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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Edward Hasbrouck

Plaintiff,

vs.

U.S. Customs and Border Protection

Defendant.

Case No. 3:10-cv-03793-RS

PLAINTIFF'S COMBINED CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Date: August 25, 2011

Time: 2:30 PM

Judge: The Hon. Richard Seeborg

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NOTICE OF CROSS-MOTION

PLEASE TAKE NOTICE that on August 25, 2011, at 2:30 P.M., in Courtroom 3, 17th Floor, United States Federal Building, 450 Golden Gate Ave, San Francisco, CA, before the Honorable Richard Seeborg, United States District Judge, plaintiff Edward Hasbrouck will cross-move this court for summary judgment in his favor and against defendant U.S. Customs and Border Protection. The cross-motion is based on this notice, the memorandum of points and authorities, the declarations of Edward Hasbrouck, Elizabeth Edwards and James Harrison, all filed herewith, all matters of record filed with the court, and other evidence that may be submitted.

STATEMENT OF RELIEF

Hasbrouck moves for an order granting summary judgment in his favor and against defendant CBP, finding specifically that CBP failed to comply with both the Privacy Act and the Freedom of Information Act in response to Hasbrouck's requests for records.

MEMORANDUM OF POINTS AND AUTHORITIES

ISSUES TO BE DECIDED

A. Whether CBP did not comply with the Privacy Act because it withheld records from the ATS and BCIS records systems and did not produce any accounting of disclosures of such records.

B. Whether CBP did not comply with FOIA when it withheld the entirety of the TECS and ATS user guides[1] because it failed to segregate nonexempt material and because it withheld material that was not exempt under exemption (7)(E) .

C. Whether Defendant U.S. Customs and Border Protection (CBP) has proved it conducted adequate searches for records responsive to Plaintiff Edward Hasbrouck's Privacy Act and Freedom of Information Act (FOIA) requests because it failed to produce specific evidence as to where and how it searched for records, because it failed to conduct

[1] These are the documents described in CBP's Vaughn Index as Bates Nos. 000017-000187. Hasbrouck does not challenge the (7)(E) exemptions claimed for the documents described in the Vaughn Index as Bates Nos. 000001-000016.

searches using the proper search parameters, and because it failed to look for categories of records Hasbrouck specifically requested.

STATEMENT OF FACTS[2]

Edward Hasbrouck is a professional journalist, author, and blogger. He was formerly a travel agent and is recognized as an expert on numerous travel-related issues. [Hasbrouck Decl. ¶¶1,41] Hasbrouck also serves as a consultant on travel-related issues to the Identity Project, a non-profit organization that provides advice, assistance, publicity, and legal defense to those who find their rights infringed or their legitimate activities curtailed by demands for identification. [Hasbrouck Decl. ¶2] The Identity Project maintains *www.papersplease.org*, where, among other things, it posts documents obtained in response to FOIA and other public records requests.

In his capacity as a professional journalist, Hasbrouck has sought certain records from CBP, described below. Hasbrouck hopes to help the public understand what records the Department of Homeland Security (DHS), of which CBP is a unit, keeps about individual travelers, how those records can be retrieved, and how those records are used.

I. HASBROUCK'S PRIVACY ACT REQUESTS FOR CBP'S RECORDS ABOUT HIM

A. THE 2007 PRIVACY ACT REQUEST AND APPEAL FOR RECORDS ABOUT HIMSELF IN ATS

By signed letter sent June 27, 2007,[3] Hasbrouck made a Privacy Act request (the "2007

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[2] This Statement of Facts includes only those facts that are pertinent to the resolution of these cross-motions, and does not respond to all of the factual assertions made by CBP in its papers. Hasbrouck does not agree with the characterizations of many of his interactions with CBP set forth in CBP's papers and responds in full to those in his declaration. [Declaration of Edward Hasbrouck in Support of Hasbrouck's Cross-Motion for Summary Judgment ("Hasbrouck Decl.") ¶¶3-40]

[3] Defendant contends that it never received a signed and dated letter. [Declaration of Shari Suzuki ("Suzuki Decl."), filed with Def.'s Cross-Motion for Summary Judgment, ¶ 7] In February 2009, while trying to find out the status of his request, Hasbrouck sent Suzuki an electronic word-processing version of his 2007 request that did not include the date or his signature. [Hasbrouck Decl. ¶ 16] Hasbrouck also erroneously attached an unsigned reprint of this letter as an exhibit to the Complaint. Prior to answering the Complaint in this matter, no one at CBP had ever asserted to Hasbrouck that his original 2007 request was either unsigned or undated.

Privacy Act Request") to the CBP Office of Field Operations for copies of all information relating to himself "contained in the system of records established for the Automated Targeting System ('ATS')," as described in the System of Records Notice (SORN), published at 71 Fed. Reg. 64543 (Nov. 2, 2006). [Hasbrouck Decl. ¶¶3-5 & Exh. A; Declaration of Elizabeth Edwards in Support of Hasbrouck's Cross-Motion for Summary Judgment ("Edwards Decl.") ¶¶3,4][4]

By letter dated August 13, 2007, CBP released sixteen pages of documents.[5] [Hasbrouck Decl. ¶6; Suzuki Decl. Exh. C.]

Hasbrouck appealed via letter dated September 13, 2007.[6] [Hasbrouck Decl. ¶7 & Exhs. C, D, E; Harrison Decl. ¶ 3] In his appeal, Hasbrouck detailed seven different search parameters that, based on his extensive personal knowledge of commercial PNR databases, CBP should employ in order to find all responsive records. He requested a new search and review for which records or portions of records should be disclosed, as well as the release of all PNRs in their original, unredacted electronic format. Hasbrouck also appealed all claimed exemptions on the ground that they were erroneous. [Hasbrouck Decl. Exh.C]

CBP's first response to this appeal was in February 2009 when Laurence Castelli called Hasbrouck. [Hasbrouck Decl. ¶ 19] Castelli was unable or unwilling to tell Hasbrouck what, if any, action had been taken on his 2007 appeal or what, if any, reference number had been assigned to it.

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[4] Hasbrouck specifically requested:

> [A]ny records relating to any risk assessments, the rules used for determining the assessments, any pointer or reference to the underlying records from other systems that resulted in the assessments, and any API (Advance Passenger Information) and PNR (Passenger Name Record) information obtained from commercial air, rail, or road carriers, CRSs (Computerized Reservation Systems), GDSs (Global Distribution Systems), PNR aggregators or intermediaries, or other third parties.

