

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

<p>ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff, v. DEPT OF HOMELAND SECURITY, et al., Defendants.</p>	<p>Civil Action No. 04-0944 (RMU) ECF</p>
--	---

Vaughn Index

TSA Records

The following describes documents withheld in full, unless otherwise noted, that were located as a result of searches conducted at the Transportation Security Administration (TSA) in response to plaintiff's Freedom of Information Act requests.

A. A 79-page document entitled "Navitaire Information Management 9.0 User Guide, Fourth Edition," This document consists of proprietary information which was shared voluntarily with TSA and which is not of the type that customarily is released to the public. It was withheld in full on the basis of Exemption 4.

B. Twenty pages of draft briefing slides entitled "CAPPS II Reservation Booking Data Delivery Architecture," which consist of preliminary suggestions on what a final presentation on this subject might look like. These pages were withheld in full on the basis of Exemption 5 in order to protect the quality of agency decisionmaking and to allow for the unfettered flow of ideas prior to a final decision being made.

C. Eight email messages, consisting of twelve pages, which were located as a result of the search conducted in the Administrator and Executive Secretary's Office. One page was released in full (an email message from Carol DiBattiste to Nuala Kelly and others entitled "JetBlue Investigation by Privacy Office.") In the remaining pages, which were withheld on the basis of Exemption 5, this text is repeated because of the nature of DHS email messages -- they reflect the original message and additional messages. In an effort not to reproduce duplicates, the identical portions of the messages were not released. The remaining portions of the pages that were withheld, however, reflect internal TSA discussions about the original message and response by Carol DiBattiste, and were withheld because they constitute predecisional deliberative information reflecting internal agency dialogue about the Chief Privacy Officer's original message. Consequently, this information was withheld on the basis of Exemption 5 and the deliberative process privilege.

D. A two-page email message dated January 31, 2003, between TSA personnel updating information on CAPPS II. These two pages were withheld in full. The identities of lower-level TSA employees were withheld on the basis of Exemption 6 because release would shed no light on government activities but might subject these individuals to unwanted and unwarranted contacts because of their relationship to the CAPPS II program. The contents of the message were withheld on the basis of Exemption 5 and the deliberative process privilege. The tenor of the message demonstrates that it was used in lieu of personal conversations between the participants and the text of the message shows their internal deliberations about strategy for CAPPS II.

E. A one-page email message dated February 20, 2003, between TSA personnel about the status of CAPPs II. This page was withheld in full. TSA personnel identities were withheld on the basis of Exemption 6. Certain information in the message indicates on its face that it is sensitive security information and so this portion was withheld on the basis of Exemption 3. The remainder was withheld on the basis of Exemption 5 because it reflects internal give-and-take about the CAPPs II program antecedent to the final decision on the construct of the program.

F. An email message with a draft Paperwork Reduction Act notice attached, comprising six pages in all. The email is dated April 22, 2003. It was sent from a TSA attorney to his client asking for comments in response to the client's need to publish the notice. JetBlue, one of the subjects of plaintiff's requests is mentioned in only one place in the message and not at all in the draft attachment. The identities of TSA employees were withheld on the basis of Exemption 6. The remaining information was withheld on the basis of the deliberative process and attorney-client privileges.

G. A one-page email message sent between TSA personnel, dated May 30, 2003. The message solicits comments on a draft nondisclosure agreement. The identities of personnel were withheld on the basis of Exemption 6; the text of the message on the basis of Exemption 5 and the deliberative process privilege.

H. An email message dated May 30, 2003, from a TSA client to his attorney in the Office of the Chief Counsel, plus a three-page attachment of a draft non-disclosure agreement. In the message the client asks the attorney for a legal analysis of the draft agreement. Both the message and the attachment were withheld in full on the basis of

Exemption 6, to protect TSA personnel, and on the basis of Exemption 5, the deliberative process and attorney-client privileges.

I. This document, consisting of an email message and a three-page attachment, is identical to Document H except that it was sent to another attorney in the Office of the Chief Counsel. It was withheld in full for the reasons articulated in the previous paragraph.

J. This document is a two-page email, dated June 12, 2003, between TSA personnel, asking for comments on an email message from the Chief Privacy Officer which, itself, asks for an analysis of a proposed answer to questions about CAPPs II. The message reflects internal agency discussions of the appropriate answer to questions from privacy advocates and was withheld in full on the basis of Exemption 5 and the deliberative process privilege. The signature block of the Chief Privacy Officer in a portion of this message and her name elsewhere are releasable information, but because the remainder of the email message has been withheld, release of her identity would be meaningless. Consequently, I determined that there was no reasonably segregable information and withheld the entire message.

K. This document is a two-page email that, because of the nature of DHS email messages, reproduces the document listed above and then provides an additional message from a TSA employee. It was withheld in full for the same reasons as explained above (Exemption 5).

L. This document, dated June 19, 2003, is the first page of a series of internal agency emails discussing the status of PNR discussions with the European Community. JetBlue Airways is mentioned only on the first page and only in passing. This page was

withheld in full on the basis of Exemption 5 because it reflects internal agency discussions about the precise content of proposed agency decisions that had not been made at the time the message was composed.

