



February 26, 2008

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RE: HB 1007: Open Government and the Virginia Fusion Intelligence Center

Dear Senators,

The Virginia Senate Courts of Justice Committee (the “Committee”) is currently considering HB 1007.¹ If enacted, HB 1007 would exempt the Virginia Fusion Intelligence Center (the “Virginia Fusion Center”) – and other Commonwealth agencies assigned to the Virginia Fusion Center – from the Virginia Freedom of Information Act and Virginia state privacy laws.

On February 12, 2008, The Electronic Privacy Information Center (“EPIC”) filed Virginia Freedom of Information Act Requests with the Virginia Department of State Police (the “VSP”) and the Virginia Department of Emergency Management (the “VDEM”) for public records that directly relate to alleged federal government involvement with HB 1007. The Virginia Fusion Center’s administrative head recently implied that federal policies might have been the impetus for HB 1007, but did not provide further details.²

Despite the expiration of the statutory deadline, neither the VSP nor the VDEM has produced responsive documents to EPIC. See Va. Code Ann. § 2.2-3704(B) (2007). The failure to release public records is a violation of Virginia law, and leaves Commonwealth citizens and legislators in the dark regarding the nature, if any, of the federal government’s influence over the terms of HB 1007.

EPIC takes no position on the pending legislation. However, we believe it is important for lawmakers to know whether the proposals to limit Virginia’s open government laws and privacy laws were put forward by federal agencies as conditions of establishing the Virginia Fusion Center. Therefore, EPIC urges the Committee to study HB 1007 over the coming year.

HB 1007

Federal guidelines state that the Virginia Fusion Center should accumulate and retain information about Virginia residents from a wide range of public and private sources. Such information includes, but is not limited to: financial records,

¹ <http://leg1.state.va.us/cgi-bin/legp504.exe?081+ful+HB1007E>.

² Richard Quinn, Secrecy bill for state anti-terror agency has some crying foul, The Virginian-Pilot, Feb. 18, 2008, available at <http://hamptonroads.com/node/454629>.

credit reports, medical records, internet and email data, video surveillance from retail stores and sporting facilities, data from preschools, and welfare records.³

HB 1007 exempts the Virginia Fusion Center from the Virginia Freedom of Information Act and the Government Data Collections and Disseminations Practices Act.⁴ Exemption from the Virginia Freedom on Information Act eliminates the opportunity for Virginia citizens' and lawmakers to exercise oversight regarding the Virginia Fusion Center. Exemption from the Government Data Collections and Disseminations Practices Act prevents Virginia citizens from accessing, and ensuring the accuracy of, personal information collected by the Virginia Fusion Center about them.

HB 1007 also makes Virginia Fusion Center employees immune from subpoena, and bars dissemination of fusion center information.⁵ Further, HB 1007 immunizes individuals who negligently provide false information to the Virginia Fusion Center from civil liability for defamation, invasion of privacy, and negligence.⁶

Several groups oppose HB 1007, including the Virginia Press Association and the Virginia Coalition for Open Government.⁷

EPIC's Open Government Requests

On February 12, 2008, EPIC filed Virginia Freedom on Information Act Requests with the VSP and the VDEM.⁸ EPIC also filed corresponding federal Freedom of Information Act requests with the U.S. Department of Homeland Security (the "DHS") and the U.S. Department of Justice (the "DOJ").

EPIC's requests require the VSP and the VDEM to produce public records relating to any federal government involvement with the Virginia Fusion Center, including funding conditions that may have been imposed by the federal government requiring the Commonwealth to exempt the Virginia Fusion Center from Virginia's

³ United States Department of Justice, "Fusion Center Guidelines: Developing and Sharing Information and Intelligence in a New Era," at Appendix C ("Functional Categories") (Aug. 2006), available at http://it.ojp.gov/documents/fusion_center_guidelines_law_enforcement.pdf.

⁴ <http://leg1.state.va.us/cgi-bin/legp504.exe?081+ful+HB1007E>.

⁵ Id.

⁶ Id.

⁷ Ginger Stanley, Virginians should question bill that has all the hallmarks of 'Big Brother', DailyPress.com, January 30, 2008, available at http://www.dailypress.com/news/opinion/dp-ed_vpa_col_0130jan30,0,7628740.story; Jennifer Perkins, Midway at the GA: Bills to watch, February 15, 2008, Virginia Coalition for Open Government, available at http://www.opengovva.org/component/option,com_mamblog/Itemid,80/.

