

/s/

RUDOLPH CONTRERAS, D.C. BAR #434122
Assistant United States Attorney

/s/

JUDITH A. KIDWELL
Assistant United States Attorney
555 4th Street, N.W.-Civil Division
Washington, D.C. 20530
(202) 514-7250

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOPHIA HELENA IN'T VELD,)	
)	
)	
Plaintiff,)	
)	
v.)	Civil No. 08-1151 (RMC)
)	
)	
DEPARTMENT OF HOMELAND)	
SECURITY, et al.,)	
)	
Defendants.)	
_____)	

**STATEMENT OF MATERIAL FACTS AS TO
WHICH THERE IS NO GENUINE ISSUE**

Defendant, United States Department of Homeland Security (“DHS”) respectfully submits this statement of material facts as to which there is no genuine issue in accordance with this Court's Local Rule 7(h). The Declaration of Vania T. Lockett, Associate Director, Disclosure and Freedom of Information Act Operations, Privacy Office, U.S. Department of Homeland Security (“Lockett Decl.”) supports this statement. *See* Defendant DHS’ Attachment A.

1. By facsimile on October 17, 2007, Plaintiff, through her counsel, the Electronic Frontier Foundation (hereafter “Plaintiff”), submitted a Freedom of Information Act (“FOIA”), request to DHS seeking all records concerning her (including but not limited to electronic records) maintained in the Non Immigrant Information System (“NIIS”), Suspect and Violator Indices (“SVAI”), and Treasury Enforcement Communications System (“TECS”). Lockett Decl. ¶ 7, Exhibit A.

2. By facsimile on October 17, 2007, Plaintiff submitted a FOIA request to U.S. Customs and Border Protection (“CBP”), seeking records concerning her (including but not limited to electronic records) maintained in the Passenger module of the Automated Targeting System (“ATS-P”), and Advanced Passenger Information System (“APIS”). Lockett Decl. ¶ 8, Exhibit B.

3. By electronic mail on May 15, 2008, Plaintiff submitted a FOIA request to the Transportation Security Administration (“TSA”) seeking all records concerning her (including but not limited to electronic records) maintained by TSA. Lockett Decl. ¶ 9, Exhibit C.

4. DHS staff reviewed Plaintiff’s FOIA requests and determined that no offices within DHS’ FOIA-processing responsibility would likely maintain records responsive to Plaintiff’s requests because the requests sought records maintained specifically within NIIS, SAVI, TECS, ATS-P, and APIS systems which are under the custody and control of CBP, as well as records maintained by TSA. Lockett Decl. ¶ 10. However, in order to provide Plaintiff with a comprehensive response, the DHS Privacy Office coordinated a search of CBP, TSA and the U.S. Visitor and Immigrant Status Indicator Technology (“US-VISIT”) Program. *Id.*

5. CBP has enforcement responsibilities for over 400 Federal statutes. Lockett Decl. ¶ 41. Its mission is to protect the borders of the United States against terrorists and the instruments of terror, enforce the customs and immigration laws of the United States, and foster our Nation’s economy by facilitating lawful international trade and travel. *Id.* Its mission includes the processing of passengers, conveyances and merchandise entering, transiting and departing the United States. *Id.* The creation and implementation of effective law enforcement systems and procedures is paramount to achieving this mission. *Id.* CBP’s Office of

Intelligence/Operations Coordination (“OI/OC”) conducted a search of the records systems within the custody and control of CBP, including TECS, NIIS, SAVI, ATS-P and APIS. Lockett Decl. ¶ 11.

6. TECS is an overarching law enforcement information collection, risk assessment, and information sharing environment. Lockett Decl. ¶ 12. It is also a repository for law enforcement and investigative information. *Id.* TECS is comprised of several modules (including the APIS), that collect, maintain and evaluate screening data, conduct targeting analysis, and make information available to appropriate law enforcement officers of the U.S. government. *Id.* TECS, which includes APIS and NIIS, ATS-P, which includes SAVI, and ADIS contain records directly related to law enforcement activities and are all used for law enforcement purposes. Lockett Decl. ¶ 42. The NIIS data is accessed through TECS, its data and functionality having been merged into TECS in December 2004, following the creation of DHS. *Id.* To ensure that all responsive records were captured, CBP searched TECS (including APIS and NIIS) using Plaintiff’s name and passport number. *Id.*

7. The ATS-P is a module of the ATS and is used at all U.S. airports and seaports receiving international flights and voyages to conduct risk assessments of passengers and crew members prior to their arrival in or departure from the United States. Lockett Decl. ¶ 13. It assists the CBP’s officer’s decision-making process about whether a passenger or crew member should receive additional screening prior to entry or departure because the traveler may pose a greater risk for violation of U.S. law. *Id.* Passenger Name Record data that is collected by CBP from air carriers operating flights to or from the U.S., pursuant to 19 C.F.R. §122.49d, is maintained in ATS-P. *Id.* The SAVI are accessed through ATS-P. *Id.* CBP searched ATS-P

and SAVI using Plaintiff's name. *Id.*

8. As a result of CBP's searches of both TECS (including NIIS and APIS) and ATSP (including SAVI), 28 pages of records were located and released to Plaintiff, in part, with certain information withheld pursuant to FOIA Exemptions 2 (low) and (high), 6, 7C and 7E. Lockett Decl. ¶ 14, Exhibit E.

