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.	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, AND U.S. DEPARTMENT OF JUSTICE'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff, the Electronic Privacy Information Center ("EPIC") brought this action seeking to compel the release of documents responsive to three Freedom of Information Act ("FOIA") requests submitted to defendant Transportation Security Administration ("TSA") and completed by defendant Department of Homeland Security ("DHS")[1] and one FOIA request to the U.S. Department of

[1] After TSA transferred plaintiff's third FOIA request to the DHS Privacy Office for direct response, the DHS Privacy Office asked TSA to forward all three of plaintiff's requests, to the extent work remained unfinished, in order to ensure consistent processing of any responsive documents. Declaration of Elizabeth Withnell ("Withnell Decl.") at ¶ 15.

Justice ("DOJ"). See Compl. (dkt. no. 1) (June 9, 2004). Each of these requests sought documents related to access and use of air passenger data by government agencies. Each defendant has conducted a thorough search and released all responsive, non-exempt documents to plaintiff. Because the only information that has not been produced is exempt from disclosure under 5 U.S.C. § 552(b), defendants are entitled to summary judgment.

PROCEDURAL BACKGROUND

A. DHS and TSA

Plaintiff submitted three FOIA requests to TSA.

First Request. By letter dated September 22, 2003, plaintiff submitted a FOIA request to the TSA for "documents or materials relating to" JetBlue Airways Corporation, Acxiom Corporation, Torch Concepts, Inc. and SRS Technologies. Withnell Decl. at ¶ 3 & Ex. A. The request focused primarily on "information directly relevant to the TSA's involvement in the testing of CAPPS II with actual passenger data." Id. By electronic mail message (email) to the TSA, plaintiff clarified the time frame for the request to include documents from "September 2002 to the present." Id. at ¶ 4 & Ex. B. TSA logged in receipt of plaintiff's request on September 23, 2003, acknowledged it by letter dated September 30, 2003, agreed to expedite the processing of the request, and assigned it tracking number TSA03-645. Id. at ¶ 5 & Ex. C.

TSA issued an interim response to plaintiff's FOIA request TSA03-645 by letter dated February 6, 2004. Id. at ¶ 6 & Ex. D. A 107-page document pertaining to JetBlue Airways Corporation was withheld in full on the basis of FOIA Exemptions 3 and 4. Id.

TSA issued a second interim response to plaintiff's FOIA request TSA03-645 by letter dated February 10, 2004. Withnell Decl. at ¶ 7 & Ex. E. With regard to that portion of plaintiff's request

concerning SRS Technologies, TSA located no records and so advised plaintiff. Id. With regard to JetBlue Airways, TSA located 36 pages of responsive records and released six pages in full. Id. The remaining information was withheld in full on the basis of FOIA Exemptions 3, 4, and 5. Id.

TSA issued a third interim response to plaintiff's FOIA request TSA03-645 by letter dated February 20, 2004. Id. at ¶ 8 & Ex. F. This interim response provided plaintiff with a complete copy of a document from Torch Concepts, Inc., entitled "Homeland Security – Airline Passenger Risk Assessment," and also advised plaintiff that TSA was still consulting on business information with JetBlue Airways Corporation and Acxiom Corporation. Id.

By letter dated February 24, 2004, plaintiff submitted an appeal of TSA's interim releases of February 6, and February 10, 2004, regarding FOIA request TSA03-645. Withnell Decl. at ¶ 9 & Ex. G. By letter dated April 26, 2004, TSA responded to plaintiff's appeal, affirming its initial decisions, with the following provisos. Id. at ¶ 10 & Ex. H. TSA noted that it had miscounted the withheld pages in its first interim response and that the correct page length of the withheld document was 79 pages, not 107 as originally stated. Id. It also indicated that the document was properly withheld on the basis of Exemption 4. TSA also determined that two of the previously withheld records were not, in fact, responsive to plaintiff's request. Id.

Second Request. By letter dated April 2, 2004, plaintiff submitted a FOIA request to TSA seeking records regarding JetBlue Airways Corporation, Acxiom Corporation, and Torch Concepts, Inc. for the period September 2001 to September 2002,[2/] including records referenced in the DHS

[2/] Although TSA was created as a result of the enactment on November 19, 2001, of the Aviation and Transportation Security Act of 2001, DHS, with which TSA was merged, did not commence operations until January 2003. Withnell Decl. at ¶ 11 n.2. Thus, the documents that were requested preceded the creation of DHS and the merging of TSA within this agency.

Privacy Office's report entitled "Report to the Public On Events Surrounding JetBlue Data Transfer," dated February 20, 2004.[3] Withnell Decl. at ¶ 11 & Ex. I. The request primarily focused on "the transfer of passenger information from an airline to an agency and the potential use of actual passenger data to test CAPPS II" and indicated that plaintiff's purpose was "to obtain information directly relevant to TSA's involvement in the transfer of data from JetBlue to the Department of Defense and the testing of CAPPS II with actual passenger data." Id. & Ex. I. By email message dated April 9, 2004 from plaintiff to TSA, plaintiff clarified and narrowed the scope of the FOIA request to encompass documents that "related to JetBlue passenger data." Withnell Decl. at ¶ 12 & Ex. J. By letter dated April 16, 2004, TSA acknowledged plaintiff's FOIA request, agreed to expedite the processing of the request, and assigned it TSA tracking number TSA04-0895. Id. at ¶ 13 & Ex. K.

Approximately 775 pages of TSA records were located as a result of TSA's TSA03-645 and TSA04-0895 searches. Id. at ¶ 25. To the extent possible, this figure does not include duplicate copies of records or public source information. Id.

Third Request. By letter dated April 12, 2004, plaintiff submitted a FOIA request to TSA seeking records "concerning, involving or related to American Airlines passenger data" and records "concerning, involving or related to disclosures of passenger data by Airline Automation Inc." Withnell Decl. at ¶ 14 & Ex. L. By letter dated April 12, 2004, TSA acknowledged plaintiff's FOIA request and assigned it TSA tracking number TSA04-0917. Id. at ¶ 15 & Ex. M. Although a search was initiated by TSA and documents were located, Id. at ¶ 26, by letter dated May 19, 2004, TSA

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[3] Plaintiff did not seek records regarding SRS Technologies in its April 2, 2004 request. Withnell Decl. at ¶ 11 n.3.

advised plaintiff that its request number TSA04-0917 had been transferred to the DHS Privacy Office for direct response. Id. at ¶ 16 & Ex. N. In fact, the Privacy Office asked TSA to forward all three of plaintiff's requests, to the extent work remained unfinished, in order to ensure consistent processing of any responsive documents. Id. at ¶ 16. Eighty pages were processed for this particular request.[4/] Id. at ¶ 26.

The Chief Privacy Officer of DHS collected all documents pertaining to her report on the transfer of JetBlue passenger data and stored them in two accordian files in her office. Id. at ¶ 27. In addition to documents located as a result of the TSA searches described in the preceding paragraphs, the Chief Privacy Officer's records, consisting of nearly 1100 pages, were processed for plaintiff's requests. Id.

TSA Headquarters consists of 25 separate offices. Withnell Decl. at ¶ 24. For FOIA requests TSA03-645 and TSA04-0895, the following offices were searched: Administrator and Executive Secretary, Office of the Chief Counsel, Legislative Affairs, Aviation Operations, Office of Transportation Security Policy, Chief Financial Officer, Operations Policy, Office of National Risk Assessment, and Acquisitions. Id. at ¶ 24. For FOIA request TSA04-0917, the offices searched consisted of the Chief Financial Officer, Operations Policy, Office of National Risk Assessment, and Acquisitions. Id. In each office, the search encompassed hard copy files, electronic files and email messages pertaining to any of the companies listed in the requests – JetBlue Airways, Acxiom Corporation, Torch Concepts, Inc., American Airlines, and Airline Automation, Inc. – and the

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[4/] In DHS' interim response to plaintiff, DHS indicated that approximately 85 pages were withheld on the basis of Exemption 7(A) that concern American Airlines and Airline Automation, the subject of TSA04-917. Withnell Decl. at ¶ 26 & Ex. N. Upon recount, DHS determined that the correct number is 80 pages. Id. at ¶ 26.

CAPPS II Program. Id.

In addition to the three interim responses to plaintiff's request TSA03-645 described above, DHS provided two responses on behalf of the Privacy Office of DHS. Withnell Decl. at ¶ 17.

