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Associate General Counsel (General Law)
Department of Homeland Security
Washington, DC 20528

Re: Freedom of Information Act Appeal

Dear FOIA Officer,

This letter constitutes an appeal under the Freedom of Information Act (“FOIA”), 5 U.S.C. §552(a)(6)(C), and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”).

EPIC seeks documents concerning Presidential Policy Directive 21 – Critical Infrastructure Security and Resilience (“PPD-21”) which establishes authority for the routine monitoring of network infrastructure and communications. On September 27, 2013 EPIC submitted a FOIA request for certain records in possession of the agency. As of today, November 21, 2013, the agency has failed to provide a response to EPIC’s request. The agency has breached its obligations under the FOIA, 5 U.S.C. §552(a)(6)(A). We write now, prior to filing a lawsuit, to provide the agency the opportunity to comply with the requirement of the Act.

Procedural Background

On September 27, 2013, EPIC submitted a FOIA request for records concerning PPD-21, via certified mail. (See attached Appendix A). Specifically, EPIC requested copies of the following agency records:

1. The description of the functional relationships within DHS and across the Federal government related to critical infrastructure security and resilience provided to the President through the Assistant to the President for Homeland Security and Counterterrorism;
2. The evaluation of the existing public-private partnership model and the recommendations for improving the effectiveness of the partnership; and
3. The analysis of the baseline data and systems requirements for the Federal Government to enable efficient information exchange provided to the President through the Assistant to the President for Homeland Security and Counterterrorism.

EPIC Appeals the Department of Homeland Security's Lack of Responsiveness

The Department of Homeland Security has not made a determination regarding EPIC's FOIA request within the statutorily required twenty-day period. At the latest, the statutory deadline passed on November 11, 2013. The statute provides, "The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. 5 U.S.C. § 552(a)(6)(A)(i). The FOIA requires an agency to make a determination on the request, to give reasons for the determination, and to notify the requester of his rights to appeal the determination. *Id.* The determination must include at least the following: 1) a statement of what the agency will release and not release; 2) a statement of the reasons for not releasing the withheld records; 3) a statement notifying the requester of his right to appeal; and 4) if a fee is charged for releasing documents, a statement of why the agency believes the waiver or reduction of the fee is not in the public interest and does not benefit the general public. At the very least, for a response to be considered sufficient to trigger the administrative exhaustion requirement, "the agency must at least indicate within the relevant time period the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents." *Citizens for Responsibility and Ethics in Washington v. Federal Election Com'n*, 711 F.3d 180, 182-83 (D.C. Cir. 2013).

By contrast, the Department of Homeland Security has not provided EPIC with even an acknowledgment of EPIC's FOIA request. As of November 21, 2013, the Department of Homeland Security has not made a determination on this request within the statutory deadline and has therefore failed to comply with the FOIA. "If the agency has not responded within the statutory time limits, then, under 5 U.S.C. § 552(a)(6)(C), the requester may bring suit." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 62 (D.C. Cir. 1990); *See also Spannaus v. United States Dep't of Justice*, 824 F.2d 52 (D.C. Cir. 1987) (holding that constructive exhaustion, i.e. the passage of the ten day period from the time the request was sent out in 5 U.S.C. § 552(a)(6)(A)(i), was sufficient to create a cause of action).

EPIC renews Its Request for "News Media" Fee Status

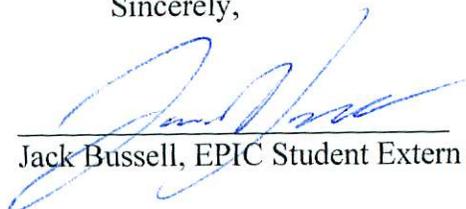
At this time, EPIC reiterates and renews all arguments that it should be granted "news media" fee status.

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 records 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," and disclosure "is not primarily in the commercial interest of the requester," any duplication fees should be waived.

Conclusion

Thank you for your prompt response to this appeal. As the FOIA provides, I anticipate that you will produce responsive documents within twenty (20) calendar days. 5 U.S.C. 552(a)(6).

Sincerely,

A handwritten signature in blue ink, appearing to read "Jack Bussell", written over a horizontal line.

Jack Bussell, EPIC Student Extern

A handwritten signature in blue ink, appearing to read "Julia Horwitz", written over a horizontal line.

Julia Horwitz, Coordinator,
EPIC Open Government Project

November 21, 2013