IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 04-00944 (RMU)**
	)	**ECF**
DEPARTMENT OF HOMELAND SECURITY,	)	
TRANSPORTATION SECURITY ADMINISTRATION,	)	
and	)	
U.S. DEPARTMENT OF JUSTICE,	)	
Defendants.	)	

<u>DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT</u>

Defendants Department of Homeland Security ("DHS"), Transportation Security Administration ("TSA"), and U.S. Department of Justice ("DOJ"), hereby reply to plaintiff's opposition to defendants' motion for summary judgment. In support of this reply, defendants DHS and TSA rely on the accompanying supplemental declaration of Elizabeth Withnell, Chief Counsel to the Department of Homeland Security Privacy Office.

As defendants explained in their Memorandum of Points and Authorities in Support of Defendants Department of Homeland Security, Transportation Security Administration, and U.S. Department of Justices's Motion for Summary Judgment ("memorandum" or "Memo"), this is a case in which defendants conducted reasonable searches and properly withheld documents in part or in full under Freedom of Information Act ("FOIA") exemptions. Accordingly, the Court

should grant summary judgment in favor of defendants.

ARGUMENT

I. DHS AND TSA ARE ENTITLED TO SUMMARY JUDGMENT

A. DHS and TSA Properly Withheld Documents Pursuant to Exemption 3.

Exemption 3[1] specifically allows an agency to withhold or redact information prohibited from disclosure by another statute if the statute "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(B); Flores v. Executive Office for United States Attorneys Freedom of Info./Privacy Act Unit, 121 F. Supp. 2d 14, 16 (D.D.C. 2000) (Urbina, J.).[2]

As a preliminary matter, the parties do not dispute that 49 U.S.C. §§ 114(s) and 40119(b) and their implementing regulations fall within the scope of Exemption 3. See 69 Fed. Reg. 28066 (May 18, 2004); Withnell Decl. ¶ 38; Opp. at 18-19. In the case at bar, then, the debate revolves around whether defendants have shown that the information withheld under Exemption 3 falls within these statutes and regulations.

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[1] Defendants withheld the following documents pursuant to Exemption 3: DHS Vaughn: TSA Records E, Z, AA, BB, CC, LL, TT, UU.

[2] As an initial matter, defendants note that plaintiff has agreed not to challenge the reasonableness of DHS and TSA's search, see Memo & Ex. B (EPIC email II); Opp. at 13, and the following exemptions. Therefore, DHS and TSA should be granted summary judgment on these issues. Plaintiff has agreed not to challenge DHS's withholdings pursuant to Exemption 2. See Memo & Ex. B (EPIC email II); Opp. at 13; DHS Vaughn Index: TSA Records BBB. "Based on Defendants' briefing," plaintiff concedes that DHS and TSA "properly asserted Exemption 4." See Opp. at 13; DHS Vaughn: TSA Records: A, Z, AA, BB, CC, PP, QQ, RR, SS, UU; Chief Privacy Officer's Documents ("CPOD"): S. Plaintiff has agreed to exclude from the scope of litigation material withheld under Exemption 5 pursuant to the attorney-client privilege. See Memo & Ex. A (EPIC email I); Opp. at 21. "Based on Defendants' briefing, Plaintiff is willing to concede that DHS and TSA have properly asserted" Exemption "7(A) withholdings." See Opp. at 13; DHS Vaughn Index: CPOD: ¶¶ 1, 2, 3, 4.

Plaintiff is incorrect in asserting that defendants have not demonstrated "that all records withheld pursuant to Exemption 3 actually fall within the regulations." Opp. at 19. Plaintiff's argument fails for both of the documents plaintiff challenges. An examination of these two documents reveals that unlike the case plaintiff cites, Gordon v. FBI, 2004 WL 1368858, at *1 (N.D. Cal. June 15, 2004), Opp. at 19, defendants in the instant case have not applied Exemption 3 broadly and have provided detailed explanations of why the withheld material is exempt.

First, plaintiff is wrong that the description in ¶ E of defendants' Vaughn Index of a withheld email is inadequate to "determine objectively whether the material at issue falls within the statutes and regulations Defendants claim to withhold it."[3] Opp. at 20. As an initial matter, only the parts of the email that related to sensitive security information were withheld on the basis of Exemption 3 and not the whole email. Further, plaintiff fails to read the Vaughn Index in connection with the Withnell Declaration. Reading the two together provides a great deal more than "conclusory" information about defendants' basis for withholding the information pursuant to Exemption 3. Opp. at 20. The Declaration both explains the nature of the statutes and regulations that bring the materials under the ambit of Exemption 3[4] and details how the

[3] Plaintiff fails to specify the Vaughn Index paragraph it is citing. Defendants believe plaintiff meant ¶ E because it contains the quotation and exemptions plaintiff cites.

[4] The Declaration describes how 49 U.S.C. §§ 114(s) and 400119(b) require the Under Secretary for Transportation Security to prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act or under chapter 449 of this title if the Under Secretary decides that disclosing the information would be an unwarranted invasion of personal privacy, reveal a trade secret or privileged or confidential commercial or financial information, or be detrimental to the security of transportation." Withnell Decl. at ¶ 38. Pursuant to the "statutory authority in ATSA, the Under Secretary for TSA issued an interim final rule revising TSA's regulations governing the protection of sensitive screening information (SSI)." Id. (citing 69 Fed. Reg. 28066 (May 18, 2004)). SSI includes "security screening information, confidential business

materials fall within the statutes and regulations.

