

April 14, 2009

VIA U.S. MAIL (CERTIFIED DELIVERY)

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U.S. Department of Homeland Security
245 Murray Drive SW, Building 410
STOP-0550
Washington, DC 20528-0550

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.¹ Passenger imaging is often called "whole body imaging."² The initial tests involved whole body imaging systems based on backscatter technology.³ In October 2007, the TSA began testing whole body imaging systems based on millimeter wave technology.⁴

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."⁵

¹ TSA: Whole Body Imaging, http://www.tsa.gov/approach/tech/body_imaging.shtm (last visited Apr. 10, 2009).

² See Whole Body Imaging Technology, EPIC, <http://epic.org/privacy/airtravel/backscatter/> (last visited Apr. 10, 2009).

³ TSA: Whole Body Imaging, *supra* note 1.

⁴ *Id.*

⁵ 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; 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."⁶ Passengers are not typically required to submit to secondary screening, but are selected for additional screening if they set off a metal detector⁷ or wear baggy clothing.⁸ The DHS's Privacy Impact Assessment of whole body imaging is predicated on the non-mandatory use of the technology for primary screening.⁹ The TSA assured travelers that "a security algorithm will be applied to the image to mask the face of each passenger."¹⁰ 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."¹¹ 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."¹²

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."¹³ 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

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.").

⁶ *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; 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").

⁷ *How to Get Through the Line Faster*, http://www.tsa.gov/travelers/airtravel/screening_experience.shtm (last visited Apr. 10, 2009).

⁸ *TSA's Head-to-Toe Screening Policies*, Transportation Security Administration, October 15, 2007 available at http://www.tsa.gov/press/happenings/sop_facts.shtm.

⁹ *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 (stating "Individuals will be able to choose to undergo [whole body imaging] screening in primary [screening]").

¹⁰ *Id.*

¹¹ *Id.*

¹² *TSA: Whole Body Imaging*, note 1 *supra*.

¹³ *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.¹⁴ 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 ..."¹⁵ On April 6, 2009, the TSA announced that it plans to expand the mandatory use of whole body imaging to all airports.¹⁶ 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

¹⁴ 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.

¹⁵ *Id.*

¹⁶ 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.¹⁷

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

¹⁷ 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/>.