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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Unknown Parties, et al.,

Plaintiffs,

v.

Jeh Johnson, et al.,

Defendants.

No. CV-15-00250-TUC-DCB

ORDER

On June 27, 2016, the Court ruled in part on two motions to partially seal documents and briefs related to Plaintiffs’ Motion for Preliminary Injunction. The Court called for supplemental briefing on Defendants’ assertion that exhibits should be sealed or redacted for security and law enforcement reasons. That briefing has now been completed. Defendants withdraw several of their previously requested redactions of Declarations filed by Plaintiffs in support of the Motion for Preliminary Injunction. As for the remainder of exhibits, Defendants offer four security reasons to seal or partially redact them, which include that the exhibits: 1) deal with physical security of Border Patrol facilities; 2) deal with holding capacity of facilities; 3) concern Border Patrol’s e3DM¹ system, and 4) pertain to Border Patrol’s internal medical, booking, and detention, processing procedures and standards. Plaintiffs respond that the supplemental explanations remain too generalized to establish compelling reasons for sealing this

¹ Detention Module 3e.

1 information, apart from two: 1) Border Patrol blueprints/schematics (Ex. 117) and 2)
2 release of camera numbers and locations (Exs. 79, 80, and 88). Plaintiffs withdraw their
3 objection to sealing these documents. Below the Court considers the remainder of the
4 exhibits pursuant to each of the four asserted reasons for sealing or redacting them.

5 1. Physical Security of Border Patrol Facilities

6 First, Defendants argue that unsealing documents that deal with the physical
7 security of Border Patrol facilities, including building blueprints, construction
8 schematics, and security camera angles will compromise the operational security of the
9 facilities by providing criminal elements with critical information regarding optimal
10 means for exploiting potential site vulnerabilities which can be used to facilitate the
11 escape of detained individuals, to harm agents, or harm detainees who intend to cooperate
12 with law enforcement authorities, and to also reveal access to station armories and seized
13 contraband, rendering security and enforcement interests vulnerable to criminal elements
14 wishing to recover contraband or harm agents. The Defendants provide the Declaration
15 of George Allen, the Assistant Chief Patrol Agent, Tucson Sector, who oversees the
16 Prosecution Program, including asset forfeiture and seized property, and the Processing
17 and Transportation Programs.

18 Exhibit 6 is a picture of a janitor's closet, which includes a schematic drawing
19 posted on one of the walls. In the hard-copy picture the details in the schematic are
20 indiscernible but because these pictures will be filed electronically, the Court cannot say
21 that with computer software the schematic might be made clear-enough to actually
22 discern specific details regarding the layout of the Border Patrol facility. The Court finds
23 the redaction, which omits the schematic, is not of significant public concern to offset the
24 possible security risk. The Court approves the Defendants' proposed redaction of Exhibit
25 6.

26 Exhibit 17 is a picture of a toilet. The Court finds no compelling reason for
27 sealing this document.

28

1 Exhibit 48 is a picture of four thermostats on the wall, with part of a security panel
2 showing a security feed. The Court finds that there is no sensitive security information
3 revealed in the hard-copy picture because the picture's screens are so small that the
4 subject matter of the screens is obscured. But, the Court cannot say that with computer
5 software the security feed pictures might be enlarged and depending on what they reveal,
6 security might be compromised. The Court finds the redaction, to omit the security
7 screen, is not of significant public concern to offset the possibility of a security risk. The
8 Court approves the Defendants' proposed redaction of Exhibit 48.

