

MICHAEL SUSSMAN,  
  
Plaintiff,  
  
v.  
  
UNITED STATES DEPARTMENT OF  
JUSTICE, UNITED STATES DEPARTMENT  
OF TRANSPORTATION, TRANSPORTATION  
SECURITY ADMINISTRATION, UNITED  
STATES POSTAL SERVICE, UNITED  
STATES SECRET SERVICE, and INTERNAL  
REVENUE SERVICE,  
  
Defendants.

**I, David M. Hardy, declare as follows:**

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State of Texas since 1980.

(2) In my current capacity as Section Chief, I supervise the Freedom of Information Information/Privacy Acts Litigation Support Unit ("FOIPA LSU"). The statements contained in this declaration are based upon my personal knowledge and upon information provided to me in my official capacity.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the treatment which has been afforded the plaintiff's three (3) FOIA requests to FBIHQ and nineteen (19) separate FBI field offices for access to records concerning himself and the government's "No Fly" List.

(4) My responsibilities also include the review of FBI information for classification purposes as mandated by Executive Order 12,958, as amended,<sup>1</sup> and the preparation of declarations in support of Exemption 1 claims under the FOIA.<sup>2</sup> I have been designated by the Attorney General of the United States as an original Top Secret classification authority and a declassification authority pursuant to Executive Order 12,958, as amended, §§ 1.3 and 3.1.

(5) The purpose of this declaration is to provide the court and plaintiff with an explanation of the procedures used in the review and processing of these documents. In accordance with Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), this declaration provides a justification for FBI records which were withheld from disclosure pursuant to FOIA Exemptions

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<sup>1</sup> 60 Fed. Reg. 19825 (1995), and 68 Fed. Reg. 15315 (2003).

<sup>2</sup> 5 U.S.C. § 552 (b)(1).

1, 2, 3, 5, 6, 7(C), 7(D), and 7(E), 5 U.S.C. § 552 (b)(1), (b)(2), (b)(3), (b)(5), (b)(6), (b)(7)(C), (b)(7)(D), and (b)(7)(E), and Privacy Act Exemption (j)(2), 5 U.S.C. § 552a (j)(2).

#### **CORRESPONDENCE RELATING TO PLAINTIFF'S REQUEST**

(6) A description of the correspondence related to plaintiff's requests is set forth in detail in the First Hardy Declaration, at ¶¶ 5-7; and the Second Hardy Declaration, at ¶¶ 6-8; therefore, it will not be repeated in this declaration.

#### **EXPLANATION OF THE CENTRAL RECORDS SYSTEM**

(7) An explanation of the FBI's Central Records System ("CRS") is set forth in detail in the Second Hardy Declaration at ¶¶ 13-17; and therefore, will not be repeated in this declaration.

#### **RECORDS RESPONSIVE TO PLAINTIFF'S HQ AND FIELD OFFICE REQUESTS**

(8) The documents covered in this declaration consist of the pre-processed material that was located at FBIHQ and that was originally processed and released in Gordon v. FBI et al., C.A. No. C-03-1779 (N.D. Cal.). The search cut-off date for this case was December 31, 2002; therefore, this material includes all records created on or before December 31, 2002.<sup>3</sup> This material was identified after a search was conducted of the CRS at FBIHQ. As part of the systematic search for potentially responsive records, on May 12, 2003, an internal memorandum

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<sup>3</sup> In response to other pending litigation in Elmoslemany et al v. FBI, C.A. No. 04-5592 (D.D.C.), FBIHQ conducted another search to locate material related to the "No Fly" list. This material is currently being processed for release in that matter and once this release is made, FBIHQ will make a release of this material to plaintiff. In the Elmoslemany litigation, a similar search was conducted for "No Fly" list material. After a search of the CRS was conducted, on January 31, 2005, an internal memorandum was sent to all FBIHQ Divisions directing all personnel to conduct a thorough search for all records that were created after December 31, 2002, concerning the "No Fly" list.

was sent to all FBIHQ Divisions and the San Francisco Field Office ("SFFO") directing all personnel to conduct a thorough search for documents responsive to the request at issue in the Gordon litigation. The results of those searches included e-mail messages, draft memorandum, hand-written meeting notes, and public source information, such as, newspaper and Internet articles.

#### **EXPLANATION OF THE PROCESSING OF RESPONSIVE DOCUMENTS**

(9) All documents were processed to achieve maximum disclosure consistent with the provisions with the FOIA. Every effort was made to provide plaintiff with all material in the public domain and with all reasonably segregable portions of releasable material. Each page of Exhibit A<sup>4</sup> is Bates stamped "SUSSMAN 1 - SUSSMAN 325."<sup>5</sup> The FBI has asserted Privacy Act Exemption (j)(2), 5 U.S.C. § 552a, and FOIA Exemptions 1, 2, 3, 5, 6, 7(C), 7(D), and 7(E), 5 U.S.C. § 552 (b)(1), (b)(2), (b)(3), (b)(5), (b)(6), (b)(7)(C), (b)(7)(D), and (b)(7)(E) to withhold certain information contained in this material.

(10) Copies of the documents contain on their face, coded categories of exemptions which detail the nature of the information withheld pursuant to the provisions of the FOIA. To

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<sup>4</sup> The FBI has reprocessed the "No Fly" list material that it released to plaintiff in December 2004. Exhibit A contains the reprocessed "No Fly" list material.

<sup>5</sup> In the Gordon litigation, the FBI identified 325 pages of material concerning the "No Fly" list; however, of that total, 78 pages of material was either withheld in full or was accounted for as a duplicate page. Accordingly, the FBI released 247 pages of material concerning the "No Fly" list to plaintiff in this case. In addition, the FBI has inadvertently released in full Sussman pages 25-27, which should have been withheld in full on behalf of the Transportation Security Administration ("TSA") pursuant to FOIA Exemptions (b)(2), (b)(3) (49 U.S.C. § 114(h)), (b)(5), and (b)(7)(E). Accordingly, in Exhibit A these pages are identified only by reference to the page numbers. The FBI has also inadvertently released certain information contained in Sussman pages 314-315, which should have been withheld pursuant to Exemptions (b)(6) and (b)(7)(C).

further describe the information withheld in more detail could identify the very material that the FBI is protecting. No reasonably segregable, nonexempt portions were withheld from plaintiff. The coded categories are provided to aid the Court's review of the FBI's explanations of FOIA exemptions used to withhold the protected material. Accordingly, a review of this information will reveal that all material withheld is exempt from disclosure pursuant to properly asserted FOIA exemptions or it is so intertwined with protected material that segregation is not possible without revealing the underlying protected material.

### **MECHANICS OF USING THE CODED FORMAT WITH THE EXEMPTION CATEGORIES**

(11) A coded format is used in this case to assist the Court and plaintiff in reviewing the information withheld within the context of the documents themselves. Each instance of information that is withheld pursuant to the FOIA on the attached documents is accompanied by a coded designation that corresponds to the categories listed below. For example, if "(b)(7)(C)-1" appears on a document, the "(b)(7)(C)" designation refers to Exemption (b)(7)(C) of the FOIA under the category "Unwarranted Invasion of Personal Privacy." The numerical designation, "1" narrows the main category to the more specific subcategory, "Names of FBI Special Agents (SAs) and Support Personnel." Listed below are the categories used to explain the FOIA exemptions asserted to withhold protected material.

### **SUMMARY OF JUSTIFICATION CATEGORIES**

#### **Category (b)(1)**

#### **Classified Information**

#### **Category (b)(2)**

#### **Internal Agency Rules and Practices**

(b)(2)-1

FBI Telephone/Facsimile Numbers (Used in conjunction with (b)(6)-1 and (b)(7)(C)-1)

- (b)(2)-2 E-Mail Addresses of FBI Special Agents and Support Employees and Non-FBI Federal Employees (Used in conjunction with (b)(6)-1 and (b)(7)(C)-1)
- (b)(2)-3 FBI File Numbers Assigned to the "No Fly " List-related material
- (b)(2)-4 Selection Criteria Used for "No Fly" and "Selectee" Lists (Used in conjunction with (b)(7)(E)-1)
- (b)(2)-5 Internal Practices with Regard to Dissemination of the TSA's "No Fly" and "Selectee" Lists

**Category (b)(3)**

**Information Protected by Statute**

- (b)(3)-1 Title 49, USC, Section 114 (per TSA)
- (b)(3)-2 Title 50, USC, Section 403 (per CIA)

**Category (b)(5)**

**Privileged Information: Deliberative Process Privilege, Attorney-Client Privilege and Attorney-Work Product Privilege**

- (b)(5)-1 Deliberative process privilege
- (b)(5)-2 Attorney-client privilege
- (b)(5)-3 Attorney-work product privilege

**Category (b)(6)**

**Clearly Unwarranted Invasion of Personal Privacy**

- (b)(6)-1 Names and/or Identifying Information Concerning FBI Special Agents and Support Employees (Used in conjunction with (b)(2)-1, 2 and/or (b)(7)(C)-1)
- (b)(6)-2 Names and/or Identifying Information of Third Parties of Investigative Interest (Used in conjunction with (b)(7)(C)-2)
- (b)(6)-3 Names and/or Identifying Information Concerning Non-FBI Federal Government Employees (Used in conjunction with (b)(7)(C)-3)

(b)(6)-4 Names and/or Identifying Information of Non-Federal Law Enforcement Employees (Used in conjunction with (b)(7)(C)-4)

(b)(6)-5 Names and/or Identifying Information of Foreign Government Personnel (Used in conjunction with (b)(7)(C)-5)

(b)(6)-6 Names and/or Identifying Information Concerning Third Parties Merely Mentioned (Used in conjunction with (b)(7)(C)-6)

**Category (b)(7)(C)**

**Unwarranted Invasion of Personal Privacy**

(b)(7)(C)-1 Names and/or Identifying Information Concerning FBI Special Agents and Support Employees (Used in conjunction with (b)(2)-1, 2 and/or (b)(6)-1)

(b)(7)(C)-2 Names and/or Identifying Information of Third Parties of Investigative Interest (Used in conjunction with (b)(6)-2)

(b)(7)(C)-3 Names and/or Identifying Information Concerning Non-FBI Federal Government Employees (Used in conjunction with (b)(6)-3)

(b)(7)(C)-4 Names and/or Identifying Information of Non-Federal Law Enforcement Employees (Used in conjunction with (b)(6)-4)

(b)(7)(C)-5 Names and/or Identifying Information of Foreign Government Personnel (Used in conjunction with (b)(6)-5)

(b)(7)(C)-6 Names and/or Identifying Information Concerning Third Parties Merely Mentioned (Used in conjunction with (b)(6)-6)

**Category (b)(7)(D)**

**Confidential Source Material**

(b)(7)(D)-1 Names and/or Identifying Information of Foreign Governments

**Category (b)(7)(E)**

**Law Enforcement Investigative Techniques and Procedures**

(b)(7)(E)-1

Selection Criteria Used for "No Fly" and "Selectee" Lists  
(Used in conjunction with (b)(2)-4)

(b)(7)(E)-2

Procedures and Methods Used for Dissemination of the  
"No Fly" List (Used in conjunction with (b)(2)-5)

### **JUSTIFICATIONS FOR REDACTIONS**

(13) Paragraphs 14-97 infra, explain the FBI's rationale for withholding each particular category of information under the specific exemption categories described above.

