

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

ELECTRONIC PRIVACY INFORMATION CENTER)
1718 Connecticut Avenue, N.W.)
Suite 200)
Washington, DC 20009,)

Plaintiff,)

v.)

Civil Action

DEPARTMENT OF HOMELAND SECURITY)
Washington, DC 20528,)

TRANSPORTATION SECURITY ADMINISTRATION)
400 Seventh Street, S.W.)
Washington, DC 20590,)

and)

DEPARTMENT OF JUSTICE)
950 Pennsylvania Avenue, N.W.)
Washington DC 20530,)

Defendants.)

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for injunctive and other appropriate relief, and seeking the expedited processing and release of agency records requested by the Electronic Privacy Information Center from the Transportation Security Administration and the Federal Bureau of Investigation.

Jurisdiction and Venue

2. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(E)(iii).

This court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

3. Plaintiff Electronic Privacy Information Center ("EPIC") is a public interest research organization incorporated as a not-for-profit corporation in Washington, DC. EPIC's activities include the review of federal law enforcement 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 site on the World Wide Web (www.epic.org) containing extensive information on privacy issues, including information EPIC has obtained from federal agencies under the FOIA.

4. Defendant Department of Homeland Security ("DHS") is a Department of the Executive Branch of the United States Government. DHS is an agency within the meaning of 5 U.S.C. § 552(f).

5. Defendant Transportation Security Administration ("TSA") is a component of Defendant DHS. TSA is an agency within the meaning of 5 U.S.C. § 552(f).

6. Defendant Department of Justice ("DOJ") is a Department of the Executive Branch of the United States Government. DOJ's components include the Federal Bureau of Investigation ("FBI"). DOJ is an agency within the meaning of 5 U.S.C. § 552(f).

Aviation Security and Government Acquisition of Airline Passenger Data

7. Following the terrorist attacks of September 11, 2001, the President signed the Aviation and Transportation Security Act ("ATSA"), Pub. L. No. 107-71. The ATSA created TSA within the Department of Transportation and, *inter alia*, transferred to TSA

the duties and responsibilities set forth in Chapter 449 of Title 49, United States Code, relating to civil aviation security. Those duties and responsibilities include "screening of all passengers." 49 U.S.C. § 44901 (2003).

8. On November 25, 2002, the President signed the Homeland Security Act ("HSA"), Pub. L. No. 107-296. The HSA created DHS and, *inter alia*, transferred the functions of TSA to DHS. 6 U.S.C. § 203 (2003).

9. As part of its responsibilities relating to the screening of airline passengers, TSA has been engaged in the development of what it describes as "the next generation of the Computer Assisted Passenger Prescreening System (CAPPS II)." In a press release titled "TSA's CAPPS II Gives Equal Weight to Privacy, Security," and issued on March 11, 2003, TSA described CAPPS II as "an enhanced system to confirm the identities of passengers and to identify foreign terrorists or persons with terrorist connections before they can board U.S. aircraft." TSA's former administrator, Admiral James M. Loy, stated in the press release that TSA "will accomplish this without compromising the privacy and civil liberties enjoyed by every American," and that "[t]he privacy rights of all passengers will be honored."

10. Since TSA began development of CAPPS II, controversy has surrounded the agency's efforts to obtain detailed passenger data from airlines. The issue has received a great deal of attention in the news media and in Congress. The public interest in the issue, which has focused on the privacy implications of government acquisition of airline passenger data, extends beyond the activities of TSA to other federal agencies.

11. On September 18, 2003, Wired News reported that JetBlue Airways had in September 2002 "provided 5 million passenger itineraries to a defense contractor for

proof-of-concept testing of a Pentagon project unrelated to airline security – with help from the Transportation Security Administration.” The disclosure was widely reported by news media throughout the country.

12. On January 18, 2004, the Washington Post published a front-page article based upon National Aeronautics and Space Administration (“NASA”) documents obtained by Plaintiff under the FOIA. The Post reported that Northwest Airlines had acknowledged that it had, as indicated in the agency documents, disclosed data concerning more than 10 million passengers to NASA. This figure is significantly higher than the number of passenger records at issue in the JetBlue case.

