

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

ELECTRONIC PRIVACY)	
INFORMATION CENTER)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:09cv2394 (HHK)
)	
UNITED STATES DEPARTMENT OF)	
JUSTICE,)	
)	
Defendant.)	

DEFENDANT’S ANSWER

Defendant Department of Justice (“DOJ”) hereby answers Plaintiff’s Complaint as follows:

In response to the numbered paragraphs and sentences of the Complaint, defendant admits, denies, or otherwise avers 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, Defendant admits that Plaintiff is suing Defendant under the Freedom of Information Act (FOIA), but denies that Defendant is liable to the Plaintiff.

Jurisdiction and Venue

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

Parties

3. This paragraph contains Plaintiff's characterizations of itself, its purpose, and its activities, to which no response is required. To the extent a response is required, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

4. Admit.

Facts

5. Admit.

6. Admit.

7. Admit.

8. Deny except to admit that the U.S. Marshals Service ("USMS") has tested machines using millimeter wave technology, which some characterize as "whole body imaging" technology, at two federal courthouses. Defendant further avers that that the BIS WDS® Gen 2 was tested at the United States District Court for the Middle District of Florida (Orlando Division) and is currently still in use at that courthouse. Defendant further avers that that the Millivision System 350 was tested at the United States District Court for the District of Columbia, but is no longer in use there.

9. This paragraph appears to refer to the contents of two Federal government web pages that are not produced by Defendant, <http://www.tsa.gov/blog/labels/privacy.html> and http://www.tsa.gov/approach/tech/imaging_technology.shtm. Defendant respectfully refers the Court to these web pages for a complete and accurate representation of their contents.

10. Admit that whole-body imaging 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.

Similarly, the term “completely undressed” is a characterization to which no response is required.

11. This paragraph consists of Plaintiff’s characterizations of the similarities of systems implemented by the USMS to systems implemented by “other government entities,” to which no response is required. To the extent a response is deemed required, deny.

12. 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 a response is not required. To the extent that a response is required, Defendants respectfully refer the Court to the text of H.R. 2200, which speaks for itself.

13. This paragraph contains Plaintiff’s characterizations of H.R. 2200, to which a response is not required. To the extent that a response is required, Defendants respectfully refer the Court to the text of H.R. 2200, which speaks for itself.

14. This paragraph contains Plaintiff’s characterizations of the status of H.R. 2200, to which a response is not required. To the extent a response is required, Defendant respectfully refers the Court to <http://thomas.loc.gov> for a complete and accurate representation of the status of the legislation.

15. The first half of this paragraph is Plaintiff’s characterization of “lawmakers” opinions regarding whole-body imaging machines, to which no response is required. With regard to the second half of this paragraph, Defendant respectfully refers the Court to an October 1, 2009 Department of Homeland Security press release, http://www.dhs.gov/ynews/releases/pr_1254405418804.shtm, which speaks for itself.

EPIC Submitted a FOIA Request to USMS Regarding Whole Body Imaging

16. Admit receipt of a letter from plaintiff dated July 2, 2009. Defendant respectfully refers the Court to Plaintiff's letter, attached as Exhibit A, for a true and accurate statement of its contents.

17. Admit receipt of a letter from plaintiff dated July 2, 2009. Defendant respectfully refers the Court to Plaintiff's letter, attached as Exhibit A, for a true and accurate statement of its contents.

18. Admit receipt of a letter from plaintiff dated July 2, 2009. Defendant respectfully refers the Court to Plaintiff's letter, attached as Exhibit A, for a true and accurate statement of its contents.

The DOJ Failed to Make a Determination Regarding EPIC's FOIA Request and Failed to Disclose Any Documents

19. Admit.

20. Defendant respectfully refers the Court to DOJ's letter of July 6, 2009, attached as Exhibit B, for a true and accurate statement of its contents.

21. Deny.

EPIC Filed an Administrative Appeal With DOJ

22. Admit that Plaintiff appealed the USMS response to the DOJ's Office of Information and Privacy (OIP) by letter dated July 30, 2009. Defendant respectfully refers the Court to Plaintiff's letter, attached as Exhibit C, for a true and accurate statement of its contents.

23. Admit that Plaintiff appealed the USMS response to the Office of Information and Privacy (OIP) by letter dated July 30, 2009. Defendant respectfully refers the Court to Plaintiff's letter, attached as Exhibit C, for a true and accurate statement of its contents.

24. Admit that Plaintiff appealed the USMS response to the Office of Information and Privacy (OIP) by letter dated July 30, 2009. Defendant respectfully refers the Court to Plaintiff's letter, attached as Exhibit C, for a true and accurate statement of its contents.

The DOJ Failed to Perform an Adequate Search for, or Produce, Documents Responsive to EPIC's Request

25. Admit that DOJ, through the USMS, responded to EPIC on August 7, 2009. Defendant respectfully refers the Court to USMS's letter, attached as Exhibit D, for a true and accurate statement of its contents.

EPIC Appealed the DOJ's Finding that it Possessed No Responsive Records

26. Admit that Plaintiff transmitted a second administrative appeal on October 2, 2009. Defendant respectfully refers the Court to Plaintiff's letter of October 2, 2009, attached as Exhibit E, for a true and accurate statement of its contents.¹

27. Admit that Plaintiff transmitted a second administrative appeal on October 2, 2009. Defendant respectfully refers the Court to Plaintiff's letter of October 2, 2009, attached as Exhibit E, for a true and accurate statement of its contents.

28. Admit that Plaintiff transmitted a second administrative appeal on October 2, 2009. Defendant respectfully refers the Court to Plaintiff's letter of October 2, 2009, attached as Exhibit E, for a true and accurate statement of its contents.

The DOJ Failed to Respond to EPIC's Second Appeal

29. Deny. Defendant further avers that DOJ sent Plaintiff a response, attached as Exhibit F, in which it denied plaintiff's request for expedited treatment of Plaintiff's appeal and informed Plaintiff that its appeal would be processed in turn.

30. Deny.

¹ Exhibit E contains Plaintiff's letter of October 2, 2009 and does not include the letter's attached appendices, as these appendices are duplicative of Exhibits A-D.

31. Admit.

32. Admit.

Count 1

Violation of the FOIA: Failure to Comply With Statutory Deadlines

33. This paragraph realleges and incorporates all preceding paragraphs. To the extent a response is required, Defendant incorporates its responses to the specific preceding paragraphs.

34-38. These paragraphs consist of conclusions of law to which no response is required. To the extent a response is deemed required, Defendant denies the allegations of these paragraphs.

The remaining paragraphs represent plaintiff's prayer for relief to which no response is required.

