IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 04-0944 (RMU)**
	)	**ECF**
DEPARTMENT OF HOMELAND SECURITY,	)	
TRANSPORTATION SECURITY ADMINISTRATION,	)	
and	)	
U.S. DEPARTMENT OF JUSTICE,	)	
Defendants.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, Plaintiff respectfully opposes the motion for summary judgment filed by Defendants Department of Justice ("DOJ"), Transportation Security Administration ("TSA"), and Department of Homeland Security ("DHS") (TSA's parent agency). Plaintiff respectfully requests that the Court direct the FBI to conduct an adequate search for records responsive to Plaintiff's request. Plaintiff also asks the Court to conduct an *in camera* inspection to determine whether Defendants TSA and DHS properly applied exemptions to withhold information responsive to Plaintiff's requests.

BACKGROUND

In this action under the Freedom of Information Act ("FOIA"), Plaintiff seeks the release of agency records concerning the efforts of the United States government to obtain personal information about air passengers from commercial airlines in the aftermath of the September 11, 2001 terrorist attacks.

Aviation Security and Government Acquisition of Airline Passenger Data

Following the terrorist attacks of September 11, 2001, the President signed the Aviation and Transportation Security Act ("ATSA"), Pub. L. No. 107-71. The ATSA created TSA within the Department of Transportation and, *inter alia*, transferred to TSA the duties and responsibilities set forth in Chapter 449 of Title 49, United States Code, relating to civil aviation security. Those duties and responsibilities include "screening of all passengers." 49 U.S.C. § 44901 (2003).

On November 25, 2002, the President signed the Homeland Security Act ("HSA"), Pub. L. No. 107-296. The HSA created DHS and, *inter alia*, transferred the functions of TSA to DHS. 6 U.S.C. § 203 (2003). As part of its responsibilities relating to the screening of airline passengers, TSA engaged in the development of what it described as "the next generation of the Computer Assisted Passenger Prescreening System (CAPPS II)."[1] In a March 11, 2003 press release titled "TSA's CAPPS II Gives Equal Weight to Privacy, Security," TSA described CAPPS II as "an enhanced system to confirm the identities of passengers and to identify foreign terrorists or persons with

[1] Since this litigation was initiated, CAPPS II has been "modified" to create a new program known as Secure Flight. *See* Press Release, Transportation Security Administration, "'Secure Flight' to be Tested Before Year's End" (Aug. 26, 2004) *at* http://www.tsa.gov/public/display?theme=44&content=09000519800c6c77 (last visited Feb. 21, 2005).

terrorist connections before they can board U.S. aircraft." TSA's former administrator, Admiral James M. Loy, stated in the press release that TSA "will accomplish this without compromising the privacy and civil liberties enjoyed by every American," and that "[t]he privacy rights of all passengers will be honored." As TSA developed CAPPS II, controversy surrounded the agency's efforts to obtain detailed passenger data from airlines. The issue received a great deal of attention in the news media and in Congress.[2]

[2] CAPPS II was a subject of intense, continuous media interest across the country, and faced criticism from members of Congress as well as the press. *See*, *e.g.*, Byron Okada and Diane Smith, "Travelers Face New Screening at Airports," *Fort Worth Star Telegram*, Dec. 1, 2002, at 1; Leslie Miller, "Feds Testing Air Passengers Check System," *Associated Press*, Feb. 27, 2003; Joe Sharkey, "A Safer Sky or Welcome to Flight 1984?," *New York Times*, March 11, 2003, at C9; Press Release, Office of Senator Ron Wyden, "Wyden Wins Commerce Committee Approval to Require Oversight of CAPPS II Airline Passenger Screening System" (Mar. 13, 2003); Editorial, "Safe Skies," *Washington Post*, Mar. 21, 2003, at A12; Audrey Hudson, "Hill Assumes Oversight Role on Airline Screening," *Washington Times*, May 10, 2003, at A02; Margie Boule, "'No-Fly List' Problems May Multiply With New System," *The Oregonian*, June 19, 2003, at E01; Sara Kehaulani Goo, "TSA May Try to Force Airlines to Share Data," *Washington Post*, Sept. 27, 2003, at A11; Jeffrey Leib, "Passengers Will Have to Give More Info," *Denver Post*, Sept. 28, 2003, at A03; Alexandra Marks, "Passenger Tracking at Airports on Hold," *Christian Science Monitor*, Oct. 21, 2003, at 02; Sean Holstege, "Air Security Grounded: Government Struggles to Launch Screening System," *Oakland Tribune* (CA), Oct. 26, 2003; David Armstrong, "The Color of Safety," *San Francisco Chronicle*, Nov. 6, 2003, at B1; Shaun Waterman, "U.S., EU Reach Passenger Data Deal," *United Press International*, Dec. 16, 2003; Paul Marks, "Screening System Stirs Concerns of Misuse," *Hartford Courant*, Jan. 17, 2004, at A1; Jon Hilkevitch, "GAO Report Critical of Profiling System for Airline Safety," *Chicago Tribune*, Feb. 13, 2004, at C1; Press Release, Office of Senator Patrick Leahy, "Reaction of Senator Leahy to GAO's Report on Flaws in the CAPPS II Program" (Feb. 13, 2004); Anastasia Ustinova, "Airport Screen Plan Has Tough Day on the Hill," *Philadelphia Inquirer*, Mar. 18, 2004, at A10; Editorial, "Airport Screening System More Minus Than Plus," *Atlanta Journal Constitution*, Mar. 25, 2004, at 14A; Press Release, Senate Governmental Affairs Committee, Senators Collins, "Lieberman Ask TSA: What Other Airlines Have Been Contacted and Asked for Passenger Information?" (Apr. 14, 2004); Ricardo Alonso-Zaldivar, "Facing Privacy Questions About Privacy Issues, the Government Will Try to Redesign a Computer System to Identify Suspected Terrorists," *Los Angeles Times*, July 17, 2004, at A20; Editorial, "Protecting Privacy," *Baltimore Sun*, July 18, 2004, at 4C.

On September 18, 2003, Wired News reported that JetBlue Airways had in September 2002 "provided 5 million passenger itineraries to a defense contractor for proof-of-concept testing of a Pentagon project unrelated to airline security – with help from the Transportation Security Administration." Ryan Singel, "JetBlue Shared Passenger Data," *Wired News*, Sept. 18, 2003. The disclosure was widely reported by news media throughout the country.[3] It also prompted several class action lawsuits against JetBlue, as well as internal investigations by the DHS Privacy Office (the final report of which is attached hereto as Pl. Ex. 1) and Army Inspector General.[4] The DHS Privacy Office's final report on the JetBlue investigation, released on February 20, 2004, stated, *inter alia*:

> [Department of Transportation]/TSA officials agreed to assist the DOD-Torch project in obtaining the consent of an airline to share passenger data for the purposes of the Base Security Enhancement project. TSA officials contacted jetBlue Airways in New York, and began conversations with jetBlue regarding this project. As a result of these conversations, on July 30, 2002, a relatively new employee of TSA sent jetBlue a written request that jetBlue provide archived passenger data to the Department of Defense for the Base Security Enhancement Program. This request does not appear to have been approved or directed by senior DOT officials.

Id. at 5. The report also found that "TSA, while part of DOT and also while part of DHS, separately sought data from several airlines for the purpose of testing CAPPS II, and, that while initially several airlines expressed interest in sharing data, these offers were later rescinded. At this time, there is no evidence that CAPPS II testing has taken

[3] Indeed, a LEXIS-NEXIS news search for "JetBlue and 'passenger information' and 'Transportation Security Administration'" from September 20, 2003 to September 26, 2003 returns 97 articles from across the country. The search results are attached hereto as Pl. Ex. 2.

