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9
 10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN FRANCISCO DIVISION

13 EDWARD HASBROUCK,
 14 Plaintiffs,
 15 v.
 16 U.S. CUSTOMS AND BORDER
 PROTECTION,
 17 Defendant.

) No. C 10-03793 RS
)
) **DEFENDANT’S MOTION FOR**
) **SUMMARY JUDGMENT**
)
) Date: August 18, 2011
) Time: 1:30 p.m.
) Place: Courtroom 3, 17th Floor, 450 Golden
) Gate Ave, San Francisco, California
) Honorable Richard Seeborg

TABLE OF CONTENTS

1

2

3 TABLE OF AUTHORITIES -ii-

4

5 NOTICE OF MOTION 1

6

7 ISSUES TO BE DECIDED 1

8

9 MEMORANDUM OF POINTS AND AUTHORITIES 1

10 I. INTRODUCTION. 1

11 II. STATEMENT OF FACTS. 2

12 A. CBP’s Law Enforcement Mission. 2

13 B. Hasbrouck’s Assorted FOIA and/or Privacy Act Requests 2

14 1. 2007 Privacy Act Request (2007F4114) and Appeal (H051659). 2

15 2. 2009 Requests and Appeals. 5

16 a. FOIA Division Request File No. 2010F03575. 6

17 b. Appeal Case No. H089015. 6

18 c. Appeal Case No. H089016. 9

19 d. Appeal Case No. H089017. 10

20 e. CBP Issued Final Administrative Appeal Decisions

21 on August 30, 2010. 10

22 3. Summary of Records Released and Redacted/Withheld. 11

23 III. LEGAL STANDARD. 12

24 IV. ARGUMENT. 12

25 A. CBP Properly Withheld Information Under FOIA. 12

26 1. Legal Framework. 12

27 2. FOIA Exemption 7(E). 13

28 3. CBP Has Met FOIA’s Segregability Requirement. 17

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

B. CBP Properly Withheld Information Under the Privacy Act. 19

 1. CBP Properly Redacted PII Pertaining to Third Parties 19

 2. CBP Properly Withheld Records Under Exemptions

 (j)(2) and (k)(2). 20

C. CBP Conducted Adequate Searches Under FOIA and the Privacy Act. 23

V. CONCLUSION. 25

1 **TABLE OF AUTHORITIES**

2

3 **FEDERAL CASES**

4 Addisu v. Fred Meyer, Inc., 198 F.3d 1130 (9th Cir. 2000) 12

5 Alexander v. United States, 787 F.2d 1349 (9th Cir. 1986) 22

6 Allard K. Lowenstein International Human Rights Project v. Dep't of Homeland Sec.,

7 626 F.3d 678 (2d Cir. 2010) 15, 16

8 Amro v. U.S. Customs Serv., 128 F. Supp. 2d 776 (E.D. Pa. 2001) 22

9 Asian Law Caucus v. U.S. Dep't of Homeland Sec., No. C 08-00842 CW, 2008 WL 5047839,

10 at *3 (N.D. Cal. Nov. 24, 2008) 12,13,15,17

11 Binion v. U.S. Department of Justice, 695 F.2d 1189 (9th Cir. 1983) 21

12 Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 12

13 Church of Scientology of Cal. v. U.S. Department of the Army,

14 611 F.2d 738 (9th Cir. 1979) 1

15 Citizens Commission on Human Rights v. FDA, 45 F.3d 1325 (9th Cir.1995) 1

16 Coastal Delivery Corp. v. U.S. Customs Serv.,

17 272 F. Supp. 2d 958 (C.D. Cal. 2003) 13, 14, 17

18 Cozen O'Connor v. U.S. Department of Treasury,

19 570 F. Supp. 2d 749 (E.D. Pa. 2008) 17

20 Exner v. FBI, 612 F.2d 1202 (9th Cir. 1980) 19, 21, 22

21 FBI v. Abramson, 456 U.S. 615 (1982) 13, 14

22 John Doe Agency v. John Doe Corp.,

23 493 U.S. 146, 110 S. Ct. 471, 107 L. Ed. 2d 462 (1989) 1

24 Johnson v. Exec. Office for U.S. Attorneys, 310 F.3d 771 (D.C. Cir. 2002) 18

25 Keys v. Department of Homeland Sec., 510 F. Supp. 2d 121 (D.D.C. 2007) 15

26 Lahr v. National Transport Safety Board,

27 569 F.3d 964 (9th Cir. 2009) 12, 13, 23, 24

28 Lane v. Department of the Interior, 523 F.3d 1128 (9th Cir. 2008) 13, 19, 23

1 Milner v. Department of the Navy, -, U.S. -, 131 S. Ct. 1259 (Mar. 7, 2011) 3, 8

2 National Sec. Archive Fund, Inc. v. CIA, 402 F. Supp. 2d 211 (D.D.C. 2005) 18

3 Poulsen v. U.S. Customs and Border Protection, Number C 06-1743 SI, 2006 WL 2788239

4 (N.D. Cal. Sept. 26, 2006) 13

5 Spurlock v. F.B.I., 69 F.3d 1010 (9th Cir. 1995) 1

6 Sussman v. U.S. Marshals Serv., 494 F.3d 1106 (D.C. Cir. 2007) 20

7 Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39

8 L.Ed.2d 873 (1974) 1

9 Willamette Industrial, Inc. v. United States, 689 F.2d 865 (9th Cir. 1982) 18

10 Williams v. Farrior, 334 F. Supp. 2d 898 (E.D. Va. 2004) 20, 22

11 Zemansky v. EPA, 767 F.2d 569 (9th Cir. 1985) 23

12

13 **FEDERAL STATUTES**

14 6 U.S.C. § 111(b) 13

15 5 U.S.C. §§ 552(b)(2),¹ (b)(6), (b)(7)(C) and (b)(7)(E) 8

16 5 U.S.C. § 552a(j)(2), (k)(2)12

17 6 C.F.R. Pt. 5, App. C, ¶ 45.5, 22

18 73 F.R. 43650 8

19 73 F.R. 77778 8, 11, 12

20 Fed. R. Civ. P. 56(a) 12

21 Notice of Privacy Act System of Records, 72 F.R. 43650, 43656 (Aug. 6, 2007) 21

22 Notice of Proposed Rulemaking, 72 F.R. 43567 (Aug. 6, 2007) 21

23

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NOTICE OF MOTION

PLEASE TAKE NOTICE that defendant U.S. Customs and Border Protection will move this court on August 18, 2011, at 1:30 p.m. in Courtroom 3, 17th Floor, United States Federal Building, 450 Golden Gate Ave., San Francisco, California, before the Honorable Richard Seeborg, United State District Judge, for an order granting summary judgment in favor of defendant U.S. Customs and Border Protection and against plaintiff Edward Hasbrouck. The motion is based on this notice, the memorandum of points and authorities, all the matters of record filed with the court, and such other evidence as may be submitted.

STATEMENT OF RELIEF

Defendant U.S. Customs and Border Protection (“CBP”) moves for an order granting summary judgment in favor of CBP and against plaintiff Edward Hasbrouck (“plaintiff” or “Hasbrouck”).

ISSUES TO BE DECIDED

Did CBP properly withhold the documents listed on its Vaughn index² and further described in the declarations of Shari Suzuki and Laurence Castelli under FOIA exemption (b)(7)(E)?

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION.**

This case concerns various FOIA and Privacy Act requests and appeals made by Hasbrouck in 2007 and 2009. Hasbrouck requested information about himself contained in various CBP law

² The term “Vaughn Index” originated from Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974), wherein the court rejected an agency's conclusory affidavit stating that requested FOIA documents were subject to exemption. Id. at 828. “A Vaughn Index must: (1) identify each document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure would damage the interests protected by the claimed exemption.” Citizens Comm'n on Human Rights v. FDA, 45 F.3d 1325, 1326 n. 1 (9th Cir.1995). This detailed affidavit “ ‘permit[s] the court system effectively and efficiently to evaluate the factual nature of disputed information.’ ” John Doe Agency v. John Doe Corp., 493 U.S. 146, 149 n. 2, 110 S.Ct. 471, 474 n. 2, 107 L.Ed.2d 462 (1989) (quoting Vaughn, 484 F.2d at 826).

Spurlock v. F.B.I., 69 F.3d 1010, 1012 n.1 (9th Cir. 1995).

1 enforcement databases, information about searching for and retrieving data from various CBP law
2 enforcement databases, and information about the processing of one of his Privacy Act requests.
3 CBP released certain documents in their entirety, released other documents with redactions, and
4 withheld other documents in their entirety.

5 As shown in the concurrently-filed declarations and Vaughn index, CBP's withholdings
6 were proper because the withheld information is exempt from disclosure under FOIA or the Privacy
7 Act or was otherwise appropriately withheld. Summary judgment should therefore be granted in
8 favor of CBP and against Hasbrouck.

