

VIA FACSIMILE

July 31, 2018

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FOIA Division
U.S. Customs and Border Protection
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Washington, DC 20229
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Dear Ms. Burroughs:

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a)(3), and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Department of Homeland Security’s (“DHS”) Customs and Border Patrol (“CBP”).

EPIC seeks records about CBP’s Directive No. 3340-049A titled *Border Search of Electronic Devices* (“2018 Directive”), issued on January 4, 2018.¹

Documents Requested

- (1) All records, including but not limited to communications, memoranda, and policy, about the development and implementation of an auditing mechanism to review whether border searches of electronic devices are being conducted in conformity with this Directive;
- (2) All audits, including any statistical reports conducted under the auditing mechanisms used to review whether border searches of electronic devices are being conducted in conformity with this Directive;
- (3) A copy of CBP Information Systems Security Policies and Procedures Handbook, CIS HB 1400-0SC.

EPIC requests all responsive documents in electronic format to be emailed directly to FOIA@epic.org or alternatively sent via mail to EPIC’s office at 1718 Connecticut Ave NW, Suite 200, Washington, DC 20009. EPIC cannot receive documents through the FOIAonline portal system and requests that CBP not send any communications through that system.

Background

¹ U.S. Customs & Border Prot., 3340-049A, *CBP Directive: Border Search of Electronic Devices* (2018), <https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf> [hereinafter 2018 Directive].

Beginning in the Obama Administration, CBP adopted policies to search information contained in electronic devices at U.S. borders. The purpose of the CBP's Directive No. 3340-049 titled *Border Search of Electronic Devices Containing Information* ("2009 Directive"), issued on August 20, 2009, was to "provide guidance and standard operating procedures for searching, reviewing, retaining, and sharing information contained in computers, disks, drives, tapes, mobile phones and other communication devices."² The 2009 Directive states that device searches are "essential to enforcing the law at the U.S. border." Since the program's inception, the number of electronic devices searches has steadily increased. The CPB searched nearly 79% more electronic devices in 2017 than in 2016.³

On January 4, 2018, CBP issued a new policy on border searches of electronic devices to improve the "transparency, accountability and oversight of electronic device border searches performed by CBP."⁴ Specifically, the purpose, policy, term definitions, authority references, and procedures were updated.⁵ An additional "Review" section was added that explicitly stated that the directive will be "reviewed and updated, as necessary, at least every three years."⁶ The 2009 Directive required CBP to "develop and periodically administer an auditing mechanism to review whether border searches of electronic devices are being conducted in conformity with" the directive.⁷ The 2018 Directive includes the same auditing requirement.⁸

The 2018 Privacy Impact Assessment ("PIA") for CBP Border Searches of Electronic Devices also states that the DHS should "audit the actual use of PII to demonstrate compliance" under the Principle of Accountability and Auditing.⁹ However, no documentation explaining this procedure or the auditing mechanism as required by the 2018 Directive or the PIA has been made available to the public.

Request for Expedition

EPIC is entitled to expedited processing of this request. 5 U.S.C. § 552(a)(6)(E)(v)(II). Specifically, this request is entitled to expedited processing because (1) there is an "urgency to inform the public about an actual or alleged federal government activity," and (2) the request is

² U.S. Customs & Border Prot., 3340-049, *CBP Directive: Border Search of Electronic Devices Containing Information* (2009), https://www.dhs.gov/xlibrary/assets/cbp_directive_3340-049.pdf [hereinafter 2009 Directive].

³ *CBP Releases Statistics on Electronic Device Searches*, U.S. Customs & Border Prot. (Apr. 11, 2017), <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-statistics-electronic-device-searches-0>.

⁴ *CBP Releases Updated Border Search of Electronic Device Directive and FY17 Statistics*, U.S. Customs & Border Prot. (Jan. 5, 2018), <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-updated-border-search-electronic-device-directive-and>.

⁵ See 2018 Directive, *supra* note 1; cf. 2009 Directive, *supra* note 2.

<https://www.cbp.gov/document/directives/cbp-directive-no-3340-049a-border-search-electronic-devices>.

⁶ 2018 Directive, *supra* note 1, at § 9.

⁷ 2009 Directive, *supra* note 2, at § 7.

⁸ See 2018 Directive, *supra* note 1, at § 7.

⁹ U.S. Dep't of Homeland Sec., DHS/CBP/PIA-008(a), *Privacy Impact Assessment Update for CBP Border Searches of Electronic Devices* (2018), available at <https://www.hsdl.org/?abstract&did=809933>.

“made by a person who is primarily engaged in disseminating information.” 6 C.F.R. § 5.5(e)(1)(ii).

First, there is an “urgency to inform the public about an actual or alleged federal government activity.” 6 C.F.R. § 5.5(e)(1)(ii). The “actual . . . federal government activity” is CBP developing and periodically administering an auditing mechanism to review whether border searches of electronic devices are following the 2018 Directive. This auditing requirement is specified directly in the 2018 Directive.¹⁰

“Urgency” to inform the public about this activity is clear given the increase number of device searches in the past few years—nearly doubling the number of searches in 2017 than in 2016.¹¹ With developing technology, electronic devices now house sensitive information and personal user data. Since 2011, almost 250 complaints have been filed with DHS regarding warrantless border searches of electronic devices, many of which complain about the loss of privacy.¹² Warrantless electronic device searches could violate Fourth Amendment rights. Because of such problematic warrantless searches, Congress is taking steps to protect citizen’s Fourth Amendment rights. Senator Patrick Leahy (D-VT) and Steve Daines (R-MT) introduced legislation that would require the government “to have reasonable suspicion or probable cause to search or seize Americans’ electronic devices at the border.”¹³ With pending legislation, it is urgent that the public knows whether these searches are complying with the 2018 Directive and how CBP is auditing their search procedures.

