

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

**AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NEW HAMPSHIRE**

Plaintiff,

v.

**UNITED STATES CUSTOMS AND
BORDER PROTECTION**

Defendant.

Case No.: 1:23-cv-00282-JL

**PLAINTIFF'S CONSOLIDATED MEMORANDUM OF LAW (I) IN SUPPORT OF
PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT, AND (II) IN
OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Plaintiff American Civil Liberties Union of New Hampshire’s (“ACLU-NH”) request under the Freedom of Information Act (“FOIA”) seeks information concerning the number of apprehensions in New Hampshire by Defendant United States Customs and Border Protection (“CBP”) from October 1, 2022 to January 31, 2023 (including in the three New Hampshire counties within the Swanton sector). In addition to this state-specific data, Plaintiff seeks the municipalities where the apprehensions occurred and the arrestees’ nationalities. Hereinafter, this is referred to as “the Request.”

In denying Plaintiff’s Request, Defendant first argues that Defendant cannot disclose “personal information from the responsive records such as names, addresses, dates of birth, places of birth, personal identification numbers (such as alien registration numbers and fingerprint identification numbers), employment history, medical history, and other personal data” under Exemptions 6 and 7(C). Govt’s Br. at 6. This is a red herring. Plaintiff repeatedly states in its Amended Complaint that it is not seeking any of this identifying and personal information. *See* Am. Compl., Docket Number (DN) 6 at p. 8-9 ¶ 23 (“The Request did not seek any names or contact information.”), p. 11 ¶ 29 (“The Request does not seek how the apprehension was conducted, any tactics used, the names of the CBP agents involved, or the numbers of agents placed at any Swanton Sector station that could cause staffing levels to be extrapolated.”), p. 15 ¶ 33 (“However, none of this information [concerning the names, addresses, and other identifying information of third parties and CBP personnel that appear in the records] is responsive to the Request, and ACLU-NH is not seeking this information.”). Thus, Exemptions 6 and 7(C) are inapplicable. Exemption 7(F) is inapplicable for the same reason, as this exemption usually applies to “names and identifying information of law enforcement officers, witnesses, confidential

informants and other third persons who may be unknown to the requester”—information which Plaintiff expressly is not seeking here. *See Anand v. U.S. HHS*, Civil Action No. 21-1635 (CKK), 2023 U.S. Dist. LEXIS 51852, at *68 (D.D.C. Mar. 27, 2023).

Defendant CBP further argues, in a sparse three-pages of analysis, that disclosing the requested information would reveal techniques/procedures or guidelines that could reasonably be expected to risk circumvention of the law under Exemption 7(E), as well as reveal law enforcement information that could reasonably be expected to endanger the life or physical safety of an individual under Exemption 7(F). At the outset, Exemption 7(E) does not apply because the basic data requested does not constitute “techniques and procedures for law enforcement investigations or prosecutions” or “guidelines for law enforcement investigations or prosecutions.” And neither Exemption 7(E) nor Exemption 7(F) also apply because, respectively, disclosure could not “reasonably be expected to risk circumvention of the law” or “reasonably be expected to endanger the life or physical safety of an individual.” Indeed, Exemption 7(E) “does not ordinarily protect ‘routine techniques and procedures already well known to the public.’” *Elec. Frontier Found v. Dep’t of Just.*, 384 F. Supp. 3d 1, 9-10 (D.D.C. 2019). But, here, Defendant routinely discloses total “encounter” figures for each state, month, and year on its website. Defendant has already published that there was only one New Hampshire “encounter” from October 2022 to January 2023, with the area of responsibility being the Boston Field Office. This “encounter” occurred in October 2022. *See Exhibit P*. Defendant also routinely releases apprehension locations and the arrestees’ nationalities through public announcements. In fact, Chief Patrol Agent Robert Garcia, who is in charge of Defendant’s Swanton Sector, often discloses this information through his Twitter account. These publicly known locations include Champlain (NY), Westville (NY), Ft. Covington (NY), Mooers (NY), Newport (VT), North Troy (VT), and Franklin (VT). *See Exhibit*

Q. In New Hampshire specifically, the United States Attorney’s Office for the District of New Hampshire and Defendant CBP also recently disclosed the location of Pittsburg (NH), where Defendant arrested individuals.¹ And CBP has already (i) disclosed to the New Hampshire Department of Safety that there has been a “slight increase” in the number of illegal crossings into the United States from the Canada/New Hampshire border (*see Exhibits F, G*)—statements that have become the basis of an over \$1.4 million policy proposed and enacted by New Hampshire officials that will create a Northern Border Alliance Program—and (ii) apparently disclosed to *WMUR* that no crossing was “recorded in New Hampshire” between October 2022 and January 2023 (*see Exhibit J*).

A federal agency does not credibly promote FOIA’s goal of transparency when it releases information only when doing so serves its interests while resisting access to the same information when it does not. CBP cannot have it both ways. CBP cannot make disclosures concerning the nature of its enforcement operations (including in New Hampshire) and then reject the public’s efforts to verify those statements, especially where these statements have become the basis of an over \$1.4 million policy proposal that has been enshrined into law. CBP is accountable to taxpayers who pay for its operations. And the taxpayers are entitled to vet CBP’s statements and disclosures, including evaluating whether this \$1.4 million policy is a good use of state taxpayer funds.

Because the exemptions invoked by Defendant are inapplicable to Plaintiff’s requested information, this Court should hold that Defendant has failed to carry its burden of justifying the

¹ U.S. DOJ, *New York Man Indicted for Human Smuggling* (July 7, 2023), <https://www.justice.gov/usao-nh/pr/new-york-man-indicted-human-smuggling>; Todd Bookman, “Man arrested for allegedly helping to smuggle nine people across Canadian border in Pittsburg, NH,” *NHPR* (July 7, 2023), nhpr.org/nh-news/2023-07-07/man-arrested-for-allegedly-helping-to-smuggle-nine-people-across-us-canadian-border-in-pittsburg-nh.

withholding of the information under the FOIA. This Court should direct Defendant to release the requested information.

UNDISPUTED MATERIAL FACTS [Local Rule 56.1(a)]

I. The ACLU-NH's Request

1. On April 5, 2023, Plaintiff ACLU-NH submitted the Request to Defendant CBP.

Exhibit A.

2. The Request sought the following data:

- October 1, 2022 to December 31, 2022

- Records sufficient to identify how many of the apprehensions from October 1, 2022 to December 31, 2022 occurred in New Hampshire—including in the New Hampshire counties of the Swanton sector (Coos, Grafton, and Carroll Counties)—relative to the total number of apprehensions by the sector during that three-month time period.

