

13 May 2010



May 7, 2010

BY CERTIFIED MAIL
NSA/CSS FOIA Appeal Authority (DJP4)
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RE: Freedom of Information Act Appeal (FOIA Case 60923)

Dear FOIA Appeals Officer:

This letter constitutes an appeal under the Freedom of Information Act ("FOIA"), 5 USC § 552, and is submitted to the National Security Agency ("NSA") by the Electronic Privacy information Center ("EPIC").

On February 4, 2010, EPIC requested, via certified mail, documents regarding the agency's arrangements with Google on cyber security, as well as records regarding the agency's role in setting security standards for Gmail and other web-based applications. Specifically, EPIC requested the following:

1. All records concerning an agreement or similar basis for collaboration, final or draft, between the NSA and Google regarding cyber security;
2. All records of communication between NSA and Google concerning Gmail, including but not limited to Google's decision to fail to routinely encrypt Gmail messages prior to January 13, 2010; and
3. All records of communications regarding NSA's role in Google's decision regarding the failure to routinely deploy encryption for cloud-based computing service, such as Google Docs.

Procedural Background

On February 4, 2010, EPIC transmitted EPIC's FOIA Request to the NSA, requesting the above records as well as news media status and expedited processing.

In a letter dated March 10, 2010 and postmarked March 15, 2010, the NSA responded. In its letter, the NSA FOIA Office acknowledged EPIC's status as a member of the news media, and made no determination as to expedited processing. The March 10 letter also contained a substantive determination as to EPIC's FOIA Request. Specifically, the letter stated that the Agency would "neither confirm nor deny whether the company has a relationship with the Agency related to the issues [EPIC] describe[s]." The agency cited FOIA exemption b(3) and Section 6 of the National Security Agency Act as grounds for denying EPIC's request and withholding responsive agency records.

EPIC Appeals the NSA's Failure to Disclose Records

EPIC hereby appeals the NSA's failure to disclose records responsive to EPIC's FOIA Request. The denial is without sufficient grounds, because the claimed statutory exemption does not justify withholding.

The third exemption to the FOIA, cited by the NSA in its denial of EPIC's FOIA Request, states that the FOIA does not apply to matters that are

specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

- (A)
 - (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
 - (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and
- (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

5 U.S.C. 552(b)(3). Section 6 of the National Security Agency Act states relevantly, "nothing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency." National Security Agency Act of 1959, Pub. L. No. 86-36, § 6, 73 Stat. 63, 64, codified at 50 U.S.C. § 402 *note*.

By citing this statute as the basis for its exemption, the NSA claims that all portions of all documents requested by EPIC fall within Section 6, *i.e.* "the organization or any function of the [NSA]" or information concerning the NSA's activities or employees. However, the agency has presented no evidence for this assertion. EPIC's FOIA Request does not explicitly specify any organizational or functional information, nor does it request any "names, titles, salaries, or number of the persons employed by [the NSA]." Such information could easily be redacted from any disclosed documents if it appears. The NSA fails to provide any factual basis for the conclusion that any portion of the responsive documents is exempt under Section 6, much less all portions of all requested records.

While courts have found that records described in Section 6 are exempt under section 552(b)(3), those same courts still required that the National Security Agency provide some factual basis for asserting the exemption. *see, e.g. Electronic Privacy Information Center v. Dep't of Justice*, 511 F. Supp. 2d 56, 67 (D.C.D. 2007); *Id.* at 73 ("Unsurprisingly, the declarations submitted by officials from NSA fail to identify at any level the documents withheld. . . . Accordingly, the court will require further submissions from NSA regarding these documents.").

Even when courts have not required a *Vaughn* index, see *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1978), they have, at the very least, required affidavits and information regarding a sample search satisfying the criteria of *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 405–06 (D.C. Cir. 1984). See *Linder v. NSA*, 94 F.3d 693, 696–97 (D.C. Cir. 1996) (quashing subpoena and holding that a *Vaughn* index was not required where defendant agency had provided extensive affidavits regarding a sample search).

The NSA has provided no information regarding the agency records that are responsive to EPIC's request, nor has it even asserted that it performed a search for responsive documents. Without considerably more information about the number and nature of documents for which the agency is claiming exemption from the FOIA, it is impossible for the NSA to support the validity of the asserted exemption.

Conclusion

By improperly denying a request without providing sufficient grounds for its decision, the NSA has failed to comply with the FOIA. EPIC appeals the NSA's failure to disclose responsive documents and its failure to perform an adequate, reasonable search for the agency records described in EPIC's FOIA Request. As provided in 32 C.F.R. § 299.5(o)(6) and the NSA's letter dated March 10, 2010, I will anticipate your response to this appeal within 20 working days.

Sincerely,



Jared Kaprove
Domestic Surveillance Counsel, EPIC



John Verdi
Director, Open Government Project, EPIC

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