UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

AMERICAN CIVIL LIBERTIES UNION OF MAINE FOUNDATION, *Plaintiff*, v. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Defendant.*	Case No. 2:20-cv-00422-JAW

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff, American Civil Liberties Union of Maine Foundation, through undersigned counsel, hereby submits its Cross-Motion for Summary Judgment. In support thereof, Plaintiff states as follows:

INTRODUCTION

In this Freedom of Information Act ("FOIA") case, Plaintiff seeks public records regarding asylum applications handled by the Boston and Newark Asylum Offices. [Plaintiff's Statement of Material Facts ("SMF") ¶¶ 15, 16]. Plaintiff acknowledges at the outset that Defendant has produced thousands of pages of responsive records. But, Defendant has redacted crucial information from those records and has also declined to search for additional responsive records on the theory that such a search is overly burdensome and not required. They are incorrect as a matter of law because statute requires Defendant to publicly post the records sought, even in the absence of a FOIA request such as this one. The Court should compel Defendant to conduct the necessary search for responsive records; compel Defendant to comply with its statutory electronic

reading room obligations; and find that Defendant's redactions pursuant to Exemptions (5), (6), (7)(C) and (7)(E) are unsupported by Defendant's Vaughn index and incorrect as a matter of law.

I. BACKGROUND AND SUMMARY OF ARGUMENT

Every year, thousands of people come to the United States fleeing persecution and ill treatment in their home countries, seeking asylum in the United States.[1] Once they arrive, the law authorizes two avenues through which they may seek asylum: affirmatively (meaning that they seek asylum on their own, before any other immigration proceeding has begun) and defensively (meaning that they assert their refugee status as a defense in a proceeding that seeks to remove them from the country).[2] When a person affirmatively seeks asylum, the process works as follows: the asylum-seeker submits an application for asylum to U.S. Citizenship and Immigration Services ("USCIS"), the defendant in this action and. they are interviewed. After an asylum officer conducts the interview and independent research, the asylum officer determines either that the asylum-seeker has a credible fear and grants asylum; or else the officer determines that the person is not eligible for asylum, because they have no credible fear, and refers the person to removal proceedings before an immigration judge or denies asylum.

The asylum process has been plagued with criticisms—many refugee advocates point out that the rules asylum officers are called to enforce are either contrary to law or are intended to deny valid applications for asylum,[3] with the ultimate result being that legitimate asylum-seekers nonetheless have their claims denied. Against this backdrop, in approximately 2019, both asylum

[1] *See* Kira Monin et al *Refugees and Asylees in the United States*, Migration Pol'y Inst. (May 13, 2021), https://migrationpolicy.org/article/refugees-and-asylees-united-states-2021.
[2] Ryan Dunsmuir & Human Rights First, *How Refugees Get to the U.S.* United Nations High Commissioner for Refugees (Feb. 2010), https://unhcr.org/en-us/58599d054.pdf.
[3] *See, e.g.*, Human Rights First, *Grant Rates Plummet as Trump Administration Dismantles U.S. Asylum System, Blocks and Deports Refugees* (June 2020), https://www.humanrightsfirst.org/sites/default/files/AdministrationDismantlingUSAsylumSystem.pdf.

seekers and asylum attorneys began to notice that the Boston Asylum Office[4] had a particularly low rate of asylum approvals, and that this low rate was conspicuous as to applicants from Angola, Burundi, Democratic Republic of Congo, and Rwanda. [SMF ¶ 16]. With this in mind, Plaintiff filed the instant FOIA requests, seeking information as to the policies and procedures governing affirmative asylum applications in the Boston and Newark Asylum Offices, as well as policies and procedures specifically governing applicants from the above-listed central African countries. *Id.* When Defendant declined to provide a timely answer, this suit followed.

In the past year, Defendant has provided approximately 6000 pages of documents. *Id.* ¶ 21. Although Defendant has removed certain redactions after negotiation, the following disputes remain: First, Defendant has not provided a sufficient explanation as to why a search for all responsive documents would be overly burdensome. Second, Defendant has failed to conduct a properly diligent search in response to Plaintiff's requests, as evidenced both by its failure to produce denial and referral notices that it is obligated to make public and despite the fact that these orders should be published online pursuant to statute even without a FOIA request. Third, Defendant has withheld the body of an email pursuant to Exemption 5, but has not explained how this email, if revealed, would imperil the quality of agency decision making. Fourth, Defendant has withheld information pursuant to Exemption 6 but has improperly withheld information for which the public's interest greatly outweighs any individual's privacy interest. Fifth, Defendant has withheld information pursuant to Exemption 7(C) but, similarly, has not demonstrated that the public's interest does not outweigh the privacy interests involved. Finally, Defendant has made repeated redactions pursuant to Exemption 7(E) to protect information related to credibility and