First Response. The first response is undated, but was sent by email (followed by Federal Express delivery) to plaintiff's Staff Counsel on September 24, 2004. Id. at ¶ 17 & Ex. O. The documents that were processed for plaintiff's requests consist of records from TSA and records used by the Chief Privacy Officer in compiling her report on the JetBlue matter that is the subject of plaintiff's requests. Id. at ¶ 18. As indicated in the interim response, a significant number of documents, particularly those found in the Chief Privacy Officer's files, consisted of public source documents. Id. DHS indicated in this interim response that unless it heard otherwise from plaintiff, DHS would assume that plaintiff was not interested in receiving this public source material. Id. Plaintiff never indicated an interest in receiving any of these records and, accordingly, they are not considered to be at issue. Id.

As indicated in DHS's undated interim response, certain information was released to plaintiff while other information was withheld in whole or in part. Withnell Decl. at ¶ 19. DHS released certain records in part that had been located by TSA and withheld the remaining portions as well as other records in full on the basis of FOIA Exemptions 3, 5, 6, and 7(C). Id. Copies of the documents that DHS released to plaintiff in DHS' first interim release are attached to Withnell Declaration as Exhibit P. Withnell Decl. at ¶ 19 & Ex. P. DHS's Vaughn Index lists the documents that were withheld in full.

Second Response. By letter dated October 20, 2004, DHS made a second response to plaintiff's FOIA requests. Withnell Decl. at ¶ 20 & Ex. Q. Copies of the documents released with

this response are attached to Withnell Declaration as Exhibit R. Id. & Ex. R. In that response, DHS reiterated the information that had previously been provided to plaintiff directly by TSA that no records responsive to plaintiff's request concerning SRS Technologies had been located. Id. at ¶ 20. DHS also pointed out that certain records that originally had appeared to be responsive were determined not to be, because they did not concern the specific subjects of plaintiff's request but rather only the general subject of the CAPPS II Program. Id. Even if these records were considered responsive, however, DHS determined that they would be exempted from disclosure under the FOIA on the basis of several exemptions. Id. DHS released certain records in part that had been located by TSA and withheld the remaining portions as well as other records in full on the basis of the FOIA Exemptions 2, 3, 4, 5, and 6. Id.

In DHS' letter of October 20, 2004, DHS also explained that additional publicly available records were found in documents used by the Chief Privacy Officer to compile her report on the JetBlue matter and indicated that, as before, DHS assumed plaintiff was not interested in these records. Id. at ¶ 21. Plaintiff never contradicted this assumption. Id.

DHS released 11 pages of records from Chief Privacy Officer's files in whole or in part, and withheld the remaining previously-unprocessed documents on the basis of Exemptions 4, 5, and 6 of the FOIA. Id. at ¶ 22.

In reexamining the documents at issue in this litigation, DHS discovered that some responsive records, which had been sent out for submitter notice, were overlooked in the initial processing. Id. at ¶ 23. DHS decided that some pages that previously had been withheld contained reasonably segregable information. Id. DHS reprocessed these records and sent them by email to plaintiff's counsel on January 4, 2005. Id. & Ex. S. In addition, pursuant to an agreement between

the parties, DHS provided plaintiff with a preliminary Vaughn index of responsive, exempt documents on January 5, 2005.

On these facts, defendants DHS and TSA are entitled to summary judgment. Because TSA is now a component of DHS, the proper party defendant under FOIA is DHS. See 6 U.S.C. §§ 203(2), 234.

B. DOJ

By facsimile letter dated May 6, 2004, plaintiff submitted a FOIA request to FBIHQ for "any records concerning, involving or related to the FBI's acquisition of passenger data from any airline since September 11, 2001," including, but not limited to "any records discussing the legal requirements governing Bureau access and use of air passenger data." Declaration of David M. Hardy ("Hardy Decl.") at ¶ 6. Plaintiff also requested that this FOIA request be given expedited processing based on numerous media reports, Congressional inquiries and the fact that other federal agencies, including the National Aeronautics and Space Administration ("NASA"), had previously granted expedited processing for FOIA requests concerning the collection and use of airline passenger data by the federal government. Id. Plaintiff also requested designation as a "representative of the news media" for purposes of any assessment of fees related to the processing of this FOIA request. Id. Plaintiff enclosed a released page from its FOIA request to NASA concerning airline passenger data and two press releases from the United States Senate Committee on Governmental Affairs concerning the acquisition of airline passenger data by the Transportation Security Administration ("TSA"). Hardy Decl. at ¶ 6 & Ex. A.

By facsimile letter dated May 6, 2004, plaintiff advised FBIHQ of a correction in a portion of its request for expedited processing of its FOIA request in that plaintiff had actually submitted

only three FOIA requests to TSA and not four FOIA requests as stated in its previous letter. Hardy Decl. at ¶ 7. Plaintiff also advised that all three of these FOIA requests to TSA had been granted expedited processing. Id. & Ex. B. By letter dated May 14, 2004, FBIHQ acknowledged receipt of plaintiff's FOIA request and assigned it as FOIPA Request Number 997,633. Hardy Decl. at ¶ 8.

By letter dated May 19, 2004, FBIHQ advised plaintiff that its request for expedited processing was being denied inasmuch as the primary activity of EPIC did not appear to be information dissemination, as required by 28 C.F.R. Section 16.5(d)(ii), and also because plaintiff had not demonstrated any particular urgency to inform the public about this subject matter. Hardy Decl. at ¶ 9.

By letter dated June 21, 2004, FBIHQ advised plaintiff that its request for expedited processing had been forwarded to the Department of Justice, Office of Public Affairs ("OPA") for further consideration pursuant to 28 C.F.R. Section 16.5(d)(iv) in regard to the potential widespread and exceptional media interest in possible questions about the government's integrity which may affect public confidence in the federal government. Hardy Decl. at ¶ 10. Plaintiff was also told that FBIHQ had been notified on June 16, 2004, that the Director of OPA had denied plaintiff's request for expedited processing based on its assertion of exceptional media interest. Id. Plaintiff was also informed that FBIHQ had reconsidered its request for expedited processing and had decided to reverse its earlier decision and grant expedited processing of its FOIA request. Id. Plaintiff was further advised that its FOIA request has been assigned and that a search was being conducted for any responsive records. Hardy Decl. at ¶ 10 & Ex. E.

The FBI employed several mechanisms as part of its search efforts to identify documents responsive to plaintiff's requests. Hardy Decl. at ¶ 17. The Record/Information Dissemination

Section ("RIDS") and other FBI personnel attempted to locate records responsive to plaintiff's FOIA requests through a standard search of records in the CRS, an individualized inquiry of the most logical offices at FBIHQ to have potentially responsive records, and via certain exceptional search methods. Id. at 17, 19. For a more thorough description of the FBI's extensive and indepth search, see Section II. A.

Following this search, FBIHQ ultimately identified twelve (12) pages of records responsive to plaintiff's FOIA request. Hardy Decl. at ¶ 4. After reviewing and processing of these records, on September 23, 2004, FBIHQ released to plaintiff 12 pages of responsive material with redactions taken pursuant to FOIA Exemptions 2, 6, 7(C) and 7(D). Id. at ¶ 4, 11. Additionally, pursuant to an agreement between the parties, DOJ provided plaintiff with a declaration, which serves as a Vaughn Index, of responsive, exempt documents on January 5, 2005.

ARGUMENT

A. Standards for Summary Judgment in FOIA Cases

Summary judgment is the procedural vehicle by which most FOIA actions are resolved. See, e.g., Misciavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993). Summary judgment is to be freely granted where, as here, there are no material facts genuinely at issue, and the agency is entitled to judgment as a matter of law. See Alyeska Pipeline Serv. Co.v. EPA, 856 F.2d 309, 314-15 (D.C. Cir. 1988); Military Audit Project v. Casey, 656 F.2d 724,738 (D.C. Cir. 1981).

The FOIA requires agencies to release documents responsive to a properly submitted request, except for those documents (or portions of documents) subject to one of nine statutory exemptions to the basic disclosure obligation. 5 U.S.C. §§ 552(a)(3), (b)(1)-(9). In discharging its obligation, the agency must conduct a reasonable search for responsive documents, and, in withholding a

document (or portions thereof) on the basis of one or more exemptions, must release those portions containing reasonably segregable, non-exempt material. 5 U.S.C. § 552(b) (text following exemptions).