The Declaration explains that the "materials processed for plaintiff's FOIA requests contain information that meets the definition of SSI because the materials pertain to procedures, including selection criteria, for a (sic) aviation screening program." Withnell Decl. at ¶ 38. The materials also "contain information and sources of information potentially to be used by a passenger screening program." Id. Further, the "materials constitute 'solicited and unsolicited proposals received by DHS' relating to aviation security and also constitute 'information obtained in the conduct of research related to aviation security activities.'" Id. In these ways, when read together, the Vaughn Index and Declaration provide a detailed description of the material which clearly shows that it falls within the statutes and regulations defendants have claimed as the basis for withholding it.

Second, plaintiff also challenges the description of a document in ¶ LL of defendants' Vaughn Index because defendants did not "invoke Exemption 4 - which protects 'trade secrets and commercial information.'" Opp. at 20. For the sake of clarification, defendants have added Exemption 4. See Withnell Supplemental Declaration at ¶ 4 ("Suppl. Decl."); Juda v. United States Customs Serv., No. 98-0533, 1999 U.S. Dist. LEXIS 12536, at *9 n.1 (D.D.C. Aug. 2, 1999) (noting that "[d]efendant may assert new exemptions at the district court level"), rev'd & remanded on other grounds, No. 99-5333, 2000 WL 1093326 (D.C. Cir. June 19, 2000). Also, even if defendants had not added Exemption 4, for the same reasons as defendants have listed for ¶ E, the Vaughn Index, when read with the Declaration, provides a thorough description of why

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information, and research and development." Withnell Decl. at 15.

Exemption 3 is properly invoked for ¶ LL.[5]

Similarly, the Vaughn Index and the Declaration when read together, provide ample descriptions of why the material in the other paragraphs that claim Exemption 3 fall within the statutes and regulations cited by defendants. Additionally, all of the documents that were withheld pursuant to Exemption 3 were also withheld on the basis of other exemptions. For all of these reasons, these documents were properly withheld pursuant to Exemption 3.

B. DHS and TSA Properly Withheld Documents Pursuant to Exemption 5.

FOIA Exemption 5,[6] 5 U.S.C. § 552(b)(5), provides that the FOIA's disclosure obligations do not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency."

Plaintiff's Exemption 5 arguments fail because plaintiff misconstrues defendants' declaration, misreads the law governing the deliberative process privilege, and does not take proper account of defendants' descriptions of the handwritten notes in the Vaughn Index.[7] First,

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[5] Even if defendants had not added Exemption 4 to ¶ LL, there still would not have been reason to question "whether this material truly falls within the scope of 'confidential business information' under 69 Fed. Reg. 28083 (§ 1520.5 (b)(14))." Opp. at 20. As plaintiff admits, 69 Fed. Reg. 28083 covers "confidential business information." Id. To the extent the agency properly invoked at least one exemption, Exemption 3, on the basis of the information being confidential commercial information, that was sufficient to place the requestor on notice of the basis for the withholding. There is no requirement, and plaintiff does not attempt to cite one, that requires a defendant to cite all applicable exemptions.

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

[7] Plaintiff also notes that four paragraphs in defendants Vaughn Index, see Vaughn Index, CPOD ¶¶ EE, GG, HH, and II, did not specifically indicate which exemption was being invoked

plaintiff misconstrues a statement by DHS concerning plaintiff's FOIA request. In her declaration, Ms. Withnell stated that "in making my determination on these records, I was cognizant of the fact that plaintiff's avowed purpose in submitting its FOIA request was to demonstrate that JetBlue and other airlines were involved in providing PNR to TSA to test the system, a hypothesis that is not borne out by any of these records." See Withnell Decl. at ¶ 46. Plaintiff mistakenly asserts that this statement was a concession by DHS that "the purpose Plaintiff could make of the records was a factor in DHS' decision to withhold information" and that the "Court should review Defendants' withholdings with particular scrutiny." Opp. at 22. However, this statement is not part of a "rationale for invoking Exemption 5," but rather Ms. Withnell cited "the reason plaintiff wanted the documents . . . because it helped describe the scope of the request." Suppl. Decl. at ¶ 9. "In reviewing all the documents that mentioned any of the companies cited in plaintiff's request, I took special pains to ascertain whether any bore directly on the point of plaintiff's request. None did so." Thus, plaintiff misinterpretation of DHS' statement concerning plaintiff's FOIA request, requires no special scrutiny of defendants' withholdings. Instead, as the declarations submitted in this case make clear, defendant DHS processed plaintiff's requests in good faith and released "all reasonably segregable information." Id. Summary judgment is therefore appropriate.

Second, plaintiff's argument that materials defendants have withheld under the

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and claims that this factor "underscores the need for in camera review to determine whether these documents have been properly withheld." Opp. at 24. Although the descriptions in the Vaughn Index made clear that these documents were covered by Exemption 5, in the interest of clarity, the Supplemental Declaration specifically describes each document as withheld pursuant to Exemption 5. See Suppl. Decl. at ¶¶ 5, 6, 7, 8. For this reason, and for the reasons articulated in Section I.F., in camera review is not necessary.

deliberative process privilege may have lost their Exemption 5 protection fails because plaintiff misunderstands the standard for how a document can lose its predecisional status. Plaintiff cites Coastal States Gas Corp. v. Dep't of Energy, for the proposition that "even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on that issue or is used by the agency in its dealings with the public." 617 F.2d 854, 866 (D.C. Cir. 1980) (emphasis added). Plaintiff contends that to the extent that "Defendants have withheld material under Exemption 5 that was the basis of the final decision to terminate the [CAPPS II] program, this material is clearly not exempt from disclosure." Opp. at 23 (emphasis added). In support of this argument, plaintiff cites ¶ Z of the Vaughn Index because DHS has explained that it withheld information as deliberative since it was "used to decide the feasibility of the proposed CAPPS II program." Opp. at 22-23. Further, plaintiff cites six other paragraphs from the Vaughn Index which mention that CAPPS II "was terminated and replaced by a new program." Id. at 23 (citing Vaughn Index at ¶¶ U, TT, CC, DD, SS, VV). However, a careful reading of Coastal States rebuts plaintiff's claim.