M. This document, also dated June 19, 2003, is identical to the document described above, except that the first page, where the subject of plaintiff's requests appears, also includes an additional message offering proposed draft language for an agency initiative. It was withheld in full for the same reason described in the previous paragraph (Exemption 5).

N. Again, this document is an email message, dated June 20, 2003, which reproduces the text of documents L and M, but includes additional comments reflecting internal agency deliberations. It was withheld on the basis of Exemption 5 to protect the quality of agency decisionmaking.

O. This document is an email message dated July 2, 2003, from a TSA employee asking an attorney in the Office of the Chief Counsel to review a draft nondisclosure agreement. The email includes a three-page draft nondisclosure agreement. TSA personnel names were withheld on the basis of Exemption 6, the message and the draft agreement were withheld on the basis of Exemption 5 and the deliberative process and attorney-client privileges.

P. This document consists of an email message dated July 7, 2003, and a draft agenda sent between TSA personnel, including contractors, asking for input on the draft agenda for a forthcoming meeting, as well as a response to the email dated July 10, 2003. The identities of TSA personnel were withheld on the basis of Exemption 6; the message

was withheld on the basis of Exemption 5 and the deliberative process privilege in order to protect the free flow of ideas and suggestions among subordinates.

Q. This document is an email message dated July 14, 2003, sent between TSA personnel, reflecting the recommendations of one of them on technical specifications for passenger data in connection with CAPPS II. The identities of TSA employees were withheld on the basis of Exemption 6, while the recommendations were withheld on the basis of Exemption 5, to protect the free flow of ideas and recommendations antecedent to a final agency decision.

R. This document reflects two email messages sent between TSA personnel. One message is to an attorney in the Office of the Chief Counsel asking for legal advice on the second message, while the second message is commentary on draft questions and answers provided by a TSA employee. The identities of the employees were withheld on the basis of Exemption 6. The text of the messages was withheld on the basis of Exemption 5 and the deliberative process privilege as well as the attorney-client privilege for the first message described.

S. This document, and four others that are similar, are all two-page email messages, dated July 14, and July 15, 2003, between TSA employees containing recommendations on technical requirements for CAPPS II. Much of the discussion is repetitive given the nature of DHS emails. The identities of TSA employees were withheld on the basis of Exemption 6; the text of the message was withheld on the basis of Exemption 5 and the deliberative process privilege, because the message reflects internal give-and-take among agency employees each expressing his or her own opinions about certain technical requirements associated with CAPPS II.

T. This document is a three-page email, dated July 16, 2003, sent among TSA employees discussing technical requirements for a proposal for CAPPS II. The identities of TSA employees were withheld on the basis of Exemption 6 and the contents of the message were withheld on the basis of Exemption 5 to protect internal communications antecedent to a decision.

U. This document is a one-page 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. The identities of TSA employees were withheld on the basis of Exemption 6. The message itself was withheld on the basis of Exemption 5 and the deliberative process privilege in order to protect the ability of agency employees to freely explore possibilities for the program without the fear of public scrutiny. Because the CAPPS II program has been terminated, release of this information at this point could detract from the debate about TSA's new initiative, Secure Flight, and cause public confusion.

V. I have grouped together the next three documents, consisting of six pages in total (three email messages of two pages each) because they all concern a database scheme and in some cases, are repetitive, because of the nature of DHS emails. The emails were sent between TSA personnel and TSA contractors and amount to internal discussions of a technical nature about attributes that will be used in connection with the CAPPS II architecture. Individual identities were withheld on the basis of Exemption 6; the messages themselves were withheld on the basis of Exemption 5 because they reflect predecisional agency deliberations.

W. I have grouped two two-page emails together because both are continuations of the conversation reflected in the document described in paragraph R between client and attorney and both have been withheld for the same reasons outlined in paragraph R.

X. This one-page email, dated August 19, 2003, reflects an internal discussion between TSA personnel of the technical specifications thought to be required for CAPPS II. The identities of TSA employees were withheld on the basis of Exemption 6; the discussion was withheld on the basis of Exemption 5 and the deliberative process privilege in order to protect the internal discussions of staff members antecedent to a decision on the technical specifications for CAPPS II.

Y. This document, a two-page email dated August 19, 2003, among TSA employees, also reflects discussions of the pros and cons of particular pieces of data and their utility for CAPPS II. It was withheld for the same reasons as discussed in the previous paragraph.