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

Requested Relief

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

1. Deny Plaintiff's request to order Defendant to conduct an adequate search (including, but not limited to, all sites at which the USMS operates WBI technology) for agency records responsive to EPIC's FOIA Request within five working days of the date of the Court's Order in this matter;

2. Deny Plaintiff's request to order Defendant to produce all responsive agency records within ten business days of the Court's Order in this matter;

3. Deny Plaintiff's request for an award of costs and reasonable attorneys' fees incurred in this action;

4. Deny all other relief sought by Plaintiff;

5. Enter judgment dismissing the Complaint with prejudice; and

6. Award Defendant such relief as the Court may deem appropriate.

Date: February 18, 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)
U.S. Department of Justice
Civil Division, Federal Programs Branch

Mailing Address:
Post Office Box 883
Washington, D.C. 20044

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20 Massachusetts Ave., N.W.
Washington, D.C. 20001

Telephone: (202) 514-2849
Fax: (202) 616-8460
Email: jesse.z.grauman@usdoj.gov

Attorneys for Defendants

EXHIBIT A



July 2, 2009

VIA E-MAIL (usms.foia@usdoj.gov) and U.S. MAIL (CERTIFIED DELIVERY)
 William E. Bordley, Associate General Counsel
 Office of General Counsel
 United States Marshals Service
 Department of Justice
 CS-3, 12th Floor
 Washington, D.C. 20530-1000

1718 Connecticut Ave NW

Suite 200

Washington DC 20009

USA

+1 202 483 1140 [tel]

+1 202 483 1248 [fax]

www.epic.org

Dear Mr. Bordley:

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 the technical specifications of Whole Body Imaging hardware, including the limitations on image capture and storage, and related documents.

Background

In February 2007, the Transportation Security Administration ("TSA"), a Department of Homeland Security ("DHS") component, began testing passenger imaging technology to screen air travelers.¹ Passenger imaging is often called "whole body imaging."² The initial tests involved whole body imaging systems based on backscatter technology.³ In October 2007, the TSA began testing whole body imaging systems based on millimeter wave technology.⁴ In addition to voluntary passenger screening, the TSA also conducts covert tests with officers.⁵ These covert tests, according to the TSA, demonstrate that the WBI scanners more effectively detect threats than metal detectors.⁶

However, the use of WBI scanners raises serious privacy concerns. These systems produce detailed, three-dimensional images of individuals. Security experts have described whole body scanners as the equivalent of "a physically invasive strip-search."⁷ On October 11, 2007, the

¹ TSA: Whole Body Imaging, http://www.tsa.gov/approach/tech/body_imaging.shtm (last visited Apr. 10, 2009).

² See Whole Body Imaging Technology, EPIC, <http://epic.org/privacy/airtravel/backscatter/> (last visited Apr. 10, 2009).

³ TSA: Whole Body Imaging, *supra* note 1.

⁴ *Id.*

⁵ TSA: Covert Testing, http://www.tsa.gov/what_we_do/screening/covert_testing.shtm (last visited June, 26, 2009).

⁶ *Id.*

⁷ 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; see also Schneier on Security, June 9, 2005, 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.").

TSA provided various assurances regarding its use of whole body imaging. The TSA stated that whole body imaging would not be mandatory for passengers, but rather "a voluntary alternative to a pat-down during secondary screening."⁸ Passengers are not typically required to submit to secondary screening, but are selected for additional screening if they set off a metal detector⁹ or wear baggy clothing.¹⁰ The DHS's Privacy Impact Assessment of whole body imaging is predicated on the non-mandatory use of the technology for primary screening.¹¹ The TSA assured travelers that "a security algorithm will be applied to the image to mask the face of each passenger."¹² The TSA said that the picture generated by whole body imaging "will never be stored, transmitted or printed, and it will be deleted immediately once viewed."¹³ Moreover, the TSA states that, "to ensure privacy, the passenger imaging technology being tested by TSA has zero storage capability and images will not be printed stored or transmitted. Once the transportation security officer has viewed the image and resolved anomalies, the image is erased from the screen permanently. The officer is unable to print, export, store or transmit the image."¹⁴

On April 27, 2007, the TSA removed from its web site assurances that its whole body imaging technology "incorporate[s] a privacy algorithm" that "eliminate[s] much of the detail shown in the images of the individual while still being effective from a security standpoint."¹⁵ The removal calls into question the TSA's commitment to keeping its promises concerning privacy safeguards. On February 18, 2009 the TSA announced that it would require passengers at six airports to submit to whole body imaging in place of the standard metal detector search.¹⁶ This contradicts previous assurances that whole body imaging is "voluntary." The TSA's February 18, 2009 statement also indicates that the DHS component may renege on other privacy assurances by "exploring and testing technologies" ... in new configurations ...¹⁷ On April 6, 2009, the TSA announced that it plans to expand the mandatory use of whole body imaging to all airports.¹⁸ All passengers must "go through the whole-body imager instead of the walk-through metal detector," the TSA said.

⁸ *TSA Tests Second Passenger Imaging Technology at Phoenix Sky Harbor Airport*, Transportation Security Administration, October 11, 2007 available at http://www.tsa.gov/press/releases/2007/press_release_10112007.shtm; see also *X-Ray Backscatter Technology and Your Personal Privacy*, <http://www.tsa.gov/research/privacy/backscatter.shtm> (last visited Apr. 10, 2009) (stating "Backscatter is a voluntary option for passengers undergoing secondary screening as an alternative to the physical pat down procedures").

⁹ *How to Get Through the Line Faster*, http://www.tsa.gov/travelers/airtravel/screening_experience.shtm (last visited Apr. 10, 2009).

¹⁰ *TSA's Head-to-Toe Screening Policies*, Transportation Security Administration, October 15, 2007 available at http://www.tsa.gov/press/happenings/sop_facts.shtm.

¹¹ *Privacy Impact Assessment for TSA Whole Body Imaging*, DHS, October 17, 2008, available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_tsa_wbi.pdf (stating "Individuals will be able to choose to undergo [whole body imaging] screening in primary [screening].").

¹² *Id.*

¹³ *Id.*

¹⁴ TSA: Whole Body Imaging, note 1 *supra*.

¹⁵ *Compare TSA: Privacy*, Mar. 16, 2007 available at <http://web.archive.org/web/20070316125218/http://www.tsa.gov/research/privacy/faqs.shtm> with TSA: Privacy, Apr. 27, 2007 available at

<http://web.archive.org/web/20070427205030/http://www.tsa.gov/research/privacy/faqs.shtm> with TSA: Privacy, <http://www.tsa.gov/research/privacy/faqs.shtm> (last visited Apr. 10, 2009).

¹⁶ *TSA Continues Millimeter Wave Passenger Imaging Technology Pilot*, Transportation Security Administration, February 18, 2009 available at http://www.tsa.gov/press/happenings/mwave_continues.shtm.

¹⁷ *Id.*

¹⁸ Sharkey, *supra* note 4.

