

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
ELECTRONIC PRIVACY INFORMATION)	
CENTER,)	
)	
Plaintiff,)	
)	
v.)	Civ. A. No. 04-CV-00944
)	
U.S. DEPARTMENT OF HOMELAND)	
SECURITY, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), at Federal Bureau of Investigation Headquarters (“FBIHQ”) in Washington, D.C. I have held this position since August 1, 2002. Prior to my joining the FBI, from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight over Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate, serving at various commands and routinely working FOIA matters. I am an attorney and have been licensed to practice law in the State of Texas since 1980.

(2) In my current capacity as Section Chief, I supervise the Freedom of Information/Privacy Acts (“FOIPA”) Litigation Support Unit (“LSU”). The statements contained

in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(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. Specifically, I am aware of the treatment which has been afforded the FOIA request of plaintiff, the Electronic Privacy Information Center (“EPIC”), for access to FBIHQ records pertaining to the FBI’s acquisition of passenger data from any airline since September 11, 2001, including records discussing the legal requirements governing FBI access and use of air passenger data.

(4) Following a search of the automated indices to the Central Records System (“CRS”) at FBIHQ, manual searches of logical FBIHQ Divisions likely to possess such records, and contacts with knowledgeable FBI personnel, FBIHQ ultimately identified twelve (12) pages of records responsive to plaintiff’s FOIA request. After reviewing and processing of these records, on September 23, 2004, FBIHQ released to plaintiff 12 of 12 pages of responsive material with redactions taken pursuant to FOIA Exemptions 2, 6, 7(C) and 7(D), 5 U.S.C. §§ 552 (b)(2), (b)(6), (b)(7)(C), and (b)(7)(D).

(5) In accordance with Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), this declaration, which is being submitted in support of defendant FBI’s motion for summary judgment, will provide the Court and plaintiff with an explanation for the procedures used in searching, reviewing, and processing the FBIHQ records responsive to plaintiff’s FOIA request, and provide justifications for the withholding of information from these records pursuant to FOIA Exemptions 2, 6, 7(C) and 7(D).

CORRESPONDENCE PERTAINING TO PLAINTIFF'S FOIA REQUEST

(6) By facsimile letter dated May 6, 2004, plaintiff submitted a FOIA request to FBIHQ for "any records concerning, involving or related to the FBI's acquisition of passenger data from any airline since September 11, 2001," including, but not limited to, "any records discussing the legal requirements governing Bureau access and use of air passenger data." Plaintiff also requested that this FOIA request be given expedited processing based on numerous media reports, Congressional inquiries and the fact that other federal agencies, including the National Aeronautics and Space Administration ("NASA"), had previously granted expedited processing for FOIA requests concerning the collection and use of airline passenger data by the federal government. Plaintiff also requested designation as a "representative of the news media" for purposes of any assessment of fees related to the processing of this FOIA request. Plaintiff enclosed a released page from its FOIA request to NASA concerning airline passenger data and two press releases from the United States Senate Committee on Governmental Affairs concerning the acquisition of airline passenger data by the Transportation Security Administration ("TSA"). **(See Exhibit A.)**

(7) By facsimile letter dated May 6, 2004, plaintiff advised FBIHQ of a correction in a portion of its request for expedited processing of its FOIA request in that plaintiff had actually submitted only three FOIA requests to TSA and not four FOIA requests as stated in its previous letter. Plaintiff also advised that all three of these FOIA requests to TSA have been granted expedited processing. **(See Exhibit B.)**

(8) By letter dated May 14, 2004, FBIHQ acknowledged receipt of plaintiff's FOIA request and advised plaintiff that it had been assigned FOIPA Request Number 0997633-000. **(See Exhibit C.)**

(9) By letter dated May 19, 2004, FBIHQ advised plaintiff that its request for expedited processing pursuant to 28 C.F.R. § 16.5(d)(ii), which provides for the expedition of requests involving “[a]n urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information,” had been denied. The FBI concluded that EPIC’s primary activity did not appear to be information dissemination, as required by Section 16.5(d)(ii), and EPIC had failed to demonstrate any particular urgency to inform the public about this subject matter beyond the public’s right to know about government activity generally. Plaintiff was therefore advised that its FOIA request had been placed in the regular processing queue and told of the procedure to appeal this decision to the U.S. Department of Justice (“DOJ”), Office of Information and Privacy (“OIP”). (**See Exhibit D.**)

(10) By letter dated June 21, 2004, FBIHQ advised plaintiff that its request for expedited processing pursuant to 28 C.F.R. § 16.5(d)(iv), which provides for the expedition of requests involving “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect the public’s confidence,” had been forwarded to the DOJ Office of Public Affairs (“OPA”) for further consideration. The FBI advised plaintiff that the Director of OPA had denied plaintiff’s request for expedited processing pursuant to Section 16.5(d)(iv), and had notified FBIHQ of its decision on June 16, 2004. Following OPA’s denial of plaintiff’s expedition request, the FBI advised EPIC that it reevaluated its May 6, 2004 request for expedition, and had decided to grant expedition pursuant to 28 C.F.R. § 16.5(d)(ii). As a result, plaintiff was informed that its FOIA request had been assigned and that FBIHQ would now be conducting a search for any potentially responsive records. (**See Exhibit E.**)

(11) By letter dated September 23, 2004, FBIHQ processed twelve (12) pages and released twelve (12) pages of records with redactions in response to its FOIA request. Plaintiff was advised that certain information in these records is exempt from disclosure pursuant to FOIA Exemptions 2, 6, 7(C) and 7(D). Plaintiff was also advised of the procedure to appeal any denial of information in these records to OIP. (See Exhibit F). Our administrative records show that plaintiff never appealed this release to OIP.