In Coastal States, the D.C. Circuit focused on whether Exemption 5 covered "memoranda from regional counsel to auditors working in [Department of Energy's] field offices, issued in response to requests for interpretations of regulations within the context of particular facts encountered while conducting an audit of a firm." 617 F.2d at 858. The D.C. Circuit found that the memoranda bore "little resemblance to the types of documents intended to be protected under the deliberative process privilege" for very different reasons than offered by plaintiff in the instant case. Id. at 868. The documents were "not suggestions or recommendations as to what agency policy should be." Id. They were "not one step of an established adjudicatory process,

which would result in a formal opinion." Id. They were more akin to "a 'resource' opinion about the applicability of existing policy to a certain state of facts, like examples in a manual, to be contrasted to a factual or strategic advice giving opinion." Id. Nor did they reflect "'agency give-and-take of the deliberative process by which the decision itself is made.'" Id. (quoting Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975)). Thus, Coastal States, clearly shows that for a document to lose its predecisional status, it has to be adopted as the agency's position on an issue, not just be part of the decisionmaking process or a basis of the final decision.[8]

In contrast, the documents plaintiff cites in the instant case are clearly predecisional. Plaintiff questions the predecisional status of the document described in ¶ Z of the Vaughn Index because DHS has explained that it withheld information as deliberative because it was "used to decide the feasibility of the proposed CAPPS II program." Opp. at 22-23. Plaintiff fails to provide the rest of this sentence which explains that the information, because it was used to decide the feasibility of CAPPS II, "therefore constitutes part of the agency's deliberative process." Vaughn Index at ¶ Z. Further, there is no indication that the document was "adopted, formally or informally, as the agency position on that issue or [was] used by the agency in its dealings with the public." 617 F.2d at 866. Instead, the Vaughn Index explains that the pages "describe data elements in passenger name record information held by JetBlue Airlines." Vaughn Index at ¶ Z. This document was predecisional because of the "fact that TSA was reviewing the attributes of the JetBlue database for PNR data and [that] the precise elements

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[8] Similarly, the documents in the two cases plaintiff cites in addition to Coastal States were adopted as the agency's final position on an issue. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 158 ("[T]hese memoranda are 'final opinions'"); id. at 158 n.25; Evans v. OPM, 276 F. Supp. 2d 34, 41 (D.D.C. 2003) ("memo at issue describes OPM's legal position in terms and under circumstances strongly suggestive of finality").

contained in the database would shed light on agency thought processes regarding technically how to structure passenger prescreening and the elements that would be necessary in order to conduct passenger verification." Id. Thus, the document described in ¶ Z is predecisional.

Further, plaintiff's argument that documents which mention that "CAPPS II was terminated and replaced by a new program" should also lose their predecisional status similarly fails. Defendants' Vaughn Index descriptions of each of these documents makes clear that these documents were predecisional and none were adopted as DHS' position or used by the agency in its dealings with the public. Coastal States, 617 F.2d at 866.[9] Additionally, DHS found that each of these documents was protected by other exemptions besides Exemption 5.

Third, plaintiff is incorrect that defendants' explanations for withholding handwritten notes are inadequate to support their summary judgment motion. Opp. at 23. Although plaintiff asserts that in "some cases these notes have apparently been withheld merely because they are handwritten," id., this statement is not borne out by the Vaughn Index and Declaration

[9] The document in ¶ U, is an "email message sent among TSA employees providing an update on proposals and plans to use JetBlue technical specifications as part of the development of CAPPS II." Vaughn Index at ¶ U. In ¶ CC, a document was withheld pursuant to Exemption 5 because "this information represents internal agency deliberations about the structure of the program at the time." Id. at ¶ CC. In ¶ DD, an email message was withheld pursuant to Exemption 5 "because it reflects the give-and-take of agency deliberations that occur antecedent to a decision." Id. at ¶ DD. In ¶ SS, a document was withheld on the basis of Exemption 5 because it "constitutes information that was reviewed by TSA employees in the process of making decisions about CAPPS II." Id. at ¶ SS. The document in ¶ TT, amounted to predecisional material because "the final decision on the architecture and final configuration of the CAPPS II program had not been made when this document was prepared." Id. at ¶ TT. In ¶ VV, email messages, draft nondisclosure agreements and copies of signed nondisclosure agreements were withheld because they represent "the extensive give-and-take and drafting changes that preceded an agreement over sharing sensitive security information [and] . . . even though the nondisclosure agreements ultimately were signed, they were of no binding effect, because the final decision regarding CAPPS II was to terminate the program." Id. at ¶ VV.

descriptions of the paragraphs plaintiff cites. In fact, each of the documents plaintiff cites provide explanations that this Court has held to be adequate to show that documents are deliberative and predecisional. This Court has found handwritten notes both predecisional and deliberative because the notes "could reveal how [she] prioritized different facts and considerations in deliberating . . . [and] reveal her interpretation of public policies which she deemed relevant." Judicial Watch of Florida, Inc., v. Dep't of Justice, 102 F. Supp. 2d 6, 14 (D.D.C. 2000) (Urbina, J.) (protecting notes taken by Attorney General). "[I]n some cases selection of facts or summaries may reflect a deliberative process which exemption 5 was intended to shelter." Montrose Chemical Corp. v. Train, 491 F.2d 63, 71 (D.C. Cir. 1974). This logic fits the handwritten notes that defendants have withheld. See Vaughn Index (CPOD) ¶¶ O, P, Q, R, V, Y, Z.[10] Additionally, DHS also determined that each of these documents, except ¶ Q, were also covered by other exemptions. For these reasons, DHS appropriately withheld these documents under authority of Exemption 5.

