

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

<p>ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff, v. DEP'T OF HOMELAND SECURITY, et al., Defendants.</p>	<p>Civil Action No. 04-0944 (RMU) ECF</p>
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DECLARATION OF ELIZABETH WITHNELL

I, ELIZABETH WITHNELL, hereby declare and state as follows:

1. I am the Chief Counsel to the Department of Homeland Security (DHS) Privacy Office. I have held this position since May 2004. From August 2003 until May 2004, when a permanent Director for Departmental Disclosure and FOIA was hired, I served as the Acting Departmental Disclosure Officer for DHS, responsible for operation of the agency's Freedom of Information Act/Privacy Act Program (FOIA/PA). I have been involved in the processing of the FOIA requests at issue in both of my official capacities.

2. I have over a decade of experience handling FOIA requests, appeals and litigation on behalf of the Executive Branch. While at DHS, my duties have encompassed overall management of the FOIA/PA program, including responding to requests, consulting with DHS components and other agencies on such requests, and making release determinations on DHS documents. I make this declaration on the basis of personal knowledge and on information I have received in the performance of my official duties. If called upon to do so I could testify competently as to the contents of this declaration.

Correspondence Pertaining to Plaintiff's FOIA Requests

3. By letter dated September 22, 2003, plaintiff submitted a FOIA request to the Transportation Security Administration (TSA) for "documents or materials relating to" JetBlue Airways Corporation, Axiom Corporation, Torch Concepts, Inc. and SRS Technologies. A copy of that request is attached to this declaration as Exhibit A. The request focused primarily on "information directly relevant to the TSA's involvement in the testing of CAPPS II with actual passenger data."

4. By electronic mail message (email) to the TSA, plaintiff clarified the time frame for the above request to include documents from "September 2002 to the present." A copy of that email is attached to this declaration as Exhibit B.

5. TSA logged in receipt of plaintiff's request on September 23, 2003, acknowledged it by letter dated September 30, 2003, and assigned it tracking number TSA03-645. A copy of this acknowledgment letter is attached to this declaration as Exhibit C.

6. TSA issued an interim response to plaintiff's FOIA request TSA03-645 by letter dated February 6, 2004, a copy of which is attached to this declaration as Exhibit D. A 107-page document pertaining to JetBlue Airways Corporation was withheld in full on the basis of Exemptions 3 and 4 of the FOIA, 5 U.S.C. § 552(b)(3) and (4).¹

7. TSA issued a second interim response to plaintiff's FOIA request TSA03-645 by letter dated February 10, 2004, a copy of which is attached to this declaration as Exhibit E. With regard to that portion of plaintiff's request concerning SRS Technologies, TSA located no records and so advised plaintiff. With regard to JetBlue Airways, TSA located 36 pages of responsive records, as listed in Exhibit E, and released six pages of these records in full. The

¹ Upon appeal of this determination, a recount showed that the withheld document consisted only of 79 pages. See paragraph 8 and Exhibit H.

remaining information was withheld in full on the basis of Exemptions 3, 4, and 5 of the FOIA. With respect to that portion of plaintiff's request pertaining to Acxiom Corporation and Torch Concepts, Inc., TSA advised plaintiff that it had contacted those companies for their review of records containing the companies' proprietary information. Such submitter notice is required by Executive Order 12,600.

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

9. By letter dated February 24, 2004, plaintiff submitted an appeal of TSA's interim releases of February 6, and February 10, 2004, regarding FOIA request TSA03-645. A copy of that letter is attached to this declaration as Exhibit G.

10. By letter dated April 26, 2004, TSA responded to plaintiff's appeal, affirming its initial decisions, with the following provisos. TSA noted that it had miscounted the withheld pages in its first interim response and that the correct page length of the withheld document was 79 pages, not 107 as originally stated. It also indicated that the document was properly withheld on the basis of Exemption 4. TSA also determined that two of the previously-withheld records were not, in fact, responsive to plaintiff's request. A copy of TSA's appeal response is attached to this declaration as Exhibit H.

11. By letter dated April 2, 2004, plaintiff submitted a FOIA request to TSA seeking records regarding JetBlue Airways Corporation, Acxiom Corporation, and Torch Concepts, Inc.

for the period September 2001 to September 2002,² including records referenced in the Department of Homeland Security Privacy Office's report entitled "Report to the Public On Events Surrounding jetBlue Data Transfer," dated February 20, 2004.³ A copy of the request is attached to this declaration as Exhibit I. The request focused primarily on "the transfer of passenger information from an airline to an agency and the potential use of actual passenger data to test CAPPs II" and indicated that plaintiff's purpose was "to obtain information directly relevant to TSA's involvement in the transfer of data from JetBlue to the Department of Defense and the testing of CAPPs II with actual passenger data."

