Case No. 13-14053

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JONATHAN CORBETT,
Plaintiff/Appellant

v.

TRANSPORTATION SECURITY ADMINISTRATION,
UNITED STATES OF AMERICA,
ALEJANDRO CHAMIZO,
BROWARD COUNTY, and
BROWARD SHERIFF'S OFFICE
Defendants/Appellees

On Appeal From the United States District Court for the Southern District of Florida
Case No. 12-CV-20863 (Lenard/O'Sullivan)

BRIEF OF APPELLANT JONATHAN CORBETT

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CERTIFICATE OF INTERESTED PARTIES

Appellant Jonathan Corbett certifies that the following is a complete list of the trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations known to him that have an interest in the outcome of this case as defined by 11th Circuit Local Rule 26.1-1:

Judges & Magistrates

- U.S. District Judge Joan A. Lenard
- U.S. Magistrate Judge John J. O'Sullivan

Appellant

- Jonathan Corbett

Appellees

- United States of America, its agencies, and its employees, including:
    - U.S. Department of Homeland Security
        - Janet Napolitano
        - Transportation Security Administration
            - John Pistole
            - Alejandro Chamizo
    - U.S. Department of Justice
        - Laura G. Lothman

        - Sharon Swingle
        - Andrea W. McCarthy
        - Rupa Bhattacharyya
        - Stuart F. Delrey
        - Wilfredo Ferrer
- Broward County, its agencies, and its employees, including:
    - Broward County Aviation Department
        - Robert L. Teitler
    - Broward Sheriff's Office

Non-Employee Attorneys for Appellee

- Counsel for Broward Sheriff's Office
    - Robert D. Yates

STATEMENT REGARDING ORAL ARGUMENT

Appellant Jonathan Corbett respectfully requests oral arguments to provide the Court more clarity than can be, or has been, provided to it in writing, and requests that oral arguments be assigned to the Court's satellite office in Miami, Fla..

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STATEMENT OF JURISDICTION

Appellant appeals from a final decision of a U.S. District Court within this circuit and invokes this Court's jurisdiction as of right under 28 U.S.C. § 1291. *See also* Fed. R. App. P., Rule 3.

STATEMENT OF THE ISSUES

1. Whether the district court erred in determining that a Transportation Security Administration ("TSA") supervisor could reasonably have concluded that he may lawfully continue an administrative airport checkpoint search beyond the point necessary to find weapons (to wit: by reading through a book, credit cards, and identity documents, and continuing a search for the purpose of retaliation)
2. Whether the district court erred in failing to apply the qualified immunity test established by the Eleventh Circuit
3. Whether the district court abused its discretion in failing apply the *Saucier* sequence for determining the question of qualified immunity
4. Whether the district court erred in dismissing claims seeking declaratory relief under qualified immunity grounds
5. Whether the district court erred in determining that TSA screeners do not meet the definition for "investigative or law enforcement officers" as defined by the Federal Tort Claims Act
6. Whether the district court erred in determining that the charges of invasion of privacy and intentional infliction of emotional distress are derivative of the charges of civil assault and false arrest

7. Whether the district court erred in determining that non-consensual inclusion in government databases is not a redressable damage contemplated by 5 U.S.C. § 552a
8. Whether the district court erred in determining that it could not grant injunctive relief under 5 U.S.C. § 552a
9. Whether the district court erred in determining that the complaint failed to state a claim for civil conspiracy
10. Whether the district court erred in determining that Article I, Section 12 of the Florida constitution is not self-executing
11. Whether the district court abused its discretion in refusing leave to amend the complaint to correct a technicality that would have substantively restored a dismissed charge
12. Whether the district court erred in determining that CCTV camera video constitutes a "similar file" to a personnel or medical file
13. Whether the district court erred in determining that an incident report about Appellant constitutes a "similar file" to a personnel or medical file of a TSA employee
14. Whether the district court erred in determining that the disclosure of CCTV camera video of TSA employees at work at a public checkpoint "would constitute a clearly unwarranted invasion of personal privacy"

15. Whether the district court erred in determining that disclosure of the names of TSA employees "would constitute a clearly unwarranted invasion of personal privacy"

16. Whether the district court erred in determining that the incident report about Appellant was compiled "for law enforcement purposes"

17. Whether the district court erred in determining that disclosure of the names of local police officers "could reasonably be expected to constitute an unwarranted invasion of personal privacy"

18. Whether the district court erred in determining that the TSA's search for FOIA documents was adequate

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in the Court Below

Appellant Jonathan Corbett ("CORBETT") filed suit against the five Appellees (collectively, "Appellees") over an unlawful search and seizure followed by the unlawful concealment evidence of the incident in the form of false denials and fabrications in public records responses. Final judgment dismissing this action was entered on September 3rd, 2013. A timely Notice of Appeal was filed along with this motion on September 6th, 2013, based on a breathtaking quantity of errors of law and abuses of discretion at the hands of the district court.

II. Statement of the Facts

A. Background

On August 27th, 2011, Appellant arrived at Fort Lauderdale–Hollywood International Airport with the intent of boarding a commercial airline flight. After reaching the TSA security checkpoint, a TSA employee directed Appellant to undergo screening using a nude body scanner. A nude body scanner is a device that uses electromagnetic radiation to create a detailed image of a person with their clothing removed. Appellant finds this screening to be morally and constitutionally objectionable and declined to consent to screening using nude body scanners.

The TSA offers alternate screening to travelers who cannot or choose not to participate in the virtual strip search described above. This alternate screening consists of a full-body pat-down. Appellant was offered this alternate screening and consented to it with the qualification that the TSA screener may not touch his genitals. This condition was unacceptable to the TSA screener, as well as to that screener's supervisor.

A higher-level TSA supervisor, Appellee Alejandro Chamizo, was contacted via phone and arrived at the scene, confirming the screener and supervisor's position that Appellant must consent to having his genitals inspected. Chamizo then directed his subordinates to conduct a retaliatory search on Appellant's baggage, which had already been screened via x-ray and would not have been touched again had Appellant cooperated with the invasive pat-down requested. The search of Appellant's two small bags extended for approximately half an hour and included search techniques far beyond anything required to determine if they contained weapons or explosives. In particular, the screeners read pages of books, inspected credit cards, and reviewed identification cards.

While the retaliatory search was in process, Chamizo summoned local law enforcement, Appellee Broward Sheriff's Office ("BSO"), and began to threaten Appellant with arrest and forcible search. Chamizo, without Appellant's consent, provided BSO with Appellant's identification documents for the purpose of running a

criminal records check. After BSO indicated that they would not be arresting Appellant and the retaliatory bag search was completed, Chamizo informed Appellant that he was being ejected from the checkpoint and would not be able to fly. Appellant left the airport, missing his flight.

Subsequent to the incident described above, Appellant submitted public records requests to Appellees TSA and Broward County, seeking documents related to the incident and CCTV camera footage of the incident. All parties denied possession of CCTV video, and TSA refused to provide any documents. Since CCTV cameras were plainly visible at the checkpoint, Appellant pressed the matter of who owns those cameras, and eventually, Broward County relented that they own the cameras, but were directed to lie about the existence of video by the TSA. Broward County claimed that the TSA had deemed the footage to be "Sensitive Security Information" ("SSI"), 6 U.S.C. § 114, and that not just the contents of the footage, but its mere existence, was SSI.

B. Procedural History

Appellant filed suit in the U.S. District Court for the Southern District of Florida on March 2nd, 2013 and amended his complaint on May 8th, 2013. After being served with the suit, TSA provided to Appellant pixelated CCTV footage and several redacted documents. The TSA justified the pixelation of the footage as necessary to protect the privacy of the TSA screeners visible within the footage, and

the redactions, which were mostly, but not exclusively, the names of TSA employees, for the same reason.

