



ELECTRONIC PRIVACY INFORMATION CENTER

Testimony and Statement for the Record of

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“Why Isn’t The Department Of Homeland Security Meeting The President’s Standard On
FOIA?”

Before the

House Committee on Oversight and Government Reform

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Introduction

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today on “Why Isn’t The Department Of Homeland Security Meeting The President’s Standard On FOIA?” My name is John Verdi and I am Senior Counsel at the Electronic Privacy Information Center (EPIC) and Director of EPIC’s Open Government Project. I am co-editor of *Litigation Under the Federal Open Government Laws*, the leading litigation handbook concerning open government litigation and administrative practice.¹

EPIC thanks the Committee for holding today’s hearing. We appreciate your work exercising oversight concerning the Department of Homeland Security’s political review of Freedom of Information Act (FOIA) requests. The agency’s policies have harmed requesters, including EPIC, by delaying the disclosure of documents and raising the specter of unlawful withholdings. The Committee’s oversight has played, and continues to play, a critical role in illuminating this deeply troubling program.

Political review of FOIA requests is antithetical to the fundamental values that undergird the FOIA. The FOIA is founded on non-partisan, apolitical principles. The Supreme Court has recognized the FOIA’s basic premise: “to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”² To accomplish that end, “[d]isclosure, not secrecy, is the dominant objective of the Act.”³ Senators Patrick Leahy and John Cornyn, co-sponsors of the most recent amendments to the FOIA statute, call FOIA “the nation’s foremost open government law.”⁴ “The Act remains an indispensable tool for shedding light on government policies and abuses that would otherwise remain hidden public knowledge. FOIA has helped to guarantee the public’s right to know for generations of Americans.”⁵

Summary

In EPIC’s many years of FOIA practice, we have never encountered policies like the DHS program at issue at today’s hearing. EPIC often clashes with agencies over the application of statutory exemptions. We battle agencies’ failure to comply with statutory deadlines. We often litigate, challenging agencies’ alleged legal bases for withholding specific records. But we have never observed agency practices that flag FOIA requests for political review. We are not aware of any other program that has singled out FOIA

¹ LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS (Harry Hammitt, John Verdi et al. eds., 2010).

² *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

³ *Department of the Air Force v. Rose*, 425 U.S. 352 (1976).

⁴ Leahy, Cornyn Celebrate Sunshine Week With FOIA Legislation, March 17, 2009.

⁵ LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS i, (Harry Hammitt, John Verdi et al. eds., 2010).

requests based on politically sensitive content or the identity of the requester. In our experience, this program is unique. And it is uniquely harmful.

In my statement this morning, I will outline EPIC's experience filing and litigating FOIA requests, educating requesters, and advocating for greater transparency and accountability. I will discuss EPIC's efforts to determine the scope of federal agencies' political review of FOIA requests. I will detail how this political review unlawfully delayed DHS's disclosure of records to EPIC in response to EPIC FOIA requests. And I will highlight an additional DHS policy – administrative closures – that contravenes the FOIA, thereby reducing transparency and hindering accountability.

Based on EPIC's experiences, it is our view that: 1) DHS should immediately cease political review of FOIA requests; 2) DHS should immediately disclose all agency records responsive to FOIA requests that were subject to political review; 3) all other executive agencies should immediately cease political review of FOIA requests and report to the Committee the extent to which they engaged in such review; and 4) all agencies should certify, as part of their annual FOIA reporting requirements,⁶ that no FOIA requests were reviewed by political appointees.

About EPIC

EPIC is a non-partisan research organization, focused on emerging privacy and civil liberties issues. We have a longstanding interest in open government, particularly in the power of transparency to ensure accountability for executive agencies.

Since EPIC's establishment in 1994, we have filed Freedom of Information Act (FOIA) requests with federal agencies, including the Department of Homeland Security (DHS), concerning domestic surveillance programs and emerging electronic privacy topics. EPIC routinely files FOIA lawsuits, forcing agencies to comply with their statutory obligations and disclose agency records. The cases range from 1994, when an EPIC FOIA lawsuit forced the disclosure of documents detailing U.S. Secret Service investigations into computer security experts, through the present, including EPIC's ongoing FOIA lawsuit against DHS concerning key documents detailing the operation of airport body scanners.

For the past 17 years, EPIC has pursued FOIA requests and lawsuits concerning the most critical online privacy issues. We have testified before lawmakers in support of broad disclosure of agency records and strong rights for FOIA requesters. We have opposed expansion of FOIA exemptions and policies that would increase agency secrecy.

Several successful EPIC FOIA matters are detailed in Appendix 1. These cases highlight EPIC's ability to successfully employ FOIA requests and litigation to force

⁶ 5 U.S.C. § 552(e) (2010).

disclosure of agency records. EPIC often obtains records in response to FOIA requests. If we encounter agency recalcitrance, we file detailed administrative appeals. And if agencies fail to meet statutory deadlines or unlawfully withhold records, EPIC routinely files lawsuits that result in the disclosure of records that inform the public, press, and policymakers.

President Obama's Commitment to Promote Open Government

President Obama made open government and transparency a hallmark of his administration by issuing a memorandum about its importance on his first day in office. "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails."⁷ He directed agencies to be more proactive in their disclosure and act cooperatively with the public. He explained, "At that heart of that commitment [to transparency] is the idea that accountability is in the interest of the Government and the citizenry alike."⁸

To further his goals, President Obama directed the Attorney General to issue new guidelines for implementing FOIA and the Director of the Office of Management and Budget to issue guidelines for the agencies as they "increase and improve information dissemination to the public."⁹ The guidelines issued by Attorney General Holder establish a "presumption of openness" governing federal records.¹⁰ The guidelines state that the Department of Justice will defend denial of a FOIA request only if disclosure would harm an interest protected by one of FOIA's statutory exemptions or if disclosure is prohibited by law.¹¹

EPIC's Efforts to Determine the Scope of Executive Agencies' Unlawful Political Review of FOIA Requests

For many years, EPIC has filed FOIA requests with federal agencies to obtain records concerning a variety of emerging issues. EPIC routinely obtains agency records, analyzes the contents, posts the key documents on our web site – epic.org – and features the records in the EPIC Alert – our online newsletter that reaches approximately 20,000 subscribers.

Since DHS was created in 2002, EPIC has filed numerous FOIA requests with the agency. In 2010, the Associated Press (AP) made public records detailing DHS's unlawful policy of subjecting FOIA requests to vetting by political appointees. EPIC

⁷ President Barack Obama, Memorandum, "Freedom of Information Act," Jan. 21, 2009.

⁸ *Id.*

⁹ *Id.* For the guidelines developed by OMB in compliance with President Obama's directive, *see* <http://www.whitehouse.gov/omb/open>.

¹⁰ Memorandum for Heads of Executive Departments and Agencies, Attorney General Eric Holder, Mar. 19, 2009, <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

¹¹ *Id.*

analyzed the released documents, which indicate that EPIC's requests were improperly delayed by DHS's unlawful policy.

On December 8, 2010, EPIC wrote to the Office of Government Information Services (OGIS), stating, "EPIC's review of the released documents demonstrates that DHS required political appointees to review the determinations of FOIA career staff to certain requests before documents were disclosed by the agency." Appendix 2 at 1. EPIC observed that "at least two of EPIC's FOIA requests were inappropriately flagged for review by political appointees and were consequently delayed in processing" and noted that the agency practice violates the FOIA's statutorily mandated deadlines for processing requests. *Id.*; 5 U.S.C. 552(a)(6)(A), (B).

EPIC's December 8 letter noted:

As FOIA Ombudsman, OGIS is authorized to review policies and procedures of administrative agencies, review compliance by administrative agencies, and recommend policy changes to Congress and the President. § 552(h)(2). OGIS is also required to conduct audits of agencies' FOIA implementation and issue reports. § 552(i).

EPIC urged OGIS to investigate the practices involved in DHS's impermissible use of political appointees to vet the processing of FOIA requests. EPIC identified six critical questions that should form the basis of such an investigation:

- Were responsive documents withheld from FOIA requesters as a result of political appointees' review?
- Has the DHS in fact abandoned its policy of effectively exercising a political veto over FOIA disclosures?
- Do other agencies have similar improper policies?
- How many FOIA requests have been impermissibly delayed because of vetting by political appointees?
- To what extent have people and organizations who are legally entitled to request DHS records been denied that access because political appointees at the DHS decided that it was not politically expedient to process those requests?
- Under what authority does the DHS claim the right to require that FOIA requests be vetted by political appointees?

EPIC also asked OGIS to advise DHS that the agency lacks the legal authority to require that political appointees approve, deny, or delay FOIA requests. EPIC

recommended additional training be provided to DHS FOIA staff regarding implementation of FOIA. Finally, EPIC requested that OIGIS publish a report of its findings and issue guidance to all executive agencies making clear that the processing of FOIA requests is not subject to review or approval by political appointees.

On February 15, 2011, EPIC (joined by twenty other groups and eight individual experts) wrote to this Committee, supporting the Committee's decision to investigate DHS's FOIA policies and procedures. Appendix 3. EPIC's letter describes the DHS political review policy, notes that the policy is "contrary to federal law and Supreme Court holdings," and objects to "DHS efforts to circumvent the FOIA process." *Id.*

EPIC's Freedom of Information Act Requests to the Department of Homeland Security

Prior to 2009, EPIC used FOIA requests to obtain numerous records concerning programs operated by DHS and its components. A 2002 EPIC FOIA request obtained records demonstrating that the Immigration and Naturalization Service, a DHS component, purchased personal information from the national ID databases of several Latin American countries from a private data broker. The same year, EPIC's FOIA request to the Transportation Security Administration (TSA), also a DHS component, revealed a proposed passenger profiling model that would incorporate biometric identification and extensive data mining of unknown government and private sector databases to develop profiles and identify potentially "risky" travelers. In 2003 and 2005, EPIC FOIA requests obtained records detailing widespread errors on TSA air travel watch lists. A 2004 EPIC FOIA revealed that DHS improperly obtained census data on Americans of Arab ancestry.

Despite EPIC's expertise and history of successful FOIA practice, our experience with DHS from 2009 through the present has been primarily characterized by improper agency delays. Further, DHS has wrongfully withheld agency records under the guise of inapplicable FOIA exemptions. And EPIC has repeatedly needed to sue the agency in order to receive any substantive response at all to our FOIA requests. Despite these obstacles, we have forced disclosure of critical agency records that inform the policy debate. However, EPIC's experience indicates deeply flawed practices at DHS that have led to the agency's failure to comply with statutory requirements and guidance promulgated by the President Obama and Attorney General Holder.

Between January 2009 and my testimony today, EPIC pursued twelve FOIA requests before DHS.¹² A more detailed discussion of EPIC's twelve FOIA matters before the agency is attached at Appendix 4. DHS failed to comply with statutory deadlines concerning all twelve EPIC requests. Often, the agency failed to comply with

¹² EPIC submitted eleven FOIA requests between January 1, 2009 and the date of this hearing. EPIC submitted one request in December 2008, and continued to actively pursue it post-January 2009.

multiple statutory deadlines while processing a single request.¹³ DHS failed to disclose any responsive documents *at all* in response to six of the twelve requests. In other cases, the DHS improperly asserted FOIA exemptions to withhold agency records. EPIC filed four lawsuits challenging DHS's failures to comply with the FOIA. No court has found the agency's noncompliance with the statute to be justified.

All FOIA requests filed by EPIC during this period were subject to unlawful delays or the agency's improper refusal to disclose records.

For example, EPIC filed two FOIA requests concerning airport full body scanners with DHS in 2009. The requests followed DHS's public indication that it intended to subject all air travelers to full body scans as primary, mandatory screening at U.S. airports. EPIC sought documents regarding the capabilities of the technology, as well as training manuals, images, and traveler complaints. DHS referred both requests to TSA, which failed to disclose any documents within the statutory deadlines. EPIC filed administrative appeals in both cases, and again TSA failed to disclose any records within the statutory deadlines.

