

**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 AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE
FOUNDATION'S CONSOLIDATED (I) REPLY IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT AND (II) SUR-REPLY IN OPPOSITION TO
DEFENDANT U.S. CUSTOMS AND BORDER PROTECTION'S MOTION FOR
SUMMARY JUDGMENT**

INTRODUCTION

This submission makes several points. *First*, CBP’s argument that the responsive records contain personally-identifying information triggering Exemptions 6 and 7(C) continues to be a red-herring. Plaintiff has made clear that it is not seeking such identifying information. This should end the matter. To the extent that personally-identifying information may exist in documents that are otherwise responsive, CBP can redact such identifying information, as federal agencies routinely do. The FOIA requires that “any reasonably segregable portion of a record” must be released “after deletion of the portions which are exempt” under the Act’s nine exemptions. *See* 5 U.S.C. § 552(b) (sentence immediately following exemptions). But CBP has not engaged in a segregability analysis. Nor has it made a claim that non-exempt information is so interspersed with exempt personally-identifiable material that separation by the agency of exempt material would constitute an inordinate burden. This is fatal. *See infra* Section I.

Second, CBP’s position that New Hampshire statewide apprehension data constitutes a technique, procedure, or guideline that would allow others to circumvent the law under Exemption 7(E) is unpersuasive. Plaintiff’s request does not seek any information revealing CBP’s vulnerabilities along the border, such as “where Agency resources are and are not deployed.” *See* DN 16-1 at 7. Plaintiff also has *not* requested the complete apprehension data for each station in the Swanton Sector that would meaningfully allow Plaintiff to compare apprehension data “across Stations” within the Sector. *See id.*

Further, CBP asserts that it cannot release New Hampshire apprehension data because the state “only has one USBP Station—the Beecher Falls Station” (which is headquartered in Canaan, Vermont) and, thus, “the current request for New Hampshire apprehension records is a request for records revealing Beecher Falls Station level enforcement data.” *See* DN 16-1 at 8. CBP adds

that it “does not release station level enforcement data.” *See* Pansiri Dec., p. 5. At the outset, Plaintiff has *not* sought Beecher Falls’ entire “station level enforcement data,” but rather *only* its New Hampshire apprehension data (which excludes that station’s Vermont apprehensions). Moreover, CBP has publicly disclosed state-specific border patrol apprehension data for three other states and one territory that only have one CBP station operating in its jurisdiction: Alabama; Mississippi; Puerto Rico; and Pennsylvania. These station-level, statewide apprehension disclosures undermine CBP’s claim that disclosure of this same information for New Hampshire would reveal a technique, procedure, or guideline that would reasonably be expected to risk circumvention of the law under Exemption 7(E). *See infra* Section II.

Finally, CBP recently suggested to the *Boston Globe* that New Hampshire’s Beecher Falls station apprehension data is subsumed within the Swanton Sector’s Vermont public apprehension data on its website (*see* Pl.’s *Ex. P*, DN 12-18):

A spokesperson for [CBP] said the data team is working on parsing New Hampshire specific data. While there’s no station in New Hampshire, a nearby Vermont station [Beecher Falls station] collects data for New Hampshire. “We are trying to delineate now how those get counted as New Hampshire and not Vermont,” said Ryan Brissette.

“It’s an issue we are still working on,” he said. He did not have a timeline about when asked when the data would be available.¹

See also 16-1 at 9 (citing Pansiri Dec., ¶ 10). Even if New Hampshire’s Beecher Falls station apprehension data is subsumed within the Swanton Sector’s public data for Vermont (*see* Pl.’s *Ex. P*, DN 12-18), this information is easily accessible to CBP, can be disaggregated, and should be produced immediately to the public—especially where the degree to which CBP is engaging in apprehensions in New Hampshire has been used to justify a state appropriation of over \$1.4 million

¹ *See* Amanda Gokee, “Sununu asks for federal response to ‘surge of activity’ at New Hampshire’s northern border,” *Boston Globe* (Aug. 18, 2023), <https://www.bostonglobe.com/2023/08/18/metro/nh-governor-chris-sununu-federal-help-northern-border-immigration/>.

for a Northern Border Alliance Program. CBP’s position of secrecy should be rejected. CBP is funded by the public, and the public is entitled to know what CBP is up to in New Hampshire.

