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-- FREEDOM OF INFORMATION APPEAL --

September 21, 2011

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

**Re: Appeal of FOIA Request No. TSA 10-0780**

Dear Ms. Walton,

This letter constitutes an appeal pursuant to 5 U.S.C. § 552(a)(6) of the determination made on August 17, 2011 in response to request number TSA 10-0780.

The underlying request for “(any) reports addressing the effectiveness or performance of [Electronic Trace Portals (ETP)]. Documents addressing performance issues that have led to ETPs being removed from some airports” was made by the American Civil Liberties Union Foundation of Massachusetts (ACLUM). Exhibit A.

The agency responded by letter dated August 17, 2011, signed by Yvonne L. Coates, Director, Freedom of Information Act Office. Exhibit B. The letter stated that TSA found 75 pages of responsive documents. However only fifty-six (56) pages accompanied the letter. The agency did not provide an explanation for the nineteen (19)

pages that were withheld. In addition, the agency redacted most of thirteen (13) pages, citing 5 U.S.C. § 552(b)(3) and (b)(6). For the following reasons, we appeal both the withholding of nineteen (19) pages and the redactions in the released documents.

**I. TSA MAY NOT WITHHOLD DOCUMENTS WITHOUT REFERENCE TO A FOIA EXEMPTION**

In its letter dated August 17, 2011, TSA stated that it had located 75 pages of responsive documents. Yet, it released only 56 pages, and made no reference to an exemption under FOIA that allowed the missing nineteen (19) pages to be withheld.

Exhibit B.

Attached to its August 17, 2011 letter, TSA released the following documents:

1. Special Study #2005-002, dated March 18, 2005
2. Special Study # 2005-003, dated March 18, 2005
3. A GAO report GAO-07-448T, entitled “Aviation Security; Progress Made in Systematic Planning to Guide Key Investment Decisions, but More Work Remains.”

Department of Homeland Security regulations mandate that a letter giving notice of an adverse determination include a “brief statement of the reason(s) for the denial, including any FOIA exemption applied by the component in denying the request.” 6 CFR § 5.9 (c)(2).

The agency’s August 17, 2011 letter failed to state a reason for withholding the nineteen (19) pages that were missing from the attached documents. As such, the agency is not in compliance with its own regulations and should release all responsive

documents, or provide a reason, citing to the applicable FOIA exemption, for their withholding.

## **II. TSA WRONGLY REDACTED PORTIONS OF ETP TESTS**

Citing FOIA exemption (b)(3), TSA redacted almost entirely two studies relating to Electronic Trace Portals (ETPs) – Special Study #2005-002 and Special Study # 2005-003, both dated March 18, 2005.

Exemption (b)(3) permits the withholding of documents “specifically exempted from disclosure by statute” 5 U.S.C. § 552(b)(3). TSA cited 49 U.S.C. § 114(r) and implementing regulation at 49 C.F.R. Part 1520, as exempting the withheld information because it is “sensitive security information” and its release would be “detrimental to the security of transportation.” Exhibit B.

The released reports are regression tests of the Smiths Ionscan Sentinel III Modular Portal and the GE Entryscan Portal. *TSA no longer uses either of these devices.* Thereby information relating to the testing of these devices cannot reasonably be determined to be detrimental to the security of transportation.

In the summer of 2008, TSA decided to phase out ETP technology, after “it became increasingly apparent that tweaks and fixes were unable to resolve ETP maintenance issues cause by dirt and humidity common to any airport environment. *See* <http://blog.tsa.gov/2009/05/explosive-trace-detection.html>. By the end of 2010, the ETP devices had been completely removed from service. *See* Dana Hedgpeth, “Auditors question TSA’s use of and spending on technology,” *The Washington Post*, Dec. 21, 2010.

Given that TSA no longer uses these devices, or indeed any ETP technology, releasing information relating to their testing is cannot be detrimental to security.

