

United States District Court

For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REBECCA ALLISON GORDON, et al.,

No. C 03-01779 CRB

Plaintiffs,

MEMORANDUM AND ORDER

v.

FEDERAL BUREAU OF
INVESTIGATION, et al.,

Defendants.

In this Freedom of Information Act (“FOIA”) lawsuit plaintiffs seek records from the Federal Bureau of Investigation (“FBI”) and the Transportation Security Administration (“TSA”) regarding the administration of the “no fly” and other aviation watch lists, as well as agency records concerning plaintiffs Rebecca Gordon and Janet Adams. Now pending before the Court are the parties’ second set of cross-motions for summary judgment.

PROCEDURAL HISTORY

The parties initially filed cross-motions for summary judgment. Upon review of the papers, and in light of the nature of the government’s claimed exemptions, the Court directed the government to produce copies of all withheld records for the Court’s review. After conducting a preliminary review of the claimed exemptions and the withheld documents, the Court ordered defendants to review all of the withheld material to determine whether they

1 believe in good faith that the withheld material is in fact exempt and, if so, to provide a
2 detailed affidavit that explains why the particular material is exempt. The Court also ordered
3 defendants to promptly disclose to plaintiffs the material which they determined upon their
4 further review is not exempt.

5 In response to the Court's order, defendants produced additional materials to
6 plaintiffs. According to plaintiffs, the FBI has released an additional 11 pages of documents
7 in their entirety, as well as portions of most of the previously withheld documents. The TSA
8 released an additional six pages in their entirety and additional portions of most of the
9 remaining documents. Now pending before the Court are the parties' cross-motions for
10 summary judgment regarding the remaining withheld material. Plaintiffs have elected not to
11 challenge the withholding of "sensitive security information" ("ssi"), except for disclosure of
12 whether plaintiffs' names appear on any watch lists, the TSA's alleged failure to adequately
13 describe withheld documents, and the TSA's alleged failure to segregate ssi from non-ssi.
14 Plaintiffs also do not challenge information withheld on the basis of attorney-client privilege
15 and documents the government maintains are exempt as "confidential sources" under FOIA
16 exemption 7(D).

17 At oral argument, the parties agreed that this Court can resolve their dispute on
18 summary judgment and that no trial is required.

19 LEGAL STANDARD

20 "FOIA entitles private citizens to access government records." Minier v. Central
21 Intelligence Agency, 88 F.3d 796, 800 (9th Cir. 1996). "The Supreme Court has interpreted
22 the disclosure provisions broadly, noting that the act was animated by a 'philosophy of full
23 agency disclosure.'" Lion Raisins v. U.S. Dep't. of Agriculture, 354 F.3d 1072, 1079 (9th
24 Cir. 2004) (quoting John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989)).
25 Nonetheless, FOIA contains nine exemptions which a government agency may invoke to
26 protect certain documents from public disclosure. See id. (citing 5 U.S.C. § 552(b)).
27 "Unlike the disclosure provisions of FOIA, its statutory exemptions 'must be narrowly
28 construed.'" Lion Raisins, 334 F.3d at 1079 (internal quotation and citation omitted).

1 The agencies resisting public disclosure--here, the FBI and TSA--have “the burden of
 2 proving the applicability of an exception.” Minier, 88 F.3d at 800. “That burden remains
 3 with the agency when it seeks to justify the redaction of identifying information in a
 4 particular document as well as when it seeks to withhold an entire document.” United States
 5 Dep’t. of State v. Ray, 502 U.S. 164, 173 (1991). An agency “may meet its burden by
 6 submitting a detailed affidavit showing that the information logically falls within the claimed
 7 exemptions.” Minier, 88 F.3d at 800 (internal quotation marks and citation omitted). “In
 8 evaluating a claim for exemption, a district court must accord ‘substantial weight’ to
 9 [agency] affidavits, provided the justifications for nondisclosure are not controverted by
 10 contrary evidence in the record or by evidence of [agency] bad faith.” Id. (internal quotation
 11 marks and citation omitted).

12 DISCUSSION

13 I. Exemption 3 (ssi)

14 The TSA’s assertion of protected ssi is supported by the declaration of David
 15 Graceson, submitted under seal. The declaration addresses each “redaction” and explains the
 16 specific reasons for the TSA’s determination that the redacted information is ssi.

17 Plaintiffs do not challenge the withholding of information the TSA has designated as
 18 ssi, although they generally claim the TSA has not provided sufficient details about the
 19 withheld information. The Court disagrees; the TSA could not reveal any more than it has
 20 without revealing the ssi itself. Moreover, the Court has reviewed *in camera* all of the
 21 redacted ssi and has determined that all of it is properly withheld. Plaintiffs also generally
 22 complain that the TSA has not clarified that it has segregated non-ssi from ssi. Again, the
 23 Court has reviewed each of the ssi redactions *in camera* and has determined that each is
 24 properly asserted.

25 II. Exemptions 2 and 7(E)

26 Exemption 2 protects from FOIA disclosure “matters that are . . . related solely to the
 27 internal rules and practices of an agency.” 5 U.S.C. § 552(b)(2). The Ninth Circuit has held
 28 that this exemption excludes from disclosure “law enforcement materials, disclosure of

1 which may risk circumvention of agency regulation.” See Hardy v. Bureau of Alcohol,
 2 Tobacco & Firearms, 631 F.2d 653, 656 (9th Cir. 1980). “‘Law enforcement’ materials
 3 involve methods of enforcing the laws, however interpreted.” Id. at 657. “Materials that
 4 solely concern law enforcement are exempt under Exemption 2 if disclosure may risk
 5 circumvention of agency regulation.” Id.

