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July 18, 2012

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

Dear Ms. Coates:

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 documents relating to the Transportation Security Administration's ("TSA") Notice of Proposed Rulemaking ("NPRM") on the agency's decision to deploy body scanners as the primary screening technique in U.S. airports, as mandated by the United States Court of Appeals for the District of Columbia Circuit. *EPIC v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1 (D.C. Cir. 2011).

### Background

In March 2010, the TSA, without any explicit act by Congress, made a decision to deploy Whole Body Imaging ("WBI") scanners as the primary screening devices in American airports.<sup>1</sup> The TSA's plan to use these scanners for primary screening was first revealed in a New York Times Article in April 2009.<sup>2</sup> As part of this effort, the TSA announced its decision to deploy approximately one thousand additional WBI devices.<sup>3</sup>

Following this announcement, EPIC filed a petition along with 29 other privacy, consumer protection, and civil liberties organizations, pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(e), requesting suspension of the WBI screening program pending notice-and-comment rulemaking as required by law.<sup>4</sup> After the agency failed to act on EPIC's

<sup>1</sup> U.S. Gov't Accountability Office, *Aviation Security: TSA is Increasing Procurement and Deployment of the Advanced Imaging Technology, but Challenges to this Effort and Other Areas of Aviation Security Remain*, GAO-10-484T (2010), available at <http://www.gao.gov/new.items/d10484t.pdf>.

<sup>2</sup> See Joe Sharkey, *Whole-Body Scans Pass First Airport Tests*, N.Y. Times, April. 6, 2009, at B6; EPIC Letter to Janet Napolitano, Secretary, Dep't of Homeland Sec. (May 31, 2009), available at [http://epic.org/privacy/body\\_scanners/EPIC\\_Body\\_Scan\\_DHS\\_Petition\\_05\\_31\\_09.pdf](http://epic.org/privacy/body_scanners/EPIC_Body_Scan_DHS_Petition_05_31_09.pdf).

<sup>3</sup> See Matthew L. Wald, *Mixed Signals on Airport Scanners*, N.Y. Times, Jan. 12, 2010, at A21.

<sup>4</sup> Available at [http://epic.org/privacy/airtravel/backscatter/petition\\_042110.pdf](http://epic.org/privacy/airtravel/backscatter/petition_042110.pdf).

request, EPIC brought suit in the Court of Appeals for the District of Columbia Circuit, challenging the TSA's massive and unlawful deployment of airport body scanners on various constitutional and statutory grounds as well as the agency's failure to undertake a public rulemaking as required by the APA.

On July 15, 2011 the D.C. Circuit granted EPIC's petition in part, holding that the agency had not "justified its failure to issue notice and solicit comments." *EPIC*, 653 F.3d at 3. The court made clear that the agency must "act promptly on remand to cure the defect in its promulgation." *Id.* at 8. In response to EPIC's October 28, 2011 motion to enforce the court's mandate, the agency provided the declaration of James S. Clarkson, Acting General Manager of the Intermodal Security Support Division at the TSA.<sup>5</sup> The Clarkson Declaration stated that "TSA initiated its internal rulemaking process on July 25, 2011" and that "the staff responsible for drafting the proposed rule indicated [that] they had an initial, very preliminary draft prepared by August 11, 2011 ...."<sup>6</sup>

Given the "significant resources" that the agency has "committed" to this process and "the importance of the issue" as stated in the Clarkson Declaration,<sup>7</sup> it is somewhat surprising that this matter does not appear in the agency's February 2012 Unified Agenda of Federal Regulatory and Deregulatory Actions.<sup>8</sup> Nevertheless, the agency has claimed in numerous filings before the D.C. Circuit that the regulatory process has begun, that documents relevant to the proceeding exist and are in the agency's possession, and that at least a preliminary draft of the rule has been completed.

#### Documents Requested

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

- Any draft of a proposed notice and rule for the WBI program, as well as communications or records regarding the draft proposals

#### 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).

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<sup>5</sup> Declaration of James S. Clarkson in Support of Respondents' Opposition to Petitioners' Motion to Enforce the Court's Mandate, *EPIC v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1 (D.C. Cir. 2010) (hereinafter Clarkson Declaration), available at [http://epic.org/privacy/body\\_scanners/10-1157\\_Documents.pdf](http://epic.org/privacy/body_scanners/10-1157_Documents.pdf).

<sup>6</sup> Clarkson Declaration at ¶14.

<sup>7</sup> Clarkson Declaration at ¶16.

<sup>8</sup> See Dep't of Homeland Sec., Unified Agenda of Federal Regulatory and Deregulatory Actions, 77 Fed. Reg. 7960 (Feb. 13, 2012), available at [www.gpo.gov/fdsys/pkg/FR-2012-02-13/pdf/2012-1648.pdf](http://www.gpo.gov/fdsys/pkg/FR-2012-02-13/pdf/2012-1648.pdf).

There is a particular urgency for the public to obtain information about TSA's progress on the NPRM. First, a large number of individuals travel through airports each year and undergo invasive body scanner searches. The Research and Innovative Technology Administration's Bureau of Transportation Statistics reports that from February 2011 until March 2012, 642 million revenue passengers flew aboard U.S. aircraft.<sup>9</sup> And TSA reports that "more than 99 percent of passengers" undergo WBI screening.<sup>10</sup> Given the large number of Americans who travel through airports and are screened by WBI technology, the impact of WBI devices is enormous. Second, informing the public on this matter helps ensure that TSA complies with the Court's order. Third, as a matter of right the public is entitled to comment on this agency program, and the agency must demonstrate that it is moving expeditiously to undertake the rulemaking.

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 records with only duplication fees assessed. Further, as addressed above, airport body scanners affect millions of people who board aircraft daily. Release of the requested records will "contribute significantly to public understanding of the operations or activities of the government" because the records will inform the public about TSA's progress on undertaking the critical rulemaking process.

Thank you for your consideration of this request. As 6 C.F.R. § 5.5(d)(4) provides, we will anticipate your determination on our request within ten (10) calendar days. For questions regarding this request, please contact 202-483-1140 ext. 102 or foia@epic.org.

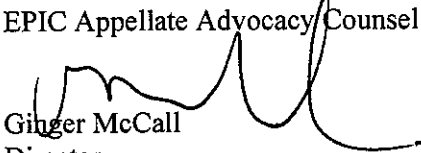
Respectfully submitted,



Khaliah Barnes  
EPIC Open Government Counsel



Alan Butler  
EPIC Appellate Advocacy Counsel



Ginger McCall  
Director  
EPIC Open Government Program

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<sup>9</sup> Research and Innovative Technology Administration Bureau of Transportation Statistics, TranStats, <http://www.transtats.bts.gov/> (last visited July 12, 2012).

<sup>10</sup> Transp. Sec. Admin., *Advanced Imaging Technology (AIT)*, <http://www.tsa.gov/approach/tech/ait/index.shtm> (last visited July 16, 2012).