12. By email message dated April 9, 2004 from plaintiff to TSA, plaintiff clarified and narrowed the scope of the FOIA request described in paragraph 9 and Exhibit I to encompass documents that "related to JetBlue passenger data." A copy of this email message is attached to this declaration as Exhibit J.

13. By letter dated April 16, 2004, TSA acknowledged plaintiff's FOIA request and assigned it TSA tracking number TSA04-0895. A copy of this acknowledgment letter is attached to this declaration as Exhibit K.

14. By letter dated April 12, 2004, plaintiff submitted a FOIA request to TSA seeking records "concerning, involving or related to American Airlines passenger data" and records "concerning, involving or related to disclosures of passenger data by Airline Automation Inc." A copy of plaintiff's request is attached to this declaration as Exhibit L.

² Although the Transportation Security Administration was created as a result of the enactment on November 19, 2001, of the Aviation and Transportation Security Act of 2001, the Department of Homeland Security, with which TSA was merged, did not commence operations until January 2003. Thus, the documents that were requested preceded the creation of DHS and the merging of TSA within this agency.

³ Plaintiff did not seek records regarding SRS Technologies in its April 2, 2004 request.

15. By letter dated April 12, 2004, TSA acknowledged plaintiff's FOIA request and assigned it TSA tracking number TSA04-0917. A copy of this acknowledgment letter is attached to this declaration as Exhibit M.

16. By letter dated May 19, 2004, TSA advised plaintiff that its request number TSA04-0917 had been transferred to the DHS Privacy Office for direct response. A copy of TSA's letter is attached to this declaration as Exhibit N. In fact, the Privacy Office asked TSA to forward all three of plaintiff's requests, to the extent work remained unfinished, in order to ensure consistent processing of any responsive documents.

Responses to Plaintiff's Requests

17. TSA provided three interim responses to plaintiff's request TSA03-645, as described above. In addition to these responses from TSA, I provided two responses on behalf of the Privacy Office of the Department of Homeland Security. The first response is undated, but was sent by email (followed by Federal Express delivery) to plaintiff's Staff Counsel on September 24, 2004. A copy of this response and the email transmittal of it are attached to this declaration as Exhibit O. The second and last response to plaintiff is dated October 20, 2004, and is explained more fully below.

18. The documents that were processed for plaintiff's requests consist of records from TSA and records used by the Chief Privacy Officer in compiling her report on the JetBlue matter that is the subject of plaintiff's requests. As I indicated in my interim response, a significant number of documents, particularly those found in the Chief Privacy Officer's files, consisted of public source records, including court filings in civil actions against JetBlue Airways Corporation, as well as the text of news articles that were included in email messages. Other publicly-available records included a declaration filed by John Gilmore in connection with

litigation filed in the Northern District of California, several copies of a Torch Concepts presentation entitled "Homeland Security -- Airline Passenger Risk Assessment," and a copy of a FOIA request that had been submitted by plaintiff to the Federal Aviation Administration. I indicated in this interim response that unless I heard otherwise from plaintiff, I would assume that plaintiff was not interested in receiving this public source material. Plaintiff never indicated an interest in receiving any of these records and, accordingly, they are not considered to be at issue.

19. As indicated in my undated interim response, certain information was released to plaintiff while other information was withheld in whole or in part. I have attached as Exhibits P copies of the documents that I released to plaintiff in my first interim release. The Vaughn Index appended to this declaration lists the documents that were withheld in full. An explanation of the basis for withholding the information that was released in part follows later in this declaration.

20. By letter dated October 20, 2004, I made my second response to plaintiff's FOIA requests. A copy of that response is attached to this declaration as Exhibit Q. I have attached as Exhibit R copies of the documents that I released with this response. In that response, I reiterated information that had previously been provided to plaintiff directly by TSA that no records responsive to plaintiff's request concerning SRS Technologies had been located. I also pointed out that certain records that originally had appeared to be responsive were determined not to be, because they did not concern the specific subjects of plaintiff's request but rather only the general subject of the CAPPS II Program. Even if these records were considered responsive, however, I determined that they would be exempt from disclosure under the FOIA on the basis of several exemptions. I released certain records in part that had been located by TSA and withheld the remaining portions as well as other records in full on the basis of the following

FOIA exemptions: 2, 3, 4, 5 and 6. A more complete explanation of the basis for these withholdings follows later in this declaration.