A court reviews an agency's response to a FOIA request on a de novo basis. See 5 U.S.C. § 552(a)(4)(B). The government bears the burden of justifying its withholdings under one or more of the FOIA's nine exemptions. See McCutchen v. Dep't of Health & Human Servs., 30 F.3d 183, 185 (D.C. Cir.1994). It may satisfy that burden through submission of an agency declaration, and, if necessary, a "Vaughn" index, describing the withheld material with reasonable specificity, explaining the reasons for non-disclosure, and demonstrating, again, with reasonable specificity, that reasonably segregable material has been released. See Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 753 (1989); Armstrong v. EOP, 97 F.3d 575, 577-78 (D.C. Cir. 1996).

The agency can also show that it has discharged its obligation to conduct an adequate search for records with affidavits "demonstrat[ing] that it has conducted a search reasonably calculated to uncover all relevant documents." Weisberg v. Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). See Oglesby v. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (an agency is not required to search every record system, only to show "that it made a good faith effort to conduct a search . . . using methods which can be reasonably expected to produce the information requested"). To establish the sufficiency of its search, the agency need only explain the "scope and method of the search" in "reasonable detail." Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982).

I. DHS AND TSA ARE ENTITLED TO SUMMARY JUDGMENT

A. DHS and TSA Conducted Reasonable Searches for Responsive Documents.

Plaintiff has agreed not to challenge the reasonableness of DHS and TSA's search so DHS and TSA should be granted summary judgment on this issue. See Ex. B (EPIC email II).

B. DHS and TSA Properly Withheld Documents Pursuant to Exemption 2. (DHS Vaughn Index: TSA Records BBB)

Plaintiff has agreed not to challenge DHS's withholdings pursuant to Exemption 2 so DHS and TSA should be granted summary judgment on this issue. See Ex. B (EPIC email II).

C. DHS and TSA Properly Withheld Documents Pursuant to Exemption 3. (DHS Vaughn: TSA Records E, Z, AA, BB, CC, LL, TT, UU)

Exemption 3 permits the withholding of information that another statute prohibits an agency from disclosing, so long as the statute either "(A) requires that the matters be withheld from the public in such a manner as 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). Here, Congress required the TSA to prescribe regulations prohibiting disclosure of information obtained or developed in carrying out its aviation security functions if the Under Secretary of TSA decides that disclosing the information would be detrimental to the security of transportation. 49 U.S.C. §§ 114(s) and 40119(b). These statutes and their implementing regulations have been held to qualify as Exemption 3 statutes. See, e.g., Gordon v. F.B.I., 2004 WL 1368858, *2 (N.D. Cal. 2004).

Section 114(s), which was added when the Department of Homeland Security was created,[5] by its terms, prohibits disclosure of this information *notwithstanding* the requirements of the FOIA:

(s) NONDISCLOSURE OF SECURITY ACTIVITIES - -

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[5] Pub. L. No. 107-296, § 1601(b), 116 Stat. 2135, 2312 (Nov. 25, 2002).

> (1) IN GENERAL. - - *Notwithstanding section 552 of title 5*, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would - -
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> * * *
>
> (C) be detrimental to the security of transportation.

49 U.S.C. § 114(s) (emphasis added).

The TSA has promulgated implementing regulations that expressly prohibit disclosure of certain categories of information such as security programs, security directives, and selection criteria used in screening passengers. 49 C.F.R. Part 1520, as amended by 69 Fed. Reg. 28066 (May 18, 2004).

Under 49 U.S.C. § 46110, the United States Courts of Appeals have *exclusive* jurisdiction to affirm, amend, modify, or set aside any part of the regulations implementing section 114(s). Section 46110 of Title 49 provides, in relevant part, that:

> a person disclosing a substantial interest in an order issued by the . . . Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary . . . in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

49 U.S.C. § 46110(a) (emphasis added).[6/] When a claim implicates section 46110(a), the district

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[6/] The phrase "this part" in § 46110(a) refers to Part A ("Air Commerce and Safety") of Subtitle VII of Title 49 ("Aviation Programs"), see 49 U.S.C. §§ 40101-46507. The statutory provisions requiring the Administrator to provide for the screening of passengers and the use of a passenger pre-screening system are contained in 49 U.S.C. §§ 44901(a) and 44903(i)(2), which are encompassed within Part A. Subsection (l) of section 114, which is also cross-referenced in section 46110, authorizes the Secretary to issue regulations and security directives to protect transportation security. 49 U.S.C. § 114(l)(2).

court's federal question jurisdiction is preempted. See Clark v. Busey, 959 F.2d 808, 811 (9th Cir. 1992).

In these ways, Congress has made clear its intention that the rules and procedures of the FOIA do not apply to SSI, 49 U.S.C. § 114(s) (authorizing TSA to prohibit disclosure of SSI notwithstanding the FOIA), and that the exclusive remedy in any challenge to an order issued in whole or in part under section 114(s) lies in the United States Courts of Appeals under the procedures and standards established by section 46110.

Thus, this Court's role in this FOIA case is narrowly confined to determining whether the information at issue falls within the relevant statute and regulations. See Aronson v. Internal Revenue Service, 973 F.2d 962, 967 (1st Cir. 1992) ("once a court determines that the statute in question is an Exemption 3 statute, and that the information requested at least arguably falls within the statute, FOIA *de novo* review normally ends"). As DHS explains in the declaration filed in support of this motion, TSA's regulations specifically prohibit disclosure of the sensitive security information (SSI) that is at issue, and those regulations are controlling in this case. Moreover, release of the SSI sought by plaintiff in this case would compromise the safety of the traveling public by revealing what elements have been considered in structuring a screening program. This information would provide terrorists with knowledge they could use to exploit the system. Because the statute and implementing regulation governing SSI plainly forbid disclosure of this information, DHS properly withheld it under FOIA Exemption 3.

In recognition of Exemption 3, plaintiff has agreed to exclude sensitive security information withheld pursuant to Exemption 3 from the scope of litigation to the extent that DHS can represent that the document was marked "SSI" and cites the statute that permits the material's withholding.

See Ex. A (EPIC email I). The marking of a document as "SSI," however, is not dispositive as to whether the document in fact contains SSI. The regulation defines the term "SSI" to include, among other things, security programs and contingency plans, security directives, vulnerability assessments, specific details of aviation security measures, and security screening information which, in turn, encompasses not only the procedures and selection criteria used in screening passengers, but also information and sources of information used by a passenger screening program. 69 Fed. Reg. at 28083 (§§ 1520.5(b)(1), (2), (5), (8), and (9)). Although only one of the eight withheld documents was expressly marked "SSI," each document firmly fits within Exemption 3.

DHS withheld eight documents pursuant to Exemption 3. See DHS Vaughn Index at ¶¶ E, Z, AA, BB, CC, LL, TT, UU. The first document withheld is a one-page email message dated February 20, 2003, between TSA personnel about the status of CAPPS II. Id. at ¶ E; 69 Fed. Reg. at 28083. Certain information in the message indicates on its face that it is sensitive security information and so this portion was withheld on the basis of Exemption 3. DHS Vaughn Index at ¶ E. Further, TSA personnel identities were withheld on the basis of Exemption 6 and the remainder of the document was withheld on the basis of Exemption 5. Id.

The second document is a forty-one page document entitled "JetBlue (B6) database attributes." DHS Vaughn at ¶ Z. This document was withheld in full on the basis of Exemptions 3, 4, and 5. Id. These pages describe data elements in passenger name record information held by JetBlue Airlines. Id. Because this information potentially was to be used to design a system for passenger screening, it constitutes selection criteria used in any security process and was therefore withheld on the basis of Exemption 3 as sensitive security information. Id. (citing 69 Fed. Reg. 28066 (SSI includes security screening information)). SSI also encompasses solicited or unsolicited

proposals received by DHS 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 security measures. Id. This information was offered by JetBlue in connection with the design of CAPPS II. Id.

The third document is a 35-page document consisting of two email messages entitled "Warehouse Schema" and "Data Warehouse" and an attachment which lays out in list and schematic format data elements used in a Passenger Name Record ("PNR"), which is a record of passenger information. DHS Vaughn at ¶ AA. It has been withheld in full on the basis of Exemptions 3, 4, and 5. It was withheld on the basis of Exemption 3 because the first page of the attachment is marked "Confidential re warehouse schema." Id. Release would reveal sensitive security information that bears on the potential selection criteria used in security screening and that amounts to confidential business information submitted to TSA as part of an aviation security program. See 69 Fed. Reg. 28066.

