

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER )  
1718 Connecticut Avenue, N.W. )  
Suite 200 )  
Washington, DC 20009, )  
 )  
Plaintiff, )  
 )  
v. ) Civil Action  
 )  
DEPARTMENT OF DEFENSE )  
The Pentagon )  
Washington, DC 20301, )  
 )  
Defendant. )  
 )

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COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552; and the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. Plaintiff seeks injunctive and declaratory relief to invalidate a determination by defendant Department of Defense ("DoD") that plaintiff is not entitled to expedited processing of its requests to defendant DoD under the FOIA when the subjects of such requests constitute "breaking news."

Jurisdiction and Venue

2. This court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 552(a)(6)(E)(iii). This court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. §§ 2201(a) & 2202. Venue lies in this

district under 5 U.S.C. § 552(a)(4)(B).

### The Parties

3. Plaintiff Electronic Privacy Information Center ("EPIC") is a research organization incorporated as a not-for-profit corporation in Washington, DC. EPIC's activities include the review of federal government activities and policies to determine their possible impacts on civil liberties and privacy interests. Among its other activities, EPIC publishes books, reports and a bi-weekly electronic newsletter. EPIC also maintains a heavily-visited site on the World Wide Web containing extensive information on privacy issues, including information EPIC has obtained from federal agencies under the FOIA.

4. Defendant Department of Defense ("DoD") is a department of the Executive Branch of the government of the United States. DoD is an "agency" within the meaning of 5 U.S.C. § 552(f).

### Plaintiff's FOIA Request and Correspondence with Defendant DoD

5. By letter sent to defendant DoD by messenger on November 21, 2002, plaintiff requested copies of records maintained by DoD's Defense Advanced Research Projects Agency ("DARPA"). Specifically, plaintiff requested copies of all agency records related to DARPA's Information Awareness Office program known as Total Information Awareness ("TIA") project that address the following subjects:

- a) Any existing legal, statutory and/or regulatory frameworks concerning governmental access to and use of transactional and other records about individuals. Plaintiff noted that its request includes, but is not limited to, any assessments of the legal authority (or lack thereof) for activities proposed for the TIA project; and
- b) Potential privacy and/or civil liberties implications of the activities proposed for the TIA project.

6. Plaintiff requested that processing of its request be expedited and asserted that the request "clearly meets the criteria for expedited processing under applicable Defense Department regulations (32 CFR 286; DoD 5400.7-R), as there exists a 'compelling need' because 'the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity.'"

7. Plaintiff noted that DoD's regulations provide that "[u]rgently needed means that the information has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of general public interest." 32 CFR 286.4(d)(3)(ii)(A). Plaintiff asserted that:

The government activity at issue here -- creating a "total information awareness" program -- implicates serious privacy and security issues that have received considerable news media attention in recent days. A search in the Lexis-Nexis news database for articles on "total information awareness" for the past week returns 74 results. Indeed, the TIA project has been

a "breaking news story" at least since the publication of a New York Times article on November 9. Recent editorials in newspapers, including the New York Times and the Washington Post, have discussed the TIA project and noted the need for public information concerning the initiative. There is clearly an urgent public interest in understanding and discussing how the proposed system will affect personal privacy and civil liberties.

8. Plaintiff further stated that EPIC is "primarily engaged in disseminating information," and noted that DoD's regulations provide that "[r]epresentatives of the news media . . . would normally qualify as individuals primarily engaged in disseminating information." 32 CFR 286.4(d)(3)(ii).

9. In support of its request for both expedited processing and assessment of processing fees as a "representative of the news media," plaintiff stated:

EPIC is a non-profit, educational organization that routinely and systematically disseminates information to the public. This is accomplished through several means. First, EPIC maintains a heavily visited Web site ([www.epic.org](http://www.epic.org)) that highlights the "latest news" concerning privacy and civil liberties issues. The site also features scanned images of documents EPIC obtains under the FOIA. Second, EPIC publishes a bi-weekly electronic newsletter that is distributed to over 15,000 readers, many of whom report on technology issues for major news outlets. The newsletter reports on relevant policy developments of a timely nature (hence the bi-weekly publication schedule). It has been published continuously since 1996, and an archive of past issues is available at our Web site. Finally, EPIC publishes and distributes printed books that address a broad range of privacy, civil liberties and technology issues. A list of EPIC publications is available at our Web site.

