

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

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ELECTRONIC PRIVACY  
INFORMATION CENTER

Plaintiff,  
v.

UNITED STATES DEPARTMENT OF  
HOMELAND SECURITY

Defendant.

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Civil Action No. 1:09cv2084 (RMU)

**PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION FOR EXTENSION OF  
TIME TO ANSWER OR OTHERWISE RESPOND TO COMPLAINT; AND  
PLAINTIFF’S OPPOSITION TO DEFENDANT’S NOTICE IN OPPOSITION TO  
ENTRY OF DEFAULT**

Plaintiff the Electronic Privacy Information Center (“EPIC”) hereby opposes the January 12, 2010 motion and notice filed by Defendant U.S. Dept. of Homeland Security (“DHS”). EPIC asks the Court to deny DHS’ request for extension of time, and further asks the Court to direct the clerk to enter DHS’ default based on the agency’s failure to timely answer EPIC’s Complaint because:

- 1) DHS’ motion is procedurally defective on its face, violating LCvR 7(g);
- 2) Fed. R. Civ. P. 55(a) requires the clerk to enter DHS’ default;
- 3) DHS’ motion fails to raise a single defense to EPIC’s Complaint – indeed, the agency’s own statements demonstrate that EPIC is entitled to the relief requested in the Complaint;
- 4) EPIC properly served this lawsuit, and DHS tacitly admits that the agency was served in November 2009;
- 5) DHS has, through the date of this opposition, failed to file an answer;
- 6) EPIC would suffer substantial prejudice by further delay.

## **BACKGROUND**

This action arises from Defendant's repeated failure to comply with federal law in responding to a Freedom of Information of Act ("FOIA") request filed by EPIC. EPIC's request demands disclosure of documents bearing on an issue of considerable public importance and current debate – the federal government's use of "body scanners" to take detailed naked images of air travelers. Exhibit 1. No fewer than four Congressional hearings will be held on this topic next week. *See, e.g., Intelligence Reform: The Lessons and Implications of the Christmas Day Attack, Hearing before the S. Comm. on Homeland Sec., 111<sup>th</sup> Cong. (January 20, 2010);<sup>1</sup> The State of Aviation Security - Is Our Current System Capable of Meeting the Threat? S. Comm. on Commerce, Science, and Transportation, 111<sup>th</sup> Cong. (January 20, 2010);<sup>2</sup> Securing America's Safety: Improving the Effectiveness of Anti-Terrorism Tools and Inter-Agency Communication, S. Comm. on the Judiciary, 111<sup>th</sup> Cong. (January 20, 2010);<sup>3</sup> Closed Hearing: Intelligence Matters, Senate Select Comm. on Intelligence, 111<sup>th</sup> Cong. (January 21, 2010).<sup>4</sup>*

EPIC made the FOIA request at issue in this suit on April 14, 2009. Exhibit 1. Federal law required DHS to respond within 20 working days – by May 12, 2009. 5 U.S.C. § 552(a)(6)(A)(i) (2009). But DHS failed to disclose any documents by the statutory deadline. In fact, DHS failed to disclose any documents until December 2, 2009 – a partial disclosure that came on the heels of EPIC's initiation of this lawsuit. Exhibit 2. DHS has failed to disclose any additional documents since December 2, 2009, though the agency admits that it has not fulfilled

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<sup>1</sup> [http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=db07fd72-c631-42ea-a514-215127425e3a](http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=db07fd72-c631-42ea-a514-215127425e3a)

<sup>2</sup> [http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=492e9226-5a14-4568-9de6-92bff715d846](http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=492e9226-5a14-4568-9de6-92bff715d846)

<sup>3</sup> <http://judiciary.senate.gov/hearings/hearing.cfm?id=4332>

<sup>4</sup> <http://intelligence.senate.gov/press/record.cfm?id=321274>

its statutory duties in response to EPIC's FOIA request, and is required to disclose additional agency records. Exhibit 2 ("This is an interim response ... please be advised that we are still continuing our review of additional documents."). DHS failed to enter an appearance in this case until after its deadline to answer, and after EPIC requested entry of default.

EPIC had a statutory right to receive all agency records described in its FOIA request by May 12, 2009. Today, more than eight months later, DHS remains in violation of its obligations, and EPIC does not have the agency records to which it is entitled. DHS' response to EPIC's FOIA request has consisted of repeated delays punctuated by intermittent periods of action. Each brief flurry of activity followed EPIC's filings in this Court. DHS' Motion for extension of time asks the Court to permit further delay by an agency that is already long derelict in its responsibilities. Such delay would cause severe prejudice to EPIC, which requires disclosure of the agency records sought in this lawsuit to inform the ongoing public debate concerning airport body scanners.

## **ARGUMENT**

### I. DHS' Motion is Defective on its Face, and Therefore Must be Denied

DHS moves the Court to "direct the Clerk to refrain from entering a default in this matter." That is, DHS asks the Court to preemptively vacate the clerk's entry of DHS' default.

Motion at 1. Yet DHS' motion fails to comply with LCvR 7(g), which requires:

a motion to vacate an entry of default, or a judgment by default, or both, shall be accompanied by a verified answer presenting a defense sufficient to bar the claim in whole or in part.

DHS's preemptive motion to vacate entry of default was not accompanied by an answer. Instead, the motion requests an extension of time in which to file an answer. Motion at 3. Furthermore, DHS is almost certainly unable to file an answer "presenting a defense sufficient to bar [EPIC's]

claim in whole or in part.” EPIC’s core cause of action in this suit alleges DHS’ failure to make a complete determination concerning EPIC’s FOIA Request. DHS admits that it has failed to do so. Exhibit 2 (“This is an interim response . . . please be advised that we are still continuing our review of additional documents.”). DHS’ motion seeks relief that would only enable extension of the agency’s eight-month pattern of delay in responding to EPIC’s FOIA request.