Likewise, releasing information that may disclose the testing *methods* used is also not detrimental to transportation security because the TSA now has a new testing facility that conducts tests different methods from those used in the responsive documents. *See* <http://blog.tsa.gov/2009/03/blogger-pauls-visit-to-tsif.html>. Because the tests used on ETPs did not properly simulate a live airport environment, the TSA devised new tests. *See* <http://blog.tsa.gov/2009/05/explosive-trace-detection.html>.

FOIA “adopts as its most basic premise a policy strongly favoring public disclosure of information in the possession of federal agencies.” Halpern v. FBI, 181 F.3d 279, 286 (2d Cir. 1999). Exemptions are narrowly construed and the government bears the burden of proving that any one applies. *See Halpern*, 181 F.3d at 287; *see also Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 7-8 (2001) (FOIA exemptions are narrowly construed); John Doe Agency v. John Doe Corp., 493 U.S. 146, 151-52 (1989); DOJ v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 755 (1989). It is well established that these “limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” Klamath Water Users, 532 U.S. at 7-8.

Consistent with the statute and a renewed commitment to open government, on January 21, 2009, President Obama issued a memorandum to the heads of all departments and agencies on the Freedom of Information Act (FOIA) directing that FOIA “should be administered with a clear presumption: In the face of doubt, openness prevails.”  
Memorandum from President Barack Obama to Heads of Executive Departments and

Agencies (Jan. 21, 2009) available at  
[http://www.whitehouse.gov/the\\_press\\_office/Freedom\\_of\\_Information\\_Act/](http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act/). Moreover,  
the President instructed agencies to “adopt a presumption in favor of disclosure, in order  
to renew their commitment to the principles embodied in FOIA, and to usher in a new era  
of open Government. The presumption of disclosure should be applied to all decisions  
involving FOIA.” Id.

**I. CONCLUSION**

For the foregoing reasons, we urge you to reconsider the withholding of nineteen  
(19) pages of responsive documents and the redaction of the released documents.

Thank you for your consideration.

Sincerely,

  
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Laura Rótolo  
ACLUM Staff Attorney

cc: Associate General Counsel (General Law), Department of Homeland Security

FOIA Appeal  
Request No. TSA 10-780

# **EXHIBIT A**



Laura Rótolo  
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August 31, 2010

Transportation Security Administration  
Freedom of Information Act Office, TSA-20  
11th Floor, East Tower  
601 South 12th Street  
Arlington, VA 20598-6020

To whom it may concern:

This letter constitutes a request pursuant to the Freedom of Information Act, 5 U.S.C. § 552 made to the Transportation and Security Administration. The Request is submitted on behalf of the American Civil Liberties Union of Massachusetts and its educational arm, the American Civil Liberties Union Foundation of Massachusetts (jointly referred to as ACLUM).

## **I. BACKGROUND**

Earlier this month, news sources reported that the Transportation Security Administration is instituting an “enhanced pat down” at Logan International Airport and Las Vegas-McCarran Airport for passengers who opt out of the “full-body scanner” search.

According to one news report, the “enhanced pat down” will be carried out “using all front-of-the-hand sliding motions over greater areas of passengers’ bodies, including sensitive areas.”<sup>1</sup>

Members of the public and even TSA employees have expressed concern about the privacy impact of such enhanced searches and the effectiveness of this heightened procedure. In order to provide information to the public about these new procedures, this request seeks documents containing information about them.

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<sup>1</sup> Donna Goodison, *New Logan Searches Blasted*, The Boston Herald, Aug. 21, 2010

## **II. DOCUMENTS SOUGHT**

1. Policies, procedures and training materials regarding the screening of passengers who opt out of the Whole Body Imaging/ Backscatter Full Body Scanner.
2. Policies, procedures and training materials regarding pat-down screening of passengers, including documents addressing when a pat-down is appropriate, the procedure for pat-downs generally and the procedures for what TSA has termed the “enhanced pat-down” process.

## **III. SEARCH AND COPYING FEES**

The American Civil Liberties Union Foundation of Massachusetts (“ACLUM”) requests a waiver of search, duplication and review fees under the FOIA statute and Department of Homeland Security Regulations for two reasons. First, the requester qualifies as a representative of the news media. Second, release of the records requested is in the public interest and not in any commercial interest of the requester. In a recent related request to the TSA dated March 25, 2010, the agency granted ACLUM a fee waiver.

