



July 19, 2012

VIA FACSIMILE (703) 874-8910

FOIA Officer

Office of the Director of National Intelligence

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Re: Freedom of Information Act Appeal of DF-2012-00092

Dear FOIA Officer:

This letter constitutes an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted to the Office of the Director of National Intelligence ("ODNI") by the Electronic Privacy Information Center ("EPIC").

On June 15, 2012, EPIC requested, via facsimile, agency records related to the National Counterterrorism Center's ("NCTC") access and acquisition of data as described in the March 22, 2012 Guidelines for Access, Retention, Use, and Dissemination by the National Counterterrorism Center and Other Agencies of Information in Datasets Containing Non-Terrorism Information.¹ Specifically, EPIC requested the following:

1. Any guidelines or legal memoranda discussing NCTC's understanding and interpretation of the following standards used in the Guidelines discussed above: "reasonably believed to constitute terrorism information," "reasonably believed to contain terrorism information," and "likely to contain significant terrorism information."

Procedural Background

On June 15, 2012, EPIC transmitted a request for the preceding category of documents ("EPIC's FOIA Request"), as well as a request for news media fee status and a waiver of duplication fees.²

In a letter dated July 5, 2012, ODNI responded to EPIC's FOIA Request.³ The agency acknowledged receipt of EPIC's FOIA Request.⁴

¹ Guidelines for Access, Retention, Use, and Dissemination by the National Counterterrorism Center and Other Agencies of Information in Datasets Containing Non-Terrorism Information (Mar. 22, 2012), <https://www.documentcloud.org/documents/327629-nctc-guidelines.html>.

² *Id.*

³ Appendix 2.

⁴ *Id.*

EPIC has received no further communication from ODNI in response to EPIC's FOIA Request. More than twenty working days have passed since ODNI received EPIC's FOIA request.

EPIC Appeals ODNI's Failure to Disclose Records Responsive to the Category Requested

EPIC hereby appeals ODNI'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.⁵ EPIC received ODNI's acknowledgment letter on July 6, 2012. That letter acknowledged that the ODNI FOIA office was the component designated to receive FOIA requests, which means that the statutory deadline expired twenty days after EPIC's request was received by that office.

ODNI's July 5, 2012 acknowledgment letter is not a determination. 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."⁶

An agency's "acknowledgement" of a request "cannot be construed as a 'determination' . . . if it does not grant or deny the right to appeal."⁷ ODNI has not responded substantively to EPIC's FOIA Request, and therefore a determination has not been made as to these documents. As more than twenty days have passed since ODNI received EPIC's FOIA Request, ODNI's 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.⁸

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.

EPIC Renews Its Request for Expedited Processing

⁵ 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. United States, 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.'").

⁶ *Shermco Indus., Inc. v. Sec'y of Air Force*, 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)).

⁷ *Martinez v. F.B.I.*, 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)).

⁸ *EPIC v. Dep't of Defense*, 241 F. Supp. 2d. 5 (D.D.C. 2003).

At this time, EPIC reiterates and renews all arguments that its request should be granted expedited processing because it is made by “a person primarily engaged in disseminating information ...” and it pertains to a matter about which there is an “urgency to inform the public concerning actual or alleged federal government activity.”⁹

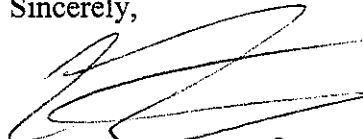
EPIC is “primarily engaged in disseminating information.”¹⁰

There is a particular urgency for the public to obtain information about the NCTC’s new Guidelines. Many national news media outlets¹¹ covered this development because the sharing of these datasets has profound privacy implications for U.S. persons and marks a strong departure from earlier guidelines.

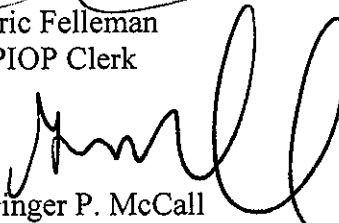
Conclusion

Thank you for your prompt response to this appeal. I anticipate that you will produce responsive documents within twenty working days of this appeal. If you have any questions, please feel free to contact me at (202) 483-1140 x 102 or FOIA@epic.org.

Sincerely,



Eric Felleman
IPIOP Clerk



Ginger P. McCall
Director, EPIC Open Government Project

/enclosures

⁹ 5 U.S.C. § 552(a)(6)(E)(v)(II) (2008); *Al-Fayed v. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001).

¹⁰ *American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

¹¹ *Supra* note 1 at 2.