[Hasbrouck Decl. Exh. A]

[5] Despite the fact that Hasbrouck made the request under the Privacy Act, CBP processed it as a FOIA request. [Suzuki Decl. ¶ 8 & Exh. C] The request was not sent to CBP's Privacy Act processing unit until February 2, 2009. [Declaration of Laurence Castelli filed with Def.'s Cross-Motion for Summary Judgment ("Castelli Decl.") ¶10]

[6] The letter was sent via certified mail and was signed for on behalf of CBP by Stephen Christenson on September 18, 2007. [Declaration of James Harrison in Support of Hasbrouck's Cross-Motion for Summary Judgment ("Harrison Decl.") ¶¶3-4; Hasbrouck Decl. Exhs. D, E]

He said that Hasbrouck would receive a letter confirming that his appeal had been docketed and would be acted on. Hasbrouck never received any such letter, and received no response to repeated follow-up phone calls and e-mail messages. [Hasbrouck Decl. ¶ 19 & Exh. J]

According to CBP, CBP's Office of Intelligence and Operations Coordination (OIOC) began processing Hasbrouck's request and appeal in February 2009 following that telephone call. [Castelli Decl. ¶¶ 10-11] Castelli received some responsive records from OIOC on April 2, 2009. [Castelli Decl. ¶ 14] However, the records were not released to Hasbrouck until September 15, 2010, more than 17 months later, and three weeks after the Complaint in this matter was filed. [Castelli Decl. ¶ 15] The release consisted of 47 pages of documents, including 20 unredacted pages of Hasbrouck's PNR data, including the 16 pages that was released to him in 2007 in redacted form. [Suzuki Decl. Exh. C] The release also included 27 pages of records containing data entered by or otherwise identifiable with Hasbrouck in his capacity as a travel agent. CBP withheld risk assessments pertaining to Hasbrouck, and the rules used in assessing risk.[7] [Castelli Decl. ¶ 17]

As of October 15, 2009, however, Hasbrouck had not received a response to his ATS Privacy Act appeal. He thus made the following three additional requests.

B. THE 2009 PRIVACY ACT REQUEST FOR ATS, TECS, BCIS AND APIS RECORDS

On October 15, 2009, Hasbrouck submitted a second Privacy Act request to CBP. [Hasbrouck Decl. ¶ 20; Suzuki Decl. Exh. E] In the letter, Hasbrouck both renewed his earlier request for ATS records, and additionally sought copies of all information about himself from these additional systems of records[8]: Advance Passenger Information System (APIS); Border Crossing Information System (BCIS); and U.S. Customs and Border Protection TECS. He included a request for all PNR and Interagency Border Inspection System (IBIS) data, regardless of where it was located, as well as all information about him referenced in the "Categories of Records in the System"

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[7] These withheld records are not accounted for in the Vaughn index. [Suzuki Decl. Exh. A]

[8] Hasbrouck also requested copies of records from the Arrival and Departure Information System. [Hasbrouck Decl. Exh. E] However, CBP identified these as records of US VISIT/DHS. [Suzuki Decl. ¶18] Hasbrouck does not seek ADIS records through this lawsuit.

section of the SORN, and an accounting of all disclosures of any of these records. [Suzuki Decl. Exh. E]

Hasbrouck received no response other than a postal delivery confirmation receipt. [Hasbrouck Decl. ¶ 21] Hasbrouck appealed this constructive denial of his request by letter dated December 10, 2009. CBP acknowledged receipt of the appeal by letter dated December 24, 2009. [Hasbrouck Decl. Exh. T] [Suzuki Decl. Exh. H]

After the Complaint was filed in this action CPB, by letter August 30, 2010, released 24 pages of ATS data pertaining to Hasbrouck.[9] [Suzuki Decl. Exh. O]

As to TECS, APIS, and BCIS records, CPB, by the same August 30, 2010 letter, explained that it processed the request under FOIA rather than the Privacy Act because the SORN for TECS, published at 73 Fed. Reg. 77778 (Dec. 19, 2008), exempted TECS, APIS and BCIS from the Privacy Act's access provisions. [Suzuki Decl. Exh. O] CBP produced 16 pages it deemed partially releasable under FOIA. [Suzuki Decl. Exh. O]

Hasbrouck maintains that CBP did not perform an adequate search for responsive records and disputes CBP's position that the Privacy Act is of only a limited application to these records systems.

II. THE 2009 FOIA/PRIVACY ACT REQUEST FOR RECORDS RELATING TO THE PROCESSING OF HASBROUCK'S 2007 ATS REQUEST

On October 15, 2009, Hasbrouck sent a FOIA and Privacy Act request to CBP [Hasbrouck Decl. ¶20; Suzuki Decl. Exh. G] seeking copies of any and all documents and records created by CBP or other agencies in the course of processing of his 2007 Privacy Act request and appeal.[10]

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[9] These same 24 pages had been previously released to Hasbrouck: first, in 2007 in redacted form; and then again by letter dated December 18, 2009, as part of a response to a "new" FOIA request CBP's FOIA Division had created on its own. [Suzuki Decl. Exhs. C, N] Hasbrouck did not at the time and does not now contest the creation of this new FOIA request, but maintained at the time that it did not replace his pending Privacy Act request. [Hasbrouck Decl. ¶¶ 30-31] This "new" FOIA request was not included in the Complaint and is not a part of this litigation.

[10] Specifically, the request included: "any responsive records of (1) the CBP FOIA and Privacy Act offices; (2) the office(s) in which Stephen Christenson did or does work; (3) any other office or agency which was consulted or contacted by CBP in the course of processing my request and/or appeal; and (4) any other office or agency identifiable as having, or likely to have, responsive records." [Suzuki Decl. Exh. G]

[Suzuki Decl. Exh. G] As before, Hasbrouck received no immediate response other than a postal delivery confirmation receipt. [Hasbrouck Decl. ¶21] Hasbrouck appealed this constructive denial of his request by letter dated December 10, 2009. [Hasbrouck Decl. Exh. J] By letter dated December 24, 2009, CBP acknowledged receipt of Hasbrouck's appeal. [Hasbrouck Decl. Exh. U]

CBP responded to the FOIA portion of this appeal in the same August 30, 2010 letter. No responsive records were released. [Suzuki Decl. Exh. O] CBP has never responded to the Privacy Act portion of this request.

Hasbrouck maintains that CBP did not perform an adequate search for and has withheld responsive records.

III. THE 2009 FOIA REQUEST FOR RECORDS DESCRIBING SEARCH SYSTEMS AND METHODS

On October 15, 2009, by a third and separate request, Hasbrouck requested copies of any and all documents and records describing the search systems and methods, indexing, query formats and options, data fields and formatting, and the numbers or other identifying particulars by which Passenger Name Record (PNR) or other data can be retrieved from ATS, APIS, BCIS, ADIS, and TECS.[11] [Suzuki Decl. Exh. F]

As with the other two 2009 requests, Hasbrouck received no immediate response other than a postal delivery confirmation receipt. [Hasbrouck Decl. ¶ 21] Hasbrouck appealed this constructive denial of his request by letter dated December 10, 2009. [Suzuki Decl. Exh. I] By letter dated December 24, 2009, CBP acknowledged receipt of Hasbrouck's appeal. [Hasbrouck Decl. Exh. V]

In the same August 30, 2010 letter, CBP explained that it located 52 pages from the TECS User Guide and 119 pages from the ATS User's Guide that were responsive to the request. [Suzuki

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[11] Specifically, Hasbrouck requested:

> [A]ny user manuals, training manuals or materials, reference manuals, query format guides, search protocols or instructions, interpretation guides, standard operating procedures, contract specifications, software use cases or other functional or technical specifications, Application Programming Interface (API) specifications and formats for any software or systems which contain, process, or interact with these records, and the contents of any online or electronic help or reference system for any of these systems.

