adhere in order to ensure that actionable immigration fraud referrals are being

sent to the Center Fraud Detection Operation. See id. Exh. X. The precise nature of each fraud indicator is set forth in unequivocal language designed to be readily understood by the adjudicator without resort to more than the guidance contained in the Neufeld Memorandum. See id. Were the USCIS to publically disclose the Neufeld Memorandum along with the entirety of the H1-B Petition Fraud Referral Sheet, together these documents could be used by potential fraudsters to determine the patterns of behavior to be avoided when seeking to escape detection by immigration-enforcement officials. See id. Disclosure of the checklist would reveal the guidelines for investigations and prosecutions and thereby undermine the guidelines' usefulness. See id.

4. Compliance Review Report

With respect to the Compliance Review Report, the protected information it contains amounts to an investigative questionnaire that is completed by USCIS and Immigration and Customs Enforcement ("ICE") site inspectors and on which those investigators record their personal observations during inspections. See id. Items 1 through 10 contain the precise questions investigators ask during site investigations and provide the foundation for additional impromptu or follow-up questioning that may take place as needed. Id. Importantly, the decision whether to initiate a more intensive investigation is invariably based on the recommendation proffered by an investigator. Id. Public disclosure of the questions contained in the investigative questionnaire would alert potential fraudsters and subjects of investigations by the USCIS and ICE to the types of conduct, behavior, and working conditions that attract the attention of law-enforcement officials, and would allow fraudsters to evade law enforcement by sanitizing or tailoring their responses to an investigator's questions. See id.

C. USCIS has complied with the FOIA's segregability requirement.

If a record contains information exempt from disclosure, the FOIA requires that any "reasonably segregable," non-exempt information be disclosed after redaction of the exempt information. 5 U.S.C. § 552(b). Non-exempt portions of records need not be disclosed if they are "inextricably intertwined with exempt portions." Mead Data Cent., Inc. v. Dep't of the Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977). To establish that all reasonably segregable, non-exempt information has been disclosed, an agency need only show "with reasonable specificity" that the information withheld cannot be segregated. Armstrong v. Executive Office of the President, 97 F.3d 575, 578-79 (D.C. Cir. 1996) (internal quotation marks omitted); Canning v. Dep't of Justice, 567 F. Supp. 2d 104, 110 (D.D.C. 2008).

Where non-exempt information could be segregated from exempt information, the USCIS segregated and disclosed the non-exempt information. The USCIS has established, with reasonable specificity, that responsive documents were redacted in part after a line-by-line review and after a determination that there were no reasonably segregable portions of documents appropriate for release. Sub. Eggleston Decl. ¶ 60. The USCIS has therefore complied with its duty to segregate exempt from non-exempt information.

II. THE "PUBLIC DOMAIN DOCTRINE" DOES NOT REQUIRE RELEASE OF THE INFORMATION AILA SEEKS.

AILA errs in asserting that the information it seeks is already publicly available. In this Circuit, for information to be considered sufficiently within the public domain such that an agency may not assert a FOIA exemption to protect it, the information must have been "officially disclosed" by the agency. Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990) (waiver cannot occur absent "an official and documented disclosure"). Information is officially disclosed only if it has entered the public domain under circumstances in which an authoritative government

official allowed it to become public. See, e.g., Wolf v. CIA, 473 F.3d 370, 379-80 (D.C. Cir. 2007) (finding that the CIA director's testimony amounted to an "official and documented disclosure" that waived the agency's ability to assert a Glomar response); Afshar v. Dep't of State, 702 F.2d 1125, 1133 (D.C. Cir. 1983) (books written by former agency official did not constitute official disclosures).