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[10] See Vaughn Index, CPOD at ¶ O ("handwritten notes reflecting information provided to the Chief Privacy Officer as part of her investigation."); id. at ¶ P ("margin notes from the Chief Privacy Officer . . . reflect information she was considering as part of her investigation."); id. at ¶ Q ("handwritten notes reflecting various aspects of the Chief Privacy Officer's investigation, including tasks to accomplish in order to complete the investigation, and her understanding of events as of the time the notes were drafted."); id. at ¶ R ("handwritten notes reflecting questions the Chief Privacy Officer needed answered, as well as her impressions of the chain of events as she understood them at the time."); id. at ¶ V ("handwritten notes from the Chief Privacy Officer that reveal information she obtained from various interviews."); id. at ¶ Y ("handwritten notes and a one-page summary of background materials"); id. at ¶ Z ("handwritten notes the Chief Privacy Officer made prior to composing her final report.").

C. DHS and TSA Properly Withheld Documents Pursuant to Exemption 6.

Exemption 6[11] 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] In applying Exemption 6, the Court must balance the potential invasion of privacy against the public's interest in disclosure. Dep't of Air Force v. Rose, 425 U.S. 352, 372 (1976); Thompson, 1997 WL 527344, at *6. Although the public interest in an Exemption 6 case need not be of the same magnitude as in an Exemption 7(C) case, see Dep't of Defense v. Fed'l Labor Relations Authority, 510 U.S. 487, 496 n.6 (1994) [hereinafter FLRA], as plaintiff admits, Opp. at 24, "something, even a modest privacy interest, outweighs nothing every time." National Ass'n of Retired Federal Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989).

Plaintiff reiterates in its Opposition that it does not challenge the withholding of "personally identifiable information about non-government employees." Opp. at 25; Memo & Ex. A (EPIC email I). Plaintiff also does not "challenge Defendants' withholding of telephone numbers, addresses, and email user names of government employees." Opp. at 25. What remains at issue is the withholding of "certain government employees' names, names of agencies

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[11] Defendants withheld the following documents pursuant to Exemption 6: DHS Vaughn: TSA Records: D, E, F, G, H, I, O, P, Q, R, S, T, U, V, W, X, Y, FF, GG, II, JJ, KK, MM, NN, OO, WW, XX, YY, ZZ, AAA, BBB, DDD, EEE, FFF, GGG, HHH; CPOD: A, B, C, J, K, L, M, N, S, T, U, W, Y, Z, DD.

[12] The documents easily meet the exemption's threshold requirement that they be "personnel, medical or similar files," 5 U.S.C. § 552(b)(6), because all of the information contained therein "applies to particular individuals." Dep't of State v. Wash. Post Co., 456 U.S. 595, 602 (1982). "[S]imilar files" are broadly defined to include any "Government records on an individual which can be identified as applying to that individual." See U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 601-02 (1982); Thompson v. Dep't of Navy, 1997 WL 527344, at *6 (D.D.C.) (Urbina, J.).

and businesses, and domain names." Id.

Plaintiff bears the burden of demonstrating that the release of the withheld documents would serve the public interest in disclosure. See Carter v. United States Dep't of Commerce, 830 F.2d 388, 391-92 nn.8 & 13 (D.C. Cir. 1987). Plaintiff has not sustained this burden. As a preliminary matter, in United States Dep't of Justice v. Reporters Comm for Freedom of the Press, 489 U.S. 749 (1989), "the Supreme Court . . . sharply limited the concept of 'public interest' under the FOIA." Voinche v. FBI, 940 F. Supp. 323, 330 (D.D.C. 1996). Following Reporters Committee, the "only relevant 'public interest in disclosure' . . . is the extent to which disclosure would serve the core purpose of FOIA, which is contribut[ing] significantly to public understanding of the operations or activities of the government." FLRA, 510 U.S. at 495 (internal quotation marks omitted) (quoting Reporters Committee, 489 U.S. at 775).

Plaintiff fails to show that disclosure of the withheld names would "shed[] light on an agency's performance of its statutory duty" or inform citizens about "'what their government is up to.'" Reporters Committee, 489 U.S. at 773. Plaintiff is wrong that the withheld information would contribute to "'public understanding of the operations or activities of the government,'" Opp. at 29 (citing Reporters Committee, 489 U.S. at 772-73), by revealing "how employees of Defendants DHS and TSA worked with airlines to develop CAPPS II, and their involvement in the transfer of passenger data from JetBlue to the Army." Opp. at 29. Rather, the disclosure of this information would only reveal "who" was involved and not "how" the development and transfer occurred.

As this Court has concluded previously, and should conclude here, "there is no reason to believe that the public [would] obtain a better understanding of the workings of various agencies

by learning the identities of" the individuals associated with the documents. Voiche, 940 F. Supp. at 330. "In fact, the only imaginable contribution that this information could make would be to enable the public to seek out [the] individuals . . . and to question them for . . . information." Southam News v. INS, No. 85-2721, slip op. at 3 (D.D.C. Aug. 30, 1989) (see Ex. A). This Court has rejected such a "derivative theory of public interest." Hertzberg v. Veneman, 273 F. Supp. 2d 67, 87 (D.D.C. 2003); see also Horner, 879 F.2d at 879 ("The lesson for this case . . . is that unless the public would learn something directly about the Government by knowing the names and addresses . . . , their disclosure is not affected with the public interest." (first emphasis added)).