EXPLANATION OF THE CENTRAL RECORDS SYSTEM

(12) The Central Records System (“CRS”), which is utilized by the FBI to conduct searches in response to FOIA and Privacy Act requests, enables it to maintain all information which it has acquired in the course of fulfilling its mandated law enforcement responsibilities. The records maintained in the CRS consist of administrative, applicant, criminal, personnel, and other files compiled for law enforcement purposes. This system consists of a numerical sequence of files broken down according to subject matter. The subject matter of a file may relate to an individual, organization, company, publication, activity, or foreign intelligence matter. Certain records in the CRS are maintained at FBIHQ. Records that are pertinent to specific field offices of the FBI are maintained in those field offices.

(13) Access to the CRS is obtained through the General Indices, which are arranged in alphabetical order. The General Indices consist of index cards on various subject matters that are searched either manually or through the automated indices. The entries in the General Indices fall into two categories:

(a) A “main” entry -- A “main” entry, or “main” file, carries the name corresponding with a subject of a file contained in the CRS.

(b) A “reference” entry -- “Reference” entries, sometimes called “cross-references,” are generally only a mere mention or reference to an individual,

organization, or other subject matter, contained in a document located in another "main" file on a different subject matter.

(14) Access to the CRS files in FBI field offices is also obtained through the General Indices (automated and manual), which are likewise arranged in alphabetical order, and consist of an index on various subjects, including the names of individuals and organizations. Searches made in the General Indices to locate records concerning a particular subject, are made by searching the subject requested in the index. FBI field offices have automated indexing functions.

(15) On or about October 16, 1995, the Automated Case Support ("ACS") system was implemented for all Field Offices, Legal Attaches ("Legats"), and FBIHQ. Over 105 million records were converted from automated systems previously utilized by the FBI. ACS consists of three integrated, yet separately functional, automated applications that support case management functions for all FBI investigative and administrative cases:

(a) Investigative Case Management ("ICM") – ICM provides the ability to open, assign, and close investigative and administrative cases as well as set, assign, and track leads. The Office of Origin ("OO"), which sets leads for itself and other field offices, as needed, opens a case. The field offices that receive leads from the OO are referred to as Lead Offices ("LOs") – formerly known as Auxiliary Offices. When a case is opened, it is assigned a Universal Case File Number ("UCFN"), which is utilized by all FBI field offices, Legats, and FBIHQ that are conducting or assisting in the investigation. Using a fictitious file number "111-HQ-12345" as an example, an explanation of the UCFN is as follows: "111" indicates the classification for the specific type of investigation; "HQ" is the abbreviated form used for the OO of the investigation, which in this case is FBIHQ; and "12345" denotes the individual case file number

for the particular investigation.

(b) Electronic Case File (“ECF”) – ECF serves as the central electronic repository for the FBI’s official text-based documents. ECF supports the universal serial concept, in that only the creator of a document serializes it into a file. This provides a single-source entry of serials into the computerized ECF system. All original serials are maintained in the OO case file.

(c) Universal Index (“UNI”) – UNI continues the universal concepts of ACS by providing a complete subject/case index to all investigative and administrative cases. Only the OO is required to index; however, the LOs may index additional information as needed. UNI, an index of approximately 86.1 million records, functions to index names to cases, and to search names and cases for use in FBI investigations. Names of individuals or organizations are recorded with identifying applicable information such as date or place of birth, race, sex, locality, Social Security number, address, and/or date of event.

(16) The decision to index names other than subjects, suspects, and victims is a discretionary decision made by the FBI Special Agent (“SA”) assigned to work on the investigation, the Supervisory SA (“SSA”) in the field office conducting the investigation, and the SSA at FBIHQ. The FBI does not index every name in its files; rather, it indexes only that information considered to be pertinent, relevant, or essential for future retrieval. Without a “key” (index) to this enormous amount of data, information essential to ongoing investigations could not be readily retrieved. The FBI files would thus be merely archival in nature and could not be effectively used to serve the mandated mission of the FBI, which is to investigate violations of federal criminal statutes. Therefore, the General Indices to the CRS files are the means by which the FBI can determine what retrievable information, if any, the FBI may have in its CRS files on a particular subject matter or individual, i.e., “Airline Passenger Data.”