Appellees filed various motions to dismiss, which were granted in part, dismissing 19 of the 21 charges brought by Appellant. Subsequently, the remaining defendants filed motions for summary judgment, which were granted in full, dismissing the remaining counts. The charges and their dispositions are summarized in the following table:

Count(s)	**Defendant**	**Charge**	**Disposition**
1	Chamizo	4th Amendment Unlawful Seizure	Qualified immunity
2	Chamizo	4th Amendment Unlawful Search (Cards)	Qualified immunity
3	Chamizo	4th Amendment Unlawful Search (Books)	Qualified immunity
4	Chamizo	4th Amendment Unlawful Search (Intensity)	Qualified immunity
5	Chamizo	42 U.S.C. § 1983	Abandoned by Plaintiff/Appellant
6	USA	Assault	Sovereign immunity
7	USA	False Arrest	Sovereign immunity
8	USA	Invasion of Privacy	Sovereign immunity (derivative)
9	USA	Intentional Infliction of Emotional Distress	Sovereign immunity (derivative)
10-16	TSA	Privacy Act	Failure to state a claim
17	TSA	Freedom of Information Act	Documents are exempt
18	Broward	Fla. Public Records Act	Moot
19	USA	Civil Conspiracy	Failure to state a claim
20	Broward	Civil Conspiracy	Failure to state a claim

21	BSO	Fla. Constitution	Failure to state a claim

C. Standard of Review

This Court reviews a district court's decision on whether to grant a Fed. R. Civ. P. Rule 12(b)(1) motion to dismiss *de novo*. *Clark v. Riley*, 595 F.3d 1258, 1264 (11th Cir. 2010); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009). Motions for summary judgment are reviewed under the same standard. *Durruthy v. Pastor*, 351 F.3d 1080, 1084 (11th Cir. 2003).

In reviewing an order granting a motion to dismiss, the appellate court must accept all well-plead facts as true and draw all reasonable inferences in favor of the appellants. *Edwards v. Shanley*, 666 F.3d 1289, 1292 (11th Cir. 2012) ("We resolve all issues of material fact in favor of the plaintiff, and then determine the legal question of whether the defendant is entitled to qualified immunity under that version of the facts.") (*internal citation omitted*); *Aversa v. United States*, 99 F.3d 1200, 1209-10 (1st Cir. 1996), *Washington Legal Found. v. Massachusetts Bar Found*, 993 F.2d 962, 971 (1st Cir. 1993). This is especially true of cases prosecuted *pro se*, such as this one, where courts are "required to construe liberally a *pro se* complaint." *Ahmed v. Rosenblatt*, 118 F.3d 886, 890 (1st Cir. 1997); *see also Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998).

SUMMARY OF ARGUMENT

TSA checkpoints conduct warrantless, consentless searches and seizures under the administrative search doctrine. *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007) (*en banc*). An administrative search is a search conducted for specific public safety purposes, rather than general law enforcement objectives, and must be no more extensive or intensive than necessary to further that purpose. *Id*. In the context of aviation security checkpoints, this allows TSA searches to go no further than that which is necessary to detect weapons and explosives.

Further, Appellant was – and one could perhaps argue that all travelers passing through TSA checkpoints are – briefly seized for the purpose of conducting that search. Seizures must be evaluated against a reasonableness test that balances the threat against the efficacy and the intrusiveness of the search. *Illinois v. Lidster*, 540 U.S. 419 (2004).

The district court granted qualified immunity to Appellee Chamizo, but no reasonable TSA employee would have believed that the searches he conducted would be likely to turn up weapons of explosives, especially in light of the fact that Appellee's bags had already been screened using the TSA's standard procedures (including an x-ray) before Chamizo arrived on the scene. Further, no reasonable TSA employee would have believed he had the right to detain Appellant against his

will under threat of arrest and forcible search, as the TSA indisputably has no authority to do either.

The district court dismissed Appellant's intentional tort claims on the grounds that Appellee United States had only waived sovereign immunity for an "officer of the United States who is empowered by law to execute searches," and TSA screeners do not qualify because that power is limited, based on consent, and comes without the power to seize what is discovered. But, the irony of this argument in light of the grant of qualified immunity notwithstanding, TSA searches are not consent searches, and even if they were, the waiver of sovereign immunity does not distinguish between broad and limited, consensual or non-consensual, with or without seizure. The district court plainly inserted language into the statute that does not exist.

The district court dismissed Appellant's Privacy Act claims because it found that Appellant has no injury. The court erred by failing to distinguish case law where the government improperly transmitted an individual's private information to the individual himself – a situation where clearly no harm was done – to the instant case where Appellant's information is unlawfully collected and maintained in government databases.

The district court dismissed Appellant's civil conspiracy claims for being "too nonspecific and insufficient." Appellant alleged that Appellees Broward County and TSA conspired to withhold public records – the CCTV camera footage – from

Appellant in violation of Florida public records laws, by improperly designating them as SSI. In light of the fact that the TSA has admitted that the records are not SSI and that there is no basis for labeling *the existence* of records as SSI, it is plainly apparent that the result of discussions between these two Appellees was unlawful. However, the Court need not even dig that deep: even if the existence of records could be legitimate SSI, Broward County was still obligated to issue a *Glomar* denial, rather than simply lie about their existence.

The district court further ruled that the names and faces of TSA screeners on documents and in CCTV video footage is exempt from disclosure. But, these records do not meet the requirements for exemption, and their release would not violate the privacy rights of anyone.

Finally, the district court ruled that money damages are not available under the Florida constitution's Article I, Section 12. This ruling ignores the clear interpretation by the high court of the state that the section is indeed self-executing.

ARGUMENT

I. No Reasonable TSA Screener Would Have Thought the Searches Performed Were Lawful

An administrative search is a search conducted for specific public safety purposes, rather than general law enforcement objectives. The dawn of the administrative search doctrine can perhaps be found in *Frank v. Maryland*, 359 U.S. 360 (1959), where city health inspectors were granted permission to intrude upon homes absent a warrant for the sole purpose of ensuring compliance with building codes. Such searches were permitted "solely for the protection of the community's health" with the strict condition that "[n]o evidence for criminal prosecution is sought to be seized." *Id.* at 366.

Frank was, of course, overruled eight years later by *Camara v. San Francisco*, 387 U.S. 523 (1967), for giving the government *too much* leeway with searches. Post-*Camera*, the administrative search doctrine would slowly be pieced back together by the Supreme Court, but always with the intent to limit such searches to that which are specifically required to advance a specific public interest rather than to search for evidence of general criminality. In 1987, the court finally made defined the contours of administrative searches with a three-pronged test: 1) There must be "substantial government interest" supporting the regulatory scheme to which the

search was made, 2) The warrantless searches must be "necessary to further the regulatory scheme," and 3) "[T]he statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant." *New York v. Burger*, 482 U.S. 691, 702 – 703 (1987). This test was applied only after the court determined that a "special need" was present to justify an administrative search at all.

The "special need" in *Burger* was that of a "pervasively regulated business," in *Frank* was that of public health, and for the TSA flows from the need to protect the skies from air piracy and terrorism[1]. The Transportation Security Administration, created in 2002 after the tragic events of September 11th, 2001, exists solely to secure our nation's travelers from people intent on taking their lives. This is the "regulatory scheme" contemplated by *Burger* and the rest of the long lines of administrative search doctrine case law.

It follows, then, that the TSA's administrative searches may not be conducted with the intent of finding cocaine, child pornography, counterfeit money, stolen credit cards, *etc*., but must be confined to that which is necessary to thwart those intent on taking over, or taking down, airplanes: weapons and explosives. More clarity is not

[1] Appellant does not challenge that the TSA has a valid "special need" for the purposes of the instant case.

required to put the TSA on notice that it may not conduct searches beyond these parameters: the limitation is clearly established by the U.S. Supreme Court.

Federal courts across the country have quite consistently applied the limitations for administrative searches set by the high court for at least 40 years. *Aukai*; *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973); *United States v. Hartwell*, 436 F.3d 174, 178 (3rd Cir. 2006), *cert. denied*; *United States v. Fofana*, 2009 U.S. Dist. LEXIS 45852, 09-CR-49 (S.D.O.H. 2009). *Aukai* offers perhaps the clearest articulation of the application of Supreme Court doctrine to the context of TSA searches with a three part balancing test: (1) the search is "no more extensive or intensive than necessary, in light of current technology, to detect the presence of weapons or explosives;" (2) the search "is confined in good faith to that purpose;" and (3) a potential passenger may avoid the search by choosing not to fly. *Aukai* at 962.

Beyond the search, Appellant was also seized for a period of about 1 hour. Plaint. First Am. Compl., ¶ 3. One could reasonably argue that every traveler who passes through TSA checkpoints is briefly seized, but in the instant case, Appellant was told he was not free to go and was guarded by nearly a dozen TSA screeners and law enforcement summoned by the same.

The Supreme Court has also squarely addressed the requirements for seizures that occur outside the context of criminal investigations. Seizures must be evaluated

against a reasonableness test that balances the threat addressed by the seizure against the efficacy and the intrusiveness of the seizure. *Lidster*.

Appellee Chamizo was granted qualified immunity for four charges: that he held Appellant without a legal basis for doing so (Count 1), that he directed his subordinates in the execution of a search that involved the review of the text of Appellee's cards (Count 2) and the text of his books (Count 3), and that the search he directed continued beyond the point at which he knew that Appellant had no weapons or explosives (Count 4).

The district court cited the correct law that Appellant has discussed above. However, the district court failed to apply Appellant's version of the facts, as it must do at the motion to dismiss stage of proceedings, to that law. Starting with the searches (Counts 2 – 4), the district court justified them by stating that a reasonable screener may have thought that Appellant's books and cards may have been "sheet explosives." Dismissal Order I[2], pp. 12, 14. But, the district court ignored Appellant's well-plead facts that make this justification a fantasy. First, Appellant plead that the screeners did not merely "thumb through" the books, credit cards, and identification cards to see if anything was concealed inside or between them, but *read the text printed on them*. In *Fofana,* a TSA screener admitted that the purpose of such

[2] The district court's order granting in part Appellee's motions to dismiss shall be referred to as Dismissal Order I, while the order dismissing the remainder of the case during summary judgment shall be referred to as Dismissal Order II.

an exercise is obviously not to determine if an explosive is present (the name and numbers on Appellant's credit cards, for example, obviously would not help that determination), but rather to find evidence of general criminality, such as possession of a stolen credit card. *Fofana* at *7. Second, Appellant disputed that sheet explosives that can be disguised as paper exist at all:

> A sheet explosive is so named because it is flat in comparison to a stick of dynamite or other brick-shaped explosives, not because it is flat like a sheet of paper. Defendant's description of sheet explosives – "thin flat explosives" that "may be disguised as a simple piece of paper" – has no basis in reality. First, the thinnest sheet explosives on the market are 1.00 mm in thickness. An ordinary sheet of book paper (20 lb. stock) is 0.09 mm in thickness. A sheet explosive is a rubbery, smooth material. An ordinary sheet of book paper is coarse and entirely different to the touch. A sheet explosive is a brown/gray color. An ordinary sheet of book paper is white. Quite simply, a sheet explosive would not be able to be disguised as a page in a book.

Plaint. Opp. to Deft. Chamizo's Mot. to Dismiss, pp. 15, 16. Appellant also provided to the court specifications from the largest sheet explosive manufacturer to support the above claim. *Id*., Exhibit A. Chamizo offered no evidence to contradict the same.

Continuing with the seizure (Count 1), the district court merely states that a reasonable screener could have concluded that "agents could detain Plaintiff while completing their inspection." Dismissal Order I, p. 14. This may be true, but ignores Appellant's assertion that at some point during the inspection, Chamizo became

aware that the inspection would not turn up weapons or explosives, but continued it anyway for the purpose of "teaching Appellant a lesson." The district court noted that in *Aukai*, an 18-minute detention was found to be reasonable, but Appellant was held for approximately one hour. Dismissal Order I, p. 12.

The TSA clears passengers for weapons and explosives on the order of approximately 2 million individuals per day, most in a matter of mere seconds. Appellant has alleged that he possessed only 2 small bags. Plaint. First Am. Compl., ¶ 51. The TSA has offered no explanation as to how it could possibly have taken them an hour to search what usually takes them not even a minute. The district court's assumption that the TSA screeners had a good-faith belief towards the end of the hour that Appellant may have had a weapon or explosive, is unsupported by any evidence, and certainly does not accept Appellant's well-plead facts as true.

II. The District Court Failed to Use the Qualified Immunity Test Established by This Court

This Court has established for the district courts beneath it "two methods to determine whether a reasonable officer would know that his conduct is unconstitutional." *Fils v. City of Aventura*, 647 F.3d 1272, 1291 (11th Cir. 2011). The court explains:

> The first method looks at the relevant case law at the time of the violation; the right is clearly established if a concrete factual context [exists] so as to make it obvious to a reasonable government actor that his actions violate federal law. This method does not require that the case law be materially similar to the officer's conduct; officials can still be on notice that their conduct violates established law even in novel factual circumstances. But, where the law is stated in broad propositions, a very high degree of prior factual particularity may be necessary.
>
> The second method looks not at case law, but at the officer's conduct, and inquires whether that conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to [the officer], notwithstanding the lack of fact-specific case law. This method — termed obvious clarity — is a narrow exception to the normal rule that only case law and specific factual scenarios can clearly establish a violation[.]

Id.; see also *Edwards* at 1296. Instead of applying this mandatory test that the Court has crafted to properly effect *Saucier*[3], *Pearson*[4], and other relevant Supreme Court mandates, the district court applied the significantly vaguer standard touched upon in *Saucier* of "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Dismissal Order I, p. 10.

Although clearly established law prohibiting Chamizo's conduct exists in *Burger*, the Eleventh Circuit test required the district court to deny qualified immunity in certain circumstances even when there is no relevant case law at all. If

[3] *Saucier v. Katz*, 533 U.S. 194, 201 (2001)
[4] *Pearson v. Callahan*, 555 U.S. 223, 129 (2009)

"the unlawfulness of the conduct is readily apparent," it matters not whether a court has ruled on the issue. "Concrete facts are generally necessary to provide an officer with notice of the hazy border between excessive and acceptable force. But, where the officer's conduct is so outrageous that it clearly goes so far beyond these borders, qualified immunity will not protect him even in the absence of case law." *Id*. Qualified immunity serves only to protect honest mistakes as to fact or law, not to protect those who know they are breaking the law.

Appellant described conduct that every reasonable TSA screener knows is impermissible. Circumventing the Constitution by abusing the narrow "administrative search doctrine" exception to look for evidence of general criminality is, indeed, outrageous conduct. Had the district court applied the test demanded by this Court, there would have been no question that Chamizo is not entitled to qualified immunity.

III. The District Court Absued its Discretion by Failing to Apply *Saucier*

The district court was correct that the rigid "order of battle" established by *Saucier* was made discretionary as a result of *Pearson*. Dismissal Order I, p. 10. However, that flexibility may not be used arbitrarily or solely for the purpose of "promoting judicial economy," and the Supreme Court has noted that they "continue

to recognize that it is often beneficial" to analyze the constitutional question first. *Pearson* at 818. The Eleventh Circuit has also made clear that the "two-step analysis is not mandatory, but is the 'often appropriate' manner through which to analyze qualified immunity claims." *Edwards* at 1294. A court must investigate the proper approach, rather than simply take the "easier" one, but in this instance, the district court failed to do so.

There is significant authority for use as guidance as to whether the two-step process should be used. Starting with *Pearson* itself, and perhaps the most important reason a court may decide to apply the *Saucier* rule, is that doing so "promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Pearson* at 818. Because of the sheer quantity of searches that the TSA conducts, there is significant public interest in defining the outer boundaries of their search and seizure powers. The only opportunity to establish these boundaries are *Bivens* suits and suppression hearings, as seen in *Fofana*. But, suppression hearings are often avoided due to plea bargaining and the inability of a defendant to prove that the TSA screener *intended* to find non-weapon contraband. For example, in one suppression hearing, the TSA screener conveniently testified that the defendant's contraband simply "spilled out" of an envelope. *United States v. McCarty*, 672 F. Supp. 2d 1085 (D.H.I. 2009). The two million members of the

general public who are forced to interact with the TSA every day deserve to know precisely how much those government employees may interfere with their liberty.

Another factor a court may use is to decide whether the constitutional precedent set would be "meaningful" based on whether the constitutional questions are tightly bound to a narrow set of facts or general enough to have useful application in a broader set of cases. *Pearson* at 819. In this instance, the constitutional questions are entirely unbounded by facts: Can a TSA screener read through a traveler's documents? Can a TSA supervisor detain a traveler, and for how long? Again, these are questions for which the public deserves an answer, and punting on this question is clearly not in the interest of justice. This is doubly true considering that Plaintiff has asked for declaratory relief. Plaint. First. Am. Compl., Prayer for Relief, ¶ 1.

Yet another pair of factors that lie in favor of adhering to Saucier are whether the question requires the court to analyze potentially ambiguous state law and whether the question rests upon undeveloped facts. *Pearson* at 819, 820. Appellant's claims dismissed due to qualified immunity do not call upon state law, and there was no mention by the district court that Appellant's allegations of fact were underdeveloped.

IV. The District Court Erred by Refusing Declaratory Relief on Qualified Immunity Grounds

There is but one avenue that Plaintiff may take to obtain a ruling on the constitutionality of Chamizo's actions despite qualified immunity: asking for declaratory relief. "[C]onstitutional plaintiffs may seek declaratory or injunctive relief pursuant to standard principles of justiciability. Those plaintiffs do not need *Pearson*'s special rule." *Camreta v. Greene*, 132 S.Ct. 91 (2011) (*Kennedy, J., dissenting*). Appellant asked for declaratory relief, but the district court ignored it. Plaint. First. Am. Compl., Prayer for Relief, ¶ 1.

Qualified immunity only shields public officials from immunity from damages. *Horstkoetter v. D.H.S.*, 159 F.3d 1265 (10th Cir. 1998) ("his claims for damages are barred by the doctrine of qualified immunity") (*emphasis added*). Declaratory relief is more traditionally brought against government officials in their official capacities, where immunity (both qualified and absolute) do not apply at all. *Randall v. Scott*, 610 F.3d 701 (11th Cir. 2010) ("…federal law provides government officials a qualified immunity when sued individually…"), *VanHorn v. Oelschlager*, 502 F.3d 775, 779 (8th Cir. 2007); *Lonzetta Trucking & Excavating Co. v. Schan*, 144 Fed.Appx. 206, 210 – 211 (3rd Cir. 2005) ("...zoning officials in their official capacities ... are not entitled to absolute immunity."); *Turner v. Houma Mun. Fire & Police Civil Serv. Bd.*, 229 F.3d 478, 483 (5th Cir.2000) (rejecting quasi-judicial

immunity in "official capacities" because such an argument "misconstrues the distinction between immunities available for 'individual-capacity' and 'official capacity' suits); *Alkire v. Irving*, 330 F.3d 802, 810-11 (6th Cir. 2003) ("...sued only in their official capacities, Sheriff Zimmerly and Judge Irving cannot claim any personal immunities, such as quasi-judicial or qualified immunity..."). However, Plaintiff has found no clear authority showing that declaratory relief is unavailable against individuals or subject to any personal immunity defenses. Indeed, the objectives of qualified immunity are still largely maintained: the official will not need to stand trial because declaratory judgments turn only on questions of law.

Appellant also asked the district court, in the alternative, for leave to amend to name Chamizo in his official capacity. Mot. for Reconsideration, p. 9. Rule 15 requires that leave to amend shall be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2); *see also Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 234 (2nd Cir. 1995) (granting leave to amend four years after original complaint); *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227 (1962). The district court improperly denied this request.

V. TSA Screeners are "Investigative Officers" Under the Federal Tort Claims Act

Appellee United States is only liable for FTCA claims for civil assault and false arrest when those torts are committed by "investigative or law enforcement officers of the United States Government." 28 U.S.C. § 2680(h). The section continues on to define "investigative or law enforcement officers" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.*

The men and women in blue uniforms working the security checkpoints at U.S. airports are employees of the TSA known as "Transportation Security Officers" ("TSOs"). These TSOs have only one primary job function: to search travelers and their belongings as authorized by federal law.

In order for these men and women to be outside of the definition presented by § 2680(h), one must do both of the following: 1) ignore the plain meaning of the word "or" and instead replace it with some kind of balancing test, and 2) ignore both the plain meaning and the legal context of the word "search." This is an issue of first impression here in the Eleventh Circuit. Neither Appellees nor the district court were able to locate a circuit that has ruled that a TSA screener falls outside of § 2680(h), and the district court notes at least one case where a district court did not accept the the government's argument that screeners are not covered. Dismissal Order I, p. 17.

Any interpretation of a statute must begin with a plain reading of the text. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 112 S. Ct. 1146, 1149 (1992) (*internal citations omitted*). "It is our duty 'to give effect, if possible, to every clause and word of a statute.'" *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120 (2001).

Based on these elementary rules of construction, and since it is undisputed and undisputable that "Transportation Security Officers" employed by the United States Transportation Security Administration, are "officer[s] of the United States," the Court must find that § 2680(h) applies to TSOs if they are empowered by law to do any of the following: 1) to execute searches, 2) to seize evidence, or 3) to make arrests for violations of Federal law. There is no balancing test implied by the statute. Plaintiff will stipulate that options 2 and 3 do not apply to TSA screners, but option 1 clearly does.

Appellees readily concede that it is the job of a TSO to conduct searches. Deft. United States' Motion to Dismiss, p. 7 ("search at a security screening area is lawful"), p. 10 ("TSA agents were constitutionally permitted to search his belongings"), *etc*. Federal law similarly has no problem describing the duties of TSA screeners as being the performance of searches. 49 USC § 44935(f)(1)(B)

("Screeners performing physical searches…"), ("Screeners who perform pat-downs or hand-held metal detector searches of individuals…"). Indeed, the authority of the federal government to mandate submission to TSA searches before entering the sterile airport is known as the administrative *search* doctrine. *Davis*.

The district court indicated that it was adopting the position of *Weinraub v. United States*, 5:11–CV–651, 2012 WL 3308950, at *7 (E.D.N.C., Aug. 13th, 2012), which concluded that TSA screeners were not "empowered by law to execute searches" because the searches they conduct are "limited" and "consensual." Dismissal Order I, pp. 17 – 19. There are two fatal flaws with this reasoning. The first is that TSA searches are not consent searches, which the district court acknowledged just 6 pages earlier. Dismissal Order I, pp. 11, *citing* *United States v. Biswell*, 406 U.S. 311, 315 (1972); *see also* *Aukai* ("Today we clarify that the reasonableness of such searches does not depend, in whole or in part, upon the consent of the passenger being searched."). While a person is not subject to TSA screening should they not wish to fly[5], once they reach the checkpoint, there is no choice in the matter. Second, there is absolutely no mention of any test for how limited or consensual the searches are within the text of § 2680(h), and there is no

[5] The TSA has "tested the waters" for screening at bus stations, train stations, subways, and the like. "If you don't like it, don't fly" is a mantra that has proven to be foolish.

reason whatsoever to read such a test into the law. An administrative search is, undeniably, a search, and therefore it qualifies.

Exclusion of those who conduct non-law enforcement searches would not only require the insertion of words that are not present, but it would also render superfluous other words. There would be no meaning given to the words "investigative or." There would also be no reason for the definition to have a three part criteria, or to have a definition at all, really: "law enforcement officer" is relatively unambiguous by itself. If Congress had intended only law enforcement officers to be covered by § 2680(h), they would have said so, and they would not have included additional words to muddy their intent.

The reading adopted by the district court would also lead to legal nonsense: if TSOs are not "empowered by law to execute searches," it would mean that travelers could necessarily ignore TSA employees at airports. After all, if these men and women of the TSA are not empowered by law to search us, we clearly need not submit. This is, of course, silliness. Federal law requires that "[n]o individual may enter a sterile area or board an aircraft without submitting to the screening and inspection of his or her person and accessible property." 49 C.F.R. § 1540.107.

The district court's dismissal of Counts 6 & 7 was therefore incorrect.

VI. Appellant's Invasion of Privacy and IIED Claims Were Not Derivative of Barred Claims

The district court ruled that Counts 8 and 9 are "derivative" of Counts 6 and 7, and therefore must too be dismissed. Dismissal Order I, p. 19. Plaintiff's invasion of privacy claim stems from being directed by the TSA to sit in a chair and then being surrounded by, at times, half a dozen uniformed TSA screeners and law enforcement officers in a way that was clearly unnecessary for the performance of their duties, and additionally had multiple officers dump and paw through Plaintiff's belongings in a way that would have made any reasonable passersby (who numbered in the hundreds) suspect that Plaintiff was a criminal. Plaint. First Am. Compl., ¶ 120 – 125. To accomplish this, Appellees need not have assaulted or falsely detained Plaintiff, and indeed much of this conduct happened before Plaintiff was told he was not free to go.

Plaintiff's intentional infliction of emotional distress claim stems from the employees of the TSA searching Plaintiff in a way that was "invasive, demeaning, unnecessary, and unlawful." Plaint. First Am. Compl., ¶ 127. Appellee TSA could have been (and is quite good at being) invasive, demeaning, and unnecessary, even when it fails to assault or falsely arrest a traveler. While ¶ 128 of the First Amended Complaint does list the unlawful seizure (false arrest) as *a* reason for the emotional distress, if this reason were stricken from the complaint, the intentional infliction of

emotional distress claim would stand without it. Since this claim would have occurred even absent the assault and false arrest, it is not derivative of the same.

Courts should look at claims of derivation with great skepticism; otherwise, the government may avoid liability for a non-exempt tortious act simply by committing an exempt tortious act at the same time. In order for a claim to be a "derivative" of another claim, the other claim must be "essential to" the derivative claim. *O'Ferrell v. United States*, 253 F.3d 1257, 1265 (11th Cir. 2001). The questions before the court, then, were: "Could the invasion of privacy have occurred without the false arrest or assault?" and "Could the intentional infliction of emotional distress have occurred without the false arrest or assault?"

However, the Court failed to specifically address the core test provided by *O'Ferrell* and detailed by Plaintiff: whether the allegedly derivative claims could have occurred absent the claims for which they have allegedly derived. It is entirely unclear how the Court came to the conclusion that all tort claims "hinged on the same underlying governmental conduct" without examining if the claims could indeed be based on separate actions that happened to occur during the same time span.

The answer to both questions before the district court *a la O'Ferrell* is "yes," and thus the district court's dismissal of Counts 8 and 9 should be reversed.

VII. Forcible Collection of Data is *Per Se* Actual Damage Under The Privacy Act

At the time of the incident in the airport, the TSA took from Appellant, at a minimum, his boarding pass and Florida driver's license, without Appellant's consent. These documents were photocopied and later reproduced in an incident report generated by the TSA. *See* Appendix A, Sample Pages from Incident Report. This incident report now lives in one or more government databases, and can subject Appellant to negative inferences when, for example and at a minimum, interacting with Customs and Border Patrol when re-entering the country, applying for trusted traveler programs such as TSA Pre-Check and NEXUS, and, of course, passing through TSA security checkpoints.

Appellant was presented with no authority for the collection of this data, and no such authority exists. The TSA has never published any notice about the collection of such data in the Federal Register, nor, to the best of Appellant's knowledge, has it established any systems for safe storage, transfer, appeal, or destruction of this data. The information collected by the TSA (including driver's license number, date of birth, address, *etc*.) is a perfect start for any identity thief, and the TSA demonstrated their inability to store this document safely when they "accidentally" published it to the world in a filing on the public docket on Feb. 13th, 2013, in violation of Fed. R. Civ. P., Rule 5.2(a)(2). *See* Dist. Ct. D.E. 89-9.

Demonstrating their expert-level obtuseness, the subject of this accidental filing was an argument that releasing the mere names of their employees would be a "clearly unwarranted invasion of privacy."

Appellant plead 7 distinct violations of the Privacy Act, 5 USC § 552a(e): failure to provide authority and purpose, failure to provide notice in the Federal Register, failure to ensure fairness, failure to establish rules of conduct, failure to establish safeguards, failure to accept comment, and failure to publish a matching program (Counts 10 – 16, respectively, corresponding to § 552a(e) subsections 3, 4, 5, 9, 10, 11, 12). The district court dismissed Appellant's Privacy Act claims, stating that: 1) Appellant did not plead actual damages, and 2) Appellant's request for injunctive relief is unsupported by the statute. Both lines of reasoning are incorrect, and the district court additionally ignored Appellant's request for declaratory relief.

The district court concedes that "Plaintiff argues that he has been adversely affected by the alleged Privacy-Act violations." Dismissal Order I, p. 20. However, the Court's order never explores this, and summarily concludes "Plaintiff alleges no actual damages…" Dismissal Order I, p. 23. Appellant detailed his actual damages to the district court in his opposition to TSA's motion to dismiss. Plaint. Opp. to USA & TSA's Mot. to Dismiss, pp. 11, 12. In that explanation, Appellant clearly

distinguishes *Chao*[6], a case in which the government accidentally unlawfully printed a social security number (which it was lawfully entitled to collect) on a letter sent to the holder of that social security number – a case where clearly no harm was done – to the instant case, where Plaintiff's personal information was unlawfully collected and is now sitting in one or more unknown government databases. The government's unlawful possession and storage is in-and-of-itself an actual damage.

Those who have their privacy violated typically do not have a dollar value that actually disappeared from their pockets: the breach of their privacy is a damage in itself. To hold that this damage is insufficient and that Appellent is entitled to neither damages nor injunctive relief, despite the government breaking the law, would render the Privacy Act utterly meaningless. Clearly this was not the intent of Congress, and the Court, in longstanding American tradition, is obligated to fasten a remedy for every wrong. *United States v. Nourse*, 34 U.S. 8 (1835).

Perhaps the district court was unimpressed by the articulation of this in the First Amended Complaint. The district court did not say so, and if it had, Appellant would certainly have sought leave to amend. But, as is, a reader of the complaint could reasonably distinguish this case from *Chao* and conclude the damages articulated by Appellant in his opposition, especially in light of liberal construction rules. *Ahmed; Tannenbaum.*

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[6] *Doe v. Chao,* 540 U.S. 614, 616 (2004)

Finally, Appellant requested declaratory relief. Plaint. First. Am. Compl., Prayer for Relief, ¶ 1. The district court ignored this request.

VIII. Injunctive Relief is Available Under The Privacy Act

In addition to being required to view the facts presented in the complaint in the light most favorable to Appellant, the district court was required to construe Plaintiff's pro se complaint liberally, but failed to do so. *Tannenbaum at* 1263 ("Pro se pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed"); *see also Lindsey v. United States*, No. 10-14721 (11th Cir., Jan. 6, 2012).

In light of liberal construction rules, Appellant's request for injunctive relief should have been construed as a § 552a(g)(2) request to amend his records, in the form of deleting the records in their entirety. It is unclear why the Court, seeing that Appellant requested injunctive relief and finding in the statute a means to grant it, chose not to. Appellant pointed this out to the district court and also moved, in the alternative, for leave to amend, which was denied. Mot. for Reconsideration, p. 12. Rule 15 requires that leave to amend shall be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2); *see also Rachman Bag Co.*; *Foman*. The district court improperly denied this request.

IX. Appellant Properly Stated a Claim for Civil Conspiracy

Two days after the incident at the airport, Appellant submitted public records requests to Appellees TSA and Broward County, seeking documents related to the incident and CCTV camera footage of the incident. Broward County responded first and provided no useful information, specifically noting that they do not have any CCTV video. Months later, TSA responded to the records request, also providing no useful information and denying possession of CCTV video.

Appellant, perplexed by all parties denying that they possessed video, in light of the fact that more than a dozen camera domes were visible at the security checkpoint and signage indicated that the checkpoint was under video surveillance, asked Broward Country to identify who owns those cameras. Broward County eventually conceded that they own the cameras. Appellant then questioned how they could own the cameras and not have footage, and Broward County relented that they do have the footage, but were directed to lie about its existence by the TSA. Broward County claims that the TSA had deemed the footage to be "Sensitive Security Information" ("SSI"), 6 U.S.C. § 114, and that not just the contents of the footage, but its mere existence, is SSI. The material facts in these two paragraphs are not in dispute by any party.

Absent from the text of the statutes governing the federal Freedom of Information Act and the Florida Public Records act, as well as the statute defining Sensitive Security Information, is any mention that lying is acceptable to protect SSI. In fact, the federal Freedom of Information Act defines the circumstances in which lying is permitted: if it would interfere with certain ongoing criminal investigations, requests a search on the name of a confidential informant, or requests a record relating to the FBI's foreign counterintelligence efforts. 5 USC § 552(c). Clearly, none of these apply. The Florida Public Records Act defines no circumstance in which lying is acceptable, and actually makes lying a criminal offense. Fla. Stat. § 119.10(2).

The notion that *the existence of* CCTV footage is SSI is patently absurd in light of the visible camera domes and signage informing travelers of CCTV monitoring at the checkpoint. The TSA later admitted as much when it provided partial video from the checkpoint after this case was filed. But regardless of all of the above, if the government needed to protect the fact that CCTV video existed, it could have done so while complying with state and federal law by issuing a *Glomar* denial[7].

Appellant has facially alleged that 1) two parties communicated with each other, 2) afterwards, at least one of the parties committed unlawful acts that harmed

[7] *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) ("neither confirm nor deny…")

Plaintiff, and 3) one of the parties has informed Plaintiff (not to mention submitted to the district court) that the action they took was at the direction of the other party. Plaint. First Am. Compl., ¶¶ 77 – 85. It has been stipulated by the parties that there was indeed collaboration as to their actions in denying Plaintiff's records requests. Deft. Broward County's Mot. to Dismiss, p. 7 ("Based on that required interaction [with the TSA]…").

The intent of the Appellees is a question of their state of mind, which rarely can be shown with absolute certainty. But, at the motion to dismiss stage, Appellant's complaint need only show that it is plausible that they intended to conspire against Appellant. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The First Amended Complaint indeed explores that plausibility. Besides it being facially absurd that the TSA and Broward County would be unfamiliar with the fact that they are not allowed to lie to the public in a public records response, the TSA regularly releases security checkpoint videos to the public when it suits them. Plaint. First Am. Compl., ¶ 86. As such, it is impossible that the parties "accidentally" thought that they: 1) may not release the videos, and 2) could lie about their existence.

Appellant further explored this in his oppositions to the Appellees' motions to dismiss. Plaint. Opp. to Broward County's Mot. to Dismiss, p. 4. Appellant even further explored the absurdity of lying about the existence of checkpoint video when the checkpoints have a dozen visible camera domes and TSA-produced signage that

says, "This Checkpoint Is Under Video Surveillance." Plaint. Opp. to Broward County's Mot. to Dismiss, Exhibits A – C.

The bottom line is that if the Appellees had simply failed to produce the videos, an argument that they may have broken the law unwittingly because they thought in good-faith that the videos were exempt would be plausible. But any argument that they, in good-faith, thought that they could lie to the public about their existence is entirely without merit. The district court granted Appellees the benefit of the doubt to an extreme degree when, at that stage, it was Appellant who was entitled to the benefit of the doubt.

X. The Protections Against Unlawful Search in the Florida Constitution are Self-Executing

Appellant notes that it is peculiar that it does not seem Florida's Supreme Court has directly taken up the issue of whether money damages are available under Article I, Section 12 of the state's constitution, and perhaps this is a question that should be certified to that court. However, the Florida Supreme Court has squarely rejected the logic of the case law relied on by the district court in concluding that money damages are unavailable, and has provided a test:

> The basic guide, or test, in determining whether a constitutional provision should be construed to be

> self-executing, or not self-executing, is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. State ex rel. City of Fulton v. Smith, 1946, 355 Mo. 27, 194 S.W.2d 302. If the provision lays down a sufficient rule, it speaks for the entire people and is self-executing. City of Shawnee v. Williamson, Okl. 1959, 338 P.2d 355. The fact that the right granted by the provision may be supplemented by legislation, further protecting the right or making it available, does not of itself prevent the provision from being self-executing. People v. Carroll, 1958, 3 N.Y.2d 686, 171 N.Y.S.2d 812, 148 N.E.2d 875.

Florida Hospital Waterman v. Buster, 984 So.2d 478, 485 (Fla. 2007), *citing* *Gray v. Bryant*, 125 So. 2d 846 (Fla. 1960). That court continued on to make itself abundantly clear:

> The will of the people is paramount in determining whether a constitutional provision is self-executing and the modern doctrine favors the presumption that constitutional provisions are intended to be self-operating. This is so because in the absence of such presumption the legislature would have the power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people.

Id at 486.

The district court failed to run the test provided by the Florida Supreme Court, and indeed refused to use any test whatsoever, instead relying on conflicting case law from inferior Florida courts.

The idea that the Florida legislature would have the power to override – via failure to implement – a constitutional clause that guarantees a basic right of the people is contrary to the fundamentals of our system of law. Viewed against the Florida Supreme Court's opinion in *Florida Hospital Waterman*, it is clear that Article I, Section 12 is self-executing and comes with money damages since there is no other possible state remedy for the violation of Plaintiff's rights.

XI. Leave to Amend A Civil Rights Act Charge Should Have Been Granted

In the event that the Florida constitutional claim was ruled to be without the consequence of money damages, Appellant moved the district court to amend his complaint to change that violation to a Civil Rights Act claim. Plaint. Opp. to Deft. Broward Sheriff's Office Mot. to Dismiss, p. 8. The district court denied this request as "vague, unsupported by a proposed amended pleading, and not properly raised." Dismissal Order I, p. 32.

