**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **SOPHIA HELENA IN'T VELD,** | ) | |
| **Plaintiff,** | ) | |
| **v.** | ) | **Civil No. 08-1151 (RMC)** |
| **DEPARTMENT OF HOMELAND SECURITY, *et al.*,** | ) | |
| **Defendants**. | ) | |

**DEFENDANT UNITED STATES DEPARTMENT OF JUSTICE'S**
**MOTION FOR SUMMARY JUDGMENT**

Defendant, United States Department of Justice ("DOJ"), by and through undersigned counsel, respectfully moves the Court, pursuant to Fed. R. Civ. P. 56, for summary judgment on the grounds that no genuine issue of material fact exists and, therefore, Defendant DOJ is entitled to judgment as a matter of law. In support of this motion, Defendant respectfully refers the Court to the attached Memorandum of Points and Authorities in Support, Statement of Material Facts As To Which There Is No Genuine Issue, and Declaration of David M. Hardy, Section Chief of the Record/Information Dissemination Section, Records Management Division, at the DOJ's Federal Bureau of Investigation's Headquarters Office in Washington, D.C.

Because this is a dispositive motion, Defendant has not sought Plaintiff's consent before filing this motion. *See* LCvR 7(m).

Respectfully submitted,

/s/
JEFFREY A. TAYLOR, D.C. BAR #498610
United States Attorney

/s/
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**STATEMENT OF MATERIAL FACTS AS TO**
**WHICH THERE IS NO GENUINE ISSUE**

Defendant, United States Department of Justice ("DOJ"), respectfully submits this statement of material facts as to which there is no genuine issue in accordance with this Court's Local Rule 7(h). The Declaration of David M. Hardy, Section Chief of the Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD"), at DOJ's Federal Bureau of Investigation's ("FBI") Headquarters Office ("FBIHQ") in Washington, D.C., ("Hardy Decl."), supports this statement. *See* Defendant DOJ's Attachment A.

1. By letter dated October 17, 2007, Plaintiff, through her counsel, (hereafter "Plaintiff"), submitted by facsimile a Freedom of Information Act ("FOIA"), request to FBIHQ seeking "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." Hardy Decl. ¶ 7, Exhibit A.

2. The Terrorist Screening Center ("TSC") was created pursuant to Homeland Security Presidential Directive-6 ("HSPD-6"), and began operations on December 1, 2003.

Hardy Decl. ¶ 5. The TSC's mission is to coordinate the U.S. Government's approach to terrorism screening and maintain a consolidated database of all known and suspected terrorists for use in screening. *Id*.

3. 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. Hardy Decl. ¶ 6.

4. In March 2004, the TSC consolidated the U.S. Government's terrorist watch list information into a sensitive, but unclassified database known as the Terrorist Screening Center Database ("TSDB"). *Id*.

5. 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." *Id*.

6. 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 United States' visas or other immigration and citizenship benefits, at United States' borders and ports of entry, and for civil action security purposes. *Id*.

7. By letter dated December 18, 2007, the FBI responded to Plaintiff's FOIA request dated October 17, 2007. Hardy Decl. ¶ 8, Exhibit B. The FBI advised Plaintiff that it had conducted a search of the FBI's automated indices, concentrating on identifying main files in the central records system at FBIHQ, but that it could not locate any responsive records. *Id*. The response letter advised Plaintiff that she could appeal the FBI's determination by filing an administrative appeal with the DOJ's Office of Information and Privacy ("OIP") within sixty

days. *Id*.

8. By letter dated January 22, 2008, Plaintiff submitted by facsimile her appeal to OIP regarding the FBI's no records response. Hardy Decl. ¶ 9, Exhibit C.

9. By letter dated January 25, 2008, OIP acknowledged receipt of Plaintiff's appeal letter. Hardy Decl. ¶ 10, Exhibit D. Additionally, OIP advised Plaintiff of the substantial backlog of pending appeals at OIP. *Id*.