SEARCHES FOR RECORDS RESPONSIVE TO PLAINTIFF'S REQUEST

(17) In this case, the FBI has employed several mechanisms as part of its search efforts to identify documents responsive to plaintiffs' request. As a threshold matter, it is important to note that the generalized nature of the current FOIA request, *i.e.*, "Airline Passenger Data," does not lend itself readily or naturally to the searches that the FBI routinely conducts in response to FOIA requests seeking access to FBI investigative files. This is particularly the case where, as is the case here, the subject matter of the request is relatively recent, and certain of the potentially responsive records may not have yet been indexed to the FBI's Central Records System ("CRS"), particularly because they are part of the FBI's largest, most comprehensive investigation in its history – "PENTTBOMB" – designed to identify the killers behind the September 11, 2001 terrorist attacks, as well as to prevent further terrorist attacks. As a result, RIDS and other FBI personnel attempted to locate records responsive to plaintiff's FOIA request both through a standard search of records in the CRS as well as an individualized inquiry of the most logical offices at FBIHQ to have potentially responsive records. FBIHQ initiated a search of its automated general indices to the CRS at FBIHQ to identify any records pertaining to the FBI's acquisition of passenger data from any airline since September 11, 2001. The following phrases were searched through the CRS without success: "Airline Passenger Data," "Airline Passenger," and "Airline Data."

(18) In addition, an Electronic Communication ("EC") was sent to all FBIHQ Divisions to determine if they possessed any records responsive to plaintiff's FOIA request. Although the EC did not initially prompt any positive responses, after further follow-up with logical Divisions, documents were eventually obtained from the Cyber Division, the Counterterrorism Division, and the Office of the General Counsel.

(19) FBIHQ also undertook certain exceptional search methods to locate any relevant records. FBI personnel contacted the General Counsel at NASA telephonically in an attempt to locate the source of the information that the FBI had obtained "one year's data on 6000 CD's" discussed in the Electronic Mail ("e-mail") released by NASA to plaintiff and subsequently attached by plaintiff to its May 6, 2004 request. (**See Exhibit A.**) The contact with the NASA General Counsel and other knowledgeable NASA employees ultimately provided the identity of an FBI SA in the Minneapolis Field Office, who, when contacted by FBIHQ, confirmed that he took possession of passenger data from an airline during the initial investigative stages of the PENTTBOMB investigation, which had then been forwarded to FBIHQ.

(20) In response to further contacts with the Counterterrorism Division at FBIHQ, it was determined that several field offices had forwarded airline passenger data in the context of the PENTTBOMB investigation to FBIHQ. That forwarded airline passenger data was subsequently entered into computerized databases maintained by the Cyber Division at FBIHQ.

(21) Cyber Division at FBIHQ confirmed the existence and voluminous size of these databases which contain airline passenger data acquired in the context of the PENTTBOMB investigation. These databases, referred to by the Cyber Division as "Airline Data Sets," are further described in the following paragraphs.

DESCRIPTION OF THE RECORDS RESPONSIVE TO PLAINTIFF'S REQUEST

(22) Pursuant to plaintiff's request, Cyber Division personnel initiated a query of its computer systems to retrieve summaries and descriptions of the PENTTBOMB Airline Data Sets. The results of this query are the twelve (12) pages of records processed and released with

redactions to plaintiff on or about September 23, 2004.¹

(23) These records show that, during the initial phases of the PENTTBOM investigation, airline passenger data was acquired from several airlines, with their consent, soon after the terrorist attacks on September 11, 2001. This airline passenger data was provided by the airlines to the FBI with implied assurances of confidentiality. One exception is one set of airline passenger data which was acquired through a Federal Grand Jury subpoena.

(24) The majority of these Airline Data Sets were received at FBIHQ from on or about September 22, 2001, to on or about November 19, 2001; one airline's passenger data was received at FBIHQ on or about April 18, 2002. The data in these Airline Data Sets consists of two subsets of data: "Airline Manifests and Reservations" and "Airline Passenger Name Record." The time periods for the Airline Manifests and Reservations subset range from December 31, 2000, to September 30, 2001. The time periods for the Airline Passenger Name Record subset range from June 1, 2001, to September 11, 2001.

(25) The information contained in these Airline Data Sets is extremely voluminous. The Airline Manifests and Reservations subset contains 82.1 million records and the Airline Passenger Name Record subset contains 257.5 million records. I have been advised that the Airline Data Sets have been entered by the Cyber Division into a "Data Warehouse" and have been intertwined for analytical purposes with the information from several other PENTTBOMB Data Sets. The voluminous amount of information contained in the PENTTBOMB Data Sets in which the Airline Data Sets are stored in the Data Warehouse consists of more than one

¹ Query of the Cyber Division's computer systems for records concerning Airline Data Sets also produced, in some instances, descriptions of other data sets not related to airline passenger data and thus not responsive to plaintiff's FOIA request. Descriptions of non-responsive data sets were withheld from release and designated as "outside the scope" of plaintiff's FOIA request. See pages 9 and 10 of Exhibit G.

“terabyte” of data. In order to fully appreciate the enormity of this amount of data, I have been advised that one “byte” of data equals one character of information, such as one letter, one number, one empty space, or one formatting command, such as a line indentation, in a typed document. For example, the phrase “for example” consists of eleven (11) bytes of data, one for each letter and one for the empty space between the words. A double-spaced typed page such as this page consists of approximately three (3) “kilobytes” of data consisting of typed words, empty spaces and formatting, such as indentation of lines. A kilobyte of data equals 1,024 bytes of data; a “megabyte” of data equals 1,024 kilobytes of data; a “gigabyte” of data equals 1,024 megabytes of data; and a “terabyte” of data equals 1,024 gigabytes of data.

