

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

ELECTRONIC PRIVACY
INFORMATION CENTER

Plaintiff,
v.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY

Defendant.

Civil Action No. 1:09cv2084 (RMU)

JOINT MOTION TO CONSOLIDATE

Plaintiff the Electronic Privacy Information Center (“EPIC”) and Defendant U.S. Dep’t. of Homeland Security (“DHS”) hereby jointly move the court to consolidate the present action with *EPIC v. Dep’t. of Homeland Security*, No. 10-0063 (CKK) (D.D.C. filed Jan. 13, 2010).

The parties move the court for consolidation pursuant to Fed. R. Civ. P. 42(a)(2) and Local Civ. R. 40.5(d) because:

- 1) Both lawsuits arise from FOIA requests filed by EPIC with the DHS concerning the same general subject matter – the DHS’s use of “whole body imaging” technology;
- 2) This lawsuit is the first-filed case;
- 3) The DHS is processing EPIC’s FOIA requests contemporaneously;
- 4) The parties wish both cases to be governed by the Court’s scheduling order in this matter;
- 5) The parties agree that both cases can be resolved on cross-motions for summary judgment;
- 6) The two cases are likely to raise identical issues on summary judgment; and
- 7) Judicial economy favors consolidation.

BACKGROUND

EPIC filed this action on November 5, 2009 (“*EPIC v. DHS I*”). In *EPIC v. DHS I*, EPIC alleges that the DHS violated the Freedom of Information Act (“FOIA”) in responding to EPIC’s April 14, 2009 FOIA request to the agency, a request seeking three categories of documents related to the DHS’s use of “whole body imaging” technology. The DHS filed its Answer on January 15, 2010. On February 16, 2010, the parties submitted a proposed scheduling order to the Court; on February 24, 2010, the Court entered an order adopting the proposed schedule. The DHS has produced two sets of records to EPIC since this lawsuit was filed, and expects to produce additional records according to the February 24, 2010 scheduling order.

EPIC filed a second lawsuit against the DHS on January 13, 2010. *EPIC v. Dep’t. of Homeland Security*, No. 10-0063 (CKK) (D.D.C. filed Jan. 13, 2010) (“*EPIC v. DHS II*”). In *EPIC v. DHS II*, EPIC alleges that the DHS violated the FOIA in responding to EPIC’s July 2, 2009 FOIA request to the agency, which seeks six categories of documents related to the DHS’s use of “whole body imaging” technology. The DHS filed its Answer on February 18, 2010. The DHS has produced one set of records to EPIC since this lawsuit was filed, and expects to produce additional records according to the schedule set forth in the February 24, 2010 scheduling order in *EPIC v. DHS I*.

ARGUMENT

“If actions before the court involve a common question of law or fact, the court may ... consolidate the actions.” Fed. R. Civ. P. 42(a)(2). “The decision whether to consolidate cases under Rule 42(a) is within the broad discretion of the trial court.” *Stewart v. O’Neill*, 225 F. Supp. 2d 16, 20 (D.D.C. 2002). “When determining whether to exercise such discretion, courts weigh considerations of convenience and economy against considerations of confusion and

prejudice.” *Am. Postal Workers Union v. U.S. Postal Serv.*, 422 F. Supp. 2d 240, 245 (D.D.C. 2006) (internal quotations omitted).

As described above, *EPIC v. DHS I* and *EPIC v. DHS II* arise from closely related FOIA requests. The parties in the cases are identical. The cases are likely to raise substantially similar, if not identical, issues of fact and law. The parties agree that consolidation will increase convenience and economy, and will not cause any confusion or prejudice.

Both cases arise from EPIC’s FOIA requests to the DHS concerning “whole body imaging” airport screening technology. Although the FOIA requests were submitted on different dates, the parties have determined that some of the requested categories overlap, and that the DHS possesses some records that are responsive to both EPIC’s April 14, 2009 request and EPIC’s July 2, 2009 request. For example, both requests seek contracts and technical specifications relating to “whole body imaging” machines. Therefore, the DHS is processing EPIC’s FOIA requests contemporaneously, employing one search process to identify documents responsive to both EPIC FOIA requests. The DHS is also reviewing the documents for exempt material contemporaneously, and will prepare a single *Vaughn* index that covers documents responsive to both requests. The parties are also represented by the same counsel in the two cases.

The two cases’ factual similarities will almost certainly implicate common questions of law. The parties agree that both cases can be resolved on cross-motions for summary judgment. The DHS’s contemporaneous search will result in the cases’ raising similar, if not identical, legal issues on summary judgment: *e.g.*, the sufficiency of the agency’s search and the propriety of its asserted FOIA exemptions. Accordingly, the interests of judicial economy will be served if the two cases are resolved with only one set of summary judgment motions rather than two.

For the foregoing reasons, the parties request that the Court consolidate *EPIC v. DHS I* and *EPIC v. DHS II*. The parties request that the consolidated matter proceed on the present docket, consistent with Local Civ. R. 40.5(d)'s direction that "the later-numbered case shall be reassigned." The parties further request that the Court's February 24, 2010 scheduling order, entered in *EPIC v. DHS I*, govern the consolidated actions. A proposed order is attached.

Dated: March 11, 2010

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