Z. This is a forty-one page document entitled "jetBlue (B6) database attributes." This document was withheld in full on the basis of Exemptions 3, 4, and 5. These pages describe data elements in passenger name record information held by JetBlue Airlines. Because this information potentially was to be used to design a system for passenger screening, it constitutes selection criteria used in any security process and was therefore withheld on the basis of Exemption 3 as sensitive security information.¹ SSI also

¹ Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3), allows an agency to withhold information that is specifically exempted from disclosure by statute, as long as the statute in question requires that the matters be withheld or establishes particular criteria for withholding or refers to particular matters to be withheld. 49 U.S.C. §§ 114(s) and 40119(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

encompasses solicited or unsolicited proposals received by DHS to perform work pursuant to a grant, contract, cooperative agreement, or other transaction, but only to the extent that the subject matter of the proposal relates to aviation security measures. This information was offered by JetBlue in connection with the design of CAPPS II. It also represents confidential commercial information voluntarily obtained from JetBlue that would not ordinarily be released to the public; in fact, it was marked "Confidential" by the company to signify that it is proprietary information. The information also was used to decide the feasibility of the proposed CAPPS II program and therefore it constitutes part of the agency's deliberative process. The fact that TSA was reviewing the attributes of the JetBlue database for PNR data and the precise elements contained in the database would shed light on agency thought processes regarding technically how to structure passenger prescreening and the elements that would be necessary in order to conduct passenger verification.

AA. This is a 35-page document consisting of two email messages entitled "Warehouse Schema" and "Data Warehouse" and an attachment which lays out in list and schematic format data elements used in PNR. It has been withheld in full on the basis of Exemptions 3, 4 and 5. The first page of the attachment is marked "Confidential re warehouse schema." Release would reveal sensitive security information that bears on

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. These statutory provisions have been held to qualify as Exemption 3 statutes. (See, e.g., *Gordon v. F.B.I.*, 2004 WL 1368858, *2 (N.D. Cal. 2004)). 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 security information (SSI). See 69 Fed. Reg. 28066 (May 18, 2004). SSI includes security screening information, confidential business information, and research and development.

the potential selection criteria used in security screening and that amounts to confidential business information submitted to TSA as part of an aviation security program. The information also is proprietary and would not normally be shared with the public. Finally, the email message reflects internal agency give-and-take surrounding the question of what data elements would be appropriate for use in a passenger screening program and the attachment provides additional pertinent details to inform that discussion.

BB. This is an email message transmitting a data dictionary from JetBlue to TSA for possible use in connection with CAPPs II, together with 65 pages of attachments of a technical nature explaining the contents of the dictionary. The information was voluntarily submitted for consideration in TSA's efforts to design CAPPs II, and bears on selection criteria for an aviation security screening program. It was thus withheld on the basis of Exemption 3 of the FOIA. This is not the type of information that JetBlue would normally make available to the public, and so Exemption 4 was used as well to withhold this material. Because the message and attachment also reflect the thinking of TSA at the time on a matter that had not been settled, the information also presents predecisional deliberative material. Thus, it was withheld on the basis of Exemption 5 as well.

CC. This document consists of three pages of an email message, dated July 16, 2003, between a contractor and TSA personnel, with a 20-page attachment of an unencrypted data warehouse scheme. The information reflects proprietary business information that was voluntarily submitted in connection with an aviation screening program and the fact that it had to be unencrypted is indicative of the fact that it is customarily not made available to the public. Exemptions 3 and 4 therefore were

invoked to withhold it. Additionally, although CAPPS II has since been terminated, this information represents internal agency deliberations about the structure of the program at the time and thus Exemption 5 and the deliberative process privilege were used to withhold it as well.

DD. This document is an email message, with previous messages attached, dated January 24, 2003, among TSA personnel updating information on the status of CAPPS II and the fact that JetBlue is interested in a CAPPS II pilot project. The information was withheld on the basis of Exemption 5 and the deliberative process privilege because it reflects the give-and-take of agency discussions that occur antecedent to a decision. In the case of CAPPS II, JetBlue did not participate in any pilot and the program itself was terminated.

EE. These two one-page documents are email messages drafted by a TSA employee for the Director of ONRA to send to JetBlue Airways. They were never sent and have therefore been withheld as predecisional documents written antecedent to a final agency decision.

FF. This is a three-page email message dated July 9, 2003, sent between TSA personnel describing a draft agenda and other draft documents. The identities of TSA employees were withheld on the basis of Exemption 6; the message text was withheld on the basis of Exemption 5 and the deliberative process privilege.

GG. This is a two-page email message reflecting a conversation between two TSA employees about the status of JetBlue's role in the CAPPS II program. The identities of TSA employees were withheld on the basis of Exemption 6; the message text was withheld on the basis of Exemption 5 and the deliberative process privilege.

HH. This document consists of seven pages and summarizes internal staff discussions about CAPPs II. It was withheld on the basis of Exemption 5 and the deliberative process privilege.

II. This document is a continuation of an email conversation that was discussed in paragraph GG. It has been withheld for the same reasons as outlined in that paragraph.

JJ. This document is an email message consisting of four pages, two of which duplicate other pages described above. The email message, sent among TSA personnel and dated January 24, 2003, reflects internal agency discussions among staff about the fact that JetBlue will not be participating in CAPPs II. Release could chill internal agency deliberations and so Exemption 5 and the deliberative process privilege were invoked to withhold it. The identities of TSA employees were withheld on the basis of Exemption 6.