9 **II. STATEMENT OF FACTS.**

10 **A. CBP's Law Enforcement Mission.**

11 CBP is a law enforcement agency with the responsibility for enforcing more than 400
12 federal statutes on behalf of more than 40 different federal agencies. Decl. of Shari Suzuki
13 ("Suzuki Decl."), filed concurrently herewith, ¶ 3; Decl. of Laurence Castelli ("Castelli Decl."),
14 filed concurrently herewith, ¶ 2. CBP's mission is to protect the United States's borders against
15 terrorists and the instruments of terror, to enforce the United States's customs and immigrations
16 laws, and to foster the United States's economy by facilitating lawful international trade and travel.
17 Suzuki Decl. ¶ 3; Castelli Decl. ¶ 2. Its mission includes the inspection and processing of
18 passengers, conveyances and merchandise entering, transiting and departing the United States.
19 Suzuki Decl. ¶ 3; Castelli Decl. ¶ 2. The creation and implementation of effective law enforcement
20 policies and procedures is paramount to achieving that mission. Suzuki Decl. ¶ 3; Castelli Decl. ¶
21 2. The programs, policies and procedures at issue in this case are directly related to CBP's law
22 enforcement activities and are all used for border security and law enforcement purposes. Suzuki
23 Decl. ¶ 3; Castelli Decl. ¶ 2.

24 **B. Hasbrouck's Assorted FOIA and/or Privacy Act Requests.**

25 **1. 2007 Privacy Act Request (2007F4114) and Appeal (H051659).**

26 Hasbrouck made an initial Privacy Act request in a letter that was undated or, according to
27
28

1 Hasbrouck, dated June 27, 2007,³ for “copies of all information relating to myself contained in the
 2 system of records established for the Automated Targeting System (“ATS”).”⁴ Ex. B;⁵ Suzuki
 3 Decl. ¶ 7; Castelli Decl. ¶ 6. CBP gave that request File No. 2007F4114 and responded to it via
 4 letter dated August 13, 2007, releasing 16 pages (erroneously described in the cover letter as 14
 5 pages) of responsive records from ATS, with redactions made pursuant to FOIA exemptions (b)(2)⁶
 6 and (b)(7)(C), 5 U.S.C. §§ 552(b)(2), (b)(7)(C). Ex. C; Suzuki Decl. ¶ 8; Castelli Decl. ¶ 8.

7 Hasbrouck purportedly appealed CBP’s August 2007 release of records via letter dated
 8 September 13, 2007, although CBP did not receive the appeal until February 2009, when
 9 Hasbrouck spoke about it with Shari Suzuki, the CBP FOIA Appeals Officer and Chief of the FOIA
 10 Appeals, Policy and Litigation (“FAPL”) Branch. Ex. D; Suzuki Decl. ¶¶ 1, 9-11. Suzuki
 11 explained to Hasbrouck that his September 13, 2007 appeal had not been received and offered to
 12 open a new appeal and move it to the front of the queue for processing. Id. ¶ 11. When Hasbrouck
 13 insisted that the September 13, 2007 appeal be processed under the Privacy Act rather than under
 14 FOIA, CBP transferred the appeal to its Privacy Act Policy and Procedures Branch (the “Privacy
 15 Branch”), which assigned the request File No. H051659. Id. ¶ 11; Castelli Decl. ¶ 10. In his
 16 September 13, 2007 appeal, Hasbrouck requested the following records:

- 17 A. ATS and PNR records relating to Mr. Hasbrouck's travel prior to June 23, 2003;
 18 B. PNRs containing data entered by, or otherwise identifiable with, Mr. Hasbrouck in

20 ³ CBP received an unsigned and undated letter. Ex. B. However, CBP understands
 21 Hasbrouck to assert that the letter was signed and dated June 27, 2007. Whether the letter was
 signed and dated are not material facts for purposes of this motion.

22 ⁴ Descriptions of ATS and other systems of records (TECS, BCIS and APIS) that
 23 are relevant to this litigation are contained in Appendix 1.

24 ⁵ Exhibits A through O cited herein are attached to the Suzuki Decl. Exhibit P
 25 cited herein is attached to the Castelli Decl.

26 ⁶ When CBP released information to Hasbrouck in August 2007, December 2009
 27 and August 2010, redactions were made pursuant to exemption (b)(2) as interpreted by case law
 28 published before the Supreme Court’s decision in Milner v. Dep’t of the Navy, – U.S. –, 131 S.
 Ct. 1259 (Mar. 7, 2011). In light of Milner, CBP no longer is asserting exemption (b)(2) to
 withhold information in this litigation. Suzuki Decl. at 3 n.1.

1 his capacity as travel agent. These include, but are not limited to, PNRs from the Sabre
2 computerized reservation system showing PNR history entries from pseudo-city code A787
3 and agent sines A24 or AEH, and all records identifiable with ARC/IATA travel agency ID
4 number 05626515 and agent "EH" or "EDWARD";

5 C. Portions of responsive PNRs not displayed on the "face" (front page) or "history"
6 (audit trail) of the PNR;

7 D. Split/divided PNRs identifiable with Mr. Hasbrouck;

8 E. Risk assessments pertaining to Mr. Hasbrouck;

9 F. The rules used for determining risk assessments to Mr. Hasbrouck;

10 G. API data pertaining to Mr. Hasbrouck from air, rail and road carriers.

11 Ex. D; Castelli Decl. ¶ 9.

12 Laurence Castelli, the CBP Privacy Officer and Chief of the Privacy Branch, spoke with
13 Hasbrouck by telephone and confirmed Hasbrouck's intention that the September 13, 2007 appeal
14 be processed under the Privacy Act rather than FOIA. Id. ¶¶ 1, 10. On February 5, 2009, the Chief
15 of the Passenger Branch, Office of Intelligence and Operations Coordination (the "Passenger
16 Branch"), provided the Privacy Branch with unredacted PNR records for Hasbrouck that were
17 responsive to Hasbrouck's initial request. Id. ¶ 11. On February 25, 2009, the Chief of the
18 Passenger Branch was contacted to clarify the scope of the appeal and convey the additional alpha-
19 numeric identifiers provided by Hasbrouck for records transmitted in his capacity as travel agent.
20 Id. ¶ 12. The Chief of the Passenger Branch agreed to search for all responsive records. Id.

21 On March 30, 2009, the Chief of the Passenger Branch indicated that the methodology of
22 the searches being conducted was intensive and encompassing and that more time was needed to
23 ensure an accurate response. Id. ¶ 13. The initial search was conducted using search terms that
24 Hasbrouck had specifically requested. Id. To ensure that all files likely to contain responsive
25 records were searched, CBP's Office of Information Technology ("OIT") was contacted to perform
26 a search based on additional criteria, whereupon the Chief of the Passenger Branch, using
27 Passenger Name Record ("PNR") locator codes provided by OIT, manually retrieved and reviewed
28 PNR records from the system for responsive documents, which were then provided to Castelli for

1 Castelli's review. Id. ¶¶ 14, 15. Castelli confirmed that all files containing responsive materials
2 were searched. Id. ¶ 14.

3 By letter dated September 15, 2010, CBP released 47 pages of documents to Hasbrouck
4 under the Privacy Act. Id. ¶ 15. Twenty (20) of those pages pertained to Hasbrouck in his capacity
5 as a passenger and were released in their entirety. Id. Twenty-seven (27) of those pages pertained
6 to Hasbrouck in his capacity as a travel agent and were released subject to redaction, although only
7 24 of those pages actually contained redactions (three of those pages were released without
8 redactions). Id. The redacted material on those 24 pages consisted of PNR data that contained
9 personally identifying information ("PII") pertaining to individuals other than Hasbrouck, which
10 was withheld as non-responsive to Hasbrouck's request. Id. ¶ 16. This PII pertaining to third
11 parties included information such as the date of reservation/issue of ticket, date(s) of intended
12 travel, frequent flier and benefit information, contact information, payment/billing information,
13 passenger travel status and relevant travel history, baggage information and seat information. Id.
14 Although the Privacy Act provides an individual access to his own records, it protects the PII of
15 other persons from disclosure in the absence of those other persons' prior written consent. Id.

16 The Privacy Branch withheld in its entirety all information regarding the rules used by ATS
17 for determining a risk assessment, as well as any risk assessment pertaining to, or identifiable with,
18 Hasbrouck, as information contained within a system of records for which an exemption was
19 claimed pursuant to 5 U.S.C. § 552a(j)(2), (k)(2), as set forth in 6 C.F.R. Pt. 5, App. C, ¶ 45.
20 Castelli Decl. ¶ 17. "ATS exists to assist CBP in identifying persons who, and cargo that, may pose
21 a higher risk for violating U.S. law while not impeding the flow of legitimate travelers, cargo and
22 conveyances." Id. The exemptions are needed "to protect information relating to law enforcement
23 investigations from disclosure to subjects of investigations and others who could interfere with
24 investigatory and law enforcement activities." Id.

25 2. 2009 Requests and Appeals.

26 Hasbrouck filed three additional requests, dated October 15, 2009, with the FOIA Division.
27 Suzuki Decl. ¶ 12. One was captioned "Privacy Act Request" and two were captioned
28 "FOIA/Privacy Act Requests." Id.; Exs. E, F, G. Via three letters dated December 10, 2009,

1 Hasbrouck appealed the purported “constructive denial” of those three requests, alleging that he
 2 had not received “any acknowledgment or response whatsoever” aside from a Postal Service
 3 delivery confirmation. Suzuki Decl. ¶ 13; Exs. H, I, J. Suzuki and FOIA Division Acting Director
 4 Elissa Kay had subsequent conversations with Hasbrouck by email and phone on December 15 and
 5 16, 2009, in which they further discussed his requests and appeals. Suzuki Decl. ¶¶ 14-15; Exs. K,
 6 L, M. Through these communications, it was determined that the FOIA Division would open a new
 7 FOIA/Privacy Act request, FOIA Division File No. 2010F03575, for “entry/exits, secondary exams
 8 and PNR” data, while Suzuki and the FAPL Branch simultaneously would process the three appeals
 9 of plaintiff’s October 15, 2009 requests. Suzuki Decl. ¶ 15; Ex. K. The disposition of that new
 10 request and the three appeals is discussed below.

