

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

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

DECLARATION OF MARK ROBERTS

I, MARK ROBERTS, make this declaration in support of Defendant's Motion for Summary Judgment.

1. I serve as the Acting Manager of the Sensitive Security Information (SSI) Branch of the Transportation Security Administration (TSA), a Department of Homeland Security (DHS) component. The statements made in this declaration are based upon my personal knowledge and information made available to me in the performance of my official duties, my personal review of the records in question, and conclusions reached in accordance therewith. My position as Acting Manager of the SSI Branch places me in a position to determine the potential harm of releasing records containing SSI.

2. The TSA SSI Branch is responsible for all aspects of the DHS-wide SSI Program, including policy, analysis, SSI Determinations, and regulatory execution. The SSI Branch serves as the primary point of contact (POC) for the DHS Office of Security, other DHS Components,

Stakeholders, and TSA as a whole on issues involving SSI in accordance with 49 C.F.R. part 1520.

3. The SSI Branch conducts assessments and reviews of TSA and DHS records, and upon request, records of other “covered persons” under 49 C.F.R. § 1520.7, to determine which information contained within those records is SSI. The SSI Branch thereafter ensures that the appropriate SSI designations and redactions are made in accordance with 49 C.F.R. part 1520. The prohibition on public release of SSI is not discretionary but is mandatory in accordance with 49 C.F.R. § 1520.15(a). The SSI Branch also determines whether specific information should no longer be protected as SSI in accordance with 49 C.F.R. § 1520.5(c) and whether information previously not deemed SSI should be so designated.

4. I understand that Plaintiff, the Electronic Privacy Information Center (EPIC), has submitted Freedom of Information Act (FOIA) requests for records including (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; (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; (4) all unfiltered or unobscured images captured using Whole Body Imaging (WBI) Technology; (5) all contracts entered into by DHS pertaining to WBI systems, including contracts for hardware, software or training; (6) all documents detailing the technical specifications of WBI hardware, including any limitations on image capture, storage or copy; (7) all documents, including but not limited to presentations, images and videos, used for training persons to use WBI systems; (8) all complaints related to

the use of WBI and all documents relating to the resolution of those complaints; and (9) all documents concerning data breaches of images generated by WBI technology.

5. I supervised the SSI Branch's review of the documents found by the FOIA office to be responsive to the FOIA requests referenced in paragraph 4. I have also personally reviewed the documents found by the SSI Branch to contain SSI, whether in part or in full. Specifically, of 1766 pages released to plaintiff consisting of contracts, performance specifications (including "Question Trackers"), operational requirements documents, passenger and other complaints, along with TSA documents reflecting the resolution of those complaints, 26 pages contained SSI and were redacted accordingly. In addition, two thousand (2000) Advanced Imaging Technology (AIT) electronic test images were located and were withheld in full. Finally, the TSA Whole Body Imaging (WBI) Training Instructor Guides for L3 ProVision SC100 Versions 1.2, 1.1 and Pilot 2.1 (376 pages) also were withheld in full.

6. Exemption 3 of the Freedom of Information Act (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.'"

7. Pursuant to 49 U.S.C. § 114(r), TSA is required to exempt information from disclosure notwithstanding the FOIA if TSA determines that disclosure would "(A) be an unwarranted invasion of personal privacy; (B) reveal a trade secret or privileged or confidential commercial or financial information; or (C) be detrimental to the security of transportation." 49 U.S.C. § 114(r)(1). The regulations promulgated pursuant to § 114(r) that prohibit disclosure of SSI

(“TSA’s implementing regulations”) are set forth at 49 C.F.R. part 1520. TSA’s determinations as to what constitutes SSI are exclusively reviewable by a United States court of appeals. 49 U.S.C. § 46110.

8. Specifically, TSA’s implementing regulations expressly prohibit disclosure of specified types of information relating to transportation security measures, including the following categories of information relevant to the records responsive to EPIC’s FOIA requests that are the subject of this action:

Any performance specification and any description of a test object or test procedure, for [a]ny 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, 49 C.F.R § 1520.5(b)(4)(i);

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, 49 C.F.R § 1520.5(b)(9)(i);

Performance or testing data from security equipment or screening systems, 49 C.F.R. § 1520.5(b)(9)(v);

Any electronic image shown on any screening equipment monitor, including threat images and descriptions of threat images for threat image projection systems, 49 C.F.R § 1520.5(b)(9)(vi);

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 aviation, maritime, or rail transportation security measures required or recommended by DHS or DOT, 49 C.F.R § 1520.5(b)(10); and

Trade secret information, including information required or requested by regulation or Security Directive, obtained by DHS or DOT in carrying out aviation or maritime transportation security responsibilities, 49 C.F.R. § 1520.5(b)(14)(ii).