9. Certain offices within TSA were directed to conduct searches in response to Plaintiff's FOIA request, including the Office of Civil Rights and Liberties ("OCRL"), the Office of the Ombudsman, the Office of Security Operations & Compliance Programs, the Office of Security Intelligence & Analysis, the Office of Redress, the Deputy Administrator's Office, the Office of the Executive Secretariat, the Office of the Administrator, the Transportation Security Operations Center ("TSCO"), the Office of Chief Counsel and the TSA Contact Center. Lockett Decl. ¶ 15.

10. The OCRL conducted a search in the name of "Sophia Helena In't Veld" and "Sophie Helena In't Veld" by searching its computerized internal data, DHS Eagle. Lockett Decl. ¶ 16. The OCRL also searched all paper files. *Id.* Additionally, OCRL staff searched their electronic mail for responsive documents pertaining to Plaintiff. *Id.* No responsive documents were located. *Id.*

11. The Office of Ombudsman conducted an electronic search through the Inquiry Management System. Lockett Decl. ¶ 17. No responsive records were located. *Id.*

12. The Office of Security Operations & Compliance conducted an electronic search in the name of "Sophia Helena In't Veld" by utilizing the Performance and Results Information System database. Lockett Decl. ¶ 18. No responsive records were located. *Id.*

13. The Office of Redress conducted an electronic search utilizing the Traveler Redress Inquiry Program Systems database. Lockett Decl. ¶ 20. The Office of Redress searched by Plaintiff's first name and searched by Plaintiff's last name. *Id.* No responsive records were located. *Id.*

14. The Deputy Administrator's Office conducted an electronic email search using the following variations of Plaintiff's name: "Sophia," "Sophie," and "Helena." Lockett Decl. ¶ 21. No responsive records were located. *Id.*

15. The Office of the Executive Secretariat conducted a search using the following variations/combinations of Plaintiff's name: "Sophia" + "t'Veld," "Sophie" + "%Veld," or "Helena" + "%Veld." Lockett Decl. ¶ 22. The search was conducted through the internal databases, Control Correspondence Management System and Access. *Id.* No responsive records were located. *Id.*

16. The Office of the Administrator conducted an electronic email search using several variations and combinations of Plaintiff's first and last names. Lockett Decl. ¶ 23. No responsive documents were located. *Id.*

17. The TSOC conducted an electronic search for records relating to Plaintiff. Lockett Decl. ¶ 24. The search was conducted through WEBEOC, a comprehensive database that includes all reportable incidents dating back to September 11, 2002. *Id.* No responsive records were located. *Id.*

18. The Office of Chief Counsel and the Assistant Chief Counsel for International and Operational Law conducted electronic email searches for records relating to Plaintiff. Lockett Decl. ¶ 25. No responsive records were located. *Id.*

19. The TSA Contact Center conducted an electronic file search through the Information Management System. Lockett Decl. ¶ 26. The search was conducted using the following variations/combinations of Plaintiff's name: "Sophia" + "t'Veld," "Sophie" + "%Veld," or "Helena" + "%Veld." *Id.* No responsive records were located. *Id.*

20. DHS voluntarily extended its search beyond the parameters of Plaintiff's FOIA requests and directed a search of the US-VISIT Program for records relating to Plaintiff. Lockett Decl. ¶ 27. US-VISIT searched the two identity management databases that it manages -- the arrival and Departure Information system ("ADIS"), and the Automated Biometric Identification system ("IDENT"). *Id.*

21. ADIS is the primary repository of data held by DHS for near real-time entry and exit status tracking throughout the immigrant and non-immigrant pre-entry, entry, status management and exit processes, based on data collected by DHS or other Federal or foreign government agencies and used in connection with DHS national security, law enforcement, immigration, intelligence, and other DHS mission-related functions. Lockett Decl. ¶ 28. US-VISIT searched ADIS using various name permutations and the date of birth provided in Plaintiff's October 17, 2007 FOIA request. *Id.* Thirty (30) pages of records were located pursuant to the search of ADIS and released to Plaintiff with certain information withheld pursuant to FOIA Exemptions 2(low) and (high), and 7E. *Id.*, Exhibit E.

22. IDENT is the primary repository of biometric information held by DHS in connection with its varied missions and functions. Lockett Decl. ¶ 29. IDENT can only be searched by using one or more of three numerical biometric indicators. *Id.* Although ADIS records may contain one of the biometric indicators, in this case, no biometric indicator was

I. FACTUAL BACKGROUND

Plaintiff, through her counsel, the Electronic Frontier Foundation (hereafter “Plaintiff”), submitted a FOIA request to DHS seeking all records concerning her (including but not limited to electronic records) maintained in the Non Immigrant Information System (“NIIS”), Suspect and Violator Indices (“SVAI”), and Treasury Enforcement Communications system (“TECS”). Lockett Decl. ¶ 7, Exhibit A. She also submitted two other FOIA requests to DHS components. One to CBP seeking records concerning her (including but not limited to electronic records) maintained in the Passenger module of the Automated Targeting System (“ATS-P”), and Advanced Passenger Information System (“APIS”), and one to TSA seeking all records concerning her (including but not limited to electronic records) maintained by TSA. Lockett Decl. ¶¶ 8, 9, Exhibits B and C.