### **1. ACLUM is entitled to a waiver of fees because it is a representative of the news media as defined in the FOIA statute and in DHS regulations.**

The requester is a representative of the news media under both the FOIA statute and the Department of Homeland Security regulations regarding FOIA fees in that it is an organization “actively gathering news for an entity that is organized and operated to publish or broadcast news to the public,” where “news” is defined as “information that is about current events or that would be of current interest to the public.” 5 U.S.C. § 552(a)(4)(A)(ii)(II); 6 C.F.R. § 5.5(b)(6).

In addition, ACLUM meets the statutory definition of a “representative of the news media” because it is an “an entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.” *Nat’s Security Archive v. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir 1989). *See also Electronic Privacy Information Ctr. v. Dep’t of Defense*, 241 F.Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit interest group that disseminated an electronic newsletter and published books was a “representative of the media” for purposes of FOIA.)

ACLUM, a not-for-profit, non-partisan organization with over 22,000 members and supporters across Massachusetts is dedicated to the principles of liberty and equality. As the Massachusetts affiliate of the national ACLU, a not-for-profit, non-partisan



organization with over 500,000 members nationwide, ACLUM distributes information outside of Massachusetts to thousands of members of the public.

Gathering and disseminating current information to the public is a critical and substantial component of ACLUM's mission and work. ACLUM publishes newsletters, news briefings, reports and other printed materials that are disseminated to the public. These materials are widely available to everyone, including tax-exempt organizations, not-for-profit groups, law students and faculty, at no cost. ACLUM also disseminates information through its heavily subscribed website, [www.aclum.org](http://www.aclum.org), a blog, <http://www.massrightsblog.org> and regular posts on social media sites such as Facebook and Twitter. Our web postings address civil liberties issues in depth, provide features on civil liberties issues in the news, and contain hundreds of documents that relate to the issues addressed by ACLUM. The website includes features on information obtained through the FOIA. See, e.g., [www.aclum.org/ice](http://www.aclum.org/ice).

Courts have further confirmed the broad scope of the definition of news media. In a case regarding a request made by a similar advocacy organization, the Electronic Privacy Information Center, the D.C. Circuit held that "[i]t is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected . . . [n] fact, any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'" *Electronic Privacy Information Ctr. v. Dep't of Defense*, 241 F.Supp. 2d 5, 10 (D.D.C. 2003).

Other organizations similar to ACLUM have also been found to meet the statutory definition of "representative of the news media" when the organization making the request is "an entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience." *Nat'l Security Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C.Cir 1989) (finding that organization was a "representative of the news media"); See also *Electronic Privacy Information Ctr. v. Dep't of Defense*, 241 F.Supp. 2d 5, 10-15 (D.D.C. 2003) (holding that non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the media" for purposes of FOIA).

Gathering, analyzing and disseminating information that is relevant and current to issues relating to civil liberties and privacy are key components of ACLUM. The organization continually and as part of its core functions disseminates information of public interest through internet, print, television and radio. Such information reaches thousands of members of the public including students, journalists, academics, advocates, members of government and interested readers every year.

These characteristics are typically sufficient to convey "representative of the news media" status on FOIA requesters. Courts have held that "[i]t is critical that the phrase 'representative of the new media' be broadly interpreted if the act is to work as expected ... [n] fact, any person or organization which regularly publishes or disseminates

information to the public ... should qualify for waivers as a 'representative of the news media.'" *Electronic Privacy Ctr. v. Dep't of Defense*, 241 F.Supp, 2d 5, 10 (D.D.C. 2003).

On account of these factors, government agencies have waived fees for the ACLU and ACLUM on numerous occasions.<sup>2</sup>

**2. The records sought are in the public interest and the requester has no commercial interest in the disclosure.**

ACLUM is entitled to a waiver or reduction of fees because "[d]isclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government," and "[d]isclosure of the information is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 6 CFR § 5.5(k)(1)(i) and (ii).