[Suzuki Decl. Exh. F]

Decl. Exh. O] The user guides were withheld in their entirety pursuant to FOIA exemption (b)(7)(E). [Suzuki Decl. Exhs. A,O]

Hasbrouck contends that CBP did not perform an adequate search for responsive records and that not all of the material in the records identified were properly exempted under FOIA.

ARGUMENT

I. CBP BEARS THE BURDEN OF PROVING ITS COMPLIANCE WITH BOTH THE PRIVACY ACT AND FOIA

A court considering a FOIA summary judgment motion generally conducts a two-stage inquiry. First, the Court must determine whether the agency has met its burden of proving that it fully discharged its duties under FOIA and adequately searched for the records requested and produced records responsive to the request. Zemansky v. Environmental Protection Agency, 767 F.2d 569, 571 (9th Cir. 1985). Second, if the agency has met this burden, the Court must then determine whether the agency has claimed a valid exemption for all responsive records identified but not produced to the requester. See Dobronski v. FCC, 17 F.3d 275, 277 (9th Cir. 1994).

The agency bears the burden of proving its compliance with FOIA even if the requestor is the party moving for summary judgment. See L.A. Times Comm'cns LLC v. Dep't of Army, 442 F. Supp. 2d 880, 894 (C.D. Cal. 2006) (ruling on cross-motions for summary judgment on adequacy of search). See generally Joe Doe Agency v. Joe Doe Corp., 493 U.S. 146, 152 (1989) (holding that the agency bears the burden of justifying all claimed FOIA exemptions).

The agency's burden of proof is the same under the Privacy Act. Lane v. Dep't of Interior, 523 F.3d 1128, 1139 & n.9 (9th Cir. 2008).

II. CBP HAS NOT COMPLIED WITH THE PRIVACY ACT BECAUSE IT IS IMPROPERLY TREATING THE RELEVANT RECORDS SYSTEMS AS EXEMPT

The Privacy Act regulates the collection, maintenance, disclosure of, and access to an individual's personal information maintained by federal agencies. 5 U.S.C. § 552a. Except when an agency has properly promulgated an exemption, an individual is entitled to access records and information pertaining to him, and to accountings of disclosures made to others. 5 U.S.C. §§ 552a(c), (d), (j), (k).

CBP has not complied with the Privacy Act because it has treated much of the ATS and the

entire BCIS as exempt from that law's disclosure and accounting requirements. However, CBP's contention must be rejected because there were no final rules in place creating such exemptions.

A. CBP'S STATEMENTS IN ITS SORNS THAT ATS RECORDS ARE EXEMPT ARE NOT ENFORCEABLE "RULES"

1. AN EXEMPTION IS NOT EFFECTIVE UNTIL IT IS VALIDLY PROMULGATED PURSUANT TO THE ADMINISTRATIVE PROCEDURES ACT

An agency may issue rules exempting its systems of records from the Privacy Act's access provisions. 5 U.S.C. §§ 552a(j), (k). However, an agency, in issuing such rules, must strictly comply with certain provisions of the Administrative Procedures Act, 5 U.S.C. § 553. 5 U.S.C. § 552a(j)(2), (k)(2); Louis v. Dep't of Labor, 419 F.3d 970, 974-76 (9th Cir. 2005).

The APA requires that for a rule to be valid, the agency must complete three tasks. First, the agency must publish a notice of proposed rulemaking.[12] 5 U.S.C. § 553(b). Second, the agency must accept public comment. Id. § 553(c). Third, and only after this public comment period has expired, can the agency issue a "final rule" making the exemption effective. 5 U.S.C. § 553(c); Louis, 419 F.3d at 975.

At most, a SORN can fulfill the first of these functions and serve as a notice of proposed rulemaking. But a SORN will only serve that function if it incorporates all three of the subsection 553(b) elements. See Louis, 419 F.3d at 975. The mere "invocation of [the Privacy Act's exemption provisions] to exempt information from the Act's disclosure requirements, when published under headings indicating that the purpose of the publication is compliance with [the SORN publication requirement], is insufficient to constitute the kind of notice of proposed rulemaking and invitation to comment required by the APA." Id. at 977.

But a SORN can never simultaneously serve both as a notice of proposed rulemaking and a *final* rule. The APA requires that an agency issue a separate "final rule" only after the notice and proposed rulemaking processes are complete. 5 U.S.C. § 553(c) (providing for an agency's adoption

[12] A notice of proposed rulemaking must include (1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or the substance of the proposed rule or a description of the subjects and issues involved. 5 U.S.C. § 553(b).

of rules only "after consideration" of public comments).

2. CBP'S SORNS FOR ATS WERE NOT "FINAL RULES"

CBP here improperly relies on the SORN for ATS in lieu of a proper rulemaking.[13] The ATS SORN does not meet the requirements for a rulemaking as required by the Privacy Act and the APA. Just like the SORN in Louis, CBP's SORN for ATS merely states that the ATS records "are exempt." 72 Fed. Reg. 43650, 43656 (Aug. 6, 2007). CBP effectively acknowledged the inadequacy of the SORN's because on the same day it issued the SORN, it issued the notice of proposed rulemaking for ATS incorporating the Privacy Act exemption, thus initiating, not concluding, the APA process. See 72 Fed. Reg. 43567 (Aug. 6, 2007).

As CBP concedes, a "final rule" setting forth the exemption was not in place until February 2010. As such, the Code of Federal Regulations was not amended to exempt ATS until then; prior to 2010, 6 C.F.R. pt. 5, app'x C did not include any provision exempting ATS from the Privacy Act.

B. CBP CANNOT RELY ON THE ATS EXEMPTION BECAUSE THE FINAL RULE IMPLEMENTING THE EXEMPTION WAS NOT EFFECTIVE UNTIL 2010

Nor can CBP rely on the final rule that it implemented in February 2010 in processing Hasbrouck's 2007 and 2009 Privacy Act requests. See 6 C.F.R. Pt. 5, App. C, ¶45.

The "deeply rooted" presumption against the retroactive application of a law, Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994), applies also to administrative regulations. See Mejia v. Gonzales, 499 F.3d 991, 997 (9th Cir. 2007).

And an agency cannot give a regulation retroactive effect unless it has the legislative authority to do so. A regulation with retroactive effect "does not govern absent clear *congressional* intent favoring such a result." Koch v. SEC, 177 F.3d 784, 786 (9th Cir. 1999) (emphasis added).