ARGUMENT

I. EXEMPTIONS 6 AND 7(C) DO NOT APPLY

Defendant CBP contends that the requested information contains privacy information that triggers Exemption 6 and 7(C). Accordingly, CBP concludes that it cannot disclose “responsive records consisting of Beecher Falls Form I-213 and apprehension log records.” DN 16-2, Pansiri Dec., ¶¶ 6-7. To the extent that CBP is withholding responsive documents *in full* because portions of these documents may contain such identifiable information, CBP’s position is without merit, especially where Plaintiff has repeatedly explained—including in its April 18, 2023 appeal letter to CBP (*see Exhibit C*²)—that its request does not implicate privacy information.

The FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.” 5 U.S.C. § 552(b). “In determining segregability[,] courts must construe the exemptions narrowly with the emphasis on disclosure.” *Wightman v. Bureau of Alcohol, Tobacco & Firearms*, 755 F.2d 979, 982 (1st Cir. 1985). Here, in blanketly relying on exemptions covering personally-identifiable information to withhold documents *in their entirety*, CBP does not engage in a segregability analysis, let alone argue that segregability cannot occur here because “[n]on-exempt information or materials” are “so interspersed with exempt material that separation by the agency ... would impose an inordinate burden.” *See Carpenter v. U.S. Dep’t of Justice*, 470 F.3d 434, 442-43 (1st Cir. 2006) (quoting *Church of Scientology Int’l v. U.S. Dep’t of Justice*, 30 F.3d 224, 228 (1st Cir. 1994)); *see also* DN 16-2, Pansiri Dec., ¶¶ 5-7 (not engaging in a segregability analysis). Here,

² There, Plaintiff explained that “none of the [requested] information requested implicates “employee PII.””

the simple solution is to redact identifying information from the responsive documents and produce the redacted versions. This is how CBP chose to respond in another FOIA case before this Court.³ *See ACLU Found. v. United States Customs & Border Prot.*, 586 F. Supp. 3d 68, 73 (D.N.H. 2022) (noting that “CBP produced the subsequent pages—with redactions—for 14 of the I-213s”). But what CBP cannot do is withhold the responsive documents *in full* under Exemptions 6 and 7(C).⁴

II. EXEMPTION 7(E) DOES NOT APPLY

CBP’s New Hampshire statewide apprehension data does not constitute a technique, procedure, or guideline that would reasonably be expected to risk circumvention of the law under Exemption 7(E).⁵ This is because the New Hampshire statewide apprehension data is “too generic to constitute a technique or procedure of law enforcement,” as “it does not disclose how [the agency] investigates crimes or disclose any investigative trends.” *See ACLU Found. of Mass. v. FBI*, Civil Action No. 14-cv-11759, 2016 U.S. Dist. LEXIS 110022, at *17 (D. Mass. Aug. 17,

³ An example of a redacted I-213 form and the Swanton Sector’s Daily Activity Report are attached. *See Exhibit S*. As this example shows, CBP has redacted various portions of I-213 forms and its Daily Activity Report. Nonetheless, CBP produced these documents and disclosed the apprehended individual’s nationality and the apprehension location.

⁴ *See Church of Scientology*, 30 F.3d at 231 (“Most documents, including lengthy ones like No. 4, are withheld in their entirety, without any reference to segregability.”); *Citizens for Responsibility & Ethics v. United States Postal Serv.*, 557 F. Supp. 3d 145 (D.D.C. 2021) (an agency “may not invoke Exemption 6 to withhold the” entire documents, but it “may redact [any truly private information appears in the responsive documents] pursuant to Exemption 6[,]” consistent “with the segregability” obligations); *see also Villar v. FBI*, No. 15-cv-270-LM, 2018 U.S. Dist. LEXIS 122246, at *43 (D.N.H. July 23, 2018) (“These documents contain pinpoint redactions, which are narrow in scope and only excise the exempt material, such as the names or other identifying information of law enforcement personnel or third parties. These targeted redactions support Hardy’s assertion that the FBI conducted a detailed segregability analysis.”).

⁵ As to Exemption 7(F)—which 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,” *see* 5 U.S.C. § 552(b)(7)(F)—little analysis is required here given the sparseness of Defendant’s four sentences of conclusory support for this exemption in its brief. *See* DN 16-1 at 11; *see also* DN 16-2, Pansiri Dec., ¶ 13 (raising agent safety in a conclusory single paragraph). Where Plaintiff is not seeking the actual names of CBP employees, there is no basis to conclude that disclosure would create any safety concerns for individual CBP 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.”). Moreover, as explained in more detail below, apart from the speculative nature of this safety assertion, this rationale is undermined by the fact that CBP, in fact, *does* release statewide apprehension data for three states and one territory that are controlled by only one CBP station within a sector.