EPIC filed lawsuits in both cases, which were consolidated. DHS failed to file an Answer to EPIC's Complaint by the deadline set forth in the Federal Rules of Civil Procedure, and EPIC moved for entry of a default judgment. During the course of litigation, EPIC obtained some of the requested documents. However, TSA refused to make all of the requested documents public. The litigation regarding 2,000 naked body scanner images and 376 pages of training manuals in possession of the agency continues more than a year later. The agency has refused to disclose the documents despite the fact that DHS's primary alleged basis for withholding – FOIA exemption b(2)-high – was struck down by the U.S. Supreme Court earlier this month.

By further way of example, EPIC filed two FOIA requests concerning "automated target recognition" – a technology related to airport body scanners – with DHS in 2010. The agency unilaterally extended its statutory deadline to make a determination concerning EPIC's requests, yet failed to process the requests within the extended period. EPIC appealed the agency's failure to comply with FOIA deadlines. DHS responded by unlawfully placing EPIC's administrative appeals in a queue for processing FOIA requests. EPIC sued the agency in February 2011. The lawsuit is presently pending.

All of EPIC's FOIA matters pending from January 2009 through the date of my testimony are described in detail in Appendix 4.

¹³ *E.g.* in EPIC Case Nos. 09-04-14 DHS and 09-07-02 DHS, DHS failed to make a timely determination concerning EPIC's FOIA request, failed to timely process EPIC's administrative appeal, and failed to timely Answer EPIC's Complaint in D.C. District Court. These matters are discussed in more detail at Appendix 4.

DHS Political Appointees Unlawfully Delayed Two EPIC FOIA Requests in 2009

EPIC's review of available records confirms that in 2009 alone, at least two of EPIC's FOIA requests to DHS were referred to political appointees. In both cases involving improper political review, the agency's response to EPIC was delayed, violating statutory deadlines.¹⁴

DHS Failed to Timely Respond to EPIC's June 2009 Request for the Calendar of Mary Ellen Callahan, DHS Chief Privacy Officer

In June 2009, EPIC filed a FOIA request seeking the calendar of DHS Chief Privacy Officer Mary Ellen Callahan.

EPIC organizes and hosts the monthly meetings of the Privacy Coalition, a nonpartisan coalition of consumer, civil liberties, educational, family, library, labor, and technology organizations. At the Privacy Coalition's monthly meetings, guests are invited to discuss topics of interest to the coalition. The Privacy Coalition frequently invites federal Privacy Officers to speak at its meetings. Several previous Privacy Officers from DHS had addressed the coalition. The Privacy Coalition extended an invitation to Mary Ellen Callahan shortly after she was named Chief Privacy Officer in March 2009.

Ms. Callahan was scheduled to appear at the May 29, 2009 Privacy Coalition meeting. She cancelled days before the visit, citing a scheduling conflict. EPIC attempted to reschedule the visit, but was unable to obtain a commitment from Ms. Callahan.

EPIC submitted a FOIA request on June 25, 2009 for Ms. Callahan's calendar. The request sought copies of the following agency records:

1. All agency records concerning appointments and meetings between Mary Ellen Callahan, Chief Privacy Officer for the Department of Homeland Security, and all nongovernmental individuals or entities from the date of her appointment, March 9, 2009, to the present. Such nongovernmental individuals and entities include, but are not limited to, trade associations, industry representatives, and/or business owners. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.
2. All agency records concerning Ms. Callahan's appointments and meetings for May 29, 2009. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.

¹⁴ DHS's political review of EPIC's FOIA requests is set forth in more detail, with references to the underlying primary documents, in Appendix 2.

The FOIA required DHS to disclose responsive agency records to EPIC's request within 20 working days—by July 24, 2009. On July 2, 2009, DHS responded to EPIC's request by invoking the 10-day extension pursuant to 5 U.S.C. § 552(a)(6)(B). DHS claimed that EPIC's simple request for Ms. Callahan's calendar sought "numerous documents" that would "necessitate a thorough and wide-ranging search." Consequently, the deadline for a lawful response was pushed back to August 7, 2009.

On July 9, 2009, EPIC received another letter from DHS stating that its request had been referred to the DHS Office of the General Counsel (OGC).

The DHS Office of the General Counsel provided an interim response to the request on July 30, 2009, but failed to disclose all responsive agency records. The response, which included heavily redacted documents, stated that DHS required even more time to find records related to Mary Ellen Callahan's calendar. The OGC stated that it would be able to complete its review on or before August 7, 2009. But the agency failed to do so.

The OGC wrote to EPIC on August 25, 2009, stating that it had completed its review. The OGC had "located a total of 84 pages." The agency "determined that 40 pages can be released in their entirety and 44 pages can be partially released, but with certain information withheld pursuant to Title 5 U.S.C. § 552 (b)(2)(low), (b)(5), and (b)(6).

On September 17, 2009, EPIC filed an administrative appeal based on DHS's failure to disclose responsive records in its possession and DHS's overly broad assertion of statutory exemptions in the records it did disclose.

On September 18, 2009, DHS acknowledged receipt of EPIC's appeal. Through the date of my testimony this morning, DHS has failed to make a determination concerning EPIC's appeal.

DHS Failed to Timely Respond to EPIC's June 2009 Request for National Security Presidential Directive 54

In June 2009, an EPIC FOIA request sought documents relating to National Security Presidential Directive 54. The directive sets forth DHS's legal authority to conduct cybersecurity operations, but has not been made public.

Specifically, EPIC requested:

1. The text of the National Security Presidential Directive 54, otherwise referred to as the Homeland Security Presidential Directive 23.

2. The full text, including previously unreported sections, of the Comprehensive National Cybersecurity Initiative, as well as any executing protocols distributed to the agencies in charge of its implementation.
3. All privacy policies related to either the Directive or the Comprehensive National Cybersecurity Initiative, including but not limited to, contracts or other documents describing privacy policies for information shared with private contractors to facilitate the Comprehensive National Cybersecurity Initiative.

On June 26, 2009, the DHS Management Directorate wrote to EPIC to acknowledge receipt of EPIC's FOIA request and to announce a referral of the request to the DHS Headquarters & Privacy Office. The DHS did not make any determination regarding EPIC's FOIA request at that time.

On July 9, 2009, the DHS Headquarters & Privacy Office wrote to EPIC, acknowledging receipt of EPIC's FOIA request, and referring the request to the DHS National Protection and Programs Directorate ("NPPD"), but did not make any determination regarding the substance of EPIC's FOIA request.

EPIC then appealed, on August 4, 2009, the DHS's failure to make a timely determination regarding EPIC's FOIA request. Through the date of my testimony this morning, DHS has failed to make a determination concerning EPIC's FOIA request, failed to respond to EPIC's administrative appeal, and failed to disclose responsive agency records.

DHS Political Appointees Impermissibly Delayed the Agency's Responses to EPIC's June 2009 FOIA Requests

On June 29, 2009, the DHS Special Assistant to the Chief of Staff, Jordan Grossman, sent FOIA staff a list of questions requesting a status update and detailed information about a number of FOIA requests. Among them were EPIC's June 2009 requests for Mary Ellen Callahan's calendar and for the National Security Presidential Directive 54. Mr. Grossman was a political appointee, and has no legal authority to routinely review FOIA requests.

Mr. Grossman, in reference to the request for Ms. Callahan's calendar, asked "Do we know why they [EPIC] are interested in 5/29/2009 specifically?" He then asked about EPIC's request for National Security Presidential Directive 54. "What does this Directive say? Is this Directive unclassified?"

On June 30, 2009, Vania T. Lockett, CIPP/G, Acting Departmental Disclosure Officer, responded with an update to Mr. Grossman's improper requests.

Regarding the request for Ms. Callahan's calendar, Ms. Lockett wrote, "PRIV: Compiling records and issuing acknowledging letter to the requester. EPIC's Privacy Coalition invited the CPO to their monthly meeting on 5/29/2009, to which the CPO did not attend. EPIC wishes to see what the CPO had on her agenda that prevented her from attending."

Ms. Lockett then updated Mr. Grossman about EPIC's request for National Security Presidential Directive 54. She wrote, "MGMT: This request was referred to PRIV for direct response on 6/26/2009. This directive is classified Top Secret and concerns a series of efforts to protect Government systems and reduce potential vulnerabilities, protect against intrusion attempts, and anticipate future threats through cyber security and monitoring."

The Agency's Unlawful Political Review of FOIA Requests Fails to Promote Transparency, Accountability, and Open Government

Despite DHS protestations that the policy of politically vetting FOIA requests has been retracted, there has been no publication confirming the existence and nature of a new policy nor an end of the old policy.

The FOIA was intended to further the public interest and awareness, not politics. See *Wash. Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 74, 76 (D.D.C. 2006) (citing *Jacksonville Port Auth. v. Adams*, 556 F.3d 52, 59 (D.C.Cir.1977) (recognizing "an overriding public interest ... in the general importance of an agency's faithful adherence to its statutory mandate").

The FOIA does not permit agencies to select FOIA requests for political scrutiny of either the request or the requester. The Supreme Court has clearly stated that disclosure of documents under FOIA will not depend on either the identity of the requester nor the reasons for the request. See *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170, 172 (2004); see also *United States Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 89 U.S. 749, 771 (1989) (stating that the requester's identity has "no bearing on the merits of his...FOIA request").

As discussed above, DHS unlawfully reviewed both factors concerning EPIC's 2009 FOIA requests. Though the Grossman and Lockett emails do not prove that documents were ultimately kept secret as a result of the 2006 and 2009 DHS directives, they demonstrate that the agency policies unlawfully delayed the agency's response. And at least in the case of EPIC's 2009 FOIA requests, it is clear that DHS failed to meet its statutory deadlines in response to FOIA requests that were referred for political review. The political review process also raises the specter of political influence over disclosure.

Political review of FOIA requests and requesters is simply unlawful. Unless records fall into one of the specified statutory exemptions, anyone who seeks documents under FOIA is entitled to receive them. No FOIA provision allows an agency to deny or delay its response to a FOIA requester for political reasons.

DHS's FOIA Policies Concerning Administrative Closure of FOIA Requests Fails to Promote Transparency, Accountability, and Open Government

On November 24, 2010, EPIC filed a FOIA request with DHS for documents concerning the agency's development and deployment of "body scanner" technology by law enforcement agencies in surface transit facilities and street-roaming vans. EPIC's FOIA request described the technology, identified manufacturers, and cited press reports concerning law enforcement use of the scanners.

EPIC's FOIA request sought:

1. All documents detailing plans by federal law enforcement agencies to implement body scanner technology in the surface transportation context.
2. All contracts, proposals, and communications with private transportation and shipping companies (including, but not limited to NJ PATH, Amtrak, and Greyhound) regarding the implementation of body scanner technology in surface transit.
3. All contracts, proposals, and communications with states, localities, tribes, and territories (and their subsidiaries or agencies) regarding the implementation of body scanners in surface transportation.
4. All documents detailing plans by federal law enforcement agencies to use "Z Backscatter Vans" or similar technology.
5. All contracts, proposals, and communications with the manufacturers of the "Z Backscatter Vans" or similar technology.
6. All contracts, proposals, and communications with states, localities, tribes, and territories (and their subsidiaries or agencies) regarding the implementation of "Z Backscatter Vans" or similar technology.

DHS referred the request to two components: the TSA and the Science and Technology Directorate.

On February 7, 2011, the TSA wrote to EPIC, alleging that EPIC's request did not reasonably describe agency records.¹⁵ This, despite the fact that the Science and Technology Directorate, based on the same request, had already identified responsive records.