DHS staff reviewed Plaintiff’s FOIA requests and determined that no offices within DHS’ FOIA-processing responsibility would likely maintain records responsive to Plaintiff’s requests because the requests sought records maintained specifically within NIIS, SAVI, TECS, ATS-P, and APIS systems which are under the custody and control of CBP, as well as records maintained by TSA. Lockett Decl. ¶ 10. However, in order to provide Plaintiff a comprehensive response to her FOIA requests, the DHS Privacy Office coordinated a search of CBP and TSA, and voluntarily directed a search of the U.S. Visitor and Immigrant Status Indicator Technology (“US-VISIT”) Program. *Id.*

A. CBP's Searches

CBP has enforcement responsibilities for over 400 Federal statutes. Lockett Decl. ¶ 41. Its mission is to protect the borders of the United States against terrorists and the instruments of terror, enforce the customs and immigration laws of the United States, and foster our Nation's economy by facilitating lawful international trade and travel. *Id.* Its mission includes the processing of passengers, conveyances and merchandise entering, transiting and departing the United States. *Id.* The creation and implementation of effective law enforcement systems and procedures is paramount to achieving this mission. *Id.*

CBP's Office of Intelligence/Operations Coordination ("OI/OC") conducted a search of the records systems within the custody and control of CBP, including TECS,² NIIS, SAVI, ATS-P³ and APIS. Lockett Decl. ¶ 11. The NIIS data is accessed through TECS, its data and functionality having been merged into TECS in December 2004, following the creation of DHS. *Id.* To ensure that all responsive records were captured, CBP searched TECS (including APIS and NIIS) using Plaintiff's name and passport number. *Id.* The SAVI are accessed through ATS-P. *Id.* CBP searched ATS-P and SAVI using Plaintiff's name. *Id.* As a result of CBP's

² TECS is an overarching law enforcement information collection, risk assessment, and information sharing environment. Lockett Decl. ¶ 12. It is also a repository for law enforcement and investigative information. *Id.* TECS is comprised of several modules (including the APIS), that collect, maintain and evaluate screening data, conduct targeting analysis, and make information available to appropriate law enforcement officers of the U.S. government. *Id.*

³ The ATS-P is a module of the ATS and is used at all U.S. airports and seaports receiving international flights and voyages to conduct risk assessments of passengers and crew members prior to their arrival in or departure from the United States. Lockett Decl. ¶ 13. It assists the CBP's officer's decision-making process about whether a passenger or crew member should receive additional screening prior to entry or departure because the traveler may pose a greater risk for violation of U.S. law. *Id.*

searches of both TECS (including NIIS and APIS) and ATS-P (including SAVI), 28 pages of records were located and released to Plaintiff, in part, with certain information withheld pursuant to FOIA Exemptions 2 (low) and (high), 6, 7C and 7E. Lockett Decl. ¶ 14, Exhibit E.

B. TSA's Searches

Certain offices with TSA were directed to conduct searches in response to Plaintiff's FOIA request, including the Office of Civil Rights and Liberties ("OCRL"), the Office of the Ombudsman, the Office of Security Operations & Compliance Programs, the Office of Security Intelligence & Analysis, the Office of Redress, the Deputy Administrator's Office, the Office of the Executive Secretariat, the Office of the Administrator, the Transportation Security Operations Center ("TSCO"), the Office of Chief Counsel, including the Assistant Chief Counsel for International and Operational Law, and the TSA Contact Center. Lockett Decl. ¶¶ 15, 25.

The OCRL conducted a search in the name of "Sophia Helena In't Veld" and "Sophie Helena In't Veld" by searching its computerized internal data, DHS Eagle. Lockett Decl. ¶ 16. The OCRL also searched all paper files. *Id.* Additionally, OCRL staff searched their electronic mail for responsive documents pertaining to Plaintiff. *Id.* No responsive documents were located. *Id.*

The Office of Ombudsman conducted an electronic search through the Inquiry Management System ("IMS"). Lockett Decl. ¶ 17. No responsive records were located. *Id.*

The Office of Security Operations & Compliance conducted an electronic search in the name of "Sophia Helena I'nt Veld" by utilizing the Performance and Results Information system ("PARIS") database. Lockett Decl. ¶ 18. No responsive records were located. *Id.*

The Office of Redress conducted an electronic search utilizing the Traveler

Redress Inquiry Program (“TRIP”) Systems database. Lockett Decl. ¶ 20. The Office of Redress searched by Plaintiff’s first name and searched by Plaintiff’s last name. *Id.* No responsive records were located. *Id.*

The Deputy Administrator’s Office conducted an electronic email search using the following variations of Plaintiff’s name: “Sophia,” “Sophie,” and “Helena.” Lockett Decl. ¶ 21. No responsive records were located. *Id.*

The Office of the Executive Secretariat conducted a search using the following variations/combinations of Plaintiff’s name: “Sophia” + “t’Veld,” “Sophie” + “%Veld,” or “Helena” + “%Veld.” Lockett Decl. ¶ 22. The search was conducted through the internal databases Control Correspondence Management System and Access. *Id.* No responsive records were located. *Id.*

The Office of the Administrator conducted an electronic email search using several variations and combinations of Plaintiff’s first and last names. Lockett Decl. ¶ 23. No responsive documents were located. *Id.*