[4] USCIS maintains ten asylum offices across the United States where it conducts scheduled asylum-related interviews. U.S. Citizenship & Immigration Servs., *USCIS Service and Office Locator*, https://egov.uscis.gov/office-locator/#/ (last accessed Dec. 13, 2021).

fraud trainings provided to asylum officers. These redactions are improper as the concealed information, if revealed, may not constitute a law enforcement technique and would not create a risk of circumvention of law enforcement.

II. GOVERNING LEGAL STANDARDS

"The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *ACLU of Maine. v. DHS*, No. 2:18-CV-00176-JDL, 2019 WL 2028512, at *1 (D. Me. May 8, 2019) (quoting *N.L.R.B. v. Robbins Tire & Rubber Co*., 437 U.S. 214, 242 (1978)). "FOIA requires federal agencies to promptly release records in response to a request for production," and "authorizes federal courts 'to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." *Id.* (quoting 5 U.S.C. §§ 552(a)(3)(A)), 552(a)(4)(B)). "[C]ourts have interpreted the disclosure provisions generously, in order to achieve the FOIA's basic aim: sunlight." *Aronson v. I.R.S.*, 973 F.2d 962, 966 (1st Cir. 1992).

Under the FOIA, federal agencies must provide public access to government records unless an exemption applies. *Carpenter v. DOJ*, 470 F.3d 434, 438 (1st Cir. 2006). "FOIA exemptions are construed narrowly, and any doubts are resolved in favor of disclosure." *ACLU of Maine*, 2019 WL 2028512, at *1 (citation omitted). Defendant bears the burden to prove that withheld materials fall within one of the statutory exemptions. *Carpenter*, 470 F.3d at 438. To satisfy this burden, Defendant must typically create a so-called *Vaughn* index detailing each document withheld, the statutory exemption claimed, and a particularized explanation of how disclosure would damage the interest protected by the claimed exemption. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). The index is designed to enable the requester to offer effective advocacy and to provide a

basis for the court to reach a reasoned decision. *See, e.g.*, *Church of Scientology Int'l v. DOJ*, 30 F.3d 224, 234-35 (1st Cir. 1994). If the government improperly withholds records, "FOIA provides federal courts with the power to enjoin the agency from withholding agency records and to order the production of any agency records . . . and directs district courts to determine *de novo* whether non-disclosure was permissible." *Ctr. for Biological Diversity v. USEPA*, 279 F.Supp.3d 121, 137 (D.D.C. 2017) (quotations and citations omitted).

In litigation challenging the sufficiency of the release of information under the FOIA, "the agency has the burden of showing that requested information comes within a FOIA exemption." *Pub. Citizen Health Rsch Grp. v. FDA*, 185 F.3d 898, 904 (D.C. Cir. 1999) (quotations omitted). "This burden does not shift even when the requester files a cross-motion for summary judgment because the Government ultimately has the onus of proving that the documents are exempt from disclosure, while the burden upon the requester is merely to establish the absence of material factual issues before a summary disposition of the case could permissibly occur." *Center for Biological Diversity*, 279 F.Supp.3d at 137 (quotations omitted). It is the government's burden "to establish that it has made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *ACLU of Massachusetts v. ICE*, 448 F. Supp. 3d 27, 42 (D. Mass. 2020) (quotations omitted).

III. DEFENDANT HAS FAILED TO PERFORM AN ADEQUATE SEARCH

An agency "fulfills its obligations under [the] FOIA if it can demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents" and "perform[ed] more than a perfunctory search" to identify responsive records. *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011) (citations and quotations omitted). "[T]he issue to be resolved is not whether there might exist any other

documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

When a government agency argues—as Defendant does here—that it should not be compelled to undertake a certain search because it would be burdensome, the agency must "provide a sufficient explanation why a search . . . would be unduly burdensome." *Publ. Citizen, Inc. v. DOE*, 292 F.Supp.2d 1, 6 (D.D.C. 2003). A described search is more likely to be deemed burdensome if the sought-after documents may not even exist. *Id.* Whether a given search might actually produce the requested records is vital to the question of reasonableness. *Trentadue v. FBI*, 572 F.3d 794, 797 (10th Cir. 2009); *Public Citizen*, 292 F.Supp.2d at 6 (finding search of 25,000 files for irregularly kept data not burdensome when it was "certain to turn up responsive documents"). The affidavit explaining why the required search would be burdensome must be "detailed." *Wolf v. CIA*, 569 F.Supp. 2d 1, 9 (D.D.C. 2008) (finding affidavit sufficiently detailed when it explained precisely how the documents were stored, the necessity of looking at each frame of a given file, and the possibility that none of the records had been retained).