### **PRIVACY ACT EXEMPTION (j)(2)**

(14) Subsection (j)(2) of the Privacy Act exempts from mandatory disclosure systems of records "maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals...."

(15) The documents which have been identified as responsive to plaintiff's request and which are now the subject of this declaration, are either currently a part of the FBI's CRS, or will shortly be incorporated into, the CRS. In the wake of the terrorist attacks of September 11, 2001, the FBI launched the largest, most comprehensive investigation in its history (PENTTBOMB) in order to identify the killers of September 11 and to prevent further terrorist attacks. The "no fly" and "selectee" lists have become a significant and valuable tool in the FBI's efforts to fight terrorism, specifically in the area of aviation. The documents generated as a result of these investigative efforts, as they relate to the "No Fly" list and "Selectee" list and PENTTBOMB, are exempt from disclosure pursuant to Exemption (j)(2) of the Privacy Act. Although access to these documents has been denied under the Privacy Act, documents responsive to plaintiff's requests have been processed under the access provisions of the FOIA to achieve maximum



disclosure.

**FOIA EXEMPTION (b)(1)**  
**CLASSIFIED INFORMATION**

(16) 5 U.S.C. § 552 (b)(1) exempts from disclosure those records that are:

(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy; and (B) are in fact properly classified pursuant to such Executive Order . . .

(17) Before I consider an Exemption (b)(1) claim for withholding agency records, I determine whether the information in those records is information that satisfies the requirements of E.O. 12,958, as amended, which governs the classification and protection of information that affects the national security,<sup>6</sup> and complies with the various substantive and procedural criteria of Executive Order. E.O. 12,958, as amended, on March 25, 2003. Executive Order 12,958, as amended, that currently applies to the protection of national security information.<sup>7</sup> I am bound by the requirements of E.O. 12,958, as amended, when making classification determinations.

(18) For information to be properly classified, and thus properly withheld from disclosure pursuant to Exemption (b)(1), the information must meet the requirements set forth in E.O. 12,958, as amended, § 1.1 (a):

- (1) an original classification authority is classifying the information;
- (2) the information is owned by, produced by or for, or is under the control of the United States Government;
- (3) the information falls within one or more of the categories of information listed in

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<sup>6</sup> "National Security" as defined in E.O. 12,958, as amended, § 6.1 (y) "means the national defense or foreign relations of the United States."

<sup>7</sup> E.O. 12,958 was amended and became effective as of March 25, 2003, with the exemption of § 1.6, which became effective 180 days thereafter.

§ 1.4 of this order; and

(4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

(19) All information which I determined to be classified, and which is under the control of the of the United States government, is marked at the "Secret" level since the unauthorized disclosure of this information reasonably could be expected to cause serious damage ("Secret") to the national security. See E.O. 12,958, as amended, § 1.2 (a)(2). In addition to these substantive requirements, certain procedural and administrative requirements of E.O. 12,958, as amended, must be followed before information can be considered to be properly classified, such as, proper identification and marking of documents. I made certain that all procedural requirements of E.O. 12,958, as amended, were followed in order to ensure that the information was properly classified. I made certain that:

- (1) each document was marked as required and stamped with the proper classification designation;<sup>8</sup>
- (2) each document was marked to indicate clearly which portions are classified and which portions are exempt from declassification as set forth in E.O. 12,958, as amended, § 1.5 (b), and which portions are unclassified;<sup>9</sup>
- (3) the prohibitions and limitations on classification specified in E.O. 12,958, as amended, § 1.7, were adhered to;
- (4) the declassification policies set forth in E.O. 12,958, as amended, §§ 3.1 and 3.3 were followed; and
- (5) any reasonably segregable portion of these classified documents that did not meet

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<sup>8</sup> E.O. 12,958, as amended, §§ 1.6 (a)(1)-(5).

<sup>9</sup> E.O. 12,958, as amended, §§ 1.6 (c).

the standards for classification under E.O. 12,958, as amended, were declassified and marked for release, unless withholding was otherwise warranted under applicable law.<sup>10</sup>

### **FINDINGS OF DECLARANT**

(20) With the above requirements in mind, I personally and independently examined the information withheld from plaintiff pursuant to FOIA Exemption 1. I determined that the classified information<sup>11</sup> withheld warrants continued classification at the "Secret" level, pursuant to E.O. 12,958, as amended, § 1.4. Release of this material could be expected to reveal information, including foreign government information, that would seriously and demonstrably impair relations between the United States and foreign governments, or reveal intelligence activities (including special activities).

### **INTELLIGENCE ACTIVITIES AND METHODS**

(21) E.O. 12,958, as amended, § 1.4(c), exempts intelligence activities (including special activities), intelligence sources and methods, or cryptology from disclosure. Redactions made pursuant to Exemption (b)(1) in Exhibit A were made to protect intelligence activities and methods. An intelligence activity or method includes any intelligence action or technique utilized by the FBI against a targeted individual or organization that has been determined to be of national security interest. An intelligence method is used to indicate any procedure (human or non-human) utilized to obtain information concerning such individual or organization.

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<sup>10</sup> 5 U.S.C. § 552 (b) provides in part: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

<sup>11</sup> Information classified and withheld pursuant to Exemption 1 appears on SUSSMAN pages 18-19, 50-51, 54-60, 84, 149-151, 184, 195, 220, 229-230, and 264-265.

(22) The classified information withheld identifies the specific targets of current on-going FBI intelligence gathering operations and the methods utilized by the FBI to collect intelligence information about or from these specific targets.

(23) The intelligence activities and methods detailed in the withheld information are effective means for the FBI to gather, store or disseminate intelligence information. The criteria utilized by the FBI in these instances to decide what actions by an individual or organization warranted the commencement of an investigation, or caused a certain activity to be given investigative attention over others, could be revealed through disclosure of these intelligence activities and methods. The criteria applied and priorities assigned are used in the FBI's present intelligence or counterintelligence investigations, and are in accordance with the Attorney General's guidelines on FBI intelligence or counterintelligence investigations. The information obtained from the intelligence activities and methods is very specific in nature, provided during a specific time period, and known to very few individuals.

(24) It is my determination that the disclosure of the specific information which describes the intelligence activities and methods withheld in this case and still used by the FBI today to gather intelligence information could reasonably be expected to cause serious damage to the national security for the following reasons: (1) disclosure would allow hostile entities to discover the current intelligence gathering methods used; (2) disclosure would reveal current specific targets of the FBI's national security investigations; and (3) disclosure would reveal the determination of the criteria used and priorities assigned to current intelligence or counterintelligence investigations. With the aid of this detailed information hostile entities could then develop countermeasures which could severely disrupt the FBI's intelligence-gathering

capabilities. This would severely damage the FBI's efforts to detect and apprehend violators of the national security and criminal laws of the United States. Thus, the intelligence activities and methods withheld by the FBI are properly classified at the "Secret" level and withheld pursuant to E.O. 12,958, as amended, § 1.4 (C).

### **FOREIGN RELATIONS**

(25) E.O. 12,958, § 1.4(d), as amended, is used to indicate cooperative endeavors between the FBI and a named foreign government's intelligence components. Redactions were made to protect information regarding the cooperative endeavors between the FBI and a named foreign government. Intelligence information was exchanged between this foreign government and the FBI with the express understanding that the relationship will be held in strict confidence. The retention of the secret nature of this exchange is essential to ensure continued liaison with this cooperating foreign government, which continues at the present time.

(26) Information that identifies intelligence information gathered by the United States either about or from a foreign country is sensitive. This condition exists due in part to the delicate nature of international diplomacy. This information must be handle with care so as not to jeopardize the fragile relationships that exist among the United States and certain foreign governments.

(27) The unauthorized disclosure of information concerning foreign relations or foreign activities of the United States can reasonably be expected to lead to diplomatic or economic retaliation against the United States; identify the target, scope or time frame of intelligence activities of the United States in or about a foreign country, which may result in the curtailment or cessation of these activities; enable hostile entities to assess United States

intelligence gathering activities in or about a foreign country and devise countermeasures against these activities; or compromise cooperative foreign sources which may jeopardize their safety and curtail the flow of information from these sources.

(28) It is my determination that the delicate liaison established between the United States and this foreign government could be severely damaged should the United States decide to disclose this relationship. The foreign government's cooperation in the FBI investigations at issue have not been publicly revealed. To do so now would endanger the spirit of law enforcement intelligence cooperation that the FBI has labored most strenuously to obtain. This foreign government will not likely continue to trust the United States if the FBI discloses its cooperation in violation of the confidentiality promise given, and will be less willing to cooperate in the future if its past and continuing requests for confidentiality are not honored. At the very least a breach of this confidential relationship could be expected to produce a chilling effect of the free flow of vital information to United States intelligence and law enforcement agencies, thereby reducing their effectiveness. This would severely hamper the FBI's law enforcement efforts to detect and apprehend those who seek to damage the national security. Therefore, the information withheld to protect the FBI's confidential relationship with a specific foreign government is properly classified at the "Secret" level and withheld pursuant to E.O. 12,958, as amended, § 1.4(d).

**DEFENDANT'S BURDEN OF ESTABLISHING**  
**EXEMPTION ONE CLAIMS**

(29) The information withheld pursuant to Exemption (b)(1) was examined in light of the body of information available to me concerning the national defense and foreign relations of

the United States. This information was not examined in isolation. Instead, each individual piece of information was evaluated with careful consideration given to the impact that disclosure of this information will have on other sensitive information contained elsewhere in the United States intelligence community's files. Equal consideration was given to the impact that other information either in the public domain or likely known or suspected by present or potential adversaries of the United States, would have upon the information I examined.

(30) In those instances where, in my judgement, the disclosure of this information could reasonably be expected to cause serious damage to the national security, and its withholding outweighed the public benefit of disclosure, I exercised my prerogative as an original classification authority and designated that information as classified in the interest of national security and invoked Exemption (b)(1) to prevent disclosure. Likewise, the justifications for the withheld classified information were prepared with the intent that they be read with consideration given to the context in which the classified information is found.

