

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
SOPHIA HELENA IN'T VELD,)	
)	
Plaintiff,)	
)	
v.)	Civ. A. No. 1:08-cv-01151 (RMC)
)	
DEPARTMENT OF HOMELAND)	
SECURITY, <u>et al.</u>)	
)	
Defendants.)	
_____)	

DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

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

(2) In my current capacity as Section Chief of RIDS, I supervise approximately 195 employees who staff a total of ten (10) FBIHQ units and a field operational service center unit whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA; Privacy Act; Executive Order

12958, as amended; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and other Presidential and Congressional directives. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552. Specifically, I am aware of the treatment which has been afforded the request for records made to FBIHQ by plaintiff's counsel (hereinafter "plaintiff") in which she sought "all records concerning Ms. In't Veld (including but not limited to electronic records) in the consolidated and integrated terrorist watch list maintained by the Terrorist Screening Center."

(4) The purpose of this declaration is to provide the Court and plaintiff with the administrative and litigation history of plaintiff's request. In particular, in support of Defendants' Motion for Summary Judgment, this declaration will explain the government's policy of neither confirming nor denying the existence of records which would tend to indicate whether a particular person is or ever was listed on any government terrorist watch list, including but not limited to, the Terrorist Screening Center Database ("TSDB").

TERRORIST SCREENING CENTER DATABASE

(5) The Terrorist Screening Center ("TSC") was created pursuant to Homeland Security Presidential Directive-6 ("HSPD-6") and began operations on December 1, 2003. The TSC is administered by the FBI with support from the Intelligence Community, Department of Justice, Department of Homeland Security, Department of State, Department of

Treasury, and Department of Defense. Its mission is to coordinate the Government's approach to terrorism screening and maintain a consolidated database of all known and suspected terrorists for use in screening.

(6) Prior to creation of the TSC, information about known and suspected terrorists was dispersed throughout the U.S. Government, and no single agency was responsible for consolidating and making the terrorist watch lists available for use in screening. In March 2004, the TSC consolidated the Government's terrorist watch list information into a sensitive but unclassified database known as the TSDB. As required by HSPD-6, the TSDB contains "information about individuals known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism." Information from the TSDB is used to screen for known and suspected terrorists in a variety of contexts, including during law enforcement encounters, the adjudication of applications for U.S. visas or other immigration and citizenship benefits, at U.S. borders and ports of entry, and for civil aviation security purposes.

ADMINISTRATIVE HISTORY OF PLAINTIFF'S FOIA REQUEST

(7) By letter dated October 17, 2007, plaintiff submitted via facsimile a FOIA request to FBIHQ seeking access to "all records concerning Ms. In't Veld (including but not limited to electronic records) in the consolidated and integrated terrorist watch list maintained by the Terrorist Screening Center." (See Exhibit A.)

(8) By letter dated December 18, 2007, the FBI responded to plaintiff's October 17, 2007 FOIA request. The FBI stated that it conducted a search of the automated indices, concentrating on identifying main files in the central records system at FBIHQ; however,

the FBI could not locate any responsive records. The response letter advised plaintiff that she could appeal the FBI's determination by filing an administrative appeal with the Department of Justice ("DOJ") Office of Information and Privacy ("OIP") within sixty days. (See Exhibit B.)

(9) By letter dated January 22, 2008, plaintiff submitted via facsimile her appeal to OIP regarding the FBI's December 18, 2007 no records response letter. (See Exhibit C.)

(10) By letter dated January 25, 2008, OIP acknowledged receipt of plaintiff's January 22, 2008 appeal letter. Further, OIP advised plaintiff of the substantial backlog of pending appeals. (See Exhibit D.)

(11) On July 1, 2008, plaintiff filed a Complaint in the U.S. District Court for the District of Columbia, requesting a release of all records responsive to plaintiff's October 17, 2007 FOIA request.