The fourth document is an email message transmitting a data dictionary from JetBlue to TSA for possible use in connection with CAPPS II, together with 65 pages of attachments of a technical nature explaining the contents of the dictionary. DHS Vaughn at ¶ BB. This document was withheld pursuant to Exemption 3 because the information in it was voluntarily submitted for consideration in TSA's efforts to design CAPPS II, and bears on selection criteria for an aviation security screening program. Id.; 69 Fed. Reg. at 28083. The document was also withheld on the basis of Exemptions 4 and 5. DHS Vaughn at ¶ BB.

The fifth document consists of three pages of an email message, dated July 16, 2003, between a contractor and TSA personnel, with a 20-page attachment of an unencrypted data warehouse

scheme. DHS Vaughn at ¶ CC. The document was withheld pursuant to Exemption 3 because the information reflects proprietary business information that was voluntarily submitted in connection with an aviation screening program. Id.; 69 Fed. Reg. at 28083. The document was also withheld pursuant to Exemption 4. DHS Vaughn at ¶ CC.

The sixth document consists of five pages titled "JetBlue Data Elements Request" and appears to reflect TSA thinking on the content of an airline screening protocol. DHS Vaughn at ¶ LL; 69 Fed. Reg. at 28083. The pages are marked "Confidential," not because they are classified in accordance with Executive Order 12958, as amended, but because they constitute confidential commercial information. Id. Accordingly, Exemption 3 was invoked to withhold this information. This document was also withheld pursuant to Exemption 5. Id.

The seventh document is a seven-page document consisting of slides providing an overview of the CAPPS II system, dated July 1, 2003. DHS Vaughn at ¶ TT. The document is marked SSI and constitutes selection criteria proposed to be used for aviation screening. Id. Therefore, it was withheld on the basis of Exemption 3, in conjunction with 49 U.S.C. §§ 114(s) and 40119(b). Id. The materials also contain information and sources of information potentially to be used by a passenger screening program. Id.; 69 Fed. Reg. at 28083. Further, the materials constitute "solicited and unsolicited proposals received by DHS" relating to aviation security and also constitute "information obtained in the conduct of research related to aviation security activities." DHS Vaughn at ¶ TT; 69 Fed. Reg. at 28083. Accordingly, Exemption 3 was invoked to protect this sensitive security information. Id. The document was also withheld on the basis of Exemption 5.

The eighth document is a six-page record that shows numerical results from the use of a risk assessment tool developed by Sentricx. Id. at ¶ UU. It was withheld pursuant to Exemption 3

because the information is confidential proprietary information submitted voluntarily to TSA in connection with a proposal for aviation security. Id.; 69 Fed. Reg. at 28083. The document was also withheld pursuant to Exemptions 4 and 5. DHS Vaughn at ¶ 4 and 5.

Accordingly, because DHS has determined that each of these documents contains SSI, these documents were properly withheld pursuant to Exemption 3.

D. DHS and TSA Properly Withheld Documents Pursuant to Exemption 4. (DHS Vaughn: TSA Records: A, Z, AA, BB, CC, PP, QQ, RR, SS, UU; Chief Privacy Officer's Documents ("CPOD"): S)

Exemption 4 protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. § 552(b)(4). The documents in question indisputably qualify as “commercial or financial” information, as they relate to business or trade. See, e.g., Allnet Communications Servs. v. FCC, 800 F. Supp. 984, 988 (D.D.C. 1992). As information provided to the government by a corporate entity, they also qualify as “information obtained from a person.” Id.; 5 U.S.C. § 551(2) (For FOIA purposes, a "person" may be a "partnership, corporation, association, or public or private organization other than an agency.").

They also meet the requirement that the withheld information be confidential. Where commercial information is submitted voluntarily to an agency, it is considered confidential, for purposes of Exemption 4, “if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.” Critical Mass Energy Project v. NRC, 975 F.2d 871, 878 (D.C. Cir. 1992) (en banc). The documents also pass the test for confidentiality under Nat’l Parks & Conservation Ass’n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). First, disclosure of the information is likely to "impair the Government's ability to obtain necessary information in the future." 498 F.2d at 770. Second, disclosure would "cause substantial harm to the competitive position of the person

from whom the information was obtained." Id. Further, Exemption 4 has been held to encompass – under the "third prong," of Nat'l Parks, 498 F.2d at 770 n.17 – information the disclosure of which would cause "an impairment of an agency's ability to carry out its statutory purpose . . ." Judicial Watch, Inc. v. Export-Import Bank, 108 F. Supp. 2d 19, 30 (D.D.C. 2000). The disclosure of the documents also falls within this area.

As the record reflects, DHS released certain records in part, but withheld material that would identify confidential commercial information the release of which could cause competitive harm. Withnell Decl. at ¶ 39; Allnet, 800 F. Supp. at 988; Critical Mass, 975 F.2d at 878. DHS also invoked Exemption 4 to withhold in full information that was obtained from airlines or other companies, which related to how airlines structure reservation systems and what elements they collect and use, as part of TSA's efforts to design CAPPS II. DHS withheld this information in order both to protect the commercial interests of the submitters, who justifiably feared competitive harm if the precise details of their submissions were made public, Critical Mass, 975 F.2d at 878, and the interests of the Department in having companies voluntarily submit proprietary information for DHS's assessment and use. Withnell Decl. at ¶ 39; Judicial Watch, 108 F. Supp. 2d at 30. Although TSA has issued solicitations for business submissions for some of its programs, the documents that were processed for this request consist primarily of technical details about the data that JetBlue collects in its PNR. Withnell Decl. at ¶ 39. This information was provided to TSA voluntarily, in an effort by JetBlue to assist TSA in making progress toward development of an effective airline screening program. Id. It is not the type of information that customarily would be released to the public. Id. Aside from being unintelligible to the lay reader, it could disclose the architecture of JetBlue's databases, and permit a savvy computer operator to access otherwise secure systems. Id.;

Critical Mass, 975 F.2d at 878.

Additionally, other relevant documents that were submitted to TSA by Torch Concepts were given to the agency in an effort to demonstrate to TSA the utility of Torch Concepts' risk assessment program that was being considered for funding by the Department of Defense ("DOD") and that might also be useful for TSA's own initiatives. Withnell Decl. at ¶ 41. The Torch information was not provided to TSA in response to a compulsory directive, but in an effort to be a helpful corporate citizen. Id.; see, e.g., Center for Auto Safety v. NHTSA, 244 F.3d 144, 149 (D.C. Cir. 2001). And beyond the information that is and has already been made public about Torch Concepts' efforts, the information Torch submitted is not the type that is customarily disclosed to the public. Id.; Critical Mass, 975 F.2d at 878. Because airlines and other companies in the future may be hesitant to cooperate with TSA in developing security programs, DHS invoked Exemption 4 to protect the proprietary information at issue and to protect the U.S. government's ability to obtain such information in the future. Judicial Watch, 108 F. Supp. 2d at 30.

Accordingly, these documents were properly withheld pursuant to Exemption 4.

E. DHS and TSA Properly Withheld Documents Pursuant to Exemption 5. (DHS Vaughn: TSA Records: B, C, D, E, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, BB, CC, DD, FF, GG, HH, II, JJ, KK, LL, MM, NN, OO, PP, QQ, RR, SS, TT, UU, VV, WW, XX, YY, ZZ, AAA, BBB, DDD, EEE, FFF, GGG; CPOD: A, B, C, D, H, J, K, L, M, N, O, P, Q, R, S, T, V, X, Y, Z, CC, JJ)

FOIA Exemption 5, 5 U.S.C. § 552(b)(5), provides that the FOIA's disclosure obligations do not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." Exemption 5 thus creates an exception to mandatory disclosure "for documents that are normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); Martin v. Office of Special Counsel, 829

F.2d 1181, 1184 (D.C. Cir. 1987).