Appellant renewed his motion for leave in the form of a motion for reconsideration where he detailed, using a full page, exactly what his "vague" request was. It should have been obvious to any reasonable jurist what Appellant was seeking between the original motion and the motion for reconsideration, but Appellant's motion was again denied.

Under the principles of liberal construction for *pro se* pleadings and that motions for leave to amend should be freely given, as already discussed, the denial of this motion was a clear abuse of discretion. *Tannenbaum*; Fed. R. Civ. P. 15(a)(2); *see also Rachman Bag Co.*; *Foman.*

XII. CCTV Video and Incident Reports Are Not "Similar" To Personnel Files

In response to Appellant's public records request, after litigation commenced, Appellee TSA provided Appellant with redacted incident reports and pixelated[8] CCTV footage. The incident reports were authored by numerous TSA employees and detailed the accounts of the TSA screeners that personally interacted with Appellant, as well as the conclusions of higher-level TSA employees who investigated the incident. These reports were entirely focused on describing the behavior of Appellant, and did not in any way remark on the performance of the employees who interacted with Appellant. *See* Exhibit A, Incident Report Sample.

Exemption 6 of the Freedom of Information Act allows the TSA to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 USC § 552(b)(6).

[8] Pixelation is a process by which video or still images are intentionally made less clear, often for the purpose of concealing identities or other information.

According to the government's own analysis, as detailed in "Department of Justice Guide to the Freedom of Information Act" ("Guide")[9], in order for the Court to uphold the TSA's determination that Exemption 6 applies, it first must determine that the requested record is a personnel, medical, or similar file, then determine that a protectable privacy interest is implicated, and finally determine that, when compared to the public interest in disclosure, the privacy interest outweighs the public interest. Guide, p. 418. If any determination along this three-step path is found to be in the negative, the records must be released. *Id*.

It is clear that the incident report and videos are neither personnel nor medical files; therefore, TSA is left to argue, and the Court is left to decide, whether the incident report and videos constitute "similar files." The U.S. Supreme Court has provided that the term "similar files" be construed broadly, and offers the guidance that the term "covers detailed Government records on an individual which can be identified as applying to that individual." *United States Department of State v. Washington Post Co*., 456 U.S. 595, 602 (1982), *see also* Guide, p.420, 421.

Even under this standard, a record does not qualify as a "similar file" when the information pertains to federal government employees but is not personal in nature. See Guide, p. 421. "For example, information that 'merely identifies the names of

[9] This lengthy document can be viewed at:
http://www.justice.gov/oip/foia_guide09/exemption6.pdf

government officials who authored documents and received documents' does not generally fall within Exemption 6." *Aguirre v. SEC*, 551 F. Supp. 2d 33, 53 (D.D.C. 2008), *citing* *VoteHemp, Inc. v. DEA*, No. 02-CV-985, slip op. at 12 (D.D.C. Oct. 15, 2004). "Correspondence does not become personal solely because it identifies government employees." *Id* at 54.

Courts across the country have been consistent in denying "similar file" status to a document merely because the document identifies a federal employee. *Gordon v. FBI*, 390 F. Supp. 2d 897, 902 (N.D. Cal. 2004) (deciding that names of agency employees are not personal information about those employees that meets Exemption 6 threshold), *summary judgment granted*, 388 F. Supp. 2d 1028, 1040-42 (N.D. Cal. 2005) (concluding that Exemption 6 does not apply to the names of agency's "lower-level" employees, and likewise opining that "[t]he [agency] still has not demonstrated that an employee's name alone makes a document a personnel, medical or 'similar file'"); *Darby v. U.S. Dep't of the Air Force*, No. 00-0661, slip op. at 10-11 (D. Nev. Mar. 1, 2002) (rejecting redaction of names in IG report on basis that such documents "are not 'personnel or medical files[,]' nor are they 'similar' to such files"), *aff'd on other grounds*; *Providence Journal Co. v. U.S. Dep't of the Army*, 781 F. Supp. 878, 883 (D.R.I. 1991) (finding investigative report of criminal charges not to be "similar file," on basis that it was "created in response to specific criminal allegations" rather than as "regularly compiled administrative record"), *modified & aff'd on other*

grounds, 981 F.2d 552 (1st Cir. 1992); *Greenpeace USA, Inc. v. EPA*, 735 F. Supp. 13, 14 (D.D.C. 1990) (information pertaining to an employee's compliance with agency regulations regarding outside employment "does not go to personal information… [e]ven in view of the broad interpretation [of Exemption 6] enunciated by the Supreme Court").

Based on the foregoing, it is clear that the incident reports are not similar to a personnel or medical file. The subject of these incident reports is Appellant himself, not any TSA employee. Exemption 6 "of course" cannot be used to deny the requestor his or her own records. Guide, p. 457, *see also D.O.J. v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989). The Exemption 6 test for the incident report is therefore terminated at the first step.

Based on the foregoing, it is also clear that video showing a public area that happens to capture a government employee in the course of doing their job is not a similar to a personnel or medical file simply because one may be able to identify the government employee by watching the video. If the government employee, for example, were captured on video taken of him or her by an inspector investigating that employee's performance, the outcome of part one of the Exemption 6 test may well be different; however, a security camera is used for no purpose relevant or similar to a personnel or medical file and the footage generated is not comparable. In fact, the footage, had Plaintiff not requested it, would have been viewed by no one

and routinely deleted weeks later, rather than stored as a personnel or medical file would. The Exemption 6 test for the video is therefore also terminated at the first step.

XIII. Incident Reports Are Not Compiled "For Law Enforcement Purposes"

Exemption 7 applies only to "records or information compiled for law enforcement purposes." 5 USC § 552(b)(6). As the TSA is not a law enforcement agency and none of the employees who compiled the report were law enforcement officers, its incident reports are clearly not created "for law enforcement purposes" and this exception therefore cannot be applied.

XIV. Releasing The Names and Faces of Public Servants Does Not Constitute a "Clearly Unwarranted Invasion of Personal Privacy"

The Department of Justice notes in its Guide that "civilian federal employees who are not involved in law enforcement generally have no expectation of privacy regarding their names, titles, grades, salaries, and duty stations as employees…" Guide, p. 430. The releasability of the

names of federal employees is codified by federal regulation. 5 C.F.R. § 293.311. And, disclosure has been consistently upheld by the courts. *Core v. USPS*, 730 F.2d 946, 948 (4th Cir. 1984) (finding no substantial invasion of privacy in information identifying successful federal job applicants); *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (allowing release of Justice Department paralegals' names and work numbers), *appeal dismissed voluntarily*, No. 06-5055, 2006 WL 1214937 (D.C. Cir. Apr. 28, 2006); *Lawyers Comm. for Human Rights v. INS*, 721 F. Supp. 552, 569 (S.D.N.Y. 1989) (stating that "disclosure [of names of State Department's officers and staff members involved in highly publicized case] merely establishes State [Department] employees' professional relationships or associates these employees with agency business"); *Nat'l W. Life Ins. v. United States*, 512 F. Supp. 454, 461 (N.D. Tex. 1980) (discerning no expectation of privacy in names and duty stations of Postal Service employees).

The fact that the TSA employees whose names are sought by Plaintiff interface directly with the public while wearing name tags and identification badges make the government's insistence that these individuals have a privacy interest in their names and faces all the more absurd. "[A]n individual generally does not have any expectation of

privacy with respect to information that he or she has made public." Guide, p. 435. Plaintiff could have – and still can – lawfully stand near the security checkpoint at any airport and record the names and faces of any TSA employee in the area using either still photography or video. By obtaining employment as a TSA employee and then electing to wear a uniform with a name tag while working in a public area, these employees understood that their identities were no longer completely private.