13. On April 9, 2004, AMR Corporation, the parent corporation of American Airlines, issued a press release stating that it had “recently learned that in June 2002, at the request of the Transportation Security Administration (TSA), some passenger travel data was turned over by an American Airlines vendor to four research companies vying for contracts with TSA.” The airline stated that “[t]he discovery came as American reviewed whether it had turned over such data to the TSA following the announcement of data releases by other carriers.”

14. On April 28, 2004, Plaintiff received a document from NASA in response to a FOIA request indicating that Northwest Airlines “gave the FBI one year’s [passenger] data on 6000 CD’s.” The New York Times subsequently published a front-page article on the disclosure revealing that “in the days after the Sept. 11 terrorist attacks in 2001, the nation’s largest airlines, including American, United and Northwest, turned over millions of passenger records to the Federal Bureau of Investigation.”

**Plaintiff's First FOIA Request for Information Concerning the JetBlue
Disclosure and Defendant TSA's Response**

15. On September 22, 2003, Plaintiff wrote to Defendant TSA and requested under the FOIA the following agency records:

- a) any documents or materials relating to JetBlue Airways Corporation;
- b) any documents or materials relating to Axiom Corporation;
- c) any documents or materials relating to Torch Concepts, Inc.; and
- d) any documents or materials relating to SRS Technologies [the primary contractor in the Defense Department project].

16. Plaintiff requested that the processing of its FOIA request be expedited pursuant to 5 U.S.C. § 552(a)(6)(E), noting the public interest in Defendant TSA's possible use of passenger information to test CAPPS II.

17. By telephone and e-mail communication on September 24, 2003, Defendant TSA and Plaintiff agreed that the request would be limited to records from "September 2002 to the present."

18. By letter dated September 30, 2003, Defendant TSA granted expedited processing of Plaintiff's request.

19. By letter dated February 6, 2004, Defendant TSA issued an "interim response" to Plaintiff's request. The response identified a 107-page document that has been withheld in full under 5 U.S.C. §§ 552(b)(3) and (b)(4). Defendant TSA advised Plaintiff of its right to file an administrative appeal of the determination.

20. By letter dated February 10, 2004, Defendant TSA issued a "second interim response" to Plaintiff's request. This response identified a two-page Security Directive that has been withheld in full under 5 U.S.C. § 552(b)(3); a 20-page draft briefing on

reservation booking that has been withheld in full under §§ 552(b)(3) and (b)(5); and an eight-page draft LGB Pilot Test Program briefing that has been withheld in full under §§ 552(b)(3) and (b)(5). Defendant TSA released in full three e-mails consisting of a total of six pages. Defendant TSA advised Plaintiff of its right to file an administrative appeal of the determination.

21. By letter dated February 20, 2004, Defendant TSA issued a “third interim response” to Plaintiff’s request. This response noted that Defendant TSA was waiting for JetBlue Airways and Axiom Corporation to “provide comments on the proprietary information.” Defendant TSA also released in full a 23-page presentation entitled “Homeland Security Airline Passenger Risk Assessment.” Defendant TSA did not advise Plaintiff that it had a right to file an administrative appeal of this determination.

22. By letter dated February 24, 2004, Plaintiff administratively appealed Defendant TSA’s first two interim responses on the grounds that the agency had applied its stated exemptions too broadly, failed to segregate exempt material from non-exempt material, and had not conducted an adequate search for responsive material.

23. By letter dated April 26, 2004, Defendant TSA responded to Plaintiff’s appeal. The agency found that it had mistakenly identified a 79-page document entitled “Navitaire Information Management 9.0 User Guide, Fourth Addition” as 108 pages long in its first interim response, and that Defendant TSA’s decision to withhold this record under 5 U.S.C. § 552(b)(3) was in error. However, Defendant TSA stated that it would continue to withhold the document under 5 U.S.C. § 552(b)(4). Defendant TSA also asserted that neither the two-page Security Directive nor the draft LGB draft Pilot Test Program briefing identified in the second interim response was actually responsive to

Plaintiff's request. Defendant TSA further determined that it had mistakenly identified the 20-page draft briefing on reservation booking mentioned in the second interim response as exempt from disclosure under 5 U.S.C. § 552(b)(3), but stated that it would continue to withhold the document under 5 U.S.C. § 552(b)(5). Defendant TSA claimed that none of the records contained any non-exempt material. Defendant TSA also asserted that the adequacy of its search could not be challenged because a final determination on Plaintiff's request is still pending. Defendant TSA did not advise Plaintiff of a right to judicial review of the determinations contained in the letter.

