IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff, v. TRANSPORTATION SECURITY ADMINISTRATION, Defendant.	Civil Action No. 11-0290 (ABJ)

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Transportation Security Administration hereby moves the Court to enter summary judgment in Defendant's favor pursuant to Rule 56(b) of the Federal Rules of Civil Procedure. Included in support of this motion are a memorandum of points and authorities, a statement of material facts not in genuine dispute, and attached exhibits, including the declarations of Paul Sotoudeh, William Benner, Peter Modica, and Whitney Weller, and a proposed order.

Dated: September 16, 2011

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Electronic Privacy Information Center ("EPIC") has sued Defendant Transportation Security Administration ("TSA") under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). EPIC seeks agency records concerning the use of Automated Target Recognition (ATR) software on certain Advanced Imaging Technology ("AIT") scanners deployed by TSA at airports for the screening of airline passengers. Because TSA has conducted an adequate search and produced all responsive documents that are not exempt from release under FOIA, summary judgment should be granted in Defendant's favor.

FACTUAL AND PROCEDURAL BACKGROUND

I. Background on AIT and ATR

The FOIA request in this case generally relates to the use of Automated Target Recognition (ATR) software as a component of airport screening of passengers. TSA has been charged by Congress with overall responsibility for civil aviation security, 49 U.S.C. § 114(d); 6 U.S.C. § 202(1), and must provide for "the screening of all passengers and property . . . before

boarding," in order to ensure that no passenger is unlawfully carrying a dangerous weapon, explosive, or other destructive substance. 49 U.S.C. §§ 44901(a), 44902(a), 114(e); *see also* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108–458, § 4013(a), 118 Stat. 3638, 3719 (codified at 49 U.S.C. § 44925(a)) (directing TSA to give high priority to deploying new technologies at airport screening checkpoints to detect "nonmetallic, chemical, biological, and radiological weapons, and explosives" on individuals and in their property, including such explosives that "terrorists would likely try to smuggle aboard").

TSA decided in 2010 to utilize Advanced Imaging Technology (AIT) scanners as a primary form of screening of passengers seeking to board aircraft. *Elec. Privacy Info. Ctr. v. DHS*, --- F.3d ----, 2011 WL 2739752, at *1 (D.C. Cir. 2011).[1] As initially deployed, these scanners worked by bouncing the electromagnetic waves or X-ray beams off of the passenger being screened and producing an image that could be viewed by a Transportation Security Officer (TSO). TSA contracts with private vendors to develop and manufacture AIT scanners. *Id.* L-3 Communications manufactures the Provision, an AIT scanner that uses millimeter wave technology, and Rapiscan Systems has created the Secure 1000, which uses backscatter technology.

Consistent with TSA's commitment to maintaining high levels of security while also improving the passenger experience, TSA began to test the use of Automated Target Recognition (ATR) software. Rather than having a TSO view a passenger-specific image, scanners utilizing this software auto-detect potential threat items and indicates their location on a generic outline of a person. TSA began field testing this software at three airports in the beginning of 2011. On

[1] No individual, however, is required to go through a scanner. Instead, an individual may opt to be patted down by a TSO.

July 20, 2011, TSA announced that it would begin installing ATR software on millimeter wave machines across the country. http://www.tsa.gov/press/releases/2011/0720.shtm.

II. Procedural History

While TSA was still in the process of reviewing ATR technology, EPIC filed two FOIA requests. The first request, filed in June 2010, sought:

> 1) All specifications provided by TSA to automated target recognition manufacturers concerning automated target recognition systems.
> 2) All records concerning the capabilities, operational effectiveness, or suitability of automated target recognition systems, as described in Secretary Napolitano's letter to Senator Collins.
> 3) All records provided to TSA from the Dutch government concerning automated target recognition systems deployed in Schiphol Airport, as described in Secretary Napolitano's letter to Senator Collins.
> 4) All records evaluating the FBS program and determining automated target recognition requirements for nationwide deployment, as described in Secretary Napolitano's letter to Senator Collins.

Defendant's Statement of Material Facts ("LCvR 7(h) Stmt.") ¶ 1; *see also* Ex. 1, Sotoudeh Decl. ¶1 ("Sotoudeh Decl."). The second request, filed in October 2010, sought:

> 1) All records provided from L3 Communications or Rapiscan in support of the submission or certification of ATR software modifications;
> 2) All contracts, contract amendments, or statements of work related to the submission or certification of ATR software modifications;
> 3) All information, including results, of government testing of ATR technology, as referenced by Greg Soule of the TSA in an e-mail to Bloomberg News, published September 8, 2010.

LCvR 7(h) Stmt. ¶ 2 (quoting Sotoudeh Decl. ¶2). The second request was addressed to DHS, which referred the request to TSA because the requested information fell within TSA's purview. LCvR 7(h) Stmt. ¶ 3.

TSA identified the following offices that it thought were likely to have responsive records to one or both of the requests: the Office of Security Technology ("OST"), the Office of

Acquisitions, the Office of Global Strategies (OGS), the Office of the Executive Secretary, the Office of Security Operations (OSO), and the Office of the Chief Counsel (OCC). LCvR 7(h) Stmt. ¶ 4 (citing Sotoudeh Decl. ¶¶ 9, 20).

The Office of Security Technology is responsible for TSA's programs for transportation screening equipment and explosive detection solutions. LCvR 7(h) Stmt. ¶ 5 (citing Sotoudeh Decl. ¶ 10). The Advanced Imaging Technology ("AIT") program is part of the Passenger Screening Program ("PSP") within the OST, which focuses on identifying, testing, procuring, deploying, and sustaining checkpoint security equipment. *Id.* OST also administers the contracts with AIT manufacturers. *Id.* OST electronically searched its files for responsive records by searching the "AIT"-related folder on the computer of the Deputy Program Manager for the Passenger Screening Program ("PSP"). LCvR 7(h) Stmt. ¶ 6 (citing Sotoudeh Decl. ¶¶ 11, 21). OST also searched the Schiphol folder in the classified safe for responsive records. *Id.* OST also contacted the TSA Security Integration Facility (TSIF), which is responsible for testing security technologies, and asked it to locate AIT/ATR test results. LCvR 7(h) Stmt. ¶ 6 (citing Sotoudeh Decl. ¶ 21).

As part of its search for records responsive to the first request, item number 3, regarding records sent from the Dutch government, the TSA FOIA office consulted with the OST Deputy Assistant Administrator, who had personal knowledge of the information exchanged between the United States and the government of Netherlands. The OST Deputy Assistant Administrator recalled that there was an oral exchange of information between the governments, but no physical records were exchanged during the visit. LCvR 7(h) Stmt. ¶7 (citing Sotoudeh Decl. ¶ 11).

Also identified as an office likely to have responsive documents to both requests was the Office of Acquisitions, which maintains and manages all procurement activities for the PSP program. LCvR 7(h) Stmt. ¶8 (citing Sotoudeh Decl. ¶¶12, 22). The Office of Acquisition searched its contract files that related to AIT/ATR for responsive records. *Id.*

The FOIA Office tasked the Office of Global Strategies (OGS) to search for records responsive to the first request because the mission of OGS is to work with foreign governments and industry partners regarding overseas transportation operations affecting the United States. LCvR 7(h) Stmt. ¶9 (citing Sotoudeh Decl. ¶ 13). In addition to a manual search for files, OGS performed an electronic search of its files at headquarters for files containing the terms "Advanced Imaging Technology," "AIT," "ATR," and "testing." *Id.* Additionally, the Transportation Security Administration Representative for the region that includes the Netherlands conducted an electronic search of its files using the terms "ATR, Automated Threat Recognition, AIT, Schiphol, NCTB, Millimeter Wave, Body Scanner, Presentation, PowerPoint, Brochure, and Attachment," as well as reviewing file folders that referenced the Dutch. *Id.*

TSA also searched the Office of the Executive Secretary for responsive records. The Office of the Executive Secretary maintains and tracks correspondence that pertains to officials in TSA's front office, including the Administrator and Deputy Administrator, and that pertains to TSA interaction with the DHS Office of the Secretary. LCvR 7(h) Stmt. ¶11 (citing Sotoudeh Decl. ¶ 14). The Executive Secretary conducted an electronic and manual search, using the terms "Dutch, KLM, ATR, Automated Target Recognition, AIT, Advanced Imaging Technology, Whole Body Imaging, and WBI." *Id.* Additionally, the Executive Secretary searched for all ATR-related Action Memos created between August 1, 2009 and June 25, 2010. *Id.*

The Office of Security Operations was also directed to search its files for records responsive to the requests because it is responsible for operationalizing new technology both during the testing phase and ultimately once new technology is deployed. LCvR 7(h) Stmt. ¶12 (citing Sotoudeh Decl. ¶ 15, 23). Within OSO, ATR points of contact searched their ATR folders for data concerning ATR operational testing and effectiveness work conducted in the field and produced responsive records. *Id.*

Finally, the Office of Chief Counsel participated in the search. The Deputy Chief Counsel for Procurement and the Assistant Chief Counsel for Information Law were consulted, and both determined that the responsive records were likely located within the Program Offices that ultimately located the responsive records. LCvR 7(h) Stmt. ¶10 (citing Sotoudeh Decl. ¶ 16).

On July 29, 2011, TSA made an initial release of several hundred pages of records responsive to EPIC's request. LCvR 7(h) Stmt. ¶ 13. On August 22, 2011, TSA made a supplemental release of 166 pages. LCvR 7(h) Stmt. ¶ 14. On September 8, 2011, TSA re-released 18 pages when, upon further examination and consultation, TSA determined that certain excerpts previously withheld could be released. LCvR 7(h) Stmt. ¶ 15. TSA has now completed its release of all responsive, non-exempt documents, and has withheld information under Exemptions 3, 4, 5, 6, and 49 U.S.C. § 114(r).[2] *See* Sotoudeh Decl., Ex. 1C ("*Vaughn* index").

STANDARD OF REVIEW

Summary judgment is appropriate when the there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c);

[2] TSA originally identified both Exemption 2 and Exemption 6 as the basis for withholding certain direct telephone numbers. For purposes of this litigation, TSA is no longer arguing that this information is exempt under Exemption 2. However, the information remains exempt from disclosure under Exemption 6.

Diamond v. Atwood, 43 F.3d 1538, 1540 (D.C. Cir. 1995). FOIA actions are typically resolved on summary judgment. *Reliant Energy Power Generation, Inc. v. FERC*, 520 F. Supp. 2d 194, 200 (D.D.C. 2007). A court reviews an agency's response to a FOIA request de novo. *See* 5 U.S.C. § 552(a)(4)(B).