- Records sufficient to identify (1) how many of the 367 January 2023 apprehensions occurred in New Hampshire, (2) the municipality where the apprehensions occurred, and (3) the nationality of the individuals apprehended.

- January 2023

- Records sufficient to identify how many of the 367 January 2023 apprehensions occurred in New Hampshire, including in the New Hampshire counties of the Swanton sector (Coos, Grafton, and Carroll Counties).

- Of these January 2023 apprehensions in New Hampshire identified in the above Request, records sufficient to identify (i) the municipality where the apprehension occurred, and (ii) the nationality of the person apprehended.

II. Why The ACLU-NH Sent The Request

3. Plaintiff ACLU-NH's Request arises from Defendant CBP's recent claim that the number of apprehensions and encounters at the Canadian/United States Swanton Sector border has significantly increased, along with CBP's apparent claim that there has been a "slight increase" in the number of illegal crossings into the United States from the Canada/New Hampshire border.

Exhibits A-C, F-G.

4. On January 25, 2023, Defendant CBP issued a press release stating that, “[b]etween October 1, 2022, and December 31, 2022, [CBP’s] Swanton Sector recorded an approximate 743% increase in apprehensions and encounters compared to the same period of the year prior.” Exhibit D. On February 13, 2023, Defendant CBP also publicly announced that the “Swanton Sector recorded 367 apprehensions and encounters during January of fiscal year 2023,” and “January’s total surpassed the preceding January apprehensions for the past 12 years combined (Total: 344).” Exhibit E.

5. However, these statistics are not specific to New Hampshire. Instead, they cover the entire Swanton Sector, which consists of the following: (i) the entire State of Vermont, (ii) Clinton, Essex, Franklin, St. Lawrence and Herkimer counties in New York, and (iii) Coos, Grafton, and Carroll counties in New Hampshire.² The New Hampshire/Canadian border only constitutes about 58 of the 295 miles of Canadian border in the Swanton Sector. Further, these statistics referenced by Defendant CBP do not seem to be limited to cross-border apprehensions but rather seem to cover apprehensions in the *entire* Sector and potentially deep into the interior of New England. This would include, if they actually occurred, apprehensions deep in the interior of New Hampshire in Grafton and Carroll Counties—far from the border.

6. Notwithstanding this ambiguity, the Commissioner of the New Hampshire Department of Safety, Robert Quinn, recently testified before the U.S. House of Representatives Committee on Homeland Security Subcommittee on Oversight, Investigations, and Accountability on March 28, 2023 that “New Hampshire has seen an increase in crossings.” Exhibit F. As

² CBP, *Swanton Sector Vermont*, <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/swanton-sector-vermont>

reported in the *Boston Globe*, Commissioner Quinn also appeared on *Fox News* on March 27, 2023 and told viewers that New Hampshire had seen a “slight increase” in illegal crossings. Exhibit G.

7. Commissioner Quinn’s statements are related to New Hampshire Governor Christopher Sununu’s earlier March 13, 2023 letter to Secretary of Homeland Security Alejandro Mayorkas, which also relied on Defendant CBP’s statements to advocate for policy changes, noting “the recent rise in [CBP] agents encountering and apprehending individuals illegally crossing the international border in this [Swanton] Sector.” Exhibit H. Citing these statistics from Defendant CBP, the Governor asked the Department of Homeland Security to “immediately lift the moratorium” that would allow federal officials to “enter into a customized agreement with the State of New Hampshire in order to train its [state] law enforcement officers and to allow them to serve as a force multiplier in New Hampshire’s North Country.” He added that “[i]t is imperative that we act quickly to respond to today’s crisis with enhanced border security and prevent and further loss of life along our border.” He then noted that “New Hampshire will not be waiting idly by,” as he has “put forward \$1.4 million toward the creation of a Northern Border Alliance Program” that, if enacted, “will establish a task force of state, county, and local law enforcement officers to patrol the roads, highways, and state forest land along the the border to detect and deter illegal activity and to prevent any further escalation of the humanitarian crisis facing our borders.” Exhibit H.

8. As the Governor’s comments demonstrate, New Hampshire state officials have used CBP’s public statements to advocate for a \$1,435,384 budgetary allocation for the fiscal year ending June 30, 2023 that would create and fund a Northern Border Alliance Program. Under this Program that was first proposed in late February 2023 at the legislature in the budget, the New Hampshire Department of Safety would “make grants available to other state, county, and local

law enforcement agencies, and also provide funding for the division of state police to reduce the instance of crimes and illicit activity in close proximity to the Canadian border.” Exhibit I.

9. After Commissioner Quinn’s March 2023 public statements, the *Boston Globe* inquired about the data supporting Commissioner’s statement that there has been a “slight increase” in illegal crossings at the New Hampshire/Canada border. Exhibit G. The spokesperson for the Department of Safety indicated to the *Boston Globe* that a CBP supervisor provided this information—presumably orally³—to the New Hampshire Information and Analysis Center, indicating that there has been a “slight increase” in the number of illegal crossings into the United States from Canada along New Hampshire’s border. This was the sole basis of Commissioner Quinn’s “slight increase” statement. Exhibit F.

10. Further, according to *WMUR*, no crossing was “recorded in New Hampshire” between October 2022 and January 2023. Exhibit J. The *WMUR* article also indicated that “[t]here were 94 people from 11 different countries taken into custody across Vermont and New York.” *Id.* Presumably, CBP provided this data, which was state specific, to *WMUR*. See also Amanda Gokee, “N.H. ACLU Files Lawsuit Seeking Border Crossing Data,” *Boston Globe* (May 22, 2023) (“*WMUR* reported in March that there were no encounters or apprehensions in New Hampshire between October and January. Ryan Brissette, a Customs and Border Protection spokesperson, told the Globe in March [2023] the agency had recorded zero or minimal encounters in the state of New Hampshire in that time frame, but said he needed to verify this was not due to an error in the reporting system. Brissette said in April he had not been able to verify that information and did not respond to a request for comment for this story.”) (emphasis added),

³ The ACLU-NH asked the Department of Safety for documentation supporting this “slight increase” comment. The Department stated on April 10, 2023 that “Commissioner Quinn’s ‘slight increase’ comment was not based on any written/electronic document and was the product of only verbal communication from CBP.”

<https://www.bostonglobe.com/2023/05/22/metro/nh-aclu-files-lawsuit-seeking-border-crossing-data/>.

11. Is there actually a “humanitarian crisis” at the New Hampshire/Canada border as the Governor suggested in his March 13, 2023 letter in an effort to advocate for policy proposals that would spend state taxpayer dollars? In an effort to answer this question, the ACLU-NH submitted a right-to-know request under RSA ch. 91-A to the New Hampshire Department of Safety and under the New Hampshire Constitution to the New Hampshire Governor’s Office on March 16, 2023 seeking the exact number of border crossings between Canada and New Hampshire from October 2022 to January 2023. Exhibit K; Exhibit L.