The TSOC conducted an electronic search for records relating to Plaintiff. Lockett Decl. ¶ 24. The search was conducted through WEBEOC, a comprehensive database that includes all reportable incidents dating back to September 11, 2002. *Id.* No responsive records were located. *Id.*

The Office of Chief Counsel and the Assistant Chief Counsel for International and Operational Law conducted electronic email searches for records relating to Plaintiff. Lockett Decl. ¶ 25. No responsive records were located. *Id.*

The TSA Contact Center conducted an electronic file search through the

Information Management System. Lockett Decl. ¶ 26. The search was conducted using the following variations/combinations of Plaintiff's name: "Sophia" + "t'Veld," "Sophie" + "%Veld," or "Helena" + "%Veld." *Id.* No responsive records were located. *Id.*

C. DHS' Additional Voluntary Search in the US-VISIT Program

US-VISIT was established in order to accurately record the entry and exit of aliens to the United States by collecting biographic and biometric information (*e.g.* digital fingerprints and photographs). Lockett Decl. ¶ 43. It has been granted the authority to manage the Arrival and Departure Information system ("ADIS") and the Automated Biometric Identification system ("IDENT"). Lockett Decl. ¶¶ 27, 43. US-VISIT provides a continuum of identity management services and security measures that begin overseas, continue through an alien's arrival and stay in the United States, and conclude with the alien's departure from the country. Lockett Decl. ¶ 43.

DHS voluntarily extended its search beyond the parameters of Plaintiff's requests and directed a search of the US-VISIT Program for records relating to Plaintiff. Lockett Decl. ¶ 27. US-VISIT searched the two identity management databases that it manages -- ADIS and IDENT. *Id.*

ADIS is the primary repository of data held by DHS for near real-time entry and exit status tracking throughout the immigrant and non-immigrant pre-entry, entry, status management and exit processes, based on data collected by DHS or other Federal or foreign government agencies and used in connection with DHS national security, law enforcement, immigration, intelligence, and other DHS mission-related functions. Lockett Decl. ¶ 28. US-VISIT searched ADIS using various name permutations and the date of birth provided in Plaintiff's October 17, 2007 FOIA request. *Id.* Thirty (30) pages of records were located

pursuant to the search of ADIS and provided to Plaintiff with certain information withheld pursuant to FOIA Exemptions 2(low) and (high), and 7E. *Id.*, Exhibit E.

IDENT is the primary repository of biometric information held by DHS in connection with its varied missions and functions. Lockett Decl. ¶ 29. IDENT can only be searched by using one or more of three numerical biometric indicators. *Id.* Although ADIS records may contain one of the biometric indicators, in this case, no biometric indicator was contained in the ADIS records. *Id.* Consequently, no search of IDENT was conducted. *Id.* The lack of a biometric indicator in ADIS suggests that no biometric records exist in IDENT. *Id.*

D. Release of Records To Plaintiff

Pursuant to 6 C.F.R. § 5.3, DHS determined that it was not appropriate to refer this request to any other DHS components, because it was not likely that any other DHS component or office would have records responsive to Plaintiff's FOIA requests. Lockett Decl. ¶ 30. Therefore, by letter dated July 10, 2008, 58 pages of responsive records, that had been identified as a result of searches within CBP and US-VISIT, were released to Plaintiff. Lockett Decl. ¶ 31, Exhibit D. Portions of the records were withheld and redactions were made pursuant to FOIA Exemptions 2(low), 2(high), 6, 7(C), and 7(E). *Id.*, Exhibit E.

II. LEGAL STANDARDS

A. Motion for Summary Judgment Under Rule 56

Summary judgment is appropriate when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A “genuine issue” is one whose resolution could establish an element of a claim or defense and, therefore,

affect the outcome of the action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To determine which facts are material, the Court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether there exists a genuine issue of material fact sufficient to preclude summary judgment, the Court must regard the non-movant's statements as true and accept all evidence and make all inferences in the non-movant's favor. *Id.*, at 255. A non-moving party, however, must establish more than the "mere existence of a scintilla of evidence" in support of her position. *Id.* at 252. By pointing to the absence of evidence proffered by the non-moving party, a moving party may succeed on summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. at 322. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, at 249-250.

B. Summary Judgment In FOIA Cases

The FOIA, 5 U.S.C. § 552, represents a balance "between the right of the public to know and the need of the government to keep information in confidence." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. 89-1497, 89th Cong., 2d Sess., 6 (1966)). While the FOIA requires agency disclosure under certain circumstances, the statute recognizes "that public disclosure is not always in the public interest." *Baldrige v. Shapiro*, 455 U.S. 345, 352 (1982). Consequently, the FOIA "provides that agency records may be withheld from disclosure under any one of the nine exemptions defined in 5 U.S.C. § 552(b)." *Id.* As directed by the Supreme Court, the statutory exemptions must be construed "to have meaningful reach and application." *John Doe Agency v. John Doe Corp.*, 493 U.S. at 152.

For purposes of summary judgment, an agency's decision to withhold information from a

FOIA requester is subject to *de novo* review by the Courts. *Hayden v. National Security Agency Cent. Sec. Serv.*, 608 F.2d 1381, 1384 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980). In a FOIA suit, an agency is entitled to summary judgment once it demonstrates that no material facts are in dispute and that each document that falls within the class requested either has been produced, is unidentifiable, or is exempt from disclosure. *Students Against Genocide v. Dept. of State*, 257 F.3d 828, 833 (D.C. Cir. 2001); *Weisberg v. U.S. Dept. of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980).

