

BEFORE THE POLICY AND LITIGATION BRANCH

U.S. CUSTOMS AND BORDER PROTECTION

ON APPEAL FROM THE FOIA DIVISION, OFFICE OF INTERNATIONAL TRADE,
U.S. CUSTOMS AND BORDER PROTECTION

APPELLANT AMERICANS FOR LIMITED GOVERNMENT'S FREEDOM OF
INFORMATION ACT APPEAL

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STATEMENT OF FACTS

Appellant, Americans for Limited Government, (Appellant) filed a request under the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* with U.S. Customs and Border Protection (CBP) on January 6, 2010. A copy of that FOIA request is attached as Appendix 1.

In its FOIA request Appellant sought production from CBP of specifically described federal records regarding a situation that occurred on January 5, 2010. On that date one Michael Yon was detained by CBP personnel at the Seattle Sea-Tac Airport.

In its FOIA request Appellant specifically requested records in six categories as follows:

Copies of any records that exist in any of the following categories:

1. Audio recordings of the incident described above;
2. Video recordings of the incident described above;
3. Communications occurring on January 5, 2010 from the officers involved in the incident described above to superior CBP officers regarding this incident;
4. Any field manuals, training guides, or other records as described further below that direct CBP officials to ask persons being screened about their income;
5. Any authority which directs CBP officials to arrest or otherwise detain persons who decline to state their income when requested by CBP officials;

and

6. List of questions that CBP expects persons being screened to answer in response to questioning by CBP officials.

Appellant received an initial response from CBP dated January 19, 2010 acknowledging receipt of the FOIA request.

Appellant received a "Final Response" dated March 1, 2010 wherein CBP applied a blanket denial of Appellant's FOIA request for all six categories referenced above. A copy of that Final Response is attached as Appendix 2.

Appellant hereby appeals the denial in the Final Response as that denial relates to points 4 through 6 of its FOIA Request. Appellant reserves the right to appeal at a later date the denial of points 1 through 3 of its FOIA Request.

SUMMARY OF THE ARGUMENT

The CBP's conclusory statements made in denying Appellant's FOIA request are wholly unsupported by reasoned analysis. No reasonable person would interpret Appellant's FOIA request as seeking records relating to whether a particular individual is or has been included any "government watch list." Additionally, the CBP inappropriately applied its regulation at 5 C.F.R. § 5.21(f) regarding the Privacy Act, 5 U.S.C. § 552a *et seq.*, in a blanket manner to records to which the Act clearly does not apply. Even if the Privacy Act applies to certain records sought by Appellant, those records not covered by the Act must be segregate and disclosed. Those records that are not covered by the Privacy Act should be released immediately.

ARGUMENT

I. CONTRARY TO CBP'S ANALYSIS, APPELLANT'S FOIA REQUEST DID NOT SEEK RECORDS TENDING TO INDICATE WHETHER A PARTICULAR INDIVIDUAL IS ON ANY "GOVERNMENT TERRORIST WATCH LIST"

Appellant's FOIA request sought records in the six categories detailed above. These six categories of relate to two types of records: 1.) records regarding an incident on one particular day (January 5, 2010); and 2.) records regarding standards for official behavior and standards of operation for such incidents.

The CBP's Final Response references FOIA Exemptions 2 and 7(e), 5 U.S.C. § 552(b)(2) and (b)(7)(e) stating that "CBP can neither confirm nor deny the existence of certain records which would tend to indicate whether a particular person is or ever was listed on any government terrorist watch list." The CBP then states that "this is a standard response to all FOIA requests for 'all records' on private individuals who have not authorized the release of records concerning themselves, in accordance with Title 6 C.F.R. § 5.21(f)."

Appellant did not request "all records" relating to an individual. Appellant requested records relating to one specific incident on one specific day and records relating to how CBP handles such incidents. At no point did Appellant request information relating to whether any individual is or ever has been included in any "government terrorist watch list." Further, no information sought by Appellant could reasonably lead to an indication that any individual is or has ever been on any "government terrorist watch list."