One of the principal privileges incorporated by Exemption 5 is the deliberative process privilege, see Sears, 421 U.S. at 149-51, the general purpose of which is to "prevent injury to the quality of agency decisions" by protecting the "decision making processes of government agencies." Id. at 150-51. The privilege "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001). To fall within Exemption 5's exception for documents protected by the deliberative process privilege, the documents must be both "pre-decisional" and "deliberative." Mapother v. Dep't of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993).[7]

TSA Records. For the majority of the documents for which DHS claimed Exemption 5, DHS

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[7] The documents must also satisfy the exemption's threshold requirement that they be "inter-agency or intra-agency" memoranda, 5 U.S.C. § 552(b)(5). The documents described in DHS's Vaughn index include various internally generated documents, drafts, and other intra- and inter-agency communications that easily meet this test. The remaining communications between TSA and airline employees also constitute "intra-agency memorandums" within the meaning of Exemption 5, which courts have held to include communications made between an agency and outside consultants to assist the agency in its decision making. Pub. Citizen, Inc. v. Dep't of Justice, 111 F.3d 168, 170 (D.C. Cir. 1997). In Klamath, the Supreme Court recently held that communications with outside consultants who are acting as self-advocates "at the expense of others seeking [government] benefits inadequate to satisfy everyone" do not qualify as intra-agency communications, 532 U.S. at 12, but, at the same time, the Court declined to overrule Public Citizen and other precedents that have considered consultant communications to be "intra-agency" under circumstances different than those presented in Klamath itself. Id. at 12 n. 4.

did so on the basis of the deliberative process privilege.[8] Withnell Decl. at ¶ 45. DHS released several documents in part, but withheld certain portions in order to protect internal agency deliberations, including staff opinions. Withnell Decl. at ¶ 42 (citing Ex. R, document titled "Memorandum.").[9] The records reflect internal agency deliberations about the construct of the CAPPS II program. Id. at ¶ 45. These materials are pre-decisional because they were "prepared in order to assist in arriving at . . . decision[s]," Quarles v. Dep't of the Navy, 893 F.2d 390, 392 (D.C. Cir. 1990); Mapother, 3 F.3d at 1537. In some cases, DHS withheld email messages, the text of which makes clear that the messages were a substitute for informal conversations between TSA personnel which, were it not for the advent of technology, would not have been memorialized at all. Withnell Decl. at ¶ 45. These messages were deliberative in that they reflect the normal give-and-take that precedes an agency decision, which, in this case, was the precise way to build the risk assessment portion of CAPPS II. Id.; Access Reports v. Dep't of Justice, 926 F.2d 192, 195 (D.C. Cir. 1991) (citing Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)), see also, Sears, 421 U.S. at 150 (documents "reflecting . . . deliberations comprising part of a process by which governmental decisions . . . are formulated" are deliberative).

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[8] Plaintiff has agreed to exclude from the scope of litigation all claims of attorney-client privilege pursuant to Exemption 5. See Ex. A (EPIC email I); DHS Vaughn Index (TSA Records) at H, O, and R and (Chief Privacy Officer's Documents) at H, J, and FF. Hence, these claims will not be discussed in this memorandum.

[9] In DHS's first interim response to plaintiff's request, Withnell Decl. Ex. O, DHS indicated that it was withholding 31 pages in full that were located in the Office of the Chief Counsel on the basis of Exemption 5 and the attorney-client and deliberative process privileges. Withnell Decl. at ¶ 44. Upon reexamination of those documents, DHS has determined that none of them refers to any of the subjects of plaintiff's requests. Therefore, the documents are not responsive and have not been included in the attached Vaughn Index. Id.

In some cases, the email messages are between TSA employees and airline personnel, who were attempting to cooperate with TSA in constructing the CAPPS II system. Withnell Decl. at ¶ 45. Because these company employees were being relied upon as experts in TSA's efforts, they functioned as de facto agency personnel. Id.; Pub. Citizen, 111 F.3d at 170. By invoking Exemption 5, DHS protected the records revealing their contributions to these predecisional deliberations just as though they were TSA employees. Withnell Decl. at ¶ 45.

The responsive records do not indicate that a final decision was ever reached on the technical aspect of the CAPPS II model and, in fact, as noted previously, CAPPS II has now been replaced by a new program that is currently in the testing phase. Withnell Decl. at ¶ 46. Release of the documents at issue at this point, therefore, in light of the fact that TSA has decided not to proceed with CAPPS II but to start over with a new program, would chill the deliberative process, because TSA personnel would be less likely to be as candid about potential policy matters in the future. Id.; Formaldehyde Inst. v. Dep't of Health and Human Serv., 889 F.2d 1118, 1122 (D.C. Cir. 1989) (disclosure of documents "would expose an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.") More importantly, release of these records would serve only to confuse the debate about Secure Flight at a time when the public necessarily should be focused on TSA's current efforts rather than on what TSA has decided not to do. Withnell Decl. at ¶ 46. The records reflect that JetBlue provided technical data about how its PNR is put together, but no personal identifying information that would appear in the PNR. Id.

Chief Privacy Officer. For the vast majority of documents that were withheld from the files of the Chief Privacy Officer DHS claimed Exemption 5 for the deliberative process privilege.

Withnell Decl. at ¶ 53. The records maintained by the Chief Privacy Officer were predecisional in that they were collected in anticipation of her issuing a decision as to whether or not the facilitation by TSA of the transfer of PNR from JetBlue to the Department of Defense constituted a privacy violation. Id.; Quarles, 893 F.2d at 392. They were also deliberative in that the Chief Privacy Officer sifted through data, requested answers to questions, asked for suggestions and recommendations and otherwise examined a plethora of materials prior to drafting her final report. Id.; Sears, 421 U.S. at 150. This information constituted the raw materials used to arrive at a final decision, which is reflected in her "Report to the Public on Events Surrounding JetBlue Data Transfer." Withnell Decl. at ¶ 53. Individuals could speak freely and candidly, which greatly enhanced the overall analysis and contributed to a better final report. Id.; Formaldehyde, 889 F.2d at 1122. These documents are thus the sort of deliberative material "which must remain uninhibited and thus undisclosed, in order to supply maximum assistance to the [agency] in reaching its decision." Negotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 186 (1975). DHS invoked Exemption 5 to protect these candid conversations. Withnell Decl. at ¶ 53. For similar reasons, DHS invoked Exemption 5 to protect draft documents and internal agency comments about the draft report, so that the Privacy Officer's final decision could be evaluated as it was expressed in her published report, rather than in preliminary drafts. Id.

It does not matter that some of the information contained in the TSA Records and DHS Chief Privacy Officer's Documents could be described, on their face, as factual. "The deliberative character of agency documents can often be determined through the simple test that factual material must be disclosed but advice and recommendations may be withheld." Mapother, 3 F.3d at 1537. That rule of thumb, however, "is not infallible and must not be mechanically applied," because "the

privilege serves to protect the deliberative process itself, not merely documents containing deliberative material." Id. "The key question in identifying deliberative material," therefore, "is whether disclosure of the information would discourage candid discussion within the agency." Access Reports, 926 F.2d at 1195. Where that would be the case, as here, courts have held documents to be exempt from disclosure under the FOIA "[e]ven where the requested material is found to be factual," Quarles, 893 F.2d at 392.

For all of these reasons, DHS appropriately withheld these documents under authority of Exemption 5.

F. DHS and TSA Properly Withheld Documents Pursuant to Exemption 6. (DHS Vaughn: TSA Records: D, E, F, G, H, I, O, P, Q, R, S, T, U, V, W, X, Y, FF, GG, II, JJ, KK, MM, NN, OO, WW, XX, YY, ZZ, AAA, BBB, DDD, EEE, FFF, GGG, HHH; CPOD: A, B, C, J, K, L, M, N, S, T, U, W, Y, Z, DD)

Exemption 6 protects information when disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).[10] In applying Exemption 6, a court

> must identify the privacy interest served by withholding information and then the public interest that would be advanced by disclosing it. Having done so, the court must determine whether, on balance, disclosure would work a clearly unwarranted invasion of personal privacy.

Painting and Drywall Work Preservation Fund, Inc. v. Dep't of Housing and Urban Dev., 936 F.2d 1300, 1302 (D.C. Cir. 1991). Privacy encompasses the "'individual's control of information concerning his or her person,'" including "the prosaic (e.g., place of birth and date of marriage) as well as the intimate and potentially embarrassing." Id., (quoting Reporters Committee, 489 U.S. at

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[10] The documents easily meet the exemption's threshold requirement that they be "personnel, medical or similar files," 5 U.S.C. § 552(b)(6), because all of the information contained therein "applies to particular individuals." Dep't of State v. Wash. Post Co., 456 U.S. 595, 602 (1982).

