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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Irvin Muchnick, an individual Plaintiff, vs. U.S. Department of Homeland Security, an agency of the United States Government Defendant	) Case No. 3:15 cv – 03060 CRB)))))) Date: October 21, 2016) Time: 10:00 am) Courtroom: 6, 17th Floor) Hon. Charles R. Breyer)

PLAINTIFF'S MEMORANDUM OF POINTS & AUTHORITIES IN OPPOSITION TO DEFENDANT'S "SUPPLEMENTAL" MOTION FOR SUMMARY JUDGMENT

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I. Introduction and Summary of Argument

Defendant has added some make-up and lipstick to its first *Vaughn* Index and document disclosures, but fatal deficiencies remain. After two swings and misses by Defendant, the Court is justified, based on *in camera* review, to order release of the now only 20 withheld documents in dispute, or of appropriately segregable content therefrom. Such an outcome would meet the immense and justified public curiosity, on two continents, of the American government's role in enabling the movements of former Irish Olympic swimming coach George Gibney, one of the most notorious and disgraced figures in all global sports. In no way would such disclosure abrogate legitimate privacy exemptions under the Freedom of Information Act.

To a large extent the analysis set forth in Plaintiff's Response to Defendant's first Motion for Summary Judgment is applicable to this renewed Motion. Thus, there is little to be gained from a repetition of the factual underpinnings and the broader as well as specific legal arguments set forth in Plaintiff's Response to Defendant's first Motion for Summary Judgment (Docket # 17), and the Court's Order dated February 24, 2016 denying Defendant's Motion. (Docket # 21). Virtually everything from Plaintiff's previous Memorandum still applies. This Memorandum will supplement Plaintiff's previous Memorandum primarily by pointing to Defendant's inadequate justifications for withholding information or entire documents in its Supplemental *Vaughn* Index. This Memorandum will also emphasize cases that help to explain by example how and why Defendant has failed to comply with the Court's Order dated 24, 2016 (Docket #21) such that summary judgment should again be denied, most importantly *Kowack v. U.S. Forest Services*, 766 F.3d 1130, 1137 (9th Cir. 2014) and *Wiener v. FBI*, 943 F.2d 972 (9th Cir. 1991).

Inexplicably Defendant is unable or unwilling to comply with the Court's reasonable demands, such that the Court at this point is justified in exercising its authority, based on its own

in camera review, to disclose all of the documents with the Court's own redaction of only the most obviously exempt portions that are subject to any of the three FOIA exemptions asserted by Defendant.

II. Balancing of Policies Is Required, but Not as Described by Defendant and Not with the Result Advocated by Defendant

A. FOIA Seeks to Open the Government to the Light of Public Scrutiny

As stated in Plaintiff's Response to the first Motion for Summary Judgment (Docket # 17), at its core this FOIA case presents the Court with the need to balance the classic countervailing policies concerning how much secrecy a government agency requires to perform its function properly and the privacy interests of an individual who is the subject of an agency inquiry, on the one hand, versus on the other hand a legitimate journalistic investigation into the operations of that agency. FOIA is designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *U.S. Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Fortunately, the statute, and the bountiful case law explaining the statute, provide the Court and the parties ample guidance, although the parties do not agree on whether or not Defendant has met its obligations. Plaintiff will demonstrate that Defendant has not met its obligations.

B. Defendant Refuses to Acknowledge the Line of Cases Not Requiring a Showing of Malfeasance, Only Exposure of Government Procedures that Are in the Public Interest

A part of the problem is that Defendant continues its refusal to acknowledge that there are two schools of thought on the issue of whether a FOIA requestor is obligated to demonstrate government malfeasance, or whether something less is sufficient. Plaintiff discussed this at page 13 of its previous Memorandum (Docket # 17) As illustrated by the lengthy quotation below from *Kowack v. U.S. Forest Service, 766 F.3d 1130, 1137 (9th Cir. 2014)* and the cases cited therein, one of Plaintiff's various goals in obtaining the documents and information that is the

subject of his FOIA request, as stated in his Complaint and in his earlier Memorandum (Docket # 17) at page 17, is to shed light on how the US Immigration Service permitted a person with a known criminal history to enter the United States. Should it have been prevented, and could it have been prevented? So, on one side there is this significant inquiry concerning the public interest of an isolated case as well as the implications about who generally is allowed into our country today and in the future, and on the other side, we have the purported privacy rights of a non-citizen whose sordid history has already been exposed in international media so who clearly has diminished privacy rights in these documents and in this information.