Second, EPIC is an organization “primarily engaged in disseminating information.” 6 C.F.R. § 5.5(e)(1)(ii). As the Court explained in *EPIC v. DOD*, “EPIC satisfies the definition of ‘representative of the news media’” entitling it to preferred fee status under FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

In submitting this request for expedited processing, I certify that this explanation is true and correct to the best of my knowledge and belief. 5 U.S.C. § 552(a)(6)(E)(vi); 6 C.F.R. § 5.5(e)(3).

Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes. *EPIC v. Dep’t of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplication fees assessed. 5

¹⁰ See 2018 Directive, *supra* note 1, at § 7.

¹¹ See *CBP Releases Statistics on Electronic Device Searches*, *supra* note 3 (showing a 79% increase of device searches in 2017 compared to 2016).

¹² Charlie Savage & Ron Nixon, *Privacy Complaints Mount Over Phone Searches at U.S. Border Since 2011*, N.Y. Times (Dec. 22, 2017), <https://www.nytimes.com/2017/12/22/us/politics/us-border-privacy-phone-searches.html>.

¹³ Press Release, Patrick Leahy, Senator from Vermont, Leahy And Daines Introduce Legislation To Protect Americans’ Privacy At The Border (Feb. 27, 2018), <https://www.leahy.senate.gov/press/leahy-and-daines-introduce-legislation-to-protect-americans-privacy-at-the-border>.

U.S.C. § 552(a)(4)(A)(ii)(II); 6 C.F.R. § 5.11(d)(1).

Further, any duplication fees should also be waived because (i) “disclosure of the requested information is in the public interest because it is likely to contribute to the public understanding of the operations or activities of the government” and (ii) “disclosure of the information is not primarily in the commercial interest” of EPIC, the requester. 6 C.F.R. § 5.11(k)(1); 5 U.S.C. § 552(a)(4)(A)(iii). EPIC’s request satisfies this standard based on the DHS’s considerations for granting a fee waiver. 6 C.F.R. §§ 5.11(k)(2)–(3).

(1) Disclosure of the requested information is likely to contribute to the public understanding of the operations or activities of the government.

Disclosure of the requested documents is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” 6 C.F.R. § 5.11(k)(2). DHS components evaluate four considerations to determine whether this requirement is met: (i) the “subject of the request must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated;” (ii) disclosure “must be meaningfully informative about government operations or activities in order to be ‘likely to contribute’ to an increased public understanding of those operations or activities;” (iii) “disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester;” and (iv) “[t]he public's understanding of the subject in question must be enhanced by the disclosure to a significant extent.” *Id.*

First, the subject of the request concerns “identifiable operations or activities of the federal government with a connection that is direct and clear, not remote or attenuated.” 6 C.F.R. § 5.11(k)(2)(i). The 2018 Directive states that CBP Management Inspection will “develop and periodically administer” audits.

Second, disclosure would be “likely to contribute to an increased public understanding of those operations or activities.” 6 C.F.R. § 5.11(k)(2)(ii). Disclosure would be “meaningfully informative about government operations or activities” because there is little public information about how CBP’s electronic search procedures are audited and the results of those audits. It is essential to know the outcomes of the audits because it will add to public debate already surrounding warrantless electronic device searches at the border. With this information, citizens will be more informed of the practices of the CBP as well as the status of compliance with the 2018 Directive.

Third, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject,” because, as stated in DHS’s relevant FOIA regulations, components will “presume that a representative of the news media will satisfy this consideration.” 6 C.F.R. § 5.11(k)(2)(iii).

Fourth, disclosure will enhance “the public's understanding of the subject . . . to a significant extent.” Currently, no details are known of CBP’s auditing mechanism. CBP has not released reports of previously conducted audits or guidelines of what this auditing mechanism

looks like. Disclosure of the auditing mechanisms and previously conducted reports will enhance the public's understanding of how the agency assesses the strength of its electronic device border search policy.

(2) Disclosure of the information is not primarily in the commercial interest of the requester

The “[d]isclosure of the information is not primarily in the commercial interest” of EPIC. 6 C.F.R. § 5.11(k)(3). The DHS components evaluate two considerations in assessing this requirement: (i) whether there are “any commercial interest of the requester . . . that would be furthered by the requested disclosure;” and/or (ii) whether “the public interest is greater than any identified commercial interest in disclosure” and “[c]omponents ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.” *Id.*

First, there is no “commercial interest of the requester . . . that would be furthered by the requested disclosure.” 6 C.F.R. § 5.11(k)(3)(i). EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.¹⁴ EPIC has no commercial interest in the requested records.

Second, “the public interest is greater than any identified commercial interest in disclosure.” 6 C.F.R. § 5.11(k)(3)(ii). Again, EPIC is a non-profit organization with no commercial interest in the requested records and has established that there is significant public interest in the requested records. The DHS should presume that EPIC has satisfied 6 C.F.R. § 5.11(k)(3)(ii). The DHS FOIA regulations state “[c]omponents ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.” *Id.* Here, EPIC is a news media requester and this request should satisfy the public interest standard.

For these reasons, a fee waiver should be granted to EPIC's request.

¹⁴ EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

Conclusion

Thank you for your consideration of this request. I anticipate your determination on our request within ten calendar days. 5 U.S.C. § 552(a)(6)(E)(ii)(I); 6 C.F.R. § 5.5(e)(4). For questions regarding this request contact Enid Zhou at 202-483-1140 x104 or FOIA@epic.org.

Respectfully submitted,

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