763). The "only relevant public interest to be weighed in this balance is the extent to which disclosure would serve the core purpose of FOIA, which is contribut[ing] significantly to public understanding of the operations or activities of the government." Dep't of Defense v. Fed'l Labor Relations Authority, 510 U.S. 487, 495-96 (1994) (internal citation and quotation marks omitted). Plaintiffs bear the burden of demonstrating that the release of the withheld documents would serve this interest. See Carter v. United States Dep't of Commerce, 830 F.2d 388, 391-92 nn.8 & 13 (D.C. Cir. 1987).

Although the public interest in an Exemption 6 case need not be of the same magnitude as in an exemption 7(C) case, see Federal Labor Relations, 510 U.S. at 496 n.6, “something, even a modest privacy interest, outweighs nothing every time.” National Ass’n of Retired Federal Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989); see also Federal Labor Relations Auth. v. United States Dep’t of Navy, 941 F.2d 49, 57 (1st Cir. 1991) (noting that “[w]hatever non-zero privacy interest at stake, under Reporters Committee, that interest cannot be outweighed by public interest in disclosure – whatever its weight or significance – that falls outside of the FOIA cognizable public interest in permitting the people to know what their government is up to”).

Plaintiff has informed DHS that it is willing to exclude from the scope of litigation non-government employees' names, phone numbers, addresses, and email user names withheld under Exemption 6. Plaintiff is not willing to exclude from the scope of litigation names of businesses or entities with which individuals are affiliated, or domain names within email addresses. Further, plaintiff is not willing to exclude identifying information of TSA employees, or employees of other federal agencies, withheld under Exemption 6. See Ex. A (EPIC email I).

DHS can, however, properly withhold the names of businesses and entities with which

individuals are affiliated and domain names within email addresses as well as identifying information of TSA employees and employees of other federal agencies pursuant to Exemption 6.

TSA Records. In the vast majority of instances where this exemption was invoked, DHS withheld the identities of lower-level agency employees, contractors, or airline personnel who were involved in deciding how to construct CAPPS II.[11] Withnell Decl. at ¶ 47. DHS did so for several reasons. First, federal employees do not give up all privacy rights by virtue of their employment by the Federal Government. Withnell Decl. at ¶ 47. Courts have recognized that there is a privacy interest in the "release of an individual's name in association with his employment position in the federal government." U.S. Dep't of Navy v. Fed'l Labor Relations Authority, 975 F.2d 348, 352 (7th Cir. 1992). Similarly, lists of names and addresses have been held to constitute a "similar file." Minnis v. U.S. Dep't of Agriculture, 737 F.2d 784, 786 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985); Horner, 879 F.2d at 875 ("The Supreme Court has made clear that Exemption 6 is designed to protect personal information in public records, even if it is not embarassing or of an intimate nature."). Second, TSA's primary mission is to ensure that U.S. transportation systems are secured against terrorism and other threats. Id. The nature of the agency's mission potentially puts its

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[11] In reexamining the relevant documents at issue, DHS discovered that no response was ever made by TSA or by DHS after submitter notice was provided to Torch Concepts concerning certain of its records. Withnell Decl. at ¶ 40. This notice was mentioned in TSA's interim responses to plaintiff. Id. Attached to Withnell's declaration as Exhibit S are 21 pages of records that have not been heretofore released, but which were the subject of submitter notice. Id. at ¶ 40 & Ex. S. At the request of the Army, Torch Concepts itself substituted the term "The Army" on one of the pages for the identity of the individual that appeared there. Id. Because of the sensitivity of the Department of Defense in general to the release of names of service personnel and employees, this identity was withheld on the basis of Exemption 6. The Department of Defense has a policy counseling against release of DOD names. See http://www.defenselink.mil/pubs/foi/withhold.pdf.

employees in the unenviable and untenable position of not only being advocates for security measures that may be unpopular, but also of being on the front lines of implementation of those policies. Id. Association 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. Id. 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." Baez v. U.S. Dep't of Justice, 647 F.2d 1328, 1339 (D.C. Cir. 1980); Lesar v. U.S. Dep't of Justice, 636 F.2d 472, 487 (D.C. Cir. 1980) (same); Hunt v. Federal Bureau of Investigation, 972 F.2d 286, 288 (9th Cir. 1992) (government employees have a "legitimate interest in keeping private matters that could conceivably subject them to annoyance or harassment."). Some of the individuals mentioned in the documents have moved to different positions within DHS or outside of the government. Withnell Decl. at ¶ 47.

All of these factors persuaded DHS that these individuals possessed a privacy interest in not having their identities made public. Id. DHS balanced this privacy interest against the public interest in these names, and decided that the names provided no meaningful information about government activities, which is the core purpose of the FOIA. Id.; Federal Labor Relations, 510 U.S. at 496 n.6. On balance, therefore, DHS decided to withhold these individual identities on the basis of Exemption 6. Withnell Decl. at ¶ 47.

The Chief Privacy Officer's Documents. As can be seen in the documents that were released to plaintiff in Exhibits P, R, and S, DHS invoked Exemption 6 to protect the identities of DHS employees and other individuals, including personal cell phone numbers and other contact information. Withnell Decl. at ¶ 54 & Exs. P, R, S. DHS also protected the identities of certain

individuals who sent messages to the Chief Privacy Officer. Id. DHS's rationale for protecting agency employees has been explained in the previous paragraphs concerning the TSA documents. In addition, the Chief Privacy Officer is sensitive to the need for privacy protections for all types of individuals, and DHS's redaction decisions on the Chief Privacy Officer's records reflect this policy. Id. The individual identities at issue shed no light on government activities. Id. "FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed." Reporters Committee, 489 U.S. at 774 (emphasis by court). The matter involving the transfer of PNR is an issue of policy and law, not of personalities, so even where certain individuals might have a reduced expectation of privacy DHS decided that on balance, that privacy interest was paramount. Id.

Further, in some cases, if DHS were to release the information that plaintiff believes should not be withheld (regarding the names of businesses or entities with which individuals are affiliated, domain names within email addresses as well as identifying information of TSA employees, or employees of other federal agencies), it would be the only information on a page that is releasable. Withnell Decl. at ¶ 47. Since such information does not shed light on government activities, the information, even if releasable, is not reasonably segregable. Id.; Federal Labor Relations, 510 U.S. at 496 n.6; Mead Data Central, Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 261 n.55 (D.C. Cir. 1977); Judicial Watch, 108 F.Supp.2d at 38.

In sum, given the absence of any public interest in the disclosure of the information relating to these individuals, it is clear this information was appropriately withheld under Exemption 6.

G. DHS and TSA Properly Withheld Documents Pursuant to Exemption 7(A). (DHS Vaughn Index CPOD: ¶¶ 1, 2, 3, 4)

Records compiled for law enforcement purposes are exempt from disclosure if they fall within one of the six categories set forth at § 552(b)(7)(A)-(F). Before examining whether the requested documents fall within one of the six categories, the court must first determine whether they were "compiled for law enforcement purposes." Quinon v. FBI, 86 F.3d 1222, 1228 (D.C. Cir. 1996). Records must meet two criteria to qualify as law enforcement records: 1) the activity that gave rise to the documents must be related to the enforcement of federal laws or the maintenance of national security; and 2) the nexus between the activity and one of the agency's law enforcement duties must be based on information sufficient to support at least a "colorable claim" of its rationality. See Keys v. United States Dep't of Justice, 830 F.2d 337, 440 (D.C. Cir. 1987); Pratt v. Webster, 673 F.2d 408, 420-21 (D.C. Cir. 1982); Blanton v. Dep't of Justice, 63 F. Supp.2d 35, 44 (D.D.C. 1999).

Exemption 7(A) of the FOIA, 5 U.S.C. § 552(b)(7)(A), exempts from disclosure records compiled for law enforcement and investigatory purposes that "could reasonably be expected to interfere with enforcement proceedings." See Swan v. Securities and Exchange Comm'n, 96 F.3d 498, 500 (D.C. Cir. 1996) (finding documents exempt under 7(A) where disclosure "could reveal much about the focus and scope of the Commission's investigation"). To fit within Exemption 7(A), the government must show that (1) a law enforcement proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm. Manna v. United States Dep't of Justice, 51 F.3d 1158, 1164 (3d Cir. 1995).