An agency satisfies the summary judgment requirements in a FOIA case by providing the Court and a plaintiff with affidavits or declarations which show that the documents are exempt from disclosure. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); *Canning v. United States Dep't of Justice*, 848 F. Supp. 1037, 1042 (D.D.C.) (agencies are typically permitted to meet [their] heavy burden by 'filing affidavits describing the material withheld and the manner in which it falls within the exemption claimed.') (quoting *King v. United States Dep't of Justice*, 830 F.2d 210, 217 (D.C. 1987)).

In a FOIA case, the Court may award summary judgment solely based on the information provided in affidavits or declarations when they describe "the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

ARGUMENT

III. DHS CONDUCTED REASONABLE SEARCHES FOR RECORDS RESPONSIVE TO PLAINTIFF'S FOIA REQUESTS

In responding to a FOIA request, an agency is under a duty to conduct a reasonable search for responsive records. *Oglesby v. U.S. Dept. of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Weisberg v. U.S. Dept. of Justice*, 705 F.2d 1344, 1352 (D.C. Cir. 1983). This “reasonableness” standard focuses on the method of the search, not its results, so that a search is not unreasonable simply because it fails to produce relevant material. *Id.* at 777 n.4. An agency is not required to search every record system, but need only search those systems in which it believes responsive records are likely to be located. *Oglesby*, 920 F.2d at 68. Simply stated, the adequacy of the search is “dependent upon the circumstances of the case.” *Truitt v. Dept. of State*, 897 F.2d 540, 542 (D.C. Cir. 1990).

The search standards under FOIA do not place upon the agency a requirement that it prove that all responsive documents have been located. *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 892 n.7 (D.C. Cir. 1995). It has been held that “ ‘the search need only be reasonable; it does not have to be exhaustive.’ ” *Miller v. Dept. of State*, 779 F.2d 1378, 1383 (8th Cir. 1985) (citing *National Cable Television Association v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973)). Even when a requested document indisputably exists or once existed, summary judgment will not be defeated by an unsuccessful search for the document so long as the search was diligent. *Nation Magazine*, 71 F.3d at 892 n.7. Additionally, the mere fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it. *Maynard v. CIA*, 982 F.2d 546, 564

(1st Cir. 1993).

The burden rests with the agency to establish that it has “made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Oglesby*, 920 F.2d at 68; *see SafeCard Servs. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). “An agency may prove the reasonableness of its search through affidavits of responsible agency officials so long as the affidavits are relatively detailed, non-conclusory and submitted in good faith.” *Miller*, 779 F.2d at 1383; *Goland*, 607 F.2d at 352. Though the “affidavits submitted by an agency are ‘accorded a presumption of good faith,’” *Carney v. Dept. of Justice*, 19 F.3d 807, 812 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) (*quoting SafeCard Servs.*, 926 F.2d at 1200), the burden rests with the agency to demonstrate the adequacy of its search. Once the agency has met this burden through a showing of convincing evidence, the burden shifts to the requester to rebut the evidence by a showing of bad faith on the part of the agency. *Miller*, 779 F.2d at 1383. A requester may not rebut agency affidavits with purely speculative allegations. *See Carney*, 19 F.3d at 813; *SafeCard*, 926 F.2d at 1200; *Maynard v. CIA*, 986 F.2d 547, 559-560 (1st Cir. 1993). The fundamental question is not “whether there might exist any other documents responsive to the request, but rather whether the search for those documents was adequate.” *Steinberg v. Dept. of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994) (*quoting Weisberg v. Dept. of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)).

In this case, DHS’ Privacy Office coordinated comprehensive searches for records responsive to Plaintiff’s FOIA requests. It directed searches of the systems identified in Plaintiff’s FOIA requests, such as the TECS, NIIS, SAVI, ATS-P, and the APIS, but also directed that searches be conducted in other systems or databases that might have information

concerning Plaintiff. Indeed, although not mentioned in any of Plaintiff's FOIA requests, DHS voluntarily directed a search of the US-VISIT Program for records concerning Plaintiff. DHS located and released to Plaintiff 30 pages of records from this search, with some redactions. Clearly, DHS has met its burden and conducted more than adequate searches in response to Plaintiff's FOIA requests.

IV. DHS PROPERLY INVOKED FOIA EXEMPTIONS 2, 6, 7C AND 7E

Although DHS released 58 pages of responsive records to Plaintiff, certain information was withheld from these records pursuant to FOIA Exemptions 2, 6, 7(C) and 7(E). The information withheld is detailed in Exhibit E of the Lockett Declaration, and, as discussed below, was properly exempted under FOIA.

A. Exemption 2

Exemption 2 exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The information need not be actual rules or practices; agencies can also invoke Exemption 2 for matters related to rules and practices. *See Department of Air Force*, 425 U.S. 352, 369-70 (1976). The courts have interpreted this statutory provision to encompass two very different categories of information: (1) internal matters of a relatively trivial nature (referred to as "low-2"); and (2) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement (referred to as "high-2"). *See Department of Air Force*, 425 U.S. at 369-70; *Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 528-30 (D.C. Cir. 1986).