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

22. I released 11 pages of records from the Chief Privacy Officer's files in whole or in part, and withheld the remaining previously-unprocessed documents on the basis of Exemptions 4, 5 and 6 of the FOIA. The basis for these withholdings will be explained in greater detail later in this declaration.

23. In reexamining the documents at issue in this litigation, I discovered that some responsive records, which had been sent out for submitter notice, were overlooked in the initial processing. Upon further reflection, moreover, I decided that some pages that previously had been withheld contained reasonably segregable information. I reprocessed these records and sent them by email to plaintiff's counsel on January 4, 2005. A copy of my electronic transmittal and the documents as released is attached to this declaration as Exhibit S.

The Search for Responsive Documents

24. TSA Headquarters consists of 25 separate offices.⁴ For FOIA requests TSA03-645 and TSA04-0895, the following offices were searched: Administrator and Executive Secretary, Office of the Chief Counsel, Legislative Affairs, Aviation Operations, Office of Transportation

⁴ The 25 offices are: Administrator and Executive Secretary; Chief Counsel; Strategic Management and Analysis; Communications and Public Information; Legislative Affairs; Civil Rights; Aviation Operations; Maritime and Land Security; Transportation Security Policy; Information Technology; Workforce Performance and Training; Internal Affairs and Program Review; Finance and Administration; Chief Support Systems Officer; Security Technology; Administration; Chief Operating Officer; Credentialing; Security; Human Resources; Ombudsman; Operations Policy; Office of National Risk Assessment; and Acquisitions.

Security Policy, Chief Financial Officer, Operations Policy, Office of National Risk Assessment, and Acquisitions. For FOIA request TSA04-0917, the offices searched consisted of the Chief Financial Officer, Operations Policy, Office of National Risk Assessment, and Acquisitions. In each office, the search encompassed hard copy files, electronic files and email messages pertaining to any of the companies listed in the requests -- JetBlue Airways, Acxiom Corporation, Torch Concepts, Inc., American Airlines, and Airline Automation, Inc. -- and the CAPPS II Program.

25. TSA03-645 was received by TSA on September 23, 2003, and that date was used as the cutoff date for the search for responsive documents. (Plaintiff asked for all records concerning the four companies listed in its requests for the period of "September 2002 to the present.") TSA04-0895 was received on April 5, 2004, but plaintiff requested documents for the period between September 2001 and September 2002, including records referenced in the DHS Privacy Office's JetBlue report. Approximately 775 pages of TSA records were located as a result of TSA's search. To the extent possible, this figure does not include duplicate copies of records or public source information.

26. TSA04-917 was received on April 12, 2004. Although a search was initiated by TSA and documents were located, the request and the records were forwarded to the DHS Privacy Office for further handling on May 19, 2004. Eighty pages were processed for this particular request.⁵

27. The Chief Privacy Officer of DHS collected all documents pertaining to her report on the transfer of JetBlue passenger data and stored them in two accordion files in her office. In addition to documents located as a result of the TSA searches described in the preceding

⁵ In my interim response to plaintiff, I indicated that approximately 85 pages were withheld on the basis of Exemption 7A that concern American Airlines and Airline Automation, the subjects of TSA04-917. See Exhibit N. Upon recount, I have determined that the correct number is 80 pages.

paragraphs, the Chief Privacy Officer's records, consisting of nearly 1100 pages, were processed for plaintiff's requests.

The Responsive Records

TSA Documents

28. As plaintiff's FOIA requests make clear, its purpose in submitting these requests was to "obtain information directly relevant to the TSA's involvement in the testing of CAPPS II with actual passenger data."⁶ The companies that are the subjects of plaintiff's FOIA requests allegedly were involved in sharing passenger name record information with the Federal Government in order to test the feasibility of screening programs designed to thwart terrorism. With regard to data from JetBlue Airways Corporation, for example, TSA personnel, while still a part of the Department of Transportation, facilitated the transfer of passenger information to the Department of Defense to test a base security enhancement proposal. At the time this transfer became public, there were reports that TSA was also planning to obtain passenger name record data to test the feasibility of its proposed CAPPS II program.

29. Some of the documents that were processed for plaintiff's request bear directly on the facilitation by TSA of the transmission of passenger data from JetBlue to the Department of Defense to test a proposal for base security to be funded by the DOD. In connection with this declaration, however, I have reexamined the records processed for plaintiff's requests. The vast majority of the documents say nothing about TSA's use of actual passenger data. Instead, the documents show an effort by TSA, particularly by ONRA, to determine what categories of information from passenger name records would be useful in order to develop a risk assessment for screening airline passengers. In trying to determine which passenger name record elements

⁶ While the requester's purpose in submitting a FOIA request is not material to the disposition of the request, this information is presented to place the request in context and to help explain the documents that were determined to be responsive.

would be most useful, TSA did reach out to JetBlue for technical assistance in evaluating the types of data contained in the airlines' PNR, but the assistance from JetBlue did not cover the transmission of any personally-identifiable PNR to be used for testing purposes. Ultimately, moreover, the entire CAPPs II project was cancelled.