6 Exemption 7(E) excludes from disclosure “records or information compiled for law
 7 enforcement purposes, but only to the extent that the production of such law enforcement
 8 records or information . . . (E) would disclose techniques and procedures for law enforcement
 9 investigations or prosecutions, or would disclose guidelines for law enforcement
 10 investigations or prosecutions if such disclosure could reasonably be expected to risk
 11 circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). Under this exemption the government
 12 must make two showings: (1) that the records were compiled for a law enforcement purpose,
 13 and (2) that the records reveal law enforcement techniques or guidelines that, if disclosed,
 14 “could reasonably be expected to risk circumvention of the law.” Id.

15 The FBI “has a clear law enforcement mandate.” Rosenfeld v. U.S. Dep’t of Justice,
 16 57 F.3d 803, 808 (9th Cir. 1995). As a result, the FBI “need only establish a ‘rational nexus’
 17 between enforcement of a federal law and the document for which [a law enforcement]
 18 exemption is claimed.” Id. (internal quotation marks and citation omitted).

19 The rational nexus test requires courts to accord a degree of deference to a law
 20 enforcement agency’s decisions to investigate. The court need not accept the
 21 government’s claim that a previous investigation had a law enforcement
 22 purpose if the asserted purpose is pretextual or wholly unbelievable. However,
 in other circumstances, the court should not second-guess a law enforcement
 agency’s decision to investigate if there is a plausible basis for the decision.

23 Id. (internal quotation marks and citation omitted).

24 The FBI has identified portions of numerous documents that it claims are protected by
 25 exemptions 2 and 7(E). The FBI places the documents into five general categories: (1) watch
 26 list selection criteria; (2) procedures for dissemination of watch lists; (3) procedures for
 27 handling potential/actual name matches; (4) raising/addressing perceived problems in
 28 security measures; and (5) compilation of watch lists (involving such things as the adding or
 removing of names). The FBI contends that “disclosure of information in the five categories

1 “would permit individuals to devise strategies designed to circumvent the procedures the FBI
2 developed for local law enforcement officials, would enable criminals to educate themselves
3 about various aspects of the FBI’s watch list procedures; and consequently, would allow
4 them to take countermeasures in an attempt to evade detection.” Defendants’ Motion for
5 Summary Judgment at 33-34.

6 Plaintiffs argue that the FBI has not shown the required “law enforcement purpose”
7 with respect to many of the documents; in particular, memoranda and emails discussing
8 problems with the watch lists. See, e.g. FBI nos. 248, 268. Plaintiffs contend that these
9 documents do not relate to a criminal investigation, but instead are more akin to internal
10 audits which do not fall within exemption 7(E). Plaintiffs’ Memorandum at 36.

11 Plaintiffs read the “law enforcement purpose” requirement too narrowly. Exemption
12 7(E) is not limited to documents created in connection with a criminal investigation. In
13 Dirksen v. U.S. Dep’t of Health and Human Services, 803 F.2d 1456 (9th Cir. 1986), for
14 example, the Ninth Circuit held that disclosure of Blue Shield’s internal guidelines for
15 processing medicare claims fell within this exemption:

16 It is not difficult to believe that, among the care providers in possession of
17 these materials, there would be some who would try to fit their claims into the
18 “automatically granted” category. Nor is it difficult to believe that, upon the
19 submission of a barrage of claims fashioned to conform to the Guidelines, the
20 Guidelines would lose the utility they were intended to provide. The requested
21 Guidelines serve an auditing function. This puts them into the category of
22 exempt law enforcement material.

23 Id. at 1459. The redacted memoranda and emails discuss issues that have arisen about the
24 watch lists. These memoranda and emails were created for a law enforcement purpose;
25 namely, maintenance of various watch lists to protect the American flying public from
26 terrorism. It is not too difficult to believe that if this information was publicly disclosed,
27 potential terrorists would use the information to circumvent the watch lists.

28 Plaintiffs next argue that because the public has a substantial interest in the
information in these documents “Exemption 2 does not bar their disclosure.” Plaintiffs’
Memorandum at 20. While the Court agrees that the public has a substantial interest in
knowing how the watch lists are created and implemented, the only issue for the Court is

1 whether disclosing the information would assist terrorists in circumventing the purpose of
2 the watch lists; if so, the information is exempt from disclosure regardless of the public
3 interest in the material.

4 The FBI has submitted the declaration of Keith Gehle in support of its claimed
5 exemptions. Mr. Gehle's declaration discusses each document in which information has
6 been withheld. In addition, the Court has reviewed *in camera* all of the withheld
7 information. After reviewing Mr. Gehle's declaration and the documents themselves, the
8 Court concludes that the FBI has met its burden of showing that exemptions 2 and/or 7(E)
9 apply to all relevant documents, except two.

10 First, FBI no. 28 was withheld in its entirety. The withheld information includes the
11 legal basis for detaining someone whose name appears on a watch list. The FBI has not
12 adequately explained how this information could be used to circumvent agency regulations.
13 Accordingly, the FBI shall disclose the information withheld pursuant to exemptions 2 and
14 7(E) to plaintiffs.

15 Second, the FBI has not met its burden with respect to the redacted "subject line" of
16 FBI no. 30 and therefore must disclose that information as well.