⁸ http://epic.org/privacy/fusion/VA_FOIA021208.pdf.

open government and privacy laws. The VSP and the VDEM are required to produce “[a]ll correspondence, communications, and records of meetings” between the Commonwealth agencies and the DHS or the DOJ “concerning the Virginia Fusion Center, including funding, development, and impact on the Virginia Freedom of Information Act and the Virginia Collections and Disseminations Practices Act.”⁹ EPIC’s requests “urge [the VSP and the VDEM] to provide the requested documents as soon as possible” because “[c]oncerns have been raised about HB 1007, a bill now pending in the Virginia Assembly.”¹⁰

Pursuant to Va. Code Ann. § 2.2-3704(B) (2007), the VSP and the VDEM were required to produce all public records responsive to EPIC’s requests within “five working days.” *Id.* The five-day deadline expired on February 20, 2008.¹¹ The VSP and the VDEM have not made a single document public in response to EPIC’s requests.

Alleged Federal Involvement With the Virginia Fusion Center and HB 1007

Press reports allege that the federal government is intimately involved with the Virginia Fusion Center. Allegedly, federal agents, including employees from “the U.S. Department of Homeland Security [and] the FBI” work shoulder to shoulder with Virginia entities at the Virginia Fusion Center.¹² There, state and federal agents allegedly “‘fuse together’ to share information.”¹³

The Virginia Fusion Center’s enabling legislation also suggests federal involvement, directing the Virginia Fusion Center to “collect ... information to support local, state, and *federal* law-enforcement agencies ... in preventing ... any possible or actual terrorist attack.” Va. Code Ann. § 52-47 (2007) (emphasis added). However, the Virginia Fusion Center has not publicly confirmed the nature of the federal government’s role in the Virginia Fusion Center.

EPIC’s Recommendation

The impact of fusion centers is a matter of great public interest. Many newspapers, including *The Washington Post* and *The Fredericksburg Free Lance-*

⁹ *Id.* at 2-3.

¹⁰ *Id.* at 3.

¹¹ On February 15, 2008, the VDEM requested a statutory extension of seven working days. However, the VDEM subsequently stated, in writing, that it would not release any documents in response to EPIC’s request.

¹² Richard Quinn, Secrecy bill for state anti-terror agency has some crying foul, *The Virginian-Pilot*, Feb. 18, 2008, available at <http://hamptonroads.com/node/454629>.

¹³ *Id.*

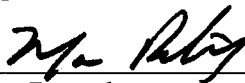
Star, have published substantial articles about fusion centers.¹⁴ Virginia citizens are particularly interested in the important issues raised by alleged federal involvement in modifying Virginia open government and privacy laws. Virginia newspapers such as *The Virginian-Pilot* and *The Central Virginian* have covered HB 1007.¹⁵

Official statements and press reports raise serious questions regarding the extent and nature of federal involvement with HB 1007. EPIC's pending open government requests will almost certainly clarify what role, if any, the federal government has played in HB 1007.

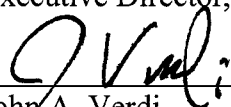
However, the VSP and the VDEM failed to produce responsive public records by the statutory deadline, in violation of the Virginia Freedom of Information Act. This lack of transparency harms Commonwealth citizens, and deprives the Committee of the whole story about HB 1007. Virginia citizens and lawmakers deserve to know if there is federal government involvement with HB 1007. By undertaking a year-long review of HB 1007, the Committee can ensure that it has all the facts necessary to make a fully informed decision regarding the bill.

Therefore, EPIC urges the Committee to study HB 1007 over the coming year. Such a study would ensure that the Committee has the opportunity to review documents produced in response to EPIC's open government requests. Such a study would also give the Committee the opportunity to solicit detailed comments from experts, including the Virginia State Crime Commission and the Virginia Freedom of Information Advisory Council.

Respectfully submitted,



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¹⁴ Mary Beth Sheridan and Spencer S. Hsu, Localities Operate Intelligence Centers To Pool Terror Data, Wash. Post, Dec. 31, 2006, at A03, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/30/AR2006123000238.html>; Cheylen Davis, Bill would keep intel center data secret, The Free Lance-Star, Feb. 2, 2008, available at <http://fredericksburg.com/News/FLS/2008/022008/02022008/353419>.

¹⁵ Id.; Steve Weddle, A page from history, The Central Virginian, available at http://www.thecentralvirginian.com/Editorial/cv_editorial.html; Oversight required on intelligence unit, The Virginian-Pilot, Feb. 25, 2008, available at <http://hamptonroads.com/2008/02/oversight-required-intelligence-unit>.