

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

**ELECTRONIC PRIVACY INFORMATION CENTER
1718 Connecticut Ave., N.W.
Suite 200
Washington, DC 20009**

Plaintiff,

v.

**THE UNITED STATES DEPARTMENT OF
HOMELAND SECURITY
Washington, D.C. 20528**

Defendant.

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) **Civil Action No. _____**
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COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 (2009), for injunctive and other appropriate relief, seeking the release of agency records requested by the Electronic Privacy Information Center from the United States Department of Homeland Security.

Jurisdiction and Venue

2. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) (2009) and 5 U.S.C. § 552(a)(6)(C)(i) (2009). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (2009). Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) (2009).

Parties

3. Plaintiff Electronic Privacy Information Center (“EPIC”) is a public interest research

organization incorporated as a not-for-profit corporation in Washington, D.C. EPIC's activities include the review of federal activities and policies to determine their possible impacts on civil liberties and privacy interests. Among its other activities, EPIC publishes books, reports, and a bi-weekly electronic newsletter. EPIC also maintains a heavily visited Internet site, <http://www.epic.org>, which contains extensive information regarding privacy issues, including information EPIC has obtained from federal agencies under the FOIA.

4. Defendant United States Department of Homeland Security ("DHS") is an agency established in the Executive Branch of the United States Government. DHS is an agency within the meaning of 5 U.S.C. § 552(f)(1) (2007). DHS includes a component called the Transportation Security Administration ("TSA").

Facts

DHS is Implementing Body Scanner Technology That Does Not Have Meaningful Privacy Safeguards

5. In February 2007, TSA, a DHS component, began testing passenger imaging technology – called "body scanners" or "whole body imaging" – to screen air travelers.

6. Whole body imaging machines produce detailed, three-dimensional images of individuals stripped naked.

7. The TSA is testing whole body imaging systems at airport security checkpoints, screening passengers before they board flights.

8. On October 11, 2007, the TSA provided various assurances regarding its use of whole body imaging.

9. TSA has stated that whole body imaging would not be mandatory for passengers and that images produced by the machines would not be stored, transmitted, or printed.

10. On April 27, 2007, TSA removed from its website assurances that its whole body

imaging technology would “incorporate a privacy algorithm” that will “eliminate much of the detail shown in the images of the individual while still being effective from a security standpoint.”

11. On February 18, 2009, TSA announced that it would require passengers at six airports to submit to whole body imaging in place of the standard metal detector search, which contravenes its earlier statements that whole body imaging would not be mandatory.

12. On April 6, 2009, TSA announced its plans to expand the mandatory use of whole body imaging to all airports.

13. The December 25, 2009 attempted bombing of Northwest Airlines Flight 253 caused increased interest and debate concerning airport body scanners, including proposals that would require all U.S. air travelers to submit to mandatory body scans.

14. Congress is reviewing the TSA’s use of body scanners – a review that requires full, immediate disclosure of the agency records sought by EPIC’s FOIA Request.

15. On January 20, 2010, the Senate Judiciary Committee will hold a hearing, “Securing America’s Safety: Improving the Effectiveness of Anti-Terrorism Tools and Inter-Agency Communication.” David F. Heyman, DHS Assistant Secretary for Policy, is scheduled to testify. Body scanners are expected to be a topic of inquiry at the hearing.

16. On January 20, 2010, the Senate Commerce Committee will hold a hearing, “The State of Aviation Security - Is Our Current System Capable of Meeting the Threat?” Committee Chairman John D. Rockefeller IV has stated that the Committee will focus on “the effectiveness of our aviation security screening.” Body scanners are expected to be a topic of inquiry at the hearing.

17. On January 21, 2010, the Senate Select Committee on Intelligence will begin hearings concerning the December 25, 2009 attempted bombing of Northwest Airlines Flight 253. Body scanners are expected to be a topic of inquiry at the hearing.

18. In January 2010, the Senate Committee on Homeland Security and Government Affairs will hold a hearing “to examine the layers of security meant to protect airline passengers from terrorist attacks but which accused terrorist Umar Farouk Abdulmutallab successfully evaded.” The Committee has stated that body scanners will to be a primary topic of inquiry at the hearing.