10. On July 1, 2008, Plaintiff filed a complaint in the U.S. District Court for the District Columbia requesting a release of all records responsive to her FOIA request to the FBI dated October 17, 2007. Hardy Decl. ¶ 11.

11. By letter dated August 8, 2008, the FBI informed Plaintiff that after further review on her initial correspondence, the FBI had determined that due to an administrative misinterpretation of Plaintiff's FOIA request dated October 17, 2007, the FBI's December 18, 2007 "no records" response had been in error. Hardy Decl. ¶ 12, Exhibit E. The FBI explained that it had interpreted Plaintiff's FOIA request as a general first-party request instead of a specific request for records concerning Plaintiff located in the TSDB. *Id*. Pursuant to FOIA Exemptions 2 and 7(E), 5 U.S.C. §§ 552(b)(2) and (b)(7)(E), the FBI issued a *Glomar* response advising Plaintiff that 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. *Id*.

12. While the use of the TSBD 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. Hardy Decl. ¶ 18.

13. Disclosure of whether any particular individual is listed in the TSBD may cause substantial harm to the law enforcement investigative and intelligence gathering interests of the FBI. *Id.*

14. Public confirmation that a particular person is listed within the TSDB would alert that individual to the fact that he or she was the subject of an investigation. *Id.*

15. By alerting particular groups of associates that certain of their members are under investigation and of the types of records obtained, these groups might learn the focus of the investigations and come to understand the inner workings of the TSDB as a technique in national security investigations. *Id.* These groups could then adjust their means of communication or their financial dealings to avoid detection of the very behavior which the law enforcement community and the intelligence community have determined as being indicative of a terrorist threat and which form the core of pending investigative efforts. *Id.*

16. The TSBD 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. Hardy Decl. ¶ 19.

17. By issuing a *Glomar* response, the FBI is protecting information which would tend to indicate whether a particular person is or ever was listed in the TSBD pursuant to Exemptions 2(high) and 7(E), because the information contained in the TSBD was compiled in the course of law enforcement investigations and disclosure of any information regarding any individual would reveal investigative techniques and procedures, and reasonably be expected to risk circumvention of the law. *Id.*

Respectfully submitted,

/s/
JEFFREY A. TAYLOR, D.C. BAR #498610
United States Attorney

/s/
RUDOLPH CONTRERAS, D.C. BAR #434122
Assistant United States Attorney

/s/
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| **Defendants**. | ) | |
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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT UNITED STATES DEPARTMENT OF JUSTICE'S MOTION FOR SUMMARY JUDGMENT**

**Preliminary Statement**

Plaintiff brought this action against three Federal agencies[1] pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq*. Plaintiff's action against the U.S. Department of Justice concerns the Federal Bureau of Investigation's ("FBI") response to Plaintiff's FOIA request for all records concerning her in the consolidated and integrated terrorist watch list maintained by the Terrorist Screening Center ("TSC"). Plaintiff's suit challenges a "no records" response by the FBI.

However, after Plaintiff's complaint was filed, the FBI realized that there had been an administrative misinterpretation of Plaintiff's FOIA request as a general first-party request.

[1] Defendants named in the complaint are the United States Department of Justice ("DOJ"), U.S. Department of State and the U.S. Department of Homeland Security. The Federal Bureau of Investigation is a component of the DOJ.

Thereafter, the FBI sent Plaintiff a *Glomar* response[2] pursuant to FOIA Exemptions 2 and 7(E), 5 U.S.C. §§ 552(b)(7)(E) and (b)(2), advising her that the FBI could neither confirm nor deny that a particular person is or ever was listed on any government terrorist watch list.

## I. BACKGROUND

The TSC was created pursuant to Homeland Security Presidential Directive-6 ("HSPD-6"), and began operations on December 1, 2003. Hardy Decl. ¶ 5. The TSC's mission is to coordinate the U.S. Government's approach to terrorism screening and maintain a consolidated database of all known and suspected terrorists for use in screening. *Id*. 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. Hardy Decl. ¶ 6.

