

April 27, 2011

VIA U.S. MAIL (CERTIFIED DELIVERY)

Transportation Security Administration
Office of the Special Counselor
ATTN: Freedom of Information Act Office
601 South 12th Street
Arlington, VA 20598-6033

RE: Freedom of Information Act Request; Request for Waiver of Fees; Request for Expedited Processing

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”). EPIC seeks agency records concerning technologies deployed by the Transportation Security Administration (“TSA”) that capture naked images of passengers at airline terminals in the United States.

Background

In February 2007, the TSA, a component of the Department of Homeland Security (“DHS”), began testing security screening technology on airline travelers, widely known as Full-Body Scanning (“FBS”).¹ The initial tests involved FBS systems based on backscatter technology.² In October 2007, the TSA began testing FBS systems based on millimeter wave technology.³

The use of FBS machines poses serious privacy risks. These systems produce detailed, three-dimensional images of individuals.⁴ Security experts have described full body scanners as the equivalent of “a physically invasive strip-search.”⁵ As part of a FOIA lawsuit filed against TSA in 2009, EPIC acquired TSA procurement specifications for full body scanners, dated

¹ TSA: Whole Body Imaging, http://www.tsa.gov/approach/tech/body_imaging.shtm (last visited April 10, 2009). See also Whole Body Imaging Technology, EPIC, <http://www.epic.org/privacy/airtravel/backscatter/> (last visited April 10, 2009).

² TSA: Whole Body Imaging, *supra* note 1.

³ *Id.*

⁴ Petitioner’s Reply Brief at exhibit 1, EPIC v. DHS (D.C. Cir. 2010) (No. 10-1157), available at http://epic.org/privacy/body_scanners/Body_Scan_Pic.pdf.

⁵ 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.”).

September 2008, as well as related TSA operational requirements, dated July 2006.⁶ The documents establish that the TSA required all FBS machines to be capable of storing, recording, and transferring detailed images of naked air travelers. Based on this information, EPIC filed a lawsuit against the DHS alleging that the FBS program violated the Fourth Amendment to the United States Constitution, the Administrative Procedure Act, the Video Voyeurism Prevention Act, the Privacy Act of 1974, and the Religious Freedom Restoration Act.⁷

On March 16, 2011, two TSA officials testified publicly before the House Oversight and Government Reform Committee's National Security, Homeland Defense, and Foreign Operations Subcommittee. At that time, the Officials represented to Subcommittee Chairman Rep. Jason Chaffetz (R-UT), Ranking Member John F. Tierney (D-MA), and the Subcommittee members that the Documents provided to EPIC had been subsequently modified and "cleaned up."⁸

I. Documents Requested

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

1. All presently-enforceable contracts entered into by DHS pertaining to Full-Body Scanning systems, including contracts for hardware, software, or training.
2. All technical specifications for Full-Body Scanners currently operated by TSA at US airports (including but not limited to the records referenced by Mr. Lee Kair and Mr. Robin Kane on March 16, 2011).
3. All procurement requirements for Full-Body Scanners currently operated by TSA at US airports (including but not limited to the records referenced by Mr. Lee Kair and Mr. Robin Kane on March 16, 2011).
4. All complaints filed by air travel passengers after January 1, 2010, related to the use of Full-Body Scanning and all documents relating to the resolution of those complaints.
5. All documents concerning data breaches of images generated by Full-Body Scanning technology.

⁶ EPIC v. Department of Homeland Security – Body Scanners, EPIC.ORG, http://epic.org/privacy/airtravel/backscatter/epic_v_dhs.html (last visited Mar. 23, 2011) (EPIC's FOIA Request also asked for, and received, TSA contracts with Full-Body Scanner manufacturers L3 and Rapiscan as well as hundreds of pages of complaints regarding FBS technology that span from late 2008 to January 2010.)

⁷ See Petitioner's Opening Brief, EPIC v. DHS (D.C. Cir. 2010) (No. 10-1157), *available at* http://epic.org/EPIC_Body_Scanner_OB.pdf.

⁸ TSA Oversight Part I: Whole Body Imaging Panel III, *available at* <http://www.youtube.com/watch?v=CvCaraZ7Xtk>. Mr. Lee Kair is the Assistant Administrator for Security Operations at the TSA. Mr. Robin Kane is the Assistant Administrator for Security Technology at the TSA.