For the foregoing reasons, we believe that EPIC clearly fits the definition of "representative of the news media" contained in the FOIA and the DoD regulations. Based on our status as a "news media" requester, we are also entitled to receive the

requested records with only duplication fees assessed under 32 CFR 286.28(b)(5)(e).

10. By letter to plaintiff dated December 2, 2002, defendant DoD acknowledged receipt of plaintiff's FOIA request on November 25, 2002. Defendant DoD further acknowledged that "the subject of [plaintiff's] request is 'breaking news,'" but asserted that "this is not enough to satisfy the requirements for expedited processing."

11. Defendant DoD stated that "[e]ven though you mention in your request that EPIC has the capability to disseminate information, you do not prove that EPIC's primary activity is disseminating information. To the contrary, you mention that 'EPIC is a non-profit, educational organization that routinely and systematically disseminates information to the public.' Accordingly, your request for expedited processing does not meet the requirements for compelling need under the FOIA ...."

12. Defendant DoD further stated that "[t]his issue is related to your assertion that EPIC qualifies, for the purposes of assessing fees, as a 'member of the news media.' This is currently a matter of litigation between the DoD and EPIC. We have determined that EPIC is not a member of the news media ...."

13. Defendant DoD advised plaintiff of its right to appeal DoD's denial of its request for expedited processing.

14. By letter sent by facsimile to defendant DoD on December 6, 2002, counsel for plaintiff appealed the denial of

plaintiff's request for expedited processing of its FOIA request. Specifically, plaintiff's counsel stated:

You note in your letter that EPIC's entitlement to expedited processing is related to EPIC's assertion that it qualifies as a "representative of the news media" under the FOIA and DoD regulations. You further note that EPIC's entitlement to news media status "is currently a matter of litigation between DoD and EPIC."

In support of this appeal, I incorporate by reference 1) the administrative record concerning EPIC's request for treatment as a "representative of the news media;" and 2) the court record of the pending litigation between DoD and EPIC. I believe that material, in addition to the information submitted in support of EPIC's request for expedited processing, clearly establishes that EPIC is primarily involved in disseminating information within the meaning of applicable DoD regulations.

15. Plaintiff's counsel further stated, "[a]s DoD regulations provide, I will anticipate your determination of this appeal within ten (10) calendar days."

16. To date, defendant DoD has failed to respond to plaintiff's appeal, notwithstanding DoD's regulatory requirement to respond to such an appeal within ten calendar days.

17. Plaintiff has exhausted all applicable administrative remedies.

#### Plaintiff's Entitlement to Expedited Processing

18. Plaintiff qualifies for expedited processing of its requests under the FOIA when the subjects of such requests constitute "breaking news."

19. Defendant DoD's denial of plaintiff's request for expedited processing violates the FOIA and applicable DoD

regulations promulgated thereunder.

20. Defendant DoD's refusal to expedite the processing of plaintiff's FOIA request constitutes a wrongful withholding of the requested agency records.

21. Defendant DoD has adopted a policy and practice of interpreting its applicable regulations so as to deny plaintiff the right to expedited processing of its requests under the FOIA when the subjects of such requests constitute "breaking news."

22. Plaintiff requests information from defendant DoD on a continuing basis. Defendant DoD's policy with respect to plaintiff's entitlement to expedited processing constitutes a continuing and unlawful barrier to plaintiff's access rights under the FOIA.

Requested Relief

WHEREFORE, plaintiff prays that this Court:

A. Order defendant DoD to expedite the processing of plaintiff's FOIA request submitted to defendant DoD on November 21, 2002;

B. Issue a declaration that plaintiff is entitled to expedited processing of its requests to defendant DoD under the FOIA when the subjects of such requests constitute "breaking news";

D. Provide for expeditious proceedings in this action;

C. Retain jurisdiction of this action to ensure that the processing of plaintiff's FOIA request is expedited;

E. Award plaintiff its costs and reasonable attorneys fees incurred in this action; and

F. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

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