Here, there is no dispute that Defendant did not perform a search reasonably calculated to uncover all responsive documents. Plaintiff seeks denial and referral notices, which are indisputably contained in the Alien Files, or "A-files" maintained by Defendant.[5] Defendant asserts that a search of the A-Files would be overly burdensome because the files are distributed over a geographic area in hard copy only and would have to be tracked down, requested, received, scanned, and manually reviewed before production. Defendant's search was insufficient, and its

[5] "The Alien File. . . is the official record system that contains information regarding the transactions of an individual as he or she passes through the U.S. immigration process . . . USCIS is the custodian of the A-File and the documents contained within it that are derived from various systems belonging to USCIS, ICE, and CBP." 82 CFR 43556.

description of the search of the A-Files does not indicate that such a search would be burdensome, for three reasons.

First, when a search is "certain to turn up responsive documents," that weighs greatly in favor of finding that it is not unreasonable. *Public Citizen*, 292 F.Supp.2d at 6. Second, Defendant's explanation for the burden caused by the search is deficient. Defendant first states it would take almost nine years to identify the location of, order, and retrieve the A-Files. But Defendant has offered no explanation for why every one of the appropriate A-Files is presumed to be elsewhere and not in the Boston or Newark Asylum Offices. Similarly, Defendant has stated that some time (the exact amount is unclear) must be devoted to digitizing each of the files, but Defendant has not explained why the digitization is necessary (since Defendant would, apparently, still have to manually search the files). Defendant's explanation for why a search of the A-Files is burdensome is, therefore, neither logical nor persuasive, and should be rejected. The Court should find that Defendant has failed to explain why a search for the A-Files is an undue burden and require Defendant to perform the search in order to fully answer Plaintiff's FOIA request.

IV. DEFENDANT HAS FAILED TO COMPLY WITH ELECTRONIC READING ROOM REQUIREMENTS AND THE COURT SHOULD COMPEL COMPLIANCE.

Defendant's purported burden in producing denial and referral notices must be viewed in light of its own failure to comply with 5 U.S.C. § 552 (a)(2)(A). The Electronic FOIA Amendments of 1996 require agencies to "make available for public inspection in an electronic format . . . final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases." 5 U.S.C. § 552(a)(2)(A). Thus, Defendant is obligated to produce final orders and opinions to an electronic reading room. In determining what constitutes a "final opinion," the Supreme Court has explained that records with the force and effect of law must be produced. *See*

NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975). To constitute a final opinion, records must be the product of adjudication, defined as "agency process for the formulation of an order." 5 U.S.C. § 551(7).

Here, final denials and referrals are final orders or opinions within the meaning of §552(a)(2)(A) and, thus, must be published electronically. Referrals and denials have the force and effect of law and are post-decisional. *See Abtew v. DHS,* 47 F. Supp. 3d 98, 106 (D.D.C.2014) (explaining that in contrast to notices of intent to deny, referrals and final denials are final because they are post-decisional and set out more than a mere recommendation); *Gosen v. USCIS,* 118 F. Supp. 3d 232, 238–40 (D.D.C. 2015). In fact, final denials specifically state that "there is no appeal" from the decision. Additionally, at least one court has explicitly recognized referral notices as final decisions. *See Abtew*, 47 F. Supp. 3d 98, at 104–05. Importantly, this Court has the authority under § 552(a)(4)(B) to compel electronic disclosure of final orders and opinions that have been improperly withheld. *See New York Legal Assistance Grp. v. Bd. of Immigr. Appeals*, 987 F.3d 207, 225 (2d Cir. 2021); *Animal Legal Def. Fund v. United States Dep't of Agric.*, 935 F.3d 858, 877 (9th Cir. 2019).