II. Request for News Media Status and Fee Waiver

EPIC meets the six factors for FOIA fee waivers listed in 6 C.F.R. § 5.11(k)(2). The six factors are:

1. Whether the subject of the requested records concerns “the operations or activities of the government;”
2. Whether the disclosure is “likely to contribute” to an understanding of government operations or activities;
3. Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons;
4. Whether the contribution to the public understanding of government operations or activities will be “significant;”
5. Whether the requestor has a commercial interest that would be furthered by the requested disclosure; and
6. Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor.

We address each of the relevant factors in turn.

a. The Subject of EPIC’s FOIA Request Concerns “The Operations or Activities of the Government.”

The TSA is responsible for “security at the nation’s airports and [has] deployed a Federal workforce to meet Congressional deadlines for screening all commercial airline passengers and baggage.”⁹ The TSA’s mission “is to improve homeland security by providing to customers state-of-the-art technology.”¹⁰ Currently, the “state-of-the-art” technology that TSA is employing is Full-Body Scanning machines.¹¹ TSA has contracted for the development of this technology, has distributed it to airports around the country, and employs its own workers to operate this equipment in American airports. EPIC’s FOIA Request seeks records regarding the specifications, procurement, and complaints related to the deployment and use of FBS. As such, this FOIA request directly and clearly concerns the TSA’s operations and activities.

b. The Documents Requested by EPIC are “Likely to Contribute” to an Understanding of Government Operations or Activities

The release of specifications of FBS technology is “likely to contribute” to the understanding of the effectiveness of the TSA’s continued use of airport security screening. 6 C.F.R. § 5.11(k)(1)(ii) requires that “disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be ‘likely to

⁹ TSA: What is TSA, http://www.tsa.gov/who_we_are/what_is_tsa.shtm (last visited Nov. 19, 2010).

¹⁰ *Id.*

¹¹ TSA: Advanced Imaging Technology, <http://www.tsa.gov/approach/tech/ait/index.shtm> (last visited Nov. 19, 2010).

contribute' to an increased public understanding of those operations or activities.¹² Records and specifications pertaining to the deployment of FBS will help the public understand the TSA's large investment in this technology and will give the public an opportunity to evaluate the relative value of this program by weighing its risks and benefits.

In addition, both the D.C. Circuit and the Tenth Circuit have recognized that "an understanding of how [a federal agency] makes policy decisions . . . is important to the public's understanding of the government."¹³ Release of these records would allow the public to further evaluate and study the technical capabilities of FBS machines, and, in turn, will increase the public's ability to understand the government's policy decisions concerning the technology.

c. The Disclosure of the Documents Will Contribute to the Understanding of the Public at Large

EPIC routinely and systematically disseminates information to the public and, as the TSA has acknowledged in other FOIA matters,¹⁴ is a representative of the news media for FOIA purposes. EPIC maintains several heavily visited websites that highlight breaking news concerning privacy and civil liberties issues. Two of EPIC's sites, EPIC.org and PRIVACY.org, consistently appear at the top of search engine rankings for searches on "privacy." EPIC's webpage on Full-Body Scanning also consistently appears in the top listings for searches on "whole body imaging" and "body scanners."

EPIC.org, maintained by EPIC, highlights critical portions of documents EPIC obtains under the FOIA. Further, EPIC routinely publishes complete copies of records we receive through FOIA requests. EPIC's FOIA documents have routinely been the subject of national news coverage.¹⁵

EPIC also publishes a bi-weekly electronic newsletter, the EPIC Alert, which is distributed to over 20,000 readers, many of whom report on technology and privacy issues for major news outlets. The newsletter has been published continuously since 1996, and an archive of past issues is available at our website.¹⁶ EPIC is continually interviewed by mainstream media on the topic of Full-Body Scanning.¹⁷

¹² 6 C.F.R. § 5.11(k)(1)(ii).

¹³ *Natural Resources Defense Council v. U.S. EPA*, 581 F. Supp. 2d 491, 498–99 (S.D.N.Y. 2008) (citing *Forest Guardians*, 416 F.3d at 1179; *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1313–14 (D.C. Cir. 2003)).

¹⁴ See Letter from Kevin J. Janet, FOIA Officer, Freedom of Information Act Office, Transportation Security Administration to Gautam Hans, EPIC (June 24, 2010), available at http://epic.org/privacy/body_scanners/TSA_FOIA_Ack_Ltr_06_24_10.pdf.

¹⁵ See, e.g., *Happening Now: Feds Admit Storing Thousands of Checkpoint Body Scan Images* (Fox News television broadcast Aug. 5, 2010), available at <http://www.youtube.com/watch?v=djQ0JWnn8uU>; Jeanne Meserve and Mike M. Ahlers, *Body Scanners Can Store, Send Images, Group Says*, CNN, January 11, 2010, <http://www.cnn.com/2010/TRAVEL/01/11/body.scanners/>.

