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VIA CERTIFIED MAIL

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RE: Freedom of Information Act Appeal on TSA10-0674

Dear Ms. Walton:

This letter constitutes an appeal under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted to the Transportation Security Administration (“TSA”), a component of the Department of Homeland Security (“DHS”), on behalf of the Electronic Privacy Information Center (“EPIC”). EPIC seeks agency records in the TSA’s possession concerning radiation and health testing of the Full Body Scanner (“FBS”) devices operated by DHS. This letter appeals the TSA’s denial of EPIC’s request for a fee waiver and expedited processing.

This appeal arises from EPIC’s July 13, 2010 request (“EPIC’s FOIA Request”) to the DHS for the following agency records:

- 1) All records concerning TSA tests regarding body scanners and radiation emission or exposure;
- 2) All records concerning third party tests regarding body scanners and radiation emission or exposure.¹

I. Factual Background

The TSA currently operates Full Body Scanners at airports throughout the United States. The TSA uses two types of FBS devices: backscatter x-ray and millimeter wave.² Both types of FBS devices can capture, store, and transfer detailed, three-dimensional images of individuals’ naked bodies. Experts have described full body scans as “digital

¹ EPIC, *FOIA request from Ginger McCall, EPIC to Mary Ellen Callahan, U.S. Dep’t. of Homeland Sec.* (July 13, 2010) [hereinafter *EPIC’s FOIA Request*]. See Appendix 1.

² TSA: Imaging Technology, http://www.tsa.gov/approach/tech/imaging_technology.shtml (last visited June 7, 2010).

strip searches.”³ In February 2007, the TSA began testing FBS technology on American travelers.⁴

EPIC has pending Freedom of Information Act lawsuits against the DHS and the Department of Justice (“DOJ”) regarding whole body imaging technology. As a result of these lawsuits, EPIC has received hundreds of pages of contracts, traveler complaints, TSA specifications, images, and other documents from the DHS and the DOJ.⁵ Many of these documents raise questions about the health impacts of airport body scanners.

However, the health risks posed by the deployment of body scanners in US airports have not been fully assessed. FBS devices subject air travelers to radiation during each FBS scan.⁶ Although the TSA commissioned a Johns Hopkins University study on the machines, no independent study has been conducted on the health risks of these scanners.⁷⁸

Experts recognize that exposure to radiation is harmful. The Environmental Protection Agency has documented that repeated exposure to radiation, even in low individual doses, can lead to cancer and birth defects.⁹ Studies on Terahertz Wave (T-wave) radiation reveal that exposure to such radiation can cause DNA damage that results in cancer.¹⁰ A recent report by the European Commission found that “it is evident any exposure to ionising radiation, however small, may have health effects in the longer term.”¹¹ American scientists have also expressed concerns regarding the aggregate effect of body scanner radiation on the traveling population.¹²

University of California biochemist David Agard has analyzed Full Body Scanners, concluding that “While the dose would be safe if it were distributed throughout

³ 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; Schneier on Security, June 9, 2005, http://www.schneier.com/blog/archives/2005/06/backscatter_x-r.html (“[whole body imaging] technology is incredibly intrusive. I don't think that people should be subjected to strip searches before they board airplanes.”) (last visited June 11, 2010).

⁴ TSA: Imaging Technology, http://www.tsa.gov/approach/tech/imaging_technology.shtm (last visited February 3, 2010).

⁵ EPIC, *Whole Body Imaging Technology and Body Scanners*, <http://epic.org/privacy/airtravel/backscatter/>; EPIC, *EPIC v. DHS*, http://epic.org/privacy/airtravel/backscatter/epic_v_dhs.html.

⁶ David Brenner, *Congressional Biomedical Research Caucus: Airport Screening: The Science and Risks of Backscatter Imaging*, 2010, available at <http://blip.tv/file/3379880>.