(12) By letter dated August 8, 2008, the FBI informed plaintiff that after further review of her initial correspondence in this case it determined that due to an administrative misinterpretation of plaintiff's October 17, 2007 request, the FBI's December 18, 2007 "no records" response was sent in error. Further, the FBI explained it had interpreted the request as a general first-party request rather than a specific request for records concerning Ms. In't Veld located in the TSDB. Thus, pursuant to FOIA Exemptions 2 and 7(E), 5 U.S.C. §§ 552(b)(2) and (b)(7)(E), the FBI could neither confirm nor deny the existence of records which would tend to indicate whether a particular person is or ever was listed on any government terrorist watch list, including but not limited to, the TSDB. (See Exhibit E.)

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

(13) 5 U.S.C. § 552(b)(2) exempts from disclosure information "related solely to the internal personnel rules and practices of an agency." This exemption encompasses two distinct categories of records that are internal in nature: those involving trivial administrative matters of no genuine public interest ("Low 2") and those the disclosure of which would risk circumvention of a statute or regulation ("High 2"). The FBI can neither confirm nor deny whether any particular individual, including plaintiff, is listed in the TSDB pursuant to "High 2." The release of TSDB-related information concerning any individual, if publicly disclosed, would reasonably be expected to cause disclosure of techniques and procedures used in law enforcement investigations and would risk circumvention of law.

EXEMPTION 7 THRESHOLD

(14) Exemption 7 of the FOIA protects from mandatory disclosure records or information compiled for law enforcement purposes, but only to the extent that disclosure could reasonably be expected to cause one of the harms enumerated in the subpart of the exemption. See 5 U.S.C. § 552(b)(7). In this case, the harm that could reasonably be expected to result from disclosure concerns the disclosure of techniques and procedures.

(15) Before an agency can invoke any of the harms enumerated in Exemption 7, it must first demonstrate that the records or information at issue were compiled for law enforcement purposes. Law enforcement agencies such as the FBI must demonstrate that the records at issue are related to the enforcement of federal laws and that the enforcement activity is within the law enforcement duty of that agency. Under the FOIA, the law to be enforced within the meaning of the term "law enforcement purposes" includes both criminal and civil statutes as

well as those statutes authorizing administrative/regulatory proceedings. Most significantly, in the post-9/11 world, Exemption 7 extends into the realms of national security and homeland security-related government activities. And the FBI's mission of preventing terrorist attacks within the United States, and reducing the vulnerability of the United States to terrorism, are keys to satisfying the Exemption 7 threshold. The TSDB is used in counterterrorism and counterintelligence investigations conducted by the FBI and the FBI has jurisdiction to maintain and use the TSDB pursuant to HSPD-6. Thus, information within the TSDB falls within the law enforcement duties of the FBI. Accordingly, the information readily meets the threshold requirement of Exemption 7.

(16) Because the records meet the Exemption 7 threshold, the remaining inquiry is whether their disclosure would "reveal sensitive law enforcement techniques."

EXEMPTION (b)(7)(E)
INVESTIGATIVE TECHNIQUES AND PROCEDURES

(17) 5 U.S.C. § 552(b)(7)(E) provides for the withholding of:

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

(18) While the use of the TSDB and other government watch lists as an investigative technique is known, the manner of use and the individuals listed within these watch lists are not known. Disclosure of whether any particular individual is listed in the TSDB may cause substantial harm to the law enforcement investigative and intelligence gathering interests of the FBI. Public confirmation that a particular person is listed within the TSDB would alert this

individual that he/she is the subject of an investigation. By alerting a particular group of associates which of their members are subject to investigations and the types of records obtained, they might learn the focus of these investigations and understand the inner workings of the TSDB as a technique in national security investigations. They could then adjust their means of communication or financial dealings to avoid detection of the very behavior that the law enforcement and intelligence community have determined may be indicative of a terrorist threat, and which form the core of pending investigative efforts.

**JUSTIFICATION FOR NEITHER CONFIRMING NOR DENYING THE
EXISTENCE OF RECORDS ON ANY INDIVIDUAL CONCERNING THE TSDB,
PURSUANT TO FOIA EXEMPTIONS 2 (HIGH) AND 7(E)**

(19) As previously stated in ¶ 6, the TSDB is an indispensable investigative tool that is used to screen for known and suspected terrorists in a variety of law enforcement and immigration related encounters. The FBI is protecting information concerning information which would tend to indicate whether a particular person is or ever was listed in the TSDB pursuant to Exemptions 2 (high) and 7(E), which in this case are complimentary and have the same standard for their invocation because the information contained in the TSDB was compiled in the course of law enforcement investigations and disclosure of any information regarding any individual would reveal investigative techniques and procedures, and could reasonably be expected to risk circumvention of the law.