12. On March 23, 2023, the New Hampshire Governor’s Office indicated that the office was “not in possession of any governmental records that would be responsive to [the ACLU-NH’s] request.” Exhibit M.

13. On March 22, 2023, the New Hampshire Department of Safety responded that “the State Police was unable to locate any records responsive to [ACLU-NH’s] requests pertaining to CBP apprehensions in the Swanton Sector during the months of October through December 2022.” Exhibit N.

14. On April 10, 2023, the New Hampshire Department of Safety further shared to the *Boston Globe* that “Commission Quinn’s statement [concerning the ‘slight increase’ in the New Hampshire border crossing] was based solely upon information from a supervisor of the United States Border Patrol in the Swanton Sector, provided to the New Hampshire Information and Analysis Center” Exhibit O (emphasis added). The Department suggested that the *Globe* would “have to contact U.S. Border Patrol through their CBP spokesperson for an explanation, and to clarify any of [ACLU-NH’s] questions on statistics” Exhibit O.

15. The Northern Border Alliance Program was ultimately enacted by the legislature as part of the recent budget and signed into law by the Governor on June 20, 2023. The provisions enacting the Program went into effect on June 30, 2023. *See Exhibit R* (final budget language that went into effect on June 30, 2023).

16. Defendant CBP has disclosed total “encounter” figures for each state, month, and year on its website, with Defendant publishing that there was only one New Hampshire “encounter” during the four-month window sought, with the area of responsibility being the Boston Field Office. This New Hampshire “encounter” occurred in October 2022. *See Exhibit P*.

17. Defendant CBP also has released apprehension locations and arrestees’ nationalities through public announcements. Chief Patrol Agent Robert Garcia, who is in charge of Defendant’s Swanton Sector, has disclosed this information publicly through his Twitter account. These publicly known locations include Champlain (NY), Westville (NY), Ft. Covington (NY), Mooers (NY), Newport (VT), North Troy (VT), and Franklin (VT). *See Exhibit Q*.

18. In New Hampshire specifically, the United States Attorney’s Office for the District of New Hampshire and Defendant CBP recently disclosed the location of Pittsburg (NH), where Defendant arrested individuals.⁴ When this prosecution was announced in July 2023, the U.S. Attorney for the District of New Hampshire disclosed that this “was the first arrest on smuggling-related charges in at least the last 14 months” in New Hampshire.⁵

III. CBP’s Response to the Request

⁴ U.S. DOJ, *New York Man Indicted for Human Smuggling* (July 7, 2023), <https://www.justice.gov/usao-nh/pr/new-york-man-indicted-human-smuggling>; Todd Bookman, “Man arrested for allegedly helping to smuggle nine people across Canadian border in Pittsburg, NH,” *NHPR* (July 7, 2023), nhpr.org/nh-news/2023-07-07/man-arrested-for-allegedly-helping-to-smuggle-nine-people-across-us-canadian-border-in-pittsburg-nh.

⁵ Todd Bookman, “Man arrested for allegedly helping to smuggle nine people across Canadian border in Pittsburg, NH,” *NHPR* (July 7, 2023), nhpr.org/nh-news/2023-07-07/man-arrested-for-allegedly-helping-to-smuggle-nine-people-across-us-canadian-border-in-pittsburg-nh.

19. On April 18, 2023, Defendant CBP categorically denied the Request. Exhibit B.

20. CBP explained that “CBP does not release enforcement statistics and/or enforcement data at less than a Sector of Field Office level.” *Id.*

21. However, CBP failed to cite any statutory exemption for this position. *Id.*

22. CBP also noted that CBP “may have applied FOIR Exemption 6 to protect PII [personally-identifiable information] of DHS employees, including names and contact information.” *Id.*

23. On April 18, 2023, Plaintiff ACLU-NH administratively appealed CBP’s categorical denial. Exhibit C.

24. Plaintiff ACLU-NH raised two arguments. First, ACLU-NH asserted that CBP failed to carry the burden of establishing the applicability of proper exemptions. Second, ACLU-NH argued that CBP failed to release any data that was not covered by Exemption 6. The ACLU-NH made clear that it was not seeking personally-identifiable information.

25. Defendant CBP affirmed its initial determination in its June 2, 2023 final determination. Exhibit B.

26. Defendant CBP categorically withheld the responsive record in full under Exemptions 6, 7(C), 7(E), and 7(F). Exhibit B.

27. First, CBP withheld the requested information under Exemptions 6 and 7(C) to protect the privacy of apprehended individuals. Exhibit B at 8-10.

28. Second, CBP withheld the requested information to protect law enforcement techniques and procedures under Exemption 7(E) and to protect the safety of CBP personnel and other individuals under Exemption 7(F). From CBP’s perspective, disclosure of the requested information “would allow someone to construct a mosaic of CBP law enforcement techniques,

procedure, and guidelines practiced in the State of New Hampshire and endanger CBP personnel and other individuals, including innocent bystanders” Exhibit B at 3. CBP’s main concern was that “individuals could compare the number and extent of law enforcement activities at one station and compare it to surrounding stations to learn which areas of the border the agency deploys its resources and targets its focus. *Id.* at 5. As a result, CBP believed that “non-citizens without legal status ... might avoid certain areas along the border or target other areas along the border to circumvent adherence to immigration law requirements.” *Id.* CBP further noted that “the location of each apprehension would disclose techniques and procedures for law enforcement investigations or prosecutions.” *Id.*

STANDARD FOR CROSS-MOTIONS FOR SUMMARY JUDGEMENT

As recently explained in *SEC v. LBRY, Inc.*, 21-cv-260-PB, 2022 U.S. Dist. LEXIS 202738, ___ F. Supp. 3d ___ (D.N.H. Nov. 7, 2022), summary judgment is warranted “only if the record, construed in the light most amiable to the non-movant, presents no genuine issue as to any material fact and reflects the movant’s entitlement to judgment as a matter of law.” *Perea v. Editorial Cultural, Inc.*, 13 F.4th 43, 50 (1st Cir. 2021) (quoting *Irobe v. USDA*, 890 F.3d 371, 377 (1st Cir. 2018)) (cleaned up). This Court need not consider factual disputes immaterial to the legal issues under review in ruling on a motion for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (“[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment[.]”). When parties cross-move for summary judgment, this Court “view[s] each motion separately, drawing all inferences in favor of the nonmoving party.” *See Giguere v. Port Res. Inc.*, 927 F.3d 43, 47 (1st Cir. 2019) (quoting *Fadili v. Deutsche Bank Nat’l Tr. Co.*, 772 F.3d 951, 953 (1st Cir. 2014)); *see also Mandel v. Boston Phoenix, Inc.*, 456 F.3d 198, 205 (1st Cir. 2006) (“The presence of

cross-motions for summary judgment neither dilutes nor distorts this standard of review.”). Thus, this Court must “determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed.” *See Adria Int’l Grp., Inc. v. Ferré Dev., Inc.*, 241 F.3d 103, 107 (1st Cir. 2001). Here, there are no material facts in dispute.

