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Dear Ms. Nisbet:

We write to the Office of the Government Information Services, as the FOIA Ombudsman, to request an independent investigation into the Department of Homeland Security's ("DHS") unlawful policy of subjecting FOIA requests to vetting by political appointees. At least two EPIC FOIA requests submitted to the DHS were subject to review by White House officials prior to processing by the agency.

The Freedom of Information Act ("FOIA") requires agencies to process FOIA requests in accordance with clear statutory obligations.¹ The FOIA does not permit agencies to select certain categories of FOIA requests for political scrutiny. Further, in the case of EPIC's FOIA requests, the DHS failed to timely disclose agency records responsive to those requests. The FOIA does not permit agencies to add an extra, politically motivated step to FOIA processing.

Furthermore, the Supreme Court has consistently held that FOIA does not permit agencies to investigate either FOIA requesters or their reasons for submitting requests. "As a general rule, withholding information under FOIA cannot be predicated on the identity of the requester." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170 (2004). The Court held as well that "As a general rule, citizens seeking documents subject to FOIA disclosure are not required to explain why they seek the information." *Id.* at 172; *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) (stating that the requester's identity has "no bearing on the merits of his . . . FOIA request").

The DHS policy of White House review came to light after the Associated Press ("AP") submitted a FOIA request in January 2010 to DHS.³ The AP sought "all

¹ 5 U.S.C. §552(a). *See generally*, H. HAMMITT, G. MCCALL, M. ROTENBERG, J. VERDI & M. ZAID, LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS (EPIC 2010).

communication...pertaining to Front Office oversight of FOIA operations at DHS” and for “all communications directing DHS FOIA staff to amend the protocol of processing requests and involvement of the Front Office and staff members in the review, approval and formulation of FOIA responses.” *See* Appendix 1. The AP sought documents dating from January 1, 2009 to the present. *Id.* OGIS mediated disputes between the AP and the agency concerning the AP’s FOIA request, securing the disclosure of more than 1,000 pages of agency records.

EPIC’s review of the released documents demonstrates that DHS required political appointees to review the determinations of FOIA career staff assessments to certain requests before documents were disclosed by the agency. The documents indicate that EPIC’s requests were improperly delayed by the Department of Homeland Security’s unlawful policy.

At least two of EPIC’s FOIA requests were inappropriately flagged for review by political appointees and were consequently delayed in processing. This is a violation of the FOIA’s statutorily mandated deadlines for processing requests. 5 U.S.C. 552(a)(6)(A), (B).

DHS Political Appointees Impermissibly Vetted FOIA Requests

Beginning in February 2005, DHS FOIA and Privacy career staff were directed by the Chief Privacy Officer to compile and submit a weekly report to the Privacy Office. The report collected information about “recently completed and/or published systems of records notices (SORNs), Privacy Impact Assessments (PIAs), new FOIA requests received during the preceding week and those requests closed out during the same time period.” SORNS, PIAs, and FOIAs in progress were also to be reported.

This weekly report was submitted to the Secretary. It subsequently formed “the basis for developing the Department’s weekly report to the White House.” *See* Appendix 2.

In August 2006, the Privacy Office FOIA leadership was directed to begin integrating the information from the weekly report, now called the “FOIA Section of the DHS Cabinet Report to the White House,” into its report to the White House Liaison. *See* Appendix 3. This directive to report to the White House Liaison is an impermissible requirement to vet FOIA requests by political appointees.

The February 2005 directive merely required the inclusion of all SORNS, PIAs, and FOIAs. The 2006 directive identified specific types of FOIA requests to be included in the weekly report. The 2006 directive provides that political appointees should vet FOIA requests if they fall into any of the following categories:

³ Kim Zetter, “Report: Political Appointees Vetted DHS Public Records Request,” *wired.com*, July 22, 2010, <http://www.wired.com/threatlevel/2010/07/foia-filtered/>.

- a. The FOIA request relates to a Presidential or agency priority;
- b. The FOIA requester or requested documents will garner media attention or is receiving media attention;
- c. The FOIA request is for documents associated with meetings with prominent elected, business, and/or community leaders;
- d. The FOIA request is for congressional correspondence;
- e. The FOIA request is from a member of Congress;
- f. The FOIA request is from a member of the media;
- g. The FOIA request is from a member of an activist group, watchdog organization, special interest group, etc.;
- h. The FOIA request is for documents associated with a controversial or sensitive subject;
- i. The FOIA request is for documents associated with a senior official of the component;
- j. A FOIA appeal if it meets one of the “a” through “i” criteria;
- k. It is a FOIA request and not a Privacy Act; request.

See Appendix 3.

