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VIA U.S. MAIL (CERTIFIED DELIVERY)

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RE: Freedom of Information Act Request and Request for Expedited Processing

Dear Ms. Noonan,

This letter constitutes a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center ("EPIC"). EPIC seeks records in possession of the Federal Aviation Administration ("FAA") regarding applications for, and grants of, authorization to operate Unmanned Aircraft Systems ("UAS") within the National Airspace System ("NAS").

Background

Unmanned aircraft systems (UASs), more commonly known as drones, have in the last decade become an everyday tool for the American military.¹ UASs are also a regular part of the mission of the Department of Homeland Security ("DHS"), with the Customs and Border Patrol operating seven "Predator B" UASs along the Mexican and Canadian borders,² and the Coast Guard pursuing its own UAS acquisitions program.³ Although DHS officials have recently backed-off from plans to use drones in a more expansive way, citing concerns that UASs might not be "acceptable to the public,"⁴ UAS programs appear to be on the rise nationwide. Other domestic government agencies are using UASs: the National Oceanic and Atmospheric Administration has, along with the

¹ Elisabeth Bumiller and Thom Shanker, *War Evolves With Drones, Some Tiny as Bugs*, NY TIMES, June 19, 2011, at A1, available at <http://www.nytimes.com/2011/06/20/world/20drones.html> (noting that the U.S. Air Force has increased its force of drones from 50 to approximately 7,000 in the last decade).

² "UAS Overview," CBP.gov, Aug. 31, 2010, available at http://www.cbp.gov/xp/cgov/border_security/air_marine/uas_program/uasoverview.xml.

³ "Unmanned Aircraft Systems," United States Coast Guard Acquisitions Directorate, Mar. 2, 2011, available at <http://www.uscg.mil/acquisition/uas/default.asp>.

⁴ Spencer Ackerman, *Even DHS Is Freaked Out by Spy Drones Over America*, WIRED.COM, Jan. 26, 2011, available at <http://www.wired.com/dangerroom/2011/01/spy-drones-over-america-dhs-would-rather-not/>.

National Aeronautics and Space Administration (“NASA”), developed a UAS program for storm monitoring⁵ and NASA has used one of its UASs for forest fire observation.⁶

Recently, several state and local law enforcement agencies have begun to pursue, and even use, UASs. Police departments in Miami-Dade County, Florida,⁷ Mesa County, Colorado, and Queen Anne's County, Maryland,⁸ are among the units that have already acquired UASs, while the Texas Department of Public Safety is known to have already used its UAS.⁹ Increasing the domestic use of UASs has been a concern for many years,¹⁰ but in practice UAS use has been severely limited by strict Federal Aviation Administration (FAA) guidelines on the operation of unmanned aircraft.¹¹ The FAA intends to release new rules in 2011 that are intended to make it less burdensome for civilian agencies to operate UASs.¹²

In April 2008, the FAA formed a Small Unmanned Aircraft System Aviation Rulemaking Committee.¹³ This committee has presented its proposed rules to the FAA, which intends to publish a proposed rule this year.¹⁴

In addition to the FAA's internal committee, the National Defense Authorization Act for Fiscal Year 2010, Congress required the Department of Defense (“DoD”) to work with the Department of Transportation to “jointly develop a plan for providing expanded access to national airspace for Unmanned Aircraft Systems” operated by the DoD.¹⁵ The resulting report, which DoD submitted to Congress in October 2010, states as its goals: “Public operators of UAS have a goal to have appropriately equipped UAS gain routine access to the NAS [“National Airspace System”] in support of domestic operations, exercises, training, and testing. The FAA's goal is to ensure all UAS operations are

⁵ Jim Waymer, *Drones seek storms' secrets: New unmanned drones promise better weather insight*, FLORIDA TODAY, June 29, 2009, available at <http://uas.noaa.gov/news/drone-seeks-storm-secrets.html>.

⁶ Peter W. Merlin, *Ikhana: Unmanned Aircraft System Western States Fire Mission*, National Aeronautics and Space Administration History Office, 2009, available at <http://history.nasa.gov/monograph44.pdf>.

⁷ Charles Rabin, *New police drones keep on top of the case*, MIAMI HERALD, Feb. 1, 2011, available at <http://www.miamiherald.com/2011/02/01/2045956/new-police-drones-keep-on-top.html#storylink=misearch>.

⁸ Peter Finn, *Domestic use of aerial drones by law enforcement likely to prompt privacy debate*, WASHINGTON POST, Jan. 23, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/22/AR2011012204111.html>

⁹ *Id.*

¹⁰ Electronic Privacy Information Center, *Unmanned Planes Offer New Opportunities for Clandestine Government Tracking*, EPIC.ORG, Aug. 2005, available at <http://epic.org/privacy/surveillance/spotlight/0805/>.

¹¹ Federal Aviation Administration, *Fact Sheet – Unmanned Aircraft Systems (UAS)*, FAA.GOV, Dec. 1, 2010, available at http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=6287.