11 **a. FOIA Division Request File No. 2010F03575.**

12 Kay searched TECS (including Border Crossing Information System (“BCIS”) and
 13 Advanced Passenger Information System (“APIS”) data) and ATS using Hasbrouck’s first name,
 14 last name and date of birth: “Hasbrouck”, “Edward” and “01/11/1960”. Suzuki Decl. ¶ 16. The
 15 FOIA Division searched the CBP systems specified in Hasbrouck’s request. Id. All files likely to
 16 contain responsive material were searched. Id.

17 On December 18, 2009, Kay issued a decision in FOIA Division File No. 2010F03575. Id. ¶
 18 17; Ex. N. Kay released 33 pages of records to Hasbrouck, 24 pages of which were unredacted
 19 ATS PNR records released under the Privacy Act, and 9 pages of which were redacted TECS
 20 records released under FOIA. Id.

21 **b. Appeal Case No. H089015.**

22 The first of plaintiff’s three appeals dated December 10, 2009, was assigned appeal case
 23 number H089015. Id. ¶ 18. It concerned a submission styled as a “Privacy Act Request” that
 24 requested from CBP “all information pertaining to [himself] contained in the following systems of
 25 records maintained by the CBP:” the Automated Targeting System (“ATS”)⁷, (ATS, DHS/CBP-

26
 27
 28 ⁷ See the description of ATS at
http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_ats.pdf.

1 006), Advanced Passenger Information System (“APIS”)⁸, (APIS, DHS/CBP-005), Border
 2 Crossing Information System (“BCIS”)⁹ (BCIS, DHS/CBP-007), Arrival and Departure Information
 3 System (“ADIS”)¹⁰ (ADIS, DHS/CBP-001), and U.S. Customs and Border Protection TECS¹¹
 4 (DHS/CBP-011) databases. *Id.*; Ex. E. Plaintiff elaborated that the request sought any Passenger
 5 Name Record (“PNR”)¹² data and Interagency Border Inspection System (“IBIS”)¹³ data, regardless
 6 of the system(s) of records in which it is deemed to reside. Suzuki Decl. ¶ 18; Ex. E. The request
 7 included any records held jointly by CBP in conjunction with any other agency, or in interagency
 8 systems of records. Suzuki Decl. ¶ 18; Ex. E.

9 In response to this appeal and in consideration of the issues raised by Hasbrouck, Suzuki
 10 and an attorney in the FAPL Branch searched for responsive ATS records. Suzuki Decl. ¶ 19.
 11 Suzuki explained in a response letter dated August 30, 2010, that the SORN for ATS, published at

12 ⁸ See the description of APIS at

13 http://www.cbp.gov/xp/cgov/travel/inspections_carriers_facilities/apis/.

14 ⁹ See the description of BCIS at <http://foia.cbp.gov/streamingWord.asp?i=45>.

15 ¹⁰ See the description of ADIS at

http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_usvisit_adis_2007.pdf.

16 ¹¹ See the description of TECS at

http://www.dhs.gov/files/publications/gc_1281020492905.shtm; See also, Federal Register:
 17 December 19, 2008 (Volume 73, Number 245), Pages 77778-77782: “Privacy Act of 1974; U.S.
 Customs and Border Protection--011 TECS System of Records Notice” at [http://edocket.](http://edocket.access.gpo.gov/2008/E8-29807.htm)

18 [access.gpo.gov/2008/E8-29807.htm](http://edocket.access.gpo.gov/2008/E8-29807.htm): “Accordingly, inasmuch as the Treasury Enforcement
 19 Communications System is principally owned and managed by CBP and CBP is no longer part
 of the Department of the Treasury, the system formerly known as the Treasury Enforcement
 20 Communications System will now be known as DHS/CBP-011 TECS (no longer an acronym) . .
 . DHS/CBP-011 TECS is an updated and modified version of the former Treasury Enforcement
 21 Communications System (TECS), which is principally owned and managed by U.S. Customs
 and Border Protection and is its principal law enforcement and anti-terrorism data base system.
 22 TECS is established as an overarching law enforcement information collection, analysis, and
 23 sharing environment that links telecommunications devices and personal computers securely to a
 central system and database. This environment is comprised of several modules designed to
 24 collect, maintain and screen data as well as conduct analysis, screening, and information sharing.
 TECS databases contain temporary and permanent enforcement, inspection, and intelligence
 25 records relevant to the anti-terrorism and law enforcement mission of U.S. Customs and Border
 Protection and numerous other federal agencies that it supports.”

26 ¹² For further information concerning PNR data see

<http://www.cbp.gov/xp/cgov/travel/clearing/pnr/>.

27 ¹³ For further information concerning IBIS see

28 <https://help.cbp.gov/app/answers/list/kw/ibis%20fact%20sheet/p/0/c/0>.

1 73 FR 43650, expressly stated that the only information that may be provided regarding ATS
2 pursuant to the Privacy Act is raw PNR data. Id. ¶ 19 & n.9; Ex. O at FAP 0202. Suzuki
3 acknowledged that the FOIA Division had already provided plaintiff 24 pages of PNR data under
4 the Privacy Act on December 18, 2009 (as set forth above regarding Kay’s production of records),
5 and again provided Hasbrouck with 24 pages of ATS PNR data. Suzuki Decl. ¶ 19; Ex. O at FAP
6 0202.

7 Regarding Hasbrouck’s request for records from APIS, BCIS and TECS, Suzuki noted that
8 APIS and BCIS are subsets of data within TECS.¹⁴ Suzuki Decl. ¶ 20; Ex. O at FAP 0202. Even
9 though Hasbrouck had styled his original request as a “Privacy Act Request,” Suzuki informed him
10 that the Privacy Act did not afford him the greatest degree of access to TECS records authorized by
11 law because, as a law enforcement system, TECS had been exempted from the Privacy Act’s access
12 procedures under its SORN published at 73 FR 77778. Suzuki Decl. ¶ 20; Ex. O at FAP 0202.
13 Therefore, CBP did not provide Hasbrouck with TECS records pursuant to the Privacy Act. Suzuki
14 Decl. ¶ 20; see also Ex. O at FAP 0202. However, Suzuki did process Hasbrouck’s request for
15 TECS records under FOIA to provide Hasbrouck with the greatest degree of access authorized by
16 law. Suzuki Decl. ¶ 20; see also Ex. O at FAP 0202. All files likely to contain responsive material
17 were searched. Suzuki Decl. ¶ 20. Suzuki determined that 16 pages were partially releasable under
18 FOIA, with certain information redacted pursuant to the following FOIA exemptions: 5 U.S.C. §§
19 552(b)(2),¹⁵ (b)(6), (b)(7)(C) and (b)(7)(E). Suzuki Decl. ¶ 20; see also Ex. O at FAP 0202-03.
20 Those 16 pages consisted of six pages of Passenger Activity Reports, four pages of inspection
21 reports from TECS, and six pages of detailed API data from APIS contained in TECS.¹⁶ Suzuki
22

23 ¹⁴ ADIS was not searched because ADIS records are not CBP records, but are
24 records of US VISIT/DHS, whose contact information Hasbrouck was given. Suzuki Decl. ¶ 18;
Ex. O at FAP 0202.

25 ¹⁵ As set forth in footnote 5 above, CBP is no longer relying on exemption (b)(2)
26 after Milner.

27 ¹⁶ As set forth above, Kay had released 9 pages of redacted TECS records in
28 response to File No. 2010F03575. Suzuki Decl. ¶ 17. In processing appeal case number
H089015, Suzuki determined that 7 more pages of TECS records could be released with
redactions, for 16 pages total. Suzuki Decl. ¶ 20 & n.11.

1 Decl. ¶ 20. Those 16 pages comprise the redacted pages described in the Vaughn Index, attached as
2 Exhibit A, as numbers 000001-16. Id.

3 **c. Appeal Case No. H089016.**

4 One of Hasbrouck's December 2009 appeal submissions concerned a request styled as a
5 "FOIA/Privacy Act Request" and was assigned appeal case number H089016. Id. ¶ 21. In it,
6 Hasbrouck sought records related to the search and retrieval of data from ATS, APIS, BCIS and
7 TECS.¹⁷ Id.; Ex. F. Hasbrouck elaborated in the underlying request that:

8 Specifically, this request (sic) any user manuals, training manuals or
9 materials, reference manuals, query format guides, search protocols or instructions,
10 interpretation guides, standard operating procedures, contract specifications,
11 software use cases or other functional or technical specifications, Application
12 Programming Interface (API) specifications and formats for any software or systems
13 which contain, process, or interact with these records, and the contents of any online
14 or electronic help or reference system for any of these systems.