9 Exhibit 81 is Appendix 8.10: Hold Rooms to the CBP Security, Policy, and
10 Procedures Handbook. A contraband copy has been posted online by a public right to
11 access advocacy group. The Court agrees with Valerie Lee-Lloyd's assessment that
12 disclosures in this Appendix of standards for wall and roof construction methods and for
13 security barrier placement and emergency power systems pose a security risk if criminal
14 elements sought to exploit physical vulnerabilities to stage a breakout or access a facility
15 to rob it of guns or contraband. (D's Supplemental Brief, Lee-Lloyd Decl. (Doc. 183-1)
16 ¶¶ 8-20). While this information is already in the public domain so the horse may already
17 be out of the barn, the Court does not intend to compound the problem by opening the
18 yard gate—it will not publish this information in its record, especially, since the
19 information is neither a public concern nor central to this case. Cell dimensions and other
20 relevant details which can be gleaned from exhibit 81 are readily available from other
21 exhibits. The Court will grant Defendants' motion to seal exhibit 81.

22 Exhibit 98 is “simply a set of instructions for how to view security camera
23 footage,” but the instructions reflect how many cameras are being used, where cameras
24 are mounted, and the breadth of their coverage. The Court finds the redactions of this
25 limited information is not of significant public concern to offset the security risk which
26 exists if criminal elements obtained information of where security dead-zones or
27 weaknesses might exist in the facility. The Court approves the Defendants' proposed
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1 redaction of Exhibit 98. The Court intends that declarations which reveal camera
2 numbers and locations also be redacted. *See* below Coles Decl.

3 Exhibits 147, 167, 170-72, 186-87 are pictures from security cameras, which are
4 primarily of the holding cells and a few are of storage rooms and interview rooms. The
5 Defendants assert that taken together they could reveal staffing patterns, dead-zones in
6 surveillance, and where guns and contraband are located in the facility. The Court does
7 not see how that is true, but in an abundance of caution the Court will allow Defendants
8 to redact the pictures of storage areas, hallways, etc., which are not holding areas and to
9 which detainees do not have access. The Court questions their relevancy; these pictures
10 are not central to the case or of a public concern. The Court will not order these
11 documents sealed, but will allow Defendants to redact the individual security pictures
12 from this footage that are not relevant to the issues which are central to this case.

13 Plaintiffs' Motion for Preliminary Injunction includes pictures of overcrowded
14 holding area which, as Plaintiffs argue, go to the heart of this case. Because the
15 Defendants fail to identify any compelling security reasons to redact these pictures, the
16 Court denies these redactions with the exception of the security footage on page 13 of the
17 Plaintiffs' Memorandum supporting the Motion for Preliminary Injunction. This picture,
18 which is a reproduction of document 170, discussed above, may be redacted accordingly.

19 Vail Declaration includes various paragraphs opining that the holding cells are
20 overcrowded. Defendants do not offer any compelling reason to redact the Vail
21 Declaration of these paragraphs. The Court finds none, and the Court notes that four of
22 the five proposed redactions are new (¶¶ 29, 33, 36, 46) —they were not even proposed
23 in the Defendants' Motion to Partially Seal the Plaintiffs' Motion for Preliminary
24 Injunction. The Vail Declaration goes to the heart of this case because it addresses the
25 public concern that detainees be treated humanely. The Court denies the redactions.

26 Coles Declaration includes numbers of cameras and camera locations. The Court
27 finds the redactions of this limited information is not of significant public concern to
28 offset the security risk which exists if criminal elements obtained information as to how

1 many security cameras exist at a station and where they are located in the event of a
2 criminal attack on a station. The Court approves the Defendants' proposed redaction to
3 the Coles Declaration.

4 2. Holding Capacity

5 Second, Defendants seek to redact holding capacity at the facilities because this
6 information would enable criminal elements to target and overwhelm specific Border
7 Patrol stations, thereby, impeding the Tucson Sector to carry out its enforcement and
8 protection responsibilities. The Court rejects this assertion outright, but it does not take it
9 lightly. "Chief Trindade explained the raw data, if analyzed, allows a person to identify
10 apprehension trends, showing what percentage of people Tucson Sector is apprehending
11 versus what the organization is sending. Furthermore, the raw data would also allow
12 people to predict staffing levels and coordinate an attempt to overwhelm the station's
13 capabilities, thus leaving other areas open for ongoing smuggling or other criminal
14 activity. Planned smuggling attempts in mass numbers may result once the threshold of
15 facilities capacity is reached." (Reply (Doc. 188) at 4 (quoting Supplement, Trindade
16 Decl. (Doc. 183-1) ¶ 10).