⁷ The TSA Blog, *Advanced Imaging Technology: “Radiation Risk Tiny,”* March 11, 2010, <http://blog.tsa.gov/2010/03/advanced-imaging-technology-radiation.html>

⁸ http://epic.org/privacy/airtravel/backscatter/EPIC-Nader_WBI_Letter.pdf

⁹ <http://www.bloomberg.com/apps/news?pid=20601209&sid=aoG.YbbvnkzU>

¹⁰ <http://www.technologyreview.com/blog/arxiv/24331/>

¹¹ Commission to the European Parliament, *Communication on the Use of Security Scanners at EU Airports*, June 15, 2010,

http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBIQFjAA&url=http%3A%2F%2Fec.europa.eu%2Ftransport%2Fair%2Fsecurity%2Fdoc%2Fcom2010_311_security_scanners_en.pdf&ei=h6k0TODUFMSBIAenwMzSBw&usq=AFQjCNF7Ck0G64bzz4riFHukJOp4XDaVGA (p. 16)

¹² Kate Schneider, “Naked” Scanners May Increase Cancer Risk, news.com.au, May 19, 2010, <http://www.news.com.au/travel/news/naked-scanners-may-increase-cancer-risk/story-e6frfq80-1225868706270>

the volume of the entire body, the dose to the skin may be dangerously high. In an address to the Congressional Biomedical Research Caucus, Dr. David Brenner noted that FBS machines expose the skin of the scalp to up to twenty times the reported amount of radiation.¹³ He pointed out that skin is one of the most radiation-sensitive parts of the body.¹⁴ Ionizing radiation such as the X-rays used in these scanners have the potential to induce chromosome damage, and that can lead to cancer.”¹⁵

According to experts, the radiation that FBS devices emit is especially risky for certain segments of the population, including pregnant women, children, elderly travelers, and immunocompromised individuals.¹⁶

Experts have called for a truly independent review of FBS technology because the true extent of the risk “can only be determined by a meeting of an impartial panel of experts that would include medical physicists and radiation biologists at which all of the available relevant data is reviewed.” In his address to the Congressional Biomedical Caucus, Dr. Brenner also called for greater testing of FBS technology and the effects of “low dose” radiation.¹⁷

II. Procedural History

On July 13, 2010, EPIC submitted, *via* Certified Mail, EPIC’s FOIA Request to the DHS.¹⁸

On July 29, 2010, the DHS wrote to EPIC acknowledging receipt of EPIC’s FOIA Request stating that the DHS determined that the information sought by EPIC’s FOIA Request is under the purview of the TSA and the DHS’ Science and Technology Directorate (S&T).¹⁹ Therefore the request was referred the TSA FOIA Officer, Kevin Janet and FOIA Officer for S&T, Miles Wiley.²⁰ The DHS assigned EPIC’s FOIA Request the case number DHS/OS/PRIV 10-0869.

¹³ Brenner, *supra* note 6.

¹⁴ *Id.*

¹⁵ Drs. John Sedat, David Agard, Marc Shuman, and Robert Stroud, Letter of Concern to Dr. John P. Holdren, Assistant to the President for Science and Technology, April 6, 2010, available at: <http://www.npr.org/assets/news/2010/05/17/concern.pdf>; Ben Mutzabaugh, Full-body Scanners Could Pose Cancer Risk at Airports, U.S. Scientists Warn, *USA Today*, July 1, 2010, <http://travel.usatoday.com/flights/post/2010/07/full-body-scanners-pose-cancer-risk-at-airports-us-scientists-warn/98552/1>

¹⁶ *Id.*; Jonathan Tirone, *Airport Body Scan Raises Radiation Exposure, Committee Says*, Feb. 5, 2010, <http://www.bloomberg.com/apps/news?pid=20601209&sid=aoG.YbbvnkzU>; Commission to the European Parliament, *Communication on the Use of Security Scanners at EU Airports*, June 15, 2010, http://www.google.com/url?sa=t&source=web&cd=1&ved=0CB1QFjAA&url=http%3A%2F%2Fec.europa.eu%2Ftransport%2Fair%2Fsecurity%2Fdoc%2Fcom2010_311_security_scanners_en.pdf&ei=h6k0TODUFMSBlAenwMzSBw&usq=AFQjCNF7Ck0G64bzz4riFHukJOp4XDaVGA (p. 16); Brenner, *supra* note 6.

¹⁷ *Id.*

¹⁸ EPIC’s FOIA Request, *supra* note 1.

¹⁹ DHS, *Response to EPIC FOIA Request Referring to TSA and S&T*, July 29, 2010, See Appendix 2.

²⁰ TSA, *Response to EPIC Denying Fee Waiver and Expedited Processing*, August 13, 2010, See Appendix 3.