9. The SSI Branch, under my supervision, determined that certain documents and excerpts thereof responsive to EPIC’s requests were SSI, and that their public release would be

detrimental to the security of transportation. Below, I describe the specific redactions to the documents produced in this action that were made by TSA pursuant to SSI, and the specific provision(s) of TSA's implementing regulations that apply to each redaction.

Performance Specifications

10. Six (6) pages, Bates Nos. 000136, 000149-000150, 001636, and 001649-001650, were partially withheld because the redacted language describes performance specifications that are expressly exempt from disclosure as SSI by 49 C.F.R. § 1520.5(b)(4)(i).¹ The narrowly redacted language of these pages describes the precise technical tolerance levels of screening detection required of AIT machines for explosives, weapons, liquids, and other anomalies. These withholdings therefore are “performance specification[s] . . . for [a]ny 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” under 49 C.F.R. § 1520.5(b)(4)(i). Release of such information would be detrimental to transportation security as it implicitly reveals levels of explosives, weapons, liquids, and anomalies the AIT machines are not required to detect, facts that could be exploited by terrorists.

11. Two pages, Bates Nos. 001733 and 001752, were withheld in part from TSA's 9.1 and 8.1 versions of the July 2006 Operational Requirements document released to EPIC. The Operational Requirements document is a foundational document from which Performance Specifications are derived. The document defines minimum requirements for AIT systems that provide the capability to locate potential threats on a person. In particular, the redacted excerpts

¹ The redacted material in the Bates Nos. 000136, 000149-000150 is identical to the redacted material in Bates Nos. 001636, 001649-001650.

on Bates Nos. 001733 and 001752 contain certain functional and operational requirements as to the machines' settings regarding detection of threat items. This information, much like the information described in paragraph 10, could be exploited by a terrorist seeking to take threat items onto an airplane. As such, these performance specifications were properly withheld under 49 C.F.R. § 1520.5(b)(4)(i).

12. Performance specifications are not released to the public. Rather, they are released only to (1) vendors who hold a facility clearance under the National Industrial Security Program (NISP) permitting access to classified information and only after the vendor executed non-disclosure agreements (NDAs) with TSA, (2) vendors who are already covered parties within the regulation and permitted access to SSI because they have existing contracts with TSA, or (3) vendors who are vetted and cleared as covered parties under the SSI regulations to have access to SSI, and again, only after they had executed non-disclosure agreements governing the handling of SSI.

Security Screening Information

13. Ten (10) pages, Bates labeled 000876, 000908, 000917-000918, 000920-000921, 000923-000924, 000935, and 001225, were partially withheld pursuant to 49 C.F.R. § 1520.5(b)(9)(i), which expressly prohibits from disclosure “[a]ny 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.” The redacted portions describe or identify very specific security screening procedures that were deployed, and/or the reasons those procedures were deployed, in the particular factual scenarios presented on the pages. The redaction on Bates No. 000876 describes the specific procedures that were employed

for a passenger who declined AIT screening. The redactions on Bates Nos. 000908, 000917, 000918, and 000920 (first redaction) describe a specific feature of a search used to screen an individual. The second redaction on Bates No. 000920 describes the reason that a further search of the individual at issue in the complaint was performed. The redacted excerpts on Bates Nos. 000921, 000923, and 000924 describe a specific type of screening and the circumstances that would warrant employing such a procedure. The withheld excerpt on Bates No. 000935 contains a reference to a particular feature of TSA's screening procedures. Likewise, the redacted language on Bates No. 001225 describes a specific technique and the reason it was used in a particular case. All of these portions describe "procedure[s] . . . for screening of persons" conducted by TSA employees. They accordingly are SSI under 49 C.F.R. § 1520.5(b)(9)(i). Moreover, release of this information could be detrimental to transportation security because knowledge of the particular algorithms, procedures, protocols, and safeguards used by TSA screeners could enable terrorists to evade or circumvent those procedures.