In March 2004, the TSC consolidated the U.S. Government's terrorist watch list information into a sensitive, but unclassified database known as the Terrorist Screening Center Database ("TSDB"). *Id*. 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." *Id*. 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 United States' borders and ports of entry, and for civil action security

[2] The refusal to confirm or deny the existence of documents responsive to a FOIA request is typically called a *Glomar* response in reference to the case *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), in which the Central Intelligence Agency successfully defended its refusal to confirm or deny the existence of records regarding a ship, the Hughes Glomar Explorer.

purposes. *Id*.

## II. FACTUAL BACKGROUND

By letter dated October 17, 2007, Plaintiff, through her counsel, (hereafter "Plaintiff"), submitted a FOIA request to the FBI's Headquarters Office ("FBIHQ") seeking "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." Hardy Decl. ¶ 7, Exhibit A. By letter dated December 18, 2007, the FBI responded to Plaintiff's FOIA request. Hardy Decl. ¶ 8, Exhibit B. The FBI advised Plaintiff that it had conducted a search of the FBI's automated indices, concentrating on identifying main files in the central records system at FBIHQ, but that the FBI could not locate any records responsive to Plaintiff's FOIA request. *Id*. Additionally, the FBI advised Plaintiff that she could appeal the FBI's determination by filing an administrative appeal with the DOJ's Office of Information and Privacy ("OIP") within sixty days. *Id*.

By letter dated January 22, 2008, Plaintiff submitted her appeal to OIP regarding the FBI's no records response. Hardy Decl. ¶ 9, Exhibit C. By letter dated January 25, 2008, the OIP acknowledged receipt of Plaintiff's appeal letter. Hardy Decl. ¶ 10, Exhibit D. In addition, the OIP advised Plaintiff of the substantial backlog of pending appeals at OIP. *Id*.

On July 1, 2008, Plaintiff filed a complaint in the U.S. District Court for the District Columbia requesting a release of all records responsive to her FOIA request to the FBI dated October 17, 2007. Hardy Decl. ¶ 11. After receiving the complaint, the FBI again reviewed Plaintiff's initial FOIA request. Hardy Decl. Hardy Decl. ¶ 12. By letter dated August 8, 2008, the FBI informed Plaintiff that after further review on her initial correspondence, the FBI had

determined that due to an administrative misinterpretation of Plaintiff's FOIA request dated October 17, 2007, the FBI's December 18, 2007 "no records" response had been in error. Hardy Decl. ¶ 12, Exhibit E. The FBI explained that it had interpreted Plaintiff's FOIA request as a general first-party request instead of a specific request for records concerning Plaintiff located in the TSDB. *Id*. Thus, pursuant to FOIA Exemptions 2 and 7(E), 5 U.S.C. §§ 552(b)(2) and (b)(7)(E), the FBI issued a *Glomar* response advising Plaintiff that the FBI could neither confirm nor deny the existence of records which tend to indicate whether a particular person is or ever was listed on any government terrorist watch list, including but not limited to, any records in the TSDB. *Id*.

## III. LEGAL STANDARDS

### A. Motion for Summary Judgment Under Rule 56

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To determine which facts are material, the Court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). In determining whether there exists a genuine issue of material fact sufficient to preclude summary judgment, the Court must regard the non-movant's statements as true and accept all evidence and make all inferences in the non-movant's favor. *Id.*, at 255. A non-moving party, however, must establish more than the "mere existence of a scintilla of evidence" in support of her position. *Id*. at 252. By pointing

to the absence of evidence proffered by the non-moving party, a moving party may succeed on summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. at 322. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc*., at 249-250.