ARGUMENT

I. DEFENDANT CBP FAILED TO CARRY ITS BURDEN TO JUSTIFY WITHHOLDING OF THE REQUESTED INFORMATION UNDER EXEMPTIONS 6 AND 7(C)

Exemption 6 covers “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). Exemption 7(C) similarly covers records or information compiled for law enforcement purposes to the extent disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). Defendant has failed to carry its burden to justify the withholding of the requested information under Exemption 6⁶ and Exemption 7(C) because the requested information does not include any information that would implicate the privacy of Defendant’s personnel.

To be sure, in the case of records related to investigations by law enforcement agencies, courts have long recognized, either expressly or implicitly, that “the mention of an individual’s

⁶ The Court of Appeals for the District of Columbia Circuit has declared that “under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act.” *See Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1227 (D.C. Cir. 2008). Exemption 6 also requires an analysis of the public’s interest in disclosure, which is high in this case. *See Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976); *Berger v. IRS*, 288 F. App’x 829, 832 (3d Cir. 2008) (“To determine whether the exemption applies, courts balance the public interest in disclosure against the privacy interest protected by the exemption.”); *see* Am. Compl., Docket Number (DN) 6 at p. 3 (“The production of this information is in the public interest. This FOIA request seeks information in possession of CBP that is similar to the information the ACLU-NH previously requested from state officials (but that these state officials did not have). This information will help the public continue to evaluate the propriety of this proposed over \$1.4 million appropriation for a ‘Northern Border Alliance Program.’ And CBP is the only entity that possesses accurate data concerning the nature of apprehensions at the border.”).

name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.” *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) (quoting *Branch v. FBI*, 658 F. Supp. 204, 209 (D.D.C. 1987)). But, as Plaintiff has repeatedly made clear, Plaintiff’s Request does not implicate or reference a single individual’s name. *See* Am. Compl., DN 6 at p. 8-9 ¶ 23, p. 11 ¶ 29, p. 15 ¶ 33. Accordingly, Defendant’s statement that “Plaintiff’s request seeks law enforcement records that include personal information such as names, addresses, dates of birth, places of birth, personal identification numbers ..., employment history, [and] medical history,” *see* Pansiri Decl. ¶ 22, is incorrect, as such information is not responsive to Plaintiff’s request. And even if the records Defendant deemed responsive did contain this identifying information, this information could be redacted because this information falls outside the scope of Plaintiff’s Request.

While Defendant elsewhere concedes that Plaintiff “is not seeking the release of this personal identifying information,” *see* Govt’s Br. at 7, Defendant still asks the Court to “hold that CBP properly applied Exemption (b)(6) in withholding personal information from the requested records.” *Id.* But such a ruling would be a *de facto* advisory opinion since Plaintiff has not even asked for such information to be produced. This Court need not reach this question. To the contrary, this Court should conclude that these exemptions are inapplicable to Plaintiff’s Request.

II. DEFENDANT CBP FAILED TO CARRY ITS BURDEN TO JUSTIFY WITHHOLDING OF THE REQUESTED INFORMATION UNDER EXEMPTIONS 7(E) AND 7(F)

Defendant “relied on FOIA Exemptions (b)(7)(E) and (b)(7)(F) in withholding the responsive records in full.” Govt’s Br. at 8-11. However, based on Defendant’s sparse three pages of analysis and only a few sentences of declarant testimony, Defendant CBP has failed to carry its burden to justify the withholding of the requested information under Exemptions 7(E) and 7(F).

A. Exemption 7(E) is Inapplicable to the Requested Information.

Exemption 7(E) exempts disclosure agency records or 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 the law.” 5 U.S.C. § 552(b)(7)(E). To withhold records containing information about “techniques and procedures” under Exemption 7(E), the agency must show “(i) that the withheld records or information would disclose techniques and procedures for law enforcement investigations and (ii) that their disclosure would reasonably risk circumvention of the law.” *Sack v. U.S. Dep’t of Def.*, 823 F.3d 687, 694 (D.C. Cir. 2016) (citing *Blackwell v. FBI*, 646 F.3d 37, 41-42 (D.C. Cir. 2011)); *Villar v. FBI*, 15-cv-270-LM, 2018 DNH 141, 2018 U.S. Dist. LEXIS 122246, at *33-34 (D. N.H. July 23, 2018) (McCafferty, J.) (quoting same standard).⁷

⁷ Courts are divided on whether a showing of a “risk [of] circumvention of the law” is required for an agency to withhold law enforcement “techniques or procedures,” or whether they can be categorically withheld. As in *Sack*, *Blackwell*, and other courts (either implicitly or explicitly), this Court should hold that the language concerning “risk [of] circumvention of the law” is applicable to the first clause—as well as the second clause of Exemption 7(E)—thereby requiring a showing that disclosure of a law enforcement technique or procedure could risk circumvention of the law. See also, e.g., *Catledge v. Mueller*, 323 F. App’x 464, 466-67 (7th Cir. 2009) (requiring showing of risk of circumvention for techniques and procedures); *Davin v. DOJ*, 60 F.3d 1043, 1064 (3d Cir. 1995) (declaring that “Exemption 7(E) applies to law enforcement records which, if disclosed, would risk circumvention of the law”), modified on other grounds *Abdelfattah v. DHS*, 488 F.3d 178, 185 (3d Cir. 2011); *PHE, Inc. v. DOJ*, 983 F.2d 248, 250 (D.C. Cir. 1993) (stating that under Exemption 7(E), agency “must establish that releasing the withheld materials would risk circumvention of the law”); *Elec. Frontier Found. v. DOD*, No. 09-05640, 2012 U.S. Dist. LEXIS 137010, at *7-8 (N.D. Cal. Sept. 24, 2012) (requiring that agency satisfy “risk of circumvention” standard without distinguishing between first and second prongs of Exemption 7(E)); *Muslim Advocates v. DOJ*, 833 F. Supp. 2d 106, 109 (D.D.C. 2012) (citing prior case in which court required circumvention showing under first clause of Exemption 7(E), and finding that agency made adequate showing of circumvention harm for certain techniques and procedures); *Riser v. U.S. Dep’t of State*, No. 09-3273, 2010 U.S. Dist. LEXIS 112743, at *15-18 (S.D. Tex. Oct. 22, 2010) (holding that “risk of circumvention” analysis must be applied to withholdings of law enforcement techniques and procedures; also noting that “OPM cannot carry its burden simply by stating, for example, that the record describes ‘the guidance for handling protected sources,’ as if the risk of circumvention of the law were self-evident.”); *Council on Am.-Islamic Relations, Cal. v. FBI*, 749 F. Supp. 2d 1104, 1123 (S.D. Cal. 2010) (stating that agency can withhold techniques or guidelines whose release could risk circumvention of law); *Unidad Latina En Accion v. DHS*, 253 F.R.D. 44, 49 (D. Conn. 2008) (stating that for Exemption 7(E) to apply, court must find disclosure “could reasonably be expected to risk circumvention of the law”).