CBP lacks this Congressional authority. Nothing in subsections (j) or (k) of the Privacy Act permits the promulgation of retroactive regulations.

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[13] CBP provided Hasbrouck with only raw PNR data from ATS because "the SORN for ATS . . . expressly stated that the only information that may be provided regarding ATS pursuant to the Privacy Act is raw PNR data." [Def.'s Mot. Summ. J. 7-8; Suzuki Decl. ¶ 19 & n.9 & Exh. O]

C. CBP CANNOT RELY ON ANY BCIS EXEMPTION BECAUSE THE FINAL RULE EXEMPTING BCIS WAS NOT EFFECTIVE UNTIL 2010

Similarly, BCIS is not exempt under the Privacy Act with respect to Hasbrouck's 2009 request for BCIS data because the final rule exempting the system was not final until 2010. The SORN for BCIS and a notice of proposed rulemaking were both published on the same date in 2008. See 73 Fed. Reg. 43457 (July 25, 2008) (SORN); 73 Fed. Reg. 43374 (July 25, 2008) (notice of proposed rulemaking). However, the final rule adding Privacy Act exemptions to BCIS was not promulgated until February 3, 2010, the same date as the final rule for ATS. See 75 Fed. Reg. 5491, 5495 (Feb. 3, 2010). Thus, the 2010 BCIS exemption does not apply to Hasbrouck's request.

For both systems, CBP must release records to Hasbrouck responsive to his requests.

III. CBP DID NOT COMPLY WITH FOIA BECAUSE IT IMPROPERLY WITHHELD NONEXEMPT MATERIAL FROM DISCLOSURE

"Disclosure, not secrecy, is the dominant objective of" FOIA. Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976). Accordingly, agency documents are subject to disclosure unless they fall into one of the nine exemptions enumerated in the statute. See 5 U.S.C. § 552(b). The exemptions are to be construed narrowly, with the burden on the government to justify exemption. Rose, 493 U.S. at 361.

FOIA exemption (7)(E) protects from disclosure only those law enforcement records[14] that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). The exemption must be construed narrowly so as to maximize citizen oversight of CBP's practices.

Hasbrouck challenges only CBP's withholding the entirety of the ATS and TECS user guides under exemption (7)(E) of FOIA. As described below, CBP has failed to justify withholding these documents in full.

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[14] For the purposes of this motion, Hasbrouck does not contest that the records at issue have a rational nexus with CBP's law enforcement purpose.

A. CBP DID NOT FULFILL ITS DUTY TO SEGREGATE NONEXEMPT MATERIAL

Under FOIA, an agency must attempt to segregate nonexempt material from exempt material, with the goal being to produce as much information as possible. Mead Data Central, Inc. v. Dep't of Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977); Hertzberg v. Veneman, 273 F. Supp. 2d 67, 90 (D.D.C. 2003). See Peter S. Herrick's Customs & Int'l Trade Newsletter v. Customs & Border Protection, No. 04-00377, 2006 WL 1826185, at *8 (D.D.C. June 30, 2006) (requiring CBP to segregate and produce 21 sentences of an internal operations manual).

To justify a claim that segregation is impossible, an agency must supply a "relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." King v. Dep't of Justice, 830 F.2d 210, 224 (D.C. Cir. 1987) (quoting Mead Data, 566 F.2d at 261). See also Armstrong v. Exec. Office of the President, 97 F.3d 575, 578 (D.C. Cir. 1996) (requiring "reasonable specificity" in explaining nonsegregability). The government's justifications must not be conclusory; a blanket statement that exempt and nonexempt portions of a record are so intertwined as to prevent disclosure is insufficient to justify nonsegregability. Pac. Fishers, Inc. v. United States, 539 F.3d 1143, 1148 (9th Cir. 2008); Defenders of Wildlife v. U.S. Border Patrol, 623 F. Supp. 2d 83, 90 (D.D.C. 2009). The agency must also describe "what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document." Nat'l Res. Def. Council v. Dep't of Educ., 388 F. Supp. 2d 1086, 1097 (C.D. Cal. 2005).

If the government's showing is inadequate, the court may direct the agency to release the document or to provide additional justification. Williams & Connolly LLP v. SEC, 729 F. Supp. 2d 202, 215 (D.D.C. 2010) (denying SEC's motion for summary judgment after it failed to show that nonexempt information could not be segregated). See Peter S. Herrick's, 2006 WL 1826185, at *10 & n.10. The Court may also undertake an *in camera* review[15] of the documents to determine whether

[15] The Court may conduct an *in camera* review after considering four factors: (1) judicial economy; (2) actual agency bad faith; (3) strong public interest; and (4) the parties' request for *in camera* review. Hiken v. Dep't of Defense, 521 F. Supp. 2d 1047, 1056 (N.D. Cal. 2007). But *in camera* review is not generally considered a substitute for an agency's obligation to justify its

the agency may withhold any part of the records. 5 U.S.C. § 552(a)(4)(B); Vaughn v. Rosen, 484 F.2d 820, 824-25 (D.C. Cir. 1973). See Peter S. Herrick's, 2006 WL 1826185, at *10 & n.10.

CBP concedes that it is withholding some nonexempt information because it is not segregable from exempt information. [Suzuki Decl. ¶ 42] CBP has not carried its burden of justifying nonsegregability. CBP's conclusory explanation that nonexempt information in nonsegregable does not provide the required specific, detailed justification.[16] [See Suzuki Decl. ¶ 42]

This Court should direct CBP to release nonexempt withheld records, or alternatively order CBP to submit additional information justifying withholding material from Hasbrouck in full, or conduct its own *in camera* review of the user guides.

B. EXEMPTION (7)(E) DOES NOT APPLY TO ALL OF THE INFORMATION IN THE USER GUIDES

1. THE PRIVACY ACT REQUIRES THAT THE INFORMATION CBP IS WITHHOLDING BE MADE PUBLIC

At least some of the withheld information must be disclosed because the Privacy Act requires its publication. The Privacy Act requires that agencies publish in the Federal Register "the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records" in a system of records. 5 U.S.C. § 552a(e)(4)(E).[17] This information cannot be exempted under FOIA, even if the agency neglected its duties under the Privacy Act and failed to publish the information. See Doe v. Gen. Servs. Admin., 544 F. Supp. 530, 536-37 (D. Md. 1982) (considering agency's unpublished "Release and Access Guide" to be a "statement of agency 'policies and practices' regarding 'retrievability, access controls, retention, and disposal of

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withholding of records. See PHE, Inc. v. Dep't of Justice, 983 F.2d 248, 253 (D.C. Cir. 1993).

[16] CBP's justification is in full: "I assert that after conducting a line-by-line review, it is inextricably intertwined with the exempt information and therefore no portions can be segregated and disclosed. The few non-exempt words and phrases that are dispersed throughout the records withheld in full, if disclosed, would be meaningless and would not serve the purpose of FOIA—to open agency action to the light of public scrutiny." [Suzuki Decl. ¶ 42]

[17] The Privacy Act bars agencies from exempting a system of records from this requirement. 5 U.S.C. § 552a(j) (identifying subsection (e)(4)(E) as one of the provisions of the Privacy Act not subject to a general exemption); § 552a(k) (not listing (e)(4)(E) as one of the provisions from which a system may be exempted under the specific exemption).

records'").