Furthermore, even if Defendant can show an unreasonable burden if disclosure of past notices is compelled, this court should nonetheless require the agency to post referrals and denials prospectively. While courts must account for the "potentially significant burden" placed on agencies forced to comply with § 552(a)(2)(A), courts have noted that the "burden of remedying [the failure to comply with 552(a)(2)(A)] going forward" is less daunting. *New York Legal Assistance Grp.*, 987 F.3d at 225.[6] And even if the Court decides that production of all denials and referrals in their entirety is not warranted, the Court should require the agency to post the statistical

[6] Notably, prospective production of final orders and opinions would reduce the amount of time and expense associated with similar requests in the future.

data that was shared with Plaintiffs in the form of two Excel Spreadsheets. [Def. Mot. p. 4]. Defendant has explained that these affirmative notices are created using "a form generator" [Exhibit D, p. 3], the information nevertheless helps inform the public of the final agency orders and opinions. *See Abtew*, 47 F. Supp. 3d at 106 n.6 ("[T]he evidence before this Court indicates that the Referral Notice is the final decision . . . this conclusion is not altered just because the Referral Notice is created "by checking boxes on a computer.").

Therefore, any burden associated with the production of denial and referral notices is of Defendant's own making and would not exist had Defendant complied with its statutory publishing obligations. The Court should compel disclosure of the denials and referral notices; set a schedule for Defendant to post past final denials or referrals to an electronic reading room; and compel Defendant to post all final decisions going forward.

V. DEFENDANT'S USE OF EXEMPTION 5 IS INCORRECT AS A MATTER OF LAW.

Exemption 5 contains "the executive deliberative process privilege," which protects pre-decisional agency communications. *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 862, 866 (D.C. Cir. 1980). "In deciding whether a document should be protected by the privilege [courts] look to whether the document is 'predecisional' whether it was generated before the adoption of an agency policy and whether the document is 'deliberative' whether it reflects the give-and-take of the consultative process." *Id.* The deliberative privilege is intended to ensure that those people deliberating within the agency are able to engage in frank, uninhibited discussion without worrying about the possibility of embarrassment should the discussion become public. *Sears, Roebuck & Co.*, 421 U.S. at 150. This, in turn, increases the quality of agency decision-making. *Id.*

Defendant has redacted the entirety of two emails, which bear the subject line "thoughts on credibility."[7] Defendant has also provided a brief explanation for the redaction, based on the emails' contents and the emails' senders and recipients.[8] Nonetheless, the Court should find that Defendant's assertion of the deliberative process privilege is improper. Defendant has failed to demonstrate that the information contained in the email, if revealed, would cause any embarrassment or generally inhibit the ability of the agency to engage in candid discussions prior to making final decisions. Because Defendant cannot show that the justifications underlying the deliberative process privilege apply, the privilege should not apply and the Court should compel disclosure.

VI. DEFENDANT'S USE OF EXEMPTION 6 IS INCORRECT AS A MATTER OF LAW.

Exemption 6 protects those files and information for which disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The exemption requires the agency to balance an individual's right to privacy against the public's interest in disclosure. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976). The public's interest is in "the core purpose of FOIA, which is contribut[ing] significantly to public understanding of the operations or activities of the government." *U.S. Dep't of Defense v. Fed. Labor Relations Auth.,* 510 U.S. 487, 495 (1994).

Pursuant to Exemption 6, Defendant has redacted a quiz titled "Credibility Issues Within Affirmative Asylum Issues," a "Draft Fact Pattern for Eliciting Testimony" training, both administered to asylum officers, and an "Eliciting Testimony" training.[9] Specifically, Defendant

[7] Defendant's Exemption 5 redactions occur at pages 3842-3844 and are addressed on pages 5-6 of Defendant's Vaughn Index.
[8] Vaughn Index, p. 6.
[9] The challenged Exemption 6 redactions occur at pages 3725, 3727-3730, 3763, 3765 and are addressed at pages 1-3 of Defendant's Vaughn Index. Plaintiff does not dispute the redactions of asylum applicants' names, the names of

has used Exemption 6 to withhold "information that could be used to identify individual [asylum] applicants, including . . . religious affiliation and specific churches attended, and other specific family and/or personal history." [Vaughn Index p. 2]. The exemption has also been used to withhold applicants' "citizenship information" "the name of [an applicant's] middle school" and "country of original, political affiliation, and specific roles in certain political elections." *Id.* p. 3, 4, 23.

