

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

ELECTRONIC PRIVACY INFORMATION CENTER	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:09-cv-02084 (RMU)
	)	
THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY,	)	
	)	
Defendant.	)	
	)	

DECLARATION OF KEVIN J. JANET

I, Kevin J. Janet, do hereby declare as follows:

1. I am the Freedom of Information Act (FOIA) Officer for the Transportation Security Administration (TSA) within the Department of Homeland Security (DHS). I am responsible for processing all requests made to TSA under FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, for initiating searches for records relevant to such requests, and for supervising the determination of what records or portions thereof should be disclosed. I have held this position since March 2007.

2. Due to the nature of my official duties, I am familiar with Defendant's obligations under FOIA and the Privacy Act, including application of the various exemptions. The statements made in this declaration are based on my personal knowledge, information made available to me in the performance of my official duties, and conclusions reached in accordance therewith.

3. The purpose of this declaration is to set forth the chronology of correspondence

relating to the FOIA requests by Plaintiff, the Electronic Privacy Information Center (EPIC), at issue in this action, to describe the searches conducted to identify responsive records, to explain Defendant's procedures for processing responsive records, and to identify the basis for Defendant's decision to withhold information requested by EPIC pursuant to Exemptions 2 ("high"), 3, 4, and 5 of the FOIA.

### Chronology

4. By letter dated April 14, 2009, John Verdi submitted to the Department of Homeland Security (DHS) a FOIA request on behalf of EPIC (the "April 14 request"). Upon initial review of the request, DHS determined that the information sought by EPIC was under the purview of TSA. By memorandum dated April 27, 2009, TSA received a referral from DHS. TSA assigned EPIC's April 14, 2009 request FOIA request identification number TSA09-0510. EPIC sought the following three categories of records:

1. "All documents concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals;
2. All contracts that include provisions concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals; and
3. All instructions, policies, and/or procedures concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals."

EPIC requested expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E), and fee status as a "representative of the news media" pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II). A copy of the FOIA request letter and referral memorandum is attached as Exhibit A.

5. By letter dated April 29, 2009, DHS acknowledged the April 14 request. A copy of DHS's letter of April 29, 2009 is attached as Exhibit B.

6. Due to the subject matter of the request, it was determined that the request would produce voluminous records. Accordingly, upon receipt of the request, I contacted EPIC via telephone on approximately May 4, 2009, to discuss the possibility of narrowing the scope of the request. Based on that discussion, it was agreed that the TSA would concentrate on locating records in response to item two pertaining to “[a]ll contracts” for passenger imaging technology that defined the scope of work, operational requirements and any subsequent modifications thereto. This amendment allowed TSA to eliminate the lengthy and time-consuming “submitter notice process” wherein TSA would consider contractor claims of confidential business information (CBI). Accordingly, in all but two instances, rather than asserting FOIA Exemption 4 for CBI, TSA has, in limited circumstances, identified and withheld certain information as non-responsive that would typically be forwarded to contractors as part of the submitter notice process.

7. By letter dated July 2, 2009, John Verdi and Courtney Barclay submitted a second FOIA request to DHS on behalf of EPIC (the “July 2 request”). DHS determined this request was also under the purview of TSA. By memorandum dated July 16, 2009, the TSA received a second referral from DHS. TSA assigned EPIC’s FOIA request identification number TSA10-0260. EPIC sought the following six categories of records:

1. All unfiltered or un-obscured images captured using Whole Body Imaging (“WBI”) technology.
2. All contracts entered into by DHS 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.

EPIC again requested “news media” fee status and expedited processing. A copy of the request and referral memorandum pertaining to the July 2 request is attached as Exhibit C.

8. By letter dated July 16, 2009, DHS acknowledged EPIC’s July 2, 2009, FOIA request. A copy of DHS’s letter of July 16, 2009 is attached as Exhibit D.

9. By letter dated December 1, 2009, TSA provided an interim response and document production in response to the April 14 request. TSA advised EPIC that it was continuing to search for records responsive to the request and would respond upon completion of the search. A copy of the interim response letter, which also references the May 4, 2009 agreement to narrow the scope of the request, is attached at Exhibit E.

10. TSA received notice that EPIC filed two civil actions in the United States District Court for the District of Columbia (Civil Action Nos. 1:09-cv-2084-RMU, filed November 5, 2009, and 1:10-cv-63-CKK, filed January 13, 2010), seeking to compel production of the records at issue in the April 14 request and the July 2 request. Because the two requests overlapped in subject matter and were both the subject of pending litigation, TSA began to treat them as one combined request, and informed EPIC of that fact on or about February 5, 2010.

11. By letter dated March 2, 2010, TSA provided a second interim response to the April 14 request, which also included a response to the July 2 request. EPIC was advised that TSA

was continuing to review additional documents responsive to both requests. A copy of TSA's letter of March 2, 2010, is attached as Exhibit F.

12. During a conference call on March 3, 2010, TSA and EPIC came to four additional agreements as to the scope of EPIC's requests. These agreements are memorialized in an email exchange attached as Exhibit G.

13. By letter dated March 15, 2010, TSA provided a third consolidated response to the two requests. A copy of TSA's letter of March 15, 2010, is attached as Exhibit H. In this letter, TSA also notified EPIC that it was waiving all fees associated with EPIC's requests.

14. By letter dated April 15, 2010, TSA provided a final consolidated response to both requests. A copy of TSA's letter of April 15, 2010 is attached as Exhibit I.

15. In total, TSA produced 1,766 pages of documents in response to EPIC's two requests. Excerpts of many of these pages were withheld in part pursuant to FOIA Exemptions 2 ("low"), 2 ("high"), 3, 4, 5, 6, and 7(c). In addition to the documents that were produced, TSA also located two categories of responsive records that were withheld in full. The first category consists of test images produced by Advanced Imaging Technology ("AIT")<sup>1</sup> machines. AIT machines in the airports are not enabled to store images. A search within TSA was conducted and approximately 2,000 test images responsive to EPIC's request were located at a TSA test facility. These images were taken in test mode at the test facility using TSA models, not members of the public, and were for test purposes only. EPIC was provided with a link to a TSA website to obtain images that have been released to the public. The second category of full

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<sup>1</sup> The terms "Advanced Imaging Technology" (AIT) and "Whole Body Imaging" (WBI) are essentially synonymous. The terms encompass both types of imaging technology used by TSA, millimeter wave and backscatter. This declaration uses the term "AIT."

withholdings consists of 376 pages of training materials for TSA employees regarding the use of WBI machines. The images and training materials have been withheld in their entirety pursuant to Exemptions 2 (“high”) and 3 of the FOIA.

16. On May 18, 2010, Defendant shared a draft Vaughn index with EPIC, and the parties held a phone conference call later that day. During the conference call, EPIC agreed not to contest any withholdings by DHS and TSA made on the following bases: Exemption 2 (“low”), Exemption 2 (“high”) as asserted with regard to redactions of “mean downtime requirements” and identities of TSA security personnel, Exemption 4, Exemption 6, Exemption 7(c), and portions of records redacted as non-responsive pursuant to the agreement of May 4, 2009. A copy of the email memorializing the May 18, 2010 agreement is attached as Exhibit J.

17. Subsequent to the May 18, 2010 agreement, Defendant recognized that it had inadvertently omitted ten partial withholdings – eight made pursuant to Exemptions “high 2” and 3, and a pair of withholdings made pursuant to Exemption 4 – from the draft Vaughn index shared with EPIC on May 18.<sup>2</sup> Defendant informed EPIC via telephone of the inadvertent omission, and stated that it would construe all withholdings that had been omitted from the draft Vaughn index as outside the scope of the May 18 agreement, and would accordingly defend all of those withholdings at summary judgment. An email exchange memorializing the phone conversation is attached as Exhibit K.

18. Upon reviewing the records produced to EPIC in preparation of Defendant’s Motion for Summary Judgment, TSA determined that eight redactions made pursuant to Exemption 2

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<sup>2</sup> These withholdings are on Bates Nos. 001702, 001703, 001710, 001714, 001715, 001716, 001718, 001719, and 001721.

("high") were erroneously made.<sup>3</sup> Accordingly, TSA produced the documents to EPIC without these withholdings on May 27, 2010. A copy of the letter sent to EPIC on May 27, 2010 is attached as Exhibit L.

19. As a result of the parties' agreements, only 58 of the partially withheld pages contain withholdings that are at issue in this action. In addition, the full withholdings of the test images and training materials remain at issue. The only exemptions at issue are Exemptions 2 ("high"), 3, 4, and 5.

### **Scope of Search**

20. Based on the number of categories in EPIC's two requests, the TSA initiated an extensive search for responsive records. Due to the breadth of EPIC's request, it would have been overly burdensome to search every TSA office across the country. As detailed below, the FOIA Office identified those offices that are most likely to have records concerning each of the items in EPIC's two requests, and directed that they search for responsive records. The offices identified as likely to have responsive records were the Office of Security Technology, the Department of Homeland Security (DHS) Transportation Security Laboratory (TSL), the Office of Acquisitions, the Office of Operational and Technical Training, the TSA Contact Center, the Office of Legislative Affairs, the Privacy Office, and the Federal Security Director Offices for those airports deploying AIT technology.

21. The offices performed both electronic and manual searches. The categories for which each office was tasked, the searches performed, and the results of those searches are more specifically set out in the following paragraphs.

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<sup>3</sup> These withholdings are on Bates Nos. 000797, 000799, 001050, 001055, 001058, 001061, 001065, and 001702.

22. The FOIA Office determined that the Office of Security Technology (OST) would be likely to have records responsive to items 1 and 3 of the April 14, 2009 request and items 1 and 3 of the July 2, 2009 request. Specifically, the Passenger Screening Program within OST focuses on identifying, testing, procuring, deploying, and sustaining checkpoint security equipment that detects explosives and/or prohibited items that may be concealed on people and/or their carry-on items. Two pages were located in response to item 1 of the April 14 request and 101 pages were located in response to Item 3 of the July 2 request.

23. In addition, the FOIA Office determined that the DHS Transportation Security Laboratory (TSL) of the Science and Technology Directorate would likely have records belonging to TSA and deemed responsive to item 1 of the July 2 request. TSL's core mission is to enhance Homeland Security by performing research, development and validation of solutions to detect and mitigate the threat of improvised explosive devices. TSL was charged with accrediting and testing AIT and held AIT images belonging to TSA as part of its testing process. As a result of the TSL searches, approximately 2,000 images were identified as being responsive to Item 1 of the July 2 request.