III. Issues to Be Decided :

1. Has Defendant met its burden to demonstrate that its Supplemental *Vaughn* Index and its supporting Declaration provide sufficient factual basis about the limited number of documents still pursued by Plaintiff as required under the precedent and accepted practice pursuant to each statutory exemption to permit Plaintiff or the Court to determine whether these specified documents have been justifiably withheld or appropriately redacted?
2. Has Defendant met its burden to provide sufficient factual basis for the Court to determine whether or not the subject documents contain segregable content that would allow Defendant to provide at least portions of the withheld documents in redacted form as to each exemption relied upon?
3. Is the Defendant entitled to have summary judgment granted in its favor?

IV. The Remaining Documents at Issue Categorized by Defendant's Asserted Statutory Exemption

Defendant has summarized in a chart on pages 4 and 5 of its Motion the twenty documents consisting of 43 pages identified in the Supplemental *Vaughn* Index (Docket # 30) that Plaintiff continues to pursue but which Defendant claims it cannot disclose for the reasons set forth in the Supplemental *Vaughn* Index.[1] It will be helpful to also categorize the documents based on which of the three exemptions Defendant contends should apply; some documents are withheld on more than one basis:

Exemption 6 (Individual's privacy):
Document Nos. 2, 8, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 33, 34, 35, 37, 40, 43, 50

Exemption 7(C) (Records compiled for law enforcement purposes with privacy concerns):
Document Nos. 20, 21, 23, 24, 25, 31, 50

Exemption 7(E) (Law enforcement techniques and procedures)
Document Nos. 20, 21, 22, 23, 24, 25, 26, 31, 50

V. Defendant Shuns the Guidance from the Court and the Cases Concerning the Explanations Expected of a *Vaughn* Index and for Determining What Is Segregable

A. Overview of Principles re: Burdens under FOIA and Summary Judgment

The government agency bears the burden to prove a particular document or redaction falls within one of the nine statutory exemptions from disclosure. *U.S. Department of State v. Ray,* 502 U.S. 164, 173 (1991). In FOIA cases, district courts can grant summary judgment based upon agency submissions, such as affidavits, but normally "the government must submit detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed

[1] It is noteworthy that despite not being provided adequate information about the documents, in a spirit of cooperation, and with little incentive from Defendant, Plaintiff has voluntarily winnowed down the total number of documents at issue.

exemption." *Lion Raisins v. U.S. Dep't of Agriculture*, 354 F.3d 1072, 1082 (9th Cir. 2004) (internal citation omitted). To meet its statutory burden, the government cannot "rely upon 'conclusory and generalized allegations of exemptions.'" *Church of Scientology of Cal. v. U.S. Dep't of Army*, 611 F.2d 738, 742 (9th Cir. 1980) (quoting *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir.1973) If the court concludes that the government has failed to sustain its burden to justify withholdings, the agency must disclose those records. *See Kowack v. U.S. Forest Serv.*, 766 F.3d 1130, 1137 (9th Cir. 2014); *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d, 681, 687-88 (9th Cir. 2012)

B. Providing Segregable Portions of Documents Is Mandatory Even If Documents May Be Withheld

Even if an exemption applies to a particular record, the agency must still disclose "[a]ny reasonably segregable portion of a record" after exempt material is redacted. 5 U.S.C. § 552(b). The government bears the burden of justifying any withholding of responsive information, and the district court reviews its decisions to withhold *de novo*. 5 U.S.C. § 552(a)(4)(B); *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir.1997). The *Vaughn* index "must be detailed enough for the district court to make a de novo assessment of the government's claim of exemption." *Hamdan v. U.S. Dep't of Justice,* 797 F.3d 759, 769 (9th Cir. 2015) (internal quotation marks omitted). For documents withheld in their entirety, "the requester needs a *Vaughn* index of considerable specificity." *Fiduccia v. U.S. Dep't of Justice*, 185 F.3d 1035, 1043 (9th Cir. 1999).

As to segregability, the agency is required to provide all "reasonably segregable" portions of the records to the requester. 5 U.S.C. § 552(b). "The burden is on the agency to establish that all reasonably segregable portions of a document have been segregated and disclosed." *Pac. Fisheries, Inc. v. United States*, 539 F.3d 1143, 148 (9th Cir. 2008). "To meet its burden in this regard, the agency must provide a detailed justification and not just conclusory statements."