On summary judgment in a FOIA case, the agency must demonstrate that it has conducted an adequate search. To do so, it must explain the "scope and method of the search" in "reasonable detail[,]" but need not provide "meticulous documentation [of] the details of an epic search." *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982). 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. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). "There is no requirement that an agency search every record system." *Id.* (citations omitted). Rather, "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*." *Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (emphasis in original). On this issue, courts accord agency affidavits "a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (quoting *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981)).

The agency must also justify any records withheld subject to FOIA's statutory exemptions. FOIA "represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 925 (D.C. Cir. 2003). As such, Congress recognized "that legitimate governmental and private interests could be harmed by release of certain types of

information and provided nine specific exemptions under which disclosure could be refused." *FBI v. Abramson*, 456 U.S. 615, 621 (1982). These exemptions are specified in 5 U.S.C. § 552(b).

The agency has the burden of justifying nondisclosure based on any exemptions. *Elec. Privacy Info. Ctr. v. DHS,* 384 F. Supp. 2d 100, 106 (D.D.C. 2005). It may meet this burden by providing affidavits and, if necessary, an index that provides an adequate description of each withheld document or portion thereof, and how each asserted exemption applies. *Id.* (citing *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)). A court may grant summary judgment to an agency on the basis of its affidavits if they "(a) describe the documents and the justifications for nondisclosure with reasonably specific detail, (b) demonstrate that the information withheld logically falls within the claimed exemption, and (c) are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Id.* (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)) (internal quotation marks and brackets omitted).

In the context of documents that implicate national security, courts typically give particular deference to agency declarations regarding the use of FOIA exemptions to withhold documents. *See Krikorian v. Dep't of State*, 984 F.2d 461, 464 (D.C. Cir. 1993) (noting deference to expertise of agencies engaged in national security and foreign policy). "[A] reviewing court 'must take into account . . . that any affidavit or other agency statement of threatened harm to national security will always be speculative to some extent, in the sense that it describes a potential future harm.'" *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (quoting *Halperin v. CIA*, 629 F.2d 144, 149 (D.C. Cir. 1980)) (omission in original). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Id.* at 374-75.

ARGUMENT

I. TSA's Search for Responsive Records was Adequate

To demonstrate the adequacy of a search for the purposes of summary judgment in a FOIA action, an 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." *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (internal citation and quotations omitted).

It is well-settled that under the FOIA, an agency's search for responsive records "need not be perfect, [but] only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request." *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986). Nor does an agency's failure to locate any particular document undermine an otherwise adequate search. *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). "[I]t is long settled that the failure of an agency to turn up one specific document in its search does not alone render a search inadequate . . . . After all, . . . a reasonable and thorough search may have missed" particular documents. *Id.* Similarly, the D.C. Circuit has rejected the claim that a search is inadequate because it did not uncover "documents that [plaintiff] claims *must* exist." *Oglesby*, 920 F.2d at 68 n.13.

Here, as set out in detail in the Sotoudeh Declaration, TSA's search for records responsive to Plaintiff's request was much more than adequate. *Meeropol*, 790 F.2d at 952; *see also Perry*, 684 F.2d at 127 (declaration need not "set forth with meticulous documentation the details of an epic search for the requested records" but need only "explain in reasonable detail the scope and method of the search conducted by the agency"). Upon receiving the requests,

TSA referred the requests to those divisions within TSA that it identified as likely to have responsive records. LCvR 7(h) Stmt. ¶4 (citing Sotoudeh Decl. ¶ 9, 20).

The choices of the offices to be searched were reasonable based on the subject matter covered by these offices, and their likelihood to have records responsive to EPIC's specific requests. The Office of Security Technology was selected for a search because it administers contracts with AIT manufacturers and is responsible for TSA's programs for transportation-security technology, including the ATR for AIT, whereas the Office of Acquisitions was selected due to its role in procurement activities. *See* LCvR 7(h) Stmt. ¶¶5, 8 (citing Sotoudeh Decl. ¶¶ 10, 12, 22). Because the Transportation Security Infrastructure Facility was the OST facility that conducted the ATR testing and was maintaining the test results, the TSIF was asked to locate the results of testing sought by EPIC. *See* LCvR 7(h) Stmt. ¶6 (citing Sotoudeh Decl. ¶ 21). In addition, the Office of Global Strategies was reasonably selected as a potential custodian of records responsive to EPIC's first request, which included a request for information received from a foreign government. *See* LCvR 7(h) Stmt. ¶9 (citing Sotoudeh Decl. ¶ 13). The Office of Security Operations was identified because it is responsible for operationalizing new technology both during the testing phase and ultimately once new technology is deployed. *See* LCvR 7(h) Stmt. ¶12 (citing Sotoudeh Decl. ¶ 15, 23). The Office of the Executive Secretary was selected because it maintains correspondence that might discuss the records sought. *See* LCvR 7(h) Stmt. ¶11 (citing Sotoudeh Decl. ¶ 14). Finally, the Deputy Chief Counsel for Procurement and the Assistant Chief Counsel for Information Law within the Office of Chief Counsel determined that responsive records were likely located within the Program Offices that ultimately located the responsive records. *See* LCvR 7(h) Stmt. ¶10 (citing Sotoudeh Decl. ¶ 16). Each office searched using either text-based electronic searches, or manual searches in the locations deemed

most likely to have responsive records. *See* LCvR 7(h) Stmt. ¶¶6-13 (citing Sotoudeh Decl. ¶¶ 11-16, 21-23).[3]

These searches were reasonably expected to produce the information requested. *See Greenberg v. U.S. Dep't of Treasury*, 10 F. Supp. 2d 3, 30 n.38 (D.D.C. 1998) (finding agency demonstrated adequacy of search when agency affidavit explained that agency "searched those files which officials expected would contain the information requested by plaintiff[]"). Because TSA employed an adequate search for documents, it should be granted summary judgment on this issue.

II. Sensitive Security Information is Exempt from FOIA and such designations can be challenged only in the Court of Appeals

Information designated by TSA as "sensitive security information" (SSI) is exempt from disclosure by section 114(r) of title 49, which provides:

> 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—
> (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(r). Accordingly, TSA has promulgated implementing regulations that expressly prohibit disclosure of certain categories of SSI. *See generally* 49 C.F.R. pt. 1520. Pursuant to

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[3] Pursuant to DHS regulations, only records in a component's possession on the date it began to search for records responsive a particular request were deemed responsive to that request. *See* 6 C.F.R. § 5.4(a) ("In determining which records are responsive to a request, a component ordinarily will include only records in its possession as of the date the component begins its search for them.").

these regulations, there are several specific types of information that constitute SSI, and TSA may also designate other types of information as SSI. *See* 49 C.F.R. § 1520.5(b).

Material designated as SSI is exempt from disclosure pursuant to Congress's explicit command that disclosure be prohibited "[n]othwithstanding section 552 of title 5." 49 U.S.C. § 114(r). The meaning of "notwithstanding section 552 of title 5" is plain – this language means that § 114(r) supersedes FOIA as applied to information designated by TSA as SSI. *Cf. Energy Transp. Group, Inc v. Skinner*, 752 F. Supp. 1, 10 (D.D.C. 1990) ("[T]he phrase 'notwithstanding any other provision of law,' or a variation thereof, means exactly that; it is unambiguous and effectively supersedes all previous laws.").

Analyzing nearly identical language in a predecessor statute vesting similar authority in the Federal Aviation Administration,[4] the D.C. Circuit found that the phrase "notwithstanding section 552 of Title 5" "clearly and unambiguously provides that [the non-disclosure statute], where applicable and invoked by the FAA, trumps FOIA's disclosure requirements." *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 194 (D.C. Cir. 1993). The Court wrote, "we conclude unmistakably that Congress intended to allow the FAA to withhold from public disclosure information falling within § 1357(d), whether or not FOIA is invoked." *Id.* at 195; *see also id.* ("Congress' intent was to *broaden* the FAA's power to withhold sensitive information, *not* to limit that power . . . Where disclosure of information specified in § 1357(d)(2) and the FAA's

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[4] Pub. L. No. 93-366, § 202, 88 Stat. 409, 417 (Aug. 5, 1974) (previously codified at 49 U.S.C. § 1357(d)(2) (1988 & Supp. II 1990)), provided:

> Notwithstanding section 552 of Title 5 relating to freedom of information, the [FAA] Administrator shall prescribe such regulations as he may deem necessary to prohibit disclosure of any information obtained or developed in the conduct of security or research and development activities under this subsection if, in the opinion of the Administrator, the disclosure of such information-
> …
> (C) would be detrimental to the safety of persons traveling in air transportation.

implementing regulations would jeopardize passenger safety, Congress clearly intended for the FAA to be able to withhold such information under § 1357(d)(2).” (emphasis in original)). The similar language in section 114(r) compels the same conclusion: SSI is exempt from disclosure under FOIA.

Not only does section 114(r) by its express terms trumps FOIA, Exemption 3 of FOIA authorizes an agency to withhold information that is

> specifically exempted from disclosure by statute . . . if that statute
>
> (A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
> (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and
>
> (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

5 U.S.C. § 552(b)(3). Given the clear intent of Congress, material designated under section 114(r) falls under Exemption 3, as several courts have held. *Tooley v. Bush*, No. 06-306, 2006 WL 3783142, at *20 (D.D.C. Dec. 21, 2006), *rev'd & remanded in part on other grounds sub nom.*, *Tooley v. Napolitano*, 556 F.3d 836 (D.C. Cir. 2009); *Gordon v. FBI*, 390 F. Supp. 2d 897, 900 (N.D. Cal. 2004); *see also Elec. Privacy Info. Ctr*, 384 F. Supp. 2d at 110 & n.10 (applying exemption 3 to SSI after noting that this point was uncontested). Whether exempted by section 114(r)'s explicit removal of SSI from disclosure under FOIA, or exempted by FOIA's exemption 3, the result is the same: SSI need not be disclosed to plaintiff.