Turning to the privacy interest, defendants explained previously, Memo at 27, that, as an initial matter, federal employees have a privacy interest in the nondisclosure of their names "in association with . . . employment position[s] in the federal government." U.S. Dep't of Navy v. Fed'l Labor Relations Authority, 975 F.2d 348, 352 (7th Cir. 1992).[13] Plaintiff acknowledges this privacy interest. Opp. at 26. Given the nonexistent public interest in disclosure of the names, defendants "need not [have gone further] in [the] quantification of the privacy interest." Dep't of Defense, 510 U.S. at 500. It would be "enough . . . to observe that the employees' interest in

[13] Plaintiff unsuccessfully attempts to cast doubt on three cases defendants cited in their memorandum for the proposition that federal employees have a recognized privacy interest. See Baez v. Dep't of Justice, 647 F.2d 1328, 1339 (D.C. Cir. 1980); Lesar v. Dep't of Justice, 636 F.2d 472, 487 (D.C. Cir. 1992); Hunt v. FBI, 972 F.2d 286, 288 (9th Cir. 1992). Defendants cited these cases as examples of courts recognizing the *existence* of a particular privacy interest. See Memo at 28. Plaintiff suggests that, because these cases involved Exemption 7(C), their holdings are less relevant here in the context of Exemption 6. Opp. at 26 n.11. However, whether a privacy interest *exists* is not a matter that varies between Exemption 7(C) and Exemption 6. The difference between the two exemptions "goes only to the weight of the privacy interest needed to outweigh disclosure." Fed. Labor Relations Auth. v. U.S. Dep't of Treasury, 884 F.2d 1446, 1451-52 (D.C. Cir. 1989) (second emphasis added).

nondisclosure is not insubstantial." Id.; Hertzberg, 273 F. Supp. 2d at 86-87 (finding "de minimis" privacy interests outweighed nonexistent public interest).

Further, defendants showed that the employees possessed a significant privacy interest, arising from the fact that association with the CAPPS II program could lead to federal employees "being harassed by certain individuals or groups merely because of this link to what turned out to be an unpopular program." Memo at 28; see also Withnell Decl. at ¶¶ 47, 54 (explaining that rationale used for protecting identities of TSA employees in ¶ 47 also extends to DHS employees). Contrary to plaintiff's contention, the potential for harassment is "'more palpable than mere possibilit[y]." Opp. at 27 (quoting Rose, 425 U.S. at 370 n.19). In other words, there "is a substantial probability that disclosure will cause" harassment. Horner, 879 F.2d at 878 (explaining Rose).

As a general matter, "it is a simple fact, given the world security climate, that federal employees, especially those involved with homeland security, are at a heightened risk of harassment and endangerment." Suppl. Decl. at ¶ 16. DHS was "created to prevent and deter terrorist attacks and protect against and respond to threats and hazards to the United States." Id. That "mission has the potential to place DHS employees," which include TSA employees, "in harm's way directly or indirectly." Id. "Even employees who work on policy matters, as opposed to law enforcement activities, are not immune from unwarranted and unwanted contacts as a direct result of the work they do." Id. Accordingly, the agency "takes pains to be transparent about its programs but much more opaque about its employees, because identifying those involved with DHS or its component agencies, including TSA, makes the individuals susceptible to harassment and unwarranted attention, whether it be to further criminal purposes or merely to

vent misplaced frustrations." Id.

Plaintiff also misunderstands defendants' argument regarding the withholding of the names of agencies and businesses with which TSA worked and domain names in email addresses. Opp. at 27. Plaintiff incorrectly suggests that defendants made these withholdings based on the privacy interest of the agencies, businesses, and entities. Opp. at 27. Rather, these withholdings were made because this information when combined "with a name . . . identifies an employee or individual and so is protectible on the basis of Exemption[] 6." Suppl. Decl. at ¶ 16. Additionally, by itself, "this information is not reasonably segregable because it adds nothing to the store of information responsive to plaintiff's request[s]." Id.; Memo at 29 (citing Withnell Decl. at ¶ 47; Federal Labor Relations, 510 U.S. at 496 n.6; Mead Data Central, Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 261 n.55 (D.C. Cir. 1977); Judicial Watch, 108 F. Supp. 2d at 38). Moreover, because this information "would be the only information on a given page that arguably could be released, to require the agency to release the information would be unduly burdensome." Suppl. Decl. at ¶ 16; Memo at 29 (citing Withnell Decl. at ¶ 47); Yeager v. DEA 678 F.2d 315, 322 n.16 (D.C. Cir. 1982) (concluding that it was appropriate to consider "intelligibility" of document and burden imposed by editing and segregation of nonexempt matters); Assassination Archives & Research Ctr. v. CIA, 177 F. Supp. 2d 1, 9 (D.D.C. 2001).

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

D. DHS and TSA Properly Withheld Documents Protected under Exemption 7(C).

Plaintiff has conceded that it "does not dispute that names, email user names, addresses,

and telephone numbers in documents collected for the DHS Privacy Office's JetBlue investigation" fall within Exemption 7(C).[14] Opp. at 30. In making this concession, plaintiff has chosen not to challenge any of the withholdings that defendants have made solely pursuant to Exemption 7(C) and defendants should be granted summary judgment on this issue.

Plaintiff still challenges the withholding of "the names of businesses, agencies and domain names revealing entities involved in the JetBlue data transfer." Id. However, plaintiff fails to understand that defendants only withheld this information pursuant to Exemption 7(C) because this information together with a name can identify an employee or individual. Suppl. Decl. at ¶ 16. Since plaintiff has chosen not to challenge defendants' withholding of the names of individuals under Exemption 7(C), defendants only withhold the names of businesses, agencies and domain names now due to the fact that "this information is not reasonably segregable because it adds nothing to the store of information responsive to plaintiff's request[s]." Id. And "because this would be the only information on a given page that arguably could be released, to require the agency to release this information would be unduly burdensome." Id. Defendants have explained the case law supporting this withholding at greater length above in Section I.C.