(31) This context includes not only the surrounding unclassified information but also other information already in the public domain, as well as information likely known or suspected by other hostile intelligence entities. It is my judgement that any greater specificity in the descriptions and justifications set forth with respect to intelligence activities could reasonably be expected to jeopardize the national security of the United States.

**FOIA EXEMPTION (b)(2)**  
**INTERNAL AGENCY RULES AND PRACTICES**

(32) 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 encompasses two distinct

categories of records that are internal in nature: those involving trivial administrative matters of no genuine public interest (Low 2) and those the disclosure of which would risk circumvention of a statute or regulation (High 2). Disclosure of this type of information could impede the effectiveness of the FBI's internal law enforcement procedures.

**(b)(2)-1      FBI Telephone/Facsimile Numbers**

(33) Exemption (b)(2)-1 has been asserted to protect internal telephone and fax numbers of FBI Special Agents (SAs), support employees, and non-FBI federal employees (including the direct dial telephone numbers of these employees).<sup>12</sup> The business telephone and fax numbers relate directly to the internal practices of the FBI and other federal agencies in that they are used by these individuals during the performance of their duties. Disclosure of the telephone numbers of FBI SAs and support employees, and non-FBI federal employees could subject these individuals to harassing phone calls which could disrupt official business (including, impeding the ability of these employees to conduct and conclude law enforcement investigations in a timely manner). In addition, disclosure of the internal fax numbers of the FBI and other government agencies could cause these offices to be inundated with faxes which could also disrupt official business. Routine internal administrative information such as the phone numbers and fax numbers referenced above serve no public benefit, and there is no indication that there is a genuine public interest in the disclosure of these numbers. Accordingly, because

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<sup>12</sup> See SUSSMAN pages 1, 5-10, 24, 29-30, 33, 36-37, 39, 44-45, 47, 49, 52, 72-73, 75, 77, 82, 84, 98, 117, 128, 132-133, 135, 143-144, 156-158, 160-161, 168, 171-172, 175, 179, 195, 197-198, 201, 204, 207, 210, 213, 215, 218, 221-222, 228, 238, 244, 246, 248, 254-255, 260-265, 267, 271, 273, 275, 284, 287, 304, and 310. In addition to invoking Exemption (b)(2)-1 to protect the telephone and facsimile numbers of FBI personnel, the FBI is also asserting Exemptions (b)(6)-1 and (b)(7)(C)-1 to protect this information. (See ¶¶ 61-65 and 77-81, infra.)



the internal business phone numbers and fax numbers are solely related to the FBI's and other federal agencies' internal practices, because disclosure would not serve any public benefit, and because disclosure would impede the effectiveness of the federal agencies referenced above, the FBI withheld this information pursuant to Exemption (b)(2)-1.

**(b)(2)-2      E-Mail Addresses of FBI Special Agents and Support  
Employees and Non-FBI Federal Employees**

(34) Exemption (b)(2)-2 has been asserted to protect the e-mail addresses of FBI SAs and support employees, as well as the e-mail addresses of non-FBI federal employees.<sup>13</sup> In this case, the documents at issue represent the e-mail dialogue between FBI employees and employees at other federal agencies regarding the criteria used in security screening processes, details of aviation security measures and law enforcement response requirements for the "No Fly" list. The FBI has partially protected the e-mail addresses of non-FBI federal employees who have worked on "No Fly" list issues by redacting only the names of these employees as it appears in their agency e-mail address. The FBI has withheld in full the e-mail addresses of FBI SAs and support employees. The employees referenced in the responsive records have an intimate working knowledge of the criteria used in security screening processes, information revealing specific details of aviation security measures, and law enforcement response requirements. The e-mail addresses of FBI SAs and non-FBI federal employees relate directly to the internal practices of these agencies because the e-mail addresses are used by these employees during the performance of their duties. The use of the "No Fly" list has been the subject of intense media

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<sup>13</sup> See SUSSMAN pages 1, 29-30, 33, 37, 39, 41-42, 44, 47, 49, 52, 71-73, 84, 98, 143-144, 156, 158, 160-161, 168, 171, 175, 179, 195, 197-198, 204, 206, 211-213, 221, 228, 238, 260-263, 266, 268-271, 275, 284, and 286.

scrutiny. Thus, disclosure of the e-mail addresses of FBI SAs, FBI support employees, and other federal employees who have an intimate working knowledge of the "No Fly" list could subject them to harassing e-mails from members of the general public and the media who seek information regarding the "No Fly" list.

(35) Receipt of e-mails from the general public and the media have the potential to disrupt official government business in two significant ways. First, disclosure of the e-mail addresses would allow individuals to inundate the electronic in-boxes of FBI SAs, FBI support employees, and non-FBI federal employees with e-mails, which would interfere with the employees' ability to communicate within their respective agencies as well as interface with other law enforcement agencies. Any such disruption could have grave consequences for the agencies charged with ensuring the safety of the flying public. Second, disclosure of the e-mail addresses could compromise the security systems of the respective agencies because disclosure could provide a savvy and sophisticated computer expert with a means by which to access the internal computer systems of the agencies charged with ensuring the safety of the flying public. A sophisticated user could send computer viruses via e-mail which would disable the computer networks of the respective agencies. Furthermore, a sophisticated user could use the e-mail addresses as a means to gain unauthorized access to sensitive law enforcement files, which could jeopardize national security. Disclosure of the e-mail address would serve no public benefit because the e-mail addresses do not in any way demonstrate how the agencies are performing their statutory duties. The disclosure of these e-mail addresses could cause significant harm to the agencies referenced above and would impede the FBI's and the other government agencies' effectiveness in carrying out their missions. In addition, disclosure of these e-mail addresses

could risk circumvention of the computer security measures employed by the FBI and the other federal agencies referenced above; therefore, the FBI has properly withheld this information pursuant to Exemption (b)(2)-2.

**(b)(2)-3      FBI File Numbers Assigned to the "No Fly" List**

(36) The FBI protected file numbers used by FBI personnel as an internal administrative tool to facilitate and coordinate the FBI's law enforcement response requirements.<sup>14</sup> These file numbers designate files that serve as repositories for the FBI's law enforcement response requirements. In this case, the "No Fly" list file numbers are exclusively used as internal identifiers for the administrative control of "No Fly" list matters and have no bearing on the substance of the information. This is a purely internal practice which allows the FBI to more efficiently direct correspondence, reports and other records concerning the "No Fly" list. Accordingly, because the "No Fly" list file numbers are solely related to the FBI's internal practices, and because disclosure would not serve any public benefit, the FBI has properly withheld this information pursuant to Exemption (b)(2)-3.

**(b)(2)-4      Selection Criteria Used for "No Fly" and "Selectee" Lists**

(37) Exemption (b)(2)-4, in conjunction with Exemption (b)(7)(E)-1, has been asserted to protect the following categories of documents: (1) documents which provide guidance, directions and instructions to federal and local law enforcement agencies (including points of contact) when dealing with individuals whose names may appear on the "No Fly" list; and (2) documents which describe the criteria and procedures used in determining whether an individual

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<sup>14</sup> See SUSSMAN pages 77-82, 124-127, and 215-217.

poses a threat to aviation.<sup>15</sup>

**Documents Which Provide Guidance, Directions and  
Instructions to Law Enforcement Agencies**

(38) Exemption (b)(2)-4 has been asserted to protect documents which provide guidance, directions and instructions to federal and local law enforcement agencies because disclosure could reasonably impede the effectiveness of the "No Fly" list law enforcement response requirements developed by the FBI and other federal agencies, and risk circumvention of the law. More specifically, the documents at issue provide specific, step-by-step law enforcement directions and instructions to other federal agencies, local police departments, foreign officials and airlines. The documents detail the framework and parameters within which individuals may be detained. Lastly, the documents provide points of contact for law enforcement officials (including the telephone and pager numbers of critical law enforcement personnel).

(39) The information at issue is internal because the information is used by - and shared with - the various law enforcement agencies charged with protecting the safety of the flying public. Disclosure of such sensitive law enforcement information would have disastrous, far-reaching consequences. For example, disclosure of step-by-step "No Fly" list law enforcement response directions and instructions could compromise the "No Fly" list law enforcement response requirements developed by the FBI, which would impede the effectiveness of the "No Fly" list. Disclosure of the step-by-step instructions would permit criminals or

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<sup>15</sup> See SUSSMAN pages 1, 4, 14-23, 28-30, 33, 37-44, 46-52, 61-64, 67-70, 75-76, 84-90, 96-98, 104-105, 116-132, 134-139, 141-148, 152, 155-157, 159, 161-167, 169-170, 173-174, 181-183, 195-198, 202-206, 208-209, 211-213, 221, 223-228, 231-240, 244-249, 252, 254, 256, 260-266, 268-272, and 287-289.

terrorists to learn the law enforcement response requirements of the "No Fly" list and adjust their behavior to avoid detection by the very law enforcement authorities responsible for identifying individuals who pose a threat to civil aviation. Disclosure of the detailed, step-by-step law enforcement response directions and instructions would only benefit those attempting to violate the law and avoid detection. As such, disclosure of the step-by-step directions and instructions could reasonably be expected to risk circumvention of law. Accordingly, because disclosure of the step-by-step law enforcement response instructions would impede the effectiveness of the "No Fly" list law enforcement response requirements developed by the FBI and other federal agencies, and disclosure could reasonably be expected to risk circumvention of law, the FBI has properly protected this information pursuant to Exemption (b)(2)-4.

**Documents Which Describe the Criteria and Procedures Used in Determining  
Whether an Individual Poses a Threat to Aviation**

(40) Exemption (b)(2)-4, in conjunction with Exemption (b)(7)(E)-1, has also been asserted to protect documents which detail the selection criteria used in security screening processes when identifying and determining whether an individual poses a threat to civil aviation (including the criteria used when deciding whether an individual should be added or removed from the list). Furthermore, Exemption (b)(2)-4, in conjunction with Exemption (b)(7)(E)-1, has been asserted to protect documents which detail specific aviation security procedures used by the FBI and other law enforcement agencies when identifying and determining whether an individual poses a threat to civil aviation.

(41) The information at issue is clearly internal because it is used by, and shared with, the various law enforcement agencies charged with protecting the safety of the flying public.

