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VIA U.S. MAIL (CERTIFIED DELIVERY)

FOIA/PA

The Privacy Office

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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.¹ These companies share a contract worth \$47.9 million, which they signed in April for the supply of 302 full-body scanners.² 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.³ 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 2014.⁴

¹ 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.shtm> (last visited Sept. 24, 2010).

² See Homeland Security Newswire, *supra* note 1.

³ *Id.*

⁴ *Id.*

Recently, L-3 and Rapiscan announced that they had developed software modifications for these scanners.⁵ 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."⁶ 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.⁷ 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.⁸

Although the vendors have stated that the ATR technology will "address most of the privacy concerns,"⁹ questions necessarily remain regarding the scanners' technical specifications and the presence of any privacy safeguards.¹⁰ For instance, though the manufacturers of ATR scanners promote them as "eliminating the generation and review of images,"¹¹ 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."¹² As a result of a later request under the Freedom of Information Act, documents were

⁵ 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/>.

⁶ 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/>

⁷ 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.

⁸ Hughes, *supra* note 5 ["Every passenger will generate an avatar that 'looks like a guy wearing a baseball cap,' [Peter Kant] said."].

⁹ See L3 Communications, *Advanced Imaging Technology – Provision ATD*, <http://www.sds.l-3.com/advancedimaging/provision-at.htm> (last visited Sept. 24, 2010).

¹⁰ 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?"].

¹¹ L3 Communications, *supra* note 9.

¹² 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.¹³ 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.¹⁴ Both L-3 and Rapiscan contracted with the government to supply scanners under these specifications.¹⁵

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.¹⁶ 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.¹⁷ 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.¹⁸

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;

¹³ 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; 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; 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.

¹⁴ *Id.*

¹⁵ *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; Contract between TSA and Rapiscan (received by EPIC Dec. 1, 2009), available at 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.

¹⁶ Hughes, *supra* note 5.

¹⁷ Golden, *supra* note 5; See also Hughes, *supra* note 5 [TSA spokesman Greg Soule states that "testing is currently under way."].

¹⁸ 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, 2010.¹⁹

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.²⁰ Several Senators have expressed concerns with the FBS program through official letters.²¹ 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.²² 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.

¹⁹ *Id.* [TSA spokesman Greg Soule states that "testing is currently under way."]

²⁰ *See infra*, p.2-3.

²¹ 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; 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.

²² 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,

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