Here, TSA designated certain material as SSI, and therefore exempt from FOIA. Only the Court of Appeals can review the designation of information as SSI pursuant to 49 U.S.C. § 46110, which provides that:

> . . . a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary

> or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part, part B, or subsection (l) or (s)[5] 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). Circuit court jurisdiction is exclusive, and bars district court jurisdiction to review those decisions the final orders issued by TSA referenced in § 46110(a), including SSI designations under section 114(r). 49 U.S.C. § 46110(c); *see also City of Rochester v. Bond*, 603 F.2d 927, 934-35 (D.C. Cir. 1979).[6] As such, District Courts may not review orders of TSA designating material as SSI. *MacLean v. DHS*, 543 F.3d 1145, 1149 (9th Cir. 2008) (holding that section 46110 governs review of decision to designate a document SSI); *Koutny v. Martin*, 530 F. Supp. 2d 84, 91 (D.D.C. 2007) ("A remedy to challenge a final TSA classification order [of SSI] is provided by statute. An interested party may petition to modify or set aside such an order in an appropriate court of appeals."); *Shqeirat v. U.S. Airways Group, Inc*., 2008 WL 4232018, at *2 (D. Minn. Sept. 9, 2008) ("District Courts are without jurisdiction to entertain challenges to the TSA's decisions regarding disclosure of SSI."); *In re September 11 Litig*., 236 F.R.D. 164, 174-75 (S.D.N.Y. 2006) ("TSA's determinations of SSI. . . [is] subject to appeal to the Courts of Appeals as provided by 49 U.S.C. § 46110."); *Chowdhury v. Northwest Airlines Corp.*, 226 F.R.D. 608, 614 (N.D. Cal. 2004) ("Congress has expressly provided that an appeal from an

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[5] Section 114(s) is the subsection that formerly authorized TSA to designate certain material as SSI; in 2007, this section was redesignated as § 114(r). Section 46110(a) has not yet been updated to reflect this clerical change.

[6] The judicial review provision of section 46110 was previously codified in 49 U.S.C. App. § 1486, which was the statute at issue in *City of Rochester* and other earlier cases. "The statutes do not materially differ." *Ass'n of Citizens to Protect & Pres. the Env't v. FAA*, 287 F. App'x 764, 766 n.3 (11th Cir. 2008); *see City of Rochester*, 603 F.2d at 934-35 (noting that the version of the Aviation Act in force at the time, like the current version, provided for "exclusive jurisdiction" of a court of appeals to review final orders by the agencies listed in the statute).

order of the TSA pursuant to section 114(s) (non-disclosure of certain information) lies exclusively with the Court of Appeals."); *see also Public Citizen, Inc. v. FAA*, 988 F.2d 186, 198 (D.C. Cir. 1993) (reviewing predecessor to 114(r) under predecessor to 46110(a)). Therefore, the Court lacks jurisdiction to make further inquiry, and any challenge to TSA's designation must be brought in the Court of Appeals.

Even if this Court had jurisdiction to review TSA's designation of information as SSI, its review is still quite limited. "When analyzing whether the defendant is entitled to invoke Exemption 3, the court need not examine the detailed factual contents of specific documents withheld; rather, the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *James Madison Project v. CIA*, 607 F. Supp. 2d 109, 126 (D.D.C. 2009) (internal quotation marks omitted). TSA's affidavits are entitled to "substantial weight" as to what constitutes SSI. *See Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009).

TSA properly designated and withheld information that constitutes SSI. TSA referred all records that were responsive to plaintiff's FOIA request that were either marked SSI or were the types of documents that contain SSI to the SSI branch for review.[7] LCvR 7(h) Stmt. ¶20 (citing Ex. 2, Benner Decl. ¶5 ("Benner Decl.")). The SSI branch then reviewed each document to ensure that SSI was redacted, considering whether specific information should no longer be designated as SSI. LCvR 7(h) Stmt. ¶ 20 (citing Benner Decl. ¶5). The SSI branch makes SSI designations based on the analysts' training, and consultation with subject-matter experts who provide expertise on the threats posed by those seeking to do harm to transportation security.

[7] As discussed in the Sotoudeh Declaration at ¶ 35, forty-four drafts of the ATR for AIT Functional Requirements Document, although marked SSI, were not referred to the SSI branch for review because, among other reasons, they were withheld in full under Exemption 5. *See also* footnote 11, *infra*.

LCvR 7(h) Stmt. ¶ 19 (citing Benner Decl. ¶3). This expertise permits the SSI Branch to understand how even seemingly innocuous terms, phrases, and concepts could be used by terrorists to undermine security systems in their attempt to harm transportation security. LCvR 7(h) Stmt. ¶ 19 (citing Benner Decl. ¶3). Upon its review, TSA determined that the release of certain information could be detrimental to transportation security, and therefore withheld this information from disclosure as SSI.

First, TSA properly withheld as SSI performance specifications and testing methodologies regarding ATR. LCvR 7(h) Stmt. ¶ 21 (citing Benner Decl. ¶10-22). The regulations include as SSI "[a]ny performance specification and any description of a test object or test procedure, for-- (i) Any device used by the Federal Government or any other person pursuant to any aviation or maritime transportation security requirements of Federal law for the detection of any person, and any weapon, explosive, incendiary, or destructive device, item, or substance." 49 C.F.R. § 1520.5(b)(4). The release of this information would be detrimental to aviation security because it would reveal the scanner's capabilities and vulnerabilities, which could then be exploited by terrorists. LCvR 7(h) Stmt. ¶21 (citing Benner Decl. ¶11).

Second, TSA has withheld performance or testing data of the ATR. LCvR 7(h) Stmt. ¶ 22 (citing Benner Decl. ¶¶25-28); *see also* 49 C.F.R. § 1520.5(b)(9)(v) (SSI includes "[p]erformance or testing data from security equipment or screening systems"). The release of testing results would reveal vulnerabilities in the security system by identifying minimum testing standards and exposing potential limitations or capability gaps in technology. LCvR 7(h) Stmt. ¶ 22 (citing Benner Decl. ¶25).

Third, TSA properly designated as SSI screening procedures. LCvR 7(h) Stmt. ¶ 23 (citing Benner Decl. ¶¶23-24). The regulations include as SSI "[a]ny procedures, including

selection criteria and any comments, instructions, and implementing guidance pertaining thereto, for screening of persons, accessible property, checked baggage, U.S. mail, stores, and cargo, that is conducted by the Federal government or any other authorized person." 49 C.F.R. § 1520.5(b)(9)(i). TSA determined that the release of this information could be detrimental to transportation security because a terrorist with knowledge of the particular screening methods could evade or circumvent those procedures. LCvR 7(h) Stmt. ¶ 23 (citing Benner Decl. ¶23).

Fourth, TSA properly designated as SSI vulnerability assessments under 49 C.F.R § 1520.5(b)(5), which includes as SSI "[a]ny vulnerability assessment directed, created, held, funded, or approved by the DOT, DHS, or that will be provided to DOT or DHS in support of a Federal security program." The public disclosure of the security system's vulnerability could provide a roadmap to terrorists who seek to exploit those vulnerabilities in order to cause harm to transportation. LCvR 7(h) Stmt. ¶ 24 (citing Benner Decl. ¶29).

Fifth, electronic images were properly withheld as SSI under 49 C.F.R § 1520.5(b)(9)(vi), which applies SSI to "[a]ny electronic image shown on any screening equipment monitor, including threat images and descriptions of threat images for threat image projection systems." Terrorists can derive a range of operationally useful information from these images, such as the extent to which the security system is able to detect obscured or camouflaged threat items or items of particular sizes, shapes, and consistencies. LCvR 7(h) Stmt. ¶ 25 (citing Benner Decl. ¶31-22).

Sixth, materials created to train screeners in the use of AIT scanners was withheld pursuant to 49 C.F.R § 1520.5(b)(10), which includes as SSI "[r]ecords created or obtained for the purpose of training persons employed by, contracted with, or acting for the Federal government or another person to carry out aviation, maritime, or rail transportation security

measures required or recommended by DHS or DOT." The release of information about TSA's protocols can also be exploited by terrorists. LCvR 7(h) Stmt. ¶ 26 (Benner Decl. ¶34).

Seventh, certain confidential business information was designated as SSI under 49 C.F.R § 1520.5(b)(14). LCvR 7(h) Stmt. ¶ 27 (citing Benner Decl. ¶¶36-38). The release of this information would permit adversaries to sabotage the vendors' technological development processes as they develop the technology for the transportation security systems, such as identifying and exploiting system vulnerabilities during the development stage, thus hindering the Government's progress in obtaining the technology needed to secure the nation's transportation systems. LCvR 7(h) Stmt. ¶ 27 (citing Benner Decl. ¶38).

Finally, TSA properly withheld as SSI certain information obtained or developed in the conduct of research relating to transportation security. LCvR 7(h) Stmt. ¶ 28 (citing Benner Decl. ¶39-44); *see also* 49 C.F.R § 1520.5(b)(15) (SSI includes "[i]nformation obtained or developed in the conduct of research related to aviation, maritime, or rail transportation security activities, where such research is approved, accepted, funded, recommended, or directed by DHS or DOT, including research results."). The release of the withheld information would be detrimental to transportation security by allowing adversaries to track the progress of security technology development and TSA's planning for future technological development. LCvR 7(h) Stmt. ¶ 28 (citing Benner Decl. ¶¶ 41-44).

Therefore, even if the Court had jurisdiction to review TSA's SSI designations, the material designated as SSI was properly withheld, and TSA should be granted summary judgment over these withholdings.

III. TSA properly withheld confidential information submitted by private vendors under FOIA's Exemption 4

TSA withheld certain confidential commercial information pursuant to FOIA Exemption 4, which protects records from disclosure that contain "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). This exemption covers two distinct categories of information. One is "trade secrets," which the D.C. Circuit has defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

In this case, DHS has withheld certain material pursuant to the second category of information specified in § 552(b)(4), namely, information that is "(1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential." *Id.* at 1290.

A. Withheld information was obtained from a person

To begin, the information withheld under Exemption 4 was provided to DHS by Rapiscan and L-3. LCvR 7(h) Stmt. ¶ 31, 37, 52, 55.[8] "There is no doubt that a corporation may be considered a 'person' for purposes of exemption 4." *Pub. Citizen Health Res. Gp. v. NIH*, 209 F. Supp. 2d 37, 44 (D.D.C. 2002); *see also* 5 U.S.C. § 551(2) (defining "person" to include, inter alia, a "partnership" and "corporation"). Therefore, the information was obtained from a "person" within the meaning of Exemption 4.