The 2006 directive described the list as “suggestive—not exclusive.” Privacy Office and FOIA staff were further directed that if they were in doubt about whether to include a report, they should “please submit.” *Id.*

The DHS’s practice of subjecting FOIA requests to political approval was again expanded in a 2009 directive. *See Appendix 4.* The 2009 directive required DHS career staff to provide Secretary Napolitano’s political staff with detailed information about the people and organizations making FOIA requests. The directive required that career staff

1. Identify the requester’s name, city and state (spell out name of state).
2. Identify the requester by affiliation (private citizen, organization membership, etc.).
4. Provide a brief description of any lesser-known organization’s mission.

Id.

The August 2006 and July 2009 directives clearly violate Supreme Court precedent stating that disclosure of documents under FOIA will not depend upon either the identity of the requester nor the reasons for the request. *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170, 172 (2004).

Additionally, though Chief Privacy Officer Mary Ellen Callahan characterized the political vetting process as a “review,” *see Appendix 5*, the emails obtained by the AP, *see Appendix 1*, make clear that documents were withheld until a political appointee approved the disclosures. This approval process often significantly delayed document releases. *See Appendix 6.* The approval process also violated clear statutory obligations under FOIA. 5 U.S.C. 552(a)(6)(A), (B).

DHS Political Appointees Impermissibly Delayed Two EPIC FOIA Requests in 2009

In 2009 alone, at least two of EPIC's FOIA requests to DHS were referred to political appointees.

DHS Failed to Timely Respond to EPIC's June 2009 Request for the Calendar of Mary Ellen Callahan, DHS Chief Privacy Officer

In the first instance when White House officials impermissibly intervened in the processing of EPIC's FOIA requests, EPIC sought the calendar of DHS Chief Privacy Officer Mary Ellen Callahan.

EPIC organizes and hosts the monthly meetings of the Privacy Coalition, a nonpartisan coalition of consumer, civil liberties, educational, family, library, labor, and technology organizations. At the Privacy Coalition's monthly meetings, guests are invited to discuss topics of interest to the coalition. The Privacy Coalition frequently invites federal Privacy Officers to speak at its meetings. Several previous Privacy Officers from DHS had addressed the coalition. The Privacy Coalition extended an invitation to Mary Ellen Callahan shortly after she was named Chief Privacy Officer in March 2009. *See Appendix 7.*

Ms. Callahan was scheduled to appear at the May 29, 2009 Privacy Coalition meeting. She cancelled days before the visit, citing a scheduling conflict. *See Appendix 7.* EPIC attempted to reschedule the visit, but was unable to obtain a commitment from Ms. Callahan. *See Appendix 8.*

EPIC submitted a FOIA request on June 25, 2009 for Ms. Callahan's calendar. The request sought all copies of the following agency records:

1. All agency records concerning appointments and meetings between Mary Ellen Callahan, Chief Privacy Officer for the Department of Homeland Security, and all nongovernmental individuals or entities from the date of her appointment, March 9, 2009, to the present. Such nongovernmental individuals and entities include, but are not limited to, trade associations, industry representatives, and/or business owners. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.
2. All agency records concerning Ms. Callahan's appointments and meetings for May 29, 2009. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.

See Appendix 9.

The FOIA required DHS to disclose responsive agency records to EPIC's request within 20 working days—by July 24, 2009. On July 2, 2009, DHS responded to EPIC's request by invoking the 10-day extension pursuant to 5 U.S.C. § 552(a)(6)(B). DHS claimed that EPIC's simple request for Ms. Callahan's calendar sought "numerous documents" that would "necessitate a thorough and wide-ranging search." *See* Appendix. Consequently, the date for an expected response was pushed back to August 7, 2009.

On July 9, 2009, EPIC received another letter from DHS stating that its request had been referred to the DHS Office of the General Counsel (OGC). *See* Appendix 11.

The DHS Office of the General Counsel provided an interim response to the request on July 30, 2009, but failed to disclose all responsive agency records. The response, which included heavily redacted documents, stated that DHS required even more time to find records related to Mary Ellen Callahan's calendar. The OGC stated that it would be able to complete its review on or before August 7, 2009. *See* Appendix 12.

The OGC wrote to EPIC on August 25, 2009, stating that it had completed its review. The OGC had "located a total of 84 pages." The agency "determined that 40 pages can be released in their entirety and 44 pages can be partially released, but with certain information withheld pursuant to Title 5 U.S.C. § 552 (b)(2)(low), (b)(5), and (b)(6). *See* Appendix 13.

On September 17, 2009, EPIC filed an appeal based on DHS's failure to disclose responsive records in its possession and DHS's overly broad assertion of statutory exemptions in the records it did disclose. *See* Appendix 14.

