

VIA E-MAIL & FACSIMILE

March 21, 2017

Transportation Security Administration  
TSA-20 East Tower  
FOIA Branch  
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Arlington, VA 20598-6020  
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Dear FOIA Officer:

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”) to the Transportation Security Administration (“TSA”).

EPIC seeks record related to the recently implemented policy banning certain electronic devices on direct flights to the United States from the following ten airports: Jordan’s Queen Alia International, Egypt’s Cairo International, Turkey’s Istanbul Ataturk, Saudi Arabia’s King Abdulaziz International, Saudi Arabia’s King Khalid International, Kuwait International, Qatar’s Doha International, Morocco’s Mohammed V Airport, Dubai International, and Abu Dhabi International.<sup>1</sup>

On March 20, 2017, Royal Jordanian Airlines tweeted that they were prohibiting electronic devices on their flights bound for the United States following a directive they had received from U.S. authorities.<sup>2</sup> On March 21, 2017 reports surfaced that the change in policy was based on intelligence indicating that terrorists were targeting commercial flights by

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<sup>1</sup> Frederic Lardinois, *U.S. Confirms Ban On Large Electronics In Cabin On Flights From 10 Airports*, Tech Crunch, Mar. 21, 2017, <https://techcrunch.com/2017/03/21/u-s-bans-laptops-and-tablets-in-passenger-cabin-on-flights-from-10-airports-in-the-middle-east-and-africa/>.

<sup>2</sup> Jennifer Calfas, *Royal Jordanian Airlines Says It’s Banning Electronics From U.S.-Bound Flights*, CNN, Mar. 20, 2017, <http://time.com/money/4707345/royal-jordanian-airlines-us-electronics-ban-flight/>.

smuggling explosives in electronic devices.<sup>3</sup> These reports were confirmed by the TSA on its website where it states:

“The U.S. Government is concerned about terrorists’ ongoing interest in targeting commercial aviation...Evaluated intelligence indicates that terrorist groups continue to target commercial aviation, to include smuggling explosive devices in various consumer items.” ...[The TSA has] determined it is prudent to enhance security, to include airport security procedures for passengers at certain point of departure airports to the United States. These enhancements include more stringent measures applied to 10 specific airports.”<sup>4</sup>

Based on this information, Secretary of Homeland Security, John Kelly, and TSA acting administrator, Huban Gowadia, determined that enhanced security procedures were necessary at certain airports.<sup>5</sup>

### Documents Requested

EPIC seeks five categories of records related to the TSA’s sudden change in policy:

1. Memoranda, reports, and e-mails relating to the ban for electronic devices from the cabins of flights to the United States originating at the ten airports at issue;
2. Memoranda, reports, and e-mails related to an increased threat of explosive devices being smuggled onto flights originating at ten airports at issue;
3. Policies and procedures related to searches of electronic devices in checked bags;
4. Policies and procedures that relate to individuals’ rights to object to, or be present while, their electronic devices are being searched; and
5. Policies and procedures related to notifying passengers that their electronic devices have been searched.

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<sup>3</sup> Ron Nixon, *U.S Limits Devices For Passengers On Foreign Airlines From Eight Countries*, New York Times, Mar. 21, 2017, <https://www.nytimes.com/2017/03/21/us/politics/tsa-ban-electronics-laptops-cabin.html>.

<sup>4</sup> *Q&A: Aviation Security Enhancements for Select Last Point of Departure Airports with Commercial Flights to the United States*, TSA, Mar. 21, 2017, <https://www.dhs.gov/news/2017/03/21/qa-aviation-security-enhancements-select-last-point-departure-airports-commercial>.

<sup>5</sup> Rick Noack et al, *Britain Follows U.S. In Banning Some Electronics In Cabins On Certain Flights From Several Muslim-Majority Countries*, Wash. Post, Mar. 21, 2017, [https://www.washingtonpost.com/local/trafficandcommuting/us-unveils-new-restrictions-on-travelers-from-eight-muslim-majority-countries/2017/03/21/d4efd080-0dcb-11e7-9d5a-a83e627dc120\\_story.html](https://www.washingtonpost.com/local/trafficandcommuting/us-unveils-new-restrictions-on-travelers-from-eight-muslim-majority-countries/2017/03/21/d4efd080-0dcb-11e7-9d5a-a83e627dc120_story.html).

## Request for Expedited Processing

EPIC is entitled to expedited processing of this request under the FOIA 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(e)(1)(ii). Specifically, EPIC’s FOIA Request is entitled to expedited processing because, first, there is an “urgency to inform the public about an actual or alleged federal government activity,” and, second, because the request is “made by a person who is primarily engaged in disseminating information.” § 5.5(e)(1)(ii).

First, there is an “urgency to inform the public about an actual or alleged federal government activity.” § 5.5(e)(1)(ii). The “actual” federal government activity at issue is the directive by the TSA that certain electronic devices must be stowed under the airplane on flights originating from certain airports travelling to the United States. There is no dispute that the TSA has directed airlines flying from the affected airports to the United States to implement this directive by March 24, 2017.