KK. This two-page email message sent among personnel working on CAPPs II is dated August 27, 2003, and reflects notes taken at a meeting where issues related to the program were discussed. Individual identities were withheld on the basis of Exemption 6; the remainder was withheld on the basis of Exemption 5 because it reflects discussions at the staff level antecedent to an agency decision.

LL. These five pages are titled jetBlue Data Elements Request and appear to reflect TSA thinking on the content of an airline screening protocol. The pages are marked "Confidential," not because they are classified in accordance with Executive Order 12958, as amended, but because they constitute confidential commercial information. Accordingly, Exemption 3 was invoked to withhold this information. It

was also withheld on the basis of Exemption 5 because it was developed prior to a final decision being made on CAPPs II.

MM. This set of documents consists of eight pages: three email messages and an attached report prepared by a contractor for TSA. The factual portions of the report were released to plaintiff. The remaining information, however, reflects internal agency deliberations and the opinions of lower level staff and contractors. It was therefore withheld on the basis of Exemption 5 and the deliberative process privilege. The identities of the individuals were withheld on the basis of Exemption 6.

NN. This one-page email, dated July 22, 2003, between TSA personnel, reflects internal staff discussions about the possible technical aspects of CAPPs II. The identities of TSA employees were withheld on the basis of Exemption 6; the message was withheld on the basis of Exemption 5 and the deliberative process privilege.

OO. This one-page email, dated July 14, 2003, was sent among TSA personnel and reflects the writer's opinion on technical specifications needed for CAPPs II. The identities of TSA employees were withheld on the basis of Exemption 6; the message was withheld on the basis of Exemption 5 and the deliberative process privilege.

PP. This document was created by Acxiom Corporation expressly for JetBlue Airways and contains proprietary data the release of which could cause competitive harm, Exemption 4 was therefore invoked to withhold it. It appears that the document was provided to TSA voluntarily by JetBlue Airways and it is not the type of record that customarily would be released to the public. Because it also constitutes information that was reviewed by TSA employees in the process of making decisions about CAPPs II, it was also withheld on the basis of Exemption 5 and the deliberative process privilege.

QQ. This document consists of 12 pages from Navitaire explaining their data extraction process. It contains proprietary information the release of which could cause competitive harm. In fact, the document contains a disclaimer that says that the information is confidential and propriety and may only be used, modified, altered, copied, reproduced, or transferred only in accordance with a written license agreement. Exemption 4 was therefore used to withhold it. Because it also constitutes information that was reviewed by TSA employees in the process of making decisions about CAPPS II, it was also withheld on the basis of Exemption 5 and the deliberative process privilege.

RR. This is a 29-page document with no cover page, but it appears to be a copy of Navitaire's data assessment tool. The document contains technical proprietary information the release of which would cause competitive harm. It appears that it was voluntarily submitted and is not the type of document that would customarily be disclosed. Accordingly, Exemption 4 was invoked to withhold it. Because it also constitutes information that was reviewed by TSA employees in the process of making decisions about CAPPS II, it was also withheld on the basis of Exemption 5 and the deliberative process privilege.

SS. This is a nine-page document, although the last two pages have no text, that is labeled TrueBlue DB. It is technical information that appears to have been voluntarily obtained from JetBlue Airways and is not the type of information that would customarily be disclosed. Accordingly, Exemption 4 has been invoked to withhold it. Because it also constitutes information that was reviewed by TSA employees in the process of making

decisions about CAPPs II, it was also withheld on the basis of Exemption 5 and the deliberative process privilege.

TT. This is a seven-page document consisting of slides providing an overview of the CAPPs II system, dated July 1, 2003. The document is marked SSI and constitutes selection criteria proposed to be used for aviation screening. Therefore, it was withheld on the basis of Exemption 3, in conjunction with 49 U.S.C. §§ 114(s) and 40119(b). The materials also contain information and sources of information potentially to be used by a passenger screening program. 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." Accordingly, I invoked Exemption 3 to withhold some of the materials responsive to plaintiff's requests in order to protect this sensitive security information.

It also amounted to predecisional material because although it may have reflected TSA staff information as developed at the time, the final decision on the architecture and final configuration of the CAPPs II program had not been made when this document was prepared. Furthermore, the decision was made to cancel CAPPs II and replace it with a new program. Because release of this record reflected only internal discussions at the time and ultimately the document was discarded when a new program was formulated, Exemption 5, in particular the deliberative process privilege, was used to withhold it.

UU. This is a six-page record that shows numerical results from the use of a risk assessment tool developed by Sentricx. The information is confidential proprietary information submitted voluntarily to TSA in connection with a proposal for aviation security and is not the type of information that customarily would be released to the

public. Exemptions 3 and 4 were therefore used to withhold it. Because it also constitutes information that was reviewed by TSA employees in the process of making decisions about CAPPs II, it was also withheld on the basis of Exemption 5 and the deliberative process privilege.

