

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

ELECTRONIC PRIVACY INFORMATION CENTER	)	
Appellant,	)	
v.	)	No. 13-5113
DEPARTMENT OF HOMELAND SECURITY	)	
Appellee.	)	
	)	

**MOTION TO CONSOLIDATE RELATED APPEALS**

Appellant Electronic Privacy Information Center ("EPIC") submits this Motion to Consolidate Related Appeals, *EPIC v. DHS*, No. 13-5113 and *EPIC v. TSA*, No. 13-5114, under Federal Rule of Appellate Procedure 3(b)(2).

**BACKGROUND**

The appeals at issue arise from two opinions concerning Freedom of Information Act litigation pursued by EPIC against the Department of Homeland Security ("DHS") and the Transportation Security Administration ("TSA") regarding records in the possession of the agencies concerning airport body scanners and the health risks of radiation exposure.

On November 19, 2010, EPIC filed a lawsuit against DHS in the United States District Court for the District of Columbia after the agency failed to comply

with the FOIA's statutory requirements and failed to disclose any responsive records. On February 2, 2011, EPIC filed a similar lawsuit in the same court against TSA. The cases were assigned to the Hon. Royce C. Lamberth. Several months after the lawsuits were filed, DHS and TSA each released some responsive records, but withheld numerous other materials claiming FOIA Exemptions 3, 4, 5, and 6. EPIC challenged the agencies' withholdings in both cases. In September 2011, both the DHS and the TSA filed their motions for summary judgment. EPIC cross-moved for summary judgment against both the DHS and the TSA in October 2011. On March 7, 2013, the District Court issued orders in both cases granting in part and denying in part each party's motion for summary judgment. On April 16, 2013, EPIC filed Notices of Appeal challenging both summary judgment decisions.

### **DISCUSSION**

By this motion, EPIC respectfully requests that this Court consolidate Docket No. 13-5113 with Docket No. 13-5114. Consolidation of related appeals is appropriate "[w]hen the parties have filed separate timely notices of appeal." Fed. R. App. P. 3(b)(2), and the "cases involv[e] essentially the same parties or the same, similar, or related issues." *Handbook of Practice and Internal Procedures* at 23 (D.C. Cir. Dec. 1, 2011).

Consolidation is appropriate here because EPIC is appealing the same legal issue in both cases. Both cases stem from Freedom of Information Act requests to DHS or a subcomponent of DHS (i.e. TSA). Both cases seek records related to bodyscanner machines. Both cases address the withholding of factual materials under FOIA Exemption 5. Both cases were decided by the District Court on the same day and with substantially similar opinions. In addition, the same attorneys at both EPIC and the Department of Justice handled both cases. Hearings and negotiations related to the two cases were routinely held contemporaneously.

EPIC is appealing the same issues in both cases. EPIC intends to argue, in both cases, that the District Court erred in failing to apply the D.C. Circuit's "inextricably intertwined" test before determining that records containing non-deliberative, factual materials may be properly withheld in their entirety under FOIA Exemption 5.

EPIC attempted to contact opposing counsel at Department of Justice to obtain consent to this motion to consolidate, but has not received a response.

Because these two cases involve the same parties, similar facts, the same legal issues, and substantially similar treatment by the District Court, consolidation of their appeals is appropriate.

## **CONCLUSION**

Based on the foregoing, EPIC respectfully requests that the Court consolidate its two appeals, *EPIC v. DHS*, No. 13-5113, and *EPIC v. TSA*, No. 13-5114.

Respectfully submitted,

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