As Chief Judge McCafferty has noted, the First Circuit has not addressed whether the circumvention of law

Exemption 7(E) is inapplicable to the requested information, which consists of the following: (1) the number of apprehensions in New Hampshire (including in the three New Hampshire counties of the Swanton sector); (2) the names of municipalities where the apprehensions occurred; and (3) the nationalities of arrestees.

1. The Requested Information Does Not Implicate “Techniques and Procedures for Law Enforcement Investigations or Prosecutions” or “Guidelines for Law Enforcement Investigations or Prosecutions.”

This requested information is not a “technique [or] procedure for law enforcement investigations or prosecutions” covered by Exemption 7(E), and Defendant fails to meaningfully argue this point. *See* Govt’s Br. at 9. The phrase “techniques and procedures” has been defined as “how law enforcement officials go about investigating a crime.” *ACLU Found. of Massachusetts v. Fed. Bureau of Investigation*, No. 14-cv-11759, 2016 U.S. Dist. LEXIS 110022, at *11 (D. Mass. Aug. 17, 2016) (citations omitted) (quoting *Allard K. Lowenstein Int’l Human Rights Project v. Dep’t of Homeland Sec.*, 626 F.3d 678, 682 (2d Cir. 2010)). As another court has observed, “[t]he terms ‘techniques’ and ‘procedures’ refer to specific methods of law enforcement, not policy and budgetary choices about the assignment of personnel.” *Families for Freedom v. U.S. Customs & Border Prot.*, 837 F. Supp. 2d 287, 299 (S.D.N.Y. 2011) (finding that “[t]echniques and procedures include how, where, and when agents board Buffalo-region trains and buses, talk to passengers, and make arrests,” but that “[t]he words do not refer to the staffing decisions defendants made years ago”); *see also Irons v. F.B.I.*, 880 F.2d 1446, 1451 (1st Cir. 1989)

requirement “applies only to guidelines for law enforcement investigations or prosecutions, and not to techniques and procedures.” *Villar*, 2018 U.S. Dist. LEXIS 122246, at *34 n.8 (acknowledging *Am. Civil Liberties Union of N. California v. United States Dep’t of Justice*, 880 F.3d 473, 491 (9th Cir. 2018) and *Allard K. Lowenstein Int’l Human Rights Project v. Dep’t of Homeland Sec.*, 626 F.3d 678, 681-82 (2d Cir. 2010), which concluded that the circumvention of law requirement “applies only to guidelines for law enforcement investigations or prosecutions, not to techniques and procedures,” but not considering the question in *Villar* “[b]ecause the FBI has demonstrated that the release of the techniques and procedures at issue here would indeed risk the circumvention of law”).

(noting that Exemption 7(E) protects “disclosure indicat[ing] how the agency investigated the case”).

Here, disclosing the location of apprehension would not reveal how CBP officials investigate border crossings. *See Families for Freedom v. United States Customs & Border Prot.*, 797 F. Supp. 2d 375, 391 (S.D.N.Y. 2011) (“I find that defendants must release the portions of the six Buffalo Sector Daily Reports that indicate the total number of all arrests made by the Rochester Station for each year, and the total number of transportation raid arrests within the Buffalo Sector. Such statistics are neither ‘techniques or procedures’ nor ‘guidelines,’ such that they could be properly exempt under 7(E).”) (emphasis added); *see also ACLU Found. of Mass.*, 2016 U.S. Dist. LEXIS 110022, at *17-18 (“Arrest statistics, however, are a compilation of historic, generally public, information. As a result, they do not disclose any unknown information about how crimes are investigated.”). Defendant CBP cites no relevant case to support its theory that the number of apprehensions in a location is a “technique” or “procedure.” *See* Govt’s Br. at 9-10; *see also Families for Freedom*, 837 F. Supp. 2d at 299 (“Defendants have pointed to no instances in which a court has held that law enforcement statistics are covered by Exemption 7(E).”).

Similarly, the requested information does not constitute “guidelines for law enforcement investigations or prosecutions,” and Defendant similarly fails to meaningfully argue as much. *See* Govt’s Br. at 9. The Second Circuit Court of Appeals has distinguished between “guidelines” in the second clause of Exemption 7(E) and “techniques and procedures” in the first clause, noting that “guidelines” refer to the means by which agencies allocate resources for law enforcement investigations (namely, whether to investigate), while “techniques and procedures” refer to the means by which agencies conduct investigations (namely, how to investigate). *See Allard K. Lowenstein Int’l Human Rights Project*, 626 F.3d at 682 (noting as example that if tax investigators

are told only to bring charges against those who evade more than a certain enumerated dollar amount in taxes, such guidance constitutes guidelines, while if investigators are given instructions on the manner in which to investigate those suspected of tax evasion, such details constitute techniques and procedures). Here, nothing in the requested information implicates the means by which Defendant CBP allocates resources. Indeed, Plaintiff is not seeking, for example, policy or budgetary decisions about Defendant's staffing patterns or statistics that would, in any way, reveal the means of how it decides to use its agents. *See Families for Freedom*, 837 F. Supp. 2d at 299 (“Although current or prospective staffing statistics could arguably fall under the definition of ‘guidelines,’ plaintiffs seek historical statistics.”).

2. Disclosure of the Requested Information Could Not Reasonably Be Expected to Risk Circumvention of the Law.

Even if “techniques and procedures for law enforcement investigations or prosecutions” or “guidelines for law enforcement investigations or prosecutions” are implicated in Plaintiff’s request—and they are not—Defendant CBP has not shown that disclosure “could reasonably be expected to risk circumvention of the law.” *See Blackwell*, 646 F.3d at 42 (reciting standard); *see also Villar v. FBI*, 15-cv-270-LM, 2018 DNH 141, 2018 U.S. Dist. LEXIS 122246, at *34 (D. N.H. July 23, 2018) (McCafferty, J.) (same). Here—if a mere four months of disaggregated apprehension figures are released—Defendant CBP claims that someone would somehow be able “to construct a mosaic of CBP law enforcement techniques, procedures, and guidelines practices in the state of New Hampshire.” *See Pansiri Decl.* ¶ 16; *see also Govt’s Br.* at 9-10. This argument fails for multiple reasons.