In the instant case, DHS has invoked Exemption 7(A) to withhold certain categories of documents responsive to plaintiff's third request because the DHS Chief Privacy Officer is reviewing the circumstances surrounding the transfer of PNR data from airlines and Global Distribution Services companies to TSA to determine if such transfers violated the privacy obligations of TSA. Withnell Decl. at ¶ 55. The investigation has not yet been completed. Id.

The Chief Privacy Officer occupies a distinctive position. Id. at ¶ 56. She is charged by law with investigating privacy complaints and reporting on such matters. Id. Although she is also charged by law with enforcing privacy policy for DHS, if she were to find a Privacy Act or other statutory violation as a result of an investigation, she could refer the matter to the DHS Inspector General who could, in turn, impose sanctions on an employee. Id. The Privacy Act itself contains not only civil remedies, but also criminal penalties for willful violations. Id. Consequently, the potential for some form of punishment exists as a result of an investigation by the Privacy Officer, even if the Privacy Officer herself cannot impose that punishment. Id. Moreover, her statutory authority is more than mere monitoring; she is required to focus on specific acts that allegedly amount to privacy violations. Id. For these reasons, records or information compiled by the Chief Privacy Officer in connection with the investigation of an alleged privacy violation amounts to records or information compiled for law enforcement purposes. Id.

Because the investigatory activities of the Chief Privacy Officer meet the threshold test for Exemption 7 applicability, DHS invoked Exemption 7(A) to withhold material relating to the Chief Privacy Officer's investigation of additional PNR transfers directly involving TSA. Withnell Decl. at ¶ 57. Premature release of the documents at issue could reveal the very evidence that is being reviewed by the Chief Privacy Officer as well as the scope and direction of her analysis. Id.

Releasing the information at issue before the conclusion of her investigation could allow personnel who may be the focus of the investigation to take defensive measures to blunt any recommendations that may be forthcoming, including those concerning disciplinary or other punitive measures. Id.; Swan, 96 F.3d at 500.

Accordingly, these documents were properly withheld pursuant to Exemption 7(A).

H. DHS and TSA Properly Withheld Documents Pursuant to Exemption 7(C). (DHS Vaughn CPOD: A, B, C, J, K, L, M, N, S, U, W, Y, Z, DD)

Exemption 7(C) of the FOIA protects from disclosure "records or information compiled for law enforcement purposes" to the extent that the production of such law enforcement records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In applying exemption 7(C), the Court must "balance the privacy interests that would be compromised by disclosure against the public interest in release of the requested information." Davis v. Dep't of Justice, 968 F.2d 1276, 1281 (D.C. Cir. 1992). However, recognizing the considerable stigma inherent in being associated with law enforcement proceedings, courts "do[] not require a balance tilted emphatically in favor of disclosure" when reviewing a claimed 7(C) exemption. Bast v. U.S. Dep't of Justice, 665 F.2d 1251, 1254 (D.C. Cir. 1981). Additionally, courts have construed the public interest component narrowly, noting that the public interest "must be assessed in light of FOIA's central purpose," and that this purpose "is not fostered by disclosure about private individuals that is accumulated in various government files but that reveals little or nothing about an agency's conduct." Nation Magazine Washington Bureau v. United States Customs Serv., 71 F.3d 885, 894 (D.C. Cir. 1995) (quotation marks and citation omitted).

It is settled that parties mentioned in law enforcement materials have a presumptive privacy

interest in having their names and other personal information withheld from public disclosure. See, e.g., Nation Magazine, 71 F.3d at 894; Safecard Servs., Inc. v. SEC, 926 F.2d 1197, 1206 (D.C. Cir. 1991); Bast, 665 F.2d 1251. The Supreme Court has concluded that "as a categorical matter . . . a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy." Reporters Committee, 489 U.S. at 780; Perrone v. FBI, 908 F.Supp. 24, 26 (D.D.C. 1995). On the other hand, the public interest in knowing the names of individuals mentioned in law enforcement records, as a general matter, is nil. See Blanton, 63 F. Supp.2d at 45 ("The privacy interests of individual parties mentioned in law enforcement files are 'substantial' while '[the public interest in disclosure [of third party identities] is not just less substantial, it is unsubstantial.'" (quoting Safecard, 926 F.2d at1205)). Indeed, in Safecard, this Circuit stated that

> unless there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the names of private individuals appearing in the agency's law enforcement files is necessary in order to confirm or refute that evidence, there is no reason to believe that the incremental public interest would ever be significant.

Safecard, 926 F.2d at 1205-06; see also Reporters Committee, 489 U.S. at 774 ("Although there is undoubtedly some public interest in anyone's criminal history . . . the FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed."); id. at 765 ("[D]isclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind.").

In this case, because the investigatory activities of the Chief Privacy Officer meet the threshold test for Exemption 7 applicability, DHS invoked Exemption 7(C) to protect the identities

of DHS employees and other individuals, including personal cell phone numbers and other contact information. Withnell Decl. at ¶ 54, 58. DHS also protected the identities of certain individuals who sent messages to the Chief Privacy Officer. Id.

Plaintiff has informed DHS that it is willing to exclude from the scope of litigation non-government employees' names, phone numbers, addresses, and email user names withheld under Exemption 7(C) in the material described in paragraphs A, J, S, U, W, and Y of the Chief Privacy Officer's Documents. See Ex. A (EPIC email I). Plaintiff is not willing to exclude from the scope of litigation names of businesses or entities with which individuals are affiliated, or domain names within email addresses. Further, plaintiff is not willing to exclude identifying information of TSA employees, or employees of other federal agencies, withheld under Exemption 7(C).

DHS can, however, properly withhold the names of businesses and entities with which individuals are affiliated, and domain names within email addresses as well as identifying information of TSA employees amd employees of other federal agencies pursuant to Exemption 7(C).

DHS's rationale for protecting federal government employees, particularly from harassment, explained above in the discussion of Exemption 6, is also applicable here. Baez, 647 F.2d at 1339; Lesar, 636 F.2d at 487; Hunt v. FBI, 972 F.2d at 288. Additionally, the Chief Privacy Officer, as with Exemption 6, is sensitive to the need for privacy protections for all types of individuals including private individuals, and DHS's redaction decisions on the Chief Privacy Officer's records reflects this policy. Withnell Decl. at ¶ 54, 58; Reporters Committee, 489 U.S. at 774.

Further, identifying information on TSA employees and employees of other federal agencies are exempt under Exemption 7(C) because association with an investigation may result in heightened

attention being paid to these individuals that could reasonably be expected to constitute an invasion of privacy. Withnell Decl. at ¶ 58; Nation Magazine, 71 F.3d at 894; Safecard, 926 F.2d at 1206; Bast, 665 F.2d 1251; Reporters Committee, 489 U.S. at 780. Balanced against the risk of a privacy invasion is the fact that their identities shed no light on government activities, which is the core purpose of the FOIA. Withnell Decl. at ¶ 58; Federal Labor Relations, 510 U.S. at 496 n.6.

Moreover, in some cases, if DHS were to release the information that plaintiff believes should not be withheld (regarding the names of businesses or entities with which individuals are affiliated, domain names within email addresses as well as identifying information of TSA employees, or employees of other federal agencies), it would be the only information on a page that is releasable. Withnell Decl. at ¶ 47. Since such information does not shed light on government activities, the information, even if releasable, is not reasonably segregable. Id.; Federal Labor Relations, 510 U.S. at 496 n.6; Mead Data, 566 F.2d at 261 n.55; Judicial Watch, 108 F.Supp.2d at 38.

Accordingly, the personal information contained in these fields was properly redacted as exempt under Exemption 7(C).

II. DOJ IS ENTITLED TO SUMMARY JUDGMENT

A. DOJ Conducted a Reasonable Search for Responsive Records.

The search conducted by DOJ was reasonably calculated to locate documents responsive to plaintiff's request. Weisberg, 745 F.2d at 1485. In fact, DOJ went above and beyond conducting a reasonable search and employed exceptional search methods in response to plaintiff's request. The Declaration of David M. Hardy details the extensive search conducted in response to plaintiff's FOIA request. See Hardy Dec. at ¶¶ 12-16, 17-21. As stated previously, Mr. Hardy is the Section Chief

of the Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD"), at the Federal Bureau of Investigation Headquarters ("FBIHQ") in Washington, D.C. See Hardy Decl. at ¶ 1.