24. The FOIA Office determined that records responsive to Item 2 of each FOIA request and item 3 of the July 2 request were likely to be located in the Office of Acquisitions (OA). OA is responsible for contracting for goods and services, including such activity as procurement planning, pre-solicitation, solicitation, and negotiation, evaluation, award and contract administration. A search of paper and computerized files within the office was conducted by contract number. As a result, a total of 538 pages were located for item 2 in each request.

25. The FOIA Office determined that the Office of Operational and Technical Training



(OTT) within the Office of Security Operations (OSO) would be likely to have records responsive to Item 4 of the July 2 request. OTT is responsible for the design, development, implementation, management, support, and evaluation of operational and technical training solutions required by statute or regulation to establish workforce competencies and improve workforce performance throughout OSO. OTT develops, tests and executes operational and technical training for the OSO workforce to perform their duties in protecting the nation's transportation systems. OTT provides TSOs with technical training to ensure that security and passenger engagement functions are performed in accordance with established standards and practices, to include appropriate initial training (New Hire Training), ongoing skills maintenance training (Recurrent Training), and when necessary, remedial training. OTT establishes the training programs associated with emerging technologies, and provides the training tool kits used for training and testing weapons and improvised explosive device (IED) components to effectively train and test TSOs' performance. A search of paper files within the OTT internal filing system was conducted. As a result, 376 pages were located.

26. The FOIA Office determined that records responsive to item 5 of the July 2 request were likely to be located in the TSA Contact Center (TCC) within the Office of the Executive Secretariat. The TCC serves as the single point of contact for all non-media public inquiries and complaints. The TCC conducted a computerized search utilizing the TSA Contact Center database (TCRS) and the Correspondence Control Management System (CCMS). The TCC based their findings on the following search combinations: "Rapiscan"; "Backscatter"; "Millimeter Wave"; "Whole Body Imaging"; and "WBI."

27. In addition, the FOIA Office tasked the Federal Security Director (FSD) Offices at the 19 airports where TSA deployed AIT technology. FSD offices have Customer Support Managers who respond to email and/or handwritten complaint forms submitted directly at the airports. As a result of the TCC and FSD Office searches, 1,031 pages were located in response to Item 5 of the July 2 request.

28. The FOIA Office determined that records responsive to Item 5 of the July 2 request were likely to be located in the Office of Legislative Affairs (OLA). OLA is Defendant's primary point of contact for Congress. OLA fields congressional inquiries, prepares witnesses to provide testimony at hearings, sets up briefings with Members of Congress and committees, identifies key areas of Member concern and coordinates meetings with Members and congressional staff. OLA was specifically tasked to locate any complaints received through a Congressional inquiry related to whole body imaging. OLA searched both computerized and paper files. An electronic search of emails in Microsoft Outlook was performed. Additionally, a manual search of paper files within the OLA's internal filing system was conducted. Based on this search, OLA located no records in response to Item 5.

29. The FOIA Office determined that records responsive to Items 5 and 6 of the July 2 request were likely to be located in the Privacy Office within the Office of Special Counselor. The Privacy Office is responsible for (a) formulating and communicating official TSA privacy policies; (b) monitoring agency compliance with all applicable Federal privacy laws and regulations and implementing corrective, remedial, and preventive actions whenever necessary; and (c) ensuring that personal information contained in Privacy Act systems records is handled in full compliance with the Privacy Act, 5 U.S.C. 552a, as amended. In the event of a data security

breach involving AIT imagery, the Privacy Office would assist in any action to ameliorate adverse privacy impact(s) caused by the breach and would ensure that corrective actions were taken to protect against similar breaches in the future. Also, given the Privacy Office's public role in addressing privacy issues for TSA, the FOIA Office determined to search that office for records of complaints in the event that members of the public contacted the Privacy Office. The Privacy Office located no records in response to either Item 5 or 6 of the July 2 request. The Privacy Office searched both computerized and paper files. An electronic search of emails in Microsoft Outlook was performed. Additionally, a manual search of paper files within the PA's internal filing system was conducted.

### **Exemptions**

30. The following paragraphs describe the records withheld by TSA pursuant to the FOIA exemptions that still at issue in this action.

#### *Exemptions 3 and 2 ("high")*

31. Exemption 3 of the FOIA allows the withholding of information "specifically exempted from disclosure by statute . . . if that statute (A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph." 5 U.S.C. § 552(b)(3).

32. TSA made a number of Exemption 3 withholdings pursuant to 49 U.S.C. § 114(r) and its implementing regulations, which authorize TSA to prohibit the disclosure of sensitive security information ("SSI"). The bases for all of TSA's withholdings pursuant to Exemption 3 are fully

explained in the Declaration of Mark Roberts (“Roberts Declaration”). Mr. Roberts is the Acting Manager of TSA’s SSI Branch and supervised the review of the documents produced to EPIC to ensure that SSI would not be publicly released.

33. Exemption 2 of the FOIA provides that FOIA “does not apply to matters that are . . . related solely to the internal personnel rules and practices of an agency.” 5 U.S.C. § 552(b)(2). Exemption 2 exempts two types of predominantly internal information: (1) “high 2”, which consists of information the release of which would risk circumvention of agency regulations, and (2) “low 2”, which consists of routine matters of merely internal interest. All of the Exemption 2 withholdings at issue in this case fall into the “high 2” category.

34. The “high 2” withholdings in this case fall into six categories: (1) Excerpts from procurement specifications describing the required capabilities of WBI machines for detecting weapons, explosives, liquids, and other anomalies,<sup>4</sup> (2) Excerpts from operational requirements documents that describe certain functional requirements,<sup>5</sup> (3) Excerpts from TSA communications that identify specific security screening procedures and techniques,<sup>6</sup> (4) Excerpts from the “question trackers” that describe certain performance specifications,<sup>7</sup> (5) the 2000 test images produced by IAT machines that have not been deployed at airports, withheld in their entirety and (6) the training materials, withheld in their entirety.

35. Nearly all of the records withheld under Exemption “high 2” were also withheld under Exemption 3 because they constitute sensitive security information (SSI). The only

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<sup>4</sup> Bates Nos. 000136, 000149, 000150, 001636, 001637, 001640, 001649, 001650.

<sup>5</sup> Bates Nos. 001733, 001752.

<sup>6</sup> Bates Nos. 000876, 000896, 000907, 000908, 000917, 000918, 000920, 000921, 000923, 000924, 000935, 001225.

<sup>7</sup> Bates Nos. 001702, 001703, 001710, 001714, 001716, 001718, 001719, 001721.

exceptions are excerpts from two pages of TSA emails and communications and two excerpts from two pages of the Procurement Specifications.<sup>8</sup> These excerpts do not constitute SSI but nonetheless fall within the scope of Exemption “high 2.” They are described further below.

36. All of the information withheld under Exemption 2 is predominantly internal. The procurement specifications, operational requirements<sup>9</sup>, internal TSA emails and communications, questions and answers about operational requirements, test images, and training materials are all either internal documents that were written and prepared solely for internal review and use within TSA, or in some cases, as described in paragraphs 12 and 14 of the Roberts Declaration, documents that were circulated to a limited number of vendors who had been cleared to view SSI because they either had contracts with TSA to manufacture security technology, or were being considered for such contracts. These documents were all prepared to guide TSA personnel and contractors in their deployment and use of AIT machines, as well as in their responses to passengers who voiced concerns and complaints about the machines. None of the withheld documents were widely disseminated outside TSA. Only one excerpt withheld under Exemption “high 2” was directed to an individual other than a TSA employee or contractor. This redaction, Bates No. 001225, is a short excerpt from TSA’s response to an individual passenger who

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<sup>8</sup> Bates Nos. 000896, 000907, 001637, 001640.

<sup>9</sup> As I was reviewing the two Operational Requirements Documents (ORD) at Bates Nos. 001729-67, I discovered language on the cover pages (Bates Nos. 001729 and 001748) that suggests that the ORDs were intended for public release. Upon further inquiry, I determined that TSA has not released the ORDs to the public, nor has it ever intended to do so. Instead, when first drafting the documents, the drafters used an old ORD template which contained the public release language, and that language was inadvertently left on the cover pages. The documents have not been released to the public and are not located at the Transportation Security Laboratory Library or at the National Technical Information Service (NTIS).

registered a complaint.

37. All information that was withheld as SSI under Exemption 3 is being withheld under Exemption “high 2” based on the same rationale that justifies its designation as SSI. As explained in paragraph 9 of the Roberts Declaration, the information designated SSI in this case was so designated because its disclosure would be detrimental to the security of transportation. Similarly, this information is exempted from disclosure under Exemption “high 2” because the disclosure of this information could be used to breach transportation security and thereby circumvent agency security regulations and procedures. The release of any information pertaining to AIT performance specifications, procedures and selection criteria related to passenger screening, AIT images, and AIT training records could be exploited by terrorists to circumvent agency regulations and procedures related to transportation security. Accordingly, TSA asserts Exemption “high 2” concurrently with Exemption 3 to protect SSI.

38. TSA, in very limited instances, has asserted Exemption “high 2” independent of SSI-designated information. TSA has withheld descriptions of specific screening procedures and techniques at Bates Nos. 000896 and 000907. Both of these excerpted withholdings are from TSA emails and communications. Additionally, TSA has withheld AIT performance specifications and physical space requirements at Bates Nos. 001637 and 001640. These excerpted withholdings are from the Procurement Specifications.

39. The withheld excerpts on Bates Nos. 000896 and 000907 contain descriptions of screening procedures and selection criteria used at a particular airport. The release of these screening operational details could be used by terrorists to anticipate and prepare against the withheld screening measures.

40. The withheld excerpts on Bates Nos. 001637 and 001640 contain descriptions of AIT performance specifications and space requirements, specifically, passenger height limitations, distance measurements between AIT and passengers, and monitor zoom capability. The release of any specific AIT performance features and requirements could potentially give terrorists an advantage by having insight into the capabilities of the system. By knowing these types of details, one could circumvent transportation security regulations by recruiting the services of an individual who would exceed AIT height restrictions, or by concealing something of a certain size that would surpass the zoom capability.

*Exemption 4*

41. Exemption 4 of the FOIA protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. § 552(b)(4). With regard to information required to be submitted to the Government, information is considered confidential if its disclosure is likely to either (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.

42. TSA has withheld two excerpts of an “Industry Day question tracker” on Bates No. 001715 pursuant to Exemption 4. Industry Day was held by TSA to enable vendors of AIT machines to present questions and concerns about the technical performance specifications required under the contracts for the machines. The “question tracker” includes questions by the vendors and responses by TSA.