This information is necessary to serve the public's interest in knowing how USCIS approaches its work, and it will not render the applicants easily identifiable. This information is highly revelatory of Defendant's own conduct—this information was used for training purposes and therefore presumably indicative of Defendant's review of asylum applications. *Judicial Watch, Inc. v. Reno*, 2001 WL 1902811 at *8 (D.C. Cir. Mar. 30, 2001) (noting that a primary Exemption 6 consideration is the extent to which the information reveals the agency's inner workings). The public's interest in knowing how USCIS operates remains strong—it is the sort of interest which FOIA is explicitly designed to protect. Defendant has failed to identify anything other than a vague, unspecified multitude of harms that might occur if the information is disclosed. Thus, Defendant has failed to demonstrate that the privacy concerns at issue outweigh the public interest, and disputed information withheld pursuant to Exemption 6 should be disclosed.

VII. DEFENDANT'S USE OF EXEMPTION 7(C) IS INCORRECT AS A MATTER OF LAW.

Exemption 7(C) protects from disclosure those documents which are "compiled for law enforcement purposes . . . [and] could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). When information is withheld pursuant to

their family members, their family member' addresses, applicants' addresses, or "dates of significance related to important events within the applicant's personal history." Plaintiff also does not dispute the redaction of the phone number and email of a USCIS employee. Vaughn Index p. 6, 19-20, 36.

7(C) and the FOIA requester asserts a public interest related to "public officials [having] acted negligently or otherwise improperly in the performance of their duties . . . . the requester must produce evidence that would warrant a belief by a reasonable person that the alleged government impropriety *might have* occurred." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 159 (2003) (emphasis added).

When the government seeks, pursuant to 7(C), to withhold the name of a government actor, the federal actor has a "diminishe[d]" privacy interest "because of the corresponding public interest in knowing how public employees are performing their jobs." *Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984). The extent of the public's interest will depend in part on "the level of responsibility held by a federal employee, as well as the activity for which such an employee has been censured." *Id.* Courts also look to the publicity of the supposed wrongdoing, with a greater level of publicity weighting the public's interest more heavily. *People for the Ethical Treatment of Animals v. USDA*, No. 06-930, 2007 WL 1720136 at *6 (D.D.C. June 11, 2007). The agency must also be able to articulate specific harms the government employee will suffer if his name is revealed, and not rely solely on vague assertions of potential harm. *Reporters Comm. For Freedom of Press v. DOJ*, Case No. 19-2847 (TFH) (D.D.C. Nov. 8, 2021).

Defendant has invoked Exemption 7(C) to redact certain portions of training provided by FDNS for asylum officers.[10] Specifically, Defendant invokes the exemption to redact "detailed information pertaining to an immigration applicant, including the applicant's case referral number, and the name of the FDNS Immigration Officer responsible for referring that application for additional vetting" because "[t]he release of the third parties' names and personally identifying information without consent could reasonably be expected to lead to targeted harassment of those

[10] The challenged Exemption 7(C) redaction occurs at page 4138 and is addressed at pages 11-12 of Defendant's Vaughn Index.

individuals and an invasion of their personal privacy, and could also reasonably be expected to lead to targeted harassment of the immigration officer and interference in the performance of the officer's duties."

Here, all of the factors outlined above weigh in favor of disclosing the information withheld pursuant to 7(C). First, Plaintiff has put forth evidence to show that the incorrect action—improperly denied asylum applications—has occurred. [SMF ¶¶ 9-13]. Second, the wrongful behavior—improperly denying asylum applications—has received press coverage, making the public interest here particularly strong.[11] Finally, Defendant has not been able to articulate anything other than a general, speculative fear of consequences associated with disclosure of the subject officer's name—this is insufficient. Revealing this information will unequivocally shed light on how Defendant performs its mandated duties because it will show how asylum officers are trained to carry out their duties. This is precisely the purpose FOIA is meant to serve and any interpretation of 7(C) should further that purpose. Accordingly, this redaction is improper and disclosure should be compelled.