The millimeter wave scanner being tested by the TSA is the ProVision Whole Body Imager produced by L-3 Communications.¹⁹ This technology “penetrates clothing and packaging” and consists of systems that can “easily be configured to meet specific . . . facility requirements.”²⁰ Rapiscan’s Secure 1000 scanner is certified by DHS for homeland security.²¹ This technology allows operators to save images from the scanner on the system’s hard disk or on an external disk “for training and legal documentation. The stored images can be recalled and viewed on the system monitor or on any IBM compatible personal computer with color graphics.”²²

Other federal agencies use WBI systems. The Department of Defense uses WBI systems to screen individuals.²³ Federal courts use the technology to screen visitors.²⁴ Correctional institutions employ WBI systems, and the U.S. Department of Justice has commissioned studies regarding WBI technology.²⁵

The U.S. Marshal’s Service is responsible for the protection of the federal judiciary. In fulfilling this responsibility, “the Marshals Service’s Judicial Security Systems (JSS) group designs and coordinates the installation of complex electronic security systems to protect federal judges, courthouse staff members and the physical court facilities.”²⁶ Additionally, the Marshal’s Service performs physical security surveys across the country.²⁷

On June 4, 2009, the U.S. House of Representatives passed a bill that will limit the use of WBI systems in airports.²⁸ The bill prevents use of this technology for primary screening purposes.²⁹ The bill was referred to the Senate for consideration on June 8, 2009. As the Senate considers legislation on the authorized use of this invasive technology, it is imperative that the public has the relevant information to participate in the debate. The documents requested below will facilitate this discussion.

¹⁹ Blair Watson, *More Airports Using Body-revealing Scanners*, Aug. 26, 2008, <http://www.msnbc.msn.com/id/26408850/>

²⁰ Whole Body Imaging, Provision Product Page, L-3 Communications, <http://www.l-3com.com/products-services/productservice.aspx?type=p&id=866> (last visited July 2, 2009).

²¹ Rapiscan Secure 1000, Produce Page, <http://www.rapiscansystems.com/sec1000.html> (last visited July 2, 2009).

²² Backscatter, Rapiscan Secure 1000, FAQ, <http://www.rapiscansystems.com/sec1000faqs.html#10> (last visited July 2, 2009).

²³ Millimeter Wave Technology, Scans for More than Just Security, Dep’t. of Energy, http://www.energy.gov/discovery/millimeter_wave_technology.html.

²⁴ Imaging Technology, Transportation Security Administration, http://www.tsa.gov/approach/tech/imaging_technology.shtm (citing WBI deployment at a Virginia federal court, state courts in Colorado Springs, Los Angeles, and Cook County, as well as the Pennsylvania Department of Corrections).

²⁵ *Id.*, G. Richard Huguenin, et al., *A Final Report to the National Institute for Justice: Millivision Millimeter Wave Imagers*, Apr. 15, 1997 available at <http://www.ncjrs.gov/pdffiles1/nij/grants/181652.pdf>.

²⁶ Protecting the Courts, U.S. Marshal’s Service, <http://www.usmarshals.gov/duties/courts.htm> (last visited July 2, 2009).

²⁷ *Id.*

²⁸ H.R. 2200, 111th Cong., as amended by H. Amend. 172 (1st Sess. 2009).

²⁹ *Id.*

Documents Requested

EPIC requests copies of the following agency records:

1. All unfiltered or unobscured images captured using Whole Body Imaging technology.
2. All contracts entered into by the U.S. Marshal's Service pertaining to Whole Body Imaging systems, including contracts for hardware, software, or training.
3. All documents detailing the technical specifications of Whole Body Imaging hardware, including any limitations on image capture, storage, or copying.
4. All documents, including but not limited to presentations, images, and videos, used for training persons to use Whole Body Imaging systems.
5. All complaints related to the use of Whole Body Imaging and all documents relating to the resolution of those complaints.
6. All documents concerning data breaches of images generated by Whole Body Imaging technology.

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 Whole Body Imaging systems as the U.S. Senate is currently considering a bill that would limit the use of this technology. This technology is currently being used at nineteen airports across the country. The documents requested by EPIC will inform the public regarding the capabilities, uses, and effectiveness of these controversial scanners.

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 28 C.F.R. § 16.5(d)(4) provides, I will anticipate your determination on our request within ten (10) calendar days.

Sincerely,



Courtney Barclay
EPIC Visiting Scholar



John Verdi
Director
EPIC Open Government Project

EXHIBIT B

Robinson, Nancy (USMS)

From: Robinson, Nancy (USMS)
Sent: Monday, July 06, 2009 1:17 PM
To: 'Courtney Barclay'
Subject: RE: FOIA REQUEST 2009USMS13697

July 6, 2009

Courtney A. Barclay
EPIC
1718 Connecticut Avenue, N.W.
Suite 200
Washington, DC 20009

RE: Freedom of Information/Privacy Act Request No. 2009USMS13697

Dear Requester:

The United States Marshals Service is in receipt of your Freedom of Information/Privacy Act request for records maintained by this Bureau. We have commenced a search for documents responsive to your request and will contact you when our processing is complete.

Although we are unable to determine at this time the amount of fees to be charged to you, if any, the filing of your request constitutes your agreement to pay all applicable fees that may be charged under 28 C.F.R. § 16.11 or § 16.49, up to \$25.00. You will be notified as soon as practicable if the estimated or actual fee for satisfying your request exceeds \$25.00.

If you should have any questions, please contact us at (202) 307-9054.

Sincerely,

William E. Bordley
Associate General Counsel/FOIPA Officer
Office of General Counsel

-----Original Message-----

From: Courtney Barclay [mailto:barclay@epic.org]
Sent: Thursday, July 02, 2009 3:09 PM
To: USMS FOIA
Cc: John Verdi; barclay@epic.org
Subject: FOIA REQUEST

7/6/2009

Mr. Bordley,

This email 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 the technical specifications of Whole Body Imaging hardware, including the limitations on image capture and storage, and related documents.

Please find the full request pasted below as well as attached as a PDF file.

Sincerely,
Courtney A. Barclay
Visiting Scholar
Electronic Privacy Information Center
barclay@epic.org

7/6/2009

EXHIBIT C



July 30, 2009

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

VIA U.S. MAIL (CERTIFIED DELIVERY)

Office of Information and Privacy
U.S. Department of Justice
Suite 11050
1425 New York Avenue, N.W.
Washington, D.C. 20530-0001

RE: Freedom of Information Act Appeal (FOIA Request No. 2009USMS13697)

Dear Information and Privacy Officer:

This letter constitutes an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted to the United States Marshals Service ("USMS") of the Department of Justice ("DOJ") on behalf of the Electronic Privacy Information Center ("EPIC").

On July 2, 2009, EPIC requested from the USMS, *via* certified mail, technical specifications of Whole Body Imaging hardware, including the limitations on image capture and storage, and related documents. Specifically, EPIC requested:

1. All unfiltered or unobscured images captured using Whole Body Imaging technology.
2. All contracts entered into by the U.S. Marshals Service pertaining to Whole Body Imaging systems, including contracts for hardware, software, or training.
3. All documents detailing the technical specifications of Whole Body Imaging hardware, including any limitations on image capture, storage, or copying.
4. All documents, including but not limited to presentations, images, and videos, used for training persons to use Whole Body Imaging systems.
5. All complaints related to the use of Whole Body Imaging and all documents relating to the resolution of those complaints.
6. All documents concerning data breaches of images generated by Whole Body Imaging technology.