VV. I have grouped together 74 pages consisting of email messages (many with duplicate information because of the way DHS email is formatted), draft nondisclosure agreements and copies of signed nondisclosure agreements covering sensitive security information, which were negotiated with JetBlue Airways and Navitaire Corporation, its subsidiary. I released two of these pages in part, with exemptions taken to protect the identities of TSA employees and a JetBlue representative. I withheld the remainder because although TSA was involved in negotiations with JetBlue Airways about its voluntary participation in the CAPPs II program, that participation did not occur and ultimately CAPPs II was terminated. The withheld material represents the extensive give-and-take and drafting changes that preceded an agreement over sharing sensitive security information between TSA and a company that was serving as an expert advisor in the development of a passenger prescreening program. Release of this material would make it more difficult for TSA in the future to encourage voluntary business participation in its efforts. Moreover, 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. In fact, the companies ceased participation even prior to the point that this decision was made. Rather than risk public confusion about aspects of a program that ultimately was terminated, I decided that these records should be withheld to protect the agency's deliberative process. Some of the pages consisted only of standard

legends contained on email messages indicating that the message had been scanned for viruses. Although this legend is not exempt, neither does it provide meaningful information on the subject of plaintiff's requests, so I determined that it was not reasonably segregable.

WW. This document is a two-page email message, dated July 15, 2003, that reflects internal agency discussions about the technical aspects of the CAPPS II architecture. The identities of TSA employees were withheld on the basis of Exemption 6; the message was withheld on the basis of Exemption 5 and the deliberative process privilege.

XX. This document is a one-page email among TSA employees that reflects the status of various initiatives related to CAPPS II. The identities of TSA employees were withheld on the basis of Exemption 6; the message was withheld on the basis of Exemption 5 and the deliberative process privilege.

YY. This document is a two-page email message among TSA employees also reflecting the status of various initiatives related to CAPPS II. The identities of TSA employees were withheld on the basis of Exemption 6; the message was withheld on the basis of Exemption 5 and the deliberative process privilege.

ZZ. These eight pages include three email messages and an attachment providing an update on current staff activities relating to efforts by TSA to work with JetBlue Airways. One page was released in part indicating that a report had been drafted following a meeting with JetBlue. The remaining pages were withheld. The identities of TSA employees were withheld on the basis of Exemption 6; the other email messages and the report itself were withheld on the basis of Exemption 5 and the deliberative

process privilege as the information reflects internal conversations and TSA staff analysis of meeting discussions.

AAA. This is a one-page memorandum highlighting the results of a meeting to discuss CAPPS II. The document is dated August 18, 2003. Exemption 6 was invoked to protect the identities of the meeting attendees; Exemption 5 was invoked to protect the discussion about the contents of this meeting, which was part of ongoing discussions about the contours of the CAPPS II program.

BBB. This document is an email message between TSA employees, dated March 14, 2003, providing instructions on how to access a secure database for purposes of testing. The identities of TSA employees were withheld on the basis of Exemption 6. The content of the message was withheld on the basis of Exemption 2, because release would permit access to an otherwise secure database, and on the basis of Exemption 5, because the message reflects aspects of the agency's internal decisionmaking process.

CCC. This email notification that a message had been read was released in part, with redactions taken only to protect the identities of TSA employees. I note it here to point out that in reexamining the documents for this index, I noticed that a similar message was apparently withheld in full. The releasable information, however, is virtually identical to that which was already released to plaintiff. Since I endeavored not to reproduce duplicates, I have not provided the document here, but it is available upon request.

DDD. These documents consist of three email messages, totaling five pages in all, that discuss the technical data documents provided by JetBlue to TSA. Individual identities were protected on the basis of Exemption 6; the content of the messages was

protected on the basis of Exemption 5 because the content reflects internal discussions about certain technical aspects of CAPPS II.

EEE. This document consists of an email message with a draft memorandum attached discussing a proposed notice for testing CAPPS II. The information reflects the opinions of the sender of the email on the content of a draft notice, along with the draft notice. Individual identities were withheld on the basis of Exemption 6; the message and attached draft notice were withheld on the basis of Exemption 5 and the deliberative process privilege.

FFF. This document consists of two email messages, dated August 19, and 20, 2003, sent among TSA personnel, and five pages that provided technical data which might be used in connection with CAPPS II. The information contains the opinions of TSA staff on the utility of the data. The identities of TSA employees were withheld on the basis of Exemption 6; the message was withheld on the basis of Exemption 5 and the deliberative process privilege.

GGG. This document is a one-page email message dated July 10, 2003, among TSA employees welcoming a new employee and commenting on the status of ascertaining data requirements for CAPPS II. The identities of TSA employees were withheld on the basis of Exemption 6; the message text was withheld on the basis of Exemption 5 and the deliberative process privilege.

HHH. The last set of documents consists of 10 pages, some of which were inadvertently included in the packet of materials sent to Torch Concepts as part of the submitter notice package, and some of which were overlooked during the initial processing of plaintiff's requests. I have endeavored to release all factual information

from these documents, but have protected the identities of TSA employees and an Army employee on the basis of Exemption 6 and have protected the remaining information because it reflects internal policy discussions and the typical give-and-take of agency deliberations. A copy of my letter releasing these documents, with redacted copies of these documents are attached to my declaration as Exhibit R..