43. The first redaction on page 001715 is a question that contains proprietary information submitted by a vendor detailing a specific performance capability of a machine

manufactured by that vendor. Similarly, the second withheld excerpt pertains to proprietary information submitted by a vendor that identifies a certification that reveals a unique capability of that vendor's system.

44. The confidential information referenced in both of these questions was required to be submitted by the vendors to TSA as a prerequisite for vendors to compete for contracts for AIT machines. The information in the withheld questions is commercial in nature, and the public disclosure of the details in these questions is likely both to cause substantial harm to the competitive position of the vendor from whom the information was obtained, and to impair the Government's ability to obtain such information in the future.

#### *Exemption 5*

45. Under Exemption 5, FOIA's disclosure requirements do not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption has been interpreted to include the deliberative process privilege, the attorney-client privilege, and attorney work product. TSA has asserted Exemption 5 to withhold information protected under all three of these categories.

#### Deliberative Process Privilege

46. The deliberative process privilege protects internal agency communications that are both predecisional, that is, that predate an agency decision or policy, and deliberative, that is, containing recommendations or opinions on legal or policy matters. It therefore applies to records such as recommendations, evaluations, drafts, proposals, suggestions, and other subjective documents which do not reflect final agency policy. There are three primary concerns



recognized under the deliberative process privilege: (1) to encourage open and frank discussion of policy matters between subordinates and supervisors; (2) to protect against the premature disclosure of proposed policies before they become final; and (3) to protect against public confusion that might result from the disclosure of reasons and rationales that were not, in fact, the ultimate grounds for the agency's action.

47. TSA partially withheld records on Bates Nos. 000268, 000888, 0000891, 000892, 000912, 000919, 001054, 001055, 001060, 001061, 001065, 001079, 001083, 001086, 001088, 001092, 001100, 001107, 001119, 001124, 001145, and 001148 on the basis of the deliberative process privilege. The redacted information on all of these pages except for pages 001145 and 001148 consists of communications between TSA personnel regarding recommended or proposed responses to passenger complaints about AIT and/or corrective measures at the checkpoints. Each specific redaction is described below.

48. The redaction on Bates No. 000268 consists of one sentence of an internal TSA email communication in which the TSA employee who contacted the passenger who registered the complaint evaluates his own effort at resolving the complaint. This excerpt shares the author's own subjective opinion and was part of the process by which TSA has continually evaluated and refined its approach to handling passenger complaints about WBI machines.

49. The identical redactions on Bates Nos. 000888 and 000892 (second set of deliberative-process redactions on 000892) consist of two sentences of an internal TSA email regarding a passenger complaint. These sentences are predecisional in that they concern TSA's plans to address the complaint, and deliberative in that they reflect the personal opinions of the email's author regarding the complaint and its possible outcome. They are accordingly protected

by the deliberative process privilege.

50. The final sentence of an interoffice memorandum, Bates No. 000891, is redacted. This document is an internal agency communication prepared to assist TSA in responding to a complaint and is therefore predecisional. The final sentence reflects the author's personal opinion on the merits of the complaint and is therefore deliberative.

51. One sentence of an internal TSA email, Bates No. 000892 (first email), is redacted because it consists of the author's opinions as to (1) the possible outcome and future of the complaint, and (2) the merits of the complaint. This excerpt is predecisional as it is part of a string of emails in which TSA employees discuss how to address the complaint, and deliberative in that it reflects the opinions of the author.

52. The identical redactions on Bates Nos. 000912 and 000919, one sentence of an internal TSA communication, contain the author's recommendation as to any further action the agency should take with regard to a particular complaint. For the same reasons described above, this sentence is both predecisional and deliberative.

53. The identical redactions on Bates Nos. 001054, 001079, 001083, 001086, 001088, 001092, and 001100 consist of a TSA attorney's opinion about a pending complaint and a follow-up question.<sup>10</sup> For the same reasons described above, the redacted excerpt is both predecisional and deliberative.

54. The identical redactions on Bates Nos. 001055, 001060, 001061, and 001065 consist of communications between a Deputy Assistant Federal Security Director and a Transportation Security Manager in which, as part of an effort to resolve a complaint, they discuss factual

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<sup>10</sup> These excerpts, as well as those on Bates Nos. 001107 and 001119, are also protected by the attorney-client privilege as discussed below.

discrepancies between witness accounts and an incident report documenting a complainant's experience with AIT screening at the airport. For the same reasons described above, the redacted excerpt is both predecisional and deliberative.

55. TSA withheld an email from a TSA attorney, Bates No. 001107, advising TSA as to future action to take with regard to a particular complaint. For the same reasons described above, this sentence is both predecisional and deliberative.

56. TSA also withheld an excerpt from an email from a TSA attorney, Bates No. 001119, in which the attorney expresses her opinion about the events underlying a complaint as part of an effort to determine how to address it. For the same reasons described above, this sentence is both predecisional and deliberative.

57. A redacted sentence on Bates No. 001124 contains a TSA official's recommendation as to the next steps to take with regard to a particular complaint. For the same reasons described above, this sentence is both predecisional and deliberative.

58. TSA also withheld two handwritten notes, Bates Nos. 001145 and 001148, pursuant to the deliberative process privilege. In these notes, individuals from the TSA office providing complaints in response to EPIC's requests made recommendations regarding the application of FOIA exemptions to the email communications. These are predecisional in that a final decision had not yet been made whether to assert any exemptions, and are deliberative in that they reflect the opinions of the individuals who made the recommendations.

#### Attorney-Client Privilege

59. The attorney-client privilege protects confidential communications made between clients and their attorneys for the purpose of securing legal advice or services. It encompasses

facts divulged by a client to the client's attorney, as well as communications from the attorney to the client based upon and reflecting those facts.

60. Records on Bates Nos. 001054, 001079, 001083, 001086, 001087, 001088, 001090, 001092, 001095, 001098, 001100, 001107, and 001119 were partially withheld from production to EPIC on the basis of the attorney-client privilege.<sup>11</sup> These withheld excerpts all consist of email communications to and from TSA attorneys in which TSA employees seek, and receive, the attorneys' legal advice as to how to handle passenger complaints as they sought both to resolve the complaints and prepare to deal with any anticipated legal claims stemming from the incidents documented in the complaints. They are described in greater detail below.

61. The identical redactions on Bates Nos. 001054, 001079, 001083, 001086, 001088, 001092, and 001100 consist of a TSA attorney's opinion about a complaint and a follow-up factual question.

62. The identical redactions on Bates Nos. 001087 and 001098 contain advice by a TSA attorney regarding steps the agency should take as to handling a complaint and anticipating possible litigation.

63. The redactions on Bates No. 001090 contain a TSA attorney's explicit advice as to how to resolve a complaint.

64. The redaction on Bates No. 001095 consists of facts conveyed by a TSA employee to a TSA attorney for the purpose of securing the attorney's legal advice and guidance.

65. The redaction on Bates No. 001107 consists of a TSA attorney's advice as to future

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<sup>11</sup> As discussed above, the withholdings on Bates Nos. 001054, 001079, 001083, 001086, 001088, 001092, 001100, 001107, and 001119 are also covered by the deliberative process privilege. As discussed below, the withholdings on Bates Nos. 001087 and 001098 are also attorney work product.

action TSA should take with regard to a particular complaint.

66. The redaction on Bates No. 001119 consists of a TSA attorney's opinions as to the events underlying a pending complaint.

#### Attorney Work Product

67. The attorney work product doctrine protects material prepared by an attorney in contemplation of litigation. Its purpose is to protect the litigation process by insulating an attorney's preparation from scrutiny. TSA has withheld three excerpts pursuant to this privilege: Bates Nos. 000979, 001087, and 001098.<sup>12</sup>

68. The redacted excerpt on Bates No. 000979 is an email communication between attorneys pertaining to this current litigation.

69. The identical redacted excerpts on Bates Nos. 001087 and 001098 contain advice by a TSA attorney regarding steps the agency should take as to handling a complaint in anticipation of possible litigation.

#### Conclusion

70. All TSA offices that were expected to maintain records concerning the six categories identified in EPIC's FOIA request were searched. Further, all non-exempt responsive records that were located were provided to EPIC. For all records partially withheld, TSA produced the segregable portion of each of the records, and provided a justification for withholding the remainder of the information in its response letters, and marked each document with the applicable exemption.

71. In the 58 partially withheld pages at issue between the parties, the limited

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<sup>12</sup> The redactions on Bates Nos. 001087 and 000198 are also protected by the attorney-client privilege.

withholdings consisted of individual paragraphs, sentences, and phrases. No further segregation of these excerpts was possible. As set forth in detail in paragraphs 20 and 24 of the Roberts Declaration, no segregation was possible with regard to the test images and training materials withheld in full.

72. Attached as Exhibit M to this declaration is an index of the withheld records. It is intended as a reference only, and cites to the appropriate paragraphs of this declaration and the Declaration of Mark Roberts. The declarations, and not the index, are being provided by TSA to justify its withholdings and to satisfy the requirements of Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 27, 2010



---

Kevin J. Janet

Freedom of Information Act Officer  
Transportation Security Administration  
Department of Homeland Security

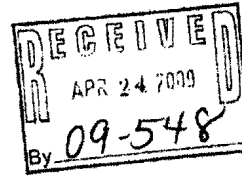
# **Exhibit A**

**epic.org**

April 14, 2009

VIA U.S. MAIL (CERTIFIED DELIVERY)

Catherine M. Papoi, J.D., CIPP/G  
 Deputy Chief FOIA Officer  
 Director, Disclosure & FOIA  
 The Privacy Office  
 U.S. Department of Homeland Security  
 245 Murray Drive SW, Building 410  
 STOP-0550  
 Washington, DC 20528-0550



1718 Connecticut Ave NW  
 Suite 200  
 Washington DC 20009  
 USA  
 +1 202 483 1140 (tel)  
 +1 202 483 1248 (fax)  
 www.epic.org

**RE: Freedom of Information Act Request and Request for Expedited Processing**

Dear Ms. Papoi,

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 Department of Homeland Security ("DHS") component, began testing passenger imaging technology to screen air travelers. 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>

Whole body imaging systems produce detailed, three-dimensional images of individuals. The TSA is testing whole body imaging systems at airport security checkpoints, screening passengers before they board flights. Security experts have described whole body scanners as the equivalent of "a physically invasive strip-search."<sup>5</sup>

<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> 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,



On October 11, 2007, the 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>6</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>7</sup> or wear baggy clothing.<sup>8</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>9</sup> The TSA assured travelers that "a security algorithm will be applied to the image to mask the face of each passenger."<sup>10</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>11</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>12</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>13</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

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2005, [http://www.schneider.com/blog/archives/2005/06/backscatter\\_x-r.html](http://www.schneider.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.").