15 This request includes any responsive records of (1) the CBP FOIA and
16 Privacy Act offices (such as protocols, references, and manuals that may be used in
17 retrieving and/or interpreting PNR or other data in response to Privacy Act and/or
18 FOIA requests); (2) any offices or agencies responsible for policies and procedures
19 related to the collection, retention, or use of this data; (3) any offices or agencies
20 which have access to or use records retrieved from these systems of records, and
21 which may have manuals, protocols, or the like for such usage; (4) any offices or
22 agencies responsible for or engaged in development, deployment, or operation of
23 software or systems that use data from, or interface with, these systems of
24 records, or contracting with third parties for such development, deployment, or
25 operation, and (5) any other office or agency identifiable as having, or likely to have,
26 responsive records.

18 Suzuki Decl. ¶ 21; Ex. F.

19 Suzuki located 52 pages from the TECS User Guide and 119 pages from the ATS User's
20 Guide that were responsive to the request. Suzuki Decl. ¶ 22; see also Ex. O at FAP 0209. Suzuki
21 looked in the tables of contents for those user guides and read through the relevant sections of those
22 guides page-by-page and line-by-line for responsive information. Suzuki Decl. ¶ 22. All files
23 likely to contain responsive material were searched. Id. Those pages were withheld in their
24 entirety pursuant to FOIA Exemptions (b)(2) and (b)(7)(E). Id.; see also Ex. O at FAP 0209. They
25 comprise the pages described in the Vaughn Index, attached as Ex. A, as 000017-187. Suzuki Decl.
26

27 ¹⁷ Hasbrouck also specified ADIS, but because ADIS is not a CBP system of
28 records, it was not addressed. Suzuki Decl. ¶ 21 & n.13; see also footnote 13, above.

1 ¶ 22.

2 **d. Appeal Case No. H089017.**

3 The last of Hasbrouck's December 2009 appeal submissions concerned another request
4 styled as a "FOIA/Privacy Act Request" and was assigned appeal case number H089017. Id. ¶ 23.
5 In that request, Hasbrouck asked for records relating to the processing of his 2007 Privacy Act
6 request, CBP file number 2007F4114, and his appeal of CBP's response to that request. Id.; Ex. G.
7 The request included:

8 any responsive records of (1) the CBP FOIA and Privacy Act offices; (2) the
9 office(s) in which Stephen Christenson did or does work, or to which his former
10 duties, files or records were transferred or assigned; (3) any other office or agency
11 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.

12 Suzuki Decl. ¶ 23; Ex. G.

13 In responding to that appeal, Suzuki checked the employee directory but could not locate
14 any CBP employee named "Stephen Christenson." Suzuki Decl. ¶ 24; see also Ex. O at FAP 0211.
15 Suzuki also contacted the mailroom but was advised that there were no responsive records. Suzuki
16 Decl. ¶ 24 see also Ex. O at FAP 0211-12. Suzuki also contacted the FOIA Division regarding file
17 number 2007F4114, but the file contained only Hasbrouck's incoming request and the FOIA
18 Division's response thereto. Suzuki Decl. ¶ 25 see also Ex. O at FAP 0212. Suzuki also contacted
19 the Privacy Branch, who informed her that the Privacy Act appeal was still pending. Suzuki Decl.
20 ¶ 25 see also Ex. O at FAP 0212. Therefore, Suzuki provided Hasbrouck with contact information
21 for the Privacy Branch. Suzuki Decl. ¶ 25; Ex. O at FAP 0212. In summary, there were no
22 responsive records to be released. Suzuki Decl. ¶ 25. All files likely to contain responsive
23 information were searched. Id.

24 **e. CBP Issued Final Administrative Appeal Decisions on August 30, 2010.**

25 On February 17, 2010, and on several occasions before and after that, Hasbrouck had
26 various discussions with Suzuki and one of her staff attorneys regarding the pending appeals, case
27 numbers H089015, H089016 and H89017. Id. ¶ 26. Suzuki confirmed that those three appeals
28 were pending with the FAPL Branch and that Hasbrouck's 2007 Privacy Act request was pending

1 with the Privacy Branch. Id. Even though those matters were still pending, Hasbrouck went ahead
 2 and filed this action on August 25, 2010, unbeknownst to Suzuki or her staff. Id. ¶ 27; see also
 3 Compl. (Doc. #1).

4 In a letter dated August 30, 2010, Suzuki issued final administrative appeal decisions in
 5 appeal case numbers H089015, H089016 and H89017 and released certain records to Hasbrouck.
 6 Suzuki Decl. ¶ 28; Ex. O. In total, Suzuki and the FAPL Branch released 40 pages of records to
 7 Hasbrouck under FOIA – 16 pages of TECS records with redactions and 24 unredacted pages of
 8 ATS records. Suzuki Decl. ¶ 31. Suzuki withheld in full 171 pages from the TECS and ATS
 9 User’s Guides. Id. Information was withheld pursuant to FOIA Exemptions (b)(6), (b)(7)(C) and
 10 (b)(7)(E). Id. On September 1, 2010, Suzuki was notified for the first time that Hasbrouck had
 11 filed this action. Id. ¶ 29.

12 3. Summary of Records Released and Redacted/Withheld.

13 To summarize, the FAPL Branch released 40 pages of records to Hasbrouck under FOIA: 24
 14 pages in their entirety and 16 redacted pages, which are described in the Vaughn index as pages
 15 000001-16.¹⁸ Id. ¶ 31. The FAPL Branch also withheld in their entirety 171 pages from the TECS
 16 and ATS User’s Guides, which are described in the Vaughn index as pages 000017-187. Id. The
 17 redactions and withholdings are based on FOIA Exemptions (b)(6), (b)(7)(C) and (b)(7)(E). Id.;
 18 Ex. A.

19 The Privacy Branch, meanwhile, released under the Privacy Act 20 pages of documents in
 20 their entirety pertaining to Hasbrouck in his capacity as a passenger. Castelli Decl. ¶ 15. The
 21 Privacy Branch also released under the Privacy Act an additional 27 pages pertaining to Hasbrouck
 22 in his capacity as a travel agent, of which 24 pages contained redactions of other persons’ PII which
 23 was non-responsive to Hasbrouck’s request, and of which the remaining 3 pages contained no
 24 redactions. Id. ¶ 16. The Privacy Branch withheld in its entirety all information regarding the rules

25
 26 ¹⁸ As explained above, Hasbrouck’s request for TECS records under the Privacy Act
 27 was processed under FOIA to give Hasbrouck the greatest degree of access under the law
 28 because the TECS records were exempted from access under Privacy Act exemptions (j)(2) and
 (k)(2), 5 U.S.C. §§ 552a(j)(2), (k)(2), as set forth in the SORN published at 73 FR 77778.
 Suzuki Decl. ¶ 20; see also 6 C.F.R. Pt. 5, App. C, ¶ 22.

1 used by ATS for determining a risk assessment, as well as any risk assessment pertaining to, or
2 identifiable with, Hasbrouck, as information contained within a system of records for which an
3 exemption was claimed pursuant to 5 U.S.C. § 552a(j)(2), (k)(2), as set forth in 6 C.F.R. Pt. 5, App.
4 C, ¶ 45. Castelli Decl. ¶ 17.

5 **III. LEGAL STANDARD.**

6 “The court shall grant summary judgment if the movant shows that there is no genuine
7 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
8 Civ. P. 56(a); see also Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). One of the
9 principal purposes of summary judgment is to identify and dispose of factually unsupported claims
10 and defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Summary judgment must be
11 granted against a party that fails to demonstrate facts to establish what will be an essential element
12 at trial. See id. at 323.

13 **IV. ARGUMENT.**

14 **A. CBP Properly Withheld Information Under FOIA.**

15 **1. Legal Framework.**

16 “FOIA was enacted to facilitate public access to Government documents.” Lahr v. Nat’l
17 Transp. Safety Board, 569 F.3d 964, 973 (9th Cir. 2009) (internal quotation marks and citation
18 omitted). “At the same time, FOIA contemplates that some information may legitimately be kept
19 from the public. The statute contains nine enumerated exemptions allowing the government to
20 withhold documents or portions of documents.” Id. (citing 5 U.S.C. § 552(b)(1)-(9)).

21 “The Court reviews the government’s withholding of agency records de novo, and the
22 government bears the burden of justifying non-disclosure.” Asian Law Caucus v. U.S. Dep’t of
23 Homeland Sec., No. C 08-00842 CW, 2008 WL 5047839, at *3 (N.D. Cal. Nov. 24, 2008) (citing 5
24 U.S.C. § 552(a)(4)(B)). “The agency may meet its burden by submitting a detailed affidavit
25 showing that the information logically falls within one of the claimed exemptions,” but “may not
26 rely upon conclusory and generalized allegations of exemptions.” Asian Law Caucus, 2008 WL
27 5047839, at #3 (internal quotation marks and citations omitted). “If the affidavits contain
28 reasonably detailed descriptions of the documents and allege facts sufficient to establish an

1 exemption, the district court need look no further.” Lane v. Dep’t of the Interior, 523 F.3d 1128,
 2 1135-36 (9th Cir. 2008) (internal quotation marks and citation omitted). “As a general matter, an
 3 affidavit from an agency employee responsible for supervising a FOIA search is all that is needed
 4 to satisfy the personal knowledge requirement of Federal Rule of Civil Procedure 56(e).” Lahr, 569
 5 F.3d at 990 (internal quotation marks, brackets and citation omitted).