This request aims at furthering public understanding of government conduct, and specifically at helping the public determine the ways in which the Transportation Security Administration, is carrying out security functions at airports. It therefore meets the component spelled out in 6 CFR § 5.5(k)(2)(iii).

There is broad demonstrated public interest in the safety, privacy impact, cost and effectiveness of new technologies and tools that TSA is implementing. 6 CFR § 5.5(k)(1)(iii). Countless news articles, opinion pieces, blogs and internet posts have been dedicated to this subject. *See e.g.* Anita Allen, *Privacy Stays Home This Year: The Moralist*, The Star-Ledger, December 10, 2006; James Bamford, *Who's in Big Brother's Database?*, The New York Times, November 5, 2009; Jeffrey Rosen, *Nude Awakening*, The New Republic, February 10, 2010; Marc Rotenberg, *Opposing View: Uniquely Intrusive Devices*, USA Today, January 12, 2010; Bruce Schneier, *Our Reaction Is the Real Security Failure*, AOL News, January 7, 2010; Bruce Schneier, *Stop the Panic on Air Security*, CNN, January 7, 2010; Spencer S. Hsu, *Scanners may not have detected alleged explosive in Detroit jet case*, GAO reports, Washington Post, March 18, 2010; Jaikumar Vijayan, *Travelers file complaints over TSA body scanners*, Business Week, March 8, 2010; Will Pavia, *Muslim woman refuses body scan at airport*, London Times Online, March 3, 2010; Jaikumar Vijayan, *Suspend airport body scanner program, privacy groups say*, Computerworld, February 26, 2010; Julie Johnsson, *Airport body*

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<sup>2</sup> The following are examples of requests in which government agencies did not charge the ACLU or ACLUM fees associated with responding to a FOIA request: (1) Immigration and Customs Enforcement granted the ACLU of Massachusetts a waiver of all search fees for a request submitted on Jan. 25, 2007; (2) The Office of Science and Technology Policy in the Executive Office of the President told the ACLU that it would waive the fees associated with a FOIA request submitted by the ACLU in August 2003; (3) The Federal Bureau of Investigation did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002; (4) The Office of Intelligence Policy and Review did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002; and (5) The Office of Information and Privacy in the Department of Homeland Security did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