**B. Summary Judgment In FOIA Cases**

The FOIA, 5 U.S.C. § 552, represents a balance "between the right of the public to know and the need of the government to keep information in confidence." *John Doe Agency v. John Doe Corp*., 493 U.S. 146, 152 (1989) (quoting H.R. Rep. 89-1497, 89th Cong., 2d Sess., 6 (1966)). While the FOIA requires agency disclosure under certain circumstances, the statute recognizes "that public disclosure is not always in the public interest." *Baldridge v. Shapiro*, 455 U.S. 345, 352 (1982). Consequently, the FOIA "provides that agency records may be withheld from disclosure under any one of the nine exemptions defined in 5 U.S.C. § 552(b)." *Id*. As directed by the Supreme Court, the statutory exemptions must be construed "to have meaningful reach and application." *John Doe Agency v. John Doe Corp*., 493 U.S. at 152.

For purposes of summary judgment, an agency's decision to withhold information from a FOIA requester is subject to *de novo* review by the Courts. *Hayden v. National Security Agency Cent. Sec. Serv*., 608 F.2d 1381, 1384 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980). In a FOIA suit, an agency is entitled to summary judgment once it demonstrates that no material facts are in dispute and that each document that falls within the class requested either has been produced, is unidentifiable, or is exempt from disclosure. *Students Against Genocide v. Dept. of State*, 257 F.3d 828, 833 (D.C. Cir. 2001); *Weisberg v. U.S. Dept. of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980).

An agency satisfies the summary judgment requirements in a FOIA case by providing the Court and a plaintiff with affidavits or declarations which show that the documents are exempt from disclosure. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); *Canning v. United States Dep't of Justice*, 848 F. Supp. 1037, 1042 (D.D.C.) (agencies are typically permitted to meet [their] heavy burden by 'filing affidavits describing the material withheld and the manner in which it falls within the exemption claimed.") (quoting *King v. United States Dep't of Justice*, 830 F.2d 210, 217 (D.C. 1987)).

In a FOIA case, the Court may award summary judgment solely based on the information provided in affidavits or declarations when they describe "the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). In cases, such as this one, which implicate national security concerns, courts have accorded deference to the agency's declaration. *See Center for Nat'l Security Studies v. U.S. Dept. of Justice*, 331 F.3d 918, 926 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004) (applying this deference with respect to information withheld under Exemption 7).

## ARGUMENT

### IV. THE FBI PROPERLY REFUSED TO CONFIRM OR DENY WHETHER PLAINTIFF WAS ON A TERRORIST WATCH LIST

After Plaintiff filed suit, the FBI realized that Plaintiff's FOIA request had initially been misinterpreted and that, in fact, she was seeking information on whether or not she was listed on a terrorist watch list. Hardy Decl. ¶ 12. By letter dated August 8, 2008, the FBI advised Plaintiff

that after further review of her request, the FBI could neither confirm nor deny the existence of records which would tend to indicate whether any particular person is or ever was listed on any government terrorist watch list, including the TSDB. Hardy Decl. ¶ 12, Exhibit E. In that letter, the FBI, citing Exemptions 2 and 7(E), explained that "[M]aintaining the confidentiality of government watch lists is necessary to achieve the counterterrorism objectives of the U.S. Government." *Id.*

The invocation of the *Glomar* response is appropriate when "to confirm or deny the existence of records . . . would cause harm cognizable under a FOIA exemption." *Gardels v. Central Intelligence Agency*, 689 F.2d 1100, 1103 (D.C. Cir. 1982). *Glomar* responses have been upheld by courts in the context of various FOIA exemptions. *See Miller v. Casey*, 730 F.2d 773, 776-77 (D.C. Cir. 1984); *Phillippi v. CIA*, 546 F.2d 1009, 1012 (D.C. Cir. 1976); *Tooley v. Bush,* 2006 WL 3783142 (D.D.C. 2006) (upholding TSA's *Glomar* response for watch list records concerning the plaintiff). As discussed below, the FBI properly justified its *Glomar* response under FOIA Exemptions 2 and 7(E), 5 U.S.C. §§ 552(b)(2) and (b)(7)(E).