First, given the fact that a number of the documents list the specific criteria which have been determined to be identifiable to persons who pose a threat to civil aviation, public disclosure of this set of criteria would have disastrous effects. More specifically, disclosure of the criteria used to determine whether an individual poses a threat to civil aviation would permit individuals to devise circumvention strategies. Armed with the selection criteria used in security screening processes, criminals and/or terrorists could adjust their behavior to evade detection by avoiding the very behavior the FBI and other law enforcement agencies have determined pose a threat to civil aviation. Accordingly, such a disclosure could reasonably be expected to risk circumvention of law. Second, disclosure of "No Fly" list procedures could likewise have disastrous consequences. Specifically, disclosure of "No Fly" list procedures would enable criminals to educate themselves about the "No Fly" list procedures that have been implemented. With this information, criminals or terrorists could take countermeasures in order to evade detection, which would undermine the effectiveness of "No Fly" list procedures. As such, disclosure of security screening procedures would impede the effectiveness of the "No Fly" list and could reasonably be expected to risk circumvention of law. Accordingly, because disclosure of the criteria and procedures used when determining whether an individual poses a threat to civil aviation would impede the effectiveness of the "No Fly" list, and because disclosure could reasonably be expected to risk circumvention of law, the FBI has properly protected this information pursuant to Exemption (b)(2)-4, in conjunction with Exemption (b)(7)(E)-1.

**(b)(2)-5      Internal Practices with Regard to Dissemination of the  
TSA's "No Fly" and "Selectee" Lists**

(42) The FBI protected portions of documents pursuant to Exemption (b)(2)-5, in

conjunction with Exemption (b)(7)(E)-2, that would reveal predominately internal practices follow by the TSA and the FBI with respect to the dissemination of the TSA's "No Fly" and "Selectee" Lists.<sup>16</sup> Disclosure of this information could compromise the efficacy of aviation security measures by providing information that may be used to assist unauthorized individuals in gaining access to the "No Fly" and "Selectee" Lists and enable them to avoid detection and/or plan counter measures. Disclosure of this information would also impede the effectiveness of the law enforcement mission of the federal agencies referenced above as well as the effectiveness of the law enforcement response requirements. For these reasons, the FBI has protected this information pursuant to Exemption (b)(2)-5, in conjunction with Exemption (b)(7)(E)-2.

#### **FOIA EXEMPTION (b)(3)**

(43) 5 U.S.C. § 552 (b)(3) exempts from disclosure information "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

#### **(b)(3)-1 49 U.S.C. § 114 (per TSA)**

(44) Exemption (b)(3)-1, 49 U.S.C. § 114, has been asserted to withhold information on behalf of the Transportation Security Administration<sup>17</sup> ("TSA"). This information relates to TSA's mission to identify individuals "who pose a risk to air piracy or terrorism or a threat to airline ro passenger safety." See 49 U.S.C. § 114(h)(2). Specifically, Title 49, U.S.C. sections 114(s) and 40119(b), prohibit disclosure of "sensitive security information" or "SSI." The term

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<sup>16</sup> See SUSSMAN pages 47-48, 63, 124, 148, 155, 161, and 214.

<sup>17</sup> See SUSSMAN pages 4, 17-18, 90, 116, 128-130, 132, 245, 269, and 272.

"sensitive security information" is defined in TSA's regulation to include, among other things, security programs, security directives, selection criteria used in any security screening process, specific details of aviation security measures, any comments, guidance or implementing instructions pertaining to a security program or security directive, and any draft, proposed or recommended change to this type of information. 49 C.F.R. § 1520.7(a), (b), (c), (j) and (l). TSA has restricted the disclosure of the details of aviation security measures because its release would compromise the safety of the traveling public by revealing potential weaknesses in the current security system, by allowing potential attackers of civil aviation to circumvent or otherwise defeat the security measures, and by undermining the effectiveness of countermeasures adopted to prevent terrorism and other violent criminal acts aboard aircraft.

(45) The redacted information consists of the following: (1) selection criteria; (2) discussions of problems related to implementation of the "No Fly" list; and, (3) information related to other watchlists. The redacted information clearly relates to TSA's mission to identify individuals "who pose a risk to air piracy or terrorism or a threat to airline ro passenger safety;" therefore, the FBI has properly withheld it on behalf of TSA pursuant to Exemption (b)(3)-1, 49 U.S.C. § 114(h)(2).

**(b)(3)-2      50 U.S.C. § 403 (per CIA)**

(46) Exemption (b)(3)-2 was asserted to withhold information pursuant to Title 50, of the United States Code, § 403 on behalf of the Central Intelligence Agency ("CIA"), which relates to the organization, its functions, names, official titles, salaries and numbers of personnel employed by the agency. The FBI has withheld information behalf of the CIA that is related to issues that arose in connection with the "No Fly" list selection criteria pursuant to Exemption



(b)(3)-2, 50 U.S.C. § 403.<sup>18</sup>

**FOIA EXEMPTION (b)(5)**  
**PRIVILEGED INFORMATION**

(47) 5 U.S.C. § 552(b)(5) exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Exemption (b)(5) has been construed to exempt those documents or information normally privileged in the civil discovery context, including, as is the case here, documents privileged pursuant to the deliberative process privilege, the attorney-client privilege and the attorney-work product privilege.

**Deliberative Process Privilege**<sup>19</sup>

(48) The deliberative process privilege protects the internal deliberations of the government by exempting from release recommendations, analyses, speculation and other non-factual information prepared in anticipation of decision-making. The general purpose of the deliberative process privilege is to prevent injury to the quality of agency decisions. Thus, material that contains or was prepared in connection with the formulation of opinions, advice, evaluations, deliberations, policy formulation, proposals, conclusions or recommendations may properly be withheld. Release of this type of information would have an inhibiting effect upon the development of policy and administrative direction of an agency because it would chill the full and frank discussion between agency personnel regarding a decision. If agency personnel

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<sup>18</sup> See SUSSMAN pages 51, 84, 195, and 264.

<sup>19</sup> See SUSSMAN pages 17-24, 28-29, 31-37, 43-46, 48, 77-78, 80-82, 84, 117-119, 146, 156-157, 159, 162-165, 172-174, 176, 199-200, 203, 215, 217, 220, 224-225, 227-228, 231-233, 238, 240, 246, 248-249, 251-252, 254, 260-264, 270, 288-289, and 301.

knew that their preliminary opinions, evaluations and comments would be released for public consumption, they may be more circumspect in what they put in writing, and thereby, impede a candid discussion of the issues surrounding a decision.

(49) Shortly after 9/11, an internal dialogue and exchange of ideas, policies and procedures regarding aviation safety was initiated both internally in the FBI as well as among and between multiple federal agencies. From the FBI's perspective, the focus of this on-going dialogue, as reflected in the documents that the FBI has identified as responsive to plaintiff's request, has been the FBI's law enforcement functions and response requirements necessary to ensure the transportation safety of the flying public.

(50) This set of deliberations is reflected in a varied collection of internal e-mails among FBI SAs, FBI attorneys and FBI support employees, and reflect discussions of problems that have arisen in connection with the implementation of the "No Fly" and "Selectee" lists, as part of the FBI's deliberations regarding possible improvements that may be made in existing procedures in order to avoid recurrence of such problems. These internal deliberations within the FBI concerning the use of the "No Fly" and "Selectee" lists, as well as ongoing efforts to identify potential new tools and law enforcement mechanisms as part of the war against terrorism, are quintessentially deliberative in nature, and take on added significance following the events of September 11, 2001.

(51) More specifically, certain documents consist of internal e-mails reflecting preliminary advice, opinions and recommendations among and between FBI attorneys, FBIHQ SAs, field office SAs, FBI field office attorneys, and, in certain instances, employees of other government agencies working specifically in concert with the FBI on "No Fly" list issues. These

deliberations are reflected in such documents as SUSSMAN pages 28, 31-37, 44, 224-225 and 227-228, and 248-249. Moreover, certain documents reflect an internal set of deliberations regarding the criteria that should be used in deciding whether individuals should be added to the "No Fly" list (e.g., SUSSMAN pages 32, 35, 36, 43, 46, 117-119, 224-225, 227-228, and 248-249); or whether individuals should be removed from the "No Fly" list (e.g., SUSSMAN page 254); potential improvements in the methods used to administer the "No Fly" list (e.g., SUSSMAN pages 29, 43, 46, 224-225, 227-228, 232-233, 238, 240, 246, and 248); and changes in the manner in which the "No Fly" list is disseminated (e.g., SUSSMAN pages 146 and 157).

(52) Several of the responsive documents reflect drafts of responses to various inquiries in connection with the "No Fly" and "Selectee" lists, including to Congressional questions and correspondence (e.g., SUSSMAN pages 17-23), and discuss the purpose of the watch/No Fly/Selectee lists; the criteria for individuals to be added or removed from the list, and other aviation security measures being implemented by the FBI in order to address transportation safety.

(53) Disclosure of this internal dialogue would have a significant adverse impact on the give-and-take that is crucial to formulating policy. The material the FBI seeks to protect reflects the FBI's internal deliberative process and is being withheld in order to protect the ability of FBI SAs and support employees to provide candid feedback in the context of such deliberative processes, and engage in full, frank, and open intra-agency debate on these important issues, prior to final decisions being reached. The process by which possible law enforcement-related ideas are developed and critiqued is inherently deliberative. It is crucial to the effectiveness of such a process that FBI employees feel free to express their opinions without fear that their

opinions will be disclosed. Furthermore, exempting such documents from disclosure also protects against public confusion that might result from preliminary disclosure of opinions and information that do not, in fact, reflect the final views or policies of the FBI. The privilege is designed to protect not only documents but also the integrity of the deliberative process itself where the exposure of the process would result in harm. FBI employees would hesitate to offer their candid and conscientious opinions to superiors or coworkers and DOJ employees if they knew that their opinions of the moment might be made a matter of public record at some future date. As a result, these documents which are deliberative in nature have been appropriately withheld pursuant to Exemption (b)(5), the deliberative process privilege.

(54) Purely factual material was examined carefully to determine whether it could be segregated and released. However, here, the facts themselves reflect the deliberative process (e.g., discussions about individuals being stopped at airports who have similar names to the individuals on the list), and are so inextricably intertwined with the remaining material, that I have determined that the factual information is deliberative in and of itself and should therefore not be released. As a result, I have determined that all of the material that is deliberative in nature consists of preliminary drafts and/or internal dialogue amongst and between FBI SAs and FBI support employees and other federal government employees regarding the selection criteria and implementation of the "No Fly" list. Accordingly, this information has been properly withheld pursuant to Exemption (b)(5), the deliberative process privilege.

#### **Attorney-Client Privilege**

(55) Exemption (b)(5) has also been invoked to protect material covered by the attorney-client privilege. The attorney-client privilege is appropriately asserted when legal

advice of any kind is sought from a professional legal adviser in his or her capacity as such; the communications relating to that purpose are made in confidence by the client; and are at the client's insistence, permanently protected from disclosure by the client or by the legal advisor unless the attorney-client protection is waived. This privilege encompasses confidential communications made to the attorney not only by decision-making personnel but also by lower-echelon employees who possess information relevant to an attorney's advice-rendering function. In addition, the attorney-client privilege covers the two-way communications between a client and an attorney, which relates to legal advice.