See Appendix 1 ("EPIC's FOIA Request").

Factual Background

In February 2007, the TSA, a Department of Homeland Security (“DHS”) component, began testing passenger imaging technology to screen air travelers.¹ Passenger imaging is often called “whole body imaging.”² The initial tests involved whole body imaging systems based on backscatter technology.³ In October 2007, the TSA began testing whole body imaging systems based on millimeter wave technology.⁴ In addition to voluntary passenger screening, the TSA also conducts covert tests with officers.⁵ These covert tests, according to the TSA, demonstrate that the WBI scanners more effectively detect threats than metal detectors.⁶

However, the use of WBI scanners raises serious privacy concerns. These systems produce detailed, three-dimensional images of individuals. Security experts have described whole body scanners as the equivalent of “a physically invasive strip-search.”⁷ On October 11, 2007, the TSA provided various assurances regarding its use of whole body imaging. The TSA stated that whole body imaging would not be mandatory for passengers, but rather “a voluntary alternative to a pat-down during secondary screening.”⁸ Passengers are not typically required to submit to secondary screening, but are selected for additional screening if they set off a metal detector⁹ or wear baggy clothing.¹⁰ The DHS’s Privacy Impact Assessment of whole body imaging is predicated on the non-mandatory use of the technology for primary screening.¹¹ The TSA assured travelers that “a security algorithm will be applied to the image to mask the face of each passenger.”¹² The TSA said that the picture generated by whole body imaging “will never be stored, transmitted or printed, and it will be deleted immediately once viewed.”¹³ Moreover, the DHS stated that, “the WBI technology used by TSA has zero storage capacity. Images cannot be

¹ TSA, *TSA IED Mitigation: 2005 to Present*, Nov. 15, 2007, available at http://www.tsa.gov/press/happenings/tsa_ied_mitigation.shtm.

² See EPIC, *Whole Body Imaging Technology*, <http://epic.org/privacy/airtravel/backscatter/> (last visited July 27, 2009).

³ TSA, *supra* note 1.

⁴ TSA, *TSA Tests Second Passenger Imaging Technology at Phoenix Sky Harbor Airport*, Oct. 11, 2007, available at http://www.tsa.gov/press/releases/2007/press_release_10112007.shtm.

⁵ TSA: *Covert Testing*, http://www.tsa.gov/what_we_do/screening/covert_testing.shtm (last visited July 27, 2009).

⁶ *Id.*

⁷ 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; see also Bruce Schneier, *Backscatter X-Ray Technology*, SCHNEIER ON SECURITY, June 9, 2005,

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.”).

⁸ TSA, *supra* note 4; see also Nico Melendez, *Catch a Wave and Avoid a Pat Down*, THE TSA BLOG, Apr. 17, 2008, <http://www.tsa.gov/blog/2008/04/catch-wave-and-avoid-pat-down.html> (“[Whole body imaging] remains an optional screening method for passengers. It’s voluntary so if you’re selected for additional screening and you prefer the physical pat-down, just let our officers know.”).

⁹ TSA, *How to Get Through the Line Faster*, http://www.tsa.gov/travelers/airtravel/screening_experience.shtm (last visited July 27, 2009).

¹⁰ TSA, *TSA’s Head-to-Toe Screening Policies*, Oct. 15, 2007,

http://www.tsa.gov/press/happenings/sop_facts.shtm.

¹¹ DHS, *PRIVACY IMPACT ASSESSMENT FOR TSA WHOLE BODY IMAGING 2 (2008)*, available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_tsa_wbi.pdf (“Individuals will be able to choose to undergo [whole body imaging] screening in primary [screening].”).

¹² TSA, *supra* note 4.

¹³ *Id.*

printed, stored, exported, or transmitted. Once the TSO has viewed the image and resolved anomalies, the image is erased from the screen and permanently lost."¹⁴

On April 27, 2007, the TSA removed from its web site assurances that its whole body imaging technology "incorporate[s] a privacy algorithm" that "eliminate[s] much of the detail shown in the images of the individual while still being effective from a security standpoint."¹⁵ The removal calls into question the TSA's commitment to keeping its promises concerning privacy safeguards. On February 18, 2009 the TSA announced that it would require passengers at six airports to submit to whole body imaging in place of the standard metal detector search.¹⁶ This contradicts previous assurances that whole body imaging is "voluntary." The TSA's February 18, 2009 statement also indicates that the DHS component may renege on other privacy assurances by "exploring and testing technologies . . . in new configurations."¹⁷ On April 6, 2009, the TSA announced that it plans to expand the mandatory use of whole body imaging to all airports.¹⁸ All passengers must "go through the whole-body imager instead of the walk-through metal detector," the TSA said.¹⁹

The millimeter wave scanner being tested by the TSA is the ProVision Whole Body Imager produced by L-3 Communications.²⁰ This technology "penetrates clothing and packaging" and consists of systems that can "easily be configured to meet specific . . . facility requirements."²¹ Rapiscan's Secure 1000 scanner is certified by DHS for homeland security.²² This technology allows operators to save images from the scanner on the system's hard disk or on an external disk "for training and legal documentation. The stored images can be recalled and viewed on the system monitor or on any IBM compatible personal computer with color graphics."²³

Other federal agencies use WBI systems. The Department of Defense uses WBI systems to screen individuals.²⁴ Federal courts use the technology to screen visitors.²⁵ Correctional

¹⁴ DHS, PASSENGER SCREENING PROGRAM: PROGRAM SPECIFIC RECOVERY ACT PLAN 6 (2009), available at http://www.dhs.gov/xlibrary/assets/recovery/TSA_PSP_Recovery_Act_Plan_Final_2009-05-15.pdf.

¹⁵ Compare TSA, Privacy, Mar. 16, 2007, available at <http://web.archive.org/web/20070316125218/http://www.tsa.gov/research/privacy/faqs.shtm> with TSA, Privacy, Apr. 27, 2007, available at <http://web.archive.org/web/20070427205030/http://www.tsa.gov/research/privacy/faqs.shtm> and TSA, Privacy, <http://www.tsa.gov/research/privacy/faqs.shtm> (last visited Apr. 10, 2009).

¹⁶ TSA, *TSA Continues Millimeter Wave Passenger Imaging Technology Pilot*, Feb. 18, 2009 available at http://www.tsa.gov/press/happenings/mwave_continues.shtm.

¹⁷ *Id.*

¹⁸ Sharkey, *supra* note 7.

¹⁹ *Id.*

²⁰ Blair Watson, *More Airports Using Body-revealing Scanners*, Aug. 26, 2008, <http://www.msnbc.msn.com/id/26408850/>.

²¹ L-3 Communications, *Whole Body Imaging, ProVision Product Page*, <http://www.l-3com.com/products-services/productservice.aspx?type=p&id=866> (last visited July 27, 2009).