24. To date, more than eight months after Defendant TSA granted Plaintiff's request for expedited processing, the agency has not issued a final determination on Plaintiff's September 22, 2003 FOIA request.

Plaintiff's Second FOIA Request for Information Concerning the JetBlue Disclosure and Defendant TSA's Response

25. On February 20, 2004, Defendant DHS's Privacy Office released a document entitled "Report to the Public on Events Surrounding jetBlue Data Transfer," which stated, *inter alia*, that officials of Torch Concepts, Inc. met with TSA officials in May and/or June 2002, and that on July 30, 2002, a TSA employee sent JetBlue a written request that the airline provide passenger data to the Defense Department for use in a Torch Concepts study.

26. On April 2, 2004, referencing the DHS Privacy Office's "Report to the Public on Events Surrounding jetBlue Data Transfer," Plaintiff wrote to Defendant TSA and requested under the FOIA the following agency records from September 2001 to September 2002:

- a) any documents or materials relating to JetBlue Airways Corporation;

- b) any documents or materials relating to Axiom Corporation;
- c) any documents or materials relating to Torch Concepts, Inc.; and
- d) any documents or materials relating to SRS Technologies [the primary contractor in the Defense Department project].

27. Plaintiff requested that the processing of its FOIA request be expedited pursuant to 5 U.S.C. § 552(a)(6)(E), noting the public interest in Defendant TSA's possible use of passenger information to test CAPPS II.

28. By telephone and e-mail communication on April 9, 2004, Defendant TSA and Plaintiff agreed that the request would be limited to records involving, concerning, or relating to JetBlue passenger data.

29. By letter dated April 16, 2004, Defendant TSA acknowledged receipt and granted expedited processing of Plaintiff's request.

30. To date, more than two months after Defendant TSA granted expedited processing, the agency has not issued a determination on Plaintiff's April 2, 2004 FOIA request.

Plaintiff's FOIA Request for Information Concerning the American Airlines Disclosure and Defendant TSA's Response

31. On April 12, 2004, Plaintiff wrote to Defendant TSA and requested under the FOIA the following records from September 2001 to the date of Plaintiff's request:

- a) any records concerning, involving, or related to American Airlines passenger data; and
- b) any records concerning, involving, or related to disclosures of passenger data by Airline Automation Inc.

32. Plaintiff requested that the processing of its FOIA request be expedited, pursuant to 5 U.S.C. § 552(a)(6)(E), noting the public interest in Defendant TSA's possible use of passenger information to test CAPPS II.

33. By letter dated April 12, 2004, Defendant TSA acknowledged receipt of Plaintiff's FOIA request.

34. By letter dated April 15, 2004, Defendant TSA granted expedited processing of Plaintiff's request.

35. By letter dated May 19, 2004, Defendant TSA informed Plaintiff that Defendant DHS' Privacy Officer had requested that Plaintiff's request be forwarded to Defendant DHS' FOIA Office for response.

36. To date, nearly two months after Defendant TSA granted expedited processing, neither Defendant TSA nor Defendant DHS has issued a determination on Plaintiff's April 12, 2004 FOIA request.

Plaintiff's FOIA Request for Information Concerning Disclosures of Airline Passenger Data to the FBI and the FBI's Response

37. On May 6, 2004, Plaintiff sent a letter to the FBI requesting the following agency records:

any records concerning, involving or related to the FBI's acquisition of passenger data from any airline since September 11, 2001. This request includes, but is not limited to, any records discussing the legal requirements governing Bureau access and use of air passenger data.

38. Plaintiff requested that the processing of its FOIA request be expedited pursuant to 5 U.S.C. § 552(a)(6)(E) because the request pertained to a matter about which there was "an urgency to inform the public about an actual or alleged federal activity," and the request was made by "a person primarily engaged in disseminating information."