First, the locations of apprehensions are both general and so well known to the public that disclosure would not reveal anything that could reasonably be expected to risk circumvention of the law. *See Founding Church of Scientology of Wash., D.C. v. NSA*, 610 F.2d 824, 832 n.67 (D.C.

Cir. 1979) (internal quotation marks omitted) ((b)(7)(E) “should not be interpreted to include routine techniques and procedures already well known to the public”); *Rugiero v. U.S. Dep’t of Just.*, 257 F.3d 534, 551 (6th Cir. 2001) (noting that Exemption 7(E) “only protects techniques and procedures not already well-known to the public”); *ACLU v. United States Citizenship & Immigration Servs.*, No. 2:20-cv-00422-JAW, 2022 U.S. Dist. LEXIS 115556, at *3 (D. Me. June 30, 2022) (“To the extent the documents touch on a strategy for questioning, the information is of a high level of generality and is evident from other disclosed documents such that disclosure would not reveal a new technique, procedure, or guideline and would present no plausible risk of circumvention of the law.”). To be clear, Plaintiff is not seeking the station in which in any apprehension occurred, just whether the apprehension occurred in New Hampshire and the municipality and nationality with respect to the apprehension. Indeed, it is well-known to the public that apprehensions may happen in New Hampshire, as (i) New Hampshire’s three counties bordering Canada house the Swanton sector and (ii) the Swanton sector is responsible for apprehensions at the New Hampshire/Canada border. Defendant’s website indicates that it is responsible for “Coos, Grafton and Carroll counties of New Hampshire.”⁸

Defendant’s website also allows the public to ascertain the total number of “encounters” of the Swanton Sector *for each state* within its area of responsibility, which are further broken down by each month and year.⁹ This data published by Defendant reveals that there was only one New Hampshire “encounter” during the four-month window sought, with the area of responsibility being the Boston Field Office. This “encounter” occurred in October 2022. See Exhibit P.

⁸ CBP, *Swanton Sector Vermont*, available at <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/swanton-sector-vermont> (last visited on August 4, 2023).

⁹ CBP, *Nationwide Encounters*, available at <https://www.cbp.gov/newsroom/stats/nationwide-encounters> (last visited on August 8, 2023).

According to Defendant’s public statistics, Defendant’s Swanton Sector apprehended 88 noncitizens for October 2022, 137 for November 2022, 121 for December 2022, and 101 noncitizens for January 2023 in Vermont. *See id.* Given these disclosures, it makes little sense why Defendant CBP cannot disclose Plaintiff’s requested information for New Hampshire.

It is also well-known to the public that CBP routinely releases the apprehension locations, the number of arrestees for each apprehension, and the nationalities of each arrestee within its area of responsibility.¹⁰ These publicly-known locations include Champlain (NY), Westville (NY), Ft. Covington (NY), Mooers (NY), Newport (VT), North Troy (VT), and Franklin (VT). *See Exhibit Q.* And just recently, the United States Attorney’s Office for the District of New Hampshire and Defendant CBP recently disclosed the location of Pittsburg, New Hampshire in Coos County, where Defendant arrested individuals, through a press release.¹¹ There are multiple other examples

¹⁰ CBP, *Buffalo and Swanton Sector Border Patrol Prevents a Human Smuggling Attempt* (Nov. 15, 2022) (explaining that CBP agents stopped a vehicle and arrested alleged human trafficking smugglers “on State Route 11 near Philadelphia, NY”), available at <https://www.cbp.gov/newsroom/local-media-release/buffalo-and-swanton-sector-border-patrol-prevents-human-smuggling>; CBP, *Busy Weekend for Swanton Border Patrol Agents, Apprehended 20 Individuals in 4 Incidents* (Apr. 2, 2018) (identifying “nine individuals” apprehended by the Champlain Border Patrol Station, “eight individuals” apprehended by the Newport Border Patrol Station, one individual apprehended by the Richford Border Patrol Station, and two individuals apprehended by the Beecher Falls Border Patrol Station), available at <https://www.cbp.gov/newsroom/local-media-release/busy-weekend-swanton-border-patrol-agents-apprehended-20-individuals-4>; CBP, *Swanton Sector Border Patrol Agents Arrest 25 Aliens, Seize Drugs, Paraphernalia during Checkpoint Operation* (Aug. 28, 2017) (“Lincoln, N.H. – U.S. Border Patrol agents based out of the Beecher Falls Border Patrol Station, had a busy weekend August 25 – 27, including arresting 25 illegal aliens and seizing various narcotics and drug paraphernalia. The sector established the checkpoint with the support of the Woodstock Police Department, on Interstate 93 in New Hampshire During the 3-day operation, Swanton Sector agents encountered and arrested 25 people who did not possess valid immigration status, 14 of whom were visa overstays from Colombia. Agents also arrested other illegal aliens from Colombia, Brazil, Ecuador and Mexico.”), available at <https://www.cbp.gov/newsroom/local-media-release/swanton-sector-border-patrol-agents-arrest-25-aliens-seize-drugs>; CBP, *Swanton Sector Border Patrol Agents Arrest 8, Seize Drugs, Paraphernalia during Checkpoint Operation* (Oct. 2, 2017) (“Woodstock, N.H. -- U.S. Border Patrol agents based out of the Beecher Falls Border Patrol Station, had a busy couple of days from September 26 –28, including arresting eight illegal aliens and seizing various narcotics and drug paraphernalia. The sector established the checkpoint on Interstate 93 in New Hampshire During the 3-day operation, Swanton Sector agents encountered and arrested eight people who did not possess valid immigration status, two of whom were visa overstays. Agents arrested illegal aliens from Bulgaria, Ecuador, El Salvador and Guatemala.”), available at <https://www.cbp.gov/newsroom/local-media-release/swanton-sector-border-patrol-agents-arrest-8-seize-drugs-paraphernalia>.