¹² *Id.*

¹³ Federal Aviation Administration, *Order 1110.150 - Small Unmanned Aircraft System Aviation Rulemaking Committee*, Apr. 10, 2008, available at [http://rgl.faa.gov/regulatory_and_guidance_library/rgOrders.nsf/0/8616600949dcc4b78625742c004c52b0/\\$FILE/1110.150.pdf](http://rgl.faa.gov/regulatory_and_guidance_library/rgOrders.nsf/0/8616600949dcc4b78625742c004c52b0/$FILE/1110.150.pdf).

¹⁴ Federal Aviation Administration, *Fact Sheet – Unmanned Aircraft Systems (UAS)*, FAA.GOV, Dec. 1, 2010, available at http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=6287.

¹⁵ National Defense Authorization Act for Fiscal Year 2010 § 935, PL 111-84.

conducted safely, present no threat to the general public, and do not harm to other users of the NAS.”¹⁶ The report, which was a cooperative effort of DoD, FAA, DHS, and NASA recommended allowing increased domestic operations for military UASs and including DoD, DHS, and NASA systems in the FAA’s pending rulemaking on small UAS aviation.¹⁷

Presently, before a UAS can operate within the National Airspace System, the FAA must grant a waiver that authorizes the specific testing or operation. As of December 1, 2010, the FAA reports that there were 273 active Certificates of Waiver or Authorization (COAs) allowing UASs to operate in the continental United States.¹⁸ In 2010, 95 users received COAs for 72 different aircraft types.¹⁹ Only public agencies may receive COAs.²⁰ According to *The Washington Post*, approximately 35 percent of these COAs are held by the Defense Department, 11 percent by NASA, and 5 percent by the DHS.²¹ The DoD currently has 146 UAS units based at 63 continental United States locations. The DoD estimates that it will have 197 units at 105 locations - a 35% increase in units and 67% increase in number of locations.²² DHS is also expanding its use of UAS along the borders and in the Gulf of Mexico.²³

Relation to EPIC’s Ongoing Interests

EPIC has a long history of monitoring government surveillance programs. The online “Spotlight on Surveillance” series highlighted UASs in August 2005.²⁴ In that work, EPIC highlighted the particularly “troubling” nature of the “redirection of military technology toward the civilian population.”²⁵ EPIC staff has also provided expert insight to the media about the use of drones by police forces.²⁶ More broadly, EPIC’s mission

¹⁶ UAS ExCom NAS Access Working Group, *National Airspace System Access Plan for Federal Public Unmanned Aircraft Systems*, Oct. 2010, iii, available at <http://www.acq.osd.mil/psa/docs/report-to-congress-ana-for-uas.pdf>.

¹⁷ UAS ExCom NAS Access Working Group, *National Airspace System Access Plan for Federal Public Unmanned Aircraft Systems*, Oct. 2010, 35, available at <http://www.acq.osd.mil/psa/docs/report-to-congress-ana-for-uas.pdf>.

¹⁸ Federal Aviation Administration, *Fact Sheet – Unmanned Aircraft Systems (UAS)*, FAA.GOV, Dec. 1, 2010, available at http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=6287.

¹⁹ *Id.*

²⁰ Federal Aviation Administration, *COA: Frequently Asked Questions*, FAA.GOV, Jan. 1, 2009, available at http://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/aaim/organizations/uas/coal/faq/.

²¹ Finn, *supra* note 8.

²² UAS ExCom NAS Access Working Group, *National Airspace System Access Plan for Federal Public Unmanned Aircraft Systems*, Oct. 2010, 2, available at <http://www.acq.osd.mil/psa/docs/report-to-congress-ana-for-uas.pdf>.

²³ *Id.* at 3.

²⁴ Electronic Privacy Information Center, *Unmanned Planes Offer New Opportunities for Clandestine Government Tracking*, EPIC.ORG, Aug. 2005, available at <http://epic.org/privacy/surveillance/spotlight/0805/>.

²⁵ *Id.*

²⁶ See Electronic Privacy Information Center, *EPIC in the News*, EPIC.ORG, Aug. 9, 2007, available at <http://epic.org/news/epic-in-news.html/>.

has focused on the surveillance technologies deployed by the government, from wiretapping,²⁷ to national ID cards²⁸ and body scanners.²⁹

Documents Requested

EPIC requests copies of the following agency records:

1. All applications for Certificates of Waiver or Authorization (COA) to operate Unmanned Aircraft Systems within the National Airspace System—including applications approved, denied, deferred, and pending—made by the Department of Defense, Department of Homeland Security, Department of Justice, or State and Local law enforcement agencies since 2005;
2. All associated applications for U.S. airworthiness certificates (FAA Form 8130-6); and
3. All associated special airworthiness certificates (FAA Form 8130-7).