The Chief Privacy Officer's Documents

The following describes documents withheld in full from the files of the Chief Privacy Officer of DHS in response to plaintiff's FOIA requests.

A. The first 226 pages of records processed for plaintiff's requests consist of numerous drafts of the Chief Privacy Officer's JetBlue report and email messages with comments about the draft report. The drafts and the messages reflect the opinions of various DHS personnel who reviewed the preliminary report of the Chief Privacy Officer and also constitute different versions of the report that were considered before the final document was published on the DHS website. I invoked Exemption 5 to withhold these drafts in order to protect the integrity of the agency's deliberations as well as the deliberations of the Chief Privacy Officer and to ensure that when the report was issued, it reflected the final decision of the Chief Privacy Officer, not her interim analysis or the comments of other agency personnel who made suggestions about the report.

The following documents appear behind a folder marked "Internal Investigation Documents." In all cases, unless otherwise noted, the identities of agency personnel and other individuals were withheld on the basis of Exemption 6 and 7(C). The remainder of the materials was withheld on the basis of Exemption 5 in order to protect the

deliberations in which the Chief Privacy Officer engaged prior to making her decision on whether a Privacy Act violation occurred when TSA facilitated the release of PNR data to the Department of Defense. The documents primarily focus on those areas that were of interest to the Chief Privacy Officer, the kinds of questions she asked DHS personnel, and her thought processes as the investigation proceeded. I carefully examined each document and, except where otherwise noted, determined that no reasonably segregable information could be released.

B. A three-page email message dated February 16, 2004, was released in part as part of Exhibit M. The portion released reflected a final agency decision taken by TSA. The remainder of the email reveals internal agency deliberations antecedent to the preparation of the final JetBlue report and was therefore withheld on the basis of Exemption 5 of the FOIA. As with all email messages that have been withheld, the name and other identifiers (address and telephone numbers) of the Chief Privacy Officer constitutes releasable information, but by itself is not reasonably segregable as it adds no information about the topics of plaintiff's requests. Other identities were withheld on the basis of Exemptions 6 and 7(C).

C. A three-page email message dated February 16, 2003, from the Chief Privacy Officer to a number of DHS employees. Some of the message replicates information in the previous document, due to the cumulative nature of DHS email messages. The remainder of the information reflects internal agency discussions that occurred during the Chief Privacy Officer's investigation. Exemptions 5 and 6 and 7(C) were invoked to protect this message.

D. A one-page email message dated February 13, 2004, providing suggestions for the Privacy Officer's investigation. The message was withheld on the basis of Exemption 5 to protect suggestions and ideas that contributed to the thought processes of the Chief Privacy Officer, who considered various matters in the course of her investigation.

E. A one-page email message between the Chief Privacy Officer and other DHS employees concerning draft responses to Congressional correspondence under review within the agency.

F. A one-page email dated January 16, 2004, between the Chief Privacy Officer and a TSA employee asking about various documents that might have some bearing on the JetBlue investigation.

G. Another one-page email dated January 16, 2004, between the Chief Privacy Officer and a TSA employee reflecting further comments on documents that might have some bearing on the JetBlue investigation.

H. A two-page email message, dated January 15, 2004, that I prepared for the Chief Privacy Officer regarding certain legal aspects of TSA's actions in facilitating the transfer of PNR to DOD. In addition to reflecting the thought processes of the Chief Privacy Officer at the time, this document also reflects a client's request for legal advice and an attorney's response and so I withheld it on the basis of both the deliberative process and attorney-client privileges covered by Exemption 5.

I. There are several email messages, consisting of five pages, that the Chief Privacy Officer included in her JetBlue files but which have no bearing on her investigation. One of them, for example, contains personal information about the Chief Privacy Officer. Another, which is a response to her request for contact information,

contains personal information about another federal employee. None of these pages bear directly on the JetBlue investigation and I have therefore considered them outside the scope of plaintiff's request.

J. Two email messages dated September 25, 2003, consisting of six pages, about the availability of documents concerning PNR data, which includes a copy of a FOIA request received by TSA for "all agency records regarding access and/or use of JetBlue Airways passenger data." Portions of these documents were released to plaintiff as part of Exhibit M. The remainder have been withheld on the basis of Exemptions 6 and 7(C) and Exemption 5. Certain parts of the second email message consist of advice provided to the Chief Counsel by legal staff and therefore are covered by the attorney-client privilege.

K. An email message to the Chief Privacy Officer, dated September 19, 2003, providing some information for her consideration as part of her investigation. The message was withheld on the basis of Exemption 5, 6 and 7(C).

L. Another email message to the Chief Privacy Officer, dated February 11, 2004, providing additional information in response to her inquiry and for consideration as part of her investigation. This message also was withheld on the basis of Exemptions 5, 6, and 7(C).

M. Ten pages of email messages between the Chief Privacy Officer and the Chief Counsel of TSA reflecting back-and-forth discussions about the Chief Privacy Officer's investigation. These pages were withheld on full on the basis of Exemptions 5, 6, and 7(C).