The TSA asserted the authority to "administratively close" EPIC's request unless EPIC modified the request within 20 days. EPIC contacted the agency, disputed the TSA's allegation that EPIC's request was insufficiently specific, and challenged the agency's alleged right to administratively close FOIA requests without the consent of the requester. The TSA subsequently withdrew its February 7, 2011 letter, agreeing to process EPIC's FOIA request as submitted, without modification.

Conclusion

EPIC has pursued FOIA requests and lawsuits for more than 17 years. We publish the leading handbook concerning litigation under the FOIA. We use the open government laws to obtain and make public agency records that impact emerging electronic privacy issues and inform the policy debate. EPIC is, by all accounts, a sophisticated FOIA requester.

Yet DHS's practice of politically vetting FOIA requests delayed the agency's response to at least two EPIC FOIA requests. Since 2009, the agency has failed to comply with FOIA deadlines in 100% of requests filed by EPIC. These delays pose real frustrations to savvy requesters like EPIC. The majority of FOIA requesters are much less experienced. In those cases, the delays can prevent the disclosure of records in a useful timeframe or preclude any disclosure at all. DHS's practices concerning unilateral administrative closures can be a nearly insurmountable hurdle to many requesters. EPIC is deeply worried that political review of FOIA requests continues at DHS. We are also troubled by the prospect that such unlawful review might be practiced by other executive agencies.

Thank you for your interest. I will be pleased to answer your questions.

¹⁵ The TSA letter is attached at Appendix 5.

Appendix 1 – EPIC’s FOIA Expertise

EPIC is a strong advocate of open government, and has made frequent use of the FOIA to obtain information from the government about a wide range of policy issues, including computer security, consumer privacy, electronic surveillance, encryption controls and Internet content regulation.

For more than 17 years, EPIC has conducted a successful open government project that requests, obtains, and disseminates important federal records that agencies previously kept secret. Highlights of EPIC’s successful FOIA work discussed below.

EPIC publishes the authoritative FOIA litigation handbook, *Litigation Under the Federal Open Government Laws*.¹⁶ We also routinely publish agency records obtained under FOIA on our web site – epic.org.¹⁷ EPIC highlights important documents and provides analysis concerning the records’ relationship to emerging privacy and civil liberties issues.¹⁸

EPIC often testifies before Congress concerning open government and FOIA.¹⁹

In 2000, EPIC successfully sued to obtain an FBI report titled “Impact of Emerging Telecommunications Technologies on Law Enforcement.” The report called

¹⁶ Senator Patrick Leahy authored the forward to the 2008 edition of *Litigation Under the Federal Open Government Laws*, praising EPIC’s work: “the EPIC FOIA litigation manual will help ensure that those who are pursuing open government requests understand their rights, and the best strategies to pursue their requests.” Professor David Vladeck said, “The EPIC FOIA litigation manual remains the one indispensable tool for any lawyer ... thinking about bringing a FOIA case against the government. [It] is invaluable to practitioners.” The 2010 edition incorporates President Obama’s open government memorandum and Attorney General Holder’s guidance to executive agencies.

¹⁷ EPIC publishes “FOIA Notes,” an online newsletter that gives subscribers fast access to important documents obtained by EPIC under the Freedom of Information Act.¹⁷ The publication provides images and information about the government’s latest disclosures, as well as links to other FOIA resources. http://epic.org/foia_notes/

¹⁸ EPIC also publishes annual “FOIA Galleries,” highlighting the most significant disclosures in a given year. *E.g.* http://epic.org/open_gov/foiagallery2011.html

¹⁹ In 2000, EPIC testified before the House Committee on Government Reform, Subcommittee on Government Management, Information and Technology, urging lawmakers to avoid adopting “[o]verly broad new exemptions” that would “adversely impact the public’s right to oversee important and far-reaching governmental functions.” http://epic.org/security/cip/hr4246_testimony.html. In 2002, EPIC testified twice before Congress (once before the Senate Committee on Governmental Affairs and once before the House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations) about a proposed FOIA exemption for information concerning critical infrastructure protection. http://epic.org/security/infowar/sobel_testimony.html; http://epic.org/security/infowar/07_02_testimony.htm. EPIC criticized the proposed exemption as overly broad, and “urge[d] the Committee and the Congress to preserve the public’s fundamental right to know.” The proposed exemption was not enacted. In 2008, EPIC testified before the House Committee on Homeland Security, Subcommittee on Transportation Security and Infrastructure Protection on the topic of Ensuring America’s Security: Cleaning Up the Nation’s Watchlists. EPIC described concrete examples of FOIA problems at the agency. http://epic.org/privacy/airtravel/watchlist_test_090908.pdf

“Why Isn’t The Department Of Homeland Security Meeting The President’s Standard On FOIA?”
House Oversight Committee

Testimony of John Verdi, EPIC
April 29, 2010
Appendix 1

for a national policy prohibiting cryptography that did not ensure real-time access to law enforcement. The release of this document played a significant role in the public debate over the now-defunct “Clipper Chip” encryption initiative.

In 2001, an EPIC FOIA request revealed that law enforcement agencies were spending millions of taxpayers dollars to purchase databases from information brokers while circumventing Privacy Act obligations. These databases provided desktop access to the details of the private lives of Americans. EPIC’s FOIA request provided the first insight into the scope of the program.

A 2002 EPIC FOIA lawsuit forced disclosure of an internal FBI memo that revealed agency abuses of Foreign Intelligence Surveillance Act authority. The memo detailed agents illegal videotaping of suspects, interception of e-mails without court permission, unauthorized recording of phone conversations, and electronic surveillance operations continued beyond their legal deadline. The existence of the memo was first revealed in documents that EPIC obtained through FOIA litigation.

In 2003, EPIC used FOIA to obtain 11,000 consumer complaints to the Federal Communications Commission concerning telemarketing abuse. The complaints demonstrated the need for a national Do-Not-Call Registry, and were used to buttress the Federal Communications Commission’s operation of the registry in the face of a legal challenge to the program brought by corporations in federal court.

A 2004 EPIC FOIA lawsuit revealed that the FBI acquired one year’s worth of passenger data from Northwest Airlines after the September 11, 2001 terrorist attacks. The story was reported in newspapers across the country, including on the front page of the New York Times and in the Washington Post and Wall Street Journal. EPIC’s FOIA detailed the FBI’s acquisition of 257.5 million Passenger Name Records following 9/11, and the Bureau’s permanent incorporation of the travel details of tens of millions of innocent people into its investigative databases.

In 2005, an EPIC FOIA request obtained documents concerning the National Security Agency’s controversial warrantless surveillance program. The documents included emails and a memo from a former high-level Justice Department official expressing doubt about the legality of the program. EPIC also obtained internal messages from the NSA’s director to agency staff, discouraging employees from discussing the issue with the news media.

In 2009, an EPIC FOIA lawsuit obtained contracts and technical specifications for airport body scanners. The documents included 250 pages of technical data. They revealed that scanners can record, store, and transmit images of Americans stripped naked. This contradicts assurances made by the Transportation Security Administration.

Last year, EPIC’s FOIA lawsuit against the State Department produced a report detailing security breaches of passport data for three Presidential candidates. Federal investigators

prepared the report in the wake of March 2008 breaches that exposed Barack Obama, Hillary Clinton, and John McCain's personal information. Previously secret sections state "the Department was ineffective at detecting possible incidents of unauthorized access," and criticized the agency's failure to "provide adequate control or oversight." EPIC testified before the Senate in 2008 concerning the security breaches, urging lawmakers to limit employee and contractor access to personal data.

Appendix 2 – EPIC’s December 8, 2010 Letter to the Office of Government
Information Services

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College Park, MD 20740-6001

Dear Ms. Nisbet:

We write to the Office of the Government Information Services, as the FOIA Ombudsman, to request an independent investigation into the Department of Homeland Security’s (“DHS”) unlawful policy of subjecting FOIA requests to vetting by political appointees. At least two EPIC FOIA requests submitted to the DHS were subject to review by White House officials prior to processing by the agency.

The Freedom of Information Act (“FOIA”) requires agencies to process FOIA requests in accordance with clear statutory obligations.¹ The FOIA does not permit agencies to select certain categories of FOIA requests for political scrutiny. Further, in the case of EPIC’s FOIA requests, the DHS failed to timely disclose agency records responsive to those requests. The FOIA does not permit agencies to add an extra, politically motivated step to FOIA processing.

Furthermore, the Supreme Court has consistently held that FOIA does not permit agencies to investigate either FOIA requesters or their reasons for submitting requests. “As a general rule, withholding information under FOIA cannot be predicated on the identity of the requester.” *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170 (2004). The Court held as well that “As a general rule, citizens seeking documents subject to FOIA disclosure are not required to explain why they seek the information.” *Id.* at 172; *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) (stating that the requester’s identity has “no bearing on the merits of his . . . FOIA request”).

The DHS policy of White House review came to light after the Associated Press (“AP”) submitted a FOIA request in January 2010 to DHS.³ The AP sought “all

¹ 5 U.S.C. §552(a). See generally, H. HAMMITT, G. MCCALL, M. ROTENBERG, J. VERDI & M. ZAIID, LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS (EPIC 2010).

communication...pertaining to Front Office oversight of FOIA operations at DHS” and for “all communications directing DHS FOIA staff to amend the protocol of processing requests and involvement of the Front Office and staff members in the review, approval and formulation of FOIA responses.” *See* Appendix 1. The AP sought documents dating from January 1, 2009 to the present. *Id.* OIGS mediated disputes between the AP and the agency concerning the AP’s FOIA request, securing the disclosure of more than 1,000 pages of agency records.

EPIC’s review of the released documents demonstrates that DHS required political appointees to review the determinations of FOIA career staff assessments to certain requests before documents were disclosed by the agency. The documents indicate that EPIC’s requests were improperly delayed by the Department of Homeland Security’s unlawful policy.

At least two of EPIC’s FOIA requests were inappropriately flagged for review by political appointees and were consequently delayed in processing. This is a violation of the FOIA’s statutorily mandated deadlines for processing requests. 5 U.S.C. 552(a)(6)(A), (B).

DHS Political Appointees Impermissibly Vetted FOIA Requests

Beginning in February 2005, DHS FOIA and Privacy career staff were directed by the Chief Privacy Officer to compile and submit a weekly report to the Privacy Office. The report collected information about “recently completed and/or published systems of records notices (SORNs), Privacy Impact Assessments (PIAs), new FOIA requests received during the preceding week and those requests closed out during the same time period.” SORNS, PIAs, and FOIAs in progress were also to be reported.

This weekly report was submitted to the Secretary. It subsequently formed “the basis for developing the Department’s weekly report to the White House.” *See* Appendix 2.

In August 2006, the Privacy Office FOIA leadership was directed to begin integrating the information from the weekly report, now called the “FOIA Section of the DHS Cabinet Report to the White House,” into its report to the White House Liaison. *See* Appendix 3. This directive to report to the White House Liaison is an impermissible requirement to vet FOIA requests by political appointees.

The February 2005 directive merely required the inclusion of all SORNS, PIAs, and FOIAs. The 2006 directive identified specific types of FOIA requests to be included in the weekly report. The 2006 directive provides that political appointees should vet FOIA requests if they fall into any of the following categories:

³ Kim Zetter, “Report: Political Appointees Vetted DHS Public Records Request,” *wired.com*, July 22, 2010, <http://www.wired.com/threatlevel/2010/07/foia-filtered/>.

- a. The FOIA request relates to a Presidential or agency priority;
- b. The FOIA requester or requested documents will garner media attention or is receiving media attention;
- c. The FOIA request is for documents associated with meetings with prominent elected, business, and/or community leaders;
- d. The FOIA request is for congressional correspondence;
- e. The FOIA request is from a member of Congress;
- f. The FOIA request is from a member of the media;
- g. The FOIA request is from a member of an activist group, watchdog organization, special interest group, etc.;
- h. The FOIA request is for documents associated with a controversial or sensitive subject;
- i. The FOIA request is for documents associated with a senior official of the component;
- j. A FOIA appeal if it meets one of the "a" through "i" criteria;
- k. It is a FOIA request and not a Privacy Act; request.

