

June 24, 2009

VIA FACSIMILE (202.447.3713)

Mr. Mark Dorgan
Under Secretary for Management
U.S. Department of Homeland Security
Washington, D.C. 20528
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RE: Freedom of Information Act Request and Request for Expedited Processing

Mr. Dorgan:

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 National Security Presidential Directive 54, otherwise referred to as The Homeland Security Presidential Directive 23 (“the Directive”).

Background

In January 2008, President George W. Bush issued the Directive, but it was never released to the public.¹ Under this Directive,² the Comprehensive National Cybersecurity Initiative (“CNCI”) was formed to “improve how the federal government protects sensitive information from hackers and nation states trying to break into agency networks.”³ In February 2009, President Obama appointed Melissa Hathaway as the head of a 60-day review of the government’s cybersecurity efforts (“the Hathaway Report”).⁴ In April 2009, Senator Jay Rockefeller (D-WV)

¹ Jill R. Aitoro, *The Comprehensive National Cybersecurity Initiative*, NEXTGOV, June 1, 2009, http://www.nextgov.com/the_basics/tb_20090601_8569.php.

² “The CNCI – officially established in January when President Bush signed National Security Presidential Directive 54 / Homeland Security Presidential Directive 23 – is a multi-agency, multi-year plan that lays out twelve steps to securing the federal government’s cyber networks. DHS has been tasked to lead or play a major role in many of these tasks. This bold, much-needed approach to cyber security will lead to a fundamental shift in the way the Department approaches the security of U.S. networks.” Letter from Joseph I. Lieberman, Chairman, and Susan M. Collins, Ranking Member, United States Senate Committee on Homeland Security and Governmental Affairs to Michael Chertoff, Secretary, Department of Homeland Security (May 1, 2008), *available at* http://hsgac.senate.gov/public/_files/5108LiebermanCollinslettertoChertoff.pdf.

³ *Id.*

⁴ Jaikumar Vijayan, *Obama Taps Bush Aide Melissa Hathaway to Review Federal Cybersecurity Efforts*, COMPUTER WORLD: SECURITY, Feb. 9, 2009, <http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=9127682>.

introduced to Congress the Cybersecurity Act of 2009 (S. 773), still pending in the Senate Committee on Commerce, Science, and Transportation.⁵

Despite a 2008 power struggle over the CNCI, the Department of Homeland Security (“DHS”) was ultimately charged to oversee the details, with operational functions split between the National Security Agency (NSA), the Central Intelligence Agency (CIA), and the Federal Bureau of Investigation’s (FBI) Cyber Division.⁶ Each agency under DHS is responsible to “investigate intrusions by monitoring Internet activity and ... capturing data for analysis.”⁷ However, DHS acts as the lead agency on cybersecurity, as well as many other areas of Internet regulation.⁸

Though privacy is highlighted in the Hathaway Report, such considerations are noticeably absent from any practical application of the Cybersecurity Act. As Senators Joseph Lieberman and Susan Collins noted in their May 1, 2008 letter to DHS Secretary Michael Chertoff, efforts to “downgrade the classification or declassify information regarding [CNCI] would ... permit broader collaboration with the privacy sector and outside experts.”⁹ President Obama’s recent focus on Transparency, Participation, and Collaboration between the public and executive agencies further justifies a renewed effort to disclose such information to the public. Releasing the documents sought in this request would provide the opportunity for meaningful public participation in the development of new security measures that may have a significant impact on civil liberties, such as privacy.¹⁰ The Senate Committee on Homeland Security and Governmental Affairs recognizes that cyber security initiatives must include actions to “...reassure [the public] that efforts to secure cyber networks will be appropriately balanced with respect for privacy and

⁵ Jennifer Granick, *Federal Authority Over the Internet? The Cybersecurity Act of 2009*, ELECTRONIC FRONTIER FOUNDATION, Apr. 10, 2009, <http://www EFF.org/deeplinks/2009/04/cybersecurity-act>.

⁶ *Supra* note 1.

⁷ Ellen Nakashima, *Bush Order Expands Network Monitoring*, THE WASHINGTON POST, Jan. 26, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/25/AR2008012503261.html?wpisrc=newsletter>.

⁸ See, e.g., Department of Homeland Security, *Cybersecurity: Make it a Habit*, Oct. 20, 2008, http://www.dhs.gov/xprevprot/programs/gc_1202746448575.shtm; Department of Homeland Security, *Internet Hoaxes*, Oct. 21, 2008, http://www.dhs.gov/xcitizens/general_1165337828628.shtm; Department of Homeland Security, *DHS Privacy Office – Privacy Workshops*, June 9, 2009, http://www.dhs.gov/xinfoshare/committees/editorial_0699.shtm.

⁸ Walter Pincus, *Cybersecurity Will Take a Big Bite of the Budget*, THE WASH. POST, July 21, 2008 at A13, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/07/20/AR2008072001641_pf.html.

⁹ *Supra* note 2.

¹⁰ Memoranda from Barack Obama, President of the United States, on Transparency and Open Government (January 21, 2009) available at http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/.

civil liberties.”¹¹ The government cannot meaningfully make such assurances without making public the foundational documents underpinning the CNCI.

Documents Requested

Although the CNCI has been the primary source of cybersecurity rules since 2008, neither it nor the authorizing Directive have been released in full.¹² Gregory Garcia (then DHS Assistant Secretary of Cybersecurity and Telecommunications) stated in February 2009 that “too much was kept secret.”¹³ The policy goals in the Directive, and the implementation of those goals in the CNCI, have directed virtually all cybersecurity regulation. Therefore, EPIC requests copies of the following agency records in the possession of the Department of Homeland Security:

1. The text of the National Security Presidential Directive 54, otherwise referred to as the Homeland Security Presidential Directive 23.
2. The full text, including previously unreported sections, of the Comprehensive National Cybersecurity Initiative, as well as any executing protocols distributed to the agencies in charge of its implementation.
3. All privacy policies related to either the Directive or the Comprehensive National Cybersecurity Initiative, including but not limited to, contracts or other documents describing privacy policies for information shared with private contractors to facilitate the Comprehensive National Cybersecurity Initiative.

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 factual government activity.” 5 U.S.C. § 552 (a)(6)(E)(v)(II).

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).

Moreover, there is particular urgency for the public to obtain information about CNCI. The Cybersecurity Act of 2009 is presently under consideration by the Senate Committee on Commerce, Science, and Transportation. In order for meaningful public comment on this or subsequent cybersecurity measures, the public

¹¹ *Supra* note 2.

¹² *See supra* note 1.

¹³ *Id.*

must be aware of current programs. Neither DHS nor NSA has provided information on measures adopted to safeguard the privacy of citizens' personal information in connection to the Directive or the CNCI. The public should be informed of DHS' ongoing role in the CNCI.

Request for "News Media" Status

EPIC is a non-profit, educational organization that routinely and systematically disseminates information to the public. EPIC is a representative of the news media. *EPIC v. Dep't 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," as described above, any duplication fees should be waived.

Thank you for your consideration of this request. As provided in 5 U.S.C. § 552(a)(6)(E)(ii)(I) I will anticipate your determination on our request for expedited processing within ten (10) calendar days.

Sincerely,

Amie L. Stepanovich
EPIC Clerk

John Verdi
Director, EPIC Open Government Project