

July 2, 2009

VIA E-MAIL ([usms.foia@usdoj.gov](mailto: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

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.<sup>1</sup> Passenger imaging is often called "whole body imaging."<sup>2</sup> The initial tests involved whole body imaging systems based on backscatter technology.<sup>3</sup> In October 2007, the TSA began testing whole body imaging systems based on millimeter wave technology.<sup>4</sup> In addition to voluntary passenger screening, the TSA also conducts covert tests with officers.<sup>5</sup> These covert tests, according to the TSA, demonstrate that the WBI scanners more effectively detect threats than metal detectors.<sup>6</sup>

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."<sup>7</sup> On October 11, 2007, the

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<sup>1</sup> TSA: Whole Body Imaging, [http://www.tsa.gov/approach/tech/body\\_imaging.shtm](http://www.tsa.gov/approach/tech/body_imaging.shtm) (last visited Apr. 10, 2009).

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

<sup>3</sup> TSA: Whole Body Imaging, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> TSA: Covert Testing, [http://www.tsa.gov/what\\_we\\_do/screening/covert\\_testing.shtm](http://www.tsa.gov/what_we_do/screening/covert_testing.shtm) (last visited June, 26, 2009).

<sup>6</sup> *Id.*

<sup>7</sup> 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](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](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."<sup>8</sup> Passengers are not typically required to submit to secondary screening, but are selected for additional screening if they set off a metal detector<sup>9</sup> or wear baggy clothing.<sup>10</sup> The DHS's Privacy Impact Assessment of whole body imaging is predicated on the non-mandatory use of the technology for primary screening.<sup>11</sup> The TSA assured travelers that "a security algorithm will be applied to the image to mask the face of each passenger."<sup>12</sup> 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."<sup>13</sup> 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."<sup>14</sup>

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."<sup>15</sup> 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.<sup>16</sup> 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 ...<sup>17</sup> On April 6, 2009, the TSA announced that it plans to expand the mandatory use of whole body imaging to all airports.<sup>18</sup> All passengers must "go through the whole-body imager instead of the walk-through metal detector," the TSA said.

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<sup>8</sup> *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](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").

<sup>9</sup> *How to Get Through the Line Faster*, [http://www.tsa.gov/travelers/airtravel/screening\\_experience.shtm](http://www.tsa.gov/travelers/airtravel/screening_experience.shtm) (last visited Apr. 10, 2009).

<sup>10</sup> *TSA's Head-to-Toe Screening Policies*, Transportation Security Administration, October 15, 2007 available at [http://www.tsa.gov/press/happenings/sop\\_facts.shtm](http://www.tsa.gov/press/happenings/sop_facts.shtm).

<sup>11</sup> *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](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].").

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *TSA: Whole Body Imaging*, note 1 *supra*.

<sup>15</sup> *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).

<sup>16</sup> *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](http://www.tsa.gov/press/happenings/mwave_continues.shtm).

<sup>17</sup> *Id.*

<sup>18</sup> Sharkey, *supra* note 4.

The millimeter wave scanner being tested by the TSA is the ProVision Whole Body Imager produced by L-3 Communications.<sup>19</sup> This technology “penetrates clothing and packaging” and consists of systems that can “easily be configured to meet specific . . . facility requirements.”<sup>20</sup> Rapiscan’s Secure 1000 scanner is certified by DHS for homeland security.<sup>21</sup> 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.”<sup>22</sup>

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

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.”<sup>26</sup> Additionally, the Marshal’s Service performs physical security surveys across the country.<sup>27</sup>

On June 4, 2009, the U.S. House of Representatives passed a bill that will limit the use of WBI systems in airports.<sup>28</sup> The bill prevents use of this technology for primary screening purposes.<sup>29</sup> 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.

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

<sup>20</sup> 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).

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

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

<sup>23</sup> Millimeter Wave Technology, Scans for More than Just Security, Dep’t. of Energy, [http://www.energy.gov/discovery/millimeter\\_wave\\_technology.html](http://www.energy.gov/discovery/millimeter_wave_technology.html).

<sup>24</sup> Imaging Technology, Transportation Security Administration, [http://www.tsa.gov/approach/tech/imaging\\_technology.shtm](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).

<sup>25</sup> *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>.

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

<sup>27</sup> *Id.*

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

<sup>29</sup> *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