<sup>6</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>7</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>8</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>9</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>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *TSA: Whole Body Imaging*, note 1 *supra*.

<sup>13</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).

the standard metal detector search.<sup>14</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>15</sup> On April 6, 2009, the TSA announced that it plans to expand the mandatory use of whole body imaging to all airports.<sup>16</sup> All passengers must "go through the whole-body imager instead of the walk-through metal detector," the TSA said.

#### Documents Requested

EPIC requests copies of the following agency records in the possession of the DHS:

1. All documents concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals;
2. All contracts that include provisions concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals; and
3. All instructions, policies, and/or procedures concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals.

#### 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 the privacy implications of the TSA's whole body imaging program. The TSA is presently using whole body imaging technology as the primary security screening method at six airports, and plans to expand the program to scan all U.S. air travelers. Whole body imaging is capable of generating, displaying, and storing detailed images of travelers that

<sup>14</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.shm](http://www.tsa.gov/press/happenings/mwave_continues.shm).

<sup>15</sup> *Id.*

<sup>16</sup> Sharkey, *supra* note 4.

are so graphic, security experts liken them to virtual "strip searches." The TSA had repeatedly made assurances concerning privacy protections for its whole body imaging program, but has reneged on several promises. This calls into question the TSA's commitment to the remaining privacy safeguards, and the truthfulness of its pledge to obscure and delete whole body imaging scans. The documents requested by EPIC will inform the public regarding this controversial federal screening plan.

The TSA's use of whole body imaging is a matter of great public interest. Many news outlets, including The New York Times, Slate, and MSNBC, have published substantial coverage concerning the topic.<sup>17</sup>

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 provided in 6 C.F.R. § 5.5(d)(4), I will anticipate your determination on our request for expedited processing with ten (10) calendar days.

Respectfully submitted,



John Verdi  
Director, EPIC Open Government Project

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<sup>17</sup> See, e.g. Sharkey, *supra* note 4; William Saletan, *Deeper Digital Penetration*, Slate, Apr. 8, 2009 available at <http://slate.msn.com/id/2215687/>; William Saletan, *Digital Penetration*, Slate, Mar. 3, 2007 available at <http://www.slate.com/id/2160977/>; Jeremy Hsu, *Airport body scans reveal all*, MSNBC, Apr. 1, 2009 available at <http://www.msnbc.msn.com/id/29997633/>.

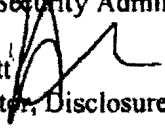


# Homeland Security

*Privacy Office, Mail Stop 0655*

April 27, 2009

**MEMORANDUM FOR:** Kevin Janet, FOIA Officer  
Transportation Security Administration (TSA)

**FROM:** Vania T. Lockett   
Associate Director, Disclosure & FOIA Operations

**SUBJECT:** **DHS/OS/PRIV 09-548**

Attached is a Freedom of Information Act (FOIA) request received at the DHS FOIA Office on April 24, 2009. The requester is seeking the following agency records:

1. All documents concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals;
2. All contracts that include provisions concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals; and
3. All instructions, policies, and/or procedures concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals.

Upon review of the request, I have determined that, if such records exist, they would be under your purview. Therefore, I am transferring this request to your office for action. Please respond directly to the requester.

The requester has been notified of this transfer. A copy of the transmittal letter is attached.

# **Exhibit B**



# Homeland Security

Privacy Office, Mail Stop 0633

April 29, 2009

John Verdi  
Director  
EPIC Open Government Project  
1718 Connecticut Ave NW  
Washington, DC 20009

Re: **DHS/OS/PRIV 09-548**

Dear Mr. Verdi:

This acknowledges receipt of your Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), dated April 14, 2009, and received in this office April 24, 2009. You are seeking the following agency records:

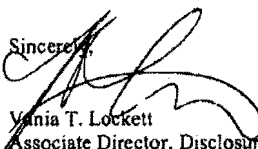
1. All documents concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals;
2. All contracts that include provisions concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals; and
3. All instructions, policies, and/or procedures concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals.

Upon initial review of your request, I have determined that the information you are seeking is under the purview of the Transportation Security Administration (TSA). Therefore, I am referring your request to the FOIA Officer for TSA, Kevin Janet, for processing and direct response to you. You may contact that office in writing at Transportation Security Administration, 601 S. 12<sup>th</sup> Street, 11<sup>th</sup> Floor, East Tower, Arlington, VA 22202 or via telephone at 1-866-FOIA-TSA or 571-227-2300.

If there are any other DHS components that you would like us to search, please advise this office in writing. A list of DHS components and offices may be found at:  
<http://www.dhs.gov/xabout/structure/index.shtm>.

If you need to contact this office again concerning your request, please refer to **DHS/OS/PRIV 09-548**. This office can be reached at 866-431-0486.

Sincerely,

  
Yania T. Lockett  
Associate Director, Disclosure & FOIA Operations

[www.dhs.gov](http://www.dhs.gov)

# **Exhibit C**

ELECTRONIC PRIVACY INFORMATION CENTER

TSA 10-0260

11/22/10

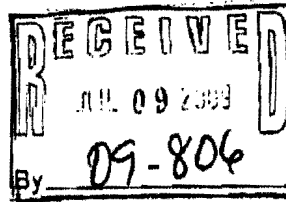
11/29/10

epic.org

July 2, 2009

VIA U.S. MAIL (CERTIFIED DELIVERY)

Catherine M. Papoi, J.D., CIPP/G  
Deputy Chief FOIA Officer  
Director, Disclosure & FOIA  
The Privacy Office  
U.S. Department of Homeland Security  
245 Murray Drive SW, Building 410  
STOP-0550  
Washington, DC 20528-0550



1718 Connecticut Ave NW  
Suite 200  
Washington DC 20009  
USA  
+1 202 483 1140 (tel)  
+1 202 483 1248 (fax)  
www.epic.org

Dear Ms. Papoi:

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

<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>

On June 4, 2009, the U.S. House of Representatives passed a bill that will limit the use of WBI systems in airports.<sup>23</sup> The bill prevents use of this technology for primary screening purposes.<sup>24</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.

#### 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 DHS 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

<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-3.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/sec1000faq.html#10> (last visited July 2, 2009).

<sup>23</sup> H.R. 2200, 111<sup>th</sup> Cong., as amended by H. Amend. 172 (1<sup>st</sup> Sess. 2009).

<sup>24</sup> *Id.*

"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.

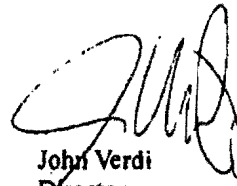
Request for "News Media" Fee Status

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 6 C.F.R. § 5.5(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




# Homeland Security

*Privacy Office, Mail Stop 0655*

July 16, 2009

**MEMORANDUM FOR:** Kevin Janet, FOIA Officer  
Transportation Security Administration (TSA)

**FROM:** Vania T. Lockett   
Acting Departmental Disclosure Officer

**SUBJECT:** DHS/OS/PRIV 09-806

Attached is a Freedom of Information Act (FOIA) request received at the DHS FOIA Office on July 9, 2009. The requester is seeking the following records:

1. All unfiltered or un-obscured images captured using Whole Body Imaging technology.
2. All contracts entered into by DHS 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, of 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

Upon review of the request, I have determined that, if such records exist, they would be under your purview. Therefore, I am transferring this request to your office for action. Please respond directly to the requester.

The requester has been notified of this transfer. A copy of the transmittal letter is attached.

# **Exhibit D**



# Homeland Security

*Privacy Office, Mail Stop 0655*

July 16, 2009

Mr. John Verdi  
Electronic Privacy Information Center  
1718 Connecticut Ave., N.W.  
Suite 200  
Washington, DC 20009

**Re: DHS/OS/PRIV 09-806**

Dear Mr. Verdi:

This acknowledges receipt of your July 2, 2009, Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS). Your request was received in this office on July 9, 2009. You are seeking copies of the following records:

1. All unfiltered or un-obscured images captured using Whole Body Imaging technology.
2. All contracts entered into by DHS 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

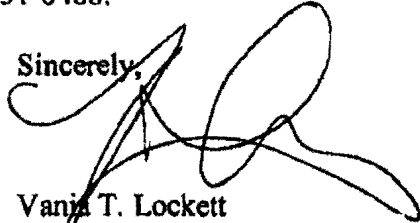
Upon initial review of your request, I have determined that the records you seek are under the purview of the Transportation Security Administration (TSA). Therefore, I am referring your request to the FOIA Officer for TSA, Kevin Janet, for processing and direct response to you. You may contact TSA in writing at Transportation Security Administration, 601 S. 12<sup>th</sup> Street, 11<sup>th</sup> Floor, East Tower, Arlington, VA 22202 or via telephone at 1-866-FOIA-TSA or 571-227-2300.

If there are any additional DHS components that you believe to be in possession of records responsive to your request, please advise this office. For your convenience, a list of DHS

disclosure contacts may be found on our website at:  
[http://www.dhs.gov/xfoia/Copy\\_of\\_editorial\\_0318.shtm](http://www.dhs.gov/xfoia/Copy_of_editorial_0318.shtm); Internet, accessed July 16, 2009.

If you need to contact this office again concerning your request, please refer to **DHS/OS/PRIV 09-806**. This office can be reached at 866-431-0486.

Sincerely,

A handwritten signature in black ink, appearing to read 'V. Lockett', with a large, stylized flourish extending to the right.

Vania T. Lockett  
Acting Departmental Disclosure Officer

# **Exhibit E**





Transportation  
Security  
Administration

DEC - 1 2009

Mr. John Verdi  
EPIC Open Government Project  
1718 Connecticut Ave. N. W., Suite #200  
Washington, DC 20009

**FOIA Case Number: TSA09-0510**

Dear Mr. Verdi:

This is an interim response to your Freedom of Information Act (FOIA) request to the Transportation Security Administration (TSA), dated April 14, 2009, and received by this office on May 4, 2009. Specifically, you requested to the following:

1. "All documents concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals;
2. All contracts that include provisions concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals; and
3. All instructions, policies, and/or procedures concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals."