CBP's description of the exempted information appears to include the type of information that should have been published in the SORN for each records system. The user guides apparently contain "instructions on how to retrieve records." [Suzuki Decl. ¶40] This information fits squarely within the Privacy Act's command that "policies and practices of the agency regarding storage, retrievability, access controls" be disclosed.

The Court should order all such material released.

2. CBP FAILED TO DEMONSTRATE HOW RELEASE OF THE WITHHELD INFORMATION WOULD REVEAL NONROUTINE OR UNKNOWN TECHNIQUES OR PROCEDURES

Exemption (7)(E) does not apply unless CBP demonstrates how release of the withheld material would improperly reveal actual law enforcement techniques or procedures. Thus, exemption (7)(E) does not apply to several types of information.

First, exemption (7)(E) does not apply to techniques or procedures that are obvious, routine or generally known to the public. Rosenfeld v. Dep't of Justice, 57 F.3d 803, 815 (9th Cir. 1995); Albuquerque Publ'g Co. v. Dep't of Justice, 726 F. Supp. 851, 858 (D.D.C. 1989) (requiring disclosure of techniques commonly depicted in entertainment media). Thus a law enforcement agency cannot withhold information that reveals it utilizes techniques such as eavesdropping, wiretapping, tape recording, photographing, and pretextual phone calls because the public generally knows that such techniques are used. See Rosenfeld, 57 F.3d at 815; Albuquerque Publ'g Co., 726 F. Supp. at 858. And an agency cannot refuse to disclose a technique because although the general use of the technique is known, a specific application of that technique is not known. Rosenfeld, 57 F.3d at 815 (rejecting the argument that the exemption should apply because the agency is seeking to protect "not the practice but the application of the practice to the particular facts" underlying the request).

Second, exemption (7)(E) does not apply to records that fall within the scope of 5 U.S.C. § 552(a)(2), which provides that an agency "shall make available . . . (C) administrative staff manuals and instructions to staff that affect a member of the public." Firestone Tire & Rubber Co. v. Coleman, 432 F. Supp. 1359, 1366 (N.D. Ohio 1976) (noting legislative history).

CBP's justification for why disclosure of the ATS and TECS user guides would reveal techniques and procedures suggests that at least some of the techniques or procedures are actually routine and well known to the public. Moreover, portions of the ATS and TECS user guides appear to relate to matters that are usually found in administrative staff manuals and instructions to staff.

According to CBP, exemption (7)(E) is being asserted in this case to protect two general categories of information: (1) information that would reveal procedures for processing international travelers; and (2) information that would reveal how to navigate sensitive law enforcement databases. [Suzuki Decl. ¶ 38] The information in the user guides were withheld as part of the second category, that is, they allegedly "provide a road map of how to use the law enforcement databases." [Suzuki Decl. ¶ 40] As Hasbrouck is only challenging the claim of exemption with respect to the user guides, this second category of information is the only one at issue.

With respect to this navigational information, unless CBP has devised some especially labyrinthine navigational scheme as an added layer of security against hackers, this withheld information is likely to be the type of routine, instructional material to which the exemption does not apply. How to use drop-down menus, perform searches and read search results are well known to anyone who has used computer software with database capabilities. Any withheld information that describes such routine navigational techniques is not exempt under exemption (7)(E).

3. CBP DID NOT SUFFICIENTLY DEMONSTRATE A REASONABLE RISK OF CIRCUMVENTION SHOULD THE INFORMATION BE DISCLOSED

To meet its burden on exemption 7(E), the government must show "that the records reveal law enforcement techniques or guidelines that, if disclosed, could reasonably be expected to risk circumvention of the law." Council on Am. Islamic Relations v. FBI (CAIR), 749 F. Supp. 2d 1104, 1123 (S.D. Cal. 2010) (internal quotation marks omitted). CBP has not carried its burden of proving that the release of parts of the user guides meet these requirements.

a. A REASONABLE EXPECTATION OF THE RISK OF CIRCUMVENTION MUST BE SHOWN, WHETHER THE MATERIAL IS A TECHNIQUE OR PROCEDURE, OR A GUIDELINE

This Court should require, as its sister district courts in the Ninth Circuit have so done, that

the agency demonstrate a circumvention risk regardless of whether the information is a "technique or procedure" or a "guideline." See CAIR, 749 F. Supp. 2d at 1123; Gordon v. FBI, 388 F. Supp. 2d 1028, 1035 (N.D. Cal. 2005); Feshbach v. SEC, 5 F. Supp. 2d 774, 786 & n.11 (N.D. Cal. 1997) (rejecting the SEC's argument that "techniques" and "procedures" be evaluated differently from "guidelines"; citing Davin v. Dep't of Justice, 60 F.3d 1043, 1064 (3rd Cir. 1995)).[18]

b. CBP FAILS TO DEMONSTRATE HOW RELEASE OF THE WITHHELD INFORMATION COULD REASONABLY BE EXPECTED TO RISK CIRCUMVENTION OF THE LAW

CBP fails to show how only complete withholding of the ATS and TECS user guides will prevent circumvention of the law. Accordingly, exemption (7)(E) does not apply.

Courts must not simply defer to the government's claims that disclosure would facilitate circumvention of the law. Rather, specific, nonconclusory explanations of how disclosure would enable individuals to evade the law are required. See El Badrawi v. Dep't of Homeland Security, 583 F. Supp. 2d 285, 312-13 (D. Conn 2008) (rejecting CBP's (7)(E) exemption claims because CBP only offered "boilerplate warnings about 'jeopardizing' databases and 'revealing law enforcement procedures'" which were "devoid of any nonconclusory indication of the nature of the information redacted, or why release of that information could reasonably be expected to risk circumvention of the law"). A conclusion, without explanatory detail, that disclosure "would reveal internal procedures, techniques, and strategies and allow broker-dealers to frustrate or deceive the staff in its efforts to enforce compliance with federal security laws," for example, is insufficient. Feshbach, 5 F. Supp. 2d at 786 (rejecting assertion of exemption claimed, as here, for screen prints from databases). This is true even when the withheld records involve matters of national security. See, e.g., Gordon, 388 F. Supp. 2d at 1036-37 (ordering FBI to disclose records revealing legal basis for

[18] Although as CBP asserts, the Ninth Circuit has not spoken to this issue, the trial courts within the Ninth Circuit appear to be in general uniformity that disclosure must reasonably be expected to risk circumvention of the law before the exemption applies with respect to both "techniques" and "guidelines." Accord Catledge v. Mueller, 323 F. App'x 464, 466-67 (7th Cir. 2009) (stating that exemption applies if production "would disclose techniques and procedures for law enforcement investigations or prosecutions . . . if such disclosure could reasonably be expected to risk circumvention of the law") (ellipses in original).

detaining someone on terrorist watchlist because FBI had not adequately explained how information could be used to circumvent agency regulations).