(56) The FBI has withheld internal e-mails and related documents pursuant to the attorney-client privilege which reflect communications among FBI OGC attorneys and FBI SAs, and reflect attorney advice, opinions, and recommendations based on client-supplied information.<sup>20</sup> Although the attorney-client privilege fundamentally applies to facts divulged by a client to his or her attorney, this privilege also encompasses any opinions given by an attorney to his or her client based on those facts, as well as communications between attorneys which reflect client-supplied information. Disclosure of the candid exchanges between FBI attorneys and FBI SAs would have a repressive and stifling effect on the interaction between these individuals, and would vitiate the value of these attorney-client privileged communications. The attorney-client privilege has therefore been asserted to protect the confidential internal communications between FBI attorneys and FBI SAs and support employees concerning legal

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<sup>20</sup> Specifically, the FBI is asserting Exemption (b)(5) with respect to attorney-client privileged communications included in the following documents: SUSSMAN pages 24,31-37, 43-44, 77-78, 80-82, 162-164, 172-174, 176, 199-200, 203, 215, 217, 246, 248-249, 251-252, 254, and 301.

strategies and deliberations related to the administration and enforcement of the "No Fly" and "Selectee" lists.

(57) Disclosure of these communications would breach the confidential relationship between these individuals and repress and stifle such critical communications in the future. For these reasons, the FBI has asserted Exemption 5, the attorney-client privilege, to protect the confidential communications among FBI attorneys and FBI SAs and support employees.

**Attorney-Work Product Privilege**

(58) The attorney-work product privilege protects from disclosure, documents and other memoranda prepared by an attorney in contemplation of litigation. The purpose of this privilege is to protect the adversarial trial process by insulating the attorney's mental impressions and litigation strategy from scrutiny. The FBI has withheld one sentence and a portion of another sentence in the first e-mail, dated April 23, 2003, which appears on Sussman p. 301, under the attorney-work product privilege. This e-mail is from an OGC attorney to other FBI attorneys, agents, and support personnel notifying them of the filing of the Gordon et al. v. FBI et al., No. 03-1779 (N.D. Cal.) lawsuit. The information withheld in this e-mail consists of a main DOJ attorney's characterization of the pending litigation and an OGC attorney's instructions to FBI personnel with regard to responding to the then newly filed complaint. The disclosure of this information would reveal the preliminary mental impressions of a DOJ attorney regarding the lawsuit and the initial steps employed by agency counsel in preparation for defending against the lawsuit. Accordingly, the FBI has properly withheld this information pursuant to Exemption 5, the attorney-work product privilege.

**FOIA EXEMPTION (b)(6)**

## **CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY**

(59) 5 U.S.C. § 552 (b)(6) exempts from disclosure "all information in government records about individuals in personnel and medical files and similar files when disclosure of such information would constitute a clearly unwarranted invasion of personal privacy."

(60) When withholding information pursuant to this exemption, the FBI is required to balance the privacy interests of the individuals mentioned in these records against any public interest in disclosure. In asserting this exemption, each item of information was examined to determine the degree and nature of the privacy interest of every individual whose name and/or identifying data appears in these records. The public interest in disclosure of this information is determined by whether the information in question would inform plaintiff and the general public about the FBI's performance of its mission to enforce federal criminal and national security statutes and/or how the FBI actually conducts its internal operations and investigations. In each instance where information was withheld, it was determined that individual privacy interests were not outweighed by any public interest in disclosure. To reveal the names and/or identifying data of third party individuals in the context of these records could reasonably be expected to cause embarrassment and humiliation, and thus constitute an unwarranted invasion of personal privacy. Every effort has been made to release all reasonably segregable information contained in these records without invading the privacy interests of third parties.

### **(b)(6)-1      Names and/or Identifying Information Concerning FBI Special Agents and Support Employees**

(61) Exemption (b)(6)-1 has been asserted to protect the names and identifying information concerning FBI SAs involved in establishing the law enforcement response

requirements for the "No Fly" list.<sup>21</sup> The SAs assigned to this matter did not choose their assignments. Given the intense media scrutiny of the "No Fly" list, publicity (adverse or otherwise) regarding their role in the FBI's law enforcement response requirements may seriously impede their effectiveness in continuing to develop the law enforcement response requirements for the "No Fly" list, as well as any other investigation they may become involved with at a later date. Furthermore, given the intense media scrutiny surrounding these issues, disclosure of their identities in connection with the "No Fly" list could subject the FBI SAs to unauthorized inquiries by members of the media and the general public who seek access to information regarding the criteria and procedures used when determining whether an individual poses a threat to civil aviation.

(62) FBI SAs conduct official inquiries into violations of various criminal statutes and national security laws. They come into contact with all strata of society, conducting searches and making arrests, all of which result in reasonable but nonetheless serious disturbances to individuals and their lives. It is possible for an individual targeted by such law enforcement actions to carry a grudge which may last for years, and to seek revenge on the agents and other federal employees involved in the investigation. The publicity associated with the release of an agent's identity in connection with the "No Fly" list could trigger hostility toward a particular SA. Accordingly, the FBI has determined that the SAs whose names and information appear in

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<sup>21</sup> See SUSSMAN pages 1, 4-11, 15-16, 24, 28-53, 61-66, 71-82, 84, 90, 98, 104-105, 116-124, 128-148, 152, 155-179, 181-184, 195-215, 218, 220-222, 224-228, 231-238, 240, 244, 246-250, 252-271, 273-275, 277, 280-281, 284, 286-292, 301, and 307-309. In addition to invoking Exemption (b)(6)-1 to protect names and/or identifying information concerning FBI Special Agents and support personnel, the FBI is also asserting Exemption (b)(7)(C)-1 to protect this information. (See ¶¶ 77-81, *infra*.)



these documents maintain a substantial privacy interest in not having their identities disclosed.

(63) The FBI next examined the records at issue to determine whether there was any public interest that outweighed the substantial privacy interests of the FBI SAs referenced in the responsive records. The FBI could not identify any discernible public interest. In particular, the FBI could not determine how the disclosure of the names and identifying information of these FBI SAs would demonstrate how the FBI develops and implements law enforcement response requirements in connection with the "No Fly" list. Accordingly, the FBI determined that the disclosure of the names of FBI SAs would shed no light on the FBI's performance of its statutory duties. Thus, the FBI determined that the SAs' privacy interests outweighed any public interest in disclosure, and that disclosure of the names and identifying information of the FBI SAs would constitute an unwarranted invasion of their personal privacy.

(64) In addition, the FBI asserted Exemption (b)(6)-1 to protect the names, telephone numbers and facsimile numbers of FBI support employees. Specifically, the FBI protected the identities of FBI attorneys that provided legal advice regarding "No Fly" list law enforcement response requirements, as well as secretarial staff and other FBI support employees whose names appear in the documents responsive to plaintiff's request. In this case, FBI support employees have access to information regarding the selection criteria used in security screening processes, information revealing specific details of aviation security measures, and the FBI's law enforcement response requirements. These individuals, like FBI SAs, have little choice in their assignments. Given the intense media scrutiny of the "No Fly" list, disclosure of their identities could make them targets of harassing inquiries for unauthorized access to information. Accordingly, the FBI has determined that the FBI support employees maintain a substantial

privacy interest in not having their identities and related information disclosed.

(65) The FBI next balanced the privacy interests of the FBI SAs and FBI support employees against the public interest in disclosure. The FBI determined that the disclosure of the names of FBI support personnel would not demonstrate how the FBI develops the law enforcement response requirements for the "No Fly" list. Disclosure of the names and related identifying information of FBI support employees in the documents at issue here would shed no light of the performance of the FBI's statutory duties. Accordingly, after balancing the competing interests, the FBI concluded that no public interest would be served by disclosing the identities of these FBI support employees to the general public. The disclosure of the names and related identifying information of the FBI support personnel would constitute an unwarranted invasion of their personal privacy; and therefore, the FBI has properly asserted Exemption (b)(6)-1, in conjunction with Exemption (b)(7)(C)-1 to withhold this information.

**(b)(6)-2**      **Names and/or Identifying Information of  
Third Parties of Investigative Interest**

(66) Exemption (b)(6)-2, in conjunction with Exemption (b)(7)(C)-1, has been asserted to protect the names, identities, addresses, and information concerning third parties selected during security screening processes as potential matches for names that appear on the "No Fly" list.<sup>22</sup> Furthermore, the FBI protected the names and identifying information of third parties whose names appeared on the "No Fly" list. All of these individuals were determined to be of investigative interest to the FBI. During the course of the FBI's development of the "No Fly" list law enforcement response, information concerning third-party individuals (including

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<sup>22</sup> See SUSSMAN pages 2-3, 18, 39-40, 50, 73-74, 84, 105, 136, 141, 155-156, 168, 171, 177-181, 195, 197, 206-207, 209, 248, 254-256, 264-265, 267, 273-282, and 284-286.

social security numbers, home addresses, passports, driver licenses, photographs, etc.) who were selected during security screening processes, and third-party individuals whose names appeared on the list were provided to the FBI. Disclosure of the identities of these third parties of investigative interest would constitute an unwarranted invasion of their personal privacy because being mentioned in connection with the "No Fly" list as a potential threat to civil aviation carries a strong negative connotation. Disclosure of the identities of these individuals could subject them to harassment, embarrassment and undue public attention. Accordingly, the FBI has determined that these individuals maintain a substantial privacy interest in not having their identities disclosed.

(67) After identifying the substantial privacy interests of these third parties, the FBI balanced their privacy interests against the public interest in disclosure. The FBI determined that the disclosure of the names of these third parties would shed no light on the performance of the FBI's statutory duties. Accordingly, the FBI could not identify any discernible public interest in the disclosure. Thus, the FBI has properly withheld this information pursuant to Exemption (b)(6)-2, in conjunction with Exemption (b)(7)(C)-2.