17 Finally, plaintiffs still challenge the government's refusal to confirm whether their
18 names appear on any watch lists. The watch lists were developed and are maintained for a
19 law enforcement purpose. Requiring the government to reveal whether a particular person is
20 on the watch lists would enable criminal organizations to circumvent the purpose of the
21 watch lists by determining in advance which of their members may be questioned. Plaintiffs
22 appear to acknowledge this risk as they are no longer requesting the watch lists themselves.
23 While such a risk is not posed by plaintiffs, if the Court were to require the government to
24 reveal such information to plaintiffs, it would have to require the government to do the same
25 for all inquiries.

26 **III. Exemption 5**

27 Exemption 5 provides that FOIA does not apply to "inter-agency or intra-agency
28 memorandums or letters which would not be available by law to a party other than an agency

1 in litigation with the agency.” 5 U.S.C. § 552(b)(5). “The exemption is ‘cast in terms of
 2 discovery law,’ and entitles an agency to withhold from the public ‘documents which a
 3 private party could not discover in litigation with the agency.’” Maricopa Audubon Soc. v.
 4 U. S. Forest Service, 108 F.3d 1089, 1092 (9th Cir. 1997) (citations omitted). “Exemption 5
 5 thus covers the attorney-client privilege, the attorney work-product privilege, and the
 6 executive ‘deliberative process’ privilege.” Id.

7 Plaintiffs challenge the government’s assertion of the “deliberative process” privilege.
 8 “The purpose of the deliberative process privilege is to prevent injury to the quality of agency
 9 decisions by ensuring that the frank discussion of legal or policy matters in writing, within
 10 the agency, is not inhibited by public disclosure.” Id. (internal quotation marks and citation
 11 omitted). To fall within the privilege, the information “must be ‘predecisional’ in nature *and*
 12 must also form part of the agency’s ‘deliberative process.’” Id. at 1093. “In light of the
 13 strong policy of the FOIA that the public is entitled to know what its government is doing
 14 and why, exemption 5 is to be applied as narrowly as consistent with efficient Government
 15 operation.” Id.

16 “A ‘predecisional’ document is one ‘prepared in order to assist an agency
 17 decisionmaker in arriving at his decision,’ and may include ‘recommendations, draft
 18 documents, proposals, suggestions, and other subjective documents which reflect the
 19 personal opinions of the writer rather than the policy of the agency.” Id. at 1093. A
 20 “continuing process of agency self-examination” is not enough to render a document
 21 “predecisional.” Id. at 1094. The government “must identify a specific decision to which the
 22 document is predecisional;” however, the government need not identify the actual decision
 23 that was made based on the document. Id.

24 Material forms part of an agency’s deliberative process if “the effect of the materials’
 25 release--namely, whether disclosure of materials would expose an agency’s decision-making
 26 process in such a way as to discourage candid discussion within the agency and thereby
 27 undermine the agency’s ability to perform its functions.” Id. at 1094-95 (internal quotation
 28 marks and citation omitted). In Maricopa, for example, the court held the redacted material

1 was deliberative because it consisted of “recommendations” and “suggestions” from an
2 inferior to a superior that reflected the personal opinions of the author. Id. at 1095.

3 **A. TSA Documents**

4 The TSA relies on the declaration of Catrina Pavlik to support its assertion of
5 exemption 5. She explains that the TSA has asserted the privilege for records which were
6 “generated as a result of TSA’s initiative to develop a new policy governing the
7 development, maintenance, and use of the No Fly List and Selectee Lists.” Decl. at ¶ 6.
8 Plaintiffs’ primary objection is that the date of most of the withheld information is after the
9 TSA had already implemented the watch lists; therefore, they argue, the documents cannot be
10 pre-decisional.

11 Plaintiffs’ argument reads the exemption too narrowly; the government may
12 consider whether to make changes to watch list procedures and “deliberative” documents
13 related to proposed changes are exempt from disclosure. For example, plaintiffs complain
14 that exemption 5 does not apply to TSA no. 44 because the unredacted portion of the
15 document reflects that the document relates to an existing agency regulation. Plaintiffs’
16 argument, however, ignores the declaration of Catrina Pavlik. Ms. Pavlik explains that TSA
17 nos. 44-45 reflect agency deliberations regarding *revisions* to agency regulations. Pavlik
18 Decl. ¶ 12. That an agency official is “deliberating” on whether or how to change an existing
19 policy, as opposed to deliberating on whether to adopt an entirely new policy, does not
20 mean the deliberations fall outside the privilege.

21 The Court has reviewed *in camera* the information which the TSA has withheld
22 pursuant to exemption 5. Nearly all the redactions are well-taken. In a few instances,
23 however, the TSA applies this exemption too broadly. For example, on TSA no. 9, the
24 government has redacted portions of the document based on the deliberative process
25 privilege (among other exemptions). The redacted sections, however, are not a
26 recommendation, proposal, or opinion on a proposal, but are instead a recitation of current
27 problems with the watch lists. Nonetheless, all of the information on this document, and

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1 other TSA documents which the Court has found the TSA improperly withheld under
2 exemption 5, is protected from disclosure as protected ssi.