(20) Disclosure of whether any particular individual is listed in the TSDB may cause substantial harm to the law enforcement investigative and intelligence gathering interests of the FBI. Public confirmation that an individual is in the TSDB would alert this individual that he/she is the subject of an investigation. By alerting a particular group of associates which of

their members are subject to an investigation and the types of records obtained, they might learn the focus of the investigation and understand the inner workings of the use of the TSDB as a technique in national security investigations. They could then adjust their means of communication or financial dealings to avoid the detection of the very behavior that the law enforcement and intelligence community have determined may be indicative of a terrorist threat, and which form the core of pending investigative efforts.

(21) In response to first-party FOIA/Privacy Act requests where there are no responsive records located, the FBI typically would have no difficulty in providing a "no records" response. But this is not a typical FOIA request. By giving a "no records" response to a requester when there are in fact no records, leaves the FBI no practical response options when a requester is listed in the TSDB without compromising the fact of a national security investigation. By way of illustration, suppose the FBI receives a FOIA request from an individual for records concerning their inclusion in the TSDB and there are no responsive records; they are then given a "no records" response. The next requester with the same request is in fact listed in the TSDB and therefore has responsive records, but is given a "Glomar" response that "neither confirms nor denies" the existence of any FBI records. Unless the integrity of the system is preserved by consistently providing every individual requester with a "Glomar" response, a potential terrorist could find out whether or not they are listed in the TSDB.

(22) A requester might argue that they have the right to know if they are listed in the TSDB because he/she knows they are not a terrorist and their placement on the TSDB would have been made erroneously with no right to redress. The unintended consequence if a

substantive response is required, however, is to force the FBI or any other national security agency which maintains a government terrorist watch list to vet possible terrorists by revealing whether or not an individual is of investigative interest. A potential terrorist who receives a "Glomar" response knows that their actions are subject to investigative scrutiny. By contrast, a "no records" response indicates that the potential terrorist can move about freely without fear of scrutiny. A terrorist group can use this process to circumvent the law by determining which of its members have not been detected and then using those individuals to engage in terrorist actions.

(23) Given the above, the only reasonable response by the FBI, consistent with the response of other government agencies to FOIA requests for information concerning whether a particular individual, including plaintiff, is on a terrorist watch list is to consistently neither confirm nor deny whether any individual is on a watch list, regardless of whether or not they are listed. Such disclosure could reasonably be expected to risk circumvention of law and thereby impede the effectiveness of the FBI's law enforcement activities. Moreover, the consistent application of this response of non-confirmation and non-denial pursuant to Exemptions 2 and 7(E), results in the inability of any individual to draw logical inferences as to whether or not they are listed in the TSDB, thus preserving and protecting the integrity and effectiveness of the TSDB.

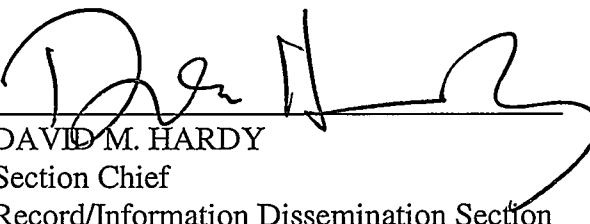
CONCLUSION

(24) The FBI has appropriately neither confirmed nor denied whether any individual, including plaintiff, has records relating to whether he/she is included in the TSDB pursuant FOIA Exemptions 2 and 7(E), 5 U.S.C. §§ 552(b)(2) and (b)(7)(E), inasmuch as the public

disclosure could reasonably be expected to damage the use of the TSDB as an effective tool in the Government's counterintelligence and counterterrorism efforts.

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

Executed this 15th day of September, 2008.



DAVID M. HARDY
Section Chief
Record/Information Dissemination Section
Federal Bureau of Investigation
Washington, D.C.