6 2. FOIA Exemption 7(E).

7 CBP properly withheld information pursuant to FOIA Exemption 7(E), 5 U.S.C.
 8 § 552(b)(7)(E).¹⁹ “[J]udicial review of an asserted Exemption 7 privilege requires a two-part
 9 inquiry. First, a requested document must be shown to have been an investigatory record ‘compiled
 10 for law enforcement purposes.’ If so, the agency must demonstrate that release of the material
 11 would have one of the six results specified in the Act.” FBI v. Abramson, 456 U.S. 615, 622 (1982)
 12 (footnote omitted).

13 The first part of the inquiry is met. “CBP is a law enforcement agency with enforcement
 14 responsibilities for over 400 Federal statutes on behalf of over 40 different federal agencies.”
 15 Suzuki Decl. ¶ 3; Castelli Decl. ¶ 2. Its “primary mission” is to carry out various law enforcement
 16 duties. See 6 U.S.C. § 111(b). When, as here, the agency “has a clear law enforcement mandate,”²⁰
 17 it “need only establish a ‘rational nexus’ between enforcement of a federal law and the document
 18 for which an exemption is claimed.” Church of Scientology of Cal. v. U.S. Dep’t of the Army, 611
 19 F.2d 738, 748 (9th Cir. 1979) (citation omitted). Here, the rational nexus between the withheld
 20 information and the enforcement of federal law pertains to the screening of passengers entering the
 21 United States. Suzuki Decl. ¶ 37. The withheld information consists generally of “1) information
 22

23 ¹⁹ Although CBP withheld material (as described in the Vaughn Index) under FOIA
 24 Exemptions 6, 7(C) and 7(E), 5 U.S.C. §§ 552(b)(6), 552(b)(7)(C), 552(b)(7)(E), the parties have
 25 stipulated that Hasbrouck is challenging only the application of FOIA Exemption 7(E) and is not
 challenging the application of FOIA Exemptions 6 or 7(C).

26 ²⁰ Accord Poulsen v. U.S. Customs and Border Protection, No. C 06-1743 SI, 2006
 27 WL 2788239, at *6 (N.D. Cal. Sept. 26, 2006) (“The parties agree that CBP has a clear law
 28 enforcement mandate”); Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d
 958, 963 (C.D. Cal. 2003) (“both parties agree that Customs has a law enforcement mandate”).

1 that would reveal procedures for processing international travelers and 2) information that would
2 reveal how to navigate sensitive law enforcement databases.” Id. ¶ 38. That information has a
3 rational nexus to law enforcement because, if disclosed, it “would reveal CBP law enforcement
4 examination and inspection procedures used in the processing of international travelers,” id.; would
5 “reveal precise CBP procedures for retrieving law enforcement records and navigating a law
6 enforcement database,” id. ¶ 39; and would “provide a road map of how to use the [TECS and ATTS]
7 law enforcement databases,” id. ¶ 40. That is sufficient to establish a rational nexus. Cf. Coastal
8 Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 963 (C.D. Cal. 2003) (holding that
9 CBP established a rational nexus between withheld information and its law enforcement mandate
10 when the withheld numbers allowed CBP “to track the overall effectiveness of its examination
11 technique, and evaluate both its commercial enforcement strategy and its border security
12 responsibilities”).

13 Turning to the second part of the inquiry, “release of the material would have one of the six
14 results specified in the Act.” Abramson, 456 U.S. 615, 622 (1982) (footnote omitted). Here, the
15 only FOIA exemption the parties dispute is FOIA Exemption 7(E). See n.11, supra. That
16 exemption applies to

17 records or information compiled for law enforcement purposes, but only to the extent
18 that the production of such law enforcement records or information . . . (E) would
19 disclose techniques and procedures for law enforcement investigations or
20 prosecutions, or would disclose guidelines for law enforcement investigations or
21 prosecutions if such disclosure could reasonably be expected to risk circumvention
22 of the law.

21 5 U.S.C. § 552(b)(7).

22 As seen from the statutory text, FOIA Exemption 7(E) contains two clauses: the first
23 pertaining to techniques and procedures, and the second pertaining to guidelines. Some courts hold
24 that the first clause “provides categorical protection for techniques and procedures used in law
25 enforcement investigations or prosecutions” and “requires no demonstration of harm or balancing
26 of interests.” Keys v. Department of Homeland Sec., 510 F. Supp.2d 121, 129 (D.D.C. 2007)
27 (internal quotation marks, citations and brackets omitted). Other courts disagree and hold that the
28 phrase “could reasonably be expected to risk circumvention of the law” applies to both the first and

1 second clauses. See Asian Law Caucus, 2008 WL 5047839, at *3 (collecting cases on both sides).
2 “The Ninth Circuit has not squarely addressed the issue.” Id. However, the Second Circuit
3 recently examined this issue in detail and concluded that the “risk circumvention of the law”
4 requirement applies only to the second clause, not to the first clause. See Allard K. Lowenstein
5 Int’l Human Rights Project v. Dep’t of Homeland Sec., 626 F.3d 678, 681 (2d Cir. 2010). The
6 Second Circuit concluded that this reading was unambiguous from “the plain meaning of the
7 statute’s text and structure,” applying “basic rules of grammar and punctuation.” Id. The Second
8 Circuit further noted that this reading was supported by the legislative history of the statute’s
9 amendments. Id.

10 Ultimately, CBP’s withholding of information under the first clause is appropriate whether
11 or not the risk-of-circumvention requirement applies. The redacted information falls into two
12 general categories of techniques and procedures: “1) information that would reveal procedures for
13 processing international travelers and 2) information that would reveal how to navigate sensitive
14 law enforcement databases.” Suzuki Decl. ¶ 38. Specifically, the withheld information would
15 reveal techniques and procedures as follows:

- 16 • “[T]he names of law enforcement databases queried and the results of those queries
17 . . . would reveal CBP law enforcement examination and inspection procedures used
18 in the processing of international travelers.” Id.
- 19 • The disclosure of computer terminal identification codes, screen transaction codes,
20 screen program codes and computer “PF” function/navigation codes “would reveal
21 precise CBP procedures for retrieving law enforcement records and navigating a law
22 enforcement database.” Id. ¶ 39. In particular, “[r]elease of the computer function
23 or navigation codes (‘PF keys’) would reveal exact keys and keystrokes used for
24 navigating TECS. Release of the computer terminal and screen codes would reveal
25 methods for retrieving precise screens within TECS.” Id.
- 26 • Information from the TECS and ATS user manuals would “provide a road map of
27 how to use the law enforcement databases.” Id. ¶ 40. The withheld information
28 would literally teach someone how to use those databases by, for example, revealing

1 step-by-step instructions for navigating, querying and retrieving records from the
 2 databases; revealing query codes and detailed query screen information; revealing
 3 instructions on how to read results screens; and revealing information about system
 4 capabilities.²¹ See id.

5 Because law enforcement techniques and procedures would be revealed, the information is
 6 categorically exempt under Exemption 7(E) and the court need inquire no further. See Lowenstein
 7 Int'l Human Rights Project, 626 F.3d at 680-82 (holding that information was properly redacted
 8 under Exemption 7(E) because it was about techniques and procedures, without reaching the
 9 question of whether it could reasonably be expected to risk circumvention of the law).

10 Nevertheless, even if the risk-of-circumvention requirement were to apply to techniques and
 11 procedures, that requirement is met here. If released, the techniques and procedures at issue could
 12 risk circumvention of the law as follows:

- 13 • The names of law enforcement databases queried and the results of those queries, if
 14 released, “would permit potential violators to design strategies to circumvent the
 15 examination procedures developed by CBP.” Suzuki Decl. ¶ 38.
- 16 • Computer terminal identification codes, screen transaction codes, screen program
 17 codes and computer “PF” function/navigation codes, if released, could cause
 18 “unauthorized access to information which could result in alternation, loss, damage

19
 20 ²¹ More specifically:

21 The information withheld includes step-by-step instructions on how to navigate a
 22 law enforcement database, step-by-step instructions on how to retrieve records
 23 from a law enforcement database, specific drop down menus and instructions for
 24 querying and navigating the database, names of specific modules within a law
 25 enforcement database, computer query codes, precise details of query screens,
 26 query screen field descriptions that would reveal law enforcement techniques of
 how system can be queried, navigation buttons, instructions on how to read
 results screens, system capabilities with respect to records that would reveal law
 enforcement techniques, and information about querying abilities and results that
 would reveal capabilities of system.

27 Suzuki Decl. ¶ 40.
 28

1 or destruction of data contained in CBP's law enforcement database. Release of this
2 information could allow an individual knowledgeable in computer mainframes and
3 systems to circumvent the database and interfere with enforcement proceedings." Id.
4 ¶ 39.

- 5 • Information from the TECS and ATS user manuals, if released, "would facilitate
6 unlawful access to law enforcement databases and disclose precise procedures
7 followed by CBP officers when conducting law enforcement queries to determine the
8 admissibility of international travelers and would disclose scope of investigations
9 and techniques/procedures for border law enforcement and investigations, thereby
10 risking circumvention of the law." Id. ¶ 40.