As an initial matter, an agency may withhold information under Exemption 2 if the

information is “used for predominantly internal purposes.” *Crooker v. ATF*, 670 F.2d 1051, 1073 (D.C. Cir. 1981) (*en banc*). Courts have found that information is “predominately internal” if it “does not purport to regulate activities among the public or set standards to be followed by agency personnel in deciding whether to proceed against or take action affecting members of the public.” *Edmonds v. Federal Bureau of Investigation*, 272 F.Supp.2d 35, 50 (D.D.C. 2003) (quoting *Cox v. U.S. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979)). If this threshold test is met, an agency may withhold the material “by proving that either [1] disclosure may risk circumvention of agency regulation (high 2), or [2] the material relates to trivial administrative matters of no genuine public interest (low 2).” *Schiller v. NLRB*, 964 F.2d at 1207.

In the instant case, pursuant to Exemption 2 (low), DHS withheld administrative markings such as codes indicating inspection results, referring officer codes, record identification numbers, terminal identification numbers, intranet addresses and computer function codes that instruct TECS, ATS-P, ADIS, and other computer system users on how to navigate their way through the system. Lockett Decl. ¶ 34, Exhibit E. These markings are purely internal and are utilized by DHS to assist in the access, use and control of DHS databases. Lockett Decl. ¶ 35, Exhibit E. They are used exclusively by DHS for the purposes of indexing, storing, locating, retrieving and distributing information in the databases. *Id.* Because access to the file and computer systems is restricted from the public, there is little or no public interest in this information. *Id.*

Additionally, DHS withheld information pursuant to Exemption 2 (high). This information consisted of examination and inspection procedures, internal reporting requirements and instructions on how to process international travelers. Lockett Decl. ¶ 36, Exhibit E.

Disclosure of this information would permit potential violators, to whom the documents may be disclosed, to develop countermeasures to evade detection, inspection and targeting methods. *Id.* Public awareness of this operational information would aid those who seek to circumvent DHS operations and thus harm DHS' ability to enforce the laws of the United States. *Id.* Furthermore, any further detailed description of this information would divulge the very information that DHS seeks to protect. *Id.*

B. Exemption 6

Exemption 6 of the FOIA protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). "The Supreme Court has interpreted the phrase 'similar files' to include all information that applies to a particular individual." *Lepelletier v. FDIC*, 164 F.3d 37, 46 (D.C. Cir. 1999), quoting *Dept. of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). The Court has also emphasized that "both the common law and the literal understanding of privacy encompass the individual's control of information concerning his or her person." *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 763 (1989).

In order to determine whether there would be a "clearly unwarranted invasion of personal privacy," the Court must balance the interests of protecting "an individual's private affairs from unnecessary public scrutiny," and "the public's right to governmental information." *Lepelletier*, 164 F.3d at 46 (interior quotation marks omitted), citing *United States Dept. of Defense v. FLRA*, 964 F.2d 26, 29 (D.C. Cir. 1992), quoting *Dept. of Air Force v. Rose*, 425 U.S. 352, 372 (1976). In determining how to balance the private and public interests involved, the Supreme Court has sharply limited the notion of "public interest" under the FOIA: "[T]he *only* relevant public

interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would 'shed light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *Lepelletier*, 164 F.3d at 46 (editing by the court, emphasis supplied, interior quotation marks omitted), quoting *United States Dept. of Defense v. FLRA*, 510 U.S. 487, 497 (1994). *See also Reporters Committee*, 489 U.S. at 773. Information that does not directly reveal the operation or activities of the federal government "falls outside the ambit of the public interest that the FOIA was enacted to serve." *Id.* at 775. Further, "something, even a modest privacy interest, outweighs nothing every time." *National Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989); *but see Lepelletier*, 164 F.3d at 48 (in extraordinary circumstance where the individuals whose privacy the government seeks to protect have a "clear interest" in release of the requested information, the balancing under Exemption 6 must include consideration of that interest).

Pursuant to Exemption 6, DHS withheld the names, social security numbers, badge numbers and other personal identifying information of federal personnel and third parties, because these individuals' right of privacy was not outweighed by any public interest. Lockett Decl. ¶ 38, Exhibit E. *See Int'l Bhd. Of Elec. Workers Local No. 5 v. HUD*, 852 F.2d 87, 89 (3rd Cir. 1988) (perceiving no public interest in disclosure of employees' social security numbers). Plaintiff has not demonstrated any public interest in the disclosure of this information, and disclosing this information would not shed light on how CBP performs its statutory duties. *Id.*

C. Exemption 7 – Threshold

Application of any of FOIA's exemptions in Exemption 7 requires the agency to satisfy the threshold issues of, first, whether the agency has the requisite law enforcement purpose in

compiling the records at issue and, second, whether the information gathered has a sufficient nexus to the law enforcement purpose. *See, e.g., Tax Analysts v. IRS*, 294 F.3d 71, 76-79 (D.C. Cir. 2002); *Jefferson v. DOJ*, 284 F.3d 172, 176-77 (D.C. Cir. 2002); *Campbell v. DOJ*, 164 F.3d 20, 32 (D.C. Cir. 1998); *Pratt v. Webster*, 673 F.2d 408, 419 (D.C. Cir. 1982). In *Jefferson*, the court drew a distinction between agencies gathering information as part of any government agency's "oversight of the performance of duties by its employees," and information sought as part of investigations into illegal conduct for which the agency might impose criminal or civil sanctions. 284 F.3d at 177. Thus, the rule from *Jefferson* provides a broadly applicable distinction based more on the agency's mission and reasons for collecting the information at issue.