¹¹ U.S. D.O.J., *New York Man Indicted for Human Smuggling* (July 7, 2023), <https://www.justice.gov/usao-nh/pr/new-york-man-indicted-human-smuggling>; Todd Bookman, “Man arrested for allegedly helping to smuggle nine people

where the Swanton Sector has published, for their own communications purposes, the location where they apprehend individuals and the arrestees' nationalities through social media.¹² And CBP has placed this information directly in the public debate by not only issuing self-serving press releases that the public is entitled to vet, but also because CBP has already (i) disclosed to the New Hampshire Department of Safety that there has been a "slight increase" in the number of illegal crossings into the United States from the Canada/New Hampshire border (*see Exhibits F, G*), and (ii) disclosed to *WMUR* that no crossing was "recorded in New Hampshire" between October 2022 and January 2023 (*see Exhibit J*). Where this information has been released by Defendant CBP in various forms, it can hardly be said that it is "critical" to keep this information secret. *See Pansiri Decl.* ¶ 17.

Second and relatedly, Defendant's declaration arguing that disclosure of this basic data could reasonably be expected to risk circumvention of the law is speculative and conclusory.

across Canadian border in Pittsburg, NH," *NHPR* (July 7, 2023), nhpr.org/nh-news/2023-07-07/man-arrested-for-allegedly-helping-to-smuggle-nine-people-across-us-canadian-border-in-pittsburg-nh.

¹² Swanton Sector Chief Patrol Agent Robert Garcia, *Twitter* (June 6, 2023) ("15 subjects apprehended in Champlain, NY" who were among "illegal border crossers from 15 different countries"), *available at* <https://twitter.com/USBPChiefSWB/status/1666026464679018498?s=20>; *id.* (Apr. 25, 2023) ("the two [of undocumented noncitizens] were lost in the woods near Ft. Covington, NY, after illegally crossing into the U.S. around 2 a.m."), *available at* <https://twitter.com/USBPChiefSWB/status/1650829763651485698?s=20>; *id.* (Mar. 28, 2023) ("After picking up 4 Guatemalan citizens who illegally entered the U.S., a NJ man was arrested by #BorderPatrol Agents near East Berkshire, VT."), *available at* <https://twitter.com/USBPChiefSWB/status/1640657566916128768?s=20>; *id.* (Mar. 20, 2023) ("Following his illegal entry into the U.S. near Mooers Forks, NY, this citizen of Bulgaria decided to make another unlawful entry into a privately owned cabin."), *available at* <https://twitter.com/USBPChiefSWB/status/1637828511246188548?s=20>; *id.* (Mar. 10, 2023) ("On Tuesday morning, [K-9] assisted in locating 7 citizens of Mexico who illegally entered the U.S. from Canada near Mooers, New York."), *available at* <https://twitter.com/USBPChiefSWB/status/1634148124829556736?s=20>; US Border Patrol Swanton Sector, *Facebook* (June 6, 2023) ("Friday-Sunday, Swanton Sector US Border Patrol Agents were busy securing our 295-mile stretch of border with Canada, tallying 111 arrests of illegal border crossers from 15 different countries, including: Colombia, Congo, Dominican Republic, England, Guatemala, India, Mexico, North Korea, Romania, Senegal, South Korea, Tajikistan, Turkey, Uzbekistan, Venezuela[.] PHOTOS: 15 subjects apprehended in Champlain, NY."), *available at* [https://www.facebook.com/USBPSwantonSector/posts/pfbid02S64TTJYV55Ewn3VX5uxZ9fiNYEcfuU1hkHcSP7mL2COYZ11juyFMhQPXfGJSLgZDI?_cft__\[0\]=AZXGjc_hx0HEOnzPt6US5gO9OcqH94fA5VzWimfRHuvGVYzBFOxWA87dWi5HLLAEnmuT1341iWbJW6icwLKAjVw5vlnnaKDRKisfJ52j685xxia2VJsduV1k725zwwQAwPzWciSyR1icWN9hKB5ad9PG6hO5TQVh5J9_Crar0hfGpt7XXsHhvP37emoFkNnxIdziAAQojXuvOTyboro5qOb&_tn_=-UK-R\]-R](https://www.facebook.com/USBPSwantonSector/posts/pfbid02S64TTJYV55Ewn3VX5uxZ9fiNYEcfuU1hkHcSP7mL2COYZ11juyFMhQPXfGJSLgZDI?_cft__[0]=AZXGjc_hx0HEOnzPt6US5gO9OcqH94fA5VzWimfRHuvGVYzBFOxWA87dWi5HLLAEnmuT1341iWbJW6icwLKAjVw5vlnnaKDRKisfJ52j685xxia2VJsduV1k725zwwQAwPzWciSyR1icWN9hKB5ad9PG6hO5TQVh5J9_Crar0hfGpt7XXsHhvP37emoFkNnxIdziAAQojXuvOTyboro5qOb&_tn_=-UK-R]-R).

Defendant claims that, under a “statistical mosaic” theory, that disclosure would “effectively create a map for violators of the law to conduct their illegal activity thereby leaving our nation’s borders more vulnerable,” and that disclosure would allow “non-citizens without legal status to enter, or remain, in the United States” by enabling them to “avoid certain areas along the border or target other areas along the border to circumvent adherence to immigration law requirements.” *See* Pansiri Decl. ¶ 16. But, beyond these generic assertions, there is no explanation in Defendant’s declaration on how exactly this would be the case, especially where Defendant has released statewide apprehension information elsewhere (including potentially the New Hampshire press), as well as the municipality and nationality of apprehensions to promote its own activities. This is precisely the type of speculative assertion that other courts have rejected. *See, e.g., ACLU v. DHS*, 243 F. Supp. 3d 393, 403 (S.D.N.Y. 2017) (finding that agency did not meet its burden to provide more than “generic assertions” and “boilerplate” justifications) (quoting *ACLU v. Office of the Dir. of Nat’l Intelligence*, No. 10-4419, 2011 WL 5563520, at *11 (S.D.N.Y. Nov, 15 2011)); *Strunk v. U.S. Dep’t of State*, 845 F. Supp. 2d 38, 47 (D.D.C. 2012) (holding that even under “low standard” for withholding under Exemption 7(E) established by D.C. Circuit, agency’s declaration offered “too little detail” to demonstrate withholdability of records at issue); *Raher v. Fed. Bureau of Prisons*, No. CV-09-526-ST, 2011 U.S. Dist. LEXIS 56211, at *25 (D. Or. May 24, 2011) (granting summary judgment to requester because agency’s declarant failed to explain why responsive records met standard for withholding under Exemption 7(E)); *Clemente v. FBI*, 741 F. Supp. 2d 64, 88 (D.D.C. 2010) (noting that declarant cannot merely rely upon “vaguely worded categorical description” of withheld law enforcement techniques, but “must provide evidence . . . of the nature of the techniques in question”); *Allard K. Lowenstein Int’l Human Rights Project v. DHS*, 603 F. Supp. 2d 354, 360 (D. Conn. 2009) (criticizing portions of agency’s declaration

describing “ongoing law enforcement techniques” as “vague” and “of little, or no, use”; agency “must understand that affidavits and indices must be ‘relatively detailed’ and nonconclusory to serve their intended purpose”) (citation omitted), *aff’d on other grounds*, 626 F.3d 678 (2d Cir. 2010); *Feshbach v. SEC*, 5 F. Supp. 2d 774, 786-87 & n.11 (N.D. Cal. 1997) (finding agency’s reasons for withholding computer printouts from internal database to be conclusory and insufficient). If Defendant CBP was truly concerned about how the requested information could risk circumvention of law, Defendant would not have released the apprehension number for each state and month/year, apprehension location, the number of arrestees in each apprehension, and the arrestees’ nationalities. Defendant cannot have both ways where it elects to not disclose the requested information to Plaintiff while it routinely releases the same information publicly for its own public-relations purposes.