11 Therefore, the risk-of-circumvention requirement is met and the above information has been
12 properly withheld under Exemption 7(E). In Asian Law Caucus, this court upheld CBP's
13 withholding of similar information (the names of databases, names of database reports and
14 modules, and information relating to the use of government watchlists) under Exemption 7(E) when
15 its release "could lead to circumvention of CBP law enforcement efforts or facilitate improper
16 access to the database for the purpose of frustrating CBP law enforcement functions." 2008 WL
17 5047839, at *4; see also Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 786
18 (E.D. Pa. 2008) (holding that Exemption 7(E) applied to material withheld by the Treasury
19 Department regarding databases and information services); Coastal Deliv. Corp., 272 F. Supp. 2d at
20 965 (holding that the U.S. Customs Service had properly withheld information about the number of
21 containers examined at a port under Exemption 7(E)).

22 3. CBP Has Met FOIA's Segregability Requirement.

23 Under FOIA, "[a]ny reasonably segregable portion of a record shall be provided to any
24 person requesting such record after deletion of the portions which are exempt" 5 U.S.C.
25 § 552(b). The agency need not disclose non-exempt portions of a document if "they are
26 inextricably intertwined with exempt portions such that the excision of exempt information would
27 impose significant costs on the agency and produce an edited document with little informational
28 value." Willamette Indus., Inc. v. United States, 689 F.2d 865, 867-68 (9th Cir. 1982) (internal

1 quotation marks and citations omitted). The agency must provide a “detailed justification” for its
2 claim of non-segregability, but “is not required to provide so much detail that the exempt material
3 would be effectively disclosed.” Johnson v. Exec. Office for U.S. Attorneys, 310 F.3d 771, 776
4 (D.C. Cir. 2002) (citation omitted). The agency can fulfill its “obligation to show with ‘reasonable
5 specificity’ why a document cannot be further segregated” through a combination of its Vaughn
6 index and affidavits. See id. (citation omitted).

7 Here, CBP has met the segregability requirement. The Vaughn index and the Suzuki
8 declaration describe the documents at issue, the information withheld, the exemptions claimed and
9 why the exemptions apply. Suzuki reviewed the documents “line-by-line” and explained that “any
10 further release of the exempted materials could reasonably lead to the identification of the
11 individuals or other law enforcement information that are properly protected by the exemptions
12 asserted.” Suzuki Decl. ¶ 41. She also explained that “any non-exempt information in the
13 documents referenced in the Vaughn index . . . is inextricably intertwined with the exempt
14 information and therefore no portions can be segregated and disclosed.” Suzuki Decl. ¶ 42. With
15 regard to the user’s guides that were withheld in full, “[t]he few non-exempt words and phrases that
16 are dispersed throughout [those] records . . . , if disclosed, would be meaningless and would not
17 serve the purpose of FOIA—to open agency action to the light of public scrutiny.” Id. ¶ 42.

18 Under these circumstances, CBP has met the FOIA segregability requirement. Cf. Johnson,
19 310 F.3d at 776 (holding that the segregability requirement was met when the Vaughn index
20 described each document withheld and applicable exemption and when an agency affidavit stated
21 that a line-by-line review of documents had been conducted and that no releasable information
22 could be reasonably segregated); Nat’l Sec. Archive Fund, Inc. v. CIA, 402 F. Supp. 2d 211, 221
23 (D.D.C. 2005) (holding that the segregability requirement was met when the agency’s declaration,
24 taken in its entirety, showed that “those isolated words or phrases that might not be redacted for
25 release would be meaningless”).

26 **B. CBP Properly Withheld Information Under the Privacy Act.**

27 “The Privacy Act governs the disclosure of, access to, and amendment of records on
28 individuals that are maintained by federal agencies.” Lane, 523 F.3d at 1138 (citing 5 U.S.C. §

1 552a). “Subsection 552a(d) of the Privacy Act permits an individual to gain access to those records
2 which pertain to him and are found in a system of records maintained by an agency.” Exner v. FBI,
3 612 F.2d 1202, 1203-04 (9th Cir. 1980) (internal footnotes omitted); see also 5 U.S.C. § 552a(d)(1).
4 However, there are limitations and exemptions on the Privacy Act’s access provision, discussed
5 below. CBP properly invoked those limitations and exemptions to withhold material.

6 The materials that were withheld from Plaintiff under the Privacy Act fall into two
7 categories: (1) 27 pages that pertained to Hasbrouck in his capacity as a travel agent and were
8 released to him with 24 of those pages containing redactions of third-parties’ PII, see Castelli Decl.
9 ¶ 16; and (2) information regarding the rules used by ATS for determining a risk assessment, as
10 well as any risk assessment pertaining to, or identifiable with, Hasbrouck, which was withheld in
11 its entirety as information contained within a system of records for which an exemption was
12 claimed pursuant to Privacy Act Exemptions (j)(2) and (k)(2), 5 U.S.C. §§ 552(j)(2), (k)(2), see
13 Castelli Decl. ¶ 17. Each of those are examined in turn.

14 **1. CBP Properly Redacted PII Pertaining to Third Parties.**

15 CBP responded to Hasbrouck’s 2007 Privacy Act request by releasing 47 pages of
16 documents to Hasbrouck under the Privacy Act. Castelli Decl. ¶ 15. Of those, 20 pages pertained
17 to Hasbrouck in his capacity as a passenger and were released in their entirety. Castelli Decl. ¶ 15.
18 The remaining 27 pages pertained to Hasbrouck in his capacity as a travel agent and were released
19 subject to redaction. Castelli Decl. ¶ 15. Twenty-four (24) of those pages actually contained
20 redactions of data third-parties’ PII. Castelli Decl. ¶¶ 15, 16. The PII included such third-party
21 information as PNR record locator code; date of reservation/issue of ticket, date(s) of intended
22 travel; names; available frequent flier and benefit information; other names on PNR, including
23 number of travelers on PNR; all available contact information; all available payment/billing
24 information; travel itinerary for specific PNR; travel agency/travel agent; code share information;
25 split/divided information; travel status of passenger (including confirmation and check in status)
26 and relevant travel history; ticketing information; baggage information and seat information.
27 Castelli Decl. ¶ 16. That third-party PII was properly redacted because it was not responsive to
28 Hasbrouck’s request and was protected by the Privacy Act absent those third-parties’ written

1 consent. Castelli Decl. ¶ 16. The redactions were proper given the critical importance of the
 2 Privacy Act's consent requirement codified at 5 U.S.C. § 552a(b). See Sussman v. U.S. Marshals
 3 Serv., 494 F.3d 1106, 1121 n.9 (D.C. Cir. 2007) (holding that the consent requirement of § 552a(b)
 4 would prohibit the disclosure of materials pertaining to other individuals who had not given written
 5 consent to disclosure, even if the materials also pertained to the requestor).

6 2. CBP Properly Withheld Records Under Exemptions (j)(2) and (k)(2).

7 Just like FOIA, the Privacy Act contains exemptions limiting an individual's access to
 8 records. "Put in the simplest terms, what Congress gave Congress can take away, which it did here
 9 by conferring on agencies the power to exempt certain records from the Privacy Act." Williams v.
 10 Farrior, 334 F. Supp. 2d 898, 905 (E.D. Va. 2004). The two Privacy Act exemptions relevant to
 11 this case are Exemptions (j)(2) and (k)(2), 5 U.S.C. §§ 552a(j)(2), (k)(2). Both exemptions permit
 12 the head of an agency to promulgate rules exempting any system of records from the Privacy Act's
 13 access provisions. The exemptions were properly applied to withhold from Hasbrouck in its
 14 entirety information regarding the rules used by ATS for determining a risk assessment, as well as
 15 any risk assessment pertaining to, or identifiable with, Hasbrouck.

16 Exemption (j)(2) states:

17 **(j) General exemptions.**--The head of any agency may promulgate rules, in
 18 accordance with the requirements (including general notice) of sections 553(b)(1),
 19 (2), and (3), (c), and (e) of this title, to exempt any system of records within the
 20 agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A)
 21 through (F), (e)(6), (7), (9), (10), and (11), and (I) if the system of records is--

22 (2) maintained by an agency or component thereof which performs as
 23 its principal function any activity pertaining to the enforcement of
 24 criminal laws, including police efforts to prevent, control, or reduce
 25 crime or to apprehend criminals, and the activities of prosecutors,
 26 courts, correctional, probation, pardon, or parole authorities, and
 27 which consists of (A) information compiled for the purpose of
 identifying individual criminal offenders and alleged offenders and
 consisting only of identifying data and notations of arrests, the nature
 and disposition of criminal charges, sentencing, confinement, release,
 and parole and probation status; (B) information compiled for the
 purpose of a criminal investigation, including reports of informants
 and investigators, and associated with an identifiable individual; or
 (C) reports identifiable to an individual compiled at any stage of the
 process of enforcement of the criminal laws from arrest or indictment
 through release from supervision.

28 5 U.S.C. § 552a(j)(2). Exemption (j)(2) should be construed broadly. See Binion v. U.S. Dep't of

1 Justice, 695 F.2d 1189, 1192(9th Cir. 1983) (noting legislative history in support of “a broad
2 exemption” for these records “because they contain particularly sensitive information”).