On August 12, 2010, the TSA wrote to EPIC denying EPIC's requests for expedited processing and a fee waiver.²¹

III. EPIC Appeals the TSA's Denial of Fee Waiver

EPIC hereby appeals the TSA's denial of EPIC's fee waiver request. EPIC's FOIA Request meets the six factors for FOIA fee waivers listed in 6 C.F.R. § 5.11(k)(12). The six factors are:

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

We address each of the relevant factors in turn.

1. The Subject of EPIC's FOIA Request Concerns "The Operations or Activities of the Government."

The TSA is a federal agency. The FOIA request concerns the activity of the TSA, specifically, FBS machine use at American airports. The TSA is responsible for "security at the nation's airports and [has] deployed a Federal workforce to meet Congressional deadlines for screening all commercial airline passengers and baggage."²² The TSA's mission "is to improve homeland security by providing to customers state-of-the-art technology."²³ Currently, the TSA is employing FBS machines to screen air travelers.²⁴ The TSA has contracted for the development of this technology, has distributed it to airports around the country, and employs workers to operate this equipment in American airports. EPIC's FOIA Request seeks records regarding the testing of FBS devices used by the TSA.²⁵ As such, the request for "All records concerning ...tests regarding body

²¹ See 5 U.S.C. § 552(a)(6)(B).

²² TSA: What is TSA, http://www.tsa.gov/who_we_are/what_is_tsa.shtm (last visited Aug. 18, 2010).

²³ *Id.*

²⁴ TSA: Imaging Technology, http://www.tsa.gov/approach/tech/imaging_technology.shtm (last visited June 7, 2010).

²⁵ TSA: Mission, Vision, and Core Values, http://www.tsa.gov/who_we_are/mission.shtm (last visited Aug. 6, 2010).

scanners and radiation emission or exposure” done by TSA or third party contractors directly and clearly concerns the TSA’s operations and activities.

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

Records pertaining to the testing of the radiation emission and dangers of FBS devices will help the public understand the safety implications of the TSA’s FBS program and will give the public the opportunity to evaluate the relative value of this program by weighing its risks and alleged benefits. Therefore, the release of radiation test results for FBS devices is “likely to contribute” to the understanding of the safety of the TSA’s use of FBS devices. 6 C.F.R. § 5.11(k)(1)(ii) requires that “disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be ‘likely to contribute’ to an increased public understanding of those operations or activities.”²⁶

In addition, both the D.C. Circuit and the Tenth Circuit have recognized that “an understanding of how [a federal agency] makes policy decisions . . . is important to the public’s understanding of the government.”²⁷

Release of these records would allow the public to further evaluate and study the risks inherent in FBS devices and in turn, enhance the public’s ability to understand the government’s policy decisions concerning the devices. Public understanding of FBS devices is of particular importance given the acceleration of the FBS program, which is occurring despite public concern about the use of FBS devices in airports and scandal surrounding the use of similar machines.

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

EPIC routinely and systematically disseminates records obtained through the FOIA to the public at large and, as the TSA has acknowledged,²⁸ is a representative of the news media for FOIA purposes. EPIC maintains several heavily visited websites that highlight breaking news concerning privacy and civil liberties issues. Two of EPIC’s sites, EPIC.org and PRIVACY.org, consistently appear at the top of search engine rankings for searches on “privacy.” EPIC’s webpage on FBS also consistently appears in the top listings for searches on “whole body imaging” and “body scanners.”

EPIC.org, maintained by EPIC, highlights critical portions of documents EPIC obtains under the FOIA. Further, EPIC routinely publishes complete copies of records we

²⁶ 6 C.F.R. § 5.11(k)(1)(ii)

²⁷ *Natural Resources Defense Council v. U.S. EPA*, 581 F. Supp. 2d 491, 498–99 (S.D.N.Y. 2008) (citing *Forest Guardians*, 416 F.3d at 1179; *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1313–14 (D.C. Cir. 2003)).

