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December 19, 2024

Deborah Fleischaker  
Acting Chief Privacy Officer/Chief FOIA Officer  
The Privacy Office, Attn: FOIA Appeals  
U.S. Department of Homeland Security  
2707 Martin Luther King Jr. Ave SE  
STOP-0655  
Washington, D.C. 20528-0655

Re: CISA Case Number 2024-NPFO-00295

Dear Ms. Fleischaker,

This letter constitutes an appeal under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a)(6)(A), and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Department of Homeland Security (“DHS”).

This appeal arises from EPIC’s March 12, 2024, request (“EPIC’s FOIA Request”) (Appendix A) to DHS, seeking an unclassified report authored by independent experts commissioned by the Cybersecurity and Infrastructure Security Agency (CISA) regarding the threats posed by surveillance technology exploitation of flaws in Diameter and Signaling System 7 (SS7), as well as any appendices or other attachments, designated CISA Case Number 2024-NPFO-00295. This letter appeals DHS’s withholding of responsive records under exemption (b)(5) of the FOIA. This appeal arises out of the agency’s letter to EPIC dated Nov. 19, 2024 (“DHS’s Nov. 19th Letter”) (Appendix B) enclosing a final response.

### Procedural Background

On March 12, 2024, EPIC submitted EPIC’s FOIA Request via email. In the Request, EPIC sought an unclassified report commissioned by CISA, as well as any appendices or other attachments. DHS acknowledged receipt via email on March 19, 2024.

EPIC followed up via email on April 11, 2024; later that same day the DHS FOIA office indicated that the request was tasked to a program office but that the request was still in processing. EPIC followed up via email again on May 21, 2024; on May 22, 2024, the DHS FOIA office indicated that “[t]he status of this request is the same as the previous email, it has been tasked to a program office for record search.” EPIC followed up via email again on June 21, 2024 and received no reply. EPIC followed up via email again on November 13, 2024 and received no reply. EPIC followed up via email again on November 15, 2024; later that same day the DHS FOIA office

indicated that the located records were under final review and that EPIC should receive a final response the following week. On November 19, 2024, DHS responded to EPIC with DHS's Nov. 19<sup>th</sup> Letter, which in relevant part stated that: "I have determined that the 111 pages are withheld in their entirety pursuant to Title 5 U.S.C. § 552 Exemption Code: (b)(5), FOIA Exemption 5... After carefully reviewing the responsive documents, I determined that the responsive documents qualify for protection under the Deliberative Process Privilege....The release of this internal information would discourage the expression of candid opinions and inhibit the free and frank exchange of information among agency personnel."

EPIC challenges DHS's withholding under exemption (b)(5) of the FOIA on several grounds.

*EPIC challenges DHS's withholding under Exemption (b)(5)*

The FOIA specifies that certain categories of information may be exempt from disclosure, "[b]ut these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act" *Oglesby v. United States Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Under the FOIA, the "agency bears the burden of establishing that an exemption applies." *Id.*

DHS claimed the (b)(5) exemption for the withheld records, and noted that the deliberative process privilege protects the integrity of decision-making within the agency and that in this particular instance the release of internal information would discourage expression of candid opinions and inhibit the free and frank exchange of information among agency personnel. However, it did not explain how an unclassified report commissioned by outside experts would implicate the opinions of agency personnel.

Similarly, DHS merely asserted conclusory terms about every page of the withheld report rather than explaining how they were predecisional, part of a deliberative process, or why there was no reasonably segregable non-exempt factual material. *See, e.g., Natl. Sec. Counselors v. C.I.A.*, 960 F. Supp. 2d 101, 192 (D.D.C. 2013) (citing to *Muttitt v. Dep't of State*, 926 F.Supp.2d 284, 306–07 (D.D.C.2013)) (" 'buzz-word adjectives' are no substitute for 'a meaningful description of the factual context surrounding a document' "). To be predecisional, the agency must pinpoint the decision or policy to which the document contributed. *See, e.g., Sen. of the Com. of Puerto Rico on Behalf of Jud. Comm. v. U.S. Dept. of J.*, 823 F.2d 574, 585 (D.C. Cir. 1987) (citing to *Paisley v. CIA*, 712 F.2d 686, 698 (D.C.Cir.1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C.Cir.1984)); *Morley v. C.I.A.*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (same). To be considered part of a deliberative process, the agency must not only describe the process involved and the role played by the document in the course of that process (including its function and significance), but also the agency must describe the nature of the decisionmaking authority vested in the office or person issuing the disputed documents and the positions of the author and recipient in the chain of command. *See, e.g., Natl. Sec. Counselors*, 960 F. Supp. 2d at 188 (citing to *Elec. Frontier Found. v. U.S. Dep't of Justice*, 826 F.Supp.2d 157, 168 (D.D.C.2011)). Factual material that does not reveal deliberative process is expressly not protected by Exemption 5. *See, e.g., Paisley*, 712 F.2d at 698. And agencies should have an easier time segregating non-exempt factual material in the context of the deliberative process privilege than in the case of the attorney "work product" privilege. *See, e.g., Mervin v. F.T.C.*, 591 F.2d 821, 827 (D.C. Cir. 1978).

Moreover, DHS did not explain how the entirety of every individual page of the 111-page report contained or even implicated opinions, conclusions, or recommendations regarding inter-agency or intra-agency memoranda or letters. Even if this were a report written by agency personnel, which it is not, DHS would not have met its burden to justify the withholding of every word of the report with such a superficial and blanket assertion.

EPIC also challenges the manner in which Exemption 5 was applied. 111 responsive pages were withheld in full from EPIC. However, the FOIA “makes clear that the fact that a responsive document fits within an applicable exemption does not automatically entitle the keeper of such material to withhold the *entire* record.” *Charles v. Office of the Armed Forces Med. Exam’r*, 979 F. Supp. 2d 35, 42 (D.D.C. 2013). Thus even when an agency has properly invoked a FOIA exemption, it must still disclose any “reasonably segregable portion” of the record requested. *Stolt-Nielsen Transp. Group Ltd v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008); *Oglesby v. United States Dep’t of the Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). “The ‘segregability’ requirement applies to all documents and all exemptions in the FOIA.” *Ctr. for Auto Safety v. EPA*, 731 F.2d 16, 21 (D.C. Cir. 1984). The burden is on the agency to “provide a detailed justification for its non-segregability.” *Johnson v. EOUSA*, 310 F.3d 771, 776 (D.C. Cir. 2002) (internal quotation marks omitted). This includes “a statement of [the government’s] reasons, and a “descri[ption of] what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document.” *Mead Data Cent., Inc. v. Dep’t of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977). Again, without an explanation of DHS’s application of the (b)(5) exemption, the agency has failed to carry its burden of justifying the withholding.

For the foregoing reasons, EPIC’s appeal of the agency’s withholding under exemption (b)(5) should be granted.

### Conclusion

Thank you for your consideration of this appeal. As provided in 5 U.S.C. § 552(a)(6)(A)(ii), I will anticipate your determination on our request within twenty working days.

For questions regarding this request we can be contacted at [FOIA@epic.org](mailto:FOIA@epic.org).

Respectfully Submitted,

/s Jeramie Scott

Jeramie Scott

Senior Counsel

Director, Project on Surveillance Oversight

/s Chris Frascella

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EPIC Counsel

Enclosures