*scanners have critics, including Pope*, Chicago Tribune, February 23, 2010; Thomas Frank, *Airport-security plan calls for 500 body scanners in '11*, USA TODAY, February 3, 2010; *European Union Puts Off Reply to U.S. Body Scanner Request*, AFP, January 21, 2010; *Body Scanners Risk Right to Privacy Says UK Watchdog*, BBC, January 20, 2010; *The Body Scanner Scam*, The Wall Street Journal, January 18, 2010; *The Fight Against Full-Body Scanners in Airports*, Los Angeles Times, January 13, 2010; *Mixed Signals on Airport Scanners*, The New York Times, January 12, 2010; *Body Scanners Can Store, Send Images, Group Says*, CNN, January 11, 2010; *European Response Mixed to New U.S. Security Demands*, Business Week, January 4, 2010; *Schiphol Buys 60 Body Scanners, Denies Lax Security*, Reuters, January 4, 2010; *New Scanners Break Child Porn Laws*, The Guardian, January 4, 2010; *TSA Tries to Assuage Passengers' Concerns About Full Body Scans*, The Washington Post, January 4, 2010; *Brown Gives Go-Ahead for Full Body Scanners at Britain's Airports*, The Guardian, January 4, 2010; *Former Homeland Security Chief Argues for Whole-Body Imaging*, The Washington Post, January 1, 2010; *150 More Full-Body Scanners to go in U.S. Airports*, CNN, December 31, 2009; *Calls for Full-Body Scanners Re-Ignite Privacy Concerns*, Fox News, December 31, 2009; *Body Scanners Not 'Magic Technology' Against Terror*, CNN, December 31, 2009; *Wide Use of U.S. Airport Body Scanners Depends on Obama*, Reuters, December 30, 2009; *Do Airport Imagers Invade Privacy*, The San Francisco Chronicle, December 29, 2009; *No more getting naked for the TSA*, The Examiner, May 20, 2009; *X-Ray Body Scanner Stirs Controversy*, Fox Washington DC, May 18, 2009; *Airport scanners take 'naked' pics, group says*, CNN.com, Monday, May 18, 2009; Kai Jackson, *Total Body Scans At Airports Cause Controversy*, Channel 13 Baltimore, May 18, 2009; *Whole Body Imaging is Wholly Frightening*, Manolith.com, Monday, May 18, 2009; *Commentary: Whole-Body imaging invades privacy*, CNN.com, May 19, 2009; *Privacy Advocates Take Issue With 'Whole Body Imaging' Airport Security Technology*, All Headline News, May 19, 2009; *Airport scanners take 'naked' pics, group says*, CNN.com, Monday, May 18, 2009; *Airport body scans: An issue of privacy*, The Windsor Star (Canadian), Tuesday, May 12, 2009; Anice Tibbetts, *Airport officials make plans to conduct virtual strip searches*, CanWest News Service, May 6, 2009; David Copeland, *Scanner finds hidden objects, not flesh*, Boston.com, April 27, 2009; *Herald Poll: Porn at the airport?* Daily Herald, April 24, 2009; *Chaffetz wants ban on airport whole body imaging*, ABC Channel 4 (Salt Lake City), April 22, 2009; William Saletan, *Deeper Digital Penetration*, Slate, April 8, 2009; Sean O'Neill, *TSA: Whole-body scanners to replace metal detectors*, Budget Travel, April 7, 2009; Joe Sharkey, *Whole-Body Scans Pass First Airport Tests*, N.Y. Times, April 6, 2009; Jeremy Hsu, *Airport body scans reveal all*, MSNBC, Apr. 1, 2009; *New security scan at DFW Airport has privacy advocates worried*, Dallas Morning News, June 16, 2008; Thomas Frank, *TSA looks into using more airport body scans*, USA Today, October 7, 2007; William Saletan, *Digital Penetration*, Slate, Mar. 3, 2007; *Controversial X-ray machine to make national debut Friday at Sky Harbor*, Associate Press, February 21, 2007; *Phoenix Airport to Test X-Ray Screening*, Associate Press as reported on Privacy.org, December 1, 2006; Joe Sharkey, *Airport screeners could see X-rated X-Rays*, New York Times, May 24, 2005; Thomas Frank, *Airports roll out high-tech security*, USA Today, May 16, 2005; Ryan Single, *New Screening Technology Is Nigh*, Wired News, May 19, 2005; Bryon Okada, *TSA official says machine, not screeners, at fault*, Star-Telegram, May 1, 2005; Michael

Grabell, *Airport plans to screen for explosives this fall Machines at D/FW*, Dallas News, May 1, 2005; Ryan Single, *Passenger Screening, Take 10*, Wired News, January 31, 2005; 'Nice Bombs Ya Got There', Associated Press, Wired News, June 26, 2003; Megan Lisagor, *TSA awards passenger screening contract*, Federal Computer Week, March 10, 2003; Megan Lisagor, *TSA prepares passenger screening system*, Federal Computer Week, February 26, 2003; *Smart Check-In Cuts Airport Lines*, Wired News, February 5, 2001.