With respect to information specifically regarding the navigation of a database, an agency must provide a specific explanation of how "disclosure of a system's architecture (i.e., where certain pieces of information are stored in relation to others) could allow persons to circumvent" the database and its purpose. See ACLU of Wash. v. Dep't of Justice, 2011 WL 887731, at *8 (W.D. Wash. 2011). If withheld material "simply reveal[s] the location of information within" an agency's databases and systems, the agency fails to justify nondisclosure if its explanation does not make clear how the information relates to the agency's concerns. Id. (noting that FBI's description of withheld material, consisting of information identifying where data is recorded, "does not even suggest that disclosure of investigative techniques is a possibility").

Although CBP has asserted a risk of circumvention, it has not explained why disclosure presents such a risk. CBP states that the user guides include "step-by-step" instructions on how to retrieve, query and navigate the database. [Suzuki Decl. ¶ 40] A risk of circumvention exists, then, only if one presumes that others have unauthorized access to the database. The secrets CBP wants to protect are not the instructions for how to find information in the database, but the information itself. These user guides are not the combination to the lock on the safe, nor the contents of the book inside the safe, but only the instructions for how to turn the pages on the book inside the safe.

There may indeed be some component of these user guides that deals with some specific substance of the ATS and TECS programs that is not generally known and the effectiveness of which depends on such substance not being known. But CBP has not explained that that is the case.

CBP has not carried its burden of justifying its claims of exemption 7(E).

IV. CBP FAILED TO SEARCH ADEQUATELY FOR RECORDS RESPONSIVE TO HASBROUCK'S REQUESTS

A. THE AGENCY MUST PRODUCE SPECIFIC AND DETAILED EVIDENCE THAT IT HAS CONDUCTED A REASONABLE SEARCH FOR RECORDS

An agency must produce specific evidence that proves that it has conducted a search reasonably calculated to uncover all relevant documents requested. Zemansky, 767 F.2d at 571. The adequacy of an agency's search for documents is judged by a reasonableness standard, with the facts

construed in the light most favorable to the requester. Id.; Steinberg v. Dep't of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994). A search will be considered adequate only if the agency has made a "good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Oglesby v. Dep't of Army, 920 F.2d 57, 68 (D.C. Cir. 1990).

Although an agency is not as a general matter required to search every existing database for responsive records, Founding Church of Scientology v. NSA, 610 F.2d 824, 837 (D.C. Cir. 1979), an agency may not exclude a records system unless it reasonably believes, and can demonstrate why, that system will not have responsive records. See Campbell v. Dep't of Justice, 164 F.3d 20, 28 (D.C. Cir.1998); Oglesby, 920 F.2d at 68 (noting the agency's failure to explain why the records system it searched was "the *only* possible place that responsive records are likely to be located").

A declaration describing the agency's search procedures is sufficient to prove that an adequate search was performed only if the declaration is relatively detailed in its description of the files searched and the search procedures used, and if it is nonconclusory and not impugned by evidence of bad faith. Zemansky, 767 F.2d at 573. A declarant's description of the search conducted cannot be so "general" that it would not permit the court to determine de novo whether a "reasonably thorough search" was performed. Steinberg, 23 F.3d at 551. The declaration must include at least the following information:

(1) the identification of which records systems were searched, Wickwire Gavin, P.C. v. Def. Intel. Agy., 330 F. Supp. 2d 592, 598 (E.D. Va. 2004);

(2) an explanation of why those records systems searched were the only ones likely to contain responsive records, Oglesby, 920 F.2d at 68;

(3) the search terms used, id.;

(4) reasonable detail about how the search was conducted, id.;

(5) the identity of those who conducted the search, Wickwire, 330 F. Supp. 2d at 598, and;

(6) an indication of how long the searches took to perform, id.

Also, an agency has a positive obligation to follow leads it uncovers as it identifies responsive records. Campbell, 164 F.3d at 28. As a result, the agency's declaration should explain

how all such leads and suggestions of where additional records might be located were pursued.

A requester may rebut an agency's assertion that it adequately searched its records by suggesting specific places where responsive records may be found. See Weisberg v. Dep't of Justice, 745 F.2d 1476, 1485, 1487 (D.C. Cir. 1984). But even in the absence of such suggestions, an agency must demonstrate that it searched all records systems that are likely to turn up the information requested. See Campbell, 164 F.3d at 28.

A requester may also challenge the adequacy of an agency's search by identifying responsive records that should exist but have not been found. Fitzgibbon v. CIA, 578 F. Supp. 704, 726 (D.D.C. 1983). See also Hiken v. Dep't of Defense, 521 F. Supp. 2d 1047, 1054-55 (N.D. Cal. 2007) (declining to grant the agency summary judgment because of the "general nature" of the declaration's description of the search in combination with evidence that the results of the search failed to produce responsive documents).

B. CBP FAILED TO SEARCH ADEQUATELY FOR RECORDS RESPONSIVE TO HASBROUCK'S 2007 PRIVACY ACT REQUEST FOR HIS ATS RECORDS AND HIS 2009 PRIVACY ACT REQUEST FOR HIS ATS, TECS, BCIS AND APIS RECORDS

CBP has failed to establish that it conducted an adequate search for records in response to Hasbrouck's 2007 Privacy Act Request for his ATS records and/or his 2009 Privacy Act request for his ATS, TECS, BCIS and APIS records.

1. CBP HAS NOT DEMONSTRATED THAT ITS FOIA BRANCH ADEQUATELY SEARCHED FOR RESPONSIVE RECORDS

a. CBP HAS NOT DEMONSTRATED THAT ITS FOIA BRANCH SEARCHED FOR RECORDS IN THE CORRECT PLACES

CBP's FOIA Branch apparently conducted two searches in response to Hasbrouck's Privacy Act requests for his travel-related records. The first, conducted in 2007, resulted in the release of 16 pages of documents. [Castelli Decl. ¶ 8] CBP does not explain how that search was conducted. [Castelli Decl. ¶ 8]

A second search was conducted in December 2009. CBP has not carried its burden of proving that this search was adequate either. Instead CBP simply concludes (twice) that "all files likely to contain responsive material were searched." [Suzuki Decl. ¶¶ 16, 18-20]

CBP's bare conclusion is not sufficient. CBP does not explain how its records are stored[19] so that this Court can assess whether all places reasonably likely to contain responsive records were searched. CBP does not explain whether any records repositories were not searched or give any reasons for such exclusions. CBP does not explain whether it uses a manual or computerized indexing system or how responsive records are otherwise identified, located and searched.

b. CBP'S FOIA BRANCH DID NOT USE THE PROPER SEARCH PARAMETERS

CBP's search was also inadequate because it failed to use search parameters that were reasonably calculated to discover responsive records.