²⁸ *TSA Reply*, *supra* note 20, *see* Appendix 3.

receive through FOIA requests. EPIC's FOIA documents have routinely been the subject of national news coverage.²⁹

EPIC also publishes a bi-weekly electronic newsletter, the EPIC Alert, which is distributed to around 20,000 readers, many of whom report on technology and privacy issues for major news outlets. The newsletter has been published continuously since 1996, and an archive of past issues is available at our website. EPIC is frequently interviewed by mainstream media outlets on the topic of FBS.³⁰

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

4. The Contribution to the Public Understanding of Government Operations or Activities Will be "Significant"

Although there is widespread public discussion of the radiation risk assessments that are the subject of EPIC's FOIA request, test results and related documents regarding the radiation emissions of FBS devices and the radiation exposure of air travelers are not currently available to the public. The DHS, TSA, and S&T have failed to publish any primary source data concerning the radiation emissions and exposure of FBS devices. Without access to these documents, the public has no ability to accurately evaluate the health risks of a controversial screening method that is costing tax-payers millions of dollars and being deployed at an increasing number of airports. Disclosure of the requested documents would contribute significantly to the public's ability to evaluate the use of FBS devices and to assess potential health risks associated with the technology.

5. EPIC has No Commercial Interest in the Disclosure

10 C.F.R. § 1004.9(c) defines a commercial use request as "a request from . . . one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requestor . . ."³¹ EPIC is a non-profit, public interest research center. EPIC's work is distributed freely through our website and through the bi-weekly EPIC Alert newsletter. EPIC has no commercial interest that would be furthered by disclosing the requested records.

²⁹ See e.g. *Happening Now: Feds Admit Storing Thousands of Checkpoint Body Scan Images* (Fox News television broadcast Aug. 5, 2010), available at <http://www.youtube.com/watch?v=djQ0JWnn8uU>; Jeanne Meserve and Mike M. Ahlers, *Body Scanners Can Store, Send Images, Group Says*, CNN, January 11, 2010, <http://www.cnn.com/2010/TRAVEL/01/11/body.scanners/>.

³⁰ See generally, *Happening Now: Feds Admit Storing Thousands of Checkpoint Body Scan Images* (Fox News television broadcast Aug. 5, 2010), available at <http://www.youtube.com/watch?v=djQ0JWnn8uU>; *PBS NewsHour: After Christmas Bomb Plot, New Airport Screening Techniques Examined* (PBS television broadcast Jan. 20, 2010), available at http://www.pbs.org/newshour/bb/transportation/jan-june10/scanners_01-20.html; *American Morning: New Questions on Body Scanners* (CNN television broadcast Jan. 11, 2010), available at <http://www.cnn.com/video/?/video/tech/2010/01/11/meserve.full.body.scans.cnn>.

³¹ 10 C.F.R. § 1004.9(c) (2009).

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

As established above, EPIC has no commercial interest in this disclosure. EPIC is “primarily engaged in disseminating information.”³² EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC has no clients, no customers, and no shareholders.

IV. EPIC Appeals the TSA’s Denial of Expedited Processing

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

- (i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
- (ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.

While EPIC need only meet one of these requirements in order to qualify for expedited processing, EPIC, in fact, meets *both* of these requirements.

1. EPIC’s Request Involves Circumstances in Which the Lack of Expedited Treatment Could Reasonably be Expected to Pose an Imminent Threat to the Life or Physical Safety of an Individual

EPIC’s request involves “circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.” As detailed in EPIC’s FOIA request, many noted experts have raised objections to this technology because it exposes air travelers to unnecessary radiation during each FBS scan.³³

As described above, many experts have stated that the exposure to radiation, even in low doses, could reasonably be expected to create a greater risk of cancer and birth defects.³⁴ A recent report by the European Commission found that “it is evident any exposure to ionising radiation, however small, may have health effects in the longer term.”³⁵ American scientists have also expressed concerns regarding the aggregate effect

³² *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

³³ Brenner, *supra* note 6.

³⁴ Jonathan Tirone, *Airport Body Scan Raises Radiation Exposure, Committee Says*, Feb. 5, 2010, <http://www.bloomberg.com/apps/news?pid=20601209&sid=aoG.YbbvnkzU>

³⁵ Commission to the European Parliament, *Communication on the Use of Security Scanners at EU Airports*, June 15, 2010, <http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBIQFjAA&url=http%3A%2F%2Fec.europa>

of body scanner radiation on the traveling population.³⁶

University of California biochemist David Agard has stated that "While the dose would be safe if it were distributed throughout the volume of the entire body, the dose to the skin may be dangerously high. Ionizing radiation such as the X-rays used in these scanners have the potential to induce chromosome damage, and that can lead to cancer."³⁷

