

Freedom of Information Act Office  
601 South 12<sup>th</sup> Street  
Arlington, VA 20598-6020



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 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