N. Two one-page emails reflecting attempts by the Chief Privacy Officer to reach a particular Department of Transportation employee and a notification that her message was undeliverable. The fact that the Chief Privacy Officer was trying to reach this individual sheds light on aspects of her investigation; the fact that she could not may mean that the individual is no longer in government service. Consequently, I decided that the documents should be withheld to protect the privacy of the individual as well as the thought processes of the Chief Privacy Officer. Therefore, these pages were withheld on full on the basis of Exemptions 5, 6, and 7(C).

O. Two pages of handwritten notes reflecting information provided to the Chief Privacy Officer as part of her investigation. These pages were withheld on full on the basis of Exemption 5.

P. Two copies of a memorandum regarding a Request for PNR data for a Department of Defense Proof of Concept, dated July 30, 2002. One of these was released in part. The second one contains margin notes from the Chief Privacy Officer that reflect information she was considering as part of her investigation. Because I released the first copy of the memorandum, with redactions taken for personal identifiers, I did not reproduce the same information in the second copy. I withheld the marginal notations on the basis of Exemption 5.

Q. Twelve pages of 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. These pages were withheld in full on the basis of Exemption 5.

R. Behind a tab marked "JetBlue" are four pages of 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. This tab also includes discussions with JetBlue personnel on a number of matters, including JetBlue's privacy policy. The policy itself was released to plaintiff, but the discussions have been withheld on the basis of Exemption 5 because they reflect the nature and scope of the inquiries that the Chief Privacy Officer was making prior to composing her report. Most of the other documents behind this tab are court documents related to privacy litigation filed against JetBlue. These documents were offered to plaintiff, with no response. In reexamining the records behind this tab, I noticed that there are several copies of a submitter notice letter sent by the TSA FOIA office to an attorney for JetBlue seeking comments on the releasability of a nondisclosure agreement. That agreement is referenced in the TSA portion of this index. The submitter notice letter is a standard form letter used by TSA, but is releasable if plaintiff wishes to have it.

S. The Chief Privacy Officer submitted inquiries on at least two occasions to personnel at Torch Concepts and received responses, including documentation about Torch Concepts "Security Enhancement Study." These documents appear behind a tab marked "Torch Concepts." The queries and the responses that were received were withheld on the basis of Exemption 5, because release would illuminate the Chief Privacy Officer's thought processes during her investigation and would reveal all the information she considered in preparing her final report, including information that she ultimately discarded as not relevant or otherwise useful. Her decisions as to the weight to accord to information provided by Torch Concepts and the impact the Torch Concepts information

had on her analysis of the JetBlue matter are reflected in her final JetBlue report. Some of the materials submitted by Torch Concepts constitute proprietary information that would not customarily be disclosed to the public and so was withheld on the basis of Exemption 4. Because Torch Concepts was under no compulsion to cooperate with the Chief Privacy Officer's investigation, protection of this information is necessary in order to ensure that the Chief Privacy Officer will continue to have the cooperation of the business community in any future privacy-related investigation. For similar reasons, I withheld the identities of Torch personnel on the basis of Exemptions 6 and 7(C). Obtaining the cooperation of individuals in future investigations would be difficult if such people could not be assured that their contacts with the Chief Privacy Officer would not result in unwarranted and unwanted publicity. Some of the materials submitted by Torch Concepts are otherwise publicly available, such as a presentation, included in these records, entitled "Homeland Security – Airline Passenger Risk Assessment, and, as I indicated to plaintiff in my responses to their requests, I assumed, unless contradicted, that they did not need duplicative copies of such publicly available information. The information discussed in this paragraph appears multiple times in the Chief Privacy Officer's records.

T. Some of the documents in the Chief Privacy Officer's file duplicate documents that were processed as a result of the searches conducted by TSA. For example, the Chief Privacy Officer's file contains an email message, dated May 30, 2003, from a TSA/ONRA employee to an attorney in the Office of the Chief Counsel asking for a legal interpretation of a draft nondisclosure agreement, together with the draft agreement as an attachment. This document is discussed in the TSA portion of this index and was

withheld in full to protect the attorney-client privilege (Exemption 5). Employee names were withheld on the basis of Exemption 6. I did not process duplicate copies of TSA records that were located in the Chief Privacy Officer's files.

U. At this point in the file there is a one-page email message reflecting a query for information that was made by the Chief Privacy Officer and the results of that query. I protected the substance of the message because release would reveal the direction the investigation was headed at the time the message was composed, and I withheld personal identifiers on the basis of Exemptions 6 and 7(C).

V. Behind a tab marked "Department of Defense" are three pages of handwritten notes from the Chief Privacy Officer that reveal information she obtained from various interviews. I withheld these predecisional notes on the basis of Exemption 5.

W. A one-page email message appears in this portion of the file, in which the Chief Privacy Officer asks for contact information for a DOD employee. Given the sensitivity of DOD about its personnel names, I opted to withhold this message on the basis of Exemptions 6 and 7(C). The remaining materials behind this tab are otherwise publicly available.