ACLU of N. Cal. v. FBI, 2014 WL 4629110, at *3 (N.D. Cal. 2014) (internal quotation marks and citation omitted)

C. Defendant's Supplemental Vaughn Index Has Inadequate Descriptions

Defendant's *Vaughn* index fails to offer the specific, contextualized explanations for withholdings that FOIA requires. *See Hamdan, supra,* 797 F3d at 780.

This Section will discuss the three specific exemptions as applied to the documents and their corresponding entries in the *Vaughn* Index.

i) Exemption 6 – Individual's Privacy

Defendant's explanations related to documents withheld on grounds of privacy contain repetitive mantras consisting mostly of repetitive arguments instead of information tailored to each document that would give Plaintiff and the Court more than an inkling about the nature of the information that deserves to be withheld.

Defendant needed to be forthcoming with its descriptions if it expects Plaintiff to share its belief that it has met its burden. In similar circumstances, Chief Judge Kozinski recently wrote:

> … even personal information must be disclosed unless doing so is "clearly unwarranted," and this is true only when the individual's privacy interest outweighs the public interest. *See Yonemoto,* 686 F.3d at 694. The only public interest we consider is "the extent to which disclosure of the information sought would `she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know `what their government is up to.'" *U.S. Dep't of Defense v. Fed. Labor Relations Auth.,* 510 U.S. 487, 497, 114 S.Ct. 1006, 127 L.Ed.2d 325 (1994) (quoting *Reporters Comm. for Freedom of the Press,* 489 U.S. at 773, 109 S.Ct. 1468) (alteration in original).
>
> But the government hasn't provided enough information for us to make an independent determination whether it's necessary to withhold all details about the events the witnesses described in order to protect that interest. *See Yonemoto,* 686 F.3d at 694…. That's fine in theory, but the government hasn't told us anything about the type of incidents reported. It's entirely possible that the substance of the witness statements could be disclosed without revealing who made them. The government asks us to take its word for it. FOIA requires more.
>
> Nor do we have enough information to assess the public interest. The district court found that any public interest in the witness statements is "marginal" because they "shed light only on interpersonal and interoffice conflict." But the Turner declaration discloses that the misconduct investigation "focused on allegations of

> workplace violence, threatening remarks, and negative workplace culture." For all we know, the witness statements reveal that the Trapper Creek Center is run by dangerous bullies who shouldn't be allowed anywhere near disadvantaged youth. That kind of information would certainly "let citizens know `what their government is up to.'" *Fed. Labor Relations Auth.,* 510 U.S. at 497, 114 S.Ct. 1006 (quoting *Reporters Comm. for Freedom of the Press,* 489 U.S. at 773, 109 S.Ct. 1468). Without a more detailed description from the government, the only way we can determine the public interest is by looking at the documents ourselves.

Kowack, supra, at 1134

ii) The Purported Third Party Privacy Interests Are Outweighed by the Public Interest in this Situation Based on Facts Presented by Plaintiff and Applied to Exemptions 6 and 7(C)

"The privacy interests of third persons whose names appear in FBI files, the public interest in disclosure, and a proper balancing of the two, will vary depending upon the content of the information and the nature of the attending circumstances." *Wiener v. FBI*, 943 F.2d 972 (9th Cir. 1991)

Thus, whether disclosure would amount to a clearly unwarranted invasion of privacy is to be judged by a balancing test that weighs the public's right or interest in the information against the individual's privacy interests. *See Lepelletier v. FDIC*, 164 F.3d 37, 46 (D.C. Cir. 1999) It is well-accepted that courts hold that the only legitimate public interest in this balancing analysis is "the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *Id.* (quoting *United States Department of Defense v. FLRA*, 510 U.S. 487, 497, (1994)). As argued in Defendant's first and now renewed "Supplemental" Motion for Summary Judgment, some courts go further and hold that there must be some evidence of malfeasance or serious government impropriety before the court will impinge on an individual's privacy rights, such as the decision in *Mezerhane de Schnaap v. USCIS*, 67 F. Supp. 3d 95 (D.D.C. 2014). To its detriment, Defendant refuses to accept that this view is not shared by all courts as evidenced in many cases, including U.S. Supreme Court cases. This countervailing view, with Supreme Court

citations, was articulated by Chief Judge Kozinski in the above lengthy quotation from the *Kowack* opinion and also by Judge Berzon in a well-reasoned and well-supported dissent:

> As the majority correctly notes, only a disclosure that "would `she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know `what their government is up to,'" qualifies as a cognizable public interest under FOIA. *FLRA,* 510 U.S. at 497, 114 S.Ct. 1006 (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 773, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989)). But that does not mean, as the majority's analysis at some points suggests, that the plaintiff must have demonstrated that the government's behavior may have been *improper or inefficient.* "[P]ublic understanding of the operations or activities of the government," *Reporters Comm.,* 489 U.S. at 775, 109 S.Ct. 1468, includes not only exposure of government misfeasance, but also of governmental effectiveness and other aspects of internal agency functioning.