B. Withheld information is commercial

[8] One of the withheld documents was created by TSA, but incorporated confidential commercial information that was submitted by Rapiscan. LCvR 7(h) Stmt. ¶ 55 (citing Sotoudeh Decl. ¶ 48). A record created by the government can fall within Exemption 4 "to the extent it contains . . . information obtained from nongovernmental parties on a confidential basis." *Soucie v. David*, 448 F.2d 1067, 1079 n.47 (D.C. Cir. 1971); *see also Gulf & Western Indus., v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979) (upholding Exemption 4 withholding of excerpts of government reports where release "would disclose data supplied to the government from a person outside the government" (citations omitted)).

Second, the information is clearly commercial. *See* LCvR 7(h) Stmt. ¶31-62. The D.C. Circuit has held that records are commercial so long as the submitter has a "commercial interest" in them. *Pub. Citizen*, 704 F.2d at 1290; *see also Baker & Hostetler LLP v. Dep't of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006) (defining "commercial" broadly to include not only "records that reveal basic commercial operations or relate to the income-producing aspects of a business" but also situations "when the provider of the information has a commercial interest in the information submitted to the agency" (internal quotations omitted)). Certainly, the vendors have a "commercial interest" in the information regarding their products.

C. Withheld information is confidential

Finally, the information is "confidential." Private commercial information that has been submitted to the government under compulsion is confidential for purposes of exemption 4 if disclosure is likely either (1) "to cause substantial harm to the competitive position of the person from whom the information was obtained" or (2) "to impair the Government's ability to obtain necessary information in the future." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted); *see also Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc) (holding that *National Parks* test applies when a person is required to provide private commercial information to the government).[9] This test recognizes that exemption 4 is designed to protect the government's

[9] Different tests for confidentiality apply depending on how the commercial information is obtained by the government. If private commercial information is provided to the government voluntarily, it is 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*, 975 F.2d at 879. Because TSA has demonstrated that the withheld information satisfies the standard for confidentiality under the more stringent standard announced by *National Parks* for required submissions it is unnecessary to determine whether these submissions were voluntary or required. *See Honeywell Tech. Solutions, Inc. v. Dep't of Air Force*, -- F. Supp. 2d --, 2011 WL 1595161, at *6 n.2 (D.D.C. Apr. 19, 2011) (finding that

interest in the availability and reliability of commercial and financial information obtained from third parties as well as the interests of persons who provide such information to the government. *See Critical Mass*, 975 F.2d at 877–79.

The D.C. Circuit does not require that a party show "actual competitive harm" in order to make an adequate showing of the likelihood of substantial competitive harm. *Pub. Citizen*, 704 F.2d at 1291 (quoting *Gulf & W. Indus., Inc.*, 615 F.2d at 530). Rather, "evidence revealing '[a]ctual competition and the likelihood of substantial competitive injury' is sufficient to bring commercial information within the realm of confidentiality." *Kahn v. Fed. Motor Carrier Safety Admin.*, 648 F. Supp. 2d 31, 36 (D.D.C. 2009) (quoting *Pub. Citizen*, 704 F.2d at 1291). Although conclusory and generalized allegations of substantial competitive harm are insufficient to justify the application of Exemption 4, "the court need not conduct a sophisticated economic analysis of the likely effects of disclosure." *Pub. Citizen*, 704 F.2d at 1291 (citations omitted).

To begin, there is actual competition in the market for advanced scanning systems in general, and Rapiscan and L-3 are engaged in actual competition for the sale of scanners to the United States government. LCvR 7(h) Stmt. ¶ 29 (citing Ex. 3, Modica Decl. ¶¶ 10-11 ("Modica Decl."); Ex. 4, Weller Decl. ¶ 3 ("Weller Decl."); Sotoudeh Decl. ¶50). In fact, AIT devices with ATR enhancement are in demand for various purposes, including airport screening, courthouses, prisons, and borders, in the United States and worldwide. LCvR 7(h) Stmt. ¶ 29 (citing Sotoudeh Decl. ¶ 50).

Moreover, declarations provided by Rapiscan and L-3 establish that release of the withheld information would cause a likelihood of substantial competitive harm to the vendors

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"because [the records at issue] should not be released even under the more stringent *National Parks* test, the Court need not determine" whether the records were required or voluntary submissions).

that supplied the information. *See* LCvR 7(h) Stmt. ¶¶ 31-62. The information withheld under exemption 4 falls into one or more of five categories: unit pricing information, employee contact information, design and specification information, testing protocols, and proprietary manuals. As explained below, the disclosure of information in each category would likely cause substantial competitive harm to the manufacturers.

First, pricing information is confidential and would cause substantial competitive harm to the vendors if released. LCvR 7(h) Stmt. ¶¶ 53, 57-59. Pricing information would provide "a roadmap" to the vendors' approach to pricing their "scanner systems and related research and development projects." LCvR 7(h) Stmt. ¶ 58 (quoting Modica Decl. ¶4). It would also give competitors insight into the vendors' pricing strategy, costs, markups, efficiencies, and economies of scale. LCvR 7(h) Stmt. ¶ 58 (Modica Decl. ¶4). As a result, competitors could underbid the vendors in future competitions. LCvR 7(h) Stmt. ¶¶ 53, 59(citing Modica Decl. ¶4; Weller Decl. ¶15). This would cause substantial competitive harm to L-3 and Rapiscan. LCvR 7(h) Stmt. ¶ 53, 57-59 (citing Modica Decl. ¶4; Weller Decl. ¶15); *see also McDonnell Douglas Corp. v. U.S. Dept. of the Air Force*, 375 F.3d 1182, 1190 (D.C. Cir. 2004) (applying Exemption 4, concluding that "disclosure of McDonnell Douglas's option year prices would likely cause McDonnell Douglas substantial competitive harm by informing the bids of its rivals in the event the contract is rebid."). Therefore, TSA properly withheld pricing information under Exemption 4. *See Canadian Commercial Corp. v. Dep't of Air Force*, 514 F.3d 37, 40 (D.C. Cir. 2008) ("[I]t is the law of this circuit that line-item prices do come within Exemption 4.").

Second, the names and other identifying information of Rapiscan and L-3 employees are exempt from disclosure.[10] L3 and Rapiscan have invested heavily in their human capital. LCvR 7(h) Stmt. ¶¶ 49, 61 (citing Modica Decl. ¶¶8-9; Weller Decl. ¶10). The release of this information would allow competitors to attempt to identify and attempt to lure knowledgeable employees away from their employer. *Id.* This would cause L3 and Rapiscan substantial competitive harm. *Id.*

Third, TSA properly withheld non-public information about the design and performance capabilities of Rapiscan and L3's scanners. Release of this design and performance information would cause substantial competitive harm by allowing a competitor to imitate the vendors' approach to designing effective scanners. LCvR 7(h) Stmt. ¶¶ 33-34, 39, 41, 44-48 (citing Modica Decl. ¶6; Weller Decl. ¶¶7, 11-15). It would also permit competitors to determine what capabilities their scanners must have to compete successfully against the vendors. LCvR 7(h) Stmt. ¶ 33 (citing Modica Decl. ¶6). For this reason, the vendors take steps to keep this information non-public, and they expected TSA to do the same. LCvR 7(h) Stmt. ¶¶ 32, 38 (citing Modica Decl. ¶ 5; Weller Decl. ¶5; Ex. 5, EPIC ATR 00101); *see also* S. Rep. No. 89-813, at 9 (1965) (exemption 4 intended to protect information "which would customarily not be released to the public by the person from whom it was obtained"). Therefore, the release of this information would cause substantial competitive harm to Rapiscan and L-3. LCvR 7(h) Stmt. ¶ 33, 40.

Fourth, TSA properly withheld Rapiscan and L-3's proprietary approaches to substantiating compliance with TSA requirements. Not only would the testing protocols and results reveal the system design of the scanners, but the testing methodology is itself proprietary

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[10] The names and other information about these employees are also exempt from disclosure under Exemption 6, discussed *infra*.

and its disclosure would cause an independent competitive harm to Rapiscan and L-3. LCvR 7(h) Stmt. ¶¶ 34, 41-42, 45 (citing Modica Decl. ¶7; Weller Decl. ¶8, 12). Manufacturers that wish to sell AIT scanners to DHS must establish that their scanners comply with a range of requirements. LCvR 7(h) Stmt. ¶ 42 (citing Weller Decl. ¶12). The testing protocols used to substantiate compliance are carefully designed by the manufacturers. LCvR 7(h) Stmt. ¶ 34 (citing Modica Decl. ¶7). If a competitor had access to this methodology, it could use it as a blueprint for developing or improving its own method of demonstrating compliance with the TSA's scanner-systems requirements. LCvR 7(h) Stmt. ¶¶ 34, 42, 45 (quoting Modica Decl. ¶7; Weller Decl. ¶¶8, 12). Therefore, the release of proprietary testing methods would cause substantial competitive harm to Rapiscan and L-3. LCvR 7(h) Stmt. ¶¶ 34, 42, 45. This provides an additional basis for withholding testing approaches. *See United Technologies Corp. v. U.S. Dept. of Defense*, 601 F.3d 557, 564 (D.C. Cir. 2010) (upholding assertion of Exemption 4 over "proprietary manufacturing and quality control processes" because "competitors could . . . use the information to improve their own manufacturing and quality control systems, thus making 'affirmative use of proprietary information' against which Exemption 4 is meant to guard"); *cf. Heeney v. FDA*, Case No. 97-cv-5461, 1999 U.S. Dist. LEXIS 23365, at *25 & n.13 (C.D. Cal. Mar. 11, 1999) (upholding assertion of Exemption 4 over information relating to "compliance testing" submitted as part of process of seeking approval of medical device), *aff'd*, 7 Fed. Appx. 770 (9th Cir. 2001).

Fifth, TSA properly withheld the manuals submitted by L-3 in support of its QPL. These manuals are replete with design and performance information, and, as discussed above, were properly withheld on that basis. LCvR 7(h) Stmt. ¶¶ 44, 47, 48 (citing Weller Decl. ¶¶11, 14, 15). In addition, even apart from design and performance information, the manuals are

themselves proprietary. They required skill and effort in their creation, and a competitor that gained access to the manuals could replicate L-3's innovative method of communicating information about its scanners to users. LCvR 7(h) Stmt. ¶¶ 44, 48 (citing Weller Decl. ¶¶ 11, 15). As a result, the manuals are not generally made public by L-3, LCvR 7(h) Stmt. ¶ 43 (citing Ex. 5, EPIC ATR 00231, 00293), and their release would cause substantial competitive harm to L-3. LCvR 7(h) Stmt. ¶¶ 44, 47, 48. Therefore, they were properly withheld under Exemption 4. *See Ruston v. DOJ*, 521 F. Supp. 2d 18, 21 (D.D.C. 2007) (manual properly withheld under Exemption 4). TSA is entitled to summary judgment on its assertions of Exemption 4.