(26) The Cyber Division has also informed me that since the Airline Data Sets have been intertwined with other PENTTBOMB Data Sets, the information contained in the Airline Data Sets cannot be segregated and extracted from the Data Warehouse in its original form. The only information which can be extracted concerning the Airline Data Sets are the records which were processed and released to plaintiff. These twelve (12) pages of records are referred to by the Cyber Division as “metadata,” i.e., data which describes and summarizes the Airline Data Sets.

**EXPLANATION OF THE FORMAT UTILIZED FOR THE
JUSTIFICATION OF DELETED MATERIAL**

(27) Attached as **Exhibit G** to this declaration is a copy of the twelve (12) pages of FBI documents released with redactions to plaintiff by letter dated September 23, 2004. Of the twelve (12) pages, three (3) pages were released in their entireties, and nine (9) pages were released with partial redaction of information. Each page of Exhibit G has been consecutively numbered on the bottom of the page beginning with “Airline Data-1” and ending with “Airline

Data-12.” In addition, each withholding of information at issue has a coded exemption next to it that details the nature of the information withheld pursuant to the provisions of the FOIA as well as a numerical designation which specifically identifies the exact nature of the withheld information. For example, on Page 2 of Exhibit G, Exemption (b)(7)(C)-1 is cited to protect information in several instances on the page, specifically the names of FBI Special Agents and Support Personnel. The “(b)(7)(C)” designation refers to FOIA Exemption 7(C) concerning Unwarranted Invasion of Personal Privacy. The numerical designation “1” following the (b)(7)(C) narrows the category of protected information from the main category to the more specific subcategory of “Names of FBI Special Agents and Support Personnel.” These coded categories are used to assist the Court and plaintiff in their review of the FBI’s withholding of information in these records.

(28) Every effort was made to provide plaintiff with all reasonably segregable portions of material. Any further description of the withheld information would identify the very material that the FBI is protecting, thus negating the purpose of the exemptions. A listing of the exemption categories and justifications for the withheld information are discussed below.

SUMMARY OF JUSTIFICATION CATEGORIES

(29) Listed below are the categories used to explain the FOIA exemptions asserted to withhold protected material.

Category (b)(2)

Internal Rules and Practices

(b)(2)-1

Internal FBI Business Telephone Numbers

Category (b)(6)

Clearly Unwarranted Invasion of Personal Privacy

(b)(6)-1

Names of FBI Special Agents and Support Personnel

(b)(6)-2 Business Telephone Numbers of FBI Special Agents

(b)(6)-3 Name of a Third Party Individual who Provided Information to the FBI

Category (b)(7)(C) Unwarranted Invasion of Personal Privacy

(b)(7)(C)-1 Names of FBI Special Agents and Support Personnel

(b)(7)(C)-2 Business Telephone Numbers of FBI Special Agents

(b)(7)(C)-3 Name of a Third Party Individual who Provided Information to the FBI

Category (b)(7)(D) Confidential Source Material

(b)(7)(D)-1 Name of an Individual who Provided Information to the FBI under an Implied Assurance of Confidentiality

(b)(7)(D)-2 Identities of Airlines which Provided Information to the FBI under an Implied Assurance of Confidentiality

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

(30) 5 U.S.C. § 552 (b)(2) exempts from disclosure information “related solely to the internal personnel rules and practices of an agency.” This exemption protects routine internal administrative matters and functions of the FBI which have no effect on the public at large. Disclosure of this information could impede the effectiveness of the FBI’s internal law enforcement procedures. In addition, Exemption 2 also protects internal personnel rules and practices of the FBI where disclosure may risk circumvention of the law.

(b)(2)-1 Internal FBI Business Telephone Numbers

(31) Exemption (b)(2)-1 has been asserted in conjunction with Exemption (b)(6)-2 and Exemption (b)(7)(C)-2 in two instances on Page 2 of Exhibit G to protect the business telephone numbers of two FBI SAs who were designated as the Points of Contact for information

concerning two of the data sets of airline passenger data.

(32) The business telephone numbers of these two FBI SAs relate directly to the internal practices of the FBI in that they are used on a daily basis by these employees during the performance of their official duties. Disclosure of the business telephone numbers of these SAs to the public could subject these individuals to harassing telephone calls which could disrupt their official business and thus impede their ability to conduct law enforcement and counter-terrorism investigations in a timely manner. Additionally, disclosure of these telephone numbers to the public could result in an inundation of telephone calls to these business telephones by an automatic computer dialer, which can be set to dial the same telephone numbers over and over again. Such an inundation of telephone calls to these internal FBI telephone numbers would render them useless to the FBI and would thus impede these SAs in the performance of their official law enforcement duties.

