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

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

**PLAINTIFF'S OPPOSITION TO DEFENDANT DEPARTMENT OF HOMELAND SECURITY'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff, a member of the European Parliament, initiated this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking disclosure of records maintained under her name by several U.S. government agencies. Following the submission of dispositive motions by two of the defendant agencies – the Departments of Justice and State – and based upon their explanations of their responses to plaintiff's FOIA requests, plaintiff dismissed her claims against those agencies. Because questions remain as to the adequacy of the search for responsive records conducted by defendant Department of Homeland Security ("DHS"), plaintiff opposes DHS's motion for summary judgment for the reasons set forth below.[1]

**Background**

Plaintiff Sophia Helena in 't Veld is a citizen of the Netherlands and a member of the European Parliament for the Dutch social-liberal party D66. Among her parliamentary

[1] Plaintiff does not challenge the agency's invocation of FOIA Exemptions 2, 6, 7(C) and 7(E) to withhold portions of records the agency has identified as responsive to plaintiff's FOIA requests.

activities, plaintiff serves on the Committee on Civil Liberties, Justice and Home Affairs. In that capacity, she has been actively engaged in the development of policies concerning European Union-United States agreements governing the exchange of Passenger Name Record ("PNR") data. For several years, the United States ("U.S.") and European Union ("EU") have engaged in an ongoing and highly controversial debate concerning the weakness of legal protections for PNR data processed and transferred to defendant DHS from airlines traveling between the EU and U.S.[2] In the course of her service in the European Parliament, plaintiff has repeatedly expressed concern that the level of protection afforded such data by the U.S. is inadequate to protect the fundamental rights of EU citizens.

In November 2006, defendant DHS and its component, Customs and Border Protection ("CBP"), published a public notice stating that it maintains a system of records called the Automated Targeting System ("ATS"). Notice of Privacy Act System of Records, 71 Fed. Reg. 64,543 (Nov. 2, 2006). The ATS, as described by DHS, is a data-mining system that the agency uses to create "risk assessments" for tens of millions of travelers crossing U.S. borders, drawing on PNR and other personal data maintained by the U.S. government in such information systems as the Non Immigrant Information System ("NIIS"), Suspect and

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[2] *See*, *e.g.*, Sara Kehaulani Goo, *U.S., EU Will Share Passenger Records*, Wash. Post, May 29, 2004, at A02, *available at* http://www.washingtonpost.com/wp-dyn/articles/A64445-2004May28.html; Nicole Clark, *European Court Bars Passing Passenger Data to U.S.,* Int'l Herald Trib., May 20, 2006, *available at* http://www.nytimes.com/iht/2006/05/30/world/30cnd-air.html; *EU, U.S. Try Again to Nail Down Anti-Terrorism Agreement*, Associated Press, Oct. 5, 2006, *available at* http://www.iht.com/articles/ap/2006/10/05/europe/EU_GEN_EU_Air_Passenger_Data.php; Jane Perlez, *U.S. Asks Europe to Ensure Continued Access to Passenger Data*, N.Y. Times, May 14, 2007, *available at* http://travel.nytimes.com/2007/05/14/world/europe/14security.html; Mattias Gebauer, *US Shuns European Privacy Concerns*, Der Spiegel, May 17, 2007, *available at* http://www.spiegel.de/international/europe/0,1518,483268,00.html; *EU Slams US Moves on Air Passenger Data as "Unacceptable,"* AFP, Feb. 13, 2008, *available at* http://afp.google.com/article/ALeqM5h9GcjqAetL9qcqytVdl5Euea-Ftg.

Violator Indices ("SAVI"), Treasury Enforcement Communications System ("TECS"), Advanced Passenger Information System ("APIS"), the Department of State visa databases, and information from the consolidated and integrated terrorist watch list maintained by the Terrorist Screening Center. Notice of Privacy Act System of Records, 72 Fed. Reg. 43,650 (Aug. 6, 2007). Prior to DHS's announcement, the existence of ATS had not been disclosed to the European Parliament, despite the contentious EU-U.S. PNR negotiations. In December 2006, European Commissioner for Freedom, Security and Justice Franco Frattini told the European Parliament that the manner in which PNR data were handled within ATS violated commitments made by DHS concerning the agency's use of European passenger data. Franco Frattini, European Commissioner for Freedom, Security and Justice, Address Before the European Parliament: "Data Protection and Transfer of PNR Data" (Dec. 13, 2006) ("[I]nformation published by the DHS reveals significant differences between the way in which PNR data are handled within the Automated Targeting System on the one hand and the stricter regime for European PNR data according to the Undertakings given by the DHS.").