30. After the searches were completed and the documents were forwarded to the Privacy Office for further processing, TSA nevertheless discovered that it maintained PNR for a limited number of JetBlue flights. These records had been voluntarily and separately submitted by JetBlue as part of TSA's efforts to respond to industry complaints that the CAPPs criteria inordinately impacted certain carriers and to analyze the effectiveness of the CAPPs criteria.⁷ JetBlue passengers were frequently selected under the CAPPs criteria for additional screening. Because the company did not have the technical capability to analyze its own flight information to determine why this would be so, JetBlue provided TSA sample flight data for TSA's analysis and evaluation of the CAPPs criteria. These PNR were maintained in a folder with access restricted to only two personnel in TSA's Office of Aviation Operations, and they do not respond to plaintiff's requests, because they do not concern PNR that was actually used to test CAPPs II. (No PNR data was used to test CAPPs II.) Even if the data were somehow considered responsive to plaintiff's requests, however, the data are exempt from disclosure on the basis of Exemptions 4 and 6 of the FOIA. The information is proprietary business information that was voluntarily submitted by JetBlue and is of the type that customarily would not be disclosed. Moreover, the information contains identifying details about JetBlue passengers, the release of which would constitute a clearly unwarranted invasion of privacy, particularly since the identities of JetBlue passengers say nothing about governmental activities, which is the core

⁷ CAPPs II was intended to be the successor of the CAPPs program, which began with the Federal Aviation Administration and is still in use today for passenger screening purposes.

purpose of the Freedom of Information Act. Further, portions of the documents are exempt under Exemption 3 of the FOIA because they contain Sensitive Security Information under 49 U.S.C. §114(s), including the CAPPS criteria and weights assigned to each criteria.

31. The status of the CAPPs II program informed the decisions made with regard to the releasability of the documents that were determined to be responsive to plaintiff's requests. As already noted, the vast majority of the documents constitute internal agency deliberations about the technical constructs of the CAPPs II program. Because of concerns generally about the operation of CAPPs II and more specifically, about the privacy aspects of the program, the Department of Homeland Security undertook a thorough review of CAPPs II, which included input from Congress, the public, privacy and civil liberties groups, airline passengers, the airline industry, and international partners. As a result of this internal review, the CAPPs II program was terminated and a new program was developed, entitled Secure Flight, which is currently in the testing phase. The Secure Flight testing phase includes a requirement that domestic air carriers submit historic passenger name record information collected during the month of June 2004 in order to test whether the Secure Flight concept will help to improve airline security. (See <http://www.tsa.gov/public/display?content=09000519800cf3a7> and <http://www.tsa.gov/public/display?content=09000519800df71c>.)

32. Because the CAPPs II program has been replaced by a new initiative, there is the potential that release of information about the now-defunct program will serve only to confuse the public and misinform the public debate about Secure Flight. Whatever internal discussions occurred about CAPPs II, the fact is that CAPPs II has now been replaced. The decision to initiate a new passenger prescreening effort has been made transparent by the Department and has been the subject of scrutiny and analysis by the public, the media, and others. Releasing

documents that reflect the inner debates about CAPPS II, a program that is no longer viable, would detract from the important and necessary discussion of Secure Flight that is now occurring. Consequently, as noted more fully below, a significant portion of the documents at issue were withheld on the basis of Exemption 5 of the FOIA, which allows agencies to protect their predecisional, internal deliberations.

Disposition of the Documents

33. In its three interim responses to TSA03-645, TSA released 29 pages in full and withheld 99 pages on the basis of Exemptions 4 and 5 of the FOIA. As noted above, ten pages of records that were initially thought to be responsive to plaintiff's request were, on appeal, determined to be incorrectly identified as responsive, and the page count for one document that had been withheld was incorrectly noted initially and subsequently corrected upon appeal.