17 The Court has reviewed the "raw data" contained in Exhibits 83, 94, and 99,
18 which simply duplicates holding cell capacity numbers which Defendants currently post
19 at the doors of the holding cells. The information in these exhibits (holding cell capacity
20 numbers) are routinely seen by all detainees, with the exception of exhibit 83 which
21 includes instructions for how to obtain permission to exceed the cell limits. This
22 disclosure should dampen any enthusiasm by the criminal element to rely on the cell
23 limits contained in the exhibits as they can clearly be exceeded. Additionally, border
24 arrests and number of agents is data that is readily available to the public. *See*
25 www.cbp.gov/newsroom at Stats and Summaries. Defendants' own conduct is contrary
26 to their asserted security concern, and the capacity of the holding cells and alleged
27 overcrowding is at the heart of this case and is a public concern. The Court finds the
28 Defendants do not offer a compelling reason for sealing Exhibits 83, 94, 99 or for

1 redactions in the Declarations by Bristow,² Gaston, Vail, Goldenson, and Powitz, and the
2 Plaintiffs' Memorandum in Support of the Motion for Preliminary Injunction and
3 Defendants' Opposition.

4 3. Border Patrol's e3DM System

5 Third, the Defendants seek to seal and redact documents concerning Border
6 Patrol's e3DM system because unsealing these documents would enable hackers and
7 other criminal elements to exploit Border Patrol databases, computer systems, data
8 collection methods and categories to manipulate and/or delete, records which would
9 further trafficking, escape, and other criminal activities, and impede the Tucson Sector in
10 carrying out its law enforcement and protection responsibilities.

11 The Defendants provide the Declaration of Antonio J. Trindade, the Associate
12 Chief, Enforcement Division, U.S. Border Patrol, who is in charge of the Division
13 responsible for the e3 Processing Module and the e3 Detention Module. The Court notes
14 that the existence of the e3 Detention Module (e3DM) is not a secret. It is a data system
15 to "collect and transmit biographic, encounter, and biometric data for individuals
16 apprehended at the border for CBP's law enforcement and immigration mission." (Ds'
17 Supplement, Trindale Decl. ¶ 6.) The Court rejects assertions to seal or for redactions in
18 policy statements that speak only to generalized "capabilities and capacities of the e3DM
19 system." *Id.* ¶ 8. Likewise, the Court rejects the assertion to seal or redact what type of
20 information goes into the system. *Id.* The Court is, however, persuaded that there is a
21 security risk if information is disclosed that could be used by a hacker to access or
22 navigate the system or to manipulate or delete its data. Likewise, the Court is persuaded
23 to redact information related to how and where to locate an individual being held by
24 Border Patrol.

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28 ² This is the only reference in the Supplement Brief of a reason for the proposed
redactions related to the Defendant's Response to the Motion for Preliminary Injunction.
The Court will, therefore, deny the Motion to Partially Seal the Response to the Motion
for Preliminary Injunction and Exhibit 5, the Bristow Declaration.

1 Exhibits 96, 103, and 119 are index pages which define the various action codes,
2 like “LANG” for language service provided and other abbreviations like “SECTOR” for
3 Border Patrol Sector. The Defendants explain that knowing these codes would allow a
4 hacker to manipulate data contained in the e3DM system. The redactions in the Gaston
5 Declaration, however, reflect workflow actions that are discernable through common
6 sense: processing detainees reflects action events beginning with “Arrest;” “In BP
7 Station” for arriving in BP station; “In Transit”- if detainee is transported from one
8 station to another; “In BP station”—following any “In Transit;” followed by various in-
9 custody codes reflecting MLACC for “served meal, accepted,” MLREF for “served meal,
10 accepted”³ (sic); SHWRP for “shower provided.” The Court finds that neither these
11 codes nor the generalized workflow information contained in this paragraph poses a
12 security risk. They identify the services being provided to the detainees which are at
13 issue in this case. This is not the type of information which could be used to understand
14 law enforcement investigative techniques and procedures.