In his 2009 Privacy Act request for the ATS, TECS, BCIS, and APIS records, Hasbrouck specified that CBP should search by his name, address, date and place of birth, current and past passport numbers, and current and past telephone numbers. [Hasbrouck Decl. ¶20; Suzuki Exh. E] With respect to his name, he specified that CBP search by his first, middle and last name, including common misspellings, similar pronunciations and transpositions. He specifically requested that the systems' fuzzy matching capabilities be used. He also requested that CBP look for his name in fields other than the "NAME" field. [Suzuki Decl. Exh. E]

Hasbrouck's specification of these search parameters was founded in his extensive knowledge of the data contained in computerized reservations systems used by commercial travel entities and imported into the CBP records systems. In his experience, it was necessary to employ such search parameters in order to get complete PNR data from such systems because misspellings, transposition and the like are common in such databases. [Hasbrouck Decl. ¶¶51-56]

However, CBP searched ATS and TECS using only the search terms "Hasbrouck," "Edward," and his date of birth. [Suzuki Decl. ¶16] CBP admits that it did not search using alternative spellings of his name, even though it does that in other situations, [Suzuki Decl. ¶16] and even though CBP can employ a "LIKE" names search option in searching TECS and ATS. [Hasbrouck Decl. ¶57] Given that "Hasbrouck" is frequently misspelled, [Hasbrouck Decl. ¶51,53-

[19] This information is apparently readily available. The TECS and ATS user guides appear to provide this type of information for those two records systems. [Suzuki Decl. ¶22]

54] is subject to numerous alternative spellings, [Hasbrouck Decl. ¶52] and that PNR records are known to be so fraught with misspelled names that alternative spelling searches are the norm in the travel industry, [Hasbrouck Decl. ¶56] CBP's failure to do such a search is unreasonable.

Nor did CBP conduct a transposed name search, even though it does search for different name combinations in some circumstances. [Suzuki Decl. ¶16] Transposed names are one the most common reasons why PNR data is not located in the commercial context. [Hasbrouck Decl. ¶60]

CBP also failed to search by Hasbrouck's passport number or telephone number, searches that are commonly understood in the travel industry as providing more complete results in finding PNR data than name searches. [Hasbrouck Decl. ¶59]

2. CBP HAS NOT DEMONSTRATED THAT ITS PRIVACY BRANCH ADEQUATELY SEARCHED FOR RECORDS

Nor did CBP's Privacy Branch perform an adequate search.

Following CBP's August 2007 release of 16 pages of records to Hasbrouck, Hasbrouck appealed by letter dated September 13, 2007. In that letter, Hasbrouck specified that an adequate search should include at least the following:

1. ATS and PNR records relating to his travel prior to June 23, 2003;
2. PNRs containing data entered by him in his capacity as a travel agent (including, but not limited to, records from the SABRE reservation system showing PNR history entries from pseudo-city code A787 and agent sines A24 or AEH, and all records identifiable with ARC/IATA travel agency ID member 05626515 and agent "EH" or "EDWARD";
3. Portions of the responsive PNRs not displayed on the front page or audit trail;
4. Split/divided PNRs identifiable with Hasbrouck;
5. Risk assessments pertaining to Hasbrouck;
6. The rules used for determining risk assessments pertaining to Hasbrouck;
7. API data pertaining to Hasbrouck from air, rail and road carriers.

[Hasbrouck Decl. Exh. C]

In response, the CBP Privacy Branch conducted what it called an "intensive and

encompassing" search in February and March 2009. [Castelli Decl. ¶13]

However, CBP has not carried its burden of proving that this search was in fact adequate. As noted above, CBP does not explain how its records are stored so that this Court can assess whether all places reasonably likely to contain responsive records were searched. CBP does not explain whether any records repositories were not searched or give any reasons for such exclusions. CBP does not explain whether it uses a manual or computerized indexing system or how responsive records are otherwise identified.

For records pertaining to Hasbrouck as a traveler, we know that 20 pages of records were identified as responsive and produced to Hasbrouck in March 2009. [Castelli Decl. ¶¶13-15] But CBP provides no information about how such records were searched for, identified or located.

Only scant more detail is provided for the records pertaining to Hasbrouck as a travel agent. Aside from indicating that it used some of the search terms suggested by Hasbrouck in his appeal letter, [Castelli Decl. ¶13] CBP tells this Court little about that search. In order for this Court to determine whether this search of the ATS records was adequate, this Court must know the specific line commands inputted into the system, the methodology employed for identifying responsive records, and a description of the target database, that is, whether an entire database, an index or just selected fields within a database were searched. [Hasbrouck Decl. ¶¶49-50]

And aside from employing some of the search terms suggested by Hasbrouck, there is no indication that any of the other points included in Hasbrouck's appeal letter were addressed.

C. CBP HAS NOT SEARCHED ADEQUATELY FOR RECORDS RESPONSIVE TO HASBROUCK'S 2009 PRIVACY ACT/FOIA REQUEST FOR RECORDS OF THE PROCESSING OF HIS 2007 PRIVACY ACT REQUEST AND APPEAL

CBP has failed to establish that it conducted an adequate search for records in response to Hasbrouck's 2009 Privacy Act/FOIA request for records regarding the processing of his 2007 FOIA request and appeal thereof. CBP's contention that it found no responsive records is not believable. [See Suzuki Decl. ¶25]

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1. CBP'S OWN EVIDENCE INDICATES THAT NUMEROUS RESPONSIVE RECORDS MUST EXIST

Although CBP claims to have found no responsive records, its own evidence refers to numerous communications within CBP that were made regarding Hasbrouck's 2007 Privacy Act request, and as such should have been disclosed to him:

- On February 2, 2009, the request was referred from the FOIA Division to the Privacy Branch and assigned case file H051659. [Castelli Decl. ¶10] The document in which that case file number is used, and other records of the referral or the assignment of the case file number, are responsive records that were not produced to Hasbrouck. Hasbrouck has never received a document in which this request is denoted as having case file number H051659; he learned of this file number only with the filing of Castelli's Declaration. [Hasbrouck Decl. ¶11]
- Following a February 2009 telephone call with Hasbrouck, the FOIA Branch transferred the appeal of the 2007 request to the Privacy Branch. [Suzuki Decl. ¶11] No record of this transfer was produced to Hasbrouck.
- The Privacy Branch received an email from the Chief, Passenger Branch, Office of Intelligence and Operations Coordination (OIOC), attaching the unredacted PNR records for Hasbrouck located in response to his appeal of the 2007 request. [Castelli Decl. ¶11] Several communications between the Privacy Branch and OIOC followed on February 25, 2009, March 30, 2009 and April 2, 2009. [Castelli Decl. ¶¶12-14] No records of these communications were produced to Hasbrouck.
- The FOIA Branch determined that records of the processing of the search might exist at the Privacy Branch. But rather than searching and producing responsive records, the FOIA Branch simply told Hasbrouck to call the Privacy Branch himself. [Suzuki Decl. ¶25]

2. OTHER RECORDS THAT SHOULD EXIST WERE NOT LOCATED OR PRODUCED TO HASBROUCK

Other records of the processing of Hasbrouck's 2007 Privacy Act request and appeal must also exist, including the following:

- Beginning in 2005, the DHS Chief Privacy Officer directed all DHS and component FOIA offices to report a list of "significant FOIA activities" each week to the DHS Privacy Office,

for inclusion in a weekly report to the DHS "Front Office" for review and approval, and for reports to the White House. FOIA appeals were also included in the reporting requirement if they met any of the same criteria.[20] Other requests made by Hasbrouck have been so deemed "significant." [Hasbrouck Decl. ¶35 & Exh. W] CBP has not indicated that they searched for a weekly report or related communications that pertained to either his 2007 request or the appeal thereof.

