



February 5, 2014

1718 Connecticut Ave NW
Suite 200
Washington DC 20009
USA
+1 202 483 1140 [tel]
+1 202 483 1248 [fax]
www.epic.org

VIA CERTIFIED MAIL

Alecia Bolling
Department of the Army
Freedom of Information Act Office Suite 144
7701 Telegraph Road, Room 150
Alexandria, VA 22315-3905
(703) 428-7128 (Telephone)
(703) 428-6522 (Fax)

Re: Freedom of Information Act Appeal, FOIA 14-0148

Dear Ms. Bolling,

This letter constitutes an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552(a)(6)(C), and is submitted on behalf of the Electronic Privacy Information Center ("EPIC").

EPIC seeks documents concerning the capabilities of the Joint Land Attack Cruise Missile Defense Elevated Netted Sensor System ("JLENS"). On November 1, 2013, EPIC submitted a FOIA request for certain records in possession of the agency. As of today, February 5, 2014, the agency has failed to make a determination regarding EPIC's request.

The agency has breached its obligations under the FOIA. 5 U.S.C. §552(a)(6)(A). We write now, prior to filing a lawsuit, to provide the agency the opportunity to comply with the requirements of the Act.

Procedural Background

On November 1, 2013, EPIC submitted a FOIA request for records concerning the JLENS program via fax. Specifically, EPIC requested copies of the following agency records:

1. All technical specifications, contracts, and statements of work for JLENS systems purchased or contracted for by the Department of the Army, including but not limited

to contracts with Ratheon;

2. All instructions, policies, and procedures concerning the use of JLENS to collect, store, transmit, reproduce, retain, degrade, or delete images and sounds;
3. All documents detailing the technical specifications of visual and auditory surveillance hardware on JLENS aerostats;
4. All contracts and statements of work entered into by the Department of the Army for JLENS hardware, software, or training that concerns the ability of JLENS to collect, obscure, degrade, store, transmit, reproduce, retain, or delete images and sounds.

On November 11, 2013, EPIC received a letter, dated November 5, 2013, from the agency confirming receipt of the request and stating that the request had been forwarded to the components most likely in possession of the records.

EPIC Appeals the Department of the Army's Lack of Responsiveness

The Department of the Army has not made a determination regarding EPIC's FOIA request within the statutorily required twenty-day period. At the latest, the statutory deadline passed on December 18, 2013. The statute provides, "The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. 5 U.S.C. § 552(a)(6)(A)(i). The FOIA requires an agency to make a determination on the request, to give reasons for the determination, and to notify the requester of his rights to appeal the determination. *Id.* The determination must include at least the following: 1) a statement of what the agency will release and not release; 2) a statement of the reasons for not releasing the withheld records; 3) a statement notifying the requester of his right to appeal; and 4) if a fee is charged for releasing documents, a statement of why the agency believes the waiver or reduction of the fee is not in the public interest and does not benefit the general public. *Citizens for Responsibility and Ethics in Washington v. Federal Election Com'n*, 711 F.3d 180, 182-83 (D.C. Cir. 2013). At the very least, for a response to be considered sufficient to trigger the administrative exhaustion requirement, "the agency must at least indicate within the relevant time period the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents." *Id.*

By contrast, the Department of the Army has only provided EPIC with an acknowledgment of EPIC's FOIA request. As of February 5, 2014, the Department of the Army has not made a determination on this request within the statutory deadline and has therefore failed to comply with the FOIA. "If the agency has not responded within the statutory time limits, then, under 5 U.S.C. § 552(a)(6)(C), the requester may bring suit." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 62 (D.C. Cir. 1990); *See also Spannaus v. United States Dep't of Justice*, 824 F.2d 52 (D.C. Cir. 1987) (holding that constructive exhaustion, i.e. the passage of the ten day period from the time the request was sent out in 5 U.S.C. § 552(a)(6)(A)(i), was sufficient to create a cause of action).

As stated above, the agency has breached its obligations under the FOIA. 5 U.S.C. §552(a)(6)(A). We write now to provide the agency the opportunity to comply with the requirements of the Act.

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 “representative of the news media” for fee waiver purposes. *EPIC v. Department of Defense*, 241 F. Supp. 2D 5 (D.D.C. 2003). 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,” and disclosure “is not primarily in the commercial interest of the requester,” 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 twenty (20) calendar days. 5 U.S.C. 552(a)(6).

Sincerely,



Julia Horwitz
EPIC Open Government Coordinator