VIII. DEFENDANT'S APPLICATION OF EXEMPTION 7(E) IS INCORRECT AS A MATTER OF LAW.

Exemption 7(E) bars from disclosure those documents which "are compiled for law enforcement purposes [and] . . . would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or

[11] Eleanor Acer, *How the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Has Undermined U.S. Refugee Protection Obligations and Wasted Government Resources*, 5 J. on Migration & Human Security 356, 360 (2017) (detailing a study which found that as in as many as half of asylum interviews, officers failed to properly read background information), https://www.researchgate.net/publication/316751151_How_the_Illegal_Immigration_Reform_and_Immigrant_Responsibility_Act_of_1996_Has_Undermined_US_Refugee_Protection_Obligations_and_Wasted_Government_Resources; Beth Fertig, *A Mother and Daughter Both Have H.I.V. The U.S. Lets In Only One*, N.Y. Times (Mar. 6, 2019) (detailing how asylum seekers facing identical threats in their home countries face different outcomes in their asylum applications based on an officer's failure to account for an interviewee's youth, language skills, and emotional state), https://www.nytimes.com/2019/03/06/nyregion/family-separation-hiv.html?searchResultPosition=12.

prosecutions *if* such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E) (emphasis added); *see also Bloomer v. DHS.,* 870 F.Supp.2d 358 (D.Vt. 2012) (explaining that the risk of circumvention is critical); *Unidad Latina en Accion v. DHS,* 253 F.R.D. 44 (D. Conn. 2008); *Muslim Advocates v. DOJ,* 833 F.Supp.2d 106 (D.D.C. 2012). To fall under the first portion of 7(E), the redacted information must actually be a technique or procedure. *Am. Civil Liberties Union Found. v. DHS,* 243 F.Supp.3d 393 (S.D.N.Y. 2017) (finding that list of questions and follow-up questions used by law enforcement were not a technique or procedure because there was nothing technical about the questions asked, no special method or technique used, and the person hearing the questions would inevitably learn the technique anyway—a mere record that the agency asks these questions is not a technique/procedure). The purpose of 7(E) is particularly served when the technique is secret and not something like security guards deployed in the open. *Maguire v. Mawn*, 02 Civ. 2164, 2004 WL 1124673 (S.D.N.Y. May 17, 2004). The bulk of the disputed redactions are caused by Defendant's invocation of Exemption 7(E).

"specific identity issues, claims from specific countries, claims based on certain applications and visa types, and factors that would indicate fraud"[12]

Exemption 7(E) should be deemed inapplicable to the above withheld information because it is not at all clear how disclosure of the above factors could create a risk of circumvention. It is not an easy or feasible matter for an asylum applicant to simply change their identity, purport to be from a different country, or apply for a different type of visa in order to avoid a 'suspect' type of visa (indeed, the process of obtaining a visa itself requires an application and applicants are vetted). The provided summary of the redacted information does not suggest that any circumvention is possible.

"details of what documents and biographic information are used for the background check process, what other governments require and use during their vetting process, the recent issues

[12] Vaughn Index, p. 5.

indicating fraud, and the factors and the types of applications and applicants that show a pattern of fraudulent activity [as well as] the names of individuals who are listed in law enforcement reports as being linked to fraudulent activity . . . including" names of people who fraudulent applicants have referenced in their personal history.[13]

Exemption 7(E) should not apply to the above-listed information. First, several of the listed items are public or common knowledge. At least some of the documents used during the background check process are, for example, provided by the applicant and therefore the applicant is aware they are being used. Information as to what other governments require or use during a vetting process could hardly be used to circumvent any U.S. process—it is not clear what the value of that information to an ill-willed asylum applicant would be. Regarding the fact sheets for Burundi and Rwanda, it is not clear from the government how an applicant could circumvent law enforcement if he or she were to learn of these facts. There is no suggestion that the facts were compiled from secret sources inaccessible to the public—presumably any applicant could learn the same information about the given countries with internet or library access.

As to the issues surrounding fraud, the limited information provided by Defendant does not suggest a risk that if this information were public knowledge, asylum applicants could simply avoid submitting applications with the disclosed fraud markers. An applicant cannot change the 'type' of applicant they are, or the type of application they submit. There are also no facts or argument to suggest that changing the names referenced in an asylum application is an easy or possible matter.

Asylum officer interview techniques and questions [14]

[13] *Id.* p. 7, 8-9.

[14] This includes "specific examples of how questions should be worded based on actual factual scenarios, and what this pattern of facts should reveal to the asylum officer, as well as ways to use interview questions to elicit testimony to reflect whether or not the information provided by the applicant is credible;" *id.* p. 10, "specific examples of how questions should be worded . . . and what [a certain] pattern of facts should reveal to the asylum officer" and ways to use questions to determine credibility. *Id.* p. 18-19.