3 **B. FBI Documents**

4 Gehle's declaration meets the FBI's burden as to most of the information withheld
5 pursuant to exemption 6. In some instances, however, Gehle fails to identify any decision
6 which was being considered. For example, again with respect to FBI no. 28 (see ¶¶ 34-35 of
7 Gehle declaration), Gehle generally claims that the withheld emails "reflect preliminary
8 internal deliberations within the FBI regarding the legal and policy issues relating to 'no-fly'
9 and 'selectee' lists and the FBI's law enforcement authority with respect to persons named on
10 the list." He thus has not identified any "decision" which was under consideration; indeed,
11 as previously explained, the emails reveal a question about the legal basis for detaining
12 persons whose names appear on the lists. To interpret the deliberative process privilege so
13 broadly as to encompass any question and answer violates the rule that the deliberative
14 process privilege should be applied as narrowly as is consistent with government operations.
15 See Maricopa Audubon Society, 108 F.3d at 1093. At oral argument, in response to a
16 question from the Court regarding this document, the government identified Gehle paragraph
17 18 as providing a basis for the application of exemption 5. That paragraph, however, does
18 not refer to FBI no. 28.

19 The government claims that the material redacted pursuant to exemption 5 on FBI
20 no. 29 "reflects internal deliberations within the FBI regarding what steps should be taken to
21 enhance coordination between the TSA and the FBI and to improve procedures used to
22 disseminate the TSA's 'no fly' and Selectee lists." Gehle Decl. ¶ 5. While the issue as to
23 this document is close, the government has met its burden. The portions of the document
24 redacted solely pursuant to the deliberative process privilege reflect an inferior's personal
25 opinions and reflections communicated to a superior for the purpose of the superior
26 determining how the agency should address an issue. See Maricopa Audubon Soc., 108 F.3d
27 at 1095.

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1 The FBI redacted three sentences on FBI no. 200 pursuant to exemption 5. The FBI
2 explains that these sentences consist of a Special Agent's comments on a draft letter. The
3 FBI's description, however, is inaccurate. The only portion of the redacted sentences that
4 discloses the substance of the draft letter, and therefore the author's recommendation as to
5 how to respond to a congressional mandate, begins at word 17 in the fifth sentence of the
6 second full paragraph, and ends at the end of that sentence. The remaining redacted material
7 does not fall within exemption 5.

8 The FBI has failed to meet its burden of showing that exemption 5 applies to
9 document nos. 232-33 and 240. All of these documents were withheld in their entirety on the
10 basis of several exemptions, thus it is impossible for the Court to discern precisely which
11 information is being withheld under exemption 5. The FBI merely asserts that the
12 deliberative process privilege applies and does not identify any possible decision that was
13 "deliberated." See, e.g., Gehle Decl. at p. 118 (stating only that exemption 5 applies to
14 document nos. 232-33 "because it contains information protected under the deliberative
15 process privilege and these redactions were made because disclosure of this information
16 would inhibit government employees from engaging in full, frank, and open internal
17 discussions"). Indeed, the FBI claims that the attorney-client privilege applies to document
18 no. 240, but no attorney is a party to the email and the FBI gives no explanation as to how
19 this privilege applies. Its "evidence" of the deliberative process privilege is also inadequate.
20 Accordingly, the FBI shall disclose the material redacted pursuant to exemption 5 on
21 document nos. 232-33 and 240.

22 The FBI applies exemption 5 too broadly in other instances as well, but the redacted
23 material is exempt from disclosure under exemptions 2 or 7(E), as also claimed by the FBI.
24 See, e.g., FBI nos. 220, 264-65, 270.

25 **IV. Exemption 6**

26 Exemption 6 protects "personnel and medical files and similar files the disclosure of
27 which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.
28 § 552(b)(6). "The Supreme Court has defined 'similar file' broadly as government records

1 containing ‘information which applies to a particular individual.’” Minnis v. Dept. of
 2 Agriculture, 737 F.2d 784, 786 (9th Cir. 1984) (quoting United States Dep’t of State v.
 3 Washington Post Co., 456 U.S. 595, 602 (1982)). “Exemption 6 is intended to protect
 4 ‘individuals from the injury and embarrassment that can result from the unnecessary
 5 disclosure of personal information.’” Bowen v. U.S. Food & Drug Admin., 925 F.2d 1225,
 6 1228 (9th Cir. 1991) (internal quotation marks and citation omitted); see also Dobronski v.
 7 F.C.C., 17 F.3d 275 (9th Cir. 1994) (applying exemption 6 to sick leave records); Van
 8 Bourg, Allen, Weinberg & Roger v. N.L.R.B., 728 F.2d 1270, 1273 (9th Cir. 1984) (applying
 9 exemption 6 to names and addresses of employees eligible to vote for a union).

10 To determine if exemption 6 applies, the Court must weigh the interests involved:

11 First, in evaluating whether a request for information lies within the scope of a
 12 FOIA exemption, such as Exemption 6, that bars disclosure when it would
 13 amount to an invasion of privacy that is to some degree “unwarranted,” “a
 14 court must balance the public interest in disclosure against the interest
 15 Congress intended the [e]xemption to protect.”