(33) Disclosure of routine internal administrative information such as the business telephone numbers of FBI SAs would not result in any benefit to the public at large and there is no legitimate public interest to be served in the disclosure of these telephone numbers. Accordingly, these two internal FBI telephone numbers have been exempted from disclosure pursuant to Exemption (b)(2)-1 in conjunction with Exemption (b)(6)-2 and Exemption (b)(7)(C)-2. Exemption (b)(2)-1 has been cited on page 2 of Exhibit G.

FOIA EXEMPTION (b)(6)
CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

(34) 5 U.S.C. § 552(b)(6) exempts from disclosure “personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.”

(35) In asserting this exemption, each piece of information was scrutinized to determine the nature and strength of the privacy interest of any individual whose name or business telephone number appears in these records. In withholding the information, the individual's privacy interest was balanced against the public's interest in disclosure. In making this analysis, public interest information was determined to be information which would shed light on the FBI's performance of its statutory duties. In each instance where information was withheld pursuant to Exemption (b)(6), it was determined that the individual's privacy rights outweighed the public interest in disclosure.

(b)(6)-1 Names of FBI Special Agents and Support Personnel

(36) Exemption (b)(6)-1 has been asserted in conjunction with Exemption (b)(7)(C)-1 to protect the names of FBI SAs who were responsible for conducting, supervising, and/or maintaining the investigative activities reported in this phase of the PENTTBOM investigation. Publicity, adverse or otherwise, regarding any particular investigation conducted by SAs may seriously impair their effectiveness in conducting future investigations. The privacy consideration also protects SAs from unnecessary, unofficial questioning as to the conduct of an investigation, whether or not they are currently employed by the FBI. FBI SAs conduct official inquiries into violations of various criminal statutes and counter-terrorism and national security cases. They come into contact with all strata of society and conduct searches and make arrests, both of which result in reasonable, but nonetheless serious disturbances in the lives of individuals. It is possible for a person targeted by such law enforcement action to carry a grudge which may last for years, and to seek revenge on the SAs involved in the investigation. The publicity associated with the release of the identity of a FBI Special Agent in connection with a particular investigation could trigger hostility towards the SA by such persons. Accordingly,

there is no legitimate public interest to be served in the disclosure of the names of the SAs in this phase of the PENTTBOMB counterterrorism investigation to the public.

(37) The names of FBI support personnel have also been withheld pursuant to Exemption (b)(6)-1 in conjunction with Exemption (b)(7)(C)-1. Support personnel are assigned to handle tasks relating to FBI investigations. These individuals are in positions to access information concerning official law enforcement, counter-terrorism and national security investigations. They could therefore become targets of harassing inquiries for unauthorized access to FBI investigations if their identities were released. Accordingly, there is no legitimate public interest to be served in releasing the names of these FBI support employees. Exemption (b)(7)(C)-1 has been cited on pages 2 and 3 of Exhibit G.

(b)(6)-2 Business Telephone Numbers of FBI Special Agents

(38) Exemption (b)(6)-2 has been asserted in conjunction with Exemption (b)(2)-1 and Exemption (b)(7)(C)-2 in two instances on Page 2 of Exhibit G to protect the business telephone numbers of two FBI SAs who were designated as the Points of Contact for information concerning two of the data sets of airline passenger data.

(39) As discussed in ¶¶ 32 and 33, supra, these business telephones are used by these FBI SAs in the performance of their official duties as federal law enforcement officers. Disclosure of these telephone numbers to the public could subject these individuals to harassing telephone calls that could disrupt their official business and impede their ability to conduct law enforcement, counter-terrorism and national security investigations. In addition, the disclosure of these telephone numbers could result in an inundation of telephone calls to these business telephones through the use of an automatic computer dialer, which can be set to dial the same telephone numbers over and over again. Such an inundation of telephone calls would render

these business telephones useless to the FBI SAs and definitely impede their ability to perform their official law enforcement duties.

(40) As discussed in ¶ 36, supra, FBI SAs conduct official law enforcement, counter-terrorism and national security investigations and come into contact with all strata of society in conducting searches and making arrests, both of which result in reasonable, but nonetheless serious disturbances in the lives of individuals. Some of these individuals may carry grudges against particular FBI SAs or FBI SAs in general and would thus be likely to make harassing telephone calls to these business telephones if they were disclosed to the public. In addition, some persons may be likely to make telephone calls to these business telephones in attempts to gain unauthorized access to FBI investigations. Accordingly, there is no legitimate public interest to be served in disclosing these business telephone numbers of FBI SAs. Exemption (b)(6)-2 has been cited on page 2 of Exhibit G.

(b)(6)-3 Name of a Third Party Individual who Provided Information to the FBI

(41) Exemption (b)(6)-3 has been asserted in conjunction with Exemption (b)(7)(C)-3 and Exemption (b)(7)(D)-1 in one instance on Page 2 of Exhibit G to protect the name of an airline employee who provided information to the FBI. This third party individual provided the FBI with airline passenger data of their employing airline through official channels and with the consent of the airline. This airline employee was thus acting as the official liaison for the airline for the transfer of this airline passenger data to the FBI in an official law enforcement investigation. Given the position of this employee with this airline, it is very likely that this individual would again act in such a liaison capacity in future FBI investigations.