Many types of agency activities have been upheld as having a law enforcement purpose, even several that arguably go beyond the core law enforcement mission of investigating crimes that have been committed. *See, e.g., Mittleman v. OPM*, 76 F.3d 1240, 1241-43 (D.C. Cir. 1996) (OPM background investigation), *cert. denied*, 519 U.S. 1123 (1997); *Heggstad v. DOJ*, 182 F. Supp. 2d 1, 13 (D.D.C. 2000) (IRS has law enforcement purpose); *Center to Prevent Handgun Violence v. Dep't of Treasury*, 981 F. Supp. 20 (D.D.C. 1997) (collecting information on all repeat handgun sales); *Doe v. DOJ*, 790 F. Supp. 17, 20-21 (D.D.C. 1992) (background investigations). In addition, the case law in this circuit is well-settled that the agency need not tie its collection of information to any specific or ongoing investigation. *See Tax Analysts*, 294 F.3d at 78; *Keys v. U.S. Department of Justice*, 830 F.2d 337, 342 (D.C. Cir. 1987). This is fully consistent with the courts' broad acceptance that the 1986 amendments to FOIA relaxed the required threshold showing for Exemption 7. *See, e.g., United States Department of Justice v.*

Reporters Committee for Freedom of the Press, 489 U.S. 749, 780 (1989) (recognizing that the shift from the “would constitute” standard to the “could reasonably be expected to constitute” standard represents a congressional effort to ease considerably the burden in invoking Exemption 7); S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983) (“Substitute ‘records or information’ for ‘investigatory records’ as the threshold qualification for the exemption: This amendment would broaden the scope of the exemption to include ‘records or information compiled for law enforcement purposes,’ regardless of whether they may be investigatory or noninvestigatory.”). The information at issue clearly meets the threshold requirement that it was compiled for law enforcement purposes.

DHS has a mission to lead the unified national effort to secure America, to prevent and deter terrorist attacks and to protect against and respond to threats and hazards to the Nation. Lockett Decl. ¶ 40. This includes identifying threats, assessing vulnerabilities and safeguarding the American people, critical infrastructure, property and the economy of the Nation from terrorism, natural disasters or other emergencies. *Id.*

CBP, a component of DHS, has enforcement responsibilities for over 400 Federal statutes. Lockett Decl. ¶ 41. Its mission is to protect the borders of the United States against terrorists and the instruments of terror, enforce the customs and immigration laws of the United States, and foster our Nation’s economy by facilitating lawful international trade and travel. *Id.* Its mission includes the processing of passengers, conveyances and merchandise entering, transiting and departing the United States. *Id.* The creation and implementation of effective law enforcement systems and procedures is paramount to achieving this mission. *Id.* Moreover, TECS (which includes APIS and NIIS), ATS-P (which includes SAVI), and ADIS contain

records directly related to law enforcement activities and are all used for law enforcement purposes. Lockett Decl. ¶ 42. Therefore, disclosure of the information withheld by DHS could reasonably be expected to risk circumvention of law and may cause substantial harm to the law enforcement investigative and terrorist preventive measures of CBP.

1. Exemption 7(C)

Exemption 7(C) allows agencies to withhold “records or information compiled for law enforcement purposes” to the extent that the production of such records or information “could reasonably be expected to constitute an unwarranted invasion of privacy” 5 U.S.C. § 552(b)(7)(C). This exemption protects the identities of suspects and other persons of investigatory interest who are identified in agency records in connection with law enforcement investigations. *Reporters Comm. for Freedom of the Press v. U.S. Dept of Justice*, 816 F.2d 730, 780 (D.C. Cir. 1987), modified on other grounds, 831 F.2d 1124 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989); *Computer Prof'ls for Social Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 904 (D.C. Cir. 1996). An agency in a FOIA case may categorically assert Exemption 7(C) to protect the identities of witnesses or other persons mentioned in law enforcement files in such a way as to associate them with criminal activity. *Reporters Comm. for Freedom of the Press*, 489 U.S. at 780; *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 893, 895-896 (D.C. Cir. 1995); *SafeCard Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1206 (D.C. Cir. 1991).

The names of law enforcement officers who work on criminal investigations have also traditionally been protected against release by Exemption 7(C). *Davis v. U.S. Dept. of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992); *Lesar v. U.S. Dept of Justice*, 636 F.2d 472, 487-488 (D.C. Cir. 1980). Similarly, individuals who provide information to law enforcement authorities,

like the law enforcement personnel themselves, have protectable privacy interests in their anonymity. *Computer Prof'ls for Social Responsibility*, 72 F.3d at 904; *Farese v. U.S. Dept. of Justice*, 683 F. Supp. 273, 275 (D.D.C. 1987). The fact that the requester might be able to ascertain the individuals' identities through other means, or that their identities have been disclosed elsewhere, does not diminish their privacy interests. *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990); *Weisberg v. Dept. of Justice*, 745 F.2d 1476, 1491 (D.C. Cir. 1984).