On September 18, 2009, DHS acknowledged receipt of EPIC's appeal. *See* Appendix 15. Through the date of this letter, DHS has failed to make a determination concerning EPIC's appeal.

DHS Failed to Timely Respond to EPIC's June 2009 Request for National Security Presidential Directive 54

In the second instance when White House officials impermissibly intervened in the processing of EPIC's FOIA requests, EPIC sought documents relating to National Security Presidential Directive 54.

In January 2008, President George W. Bush issued National Security Presidential Directive 54, otherwise referred to as The Homeland Security Presidential Directive 23 ("NSPD 54"), but it was never released to the public.⁴ Under this Directive, the Comprehensive National Cybersecurity Initiative ("CNCI") was formed to "improve how

⁴ Jill R. Aitoro, *The Comprehensive National Cybersecurity Initiative*, NEXTGOV, June 1, 2009, http://www.nextgov.com/the_basics/tb_20090601_8569.php.

the federal government protects sensitive information from hackers and nation states trying to break into agency networks.”⁵

On June 25, 2009, EPIC submitted, *via* facsimile, EPIC’s FOIA request to the DHS Management Directorate documents regarding NSPD 54. The letter contained a request for expedited processing. *See* Appendix 16. This request was re-transmitted on June 26, 2009, on the request of DHS. *Id.*

Specifically, EPIC requested:

1. The text of the National Security Presidential Directive 54, otherwise referred to as the Homeland Security Presidential Directive 23.
2. The full text, including previously unreported sections, of the Comprehensive National Cybersecurity Initiative, as well as any executing protocols distributed to the agencies in charge of its implementation.
3. All privacy policies related to either the Directive or the Comprehensive National Cybersecurity Initiative, including but not limited to, contracts or other documents describing privacy policies for information shared with private contractors to facilitate the Comprehensive National Cybersecurity Initiative.

Id.

On June 26, 2009, the DHS Management Directorate wrote to EPIC to acknowledge receipt of EPIC’s FOIA request and to announce a referral of the request to the DHS Headquarters & Privacy Office. *Id.* The DHS did not make any determination regarding EPIC’s FOIA request at that time.

On July 9, 2009, the DHS Headquarters & Privacy Office wrote to EPIC, acknowledging receipt of EPIC’s FOIA request, and referring the request to the DHS National Protection and Programs Directorate (“NPPD”), but did not make any determination regarding the substance of EPIC’s FOIA request. *Id.*

EPIC then appealed, on August 4, 2009, the DHS’s failure to make a timely determination regarding EPIC’s FOIA request.

⁵ “The CNCI – officially established in January when President Bush signed National Security Presidential Directive 54 / Homeland Security Presidential Directive 23 – is a multi-agency, multi-year plan that lays out twelve steps to securing the federal government’s cyber networks. DHS has been tasked to lead or play a major role in many of these tasks. This bold, much-needed approach to cyber security will lead to a fundamental shift in the way the Department approaches the security of U.S. networks.” Letter from Joseph I. Lieberman, Chairman, and Susan M. Collins, Ranking Member, United States Senate Committee on Homeland Security and Governmental Affairs to Michael Chertoff, Secretary, Department of Homeland Security (May 1, 2008), *available at* http://hsgac.senate.gov/public/_files/5108LiebermanCollinslettertoChertoff.pdf.

DHS Political Appointees Impermissibly Delayed the Agency's Responses to EPIC's June 2009 FOIA Requests

On June 29, 2009, the DHS Special Assistant to the Chief of Staff, Jordan Grossman, sent FOIA staff a list of questions requesting a status update and detailed information about a number of FOIA requests. Among them were EPIC's June 2009 requests for Mary Ellen Callahan's calendar and for the National Security Presidential Directive 54. *See* Appendix 17. Mr. Grossman was a political appointee, and has no legal authority to routinely review FOIA requests.

Mr. Grossman, in reference to the request for Ms. Callahan's calendar, asked "Do we know why they are interested in 5/29/2009 specifically?" He then asked about EPIC's request for National Security Presidential Directive 54. "What does this directive say? Is this Directive unclassified?" *Id.*

On June 30, 2009, Vania T. Lockett, CIPP/G, Acting Departmental Disclosure Officer, responded with an update to Mr. Grossman's improper requests. *See* Appendix 18.

