

December 6, 2023

Department of Homeland Security
Transportation Security Administration
6595 Springfield Center Drive
Springfield, VA 20598-6020
FOIA@tsa.dhs.gov



Re: Request Under Freedom of Information Act Concerning Thruvision and Pendar Technology Use by the Transportation Security Administration (Fee Waiver Requested)

National Office
125 Broad Street,
18th Floor
New York, NY 10004
aclu.org

Deborah N. Archer
President

Anthony D. Romero
Executive Director

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”)¹ submit this Freedom of Information Act (“FOIA”) request (the “Request”) for records pertaining to TSA’s use of Thruvision thermal scanners and Pendar chemical detection technology.

I. Background

In a press release published on July 7, 2023, the Transportation Security Administration (“TSA”) and its Multimodal and Public Area Capabilities (“MPAC”) team announced a partnership with the Metropolitan Transportation Authority (“MTA”) to assess new screening technology.² The release stated that the new technology will be used to screen passengers and bags that may contain hazardous materials in an effort to “address continued security threats.”³ TSA’s MPAC surface team is also collaborating with the New York Police Department to train and brief law enforcement on the new technology.⁴ The announcement indicates TSA’s growing use of the new screening technology in highly populated public areas.

One new technology is the Pendar X10 Handheld Standoff Raman Spectrometer (“Pendar”). Developed by Pendar Technologies, the Pendar is a

¹ The American Civil Liberties Union Foundation is a 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, and educates the public about civil rights and civil liberties issues across the country. The American Civil Liberties Union is a separate non-profit, 26 U.S.C. § 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

² Press Release, Lisa Farbstein, TSA Strategic Communications and Public Affairs (July 7, 2023), <https://www.tsa.gov/about/employee-stories/tsa-partners-metropolitan-transportation-authority-assess-new-security>.

³ *Id.*

⁴ *Id.*

handheld spectrometer that uses a laser to scan unknown substances, such as liquid, gel, or solid samples, and “compares them to a library of over 4,000 chemical identifiers in under 30 seconds.”⁵ It is claimed that the device “can identify military, industrial, and homemade explosives; drugs; chemical warfare agents; toxic chemicals, related precursors and byproducts; and other organic or inorganic materials in a wide range of law enforcement and emergency response applications.”⁶ The Pendar device resembles a hand-held video camera and is designed for short-range, point-and-shoot identification. Notably, it is reported that the device can measure materials through plastic bags, fume hood sashes, car windows, and windshields.⁷

The second technology, a Thruvision screening device named “TAC”, is a passive thermal device intended to look for objects concealed on a person’s body, such as a firearm.⁸ Thruvision claims the TAC can screen up to 2,000 people an hour and detect a concealed device at a distance of up to 25 feet.⁹ According to TSA, TAC has been assessed at “many locations across the country including Amtrak’s Union Station in Washington, D.C., New York’s Penn Station, Secaucus Junction Station in the New Jersey Transit system and in the Los Angeles Metro Transit Authority System.”¹⁰

According to TSA, the Pendar and TAC technology was recently deployed at Grand Central Terminal during several rush hours. The goal of the deployment was to “gauge the suitability of these two new methods of screening passengers and bags that may contain hazardous materials and threaten the mass transit system.”¹¹

Despite the use of the Pendar and TAC technology by TSA and local law enforcement in public areas, the public lacks information on how these technologies work, when they are used, and the privacy assessments TSA relied on prior to distributing these technologies for use on the general population. To provide the American public with information about TSA’s use of Pendar and TAC technology, the ACLU seeks such information through this FOIA request.

⁵ Alexis Lollar, et al., *Pendar X10 Handheld Standoff Raman Spectrometer: Technology Report* (2023), at 10, https://www.dhs.gov/sites/default/files/2023-01/22_0818_st_pendar_x10.pdf.

⁶ *Id.*

⁷ *Id.*

⁸ Press Release, Lisa Farbstein, TSA Strategic Communications and Public Affairs (July 7, 2023), <https://www.tsa.gov/about/employee-stories/tsa-partners-metropolitan-transportation-authority-assess-new-security>.

⁹ Hugo Martin, *TSA Gives Green Light to Test New Technology That Can Screen Passengers from 25 Feet Away*, Los Angeles Times, November 2, 2018, <https://www.latimes.com/business/la-fi-travel-briefcase-tsa-screening-technology-20181101-story.html>.

¹⁰ Press Release, Lisa Farbstein, TSA Strategic Communications and Public Affairs (July 7, 2023), <https://www.tsa.gov/about/employee-stories/tsa-partners-metropolitan-transportation-authority-assess-new-security>.