Once a privacy interest has been established, as here, it must be balanced against the public interest, if there is any, that would be served by disclosure. *Albuquerque Publ'g Co. v. Dept. of Justice*, 726 F. Supp. 851, 855 (D.D.C. 1989). The public interest in disclosure is limited to the FOIA's "core purpose" of shed[ding] light on an agency's performance of its statutory duties." *Reporters Comm. for Freedom of the Press*, 489 U.S. at 773. This standard is not easily satisfied when law enforcement information pertaining to individuals is sought, for there "is no reasonably conceivable way in which the release of one individual's name . . . would allow citizens to know 'what their government is up to.'" *Fitzgibbon v. CIA*, 911 F.2d 755, 768 (D.C. Cir. 1990). *See also Albuquerque Publ'g Co.*, 726 F. Supp. at 855-56 (no public interest in disclosure of sensitive information DEA obtained about individuals and their activities, where such material would not shed light on DEA's conduct with respect to the investigation). Furthermore, the requester must not only demonstrate the existence of the public interest, but also that the public interest is both significant and compelling, in order to overcome legitimate privacy interests. *Senate of Puerto Rico v. Dept. of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987); *Stone v. FBI*, 727 F. Supp. 662, 667-69 (D.D.C. 1990).

In this case, DHS withheld the identifying markings of federal personnel as well as

individual third parties pursuant to Exemption 7(C). Lockett Decl. ¶ 46, Exhibit E. DHS scrutinized each piece of information to determine the nature and strength of any individual's privacy interest. Lockett Decl. ¶ 45. In each instance, it was determined that whatever public interest there might be, if any, in knowing the personally identifying information of the individuals identified in the relevant records, that public interest did not outweigh the privacy interests of the individuals. *Id.* Pursuant to Exemption 7(C), DHS properly withheld identifying information, including social security and badge numbers, of federal employees, including CBP employees. Lockett Decl. ¶ 46, Exhibit E. The privacy consideration here is to protect federal personnel and third parties as individuals from unnecessary, unofficial questioning, harassment and stigmatization. Lockett Decl. ¶ 46. What is more, the disclosure of the information redacted by DHS pursuant to exemption 7(C) would not shed light on how DHS or CBP perform their statutory duties. *Id.*

2. Exemption 7(E)

Exemption 7(E). This exemption excludes from disclosure “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). Under Exemption 7(E), the government must make two showings: (1) that the records were compiled for a law enforcement purpose; and (2) that the records reveal law enforcement techniques or guidelines that, if disclosed, “could reasonably be expected to risk circumvention of the law.” *Id.* DHS’ invocation of this

exemption meets both requirements.

DHS withheld information that would reveal its investigative techniques. Lockett Decl. ¶ 47. The disclosure of this information would reveal DHS examination and inspection procedures, internal reporting requirements and instructions on how to process international travelers. *Id.* This information could then be used by potential violators to develop countermeasures to evade detection, inspection and targeting methods. *Id.* Public awareness of this operational information would aid those who seek to circumvent DHS operations and harm the agency's ability to enforce the laws of the United States. *Id.* Any further detailed description of the information withheld pursuant to Exemption 7(E) would divulge to Plaintiff the examination and inspection procedures, internal reporting requirements and instructions on how to process international travelers, the very information that DHS seeks to protect. *Id.*

**V. ALL REASONABLY SEGREGABLE INFORMATION
HAS BEEN RELEASED TO PLAINTIFF**

“The FOIA requires that ‘[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.’” *Juarez v. Department of Justice*, 518 F.3d 54, 61 (D.C. Cir. 2008) (citing 5 U.S.C. § 552(b)). “This Circuit has long recognized, however, that documents may be withheld in their entirety when nonexempt portions ‘are inextricably intertwined with exempt portions [of the record].’” *Id.* (citing *Mead Data Cent., Inc. v. United States Dept. Of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)). “A court may rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated for this reason.” *Id.* (citing *Armstrong v. Executive Office of the President*, 97 F.3d 575, 578

(D.C. Cir. 1996).

As shown by Exhibit E to the Lockett Declaration, DHS only withheld internal codes and other internal markings, information which would have disclosed the names or other personal identifying information of federal personnel or third parties, and information concerning investigative techniques used in executing its law enforcement responsibilities. A review of Ms. Lockett's Declaration and Exhibit E confirms that all reasonably segregable non-exempt information has been released to Plaintiff.

Conclusion

For the foregoing reasons, Defendant DHS's motion for summary judgment should be granted.

Respectfully submitted,

/s/
JEFFREY A. TAYLOR, D.C. BAR #498610
United States Attorney

/s/
RUDOLPH CONTRERAS, D.C. BAR #434122
Assistant United States Attorney

/s/
JUDITH A. KIDWELL
Assistant United States Attorney
555 4th Street, N.W.-Civil Division
Washington, D.C. 20530
(202) 514-7250

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SOPHIA HELENA IN'T VELD,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 08-1151 (RMC)
)	
DEPARTMENT OF HOMELAND)	
SECURITY, et al.,)	
)	
Defendants.)	

UPON CONSIDERATION OF Defendant's Motion for Summary Judgement, any opposition thereto, and the entire record herein, it is this _____ day of _____, 2008,

ORDERED that Defendant's motion for summary judgment is **GRANTED**.

UNITED STATES DISTRICT JUDGE