We conducted a search of files for records that would be responsive to your request and located (286) pages responsive to item two of your request. Of these records located, we have determined that (279) pages of the records are releasable in their entirety and (7) pages are partially releasable pursuant to Title 5 U.S.C. § 552, (b)(2)(low), (b)(2)(high), (b)(3), (b)(5) and (b)(6). In response to item one and three, please be advised that we are still continuing our review of additional documents. Once our review is complete and a determination has been made, we will respond to you accordingly.

Upon receipt of the request on or around May 4, 2009, I contacted you to discuss the overall scope of your request and to determine whether there were particular types of records and/or subject matters of interest to you that would enable TSA to narrow the scope of search. With respect to item 2 pertaining to "[a]ll contracts" for passenger imaging technology, it was agreed that TSA would focus its search to records that defined the scope of work, operational requirement and any subsequent modifications thereto. By doing so, TSA eliminated the lengthy and time consuming "submitter notice process" wherein TSA would consider contractor claims of confidential business information (CBI). Accordingly, rather than asserting exemption b(4) for CBI, TSA has, in limited circumstances, identified and withheld certain information as non responsive that would typically be forwarded to contractors as part of the submitter notice process.

### Exemption (b)(2)

Exemption (b)(2) of the FOIA exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency." The courts have interpreted the exemption to encompass two distinct categories of information: (1) internal matters of a relatively trivial nature -- often referred to as "Low" 2 information; and (2) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement -- often referred to as "High" 2 information.

Exemption "low" 2 of the FOIA protects from disclosure internal matters of a relatively trivial nature. The Supreme Court has held that the very task of processing and releasing some requested records would place an administrative burden on the agency that would not be justified by any genuine public benefit. Low 2 serves to relieve the agency from the administrative burden of processing FOIA requests when internal matters are not likely to be the subject of public interest. For example, routine internal personnel matters, such as information relating to performance standards and leave practices, are included within the scope of the exemption.

Exemption 2 has also been construed to permit the nondisclosure of mundane, yet far more pervasive administrative data -- such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other similar administrative markings.

We have determined that certain portions of the requested records are properly withheld from disclosure as "High" 2 information, in that they contain sensitive materials. Sensitive materials are exempt from disclosure under "High" 2 when the requested document is predominantly internal, and disclosure significantly risks circumvention of a regulation or statute, including civil enforcement and regulatory matters. Whether there is any public interest in disclosure is legally irrelevant. Rather, the concern under "High" 2 is that a FOIA disclosure should not benefit those attempting to violate the law and avoid detection.

### Exemption (b)(3)

Portions of these documents are considered Sensitive Security Information (SSI) and those portions are exempt from disclosure under Exemption 3 of the FOIA. Exemption 3 permits the withholding of records specifically exempted from disclosure by another Federal statute. Section 114(r) of title 49, United States Code, exempts from disclosure of Sensitive Security Information that "would be detrimental to the security of transportation" if disclosed. The TSA regulations implementing Section 114(r) are found in 49 CFR Part 1520.

Pursuant to 49 C.F.R. Section 1520.5(b)(4)(i), "any performance specification and any description of a test object or test procedure, for any device used by the Federal government or any other person pursuant to any aviation or maritime transportation security requirements of Federal law for the detection of any person, and any weapon, explosive, incendiary, or destructive device, item, or substance" is SSI. This information is exempt from disclosure under 49 C.F.R. Section 1520.15(a).

Exemption (b)(6)

Exemption 6 of the FOIA permits the government to withhold all identifying information that applies to a particular individual when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." This requires a balancing of the public's right to disclosure against the individual's right to privacy. After performing this analysis, we determined that the privacy interest in the identities of individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into the aforementioned balancing test.

Administrative Appeal

You have a right to appeal the above withholding determination. In the event that you may wish to appeal this determination an administrative appeal may be made in writing to Kimberly Walton, Special Counselor, Office of the Special Counselor, Transportation Security Administration, 601 South 12<sup>th</sup> Street, East Building, E7-121S, Arlington, VA 20598-6033. Your appeal **must be submitted within 60 days** from the date of this determination. It should contain your FOIA request number and state, to the extent possible, the reasons why you believe the initial determination should be reversed. In addition, the envelope in which the appeal is mailed in should be prominently marked "FOIA Appeal." Please note the Special Counselor's determination will be administratively final. Your envelope and letter should be marked "FOIA Appeal."

If you need to contact our office again about this matter, please refer to **TSA09-0510**. This office can be reached at 1-866-FOIA-TSA (364-2872).

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin J. Janet", with a long horizontal flourish extending to the right. Below the signature, the initials "KJ" are written.

Kevin J. Janet  
FOIA Officer  
Freedom of Information Act Office

Enclosure(s): Release Documents, (286) pages

# **Exhibit F**



**Transportation  
Security  
Administration**

**MAR - 2 2010**

**FOIA Case Number: TSA09-0510 and TSA10-0260**

Mr. John Verdi  
EPIC Open Government Project  
1 1718 Connecticut Ave NW, Ste #200  
Washington, D.C. 20009

Dear Mr. Verdi:

This letter is in response to your Freedom of Information Act (FOIA) requests to the Transportation Security Administration (TSA) dated April 14, 2009 and July 2, 2009, respectively, on behalf of the Electronic Privacy Information Center ("EPIC") in which you are seeking records dealing with TSA's advanced imaging technology program. This response pertains to those documents over which TSA exercises control, including the following documents identified in your requests:

TSA09-510 (2<sup>nd</sup> interim response):

- "1. All documents concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals;
2. All contracts that include provisions concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals; and
3. All instructions, policies, and/or procedures concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals.

TSA10-0260:

1. All unfiltered or unobscured images captured using Whole Body Imaging Technology (WBI),
2. All contracts entered into by DHS pertaining to WBI systems, including contracts for hardware, software or training.
3. All documents detailing the technical specifications of WBI hardware, including any limitations on image capture, storage or copy.
4. All documents, including but not limited to presentations, images and videos used for training persons to use WBI systems.
5. All complaints related to the use of WBI and all documents relating to the resolution of those complaints.

6. All documents concerning data breaches of images generated by WBI technology.”

Your request has been processed under the FOIA, 5 U.S.C. § 552.

With respect to Item 1, of TSA09-510, a search within the TSA was conducted and documents (2 pages) responsive to your request were located. Two pages are being released in full. In response to Item 3, we are continuing our review of additional documents. In our interim response to you dated December 1, 2009, we provided you responsive records for item 2.

In response to items 1-4, 6, of TSA10-0260, we are continuing our search and review of responsive documents.

With respect to Item 5, of TSA10-0260, a search within the TSA was conducted and documents (49 pages) responsive to your request were located. Seven pages are being released in full. Portions of 42 pages are being withheld under Exemptions “High” and “Low” (b)(2),(b)(5) and (b)(6) of the FOIA. We have inserted notations in the attached documents to identify the portions deleted and the reasons therefore. A more complete explanation of these exemptions is provided below.

#### Exemption (b)(2)

Exemption 2 of the FOIA exempts from mandatory disclosure records that are “related solely to the internal personnel rules and practices of an agency.” The courts have interpreted the exemption to encompass two distinct categories of information: (1) internal matters of a relatively trivial nature -- often referred to as “Low” 2 information; and (2) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement -- often referred to as “High” 2 information.

Exemption “low” 2 of the FOIA protects from disclosure internal matters of a relatively trivial nature. The Supreme Court has held that the very task of processing and releasing some requested records would place an administrative burden on the agency that would not be justified by any genuine public benefit. Low 2 serves to relieve the agency from the administrative burden of processing FOIA requests when internal matters are not likely to be the subject of public interest. For example, routine internal personnel matters, such as information relating to performance standards and leave practices, are included within the scope of the exemption. Exemption 2 has also been construed to permit the nondisclosure of mundane, yet far more pervasive administrative data -- such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other similar administrative markings.

I have determined that certain portions of the requested records are properly withheld from disclosure as “High” 2 information, in that they contain internal administrative and/or personnel matters to the extent that disclosure would risk circumvention of a regulation or statute or impede the effectiveness of law enforcement activities. A more detailed explanation follows.

Sensitive materials are exempt from disclosure under “High” 2 when the requested document is predominantly internal, and disclosure significantly risks circumvention of a regulation or statute,

including civil enforcement and regulatory matters. Whether there is any public interest in disclosure is legally irrelevant. Rather, the concern under "High" 2 is that a FOIA disclosure should not benefit those attempting to violate the law and avoid detection.

Exemption (b)(5)

Exemption 5 of the FOIA protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. Of those, I have determined that portions of the documents you have requested are appropriately withheld under the deliberative process privilege. Disclosure of those records would injure the quality of future agency decisions by discouraging the open and frank policy discussions between subordinates and superiors.

Exemption (b)(6)

Exemption 6 of the FOIA permits the government to withhold all identifying information that applies to a particular individual when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." This requires a balancing of the public's right to disclosure against the individual's right to privacy. After performing this analysis, I have determined that the privacy interest in the identities of individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into the aforementioned balancing test.

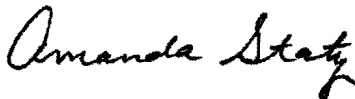
Fees

TSA is waiving any applicable fees associated with the processing of your request.

In addition, as TSA's response to this request is currently the subject of litigation, the administrative appeal rights that normally accompany a FOIA response are not being provided.

If you have any questions regarding this release, please contact Department of Justice Attorney Jesse Grauman. He can be reached directly at 202-514-2489.

Sincerely,



for Kevin J. Janet  
FOIA Officer  
Freedom of Information Act Office

Enclosure

# **Exhibit G**



## Grauman, Jesse Z. (CIV)

---

**From:** John Verdi [verdi@epic.org]  
**Sent:** Tuesday, March 09, 2010 1:51 PM  
**To:** Grauman, Jesse Z. (CIV)  
**Cc:** Grady, Janessa <TSA OCC>; Janet, Kevin <TSA FOIA>  
**Subject:** Re: Recap of Wednesday's conference call

Jesse,

That's accurate. We're looking forward to the production on the 15th.

I'll shoot you an email this week re: the specifics on reproduction quality for some of the pages from the previous production.

-John

--  
John Verdi  
[verdi@epic.org](mailto:verdi@epic.org)

On Mar 5, 2010, at 2:10 PM, Grauman, Jesse Z. (CIV) wrote:

John – I've put together the following summary of the agreements we reached during our conference call on Wednesday concerning the EPIC v DHS cases. Please email to confirm whether you agree with these characterizations of our agreements; if you think anything does not represent what we had discussed, please let me know. Thanks.