34. In my two responses to plaintiff's requests, which were the result of processing of TSA records as well as those maintained by the DHS Chief Privacy Officer in connection with her JetBlue report, I released 56 pages in whole or in part, which are attached as Exhibits P and R. I did not provide a page count of the number of documents that were otherwise publicly available, but I notified plaintiff's counsel that these could be had upon request. I also notified plaintiff's counsel that I was not releasing duplicate pages or similar email messages responding to a request for a meeting, since the information on each was duplicative of the email message I released. I pointed out, however, that if plaintiff wished to receive all relevant emails, I would release them. Plaintiff did not respond to my overtures. In preparing this declaration, moreover, I ascertained that certain documents had not been previously processed which nevertheless respond to plaintiff's request, and other documents that were previously withheld contained

segregable information. I provided these pages, x number in all, to plaintiff by email on January 4, 2005.

35. In processing the entirety of these records, I invoked Exemptions 2, 3, 4, 5, 6, and 7(A) to withhold information responsive to plaintiff's three requests. The information initially withheld from the Chief Privacy Officer's records on the basis of Exemption 6 also qualifies for protection on the basis of Exemption 7(C) as explained more fully below.

TSA Records

36. Exemption 2 of the FOIA, 5 U.S.C. § 552 (b)(2), exempts from disclosure information "related solely to the internal personnel rules and practices of an agency." This exemption protects predominately internal information in which there is little or no public interest or, if there is public interest, information the release of which might permit circumvention of a statute, rule, or agency procedure. I invoked Exemption 2 to protect access codes and telephone numbers for an agency internal teleconference and also to protect the direct telephone numbers and facsimile numbers of agency personnel. (See Exhibit R, document number "146.") This information relates directly to the internal practices of the Department. This agency, like most others, has made available telephone lines for public inquiries. Releasing additional telephone information, however, including the call-in number for agency teleconferences, could lead to the subversion of these lines as individuals use them, instead of the public access numbers, to call the Department. Release of access information for teleconferencing purposes could subvert the purpose of the teleconference, which is to allow only those with a need to participate in a discussion to have access to that discussion. Disclosure of the internal fax numbers of agency employees could cause the offices where these employees work to be inundated with faxes, which could disrupt official business. Because these internal

telephone numbers are related solely to the agency's internal practices, and because disclosure could permit circumvention of the system DHS has established for public access, I withheld this information pursuant to Exemption 2 of the FOIA.

37. As part of preparing the Vaughn Index for this case, I reexamined all the documents at issue. I determined that four additional pages similar to the pages marked "146" and "150" were not processed initially for release. Two pages refer to two different meetings but contain similar information to information that was released. Two others are a request for a call-in number for another meeting. None of these documents bear directly on the alleged transfer of PNR by JetBlue to TSA for testing purposes, but the records do contain segregable information which can be made available to plaintiff upon request. Exemptions will be applied similar to those applied to document "146."

38. 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 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 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 aviation screening program. 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.

39. Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4), permits an agency to withhold trade secrets and commercial or financial information obtained from a person that is privileged and confidential. As noted in Exhibit R, I released certain records in part, but withheld material that would identify confidential commercial information the release of which could cause competitive harm. (See Exhibit R, document marked "30.") I also invoked Exemption 4 to withhold in full information that was obtained from airlines or other companies as part of TSA's efforts to design CAPPS II in order both to protect the commercial interests of the submitters, who justifiably feared competitive harm if the precise details of their submissions were made public, and the interests of the Department in having companies voluntarily submit proprietary information for our assessment and use. Although TSA has issued solicitations for business submissions for some of its programs, the documents that were processed for this request consist primarily of technical details about the data that JetBlue collects in its PNR. This information

was provided to TSA voluntarily, in an effort by JetBlue to assist TSA in making progress toward development of an effective airline screening program. It is not the type of information that customarily would be released to the public. Aside from being unintelligible to the lay reader, it could disclose the architecture of JetBlue's databases, and permit a savvy computer operator to access otherwise secure systems.

40. In reexamining the relevant documents at issue, I discovered that no response was ever made by TSA or by me after submitter notice was provided to Torch Concepts concerning certain of its records. This notice was mentioned in TSA's interim responses to plaintiff. Attached to this declaration as Exhibit S are 21 pages of records that have not been heretofore released, but were the subject of submitter notice. At the request of the Army, Torch Concepts itself substituted the term "The Army" on one of the pages for the identity of the individual that appeared there. Because of the sensitivity of the Department of Defense in general to the release of names of service personnel and employees, this identity was withheld on the basis of Exemption 6, as more fully explained below.