**(b)(6)-3      Names and/or Identifying Information Concerning  
Non-FBI Federal Government Employees**

(68) The FBI asserted Exemption (b)(6)-3, in conjunction with Exemption (b)(7)(C)-3, to protect the names of and/or identifying information of non-FBI federal government employees, including their e-mail addresses and business telephone numbers.<sup>23</sup> Disclosure of the identities

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<sup>23</sup> See SUSSMAN pages 4-5, 24, 29, 37-39, 42-43, 45, 49-50, 52-53, 61-62, 64, 71, 73, 84, 90, 116, 121, 128-131, 135, 137-138, 140, 143, 148, 152, 156, 158-162, 166-173, 181, 183, 195-196, 198-203, 205-213, 224, 227, 238, 240, 244, 252, 260-264, 266-267, 270-271, and 291-292.

of these individuals could subject them to unauthorized inquiries and harassment, which could constitute an unwarranted invasion of their personal privacy. The rationale for protecting the names and identifying information related to non-FBI federal employees is the same as that for FBI employees. (See ¶¶ 61-65, supra). Balanced against the legitimate privacy interests of these third parties, is the lack of any bona fide public interest in the disclosure. Accordingly, the FBI has determined that the disclosure of information concerning these federal government employees would constitute invasion of their personal privacy. Thus, the FBI has properly withheld this information pursuant to Exemption (b)(6)-3, in conjunction with Exemption (b)(7)(C)-3.

**(b)(6)-4**      **Names and/or Identifying Information of  
Non-Federal Law Enforcement Employees**

(69) Exemption (b)(6)-4, in conjunction with Exemption (b)(7)(C)-4, has been asserted to withhold the names of local, county or state law enforcement officers.<sup>24</sup> The rationale for protecting the identities of local law enforcement personnel is the same as the rationale for protecting the identities of FBI SAs found at ¶¶ 61-65, supra. These law enforcement officers have a substantial privacy interest in their names and identifying information. There is no public interest in releasing the names of local law enforcement personnel because the disclosure of their identities would not in any way reveal how the FBI performs its statutory duties. Accordingly, the FBI determined that the privacy interests of the local law enforcement officers outweigh any public interest in disclosure. Thus, the FBI has properly protected their identities pursuant to Exemption (b)(6)-4, in conjunction with Exemption (b)(7)(C)-4.

**(b)(6)-5**      **Names and/or Identifying Information  
of Foreign Government Personnel**

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<sup>24</sup> See SUSSMAN pages 4, 197, 253, and 266-267.

(70) Exemption (b)(6)-5, in conjunction with Exemption (b)(7)(C)-5, has been asserted to protect the names, official titles/ranks, and direct telephone numbers of foreign government employees.<sup>25</sup> The foreign government employees, acting in their official capacities, furnished detailed information concerning security screening processes and aviation security measures to U.S. law enforcement agencies charged with ensuring the safety of the flying public. Disclosure of the identities of these third parties could subject them to unofficial inquiries not anticipated by their contact with the FBI. Disclosure of the identities of these foreign government employees could have a chilling effect on the FBI's relationships with these foreign governments who have cooperated with the FBI and other law enforcement agencies to develop uniform "No Fly" list procedures. Moreover, disclosure of their identities could also have a chilling effect on the FBI's ability to secure the cooperation of other foreign governments in future investigations. Accordingly, the FBI determined that the foreign government employees maintain a substantial privacy interest in not having their identities disclosed. Furthermore, the disclosure of their identities would not shed any light on the FBI's performance of its statutory duties. Accordingly, the FBI determined that the disclosure of this information would constitute an unwarranted invasion of their personal privacy. Thus, the FBI has properly withheld their identities pursuant to Exemption (b)(6)-5, in conjunction with Exemption (b)(7)(C)-5.

**(b)(6)-6      Names and/or Identifying Information Concerning  
Third Parties Merely Mentioned**

(71) Exemption (b)(6)-6, in conjunction with Exemption (b)(7)(C)-6, has been asserted to withhold the names and identifying information of third parties merely mentioned in

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<sup>25</sup> See SUSSMAN pages 38-42, 49-50, 71, 124, 152, 154, 167-171, 183, 206-212, 214, 266-272.

documents, which represent the on-going dialogue among FBI, TSA, FAA and local police departments regarding the FBI's law enforcement response requirements in connection with the security screening processes and aviation security measures implemented after September 11, 2001.<sup>26</sup> Information concerning third-party individuals who are not of investigative interest, but rather who are merely mentioned, appears in the responsive records. Disclosure of the names of these third parties could cause unsolicited and unnecessary attention to be focused on them and disclosure may embarrass these individuals. Disclosure of the identities of these third parties in connection with the "No Fly" list (as a potential threat to civil aviation) may cast them in an unfavorable or negative light to the public. Thus, the FBI determined that the third party individuals merely mentioned in the responsive records maintain strong privacy interests in not having their identities and personal information disclosed. After identifying the substantial privacy interests of the third parties merely mentioned, the FBI balanced those interests against the public interest in disclosure. The FBI could identify no discernable interest in the disclosure because the disclosure of the names would not shed any light on the FBI's performance of its statutory duties. Accordingly, the FBI determined that the disclosure of the names and identifying information of the third parties merely mentioned in these records would constitute an unwarranted invasion of personal privacy. Thus, the FBI properly protected the names and identifying information of third parties merely mentioned pursuant to Exemption (b)(6)-6, in conjunction with Exemption (b)(7)(C)-6.

**EXEMPTION 7**  
**EXEMPTION 7 THRESHOLD**

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<sup>26</sup> See SUSSMAN pages 71-74, 179-180, 223, 264-265, 273-276, 284-285, and 314-315.

(72) Exemption 7 of the FOIA protects from mandatory disclosure records or information compiled for law enforcement purposes, but only to the extent that disclosure could reasonably be expected to cause one of the harms enumerated in the subpart of the exemption. See 5 U.S.C. § 552(b)(7). Before an agency can invoke any of the harms enumerated in Exemption 7, it must first demonstrate that the records or information at issue were compiled for law enforcement purposes. Under the FOIA, the law to be enforced within the meaning of the term "law enforcement purposes" includes both civil and criminal statutes as well as those statutes authorizing administrative or regulatory proceedings. Most significantly, in the post-9/11 world, Exemption 7 extends into the realms of national security and homeland security-related government activities. Clearly, the FBI's mission of preventing terrorist attacks within the United States and reducing the vulnerability of the United States to terrorism, satisfy the threshold of Exemption 7.

(73) Law enforcement agencies such as the FBI must demonstrate that the records at issue are related to the enforcement of federal laws and that the enforcement activity is within the law enforcement duty of that agency. The FBI has analyzed the specific purpose of each individual record to determine whether there is a "rational nexus" between the FBI's law enforcement duties and the documents for which Exemption 7 is claimed. Taken as a whole, the documents at issue are a collection of documents which represent internal dialogue, both legal and operational, following the events of 9/11. This dialogue involved the exchange of ideas, policies, and procedures regarding the creation, implementation and maintenance of the "No Fly" and "Selectee" lists in the context of the FBI's broader role of preventing and deterring terrorism and other acts of criminal violence against citizens of the United States. The documents further

reflect the FBI's post 9/11 proactive law enforcement role in protecting the flying public. This material also contains the details of the framework and parameters established by the FBI, TSA, and other federal agencies to be used to identify individuals who may be detained by airlines because they pose a threat to the safety of the flying public. Thus, there is no doubt that these guidelines fall within the law enforcement duties of the FBI.

(74) Because terrorists used airplanes as tools to carry out their attack, part of the FBI's new mission is to identify individuals "who pose a risk to air piracy or terrorism or a threat to airline or passenger safety" pursuant to 49 U.S.C. § 114(h)(2) (2002). The FBI's duty is to liaison with the Transportation Security Administration ("TSA") and other federal law enforcement agencies to notify the appropriate state and local law enforcement officials, and airport and airline security officers of the individuals known to pose a threat to airline or passenger safety in order to prevent such individuals from boarding an aircraft. Such identification is part of the FBI's mandate to "protect passengers and property on an aircraft . . . against an act of criminal violence or aircraft piracy." *Id.* The documents at issue here, as a whole, relate to the FBI's mandate of establishing procedures to notify the appropriate law enforcement officials and airport or airline security officers of the identity of individuals known to pose a threat to civil aviation. In this case, the harms that could reasonably be expected to result from disclosure of this information concern an unwarranted invasion of the personal privacy of certain individuals, revealing the identities of confidential sources and the information that they provided, and revealing sensitive law enforcement techniques and procedures.

**FOIA EXEMPTION (b)(7)(C)**  
**UNWARRANTED INVASION OF PERSONAL PRIVACY**



(75) 5 U.S.C. § 552(b)(7)(C) exempts 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 . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy."

(76) When withholding information pursuant to this exemption, the FBI is required to balance the privacy interests of the individuals mentioned in these records against any public interest in disclosure. In asserting this exemption, each item of information was examined to determine the degree and nature of the privacy interest of every individual whose name and/or identifying data appears in these records. The public interest in disclosure of this information is determined by whether the information in question would inform plaintiff and the general public about the FBI's performance of its mission to enforce federal criminal and national security statutes and/or how the FBI actually conducts its internal operations and investigations. In each instance where information was withheld, it was determined that individual privacy interests were not outweighed by any public interest in disclosure. To reveal the names and/or identifying data of third party individuals in the context of these records could reasonably be expected to cause embarrassment and undue attention, and thus constitute an unwarranted invasion of personal privacy. Every effort has been made to release all reasonably segregable information contained in these records without infringing upon the privacy interests of third parties.

**(b)(7)(C)-1    Names and/or Identifying Information Concerning FBI Special Agents and Support Employees and Non-FBI Federal Employees**

(77) Exemption (b)(7)(C)-1, in conjunction with Exemption (b)(6)-1, has been asserted to protect the names and identifying data of FBI SAs involved in establishing the law

enforcement response requirements for the "No Fly" list.<sup>27</sup> The SAs assigned to this matter did not choose their assignments. Given the intense media scrutiny of the "No Fly" list, publicity (adverse or otherwise) regarding their role in the FBI's law enforcement response requirements may seriously impede their effectiveness in continuing to develop the law enforcement response requirements for the "No Fly" list, as well as any other investigation they may become involved with at a later date. Furthermore, given the intense media scrutiny surrounding these issues, disclosure of their identities in connection with the "No Fly" list could subject the FBI SAs to unauthorized inquiries by members of the media and the general public who seek access to information regarding the criteria and procedures used when determining whether an individual poses a threat to civil aviation.