Defendant DHS has repeatedly represented that the FOIA provides a means of access to PNR and related data, permitting any person, regardless of nationality or country of residence, to obtain relevant agency records unless they are specifically exempted from public disclosure under the FOIA. *See*, *e.g.*, Dep't of Homeland Security Privacy Office, A Report Concerning Passenger Name Record Information Derived From Flights Between the U.S. and the European Union at 37-39 (Sept. 19, 2005); Dep't of Homeland Security, Privacy Impact Assessment for the Automated Targeting System at 18 (Nov. 22, 2006).

**Plaintiff's FOIA Requests to Defendant DHS and the Agency's Response**

By letter sent by facsimile to defendant DHS on October 17, 2007, counsel for plaintiff requested under the FOIA the following agency records:

> all records concerning Sophie in 't Veld (including but not limited to electronic records) maintained in the Non Immigrant Information System (NIIS), Suspect and Violator Indices (SAVI), and the Treasury Enforcement Communications System (TECS).

Exhibit A (attached to Declaration of Vania T. Lockett, Associate Director, Disclosure and Freedom of Information Act Operations, Privacy Office, U.S. Department of Homeland Security ("Lockett Decl.")). Also on October 17, 2007, counsel for plaintiff requested from defendant DHS's component, U.S. Customs and Border Protection ("CBP"),

> all records concerning Ms. in 't Veld (including but not limited to electronic records) maintained in the Passenger module of the Automated Targeting System (ATS-P) and Advanced Passenger Information System (APIS).

Exhibit B (attached to Lockett Decl.).[3]

In response to plaintiff's requests, defendant DHS initially stated that it had "conducted a comprehensive search of files within Customs and Border Protection (CBP), United States Citizenship and Immigration Services (USCIS), Office of Policy (PLCY), Privacy Office (PRIV), and United States Immigration and Customs Enforcement (USICE)" and that it was "unable to locate or identify any responsive records." Complaint for Injunctive Relief, ¶ 12. Plaintiff appealed that determination and, by letter to plaintiff's counsel dated June 26, 2008, defendant DHS stated that "U.S. Customs and Border Protection

[3] Plaintiff also submitted a FOIA request to defendant DHS's component Transportation Security Administration ("TSA"). Exhibit C (attached to Lockett Decl.). TSA determined that it did not possess records responsive to the request, Exhibit D (attached to Lockett Decl.) at 2, and plaintiff does not challenge that determination.

(CBP) may have records about your client" and that "we are therefore remanding your request to CPB for processing and their direct response to you." *Id*., ¶¶ 13-14.

Upon defendant DHS's failure to produce responsive records within the statutorily required time period, 5 U.S.C. § 552(a)(6)(A), plaintiff initiated this action on July 1, 2008. Subsequently, by letter dated July 10, 2008, defendant DHS informed plaintiff's counsel, *inter alia*, that "[a] search by CBP produced 28 pages of [responsive] records," and that the material was being provided to plaintiff with redactions. Exhibit D (attached to Lockett Decl.) at 1.[4] On September 22, 2008, defendant DHS moved for summary judgment in this action and asserted that it had fully complied with the requirements of the FOIA.

**Argument**

Congress enacted the FOIA to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007), quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (internal quotation marks omitted). The Supreme Court has stated that "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within [the] statutory purpose." *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). "[D]isclosure, not secrecy, is the dominant objective of the [FOIA]." *Rose*, 425 U.S. at 361.

The standard governing a grant of summary judgment in favor of an agency's claim that it has fully satisfied its obligations under the FOIA is well established. The agency "bears the burden of showing that there is no genuine issue of material fact, even when the

[4] Defendant DHS further represented that "[a] search by the U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) program returned 30 pages of records from the Advanced Departure Information Systems (ADIS)," and that certain portions of those records were being withheld as exempt from disclosure. *Id*. at 2. Plaintiff challenges neither the search nor the withholdings relating to those records.

underlying facts are viewed in the light most favorable to the requester." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1350 (D.C. Cir. 1983) (citation omitted); *see also Tax Analysts v. IRS*, 97 F. Supp. 2d 13, 14-15 (D.D.C. 2000), *aff'd in part, rev'd in part on other grounds*, 294 F.3d 71 (D.C. Cir. 2002). Summary judgment in favor of defendant DHS is inappropriate because the agency has failed to satisfy this burden.

## I. DHS Is Not Entitled to Summary Judgment Because CBP's Search Was Not Reasonably Calculated to Uncover All Responsive Documents

To meet its obligations under the FOIA, the "defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the [FOIA's] inspection requirements." *Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982) (quoting *Nat'l Cable Television Ass'n v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973)). As part of its obligation to account for all responsive material, "the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (citations omitted).