IV. TSA Properly Asserted Exemption 5 to Withhold Information under the Deliberative Process Privilege

Exemption 5 exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). Records are exempt from disclosure if they would be "normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Exemption 5 thus incorporates the privileges that are available to an agency in civil litigation, including the deliberative process privilege. *Id.* at 148-50; *Rockwell Intern. Corp. v. DOJ*, 235 F.3d 598, 601 (D.C. Cir. 2001). TSA withheld deliberative process privileged information under Exemption 5.

The deliberative process privilege protects intra- or inter-agency documents that are "both predecisional and deliberative," *Mapother v. DOJ*, 3 F.3d 1533, 1537 (D.C. Cir. 1993), by protecting "'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Loving v. Dep't of Defense*, 550 F.3d 32, 38 (D.C. Cir. 2008) (quoting *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001)).

Documents "reflecting . . . deliberations comprising part of a process by which governmental decisions . . . are formulated" are deliberative. *Sears*, 421 U.S. at 150 (quotation omitted). Deliberative material "make[s] recommendations for policy change []or reflect[s] internal deliberations on the advisability of any particular course of action." *Public Citizen v. OMB*, 598 F.3d 865, 875 (D.C. Cir. 2010). 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." *Wolfe*, 839 F.2d at 774. However, exemption 5 "was intended to protect not simply deliberative *material*, but also the deliberative *process* of agencies." *Montrose Chem. Corp. of California v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974) (emphasis added). Thus, even factual material is exempt under Exemption 5 if disclosure "would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Quarles v. Dep't of Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) (citing *Dudman Comm. Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)). "There should be considerable deference to the [agency's] judgment as to what constitutes . . . 'part of the agency give-and-take — of the deliberative process — by which the decision itself is made'" because the agency is best situated "to know what confidentiality is needed 'to prevent injury to the quality of agency decisions . . . .'" *Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F. Supp. 114, 118 (D.D.C. 1984) (quoting *Sears*, 421 U.S. at 151; *Vaughn*, 523 F.2d at 1144).

First, drafts of the Functional Requirements Document (FRD) are exempt from disclosure under the deliberative process privilege.[11] LCvR 7(h) Stmt. ¶ 63 (citing Sotoudeh Decl. ¶ 35). TSA released the final version of the document. LCvR 7(h) Stmt. ¶ 64 (citing Sotoudeh Decl. ¶ 35). "As a general matter, 'drafts' of documents are exempt from disclosure under the deliberative process privilege." *Goodrich Corp. v. EPA*, 593 F. Supp. 2d 184, 189 (D.D.C. 2009) (collecting cases); *see also Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152 (D.C. Cir. 2006) ("[T]he label 'draft' goes to the merits of Exemption 5's predecisional and deliberative elements. . . ."); *Fischer v. DOJ*, 723 F. Supp. 2d 104, 113 (D.D.C. 2010) (noting that "[d]raft documents, by their very nature, are typically predecisional and deliberative") (quoting *Exxon Corp. v. Dep't of Energy*, 585 F. Supp. 690, 698 (D.D.C. 1983)). Getting to a final agency decision may require many drafts, and each draft represents a snapshot of the agency's deliberation each step of the way. *See Petroleum Info. Corp. v. DOI*, 976 F.2d 1429, 1435 (D.C. Cir. 1992) ("To the extent that predecisional materials . . . reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5.") "FOIA provides public access to the [final decisional documents] that were finally created, not the draft text considered along the way." *Pub. Employees for Envt'l Responsibility v. Bloch*, 532 F. Supp. 2d 19, 22 (D.D.C. 2008).

Second, TSA properly relied upon Exemption 5 to redact internal recommendations and assessments regarding aspects of ATR, including proposals for future testing. LCvR 7(h) Stmt. ¶¶ 65-73 (citing Sotoudeh Decl. ¶¶ 36-40 & *Vaughn* index). Such recommendations and the

[11] These documents are not responsive to EPIC's FOIA request, which sought "specifications *provided* . . . *to* automated target recognition manufacturers." LCvR 7(h) Stmt. ¶1 (emphasis added). However, TSA has brought the existence of these drafts to EPIC's attention as a matter of agency discretion. In addition to being exempt from disclosure in their entirety under the deliberative process privilege, portions of these drafts that contain SSI are additionally exempt from disclosure on that basis.

opinions and evaluations that inform them are protected by the deliberative process privilege. *See DOI v. Klamath*, 532 U.S. 1, 8 (2001) (holding that "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated" are protected by the deliberative process privilege (quoting *Sears*, 421 U.S. at 150)); *Murphy v. Dep't of Army*, 613 F.2d 1151, 1154 (D.C. Cir. 1979) (applying privilege to "exchange of memoranda" between general counsel and the "[a]ssistant Secretary who had the decision-making power"); *Citizens for Responsibility and Ethics in Washington v. DHS*, 648 F. Supp. 2d 152, 162 (D.D.C. 2009) (applying Exemption 5 to "drafter's personal assessment of possible policy options"). Therefore, TSA properly withheld information under Exemption 5.

V. TSA Properly Withheld Information under Exemption 6

TSA also properly redacted the e-mail addresses and phone numbers of agency personnel under Exemption 6, which exempts from disclosure "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).[12] "The balancing analysis for FOIA Exemption 6 requires that [the Court] first determine whether disclosure of the files 'would compromise a substantial, as opposed to *de minimis*, privacy interest.'" *Multi Ag Media LLC v. Dep't of Agriculture*, 515 F.3d 1224, 1229 (D.C. Cir. 2008) (quoting *Nat'l Ass'n of Retired Fed. Emps. v. Horner,* 879 F.2d 873, 874 (D.C. Cir. 1989)). The "use of the word substantial in this context means less than it might seem. A substantial privacy interest is anything greater than a *de minimis* privacy interest." *Id.* at

[12] The withheld information meets the threshold requirement that the information must be "found in personnel, medical or similar files." The Supreme Court has made clear that the phrase "similar files" must be interpreted broadly, and that any information in government records that "applies to a particular individual" meets the threshold for Exemption 6 protection. *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982). The withheld information relates to particular individuals, and therefore meets the threshold requirement of Exemption 6.

1229-30. If a substantial privacy interest is implicated, the Court "must weigh that privacy interest in non-disclosure against the public interest in the release of the records in order to determine whether, on balance, disclosure would work a clearly unwarranted invasion of personal privacy." *Horner*, 879 F.2d at 874. Under these standards, TSA properly withheld the names of the agency and vendor personnel that were involved in the ATR project, and the non-public direct telephone numbers, e-mail addresses, and signatures of these individuals. LCvR 7(h) Stmt. ¶74.

Disclosure of this information would compromise a "greater than a *de minimis* privacy interest." *Multi Ag Media*, 515 F.3d at 1229-30. The individuals have a privacy interest in their identities, signatures, and direct contact information. *See Reed v. NLRB*, 927 F.2d 1249, 1251 (D.C. Cir. 1991) (finding privacy interest in names of employee's eligible to vote in labor election).

The balance between the privacy interest and the public interest in disclosure tips sharply against disclosure. Congress did not intend the FOIA to facilitate "disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *DOJ v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 772-73 (1989) (quotations omitted). Thus, "unless a FOIA request advances 'the citizens' right to be informed about what their government is up to,' no relevant public interest is at issue." *Nat'l Ass'n of Home Bldgs v. Norton*, 309 F.3d 26, 34 (D.C. Cir. 2002) (quoting *Reporters Comm.*, 489 U.S. at 773). Releasing the identities, signatures, phone numbers and e-mail addresses of agency and vendor personnel would provide no insight into government function and would not help Plaintiff to understand how TSA performs its duties. LCvR 7(h) Stmt. ¶ 75. In the absence of any identified public interest of the sort the FOIA was intended to

serve, the Court's inquiry must end, and the exemption must be upheld. *Consumers' Checkbook Ctr. for the Study of Servs. v. HHS*, 554 F.3d 1046, 1056 (D.C. Cir. 2009) ("[W]e need not balance the non-existent public interest against every physician's substantial privacy interest in the Medicare payments he receives."). As courts have repeatedly recognized, "something, even a modest privacy interest, outweighs nothing every time." *Horner*, 879 F.2d at 879.

Even if the Court determines that a public interest is implicated, the balance of the individuals' privacy interests outweighs the minimal public interest in disclosure. *See U.S. Dep't of Defense v. FLRA*, 510 U.S. 487, 495-97 (1994). Whatever minimal public interest disclosure of direct contact information would further is significantly outweighed by the substantial privacy interests of agency personnel in their non-public contact information and avoiding unwarranted harassment and other contact. LCvR 7(h) Stmt. ¶ 78 (citing Sotoudeh Decl. ¶ 28); *see also Gov't Accountability Project v. U.S. Dep't of State*, 699 F. Supp. 2d 97, 106 (D.D.C. 2010) (withholding e-mail addresses). The release of the names and other identifying information about employees places those individuals at risk for harassment or threats, particularly given the high-profile and sensitive nature of the security systems. LCvR 7(h) Stmt. ¶ 76 (citing Sotoudeh Decl. ¶ 28); *see also Horowitz v. Peace Corps*, 428 F.3d 271, 278 (D.C. Cir. 2005) (withholding name of volunteer); *Smith v. Dep't of Labor*, --- F. Supp. 2d ----, 2011 WL 3099703, at *6 (D.D.C. 2011) ("Generally, personal identifying information such as a person's name, address, [and] phone number, . . . may be protected under Exemption 6." (citations omitted)). Finally, the release of signatures could reveal the individual's identity and expose the individual to identity theft and impersonation, without any corresponding benefit to disclosure. LCvR 7(h) Stmt. ¶ 77 (citing Sotoudeh Decl. ¶ 28); *see Wilson v. U.S. Air Force*, No. 08-324, 2009 WL 4782120, at *3

(E.D. Ky. Dec. 9, 2009) (applying Exemption 6 to signatures). Therefore, TSA properly withheld the information under Exemption 6.