(78) FBI SAs conduct official inquiries into violations of various criminal statutes and national security laws. They come into contact with all strata of society, conducting searches and making arrests, all of which result in reasonable but nonetheless serious disturbances to individuals and their lives. It is possible for an individual targeted by such law enforcement actions to carry a grudge which may last for years, and to seek revenge on the agents and other federal employees involved in the investigation. The publicity associated with the release of an agent's identity in connection with the "No Fly" list could trigger hostility toward a particular SA. Accordingly, the FBI determined that the SAs whose names and information appear in these

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<sup>27</sup> See SUSSMAN pages 1, 4-11, 15-16, 24, 28-53, 61-66, 71-82, 84, 90, 98, 104-105, 116-124, 128-148, 152, 155-179, 181-184, 195-215, 218, 220-222, 224-228, 231-238, 240, 244, 246-250, 252-271, 273-275, 277, 280-281, 284, 286-292, 301, and 307-309. In addition to invoking Exemption (b)(7)(C)-1 to protect names and/or identifying information concerning FBI Special Agents and support personnel, the FBI is also asserting Exemption (b)(6)-1 to protect this information. (See ¶¶ 61-65, supra.)

documents maintain a substantial privacy interest in not having their identities disclosed.

(79) The FBI next examined the records at issue to determine whether there was any public interest that outweighed the substantial privacy interests of the FBI SAs referenced in the responsive records. The FBI could not identify any discernible public interest. In particular, the FBI could not determine how the disclosure of the names and identifying information of the FBI SAs would demonstrate how the FBI develops and implements law enforcement response requirements in connection with the "No Fly" list. Accordingly, the FBI determined that the disclosure of the names of FBI SAs would shed no light on the FBI's performance of its statutory duties. Thus, the FBI determined that the SAs' privacy interests outweighed any public interest in disclosure, and that disclosure of the names and identifying information of the FBI SAs would constitute an unwarranted invasion of their personal privacy.

(80) In addition, the FBI asserted Exemption (b)(7)(C)-1, in conjunction with Exemption (b)(6)-1, to protect the names, telephone numbers and facsimile numbers of FBI support employees. Specifically, the FBI protected the identities of FBI attorneys that provided legal advice regarding "No Fly" list law enforcement response requirements, as well as secretarial staff and other FBI support employees whose names appear in the documents responsive to plaintiff's request. In this case, FBI support employees had access to information regarding the selection criteria used in security screening processes, information revealing specific details of aviation security measures, and the FBI's law enforcement response requirements. These individuals, like FBI SAs, have little choice in their assignments. Given the intense media scrutiny of the "No Fly" list, disclosure of their identities could make them targets of harassing inquiries for unauthorized access to information. Accordingly, the FBI has determined that FBI

support employees maintain a substantial privacy interest in not having their identities and related information disclosed.

(81) The FBI next balanced the privacy interests of the FBI support employees against the public interest in disclosure. The FBI determined that the disclosure of the names of FBI support personnel would not demonstrate how the FBI develops the law enforcement response requirements for the "No Fly" list. Disclosure of the names and related identifying information of FBI support employees in the documents at issue here would shed no light of the performance of the FBI's statutory duties. Accordingly, after balancing the competing interests, the FBI concluded that the privacy interests of the FBI support employees named in these documents outweighed any public interest in disclosure. The disclosure of the names and identifying information concerning FBI support personnel would constitute an unwarranted invasion of their personal privacy; therefore, the FBI has properly asserted Exemption (b)(7)(C)-1, in conjunction with Exemption (b)(6)-1, to withhold this information.

**(b)(7)(C)-2 Names and/or Identifying Information of  
Third Parties of Investigative Interest**

(82) Exemption (b)(7)(C)-2, in conjunction with Exemption (b)(6)-2, has been asserted to protect the names, identities, addresses, and information concerning third parties selected during security screening processes as potential matches for names that appear on the "No Fly" list.<sup>28</sup> Furthermore, the FBI protected the names and identifying information of third parties whose names appear on the "No Fly" list. These individuals have been determined to be of investigative interest to the FBI. During the course of the FBI's development of the "No Fly" list

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<sup>28</sup> See SUSSMAN pages 2-3, 18, 39-40, 50, 73-74, 84, 105, 136, 141, 155-156, 168, 171, 177-181, 195, 197, 206-207, 209, 248, 254-256, 264-265, 267, 273-282, and 284-286.

law enforcement response, information concerning third-party individuals (including social security numbers, home addresses, passports, driver licenses, photographs, etc.) who were selected during security screening processes, and third-party individuals whose names appear on the list was provided to the FBI. Disclosure of the identities of these third parties of investigative interest would constitute an unwarranted invasion of their personal privacy because being mentioned in connection with the "No Fly" list as a potential threat to civil aviation carries a strong negative connotation. Disclosure of the identities of these individuals could subject them to harassment, embarrassment and undue public attention. Accordingly, the FBI has determined that these individuals maintain a substantial privacy interest in not having their identities disclosed.

(83) After identifying the substantial privacy interests of these third parties, the FBI then balanced their privacy interests against the public interest in disclosure. The FBI determined that the disclosure of the names of these third parties would shed no light on the performance of the FBI's statutory duties. Accordingly, the FBI could not identify any discernible public interest in the disclosure. Thus, the FBI has properly withheld this information pursuant to Exemption (b)(7)(C)-2, in conjunction with Exemption (b)(6)-2.

**(b)(7)(C)-3    Names and/or Identifying Information Concerning  
Non-FBI Federal Government Employees**

(84) The FBI asserted Exemption (b)(7)(C)-3, in conjunction with Exemption (b)(6)-3, to protect the names of and/or identifying information pertaining to non-FBI federal government employees, including their e-mail addresses and business telephone numbers.<sup>29</sup> Disclosure of the

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<sup>29</sup> See SUSSMAN pages 4-5, 24, 29, 37-39, 42-43, 45, 49-50, 52-53, 61-62, 64, 71, 73, 84, 90, 116, 121, 128-131, 135, 137-138, 140, 143, 148, 152, 156, 158-162, 166-173, 181, 183,

identities of these individuals could subject them to unauthorized inquiries and harassment which could constitute an unwarranted invasion of their personal privacy. The rationale for protecting non-FBI federal employees is the same as that for FBI employees. (See ¶¶ 61-65 & 77-81, supra.) These federal employees have a strong privacy interest in this information. Balanced against the legitimate privacy interests of these third parties, is the lack of any bona fide public interest in the disclosure because release of their names and identifying information will not shed light on the operations and activities of the FBI. Accordingly, the FBI has determined that the disclosure of information concerning these federal government employees would constitute invasion of their personal privacy; therefore, the FBI properly withheld this information pursuant to Exemption (b)(7)(C)-3, in conjunction with Exemption (b)(6)-3.

**(b)(7)(C)-4 Names and/or Identifying Information of Non-Federal Law Enforcement Employees**

(85) Exemption (b)(7)(C)-4, in conjunction with Exemption (b)(6)-4, was asserted to withhold the names of local, county or state law enforcement officers.<sup>30</sup> The rationale for protecting the identities of local law enforcement personnel is the same as the rationale for protecting the identities of FBI SAs found at ¶¶ 61-65 & 77-81, supra. Local, county and state law enforcement personnel have a substantial privacy interest in their names and identifying information. There is no public interest in releasing the names of local law enforcement personnel because the disclosure of their identities would not in any way reveal how the FBI performs its statutory duties. Accordingly, the FBI determined that the privacy interests of the

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195-196, 198-203, 205-213, 224, 227, 238, 240, 244, 252, 260-264, 266-267, 270-271, and 291-292.

<sup>30</sup> See SUSSMAN pages 4, 197, 253, and 266-267.

local law enforcement officers outweigh any public interest in disclosure. Thus, the FBI has properly protected their identities pursuant to Exemption (b)(7)(C)-4, in conjunction with Exemption (b)(6)-4.

**(b)(7)(C)-5    Names and/or Identifying Information  
of Foreign Government Personnel**

(86) Exemption (b)(7)(C)-5, in conjunction with Exemption (b)(6)-5, has also been asserted to protect the names, official titles/ranks, and direct telephone numbers of foreign government employees.<sup>31</sup> The foreign government employees, acting in their official capacities, furnished detailed information concerning security screening processes and aviation security measures to the law enforcement agencies charged with ensuring the safety of the flying public. Disclosure of the identities of these third parties could subject them to unofficial inquiries not anticipated by their contact with the FBI. Disclosure of the identities of these foreign government employees could have a chilling effect on the FBI's relationships with these foreign governments who have cooperated with the FBI and the other law enforcement agencies to develop uniform "No Fly" list procedures. Moreover, disclosure of their identities could also have a chilling effect on the FBI's ability to secure the cooperation of other foreign governments in future investigations. Accordingly, the FBI determined that the foreign government employees maintain a substantial privacy interest in not having their identities disclosed because the disclosure of their identities would not shed any light on the FBI's performance of its statutory duties. Accordingly, the FBI determined that the disclosure would constitute an unwarranted invasion of their personal privacy. Thus, the FBI has properly withheld their identities pursuant

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<sup>31</sup> See SUSSMAN pages 38-42, 49-50, 71, 124, 152, 154, 167-171, 183, 206-212, 214, and 266-272.

to Exemption (b)(7)(C)-5, in conjunction with Exemption (b)(6)-5.

**(b)(7)(C)-6 Names and/or Identifying Information Concerning  
Third Parties Merely Mentioned**

(87) Exemption (b)(7)(C)-6, in conjunction with Exemption (b)(6)-6, has been asserted to withhold the names and identifying information of third parties merely mentioned in these documents, which represent the on-going dialogue among FBI, TSA, FAA and local police department regarding the FBI's law enforcement response requirements in connection with the security screening processes and aviation security measures implemented after September 11, 2001.<sup>32</sup> Information concerning third-party individuals who are not of investigative interest, but rather who are merely mentioned, are referenced in the responsive records. Disclosure of the names of these third parties could cause unsolicited and unnecessary attention to be focused on them and disclosure may embarrass these individuals. Furthermore, the disclosure of the identities of these third parties in connection with the "No Fly" list (as a potential threat to civil aviation) may cast them in an unfavorable or negative light to the public. Thus, the FBI determined that the third party individuals merely mentioned in the responsive records maintain a strong privacy interest in not having their identities and personal information disclosed. After identifying the substantial privacy interests of the third parties merely mentioned, the FBI balanced those interests against the public interest in disclosure. The FBI could identify no discernable interest in the disclosure because the disclosure of the names would not shed any light on the FBI's performance of its statutory duties. Accordingly, the FBI determined that the disclosure of the names and identifying information of the third parties merely mentioned would

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<sup>32</sup> See SUSSMAN pages 71-74, 179-180, 223, 264-265, 273-276, 284-285, and 314-315.



constitute an unwarranted invasion of personal privacy. Thus, the FBI has properly protected the names and identifying information of third parties merely mentioned pursuant to Exemption (b)(7)(C)-6, in conjunction with Exemption (b)(6)-6.