39. Plaintiff provided extensive evidence to support its assertion that there existed “an urgency to inform the public about an actual or alleged federal activity.” Plaintiff demonstrated that the national news media had shown significant interest in the FBI’s collection of passenger data:

On May 1, 2004, the New York Times published a front page article on the disclosure, reporting that “in the days after the Sept. 11 terrorist attacks in 2001, the nation's largest airlines, including American, United and Northwest, turned over millions of passenger records to the Federal Bureau of Investigation.” John Schwartz and Micheline Maynard, *The N.Y. Times*, F.B.I. Got Records on Air Travelers, May 1, 2004, at A1. This article was republished in the *Star Tribune* (Minneapolis, MN), *Omaha World-Herald*, *Atlanta Journal Constitution*, *Pioneer Press* (Saint Paul, MN), *The Ledger* (Lakeland, FL), *Los Angeles Daily News*, *San Jose Mercury News*, *Ocala Star-Banner* (Ocala, FL), *For Worth Star Telegram*, *Spartanburg Herald Journal* (Spartanburg, SC), *Times-Picayune* (New Orleans, LA), *Chattanooga Times Free Press* (Chattanooga, TN), *Kansas City Star*, and *Business Times* (Singapore). On May 2, 2004, the *Washington Post* also published a story about the airlines’ disclosures of passenger data to the FBI. Sara Kehaulani Goo, Airlines Confirm Giving Passenger Data to FBI After 9/11, May 2, 2004, at A14. This article was reprinted in the *Seattle Times*, *Indianapolis Star*, and *Oakland Tribune* (Oakland, CA). The *Wall Street Journal* also published a story on the disclosure. Amy Schatz, Airline Disclosure of Traveler Data Exceeded Prior Acknowledgements, *Wall Street Journal*, May 3, 2004, at A4.

40. In support of its request for expedited processing, Plaintiff discussed the privacy issues raised by the FBI’s activities:

There is a particular urgency for the public to obtain information about the FBI’s acquisition of air passenger information from airlines. The government activity at issue here — the sweeping collection of massive amounts of passenger information without any suspicion that the vast majority of those affected have committed wrongdoing — raises serious privacy implications, particularly in light of evidence that numerous airlines have disclosed passenger data to various government agencies and contractors. Prior to the most recent disclosure, American Airlines became the third airline, after JetBlue Airways and Northwest Airlines, to admit turning over passenger information at the government’s request. See Press Release, AMR Corporation, American Airlines Passenger Data Released In June 2002 (Apr. 9, 2004). The NASA document obtained by EPIC under the FOIA and subsequent news stories indicate that such

disclosures are more commonplace and widespread than previously thought.

41. Plaintiff also noted that Congress has expressed serious concern about prior revelations detailing the acquisition of airline passenger information by Defendant TSA and NASA:

Indeed, government collection of passenger data from airlines is the focus of increasing Congressional inquiry. The Chairman and Ranking Member of the Senate Committee on Governmental Affairs have twice called on the Transportation Security Administration to explain its role in obtaining information from two separate airlines (see attached press releases) (noting that government acquisition of passenger data involves “privacy of personal information” and thus requires “openness and public trust”). Furthermore, members of the Senate Committee on Commerce, Science and Transportation repeatedly asked NASA Administrator Sean O’Keefe about NASA’s acquisition of passenger information from Northwest Airlines during a hearing on the Bush administration’s proposed space exploration program. See U.S. Senate Committee on Commerce, Science and Transportation Holds a Hearing on Administration Space Initiative, 108th Cong. (Jan. 27, 2004).

42. Furthermore, Plaintiff noted that Defendant TSA and NASA have repeatedly granted expedited processing for records concerning agency acquisition and use of airline passenger data:

Other agencies have recognized the urgency to inform the public about government collection and use of passenger data by granting expedited processing for requests involving such matters. EPIC has submitted four FOIA requests to the Transportation Security Administration seeking information about that agency’s role in the collection and use of passenger data from various airlines. All of these requests have been granted expedited processing. Furthermore, NASA granted expedited processing of two requests EPIC submitted seeking information about the agency’s acquisition of passenger information and subsequent passenger profiling research.

43. In support of its assertion that it is “primarily engaged in disseminating information” within the meaning of the FOIA and DOJ regulations, Plaintiff addressed its news collection and dissemination activities:

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 Web site (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 over 15,000 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 Web site. 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 Web site.

44. Finally, Plaintiff noted that “the U.S. District Court for the District of Columbia has held that EPIC is a ‘news media’ requester under the FOIA.” (citing *Electronic Privacy Information Center v. Dep’t of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)).

45. The same day Plaintiff submitted this FOIA request to the FBI, Plaintiff amended its request to state that it had submitted “three FOIA requests to the Transportation Security Administration seeking information about that agency’s role in the collection and use of passenger information from various airlines. All three have been granted expedited processing.”