“Urgency” to inform the public about this change is clear because of the policy’s swift and far reaching impact, focus on majority Muslim countries, and potential impact on TSA searches of electronic devices. First, urgency is established because numerous travelers will be immediately and directly impacted by the TSA order; according to the DHS’s own measure, over 325,000 international air travelers arrive in the U.S. each day, yet the public was provided no notice, justification, or details of the policy change.<sup>6</sup>

Moreover, this urgency is heightened by the TSA decision to specifically target ten airports from eight majority Muslim countries in the new policy. Following court rulings halting an *Executive Order* impacting travelers from majority Muslim countries on Constitutional grounds, the TSA has a unique responsibility to justify such a particularized directive. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

Finally, urgency is increased by the directive’s potential impact on TSA searches of electronic devices. By separating passengers from their devices, the directive may increase the ease of TSA access to passenger devices. Electronic devices are uniquely rich in personal data. *See, e.g., Riley v. California*, 134 S.Ct. 2473, 2489–91 (2014). Constitutional rights are not extinguished points of entry. *United States v. Flores-Montano*, 541 U.S. 149 (2004). Nor does the Constitution stop at the border. *Boumediene v. Bush*, 553 U.S. 723 (2008). The public should be provided notice of any impacts of the TSA directive on device searches, told whether their personal information has been downloaded and stored, and give an opportunity to challenge such searches.

Second, EPIC is an organization “primarily engaged in disseminating information.” § 5.5(e)(1)(ii). As the Court explained in *EPIC v. Dep’t of Def.*, “EPIC satisfies the definition of

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<sup>6</sup> Press Release: Department Of Homeland Security Response To Recent Litigation (Jan. 29, 2017), <https://www.dhs.gov/news/2017/01/29/department-homeland-security-response-recent-litigation>.

‘representative of the news media’” entitling it to preferred fee status under FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

In submitting this request for expedited processing, I certify that this explanation is true and correct to the best of my knowledge and belief. § 5.5(e)(3); § 552(a)(6)(E)(vi).

#### Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes. *EPIC v. Dep’t of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplication fees assessed. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

Further, any duplication fees should also be waived because (i) “disclosure of the requested information is in the public interest because it is likely to contribute to the public understanding of the operations or activities of the government” and (ii) “disclosure of the information is not primarily in the commercial interest” of EPIC, the requester. 6 C.F.R. § 5.11(k)(1); § 552(a)(4)(A)(iii). EPIC’s request satisfies this standard based on TSA’s considerations for granting a fee waiver. §§ 5.11(k)(2-3).

*(1) Disclosure of the requested information is likely to contribute to the public understanding of the operations or activities of the government.*

First, disclosure of the requested documents “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” § 5.11(k)(2). TSA evaluates the following four considerations to determine whether this requirement is met: (i) the “subject of the request must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.”; (ii) disclosure “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”; (iii) “disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester” and it “shall be presumed that a representative of the news media will satisfy this consideration”; and/or (iv) the “public’s understanding of the subject in question must be enhanced by the disclosure to a significant extent.” *Id.*

As to the first consideration, the subject of the request concerns “identifiable operations or activities of the federal government” because the requested documents involve a change in TSA policy and procedures concerning travelers’ electronic devices. § 5.11(k)(2)(i). This new policy by the TSA self evidently involves the agency’s travel security activities and, therefore, identifiable operations of the federal government.

As to the second consideration, disclosure would also be “meaningfully informative about” these operations or activities and is thus “‘likely to contribute’ to an increased understanding of government operations or activities.” § 5.11(k)(2)(ii). The TSA has provided no

notice and little information about why such a sudden change in practice is now necessary and why it only applies to certain airports. For instance, the public first learned of this change in policy from Royal Jordanian airlines, followed by news reports; the TSA only subsequently updated its website to include a brief “Questions & Answers” section for this sudden change. These materials will, as a result, meaningfully contribute to the public understanding of the TSA operations or activities.

As to the third consideration, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject” because, as provided in the relevant FOIA regulations, TSA will “presum[e] that a representative of the news media will satisfy this consideration.” § 5.11(k)(2)(iii).

Finally, as to the fourth consideration, the public’s understanding will “be enhanced by the disclosure to a significant extent” because, as just described, little is known about the justification for or procedures governing this sudden TSA directive. § 5.11(k)(2)(iv).

*(2) Disclosure of the information is not primarily in the commercial interest of the requester.*

Second, “[d]isclosure of the information is not primarily in the commercial interest” of EPIC. § 5.11(k)(3). In determining whether this second requirement is met, TSA evaluates the following two considerations: (i) whether there is “any commercial interest of the requester... that would be furthered by the requested disclosure”; and/or (ii) whether “the public interest is greater than any identified commercial interest in disclosure,” and “[c]omponents ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.” *Id.*

As to the first consideration, there is not “any commercial interest of the requester... that would be furthered by the requested disclosure.” § 5.11(k)(3)(i). EPIC has no commercial interest in the requested records. EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.<sup>7</sup>

As to the second consideration, “the public interest is greater than any identified commercial interest in disclosure.” § 5.11(k)(3)(ii). Again, EPIC has no commercial interest in the requested records, and, as noted above, there is significant public interest in the requested records. Moreover, TSA should presume that EPIC has satisfied § 5.11(k)(3)(ii). The FOIA regulations state “[c]omponents ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.” *Id.* As established in the sections above, EPIC is a news media requester, and its request satisfies the public interest standard.

For these reasons, a fee waiver should be granted.

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<sup>7</sup> *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.

Conclusion

Thank you for your consideration of this request. As provided in 5 U.S.C. § 552(a)(6)(E)(ii)(I) and 6 C.F.R. § 5.5(e)(4), I will anticipate your determination on our request within ten calendar days.

For questions regarding this request I can be contacted at 202-483-1140 x108 or FOIA@epic.org.

Sincerely,

/s/ Jeramie Scott  
Jeramie Scott  
EPIC National Security Counsel

/s/ Kim Miller  
Kim Miller  
EPIC Policy Fellow