The determination of a search's reasonableness "is dependent on the circumstances of each case." *Spannaus v. CIA*, 841 F. Supp. 14, 16 (D.D.C 1993) (citation omitted). Agency affidavits may be an adequate basis for summary judgment when they are "'relatively detailed,' and nonconclusory and . . . submitted in good faith[.]" *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978) (quoting *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973); *see also Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). An agency "cannot limit its search to only one or more places if 'there are additional sources that are likely to turn up the information requested.'" *Valencia-Lucena v. U.S. Coast Guard*, 180 F. 3d 321, 326 (D.C. Cir. 1999) (quoting *Oglesby*, 920 F. 2d at 68; *Campbell v. Dep't of Justice*, 164

F.3d 20, 28 (D.C. Cir. 1998)) (internal quotation marks omitted). Thus, "if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order." *Founding Church of Scientology v. Nat'l Security Agency*, 610 F.2d 824, 836 (D.C. Cir. 1979); *see also Weisberg v. Dep't of Justice*, 627 F.2d 365, 370 (D.C. Cir. 1980); *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990).

The adequacy of defendant DHS's identification and retrieval process is in issue in this case because, as we show, CBP did not "us[e] methods which can be reasonably expected to produce the information requested." *Oglesby,* 920 F.2d at 68. In support of her opposition to the agency's motion, plaintiff proffers the attached declaration of Edward Hasbrouck, a recognized and award-winning authority on PNR data and other computerized travel records. As Mr. Hasbrouck explains,

> At different times during the course of my employment [spanning a period of 15 years], I have used three of the four major global Computerized Reservation Systems (CRS's) on a daily basis to create, retrieve, modify, and work with air travel PNR's.
>
> I have been trained in CRS usage and formats, CRS system administration, interpreting PNR's and PNR histories, and other advanced CRS topics. I have trained and supervised the training of other travel agents in CRS usage, PNR formats, and the interpretation of PNR and history data. . . .
>
> . . . [M]y day-to-day work exposed me to, and required me to be familiar with, the PNR data entry practices of an unusually wide range of airlines and travel agencies around the world. As part of my work, I visited and negotiated both prices and operational agreements, including methods for exchanging and transferring PNR and reservation data, with air ticket vendors in other countries, both in their offices where I could observe their procedures first hand, and at meetings of international consortia and networking groups of discount ticket exporters and importers.
>
> I consider myself an expert in industry (airline, travel agency, and CRS) practices for the entry and international transmission, exchange, and sharing of PNR data, and in the norms and global variation in practices for PNR data entry and handling.

Declaration of Edward Hasbrouck ("Hasbrouck Decl."), ¶¶ 2-7. Mr. Hasbrouck has testified on issues related to PNR data before the Transportation Security Administration and the Data Privacy Advisory Committee of defendant DHS. He has also presented testimony on these issues to meetings of the Article 29 Working Party of European Union national data protection authorities and the Committee on Civil Liberties, Justice, and Home Affairs of the European Parliament. *Id*., ¶ 7.

Mr. Hasbrouck reviewed the material released in part to plaintiff by defendant DHS, "including excerpts from PNR's related to some of her flights," as well as the declaration of Ms. Lockett, which purports to explain the manner in which the agency responded to plaintiff's FOIA request. *Id*., ¶ 8. Based upon his review, Mr. Hasbrouck concluded:

> [M]y expert professional opinion is that the [agency's submissions] are insufficient to establish that a competent, diligent, or good faith search was conducted. On the contrary, they provide substantial evidence that the search for responsive records was conducted by a person or persons unfamiliar with the types of PNR and other travel data contained in these records, or the likely variations in PNR data entry formats and transformations of names, numbers, and other information.

*Id*., ¶ 9.

In support of his conclusion, Mr. Hasbrouck explains that, given the complexity and unique nature of PNR data and related airline database systems, any determination of the adequacy of a "search" must be based upon detailed knowledge of several factors, including what "input" was provided by the operator, what methodology was employed, and what "target database" was searched. *Id*., ¶ 11. He notes that none of this information has been provided by defendant DHS, and that "[w]ithout this essential information as to what is actually meant by the simplistic and conclusionary term 'search,' the [agency's submissions]

are insufficient to establish that whatever was done constituted a diligent or competent search." *Id*., ¶ 12.