See Appendix 3.

The 2006 directive described the list as "suggestive—not exclusive." Privacy Office and FOIA staff were further directed that if they were in doubt about whether to include a report, they should "please submit." *Id.*

The DHS's practice of subjecting FOIA requests to political approval was again expanded in a 2009 directive. See Appendix 4. The 2009 directive required DHS career staff to provide Secretary Napolitano's political staff with detailed information about the people and organizations making FOIA requests. The directive required that career staff

1. Identify the requester's name, city and state (spell out name of state).
2. Identify the requester by affiliation (private citizen, organization membership, etc.).
4. Provide a brief description of any lesser-known organization's mission.

Id.

The August 2006 and July 2009 directives clearly violate Supreme Court precedent stating that disclosure of documents under FOIA will not depend upon either the identity of the requester nor the reasons for the request. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170, 172 (2004).

Additionally, though Chief Privacy Officer Mary Ellen Callahan characterized the political vetting process as a "review," see Appendix 5, the emails obtained by the AP, see Appendix 1, make clear that documents were withheld until a political appointee approved the disclosures. This approval process often significantly delayed document releases. See Appendix 6. The approval process also violated clear statutory obligations under FOIA. 5 U.S.C. 552(a)(6)(A), (B).

DHS Political Appointees Impermissibly Delayed Two EPIC FOIA Requests in 2009

In 2009 alone, at least two of EPIC's FOIA requests to DHS were referred to political appointees.

DHS Failed to Timely Respond to EPIC's June 2009 Request for the Calendar of Mary Ellen Callahan, DHS Chief Privacy Officer

In the first instance when White House officials impermissibly intervened in the processing of EPIC's FOIA requests, EPIC sought the calendar of DHS Chief Privacy Officer Mary Ellen Callahan.

EPIC organizes and hosts the monthly meetings of the Privacy Coalition, a nonpartisan coalition of consumer, civil liberties, educational, family, library, labor, and technology organizations. At the Privacy Coalition's monthly meetings, guests are invited to discuss topics of interest to the coalition. The Privacy Coalition frequently invites federal Privacy Officers to speak at its meetings. Several previous Privacy Officers from DHS had addressed the coalition. The Privacy Coalition extended an invitation to Mary Ellen Callahan shortly after she was named Chief Privacy Officer in March 2009. *See Appendix 7.*

Ms. Callahan was scheduled to appear at the May 29, 2009 Privacy Coalition meeting. She cancelled days before the visit, citing a scheduling conflict. *See Appendix 7.* EPIC attempted to reschedule the visit, but was unable to obtain a commitment from Ms. Callahan. *See Appendix 8.*

EPIC submitted a FOIA request on June 25, 2009 for Ms. Callahan's calendar. The request sought all copies of the following agency records:

1. All agency records concerning appointments and meetings between Mary Ellen Callahan, Chief Privacy Officer for the Department of Homeland Security, and all nongovernmental individuals or entities from the date of her appointment, March 9, 2009, to the present. Such nongovernmental individuals and entities include, but are not limited to, trade associations, industry representatives, and/or business owners. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.
2. All agency records concerning Ms. Callahan's appointments and meetings for May 29, 2009. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.

See Appendix 9.

The FOIA required DHS to disclose responsive agency records to EPIC's request within 20 working days—by July 24, 2009. On July 2, 2009, DHS responded to EPIC's request by invoking the 10-day extension pursuant to 5 U.S.C. § 552(a)(6)(B). DHS claimed that EPIC's simple request for Ms. Callahan's calendar sought "numerous documents" that would "necessitate a thorough and wide-ranging search." *See* Appendix. Consequently, the date for an expected response was pushed back to August 7, 2009.

On July 9, 2009, EPIC received another letter from DHS stating that its request had been referred to the DHS Office of the General Counsel (OGC). *See* Appendix 11.

The DHS Office of the General Counsel provided an interim response to the request on July 30, 2009, but failed to disclose all responsive agency records. The response, which included heavily redacted documents, stated that DHS required even more time to find records related to Mary Ellen Callahan's calendar. The OGC stated that it would be able to complete its review on or before August 7, 2009. *See* Appendix 12.

The OGC wrote to EPIC on August 25, 2009, stating that it had completed its review. The OGC had "located a total of 84 pages." The agency "determined that 40 pages can be released in their entirety and 44 pages can be partially released, but with certain information withheld pursuant to Title 5 U.S.C. § 552 (b)(2)(low), (b)(5), and (b)(6). *See* Appendix 13.

On September 17, 2009, EPIC filed an appeal based on DHS's failure to disclose responsive records in its possession and DHS's overly broad assertion of statutory exemptions in the records it did disclose. *See* Appendix 14.

On September 18, 2009, DHS acknowledged receipt of EPIC's appeal. *See* Appendix 15. Through the date of this letter, DHS has failed to make a determination concerning EPIC's appeal.

DHS Failed to Timely Respond to EPIC's June 2009 Request for National Security Presidential Directive 54

In the second instance when White House officials impermissibly intervened in the processing of EPIC's FOIA requests, EPIC sought documents relating to National Security Presidential Directive 54.

In January 2008, President George W. Bush issued National Security Presidential Directive 54, otherwise referred to as The Homeland Security Presidential Directive 23 ("NSPD 54"), but it was never released to the public.⁴ Under this Directive, the Comprehensive National Cybersecurity Initiative ("CNCFI") was formed to "improve how

⁴ Jill R. Aitoro, *The Comprehensive National Cybersecurity Initiative*, NEXTGOV, June 1, 2009, http://www.nextgov.com/the_basics/tb_20090601_3569.php.

the federal government protects sensitive information from hackers and nation states trying to break into agency networks.”⁵

On June 25, 2009, EPIC submitted, *via* facsimile, EPIC’s FOIA request to the DHS Management Directorate documents regarding NSPD 54. The letter contained a request for expedited processing. *See* Appendix 16. This request was re-transmitted on June 26, 2009, on the request of DHS. *Id.*

Specifically, EPIC requested:

1. The text of the National Security Presidential Directive 54, otherwise referred to as the Homeland Security Presidential Directive 23.
2. The full text, including previously unreported sections, of the Comprehensive National Cybersecurity Initiative, as well as any executing protocols distributed to the agencies in charge of its implementation.
3. All privacy policies related to either the Directive or the Comprehensive National Cybersecurity Initiative, including but not limited to, contracts or other documents describing privacy policies for information shared with private contractors to facilitate the Comprehensive National Cybersecurity Initiative.

Id.

On June 26, 2009, the DHS Management Directorate wrote to EPIC to acknowledge receipt of EPIC’s FOIA request and to announce a referral of the request to the DHS Headquarters & Privacy Office. *Id.* The DHS did not make any determination regarding EPIC’s FOIA request at that time.

On July 9, 2009, the DHS Headquarters & Privacy Office wrote to EPIC, acknowledging receipt of EPIC’s FOIA request, and referring the request to the DHS National Protection and Programs Directorate (“NPPD”), but did not make any determination regarding the substance of EPIC’s FOIA request. *Id.*

EPIC then appealed, on August 4, 2009, the DHS’s failure to make a timely determination regarding EPIC’s FOIA request.

⁵ “The CNCI – officially established in January when President Bush signed National Security Presidential Directive 54 / Homeland Security Presidential Directive 23 – is a multi-agency, multi-year plan that lays out twelve steps to securing the federal government’s cyber networks. DHS has been tasked to lead or play a major role in many of these tasks. This bold, much-needed approach to cyber security will lead to a fundamental shift in the way the Department approaches the security of U.S. networks.” Letter from Joseph I. Lieberman, Chairman, and Susan M. Collins, Ranking Member, United States Senate Committee on Homeland Security and Governmental Affairs to Michael Chertoff, Secretary, Department of Homeland Security (May 1, 2008), available at http://hsgac.senate.gov/public/_files/5108LiebermanCollinslettertoChertoff.pdf.

DHS Political Appointees Impermissibly Delayed the Agency's Responses to EPIC's June 2009 FOIA Requests

On June 29, 2009, the DHS Special Assistant to the Chief of Staff, Jordan Grossman, sent FOIA staff a list of questions requesting a status update and detailed information about a number of FOIA requests. Among them were EPIC's June 2009 requests for Mary Ellen Callahan's calendar and for the National Security Presidential Directive 54. See Appendix 17. Mr. Grossman was a political appointee, and has no legal authority to routinely review FOIA requests.

Mr. Grossman, in reference to the request for Ms. Callahan's calendar, asked "Do we know why they are interested in 5/29/2009 specifically?" He then asked about EPIC's request for National Security Presidential Directive 54. "What does this directive say? Is this Directive unclassified?" *Id.*

On June 30, 2009, Vania T. Lockett, CIPP/G, Acting Departmental Disclosure Officer, responded with an update to Mr. Grossman's improper requests. See Appendix 18.

Regarding the request for Ms. Callahan's calendar, Ms. Lockett wrote, "PRIV: Compiling records and issuing acknowledging letter to the requester. EPIC's Privacy Coalition invited the CPO to their monthly meeting on 5/29/2009, to which the CPO did not attend. EPIC wishes to see what the CPO had on her agenda that prevented her from attending." *Id.*

Ms. Lockett then updated Mr. Grossman about EPIC's request for National Security Presidential Directive 54. She wrote, "MGMT: This request was referred to PRIV for direct response on 6/26/2009. This directive is classified Top Secret and concerns a series of efforts to protect Government systems and reduce potential vulnerabilities, protect against intrusion attempts, and anticipate future threats through cyber security and monitoring." *Id.*

The FOIA was intended to further the public interest and awareness, not politics. See *Wash. Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 74, 76 (D.D.C. 2006) (citing *Jacksonville Port Auth. v. Adams*, 556 F.3d 52, 59 (D.C.Cir.1977) (recognizing "an overriding public interest ... in the general importance of an agency's faithful adherence to its statutory mandate").

Though the Grossman and Lockett emails do not definitively prove that documents were ultimately kept secret as a result of the 2006 and 2009 DHS directives, they demonstrate that the agency policies unlawfully delayed the agency's response. And at least in the case of EPIC's 2009 FOIA requests, it is clear that DHS failed to meet its statutory deadlines in response to FOIA requests that were referred for political review. Such review is unlawful. Unless records fall into one of the specified statutory exemptions, anyone who seeks documents under FOIA is entitled to receive them. No

FOIA provision allows an agency to deny or delay its response to a FOIA requester for political reasons.

DHS Has Been Impermissibly Allowing Political Appointees to Vet FOIA Requests Filed by Activist Groups, Watchdog Organizations, and Special Interest Groups in Violation of the FOIA.

The above referenced DHS 2009 directive required DHS career staff to provide Secretary Napolitano's political staff with detailed information about the people and organizations making FOIA requests. The emails show that the documents were withheld until a political appointee approved the disclosures. This approval process often significantly delayed document releases.

Though the July 2009 directive was not officially promulgated until after EPIC's two June 2009 requests were made, it is clear that DHS had been working under an informal policy to vet FOIA requests from activist groups since the promulgation of the August 2006 directive, referenced above.

EPIC Requests the Following Assistance from the FOIA Ombudsman

As FOIA Ombudsman, OGIS is authorized to review policies and procedures of administrative agencies, review compliance by administrative agencies, and recommend policy changes to Congress and the President. § 552(h)(2). OGIS is also required to conduct audits of agencies' FOIA implementation and issue reports. § 552(i).

As a frequent FOIA litigant, EPIC has a strong interest in ensuring that that FOIA requests are processed in a timely, lawful, and responsive manner. In addition, as the publisher of the leading FOIA litigation handbook, *Litigation Under the Federal Open Government Laws*, EPIC has expertise regarding FOIA's statutory requirements and deadlines.