EPIC Submitted a FOIA Request to DHS Regarding Whole Body Imaging

19. On July 2, 2009, EPIC transmitted, via certified mail, a written FOIA request (“EPIC’s FOIA Request”) to DHS for agency records. EPIC requested the following agency records:

- a. all unfiltered or unobscured images captured using Whole Body Imaging technology;
- b. all contracts entered into by DHS pertaining to Whole Body Imaging systems, including contracts for hardware, software, or training
- c. all documents detailing the technical specifications of Whole Body Imaging hardware, including any limitations on image capture, storage, or copying;
- d. all documents, including, but not limited to, presentations, images, and videos, used for training persons to use Whole Body Imaging systems;
- e. all complaints related to the use of Whole Body Imaging and all documents relating to the resolution of those complaints; and
- f. all documents concerning data breaches of images generated by Whole Body Imaging technology.

20. EPIC also asked DHS to expedite its responses to EPIC’s FOIA Request on the bases that it pertains to a matter about which there is an urgency to inform the public about an actual or alleged federal government activity, and was made by a person primarily engaged in disseminating information. EPIC made this request pursuant to 5 U.S.C. § 552(a)(6)(E) (2009). EPIC based the request on the public’s and press’s interest in whole body imaging and privacy

protections.

21. EPIC also requested “News Media” fee status under the Freedom of Information Act, based on its status as a “representative of the news media.”

DHS Failed to Make a Determination Regarding EPIC’s FOIA Request and Failed to Produce Any Documents

22. DHS transmitted a letter to EPIC dated July 16, 2009 (“DHS Letter 1”), acknowledging receipt of EPIC’s FOIA Request and stating that DHS had referred EPIC’s FOIA Request to the TSA.

23. The TSA did not respond to EPIC’s FOIA Request.

24. Both DHS and its component, TSA, failed to produce any documents in response to EPIC’s FOIA Request, and failed to make any determination regarding EPIC’s FOIA Request.

EPIC Filed an Administrative Appeal with DHS

25. On July 31, 2009 EPIC transmitted a written administrative appeal to DHS (“EPIC’s Administrative Appeal”).

26. EPIC’s Administrative Appeal appealed DHS’s failure to make a determination regarding EPIC’s FOIA Request.

27. EPIC’s Administrative Appeal also reiterated EPIC’s request for “News Media” fee status.

DHS Failed to Respond to EPIC’s Administrative Appeal and Failed to Produce Any Documents

28. Through the date of this pleading, which is filed more than twenty working days after DHS received EPIC’s Administrative Appeal, DHS has neither made a determination regarding EPIC’s FOIA Request, nor responded to EPIC’s Administrative Appeal.

29. Through the date of this pleading, the TSA has wholly failed to respond to EPIC’s

FOIA Request or Administrative Appeal.

30. Through the date of this pleading, DHS has failed to produce any documents in response to EPIC's FOIA Request.

31. Through the date of this pleading, DHS has failed to state which documents, if any, it intends to produce in response to EPIC's FOIA Request and EPIC's Administrative Appeal.

32. On December 2, 2009, EPIC obtained documents as part of a separate FOIA request to DHS and the TSA. These documents include a 2008 TSA Operational Requirements Document that states: "The contractor shall provide [to the TSA] a library of 50 [whole body imaging] images that consist of a representative mix of passenger body types and gender." This TSA document demonstrates that the agency possesses at least 50 "unfiltered or unobscured images captured using Whole Body Imaging technology" – agency records responsive to a portion of EPIC's FOIA Request.

Count I

Violation of the FOIA: Failure to Comply With Statutory Deadlines

33. Paragraphs 1-32 above are hereby incorporated by reference as if set forth fully herein.

34. DHS' response to EPIC's FOIA Request violated the statutory deadlines imposed by the FOIA, including the deadlines set forth in 5 U.S.C. § 552(a)(6)(A) (2009).

35. EPIC has exhausted the applicable administrative remedies with respect to EPIC's FOIA Request.

36. DHS has wrongly withheld responsive agency records from EPIC.

37. EPIC is entitled to injunctive relief compelling the release and disclosure of the requested agency records.

Requested Relief

WHEREFORE, plaintiff prays that this Court:

- A. order defendant to make a complete determination regarding EPIC's FOIA Request within five working days of the date of the Court's Order in this matter;
- B. order defendant to produce all responsive agency records within ten business days of the Court's Order in this matter;
- C. award plaintiff its costs and reasonable attorneys' fees incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E) (2009); and
- D. grant such other relief as the Court may deem just and proper.

Respectfully submitted,

By:

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Dated: January 13, 2010

*Ms. McCall is barred in the State of Pennsylvania