²² Rapiscan Systems, *Rapiscan Secure 1000 Product Page*, <http://www.rapiscansystems.com/sec1000.html> (last visited July 27, 2009).

²³ Rapiscan Systems, *Backscatter, Rapiscan Secure 1000, FAQ*, <http://www.rapiscansystems.com/sec1000faqs.html#10> (last visited July 27, 2009).

²⁴ Dep't of Energy, *Millimeter Wave Technology, Scans for More than Just Security*, http://www.energy.gov/discovery/millimeter_wave_technology.html (last accessed July 27, 2009).

²⁵ TSA, *Imaging Technology*, http://www.tsa.gov/approach/tech/imaging_technology.shtm (citing WBI deployment at a Virginia federal court, state courts in Colorado Springs, Los Angeles, and Cook County, as well as the Pennsylvania Department of Corrections) (last accessed July 27, 2009).

institutions employ WBI systems, and the U.S. Department of Justice has commissioned studies regarding WBI technology.²⁶

The U.S. Marshals Service is responsible for the protection of the federal judiciary. In fulfilling this responsibility, "the Marshals Service's Judicial Security Systems (JSS) group designs and coordinates the installation of complex electronic security systems to protect federal judges, courthouse staff members and the physical court facilities."²⁷ Additionally, the Marshal's Service performs physical security surveys across the country.²⁸

On June 4, 2009, the U.S. House of Representatives passed a bill that will limit the use of WBI systems in airports.²⁹ The bill prevents use of this technology for primary screening purposes.³⁰ The bill was referred to the Senate for consideration on June 8, 2009. As the Senate considers legislation on the authorized use of this invasive technology, it is imperative that the public has the relevant information to participate in the debate. The documents requested above will facilitate this discussion.

Procedural Background

On July 2, 2009, EPIC transmitted EPIC's FOIA Request to the USMS. *See* Appendix 1.

On July 6, 2009, the USMS wrote to EPIC acknowledging receipt of EPIC's FOIA Request, but did not make any determination regarding that Request. *See* 5 U.S.C. § 552(a)(6); *see also* Appendix 2.

EPIC Appeals the USMS's Failure to Disclose Records

EPIC hereby appeals the USMS's failure to make a timely determination regarding EPIC's FOIA Request. An agency must make a determination regarding a FOIA request within twenty working days. 5 U.S.C. § 552(a)(6); *see also* *Wash. Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 74 (D.D.C. 2006) (citing *Payne Enters. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1998)) ("FOIA was created to foster public awareness, and failure to process FOIA requests in a timely fashion is tantamount to denial.").

Renewal of 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." *Am. Civil Liberties Union v. Dep't of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

²⁶ *Id.*; G. Richard Huguenin, et al., A FINAL REPORT TO THE NATIONAL INSTITUTE FOR JUSTICE: MILLIVISION MILLIMETER WAVE IMAGERS, (1997), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/181652.pdf>.

²⁷ U.S. Marshals Service, Protecting the Courts, <http://www.usmarshals.gov/duties/courts.htm> (last visited July 27, 2009).

²⁸ *Id.*

²⁹ H.R. 2200, 111th Cong. § 215 (2009).

³⁰ *Id.*

There is a particular urgency for the public to obtain information about Whole Body Imaging systems as the U.S. Senate is currently considering a bill that would limit the use of this technology.³¹ This technology is currently being used at nineteen airports across the country. The documents requested by EPIC will inform the public regarding the capabilities, uses, and effectiveness of these controversial scanners.

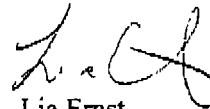
Renewal of Request for "News Media" Fee Status

EPIC is a "representative of the news media" for fee waiver purposes. *EPIC v. Dep't 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 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," any duplication fees should be waived.

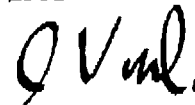
Conclusion

Thank you for your prompt response to this appeal. As the FOIA provides, I anticipate that you will produce responsive documents within 10 working days. If you have any questions, please feel free to contact me at (202) 483-1140 or verdi@epic.org.

Sincerely,



Lia Ernst
Law Clerk
EPIC



John Verdi
Director
EPIC Open Government Project

/enclosures

³¹ See <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.2200:>.

EXHIBIT D



United States Marshals Service

Office of General Counsel

Washington, DC 20530-1000

August 7, 2009

Courtney Barclay
EPIC
1718 Connecticut Avenue, N.W.
Suite 200
Washington, DC 20009

Re: Freedom of Information/Privacy Act Request No. 2009USMS13697

Dear Requester:

The United States Marshals Service (USMS) is responding to your request for records pertaining to body imaging contracts.

Pursuant to your request, the USMS conducted a search of records in the Headquarters Judicial Security Division and located no records responsive to your request.

If you are dissatisfied with my action on this request, you may appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, D.C. 20530-0001. Your appeal must be received within 60 days of the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information/ Privacy Act Appeal." In the event you are dissatisfied with the results of any such appeal, judicial review will thereafter be available to you in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia.

Sincerely,

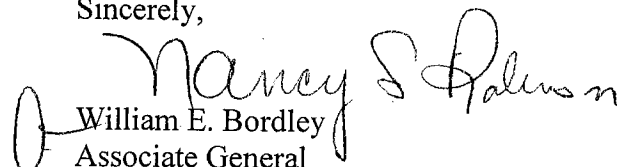

William E. Bordley
Associate General
Counsel/FOIPA Officer
Office of General Counsel

EXHIBIT E



October 2, 2009

VIA FEDERAL EXPRESS

Director
Office of Information Policy
United States Department of Justice
Suite 11050
1425 New York Ave., NW
Washington, D.C. 20530-0001

1718 Connecticut Ave NW
Suite 200
Washington DC 20008
USA
+1 202 463 1140 [tel]
+1 202 463 1248 [fax]
www.epic.org

RE: Freedom of Information Act Appeal (FOIA Request No. 2009USMS13697)

Dear Director:

This letter constitutes an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted to the United States Marshals Service ("USMS") of the Department of Justice ("DOJ") on behalf of the Electronic Privacy Information Center ("EPIC"). EPIC seeks agency records in the USMS's possession concerning images captured by Whole Body Imaging devices operated by the USMS in federal courts, as well as related documents. This appeal arises from the USMS's failure to disclose responsive agency records. The USMS failed to conduct an adequate search. In fact, the USMS wholly failed to search its offices in the Virginia federal courts – locations identified in EPIC's FOIA request as likely repositories of responsive agency records.

This appeal arises from EPIC's July 2, 2009 request to the USMS for the following agency records:

1. All unfiltered or unobscured images captured using Whole Body Imaging technology.
2. All contracts entered into by the U.S. Marshals Service pertaining to Whole Body Imaging systems, including contracts for hardware, software, or training.
3. All documents detailing the technical specifications of Whole Body Imaging hardware, including any limitations on image capture, storage, or copying.
4. All documents, including but not limited to presentations, images, and videos, used for training persons to use Whole Body Imaging systems.
5. All complaints related to the use of Whole Body Imaging and all documents relating to the resolution of those complaints.
6. All documents concerning data breaches of images generated by Whole Body Imaging technology.