## II. The Clerk Must Enter DHS’ Default

The clerk must enter DHS’ default even if the Court considers DHS’ motion despite the agency’s failure to file an accompanying verified complaint. “When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk *must enter* the party’s default.” Fed. R. Civ. P. 55(a) (emphasis added); see *Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Cir. 1980) (“Once a defendant fails to file a responsive answer, he is in default. . . .”). EPIC seeks affirmative relief against DHS. EPIC properly served DHS with the Complaint and all other required papers on November 12, 2009 via certified mail pursuant to Fed. R. Civ. P. 4(i)(2). DHS failed to plead or otherwise defend EPIC’s complaint, and failed to even enter an appearance until after its deadline to answer, and after EPIC requested entry of default in this matter. DHS is in default and the clerk “must” enter its default.

The default judgment remedy serves important policy goals. When faced with “an essentially unresponsive party . . . the diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights. The default judgment remedy serves as such a protection.” *Jackson*, 636 F.2d at 836 (quoting *H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970) (per curiam)). DHS’

response to EPIC’s FOIA request has been “essentially unresponsive,” repeatedly delaying proceedings and taking action only in response to filings in this Court.

In analyzing whether default was properly entered, a reviewing court will consider “whether (1) the default was willful, (2) a set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious.” *Keegel v. Key West & Caribbean Trading Co., Inc.*, 627 F.2d 372, 373 (D.C. Cir. 1980); *see Jackson*, 636 F.2d at 836; *Reading v. United States*, 506 F. Supp. 2d 13, 17 (D.D.C. 2007). “The court need not find bad faith to conclude that the defendant acted willfully.” *Capital Yacht Club v. Vessel Aviva*, 228 F.R.D. 389, 393 (D.D.C. 2005) (Urbina, J.). DHS has repeatedly and willfully ignored EPIC’s FOIA request and has demonstrated that it will take action only in response to filings in this court.

Under *Jackson*, a party seeking relief from an entry of default must “assert a meritorious defense that may be proven at trial.” *Canales v. A.H.R.E., Inc.*, 254 F.R.D. 1, 11 (D.D.C. 2008). As discussed in Section I above, DHS asserts no defense whatsoever to EPIC’s allegations. In fact, the motion concedes EPIC’s central claim in this suit – that EPIC is entitled to agency records possessed by DHS. Motion at 3 (“the relief Plaintiff seeks is the provision of certain documents. Defendant is currently endeavoring to respond to Plaintiff’s document request”). Further, EPIC would be prejudiced by additional delay if the Court grants DHS’ motion.

III. EPIC Will Suffer Substantial Prejudice if the Clerk Does Not Enter DHS' Default

Moreover, EPIC would suffer substantial prejudice by any further delay in this action.

EPIC's underlying FOIA request demands disclosure of agency records concerning the DHS' use of "whole body imaging" or "body scanner" technology. The scanners produce detailed, three-dimensional images of individuals stripped naked. 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.

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. 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. 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." 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. In January 2010, the Senate Committee on Homeland Security 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 Committees have stated that body scanners will be a primary topic of inquiry at the hearings.

IV. DHS' Motion Misapplies the Rule 55(d) Standard to EPIC's Rule 55(a) Request for Entry of Default

DHS' motion argues that a plaintiff must meet a higher standard for entry of default against the United States than for entry of default against a private litigant. Yet the Federal Rules make no such distinction. DHS' authority for this proposition, Fed. R. Civ. P. 55(d), addresses default judgments against the United States, but not entry of default: "default *judgment* may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court." Fed. R. Civ. P. 55(d) (emphasis added). On the other hand, Fed. R. Civ. P. 55(a) governs entry of default, and makes no distinction between the United States and private litigants. The Federal Rules and the courts distinguish between entry of default and entry of default judgment, as well as the standards for setting each aside. *See* Fed. R. Civ. P. 55(c) ("The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b)."); *Jackson*, 636 F.2d at 835 ("we note that there is a distinction between the appropriate standard for setting aside a default and that appropriate for setting aside a default judgment").

Moreover, even under the standard set forth in Fed. R. Civ. P. 55(d), courts have repeatedly entered default judgment against the United States, its officers, or its agencies. *See, e.g., Marziliano v. Heckler*, 728 F.2d 151, 159 (2d Cir. 1984); *Alameda v. Secretary of Health, Education & Welfare*, 622 F.2d 1044, 1049 (1st Cir. 1980); *Knowles v. Butz*, 358 F. Supp. 228, 230-32 (N.D. Ca. 1973). Indeed, this Court recently upheld a default judgment against a foreign state under the Foreign Sovereign Immunities Act, which sets forth a standard "identical to the standard for entry of default judgments against the United States in Federal Rule of Civil Procedure 55(e)." *Wachsman ex rel. Wachsman v. Islamic Republic of Iran*, 603 F. Supp. 2d 148, 155 (D.D.C. 2009) (Urbina, J.) (relying on affidavits and expert reports in granting default





**CERTIFICATE OF SERVICE**

I hereby certify that on January 14, 2010, I electronically filed the foregoing “PLAINTIFF’S OPPOSITION TO: 1) DEFENDANT’S MOTION FOR EXTENSION OF TIME TO ANSWER OR OTHERWISE RESPOND TO COMPLAINT; AND 2) NOTICE IN OPPOSITION TO ENTRY OF DEFAULT” through the Court’s CM/ECF system, which will send notification of such filing to the following individuals:

JESSE Z. GRAUMAN  
U.S. Department of Justice  
Civil Division, Federal Programs Branch

\_\_\_\_\_/s/\_\_\_\_\_  
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John Verdi  
*Counsel for Plaintiff*