Performance Specification Question Trackers

14. The released documents at Bates Nos. 001696-1727 are performance specification "question trackers" consisting of vendor questions and TSA responses. The questions stemmed from an "Industry Day" that was held by TSA to permit the SSI-cleared vendors referenced in paragraph 12 above to present questions and concerns about the technical performance specifications required under the contracts for AIT machines. The questions in the document were posed by the vendors during "Industry Day," and the written responses were provided by TSA at a later date. The "question trackers" were released only to these SSI-cleared vendors.

15. Eight (8) pages of the "question trackers," Bates Nos. 001702, 001703, 001710, 001714, 001716, 001718, 001719, and 001721, were partially withheld. All of these excerpts

refer to the AIT machines' performance specifications and were therefore withheld under 49 C.F.R. § 1520.5(b)(4)(i). Additionally, some of the excerpts were also withheld under additional provisions in the SSI regulations. Specifically, the redacted portion of Bates No. 001702 directly references and discusses the performance specifications for detection of explosives, weapons, and liquids, which were redacted on Bates No. 000150 in accordance with 49 C.F.R. § 1520.5(b)(4)(i). The redacted portion of Bates No. 001703 discusses and references trade secret information belonging to and submitted by a particular vendor pertaining to classes of testing equipment, and thus was withheld under § 1520.5(b)(4)(i) as well as § 1520.5(14)(ii), which prohibits the release of "[t]rade secret information, including information required or requested by regulation or Security Directive, obtained by DHS or DOT in carrying out aviation or maritime transportation security responsibilities." Bates No. 001710 contains a question and answer pertaining to the machines' abilities to detect anomalies, including various types of threat objects described in a classified appendix; this was withheld pursuant to § 1520.5(b)(4)(i) as well as § 1520.5(b)(9)(i) because it discusses screening criteria. The redacted answer provided on Bates No. 001714 contains a description of the performance specification for resolving situations where anomalies are detected along with procedures for secondary searches, and was withheld pursuant to §§ 1520.5(b)(4)(i) and 1520.5(b)(9)(i). The redactions on Bates Nos. 001716 and 001719 identify sources and types of test objects used to test for threat detection accuracy, and were withheld under § 1520.5(b)(4)(i); this is information that a terrorist could use to identify the precise objects with which TSA tests and trains and thereafter simulate the AIT testing and/or training environment. The redacted portion of Bates No. 001718 reveals a threat detection capability located in the performance specification, also withheld under § 1520.5(b)(4)(i). Finally, the redacted portion of Bates No. 001721 consists of a question that provides

performance specifications for processes and procedures to be used in response to an image on a machine's monitor, and was withheld pursuant to § 1520.5(b)(4)(i) and § 1520.5(b)(9)(i). In all of these cases, public knowledge of the specific features of the machines, and/or the screening techniques and criteria mentioned, could be detrimental to transportation security as they could enable terrorists to circumvent the machines' technical capabilities and/or the screening techniques employed by TSA personnel.

Electronic Images

16. Two thousand AIT test Images were withheld in full. They consist of threat images and descriptions of threat images that are expressly prohibited from disclosure as SSI under 49 C.F.R § 1520.5(b)(9)(vi). Additionally, these images were created for the purpose of testing the degree to which vendors' AIT machines conform to the detection standards issued by TSA in its procurement specifications, and were also properly withheld pursuant to section 1520.5(b)(9)(v). Furthermore, many of the images were used to develop training materials and, as such, constitute training materials prohibited from disclosure as SSI under section 1520.5(b)(10) of TSA's implementing regulations.