Specifically, there has been much media attention around the implementation of the “enhanced pat-down” procedure. A selection of articles is included in Exhibit A. See Donna Goodison, *New Logan Searches Blasted*, The Boston Herald, Aug. 21, 2010; Donna Goodison, *Passengers shocked by new touchy-feely TSA screening*, The Boston Herald, Aug. 24, 2010; *TSA Launches ‘Enhanced Patdown,’ Draws Critics*, America Online, Aug. 24, 2010, at <http://news.travel.aol.com/2020/08/24-tsa-launches-enhanced-patdown-draws-critics/>; Rachel Slajda, *TSA Testing New, More Invasive Pat-Downs for Those Who Refuse Scans*, Talking Points Memo, Aug. 24, 2010, at [http://tpmmuckraker.talkingpointsmemo.com/2010/08/tsa\\_testing\\_new\\_more\\_invasive\\_p-at-downs.php](http://tpmmuckraker.talkingpointsmemo.com/2010/08/tsa_testing_new_more_invasive_p-at-downs.php); Kelly Holt, *TSA Test Markets More Aggressive Frisking*, The New American, Aug. 25, 2010; Aubrey Cohen, *How personal should airport screeners get?*, Aerospace News, Aug. 24, 2010 at <http://blog.seattlepi.com/aerospace/archives/219194.asp>; Andrew Hickey, *ACLU Comes Out Strong Against ‘Enhanced Patdown’ of Air Travelers*, Aug. 23, 2010, at <http://blog.cheapoair.com/news/aclu-comes-out-strong-against-enhanced-patdown-of-air-travelers.aspx>; Aubrey Cohen, *How personal should airport screeners get?*, Seattle Post-Intelligencer, Aug. 24, 2010 at <http://blog.seattlepi.com/print.asp?entryID=219194>; Ben Mutzabaugh, *Hands on: TSA tests ‘enhanced patdowns’*, USA TODAY, Aug. 24, 2010; Alana Gomez, *Logan Airport Conducts More Hands-On Pat Downs*, WBZ News, Aug. 21, 2010, at <http://wbztv.com/local/pat-downs.airport.2.1872376.html>; Katie Johnston Chase, *Ahead of the Line*, The Boston Globe, Aug. 29, 2010; Bill Anderson, *TSA to grope flyers who don’t want to submit to naked X-rays*, The New York Post, Aug. 27, 2010; Chris Moran, *TSA’s ‘Enhanced’ Pat-Down Procedure Lets Their Fingers Do the Searching*, The Consumerist, Aug. 30, 2010; Jen Phillips, *TSA’s Frisky New Pat-Downs*, Mother Jones, Aug. 24, 2010.

As the federal government implements these new “enhanced” security screenings, the public has demanded answers to a host of questions. How necessary are these procedures? Do they violate the privacy of travelers? Do they work? Many of these answers can only be gained through an analysis of the documents requested here. For these reasons, the disclosure is very “‘likely to contribute’ to an understanding of government operations or activities” and this contribution is likely to be “significant” given the lack of publicly available information on the subject. 6 C.F.R. § 5.5(k)(2)(ii) and (iv).

Lastly, ACLUM is a non-profit organization whose purposes are the protection of civil rights and liberties and to advance a just, democratic, and pluralistic society. As such, the requesters have no “commercial interest” in the information. 6 CFR § 5.5(k)(1)(ii).

#### **IV. APPLICATION FOR EXPEDITED PROCESSING**

ACLUM respectfully seeks expedited processing of its request for public records for the reasons laid out below and in a certified statement attached as Exhibit B.

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(d). There is an urgency to inform the public about the government activities addressed in the request and the requester is an organization primarily engaged in disseminating such information. *See* 6 C.F.R. § 5.5(d)(1)(ii).

**1. There is an urgency to inform the public about a federal government activity.**

The records sought relate to “an alleged government activity” – the “enhanced pat-down” procedures announced and recently implemented by TSA. 6 C.F.R. § 5.5(d)(1)(ii).

There is an urgent need to inform the public about this government activity because it implicates core privacy concerns, but many unanswered questions remain. The public has raised questions regarding the standards that guide or limit these new technologies, including whether they are potentially invasive, necessary or subject to abuse. Without disclosure of the records sought, the public will remain in the dark about TSA’s operations, and cannot assess for itself whether the program is necessary, effective, or subject to sufficient limits and oversight.

The urgent need for information is demonstrated by the numerous news articles, opinion pieces, blogs and internet posts that have been dedicated to this subject in the recent months. A selection of such articles is included in Exhibit A.

As the sustained public interest concerning TSA’s methods clearly attests, there is an “urgent need to inform the public” about this federal governmental activity. 6 C.F.R. § 5.5(d)(1)(ii).