16 Second, the only relevant “public interest in disclosure” to be weighed in this
 17 balance is the extent to which disclosure would serve the “core purpose of the
 18 FOIA,” which is “contribut[ing] significantly to public understanding of *the*
 19 *operations or activities of the government.*”

20 U.S. Dep’t of Defense v. Federal Labor Relations Board, 510 U.S. 487, 496 (1994) (citations
 21 omitted).

22 **A. TSA employees**

23 _____ The TSA seeks to use exemption 6 to redact some of the names of government
 24 officials that appear in otherwise disclosable documents. After the Court ordered the TSA to
 25 review its response to plaintiffs’ FOIA request, the TSA disclosed the names of officials
 26 holding the position of Associate Under-Secretary or higher, as well as the names of those
 27 individuals who interact with the public and/or Congress. Pavlik Decl. at ¶¶ 25-26. The
 28 TSA continues to withhold all other names on the ground that identifying these persons as
 employees who work on the watch lists will subject these employees to harassment. See
 Pavlik Decl. ¶ 22 (stating that the disclosure of the employees’ names would constitute an
 unreasonable invasion of privacy because the documents would reveal that the employees

1 work on issues concerning the No Fly or Selectee lists--“facts which, if disclosed, might lead
2 to harassment”).

3 The Court previously ruled that the TSA had not met its burden of showing that
4 exemption 6 permits it to withhold the names of TSA employees as such information--their
5 names--is not “private.” The TSA asks the Court to reconsider its ruling.

6 The TSA still has not demonstrated that an employee’s name alone makes a document
7 a personnel, medical or “similar file.” 5 U.S.C. § 552(b)(6). If “similar file” is interpreted as
8 broadly as the TSA urges, the “personnel, medical or similar file” condition is surplusage;
9 Congress could have simply exempted the disclosure of *any* document that would constitute
10 an unwarranted invasion of privacy.

11 Nor has the TSA met its burden of showing that revealing the names of TSA
12 employees that appear on otherwise disclosable documents would “constitute an unwarranted
13 invasion of personal privacy.” *Id.* It offers no evidence to support its speculation that the
14 employees are likely to be harassed if their names are released. See Department of Air Force
15 v. Rose, 425 U.S. 352, 380 n.19 (1976) (stating that “[t]he legislative history is clear that
16 Exemption 6 was directed at threats to privacy interests more palpable than mere
17 possibilities”). This evidentiary omission is especially glaring in light of the TSA’s
18 disclosure of the names of “higher level” employees more than six months ago; it offers no
19 evidence that these officials have been “harassed” as a consequence of the disclosure.

20 None of the cases cited by the TSA support its application of exemption 6. While
21 several cases have held that an employee has a privacy interest in his name *and home*
22 *address*, see, e.g., Minnis v. United States Dep’t of Agriculture, 737 F.2d 784, 786 (9th Cir.
23 1984); National Assoc. of Retired Federal Employees v. Horner, 879 F.2d 873, 875 (D. C.
24 Cir. 1989), the TSA does not cite a single case in which a court has permitted a non-law
25 enforcement agency to uniformly redact government employees’ names from otherwise
26 disclosable documents pursuant to exemption 6.

27 The TSA’s citation of United States Dep’t of Navy v. Federal Labor Relations
28 Authority, 975 F.2d 348, 352 (7th Cir. 1992) as supporting the proposition that “courts have

1 recognized that there is privacy interest in the release of an individual's name in association
2 with his employment position in the federal government," Defendants' Memorandum at 44,
3 is unpersuasive. The case involved an order of the Federal Labor Relations Authority
4 directing the Navy to release to the Navy's employees' exclusive bargaining representative
5 the names *and home addresses* of all bargaining unit employees. The Seventh Circuit held
6 that FOIA did not compel the disclosure of the information because federal employees "have
7 a privacy interest in their names and home addresses." *Id.* at 353. The court did not hold that
8 non-law enforcement government employees have a privacy interest in keeping their
9 positions in the government secret.

10 Even assuming the TSA employees have some, slight, privacy interest in keeping their
11 names private and that the appearance of their name alone makes a document a "similar file"
12 for purposes of exemption 6, revealing the names of government employees who are making
13 important government policy serves FOIA's core purpose of contributing to the public's
14 understanding of how its government operates. Knowing *who* is making government policy
15 with respect to the watch lists is relevant to understanding *how* the government operates.

16 TSA document no. 46 is an example of the public interest at issue. This document is a
17 memorandum memorializing a meeting concerning the watchlist "false positive problem"--a
18 problem in which there is significant public interest. The TSA has redacted the names of all
19 but one of the attendees of the meeting. The public, however, has an interest in knowing
20 who--and at what level of the government--is working on this significant problem that affects
21 many Americans. See also TSA nos. 50-53 (names of government officials redacted from
22 documents demonstrating the organization of a working group to develop TSA watch list
23 policy).

24 In sum, the TSA has not met its burden of demonstrating that exemption 6 applies to
25 the names of its "lower-level" employees. Exemption 6 has never been interpreted as
26 broadly as the TSA urges, and the Court declines the TSA's invitation to be the first court to
27 do so.

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B. Airline employees

1 **B. Airline employees**
2 The same analysis applies to airline employees whose names appear in otherwise
3 disclosable documents. The TSA has not identified any privacy interest of the airline
4 employees, and no interest which would render disclosure of their names an unwarranted
5 invasion of privacy. Therefore the FOIA-recognized public interest in knowing who has
6 access to, is managing, and implementing the watch lists, even if in any particular situation it
7 is slight, outweighs the virtually non-existent privacy interest.