- Audit records should have been generated during the processing of Hasbrouck's 2007 Privacy Act request. An agency's records of its processing of FOIA and Privacy Act requests constitute a system of records subject to the Privacy Act.[21] CBP was thus required under the Privacy Act to maintain records sufficient to enable it to provide, on request, an accounting of disclosures.5 U.S.C. § 552a(c). Moreover, the SORN for ATS states that access logs are created for the system and routinely reviewed. 72 Fed. Reg. 43650, 43655 (Aug. 6, 2007) ("To ensure that ATS is being accessed and used appropriately, audit logs are also created and reviewed routinely by CBP's Office of Internal Affairs to ensure integrity of the system and process.").[22] Given that CBP in August 2007 did release sixteen pages of ATS data in response to Hasbrouck's 2007 Privacy Act request, logs showing access to and retrieval of

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[20] "Significant" FOIA requests were defined to include all requests for which "The FOIA request or requested documents will garner media attention or is receiving media attention; . . . The FOIA request is from a member of the media; . . . FOIA request is from a member of an activist group, watchdog organization, special interest group, etc.;" or "The FOIA request is for documents associated with a controversial or sensitive subject." The directives can be found in the following: http://www.dhs.gov/xlibrary/assets/foia/priv_cpo_cabinet_report_submission_guidelines_20050209.pdf; http://www.dhs.gov/xlibrary/assets/foia/priv_foia_cabinet_report_submission_guidelines_20060804.pdf ; http://www.dhs.gov/xlibrary/assets/foia/priv_cfoiao_memo_cabinet_report_foia_guidelines_20090707.pdf.

[21] DHS did not publish a SORN for FOIA and Privacy Act processing records until October 28, 2009. 74 Fed. Reg. 55572 (Oct. 28, 2009). However, it is apparent that these records already existed and satisfied the definition of a "system of records" before then. FOIA and Privacy Act processing records were later exempted from the rule requiring an accounting of disclosures by regulation promulgated August 18, 2010. 75 Fed. Reg. 50846, 50846-50847 (Aug. 18, 2010).

[22] DHS's Privacy Impact Assessment for ATS similarly states that access records are logged and audited. See Privacy Impact Assessment for the Automated Targeting System at 13, 16, 19, 26, 27, available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_ats_updated_fr.pdf.

this data must therefore exist and should have been produced. CBP's statement that the searches performed in response to Hasbrouck's 2007 request were not retained [Suzuki Decl. ¶16] is thus either incorrect, or indicates that CBP was not complying with its own regulations, and the Privacy Act as a whole. See Jefferson v. Dep't of Justice, Office of Inspector Gen., 168 F. App'x 448, 450 (D.C. Cir. 2005) (holding that search was inadequate where agency maintained separate audit and inspection database which was not searched).

- Records of Hasbrouck's email exchange with Hugo Teufel, John Kropf and Vania Lockett of DHS regarding his 2007 Privacy Act request, or any records of Teufel, Knopf or Lockett having investigated the status of his request, as promised, should also exist. [Hasbrouck Decl. ¶ 13] There is no indication that CBP searched for such records.
- Hasbrouck made numerous phone calls from mid-2008 to early 2009 to CBP and DHS attempting to learn the status his 2007 request. [Hasbrouck Decl. ¶14] CBP has not indicated that it searched for any records of these telephone calls.
- CBP never located Hasbrouck's original signed 2007 request, or his 2007 appeal.
- Hasbrouck's appeal of his 2007 Privacy Act request was signed for by "Stephen Christenson" on September 18, 2007. [Hasbrouck Decl. Exh. E] However, CBP did not find any record indicating who Stephen Christenson is, or what his job responsibilities were. [Suzuki Decl. ¶25] Suzuki states that she checked "the employee directory" and the "mailroom." [Suzuki Decl. ¶25] But no effort was apparently made to check records of employees and contractors from the relevant period in 2007 when the mail receipt was signed.

3. CBP CANNOT PROVE IT PERFORMED AN ADEQUATE SEARCH BECAUSE IT FAILED TO DESCRIBE ITS RECORD-KEEPING SYSTEMS AND HOW THEY ARE SEARCHED

CBP has not explained to the Court the most basic information necessary for this Court to assess whether an adequate search was performed for the records described above and similarly responsive records. CBP has not explained what record-keeping systems it maintains for such records, most of which would be internal communications. [Suzuki Decl. ¶¶23-25]

The records described above are most likely to be found in email archives, memo files, FOIA logs, Privacy Act logs, appeal logs, electronic database audit or accesslogs, or the personal files of

the DHS employees involved. The records might be found in the FOIA Division, the FOIA Branch, the Privacy Branch or the Passenger Branch's OIOC. CBP has not indicated that any such systems or any of those offices were searched.

D. CBP FAILED TO SEARCH ADEQUATELY FOR RECORDS RESPONSIVE TO HASBROUCK'S 2009 FOIA REQUEST FOR DOCUMENTS DESCRIBING SEARCH SYSTEMS AND METHODS

Nor has CBP carried its burden of proving that it adequately searched for records in response to Hasbrouck's 2009 FOIA request for records relating to the search and retrieval of records from ATS, APIS, BCIS and TECS. In response, CBP only located and produced wholly redacted versions of the TECS and ATS user guides. [Suzuki Decl. ¶22]

However, Hasbrouck sought more than just user guides. And although the "user manuals, training manuals or materials, reference manuals, query format guides, search protocols or instructions, interpretation guides, standard operating procedures" he specified may be included in the user guides, the "contract specifications, software use cases or other functional or technical specifications, Application Programming Interface specifications and formats for any software or systems which contain, process, or interact with these records" would not. Such specifications are given to the programmers who will be creating and testing the systems during their development. CBP has not explained how it searched for such software specifications, if it searched at all.

CONCLUSION

For the above-stated reasons, Hasbrouck's motion for summary judgment should be granted and CBP's motion for summary judgment should be denied.

Dated: June 24, 2011

FIRST AMENDMENT PROJECT

by: /s/

David Greene

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