

**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 SUR-SUR REPLY IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

In light of Defendant Customs and Border Protection’s (“CBP” or “Defendant”) new November 10, 2023 declaration (DN 23-1) attached to its November 13, 2023 Surreply in Opposition to Plaintiff’s Motion for Summary Judgment (DN 23), Plaintiff American Civil Liberties Union Foundation of New Hampshire hereby files this Sur-sur Reply in Support of its Motion for Summary judgment.

INTRODUCTION

In a September 20, 2023 declaration, a CBP agent testified that “CBP releases Sector level statistics and data on its website *but does not release Station level statistics and data.*” See Pansiri Dec., ¶ 10 (DN 16-2) (emphasis added). However, after being highlighted by Plaintiff in its October 18, 2023 submissions (DN 19, 20), CBP now acknowledges in its November 13, 2023 filing that it has publicly disclosed the U.S. Border Patrol’s “station level statistics in some locations where only one USBP station is responsible for patrolling the entire state.” See Lewandowski Dec., ¶ 6 (DN 23-1). This includes apprehension data for Alabama, Mississippi, and Pennsylvania. This disclosure is on top of an apparent March 2023 disclosure to *WMUR* that no crossing was “recorded in New Hampshire” between October 2022 and January 2023. See *Ex. J.*

Despite Defendant’s new acknowledgment that it has disclosed apprehension data from other similarly situated states, Defendant has now elected to—rather than release New Hampshire apprehension data consistent with these prior disclosures—double down on its position of secrecy. Indeed, in response to Plaintiff’s October 18, 2023 revelation, Defendant now has gone so far as to, effective November 9, 2023, shield the public’s access to specific U.S. Border Patrol’s state-wide apprehension data for all states (including for Alabama, Mississippi, and Pennsylvania) by seemingly combining them with the apprehension data for CBP’s Office of Field Operations. See

Lewandowski Dec., ¶ 7 (DN 23-1) (“To rectify this error, I instructed my CBP STAT staff to modify the filter capabilities to combine CBP component (USBP and OFO) statistics in states where filtering would reveal station level statistics. With this modification, New Hampshire state statistics continue to be shielded from public view. As a result, effective Thursday, November 9, 2023, access to USBP station level statistics via a state filter is no longer publicly available.”); *compare* Ex. X (currently published Alabama data); Ex. Y (currently published Mississippi data); Ex. Z (currently published Pennsylvania data) *with* Ex. T (DN 19-3; Alabama published data as of Oct. 2023), Ex. U (DN 19-4; Mississippi published data as of Oct. 2023); and Ex. W (DN 19-6; Pennsylvania published data as of Oct. 2023); *see also* <https://www.cbp.gov/newsroom/stats/nationwide-encounters>. In other words, when confronted with the reality that Defendant routinely has released for other jurisdictions the very information that is being sought here for New Hampshire, Defendant has continued to reject transparency and, rather, has opted for even *more* secrecy for these other jurisdictions. And Defendant does so even where it has presented *no evidence* that these prior disclosures in these other states have risked circumvention of the law under Exemption 7(E) or have endangered the life or physical safety of any individual under Exemption 7(F). Given this fatal omission, there similarly would be no harm if this New Hampshire apprehension data is released.

CBP is a taxpayer-funded entity that is accountable to the public. The requested information should be released, especially in the face of these prior disclosures.

ARGUMENT

This Sur-sur Reply makes the following brief points in light of Defendant’s new November 10, 2023 declaration. *See* DN 23-1.

First, even assuming that the withholding of the New Hampshire apprehension data is

proper under Exemptions 7(E) and 7(F)—and it is not—Defendant’s voluntary disclosure of U.S. Border Patrol’s state-wide apprehension data for several similarly situated states with one station (possibly for years) constitutes a waiver of Exemptions 7(E) and 7(F) as applied to this identical New Hampshire apprehension data.¹ “Under [the] public-domain doctrine, materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record.” *Muslim Advocates v. United States DOJ*, 833 F. Supp. 2d 92, 99 (D.D.C. 2011) (quoting *Cottone v. Reno*, 193 F.3d 550, 554, 338 U.S. App. D.C. 270 (D.C. Cir. 1999)). “The logic of the doctrine is that where information requested is truly public, then enforcement of an exemption cannot fulfill its purposes.” *Id.* (internal quotations omitted). Under the public-domain doctrine, Plaintiff “must establish that the information requested is as specific as the information previously released, must match the information previously disclosed, and must have already been made public through an official and documented disclosure.” *Am. Immigration Lawyers Ass’n v. United States Dept’s of Homeland Sec.*, 852 F. Supp. 2d 66, 74 (D.D.C. 2012). This criteria is met. Here, Defendant already concedes that its public website disclosed U.S. Border Patrol’s state-wide apprehension data for several states that have only one station. This state-wide apprehension data is precisely what Plaintiff has sought for New Hampshire. Although these prior disclosures did not include New Hampshire apprehension data—but rather identical data for similarly situated states—it does not alter the waiver analysis. *See N.Y. Times Co. v.*