See Appendix 1 ("EPIC's FOIA Request").

RECEIVED

OCT 08 2009

Factual Background

The U.S. Marshals Service Uses Whole Body Imaging Scanners in Federal Courts

The U.S. Marshals Service is responsible for the protection of the federal judiciary. In fulfilling this responsibility, “the Marshals Service’s Judicial Security Systems (JSS) group designs and coordinates the installation of complex electronic security systems to protect federal judges, courthouse staff members and the physical court facilities.”¹ Additionally, the Marshal’s Service performs physical security surveys across the country.² The USMS uses “whole body imaging” (“WBI”) technology to screen visitors to at least one federal court.³ A government website states that WBI technology is deployed in at least one federal court – “Federal Court House (VA).”⁴ WBI systems produce detailed, three-dimensional images of individuals. The WBI systems operated by the USMS use the same technology as WBI systems implemented by other agencies, including systems the federal government intends to use to screen all air travelers in U.S. airports.

The TSA Is Implementing a Plan to Subject All American Air Travelers to Digital Strip Searches Using Whole Body Imaging Scanners

In February 2007, the Transportation Security Administration (“TSA”), a Department of Homeland Security (“DHS”) component, began testing passenger imaging technology to screen air travelers.⁵ Passenger imaging is often called “whole body imaging.”⁶ The initial tests involved whole body imaging systems based on backscatter technology.⁷ In October 2007, the TSA began testing whole body imaging systems based on millimeter wave technology.⁸

The use of WBI scanners raises serious privacy concerns. Security experts have described WBI scanners as the equivalent of “a physically invasive strip-search.”⁹ On

¹ U.S. Marshals Service, Protecting the Courts, <http://www.usmarshals.gov/duties/courts.htm> (last visited July 27, 2009).

² *Id.*

³ TSA, Imaging Technology, http://www.tsa.gov/approach/tech/imaging_technology.shtm (citing WBI deployment at a Virginia federal court, state courts in Colorado Springs, Los Angeles, and Cook County, as well as the Pennsylvania Department of Corrections.) (last accessed July 27, 2009).

⁴ *Id.*

⁵ TSA, *TSA IED Mitigation: 2005 to Present*, Nov. 15, 2007, available at http://www.tsa.gov/press/happenings/tsa_ied_mitigation.shtm.

⁶ See EPIC, Whole Body Imaging Technology, <http://epic.org/privacy/airtravel/backscatter/> (last visited July 27, 2009).

⁷ TSA, *supra* note 1.

⁸ TSA, *TSA Tests Second Passenger Imaging Technology at Phoenix Sky Harbor Airport*, Oct. 11, 2007, available at http://www.tsa.gov/press/releases/2007/press_release_10112007.shtm.

⁹ 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; see also Bruce Schneier, *Backscatter X-Ray Technology*, SCHNEIER ON SECURITY, June 9, 2005, http://www.schneier.com/blog/archives/2005/06/backscatter_x-r.html (“[Whole body imaging] technology

October 11, 2007, the TSA provided various assurances regarding its use of whole body imaging. The TSA stated that whole body imaging would not be mandatory for passengers, but rather “a voluntary alternative to a pat-down during secondary screening.”¹⁰ Passengers are not typically required to submit to secondary screening, but are selected for additional screening if they set off a metal detector¹¹ or wear baggy clothing.¹² The DHS’s Privacy Impact Assessment of whole body imaging is predicated on the non-mandatory use of the technology for primary screening.¹³ The TSA assured travelers that “a security algorithm will be applied to the image to mask the face of each passenger.”¹⁴ The TSA said that the picture generated by whole body imaging “will never be stored, transmitted or printed, and it will be deleted immediately once viewed.”¹⁵ Moreover, the DHS stated that, “the WBI technology used by TSA has zero storage capacity. Images cannot be printed, stored, exported, or transmitted. Once the TSO has viewed the image and resolved anomalies, the image is erased from the screen and permanently lost.”¹⁶

On April 27, 2007, the TSA removed from its web site assurances that its whole body imaging technology “incorporate[s] a privacy algorithm” that “eliminate[s] much of the detail shown in the images of the individual while still being effective from a security standpoint.”¹⁷ The removal calls into question the TSA’s commitment to keeping its promises concerning privacy safeguards. On February 18, 2009, the TSA announced that it would require passengers at six airports to submit to whole body imaging in place of the standard metal detector search.¹⁸ This contradicts previous assurances that whole body imaging is “voluntary.” The TSA’s February 18, 2009 statement also indicates that the DHS component may renege on other privacy assurances by “exploring and testing technologies . . . in new configurations.”¹⁹ On April 6, 2009, the TSA announced that it

is incredibly intrusive. I don’t think that people should be subjected to strip searches before they board airplanes.”).

¹⁰ TSA, *supra* note 4; see also Nico Melendez, *Catch a Wave and Avoid a Pat Down*, THE TSA BLOG, Apr. 17, 2008, <http://www.tsa.gov/blog/2008/04/catch-wave-and-avoid-pat-down.html> (“[Whole body imaging] remains an optional screening method for passengers. It’s voluntary so if you’re selected for additional screening and you prefer the physical pat-down, just let our officers know.”).

¹¹ TSA, *How to Get Through the Line Faster*, http://www.tsa.gov/travelers/airtravel/screening_experience.shtm (last visited July 27, 2009).

¹² TSA, *TSA’s Head-to-Toe Screening Policies*, Oct. 15, 2007, http://www.tsa.gov/press/happenings/sop_facts.shtm.

¹³ DHS, *PRIVACY IMPACT ASSESSMENT FOR TSA WHOLE BODY IMAGING 2 (2008)*, available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_tsa_wbi.pdf (“Individuals will be able to choose to undergo [whole body imaging] screening in primary [screening].”).

¹⁴ TSA, *supra* note 4.

¹⁵ *Id.*

¹⁶ DHS, *PASSENGER SCREENING PROGRAM: PROGRAM SPECIFIC RECOVERY ACT PLAN 6 (2009)*, available at http://www.dhs.gov/xlibrary/assets/recovery/TSA_PSP_Recovery_Act_Plan_Final_2009-05-15.pdf.

¹⁷ Compare TSA, *Privacy*, Mar. 16, 2007, available at <http://web.archive.org/web/20070316125218/http://www.tsa.gov/research/privacy/faqs.shtm> with TSA, *Privacy*, Apr. 27, 2007, available at

<http://web.archive.org/web/20070427205030/http://www.tsa.gov/research/privacy/faqs.shtm> and TSA, *Privacy*, <http://www.tsa.gov/research/privacy/faqs.shtm> (last visited Apr. 10, 2009).

¹⁸ TSA, *TSA Continues Millimeter Wave Passenger Imaging Technology Pilot*, Feb. 18, 2009 available at http://www.tsa.gov/press/happenings/mwave_continues.shtm.