41. Other relevant documents that were submitted to TSA by Torch Concepts were given to the agency in an effort to demonstrate to TSA the utility of Torch Concepts' risk assessment program that was being considered for funding by the Department of Defense and that might also be useful for TSA's own initiatives. The Torch information was not provided to TSA in response to a compulsory directive, but in an effort to be a helpful corporate citizen. And beyond the information that is and has already been made public about Torch Concepts' efforts, the information Torch submitted is not the type that is customarily disclosed to the public. Because airlines and other companies in the future may be hesitant to cooperate with TSA in developing

security programs, I invoked Exemption 4 of the FOIA to protect the proprietary information at issue and to protect the U.S. Government's ability to obtain such information in the future.

42. Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), permits an agency to withhold inter-agency or intra-agency records that would be privileged in civil discovery. The threshold requirement has been given a necessary functional and commonsense gloss to encompass records generated by consultants, contractors, and others whose expertise is used by an agency in making a decision. Once the threshold has been met, agencies can withhold information that meets any of the commonly accepted discovery privileges. In this case, I released several documents in part, but withheld certain portions in order to protect internal agency deliberations, including staff opinions, on the basis of the deliberative process privilege. (See, e.g., Exhibit R, document titled "Memorandum.") I invoked the attorney-client and the deliberative process privileges to withhold other records in full, which are listed in the Vaughn Index.

43. The attorney-client privilege protects confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice. In this case, I invoked Exemption 5 and the attorney-client privilege to protect several messages, plus attachments, sent between a TSA/ONRA staff member and attorneys in the Office of the Chief Counsel of TSA, requesting advice on legal matters. Release of this information would reveal the details of the request for legal advice and would breach the confidentiality of the client's request for such advice. These documents also qualify for protection under the deliberative process privilege because they reflect a portion of the agency's decisionmaking process.

44. In my first interim response to plaintiff's request, Exhibit O, I indicated that I was withholding 31 pages in full that were located in the Office of the Chief Counsel on the basis of

Exemption 5 and the attorney-client and deliberative process privileges. Upon reexamination of those documents, I have determined that none of them refers to any of the subjects of plaintiff's requests. Therefore, the documents are not responsive and have not been included in the attached Vaughn Index.

45. For the majority of documents for which I invoked Exemption 5, I did so on the basis of the deliberative process privilege. The records reflect internal agency deliberations about the construct of the CAPPS II program. In some cases, I withheld email messages, the text of which makes clear that the messages were a substitute for informal conversations between TSA personnel which, were it not for the advent of technology, would not have been memorialized at all. These messages reflect the normal give-and-take that well precedes an agency decision, which, in this case, was the precise way to build the risk assessment portion of CAPPS II. In some cases, the email messages are between TSA employees and airline personnel, who were attempting to cooperate with TSA in constructing the CAPPS II system. Because these company employees were being relied upon as experts in TSA's efforts, they functioned as de facto agency personnel. By invoking Exemption 5, I protected the records revealing their contributions to these predecisional deliberations just as though they were, in fact, TSA employees.

46. The responsive records do not indicate that a final decision was ever reached on the technical aspects of the CAPPS II model and, in fact, as I noted previously, CAPPS II has now been replaced by a new program that is currently in the testing phase. Release of the documents at issue at this point, therefore, in light of the fact that TSA has decided not to proceed with CAPPS II but to start over with a new program, would chill the deliberate process, because TSA personnel would be less likely to be as candid about potential policy matters in the future. More importantly, release of these records would serve only to confuse the debate about Secure Flight

these factors persuaded me that these individuals possessed a privacy interest in not having their identities made public. I balanced this privacy interest against the public interest in these names, and decided that the names provided no meaningful information about government activities, which is the core purpose of the FOIA. On balance, therefore, I decided to withhold these individual identities on the basis of Exemption 6.

48. In one instance, one page was withheld which amounted to an attempt by a private individual to submit comments on CAPPs II and a message from the Privacy Act Coordinator of the Department of Transportation indicating that the individual should submit any comments to the DOT rulemaking docket. I am not aware whether this comment was placed on the public docket. The comment mentions Acxiom only in passing and does not appear to be directly responsive to plaintiff's request. Upon reexamination of it, however, I have determined that the document could be released if plaintiff wishes to have it.

The Chief Privacy Officer's Documents

49. Plaintiff's second request, TSA04-0895, encompassed specifically "records referenced" in the Privacy Officer's report concerning the transfer of passenger data by JetBlue to the Department of Defense with the facilitation of TSA. The Chief Privacy Officer, who holds a unique position in the United States Government as the first statutorily-required Privacy Officer for a federal agency, is charged by law with, among other duties, "assuring that personal information contained in Privacy Act systems of records is handled in full compliance with fair information practices as set out in the Privacy Act of 1974." She also is charged with preparing an annual report to Congress on "complaints of privacy violations, implementation of the Privacy Act of 1974" and other matters. Pursuant to this authority, the Chief Privacy Office conducted an examination of the events surrounding JetBlue's transfer of PNR to DOD at the behest of TSA

at a time when the public necessarily should be focused on TSA's current efforts rather than on what TSA has decided not to do. And 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. The records reflect that JetBlue provided technical data about how its PNR is put together, but no personal identifying information that would appear in the PNR.

47. Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6), permits an agency to withhold identifying information about an individual when release would constitute a clearly unwarranted invasion of personal privacy. In the vast majority of instances where this exemption was invoked, I withheld the identities of lower-level agency employees, contractors, or airline personnel who were involved in deciding how to construct CAPPs II.⁸ I did so for several reasons. First, federal employees do not necessarily give up all privacy rights by virtue of their employment by the Federal Government. Second, TSA's primary mission is to ensure that U.S. transportation systems are secured against terrorism and other threats. The nature of the agency's mission potentially puts its employees in the unenviable and untenable position of not only being advocates for security measures that may be unpopular, but also of being on the frontlines of implementation of those policies. Association with the CAPPs II program, itself, could result in TSA employees being harassed by certain individuals or groups merely because of this link to what turned out to be an unpopular program. Some of the individuals mentioned in the documents have moved to different positions within DHS or outside of the government. All of

⁸ As noted above, the identity of an Army employee was also withheld on the basis of Exemption 6. The Department of Defense has a policy counseling against release of DOD names. See <http://www.defenselink.mil/pubs/foi/withhold.pdf>.

and issued a report of her findings on February 23, 2004. Because plaintiff's request, TSA04-895, specifically referenced the documents that the Chief Privacy Officer had reviewed in her JetBlue report, the Chief Privacy Officer asked that this request be forwarded to the Privacy Office for further processing and to ensure consistent treatment of all responsive records.

50. In addition to the statutory duties established for the Chief Privacy Officer by Section 222 of the Homeland Security Act, by delegation from the Secretary of the Department of Homeland Security, the Chief Privacy Officer has overall responsibility for compliance with the FOIA for DHS. Referral of plaintiff's requests was consistent with this authority.

51. In the first two responses that I made to plaintiff's requests, I released to plaintiff 36 pages of records in full or in part from the Chief Privacy Officer's records. I cited Exemptions 4, 5, 6, and 7(A) to withhold the remaining materials. Because the records compiled by the Chief Privacy Officer meet the threshold for Exemption 7 applicability as explained below, Exemption 7(C) is also appropriate to protect the information that was withheld on the basis of Exemption 6 at the initial processing stage. After reexamining the records at issue in connection with the preparation of this declaration, I also determined that two additional pages could be released in full. They were sent to plaintiff as part of my final release, attached as Exhibit S.

52. As explained above, Exemption 4 allows an agency to withhold confidential business information if release could cause competitive harm to the submitter. The exemption is intended to protect the submitter's competitive position in the marketplace and also the government's ability to obtain information in the future. When information is submitted voluntarily and is not of the type that customarily is released by the submitter, it can be protected on the basis of Exemption 4. In the documents that were processed from the files of the Chief Privacy Officer, only limited redactions were taken on the basis of Exemption 4. In one case, information was

only limited redactions were taken on the basis of Exemption 4. In one case, information was withheld from a document otherwise released in part. Some of the documents obtained by the Chief Privacy Officer in connection with her review of the JetBlue matter contain proprietary information. Some of these documents are duplicates of those that exist in TSA's files. Although the Chief Privacy Officer by statute is required to investigate complaints of privacy violations, she does not have subpoena authority. She must therefore rely on voluntary submissions of information in order to conduct her investigations. Because the proprietary information she received in connection with her examination of the JetBlue matter is not customarily disclosed to the public, I invoked Exemption 4 to protect it.

53. For the vast majority of documents that were withheld from the files of the Chief Privacy Officer I invoked Exemption 5 and the deliberative process privilege. In a few instances, the attorney-client privilege also applied. The records maintained by the Chief Privacy Officer were collected in anticipation of her issuing a decision as to whether or not the facilitation by TSA of the transfer of PNR from JetBlue to the Department of Defense constituted a privacy violation. She sifted through data, requested answers to questions, asked for suggestions and recommendations and otherwise examined a plethora of materials prior to drafting her final report. This information constituted the raw materials used to arrive at a final decision, which is reflected in her "Report to the Public on Events Surrounding jetBlue Data Transfer." Individuals could speak freely and candidly, which greatly enhanced the overall analysis and contributed to a better final report. I invoked Exemption 5 to protect these candid conversations. For similar reasons, I also invoked Exemption 5 to protect draft documents and internal agency comments about the draft report, so that the Privacy Officer's final decision could be evaluated as it was expressed in her published report, rather than in preliminary drafts.