¹ Because, effective November 9, 2023, Defendant changed the public website and data since Plaintiff’s last October 18, 2023 pleading, Plaintiff has not been able to ascertain for how many years Defendant has disclosed state-wide U.S. Border Patrol data on its website. In any event, although Defendant submitted a new sworn declaration (DN 23-1) dated November 10, 2023, this declaration does not explain the following critical information: (1) how long Defendant has disclosed U.S. Border Patrol state-wide apprehension data (including the states where there is only one station for each state) through its public website; (2) whether this disclosure has contributed to an increase in unlawful crossings in these states; and (3) whether this disclosure has contributed to the endangerment of Defendant’s officers. Because these questions are vital (yet left unanswered), Defendant has failed to meet its burden in resisting disclosure, and judgment should be granted in Plaintiff’s favor. But if this Court disagrees, discovery should be permitted on these important questions. *See Carton v. Norton*, 2005 U.S. Dist. LEXIS 7769, at *17 (D.N.H. May 2, 2005) (“this court retains broad discretion over the proper scope of such discovery [under the FOIA.]”).

United States DOJ, 756 F.3d 100, 120 (2d Cir. 2014) (interpreting that the matching aspect of the test does not mean the absolutely same document or information because “such a requirement would make little sense” when “[a] FOIA requester would have little need for undisclosed information if it had to match precisely information previously disclosed”).

Second, even if this Court concludes that there has been no waiver, Defendant’s concession that it has previously disclosed state-wide apprehension data for similarly situated states undermines its position that the disclosure of similar New Hampshire state-wide apprehension data would allow potential law-breakers to circumvent border apprehension or would endanger its officers under Exemptions 7(E) and 7(F). Again, Defendant has disclosed this similar information for other states potentially for years. If this information was so sensitive and the stakes so high, Defendant would not have been cavalier with this information and previously disclosed it. And, even more critically, Defendant presents no actual evidence that the information previously disclosed in other similarly-situated states has allowed potential law-breakers to circumvent border apprehension or otherwise endangered its officers. This is fatal. Thus, in light of this acknowledged prior disclosure, CBP’s continued claim that disclosure of New Hampshire state-wide apprehension data would lead to potential law-breakers circumventing the border apprehension and would endanger Defendant’s officers under Exemptions 7(E) and 7(F) is meritless.

Third, it is worth noting that Department of Homeland Security Secretary Alejandro Mayorkas, on November 8, 2023, provided testimony before the Senate Appropriations Committee, committing to Senator Jeanne Shaheen that his Department would provide New Hampshire state-

wide apprehension data to her office.² If this information can be given to a New Hampshire Senator without harming public safety, then this same information can and should be given to the public. Such a disclosure to Senator Shaheen’s office would only confirm the inapplicability of Exemptions 7(E) and 7(F). *See In re Sealed Case*, 121 F.3d 729, 741-42 (D.C. Cir. 1997) (“[T]he White House has waived its claims of privilege in regard to the specific documents that it voluntarily revealed to third parties outside the White House.”).

Respectfully submitted,

By and through his attorneys affiliated with the
American Civil Liberties Union Foundation of
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² *See* “Shaheen Secures Commitment from DHS Secretary Mayorkas on Northern Border Data During Appropriations Hearing” (Nov. 8, 2023), <https://www.shaheen.senate.gov/shaheen-secures-commitment-from-dhs-secretary-mayorkas-on-northern-border-data-during-appropriations-hearing>; *see also* “Secretaries Mayorkas and Becerra Testify on President Biden’s Supplemental Request” (Nov. 8, 2023), <https://www.c-span.org/video/?531590-1/secretaries-mayorkas-becerra-testimony-senate-appropriations-committee> (starting at 1:12:12); https://www.youtube.com/watch?v=jlf_shO-Uic.