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VIA FAX 703.235.2052

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National Protection and Programs Directorate
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Re: Freedom of Information Act Appeal (DHS/OS/PRIV 11-1104)

Lizzy Gary:

This letter constitutes an appeal under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted to the National Protection and Programs Directorate (“NPPD”) at the Department of Homeland Security (“DHS”) by the Electronic Privacy Information Center (“EPIC”).

On July 26, 2011, EPIC requested, via facsimile, agency records regarding a joint program between DHS and the National Security Agency (“NSA”) to monitor Internet traffic flowing through certain Internet Service Providers (“ISPs”) to a select number of defense contractors. Specifically, EPIC requested the following:

1. All contracts and communications with Lockheed Martin, CSC, SAIC, Northrop Grumman, or any other defense contractors regarding the new NSA pilot program;
2. All contracts and communications with AT&T, Verizon, and CenturyLink or any other ISPs regarding the new NSA pilot program;
3. All analyses, legal memoranda, and related records regarding the new NSA pilot program; and
4. Any memoranda of understanding between NSA and DHS or any other government agencies or corporations regarding the new NSA pilot program.
5. Any Privacy Impact Assessment performed as part of the development of the new NSA pilot program.

Procedural Background

On July 26, 2011, EPIC transmitted a request for the preceding five categories of documents ("EPIC's FOIA Request"), as well as a request for news media fee status and a waiver of duplication fees.¹

In a letter dated August 3, 2011, the DHS responded to EPIC's FOIA Request.² The DHS stated that the Department was unable to locate documents in response to Category 5 of EPIC's FOIA Request and notified EPIC of the right to appeal that determination.

The DHS informed EPIC that the remainder of EPIC's FOIA Request, Categories 1-4, were being referred, by the agency, to "the FOIA Officer for NPPD, Lizzy Gary, for processing and direct response." In this letter, the agency made neither made a determination nor requested clarification on the four categories.

EPIC has received no further communication from the DHS in response to EPIC's FOIA Request. EPIC has received no communication from the NPPD in response to EPIC's FOIA Request. 110 working days have passed since the DHS received EPIC's FOIA Request, and 104 working days have passed since the DHS referred EPIC's FOIA Request to the NPPD.

EPIC Appeals the NPPD's Failure to Disclose Records Responsive to Categories 1-4

EPIC hereby appeals the NPPD's failure to make a timely determination regarding EPIC's FOIA Request. Typically, an agency must make a determination regarding a FOIA request within twenty working days.³ A "determination" must include at least a list of the documents to which the requester is being denied access and reasons for the withholding. "Denial of this information would in all likelihood be a violation of due process as well as effectively gutting the reasons for applying the exhaustion doctrine in FOIA cases."⁴ When a FOIA request is granted expedited treatment, the agency must make a determination within ten working days. Nearly four months have passed since the date that EPIC's FOIA Request was transmitted to the NSA.

An agency's "acknowledgement" of a request "cannot be construed as a 'determination' . . . if it does not grant or deny the right to appeal."⁵ Though the DHS has provided a substantive response in reply to Category 5, neither the DHS nor the NPPD have responded to Categories 1-

¹ Appendix 1.

² Appendix 2.

³ 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.'").

⁴ 452 F. Supp. 306, 317 n 7 (N.D. Texas. 1978) rev'd on other grounds, 613 F.2d 1314 (5th Cir. 1980); see also *Oglesby v. Dep't of Army*, 920 F.2d 57, 65 (D.C. Cir. 1990) (citing *Shermco Indus., Inc. v. Sec'y of Air Force*, 452 F. Supp. 306 (N.D. Tex. 1978)).

⁵ *Martinez v. FBI*, No. 82-1547 (D.D.C. Oct. 11, 1983) (citing *Shermco Indus., Inc., v. Sec'y of Air Force*, 452 F. Supp. 306 (N.D. Tex. 1978) and *Marschner v. Dep't of State*, 470 F. Supp. 196, 199 (D. Conn. 1979)).

4 of EPIC's FOIA Request, and therefore a determination has not been made as to the documents under these categories. The failure to make a determination violates the FOIA.

EPIC Renews Its Request for "News Media" Fee Status

At this time, EPIC reiterates and renews all arguments that it should be granted "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.⁶

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 will "contribute significantly to public understanding of the operations or activities of the government," any duplication fees should be waived.

Conclusion

Thank you for your prompt response to this appeal. I anticipate that you will produce responsive documents within 20 working days of this appeal. If you have any questions, please feel free to contact me at (202) 483-1140 x 120 or stepanovich@epic.org.

Sincerely,



Amie Stepanovich
EPIC National Security Counsel

/enclosures

⁶ *EPIC v. Dep't of Defense*, 241 F. Supp. 2d. 5 (D.D.C. 2003).

Appendix 1

EPIC's July 26, 2011 FOIA Request to the DHS

Appendix 2

DHS's August 3, 2011 Acknowledgement, Partial Denial, and Referral of EPIC's FOIA Request to the NPPD