¹⁶ EPIC Alert, EPIC.ORG, <http://epic.org/alert/> (last visited Nov. 18, 2010).

¹⁷ See, generally, *Happening Now: Feds Admit Storing Thousands of Checkpoint Body Scan Images* (Fox News television broadcast Aug. 5, 2010), available at <http://www.youtube.com/watch?v=djQ0JWnn8uU>; *PBS NewsHour: After Christmas Bomb Plot, New Airport Screening Techniques Examined* (PBS television broadcast Jan. 20, 2010), available at http://www.pbs.org/newshour/bb/transportation/jan-june10/scanners_01-20.html; *American Morning: New Questions on Body Scanners* (CNN television broadcast Jan. 11, 2010), available at

Finally, EPIC publishes and distributes printed books that address a broad range of privacy, civil liberties, and technology issues. EPIC will disseminate information gained from disclosure of the requested documents to the public in a form that will ensure wide access to, and further understanding of, Full-Body Scanning privacy and security issues.

d. The Contribution to the Public Understanding of Government Operations or Activities Will be “Significant”

Current documents regarding the testing, implementation, and modification of Full-Body Scanning machines are not currently available to the public. Already, 500 FBS machines have been deployed in airports across the country,¹⁸ with plans for 500 more in 2011 and 275 in 2012.¹⁹ However, there is any current data published regarding the technical capabilities of this technology.²⁰ Without access to this information, the public has no ability to accurately evaluate the risks and benefits of FBS as a screening method that has already cost taxpayers millions of dollars. Disclosure of the requested documents would contribute significantly to the public’s ability to evaluate the use of Full-Body Scanning machines.

e. EPIC has No Commercial Interest in the Disclosure

10 C.F.R. § 1004.9(c) defines a commercial use request as “a request from . . . one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requestor . . .”²¹ EPIC is a non-profit, public interest research center. EPIC’s work is distributed freely through our website and through the bi-weekly EPIC Alert newsletter. EPIC has no commercial interest that would be furthered by disclosing the requested records.

f. Because EPIC has No Commercial Interest, Commercial Interest Cannot be “Primary”

As established above, EPIC has no commercial interest in this disclosure. EPIC is “primarily engaged in disseminating information.”²² EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC has no clients, no customers, and no shareholders.

<http://www.cnn.com/video/?/video/tech/2010/01/11/meserve.full.body.scans.cnn>.

¹⁸ See Press Release, Department of Homeland Security, Rea Testimony of Assistant Administrator for Operational Process & Technology Robin Kane and Assistant Administrator for Security Operations Lee Kair, Transportation Security Administration, before the United States House Committee on Oversight and Government Reform, Subcommittee on National Security, Homeland Defense, and Foreign Operations, “TSA Oversight Part I: Whole Body Imaging” (Mar. 16, 2011), *available at*

http://www.dhs.gov/ynews/testimony/testimony_1300369174455.shtm.

¹⁹ *Id.*

²⁰ See TSA Oversight Part I: Whole Body Imaging Panel III, *supra* note 8.

²¹ 10 C.F.R. § 1004.9(c) (2009).

²² *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

III. Request for Expedited Processing

EPIC's FOIA Request meets the second factor for expedited processing listed in 6 C.F.R. § 5.5(d), which states that requests and appeals will be taken out of order and given expedited treatment whenever it is determined that they involve:

- (i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
- (ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.
 - a. EPIC's Request Involves An Urgency to Inform the Public About an Actual or Alleged Federal Government Activity and is Made by an Organization Primarily Engaged in Disseminating Information

EPIC's request involves an urgency to inform the public about an actual or alleged federal government activity and is made by an organization primarily engaged in disseminating information. A District of Columbia Circuit Court has articulated a test to determine whether requestors have demonstrated "urgency to inform," and hence "compelling need;" courts must consider at least 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.²³

EPIC's request satisfies the first prong of this test because it concerns a matter of current exigency to the American public. As discussed above, in recent months, many experts have questioned the TSA's use of Full-Body Scanning machines.²⁴ In late July 2010, TSA has announced its intent to continue to expand the Full-Body Scanning program to airports across the country.²⁵ By the end of 2010, October 2010, a total of 500 Full-Body Scanners were in use, with an additional 500 planned for deployment in 2011.²⁶

On June 4, 2009, the U.S. House of Representatives passed HR 2200, a bill that would limit the use of full body scanner systems in airports.²⁷ The bill prevents use of full body scanner technology for primary screening purposes.²⁸ The government continues to express an interest in the

²³ *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001).