(42) Information provided by individuals is one of the most productive investigative

tools utilized by law enforcement agencies. The largest roadblock to successfully obtaining the desired information is the fear of an individual that his or her identity could possibly be exposed and, he or she could consequently being harassed, intimidated or threatened with legal or economic reprisal, or possible physical harm. In order to surmount these obstacles, individuals who provide information to the FBI must be assured that their identities will be held in the strictest confidence and not disclosed to the public.

(43) The FBI has attempted to release all segregable portions of the information provided by this individual without revealing his or her identity. The continued access to persons willing to assist the FBI in the performance of its law enforcement, counter-terrorism and national security investigations by providing pertinent factual information outweighs any public benefit that could be derived from the disclosure of the identity of this individual. Furthermore, there is no legitimate public interest to be served by releasing the identity of this airline employee who provided information to the FBI. Exemption (b)(6)-3 has been cited on page 2 of Exhibit G.

FOIA EXEMPTION (b)(7)
RECORDS OR INFORMATION COMPILED
FOR LAW ENFORCEMENT PURPOSES

(44) 5 U.S.C. § 552(b)(7) exempts from 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. In this case, the particular harms that could reasonably be expected as a result of disclosure to the public concern the personal privacy of FBI employees and an individual who provided information to the FBI under an implied assurance of confidentiality and the identities of airlines who provided airline passenger data to the FBI under an implied assurance of confidentiality.

(45) Before an agency can invoke any of the harms enumerated in Exemption (b)(7), it

must first demonstrate that the records or information at issue were compiled for law enforcement purposes. Law enforcement agencies such as the FBI must demonstrate that the records or information at issue are related to the enforcement of federal laws and that the enforcement activity is within the official law enforcement duties of that agency.

(46) The records at issue in this case were compiled during the course of the FBI's PENTTBOMB investigation, which is an on-going counterterrorism investigation of the terrorist attacks of September 11, 2001. This investigation is being conducted pursuant to the provisions of 18 U.S.C. § 2332(b). These Airline Data Sets were acquired from the airlines by the FBI for use in its mission of identifying those individuals responsible for the September 11, 2001, terrorist attacks and preventing future acts of terrorism against the United States. The records and information at issue in this case are clearly within the official law enforcement duties and mission of the FBI, and therefore readily meet the threshold requirement of Exemption (b)(7).

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

(47) 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

(48) 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 business telephone number 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, counter-terrorism, 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 business telephone numbers of FBI employees and the identity of a third party individual who provided information to the FBI in the context of these records of a FBI counter-terrorism investigation could reasonably be expected to cause harassment, embarrassment and humiliation, and thus constitute an unwarranted invasion of personal privacy.

(49) At the time that these records were reviewed, the passage of time and its effect on the privacy interests of these third party individuals was considered. It was determined that the privacy interests are as strong and pertinent now as when the records were created in 2001 and 2002, and that there is no public or historical interest in these records which would outweigh the privacy interests of these third party individuals.

(50) Every effort has been made to release all segregable information contained in these records without infringing upon the privacy interests of FBI employees and a third party individual who provided information to the FBI under an implied assurance of confidentiality.

(b)(7)(C)-1 Names of FBI Special Agents and Support Personnel

(51) Exemption (b)(7)(C)-1 has been asserted in conjunction with Exemption (b)(6)-1 to protect the names of FBI SAs who were responsible for conducting, supervising, and/or maintaining the investigative activities reported in this phase of the PENTTBOM investigation. As discussed in ¶¶ 36 and 37, supra, publicity, adverse or otherwise, regarding any particular investigation conducted by SAs may seriously impair their effectiveness in conducting future

investigations. The privacy consideration also protects SAs from unnecessary, unofficial questioning as to the conduct of an investigation, whether or not they are currently employed by the FBI. FBI SAs conduct official inquiries into violations of various criminal statutes and counter-terrorism and national security cases. They come into contact with all strata of society and conduct searches and make arrests, both of which result in reasonable, but nonetheless serious disturbances in the lives of individuals. It is possible for a person targeted by such law enforcement action to carry a grudge which may last for years, and to seek revenge on the SAs involved in the investigation. The publicity associated with the release of the identity of an FBI SA in connection with a particular investigation could trigger hostility towards the SA by such persons. Accordingly, there is no legitimate public interest to be served in the disclosure of the names of the SAs in this phase of the PENTTBOMB counterterrorism investigation to the public.

(52) The names of FBI support personnel have also been withheld pursuant to Exemption (b)(7)(C)-1. Support personnel are assigned to handle tasks relating to FBI investigations. These individuals are in positions to access information concerning official law enforcement, counter-terrorism and national security investigations. They could therefore become targets of harassing inquiries for unauthorized access to FBI investigations if their identities were released. Accordingly, there is no legitimate public interest to be served in releasing the names of these FBI support employees. Exemption (b)(7)(C)-1 has been cited on pages 2 and 3 of Exhibit G.

(b)(7)(C)-2 Business Telephone Numbers of FBI Special Agents

(53) Exemption (b)(7)(C)-2 has been asserted in conjunction with Exemption (b)(2)-1 and Exemption (b)(6)-2 in two instances on Page 2 of Exhibit G to protect the business telephone numbers of two FBI SAs who were designated as the Points of Contact for information

concerning two of the data sets of airline passenger data.