C. Third parties

8 **C. Third parties**
9 The Court's analysis is different for the names of persons who have complained to the
10 TSA about the operation of the watch list and who have not otherwise made their complaints
11 public (by, for example, speaking to a newspaper). A memorandum recounting a civilian's
12 efforts to avoid being repeatedly stopped before flying is a government record containing
13 "information which applies to a particular individual." Washington Post Co., 456 U.S. at
14 602. Moreover, a person might not want it publicly known that he or she has been repeatedly
15 stopped from boarding airplanes, just as one might not want it known that he was interviewed
16 in connection with a criminal investigation. There is, therefore, a privacy interest in the fact
17 that one complained or was stopped. On the other hand, there is some public interest in
18 knowing the names of those who are stopped: for example, do the airlines frequently stop
19 persons of a certain ethnicity, or persons with a common name. "Hiding" the identities of
20 those who are "false positives" conceals from the public something about the operation of the
21 watch lists.

22 On balance, the Court concludes that the individuals' privacy interests outweigh the
23 limited public interest in knowing the identity of third parties whose names appear in
24 documents responsive to plaintiffs' FOIA request. The government represents that it does
25 not maintain a list of "false positives;" revealing the few names that happen to appear in
26 responsive documents will shed little, if any, light on the operations of the government.
27 Moreover, if these individuals desire their complaints to be public, they may make them so as
28 many, such as plaintiffs, have done.

1 **V. Exemption 7(C)**

2 Exemption 7(C) provides that materials may be withheld by an agency if they are
 3 “records or information compiled for law enforcement purposes, but only to the extent that
 4 production of such law enforcement records . . . (C) could reasonably be expected to
 5 constitute an unwarranted invasion of privacy.” 5 U.S.C. § 552(b)(7)(C). Exemption 7(C) is
 6 limited to “law enforcement materials,” but is broader than exemption 6. First, it is not
 7 limited to medical, personnel or similar files, but instead applies to all information or records,
 8 provided they are compiled for a law enforcement purpose. Second, unlike exemption 6,
 9 which requires that disclosure *would constitute* an unwarranted invasion of privacy, under
 10 exemption 7(C) the agency need only show that disclosure *could reasonably be expected* to
 11 constitute an unwarranted invasion of privacy. See Rosenfeld v. U.S. Dept of Justice, 57
 12 F.3d 803, 812 (9th Cir. 1995) (stating that exemption 6 requires a showing of a more
 13 intrusive invasion of privacy than exemption 7(C)); Hunt v. F.B.I., 972 F.2d 286, 288 (9th
 14 Cir. 1992) (stating that exemption 6 is not co-extensive with exemption 7(C)). “Where law
 15 enforcement records are sought (Exemption 7(C)), the threatened invasion of privacy need
 16 not be as likely as where personnel, medical, or similar files are at issue (Exemption 6).” Id.
 17 Thus, the Court’s analysis of the FBI’s exemption 7(C) withholdings is not controlled by the
 18 Court’s conclusions as to the TSA’s assertion of exemption 6.

19 “In order to determine under Exemption 7(C) whether the production of responsive
 20 law enforcement records or information could ‘reasonably be expected to constitute an
 21 unwarranted invasion of personal privacy,’ the public interest in disclosure of the responsive
 22 information must be weighed against the privacy interests of the information.” Neely v. FBI,
 23 208 F.3d 461, 463-64 (4th Cir. 2000). “The sole cognizable public interest for FOIA is the
 24 interest ‘to open agency action to the light of public scrutiny,’ to inform the citizenry ‘about
 25 what their government is up to.’” Rosenfeld, 57 F.3d at 811 (citation omitted).

26 In its Memorandum and Order on the parties’ initial motions for summary judgment,
 27 the Court held that the government had not met its burden of showing a law enforcement
 28 purpose with respect to an email from a Wall Street Journal reporter, and, in any event, had

1 redacted more information than necessary. In response to the Court's order, the FBI has
2 disclosed the email. The Court also commented that the FBI had used exemption 7(C) to
3 withhold entire documents when it could have simply redacted an individual's name. The
4 FBI has now corrected this error as well. Plaintiffs, however, still challenge the FBI's
5 assertion of exemption 7(C) to redact the names of FBI officials and third parties that appear
6 in the FBI documents.

7 **A. The names of government officials**

8 Courts have held that law enforcement officials have a privacy interest in non-
9 disclosure of their names in connection with law enforcement investigations. See Neely, 208
10 F.3d at 464 (stating that law enforcement officials have a substantial interest in the
11 nondisclosure of their identities and their connection with particular investigations because of
12 the potential for future harassment, annoyance, or embarrassment); Jones v. F.B.I., 41 F.3d
13 238, 247 (6th Cir. 1994) (stating "that federal law enforcement officials have the right to be
14 protected against public disclosure of their participation in law enforcement investigations
15 pursuant to exemption (b)(7)(C)") (internal quotation marks and citation omitted).

16 In Neely, an inmate sought disclosure under FOIA for information in his FBI file.
17 The FBI withheld the names of FBI agents, among others, pursuant to exemption 7(C). The
18 court affirmed on the ground that the agents' privacy interest in not disclosing their names in
19 connection with a particular investigation outweighed the negligible public interest in their
20 names. Id. at 464. The court noted that "there being no compelling allegation of agency
21 corruption or illegality, there would appear to be no reason on the record before us to assume
22 that these names and identifying information bear in any way upon the agency's performance
23 of its statutory duties or contribute significantly to public understanding of the operations or
24 activities of the government." Id.

25 Similarly, in Jones, the plaintiff, who had been convicted of murder, sought FBI
26 records related to himself and a group he founded. 41 F.3d at 239. Some of the records he
27 received in response to his FOIA request led to the granting of his habeas corpus petition. Id.
28 at 241. The FBI redacted the names of FBI agents appearing in many of the documents.