Based upon the limited information available to him, Mr. Hasbrouck was able to identify several apparent errors and omissions in the search process. For instance, he identified an apparent error in the entry of a passport number used in the search, *id*., ¶ 15, and concluded that the failure to use variations or permutations of Ms. in 't Veld's surname likely compromised the integrity of the search results. As Mr. Hasbrouck explains:

> CRS's were developed in the United States, in mainframe databases that represented text in EBCDIC. As a result, they typically use a very limited character set. The ATA/IATA "Reservations Interline Message Procedures - Passenger" (AIRIMP) protocol for messaging between airlines, travel agencies, and CRS's requires passenger names to be represented solely in the 26 upper- case letters of the English alphabet. No diacritals (accent marks or accented letters) or punctuation can be included in AIRIMP messages. As a result, none are typically permitted in names entered in PNR's. And no spaces are permitted within a surname in an AIRIMP message.
>
> As a result, Ms. in 't Veld's surname – which includes two spaces and an apostrophe – cannot be completely or unambiguously entered into a PNR. I know from experience that failure to retrieve a reservation for a person with such a name often results from differences in how the name is represented in a PNR. Among the likely ways that her name might be entered, particularly by airline or travel agency staff in the United States, unfamiliar with the Dutch language and Dutch names, would be:
>
> INTVELD/SOPHIA
> TVELD/SOPHIA IN
> VELD/SOPHIA INT
> VELD/SOPHIA IN T
>
> In a travel agency, I would expect a competent agent, attempting to retrieve all PNR's related to Ms. in 't Veld, to search for names similar to any of these permutations, using the default of all major CRS's to search by similar, not exact, name. But according to pages 4 and 5 of [Ms. Lockett's] Declaration, searches were made using "name" (singular). And the query form on pages 1 and 28 [of the released records] shows that the search system – even if a name search were performed, of which there is no evidence – defaults to an exact rather than a "like" or similar name search. The failure to document a search for names similar to multiple likely permutations causes me to doubt the

> competence, diligence, and/or good faith of the search, as well as whether other responsive records might exist that were not found.

*Id*., ¶¶ 17-19.

In addition to these serious errors and omissions, Mr. Hasbrouck notes that there are reasons to question "the efficacy of the algorithm and/or the completeness of the data set that produced the query results," *id.*, ¶ 21, and finds that "[e]ach of the[] PNR's is incomplete, and contains unambiguous internal evidence of its incompleteness," *id.*, ¶ 23. Having detailed all of these errors, omissions and discrepancies, Mr. Hasbrouck concludes that "based upon my expertise and review of the [agency's submission], I do not believe that the individuals who conducted the search in this case used methods that could have been reasonably expected to locate all of the information responsive to Ms. in 't Veld's request." *Id*., ¶ 25.

As we have noted, agency declarations may be an adequate basis for summary judgment when they are "relatively detailed," *Goland*, 607 F.2d at 352 (citation and internal quotation marks omitted). In support of its assertion that CBP conducted an adequate search, defendant DHS avers as follows:

> To ensure that all responsive records were captured, CBP search TECS (including APIS and NIIS) using the Plaintiff's name and passport number.
>
> . . . CBP searched ATS-P and SAVI using the Plaintiff's name.

Lockett Decl., ¶¶ 12-13. By no stretch of the imagination can such a spare description of CBP's search efforts be described as "relatively detailed," particularly in light of the complexities of locating responsive information in PNR databases, as described by Mr. Hasbrouck.

The D.C. Circuit recently summarized the standard by which an agency's search must be judged:

> "[I]n adjudicating the adequacy of the agency's identification and retrieval efforts, the trial court may be warranted in relying upon agency affidavits." (citation omitted) However, such reliance is only appropriate when the agency's supporting affidavits are "'relatively detailed' and nonconclusory and . . . submitted in good faith." (citation omitted) "Even if these conditions are met the requester may nonetheless produce countervailing evidence, and if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order." (citation omitted).

*Morley*, 508 F.3d at 1116; *see also Wolf v. CIA*, 569 F. Supp. 2d 1, 7 (D.D.C. 2008) ("In assessing whether an agency's search is reasonably calculated to discover responsive documents, courts have placed particular emphasis on whether the affidavit "identif[ies] the terms searched or explain[s] how the search was conducted."). Here, it is clear that the utter lack of detail in the agency's affidavit, coupled with the "countervailing evidence" set forth in Mr. Hasbrouck's declaration, leads to the inescapable conclusion that "summary judgment is not in order."

## Conclusion

Defendant DHS has failed to carry its burden of demonstrating that its component CBP "us[ed] methods which can be reasonably expected to produce the information requested" by plaintiff, *Oglesby*, 920 F.2d at 68. As such, the agency's motion for summary judgment should be denied.

Respectfully submitted,

*/s/ David L. Sobel*

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