EPIC therefore urges OGIS to investigate the practices raised by DHS's impermissible use of political appointees to vet the processing of FOIA requests. Were responsive documents withheld from FOIA requesters as a result of political appointees' review? Has the DHS in fact abandoned its policy of effectively exercising a political veto over FOIA disclosures? Do other agencies have similar improper policies? How many FOIA requests have been impermissibly delayed because of vetting by political appointees? To what extent have people and organizations who are legally entitled to request DHS records been denied that access because political appointees at the DHS decided that it was not politically expedient to process those requests? Under what authority does the DHS claim the right to require that FOIA requests be vetted by political appointees?

EPIC requests that the FOIA Ombudsman advise the Department of Homeland Security that DHS lacks the legal authority under FOIA to require that political appointees approve, deny, or delay FOIA requests. EPIC recommends additional training

be provided to DHS FOIA staff regarding implementation of FOIA as required by the DHS's FOIA regulations.

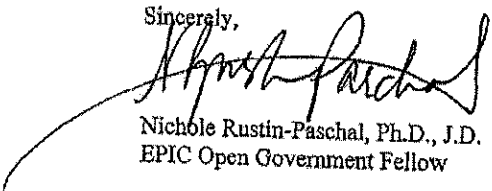
EPIC requests that the OGIS publish a report of its findings in this matter. In addition, OGIS should issue guidance making clear that the processing of FOIA requests is not subject to review or approval by political appointees.

Privacy Consent Statement

In accordance with the Privacy Act of 1974 as amended, EPIC hereby authorizes the Office of Government Information Services to make inquiries on its behalf, including the right to review all documentation that OGIS deems necessary in connection with EPIC's request for assistance regarding the Freedom of Information Act appeal that it has referenced above. EPIC understands that any documents it provides to OGIS may be copied and forwarded to officials of the referenced agency as a part of the mediation/resolution process. EPIC authorizes any Federal department, agency or component to release to OGIS information and records related to its Freedom of Information Act request.

Thank you for your attention to this matter. We look forward to your continued work on this issue.

Sincerely,



Nichole Rustin-Paschal, Ph.D., J.D.
EPIC Open Government Fellow

John Verdi
Director, EPIC Open Government Project

Appendix 3 – EPIC’s February 15, 2011 Letter to the House Oversight Committee

ELECTRONIC PRIVACY INFORMATION CENTER



February 15, 2011

The Hon. Darrell E. Issa (R-CA), Chairman
House Committee on Oversight and Government Reform
Washington, DC 20510

The Hon. Elijah Cummings (D- MD), Ranking Member
House Committee on Oversight and Government Reform
Washington, DC 20510

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Washington DC 20009
USA
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+1 202 463 1248 (fax)
www.epic.org

Dear Chairman Issa and Ranking Member Cummings,

We are writing to support the House Committee on Oversight and Government Reform’s decision to examine FOIA oversight by investigating the Department of Homeland Security’s (“DHS”) FOIA policies and procedures. The broad coalition of privacy and civil liberties groups signing on to this letter has a shared interest in open government policies and procedures.

We understand that your investigation intends to focus primarily on DHS’s practice of vetting FOIA requests through political appointees before they are processed. We suggest that your investigation of DHS policy begin from the creation of the agency, because, as we note later in this letter, the policy of political vetting of FOIA requests has been in place for many years.

We would ask in addition that, in order to facilitate FOIA oversight in the future, your hearing also inquire into the scope of authority allowed the Office of Government Information Services (“OGIS”) and the Government Accountability Office (“GAO”) to conduct investigations of FOIA practices at government agencies.

Open Government and Transparency Issues

President Obama made open government and transparency a hallmark of his administration by issuing a memorandum about its importance as his first executive action. “The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails.”¹ He directed agencies to be more proactive in their disclosure and act cooperatively with the public. He explained, “At that heart of that commitment [to transparency] is the idea that accountability is in the interest of the Government and the citizenry alike.”² To further his goals, President Obama directed the Attorney General to issue new guidelines for implementing FOIA and the

¹ President Barak Obama, Memorandum, “Freedom of Information Act,” Jan. 21, 2009.

² *Id.*

Director of the Office of Management and Budget to issue guidelines for the agencies as they “increase and improve information dissemination to the public.”³

Unfortunately, under a DHS policy in effect since 2006, political appointees have received detailed information about the identity of FOIA requesters and the topics of their requests in weekly reports before FOIA career staff could complete the processing of the requests.⁴ The policy requires DHS career staff to provide Secretary Napolitano’s political staff with information, including where a requester lives, the requester’s affiliation, and descriptions of the requesting organization’s mission. Despite DHS protestations that the policy has been retracted, there has been no publication about the new policy or the end of the old policy.

This policy is contrary to federal law and Supreme Court holdings, as the FOIA does not permit agencies to select FOIA requests for political scrutiny of either the request or the requester. The Supreme Court has clearly stated that disclosure of documents under FOIA will not depend on either the identity of the requester nor the reasons for the request. *See Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170, 172 (2004); *see also United States Dep’t of Justice v. Reporters Comm. For Freedom of the Press*, 89 U.S. 749, 771 (1989) (stating that the requester’s identity has “no bearing on the merits of his...FOIA request”).

The DHS policy of requiring political review came to light after the Associated Press (“AP”) submitted a FOIA request in January 2010 to DHS seeking agency documents from 2009 directing FOIA staff to submit FOIA requests to political appointees prior to processing the requests.⁵ OGIS mediated disputes between the AP and the agency concerning the AP’s FOIA request, securing the disclosure of more than 1,000 pages of agency records. The over 1,000 agency documents released reveals a persistent agency practice of flagging FOIA requests from watchdog organizations for referral to political appointees.

EPIC’s review of the released documents demonstrates that DHS required political appointees to review the determinations of FOIA career staff assessments to certain requests before documents were disclosed by the agency. EPIC discovered that the policy had been ongoing since 2006. The documents indicate that requests by EPIC and other watchdog groups were improperly flagged for review by political appointees and likely delayed in processing as a result, by the Department of Homeland Security’s unlawful policy. This is a violation of the FOIA’s statutorily mandated deadlines for processing requests. 5 U.S.C. 552(a)(6)(A), (B).

³ *Id.* For the guidelines developed by OMB in compliance with President Obama’s directive, *see* <http://www.whitehouse.gov/omb/open>.

⁴ *See* “FOIA Section of the DHS Cabinet Report to the White House Submission Guidelines Updated August 4, 2006,” and “Guidelines for Reporting o Significant FOIA Activity for Inclusion in the Cabinet Report to the White House July 7, 2009.”

⁵ Kim Zetter, “Report: Political Appointees Vetted DHS Public Records Request,” *wired.com*, July 22, 2010, <http://www.wired.com/threatlevel/2010/07/foia-filtered/>.

The inefficiencies of the DHS FOIA process have already come under scrutiny. The Government Accountability Office (“GAO”) assessed DHS’s FOIA program in a report published in March 2009, covering the period from May 2008 to January 2009. The GAO explained that the guiding principles of FOIA had changed since the law was enacted in 1966. The report states:

Before [FOIA], the government required individuals to demonstrate “a need to know” before granting the right to examine federal records. FOIA established a “right to know” standard, under which an organization or any member of the public could receive access to information held by federal agencies without demonstrating a need or reason. The “right to know” standard shifted the burden of proof from the individual to government agencies and required agencies to provide proper justification when denying requests for access to records.⁶

The GAO recommended DHS increase its internal monitoring and oversight as one way to reduce the agency’s backlog of FOIA requests.⁷ However, the GAO did not intend the monitoring and oversight to include vetting of requests by political appointees. The GAO also recommended increasing and specializing the training that DHS FOIA staff received as another way to increase efficiency.⁸ The GAO noted that “[w]hile DHS has made advances in ensuring compliance and oversight among its components... opportunities exist for further improvements.”⁹

Scope of Authority Issues:

EPIC has submitted a request to OIGIS seeking an independent investigation of the above referenced DHS policy of vetting FOIA requests by political appointees. EPIC also urged OIGIS to investigate whether other agencies have similar policies. However, as indicated by a response from the Director of OIGIS, Miriam Nisbet,¹⁰ there is uncertainty as to the scope of authority for OIGIS to undertake the type of investigation recommended by EPIC. Director Nisbet suggests that the GAO may have the better authority to conduct such an investigation. EPIC and the coalition of privacy organizations request that the Committee examine this issue in a public hearing.

FOIA was amended in 2007 to create the Office of Government Information Services (“OGIS”) within the National Archives and Records Administration. Since 2009, OGIS, acting as the FOIA Ombudsman, has mediated disputes between FOIA requesters and Federal agencies, reviewed agency compliance with FOIA as well agency policies and procedures for administering FOIA. OGIS is authorized to recommend policy changes to Congress and the President to improve the administration of FOIA. § 552(h)(2), (i)

⁶ Government Accountability Office, Freedom of Information Act: DHS has Taken Steps to Enhance Its Program, but Opportunities Exist to Improve Efficiency and Cost-Effectiveness, March 20, 2009, <http://www.gao.gov/new.items/d09260.pdf>

⁷ *Id.* at 14.

⁸ *Id.* at 16.

⁹ *Id.* at 25.

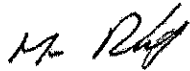
¹⁰ Miriam Nisbet, Letter to EPIC, January 2011, attached.

The GAO serves as the "congressional watchdog" by investigating, among other activities, "how well government programs and policies are meeting their objectives....[The GAO] advise[s] Congress and the heads of executive agencies about ways to make government more efficient, effective, ethical, equitable and responsive."¹¹ Further, the GAO is authorized to conduct audits of agency operations and investigate alleged illegal or improper activities.

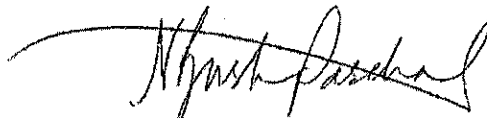
We object to DHS efforts to circumvent the FOIA process. The effectiveness of FOIA depends on agencies adhering to the principles of open government and transparency. Agencies must operate under the "right to know" standard. To ensure the accountability of agencies under this standard, the jurisdictions of OGIS and GAO must be clear so that they might effectively investigate FOIA procedures and advise the Congress and the President.

The House Committee on Oversight and Government Reform must hold rigorous hearing to review these issues.

Sincerely,



Marc Rotenberg
Executive Director, EPIC



Nichole Rustin-Paschal, Ph.D., J.D.
Open Government Fellow, EPIC

American Association of Law Libraries
American Library Association
Association of Research Libraries
Bill of Rights Defense Committee
Center for Financial Privacy & Human Rights
Center for Media & Democracy
Common Cause
Consumer Action
Defending Dissent Foundation
Doctor-Patient Medical Association
Essential Information
Electronic Privacy Information Center
Government Accountability Project
Identity Project
Liberty Coalition
National Coalition Against Censorship
National Workrights institute

¹¹ About GAO, <http://www.gao.gov/about/index.html>.

Patient Privacy Rights
Privacy Rights Clearinghouse
UNITED SIKHS
World Privacy Forum

Experts:

Steven Aftergood
Grayson Barber
David H. Flaherty
Pablo Molina
Dr. Deborah C. Peel
Chip Pitts
Bruce Schneier
Edward Hammond, Former Director of the Sunshine Project

CC:

Senator Patrick J. Leahy (D-VT), Chairman
Senate Committee on the Judiciary

Senator John Cornyn (R-TX)
Senate Committee on the Judiciary

Senator Joseph Lieberman (ID) (CT), Chairman
Senate Committee on Homeland Security & Governmental Affairs

Senator Susan M. Collins (R-ME), Ranking Member
Senate Committee on Homeland Security & Governmental Affairs

Miriam Nisbet
Director, Office of Government Information Services

Elizabeth Johnston,
Government Accountability Office

/Attachment

Appendix 4 – EPIC FOIA Requests to DHS, January 2009 to Present

This appendix details FOIA requests pursued by EPIC DHS between January 1, 2009 and present. They are presented in chronological order by date filed.