46. FBI sent Plaintiff a letter dated May 19, 2004, denying Plaintiff’s request for expedited processing. The letter stated, *inter alia*,

Based on the information you have provided, I have determined that your request for expedited processing under this standard should be denied because the primary activity of EPIC does not appear to be information dissemination, which is requested for a requester to qualify for expedited processing. Moreover, you have not demonstrated any particular urgency to inform the public about the subject matter of your request beyond the public’s right to know generally.

Causes of Action

Count I: Defendant TSA has Violated the FOIA by Failing to Complete Its Processing of Plaintiff's September 22, 2003 Request

47. Plaintiff realleges the allegations contained in ¶¶ 1-25.

48. Defendant TSA has failed to comply with the statutory time limits contained in 5 U.S.C. §§ 552(a)(6)(A) with respect to Plaintiff's September 22, 2003 FOIA request.

49. Plaintiff has exhausted the applicable administrative remedies with respect to the above-referenced request.

50. Defendant TSA has wrongfully withheld responsive agency records from Plaintiff.

51. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the requested documents.

Count II: Defendant TSA has Violated the FOIA by Failing to Complete Its Processing of Plaintiff's April 2, 2004 Request

52. Plaintiff realleges the allegations contained in ¶¶ 1-15 and ¶¶ 26-31.

53. Defendant TSA has failed to comply with the statutory time limits contained in 5 U.S.C. §§ 552(a)(6)(A) with respect to Plaintiff's April 2, 2004 FOIA request.

54. Plaintiff has exhausted the applicable administrative remedies with respect to the above-referenced request.

55. Defendant TSA has wrongfully withheld responsive agency records from Plaintiff.

56. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the requested documents.

Count III: Defendants TSA and DHS have Violated the FOIA by Failing to Complete Their Processing of Plaintiff's April 12, 2004 Request

57. Plaintiff realleges the allegations contained in ¶¶ 1-15 and ¶¶ 32-36.

58. Defendants TSA and DHS have failed to comply with the statutory time limits contained in 5 U.S.C. §§ 552(a)(6)(A) with respect to Plaintiff's April 12, 2004 FOIA request.

59. Plaintiff has exhausted the applicable administrative remedies with respect to the above-referenced request.

60. Defendants TSA and DHS have wrongfully withheld responsive agency records from Plaintiff.

61. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the requested documents.

Count IV: The FBI has Violated the FOIA by Failing to Grant Plaintiff's Request for Expedited Processing

62. Plaintiff realleges the allegations contained in ¶¶ 1-15 and ¶¶ 37-46.

63. The FBI has failed to comply with the statutory expedited processing provision contained in 5 U.S.C. §§ 552(a)(6)(E) with respect to Plaintiff's May 6, 2004 FOIA request.

64. Plaintiff has exhausted the applicable administrative remedies with respect to the above-referenced request for expedited processing.

65. The FBI has wrongfully denied Plaintiff's request for expedited processing.

66. Plaintiff is entitled to injunctive relief with respect to the expedited processing of the requested documents.

Count V: The FBI has Violated the FOIA by Failing to Complete Its Processing of Plaintiff's May 6, 2004 Request

67. Plaintiff realleges the allegations contained in ¶¶ 1-15 and ¶¶ 33-42.
68. The FBI has failed to comply with the statutory time limits contained in 5 U.S.C. §§ 552(a)(6)(A) with respect to Plaintiff's May 6, 2004 FOIA request.
69. Plaintiff has exhausted the applicable administrative remedies with respect to the above-referenced request.
70. The FBI has wrongfully withheld responsive agency records from Plaintiff.
71. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the requested documents.

Requested Relief

WHEREFORE, Plaintiff prays that this Court:

- A. order the Defendant DOJ and its component FBI to expedite the processing of Plaintiff's May 6, 2004 FOIA request;
- B. order Defendants TSA and DHS and Defendant DOJ and its component FBI to disclose the requested records in their entirety and make copies available to Plaintiff;
- C. provide for expeditious proceedings in this action;
- D. award Plaintiff its costs and reasonable attorneys fees incurred in this action;
and
- E. grant such other relief as the Court may deem just and proper.

Respectfully submitted,

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D.C. Bar No. 360418

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