15 The Court, however, finds that knowing the comprehensive list of e3DM data
16 codes and definitions would assist a hacker in manipulating data contained in the e3DM
17 system. The Court finds this is a compelling reason to seal these documents especially
18 given that this evidence is not a public concern or central to the Plaintiffs’ case. Exhibits
19 96, 103, and 119 shall be sealed, but there shall be no redactions to the Gaston
20 Declaration. The information contained in Exhibit 96 which warrants sealing-- it is not
21 disclosed in paragraph 91 of Gaston’s Declaration.

22 4. Internal Processing Procedures

23 Fourth, Defendants seek to seal and redact documents involving internal medical,
24 booking, and detention, processing procedures and standards because knowing this
25 information would enable criminals to use fraudulent age, medical injuries, and other
26 process-related claims to exploit internal procedures to further criminal trafficking and
27 other criminal activities and to escape. Criminals could create fraudulent family units to

28 ³ The Court assumes this should be “served meal, refused.”

1 traffic kidnapped children; circumvent video monitoring; conceal contraband; falsify age
2 to avoid adult processing, and escape. This would jeopardize the safety of Border Patrol
3 personnel and detainees and allow criminals to target victims of human trafficking and
4 detainees with mental or physical abuse to ensure they are unable to assist law
5 enforcement authorities. The Court has reviewed both the Allen and Trindade
6 declarations.

7 Exhibit 82 is a series of policy memoranda to Command Staff regarding updated
8 use directives for the e3DM system. Neither declarant, Allen or Trindade, expressly
9 addresses this exhibit. Of its own accord, the Court has reviewed the April 28, 2015,
10 memo and finds that it tells staff that all custodial actions must be properly logged into
11 the system to ensure proper use of the system pursuant to the Self-Inspect Program,
12 Prison Rape Elimination Act and to provide accurate historical records of detainee care
13 and movement while in Border Patrol custody. Without explanation from Defendants,
14 the Court finds nothing here to suggest a security risk exists if this document is not
15 sealed. The Court concludes similarly regarding the October 8, 2013, memo, with the
16 exception of the in-house reference to the website for obtaining training materials. This
17 website reference might be of use to hackers and may be redacted. Otherwise, the Court
18 finds nothing in the memoranda that reveals details not commonly known regarding the
19 e3DM system.

20 Exhibit 84 is a procedural directive regarding medical responsibilities, which
21 Allen describes as containing specific information regarding how agents handle sick or
22 injured detainees which could compromise law enforcement because knowing this would
23 allow criminal elements to manipulate the processing system to delay their processing to
24 effectuate escape or prevent monitoring. The flaw with this reason is that the risk of
25 manipulation exists without the information contained in Exhibit 84. The Court assumes
26 that the criminal element knows that medical care will be rendered should they feign a
27 need for it. Therefore, the risk of manipulating the system likely exists through the
28 criminal elements' use of common sense.

1 The Court does, however, find other information that fits within the concerns for
2 hackers such as various internal login data system information. The Court is also
3 persuaded that special routing or isolation information for sick or pregnant detainees,
4 which includes identifying specific detention and medical facilities, would be helpful to a
5 criminal element seeking to facilitate an escape. The Court will allow redactions,
6 accordingly, of this information which is not central to the case nor is it a public concern,
7 as follows: USA000164 redact bullets 3, 6, 8, 10-12; USA000165 redact bullets 1-4, and
8 number 4; USA 000166 redact specified housing for pregnant detainees. The Court finds
9 that the policy and procedures for processing detainees with chiggers vs. scabies does not
10 need to be sealed or redacted.

11 The references to Exhibit 84 contained in the Goldenson declaration do not need
12 to be redacted because information contained in Exhibit 84 which warrants redaction is
13 not disclosed in paragraphs 30 and 41 of the declaration.