E. DHS and TSA Complied with the Segregability Requirements of the FOIA.

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). As defendants explained in their Declaration, DHS and TSA have met this requirement by "conduct[ing] a thorough review of all documents found to be responsive to any of the

[14] Defendants withheld the following documents pursuant to Exemption 7(C): DHS Vaughn: CPOD: A, B, C, J, K, L, M, N, S, U, W, Y, Z, DD.

plaintiff's requests . . . this review included a line-by-line assessment of the contents of the records [and] [i]n reviewing the responsive documents, I have been mindful of the need to segregate and release all nonexempt material." Withnell Decl. at ¶ 59. Indeed, DHS reviewed the records twice, and segregated and released to plaintiff additional information on January 4, 2005. Id. at ¶¶ 23, 59. Defendant also "describe[d] what proportion of the information . . . is non-exempt and how that material is dispersed," Mead, 566 F.2d at 261; Withnell Decl. at ¶ 17-23. "These efforts make clear that defendant[s] undertook an analysis to determine what, if any, . . . information could be released." S.D. Edmonds, 272 F. Supp. at 57.

Nevertheless, plaintiff contests the adequacy of defendant's efforts to segregate exempt material from non-exempt material in its Exemption 5 withholdings.[15] Accordingly, defendants have made further efforts to supplement their already "reasonabl[y] specific[]" declaration regarding Exemption 5 withholdings. Armstrong v. EOP, 97 F.3d 575, 578 (D.C. Cir. 1996). In her supplemental declaration, Ms. Withnell explains in more detail why each redacted segment that plaintiff cites as an example could not be redacted further.

First, "no reasonably segregable information from the documents in paragraphs Z, BB, and CC of the Vaughn Index is releasable after application of" Exemptions 3, 4, and 5, all of which have been fully justified." Suppl. Decl. at ¶ 12. Exemption 5 "was invoked to withhold data elements in passenger name record information held by JetBlue Airlines because this information was considered by TSA in deciding on how to structure a passenger prescreening

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[15] Plaintiff also contests defendants' Exemption 3 withholdings, claiming that there is no evidence "Defendants made any attempt to segregate non-exempt information from material legitimately falling within . . . Defendants' Exemption 3 claims." Opp. at 32. Plaintiff is wrong as defendants have shown in Section I.A.

program." Id. The "precise factual information that plaintiff takes issue with, however, was withheld on the basis of Exemptions 3 and 4." Id. Exemption 3 protects "sensitive security information, which includes materials that pertain to procedures, including selection criteria, for aviation screening programs." Id. SSI also includes "solicited and unsolicited proposals relating to aviation security that constitute information obtained in the conduct of research related to aviation security activities." Id. SSI further encompasses confidential business information, "which is also protectible on the basis of Exemption 4." Id. Plaintiff's segregability argument regarding paragraphs Z, BB, and CC simply fails to account for the fact, as defendants have fully explained, that multiple exemptions were used.

Second, there is "no information that could be released in paragraphs DD and JJ of the Vaughn Index without harm to the deliberative process." Suppl. Decl. at ¶ 13. Plaintiff seizes on the use of the word "fact" in both of these paragraphs to assert that these documents were not properly segregated, Opp. at 34, but the fact of the matter is that the descriptions in paragraphs DD and JJ are "an attempt to describe factually documents that reflect internal agency deliberations." Suppl. Decl. at ¶ 13. Paragraph 45 of the Withnell Declaration describes the rationale for the withholdings based "on the deliberative process privilege." Withnell Decl. at ¶ 45. The information that was withheld "reflects internal agency give-and-take." Suppl. Decl. at ¶ 13. The information in the documents "shows internal deliberations and reflects only the views of the conversation participants." Id.

Finally, as plaintiff acknowledges, Opp. at 35, in paragraphs PP, QQ, RR, and SS another exemption, Exemption 4, was applied. The factual material was "withheld on the basis of Exemption 4, while the deliberative material was withheld on the basis of Exemption 5." Suppl.

Decl. at ¶ 14; Withnell Decl. at ¶¶ 39-41.

For all of these reasons, these examples clearly demonstrate that defendants have made adequate justifications for invocation of the deliberative process privilege and have not made overly broad Exemption 5 withholdings. Plaintiff ignores that defendants made "a good faith effort to release all reasonably segregable information" and that in "some cases . . . after the application" of applicable exemptions, "there was simply no segregable information to release." Suppl. Decl. at ¶ 15. Thus, summary judgment in favor of defendants is appropriate.[16]

F. *In Camera* Review is Not Appropriate in this Case.

The FOIA "permits, but does not require, a district court to undertake an in camera review of withheld documents." PHE, Inc. v. Dep't of Justice, 983 F.2d 248, 252 (D.C. Cir. 1993). Indeed, "in camera review is generally disfavored," id. at 253, and "is designed to be invoked when the issue before the District Court could not be otherwise resolved." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978). Plaintiff's argument for in camera inspection of the records withheld in this case fails because none of the factors plaintiff cites which make in camera inspection appropriate in some cases exist in the instant case. Opp. at 37. "[I]n camera inspection may be particularly appropriate when . . . the agency affidavits are insufficiently