VI. TSA Released All Reasonably Segregable, Non-Exempt Records

Under FOIA, "any reasonably segregable portion 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). Accordingly, "non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). An agency has no obligation to segregate non-exempt material that is so "inextricably intertwined" with exempt material that "the excision of exempt information would impose significant costs on the agency and produce an edited document with little informational value." *Neufeld v. IRS*, 646 F.2d 661,666 (D.C. Cir. 1981), *abrogated on other grounds by The Church of Scientology of Calif. v. IRS*, 792 F.2d 153 (D.C. Cir. 1986); *see also Nat'l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 220–21 (D.D.C. 2005) (same). A court "may rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated." *Juarez v. DOJ*, 518 F.3d 54, 61 (D.C. Cir. 2008) (internal citation omitted).

As detailed in the *Vaughn* index, many of the withholdings at issue in this case have been withholdings of limited excerpts of documents – individual paragraphs, sentences, or phrases. *See Vaughn* index. The reasonably segregable non-exempt portions of these documents were disclosed to EPIC in redacted form. LCvR 7(h) Stmt. ¶ 18, 62; *see also Vaughn* index.

Some responsive documents were withheld in full because they were exempt in full. First, the agency withheld drafts of the Functional Requirements Document under Exemption 5. LCvR 7(h) Stmt. ¶ 63. These withheld documents were drafts in their entirety, and no part of

these drafts can be segregated and released. LCvR 7(h) Stmt. ¶ 63 (citing Sotoudeh Decl. ¶ 35). Therefore, they were properly withheld in full. *See Hamilton Securities Group Inc. v. HUD*, 106 F. Supp. 2d 23, 34 (D.D.C. 2000) (finding agency had shown that drafts were properly withheld in full when it attested that the withheld documents "are drafts in their entirety, there is nothing in the drafts of the audit report that can reasonably be segregated and released").

Second, the agency also properly withheld in full test data from the pilot deployment of ATR as sensitive security information under 49 C.F.R. § 1520.5(b)(9)(v). LCvR 7(h) Stmt. ¶ 22 (citing Benner Decl. ¶¶25, 28). Finally, TSA withheld in full certain proprietary documents submitted by L-3 because the release of any portion of the proprietary document would precipitate the substantial competitive harm sought to be avoided. LCvR 7(h) Stmt. ¶ 51 (citing Sotoudeh Decl. ¶ 52). Because TSA released all reasonably segregable, non-exempt information, the Court should grant summary judgment to TSA on this issue.

CONCLUSION

Because TSA has conducted an adequate search and produced all non-exempt responsive documents to EPIC, and because no further segregation of non-exempt responsive documents is possible, summary judgment should be granted to the Defendant.

Dated: September 16, 2011

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff,

v.

TRANSPORTATION SECURITY ADMINISTRATION,

Defendant.

Civil Action No. 11-0290 (ABJ)

STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Defendant, per Local Civil Rule 7(h), submits that the following material facts are not in genuine dispute:

BACKGROUND

A. FOIA Requests & Responses

1. On June 15, 2010, Plaintiff Electronic Privacy Information Center (EPIC) filed with Defendant Transportation Security Administration (TSA) a Freedom of Information Act (FOIA) request seeking:

   1) All specifications provided by TSA to automated target recognition manufacturers concerning automated target recognition systems.
   2) All records concerning the capabilities, operational effectiveness, or suitability of automated target recognition systems, as described in Secretary Napolitano's letter to Senator Collins.
   3) All records provided to TSA from the Dutch government concerning automated target recognition systems deployed in Schiphol Airport, as described in Secretary Napolitano's letter to Senator Collins.
   4) All records evaluating the FBS program and determining automated target recognition requirements for nationwide deployment, as described in Secretary Napolitano's letter to Senator Collins.

Ex. 1, Sotoudeh Decl. ¶ 4 (“Sotoudeh Decl”) & Ex. 1A.

2. On October 5, 2010, EPIC filed a Freedom of Information Act request with the Department of Homeland Security (DHS) seeking:

   1) All records provided from L3 Communications or Rapiscan in support of the submission or certification of ATR software modifications;
   2) All contracts, contract amendments, or statements of work related to the submission or certification of ATR software modifications;
   3) All information, including results, of government testing of ATR technology, as referenced by Greg Soule of the TSA in an e-mail to Bloomberg News, published September 8, 2010.

   Sotoudeh Decl. ¶ 17 & Ex. 1B.

3. DHS referred the request to TSA because the information sought was within TSA’s purview. Sotoudeh Decl. ¶ 18.

B. TSA’s Search for Records

4. TSA identified the following offices as likely to have responsive records to one or both of the requests: the Office of Security Technology (“OST”), the Office of Acquisitions, the Office of Global Strategies (OGS), the Office of the Executive Secretary, the Office of Security Operations (OSO), and the Office of the Chief Counsel (OCC). Sotoudeh Decl. ¶ 9, 20.

5. OST is responsible for TSA’s programs for transportation screening equipment and explosive detection solutions. Sotoudeh Decl. ¶ 10. The Advanced Imaging Technology (“AIT”) program is part of the Passenger Screening Program (“PSP”) within the OST, which focuses on identifying, testing, procuring, deploying, and sustaining checkpoint security equipment that detects explosives and/or prohibited items that may be concealed on people and/or their carry-on items. Sotoudeh Decl. ¶ 10. OST also administers the contracts with AIT manufacturers. Sotoudeh Decl. ¶ 10.

6. OST electronically searched for responsive records by searching the "AIT"-related folder on the computer of the Deputy Program Manager for the Passenger Screening Program, and found responsive records. Sotoudeh Decl. ¶ 11, 21. OST also searched the Schiphol folder in the classified safe for responsive records. Sotoudeh Decl. ¶ 11. The PSP Program Office also contacted the TSA Security Integration Facility (TSIF) to locate AIT/ATR test results because the TSIF is responsible for testing security technologies, processes, and procedures in a simulated operational environment to support acquisition decisions, validate system conformance with technical specifications, and determine readiness to enter operational testing, evaluation, and deployment. Sotoudeh Decl. ¶ 21.
7. As part of its search for records responsive to the first request, item number 3, regarding records sent from the Dutch government, the TSA FOIA office consulted with the OST Deputy Assistant Administrator, who had personally participated in the trip to the Netherlands and had personal knowledge of the information exchanged between the United States and the government of Netherlands. Sotoudeh Decl. ¶ 11. The OST Deputy Assistant Administrator recalled that there was an oral exchange of information between the governments during the trip, but no physical records were exchanged during the visit. Sotoudeh Decl. ¶ 11.
8. The Office of Acquisitions maintains and manages all procurement activities for the PSP program. Sotoudeh Decl. ¶ 12, 22. It searched its AIT/ATR contract files for responsive records. Sotoudeh Decl. ¶ 12, 22.
9. The mission of OGS is to work with foreign governments and industry partners regarding overseas transportation operations affecting the United States. Sotoudeh Decl. ¶ 13. In addition to a manual search for files, OGS performed an electronic search of its files at

headquarters for files containing the terms "Advanced Imaging Technology," "AIT," "ATR," and "testing." Sotoudeh Decl. ¶ 13. Additionally, the Transportation Security Administration Representative for the region that includes the Netherlands conducted an electronic search of its files using the terms "ATR, Automated Threat Recognition, AIT, Schiphol, NCTB, Millimeter Wave, Body Scanner, Presentation, PowerPoint, Brochure, and Attachment," as well as reviewing file folders that referenced the Dutch. Sotoudeh Decl. ¶ 13.

10. The Office of Chief Counsel consulted the Deputy Chief Counsel for Procurement and the Assistant Chief Counsel for Information Law, both of whom determined that the responsive records were likely located within the Program Offices that ultimately located the responsive records. Sotoudeh Decl. ¶ 16.

11. The Office of the Executive Secretary maintains and tracks correspondence that pertains to officials in TSA's front office, including the Administrator and Deputy Administrator, and that pertains to TSA interaction with the DHS Office of the Secretary. Sotoudeh Decl. ¶ 14. The Executive Secretary conducted an electronic and manual search, using the terms "Dutch, KLM, ATR, Automated Target Recognition, AIT, Advanced Imaging Technology, Whole Body Imaging, and WBI." Sotoudeh Decl. ¶ 14. Additionally, all Action Memos created between August 1, 2009 and June 25, 2010, were searched. Sotoudeh Decl. ¶ 14.

12. The Office of Security Operations was also directed to search its files for responsive records. Sotoudeh Decl. ¶ 15, 23. The OSO is responsible for operationalizing new technology both during the testing phase and ultimately once new technology is deployed. Sotoudeh Decl. ¶ 15, 23. ATR points of contact searched their ATR folders

for data concerning ATR operational testing and effectiveness work conducted in the field and produced responsive records. Sotoudeh Decl. ¶ 15, 23.

C. Release of Records

13. On July 29, 2011, TSA made an initial release of 483 pages of records responsive to EPIC's request. Sotoudeh Decl. ¶ 24.

14. On August 22, 2011, TSA released an additional 166 pages of responsive records. Sotoudeh Decl. ¶ 25.

15. On September 8, 2011, TSA re-released 18 pages of TSA records when, upon further examination and consultation, TSA determined that certain excerpts previously withheld could be released. Sotoudeh Decl. ¶ 25. In addition, TSA provided EPIC a complete version of all released records with new bates-stamped numbering. Sotoudeh Decl. ¶ 25.

16. Exhibit 1C to the Sotoudeh Declaration ("*Vaughn* index") fully and accurately summarizes information that was withheld or redacted. Sotoudeh Decl. ¶ 26.

17. TSA has withheld information on the basis of Exemptions 3, 4, 5, and 6, and 49 U.S.C. § 114(r). *See Vaughn* index.

18. All reasonably segregable, non-exempt information has been released. Sotoudeh Decl. ¶ 35, 52, 57.

EXEMPTION 3 & 49 U.S.C. § 114(r)

19. TSA's Sensitive Security Information Branch ("SSI Branch") is responsible for making determinations as to whether information should be designated as Sensitive Security Information (SSI). Ex. 2, Benner Decl. ¶2-4 ("Benner Decl."). "The SSI Program analysts possess a specialized knowledge of what types of information constitute SSI based on their information protection training and expertise and their routine

consultations with subject-matter experts in the various DHS and TSA program offices who provide expertise on technical matters and describe the ever-evolving technological and systematic threats posed by our adversaries." Benner Decl. ¶3. This "training and expert consultation enable the analysts to filter seemingly ordinary words, phrases and technological concepts through the prism of the current threat environment to determine how our systems and technology could be undermined by terrorists with the release of even seemingly innocuous terms, phrases, or concepts." Benner Decl. ¶3.