14 Exhibits 85 and 87 are memoranda to command staff to announce and transmit the
15 “2008 Hold Rooms and Short Term Custody” policy, and both include a copy of the 2008
16 policy. Neither memo contains any information which in any conceivable way could
17 pose a security risk.

18 As for the “2008 Hold Rooms and Short Term Custody” policy, the Government
19 has posted it in its Freedom of Information (FOI) Library in redacted form, which
20 includes redactions under the FOI exception to disclosures for techniques and procedures
21 for law enforcement investigations or prosecutions. 5 U.S.C. § 552b(c)(7)(E). The
22 parties were guided to some extent by the FOI exemptions, but it serves a different
23 purpose and exempt disclosures under the FOI are not automatically privileged in civil
24 discovery. (Motion to Partially Seal (Doc. 101) at 10); Objection (Doc. 109) at 10 (citing
25 *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1344 (D.C. Cir. 1984)).
26 The Court agrees with Defendants that the 2008 policy should be redacted as posted for
27 FOIA purposes, with the exception of the references in the policy to duration of detention
28 time which is information central to the question raised in this case. The Defendants fail,

1 however, to explain how knowing the specific length of the short term stay would aid the
2 criminal element in either escaping or manipulating law enforcement procedures.

3 Any document not expressly addressed by the Court contained in this Exhibit is
4 admissible as proposed by the Plaintiffs. The Court finds there is no compelling security
5 reason to redact this information which is central to this case and of a public concern.

6 Exhibit 87, “Encounters with Injured Subjects” is the policy for encounters with
7 injured subjects. The reason given for sealing the policy for encounters with injured
8 detainees is the same as the reason given for sealing the medical procedures and policy
9 information, Exhibit 84. However, the reasoning is more persuasive here because injured
10 detainees are likely to require more immediate emergency type care which could impede
11 the ability to make the initial identification of the detainee and initial determination as to
12 whether the detaining has a criminal record or in some other way poses a threat to the
13 United States. Thus the criminal element could take more advantage of the information
14 contained in this policy and procedure memorandum. The Court finds the “Encounters
15 with Injured Subjects” should be redacted of § § 2.1 through 2.3, and § 2.4 should be
16 redacted as proposed by the Plaintiffs.

17 Exhibit 86 is another memorandum to command staff regarding the use of the
18 updated, 2013, e3DM system. For the same reasons this Court found the other
19 memorandum did not need to be sealed, there is no compelling reason to seal this
20 memoranda. The Court, however, finds it should be redacted of its reference to the
21 Border Patrol’s secured internet training website.

22 Conclusion

23 Given the standard of review for a protective order, (Order (Doc. 164), the Court
24 only reviewed the reasons provided in the Defendants’ Supplemental Brief, properly
25 supported by affidavits. Burden, delay and expense are born of each side’s unnecessary
26 zeal. For example, Defendants argued to seal rather than redact exhibits and offered a
27 weak reason for nondisclosure of information on overcrowding which is clearly central to
28 the issues raised in this case and which addresses the public concern that detainees be

1 treated humanely in the United States. On the other hand, Plaintiffs appeared unwilling
2 to make redactions of information posing potential security risks to our country when that
3 information was not relevant to the issues central to the case and of public concern.
4 Given the voluminous exhibits accompanying the Plaintiffs Motion for Preliminary
5 Injunction, the Court will order the parties to meet and confer before making the filings
6 which are the subject of this Order. With the guiding principles in mind that the Court
7 has provided in this Order, the parties are invited to agree to any further redactions
8 which the Court may not have addressed expressly in this Order.

9 **Accordingly,**

10 **IT IS ORDERED** that the Motion to Partially Seal the Plaintiffs' Motion for
11 Preliminary Injunction (Doc. 101) is GRANTED IN PART AND DENIED IN PART and
12 the Motion to Partially Seal the Defendants Response to the Motion for a Preliminary
13 Injunction (Doc. 139) is DENIED.