The dose of radiation that FBS puts forth is especially risky for certain segments of the population. Professor Agard and several other experts wrote a recent letter to Dr. John P. Holdren, the Assistant to the President for Science and Technology.³⁸ They called for further evaluation of the FBS technology, and identified several groups of people – including children and pregnant women, as being especially at risk of harm from the scans.³⁹ Their letter stated that a "large population of older travelers, >65 years of age, is particularly at risk from the mutagenic effects of the X-rays based on the known biology of melanocyte aging."⁴⁰ The experts also noted, "A fraction of the female population is especially sensitive to ... radiation leading to breast cancer. Notably, because these women, who have defects in DNA repair mechanisms, are particularly prone to cancer, X-ray mammograms are not performed on them. The dose to breast tissue beneath the skin represents a similar risk."⁴¹ Dr. Agard and the other experts also stated, "The population of immunocompromised individuals--HIV and cancer patients (see above) is likely to be at risk for cancer induction by the high skin dose [of FBS technology radiation]."⁴²

Other experts have agreed that FBS radiation could be especially harmful to some segments of the population. In a report restricted to certain agencies and not meant for public dissemination, the Inter-Agency Committee on Radiation Safety said "pregnant women and children should not be subject to scanning."⁴³ The European Commission report called for a similar exception for pregnant women and children, stating that "Special considerations might also be called for when it comes to passengers that are especially sensitive to ionising radiation, primarily pregnant women and children."⁴⁴ In

.eu%2Ftransport%2Fair%2Fsecurity%2Fdoc%2Fcom2010_311_security_scanners_en.pdf&ei=h6k0TODU
FMSBIAenwMzSBw&usq=AFQjCNF7Ck0G64bzz4riFHukJOp4XDaVGA (p. 16)

³⁶ Kate Schneider, "Naked" Scanners May Increase Cancer Risk, news.com.au, May 19, 2010, <http://www.news.com.au/travel/news/naked-scanners-may-increase-cancer-risk/story-e6frfq80-1225868706270>

³⁷ Ben Mutzabaugh, Full-body Scanners Could Pose Cancer Risk at Airports, U.S. Scientists Warn, *USA Today*, July 1, 2010, <http://travel.usatoday.com/flights/post/2010/07/full-body-scanners-pose-cancer-risk-at-airports-us-scientists-warn/98552/1>

³⁸ Sedat, Agard, Shuman, and Stroud, *supra* note 15.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Jonathan Tirone, *Airport Body Scan Raises Radiation Exposure, Committee Says*, Feb. 5, 2010, <http://www.bloomberg.com/apps/news?pid=20601209&sid=aoG.YbbvnkzU>

⁴⁴ Commission to the European Parliament, *Communication on the Use of Security Scanners at EU Airports*, June 15, 2010,

<http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBIQFjAA&url=http%3A%2F%2Fec.europa>

his recent address to the Congressional Biomedical Caucus, Columbia Professor Dr. David Brenner agreed, stating that the dose of radiation delivered by FBS machines would be particularly risky for children and members of the population with a genetically higher sensitivity to radiation.⁴⁵

Experts have also reported that body scanners may emit up to twenty times the reported amount of radiation.⁴⁶ Dr. Brenner noted that FBS machines expose the skin of the scalp to up to twenty times the reported amount of radiation.⁴⁷ He pointed out that skin is one of the most radiation-sensitive parts of the body.⁴⁸

Dr. Agard and the other drafters of the letter to the Assistant to the President for Science and Technology called for a truly independent review of FBS technology because the true extent of the risk “can only be determined by a meeting of an impartial panel of experts that would include medical physicists and radiation biologists at which all of the available relevant data is reviewed.”⁴⁹ In his address to the Congressional Biomedical Caucus, Dr. Brenner also called for greater testing of FBS technology and the effects of “low dose” radiation.⁵⁰

These concerns have been underscored by a recent letter by three United States senators to the Secretary Napolitano and TSA Administrator, John Pistole.⁵¹ Senators Collins (R-ME), Burr (R-NC), and Coburn (R-OK) noted that “[t]he issue of radiation associated with the backscatter x-ray AIT machines has not been adequately addressed by TSA.”⁵² The senators expressed particular concern for the well-being of frequent flyers who “would receive heightened exposures from multiple AIT scans” and airport and airline personnel “who work at the airport and therefore could receive multiple doses of radiation every work day.”⁵³

These examples illustrate the “imminent threat to the life or physical safety” to not just one individual, but the entire American traveling public, and especially to select kinds of travelers: children, pregnant women, immunocompromised individuals, frequent fliers, and TSA personnel.