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[16] Plaintiff states that paragraphs VV of the TSA documents and B of the Chief Privacy Officer documents ("CPOD") contain segregable information. Opp. at 36. In ¶ VV, a legend contained on email messages indicating that the message had been scanned for viruses was determined to not be reasonably segregable because although "this legend is not exempt, neither does it provide meaningful information on the subject of plaintiff's requests." Vaughn Index at ¶ VV. However, "if plaintiff wants the legend," defendants "can make it available." Suppl. Decl. at ¶ 15. Similarly, the material in ¶ B, consists of the "standard signature block used on the Chief Privacy Officer's email messages," which "appears on at least one of the documents that was already released to plaintiff." Id. at ¶ B. It was "not reasonably segregable and its release in any event would merely duplicate information that plaintiff already has." Id. The signature block has no bearing on the subjects of plaintiff's request. Id.

detailed to permit meaningful review of exemption claims . . . when the number of withheld documents is relatively small, and when the dispute turns on the contents of the documents, and not the parties' interpretations of those documents." Spirko v. Postal Service, 147 F.3d 992, 996 (D.C. Cir. 1998) (internal quotations omitted).

First, contrary to plaintiff's contentions, the agency affidavits in the instant case, as defendants have shown above, are sufficiently detailed to permit meaningful review of exemption claims. Spirko, 147 F.3d at 996.[17] Additionally, defendants have made further efforts to supplement their already sufficiently detailed Vaughn Index and Declaration with a supplemental declaration.

Second, the number of withheld documents is not relatively small. Spirko, 147 F.3d at 996. In fact, defendants have withheld over 1,000 pages in full and in part. When, as here, examination of the requested documents would require "herculean labors because of their volume, courts may legitimately be reluctant to conduct in camera inspection." Carter, 830 F.2d at 393. Further, since, as defendants show in this section, none of the factors which make in camera inspection appropriate are present in the instant case, it makes no sense for this Court to review a sample of the materials as plaintiff suggests. Opp. at 37.

Finally, the dispute in the instant case does not turn on "the contents of the documents" but rather on "the parties' interpretations of those documents." Spirko, 147 F.3d at 996. In no part of its Opposition does plaintiff challenge defendants' description of the contents of the

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[17] A review of DHS and TSA's Vaughn Index and Declaration reveal that defendants have followed the teachings of Vaughn and provided a detailed index to the requester "itemizing each item withheld, the exemptions claimed for that item, and the reasons why the exemption applies to that item." Lykins v. Dep't of Justice, 725 F.2d 1455, 1463 (D.C. Cir. 1984) (citing Vaughn, 484 F.2d at 827-28).

documents. Rather, plaintiff only challenges the exemptions defendants have claimed and defendants' interpretations of those documents. See Carter, 830 F.2d at 393.

Where, as in the instant case, "the [agency declarations] describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption[s], and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith," Hemenway v. Hughes, 601 F. Supp. 1002, 1004 (D.D.C. 1985) (internal quotation marks omitted), the Court should grant summary judgment on the basis of the agency declarations. For these reasons, in camera inspection is not appropriate.

II. DOJ IS ENTITLED TO SUMMARY JUDGMENT

A. DOJ Conducted a Reasonable Search for Responsive Records.

DOJ is entitled to summary judgment because it conducted a search reasonably calculated to uncover all documents relevant to plaintiff's request.[18] Plaintiff's argument regarding DOJ's search suffers from two fatal flaws. First, plaintiff fails to acknowledge that DOJ not only met the standard for a reasonable search, but went far beyond this standard. Second, plaintiff fundamentally misunderstands the nature of the documents provided by DOJ.

In evaluating the adequacy of an agency's search for records responsive to a FOIA request, the "issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Weisberg v. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983) (internal citations omitted) (emphasis in

[18] Plaintiff has agreed not to challenge any of the exemptions, Exemptions 2, 6, 7(C), and 7(D), claimed by DOJ in the Declaration of David M. Hardy. See Memo & Ex. A (EPIC email I); Opp. at 12. Therefore, DOJ should be granted summary judgment on these issues.

original).[19] An agency can show that it has discharged its obligation to conduct an adequate search for records with affidavits "demonstrat[ing] that it has conducted a search reasonably calculated to uncover all relevant documents." Weisberg v. Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984); Oglesby v. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990).[20] To establish the sufficiency of its search, the agency need only explain the "scope and method of the search" in "reasonable detail." Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982). As this Court stated in another case involving the FBI, the "agency need not search every record system or conduct a 'perfect,' 'epic,' 'hopeless,' or 'wasteful' search." Raulerson v. Ashcroft, 271 F. Supp. 2d 17, 21 (D.D.C. 2002) (Urbina, J.) (citations omitted).

As described at length in defendants' memorandum, DOJ went above and beyond conducting a reasonable search and employed exceptional search methods in response to plaintiff's FOIA request. See Memo at 35. DOJ would have fully met its responsibility to search for documents under the FOIA by conducting its search of records in the Central Records System

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[19] As defendants previously noted, Memo at 36, the generalized nature of EPIC's FOIA request, i.e., "Airline Passenger Data," does not lend itself easily to the searches the FBI routinely conducts. Hardy Decl. at ¶ 17. This is especially true here where the subject matter is recent, and some of the potentially responsive records may not have been indexed to the FBI's Central Records System, "particularly because they are part of the FBI's largest, most comprehensive investigation in its history – 'PENTTBOMB' – designed to identify the killers behind the September 11, 2001 terrorist attacks, as well as to prevent further terrorist attacks." Id.