Prudential Locations v. U.S. Department of Housing and Urban Development, 739 F.3d 424, 440 (9th Cir. 2013), Judge Berzon dissenting

Indeed, the disclosure of information in an A-File, even the names in that file, must be determined on a case by case basis with a weighing of the particular privacy interests at stake: "we take our guidance from the Court's subsequent statement in *Ray* that 'whether disclosure of a list of names is a significant or a *de minimis* threat [to privacy] depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue.' *Union Leader v. U.S. Department of Homeland Security*, 749 F, 3d 45 (1st Cir. 2014) quoting from *Ray, supra,* 502 U.S. 164, 176 n. 12 (1991).[2]

iii) An Examination of Defendant's Supplemental *Vaughn* Index Entries Demonstrates that Defendant's Explanations Are Inadequate

In the instant case, Defendant can point to no harmful or significant consequences to any third party: the presumed subject, Gibney, is notorious already for his reported criminal and nefarious acts (see Exhibits A –E to the Muchnick Declaration submitted with Plaintiff's Response Memorandum to Defendant's First Motion for Summary Judgment, (Docket # 17). It is therefore difficult to perceive what harmful or significant consequences

[2] Defendant's Supplemental Motion also renews its argument that A-Files are entitled to an almost categorical exemption despite the Court's holding in its Order of February 24, 2016 Docket # 21) that they are not

would result from disclosing documents assembled or prepared by the government concerning Gibney so long as confidential details, such as birth date, phone numbers and the like, are excised, which can be easily accomplished.

An analysis of the identifying entries of those documents withheld by Defendant under Exemption 6 demonstrates that Defendant's *Vaughn* Index continues to be woefully inadequate. For example, for Document 2 on page 2 of the Supplemental *Vaughn* Index, Defendant uses contradictory reasoning: the information relates to "personal activities", so it cannot "reflect on government activities". This reasoning ignores the purpose of Plaintiff's investigation: was there any information that the agency was aware about Gibney's activities that should have alerted the agency that Gibney should not have been granted the right to take up residence in the US? Defendant is engaging in argument in the *Vaughn* Index rather than providing the necessary details of what is contained in the document that was redacted. This pattern continues with Document 8, where Defendant uses slightly different language, but again bases its refusal on the false premise that Plaintiff must first demonstrate "government impropriety", which is not necessarily the standard to be applied here, as expressed forthrightly above by Chief Judge Kozinski and Judge Berzon. Defendant has withheld so much information that it is impossible to determine anything meaningful about the content.

Going through the documents in the *Vaughn* Index for which Defendant hides behind Exemption 6 and Exemption 7(C), it is seen that the government recycles this type of circular reasoning with inappropriate arguments with "[n]o effort to tailor the explanation to the specific document withheld." *Wiener*, 943 F.2d at 978-79 (agency provided nearly identical description for withheld information). This is a fatal deficiency because "[s]pecificity is the defining requirement of the *Vaughn* index." *King v. U.S. Dep't of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987). In almost all cases, the only

specifics for a document withheld under this exemption is the document's title. Furthermore, many of these titles are comprised of terms that are not defined or that are incomprehensible to lay persons, such as "TECS electronic database printout" (Document 22 on page 53) and "IBIS Query results" (Document 24), or are vague "5 page record of results generated by electronic database" (Document 25) For many of these documents, Defendant merely regurgitates its argument about privacy, with no specific connection to the withheld information. Document 23 is a "background check"; presumably this is information that Defendant was itself able to find in public or private sources, we have no idea from which sources and the nature of the content. The fact is that Defendant found the information somewhere so it could not have been so "private". It is implausible that all of the information uncovered is so confidential that Defendant is mandated to prevent any disclosure about what is in the document to the extent that the Defendant did here. Along these lines, Document 37 is a "Police Certificate" related to Gibney. How could there be a need to protect the privacy of an Irish police person or bureaucrat that plausibly might have written about criminal files of an Irish national and sent the report based on a mere request from the subject individual? Document 40 is an "Offer of Employment". What privacy interest, and of whom, is being protected by this refusal to disclose the details of this employment offer? Moreover, the existence of an employment offer as part of an immigrant file or application is a strong clue that Gibney was admitted to this country under a special visa category, and examination of the USCIS standards in this connection fit precisely the definition of "pierc[ing] the veil of administrative secrecy" and "open[ing] agency action to the light of public scrutiny." Document 32 is an "administrative decision" related to a "third party" but inexplicably refuses to disclose which administrative agency and who is the mysterious "third party"? It is the government's burden to "disclose as much information as possible without thwarting the purpose of the exemption claimed." *Citizens Commission on Human Rights v. FDA*, 45 F.3d