3 Exemption (k)(2) states:

4 **(k) Specific exemptions.**--The head of any agency may promulgate rules, in
5 accordance with the requirements (including general notice) of sections 553(b)(1),
6 (2), and (3), (c), and (e) of this title, to exempt any system of records within the
agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this
section if the system of records is--

7 . . .
8 (2) investigatory material compiled for law enforcement purposes,
9 other than material within the scope of subsection (j)(2) of this
10 section: Provided, however, That if any individual is denied any right,
11 privilege, or benefit that he would otherwise be entitled by Federal
12 law, or for which he would otherwise be eligible, as a result of the
13 maintenance of such material, such material shall be provided to such
individual, except to the extent that the disclosure of such material
would reveal the identity of a source who furnished information to the
Government under an express promise that the identity of the source
would be held in confidence, or, prior to the effective date of this
section, under an implied promise that the identity of the source would
be held in confidence[.]

14 5 U.S.C. § 552(a)(k)(2).

15 To invoke these exemptions for a system of records, “an agency must, first, promulgate
16 rules, pursuant to the rulemaking requirements of 5 U.S.C. ss 553(b)(1), (2), and (3), (c) and (e),
17 and, second, state the reasons in the rule itself why the system of records is to be exempt from a
18 provision of the Act.” Exner, 612 F.2d at 1204 (citing 5 U.S.C. § 552a(j)). CBP has done so for
19 the ATS risk assessment information at issue. First, CBP promulgated a rule exempting, “[w]ith
20 respect to the ATS-P module, . . . the targeting rule sets, risk assessment analyses, and business
21 confidential information contained in the PNR that relates to the air and vessel carriers,” pursuant
22 to Exemptions (j)(2) and (k)(2). 6 C.F.R. Pt. 5, App. C, ¶ 45; see also Notice of Privacy Act
23 System of Records, 72 FR 43650, 43656 (Aug. 6, 2007); Notice of Proposed Rulemaking, 72 FR
43567 (Aug. 6, 2007).

24 Second, CBP stated the reasons in the rule itself why the system of records is to be exempt
25 from the Privacy Act’s access provisions, including 5 U.S.C. § 552a(d)(1). CBP explained that
26 exemption was necessary because

27 [c]ompliance with these [access-to-records] provisions could alert the subject of an
28 investigation to the fact and nature of the investigation, and/or the investigative

1 interest of intelligence or law enforcement agencies; compromise sensitive
 2 information related to law enforcement, including matters bearing on national
 3 security; interfere with the overall law enforcement process by leading to the
 4 destruction of evidence, improper influencing of witnesses, fabrication of testimony,
 and/or flight of the subject; could identify a confidential source; reveal a sensitive
 investigative or intelligence technique; or constitute a potential danger to the health
 or safety of law enforcement personnel, confidential informants, and witnesses.

5 6 C.F.R. Pt. 5, App. C, ¶ 45(c).

6 Because CBP fully complied with both requirements, Hasbrouck is not entitled to any of the
 7 records he requested under the Privacy Act regarding the rules used by ATS for determining a risk
 8 assessment, as well as any risk assessment pertaining to, or identifiable with, him.²² See Exner, 612
 9 F.2d at 1205 (holding that, where the Justice Department had properly complied with the
 10 requirements for exemption under the Privacy Act, the plaintiff was not entitled to the withheld
 11 information “[o]n the face of” exemption (j)(2)(B) and the accompanying regulation); Amro v. U.S.
 12 Customs Serv., 128 F. Supp. 2d 776, 789 (E.D. Pa. 2001) (“Because the DEA is principally
 13 involved in criminal law enforcement and because the DEA has passed regulations exempting its
 14 records from disclosure to the public, the court finds that the DEA properly refused to process [the
 15 plaintiff’s] request for documents under the Privacy Act.”); see also Alexander v. United States,
 16 787 F.2d 1349, 1351-52 (9th Cir. 1986) (“Because the Identification Division of the FBI maintains
 17 [the plaintiff’s] record and because the Department of Justice has promulgated rules exempting the
 18 records system of that division from 5 U.S.C. § 552a(g), [the plaintiff] is barred from taking
 19 advantage of the civil remedies afforded by the Privacy Act.”); Williams, 334 F. Supp. 2d at 905
 20 (holding that the plaintiff could not assert a claim against the Bureau of Prisons regarding the
 21 accuracy of one of his records when the agency had exempted those records from the Privacy Act’s
 22 “accuracy” requirement pursuant to 5 U.S.C. § 552a(j)).

23 **C. CBP Conducted Adequate Searches Under FOIA and the Privacy Act.**

24 “FOIA requires an agency responding to a request to demonstrate that it has conducted a
 25 search reasonably calculated to uncover all relevant documents.” Lahr, 569 F.3d at 986 (internal
 26 _____

27 ²² CBP also promulgated a rule exempting TECS under Exemptions (j)(2) and (k)(2)
 and set forth the reasons for the exemptions in the rule. See 6 C.F.R. Pt. 5, App. C, ¶¶ 22, 22(b);
 28 see also Notice of Privacy Act System of Records, 73 FR 77778, 77782 (Dec. 19, 2008).

1 quotation marks and citations omitted).

2 [T]he issue to be resolved is not whether there might exist any other documents
3 possibly responsive to the request, but whether the *search* for those documents was
4 *adequate*. The adequacy of the search, in turn, is judged by a standard of
5 reasonableness and depends, not surprisingly, upon the facts of each case. In
demonstrating the adequacy of the search, the agency may rely upon reasonably
detailed, nonconclusory affidavits submitted in good faith.

6 Zemansky v. EPA, 767 F.2d 569, 571 (9th Cir. 1985) (italics in original) (quotation marks and
7 citation omitted).

8 “[A]ffidavits describing agency search procedures are sufficient for purposes of summary
9 judgment only if they are relatively detailed in their description of the files searched and the search
10 procedures, and if they are nonconclusory and not impugned by evidence of bad faith.” Id. at 573
11 (citation omitted). The same standard governing the adequacy of a search under FOIA governs the
12 adequacy of a search under the Privacy Act. Lane, 523 F.3d at 1139 n.9.

13 The declarations of Suzuki and Castelli meet this standard. They go into reasonable detail
14 to describe the files searched and the search procedures and demonstrate reasonable, adequate
15 searches for all relevant documents under FOIA and the Privacy Act. With respect to FOIA,
16 Suzuki explained that Kay searched TECS (including BCI and APIS data) and ATS using
17 Hasbrouck’s first name, last name and date of birth. Suzuki Decl. ¶ 16. Suzuki also confirmed that
18 the FOIA Division searched the CBP systems specified in Hasbrouck’s request. Id. Suzuki
19 explained that, because Hasbrouck’s name is uncommon and because other available data insured
20 the correct results, CBP did not need to search for different combinations or alternative spellings of
21 his name. Id. Suzuki further explained that, in searching for the material Hasbrouck requested
22 relating to user manuals, she located the applicable TECS and ATS user’s guides, looked through
23 their tables of contents for relevant sections, and then read through those sections “page-by-page
24 and line-by-line searching for information about how to search the systems identified by Plaintiff.”
25 Id. ¶ 22. Finally, Suzuki explained that, with respect to Hasbrouck’s request for records related to
26 the processing of his 2007 Privacy Act request (2007F4114) and associated appeal, she checked the
27 employee directory for any employee by the name of “Stephen Christenson.” Id. ¶ 24. She also
28 contacted the mailroom, but no log is kept of incoming mail. Id. The FOIA Division searched its

1 file pertaining to 2007F4114. Id. ¶ 25. Suzuki also contacted the Privacy Branch. Id.

2 With respect to the Privacy Act, Castelli explained that an initial search was conducted for
3 PNR records responsive to Hasbrouck's initial request. Castelli Decl. ¶ 11. Later, the Passenger
4 Branch conducted an additional search for PNR records relating to Hasbrouck in his capacity as a
5 travel agent using an "intensive and encompassing" methodology. Id. ¶¶ 12-13. Castelli listed the
6 search criteria used, which were those Hasbrouck had requested. Castelli Decl. ¶ 13. But CBP did
7 not stop at what Hasbrouck had requested. OIT performed an additional search for five criteria,
8 specified in Castelli's declaration, appearing in any ATS PNR record. Id. The Chief of the
9 Passenger Branch then used the information provided by OIT to manually retrieve and review PNR
10 records for responsive documents. Id. The Chief of the Passenger Branch then identified the
11 responsive documents and transmitted them to Castelli, who further reviewed them. Id. ¶¶ 13-14.
12 Both Castelli and Suzuki confirmed that all files likely to contain responsive material were
13 searched. Castelli Decl. ¶ 14; Suzuki Decl. ¶¶ 16, 20, 22, 25.

14 Given the declarations' detailed descriptions of the searches conducted and the
15 reasonableness of the search terms and methodologies used, CBP's searches were adequate. Cf.
16 Lahr, 569 F.3d at 988 & n.21 (holding that a search for records under FOIA was adequate when the
17 government's submissions described the searches in sufficient detail and the searches were
18 reasonably calculated to uncover responsive documents).

19

20 **V. CONCLUSION.**

21 For the foregoing reasons, the court should grant defendant's motion for summary
22 judgment.

23 Dated: June 3, 2011

Respectfully submitted,

24

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United States Attorney

25

26

/s/
NEILL T. TSENG
Assistant United States Attorney

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TECS

The following is a brief description of the TECS database summarized from the most recent System of Records Notice (SORN) pertaining to TECS that is located at 73 FR 77778 (Dec. 19, 2008); see also 6 C.F.R. Pt. 5, App. C, para 22. The initial SORN is located at 66 FR 52984.