[20] The adequacy of the search standard also rebuts plaintiff's assertion that "testimony presented by airline executives to the 9/11 Commission raises questions about the likely existence of more material not identified by the Bureau." Opp. at 16. The FBI did not have to find all documents that might conceivably exist but just conduct an adequate search, Weisberg, 705 F.2d at 1351, which was reasonably calculated to uncover all relevant documents. Weisberg, 745 F.2d at 1485. Further, it is possible that information related to the testimony may be contained in the Airline Data Sets but, as discussed below, it is inaccessible because the Airline Data Sets are inextricably intertwined with PENTTBOMB Data Sets. Hardy Decl. at ¶¶ 25-26.

("CRS"), an individualized inquiry of the most logical offices at FBIHQ to have potentially responsive records, and returning to these offices for further follow up. Memo at 40. EPIC's request did "not specify the locations in which [the] agency should search," and thus, DOJ had "discretion to confine its inquiry to a central filing system if additional searches [were] unlikely to produce any marginal return . . ." Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 28 (D.C. Cir. 1998). As this Court has held, "if the FBI believes that a search of its CRS is sufficient, it need not go further." Raulerson, 271 F. Supp. 2d at 22.

However, DOJ went beyond what it was obligated to do and upon its own initiative took the extraordinary search measures of contacting the NASA General Counsel and other knowledgeable NASA employees and an FBI Special Agent in the Minneapolis Field Office. Memo at 37. DOJ used the information acquired from these contacts to guide a further search involving the Counterterrorism Division at FBIHQ. Id. at 38. These measures were extraordinary because under the FOIA, DOJ has no obligation to search beyond the DOJ. Brunskill v. Dep't of Justice, No. 99-3316, slip op. at 4-5 (D.D.C. Mar. 19, 2001). Similarly, FBI headquarters does not have a duty to conduct a search of FBI field offices. Prescott v. U.S. Dep't of Justice, No. 00-0187, slip op. at 7 (D.D.C. Aug. 10, 2001). Further, "plaintiff has not demonstrated that the FBI should have proceeded any differently than it did." Raulerson, 271 F. Supp. 2d at 22. Thus, DOJ more than fully discharged its obligation to search for documents under the FOIA.

Moreover, plaintiff fundamentally misunderstands the nature of the documents provided by DOJ. These twelve pages of records are referred to by the Cyber Division as "metadata," i.e., data which describes and summarizes the Airline Data Sets. Memo at 38-40; Hardy Decl. at ¶

26. The Airline Data Sets are made up of airline passenger data that was forwarded from several FBI field offices "in the context of the PENTTBOMB investigation to FBIHQ [and] subsequently entered into computerized databases maintained by the Cyber Division at FBIHQ." Hardy Decl. at ¶ 20. Plaintiff mistakenly asserts that "documents responsive to Plaintiff's request were not uncovered by the agency's search [and] [s]uch evidence calls into question the adequacy of the search." Id. at 16.[21]

Plaintiff does not seem to understand that what it seeks, additional information on how passenger data was collected, if it does exist, is embedded and inextricably bound up with the PENTTBOMB Data Sets. Hardy Decl. at ¶ 26. The twelve pages plaintiff has been given describe and summarize a huge amount of data. Id. at ¶ 25. The data in these Airline Data Sets consists of two subsets of data: "Airline Manifests and Reservations" and "Airline Passenger Name Record." Id. at ¶ 24. The Airline Manifests and Reservations subset contains 82.1 million records and the Airline Passenger Name Record subset contains 257.5 million records. Id. at ¶ 25. All of these records have been entered by the Cyber Division into a "Data Warehouse" and have been "intertwined for analytical purposes with the information from several other PENTTBOMB Data Sets." Id. The information contained in the Airline Data Sets, which may contain the more detailed information plaintiff wants concerning how passenger records were acquired by DOJ, "cannot be segregated and extracted from the Data Warehouse in its original

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[21] Plaintiff's misunderstanding is evident in its comment that these documents "cover only records relating to passenger data itself." Opp. at 17. This comment is contradicted by plaintiff's acknowledgment, Opp. at 16-17, that these records show how passenger data was acquired from several airlines who gave the data voluntarily and how another set of airline passenger data was acquired through a federal grand jury subpoena. In this way, these documents clearly go beyond records only covering "passenger data itself," Opp. at 17, and reveal how DOJ collected passenger data from the airlines.

form." Id. at ¶ 26. The only information "which can be extracted concerning the Airline Data Sets are the records which were processed and released to plaintiff" which provide overviews of the information contained in the Airline Data Sets. Id. at ¶ 26.[22] Thus, DOJ has uncovered documents responsive to plaintiff's request and provided plaintiff with all of the records that it is possible for DOJ to provide. In these ways, DOJ has more than fully discharged its obligation to search for documents under the FOIA.

CONCLUSION

For the foregoing reasons, defendants respectfully request that this Court grant summary judgment in their favor pursuant to Federal Rule of Civil Procedure 56(b).

[22] Plaintiff's reliance on EPIC v. Dep't of Justice, No. 00-1849 (JR) slip op. at 3 (D.D.C. March 25, 2002) (Opp. & Ex. 6), is misplaced. Opp. at 17. In that case, the court noted there were indications that divisions of the FBI that might have had relevant documents had not been searched. EPIC, No. 00-1849, at 3. Similarly, in the D.C. Circuit case that the EPIC court relied on, the D.C. Circuit was concerned that the agency had not searched in all relevant places. See Valencia-Lucena v. United States Coast Guard, FOIA/PA, 180 F.3d 321, 326 (D.C. Cir. 1999). Here, however, plaintiff makes no argument that DOJ has not searched all relevant places but simply asserts DOJ has not found all of the documents plaintiff would like DOJ to have found. Thus, plaintiff both misapprehends EPIC and Valencia-Lucena's teachings, and disregards the adequate search standard. Weisberg, 705 F.2d at 1351.

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