X. Behind a tab marked "Congressional Inquiries" are seven pages, consisting of a fax cover sheet and six pages of a draft letter to Senator Leahy. The materials reflect internal agency decisions about what the final content of the letter should contain, and include extensive marginal notes. These pages were withheld in full on the basis of Exemption 5. The remaining documents behind this tab either were processed and released in whole or in part, or appear publicly on websites.

Y. The next tab is the name of a lower-level DHS employee, three pages of handwritten notes, and a one-page summary of background materials pertaining to this aspect of the Chief Privacy Officer's investigation. I withheld these pages on the basis of Exemptions 6 and 7(C) and Exemption 5. The remaining items are either news articles or presentations that are publicly available and, in some cases, duplicate information in the TSA portion of this index.

Z. The next tab is the name of another lower-level DHS employee and consists of four pages of handwritten notes the Chief Privacy Officer made prior to composing her final report. These pages were withheld on full on the basis of Exemptions 5, 6, and 7(C).

AA. The next tab is marked "EPIC FOIA." I offered the FOIA request that appears there to plaintiff, but received no response to my overture.

BB. The next tab is marked "Litigation" and consists of a declaration filed by John Gilmore in the Northern District of California, which was offered as well to plaintiff, with no response.

CC. The next tab is marked "Press," and consists of numerous pages of public source information. Some of the items appear in email messages that were sent to the Chief Privacy Officer, which include some personal references or some information that is protected on the basis of Exemption 5 and the deliberative process privilege because it reflects opinions about the ongoing matter. I explained that plaintiff could have the segregable public source information if it so desired, but received no response.

DD. Some documents appear behind this tab that do not involve “Press.” Many of them, however, are duplicates of documents that have either been listed in this index, released in whole or in part, or are publicly available on the Internet. One that does not appear elsewhere is a “CAPPS II Contact List.” I withheld this document in full on the basis of Exemptions 6 and 7(C), to protect the identities of the individuals – primarily TSA employees, but also some contractors – whose contact information appears on the list. Because the CAPPS II program has been terminated, the privacy interests of these individuals in not being subjected to continuing questions about the program outweighed any public interest in their identities. I determined that the public interest in knowing what the government is doing would not be furthered by disclosure of this identifying information.

EE. This is an email message, dated July 18, 2003, in which the Chief Privacy Officer asks for advice on contacts regarding her investigation. The message reveals the concerns of the Chief Privacy Officer at the outset of her investigation.

FF. Two email messages dated February 17, 2004, and a two-page attachment concern TSA legal authorities. The information was prepared by an attorney at the request of the client and constitutes attorney-client privileged information. While withholding the privileged information, I made a discretionary release, however, of one page of the attachment, which discusses several statutory authorities.

GG. Six pages of email messages appear at this point in the file and have been withheld in full. The first is a legal opinion provided to the Chief Privacy Officer about the subject of her investigation; the remaining pages are comments on her draft report.

HH. The next set of documents consist of 23 pages of emails concerning various aspects of TSA's role in the JetBlue/DOD transfer of information. Many of the pages are duplicates because of the format of DHS email messages. These records reflect debate between the Chief Privacy Officer and other DHS employees about various aspects of the JetBlue matter. A portion of one of the messages is a duplicate and was released to plaintiff because it reflects a final agency decision. The remainder were withheld to protect internal agency deliberations.

II. The next set of documents consist of a facsimile cover sheet and five attachments which reflect information directly requested by the Chief Privacy Officer as part of her review and the responses received to her request. One page duplicates a page previously described in this index concerning background materials.

JJ. This one-page document contains comments on the Chief Privacy Officer's draft report and reflects part of the internal give-and-take that occurred prior to finalization of the JetBlue report. It was withheld in full on the basis of Exemption 5.

KK. The last tab is marked Northwest/NASA. Documents behind this tab include public source material and a presentation that is on plaintiff's website concerning a Northwest Airlines briefing. There are other documents such as a facsimile cover sheet reflecting that the information behind the tab was forwarded to the Chief Privacy Officer by the TSA FOIA office, but none of the materials bear directly on the JetBlue matter and so were not included in my initial processing of the responsive records.

The following categories of documents have been withheld in full on the basis of Exemption 7(A) because the Chief Privacy Officer has not completed her examination of the circumstances surrounding any alleged transfer of PNR by American Airlines and Airline Automation, Inc. to TSA. These records respond to plaintiff's request TSA04-0917.

1. Letters and memoranda from the Director of TSA's Office of National Risk Assessment to companies regarding assistance they might provide for CAPPS II.
2. Email messages, including some pertaining to the content of the correspondence described in the previous paragraph, and others analyzing the utility of using GDS company data.
3. Internal memoranda analyzing the legal basis for using PNR obtained from GDS companies and other legal issues.
4. Draft nondisclosure and confidentiality agreements covering assistance to TSA with CAPPS II.

Respectfully submitted,


Elizabeth Withnell