The TECS is principally owned and managed by CBP and is its principal law enforcement and anti-terrorism database system. See 73 FR 77778-79. TECS is established as an overarching law enforcement information collecting, analysis, and sharing environment that securely links telecommunications devices and personal computers to a central system and database. *Id.* This environment is comprised of several modules designed to collect, maintain, and screen data as well as conduct analysis, screening, and information sharing. *Id.* TECS databases contain temporary and permanent enforcement, inspection, and intelligence records relevant to the anti-terrorism and law enforcement mission of CBP and numerous other federal agencies that it supports. *Id.* at 77780-81. The purpose of the system is to track individuals who have violated or are suspected of violating a law or regulation that is enforced or administered by CBP, to provide a record of any inspections conducted at the border by CBP, to determine inadmissibility into the United States and to record information regarding individuals, firms, and organizations to whom DHS/CBP has issued detentions and warnings. *Id.* 77781-82. The Secretary of DHS has exempted this system from the notification, access, and amendment procedures of the Privacy Act because it is a law enforcement system. 74 FR 45072 (Aug. 31, 2009). However, CBP will consider individual requests to determine whether or not information may be released. *Id.*

On the next three pages appear three tables that are reproduced from Appendix A of the Privacy Impact Assessment for the TECS: CBP Primary and Secondary Processing (PIA TECS), December 22, 2010, pages 25-28 and can be located at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_tecs.pdf. These tables explain the data that resides on the TECS platform and is collected by CBP, the data that resides on TECS but is not collected by CBP, and the data that is accessible through TECS but does not reside on TECS.

Table 1 Sub-systems – Data that resides on the TECS Platform and is collected by CBP

<i>Sub-system</i>	<i>Privacy Act – System of Records Notice – Federal Register</i>	<i>Published or Pending PIA</i>	<i>General Comments</i>
Advance Passenger Information System (APIS)	73 Fed. Reg. 68435	YES	See APIS PIA and SORN for more information on APIS. These documents can be found on the DHS Privacy Office website at www.dhs.gov/privacy .
Border Crossing Information (BCI)	73 Fed. Reg. 43457	YES	See BCI PIA and SORN.
Global Enrollment System (GES)	71 Fed. Reg. 20708	YES	See GES PIA. Principal system for collecting and storing information on individuals who have enrolled in a CBP trusted traveler program.
Non-immigrant Information System (NIIS) - I-94 and I-94W data/query	73 Fed. Reg. 77739	NO	See NIIS SORN.
Seized Asset and Case Tracking System (SEACATS)	73 Fed. Reg. 77764	PIA currently Pending for Publication	See SEACATS SORN.

Table 2 Data that resides on TECS but is not collected by CBP

<i>Sub-system or Interface Name</i>	<i>Privacy Act – System of Records Notice – Federal Register</i>	<i>Published or Pending PIA</i>	<i>General Comments</i>
Interface with U.S. Department of State: Passport Information Electronic Records System (PIERS)	73 Fed. Reg. 16602008	YES	PIERS is a U.S. Department of State system.
Interface with Non-Federal Entity Data System (NEDS)	73 Fed. Reg. 43462	Yes	States with Enhanced Drivers Licenses
Interface with U.S. Citizenship and Information Services: Alien File (A-File) and Central Index System (CIS)	72 Fed. Reg. 1755	Yes	USCIS provides data from the Central Index System (CIS) on persons entitled to lawful permanent residence, refugees, and asylees, all classes of persons whose information is maintained by DHS as being entitled to special procedures regarding admissibility under the Immigration and Naturalization Act.
Interface with the DHS Watchlist Service	73 Fed. Reg. 77778	Yes	In accordance with the Watchlist Service PIA (July 14, 2010), Watchlist information for CBP is maintained in TECS

Table 3 Data that is accessible through TECS but does not reside on TECS

<i>Sub-system or Interface Name</i>	<i>Privacy Act – System of Records Notice – Federal Register</i>	<i>Published or Pending PIA</i>	<i>General Comments</i>
National Crime Information Center (NCIC)	64 Fed. Reg. 52343	YES	NCIC is U.S. Department of Justice system.
NLETS (formerly known as the National Law Enforcement Telecommunications System)	NO	NO	Owned by the states of the U.S., not subject to PA or E-Gov.
California Law Enforcement Telecommunications System (CLETS)	NO	NO	See above.
Canadian Police Information Center (CPIC)	NO	NO	Foreign agencies are not subject to PA or E-Gov.

Automated Targeting System (ATS)

Detailed information regarding this system was published in the Notice of Privacy Act System of Records Notice (SORN) at 72 FR 43650 (Aug. 6, 2007), the Notice of Proposed Rulemaking (NPRM) for Privacy Act exemptions at 72 FR 43567 (Aug. 6, 2007), the Final Rule for Privacy Exemptions at 75 FR 5487 (Feb 3, 2010), and 6 C.F.R. Pt. 5, App. C, para 45.

In addition, detailed Privacy Impact Assessments (PIA) can be found at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_atupdate10plus2.pdf (published December 2, 2008) and http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_ats_updated_fr.pdf (published on August 6, 2007).

The following is a brief description of the ATS System as described in its SORN at 72 FR 43650. ATS is an intranet-based enforcement screening tool consisting of six separate and distinct components that perform screening of inbound and outbound cargo, conveyances, or travelers. *Id.* These modules compare information received against CBP's law enforcement databases, the Federal Bureau of Investigation Terrorist Screening Center's Terrorist Screening Database (TSDB), information on outstanding wants or warrants, information from other government agencies regarding high-risk parties, and risk-based rules developed by analysts using law enforcement data, intelligence, and past case experience. *Id.* at 43651. ATS is a decision-support tool that allows DHS officers charged with enforcing U.S. law and preventing terrorism and other crime to effectively and efficiently manage information collected when travelers or goods seek to enter, exit, or transit through the United States. *Id.* One of these modules, ATS-P, collects and maintains Passenger Name Record (PNR) data, which is data provided to airlines and travel agents by or on behalf of air passengers seeking to book travel. *Id.* CBP collects this information as part of its border enforcement mission and pursuant to the Aviation and Transportation Security Act of 2001. *Id.* ATS is the actual source system for this PNR data. *Id.*

Certain records within ATS are exempt from certain provisions of the Privacy Act. *See id* at 43652 and 75 FR 5487 (Feb. 3, 2010). Notwithstanding the listed exemptions for the system, individuals, regardless of citizenship, may seek access under the Privacy Act to information provided by and regarding the requestor, or provided by a booking agent, broker, or other person on the requestor's behalf, that is collected by CBP and contained in the PNR database stored in the ATS-P. *Id.*

Border Crossing Information (BCI)

Detailed information regarding the BCI System can be found in the Privacy Act System of Records Notice at 73 FR 43457 (Jul. 25, 2008), the Notice of Proposed Rulemaking for Privacy Act Exemptions 73 FR 43374 (Jun. 25, 2008), the Final Rule for Privacy Act Exemptions 75 FR 5491 (Feb. 3, 2010), and 6 C.F.R. Pt.5, App. C, para 46.

The following information is a brief description of the information contained in BCI as described in its SORN at 73 FR 43457. BCI will receive and maintain border crossing information on travelers who are admitted or paroled into the United States, including certain biographical information; a photograph; certain itinerary information provided by air and sea carriers and any other forms of passenger transportation, including rail, which is or may subsequently be mandated, or is or may be provided on a voluntary basis; and the time and location of the border crossing. *Id.* BCI contains border crossing information for individuals crossing the border, regardless of method or conveyance, and information for all individuals who depart the United States by air or sea and, in certain circumstances, by land. *Id.* In certain circumstances in the land environment, CBP will collect the individual's biographic data, either directly from an approved travel document presented by the traveler and/or by verifying the traveler's border crossing information against electronic records supporting certain documents. *Id.*

Advanced Passenger Information System (APIS)

Detailed information regarding the APIS System can be found in the Privacy Act System of Records Notice at 73 FR 68435 (Nov. 18, 2008), the Final Rule for Privacy Act Exemptions 73 FR 68291 (Nov. 18, 2008), and 6 C.F.R. Pt. 5, App. C, para 12. The following information is a brief description of the information contained in APIS as described in its SORN at 73 FR 68435. APIS collects certain biographical information on all passengers and crew members who arrive in or depart from, or transit through (and crew that over fly) the United States on a covered air or vessel carrier, and, in the case of crew members, those who continue domestically on a foreign air or vessel carrier, to additionally encompass private aircraft, rail, and bus travel. *Id.* An example of a relevant category of records contained in APIS would be: complete name, date of birth, gender, country of citizenship, passport/alien registration number and country of issuance, passport expiration date, country of residence, status on board the aircraft, travel document type, United States destination address (for all private aircraft passengers and crew, and commercial air, rail, bus, and vessel passengers except for U.S. Citizens, lawful permanent residents, crew and those in transit), place of birth and address of permanent residence (commercial flight crew only), pilot certificate number and country of issuance (flight crew only, if applicable), the Passenger Name Record (PNR) locator number, primary inspection lane, ID inspector, and other records. *Id.*