20. The SSI Branch reviewed documents that were responsive to Plaintiff's FOIA request and determined that some of the requested information was SSI. Benner Decl. ¶5.

21. Performance specifications and descriptions of test objects or procedures were designated SSI under 49 C.F.R. § 1520.5(b)(4)(i) and therefore withheld from disclosure. Benner Decl. ¶10-12. This designation was made over information contained in pages in the Procurement Specification; Functional Requirements Document (FRD) for ATR; Rapiscan Systems AIT Qualification Data Package for ATR; L-3 AIT ATR QPL; Task Order/Statement of Work for AIT System with ATR for Checkpoint Operations; ATR OTE Weekly Data Report/PowerPoint; DHS Acquisition Review Board for ATR; TSA's Operational Test Plan (OTP) and Operational Test and Evaluation (OT&E) or AIT/ATR; and Final Report Lab Qualification Test for L-3 Pro-Vision. Benner Decl. ¶13-22; *Vaughn* Index. The release of this information would reveal the scanner's capabilities and vulnerabilities, which could then be exploited by terrorists. Benner Decl. ¶11.

22. Performance or testing data from security equipment or screening systems were designated as SSI under 49 C.F.R. § 1520.5(b)(9)(v) and therefore withheld from disclosure. Benner Decl. ¶25-28. This designation was made over information contained

in pages in the DHS Acquisition Review Board for ATR and Final Report Lab Qualification Test for L-3 Pro-Vision. Benner Decl. ¶26-27; *Vaughn* Index. In addition, this designation was made over raw data contained in two databases withheld in full. Benner Decl. ¶28. These testing results reveal vulnerabilities in the security system by identifying minimum testing standards and exposing "potential limitations or capability gaps in certain technology." Benner Decl. ¶25.

23. The SSI branch designated screening procedures contained in TSA's Operational Test Plan (OTP) and Operational Test and Evaluation (OT&E) or AIT/ATR as SSI under 49 C.F.R. § 1520.5(b)(9)(i). Benner Decl. ¶23-24. The release of this information could be detrimental to transportation security because knowledge of the particular algorithms, procedures, protocols, and safeguards used by TSA screeners could enable terrorists to evade or circumvent those procedures. Benner Decl. ¶23.

24. The vulnerability assessment contained in the DHS Acquisition Review Board for ATR PowerPoint was designated as SSI under 49 C.F.R § 1520.5(b)(5), and withheld from disclosure. Benner Decl. ¶29-30; *Vaughn* index. The release of this information could be detrimental to transportation security by revealing aspects of the security system that are vulnerable to evasion. Benner Decl. ¶29.

25. Electronic images shown on screening equipment monitor were designated as SSI under 49 C.F.R. § 1520.5(b)(9)(vi), and therefore withheld from disclosure. Benner Decl. ¶31-33. This designation was made over several pages from the Rapiscan Systems QDP. Benner Decl. ¶33; *Vaughn* index. Terrorists can derive a "range of operationally useful information" from these images, such as the extent to which the security system is able to

detect obscured or camouflaged threat items or items of particular sizes, shapes, and consistencies. Benner Decl. ¶31-32.

26. The SSI Branch also designated training materials created for the purpose of training screeners who operate the AIT scanners as SSI under 49 C.F.R. § 1520.5(b)(10). Benner Decl. ¶34-35; *Vaughn* index. "Training materials, if released to the public, could reveal TSA security screening steps, processes and communication protocols – the type of information that can be exploited by terrorists." Benner Decl. ¶34.

27. Certain confidential business information submitted to DHS was designated as SSI under 49 C.F.R. § 1520.5(b)(14). Benner Decl. ¶36-38. Certain pages from Rapiscan's QDP and L-3's QPL were designated under this section. Benner Decl. ¶37-38; *Vaughn* index. The release of this information would permit adversaries to sabotage transportation security system and exploit system vulnerabilities, and would reveal TSA's security theories and methodology. Benner Decl. ¶38.

28. Finally, the SSI Branch designated information obtained or developed in the conduct of research relating to transportation security as SSI under 49 C.F.R. § 1520.5(b)(15). Benner Decl. ¶39-44. On this rationale, the SSI Branch designated as SSI pages in the FRD; ATR Weekly Report/AIT/ATR PowerPoint; DHS Acquisition Review Board Power Point; ATR Internal Action Memoranda; TSA's Operational Test Plan (OTP) and Operational Test and Evaluation (OT&E) or AIT/ATR. Benner Decl. ¶40-44; *Vaughn* index. The withheld information contains information that would allow adversaries to track the progress of security technology development and plans for future technological development, revealing current technological limitations. Benner Decl. ¶41-44.

EXEMPTION 4

29. Rapiscan and L3 are engaged in actual competition for the sale of scanners to the United States government. Ex. 3, Modica Decl. ¶ 10-11 ("Modica Decl."); Ex. 4, Weller Decl. ¶ 3 ("Weller Decl."); Sotoudeh Decl. ¶ 50. AIT devices with ATR enhancement are in demand for various purposes, including airport screening, courthouses, prisons, and borders, in the United States and worldwide. Sotoudeh Decl. ¶ 50.

30. The following documents were withheld in full or part under Exemption 4: Rapiscan Systems Advanced Imaging Technology Qualification Data Package (QDP) (Bates Numbers 00055-00149); L-3 Communications Security and Detection Systems AIT ATR QPL (Pages 00150-00369) and L-3 Requests for Waiver/Deviation (Pages 00370-00380); and Rapiscan Task Order/Statement of Work for AIT System with ATR For Checkpoint Operations (Pages 00387-00402). Sotoudeh Decl. ¶ 47; *Vaughn* index.

<u>Rapiscan Systems Advanced Imaging Technology Qualification Data Package (QDP) (Bates Numbers 55-149)</u>

31. The Rapiscan Systems Advanced Imaging Technology Qualification Data Package (QDP) was submitted to TSA by Rapiscan. Modica Decl. ¶2. It "describes the capabilities of the Secure 1000 scanner system, including, for example, image resolution measurements, detection capabilities, effectiveness of the system at particular distances, and the ability of Rapiscan's scanner to operate in multiple configurations," and "reveals the component parts" of the system. Modica Decl. ¶ 5. "The performance capabilities of this system are very important aspect of the overall design and construction of Rapiscan's scanner system." Modica Decl. ¶ 5.

32. The system design and capabilities information is customarily not made available to the public. Modica Decl. ¶ 5. Rapiscan expected that TSA would not disclose the data it submitted outside the government. Ex. 5, EPIC ATR 00101 ("These data may be

reproduced and used by the Government with the express limitation that they will not, without written permission of the Contractor, be used for purposes of manufacture nor disclosed outside the Government.”).

33. Disclosure of design information and performance specifications would cause competitive harm to Rapiscan. Modica Decl. ¶ 5-6. A competitor with this information would have insight into “the design specifications of the Secure 1000 system and would alert competitors to the standard of performance they must achieve to successfully compete against Rapiscan. Access to such capabilities information, and to design details themselves, would permit a competitor to more effectively design and build its own systems and would, therefore, cause Rapiscan substantial competitive injury.” Modica Decl. ¶ 6; Sotoudeh Decl. ¶ 51.

34. In addition, the QDP reveals information about the tests that Rapiscan uses to establish compliance with TSA’s scanner systems requirements. Modica Decl. ¶ 7. “The manner in which these tests were performed reveals aspects of Secure the 1000 system design.” Modica Decl. ¶ 7. Moreover, the testing methods themselves are proprietary, and reflect a “carefully designed a testing protocol to demonstrative compliance TSA’s functional requirements.” Modica Decl. ¶ 7. If the proprietary testing methods were released, Rapiscan would suffer competitive harm because a competitor could use the testing methods as a “blueprint for demonstrating compliance with the TSA’s scanner-systems requirements.” Modica Decl. ¶ 7; Sotoudeh Decl. ¶ 51.

35. Finally, Rapiscan’s employee names and titles were withheld. Modica Decl. ¶8-9.

36. The release of employee names and titles would cause Rapiscan substantial competitive harm. Modica Decl. ¶ 8-9; Rapiscan has invested heavily in its human capital. Modica

Decl. ¶8-9. The release of this information would allow competitors to attempt to identify and attempt to lure knowledgeable employees away from their employer. Modica Decl. ¶8-9.

L-3 Communications Security and Detection Systems AIT ATR QPL (Pages 00150-00369)

37. L-3 submitted the L-3 Communications Security and Detection Systems AIT ATR QPL. This document contains substantiation data that demonstrates the scanner's ability to meet the government's specifications. Weller Decl. ¶ 5.

38. This document is covered by non-disclosure agreements between DHS and L-3. Weller Decl. ¶ 5. It is kept secret, on a secure data storage facility, with access limited to those who need to have access to it. Weller Decl. ¶ 6.

39. The information redacted in the QPL main document "pertain to ProVision AIT specific design parameters, feature implementation and functional performance details." Weller Decl. ¶ 7. Release of system design information "would enable competitors to gain insights into proprietary algorithm implementation techniques and system performance metrics" and would "enable competitors to copy technical attributes of the design for use" in competitive products. Weller Decl. ¶ 7.

40. Release of the redacted information about system design in the QPL documents would cause L-3 substantial competitive harm. Weller Decl. ¶¶ 7, 11-15.

41. Appendix A to the QPL is set forth at pages 000198-000228, and provides substantiation data for certain TSA requirements. Weller Decl. ¶ 8. "These pages provide the government with statements, test results and evidence that the ProVision ATR complies" with TSA specifications." Weller Decl. ¶ 8. In addition, "[t]hese pages include detailed description of feature implementation." Weller Decl. ¶ 8.

42. Release of this information would cause substantial competitive harm to L-3. Weller Decl. ¶ 8. "Substantiating that the AIT Scanners comply with all government standards and contract requirements is an important part of transactions with the government for AIT scanners." Weller Decl. ¶ 12. If a competitor gained access to this information, it could copy L-3's techniques and model its technology on L-3's approach without the investment of resources that L-3 had employed. Weller Decl. ¶ 8.