.eu%2Ftransport%2Fair%2Fsecurity%2Fdoc%2Fcom2010_311_security_scanners_en.pdf&ei=h6k0TODU
FMSBIAenwMzSBw&usg=AFQjCNF7Ck0G64bzz4riFHukJOp4XDaVGA (p. 16)

⁴⁵ Brenner, *supra* note 6.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Sedat, Agard, Shuman, and Stroud, *supra* note 15.

⁵⁰ Brenner, *supra* note 6.

⁵¹ United States Senate Committee on Homeland Security and Government Affairs, *Press Release: Senator Collins Sends Letter to Top DHS Officials, Noting Safety Questions About New Airport Scanning Machines*, Aug. 6, 2010, available at: http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MinorityNews&ContentRecord_id=48bdf98d-5056-8059-76f0-36d9d201328e&Is.

⁵² *Id.*

⁵³ *Id.*

2. EPIC's Request Involves An Urgency to Inform the Public About an Actual or Alleged Federal Government Activity and is Made by an Organization Primarily Engaged in Disseminating Information

EPIC's request involves an urgency to inform the public about an actual or alleged federal government activity and is made by an organization primarily engaged in disseminating information. A District of Columbia Circuit Court has articulated a test to determine whether requestors have demonstrated "urgency to inform," and hence "compelling need;" courts must consider at least three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity.⁵⁴

EPIC's request satisfies the first prong of this test because it concerns a matter of current exigency to the American public. As discussed above, in recent months, many experts have questioned the safety of the TSA's FBS devices.⁵⁵ In late July 2010, TSA has announced its intent to continue to expand the FHS program to airports across the country.⁵⁶ New airports are receiving FBS machines every week.⁵⁷

In an August 6, 2010 letter, three senators questioned the safety of these devices.⁵⁸ In that letter, Senators Collins (R-ME), Burr (R-NC), and Coburn (R-OK), wrote:

As the Department of Homeland Security (DHS) continues the deployment of Advanced Imaging Technology (AIT) machines at airport passenger screening checkpoints, we urge the Department to better address an issue with the new technology that remains a persistent question with the American people. The issue of radiation associated with the backscatter x-ray AIT machines has not been adequately addressed by TSA... TSA's privacy assessment on AIT does little to assuage fears over the level of radiation that individuals are exposed to at airports. TSA's privacy assessment does note that the level of radiation absorbed from a single scan is "equivalent to the radiation received in two minutes of airplane flight at altitude." This is intended apparently to answer passengers who have real and legitimate concerns with exposure to even low doses of radiation. Frequent flyers, however, would receive heightened exposures from multiple AIT scans, and other travelers have expressed the belief that "there is *no* safe level of radiation exposure..." Furthermore, we have not seen TSA address the issue of airport and airline personnel who work at the airport and therefore could receive multiple

⁵⁴ *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001).

⁵⁵ See e.g. Brenner, *supra* note 6; Sedat, Agard, Shuman, and Stroud, *supra* note 15.

⁵⁶ Department of Homeland Security, *Press Release: Secretary Napolitano Announces Additional Recovery Act-Funded Advanced Imaging Technology Deployments*, July 20, 2010, available at: http://www.dhs.gov/ynews/releases/pr_1279642622060.shtm

⁵⁷ See e.g. Carol Pucci, *Full-Body Scans of Passengers to Start at Sea-Tac in September*, The Seattle Times, Aug. 18, 2010, http://seattletimes.nwsourc.com/html/travel/2012663519_bodyscanners19.html

⁵⁸ United States Senate Committee on Homeland Security and Government Affairs, *supra* note 51.

doses of radiation every work day. It also may be possible for TSA personnel to receive collateral doses of radiation while working in the vicinity of backscatter x-ray AIT machines.⁵⁹

Also, a bill has recently been introduced in the Senate that would mandate deployment of FBS machines as primary screening devices in all commercial airports across the country.⁶⁰ FBS machines are obviously the topic of current and urgent debate and lawmaking.

