



June 1, 2012

Miriam Nisbet, Director
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Re: DHS Freedom of Information Act Procedures

Dear Director Nisbet:

EPIC is writing to inform the Office of Government Information Services (“OGIS”), as the FOIA Ombudsman, of a systemic problem with administration of the Freedom of Information Act (“FOIA”) at the Department of Homeland Security.

EPIC has submitted numerous FOIA requests to the Department of Homeland Security (“DHS”), as well as its various components, including the Transportation Security Administration (“TSA”) and the Bureau of Customs and Border Protection (“CBP”). Unlike other federal agencies, the DHS and its components routinely deny blanket fee waiver requests to individuals and groups. This practice is harmful to requesters and contravenes the purpose of FOIA and the specific reason for the fee waiver provision. It is particularly surprising with respect to the FOIA requests of EPIC as a federal district court has previously held that EPIC is “a representative of the news media.”¹ While this is not dispositive as to the separate determination of fee waiver, it is also plainly evident under the agency’s own rule that EPIC’s FOIA requests satisfy the requirements for the waiver or reduction of fees.²

OGIS should investigate this practice and its impact on FOIA requesters as a barrier to pursuing government records.

The Freedom of Information Act (“FOIA”) exists to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable.”³ The FOIA provides for fee waivers or reductions “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”⁴

¹ *EPIC v. Department of Defense*, 241 F.Supp.2d 5 (D.D.C. 2003).

² 6 C.F.R. § 5.11(k)(1) (2011).

³ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

⁴ 5 U.S.C. § 552(a)(4)(A)(iii) (2011); see also *Dep’t of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 775 (1989).

The DHS practice communicates to FOIA requesters – journalists, scholars, and non-profit interest groups – that they could be charged for document reproduction when the agency knows that the requesters likely qualify for a blanket fee waiver. For sophisticated FOIA requesters such as EPIC, this creates additional work. For the less experienced FOIA requester, it has the practical effect of ending many worthwhile FOIA requests. The fees at issue here – duplication fees – can add up quickly, and will lead many requesters to give up their efforts.

To provide a recent example from EPIC's experience, in the attached FOIA appeal EPIC requested documents from the DHS related to the deployment of Terahertz scanning technology, which is now being used by police agencies with funding provided by DHS. The technology allows police officers to penetrate "walls, clothing, and packaging materials" to be able to identify exactly what a person is wearing or carrying in a package, box, or backpack.⁵ EPIC requested documents relating to the use of this technology by the New York City Police Department.

The DHS acknowledged receipt of EPIC's request, but notified EPIC that it would be charged 10-cents a page for duplication" after the first 100 pages, and that the submission of EPIC's FOIA Request would be construed as "an agreement to pay up to \$25.00"

The legislative history of the fee waiver standard "clearly indicates" that Congress intended to create a public interest / benefit test for granting FOIA fee waivers that was to be "liberally construed" and was "consistently associated with requests from journalists, scholars, and non-profit interest groups who it was intended to benefit."⁶ According to the agency's rule:

- 1) Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (c)⁷ of this section where a component determines, based on all available information, that the requester has demonstrated that:
 - (i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and
 - (ii) Disclosure of the information is not primarily in the commercial interest of the requester.⁸

To determine whether these requirements are met, DHS components consider the following six factors:

- (i) The subject of the request;

⁵ Jess McNally, *Terahertz Detectors Could See Through Your Clothes From a Mile Away*, Wired (July 12, 2010, 3:16 PM), <http://www.wired.com/wiredscience/2010/07/terahertz-detection/>.

⁶ *Ettlinger v. FBI*, 569 F. Supp. 867, 872 (D. Mass. 1984); *Nat'l Treasury Employees Union v. Griffin*, 811 F.2d 644, 649 (D.C. Cir. 1987) (legislative history shows a "special solicitude for journalists"); *Lybarger v. Cardwell*, 577 F.2d 764 (1st Cir. 1978).

⁷ Paragraph (c) requires that search fees may not be assessed against certain FOIA requesters, namely educational institutions, noncommercial scientific institutions, or representatives of the news media. 6 C.F.R. § 5.11(c)(1)(i) (2011). As noted above, EPIC is a member of the news media for purposes of the FOIA. See *supra* n. 1.

⁸ 6 C.F.R. § 5.11(k)(1) (2011).

- (ii) The informative value of the information to be disclosed;
- (iii) The contribution to an understanding of the subject by the public likely to result from disclosure;
- (iv) The significance of the contribution to public understanding;
- (v) The commercial interest of the requester; and
- (vi) The public interest in the disclosure.⁹

As EPIC is by definition a non-commercial requester, our analysis focuses on the application of these four factors in the current matter. First, the subject of the request is of public interest and has been widely discussed by the media, as the original FOIA request noted. Second, as the request concerns an agency program currently underway, there is clear informative value. Third, as EPIC is seeking the documents that will help assess both the costs and benefits of the program, disclosure of the documents will contribute to public understanding. Finally, there is a great significance to the public as this is one of several related DHS programs involving new surveillance technology.

In sum, it is obvious that this request “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”¹⁰ More critically, it is particularly well known to DHS that the EPIC FOIA request satisfies this standard.

But this practice of withholding FOIA fee waivers is not just about EPIC. The Agency is throwing up roadblocks to all requesters by withholding fee waivers that should properly be granted. Most remarkably, the agency routinely claims:

Your request shall not be considered received and further work shall not be done on it until you agree to pay fees. If you do not provide a firm commitment to pay the anticipated fee within the time period specified by the component, the request will be administratively closed.¹¹

In other words, the agency uses its decision to withhold fee waivers to create a presumption that FOIA requests will not be processed. This is entirely contrary to the purpose of the FOIA.

EPIC urges OGIS to investigate the impact of this agency practice. How often does the DHS deny a FOIA requesters’ request for a blanket fee waiver? What percentage of FOIA requesters in receipt of a constructive denial follow up with the Agency and, when they do not, has the fee waiver request ever been deemed abandoned? Has a FOIA requester who requested a blanket fee waiver ever had fees assessed against them?

EPIC requests that the FOIA Ombudsman advise the DHS that the Agency is in violation of the purpose and scope of the FOIA and its implementing regulations when the Agency treats a

⁹ 6 C.F.R. § 5.11(k)(2)-(3) (2011).


¹⁰ 5 U.S.C. § 552(a)(4)(A)(iii) (2011); *see also Dep’t of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 775 (1989); 6 C.F.R. § 5.11(k)(1)(i) (2011).

¹¹ 6 C.F.R. § 5.11(e) (2011).

fee waiver request as if it has been denied. EPIC further requests that OGIS publish a report of its findings in this matter.

Thank you for your attention to this matter. We look forward to your continued work on this issue.

Sincerely,


Amie Stepanovich
Associate Litigation Counsel, EPIC

Ginger P. McCall
Director, EPIC Open Government Project

cc: Rep. Darrell Issa, Chair, Committee on Oversight and Government Reform
Rep. Elijah Cummings, Ranking Member, Committee on Oversight and Government Reform
Mary Ellen Callahan, Chief FOIA Officer, DHS