43. L-3 submitted five documents as Appendix B to the QPL: an Operations Manual (00230-00263); a Qualification Plan (00264-00278); Off-line processing TSA 3.8 ATR Provision (00279-00290); a Service Manual (00291-00321); and a Training Manual (00322-00369). Weller Decl. ¶ 9. L-3 expected TSA to keep the manuals secret. *See* Ex. 5, EPIC ATR 00231 ("The materials and information contained herein are being provided by L-3 Communications Security and Detections to its Customers for their internal business purposes only. . . . The materials and information contained herein constitute confidential information of L-3 Communications Security and Detections. Customer shall not disclose or transfer any of these materials or information to any third party."); Ex. 5, EPIC ATR 00293 (same).

44. The Operations Manual "reveal[s] how the machine functions." Weller Decl. ¶ 11. In addition, the Operations Manual "requires understanding, effort and skill to produce," and is part of L-3's innovation. Weller Decl. ¶ 11. Moreover, "[a] competitor having access to this manual could copy the manual to improve its own operations manual and its methods of communicating information about operation to users, thereby increasing the value of the competitor's products." Weller Decl. ¶ 11. Therefore, the release of this information would cause L-3 substantial competitive harm. Weller Decl. ¶ 11.

45. The Qualification Plan "contains proprietary test validation techniques" used to evaluate the millimeter wave AIT system. Weller Decl. ¶ 12. "Substantiating that the AIT Scanners comply with all government standards and contract requirements is an important part of transactions with the government for AIT scanners." Weller Decl. ¶ 12. The release of this information would allow a competitor to copy the proprietary techniques for demonstrating compliance. Weller Decl. ¶ 12. Therefore, the release of this information would cause L-3 substantial competitive harm. Weller Decl. ¶ 12.

46. The document containing information about Off-line Processing describes a proprietary tool developed by L-3 that gives L-3 a competitive advantage. The document contains details about this tool, the release of which would "expose techniques, features, and performance parameters." Weller Decl. ¶ 13. The release of this information would allow a competitor to mimic the approach and techniques of this tool, negating one of L-3's competitive advantages. Weller Decl. ¶ 13. Therefore, the release of this information would cause L-3 substantial competitive harm. Weller Decl. ¶ 13.

47. The Provision Service Manual "contains information on system operation and installation that reveals important system architecture." Weller Decl. ¶ 14. Revealing this information would permit a competitor to reverse engineer L-3's scanner. Weller Decl. ¶ 14. This would cause competitive harm to L-3. Weller Decl. ¶ 14; Sotoudeh Decl. ¶ 51.

48. The Operator Training Manual contains information about operating L-3's scanner. Weller Decl. ¶ 15. The release of this information would expose details about its operation, including power-up sequencing and proprietary tools for determining system health. Weller Decl. ¶ 15. Release of this information would allow competitors to copy L-3's proprietary techniques in their own technology. Weller Decl. ¶ 15. In addition, the

Operator Training Manual reflects L-3's proprietary approach to training and providing information about the operation of its scanner. Weller Decl. ¶ 15. The release of this document would cause substantial competitive harm to L-3. Weller Decl. ¶ 15; Sotoudeh Decl. ¶ 51.

49. In addition, the release of the employee name would cause L3 substantial competitive harm. Weller Decl. ¶ 10. L-3 spends "considerable effort recruiting, training and developing human capital." Weller Decl. ¶ 10.

50. The release of this information would allow competitors to attempt to identify and attempt to lure knowledgeable employees away from their employer, which would cause substantial competitive harm to L-3. Weller Decl. ¶ 10.

51. Some documents submitted by L-3 were withheld in full because the entirety of the document is exempt from disclosure, and the release of any portion of these documents would precipitate the substantial competitive harm identified by the manufacturer. Sotoudeh Decl. ¶ 52.

L-3 Requests for Waiver/Deviation (Pages 00370-00380)

52. The Requests for Waiver/Deviation were submitted by L-3. These documents contain cost and pricing information. Weller Decl. ¶ 15.

53. The release of pricing information would cause substantial competitive harm to L-3, because it would allow competitors to underbid the vendors' prices in future competitions. Weller Decl. ¶ 15.

54. In addition, these documents contain unique L3 software configuration information, the release of which would cause substantial competitive harm to L3. Weller Decl. ¶ 15; Sotoudeh Decl. ¶ 51.

Rapiscan Amendment of Solicitation/Modification of Contract/Order for Supplies or Services (Pages 00387-00402)

55. The unit pricing information and Rapiscan employee names contained in these documents were submitted by Rapiscan. Sotoudeh Decl. ¶ 48.
56. Pricing information was redacted from these pages. *See Vaughn* index.
57. The release of pricing information would cause substantial competitive harm to Rapiscan. Modica Decl. ¶ 4.
58. This information would provide "a roadmap" to the vendors' approach to pricing their "scanner systems and related research and development projects." Modica Decl. ¶ 4.
59. It would also give competitors insight into the vendors' "pricing strategy, costs, markups, efficiencies, and economies of scale." Modica Decl. ¶ 4. The release of this information would allow competitors to underbid the vendors' prices in future competitions. Modica Decl. ¶ 4.
60. In addition, Rapiscan employee names were withheld under Exemption 4. *See Vaughn* index.
61. Release of Rapiscan employee names would cause substantial competitive harm to Rapiscan. Modica Decl. ¶ 4. Rapiscan has invested heavily in its human capital. Modica Decl. ¶ 8-9. The release of this information would allow competitors to attempt to identify and attempt to hire Rapiscan employees with knowledge of the industry. Modica Decl. ¶ 8-9.
62. All reasonably segregable, non-exempt information contained in these pages were released. *See Vaughn* index.

EXEMPTION 5

A. Drafts of AIT with ATR Functional Requirements Document

63. TSA withheld forty-four draft versions of the AIT with ATR Functional Requirements Document (FRD). Sotoudeh Decl. ¶ 35. The withheld documents are drafts in their entirety, and the disclosure of these preliminary drafts would reveal the agency's deliberation over the contents of the FRD. Sotoudeh Decl. ¶ 35.

64. The final version of this document was released to EPIC on July 29, 2011. Sotoudeh Decl. ¶ 35; *Vaughn* Index.

B. Recommendations Regarding Future Policy

65. The AIT/ATR PowerPoint Presentation was used in a briefing to the House Appropriations Committee in connection with a discussion about future funding for ATR. Sotoudeh Decl. ¶ 36.

66. This document provides background on the ATR functionality and insight, opinions and deliberations on the testing results from the airport pilots. Sotoudeh Decl. ¶ 36; *Vaughn* index. Bates pages 000413-000414 discuss positive operational impact/effectiveness data provided in furtherance of request for appropriations. *Id.* Bates pages 000415-000417 contain the internal analysis of the pilot testing, including recommendations pertaining to the future use of ATR. *Id.* These pages also discuss the "next steps" for ATR deployment and ATR testing. *Id.* Bates pages 000418-000420 discuss future budget and purchase projections, along with a proposed procurement schedule and deployment goals. *Id.*

67. Portions of the document DHS Acquisition Review Board for ATR PowerPoint were also redacted as deliberative. Sotoudeh Decl. ¶ 37; *Vaughn* index. The Acquisition Review Board PowerPoint was prepared by the Passenger Screening Program within the Office of Security Technology (OST) to brief the DHS Acquisition Review Board about TSA's

proposal to acquire the ATR upgrade, and to seek permission to move forward with the ATR upgrades in the field. Sotoudeh Decl. ¶ 37.

68. Several pages contain information that discusses various proposals and future plans, strategy and risks for the acquisition, testing and evaluation, budgeting and cost projections, proposed procurement upgrades to the technology, proposed staffing plans and a projected acquisition schedule. Sotoudeh Decl. ¶ 37; *Vaughn* index.

69. Bates pages 000463-000476 were redacted partially or in full from a Letter of Assessment in the form of a Memorandum. Sotoudeh Decl. ¶ 38; *Vaughn* index. The AIT/ATR Letter of Assessment was prepared by OST and used to brief the DHS Under Secretary for Management in connection with request for authority to procure the ATR security upgrade. Sotoudeh Decl. ¶ 38.

70. In particular, bates pages 000463-000464 of the Letter of Assessment discuss the criteria and thought processes underlying the assessment and follow-on recommendations for the ATR program. Sotoudeh Decl. ¶ 38; *Vaughn* index. Bates pages 000466-000467 convey the internal policymaking progression and background deliberations that led to the conclusions in the assessment. *Id.* Bates pages 000468-00475 constitute an analysis of ATR's compliance with specific security performance objectives, including recommendations for future testing and evaluation. *Id.*

71. The Action Memoranda were used to exchange recommendations and opinions between OSO and OST regarding aspects of the use and testing of AIT/ATR. Sotoudeh Decl. ¶ 39.

72. Information contained in the Action Memoranda located at bates pages 000478-000483 were withheld from release because they propose action on future policy decisions and

contain contemplative discussions in furtherance of ATR procurement, evaluation, and deployment. Sotoudeh Decl. ¶ 39; *Vaughn* index.

73. Finally, some information was redacted as deliberative from Appendix A of the Operational Test Plan (OTP) for Operational Testing and Evaluation (OT&E) for AIT/ATR. *Vaughn* index. The OTP for OTE is an internal document created by OST and presented internally that describes OST's proposal for how TSA will conduct the future pilot Operational Test and Evaluation. Sotoudeh Decl. ¶ 40. The proposed testing set forth in the OTP for the ATR OT&E thereafter was submitted by TSA to DHS's Office of Testing and Evaluation for review, deliberation, and ultimately for approval by DHS. Sotoudeh Decl. ¶ 40. The withheld pages describe TSA's proposed plan for the ATR testing processes, the rationale behind the proposed processes, and TSA's overall plan for ATR. Sotoudeh Decl. ¶ 40; *Vaughn* index.

EXEMPTION 6

74. TSA withheld under Exemption 6 names of TSA and vendor employees, titles of non-government employees, employee signatures, direct phone numbers, and e-mail addresses. *Vaughn* index.

75. This information provides no insight into government function and would not help Plaintiff to understand how TSA performs its duties. *See* Sotoudeh Decl. ¶ 29.

76. The release of the identities of individuals who are involved with the design, evaluation, and procurement of this security system could expose those individuals to a risk of harassment and danger due to the high-profile, sensitivity, and high-threat nature of the design and procurement of security systems. Sotoudeh Decl. ¶ 28.

77. The release of the signatures of agency and vendor employees could expose those individuals to a risk of impersonation or identity theft. Sotoudeh Decl. ¶ 28.

78. The release of direct contact information could expose these individuals to harassment and unwarranted solicitation. Sotoudeh Decl. ¶ 28.

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Respectfully submitted,

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