[4] The Army Inspector General's final report on the JetBlue investigation is available at http://www.epic.org/privacy/airtravel/army_ig_report.pdf (last visited Feb. 21, 2005).

place using passenger data." *Id*. at 8. The report concluded that no TSA employee had violated the Privacy Act by facilitating the transfer of passenger data. *Id*.

On January 18, 2004, the Washington Post published a front-page article based upon National Aeronautics and Space Administration ("NASA") documents obtained by Plaintiff under the FOIA. Sara Kehaulani Goo, "Northwest Gave U.S. Data on Passengers," *Washington Post*, Jan. 18, 2004. The *Post* reported that Northwest Airlines acknowledged that it had, as indicated in the agency documents, disclosed data concerning more than 10 million passengers to NASA. *Id*.

On April 9, 2004, AMR Corporation, the parent corporation of American Airlines, issued a press release stating that it had "recently learned that in June 2002, at the request of the Transportation Security Administration (TSA), some passenger travel data was turned over by an American Airlines vendor to four research companies vying for contracts with TSA." Press Release, AMR Corporation, "American Airlines Passenger Data Released in June 2002" (Apr. 9, 2004). The airline stated that "[t]he discovery came as American reviewed whether it had turned over such data to the TSA following the announcement of data releases by other carriers." *Id*.

On April 28, 2004, Plaintiff received a document from NASA in response to a FOIA request indicating that Northwest Airlines "gave the FBI one year's [passenger] data on 6000 CD's." *See* Plaintiff's FOIA request, FBI. Ex. A. The *New York Times* subsequently published a front-page article on the disclosure revealing that "in the days after the Sept. 11 terrorist attacks in 2001, the nation's largest airlines, including American, United and Northwest, turned over millions of passenger records to the Federal Bureau of Investigation." John Schwartz and Micheline Maynard, "Airlines Gave

F.B.I. Millions of Records on Travelers After 9/11," *NY Times*, May 1, 2004 (attached hereto as Pl. Ex. 3). An FBI official speaking on condition of anonymity told the newspaper the FBI had requested the information "under the bureau's general legal authority to investigate crimes and that the requests were accompanied by subpoena . . . as a 'course of business' to ensure that all proper procedures were followed." *Id*.

As these events unfolded, the Senate Committee on Governmental Affairs repeatedly expressed concern and questioned TSA officials about the privacy implications of CAPPS II, as well as the agency's role in passenger data disclosures and the possible use of such data to test CAPPS II.[5] In June 2004, in response to questions posed by the Committee, acting TSA Administrator Admiral David Stone acknowledged that as many as eight airlines and other businesses had given passenger data to companies vying for contracts with TSA to help develop passenger prescreening. (An excerpt of Admiral Stone's answers is attached hereto as Pl. Ex. 5.) Senator Joseph Lieberman, Ranking Member of the Committee, responded:

> [F]or the past six months, Chairman [Susan] Collins and I have been concerned that personal information about airline passengers may have

[5] *See, e.g.*, Press Release, Senate Governmental Affairs Committee, "DOD Privacy Protections Questions by Bipartisan Trio: Collection of JetBlue Passenger Information May Have Violated the Law" (Oct. 17, 2003); Press Release, Senate Governmental Affairs Committee, "Senators Call on TSA to Explain Its Role in Obtaining Sensitive Airline Passenger Information" (Feb. 13, 2004); Press Release, Senate Governmental Affairs Committee, "Senators Collins, Lieberman Comment on TSA's Involvement in Obtaining Sensitive Passenger Information" (Feb. 20, 2004); Press Release, Senate Governmental Affairs Committee, "DHS Responds to Sens. Collins, Lieberman Request to Explain TSA's Role in Obtaining Sensitive Airline Passenger Information" (Apr. 7, 2004); Press Release, Senate Governmental Affairs Committee, "Senators Collins, Lieberman Ask TSA: What Other Airlines Have Been Contacted and Asked for Passenger Information?" (Apr. 14, 2004); Press Release, Senate Governmental Affairs Committee, "Sensitive Passenger Data From at Least 8 Airlines and Reservation Services Provided to Companies Working for TSA" (June 23, 2004) (attached hereto as Pl. Ex. 4).

> been used by TSA and other agencies in violation of the Privacy Act. I am disturbed to learn of these new disclosures that suggest TSA may have violated the Privacy Act in the handling of passenger records from four additional airlines. It is essential that agencies comply with all applicable privacy laws to maintain public confidence in systems the government is developing to protect the nation.

Press Release, Senate Governmental Affairs Committee, "Sensitive Passenger Data From at Least 8 Airlines and Reservation Services Provided to Companies Working for TSA" (June 23, 2004) (attached hereto at Pl. Ex. 4). DHS states that its Privacy Office is currently investigating the circumstances surrounding these passenger data transfers. Withnell Decl. ¶ 55.

Plaintiff's First FOIA Request for Information Concerning the JetBlue Disclosure and Defendant TSA's Response

After learning of TSA's involvement in the disclosure of JetBlue passenger data for use in the Army project, Plaintiff wrote to Defendant TSA on September 22, 2003, and requested under the FOIA:

> a) any documents or materials relating to JetBlue Airways Corporation;
> b) any documents or materials relating to Acxiom Corporation;
> c) any documents or materials relating to Torch Concepts, Inc.; and
> d) any documents or materials relating to SRS Technologies [the primary contractor in the Defense Department project].

DHS Ex. A. Plaintiff requested that the processing of its FOIA request be expedited pursuant to 5 U.S.C. § 552(a)(6)(E), noting the public interest in Defendant TSA's possible use of passenger information to test CAPPS II. *Id*. By telephone and email communication on September 24, 2003, Defendant TSA and Plaintiff agreed that the request would be limited to records from "September 2002 to the present." DHS Ex. B. By letter dated September 30, 2003, Defendant TSA granted expedited processing of Plaintiff's request. DHS Ex. C.

By letter dated February 6, 2004, Defendant TSA issued an "interim response" to Plaintiff's request. DHS Ex. D. The response identified a 107-page document that has been withheld in full under 5 U.S.C. §§ 552(b)(3) and (b)(4). Defendant TSA advised Plaintiff of its right to file an administrative appeal of the determination. *Id*.

By letter dated February 10, 2004, Defendant TSA issued a "second interim response" to Plaintiff's request. DHS Ex. E. This response identified a two-page Security Directive that has been withheld in full under 5 U.S.C. § 552(b)(3); a 20-page draft briefing on reservation booking that has been withheld in full under §§ 552(b)(3) and (b)(5); and an eight-page draft LGB Pilot Test Program briefing that has been withheld in full under §§ 552(b)(3) and (b)(5). *Id*. Defendant TSA released in full three emails consisting of a total of six pages. *Id*.

By letter dated February 20, 2004, Defendant TSA issued a "third interim response" to Plaintiff's request. DHS Ex. F. This response noted that Defendant TSA was waiting for JetBlue Airways and Acxiom Corporation to "provide comments on the proprietary information." *Id*. Defendant TSA also released in full a 23-page presentation entitled "Homeland Security Airline Passenger Risk Assessment." *Id*.