Pursuant to a conference call Wednesday, March 3, 2009, Plaintiff Electronic Privacy information Center ("EPIC") and Defendant Department of Homeland Security ("DHS") have agreed to the following concerning the scope of EPIC's two FOIA requests that are the subjects of Civil Action Nos. 1:09cv2084 and 1:10cv63 (D.D.C.):

- 1) EPIC's requests do not seek the release of communications or deliberations.
- 2) Item No. 2 in EPIC's second request, seeking "All contracts entered into by DHS pertaining to WBI systems, including contracts for hardware, software or training," is understood to be essentially identical to Item No. 2 in EPIC's first request, seeking "All contracts that include provisions concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals."
- 3) Regarding Item No. 3 in EPIC's second request, seeking "All documents detailing the technical specifications of WBI hardware, including any limitations on image capture, storage or copy:" If DHS finds technical specifications for WBI hardware that do not relate to image capture, storage, or copy, DHS will produce those specifications if they are part of a larger document that includes specifications that relate to image capture, storage, or copy. If DHS finds standalone specifications for the machines that are unrelated to image capture, storage, or copy, DHS will discuss these documents with EPIC to determine whether EPIC seeks such documents.
- 4) Regarding Item No. 6 in EPIC's second request, seeking "All documents concerning data breaches of images generated by WBI technology," the term "data breaches" refers to any instances of unauthorized access to, or distribution of, the images generated by WBI technology.

In addition to the above agreements on scope, DHS and EPIC agree that DHS is treating EPIC's two FOIA requests concerning WBI imaging as one, and the parties have agreed to move to consolidate the cases. Accordingly, for each of the remaining production dates agreed to in the Joint Status report in 1:09cv2084 (March 15, 2010 and April 15, 2010), the parties will consider DHS in compliance if it produces documents on those dates that are responsive to either of EPIC's two FOIA requests on WBI imaging, provided that DHS produces all documents responsive to the two requests, and not subject to exemptions, by April 15, 2010.

Jesse Grauman  
Trial Attorney  
U.S. Department of Justice, Civil Division, Federal Programs Branch  
20 Massachusetts Avenue NW, Room 6141  
Washington, DC 20001  
[jesse.z.grauman@usdoj.gov](mailto:jesse.z.grauman@usdoj.gov)  
Phone: (202) 514-2849  
Fax: (202) 616-8460

# **Exhibit H**



Transportation  
Security  
Administration

MAR 15 2010

**FOIA Case Number: TSA09-0510 and TSA10-0260**

Mr. John Verdi  
EPIC Open Government Project  
1 1718 Connecticut Ave NW, Ste #200  
Washington, D.C. 20009

Dear Mr. Verdi:

This letter is in response to your Freedom of Information Act (FOIA) requests to the Transportation Security Administration (TSA) dated April 14, 2009 and July 2, 2009, respectively, on behalf of the Electronic Privacy Information Center ("EPIC") in which you are seeking records dealing with TSA's advanced imaging technology (AIT) program. The security measures that TSA employs are critical to our mission to protect transportation and national security. Preventing undue disclosure of these measures is necessary to counter the increased sophistication of those who pose a threat to civil aviation and their ability to develop techniques to subvert current security measures. Also, TSA is committed to ensuring the privacy of the traveling public to the greatest extent possible. AIT is part of our multi-layered security strategy to stay ahead of evolving threats.

This response pertains to those documents over which TSA exercises control, including the following documents identified in your July 2, 2009 request set forth below:

TSA10-0260:

1. All unfiltered or unobscured images captured using Whole Body Imaging Technology (WBI),
2. All contracts entered into by DHS pertaining to WBI systems, including contracts for hardware, software or training.
3. All documents detailing the technical specifications of WBI hardware, including any limitations on image capture, storage or copy.
4. All documents, including but not limited to presentations, images and videos used for training persons to use WBI systems.
5. All complaints related to the use of WBI and all documents relating to the resolution of those complaints.
6. All documents concerning data breaches of images generated by WBI technology."

Your request has been processed under the FOIA, 5 U.S.C. § 552.

As an preliminary matter, in our interim response to you dated December 1, 2009, for your April 14, 2009 request, we provided you responsive records for Item 2. We stated that after a search of files for records that would be responsive to your request, we had located (286) pages responsive to Item 2 of your request; however, the correct page count of responsive records located is (238) pages.

With respect to Items 1-3 of your April 14, 2009 request, we are continuing our review of additional documents. In response to Items 1-4, and 6, of your July 2, 2009 request, we are continuing our search for and review of responsive documents.

With respect to Item 5, of TSA10-0260, a search within the TSA was conducted and documents (451 pages) responsive to your request were located. The documents located consist of complaints regarding AIT received by TSA. Of the 4,000,000+ individuals screened using AIT, the 600+ total complaints received by TSA constitute approximately .00015 % of the total number of those individuals, an infinitesimally small percentage of the traveling public.

Portions of all 451 pages are being withheld under Exemptions "High" and "Low" (b)(2) and (b)(6) of the FOIA. We have inserted notations in the attached documents to identify the portions deleted and the reasons therefore. A more complete explanation of these exemptions is provided below.

#### Exemption (b)(2)

Exemption 2 of the FOIA exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency." The courts have interpreted the exemption to encompass two distinct categories of information: (1) internal matters of a relatively trivial nature -- often referred to as "Low" 2 information; and (2) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement -- often referred to as "High" 2 information.

Exemption "low" 2 of the FOIA protects from disclosure internal matters of a relatively trivial nature. The Supreme Court has held that the very task of processing and releasing some requested records would place an administrative burden on the agency that would not be justified by any genuine public benefit. Low 2 serves to relieve the agency from the administrative burden of processing FOIA requests when internal matters are not likely to be the subject of public interest. For example, routine internal personnel matters, such as information relating to performance standards and leave practices, are included within the scope of the exemption. Exemption 2 has also been construed to permit the nondisclosure of mundane, yet far more pervasive administrative data -- such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other similar administrative markings.

I have determined that certain portions of the requested records are properly withheld from disclosure as "High" 2 information, in that they contain internal administrative and/or personnel matters to the extent that disclosure would risk circumvention of a regulation or statute or impede the effectiveness of law enforcement activities. A more detailed explanation follows.

Sensitive materials are exempt from disclosure under "High" 2 when the requested document is predominantly internal, and disclosure significantly risks circumvention of a regulation or statute, including civil enforcement and regulatory matters. Whether there is any public interest in disclosure is legally irrelevant. Rather, the concern under "High" 2 is that a FOIA disclosure should not benefit those attempting to violate the law and avoid detection.

Exemption (b)(6)

Exemption 6 of the FOIA permits the government to withhold all identifying information that applies to a particular individual when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." This requires a balancing of the public's right to disclosure against the individual's right to privacy. After performing this analysis, I have determined that the privacy interest in the identities of individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into the aforementioned balancing test.

Fees

TSA is waiving any applicable fees associated with the processing of your request.

In addition, as TSA's response to this request is currently the subject of litigation, the administrative appeal rights that normally accompany a FOIA response are not being provided.

If you have any questions regarding this release, please contact Department of Justice Attorney Jesse Grauman. He can be reached directly at 202-514-2849.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin J. Janet", with a horizontal line extending to the right. Below the signature, the word "for" is written in a smaller, cursive script.

Kevin J. Janet  
FOIA Officer  
Freedom of Information Act Office

Enclosure

# **Exhibit I**



**Transportation  
Security  
Administration**

**APR 15 2010**

**FOIA Case Number: TSA09-0510 and TSA10-0260**

Mr. John Verdi  
EPIC Open Government Project  
1718 Connecticut Ave NW, Ste #200  
Washington, D.C. 20009

Dear Mr. Verdi:

This letter is the Transportation Security Administration's (TSA) final response to your Freedom of Information Act requests dated April 14, 2009, and July 2, 2009, respectively, on behalf of the Electronic Privacy Information Center (EPIC) in which you are seeking records pertaining to TSA's Advanced Imaging Technology (AIT) program. The security measures that TSA employs are critical to our mission to protect transportation and national security. Preventing undue disclosure of these measures is necessary to counter the increased sophistication of those who pose a threat to civil aviation and their ability to develop techniques to subvert current security measures. Also, ensuring the privacy of the traveling public is of paramount importance to us.

Prior responses were provided to EPIC on December 1, 2009, March 2, 2010, and March 15, 2010. This final response pertains to those records over which TSA exercises control, including the following records identified in your April 14, 2009, and July 2, 2009 requests as set forth below:

April 14, 2009 (TSA09-510)

- “1. All documents concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals;
2. All contracts that include provisions concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals; and
3. All instructions, policies, and/or procedures concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals.

July 2, 2009 (TSA10-0260)

1. All unfiltered or unobscured images captured using Whole Body Imaging Technology (WBI)



2. All contracts entered into by DHS pertaining to WBI systems, including contracts for hardware, software or training;
3. All documents detailing the technical specifications of WBI hardware, including any limitations on image capture, storage or copy;
4. All documents, including but not limited to presentations, images and videos used for training persons to use WBI systems;
5. All complaints related to the use of WBI and all documents relating to the resolution of those complaints
6. All documents concerning data breaches of images generated by WBI technology.”

Your request has been processed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

#### April 14, 2009 FOIA Request

With respect to Item 1 of your April 14, 2009 request, you were provided 2 responsive pages attached to our release determination dated March 2, 2010. No additional records were located.

With respect to Item 2 of your April 14, 2009 request, we provided you responsive records on December 1, 2009. Pursuant to our March 3, 2010 agreement to treat Item 2 of the July 2, 2009 request as identical to Item 2 of the April 14, 2009 request, additional records have been provided in response to Item 2 of your July 2, 2009 request.

With respect to Item 3 of your April 14, 2009 request, a search was conducted within the TSA and no responsive records were located.

#### July 2, 2009 FOIA Request

Advanced Imaging Technology (AIT) test mode on test machines is the sole mode of operation permitting the exporting of image data. The test machines are located at the TSA test facility. AIT machines in the airports are not enabled to store images. Therefore, with respect to Item 1 of your July 2, 2009 request, a search within the TSA was conducted and approximately 2000 test images responsive to your request were located at the test facility. These test images were taken in test mode at TSA’s test facility using TSA models, not members of the public, and for test purposes only. These images are being withheld in full under Exemption “High” (b)(2) and (b)(3). However, images are available to you on our website and you may obtain this information from the TSA website at the following link:

- <http://www.tsa.gov>

Click on the TSA News Ticker for “TSA Begins Deploying 150 Advanced Imaging Technology Machines at Airports Nationwide” to find these images.