²⁴ See e.g. John Oates, *Airport Security Boss Calls Time on Tech: Old School Intelligence, Not New School Stupidity*, The Register, Nov. 12, 2010, http://www.theregister.co.uk/2010/11/12/airport_security_scanners/; Sarah Schmidt, *Full-body Scanners are Waste of Money, Israeli Expert Says*, Canwest News Service, April 23, 2010, http://www.vancouversun.com/story_print.html?id=2941610&sponsor=; Keith Johnson, *Fliers Try to Ground New Airport Body Scanners*, The Wall Street Journal, Nov. 17, 2010, <http://online.wsj.com/article/SB20001424052748703628204575618743779803722.html>.

²⁵ Press Release, Department of Homeland Security, Secretary Napolitano Announces Additional Recovery Act-Funded Advanced Imaging Technology Deployments (July 20, 2010) *available at* http://www.dhs.gov/ynews/releases/pr_1279642622060.shtm.

²⁶ Press Release, Department of Homeland Security, Readout of Secretary Napolitano's Visit to New York City (Oct. 22, 2010), *available at* http://www.dhs.gov/ynews/releases/pr_1287780009339.shtm.

²⁷ H.R. 2200, 111th Cong. (2010), *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.2200>.

²⁸ *Id.*

TSA's use of FBS machines in our country's airports. In fact, this request was produced based upon recent testimony given by TSA Officials in a hearing before a House of Representatives Subcommittee.²⁹ The Subcommittee plans to re-convene early in April 2011 to recommence the hearing, which is currently on recess.

EPIC's request also satisfies the second prong of this test: the consequence of delaying a response would compromise a significant recognized interest. A failure by the agency to disclose records detailing its specifications for Full-Body Scanning machines denies the American public the opportunity to make an informed decision about this technology. The House Resolution demonstrates that many congressmen have concerns about the usefulness of these machines. The public must be informed in order to participate in the current debate over Full-Body Scanning machines. Courts have been persuaded to require expedited process when Congress is considering legislation on an issue at the time of the request³⁰ or where Congress has expressed interest in a particular topic.³¹

EPIC's request also clearly fulfills the third prong of this test: it concerns federal government activity. As discussed in Section III, above, the TSA is responsible for "security at the nation's airports and [has] deployed a Federal workforce to meet Congressional deadlines for screening all commercial airline passengers and baggage."³² The TSA is currently employing Full-Body Scanning machines to screen air travelers.³³ The TSA has contracted for the development of this technology, is distributing Full-Body Scanning machines to airports around the country, and employs workers to operate this equipment in American airports. EPIC's FOIA Request seeks records regarding important software updates to these Full-Body Scanning devices used by the TSA.³⁴ As such, this request directly and clearly concerns the TSA's operations and activities.

Regarding EPIC's status as an organization "primarily engaged in disseminating information," as the TSA has already acknowledged in its response, EPIC is a news media organization and is primarily engaged in disseminating information. EPIC's status as a news media organization³⁵ and an organization that is "primarily engaged in disseminating information" for the purposes of expediting the request has been recognized by District of Columbia Courts.³⁶

IV. Conclusion

Thank you for your consideration of this request. As required by 32 C.F.R. § 286.4(d)(3), I will anticipate that you will make a determination on this request within ten (10) calendar days.

²⁹ See discussion, *supra* p. 1-2.

³⁰ *Gerstein v. CIA*, 2006 U.S. Dist. LEXIS 89883 (N.D. Cal. Nov 29, 2006).

³¹ *Natural Res. Def. Council v. DOE*, 191 F. Supp. 2d 41, 43-44 (D.D.C. 2002).

³² TSA: What is TSA, *supra* note 9.

³³ TSA: Advanced Imaging Technology, *supra* note 11.

³⁴ TSA: Mission, Vision, and Core Values, http://www.tsa.gov/who_we_are/mission.shtm (last visited Nov. 19, 2010).

³⁵ *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).

³⁶ *ACLU v. DOJ*, 321 F. Supp. 2d 24, 30 (D.D.C. 2004).

If you have any questions, please feel free to contact me at (202) 483-1140 or stepanovich@epic.org.

V. Certification

The undersigned certifies that the statements in this request are true and correct, to the best of their knowledge, in accordance with 6 C.F.R. § 5.5(d)(3).

Sincerely,

Amie Stepanovich
EPIC National Security Counsel