Regarding the request for Ms. Callahan's calendar, Ms. Lockett wrote, "PRIV: Compiling records and issuing acknowledging letter to the requester. EPIC's Privacy Coalition invited the CPO to their monthly meeting on 5/29/2009, to which the CPO did not attend. EPIC wishes to see what the CPO had on her agenda that prevented her from attending." *Id.*

Ms. Lockett then updated Mr. Grossman about EPIC's request for National Security Presidential Directive 54. She wrote, "MGMT: This request was referred to PRIV for direct response on 6/26/2009. This directive is classified Top Secret and concerns a series of efforts to protect Government systems and reduce potential vulnerabilities, protect against intrusion attempts, and anticipate future threats through cyber security and monitoring." *Id.*

The FOIA was intended to further the public interest and awareness, not politics. *See Wash. Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 74, 76 (D.D.C. 2006) (citing *Jacksonville Port Auth. v. Adams*, 556 F.3d 52, 59 (D.C.Cir.1977) (recognizing "an overriding public interest ... in the general importance of an agency's faithful adherence to its statutory mandate").

Though the Grossman and Lockett emails do not definitively prove that documents were ultimately kept secret as a result of the 2006 and 2009 DHS directives, they demonstrate that the agency policies unlawfully delayed the agency's response. And at least in the case of EPIC's 2009 FOIA requests, it is clear that DHS failed to meet its statutory deadlines in response to FOIA requests that were referred for political review. Such review is unlawful. Unless records fall into one of the specified statutory exemptions, anyone who seeks documents under FOIA is entitled to receive them. No

FOIA provision allows an agency to deny or delay its response to a FOIA requester for political reasons.

DHS Has Been Impermissibly Allowing Political Appointees to Vet FOIA Requests Filed by Activist Groups, Watchdog Organizations, and Special Interest Groups in Violation of the FOIA.

The above referenced DHS 2009 directive required DHS career staff to provide Secretary Napolitano's political staff with detailed information about the people and organizations making FOIA requests. The emails show that the documents were withheld until a political appointee approved the disclosures. This approval process often significantly delayed document releases.

Though the July 2009 directive was not officially promulgated until after EPIC's two June 2009 requests were made, it is clear that DHS had been working under an informal policy to vet FOIA requests from activist groups since the promulgation of the August 2006 directive, referenced above.

EPIC Requests the Following Assistance from the FOIA Ombudsman

As FOIA Ombudsman, OGIS is authorized to review policies and procedures of administrative agencies, review compliance by administrative agencies, and recommend policy changes to Congress and the President. § 552(h)(2). OGIS is also required to conduct audits of agencies' FOIA implementation and issue reports. § 552(i).

As a frequent FOIA litigant, EPIC has a strong interest in ensuring that that FOIA requests are processed in a timely, lawful, and responsive manner. In addition, as the publisher of the leading FOIA litigation handbook, *Litigation Under the Federal Open Government Laws*, EPIC has expertise regarding FOIA's statutory requirements and deadlines.

EPIC therefore urges OGIS to investigate the practices raised by DHS's impermissible use of political appointees to vet the processing of FOIA requests. Were responsive documents withheld from FOIA requesters as a result of political appointees' review? Has the DHS in fact abandoned its policy of effectively exercising a political veto over FOIA disclosures? Do other agencies have similar improper policies? How many FOIA requests have been impermissibly delayed because of vetting by political appointees? To what extent have people and organizations who are legally entitled to request DHS records been denied that access because political appointees at the DHS decided that it was not politically expedient to process those requests? Under what authority does the DHS claim the right to require that FOIA requests be vetted by political appointees?

EPIC requests that the FOIA Ombudsman advise the Department of Homeland Security that DHS lacks the legal authority under FOIA to require that political appointees approve, deny, or delay FOIA requests. EPIC recommends additional training

be provided to DHS FOIA staff regarding implementation of FOIA as required by the DHS's FOIA regulations.

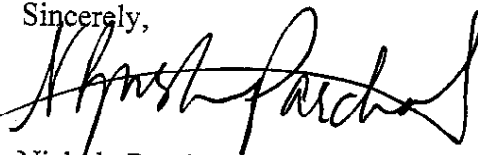
EPIC requests that the OGIS publish a report of its findings in this matter. In addition, OGIS should issue guidance making clear that the processing of FOIA requests is not subject to review or approval by political appointees.

Privacy Consent Statement

In accordance with the Privacy Act of 1974 as amended, EPIC hereby authorizes the Office of Government Information Services to make inquiries on its behalf, including the right to review all documentation that OGIS deems necessary in connection with EPIC's request for assistance regarding the Freedom of Information Act appeal that it has referenced above. EPIC understands that any documents it provides to OGIS may be copied and forwarded to officials of the referenced agency as a part of the mediation/resolution process. EPIC authorizes any Federal department, agency or component to release to OGIS information and records related to its Freedom of Information Act request.

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

Sincerely,



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