1 After acknowledging that law enforcement agents have a privacy interest in not having their
2 participation in law enforcement investigations disclosed, the court concluded that the public-
3 -as opposed to the plaintiff litigant--did not have an interest in knowing the names of the
4 agents as “the identity of these persons does not shed any light on the operations of the FBI.”
5 Id. at 247 (internal quotation marks and citation omitted). The court concluded that “the
6 withholding of these identities does not significantly limit the picture these documents paint
7 as to what the FBI was up to and what it knew about plaintiff, Afro Set, and their activities.”
8 Id.

9 The FOIA request at issue here is of a different nature than those at issue in Neely and
10 Jones and the other cases cited by the FBI. The FOIA-recognized public interest in knowing
11 how its government operates is somewhat facilitated by disclosing the names of certain
12 agents involved with the watch lists. The Court has reviewed *in camera* each 7(C)
13 exemption claimed by the FBI. Many of the documents are authored by or contain the name
14 of a special agent who, the documents reveal, was intimately involved in the administration
15 of the watch lists. The agent’s responsibilities included sharing information with the TSA
16 and the airport agents responsible for stopping passengers, as well as communicating with
17 legal counsel, and at times, members of the flying public. See, e.g., FBI nos. 1, 5, 15-16, 28-
18 53, 61-66, 71-74, 84, 98, 105, 121-123, 135, 136, 138, 147, 148, 156, 157, 177. The FBI has
19 also redacted the supervisor “in the Terrorism Watch List,” see, e.g., FBI nos. 105, 117-118,
20 121-124, 128-129, 131, 133, 138, 157, and the name of a TSA employee who was
21 responsible for advising the FBI and others on how to have a name placed on a watch list.
22 See, e.g. FBI nos. 90, 116, 128-130, 135.

23 It is beyond peradventure that the public has a strong interest in understanding the
24 government’s administration of the watch lists. Every day our government’s implementation
25 of the watch lists delays members of the flying public for minutes or even hours because their
26 names matched or were similar to a name on one of the lists. The public thus has a right to
27 know, and to demand, that the lists are being administered as competently as possible so as to
28 minimize the number of “false positives.” “Who” at the FBI is coordinating the watch lists

1 reveals something about what the FBI “is up to,” at least with respect to those officials who
2 have policy-making and implementation positions. See Rosenfeld, 57 F.3d at 811. As
3 plaintiffs argue, revealing the names of the agents who have been given responsibility for the
4 watch lists may help the public to evaluate whether the FBI is taking the watch lists, along
5 with the well-known problems with the lists, seriously enough. Thus, unlike Jones and
6 Neely, the public interest is served somewhat by revealing the names of FBI officials, albeit
7 only to a slight degree given that the FBI has revealed the “position” of some of the redacted
8 agents and given that plaintiffs have not articulated any public interest in learning the name
9 of any particular agent.

10 This slight public interest must be balanced against the privacy interests of the
11 individual officials. See Rosenfeld, 57 F.3d at 811. The FBI claims that revealing the names
12 of officials involved in counter terrorism activities “could reasonably be expected to attract
13 the attention of those who would attempt to use this information to gain unauthorized access
14 to sensitive law enforcement information and/or to intimidate, harass or harm these
15 employees.” Gehle Decl. ¶ 30. The FBI also argues that “given the intense media scrutiny
16 surrounding these issues, disclosure of the FBI SSAs identity in connection with the ‘no fly’
17 list could subject the FBI SSAs to unauthorized inquiries by members of the media and the
18 general public who seek access to information regarding the criteria and procedures used
19 when determining whether an individual poses a threat to civil aviation.” Gehle Decl. ¶ 35.

20 The latter privacy interest does not outweigh the public interest in knowing who is
21 making the policies that have such a profound effect upon the flying public. The FBI need
22 not reveal telephone numbers, email addresses, or other contact information that would
23 enable the media or public to contact the officials directly. Thus, it is not reasonably
24 expected that revealing their names will engender an avalanche of inquiries to these officials.

25 The former interest--that revealing these agents’ names could attract the attention of
26 terrorists--is more compelling. The threshold for application of exemption 7(C) is lower than
27 exemption 6; namely, the FBI must show that disclosure “could reasonably be expected to
28 constitute an unwarranted invasion of privacy.” Common sense dictates that revealing the

1 names of officials intimately involved with the distribution, implementation and maintenance
2 of watch lists could reasonably be expected to make these officials targets of those who want
3 access to the lists or non-public information about the lists. This privacy interest outweighs
4 the minimal public interest in learning the names of these officials, especially since plaintiffs
5 have not identified any public interest in learning whether ant specific person is or is not
6 involved with the lists. See Neely, 208 F.3d at 464 (finding that since there was no allegation
7 of agency corruption or illegality there was no FOIA-recognized interest in learning the
8 names of the investigating agents).

9 **B. Third parties**

10 The Court also concludes that the privacy interests of third parties who have
11 complained to the FBI about being frequently stopped, see, e.g., FBI nos. 177-180, 181,
12 outweigh the public interest in learning the names of those who have so complained.
13 Plaintiffs' reliance on Rosenfeld is unconvincing. In Rosenfeld, the district court ordered the
14 government to release the names of persons who had been the subject of FBI investigations
15 in connection with the Free Speech Movement. The court held there was a public interest in
16 "knowing whether and to what extent the FBI investigated individuals for participating in
17 political protests." 57 F.3d at 812. Disclosing the names of the investigation subjects would
18 make its possible for the public to compare the subjects of the FBI's investigations to the
19 roster of the Free Speech Movement's leadership. Therefore, the Ninth Circuit concluded,
20 there was a strong public interest in revealing the names of the subjects, a public interest that
21 could not be served through any other means. Id.