2016). Nor could these apprehension figures for an entire state be considered a guideline, as no showing has been made—beyond conclusory allegations—that this information would reveal how CBP allocates its staffing resources. Here—even setting aside that CBP *has* previously released to the ACLU-NH apprehension information from the Swanton Sector, *see Exhibit S*—the mere fact that an apprehension occurred in New Hampshire says nothing about how many Beecher Falls station agents are deployed in the state, the frequency with which they are deployed in specific New Hampshire locations, what their specific duties are, and how Swanton Sector resources are used more broadly. Just as arrest data by other agencies are routinely produced, this information too should be disclosed here.

A. Plaintiff is Not Seeking Information “Across Stations,” or Even the Total Apprehension Data for the Beecher Falls Station

CBP raises a concern that the Beecher Falls station’s New Hampshire statewide apprehension data “shows the exact distribution of encounters and would shed light on the CBP resources allocated to address those encounters based on this expected distribution *across Stations*.” DN 16-1 at 7 (emphasis added). This concern is without basis. Plaintiff is not seeking (let alone trying to compare) apprehension data “across Stations” for the Swanton Sector.⁶ Rather, Plaintiff’s request, at most, implicates only one Swanton Sector station—namely, the Beecher Falls station. And, even then, Plaintiff’s request does not seek all of Beecher Falls station’s apprehension data, but rather only its New Hampshire apprehension information. At least one other court rejected similar concerns raised by CBP where a plaintiff limited its request to only one station in a sector

⁶ According to CBP’s website, “[t]he Swanton Sector has eight stations to monitor activity along the International Boundary. The stations from west to east with miles of boundary responsibility are: Ogdensburg, New York (48); Massena, New York (38); Burke, New York (31); Champlain, New York (29); Swanton, Vermont (18); Richford, Vermont (21); Newport, Vermont (32) and Beecher Falls, Vermont (78).” *See* CBP, “Swanton Sector Vermont” (last modified: Aug 21, 2023), <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/swanton-sector-vermont>.

(as opposed to all the stations in the applicable sector).⁷

CBP's reliance on three district court cases is misplaced. CBP first relies on *Am. Immigration Council v. U.S. Immigration and Customs Enforcement*, 464 F. Supp. 3d 228 (D.D.C. 2020). See DN 16-1 at 5-6. This case is distinguishable because the scope of the FOIA request at issue there was far broader. There, the plaintiff requested specific apprehension locations as part of "a complete dataset containing detailed information about all individuals who were apprehended by U.S. Customs and Border Protection; encountered by U.S. Immigration and Customs Enforcement; or removed from the United States between January 1, 2016 and October 10, 2017." *Id.* at 233 (emphasis added). In holding that the defendant's withholding of this information was proper, the court credited defendant's declaration stating that, due to the "production of the size involved," "[t]he substantive effect of over 1 million points of location data would be the disclosure of law enforcement techniques and procedures." *Id.* at 244-45 (further crediting defendant's declaration noting that disclosure "will enable criminals to utilize a technique called 'port shopping'"). Unlike *Am. Immigration Council*, Plaintiff here does not seek such sector-wide or nationwide data that would allow Plaintiff, through "1 million points of location data," to (i) assess daily traveler volume or (ii) compare apprehension data across CBP's stations or ports of entry.

Similarly, CBP's reliance on *ACLU of Me Found. v. United States Dep't of Homeland Sec.*, No. 2:18-cv-00176-JDL, 2019 U.S. Dist. LEXIS 77494 (D. Me. May 8, 2019), is misplaced. There, the district court upheld CBP's redaction of "Shift Logs," which contained information "covering [agency] staffing levels, shift hours, zone assignments, zone boundaries, and vehicle numbers[.]"

⁷ See *Families for Freedom v. United States Customs & Border Prot.*, 797 F. Supp. 2d 375, 391 (S.D.N.Y. 2011) ("Plaintiffs are not requesting arrest statistics for *each station* within the Buffalo sector, which could theoretically aid circumvention of the law by publicizing the relative activity or success of Border Patrol agents in effecting apprehensions at each station, as defendants fear. Rather, plaintiffs seek information only about the Buffalo Sector as a whole and Rochester Station in particular" which "will not reveal the comparative strengths and weaknesses of the various stations within the Buffalo Sector") (emphasis in original) (hereinafter *Families for Freedom I*).

Id. at *4-6. Here, once again, Plaintiff only seeks apprehension data in New Hampshire, not current agency staffing levels or statistics, shift hours, vehicle numbers, and the like.