¹⁹ *Id.*

plans to expand the mandatory use of whole body imaging to all airports.²⁰ All passengers must “go through the whole-body imager instead of the walk-through metal detector,” the TSA said.²¹

The millimeter wave scanner being tested by the TSA is the ProVision Whole Body Imager produced by L-3 Communications.²² This technology “penetrates clothing and packaging” and consists of systems that can “easily be configured to meet specific . . . facility requirements.”²³ Rapiscan’s Secure 1000 scanner is certified by DHS for homeland security.²⁴ This technology allows operators to save images from the scanner on the system’s hard disk or on an external disk “for training and legal documentation. The stored images can be recalled and viewed on the system monitor or on any IBM compatible personal computer with color graphics.”²⁵

Lawmakers Are Presently Debating Legislation That Would Curtail the Use of Whole Body Imaging Scanners

On June 4, 2009, the U.S. House of Representatives passed a bill that would limit the use of WBI systems in airports.²⁶ The bill prohibits use of this technology for primary screening purposes.²⁷ The bill was referred to the Senate for consideration on June 8, 2009. Despite lawmakers’ opposition to the TSA’s use of WBI scanners for primary screening, on October 1, 2009 the agency announced plans to install 150 more WBI machines in American airports.²⁸

As the Senate considers legislation concerning the authorized use of this invasive technology, it is imperative that the public and lawmakers have the relevant information to participate in the debate. Legislators and the public should be informed about the current, ongoing operation of WBI scanners by federal agencies, including the USMS. EPIC’s FOIA Request seeks disclosure of documents that will shed light on the details of the federal government’s use of WBI technology. The agency records will verify or refute government claims concerning the operation of WBI systems, alleged privacy safeguards concerning operation of the machines, and related issues. The disclosure is particularly important given the TSA’s ongoing, dramatic expansion of mandatory WBI scanning in American airports and the Congressional opposition to the program. The federal government intends to subject all American air travelers to digital strip searches.

²⁰ Sharkey, *supra* note 7.

²¹ *Id.*

²² Blair Watson, *More Airports Using Body-revealing Scanners*, Aug. 26, 2008, <http://www.msnbc.msn.com/id/26408850/>.

²³ L-3 Communications, *Whole Body Imaging, ProVision Product Page*, <http://www.l-3com.com/products-services/productservice.aspx?type=p&id=866> (last visited July 27, 2009).

²⁴ Rapiscan Systems, *Rapiscan Secure 1000 Product Page*, <http://www.rapiscansystems.com/sec1000.html> (last visited July 27, 2009).

²⁵ Rapiscan Systems, *Backscatter, Rapiscan Secure 1000, FAQ*, <http://www.rapiscansystems.com/sec1000faqs.html#10> (last visited July 27, 2009).

²⁶ H.R. 2200, 111th Cong. § 215 (2009) available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.2200..>

²⁷ *Id.*

²⁸ Thomas Frank, *TSA to expand use of body scanners*, USA Today, Oct. 1, 2009 available at http://www.usatoday.com/tech/news/surveillance/2009-09-30-backscatter-body-scanners_N.htm.

Members of Congress have voiced vehement opposition to the plan and are debating legislation to curtail WBI deployment. The USMS should disclose the responsive documents immediately, making public important facts about this controversial program.

Procedural Background

On July 2, 2009, EPIC transmitted EPIC's FOIA Request to the USMS. *See* Appendix 1.

On July 6, 2009, the USMS wrote to EPIC acknowledging receipt of EPIC's FOIA Request, but did not make any determination regarding that request. *See* 5 U.S.C. § 552(a)(6); *see also* Appendix 2.

On July 30, 2009, EPIC Appealed the USMS's failure to respond to EPIC's FOIA Request. *See* Appendix 3.

On August 7, 2009, the USMS responded to EPIC's request, stating that it "conducted a search of the Headquarters Judicial Security Division and located no records responsive [EPIC's] request." Appendix 4.

EPIC Appeals the USMS's Failure to Disclose Responsive Records

Under the FOIA, agencies are required to fully disclose all responsive records that do not fall under one of the enumerated exemptions under the Act.²⁹ Agencies must conduct a search that is "reasonably calculated to uncover all relevant documents."³⁰ "If challenged, [the agency] must demonstrate beyond material doubt that the search was reasonable."³¹ "The adequacy of the [agency's] search, in turn, is judged by a standard of reasonableness and depends, not surprisingly, upon the facts of each case."³² When an agency is unable to locate responsive documents, it bears the burden proving that its less than comprehensive search is reasonable under the circumstances.³³

In the USMS's response to EPIC's request, the USMS stated: "the USMS conducted a search of records in the Headquarters Judicial Security Division and located no records responsive to [EPIC's] request."³⁴ The USMS's search was facially inadequate. In its FOIA request, EPIC identified at least one location as a site where these Whole Body Imaging machines are in use – a federal courthouse in Virginia.³⁵ This location is likely to house responsive agency records. Yet the USMS did not search in

²⁹ 5 U.S.C. § 552 (stating that each agency shall make information available to the public).

³⁰ *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see also* *McGehee v. CIA*, 697 F.2d 109, 1100 (D.C. Cir. 1983).

³¹ *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996) (quoting *Truitt v. Department of State*, 283 U.S. App. D.C. 86, 897 F.2d 540, 542 (D.C. Cir. 1990)).

³² *Natural Res. Def. Council v. Dep't of Def.*, 388 F. Supp. 2d 1086, 1095 (C.D. Cal. 2005) (quoting *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)).

³³ *McGehee*, 697 F.2d at 1101.

³⁴ *See* Appendix 4.

³⁵ *See* Appendix 1 at 3 fn 24.

USMS offices located in Virginia federal courts or in federal courts located in the rest of the United States. The USMS's response does not indicate that the USMS even contacted a single federal court as part of its search for responsive records. Instead, the USMS searched its Headquarters Judicial Security Division. Courts have found agency searches to be inadequate when they fail to include locations known to the agency but unknown to the requester.³⁶ The USMS failed to search locations that are: 1) likely to contain responsive records; 2) known to the agency; 3) known to EPIC; and 4) specifically identified in EPIC's FOIA Request. The USMS bears the burden of showing that its search – which did not include a single federal court – was adequate and reasonable. It has failed to do so.