**FOIA EXEMPTION (b)(7)(D)**  
**CONFIDENTIAL SOURCE MATERIAL**

(88) 5 U.S.C. § 552(b)(7)(D) exempts 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 . . . could reasonably be expected to disclose the identity of a confidential source, including a state, local or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting lawful national security intelligence investigation, information furnished by a confidential source"

(89) Numerous confidential sources report to the FBI on a regular basis and are "informants" within the common meaning of the term. These sources provide information under a variety of circumstances, including either an express or an implied assurance of confidentiality. Releasing the information provided by these sources may likely reveal a confidential source's identity. The release of a source's identity would forever eliminate that source as a future means of obtaining information. In addition, when the identity of one source is revealed, that revelation has a chilling effect on the activities and cooperation of other sources. It is only with the understanding of complete confidentiality (whether express or implied) that the aid of such sources can be enlisted, and only through this confidence that these sources can be persuaded to

continue providing valuable assistance in the future. Other sources provide information under circumstances from which confidentiality can be implied.

(90) The FBI has asserted Exemption (b)(7)(D) to withhold information provided by foreign law enforcement entities under circumstances from which an assurance of confidentiality may be implied. During the course of the FBI's development of its law enforcement response requirements for the "No Fly" list, the FBI received information from certain foreign governments regarding internal criteria and procedures that were in place to determine whether an individual poses a threat to civil aviation, and certain related problems that had arisen in implementing the "No Fly" list. To breach the anonymity these agencies expect would sever the relationship that the FBI has with these foreign law enforcement entities. Further, if the FBI were to disclose this confidential information to the public, other foreign law enforcement agencies could refuse to cooperate and provide the FBI with essential information in the future. Due to the fact that the FBI relies on the close cooperation of foreign law enforcement entities, the natural consequence of any such disclosure would be the chilling of such relations. Accordingly, it is clear that the foreign law enforcement entities that provided valuable information to the FBI did so under circumstances from which an assurance of confidentiality may be implied.

**(b)(7)(D)-1 Names and/or Identifying Information of Foreign Governments  
(Implied Confidentiality)**

(91) The FBI has asserted Exemption (b)(7)(D) to withhold information provided to the FBI by three foreign law enforcement entities under circumstances from which an assurance of

confidentiality may be implied.<sup>33</sup> During the course of the FBI's development of its law enforcement response requirements for the "No Fly" list, the FBI received information from certain foreign governments regarding the internal practices and law enforcement techniques and procedures employed by these governments in order to ensure the safety of aviation transportation. Specifically, this information included the criteria and procedures that it had in place to determine whether an individual poses a threat to civil aviation. Disclosure of this information would enable identification of the foreign governments involved, which would discourage further cooperation related to international counter-terrorism efforts. Furthermore, the disclosure would have a chilling effect on the FBI's relationship with other foreign law enforcement agencies which have provided information to the FBI. Accordingly, the FBI has properly withheld information provided by the foreign law enforcement agencies pursuant to Exemption (b)(7)(D)-1.

**FOIA EXEMPTION (b)(7)(E)**  
**LAW ENFORCEMENT INVESTIGATIVE TECHNIQUES AND PROCEDURES**

(92) 5 U.S.C. § 552 (b)(7)(E) affords protection to all "law enforcement records which 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." Homeland security-related information, insofar as it meets the law enforcement threshold requirements for all of Exemption 7, qualifies for protection under Exemption 7(E) as highly sensitive information to be shielded from disclosure, if its disclosure would reveal law enforcement techniques and

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<sup>33</sup> See SUSSMAN pages 38-42, 50, 51, 53, 141, 148, 152-154, 166-171, 205-214, 220, 234, 239, 266-269, 271-272, and 286.

could reasonably be expected to risk circumvention of the law. In order for this exemption to apply, the use of the technique or procedure at issue must not be well known to the public.

**(b)(7)(E)-1: Selection Criteria for No-Fly and Selectee Lists**

(93) The FBI has asserted Exemption (b)(7)(E), in conjunction with Exemption (b)(2)-4, to protect documents<sup>34</sup> which provide (A) guidance, directions and instructions to federal and local law enforcement agencies when dealing with individuals whose names may appear on the "No Fly" list; and (B) documents which describe the criteria and procedures used in determining whether an individual poses a threat to aviation because disclosure could reasonably be expected to risk circumvention of law.

**Documents which Provide Guidance, Directions and Instructions to Law Enforcement Officials**

(94) In this case, the FBI has protected documents which provide step-by-step instructions (including specific details of aviation security measures) to federal, state and local law enforcement officials who are charged with detaining individuals whose names may appear on the "No Fly" or "Selectee" lists. Several of the responsive documents detail the circumstances under which an individual may be detained. For example, the documents provide points of contact for law enforcement officials (including the telephone and pager numbers of critical law enforcement personnel) when they identify an individual whose name may appear on the "No Fly" list. The documents reflect that the step-by-step instructions are disseminated and used by various law enforcement agencies at the federal, state and local levels which are charged with

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<sup>34</sup> See SUSSMAN pages 1, 4, 14-23, 28-30, 33, 37-44, 46-52, 61-64, 67-70, 75-76, 84-90, 96-98, 104-105, 116-132, 134-139, 141-148, 152, 155-157, 159, 161-167, 169-170, 173-174, 181-183, 195-198, 202-206, 208-209, 211-213, 221, 223-228, 231-240, 244-249, 252, 254, 256, 260-266, 268-272, and 287-289.

protecting the safety of the flying public. Disclosure of these detailed instructions to the general public, which represent extremely sensitive law enforcement information, would gravely undermine the efforts of the FBI, TSA and other agencies at the federal, state and local levels to enforce aviation security measures that have been implemented since September 11, 2001.

(95) The "No Fly" list and "Selectee" list together represent highly effective tools for law enforcement agencies charged with protecting the safety of the flying public. The disclosure of step-by-step law enforcement response directions and instructions would jeopardize the monumental efforts of the various federal, state and local law enforcement agencies tasked to administer, monitor and enforce the "No Fly" list. Release of the responsive documents could very likely provide criminals or terrorists with detailed aviation security directions and instructions. A terrorist could use these instructions as a guide to adjust their behavior to avoid detection by law enforcement authorities. The disclosure of the step-by-step law enforcement directions and instructions would only benefit those criminals and terrorists who seek to violate the law and avoid detection. As such, disclosure of the step-by-step instructions could reasonably be expected to risk circumvention of law. Accordingly, because disclosure of the step-by-step law enforcement response instructions could reasonably be expected to risk circumvention of law, the FBI has properly protected this information pursuant to Exemption (b)(7)(E)-1, in conjunction with Exemption (b)(2)-4.

**Documents Which Describe the Criteria and Procedures Used in Determining Whether an Individual Poses a Threat to Aviation**

(96) The FBI has asserted Exemption 7(E)-1, in conjunction with Exemption (b)(2)-4, to withhold documents which detail the selection criteria and procedures used in security

screening processes when identifying and determining whether an individual poses a threat to civil aviation (including the criteria and procedures used to determine when an individual should be added or removed from the "No Fly" list). The criteria and procedures used to determine whether an individual poses a threat to civil aviation are used by, and shared with, the various law enforcement agencies charged with protecting the safety of the flying public. Because the documents detail the specific criteria and procedures used to determine whether an individual poses a threat to civil aviation, the selection procedures are not known by the general public. First, disclosure of the criteria the FBI and the other agencies use to determine whether an individual poses a threat to civil aviation would have catastrophic consequences. Such a disclosure of "No Fly" list security screening procedures would provide criminals and terrorists with invaluable tools to evade detection. Criminals and terrorists could use this information to avoid detection by eschewing the very behavior the FBI and the other law enforcement agencies have determined pose a potentially deadly threat to civil aviation. Accordingly, because disclosure of the criteria and procedures used when determining whether an individual poses a threat to civil aviation could reasonably be expected to risk circumvention of law, the FBI has properly withheld this information pursuant to Exemption (b)(7)(E)-1, in conjunction with Exemption (b)(2)-4.

**(B)(7)(E)-2: Procedures and Methods Used to Disseminate the No Fly List**

(97) The FBI has asserted Exemption (b)(7)(E)-2, in conjunction with Exemption (b)(2)-5, to withhold information concerning the procedures and methods used to disseminate the "No Fly" and "Selectee" lists.<sup>35</sup> Disclosure of this information would enhance the likelihood of

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<sup>35</sup> See SUSSMAN pages 47-48, 63, 124, 148, 155, 161, and 214.

an unauthorized person obtaining access to the lists by providing non-public information concerning individuals or entities who have access to the lists. If terrorists or other individuals who pose a risk to aviation safety were able to target individuals or entities who have access to the list, they could attempt to gain access to these lists, and they could determine which of their operatives have been compromised, thereby enhancing the likelihood of circumventing aviation security measures and jeopardizing the safety of airline passengers. For these reasons, the FBI has properly withheld information concerning the procedures and methods used to disseminate the "No Fly" and "Selectee" lists pursuant to Exemption (b)(7)(E)-2, in conjunction with Exemption (b)(2)-5.

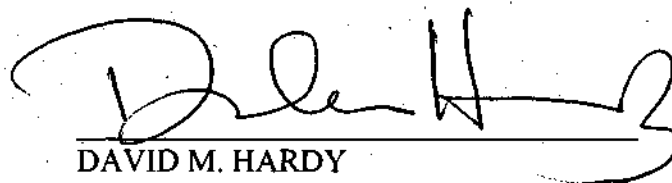
### CONCLUSION

(98) FBIHQ has released all segregable information from documents responsive to plaintiff's request. The FBI has carefully examined the records at issue in this case and released 247 pages with carefully tailored redactions pursuant to FOIA Exemptions 1, 2, 3, 5, 6, 7(C), 7(D), and 7(E), 5 U.S.C. § 552(b)(1), (b)(2), (b)(3), (b)(5), (b)(6), (b)(7)(C), (b)(7)(D), and (b)(7)(E). Furthermore, the FBI carefully examined the remaining pages withheld in full and in part, and determined that the information withheld from plaintiff in this case, if disclosed, could reasonably be expected to damage national security, impede the effectiveness of the FBI's internal law enforcement procedures, interfere with and damage attorney-client privileged communications, as well as chill internal intra-agency deliberations, cause unwarranted invasions of the privacy interests of numerous individuals, disclose the confidential sources and the information they have provided to the FBI, and disclose techniques and procedures for law enforcement investigations. The FBI has released all reasonably segregable, nonexempt

information in this case.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that **Exhibit A** attached hereto is a true and correct copy.

Executed this 9<sup>th</sup> day of May, 2005.

A handwritten signature in dark ink, appearing to read 'D. Hardy', written over a horizontal line.

DAVID M. HARDY  
Section Chief  
Record/Information Dissemination Section  
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Washington, D.C.