¹¹ *Id.*

II. Requested Records

The ACLU seeks the release of the following records created since **January 1, 2018**—including but not limited to legal and policy memoranda; guidance documents; instructions; training documents; formal and informal presentations; directives; contracts or agreements; memoranda of understanding; and written communications:

1. All records detailing the dates and locations TSA has deployed Pendar and TAC devices, or has provided them for use by state, local, or private sector entities;
2. All records related to the dates and locations for future assessments of the Pendar and TAC technologies;
3. All records related to the airports TSA has provided TAC and the dates the technology was used;
4. All records regarding the legal authority for TSA or its assessment partners (i.e., state, local, or private sector entities) to use Pendar devices, including all analyses or conclusions concerning whether a warrant or individualized suspicion is required under the Fourth Amendment;
5. All records of notice provided to the public at locations where the Pendar and TAC technology is operated;
6. All records related to privacy assessments (including Privacy Threshold Assessments and Privacy Impact Assessments) for the use of the TAC and Pendar technology, including any communications addressing any decision not to conduct privacy assessments;
7. All records regarding the funding used to provide Pendar and TAC technology to state, local, and private sector entities;
8. All records related to privacy filters as they relate to TAC, including avatar images;
9. All communications, agreements, and other documents pertaining to partnerships between DHS and the U.S. Army, private-sector contractors, or local law enforcement partners, including emails, memorandums of understanding, non-disclosure agreements, Cooperative Research and Development Agreements (CRADAs), and other contracts.
10. All information pertaining to patents or patent filings related to the Pendar and TAC technologies.

11. All records concerning tests of the Pendar and TAC technology carried out by DHS, any of its component agencies, or other federal governmental entities, including records pertaining to the accuracy of the devices such as false negative and false positive rates.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU requests that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, the ACLU requests that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency’s possession, and that the records be provided in separate, Bates-stamped files.

III. Application for Waiver or Limitation of Fees

The ACLU requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).¹² The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

- A. *The Request is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the ACLU.*

As discussed above, this Request concerns TSA’s use of Pendar and TAC technology. Little information is publicly available regarding the technology at issue in this Request or how it is being tested on Americans, so the records sought are certain to contribute significantly to the public’s understanding of TSA and law enforcement’s use of these new technologies to monitor the public.

The ACLU is not filing this Request to further its commercial interest. Any information disclosed by the ACLU as a result of this FOIA Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress’s legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.” (quotation marks omitted)).

¹² *See also* 6 C.F.R. § 5.11(k)(1).

B. *The ACLU is a representative of the news media and the records are not sought for commercial use.*

The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). The ACLU meets the statutory and regulatory definitions of a “representative of the news media” because it is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III)¹³; *see also Nat’l Sec. Archive v. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, “devises indices and finding aids,” and “distributes the resulting work to the public” is a “representative of the news media” for purposes of the FOIA); *Serv. Women’s Action Network v. Dep’t of Defense*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. Dep’t of Justice*, No. C09–0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience”); *ACLU*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is therefore a “representative of the news media” for the same reasons it is “primarily engaged in the dissemination of information.”

Courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU’s to be “representatives of the news media” as well. *See, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10–15 (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of the FOIA); *Nat’l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. Dep’t of Justice*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester).¹⁴

On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU as a “representative of the news

¹³ *See also* 6 C.F.R. § 5.11(b)(6).

¹⁴ Courts have found these organizations to be “representatives of the news media” even though they engage in litigation and lobbying activities beyond their dissemination of information and public education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5; *Nat’l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53–54.

media.”¹⁵ As was true in those instances, the ACLU meets the requirements for a fee waiver here.

* * *

If the Request is denied in whole or in part, the ACLU asks that you justify all deletions by reference to specific exemptions to FOIA. The ACLU expects the release of all segregable portions of otherwise exempt material. The ACLU reserves the right to appeal a decision to withhold any information or deny a waiver of fees.

Thank you for your prompt attention to this matter. Please furnish the applicable records to:

Nathan Freed Wessler
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, New York 10004
T: 212.549.2500
F: 212.549.2654
nwessler@aclu.org

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Sincerely,

/s/ Nathan Freed Wessler
Nathan Freed Wessler
Deputy Project Director

¹⁵ The ACLU regularly receives FOIA fee waivers from federal agencies. For example, in June 2018, the U.S. Citizenship and Immigration Services granted a fee-waiver request regarding a FOIA request for documents relating to the use of social media surveillance. In August 2017, CBP granted a fee-waiver request regarding a FOIA request for records relating to a muster sent by CBP in April 2017. In June 2017, the Department of Defense granted a fee-waiver request regarding a FOIA request for records pertaining to the authorities approved by President Trump in March 2017 which allowed U.S. involvement in Somalia. In June 2017, the Department of Defense, the CIA, and the Office of Inspector General granted fee-waiver requests regarding a FOIA request for records pertaining to U.S. involvement in the torture of detainees in prisons in Yemen, Eritrea, and aboard Yemeni or Emirati naval vessels. In May 2017, CBP granted a fee-waiver request regarding a FOIA request for documents related to electronic device searches at the border. In April 2017, the CIA and the Department of State granted fee-waiver requests in relation to a FOIA request for records related to the legal authority for the use of military force in Syria. In March 2017, the Department of Defense Office of Inspector General, the CIA, and the Department of State granted fee-waiver requests regarding a FOIA request for documents related to the January 29, 2017 raid in al Ghayil, Yemen. In June 2016, the Office of the Director of National Intelligence granted a fee-waiver request regarding a FOIA request related to policies and communications with social media companies’ removal of “extremist” content. In May 2016, the FBI granted a fee-waiver request regarding a FOIA request issued to the Department of Justice for documents related to Countering Violent Extremism Programs.

Speech, Privacy, and Technology Project
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, New York 10004
T: 212.549.2500
nwessler@aclu.org

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION