

ORAL ARGUMENT NOT YET SCHEDULED

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**Nos. 13-5113, 13-5114**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**ELECTRONIC PRIVACY INFORMATION CENTER**

*Plaintiff-Appellant,*

v.

**UNITED STATES DEPARTMENT OF HOMELAND SECURITY**

*Defendant-Appellee.*

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On Appeal from the  
United States District Court  
for the District of Columbia

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**JOINT APPENDIX**

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**TABLE OF CONTENTS***Electronic Privacy Information Center v. U.S. Department of Homeland Security, Docket Nos. 13-5113, 5114*

<u>Case No.</u>	<u>Document Title</u>	<u>Page</u>
10-1992	Memorandum Opinion by Judge Royce C. Lamberth	000001
10-1992	Civil Docket Report Through 04/17/2013	000023
10-1992	Complaint for Injunctive Relief filed by EPIC	000027
10-1992	Answer to Complaint for Injunctive Relief Filed by DHS	000037
	Attachments:	
	Tab A (Exhibit A – FOIA Request)	000048
10-1992	Defendant’s Motion for Summary Judgment	
	Attachments:	
	Tab A (Defendant’s Statement of Material Facts Not In Dispute)	000054
	Tab B (Exhibit 1 – Declaration of Paul Sotoudeh)	000061
	Tab C (Exhibit 2 – Declaration of Bert Coursey)	000140
	Tab D (Exhibit 3 – Declaration of Pamela Beresford)	000192
10-1992	Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment, Cross-Motion for Summary Judgment, and Request for Oral Hearing	
	Attachments:	
	Tab A (Plaintiff’s Statement of Material Facts Not in Genuine Dispute)	000239
	Tab B (Plaintiff’s Statement of Genuine Issues in Opposition to Defendant’s Statement of Material Facts)	000242
10-1992	Defendant’s Reply in Support of Its Motion for Summary Judgment and Memorandum in Opposition to Plaintiff’s Cross Motion for Summary Judgment	
	Attachments:	
	Tab A (Exhibit 2 – TES Limited <u>Vaughn</u> Index)	000244
	Tab B (Exhibit 3 – TSL Limited <u>Vaughn</u> Index)	000249
11-0290	Memorandum Opinion by Judge Royce C. Lamberth	000256
11-0290	Civil Docket Report Through 04/17/2013	000277

<u>Case No.</u>	<u>Document Title</u>	<u>Page</u>
11-0290	Complaint for Injunctive Relief filed by EPIC	000281
11-0290	Answer to Complaint for Injunctive Relief Filed by TSA	000292
	Attachments:	
	Tab A (Exhibit A – EPIC’s First Request)	000304
	Tab B (Exhibit B – EPIC’s Second Request)	000308
11-0290	Defendant’s Motion for Summary Judgment	
	Attachments:	
	Tab A (Defendant’s Statement of Material Facts Not in General Dispute)	000314
	Tab B (Exhibit 1 – Declaration of Paul Sotoudeh)	000333
	Tab C (Exhibit 1C – Vaughn Index)	000351
11-0290	Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment, Cross-motion for Summary Judgment, and Request for Oral Hearing	
	Attachments:	
	Tab A (Plaintiff’s Statement of Material Facts Not in Genuine Dispute)	000372
	Tab B (Plaintiff’s Statement of Genuine Issues in Opposition to Defendant’s Statement of Material Facts)	000378

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

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<b>ELECTRONIC PRIVACY INFORMATION CENTER,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 10-1992 (RCL)</b>
	)	
<b>UNITED STATES DEPARTMENT OF HOMELAND SECURITY,</b>	)	
	)	
<b>Defendant.</b>	)	

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**MEMORANDUM OPINION**

This action concerns a Freedom of Information Act (“FOIA”) request by the Electronic Privacy Information Center (“EPIC”) for records held by the Department of Homeland Security (“DHS”) pertaining to radiation emissions produced by Advanced Imaging Technology (“AIT”) machines used to screen passengers at commercial airports. The parties have filed cross-motions for Summary Judgment. ECF Nos. 9 & 11. The Court will GRANT in part and DENY in part both motions. DHS is entitled to summary judgment as to all of its withholdings pursuant to exemptions 3, 5, and 6 and all withholdings pursuant to exemption 4 except for two reports based on the government’s own testing, which DHS must disclose.

**I. BACKGROUND**

Starting in 2005, the Transportation Security Administration (“TSA”) began using full-body scanning machines in U.S. airports to screen travelers on U.S. commercial aircraft. Pl.’s Opp’n to Def.’s Mot. for Summ. J., Cross-Mot. for Summ. J. (“Pl.’s Opp’n”) 1, ECF No. 11. The TSA subsequently decided to make these scanners the primary form of screening

passengers. *Id.* at 2. These machines use either backscatter x-ray or millimeter wave technology to capture detailed, three-dimensional images of individuals and transmit them for review by Transportation Security Officers. *Id.* at 1–2.

In July 2010, EPIC submitted a FOIA Request to DHS seeking the following information about AIT:

- 1) All records concerning TSA tests regarding body scanners and radiation emission or exposure; and
- 2) All records concerning third party tests regarding body scanners and radiation emission or exposure.

*See* FOIA Request at 4, Def.’s Ex. A, ECF No. 9-1 at 1. EPIC requested expedited processing of its request and a waiver of duplication fees. *Id.* at 4–5. DHS referred the request to two components: the TSA and the Science and Technology Directorate (“S&T”). Def.’s Statement of Material Facts ¶ 2, ECF No. 9; Pl.’s Statement of Material Facts ¶ 3, ECF No. 11-2.

TSA initially denied EPIC’s requests for expedited processing and a fee waiver. Def.’s Ex. C, Aug. 12, 2010, ECF No. 9-1 at 35. EPIC appealed, Def.’s Ex. D, Aug. 27, 2010, ECF No. 9-1 at 39, and challenged the agency’s failure to make a timely determination regarding its FOIA request. Pl.’s Statement ¶ 7; Def.’s Resp. to Pl.’s Statement of Material Facts (“Def.’s Resp.”) ¶ 7, ECF No. 13 at 29. The TSA affirmed its denial of the request for expedited processing but agreed to waive fees. Def.’s Ex. F, Nov. 24, 2010, ECF No. 9-1 at 58.

S&T denied EPIC’s request for a fee waiver. EPIC appealed this determination along with S&T’s failure to make a timely determination regarding EPIC’s FOIA request. Pl.’s Statement ¶¶ 8–10; Def.’s Resp. ¶¶ 8–10.

EPIC filed this FOIA action in November 2010, alleging that DHS had “failed to disclose a single record” and had “failed to comply with statutory deadlines” and seeking an order that the agency immediately disclose all responsive records. Compl. ¶ 2, ECF No. 1.

Several months later, both TSA and S&T released hundreds of pages of records responsive to EPIC’s requests and withheld information pursuant to FOIA exemptions 3, 4, 5, and 6. Pl.’s Statement ¶¶ 13–16; Def.’s Statement ¶¶ 11–15. EPIC now challenges certain of these withholdings, but notably EPIC also claims it has already “substantially prevailed” by obtaining the released documents. Pl.’s Opp’n 23.

## II. LEGAL STANDARD

The Freedom of Information Act, 5 U.S.C. § 552, requires federal agencies to make certain records publicly available. FOIA also provides exemptions from the disclosure requirement, which are to be “narrowly construed.” *FBI v. Abramson*, 456 U.S. 615, 630 (1982). Four of these, exemptions 3, 4, 5, and 6, are relevant to this case and are described in greater detail below.

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment must be granted when “there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). FOIA actions are typically and appropriately resolved on summary judgment. *See Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 527 (D.C. Cir. 2011); *see also COMPTTEL v. FCC*, 06-cv-1718, 2012 WL 6604528, \*4 (D.D.C. Dec. 19, 2012).

The agency bears the burden in litigation to justify withholding any records. 5 U.S.C. § 552(a)(4). This is in part because of the “strong presumption in favor of disclosure,” *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991) and because FOIA requesters face an information

asymmetry given that the agency possesses the requested information and decides whether it should be withheld or disclosed. *See Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 145–46 (D.C. Cir. 2006). Thus, even where the requester has moved for summary judgment, the Government “ultimately has the onus of proving that the documents are exempt from disclosure.” *Pub. Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 904–05 (D.C. Cir. 1999) (internal quotations and modifications omitted); *see also COMPTTEL*, 2012 WL 6604528, at \*4.

To satisfy its burden, an agency may rely on detailed affidavits, declarations, a *Vaughn* index, in camera review, or a combination of these tools. A *Vaughn* index correlates each withheld document, or portion thereof, with a particular FOIA exemption and the justification for nondisclosure. *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973). While agency affidavits are accorded a presumption of good faith, *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991), they must “provide[] a relatively detailed justification, specifically identify[ing] the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.” *Judicial Watch v. FDA*, 449 F.3d at 146; *see also COMPTTEL*, 2012 WL 6604528 at \*4.

### **III. EPIC HAS CONCEDED THE ADEQUACY OF DHS’S SEARCH FOR RESPONSIVE DOCUMENTS AND HAS AGREED NOT TO CONTEST ITS WITHHOLDINGS PURSUANT TO EXEMPTION 6**

DHS has moved for summary judgment as to the adequacy of its search for responsive documents, Def.’s Br. 10–11, and the appropriateness of all its withholdings. *See* Def.’s Br. 11–34. EPIC does not contest the adequacy of DHS’s search or any of its withholdings pursuant to exemption 6. *See* Pl.’s Opp’n. In addition, EPIC apparently agreed not to contest any of these exemption 6 withholdings. *See* E-mail from John Verdi to Jesse Grauman, Aug. 5, 2011, Ex. 9,

ECF No. 9-9. Accordingly, the Court takes these issues as conceded and grants summary judgment to DHS as to all withholdings made under exemption 6.

#### **IV. DHS IS ENTITLED TO SUMMARY JUDGMENT AS TO ITS EXEMPTION 3 WITHHOLDINGS<sup>1</sup>**

Both parties move for summary judgment as to withholdings made by DHS pursuant to exemption 3. DHS is entitled to summary judgment as to these withholdings.

Exemption 3 permits the nondisclosure of materials that are “specifically exempted from disclosure by statute” so long as that statute “establishes particular criteria for withholding or refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3)(A)(ii). Congress amended exemption 3, adding language requiring “particular criteria for withholding” in order “to overrule legislatively the Supreme Court’s decision in *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975), which had given an expansive reading to the version of exemption 3 then in force.”<sup>2</sup> *Irons & Sears v. Dann*, 606 F.2d 1215, 1219 (D.C. Cir. 1979). Only statutes that “incorporate[] a formula whereby the administrator may determine precisely whether disclosure in any instance” was prohibited will qualify under exemption 3. *Am. Jewish Cong. v. Kreps*, 574 F.2d 624, 628–29 (D.C. Cir. 1978). Statutes that merely “set forth benchmarks for secrecy so general as the ‘interest of the public’ (such as the statute at issue in *Robertson*) do not satisfy . . . [the] ‘particular criteria’ requirement.” *Wis. Project on Nuclear Arms Control v. U.S. Dep’t of Commerce*, 317 F.3d 275, 280–81 (D.C. Cir. 2003) (quoting *Am. Jewish Cong.*, 574 F.2d at 629)). But when “on the other hand, Congress has made plain its concern with a specific effect of publicity . . . exemption 3 is to honor that concern.” *Id.*

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<sup>1</sup> This Part of the opinion contains analysis that is similar to that in Part IV of this Court’s opinion in *EPIC v. TSA*, 11-cv-290, issued this date.

<sup>2</sup> *Robertson* upheld an exemption 3 claim based on a pre-FOIA statute which barred disclosure of information that would “adversely affect” the agency and was “not required to be disclosed in the interest of the public.” 422 U.S. at 259.



Section 114(r) of Title 49 provides:

Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation.

49 U.S.C. § 114(r), (r)(C). Pursuant to that authority, TSA promulgated regulations that expressly prohibit the disclosure of certain categories of sensitive security information. *See generally* 49 C.F.R. pt. 1520.

Judge Kollar-Kotelly has held that § 114(r) qualifies as a “statute of Exemption as contemplated by Exemption 3.” *Tooley v. Bush*, 06-cv-306, 2006 WL 3783142, \*4 (D.D.C. Dec. 21, 2006) *rev’d in part on other grounds sub nom. Tooley v. Napolitano*, 556 F.3d 836 (D.C. Cir. 2009). Judge Kollar-Kotelly’s conclusion rested on a D.C. Circuit decision which interpreted a provision containing nearly identical language to § 114(r). *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 194 (D.C. Cir. 1993). The *Public Citizen* court examined withholdings made pursuant to the following provision:

Notwithstanding section 552 of Title 5 relating to freedom of information, the [FAA] Administrator shall prescribe such regulations as he may deem necessary to prohibit disclosure of any information obtained or developed in the conduct of security or research and development activities under this subsection if, in the opinion of the Administrator, the disclosure of such information . . . (C) would be detrimental to the safety of persons traveling in air transportation.

*Pub. Citizen*, 988 F.2d at 189 (quoting 49 U.S.C. § 1357(d)(2) (1993) (subsequently recodified at 49 U.S.C. § 40119(b)). The Circuit concluded that the provision granted the agency authority to “withhold security-sensitive information from members of the public, regardless of the legal basis of the request for the information,” including FOIA *Id.* at 195–96. The Circuit explained

that Congress added the “notwithstanding” language to ensure that the statute qualified under FOIA’s Exemption 3.<sup>3</sup> *Id.* at 195.

This Court agrees with Judge Kollar-Kotelly in finding *Public Citizen* persuasive. Because section 114(r) contains virtually identical language to the provision in that case, particularly the “notwithstanding” language, the Circuit’s analysis is equally applicable to section 114(r), and that provision must also qualify under exemption 3.

Judicial review of TSA’s determination that certain material is nondisclosable “security sensitive information” is available exclusively in federal circuit courts. *See* 49 U.S.C. § 46110(a) (“[A] person disclosing a substantial interest in an order issued . . . in whole or in part under . . . subsection . . . (s) of section 114<sup>4</sup> may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.”); *id.* § 46110(c) (describing the prescribed jurisdiction as “exclusive”); *see also Koutny v. Martin*, 530 F. Supp. 2d 84, 91 (D.D.C. 2007) (“A remedy to challenge a final TSA classification order is provided by statute. An interested party may petition to modify or set aside such an order in an appropriate court of appeals.” (citing § 46110(a))). Accordingly, district courts may not review TSA orders that designate material as security sensitive information. *See Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 77–78 (D.C. Cir. 1984) (“[W]here a statute commits review of agency action to the Court of Appeals, any suit

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<sup>3</sup> This belies EPIC’s charges that the *Public Citizen* court “does not . . . resolve the question of whether the statute at issue in that case, 49 U.S.C. § 1357(d)(2), qualifies as an Exemption 3 statute,” and the Court did “not engage in an Exemption 3 analysis at all.” *See* Pl.’s Reply 3, ECF No. 18.

<sup>4</sup> Subsection (s) of section 114 formerly authorized TSA to prohibit the disclosure of certain material found to be detrimental to the security of transportation; in 2007, this subsection was redesignated as § 114(r). Pub. L. 110–161 § 568, Dec. 26, 2007, 121 Stat. 1844. Section 46110(a) has not yet been updated to reflect this clerical change.

seeking relief that might affect the Circuit Court's future jurisdiction is subject to the exclusive review of the Court of Appeals.”).

Here, DHS has withheld information designated as security sensitive pursuant to § 114(r). Because this Court lacks jurisdiction to review the merits of the specific withholdings made pursuant to that provision, *see* 49 U.S.C. § 46110(a), (c), the legal conclusion that § 114(r) qualifies for exemption 3 withholding takes this Court as far as it can go here. DHS is entitled to summary judgment on its withholding of the material designated as security sensitive information.

**V. BOTH PARTIES ARE ENTITLED TO PARTIAL SUMMARY JUDGMENT AS TO THE EXEMPTION 4 WITHHOLDINGS**

DHS moves for summary judgment as to its withholdings pursuant to exemption 4, and EPIC challenges only some of these withholdings. DHS is entitled to summary judgment with respect to the unchallenged exemption 4 withholdings and both parties are entitled to partial summary judgment with respect to the challenged exemption 4 withholdings.

Exemption 4 protects from disclosure information that is “commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). Information is exempt only if it is (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential. *See Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983).

Because EPIC does not contest that any of the withheld information is “commercial” or “privileged or confidential,” the sole question is whether the withheld information was “obtained from a person.” Information may be “obtained from a person” if provided by individuals, corporations, or numerous other entities, but not if it was generated by the federal government. *See Bd. of Trade v. CFTC*, 627 F.2d 392, 404 (D.C. Cir. 1980). However, government-prepared

records may be protected if they summarize information obtained from another person. *See, e.g., Gulf & W. Indus. v. United States*, 615 F.2d 527, 529–30 (D.C. Cir. 1979). The key inquiry is who “the source of the information [was] in the first instance,” and not necessarily who created the particular document. *See In Def. of Animals v. Nat’l Inst. of Health*, 543 F. Supp. 2d 83, 103 (D.D.C. 2008).

EPIC challenges fifteen sets of exemption 4 withholdings from three documents, all regarding the radiation emitted by body scanning machines produced by American Science & Engineering (“AS&E”).

#### **A. 2006 Report**

The first contested document is a 33-page 2006 report authored by a government official evaluating the radiation safety of a body scanning machine called the “Dual Smart Check” produced by AS&E. *See* Pl.’s Ex. 1 § II (challenging withholdings at Bates numbers 926, 933, 934, 936, 937, 940, 941, 942, 944–45, 946, 947, & 954–56); Def.’s Opp’n 14; Def.’s Ex. C to Decl. of Pamela Beresford (“TSL<sup>5</sup> Vaughn Index”), ECF No. 9-3.

DHS concedes that “the withholdings in this report reflect the government’s own radiation measurements conducted on an AS&E Smart Check machine . . . .” Def.’s Opp’n 15; *see also id.* at 16 (describing the information at issue as “radiation testing results performed on machines that were obtained by the government from AS&E for testing purposes”). Accordingly, the “source of the information in the first instance” was the government, not a “person.” *See In Def. of Animals*, 543 F. Supp. 2d at 103.

DHS argues that the “ultimate source” of information was not the testing but the machine provided by the company for testing. Def.’s Opp’n 16. This argument fails. DHS relies on

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<sup>5</sup> The Transportation Security Laboratory is a unit within S&T. Beresford Decl. ¶ 3, ECF No. 9-3.

cases finding that information collected by the government at on-site visits to private manufacturing plants were “obtained from a person” and protected from disclosure. *See Lion Raisins, Inc. v. USDA*, 354 F.3d 1072 (9th Cir. 2004); *Mulloy v. Consumer Prod. Safety Comm’n*, 1985 U.S. Dist. LEXIS 17194 (S.D. Ohio). But these cases are neither binding on this Court nor persuasive in the present case. First, neither case addressed the issue of whether the information was “obtained from a person.” *See* Def.’s Opp’n 15, 16 n.13. Second, even assuming that information gathered from an on-site visit to a plant qualifies as “obtained from a person,” information gathered from a test of equipment already in the government’s possession does not. This information was generated by the government’s own testing, not by a private party, and therefore is not entitled to exemption 4 protection. This Court will order DHS to disclose this information.

#### **B. 2008 Report**

The second document is a 3-page 2008 report authored by the same government official evaluating a later version of the same machine. *See* Pl.’s Ex. 1 § II, ECF No. 11-5 (challenging withholdings at Bates numbers 897–99, 1190–91); Def.’s Opp’n 13-14; TSL *Vaughn* Index 14, 20. The TSL *Vaughn* Index asserts that the information included in this document was based on:

(1) a third-party compliance report . . . submitted to the government as part of AS&E’s Qualification Package . . . demonstrating compliance with certain requirements . . . (2) radiation dosage maps submitted by AS&E . . . , (3) designs and other information obtained from AS&E, and (4) *a prior evaluation conducted by Mr. Cerra* [citing the Bates number of the 2006 Report] *based on an earlier-model AS&E system obtained by the government for testing.*

TSL *Vaughn* Index 14 (emphasis added); *see also* Def.’s Opp’n 14–15. Thus, this 3-page report was based in part on the 2006 report, which, this Court has found was not “obtained from a person.” Information based on that earlier report would also not be “obtained from a person.”

With respect to the report, Bates numbers 897–99, the TSL *Vaughn* Index states that the withholdings from this report include the following:

- Descriptions of design features and scanning mechanisms used by AS&E Dual SmartCheck, including measurements and geometry of x-ray beam
- Specific Radiation Dose Levels Emitted by AS&E Dual SmartCheck at various locations
- Assessments of, and recommendations for improving, radiation safety of AS&E Dual SmartCheck

TSL *Vaughn* Index 14. The government bears the burden to justify withholding any records. 5 U.S.C. § 552(a)(4). These descriptions fail to demonstrate that any particular piece of the withheld information was *not* based on the 2006 report, so the Court finds that these withholdings were invalid under exemption 4. The Court will order DHS to produce the report—save for any parts that were properly withheld under other exemptions.

DHS also withheld information from an attachment to the report, Bates numbers 1190–91. This attachment, a “dosage map,” was “submitted by AS&E in connection with the evaluation of AS&E’s Dual Smart Check . . . .” *Id.* Because the information withheld from this attachment was “obtained from a person” this withholding was valid.

### **C. E-mail**

The third document is an email submitted by AS&E to a TSL official regarding compliance with radiation safety standards. Pl.’s Ex. 1 § II (challenging withholdings at Bates numbers 1192–93); Def.’s Opp’n 13–14; TSL *Vaughn* Index 20–21. Because this e-mail was “obtained from a person,” the withholding pursuant to exemption 4 was valid.

**VI. DHS IS ENTITLED TO SUMMARY JUDGMENT AS TO ITS EXEMPTION 5 WITHHOLDINGS**

DHS moves for summary judgment as to its withholdings pursuant to exemption 5. EPIC challenges only some of these withholdings. DHS is entitled to summary judgment with respect to all of its exemption 5 withholdings.

FOIA's exemption 5 permits the non-disclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, a document must thus satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). One such privilege is the "deliberative process privilege," which "protects agency documents that are both predecisional and deliberative." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). A document is predecisional if "it was generated before the adoption of an agency policy" and deliberative if "it reflects the give-and-take of the consultative process." *Id.* The deliberative process protection covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Klamath*, 532 U.S. at 8. The general purpose of the deliberative process privilege is "to prevent injury to the quality of agency decisions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975).

EPIC challenges certain withholdings because they consist of "purely factual" material. EPIC also challenges other withholdings from documents DHS refers to as "drafts" because DHS failed to point to a final version of the document. The Court will address these arguments and the related documents in turn.

### A. Factual Material

The D.C. Circuit has explained that “[p]urely factual material usually cannot be withheld under exemption 5 unless it reflects an exercise of discretion and judgment calls.” *Ancient Coin Collectors Guild v. U.S. Dep’t of State*, 641 F.3d 504, 513 (D.C. Cir. 2011) (internal quotations and citations omitted). “Thus the legitimacy of withholding does not turn on whether the material is purely factual in nature or whether it is already in the public domain, but rather on whether the selection or organization of facts is part of an agency’s deliberative process.” *Id.*

For instance, in *Montrose Chemical Corp. of California v. Train* the Circuit held that factual summaries compiled into documents used by the administrator in the resolution of a difficult, complex question were within the protection of exemption 5, because “[t]o probe the summaries of record evidence would be the same as probing the decision-making process itself.” 491 F.2d 63, 68 (D.C. Cir. 1974). Similarly, in *Mapother v. Dep’t of Justice*, the Circuit held that factual materials included in a report were immune from disclosure where that information “was assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action.” 3 F.3d 1533, 1539 (D.C. Cir. 1993); *see also Ancient Coin Collectors Guild*, 641 F.3d at 513–14.

In contrast, in *Playboy Enterprises, Inc. v. Department of Justice*, the Circuit found that factual materials contained in a report were not protected because the report was “prepared only to inform the Attorney General of facts which he in turn would make available to members of Congress.” 677 F.2d 931, 936 (D.C. Cir. 1982).

EPIC challenges four of DHS’s withholdings of what it considers to be “purely factual” material:

1. Draft Fact Sheet on Radiation Exposure: This document, withheld in full, contains “[e]arly, internal draft versions of a fact sheet on



radiation exposure and AIT.” Def.’s Ex. A to Decl. of Bert Coursey (“TES<sup>6</sup> *Vaughn* Index”) 604–05, ECF No. 9-2.

2. Working Document on Radiation Exposure: This document, withheld in full, is an “[i]nternal working DHS document compiling estimates of radiation exposure from various types of AIT based on external, unverified data.” TES *Vaughn* Index 606.
3. Draft Fact Sheets on Health & Safety: These documents, withheld in full, are “working drafts of DHS ‘fact sheet[s]’ on health and safety issues related to AIT.” TSL *Vaughn* Index WHIF B.
4. E-mails re: Dosimeters: This e-mail exchange, withheld in full, “contains an informal question-and-answer discussion between two government employees regarding types of dosimeters (personal radiation monitors) that could be appropriate for measuring radiation from AIT.” TSL *Vaughn* Index WHIF H.

See Pl.’s Opp’n, Ex. 1 § III (a).<sup>7</sup>

The Court finds that all of these materials, factual or not, were properly withheld under exemption 5, because they are all part of DHS’s deliberative process regarding the future of the AIT program. Disclosure of these deliberations would cause “injury to the quality of agency decisions” and will not be required. *Sears, Roebuck & Co.*, 421 U.S. at 151.

EPIC quotes from DHS’s brief and the *Vaughn* Index to bolster its claim that these materials are ineligible because the materials are purely factual documents: “[t]he agency is withholding ‘fact sheets,’ ‘preliminary testing results,’ and information regarding types of dosimeters (personal radiation monitors that could be appropriate for measuring radiation from AIT devices.)” Pl.’s Opp’n 17–18 (quoting Def.’s Br. 14, 16; TSL *Vaughn* Index WHIF H.).

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<sup>6</sup> Test, Evaluation, and Standards office of the Science and Technology Directorate, a component of DHS. See Coursey Decl. ¶ 2, ECF No. 9-2.

<sup>7</sup> EPIC refers to an additional withholding not listed above: TSL *Vaughn* Index WHIF C. See Pl.’s Reply 14 (“It would be difficult to think of a more axiomatic example of a factual document than one that the agency itself has described as a ‘fact sheet.’” (citing TSL *Vaughn*, WHIF C). However, the *Vaughn* Index does not describe that document as a “fact sheet,” but rather as a “talking-point” memo. And, as noted above, the *Vaughn* Index *does* describe WHIF B, as a “fact sheet.” For the foregoing reasons, and because EPIC failed to list this document in its master list of challenged withholdings, the Court will not address this document further.

EPIC's quotation is misleading: the government's brief actually states that DHS withheld "records related to *the drafting process* of . . . fact sheets." Def.'s Br. 14 (emphasis added). Elsewhere, as in the above withholdings descriptions drawn from the *Vaughn* indices, DHS acknowledged withholding fact sheets, but only "*draft or preliminary* fact sheets as well as deliberations concerning those drafts." Def.'s Reply 19 (emphasis added). EPIC has apparently failed to acknowledge, much less rebut, this important qualification on the nature of the withholdings. Again, the drafts and deliberations surrounding these fact sheets were part of DHS's deliberations on the future of the body scanner program. Thus, whether "factual" or not, they are part of DHS's deliberative process. The government's descriptions of these withholdings are sufficiently specific to justify protection under the deliberative process privilege.

As to "preliminary testing results" and the information on "dosimeters," EPIC's characterization is accurate, but nevertheless does not merit disclosure. The fact that the "testing" was *preliminary* is key: these preliminary results were part of the agency's deliberations in how to approach the potential risks of the body scanning technology. As to the "dosimeter" document, the description indicates that it contains an "informal question-and-answer discussion between two government employees"—exactly the sort of agency deliberation that this exemption is meant to protect. The government's descriptions of these withholdings is sufficient to demonstrate that the factual material was part of the agency's deliberative process regarding the future testing and implementation of the body scanner program and thus qualifies for protection under exemption 5.

## B. Drafts

A document designated as a “draft” does not automatically obtain protection pursuant to exemption 5. “Even if a document is a draft of what will become a final document, the court must also ascertain whether the document is deliberative in nature.” *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257–58 (D.C. Cir. 1982); *see also Dudman Commc’ns Corp. v. Dep’t of Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987) (“disclosure of editorial judgments—for example, decisions to insert or delete material or to change a draft’s focus or emphasis—would stifle . . . creative thinking and candid exchange of ideas . . .”).

EPIC claims that “[w]hen an agency uses the deliberative process privilege to withhold draft documents under Exemption 5, it must identify a corresponding final decision” and relies on several cases from this district in support of this position. Pl.’s Opp’n 19. But this overstates the burden on agencies. As the Supreme Court explained:

Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

*Sears, Roebuck & Co.*, 421 U.S. at 153 n.18. Accordingly, to protect a “draft” document, an agency need not necessarily identify a corresponding final document but must provide adequate description of the document to demonstrate that it was genuinely part of the agency’s deliberative process.

EPIC’s reliance on three cases from this district in support of its proposed rigid rule is misplaced. Pl.’s Opp’n 19. EPIC’s reliance on *Exxon Corp. v. Department of Energy* is particularly misleading. EPIC omitted the key modifying phrase “In some instances” that

precedes the language they quote: “where DOE has failed to identify a final document corresponding to a putative draft, the ‘draft’ shall be ordered produced . . . .” 585 F. Supp. 690, 698 (D.D.C. 1983). Moreover, even the language EPIC does not selectively omit reflects a more nuanced rule than the one EPIC proposes; the sentence concludes: “. . . to the extent that the agency has provided no basis for determining that it in fact has such status.” *Id.* Similarly, in *Mayer, Brown, Rowe & Maw LLP v. IRS*, Judge Collyer found that the documents at issue were “too removed from an actual policy decision” to warrant protection under exemption 5, but the case does not stand for the proposition that an agency seeking to withhold a draft must always point to a final version of that document. 537 F. Supp. 2d 128, 136 (D.D.C. 2008). Finally, in *Judicial Watch, Inc. v. U.S. Postal Serv.*, Judge Kennedy faulted the government for failing to “identify *specific* final decisions or decisionmaking processes to which the documents contributed” where the government had merely suggested in a general way that the documents related to the issues raised in the FOIA request. 297 F. Supp. 2d 252, 264 (D.D.C. 2004). *Judicial Watch* does not stand for the rule EPIC proposes.

With these principles in mind, the Court turns to the contested withholdings. EPIC challenges numerous withholdings of “drafts”:

1. Response to EPIC: This document, withheld in part pursuant to both the deliberative process privilege and the attorney client privilege under Exemption 5, contained “draft language, from [an] attorney in TSA[’s] Office of Chief Counsel to [a] TSA official regarding [a] suggested response letter to EPIC’s petition to suspend use of AIT.” from Def.’s Ex. K to Decl. of Paul Sotoudeh (“TSA *Vaughn* Index”) 26–27.
2. Draft Document On Standards and Testing: This document, withheld in full, is a “marked-up draft of a document called ‘Standards and Testing for Radiation Safety for Airport Backscatter X-Ray Systems.’” TSL *Vaughn* Index WHIF I.

3. Memoranda on Body Scanner Radiation and Safety: One document, withheld in part, is an “internal memorandum on AIT safety.” TSA *Vaughn* Index 38. The withheld portion “contains recommendation[s] from [an] internal memorandum regarding future efforts by TSA regarding development of [body scanner] radiation safety standards.” *Id.* Another document, withheld in part, contains “[i]nternal deliberations concerning [a] cover memo for [a] report on AIT safety, including draft language for [the] memorandum.” TSA *Vaughn* Index 69–70. A third document, withheld in part, contains “preliminary versions, edits, and revisions of excerpts of a memorandum to the Undersecretary of DHS on AIT radiation safety.” TES *Vaughn* Index 87–88. A fourth document, withheld in full, contains “comments and suggested revisions to a draft document on AIT radiation safety.” TES *Vaughn* Index 608. A fifth group of documents, withheld in full, contain “draft versions of memorandum on AIT safety, emails containing comments on the drafts, and emails concerning releasing the memoranda and fact sheets on AIT safety to a wider audience.” TES *Vaughn* Index 665–80, 688–726. A sixth document, withheld in full, contains “comments concerning a draft version of memorandum on AIT safety.” TES *Vaughn* Index 741–42. A seventh set of documents, withheld in full, are “draft versions of a document on AIT radiation safety standards, with changes tracked.” TES *Vaughn* Index 743–54, 750–52, 1057–59. A ninth document, withheld in full, contains “comments concerning a draft version of a fact sheet on AIT safety, as well as draft versions of the fact sheet.” TES *Vaughn* Index 785–88, 792–838. A tenth document, withheld in full, contains “deliberations concerning a draft NIST [National Institute of Standards and Technology] technical bulletin on AIT radiation safety, and draft versions of the NIST technical bulletin.” TES *Vaughn* Index 1060–1100, 1108–1146, 1149–86. Finally, an eleventh document, withheld in part, contains “suggestions of points to be included in [a] draft memorandum to [the] Deputy Secretary of DHS on radiation safety.” TSL *Vaughn* Index 908–910.
4. Drafts of Fact Sheet: These documents, withheld in full, contains “working drafts of [a] DHS ‘fact sheet’ on health and safety issues related to AIT.” TSL *Vaughn* Index WHIF B.
5. Draft Summary of AIT Radiation Safety: This document, withheld in full, is “an early draft of [a] policy document concerning AIT radiation safety” entitled “Summary of Advanced Imaging Technology (AIT) Radiation Safety: Standards and Ensuring Compliance, April 22, 2010.” TSL *Vaughn* Index WHIF J.
6. Response to Congressional Inquiries: One document, withheld in part, contains “[i]nternal deliberations concerning TSA’s response to [a]

congressional inquiry, including draft language for [the] response.” TSA *Vaughn* Index 52. A second document, withheld in part, “reflect[s] deliberations regarding the formulation of a response by DHS to inquiries by Congress, including a draft version of the response to one question.” TES *Vaughn* Index 80–82. A third set of documents, withheld in part, consist of “deliberations concerning a proposed response to a letter by Senators Collins, Coburn, and Burr concerning backscatter radiation safety.” TES *Vaughn* Index 951–58, 971–72, 980–82, 990–1023. A fourth set of documents, withheld in full, consist of “discussions regarding how to respond to an inquiry from a congressional committee concerning AIT radiation safety.” TES *Vaughn* Index 746–49. A fifth set of documents, withheld in full, contain “comments, revisions, and internal memoranda making recommendations concerning a proposed response to a letter by Senators Collins, Coburn, and Burr concerning backscatter radiation safety, as well as draft versions of the response letters and accompanying white paper.” TES *Vaughn* Index 959–70, 973–79, 983–89, 1024–48.

7. Draft TSA Assessments and Findings: This document, withheld in full, is a “[d]raft version (including tracked changes) of TSA assessment/findings regarding radiation output of AIT machines.” TSA *Vaughn* Index 108A–F.<sup>8</sup>
8. Response to Scientists: One document, withheld in part, “describes the contents of a draft letter responding to scientists’ concerns about AIT and radiation safety.” TES *Vaughn* Index 113–15. A second document, withheld in part, contains “the authors’ discussions and opinions regarding reactions to the government’s response to the UCSF letter of concern, and future steps to take to address these reactions.” TES *Vaughn* Index 440–48. A third document, withheld in part, contains “the author’s discussions of future steps she intends to take regarding correspondence between Dr. Holdren and UCSF.” TES *Vaughn* Index 535.<sup>9</sup> A fourth document, withheld in part, “consist[s] of opinions concerning a proposed response to a letter from scientists at UCSF concerning backscatter radiation safety.” TES *Vaughn* Index 943–44. A fifth set of documents, withheld in full, “consist of comments and revisions concerning a proposed response to a letter from scientists at UCSF concerning backscatter radiation safety, as well as draft versions of the response letter.” TES *Vaughn* Index 839–60, 866–89, 896–907, 911–42, 949–50.

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<sup>8</sup> EPIC intended to list this document rather than TSA *Vaughn* Index 107–08. See Pl.’s Reply 12. The Court finds that considering this document will not prejudice DHS, although they have not had the opportunity to respond to the specific challenge, because DHS’s description of the document is materially similar to several other documents.

<sup>9</sup> There is a discrepancy here. EPIC refers to TES *Vaughn* Index 535–36, but the index contains no such document—referring only to “535, 546.” The Court assumes that EPIC refers to this document.

9. Response to Pilots: One set of documents, withheld in part, contains “draft language and deliberations concerning a DHS/TSA response to the concerns raised by American Airlines pilots.” TES *Vaughn* Index 381–82, 384–86. A second document, withheld in part, contains “the author’s reflections regarding concerns raised by the Allied Pilots Association.” TES *Vaughn* Index 391–92.
10. Documents for DHS Leadership on Radiation Safety: One document, withheld in full, “contains comments regarding an upcoming response by the DHS Undersecretary on radiation safety.” TES *Vaughn* Index 609. A second set of documents, withheld in full, “contain comments on, edits to, and draft versions of a memorandum to the Deputy Secretary of DHS on AIT safety.” TES *Vaughn* Index 620–29. A third document, withheld in full, “consists of comments and suggestions regarding the content of a proposed memorandum to the Deputy Secretary of DHS on AIT radiation safety.” TES *Vaughn* Index 631–35. A fourth document, withheld in full, “consist[s] of a draft version of a memorandum to the Deputy Secretary of DHS on AIT safety, with changes tracked, and an email forwarding the draft memorandum.” TES *Vaughn* Index 651–55. A fifth document, “consist[s] of comments and deliberations concerning draft versions of a question-and-answer memorandum to the DHS Secretary concerning backscatter radiation safety, as well as draft versions of the memorandum.” TES *Vaughn* Index 753–84.
11. Draft AIT Standard Operating Procedures: This document, withheld in full, consists of “emails forwarding a draft section regarding employee safety from TSA’s Advanced Imaging Technology Standard Operating Procedure (SOP), and the draft SOP sections themselves.” TES *Vaughn* Index 611–19.
12. Response to Foreign Government: This document, withheld in full, consists of “discussions between agency personnel regarding how to respond to an inquiry from a foreign government concerning AIT radiation safety.” TES *Vaughn* Index 729–40.
13. FDA Testing: This document, withheld in full, “is a preliminary progress report, resulting from an interagency agreement between DHS and FDA, by the FDA concerning the testing of the effects of the L3 Provision on personal medical devices.” TSL *Vaughn* Index WHIF L. The report “reflects an interim report prior to the completion of testing of the effects of the L3 Provision on medical devices.” *Id.*

As a preliminary matter, the first of these withholdings, TSA *Vaughn* Index 26–27, was withheld pursuant to both the deliberative process privilege and the attorney client privilege, but EPIC challenges only the former. Accordingly, DHS is entitled to summary judgment as to this withholding.

As to the remaining documents, EPIC’s sole argument with respect to these withholdings is that DHS failed to indicate a corresponding “final” document that would justify withholding these “drafts.” As discussed above, this overstates the agency’s burden. Instead, the agency must only demonstrate that each withholding, “draft or otherwise,” was genuinely part of the agency’s deliberative process. The Court is satisfied with the descriptions provided in the *Vaughn* indices that each of these withholdings meets this requirement and finds that these withholdings were proper pursuant to exemption 5.

Finally, EPIC’s assertion that DHS failed to produce segregable portions of the withheld documents also fails. *See* Pl.’s Opp’n 19–20. “Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material.” *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). According to the *Vaughn* indices provided by the agency, many of the contested withholdings under exemption 5 were partial redactions from specific pages, rather than complete withholdings of entire documents. *See Vaughn* Index 13–14, 17–19. Moreover, the agency has twice made supplemental release of documents after determining that further segregable material could be released and has declared in a sworn affidavit that it has released the segregable portion of each of these records. Sotoudeh Decl. ¶¶ 22–23, 72. As EPIC has failed to offer any argument in support of its allegation that might cast doubt on DHS’s sworn statement, the Court finds that all reasonably segregable materials were disclosed.



## **VI. ATTORNEYS' FEES AND COSTS**

EPIC has moved for attorneys' fees and costs. Pl.'s Opp'n 20–24. The Court will not address that motion here. Pursuant to the local rules, the Court shall “enter an order directing the parties to confer and to attempt to reach agreement on fee issues” and shall set a status conference at which the Court will

(1) determine whether settlement of any and or all aspects of the fee matter has been reached, (2) enter judgment for any fee on which agreement has been reached, (3) make the determination [regarding pending appeals] required by paragraph (b) of . . . [LCvR 54.2], and (4) set an appropriate schedule for completion of the fee litigation.

LCvR 54.2.

## **VII. CONCLUSION**

For the foregoing reasons, EPIC and DHS are both entitled to partial summary judgment. An Order shall issue with this opinion.

Signed by Royce C. Lamberth, Chief Judge, on March 7, 2013.

**U.S. District Court  
 District of Columbia (Washington, DC)  
 CIVIL DOCKET FOR CASE #: 1:10-cv-01992-RCL**

ELECTRONIC PRIVACY INFORMATION CENTER v.  
 UNITED STATES DEPARTMENT OF HOMELAND  
 SECURITY  
 Assigned to: Chief Judge Royce C. Lamberth  
 Case in other court: USCA, 13-05113  
 Cause: 05:552 Freedom of Information Act

Date Filed: 11/19/2010  
 Date Terminated: 03/07/2013  
 Jury Demand: None  
 Nature of Suit: 895 Freedom of  
 Information Act  
 Jurisdiction: U.S. Government Defendant

Date Filed	#	Docket Text
11/19/2010	<u>1</u>	COMPLAINT against UNITED STATES DEPARTMENT OF HOMELAND SECURITY ( Filing fee \$ 350, receipt number 4616034354) filed by ELECTRONIC PRIVACY INFORMATION CENTER. (Attachments: # <u>1</u> Civil Cover Sheet)(jf, ) (Entered: 11/22/2010)
11/19/2010		SUMMONS (3) Issued as to UNITED STATES DEPARTMENT OF HOMELAND SECURITY, U.S. Attorney and U.S. Attorney General. (jf, ) (Entered: 11/22/2010)
11/19/2010	<u>2</u>	LCvR 7.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests NONE by ELECTRONIC PRIVACY INFORMATION CENTER. (jf, ) (Entered: 11/22/2010)
12/21/2010	<u>3</u>	MOTION for Extension of Time to File Answer re <u>1</u> Complaint by UNITED STATES DEPARTMENT OF HOMELAND SECURITY (Attachments: # <u>1</u> Exhibit Exhibit 1: Wells v. Newsome, # <u>2</u> Text of Proposed Order)(Grauman, Jesse) (Entered: 12/21/2010)
01/05/2011	<u>4</u>	ANSWER to <u>1</u> Complaint by UNITED STATES DEPARTMENT OF HOMELAND SECURITY. (Attachments: # <u>1</u> Exhibit Exhibit A: FOIA Request)(Grauman, Jesse) (Entered: 01/05/2011)
01/06/2011		MINUTE ORDER finding as moot <u>3</u> defendant's Motion for Extension of Time to Answer. Signed by Judge Ellen S. Huvelle on January 6, 2010. (AG) (Entered: 01/06/2011)
01/06/2011		MINUTE ORDER: It is hereby ORDERED that the parties shall file a joint proposed briefing schedule by January 20, 2010. Signed by Judge Ellen S. Huvelle on January 6, 2010. (AG) (Entered: 01/06/2011)
01/06/2011		Set/Reset Deadline: Joint Proposed Briefing Schedule due by 1/20/2011. (jth) (Entered: 01/06/2011)
01/20/2011	<u>5</u>	STATUS REPORT <i>and Proposed Briefing Schedule</i> by ELECTRONIC PRIVACY INFORMATION CENTER, UNITED STATES DEPARTMENT OF HOMELAND SECURITY. (Grauman, Jesse) (Entered: 01/20/2011)
01/21/2011		MINUTE ORDER re <u>5</u> Status Report: it is hereby ORDERED that the Joint Proposed Briefing Schedule is approved; and it is further ORDERED that the following schedule shall apply: Defendant's completion of production of documents is due by June 6, 2011; Defendant's Motion for Summary Judgment (including a final Vaughn index) is due by July 11, 2011; Plaintiff's Opposition and Cross-Motion is due by August 15, 2011; Defendant's Reply and Opposition is due by August 29, 2011; and Plaintiff's Reply is due by September 12, 2011. In the event the parties are able to resolve or further limit the issues before the Court, the parties will promptly inform the Court and propose any appropriate modifications to the schedule. Signed by Judge Ellen S. Huvelle on January 21, 2011. (AG) (Entered: 01/21/2011)
01/21/2011		Set/Reset Deadlines: Defendant's completion of production of documents by 6/6/2011, Defendant's Summary Judgment Motion (Including a Vaughn Index) due

		by 7/11/2011; Plaintiff's Opposition and Cross-Motion due by 8/15/2011, Defendant's Reply and Opposition due by 8/29/2011, Plaintiff's Reply due by 9/12/2011. (jth) (Entered: 01/21/2011)
03/30/2011		Case randomly reassigned to U.S. District Judge Amy Berman Jackson. Judge Ellen S. Huvelle no longer assigned to the case. (gt, ) (Entered: 03/30/2011)
06/02/2011	<u>6</u>	Unopposed MOTION for Extension of Time to <i>Complete Release of Documents and to Modify Briefing Schedule</i> by UNITED STATES DEPARTMENT OF HOMELAND SECURITY (Attachments: # <u>1</u> Text of Proposed Order)(Grauman, Jesse) (Entered: 06/02/2011)
06/03/2011		MINUTE ORDER granting <u>6</u> Unopposed Motion for Extension of Time. The close of discovery will be extended from 6/6/2011 to 6/20/2011, defendant's motion for summary judgment will be due 7/25/2011, plaintiff's opposition to the motion for summary judgment and cross motion for summary judgment will be due 8/29/2011, defendant's reply to the motion for summary judgment and opposition to the cross motion for summary judgment will be due 9/12/2011 and plaintiff's reply to the cross motion for summary judgment will be due 9/26/2011. Signed by Judge Amy Berman Jackson on 6/3/11. (MT, ) (Entered: 06/03/2011)
06/03/2011		Set/Reset Deadlines: Document Release due by 6/20/2011; Defendant's Summary Judgment motion due by 7/25/2011, Response to Motion for Summary Judgment and Cross Motion for Summary Judgment due by 8/29/2011, Response to Cross Motion and Reply to the Motion for Summary Judgment due by 9/12/2011. Reply to the Cross Motion due by 9/26/2011. (jth) (Entered: 06/03/2011)
07/14/2011	<u>7</u>	Unopposed MOTION for Extension of Time to <i>File Summary Judgment Briefs</i> by UNITED STATES DEPARTMENT OF HOMELAND SECURITY (Attachments: # <u>1</u> Text of Proposed Order)(Grauman, Jesse) (Entered: 07/14/2011)
07/15/2011		MINUTE ORDER granting <u>7</u> Unopposed Motion for Extension of Time to Modify Briefing Schedule. The motion for summary judgment will be due 8/12/2011, the opposition to the motion for summary judgment and cross-motion for summary judgment will be due 9/16/2011, the reply to the motion for summary judgment and opposition to the cross-motion for summary judgment will be due 9/26/2011, and the reply to the cross-motion for summary judgment will be due 10/10/2011. Signed by Judge Amy Berman Jackson on 7/15/2011. (MT) (Entered: 07/15/2011)
07/16/2011		Set/Reset Deadlines: Summary Judgment motion due by 8/12/2011; Opposition and Cross Motion due by 9/16/2011; Reply to Summary Judgment and Opposition to Cross Motion due by 9/26/2011; Reply to Cross Motion due by 10/10/2011. (jth) (Entered: 07/16/2011)
08/07/2011	<u>8</u>	Unopposed MOTION for Extension of Time to <i>File Summary Judgment Briefs</i> by UNITED STATES DEPARTMENT OF HOMELAND SECURITY (Attachments: # <u>1</u> Text of Proposed Order)(Grauman, Jesse) (Entered: 08/07/2011)
08/08/2011		MINUTE ORDER granting <u>8</u> Unopposed Motion for Extension of Time. The motion for summary judgment will be due 9/12/2011, the opposition to the motion for summary judgment and cross-motion for summary judgment will be due 10/17/2011, the reply to the motion for summary judgment and opposition to the cross-motion for summary judgment will be due 10/31/2011, and the reply to the cross-motion for summary judgment will be due 11/14/2011. Signed by Judge Amy Berman Jackson on 8/8/2011. (MT, ) (Entered: 08/08/2011)
08/08/2011		Set/Reset Deadlines: Summary Judgment motion due by 9/12/2011; Opposition and Cross Motion due by 10/17/2011; Reply to the Motion for Summary Judgment and Opposition to the Cross Motion due by 10/31/2011; Reply to the Cross Motion due by 11/14/2011. (jth) (Entered: 08/08/2011)
09/12/2011	<u>9</u>	MOTION for Summary Judgment by UNITED STATES DEPARTMENT OF HOMELAND SECURITY (Attachments: # <u>1</u> Declaration Exhibit 1: Declaration of Paul Sotoudeh, # <u>2</u> Declaration Exhibit 2: Declaration of Bert Coursey, # <u>3</u> Declaration Exhibit 3: Declaration of Pamela Beresford, # <u>4</u> Declaration Exhibit 4: Declaration of Joy Lazaroff, # <u>5</u> Declaration Exhibit 5: Declaration of Peter Modica, # <u>6</u> Declaration Exhibit 6: Declaration of Scott Trosper, # <u>7</u> Declaration

		Exhibit 7: Declaration of Joseph Callera, # <u>8</u> Declaration Exhibit 8: Declaration of Rory Doyle, # <u>9</u> Exhibit Exhibit 9: E-mail from John Verdi to Jesse Grauman, # <u>10</u> Text of Proposed Order)(Grauman, Jesse) (Entered: 09/12/2011)
10/11/2011	<u>10</u>	Unopposed MOTION for Extension of Time to <i>File Summary Judgment Briefs</i> by ELECTRONIC PRIVACY INFORMATION CENTER (Attachments: # <u>1</u> Text of Proposed Order)(Verdi, John) (Entered: 10/11/2011)
10/12/2011		MINUTE ORDER granting <u>10</u> Unopposed Motion for Extension of Time. The opposition to the motion for summary judgment and cross motion will be due 10/31/2011. The reply to the motion for summary judgment and opposition to the cross motion will be due 11/18/2011. The reply to the cross motion will be due 12/2/2011. Signed by Judge Amy Berman Jackson on 10/12/2011. (MT) (Entered: 10/12/2011)
10/12/2011		Set/Reset Deadlines: The opposition to the motion for summary judgment and cross motion are due by 10/31/2011. Reply to Motion for summary judgment and opposition to the cross motion are due by 11/18/2011. reply to cross motion due by 12/2/2011. (jth) (Entered: 10/12/2011)
10/31/2011	<u>11</u>	Cross MOTION for Summary Judgment and Oral Hearing by ELECTRONIC PRIVACY INFORMATION CENTER (Attachments: # <u>1</u> Memorandum in Support, # <u>2</u> Statement of Facts, # <u>3</u> Statement of Genuine Issues in Opposition to Defendants Statement of Material Facts, # <u>4</u> Text of Proposed Order, # <u>5</u> Exhibit Exhibit 1 – Challenged Withholdings)(McCall, Ginger). Added MOTION for Hearing on 11/1/2011 (jf, ). (Entered: 10/31/2011)
10/31/2011	<u>12</u>	Memorandum in opposition to re <u>9</u> MOTION for Summary Judgment filed by ELECTRONIC PRIVACY INFORMATION CENTER. (Attachments: # <u>1</u> Statement of Facts, # <u>2</u> Statement of Genuine Issues in Opposition to Defendants Statement of Material Facts, # <u>3</u> Text of Proposed Order, # <u>4</u> Exhibit Exhibit 1 – Challenged Withholdings)(McCall, Ginger) . (Entered: 10/31/2011)
11/18/2011	<u>13</u>	REPLY to opposition to motion re <u>9</u> MOTION for Summary Judgment filed by UNITED STATES DEPARTMENT OF HOMELAND SECURITY. (Attachments: # <u>1</u> Exhibit Exhibit 1: TSA Vaughn Index Limited to Challenged Withholdings, # <u>2</u> Exhibit Exhibit 2: TES Vaughn Index Limited to Challenged Withholdings, # <u>3</u> Exhibit Exhibit 3: TSL Vaughn Index Limited to Challenged Withholdings)(Grauman, Jesse) (Entered: 11/18/2011)
11/18/2011	<u>14</u>	Memorandum in opposition to re <u>11</u> Cross MOTION for Summary Judgment MOTION for Hearing filed by UNITED STATES DEPARTMENT OF HOMELAND SECURITY. (Attachments: # <u>1</u> Exhibit Exhibit 1: TSA Vaughn Index Limited to Challenged Withholdings, # <u>2</u> Exhibit Exhibit 2: TES Vaughn Index Limited to Challenged Withholdings, # <u>3</u> Exhibit Exhibit 3: TSL Vaughn Index Limited to Challenged Withholdings)(Grauman, Jesse) (Entered: 11/18/2011)
12/02/2011	<u>15</u>	REPLY to opposition to motion re <u>11</u> Cross MOTION for Summary Judgment MOTION for Hearing filed by ELECTRONIC PRIVACY INFORMATION CENTER. (McCall, Ginger) (Entered: 12/02/2011)
03/28/2012	<u>16</u>	NOTICE of Appearance by Marc Rotenberg on behalf of ELECTRONIC PRIVACY INFORMATION CENTER (Rotenberg, Marc) (Entered: 03/28/2012)
03/28/2012	<u>17</u>	NOTICE OF WITHDRAWAL OF APPEARANCE as to ELECTRONIC PRIVACY INFORMATION CENTER. Attorney John Arthur Verdi terminated. (Verdi, John) (Entered: 03/28/2012)
04/10/2012		Case reassigned to Judge Rudolph Contreras. Judge Amy Berman Jackson no longer assigned to the case. (ds) (Entered: 04/10/2012)
01/04/2013	<u>18</u>	Case reassigned to Chief Judge Royce C. Lamberth as related. Judge Rudolph Contreras no longer assigned to the case. (ztnr, ) (Entered: 01/04/2013)
03/07/2013	<u>19</u>	ORDER granting in part and denying in part <u>9</u> Motion for Summary Judgment; granting in part and denying in part <u>11</u> Motion for Summary Judgment. Signed by Chief Judge Royce C. Lamberth on March 7, 2013. (lcr15) (Entered: 03/07/2013)

03/07/2013	<u>20</u>	MEMORANDUM OPINION granting in part and denying in part the parties' cross-motions for summary judgment. Signed by Chief Judge Royce C. Lamberth on March 7, 2013. (lcr15) (Entered: 03/07/2013)
04/05/2013		Set/Reset Hearings: Status Conference set for 4/12/2013 at 10:30 AM in Courtroom 22A before Chief Judge Royce C. Lamberth. (rje, ) (Entered: 04/05/2013)
04/11/2013	<u>21</u>	NOTICE of Appearance by Joseph Wilfred Mead on behalf of UNITED STATES DEPARTMENT OF HOMELAND SECURITY (Mead, Joseph) (Entered: 04/11/2013)
04/11/2013		Set/Reset Hearings: Status Conference reset for 4/17/2013 at 10:30 AM in Courtroom 22A before Chief Judge Royce C. Lamberth. (rje, ) (Entered: 04/11/2013)
04/16/2013	<u>22</u>	NOTICE OF APPEAL TO DC CIRCUIT COURT as to <u>19</u> Order on Motion for Summary Judgment, <u>20</u> Memorandum & Opinion by ELECTRONIC PRIVACY INFORMATION CENTER. Filing fee \$ 455, receipt number 0090-3285982. Fee Status: Fee Paid. Parties have been notified. (McCall, Ginger) (Entered: 04/16/2013)
04/17/2013	<u>23</u>	Transmission of the Notice of Appeal, Order Appealed, and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid this date re <u>22</u> Notice of Appeal to DC Circuit Court. (rdj) (Entered: 04/17/2013)
04/17/2013		Minute Entry for proceedings held before Chief Judge Royce C. Lamberth: Status Conference held on 4/17/2013. Motion due by 5/1/2013. Opposition due by 5/17/2013. Reply due by 5/24/2013. (Court Reporter Theresa Sorensen.) (rje) (Entered: 04/17/2013)

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

**ELECTRONIC PRIVACY INFORMATION CENTER**  
1718 Connecticut Ave., N.W.  
Suite 200  
Washington, DC 20009

**Plaintiff,**

v.

**THE UNITED STATES DEPARTMENT OF  
HOMELAND SECURITY**  
Washington, D.C. 20528

**Defendant.**

Civil Action No. \_\_\_\_\_

**COMPLAINT FOR INJUNCTIVE RELIEF**

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 (2010), for injunctive and other appropriate relief, seeking the release of agency records requested by the Electronic Privacy Information Center from the United States Department of Homeland Security.

2. This lawsuit challenges DHS’s failure to disclose documents in response to EPIC’s July 13, 2010 Freedom of Information Act (“FOIA”) request to the agency. EPIC’s FOIA Request seeks agency records concerning the radiation risks posed by DHS’s airport full body scanner program. DHS has failed to disclose a single record, and has failed to comply with statutory deadlines. EPIC asks the Court to order immediate disclosure of all responsive records.

### **Jurisdiction and Venue**

3. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) (2010) and 5 U.S.C. § 552(a)(6)(C)(i) (2010). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (2010). Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) (2010).

### **Parties**

4. Plaintiff Electronic Privacy Information Center (“EPIC”) is a public interest research organization incorporated as a not-for-profit corporation in Washington, D.C. EPIC’s activities include the review of federal activities and policies to determine their possible impacts on civil liberties and privacy interests. Among its other activities, EPIC publishes books, reports, and a bi-weekly electronic newsletter. EPIC also maintains a heavily visited Internet site, <http://www.epic.org>, which contains extensive information regarding privacy issues, including information EPIC has obtained from federal agencies under the FOIA. EPIC routinely and systematically disseminates information to the public. This Court recognized EPIC’s role as a representative of the news media in *EPIC v. Dep’t of Defense*, 241 F. Supp. 2d. 5 (D.D.C. 2003).

5. Defendant United States Department of Homeland Security (“DHS”) is an agency established in the Executive Branch of the United States Government. DHS is an agency within the meaning of 5 U.S.C. § 552(f)(1) (2007). DHS includes a component called the Transportation Security Administration (“TSA”). DHS includes a component called the Science and Technology Directorate (“S&T”).

## Facts

### **DHS is Implementing Full Body Scanner Technology as Primary Screening for Air Travelers**

6. In February 2007, TSA, a DHS component, began testing full body scanners – also called “whole body imaging” and “advanced imaging technology” – to screen air travelers.

7. Full body scanners produce detailed, three-dimensional images of individuals.

8. Experts have described full body scans as a “digital strip search.”

9. TSA is using full body scanner systems at airport security checkpoints, screening passengers before they board flights.

10. TSA has provided various assurances regarding its use of body scanners.

11. TSA has stated that body scanners would not be mandatory for passengers and that images produced by the machines cannot be stored, transmitted, or printed.

12. A previous EPIC FOIA lawsuit against DHS revealed that TSA’s body scanner images can be stored and transmitted.

13. On February 18, 2009, TSA announced that it would require passengers at six airports to submit to full body scanners in place of the standard metal detector search, which contravenes its earlier statements that full body scanners would not be mandatory.

14. On April 6, 2009, TSA announced its plans to expand the mandatory use of full body scanners to all airports.

15. On June 4, 2009, the U.S. House of Representatives passed HR 2200, a bill that would limit the use of full body scanner systems in airports. The bill would bar use of full body scanner technology for primary screening purposes.

16. HR 2200 was referred to the Senate for consideration on June 8, 2009. The legislation was referred to the Senate Committee on Commerce, Science, and Transportation. It



remains pending through the date of this pleading.

17. Since June 2009, the TSA has installed hundreds of additional full body scanners in American airports.

18. On July 2, 2010, EPIC filed suit in the U.S. Court of Appeals for the D.C. Circuit to suspend the TSA's full body scanner program.

**The TSA's Full Body Scanner Program Places Air Travelers at Heightened Risk of Radiation-related Illness**

19. Experts have questioned the safety of full body scanners and noted that radiation exposure from devices like full body scanner increases individuals' cancer risk.

20. No independent study has been conducted on the health risks of full body scanners.

21. In April 2010, scientists at the University of California – San Francisco wrote to President Obama, calling for an independent review of the full body scanners' radiation risks. The experts noted that children, pregnant women, and the elderly are especially at risk “from the mutagenic effects of the [body scanners'] X-rays.”

22. Dr. David Brenner, director of Columbia University's Center for Radiological Research and a professor of radiation biophysics, has warned “it's very likely that some number of [air travelers] will develop cancer from the radiation from these scanners.”

23. Peter Rez, a professor of physics at Arizona State University, has identified cancer risks to air travelers arising from improper maintenance and flawed operation of the TSA's full body scanners.

24. Other scientists and radiology experts have also identified serious health risks associated with the full body scanner program, including increased cancer risk to American travelers.

**EPIC Submitted a FOIA Request to DHS Regarding the Radiation Risks of TSA's Full Body Scanner Program**

25. On July 13, 2010, EPIC transmitted, via certified mail, a written FOIA request to DHS for agency records ("EPIC's FOIA Request"). EPIC requested the following agency records:
- a. All records concerning TSA tests regarding body scanners and radiation emission or exposure;
  - b. All records concerning third party tests regarding body scanners and radiation emission or exposure.
26. EPIC also asked DHS to expedite its response to EPIC's FOIA request on the bases that it pertains to a matter about which there is an urgency to inform the public about an actual or alleged federal government activity, and was made by a person primarily engaged in disseminating information. EPIC made this request pursuant to 5 U.S.C. § 552(a)(6)(E) (2010). EPIC based the request on public and press interest in full body scanners and privacy protections.
27. EPIC also requested "News Media" fee status under the Freedom of Information Act, based on its status as a "representative of the news media."
28. EPIC further requested waiver of all duplication fees.
29. Disclosure of the records requested in EPIC's FOIA Request will contribute significantly to public understanding of the operations and activities of the government.

**DHS Failed to Make a Determination Regarding EPIC's FOIA Request and Failed to Produce Any Documents**

30. On July 29, 2010, the DHS wrote to EPIC acknowledging receipt of EPIC's FOIA Request and stating that the DHS determined that the records sought by EPIC's FOIA Request are held by TSA and S&T.
31. EPIC's FOIA Request was referred the TSA FOIA Officer Kevin Janct and a FOIA Officer for S&T, Miles Wiley.

32. DHS assigned EPIC's FOIA Request the case number DHS/OS/PRIV 10-0869.

33. Through the date of this pleading, neither DHS, TSA, nor S&T have disclosed a single agency record in response to EPIC's FOIA Request.

34. Through the date of this pleading, neither DHS, TSA, nor S&T have made a single determination concerning the substance of EPIC's FOIA Request.

**TSA Denied EPIC's Requests for Expedited Processing and a Fee Waiver**

35. On August 12, 2010, TSA wrote to EPIC, denying EPIC's requests for expedited processing and a fee waiver.

36. EPIC filed an administrative appeal of TSA's decision on August 27, 2010.

37. Through the date of this pleading, TSA has failed to make a determination concerning EPIC's August 27, 2010 appeal.

**S&T Denied EPIC's Request for a Fee Waiver**

38. On September 3, 2010, S&T responded to EPIC, denying EPIC's request for a fee waiver.

**S&T Identified Responsive Agency Records, But Failed to Disclose the Documents**

39. On September 8, 2010, S&T responded to EPIC, stating that S&T has identified agency records that are in S&T's possession and are responsive to EPIC's FOIA Request.

40. However, S&T failed to disclose the responsive records, ostensibly because the records "belong to the Transportation Security Administration (TSA)."

41. Through the date of this pleading, neither S&T nor TSA have disclosed a single agency record to EPIC.

**EPIC Filed an Administrative Appeal with TSA**

42. On October 21, 2010, EPIC transmitted a written administrative appeal to TSA (“EPIC’s Administrative Appeal to TSA”).

43. EPIC’s Administrative Appeal to TSA appealed TSA’s failure to make a determination regarding EPIC’s FOIA Request. It also reiterated EPIC’s August 27, 2010 appeal of the TSA’s denial of EPIC’s requests for expedited processing and a fee waiver.

44. On November 5, 2010, TSA sent EPIC a letter that purported to “acknowledge receipt of your October 21, 2010 Freedom of Information Act (FOIA) request [*sic*] to the Transportation Security Administration (TSA), to appeal [*sic*] TSA’s decision regarding your FOIA request appeal [*sic*] to TSA 10-0869 ...”

45. The TSA’s November 5, 2010 letter further states that “due to the increasing number of FOIA requests [*sic*] received by this office, we may encounter some delay in processing your request [*sic*].” and invites EPIC to “narrow the scope of your request [*sic*].”

46. The TSA’s November 5, 2010 letter is an explicit or constructive denial of EPIC’s Administrative Appeal to TSA. The letter purports to respond to EPIC’s appeal, but instead unlawfully places EPIC’s appeal in a queue for processing FOIA requests – a queue in which TSA states “there are currently 50 open requests [*sic*] ahead of yours.”

**EPIC Filed an Administrative Appeal with S&T**

47. On October 21, 2010, EPIC transmitted a written administrative appeal to S&T (“EPIC’s Administrative Appeal to S&T”).

48. EPIC’s Administrative Appeal to S&T appealed S&T’s failure to disclose records, as well as S&T’s denial of EPIC’s request for a fee waiver.

49. Through the date of this pleading, S&T has failed to make a determination

concerning EPIC's Administrative Appeal to S&T.

**Count I**

**Violation of the FOIA: Failure to Comply With Statutory Deadlines**

50. Paragraphs 1-49 above are hereby incorporated by reference as if set forth fully herein.

51. As described above, DHS's responses to EPIC's FOIA Request violated the statutory deadlines imposed by the FOIA, including the deadlines set forth in 5 U.S.C. § 552(a)(6)(A) (2010) and 5 U.S.C. § 552(a)(6)(C) (2010).

52. EPIC has exhausted the applicable administrative remedies with respect to EPIC's FOIA Request.

53. EPIC is entitled to injunctive relief compelling the release and disclosure of the requested agency records.

**Count II**

**Violation of the FOIA: Unlawful Withholding of Agency Records**

54. Paragraphs 1-53 above are hereby incorporated by reference as if set forth fully herein.

55. As described above, Defendant's September 8, 2010 letter to EPIC identifies agency records that are responsive to EPIC's FOIA Request, but DHS has unlawfully withheld the records.

56. As described above, DHS has failed to comply with statutory deadlines, failing to complete a search for other agency records responsive to EPIC's FOIA Request.

57. As a result of DHS's unlawful delay, the agency has wrongly withheld additional responsive agency records from EPIC.

58. EPIC is entitled to injunctive relief compelling the release and disclosure of the requested agency records.

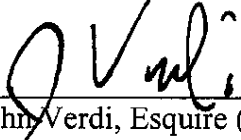
**Requested Relief**

WHEREFORE, Plaintiff prays that this Court:

- A. order Defendant to produce all responsive agency records identified in Defendant's September 8, 2010 letter to EPIC within five days of the Court's Order in this matter;
- B. order Defendant to make a complete determination regarding EPIC's FOIA Request within ten days of the date of the Court's Order in this matter;
- C. order Defendant to produce all responsive agency records to EPIC's FOIA Request within ten days of the Court's Order in this matter;
- D. order Defendant to recognize Plaintiff's "news media" fee status for the purpose of EPIC's FOIA Request, waive all duplication fees, and disclose all responsive agency records without charge;
- E. order Defendant to grant Plaintiff's request for expedited processing;
- F. award Plaintiff its costs and reasonable attorneys' fees incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E) (2010); and
- G. grant such other relief as the Court may deem just and proper.

Respectfully submitted,

By:

  
\_\_\_\_\_  
John Verdi, Esquire (DC Bar # 495764)  
Marc Rotenberg, Esquire (DC Bar # 422825)  
ELECTRONIC PRIVACY INFORMATION  
CENTER  
1718 Connecticut Avenue, N.W.  
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Washington, D.C. 20009  
(202) 483-1140 (telephone)  
(202) 483-1248 (facsimile)

Dated: November 19, 2010

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

---

ELECTRONIC PRIVACY )  
INFORMATION CENTER, )  
 )  
Plaintiff, )  
 )  
v. ) Case No. 1:10-cv-1992 (ESH)  
 )  
THE UNITED STATES DEPARTMENT OF )  
HOMELAND SECURITY, )  
 )  
Defendant. )

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**ANSWER**

Defendant United States Department of Homeland Security (“DHS”), by and through undersigned counsel, respectfully answers the Complaint as follows:

1. This paragraph contains a characterization of Plaintiff’s Complaint, which speaks for itself, and to which no response is required. To the extent a response is required, admit that Plaintiff is suing Defendant under the Freedom of Information Act (“FOIA”), but deny that Defendant is liable to Plaintiff.

2. The first and fourth sentences of this paragraph contain characterizations of Plaintiff’s Complaint, which speaks for itself, and to which no response is required. The second sentence of this paragraph contains a characterization of Plaintiff’s underlying FOIA request. The FOIA request, which is attached as Exhibit A, speaks for itself, and no response is required. In response to the third sentence of this paragraph, admit that Defendant has not, as of the date of this pleading, released any records directly to Plaintiff; however, Defendant’s component, the



Transportation Security Administration (“TSA”), has posted numerous records on its public website that are, or may be, responsive to Plaintiff’s request, and TSA provided Plaintiff with an interim response, including links to those records, on December 23, 2010. The remainder of the third sentence of this paragraph consists of a conclusion of law to which no response is required.

**Jurisdiction and Venue**

3. This paragraph contains plaintiff’s allegations concerning jurisdiction and venue, which are conclusions of law, to which no response is required.

**Parties**

4. The first five sentences of this paragraph contain Plaintiff’s characterizations of itself, its purpose, and its activities, to which no response is required. To the extent a response is deemed required, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations. The sixth sentence in this paragraph is Plaintiff’s characterization of this Court’s findings in an unrelated case involving Plaintiff; those findings speak for themselves and Defendant respectfully refers the Court to the cited opinion for a complete and accurate statement of its contents.

5. Admit.

**Facts**

6. Admit that in 2007 and 2008, TSA began deploying advanced imaging technology (“AIT”) machines in limited field trials at United States airports as secondary screening units.

7. Admit that AIT machines can be calibrated to produce three-dimensional images of individuals. The term “detailed” is vague and is Plaintiff’s characterization of the images produced by these machines, to which no response is required.

8. The term “experts” is vague and, as such, defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation.

9. Admit that TSA uses AIT systems to screen a percentage of passengers before they board flights at airports at which AIT systems have been deployed.

10. Admit.

11. Admit that TSA has stated that AIT systems would not be mandatory for passengers and that images produced by the AIT systems deployed at the airports cannot be stored, transmitted, or printed.

12. Deny except to admit that that images produced by AIT systems can be stored and transmitted only when in test mode at testing facilities.

13. Deny.

14. Deny.

15. Admit only that the House of Representatives passed H.R. 2200 on June 4, 2009. The remainder of this paragraph contains Plaintiff’s characterizations of H.R. 2200, to which no response is required. To the extent that a response is required, Defendant respectfully refers the Court to the text of H.R. 2200, which speaks for itself.

16. This paragraph contains Plaintiff’s characterizations of the status of H.R. 2200, to which no response is required. To the extent a response is deemed required, Defendant respectfully refers the Court to <http://thomas.loc.gov> for a complete and accurate representation of the status of the legislation.

17. Admit that TSA has installed approximately 446 AIT machines, which include both “backscatter” and “millimeter wave” machines, since June 2009.

18. Admit that on July 2, 2010, in the U.S. Court of Appeals for the D.C. Circuit, EPIC filed a petition for review concerning TSA's use of AIT and seeking, inter alia, an injunction preventing TSA from using AIT as a screening measure.

**The TSA's Full Body Scanner Program Places Air Travelers at Heightened Risk of Radiation-related Illness**

19. The term "experts" is vague and, as such, defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation.

20. Deny.

21. Admit that four professors at the University of California-San Francisco wrote a letter to President Obama in April 2010 expressing concerns about potential health risks they asserted could be posed by backscatter AIT machines, and requesting what they termed a "second independent evaluation" of backscatter machines. The professors expressed no concerns about millimeter wave AIT machines in their letter.

22. Admit that news reports have quoted Dr. Brenner as making the quoted assertion with regard to backscatter machines. Defendant further avers that one such news report, located at [http://articles.cnn.com/2010-11-12/travel/body.scanning.radiation\\_1\\_backscatter-radiological-research-radiation](http://articles.cnn.com/2010-11-12/travel/body.scanning.radiation_1_backscatter-radiological-research-radiation), also states that according to Dr. Brenner, "[t]he risk of harmful radiation exposure from backscatter scans is very small."

23. Deny. Defendant further avers that according to news reports, Professor Rez has speculated as to potential risks that might arise if TSA's backscatter machines were not properly maintained or operated, but these reports cite no evidence, from Professor Rez or otherwise, that TSA's backscatter machines are being improperly maintained or operated.

24. The term "other scientists and radiology experts" is vague and, as such, defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation.

**EPIC Submitted a FOIA Request to DHS Regarding the Radiation Risks of TSA's Full Body Scanner Program**

25. Admit. Defendant further avers that EPIC's request was received by the DHS FOIA office on July 20, 2010.

26. Admit that EPIC, in its letter dated July 13, 2010, requested expedited processing of its FOIA request on the bases stated. To the extent that EPIC alleges that its request met the criteria for expedited processing under 5 U.S.C. § 552(a)(6)(E), such an allegation is a conclusion of law to which no response is required. To the extent a response is deemed required, deny.

27. Admit that EPIC, in its letter dated July 13, 2010, requested "News Media" fee status. To the extent that EPIC alleges that it is a "representative of the news media," such an allegation is a conclusion of law to which no response is required. To the extent a response is deemed required, deny.

28. Admit.

29. Deny.

**DHS Failed to Make a Determination Regarding EPIC's FOIA Request and Failed to Produce Any Documents**

30. Admit.

31. Admit.

32. Admit.

33. Admit only that DHS, TSA, and S&T have not, through the date of the Complaint, released any records directly to Plaintiff. However, TSA has posted numerous records on its public website that are, or may be, responsive to Plaintiff's request, and TSA provided Plaintiff with an interim response, including links to those records, on December 23,

2010. TSA also held a conference call with plaintiff to discuss the scope of the request on December 17, 2010.

34. Deny. DHS, as set forth in its letter to EPIC on July 29, 2010, determined that the requested records were held by TSA and S&T and referred EPIC's request to those components for a direct response. S&T, as set forth in its letter to EPIC on September 8, 2010, determined that the requested records belonged to TSA, and accordingly referred the records to TSA for a direct response to EPIC. TSA's August 12, 2010 letter to EPIC constituted a determination regarding EPIC's request for the fee waiver, expedited processing, and news media status. Moreover, TSA determined that certain records responsive to EPIC's request had already been made publicly available and referred EPIC to those records in its letter of December 23, 2010.

**TSA Denied EPIC's Requests for Expedited Processing and a Fee Waiver**

35. Admit.

36. Admit.

37. Admit that as of the date of the Complaint, TSA had not made a determination as to EPIC's administrative appeal of TSA's denial of a fee waiver and expedited processing. Defendant further avers, however, that on November 24, 2010, Kimberly Walton of TSA's Office of Special Counsel sent EPIC a letter affirming the denial of expedited processing, but agreeing to waive fees.

**S&T Denied EPIC's Request for a Fee Waiver**

38. Admit.

**S&T Identified Responsive Agency Records, But Failed to Disclose the Documents**

39. Admit.

40. Admit that S&T did not release any records to plaintiff. Defendant further avers that, as stated in S&T's September 8 letter, S&T determined that these records originated with TSA and pursuant to 6 C.F.R. 5.4(c)(2), sent these records to TSA for review and determination for releasability.

41. Admit that TSA and S&T have not, as of the date of this pleading, released any records directly to Plaintiff; however, TSA has posted numerous records on its public website that are, or may be, responsive to Plaintiff's request, and TSA provided Plaintiff with an interim response, including links to those records, on December 23, 2010. TSA also held a conference call with plaintiff to discuss the scope of the request on December 17, 2010. Moreover, pursuant to 6 C.F.R. 5.4(c)(2), S&T referred EPIC's request to TSA for a direct response.

**EPIC Filed an Administrative Appeal with TSA**

42. Admit.

43. Admit that EPIC's October 21, 2010 appeal alleged that TSA failed to make a timely determination regarding EPIC's request, and renewed EPIC's request for news media status. Deny that EPIC's letter renewed EPIC's request for expedited processing.

44. Admit that TSA's November 5, 2010 letter contains the quoted excerpts, with the exception of the bracketed portions.

45. Admit that TSA's November 5, 2010 letter contains the quoted excerpts, with the exception of the bracketed portions.

46. This paragraph contains a legal conclusion to which no response is required. To the extent that a response is deemed required, deny that the letter "unlawfully place[d] EPIC's appeal in a queue for processing FOIA requests[.]"

**EPIC Filed An Administrative Appeal With S&T**

47. Admit that EPIC transmitted an administrative appeal to the DHS Associate General Counsel (General Law) that pertained to S&T's responses to EPIC's FOIA request.

48. Admit.

49. Admit only that S&T has not provided a written response to EPIC's administrative appeal. However, as stated in S&T's letter of September 8, S&T determined that any records in S&T's possession that were responsive to EPIC's request originated with TSA, and, pursuant to 6 C.F.R. 5.4(c)(2), sent these records to TSA for review and determination for releasability.

**Count I**

**Violation of the FOIA: Failure to Comply With Statutory Deadlines**

50. This paragraph realleges and incorporates all preceding paragraphs. To the extent a response is deemed required, Defendant respectfully refers the Court to its responses to specific preceding paragraphs.

51. This paragraph contains a legal conclusion to which no response is required. To the extent a response deemed required, deny.

52. This paragraph contains a legal conclusion to which no response is required. To the extent a response is deemed required, deny.

53. This paragraph contains legal conclusions regarding plaintiff's entitlement to injunctive relief, to which no response is required. To the extent a response is deemed required, deny.

**Count II**  
**Violation of the FOIA: Unlawful Withholding of Agency Records**

54. This paragraph realleges and incorporates all preceding paragraphs. To the extent a response is deemed required, Defendant respectfully refers the Court to its responses to specific preceding paragraphs.

55. This paragraph contains a legal conclusion to which no response is required. To the extent a response is deemed required, deny.

56. This paragraph contains a legal conclusion to which no response is required. To the extent a response is deemed required, deny.

57. This paragraph contains a legal conclusion to which no response is required. To the extent a response is deemed required, deny.

58. This paragraph contains legal conclusions regarding plaintiff's entitlement to injunctive relief, to which no response is required. To the extent a response is deemed required, deny.

Except to the extent expressly admitted or qualified above, Defendants deny each and every allegation of the Complaint. Defendant further denies that Plaintiff is entitled to any relief whatsoever.

The remainder of the Complaint is a prayer for relief to which no response is required. If a response is required, defendant denies that plaintiff is entitled to the relief requested or to any relief at all.

**Requested Relief**

WHEREFORE, having fully answered the Complaint, defendant prays that the Court:



1. Deny Plaintiff's request to order Defendant to produce all responsive agency records identified in Defendant's September 8, 2010 to EPIC within five days of the Court's Order in this matter;
2. Deny Plaintiff's request to order Defendant to make a complete determination regarding EPIC's FOIA Request within ten days of the date of the Court's Order in this matter;
3. Deny Plaintiff's request to order Defendant to produce all agency records responsive to EPIC's FOIA request within ten days of the Court's Order in this matter;
4. Deny Plaintiff's request to order Defendant to recognize EPIC's "news media" fee status for the purpose of EPIC's FOIA Request, waive all duplication fees, and disclose all responsive agency records without charge;
5. Deny Plaintiff's request to order Defendant to grant EPIC's request for expedited processing;
6. Deny Plaintiff's request for an award of costs and reasonable attorneys' fees incurred in this action;
7. Deny all other relief sought by Plaintiff;
8. Enter judgment dismissing the Complaint with prejudice; and
9. Award Defendant such relief as the Court may deem appropriate.

Date: January 5, 2010

Respectfully submitted,

TONY WEST  
Assistant Attorney General

RONALD C. MACHEN JR.  
United States Attorney for  
the District of Columbia

ELIZABETH J. SHAPIRO  
Deputy Branch Director

/s/ Jesse Z. Grauman  
JESSE Z. GRAUMAN (Va. Bar No. 76782)  
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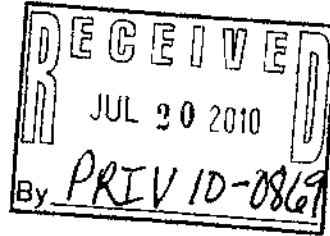
Attorneys for Defendants

# **Exhibit A**



July 13, 2010

VIA U.S. MAIL (CERTIFIED DELIVERY)  
Mary Ellen Callahan  
Chief Privacy Officer/Chief FOIA Officer  
The Privacy Office  
U.S. Department of Homeland Security  
245 Murray Drive SW, Building 410  
STOP-0655  
Washington, D.C. 20528-0655



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www.epic.org

**RE: Freedom of Information Act Request and Request for Expedited Processing**

Dear Ms. Callahan:

This letter constitutes a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center ("EPIC"). EPIC seeks agency records concerning radiation and health testing of Full Body Scanning ("FBS") devices.<sup>1</sup>

Background

The Transportation Security Administration ("TSA") currently operates Full Body Scanners at airports throughout the United States. The TSA uses two types of FBS devices: backscatter x-ray and millimeter wave.<sup>2</sup> Both types of FBS devices can capture, store, and transfer detailed, three-dimensional images of individuals' naked bodies. Experts have described full body scans as "digital strip searches."<sup>3</sup> In February 2007, the TSA, a Department of Homeland Security ("DHS") component, began testing FBS technology on American travelers.<sup>4</sup>

EPIC has pending Freedom of Information Act lawsuits against DHS and Department of Justice ("DOJ") regarding whole body imaging technology. As a result of

<sup>1</sup> The TSA currently refers to FBS devices as "advanced imaging technology" ("AIT"), and previously called the scanners "whole body imaging" ("WBI") devices. The terms "FBS" and "body scanners" in this request include all body scanners used by the Transportation Security Administration ("TSA") to screen passengers at domestic airports.

<sup>2</sup> TSA: Imaging Technology, [http://www.tsa.gov/approach/tech/imaging\\_technology.shtm](http://www.tsa.gov/approach/tech/imaging_technology.shtm) (last visited June 7, 2010).

<sup>3</sup> Joe Sharkey, *Whole-Body Scans Pass First Airport Tests*, N.Y. Times, Apr. 6, 2009, available at [http://www.nytimes.com/2009/04/07/business/07road.html?\\_r=1](http://www.nytimes.com/2009/04/07/business/07road.html?_r=1); Schneier on Security, June 9, 2005, [http://www.schneier.com/blog/archives/2005/06/backscatter\\_x-r.html](http://www.schneier.com/blog/archives/2005/06/backscatter_x-r.html) ("[whole body imaging] technology is incredibly intrusive. I don't think that people should be subjected to strip searches before they board airplanes.") (last visited June 11, 2010).

<sup>4</sup> TSA: Imaging Technology, [http://www.tsa.gov/approach/tech/imaging\\_technology.shtm](http://www.tsa.gov/approach/tech/imaging_technology.shtm) (last visited February 3, 2010).

these lawsuits, EPIC has received hundreds of pages of contracts, traveler complaints, TSA specifications, and other documents from DHS and DOJ.<sup>5</sup>

### Body Scanners Subject Air Travelers to Radiation and Health Risks

The health risks posed by the deployment of body scanners in US airports have not yet been fully assessed. FBS devices subject air travelers to radiation during each FBS scan.<sup>6</sup> While TSA has commissioned a Johns Hopkins University study on the machines, no independent study has been conducted on the health risks of these scanners.<sup>7,8</sup>

Experts recognize that frequent exposure to radiation is harmful. The Environmental Protection Agency has documented that frequent exposure to radiation, even in low individual doses, can lead to cancer and birth defects.<sup>9</sup> Studies on Terahertz Wave (T-wave) revealed that exposure to such radiation can cause DNA damage that results in cancer.<sup>10</sup> A recent report by the European Commission found that "it is evident any exposure to ionising radiation, however small, may have health effects in the longer term."<sup>11</sup> American scientists have also expressed concerns regarding the aggregate effect of body scanner radiation on the traveling population.<sup>12</sup>

University of California biochemist David Agard has stated that "While the dose would be safe if it were distributed throughout the volume of the entire body, the dose to the skin may be dangerously high. Ionizing radiation such as the X-rays used in these scanners have the potential to induce chromosome damage, and that can lead to cancer."<sup>13</sup>

The dose of radiation that FBS puts forth is especially risky for certain segments of the population. Professor Agard and several other experts wrote a recent letter to Dr.

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<sup>5</sup> EPIC, *Whole Body Imaging Technology and Body Scanners*, <http://epic.org/privacy/airtravel/backscatter/>; EPIC, *EPIC v. DHS*, [http://epic.org/privacy/airtravel/backscatter/epic\\_v\\_dhs.html](http://epic.org/privacy/airtravel/backscatter/epic_v_dhs.html).

<sup>6</sup> David Brenner, *Congressional Biomedical Research Caucus: Airport Screening: The Science and Risks of Backscatter Imaging*, 2010, available at <http://blip.tv/file/3379880>.

<sup>7</sup> The TSA Blog, *Advanced Imaging Technology: "Radiation Risk Tiny,"* March 11, 2010, <http://blog.tsa.gov/2010/03/advanced-imaging-technology-radiation.html>

<sup>8</sup> [http://epic.org/privacy/airtravel/backscatter/EPIC-Nader\\_WBI\\_Letter.pdf](http://epic.org/privacy/airtravel/backscatter/EPIC-Nader_WBI_Letter.pdf)

<sup>9</sup> <http://www.bloomberg.com/apps/news?pid=20601209&sid=aoG.YbbvnkzU>

<sup>10</sup> <http://www.technologyreview.com/blog/arxiv/24331/>

<sup>11</sup> Commission to the European Parliament, *Communication on the Use of Security Scanners at EU Airports*, June 15, 2010, [http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBiQFjAA&url=http%3A%2F%2Fec.europa.eu%2Ftransport%2Fair%2Fsecurity%2Fdoc%2Fcom2010\\_311\\_security\\_scanners\\_en.pdf&ei=h6k0TODUFMSBIAenwMzSBw&usq=AFQjCNF7Ck0G64bzz4rjFHukJOp4XDavGA](http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBiQFjAA&url=http%3A%2F%2Fec.europa.eu%2Ftransport%2Fair%2Fsecurity%2Fdoc%2Fcom2010_311_security_scanners_en.pdf&ei=h6k0TODUFMSBIAenwMzSBw&usq=AFQjCNF7Ck0G64bzz4rjFHukJOp4XDavGA) (p. 16)

<sup>12</sup> Kate Schneider, "Naked" Scanners May Increase Cancer Risk, [news.com.au](http://www.news.com.au/travel/news/naked-scanners-may-increase-cancer-risk/story-e6frfq80-1225868706270), May 19, 2010, <http://www.news.com.au/travel/news/naked-scanners-may-increase-cancer-risk/story-e6frfq80-1225868706270>

<sup>13</sup> Ben Mutzabaugh, *Full-body Scanners Could Pose Cancer Risk at Airports, U.S. Scientists Warn*, USA Today, July 1, 2010, <http://travel.usatoday.com/flights/post/2010/07/full-body-scanners-pose-cancer-risk-at-airports-us-scientists-warn/98552/1>

John P. Holdren, the Assistant to the President for Science and Technology.<sup>14</sup> They called for further evaluation of the FBS technology, and identified several groups of people – including children and pregnant women, as being especially at risk of harm from the scans.<sup>15</sup> They letter stated that a “large population of older travelers, >65 years of age, is particularly at risk from the mutagenic effects of the X-rays based on the known biology of melanocyte aging.”<sup>16</sup> The experts also noted, “A fraction of the female population is especially sensitive to ... radiation leading to breast cancer. Notably, because these women, who have defects in DNA repair mechanisms, are particularly prone to cancer, X-ray mammograms are not performed on them. The dose to breast tissue beneath the skin represents a similar risk.”<sup>17</sup> Dr. Agard and the other experts also stated, “The population of immunocompromised individuals--HIV and cancer patients (see above) is likely to be at risk for cancer induction by the high skin dose [of FBS technology radiation].”<sup>18</sup>

Other experts have said that FBS radiation could be especially harmful to some segments of the population. In a report restricted to certain agencies and not meant for public dissemination, the Inter-Agency Committee on Radiation Safety said “pregnant women and children should not be subject to scanning.”<sup>19</sup> The European Commission report called for a similar exception for pregnant women and children, stating that “Special considerations might also be called for when it comes to passengers that are especially sensitive to ionising radiation, primarily pregnant women and children.”<sup>20</sup> In his recent address to the Congressional Biomedical Caucus, Columbia Professor Dr. David Brenner agreed, stating that the dose of radiation delivered by FBS machines would be particularly risky for children and members of the population with a genetically higher sensitivity to radiation.<sup>21</sup>

Experts have also reported that body scanners may emit up to twenty times the reported amount of radiation.<sup>22</sup> Dr. Brenner noted that FBS machines expose the skin of the scalp to up to twenty times the reported amount of radiation.<sup>23</sup> He pointed out that skin is one of the most radiation-sensitive parts of the body.<sup>24</sup>

<sup>14</sup> Drs. John Sedat, David Agard, Marc Shuman, and Robert Stroud, *Letter of Concern to Dr. John P. Holdren, Assistant to the President for Science and Technology*, April 6, 2010, available at: <http://www.npr.org/assets/news/2010/05/17/concern.pdf>

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> <http://www.bloomberg.com/apps/news?pid=20601209&sid=aoG.YbbvknkzU>

<sup>20</sup> Commission to the European Parliament, *Communication on the Use of Security Scanners at EU Airports*, June 15, 2010, [http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBIQFjAA&url=http%3A%2F%2Fec.europa.eu%2Ftransport%2Fair%2Fsecurity%2Fdoc%2Fcom2010\\_311\\_security\\_scanners\\_en.pdf&ei=h6k0TODUFMSBIAenwMzSBw&usq=AFQjCNF7Ck0G64bzz4riFHukJOp4XDaVGA](http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBIQFjAA&url=http%3A%2F%2Fec.europa.eu%2Ftransport%2Fair%2Fsecurity%2Fdoc%2Fcom2010_311_security_scanners_en.pdf&ei=h6k0TODUFMSBIAenwMzSBw&usq=AFQjCNF7Ck0G64bzz4riFHukJOp4XDaVGA) (p. 16)

<sup>21</sup> David Brenner, *Congressional Biomedical Research Caucus: Airport Screening: The Science and Risks of Backscatter Imaging*, 2010, available at <http://blip.tv/file/3379880>.

<sup>22</sup> *Id.*

<sup>23</sup> David Brenner, *Congressional Biomedical Research Caucus: Airport Screening: The Science and Risks of Backscatter Imaging*, 2010, available at <http://blip.tv/file/3379880>.

<sup>24</sup> *Id.*

Dr. Agard and the other drafters of the letter to the Assistant to the President for Science and Technology called for a truly independent review of FBS technology because the true extent of the risk "can only be determined by a meeting of an impartial panel of experts that would include medical physicists and radiation biologists at which all of the available relevant data is reviewed." In his address to the Congressional Biomedical Caucus, Dr. Brenner also called for greater testing of FBS technology and the effects of "low dose" radiation.<sup>25</sup>

#### Documents Requested

EPIC requests the following agency records in the possession of DHS:

1. All records concerning TSA tests regarding body scanners and radiation emission or exposure.
2. All records concerning third party tests regarding body scanners and radiation emission or exposure.

#### Request for Expedited Processing

This request warrants expedited processing because it is made by "a person primarily engaged in disseminating information ..." and it pertains to a matter about which there is an "urgency to inform the public about an actual or alleged federal government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II) (2008); *Al-Fayed v. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001).

EPIC is "primarily engaged in disseminating information." *American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

There is a particular urgency for the public to obtain information about the health implications of the TSA's whole body imaging program. The TSA is presently expanding its FBS program to be used as the primary screening method in all domestic airports.<sup>26</sup> The systems expose passengers to radiation, the exposure levels have not been independently verified, and scientists have warned of the serious health risks for air travelers.

While the TSA claims that the FBS devices do not subject travelers to harmful levels of radiation, the agency has presented no evidence to support that assertion. The documents requested by EPIC will inform the public about the safety of the FBS scanners being deployed at airports nationwide.

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<sup>25</sup> *Id.*

<sup>26</sup> *An Assessment of Checkpoint Security: Are Our Airports Keeping Passengers Safe?: Hearing Before the Subcomm. On Transp. Sec. and Infrastructure Prot., 111th Cong. (2010) (statement of Robin Kane, Assistant Administrator, Operational Process and Technology, Transportation Security Administration), also available at <http://hsc.house.gov/SiteDocuments/20100317140301-14594.pdf>.*

Request for News Media Fee Status

EPIC is a "representative of the news media" for fee waiver purposes. *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on our status as a "news media" requester, we are entitled to receive the requested record with only duplication fees assessed. Further, because disclosure of this information will "contribute significantly to public understanding of the operations or activities of the government," any duplication fees should be waived.

Thank you for your consideration of this request. As provided in 6 C.F.R. § 5.5(d)(4), I will anticipate your determination on our request for expedited processing with ten (10) calendar days.

Sincerely,

Ginger P. McCall  
Staff Counsel  
Electronic Privacy Information Center



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

\_\_\_\_\_) )  
ELECTRONIC PRIVACY INFORMATION CENTER,) )  
 ) )  
Plaintiff, ) )  
 ) )  
v. ) Case No. 1:10-cv-1992 (ABJ)  
 ) )  
THE UNITED STATES DEPARTMENT OF ) )  
HOMELAND SECURITY, ) )  
 ) )  
Defendant. ) )  
\_\_\_\_\_)

**DEFENDANT’S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE**

Pursuant to Local Civil Rule 7(h) of the Rules of the United States District Court for the District of Columbia, Defendant United States Department of Homeland Security (“DHS”) hereby submits the following statement of material facts as to which the defendant contends there is no genuine issue in connection with its motion for summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure. Where appropriate, the statement cites to the Declarations attached to its motion for summary judgment and supporting exhibits.

1. On July 13, 2010, Plaintiff, the Electronic Privacy Information Center (“EPIC”), submitted a request under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), to DHS, seeking the following agency records:
  - a. All records concerning TSA tests regarding body scanners and radiation emission or exposure; and
  - b. All records concerning third party tests regarding body scanners and radiation emission or exposure.

Declaration of Paul Sotoudeh (“Sotoudeh Decl.”) (Ex. 1) ¶ 4 & Ex. A. EPIC requested expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E), and preferential fee status as a “representative of the news media” pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II). Id. Ex. A.

2. DHS transferred EPIC’s FOIA request to two of its components, the Transportation Security Administration (“TSA”) and the Science and Technology Directorate (“S&T”), and informed EPIC of this referral by letter dated July 29, 2010. Id. ¶¶ 5-6 & Ex. B.

3. TSA directed that two of its offices, the Office of Security Technology (“OST”) and the Office of Occupational Safety, Health, and Environment (“OSHE”), search for responsive records. Id. ¶ 13. OST is responsible for TSA’s programs for transportation screening equipment and explosive detection solutions, including the AIT program, and administers contracts with vendors of AIT technology. Id. OSHE is responsible for all safety and environmental activities within TSA. Id. ¶ 15.

4. Both OST and OSHE performed electronic and manual searches for responsive records. Id. ¶¶ 16-17.

5. S&T directed two of its offices, the Test, Evaluation, and Standards Office (“TES”), and the Transportation Security Laboratory (“TSL”), to conduct searches. Declaration of Bert Coursey (“Coursey Decl.”) (Ex. 2) ¶¶ 12-13, 16; Declaration of Pamela Beresford (“Beresford Decl.”) (Ex. 3) ¶ 12. TES develops standards for various equipment, products, and services, including those used for explosives detection, coordinates such activities between other federal agencies, and supports TSA in their certifying and testing AIT systems before they are deployed at airports. Coursey Decl. ¶¶ 3-4. TSL performs research, development and validation of solutions to address threats to transportation security, and has coordinated and collaborated with federal agencies, including the Food and Drug Administration (“FDA”) and National

Institute on Standards and Technology (“NIST”), that have engaged in testing security technologies for radiation safety. Beresford Decl. ¶¶ 5-6.

6. Both TES and TSL searched the records of those individuals within these components whom these components determined were likely have responsive records. Coursey Decl. ¶¶ 14-15, 17-21; Beresford Decl. ¶¶ 14-22.

7. Because the responsive records belonging to TSL and TES concern the AIT program, which is implemented by the TSA, and because many of the records in the possession of TSL and TES consisted of correspondence to and from TSA personnel, TSA was consulted to assist in the processing of these records pursuant to 6 C.F.R. § 5.4(c)(1), a DHS FOIA regulation that allows for consultation between DHS components and other agencies. Beresford Decl. ¶ 23; Coursey Decl. ¶ 22. TSA assisted in reviewing TES and TSL records for responsiveness and eliminating duplicate records, as well as in determining whether records were exempt from disclosure under FOIA Exemptions 3 and 4. Beresford Decl. ¶¶ 23-25; Coursey Decl. ¶¶ 22-23; Sotoudeh Decl. ¶ 25, 43-44.

8. In addition, for two records concerning testing by the FDA on the impact of millimeter wave AIT technology on personal medical devices, the FDA was consulted pursuant to 6 C.F.R. § 5.4(c)(1), and processed these records. See Beresford Decl. ¶¶ 30, 42; Declaration of Joy Lazaroff (“Lazaroff Decl.”) (Ex. 4) ¶¶ 3-7.

9. EPIC filed this civil action on November 19, 2010, alleging that DHS had violated FOIA with regard to the July 13, 2010 request and asking the Court to order DHS to produce the responsive documents. Compl. ¶¶ 50-58 & Requested Relief, ¶¶ A-C.

10. By letter on December 22, 2010, TSA sent EPIC a letter that included links to numerous responsive records that had already been made publicly available on the TSA website. See Sotoudeh Decl. ¶ 20 & Ex. G.

11. TSA produced responsive documents to EPIC on June 6, 2011. Id. ¶ 21 & Ex. H. TSA and S&T (including TES and TSL) produced responsive documents to EPIC on June 21, 2011, id. ¶ 22 & Ex. I; Beresford Decl. ¶ 26 & Ex. A; Coursey Decl. ¶ 24. S&T also notified EPIC on this date that certain records containing potentially confidential business information were being withheld because the “submitter notice process” pursuant to Executive Order 12600 had not yet been completed. Beresford Decl. ¶ 26 & Ex. A. On this date, TSA also referred EPIC to a section of its website that now includes hundreds of pages of Site Acceptance Tests (“SATs”) and Factory Acceptance Tests (“FATs”), Sotoudeh Decl. ¶ 22 & Ex. I, posted online at [http://www.tsa.gov/research/reading/xray\\_screening\\_technology\\_safety\\_reports\\_march\\_2011.shtm](http://www.tsa.gov/research/reading/xray_screening_technology_safety_reports_march_2011.shtm).

12. On July 27, 2011, TES made a supplemental production consisting of documents, and excerpts thereof, previously withheld that were subsequently determined to be releasable, either in full or in part. Coursey Decl. ¶ 25.

13. On September 7, 2011, TSL and TSA made a final production, including records that had initially been withheld pending completion of the submitter notice process and review for sensitive security information (“SSI”), but were subsequently determined to be releasable, as well as records that had been initially withheld either in whole or in part under Exemption 4 but, upon reassessment by Defendant, were determined to be releasable. Beresford Decl. ¶ 27 & Ex. B; Sotoudeh Decl. ¶ 23 & Ex. J.

14. During a conference call between the parties on January 19, 2011, EPIC agreed to narrow its request to records pertaining to vendors and technologies that are either currently being deployed by TSA, or are under consideration by TSA. Sotoudeh Decl. ¶ 12.

15. TSA, TES, and TSL have withheld certain records or portions thereof from disclosure. In support of these withholdings, TSA, TES, and TSL have asserted the exemptions established by 5 U.S.C. § (b)(3) (“Exemption 3”), (b)(4) (“Exemption 4”), (b)(5) (“Exemption 5”), and (b)(6) (“Exemption 6”). See Sotoudeh Decl. ¶¶ 25-71 & Ex. K (TSA Vaughn index); Coursey Decl. ¶¶ 27-42 & Ex. A (TES Vaughn index); Beresford Decl. ¶¶ 28-43 & Ex. C (TSL Vaughn index); Lazaroff Decl. ¶¶ 6-14.

16. On August 5, 2011, EPIC agreed that it would not contest DHS’s withholdings pursuant to FOIA Exemption 6, as well as any of DHS’s withholdings pursuant to Exemption 4 that consisted of documents withheld solely because they were subject to copyright. See E-mail from John Verdi to Jesse Grauman, Aug. 5, 2011 (Ex. 9).

17. With regard to the withholdings under Exemption 4 that are at issue between the parties, TSA (on behalf of itself, TES, and TSL) and FDA (on behalf of TSL for a limited subset of records) contacted five corporations that had submitted certain information to the government contained in the responsive records, pursuant to Executive Order 12600. See Sotoudeh Decl. ¶¶ 43-44; Coursey Decl. ¶ 22; Beresford Decl. ¶¶ 24, 30, 42; Lazaroff Decl. ¶¶ 3-7. As a result, certain records or portions thereof have been withheld because they have been determined to constitute “commercial or financial information obtained from a person and privileged or confidential.” In support of these assertions, Defendants have attached the declarations of representatives of four of these corporations, all of which are manufacturers of AIT systems: Peter Modica, Rapiscan Systems, Inc. (“Modica Decl.”) (Ex. 5); Scott Trospen, L-3

Communications (“Trosper Decl.”) (Ex. 6); Joseph Callerame, American Science & Engineering (“Callerame Decl.”) (Ex. 7), and Rory Doyle, Smiths Detection Ireland (“Doyle Decl.”) (Ex. 8).

18. The Sotoudeh, Coursey, and Beresford Declarations set forth the details of the scope of DHS’s search, and these declarations, and their attached Vaughn indices, set forth the grounds on which DHS has based its withholdings pursuant to the FOIA exemptions at issue between the parties. As to Exemption 4 specifically, DHS also submits the Lazaroff, Modica, Trosper, Callerame, and Doyle Declarations in support of its withholdings.

19. To the extent possible, the DHS components endeavored to provide all reasonably segregable non-exempt information to EPIC, and withheld records in full only when no meaningful non-exempt portions thereof remained. See Sotoudeh Decl. ¶ 72; Coursey Decl. ¶ 43; Beresford Decl. ¶ 44.

Date: September 12, 2011

Respectfully submitted,

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Assistant Attorney General

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United States Attorney for  
the District of Columbia

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Deputy Branch Director

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Attorneys for Defendants

# Exhibit 1

## Declaration of Paul Sotoudeh



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

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)  
ELECTRONIC PRIVACY INFORMATION CENTER )  
)  
Plaintiff, )  
)  
v. ) Case No. 1:10-cv-1992 (ABJ)  
)  
THE UNITED STATES DEPARTMENT OF )  
HOMELAND SECURITY, )  
)  
Defendant. )  
\_\_\_\_\_

**DECLARATION OF PAUL SOTOUDEH**

I, Paul Sotoudeh, do hereby declare as follows:

1. I am currently the Acting Freedom of Information Act (FOIA) Officer for the Transportation Security Administration (“TSA”) within the Department of Homeland Security (“DHS”).

2. Due to the nature of my official duties, I am familiar with DHS and TSA’s obligations under FOIA and the Privacy Act, including application of the various exemptions. The statements made in this declaration are based on my personal knowledge, information made available to me in the performance of my official duties, and conclusions reached in accordance therewith.

3. The purpose of this declaration is to set forth the chronology of correspondence relating to the FOIA requests by the Plaintiff, the Electronic Privacy Information Center (“EPIC”), at issue in this action, to describe the searches conducted to identify responsive records, to explain TSA’s procedures for processing responsive records; and to identify the basis for TSA’s decision to withhold information requested by EPIC pursuant to exemptions 3, 4, 5

and 6 of the FOIA. In addition, as discussed further below, this declaration also explains the basis for a limited number of withholdings made in the records of the Science and Technology Directorate (“S&T”), another component of DHS, pursuant to Exemptions 3 and 4.

#### FOIA Request

4. By letter dated July 13, 2010, Ginger P. McCall submitted a FOIA request (“the request”) on behalf of EPIC to DHS. The request is attached as Exhibit A. EPIC sought the following two categories of records:

- 1) All records concerning TSA tests regarding body scanners and radiation emission or exposure; and
- 2) All records concerning third party tests regarding body scanners and radiation emission or exposure.

5. Upon initial review of the request, DHS determined that the information sought by EPIC was under the purview of two agency components, TSA and S&T, and on July 29, 2010, DHS referred the FOIA request to both TSA and S&T.

6. By letter dated July 29, 2010, DHS acknowledged EPIC’s request and informed it of the referrals to TSA and S&T. This letter is attached as Exhibit B.

7. TSA assigned FOIA request identification number TSA10-0674 to the request.

8. By letter dated August 12, 2010, TSA acknowledged receipt of the request and denied its request for a fee waiver and expedited processing. This letter is attached as Exhibit C.

9. By letter dated August 27, 2010, Ginger McCall, on behalf of EPIC, wrote Kimberly Walton, TSA Special Counselor, to appeal “TSA’s denial of EPIC’s request for a fee waiver and expedited processing.” This letter is attached as Exhibit D.

10. By letter dated September 21, 2010, TSA acknowledged receipt of EPIC’s FOIA appeal of the TSA denial of its request for fee waiver and expedited processing. This letter is

attached as Exhibit E.

11. By letter dated November 24, 2010, TSA affirmed its initial expedited processing denial but agreed to waive the fees. This letter is attached as Exhibit F.

12. During a phone call on January 19, 2011, EPIC agreed to limit the scope of its request to records pertaining to vendors and technologies that were either (1) currently being deployed by TSA, or (2) under consideration by TSA. Accordingly, any records located by either TSA or S&T pertaining to vendors or technologies that are not either being deployed by TSA or under consideration by TSA have been deemed non-responsive to EPIC's request.

#### Scope of Search for Responsive Records

13. TSA's FOIA Office identified TSA offices that were most likely to have records concerning the two items in Plaintiff's request and directed that they search for responsive records. The offices identified as likely to have responsive records were the Office of Security Technology ("OST"), and the Office of Occupational Safety, Health, and Environment ("OSHE"), which is under the Office of the Chief Administrative Officer ("CAO"). These offices were therefore directed to search for responsive records.

14. The Office of Security Technology ("OST") is responsible for TSA's programs for transportation screening equipment and explosive detection solutions. Specifically, the Advanced Imaging Technology ("AIT") program is part of the Passenger Screening Program ("PSP") within the OST, which focuses on identifying, testing, procuring, deploying, and sustaining checkpoint security equipment that detects explosives and/or prohibited items that may be concealed on people and/or their carry-on items. OST also administers the contracts with the respective AIT vendors. This administration includes, but is not limited to, oversight of Factory Acceptance Tests and Site Acceptance Tests. A Factory Acceptance Test ("FAT") is

conducted on each AIT machine at the manufacturer's facility prior to shipment to ensure that system is in compliance with contractual requirements. A Site Acceptance Test ("SAT") is conducted on each AIT machine at every installation site location to ensure the system is properly set up, operationally configured, and remains in compliance with contractual requirements. Both FATs and SATs are witnessed by Government and/or Government-designated representative(s). The PSP also maintains, and is responsible for, many of the records posted to the TSA's public website, including those records referenced in letters sent to EPIC on December 22, 2010 and June 21, 2011, which are further described below.

15. OSHE is responsible for all safety and environmental activities within TSA. OSHE provides program support and technical assistance to TSA Headquarters, airports, and other field units on all matters relating to occupational safety, health, and environmental (including hazardous material) management. OSHE also interfaces with S&T, the other DHS component that was tasked with EPIC's FOIA request.

16. Both OST and OSHE performed both electronic and manual searches.

17. The following terms were used in the electronic search conducted by OSHE: "Advanced Imaging Technology," "AIT," "radiation," "surveys," "assessment," "evaluation," "backscatter," "general-use," "millimeter wave," "FDA," "Food and Drug Administration," "Ionizing radiation," "x-rays," "Health Physics Society," "HPS," "ANSI," "American National Standards Institute," "U.S. Army Public Health Command," "USAPHC," "USACHPPM," Johns Hopkins University, Applied Physics Laboratory, JHU, APL, "Certified Health Physicists," "and CHP."

18. OST electronically searched for responsive records by searching the "AIT"-related folder on the computer of the Deputy Program Manager for the Passenger Screening

Program (“PSP”). In addition to these records, a review of emails in the AIT folder revealed only transmittal or other non-substantive or non-responsive emails. As such, they were not deemed responsive to the request.

19. During the course of the search by both offices, it was determined that thousands of pages of responsive records either were already posted, or were in the process of being posted, to TSA’s public website, located at [www.tsa.gov](http://www.tsa.gov). As described further below, links to these records were included in TSA’s response letters to EPIC.

#### Release of Responsive Records

20. By letter dated December 22, 2010, TSA provided an interim response letter to EPIC’s request. This letter is attached as Exhibit G. In that letter, TSA identified several responsive TSA records that were publicly available and posted, or linked to, on TSA’s public web page on AIT safety and in the TSA Electronic Reading Room. TSA identified those publicly available records and provided the web addresses and links to those records, which included:

- *Assessment of the Rapiscan Secure 1000 Body Scanner for Conformance with Radiological Safety Standards*, Frank Cerra, Food and Drug Administration’s Center for Devices and Radiological Health (“CDRH”), July 21, 2006, [http://www.tsa.gov/assets/pdf/rapiscan\\_secure\\_1000.pdf](http://www.tsa.gov/assets/pdf/rapiscan_secure_1000.pdf)<sup>1</sup>
- *Radiation Safety Engineering Assessment Report for the Rapiscan Secure 1000 in Single Pose Configuration*, Applied Physics Laboratory (“APL”), Johns Hopkins University, October 2009 & August 2010 (Versions 1 & 2), [http://www.tsa.gov/assets/pdf/jh\\_apl\\_v1.pdf](http://www.tsa.gov/assets/pdf/jh_apl_v1.pdf), [http://www.tsa.gov/assets/pdf/jh\\_apl\\_v2.pdf](http://www.tsa.gov/assets/pdf/jh_apl_v2.pdf)
- TSA Memorandum on Implementing the Recommendations from the APL

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<sup>1</sup> In TSA’s letter to EPIC, attached as Exhibit G, the link to Mr. Cerra’s report was [http://www.tsa.gov/assets/pdf/nist\\_rapiscan\\_secure\\_1000.pdf](http://www.tsa.gov/assets/pdf/nist_rapiscan_secure_1000.pdf). The link has since been updated to [http://www.tsa.gov/assets/pdf/rapiscan\\_secure\\_1000.pdf](http://www.tsa.gov/assets/pdf/rapiscan_secure_1000.pdf) to reflect the fact that although Mr. Cerra wrote this report while he was affiliated with the National Institute on Standards and Technology (“NIST”), his work was performed on behalf of CDRH, not on behalf of NIST.

Assessment, October 7, 2010,

[http://www.tsa.gov/assets/pdf/tsa\\_safety\\_study\\_ait\\_info\\_memo.pdf](http://www.tsa.gov/assets/pdf/tsa_safety_study_ait_info_memo.pdf)

- Fact Sheet: Advanced Imaging Technology (AIT) Health & Safety, Department of Homeland Security, DHS Office of Health Affairs,  
[http://www.tsa.gov/assets/pdf/ait\\_fact\\_sheet.pdf](http://www.tsa.gov/assets/pdf/ait_fact_sheet.pdf)
- TSA Blog, “White House Blog: Backscatter Backstory” November 9, 2010,  
<http://blog.tsa.gov/2010/11/white-house-blog-backscatter-back-story.html>

21. By letter dated June 6, 2011, TSA provided a second interim response to EPIC’s request and released responsive records to EPIC. The response letter is attached as Exhibit H. The June 6, 2011 response included a total of 128 pages, 84 of which were released in full and 42 of which were withheld in part. In this letter, TSA also identified 5 pages of responsive records that were withheld in full pursuant to FOIA Exemption 5.

22. On June 21, 2011, TSA released an additional 69 pages of responsive documents to EPIC, 25 of which were released in their entirety and 44 of which were released in part. This letter is attached as Exhibit I. In this letter, TSA also provided an address of a web page on TSA’s public website to which hundreds of additional pages of records responsive to EPIC’s request have been posted for viewing and download. The web page address provided was [http://www.tsa.gov/research/reading/xray\\_screening\\_technology\\_safety\\_reports.shtm](http://www.tsa.gov/research/reading/xray_screening_technology_safety_reports.shtm). This web page includes links to radiation surveys concerning baggage screening equipment (which are not responsive to EPIC’s request) and backscatter AIT machines (which are responsive to EPIC’s request). The backscatter AIT radiation surveys linked on this web page consist of the Site Acceptance Tests (“SATs”) and Factory Acceptance Tests (“FATs”) that are maintained by OST and are described in more detail above in Paragraph 14. They are currently located at [http://www.tsa.gov/research/reading/xray\\_screening\\_technology\\_safety\\_reports\\_march\\_2011.shtm](http://www.tsa.gov/research/reading/xray_screening_technology_safety_reports_march_2011.shtm) and can be downloaded at any time. To provide additional transparency, all future radiation

survey reports will be posted on TSA's website after they are completed.

23. On September 7, 2011, eighteen (18) pages of TSA records were re-released to EPIC. These records were re-released after TSA, upon further examination and consultation, determined that certain excerpts previously withheld under Exemption 4 could, in fact, be publicly released. The email accompanying this release is attached as Exhibit J.

24. During the processing of responsive records, to the extent possible, if TSA and S&T records contained identical documents, an effort was made to eliminate duplicates to avoid the possibility of inconsistent application of FOIA exemptions. Notwithstanding these efforts, some duplicates remained in the final document production.

#### Exemptions

25. The following paragraphs generally describe the records withheld by TSA pursuant to FOIA's exemptions at 5 U.S.C. § 552(b). These records are described in greater detail in the TSA Vaughn index, attached as Exhibit K. These paragraphs also describe, where applicable, records withheld by S&T's components, the Test, Evaluation and Standards Office ("TES") and the Transportation Security Laboratory ("TSL"), pursuant to Exemptions 3 and 4. TSA was consulted to assist in processing these records pursuant to 6 C.F.R. § 5.4(c)(1). These records are described in greater detail in the TES and TSL Vaughn indices, attached as Exhibit A to the Declaration of Bert Coursey and Exhibit C to the Declaration of Pamela Beresford, respectively.

#### ***Exemption 6***

26. Exemption 6 of FOIA exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

27. As set forth in the TSA Vaughn index, records on the following Bates-numbered pages in TSA's records were redacted in part pursuant to Exemption 6 because they contained the names, email addresses, and phone numbers of both government and non-government employees: Bates Nos. 000001, 000007-000008, 000015-000016, 000017-000019, 000026-000027, 000037-000038, 000042, 000047, 000049-000051, 000052, 000053-000054, 000055-000056, 000069-000070, 000071-000072, 000073, 000106, 000107-000108, 000111-000112, 000113-000114, 000115-000118, 000120, 000127, 000129, 000133-000135, 000136, 000139, 000140, 000141-000143, 000145-000149, 000151-000152, 000154, 000156-000160, 000165, 000167-000171, 000174, 000181, and 000192-000195.

28. In addition, as set forth in the last row of the TSA Vaughn index, the SATs and FATs posted online at [http://www.tsa.gov/research/reading/xray\\_screening\\_technology\\_safety\\_reports\\_march\\_2011.shtml](http://www.tsa.gov/research/reading/xray_screening_technology_safety_reports_march_2011.shtml) all have been redacted to withhold the names, signatures, and initials of both government and non-government employees. These withholdings are contained throughout the SATs and FATs. They are the only portions of the SATs and FATs withheld from release; in all other respects, these documents have been released in their entirety.

29. Disclosure of the information specified above would constitute a clearly unwarranted invasion of the personal privacy of the individuals referenced. The privacy interests of the individuals referenced outweigh any minimal public interest in disclosure.

#### ***Exemption 5***

30. Exemption 5 of FOIA exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption has been interpreted to



encompass the privileges typically available to a party in litigation. As described below, TSA has asserted Exemption 5 to withhold information protected under the deliberative process privilege and the attorney-client privilege.

*Deliberative Process Privilege*

31. TSA has asserted Exemption 5 to withhold certain information protected under the deliberative process privilege. The deliberative process privilege protects internal agency communications that are both predecisional, that is, that predate an agency decision or policy, and deliberative, that is, containing recommendations or opinions on legal or policy matters. It therefore applies to records such as recommendations, evaluations, drafts, proposals, suggestions, and other subjective documents (and excerpts thereof) which do not reflect final agency policy.

32. There are three primary concerns recognized under the deliberative process privilege: (1) to encourage open and frank discussion of policy matters between subordinates and supervisors; (2) to protect against the premature disclosure of proposed policies before they become final; and (3) to protect against public confusion that might result from the disclosure of reasons and rationales that were not, in fact, the ultimate grounds for the agency's action.

33. As described more specifically in the TSA Vaughn index, portions of the responsive records were withheld in part, and certain records were withheld in full, pursuant to the deliberative process privilege. These records, or portions thereof, are internal government e-mails, memoranda, and documents.

34. The records, or portions thereof, withheld pursuant to the deliberative process privilege fit into the following general categories. More specific descriptions are contained in the numbered entries in the TSA Vaughn index:

- a. **Draft documents, and deliberations, comments, and opinions offered during the drafting of documents.** See TSA Vaughn Index, Bates Nos. 18, 26-27, 52, 69-70, 70A-C, and 108A-F.
- b. **Recommendations regarding future policy steps:** See TSA Vaughn Index, Bates Nos. 38, 42, and 128.
- c. **General deliberations on policy matters concerning AIT and radiation safety.** See TSA Vaughn Index, Bates Nos. 7-8, 71-72, and 71A.

*Attorney-Client Privilege*

35. The attorney-client privilege protects confidential communications made between clients and their attorneys for the purpose of securing legal advice or services. It encompasses facts divulged by a client to the client's attorney, as well as communications from the attorney to the client based upon and reflecting those facts.

36. TSA has withheld portions of two pages containing an internal email, including draft language, from an attorney in TSA's Office of Chief Counsel to TSA official regarding a suggested response letter to EPIC's petition to suspend the use of AIT. See TSA Vaughn Index, Bates Nos. 000026-27. These records have also been withheld under the deliberative process privilege.

*Exemption 3*

37. Exemption 3 of FOIA allows the withholding of information 'specifically exempted from disclosure by statute . . . if that statute "(A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009,

specifically cites to this paragraph.” 5 U.S.C. § 552(b)(3).

38. 49 U.S.C. § 114(r) prohibits the disclosure of certain “sensitive security information” (“SSI”) notwithstanding the FOIA. Disclosure of such information is prohibited if TSA determines that its disclosure would “(A) be an unwarranted invasion of personal privacy; (B) reveal a trade secret or privileged or confidential commercial or financial information; or (C) be detrimental to the security of transportation.” 49 U.S.C. § 114(r)(1). TSA has promulgated regulations pursuant to § 114(r) defining specific categories of SSI, which are set forth at 49 C.F.R. part 1520.

39. The TSA SSI Branch is responsible for all aspects of the DHS-wide SSI Program, including policy, analysis, SSI Determinations, and regulatory execution. The SSI Branch serves as the primary point of contact (POC) for the DHS Office of Security, other DHS Components, Stakeholders, and TSA as a whole on issues involving SSI in accordance with 49 C.F.R. part 1520.

40. The SSI Branch conducts assessments and reviews of TSA and DHS records, and upon request, records of other “covered persons” under 49 C.F.R. § 1520.7, to determine which information contained within those records is SSI. The SSI Branch thereafter ensures that the appropriate SSI designations and redactions are made in accordance with 49 C.F.R. part 1520. The prohibition on public release of SSI is not discretionary but is mandatory in accordance with 49 C.F.R. § 1520.15(a). The SSI Branch also determines whether specific information should no longer be protected as SSI in accordance with 49 C.F.R. § 1520.5(c) and whether information previously not deemed SSI should be so designated.

41. Pursuant to 49 U.S.C. § 114(r) and its implementing regulations, TSA has determined that certain limited portions of records responsive to EPIC’s requests were SSI

pursuant to 49 U.S.C. § 114(r)(C) because their disclosure would be detrimental to the security of transportation. These include records located as part of TSA's search, as well as records located by S&T's components, the Transportation Security Laboratory ("TSL") and the Test, Evaluation, and Standards ("TES") Office:

a. One picture of a "scatter phantom image" that was generated by the Rapiscan Secure 1000. This image is contained in a July 21, 2006 report by Frank Cerra evaluating the Rapiscan Secure 1000's safety. As noted above in Footnote 1, Mr. Cerra performed the work underlying this report while at FDA/CDRH, but wrote the report when he was affiliated with NIST. This report was located in both the TSA and TES records, Bates Nos. TSA74-105 and TES124-155, and the withheld image is located at Bates Nos. TSA92 and TES142. See TSA and TES Vaughn indices. The image on these pages was designated SSI under 49 U.S.C. § 114(r) 49 C.F.R. § 1520.5(b)(9)(vi), which designates as SSI "[a]ny electronic image shown on any screening equipment monitor, including threat images and descriptions of threat images for threat image projection systems." Disclosure of images such as the one at issue here would provide insight into the screening capabilities and limitations of the Rapiscan Secure 1000 and accordingly be detrimental to the security of transportation. The image fits within § 1520.5(b)(9)(vi) and is accordingly exempt from disclosure under 49 U.S.C. § 114(r) and its implementing regulations.

b. Two identical excerpts describing the specific screening procedures used by TSA when utilizing the Rapiscan Secure 1000. These excerpts are contained within two reports prepared for TSA by the Johns Hopkins University's Applied Physics Laboratory ("JHU APL") concerning the radiation safety of the Rapiscan Secure 1000 in

October 2009 and August 2010, redacted versions of which appear both in the TES records and in documents posted to TSA's public website referenced in TSA's letter of December 22, 2010. See TES224-348, [http://www.tsa.gov/assets/pdf/jh\\_apl\\_v1.pdf](http://www.tsa.gov/assets/pdf/jh_apl_v1.pdf), [http://www.tsa.gov/assets/pdf/jh\\_apl\\_v2.pdf](http://www.tsa.gov/assets/pdf/jh_apl_v2.pdf). The withheld excerpts are located at on Bates pages TES268 and TES333, or on page 34 of the publicly available report. See TES Vaughn index. They are SSI pursuant to 49 U.S.C. § 114(r) and 49 C.F.R. § 1520.5(b)(9)(i), which designate as SSI "[a]ny procedures, including selection criteria and any comments, instructions, and implementing guidance pertaining thereto, for screening of persons, accessible property, checked baggage, U.S. mail, stores, and cargo, that is conducted by the Federal government or any other authorized person." Disclosure of such procedures would be detrimental to the security of transportation because knowledge of the precise procedures used by TSA could be used as a "road map" for those seeking to circumvent them and to bring prohibited items into the "sterile area" of an airport and onto aircraft. The screening procedures described in these pages fit within § 1520.5(b)(9)(vi) and are exempt from disclosure under 49 U.S.C. § 114(r) and its implementing regulations.

c. Excerpts from an email exchange, located in TSL's records, between employees of TSL and TSA. See TSL Vaughn index at TSL836. The withheld excerpts describe a particular phenomenon observed while performance-testing the Rapiscan Secure 1000. This feature could be used to identify a potential vulnerability of the system. It is SSI pursuant to 49 U.S.C. § 114(r) and 49 C.F.R. § 1520.5(b)(9)(v), which designates as SSI "Performance or testing data from security equipment or screening systems."

*Exemption 4*

42. Exemption 4 of the FOIA protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” In determining whether commercial or financial information is confidential, and therefore withheld from disclosure, there is a distinction between information required to be submitted to the government, and information voluntarily submitted to the government. If information is required to be submitted to the government, it is considered confidential if its disclosure is likely to have either of the following effects: (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. If information is voluntarily submitted, a less stringent standard applies, and the information is considered confidential if it would customarily not be released to the public by the person from whom it was obtained.

43. In this action, TSA was consulted to make Exemption 4 determinations pertaining to information obtained from AIT manufacturers on behalf of itself and on behalf of S&T's components, TES and TSL, pursuant to 6 C.F.R. § 5.4(c)(1), a DHS FOIA regulation stating that “[w]hen a component receives a request for a record in its possession, it shall determine whether another component, or another agency of the Federal Government, is better able to determine whether the record is exempt from disclosure under the FOIA and, if so, whether it should be disclosed as a matter of administrative discretion.” The regulation further states that the receiving component may, if necessary, “[r]espond to the request regarding that record, after consulting with the component or agency best able to determine whether to disclose it and with any other component or agency that has a substantial interest in it.” TSA was consulted to conduct the “submitter notice” process under Executive Order 12600, which requires agencies to

solicit the views of submitters of trade secrets or confidential commercial information prior to disclosing such information to the public, and to make Exemption 4 determinations on behalf of TES and TSL, based both on its substantial interest in the responsive records and its expertise in the subject matter. In addition, many of these records originated with TSA.

44. Certain records, and portions thereof, located in the searches of TSA, TES, and TSL have been withheld pursuant to Exemption 4 because they contain confidential commercial information obtained from AIT manufacturers. Further information supporting these withholdings is contained in declarations attached to Defendants' summary judgment motion in this action that were submitted by representatives of four AIT manufacturers: Peter Modica, Rapiscan Systems, Inc. ("Rapiscan"), Scott Trospen, L-3 Communications ("L-3"), Joseph Callerame, American Science & Engineering ("AS&E"), and Rory Doyle, Smiths Detection Ireland ("Smiths").

45. Much of the information withheld pursuant to Exemption 4 consists of portions of documents that were submitted directly to the government by AIT manufacturers. As described in more detail in the TSL Vaughn index, these documents include:<sup>2</sup>

(1) Memorandum regarding Radiated Emissions Testing and Power Density Calculation for Guardian 100 System; TSL29-31

(2) Questionnaire from L-3 – "In order to begin the preliminary assessments..." TSL32-38

(3) Addendum to L-3 Communications Safeview, Inc. Test Report ETS-07-009-A; TSL48-144

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<sup>2</sup> The Bates numbers shown here are the Bates numbers for the entire documents at issue, not the pages on which information was withheld. The Bates-numbered pages on which information was withheld are cited in the sections beginning with paragraph 54, and on the Vaughn indices.

- (4) F. X Masse Certificate of Compliance for AS&E Dual SmartCheck HT Personnel Scanner, April 8, 2010; TSL714-15
- (5) F. X. Masse letter of compliance regarding AS&E Dual SmartCheck, June 4, 2008; TSL829-30
- (6) F. X. Masse letter of compliance regarding AS&E SmartCheck, March 2006; TSL831-32
- (7) Dosage map showing radiation dosage from AS&E SmartCheck; TSL1190-91;
- (8) Email submitted by AS&E, TSL1192-93
- (9) Radiation Survey forms for AS&E SmartCheck submitted by AS&E, TSL1194-97
- (10) EMC Test Report WC808134, TUV (Third party reports on radio interference) regarding Rapiscan Secure 1000 system; TSL1199-1281
- (11) Test Report IEC-61010-1 (Electrical Safety) on Rapiscan Secure 1000 System; TSL1282-1360
- (12) Compliance Engineering Ireland radiation safety report on Smiths Detection Systems “eqo” scanner; TSL1361-78
- (13) Excerpts from Underwriters Laboratories, Inc. Test Results regarding L3 ProVision; TSL1379-82
- (14) Draft Report: Radiated Emission and Personnel Health from SafeView's mmWave Holographic Imaging Portals; TSL Withheld-in-full R.

46. Some of the information withheld pursuant to Exemption 4 is contained in documents created by, or at the direction of, the government, to the extent that the information withheld was itself derived from information obtained from manufacturers. Specifically, as described in more detail in the Vaughn indices, such documents include:



- (1) 2006 evaluation of the Rapiscan Secure 1000 system by Frank Cerra, an employee of the National Institute of Standards and Technology (“NIST”), TSA74-105, TES124-155;
- (2) 2006 evaluation of the AS&E SmartCheck system by Mr. Cerra, TSL924-956;
- (3) 2008 evaluation of the Dual Source AS&E SmartCheck by Mr. Cerra, TSL897-899;
- (4) the two reports prepared for TSA by the Johns Hopkins University’s Applied Physics Laboratory (“JHU APL”) concerning the Rapiscan Secure 1000 in October 2009 and August 2010, TES224-348; and
- (5) “Quick look brief” summarizing the results of the JHU APL study, TSA178-191.

47. Although the records described in Paragraph 46 were produced by, or at the direction of, the government, as described in greater detail in the TSA, TES, and TSL Vaughn indices, the confidential commercial information in these records that is being withheld under Exemption 4 is derived from information and materials submitted by Rapiscan and AS&E, namely, (1) third-party radiation reports submitted by the vendors, (2) communications with, and other materials received from, the vendors, including documentation, and/or (3) the Rapiscan Secure 1000 and AS&E Smart Check AIT systems themselves, which were obtained by the FDA, NIST, and the JHU APL from Rapiscan and AS&E for the purpose of radiation testing. But for the government’s having obtained these third-party reports, materials, and/or AIT systems from the vendors for testing, production of the reports described above would not have been possible.

48. As described in more detail in the Vaughn indices, the information withheld under Exemption 4 was obtained through both required and voluntary submissions by vendors.

49. Required submissions included information submitted by vendors as part of, and in connection with, Qualification Data Packages (“QDPs”). A QDP is a set of information,

submitted by vendors, used by DHS and TSA to establish a Qualified Product List (“QPL”) of products considered for procurement based on the overall performance of each vendor’s system against TSA specifications and reasonableness of price. Only vendors who demonstrate compliance with certain requirements are eligible for placement onto the QPL, and only products that are placed on the QPL are considered for a contract award.

50. TSA has determined that certain types of information were not required submissions, but voluntary ones. Such information includes:

1) Information obtained through the JHU APL study. This study was conducted in 2009 at Rapiscan, which voluntarily agreed to host JHU APL at its plant and provided a representative unit there, also voluntarily, for radiation and safety testing. Because Rapiscan’s provision of an AIT unit and other information used to conduct this study were voluntary, information obtained through this study was voluntarily submitted.

2) Information submitted by L-3 Communications in 2010 connection with an FDA/DHS interagency agreement to test the effects of millimeter wave scanners on personal medical devices. This information was not required to be submitted in order for L-3 scanners to be deployed by TSA; rather, L-3 agreed to do so voluntarily.

3) Other information submitted voluntarily by vendors (see Category 4 below).

51. For reference, in the discussion below, information definitively obtained from required submissions is **bolded**. Information definitively obtained from voluntary submissions is *italicized*. Where TSA, TSL, and TES have been unable to determine the nature of a submission, it is neither italicized nor bolded. Further details regarding each individual record and the excerpts withheld are contained on the TSA, TSL, and TES Vaughn indices.

52. Notwithstanding these distinctions, all records discussed below except for one (the record described in Category 4, paragraphs 69-71) were withheld because they have been determined to be confidential under Exemption 4 whether they are voluntary or required submissions; that is, they would not customarily be released to the public by the person from whom they were obtained, and disclosure is likely to cause substantial harm to the competitive position of the vendors from whom the information was obtained. Accordingly, both rationales are articulated below.

53. As explained in greater detail in the Declarations of Peter Modica (Paragraphs 9-11), Scott Trospen (Paragraph 3), Joseph Callerame (Paragraphs 4,6), and Rory Doyle (Paragraph 5), significant actual competition exists in the marketplace for AIT devices, not only in the United States, but worldwide. AIT devices are in demand, and have been used, not only for airport screening, but at courthouses, prisons, and borders. Competitors in this industry include, among others, the four AIT manufacturers whose data is at issue in this litigation.

**Exemption 4, Category 1: Information concerning AIT Systems' Design Features, Operational Setting and Parameters, and Component Parts**

54. The first category of information withheld consists of information concerning design features, operational settings and parameters, and component parts of AIT systems.

55. As described in more detail in the TSA, TES, and TSL Vaughn indices, this type of information is contained on the following Bates pages, organized by vendor:

**Rapiscan:** TSA77, 86, 191, TES127, 136, 236-239, 241, 244, 247, 252-254, 260, 267-269, 272-276, 283, 301-304, 306, 309, 312, 317-319, 325, 332-334, 337-341, 348;

**TSL1273, 1282, 1283, 1286-1290, 1316, 1326-27, 1333.**

**L3:** TSL30-31, 33, 35-36, 82, 1380.

**AS&E: TSL714-715; 829-830; 897-899;** 926-927; 929; 930-935; 937-939; 941-942;  
944-945; 954-956; **1192.**

56. As explained further in the declarations of Peter Modica (Paragraphs 4-7), Scott Trospen (Paragraphs 4-7), and Joseph Callerame (Paragraph 5(i-ii)), disclosure of the information referenced above is likely to cause Rapiscan, L3, and AS&E substantial competitive harm because it would enable competitors to gain insight into the proprietary technologies, methods, mechanisms, and design and operational parameters used by these companies, and to use this information to more effectively design and build their own systems, which could then directly compete with the systems manufactured by Rapiscan, L3, and AS&E.

57. For the same reasons, as set forth in the Modica Declaration (Paragraphs 5, 7), Trospen Declaration (Paragraphs 4-7), and Callerame Declaration (Paragraph 3), these companies would not normally disclose this type of information to the public.

58. For these reasons, this information, described more specifically in the Vaughn indices, has been withheld under Exemption 4.

**Exemption 4, Category 2: Information Concerning Radiation Dose Levels Emitted by Systems of Vendors Who Do Not Have Current Contracts with TSA**

59. The second category of information withheld under Exemption 4 consists of information concerning specific radiation dose levels emitted by the AS&E SmartCheck and the Smiths Detection “eqo.” Neither of these vendors currently has a contract with TSA for deployment of their technologies at airports.

60. As described in more detail in the TSL Vaughn index, this type of information concerning these vendors is contained on the following Bates pages, organized by vendor:

**AS&E: TSL714-715; 829-832; 897-899;** 926; 929-942; 944-947; 954-956; **1190-1192;**  
1194-1197.

**Smiths: TSL1367, 1368, 1369.**

61. As explained in the Declarations of Joseph Callerame, paragraph 5(iii), and Rory Doyle, paragraphs 4-6, release of this information is likely to cause these vendors substantial competitive harm because it could enable competitors to derive operational or performance attributes of these products, such as beam characteristics or filtration. Such characteristics could enable competitors to “reverse engineer” these products and cause AS&E and Smiths substantial competitive harm.

62. For the same reasons, as set forth in the Callerame Declaration (Paragraph 3) and Doyle Declaration (Paragraph 9), these companies would not normally disclose this type of information to the public.

63. For these reasons, this information, described more specifically in the Vaughn indices, has been withheld under Exemption 4.

**Exemption 4, Category 3: Recommendations for Product Design Improvements  
Regarding Radiation Safety in AS&E SmartCheck**

64. The third category of information withheld includes recommendations contained in third-party and government reports for product design improvements regarding radiation safety in the AS&E SmartCheck.

65. As described in more detail in the TSL Vaughn index, this type of information is contained at pages **TSL829-830; 897-899;** and 942.

66. As explained in Paragraph 5(iv) of the Declaration of Joseph Callerame, release of such information could cause AS&E substantial competitive harm because, to the extent that AS&E may have incorporated some of these recommendations into their product, a competitor could utilize these same recommendations to design or improve its system.

67. For the same reasons, as set forth in the Callerame Declaration (Paragraph 3), these companies would not normally disclose this type of information to the public.

68. For these reasons, this information, described more specifically in the Vaughn indices, has been withheld under Exemption 4.

**Exemption 4, Category 4: Draft Document on Emissions by SafeView Corporation, Voluntarily Submitted.**

69. This category comprises one document, TSL Withheld-in-Full R. As noted on the TSL Vaughn index, this is a 2004 draft document on radiation emissions created by SafeView, a predecessor entity to L-3.

70. This document, obtained from L-3, is largely a review of information selected from scientific journals and government documents pertaining to health effects of electromagnetic exposure. It also includes system electrical operating characteristics of an early version of the L-3 ProVision scanner. It was created by SafeView, a predecessor entity to L-3. It was not required to be submitted to DHS as part of the procurement or qualification process. It is stamped “DRAFT” and “Proprietary and Confidential.”

71. As outlined in the Declaration of Scott Trosper, Paragraph 8, this voluntarily submitted, draft document created by a predecessor entity is not a document that L-3 would normally release to the public. For this reason, it has been withheld under Exemption 4.


Conclusion

72. All TSA offices that were expected to maintain records concerning the two categories identified in Plaintiff’s FOIA request were searched. Further, all non-exempt responsive records that were located were provided to Plaintiff. For all records partially withheld, TSA produced the segregable portion of each of the records, and provided a justification for withholding the remainder of the information in its response letters, and clearly

marked each document with the applicable exemption. As noted above, some records were re-released after it was determined they contained additional releasable non-exempt information. No further segregation was possible.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 12, 2011



Paul Sofoudeh  
Acting Freedom of Information Act Officer  
Transportation Security Administration  
Department of Homeland Security

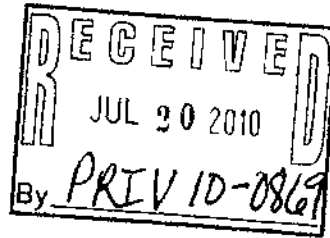
# Exhibit A to Declaration of Paul Sotoudeh





July 13, 2010

VIA U.S. MAIL (CERTIFIED DELIVERY)  
Mary Ellen Callahan  
Chief Privacy Officer/Chief FOIA Officer  
The Privacy Office  
U.S. Department of Homeland Security  
245 Murray Drive SW, Building 410  
STOP-0655  
Washington, D.C. 20528-0655



1718 Connecticut Ave NW  
Suite 200  
Washington DC 20009  
USA  
+1 202 483 1140 [tel]  
+1 202 483 1248 [fax]  
www.epic.org

**RE: Freedom of Information Act Request and Request for Expedited Processing**

Dear Ms. Callahan:

This letter constitutes a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center ("EPIC"). EPIC seeks agency records concerning radiation and health testing of Full Body Scanning ("FBS") devices.<sup>1</sup>

Background

The Transportation Security Administration ("TSA") currently operates Full Body Scanners at airports throughout the United States. The TSA uses two types of FBS devices: backscatter x-ray and millimeter wave.<sup>2</sup> Both types of FBS devices can capture, store, and transfer detailed, three-dimensional images of individuals' naked bodies. Experts have described full body scans as "digital strip searches."<sup>3</sup> In February 2007, the TSA, a Department of Homeland Security ("DHS") component, began testing FBS technology on American travelers.<sup>4</sup>

EPIC has pending Freedom of Information Act lawsuits against DHS and Department of Justice ("DOJ") regarding whole body imaging technology. As a result of

<sup>1</sup> The TSA currently refers to FBS devices as "advanced imaging technology" ("AIT"), and previously called the scanners "whole body imaging" ("WBI") devices. The terms "FBS" and "body scanners" in this request include all body scanners used by the Transportation Security Administration ("TSA") to screen passengers at domestic airports.

<sup>2</sup> TSA: Imaging Technology, [http://www.tsa.gov/approach/tech/imaging\\_technology.shtm](http://www.tsa.gov/approach/tech/imaging_technology.shtm) (last visited June 7, 2010).

<sup>3</sup> Joe Sharkey, *Whole-Body Scans Pass First Airport Tests*, N.Y. Times, Apr. 6, 2009, available at [http://www.nytimes.com/2009/04/07/business/07road.html?\\_r=1](http://www.nytimes.com/2009/04/07/business/07road.html?_r=1); Schneier on Security, June 9, 2005, [http://www.schneier.com/blog/archives/2005/06/backscatter\\_x-r.html](http://www.schneier.com/blog/archives/2005/06/backscatter_x-r.html) ("[whole body imaging] technology is incredibly intrusive. I don't think that people should be subjected to strip searches before they board airplanes.") (last visited June 11, 2010).

<sup>4</sup> TSA: Imaging Technology, [http://www.tsa.gov/approach/tech/imaging\\_technology.shtm](http://www.tsa.gov/approach/tech/imaging_technology.shtm) (last visited February 3, 2010).

these lawsuits, EPIC has received hundreds of pages of contracts, traveler complaints, TSA specifications, and other documents from DHS and DOJ.<sup>5</sup>

### Body Scanners Subject Air Travelers to Radiation and Health Risks

The health risks posed by the deployment of body scanners in US airports have not yet been fully assessed. FBS devices subject air travelers to radiation during each FBS scan.<sup>6</sup> While TSA has commissioned a Johns Hopkins University study on the machines, no independent study has been conducted on the health risks of these scanners.<sup>7,8</sup>

Experts recognize that frequent exposure to radiation is harmful. The Environmental Protection Agency has documented that frequent exposure to radiation, even in low individual doses, can lead to cancer and birth defects.<sup>9</sup> Studies on Terahertz Wave (T-wave) revealed that exposure to such radiation can cause DNA damage that results in cancer.<sup>10</sup> A recent report by the European Commission found that "it is evident any exposure to ionising radiation, however small, may have health effects in the longer term."<sup>11</sup> American scientists have also expressed concerns regarding the aggregate effect of body scanner radiation on the traveling population.<sup>12</sup>

University of California biochemist David Agard has stated that "While the dose would be safe if it were distributed throughout the volume of the entire body, the dose to the skin may be dangerously high. Ionizing radiation such as the X-rays used in these scanners have the potential to induce chromosome damage, and that can lead to cancer."<sup>13</sup>

The dose of radiation that FBS puts forth is especially risky for certain segments of the population. Professor Agard and several other experts wrote a recent letter to Dr.

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<sup>5</sup> EPIC, *Whole Body Imaging Technology and Body Scanners*, <http://epic.org/privacy/airtravel/backscatter/>; EPIC, *EPIC v. DHS*, [http://epic.org/privacy/airtravel/backscatter/epic\\_v\\_dhs.html](http://epic.org/privacy/airtravel/backscatter/epic_v_dhs.html).

<sup>6</sup> David Brenner, *Congressional Biomedical Research Caucus: Airport Screening: The Science and Risks of Backscatter Imaging*, 2010, available at <http://blip.tv/file/3379880>.

<sup>7</sup> The TSA Blog, *Advanced Imaging Technology: "Radiation Risk Tiny,"* March 11, 2010, <http://blog.tsa.gov/2010/03/advanced-imaging-technology-radiation.html>

<sup>8</sup> [http://epic.org/privacy/airtravel/backscatter/EPIC-Nader\\_WBI\\_Letter.pdf](http://epic.org/privacy/airtravel/backscatter/EPIC-Nader_WBI_Letter.pdf)

<sup>9</sup> <http://www.bloomberg.com/apps/news?pid=20601209&sid=aoG.YbbvnkzU>

<sup>10</sup> <http://www.technologyreview.com/blog/arxiv/24331/>

<sup>11</sup> Commission to the European Parliament, *Communication on the Use of Security Scanners at EU Airports*, June 15, 2010, [http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBiQFjAA&url=http%3A%2F%2Fec.europa.eu%2Ftransport%2Fair%2Fsecurity%2Fdoc%2Fcom2010\\_311\\_security\\_scanners\\_en.pdf&ei=h6k0TODUFMSBIAenwMzSBw&usq=AFQjCNF7Ck0G64bzz4rjFHukJOp4XDvGA](http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBiQFjAA&url=http%3A%2F%2Fec.europa.eu%2Ftransport%2Fair%2Fsecurity%2Fdoc%2Fcom2010_311_security_scanners_en.pdf&ei=h6k0TODUFMSBIAenwMzSBw&usq=AFQjCNF7Ck0G64bzz4rjFHukJOp4XDvGA) (p. 16)

<sup>12</sup> Kate Schneider, *"Naked" Scanners May Increase Cancer Risk*, news.com.au, May 19, 2010, <http://www.news.com.au/travel/news/naked-scanners-may-increase-cancer-risk/story-e6frfq80-1225868706270>

<sup>13</sup> Ben Mutzabaugh, *Full-body Scanners Could Pose Cancer Risk at Airports, U.S. Scientists Warn*, USA Today, July 1, 2010, <http://travel.usatoday.com/flights/post/2010/07/full-body-scanners-pose-cancer-risk-at-airports-us-scientists-warn/98552/1>

John P. Holdren, the Assistant to the President for Science and Technology.<sup>14</sup> They called for further evaluation of the FBS technology, and identified several groups of people – including children and pregnant women, as being especially at risk of harm from the scans.<sup>15</sup> They letter stated that a “large population of older travelers, >65 years of age, is particularly at risk from the mutagenic effects of the X-rays based on the known biology of melanocyte aging.”<sup>16</sup> The experts also noted, “A fraction of the female population is especially sensitive to ... radiation leading to breast cancer. Notably, because these women, who have defects in DNA repair mechanisms, are particularly prone to cancer, X-ray mammograms are not performed on them. The dose to breast tissue beneath the skin represents a similar risk.”<sup>17</sup> Dr. Agard and the other experts also stated, “The population of immunocompromised individuals--HIV and cancer patients (see above) is likely to be at risk for cancer induction by the high skin dose [of FBS technology radiation].”<sup>18</sup>

Other experts have said that FBS radiation could be especially harmful to some segments of the population. In a report restricted to certain agencies and not meant for public dissemination, the Inter-Agency Committee on Radiation Safety said “pregnant women and children should not be subject to scanning.”<sup>19</sup> The European Commission report called for a similar exception for pregnant women and children, stating that “Special considerations might also be called for when it comes to passengers that are especially sensitive to ionising radiation, primarily pregnant women and children.”<sup>20</sup> In his recent address to the Congressional Biomedical Caucus, Columbia Professor Dr. David Brenner agreed, stating that the dose of radiation delivered by FBS machines would be particularly risky for children and members of the population with a genetically higher sensitivity to radiation.<sup>21</sup>

Experts have also reported that body scanners may emit up to twenty times the reported amount of radiation.<sup>22</sup> Dr. Brenner noted that FBS machines expose the skin of the scalp to up to twenty times the reported amount of radiation.<sup>23</sup> He pointed out that skin is one of the most radiation-sensitive parts of the body.<sup>24</sup>

<sup>14</sup> Drs. John Sedat, David Agard, Marc Shuman, and Robert Stroud, *Letter of Concern to Dr. John P. Holdren, Assistant to the President for Science and Technology*, April 6, 2010, available at: <http://www.npr.org/assets/news/2010/05/17/concern.pdf>

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> <http://www.bloomberg.com/apps/news?pid=20601209&sid=aoG.YbbvknzU>

<sup>20</sup> Commission to the European Parliament, *Communication on the Use of Security Scanners at EU Airports*, June 15, 2010, [http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBIQFjAA&url=http%3A%2F%2Fec.europa.eu%2Ftransport%2Fair%2Fsecurity%2Fdoc%2Fcom2010\\_311\\_security\\_scanners\\_en.pdf&ei=h6k0TODUFMSBIAenwMzSBw&usq=AFQjCNF7Ck0G64bzz4riFHukJOp4XDaVGA](http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBIQFjAA&url=http%3A%2F%2Fec.europa.eu%2Ftransport%2Fair%2Fsecurity%2Fdoc%2Fcom2010_311_security_scanners_en.pdf&ei=h6k0TODUFMSBIAenwMzSBw&usq=AFQjCNF7Ck0G64bzz4riFHukJOp4XDaVGA) (p. 16)

<sup>21</sup> David Brenner, *Congressional Biomedical Research Caucus: Airport Screening: The Science and Risks of Backscatter Imaging*, 2010, available at <http://blip.tv/file/3379880>.

<sup>22</sup> *Id.*

<sup>23</sup> David Brenner, *Congressional Biomedical Research Caucus: Airport Screening: The Science and Risks of Backscatter Imaging*, 2010, available at <http://blip.tv/file/3379880>.

<sup>24</sup> *Id.*

Dr. Agard and the other drafters of the letter to the Assistant to the President for Science and Technology called for a truly independent review of FBS technology because the true extent of the risk "can only be determined by a meeting of an impartial panel of experts that would include medical physicists and radiation biologists at which all of the available relevant data is reviewed." In his address to the Congressional Biomedical Caucus, Dr. Brenner also called for greater testing of FBS technology and the effects of "low dose" radiation.<sup>25</sup>

#### Documents Requested

EPIC requests the following agency records in the possession of DHS:

1. All records concerning TSA tests regarding body scanners and radiation emission or exposure.
2. All records concerning third party tests regarding body scanners and radiation emission or exposure.

#### Request for Expedited Processing

This request warrants expedited processing because it is made by "a person primarily engaged in disseminating information ..." and it pertains to a matter about which there is an "urgency to inform the public about an actual or alleged federal government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II) (2008); *Al-Fayed v. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001).

EPIC is "primarily engaged in disseminating information." *American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

There is a particular urgency for the public to obtain information about the health implications of the TSA's whole body imaging program. The TSA is presently expanding its FBS program to be used as the primary screening method in all domestic airports.<sup>26</sup> The systems expose passengers to radiation, the exposure levels have not been independently verified, and scientists have warned of the serious health risks for air travelers.

While the TSA claims that the FBS devices do not subject travelers to harmful levels of radiation, the agency has presented no evidence to support that assertion. The documents requested by EPIC will inform the public about the safety of the FBS scanners being deployed at airports nationwide.

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<sup>25</sup> *Id.*

<sup>26</sup> *An Assessment of Checkpoint Security: Are Our Airports Keeping Passengers Safe?: Hearing Before the Subcomm. On Transp. Sec. and Infrastructure Prot., 111th Cong. (2010) (statement of Robin Kane, Assistant Administrator, Operational Process and Technology, Transportation Security Administration), also available at <http://hsc.house.gov/SiteDocuments/20100317140301-14594.pdf>.*

Request for News Media Fee Status

EPIC is a "representative of the news media" for fee waiver purposes. *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on our status as a "news media" requester, we are entitled to receive the requested record with only duplication fees assessed. Further, because disclosure of this information will "contribute significantly to public understanding of the operations or activities of the government," any duplication fees should be waived.

Thank you for your consideration of this request. As provided in 6 C.F.R. § 5.5(d)(4), I will anticipate your determination on our request for expedited processing with ten (10) calendar days.

Sincerely,

Ginger P. McCall  
Staff Counsel  
Electronic Privacy Information Center

# Exhibit B to Declaration of Paul Sotoudeh



# Homeland Security

*Privacy Office, Mail Stop 0655*

July 29, 2010

Ms. Ginger P. McCall  
EPIC  
1718 Connecticut Ave., NW  
Suite 200  
Washington, DC 20009

**Re: DHS/OS/PRIV 10-0869**

Dear Ms. McCall:

This acknowledges receipt of your July 13, 2010, Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), in which you seek records concerning radiation and health testing of Full Body Scanning ("FBS") devices. Your request was received in this office on July 20, 2010.

Upon initial review of your request, I have determined that the information you are seeking is under the purview of the Transportation Security Administration (TSA) and DHS Science and Technology Directorate (S&T). Therefore, I am referring your request to the FOIA Officer for TSA, Kevin Janet, and the FOIA Officer for S&T, Miles Wiley for processing and direct response to you. You may contact those offices in writing at:

Transportation Security Administration  
601 S. 12<sup>th</sup> Street, 11<sup>th</sup> Floor, East Tower  
Arlington, VA 22202  
1-866-FOIA-TSA or 571-227-2300

U.S. Department of Homeland Security  
Science and Technology Directorate  
Washington, D.C. 20528  
202-254-6819

As it relates to your fee waiver and expedited processing request, TSA and S&T will make a determination and reply to your request.

If you need to contact this office again concerning your request, please refer to **DHS/OS/PRIV 10-0869**. This office can be reached at 866-431-0486.

Sincerely,

A handwritten signature in black ink, appearing to read "Sabrina Burroughs". The signature is fluid and cursive, with the first name "Sabrina" and last name "Burroughs" clearly distinguishable.

Sabrina Burroughs  
Disclosure & FOIA Operations Manager



# Exhibit C to Declaration of Paul Sotoudeh

Freedom of Information Act Office  
601 South 12<sup>th</sup> Street  
Arlington, VA 20598-6020



Transportation  
Security  
Administration

AUG 12 2010

Ms. Ginger P. McCall  
Staff Counsel  
Electronic Privacy Information Center  
1718 Connecticut Ave, N.W.  
Suite 200  
Washington, DC 20009

Re: **TSA10-0674**

Dear Ms. McCall:

This letter acknowledges receipt of your July 13, 2010, Freedom of Information Act (FOIA) request to the Transportation Security Administration (TSA), seeking all records concerning TSA tests and third party tests regarding body scanners and radiation emission or exposure.

As it relates to your request for expedited treatment, your request is denied.

Under the DHS FOIA regulation, expedited processing of a FOIA request is warranted if the request involves "circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual," 6 C.F.R. § 5.5(d)(1)(i), or "an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information," 6 C.F.R. § 5.5(d)(1)(ii). Requesters that seek expedited processing must submit a statement explaining in detail the basis for the request, and that statement must be certified by the requester to be true and correct. 6 C.F.R. § 5.5(d)(3).

Your request for expedited processing is denied because you do not qualify for either category. You failed to demonstrate a particular urgency to inform the public about the government activity involved in the request beyond the public's right to know about government activity generally. Your letter was conclusory in nature and did not present any facts to justify a grant of expedited processing under the applicable standards.

As it relates to your fee waiver request, I have reviewed your letter thoroughly and have determined that you have not presented a convincing argument that you are entitled to a blanket waiver of fees.

The DHS FOIA Regulations, 6 CFR § 5.11(k)(2), set forth six factors to examine in determining whether the applicable legal standard for a fee waiver has been met. We will consider these factors in our evaluation of your request for a fee waiver:

- (1) Whether the subject of the requested records concerns “the operations or activities of the government;”
- (2) Whether the disclosure is “likely to contribute” to an understanding of government operations or activities;
- (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons;
- (4) Whether the contribution to public understanding of government operations or activities will be "significant;"
- (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and
- (6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor.

As a requester, you bear the burden under the FOIA of showing that the fee waiver requirements have been met. Based on my review of your July 13, 2010 letter and for the reasons stated herein, I have determined that your fee waiver request is deficient because your request for a fee waiver has failed to satisfy each of the required factors, I am denying your fee waiver request.

Provisions of the Act allow us to recover part of the cost of complying with your request. We shall charge you for records in accordance with the DHS Interim FOIA regulations as they apply to media requestors. As a media requestor you will be charged 10-cents a page for duplication, although the first 100 pages are free. We will construe the submission of your request as an agreement to pay up to \$25.00. You will be contacted before any additional fees are accrued.

If you deem the decision to deny expedited treatment and the determination to deny your fee waiver request an adverse determination, you may exercise your appeal rights. In the event that you may wish to appeal this determination an administrative appeal may be made in writing to Kimberly Walton, Special Counselor, Office of the Special Counselor, Transportation Security Administration, 601 South 12<sup>th</sup> Street, East Building, E7-121S, Arlington, VA 20598-6033. Your appeal **must be submitted within 60 days** from the date of this determination. It should contain your FOIA request number and state, to the extent possible, the reasons why you believe the initial determination should be reversed. In addition, the envelope in which the appeal is mailed in should be prominently marked “FOIA Appeal.” Please note the Special Counselor’s determination will be administratively final. Your envelope and letter should be marked “Freedom of Information Act Appeal.” The implementing Department regulations establish the criteria under which the FOIA is administered. Copies of the FOIA and regulations are available at [www.DHS.gov](http://www.DHS.gov).

We have queried the appropriate program offices of TSA for responsive records. If any responsive records are located, they will be reviewed for determination of releasability. Please be assured that one of the processors in our office will respond to your request as expeditiously as possible. We appreciate your patience as we proceed with your request.

Your request has been assigned reference number **TSA10-0674**. Please refer to this identifier in any future correspondence. You may contact this office at 866.364.2872.

Sincerely,



Kevin J. Janet  
FOIA Officer  
Freedom of Information Act Office

# Exhibit D to Declaration of Paul Sotoudeh



August 27, 2010

VIA CERTIFIED MAIL

Kimberly Walton  
Special Counselor  
Office of the Special Counselor  
Transportation Security Administration  
601 South 12<sup>th</sup> St.  
East Building, E7-121S  
Arlington, VA 20598-6033

1718 Connecticut Ave NW  
Suite 200  
Washington DC 20009  
USA  
+1 202 483 1140 (tel)  
+1 202 483 1248 (fax)  
www.epic.org

**RE: Freedom of Information Act Appeal on TSA10-0674**

Dear Ms. Walton:

This letter constitutes an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted to the Transportation Security Administration ("TSA"), a component of the Department of Homeland Security ("DHS"), on behalf of the Electronic Privacy Information Center ("EPIC"). EPIC seeks agency records in the TSA's possession concerning radiation and health testing of the Full Body Scanner ("FBS") devices operated by DHS. This letter appeals the TSA's denial of EPIC's request for a fee waiver and expedited processing.

This appeal arises from EPIC's July 13, 2010 request ("EPIC's FOIA Request") to the DHS for the following agency records:

- 1) All records concerning TSA tests regarding body scanners and radiation emission or exposure;
- 2) All records concerning third party tests regarding body scanners and radiation emission or exposure.<sup>1</sup>

**I. Factual Background**

The TSA currently operates Full Body Scanners at airports throughout the United States. The TSA uses two types of FBS devices: backscatter x-ray and millimeter wave.<sup>2</sup> Both types of FBS devices can capture, store, and transfer detailed, three-dimensional images of individuals' naked bodies. Experts have described full body scans as "digital

<sup>1</sup> EPIC, *FOIA request from Ginger McCall, EPIC to Mary Ellen Callahan, U.S. Dep't. of Homeland Sec.* (July 13, 2010) [hereinafter *EPIC's FOIA Request*]. See Appendix 1.

<sup>2</sup> TSA: Imaging Technology, [http://www.tsa.gov/approach/tech/imaging\\_technology.shtml](http://www.tsa.gov/approach/tech/imaging_technology.shtml) (last visited June 7, 2010).

strip searches.”<sup>3</sup> In February 2007, the TSA began testing FBS technology on American travelers.<sup>4</sup>

EPIC has pending Freedom of Information Act lawsuits against the DHS and the Department of Justice (“DOJ”) regarding whole body imaging technology. As a result of these lawsuits, EPIC has received hundreds of pages of contracts, traveler complaints, TSA specifications, images, and other documents from the DHS and the DOJ.<sup>5</sup> Many of these documents raise questions about the health impacts of airport body scanners.

However, the health risks posed by the deployment of body scanners in US airports have not been fully assessed. FBS devices subject air travelers to radiation during each FBS scan.<sup>6</sup> Although the TSA commissioned a Johns Hopkins University study on the machines, no independent study has been conducted on the health risks of these scanners.<sup>78</sup>

Experts recognize that exposure to radiation is harmful. The Environmental Protection Agency has documented that repeated exposure to radiation, even in low individual doses, can lead to cancer and birth defects.<sup>9</sup> Studies on Terahertz Wave (T-wave) radiation reveal that exposure to such radiation can cause DNA damage that results in cancer.<sup>10</sup> A recent report by the European Commission found that “it is evident any exposure to ionising radiation, however small, may have health effects in the longer term.”<sup>11</sup> American scientists have also expressed concerns regarding the aggregate effect of body scanner radiation on the traveling population.<sup>12</sup>

University of California biochemist David Agard has analyzed Full Body Scanners, concluding that “While the dose would be safe if it were distributed throughout

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<sup>3</sup> Joe Sharkey, *Whole-Body Scans Pass First Airport Tests*, N.Y. Times, Apr. 6, 2009, available at [http://www.nytimes.com/2009/04/07/business/07road.html?\\_r=1](http://www.nytimes.com/2009/04/07/business/07road.html?_r=1); Schneier on Security, June 9, 2005, [http://www.schneier.com/blog/archives/2005/06/backscatter\\_x-r.html](http://www.schneier.com/blog/archives/2005/06/backscatter_x-r.html) (“[whole body imaging] technology is incredibly intrusive. I don't think that people should be subjected to strip searches before they board airplanes.”) (last visited June 11, 2010).

<sup>4</sup> TSA: Imaging Technology, [http://www.tsa.gov/approach/tech/imaging\\_technology.shtm](http://www.tsa.gov/approach/tech/imaging_technology.shtm) (last visited February 3, 2010).

<sup>5</sup> EPIC, *Whole Body Imaging Technology and Body Scanners*, <http://epic.org/privacy/airtravel/backscatter/>; EPIC, *EPIC v. DHS*, [http://epic.org/privacy/airtravel/backscatter/epic\\_v\\_dhs.html](http://epic.org/privacy/airtravel/backscatter/epic_v_dhs.html).

<sup>6</sup> David Brenner, *Congressional Biomedical Research Caucus: Airport Screening: The Science and Risks of Backscatter Imaging*, 2010, available at <http://blip.tv/file/3379880>.

<sup>7</sup> The TSA Blog, *Advanced Imaging Technology: “Radiation Risk Tiny,”* March 11, 2010, <http://blog.tsa.gov/2010/03/advanced-imaging-technology-radiation.html>

<sup>8</sup> [http://epic.org/privacy/airtravel/backscatter/EPIC-Nader\\_WBI\\_Letter.pdf](http://epic.org/privacy/airtravel/backscatter/EPIC-Nader_WBI_Letter.pdf)

<sup>9</sup> <http://www.bloomberg.com/apps/news?pid=20601209&sid=aoG.YbbvknzU>

<sup>10</sup> <http://www.technologyreview.com/blog/arxiv/24331/>

<sup>11</sup> Commission to the European Parliament, *Communication on the Use of Security Scanners at EU Airports*, June 15, 2010,

[http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBIQFjAA&url=http%3A%2F%2Fec.europa.eu%2Ftransport%2Fair%2Fsecurity%2Fdoc%2Fcom2010\\_311\\_security\\_scanners\\_en.pdf&ei=h6k0TODUFMSBIAenwMzSBw&usq=AFQjCNF7Ck0G64bzz4riFHukJOp4XDaVGA](http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBIQFjAA&url=http%3A%2F%2Fec.europa.eu%2Ftransport%2Fair%2Fsecurity%2Fdoc%2Fcom2010_311_security_scanners_en.pdf&ei=h6k0TODUFMSBIAenwMzSBw&usq=AFQjCNF7Ck0G64bzz4riFHukJOp4XDaVGA) (p. 16)

<sup>12</sup> Kate Schneider, “Naked” Scanners May Increase Cancer Risk, news.com.au, May 19, 2010, <http://www.news.com.au/travel/news/naked-scanners-may-increase-cancer-risk/story-e6frfq80-1225868706270>

the volume of the entire body, the dose to the skin may be dangerously high. In an address to the Congressional Biomedical Research Caucus, Dr. David Brenner noted that FBS machines expose the skin of the scalp to up to twenty times the reported amount of radiation.<sup>13</sup> He pointed out that skin is one of the most radiation-sensitive parts of the body.<sup>14</sup> Ionizing radiation such as the X-rays used in these scanners have the potential to induce chromosome damage, and that can lead to cancer.”<sup>15</sup>

According to experts, the radiation that FBS devices emit is especially risky for certain segments of the population, including pregnant women, children, elderly travelers, and immunocompromised individuals.<sup>16</sup>

Experts have called for a truly independent review of FBS technology because the true extent of the risk “can only be determined by a meeting of an impartial panel of experts that would include medical physicists and radiation biologists at which all of the available relevant data is reviewed.” In his address to the Congressional Biomedical Caucus, Dr. Brenner also called for greater testing of FBS technology and the effects of “low dose” radiation.<sup>17</sup>

## II. Procedural History

On July 13, 2010, EPIC submitted, *via* Certified Mail, EPIC’s FOIA Request to the DHS.<sup>18</sup>

On July 29, 2010, the DHS wrote to EPIC acknowledging receipt of EPIC’s FOIA Request stating that the DHS determined that the information sought by EPIC’s FOIA Request is under the purview of the TSA and the DHS’ Science and Technology Directorate (S&T).<sup>19</sup> Therefore the request was referred the TSA FOIA Officer, Kevin Janet and FOIA Officer for S&T, Miles Wiley.<sup>20</sup> The DHS assigned EPIC’s FOIA Request the case number DHS/OS/PRIV 10-0869.

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<sup>13</sup> Brenner, *supra* note 6.

<sup>14</sup> *Id.*

<sup>15</sup> Drs. John Sedat, David Agard, Marc Shuman, and Robert Stroud, Letter of Concern to Dr. John P. Holdren, Assistant to the President for Science and Technology, April 6, 2010, available at: <http://www.npr.org/assets/news/2010/05/17/concern.pdf>; Ben Mutzabaugh, Full-body Scanners Could Pose Cancer Risk at Airports, U.S. Scientists Warn, *USA Today*, July 1, 2010, <http://travel.usatoday.com/flights/post/2010/07/full-body-scanners-pose-cancer-risk-at-airports-us-scientists-warn/98552/1>

<sup>16</sup> *Id.*; Jonathan Tirone, *Airport Body Scan Raises Radiation Exposure, Committee Says*, Feb. 5, 2010, <http://www.bloomberg.com/apps/news?pid=20601209&sid=aoG.YbbvnkzU>; Commission to the European Parliament, *Communication on the Use of Security Scanners at EU Airports*, June 15, 2010, [http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBIQFjAA&url=http%3A%2F%2Fec.europa.eu%2Ftransport%2Fair%2Fsecurity%2Fdoc%2Fcom2010\\_311\\_security\\_scanners\\_en.pdf&ei=h6k0TODU MFMSBIaenwMzSBw&usq=AFQjCNF7Ck0G64bzz4riFHukJOp4XDaVGA](http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBIQFjAA&url=http%3A%2F%2Fec.europa.eu%2Ftransport%2Fair%2Fsecurity%2Fdoc%2Fcom2010_311_security_scanners_en.pdf&ei=h6k0TODU MFMSBIaenwMzSBw&usq=AFQjCNF7Ck0G64bzz4riFHukJOp4XDaVGA) (p. 16); Brenner, *supra* note 6.

<sup>17</sup> *Id.*

<sup>18</sup> EPIC’s FOIA Request, *supra* note 1.

<sup>19</sup> DHS, *Response to EPIC FOIA Request Referring to TSA and S&T*, July 29, 2010, See Appendix 2.

<sup>20</sup> TSA, *Response to EPIC Denying Fee Waiver and Expedited Processing*, August 13, 2010, See Appendix 3.



On August 12, 2010, the TSA wrote to EPIC denying EPIC's requests for expedited processing and a fee waiver.<sup>21</sup>

### III. EPIC Appeals the TSA's Denial of Fee Waiver

EPIC hereby appeals the TSA's denial of EPIC's fee waiver request. EPIC's FOIA Request meets the six factors for FOIA fee waivers listed in 6 C.F.R. § 5.11(k)(12). The six factors are:

1. Whether the subject of the requested records concerns "the operations or activities of the government;"
2. Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;
3. Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons;
4. Whether the contribution to the public understanding of government operations or activities will be "significant;"
5. Whether the requestor has a commercial interest that would be furthered by the requested disclosure; and
6. Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor.

We address each of the relevant factors in turn.

1. The Subject of EPIC's FOIA Request Concerns "The Operations or Activities of the Government."

The TSA is a federal agency. The FOIA request concerns the activity of the TSA, specifically, FBS machine use at American airports. The TSA is responsible for "security at the nation's airports and [has] deployed a Federal workforce to meet Congressional deadlines for screening all commercial airline passengers and baggage."<sup>22</sup> The TSA's mission "is to improve homeland security by providing to customers state-of-the-art technology."<sup>23</sup> Currently, the TSA is employing FBS machines to screen air travelers.<sup>24</sup> The TSA has contracted for the development of this technology, has distributed it to airports around the country, and employs workers to operate this equipment in American airports. EPIC's FOIA Request seeks records regarding the testing of FBS devices used by the TSA.<sup>25</sup> As such, the request for "All records concerning ...tests regarding body

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<sup>21</sup> See 5 U.S.C. § 552(a)(6)(B).

<sup>22</sup> TSA: What is TSA, [http://www.tsa.gov/who\\_we\\_are/what\\_is\\_tsa.shtm](http://www.tsa.gov/who_we_are/what_is_tsa.shtm) (last visited Aug. 18, 2010).

<sup>23</sup> *Id.*

<sup>24</sup> TSA: Imaging Technology, [http://www.tsa.gov/approach/tech/imaging\\_technology.shtm](http://www.tsa.gov/approach/tech/imaging_technology.shtm) (last visited June 7, 2010).

<sup>25</sup> TSA: Mission, Vision, and Core Values, [http://www.tsa.gov/who\\_we\\_are/mission.shtm](http://www.tsa.gov/who_we_are/mission.shtm) (last visited Aug. 6, 2010).

scanners and radiation emission or exposure” done by TSA or third party contractors directly and clearly concerns the TSA’s operations and activities.

2. The Documents Requested by EPIC are “Likely to Contribute” to an Understanding of Government Operations or Activities

Records pertaining to the testing of the radiation emission and dangers of FBS devices will help the public understand the safety implications of the TSA’s FBS program and will give the public the opportunity to evaluate the relative value of this program by weighing its risks and alleged benefits. Therefore, the release of radiation test results for FBS devices is “likely to contribute” to the understanding of the safety of the TSA’s use of FBS devices. 6 C.F.R. § 5.11(k)(1)(ii) requires that “disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be ‘likely to contribute’ to an increased public understanding of those operations or activities.”<sup>26</sup>

In addition, both the D.C. Circuit and the Tenth Circuit have recognized that “an understanding of how [a federal agency] makes policy decisions . . . is important to the public’s understanding of the government.”<sup>27</sup>

Release of these records would allow the public to further evaluate and study the risks inherent in FBS devices and in turn, enhance the public’s ability to understand the government’s policy decisions concerning the devices. Public understanding of FBS devices is of particular importance given the acceleration of the FBS program, which is occurring despite public concern about the use of FBS devices in airports and scandal surrounding the use of similar machines.

3. The Disclosure of the Documents Will Contribute to the Understanding of the Public at Large

EPIC routinely and systematically disseminates records obtained through the FOIA to the public at large and, as the TSA has acknowledged,<sup>28</sup> is a representative of the news media for FOIA purposes. EPIC maintains several heavily visited websites that highlight breaking news concerning privacy and civil liberties issues. Two of EPIC’s sites, EPIC.org and PRIVACY.org, consistently appear at the top of search engine rankings for searches on “privacy.” EPIC’s webpage on FBS also consistently appears in the top listings for searches on “whole body imaging” and “body scanners.”

EPIC.org, maintained by EPIC, highlights critical portions of documents EPIC obtains under the FOIA. Further, EPIC routinely publishes complete copies of records we

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<sup>26</sup> 6 C.F.R. § 5.11(k)(1)(ii)

<sup>27</sup> *Natural Resources Defense Council v. U.S. EPA*, 581 F. Supp. 2d 491, 498–99 (S.D.N.Y. 2008) (citing *Forest Guardians*, 416 F.3d at 1179; *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1313–14 (D.C. Cir. 2003)).

<sup>28</sup> *TSA Reply*, *supra* note 20, *see* Appendix 3.

receive through FOIA requests. EPIC's FOIA documents have routinely been the subject of national news coverage.<sup>29</sup>

EPIC also publishes a bi-weekly electronic newsletter, the EPIC Alert, which is distributed to around 20,000 readers, many of whom report on technology and privacy issues for major news outlets. The newsletter has been published continuously since 1996, and an archive of past issues is available at our website. EPIC is frequently interviewed by mainstream media outlets on the topic of FBS.<sup>30</sup>

Finally, EPIC publishes and distributes printed books that address a broad range of privacy, civil liberties, and technology issues. EPIC will disseminate information gained from disclosure of the requested documents to the public in a form that will ensure wide access to, and further understanding of, FBS privacy and security issues.

4. The Contribution to the Public Understanding of Government Operations or Activities Will be "Significant"

Although there is widespread public discussion of the radiation risk assessments that are the subject of EPIC's FOIA request, test results and related documents regarding the radiation emissions of FBS devices and the radiation exposure of air travelers are not currently available to the public. The DHS, TSA, and S&T have failed to publish any primary source data concerning the radiation emissions and exposure of FBS devices. Without access to these documents, the public has no ability to accurately evaluate the health risks of a controversial screening method that is costing tax-payers millions of dollars and being deployed at an increasing number of airports. Disclosure of the requested documents would contribute significantly to the public's ability to evaluate the use of FBS devices and to assess potential health risks associated with the technology.

5. EPIC has No Commercial Interest in the Disclosure

10 C.F.R. § 1004.9(c) defines a commercial use request as "a request from . . . one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requestor . . ."<sup>31</sup> EPIC is a non-profit, public interest research center. EPIC's work is distributed freely through our website and through the bi-weekly EPIC Alert newsletter. EPIC has no commercial interest that would be furthered by disclosing the requested records.

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<sup>29</sup> See e.g. *Happening Now: Feds Admit Storing Thousands of Checkpoint Body Scan Images* (Fox News television broadcast Aug. 5, 2010), available at <http://www.youtube.com/watch?v=djQ0JWnn8uU>; Jeanne Meserve and Mike M. Ahlers, *Body Scanners Can Store, Send Images, Group Says*, CNN, January 11, 2010, <http://www.cnn.com/2010/TRAVEL/01/11/body.scanners/>.

<sup>30</sup> See generally, *Happening Now: Feds Admit Storing Thousands of Checkpoint Body Scan Images* (Fox News television broadcast Aug. 5, 2010), available at <http://www.youtube.com/watch?v=djQ0JWnn8uU>; *PBS NewsHour: After Christmas Bomb Plot, New Airport Screening Techniques Examined* (PBS television broadcast Jan. 20, 2010), available at [http://www.pbs.org/newshour/bb/transportation/jan-june10/scanners\\_01-20.html](http://www.pbs.org/newshour/bb/transportation/jan-june10/scanners_01-20.html); *American Morning: New Questions on Body Scanners* (CNN television broadcast Jan. 11, 2010), available at <http://www.cnn.com/video/?/video/tech/2010/01/11/meserve.full.body.scans.cnn>.

<sup>31</sup> 10 C.F.R. § 1004.9(c) (2009).

6. Because EPIC has No Commercial Interest, Commercial Interest Cannot be “Primary”

As established above, EPIC has no commercial interest in this disclosure. EPIC is “primarily engaged in disseminating information.”<sup>32</sup> EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC has no clients, no customers, and no shareholders.

**IV. EPIC Appeals the TSA’s Denial of Expedited Processing**

EPIC further appeals the TSA’s denial of EPIC’s request for expedited processing. EPIC’s FOIA Request meets the two factors for expedited processing listed in 6 C.F.R. § 5.5(d), which states that requests and appeals will be taken out of order and given expedited treatment whenever it is determined that they involve:

- (i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
- (ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.

While EPIC need only meet one of these requirements in order to qualify for expedited processing, EPIC, in fact, meets *both* of these requirements.

1. EPIC’s Request Involves Circumstances in Which the Lack of Expedited Treatment Could Reasonably be Expected to Pose an Imminent Threat to the Life or Physical Safety of an Individual

EPIC’s request involves “circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.” As detailed in EPIC’s FOIA request, many noted experts have raised objections to this technology because it exposes air travelers to unnecessary radiation during each FBS scan.<sup>33</sup>

As described above, many experts have stated that the exposure to radiation, even in low doses, could reasonably be expected to create a greater risk of cancer and birth defects.<sup>34</sup> A recent report by the European Commission found that “it is evident any exposure to ionising radiation, however small, may have health effects in the longer term.”<sup>35</sup> American scientists have also expressed concerns regarding the aggregate effect

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<sup>32</sup> *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

<sup>33</sup> Brenner, *supra* note 6.

<sup>34</sup> Jonathan Tirone, *Airport Body Scan Raises Radiation Exposure, Committee Says*, Feb. 5, 2010, <http://www.bloomberg.com/apps/news?pid=20601209&sid=aoG.YbbvknzU>

<sup>35</sup> Commission to the European Parliament, *Communication on the Use of Security Scanners at EU Airports*, June 15, 2010, <http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBIQFjAA&url=http%3A%2F%2Fec.europa>

of body scanner radiation on the traveling population.<sup>36</sup>

University of California biochemist David Agard has stated that "While the dose would be safe if it were distributed throughout the volume of the entire body, the dose to the skin may be dangerously high. Ionizing radiation such as the X-rays used in these scanners have the potential to induce chromosome damage, and that can lead to cancer."<sup>37</sup>

The dose of radiation that FBS puts forth is especially risky for certain segments of the population. Professor Agard and several other experts wrote a recent letter to Dr. John P. Holdren, the Assistant to the President for Science and Technology.<sup>38</sup> They called for further evaluation of the FBS technology, and identified several groups of people – including children and pregnant women, as being especially at risk of harm from the scans.<sup>39</sup> They letter stated that a "large population of older travelers, >65 years of age, is particularly at risk from the mutagenic effects of the X-rays based on the known biology of melanocyte aging."<sup>40</sup> The experts also noted, "A fraction of the female population is especially sensitive to ...radiation leading to breast cancer. Notably, because these women, who have defects in DNA repair mechanisms, are particularly prone to cancer, X-ray mammograms are not performed on them. The dose to breast tissue beneath the skin represents a similar risk."<sup>41</sup> Dr. Agard and the other experts also stated, "The population of immunocompromised individuals--HIV and cancer patients (see above) is likely to be at risk for cancer induction by the high skin dose [of FBS technology radiation]."<sup>42</sup>

Other experts have agreed that FBS radiation could be especially harmful to some segments of the population. In a report restricted to certain agencies and not meant for public dissemination, the Inter-Agency Committee on Radiation Safety said "pregnant women and children should not be subject to scanning."<sup>43</sup> The European Commission report called for a similar exception for pregnant women and children, stating that "Special considerations might also be called for when it comes to passengers that are especially sensitive to ionising radiation, primarily pregnant women and children."<sup>44</sup> In

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FMSBIAenwMzSBw&usq=AFQjCNF7Ck0G64bzz4riFHukJOp4XDaVGA (p. 16)

<sup>36</sup> Kate Schneider, "Naked" Scanners May Increase Cancer Risk, news.com.au, May 19, 2010, <http://www.news.com.au/travel/news/naked-scanners-may-increase-cancer-risk/story-e6frfq80-1225868706270>

<sup>37</sup> Ben Mutzabaugh, Full-body Scanners Could Pose Cancer Risk at Airports, U.S. Scientists Warn, *USA Today*, July 1, 2010, <http://travel.usatoday.com/flights/post/2010/07/full-body-scanners-pose-cancer-risk-at-airports-us-scientists-warn/98552/1>

<sup>38</sup> Sedat, Agard, Shuman, and Stroud, *supra* note 15.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Jonathan Tirone, *Airport Body Scan Raises Radiation Exposure, Committee Says*, Feb. 5, 2010, <http://www.bloomberg.com/apps/news?pid=20601209&sid=aoG.YbbvknkzU>

<sup>44</sup> Commission to the European Parliament, *Communication on the Use of Security Scanners at EU Airports*, June 15, 2010,

<http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBIQFjAA&url=http%3A%2F%2Fec.europa>

his recent address to the Congressional Biomedical Caucus, Columbia Professor Dr. David Brenner agreed, stating that the dose of radiation delivered by FBS machines would be particularly risky for children and members of the population with a genetically higher sensitivity to radiation.<sup>45</sup>

Experts have also reported that body scanners may emit up to twenty times the reported amount of radiation.<sup>46</sup> Dr. Brenner noted that FBS machines expose the skin of the scalp to up to twenty times the reported amount of radiation.<sup>47</sup> He pointed out that skin is one of the most radiation-sensitive parts of the body.<sup>48</sup>

Dr. Agard and the other drafters of the letter to the Assistant to the President for Science and Technology called for a truly independent review of FBS technology because the true extent of the risk “can only be determined by a meeting of an impartial panel of experts that would include medical physicists and radiation biologists at which all of the available relevant data is reviewed.”<sup>49</sup> In his address to the Congressional Biomedical Caucus, Dr. Brenner also called for greater testing of FBS technology and the effects of “low dose” radiation.<sup>50</sup>

These concerns have been underscored by a recent letter by three United States senators to the Secretary Napolitano and TSA Administrator, John Pistole.<sup>51</sup> Senators Collins (R-ME), Burr (R-NC), and Coburn (R-OK) noted that “[t]he issue of radiation associated with the backscatter x-ray AIT machines has not been adequately addressed by TSA.”<sup>52</sup> The senators expressed particular concern for the well-being of frequent flyers who “would receive heightened exposures from multiple AIT scans” and airport and airline personnel “who work at the airport and therefore could receive multiple doses of radiation every work day.”<sup>53</sup>

These examples illustrate the “imminent threat to the life or physical safety” to not just one individual, but the entire American traveling public, and especially to select kinds of travelers: children, pregnant women, immunocompromised individuals, frequent fliers, and TSA personnel.

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<sup>45</sup> Brenner, *supra* note 6.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Sedat, Agard, Shuman, and Stroud, *supra* note 15.

<sup>50</sup> Brenner, *supra* note 6.

<sup>51</sup> United States Senate Committee on Homeland Security and Government Affairs, *Press Release: Senator Collins Sends Letter to Top DHS Officials, Noting Safety Questions About New Airport Scanning Machines*, Aug. 6, 2010, available at:

[http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MinorityNews&ContentRecord\\_id=48bdf98d-5056-8059-76f0-36d9d201328e&Is](http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MinorityNews&ContentRecord_id=48bdf98d-5056-8059-76f0-36d9d201328e&Is).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

2. EPIC's Request Involves An Urgency to Inform the Public About an Actual or Alleged Federal Government Activity and is Made by an Organization Primarily Engaged in Disseminating Information

EPIC's request involves an urgency to inform the public about an actual or alleged federal government activity and is made by an organization primarily engaged in disseminating information. A District of Columbia Circuit Court has articulated a test to determine whether requestors have demonstrated "urgency to inform," and hence "compelling need;" courts must consider at least three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity.<sup>54</sup>

EPIC's request satisfies the first prong of this test because it concerns a matter of current exigency to the American public. As discussed above, in recent months, many experts have questioned the safety of the TSA's FBS devices.<sup>55</sup> In late July 2010, TSA has announced its intent to continue to expand the FHS program to airports across the country.<sup>56</sup> New airports are receiving FBS machines every week.<sup>57</sup>

In an August 6, 2010 letter, three senators questioned the safety of these devices.<sup>58</sup> In that letter, Senators Collins (R-ME), Burr (R-NC), and Coburn (R-OK), wrote:

As the Department of Homeland Security (DHS) continues the deployment of Advanced Imaging Technology (AIT) machines at airport passenger screening checkpoints, we urge the Department to better address an issue with the new technology that remains a persistent question with the American people. The issue of radiation associated with the backscatter x-ray AIT machines has not been adequately addressed by TSA... TSA's privacy assessment on AIT does little to assuage fears over the level of radiation that individuals are exposed to at airports. TSA's privacy assessment does note that the level of radiation absorbed from a single scan is "equivalent to the radiation received in two minutes of airplane flight at altitude." This is intended apparently to answer passengers who have real and legitimate concerns with exposure to even low doses of radiation. Frequent flyers, however, would receive heightened exposures from multiple AIT scans, and other travelers have expressed the belief that "there is *no* safe level of radiation exposure..." Furthermore, we have not seen TSA address the issue of airport and airline personnel who work at the airport and therefore could receive multiple

<sup>54</sup> *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001).

<sup>55</sup> See e.g. Brenner, *supra* note 6; Sedat, Agard, Shuman, and Stroud, *supra* note 15.

<sup>56</sup> Department of Homeland Security, *Press Release: Secretary Napolitano Announces Additional Recovery Act-Funded Advanced Imaging Technology Deployments*, July 20, 2010, available at: [http://www.dhs.gov/ynews/releases/pr\\_1279642622060.shtm](http://www.dhs.gov/ynews/releases/pr_1279642622060.shtm)

<sup>57</sup> See e.g. Carol Pucci, *Full-Body Scans of Passengers to Start at Sea-Tac in September*, The Seattle Times, Aug. 18, 2010, [http://seattletimes.nwsourc.com/html/travel/2012663519\\_bodyscanners19.html](http://seattletimes.nwsourc.com/html/travel/2012663519_bodyscanners19.html)

<sup>58</sup> United States Senate Committee on Homeland Security and Government Affairs, *supra* note 51.

doses of radiation every work day. It also may be possible for TSA personnel to receive collateral doses of radiation while working in the vicinity of backscatter x-ray AIT machines.<sup>59</sup>

Also, a bill has recently been introduced in the Senate that would mandate deployment of FBS machines as primary screening devices in all commercial airports across the country.<sup>60</sup> FBS machines are obviously the topic of current and urgent debate and lawmaking.

EPIC's request also satisfies the second prong of this test: the consequence of delaying a response would compromise a significant recognized interest. A failure by the agency to disclose records detailing risk and safety assessments of FBS machines denies the American public the opportunity to make an informed decision about this technology. As mentioned above, a Senate bill has been introduced that would make FBS machines primary screening at every commercial airport across the country. At the same time, several senators have expressed concerns regarding the safety of these machines. The public must be informed in order to participate in the current debate over FBS machines. Courts have been persuaded to require expedited process when Congress is considering legislation on an issue at the time of the request<sup>61</sup> or where Congress has expressed interest in a particular topic.<sup>62</sup>

The agency's failure to disclose documents in an expedient manner compromises not only the democratic decision-making process, but also the safety of American travelers and TSA employees. As discussed above, many experts have indicated that the radiation exposure created by FBS technology presents a threat to American travelers. Few interests are more significant than the health of the American traveling public.

EPIC's request also clearly fulfills the third prong of this test: it concerns federal government activity. As discussed in Section III, above, the TSA is responsible for "security at the nation's airports and [has] deployed a Federal workforce to meet Congressional deadlines for screening all commercial airline passengers and baggage."<sup>63</sup> The TSA is currently employing FBS machines to screen air travelers.<sup>64</sup> The TSA has contracted for the development of this technology, is distributing FBS machines to airports around the country, and employs workers to operate this equipment in American airports. EPIC's FOIA Request seeks records regarding the testing of FBS devices used by the TSA.<sup>65</sup> As such, the request for "All records concerning ... tests regarding body scanners and radiation emission or exposure" done by TSA or third party contractors directly and clearly concerns the TSA's operations and activities.

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<sup>59</sup> United States Senate Committee on Homeland Security and Government Affairs, *supra* note 51.

<sup>60</sup> S.3536, 111<sup>th</sup> Cong. (2010).

<sup>61</sup> *Gerstein v. CIA*, 2006 U.S. Dist. LEXIS 89883 (N.D. Cal. Nov 29, 2006).

<sup>62</sup> *Natural Res. Def. Council v. DOE*, 191 F. Supp. 2d 41, 43-44 (D.D.C. 2002).

<sup>63</sup> TSA: What is TSA, [http://www.tsa.gov/who\\_we\\_are/what\\_is\\_tsa.shtm](http://www.tsa.gov/who_we_are/what_is_tsa.shtm) (last visited Aug. 18, 2010).

<sup>64</sup> TSA: Imaging Technology, [http://www.tsa.gov/approach/tech/imaging\\_technology.shtm](http://www.tsa.gov/approach/tech/imaging_technology.shtm) (last visited June 7, 2010).

<sup>65</sup> TSA: Mission, Vision, and Core Values, [http://www.tsa.gov/who\\_we\\_are/mission.shtm](http://www.tsa.gov/who_we_are/mission.shtm) (last visited Aug. 6, 2010).



Regarding EPIC's status as an organization "primarily engaged in disseminating information," as the TSA has already acknowledged in its response, EPIC is a news media organization and is primarily engaged in disseminating information. EPIC's status as a news media organization<sup>66</sup> and an organization that is "primarily engaged in disseminating information" for the purposes of expediting the request has been recognized by District of Columbia Courts.<sup>67</sup>

#### **V. EPIC is Entitled to Expedited Processing on This Appeal**

Pursuant to 5 U.S.C. § 552(a)(6)(E)(ii)(II) and 6 C.F.R. § 5.5, EPIC is entitled to expedited processing for this appeal. 6 C.F.R. § 5.5 sets forth the same requirements for expedited processing of appeals as for requests, that is, that requests and appeals will be taken out of order and given expedited treatment whenever it is determined that they involve:

- (i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
- (ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.

For all of the reasons stated above in Section IV, EPIC has fulfilled both of these requirements (though only one is required) and this appeal qualifies for expedited processing.

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<sup>66</sup> *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).

<sup>67</sup> *ACLU v. DOJ*, 321 F. Supp. 2d 24, 30 (D.D.C. 2004).

## VI. Conclusion

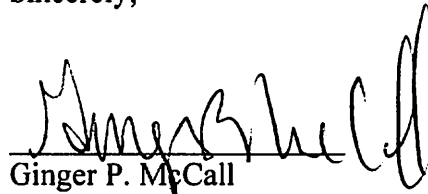
EPIC appeals the TSA's failure to grant a fee waiver and expedited processing as requested in EPIC's FOIA Request. EPIC also requests expedited processing for this appeal.

Thank you for your consideration of this appeal. I anticipate that you will make a determination on this appeal within ten (10) days.

## VII. Certification

The undersigned certifies that the statements in this appeal are true and correct, to the best of her knowledge (in accordance with 6 C.F.R. § 5.5(d)(3)).

Sincerely,



Ginger P. McCall  
Staff Counsel

Electronic Privacy Information Center

**Appendix 1**

EPIC's July 13, 2010 FOIA Request to the DHS

**Appendix 2**

DHS's July 29, 2010 Letter of Acknowledgment to EPIC and Referral to TSA and S&T

**Appendix 3**

TSA's August 13, 2010 Letter of Acknowledgment to EPIC and Denial of Fee Waiver  
and Expedited Processing

# Exhibit E to Declaration of Paul Sotoudeh



**Transportation  
Security  
Administration**

**September 21, 2010**

Ms. Ginger P. McCall  
Staff Counsel  
Electronic Privacy Information Center (EPIC)  
1718 Connecticut Ave., NW  
Suite 200  
Washington, DC 20009

Re: **TSA 10-0674**

Dear Ms. McCall:

This letter acknowledges receipt of your Freedom of Information Act/Privacy Act (FOIA/PA) appeal to the Transportation Security Administration (TSA), dated August 27, 2010, appealing TSA's denial of EPIC's fee waiver and expedited processing for the above listed FOIA request. Specifically, you requested:

1. All records concerning TSA tests regarding body scanners and radiation emission or exposure.
2. All records concerning third party tests regarding body scanners and radiation emission or exposure.

If you have any questions or would like to discuss this matter, please feel free to contact this office at 571-227-2300 or 1-866-364-2872 and refer to **TSA10-0674**.

Sincerely,

A handwritten signature in black ink, appearing to read "Howard Plofker".

*for*  
Howard Plofker  
Acting FOIA Officer  
Freedom of Information Office

# Exhibit F to Declaration of Paul Sotoudeh



U.S. Department of Homeland Security  
Office of Special Counselor  
Arlington, VA 20598-6033



Transportation  
Security  
Administration

NOV 24 2010

Ginger P. McCall  
Electronic Privacy Information Center  
1718 Connecticut Ave NW Ste 200  
Washington, DC 20009

**Re: FOIA Case Number: TSA10-0674  
Fee Waiver & Expedited Treatment Appeal**

Dear Ms. McCall:

This is in response to your letter dated August 27, 2010, appealing the August 12, 2010, denial by TSA of your request that TSA waive all fees and grant expedited processing of your request for information under the Freedom of Information Act (FOIA), 5 U.S.C. §552. Your initial request for information, dated July 13, 2010, asked for all records concerning TSA or third party tests regarding body scanners and radiation emission or exposure. In addition, you also requested that TSA waive all fees and grant expedited processing of your request for information. After reviewing your appeal and the administrative file, I hereby affirm TSA's initial expedited processing denial but agree to waive the fees.

#### Expedited Treatment

In your July 13, 2010, letter, you requested records under the FOIA related to tests regarding body scanners and radiation emission or exposure. You requested that TSA expedite processing because a lack of expedited processing "could reasonably be expected to pose an imminent threat to the life or physical safety of an individual," and because your request stated that (1) you are journalists primarily engaged in disseminating information; (2) the public has an urgent need for information about the safety of AIT programs; and (3) many alleged experts have raised questions about AIT safety.

The FOIA requires agencies to promulgate regulations providing for the expedited processing of requests if the requester demonstrates a "compelling need".<sup>1</sup> A requester bears the burden of showing "compelling need" by demonstrating either circumstances in which a lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical

<sup>1</sup> 5 U.S.C. §552(a)(6)(E) (2000).

safety of an individual or, for requesters primarily engaged in disseminating information, by demonstrating that an “urgency to inform the public concerning actual or alleged Federal Government activity” exists.<sup>2</sup> An “urgency to inform” would be found to exist if (1) the request concerns a “matter of current exigency to the American public,” and (2) the consequences of delaying the response would “compromise a significant recognized interest.”<sup>3</sup> I note that the courts have held that these categories are to be “narrowly applied”<sup>4</sup> so that other requesters would not be unduly disadvantaged.

You state that the public may be at risk because AIT “exposes air travelers to unnecessary radiation,” and that “many experts” have stated that “exposure to radiation, even in low doses, could reasonably be expected to create a greater risk of cancer and birth defects.” This, in addition to concerns raised by Members of Congress, leads you to argue that AIT may reasonably pose an imminent threat to safety. I disagree, noting that previous statements and releases by TSA and DHS have made clear that AIT is safe and meets national health and safety standards.

You also argue that the requests are a matter of current exigency in that the records specifically concern TSA’s transportation security functions, recent news stories and “experts” have raised questions about AIT safety, and Members of Congress have introduced bills concerning AIT. While the news articles demonstrate that TSA’s responses to evolving threats to transportation security are newsworthy, you have presented no evidence that a pressing or urgent situation exists that requires immediate action. General coverage of homeland security programs, even acknowledging the public’s need to know, does not meet this standard. In addition, the numerous statements and documents TSA has made available to the public also make clear that no exigency exists.<sup>5</sup> Accordingly, I affirm the denial of your request for expedited processing.

This is the final decision pertaining to your appeal for expedited processing. I am the person responsible for this decision. If you wish, you may seek judicial review of this final decision in the United States District Court for the district in which you reside, have principal place of business, where the records are located, or in the District of Columbia.

Sincerely,



Kimberly Walton  
Special Counselor

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<sup>2</sup> *Id.* at (E)(i). *See also* 6 CFR §5.5(d)(1) (2005).

<sup>3</sup> *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001).

<sup>4</sup> *Id.*

<sup>5</sup> Please refer to the studies posted to the TSA FOIA Electronic Reading Room, at <http://www.tsa.gov/research/reading/index.shtm>.

# Exhibit G to Declaration of Paul Sotoudeh

U.S. Department of Homeland Security  
Freedom of Information Act Office  
601 South 12<sup>th</sup> Street  
Arlington, VA 20598-6020



Transportation  
Security  
Administration

FOIA Case Number: TSA10-0674

DEC 22 2010

Ms. Ginger P. McCall  
Electronic Privacy Information Center  
1718 Connecticut Ave, NW  
Suite 200  
Washington, DC 20009

Dear Ms. McCall:

This letter is an interim response to your Freedom of Information Act (FOIA) request dated July 13, 2010, in which you requested agency records concerning radiation and health testing of advanced imaging technology ("AIT") devices. Specifically, you requested the following records:

1. All records concerning the Transportation Security Administration (TSA) tests regarding body scanners and radiation emission or exposure.
2. All records concerning third party tests regarding body scanners and radiation emission or exposure.

Your request is currently being processed under the FOIA, 5 U.S.C. § 552.

Please be advised that certain records that may be responsive to your request are publicly available and are posted or linked to on TSA's web page on AIT safety, <http://www.tsa.gov/approach/tech/ait/safety.shtm>, and in the TSA Electronic Reading Room (<http://www.tsa.gov/research/reading/index.shtm>). These records include:

- *Assessment of the Rapiscan Secure 1000 Body Scanner for Conformance with Radiological Safety Standards*, National Institute of Standards and Technology (NIST), U.S. Department of Commerce, July 21, 2006, [http://www.tsa.gov/assets/pdf/nist\\_rapiscan\\_secure\\_1000.pdf](http://www.tsa.gov/assets/pdf/nist_rapiscan_secure_1000.pdf)
- *Radiation Safety Engineering Assessment Report for the Rapiscan Secure 1000 in Single Pose Configuration*, Applied Physics Laboratory (APL), Johns Hopkins University, October 2009 & August 2010 (Versions 1 & 2), [http://www.tsa.gov/assets/pdf/jh\\_apl\\_v1.pdf](http://www.tsa.gov/assets/pdf/jh_apl_v1.pdf), [http://www.tsa.gov/assets/pdf/jh\\_apl\\_v2.pdf](http://www.tsa.gov/assets/pdf/jh_apl_v2.pdf)
- *TSA Memorandum on Implementing the Recommendations from the APL Assessment*, October 7, 2010, [http://www.tsa.gov/assets/pdf/tsa\\_safety\\_study\\_ait\\_info\\_memo.pdf](http://www.tsa.gov/assets/pdf/tsa_safety_study_ait_info_memo.pdf)
- *White House Blog: Backscatter Back-Story*, TSA Blog, November 9, 2010, <http://blog.tsa.gov/2010/11/white-house-blog-backscatter-back-story.html>

www.tsa.gov

JA 000121

- *Fact Sheet: Advanced Imaging Technology (AIT) Health & Safety*, Department of Homeland Security, Office of Health Affairs, [http://www.tsa.gov/assets/pdf/ait\\_fact\\_sheet.pdf](http://www.tsa.gov/assets/pdf/ait_fact_sheet.pdf)

In addition, information and links to material on this subject matter can be found on other Executive Branch and executive agency websites including:

- *Products for Security Screening of People, Radiation-Emitting Products & Procedures*, Web Site, U.S. Food and Drug Administration, <http://www.fda.gov/Radiation-EmittingProducts/RadiationEmittingProductsandProcedures/SecuritySystems/ucm227201.htm>
- *Backscatter Back-Story*, Executive Office of the President, Office of Science and Technology Policy blog post, November 8, 2010, <http://www.whitehouse.gov/blog/2010/11/08/backscatter-back-story> (containing Letter of Concern by John W. Sedat, Ph.D, and responses by John P. Holdren, Director, Executive Office of the President, Office of Science and Technology Policy, John L. McCrohan, Deputy Director for Technical and Radiological Initiatives, U.S. Food and Drug Administration, and Karen R. Shelton Waters, Deputy Assistant Administrator / Chief Administrative Officer, Designated Safety and Health Official, TSA)

TSA is waiving any applicable fees associated with the processing of your request. In addition, as TSA's response to this request is currently the subject of litigation, the administrative appeal rights that normally accompany a FOIA response are not being provided.

If you have any questions regarding this release, please contact Jesse Grauman, U.S. Department of Justice, at 202-514-2849.

Sincerely,



Howard Plofker  
Acting FOIA Officer  
Freedom of Information Act Office

# Exhibit H to Declaration of Paul Sotoudeh

Freedom of Information Act Office  
601 South 12<sup>th</sup> Street  
Arlington, VA 20598-6020



Transportation  
Security  
Administration

**FOIA Case Number: TSA10-0674**

June 6, 2011

Ms. Ginger P. McCall  
Electronic Privacy Information Center  
1718 Connecticut Ave, NW, Suite 200  
Washington, DC 20009

Dear Ms. McCall:

This letter is the second interim response to your Freedom of Information Act (FOIA) request dated July 13, 2010, in which you requested agency records concerning radiation and health testing of advanced imaging technology (“AIT”) devices. Specifically, you requested the following records:

1. All records concerning the Transportation Security Administration (TSA) tests regarding body scanners and radiation emission or exposure.
2. All records concerning third party tests regarding body scanners and radiation emission or exposure.

Your request is currently being processed under the FOIA, 5 U.S.C. § 552.

A reasonable search within the TSA was conducted and documents (135 pages) responsive to your request were located. These documents have been reviewed and 84 pages are being released in their entirety. However, portions of 42 pages are being withheld pursuant to Exemptions (b)(2), (b)(4), (b)(5), and (b)(6). In addition, nine pages are being withheld in their entirety pursuant to Exemption (b)(5). A more complete explanation of these exemptions is provided below.

Exemption (b)(2)

Exemption (b)(2) exempts from mandatory disclosure records that are “related solely to the internal personnel rules and practices of an agency.” We have determined that certain portions of the requested records contain personnel rules and/or internal practices of the TSA and are thus properly withheld from disclosure under this exemption.

Exemption (b)(4)

We have determined that portions of the responsive document are exempt from disclosure under Exemption (b)(4) and must be withheld in order to protect the submitter's proprietary interests. Exemption (b)(4) protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential. The courts have held that this subsection protects (a)

confidential commercial information, the disclosure of which is likely to cause substantial harm to the competitive position of the person who submitted the information and (b) information that was voluntarily submitted to the government if it is the kind of information that the provider would not customarily make available to the public.

Exemption (b)(5)

Exemption (b)(5) protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. Of those, we have determined that some of the information in the documents you have requested is appropriately withheld under all three privileges. Under the deliberative process privilege, disclosure of those records would injure the quality of future agency decisions by creating public confusion resulting from disclosure of reasons and rationales that were not in fact ultimately the grounds for agency action. Secondly, the attorney work-product privilege protects the adversarial trial process by insulating the attorney's preparation from scrutiny. Finally, this information is also being withheld under the attorney-client privilege. This part of Exemption 5 protects the communications between an attorney and his/her client relating to a matter for which the client has sought legal advice, as well as to protect facts divulged by client to attorney and any opinions given by attorney based on these facts.

Exemption (b)(6)

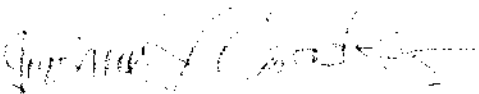
Exemption (b)(6) permits the government to withhold all identifying information that applies to a particular individual when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." This requires the balancing of the public's right to disclosure against the individual's right to privacy. After performing this analysis, we have determined that the privacy interest in the identities of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Please note that any personal interest you may have in that information does not factor into the aforementioned balancing test.

TSA is waiving any applicable fees associated with the processing of your request. In addition, as TSA's response to this request is currently the subject of litigation, the administrative appeal rights that normally accompany a FOIA response are not being provided.



If you have any questions regarding this release, please contact Jesse Grauman, U.S. Department of Justice, at 202-514-2849.

Sincerely,



Yvonne L. Coates  
Freedom of Information Act Officer  
Office of the Special Counselor  
Transportation Security Administration

Enclosure

# Exhibit I to Declaration of Paul Sotoudeh

Freedom of Information Act Office  
601 South 12<sup>th</sup> Street  
Arlington, VA 20598-6020



Transportation  
Security  
Administration

JUN 20 2011

3600.1

FOIA Case Number: TSA10-0674

Ms. Ginger P. McCall  
Electronic Privacy Information Center  
1718 Connecticut Ave, NW, Suite 200  
Washington, DC 20009

Dear Ms. McCall:

This letter is the Transportation Security Administration's (TSA) final response to your Freedom of Information Act (FOIA) request dated July 13, 2010, in which you requested agency records concerning radiation and health testing of Advanced Imaging Technology (AIT) devices. Specifically, you requested the following records:

1. All records concerning the Transportation Security Administration (TSA) tests regarding body scanners and radiation emission or exposure.
2. All records concerning third party tests regarding body scanners and radiation emission or exposure.

Your request has been processed under the FOIA, 5 U.S.C. § 552.

A reasonable search within TSA was conducted and additional documents (69 pages) responsive to your request were located. These documents have been reviewed and 25 pages are being released in their entirety. However, portions of 44 pages are being withheld pursuant to Exemptions (b)(2), (b)(4), (b)(5), and (b)(6). A more complete explanation of these exemptions is provided below. In addition to these records, TSA has posted radiation surveys for every backscatter imaging technology unit deployed in U.S. airports on its website. The test results come from testing conducted in March 2011, in addition to site acceptance and factory acceptance tests conducted on every unit prior to and immediately after installation in an airport since TSA began deploying the technology in 2009. To provide additional transparency, all future radiation survey reports will be posted on [www.tsa.gov](http://www.tsa.gov) after they are completed.

These records can be found on TSA's website at:  
[http://www.tsa.gov/research/reading/xray\\_screening\\_technology\\_safety\\_reports.shtm](http://www.tsa.gov/research/reading/xray_screening_technology_safety_reports.shtm).

Pursuant to an agreement to narrow the scope of the request on January 19, 2011, the search for responsive records was limited to records pertaining to vendors and technologies that are either

currently being deployed by TSA or are under consideration by TSA. Finally, TSA has attempted to account for and eliminate all duplicate copies of identical records.

Exemption (b)(2)

Exemption (b)(2) exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency." We have determined that certain portions of the requested records contain personnel rules and/or internal practices of TSA and are thus properly withheld from disclosure under this exemption.

Exemption (b)(4)

We have determined that portions of the responsive document are exempt from disclosure under Exemption (b)(4) and must be withheld in order to protect the submitter's proprietary interests, which protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential. The courts have held that this subsection protects (a) confidential commercial information, the disclosure of which is likely to cause substantial harm to the competitive position of the person who submitted the information and (b) information that was voluntarily submitted to the government if it is the kind of information that the provider would not customarily make available to the public.

Exemption (b)(5)

Exemption (b)(5) protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. Of those, we have determined that some of the information in the documents you have requested is appropriately withheld under the deliberative process privilege. Under the deliberative process privilege, disclosure of those records would injure the quality of future agency decisions by discouraging the open and frank policy discussions between subordinates and superiors.

Exemption (b)(6)

Exemption (b)(6) permits the government to withhold all identifying information that applies to a particular individual when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." This requires the balancing of the public's right to disclosure against the individual's right to privacy. After performing this analysis, we have determined that the privacy interest in the identities of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Please note that any personal interest you may have in that information does not factor into the aforementioned balancing test.

TSA is waiving any applicable fees associated with the processing of your request. In addition, as TSA's response to this request is currently the subject of litigation, the administrative appeal rights that normally accompany a FOIA response are not being provided.

If you have any questions regarding this release, please contact Jesse Grauman, U.S. Department of Justice, at 202-514-2849.

Sincerely,

A handwritten signature in black ink, appearing to read "Yvonne L. Coates". The signature is fluid and cursive, with a large initial "Y" and "C".

Yvonne L. Coates  
Freedom of Information Act Officer  
Office of the Special Counselor  
Transportation Security Administration

Enclosure

# Exhibit J to Declaration of Paul Sotoudeh

**Grauman, Jesse (CIV)**

---

**From:** Grauman, Jesse (CIV)  
**Sent:** Wednesday, September 07, 2011 6:49 PM  
**To:** John Verdi  
**Subject:** EPIC v. DHS (Radiation testing) (First email)  
**Attachments:** TSL1075-1189.pdf; TSL1190-1198.pdf; TSL1199-1279.pdf

John –

Attached to this email (and subsequent emails due to file size) are records being released or re-released by DHS to EPIC in EPIC v. DHS, No. 1:10cv1992 (radiation testing regarding advanced imaging technology). As you know, in an effort to narrow the issues for review, DHS has been reviewing withholdings made pursuant to Exemption 4, pursuant to the one-month extension we negotiated in early August. In addition, certain records had been temporarily withheld by DHS pending completion of the submitter notice process and review for sensitive security information (SSI). Both of these processes are complete and the following three categories of records are being released:

**I: Records previously withheld temporarily pending completion of submitter notice and SSI review and now being released upon completion of that review:**

TSL1075-1189  
TSL1190-1198  
TSL1199-1279  
TSL1280-1360

**II. Records previously withheld in full pursuant to Exemption 4, now being released in part after further review:**

TSL1361-1378  
TSL1379-1382

**III. Records previously withheld in part pursuant to Exemption 4 now being released with fewer or no Exemption 4 withholdings after further review:**

TSA178-191  
TSA192-195  
TSL774-788  
TSL919-922  
TSL-MISC (comprising TSL13, 26, 32-38, 41, 153, 165, 171, 176, 651, 841, 874)

The bases for any withholdings in these records will be identified in the Vaughn indices and declarations that will be filed with our upcoming motion for summary judgment on Monday. Please contact me if you have any questions or concerns.

Jesse

Jesse Grauman  
Trial Attorney  
U.S. Department of Justice, Civil Division, Federal Programs Branch  
20 Massachusetts Avenue NW, Room 5374  
Washington, DC 20001  
[jesse.z.grauman@usdoj.gov](mailto:jesse.z.grauman@usdoj.gov)  
Phone: (202) 514-2849  
Fax: (202) 305-8517

Exhibit K to  
Declaration of Paul Sotoudeh  
(TSA Vaughn Index)



**EPIC v. DHS, Civil Action 1:10-cv-1992**  
**US District Court, District of Columbia**

**TSA Vaughn Index**

Description of responsive TSA records withheld in full or in part pursuant to FOIA Exemptions.