By letter dated February 24, 2004, Plaintiff administratively appealed Defendant TSA's first two interim responses on the grounds that the agency had applied its stated exemptions too broadly, failed to segregate exempt material from non-exempt material, and had not conducted an adequate search for responsive material. DHS Ex. G. By letter dated April 26, 2004, Defendant TSA responded to Plaintiff's appeal. DHS Ex. H. The agency found that it had mistakenly identified a 79-page document entitled "Navitaire Information Management 9.0 User Guide, Fourth Addition" as 108 pages long in its first

interim response, and that Defendant TSA's decision to withhold this record under 5 U.S.C. § 552(b)(3) was in error. *Id*. However, Defendant TSA stated that it would continue to withhold the document under 5 U.S.C. § 552(b)(4). *Id*. Defendant TSA also asserted that neither the two-page Security Directive nor the draft LGB draft Pilot Test Program briefing identified in the second interim response was actually responsive to Plaintiff's request. *Id*. Defendant TSA further determined that it had mistakenly identified the 20-page draft briefing on reservation booking mentioned in the second interim response as exempt from disclosure under 5 U.S.C. § 552(b)(3), but stated that it would continue to withhold the document under 5 U.S.C. § 552(b)(5). *Id*. Defendant TSA claimed that none of the records contained any non-exempt material. *Id*.

Plaintiff 's Second FOIA Request for Information Concerning the JetBlue Disclosure and Defendant TSA's Response

On April 2, 2004, referencing the DHS Privacy Office's "Report to the Public on Events Surrounding jetBlue Data Transfer," Pl. Ex. 1, Plaintiff wrote to Defendant TSA and requested under the FOIA the following agency records from September 2001 to September 2002:

> a) any documents or materials relating to JetBlue Airways Corporation;
> b) any documents or materials relating to Acxiom Corporation;
> c) any documents or materials relating to Torch Concepts, Inc.; and
> d) any documents or materials relating to SRS Technologies [the primary contractor in the Defense Department project].

DHS Ex. I. Plaintiff requested that the processing of its FOIA request be expedited pursuant to 5 U.S.C. § 552(a)(6)(E), noting the public interest in Defendant TSA's possible use of passenger information to test CAPPS II. *Id*. By telephone and email communication on April 9, 2004, Defendant TSA and Plaintiff agreed that the request

would be limited to records involving, concerning, or relating to JetBlue passenger data. DHS Ex. J. By letter dated April 16, 2004, Defendant TSA acknowledged receipt and granted expedited processing of Plaintiff's request. DHS Ex. K. When Plaintiff initiated this lawsuit on June 9, 2004, no responsive documents had been disclosed by Defendants DHS or TSA.

Plaintiff's FOIA Request for Information Concerning the American Airlines Disclosure and Defendant TSA's Response

After learning that American Airlines had disclosed released passenger data to companies competing for TSA contracts, Plaintiff wrote to Defendant TSA on April 12, 2004, and requested under the FOIA the following records from September 2001 to the date of Plaintiff's request:

> a) any records concerning, involving, or related to American Airlines passenger data; and
> b) any records concerning, involving, or related to disclosures of passenger data by Airline Automation Inc.

DHS Ex. L. Plaintiff requested that the processing of its FOIA request be expedited, pursuant to 5 U.S.C. § 552(a)(6)(E), noting the public interest in Defendant TSA's possible use of passenger information to test CAPPS II. *Id*. By letter dated April 12, 2004, Defendant TSA acknowledged receipt of Plaintiff's FOIA request. DHS Ex. M. By letter dated April 15, 2004, Defendant TSA granted expedited processing of Plaintiff's request. DHS Ex. N. By letter dated May 19, 2004, Defendant TSA informed Plaintiff that Defendant DHS' Privacy Officer had requested that Plaintiff's request be forwarded to defendant DHS' FOIA Office for response. DHS Ex. O. When Plaintiff initiated this lawsuit on June 9, 2004, no responsive documents had been disclosed by Defendants DHS or TSA.

Plaintiff's FOIA Request for Information Concerning Disclosures of Airline Passenger Data to the FBI and the FBI's Response

Based on information obtained through a FOIA request to NASA, Plaintiff sent a letter on May 6, 2004, to the FBI requesting the following agency records:

> any records concerning, involving or related to the FBI's acquisition of passenger data from any airline since September 11, 2001. This request includes, but is not limited to, any records discussing the legal requirements governing Bureau access and use of air passenger data.

FBI Ex. A. Plaintiff requested that the processing of its FOIA request be expedited pursuant to 5 U.S.C. § 552(a)(6)(E) because the request pertained to a matter about which there was "an urgency to inform the public about an actual or alleged federal activity," and the request was made by "a person primarily engaged in disseminating information." *Id*.[6]

The FBI acknowledged receipt of Plaintiff's request by letter dated May 14. FBI Ex. C. The FBI denied Plaintiff's request for expedited processing by letter dated May 19, 2004. FBI Ex. D. Plaintiff initiated this lawsuit on June 9, 2004, and also filed a motion for preliminary injunction asking the Court to order the FBI to process and release the documents immediately. Before the Court could hear the matter, the FBI belatedly granted expedited processing of Plaintiff's request on June 21, 2004. FBI Ex. E.

[6] The same day Plaintiff submitted this FOIA request to the FBI, Plaintiff amended its request to state that it had submitted "*three* FOIA requests to the Transportation Security Administration seeking information about that agency's role in the collection and use of passenger information from various airlines. All three have been granted expedited processing." FBI Ex. B.

Defendants' Subsequent Responses

After Plaintiff initiated this lawsuit, the parties agreed upon a schedule whereby the agencies would release the non-exempt portions of the documents at issue. *See* Joint Status Report. Subsequent agency action was as follows:

FBI. On September 23, 2004, the FBI released to Plaintiff twelve pages of records containing redactions made pursuant to FOIA Exemptions 2, 6, 7(C) and 7(D). FBI Ex. G. Prior to Defendants' filing of their motion for summary judgment, Plaintiff agreed not to challenge the FBI's invocation of Exemption 2, 6, 7(C) and 7(D) to withhold information from the twelve pages.

DHS/TSA. On September 24, 2004, DHS released to Plaintiff certain documents from TSA and other records relevant to the Chief Privacy Officer's investigation of TSA's role in the JetBlue passenger data disclosure to the Army. DHS Exs. O, P. Some of these records were withheld in part or whole under Exemptions 3, 5, 6, and 7(C). DHS Ex. O. DHS stated in its response that publicly available material had been located during the search, and although DHS presumed Plaintiff did not want it, it could be released if Plaintiff indicated an interest in its disclosure. *Id*. Plaintiff did not indicate such interest and these records are not at issue in this case.

By letter dated October 20, 2004, DHS released additional records in response to Plaintiff's requests. DHS Ex. Q. DHS withheld records in part or whole under Exemptions 2, 3, 4, 5, and 6. *Id*. DHS again noted that publicly available material had been located in response to Plaintiff's request. *Id*. DHS presumed Plaintiff was not interested in such material, but said the records could be released if Plaintiff indicated an interest in their disclosure. *Id*. Plaintiff did not express such interest, and these materials

are not at issue in this case. On January 4, 2005, DHS released additional records to Plaintiff that had been overlooked during prior processing. DHS Ex. S.

Prior to Defendants' filing of their motion for summary judgment, Plaintiff agreed not to challenge the reasonableness of DHS and TSA's search or their Exemption 2 claims. Def. Ex. B (EPIC email II). EPIC also agreed to exclude from the scope of litigation 1.) material withheld under Exemption 3 to the extent that DHS could represent that the records are marked SSI and cites the statute that authorizes the material's withholding; 2.) materials withheld under Exemption 5 pursuant to the attorney-client privilege; and 3.) non-government employees' names, phone numbers, addresses, and email user names under Exemption 6 and 7(C). Def. Ex. A (EPIC email I).[7]

Additionally, based on Defendants' briefing, Plaintiff is willing to concede that DHS and TSA have properly asserted Exemption 4 and 7(A) withholdings. In conceding the 7(A) issue at this time, however, Plaintiff does not waive its right to request disclosure of the materials once Defendants' investigation into passenger data disclosures by American Airlines and other companies has concluded.

