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VIA U.S. MAIL (CERTIFIED DELIVERY)

Freedom of Information Act Appeal

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RE: Freedom of Information Act Appeal

This letter constitutes an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted to the Department of Homeland Security ("DHS") by the Electronic Privacy Information Center ("EPIC").

On June 23, 2011, EPIC requested, *via* facsimile, DHS documents regarding the government's identification and surveillance of individuals who have demonstrated support for or interest in WikiLeaks, as well as any documents relating to records obtained from Internet and financial services companies regarding these individuals. Specifically, EPIC requested:

1. All records regarding any individuals targeted for surveillance for support for or interest in WikiLeaks;
2. All records regarding lists of names of individuals who have demonstrated support for or interest in WikiLeaks;
3. All records of any agency communications with Internet and social media companies including, but not limited to Facebook and Google, regarding lists of individuals who have demonstrated, through advocacy or other means, support for or interest in WikiLeaks; and

4. All records of any agency communications with financial services companies including, but not limited to Visa, MasterCard, and PayPal, regarding lists of individuals who have demonstrated, through monetary donations or other means, support or interest in WikiLeaks.

See Appendix 1 ("EPIC's FOIA Request").

### *Factual Background*

On December 22, 2010, EPIC submitted FOIA requests to the Department of Justice ("DOJ"), the Secret Service, Immigration and Customs Enforcement ("ICE"), and the Financial Crimes Enforcement Network ("FinCEN"). These requests sought communications or agreements between the government and certain corporations regarding donations to WikiLeaks and personally identifiable information for individuals who accessed or attempted to access the WikiLeaks website. The request to the DOJ was referred to the Antitrust Division. As of June 9, 2011, none of the agencies have found or disclosed the records EPIC requested.

On November 28, 2010, WikiLeaks and cooperating news agencies published State Department cables allegedly provided by Pvt. Bradley Manning.<sup>1</sup> On November 29, Attorney General Eric Holder stated that DOJ was conducting a criminal investigation regarding WikiLeaks.<sup>2</sup> The government filed a sealed request pursuant to 18 U.S.C. § 2703(d) with federal magistrate judge Theresa C. Buchanan in the Eastern District of Virginia in Alexandria.<sup>3</sup> On December 14, 2010, Judge Buchanan issued an order ("Twitter Order") pursuant to § 2703(d) compelling Twitter to disclose customer account information, including Internet Protocol addresses and addressing information associated with communications, for Julian Assange, Bradley Manning, Rop Gonggrijp, and Birgitta Jónsdóttir.<sup>4</sup>

The Twitter Order prohibited Twitter from disclosing the existence of the application or order to anyone.<sup>5</sup> After contesting the seal, Twitter convinced the federal district court to unseal the order and allow Twitter to notify its users of the government's request for their information.<sup>6</sup> On January 26, 2011, the Electronic Frontier Foundation and the American Civil Liberties Union filed a motion in the Eastern District of Virginia to overturn the Twitter Order, on behalf of Rop Gonggrijp, Birgitta Jónsdóttir, and Jacob

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<sup>1</sup> Robert Booth, *WikiLeaks Cables: Bradley Manning Faces 52 Years in Jail*, The Guardian, Nov. 30, 2010, <http://www.guardian.co.uk/world/2010/nov/30/wikileaks-cables-bradley-manning>.

<sup>2</sup> Mark Memmott, *WikiLeaks Update: Justice Investigating*, National Public Radio, Nov. 29, 2010, <http://www.npr.org/blogs/thetwo-way/2010/11/29/131669228/wikileaks-update-justice-investigating>.

<sup>3</sup> See *In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d)*, Misc. No. 10GJ3793 (E.D. Va. Dec. 14, 2010).

<sup>4</sup> *Id.*

<sup>5</sup> See *id.*

<sup>6</sup> Order to Unseal the Order Pursuant to 18 U.S.C. § 2703(D), Misc. No. 10GJ3793 (E.D. Va. Jan. 5, 2010).

Appelbaum (the only U.S. citizen among the plaintiffs).<sup>7</sup> This litigation remains pending.<sup>8</sup>

As evidence of surveillance of WikiLeaks supporters, Jacob Appelbaum, U.S. WikiLeaks spokesperson, and David House, close friend of Bradley Manning, have been stopped at the border by Customs and Border Patrol (“CBP”) agents when entering the United States and specifically questioned about their involvement with WikiLeaks.<sup>9</sup> Appelbaum has been questioned at least twice at the border, and his electronic devices have been confiscated. The first time was on July 29, 2010 upon reentering the United States from the Netherlands.<sup>10</sup> When he was questioned a second time on January 10, 2011 upon return from Iceland, he traveled with no electronic equipment, causing the customs agents to be “visibly unhappy.”<sup>11</sup> The CBP agents also indicated they had viewed his Twitter feed ahead of his flight to obtain his flight details.<sup>12</sup> On July 31, 2010, plainclothes FBI agents questioned Appelbaum after he gave a speech at Defcon.<sup>13</sup> All of the questioning by FBI and DHS focused on his personal views on and work with WikiLeaks.<sup>14</sup>

*The Washington Post* reported that DHS agents at Chicago O'Hare International Airport detained David House and seized his laptop on November 3, 2010.<sup>15</sup> David House created the Bradley Manning Support Network, a defense fund for Bradley Manning.<sup>16</sup> An agent from the FBI Joint Terrorism Task Force questioned David House about his relationship with Manning and WikiLeaks.<sup>17</sup> In an interview with *The Washington Post*, David House claimed he had been stopped and questioned at the border seven times since September and he believes his name is on a government watchlist.<sup>18</sup>

There has been widespread suspicion that other online services such as Facebook and Google were served with similar court orders requesting information on WikiLeaks

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<sup>7</sup> Motion to Vacate Dec. 14, 2010 Order, Misc. No. GJ3793 (E.D. Va. Jan. 26, 2010).