	<b>BATES NUMBER</b>	<b>EXEMPTION</b>	<b>PAGES WITHHELD</b>	<b>DESCRIPTION OF MATERIAL REDACTED</b>
<b>EMAILS</b>				
	000001	<b>Exemption 6</b>	1 page withheld in part	Internal employee email addresses
	000007-000008	<b>Exemption 6</b>  <b>Exemption 5 Deliberative Process Privilege</b>	2 pages withheld in part  2 pages withheld in part	Internal employee names and email addresses  Internal government email exchange containing deliberative, questions, and answers regarding agency policies as to compliance with consensus standards regarding radiation, and authority of various federal agencies with regard to AIT safety
	000015-000016	<b>Exemption 6</b>	2 pages withheld in part	Internal employee names, email addresses and phone number
	000017-000019  000018	<b>Exemption 6</b>  <b>Exemption 5 Deliberative Process Privilege</b>	3 pages withheld in part  1 page withheld in part	Internal employee names, email addresses and phone number  Internal deliberations, discussions, and opinions of author regarding TSA's response to correspondence from Ralph Nader and its implications for AIT policy in general
	000026-000027	<b>Exemption 6</b>  <b>Exemption 5 Deliberative Process Privilege and Attorney Client Privilege</b>	2 pages withheld in part  1 page withheld in part	Internal employee names, email addresses and phone number  Internal email, including draft language, from attorney in TSA Office of Chief Counsel to TSA official regarding suggested response letter to EPIC's petition to suspend use of AIT
	000037-000038  000038	<b>Exemption 6</b>  <b>Exemption 5 Deliberative Process</b>	2 pages withheld in part  1 page withheld in part	Internal employee names, email addresses  Excerpts of recommendations section of internal memorandum on AIT safety; withheld portion contains

		<b>Privilege</b>		recommendation from internal memorandum regarding future efforts by TSA regarding development of AIT radiation safety standards
Attachment to 000037 - Memo Briefing re: Guidance on Radiation Safety	000042	<b>Exemption 6</b>  <b>Exemption 5 Deliberative Process Privilege</b>	1 page withheld in part	Internal employee names  Excerpt of internal memorandum to DHS Undersecretary containing recommendations for future steps by TSA/DHS regarding development of AIT radiation safety standards (same excerpts withheld at TSA38)
	000047	<b>Exemption 6</b>	1 page withheld in part	Internal employee names, email addresses
	000049-000051	<b>Exemption 6</b>	2 pages withheld in part	Internal employee names, email addresses and phone number
	000052	<b>Exemption 6</b>  <b>Exemption 5 Deliberative Process Privilege</b>	1 page withheld in part  1 page withheld in part	Internal employee names, email addresses  Internal deliberations concerning TSA's response to congressional inquiry, including draft language for response
	000053-000054	<b>Exemption 6</b>	2 pages withheld in part	Internal employee names, email addresses
	000055-000056	<b>Exemptions 6</b>	2 pages withheld in part	Internal employee names, email addresses and phone number
	000069-000070	<b>Exemption 6</b>  <b>Exemption 5 Deliberative Process Privilege</b>	2 pages withheld in part	Internal employee names, email addresses  Internal deliberations concerning cover memo for JHU/APL report on AIT safety, including draft language for memorandum
	000071-000072; 000071A	<b>Exemption 6</b>  <b>Exemption 5 Deliberative Process Privilege</b>	2 pages withheld in part; 1 page withheld in full	Internal employee names, phone number  Summary by TSA Office of Chief Counsel attorney describing results of JHU/APL study on Rapiscan Secure 1000, and summarizing internal agency discussions and deliberations regarding radiation safety and any impact of the results of the JHU/APL study for whether TSA would deploy Rapiscan AIT systems

	000073	<b>Exemption 6</b>	1 page withheld in part	Internal employee names, email addresses and phone number
	000106	<b>Exemption 6</b>	1 page withheld in part	Internal employee names
	000107-000108	<b>Exemption 6</b>	2 pages withheld in part	Internal employee names, phone number
	000111-000112	<b>Exemption 6</b>	2 pages withheld in part	Internal employee names, email addresses and phone number
	000127, 000129 000128	<b>Exemption 6</b> <b>Exemption 5 Deliberative Process Privilege</b>	2 pages withheld in part 1 page withheld in part	Internal employee names, email addresses and phone number Recommendation by National Institute for Occupational Safety and Health (NIOSH) regarding future steps to be taken in internal government study measuring radiation emissions at selected airports
	000133-000135	<b>Exemption 6</b>	3 pages withheld in part	Internal employee names, email addresses and phone number
	000136, 000139, 000140	<b>Exemption 6</b>	5 pages withheld in part	Internal employee names and phone numbers
	000141-000143	<b>Exemption 6</b>	3 pages withheld in part	Internal employee names
<b>REPORTS, AGREEMENTS, CORRESPONDENCE</b>				
<b>Draft Cover memorandum for JHU/APL report on AIT safety</b>	000070A- 000070C	<b>Exemption 5 Deliberative Process Privilege</b>	3 pages withheld in full	Draft version (including tracked changes) of cover memorandum for JHU/APL report on AIT safety (document attached to email on 000069-70)
<b>Assessment of the Rapiscan Secure 10000 Body Scanner for Conformance with Radiological Safety Standards</b>	000092  000077	<b>Exemption 3 (49 U.S.C. § 114(r); 49 C.F.R. § 1520.5(b)(9)(vi))</b>  <b>Exemption 4</b>	1 page withheld in part  2 pages withheld in part	Scatter phantom image generated by Rapiscan Secure 1000  Name and model number of type of X-Ray tube used in

	000086			<p>Rapiscan Secure 1000</p> <p>Description of method used to shape X-Ray beam in Rapiscan Secure 1000</p> <p>This information is contained within a government report authored by Frank Cerra on the conformance of Rapiscan's Secure 1000 Scanner to radiological safety standards. Mr. Cerra performed the work underlying this report while at the Food and Drug Administration's Center for Devices and Radiological Health ("FDA/CDRH"), but wrote the report when he was affiliated with the National Institute on Standards and Technology ("NIST"). The information withheld on page 77 (name and model information) was obtained via a personal communication with Steve Gray of Rapiscan. The information withheld in page 86 (method used to shape X-Ray beam) was obtained either from the system itself that was used for testing, or from information provided by Rapiscan in connection with the testing.</p> <p>The withheld information specified above is not of the type Rapiscan would normally release to the public. Moreover, its release is likely to cause Rapiscan substantial competitive harm because it could enable competitors to more effectively design and build their own systems using Rapiscan's proprietary information. Modica Decl. ¶¶ 4-7; Sotoudeh Decl. ¶¶ 54-58.</p>
<b>Draft TSA Assessments and Findings of the Radiation Output of AIT Machines</b>	000108A-000108F	<b>Exemption 5 Deliberative Process Privilege</b>	6 pages withheld in full	Draft version (including tracked changes) of TSA assessment/findings regarding radiation output of AIT machines (document attached to email on 000107-000108)
<b>DHS Reimbursement Agreement</b>	000113-000114	<b>Exemption 6</b>	2 pages withheld in part	Internal employee names, phone number
<b>US Army Center for Health Promotion and</b>	000115-000118	<b>Exemption 6</b>	4 pages withheld in part	Internal employee names, email addresses and phone numbers

<b>Preventive Medicine: Information regarding interagency agreement</b>				
<b>DHHS Public Health Service Letter, 9/1/10</b>	000120	<b>Exemption 6</b>	2 pages withheld in part	Internal employee names, titles, phone numbers, and signature
<b>Department of Army Letters re: Army/TSA Memorandum of Agreement, AIT Survey Worksheets and Exit Briefing Notes</b>	000145-000149, 000151-000152, 000154, 000156- 000160, 000165, 000167-000171, 000174	<b>Exemption 6</b>	20 pages withheld in part	Internal employee names and phone numbers
<b>David Bogdan: Radiation Safety Engineering Assessment of the Rapiscan Secure 1000 in Preliminary Single- Pose Configuration: Preliminary Quick- Look Brief, 8/10/09</b>	000181	<b>Exemption 6</b>	1 page withheld in part	Name of non-government physicist who performed third-party radiation testing on Rapiscan Secure 1000
	000191	<b>Exemption 4</b>	1 page withheld in part	Beam width measurement of Rapiscan Secure 1000  This information is contained within a “quick look brief” summarizing a radiation safety study on the Rapiscan system, conducted for TSA by the Johns Hopkins University Applied Physics Laboratory in 2009. This testing was conducted at Rapiscan, which voluntarily hosted APL at its plant and provided a representative unit there, also voluntarily, for radiation and safety testing.  The withheld information specified above (beam width measurement) was obtained either from the Rapiscan system itself that was provided for testing, or from information provided by Rapiscan in connection with the testing. This information is not of the type Rapiscan would normally release to the public. Moreover, its release is likely to cause Rapiscan substantial commercial harm because it could enable competitors to more effectively design and build their own systems using Rapiscan’s proprietary information. Modica Decl. ¶¶ 4-5; Sotoudeh Decl. ¶¶ 54-58.
<b>NIST Assessment of Radiation Safety and Compliance with</b>	000192-000195	<b>Exemption 6</b>	4 pages withheld in part	Name of non-government physicist who performed third-party radiation testing on Rapiscan Secure 1000.

ANSI N43.17-22, Rapiscan Dual Secure 1000 Personal Scanner				
Site Acceptance Tests (“SATs”) and Factory Acceptance Tests (“FATs”), posted online at <a href="http://www.tsa.gov/research/reading/xray_scanning_technology_safety_reports_march_2011.shtm">http://www.tsa.gov/research/reading/xray_scanning_technology_safety_reports_march_2011.shtm</a> and referenced in TSA’s June 20, 2011 letter to EPIC	N/A	<b>Exemption 6</b>	Numerous pages withheld in part	Names, signatures, and initials of government and non-government employees contained throughout.

# Exhibit 2

## Declaration of Bert Coursey

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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ELECTRONIC PRIVACY INFORMATION CENTER )  
Plaintiff, )  
v. ) Case No. 1:10-cv-1992 (ABJ)  
THE UNITED STATES DEPARTMENT OF )  
HOMELAND SECURITY, )  
Defendant. )

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**DECLARATION OF BERT COURSEY**

I, Bert Coursey, hereby declare as follows:

1. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations made in accordance herewith.
2. I currently serve as the chief of the Standards Branch within the Test, Evaluation, and Standards Office (“TES”) of the Science and Technology Directorate (“S&T”), a component of the Department of Homeland Security (“DHS”).
3. The mission of TES is to develop standards for all types of equipment, products and services including standards for the detection of chemical, biological, radioactive, nuclear and explosives substances for use throughout DHS and the private sector. As necessary or required, TES coordinates with other federal agencies to adopt appropriate standards and implement effective test and evaluation programs.
4. With regard to Advanced Imaging Technology (“AIT”) systems, TES’s role is to support TSA in their certifying and testing those systems before they are deployed at airports.



5. I have a Ph.D. in physical chemistry and over 40 years of government service. I have been at DHS since 2002 and have served as the director of the Office of Standards (now chief of the Standards Branch) since March 2003. I am a member of the senior executive service at the National Institute of Standards and Technology (“NIST”) of the Department of Commerce (“DOC”) and am currently on an assignment to DHS.
6. Prior to my work at DHS, I served as Chief of the Ionizing Radiation Division in the NIST Physics Laboratory. My duties at NIST required me to supervise radiation physicists who developed and maintained the national standards for all x-rays. These standards include mammography and dental x-rays, which are in the same energy region (although much higher dose rates) as the AIT backscatter machines. I have also served on expert review panels for the Department of Energy and for the Food and Drug Administration, Center for Devices and Radiological Health.
7. As the chief of the Standards Branch, my job is to coordinate standards activities between DHS, DOC, NIST, and other federal agencies. Specifically, I collect and harmonize the views of federal agencies in order to present the federal government’s views to independent bodies that develop voluntary consensus standards, such as the Institute of Electrical and Electronics Engineers (“IEEE”) or the American National Standards Institute (“ANSI”).
8. One of my areas of responsibility pertains to standards for explosive detection devices and X-ray screening.
9. Although the majority of TES’s work does not pertain to safety standards, I have been involved in work on safety standards for explosive detection systems deployed by DHS, including AIT, because of my expertise in this area. I have worked with other federal

agencies that are more directly involved in radiation safety standards, including NIST and the FDA. In addition, TES provides a certain amount of funding for those agencies to conduct radiation safety testing.

10. I am familiar with TES's obligations to produce responsive records under the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"), as I have frequently been asked to search for records responsive to FOIA requests. I have also been advised of these requirements by the S&T Office of Executive Secretary as well as DHS counsel.
11. The purpose of this declaration is to set forth the chronology of correspondence relating to the FOIA request by Plaintiff, the Electronic Privacy Information Center ("EPIC"), at issue in this action, to describe the search conducted at TES to identify responsive records, and to identify the basis for TES's decision to withhold certain information requested by EPIC pursuant to FOIA's exemptions, with the exception of certain confidential commercial information withheld pursuant to Exemption 4, and sensitive security information ("SSI") withheld under Exemption 3, which are separately explained in the declaration of Paul Sotoudeh.

### **Scope of Search**

12. On January 19, 2011,<sup>1</sup> I received a "tasking" from the S&T Office of Executive Secretary to conduct a search pursuant to a request, dated July 13, 2010, by the Electronic Privacy

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<sup>1</sup> Prior to January 19, 2011, TES had engaged in a search for records responsive to EPIC's request. This search began on or about August 2, 2010. TES located a small number of records, which it referred to TSA, and S&T notified EPIC of this fact on September 8, 2010. See Exhibit B. After a conference call between TSA and EPIC on January 19, 2011, during which EPIC indicated that it sought records that included internal agency e-mails and memoranda, TES was re-tasked to conduct a more expansive search. This declaration discusses the scope of that search.

Information Center (“EPIC”) under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, which requested:

- a. All records concerning TSA tests regarding body scanners and radiation emission or exposure; and
- b. All records concerning third party tests regarding body scanners and radiation emission or exposure.

13. I received the “tasking” from the Office of the Executive Secretary on behalf of TES. As the designated “deputy” of TES and the Chief of the Standards Branch, I received the tasking on behalf of all of TES.

14. I conducted a search for responsive records by searching my e-mail folder that I knew to contain information related to radiation safety testing. Given the breadth of topics that my work covers, I keep my records organized in specific folders designated by subject area. Of these folders, only one included materials related to AIT radiation testing.

15. TES currently employs approximately 30 individuals. Within TES, no other individuals worked on issues related to radiation safety testing of AIT. Accordingly, I believe that I possessed all unique records at TES responsive to EPIC’s FOIA request.

16. The Transportation Security Laboratory (“TSL”) is a unit of TES. I work closely with TSL in certain areas, and in particular on issues related to X-Ray equipment standards and testing. Accordingly, I concluded that TSL would likely have records responsive to EPIC’s FOIA request as well. I accordingly informed the S&T Office of Executive Secretary, which in turn tasked TSL to perform its own search. I was not involved in the search or processing of records at TSL.

17. I manually examined the contents of the folder I knew to contain records related to AIT radiation safety testing. In so doing, I eliminated numerous records that were not responsive to the request.
18. In determining the temporal scope of the search, I searched for records with an “end date” or “cutoff date” of January 19, 2011, because this was the date that I began the search on behalf of TES. This date was used in accordance with 6 C.F.R. § 5.4(a), which states that “[i]n determining which records are responsive to a request, a component ordinarily will include only records in its possession as of the date the component begins its search for them.” Although I did not use a formal “start date,” the effective “start date” of my search for responsive records was late December 2009, after the “Christmas Day Bombing” attempt, in which Umar Farouk Abdulmutallab attempted to detonate plastic explosives on a Northwest Airlines flight, because I became significantly more involved in issues related to AIT radiation testing at that time.
19. Specifically, following the foiled bombing attempt, the DHS Undersecretary for Science and Technology directed my division to generate a Fact Sheet on radiation safety standards for airport screening systems. I communicated constantly with colleagues at TSA, OHA, NIST and FDA regarding development of this Fact Sheet to contain accurate and concise statements regarding standards required for testing AIT machines and interpretation of results of third party testing of the machines. In addition, following the creation of the Fact Sheet, I was also consulted for input on other memoranda, documents, and requests for information pertaining to this subject matter.
20. In total, my search yielded over 400 electronic and paper documents.

21. I reviewed the responsive documents and made initial determinations to withhold certain records, or portions thereof, pursuant to FOIA's exemptions.
22. Because the responsive records concern the AIT program, which is implemented by the Transportation Security Administration ("TSA"), and because many of these records consist of correspondence to and from TSA personnel, TSA was consulted to assist in the processing of these records, consistent with 6 C.F.R. § 5.4(c)(1). This DHS FOIA regulation states that "[w]hen a component receives a request for a record in its possession, it shall determine whether another component, or another agency of the Federal Government, is better able to determine whether the record is exempt from disclosure under the FOIA and, if so, whether it should be disclosed as a matter of administrative discretion." The regulation further states that the receiving component may, if necessary, "[r]espond to the request regarding that record, after consulting with the component or agency best able to determine whether to disclose it and with any other component or agency that has a substantial interest in it." TSA was accordingly consulted based on its substantial interest in the responsive records and its expertise in the subject matter. In particular, TSA identified and processed TES and TSL records that potentially contained confidential business information and therefore implicated FOIA Exemption 4, as well as records that potentially contained Sensitive Security Information ("SSI").
23. As a result of this consultation and review, additional records were determined to be exempt from disclosure under FOIA and were accordingly withheld. In addition, to avoid duplication and inconsistent withholdings, if identical records were found among the records of TSA, TSL, and TES, duplicates were eliminated where possible.

24. On June 21, 2011, TES released 603 pages, or portions thereof, of responsive, non-exempt records to EPIC. The letter accompanying that release is attached as Exhibit A to the Declaration of Pamela Beresford.
25. On July 27, 2011, TES provided EPIC with a supplemental document release. This release consisted of:
- a. 10 pages previously withheld in part that, upon further review, were determined to contain additional segregable non-exempt information and were accordingly released with fewer withholdings;
  - b. 94 pages of emails and attachments that were previously withheld in full but, upon further review, were determined to contain segregable non-exempt information and were accordingly released in part;
  - c. One 9-page document that was determined to be releasable in full; and
  - d. One 7-page document that was originally withheld in full because it was protected by copyright, but was determined to be releasable after the copyright holder authorized TES to release the document in full.
26. In total, TES released to EPIC, in whole or in part, 713 pages. TES withheld, in full, 648 pages, including 471 pages pursuant to Exemption 5 on the basis of the deliberative process privilege, and 177 pages pursuant to Exemption 4 because they were protected by copyright.

#### **Exemptions**

27. The following paragraphs generally describe the records withheld by TES pursuant to FOIA exemptions.

28. The withheld records are described in greater specificity in the TES Vaughn index, which is attached as Exhibit A.

**Exemption 6**

29. FOIA Exemption 6 protects from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).

30. The vast majority of the emails, and many of the attachments, that I processed contained email addresses, names of non-government officials, phone numbers, addresses, and/or signatures, which have been withheld.

31. Disclosing this type of information would constitute a clearly unwarranted invasion of the personal privacy of the individuals referenced in these records. Moreover, the privacy interests of the individuals referenced in these records outweigh any minimal public interest in disclosure of the information.

32. The specific pages on which these redactions were made are referenced on the TES Vaughn index.

**Exemption 5**

33. Under Exemption 5, FOIA’s disclosure requirements do not apply to “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). The exemption has been interpreted to include, inter alia, the deliberative process privilege, the attorney-client privilege, and attorney work product.

34. TES has asserted Exemption 5 to withhold certain information protected under the deliberative process privilege. The deliberative process privilege protects internal agency

communications that are both predecisional, that is, predating an agency decision or policy, and deliberative, that is, containing recommendations or opinions on legal or policy matters. It therefore applies to records such as recommendations, evaluations, drafts, proposals, suggestions, and other subjective documents (and excerpts thereof) which do not reflect final agency policy.

35. There are three primary concerns recognized under the deliberative process privilege: (1) to encourage open and frank discussion of policy matters between subordinates and supervisors; (2) to protect against the premature disclosure of proposed policies before they become final; and (3) to protect against public confusion that might result from the disclosure of reasons and rationales that were not, in fact, the ultimate grounds for the agency's action.
36. As described more specifically in the attached Vaughn index, portions of the responsive records were withheld in part, and certain records were withheld in full, pursuant to the deliberative process privilege. These records, or portions thereof, are internal government e-mails, memoranda, and other documents that contain policy deliberations, expressions of opinions, suggestions, draft documents (including many with changes and comments tracked), and comments on policy issues.
37. The records, or portions thereof, withheld pursuant to the deliberative process privilege fit into the following general categories:
  - a. **Draft documents, and deliberations, comments, and opinions offered during the drafting of documents.** This comprises the largest group of withholdings. It includes:



- i. **Deliberations and drafts concerning questions posed to DHS for Congressional hearings and to letters by members of Congress.** As explained more specifically in the Vaughn index, withholdings in this category were made on Bates pages 44-45, 80-82, 118-120, 186-189, 191-192, 555-56, 746-49, 951-58, 959-970, 971-72, 973-979, 980-82, 983-989, 990-1023, 1024-48, 1147-48, and 1187-88.
- ii. **Deliberations and drafts concerning a federal government response to a Letter of Concern sent by four scientists from the University of California at San Francisco.** This letter, sent on April 6, 2010, raised concerns regarding AIT and radiation exposure. Numerous individuals were involved advising and assisting in the government's response letter, which was finalized later that year. This category of withholding comprises numerous drafts and deliberative emails that were exchanged leading up to the final response. As explained more specifically in the Vaughn index, withholdings in this category were made on Bates pages 46-47, 52, 113-115, 440-48, 535, 546, 839-860, 866-989, 896-907, 911-942, 943-44, 949-950, and 1101-1107.
- iii. **Deliberations and drafts concerning a memorandum to the Undersecretary of DHS regarding AIT radiation safety.** In the spring of 2010, I assisted in producing a memorandum to the DHS Undersecretary of Science and Technology, Tara O'Toole, on AIT radiation safety to prepare her to respond to public concerns about the issue. This category of withholdings comprises numerous emails and

drafts on this topic that were exchanged prior to the generation of the final documents. As explained more specifically in the Vaughn index, withholdings in this category were made on Bates pages 87-88, 608-610, 620-29, 631-35, 651-55, 662-64, 665-80, and 688-726.

- iv. **Deliberations and drafts concerning a response to concerns raised about AIT and radiation by airline pilots.** As explained more specifically in the Vaughn index, withholdings in this category were made on Bates pages 381-82, 384-86, 391-92, 395-401, and 1052-56.
- v. **Deliberations and drafts concerning revisions to TSA's Privacy Impact Assessment regarding AIT.** As explained more specifically in the Vaughn index, withholdings in this category were made on Bates pages 594-98.
- vi. **Deliberations and drafts concerning a fact sheet on radiation exposure and AIT.** Following the foiled Christmas Day attack of 2009, the DHS Undersecretary for Science and Technology directed my division to generate a Fact Sheet on radiation safety standards for airport screening systems. I communicated with colleagues at TSA, OHA, NIST and FDA regarding development of this fact sheet to contain accurate and concise statements regarding standards required for testing Advanced Imaging Technology machines and interpretation of results of third party testing of the machines. The withholdings in this category comprise draft versions, deliberations, and back-and-forth edits of the fact sheet. As explained more specifically in the Vaughn index, withholdings in this category were

made on Bates pages 604-05, 741-42, 743-45, 750-52, 785-88, 792-838, and 1057-59.

- vii. **Internal early working document comparing radiation exposure from different types of AIT machines.** This internal working document, Bates page 606, compiled estimates of radiation exposure from various types of AIT machines based on external, unverified data. This unverified data was not intended for public release and does not reflect an official position of DHS, and its release could generate confusion regarding actual radiation emitted by AIT machines.
  - viii. **Draft sections concerning radiation safety from TSA's AIT Standard Operating Procedure (SOP), as well as emails forwarding the draft SOP sections.** As explained more specifically in the Vaughn index, withholdings in this category were made on Bates pages 611-19.
  - ix. **Deliberations and drafts of a question-and-answer memorandum to the Secretary of DHS on AIT Radiation Safety.** As explained more specifically in the Vaughn index, withholdings in this category were made on Bates pages 753-84.
  - x. **Deliberations and drafts concerning a NIST "Technical Bulletin" on AIT and Radiation Safety.** As explained more specifically in the Vaughn index, withholdings in this category were made on Bates pages 1060-1100, 1108-1146, 1149-86, and 1205-1256.
- b. **Recommendations for future steps to take regarding AIT safety.** These withholdings comprise sections of memoranda, emails, and other documents that

include recommendations and suggestions made by individuals as to future action that the government might take with regard to AIT safety and with regard to ensuring the reliability of safety testing data. As explained more specifically in the Vaughn index, withholdings in this category were made on Bates pages 68, 70, and 73.

- c. **Deliberations concerning the development of international standards on ionizing radiation.** As explained more specifically in the Vaughn index, withholdings in this category were made on Bates pages 108-111, 789-90, and 861-64.
- d. **Deliberations and opinions concerning the public release of reports by Frank Cerra on radiation and the Rapiscan Secure 1000 and AS&E Smart Check systems.** In 2006, Frank Cerra, who at the time was affiliated with NIST, produced reports assessing the Secure 1000 system, manufactured by Rapiscan, and the Smart Check system, manufactured by AS&E, for conformity with radiological standards. Withholdings in this category comprise expressions of opinion and deliberations on publicly releasing these reports. As explained more specifically in the Vaughn index, withholdings in this category were made on Bates pages 157-162, 167-168, 356-58, 429-31, 434-39, 890-95, and 908-10.
- e. **General deliberations on policy matters concerning AIT.** These withholdings are too diverse to fit into any of the categories above, and generally comprise suggestions, expressions of opinion, and deliberations concerning policy matters. As explained more specifically in the Vaughn index, withholdings in this category were made on Bates pages 8, 9, 10, 12, 14-15, 33-34, 75, 203-208, 352-55, 419,

421-22, 425-26, 459, 460, 461-62, 463-65, 466, 476-81, 487-88, 527, 550, 552, 586-88, 591-92, 599-602, 607, 636, 640-41, 645-47, 650, 656-58, 661, 681-84, 687, 727-28, 729-40, and 1049-51.

38. These deliberations and drafts involved federal personnel in the DHS Science & Technology Directorate, the DHS Transportation Security Administration, the National Institute of Standards and Technology, and the Food and Drug Administration.
39. Release of this material would expose the internal deliberations of these agencies, impede the frank and candid exchange of ideas and information, reveal the reasoning and recommendations of federal officials, and ultimately have a chilling effect on intra- and inter-agency communications. Release of offhand remarks, deliberations, suggestions, opinions, and non-final draft documents would likely result in misleading and confusing information reaching the public, and would also chill the candid discussions that are critical for federal employees within DHS, NIST, FDA, and elsewhere to have as they formulate federal policy.

#### **Exemption 4**

40. Exemption 4 of the FOIA protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. § 552(b)(4).
41. Pursuant to Exemption 4, TES withheld eight documents from disclosure because they are protected by copyright. These documents are specified on the TES Vaughn index as Withheld-in-full-copyright A through H, and include articles in scholarly publications as well as published standards. TES has withheld these documents to the extent that their publishers or copyright owners have not made these documents available free of charge online, as release of such documents would dilute the value of the copyright.

42. For the remainder of records withheld in full or in part pursuant to Exemption 4, because of its expertise in the subject matter, pursuant to 6 C.F.R. § 5.4(c)(1), TSA was consulted to determine which records pertaining to AIT system manufacturers were exempt from disclosure under Exemption 4. Further details regarding these withholdings are contained in the declaration of Paul Sotoudeh.

**Segregability**

43. To the extent possible, non-exempt responsive records and portions thereof have been segregated and released to EPIC. Numerous records were released in part. As noted above, some records were re-released after it was determined they contained additional releasable non-exempt information. Records were withheld in full only when no meaningful non-exempt portions of such records remained.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: Sept. 12, 2011



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Bert Coursey  
Chief, Standards Branch  
Test, Evaluation, and Standards Office  
Science and Technology Directorate  
Department of Homeland Security

Exhibit A to  
Declaration of Bert Coursey  
(TES Vaughn Index)

TES Vaughn Index

Records withheld in part

Bates numbers of TES record at issue	Pages with withholdings	Document/Email Title	Exemption applied	Explanation/Justification for Withholding
2-7	6	Emails Subject: <i>Body scanning -Status of N43.17</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
8-13	6	Emails Subject: <i>Interest in Personal Imaging Systems (x ray)</i>	(b)(6)  (b)(5) (Deliberative Process)	<p>This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p> <p>Portions of these records are redacted pursuant to the deliberative process privilege. The redacted portions on pages 8, 9, and 12 reflect the authors' opinions, questions, and answers about the extent to which TSA or other government agencies have tested AIT devices for radiation. The redacted portions on page 10 reflect suggestions of potential standards and technologies that DHS might want to develop or use in the future.</p>



14-15	2	Email Subject: <i>Radiation safety for x-ray body scanning</i>	(b)(6)  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  Portions of these records are redacted pursuant to the deliberative process privilege. The redacted portions on page 14 reflect suggestions of potential standards and technologies that DHS might want to develop or use in the future. The redacted portions on page 15 reflect the author's opinions about the extent to which TSA or other government agencies have tested AIT devices for radiation.
19, 21, 25, 26, 30	5	Email FW: <i>FDA regs and other relevant documents for mfr of personnel screening systems</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
31-32	2	Email Subject: <i>White papers.</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
33-34	2	Email Subject: <i>Interest in Personal Imaging Systems (x ray).</i>	(b)(6)  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions reflect the authors' opinions, questions, and answers about the extent to which TSA or other government agencies have tested AIT devices for radiation.

35-38	4	Email Subject: <i>Important Update Referencing White Papers.</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
39-40, 42	3	Email Subject: <i>Transmission WBI - Part III.</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
43	1	Email Subject: <i>Due COB Mar 2: QFR Response on Passenger Screening</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
44-45	3	Email Subject: <i>Due 9 am Weds. March 17th- S1 QFR's from Jan. 20th Hearing (10-0007.19/857401).</i>	(b)(6)  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions of this e-mail chain reflect the author's suggested corrections to written answers to questions posed to an agency official at a Congressional hearing.
46-47	2	Email Subject: <i>Dangers of Imaging.</i>	(b)(6)  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The withheld excerpt reflects the author's reflections as to how DHS should address the critiques raised in the attached letter from four USCF professors.

52	1	Email Subject: <i>Dangers of Imaging.</i>	(b)(6)  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions of this e-mail chain reflect the author's opinions regarding how DHS should address the critiques raised in the letter from four USCF professors.
57-58, 60, 61, 62	5	Email Subject: <i>Dangers of Imaging</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
68, 70, 73	3	Memo Briefing for Dr. O'Toole	(b)(5)	Portions of these memoranda are redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions reflect the authors' recommendations for future action that DHS might consider taking to address the issues raised in the memoranda.
74	1	Email; subject: AIT Radiation measurement standards and approved locations	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
75	1	Email Subject: <i>Information.</i>	(b)(5)	Portions of these records were redacted pursuant to the deliberative process privilege. The redacted portions discuss Rapiscan's intentions to develop a particular technology for use in the future, and the author's beliefs as to how that technology will be evaluated by the government.
80-82	3	Email Subject: <i>OHA/TSA Getback.</i>	(b)(6)  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions of this e-mail chain reflect deliberations regarding the formulation of a response by

				DHS to inquiries by Congress, including a draft version of the response to one question.
83	1	Email Subject: <i>Fact Sheet for Radiation Safety of Backscatter x-ray: Standards &amp; Testing.</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
87-88	2	FW: Short form of memo on rad safety	(b)(6)  (b)(5) (Deliberative Process)	<p>This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p> <p>This record also contains information withheld pursuant to the deliberative process privilege. The withheld portions contain preliminary versions, edits, and revisions of excerpts of a memorandum to the Undersecretary of DHS on AIT radiation safety.</p>
89-90	2	Email Subject: <i>RE: Short form of memo on rad safety</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
92-93	2	Email Subject: <i>Fact Sheet on Standards and Testing for Radiation Safety for x-ray backscatter systems.</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.

95	1	Email Subject: <i>Backscatter response</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
101	1	Email Subject: <i>Body Scanner Radiation Safety Response</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
102-103	2	Letter to Dr. John Sedat	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
108-111	4	Email Subject: <i>Rapiscan health and safety documents</i>	(b)(6)  (b)(5) (Deliberative Process)	<p>This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p> <p>A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions convey the United Kingdom's views of a draft international standard on ionizing radiation, as well as a NIST official's opinion as to how to respond to the UK's concerns.</p>
113-115	3	Email Subject: <i>FW: RE: X-ray backscatter scanners: Letter to John Holdren.</i>	(b)(6)  (b)(5) (Deliberative Process)	<p>This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p> <p>A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portion describes the contents of a draft letter responding to scientists' concerns about AIT and radiation safety.</p>

118-120	3	Email Subject: <i>Hearing Invite - Wednesday, July 21, 2010 at 2:00 p.m.</i>	(b)(6)  (b)(5) (Deliberative Process)	<p>This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p> <p>Portions of this e-mail are redacted pursuant to exemption (b)(5), the deliberative process privilege. These portions contain deliberations and exchanges of opinions and advice among DHS personnel preparing for an upcoming congressional hearing.</p>
121-122	2	Email Subject: <i>Question on TSA Backscatter Work.</i>	(b)(6)	<p>This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p>
123	1	Email Subject: <i>NIST/FDA Report.</i>	(b)(5)	<p>A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portion contains the author's questions and opinions regarding the upcoming release of the 2006 NIST/FDA report on the Rapiscan Secure1000.</p>
124-155	2	Assessment of the Rapiscan Secure 1000 Body Scanner for Conformance with Radiological Safety Standards	(b)(3) (49 U.S.C. § 114(r); 49 C.F.R. § 1520.5(b)(9)(vi)) (TES142)  (b)(4) (TES127)  (b)(4) (TES136)	<p>Scatter phantom image generated by Rapiscan Secure 1000</p> <p>Name and model number of type of X-Ray tube used in Rapiscan Secure 1000.</p> <p>Description of mechanical method used to shape X-Ray beam in Rapiscan Secure 1000</p> <p>This information is contained within a government report authored by Frank Cerra on the conformance of Rapiscan's Secure 1000 Scanner to radiological safety standards. Mr. Cerra performed the work underlying this report while at the Food and Drug Administration's Center for Devices and Radiological Health ("FDA/CDRH"), but wrote the report when he was affiliated with the National Institute on Standards and Technology ("NIST"). The information withheld on page TES127 (name and model information) was obtained via a personal communication with Steve Gray of Rapiscan. The information withheld in page TES136 (method used to shape X-Ray</p>

				<p>beam) was obtained either from the system itself used for testing, or from information provided by Rapiscan in connection with the testing.</p> <p>The withheld information specified above is not of the type Rapiscan would normally release to the public. Moreover, its release is likely to cause Rapiscan substantial competitive harm because it could enable competitors to more effectively design and build their own systems using Rapiscan's proprietary information. Modica Decl. ¶¶ 4-7; Sotoudeh Decl. ¶¶ 54-58.</p>
157-162	6	Email Subject: <i>Re: FW: NIST/FDA Report</i>	(b)(6)  (b)(5) (Deliberative Process)	<p>This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p> <p>A portion of this e-mail exchange is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portion contains the author's questions and opinions regarding the upcoming release of the 2006 NIST/FDA report on the Rapiscan Secure1000.</p>
167-168	2	Email Subject: <i>Question on NIST Backscatter Work</i>	(b)(6)  (b)(5) (Deliberative Process)	<p>This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p> <p>Portions of these records exchange were redacted pursuant to exemption (b)(5), the deliberative process privilege. These portions reflect the tentative views of different federal agencies regarding certain matters related to the release of the 2006 NIST/FDA report.</p>
177	1	Email, Subject: Bert - FYI - this is from this AM S1 briefing	(b)(6)	<p>This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p>

186-189, 191-192	6	Email Subject: <i>Letter to Secretary Napolitano, TSA Administrator Pistole attached</i>	(b)(6)  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions of this e-mail chain contain discussions by agency personnel regarding how to respond to a letter by Senators Collins, Burr, and Coburn.
194-195	1	Letter to Senator Susan M. Collins, Richard Burr, Tom Coburn	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
203-208	6	Email Subject: <i>FW: Letter to Secretary Napolitano, TSA Administrator Pistole attached</i>	(b)(6)  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portion reflect the agency's temporary decision regarding the release of certain letters to and from DHS/TSA.
209, 216	1	Email Subject: <i>2400.4 TSA Rapiscan Secure 1000 Reports #1</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.



236-239, 241, 244, 247, 252-254, 260, 267-269, 272-276, 283, 301-304, 306, 309, 312, 317-319, 325, 332-334, 337-41, 348	38	Radiation Safety Engineering Assessment Report for the Rapiscan Secure 1000 in Single Pose Configuration	(b)(3) (49 U.S.C. § 114(r) and 49 C.F.R § 1520.5(b)(9)(i))  (b)(4)	<p>268, 333: Sensitive Security Information (“SSI”) describing scanning procedures utilized when using Rapiscan Secure 1000</p> <p>Portions of this record are being withheld under exemption (b)(4), which protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential. These portions contain specific confidential technical specification and operational settings, as well as component parts, of the Rapiscan Secure1000 system. Specifically, the redacted portions pertain to:</p> <p>236, 301: Width of inspection aisle  237, 302: Description of method in which Rapiscan conducts vertical and horizontal scans; precise dimensions of scanner  238, 303: Precise dimensions of scanner  239, 304: Diagram of scanner that includes precise dimensions  241, 306: Revision levels of hardware boards and operating system software  244, 247, 309, 312: Current of x-ray source, descriptions of speed and movement of scanning mechanism  252, 317: Picture showing how the system images a structure simulating human body and containing information on system imaging capability; and text containing information on system hardware operation and capability  253, 318: Pictures showing the internal design and components of the system  254, 319: Descriptions of specific proprietary system features, including shapes, mechanisms, and scanning times  260, 325: Description of specific system feature used to conduct scan  267-9, 332-34: Photograph and text depicting specific mode of the system, software operation and capability, and system image operator capability  272, 337: Maximum limits of X-Ray tube  273, 338: Description of particular system features, including phases, velocity, and other specific technological design features  274, 339: Measurement of beam width  275, 340: Description of completion of scanning cycle  276, 341: Photographs of internal construction and components of system  283, 348: Chart containing detailed information regarding the components and sub-systems used in building the Rapiscan Secure 1000</p> <p>This information is contained within two nearly identical reports on</p>
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				<p>radiation emissions by the Rapiscan system, conducted for TSA by the Johns Hopkins University Applied Physics Laboratory (APL) in 2009 and 2010. This testing was conducted at Rapiscan, which voluntarily hosted APL at its plant and provided a representative unit there, also voluntarily, for radiation and safety testing.</p> <p>The withheld information specified above was obtained either from the Rapiscan system itself that was provided for testing, or from information provided by Rapiscan in connection with the testing. This information is not of the type Rapiscan would normally release to the public. Moreover, its release is likely to cause Rapiscan substantial competitive harm because it could enable competitors to more effectively design and build their own systems using Rapiscan's proprietary information. Modica Decl. ¶¶ 4-7; Sotoudeh Decl. ¶¶ 54-58.</p>
284	1	Email Subject: <i>2400.4 TSA Rapiscan Secure 1000 Reports #3</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
349	1	Email Subject: <i>2400.4 TSA Rapiscan Secure 1000 Reports #2</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
352-355	4	Email Subject: <i>DHS/TSA Radiation Safety &amp; ANSI N43.17 Standard.</i>	(b)(6)  (b)(5) (Deliberative Process)	<p>This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p> <p>This record also contains portions that were withheld pursuant to exemption (b)(5), the deliberative process privilege. The withheld excerpts contain discussions, opinions, questions, and answers between agency personnel regarding the extent to which DHS and TSA must comply with consensus standards, as well as the legal authority of The Johns Hopkins Applied Physics Lab vis-a-vis DHS/TSA.</p>

356-358	3	Email Subject: <i>Assessment of the AS&amp;E Smart Check Body Scanner for Conformance and Radiological Safety Standards.</i>	(b)(6)  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  Portions of these records exchange were redacted pursuant to exemption (b)(5), the deliberative process privilege. These portions reflect the tentative views of personnel regarding matters related to the release of the 2006 NIST report on the AS&E SmartCheck.
359-360, 370-372	5	Email Subject: <i>FW: Backscatter</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
373-378	6	Email Subject: <i>RE:Backscatter</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
379	1	Email Subject: <i>Airport Body Scanners</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
381-382, 384-386	5	Email Subject: <i>Airport Body Scanners</i>	(b)(6),  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  This record also contains portions withheld under exemption (b)(5), the deliberative process privilege. The withheld excerpts consist of draft language and deliberations concerning a DHS/TSA response to the concerns raised by American Airlines pilots.

389-390	2	Email Subject: <i>Backscatter blog post on WH blog</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
391-392	2	Email Subject: <i>Letter from APA President regarding AIT</i>	(b)(6)  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  This record also contains portions withheld under exemption (b)(5), the deliberative process privilege. The withheld excerpts consist of the author's reflections regarding concerns raised by the Allied Pilots Association.
393	2	Email Subject: <i>Having a good...</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
394	1	Email Subject: <i>Cnet sedat</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
395-401	7	Email Subject: <i>NCRP Media Assistance</i>	(b)(6)  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  This record also contains portions withheld under exemption (b)(5), the deliberative process privilege. The withheld portions include the authors' opinions and comments regarding how to respond to pilots' safety and health concerns concerning AIT.

402-403	2	Email Subject: <i>2010-4 Security Alert Bulletin</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
410-411	2	Email Subject: <i>2010-4 Security Alert Bulletin</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
419, 421-422, 425-426	5	Email Subject: <i>NIST telecon with Dr. O'Toole</i>	(b)(6)  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions consist of the opinions of agency personnel regarding statements made in a USA Today article and suggestions for future actions to take regarding the issues raised in the article.
429-431	3	Email Subject: <i>Question on NIST Backscatter Work</i>	(b)(6),  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions contain questions and opinions regarding the upcoming release of the 2006 report by Frank Cerra on the AS&E SmartCheck.

432-433	2	Email Subject: <i>TSA Contact.</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
434-439	6	Email Subject: <i>FW: FW: Assessment of the AS&amp;E Smart Check Body Scanner for Conformance and Radiological Safety Standards.</i>	(b)(6)  (b)(5) (Deliberative Process)	<p>This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p> <p>A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions contain questions and opinions regarding the upcoming release of the 2006 report by Frank Cerra on the AS&amp;E SmartCheck.</p>
440-448	9	Email Subject: <i>FW: AIT Info.</i>	(b)(6)  (b)(5) (Deliberative Process)	<p>This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p> <p>A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions contain the authors' discussions and opinions regarding reactions to the government's response to the UCSF letter of concern, and future steps to take to address these reactions.</p>
451, 453	2	Email Subject: <i>FW: Airport Scanners</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.

459	1	Email Subject: <i>TSA Blog Post: TSA Myth or Fact: Leaked Images, Handcuffed Hosts, Religious Garb and More!</i>	(b)(6)  (b)(5) (Deliberative Process)	<p>This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p> <p>A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portion contains the author's personal reflections regarding public reactions to AIT.</p>
460, 466	2	Email Subject: <i>Backscatter backlash</i>	(b)(6)  (b)(5) (Deliberative Process)	<p>This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p> <p>A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portion contains the authors' opinions regarding flyers concerning AIT radiation safety being distributed at an airport.</p>
461-462	2	Email Subject: <i>Fw: airport scan questions still unanswered?</i>	(b)(6)  (b)(5) (Deliberative Process)	<p>This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p> <p>A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions contain the authors' opinions regarding reception of certain scientific studies regarding AIT and radiation by the scientific community and the public, and suggestions regarding future steps TSA and FDA should take to clarify these issues.</p>

463-465	3	Email Subject: <i>2010-4 Security Alert Bulletin.</i>	(b)(6)  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portion contains opinions and suggestions regarding a Security Alert issued by the Air Line Pilots Association.
471-474	4	Email Subject: <i>APA Radiation Concern.</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
476-481, 487-488	8	Email Subjects: <i>Re: News clip; People Scanners</i>	(b)(6)  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions contain questions, opinions, and speculations regarding the assertions made in the article discussed in the email chain.
482, 484	2	Email Subject: <i>CBS conducted their own study. AIT is safe.</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
490, 493-494	3	Email Subject: <i>OCC/ENV list serve info on TSA scanners.</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.



497-502	6	Email Subject: <i>Airport X-ray machines.</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
503-504	2	Email Subject: <i>Reminder</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
505-508	4	Email Subject: <i>TSA</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
509-510	2	Email Subject: <i>NBC - News Anchor - Tom Costello Request</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
511	1	Email Subject: <i>TSA-101201-011 - Congressman John Dingell</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
518-519	2	Email Subject: <i>Re: FW: Dr. Oz Show on Radiation</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.

520-521	1	Email Subject: <i>Potential hearing</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
522	1	Email Subject: <i>Letter to Mr. Pistole from Congressman Dennis Kucinich</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
526	1	Email Subject: <i>UCSF vs UCSF</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
527	1	Email Subject: <i>USA Today stories on radiation.</i>	(b)(6)  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions contain the author's discussions of steps already taken to provide information to a reporter asking for information about AIT and radiation exposure, and descriptions of future actions that the author anticipates will be taken to address media stories.
530-534	5	Email Subject: <i>NIST Technical bulletin on testing of AS&amp;E SmartCheck.</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.

535, 546	2	Email Subject: <i>RE: OSTP Letter</i>	(b)(6)  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  A portion of these records is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions contain the author's discussions of future steps she intends to take regarding correspondence between Dr. Holdren and UCSF.
547-549	3	Email Subject: <i>RE: NIST Technical bulletin on testing of AS&amp;E SmartCheck.</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
550, 552	2	Email Subject: <i>AG joins the call for TSA to release x-ray safety info.</i>	(b)(6)  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions contain opinions and questions regarding Attorney General Blumenthal's statements quoted in the article.
554	1	Email Subject: <i>UCSF - paper on detection ability.</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.

555-556	2	Email Subject: <i>Long term health study.</i>	(b)(6)  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions contain the author's request for input and her stated intentions regarding formulating responses to the quoted Congressional question.
578	1	Email Subject: <i>offset_trans.</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
585	1	Email Subject: <i>Airport Scanners.</i>	(b)(6)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
586-88	3	Email Subject: <i>Transmission x-ray</i>	(b)(6)  (b)(5) (Deliberative Process)	This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions contain the authors' speculations and opinions regarding the necessity of testing additional types of AIT machines.

591-592	2	Email Subject: <i>AIT Dosimetry Study - TSIF</i>	(b)(6)  (b)(5) (Deliberative Process)	<p>This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p> <p>Portions of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions contain tentative descriptions of future actions TSA may take regarding dosimetry studies at airports, and opinions of government health physicists about the testing methodology.</p>
594-598	2	Email Subject: <i>AIT PIA</i>	(b)(6)  (b)(5) (Deliberative Process)	<p>This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p> <p>Portions of this e-mail are redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions contain discussions about possible revisions to parts of TSA's Privacy Impact Assessment concerning radiation safety, and draft language of a potential revision.</p>
599-602	4	Email Subject: <i>Transmission x-ray</i>	(b)(6)  (b)(5) (Deliberative Process)	<p>This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p> <p>A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions contain the authors' speculations and opinions regarding the necessity of testing additional types of AIT machines, as well as opinions and concerns regarding the timeline of possible testing at NIST.</p>
630	1	Email Subject: <i>Overall discussion of public dose limit.</i>	(b)(6)	<p>This record contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p>

636, 640-41, 645-47, 650, 656-58, 661, 681-84, 687	16	Emails Subject: <i>FDA regs and other relevant documents for mfr of personnel screening systems.</i>	(b)(6)  (b)(5) (Deliberative Process)	These records contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  Portions of these records are also being withheld in part pursuant to exemption (b)(5), the deliberative process privilege. The withheld portions consist of deliberations between agency personnel regarding the authority of FDA to regulate health and safety issues pertaining to AIT scanners.
727-728	2	Email Subject: <i>Transmission x-ray testing.</i>	(b)(6)  (b)(5) (Deliberative Process)	These records contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  Portions of these records are also being withheld in part pursuant to exemption (b)(5), the deliberative process privilege. The withheld portions consist of discussions regarding potential future testing of transmission x-ray systems by DHS, and an interagency agreement to test such systems.
789-90, 861-64	6	Various	(b)(6)  (b)(5) (Deliberative Process)	These records contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  Portions of these records are also being withheld in part pursuant to exemption (b)(5), the deliberative process privilege. The withheld portions consist of comments concerning potential input by the federal government to a draft standard on ionizing radiation in security systems by the International Atomic Energy Agency.
943-944	2	FW: Dangers of imaging	(b)(6)  (b)(5) (Deliberative Process)	These records contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  Portions of these records are being withheld in part pursuant to

			Process)	exemption (b)(5), the deliberative process privilege. The withheld portions consist of opinions concerning a proposed response to a letter from scientists at UCSF concerning backscatter radiation safety.
951-958, 971-72, 980-82, 990-1023	47	Email Subject: Various	(b)(6)  (b)(5) (Deliberative Process)	These records contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  Portions of these records are being withheld in part pursuant to exemption (b)(5), the deliberative process privilege. The withheld portions consist of deliberations concerning a proposed response to a letter by Senators Collins, Coburn, and Burr concerning backscatter radiation safety.
1187-1188	2	Email Subject: <i>Kucinich Congressional</i> .	(b)(6)  (b)(5) (Deliberative Process)	These records contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.  Portions of these records are being withheld in part pursuant to exemption (b)(5), the deliberative process privilege. The withheld portions consist of internal comments and opinions regarding issues raised in a letter by Rep. Dennis Kucinich on AIT radiation safety.

**Records withheld in full pursuant to Exemption (b)(5) (deliberative process privilege)**

604-05	2	Technology Description: Radiation Exposure of Body Scanners	(b)(5)	Early, internal draft versions of a fact sheet on radiation exposure and AIT.
606	1	Comparison of X-Ray Technologies for Whole Body Imaging	(b)(5)	Internal working DHS document compiling estimates of radiation exposure from various types of AIT machines based on external, unverified data.

607	1	Email Subject: <i>Re_ Smiths transmission x-ray system</i>	(b)(5) (Deliberative Process)  (b)(6)	This e-mail is being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. It contains agency employees' opinions regarding claims made by a particular manufacturer about the dosage emitted by its AIT system.  This record also contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
608	1	Email Subject: <i>Draft contents for rad safety white paper.</i>	(b)(5) (Deliberative Process)  (b)(6)	This e-mail is being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. It contains comments and suggested revisions to a draft document on AIT radiation safety.  This record also contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
609	1	Email Subject: <i>Hello</i>	(b)(5) (Deliberative Process)  (b)(6)	This e-mail is being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. It contains comments regarding an upcoming response by the DHS Undersecretary on radiation safety.  This record also contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
610	1	Email Subject: <i>AIT comparison of systems and kilovoltage.</i>	(b)(5)	This e-mail is being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. It contains the authors' comments regarding an upcoming response by the DHS Undersecretary on radiation safety.



611-19	9	Email Subject: <i>TSA AIT SOP Safety Extract</i>	(b)(5) (Deliberative Process)  (b)(6)	<p>These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of emails forwarding a draft section regarding employee safety from TSA's Advanced Imaging Technology Standard Operating Procedure (SOP), and the draft SOP sections themselves.</p> <p>These records also contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p>
620-629	10	Email Subject: Misc.	(b)(5) (Deliberative Process)  (b)(6)	<p>These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They contain comments on, edits to, and draft versions of a memorandum to the Deputy Secretary of DHS on AIT safety.</p> <p>This record also contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p>
631-635	5	Email Subject: <i>Cerra weighs in on skin dose.</i>	(b)(5) (Deliberative Process)  (b)(6)	<p>This record is being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. It consists of comments and suggestions regarding the content of a proposed memorandum to the Deputy Secretary of DHS on AIT radiation safety.</p> <p>This record also contains information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p>
651-655	5	Email Subject: <i>Ver 4 lth comments attached and attached draft memorandum</i>	(b)(5)	<p>These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of a draft version of a memorandum to the Deputy Secretary of DHS on AIT safety, with changes tracked, and an email forwarding the draft memorandum.</p>

662-664	3	Email Subject: <i>Memo on Response to Radiation Concerns</i>	(b)(5)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of comments concerning a draft version of a memorandum to the Deputy Secretary of DHS on AIT safety.
665-680, 688-726	55	Various	(b)(5) (Deliberative Process)  (b)(6)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of draft versions of memorandum on AIT safety, emails containing comments on the drafts, and emails concerning releasing the memoranda and fact sheets on AIT safety to a wider audience.  These records also contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
729-740	12	Email Subject: <i>Safety concerns related to AIT equipment.</i>	(b)(5) (Deliberative Process)  (b)(6)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of discussions between agency personnel regarding how to respond to an inquiry from a foreign government concerning AIT radiation safety.  These records also contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
741-742	2	Email Subject: <i>AIT Radiation measurement standards and approved locations.</i>	(b)(5) (Deliberative Process)  (b)(6)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of comments concerning a draft version of memorandum on AIT safety.  These records also contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
743-745, 750-752, 1057-1059	9	Draft Standards and testing for radiation safety for Airport backscatter X-Ray systems.	(b)(5)	These records are being withheld in full pursuant to Exemption (b)(5). They are draft versions of a document on AIT radiation safety standards, with changes tracked.

746-749	4	Email Subject: <i>Getbacks from S&amp;T Explosives Briefing.</i>	(b)(5) (Deliberative Process)  (b)(6)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of discussions regarding how to respond to an inquiry from a congressional committee concerning AIT radiation safety.  These records also contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
753-84	32	Various	(b)(5) (Deliberative Process)  (b)(6)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of comments and deliberations concerning draft versions of a question-and-answer memorandum to the DHS Secretary concerning backscatter radiation safety, as well as draft versions of the memorandum.  These records also contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
785-88, 792-838	51	Various	(b)(5) (Deliberative Process)  (b)(6)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of comments concerning a draft version of a fact sheet on AIT safety, as well as draft versions of the fact sheet.  These records also contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
839-860, 866-89, 896- 907, 911-942, 949-950	72	Various	(b)(5) (Deliberative Process)  (b)(6)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of comments and revisions concerning a proposed response to a letter from scientists at UCSF concerning backscatter radiation safety, as well as draft versions of the response letter.  These records also contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone

				numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
890-895, 908-910	9	Emails Subject: <i>NIST/FDA Report</i>	(b)(5) (Deliberative Process)  (b)(6)	<p>These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of comments and deliberations regarding the upcoming release of the 2006 Frank Cerra report on the Rapiscan Secure1000.</p> <p>These records also contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p>
959-970, 973-979, 983-989, 1024-1048	51	Email Subjects: Various	(b)(5) (Deliberative Process)  (b)(6)	<p>These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of comments, revisions, and internal memoranda making recommendations concerning a proposed response to a letter by Senators Collins, Coburn, and Burr concerning backscatter radiation safety, as well as draft versions of the response letters and accompanying white paper.</p> <p>These records also contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p>
1049-1051	3	Email Subject: <i>DHS ANSI N43.17 Requirement.</i>	(b)(5) (Deliberative Process)  (b)(6)	<p>Withheld in full pursuant to exemption (b)(5), the deliberative process privilege. The record consists of contain discussions, opinions, questions, and answers between agency personnel regarding the extent to which DHS and TSA must comply with consensus standards, as well as the legal authority of The Johns Hopkins Applied Physics Lab vis-a-vis DHS/TSA.</p> <p>These records also contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.</p>

1052-1056	5	Email Subject: Fw: (URGENT) SIBB - 11.12.10 - Phone Call with Captain John Prater - 11.12.10, 1000	(b)(5) (Deliberative Process)  (b)(6)	Withheld in full pursuant to exemption (b)(5), the deliberative process privilege. The records consist of deliberations concerning a DHS/TSA response to the concerns raised by American Airlines pilots.  These records also contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
1060-1100, 1108-1146, 1149-1186, 1205-1236	150	Various	(b)(5) (Deliberative Process)  (b)(6)	Withheld in full pursuant to exemption (b)(5), the deliberative process privilege. The records consist of deliberations concerning a draft NIST technical bulletin on AIT radiation safety, and draft versions of the NIST technical bulletin.  These records also contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
1101-1107	7	Email Subject: UCSF Radiologist Comment.	(b)(5) (Deliberative Process)  (b)(6)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of internal comments and deliberations regarding public reaction to concerns raised by UCSF scientists concerning backscatter radiation safety.  These records also contain information withheld under exemption (b)(6) which would cause a clearly unwarranted invasion of personal privacy. The types of information withheld consist of personal addresses, phone numbers, signatures, and personal email addresses. The privacy interests of the individuals in these emails outweigh any minimal public interest in disclosure of the information.
1147-1148	2	Email Subject: TSA-101201-011 - Congressman John Dingell.	(b)(5)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of internal comments and opinions regarding the issues raised in a letter by Rep. John Dingell on AIT radiation safety.

**Withheld in full; protected by copyright (Exemption (b)(4))**

Withheld-in-full-copyright A	46	ANSI HPS N 43. 17-2009, American National Standard report on Radiation Safety for Personnel Security Screening Systems Using X-Ray or Gamma Radiation	(b)(4)	This document is being withheld as it is a publication protected by copyright.
Withheld-in-full-copyright B	43	NCRP Commentary No. 16, Screening of Humans for Security Purposes Using Ionizing Radiation Scanning Systems	(b)(4)	This document is being withheld as it is a publication protected by copyright.
Withheld-in-full-copyright C	27	Draft Standard: International Electrotechnical Commission: Radiation Protection Instrumentation-X-Ray Systems for the screening of persons for security and the carrying of illicit items	(b)(4)	This document is being withheld as it is a publication protected by copyright.
Withheld-in-full-copyright D	3	Physics Today Journal: "Airport checkpoint technologies Take Off," July 2010	(b)(4)	This document is being withheld as it is a non-U.S. government publication protected by copyright.

Withheld-in-full-copyright E	9	Radiation Protection Dosimetry, Vol 21, No, 4, pp, 429 437 (2006): DETERMINATION OF AMBIENT AND PERSONAL DOSE EQUIVALENT FOR PERSONNEL AND CARGO SECURITY SCREENING	(b)(4)	This document is being withheld as it is a publication protected by copyright.
Withheld-in-full-copyright F	35	Journal of ICRU Report 84, Vol. 10 No. 2, Reference Data for the Validation of Doses from Cosmic Radiation Exposure of Aircraft Crew	(b)(4)	This document is being withheld as it is a publication protected by copyright.
Withheld-in-full-copyright G	7	NCRP Report No 160 Section 7-3: Ionizing Radiation Exposure of the Population of the United States	(b)(4)	This document is being withheld as it is a publication protected by copyright.
Withheld-in-full-copyright H	7	Radiation Protection Dosimetry, Advance Access published November 9, 2010: THE DOSE FROM COMPTON BACKSCATTER SCREENING	(b)(4)	This document is being withheld as it is a non-U.S. government publication protected by copyright.

# Exhibit B to Declaration of Bert Coursey





September 8, 2010

Ms. Ginger McCall  
Staff Counsel  
Electronic Privacy Information Center  
1718 Connecticut Avenue  
Suite 200  
Washington D.C. 20009

Re: **DHS/OS/PRIV 10-0869**

Dear Ms. McCall:

This letter is the final response to your July 13, 2010 Freedom of Information Act (FOIA) request addressed to the Department of Homeland Security (DHS) Privacy Office. You requested copies of all records concerning TSA tests, regarding body scanners and radiation emission or exposure; and all records concerning third party tests regarding body scanners and radiation emission or exposure. While processing your request, the Privacy Office found that if such documents exist, they would fall under the purview of the Science and Technology Directorate. Your request was received in this office on August 2, 2010.

We conducted a comprehensive search of files within the Test & Evaluation and Standards Division for records that would be responsive to your request. While processing this FOIA request, we identified records that belong to the Transportation Security Administration (TSA). We have sent such documents to TSA for review and determination for releasability. The Science and Technology Directorate (S&T) found no other records in response to this request.

While an adequate search was conducted, you have the right to appeal this determination that no records exist within S&T that would be responsive to your request. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to: Associate General Counsel (General Law), U.S. Department of Homeland Security, Washington, D.C. 20528, following the procedures outlined in the DHS FOIA regulations at 6 C.F.R. § 5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at [www.dhs.gov/foia](http://www.dhs.gov/foia).

Provisions of the FOIA allow us to recover part of the cost of complying with your request. In this instance, because the cost is below the \$14 minimum, there is no charge.

If you have any questions, please contact this office at (202) 254 6819 and refer to S&T 10-0003.42.

Sincerely,



Nicole Marcson  
Assistant General Counsel  
Science and Technology Directorate

# Exhibit 3

## Declaration of Pamela Beresford

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

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ELECTRONIC PRIVACY INFORMATION CENTER )  
Plaintiff, )  
v. ) Case No. 1:10-cv-1992 (ABJ)  
THE UNITED STATES DEPARTMENT OF )  
HOMELAND SECURITY, )  
Defendant. )

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**DECLARATION OF PAMELA BERESFORD**

I, Pamela Beresford, hereby declare as follows:

1. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations made in accordance herewith.
2. I am the Technical Editor and Librarian/Archivist at the Department of Homeland Security Transportation Security Laboratory (“TSL”) located at the William J. Hughes Technical Center, Atlantic City Airport, New Jersey.
3. TSL is a unit within the Science and Technology Directorate (“S&T”) of the Department of Homeland Security (“DHS”).
4. S&T is a component of DHS whose mission is to strengthen America’s security and resiliency by providing knowledge products and innovative technology solutions for the Homeland Security Enterprise.
5. TSL’s mission is to enhance homeland security by performing research, development and validation of solutions to detect and mitigate threats to transportation security, including

explosive devices. TSL's facilities are used to perform development, tests, and evaluations of technology and associated procedures that can be used to more effectively detect concealed explosives in parcels, luggage or on people.

6. TSL's role is to evaluate systems that have been invited to enter into the procurement process. The testing of technologies by TSL is limited to testing for security effectiveness. TSL does not conduct formalized radiation testing of security technologies. However, TSL has coordinated and collaborated with other federal agencies that have engaged in radiation testing.
7. In 1995, I earned a Bachelor's of Arts degree from the City University of New York (Baccalaureate Program). In 2002, I earned a Ph. D. from the City University of New York. Prior to joining TSL, I spent several years conducting biological research. In 1998, I received a fellowship from the American Museum of Natural History for my doctoral research. I also worked in the Manhattan headquarters of Davis, Polk and Wardwell, where my responsibilities initially involved training support staff on certain administrative software platforms, and then involved production of mergers and acquisitions ("M&A") documents for closings and SEC filings.
8. I am currently employed by Global Systems Technologies, Inc. ("GST"), a federal contractor, and have been in this position since January 2007. I joined TSL through TSL's contract with GST.
9. In my current capacity as Technical Editor and Librarian/Archivist, I support the range of test and evaluation activities conducted at TSL from both a general and a technical point of view, in order to assist with TSL's outreach and communication mission. I function as writer and editor for a wide range of technical reports on security technology research,

development, test and evaluation. I also perform the librarian and archiving function at TSL.

10. I have been trained on the overall test and evaluation process concerning Advanced Imaging Technology (“AIT”, sometimes referred to as “body scanner” technology). Since 2009, I have been closely involved with the AIT test group to provide editorial and administrative process support. Specifically, I was trained in the documentation process for each AIT test effort, and helped create the system for archiving the documentation pertaining to such tests.
11. Due to the nature of my official duties, and my having conducted other records searches pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”) in the past, I am familiar with the procedures followed by DHS in responding to requests for information pursuant to FOIA.

**Scope of Search for Responsive Records**

12. On February 10, 2011, my supervisor, Patty Reichenbach, External Communications Liaison and Technology Transfer Manager for TSL, notified me that TSL had been tasked by the Office of the Executive Secretary for S&T to search for records responsive to a FOIA request to DHS by the Electronic Privacy Information Center (“EPIC”).
13. The FOIA request requested:
  - a. All records concerning TSA tests regarding body scanners and radiation emission or exposure; and
  - b. All records concerning third party tests regarding body scanners and radiation emission or exposure.

14. At the same time, on February 10, 2011, Ms. Reichenbach requested that Mr. Lee Spanier conduct a search for records responsive to the request. Mr. Spanier is the AIT Independent Test and Evaluation Lead, and is the individual at TSL who manages AIT testing. In addition, Mr. Spanier has coordinated with other components of the federal government, including the Food and Drug Administration (“FDA”) and the National Institute of Standards and Technology (“NIST”), which have engaged in testing and/or evaluation of AIT for conformity with radiation safety standards. Accordingly, to the extent that TSL possessed records responsive to the FOIA request, Mr. Spanier would have possession of such records.
15. Mr. Spanier conducted a search for records responsive to the request. Specifically, he determined that responsive records would be located within various locations within his electronic mail (“email”) account. In order to make an initial collection of records that could potentially be responsive to the request, Mr. Spanier gathered all of the records that were located in specific folders he had created that could contain information regarding the testing of AIT systems for radiation safety. He also gathered all records to or from certain individuals with whom he had corresponded concerning radiation safety testing.
16. In determining the temporal scope of records to search, Mr. Spanier searched for records dating back to 2007. 2007 was when AIT technology began to be mature enough to undergo qualification security effectiveness testing; accordingly, that was used as the “start date” for the search.
17. The “end date” or “cutoff date” used for the search for responsive records was February 10, 2011. This date was used in accordance with 6 C.F.R. § 5.4(a), which states that “[i]n determining which records are responsive to a request, a component ordinarily will

include only records in its possession as of the date the component begins its search for them.”

18. I was tasked with reviewing the records Mr. Spanier had gathered to determine which of them were responsive, that is, which of them were records concerning TSA or third-party tests regarding AIT and radiation emission or exposure. I was also tasked with making an initial determination as to which of these records were potentially subject to FOIA exemptions.
19. In preparation for this task, I discussed the substance of the FOIA request, and the types of records that might be responsive, with Mr. Spanier. We agreed that the responsive records in Mr. Spanier’s possession would likely pertain to radiation safety test results by third parties that were submitted by manufacturers of AIT machines, as well as to radiation testing done by NIST and FDA.
20. Within approximately two weeks, Mr. Spanier had provided me with over 10,000 potentially responsive emails, which included numerous attachments.
21. Mr. Spanier provided me with the responsive records in batches. I began reviewing the first batch I received on or about February 15, 2011. I reviewed the records manually, examining each email message and attachment to determine whether it was potentially responsive to the request.
22. I reviewed all of the records for responsiveness, eliminating records that were not responsive to the FOIA request.
23. In addition, because the responsive records concern the AIT program, which is implemented by the Transportation Security Administration (“TSA”), and because many of these records consist of correspondence to and from TSA personnel, TSA was



consulted to assist in the processing of these records pursuant to 6 C.F.R. 5.4(c)(1). This DHS FOIA regulation states that “[w]hen a component receives a request for a record in its possession, it shall determine whether another component, or another agency of the Federal Government, is better able to determine whether the record is exempt from disclosure under the FOIA and, if so, whether it should be disclosed as a matter of administrative discretion.” The regulation further states that the receiving component may, if necessary, “[r]espond to the request regarding that record, after consulting with the component or agency best able to determine whether to disclose it and with any other component or agency that has a substantial interest in it.” TSA was accordingly consulted based on its substantial interest in the responsive records and its expertise in the subject matter.

24. In particular, TSA assisted in the processing of TSL records that potentially contained confidential business information and therefore implicated FOIA Exemption 4, as well as records that potentially contained Sensitive Security Information (“SSI”).
25. As a result of this consultation and review, additional records were determined to be either exempt from disclosure under FOIA or non-responsive to the request. In addition, to avoid duplication and inconsistent withholdings, if identical records were found among the records of TSA, TSL, and the Test, Evaluation, and Standards Office (“TES”), the other component of S&T that searched for responsive records, duplicates were eliminated where possible. These activities were performed primarily by counsel.

26. TSL released the majority of its responsive records to EPIC on June 21, 2011, but notified EPIC that certain records containing potentially confidential business information were being withheld because the “submitter notice process” pursuant to Executive Order 12600 had not yet been completed. The disclosure letter accompanying that release is attached as Exhibit A.
27. On September 7, 2011, additional TSL records were released to EPIC. The email accompanying this disclosure is attached as Exhibit B. These records included:
- a. Records that had initially been withheld pending completion of the submitter notice process, as well as review for sensitive security information (“SSI”) review, but were subsequently determined to be releasable in part; and
  - b. Records that had been initially withheld either in whole or in part under Exemption 4 but, upon reassessment, were determined to be releasable at least in part.

**Withholdings Pursuant to FOIA Exemptions**

28. The following paragraphs generally describe the records withheld by TSL pursuant to FOIA exemptions. The withheld records are described in greater specificity in the TSL Vaughn index, which is attached as Exhibit C.
29. With the exception of the withholding of certain copyrighted material, this declaration does not address the withholding of confidential commercial information pursuant to Exemption 4, or sensitive security information (“SSI”) withheld under Exemption 3. Because TSA was consulted in this process and made determinations as to the applicability of these exemptions, these withholdings are separately explained in the declaration of Paul Sotoudeh.

30. In addition, two documents were located that implicated confidential business information submitted by Medtronic, a manufacturer of medical devices. These records concerned testing by the FDA on the interaction between millimeter wave technology and personal medical devices. The FDA was consulted pursuant to 6 C.F.R. § 5.4(c)(1) to conduct the submitter notice process and to determine whether these records were exempt from disclosure under Exemption 4. These withholdings are explained in the declaration of Joy Lazaroff.

**Exemption 6**

31. FOIA Exemption 6 protects from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”

32. The vast majority of the emails, and many of the attachments, that I processed contained email addresses, names of non-government officials, phone numbers, office addresses, and/or signatures, which have been withheld.

33. Disclosing this type of information would constitute a clearly unwarranted invasion of the personal privacy of the individuals referenced in these records. Moreover, the privacy interests of the individuals referenced in these records outweigh any minimal public interest in disclosure of the information.

34. The specific pages on which these redactions were made are referenced on the TSL Vaughn index.

**Exemption 5**

35. Under Exemption 5, FOIA’s disclosure requirements do not apply to “inter-agency or intra-agency memorandums or letters which would not be available by law to a party

other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). The exemption has been interpreted to include, inter alia, the deliberative process privilege, the attorney-client privilege, and attorney work product.