As a result of its inadequate search, the USMS failed to disclose agency records in its possession that are responsive to EPIC's FOIA Request. Specifically, the USMS failed to disclose "all unfiltered or unobscured images captured using Whole Body Imaging technology."³⁷ The federal government states that WBI systems are used in at least one Virginia Federal Court.³⁸ The USMS is responsible for the security at all federal courts, including the federal courts in Virginia. The USMS Judicial Security Systems group designs and coordinates the installation of complex electronic security systems to protect federal judges, courthouse staff members and the physical court facilities.³⁹ Whole Body Imaging machines generate digital images every time they are used to scan someone who enters the court. Therefore, the images captured by WBI technology operated by the USMS must be in the USMS's possession and must be disclosed by the agency in response to EPIC's FOIA Request.⁴⁰

The USMS also failed to disclose "all contracts entered into by the U.S. Marshals Service pertaining to Whole Body Imaging systems, including contracts for hardware, software, or training."⁴¹ In order for the USMS to obtain these machines for use in its security operations, it had to contract with a manufacturer or distributor of the Whole Body Imaging machines. These contracts must be in the possession of USMS and must be disclosed in response to EPIC's FOIA Request.⁴²

The USMS failed to disclose "all documents, including but not limited to presentations, images, and videos, used for training persons to use Whole Body Imaging systems."⁴³ It beggars belief that the USMS would operate WBI machines without training its personnel on the use of these machines. Such training almost certainly generates agency records. Therefore, USMS must be in possession of WBI training

³⁶ See e.g. *Natural Res. Def. Council*, 388 F. Supp. 2d 1086.

³⁷ See Appendix 1; see also Appendix 4.

³⁸ TSA, *Imaging Technology*, http://www.tsa.gov/approach/tech/imaging_technology.shtm (citing WBI deployment at a Virginia federal court, state courts in Colorado Springs, Los Angeles, and Cook County, as well as the Pennsylvania Department of Corrections) (last accessed July 27, 2009).

³⁹ U.S. Marshals Service, *Protecting the Courts*, <http://www.usmarshals.gov/duties/courts.htm> (last visited July 27, 2009).

⁴⁰ 5 U.S.C. § 552 (stating that each agency shall make information available to the public).

⁴¹ See Appendix 1, see also Appendix 4.

⁴² 5 U.S.C. § 552 (stating that each agency shall make information available to the public).

⁴³ See *id.*

documents, including presentations, images, or videos. These documents must be disclosed in response to EPIC's FOIA Request.⁴⁴

EPIC Renews its 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." *Am. Civil Liberties Union v. Dep't 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 Whole Body Imaging systems as the U.S. Senate is currently considering a bill that would limit the use of this technology.⁴⁵ This technology is currently being used at nineteen airports across the country, and the TSA is expanding the program to include at least 150 additional WBI machines. The documents requested by EPIC will inform the public regarding the capabilities, uses, and effectiveness of these controversial scanners.

Conclusion

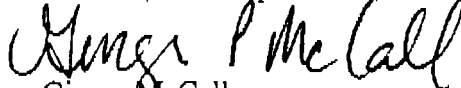
By failing to perform an adequate search and disclose responsive documents, the USMS failed to comply with the FOIA, and contravened the Obama Administration's policy of "making this administration the most open and transparent administration in history."⁴⁶ EPIC appeals the USMS's failure to disclose responsive documents and its failure to perform an adequate, reasonable search for the agency records described in EPIC's FOIA Request.⁴⁷

Sincerely,



John Verdi

Director, EPIC Open Government Project



Ginger McCall
EPIC Staff Attorney

/enclosures

⁴⁴ 5 U.S.C. § 552 (stating that each agency shall make information available to the public).

⁴⁵ See <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.2200>.

⁴⁶ 5 U.S.C. § 552 (stating that each agency shall make information available to the public); Posting of Norm Eisen to The White House Blog, <http://www.whitehouse.gov/blog/Opening-up-the-peoples-house/> (Sept. 4, 2008, 09:05 EST)

⁴⁷ *Id.*

EXHIBIT F



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

NOV 09 2009

John Verdi, Esq.
Electronic Privacy Information Center
Suite 200
1718 Connecticut Avenue, NW
Washington, DC 20009

Re: Appeal No. 2010-0305
Request No. 2009USMS13697
JGM:SJV

Dear Mr. Verdi:

This is to advise you that your October 2, 2009 administrative appeal from the action of the United States Marshals Service on your request for access to records pertaining to "Whole Body Imaging technology" was received in this Office on October 5, 2009.

I regret the delay of this response, largely resultant from this Office's closure of your appeal as untimely on October 19, 2009. Your subsequent telephone inquiry and documentation sent to me by FAX on November 3, 2009, has amply demonstrated that your appeal was received timely by this Office. Your assistance and patience in this matter is appreciated.

Your re-opened appeal has been assigned number **2010-0305**. Please mention this number in any future correspondence with this Office regarding this appeal.

In your appeal letter, you requested expedited treatment pursuant to the second standard enumerated in the Department of Justice's regulations. Under the second standard, you must show that there is "[a]n urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information." 28 C.F.R. § 16.5(d)(1)(ii) (2009).

On the basis of the information that you provided to this Office, I am denying your request for expedited treatment of your appeal. I have determined that you have not met your burden under the second standard because you have not shown an "urgency to inform the public" about an actual or alleged federal government activity. 28 C.F.R. § 16.5(d)(1)(ii) (2009). In deciding whether you have demonstrated that there is an "urgency to inform the public" under 28 C.F.R. § 16.5(d)(1)(ii), I considered 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." *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001). Although your request concerns an alleged federal government activity, you have not established that the

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requested records are a matter of current exigency to the American public. In support of factor (1), you cite to the Senate's consideration of H.R. 2200, a bill that would limit the use of whole body imaging technology. Significantly, however, there has been little action on the part of the Senate on this bill. The last action taken by the Senate on H.R. 2200 was its referral to the Senate Committee on Commerce, Science, and Transportation on June 8, 2009. Since that date, no Committee hearing has been held and no Committee hearings are currently scheduled through January 2010.

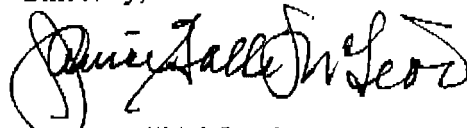
Further, under factor (2) you have not demonstrated that delaying a response would compromise a significant recognized interest. Your appeal letter states that the "documents requested by EPIC will inform the public regarding the capabilities, uses, and effectiveness of these controversial scanners." This is not sufficient to qualify as a significant recognized interest. In Al-Fayed, the D.C. Circuit found persuasive the legislative history that states "[t]he public's right to know, although a significant and important value, would not by itself be sufficient to satisfy this standard." Id. at 310.

Because the above-referenced three-prong test of Al-Fayed is conjunctive, failure to satisfy one prong would result in failing the entire test. You have failed to satisfy two prongs. Accordingly, I am denying your appeal for expedited treatment under the second standard.

As a result of the denial of your appeal, it has been placed in chronological order with other pending appeals and will be addressed in turn. Please note, however, that because of the initial delay in processing this appeal, your appeal of the merits of the USMS's "no records" response has been placed in order based upon its original receipt date, October 5, 2009.

If you are dissatisfied with my action on your request for expedited treatment of your appeal, you may file a lawsuit in accordance with 5 U.S.C. § 552(a)(6)(E)(iii).

Sincerely,

A handwritten signature in black ink, appearing to read "Janice Galli McLeod". The signature is written in a cursive, flowing style.

Janice Galli McLeod
Associate Director