EPIC's request also satisfies the second prong of this test: the consequence of delaying a response would compromise a significant recognized interest. A failure by the agency to disclose records detailing risk and safety assessments of FBS machines denies the American public the opportunity to make an informed decision about this technology. As mentioned above, a Senate bill has been introduced that would make FBS machines primary screening at every commercial airport across the country. At the same time, several senators have expressed concerns regarding the safety of these machines. The public must be informed in order to participate in the current debate over FBS machines. Courts have been persuaded to require expedited process when Congress is considering legislation on an issue at the time of the request⁶¹ or where Congress has expressed interest in a particular topic.⁶²

The agency's failure to disclose documents in an expedient manner compromises not only the democratic decision-making process, but also the safety of American travelers and TSA employees. As discussed above, many experts have indicated that the radiation exposure created by FBS technology presents a threat to American travelers. Few interests are more significant than the health of the American traveling public.

EPIC's request also clearly fulfills the third prong of this test: it concerns federal government activity. As discussed in Section III, above, the TSA is responsible for "security at the nation's airports and [has] deployed a Federal workforce to meet Congressional deadlines for screening all commercial airline passengers and baggage."⁶³ The TSA is currently employing FBS machines to screen air travelers.⁶⁴ The TSA has contracted for the development of this technology, is distributing FBS machines to airports around the country, and employs workers to operate this equipment in American airports. EPIC's FOIA Request seeks records regarding the testing of FBS devices used by the TSA.⁶⁵ As such, the request for "All records concerning ... tests regarding body scanners and radiation emission or exposure" done by TSA or third party contractors directly and clearly concerns the TSA's operations and activities.

⁵⁹ United States Senate Committee on Homeland Security and Government Affairs, *supra* note 51.

⁶⁰ S.3536, 111th Cong. (2010).

⁶¹ *Gerstein v. CIA*, 2006 U.S. Dist. LEXIS 89883 (N.D. Cal. Nov 29, 2006).

⁶² *Natural Res. Def. Council v. DOE*, 191 F. Supp. 2d 41, 43-44 (D.D.C. 2002).

⁶³ TSA: What is TSA, http://www.tsa.gov/who_we_are/what_is_tsa.shtm (last visited Aug. 18, 2010).

⁶⁴ TSA: Imaging Technology, http://www.tsa.gov/approach/tech/imaging_technology.shtm (last visited June 7, 2010).

⁶⁵ TSA: Mission, Vision, and Core Values, http://www.tsa.gov/who_we_are/mission.shtm (last visited Aug. 6, 2010).

Regarding EPIC's status as an organization "primarily engaged in disseminating information," as the TSA has already acknowledged in its response, EPIC is a news media organization and is primarily engaged in disseminating information. EPIC's status as a news media organization⁶⁶ and an organization that is "primarily engaged in disseminating information" for the purposes of expediting the request has been recognized by District of Columbia Courts.⁶⁷

V. EPIC is Entitled to Expedited Processing on This Appeal

Pursuant to 5 U.S.C. § 552(a)(6)(E)(ii)(II) and 6 C.F.R. § 5.5, EPIC is entitled to expedited processing for this appeal. 6 C.F.R. § 5.5 sets forth the same requirements for expedited processing of appeals as for requests, that is, that requests and appeals will be taken out of order and given expedited treatment whenever it is determined that they involve:

- (i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
- (ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.

For all of the reasons stated above in Section IV, EPIC has fulfilled both of these requirements (though only one is required) and this appeal qualifies for expedited processing.

⁶⁶ *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).

⁶⁷ *ACLU v. DOJ*, 321 F. Supp. 2d 24, 30 (D.D.C. 2004).

VI. Conclusion

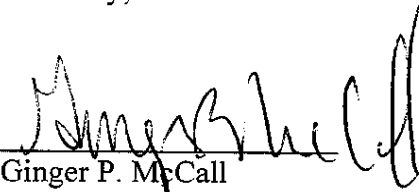
EPIC appeals the TSA's failure to grant a fee waiver and expedited processing as requested in EPIC's FOIA Request. EPIC also requests expedited processing for this appeal.

Thank you for your consideration of this appeal. I anticipate that you will make a determination on this appeal within ten (10) days.

VII. Certification

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

Sincerely,



Ginger P. McCall

Staff Counsel

Electronic Privacy Information Center