36. TSL has asserted Exemption 5 to withhold certain information protected under the deliberative process privilege. The deliberative process privilege protects internal agency communications that are both predecisional, that is, that predate an agency decision or policy, and deliberative, that is, containing recommendations or opinions on legal or policy matters. It therefore applies to records such as recommendations, evaluations, drafts, proposals, suggestions, and other subjective documents (and excerpts thereof) which do not reflect final agency policy.
37. There are three primary concerns recognized under the deliberative process privilege: (1) to encourage open and frank discussion of policy matters between subordinates and supervisors; (2) to protect against the premature disclosure of proposed policies before they become final; and (3) to protect against public confusion that might result from the disclosure of reasons and rationales that were not, in fact, the ultimate grounds for the agency’s action.
38. As described more specifically in the attached Vaughn index, portions of the responsive records were withheld in part, and certain records were withheld in full, pursuant to the deliberative process privilege. These records, or portions thereof, are internal government e-mails, memoranda, and other documents that contain policy deliberations, expressions of opinions, suggestions, draft documents (including many with changes and comments tracked), and comments on policy issues.

39. The records, or portions thereof, withheld pursuant to the deliberative process privilege fit into the following general categories, with more specific descriptions contained within the Vaughn index:

- a. **Draft documents, and deliberations, comments, and opinions offered during the drafting of documents.** As explained more specifically in the Vaughn index, withholdings in this category were made on Bates pages 201-204, 908-10, 923, and the withheld-in-full documents A, B, C, F, G, I, J, and K.
- b. **Opinions and suggestions regarding planned approaches to testing AIT devices.** This category comprises opinions and suggestions of agency personnel regarding how AIT devices should be tested for their effects on human health and/or on personal medical devices. The withheld portions are contained on Bates pages 13, 26, 41, 153, 155-56, 165, 171, 176, 183, 196-99, 605-608, 609-612, 626-27, 628-29, 651, 720, 771, 869, 871-73, 959-960, 963-67, 1060-63, 1070, and the withheld-in-full documents D, E, H, and N.
- c. **Preliminary test results.** These withholdings comprise preliminary findings regarding AIT testing results. As explained more specifically in the Vaughn index, withholdings in this category were made in one document, withheld-in-full document L.
- d. **Expressions of opinion on general policy matters pertaining to AIT radiation safety.** These withholdings are too diverse to fit into any of the categories above, and generally comprise suggestions, expressions of opinion, and deliberations concerning policy matters. As explained more specifically in the Vaughn index,

withholdings in this category were made on Bates pages 44-47, 173-75, 186-87, 634-35, 834, 870, 874-76, 957, and the withheld-in-full document M.

**Exemption 4**

40. Exemption 4 of the FOIA protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. § 552(b)(4).
41. Pursuant to Exemption 4, TSL withheld three documents from disclosure because they are protected by copyright. These documents, which are specified on the TSL Vaughn index as Withheld-in-full O, P, and Q, include two standards published by the Institute of Electrical and Electronics Engineers (“IEEE”) and one by the American National Standards Institute (“ANSI”). TSL has withheld these documents as their publishers or copyright owners have not made them available free of charge online; accordingly, release of such documents would dilute the value of the copyright.
42. For a limited subset of records subject to Exemption 4 concerning testing by the Food and Drug Administrative (“FDA”) of the impact of millimeter wave technology on personal medical devices, the FDA was consulted pursuant to 6 C.F.R. § 5.4(c)(1) to conduct the submitter notice process and to determine whether these records were exempt from disclosure under Exemption 4. Further details regarding these withholdings are contained in the declaration of Joy Lazaroff.
43. For the remainder of records withheld in full or in part pursuant to Exemption 4, because of its expertise in the subject matter, pursuant to 6 C.F.R. § 5.4(c)(1), TSA was consulted and determined which records pertaining to AIT system manufacturers were exempt from disclosure under Exemption 4. Further details regarding these withholdings are contained

in the declarations of Paul Sotoudeh, as well as in the declarations of Peter Modica, Scott Trospen, Joseph Callerame, and Rory Doyle.

**Segregability**

44. To the extent possible, non-exempt responsive records and portions thereof have been segregated and released to EPIC. Numerous records were released in part. As noted above, some records were re-released after it was determined they contained additional releasable non-exempt information. Records were withheld in full only when no meaningful non-exempt portions of such records remained.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: Sept. 9, 2011

  
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# Exhibit A to Declaration of Pamela Beresford





June 20, 2011

Ms. Ginger McCall  
Staff Counsel  
Electronic Privacy Information Center  
1718 Connecticut Ave. NW  
Suite 200  
Washington, DC 20009

Re: **Freedom of Information Act Appeal (S&T 11-0003.30)**

Dear Ms. McCall:

This is the final response to your Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), dated July 13, 2010. You are seeking all records concerning TSA tests, regarding body scanners and radiation emission or exposure; as well as all records concerning third party tests regarding body scanners and radiation emission or exposure. Pursuant to an agreement to narrow the scope of the request on January 19, 2011, the search for responsive records was limited to records pertaining to vendors and technologies that are either currently being deployed by the Science and Technology Directorate (S&T) or are under consideration by S&T.

Attached on compact disc(s) are records produced by S&T's Test & Evaluation and Standards Office and Transportation Security Laboratory as responsive to your request. Of those documents, I have determined that some are releasable in their entirety, while others are withheld in part pursuant to Title 5 U.S.C. § 552 FOIA Exemptions 3, 4, 5, and 6 as described below. Further, please be advised that some documents are currently being withheld under Exemption 4 pending completion of the submitter notice process in accordance with Executive Order 12,600.

**FOIA Exemption 3** protects information specifically exempted from disclosure by another statute, if the statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) established particular criteria for withholding or refers to particular types of matters to be withheld. Proposals Section 253b(m) of Title 41, United States Code, prohibits the release of any competitive proposal under the FOIA, except for those portions of the proposal set forth or incorporated by reference in a government contract.

**FOIA Exemption 4** protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential. The courts have held that this subsection protects (a) confidential commercial information, the disclosure of which is likely to cause substantial harm to the competitive position of the person who submitted the information and (b)

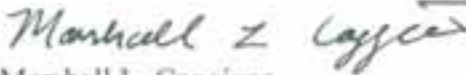
information that was voluntarily submitted to the government if it is the kind of information that the provider would not customarily make available to the public.

**FOIA Exemption 5** protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. The deliberative process privilege protects the integrity of the deliberative or decision-making processes within the agency by exempting from mandatory disclosure opinions, conclusions, and recommendations included within inter-agency or intra-agency memoranda or letters. The release of this internal information would discourage the expression of candid opinions and inhibit the free and frank exchange of information among agency personnel.

**FOIA Exemption 6** exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

If you have any questions, please contact Jesse Grauman at the U.S. Department of Justice at 202-514-2849.

Sincerely,

  
Marshall L. Caggiano  
Attorney-Advisor  
Office of the General Counsel  
Science and Technology Directorate

Enclosure(s): Compact disc(s)

# Exhibit B to Declaration of Pamela Beresford

**Grauman, Jesse (CIV)**

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**From:** Grauman, Jesse (CIV)  
**Sent:** Wednesday, September 07, 2011 6:49 PM  
**To:** John Verdi  
**Subject:** EPIC v. DHS (Radiation testing) (First email)  
**Attachments:** TSL1075-1189.pdf; TSL1190-1198.pdf; TSL1199-1279.pdf

John –

Attached to this email (and subsequent emails due to file size) are records being released or re-released by DHS to EPIC in EPIC v. DHS, No. 1:10cv1992 (radiation testing regarding advanced imaging technology). As you know, in an effort to narrow the issues for review, DHS has been reviewing withholdings made pursuant to Exemption 4, pursuant to the one-month extension we negotiated in early August. In addition, certain records had been temporarily withheld by DHS pending completion of the submitter notice process and review for sensitive security information (SSI). Both of these processes are complete and the following three categories of records are being released:

**I: Records previously withheld temporarily pending completion of submitter notice and SSI review and now being released upon completion of that review:**

TSL1075-1189  
TSL1190-1198  
TSL1199-1279  
TSL1280-1360

**II. Records previously withheld in full pursuant to Exemption 4, now being released in part after further review:**

TSL1361-1378  
TSL1379-1382

**III. Records previously withheld in part pursuant to Exemption 4 now being released with fewer or no Exemption 4 withholdings after further review:**

TSA178-191  
TSA192-195  
TSL774-788  
TSL919-922  
TSL-MISC (comprising TSL13, 26, 32-38, 41, 153, 165, 171, 176, 651, 841, 874)

The bases for any withholdings in these records will be identified in the Vaughn indices and declarations that will be filed with our upcoming motion for summary judgment on Monday. Please contact me if you have any questions or concerns.

Jesse

Jesse Grauman  
Trial Attorney  
U.S. Department of Justice, Civil Division, Federal Programs Branch  
20 Massachusetts Avenue NW, Room 5374  
Washington, DC 20001  
[jesse.z.grauman@usdoj.gov](mailto:jesse.z.grauman@usdoj.gov)  
Phone: (202) 514-2849  
Fax: (202) 305-8517

Exhibit C to  
Declaration of Pamela Beresford  
(TSL Vaughn Index)

**TSL Vaughn Index**

<b>Bates numbers</b>	<b>Number of Pages with withholdings</b>	<b>Document(s)/Email title(s)</b>	<b>Exemption</b>	<b>Explanation/Justification for Withholding</b>
TSL000001-2, TSL000009-10	4	Interagency Agreement between DHS and FDA	(b)(6)	Email address, telephone numbers, signatures of DHS and FDA staff were withheld for privacy reasons.
TSL000011	1	FW: HSHQDC-10-X-00495, PR: RSLF-10-00153	(b)(6)	Email address and telephone numbers of DHS and FDA staff were withheld for privacy reasons.
TSL000012-14; TSL000024, TSL000026-27; TSL000039-41; TSL000152-154; TSL000160-165; TSL000167; TSL000169-172; TSL000176; TSL000649-652	28	FW: modifying the mm wave scanner to be delivered to FDA labs; L-3 supplying information required by FDA for testing; modifying the mm wave scanner to be delivered to FDA labs; RE: modifying the mm wave scanner to be delivered to FDA labs; RE: AIT EMI Safety Meeting Slated for 19 July 1-3p in Silver Spring; RE: Directions to FDA labs	(b)(6)	Names, email address, and telephone numbers of DHS, FDA, and contractor employees withheld for privacy reasons.
TSL000015-19, TSL000021-22	7	TSA 10-1282; Conf/Equip form for New Equipment at The Food & Drug Administration (FDA), Silver Spring, MD (TSA); L-3 supplying information required by FDA for testing;	(b)(6)	Email address and telephone numbers of DHS and FDA staff were withheld for privacy reasons.
TSL000028	1	Medtronic memo re: Medtronic implantable pacemaker, defibrillation, and neuromodulation systems	(b)(6)  (b)(4)	Name of company signatory withheld for privacy reasons.  This record is a letter sent by Medtronic to Schiphol Airport in the Netherlands in 2007. The letter was submitted voluntarily by L-3 Communications to DHS and FDA in 2010 in connection with an inter-agency agreement between those agencies to test the effects of millimeter wave scanners on medical devices. L-3 was not required to

				<p>submit this information in order to have its products deployed by TSA.</p> <p>The withheld information concerns the interaction between Medtronic devices and Provision 100 scanner. It is not the type of information that would normally be disclosed to the public by Medtronic. Lazaroff Decl. ¶¶ 9, 11-13.</p>
<p>TSL000029, 31</p> <p>TSL000030-31</p>	3	<p>Memorandum regarding Radiated Emissions Testing and Power Density Calculation for Guardian 100 System</p>	<p>(b)(6)</p> <p>(b)(4)</p>	<p>Names of individuals withheld for privacy reasons.</p> <p>This record is a 2005 letter from EMC International Services to Safeview, Inc., a predecessor entity to L-3 Communications. It was submitted voluntarily by L-3 to DHS and FDA in 2010 in connection with an inter-agency agreement between those agencies to test the effects of millimeter wave scanners on medical devices.</p> <p>L3 was not required to submit this information in order to have its products deployed by TSA.</p> <p>The withheld excerpts are specific system timing parameters developed by L-3 that optimize the imaging performance of the L-3 system. This information would not normally be disclosed by L-3 to the public. Moreover, its release is likely to cause L-3 substantial competitive harm, as it would enable competitors to copy technical attributes of L-3's design and to extract L-3 Communications proprietary system performance metrics and use this information to their advantage in future competitive procurement programs. Trosper Decl. ¶ 5; Sotoudeh Decl. ¶¶ 54-58.</p>

TSL000033, 35-36	3	Questionnaire from L-3 Communications: "In order to begin the preliminary assessments..."	(b)(4)	<p>This record is a response by L-3 to questions posed by FDA about certain attributes of the L-3 system. It was submitted voluntarily by L-3 to DHS and FDA in 2010 in connection with an inter-agency agreement between those agencies to test the effects of millimeter wave scanners on medical devices.</p> <p>L3 was not required to submit this information in order to have its products deployed by TSA.</p> <p>The withheld excerpts are specific system timing parameters that optimize the imaging performance of the L-3 system, and specific details on L-3's antenna design. The document is marked "Proprietary Information" and would not normally be disclosed by L-3 to the public. Moreover, its release is likely to cause L-3 substantial competitive harm, as it would enable competitors to copy technical attributes of L-3's design and to extract L-3 Communications proprietary system performance metrics and use this information to their advantage in future competitive procurement programs. Trospen Decl. ¶ 5; Sotoudeh Decl. ¶¶ 54-58.</p>
<p>TSL000044-47</p> <p>TSL44</p> <p>TSL44, 47</p>	4	RE: Request to Review to Incoming Communications re AITs (two emails)	<p>(b)(6)</p> <p>(b)(5)</p>	<p>Email address and telephone numbers of DHS staff; names of outside (non-government) individuals who submitted correspondence to TSA.</p> <p>DHS official's opinion about content and proprietary status of certain reports.</p> <p>TSA official's stated belief regarding nature of available information concerning effects of AITs on medical devices.</p>



TSL000048, 52, 54, 58, 62-63, 65-67, 69, 71-72, 74-78  TSL82	18	Addendum to L-3 Communications Safeview, Inc. Test Report ETS-07-009-A	(b)(6)  (b)(4)	<p>Names and signatures of non-government individuals involved in testing. Withheld for privacy reasons.</p> <p>This record is a third-party test report required to be submitted to the government as part of L-3's Qualification Data Package ("QDP"), a set of information demonstrating compliance with certain requirements necessary for placement on a Qualified Product List ("QPL") of products eligible for consideration for TSA contracts.</p> <p>The withheld excerpt is a photograph of internal components of the L-3 ProVision AIT system that reveals specific design implementation details, including details of the millimeter wave component placement and cabling methodology. Release of this information is likely to cause L-3 substantial competitive harm by enabling competitors to copy technical attributes of the design for use in products which would directly compete with L-3 Communications in the AIT product market. Troster Decl. ¶ 6; Sotoudeh Decl. ¶¶ 54-58.</p>
TSL000145	1	RE: user and password information	(b)(6)	Email address and telephone numbers of DHS and FDA staff were withheld for privacy reasons.
TSL000148-50	3	FW: extension or new IAA with DHS	(b)(6)	Email address and telephone numbers of DHS and FDA staff were withheld for privacy reasons.
TSL000151	1	Re: Radiation Safety Standards & Testing for mm Wave AIT	(b)(6)	Email address and telephone numbers were withheld for privacy reasons.
TSL000155-6	2	RE: Advance Notice: Require Dosimeters	(b)(6)  (b)(5)	<p>Email address and telephone numbers were withheld for privacy reasons.</p> <p>Informal deliberative comments containing speculation and opinion regarding methods for detecting radiation from AIT systems, including dosimeters.</p>

TSL000173-175	3	FW: Help with USA Today question	(b)(6)  (b)(5)	Emails and phone numbers of various staff were withheld to protect privacy.  Deliberations between agency personnel concerning how to respond to certain claims made regarding AIT by USA Today reporter.
TSL000178-182	5	RE: Scanner plans and information	(b)(6)	Email address, telephone numbers of DHS and FDA staff, and names of non-government officials, withheld for privacy reasons.
TSL000183	1	RE: PR TSL-2010-050 - SOW-Amended with Edit Marks--hb --5-18-v2-clean.doc	(b)(6)  (b)(5)	Email address and telephone numbers were withheld for privacy reasons.  Expression of author's opinion as to nature of test performed by FDA when compared with tests proposed by manufacturers.
TSL000186-187	8	RE: Washington Post article on cell phone radiation	(b)(6)  (b)(5)	Email address and telephone numbers withheld for privacy reasons.  Excerpts withheld consist of agency officials' speculations and suggestions concerning assertions in Washington Post article.
TSL000193	1	Request for two papers on Radiation Safety Standards for AIT	(b)(6)	Email address and telephone numbers were withheld for privacy reasons.
TSL000196-199	4	mm wave lab project progress and pending problems	(b)(6)  (b)(5)	Email address and telephone numbers of DHS and FDA staff and non-government individuals were withheld for privacy reasons.  Withheld excerpt includes author's opinions about test approach proposed by one device manufacturer when compared with approach used by FDA.
TSL000200	1	Fw: Final Backscatter Fact Sheet	(b)(6)	Email address and telephone numbers were withheld for privacy reasons.

TSL000201-204	4	Fw: Backscatter response	(b)(6)  (b)(5)	Email address and telephone numbers were withheld for privacy reasons.  Excerpts withheld are edits and comments to draft version of portion of brief concerning backscatter safety to be sent to Secretary of DHS.
TSL000205-6	1	RE: possible funding additions to L-3 project	(b)(6)	Email address and telephone numbers of DHS and FDA staff were withheld for privacy reasons.
TSL000207	1	Fw: RF exposure guidelines and safety standards	(b)(6)	Email address and telephone numbers of staff were withheld for privacy reasons.
TSL000208-210	3	RE: Information needed for preliminary assessments	(b)(6)	Email address and telephone numbers of staff, and names of non-government officials, were withheld for privacy reasons.
TSL000214	1	Exposure to High Frequency Electromagnetic Fields, Biological Effects and Health Consequences (100 kHz-300GHz)	(b)(6)	Phone number and email of publisher withheld for privacy reasons
TSL000603	2	RE: AIT QDP - Substantiation for requirements 145, 164, 165, 168	(b)(6)	Email addresses and telephone numbers withheld for privacy reasons.
TSL000605-608; TSL000871-873	7	FW: medical device testing - Medtronic protocol; RE: Proposal for Medtronic on possible MM Wave system interference	(b)(6)  (b)(5)	Email addresses and telephone numbers withheld for privacy reasons.  Withheld portions are exchanges of opinions and thoughts expressed by government employees outlining tentative plans for testing effects of scanners on medical devices, and expressing their opinions about product manufacturers' proposed test approach.

TSL000609-612	4	RE: Information re: Medtronic testing;	(b)(6)  (b)(5)	Email addresses, telephone numbers , and names of non-governmental employees withheld for privacy reasons.  Withheld portions are exchanges between government and contractor employees concerning tentative plans and logistics for testing effects of scanners on medical devices
TSL000613-623	11	Medtronic Cardiac Rhythm Disease Management	(b)(6)  (b)(4)	Names of non-government personnel withheld for privacy reasons.  This record is a test plan submitted by Medtronic to FDA in 2010 voluntarily as part of a test program implemented by DHS and FDA to test the effects of millimeter wave scanners on medical devices.  Medtronic was not required to submit this information to the government. The document is marked "MEDTRONIC CONFIDENTIAL."  The withheld excerpts contain proprietary information concerning Medtronic medical devices, specifically, details regarding Medtronic's plan for testing the interaction of emissions from millimeter wave scanners on Medtronic devices, along with the model names of these devices. This information is not of the type Medtronic would disclose to the public. Lazaroff Decl. ¶¶ 10-13.
TSL000624-625; TSL000717-718	4	RE: ProVision 100 Unit - delivery (2 emails)	(b)(6)	Email address and telephone numbers of DHS and FDA staff were withheld for privacy reasons.

TSL000626-7	2	FDA mm wave project	(b)(6)  (b)(5)	Email address and telephone numbers of DHS and FDA staff were withheld for privacy reasons.  Deliberative remarks reflecting author's opinion about interagency administrative logistics for conducting testing.
TSL000628-629; TSL000771; TSL000869	4	RE: AS&E AIT Qualification Data Package; RE: AS&E "s AIT QDP; RE: AS&E AIT Qualification Data Package; RE: Radiation Safety Review of AS&E"s AIT QDP	(b)(6)  (b)(5)	Email address and telephone numbers of TSL staff withheld for privacy reasons.  Opinions by agency personnel concerning possible installation approaches for AS&E scanner system and system's suitability for testing.
TSL000632	1	RE: TSL Configuration Audit issue	(b)(6)	Names, email address and phone numbers of agency and non-government staff withheld for privacy reasons.
TSL000633	1	IRB requirements	(b)(6)	Telephone numbers of staff were withheld for privacy reasons.
TSL000634-5; TSL000870; TSL000874-876	6	RE: Radiation Safety (3 emails with this subject)	(b)(6)  (b)(5)	Email address and telephone numbers of TSL staff withheld for privacy reasons.  Speculative opinions expressed by agency personnel concerning their interpretations of findings and values in third party reports concerning AIT radiation safety.
TSL000638	1	RE: Emailing: TSL SafeScout - RF Rad Survey 2-15-07 .doc	(b)(6)	Email address and telephone numbers of TSL staff withheld for privacy reasons.
TSL000639-641	3	RE: extension or new IAA with DHS	(b)(6)	Email address and telephone numbers of DHS and FDA staff were withheld for privacy reasons.
TSL000642, TSL000644-648, TSL000653	7	19 July 2010; FW: TSA 10-1282; Conf/Equip form for New Equipment at The Food & Drug Administration (FDA), Silver Spring, MD (TSA); FW: TSA 10-1282 Airport Review	(b)(6)	Email address and telephone numbers of DHS and FDA staff were withheld for privacy reasons.
TSL000654	1	FW: An item to share on AIT X-ray	(b)(6)	Email address and telephone numbers of staff were withheld for privacy reasons.

TSL000692	1	Re: NIST HSHQDC-10-X-00107 - Distribution	(b)(6)	Email address and telephone numbers of DHS staff were withheld for privacy reasons.
TSL000693; TSL000903	2	FW: Information needed for preliminary assessments; Information needed for preliminary assessments	(b)(6)	Email address and telephone numbers of agency staff, and names of non-government staff, withheld for privacy reasons.
TSL000695-696; 698-699	4	RE: AIT QDP - Substantiation for requirements 145, 164, 165, 168 (two emails)	(b)(6)	Email address and telephone numbers of DHS staff were withheld for privacy reasons.
TSL000701, 707, 712	3	CMG Test Report	(b)(6)	Names, phone numbers and email addresses of CMG staff, as well as signatures, were withheld for privacy reasons.
TSL000714-715	2	F. X Masse Certificate of Compliance for AS&E Dual SmartCheck HT Personnel Scanner, April 8, 2010	(b)(6)  (b)(4)	Signature withheld for privacy reasons.  This information is located within a document required to be submitted to the government as part of AS&E's Qualification Data Package ("QDP"), a set of information demonstrating compliance with certain requirements necessary for placement on a Qualified Product List ("QPL") of products eligible for consideration for TSA contracts.  The withheld information contains:  1) Certain Operating Parameters of the AS&E Dual SmartCheck, including current and voltage measurements 2) Certain design features and component parts of the AS&E Dual SmartCheck 3) Specific Radiation Dose Levels Emitted by AS&E Dual SmartCheck  Release of this information is likely to cause AS&E substantial competitive harm because it could enable a competitor to infer non-public details about the design of AS&E's system, such as beam characteristics or filtration, which could in

				turn enable that competitor to reverse-engineer AS&E's product. Callerame Decl. ¶ 5(i-iii); Sotoudeh Decl. ¶¶ 54-63.
TSL000719	1	FW: Work under IAG	(b)(6)	Phone number and email address of FDA staff withheld for privacy reasons.
TSL000720	1	FW: New IAG SOW	(b)(6)  (b)(5)	Phone number and email address of FDA staff withheld for privacy reasons.  Excerpts withheld contain informal remarks by agency officials regarding their intentions regarding about certain test details and opinions about how to engage manufacturers.
TSL000728, 735	2	Interagency agreement to be executed	(b)(6)	Phone numbers and email addresses of FDA staff withheld for privacy reasons.
TSL000739	1	Issue Date 2008-05-29: Cover Page for Test Report	(b)(6)	Signatures and names of UL staff withheld for privacy reasons.
TSL000773	1	TUV Test Results Summary	(b)(6)	Names and signatures of TUV staff withheld for privacy reasons.
TSL000774-779	6	Letter from 3rd party physicist concerning radiation safety of Rapiscan system, Oct. 28, 2008	(b)(6)	Names, address, email address and phone numbers of non-government personnel withheld for privacy reasons.
TSL000780-788	9	Letter from 3rd party physicist concerning radiation safety of Rapiscan system, June 5, 2008	(b)(6)	Names, address, email address and phone numbers of non-government personnel withheld for privacy reasons.
TSL790, 792, 793, 801	3	Addendum to L-3 Communications Safeview, Inc. Test Report ETS-07-041-A	(b)(6)	Names and signatures of non-government officials.
TSL000824-825	2	Radiomagnetic Frequency Electromagnetic Exposure Statement of Compliance	(b)(6)	Names of non-government officials withheld for privacy reasons.
TSL000829-30	2	F. X. Masse letter of compliance regarding AS&E Dual SmartCheck, June 4, 2008	(b)(6)  (b)(4)	Signature of staff withheld for privacy reasons.  This information is located within a document required to be submitted to the government as part of AS&E's Qualification Data Package ("QDP"), a set of information demonstrating compliance

				<p>with certain requirements necessary for placement on a Qualified Product List (“QPL”) of products eligible for consideration for TSA contracts.</p> <p>The withheld information contains:</p> <ol style="list-style-type: none"> <li>1) Certain Operating Parameters of AS&amp;E Dual SmartCheck, including current and voltage measurements</li> <li>2) Certain design features and component parts of AS&amp;E Dual SmartCheck</li> <li>3) Specific Radiation Dose Levels Emitted by AS&amp;E Dual SmartCheck</li> <li>4) Recommendations for improving radiation safety of AS&amp;E Dual SmartCheck</li> </ol> <p>Release of this information is likely to cause AS&amp;E substantial competitive harm because it could enable a competitor to infer non-public details about the design of AS&amp;E’s system, such as beam characteristics or filtration, which could in turn enable that competitor to reverse-engineer AS&amp;E’s product. Moreover, disclosure of any product recommendations or solutions would cause AS&amp;E substantial competitive harm because a competitor could utilize these non-public recommendations to design or improve its system. Callerame Decl. ¶ 5(i-iv); Sotoudeh Decl. ¶¶ 54-68.</p>
TSL000831-32		F. X. Masse letter of compliance regarding AS&E SmartCheck, March 2006	(b)(6)  (b)(4)	<p>Signature of staff withheld for privacy reasons.</p> <p>This information is located within a document required to be submitted to the government as part of AS&amp;E’s Qualification Data Package (“QDP”), a set of information demonstrating compliance with certain requirements necessary for placement on a Qualified Product List (“QPL”) of products eligible for</p>



				consideration for TSA contracts.  The withheld information contains specific radiation dose levels emitted by the AS&E Dual SmartCheck at certain specific locations.  Release of this information is likely to cause AS&E substantial competitive harm because it could enable a competitor to infer non-public details about the design of AS&E's system, such as beam characteristics or filtration, which could in turn enable that competitor to reverse-engineer AS&E's product. Callrame Decl. ¶ 5(iii); Sotoudeh Decl. ¶¶ 59-63.
TSL000834	1	AIT Safety Audit	(b)(5)	Request to conduct performance testing on certain AIT devices not currently being deployed by DHS/TSA.
TSL000835	1	Re: PR for NIST	(b)(6)	Email address and telephone numbers of DHS staff were withheld for privacy reasons.
TSL000836-837	2	Re: AIT/AT Proximity Test - Preliminary Report	(b)(6)  (b)(3) (SSI) (49 U.S.C. § 114(r) and 49 C.F.R. § 1520.5(b)(9)(v))	Email address and telephone numbers of TSL staff withheld for privacy reasons.  Withheld excerpts describes particular phenomenon observed while performance-testing the Rapiscan Secure 1000, which could be used to identify a potential vulnerability of the system.
TSL000838-839	2	RE: OST WBI/EMD Testing	(b)(6)	Email address and telephone numbers of DHS staff were withheld for privacy reasons.
TSL000840	1	RE: Rapiscan WBI	(b)(6)	Email address and telephone numbers of DHS staff were withheld for privacy reasons.
TSL000841-842	2	FW: radiation emissions ratings on WBIs units	(b)(6)	Names, email address and phone numbers withheld for privacy reasons.

TSL000843	1	Re: Rapiscan WBI Safety Information	(b)(6)	Email address and telephone numbers of DHS staff were withheld for privacy reasons.
TSL000845	1	FW: Rapiscan Secure 1000 QDP letter & waiver assessment	(b)(6)	Email address and telephone numbers of staff were withheld for privacy reasons.
TSL000846	1	TUV: Certificate	(b)(6)	Signature redacted for privacy reasons.
TSL000848	1	RE: WBI/Radiation	(b)(6)	Email address of DHS staff withheld for privacy reasons.
TSL000849	1	RE: Test Prerequisites	(b)(6)	Email addresses of DHS staff withheld for privacy reasons.
TSL000850	1	RE: x-ray standards work	(b)(6)	Email addresses of NIST staff withheld for privacy reasons.
TSL000851	1	RE: Health Physicist?	(b)(6)	Email addresses of DHS staff withheld for privacy reasons.
TSL000852	1	RE: Data Package Review	(b)(6)	Email addresses of DHS staff withheld for privacy reasons.
TSL000853; TSL000961-962	3	Proposal for Medtronics on possible MM Wave system interference; RE: Proposal for Medtronics on possible MM Wave system interference	(b)(6)	Email addresses of staff withheld for privacy reasons.
TSL000854, TSL000859-860, TSL000864-865	5	Interagency Agreement b/w NIST and DHS/TSL	(b)(6)	Phone numbers, signatures, and email addresses of staff withheld for privacy reasons.
TSL000866-867	2	RE: Transmission x-ray testing	(b)(6)	Phone numbers and email addresses of staff withheld for privacy reasons.
TSL000868	1	Baseline Radiation Safety Audit	(b)(6)	Phone numbers and email addresses of staff withheld for privacy reasons.
TSL000877-878	2	FW: AIT Radiation measurement standards and approved locations	(b)(6)	Phone numbers and email addresses of staff withheld for privacy reasons.
TSL000880, TSL000881-882	1, 2	L3 Communication cover letter for and CKC Radio Frequency Electromagnetic Exposure Statement of Compliance Addendum	(b)(6)	Names and signatures of staff withheld for privacy reasons.
TSL000884-885	2	FW: Effects of MMW on implanted medical devices	(b)(6)	Phone numbers and email addresses of staff withheld for privacy reasons.

TSL000890-892	3	FW: AIT QDP - Substantiation for requirements 145, 164, 165, 168	(b)(6)	Phone numbers and email addresses of staff withheld for privacy reasons.
TSL000893-896	4	FW: High throughput SmartCheck Certifications	(b)(6)	Phone numbers and email addresses of staff withheld for privacy reasons.
TSL000897-899	3	Frank Cerra, Assessment of Radiation Safety and Compliance with ANSI N43.17-2002 AS&E Dual Smart Check Personnel Scanner	(b)(4)	<p>This record is an evaluation of AS&amp;E's Dual Smart Check by Frank Cerra, a NIST official. Although the evaluation was authored by Mr. Cerra, the information, assessments, and recommendations included in this evaluation are based on information obtained from AS&amp;E, including (1) a third-party compliance report by F.X. Masse, a copy of which is located at TSL829-30, that was required to be submitted to the government as part of AS&amp;E's Qualification Data Package ("QDP"), a set of information demonstrating compliance with certain requirements necessary for placement on a Qualified Product List ("QPL") of products eligible for consideration for TSA contracts, (2) radiation dosage maps submitted by AS&amp;E in connection with its QDP (TSL1190-91), (3) designs and other information obtained from AS&amp;E, and (4) a prior evaluation conducted by Mr. Cerra (TSL924-56) based on an earlier-model AS&amp;E system obtained by the government for testing.</p> <p>The withheld portions include:</p> <ol style="list-style-type: none"> <li>1) Descriptions of design features and scanning mechanisms used by AS&amp;E Dual SmartCheck, including measurements and geometry of x-ray beam</li> <li>2) Specific Radiation Dose Levels Emitted by AS&amp;E Dual SmartCheck at various locations</li> <li>3) Assessments of, and recommendations</li> </ol>

				for improving, radiation safety of AS&E Dual SmartCheck  Release of this information is likely to cause AS&E substantial competitive harm because it could enable a competitor to infer non-public details about the design of AS&E's system, such as beam characteristics or filtration, which could in turn enable that competitor to reverse-engineer AS&E's product. Moreover, disclosure of product recommendations or solutions would cause AS&E substantial competitive harm because a competitor could utilize these same non-public recommendations to design or improve its system. Callerame Decl. ¶ 5(i-iv); Sotoudeh Decl. ¶¶ 54-68.
TSL000901-902	2	RE: Rapiscan Secure 1000 QDP letter & waiver assessment	(b)(6)	Phone numbers and email addresses of staff withheld for privacy reasons.
TSL000905-906	2	RE: Memo on Response to Radiation Concerns	(b)(6)	Phone numbers and email addresses of staff withheld for privacy reasons.
TSL000908-910	3	FW: Memo on Response to Radiation Concerns	(b)(6)  (b)(5)	Phone numbers and email addresses of staff withheld for privacy reasons.  Excerpts withheld are suggestions of points to be included in draft memorandum to Deputy Secretary of DHS on radiation safety.
TSL000911-913; TSL000914-917; TSL000918	8	RE: High throughput SmartCheck Certifications (2 emails); Rapiscan Dual Secure 1000 Report	(b)(6)	Phone numbers and email addresses of staff withheld for privacy reasons.
TSL000919-922	4	Frank Cerra, Assessment of Radiation Safety and Compliance with ANSI N43.17-2002 Rapiscan Dual Secure 1000 Personnel Scanner	(b)(6)	Name of third-party testing physicist withheld for privacy reasons.
TSL000923	1	Single-source Smart Check error	(b)(5)	Withheld excerpts include Mr. Cerra's observations and comments on an error in the 2006 version of his assessment of the AS&E single-source SmartCheck.

<p>TSL000926-927, 929-942, 944-48, 954-56</p>	<p>24</p>	<p>Assessment of the AS&amp;E Smart Check BodyScanner for Conformance with Radiological Safety Standards</p>	<p>(b)(6)  (b)(4)</p>	<p>Names of staff withheld for privacy reasons.</p> <p>This information is located within an evaluation of AS&amp;E's SmartCheck conducted by Frank Cerra of the National Institute of Standards and Technology (NIST). The evaluation was initially conducted in 2006 and then updated in 2008 with a revision to a single page. The testing and evaluations were performed on a SmartCheck machine that was obtained from AS&amp;E.</p> <p>The withheld excerpts pertain to:</p> <p>TSL926: Specific radiation measurements emitted by AS&amp;E SmartCheck at various locations and information that could be used to derive such measurements; description of SmartCheck beam mechanism and design  TSL927: Model and features of x-ray tube used in AS&amp;E SmartCheck. Information obtained via personal communication with AS&amp;E employee.  TSL929-30: Half-value-layer measurements (thickness of aluminum required to attenuate x-ray beam to half of exposure rate of unattenuated beam) of AS&amp;E SmartCheck, and graph showing such measurements  TSL931: Observed cutoff photon energy and anode voltage of AS&amp;E SmartCheck  TSL932: Graph of uncorrected photon energy spectrum and peak energy channels observed in AS&amp;E SmartCheck  TSL933: Description of radiation exposures in certain specific locations of scan field of AS&amp;E SmartCheck  TSL934: Descriptions of two scanning features used in AS&amp;E SmartCheck, and graph of maximum relative radiation exposure as function of height</p>
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			<p>TSL935: Numeric values reflecting measured focal spot of SmartCheck scanner; descriptions of design features and scanning mechanisms; graph of radiation exposure as function of horizontal position</p> <p>TSL936: Measurement of radiation emitted by AS&amp;E SmartCheck</p> <p>TSL937: Excerpts describing shape and features of x-ray mechanism; graph of radiation exposure as function of distance; measurements of relative slope of curve in graph and focus-to-skin distance</p> <p>TSL938: Numeric values that could be used to derive focal spot of SmartCheck scanner; graph of relative exposure per scan as function of inverse distance from focal spot</p> <p>TSL939: Descriptions of specific features of scanning mechanism, including focal spot, scan field divergence, and angles.</p> <p>TSL940: Measurement of radiation emitted by AS&amp;E SmartCheck</p> <p>TSL941: Measurements of radiation emitted by AS&amp;E SmartCheck; graph and measurements of minimum inspection zone for AS&amp;E SmartCheck</p> <p>TSL942: Measurements of radiation emitted by AS&amp;E SmartCheck; measurements of distance used for various radiation measurements; graph of area that should be free of full-time employee stations based on radiation levels</p> <p>TSL944, 945: Tables showing measurements of radiation leakage and scatter radiation emitted by AS&amp;E SmartCheck at various locations</p> <p>TSL946: Measurement of scatter exposure emitted by AS&amp;E SmartCheck</p> <p>TSL947: Discussion of measurements of leakage radiation emitted by AS&amp;E SmartCheck, referencing information in SmartCheck Operator's Manual obtained from AS&amp;E</p>
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				<p>TSL954-56: Graphs and charts showing measured radiation emissions from AS&amp;E SmartCheck at various locations</p> <p>This information is not of the type AS&amp;E would normally release to the public. Moreover, release of this information is likely to cause AS&amp;E substantial competitive harm because it could enable a competitor to infer non-public details about the design of AS&amp;E's system, such as beam characteristics or filtration, which could in turn enable that competitor to reverse-engineer AS&amp;E's product. Moreover, disclosure of any product recommendations or solutions would cause AS&amp;E substantial competitive harm because a competitor could utilize these same non-public recommendations to design or improve its system. Callerame Decl. ¶ 5(i-iv); Sotoudeh Decl. ¶¶ 54-68.</p>
TSL000957	1	FW: SmartCheck HT Radiation Surveys	(b)(6)  (b)(5)	<p>Phone numbers and email addresses of staff withheld for privacy reasons.</p> <p>Sentence withheld reflects author's opinion and suggestion concerning attached radiation surveys.</p>
TSL000959-960	2	FW: Safety for AIT ATR	(b)(6)  (b)(5)	<p>Phone numbers and email addresses of staff withheld for privacy reasons.</p> <p>Excerpts withheld under Exemption (b)(5) contain opinions and stated intentions of agency personnel concerning additional testing of AIT systems employing automated target recognition ("ATR").</p>
TSL000963-967	5	Re: transmission x-ray	(b)(6)  (b)(5)	<p>Phone numbers and email addresses of staff withheld for privacy reasons.</p> <p>Excerpt withheld under Exemption (b)(5) includes author's stated opinion and speculation about element of planned test approach.</p>

TSL000969	1	To Whom It May Concert (L-3 letter)	(b)(6)	Names and signatures of staff withheld for privacy reasons.
TSL000970-971	2	RE: AS&E Safety Test Project - Kick-off	(b)(6)	Phone numbers and email addresses of staff withheld for privacy reasons.
TSL000972	1	FW: AIT Safety Testing - French Results	(b)(6)	Phone numbers of staff withheld for privacy reasons.
TSL000983, TSL001056,	2	Afsset Évaluation des risques sanitaires liés à l'utilisation du scanner corporel à ondes « millimétriques » ProVision 100	(b)(6)	Signatures of issuing agency and officials withheld for privacy reasons.
TSL001057	1	Re: Safety test issues	(b)(6)	Phone numbers and email addresses of staff withheld for privacy reasons.
TSL1059	1	Preliminary progress report for AIT-medical device testing	(b)(6)	Phone numbers and email addresses of staff withheld for privacy reasons.
TSL1060-63	4	Transmission X-Ray measurement at NIST	(b)(6)  (b)(5)	Phone numbers and email addresses of staff withheld for privacy reasons.  Redacted portions consist of agency staff's opinions and stated intentions regarding future testing of transmission X-Ray systems, utility of releasing preliminary results, potential timeline for testing, and intra-agency logistics regarding the timeline.
TSL1064	1	RE: Preliminary progress report for AIT-medical device testing	(b)(6)	Phone numbers and email addresses of staff withheld for privacy reasons.
TSL1065-66	2	RE: L3's ProVision 100 AIT?	(b)(6)	Phone numbers and email addresses of staff withheld for privacy reasons.
TSL1067-69	3	RE: request for deviation (RFD) for L-3 provision password at FDA	(b)(6)	Phone numbers and email addresses of staff, and name of non-government officials, withheld for privacy reasons.
TSL1070	1	AIT IO Qual Test - AS&E ANSI Radiation Safety Test	(b)(5)	Author's opinion regarding utility of relying only on third party radiation tests, and regarding who should bear certain costs associated with testing
TSL1071-72	2	FW: Plan for relocation of Smartcheck HT from TSL to NIST...	(b)(6)	Phone numbers and email addresses of staff, and name of non-government officials, withheld for privacy reasons.
TSL1075, 1078, 1079, 1111, 1115, 1119, 1126, 1130, 1132,	17	Addendum to SafeView, Inc. Test Report, FC06-056	(b)(6)	Names of non-government personnel redacted for privacy reasons.



1134, 1136, 1138, 1140, 1142, 1144, 1146, 1148				
TSL1149, 1151, 1152, 1157, 1160, 1164, 1166, 1167	8	SafeView Test Report for the SC-100, T-COP	(b)(6)	Names of non-government personnel redacted for privacy reasons.
TSL1168, 1170	2	L3 Communications, SafeView Inc. Report for the ProVision SC-100	(b)(6)	Names of non-government personnel redacted for privacy reasons.
TSL1186, 1187	2	CKC Certificate of Conformity	(b)(6)	Names of non-government personnel redacted for privacy reasons.
TSL1190-91	2	Dosage map showing radiation dosage from AS&E SmartCheck (attachment to report released at TSL000897-899)	(b)(4)	<p>This record is a dosage map that was submitted by AS&amp;E in connection with the evaluation of AS&amp;E's Dual Smart Check by Frank Cerra at TSL897-99.</p> <p>The withheld portions include:</p> <p>1) Text indicating location where radiation dosage was measured, including measurements of distance from scanner</p> <p>2) Graphs showing map of radiation dosage emitted by AS&amp;E Dual Smart Check at various locations</p> <p>Release of this information is likely to cause AS&amp;E substantial competitive harm because it could enable a competitor to infer non-public details about the design of AS&amp;E's system, such as beam characteristics or filtration, which could in turn enable that competitor to reverse-engineer AS&amp;E's product. Callerame Decl. ¶ 5(iii); Sotoudeh Decl. ¶¶ 59-63.</p>
TSL1192-93	2	Email: FW: SmartCheck HT	(b)(6)  (b)(4)	<p>Names of non-government personnel, and phone numbers/email address, redacted for privacy reasons.</p> <p>This record is an email submitted by AS&amp;E to a TSL official to demonstrate its</p>

				<p>system's compliance with radiation safety standards. The information in this email was submitted by AS&amp;E to the TSL official in an email to support TSL's evaluation of the SmartCheck system's compliance with radiation safety standards; AS&amp;E was required to comply with such standards in order to be placed on a qualified products list ("QPL").</p> <p>The withheld portions include:</p> <ol style="list-style-type: none"> <li>1) Descriptions of specific component parts and design features of AS&amp;E Dual SmartCheck</li> <li>2) Specific Radiation Dose Levels Emitted by AS&amp;E Dual SmartCheck</li> </ol> <p>This information is not of the type AS&amp;E would release to the public. Moreover, release of this information is likely to cause AS&amp;E substantial competitive harm because it could enable a competitor to infer non-public details about the design of AS&amp;E's system, such as beam characteristics or filtration, which could in turn enable that competitor to reverse-engineer AS&amp;E's product. Callerame Decl. ¶ 5(i,iii); Sotoudeh Decl. ¶¶ 54-63.</p>
TSL1194-97	4	Radiation Survey forms for AS&E Smartcheck (attachment to email released at TSL000957-58)	(b)(6)  (b)(4)	<p>Names of non-government personnel redacted for privacy reasons.</p> <p>This record was attached to an email submitted by AS&amp;E to a TSA official to demonstrate its system's compliance with radiation safety standards; AS&amp;E was required to comply with such standards in order to be placed on a qualified products list ("QPL").</p> <p>The withheld excerpts include specific radiation dose levels emitted by the AS&amp;E dual SmartCheck</p>

				Release of this information is likely to cause AS&E substantial competitive harm because it could enable a competitor to infer non-public details about the design of AS&E's system, such as beam characteristics or filtration, which could in turn enable that competitor to reverse-engineer AS&E's product. Callerame Decl. ¶ 5(iii); Sotoudeh Decl. ¶¶ 59-63.
TSL1198	1	TUV Certificate	(b)(6)	Names of non-government personnel redacted for privacy reasons.
TSL1199, 1216-71, 1272-73	59	EMC Test Report WC808134, TUV (Third party reports on radio interference) regarding Rapiscan Secure 1000 system	(b)(6)  (b)(4)	Names of non-government personnel, and phone numbers/email address, redacted for privacy reasons.  This information is located within a document required to be submitted to the government as part of Rapiscan's Qualification Data Package ("QDP"), a set of information demonstrating compliance with certain requirements necessary for placement on a Qualified Product List ("QPL") of products eligible for consideration for TSA contracts.  The information withheld consists of specific confidential technical specification and operational settings of the Rapiscan Secure 1000 system, specifically, current amps/phase measurements (TSL1273). The release of this information likely to cause Rapiscan substantial competitive harm because it could enable competitors to more effectively design and build their own systems using Rapiscan's proprietary information. Modica Decl. ¶¶ 4-7; Sotoudeh Decl. ¶¶ 54-58.
1282-83, 1286-90, 1316, 1328-29, 1333	21	Test Report IEC-61010-1 (Electrical Safety) on Rapiscan Secure 1000 System	(b)(6)	Names of non-government personnel, and phone numbers/email address, redacted for privacy reasons.

			(b)(4)	<p>This information is located within a document required to be submitted to the government as part of Rapiscan’s Qualification Data Package (“QDP”), a set of information demonstrating compliance with certain requirements necessary for placement on a Qualified Product List (“QPL”) of products eligible for consideration for TSA contracts.</p> <p>The withheld excerpts are confidential technical specifications, operational settings, and component parts of the Rapiscan Secure1000 system, specifically:</p> <p>TSL1282: Voltage measurement                  TSL1283: Current measurement                  TSL1286-90: Manufacturers, model numbers, and other technical data regarding component parts                  TSL1316: Mains supply measurements                  TSL1326-7: Temperature measurements                  TSL1333: Sound level measurements</p> <p>Release of this information is likely to cause Rapiscan substantial competitive harm because it could enable competitors to more effectively design and build their own systems using Rapiscan’s proprietary information. Modica Decl. ¶¶ 4-7; Sotoudeh Decl. ¶¶ 54-58.</p>
1362, 1364, 1367, 1368, 1369, 1378	6	Compliance Engineering Ireland radiation safety report on Smiths Detection Systems “eqo” scanner	(b)(6)  (b)(4)	<p>Names of non-government personnel, and phone numbers/email address, redacted for privacy reasons</p> <p>This information is located within a document required to be submitted to the government as part of Smiths’ Qualification Data Package (“QDP”), a set of information demonstrating compliance with certain requirements necessary for placement on a Qualified Product List (“QPL”) of products eligible for</p>

				<p>consideration for TSA contracts.</p> <p>The excerpts withheld are specific measured results of radiation emitted by the Smiths eqo system, and information that could be used to derive such values.</p> <p>Release of this information is likely to cause Smiths substantial competitive harm, as the information could be used to deduce or infer operational or performance attributes of the product and to reconstruct a technically accurate operational description of the scanning approach used in the system. Doyle Decl. ¶¶ 4-6; Sotoudeh Decl. ¶¶ 59-63.</p>
1380	1	Excerpts from Underwriters Laboratories, Inc. Test Results regarding L3 ProVision; majority of document is not responsive as it does not concern radiation testing. Released portions are only portions of report pertaining to radiation testing. Cover pages released at TSL738-39.	(b)(4)	<p>This record consists of the responsive excerpts of a document that was required to be submitted to the government as part of L-3's Qualification Data Package ("QDP"), a set of information demonstrating compliance with certain requirements necessary for placement on a Qualified Product List ("QPL") of products eligible for consideration for TSA contracts.</p> <p>The withheld portions consist of design parameters and component selection related to the motion control sub-system in the L3 ProVision product space.</p> <p>Release of this information is likely to cause L-3 substantial competitive harm because it would enable competitors to copy technical attributes of the design for use in products which would directly compete with L-3 Communications in the AIT product market Trosper Decl. ¶ 7; Sotoudeh Delc. ¶¶ 54-58.</p>

Withheld-in-full A	27	Four draft versions of interagency agreement between DHS and FDA.	(b)(5) (Deliberative Process)	These documents are all working drafts of the interagency agreement with the FDA for the testing of the effects of AIT on personal medical devices.
Withheld-in-full B	4	Two drafts of DHS fact sheet on AIT Health and Safety	(b)(5) (Deliberative Process)	These documents are working drafts of DHS "fact sheet" on health and safety issues related to AIT.
Withheld-in-full C	3	Draft brief for DHS Secretary on radiation safety and backscatter machines	(b)(5) (Deliberative Process)	The document is a draft of a 'talking-point' memo for the Secretary of DHS regarding radiation safety for backscatter AIT machines.
Withheld-in-full D	1	Email exchange regarding TSL's capability to measure microwaves when machine is in a particular mode.	(b)(5) (Deliberative Process)	This exchange between agency personnel consists of deliberations and opinions by two individuals regarding the ability to measure certain microwave emissions when AIT systems are in a particular mode.
Withheld-in-full E	6	Four emails regarding TSL's verification of Rapiscan's documented radiation emissions	(b)(5) (Deliberative Process)	These exchanges between agency employees discuss TSL's verification of Rapiscan's submission of third party substantiation of radiation emission requirements, and further discuss best installation methods for performance testing. They contain the opinions and recommendations of agency employees as to the system's suitability for testing and as to the best methods for testing.

Withheld-in-full F	4	Draft, unsigned internal memorandum (May 21 2005) for agency internal review board (IRB) describing system features that will be required prior to performance testing of certain imaging technologies, including AIT.	(b)(5) (Deliberative Process)	Withheld in full pursuant to Exemption (b)(5). This draft memorandum, dated May 21, 2005, describes the elements that certain imaging systems, including AIT, would need in order to be deemed safe for testing. It was unsigned, never finalized, is not used for reference by the TSL, and is not a current policy.
Withheld-in-full G	12	WBI Qualification Test Working Group Charter, draft internal memorandum assigning roles to TSL staff regarding qualification testing for WBI.	(b)(5) (Deliberative Process)	Withheld in full pursuant to Exemption (b)(5). This draft document, which contains numerous handwritten markups, assigns tasks concerning WBI testing to various TSL employees and groups. It contains no substantive information about radiation testing.
Withheld-in-full H	2	Email exchange regarding types of dosimeters to be used for measuring radiation.	(b)(5) (Deliberative Process)	Withheld in full pursuant to Exemption (b)(5). This email exchange contains an informal question-and-answer discussion between two government employees regarding types of dosimeters (personal radiation monitors) that could be appropriate for measuring radiation from AIT devices.
Withheld-in-full I	3	Draft: Standards and Testing for Radiation Safety for Airport Backscatter X-Ray Systems	(b)(5) (Deliberative Process)	Withheld in full pursuant to Exemption (b)(5). This is a marked-up draft of a document called "Standards and Testing for Radiation Safety for Airport Backscatter X-Ray Systems."
Withheld-in-full J	1	Draft: Summary of Advanced Imaging Technology (AIT) Radiation Safety: Standards and Ensuring Compliance, April 22, 2010	(b)(5) (Deliberative Process)	Withheld in full pursuant to Exemption (b)(5). This document is an early draft of policy document concerning AIT radiation safety.
Withheld-in-full K	3	Mark up and correction of one page from NIST report regarding AS&E SmartCheck.	(b)(5) (Deliberative Process)	Withheld in full pursuant to Exemption (b)(5). These documents reflect edits and updates, made in 2008, to one page of the 2006 report by Frank Cerra on radiation safety of the single-source AS&E SmartCheck, pursuant to an error that Mr. Cerra observed in 2008 when drafting a second report about the 2008 dual-source AS&E SmartCheck.

Withheld-in-full L	6	December 23, 2010 Preliminary FDA Progress Report per the FDA-TSA Agreement: Testing of Medical Devices in and Around the L3 ProVision Advanced Imaging Technology System	(b)(5) (Deliberative Process)	Withheld in full. This document is a preliminary progress report, resulting from an interagency agreement between DHS and FDA, by the FDA concerning the testing of the effects of the L3 Provision on personal medical devices. The report in its entirety is a preliminary document not intended for dissemination outside the federal government, as it reflects an interim report prior to the completion of testing of the effects of the L3 Provision on medical devices.
Withheld-in-full M	3	Email exchange regarding comparisons between radiation generated by cellular phones and millimeter wave scanners.	(b)(5) (Deliberative Process)	Withheld in full pursuant to Exemption (b)(5). This email exchange contains a discussion between agency personnel concerning revisions of an agency Privacy Impact Assessment, and specifically concerns the opinions of agency personnel regarding certain comparisons between radiation generated by cellular phones and millimeter wave scanners. It also discusses preliminary findings of the FDA concerning radiation levels emitted by millimeter wave machines.
Withheld-in-full N	2	Email exchange between FDA and DHS about setting requirements for AITs and medical devices	(b)(5) (Deliberative Process)	Withheld in full pursuant to Exemption (b)(5). This is a deliberative discussion between parties from FDA and TSA expressing their opinions on how best to approach the development of DHS requirements for the interaction between AIT and personal medical devices.
Withheld-in-full O	19	IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz Amendment 1	(b)(4)	Withheld in full; document protected by copyright.
Withheld-in-full P	250	IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz	(b)(4)	Withheld in full; document protected by copyright.
Withheld-in-full Q	46	ANSI/HPS N43.17-2009: American National Standard - Radiation Safety for Personnel Security Screening Systems Using X-Ray or Gamma Radiation	(b)(4)	Withheld in full; documents are protected by copyright.



Withheld-in-full R	15	Radiated Emission and Personnel Health from SafeView's mmWave Holographic Imaging Portals: draft report by SafeView on safety and regulatory compliance	(b)(4)	<p>Withheld in full pursuant to Exemption b(4).</p> <p>This record is a 2004 draft document on radiation emissions created by SafeView, a predecessor entity to L-3. It is largely a review of information selected from scientific journals and government documents pertaining to health effects of electromagnetic exposure, and also includes system electrical operating characteristics of an early version of the L-3 ProVision scanner. This document is marked as a "DRAFT" and "Proprietary and Confidential," and was not required to be submitted to DHS as part of the procurement or qualification process. It is not information of the type L-3 would normally release to the public. Trospen Decl. ¶ 8; Sotoudeh Decl. ¶¶ 69-71.</p>
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**IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC PRIVACY INFORMATION CENTER	)	
	)	
Plaintiff,	)	
v.	)	No. 1:10-01992 (ABJ)
	)	
UNITED STATES DEPARTMENT OF HOMELAND SECURITY	)	
	)	
Defendant.	)	
	)	

**PLAINTIFF’S STATEMENT OF MATERIAL FACTS NOT IN GENUINE  
 DISPUTE**

In accordance with LCvR 7(h), Plaintiff the Electronic Privacy Information Center submits this statement of material facts not in genuine dispute in support of its cross motion for summary judgment.

1. On July 13, 2010, EPIC transmitted its written FOIA request (“EPIC’s FOIA request) to DHS for the following agency records:
  - a. All records concerning TSA tests regarding body scanners and radiation emission or exposure;
  - b. All records concerning third party tests regarding body scanners and radiation emission or exposure.

Declaration of Paul Sotoudeh at ¶ 4; Def. Motion for Summ. Judg. at 3-4.

2. EPIC asked the agency to expedite its response to EPIC’s FOIA request and requested “News Media” fee status under FOIA, based on its status as a “representative of the news media.” EPIC further requested waiver of all duplication fees. Def. Motion for Summ. Judg. at 3-4.

3. On July 29, 2010, DHS acknowledged receipt of EPIC's FOIA Request and stated that it had determined that the records sought by EPIC were in the possession of the TSA and the Science and Technology ("S&T") directorate, a component of the agency. The agency referred the request to TSA and S&T. Declaration of Paul Sotoudeh at ¶ 6.
4. On August 12, 2010, TSA wrote to EPIC denying the request for a fee waiver and for expedited processing. Declaration of Paul Sotoudeh at ¶ 8.
5. EPIC appealed both denials by the TSA on August 27, 2010. Declaration of Paul Sotoudeh at ¶ 9.
6. The TSA failed to make a timely determination regarding EPIC's initial request and its appeal regarding fee waiver and expedited processing. Declaration of Paul Sotoudeh at ¶ 11.
7. EPIC again appealed to the TSA on October 21, 2010, this time challenging the agency's denial of fee waiver and failure to make a timely determination regarding EPIC's request. Compl., ¶ 42.
8. On September 3, 2010, S&T responded to EPIC, denying EPIC's request for a fee waiver. Compl., ¶ 38.
9. S&T failed to make a timely determination regarding EPIC's request. Declaration of Bert Coursey at ¶ 18, 24; Declaration of Pamela Beresford at ¶ 26.
10. On October 21, 2010, EPIC appealed S&T's fee waiver determination, along with S&T's failure to make a timely determination regarding EPIC's request. Compl., ¶ 47.

11. The agency failed to make a timely response to EPIC's appeals. Compl., ¶¶ 46, 49.
12. After the agency failed to comply with the statutory deadline to reply to EPIC's appeal, EPIC filed suit on November 19, 2010. Def. Motion for Summ. Judg. at 9.
13. On June 6, 2011, after the filing of this lawsuit, TSA produced 126 pages of responsive documents. Def. Motion for Summ. Judg. at 9.
14. On June 21, 2011, TSA produced an additional 69 pages and S&T produced 1677 pages of responsive documents. Def. Motion for Summ. Judg. at 9.
15. On September 7, 2011, the agency released an additional 208 pages of documents. Def. Motion for Summ. Judg. at 10.
16. The agency has withheld documents, in full and in part, and has asserted exemptions (b)(3), (b)(4), and (b)(5) as the basis for its determinations. Def. Motion for Summ. Judg. at 13.

Respectfully submitted,

/s/ Ginger McCall

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*Counsel for Plaintiff*

Dated: October 31, 2011

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
ELECTRONIC PRIVACY	)	
INFORMATION CENTER	)	
	)	
Plaintiff,	)	
v.	)	No. 1:10-01992 (ABJ)
	)	
UNITED STATES DEPARTMENT OF	)	
HOMELAND SECURITY	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S STATEMENT OF GENUINE ISSUES IN OPPOSITION TO  
DEFENDANT’S STATEMENT OF MATERIAL FACTS**

In accordance with LCvR 7(h), Plaintiff the Electronic Privacy Information Center submits this statement of genuine issues in opposition to Defendant’s statement of material facts.

17. **Defendant’s alleged fact:** “TSA assisted in reviewing TES and TSL records for responsiveness and eliminating duplicate records, as well as in determining whether records were exempt from disclosure under FOIA Exemptions 3 and 4.”

**Genuine issue:** This is a legal conclusion: that TSA determined that records are exempt from disclosure under Exemptions 3 and 4. TSA assisted in determining whether or not the agency would assert those exemptions to justify withholdings. Whether or not the withheld records are actually exempt from disclosure under Exemptions 3 and 4 is up to the Court to determine.

19. **Defendant's alleged fact:** "To the extent possible, the DHS components endeavored to provide all reasonably segregable non-exempt information to EPIC, and withheld records in full only when no meaningful non-exempt portions thereof remained."

**Genuine issue:** This is a legal conclusion. Whether or not the agency acted in good faith, released all segregable information, and withheld records in full only when no meaningful non-exempt portions thereof remained is up to the Court to determine.

Respectfully submitted,

/s/ Ginger McCall

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Dated: October 31, 2011

EXHIBIT 2  
TES Limited Vaughn Index

**TES Vaughn Index Limited to Challenged Withholdings**

**Records withheld in part**

<b>Bates numbers of TES record at issue</b>	<b>Pages with withholdings</b>	<b>Document/Email Title</b>	<b>Exemption applied</b>	<b>Explanation/Justification for Withholding</b>
80-82	3	Email Subject: <i>OHA/TSA Getback.</i>	(b)(5) (Deliberative Process)	A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions of this e-mail chain reflect deliberations regarding the formulation of a response by DHS to inquiries by Congress, including a draft version of the response to one question.
87-88	2	FW: Short form of memo on rad safety	(b)(5) (Deliberative Process)	This record also contains information withheld pursuant to the deliberative process privilege. The withheld portions contain preliminary versions, edits, and revisions of excerpts of a memorandum to the Undersecretary of DHS on AIT radiation safety.
113-115	3	Email Subject: <i>FW: RE: X-ray backscatter scanners: Letter to John Holdren.</i>	(b)(5) (Deliberative Process)	A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portion describes the contents of a draft letter responding to scientists' concerns about AIT and radiation safety.
381-382, 384-386	5	Email Subject: <i>Airport Body Scanners</i>	(b)(5) (Deliberative Process)	This record also contains portions withheld under exemption (b)(5), the deliberative process privilege. The withheld excerpts consist of draft language and deliberations concerning a DHS/TSA response to the concerns raised by American Airlines pilots.
391-392	2	Email Subject: <i>Letter from APA President regarding AIT</i>	(b)(5) (Deliberative Process)	This record also contains portions withheld under exemption (b)(5), the deliberative process privilege. The withheld excerpts consist of the author's reflections regarding concerns raised by the Allied Pilots Association.
440-448	9	Email Subject: <i>FW: AIT Info.</i>	(b)(5) (Deliberative Process)	A portion of this e-mail is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions contain the authors' discussions and opinions regarding reactions to the government's response to the UCSF letter of concern, and future steps to take to address these reactions.
535, 546	2	Email Subject: <i>RE: OSTP Letter</i>	(b)(5) (Deliberative Process)	A portion of these records is redacted pursuant to exemption (b)(5), the deliberative process privilege. The redacted portions contain the author's discussions of future steps she intends to take regarding correspondence between Dr. Holdren and UCSF.



943-944	2	FW: Dangers of imaging	(b)(5) (Deliberative Process)	Portions of these records are being withheld in part pursuant to exemption (b)(5), the deliberative process privilege. The withheld portions consist of opinions concerning a proposed response to a letter from scientists at UCSF concerning backscatter radiation safety.
951-958, 971-72, 980-82, 990-1023	47	Email Subject: Various	(b)(5) (Deliberative Process)	Portions of these records are being withheld in part pursuant to exemption (b)(5), the deliberative process privilege. The withheld portions consist of deliberations concerning a proposed response to a letter by Senators Collins, Coburn, and Burr concerning backscatter radiation safety.

**Records withheld in full pursuant to Exemption (b)(5) (deliberative process privilege)**

604-05	2	Technology Description: Radiation Exposure of Body Scanners	(b)(5)	Early, internal draft versions of a fact sheet on radiation exposure and AIT.
606	1	Comparison of X-Ray Technologies for Whole Body Imaging	(b)(5)	Internal working DHS document compiling estimates of radiation exposure from various types of AIT machines based on external, unverified data.
608	1	Email Subject: <i>Draft contents for rad safety white paper.</i>	(b)(5) (Deliberative Process)	This e-mail is being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. It contains comments and suggested revisions to a draft document on AIT radiation safety.
609	1	Email Subject: <i>Hello</i>	(b)(5) (Deliberative Process)	This e-mail is being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. It contains comments regarding an upcoming response by the DHS Undersecretary on radiation safety.
611-19	9	Email Subject: <i>TSA AIT SOP Safety Extract</i>	(b)(5) (Deliberative Process)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of emails forwarding a draft section regarding employee safety from TSA's Advanced Imaging Technology Standard Operating Procedure (SOP), and the draft SOP sections themselves.
620-629	10	Email Subject: Misc.	(b)(5)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They contain comments on, edits to, and draft versions of a memorandum to the Deputy Secretary of DHS on AIT safety.

631-635	5	Email Subject: <i>Cerra weighs in on skin dose.</i>	(b)(5) (Deliberative Process)	This record is being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. It consists of comments and suggestions regarding the content of a proposed memorandum to the Deputy Secretary of DHS on AIT radiation safety.
651-655	5	Email Subject: <i>Ver 4 lth comments attached and attached draft memorandum</i>	(b)(5)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of a draft version of a memorandum to the Deputy Secretary of DHS on AIT safety, with changes tracked, and an email forwarding the draft memorandum.
665-680, 688-726	55	Various	(b)(5) (Deliberative Process)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of draft versions of memorandum on AIT safety, emails containing comments on the drafts, and emails concerning releasing the memoranda and fact sheets on AIT safety to a wider audience.
729-740	12	Email Subject: <i>Safety concerns related to AIT equipment.</i>	(b)(5) (Deliberative Process)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of discussions between agency personnel regarding how to respond to an inquiry from a foreign government concerning AIT radiation safety.
741-742	2	Email Subject: <i>AIT Radiation measurement standards and approved locations.</i>	(b)(5) (Deliberative Process)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of comments concerning a draft version of memorandum on AIT safety.
743-745, 750-752, 1057-1059	9	Draft Standards and testing for radiation safety for Airport backscatter X-Ray systems.	(b)(5)	These records are being withheld in full pursuant to Exemption (b)(5). They are draft versions of a document on AIT radiation safety standards, with changes tracked.
746-749	4	Email Subject: <i>Getbacks from S&amp;T Explosives Briefing.</i>	(b)(5) (Deliberative Process)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of discussions regarding how to respond to an inquiry from a congressional committee concerning AIT radiation safety.
753-84	32	Various	(b)(5) (Deliberative Process)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of comments and deliberations concerning draft versions of a question-and-answer memorandum to the DHS Secretary concerning backscatter radiation safety, as well as draft versions of the memorandum.

785-88, 792-838	51	Various	(b)(5) (Deliberative Process)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of comments concerning a draft version of a fact sheet on AIT safety, as well as draft versions of the fact sheet.
839-860, 866-89, 896- 907, 911-942, 949-950	72	Various	(b)(5) (Deliberative Process)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of comments and revisions concerning a proposed response to a letter from scientists at UCSF concerning backscatter radiation safety, as well as draft versions of the response letter.
959-970, 973-979, 983-989, 1024-1048	51	Email Subjects: Various	(b)(5) (Deliberative Process)	These records are being withheld in full pursuant to exemption (b)(5), the deliberative process privilege. They consist of comments, revisions, and internal memoranda making recommendations concerning a proposed response to a letter by Senators Collins, Coburn, and Burr concerning backscatter radiation safety, as well as draft versions of the response letters and accompanying white paper.
1060-1100, 1108-1146, 1149-1186, 1205-1236	150	Various	(b)(5) (Deliberative Process)	Withheld in full pursuant to exemption (b)(5), the deliberative process privilege. The records consist of deliberations concerning a draft NIST technical bulletin on AIT radiation safety, and draft versions of the NIST technical bulletin.

EXHIBIT 3  
TSL Limited Vaughn Index

**TSL Vaughn Index Limited to Challenged Withholdings**

Bates numbers	Number of Pages with withholdings	Document(s)/Email title(s)	Exemption	Explanation/Justification for Withholding
TSL000836-837	2	Re: AIT/AT Proximity Test - Preliminary Report	(b)(3) (SSI) (49 U.S.C. § 114(r) and 49 C.F.R. § 1520.5(b)(9)(v))	Withheld excerpts describes particular phenomenon observed while performance-testing the Rapiscan Secure 1000, which could be used to identify a potential vulnerability of the system.
TSL000897-899	3	Frank Cerra, Assessment of Radiation Safety and Compliance with ANSI N43.17-2002 AS&E Dual Smart Check Personnel Scanner	(b)(4)	This record is an evaluation of AS&E's Dual Smart Check by Frank Cerra, a NIST official. Although the evaluation was authored by Mr. Cerra, the information, assessments, and recommendations included in this evaluation are based on information obtained from AS&E, including (1) a third-party compliance report by F.X. Masse, a copy of which is located at TSL829-30, that was required to be submitted to the government as part of AS&E's Qualification Data Package ("QDP"), a set of information demonstrating compliance with certain requirements necessary for placement on a Qualified Product List ("QPL") of products eligible for consideration for TSA contracts, (2) radiation dosage maps submitted by AS&E in connection with its QDP (TSL1190-91), (3) designs and other information obtained from AS&E, and (4) a prior evaluation conducted by Mr. Cerra (TSL924-56) based on an earlier-model AS&E system obtained by the government for testing.

				<p>The withheld portions include:</p> <p>1) Descriptions of design features and scanning mechanisms used by AS&amp;E Dual SmartCheck, including measurements and geometry of x-ray beam</p> <p>2) Specific Radiation Dose Levels Emitted by AS&amp;E Dual SmartCheck at various locations</p> <p>3) Assessments of, and recommendations for improving, radiation safety of AS&amp;E Dual SmartCheck</p> <p>Release of this information is likely to cause AS&amp;E substantial competitive harm because it could enable a competitor to infer non-public details about the design of AS&amp;E's system, such as beam characteristics or filtration, which could in turn enable that competitor to reverse-engineer AS&amp;E's product. Moreover, disclosure of product recommendations or solutions would cause AS&amp;E substantial competitive harm because a competitor could utilize these same non-public recommendations to design or improve its system. Callerame Decl. ¶ 5(i-iv); Sotoudeh Decl. ¶¶ 54-68.</p>
TSL000908-910	3	FW: Memo on Response to Radiation Concerns	(b)(5)	Excerpts withheld are suggestions of points to be included in draft memorandum to Deputy Secretary of DHS on radiation safety.
TSL000926-927, 929-942, 944-48, 954-56	24	Assessment of the AS&E Smart Check BodyScanner for Conformance with Radiological Safety Standards	(b)(4)	This information is located within an evaluation of AS&E's SmartCheck conducted by Frank Cerra of the National Institute of Standards and Technology (NIST). The evaluation was initially conducted in 2006 and then updated in 2008 with a revision to a single page. The

			<p>testing and evaluations were performed on a SmartCheck machine that was obtained from AS&amp;E.</p> <p>The withheld excerpts pertain to:</p> <p>TSL926: Specific radiation measurements emitted by AS&amp;E SmartCheck at various locations and information that could be used to derive such measurements; description of SmartCheck beam mechanism and design</p> <p>TSL933: Description of radiation exposures in certain specific locations of scan field of AS&amp;E SmartCheck</p> <p>TSL934: Descriptions of two scanning features used in AS&amp;E SmartCheck, and graph of maximum relative radiation exposure as function of height</p> <p>TSL936: Measurement of radiation emitted by AS&amp;E SmartCheck</p> <p>TSL937: Excerpts describing shape and features of x-ray mechanism; graph of radiation exposure as function of distance; measurements of relative slope of curve in graph and focus-to-skin distance</p> <p>TSL940: Measurement of radiation emitted by AS&amp;E SmartCheck</p> <p>TSL941: Measurements of radiation emitted by AS&amp;E SmartCheck; graph and measurements of minimum inspection zone for AS&amp;E SmartCheck</p> <p>TSL942: Measurements of radiation emitted by AS&amp;E SmartCheck; measurements of distance used for various radiation measurements; graph of area that should be free of full-time employee stations based on radiation levels</p> <p>TSL944, 945: Tables showing measurements of radiation leakage and scatter radiation emitted by AS&amp;E SmartCheck at various locations</p> <p>TSL946: Measurement of scatter exposure emitted by AS&amp;E SmartCheck</p>
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				<p>TSL947: Discussion of measurements of leakage radiation emitted by AS&amp;E SmartCheck, referencing information in SmartCheck Operator's Manual obtained from AS&amp;E</p> <p>TSL954-56: Graphs and charts showing measured radiation emissions from AS&amp;E SmartCheck at various locations</p> <p>This information is not of the type AS&amp;E would normally release to the public. Moreover, release of this information is likely to cause AS&amp;E substantial competitive harm because it could enable a competitor to infer non-public details about the design of AS&amp;E's system, such as beam characteristics or filtration, which could in turn enable that competitor to reverse-engineer AS&amp;E's product. Moreover, disclosure of any product recommendations or solutions would cause AS&amp;E substantial competitive harm because a competitor could utilize these same non-public recommendations to design or improve its system. Callerame Decl. ¶ 5(i-iv); Sotoudeh Decl. ¶¶ 54-68.</p>
TSL1190-91	2	Dosage map showing radiation dosage from AS&E SmartCheck (attachment to report released at TSL000897-899)	(b)(4)	<p>This record is a dosage map that was submitted by AS&amp;E in connection with the evaluation of AS&amp;E's Dual Smart Check by Frank Cerra at TSL897-99.</p> <p>The withheld portions include:</p> <ol style="list-style-type: none"> <li>1) Text indicating location where radiation dosage was measured, including measurements of distance from scanner</li> <li>2) Graphs showing map of radiation dosage emitted by AS&amp;E Dual Smart Check at various locations</li> </ol> <p>Release of this information is likely to cause AS&amp;E substantial competitive harm because it could enable a competitor to</p>



				infer non-public details about the design of AS&E's system, such as beam characteristics or filtration, which could in turn enable that competitor to reverse-engineer AS&E's product. Callerame Decl. ¶ 5(iii); Sotoudeh Decl. ¶¶ 59-63.
TSL1192-93	2	Email: FW: SmartCheck HT	(b)(4)	<p>This record is an email submitted by AS&amp;E to a TSL official to demonstrate its system's compliance with radiation safety standards. The information in this email was submitted by AS&amp;E to the TSL official in an email to support TSL's evaluation of the SmartCheck system's compliance with radiation safety standards; AS&amp;E was required to comply with such standards in order to be placed on a qualified products list ("QPL").</p> <p>The withheld portions include:</p> <ol style="list-style-type: none"> <li>1) Descriptions of specific component parts and design features of AS&amp;E Dual SmartCheck</li> <li>2) Specific Radiation Dose Levels Emitted by AS&amp;E Dual SmartCheck</li> </ol> <p>This information is not of the type AS&amp;E would release to the public. Moreover, release of this information is likely to cause AS&amp;E substantial competitive harm because it could enable a competitor to infer non-public details about the design of AS&amp;E's system, such as beam characteristics or filtration, which could in turn enable that competitor to reverse-engineer AS&amp;E's product. Callerame Decl. ¶ 5(i,iii); Sotoudeh Decl. ¶¶ 54-63.</p>

Withheld-in-full B	4	Two drafts of DHS fact sheet on AIT Health and Safety	(b)(5) (Deliberative Process)	These documents are working drafts of DHS "fact sheet" on health and safety issues related to AIT.
Withheld-in-full H	2	Email exchange regarding types of dosimeters to be used for measuring radiation.	(b)(5) (Deliberative Process)	Withheld in full pursuant to Exemption (b)(5). This email exchange contains an informal question-and-answer discussion between two government employees regarding types of dosimeters (personal radiation monitors) that could be appropriate for measuring radiation from AIT devices.
Withheld-in-full I	3	Draft: Standards and Testing for Radiation Safety for Airport Backscatter X-Ray Systems	(b)(5) (Deliberative Process)	Withheld in full pursuant to Exemption (b)(5). This is a marked-up draft of a document called "Standards and Testing for Radiation Safety for Airport Backscatter X-Ray Systems."
Withheld-in-full J	1	Draft: Summary of Advanced Imaging Technology (AIT) Radiation Safety: Standards and Ensuring Compliance, April 22, 2010	(b)(5) (Deliberative Process)	Withheld in full pursuant to Exemption (b)(5). This document is an early draft of policy document concerning AIT radiation safety.
Withheld-in-full L	6	December 23, 2010 Preliminary FDA Progress Report per the FDA-TSA Agreement: Testing of Medical Devices in and Around the L3 ProVision Advanced Imaging Technology System	(b)(5) (Deliberative Process)	Withheld in full. This document is a preliminary progress report, resulting from an interagency agreement between DHS and FDA, by the FDA concerning the testing of the effects of the L3 Provision on personal medical devices. The report in its entirety is a preliminary document not intended for dissemination outside the federal government, as it reflects an interim report prior to the completion of testing of the effects of the L3 Provision on medical devices.

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

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<b>ELECTRONIC PRIVACY INFORMATION CENTER,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 11-290 (RCL)</b>
	)	
<b>TRANSPORTATION SECURITY ADMINISTRATION</b>	)	
	)	
<b>Defendant.</b>	)	

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**MEMORANDUM OPINION**

This action concerns two Freedom of Information Act (“FOIA”) requests by the Electronic Privacy Information Center (“EPIC”) for records held by the Transportation Security Administration (“TSA”). The parties have filed cross-motions for Summary Judgment. ECF Nos. 13 & 14. The Court will GRANT in part and DENY in part both motions. TSA is entitled to summary judgment as to all of its withholdings pursuant to exemptions 3, 4, and 6, and all withholdings pursuant to exemption 5 except for a PowerPoint shared with a Congressional Committee, which TSA must disclose.

**I. BACKGROUND**

Starting in 2005, the TSA began using full-body scanning machines in U.S. airports to screen travelers on U.S. commercial aircraft. Pl.’s Statement of Material Facts ¶ 2, ECF No. 14-2.<sup>1</sup> In 2010 the TSA decided to make Advanced Imaging Technology scanners the primary method of screening passengers. Def.’s Br. 2, ECF No. 13. These machines capture detailed,

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<sup>1</sup> TSA does not dispute any of the facts contained in this statement. Def.’s Response to Pl.’s Statement, ECF No. 17-1.

three-dimensional images of individuals and transmit them for review by Transportation Security Officers. Pl.'s Statement ¶ 3. In response to concerns about protecting the privacy of passengers, including concerns raised by EPIC, the TSA began researching and testing Automated Target Recognition ("ATR") software updates for these machines. *Id.* ¶¶ 4–10. According to the TSA, "[r]ather than having a [security officer] view a passenger-specific image, scanners utilizing [ATR] software auto-detect potential threat items and indicate their location on a generic outline of a person." Def.'s Br. 2.

In June 2010, EPIC submitted a FOIA Request to the TSA seeking a variety of information about the development and implementation of ATR technology and seeking a waiver of the duplication fees pursuant to its status as a "representative of the news media." FOIA Request, Jun. 15, 2010 ("FOIA Request 1"), ECF Nos. 13-2, 14-5. EPIC requested the following documents:

- 1) All specifications provided by TSA to automated target recognition manufacturers concerning automated target recognition systems.
- 2) All records concerning the capabilities, operational effectiveness, or suitability of automated target recognition systems, as described in [Department of Homeland Security] Secretary [Janet] Napolitano's letter to Senator [Susan] Collins.<sup>2</sup>
- 3) All records provided to TSA from the Dutch government concerning automated target recognition systems deployed in Schiphol Airport, as described by Secretary Napolitano's letter to Senator Collins.
- 4) All records evaluating the [full body scanner] program and determining automated target recognition requirements for nationwide deployment, as described in Secretary Napolitano's letter to Senator Collins.

*See* FOIA Request 1 at 2. TSA acknowledged receipt of the request and stated that duplication fees would apply. TSA Resp. to EPIC's FOIA Request 1, Jun. 24, 2010, ECF No. 14-6. In

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<sup>2</sup> This letter, which included details about the TSA's timetable for ATR deployment, was disclosed by TSA in response to a separate April 2010 petition filed by EPIC and other organizations seeking suspension of the entire full body scanner program. *See* Pl.'s Br. 2, ECF No. 14-1.

October 2010, EPIC filed an administrative appeal based on TSA's failure to disclose records and its denial of the fee-waiver. EPIC's FOIA Appeal 1, Oct. 5, 2010, ECF No. 14-7.

EPIC submitted a second FOIA Request ("EPIC's Second FOIA Request") to the Department of Homeland Security ("DHS") seeking additional information about ATR and again requesting waiver of duplication fees. *See* FOIA Request 2, Oct. 5, 2010, ECF Nos. 13-3, 14-10. Specifically, EPIC requested the following information:

- 1) All records provided from L3 Communications or Rapiscan<sup>3</sup> in support of the submission or certification of ATR software modifications;
- 2) All contracts, contract amendments, or statements of work related to the submission or certification of ATR software modifications;
- 3) All information, including results, of government testing of ATR technology, as referenced by Greg Soule of the TSA in an e-mail to Bloomberg News, published September 8, 2010.

FOIA Request 2 at 3-4. DHS referred the request to TSA, ECF No. 14-11, who assigned it a reference number, and denied EPIC's request to waive duplication fees. TSA Response to EPIC's FOIA Request 2, Nov. 8, 2010, ECF No. 14-12. In December, EPIC filed an administrative appeal based on TSA's failure to disclose records and its denial of the requested fee-waiver. EPIC's FOIA Appeal 2, Dec. 14, 2010, ECF No. 14-13.

EPIC filed this action in February 2011, alleging that TSA had "failed to disclose a single record" and "failed to comply with agency deadlines under the FOIA." Compl. ¶¶ 4, 46-48, 64-66, ECF No. 1.

Several months later, TSA released hundreds of pages of records responsive to EPIC's requests and stated that they had withheld and redacted information pursuant to FOIA exemptions 3, 4, 5, and 6. Def.'s Statement ¶¶ 13-17; *Vaughn* index, ECF No. 13-4. EPIC

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<sup>3</sup> L3 Communications and Rapiscan are the two private vendors who developed and manufactured AIT scanners. Def.'s Br. 2.

challenges some of these withholdings, but notably it also claims it has already “substantially prevailed” in the case by obtaining these documents. Pl.’s Opp’n 21.

## II. LEGAL STANDARD

The Freedom of Information Act, 5 U.S.C. § 552, requires federal agencies to make certain records publicly available. FOIA also provides exemptions from the disclosure requirement, which are to be “narrowly construed.” *FBI v. Abramson*, 456 U.S. 615, 630 (1982). Four of these, exemptions 3, 4, 5, and 6, are relevant to this case and are described in greater detail below.

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment must be granted when “there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). FOIA actions are typically and appropriately resolved on summary judgment. *See Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 527 (D.C. Cir. 2011); *see also COMPTTEL v. FCC*, 06-cv-1718, 2012 WL 6604528, \*4 (D.D.C. Dec. 19, 2012).

The agency bears the burden in litigation to justify withholding any records. 5 U.S.C. § 552(a)(4). This is in part because of the “strong presumption in favor of disclosure,” *U.S. Dep’t. of State v. Ray*, 502 U.S. 164, 173 (1991), and because FOIA requesters face an information asymmetry given that the agency possesses the requested information and decides whether it should be withheld or disclosed. *See Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 145–46 (D.C. Cir. 2006). Thus, even where the requester has moved for summary judgment, the Government “ultimately has the onus of proving that the documents are exempt from disclosure.” *Pub. Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 904–05 (D.C. Cir. 1999) (internal quotations and modifications omitted); *see also COMPTTEL*, 2012 WL 6604528 at \*4.

To satisfy its burden, an agency may rely on detailed affidavits, declarations, a *Vaughn* index, in camera review, or a combination of these tools. A *Vaughn* index correlates each withheld document, or portion thereof, with a particular FOIA exemption and the justification for nondisclosure. *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973). While agency affidavits are accorded a presumption of good faith, *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991), they must “provide[] a relatively detailed justification, specifically identify[ing] the reasons why a particular Exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.” *Judicial Watch v. FDA*, 449 F.3d at 146; *see also COMPTTEL*, 2012 WL 6604528 at \*4.

### **III. EPIC HAS CONCEDED THE ADEQUACY OF TSA’S SEARCH FOR RESPONSIVE DOCUMENTS AND THE PROPRIETY OF ITS WITHHOLDINGS PURSUANT TO EXEMPTIONS 4 AND 6**

TSA has moved for summary judgment as to the adequacy of its search for responsive documents, Def.’s Br. 9–11, and the appropriateness of its withholdings. *See* Def.’s Br. 18–25, 28–31. EPIC does not contest the adequacy of TSA’s search or the propriety of its withholdings pursuant to exemptions 4 or 6. *See* Pl.’s Opp’n. Accordingly, the Court takes these issues as conceded and grants summary judgment to TSA as to all withholdings made under exemptions 4 and 6 as indicated in the *Vaughn* Index.

### **IV. TSA IS ENTITLED TO SUMMARY JUDGMENT AS TO ITS EXEMPTION 3 WITHHOLDINGS**

Both parties move for summary judgment as to withholdings made by TSA pursuant to exemption 3. TSA is entitled to summary judgment as to these withholdings.

Exemption 3 permits the nondisclosure of materials that are “specifically exempted from disclosure by statute” so long as that statute “establishes particular criteria for withholding or refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3)(A)(ii). Congress

amended exemption 3, adding language requiring “particular criteria for withholding” in order “to overrule legislatively the Supreme Court’s decision in *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975), which had given an expansive reading to the version of Exemption 3 then in force.”<sup>4</sup> *Irons & Sears v. Dann*, 606 F.2d 1215, 1219 (D.C. Cir. 1979). Only statutes that “incorporate[] a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazard” from disclosure that the provision was intended to protect against will qualify under exemption 3. *Am. Jewish Cong. v. Kreps*, 574 F.2d 624, 628–29 (D.C. Cir. 1978). Statutes that merely “set forth benchmarks for secrecy so general as the ‘interest of the public’ (such as the statute at issue in *Robertson*) do not satisfy . . . [the] ‘particular criteria’ requirement.” *Wis. Project on Nuclear Arms Control v. U.S. Dep’t of Commerce*, 317 F.3d 275, 280–81 (D.C. Cir. 2003) (quoting *Am. Jewish Cong.*, 574 F.2d at 629). But when “on the other hand, Congress has made plain its concern with a specific effect of publicity . . . Exemption 3 is to honor that concern.” *Id.*

Section 114(r) of Title 49 provides:

Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation.

49 U.S.C. § 114(r), (r)(C). Pursuant to that authority, TSA promulgated regulations that expressly prohibit the disclosure of certain categories of sensitive security information. *See generally* 49 C.F.R. pt. 1520.

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<sup>4</sup> *Robertson* upheld an exemption 3 claim based on a pre-FOIA statute which barred disclosure of information that would “adversely affect” the agency and was “not required to be disclosed in the interest of the public.” 422 U.S. at 259.



Judge Kollar-Kotelly has held that § 114(r) qualifies as a “statute of Exemption as contemplated by Exemption 3.” *Tooley v. Bush*, 06-cv-306, 2006 WL 3783142, \*4 (D.D.C. Dec. 21, 2006) *rev’d in part on other grounds sub nom. Tooley v. Napolitano*, 556 F.3d 836 (D.C. Cir. 2009). Her conclusion rested on a D.C. Circuit decision which interpreted a provision containing nearly identical language to § 114(r). *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 194 (D.C. Cir. 1993). The *Public Citizen* court examined withholdings made pursuant to the following provision:

Notwithstanding section 552 of Title 5 relating to freedom of information, the [FAA] Administrator shall prescribe such regulations as he may deem necessary to prohibit disclosure of any information obtained or developed in the conduct of security or research and development activities under this subsection if, in the opinion of the Administrator, the disclosure of such information . . . (C) would be detrimental to the safety of persons traveling in air transportation.

*Pub. Citizen*, 988 F.2d at 189 (quoting 49 U.S.C. § 1357(d)(2) (1993) (subsequently recodified at 49 U.S.C. § 40119(b)). The Circuit concluded that the provision granted the agency authority to “withhold security-sensitive information from members of the public, regardless of the legal basis of the request for the information,” including FOIA *Id.* at 195–96. The Circuit explained that Congress added the “notwithstanding” language to ensure that the statute qualified under FOIA’s exemption 3.<sup>5</sup> *Id.* at 195.

This Court agrees with Judge Kollar-Kotelly. Because section 114(r) contains virtually identical language to the provision in *Public Citizen*, particularly the “notwithstanding” language, the Circuit’s analysis is equally applicable to section 114(r), and that provision must also qualify under exemption 3.

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<sup>5</sup> This belies EPIC’s charges that the *Public Citizen* court “does not . . . resolve the question of whether the statute at issue in that case, 49 U.S.C. § 1357(d)(2), qualifies as an exemption 3 statute,” and the Court did “not engage in an exemption 3 analysis at all.” *See* Pl.’s Reply 3, ECF No. 18.

Judicial review of TSA's determination that certain material is nondisclosable security sensitive information is available exclusively in federal circuit courts. *See* 49 U.S.C. § 46110(a) (“[A] person disclosing a substantial interest in an order issued . . . in whole or in part under . . . subsection . . . (s) of section 114<sup>6</sup> may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.”); *id.* § 46110(c) (describing the prescribed jurisdiction as “exclusive”); *see also Koutny v. Martin*, 530 F. Supp. 2d 84, 91 (D.D.C. 2007) (“A remedy to challenge a final TSA classification order is provided by statute. An interested party may petition to modify or set aside such an order in an appropriate court of appeals.” (citing § 46110(a))). Accordingly, district courts may not review orders of TSA that designate material as security sensitive information. *See Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 77–78 (D.C. Cir. 1984) (“[W]here a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court’s future jurisdiction is subject to the exclusive review of the Court of Appeals.”).

Here, TSA has withheld information designated as security sensitive pursuant to § 114(r). Because the Court lacks jurisdiction to review the merits of the specific withholdings made pursuant to that provision, *see* 49 U.S.C. § 46110(a), (c), the legal conclusion that § 114(r) qualifies for exemption 3 withholding takes this Court as far as it can go here. TSA is entitled to summary judgment on its withholding of the material designated as security sensitive information.

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<sup>6</sup> Subsection (s) of section 114 formerly authorized TSA to prohibit the disclosure of certain material found to be detrimental to the security of transportation; in 2007, this subsection was redesignated as § 114(r). Pub. L. 110–161 § 568, Dec. 26, 2007, 121 Stat. 1844. Section 46110(a) has not yet been updated to reflect this clerical change.

**V. BOTH EPIC AND TSA ARE ENTITLED TO PARTIAL SUMMARY JUDGMENT AS TO TSA'S EXEMPTION 5 WITHHOLDINGS**

Both parties move for summary judgment as to the legality of withholdings made by TSA pursuant to FOIA's exemption 5.<sup>7</sup> EPIC is entitled to summary judgment as to the TSA's exemption 5 withholdings within a PowerPoint shared with a Congressional Committee. TSA is entitled to summary judgment as to all other exemption 5 withholdings.

FOIA's exemption 5 permits the non-disclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, a document must thus satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). One such privilege is the "deliberative process privilege," which "protects agency documents that are both predecisional and deliberative." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). A document is predecisional if "it was generated before the adoption of an agency policy" and deliberative if "it reflects the give-and-take of the consultative process." *Id.* The deliberative process protection covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Klamath*, 532 U.S. at 8. The general purpose of the deliberative process privilege is "to prevent injury to the quality of agency decisions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975)

EPIC only challenges TSA's exemption 5 withholdings made by TSA in three sets of documents: (1) a PowerPoint presentation provided to a Congressional Committee, Bates

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<sup>7</sup> EPIC only moves for summary judgment as to a small subset of these withholdings, as discussed below. This Court will enter summary judgment in favor of TSA on all exemption 5 withholdings not challenged by EPIC.

Numbers 404–421, *see* Pl.’s Opp’n 14; Soutodeh Supp. Decl. ¶¶ 4–11; (2) a letter of assessment and other intra-agency memoranda regarding ATR testing results and recommendations, Bates Numbers 463–483, *see* Pl.’s Opp’n 18; Soutodeh Decl. ¶ 39; and (3) an intra-agency Operational Test Plan and Operational Test and Evaluation the ATR program, Bates Numbers 484–617, *see see* Pl.’s Opp’n 18. The Court will discuss each of these documents in turn.

**A. The PowerPoint Was Improperly Redacted**

The first contested document, Bates Numbers 404–421, is a “PowerPoint presentation prepared by TSA’s Office of Security Technology (OST) and presented in a briefing to the House Appropriations Committee in connection with future funding for ATR.” Soutodeh Decl. ¶ 36, ECF No. 13-1. The TSA’s declaration indicates that the presentation was “provided” to the Committee. Soutodeh Supp. Decl. ¶ 3.

TSA made five withholdings from this document pursuant to exemption 5:

**TABLE 1**

<b>BATES NUMBER</b>	<b>DESCRIPTION FROM VAUGHN INDEX<sup>8</sup></b>	<b>PAGES WITHHELD</b>
411–412	Detailed description of key threat detection performance parameters and performance	2 pages partially withheld
413	Chart measuring operational availability [a]nd passenger throughput	1 page partially withheld
414	Measurement of passenger throughput	1 page partially withheld
415–417	Letter of Assessment findings and conclusions pertaining to future use of ATR; security and policy discussion of “next steps” for ATR; and description of future testing operations at three airports	3 pages partially withheld
418–420	Future budget and purchase projections; Future procurement schedule and deployment goals	3 pages partially withheld

<sup>8</sup> All descriptions are direct quotations from the *Vaughn* Index.

The question is whether such a document, once provided to Congress, may be eligible for protection under exemption 5. The Court finds that the document is not eligible for this protection and must be disclosed.

Congress is not an “agency” for purposes of the FOIA. *See* 5 U.S.C. § 551(1)(A). This suggests that documents shared with Congress should not qualify under exemption 5, which is limited to intra-agency and inter-agency documents. But, notably, Congress also expressly noted in the FOIA statute that “[t]his section is not authority to withhold information from Congress.” § 552(d). This provision arguably implies that Congress intended to permit agencies to freely share information with Congress without thereby incurring the consequence of being forced to disclose that document more broadly. *See Murphy v. Dep’t of the Army*, 613 F.2d 1151, 1156 (D.C. Cir. 1979).

The D.C. Circuit has held that “communications between an agency and Congress [may] receive protection as intra-agency memoranda if they [a]re ‘part and parcel of *the agency’s* deliberative process,’” but may not receive this protection if “created specifically to assist Congress” and shared “for the sole purpose of assisting [a] Committee with its deliberations.” *Rockwell Int’l Corp. v. Dep’t of Justice*, 235 F.3d 598, 604 (D.C. Cir. 2001) (quoting and citing *Dow Jones & Co., Inc. v. Dep’t of Justice*, 917 F.2d 571, 574–75 (D.C. Cir. 1990)); *see also Dow Jones*, 917 F.2d at 574 (“It may well be true that if Congress had thought about this question, the Exemption would have been drafted more broadly to include Executive Branch communications to Congress . . . . But Congress did not, and the words simply will not stretch to cover this situation, because Congress is simply not an agency.”).

For instance, in *Rockwell International Co.*, the Circuit held that documents provided by the Justice Department to a congressional subcommittee were eligible for exemption 5 protection

where the documents were not “created specifically to assist Congress, but rather memoranda and correspondence created as part of the Justice Department’s deliberative processes” and where the Department “gave the documents to the Subcommittee only after the Subcommittee expressly agreed not to make them public.” 235 F.3d at 604. In *Ryan v. Dep’t of Justice*, the Circuit held that questionnaires sent by the Justice Department to senators were still protected by exemption 5 where the documents were designed to collect information to assist the agency’s internal deliberations. 617 F.2d 781, 789–90 (D.C. Cir. 1980). And earlier, in *Murphy v. Department of the Army*, the Circuit held that a document disclosed by the Army to a congressman was protected under exemption 5 even where the army did not actively condition disclosure on confidentiality. 613 F.2d at 1156 (citing § 552(c), which later became § 552(d), and which provides that FOIA is not “authority to withhold information from Congress”).

In contrast, in *Dow Jones*, the Circuit held that a Department of Justice letter submitted to the Chairman of the House Ethics Committee was not eligible for exemption 5 protection because “the Department had unquestionably ended its consideration” on the issue in question “before it sent the letter to Congress,” so that the letter could not be considered “part and parcel of the agency’s deliberative process.” 917 F.2d at 575.

Under these principles, the PowerPoint may not be protected by Exemption 5. First, and most importantly, the document was assembled and presented to assist the Appropriations Committee in its own funding determinations. *See* Pl.’s Opp’n 15; Pl.’s Reply 6–7. Second, there was apparently no express agreement by the Committee that the material would remain confidential, unlike in *Rockwell*. Third, unlike the surveys in *Ryan*, there was no apparent information-*gathering* purpose to this document.

It is true that the PowerPoint was generated at least in part out of existing intra-agency documents. *See* Soutodeh Supp. Decl. ¶¶ 4–6. And, like *Rockwell* and unlike *Dow Jones*, the documents were merely “preliminary agency opinions” rather than articulations of a final decision. Def.’s Opp’n 13. However, these arguments do not undermine the main conclusion: this document was prepared to assist with Congressional deliberations rather than agency deliberations. Moreover, in FOIA actions, the agency bears the burden in litigation to justify withholding any records. 5 U.S.C. § 552(a)(4). The Agency has failed to meet its burden, and the PowerPoint is not eligible for protection under exemption 5. Accordingly, EPIC is entitled to summary judgment as to these claims, and the Court will order TSA to disclose any material withheld pursuant to exemption 5 from the PowerPoint that was not also withheld pursuant to exemption 3, *compare Vaughn* Index 10, *with id.* at 9, or later designated as security sensitive information, *see* Sotoudeh Supp. Decl. ¶¶ 8–9, and which has not already been disclosed by the agency, *see id.* at ¶¶ 7, 11.<sup>9</sup>

#### **B. The Letter of Assessment and Other ATR Memoranda Were Properly Redacted**

Next, several ATR memoranda raise the same issues and are properly dealt with as a class. First, Bates Numbers 463–76 is a memorandum “prepared by OST and used to brief the

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<sup>9</sup> The *Vaughn* index indicates that the first four withholdings listed in the table above, Bates Numbers 411–12, 413, 414, 415–17, were also withheld under exemption 3, but does not provide adequate specificity to determine whether the overlap is partial or complete. *Compare Vaughn* Index 10, *with id.* at 9. The Court has granted summary judgment to TSA on all of its exemption 3 withholdings, and thus will not order TSA to produce materials redacted pursuant to both exemptions. *See ACLU v. U.S. Dep’t of Def.*, 628 F.3d 612, 620 n.2 (D.C. Cir. 2011) (“[T]he government need not prevail on both exemptions, but under the statute may refuse disclosure if the withheld records satisfy one Exemption.”). TSA also claims that more of its exemption 5 withholdings *should have* also been exemption 3 withholdings. Sotoudeh Supp. Decl. ¶¶ 8–9 (“The redacted information contained in the last bullet on bates page 000416 and in the last three bullets located on bates page 000417 . . . should have been designated as Sensitive Security Information . . .”). As explained above, the Court lacks jurisdiction to review the agency’s designation of material as security sensitive information. *See* 49 U.S.C. § 46110(a). The Court will treat these additional redactions as properly redacted under exemption 3. In addition, parts of the fourth and fifth withholdings listed above, Bates Numbers 415–17, 418–20, have been subsequently disclosed by TSA. *See* Sotoudeh Supp. Decl. ¶¶ 7, 11 (stating that TSA would disclose the first bullet redacted on page 416, the sole redaction on 418, and the Letter of Assessment findings on 415). The Court will not Order TSA to produce any documents it has already disclosed.

DHS Undersecretary for Management in furtherance of TSA’s request for authority to procure the ATR security upgrade.” Soutodeh Decl. ¶ 38. The letter was prepared for the DHS Under Secretary for Management and recommended that DHS authorize the implementation of ATR. See Def.’s Statement ¶ 69 (not contested in Pl.’s Statement, ECF 14-2). Second, at Bates Numbers 478–83, are four 2011 memoranda regarding ATR testing results and recommendations. Soutodeh Decl. ¶ 39. These include a June 6 memorandum “prepared by the Office of Security Operations (OSO) and provided to OST to convey concurrence with and comment on OST’s recommendations regarding deferring some of the . . . ATR specification due dates”; a June 7 memorandum, provided to OST from OSO which “discusses qualification testing results and provides recommendations concerning those results”; a February 2011 memorandum provided to OSO from OST advancing “opinions about the testing results and mak[ing] recommendations regarding the contemplated changes to ATR qualification testing”; and a January memorandum, provided to OSO from OST discussing “qualification testing results and provid[ing] recommendations concerning those results.” *Id.*

TSA made four sets of withholdings from these documents pursuant to exemption 5:

**TABLE 2**

<b>BATES NUMBER</b>	<b>DESCRIPTION FROM VAUGHN INDEX</b>	<b>PAGES WITHHELD</b>
463–464	Discussion of analysis and thought processes of DHS office operational testing and evaluation, and follow-on recommendations for ATR program	2 pages partially withheld
466–467	Analysis of possible implementation of ATR, including analysis of DHS’s operational testing and evaluation of proposed ATR usage	2 pages partially withheld
468–475	Analysis of ATR’s compliance with specific security performance objectives; conclusions and recommendations for future testing and evaluations	7 pages partially withheld; 1 page withheld in full
478–483	Memoranda seeking concurrence with recommendations, and making recommendations pertaining to ATR	6 pages partially withheld.



The issue presented is whether TSA impermissibly withheld “factual” material from this letter. Pl.’s Opp’n 18. The Court finds that TSA’s withholdings were acceptable.

The D.C. Circuit has explained that “[p]urely factual material usually cannot be withheld under exemption 5 unless it reflects an exercise of discretion and judgment calls.” *Ancient Coin Collectors Guild v. U.S. Dep’t of State*, 641 F.3d 504, 513 (D.C. Cir. 2011) (internal quotations and citations omitted). “Thus the legitimacy of withholding does not turn on whether the material is purely factual in nature or whether it is already in the public domain, but rather on whether the selection or organization of facts is part of an agency’s deliberative process.” *Id.*

For instance, in *Montrose Chem. Corp. of California v. Train* the Circuit held that factual summaries compiled into documents used by the administrator in the resolution of a difficult, complex question were within the protection of exemption 5, because “[t]o probe the summaries of record evidence would be the same as probing the decision-making process itself.” 491 F.2d 63, 68 (D.C. Cir. 1974). Similarly, in *Mapother v. Department of Justice*, the Circuit held that factual materials included in a report were immune from disclosure where that information “was assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action.” 3 F.3d 1533, 1539 (D.C. Cir. 1993); *see also Ancient Coin Collectors Guild*, 641 F.3d at 513–14.

In contrast, in *Playboy Enterprises, Inc. v. Department of Justice*, the Circuit found that factual materials contained in a report were not protected because the report was “prepared only to inform the Attorney General of facts which he in turn would make available to members of Congress.” 677 F.2d 931, 936 (D.C. Cir. 1982).

Here, the parties dispute whether the withheld material is “factual.” *Compare* Pl.’s Opp’n 18, *with* Table 2 (quoting the *Vaughn* Index), *and* Def.’s Opp’n 14 (“EPIC fails to identify

what material it considers to be factual.”). But, even assuming some or all of the contested withholdings were factual, “the legitimacy of withholding does not turn on whether the material is purely factual in nature . . . , but rather on whether the selection or organization of facts is part of an agency’s deliberative process.” *Ancient Coin Collectors Guild*, 641 F.3d at 513.

Here, the Court finds that these materials are protected under exemption 5 because they were part of the agency’s deliberative process. It is not contested that the purpose of these documents was to promote deliberation as to the future of the ATR program. The Letter of Assessment was written to assist in the deliberation of the DHS Undersecretary for Management regarding the implementation of ATR, and the other memoranda were similarly focused on furthering intra-agency deliberations. Soutodeh Decl. ¶¶ 38–39. The TSA’s Statement of Facts Not in Genuine Dispute, the TSA declaration, and the *Vaughn* Index all describe these documents in sufficiently specific terms to demonstrate that they qualify for the privilege. *See, e.g.*, Def.’s Statement ¶¶ 69–72; Soutodeh Decl. ¶¶ 38–39; *Vaughn* Index 13–14. And EPIC has offered no reason to contest the deliberative nature of these documents.

As to the specific nature of the factual materials withheld, EPIC argues that these materials are like those found to have been wrongly withheld in *Playboy Enterprises*, rather than those properly withheld in *Montrose*. *See* Pl.’s Reply 9. But EPIC provides no reasoning to support this conclusion. Moreover, unlike *Playboy Enterprises*, the factual material here was not assembled for an agency actor merely to pass along to outsiders, but rather for purely internal deliberative purposes. *See* 677 F.2d at 636. The Court finds that the agency has provided adequately specific descriptions of its withholdings to demonstrate that these materials must be protected in order to safeguard the agency’s deliberative process. The TSA is entitled to summary judgment on these exemption 5 claims.

**C. Operational Test Plan for Operational Test and Evaluation**

Finally, TSA also withheld parts of the Appendix to the Operational Test Plan for Operational Testing and Evaluation for ATR, Bates Numbers 484–617; Soutodeh Decl. ¶ 40. This document “describes the proposed testing methodology to be used in pilot testing of . . . ATR.” Soutodeh Supp. Decl. ¶ 12. “The purpose of the Test and Evaluation (T&E) effort is to provide credible, timely, and sufficient information to support the evaluation of the effectiveness and suitability of the Advanced Imaging Technology . . . system with . . . ATR.” *Id.* The testing proposal was submitted by TSA to DHS’s Office of Testing and Evaluation for review, deliberation and ultimately for approval by DHS. Soutodeh Decl. ¶ 40. The field testing proposed in this document was ultimately approved, but the testing itself was implemented in order to assist with deliberations regarding “the ultimate question of whether to pursue the technological upgrade or enhancement.” Soutodeh Supp. Decl. ¶ 12.

TSA made fourteen sets of exemption 5 withholdings from this document. See Table 3.

**TABLE 3**

<b>BATES NUMBER</b>	<b>DESCRIPTION FROM VAUGHN INDEX</b>	<b>PAGES WITHHELD</b>
490	Description of proposed testing process for upcoming operational testing; discussion of vendor capability requirements; reference and table revealing security screening requirement and rationale	1 page partially withheld
493–494	Discussion of opinion about purpose and need for . . . ATR.	1 page partially withheld; 1 page withheld in full
495–500	Planned operational testing schedule and activity plan revealing framework and though [ <i>sic</i> ] processes on how to test security equipment; discussion of additional testing goals	6 pages partially withheld
501	Discussion of overall testing methodology to be deployed; discussion of planned testing of specific threats; Data collection methods to be deployed including security screening techniques; proposed testing schedule	1 page partially withheld
503	Proposed testing features and criteria, testing data collection methodology	1 page partially withheld

504–514	Planned testing evaluation methodology	11 pages partially withheld
515–536	Proposed testing objective/issue, testing criteria and source of specific requirement to be tested; Provides operational testing data collection methodology; data analysis methodology	22 pages withheld in full
539	Planned testing data review designations	1 page partially withheld
541	Planned scoring criteria for operational testing criteria	1 page partially withheld
548–550	Planned sensitive operational testing criteria	3 pages partially withheld
551–558	Screen shots of planned operational testing data collection forms	3 pages withheld in full; 5 pages partially withheld
562	Discussion of proposed authentication codes and purpose	1 page partially withheld
566–616	Discussion of each specific performance requirement planned to be tested; planned testing criterion or measure, planned operational testing measure of performance, and comments	51 pages partially withheld
617	Discussion of proposed testing articles	1 page withheld in full

EPIC alleges that TSA wrongly withheld purely factual material from these documents. See Pl.’s Opp’n 18. Again, the Court disagrees.

The TSA’s Statement of Facts Not in Genuine Dispute, the TSA declaration, and the *Vaughn* Index all describe these documents in sufficient specificity to demonstrate terms that qualify for the privilege. See, e.g., Def.’s Statement ¶ 73; Soutodeh Decl. ¶ 40; *Vaughn* Index 17–19. Again EPIC offers no reason to dispute the deliberative nature of these documents. The Court finds that these materials must be protected as deliberative. It follows that whether or not some of the material withheld was “purely factual” is of no moment because this factual material was critical to the agency’s deliberative process in determining whether to implement ATR. Allowing the public to “probe” this factual information, therefore, “would be the same as probing the decision-making process itself.” *Montrose*, 491 F.2d at 68. The Court will grant TSA summary judgment on these claims.

#### **D. EPIC’S Other Arguments for Disclosure All Fail**

EPIC’s assertion that some of the withheld information reviewed above was post-decisional, and thus was improperly withheld pursuant to exemption 5, is incorrect. Pl.’s Reply 9–10. EPIC points to two statements: first, TSA’s description of one document as containing “what the staff decided to test for, how it decided to carry out these tests”; and second, TSA’s description of another document containing “TSA’s decisions regarding what to test for reveals which factors it thought (at an early stage) were important in the decision whether to use ATR.” *See id.* (quoting Def.’s Reply 14, 16). EPIC argues that “[a]t some point this information was pre-decisional, but it does not remain predecisional after the tests have been completed.” Pl.’s Reply 9. This evinces a misunderstanding of the deliberative process privilege. As the Supreme Court has explained:

The purpose of the privilege for predecisional deliberations is to insure that a decisionmaker will receive the unimpeded advice of his associates. The theory is that if advice is revealed, associates may be reluctant to be candid and frank. It follows that documents shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice, including analysis, reports, and expression of opinion within the agency.

*Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 359–60 (1979); *see also Elec. Privacy Info. Ctr. v. Dep’t of Homeland Sec.*, 384 F. Supp. 2d 100, 112–13 (D.D.C. 2005) (“Contrary to plaintiff’s assertion that materials lose their exemption 5 protection once a final decision is taken, it is the document’s role in the agency’s decision-making process that controls.”). True, the agency has “the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980). Here, as explained

above, TSA has met this burden by demonstrating that each of these documents was part of the agency's deliberative process in determining whether to use ATR.

EPIC's assertion that TSA failed to produce segregable portions of the withheld documents also fails. *See* Pl.'s Opp'n 19–20. “Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material.” *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). According to the *Vaughn* Index provided by the agency, most of the contested withholdings under exemption 5 were partial redactions from specific pages, rather than complete withholdings of entire documents. *See Vaughn* Index 13–14, 17–19. Moreover, the agency has declared in a sworn affidavit that it has released the segregable portion of each of these records. Soutodeh Decl. ¶ 55. As EPIC has failed to offer any argument in support of its allegation that might cast doubt on TSA's sworn statement, the Court finds that all reasonably segregable materials were disclosed.

## **VI. ATTORNEYS' FEES AND COSTS**

EPIC has moved for attorneys' fees and costs. Pl.'s Opp'n 20–24. The Court will not address that motion here. Pursuant to the local rules, the Court shall “enter an order directing the parties to confer and to attempt to reach agreement on fee issues” and shall set a status conference at which the Court will

(1) determine whether settlement of any and or all aspects of the fee matter has been reached, (2) enter judgment for any fee on which agreement has been reached, (3) make the determination [regarding pending appeals] required by paragraph (b) of . . . [LCvR 54.2], and (4) set an appropriate schedule for completion of the fee litigation.

LCvR 54.2.

**VII. CONCLUSION**

For the foregoing reasons, EPIC and TSA are both entitled to partial summary judgment.

An Order shall issue with this opinion.

Signed by Royce C. Lamberth, Chief Judge, on March 7, 2013.

**U.S. District Court  
 District of Columbia (Washington, DC)  
 CIVIL DOCKET FOR CASE #: 1:11-cv-00290-RCL**

ELECTRONIC PRIVACY INFORMATION CENTER v.  
 UNITED STATES TRANSPORTATION SECURITY  
 ADMINISTRATION  
 Assigned to: Chief Judge Royce C. Lamberth  
 Case in other court: USCA, 13-05114  
 Cause: 05:552 Freedom of Information Act

Date Filed: 02/02/2011  
 Date Terminated: 03/07/2013  
 Jury Demand: None  
 Nature of Suit: 895 Freedom of  
 Information Act  
 Jurisdiction: U.S. Government Defendant

Date Filed	#	Docket Text
02/02/2011	<u>1</u>	COMPLAINT against UNITED STATES TRANSPORTATION SECURITY ADMINISTRATION ( Filing fee \$ 350, receipt number 4616036246) filed by ELECTRONIC PRIVACY INFORMATION CENTER. (Attachments: # <u>1</u> Civil Cover Sheet)(jf, ) (Entered: 02/03/2011)
02/02/2011		SUMMONS (3) Issued as to UNITED STATES TRANSPORTATION SECURITY ADMINISTRATION, U.S. Attorney and U.S. Attorney General (jf, ) (Entered: 02/03/2011)
02/02/2011	<u>2</u>	LCvR 7.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests NONE by ELECTRONIC PRIVACY INFORMATION CENTER (jf, ) (Entered: 02/03/2011)
03/08/2011	<u>3</u>	NOTICE of Appearance by Jesse Z. Grauman on behalf of UNITED STATES TRANSPORTATION SECURITY ADMINISTRATION (Grauman, Jesse) (Entered: 03/08/2011)
03/16/2011	<u>4</u>	ANSWER to <u>1</u> Complaint by UNITED STATES TRANSPORTATION SECURITY ADMINISTRATION. (Attachments: # <u>1</u> Exhibit Exhibit A: EPIC's First Request, # <u>2</u> Exhibit Exhibit B: EPIC's Second Request)(Grauman, Jesse) (Entered: 03/16/2011)
03/29/2011		Case randomly reassigned to U.S. District Judge Amy Berman Jackson. Judge Richard W. Roberts no longer assigned to the case. (gt, ) (Entered: 03/29/2011)
05/16/2011		MINUTE ORDER: A Meet & Confer Initial Status Conference is set for 6/13/2011 at 10:30 AM in Courtroom 2 before Judge Amy Berman Jackson. The parties shall meet, confer, and file a Joint Report pursuant to Local Rule 16.3 by 6/6/2011. Signed by Judge Amy Berman Jackson on 5/16/2011. (jth) (Entered: 05/16/2011)
06/06/2011	<u>5</u>	MEET AND CONFER STATEMENT. (Attachments: # <u>1</u> Text of Proposed Order)(Grauman, Jesse) (Entered: 06/06/2011)
06/13/2011	<u>6</u>	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Ginger McCall, :Firm- Electronic Privacy Information Center, :Address- 1718 Connecticut Ave NW Suite 200. Phone No. - 202-483-1140. Fax No. - 202-483-1248 by ELECTRONIC PRIVACY INFORMATION CENTER (Verdi, John) (Entered: 06/13/2011)
06/13/2011		Minute Entry for proceedings held before Judge Amy Berman Jackson: Case called for an Initial Scheduling Conference, but not held. Status Conference held on 6/13/2011. SCHEDULING ORDER TO BE ISSUED. (Court Reporter Lisa Schwam) (jth) (Entered: 06/13/2011)
06/13/2011		VACATED PURSUANT TO MINUTE ORDER FILED 06/17/2011.....MINUTE ORDER. On May 16, 2011 this Court issued a Minute Order scheduling an Initial Status Conference (ISC) for June 13, 2011 for 10:30 a.m. At no time thereafter did counsel for Plaintiff contact the Deputy Clerk seeking to reschedule the date. An attorney seeking leave to appear pro hac vice arrived in court this morning, but the motion required under LCvR 83.2 was not filed until 10:29 a.m., so the Court did not have sufficient time to evaluate the motion prior to the start of the conference,



		and plaintiff was not represented at the ISC. Therefore it is ORDERED that counsel for Plaintiff SHOW CAUSE by 6/20/2011 why sanctions should not be imposed for his non-appearance. Signed by Judge Amy Berman Jackson on 6/13/2011. (jth) Modified on 6/20/2011 (jth). (Entered: 06/13/2011)
06/13/2011		MINUTE ORDER denying <u>6</u> Motion for Leave to Appear Pro Hac Vice for failure to comply with LCvR 83.2(d)(4). Signed by Judge Amy Berman Jackson on 6/13/2011. (lcabj2, ) (Entered: 06/13/2011)
06/13/2011	<u>7</u>	SCHEDULING ORDER: a joint status report is due by 8/5/2011. SEE ORDER FOR COMPLETE DETAILS. Signed by Judge Amy Berman Jackson on 6/13/11. (MT) (Entered: 06/13/2011)
06/14/2011		Set/Reset Deadlines: Defendant's Motion for Summary Judgment due by 8/26/2011; Plaintiff's Oppositon and Cross Motion due by 9/23/2011; Defendant's Reply and Opposition to the Cross Motion due by 10/11/2011; Plaintiff's Reply to the Cross Motion is due by 10/25/2011. (jth) (Entered: 06/14/2011)
06/17/2011	<u>8</u>	RESPONSE TO ORDER TO SHOW CAUSE by ELECTRONIC PRIVACY INFORMATION CENTER re Order to Show Cause,.. (Attachments: # <u>1</u> Affidavit Affidavit of John Verdi, # <u>2</u> Affidavit Affidavit of Ginger McCall, # <u>3</u> Text of Proposed Order)(Verdi, John) (Entered: 06/17/2011)
06/17/2011		MINUTE ORDER: The order to show cause issued in a minute order on 6/13/2011 is vacated. Counsel is directed to contact the Deputy Clerk in advance in the event any future court appearances require rescheduling. Ms. McCall may not appear on behalf of the plaintiff unless and until she becomes a member of the bar of this court or she submits a motion for leave to appear pro hac vice that complies with LCvR 83.2(d)(4). Signed by Judge Amy Berman Jackson on 6/17/11. (MT, ) (Entered: 06/17/2011)
07/14/2011	<u>9</u>	Unopposed MOTION for Extension of Time to <i>File Summary Judgment Briefs</i> by UNITED STATES TRANSPORTATION SECURITY ADMINISTRATION (Attachments: # <u>1</u> Text of Proposed Order)(Grauman, Jesse) (Entered: 07/14/2011)
07/15/2011		MINUTE ORDER granting <u>9</u> Unopposed Motion for Extension of Time to File Summary Judgment Briefs. The motion for summary judgment will be due 9/9/2011, the opposition to the motion for summary judgment and the cross-motion for summary judgment will be due 10/7/2011, the reply to the motion for summary judgment and the opposition to the cross-motion for summary judgment will be due 10/25/2011, and the reply to the cross-motion for summary judgment will be due 11/8/2011. Signed by Judge Amy Berman Jackson on 7/15/2011. (MT) (Entered: 07/15/2011)
07/16/2011		Set/Reset Deadlines: Summary Judgment motions due by 9/9/2011; Opposition and Cross Motion due by 10/7/2011; Reply to Summary Judgment and Opposition to Cross Motion due by 10/25/2011; Reply to Cross Motion due by 11/8/2011. (jth) (Entered: 07/16/2011)
08/04/2011	<u>10</u>	STATUS REPORT by ELECTRONIC PRIVACY INFORMATION CENTER, UNITED STATES TRANSPORTATION SECURITY ADMINISTRATION. (Grauman, Jesse) (Entered: 08/04/2011)
08/30/2011	<u>11</u>	NOTICE OF SUBSTITUTION OF COUNSEL by Joseph Wilfred Mead on behalf of UNITED STATES TRANSPORTATION SECURITY ADMINISTRATION Substituting for attorney Jesse Grauman (Mead, Joseph) (Entered: 08/30/2011)
08/30/2011	<u>12</u>	Consent MOTION for Extension of Time to <i>File Motion for Summary Judgment</i> by UNITED STATES TRANSPORTATION SECURITY ADMINISTRATION (Attachments: # <u>1</u> Text of Proposed Order Proposed Order)(Mead, Joseph) (Entered: 08/30/2011)
08/30/2011		MINUTE ORDER granting <u>12</u> Consent Motion for Extension of Time. The motion for summary judgment will be due 9/16/2011, with opposition to motion for summary judgment and cross-motion for summary judgment due 10/14/2011, with reply to motion for summary judgment and opposition to cross-motion for summary judgment due 11/1/2011 and reply to cross-motion for summary judgment due 11/15/2011. Signed by Judge Amy Berman Jackson on 8/31/2011.

		(MT) (Entered: 08/30/2011)
08/30/2011		Set/Reset Deadlines: Summary Judgment motion due by 9/16/2011, Opposition and Cross Motion due by 10/14/2011, Reply to Motion for Summary Judgment and the Oppositon to the Cross Motion due by 11/1/2011, Reply to Cross Motions due by 11/15/2011. (jth) (Entered: 09/02/2011)
09/16/2011	<u>13</u>	MOTION for Summary Judgment by UNITED STATES TRANSPORTATION SECURITY ADMINISTRATION (Attachments: # <u>1</u> Exhibit 1 – Sotoudeh Decl., # <u>2</u> Exhibit 1A – June FOIA Request, # <u>3</u> Exhibit 1B – October FOIA Request, # <u>4</u> Exhibit 1C – Vaughn Index, # <u>5</u> Exhibit 2 – Benner Decl., # <u>6</u> Exhibit 3 – Modica Decl., # <u>7</u> Exhibit 4 – Weller Decl., # <u>8</u> Exhibit 5 – Excerpts, # <u>9</u> Text of Proposed Order Proposed Order)(Mead, Joseph) (Entered: 09/16/2011)
10/14/2011	<u>14</u>	Cross MOTION for Summary Judgment <i>Combine Cross–Motion/Opposition</i> by ELECTRONIC PRIVACY INFORMATION CENTER (Attachments: # <u>1</u> Memorandum in Support Memorandum in Support, # <u>2</u> Statement of Facts Statement of Facts, # <u>3</u> Statement of Facts Statement of Genuine Issues in Opposition to Defendant's Statement of Material Facts, # <u>4</u> Text of Proposed Order Text of Proposed Order, # <u>5</u> Exhibit Exhibit 1, # <u>6</u> Exhibit Exhibit 2, # <u>7</u> Exhibit Exhibit 3, # <u>8</u> Exhibit Exhibit 4, # <u>9</u> Exhibit Exhibit 5, # <u>10</u> Exhibit Exhibit 6, # <u>11</u> Exhibit Exhibit 7, # <u>12</u> Exhibit Exhibit 8, # <u>13</u> Exhibit Exhibit 9, # <u>14</u> Exhibit Exhibit 10, # <u>15</u> Exhibit Exhibit 11)(Verdi, John) (Entered: 10/14/2011)
10/14/2011	<u>15</u>	Memorandum in opposition to re <u>13</u> MOTION for Summary Judgment <i>Combined Cross–Motion/Opposition</i> filed by ELECTRONIC PRIVACY INFORMATION CENTER. (Attachments: # <u>1</u> Statement of Facts Statement of Facts, # <u>2</u> Statement of Facts Statement of Genuine Issues in Opposition to Defendant's Statement of Material Facts, # <u>3</u> Text of Proposed Order Text of Proposed Order, # <u>4</u> Exhibit Exhibit 1, # <u>5</u> Exhibit Exhibit 2, # <u>6</u> Exhibit Exhibit 3, # <u>7</u> Exhibit Exhibit 4, # <u>8</u> Exhibit Exhibit 5, # <u>9</u> Exhibit Exhibit 6, # <u>10</u> Exhibit Exhibit 7, # <u>11</u> Exhibit Exhibit 8, # <u>12</u> Exhibit Exhibit 9, # <u>13</u> Exhibit Exhibit 10, # <u>14</u> Exhibit Exhibit 11)(Verdi, John) (Entered: 10/14/2011)
11/01/2011	<u>16</u>	Memorandum in opposition to re <u>14</u> Cross MOTION for Summary Judgment <i>Combine Cross–Motion/Opposition and Memorandum in Support of Defendant's Motion for Summary Judgment</i> filed by UNITED STATES TRANSPORTATION SECURITY ADMINISTRATION. (Attachments: # <u>1</u> Statement of Facts Response to Plaintiff's Statement of Facts, # <u>2</u> Exhibit A – Sotoudeh Supplemental Declaration, # <u>3</u> Text of Proposed Order)(Mead, Joseph) (Entered: 11/01/2011)
11/01/2011	<u>17</u>	REPLY to opposition to motion re <u>13</u> MOTION for Summary Judgment <i>and Combined Memorandum in Opposition to Plaintiff's Motion for Summary Judgment</i> filed by UNITED STATES TRANSPORTATION SECURITY ADMINISTRATION. (Attachments: # <u>1</u> Statement of Facts Response to Plaintiff's Statement of Material Facts, # <u>2</u> Exhibit A – Sotoudeh Supplemental Declaration, # <u>3</u> Text of Proposed Order)(Mead, Joseph) (Entered: 11/01/2011)
11/15/2011	<u>18</u>	REPLY to opposition to motion re <u>14</u> Cross MOTION for Summary Judgment <i>Combine Cross–Motion/Opposition</i> filed by ELECTRONIC PRIVACY INFORMATION CENTER. (Verdi, John) (Entered: 11/15/2011)
03/28/2012	<u>19</u>	NOTICE of Appearance by Marc Rotenberg on behalf of ELECTRONIC PRIVACY INFORMATION CENTER (Rotenberg, Marc) (Entered: 03/28/2012)
03/28/2012	<u>20</u>	NOTICE OF WITHDRAWAL OF APPEARANCE as to ELECTRONIC PRIVACY INFORMATION CENTER. Attorney John Arthur Verdi terminated. (Verdi, John) (Entered: 03/28/2012)
04/10/2012		Case reassigned to Judge Rudolph Contreras. Judge Amy Berman Jackson no longer assigned to the case. (ds) (Entered: 04/10/2012)
01/04/2013	<u>21</u>	Case reassigned to Chief Judge Royce C. Lamberth as related. Judge Rudolph Contreras no longer assigned to the case. (ztnr, ) (Entered: 01/04/2013)
03/07/2013	<u>22</u>	ORDER granting in part and denying in part <u>13</u> Motion for Summary Judgment; granting in part and denying in part <u>14</u> Motion for Summary Judgment. Signed by Chief Judge Royce C. Lamberth on March 7, 2013. (lcr15) (Entered: 03/07/2013)

03/07/2013	<u>23</u>	MEMORANDUM OPINION granting in part and denying in part the parties' cross-motions for summary judgment. Signed by Chief Judge Royce C. Lamberth on March 7, 2013. (lcr15) (Entered: 03/07/2013)
04/05/2013		Set/Reset Hearings: Status Conference set for 4/12/2013 at 10:30 AM in Courtroom 22A before Chief Judge Royce C. Lamberth. (rje) (Entered: 04/05/2013)
04/11/2013		Set/Reset Hearings: Status Conference reset for 4/17/2013 at 10:30 AM in Courtroom 22A before Chief Judge Royce C. Lamberth. (rje, ) (Entered: 04/11/2013)
04/16/2013	<u>24</u>	NOTICE OF APPEAL TO DC CIRCUIT COURT as to <u>22</u> and <u>23</u> by ELECTRONIC PRIVACY INFORMATION CENTER. Filing fee \$ 455, receipt number 0090-3285888. Fee Status: Fee Paid. Parties have been notified. (McCall, Ginger) Modified on 4/17/2013 to add linkage (rdj). (Entered: 04/16/2013)
04/17/2013	<u>25</u>	NOTICE of Appearance by Jesse Z. Grauman on behalf of UNITED STATES TRANSPORTATION SECURITY ADMINISTRATION (Grauman, Jesse) (Entered: 04/17/2013)
04/17/2013	<u>26</u>	Transmission of the Notice of Appeal, Order Appealed, and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid this date re <u>24</u> Notice of Appeal to DC Circuit Court. (rdj) (Entered: 04/17/2013)
04/17/2013		Minute Entry for proceedings held before Chief Judge Royce C. Lamberth: Status Conference held on 4/17/2013. Motion due by 5/1/2013. Opposition due by 5/17/2013. Reply due by 5/24/2013. (Court Reporter Theresa Sorensen.) (rje) (Entered: 04/17/2013)

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

**ELECTRONIC PRIVACY INFORMATION CENTER**  
**1718 Connecticut Ave., N.W.**  
**Suite 200**  
**Washington, DC 20009**

**Plaintiff,**

**v.**

**Civil Action No. 11-0290(RWR)**

**THE UNITED STATES TRANSPORTATION  
SECURITY ADMINISTRATION**  
**601 South 12th Street**  
**Arlington, VA 20598**

**Defendant.**

**COMPLAINT FOR INJUNCTIVE RELIEF**

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 (2010), for injunctive and other appropriate relief, seeking the release of agency records requested by the Electronic Privacy Information Center from the United States Transportation Security Administration.

2. This lawsuit challenges TSA’s failure to disclose documents in response to two of EPIC’s Freedom of Information Act (“FOIA”) requests (“EPIC’s FOIA Requests”) to the agency.

3. EPIC’s FOIA Requests seek agency records concerning the specifications and testing of automated target recognition (“ATR”) technology in relation to TSA’s full body scanner program.

4. Though EPIC filed its first FOIA request concerning ATR technology in June 2010, TSA has failed to disclose a single record, and has failed to comply with agency deadlines under the FOIA.

5. EPIC asks the Court to immediately order the disclosure of all responsive records.

6. On February 1, 2011, TSA began testing ATR software, operating on its current full body scanner hardware, at Las Vegas McCarran International Airport.

7. TSA plans to begin testing ATR software, operating on its current full body scanner hardware, at Hartsfield Jackson Atlanta International Airport and Ronald Reagan Washington National Airport in the near future.

8. Body scanner vendors have claimed that ATR technology will partially address the privacy risks posed by body scanners.

9. However, neither the manufacturers nor TSA has disclosed any documents or provided any evidence that the ATR software prevents body scanner from capturing, storing, and transmitting naked images of air travelers.

10. TSA claims that the ATR technology “automatically detect[s] potential threats and show their location on a generic image of a person,” but fails to reveal whether the generic image merely obscures an underlying naked image of a traveler that is nonetheless susceptible to capture, storage, and transmittal.

11. EPIC seeks agency records that detail the operation and capabilities of the ATR software, permitting a public analysis of the sufficiency or insufficiency of ATR in mitigating risks to travelers’ privacy.

### **Jurisdiction and Venue**

12. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) (2010) and 5 U.S.C. § 552(a)(6)(C)(i) (2010). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (2010). Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) (2010).

### Parties

13. Plaintiff Electronic Privacy Information Center (“EPIC”) is a public interest research organization incorporated as a not-for-profit corporation in Washington, D.C. EPIC’s activities include the review of federal activities and policies to determine their possible impacts on civil liberties and privacy interests. Among its other activities, EPIC publishes books, reports, and a bi-weekly electronic newsletter. EPIC also maintains a heavily visited Internet site, <http://www.epic.org>, which contains extensive information regarding privacy issues, including information EPIC has obtained from federal agencies under the FOIA. EPIC routinely and systematically disseminates information to the public. This Court recognized EPIC’s role as a representative of the news media in *EPIC v. Dep’t of Defense*, 241 F. Supp. 2d. 5 (D.D.C. 2003).

14. Defendant United States Transportation Security Administration (“TSA”) is a component of the Department of Homeland Security, established in the Executive Branch of the United States Government. TSA is an agency within the meaning of 5 U.S.C. § 552(f)(1) (2010).

### Facts

#### **DHS is Implementing Full Body Scanner Technology as Primary Screening for Air Travelers**

15. In February 2007, TSA, a DHS component, began testing full body scanners – also called “whole body imaging” and “advanced imaging technology” – to screen air travelers.

16. Full body scanners produce detailed, three-dimensional images of individuals.

17. Experts have described full body scans as a “digital strip search.”

18. TSA is using full body scanner systems at airport security checkpoints, screening passengers before they board flights.

19. TSA has provided various assurances regarding its use of body scanners.

20. TSA has stated that body scanners would not be mandatory for passengers and that

images produced by the machines cannot be stored, transmitted, or printed.

21. An EPIC FOIA lawsuit against DHS later revealed that TSA's body scanner images can be stored and transmitted.

22. On February 18, 2009, TSA announced that it would require passengers at six airports to submit to full body scanners in place of the standard metal detector search, which contravenes its earlier statements that full body scanners would not be mandatory.

23. On April 6, 2009, TSA announced its plans to expand the mandatory use of full body scanners to all airports.

24. On June 4, 2009, the U.S. House of Representatives passed HR 2200, a bill that would limit the use of full body scanner systems in airports. The bill prevents use of full body scanner technology for primary screening purposes.

25. HR 2200 was referred to the Senate for consideration on June 8, 2009. The legislation was referred to the Senate Committee on Commerce, Science, and Transportation. It remains pending through the date of this pleading.

26. Since June 2009, the TSA has installed hundreds of additional full body scanners in American airports.

27. On July 2, 2010, EPIC filed suit in the U.S. Court of Appeals for the D.C. Circuit to suspend the TSA's full body scanner program.

**ATR Software is Being Developed for Use in Airports Across the United States**

28. ATR software is currently in use at the Schiphol Airport in Amsterdam, the Netherlands.

29. On April 30, 2010, the TSA announced that it had begun development of ATR software.

30. On September 17, 2010, the TSA announced that it had started testing ATR software.

31. On February 1, 2011, the TSA announced that it would begin testing ATR software on AIT machines in three trial airports in Las Vegas, Atlanta, and Washington, D.C.

**EPIC's First FOIA Request**

32. On June 15, 2010, EPIC transmitted, via certified mail, a written FOIA request to TSA for agency records ("EPIC's First FOIA Request"). EPIC requested the following agency records:

- a) All specifications provided by TSA to automated target recognition manufacturers concerning automated target recognition systems;
- b) All records concerning the capabilities, operational effectiveness, or suitability of automated target recognition systems, as described in Secretary Napolitano's letter to Senator Collins;
- c) All records provided to TSA from the Dutch government concerning automated target recognition systems deployed in Schiphol Airport, as described in Secretary Napolitano's letter to Senator Collins;
- d) All records evaluating the [full-body scanning] program and determining automated target recognition requirements for nationwide deployment, as described in Secretary Napolitano's letter to Senator Collins.

33. EPIC's First FOIA Request requested "News Media" fee status under the Freedom of Information Act, based on its status as a representative of the news media.

34. EPIC's First FOIA Request further requested waiver of all duplication fees.

35. Disclosure of the records requested in EPIC's First FOIA Request will contribute significantly to public understanding of the operations and activities of the government.

36. On June 24, 2010, the TSA wrote to EPIC acknowledging receipt of EPIC's First FOIA Request and invoking a 10-day extension for the request under 5 U.S.C. § 552(a)(b)(B).

37. The TSA constructively denied EPIC's request for a waiver of all duplication fees in



EPIC's First FOIA Request.

38. The TSA assigned EPIC's First FOIA Request the case number TSA10-0609.

39. On October 5, 2010, EPIC transmitted a written administrative appeal to TSA ("EPIC's First Administrative Appeal to TSA"), which appealed the TSA's denial of a waiver of duplication fees and non-responsiveness.

40. EPIC's First Administrative Appeal to TSA was received on October 12, 2010.

41. On October 18, 2010, TSA sent EPIC a letter that purported to "acknowledge receipt of your October 5, 2010 Freedom of Information Act (FOIA) request [*sic*] to the Transportation Security Administration (TSA), October 5, 2010 [*sic*] and appealing our decision to deny [*sic*] your FOIA request number TSA10-0609 ..."

42. The TSA's October 18, 2010 letter further states that the "request has been assigned reference number TSA11-0023."

43. The TSA's October 18, 2010 letter invokes a 10-day extension of the deadline under 5 U.S.C. § 552(a)(6)(B), stating that the "request seeks numerous documents that will necessitate a thorough and wide-ranging search." And the letter goes on to invite EPIC to "narrow the scope of your request [*sic*]."

44. On November 2, 2010 the TSA sent EPIC an undated letter in further response to EPIC's First Administrative Appeal to TSA. The letter stated that "[a]lthough the FOIA permits you to appeal a constructive denial of your request, [the TSA] cannot act until an initial determination has been made as to whether any responsive records may be released."

45. The TSA's October 18, 2010 and November 2, 2010 letters are an explicit or constructive denial of EPIC's First Administrative Appeal to TSA. The letters purport to respond to EPIC's First Administrative Appeal to TSA, but instead unlawfully place EPIC's appeal in a queue

for processing FOIA requests.

46. Through the date of this pleading, which is filed more than thirty working days after the receipt of EPIC's First Administrative Appeal by the TSA, the TSA has not substantively responded to EPIC's First Administrative Appeal to the TSA.

47. Through the date of this pleading, the TSA has not made a single determination concerning the substance of EPIC's First FOIA Request.

48. Through the date of this pleading, the TSA has failed to produce any documents in response to EPIC's First FOIA Request.

#### **EPIC's Second FOIA Request**

49. On October 5, 2010, EPIC transmitted, via certified mail, a written FOIA request to United States Department of Homeland Security (DHS) for agency records ("EPIC's Second FOIA Request"). EPIC requested the following agency records:

- a) All records provided from L3 Communications or Rapiscan in support of the submission or certification of ATR software modifications;
- b) All contracts, contract amendments, or statement of work related to the submission or certification of ATR software modifications;
- c) All information, including results, of government testing of ATR technology, as referenced by Greg Soule of the TSA in an e-mail to Bloomberg News, published September 8, 2010.

50. EPIC requested expedited processing for EPIC's Second FOIA Request on the grounds that there was an "urgency to inform the public about an actual or alleged federal government activity."

51. EPIC's Second FOIA Request also requested "News Media" fee status under the Freedom of Information Act, based on its status as a representative of the news media.

52. EPIC's Second FOIA Request further requested waiver of all duplication fees.

53. Disclosure of the records requested in EPIC's Second FOIA Request will contribute

significantly to public understanding of the operations and activities of the government.

54. On October 20, 2010, the DHS wrote to EPIC acknowledging receipt of EPIC's Second FOIA Request and referring the request to the TSA. The DHS assigned EPIC's Second FOIA Request the case number DHS/OS/PRIV 11-0042.

55. On November 8, 2010, the TSA wrote to EPIC acknowledging receipt of EPIC's Second FOIA Request. The TSA referenced case number TSA11-0080 in the subject line of their letter to EPIC, and later stated that they had assigned EPIC's Second FOIA Request reference number TSA10-0080.

56. TSA denied EPIC's request for expedited processing in EPIC's Second FOIA Request.

57. TSA denied EPIC's request for a waiver of all duplication fees in EPIC's Second FOIA Request.

58. On December 14, 2010, EPIC transmitted a written administrative appeal to TSA ("EPIC's Second Administrative Appeal to TSA"), which appealed the TSA's denial of expedited processing, denial of a waiver of duplication fees, and non-responsiveness.

59. EPIC's Second Administrative Appeal to TSA was received on December 20, 2010.

60. On December 27, 2010, TSA sent EPIC a letter that purported to "acknowledge receipt of your December 14, 2010 correspondence to the Transportation Security Administration (TSA), to appeal TSA's decision regarding your request for a fee waiver and expedited processing for Freedom of Information Act (FOIA) request TSA appeal [*sic*] to TSA11-0080 (constructive denial and fee waiver) [*sic*]. Your request was received in this office on December 27, 2010 [*sic*]."

61. The TSA's October 18, 2010 letter further states that the "request has been assigned reference number TSA11-0257."

62. The TSA's December 27, 2010 letter invokes a 10-day extension of the deadline under 5 U.S.C. § 552(a)(6)(B), stating that the "request seeks numerous documents that will necessitate a thorough and wide-ranging search." And the letter goes on to invite EPIC to "narrow the scope of your request [*sic*]."

63. The TSA's December 27, 2010 letter is an explicit or constructive denial of EPIC's Second Administrative Appeal to TSA. The letters purport to respond to EPIC's Second Administrative Appeal to TSA, but instead unlawfully places EPIC's appeal in a queue for processing FOIA requests.

64. Through the date of this pleading, which is filed more than thirty working days after the receipt of EPIC's Second Administrative Appeal by the TSA, the TSA has not substantively responded to EPIC's Second Administrative Appeal to the TSA.

65. Through the date of this pleading, the TSA has not made a single determination concerning the substance of EPIC's Second FOIA Request.

66. Through the date of this pleading, the TSA has failed to produce any documents in response to EPIC's Second FOIA Request.

#### **Count I**

#### **Violation of the FOIA: Failure to Comply With Statutory Deadlines and Wrongful Withholding of Agency Records in Regard to EPIC's First FOIA Request**

67. Paragraphs 1-66 above are hereby incorporated by reference as if set forth fully herein.

68. TSA's response to EPIC's First FOIA Request violated the statutory deadlines imposed by the FOIA, including the deadlines set forth in 5 U.S.C. § 552(a)(6)(A) (2010).

69. TSA has wrongly withheld responsive agency records from EPIC.

70. EPIC has exhausted the applicable administrative remedies with respect to EPIC's

First FOIA Request.

71. EPIC is entitled to injunctive relief compelling the release and disclosure of the requested agency records.

**Count II**  
**Violation of the FOIA: Failure to Comply With Statutory Deadlines and Wrongful Withholding of Agency Records in Regard to EPIC's First FOIA Request**

72. Paragraphs 1-71 above are hereby incorporated by reference as if set forth fully herein.

73. TSA's response to EPIC's Second FOIA Request violated the statutory deadlines imposed by the FOIA, including the deadlines set forth in 5 U.S.C. § 552(a)(6)(A) (2010).

74. TSA has wrongly withheld responsive agency records from EPIC.

75. EPIC has exhausted the applicable administrative remedies with respect to EPIC's

Second FOIA Request.

76. EPIC is entitled to injunctive relief compelling the release and disclosure of the requested agency records.

**Requested Relief**

WHEREFORE, Plaintiff prays that this Court:

- A. order Defendant to make a complete determination regarding EPIC's FOIA Requests within ten days of the date of the Court's Order in this matter;
- B. order Defendant to conduct an adequate search for agency records responsive to EPIC's FOIA Requests within five working days of the date of the Court's Order in this matter;
- C. order Defendant to produce all responsive agency records to EPIC's FOIA Requests within ten days of the Court's Order in this matter;

- D. award Plaintiff its costs and reasonable attorneys' fees incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E) (2010); and
- E. grant such other relief as the Court may deem just and proper.

Respectfully submitted,

By: \_\_\_\_\_  
John Verdi, Esquire (DC Bar # 495764)  
Marc Rotenberg, Esquire (DC Bar # 422825)  
Amie Stepanovich, Esquire\*  
ELECTRONIC PRIVACY INFORMATION  
CENTER  
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(202) 483-1140 (telephone)  
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Dated: February 2, 2011

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\* Amie Stepanovich is barred in New York State. She is not currently admitted to practice in the District of Columbia.

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

_____	)	
ELECTRONIC PRIVACY	)	
INFORMATION CENTER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:11-cv-290 (RWR)
	)	
THE UNITED STATES TRANSPORTATION	)	
SECURITY ADMINISTRATION,	)	
	)	
Defendant.	)	
_____	)	

**ANSWER**

Defendant United States Transportation Security Administration (“TSA”), by and through undersigned counsel, respectfully answers the Complaint as follows:

1. This paragraph contains a characterization of Plaintiff’s Complaint, which speaks for itself, and to which no response is required. To the extent a response is required, admit that Plaintiff is suing Defendant under the Freedom of Information Act (“FOIA”), but deny that Defendant is liable to Plaintiff.

2. This paragraph contains a characterization of Plaintiff’s Complaint, which speaks for itself, and to which no response is required.

3. This paragraph contains a characterization of Plaintiff’s underlying FOIA requests. The FOIA requests, which are attached as Exhibits A and B, speak for themselves, and no response is required.

4. Defendants admit that EPIC filed the first of the two requests at issue in this action in June 2010, and that TSA has not yet, as of the date of this pleading, disclosed any

records to EPIC in response to the two FOIA requests at issue. As to the final allegation in this paragraph, the term “agency deadlines” is vague and as such, defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation; moreover, this allegation is a conclusion of law, to which no response is required.

5. This paragraph contains Plaintiff’s characterizations of the relief it seeks in this action, to which no response is required.

6. Admit that on February 1, 2011, TSA began testing automated target recognition (ATR) software on its Advanced Imaging Technology (AIT) machines at Las Vegas McCarran International Airport.

7. Admit that TSA has begun testing ATR software on AIT machines at Hartsfield Jackson Atlanta International Airport and Ronald Reagan Washington National Airport.

8. The term “body scanner vendors” is vague and as such, defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation.

9. Paragraph 10 is plaintiff’s characterization of TSA’s and manufacturers’ statements regarding the ATR software, to which no response is required. To the extent a response is deemed required, deny except to admit that ATR-enabled AIT units deployed at airports are not capable of storing, printing, or transmitting images. The word “capturing” is vague and as such, defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation.

10. Paragraph 10 is plaintiff’s characterization of TSA statements regarding the ATR software, to which no response is required. To the extent a response is deemed required, deny except to admit that TSA has stated on its blog that the ATR software “automatically detects potential threats and show their location on a generic image of a person,” and ATR-enabled units



deployed at airports are not capable of storing, printing, or transmitting images. The word “capture” is vague and as such, defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation.

11. This paragraph contains plaintiff’s characterizations of the relief it seeks in this action, to which no response is required.

### **Jurisdiction and Venue**

12. This paragraph contains plaintiff’s allegations concerning jurisdiction and venue, which are conclusions of law, to which no response is required.

### **Parties**

13. The first five sentences of this paragraph contain Plaintiff’s characterizations of itself, its purpose, and its activities, to which no response is required. To the extent a response is deemed required, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations. The sixth sentence in this paragraph is Plaintiff’s characterization of this Court’s findings in an unrelated case involving Plaintiff; those findings speak for themselves and Defendant respectfully refers the Court to the cited opinion for a complete and accurate statement of its contents.

14. Admit.

### **Facts**

#### **DHS is Implementing Full Body Scanner Technology as Primary Screening for Air Travelers**

15. Admit that in 2007 and 2008, TSA began deploying advanced imaging technology (“AIT”) machines in limited field trials at United States airports as secondary screening units.

16. Admit that AIT machines can be calibrated to produce three-dimensional images of individuals. The term “detailed” is vague and is Plaintiff’s characterization of the images produced by these machines, to which no response is required.

17. The term “experts” is vague and, as such, defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation.

18. Admit that TSA uses AIT systems to screen a percentage of passengers before they enter the sterile area at airports at which AIT systems have been deployed.

19. Admit.

20. Admit that TSA has stated that AIT systems would not be mandatory for passengers and that images produced by the AIT systems deployed at the airports cannot be stored, transmitted, or printed.

21. Deny except to admit that that images produced by AIT systems can be stored and transmitted only when in test mode at testing facilities.

22. Deny.

23. Deny.

24. Admit only that the House of Representatives passed H.R. 2200 on June 4, 2009. The remainder of this paragraph contains Plaintiff’s characterizations of H.R. 2200, to which no response is required. To the extent that a response is required, Defendant respectfully refers the Court to the text of H.R. 2200, which speaks for itself.

25. Admit only that H.R. 2200 was referred to the Senate Committee on Commerce, Science, and Transportation on June 4, 2009. As to the second sentence, deny; H.R. 2200 is no longer pending pursuant to the adjournment of the 111<sup>th</sup> Congress.

26. Admit that TSA has installed approximately 446 AIT machines, which include both “backscatter” and “millimeter wave” machines, since June 2009.

27. Admit that on July 2, 2010, in the U.S. Court of Appeals for the D.C. Circuit, EPIC filed a petition for review concerning AIT. Defendant respectfully refers the Court to EPIC’s petition for a complete and accurate statement of its contents.

**ATR Software Is Being Developed for Use in Airports Across the United States**

28. Admit that a version of ATR software is currently in use at Schiphol Airport in Amsterdam, the Netherlands.

29. Admit that on April 30, 2010, a posting to the TSA Blog stated that development of ATR software was underway and that it would be followed by testing to ensure that such software would meet TSA’s detection standards.

30. Admit that on September 17, 2010, a posting to the TSA Blog stated that TSA had “just started” testing ATR software.

31. Admit.

**EPIC’s First FOIA Request**

32. Admit. Defendant further avers that EPIC’s request was received by the TSA FOIA office on June 24, 2010.

33. Admit that EPIC, in its letter dated June 15, 2010, requested “News Media” fee status. To the extent that EPIC alleges that it is a “representative of the news media,” such an allegation is a conclusion of law to which no response is required.

34. Admit that EPIC, in its letter dated June 15, 2010, requested a waiver of all duplication fees.

35. Deny.

36. Admit that TSA's then-FOIA Officer, Kevin J. Janet, wrote a letter to EPIC on June 24, 2010 acknowledging receipt of EPIC's request, and stating that TSA would invoke the 10-day extension allowed by 5 U.S.C. § 552(a)(6)(B) because EPIC's request sought numerous documents that would require a wide-ranging search. Defendant further avers that Mr. Janet invited EPIC to narrow the scope of its request, and stated that TSA would make every effort to comply with EPIC's request in a timely manner.

37. Admit only that Mr. Janet's letter of June 24, 2010 notified EPIC that EPIC would be charged 10 cents per page for duplication, although the first 100 pages would be free given EPIC's status as a media requestor. The remainder of this paragraph is a conclusion of law to which no response is required. Defendant further avers that TSA later notified EPIC that its fee waiver request was granted.

38. Admit.

39. Admit that on October 5, 2010, EPIC transmitted a letter to Kimberly Walton, Special Counselor for TSA, stating it was appealing "TSA's failure to disclose records" and "TSA's Denial of Fee Waiver."

40. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation; however, Defendant avers that that EPIC's letter of October 5, 2010 was received by the TSA FOIA Office on October 14, 2010.

41. Admit that TSA's FOIA Office sent EPIC a letter dated October 18, 2010 that contains the quoted excerpts, with the exception of the bracketed portions.

42. Admit.

43. Admit that TSA's FOIA Office sent EPIC a letter dated October 18, 2010 that contains the quoted excerpts, with the exception of the bracketed portions, and stating that TSA would invoke the 10-day extension allowed by 5 U.S.C. § 552(a)(6)(B), and would make every effort to comply with EPIC's request in a timely manner.

44. Admit.

45. This paragraph contains a legal conclusion to which no response is required. To the extent that a response is deemed required, deny that the letter "unlawfully place[d] EPIC's appeal in a queue for processing FOIA requests[.]"

46. Admit only that the Complaint was filed more than thirty working days after the TSA FOIA Office received EPIC's letter of October 5, 2010, and that through the date of the Complaint, Defendant did not provide EPIC with a response indicating whether it possessed responsive records that could be released under FOIA. Defendant avers, however, that it sent EPIC two responses to its October 5 letter, the first of which stated that TSA was receiving an increasing number of FOIA requests and could encounter some delay in processing EPIC's request, and invited EPIC to narrow the scope of its request, and the second of which granted EPIC's fee waiver request.

47. Admit only that through the date of the Complaint, TSA did not make a determination as to whether it possessed responsive records that could be released under FOIA. Defendant avers, however, that it made determinations as to EPIC's request for "news media" fee status as well as to its fee waiver request.

48. Admit that through the date of the Complaint, TSA did not produce any documents in response to EPIC's First FOIA Request.

**EPIC's Second FOIA Request**

49. Admit.

50. Admit that EPIC, in its letter dated October 5, 2010, requested expedited processing of its FOIA request on the basis stated. To the extent that EPIC alleges that its request met the criteria for expedited processing under 5 U.S.C. § 552(a)(6)(E), such an allegation is a conclusion of law to which no response is required. To the extent a response is deemed required, deny.

51. Admit that EPIC, in its letter dated October 5, 2010, requested "News Media" fee status. To the extent that EPIC alleges that it is a "representative of the news media," such an allegation is a conclusion of law to which no response is required.

52. Admit.

53. Deny.

54. Admit that on October 20, 2010, DHS Disclosure and FOIA Operations Manager Sabrina Burroughs wrote to EPIC, acknowledging receipt of EPIC's Second FOIA Request and informing EPIC that the request was being referred to TSA. Admit that DHS assigned EPIC's Second FOIA Request the case number DHS/OS/PRIV 11-0042.

55. Admit.

56. Admit.

57. Admit.

58. Admit that on December 14, 2010, EPIC transmitted a letter to Kimberly Walton, Special Counselor for TSA, in which it stated it was appealing "TSA's failure to disclose records" as well as "TSA's Denial of Fee Waiver" and "TSA's Denial of Expedited Processing."

59. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation; however, Defendant avers that the TSA FOIA Office received EPIC's letter of December 14, 2010 on December 27, 2010.

60. Admit that TSA's FOIA Office sent EPIC a letter on December 27, 2010 that contained the quoted excerpts, with the exception of the bracketed portions.

61. Admit.

62. Admit that TSA's FOIA Office sent EPIC a letter dated December 27, 2010 that contains the quoted excerpts, with the exception of the bracketed portions, and that states that TSA would invoke the 10-day extension allowed by 5 U.S.C. § 552(a)(6)(B).

63. This paragraph contains a legal conclusion to which no response is required. To the extent that a response is deemed required, deny that the letter "unlawfully place[d] EPIC's appeal in a queue for processing FOIA requests[.]"

64. Defendant lacks knowledge or information sufficient to form a belief as to whether the Complaint was filed more than thirty working days after TSA received EPIC's letter of December 14, 2010. Admit only that through the date of the Complaint, Defendant did not provide EPIC with a response indicating whether it possessed responsive records that could be released under FOIA. Defendant avers, however, that it sent EPIC a response to its October 5 letter; this response indicated that TSA was receiving an increasing number of FOIA requests and could encounter some delay in processing EPIC's request, and invited EPIC to narrow the scope of its request.

65. Admit only that through the date of the Complaint, TSA did not make a determination as to whether it possessed responsive records that could be released under FOIA.

Defendant avers, however, that it made determinations as to EPIC's request for "news media" fee status as well as to its fee waiver request.

66. Admit that through the date of the Complaint, TSA did not produce any documents in response to EPIC's Second FOIA Request.

#### **Count I**

#### **Violation of the FOIA: Failure to Comply With Statutory Deadlines and Wrongful Withholding of Agency Records in Regard to EPIC's First FOIA Request**

67. This paragraph realleges and incorporates all preceding paragraphs. To the extent a response is deemed required, Defendant respectfully refers the Court to its responses to specific preceding paragraphs.

68. This paragraph contains a legal conclusion to which no response is required. To the extent a response deemed required, deny.

69. This paragraph contains a legal conclusion to which no response is required. To the extent a response is deemed required, deny.

70. This paragraph contains a legal conclusion to which no response is required. To the extent a response is deemed required, deny.

71. This paragraph contains legal conclusions regarding plaintiff's entitlement to injunctive relief, to which no response is required. To the extent a response is deemed required, deny.

#### **Count II**

#### **Violation of the FOIA: Failure to Comply With Statutory Deadlines and Wrongful Withholding of Agency Records in Regard to EPIC's Second FOIA Request**

72. This paragraph realleges and incorporates all preceding paragraphs. To the extent a response is deemed required, Defendant respectfully refers the Court to its responses to specific preceding paragraphs.



73. This paragraph contains a legal conclusion to which no response is required. To the extent a response deemed required, deny.

74. This paragraph contains a legal conclusion to which no response is required. To the extent a response is deemed required, deny.

75. This paragraph contains a legal conclusion to which no response is required. To the extent a response is deemed required, deny.

76. This paragraph contains legal conclusions regarding plaintiff's entitlement to injunctive relief, to which no response is required. To the extent a response is deemed required, deny.

Except to the extent expressly admitted or qualified above, Defendants deny each and every allegation of the Complaint. Defendant further denies that Plaintiff is entitled to any relief whatsoever.

The remainder of the Complaint is a prayer for relief to which no response is required. If a response is required, defendant denies that plaintiff is entitled to the relief requested or to any relief at all.

**Requested Relief**

WHEREFORE, having fully answered the Complaint, defendant prays that the Court:

1. Deny Plaintiff's request to order Defendant to make a complete determination regarding EPIC's FOIA Requests within ten days of the date of the Court's Order in this matter;
2. Deny Plaintiff's request to order Defendant to conduct an adequate search for agency records responsive to EPIC's FOIA Requests within five working days of the date of the Court's Order in this matter;

3. Deny Plaintiff's request to order Defendant to produce all responsive agency records to EPIC's FOIA Requests within ten days of the Court's Order in this matter;
4. Deny Plaintiff's request for an award of costs and reasonable attorneys' fees incurred in this action;
5. Deny all other relief sought by Plaintiff;
6. Enter judgment dismissing the Complaint with prejudice; and
7. Award Defendant such relief as the Court may deem appropriate.

Date: March 16, 2011

Respectfully submitted,

TONY WEST  
Assistant Attorney General

RONALD C. MACHEN JR.  
United States Attorney for  
the District of Columbia

ELIZABETH J. SHAPIRO  
Deputy Branch Director

/s/ Jesse Z. Grauman  
JESSE Z. GRAUMAN (Va. Bar No. 76782)  
U.S. Department of Justice  
Civil Division, Federal Programs Branch

Mailing Address:  
Post Office Box 883  
Washington, D.C. 20044

Courier Address:  
20 Massachusetts Ave., N.W., Room 5374  
Washington, D.C. 20001

Telephone: (202) 514-2849  
Fax: (202) 616-8460  
Email: [jesse.z.grauman@usdoj.gov](mailto:jesse.z.grauman@usdoj.gov)

Attorneys for Defendants

# **EXHIBIT A**

epic.org

TSA FOIA DIVISION - 571-227-2300  
FOIA CASE NO: TSA10-0609  
RECEIVED: JUN 24 2010  
SUSPENSE DATE: \_\_\_\_\_  
SPECIAL INSTRUCTIONS:

1718 Connecticut Ave NW  
Suite 200  
Washington DC 20009  
USA  
+1 202 483 1140 [tel]  
+1 202 483 1248 [fax]  
www.epic.org

June 15, 2010

**VIA CERTIFIED MAIL**

FOIA Officer  
Transportation Security Agency  
U.S. Department of Homeland Security  
601 South 12<sup>th</sup> Street  
Arlington, VA, 20598

RE: Freedom of Information Act Request and Request for Expedited Processing

Dear FOIA/PA Officer:

This letter constitutes a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center ("EPIC"). EPIC seeks agency records concerning the automated target recognition ("ATR") requirements that the Transportation Security Administration ("TSA") provided to manufacturers of full body scanners ("FBS") for future deployment in American airports.

Background

On April 21, 2010, EPIC and thirty other organizations sent a petition for suspension of the Full Body Scanner program to Janet Napolitano, Secretary of the Department of Homeland Security ("DHS"), and Mary Ellen Callahan, Chief Privacy Officer of DHS.<sup>1</sup> The petition highlighted several problems with the FBS program and with the body scanners themselves.<sup>2</sup> The FBS program infringes passengers' rights under the Fourth Amendment, the Religious Freedom Restoration Act ("RFRA"), and the Privacy Act of 1974.<sup>3</sup> In addition, EPIC argued that FBS exceeds TSA's authority under the Administrative Procedures Act (APA).<sup>4</sup> Finally, EPIC highlighted the health concerns surrounding the FBS program and its effects upon passengers.<sup>5</sup>

<sup>1</sup> ELECTRONIC PRIVACY INFORMATION CENTER ET. AL., Petition for Suspension of TSA Full Body Scanner Program, (Apr. 21, 2010), [http://epic.org/privacy/airtravel/backscatter/petition\\_042110.pdf](http://epic.org/privacy/airtravel/backscatter/petition_042110.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 7-8.

<sup>4</sup> *Id.* at 8.

<sup>5</sup> *Id.*

In its response letter, the TSA disclosed that it has “worked closely” with Dutch authorities and ATR manufacturers.<sup>6</sup> TSA also included a letter to Senator Susan Collins further detailing the timetable for ATR deployment.<sup>7</sup> On its blog, the TSA claims that it is working with manufacturers concerning ATR technology. The TSA has solicited bids from manufacturers for the ATR project.<sup>8</sup> However, the solicitation notice does not explicitly describe the level of analysis the TSA requires for the ATR program.<sup>9</sup>

Given the ongoing legal and medical concerns regarding the FBS program, any modification to the program is of prime importance to air travelers within the United States. Given that TSA conceded that FBS machines can in fact retain passenger scans, despite initial claims to the contrary,<sup>10</sup> it is imperative that travelers are given accurate information regarding the ATR specifications requested by TSA.

#### Documents Requested

EPIC requests the following agency records (including but not limited to electronic records):

- 1) All specifications provided by TSA to automated target recognition manufacturers concerning automated target recognition systems.
- 2) All records concerning the capabilities, operational effectiveness, or suitability of automated target recognition systems, as described in Secretary Napolitano’s letter to Senator Collins.<sup>11</sup>
- 3) All records provided to TSA from the Dutch government concerning automated target recognition systems deployed in Schiphol Airport, as described in Secretary Napolitano’s letter to Senator Collins.<sup>12</sup>
- 4) All records evaluating the FBS program and determining automated target recognition requirements for nationwide deployment, as described in Secretary Napolitano’s letter to Senator Collins.<sup>13</sup>

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<sup>6</sup> Francine J. Kerner, Letter in Response to Petition for Suspension of TSA Full Body Scanner Program, (May 28, 2010), [http://epic.org/privacy/airtravel/backscatter/TSA\\_05\\_28\\_10\\_WBI\\_Resp.pdf](http://epic.org/privacy/airtravel/backscatter/TSA_05_28_10_WBI_Resp.pdf).

<sup>7</sup> *Id.* at 12.

<sup>8</sup> Transportation Security Administration, Automatic Target Recognition Algorithms Development For Advanced Imaging Technology (June 9, 2010), [https://www.fbo.gov/index?s=opportunity&mode=form&id=4c53238a8c790e8312e6fefac33903ed&tab=core&\\_cvview=1](https://www.fbo.gov/index?s=opportunity&mode=form&id=4c53238a8c790e8312e6fefac33903ed&tab=core&_cvview=1)

<sup>9</sup> *Id.*

<sup>10</sup> Gale D. Rossides, Letter in Response to Privacy Concerns, (Feb 24, 2010), [http://epic.org/privacy/airtravel/backscatter/TSA\\_Reply\\_House.pdf](http://epic.org/privacy/airtravel/backscatter/TSA_Reply_House.pdf).

<sup>11</sup> Kerner, *supra* note 6, at 10.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

Request for "News Media" Fee Status

EPIC is a non-profit, educational organization that routinely and systematically disseminates information to the public. This is accomplished through several means. First, EPIC maintains a heavily visited website (<http://www.epic.org/>) that highlights the "latest news" concerning privacy and civil liberties issues. The site also features scanned images of documents EPIC obtains under the FOIA. Second, EPIC publishes a bi-weekly electronic newsletter that is distributed to nearly 20,000 readers, many of whom report on technology issues for major news outlets. The newsletter reports on relevant policy developments of a timely nature (hence the bi-weekly publication schedule). It has been published continuously since 1996, and an archive of past issues is available at our website. Finally, EPIC publishes and distributes printed books that address a broad range of privacy, civil liberties and technology issues. A list of EPIC publications is available at our website.

For the foregoing reasons, EPIC clearly fits the definition of "representative of the news media" contained in the FOIA and 6 C.F.R. § 5.11(b)(6). Indeed, the U.S. District Court for the District of Columbia has specifically held that EPIC is "primarily engaged in disseminating information" for the purposes of expedited processing,<sup>14</sup> and is a "representative of the news media" for fee waiver purposes.<sup>15</sup> Based on our status as a "news media" requester, we are entitled to receive the requested records with only duplication fees assessed. Further, because disclosure of this information will "contribute significantly to public understanding of the operations or activities of the government," as described above, any duplication fees should be waived.

Thank you for your consideration of this request. As the FOIA and 5 U.S.C. § 552 provide, I will anticipate your determination on our request within twenty (20) working days. Should you have any questions about this request, please feel free to contact me at (202) 483-1140, ext. 123.

Sincerely,



Gautam Hans  
EPIC Clerk



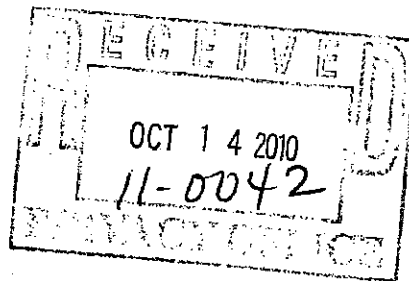
John Verdi  
Director, EPIC Open  
Government Project

<sup>14</sup> *American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

<sup>15</sup> *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).

# **EXHIBIT B**

**epic.org**



October 5, 2010

VIA U.S. MAIL (CERTIFIED DELIVERY)

FOIA/PA

The Privacy Office

U.S. Department of Homeland Security

245 Murray Drive SW

STOP-0655

Washington, D.C. 20528-0655

1718 Connecticut Ave NW

Suite 200

Washington DC 20009

USA

+1 202 483 1140 [tel]

+1 202 483 1248 [fax]

www.epic.org

**RE: Freedom of Information Act Request and Request for Expedited Processing**

To Whom It May Concern:

This letter constitutes a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center ("EPIC").

EPIC seeks agency records concerning proposed software modifications to airport body scanners.

**Background**

The Department of Homeland Security has contracted with L-3 Communications Holdings, Inc. and Rapiscan to install full body scanning ("FBS") devices in the nation's airports.<sup>1</sup> These companies share a contract worth \$47.9 million, which they signed in April for the supply of 302 full-body scanners.<sup>2</sup> As of August 27, 2010, 194 full-body scanners had been delivered and were in use at 51 United States airports, representing a 500% increase from only six months ago.<sup>3</sup> The Transportation Security Administration's ("TSA"'s) goal is to have 2,000 full-body scanners in use at 350 United States airports by the end of 2014.<sup>4</sup>

<sup>1</sup> See *New Updates Will Make Full-Body Scanners Less Privacy-Offensive*, Homeland Security Newswire, September 13, 2010, available at <http://homelandsecuritynewswire.com/new-upgrades-will-make-full-body-scanners-less-privacy-offensive>. The government refers to this technology at Advanced Imaging Technology ("AIT"). See, e.g., Transportation Security Administration, Advanced Imaging Technology (AIT) – Innovation and Technology, <http://www.tsa.gov/approach/tech/ait/index.shtml> (last visited Sept. 24, 2010).

<sup>2</sup> See Homeland Security Newswire, *supra* note 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*



Recently, L-3 and Rapiscan announced that they had developed software modifications for these scanners.<sup>5</sup> According to the vendors, scanners using this new technique would place limits on the ability of operators to view passengers' body parts, and would instead show a generic figure, called an "avatar."<sup>6</sup> The vendors indicate that the software uses "automated target recognition" ("ATR") techniques to detect suspicious items, and may eliminate the need for somebody to actually be in the screening room.<sup>7</sup> Images produced from these scanners often feature faceless, genderless figures, often compared to mannequins or stick figures. Rapiscan explains that its scanners have been designed to show an image of a fully clothed cartoon figure wearing a baseball cap.<sup>8</sup>

Although the vendors have stated that the ATR technology will "address most of the privacy concerns,"<sup>9</sup> questions necessarily remain regarding the scanners' technical specifications and the presence of any privacy safeguards.<sup>10</sup> For instance, though the manufacturers of ATR scanners promote them as "eliminating the generation and review of images,"<sup>11</sup> there is no evidence addressing if these scanners, like other FBS technology, may still have the capability to produce or store naked images of individuals, which could be accessed at a later time. The reassurances given on this matter appear ambiguous at best, and misleading at worst.

In 2009 similar statements were made regarding privacy of millimeter wave and backscatter scanners when implementation was expanded across the United States. "These technologies," the TSA claimed, "cannot save, print, or transmit images."<sup>12</sup> As a result of a later request under the Freedom of Information Act, documents were

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<sup>5</sup> John Hughes, *Airport Naked Image Scanners May Get Privacy Upgrade*, Bloomberg News, September 12, 2010 available at <http://www.bloomberg.com/news/2010-09-08/airport-naked-image-scanners-in-u-s-may-get-avatars-to-increase-privacy.html>; see also Fran Golden, *TSA Testing Privacy Upgrades for Full Body Scanners*, AOL Travel News, September 16, 2010, available at <http://news.travel.aol.com/2010/09/16/tsa-testing-privacy-upgrades-for-full-body-scanners/>.

<sup>6</sup> Hughes, *supra* note 5; see also Robert J. Hawkins, *Scanner Firms Offer Generic Image for Airport Security*, San Diego Union-Tribune, September 9, 2010 available at <http://www.signonsandiego.com/news/2010/sep/09/scanner-firms-offer-tsa-generic-image-airport-secu/>

<sup>7</sup> TSA blog, April 30, 2010, available at <http://blog.tsa.gov/2010/04/tsa-purchases-additional-advanced.html?showComment=1272653805545>; see also Hawkins, *supra* note 6.

<sup>8</sup> Hughes, *supra* note 5 ["Every passenger will generate an avatar that 'looks like a guy wearing a baseball cap,' [Peter Kant] said."].

<sup>9</sup> See L3 Communications, *Advanced Imaging Technology – Provision ATD*, <http://www.sds.l-3com.com/advancedimaging/provision-at.htm> (last visited Sept. 24, 2010).

<sup>10</sup> See generally Kashmir Hill, *Avatars for Full-Body Airport Scans Could Be A TSA Privacy Coup*, FORBES BLOG, Sept. 8, 2010, <http://blogs.forbes.com/kashmirhill/2010/09/08/avatars-for-full-body-airport-scans-could-be-a-tsa-privacy-coup/> [noting that "machines will likely still have a "naked" version of the scan — it just wouldn't be the one on display for screeners."]; See also Ron Baklarz, *The Naked Truth About Body Scanners – Update*, INFOSEC ISLAND, Sept. 16, 2010, <https://www.infosecisland.com/blogview/7884-The-Naked-Truth-About-Body-Scanners-Update.html> [asking if "even with the display of an avatar in place of the real body image, is the real body image still being captured, analyzed and stored by the system?"].

<sup>11</sup> L3 Communications, *supra* note 9.

<sup>12</sup> See, e.g., Press Release, Transportation Security Administration, *TSA to Begin Testing Imaging Technology at George Bush Intercontinental Airport*, available at <http://www.tsa.gov/press/releases/2009/0731.shtm> (July 31, 2009); Press Release, Transportation Security Administration, *TSA to Begin Testing Imaging Technology at Cleveland Hopkins Intercontinental Airport*, available at <http://www.tsa.gov/press/releases/2009/0730.shtm> (July 30, 2009).

eventually released that made clear that the full-body scanners had, in fact, been designed to allow for the production of images with no privacy filters, as well as to allow for the storage and transfer of those images.<sup>13</sup> The documents proved that the capability to create unfiltered images and to store and transmit those images was expressly required by TSA in its Operational Requirements and Procurement Specifications.<sup>14</sup> Both L-3 and Rapiscan contracted with the government to supply scanners under these specifications.<sup>15</sup>

Despite the lack of public information regarding the privacy implications of ATR scanners, one of L-3's modified scanners is already being used in Amsterdam's Schiphol airport.<sup>16</sup> A spokesman for the Transportation Security Administration has said that they are currently testing the ATR software modifications in their labs for release in the United States.<sup>17</sup> Officers at L-3 have stated that they are "look[ing] forward to a successful trial," of the ATR scanners, while Rapiscan has indicated that they planned to "present [the] software for its [ATR scanners] [in September 2010]" in order for them to be tested by the TSA.<sup>18</sup>

#### Documents Requested

EPIC requests copies of the following agency records:

1. All records provided from L3 Communications or Rapiscan in support of the submission or certification of ATR software modifications;
2. All contracts, contract amendments, or statements of work related to the submission or certification of ATR software modifications;

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<sup>13</sup> See, e.g., Transportation Security Administration Office of Security Technology System Planning and Evaluation, Procurement Specification for Whole Body Imager Devices for Checkpoint Operations (Sept. 23, 2008), available at [http://epic.org/open\\_gov/foia/TSA\\_Procurement\\_Specs.pdf](http://epic.org/open_gov/foia/TSA_Procurement_Specs.pdf); Transportation Security Administration Office of Security Technology, Procurement Specification for Advanced Imaging Technology (AIT) for Checkpoint Operations (Sept. 10, 2009), available at [http://epic.org/foia\\_1/gov20/TSA\\_Procurement\\_Specs\\_04\\_15\\_10.pdf](http://epic.org/foia_1/gov20/TSA_Procurement_Specs_04_15_10.pdf); Transportation Security Administration Systems Engineering Branch, Operational Requirements Document: Whole Body Imager Aviation Applications (July 2006), available at [http://epic.org/open\\_gov/foia/TSA\\_Ops\\_Requirements.pdf](http://epic.org/open_gov/foia/TSA_Ops_Requirements.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* See also Contract between TSA and Level 3 Communications (received by EPIC Dec. 1, 2009), available at [http://epic.org/open\\_gov/foia/TSA\\_Millwave\\_Contract.pdf](http://epic.org/open_gov/foia/TSA_Millwave_Contract.pdf); Contract between TSA and Rapiscan (received by EPIC Dec. 1, 2009), available at [http://epic.org/open\\_gov/foia/TSA\\_Rapiscan\\_Contract.pdf](http://epic.org/open_gov/foia/TSA_Rapiscan_Contract.pdf); Contract between TSA and Rapiscan (received by EPIC Dec. 1, 2009), available at [http://epic.org/open\\_gov/foia/TSA\\_Rapiscan\\_Manufacturer.pdf](http://epic.org/open_gov/foia/TSA_Rapiscan_Manufacturer.pdf).

<sup>16</sup> Hughes, *supra* note 5.

<sup>17</sup> Golden, *supra* note 5; See also Hughes, *supra* note 5 [TSA spokesman Greg Soule states that "testing is currently under way."].

<sup>18</sup> See Hughes, *supra* note 5. [Brian Frain, an L-3 senior vice president, said that L-3 "look[s] forward to a successful trial and certification process with the TSA this fall. Peter Kant, an executive VP at OSI's Rapiscan, said [Rapiscan] will present the new software this month and the change will be tested by the [TSA]."]

3. All information, including results, of government testing of ATR technology, as referenced by Greg Soule of the TSA in an e-mail to Bloomberg News, published September 8, 2010.<sup>19</sup>

#### Request for Expedited Processing

This request warrants expedited processing because it is made by "a person primarily engaged in disseminating information..." and it pertains to a matter about which there is an "urgency to inform the public about an actual or alleged federal government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II) (2008); *Al-Fayed v. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001).

EPIC is "primarily engaged in disseminating information." *American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

There is a particular urgency for the public to obtain information about software upgrades to FBS systems. As previously mentioned, questions remain about how exactly this new technology operates.<sup>20</sup> Several Senators have expressed concerns with the FBS program through official letters.<sup>21</sup> However, it is possible that any day now the Department of Homeland Security ("DHS") could certify these machines for public testing with travelers in United States airports, and there is a Senate bill pending that would make full body scanners mandatory in US airports.<sup>22</sup> It is important that the public have the documents it needs to evaluate any changes to this controversial FBS program. These documents are especially important given the recent Congressional activity regarding the FBS program.

#### Request for "News Media" Fee Status

EPIC is a "representative of the news media" for fee waiver purposes. *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on our status as a "news media" requester, we are entitled to receive the requested record with only duplication fees assessed. Further, because disclosure of this information will "contribute significantly to public understanding of the operations or activities of the government," any duplication fees should be waived.

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<sup>19</sup> *Id.* [TSA spokesman Greg Soule states that "testing is currently under way."]

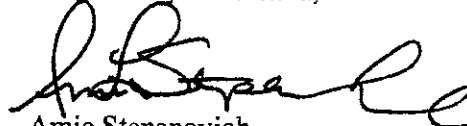
<sup>20</sup> *See infra*, p.2-3.

<sup>21</sup> Letter from Susan M. Collins, Senator, Richard Burr, Senator, and Tom Coburn, Senator to Janet Napolitano, Secretary of Homeland Security and The Honorable John S. Pistole, Administrator, Transportation Security Administration (Aug. 5, 2010) available at [http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MinorityNews&ContentRecord\\_id=48bdf98d-5056-8059-76f0-36d9d201328e&IsTextOnly=False](http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MinorityNews&ContentRecord_id=48bdf98d-5056-8059-76f0-36d9d201328e&IsTextOnly=False); Letter from Joseph I. Lieberman, Senator, Susan M. Collins, Senator, Daniel H. Akaka, Senator, Thomas R. Carper, Senator, Saxby Chambliss, Senator, and Johnny Isakson, Senator to the Honorable John F. Clark, Director, U.S. Marshals Service (Aug. 19, 2010) available at [http://epic.org/Senators\\_Letter\\_US%20Marshals\\_8-19-10.pdf](http://epic.org/Senators_Letter_US%20Marshals_8-19-10.pdf).


<sup>22</sup> Safer Air Act of 2010, S. 3536, 111th Cong. (2010).

Thank you for your consideration of this request. As provided in 6 C.F.R. § 5.5(d)(4), I will anticipate your determination on our request for expedited processing with ten (10) calendar days.

Respectfully Submitted,



Amie Stepanovich  
EPIC National Security Fellow



Sharon Goott Nissim  
EPIC Consumer Protection Fellow

John Verdi  
Director, EPIC Open Government Project

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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ELECTRONIC PRIVACY )  
INFORMATION CENTER, )  
 )  
Plaintiff, )  
 )  
v. ) Civil Action No. 11-0290 (ABJ)  
 )  
TRANSPORTATION SECURITY )  
ADMINISTRATION, )  
 )  
Defendant. )

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**STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE**

Defendant, per Local Civil Rule 7(h), submits that the following material facts are not in genuine dispute:

**BACKGROUND**

**A. FOIA Requests & Responses**

1. On June 15, 2010, Plaintiff Electronic Privacy Information Center (EPIC) filed with Defendant Transportation Security Administration (TSA) a Freedom of Information Act (FOIA) request seeking:
  - 1) All specifications provided by TSA to automated target recognition manufacturers concerning automated target recognition systems.
  - 2) All records concerning the capabilities, operational effectiveness, or suitability of automated target recognition systems, as described in Secretary Napolitano's letter to Senator Collins.
  - 3) All records provided to TSA from the Dutch government concerning automated target recognition systems deployed in Schiphol Airport, as described in Secretary Napolitano's letter to Senator Collins.
  - 4) All records evaluating the FBS program and determining automated target recognition requirements for nationwide deployment, as described in Secretary Napolitano's letter to Senator Collins.

Ex. 1, Sotoudeh Decl. ¶ 4 (“Sotoudeh Decl”) & Ex. 1A.

2. On October 5, 2010, EPIC filed a Freedom of Information Act request with the

Department of Homeland Security (DHS) seeking:

- 1) All records provided from L3 Communications or Rapiscan in support of the submission or certification of ATR software modifications;
- 2) All contracts, contract amendments, or statements of work related to the submission or certification of ATR software modifications;
- 3) All information, including results, of government testing of ATR technology, as referenced by Greg Soule of the TSA in an e-mail to Bloomberg News, published September 8, 2010.

Sotoudeh Decl. ¶ 17 & Ex. 1B.

3. DHS referred the request to TSA because the information sought was within TSA’s purview. Sotoudeh Decl. ¶ 18.

#### **B. TSA’s Search for Records**

4. TSA identified the following offices as likely to have responsive records to one or both of the requests: the Office of Security Technology (“OST”), the Office of Acquisitions, the Office of Global Strategies (OGS), the Office of the Executive Secretary, the Office of Security Operations (OSO), and the Office of the Chief Counsel (OCC). Sotoudeh Decl. ¶ 9, 20.

5. OST is responsible for TSA’s programs for transportation screening equipment and explosive detection solutions. Sotoudeh Decl. ¶ 10. The Advanced Imaging Technology (“AIT”) program is part of the Passenger Screening Program (“PSP”) within the OST, which focuses on identifying, testing, procuring, deploying, and sustaining checkpoint security equipment that detects explosives and/or prohibited items that may be concealed on people and/or their carry-on items. Sotoudeh Decl. ¶ 10. OST also administers the contracts with AIT manufacturers. Sotoudeh Decl. ¶ 10.

6. OST electronically searched for responsive records by searching the “AIT”-related folder on the computer of the Deputy Program Manager for the Passenger Screening Program, and found responsive records. Sotoudeh Decl. ¶ 11, 21. OST also searched the Schiphol folder in the classified safe for responsive records. Sotoudeh Decl. ¶ 11. The PSP Program Office also contacted the TSA Security Integration Facility (TSIF) to locate AIT/ATR test results because the TSIF is responsible for testing security technologies, processes, and procedures in a simulated operational environment to support acquisition decisions, validate system conformance with technical specifications, and determine readiness to enter operational testing, evaluation, and deployment. Sotoudeh Decl. ¶ 21.
7. As part of its search for records responsive to the first request, item number 3, regarding records sent from the Dutch government, the TSA FOIA office consulted with the OST Deputy Assistant Administrator, who had personally participated in the trip to the Netherlands and had personal knowledge of the information exchanged between the United States and the government of Netherlands. Sotoudeh Decl. ¶ 11. The OST Deputy Assistant Administrator recalled that there was an oral exchange of information between the governments during the trip, but no physical records were exchanged during the visit. Sotoudeh Decl. ¶ 11.
8. The Office of Acquisitions maintains and manages all procurement activities for the PSP program. Sotoudeh Decl. ¶ 12, 22. It searched its AIT/ATR contract files for responsive records. Sotoudeh Decl. ¶ 12, 22.
9. The mission of OGS is to work with foreign governments and industry partners regarding overseas transportation operations affecting the United States. Sotoudeh Decl. ¶ 13. In addition to a manual search for files, OGS performed an electronic search of its files at

headquarters for files containing the terms “Advanced Imaging Technology,” “AIT,” “ATR,” and “testing.” Sotoudeh Decl. ¶ 13. Additionally, the Transportation Security Administration Representative for the region that includes the Netherlands conducted an electronic search of its files using the terms “ATR, Automated Threat Recognition, AIT, Schiphol, NCTB, Millimeter Wave, Body Scanner, Presentation, PowerPoint, Brochure, and Attachment,” as well as reviewing file folders that referenced the Dutch. Sotoudeh Decl. ¶ 13.

10. The Office of Chief Counsel consulted the Deputy Chief Counsel for Procurement and the Assistant Chief Counsel for Information Law, both of whom determined that the responsive records were likely located within the Program Offices that ultimately located the responsive records. Sotoudeh Decl. ¶ 16.
11. The Office of the Executive Secretary maintains and tracks correspondence that pertains to officials in TSA’s front office, including the Administrator and Deputy Administrator, and that pertains to TSA interaction with the DHS Office of the Secretary. Sotoudeh Decl. ¶ 14. The Executive Secretary conducted an electronic and manual search, using the terms “Dutch, KLM, ATR, Automated Target Recognition, AIT, Advanced Imaging Technology, Whole Body Imaging, and WBI.” Sotoudeh Decl. ¶ 14. Additionally, all Action Memos created between August 1, 2009 and June 25, 2010, were searched. Sotoudeh Decl. ¶ 14.
12. The Office of Security Operations was also directed to search its files for responsive records. Sotoudeh Decl. ¶ 15, 23. The OSO is responsible for operationalizing new technology both during the testing phase and ultimately once new technology is deployed. Sotoudeh Decl. ¶ 15, 23. ATR points of contact searched their ATR folders



for data concerning ATR operational testing and effectiveness work conducted in the field and produced responsive records. Sotoudeh Decl. ¶¶ 15, 23.

**C. Release of Records**

13. On July 29, 2011, TSA made an initial release of 483 pages of records responsive to EPIC's request. Sotoudeh Decl. ¶¶ 24.
14. On August 22, 2011, TSA released an additional 166 pages of responsive records. Sotoudeh Decl. ¶¶ 25.
15. On September 8, 2011, TSA re-released 18 pages of TSA records when, upon further examination and consultation, TSA determined that certain excerpts previously withheld could be released. Sotoudeh Decl. ¶¶ 25. In addition, TSA provided EPIC a complete version of all released records with new bates-stamped numbering. Sotoudeh Decl. ¶¶ 25.
16. Exhibit 1C to the Sotoudeh Declaration ("*Vaughn* index") fully and accurately summarizes information that was withheld or redacted. Sotoudeh Decl. ¶¶ 26.
17. TSA has withheld information on the basis of Exemptions 3, 4, 5, and 6, and 49 U.S.C. § 114(r). *See Vaughn* index.
18. All reasonably segregable, non-exempt information has been released. Sotoudeh Decl. ¶¶ 35, 52, 57.

**EXEMPTION 3 & 49 U.S.C. § 114(r)**

19. TSA's Sensitive Security Information Branch ("*SSI Branch*") is responsible for making determinations as to whether information should be designated as Sensitive Security Information (SSI). Ex. 2, Benner Decl. ¶¶2-4 ("*Benner Decl.*"). "The SSI Program analysts possess a specialized knowledge of what types of information constitute SSI based on their information protection training and expertise and their routine

consultations with subject-matter experts in the various DHS and TSA program offices who provide expertise on technical matters and describe the ever-evolving technological and systematic threats posed by our adversaries.” Benner Decl. ¶3. This “training and expert consultation enable the analysts to filter seemingly ordinary words, phrases and technological concepts through the prism of the current threat environment to determine how our systems and technology could be undermined by terrorists with the release of even seemingly innocuous terms, phrases, or concepts.” Benner Decl. ¶3.

20. The SSI Branch reviewed documents that were responsive to Plaintiff’s FOIA request and determined that some of the requested information was SSI. Benner Decl. ¶5.
21. Performance specifications and descriptions of test objects or procedures were designated SSI under 49 C.F.R. § 1520.5(b)(4)(i) and therefore withheld from disclosure. Benner Decl. ¶10-12. This designation was made over information contained in pages in the Procurement Specification; Functional Requirements Document (FRD) for ATR; Rapiscan Systems AIT Qualification Data Package for ATR; L-3 AIT ATR QPL; Task Order/Statement of Work for AIT System with ATR for Checkpoint Operations; ATR OTE Weekly Data Report/PowerPoint; DHS Acquisition Review Board for ATR; TSA’s Operational Test Plan (OTP) and Operational Test and Evaluation (OT&E) or AIT/ATR; and Final Report Lab Qualification Test for L-3 Pro-Vision. Benner Decl. ¶13-22; *Vaughn* Index. The release of this information would reveal the scanner’s capabilities and vulnerabilities, which could then be exploited by terrorists. Benner Decl. ¶11.
22. Performance or testing data from security equipment or screening systems were designated as SSI under 49 C.F.R. § 1520.5(b)(9)(v) and therefore withheld from disclosure. Benner Decl. ¶25-28. This designation was made over information contained

in pages in the DHS Acquisition Review Board for ATR and Final Report Lab Qualification Test for L-3 Pro-Vision. Benner Decl. ¶¶26-27; *Vaughn* Index. In addition, this designation was made over raw data contained in two databases withheld in full. Benner Decl. ¶28. These testing results reveal vulnerabilities in the security system by identifying minimum testing standards and exposing “potential limitations or capability gaps in certain technology.” Benner Decl. ¶25.

23. The SSI branch designated screening procedures contained in TSA’s Operational Test Plan (OTP) and Operational Test and Evaluation (OT&E) or AIT/ATR as SSI under 49 C.F.R. § 1520.5(b)(9)(i). Benner Decl. ¶¶23-24. The release of this information could be detrimental to transportation security because knowledge of the particular algorithms, procedures, protocols, and safeguards used by TSA screeners could enable terrorists to evade or circumvent those procedures. Benner Decl. ¶23.

24. The vulnerability assessment contained in the DHS Acquisition Review Board for ATR PowerPoint was designated as SSI under 49 C.F.R § 1520.5(b)(5), and withheld from disclosure. Benner Decl. ¶¶29-30; *Vaughn* index. The release of this information could be detrimental to transportation security by revealing aspects of the security system that are vulnerable to evasion. Benner Decl. ¶29.

25. Electronic images shown on screening equipment monitor were designated as SSI under 49 C.F.R. § 1520.5(b)(9)(vi), and therefore withheld from disclosure. Benner Decl. ¶¶31-33. This designation was made over several pages from the Rapiscan Systems QDP. Benner Decl. ¶33; *Vaughn* index. Terrorists can derive a “range of operationally useful information” from these images, such as the extent to which the security system is able to

detect obscured or camouflaged threat items or items of particular sizes, shapes, and consistencies. Benner Decl. ¶31-32.

26. The SSI Branch also designated training materials created for the purpose of training screeners who operate the AIT scanners as SSI under 49 C.F.R. § 1520.5(b)(10). Benner Decl. ¶34-35; *Vaughn* index. “Training materials, if released to the public, could reveal TSA security screening steps, processes and communication protocols – the type of information that can be exploited by terrorists.” Benner Decl. ¶34.
27. Certain confidential business information submitted to DHS was designated as SSI under 49 C.F.R. § 1520.5(b)(14). Benner Decl. ¶36-38. Certain pages from Rapiscan’s QDP and L-3’s QPL were designated under this section. Benner Decl. ¶37-38; *Vaughn* index. The release of this information would permit adversaries to sabotage transportation security system and exploit system vulnerabilities, and would reveal TSA’s security theories and methodology. Benner Decl. ¶38.
28. Finally, the SSI Branch designated information obtained or developed in the conduct of research relating to transportation security as SSI under 49 C.F.R. § 1520.5(b)(15). Benner Decl. ¶39-44. On this rationale, the SSI Branch designated as SSI pages in the FRD; ATR Weekly Report/AIT/ATR PowerPoint; DHS Acquisition Review Board Power Point; ATR Internal Action Memoranda; TSA’s Operational Test Plan (OTP) and Operational Test and Evaluation (OT&E) or AIT/ATR. Benner Decl. ¶40-44; *Vaughn* index. The withheld information contains information that would allow adversaries to track the progress of security technology development and plans for future technological development, revealing current technological limitations. Benner Decl. ¶41-44.

#### **EXEMPTION 4**

29. Rapiscan and L3 are engaged in actual competition for the sale of scanners to the United States government. Ex. 3, Modica Decl. ¶¶ 10-11 (“Modica Decl.”); Ex. 4, Weller Decl. ¶ 3 (“Weller Decl.”); Sotoudeh Decl. ¶ 50. AIT devices with ATR enhancement are in demand for various purposes, including airport screening, courthouses, prisons, and borders, in the United States and worldwide. Sotoudeh Decl. ¶ 50.
30. The following documents were withheld in full or part under Exemption 4: Rapiscan Systems Advanced Imaging Technology Qualification Data Package (QDP) (Bates Numbers 00055-00149); L-3 Communications Security and Detection Systems AIT ATR QPL (Pages 00150-00369) and L-3 Requests for Waiver/Deviation (Pages 00370-00380); and Rapiscan Task Order/Statement of Work for AIT System with ATR For Checkpoint Operations (Pages 00387-00402). Sotoudeh Decl. ¶ 47; *Vaughn* index.

*Rapiscan Systems Advanced Imaging Technology Qualification Data Package (QDP) (Bates Numbers 55-149)*

31. The Rapiscan Systems Advanced Imaging Technology Qualification Data Package (QDP) was submitted to TSA by Rapiscan. Modica Decl. ¶2. It “describes the capabilities of the Secure 1000 scanner system, including, for example, image resolution measurements, detection capabilities, effectiveness of the system at particular distances, and the ability of Rapiscan’s scanner to operate in multiple configurations,” and “reveals the component parts” of the system. Modica Decl. ¶ 5. “The performance capabilities of this system are very important aspect of the overall design and construction of Rapiscan’s scanner system.” Modica Decl. ¶ 5.
32. The system design and capabilities information is customarily not made available to the public. Modica Decl. ¶ 5. Rapiscan expected that TSA would not disclose the data it submitted outside the government. Ex. 5, EPIC ATR 00101 (“These data may be

reproduced and used by the Government with the express limitation that they will not, without written permission of the Contractor, be used for purposes of manufacture nor disclosed outside the Government.”).

33. Disclosure of design information and performance specifications would cause competitive harm to Rapiscan. Modica Decl. ¶ 5-6. A competitor with this information would have insight into “the design specifications of the Secure 1000 system and would alert competitors to the standard of performance they must achieve to successfully compete against Rapiscan. Access to such capabilities information, and to design details themselves, would permit a competitor to more effectively design and build its own systems and would, therefore, cause Rapiscan substantial competitive injury.” Modica Decl. ¶ 6; Sotoudeh Decl. ¶ 51.
34. In addition, the QDP reveals information about the tests that Rapiscan uses to establish compliance with TSA’s scanner systems requirements. Modica Decl. ¶ 7. “The manner in which these tests were performed reveals aspects of Secure the 1000 system design.” Modica Decl. ¶ 7. Moreover, the testing methods themselves are proprietary, and reflect a “carefully designed a testing protocol to demonstrative compliance TSA’s functional requirements.” Modica Decl. ¶ 7. If the proprietary testing methods were released, Rapiscan would suffer competitive harm because a competitor could use the testing methods as a “blueprint for demonstrating compliance with the TSA’s scanner-systems requirements.” Modica Decl. ¶ 7; Sotoudeh Decl. ¶ 51.
35. Finally, Rapiscan’s employee names and titles were withheld. Modica Decl. ¶8-9.
36. The release of employee names and titles would cause Rapiscan substantial competitive harm. Modica Decl. ¶ 8-9; Rapiscan has invested heavily in its human capital. Modica

Decl. ¶8-9. The release of this information would allow competitors to attempt to identify and attempt to lure knowledgeable employees away from their employer.

Modica Decl. ¶8-9.

L-3 Communications Security and Detection Systems AIT ATR QPL (Pages 00150-00369)

37. L-3 submitted the L-3 Communications Security and Detection Systems AIT ATR QPL.

This document contains substantiation data that demonstrates the scanner's ability to meet the government's specifications. Weller Decl. ¶ 5.

38. This document is covered by non-disclosure agreements between DHS and L-3. Weller Decl. ¶ 5. It is kept secret, on a secure data storage facility, with access limited to those who need to have access to it. Weller Decl. ¶ 6.

39. The information redacted in the QPL main document "pertain to ProVision AIT specific design parameters, feature implementation and functional performance details." Weller Decl. ¶ 7. Release of system design information "would enable competitors to gain insights into proprietary algorithm implementation techniques and system performance metrics" and would "enable competitors to copy technical attributes of the design for use" in competitive products. Weller Decl. ¶ 7.

40. Release of the redacted information about system design in the QPL documents would cause L-3 substantial competitive harm. Weller Decl. ¶¶ 7, 11-15.

41. Appendix A to the QPL is set forth at pages 000198-000228, and provides substantiation data for certain TSA requirements. Weller Decl. ¶ 8. "These pages provide the government with statements, test results and evidence that the ProVision ATR complies" with TSA specifications." Weller Decl. ¶ 8. In addition, "[t]hese pages include detailed description of feature implementation." Weller Decl. ¶ 8.

42. Release of this information would cause substantial competitive harm to L-3. Weller Decl. ¶ 8. “Substantiating that the AIT Scanners comply with all government standards and contract requirements is an important part of transactions with the government for AIT scanners.” Weller Decl. ¶ 12. If a competitor gained access to this information, it could copy L-3’s techniques and model its technology on L-3’s approach without the investment of resources that L-3 had employed. Weller Decl. ¶ 8.
43. L-3 submitted five documents as Appendix B to the QPL: an Operations Manual (00230-00263); a Qualification Plan (00264-00278); Off-line processing TSA 3.8 ATR Provision (00279-00290); a Service Manual (00291-00321); and a Training Manual (00322-00369). Weller Decl. ¶ 9. L-3 expected TSA to keep the manuals secret. *See* Ex. 5, EPIC ATR 00231 (“The materials and information contained herein are being provided by L-3 Communications Security and Detections to its Customers for their internal business purposes only. . . . The materials and information contained herein constitute confidential information of L-3 Communications Security and Detections. Customer shall not disclose or transfer any of these materials or information to any third party.”); Ex. 5, EPIC ATR 00293 (same).
44. The Operations Manual “reveal[s] how the machine functions.” Weller Decl. ¶ 11. In addition, the Operations Manual “requires understanding, effort and skill to produce,” and is part of L-3’s innovation. Weller Decl. ¶ 11. Moreover, “[a] competitor having access to this manual could copy the manual to improve its own operations manual and its methods of communicating information about operation to users, thereby increasing the value of the competitor’s products.” Weller Decl. ¶ 11. Therefore, the release of this information would cause L-3 substantial competitive harm. Weller Decl. ¶ 11.



45. The Qualification Plan “contains proprietary test validation techniques” used to evaluate the millimeter wave AIT system. Weller Decl. ¶ 12. “Substantiating that the AIT Scanners comply with all government standards and contract requirements is an important part of transactions with the government for AIT scanners.” Weller Decl. ¶ 12. The release of this information would allow a competitor to copy the proprietary techniques for demonstrating compliance. Weller Decl. ¶ 12. Therefore, the release of this information would cause L-3 substantial competitive harm. Weller Decl. ¶ 12.
46. The document containing information about Off-line Processing describes a proprietary tool developed by L-3 that gives L-3 a competitive advantage. The document contains details about this tool, the release of which would “expose techniques, features, and performance parameters.” Weller Decl. ¶ 13. The release of this information would allow a competitor to mimic the approach and techniques of this tool, negating one of L-3’s competitive advantages. Weller Decl. ¶ 13. Therefore, the release of this information would cause L-3 substantial competitive harm. Weller Decl. ¶ 13.
47. The Provision Service Manual “contains information on system operation and installation that reveals important system architecture.” Weller Decl. ¶ 14. Revealing this information would permit a competitor to reverse engineer L-3’s scanner. Weller Decl. ¶ 14. This would cause competitive harm to L-3. Weller Decl. ¶ 14; Sotoudeh Decl. ¶ 51.
48. The Operator Training Manual contains information about operating L-3’s scanner. Weller Decl. ¶ 15. The release of this information would expose details about its operation, including power-up sequencing and proprietary tools for determining system health. Weller Decl. ¶ 15. Release of this information would allow competitors to copy L-3’s proprietary techniques in their own technology. Weller Decl. ¶ 15. In addition, the

Operator Training Manual reflects L-3's proprietary approach to training and providing information about the operation of its scanner. Weller Decl. ¶ 15. The release of this document would cause substantial competitive harm to L-3. Weller Decl. ¶ 15; Sotoudeh Decl. ¶ 51.

49. In addition, the release of the employee name would cause L3 substantial competitive harm. Weller Decl. ¶ 10. L-3 spends "considerable effort recruiting, training and developing human capital." Weller Decl. ¶ 10.

50. The release of this information would allow competitors to attempt to identify and attempt to lure knowledgeable employees away from their employer, which would cause substantial competitive harm to L-3. Weller Decl. ¶ 10.

51. Some documents submitted by L-3 were withheld in full because the entirety of the document is exempt from disclosure, and the release of any portion of these documents would precipitate the substantial competitive harm identified by the manufacturer. Sotoudeh Decl. ¶ 52.

*L-3 Requests for Waiver/Deviation (Pages 00370-00380)*

52. The Requests for Waiver/Deviation were submitted by L-3. These documents contain cost and pricing information. Weller Decl. ¶ 15.

53. The release of pricing information would cause substantial competitive harm to L-3, because it would allow competitors to underbid the vendors' prices in future competitions. Weller Decl. ¶ 15.

54. In addition, these documents contain unique L3 software configuration information, the release of which would cause substantial competitive harm to L3. Weller Decl. ¶ 15; Sotoudeh Decl. ¶ 51.

Rapiscan Amendment of Solicitation/Modification of Contract/Order for Supplies or Services  
(Pages 00387-00402)

55. The unit pricing information and Rapiscan employee names contained in these documents were submitted by Rapiscan. Sotoudeh Decl. ¶ 48.
56. Pricing information was redacted from these pages. *See Vaughn* index.
57. The release of pricing information would cause substantial competitive harm to Rapiscan. Modica Decl. ¶ 4.
58. This information would provide “a roadmap” to the vendors’ approach to pricing their “scanner systems and related research and development projects.” Modica Decl. ¶ 4.
59. It would also give competitors insight into the vendors’ “pricing strategy, costs, markups, efficiencies, and economies of scale.” Modica Decl. ¶ 4. The release of this information would allow competitors to underbid the vendors’ prices in future competitions. Modica Decl. ¶ 4.
60. In addition, Rapiscan employee names were withheld under Exemption 4. *See Vaughn* index.
61. Release of Rapiscan employee names would cause substantial competitive harm to Rapiscan. Modica Decl. ¶ 4. Rapiscan has invested heavily in its human capital. Modica Decl. ¶ 8-9. The release of this information would allow competitors to attempt to identify and attempt to hire Rapiscan employees with knowledge of the industry. Modica Decl. ¶ 8-9.
62. All reasonably segregable, non-exempt information contained in these pages were released. *See Vaughn* index.

**EXEMPTION 5**

**A. Drafts of AIT with ATR Functional Requirements Document**

63. TSA withheld forty-four draft versions of the AIT with ATR Functional Requirements Document (FRD). Sotoudeh Decl. ¶ 35. The withheld documents are drafts in their entirety, and the disclosure of these preliminary drafts would reveal the agency's deliberation over the contents of the FRD. Sotoudeh Decl. ¶ 35.
64. The final version of this document was released to EPIC on July 29, 2011. Sotoudeh Decl. ¶ 35; *Vaughn* Index.

**B. Recommendations Regarding Future Policy**

65. The AIT/ATR PowerPoint Presentation was used in a briefing to the House Appropriations Committee in connection with a discussion about future funding for ATR. Sotoudeh Decl. ¶ 36.
66. This document provides background on the ATR functionality and insight, opinions and deliberations on the testing results from the airport pilots. Sotoudeh Decl. ¶ 36; *Vaughn* index. Bates pages 000413-000414 discuss positive operational impact/effectiveness data provided in furtherance of request for appropriations. *Id.* Bates pages 000415-000417 contain the internal analysis of the pilot testing, including recommendations pertaining to the future use of ATR. *Id.* These pages also discuss the "next steps" for ATR deployment and ATR testing. *Id.* Bates pages 000418-000420 discuss future budget and purchase projections, along with a proposed procurement schedule and deployment goals. *Id.*
67. Portions of the document DHS Acquisition Review Board for ATR PowerPoint were also redacted as deliberative. Sotoudeh Decl. ¶ 37; *Vaughn* index. The Acquisition Review Board PowerPoint was prepared by the Passenger Screening Program within the Office of Security Technology (OST) to brief the DHS Acquisition Review Board about TSA's

proposal to acquire the ATR upgrade, and to seek permission to move forward with the ATR upgrades in the field. Sotoudeh Decl. ¶ 37.

68. Several pages contain information that discusses various proposals and future plans, strategy and risks for the acquisition, testing and evaluation, budgeting and cost projections, proposed procurement upgrades to the technology, proposed staffing plans and a projected acquisition schedule. Sotoudeh Decl. ¶ 37; *Vaughn* index.
69. Bates pages 000463-000476 were redacted partially or in full from a Letter of Assessment in the form of a Memorandum. Sotoudeh Decl. ¶ 38; *Vaughn* index. The AIT/ATR Letter of Assessment was prepared by OST and used to brief the DHS Under Secretary for Management in connection with request for authority to procure the ATR security upgrade. Sotoudeh Decl. ¶ 38.
70. In particular, bates pages 000463-000464 of the Letter of Assessment discuss the criteria and thought processes underlying the assessment and follow-on recommendations for the ATR program. Sotoudeh Decl. ¶ 38; *Vaughn* index. Bates pages 000466-000467 convey the internal policymaking progression and background deliberations that led to the conclusions in the assessment. *Id.* Bates pages 000468-00475 constitute an analysis of ATR's compliance with specific security performance objectives, including recommendations for future testing and evaluation. *Id.*
71. The Action Memoranda were used to exchange recommendations and opinions between OSO and OST regarding aspects of the use and testing of AIT/ATR. Sotoudeh Decl. ¶ 39.
72. Information contained in the Action Memoranda located at bates pages 000478-000483 were withheld from release because they propose action on future policy decisions and

contain contemplative discussions in furtherance of ATR procurement, evaluation, and deployment. Sotoudeh Decl. ¶ 39; *Vaughn* index.

73. Finally, some information was redacted as deliberative from Appendix A of the Operational Test Plan (OTP) for Operational Testing and Evaluation (OT&E) for AIT/ATR. *Vaughn* index. The OTP for OTE is an internal document created by OST and presented internally that describes OST's proposal for how TSA will conduct the future pilot Operational Test and Evaluation. Sotoudeh Decl. ¶ 40. The proposed testing set forth in the OTP for the ATR OT&E thereafter was submitted by TSA to DHS's Office of Testing and Evaluation for review, deliberation, and ultimately for approval by DHS. Sotoudeh Decl. ¶ 40. The withheld pages describe TSA's proposed plan for the ATR testing processes, the rationale behind the proposed processes, and TSA's overall plan for ATR. Sotoudeh Decl. ¶ 40; *Vaughn* index.

#### **EXEMPTION 6**

74. TSA withheld under Exemption 6 names of TSA and vendor employees, titles of non-government employees, employee signatures, direct phone numbers, and e-mail addresses. *Vaughn* index.

75. This information provides no insight into government function and would not help Plaintiff to understand how TSA performs its duties. *See* Sotoudeh Decl. ¶ 29.

76. The release of the identities of individuals who are involved with the design, evaluation, and procurement of this security system could expose those individuals to a risk of harassment and danger due to the high-profile, sensitivity, and high-threat nature of the design and procurement of security systems. Sotoudeh Decl. ¶ 28.

77. The release of the signatures of agency and vendor employees could expose those individuals to a risk of impersonation or identity theft. Sotoudeh Decl. ¶ 28.

78. The release of direct contact information could expose these individuals to harassment and unwarranted solicitation. Sotoudeh Decl. ¶ 28.

Dated: September 16, 2011

Respectfully submitted,

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**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

**EXHIBIT 1**



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_)  
ELECTRONIC PRIVACY INFORMATION CENTER )  
 )  
Plaintiff, )  
 )  
v. ) Case No. 1:10-cv-0290 (ABJ)  
 )  
THE UNITED STATES DEPARTMENT OF )  
HOMELAND SECURITY, )  
 )  
Defendant. )  
\_\_\_\_\_)

**DECLARATION OF PAUL SOTOUDEH**

I, Paul Sotoudeh, do hereby declare as follows:

1. I am currently the Acting Freedom of Information Act (FOIA) Officer for the Transportation Security Administration (“TSA”) within the Department of Homeland Security (“DHS”).
2. Due to the nature of my official duties, I am familiar with DHS and TSA’s obligations under FOIA and the Privacy Act, including application of the various exemptions. The statements made in this declaration are based on my personal knowledge, information made available to me in the performance of my official duties, and conclusions reached in accordance therewith.
3. The purpose of this declaration is to set forth the chronology of correspondence relating to the FOIA requests by the Plaintiff, the Electronic Privacy Information Center (“EPIC”), at issue in this action, to describe the searches conducted to identify responsive records, to explain TSA’s procedures for processing responsive records; and to identify the basis for TSA’s decision to withhold information requested by EPIC pursuant to exemptions 3, 4, 5

and 6 of the FOIA, and 114 U.S.C. § 114(r).

EPIC's June 24, 2010 FOIA Request

4. By letter dated June 15, 2010, Ginger P. McCall submitted a FOIA request (“the request”) on behalf of EPIC to DHS. The request is attached as Exhibit A. EPIC sought the following four categories of records:

- 1) All specifications provided by TSA to automated target recognition manufacturers concerning automated target recognition systems.
- 2) All records concerning the capabilities, operational effectiveness, or suitability of automated target recognition systems, as described in Secretary Napolitano's letter to Senator Collins.
- 3) All records provided to TSA from the Dutch government concerning automated target recognition systems deployed in Schiphol Airport, as described in Secretary Napolitano's letter to Senator Collins.
- 4) All records evaluating the FBS program and determining automated target recognition requirements for nationwide deployment, as described in Secretary Napolitano's letter to Senator Collins.

5. TSA assigned FOIA request identification number TSA10-0609 to the request.

6. By letter dated June 24, 2010, TSA acknowledged receipt of the request and invoked a 10-day extension of the request under 5 U.S.C. § 552(a)(b)(B) because EPIC sought numerous records. TSA also invited EPIC to narrow the scope of its request.

7. By letter dated October 5, 2010, EPIC wrote Kimberly Walton, TSA Special Counselor, stating that it was appealing “TSA’s denial of EPIC’s request for a fee waiver.”

8. By letter dated October 18, 2010, TSA acknowledged receipt of EPIC’s letter of October 5, 2010. TSA further advised that the first 100 pages of the release would be free and that EPIC would be charged ten cents (\$.10) for each subsequent page.

Scope of Search for Responsive Records

EPIC's June, 24, 2010 Request

9. Automated Target Recognition (ATR) is an enhancement of existing Advanced Imaging Technology (AIT). TSA's FOIA Office identified the TSA offices that were most likely to have records concerning the four items in Plaintiff's June 2010 FOIA request and directed that they search for responsive records. The offices identified as likely to have responsive records were the Office of Security Technology ("OST"), the Office of Acquisitions, the Office of the Executive Secretary, the Office of Security Operations (OSO), the Office of Chief Counsel (OCC) and the Office of Global Strategies (OGS). These offices were therefore directed to search for responsive records. These offices were tasked on June 24, 2010 and began searching almost immediately..

10. The Office of Security Technology ("OST") is responsible for TSA's programs for transportation screening equipment and explosive detection solutions. Specifically, the Advanced Imaging Technology ("AIT") program is part of the Passenger Screening Program ("PSP") within the OST, which focuses on identifying, testing, procuring, deploying, and sustaining checkpoint security equipment that detects explosives and/or prohibited items that may be concealed on people and/or their carry-on items. OST also administers the contracts with the respective AIT vendors.

11. OST electronically searched for responsive records by searching the "AIT/ATR-related folder on the computer of the Deputy Program Manager for the Passenger Screening Program ("PSP"). OST also searched the Schiphol folder located in the classified records safe for responsive records. The FOIA office also consulted with the OST Deputy Assistant Administrator who personally recalled from his personal experience as a participant on the trip to Schiphol Airport in the Netherlands that, the Dutch Government shared information with DHS via an oral presentation but did not physically provide TSA or other DHS officials with actual

records pertaining to ATR test results during the visit referenced by Secretary Napolitano in her letter to Senator Collins. Thus, there were no records responsive to item 3 of EPIC's June 15, 2010 FOIA request.

12. The Office of Acquisitions maintains and manages all procurement activities for the PSP program. OA is responsible for contracting for goods and services, including such activity as procurement planning, pre-solicitation, solicitation, negotiation, evaluation, award and contract administration. A search of paper and computerized files within the office was conducted by contract number. Acquisitions searched the AIT/ATR contract files for responsive documents.

13. The mission of the Office of Global Strategies is to increase security by working proactively with foreign government and industry partners regarding overseas transportation operations affecting the U.S. OGS performed both an electronic and manual search at Headquarters (HQ OGS) by the OGC Chief of Staff, the Director for International Operations, and in the field by the Transportation Security Administration Representative (TSAR) for the region. The HQ OGS officials used the following terms in the electronic search conducted by OGS: "Advanced Imaging Technology," "AIT," "ATR," and "testing." The TSAR, who was located in Paris, conducted an electronic search using the terms: "ATR, Automated Threat Recognition, AIT, Schiphol, NCTB, Millimeter Wave, Body Scanner, Presentation, PowerPoint, Brochure, and Attachment." The TSAR also reviewed file folders that referenced the Dutch.

14. The Office of the Executive Secretary was tasked because this office maintains and tracks correspondence that pertains to officials in TSA's front office, including the Administrator, the Deputy Administrator, and that pertain to TSA interaction with the DHS

Office of the Secretary. The Executive Secretary conducted an electronic and manual search. The specific search terms used were “Dutch, KLM, ATR, Automated Target Recognition, AIT, Advanced Imaging Technology, Whole Body Imaging, and WBI. The Office of the Executive Secretary also searched for all Action Memos created between August 1, 2009 and June 25, 2010.

15. Finally, the FOIA office contacted the Office of Security Operations (OSO) because that office is responsible for operationalizing new technology both during the testing phase and ultimately once new technology is deployed. The Office of Technical Training, the Office of Operational Performance, and the Operations Improvement Branch within OSO facilitate the application of new technology, including during testing phases, in the operational setting with the workforce. The ATR points of contact searched their ATR folders for records concerning ATR operational effectiveness and produced responsive records.

16. Finally, the Office of Chief Counsel consulted the Deputy Chief Counsel for Procurement and the Assistant Chief Counsel for Information Law, both of whom determined that the responsive records were likely located within the Program Offices that ultimately located the responsive records.

EPIC’s October 5, 2010 FOIA Request

17. By letter dated October 20, 2010, Ginger P. McCall submitted a second FOIA request (“October 20, 2010 request”) on behalf of EPIC to DHS. The request is attached as Exhibit B. EPIC sought the following three categories of records:

1. All records provided from L3 Communications or Rapiscan in support of the submission or certification of ATR software modifications;

2. All contracts, contract amendments, or statements of work related to the submission or certification of ATR software modifications;
3. All information, including results, of government testing of ATR technology, as referenced by Greg Soule of the TSA in an e-mail to Bloomberg News, published September 8, 2010.

18. DHS responded by letter indicating that the request was within TSA's purview, and was being referred to TSA for response. TSA sent EPIC a letter acknowledging receipt of its FOIA request on November 8, 2010, indicating that TSA had assigned case number TSA 11-0080 to that FOIA request.

19. On December 27, 2010, TSA received a letter from EPIC purporting to appeal TSA's denial of expedited processing, a denial of a waiver of duplication fees, and TSA's non-responsiveness.

#### Scope of Search for Responsive Records

##### EPIC's October 20, 2010 Request

20. TSA's FOIA Office identified the TSA offices that were most likely to have records concerning the three items in Plaintiff's October 20, 2010 request and directed that they search for responsive records. The offices identified as likely to have responsive records were the Office of Security Technology ("OST"), the Office of Acquisitions, and the Office of Security Operations (OSO). Although TSA initially began searching for responsive records pursuant to this FOIA request in December of 2010, the FOIA office determined that June 27, 2011 should be the search cut-off date because one office within TSA had not begun its search until that date.

21. The PSP Deputy Program Manager in the OST searched his AIT/ATR folder and located responsive records. The PSP Program Office also contacted the TSA Security Integration Facility (TSIF) to locate AIT/ATR test results because the TSIF is responsible for testing security technologies, processes, and procedures in a simulated operational environment

to support acquisition decisions, validate system conformance with technical specifications, and determine readiness to enter operational testing, evaluation, and deployment.

22. The Office of Acquisitions consulted the AIT/ATR contract file and determined that the responsive records were physically within the PSP Program Manager's office.

23. The FOIA office contacted the Office of Security Operations (OSO) because that office is responsible for operationalizing new technology both during the testing phase and ultimately once new technology is deployed. The Office of Technical Training, the Office of Operational Performance, and the Operations Improvement Branch within OSO facilitate the application of new technology, including during testing phases, in the operational setting with the workforce. The ATR points of contact searched their ATR folders for data concerning ATR operational testing and effectiveness work conducted in the field and produced responsive records.

#### Release of Responsive Records

24. By letter dated July 29, 2011, TSA provided an interim response to EPIC's request, releasing 483 pages of responsive documents. In addition, TSA informed EPIC that records located in two databases of test results were withheld in full as Sensitive Security Information (SSI), and drafts were withheld in full as deliberative process privileged.

25. On August 22, 2011, TSA released an additional 166 pages of responsive records, and on September 8, 2011, TSA re-released eighteen (18) pages of TSA records to EPIC. These records were re-released after TSA, upon further examination and consultation, determined that certain excerpts previously withheld under Exemption 4 could, in fact, be publicly released. Accordingly, TSA's search for responsive records in both FOIA requests that are the subject of this action were reasonable.

Exemptions

26. The following paragraphs generally describe the records withheld by TSA pursuant to FOIA's exemptions at 5 U.S.C. § 552(b). These records are described in greater detail in the TSA Vaughn index, attached as Exhibit C. The Vaughn index contains a complete and accurate description of the records' contents.

*Exemption 6*

27. Exemption 6 of FOIA exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

28. As set forth in the TSA Vaughn index, records on the following Bates-numbered pages in TSA's records were redacted in part pursuant to Exemption 6 because they contained the names, email addresses, and phone numbers of both government and non-government employees: Bates Nos. 000004, 000055, 000057, 000059, 000060, 000150, 000264-000265, 000370-000373, 000378, 000390, 000393-000401, 000395-000396, 000399, 000422, 000447, 000451-000453, 000463-000464, 000477-000479, 000481-000483, 000485. This information is generally not available publicly. Release of direct contact information could subject the individuals to unwarranted solicitation and harassment. Release of names could subject the individuals to harassment or danger, given the high-profile, sensitive, and high-threat nature of aviation security. Release of the individuals' signatures could expose the individuals to impersonation or identity theft, as well as reveal the identities of key personnel.

29. Disclosure of the information specified above would constitute a clearly unwarranted invasion of the personal privacy of the individuals referenced. The privacy interests of the individuals referenced outweigh any minimal public interest in disclosure.



*Exemption 5*

30. Exemption 5 of FOIA exempts from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). The exemption has been interpreted to encompass the privileges typically available to a party in litigation. As described below, TSA has asserted Exemption 5 to withhold information protected under the deliberative process privilege

*Deliberative Process Privilege*

31. TSA has asserted Exemption 5 to withhold certain information protected under the deliberative process privilege. The deliberative process privilege protects internal agency communications that are both predecisional, that is, that predate an agency decision or policy, and deliberative, that is, containing recommendations or opinions on legal or policy matters. It therefore applies to records such as recommendations, evaluations, drafts, proposals, suggestions, and other subjective documents (and excerpts thereof) which do not reflect final agency policy.

32. There are three primary concerns recognized under the deliberative process privilege: (1) to encourage open and frank discussion of policy matters between subordinates and supervisors; (2) to protect against the premature disclosure of proposed policies before they become final; and (3) to protect against public confusion that might result from the disclosure of reasons and rationales that were not, in fact, the ultimate grounds for the agency’s action.

33. As described more specifically in the TSA Vaughn index, portions of the responsive records were withheld in part, and certain records were withheld in full, pursuant to the deliberative process privilege. These records, or portions thereof, are AIT/ATR PowerPoint

presentation, an Acquisition Review Board PowerPoint presentation, an AIT/ATR Letter of Assessment (Memorandum), Action Memoranda, and the Operational Test Plan (OTP) and Evaluation (OT&E) for AIT/ATR.

34. The records, or portions thereof, withheld pursuant to the deliberative process privilege fit into the following general categories. More specific descriptions are contained in the numbered entries in the TSA Vaughn index:

a. **Draft documents, and deliberations, comments, and opinions offered during the drafting of documents.**

35. TSA Vaughn Index, Bates pages 000649-002693 constitute 44 draft versions of the AIT with ATR Functional Requirements Document (FRD). The final document was released to EPIC on July 29, 2011. The withheld records are drafts in their entirety, and the release of any portion of the draft would reveal the agency's deliberative process. Therefore, they were properly withheld under Exemption 5 of the FOIA. Additionally, because the final FRD provided to plaintiff contains SSI, these drafts also contain SSI. However, since the drafts were being withheld in their entirety under Exemption 5, and given that in prior AIT-related FOIA requests, plaintiff typically has agreed not to challenge our Exemption 5 designation over drafts, I decided to postpone the SSI review because such a review would unduly burden the SSI Program and delay release of the records. TSA, nonetheless, asserts Exemption 3 (49 U.S.C. § 114(r)) over those records and reserves the right to conduct the SSI review should this court so require.

b. **Recommendations regarding future policy/testing steps:**

36. TSA Vaughn Index, Bates Nos. 000411-000412 were withheld in part from the AIT/ATR PowerPoint presentation. The AIT/ATR PowerPoint presentation was prepared by the TSA Office of Security Technology (OST) and presented in a briefing to the House

Appropriations Committee in connection with future funding for ATR. This document provides background on the ATR functionality and insight, opinions and deliberations on the testing results from the airport pilots. Bates pages 000413-000414 discuss positive operational impact/effectiveness data provided in furtherance of request for appropriations. Bates pages 000415-000417 contain the internal analysis of the pilot testing, including recommendations pertaining to the future use of ATR. These pages also discuss the “next steps” for ATR deployment and ATR testing. Bates pages 000418-000420 discuss future budget and purchase projections, along with a proposed procurement schedule and deployment goals. As such, they are the type of budgeting and planning deliberations that are protected under Exemption 5.

37. Similarly, bates pages 000423, 000425, 000427, 000431-000443, 000434-000436, 000437-000438, 000439-000440, 000442-000443, 000444-000445, 000448-000449, 000450, 000454-000455 and 000462 were withheld under Exemption 5 from the DHS Acquisition Review Board for ATR PowerPoint. The Acquisition Review Board PowerPoint was prepared by the Passenger Screening Program within the Office of Security Technology (OST) to brief the DHS Acquisition Review Board about TSA’s proposal to acquire the ATR upgrade, and to seek permission to move forward with the ATR upgrades in the field. The information withheld from the bates pages referenced above discuss various proposals and future plans, strategy and risks for the acquisition, testing and evaluation, budgeting and cost projections, proposed procurement upgrades to the technology, proposed staffing plans and a projected acquisition schedule – all of which reflect deliberations, projections, proposals and recommendations.

38. Bates pages 000463-000476 were redacted partially or in full from a Letter of Assessment in the form of a Memorandum. The AIT/ATR Letter of Assessment was prepared by OST and used to brief the DHS Under Secretary for Management in furtherance of TSA’s

request for authority to procure the ATR security upgrade. In particular, bates pages 000463-000464 discuss the criteria and thought processes underlying the assessment and follow-on recommendations for the ATR program. Bates pages 000466-000467 convey the internal policymaking progression and background deliberations that led to the conclusions in the assessment. Bates pages 000468-00475 constitute an analysis of ATR's compliance with specific security performance objectives, including recommendations for future testing and evaluation.

39. The June 6, 2011 Action Memorandum was prepared by the Office of Security Operations (OSO) and provided to OST to convey concurrence with and comment on OST's recommendations regarding deferring some of the AIT/ATR specification due dates. The June 7 Action Memorandum, also prepared by the Office of Security Operations (OSO) and provided to OST, discusses qualification testing results and provides recommendations concerning those results. The February, 2011 Memorandum was prepared by OST and presented to OSO. The redacted information advances opinions about the testing results and makes recommendations regarding contemplated changes to ATR qualification testing. Finally, the January, 2011 Memorandum, provided to OSO from OST also discusses qualification testing results and provides recommendations concerning those results. Information contained in the Action Memoranda located at bates pages 000478-000483 were withheld from release because they propose action on future policy decisions and contain contemplative discussions in furtherance of ATR procurement, evaluation, and deployment.

40. Finally, redacted information located in the range between bates pages 000490-000617 of the TSA Vaughn index derive from Appendix A of the Operational Test Plan (OTP) for Operational Testing and Evaluation (OT&E) for AIT/ATR. The OTP for OTE is an internal

document created by OST and presented internally that describes OST's proposal for how TSA will conduct the future pilot Operational Test and Evaluation. The overall testing proposal set forth in the OTP for the ATR OT&E thereafter was submitted by TSA to DHS's Office of Testing and Evaluation for review, deliberation, and ultimately for approval by DHS. In general, bates pages 000490, 000493-000494, 000495-000450, 000500, 000503, 000504-000514, 000515-000536, 000539, 000541, and 000548-000550 identify and describe TSA's plan for the entire ATR testing processes and the rationale behind those processes as proposed.. Specifically, bates page 000490 contains a discussion of proposed requirements that measure vendor capability along with a detailed discussions of AIT detection capabilities. Bates pages 000490 000495-000500 set forth a proposed operational testing schedule, a deliverable plan and additional testing goals, thus revealing proposals and internal thought processes. Bates page 000501, 000503-000514, 000515, 000532, and 000534-000536 discuss proposed testing methodology, specific threats, proposed operational testing data collection methods, testing features, criteria, and those pages reference performance specifications tested. Bates page 000539 references testing data review designations and bates pages 000541, 000548-000550 identify scoring and testing criteria which, again, reveal the component parts of the assessment process. Bates pages 000551-000558 reveal screen shots of operational testing data collection forms and bates page 000617 describes testing articles, all of which reveal proposed assessment tools.

### *Exemption 3*

41. Exemption 3 of FOIA allows the withholding of information 'specifically exempted from disclosure by statute . . . if that statute "(A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii)

establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.” 5 U.S.C. § 552(b)(3).

42. 49 U.S.C. § 114(r) prohibits the disclosure of certain “sensitive security information” (“SSI”) notwithstanding the FOIA. Disclosure of such information is prohibited if TSA determines that its disclosure would “(A) be an unwarranted invasion of personal privacy; (B) reveal a trade secret or privileged or confidential commercial or financial information; or (C) be detrimental to the security of transportation.” 49 U.S.C. § 114(r)(1). TSA has promulgated regulations pursuant to § 114(r) defining specific categories of SSI, which are set forth at 49 C.F.R. Part 1520.

43. The TSA SSI Division is responsible for all aspects of the DHS-wide SSI Program, including policy, analysis, SSI Determinations, and regulatory execution. The SSI Division serves as the primary point of contact (POC) for the DHS Office of Security, other DHS Components, Stakeholders, and TSA as a whole on issues involving SSI in accordance with 49 C.F.R. Part 1520.

44. The SSI Division conducts assessments and reviews of TSA and DHS records, and upon request, records of other “covered persons” under 49 C.F.R. § 1520.7, to determine which information contained within those records is SSI. The SSI Division thereafter ensures that the appropriate SSI designations and redactions are made in accordance with 49 C.F.R. Part 1520. The prohibition on public release of SSI is not discretionary but is mandatory in accordance with 49 C.F.R. § 1520.15(a). The SSI Division also determines whether specific information should no longer be protected as SSI in accordance with 49 C.F.R. § 1520.5(c) and whether information previously not deemed SSI should be so designated.

45. Pursuant to 49 U.S.C. § 114(r) and its implementing regulations, TSA has determined that certain limited portions of records responsive to EPIC's requests were SSI pursuant to 49 U.S.C. § 114(r)(1)(C) because their disclosure would be detrimental to the security of transportation.

#### *Exemption 4*

46. Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."

47. Certain records, and portions thereof, located in TSA have been withheld pursuant to Exemption 4 because they contain confidential commercial information obtained from AIT manufacturers. As described in more detail in the Vaughn index, these documents include:

- (1) Rapiscan Systems Qualification Data Package (QDP);
  - (2) L-3's AIT ATR QPL, which includes the ATR Operations Manual, the Qualification Plan, the ProVision Service/Technical Manual and the Operator Training Manual; and
  - (3) L-3's Request for Deviation
- (4) Rapiscan Amendment of Solicitation/Modification of Contract and Order for Supplies or Services

48. Some of the information withheld pursuant to Exemption 4 is contained in a contract modification that was created by the Government. The information withheld under Exemption 4 was itself derived from information obtained from Rapiscan.

49. The records discussed below were withheld because they have been determined to be confidential under Exemption 4 whether they are voluntary or required submissions; that is, they would not customarily not be released to the public by the person from whom they were

obtained, and disclosure is likely to cause substantial harm to the competitive position of the vendors from whom the information was obtained.

50. As explained in greater detail in the Declarations of Peter Modica (Paragraphs 10-11), Whitney T. Weller (Paragraph 3), significant actual competition exists in the marketplace for AIT devices with ATR, not only in the United States, but worldwide. AIT devices with the ATR enhancement are in demand, and have been used, not only for airport screening, but at courthouses, prisons, and borders. Competitors in this industry include, among others, the two AIT manufacturers whose commercial information is at issue in this litigation.

51. As explained further in the declarations of Peter Modica (Paragraphs 4-9 and Whitney T. Weller (Paragraphs 6-16), disclosure of the information referenced above is likely to cause Rapiscan and L3 substantial competitive harm because it would enable competitors to gain insight into the proprietary technologies, methods, mechanisms, and design and operational parameters used by these companies, and to use this information to more effectively design and build their own systems, techniques, and approaches, which could then directly compete with the systems manufactured by Rapiscan and L3. As explained further in the declarations of Peter Modica (Paragraphs 4-9) and Whitney T. Weller (Paragraphs 6-16), disclosure of the information referenced above is likely to cause Rapiscan and L3 substantial competitive harm because it would enable competitors to gain insight into the proprietary technologies, methods, mechanisms, and design and operational parameters used by these companies, and to use this information to more effectively design and build their own systems, techniques, and approaches, which could then directly compete with the systems manufactured by Rapiscan and L3.

52. The FOIA office reviewed the pages that were withheld in full and determined that the entirety of the page was exempt from disclosure, and the release of any portion of the



proprietary content on the page would precipitate the substantial competitive harm identified by the manufacturers.

53. For the same reasons, as set forth in the Modica Declaration (Paragraphs 4-9), Weller Declaration (Paragraphs 6-16), these companies would not normally disclose this type of information to the public.

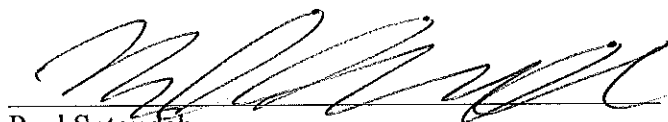
54. For these reasons, this information, described more specifically in the Vaughn index, has been withheld under Exemption 4.

#### Conclusion

55. All TSA offices that were expected to maintain records concerning the categories identified in Plaintiff's FOIA requests were searched. Further, all non-exempt responsive records that were located were provided to Plaintiff. For all records partially withheld, TSA produced the segregable portion of each of the records, and provided a justification for withholding the remainder of the information in its response letters, and clearly marked each document with the applicable exemption. As noted above, some records were re-released after it was determined they contained additional releasable non-exempt information. No further segregation was possible.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

**Dated: September 16, 2011**



Paul Sotoudeh  
Acting Freedom of Information Act Officer  
Transportation Security Administration  
Department of Homeland Security

**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

**EXHIBIT 1 - C**

EPIC v. DHS

Civil Action 1:11-cv-0290  
 US District Court, District of Columbia

Vaughn Index, September 16, 2011

Description of responsive records withheld in full or in part pursuant to  
 FOIA Exemptions 3 (SSI), 4, 5 (deliberative process privilege) and 6.

	BATES NUMBER	DESCRIPTION OF MATERIAL REDACTED	EXEMPTION	PAGES WITHHELD
PROCUREMENT SPECIFICATION	000001-000002			
	000002	A specific detection requirement	Exemption 3; 49 U.S.C. 114(r)	1 page partially withheld
FUNCTIONAL REQUIREMENTS DOCUMENT (ATR)	000003-000054			
	000003	Revision history*	Exemption 3; 49 U.S.C. 114(r)	1 page partially withheld
	000004	Names of TSA employees	Exemption 6	1 page partially withheld
	000005	Revision history	Exemption 3; 49 U.S.C. 114(r)	1 page partially withheld
	000006	Table of Contents entries displaying security system plan	Exemption 3; 49 U.S.C. 114(r)	1 page partially withheld
	000007-000008	Appendix Table of Contents entries that reveal security evaluation methodology	Exemption 3; 49 U.S.C. 114(r)	2 pages partially withheld
	000009	Description of a specific search target, screening technique enhancement, the types of objects identified as	Exemption 3; 49 U.S.C. 114(r)	1 page partially withheld

		anomalies		
000010	Definitions of imaging technology terms of art; identification of a sensitive security system	Exemption 3; 49 U.S.C. 114(r)	1 page partially withheld	
000011	Title of an internal security document	Exemption 3; 49 U.S.C. 114(r)	1 page partially withheld	
000012-000020	In-depth discussion of AIT system requirements including a discussion of threat objects, detection measurements and indicators, and operating instructions	Exemption 3; 49 U.S.C. 114(r)	7 pages partially withheld, 2 pages withheld in full	
000022	Description of methodology used to evaluate AIT system hardware	Exemption 3; 49 U.S.C. 114(r)	1 page partially withheld	
	Description of test performance criteria and component variables that are tested			
000024	Variables analyzed in hardware testing; a type of data flow or condition along with a description of certain test conditions analyzed	Exemption 3; 49 U.S.C. 114(r)	1 page partially withheld	
000025-000031	Description of system evaluation verification table references, test criteria, and evaluation codes	Exemption 349 U.S.C. 114(r)	7 page partially withheld	
	Verification methodology and identification of which entities will verify compliance			
000033	Sensitive acronyms revealing sensitive security concepts	Exemption 3; 49 U.S.C. 114(r)	1 page partially withheld	
000034-000054	Detailed outline including tables and charts setting forth the process for evaluating compliance with the requirements of the AIT/ATR security plan	Exemption 3; 49 U.S.C. 114(r)	21 pages withheld in full	
000055-000149				
<b>RAPISCAN SYSTEMS AIT QUALIFICATION DATA PACKAGE</b>				
000055	Rapiscan employee names and phone numbers	Exemptions 4 & 6	1 page partially withheld	
000056	Reference to a sensitive security plan	Exemption 3; 49 U.S.C. 114(r)	1 page partially withheld	

000057	Description of security search items Version date  Names of Rapiscan employees	Exemption 3; 49 U.S.C. 114(r)	1 page partially withheld
000058	Rapiscan equipments' serial number, software version and ATR Algorithm version  Confidential equipment part numbers and a description of the system's hardware configuration items	Exemptions 4 & 6 Exemption 4	1 page partially withheld
000059	Name, title, and signature of a Rapiscan employee	Exemptions 4 & 6	1 page partially withheld
000060	Certificate of Conformance descriptions of a business confidential distinction	Exemptions 4 & 6	1 page partially withheld
000061-000087	Name, title, and signature of a Rapiscan employee ATR functionality requirements and Rapiscan's test procedures to test compliance with ATR functionality requirements	Exemptions 3; 49 U.S.C. 114(r); Exemption 4	17 pages partially withheld
000088	Appendix A's reference to a distinguishing feature of a requirement	Exemption 3; 49 U.S.C. 114(r);	1 page partially withheld
000089	References to a distinguishing feature of a requirement, software version deployed, ATR version deployed, ATR testing locations, test results	Exemption 3; 49 U.S.C. 114(r)	1 page partially withheld
000090	ATR test procedure	Exemption 3; 49 U.S.C. 114(r) Exemption 4	1 page partially withheld
000091-000099	ATR Testing conditions and results	Exemption 3; 49 U.S.C. 114(r); Exemption 4	9 pages withheld in full
000101-000102	Description of Rapiscan's AIT ATR Feature Space and detection algorithm; algorithmic chart	Exemption 4	1 page partially withheld 1 page withheld in full

	000103-000105	System and requirements numbers; description of security screening detection images; security screening detection images	Exemption 3; 49 U.S.C. 114(r); Exemption 4	3 pages partially withheld
	000104	Discussion of Rapiscan's confidential detection algorithm process	Exemption 4	1 page partially withheld
	000106-000107	Pages discussing confidential software settings	Exemption 4	2 pages partially withheld
	000108-000109	Test procedures and results	Exemption 4	2 pages partially withheld
	000110-000112	Security screening detection images	Exemption 3; 49 U.S.C. 114(r);	2 pages partially withheld
	000113-000115	Test procedures and results	Exemption 3; 49 U.S.C. 114(r); Exemption 4	3 pages partially withheld
	000116-000120	Confidential software pages with screen icons, images / testing results and reporting	Exemption 3; 49 U.S.C. 114(r); Exemption 4	5 pages partially withheld
	000121-000123	Raw data reports	Exemption 4	3 pages partially withheld
	000124-000125	Confidential software pages with screen icons, images	Exemption 4	2 pages partially withheld
	000126	Security screening detection images	Exemption 3; 49 U.S.C. 114(r);	1 page partially withheld
	000127-000131, 000134	Confidential software pages with screen icons, images / testing results and reporting	Exemption 4	5 pages partially withheld
	000132-000133, 000135-000148		Exemption 3; 49 U.S.C. 114(r);	16 pages partially withheld
<b>L-3 AIT ATR QPL</b>	000150-000369			
	000150	Name, title and phone number of L-3 employee	Exemption 6	1 page partially withheld

000153	Description of ATR feature space used; threat detection process	Exemption 3; 49 U.S.C. Sec. 114 (r); Exemption 4	1 page partially withheld
000154	Description of Software and testing methodology	Exemption 3; 49 U.S.C. Sec. 114 (r); Exemption 4	1 page partially withheld
000155-000162	Testing images, substantiation methodology, including system model and serial numbers, threat detection evaluation criteria, compliance information	Exemption 3; 49 U.S.C. Sec. 114 (r); Exemption 4	4 pages partially withheld; 4 pages partially withheld
000163-000164, 000166-000171, 000173, 000175, 000177-000195, 000198-000228	substantiation images and dimensions; software screen shots; substantiation methodology including formula	Exemption 3; 49 U.S.C. Sec. 114 (r); Exemption 4	59 pages withheld in full
000165, 000172, 000174, 000176, 000196,	Performance specifications	Exemption 4	5 pages withheld in full
000232	Revision information for the internal operations manual to the L-3 Provision AIT ATD	Exemption 4	1 page partially withheld
000234-000263	Description of L-3 Communication's Security and detection system operation procedures; detailed description of features available to operators; includes computer screen shots, software description, theories of operation, settings and calibrations; Proprietary operating	Exemption 4	28 pages withheld in full; 2 pages partially withheld
L-3 Operations Manual			

			details			
	000239-000240, 000241-000247, 000249, 000252-000256, 000260-000262, 000264, 000265		Operational procedures including settings and calibration details, including operational screen shots	Exemption 3; 49 U.S.C. 114(r)	14 pages withheld in full; 4 pages partially withheld	
L-3's Qualification Plan	000265		Internal L-3 employee name, signature, suite number, and fax number  Internal Plan information Software and hardware discussion Testing and design discussion	Exemption 6  Exemption 4	2 pages partially withheld  1 page partially withheld	
	000267-000290,  000267, 000269-000290		Provides details on qualification and verification ; Describes testing methodology, organization, test item descriptions and configurations, requirements and substantiations, types of verifications, test plan, support equipment, test schedule and verification requirements  Provides details on qualification and verification ; Describes testing methodology, organization, test item descriptions and configurations, requirements and substantiations, types of verifications, test plan, support equipment, test schedule and verification requirements	Exemption 4  Exemption 3; 49 U.S.C. 114(r)	23 pages withheld in full  5 pages partially withheld; 18 pages withheld in full	
L-3's ProVision Service/Technical manual	000291-000321		Describes actual system design, configuration, and includes diagrams, measurements, dimension, components; also includes change description, system	Exemptions 3; 49 U.S.C. 114(r); Exemption 4	31 pages withheld in full	



		safety, installation		
L-3's Operator Training Manual  Discusses the equipment's threat detection capabilities; Contains software screen shots, control panel settings and operational instructions	000324, 000328-000329, 000331-000333	References threat objects, detection process measurements, and security screening techniques Operational instructions	Exemption 3; 49 U.S.C. 114(r)	2 pages partially withheld; 1 page withheld in full
	000336, 000339-000351, 000354-000355, 000357, 000360-000367	Operational instructions and guidance; screen shots Equipment photos, images, control panel screen shots and image interpretation	Exemption 3; 49 U.S.C. 114(r)	21 withheld in full; 4 pages partially withheld
	000328 000331-000334	Sensitive technical references and lays out proprietary approach to training operators	Exemption 4	5 pages withheld in full
	000336-000352	Describes capabilities of security system	Exemption 4	17 pages withheld in full
	000355-00368	Screen shots of control panel; Operational instructions and guidance; photograph of system component	Exemption 4	14 pages withheld in full
	<b>L-3 Request for Deviation</b>	000370-000375 000370-000373,	L3 and TSA's internal employee names, signatures,	Exemption 6

	000378, 000380	phone numbers, and email addresses	withheld
	000370, 000371-000373	System software version description; Model numbers, type of testing involved; system identification by airport;	4 pages partially withheld;
	000375	Description of deviation/waiver including specific system changes, software information, and scheduling	1 page withheld in full
	000376	Model numbers	1 page partially withheld
	000379-000380	Cost and pricing information	2 pages partially withheld
<b>TASK ORDER/STATEME NT OF WORK FOR AIT SYSTEM WITH ATR FOR CHECKPOINT OPERATIONS</b>	000376-000386		
	000382-00386	Statement of Work security-related identifying feature, revision history**	5 pages partially withheld
	000383 000384-000386	Security screening outcome; specification document revision history; description of the development, requirements, and delivery of the ATR.	4 pages partially withheld
<b>Contract Modification</b>	000387-000402		
	000387, 000390, 000393, 000401,	Rapiscan employee names, titles, signature, email address, and phone number	7 pages partially withheld

	000395-000396, 000399	Pricing information	Exemption 4	8 pages partially withheld
<b>ATR OTE WEEKLY DATA REPORT</b>	000388-000389, 000391-000392, 000397-000398, 000400-000401 000403			
	000403	ATR Testing Results	Exemption 3; 49 U.S.C. 114(r)	1 page partially withheld
<b>AIT ATR PowerPoint July 2011</b>	000404-000421			
	000406	Security screening image analysis criteria and screen shot of hidden items	Exemption 3; 49 114(r)	1 page partially withheld
	000407	screen shot of hidden items	Exemption 3; 49 114(r)	1 page partially withheld
	000408	Security screening system reliability criteria	Exemption 3; 49 114(r)	1 page partially withheld
	000411-000412	Detailed description of key threat detection performance parameters and performance effectiveness	Exemption 3; 49 114(r)	2 pages partially withheld
	000413-000414	Detection comparison Performance analysis and comparison; discussion of security screening technique; performance metrics Specific security-related future plans and goals; specific future testing objectives	Exemption 3; 49 114(r)	2 pages partially withheld

	000416, 000417	Future testing, research/development and deployment plans for AIT/ATR	Exemption 3; 49 114(r)	2 pages partially withheld
	000411-000412	Detailed description of key threat detection performance parameters and performance effectiveness	Exemption 5 deliberative process privilege	2 pages partially withheld
	000413	Chart measuring operational availability And passenger throughput	Exemption 5 deliberative process privilege	1 page partially withheld
	000414	Measurement of passenger throughput	Exemption 5 deliberative process privilege	1 page partially withheld
	000415-000417	Letter of Assessment findings and conclusions pertaining to future use of ATR; security and policy discussion of "next steps" for ATR; and description of future testing operations at three airports	Exemption 5 deliberative process privilege	3 pages partially withheld
	000418-000420	Future budget and purchase projections	Exemption 5 deliberative process privilege	3 pages partially withheld
	000422-000462	Future procurement schedule and deployment goals		
<b>DHS Acquisition Review Board for ATR, 6/13/11</b>				
	000422, 000447, 000451-453	Internal employee names	Exemption 6	5 pages partially withheld
	000423	Internal discussion of future testing and evaluation and of future procurement upgrades	Exemption 3; 49 114(r)	1 page partially withheld

000424	Discussion of ATR's capabilities	Exemption 3; 49 114(r)	1 page partially withheld
000425	Discussion of ATR's performance; includes data and performance metrics	Exemption 3; 49 114(r)	1 partially withheld
000426-000427	ATR effectiveness data and analysis	Exemption 3; 49 114(r)	2 pages partially withheld
000430	Discussion of test excursion methodology	Exemption 3; 49 114(r)	1 page partially withheld
000431-000432	Letter of Assessment conclusions and analysis of test results	Exemption 3; 49 114(r)	2 pages partially withheld
000436	Internal discussion of test results	Exemption 3; 49 114(r)	1 page partially withheld
000437-000438	Description of risks	Exemption 3; 49 114(r)	2 pages partially withheld
000440, 000450	Internal discussion of future testing and evaluation, and equipment procurement	Exemption 3; 49 114(r)	2 pages partially withheld
000423	Discussion of future procurement upgrades	Exemption 5 deliberative process privilege	1 page partially withheld
000425, 000427	Evaluation of ATR's performance	Exemption 5 deliberative process privilege	2 pages partially withheld

	000428-000429	Internal discussion of specific requirements and performance by vendor and development of plan to resolve deferred requirements	Exemption 5 deliberative process privilege	2 pages partially withheld
	000430	Discussion of planned test excursion methodology	Exemption 5 deliberative process privilege	1 page partially withheld
	000431-000443	Description of Letter of Assessment's analysis of test results	Exemption 5 deliberative process privilege	3 pages partially withheld
	000434- 000436	Discussion of planned future acquisition strategy, its schedule and issues of concern	Exemption 5 deliberative process privilege	3 pages partially withheld
	000437-000438	Description/discussion of risks going forward	Exemption 5 deliberative process privilege	2 pages partially withheld
	000439	Discussion of future action items	Exemption 5 deliberative process privilege	1 page partially withheld
	000440	Internal discussion of future testing and evaluation and equipment procurement	Exemption 5 deliberative process privilege	1 page partially withheld
	000442-000443	Summary of program plans to enhance threat detection technologies; internal program recommendation;	Exemption 5 deliberative process privilege	2 pages partially withheld
	000444-000445	Proposed funding and deployment goals for specific security programs	Exemption 5 deliberative process privilege	2 pages partially withheld

	000448-000449	ATR Program cost estimates	Exemption 5 deliberative process privilege	2 pages partially withheld
	000450	Internal discussion of future testing and evaluation, and equipment procurement	Exemption 5 deliberative process privilege	1 page partially withheld
	000454-000455	Internal proposals staffing planning and cross component coordination	Exemption 5 deliberative process privilege	2 pages partially withheld
	000456-000461	NOT RESPONSIVE		6 PAGES WITHHELD
	000462	Discussion of proposed acquisition strategy	Exemption 5 deliberative process privilege	1 page withheld in full
<b>ATR MEMORANDA</b>	000463-000483			
	000463-000464, 000477-000479, 000481-000483	Internal employee name and signature	Exemption 6	8 pages partially withheld
	000463-000464	Discussion of analysis and thought processes of DHS office operational testing and evaluation, and follow-on recommendations for ATR program	Exemption 5 deliberative process privilege	2 pages partially withheld
	000466-000467	Analysis of possible implementation of ATR, including analysis of DHS's operational testing and evaluation of proposed ATR usage	Exemption 5 deliberative process privilege	2 pages partially withheld
		Analysis of ATR's compliance with specific security	Exemption 5	7 pages partially withheld

	000468-000475	performance objectives; conclusions and recommendations for future testing and evaluations	deliberative process privilege	withheld; 1 page withheld in full
000478-000483		Memoranda seeking concurrence with recommendations, and making recommendations pertaining to ATR	Exemption 5 deliberative process privilege	6 pages partially withheld
000464-000465		Operational Requirements Document for AIT System for Checkpoint Operations version date; dates of all AIT technical documents and memoranda	Exemption 3; 49 U.S.C. 114(r)	2 pages partially withheld
000466		Reference to specific basis for anomalies	Exemption 3; 49 U.S.C. 114(r)	1 page partially withheld
000467		Discussion of security elements in control panel screen shot with image	Exemption 3; 49 U.S.C. 114(r)	1 page partially withheld
000470, 000473-000474		Discussion and analysis of ATR effectiveness and functionality; includes specific references to security screening elements	Exemption 3; 49 U.S.C. 114(r)	3 pages partially withheld
000477-000479, 000481-483		AIT security screening concept and SOP revision history; detailed discussion of internal analysis of requirements; discussion of testing and evaluation outcomes, including programmatic recommendations	Exemption 3; 49 U.S.C. 114(r)	6 pages partially withheld
000484-000617				
OPERATIONAL TEST PLAN (OTP) & OPERATIONAL TEST AND EVALUATION (OT&E) FOR				



AIT/ATR	Testing report date and signature dates	Exemption 3; 49 U.S.C. 1149(r)	3 pages partially withheld
000484-000617	Table of content references to sensitive security screening concepts	Exemption 3; 49 U.S.C. 1149(r)	3 pages partially withheld
000486-000488	Question about vulnerability	Exemption 3; 49 U.S.C. 1149(r)	3 pages partially withheld
000489 000490-000491	Description of testing process for upcoming operational testing; discussion of vendor capability requirements; Reference and table revealing security screening requirement and rationale; system description that identifies specific security objective; AIT /ATR image operator staffing proposal; Security Screening SOP reference; security screening techniques	Exemption 3; 49 U.S.C. 1149(r)	1 page withheld in full
000492	AIT ATR screening process flow that contains security screening techniques and operating procedure	Exemption 3; 49 114(r)	2 pages partially withheld
000493-000494	Discussion of purpose and need for AIT ATR and includes references to undisclosed sensitive security concepts; detailed discussions of AIT detection capability including and various layers of security; testing limitations	Exemption 3; 49 114(r)	2 pages partially withheld
000495-000496	Operational testing schedule and activity plan revealing framework and thought processes on how to test security equipment; discussion of additional testing goals	Exemption 3; 49 114(r)	3 pages partially withheld
000497-000499	Discussion of overall testing methodology to be deployed; discussion of testing of specific threats; Data collection methods to be deployed including security screening techniques	Exemption 3; 49 114(r)	3 pages partially withheld
<b>Event Description - Test Design</b>	AIT / ATR testing schedules and references to specific	Exemption 3; 49	3 pages partially withheld

	000500-000502	aspects of the security testing; reference to security screening procedures Reference to testing criteria	114(r)	withheld
	000503	Discussion of testing process pertaining to threat detection	Exemption 3; 49 114(r)	1 page partially withheld
	000504-000514	Discussion of factors evaluated in acquisitions in security context	Exemption 3; 49 114(r)	11 pages partially withheld
	000515-000521, 000523, 000526, 000530-000536	Detailed charts and discussions setting forth testing criterion and measures; listing and discussion of associated security system requirements and threat detection objectives and evaluation process	Exemption 3; 49 114(r)	3 pages withheld in full; 13 pages withheld in part
	000538	Table that describes threat detection and other security system analysis forms used during testing	Exemption 3; 49 114(r)	1 page partially withheld
<b>Testing Data Management</b>	000542, 000544, 000545	Acronyms for undisclosed sensitive security concepts	Exemption 3; 49 114(r)	3 pages partially withheld
	000546-000547	Description of types and compositions of threat objects	Exemption 3; 49 114(r)	2 pages partially withheld
<b>Appendix A -- Detailed System Descriptions</b>	000548, 000550	Sensitive operational testing criteria	Exemption 3; 49 114(r)	2 pages partially withheld
	000551-000558	Screen shots of operational testing data collection forms	Exemption 3; 49	3 pages withheld in

			114(r)	full; 5 pages partially withheld
000560, 000564	Reference to threat detection review of testing data authentication group		Exemption 3; 49 114(r)	2 pages partially withheld
000566-000616	Baseline Correlation Matrix/Requirements Crosswalk Matrix which includes detailed chart discussion of each specific performance requirement to be tested, testing criterion or measure, operational testing measure of performance, and comments		Exemption 3; 49 114(r)	51 pages partially withheld
000617	Discussion of testing articles		Exemption 3; 49 114(r)	1 pages partially withheld
000490	Description of proposed testing process for upcoming operational testing; discussion of vendor capability requirements; reference and table revealing security screening requirement and rationale		Exemption 5	1 page partially withheld
000493-000494	Discussion of opinion about purpose and need for AIT ATR		Exemption 5	1 page partially withheld; 1 page withheld in full
000495-000500	Planned operational testing schedule and activity plan revealing framework and thought processes on how to test security equipment; discussion of additional testing goals		Exemption 5	6 pages partially withheld
000501	Discussion of overall testing methodology to be deployed; discussion of planned testing of specific		Exemption 5	1 page partially

		threats; Data collection methods to be deployed including security screening techniques; proposed testing schedule		withheld
000503		Proposed testing features and criteria, testing data collection methodology	Exemption 5	1 page partially withheld
000504-000514		Planned testing evaluation methodology	Exemption 5	11 pages partially withheld
000515-000536		Proposed testing objective/issue, testing criteria and source of specific requirement to be tested; Provides operational testing data collection methodology; data analysis methodology	Exemption 5	22 pages withheld in full
000539		Planned testing data review designations	Exemption 5	1 page partially withheld
000541		Planned scoring criteria for operational testing	Exemption 5	1 page partially withheld
000548-000550		Planned sensitive operational testing criteria	Exemption 5	3 pages partially withheld
000551-000558		Screen shots of planned operational testing data collection forms	Exemption 5	3 pages withheld in full; 5 pages partially withheld
000562		Discussion of proposed authentication codes and purpose	Exemption 5	1 page partially withheld
000566-000616		Discussion of each specific performance requirement planned to be tested, planned testing criterion or measure, planned operational testing measure of performance, and comments	Exemption 5	51 pages partially withheld

	000617	Discussion of proposed testing articles	Exemption 5	1 page withheld in full
	000485	Names and signatures of internal employees	Exemption 6	1 page partially withheld
FINAL REPORT LAB QUALIFICATION TEST L-3 PRO- VISION	000618-000649			
	000618, 000620	Revision and testing history (dates, version numbers)	Exemption 3; 49 U.S.C. 114(r)	2 pages partially withheld
	000622	Table of contents reference identifying sensitive security-related testing concepts	Exemption 3; 49 U.S.C. 114(r)	1 page partially withheld
	000624, 000626	Version numbers, other sensitive identifying feature of testing; discussion of threat detection requirements and vulnerabilities; dates of reports	Exemption 3; 49 U.S.C. 114(r)	2 pages partially withheld
	000627	Discussion of testing requirement metric, security concepts, and detailed discussion of testing and evaluation methodology	Exemption 3; 49 U.S.C. 114(r)	1 page partially withheld
	000628	Catalogue of qualification test records	Exemption 3; 49 U.S.C. 114(r)	1 page partially withheld
	000629	Reference to specific test metric; reference to key security requirement testing; reference to table 2 that	Exemption 3; 49	1 page partially withheld

		discusses testing modes and processes	U.S.C. 114(r)	withheld
	000630-000631	Tables containing vendor's equipment serial numbers, location at TSA and software versions tested; specific testing activities and dates; reference to testing standard, threat detection objective and discussion of testing results	Exemption 3; 49 U.S.C. 114(r)	2 pages partially withheld
	000632-00637	Several tables detailing requirements and testing results	Exemption 3; 49 U.S.C. 114(r)	2 pages partially withheld
	000641-000649	Several tables detailing requirements and testing results and record references	Exemption 3; 49 U.S.C. 114(r)	9 pages partially withheld
<b>DRAFT FUNCTIONAL REQUIREMENTS DOCUMENTS</b>		44 Drafts of the Functional Requirements Document (ATR)	Exemption 3; 49 U.S.C. 114(r); Exemption 5 Deliberative Process Privilege	1744 pages withheld in full
<b>ATR Test Results</b>	2 databases	ATR Test Results	Exemption 3; 49 U.S.C. 114(r)	1121 pages withheld in full (estimate)

\*The revision histories (including version cites, numbers, dates, schedules, etc.) of performance specifications, standard operating procedures, operational requirements, testing, and other similar documents have been redacted throughout the document under Exemption 3; 49 U.S.C. 114(r)

\*\*This is an estimate of the potential page count; the records from the databases were not printed.

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

_____	)	
ELECTRONIC PRIVACY	)	
INFORMATION CENTER	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:11-cv-00290-ABJ
	)	
THE UNITED STATES TRANSPORTATION	)	
SECURITY ADMINISTRATION	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE**

In accordance with Local Civil Rule 7(h) (LCvR7(h)), Plaintiff Electronic Privacy Information Center (“EPIC”) submits this statement of material facts not in genuine dispute in support of its cross motion for summary judgment.

1. The Transportation Security Administration (“TSA”) is a component of the Department of Homeland Security (“DHS”).
2. In 2005, the TSA began testing Full Body Scanning machines in U.S. airports as a screening technique for travelers on United States commercial aircraft.
3. Full Body Scanners utilize either backscatter x-ray or millimeter wave technology to capture detailed, three-dimensional images of individuals.
4. On April 21, 2010, EPIC and thirty other organizations sent a petition for suspension of the Full Body Scanner Program to Janet Napolitano, Secretary of the DHS.
5. On April 30, 2010, the TSA responded to EPIC’s April 21 Petition, explaining that TSA “worked closely” with ATR manufacturers and Dutch authorities in

their field testing of ATR software at Schiphol Airport in Amsterdam. The TSA attached a letter from Secretary Napolitano to Senator Susan Collins, further detailing the timetable for ATR deployment.

6. On September 8, 2010 Mr. Greg Soule, a spokesman for the TSA, was quoted in a story in Bloomberg News, stating, “TSA continues to explore additional privacy protections for imaging technology.” He also asserted that testing for ATR software was “currently under way.”
7. On September 17, 2010, the TSA announced publicly that the Agency had “just started testing” ATR software.
8. On February 1, 2011, TSA announced that field-testing of the ATR software modifications had begun at Las Vegas McCarran International Airport, Hartsfield Jackson Atlanta International Airport, and Ronald Reagan Washington National Airport.
9. The full rollout of the modifications began on July 20, 2011, for millimeter wave body scanners only.
10. Testing of ATR software on backscatter x-ray machines is supposed to start at some point during Fall 2011.

#### **EPIC’S FIRST FOIA REQUEST**

11. EPIC submitted a Freedom of Information Act (“FOIA”) Request to the Transportation Security Administration (“TSA”) by letter dated June 15, 2010 (“EPIC’s First FOIA Request”), seeking:
  - a. All specifications provided by TSA to automated target recognition manufacturers concerning automated target recognition systems;



- b. All records concerning the capabilities, operational effectiveness, or suitability of automated target recognition systems, as described in Secretary Napolitano's letter to Senator Collins;
  - c. All records provided to TSA from the Dutch government concerning automated target recognition systems deployed in Schiphol Airport, as described in Secretary Napolitano's letter to Senator Collins; and
  - d. All records evaluating the [Full Body Scanning] program and determining automated target recognition requirements for nationwide deployment, as described in Secretary Napolitano's letter to Senator Collins.
12. EPIC's First FOIA Request included a request for News Media Fee status and for a waiver of duplication fees. Plaintiff's Exhibit 1.
13. The TSA responded to EPIC's First FOIA Request on June 24, 2010, acknowledging receipt of the request and assigning it reference number TSA10-0609. TSA further stated that EPIC's "request for expedited treatment" was under consideration, invoking a 10-day extension due to "unusual circumstances," and stating, "as a media requestor, [EPIC] will be charged 10-cents a page for duplication, although the first 100 pages are free." Plaintiff's Exhibit 2.
14. On October 5, 2010, EPIC transmitted to the TSA an administrative appeal regarding EPIC's First FOIA Request ("EPIC's First Appeal"). EPIC appealed TSA's failure to disclose records and the implied denial of EPIC's request for a waiver of duplication fees. Plaintiff's Exhibit 3.
15. The TSA responded to EPIC's First Appeal on October 18, 2010. The TSA referred to EPIC's Administrative Appeal as a "request," and assigned it reference number TSA11-0023. The TSA further invoked a second 10-day extension. Plaintiff's

16. The TSA further responded to EPIC's First Appeal by letter dated November 5, 2010. The TSA stated that the appeals office could not act until "an initial determination has been made as to whether any responsive records may be released," and granting EPIC's fee waiver request. Plaintiff's Exhibit 5.
17. EPIC received no further response to EPIC's First FOIA Request or EPIC's First Appeal.

#### **EPIC'S SECOND FOIA REQUEST**

18. On October 5, 2010, EPIC submitted a FOIA request to the DHS ("EPIC's Second FOIA Request"), requesting:
  - a. All records provided from L3 Communications or Rapiscan in support of the submission or certification of ATR software modifications;
  - b. All contracts, contract amendments, or statements of work related to the submission or certification of ATR software modifications;
  - c. All information, including results, of government testing of ATR technology, as referenced by Greg Soule of the TSA in an e-mail to Bloomberg News, published September 8, 2010.
19. EPIC's Second FOIA Request included a request for expedited processing and a request for News Media fee status and a waiver of duplication fees. Plaintiff's Exhibit 6.
20. The DHS responded to EPIC's Second FOIA Request by letter dated October 20, 2010, assigning the request reference number DHS/OS/PRIV11-0042. The letter asserted the determination that "the information [EPIC was seeking was] under the purview of the [TSA], and DHS referred the request to the Acting FOIA Officer for TSA, Howard Plofker, for processing and direct response. Plaintiff's Exhibit 7.

21. The TSA acknowledged receipt of EPIC's Second FOIA Request by letter dated November 8, 2010, assigning the request reference number TSA11-0080. The TSA denied EPIC's request for expedited processing and for a blanket fee waiver, stating "we shall charge you for records in accordance with DHS Interim FOIA regulations as they apply to media requestors." EPIC was given 60 days to appeal these determinations. Plaintiff's Exhibit 8.
22. EPIC transmitted an administrative appeal to the TSA on December 14, 2010 ("EPIC's Second Appeal"), appealing the TSA's non-responsiveness, the denial of the fee waiver, and the denial of expedited processing. Plaintiff's Exhibit 9.
23. By letter dated December 27, 2010, TSA acknowledged EPIC's "December 14, 2010 correspondence to the [TSA], to appeal TSA's decision regarding your request for a fee waiver and expedited processing." The letter stated, "your request has been assigned reference number TSA11-0257, and asserted that "TSA will invoke a 10-day extension for your request." Plaintiff's Exhibit 10.
24. The TSA further responded to EPIC's Second Appeal by letter dated April 20, 2011. The TSA asserted that the Agency could not act "until an initial determination has been made as to whether any responsive records may be released." The TSA also sustained the denial of EPIC's request for a blanket fee waiver. Plaintiff's Exhibit 11.
25. EPIC received no further response to EPIC's Second FOIA Request or EPIC's Second Appeal.

**COMPLAINT AND PRODUCTION OF DOCUMENTS**

26. The TSA failed to produce any documents or provide a substantive response to EPIC's First FOIA Request or EPIC's Second FOIA Request by the statutory deadlines imposed by the FOIA.
27. EPIC filed the immediate action in the United States District Court for the District of Columbia on February 1, 2011.
28. A preliminary release of documents in response to EPIC's FOIA Requests was sent to EPIC on July 29, 2011.
29. The TSA produced an additional 166 pages of documents on August 22, 2011.
30. TSA issued a final production of documents to EPIC on September 8, 2011, which included a copy of all documents previously produced. A total of 645 documents were produced, in full or in part.
31. Defendant's *Vaughn* Index indicates that 2,865 pages of records have been withheld in full. TSA Motion, Exhibit 1-C.

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

_____	)	
ELECTRONIC PRIVACY	)	
INFORMATION CENTER	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:11-cv-00290-ABJ
	)	
THE UNITED STATES TRANSPORTATION	)	
SECURITY ADMINISTRATION	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S STATEMENT OF GENUINE ISSUES IN OPPOSITION TO  
DEFENDANT’S STATEMENT OF MATERIAL FACTS**

In accordance with LCvR 7(h), Plaintiff the Electronic Privacy Information Center submits this statement of genuine issues in opposition to Defendant’s statement of material facts.

**18. Defendant’s alleged fact:** “All reasonably segregable, non-exempt information has been released. Sotoudeh Decl. ¶¶35, 52, 57.”

**Genuine Issue:** Plaintiff disputes Defendant’s “fact” insofar as it states a legal conclusion.

**21. Defendant’s alleged fact:** “Performance specifications and descriptions of test objects or procedures were designated SSI under 29 C.F.R. § 1520.5(b)(4)(i) and therefore withheld from disclosure. Benner Decl. ¶¶10-12. This designation was made over information contained in pages in the Procurement Specification; Functional Requirements Document (FRD) for ATR; Rapiscan Systems AIT Qualification Data Package for ATR; L-3 AIT ATR QPL; Task Order/Statement of Work for AIT System with ATR for Checkpoint Operations; ATR OTE Weekly Data Report/PowerPoint; DHS Acquisition Review Board for ATR; TSA’s Operational Test Plan (OTP) and Operational Test and Evaluation

(OT&E) or AIT/ATR; and Final Report Lab Qualification Test for L-3 Pro-Vision. Benner Decl. ¶¶13-22; *Vaughn* Index. The release of this information would reveal the scanner's capabilities and vulnerabilities, which could then be exploited by terrorists. Benner Decl. ¶11."

**Genuine Issue:** Plaintiff disputes Defendant's "fact" that "the release of this information would reveal the scanner's capabilities and vulnerabilities, which could then be exploited by terrorists," insofar as it is purely hypothetical.

**23. Defendant's alleged fact:** "The SSI branch designated screening procedures contained in TSA's Operational Test Plan (OTP) and Operational Test and Evaluation (OT&E) or AIT/ATR as SSI under 49 C.F.R. § 1520.5(b)(9)(i). Benner Decl. ¶¶23-24. The release of this information could be detrimental to transportation security because knowledge of the particular algorithms, procedures, protocols, and safeguards used by TSA screeners could enable terrorists to evade or circumvent those procedures. Benner Decl. ¶23."

**Genuine Issue:** Plaintiff disputes Defendant's "fact" that "the release of this information could be detrimental to transportation security because knowledge of the particular algorithms, procedures, protocols, and safeguards used by TSA screeners could enable terrorists to evade or circumvent those procedures," insofar as it is purely hypothetical.

**24. Defendant's alleged fact:** "The vulnerability assessment contained in the DHS Acquisition Review Board for ATR PowerPoint was designated as SSI under 49 C.F.R. § 1520.5(b)(5), and withheld from disclosure. Benner Decl. ¶¶29-30; *Vaughn* Index. The release of this information could be detrimental to transportation security by revealing aspects of the security system that are vulnerable to evasion. Benner Decl. ¶29.

**Genuine Issue:** Plaintiff disputes Defendant’s “fact” that “the release of this information could be detrimental to transportation security by revealing aspects of the security system that are vulnerable to evasion,” insofar as it is purely hypothetical.

**25. Defendant’s alleged fact:** “Electronic images shown on screening equipment monitor were designated as SSI under 49 C.F.R. § 1520.5(b)(9)(vi), and therefore withheld from disclosure. Benner Decl. ¶¶31- 33. This designation was made over several pages from the Rapiscan Systems QDP. Benner Decl. ¶¶33; Vaughn index. Terrorists can derive a “range of operationally useful information” from these images, such as the extent to which the security system is able to detect obscured or camouflaged threat items or items of particular sizes, shapes, and consistencies. Benner Decl. ¶¶31-32.”

**Genuine Issue:** Plaintiff disputes Defendant’s “fact” that “terrorists can derive a ‘range of operationally useful information’ from these images, such as the extent to which the security system is able to detect obscured or camouflaged threat items or items of particular sizes, shapes, and consistencies,” insofar as it is purely hypothetical.

**26. Defendant’s alleged fact:** “The SSI Branch also designated training materials created for the purpose of training screeners who operate the AIT scanners as SSI under 49 C.F.R. § 1520.5(b)(10). Benner Decl. ¶¶34-35; Vaughn index. ‘Training materials, if released to the public, could reveal TSA security screening steps, processes and communication protocols – the type of information that can be exploited by terrorists.’ Benner Decl. ¶¶34.”

**Genuine Issue:** Plaintiff disputes Defendant’s “fact” that “‘Training materials, if released to the public, could reveal TSA security screening steps, processes and communication protocols – the type of information that can be exploited by terrorists,’” insofar as it is purely hypothetical.

**27. Defendant's alleged fact:** "Certain confidential business information submitted to DHS was designated as SSI under 49 C.F.R. § 1520.5(b)(14). Benner Decl. ¶¶36-38. Certain pages from Rapiscan's QDP and L-3's QPL were designated under this section. Benner Decl. ¶¶37-38; Vaughn index. The release of this information would permit adversaries to sabotage transportation security system and exploit system vulnerabilities, and would reveal TSA's security theories and methodology. Benner Decl. ¶38."

**Genuine Issue:** Plaintiff disputes Defendant's "fact" that "the release of this information would permit adversaries to sabotage transportation security system and exploit system vulnerabilities, and would reveal TSA's security theories and methodology," insofar as it is purely hypothetical.

**28. Defendant's alleged fact:** "Finally, the SSI Branch designated information obtained or developed in the conduct of research relating to transportation security as SSI under 49 C.F.R. § 1520.5(b)(15). Benner Decl. ¶¶39-44. On this rationale, the SSI Branch designated as SSI pages in the FRD; ATR Weekly Report/AIT/ATR PowerPoint; DHS Acquisition Review Board Power Point; ATR Internal Action Memoranda; TSA's Operational Test Plan (OTP) and Operational Test and Evaluation (OT&E) or AIT/ATR. Benner Decl. ¶¶40-44; Vaughn index. The withheld information contains information that would allow adversaries to track the progress of security technology development and plans for future technological development, revealing current technological limitations. Benner Decl. ¶¶41-44."

**Genuine Issue:** Plaintiff disputes Defendant's "fact" that "the withheld information contains information that would allow adversaries to track the progress of security



technology development and plans for future technological development, revealing current technological limitations,” insofar as it is purely hypothetical.

**31. Defendant’s alleged fact:** “The Rapiscan Systems Advanced Imaging Technology Qualification Data Package (QDP) was submitted to TSA by Rapiscan. Modica Decl. ¶2. It “describes the capabilities of the Secure 1000 scanner system, including, for example, image resolution measurements, detection capabilities, effectiveness of the system at particular distances, and the ability of Rapiscan’s scanner to operate in multiple configurations,” and “reveals the component parts” of the system. Modica Decl. ¶5. ‘The performance capabilities of this system are very important aspect of the overall design and construction of Rapiscan’s scanner system.’ Modica Decl. ¶5.”

**Genuine Issue:** Plaintiff disputes Defendant’s “fact” that ““the performance capabilities of this system are very important aspect of the overall design and construction of Rapiscan’s scanner system’,” insofar as it is an inference that lacks factual support on the record.

**32. Defendant’s alleged fact:** “The system design and capabilities information is customarily not made available to the public. Modica Decl. ¶5. Rapiscan expected that TSA would not disclose the data it submitted outside the government. Ex. 5, EPIC ATR 00101 (“These data may be reproduced and used by the Government with the express limitation that they will not, without written permission of the Contractor, be used for purposes of manufacture nor disclosed outside the Government.”).”

**Genuine Issue:** Plaintiff disputes Defendant’s “fact” that “Rapiscan expected that TSA would not disclose the data it submitted outside the government,” insofar as it is speculative.

**33. Defendant’s alleged fact:** “Disclosure of design information and performance specifications would cause competitive harm to Rapiscan. Modica Decl. ¶5-6. A competitor with this information would have insight into “the design specifications of the Secure 1000 system and would alert competitors to the standard of performance they must achieve to successfully compete against Rapiscan. Access to such capabilities information, and to design details themselves, would permit a competitor to more effectively design and build its own systems and would, therefore, cause Rapiscan substantial competitive injury.” Modica Decl. ¶6; Sotoudeh Decl. ¶51.”

**Genuine Issue:** Plaintiff disputes Defendant’s “fact” that “disclosure of design information and performance specifications would cause competitive harm to Rapiscan,” insofar as it states a legal conclusion. Plaintiff disputes the remaining portion of Defendant’s “fact” as purely hypothetical.

**34. Defendant’s alleged fact:** “In addition, the QDP reveals information about the tests that Rapiscan uses to establish compliance with TSA’s scanner systems requirements. Modica Decl. ¶7. “The manner in which these tests were performed reveals aspects of Secure the 1000 system design.” Modica Decl. ¶7. Moreover, the testing methods themselves are proprietary, and reflect a “carefully designed a testing protocol to demonstrative compliance TSA’s functional requirements.” Modica Decl. ¶7. If the proprietary testing methods were released, Rapiscan would suffer competitive harm because a competitor could use the testing methods as a “blueprint for demonstrating compliance with the TSA’s scanner-systems requirements.” Modica Decl. ¶7; Sotoudeh Decl. ¶51.”

**Genuine Issue:** Plaintiff disputes Defendant’s “fact” that “if the proprietary testing methods were released, Rapiscan would suffer competitive harm because a competitor

could use the testing methods as a “blueprint for demonstrating compliance with the TSA’s scanner-systems requirements,” insofar as it states a legal conclusion that is based on reasoning that is purely hypothetical.

**40. Defendant’s alleged fact:** “Release of the redacted information about system design in the QPL documents would cause L-3 substantial competitive harm. Weller Decl. ¶¶7, 11-15.”

**Genuine Issue:** Plaintiff disputes Defendant’s “fact” that “release of the redacted information about system design in the QPL documents would cause L-3 substantial competitive harm,” insofar as it states a legal conclusion.

**42. Defendant’s alleged fact:** “Release of this information would cause substantial competitive harm to L-3. Weller Decl. ¶8. ‘Substantiating that the AIT Scanners comply with all government standards and contract requirements is an important part of transactions with the government for AIT scanners.’ Weller Decl. ¶12. If a competitor gained access to this information, it could copy L-3’s techniques and model its technology on L-3’s approach without the investment of resources that L-3 had employed. Weller Decl. ¶8.”

**Genuine Issue:** Plaintiff disputes Defendant’s “facts” that “Release of this information would cause substantial competitive harm to L-3,” and “‘Substantiating that the AIT Scanners comply with all government standards and contract requirements is an important part of transactions with the government for AIT scanners,’” insofar as they state legal conclusions. Plaintiff disputes Defendant’s “fact” that “if a competitor gained access to this information, it could copy L-3’s techniques and model its technology on L-3’s approach without the investment of resources that L-3 had employed,” insofar as it is purely hypothetical.

**44. Defendant's alleged fact:** "The Operations Manual 'reveal[s] how the machine functions.'"

Weller Decl. ¶11. In addition, the Operations Manual "requires understanding, effort and skill to produce,' and is part of L-3's innovation. Weller Decl. ¶11. Moreover, '[a] competitor having access to this manual could copy the manual to improve its own operations manual and its methods of communicating information about operation to users, thereby increasing the value of the competitor's products.' Weller Decl. ¶11. Therefore, the release of this information would cause L-3 substantial competitive harm. Weller Decl. ¶11."

**Genuine Issue:** Plaintiff disputes Defendant's "fact" that "'[a] competitor having access to this manual could copy the manual to improve its own operations manual and its methods of communicating information about operation to users, thereby increasing the value of the competitor's products,'" insofar as it is purely hypothetical. Plaintiff disputes Defendant's "fact" that "the release of this information would cause L-3 substantial competitive harm," insofar as it states a legal conclusion.

**45. Defendant's alleged fact:** "The Qualification Plan "contains proprietary test validation

techniques" used to evaluate the millimeter wave AIT system. Weller Decl. ¶12. "Substantiating that the AIT Scanners comply with all government standards and contract requirements is an important part of transactions with the government for AIT scanners." Weller Decl. ¶12. The release of this information would allow a competitor to copy the proprietary techniques for demonstrating compliance. Weller Decl. ¶12. Therefore, the release of this information would cause L-3 substantial competitive harm. Weller Decl. ¶12."

**Genuine Issue:** Plaintiff disputes Defendant's "fact" that "the release of this information would allow a competitor to copy the proprietary techniques for demonstrating compliance," insofar as it is purely hypothetical. Plaintiff disputes Defendant's "fact" that "the release of this information would cause L-3 substantial competitive harm," insofar as it states a legal conclusion.

**46. Defendant's alleged fact:** "The document containing information about Off-line Processing describes a proprietary tool developed by L-3 that gives L-3 a competitive advantage. The document contains details about this tool, the release of which would "expose techniques, features, and performance parameters." Weller Decl. ¶13. The release of this information would allow a competitor to mimic the approach and techniques of this tool, negating one of L-3's competitive advantages. Weller Decl. ¶13. Therefore, the release of this information would cause L-3 substantial competitive harm. Weller Decl. ¶13."

**Genuine Issue:** Plaintiff disputes Defendant's "fact" that "the release of this information would allow a competitor to mimic the approach and techniques of this tool, negating one of L-3's competitive advantages," insofar as it is purely hypothetical. Plaintiff disputes Defendant's "fact" that "the release of this information would cause L-3 substantial competitive harm," insofar as it states a legal conclusion.

**47. Defendant's alleged fact:** "The Provision Service Manual "contains information on system operation and installation that reveals important system architecture." Weller Decl. ¶14. Revealing this information would permit a competitor to reverse engineer L-3's scanner. Weller Decl. ¶14. This would cause competitive harm to L-3. Weller Decl. ¶14; Sotoudeh Decl. ¶51."

**Genuine Issue:** Plaintiff disputes Defendant's "fact" that "revealing this information would permit a competitor to reverse engineer L-3's scanner," insofar as it is purely hypothetical. Plaintiff disputes Defendant's "fact" that "this would cause competitive harm to L-3," insofar as it states a legal conclusion.

**48. Defendant's alleged fact:** "The Operator Training Manual contains information about operating L-3's scanner. Weller Decl. ¶15. The release of this information would expose details about its operation, including power-up sequencing and proprietary tools for determining system health. Weller Decl. ¶15. Release of this information would allow competitors to copy L-3's proprietary techniques in their own technology. Weller Decl. ¶15. In addition, the Operator Training Manual reflects L-3's proprietary approach to training and providing information about the operation of its scanner. Weller Decl. ¶15. The release of this document would cause substantial competitive harm to L-3. Weller Decl. ¶15; Sotoudeh Decl. ¶51."

**Genuine Issue:** Plaintiff disputes Defendant's "fact" that "release of this information would allow competitors to copy L-3's proprietary techniques in their own technology," insofar as it is purely hypothetical. Plaintiff disputes Defendant's "fact" that "the release of this document would cause substantial competitive harm to L-3," insofar as it states a legal conclusion.

**51. Defendant's alleged fact:** "Some documents submitted by L-3 were withheld in full because the entirety of the document is exempt from disclosure, and the release of any portion of these documents would precipitate the substantial competitive harm identified by the manufacturer. Sotoudeh Decl. ¶52."

**Genuine Issue:** Plaintiff disputes Defendant's "fact" that "some documents submitted by L-3 were withheld in full because the entirety of the document is exempt from disclosure, and the release of any portion of these documents would precipitate the substantial competitive harm identified by the manufacturer," insofar as it is a statement of legal conclusions, first that "the entirety of the document is exempt from disclosure," and second, that "the release of any portion of these documents would precipitate the substantial competitive harm identified by the manufacturer."

**53. Defendant's alleged fact:** "The release of pricing information would cause substantial competitive harm to L-3, because it would allow competitors to underbid the vendors' prices in future competitions. Weller Decl. ¶15."

**Genuine Issue:** Plaintiff disputes Defendant's "fact" that "the release of pricing information would cause substantial competitive harm to L-3, because it would allow competitors to underbid the vendors' prices in future competitions," insofar as it states a legal conclusion that is based on reasoning that is purely hypothetical.

**54. Defendant's alleged fact:** "In addition, these documents contain unique L3 software configuration information, the release of which would cause substantial competitive harm to L3. Weller Decl. ¶15; Sotoudeh Decl. ¶51."

**Genuine Issue:** Plaintiff disputes Defendant's "fact" that "in addition, these documents contain unique L3 software configuration information, the release of which would cause substantial competitive harm to L3," insofar as it states a legal conclusion.

**57. Defendant's alleged fact:** "The release of pricing information would cause substantial competitive harm to Rapisan. Modica Decl. ¶4."

**Genuine Issue:** Plaintiff disputes Defendant's "fact" that "the release of pricing information would cause substantial competitive harm to Rapiscan," insofar as it states a legal conclusion.

**58. Defendant's alleged fact:** "This information would provide "a roadmap" to the vendors' approach to pricing their "scanner systems and related research and development projects." Modica Decl. ¶4."

**Genuine Issue:** Plaintiff disputes Defendant's "fact" that "this information would provide "a roadmap" to the vendors' approach to pricing their "scanner systems and related research and development projects," insofar as it states a legal conclusion and it is a statement with insufficient factual support on the record.

**59. Defendant's alleged fact:** "It would also give competitors insight into the vendors' "pricing strategy, costs, markups, efficiencies, and economies of scale." Modica Decl. ¶4. The release of this information would allow competitors to underbid the vendors' prices in future competitions. Modica Decl. ¶4."

**Genuine Issue:** Plaintiff disputes Defendant's entire "fact" insofar as it is purely hypothetical.

**62. Defendant's alleged fact:** "All reasonably segregable, non-exempt information contained in these pages were released. See Vaughn index."

**Genuine Issue:** Plaintiff disputes Defendant's "fact" that "All reasonably segregable, non-exempt information contained in these pages were released," insofar as it states a legal conclusion.

**72. Defendant's alleged fact:** "Information contained in the Action Memoranda located at bates pages 000478-000483 were withheld from release because they propose action on future



policy decisions and contain contemplative discussions in furtherance of ATR procurement, evaluation, and deployment. Sotoudeh Decl. ¶39; Vaughn index.”

**Genuine Issue:** Plaintiff disputes Defendant’s “fact” insofar as it states a legal conclusion.