(54) As discussed in ¶¶ 32 and 33, supra, these business telephones are used by these FBI SAs in the performance of their official duties as federal law enforcement officers. Disclosure of these telephone numbers to the public could subject these individuals to harassing telephone calls that could disrupt their official business and impede their ability to conduct law enforcement, counter-terrorism and national security investigations. In addition, the disclosure of these telephone numbers could result in an inundation of telephone calls to these business telephones through the use of an automatic computer dialer, which can be set to dial the same telephone numbers over and over again. Such an inundation of telephone calls would render these business telephones useless to the FBI SAs and definitely impede their ability to perform their official law enforcement duties.

(55) As discussed in ¶ 36, supra, FBI SAs conduct official law enforcement, counter-terrorism and national security investigations and come into contact with all strata of society in conducting searches and making arrests, both of which result in reasonable, but nonetheless serious disturbances in the lives of individuals. Some of these individuals may carry grudges against particular FBI SAs or FBI SAs in general and would thus be likely to make harassing telephone calls to these business telephones if they were disclosed to the public. In addition, some persons may be likely to make telephone calls to these business telephones in attempts to gain unauthorized access to FBI investigations. Accordingly, there is no legitimate public interest to be served in disclosing these business telephone numbers of FBI SAs. Exemption (b)(6)-2 has been cited on page 2 of Exhibit G.

(b)(7)(C)-3 Name of a Third Party Individual who Provided Information to the FBI

(56) Exemption (b)(7)(C)-3 has been asserted in conjunction with Exemption (b)(6)-3 and Exemption (b)(7)(D)-1 in one instance on Page 2 of Exhibit G to protect the name of an airline employee who provided information to the FBI. As discussed in ¶¶ 41-43, supra, this third party individual provided the FBI with airline passenger data of their employing airline through official channels and with the consent of the airline. This airline employee was thus acting as the official liaison for the airline for the transfer of this airline passenger data to the FBI in an official law enforcement investigation. Given the position of this employee with this airline, it is very likely that this individual would again act in such a liaison capacity in future FBI investigations.

(57) Information provided by individuals is one of the most productive investigative tools utilized by law enforcement agencies. The largest roadblock in successfully obtaining the desired information is the fear of an individual that his or her identity could possibly be exposed and, he or she could consequently be harassed, intimidated or threatened with legal or economic reprisal, or possible physical harm. In order to surmount these obstacles, individuals who provide information to the FBI must be assured that their identities will be held in the strictest confidence and not disclosed to the public.

(58) The FBI has attempted to release all segregable portions of the information provided by this individual without revealing his or her identity. The continued access to persons willing to assist the FBI in the performance of its law enforcement, counter-terrorism and national security investigations by providing pertinent factual information outweighs any public benefit that could be derived from the disclosure of the identity of this individual. Furthermore, there is no legitimate public interest to be served by releasing the identity of this airline employee who provided information to the FBI. Exemption (b)(7)(C)-3 has been cited on page 2 of Exhibit

G.

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

(59) 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 criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source

(60) Numerous confidential sources report to the FBI on a regular basis and are “informants” within the common definition of the term and provide information under express assurances of confidentiality. Other individuals are interviewed under express assurances of confidentiality or under circumstances from which assurance of confidentiality can be inferred. These persons are considered to be confidential sources since it is believed that they furnish information only with the understanding that their identities and the information provided by them will not be divulged outside the FBI. This implied assurance of confidentiality can also be given to small businesses, corporations or other institutions such as in this case, where airline passenger data was provided to the FBI by certain airlines in the course of a law enforcement investigation.

(61) Releasing the specific information provided by these confidential sources would be likely to reveal their identities. The release of a source’s identity to the public would forever that source as a future means of obtaining information. Additionally, when the identity of one confidential source is revealed, that revelation has a chilling effect on the activities and

cooperation of other confidential sources. It is only with the understanding of complete confidentiality that the aid of such sources can be enlisted, and only through this assurance of confidentiality that these sources can be persuaded to continue providing valuable assistance in the future. There is no legitimate public interest to be served in releasing the identities of the airline employee and the specific airlines which provided the FBI with airline passenger data.. Thus, the identities of these confidential sources and any specific information which would identify them have been withheld from disclosure pursuant to exemption (b)(7)(D).