**A. The FBI's *Glomar* Response Is Proper Under Exemption 7(E)**

The FBI's refusal to confirm or deny whether Plaintiff's name appears on a terrorist watch list is proper under Exemption 7(E). This exemption excludes from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (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 could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). Under Exemption 7(E), the

government must make two showings: (1) that the records were compiled for a law enforcement purpose; and (2) that the records reveal law enforcement techniques or guidelines that, if disclosed, "could reasonably be expected to risk circumvention of the law." *Id*. The FBI's invocation of the *Glomar* response in this case meets both requirements.

Application of any of FOIA's exemptions in Exemption 7 requires the agency to satisfy the threshold issues of, first, whether the agency has the requisite law enforcement purpose in compiling the records at issue and, second, whether the information gathered has a sufficient nexus to the law enforcement purpose. *See, e.g., Tax Analysts v. IRS*, 294 F.3d 71, 76-79 (D.C. Cir. 2002); *Jefferson v. DOJ*, 284 F.3d 172, 176-77 (D.C. Cir. 2002); *Campbell v. DOJ*, 164 F.3d 20, 32 (D.C. Cir. 1998); *Pratt v. Webster*, 673 F.2d 408, 419 (D.C. Cir. 1982). In *Jefferson*, the court drew a distinction between agencies gathering information as part of any government agency's "oversight of the performance of duties by its employees," and information sought as part of investigations into illegal conduct for which the agency might impose criminal or civil sanctions. 284 F.3d at 177. Thus, the rule from *Jefferson* provides a broadly applicable distinction based more on the agency's mission and reasons for collecting the information at issue.

Many types of agency activities have been upheld as having a law enforcement purpose, even several that arguably go beyond the core law enforcement mission of investigating crimes that have been committed. *See, e.g., Mittleman v. OPM*, 76 F.3d 1240, 1241-43 (D.C. Cir. 1996) (OPM background investigation), *cert. denied*, 519 U.S. 1123 (1997); *Heggestad v. DOJ*, 182 F. Supp. 2d 1, 13 (D.D.C. 2000) (IRS has law enforcement purpose); *Center to Prevent Handgun Violence v. Dep't of Treasury*, 981 F. Supp. 20 (D.D.C. 1997) (collecting information on all

repeat handgun sales); *Doe v. DOJ*, 790 F. Supp. 17, 20-21 (D.D.C. 1992) (background investigations).

In addition, the case law in this circuit is well-settled that the agency need not tie its collection of information to any specific or ongoing investigation. *See Tax Analysts*, 294 F.3d at 78; *Keys v. U.S. Department of Justice*, 830 F.2d 337, 342 (D.C. Cir. 1987). This is fully consistent with the courts' broad acceptance that the 1986 amendments to FOIA relaxed the required threshold showing for Exemption 7. *See, e.g., United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 780 (1989) (recognizing that the shift from the "would constitute" standard to the "could reasonably be expected to constitute" standard represents a congressional effort to ease considerably the burden in invoking Exemption 7); S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983) ("Substitute 'records or information' for 'investigatory records' as the threshold qualification for the exemption: This amendment would broaden the scope of the exemption to include 'records or information compiled for law enforcement purposes,' regardless of whether they may be investigatory or noninvestigatory."). The information at issue clearly meets the threshold requirement that it was compiled for law enforcement purposes.

Furthermore, disclosure of such information could reasonably be expected to risk circumvention of law and may cause substantial harm to the law enforcement investigative and intelligence gathering interests of the FBI. Hardy Decl. ¶ 18. Public confirmation that a particular person is listed within the TSDB would alert that individual that he or she was the subject of an investigation. *Id*. More importantly, by alerting particular groups of associates that certain of their members are under investigation and of the types of records obtained, these

groups might learn the focus of investigations and come to understand the inner workings of the TSDB as a technique in national security investigations. *Id.* With this information, these groups could then adjust their means of communication or financial dealings to avoid detection of the very behavior which the law enforcement community and intelligence community have determined as being indicative of a terrorist threat and which form the core of pending investigative efforts. *Id.*

