



Homeland Security

Privacy Office, Mail Stop 0655

April 15, 2013

Sent VIA Electronic Mail

Andrew Christy
Law Clerk
c/o Ginger McCall, Director, Internet Public Interest Opportunities Program
Electronic Privacy Information Center
1718 Connecticut Avenue NW, Suite 200
Washington, D.C. 20009

Re: **DHS/OS/PRIV 11-1104**

Dear Mr. Christy:

This is our final response to your Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), dated July 26, 2011, and assigned the FOIA reference number DHS/OS/PRIV 11-1104. In an email dated August 31, 2011, sent to our Department of Justice counsel, your counsel, Amie Stepanovich indicated that the Electronic Privacy Information Center ("EPIC") modified your request as follows.¹ The modified request seeks:

- 1- All contracts and communications with Lockheed Martin, CSC, SAIC, Northrop Grumman or any other defense contractors regarding the DIB Cyber pilot;
- 2- All contracts and communications with AT&T, Verizon and CenturyLink or any other IPSs regarding the DIB Cyber pilot;
- 3- All legal and technical analyses, including legal memoranda, regarding the DIB cyber pilot;
- 4- Any memoranda of understanding between NSA and DHS or any other government agencies or corporations regarding the DIB cyber pilot;

¹ The amended version reflects a number of changes. Your request originally referred to the DIB Cyber Pilot as the "new NSA pilot program," but your counsel has confirmed that the request seeks records regarding what is known as the DIB Cyber Pilot. Your request initially referred to internet service providers as "IPs," rather than "ISPs," but we understand your original phrasing to be a typo. The third category of your request was originally broader and sought "all analyses, legal memoranda, and related records regarding the new NSA pilot program."

- 5- Any privacy impact assessment performed as part of the development of the DIB cyber pilot.

EPIC also excluded draft documents from the record request, according to Ms. Stepanovich's e-mail.

In a letter from this office, dated August 3, 2011, you were advised that the DHS Privacy Office had conducted a search for records responsive to item 5 of your request, but that we were "unable to locate or identify any responsive records." You were further advised that you could appeal this determination within 60 days. You declined to appeal that determination. Your counsel later confirmed that the relevant items in the related litigation, 12-cv-00333 (D.D.C.), were items 1 through 4. *See* Joint Meet and Confer Stmt. (May 21, 2012).

Also in the August 3, 2011 letter from this office, you were advised that the remaining items of the request were transferred to the National Protection and Programs Directorate (NPPD). NPPD conducted a responsive search and later returned potentially responsive documents to this office for processing.

A search for documents responsive to items 1 through 4 of your request produced a total of 2,121 pages. Of those pages, I have determined that 117 pages of the records are releasable in their entirety, 1,159 pages are partially releasable, and 845 pages are withheld in their entirety pursuant to Title 5 U.S.C. § 552 (b)(1), (b)(2), (b)(3), (b)(4), (b)(5), (b)(6), (b)(7)(C), (b)(7)(D), and (b)(7)(E), FOIA Exemptions, 1, 2, 3, 4, 5, 6, b7(C), b7(D), and b7(E).

FOIA Exemption 1 provides that an agency may exempt from disclosure matters that are (A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order.

FOIA Exemption 2 protects information applicable to internal administrative personnel matters to the extent that the information is of a relatively trivial nature and there is no public interest in the document.

FOIA Exemption 3 protects information specifically exempted from disclosure by another statute, if the statute (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

FOIA Exemption 4 protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential. The courts have held that this subsection protects (a) confidential commercial information, the disclosure of which is likely to cause substantial harm to the competitive position of the person who submitted the information and (b) information that was voluntarily submitted to the government if it is the kind of information that the provider would not customarily make available to the public.

FOIA Exemption 5 protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. After carefully reviewing the responsive documents, I determined that portions of the responsive documents qualify for protection under the Deliberative Process Privilege, Attorney Work-Product Privilege, and Attorney-Client Privilege. The deliberative process privilege protects the integrity of the deliberative or decision-making processes within the agency by exempting from mandatory disclosure opinions, conclusions, and recommendations included within inter-agency or intra-agency memoranda or letters. 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. The attorney work-product privilege protects documents and other memoranda prepared by an attorney in contemplation of litigation. The attorney-client privilege protects confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice. It applies to facts divulged by a client to his attorney, and encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts, as well as communications between attorneys that reflect client-supplied information. The attorney-client privilege is not limited to the context of litigation.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test. I note that some of the information marked as redacted pursuant to (b)(6) could also be protected pursuant to (b)(2), which protects information "related solely to the internal personnel rules and practices of an agency," including for example internal phone numbers.

Exemption 7(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, I have determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into this determination.

Exemption 7(D) pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to disclose the identities of confidential sources.

Exemption 7(E) protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

In addition, the names of National Security Agency/Central Security Services (NSA/CSS) employees have been deleted from the enclosures. These deletions are exempt from disclosure pursuant to the third exemption of the FOIA, which provides for the withholding of information specifically protected from disclosure by statute. The specific statute applicable in this case is Section 6, Public Law 86-36 (50 U.S. Code 402 note).

Sincerely,

James VML Hooper, J