In addition to demonstrating an official disclosure, AILA must show that the information it seeks is "as specific as the information previously released" and matches the information previously disclosed. Fitzgibbon, 911 F.2d at 765; see Assassination Archives & Research Ctr. v. CIA, 334 F.3d 55, 60-61 (D.C. Cir. 2003) (requiring plaintiff to show that previous disclosure duplicated the specificity of withheld material); Davis v. U.S. Dep't of Justice, 968 F.2d 1276, 1279 (D.C. Cir. 1992) ("a party who asserts that material is publicly available carries the burden of production on that issue" and must "point to 'specific' information identical to that being withheld"); Public Citizen v. Dep't of State, 11 F.3d 198, 203 (D.C. Cir. 1993) (requiring plaintiff to show that testimony was "as specific as" the documents sought, or that the testimony "matches" the information contained in the documents). To be sure, the information AILA seeks may have become public, but USCIS does not waive its right to assert FOIA exemptions unless the disclosure was official. AILA cannot meet its burden by asserting that bits of ostensibly confidential information were somehow publicly disclosed.

A. The Compliance Review Report

AILA argues that the "Compliance Review Report instructions are available in the public domain" because they "have been published by a major legal publishing house" and "are available on the internet." Pl.'s Cross-Motion at 12. Neither of these methods constitute the "official and documented disclosure" necessary to invalidate USCIS's withholdings. Fitzgibbon,

911 F.2d at 765. Nor can AILA show that the supplemental release USCIS made, entitled “Compliance Review Report Instruction Sheet for H-1B Based ASVs,” Pl.’s Cross-Motion Exh. 29, triggers the public-domain doctrine or that the information it contains “matches” the information USCIS has withheld, see id. Exh. 12. The Instruction Sheet contains information from July 2009 and postdates the Compliance Review Report, a document updated in June 2009. Even if the information it contains has allegedly been publicly released, such release was not official and not made by USCIS.

B. Fraud Referral Sheet

Likewise, the information contained in the Fraud Referral Sheet that AILA cites was publically released by a party to another FOIA action, not by USCIS. See Pl.’s Cross-Motion at 15. Moreover, the document in that case is an earlier version of the Fraud Referral Sheet, not the version at issue in this litigation. See id. Exh. 15. And although the document was appended to the Eggleston Declaration filed in that case, it was appended only because it was part of the plaintiff’s FOIA request. See id. Indeed, the document itself indicates that it is published by AILA, not the USCIS. See id. (stating that document originated from an archive entitled “AILA InfoNet”). No official release by USCIS has been made here.

C. Neufeld Memorandum

AILA next argues that “[a]t least some of the redacted content” of the Neufeld Memorandum “appears” to “relate to” primary fraud indicators. Pl.’s Cross-Motion at 15. AILA does not explain why it so surmises and fails to explain its guess that the BFCA contains the information redacted from the Neufeld Memorandum. The speculative showing AILA makes here falls far short of the requirement that AILA show that the information contained in the Neufeld Memorandum exactly “matches” the information contained in the BFCA report, or other

information already officially disclosed by USCIS. See Assassination Archives & Research Ctr., 334 F.3d at 60-61 (requiring plaintiff to show that previous disclosure duplicated the specificity of withheld material); Davis, 968 F.2d at 1279 (“a party who asserts that material is publicly available carries the burden of production on that issue” and must “point to ‘specific’ information identical to that being withheld”); Public Citizen, 11 F.3d at 203 (requiring plaintiff to show that testimony was “as specific as” the documents sought, or that the testimony “matches” the information contained in the documents).

D. “Newly-Identified Documents”

Finally, without any analysis or legal argument, AILA asserts that “[t]o the extent defendants’ newly-identified documents...also include segregable portions which are in the public domain...defendants should be ordered to release such portions.” Pl.’s Cross-Motion at 16. AILA fails to point to a single document, or portion thereof, which it claims contains redacted information that has been publically and officially released by USCIS. What’s more, AILA does not even claim that the newly released documents do in fact contain any such information. Accordingly, AILA again falls well short of the showing necessary to trigger release under the public-domain doctrine.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court grant summary judgment in their favor on all claims AILA raises in this action.

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