The FBI's use of the *Glomar* response here is similar to the government's use of the *Glomar* response in *Gordon v. Fed. Bureau of Investigation*, 388 F. Supp. 2d 1028, 1037 (N.D. Cal. 2005). In that case, plaintiffs sought information as to whether their names appeared on any terrorist watch lists. As here, the government refused to confirm or deny whether a particular plaintiff was on a watch list on the grounds that the information was protected by Exemption 7(E). As the court explained, "[r]equiring the government to reveal whether a particular person is on the watch lists would enable criminal organizations to circumvent the purpose of the watch lists by determining in advance which of their members may be questioned." *Id. Accord Buffalo Evening News, Inc. v. U.S. Border Patrol*, 791 F. Supp. 386, 392 n.5 (W.D.N.Y. 1992) (finding Exemption 7(E) protects the fact of whether an alien's name is listed in INS Lookout list); *cf. Raz v. Mueller*, 389 F.Supp.2d 1057, 1062-63 (W.D. Ark. 2005) (upholding the FBI's use of a *Glomar* response in litigation under the law enforcement privilege).[3] Accordingly, the FBI's *Glomar* response is, therefore, proper under Exemption 7(E), in response to Plaintiff's FOIA

[3] *See also People for the American Way v. National Security Agency*, 462 F.Supp.2d 21, 29-31 (D.D.C. 2006) (NSA properly refused to confirm or deny whether plaintiff had been subject of electronic surveillance under Exemption 3); *Catledge v. Mueller*, 2008 WL 4185939 (N.D. Ill. Sept. 10, 2008) (upholding the FBI's use of a *Glomar* response under Exemption 7(E) with respect to whether plaintiff was the subject of a National Security Letter).

request.

**B. The FBI's *Glomar* Response Is Proper Under Exemption 2 (High)**

The FBI's refusal to confirm or deny whether Plaintiff appears on a terrorist watch list is also proper under FOIA Exemption 2 (high), which protects from disclosure "matters that are . . . related solely to the internal rules and practices of an agency." 5 U.S.C. § 552(b)(2). Exemption 2 exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The information need not be actual rules or practices; agencies can also invoke Exemption 2 for matters related to rules and practices. *See Department of Air Force*, 425 U.S. 352, 369-70 (1976). The courts have interpreted this statutory provision to encompass two very different categories of information: (1) internal matters of a relatively trivial nature (referred to as "low-2"); and (2) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement (referred to as "high-2"). *See Department of Air Force*, 425 U.S. at 369-70; *Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 528-30 (D.C. Cir. 1986).

As an initial matter, an agency may withhold information under Exemption 2 if the information is "used for predominantly internal purposes." *Crooker v. ATF*, 670 F.2d 1051, 1073 (D.C. Cir. 1981) (*en banc*). Courts have found that information is "predominately internal" if it "does not purport to regulate activities among the public or set standards to be followed by agency personnel in deciding whether to proceed against or take action affecting members of the public." *Edmonds v. Federal Bureau of Investigation*, 272 F.Supp.2d 35, 50 (D.D.C. 2003) (quoting *Cox v. U.S. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979). If this threshold test

is met, an agency may withhold the material "by proving that either [1] disclosure may risk circumvention of agency regulation (high 2), or [2] the material relates to trivial administrative matters of no genuine public interest (low 2)." *Schiller v. NLRB*, 964 F.2d at 1207.

In the instant case, the TSDB is used internally by agency personnel to screen for known and suspected terrorists in various contexts. Hardy Decl. ¶ 6. Moreover, disclosure of TSDB-related information concerning any individual, including Plaintiff, would reasonably be expected to disclose techniques and procedures used in law enforcement investigations and risk circumvention of law. Hardy Decl. ¶ 13. Accordingly, the FBI's *Glomar* response should be upheld under Exemption 2.

**Conclusion**

For the foregoing reasons, Defendant DOJ's motion for summary judgment should be granted.

Respectfully submitted,

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RUDOLPH CONTRERAS, D.C. BAR #434122
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