II. THE RECORDS SOUGHT BY APPELLANT IN POINTS 4-6 OF THE FOIA REQUEST ARE NOT "RECORD[S]" ABOUT AN "INDIVIDUAL" AND ARE THUS NOT COVERED BY THE PRIVACY ACT

The CBP's Final Response denied Appellant's FOIA request on the basis that the agency's regulations at 5 C.F.R. § 5.21(f) preclude release of records maintained on third parties without written consent of that third party because the records are covered by the Privacy Act.

In order for the third party written consent requirements found at 6 C.F.R. § 5.21(f) to apply to a FOIA request the "records" sought must relate to an "individual" as those terms are defined at 5 U.S.C. § 552a(a)(2) and (4). The Privacy Act defines these terms as follows:

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence. 5 U.S.C. § 552a(a)(2).

.....

(4) the term "**record**" means **any item, collection, or grouping of information about an individual** that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. (Emphasis added.) 5 U.S.C. § 552a(a)(4).

The records sought by Appellant in points 4 through 6 of its request are listed above and relate to agency records¹ in general that do not in any way relate to any individual. The agency records sought in these points relate to matters such as "manuals," "any authority," and "list of questions." Because the records sought by

¹ "Record" as defined in FOIA at 5 U.S.C. § 552(f)(2), not "record" as defined by the Privacy Act at 5 U.S.C. § 552a(a)(4).

Appellant in points 4 through 6 of its request do not relate to an “individual” the records do not fall under the Privacy Act.

As such the decision of CBP to deny Appellant’s FOIA request on points 4 through 6 based on the 6 C.F.R. § 5.21(f) was improper and contrary to law. Therefore this decision should be reversed.

III. EVEN IF CERTAIN RECORDS SOUGHT IN APPELLANT’S FOIA REQUEST ARE EXEMPT FROM DISCLOSURE THE CBP FAILED TO SEGREGATE THOSE RECORDS FROM OTHER NON-EXEMPT RECORDS AND TO DISCLOSE THE NON-EXEMPT RECORDS

As discussed above, the purported basis of CBP in withholding certain records due to an inappropriate application of the Privacy Act is contrary to law. Even if certain records were exempt from disclosure under FOIA or the Privacy Act those records that are non-exempt must be released pursuant to 5 U.S.C. § 552(b) which states in relevant part as follows:

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made. 5 U.S.C. § 552(b).

This statutory requirement was reinforced by a memorandum from U.S.

Attorney General Eric Holder on March 19, 2009 wherein he stated:

Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure. *The Freedom of Information Act (FOIA)*, Attorney General Memorandum for Heads of Executive Departments and Agencies, March 19, 2009.

The CBP has failed to segregate the records sought and has merely asserted a blanket denial. This is contrary to law as well as the policy set forth in the memorandum referenced above and should be reversed.

IV. THE CBP FAILED TO PROVIDE AN INDEX OF RECORDS WITHHELD DUE TO PURPORTED EXEMPTION

Even if certain records are exempt from disclosure under FOIA the CBP is still required to provide an index of those records that is sufficiently detailed for a reasonable person to be able to ascertain whether the record sought is actually exempt from disclosure. *Vaughn v. Rosen*, 282 F.2d 820 (D.C. Cir. 1973). The CBP did not provide an index of any type but merely asserted that all records sought are exempt from disclosure. While an index for records which are properly withheld pursuant to the Privacy Act is not required in all cases, see for instance *Antonelli v. FBI*, 721 F.2d 615 (7th Cir. 1983), as stated above the CBP inappropriately applied the Privacy Act to the

records sought.² As such the CBP should provide an index of all records sought by Appellant for which it has denied disclosure due to an exemption.

CONCLUSION

Based on the foregoing the Appellant respectfully urges the Policy and Litigation Branch to reverse the decision of the Office of International Trade.

Dated this 31st day of March, 2010.

Respectfully Submitted,

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² The U.S. Court of Appeals for the 7th Circuit stated in *Antonelli*: "The *Vaughn* court struck this balance when it said that the detailed agency analysis 'would not have to contain factual descriptions that if made public would compromise the secret nature of the information'." *Antonelli v. FBI*, 721 F.2d 615, 617 (7th Cir. 1983).