As a threshold matter, it is important to note that the generalized nature of EPIC's FOIA request, i.e., "Airline Passenger Data," does not lend itself readily or naturally to the searches the FBI routinely conducts in response to FOIA requests seeking access to FBI investigative files. Hardy Decl. at ¶ 17. This is particularly true where, as in the instant case, the subject matter of the request is relatively recent, and certain of the potentially responsive records may not have yet been indexed to the FBI's Central Records System ("CRS"), "particularly because they are part of the FBI's largest, most comprehensive investigation in its history – 'PENTTBOMB' – designed to identify the killers behind the September 11, 2001 terrorist attacks, as well as to prevent further terrorist attacks." Id.; see also Id. at 12-16 (indepth description of CRS).

As a result of these complicating factors, in response to plaintiff's FOIA request, DOJ attempted to locate records responsive to plaintiff's FOIA request both through a standard search of records in the CRS as well as an individualized inquiry of the most logical offices at FBIHQ to have potentially responsive records. Id. First, FBIHQ initiated a search of its automated general indices to the CRS at FBIHQ to identify any records pertaining to the FBI's acquisition of passenger data from any airline since September 11, 2001. Id. The following phrases were searched through the CRS without success: "Airline Passenger Data," "Airline Passenger," and "Airline Data." Id.

Second, an Electronic Communication ("EC") was sent to all FBIHQ Divisions to determine if they possessed any records responsive to plaintiff's FOIA request. Id. at ¶ 18. Although the EC did not initially prompt any positive responses, after diligent further follow-up with logical

Divisions, documents were eventually obtained from the Cyber Division, the Counterterrorism Division, and the Office of the General Counsel. Id.

Further, DOJ also diligently undertook certain exceptional search methods to locate any relevant records. See Garcia v. United States Dep't of Justice, 181 F. Supp. 356, 368 (S.D.N.Y. 2002) ("The agency is not expected to take extraordinary measures to find the requested records."). FBI personnel went outside their own systems of records and contacted the General Counsel at NASA telephonically in an attempt to locate the source of the information that the FBI had obtained "one year's data on 6000 CD's discussed in the Electronic Mail ("e-mail") released by NASA to plaintiff and subsequently attached by plaintiff to its May 6, 2004 request. Hardy Decl. at ¶ 19, & Ex. A.; see also Brunskill v. United States Dep't of Justice, No. 99-3316, slip op. at 4-5 (D.D.C. Mar. 19, 2001) (concluding that the FBI has no obligation to search for records at Customs Service, because "there is no basis to compel defendant to conduct its search outside its own systems of records").

The contact with the NASA General Counsel and other knowledgeable NASA employees ultimately provided the identity of an FBI SA in the Minneapolis Field Office, who, when contacted by FBIHQ, confirmed that he took possession of passenger data from an airline during the initial investigative states of the PENTTBOMB investigation, which had then been forwarded to FBIHQ. Making this contact was also an extraordinary search measure because agencies that have field offices in various locations ordinarily are not required to search offices other than those to which the request was directed. See, e.g., Kowalczyk v. Dep't of Justice, 73 F.3d 386, 389 (D.C. Cir. 1996) (stating that when "the requester clearly states that he wants all agency records . . . regardless of their location, but fails to direct the agency's attention to any particular office other than the one receiving

the request, then the agency need pursue only a lead . . . that is both clear and certain");[12] Church of Scientology v. IRS, 792 F.2d 146, 150 (D.C. Cir. 1986) (finding that when agency regulations require requests be made to specific offices for specific records, there is no need to search additional offices when those regulations are not followed); Marks v. United States Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978) (finding no duty to search FBI field offices when requester directed request only to FBI Headquarters and did not specify which filed offices he wanted searched); Prescott v. Dep't of Justice, No. 00-0187, slip op. at 7 (D.D.C. Aug. 10, 2001) (finding search of FBI Headquarters reasonable, based on Department of Justice regulations requiring requesters to direct their requests to individual FBI field offices in the first instance).

The information gleaned from this extraordinary search measure led to further contacts with the Counterterrorism Division at FBIHQ. Hardy Decl. ¶ 20. These contacts resulted in DOJ's determination that several field offices had forwarded airline passenger date in the context of the PENTTBOMB investigation to FBIHQ. Id. That forwarded airline passenger data was subsequently entered into computerized databases maintained by the Cyber Division at FBIHQ. Id.

Cyber Division at FBIHQ confirmed the existence and voluminous size of these databases, referred to by the Cyber Division as "Airline Data Sets," which contain airline passenger data acquired in the context of the PENTTBOMB investigation. Id. at ¶ 21. Pursuant to plaintiff's request, Cyber Division personnel initiated a query of its computer systems to retrieve summaries and descriptions of the PENTTBOMB Airline Data Sets. Id. at ¶ 22. As discussed above, the results of this query are the twelve (12) pages of records processed and released with redactions to plaintiff

[12] While DOJ followed a lead to the Minneapolis Field Office in the instant case, this lead itself was only uncovered through extraordinary search methods, i.e., contacting NASA.

on or about September 23, 2004.[13] Id. at ¶ 4, 22 & Ex. G.

These records show that, during the initial phases of the PENTTBOMB investigation, airline passenger data was acquired from several airlines, with their consent, soon after the terrorist attacks on September 11, 2001. Hardy Decl. at ¶ 23. This airline passenger data was provided by the airlines to the FBI with implied assurances of confidentiality. Id. One exception is one set of airline passenger data which was acquired through a Federal Grand Jury subpoena. Id.

The majority of these Airline Data Sets were received at FBIHQ from on or about September 22, 2001, to on or about November 19, 2001; one airline's passenger data was received at FBIHQ on or about April 18, 2002. Hardy Decl. at ¶ 24. The data in these Airline Airline Data Sets consists of two subsets of data: "Airline Manifests and Reservations" and "Airline Passenger Name Record." Id. The time periods for the Airline Manifests and Reservations subset range from December 31, 2000, to September 30, 2001. Id. The time periods for the Airline Passenger Name Record subset range from June 1, 2001, to September 11, 2001. Id.

The information contained in these Airline Data Sets is extremely voluminous. Hardy Decl. at ¶ 25. The Airline Manifests and Reservations subset contains 82.1 million records and the Airline Passenger Name Record subset contains 257.5 million records. Id. The Airline Data Sets have been entered by the Cyber Division into a "Data Warehouse" and have been intertwined for analytical purposes with the information from several other PENTTBOMB Data Sets. Id. (describing the PENTTBOMB Data Sets and their voluminous nature).

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[13] Query of the Cyber Division's computer systems for records concerning Airline Data Sets also produced, in some instances, descriptions of other data sets not related to airline passenger data and thus not responsive to plaintiff's FOIA request. Descriptions of non-responsive data sets were withheld from release and designated as "outside the scope" of plaintiff's FOIA request. Hardy Decl. at ¶ 22 & Ex. G at 9, 10.

The Cyber Division informed David Hardy that since the Airline Data Sets have been intertwined with other PENTTBOMB Data Sets, the information contained in the Airline Data Sets cannot be segregated and extracted from the Data Warehouse in its original form. Hardy Decl. at ¶ 26. The only information which can be extracted concerning Airline Data Sets are the records which were processed and released to plaintiff. Id. These twelve (12) pages of records are referred to by the Cyber Division as "metadata," i.e., data which describes and summarizes the Airline Data Sets. Id.

By conducting a standard search of records in the CRS, an individualized inquiry of the most logical offices at FBIHQ to have potentially responsive records, and returning to these offices for further follow-up, DOJ would have fully discharged its obligation to search for documents under the FOIA. In addition, however, DOJ went beyond what it was required to do by contacting the NASA General Counsel and other knowledgeable NASA employees and an FBI SA in the Minneapolis Field Office and using the information acquired from these contacts to guide a further search involving the Counterterrorism Division at FBIHQ. In these ways, DOJ more than fully discharged its obligation to search for documents under the FOIA.

B. DOJ Properly Withheld 12 Pages of Responsive Documents Pursuant to Exemptions 2, 6, 7(C), and 7(D).

Plaintiff has agreed not to challenge any of the exemptions claimed by DOJ in the Declaration of David M. Hardy. See Ex. A (EPIC email I). Accordingly, DOJ should be granted summary judgment.

CONCLUSION

For the foregoing reasons, defendants respectfully request that this motion be granted and that summary judgment be granted in their favor.

Dated: January 19, 2005.

Respectfully submitted,

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