1325, 1328 (9th Cir. 1995) (citing *King*, 830 F.2d at 224); *see also Wiener*, 943 F.2d at 979. The Court and Plaintiff should not have to guess at what is in the documents.

(iv) The Entries Describing the Section 7(E) Law Enforcement Exemption Are Also Inadequate

As noted above, Defendant has withheld or heavily redacted seven documents under the Section 7(E) exemption. For each of these documents, the entry in the *Vaughn* Index recites that the withheld information would "disclose techniques and procedures for law enforcement investigations or procedures, would disclose guidelines". For Documents 24, 25 and 26 Defendant makes the ridiculous claim that they contain information that will enable others to circumvent the immigration laws. If the information is so general that it would have such widespread applicability to so many potential immigrants, it defies logic that the information is so private and confidential, as also claimed by Defendant. Or that there is so much gold in those hills for potential malfeasors to use to their advantage from documents generated around the time that Gibney was granted entry into the United States, something on the order of twenty years ago. Clearly laws, practices and technologies have significantly changed since that time. Indeed, this gets to the crux of Plaintiff's inquiry: what practices and procedures were in place at that time that Gibney was able to gain entry? Coincidentally, it was noted in *Hamdan* at 775 that the subject procedures surrounding the journalistic investigation related to John Lennon pursuant to the FOIA request in the *Wiener* case were some twenty years old, which the Ninth Circuit found seriously diminished the claims that the disclosure of such techniques would be harmful to the government.

(v) Defendant's Eggleston Declaration Is Repetitive, Vague and Conclusory

Furthermore, the Eggleston Declaration does not adequately show how the disclosure of any portion of the withheld or heavily redacted documents would "expose `the [agency's]

decision-making process itself' to public scrutiny." *Nat'l Wildlife Fed'n v. U.S. Forest Service,* 861 F.2d 1114, 1118 (9th Cir.1988); *see also Kowack*, *supra*, at 1134.

The Eggleston Declaration, like the entries in the *Vaughn* Index, consists of conclusory statements about what has been included in the *Vaughn* Index but does not provide enough detail for a neutral observer to conclude that the factual portions of the documents are "so interwoven with the deliberative material that [they are] not [segregable]." *United States v. Fernandez,* 231 F.3d 1240, 1247 (9th Cir.2000). A stand-alone fact section, for example, could likely be disclosed without revealing the agency's deliberative process, while isolated facts embedded within a subordinate's explanation of why the allegations were meritless may not be. In slightly different terms describing this same construct, the Ninth Circuit recently held that for an analysis of Exemption 7(E), a distinction can be drawn between the specific "means" of using a well-known law enforcement technique, which can be withheld, and specific "applications" of the technique, which cannot. *Hamdan, supra,* 797 F.3d at 777-778

(vi) Exemption 7(E) Does Not Apply to Specific Applications of Specific Techniques

Accordingly, Exemption 7(E) does not cover documents describing specific applications of routine techniques. In *Rosenfeld v. U.S. Department of Justice*, 57 F. 3d 803, 815 (9th Cir. 1995) the Ninth Circuit upheld a district court's order compelling the government to release information about its use of pretext phone calls in investigations, over the government's objections. The Department of Justice had argued that although pretexting was a routine technique known to the public, the particular manner in which they used the pretext techniques (including the name used over the phone) was not generally known. The Ninth Circuit disagreed:

> If we were to follow such reasoning, the government could withhold information under Exemption 7(E) under any circumstances, no matter

> how obvious the investigative practice at issue, simply by saying that the 'investigative technique' at issue is not the practice but the application of the practice to the particular facts underlying that FOIA request.