EPIC's FOIA REQUESTS TO THE DHS

1. **EPIC Case No. 08-12-4/DHS** (DHS Case No. DHS/OS/PRIV 09-165)
E-Verify Contracts and Related Documents

Summary:

After the DHS purchased advertising on National Public Radio (“NPR”) for the agency’s E-Verify program, EPIC sent a FOIA request on December 4, 2008, for records concerning the agency’s promotion of E-Verify. Vania T. Lockett, DHS Associate Director of Disclosure & FOIA Operations, wrote EPIC a letter dated December 11, 2008 in which she stated that she was referring EPIC’s request to United States Citizenship and Immigration (“USCIS”) FOIA Officer Jill Eggleston after determining that the request was under the purview of USCIS. On January 8, 2009, EPIC submitted an appeal to USCIS noting that the agency had failed to meet its statutory deadlines because “neither the DHS nor the USCIS ha[d] made any determination regarding” the request within the prescribed time periods.

EPIC received two letters from USCIS dated January 15, 2009. One letter denied EPIC’s request for expedited processing. The other stated that EPIC’s request was “deemed to constitute an agreement to pay any fees that may be chargeable up to \$25.00,” constructively denying EPIC’s request for “news media” status and a fee waiver. That letter set forth the duplication fee schedule and stated that the agency intended to charge EPIC fees. On March 13, 2009, EPIC submitted another appeal to USCIS contesting the agency’s denial of expedited processing and news media status and its “failure to timely respond to the substance of [the] request.”

On January 28, 2010, Brian J. Welsh, Acting Associate Counsel of USCIS, sent a letter to EPIC regarding EPIC’s March 13, 2009 appeal. USCIS affirmed its decision to deny expedited processing but granted EPIC’s request for a fee waiver. On February 24, 2010, EPIC received documents from USCIS.

Documents sought:

1. All records, including contracts and related documents, between DHS and NPR concerning the E-Verify promotion that began in November, 2008.
2. All records, including contracts and related documents, involving DHS and other media outlets concerning the promotion of E-Verify

Status:

More than one year after EPIC's FOIA request, DHS, through USCIS, released responsive records.

2. **EPIC Case Nos. 09-04-14 DHS and 09-07-02 DHS** (DHS Case Nos. DHS/OS/PRIV 09-548 and DHS/OS/PRIV 09-806; TSA Case Nos. TSA09-0510 and TSA10-0260, respectively)
Airport Body Scanner Documents

Summary:

On April 14, 2009, following the news that DHS would make Full Body Scanners (then called "Whole Body Imaging" or "WBI" by the agency) the primary screening technique in US airports, EPIC immediately filed a FOIA request (the "First Request") with DHS for documents regarding the capabilities of its WBI technology. On July 2, 2009, EPIC filed another FOIA request (the "Second Request") seeking training manuals, images, and complaints relating to WBI technology. DHS referred both requests to TSA, which failed to disclose any documents within the statutory deadlines. EPIC filed administrative appeals in both cases, and again TSA failed to disclose any records within the statutory deadlines.

EPIC filed lawsuits in both cases, which were consolidated. The DHS failed to file an Answer to EPIC's Complaint by the deadline set forth in the Federal Rules of Civil Procedure, and EPIC moved for entry of a default judgment. During the course of litigation, EPIC obtained some of the requested documents. However, TSA refused to make all of the documents sought public. The litigation regarding some 2,000 naked body scanner images and 376 pages of manuals in possession of the agency continues more than a year later.

Documents sought:

In Case No. 09-04-14 DHS:

1. All documents concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals;
2. All contracts that include provisions concerning the capability of passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals; and
3. All instructions, policies, and/or procedures concerning the capability to passenger imaging technology to obscure, degrade, store, transmit, reproduce, retain, or delete images of individuals.

In Case No. 09-07-02 DHS:

- a. All unfiltered or unobscured images captured using Whole Body Imaging Technology;
- b. All contracts entered into by DHS pertaining to WBI systems, including contracts for hardware, software or training;
- c. All documents detailing the technical specifications of WBI hardware, including any limitations on image capture, storage or copy;
- d. All documents, including but not limited to presentations, images and videos used for training persons to use WBI systems;
- e. All complaints related to the use of WBI and all documents relating to the resolution of those complaints;
- f. All documents concerning data breaches of images generated by WBI technology.

Status:

The Court granted DHS's motion for summary judgment regarding 2,000 body scanner images and training manuals. On March 7, 2011, the U.S. Supreme Court struck down the legal doctrine ("Exemption b(2)-high") on which the Court based its holding. EPIC filed a motion for reconsideration, which is pending. The DHS continues to withhold 2,000 naked body scanner images and 376 pages of manuals in possession of the agency.

**3. EPIC Case No. 09-6-24/DHS (DHS Case No. DHS/OS/PRIV 09-765)
Chief Privacy Officer Callahan's Calendar**

Summary:

On March 9, 2009, Mary Ellen Callahan became the Chief Privacy Officer (CPO) of DHS. The DHS Privacy Office, which Ms. Callahan has been running since then, is statutorily required to "sustain privacy protections and transparency of government operations, while achieving the mission of the Department of Homeland Security." One of the ways the Privacy Office claims to further its purpose is "communicating with the public through published materials, formal notice, public workshops, and meetings." The Privacy Coalition, which EPIC has organized since 1995, provides a venue for the federal privacy officials to conduct public meetings with privacy advocates and experts. DHS officials and chief privacy officers from other agencies have addressed the Privacy Coalition on previous occasions. Ms. Callahan was scheduled to appear at the May 29, 2009 Privacy Coalition meeting but cancelled the visit, claiming a scheduling conflict.

On June 25, 2009, EPIC submitted a FOIA request to DHS FOIA Officer Catherine M. Papoi seeking all "agency records concerning appointments and meetings between Mary Ellen Callahan, Chief Privacy Officer for the Department of Homeland Security, and all nongovernmental individuals or entities" between March 9 and June 25 of 2009. In addition, EPIC requested "all agency records concerning Ms. Callahan's appointments and meetings for May 29, 2009." EPIC sought this information to determine the exact circumstances of Ms. Callahan's "scheduling conflict" and whether

she had met with private firms or other public interest groups working on privacy issues as well as any other public outreach activities in which she might have been engaged.

On July 2, 2009, DHS wrote EPIC a letter acknowledging the request, informing EPIC of a possible delay in its processing and invoking a 10-day extension of the 20-day statutory processing deadline pursuant to 5 U.S.C. § 552(a)(6)(B). The letter also informed EPIC that its fee waiver request would be “held in abeyance pending the quantification of responsive records.” On July 9, 2009, DHS wrote EPIC a follow-up response to the FOIA request informing EPIC that it had “identified records” that it was transferring to Charlie Borrero, FOIA Officer at the DHS Office of General Counsel for processing and direct response to EPIC.

On July 30, 2009, David J. Palmer, Deputy Associate General Counsel for DHS, wrote EPIC a “first interim response” to its FOIA request. Citing “the voluminous amount of records that must be located,” Palmer claimed to need “additional time to search for possible responsive records and, to the extent these records are found, to make a determination about production of those records.” He stated that he expected to complete his review by August 7, 2009. He did not, however, cite any section of the FOIA or any other law in support of his decision to delay processing the request. Finally, Palmer stated that in DHS’s “preliminary search for records responsive to the multi-part request,” it had located “a total of 16 pages” of which it had “determined they can be partially released but with certain information withheld pursuant to [FOIA exemptions] b(2)(low), and (b)(6).”

On August 25, 2009, Palmer wrote EPIC a “final response” to its FOIA request in which he stated that DHS had identified “a total of 84 pages” of which it had determined 40 could be “released in their entirety” and 44 could only be “partially released, but with certain information withheld pursuant to [FOIA exemptions] (b)(2)(low), (b)(5), and (b)(6).”

On September 17, 2009, EPIC submitted to DHS its appeal of the agency’s “failure to disclose records in full and its assertions of exemptions.” In that appeal, EPIC also noted DHS’s failure “to comply with the open government directive that the President set out in January [2009] and the specific, and directly applicable determination made recently by the White House with respect to the records of agency officials who meet with members of the public.” On September 18, 2009, DHS wrote EPIC a letter confirming receipt of the appeal and assigning it a new tracking number, DHS09-139. EPIC never received a response to the appeal.

Documents Sought:

1. All agency records concerning appointments and meetings between Mary Ellen Callahan, Chief Privacy Officer for the Department of Homeland Security, and all nongovernmental individuals or entities from the date of her appointment, March 29, 2009, to [June 25, 2009]. Such nongovernmental individuals and entities

“Why Isn’t The Department Of Homeland Security Meeting The President’s Standard On FOIA?”
House Oversight Committee

Testimony of John Verdi, EPIC
March 31, 2011
Appendix 4

- include, but are not limited to, trade associations, industry representatives, and/or business owners. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.
2. All agency records concerning Ms. Callahan's appointments and meetings for May 29, 2009. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.

Status:

The DHS failed to respond to EPIC's administrative appeal and has not released unredacted version of the records at issue.

4. EPIC Case No. 09-06-25/DHS (CNCI)
National Security Presidential Directive 54 & the Comprehensive National Cybersecurity Initiative

Summary:

In January 2008, President George W. Bush issued the National Security Presidential Directive 54 (NSPD-54), but it was never released to the public. Under this Directive, the Comprehensive National Cybersecurity Initiative ("CNCI") was formed to "improve how the federal government protects sensitive information from hackers and nation states trying to break into agency networks." In February 2009, President Obama appointed Melissa Hathaway as the head of a 60-day review of the government's cybersecurity efforts ("the Hathaway Report"). In April 2009, Senator Jay Rockefeller (D-WV) introduced to Congress the Cybersecurity Act of 2009 (S. 773), still pending in the Senate Committee on Commerce, Science, and Transportation.

Despite a 2008 power struggle over the CNCI, the Department of Homeland Security ("DHS") was ultimately charged to oversee the details, with operational functions split between the National Security Agency (NSA), the Central Intelligence Agency (CIA), and the Federal Bureau of Investigation's (FBI) Cyber Division. Each agency under DHS is responsible to "investigate intrusions by monitoring Internet activity and . . . capturing data for analysis." However, DHS acts as the lead agency on cybersecurity, as well as many other areas of Internet regulation.

Although the CNCI has been the primary source of cybersecurity rules since 2008, neither it nor the authorizing Directive have been released in full. Gregory Garcia (then DHS Assistant Secretary of Cybersecurity and Telecommunications) stated in February 2009 that "too much was kept secret." The policy goals in the Directive, and the implementation of those goals in the CNCI, have directed virtually all cybersecurity regulation.

On June 25, 2009, EPIC submitted a FOIA request via fax to DHS seeking the text of NSPD-54, the full text of the CNCI, any executing protocols distributed to the

"Why Isn't The Department Of Homeland Security Meeting The President's Standard On FOIA?"

House Oversight Committee

Testimony of John Verdi, EPIC
March 31, 2011
Appendix 4

agencies in charge of CNCI's implementation, and all privacy policies related to either NSPD-54 or CNCI.

On June 26, 2009, the DHS Management Directorate wrote to EPIC to acknowledge receipt of EPIC's FOIA Request and to announce a transfer of the request to the DHS Headquarters & Privacy Office. The DHS did not make any determination regarding EPIC's FOIA Request at that time.

On July 9, 2009, the DHS Headquarters & Privacy Office wrote to EPIC, acknowledging receipt of EPIC's FOIA Request, and notifying EPIC of its determination to refer the request to the DHS National Protection and Programs Directorate ("NPPD"), but did not make any determination regarding the substance of EPIC's FOIA Request.