With respect to Item 2 of your July 2, 2009 request, a search within the TSA was conducted and 292 pages responsive to your request were located. Portions of 23 pages are being withheld under

Exemptions “High” and “Low” (b)(2), (b)(3), (b)(4) and (b)(6) of the FOIA. The remaining 269 pages are being released in their entirety.

With respect to Item 3 of your July 2, 2009 request, a search within the TSA was conducted and 101 pages responsive to your request were located. Portions of 12 pages are being withheld under Exemptions “High” and “Low” (b)(2), (b)(3), and (b)(6) of the FOIA. The remaining 89 pages are being released in their entirety.

With respect to Item 4 of your July 2, 2009 request, a search within the TSA was conducted and 328 pages responsive to your request were located. All 328 pages are being withheld in full under Exemptions “High” and “Low” (b)(2), (b)(3), (b)(5) and (b)(6) of the FOIA.

With respect to Item 5 of your July 2, 2009 request, a search within the TSA was conducted and an additional 531 pages responsive to your request were located. Portions of 475 pages are being withheld under Exemptions “High” and “Low” (b)(2), (b)(3), (b)(5) and (b)(6) of the FOIA. The remaining 56 pages are being released in their entirety.

With respect to Item 6 of your July 2, 2009 request, a search within the TSA was conducted and no records of data breaches of images generated by AIT were located.

We have inserted notations in the attached records to identify the portions deleted and the reasons therefore. A more complete explanation of these exemptions is provided below.

#### Exemption (b)(2)

Exemption 2 of the FOIA exempts from mandatory disclosure records that are “related solely to the internal personnel rules and practices of an agency.” The courts have interpreted the exemption to encompass two distinct categories of information: (1) internal matters of a relatively trivial nature -- often referred to as “Low” 2 information; and (2) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement -- often referred to as “High” 2 information.

Exemption “low” 2 of the FOIA protects from disclosure internal matters of a relatively trivial nature. The Supreme Court has held that the very task of processing and releasing some requested records would place an administrative burden on the agency that would not be justified by any genuine public benefit. Low 2 serves to relieve the agency from the administrative burden of processing FOIA requests when internal matters are not likely to be the subject of public interest. For example, routine internal personnel matters, such as information relating to performance standards and leave practices, are included within the scope of the exemption. Exemption 2 has also been construed to permit the nondisclosure of mundane, yet far more pervasive administrative data -- such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other similar administrative markings.

We have determined that certain portions of the requested records are properly withheld from disclosure as “High” 2 information, in that they contain internal administrative and/or personnel matters to the extent that disclosure would risk circumvention of a regulation or statute or impede the effectiveness of law enforcement activities. A more detailed explanation follows.



Sensitive materials are exempt from disclosure under “High” 2 when the requested document is predominantly internal, and disclosure significantly risks circumvention of a regulation or statute, including civil enforcement and regulatory matters. Whether there is any public interest in disclosure is legally irrelevant. Rather, the concern under “High” 2 is that a FOIA disclosure should not benefit those attempting to violate the law and avoid detection.

#### Exemption (b)(3)

Portions of these records are considered Sensitive Security Information (SSI) and those portions are exempt from disclosure under Exemption 3 of the FOIA. Exemption 3 permits the withholding of records specifically exempted from disclosure by another Federal statute. Section 114(r) of title 49, United States Code, exempts from disclosure of Sensitive Security Information that “would be detrimental to the security of transportation” if disclosed. The TSA regulations identified below and implementing Section 114(r) are found in 49 CFR Part 1520. Section 1520.5(b)(4)(i) exempts from disclosure “any performance specification and any description of a test object or test procedure, for any device used by the Federal government or any other person pursuant to any aviation or maritime transportation security requirements of Federal law for the detection of any person, and any weapon, explosive, incendiary, or destructive device, item, or substance.”

- Section 1520.5(b)(9)(i) exempts from disclosure any procedures, including selection criteria and any comments, instructions, and implementing guidance pertaining thereto, for screening of persons, accessible property, checked baggage, U.S. mail, stores, and cargo, that is conducted by the Federal government or any other authorized person.
- Section 1520.5(b)(9)(vi) exempts from disclosure any electronic image shown on any screening equipment monitor, including threat images and descriptions of threat images for threat image projection systems.
- Section 1520.5(b)(10) exempts from disclosure records created or obtained for the purpose of training persons employed by, contracted with, or acting for the Federal government or another person to carry out any aviation, maritime, or rail transportation security measures required or recommended by DHS or DOT.

#### Exemption (b)(4)

Exemption 4 of the FOIA protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” In determining whether commercial or financial information is confidential, and therefore withheld from disclosure, the courts have distinguished between information required to be submitted to the government, and information voluntarily submitted to the government. In this matter, the information required to be submitted to the government is considered confidential if its disclosure is likely to have either of the following effects: (1) impair the Government’s ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. I have determined that evidence of actual competition and a likelihood of substantial competitive injury has been shown. Accordingly, withholding these records from disclosure is appropriate.

Exemption (b)(5)

Exemption 5 of the FOIA protects from disclosure those inter- or intra-agency records that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. Of those, I have determined that portions of the records you have requested are appropriately withheld under the deliberative process privilege. Disclosure of those records would injure the quality of future agency decisions by discouraging the open and frank policy discussions between subordinates and superiors.

Exemption (b)(6)

Exemption 6 of the FOIA permits the government to withhold all identifying information that applies to a particular individual when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.” This requires a balancing of the public’s right to disclosure against the individual’s right to privacy. After performing this analysis, I have determined that the privacy interest in the identities of individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into the aforementioned balancing test.

As TSA’s s response to this request is currently the subject of litigation, the administrative appeal rights that normally accompany a FOIA response are not being provided.

If you have any questions regarding this release, please contact Department of Justice Attorney Jesse Grauman. He can be reached directly at 202-514-2849.

Sincerely,



Kevin J. Janet  
FOIA Officer  
Freedom of Information Act Office

Enclosure

# **Exhibit J**

## Grauman, Jesse Z. (CIV)

---

**From:** John Verdi [verdi@epic.org]  
**Sent:** Wednesday, May 19, 2010 3:51 PM  
**To:** Grauman, Jesse Z. (CIV)  
**Cc:** Grady, Janessa <TSA OCC>; Janet, Kevin <TSA FOIA>; Ginger McCall; Marc Rotenberg  
**Subject:** Re: Agreements in EPIC v DHS

Jesse,

Thanks for the summary. It's accurate.

-John

--

John Verdi  
[verdi@epic.org](mailto:verdi@epic.org)

On May 18, 2010, at 7:06 PM, Grauman, Jesse Z. (CIV) wrote:

John –

Pursuant to our phone conversation this afternoon after your review of our draft Vaughn index, it is our understanding that EPIC is conceding as proper, and will not be challenging, the following withholdings in EPIC v DHS (1:09cv2084 – RMU):

- 1) All withholdings of confidential business information pursuant to Exemption 4 (as well as any withholdings of similar information deemed outside the scope of EPIC's requests pursuant to a phone agreement on or about May 4, 2009)
- 2) All withholdings of names, phone numbers, email addresses, IP addresses, ID numbers, and similar trivial and/or personally identifying information, for both government and non-government individuals, made pursuant to Exemptions 2, 6, and 7
- 3) The withholding of information pertaining to "mean downtime requirements," Bates Nos. 1387 and 1495, made pursuant to Exemption 2 (high)

Accordingly, the only withholdings that remain at issue in the case are:

- 1) All withholdings made pursuant to Exemption 3
- 2) All withholdings made pursuant to Exemption 2 (high) EXCEPT
  - a. The "mean downtime requirements" withholding described above
  - b. The withholding of names of TSA screeners and "leads"
- 3) All withholdings made pursuant to Exemption 5

Please email me to confirm this understanding or if you have any questions or concerns.

Thanks,  
Jesse

Jesse Grauman  
Trial Attorney  
U.S. Department of Justice, Civil Division, Federal Programs Branch  
20 Massachusetts Avenue NW, Room 6141  
Washington, DC 20001  
[jesse.z.grauman@usdoj.gov](mailto:jesse.z.grauman@usdoj.gov)  
Phone: (202) 514-2849  
Fax: (202) 616-8460

# **Exhibit K**



## Grauman, Jesse Z. (CIV)

---

**From:** Grauman, Jesse Z. (CIV)  
**Sent:** Monday, May 24, 2010 10:36 AM  
**To:** 'John Verdi'  
**Cc:** 'Grady, Janessa <TSA OCC>'; 'Janet, Kevin <TSA FOIA>'; 'Ginger McCall'; 'Marc Rotenberg'  
**Subject:** RE: Agreements in EPIC v DHS

John, Marc, Ginger –

As a brief addendum to this email, two of the redacted excerpts that had been inadvertently omitted from DHS' draft Vaughn (as discussed below) were actually redacted pursuant to Exemption 4 (the remainder, as indicated below, were redacted pursuant to Exemptions 2(high), 3, or 5). The two Exemption 4 withholdings are on Bates No. 001715. Although EPIC had agreed not to oppose the Exemption 4 redactions on the draft Vaughn index, because these two redactions were not on the draft Vaughn, and because these redactions reflect a different type of information from the type of Exemption 4 redactions that were within the scope of our agreement (i.e., pricing, quantity, names/ID numbers of vendor contacts), we will brief the assertion of Exemption 4 on page 001715. In short, as I had indicated to Marc during our phone call, we will brief any withholdings that could be construed as outside of the scope of our agreement last week.

Thanks; please let me know if you have any questions.

---

**From:** Grauman, Jesse Z. (CIV)  
**Sent:** Friday, May 21, 2010 12:43 PM  
**To:** John Verdi  
**Cc:** Grady, Janessa <TSA OCC>; Janet, Kevin <TSA FOIA>; Ginger McCall; Marc Rotenberg  
**Subject:** RE: Agreements in EPIC v DHS

As I explained during a phone conversation with Marc Rotenberg earlier today, DHS has recognized that there were some inadvertent omissions from the draft Vaughn index provided to EPIC earlier this week. These omissions involved certain excerpts that were redacted pursuant to Exemptions 2 (high – risk of circumvention), 3 (sensitive security information), and 5 (privilege), and were therefore outside the scope of the withholdings that EPIC agreed not to challenge at summary judgment. Accordingly, DHS will include these withholdings in its final Vaughn index that will be submitted to the Court with its summary judgment brief, and will fully brief the assertions of its exemptions as to these withholdings.

---

**From:** John Verdi [mailto:verdi@epic.org]  
**Sent:** Wednesday, May 19, 2010 3:51 PM  
**To:** Grauman, Jesse Z. (CIV)  
**Cc:** Grady, Janessa <TSA OCC>; Janet, Kevin <TSA FOIA>; Ginger McCall; Marc Rotenberg  
**Subject:** Re: Agreements in EPIC v DHS

Jesse,

Thanks for the summary. It's accurate.

-John

--

John Verdi  
[verdi@epic.org](mailto:verdi@epic.org)

On May 18, 2010, at 7:06 PM, Grauman, Jesse Z. (CIV) wrote:

John –

Pursuant to our phone conversation this afternoon after your review of our draft Vaughn index, it is our understanding that EPIC is conceding as proper, and will not be challenging, the following withholdings in EPIC v DHS (1:09cv2084 – RMU):

- 1) All withholdings of confidential business information pursuant to Exemption 4 (as well as any withholdings of similar information deemed outside the scope of EPIC's requests pursuant to a phone agreement on or about May 4, 2009)
- 2) All withholdings of names, phone numbers, email addresses, IP addresses, ID numbers, and similar trivial and/or personally identifying information, for both government and non-government individuals, made pursuant to Exemptions 2, 6, and 7
- 3) The withholding of information pertaining to "mean downtime requirements," Bates Nos. 1387 and 1495, made pursuant to Exemption 2 (high)

Accordingly, the only withholdings that remain at issue in the case are:

- 1) All withholdings made pursuant to Exemption 3
- 2) All withholdings made pursuant to Exemption 2 (high) EXCEPT
  - a. The "mean downtime requirements" withholding described above
  - b. The withholding of names of TSA screeners and "leads"
- 3) All withholdings made pursuant to Exemption 5

Please email me to confirm this understanding or if you have any questions or concerns.

Thanks,  
Jesse

Jesse Grauman  
Trial Attorney  
U.S. Department of Justice, Civil Division, Federal Programs Branch  
20 Massachusetts Avenue NW, Room 6141  
Washington, DC 20001  
[jesse.z.grauman@usdoj.gov](mailto:jesse.z.grauman@usdoj.gov)  
Phone: (202) 514-2849  
Fax: (202) 616-8460

# **Exhibit L**

U.S. Department of Homeland Security  
Freedom of Information Act Office  
601 South 12<sup>th</sup> Street  
Arlington, VA 20598-6020



Transportation  
Security  
Administration

MAY 27 2010

Mr. John Verdi  
Electronic Privacy Information Center  
1718 Connecticut Ave NW, Suite 200  
Washington, D.C. 20009

**FOIA Case Number: TSA09-0510 and TSA10-0260**

Dear Mr. Verdi:

Upon reviewing the documents responsive to your FOIA requests TSA09-0510 and TSA10-0260 in preparation for Defendant's Motion for Summary Judgment in Civil Action No. 1:09cv2084-RMU (D.D.C.), we have determined that eight pages of the records produced contained withholdings that were erroneous. These withholdings were made pursuant to FOIA Exemption "high 2" on Bates labeling: 000797, 000799, 001050, 001055, 001058, 001061, 001065, and 001702. We are accordingly re-releasing those pages to you without the erroneous "high 2" redactions. These pages are attached.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Janet".

Kevin J. Janet  
FOIA Officer  
Freedom of Information Act Office

Enclosures

# **Exhibit M**

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

ELECTRONIC PRIVACY INFORMATION CENTER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:09-cv-02084 (RMU)
	)	
THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY,	)	
	)	
Defendant.	)	
	)	

**Index of Withheld Records**

This index briefly lists responsive records that are exempt from disclosure in full or in part by FOIA Exemptions 2 (“high”), 3, 4, and 5. This index lists only the withholdings that are at issue between EPIC and DHS; all other withholdings have been conceded as proper by EPIC.

This index is intended as a reference only. Detailed explanations of the withholdings, and the exemptions that support the withholdings, can be found in the declarations of Kevin J. Janet (Janet Decl.) and Mark Roberts (Roberts Decl.). The index refers to specific paragraphs of these declarations where appropriate. The declarations, and not the index, are intended to satisfy the requirements of Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).

DOCUMENT TYPE	BATES NUMBER	DESCRIPTION OF MATERIAL REDACTED	EXEMPTION	PAGES WITHHELD
<b>PROCUREMENT SPECIFICATIONS</b>				
	000136, 000149-000150	Description of capability requirements pertaining to WBI system detection for explosives, weapons, liquids, and detecting anomalies. Roberts Decl. ¶¶ 10, 12; Janet Decl. ¶¶ 31-37.	<b>Exemption 2 (high) and Exemption 3 (49 U.S.C. § 114(r); 49 C.F.R. § 1520.5(b)(4)(i))</b>	3 pages withheld in part
<b>COMPLAINTS AND ASSOCIATED DOCUMENTS</b>				
	000896, 000907	Description of screening procedures and techniques. Janet Decl. ¶¶ 31-39.	<b>Exemption 2 (high)</b>	2 pages withheld in part

<b>DOCUMENT TYPE</b>	<b>BATES NUMBER</b>	<b>DESCRIPTION OF MATERIAL REDACTED</b>	<b>EXEMPTION</b>	<b>PAGES WITHHELD</b>
	000876, 000908, 000917-000918, 000920-000921, 000923-000924, 000935, 001225	Description or identification of alternative security screening procedures which constitutes sensitive security information. Roberts Decl. ¶ 13; Janet Decl. ¶¶ 31-37.	<b>Exemption 2 (high) and Exemption 3 (49 U.S.C. § 114(r); 49 C.F.R. § 1520.5(b)(9)(i))</b>	10 pages withheld in part
	001054, 001079, 001083, 001086, 001088, 001092, 001100, 001107, 001119	TSA Attorneys' advice as to future action to take regarding pending complaints. Janet Decl. ¶¶ 46-47, 53, 55-56, 59-61, 65-66.	<b>Exemption 5 Deliberative Process Privilege and Attorney-Client Privilege</b>	9 pages withheld in part
	001087, 001098	TSA Attorneys' confidential advice given in contemplation of future legal proceedings. Janet Decl. ¶¶ 59-60, 62, 67, 69.	<b>Exemption 5 Attorney-Client Privilege and Attorney Work Product</b>	2 pages withheld in part
	000268  000888, 000891, 000892, 000912, 000919, 001055, 001060, 001061, 001065, 001124  001145, 01148	Self-evaluation regarding quality of response to complainant Janet Decl. ¶¶ 46-48.  Internal discussions, opinions, and recommendations regarding how to respond to passengers' complaints Janet Decl. ¶¶ 46-47, 49-52, 54, 57.  Handwritten notes regarding applicability of FOIA exemptions to documents Janet Decl. ¶¶ 46-47, 58.	<b>Exemption 5 Deliberative Process Privilege</b>	13 pages withheld in part
	001090, 001095	Confidential communications to and from TSA attorneys regarding passenger complaint. Janet Decl. ¶¶ 59-60, 63-64.	<b>Exemption 5 Attorney-Client Privilege</b>	2 pages withheld in part
	000979	Communications to and from TSA attorneys regarding current litigation Janet Decl. ¶ 67-68.	<b>Exemption 5 Attorney Work Product</b>	1 page withheld in part

<b>DOCUMENT TYPE</b>	<b>BATES NUMBER</b>	<b>DESCRIPTION OF MATERIAL REDACTED</b>	<b>EXEMPTION</b>	<b>PAGES WITHHELD</b>
<b>PROCUREMENT SPECIFICATIONS</b>				
	001636, 001649-001650	Description of capability requirements pertaining to WBI system detection for explosives, weapons, liquids, and detecting anomalies. Roberts Decl. ¶¶ 10, 12; Janet Decl. ¶¶ 31-37.	<b>Exemption 2 (high) and Exemption 3 (49 U.S.C. § 114(r); 49 C.F.R. § 1520.5(b)(4)(i))</b>	3 pages withheld in part
	001637	Description of height screening capabilities and distance measurements between AIT machine and passengers	<b>Exemption 2 (high)</b>	2 pages withheld in part
	001640	Description of the monitor zoom capability Janet Decl. ¶¶ 31-37, 40.		
<b>QUESTION TRACKER</b>				
	001702, 001703, 001710, 001714, 001716, 001718, 001719, 001721	WBI procurement-related performance specification "Question Tracker" that contains questions posed by SSI-cleared vendors and TSA responses. Roberts Decl. ¶¶ 14-15; Janet Decl. ¶¶ 31-37.	<b>Exemption 2 (high) and Exemption 3 (49 U.S.C. § 114(r); 49 C.F.R. §§ 1520.5(b)(4)(i), (9)(i), (14)(ii))</b>	8 pages withheld in part
	001715	Vendor question that reveals a certification related to a specification which is proprietary information Janet Decl. ¶¶ 41-44.	<b>Exemption 4</b>	1 page withheld in part
<b>OPERATIONAL REQUIREMENTS</b>				
	001733, 001752	Functional and operational requirements as to the machines' settings regarding detection of threat items. Roberts Decl. ¶¶ 11-12; Janet Decl. ¶¶ 31-37.	<b>Exemption 2 (high); Exemption 3 (49 U.S.C. § 114(r); 49 C.F.R. § 1520.5(b)(4)(i))</b>	2 pages withheld in part



<b>DOCUMENT TYPE</b>	<b>BATES NUMBER</b>	<b>DESCRIPTION OF MATERIAL REDACTED</b>	<b>EXEMPTION</b>	<b>PAGES WITHHELD</b>
<b>TEST IMAGES</b>				
	N/A (withheld in full)	TSA Whole Body Imaging (WBI) Training Test Images. Roberts Decl. ¶¶ 16-20; Janet Decl. ¶¶ 31-37.	<b>Exemption 2 (high) and Exemption 3 (49 U.S.C. § 114(r); 49 C.F.R. §§ 1520.5(b)(9)(v), 1520.5(b)(9)(vi), 1520.5(b)(10))</b>	2000 images withheld in full
<b>TRAINING MATERIALS</b>				
	N/A (withheld in full)	TSA Whole Body Imaging (WBI) Training Manuals/L3 ProVision Instructor Guides (version 1.2, version 1.1, and WBI Instructor Guide L3 ProVision SC-100) Pilot 2.1. Roberts Decl. ¶¶ 21-24; Janet Decl. ¶¶ 31-37.	<b>Exemption 2 (high) and Exemption 3 (49 U.S.C. § 114(r); 49 CFR §§ 1520.5(b)(9)(i), (v), (vi), 1520.5(b)(10))</b>	376 pages withheld in full