The case *ACLU v. DHS* is highly instructive here. In that case, the government sought to conceal "questions" and certain questioning tactics. 243 F.Supp. 3d 393, 397. "The specific set of questions and follow-ups" were "not generally known to the public." *Id.* To determine that the interview questions and follow-ups did not constitute a law enforcement technique for which disclosure could risk circumvention, the court emphasized that no "special skills" were used in asking the questions, and that any 'technique' in asking the questions would surely become known to the interviewee, and the interviewees' lawyers. *Id.*

The redacted questioning 'techniques' and lists are extremely similar to the question lists provided in *ACLU v. DHS*. They are intended to elicit information that might indicate illegal activity, and per the Vaughn Index, provide exact wordings for questions. That asylum applicants are interviewed is common knowledge. The questions, follow-up questions, and results of the questions (whether applicants are denied, approved, or referred) is obviously known to the subject applicant and, if relevant, his or her lawyer. Accordingly, these documents should not be deemed a technique that could be circumvented and disclosure should be compelled.

FDNS's role and activities[15]

For much of this information, it is not at all clear how disclosure could create any risk of circumvention of the law. There is no suggestion that an applicant can easily evade FDNS pre-

[15] This includes "which files and application types" the Fraud Detection and National Security Directorate "pre-screens for criminal activity, national security concerns, fraud, or other factors required for" review, and "detailed information about the coordination process between FDNS and RAIO, how to adjudicate an asylum application that requires FDNS review and vetting, what specifically terminology used by FDNS reveals, including background checks conducted and the results, and other vetting . . . Additionally the withheld information includes links to an internal intranet website that directs to the internal website used by FDNS to document processes and screening procedures, and other FDNS database descriptors which include the types of information screened and its role in the adjudicative process . . . . [Also] specific knowledge check examples and database screenshots were withheld, which documents the screening and vetting process between FDNS, RAISO, and other law enforcement." *Id.* p. 12-13. It further includes "screening methods and background vetting that takes place during the adjudication of an asylum application, and FDNS's role in that process . . . include[ing] common security check errors [and] common interviewing problems and issues with assessments completed by asylum officers." *Id.* p. 14-15.

screening by choosing to submit a different type of application or different files other than those they are directed to submit. There is also no suggestion that an applicant could gain any undue benefit from knowing more about coordination between FDNS and RAIO, the adjudication process, or FDNS terminology. Furthermore, an intranet is by definition secure and typically requires that the person wishing to use it either be in a specific location or use a specific type of internet connection—it is not clear how that could be circumvented. Applicants have little control over the types of information they are required to hand over, and knowing what information is evaluated will not enable applicants to dodge those requirements. And finally, it is not clear how knowing that screening and vetting occurs, and FDNS's role, would allow an applicant to dodge that screening or vetting or dodge FDNS.[16]

"the name of a specific ethno-religious group that had recently been identified" as involved in many cases with credibility issues. [Vaughn Index p. 16].

Defendant particularly relies on *Heartland Alliance National Immigration Justice Center v. DHS* to assert that the name of a particular ethno-religious group should be withheld, but that case is highly distinguishable. In *Heartland*, the plaintiff sought the names of certain suspected terrorist organizations for which "the government does not publish their names" and which "tend to be groups about which the U.S. government does not have good intelligence, making it essential that the Department be able to obtain information about them during screening interviews." 840 F.3d 419, 420 (7th Cir. 2016). The government explained that if an immigrant "becomes aware that a particular organization has been found to fall within the definition" of a terrorist

[16] Defendant argues that if the common errors and problems are made public, applicants may be able to exploit them. However, an asylum applicant has no control over the security check process. Rather, after submitting his or her application, the security check happens automatically and the applicant has no say over where their information goes to be checked or how it is investigated. *See* U.S. Citizenship & Immigration Services, *Asylum Frequently Asked Questions* https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-frequently-asked-questions (last accessed Dec. 16, 2021). It is, therefore, not at all clear how an applicant could circumvent or exploit the security check process, as they have no control over it.

organization, he "will have a very strong incentive to falsify or misrepresent any and all encounters, activities, or associations that he or she may have had with that organization." *Id.*

Here—unlike the groups in *Heartland*—it seems unlikely that Defendant has actually created a label for an ethno-religious group whose existence is highly covert and which may or may not exist at all. Similarly, it is highly difficult to see how the circumvention reasoning of *Heartland* has applicability here. An ethnic group, by definition, has certain shared attributes which distinguish it from other groups. Defendant has not explained how any member of this group could go about concealing *every* relevant attribute (which presumably includes: religion, place of worship, language, country or region of origin, physical markers, family dynamics) and thereby evade detection. *Heartland* does not apply here and Defendant has not demonstrated how an asylum applicant could convincingly conceal things—like religious and ethnic identity—that are absolutely fundamental to who they are. Because there is no risk of circumvention, this information should be disclosed.

"specific procedures for different application types . . . . [which] document specific factors to be aware of, documents that are needed for proper screening and vetting, and specific background checks . . . including the names of the databases to conduct background checks in and what results to look for [and] specific questions officers should use." [Vaughn Index p. 17].

As with the above examples, it is not clear how this information could lead to any possible circumvention of the law. Applicants do not have free choice of which documents to submit with their applications (rather, certain documents are mandatory and others left to the applicant's discretion, and can be requested by an asylum officer). Nor do applicants have any control over the databases in which the background checks are conducted—there is simply no possibility that an applicant might learn a specific database will be used and then somehow infiltrate it. And, as above, specific lists of questions cannot be deemed a 'technique' for which disclosure might risk circumvention.

"specific procedures related to specific countries and a particular fact pattern that multiple asylum officers had reported" and *"how Country of Origin Information should be used as part of adjudication."* [Vaughn Index p. 21, 23].

Knowledge of the procedures or of how Country of Origin Information would be used would not allow a person to falsify facts in an asylum application. Furthermore, there are real doubts as to whether country-specific information is actually being used correctly and whether that information is correct. [SMF ¶ 12]. Disclosure of this information is therefore highly vital to fulfilling FOIA's purpose.

"specific procedures related to a specific organization and country that was being reviewed for potential" terrorism issues [Vaughn Index p. 20, 36].

It is extraordinarily unlikely that asylum applicants might be able to invent an entirely different country of origin and thereby circumvent procedures related to a specific country. Furthermore, it is not clear how applicants could circumvent "procedures" governing a specific organization.

information "that highlighted certain techniques and factors that relevant to credibility determinations, eliciting testimony, and other significant adjudicative issues." [Vaughn Index p. p. 27, 30, 32, 34].

First, as noted above, techniques used to elicit testimony are presumably not particularly covert, as they must be performed in front of the people testifying. Defendant repeatedly asserts that the documents listed above would reveal the techniques asylum officers use to determine credibility and the existence of fraud. But, to the extent that such techniques are effectively shared with the asylum applicant—approaches to questioning, the questions themselves, or the officers' reliance on documents which are ultimately shared with the applicant or referenced in the officers' final decisions—they should not be deemed secret or a technique—rather, they are things that any applicant would be exposed to and learn about it, so cannot be deemed secret.

Second, Defendant's identification of the risk of circumvention is misplaced. Several of the withheld items—the county information sheets, the identification of a fraudulent fact pattern, and the fraud issues and trends—appear to describe a particular crime, not a law enforcement technique or guideline. That Defendant may have internally promulgated an incorrect definition of fraud that in turn leads to proper asylum applications being denied is precisely the issue underlying Plaintiff's FOIA requests. The law enforcement exemption may suffice to allow agencies to conceal those methods which allow it to identify perpetrators of established crimes, but it should not allow an agency to create its own, incorrect definition of an offense (here, fraud), conceal it, and enforce it. Because Defendant cannot demonstrate that its 7(E) redactions would, if revealed, create a risk of circumventing law enforcement, the redacted information should be disclosed.[17]

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's motion for summary judgment and 1) compel Defendant to produce denials and referral notices; 2) set a schedule for Defendant to make public past denials and referral notices; 3) compel Defendant to prospectively publish all final decisions; and 4) find that Defendant's redactions pursuant to Exemptions (5), (6), (7)(C), and (7)(E) are improper and the subject information must be disclosed.

[17] Pursuant to 7(E), Defendant also withholds "biographic information, entry information and any bars related to filing, the basis of the applicant's claim, the analysis of the applicant's claim, a summary of the applicant's testimony and relevant facts, and the Asylum Officer's recommendation or decision." [Vaughn Index p. 24-25].

Defendant suggests that if applicants were to learn how certain information is considered by asylum officers, there is a risk that applicants will conceal or alter information accordingly and thereby attempt to improperly obtain asylum. However, there is no suggestion here that an applicant would be able to dodge questions from an officer or otherwise alter the information the officer seeks. Merely knowing how an asylum officer might weigh evidence does not give an applicant the ability to falsify evidence; there is therefore little risk of circumvention if this information were revealed.

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2021, I electronically filed the foregoing using the CM/ECF system, which will send electronic notifications of such filing to all counsel of record.

Dated: December 17, 2021

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