14 **IT IS FURTHER ORDERED** that the Motion to Partially Seal the Plaintiffs'
15 Motion for Preliminary Injunction (Doc. 101) is GRANTED IN PART as follows:

16 Doc. 76: Plaintiffs' Motion for Preliminary Injunction at 13 redacted to coincide
17 with redactions to Exhibit 170;

18 Doc. 76-6: Coles Decl. redacted as requested by Defendants;

19 Doc. 77: Exhibit 6 schematic redacted;

20 Doc. 83: Exhibit 48 security panel redacted;

21 Doc. 86: Exhibits 79-80 sealed;

22 Doc. 87: Exhibit 81 sealed; Exhibit 82, October 8, 2013 Memo redacted for
23 reference to Border Patrol's internet training site; Exhibit 84, Medical Responsibilities
24 redacted at USA000164 bullets 3, 6, 8, 10-12, USA000165 bullets 1-4, and USA 000166
25 specified housing placement for pregnant detainees; Exhibit 85, 2008 Hold Rooms and
26 Short Term Custody Policy, as redacted for purposes of the FOI, except references to
27 duration of detention time limits shall not be redacted; Exhibit 86 redacted for reference
28 to Border Patrol internet training site; Exhibit 87, 2008 Hold Rooms and Short Term

1 Custody Policy, as redacted for purposes of the FOI, except references to duration of
2 detention time limits shall not be redacted, and Encounters with Injured Subjects redacted
3 at §§ 2.1-2.3 entirely and § 2.4 as redacted by Plaintiffs;

4 Doc. 88: Exhibits 88, 96, 98, and 103 sealed;

5 Doc. 91: Exhibits 117 and 119 sealed;

6 Doc. 92: Exhibits 147, 167, 170-171 redacted for pictures which show storage
7 areas, hallways, etc. that are not holding areas and to which detainees do not have access;

8 Doc. 93: Exhibits 172, 186-187 redacted the same as above.

9 **IT IS FURTHER ORDERED** that within 20 days of the filing date of this Order
10 the parties shall meet and confer regarding the redactions ordered by the Court, and if
11 possible, to agree to the appropriate redactions to Exhibits 147, 167, 170-172, and 186-
12 187.

13 **IT IS FURTHER ORDERED** that the Plaintiffs shall thereafter file the Redacted
14 Motion for Preliminary Injunction, with the declarations, including the redacted Coles
15 Declaration, and the Clerk of the Court shall reflect on the docket the *nunc pro tunc* filing
16 date of the original motion (Doc. 76).

17 **IT IS FURTHER ORDERED** that the Clerk of the Court shall file the following
18 lodged documents under seal: Documents 77, 83, 86, 87, 88, 91, 92, and 93. The exhibits
19 contained therein shall remain sealed only as follows: Exhibits 79-80, 81, 88, 96, 98, 103,
20 117, and 119.

21 **IT IS FURTHER ORDERED** that because the electronic filing system cannot
22 pick and choose between exhibits contained in one document the Plaintiffs must refile all
23 the redacted, un-redacted and unsealed exhibits contained in Docs. 77, 83, 86, 87, 88, 91,
24 92, and 93.

25 **IT IS FURTHER ORDERED** that the Clerk of the Court shall unseal Document
26 84.


27 **IT IS FURTHER ORDERED** that the remaining sealed lodged documents filed
28 by the parties shall remain lodged only.

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IT IS FURTHER ORDERED that the Motion to Partially Seal the Plaintiffs' Motion for Preliminary Injunction (Doc. 101) is DENIED IN ALL OTHER PARTS.

IT IS FURTHER ORDERED that the Defendants' Motion to Partially Seal Opposition to Motion for Preliminary Injunction (Doc. 139) is DENIED. The Clerk of the Court shall unseal Document 141.

Dated this 2nd day of August, 2016.



Honorable David C. Bury
United States District Judge