(b)(7)(D)-1 Name of an Individual who Provided Information to the FBI
Under an Implied Assurance of Confidentiality

(62) Exemption (b)(7)(D)-1 has been asserted in conjunction with Exemption (b)(6)-3 and Exemption (b)(7)(C)-3 in one instance on Page 2 of Exhibit G to protect the identity of an airline employee who provided information to the FBI under an implied assurance of confidentiality. As discussed in ¶¶ 41-43, supra, this individual provided the FBI with airline passenger data of their employing airline through official channels and with the consent of the airline. Thus, this airline employee was acting as the official liaison for the airline for the transfer of this confidential business information concerning their passengers to the FBI in the course of an official law enforcement investigation. Due to the official position of this employee with this airline, it is highly likely that this individual would again act in such a liaison capacity in future FBI investigations. This individual provided valuable information to the FBI in the PENTTBOMB investigation and thus placed in a position in which he or she may engender harassment, intimidation, legal and economic reprisal or possible physical harm should the public become aware of their assistance and cooperation with the FBI. It can be reasonably inferred from the nature of this counter-terrorism investigation and the sensitive and confidential nature

of the airline passenger data itself that this individual provided the FBI with this information under circumstances from which an assurance of confidentiality may be implied. The manifestly evident violent nature of the deceased hijackers and their associates in the Al Qaeda terrorist organization, who are responsible for the deaths of almost 3,000 people during the September 11, 2001, terrorist attacks, leads to a reasonable inference that this individual who assisted the FBI by providing information would expect an assurance of confidentiality that his or her identity would not be disclosed to the public.

(63) In such instances where information is obtained from an individual under such assurances of confidentiality, the protection of the identity of the confidential source as well as the information that he or she provided to the FBI is warranted, but only to the extent that such information could ultimately identify them. In processing these records, the objective was to release as much segregable information as possible without revealing the identity of this airline employee. If his or her identity was disclosed to the public, both this individual and his or her family members could be subjected to intimidation, harassment, legal and economic reprisal, or possible physical harm if their assistance to the FBI became publicly known. Therefore, the identity of this person who provided information to the FBI under an implied assurance of confidentiality and any singular information that they provided which would ultimately identify them was withheld from disclosure. Furthermore, there is no legitimate public interest to be served in releasing the identity of this individual who provided information to the FBI.

Exemption (b)(7)(D)-1 has been cited on page 2 of Exhibit G.

(b)(7)(D)-2 Identities of Airlines which Provided Information to the FBI Under an Implied Assurance of Confidentiality

(64) Exemption (b)(7)(D)-2 has been asserted to protect the identities of the specific

airlines which provided airline passenger data to the FBI in the course of the PENTTBOM counter-terrorism investigation under an implied assurance of confidentiality. These airlines, with one exception, provided their airline passenger data to the FBI through their consent for use in an official FBI law enforcement investigation into the deadliest terrorist attacks on American soil in its history. The provision of this sensitive and confidential business information concerning their passengers to the FBI was only done upon request of the FBI and it is reasonable to infer that these airlines only provided this data with the expectation that it would only be used for law enforcement purposes and not be disclosed to the public. These airlines provided invaluable information to the FBI in the PENTTBOM investigation and thus placed themselves in a position in which they may engender harassment, intimidation, legal and economic reprisal or possible physical harm to their employees should the public become aware of their assistance and cooperation with the FBI. It can be reasonably inferred from the nature of this counter-terrorism investigation and the sensitive and confidential nature of the airline passenger data itself that this individual provided the FBI with this information under circumstances from which an assurance of confidentiality may be implied. The violent nature of the deceased hijackers and their associates in the Al Qaeda terrorist organization leads to a reasonable inference that these corporations who assisted the FBI by providing information would expect an assurance of confidentiality that their identities would not be disclosed to the public.

(65) In such instances where information is obtained from corporations under such assurances of confidentiality, the protection of the identities of the confidential sources as well as the information that they provided to the FBI is warranted, but only to the extent that such information could ultimately identify them. In processing these records, the objective was to release as much segregable information as possible without revealing the identities of these

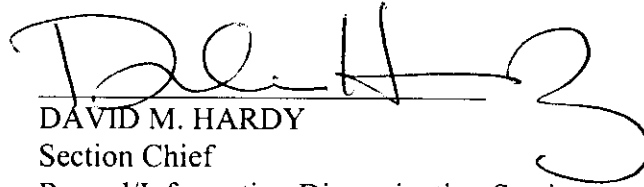
airlines. If their identities were disclosed to the public, these corporations could be subjected to intimidation, harassment, legal and economic reprisal, or possible physical harm to their employees if their assistance to the FBI became publicly known. Therefore, the identities of these airlines which provided information to the FBI under implied assurances of confidentiality and any singular information that they provided which would ultimately identify them was withheld from disclosure. Furthermore, there is no legitimate public interest to be served in releasing the identity of these airlines. Exemption (b)(7)(D)-1 has been cited on pages 3, 4, 6, 7, 10, 11, and 12 of Exhibit G.

CONCLUSION

(66) Plaintiff has been provided all responsive records pursuant to his FOIPA request to the FBI. Furthermore, all segregable information has been released to plaintiff, and no reasonably segregable portion of the withheld material can be released. Each of the documents was individually reviewed for segregability. As demonstrated above, the only information withheld by the FBI consists of information that would disclose two internal FBI telephone numbers of FBI Special Agents, the names of FBI Special Agents and support personnel, the identity of an individual who provided information to the FBI under an implied assurance of confidentiality, and the identities of airlines that provided information to the FBI under implied assurances of confidentiality. This information cannot be further segregated without revealing the protected information itself.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Exhibits A through G attached hereto are true and correct copies.

Executed this 5th day of January, 2005.

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

DAVID M. HARDY
Section Chief
Record/Information Dissemination Section
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