**2. ACLUM is an organization primarily engaged in disseminating information to inform the public.**

ACLUM is an organization “primarily engaged in disseminating information” within the meaning of the FOIA statute and DHS regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(d)(1)(ii). Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of ACLUM’s work and one of its primary missions. *See ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group that “gathers information

of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information” (internal citation and quotation marks omitted)).<sup>3</sup>

ACLUM publishes newsletters, news briefings, reports and other printed materials that are disseminated to the public. ACLUM also disseminates information through its heavily subscribed website, [www.aclum.org](http://www.aclum.org), a blog, <http://www.massrightsblog.org> and regular posts on social media sites such as Facebook and Twitter.

ACLUM regularly publishes reports about government activity and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA. This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee. Many ACLUM reports include a description and analysis of government documents obtained through FOIA.<sup>4</sup>

As the state affiliate of the national ACLU organization, ACLUM also disseminates information through the ACLU. Since 2007 alone, ACLU national projects have published and disseminated over 30 reports. The ACLU regularly publishes books, “know your rights” publications, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and liberties.<sup>5</sup>

The ACLU operates a widely-read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily.<sup>6</sup> The ACLU also creates and disseminates original editorial and educational content on civil rights and civil liberties news through multi-media projects, including videos, podcasts, and interactive features.<sup>7</sup> The ACLU has also produced an in-depth television series on civil liberties called “The Freedom Files.”<sup>8</sup>

The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, [www.aclu.org](http://www.aclu.org). The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU’s website also serves as a clearinghouse for news about

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<sup>3</sup> Notably, courts have found organizations with missions similar to the ACLU and that engage in information dissemination activities similar to the ACLU to be “primarily engaged in disseminating information.” See, e.g., *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (*Leadership Conference on Civil Rights*); *ACLU v. Dep’t of Justice*, 321 F. Supp. 2d at 30 n.5 (Electronic Privacy Information Center).

<sup>4</sup> See e.g. *Detention and Deportation in the Age of ICE*, available at [www.aclum.org/ice](http://www.aclum.org/ice) and the accompanying document gallery of FOIA documents at <http://aclum.org/ice/gallery.php>.

<sup>5</sup> A recent search of Amazon.com produced over 60 books published by the ACLU.

<sup>6</sup> See <http://www.aclu.org/blog>.

<sup>7</sup> See <http://www.aclu.org/multimedia/index.html>.

<sup>8</sup> See <http://aclu.tv/>.

ACLU cases, as well as analysis about case developments, and an archive of case-related documents. Through these pages, the ACLU also provides the public with educational material about the particular civil liberties issue or problem; recent news about the issue; analyses of Congressional or executive branch action on the issue; government documents obtained through FOIA about the issue; and more in-depth analytic and educational multi-media features on the issue.<sup>9</sup>

The ACLU website includes many features on information obtained through the FOIA.<sup>10</sup> For example, the ACLU's "Torture FOIA" webpage, <http://www.aclu.org/accountability/released.html>, contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, and an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA, and advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA.

The ACLU has also published a number of charts that collect, summarize, and analyze information it has obtained through FOIA. For example, through compilation and analysis of information gathered from various sources—including information obtained from the government through FOIA—the ACLU has created an original chart that provides the public and news media with a comprehensive index of Bush-era Office of Legal Counsel memos relating to interrogation, detention, rendition and surveillance which describes what is publicly known about the memos and their conclusions, who authored them and for whom, and whether the memos remain secret or have been released to the public in whole or in part.<sup>11</sup> Similarly, the ACLU produced a chart of original statistics about the Defense Department's use of National Security Letters based on its own analysis of records obtained through FOIA.<sup>12</sup> Currently, the ACLU is producing a chart of documents regarding government surveillance obtained through FOIA and state public records requests around the country. The first chart in the series including d obtained by ACLUM in Massachusetts.<sup>13</sup>

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<sup>9</sup> For example, the ACLU's website about national security letter ("NSL") cases, [www.aclu.org/nsl](http://www.aclu.org/nsl), includes, among other things, an explanation of what NSLs are; information about and document repositories for the ACLU's NSL cases, links to documents obtained through FOIA about various agencies' use of NSLs; NSL news in the courts, Congress, and executive agencies; links to original blog posts commenting on and analyzing NSL-related news; educational web features about the NSL gag power; public education reports about NSLs and the Patriot Act; news about and analysis of the Department of Homeland Security Inspector General's reviews of the FBI's use of NSLs; the ACLU's policy analysis and recommendations for reform of the NSL power; charts with analyzed data about the government's use of NSL; myths and facts documents; and links to information and analysis of related issues.