ARGUMENT

The Freedom of Information Act is intended to safeguard the American public's right to know "what their Government is up to." *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). The central purpose of the statute 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."

[7] Plaintiff also agreed to exclude from the litigation the "numerous drafts of the Chief Privacy Officer's JetBlue report" discussed in ¶ A of the Chief Privacy Officer's documents, and the releasable material referenced in ¶¶ AA, BB, and CC of the Chief Privacy Officer's documents. Def. Ex. A (EPIC email I).

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); *Maydak v. Dep't of Justice*, 218 F.3d 760, (D.C. Cir. 2000). "[D]isclosure, not secrecy, is the dominant objective of the [FOIA]." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The Supreme Court has stated that "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within [the] statutory purpose." *Reporters Committee*, 489 U.S. at 773.

The standard governing a grant of summary judgment in favor of an agency's claim that it has fully satisfied its obligations under the FOIA is well established. The agency "bears the burden of showing that there is no genuine issue of material fact, even when the underlying facts are viewed in the light most favorable to the requester." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1350 (D.C. Cir. 1983) (citation omitted); *see also Tax Analysts v. IRS*, 97 F. Supp. 2d 13, 14-15 (D.D.C. 2000), *aff'd in part, rev'd in part on other grounds*, 294 F.3d 71 (D.C. Cir. 2002). Summary judgment in favor of the defendant agencies here is inappropriate because they have failed to satisfy this burden.

I. The FBI Is Not Entitled to Summary Judgment Because Its Search Was Not Reasonably Calculated to Uncover All Documents Relevant to Plaintiff's Request

To meet its obligations under FOIA, the "defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the [FOIA's] inspection requirements." *Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982) (quoting *National Cable Television Ass'n v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973)). As part of its obligation to account for all responsive material, "the agency must show that it 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." *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (citations omitted).

The determination of a search's reasonableness "is dependent on the circumstances of each case." *Spannaus v. CIA*, 841 F. Supp. 14, 16 (D.D.C 1993) (citation omitted). To satisfy its burden, an agency "cannot limit its search to only one or more places if 'there are additional sources that are likely to turn up the information requested.'" *Valencia-Lucena v. U.S. Coast Guard*, 180 F. 3d 321, 326 (D.C. Cir. 1999) (quoting *Oglesby*, 920 F. 2d at 68; *Campbell v. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998)) (internal quotation marks omitted). Thus, "if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order." *Founding Church of Scientology v. Nat'l Security Agency*, 610 F.2d 824, 836 (D.C. Cir. 1979); *see also Weisberg v. Dep't of Justice*, 627 F.2d 365, 370 (D.C. Cir. 1980); *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990).

The adequacy of the FBI's identification and retrieval process is at issue in this case. In its FOIA request to the FBI, plaintiff sought "any records concerning, involving or related to the FBI's acquisition of passenger data from any airline since September 11, 2001. This request includes, but is not limited to, any records discussing the legal requirements governing Bureau access and use of air passenger data." FBI. Ex. A. The FBI's declaration confirms that several field offices took possession of and forwarded passenger data to FBI headquarters. Hardy Decl. ¶¶ 19-20.

The FBI acknowledges that one set of passenger data was disclosed by an airline pursuant to a federal grand jury subpoena. Hardy Decl. ¶¶ 23. Furthermore, a *New York Times* article published last year quotes an FBI official as confirming the FBI's requests

to airlines for passenger data "were accompanied by subpoena, not because the bureau expected resistance from the airlines, but as a 'course of business' to ensure that all proper procedures were followed." John Schwartz and Micheline Maynard, "Airlines Gave F.B.I. Millions of Records on Travelers After 9/11," *NY Times*, May 1, 2004. Significantly, no subpoena or documents related to the issuance of any subpoena have been identified as a result of the FBI's search. These facts make plain that documents responsive to Plaintiff's request were not uncovered by the agency's search. Such evidence calls into question the adequacy of the search, and proves that summary judgment in Defendant DOJ's favor is inappropriate on this issue.

Furthermore, testimony presented by airline executives to the 9/11 Commission raises questions about the likely existence of more material not identified by the Bureau. Andrew P. Studdert, Chief Operating Officer of United Airlines, told the Commission about the airline's cooperation with the FBI in the aftermath the terrorist attacks:

> We contact the local FBI. They respond immediately with a team who have been trained in the use of United's computer system and have practiced emergency response with United on several occasions. We set up facilities for Federal investigators from the FBI and other agencies in United World Headquarters outside Chicago and elsewhere, and begin gathering information and documents for those investigators. That effort continues for several weeks, and involves scores of United people and thousands of pages of United records.

Borders, Transportation, and Managing Risk: Seventh Public Hearing of the National Commission on Terrorist Attacks Upon the United States (Jan. 27, 2004) (statement of Andrew P. Studdert, COO, United Airlines). Likewise, Gerard P. Arpey, Chief Executive Officer of American Airlines, told the Commission about his airline's immediate response to the attacks:

> Our efforts in the Command Center [ ] focused on providing assistance to the FBI and other law enforcement officials who were investigating the attacks. We also worked closely with FAA and FBI officials to implement the new security procedures that were required to meet the new threats to our civil aviation system . . . . Our Command Center remained open 24 hours a day for the next two weeks, until September 24th. In addition to meeting the enormous challenges that we faced as we re-started our airline in the post-September 11th world, we continued to assist the FBI and FAA as they widened their investigation into the terrorist attacks.

Borders, Transportation, and Managing Risk: Seventh Public Hearing of the National Commission on Terrorist Attacks Upon the United States (Jan. 27, 2004) (statement of Gerald P. Arpey, CEO, American Airlines). However, no evidence of communications or cooperation between the FBI and airlines were identified by the search.

The FBI produced only twelve pages in response to Plaintiff's request, all of which are "metadata" summarizing Airline Data Sets. Hardy Decl. ¶ 26. Plaintiff's request was not so narrow, however, to cover only records relating to passenger data itself. Here, the record shows the existence of information concerning the FBI's issuance of subpoenas and extensive cooperation with airlines. The FBI's failure to locate such material despite compelling evidence that it exists shows the FBI's search for responsive records was inadequate. As such, summary judgment is inappropriate. The adequacy of the FBI's search cannot be fully assessed when, in the face of affirmative indications of overlooked responsive material, the record contains no reasonable explanation for that obvious failure. *See, e.g., Electronic Privacy Information Center v. FBI*, C.A. No. 00-1849 (JR) slip op. at 3 (D.D.C. March 25, 2002) (attached hereto as Pl. Ex. 6).

II. Defendants DHS and TSA Are Not Entitled to Summary Judgment Because They Have Failed to Show They Released All Material Not Exempt Under the FOIA

The record in this case clearly shows that Defendants DHS and TSA failed to show they properly invoked Exemptions 3, 5, 6, and 7(c) to withhold material from disclosure under the FOIA. Therefore, summary judgment in their favor is inappropriate.

A. Defendants DHS and TSA Have Not Met Their Burden of Proving They Properly Withheld Documents Under Exemption 3

Exemption 3 exempts from disclosure information that is "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as so to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). To determine whether material has been properly withheld under Exemption 3, a court must first determine whether a statute exists that is within the scope of the exemption and in effect at the time of the request. *Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1284 (D.C. Cir. 1983). Then the court must determine whether the statute encompasses the requested information. *Id.*

Defendants' Exemption 3 claims here are based upon 49 U.S.C. §§ 114(s) and 40119(b) and their implementing regulations.[8] *See* 69 Fed. Reg. 28066 (May 18, 2004).

[8] 49 U.S.C. § 114(s) requires the Under Secretary for Transportation Security to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act . . . if the Under Secretary decides that disclosing the information would (A) be an unwarranted invasion of personal privacy; (B) reveal a trade secret or privileged or confidential commercial or financial information; or (C) be detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(A)-(C) (2005).