This case is a far cry from *Shapiro v. United States DOJ*, 239 F. Supp. 3d 100 (D.D.C. 2017)—the only case substantively discussed by Defendant. There, a request was made for “search slips” reflecting FBI investigations that would, if disclosed, give the public “knowledge of the existence or non-existence of an investigation” and, thus, would likely reflect important information about the “scope of the FBI’s [domestic terrorism] program in the United States, the scope and focus of its investigative efforts, and strategies it plans to pursue in preventing and disrupting domestic terrorist activity.” *Id.* at 114. Unlike *Shapiro*, the Request here does not seek any information about investigations that would, in any way, shed light on any covert government activities—especially insofar as Plaintiff’s request seeks aggregated statewide apprehension data. Again, the Request does not seek how the apprehension was conducted, any tactics used, the names of the CBP agents involved, or the numbers of agents placed at any Swanton Sector station that could cause staffing levels to be extrapolated. Nor does the Request seek whether the apprehension

occurred at a port of entry, was the subject of a roving patrol, or was the subject of a border checkpoint. Nothing about the information sought even seeks the disclosure of a pending investigation, as apprehensions lead to removal proceedings in immigration court (and, in such proceedings, the location of apprehension is routinely disclosed as part of the administrative record). The Request does not even request “station-level statistics” that Defendant claims are protected, *see* Pansiri Decl. ¶ 16, instead seeking only the municipality of apprehension that Defendant routinely publishes when it sees fit. Evidencing how Defendant’s position of secrecy in this case is extreme, Defendant has gone so far in this case to withhold statewide, non-station-level data without indicating the municipality where the apprehension has occurred—statewide data it appears to have published elsewhere.

Accordingly, Exemption 7(E) is inapplicable.

B. Exemption 7(F) is Inapplicable to the Requested Information.

Exemption 7(F) protects “records or information compiled for law enforcement purposes [the disclosure of which] could reasonably be expected to endanger the life or physical safety of any individual.” 5 U.S.C. § 552(b)(7)(F). This exemption also is inapplicable.

This exemption is designed to protect the identities of law enforcement agents. *See Anand v. U.S. HHS*, Civil Action No. 21-1635 (CKK), 2023 U.S. Dist. LEXIS 51852, at *68 (D.D.C. Mar. 27, 2023) (“In general, this exemption has been interpreted to apply to names and identifying information of law enforcement officers, witnesses, confidential informants and other third persons who may be unknown to the requester.”); *Fiumara v. Higgins*, 572 F. Supp. 1093, 1107 (D.N.H. 1983) (focusing on the “identities of law enforcement personnel”). Just as Exemptions 6 and 7(C) do not apply because Plaintiff’s Request does not seek this information, the same is true for Exemption 7(F).

To the extent that Defendant relies on this exemption to categorically withhold Plaintiff's requested information, Defendant cites no caselaw to support this argument. *See* Govt's Br. at 9-11. In any event, "Defendant must make a more compelling showing that disclosure would endanger the safety of law enforcement personnel." *Fiumara*, 572 F. Supp. at 1107. This Court does "not assume that the safety of law enforcement personnel who are involved in such investigations is endangered *per se*." *Id.*

Here—beyond the conclusory assertion that "[d]isclosure of this information could result in the harm to the life and safety of Border patrol agents, CBP employees, and other individuals located within the Beecher Falls station and its area of responsibility," *see* Pansiri Decl. ¶ 17—Defendant explains nothing about how disclosing this information actually would endanger its personnel, especially where Plaintiff is not even seeking staffing levels, let alone the identities of Defendant's employees. *See also* Govt's Br. at 10-11. Defendant provides no analysis as to how and why such harm would occur, instead opting to simply restate the exemption's terms. *See Allen v. Fed. Bureau of Prisons*, No. 16-0708, 2019 U.S. Dist. LEXIS 20578 (D.D.C. Feb. 8, 2019) (rejecting agency's use of Exemption 7(F) when "[t]he declarant does not explain . . . how release of [this] information pertaining to plaintiff potentially endangers the life or physical safety of any individual"); *Kansas ex rel. Schmidt v. Dep. 't of Def.*, 320 F. Supp. 3d 1227, 1246 (D. Kan. Mar. 21, 2018) (denying agency summary judgment, in part, because supporting declaration failed to show how disclosure of information concerning law enforcement financial costs "would put anyone's life or physical safety in danger"). Indeed, Defendant fails to "identify at least one individual with reasonable specificity and establish that disclosure of the documents could reasonably be expected to endanger that individual." *See ACLU v. Dep' t of Def.*, 543 F.3d 59, 71 (2d Cir. 2008) (holding that Exemption 7(F) could not be used to bar disclosure of photographs

depicting treatment of prisoners because class of individuals who could reasonably be expected to be endangered by release of the photographs had not been clearly defined), *cert. granted, vacated & remanded on other grounds*, 130 S. Ct. 777 (2009).

Moreover, as explained above, Defendant routinely releases this information publicly. It makes little sense that Defendant releases this information voluntarily to the public while contending that disclosing the same information, in this case, would endanger its employees.

Accordingly, Exemption 7(F) is inapplicable.

CONCLUSION

For the reasons stated above, this Court should grant Plaintiff's Motion for Summary Judgment and deny Defendant's Motion.

Respectfully submitted,

By and through his attorneys affiliated with the
American Civil Liberties Union Foundation of
New Hampshire,

/s/ SangYeob Kim

Gilles R. Bissonnette (N.H. Bar. No. 265393)

SangYeob Kim (N.H. Bar No. 266657)

Henry R. Klementowicz (N.H. Bar No. 21177)

American Civil Liberties Union of New
Hampshire

18 Low Avenue

Concord, NH 03301

Tel.: 603.333.2081

gilles@aclu-nh.org

sangyeob@aclu-nh.org

henry@aclu-nh.org

Date: August 10, 2023