<sup>8</sup> See *Government Demands for Twitter Records of Birgitta Jonsdottir*, Electronic Frontier Foundation, June 2, 2011, <https://www.eff.org/cases/government-demands-twitter-records>.

<sup>9</sup> Glenn Greenwald, *Government Harrassing and Intimidating Bradley Manning Supporters*, Salon, Nov. 9, 2010, [http://www.salon.com/news/opinion/glenn\\_greenwald/2010/11/09/manning](http://www.salon.com/news/opinion/glenn_greenwald/2010/11/09/manning).

<sup>10</sup> Elinor Mills, *Researcher Detained at U.S. Border, Questioned about WikiLeaks*, CNET, July 31, 2010, [http://news.cnet.com/8301-27080\\_3-20012253-245.html](http://news.cnet.com/8301-27080_3-20012253-245.html)

<sup>11</sup> Xení Jardin, *Wikileaks Volunteer Detained and Searched (again) by US Agents*, Boing Boing, Jan. 12, 2011, <http://www.boingboing.net/2011/01/12/wikileaks-volunteer-1.html>.

<sup>12</sup> *Id.*

<sup>13</sup> Elinor Mills, *Researcher Detained at U.S. Border, Questioned about WikiLeaks*, CNET, July 31, 2010, [http://news.cnet.com/8301-27080\\_3-20012253-245.html](http://news.cnet.com/8301-27080_3-20012253-245.html)

<sup>14</sup> *Id.*

<sup>15</sup> Ellen Nakashima, *Activist Who Supports Soldier in WikiLeaks Case Sues U.S. over Seizure of Laptop*, The Washington Post, May 13, 2011, [http://www.washingtonpost.com/national/activist-who-supports-soldier-in-wikileaks-case-sues-us-over-seizure-of-laptop/2011/05/11/AFxxzf1G\\_story.html](http://www.washingtonpost.com/national/activist-who-supports-soldier-in-wikileaks-case-sues-us-over-seizure-of-laptop/2011/05/11/AFxxzf1G_story.html).

<sup>16</sup> Glenn Greenwald, *Government Harrassing and Intimidating Bradley Manning Supporters*, Salon, Nov. 9, 2010, [http://www.salon.com/news/opinion/glenn\\_greenwald/2010/11/09/manning](http://www.salon.com/news/opinion/glenn_greenwald/2010/11/09/manning).

<sup>17</sup> *Id.*

<sup>18</sup> Nakashima, *supra* note 15.

supporters, though neither company has confirmed the existence of such an order.<sup>19</sup> The broad nature of the Twitter Order and the silence of other companies that were likely served with a similar sealed order suggest that DOJ, FBI, DHS, and CBP may be conducting surveillance of WikiLeaks supporters.

### *Procedural Background*

On June 23, 2011, EPIC faxed EPIC's FOIA Request to the DHS, and the sending of the fax generated a confirmation sheet. *See* Appendix 2. DHS responded on July 5, 2011<sup>20</sup> by acknowledging receipt, denying the request for expedited processing, and invoking 5 U.S.C. § 552(a)(6)(B) to extend its deadline by ten working days. *See* Appendix 3.

Since August 4, 2011, DHS has failed to respond to EPIC's FOIA Request. *See* 5 U.S.C. § 552(a)(6).

### *EPIC Appeals the DHS's Failure to Disclose Records*

EPIC hereby appeals DHS's failure to make a timely determination regarding EPIC's FOIA Request. An agency must make a determination regarding a FOIA request within twenty working days. 5 U.S.C. § 552(a)(6); *see also Wash. Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 74 (D.D.C. 2006) (citing *Payne Enterprises v. U.S.*, 837 F.2d 486, 494 (D.C. Cir. 1998)) (stating "FOIA was created to foster public awareness, and failure to process FOIA requests in a timely fashion is 'tantamount to denial.'").

The DHS received EPIC's FOIA Request on June 23, 2011. *See* Appendix 2. More than thirty working days have passed since June 23, 2011, when the DHS received EPIC's FOIA Request. The DHS has failed to meet its obligation to make a determination regarding EPIC's FOIA request within twenty working days. 5 U.S.C. § 552(a)(6).

### *EPIC Renews Its Request for "News Media" Fee Status*

EPIC renews its request for "news media" fee 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. *EPIC v. Dep't of Defense*, 241 F. Supp. 2d. 5 (D.D.C. 2003).

EPIC's status as a "news media" requester entitles it to receive requested records with only duplication fees assessed. In addition, because disclosure of this information

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<sup>19</sup> Peter Beaumont, *WikiLeaks Demands Google and Facebook Unseal US Subpoenas*, The Guardian, Jan. 8, 2011, <http://www.guardian.co.uk/media/2011/jan/08/wikileaks-calls-google-facebook-us-subpoenas>.

<sup>20</sup> The letter is dated July 5, 2010; this is presumably a mistake, as the postmark states July 6, 2011, and the request was sent eleven months after the date on the DHS response.

will “contribute significantly to public understanding of the operations or activities of the government,” as described above, any duplication fees should be waived.

*Conclusion*

Thank you for your prompt response to this appeal. As the FOIA provides, I anticipate that you will produce responsive documents within 20 working days. If you have any questions, please feel free to contact Ginger McCall at (202) 483-1140 or [mccall@epic.org](mailto:mccall@epic.org).

Sincerely,

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Andrew Christy  
EPIC Clerk

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Alexandra Wood  
Law Clerk, EPIC

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Ginger McCall  
Open Government Counsel, EPIC