

April 16, 2008

Senate Committee on Homeland Security and Governmental Affairs
Subcommittee on State, Local, and Private Sector Preparedness and Integration
340 Dirksen Senate Office Building
Washington, D.C. 20510

Re: April 17, 2008 Hearing - *Focus on Fusion Centers: A Progress Report*

Dear Chairman Pryor and Senator Sununu:

We write regarding the April 17, 2008 Subcommittee hearing “Focus on Fusion Centers: A Progress Report” to express concern about the impact of the federal fusion centers on the rights of citizens under state law. From the outset, civil liberties advocates have raised questions regarding the impact of fusion centers on citizens’ privacy rights.¹ EPIC now has particular concerns about the impact of fusion centers on state open government and privacy laws.

Through Freedom of Information Act litigation, the Electronic Privacy Information Center (“EPIC”) is investigating the role of federal agencies in exempting fusion centers from state open government and privacy laws. *EPIC v. the Virginia Department of State Police*, Case No. 08-01357 (Va. Gen. Dist. Ct. filed March 12, 2008).² EPIC’s ongoing investigation indicates that the Department of Justice may have played a role in the recently enacted Virginia legislation that exempts the Virginia Fusion Intelligence Center (“Virginia Fusion Center”) from state open government and privacy laws.

EPIC’s litigation under the Virginia Freedom of Information Act also reveals that the FBI drafted a Memorandum of Understanding with the Virginia Department of State Police (“VSP”) that limits the application of Virginia’s open government and privacy laws to the Virginia Fusion Center. This MOU is in conflict with the White House’s official position, which requires that federally supported fusion centers respect state privacy laws.³

¹ EPIC, *Information Fusion Centers and Privacy*, available at: <http://epic.org/privacy/fusion/>.

² See generally EPIC, *EPIC v. Virginia Department of State Police: Fusion Center Secrecy Bill*, available at: http://epic.org/privacy/virginia_fusion/.

³ *National Strategy for Information Sharing: Successes and Challenges in Improving Terrorism-Related Information Sharing* at 20, October 2007, available at: http://www.whitehouse.gov/nsc/infosharing/NSIS_book.pdf.

In January 2008, HB 1007 was introduced before the Virginia General Assembly. After some debate, the bill was signed by Governor Tim Kaine on April 2, 2008. The law exempts the Virginia Fusion Center from the Virginia Freedom of Information Act and the Virginia Government Data Collections and Disseminations Practices Act. The Virginia Freedom of Information Act is the Commonwealth's open government statute, and sets forth procedures for "ensuring the people of the Commonwealth ready access to public records."⁴ The Virginia Government Data Collections and Disseminations Practices Act is Virginia's primary privacy law, and "establish[es] procedures to govern [government] information systems containing records on individuals."⁵ HB 1007 also includes an anti-whistleblower provision, and eliminates several long-standing civil rights of action (*e.g.* defamation and invasion of privacy) for citizens harmed by information provided to the Virginia Fusion Center.

The sponsor of HB 1007, Del. Dwight Jones, stated that he introduced the legislation to comply with federal requests that Virginia exempt its fusion center from state open government and privacy laws.⁶ Capt. J. Thomas Martin, the administrative head of the Fusion Center, implied that federal policies might have been the impetus for HB 1007, but did not provide further details.⁷

While the Virginia legislature considered HB 1007, EPIC filed an open government request with the VSP on February 12, 2008 ("EPIC's FOIA Request"). EPIC sought to clarify federal involvement in the then-pending legislation. EPIC's FOIA Request required the VSP to disclose its communications with the relevant federal entities regarding the Virginia Fusion Center, specifically relating to "funding, development, and impact" on Virginia's government transparency and privacy laws.⁸ The VSP failed to disclose any documents in response to EPIC's FOIA Request, and EPIC sued to compel disclosure. As a result of the lawsuit, EPIC obtained several documents, including a Memorandum of Understanding between the FBI and the Virginia State Police that limits the state's open government law.⁹

⁴ Va. Code Ann. § 2.2-3700 (2007).

⁵ Va. Code Ann. § 2.2-3800 (2007).

⁶ Richard Quinn, *Secrecy bill for state anti-terror agency has some crying foul*, *The Virginian-Pilot*, Feb. 18, 2008, available at: <http://hamptonroads.com/2008/02/secrecy-bill-state-antiterror-agency-has-some-crying-foul>.

⁷ *Id.*

⁸ EPIC, *Freedom of Information Act Request*, Feb. 12, 2008, available at: http://epic.org/privacy/fusion/VA_FOIA021208.pdf.

⁹ Federal Bureau of Investigation, *Memorandum of Understanding Between the Federal Bureau of Investigation and the Virginia Fusion Center*, Feb. 28, 2008, available at: http://epic.org/privacy/virginia_fusion/MOU.pdf.

The Memorandum of Understanding was signed by the FBI and the VSP before HB 1007 was enacted. The agreement requires the VSP to comply with federal regulations (28 CFR Part 16) that restrict the disclosure of public records about the Virginia Fusion Center that would otherwise be available to the public. The federal regulations contain at least thirty-seven exemptions from open government and privacy laws. The Memorandum of Understanding also requires the VSP to refer open government requests to federal agents under certain circumstances. The terms of the agreement have a substantial impact on the application of government transparency and privacy laws to the Virginia Fusion Center.

The federal involvement in Virginia's recent exemption of its fusion center from open government and privacy laws is alarming. In addition, it conflicts with the official position of the White House, which requires "compliance with all applicable privacy laws," because such compliance "respects our system of federalism and strengthens our security posture."¹⁰

We encourage you to press the witnesses at the April 17 hearing regarding the nature and extent of federal involvement in proposals that modify state open government and privacy laws for fusion centers. Furthermore, we urge you to inquire as to the nature and extent of federal agencies' use of Memorandums of Understanding to limit fusion center transparency through secret contracts between federal and state entities.

Thank you for your attention to this issue. We would be pleased to provide any other information the Subcommittee may require.

Sincerely,

Marc Rotenberg
EPIC Executive Director

John Verdi
EPIC Staff Counsel
Director, EPIC Open Government Project

Cc: Chairman Joe Lieberman, Senate Committee on Homeland Security
Ranking Member Susan Collins, Senate Committee on Homeland Security

Senator Patrick J. Leahy, Senate Judiciary Committee
Senator John Cornyn, Senate Judiciary Committee

¹⁰ *National Strategy for Information Sharing: Successes and Challenges in Improving Terrorism-Related Information Sharing* at 20, October 2007, available at: http://www.whitehouse.gov/nsc/infosharing/NSIS_book.pdf.