17. Specifically, 49 C.F.R. § 1520.5(b)(9)(vi) prohibits disclosure of "[a]ny electronic image shown on any screening equipment monitor, including threat images and descriptions of threat images for threat image projection systems," due to the ability of terrorists to derive a range of operationally useful information from them. The information on the withheld test images includes insight into difficulties that may exist in identifying specific types of prohibited items, their sizes and shapes and consistencies, methods or locations of obscuring or camouflaging threat objects and the degree to which TSA settings and calibrations of screening equipment are distinct from the standards used by other organizations. Advanced Imaging

Technology images are more sensitive than X-Ray or Explosive Detection System (EDS) images because AIT images are currently far less common and in far fewer hands, making each individual image rarer, and thus more sensitive, than images from either X-Ray or EDS. Additionally, an array of multiple images has greater sensitivity, from a security standpoint, than a single image or a small number of images. In an array of multiple images, the images may be compared and contrasted with each other, allowing terrorists the opportunity to analyze differences in the images and make determinations as to the capabilities and constraints of the technology. Thus, an image considered for protection or release must not be examined solely for a potential detrimental effect of that single image, but must be considered in the context of a terrorist or criminal comparing that image to other images. Because TSA has already released a limited number of images to the public, for the reasons articulated above, it was determined that any further release of images would constitute a threat to transportation security because it would enable terrorists, by comparing and contrasting more images, to determine AIT machines' (and TSA's) detection capabilities and limitations.

18. Additionally, 49 C.F.R. § 1520.5(b)(9)(v) prohibits disclosure of “performance or testing data from security equipment or screening systems.” As referenced above, these images were created to test the degree to which vendors’ AIT machines conform to the detection standards issued by TSA in its procurement specifications. Accordingly, they are also exempt from disclosure under § 1520.5(b)(9)(v) as “performance or testing data.”

19. Finally, many of these images were used for the purpose of developing training materials for TSA employees who operate the AIT machines. Accordingly, they are also SSI under 49 C.F.R. § 1520.5(b)(10) because they are “[r]ecords 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 aviation, maritime, or rail transportation security measures required or recommended by DHS or DOT.”

20. No aspect of any of these images is segregable because each image contains various threat objects dispersed over the bodies reflected on those images.

Security Training Materials

21. Three hundred seventy six (376) pages of records were withheld in full. These records consisted of security training materials, the TSA WBI Training Manuals/L3 ProVision Instructor Guides (version 1.2, version 1.1), and the WBI Instructor Guide L3 ProVision SC-100) Pilot 2.1.

22. Like the images, these training materials are records that were 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 aviation security measures required by DHS. Specifically, they were created to train TSA employees who operate the AIT machines. Accordingly, they are expressly prohibited from disclosure as SSI by 49 C.F.R. § 1520.5(b)(10). The records also contain dozens of pages of electronic AIT test images that, as discussed in paragraphs 16 through 20, are expressly prohibited from disclosure as SSI by 49 C.F.R. § 1520.5(b)(9)(vi) and 1520.5(b)(9)(v).

23. Moreover, these records contain significant language from Security Screening Standard Operating Procedures (SOPs), which are expressly prohibited from disclosure as SSI by 49 C.F.R. § 1520.5(b)(9)(i). The records convey to the Transportation Screening Officers the process by which the SOPs must be implemented and are therefore derivatives of the SOPs, which are SSI. Additionally, woven throughout several pages of the training records are discussions devoted to image interpretation, image anomalies and communication protocols

which, if released to the public, would reveal, among other things, TSA's processes, routines, vulnerabilities, the types of materials for which TSA searches (and conversely, does not search), the locations of those materials, and the limitations on TSA's capabilities. The training records therefore are additionally withheld under 49 C.F.R. § 1520.5(b)(9)(i) as "procedures, including selection criteria and any comments, instructions, and implementing guidance pertaining thereto, for screening of persons."

24. As noted in paragraph 21, these records were withheld in full. Consistent with the requirements of FOIA, an effort was made to segregate Sensitive Security Information within the training materials from conceivably non-sensitive language. Indeed, a line by line review of these documents was conducted to determine if any information could be reasonably segregated and released to EPIC. However, given the sensitivity of the information, the potential risk to transportation security and the traveling public, and the regulations that specifically identify this information as SSI, the TSA Acting Administrator, reviewing the materials through the prism of current intelligence and under the current threat environment, determined that segregation was simply not possible as it posed too great a risk of inadvertent disclosure of information that could compromise transportation security. Moreover, any information within these documents that would be viewed as clearly non-exempt is so inextricably intertwined with the exempt information that release of the nonexempt information would simply produce unintelligible fragments of sentences and isolated and meaningless words and phrases.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: May 27, 2010



MARK ROBERTS
Acting Manager, Sensitive Security Information Branch
Transportation Security Administration
Department of Homeland Security