22 Here, revealing the names of the handful of persons who have complained to the FBI,
23 or have sought the FBI's assistance with their aviation transportation problems, will not
24 reveal whether and to what extent the FBI has abused the watch lists. The FBI has
25 represented that it does not "keep track of" the names of persons who are "falsely" stopped
26 for being a watch list match; thus, there is no list which, if disclosed, would reveal if people
27 of a particular race, ethnicity, name or belief are being disproportionately stopped.
28 Disclosure of the few third party names in the FBI's responsive documents will simply

1 reveal the names of some of the persons who have contacted the FBI; it will not shed any
 2 light on the number of false matches or the general “make up” of the false matches.
 3 Plaintiffs have not articulated any public interest in knowing the names of these few persons,
 4 especially since these individuals are free to publicize their watch list experiences if they
 5 desire. In Rosenfeld, in contrast, the public could learn the identities of the subjects of the
 6 FBI’s investigation only if the FBI disclosed their names as only the FBI knew whom it had
 7 investigated. 57 F.3d at 812.

8 **C. Law enforcement purpose**

9 Finally, plaintiffs suggest that the redacted and withheld FBI documents were not
 10 created for a law enforcement purpose and thus exemption 7(C) does not apply in the first
 11 place. See Rosenfeld, 57 F.3d at 808 (finding that the FBI’s assertion of a law enforcement
 12 purpose for an investigation was a pretext for investigating the subject because of her
 13 activities in the Soviet Union). The Court has reviewed all of the information withheld
 14 pursuant to exemption 7(C) and concludes that the information was compiled for a law
 15 enforcement purpose; namely, the information was compiled in connection with maintaining
 16 the watch lists to prevent another terrorist attack on civil aviation. There is nothing in the
 17 redacted information that suggests that the FBI’s assertion of a law enforcement purpose is
 18 pretextual, that is, that the FBI is placing names on the watch lists because of a person’s First
 19 Amendment activities rather than for a law enforcement purpose.

20 **VI. Privacy Act**

21 _____Plaintiffs also allege that defendants violated subsection (d)(1) of the Privacy Act, 5
 22 U.S.C. section 552a(d)(1), by failing to grant plaintiffs Gordon and Adams access to records
 23 indexed or maintained under their names or identifying information. Complaint ¶ 39.

24 The Privacy Act gives an individual access to records which pertain to him and are
 25 found in a system of records maintained by an agency. See Exner v. F.B.I., 612 F.2d 1202,
 26 1203-04 (9th Cir. 1980). The Act also denies an individual access to records maintained by
 27 an agency whose principle function is the enforcement of criminal laws. See id. at 1204.
 28 “To exempt a system of records from access under the Privacy Act, an agency must, first,

1 promulgate rules, pursuant to the rulemaking requirements of 5 U.S.C. § 553(b)(1), (2), and
 2 (3), (c) and (e), and, second, state the reasons in the rule itself why the system of records is to
 3 be exempt from a provision of the Act. 5 U.S.C. § 552a(j).” Id.

4 _____Plaintiffs concede that records maintained in the FBI’s Central Records System
 5 (“CRS”) are exempt from disclosure. The FBI nonetheless represents that it searched its
 6 CRS for records about plaintiffs and found none. Declaration of David Hardy (Jan. 2004) at
 7 p. 14 n.21. Plaintiffs claim that the FBI’s representation cannot be trusted, and that it may
 8 have non-exempt documents that pertain to plaintiffs, because the FBI did produce an email
 9 that had attached to it a *Wall Street Journal* article which discusses plaintiffs. Plaintiffs also
 10 contend that the TSA’s records are not exempt from disclosure.

11 The Court has reviewed *in camera* all of the documents produced by defendants in
 12 response to plaintiffs’ FOIA request. Except for the *Wall Street Journal* article, none of the
 13 documents pertain to plaintiffs. Plaintiffs have not identified any evidence that suggests that
 14 the FBI or the TSA is withholding responsive documents. Moreover, to the extent plaintiffs
 15 contend that the Privacy Act requires the TSA to reveal whether plaintiffs’ names appear on
 16 the no-fly or selectee lists, the Court disagrees for the reasons stated in its discussion of ssi.

17 CONCLUSION

18 For the foregoing reasons, plaintiffs’ second motion for summary judgment on its first
 19 cause of action (FOIA) is denied in part and granted in part; defendants’ second motion for
 20 summary judgment on the first cause of action (FOIA) is denied in part and granted in part;
 21 plaintiffs’ motion for summary judgment on its second cause of action (Privacy Act) is
 22 denied; and defendants’ summary judgment motion on the second cause of action (Privacy
 23 Act) is granted.

24 The parties’ second set of summary judgment motions do not address the third cause
 25 of action (classifying plaintiff ACLU as a member of the media). The parties shall advise the

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1 Court in writing by Tuesday, June 28 as to whether this cause of action is still at issue.

2 **IT IS SO ORDERED.**

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4 Dated: June 23, 2005

/s/

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

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United States District Court

For the Northern District of California