Families for Freedom v. U.S. Customs & Border Prot., 837 F. Supp. 2d 287 (S.D.N.Y. 2011) (hereinafter *Families for Freedom II*), is similarly unhelpful to CBP. Unlike the narrow apprehension data sought here, the properly redacted information there specifically implicated “how, where, and when agents board Buffalo-region trains and buses, talk to passengers, and make arrests.” *Id.* at 299. But apart from this properly redacted information, the Court rejected CBP’s argument that “staffing statistics from 2009 and 2010 somehow include ‘techniques and procedures,’” noting the following:

[CBP has] pointed to no instances in which a court has held that law enforcement statistics are covered by Exemption 7(E). The terms “techniques” and “procedures” refer to specific methods of law enforcement, not policy and budgetary choices about the assignment of personnel.

Id. at 200. In any event, unlike *Families for Freedom II* where some historical “staffing level” information was ordered disclosed, Plaintiff here is not even seeking historical “staffing levels,” let alone “current or prospective staffing statistics.” *Id.* (noting that the request sought “Border Patrol officer staffing levels for the Rochester BP Station and the Buffalo BP Sector for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009”) (emphasis added).⁸

B. Defendant CBP Already Appears to be Releasing Some Station-Level Data

CBP states that, “[b]ecause Beecher Falls is the sole station responsible for patrolling the

⁸ The Court there went on to order the release of historical staffing statistics for 2009 because “Defendants do not assert that the current distribution of agents is similar to the distribution of agents in 2009,” and, the “[r]elease of historical staffing statistics could not reasonably be expected to risk circumvention of the law.” *Id.* at 299-300. The Court explained: “Of course, *any* information about past law enforcement practices could theoretically give would-be criminals help that they would not otherwise have. Congress has made clear that before guidelines may be withheld, however, there must be a *reasonable* increased risk of circumvention of the law. Such risks are lowest in the context of historical information and defendants have provided no evidence that this release would pose such a risk.” *Id.* at 300 (emphasis in original).

state of New Hampshire, CBP does not release Station level statistics regarding apprehensions. Pansiri Dec., ¶ 12.” DN 16-1 at 10. CBP adds that it “does not release Station level enforcement data. Pansiri Dec., ¶ 8.” *Id.* at 8; *see also* DN 16-2, Pansiri Dec., p. 5. This position is unavailing

At the outset, once again, Plaintiff has not requested the entirety of Beecher Falls station’s apprehension data, but rather only its New Hampshire apprehensions for a four-month period. And at least one court has concluded that station-level data is not exempt as a “technique” or “guideline.” *See Families for Freedom I*, 797 F. Supp. 2d at 391 (“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).⁹ CBP does not meaningfully distinguish this case.

Perhaps even more compelling, CBP’s published apprehension data in other states appears to rebut CBP’s claim that it “does not release Station level enforcement data. Pansiri Dec., ¶ 8.” *See* DN 16-1 at 8. CBP has publicly disclosed state-specific border patrol apprehension data for three other states and one territory that have one CBP station operating within its areas of responsibility: Alabama; Mississippi; Puerto Rico; and Pennsylvania.¹⁰ Given CBP’s public

⁹ The Court added:

However, were I to reach the latter issue [of whether disclosure of such information risks circumvention of the law], I would find that release of this information does not pose that risk To the extent that the Daily Reports include arrest data broken down by station, defendants may redact the information so that only the Rochester Station arrest data and Buffalo Sector arrest totals are disclosed.

Id. at 391 (emphasis added).

¹⁰ For Alabama, the Mobile Station of the New Orleans, Louisiana Sector is headquartered in Mobile, Alabama and covers CBP’s entire jurisdiction in Alabama. *See Exhibit T*; *see also* CBP, “Mobile Station” (last modified: May 29, 2019), <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/new-orleans-sector-louisiana/mobile-station> (“Today, the Mobile station is responsible for conducting Border Patrol operations for the entire state of Alabama and the Florida panhandle, from the Florida-Alabama state line, eastward to the Apalachicola River.”) (emphasis added).

disclosure of apprehension data for three states and one territory with one CBP station, CBP's position that it cannot release the same information for New Hampshire under Exemption 7(E) is undermined.