Withnell Decl. ¶ 38. Plaintiff does not dispute here that these statutes and regulations fall within the scope of Exemption 3. The issue, then, is whether Defendants have sufficiently shown that all information withheld under Exemption 3 falls within the regulations adopted pursuant to 49 U.S.C. §§ 114(s) and 40119(b). The agencies bear the burden of showing the information "came within the meaning of the statutes." *Tax Analysts v. IRS*, 505 F.2d 350, 353 (D.C. Cir. 1974). "Mere labeling" by the government does not satisfy this burden. *Id*.

One district court recently determined after a preliminary *in camera* inspection that the FBI and TSA improperly withheld information concerning transportation watch lists under these very statutes and regulations when it "applied the exemptions broadly and without providing a detailed explanation of why the withheld material is exempt." *Gordon v. FBI*, 2004 U.S. Dist. LEXIS 10935, at * 3 (N.D. Cal. June 15, 2004). In that case, the court found the agencies had applied Exemption 3 broadly enough to withhold, *inter alia*, historical fact and "innocuous information." *Id.* at ** 5-7. The court ordered the agencies to review the information again, "keeping in mind that it is defendants' burden to prove that an exemption applies and that exemptions are to be construed narrowly." *Id.* at *13.

As in *Gordon*, Defendants here have failed to demonstrate that all records withheld pursuant to Exemption 3 actually fall within the regulations. For instance,

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49 U.S.C. § 40119(b) provides that the Secretary of Transportation must "prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title if the Secretary of Transportation decides disclosing the information would (A) be an unwarranted invasion of personal privacy; (B) reveal a trade secret or privileged or confidential commercial or financial information; or (C) be detrimental to transportation safety." 49 U.S.C. § 40119(b)(1)(A)-(C) (2005).

Defendants' *Vaughn* index withholds an email "about the status of CAPPS II" in full under Exemptions 3, 5 and 6. The agency has claimed Exemption 3 because "[c]ertain information in the message indicates on its face that it is sensitive security information[.]" This conclusory description is wholly inadequate to determine objectively whether the material at issue falls within the statutes and regulations Defendants claim to withhold it.

Furthermore, Plaintiff notes that ¶ LL of Defendants' *Vaughn* index claims Exemption 3 and 5 to protect a five-page document entitled "jetBlue Data Elements Request," which "appear[s] to reflect TSA thinking on the content of an airline screening protocol." DHS withholds these pages under Exemption 3 because they "constitute confidential commercial information." Curiously, the agency does not invoke Exemption 4 — which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential" — to exempt this information from disclosure. This omission calls into question whether this material truly falls with the scope of "confidential business information" under 69 Fed. Reg. 28083 (§ 1520.5 (b)(14)).[9]

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[9] "Confidential business information" is defined as:

> (i) solicited or unsolicited proposals received by DHS or DOT, and negotiations arising therefrom, to perform work pursuant to a grant, contract, cooperative agreement, or other transaction, but only to the extent that the subject matter of the proposal relates to aviation or maritime transportation security measures,
>
> (ii) Trade secret information, including information required or requested by regulation or Security Directive, obtained by DHS or DOT in carrying out aviation or maritime transportation security responsibilities; and
>
> (iii) Commercial or financial information, including information required or requested by regulation or Security Directive, obtained by DHS or DOT in carrying out aviation or maritime transportation security responsibilities, but only if the source of the information does not customarily disclose it to the public.

Defendants' sweeping application of Exemption 3 to material that appears to be factual also raises segregability issues, as explained more fully Part II.F *infra*. For these reasons, Plaintiff respectfully requests that this Court conduct an *in camera* inspection to determine whether Defendants DHS and TSA have improperly withheld information under Exemption 3 that should be released to Plaintiff.

B. Defendants DHS and TSA Have Not Met Their Burden of Proving They Properly Withheld Documents Under Exemption 5

TSA continues to withhold a substantial amount of material responsive to Plaintiff's request under FOIA Exemption 5, which permits the exemption of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Plaintiff has agreed to exclude from the scope of litigation material withheld under Exemption 5 pursuant to the attorney-client privilege. *See* Def. Ex. A (EPIC email I). Therefore, the only withholdings at issue are those made pursuant to the "deliberative process privilege," which protects inter-agency and intra-agency records that are both predecisional and deliberative. *EPA v. Mink*, 410 U.S. 73, 88 (1973); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-153 (1975); *Wolfe v. HHS,* 839 F.2d 768 (D.C. Cir. 1988).

As an initial matter, Plaintiff notes that DHS states that when it chose to withhold certain records under Exemption 5, it "was cognizant of the fact that plaintiff's avowed purpose in submitting its FOIA request was to demonstrate that JetBlue and other airlines were involved in providing PNR to TSA to test the [CAPPS II] system." Withnell Decl.

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69 Fed. Reg. at 28080 (May 18, 2004).

¶ 46. This is an improper consideration on which to base withholdings under the FOIA. Records, if not exempt, must be made "promptly available to *any* person." 5 U.S.C. § 552(a)(3) (emphasis added). *See Reporters Committee*, 489 U.S. at 794; *Nat'l Ass'n Retired Fed. Employees v. Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989). As the Supreme Court has repeatedly held, Congress "clearly intended" the FOIA "to give any member of the public as much right to disclosure as one with a special interest [in requested information]." *Sears, Roebuck & Co.*, 421 U.S. at 149; *see FBI* v. *Abramson*, 456 U.S. 615 (1982), *Reporters Committee*, 489 U.S. at 771; *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 221 (1978). The Court should review Defendants' withholdings with particular scrutiny in light of DHS' concession that the purpose Plaintiff could make of the records was a factor in DHS' decision to withhold information.

Even if documents are predecisional and deliberative when they are generated during an agency's decisionmaking process, they cannot always remain indefinitely subject to Exemption 5. "[E]ven if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." *Coastal States Gas Corp.* v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980); *Sears, Roebuck & Co.*, 421 U.S. at 158 n.25; *Evans v. Office of Personnel Mgmt.*, 276 F. Supp. 2d 34, 41 (D.D.C. 2003).

Defendants' *Vaughn* index suggests that some material withheld under the deliberative process privilege may have lost its Exemption 5 protection when the agency made the decision to discontinue CAPPS II's development. For instance, in ¶ Z of the *Vaughn* index, DHS explains that it has withheld information as deliberative because it

was "used to decide the feasibility of the proposed CAPPS II program." The agency also repeatedly asserts that CAPPS II was terminated and replaced with a new program. Def. *Vaughn* index ¶¶ U, TT, CC, DD, SS, VV. To the extent that Defendants have withheld material under Exemption 5 that was the basis of the final decision to terminate the program, this material is clearly not exempt from disclosure.

In addition, ¶¶ O, P, Q, R, V, Y, Z describing the Chief Privacy Officer's documents all state that handwritten notes have been withheld pursuant to Exemption 5. In some cases these notes have apparently been withheld merely because they are handwritten, with little consideration paid to whether the substance of the notes qualifies for the deliberative process privilege.[10] One court has expressly rejected an agency's withholding of "handwritten comments in the margins of a document . . . almost exclusively devoted to clarifying the facts underlying [an] internal investigation" because they were "patently not 'opinions' or 'recommendations.'" *Azon v. Long Island Railroad*, 2001 U.S. Dist. LEXIS 22154, at *5 (S.D.N.Y. Nov. 16, 2001). Therefore, the fact that information is handwritten does not alone make it deliberative and predecisional. Defendants' cursory explanations for withholding handwritten notes are inadequate to support summary judgment in their favor.