The same logic applies to the TSA's decision to redact the names of local law enforcement under Exemption 7. The names of front-line law enforcement officers, who also wear name tags, responding to incidents are routinely documented and made available to the public. Florida law, in fact, makes this clear by specifically prohibiting the disclosure of telephone numbers and home addresses of law enforcement officers – but not their names. Fla. Stat. § 119.07(3)(i)(1). In light of the fact that neither federal nor state law recognizes any privacy interest in the names of these officers, they must be released. The district court had no basis for concluding that privacy would be violated by doing so.

XV. The TSA's Search for Public Records Was Clearly Insufficient

Broward County has admitted to having communications with, at the least, the TSA, and almost certainly with the Broward Sheriff's Office as well. However, neither TSA nor Broward County's disclosures to this date include interagency communications, a privilege log, or other explanation as to why their responses include no such communications.

Broward County also maintains at least one dozen views of the checkpoint where the incident occurred via CCTV camera that could have captured Appellant. Appellant requested all of these views, but still has not been provided most of them, pixelated or not. Further, neither TSA nor Broward County's disclosures to this date include any interagency communications whatsoever, and a privilege log or other explanation as to why their responses included no such communications has not been provided.

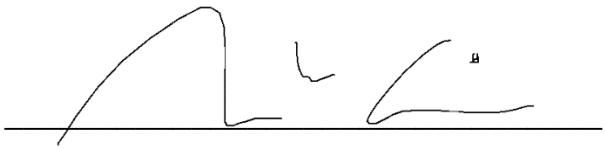
The district court determined Appellant's public records claims to be fulfilled, and thus moot, without exercising any of the tools available to it to ensure that these records, for which there is evidence of their existence, were sought by Appellees in good faith and in compliance with public records laws. For this reason, Appellant's public records charge (Count 18) should be re-instated.

CONCLUSION

For the above reasons, the judgment of the district court should be **reversed** and **remanded**.

Dated: Miami, Florida
November 5th, 2013

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I, Jonathan Corbett, *pro se* Plaintiff in the above captioned case, hereby affirm that that this brief complies with Fed. R. App. P. 32(a) because it contains approximately 11,950 words using a proportionally-spaced, 14-point font.

Dated: Miami, Florida
November 5th, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jonathan Corbett, *pro se* Plaintiff in the above captioned case, hereby affirm that I have served this **Brief of Appellant Jonathan Corbett** on November 5th, 2013, on:

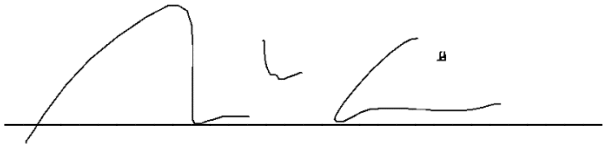
Appellees United States of America, Transportation Security Administration, and Alejandro Chamizo to Sharon Swingle, via electronic mail at the following address: Sharon.Swingle@usdoj.gov.

Appellee Broward County to Robert Teitler via electronic mail at the following address: RTEITLER@broward.org

Appellee Broward Sheriff's Office to Robert Yates via electronic mail at the following address: RDYPA@hotmail.com

Dated: Miami, Florida
November 5th, 2013

Respectfully submitted,



Jonathan Corbett
Appellant, *Pro Se*
382 N.E. 191st St., #86952
Miami, FL 33179
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Exhibit A

View Incident: Summary Information

General Information

Tracking Number: INC2011FLL3616
Mode: Air
Incident Date: 08/27/2011
Incident Time: 0410
Incident Type: Other
Port/ Responsibility Center: FLL-Ft. Lauderdale-Hollywood International
Occurred At Checkpoint: Yes
Checkpoint: FLL E
Location: Passenger and Carry-on Screening Location
TSOC Watch Notified? No

Individuals Notified: (b)(6) AFSD
Date Notified: 08/27/2011
Time Notified: 0431
Notified Method: Telephone

Individuals Notified: FLL Coordination Center
Date Notified: 08/27/2011
Time Notified: 0415
Notified Method: Telephone

Individuals Notified: (b)(6) TSI
Date Notified: 08/27/2011
Time Notified: 0730
Notified Method: Conversation

Lead Agent*: (b)(6)
Agent Hours**: 3 Travel Hours**: 0.5
Recorded By: (b)(6)
Reported By: (b)(6) STSO

Additional Information

BDO Referral to LEO? No
TDC Referral to LEO? No
Person Arrested/Cited: * No
Did this incident occur during or as a result of a Playbook activity? * No
If Yes to the above question, select the Play number from the drop down list:
Primary Carrier Involved: US Airways, Inc.
Secondary Carrier Involved:
Indirect Carrier Involved:
Flight Delay: No
# of Flights:
Length of Delay (Cumulative):
Terminal Evacuated: No
Media Attention: No
Canine Team Utilized: No
Specify Department:

Subject Information

Subject Name: Corbett, Jonathan W
Arrested: No
Alleged Crime: N/A
Supplemental Subject: No

Narrative Information

Incident Details: On August 27, 2011, at 0730 hours; I, Transportation Security Inspector (TSI) (b)(6), was notified by FLL (b)(6), regarding an incident at FLL Terminal 3 Echo Checkpoint. According to (b)(6), a passenger refused to be screened and was escorted out of the checkpoint at approximately 0502 hours. At approximately 0410 hours, passenger Jonathan CORBETT traveling on US Airways (USAA) flight number 1982, presented himself and two (2) carryon bags to the Terminal 3, Passenger Screening Checkpoint-E, Lane 3. Upon entering the Walk Thru Metal Detector (WTMD) CORBETT informed Transportation Security Officer (TSO) (b)(6) (WTMD operator), that he would like to OPT OUT of Advanced Imaging Technology (AIT) screening. TSO (b)(6) complied with CORBETTs request and requested an officer to assist in the screening process. Lead Transportation Security Officer (LTSO) (b)(6) assisted and

informed CORBETT that the screening process consists of patting down the entire body, as well as the groin and buttocks area. CORBETT stated No one is touching my balls and buttocks. LTSO (b)(6) requested supervisor assistance. Supervisory Transportation Security Officer (STSO) (b)(6) responded and explained the process again to passenger CORBETT. CORBETT responded by saying, I am not comfortable with someone touching my genitals and buttocks. STSO (b)(6) then explained that if the screening procedures are not conducted, the passenger would not be cleared to leave the checkpoint. CORBETT was content with missing his flight, as long as he was not touched in his sensitive areas. STSO (b)(6) elected to inform Broward Sherriffs Office (BSO) (b)(6), (b)(7)(C) and to inform the FLL Coordination Center of the necessity to run a background check, which all results came back clear. STSO (b)(6) assisted (b)(6) throughout the process and requested Behavior Detection Officer (BDO) (b)(6) to speak with CORBETT. According to (b)(6) and (b)(6), CORBETT was very well versed in his knowledge of the screening procedures and his general knowledge of TSA. According to (b)(6) and (b)(6), CORBETT knew acronyms such as TSM (Transportation Security Manager), BDO, and LEO (Law Enforcement Officer). CORBETT did not check in any bags and his 2 carryon bags were screened as necessary. At approximately 0502 hours, CORBETT was escorted out of the screening checkpoint by BSO (b)(6), (b)(7)(C), (b)(3); 49 USC 114(r) There was no delay due to this incident. No media attention. An EIR will be initiated.

Attachments

Attachment: Incident Report-08-27-2011.doc
Description: Checkpoint Incident Report
File Size: 589 KB
Upload Date: 08/28/2011
Attachment: J. Corbett Refused Screening.doc
Description: Inspector Statement
File Size: 115 KB
Upload Date: 08/28/2011

Status

Current State: Approved
Supplement: No
Created By: (b)(6) 08/27/2011 1158