

January 8, 2009

VIA U.S. MAIL (CERTIFIED DELIVERY)

Freedom of Information Act Appeal
United States Citizenship and Immigration Services
USCIS FOIA/PA Appeals Office
150 Space Center Loop, Suite 500
Lee's Summit, MO 64064-2139.

RE: Freedom of Information Act Appeal (DHS/OS/PRIV 09-165)

This letter constitutes an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted to the U.S. Citizenship and Immigration Services ("USCIS") by the Electronic Privacy Information Center ("EPIC").

On December 4, 2008, EPIC requested documents *via* facsimile as set forth in the letter attached as Appendix 1 ("EPIC's FOIA request") to the Department of Homeland Security ("DHS"). On December 11, 2008, the DHS wrote to EPIC, acknowledged receipt of EPIC's FOIA request on December 5, 2008, assigned the reference number DHS/OS/PRIV 09-165, but did not make any determination regarding EPIC's FOIA request. The letter also referred the request to the USCIS for processing and direct response. Through the date of this appeal, neither the DHS nor the USCIS has made any determination regarding EPIC's FOIA request. *See* 5 U.S.C. § 552(a)(6); *see also* Appendix 2.

The proper component of DHS is bound to decide a request for expedited processing within ten calendar days of receipt of a request. 6 C.F.R. § 5.5(d)(4). As of the date of this letter, USCIS has not communicated any determination regarding EPIC's FOIA request. This failure can be construed as a constructive denial. 5 U.S.C. § 552(a)(6)(A). EPIC hereby appeals the USCIS's failure to make a timely determination regarding EPIC's FOIA request. *Wash. Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61 (D.D.C. 2006) (citing *Payne Enterprises v. U.S.*, 837 F.2d 486, 494 (D.C. Cir. 1998)).

EPIC's FOIA request relates to advertisement on National Public Radio ("NPR") by the DHS for the "E-Verify" program. After learning of the promotion of "E-Verify" on NPR, EPIC wrote to the NPR Ombudsman asking NPR to discontinue the promotion for E-Verify. Appendix 3. EPIC noted that E-Verify "could deny many eligible individuals – including U.S. citizens and legal immigrants – the opportunity to work," and is "ineffective as a solution to U.S. immigration problems." *Id.* EPIC observed that the promotion is particularly problematic because "unlike typical underwriting credits that are heard on NPR, the DHS item explicitly promoted a controversial program and made a factual assertion that is in dispute." *Id.* The NPR Ombudsman has not responded to EPIC's letter.

The Government Accountability Office, the Social Security Administration's Inspector General, and the CATO Institute have highlighted numerous shortcomings of E-Verify, and have underscored high levels of inaccuracies in the databases on which the program is based, employer misuse resulting in discrimination and unlawful termination, the lack of privacy protections as well as the program's high costs.¹ Despite these shortcomings, the promotion of E-Verify on NPR continues through the date of this appeal. The ongoing expenditure of federal funds for the promotion of a deeply flawed program is a matter of public interest, and as such the full scope and extent of the agency's advertising promotion for E-Verify should be disclosed.

The DHS's promotion of E-Verify is ongoing, and documents published by the agency indicate that it will increase in scope in the future. Since EPIC's FOIA request was filed, the USCIS has issued a solicitation for further "Marketing and Advertising Services In Support of E-Verify."² The solicitation states that the USCIS "requires contractor assistance to plan and implement a *national Marketing and Advertising Campaign*" including "a multi-channel, multi-lingual media campaign." *Id.* (emphasis added). The USCIS expects to spend \$30,000,000 on the campaign. *Id.*

The urgency to inform the public regarding expenditures by a federal agency for the promotion of a controversial program is manifest. In addition, the public has demonstrated substantial interest regarding the subject of EPIC's FOIA request. A Google search performed on January 7, 2009, returned 2,470 results for the search "e-verify underwriting." Appendix 4. The public has also expressed interest in EPIC's FOIA request itself – a Google search returned 2,580 results for the search "foia e-verify." Appendix 5. Leading newspapers have published coverage questioning the "costs and collateral damage" of the E-Verify program.³ Moreover, it appears that

¹ "Employment Verification - Challenges Exist in Implementing a Mandatory Electronic Employment Verification System," United States Government Accountability Office, June 10, 2008 *available at* <http://www.gao.gov/new.items/d08895t.pdf>; "Inspector General's Statement on SSA's Major Management and Performance Challenges," Nov. 5, 2008, *available at* <http://www.socialsecurity.gov/finance/2008/IG%20Mngt%20Challenges.pdf>; Jim Harper, *E-Verify Debunking Exposes Debunking Errors*, The Cato Institute, May 21, 2008, *available at* <http://www.cato-at-liberty.org/2008/05/21/e-verify-debunking-exposes-debunking-errors/>.

² "Marketing and Advertising Services In Support of E-Verify," *available at* <https://www.fbo.gov/index?tab=core&s=opportunity&mode=form&id=ec6d6f72caf18a1a585905c003de7a56>; *see also* Solicitation Number: HSSCCG-09-R-00002, Jan. 9, 2008, *available at* <https://www.fbo.gov/utills/view?id=1f902f3fdf08bc65cbbcbbcdf354520c/>.

³ Editorial, *What Social Security Isn't Meant to Do*, N.Y. Times, May. 12, 2008, *available at* <http://www.nytimes.com/2008/05/12/opinion/12mon1.html>; *see also* Alexandra Marks, *With E-Verify, too many errors to expand its use?* The Christian Science Monitor, July 7, 2008, *available at* <http://www.csmonitor.com/2008/0707/p02s01-usgn.html>.

the DHS is poised to spend additional federal funds advertising the E-Verify program.⁴

EPIC's FOIA request includes a request for expedited processing. EPIC has demonstrated a "compelling need" for the information on the basis that expenditure of federal funds pertains to matters about which there is "urgency to inform the public about an actual or alleged federal government activity." 5 U.S.C. § 552(a)(6)(E)(v)(I)-(II) (2007); *Al-Fayed v. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001).

Thank you for your prompt response to this appeal. As the FOIA provides, I anticipate that you will produce responsive documents within 20 working days. If you have any questions, please feel free to contact me at (202) 483-1140 or sen@epic.org.

Sincerely,

Anirban Sen, Esq.
EPIC Fellow

/enclosures

⁴ See *supra* note 2.

Appendix 1

EPIC's December 4, 2008 FOIA Request to the DHS

Appendix 2

December 11, 2008 Letter from the DHS to EPIC

Appendix 3

EPIC's December 1, 2008 Letter to NPR Ombudsman

Appendix 4

January 7, 2009 Google Search for “e-verify underwriting.”

Appendix 5

January 6, 2009 Google Search for “foia e-verify.”