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[10] *See, e.g.,* ¶O ("Two pages of handwritten notes reflecting information provided to the Chief Privacy Officer as part of her investigation"); ¶ P ("The second [memorandum] contains margin notes from the Chief Privacy Officer that reflect information she was considering as part of her investigation"); ¶¶ Q (withholding handwritten notes about "tasks to accomplish in order to complete the investigation" and the Chief Privacy Officer's "understanding of events"), R (withholding handwritten notes reflecting "the chain of events as [the Chief Privacy Officer] understood them at the time"); ¶ V ("three pages of handwritten notes from the Chief Privacy Officer that reveal information she obtained from various interviews"); ¶ Y ("three pages of handwritten notes and a one-page summary of background materials . . . pertaining to this aspect ["Congressional Inquiries"] of the Chief Privacy Officer's investigation"); ¶ Z ("four pages of handwritten notes the Chief Privacy Officer made prior to composing her final report").

Further, several paragraphs of Defendants' *Vaughn* index explain that information has been withheld without actually citing the provision of the FOIA that is the basis for the withholding. *See* Chief Privacy Officer Documents ¶¶ EE, GG, HH, and II. While Plaintiff surmises that the basis for these withholdings may be Exemption 5, this lack of specificity underscores the need for *in camera* review to determine whether these documents have been properly withheld. *See* Part II.F *infra*.

Finally, Plaintiff notes that Defendants' *Vaughn* index and declaration indicate that Defendants failed to properly segregate factual material from properly exempted deliberative material, as more fully explained below in Part II.E.

C. Defendants Have Improperly Withheld Information Under Exemptions 6

Exemption 6 excludes from FOIA requests "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 6 applies broadly to "Government records on an individual which can be identified as applying to that individual." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982) (internal quotations omitted). According to the Supreme Court, "the text of the exemption requires the Court to balance the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny." *Dep't of State v. Ray*, 502 U.S. 164, 175 (1991) (quoting *Rose*, 425 U.S. at 372). Where no public interest exists, a court "need not linger over the balance; something, even a modest privacy interest, outweighs nothing every time." *Horner*, 879 F.2d at 879. Conversely, the scale tips toward disclosure any time a "de minimis" privacy interest competes with a more substantial public interest. *See Nat'l Ass'n of Homebuilders v. Norton*, 309 F.3d 26, 33 (D.C. Cir. 2002); *Landmark Legal Found. v.*

IRS, 87 F. Supp. 2d 21, 27-28 (D.D.C. 2001).

Plaintiff reiterates that it is not interested in personally identifiable information about non-government employees. *See* Def. Ex. A (EPIC email I). Plaintiff also does not challenge Defendants' withholding of telephone numbers, addresses, and email user names of government employees. What remains at issue is Defendants' withholding of certain government employees' names, names of agencies and businesses, and domain names (which disclose only where an email came from).

First, it is important in this case to distinguish clearly between Exemptions 6 and 7(C), discussed more fully II.D *supra*. Exemption 6 applies where disclosure "*would* constitute a *clearly unwarranted invasion* of personal privacy," while Exemption 7(C) prohibits disclosure where it "*could reasonably be expected to constitute an unwarranted invasion* of personal privacy." 5 U.S.C. § 552(b)(6) & (b)(7)(C) (emphasis added). Therefore, where a requester seeks an individual's identity in personnel, medical, or similar files, the threshold for disclosure is lower than when a requester seeks similar information in law enforcement records under Exemption 7(C). *See Reporters Committee,* 489 U.S. at 756. Throughout an Exemption 6 analysis, the burden is on the government to justify any withholdings because "under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere under the Act." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d at 32 (quoting *Washington Post Co. v. Dep't of Health and Human Servs*., 690 F.2d 252, 261 (D.C. Cir. 1982) *rev'd on other grounds*, 795 F.2d 205 (D.C. Cir. 1986)). *See also Ripskis v. Dep't of Housing and Urban Development*, 746 F.2d 8, 3 (D.C. Cir. 1984) ("The 'clearly unwarranted' language of Exemption 6 weighs the scales in favor of disclosure.").

In this case, DHS and TSA substantially rely upon 7(C) case law to argue for the application of Exemption 6 to the names of TSA employees involved in CAPPS II development.[11] DHS and TSA speculate that "[a]ssociation with the CAPPS II program itself could result in TSA employees being harassed by certain individuals or groups merely because of this link to what turned out to be an unpopular program." Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment ("Def. Memo") at 28. This remote possibility provides, at best, an extremely weak privacy interest under Exemption 6 case law.

As an initial matter, federal employees have a very minimal privacy interest in the mere fact that they work for the government. The negligible nature of this privacy interest is underscored by the Office of Personnel Management's obligation to make public the names, occupations, salaries, and work places of most federal employees. 5 C.F.R. § 293.311. Clearly, the fact that an individual carries out official duties in the course of government employment raises an insubstantial privacy interest under Exemption 6.

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[11] Three cases are cited by Defendants to support the proposition that "it is well-established that 'government officials have a legitimate interest in preserving the secrecy of matters that conceivably could subject them to annoyance or harassment in either their official or private lives.'" Def. Memo at 28; *see Baez v. Dep't of Justice*, 647 F.2d 1328, 1339 (D.C. Cir. 1980); *Lesar v. Dep't of Justice*, 636 F.2d 472, 487 (D.C. Cir. 1992). *Hunt v. FBI*, 972 F.2d 286, 288 (9th Cir. 1992). Defendants fail to mention, however, that the courts in those cases found this interest compelling in the more privacy-protective context of Exemption 7(C) — *not* Exemption 6. Furthermore, the D.C. Circuit specifically warned in *Baez* and *Lesar* that it was not authorizing a "blanket exemption" for the names of all FBI employees in all records, noting the importance and individualized nature of the balancing test. *Baez,* 647 F.2d at 1338; *Lesar,* 636 F.2d at 487. In fact, the D.C. Circuit stated in *Baez* that under a 7(C) analysis, "[w]e think that the public interest might be served by the release of the names of particular agents in instances, for example, in which the agent is called upon to testify concerning his activities, or in which the performance of a particular agent otherwise is called into question." *Baez*, 647 F.2d at 1339.

Furthermore, Defendant's speculative claim that TSA employees could conceivably experience harassment due to their association with CAPPS II contributes very little to their privacy interest in an Exemption 6 analysis. The Supreme Court has found that Exemption 6 is "directed at threats more palpable than mere possibilities." *Rose*, 425 U.S. at 370 n.19. As DHS and TSA repeatedly assert, CAPPS II is no longer being developed. It is extremely unlikely that employees of these or any other agencies will suffer any harassment by being linked to a program that is no longer viable and that the government abandoned months ago.

Additionally, Defendants' attempt to conceal the names of agencies and businesses with which TSA worked, as well as domain names in email addresses — which would reveal only the entity from which a message came — is unavailing. Exemption 6 protects against privacy violations "when the documents disclose information attributable to an *individual*." *Arieff*, 712 F.2d at 1468 (emphasis added). It is clearly established that "corporations, businesses and partnerships have no privacy interest whatsoever under Exemption 6." *Washington Post v. Dep't of Agriculture*, 94 F. Supp. 31, 37 n.6 (D.D.C. 1996), *see also National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d. 673, 686 n.44 (D.C. Cir. 1976); *Stern v. Small Business Administration*, 516 F. Supp. 145, 149 (D.D.C. 1980) ("information connected with professional relationships does not qualify for the exemption").

On the other side of the balancing test, the public interest in oversight of government conduct is a clear and compelling one that has been long recognized by the D.C. Circuit. *Arieff,* 712 F.2d at 1468 (quoting *Ditlow v. Schultz*, 517 F.2d 166, 172 & n.24 (D.C. Cir. 1975)) ("Providing information 'material for monitoring the

Government's activities' is the 'core purpose' of the FOIA."); *Washington Post v. Dep't of Health and Human Servs.*, 690 F.2d at 264 ("The purpose of FOIA is to permit the public to decide for *itself* whether government action is proper.") (emphasis in original); *see also Nat'l Ass'n of Atomic Veterans v. Defense Nuclear Agency*, 583 F. Supp. 1483, 1487 (D.D.C. 1984).

The public interest in disclosure of the information Plaintiff seeks here is undeniable. CAPPS II's development and the JetBlue passenger data transfer have both been subjects of substantial interest to the media. *See supra* notes 2-3. Members of Congress have also demonstrated strong and ongoing interest in the privacy implications of both CAPPS II and the extent of the government's involvement in passenger data transfers. *See supra* note 4; *see also* Def. *Vaughn* index Chief Privacy Officer Documents ¶ X. The JetBlue passenger data transfer alone sparked internal investigations by the DHS Privacy Office and Army Inspector General to determine whether agency employees had violated the Privacy Act. Pl. Ex. 1, *supra* note 4. The public has an interest in knowing the extent of TSA's involvement in the JetBlue passenger data transfer, including which agency official asked JetBlue to turn over data to the Army, what position he or she held, how substantially this person was involved in developing CAPPS II, and what other agency employees were involved in this incident.

Furthermore, TSA's ongoing development of passenger prescreening initiatives, even if not 'CAPPS II" in name, continues to be a matter of public concern. The reasons why CAPPS II was determined to be infeasible are important for the public to know as the program's replacement is developed, tested and implemented. *Id*. ¶ __.

The information requested by Plaintiff, if released, would unquestionably

"contribute significantly to public understanding of the operations or activities of the government," *Reporters Committee,* 489 U.S. at 772-73, because it would reveal how employees of Defendants DHS and TSA worked with airlines to develop CAPPS II, and their involvement in the transfer of passenger data from JetBlue to the Army. *Id*. ¶ __. These interests clearly outweigh the minimal privacy interest federal employees have in the fact they worked for the Transportation Security Administration to develop CAPPS II. As such, it is clear that Defendants have improperly withheld information from Plaintiff under Exemption 6.

D. Defendants Have Improperly Withheld Information Under Exemptions 7(C)

Most personally identifying information in documents collected for the Chief Privacy Officer's JetBlue investigation has been withheld under Exemption 7(C) in addition to Exemption 6.[12] Exemption 7(C) exempts from disclosure records "compiled for law enforcement purposes, but only to the extent that the production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) (emphasis added). Like Exemption 6, Exemption 7(C) employs a balancing test to examine the nature of the requested document and whether its disclosure serves the purpose of the FOIA, which is "to open agency action to the light of public scrutiny." *Rose*, 425 U.S. at 372; *Reporters Committee*, 489 U.S. at 772. Exemption 7(C) is intended to protect "the strong interest of individuals, whether they be suspects, witnesses or investigators, in not being associated unwarrantedly with alleged criminal activity." *Dunkelberger v. Dep't of Justice*, 906 F.2d 779, 781 (D.C. Cir. 1990) (quoting

[12] *See* Def. *Vaughn* index Chief Privacy Officer Documents ¶¶ A, B, C, J, K, L, M, N, S, U, W, Y, Z, and DD.

Stern v. FBI, 737 F.2d 84, 91-92 (D.C. Cir. 1984) (internal quotation marks omitted).

Plaintiff does not dispute that names, email user names, addresses, and telephone numbers in documents collected for the DHS Privacy Office's JetBlue investigation are generally the type of information that may fall within the scope of Exemption 7(C). However, for many of the same reasons described *supra* in Part II.C, Defendants have improperly invoked Exemption 7(C) to withhold the names of businesses, agencies and domain names revealing entities involved in the JetBlue data transfer.

EPIC acknowledges that an individual has a stronger interest in shielding personally identifiable information under Exemption 7(C) than Exemption 6. However, information that would reveal only an organizational affiliation—without divulging so much as the names of individuals affiliated with the entity — is not the type of information intended to be protected under Exemption 7(C). Case law construing the exemption specifically holds that "information relating to business judgments and relationships does not qualify" for 7(C) protection, "even if disclosure might tarnish someone's professional reputation." *McCutchen v. Dep't of Health and Human Servs.*, 30 F.2d 183, 187 (D.C. Cir. 1994); *Washington Post Co. v. Dep't of Justice*, 863 F.2d 96 (D.C. Cir. 1988); *see also Cohen v. EPA*, 575 F. Supp. 425, 429 (D.D.C. 1983) ("[Exemption 7(C)] does not apply to information regarding professional or business activities.") Even if such information were to qualify for Exemption 7(C) protection, such entities have a *de minimis* privacy interest in their association with the CAPPS II program, particularly when this program is no longer being developed.

Even if the names of businesses, agencies, and domain names could be subject to Exemption 7(C) protection, the public interest in disclosure of such information is just as

strong here as in the Exemption 6 balancing test. Again, Plaintiff seeks information from Defendants DHS and TSA reflecting which businesses and agencies were involved in transferring JetBlue passenger data to the government and developing CAPPS II. Both the development of CAPPS II and the circumstances surrounding the JetBlue passenger data transfer have been subjects of substantial interest to the media, *see supra* notes 2-3, members of Congress, *see supra* note 4; *see also* Def. *Vaughn* index Chief Privacy Officer Documents ¶ X. Both DHS and the Army conducted internal investigations to determine whether agency employees involved in the JetBlue data transfer violated federal privacy law. Pl. Ex. 1, *supra* note 4.

Information Defendants continue to withhold under 7(C) will shed light on how Defendants DHS and TSA worked with airlines to develop CAPPS II, and the involvement of those companies in the transfer of passenger data from JetBlue to the Army. This public interest unquestionably outweighs any minimal "privacy interest" businesses and agencies could possibly have in the fact they were associated with CAPPS II or the JetBlue data transfer.

E. Defendants Have Failed to Demonstrate Compliance With the Segregability Requirements of the FOIA

The FOIA explicitly requires that "[a]ny reasonably segregable potion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt[.]" 5 U.S.C. § 552(b). Even where a document is legitimately exempt from disclosure, an agency still is obligated to "describe the factual content of the documents and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents." *Mead Data Cent. v. Dep't of the Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977).

An agency's obligation to segregate factual information from exempt material is fully applicable to Exemption 3 withholdings. *Irons v. Gottschalk*, 548 F.2d 992, 995-996 (D.C. Cir. 1976). As discussed in Part II.A *supra*, Defendants have invoked Exemption 3 to justify broad, conclusory withholdings. Plaintiff does not dispute that some of the material Defendants have exempted from disclosure are likely to be legitimately withheld under Exemption 3. However, there is no evidence in the record that Defendants made any attempt to segregate non-exempt information from material legitimately falling within the scope of the statutes and regulations that are the basis for Defendants' Exemption 3 claims.

Furthermore, The D.C. Circuit has specifically determined that Exemption 5:

> applies only to the deliberative portion of a document and not to any purely factual, non-exempt information the document contains. Non-exempt information must be disclosed if it is "reasonably segregable" from exempt portions of the record, and the agency bears the burden of showing that no such segregable information exists.

Army Times Pub. Co. v. Dep't of the Air Force, 998 F.2d 1067, 1071 (D.C. Cir. 1993) (internal citations omitted); *Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980) (holding that an agency must segregate and disclose facts in a predecisional document unless they are "inextricably intertwined" with exempt portions); *see also Judicial Watch v. Dep't of Justice*, No. 02-348, 2004 U.S. Dist. LEXIS 20141, at **8-9 (D.D.C. Oct. 7, 2004); *American Civil Liberties Union v. Dep't of Justice*, 265 F. Supp. 2d 20, 33 (D.D.C. 2003).

It is well settled in the D.C. Circuit that factual material forming the basis of the deliberative process does not fall within the protection of Exemption 5:

> it is not enough to assert, in the context of Exemption 5, that a document is used by a decisionmaker in the determination of policy. Unevaluated

> factual reports or summaries of past administrative determinations are frequently used by decisionmakers in coming to a determination, and yet it is beyond dispute that such documents would not be exempt from disclosure. Rather, to come within the privilege and thus within Exemption 5, the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.

Vaughn v. Rosen, 523 F.2d 1136, 1140-1141 (D.C. Cir. 1975); *see also Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir. 1970) (quoting *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969) ("Purely factual reports . . . cannot be cloaked in secrecy by an exemption designed to protect only those internal working papers in which opinions are expressed and policies formulated and recommended.") (internal quotation marks omitted).

In this case, however, Defendants have used this rationale to label and withhold a substantial amount of material as deliberative that appears to be factual. Specifically, Defendants' *Vaughn* index repeatedly states that factual material has been withheld under Exemption 5 because it happened to be reviewed in the course of making decisions about CAPPS II. For example:

- In ¶ Z of the *Vaughn* index, DHS explains that it has withheld in full a 41-page document entitled "jetBlue (B6) database attributes," which contains "data elements in passenger name record information held by JetBlue Airlines." This document is withheld under Exemption 5, among other exemptions, because "the fact that TSA was reviewing the attributes of the JetBlue database for PNR data and the precise elements contained in the database would shed light on agency thought processes regarding technically how to structure passenger prescreening

and the elements that would be necessary in order to conduct passenger verification."

- In *Vaughn* index ¶ BB, DHS states that it has withheld under Exemption 5, among other exemptions, an email message containing a "data dictionary from JetBlue to TSA" along with "65 pages of attachments of a technical nature explaining the contents of the dictionary." TSA explains that these factual materials "reflect the thinking of TSA at the time on a matter that had not been settled," and so "presents predecisional deliberative material."
- In ¶ CC, DHS uses Exemption 5, among other exemptions, to withhold a "20-page attachment of an unencrypted warehouse scheme." The agency invokes Exemption 5 here because "this information represents internal agency deliberations about the structure of the program at the time[.]"
- in ¶ DD, DHS notes that an email message includes "the *fact* that JetBlue is interested in a CAPPS II pilot project." (emphasis added.) However, DHS withheld the entire email as deliberative because "it reflects the give-and-take of agency discussions that occur antecedent to a decision" and "[I]n the case of CAPPS II, JetBlue did not participate in any pilot and the program itself was terminated."
- In ¶ JJ, DHS explains that it withheld an entire four-page email because it "reflects internal agency discussions about the *fact* that JetBlue will not be participating in CAPPS II." (emphasis added.) Part of this email is obviously factual, and there is no evidence that any effort was made to segregate this information from exempt material.

- In ¶ PP, DHS withholds a document described as "created by Acxiom Corporation expressly for JetBlue Airways and contains proprietary data[.]" This document is not released pursuant to Exemption 5, among other exemptions, because it "constitutes information that was reviewed by TSA employees in the process of making decisions about CAPPS II[.]"
- ¶ QQ withholds "12 pages from Navitariare explaining their data extraction process." DHS withholds the document under Exemption 5, in addition to Exemption 4, because it "contains information that was reviewed by TSA employees in the process of making decisions about CAPPS II[.]"
- ¶ RR addresses a 29-page document that "appears to be a copy of Navitaire's data assessment tool." DHS withholds the document under Exemption 5, in addition to Exemption 4, because it "constitutes information that was reviewed by TSA employees in the process of making decisions about CAPPS II[.]"
- ¶ SS withholds a document entitled "TrueBlue DB" in its entirety under Exemption 5, in addition to Exemption 4, because it "constitutes information that was reviewed by TSA employees in the process of making decisions about CAPPS II[.]"

These claims are inadequate justifications for invocation of the deliberative process privilege and indicate Defendants have likely made overly broad Exemption 5 withholdings. In fact, this Court recently rejected TSA's contention that factual information in draft documents is exempt from disclosure on the ground it would reveal judgments made by agency personnel, noting that if the Court accepted this explanation alone for nondisclosure, "the segregability requirement of FOIA would be gutted."

Electronic Privacy Information Center v. TSA, C.A. No. 03-1846 (CKK), slip op. at 19 (D.D.C. Aug. 2, 2004) (attached hereto as Pl. Ex. 7).

In addition, in *Vaughn* index ¶ VV and ¶ B describing the Chief Privacy Officer's documents, DHS concedes that the documents contained releasable, nonexempt information, but decided that it was "not reasonably segregable" because the releasable information by itself would not add information specifically about the topic of Plaintiff's requests. The language of the FOIA and relevant case law clearly show, however, that factual information that is not exempt from disclosure must be released under the FOIA unless it is "inextricably intertwined" with exempt portions. (5 U.S.C. § 552(b)) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt[.]"); *Electronic Privacy Information Center v. TSA*, C.A. No. 03-1846, slip op. at 16 ("In conducting a segregability analysis, federal agencies are required to provide any material that does not meet FOIA's criteria for an exemption, such as information that is not 'predecisional.'")

These examples clearly demonstrate that Defendants have not properly segregated factual material from information properly exempt under the FOIA. For these reasons, summary judgment in favor of Defendants is inappropriate.

F. It Is Appropriate for the Court to Conduct an *In Camera* Inspection of the Records Withheld In This Case

Where an agency does not provide affidavits sufficient to justify summary judgment, a court may decide to examine the documents at issue and determine whether the exempted material should be released. The FOIA provides that a court "may examine the content of . . . agency records *in camera* to determine whether such records or any part thereof shall be withheld." 5 U.S.C. 552(a)(4)(B). The D.C. Circuit has found that

an "*in camera* inspection may be particularly appropriate when . . . the agency affidavits are insufficiently detailed to permit meaningful review of exemption claims . . . when the number of withheld documents is relatively small, and when the dispute turns on the contents of the documents, and not the parties' interpretations of those documents." *Spirko v. Postal Service*, 147 F.3d 992, 996 (D.C. Cir. 1998) (quoting *Quinon v. FBI*, 86 F.3d 1222, 1228 (D.C. Cir. 1996).

The Court's *in camera* inspection of the documents in dispute in this case would be especially appropriate. As described in detail above, DHS and TSA's declaration and *Vaughn* index do not provide explanations of their Exemption 3, 5, 6, and 7(C) withholdings sufficiently detailed to demonstrate their entitlement to summary judgment. Furthermore, the withheld material is not so voluminous as to be burdensome for this Court to review. Even if the Court finds the number of records at issue too excessive to study in detail, it may review a sample and "extrapolate its conclusions . . . to the larger group of withheld materials." *Bonner v. Dep't of State*, 928 F.2d 1148, 1151 (D.C. Cir. 1991) (quoting *Fensterwald v. CIA*, 443 F. Supp. 667, 669 (D.D.C. 1977)). Finally, the Court will best examine the question of whether Exemptions 2, 5, and 6 were properly invoked here by reviewing the material at issue. In this case, the claimed exemptions turn on the character of the material, not the parties' interpretations of the claimed exemptions. For these reasons, Plaintiff respectfully urges this Court to conduct an *in camera* inspection of the documents at issue in this case.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' motion for summary judgment. Furthermore, Plaintiff requests that this Court direct the FBI to conduct an adequate search for records responsive to Plaintiff's request.

Respectfully submitted,

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