<sup>10</sup> See, e.g., <http://www.aclu.org/accountability/released.html> (Torture FOIA) ; <http://www.aclu.org/accountability/olc.html> (OLC Memos); <http://www.aclu.org/national-security/csrt-foia> (CSRT FOIA); <http://www.aclu.org/national-security/aclu-v-doj-lawsuit-enforce-nsa-warrantless-surveillance-foia-request> (NSA FOIA); <http://www.aclu.org/national-security/patriot-foia> (Patriot Act FOIA); [http://www.aclu.org/national-security\\_technology-and-liberty/spy-files](http://www.aclu.org/national-security_technology-and-liberty/spy-files) (Spy Files).

<sup>11</sup> The chart is available at [http://www.aclu.org/safefree/general/olcmemos\\_chart.pdf](http://www.aclu.org/safefree/general/olcmemos_chart.pdf).

<sup>12</sup> The chart is available at [http://www.aclu.org/safefree/nationalsecurityletters/released/nsl\\_stats.pdf](http://www.aclu.org/safefree/nationalsecurityletters/released/nsl_stats.pdf).

<sup>13</sup> The chart is available at <http://www.aclu.org/spy-files-massachusetts>

Once released, ACLUM plans to make the information sought here available to the public through several formats, as it has done consistently with responses to FOIA requests in the past. Accordingly, expedited processing is appropriate in this case.

#### V. CONCLUSION

If our request is denied in whole or part, we ask that you justify all deletions by reference to specific exemptions of the FOIA and that you release all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees or expedited processing.

We look forward to your reply to the Request within twenty (20) business days, as required under 5 U.S.C. § 552(a)(6)(A)(i). Please reply to this request to by contacting Laura Rótolo at the address above, (617) 482-3170 x311 or through email at [lrotolo@aclum.org](mailto:lrotolo@aclum.org).

Thank you for your prompt attention to this matter.

Sincerely,

  
Laura Rótolo  
Staff Attorney



FOIA Appeal  
Request No. TSA 10-780

# **EXHIBIT B**



Transportation  
Security  
Administration

**AUG 17 2011**

**3600.1**

**FOIA Case Number: TSA10-0780**

Ms. Laura Rotolo  
ACLU Foundation of Massachusetts  
211 Congress Street  
Boston, MA 02110

Dear Ms. Rotolo:

This is in response to your Freedom of Information Act (FOIA) request dated March 25, 2010, on behalf of the American Civil Liberties Union of Massachusetts (ACLU). In our acknowledgement letter to you dated September 1, 2010, we informed you that due to the size and depth of your request, we have found it necessary to divide your request into five requests. This letter addresses the portion of your request in which you seek "(a)ny reports addressing the effectiveness or performance of ETP. Documents addressing performance issues that have led to ETPs being removed from some airports."

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

A search within the TSA was conducted and documents (75 pages) responsive to your request were located. Portions of 13 pages are being withheld under Exemptions (b)(3) and (b)(6). A more complete explanation of these exemptions is provided below.

Exemption (b)(3)

Portions of these documents are considered Sensitive Security Information (SSI) and those portions are exempt from disclosure under Exemption 3. 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 under FOIA information that "would be detrimental to the security of transportation" if disclosed. The TSA regulations implementing section 114(r) are found in 49 C.F.R. Part 1520.

Exemption (b)(6)

Exemption 6 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.

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.” Copies of the FOIA and DHS regulations are available at [www.dhs.gov/foia](http://www.dhs.gov/foia).

If you have any questions pertaining to your request, please feel free to contact the FOIA Office at 1-866-364-2872 or locally at 571-227-2300.

Sincerely,



Yvonne L. Coates  
Director, Freedom of Information Act Office  
Office of the Special Counselor  
Transportation Security Administration

Enclosure