On August 4, 2009, EPIC submitted an appeal of DHS's failure to make a timely determination regarding EPIC's FOIA request and a request for expedited processing via fax to DHS. DHS never responded to the appeal.

Documents Sought:

1. The text of the National Security Presidential Directive 54, otherwise referred to as the Homeland Security Presidential Directive 23.
2. The full text, including previously unreported sections, of the Comprehensive National Cybersecurity Initiative, as well as any executing protocols distributed to the agencies in charge of its implementation.
3. All privacy policies related to either the Directive or the Comprehensive National Cybersecurity Initiative, including but not limited to, contracts or other documents describing privacy policies for information shared with private contractors to facilitate the Comprehensive National Cybersecurity Initiative.

Status:

The DHS has failed to make a determination concerning EPIC's FOIA request, failed to respond to EPIC's administrative appeal, and failed to disclose responsive agency records.

5. **EPIC Case No. 10-03-11 DHS** (DHS Case Number DHS/OS/PRIV 10-0511)
EINSTEIN 3

Summary:

Having learned that DHS was conducting a test of its intrusion prevention deep-packet inspection program, EINSTEIN 3, EPIC filed a FOIA request on March 11, 2010

"Why Isn't The Department Of Homeland Security Meeting The President's Standard On FOIA?"
House Oversight Committee

Testimony of John Verdi, EPIC
March 31, 2011
Appendix 4

for 1) the exercise's Privacy Impact Assessment (PIA) and 2) any contracts, legal opinions, security analyses, and risk assessments concerning EINSTEIN 3. The FIOA request sought expedited processing based on the need to discuss cybersecurity legislation pending in Congress, namely the Cybersecurity Act of 2009, in light of current government cybersecurity programs.

On March 18, 2010, DHS published an unclassified PIA for the EINSTEIN 3 test. This unclassified PIA was not a declassified version of the PIA for the exercise, but rather a separate document written for public release. On March 24, 2010, EPIC received an email from DHS asserting that the unclassified PIA was responsive to part 1) of EPIC's request. EPIC disagreed, informing DHS in a phone call in April that part 1) of EPIC's request extended to the classified PIA.

On July 8, 2010, nearly three months after the last action on EPIC's FOIA request, DHS responded with the classified PIA, redacted according to DHS's assertion of FOIA exemptions, as well as 41 pages of documents that DHS determined to be responsive to part 2) of EPIC's FOIA request.

Documents Sought:

1. The Privacy Impact Assessment for the pilot exercise of the most recent version of the EINSTEIN network security program, also known as EINSTEIN 3; and
2. All contracts with private vendors, legal opinions, security analyses, and risk assessments concerning EINSTEIN 3.

Status:

Nearly four months after EPIC's FOIA request, DHS disclosed responsive records.

6. **EPIC Case No. 10-06-11 DHS** (No reply/No DHS case number assigned)
Fusion Center Training Manuals

Summary:

Fusion centers are local or state entities meant to gather information from distributed sources, both public and private, for the purpose of collection, retention, analysis, and dissemination.

DHS is responsible for providing training to privacy officers at these fusion centers in order to ensure that the privacy and civil liberties policy of the center comports with Federal, State, and local law. In a June 11, 2010 FOIA request, EPIC sought the documents DHS uses for this training, portions of which have been withheld from the public.

EPIC's FOIA request was sent on June 11, 2010. As of August 4, 2010, no response had been received, even though the statutory deadline for DHS to make a legal determination on EPIC's FOIA lapsed on July 12, 2010. On August 2, 2010, EPIC filed an administrative appeal of DHS's failure to make a legal determination regarding this FOIA request.

Documents sought:

1. All documents used by DHS to train fusion center privacy officers.
2. All documents used by DHS to train the twelve fusion centers referenced by Ms. Callahan on May 25, 2010 at the DPIAC meeting. (The training referenced is developed and administered by DHS and is required of fusion center privacy officers before the fusion center can receive federal grant money.)
3. All documents used by fusion center privacy officers for internal training of fusion center staff and personnel.
4. All documents used by DHS and fusion centers to evaluate the implementation of such training for determining individual fusion center eligibility for federal grants and all other evaluative purposes.
5. All correspondence and communications between DHS and fusion centers regarding the receipt, use, or implementation of training and evaluation documents.

Status:

EPIC's August 2, 2010 administrative appeal is pending. The DHS has failed to make any determination concerning EPIC's FOIA request or administrative appeal. The agency has failed to disclose any responsive records.

7. **EPIC Case No. 10-06-11** (DHS Case No. DHS/OS/PRIV 10-0785; TSA 10-0610; S&T 10-0003.35)
Airport Body Scanners – Operational Testing

Summary:

On June 11, 2010, EPIC sent a FOIA request to DHS seeking the results of TSA's operational testing, which was completed in 2009 according to a GAO report. The request asked for expedited processing because of TSA's impending implementation of full body scanning as the primary on-site security screening method for domestic airport security. The request was received by DHS on June 18, 2010.

DHS referred EPIC's FOIA request to TSA on June 24, 2010. TSA acknowledged receipt of the request on the same date; however, as of August 5, 2010, TSA has not made a legal determination on EPIC's request for expedited processing, nor has TSA made any legal determination on EPIC's FOIA request.

EPIC's FOIA request was also referred by DHS to its Science and Technology Directorate ("S&T"). On July 13, 2010, S&T acknowledged EPIC's FOIA request and asked that EPIC clarify whether its request was limited only to the two deployed types of FBS devices. EPIC replied that its request was not so limited. On July 27, 2010, EPIC sent a clarification letter to S&T. S&T then called EPIC on July 28 for a second clarification regarding the scope of "all communications" sought by EPIC's FOIA request. During that phone conversation, EPIC and S&T agreed that "pre-decisional" communications were not the subject of EPIC's FOIA request. On July 29, 2010, S&T sent a letter acknowledging EPIC's clarification and referencing the telephone conversation.

Both TSA and S&T informed EPIC of their intent to charge EPIC duplication fees in fulfilling EPIC's request, despite acknowledging EPIC's status as a news media organization and request for fee waiver.

Documents sought:

1. All documents and communications concerning testing of "Advanced Imaging Technology" in control and operational settings.

Status:

The agency has failed to disclose any records in response to EPIC's FOIA request, and has failed to comply with statutory deadlines.

8. EPIC Case Nos. 10-6-15/TSA, 10-10-05/DHS (TSA Case No. TSA 10-0609, TSA 11-0023; DHS/OS/PRIV 11-0042, TSA11-0080, TSA11-0257)

TSA—Automated Target Recognition

Summary:

In April 2010, EPIC sent a petition to the Transportation Security Administration (TSA) and DHS Secretary Janet Napolitano requesting that TSA and DHS suspend the Full Body Scanner (FBS) program at use in several American airports. TSA responded by denying all of the allegations EPIC made about the program that, if true, would have warranted suspension of it. In its letter, the TSA disclosed that it had "worked closely" with Dutch authorities and automated target recognition (ATR) manufacturers and included a letter to Senator Susan Collins further detailing the timetable for ATR deployment. TSA did not explicitly describe the specifications it requested from ATR manufacturers but merely stated that ATR technology did not currently meet its needs.

On June 15, 2010, EPIC submitted a FOIA request to TSA for: the specifications that the agency had given ATR manufacturers; records related to the letter to Senator Collins; and communications between the TSA and Dutch authorities regarding ATR technology.

On June 24, 2010, TSA wrote EPIC a letter acknowledging the request. The letter stated that EPIC's request for expedited treatment was "currently under consideration." It then warned of a likely delay in processing the request. TSA invoked a 10-day extension of the 20-day statutory processing deadline pursuant to 5 U.S.C. § 552(a)(6)(B). The letter stated that TSA would charge EPIC "for records in accordance with the DHS interim FOIA regulations as they apply to media requestors," thus constructively denying EPIC's request for a fee waiver.

On October 5, 2010, EPIC filed an administrative appeal concerning the TSA's denial of a waiver of duplication fees and non-responsiveness. This appeal was received by TSA on October 12, 2010.

On October 5, 2010, EPIC also filed an additional related FOIA request seeking more documents concerning software modifications to airport body scanners. DHS referred the request to the TSA and the TSA acknowledged the request with the same form extension letter with which it responded to the first request.

On October 18, 2010, TSA sent EPIC a letter acknowledging its initial appeal and assigning the request reference number TSA11-0023. The letter also invoked a 10-day extension of the 20-day statutory processing deadline pursuant to 5 U.S.C. § 552(a)(6)(B) and invited EPIC to "narrow the scope of your request." On November 2, 2010, the TSA sent EPIC an undated letter in further response to EPIC's administrative appeal. The letter stated that "[a]lthough the FOIA permits you to appeal a constructive denial of your request, [the TSA] cannot act until an initial determination has been made as to whether any responsive records may be released." This letter, along with the October 18 letter, unlawfully placed EPIC's appeal in a queue for processing FOIA requests.

On December 14, 2010, EPIC appealed the TSA's failure to disclose records in response to EPIC's second FOIA request. The TSA acknowledged this appeal on December 27, 2010 with the same letter described above, again unlawfully placing EPIC's appeal in a queue for processing FOIA requests.

On February 2, 2011, EPIC filed lawsuits in both cases, which were consolidated. The TSA filed their answer on March 16, 2011.

Documents Sought

In Case 10-6-15/TSA:

1. All specifications provided by TSA to automated target recognition manufacturers regarding automated target recognition systems.
2. All records concerning the capabilities, operational effectiveness, or suitability of automated target recognition systems, as described in Secretary Napolitano's letter to Senator Collins.
3. All records provided to TSA from the Dutch government concerning automated target recognition systems deployed in Schiphol Airport, as described by Secretary Napolitano's letter to Senator Collins
4. All records evaluating the FBS program and determining automated target recognition requirements for nationwide deployment, as described in Secretary Napolitano's letter to Senator Collins.

In Case 10-10-05/DHS:

1. All records provided from L3 Communications or Rapiscan in support of the submission or certification of ATR software modifications;
2. All contracts, contract amendments, or statements of work related to the submission or certification of ATR software modifications;
3. All information, including results, of government testing of ATR technology, as referenced by Greg Soule of the TSA in an e-mail to Bloomberg News, published September 8, 2010.

Status:

EPIC filed suit on February 2, 2011 to force disclosure of agency records.

9. **EPIC Case No. 10-6-15/DHS** (DHS Case No. DHS/OS/PRIV 10-0795):
*Homeland Security Presidential Directive 24/Facial
Recognition/Biometrics*

Summary:

On June 5, 2008, President Bush issued Homeland Security Presidential Directive 24 (HSPD-24): Biometrics for Identification and Screening to Enhance National Security, calling for reports due on June 5, 2009, from the Attorney General, the Secretaries of State, Defense, and Homeland Security, and the heads of other appropriate agencies, on the implementation of a common system for the use of biometrics.

On June 15, 2010, EPIC submitted a FOIA request via certified mail seeking the DHS's report concerning biometrics produced in response to HSPD-24 and related agency records concerning facial recognition technology.

On July 1, 2010, DHS wrote EPIC a response letter in which it denied EPIC's request for expedited processing. The letter then warned of a likely delay in processing the request. The TSA invoked a 10-day extension of the 20-day statutory processing deadline pursuant to 5 U.S.C. § 552(a)(6)(B). Finally, the letter stated that DHS would hold EPIC's request for a fee waiver in abeyance "pending the quantification of responsive records."

On July 27, 2010, EPIC submitted an administrative appeal to DHS citing the agency's failure to make a timely determination concerning EPIC's FOIA request.

On September 13, 2010, DHS sent a "final response" to EPIC's FOIA request. DHS sent 428 pages of documents, out of a total of 721 responsive documents located. DHS also determined that some of the responsive documents were under the purview of other DHS components and the request was transferred to them (National Protection and Programs Directorate, Management Directorate). Additional offices and components were also tasked to search for responsive records and EPIC's request was referred to those offices as well (TSA, Secret Service, Coast Guard, FEMA, and ICE).