CBP's position is also undermined by its public disclosure that there was one New Hampshire CBP "encounter" from October 2022 to January 2023, with the area of responsibility being CBP's Boston Field Office's Office of Field Operations. This "encounter" occurred in October 2022, presumably at a Canada/New Hampshire port of entry. *See Exhibit P.*¹¹ CBP argues that this disclosure is irrelevant since that disclosed data belongs to a CBP office that is different from the Swanton Sector. *See DN 16-1 at 9.* This misses the point. CBP's voluntary public disclosure of New Hampshire statewide apprehension data of another CBP office undermines its position here that disclosing Swanton Sector's related New Hampshire statewide apprehension data would endanger its officers and allow others to circumvent the law. If CBP's Office of Field Operations can produce statewide information, so too can the Swanton Sector.

For Mississippi, the Gulfport Station of the New Orleans, Louisiana Sector is headquartered in Gulfport, Mississippi and covers CBP's entire jurisdiction within Mississippi. *See Exhibit U; see also* CBP, "Gulfport Station" (last modified: Oct. 13, 2016), <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/new-orleans-sector-louisiana/gulfport-station> ("At that time, *as it is presently*, the station was responsible for Border Patrol operations for *the entire State of Mississippi*.") (emphasis added).

For Puerto Rico, the Ramey Station of the Ramey Sector Puerto Rico is headquartered in that territory and covers CBP's entire jurisdiction within Puerto Rico. *See Exhibit V; see also* CBP, "Ramey Station" (last modified: Oct. 13, 2016), <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/ramey-sector-aguadilla-puerto-rico/ramey-station> ("The Ramey Station is the only station within the Ramey Sector. It was established along with the sector on October of 1987. It is the only Border Patrol Station outside of the continental United States.").

For Pennsylvania, the Erie Station of the Buffalo, New York Sector is headquartered in Fairview, Pennsylvania and covers CBP's entire jurisdiction within Pennsylvania. *See Exhibit W; see also* CBP, "Erie Station" (last modified: Oct. 13, 2016), <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/buffalo-sector-new-york/erie-station> ("It is composed of counties in the states of New York and Pennsylvania."); *see also* CBP, "Sectors and Stations," <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors> (listing CBP stations).

¹¹ Agents of the Boston Field Office's Office of Field Operations are stationed at Canada/New Hampshire ports of entry where they conduct inspections and enforce immigration and customs laws. In contrast, those agents who apprehend alleged undocumented immigrants outside of the port of entry (e.g., between ports of entry) in New Hampshire belong to CBP's Swanton Sector. *See* Hillel R. Smith, Legislative Attorney, "U.S. Customs and Border Protection's Powers and Limitations: A Primer," *Congressional Research Service* (Updated Nov. 30, 2021), at p. 1, available at <https://crsreports.congress.gov/product/pdf/LSB/LSB10559>.

C. CBP’s Public Disclosure of Apprehension Information for its Own Communications Purposes Undermines the Rationale for the Exemptions Asserted

CBP’s self-serving media statements and posts sharing the number of apprehensions, the apprehension locations, and the apprehended individuals’ nationalities support the conclusion that Exemption 7(E) is inapplicable to Plaintiff’s requested information. This Court can rely on various sources of evidence produced by Plaintiff to determine whether the requested information does not fall under Exemption 7(E) because it is well known by the public. *See Schwartz v. United States DEA*, No. 13-CV-5004 (CBA) (RML), 2016 U.S. Dist. LEXIS 3696, at *38-39 (E.D.N.Y. Jan. 8, 2016) (collecting cases where courts considered news coverage). While CBP claims that “Plaintiff has not provided evidence that Defendant has released New Hampshire apprehensions publicly,” *see* DN 16-1 at 9, such evidence was not hard to find. *See* CBP, “Busy Weekend for Swanton Border Patrol Agents, Apprehended 20 Individuals in 4 Incidents” (Apr. 2, 2018), <https://www.cbp.gov/newsroom/local-media-release/busy-weekend-swanton-border-patrol-agents-apprehended-20-individuals-4>; *see also* Pl.’s Aug. 10, 2023 Memo. of Law (DN 11-1), at p. 19, n. 10 (citing this 2018 press report). While CBP asserts that this press release does “not provid[e] any specific apprehension data for any specific Station,” *see* DN 16-1 at 10; DN 16-2, Pansiri Dec., ¶ 11, the release suggests otherwise by referencing the specific station that engaged in the apprehension, the general location of the apprehension, and the nationality of the individuals detained: “Later in the day, agents from the Beecher Falls Border Patrol Station apprehended two more citizens of Guatemala who did not have immigration documents allowing them to enter or remain in the U.S. near Pittsburg, N.H.” *Id.* (emphasis added).

Respectfully submitted,

By and through his attorneys affiliated with the
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