54. As can be seen in the documents that were released to plaintiff in Exhibits P, R, and S, I invoked Exemption 6 to protect the identities of DHS employees and other individuals, including personal cell phone numbers and other contact information. I also protected the identities of certain individuals who sent messages to the Chief Privacy Officer. I have already explained my rationale for protecting agency employees in my discussions of the TSA documents above. In addition, the Chief Privacy Officer is sensitive to the need for privacy protections for all types of individuals, and my redaction decisions on her records reflected this policy. The individual identities at issue shed no light on government activities. The matter involving the transfer of PNR is an issue of policy and law, not of personalities, so even where certain individuals might have a reduced expectation of privacy I decided that on balance, that privacy interest was paramount.

55. Exemption 7 of the FOIA, 5 U.S.C. § 552(b)(7), allows an agency to withhold records or information compiled for law enforcement purposes, the release of which would cause one of six enumerated harms. In this case, I invoked Exemption 7(A) of the FOIA, 5 U.S.C. § 552(b)(7)(A), to withhold certain categories of documents responsive to the third of plaintiff's requests because the DHS Chief Privacy Officer is reviewing the circumstances surrounding the transfer of PNR data from airlines and Global Distribution Services companies to the Transportation Security Administration to determine if such transfers violated the privacy obligations of TSA. The investigation has not been completed yet.

56. To be sure, the Chief Privacy Officer occupies a distinctive position. She is charged by law with investigating privacy complaints and reporting on such matters. Although she is also charged by law with enforcing privacy policy for DHS, if she were to find a Privacy Act or other statutory violation as a result of an investigation, she could refer the matter to the DHS

Inspector General who could, in turn, impose sanctions on an employee. The Privacy Act itself contains not only civil remedies, but also criminal penalties for willful violations. Consequently, the potential for some form of punishment exists as a result of an investigation by the Privacy Officer, even if the Privacy Officer herself cannot impose that punishment. Moreover, her statutory authority is more than mere monitoring; she is required to focus on specific acts that allegedly amount to privacy violations. Consequently, in my judgment, records or information compiled by the Chief Privacy Officer in connection with the investigation of an alleged privacy violation amount to records or information compiled for law enforcement purposes.

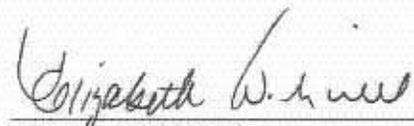
57. Because I believe that the investigatory activities of the Chief Privacy Officer meet the threshold test for Exemption 7 applicability, I invoked Exemption 7(A) to withhold material relating to the Chief Privacy Officer's investigation of additional PNR transfers directly involving TSA. Premature release of the documents at issue could reveal the very evidence that is being reviewed by the Chief Privacy Officer as well as the scope and direction of her analysis. Releasing the information at issue before the conclusion of her investigation could allow personnel who may be the focus of the investigation to take defensive measures to blunt any recommendations that may be forthcoming, including those concerning disciplinary or other punitive measures.

58. Because I believe that the investigatory activities of the Chief Privacy Officer meet the threshold test for Exemption 7 applicability, I also invoked Exemption 7(C) to protect the same identities as described in paragraph 52. Association with an investigation may result in heightened attention being paid to these individuals that could reasonably be expected to constitute an invasion of privacy. Balanced against this risk of a privacy invasion is the fact that their identities shed no light on government activities, which is the core purpose of the FOIA.

59. I have conducted a thorough review of all documents found to be responsive to any of the plaintiff's requests, including an intense reexamination undertaken in conjunction with the drafting of this affidavit and the attached Vaughn Index. This review included a line-by-line assessment of the contents of the records. In some cases, I have found additional materials that have now been released to plaintiff. I have also attempted to explain in detail the documents that were withheld in full in a way that will convey their essence without conveying the substance of the withheld information. In reviewing the responsive documents, I have been mindful of the need to segregate and release all nonexempt material, and I believe my good faith in this regard is demonstrated by the releases that have been made. The remaining information that is being withheld cannot be disclosed without harm to the Department of Homeland Security, its component agencies, its employees and/or to third parties, for the specific reasons described above.

I declare under penalty of perjury that the matters set forth in this Declaration are within my official purview and are correct and true to the best of my information, knowledge and belief.

Executed this 5th day of January 2005, in the City of Washington, District of Columbia.



Elizabeth Withnell