On September 16, 2010, FEMA acknowledged receipt of EPIC's request and assigned case number FEMA 10-763. FEMA stated that it would hold EPIC's fee request in abeyance "pending the quantification of responsive records." Also on September 16, 2010, DHS Management Directorate sent a final response to EPIC's FOIA request consisting of 64 pages of documents.

On September 30, 2010, the US-VISIT Program of DHS responded to EPIC's FOIA request with the release of 116 pages of documents.

On November 8, 2010, the U.S. Coast Guard wrote to EPIC that it could not find any responsive records. On December 16, 2010, FEMA also responded to EPIC that it could not find any responsive records. No other DHS components responded.

Documents Sought:

1. The DHS's report in response to Homeland Security Presidential Directive 24.
2. All agreements between DHS and any other entity, dated between June 5, 2009 and June 15, 2010, concerning facial recognition systems.
3. All procurement specifications dated between June 5, 2009 and June 15, 2010 concerning facial recognition systems.
4. All reports dated between June 5 2009 and June 15, 2010 concerning facial recognition systems.

Status:

The TSA failed to make a determination concerning EPIC's FOIA request by the statutory deadline, but subsequently disclosed records.

"Why Isn't The Department Of Homeland Security Meeting The President's Standard On FOIA?"
House Oversight Committee

Testimony of John Verdi, EPIC
March 31, 2011
Appendix 4

10. EPIC Case No. 10-07-13 DHS (DHS/OS/PRIV 10-0869, TSA10-0674, S&T 10-0003.42)
Health Risks of Body Scanner Radiation

Summary:

In response to concerns raised by health experts and scientists regarding the danger to air travelers posed by exposure to radiation through use of full body or whole body image scanning technology, EPIC filed a FOIA request on July 13, 2010 with DHS seeking tests regarding body scanners and radiation emission or exposure. EPIC requested expedited processing on the grounds that TSA is expanding its body-imaging program to be the primary screening method in all domestic airports. On July 29, 2010, DHS sent EPIC a letter acknowledging receipt of the request and informing EPIC that the request would be referred to the Transportation Security Administration (“TSA”) and the DHS Science and Technology Directorate (“S&T”).

On August 12, 2010, TSA wrote to EPIC, denying EPIC’s requests for expedited processing and a fee waiver. EPIC filed an administrative appeal of TSA’s decision on August 27, 2010. On September 21, 2010, the TSA wrote to acknowledge receipt of EPIC’s appeal.

On September 3, 2010, S&T responded to EPIC, denying EPIC’s request for a fee waiver. On September 8, 2010, S&T responded to EPIC, stating that S&T had identified agency records that are in S&T’s possession and are responsive to EPIC’s FOIA request. However, S&T failed to disclose the responsive records, ostensibly because the records “belong to the Transportation Security Administration (TSA).”

On October 21, 2010, EPIC transmitted a written administrative appeal to TSA regarding the TSA’s failure to make a determination regarding EPIC’s FOIA request. On November 5, 2010, TSA sent EPIC a letter that acknowledged receipt of EPIC’s appeal and then further stated that it “may encounter some delay in processing your request” and invited EPIC to “narrow the scope of your request.” This letter was an explicit or constructive denial of EPIC’s appeal to TSA, purporting to respond to EPIC’s appeal but instead unlawfully placing EPIC’s appeal in a queue for processing FOIA requests – a queue in which TSA states “there are currently 50 open requests ahead of yours.” The TSA has failed to make a determination concerning EPIC’s FOIA request.

On October 21, 2010, EPIC appealed S&T’s failure to disclose records, as well as S&T’s denial of EPIC’s request for a fee waiver. S&T has failed to make a determination concerning EPIC’s appeal and has not disclosed a single agency record.

On November 19, 2010, EPIC filed suit against DHS for failure to disclose documents in response to EPIC’s July 13, 2010 FOIA request and failure to comply with statutory deadlines.

On November 24, 2010, the TSA wrote to EPIC in response to EPIC's August 27th appeal regarding fees and expedited processing. TSA affirmed their initial expedited processing denial but agreed to a fee waiver.

On December 22, 2010, TSA sent an interim response to EPIC's original FOIA request indicating that it is "currently being processed." The response also stated that certain requested records were available publicly on the TSA's web site, and that appeal rights were not provided because of ongoing litigation.

Documents sought:

1. All records concerning TSA tests regarding body scanners and radiation emission or exposure.
2. All records concerning third party tests regarding body scanners and radiation emission or exposure.

Status:

The agency has not yet made a determination concerning EPIC's FOIA request and has failed to disclose responsive records. EPIC's lawsuit to force disclosure is pending.

11. **EPIC Case No. 10-11-23/DHS** (DHS Case Nos. DHS/OS/RIV 11-0214, S&T 10-0003.55; TSA11-0229):

Mobile Body Scanners

Summary:

On November 24, 2010 EPIC filed a FOIA request with DHS for documents concerning the agency's development and deployment of "body scanner" (or "Whole Body Imaging," "Advanced Imaging Technology," "Millimeter Wave," or "Backscatter") technology by law enforcement agencies in surface transit and street-roaming vans. The request followed news reports that, in 2009, the DHS had tested the technology on travelers using the New Jersey PATH Train and other news stories in 2010 reporting that vans known as "Z Backscatter Vans," which are capable of seeing through vehicles and clothing and routinely store the images generated, had been deployed on public roadways. In March 2010, DHS released a Surface Transportation Security Priority Assessment, which detailed the agency's plans to conduct risk assessment and implement new technology in America's surface transportation systems, including "Mass Transit, Highways, Freight Rail, and Pipelines..."

DHS acknowledged receipt of the request on December 10, 2010 and stated that the request would be forwarded to two separate DHS components: the Transportation Security Administration and the Science and Technology Directorate.

Despite receiving EPIC's request on December 14, 2010, the Science and Technology Directorate, the component invoked its right to a 10-day extension of the statutory deadline on January 11, 2011. On February 4, 2011, the component again stated that though responsive documents had been located, it was "experiencing a delay in processing [EPIC's] request." The component released documents to EPIC on February 16, 2011.

On February 7, 2011, the TSA acknowledged receipt of EPIC's forwarded request, which it received on December 21, 2010. The TSA alleged that EPIC's request did not reasonably describe agency records. The TSA asserted the authority to "administratively close" EPIC's request unless EPIC modified the request within 20 days. EPIC contacted the agency, disputed the TSA's allegation that EPIC's request was insufficiently specific, and challenged the agency's alleged right to administratively close FOIA requests without the consent of the requester. The TSA subsequently withdrew its February 7, 2011 letter, agreeing to process EPIC's FOIA request as submitted, without modification.

Documents sought:

7. All documents detailing plans by federal law enforcement agencies to implement body scanner technology in the surface transportation context.
8. All contracts, proposals, and communications with private transportation and shipping companies (including, but not limited to NJ PATH, Amtrak, and Greyhound) regarding the implementation of body scanner technology in surface transit.
9. All contracts, proposals, and communications with states, localities, tribes, and territories (and their subsidiaries or agencies) regarding the implementation of body scanners in surface transportation.
10. All documents detailing plans by federal law enforcement agencies to use "Z Backscatter Vans" or similar technology.
11. All contracts, proposals, and communications with the manufacturers of the "Z Backscatter Vans" or similar technology.
12. All contracts, proposals, and communications with states, localities, tribes, and territories (and their subsidiaries or agencies) regarding the implementation of "Z Backscatter Vans" or similar technology.
13. All images generated by the "Z Backscatter Vans" or body scanner technology that has been used in surface transit systems.

Status:

The Science and Technology Directorate released some of the requested records to EPIC; many documents were withheld in their entirety. The TSA has not

communicated with EPIC since acknowledging the errors contained in its February 7, 2011 letter.

12. EPIC Case No. 10-12-22/USSS (US Secret Service Case No. 20110021-20110022):
WikiLeaks Donor Identities

Summary:

On December 22, 2010, EPIC filed a request for disclosure of U.S. Secret Service (USSS) agency records regarding its investigation into the identities of donors to WikiLeaks or the identities of Internet users who accessed data from WikiLeaks. The request followed reports that, after WikiLeaks released confidential American diplomatic cables on its website wikileaks.org, the U.S. Government opened an investigation into the organization. The investigation attempted to identify users who accessed WikiLeaks documents and included at least one letter to a payment processor requesting information. The investigation prompted web hosts and payment processors to terminate their relationships with WikiLeaks.

On February 10, 2011, the U.S. Secret Service acknowledged receipt of the request.

Documents Sought:

1. All communications or agreements between the U.S. government and corporations (including but not limited to: Paypal, Visa, and Mastercard) regarding the personal information (including, but not limited to, the identities) of donors to WikiLeaks.
2. All communications or agreements between the U.S. government and corporations (including, but not limited to, Amazon.com, EveryDNS, internet service providers, and website hosting companies) regarding the personal information (including, but not limited to, the identities) of individuals who accessed or attempted to access the WikiLeaks web site or the November release.

Status:

The agency has failed to disclose any records or make a substantive determination concerning EPIC's request despite the expiration of the relevant FOIA deadline.

Appendix 5 – February 7, 2011 Letter from TSA to EPIC

U.S. Department of Homeland Security

Freedom of Information Act Office
601 South 13th Street
Arlington, VA 22204-6020



Transportation
Security
Administration

February 7, 2011

Ms. Ginger McCall
1718 Connecticut Ave., NW Suite 200
Washington, DC 20009

Re: TSA11-0229

Dear Ms. McCall:

This acknowledges receipt of your Freedom of Information Act (FOIA) request to the Transportation Security Administration (TSA), dated November 24, 2010, regarding documents concerning all detailing plans by federal law enforcement agencies to implement body scanner technology in the surface transportation context.

1. All contracts, proposals, and communications with private transportation and shipping companies (including, but not limited to NJ PATH, Amtrak, and Greyhound) regarding the implementation of body scanner technology in surface transit.

2. All contracts, proposals, and communications with states, localities, tribes, and territories (and their subsidiaries or agencies) regarding the implementation of body scanners in surface transportation.

3. All documents detailing plans by federal law enforcement agencies to use "Z Backscatter Vans" or similar technology.

4. All contracts, proposals, and communications with the manufacturers of the "Z Backscatter Vans" or similar technology.

5. All contracts, proposals, and communications with states, localities, tribes, and territories (and their subsidiaries or agencies) regarding the implementation of "Z Backscatter Vans" or similar technology.

6. All images generated by the "Z Backscatter Vans" or body scanner technology that has been used in surface transit systems.

Your request was received in this office on December 21, 2010.

Please resubmit your request containing a reasonable description of the records (contract numbers) you are seeking. Upon receipt of a perfected request, you will be advised as to the status of your request.

If we do not hear from you within 20 days from the date of this letter, we will assume you are no longer interested in this FOIA request, and the case will be administratively closed. Please be advised that this action is not a denial of your request and will not preclude you from filing other requests in the future.

Your request has been assigned reference number TSA11-0229. Please refer to this identifier in any future correspondence. You may contact this office at 866-364-2872.

Sincerely,

TSA FOIA Office
Freedom of Information Act

www.tsa.gov

"Why Isn't The Department Of Homeland
Security Meeting The President's Standard On
FOIA?"
House Oversight Committee

Testimony of John Verdi, EPIC
March 31, 2011
Appendix 5

Committee on Oversight and Government Reform
Witness Disclosure Requirement -- "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name: John Verdi

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2008. Include the source and amount of each grant or contract.

None.

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

Electronic Privacy Information Center.
I am Senior Counsel at EPIC and Director of the EPIC open
Government Project.

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2008, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

None.

I certify that the above information is true and correct.

Signature:

J Verdi

Date:

3/25/11