Request for Expedited Processing

EPIC's FOIA Request meets the second factor for expedited processing listed in 6 C.F.R. § 5.5(d), which states that requests and appeals will be taken out of order and given expedited treatment whenever it is determined that they involve:

- ii. An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.

a. EPIC's Request Involves An Urgency to Inform the Public About an Actual or Alleged Federal Government Activity and is Made by an Organization Primarily Engaged in Disseminating Information

EPIC's request involves an urgency to inform the public about an actual or alleged federal government activity and is made by an organization primarily engaged in disseminating information. A District of Columbia Circuit Court has articulated a test to determine whether requestors have demonstrated "urgency to inform," and hence "compelling need;" courts must consider at least three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity.³⁰

²⁷ Electronic Privacy Information Center, *Domestic Surveillance*, EPIC.ORG, available at <http://epic.org/features/surveillance.html>.

²⁸ Electronic Privacy Information Center, *National ID and the REAL ID Act*, EPIC.ORG, available at http://epic.org/privacy/id_cards/.

²⁹ Electronic Privacy Information Center, *Whole Body Imaging Technology and Body Scanners*, EPIC.ORG, available at <http://epic.org/privacy/airtravel/backscatter/>.

³⁰ *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001).

EPIC's request satisfies the first prong of this test because it concerns a matter of current exigency to the American public. As discussed above, the use of UASs has become increasingly prevalent in recent years. Reporting from national news media, including recent front-page stories in *The New York Times*³¹ and *The Washington Post*,³² has highlighted the growing public awareness of, and interest in, these programs. Recent revelations that state and local law enforcement agencies have been granted permission to test and operate UASs are of particular concern as this has the potential to affect millions of Americans.

EPIC's request also satisfies the second prong of this test: the consequence of delaying a response would compromise a significant recognized interest. A failure by the agency to disclose records detailing its grants of authorization to operate domestic UASs may deny the American public the opportunity to make an informed decision about this technology. The FAA's Small Unmanned Aircraft System Aviation Rulemaking Committee has presented its proposed rules to the FAA, which intends to publish a rule for comment this year.³³ Given the public interest in the expanded domestic-use of UASs and the broad legal and technological hurdles, it is critical that the public have the maximum possible time to review existing applications for, and grants of, authorization to operate UASs. Courts have been persuaded to require expedited processing when the request is subject to ongoing or forthcoming public policy debates.³⁴

EPIC's request also clearly fulfills the third prong of this test: it concerns federal government activity. Since the Air Commerce Act of 1926 the federal government has had exclusive authority to regulate domestic airspace.³⁵ The Federal Aviation Act of 1958 created the Federal Aviation Agency and expanded the federal government's role in aviation safety and administration.³⁶ Congress has completely pre-empted the field of aircraft registration.³⁷ Under existing authorities, the FAA is solely responsible for approving the testing and operation of all aircraft using the NAS, making the FAA's action on waiver applications the critical step in testing all aircraft in the United States.

This request warrants expedited processing because it is made by "a person primarily engaged in disseminating information . . ." and it pertains to a matter about which there is an "urgency to inform the public about an actual or alleged federal government activity."³⁸ EPIC is "primarily engaged in disseminating information."³⁹

³¹ Bumiller and Shanker, *supra* note 1.

³² Finn, *supra* note 8.

³³ Federal Aviation Administration, *Fact Sheet – Unmanned Aircraft Systems (UAS)*, FAA.GOV, Dec. 1, 2010, available at http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=6287.

³⁴ See *Gerstein v. CIA*, 2006 U.S. Dist. LEXIS 89883 (N.D. Cal. Nov 29, 2006) (holding that expedited processing is required when Congress is considering legislation on an issue at the time of the request); See also *Natural Res. Def. Council v. DOE*, 191 F. Supp. 2d 41, 43-44 (D.D.C. 2002) (holding that expedited processing is required where Congress has expressed interest in a particular topic).

³⁵ Federal Aviation Administration, *A Brief History of the FAA*, FAA.GOV, Feb. 1, 2010, available at http://www.faa.gov/about/history/brief_history/.

³⁶ *Id.*

³⁷ *Pac. Fin. Corp. v. Cent. Bank & Trust Co.*, 296 F.2d 68, 71 (5th Cir. 1961).

³⁸ 5 U.S.C. § 552(a)(6)(E)(v)(II).

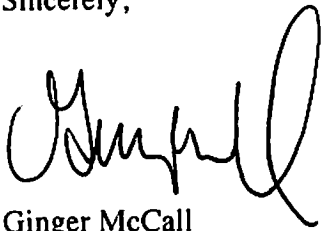
Request for "News Media" Status

EPIC is a non-profit, educational organization that routinely and systematically disseminates information to the public. EPIC is a representative of the news media.⁴⁰

Based on our status as a "news media" requester, we are entitled to receive the requested records with only duplication fees assessed. Further, because disclosure of this information will "contribute significantly to public understanding of the operations or activities of the government," as described above, any duplication fees should be waived.

Thank you for your consideration of this request. As provided in 5 U.S.C. § 552(a)(6)(E)(ii)(I), I will anticipate your determination on our request for expedited processing within ten (10) calendar days.

Sincerely,



Ginger McCall
EPIC Open Government Counsel



Alex Stout
EPIC Summer Law Clerk

³⁹ *Amer. Civil Liberties Union v. Dept. of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

⁴⁰ *Epic v. Dep't of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).