Id.; *see also ACLU of N. Cal. v. U.S. Dep't of Justice*, 70 F.Supp.3d 1018, 1038-39 (N.D. Cal. 2014) (finding "the Government's assertion that the public is unaware of the specifics of how and when the techniques listed in [the documents] are employed is not enough to sustain a withholding under Exemption 7(E)"); *see also ACLU of N. Cal. v. FBI*, 2013 WL 3346845, at *9 (N.D. Cal. 2013) ("The Court finds that the FBI's assertion that the public is unaware of the specifics of how and when a technique is employed is not enough to sustain a withholding under Exemption 7(E).").

In the instant case, again, the procedures and techniques being withheld date back two decades and hardly appear to be of such value to potential immigrants, particularly in light of the substantially more restrictive immigration policies and procedures implemented in the wake of the events of September 11, 2001, which the Court may here take judicial notice of.

vii) The Rational Nexus Required Under Section 7(E)

In *Wiener v. F.B.I.*, 943 F.2d 972, 985 (9th Cir. 1991), the court held that the FBI had failed to establish a rational nexus between law enforcement and the at-issue documents because citation to "[t]he Civil Obedience Act and the Anti-Riot Act [which] are very broad criminal statutes, prohibiting a wide variety of conduct" "d[id] little to inform Wiener of the claimed law enforcement purpose underlying the investigation" and without "further details of the kinds of criminal activity of which John Lennon was allegedly suspected, Wiener cannot effectively argue that the claimed law enforcement purpose was in fact a pretext." *Id.* at 986; *see also Am. Civil Liberties Union of N. California v. Fed. Bureau of Investigation*, 2015 WL 1346680, at *4 (N.D. Cal. 2015) (concluding that the FBI failed to establish a rational nexus because its

pleadings did not "tether the activities the withheld documents concern to the enforcement of any particular law."); *Am. Civil Liberties Union v. Fed. Bureau of Investigation*, 2013 WL 3346845, at *6 (N.D. Cal. 2013) (concluding that the FBI failed to establish a rationale nexus where "the FBI refers only vaguely to 'crimes' and 'federal laws,' but does not cite the specific laws that it was enforcing.").

The same is true in the instant case. Defendant refers generally to "immigration laws", but, as in *Wiener*, such a vague reference does not adequately identify a law enforcement objective which justifies withholding under Exemption 7(E). For this reason alone, Defendant's motion for summary judgment as to Exemption 7(E) must be denied. *See Raimondo v. Federal Bureau of Investigation*, WL 2642038, * 6, (N.D. Cal. 2016)

In addition, a review of the *Vaughn* Index provides no specifics whatsoever to describe this information or why it can be properly withheld. The justification for the 7(E) redactions is repetitive text. Even if Plaintiff could guess at the meaning of the underlying information, conjecture does not allow the Court or Plaintiff to meaningfully evaluate whether the government has met its burden to justify these particular redactions. *See Wiener*, 943 F.2d at 978-79; *King*, 830 F.2d at 223-24. The purpose of the *Vaughn* index is to enable reasoned adversarial arguments in place of guesswork. *See Wiener*, 943 F.2d at 977-79. The Court's Order (Docket # 21) provided a clear example from *Wiener* of what is reasonable under the Ninth Circuit precedent and what the Court expects in terms of detail. Defendant has ignored the Court's guideline. As to Exemption 7(E), the *Vaughn* Index is fatally flawed in its lack of particularity to explain its withholdings.

Thus, the government's decision to supply an inadequate *Vaughn* index is not merely a procedural defect - it shows that the government has failed to carry its burden in justifying refusal to disclose and its heavy redactions. *See Kowack*, 766 F.3d at 1137

(finding agency's *Vaughn* index inadequate and noting that "if the government can't meet its burden, the district court must order the documents disclosed"). This failure is inexcusable since the government has only 20 total requested documents to justify its redactions or withholding, as the case may be, as part of its "Supplemental" Motion for Summary Judgement.

VI. Conclusion

Defendant's Supplemental Motion for Summary Judgment should be denied because Defendant's *Vaughn* Index and the Eggleston Declaration do not provide sufficient detail and explanation to justify Defendant's continued refusal to disclose the 20 withheld documents still in contention or those segregable portions of the documents. In light of Defendant's refusal, and with the guidance provided by the Ninth Circuit set forth in this Memorandum, the Court should review *in camera* the 20 documents in the Court's possession and disclose those documents and/or portions of those documents that Plaintiff is entitled to obtain and which do not run afoul of the three exemptions Defendant has asserted in its Motion.

Respectfully submitted,

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