

VIA FACSIMILE

March 2, 2017

Sabrina Burroughs  
FOIA Officer/Public Liaison  
U.S. Customs & Border Protection  
1300 Pennsylvania Avenue, NW, Room 3.3D  
Washington, D.C. 20229

Dear Ms. Burroughs,

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

EPIC seeks records related to eye scans of U.S. citizens by CBP upon entry and/or exit to the U.S. (“EPIC FOIA Request”).

CBP employs “Biometric Travel Security Initiatives” to verify travelers’ identities upon entry and exit to the U.S.<sup>1</sup> CBP biometric programs have included the Departure Information Systems Test, BE-Mobile, the Pedestrian Field Test, and the 1-to-1 Facial Comparison Project.<sup>2</sup> CBP acknowledges it conducts biometric identification of U.S. Citizens.<sup>3</sup> The component also expressly stated it is “testing... iris imaging capabilities to help improve travelers’ identity protection.”<sup>4</sup>

EPIC now seeks five categories of records related to CBP eye scans of U.S. citizens.

## Documents Requested

1. Policies and procedures for CBP scanning U.S. citizens’ eyes, including iris and retinal scans, upon entry and/or exit to the U.S., including but not limited to policies and procedures pertaining to the collection, access, dissemination, and retention of iris and retinal scans;

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<sup>1</sup> *Biometric Travel Security Initiatives*, U.S. Customs and Border Protection (August 2, 2016), <https://www.cbp.gov/travel/biometric-security-initiatives>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

2. Technical specifications and contracts related to CBP scanning U.S. citizen eyes, including iris and retinal scans, upon entry and/or exit to the U.S.;
3. Passenger complaints from U.S. citizens related to CBP eye scans, including iris and retinal scans, upon entry and/or exit to the U.S.;
4. Reports or studies concerning the reliability of the eye scans, including iris and retinal scans, used by CBP for traveler identification; and
5. Memorandums of Understanding or other agreements for the dissemination or access to iris and retinal scan information collected by the CBP or agreements for CBP access to iris and retinal scan information collected by other entities.

### Request for Expedited Processing

EPIC is entitled to expedited processing of this request under the FOIA and the agency FOIA regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(e)(1)(ii). Specifically, EPIC's FOIA Request is entitled to expedited processing because, first, there is an "urgency to inform the public about an actual or alleged federal government activity," and, second, because the request is "made by a person who is primarily engaged in disseminating information." § 5.5(e)(1)(ii).

First, there is an "urgency to inform the public about an actual or alleged federal government activity." § 5.5(e)(1)(ii). The "actual" federal government activity at issue is CBP's scanning the eyes of U.S. citizens. There is no dispute that CBP has carried out such activity; the component itself acknowledges biometric review of U.S. citizens at U.S. ports of entry and exit.<sup>5</sup> "Urgency" to inform the public about this activity is clear because of the direct and immediate implications for U.S. citizens' privacy rights. The Constitutional privacy rights of U.S. citizens do not stop at the border. U.S. CONST. amend. IV. Moreover, as highlighted by recent government data breaches, personal data collection by the U.S. government entails substantial data security and identity theft risks.<sup>6</sup> Over 72 million U.S. citizens traveled abroad in 2016; vast numbers of the American public could be implicated in any biometric review by CBP. Therefore, there is an urgent public need to understand the extent, consequences, and reliability of any such review by the CBP.<sup>7</sup>

Second, EPIC is an organization "primarily engaged in disseminating information." § 5.5(e)(1)(ii). As the Court explained in *EPIC v. Dep't of Def.*, "EPIC satisfies the definition of 'representative of the news media'" entitling it to preferred fee status under FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

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<sup>5</sup> *Biometric Travel Security Initiatives*, *supra* note 1.

<sup>6</sup> Julie Hirshfeld Davis, *Hacking of Government Computers Exposed 21.5 Million People*, N.Y. Times (July 9, 2015), [https://www.nytimes.com/2015/07/10/us/office-of-personnel-management-hackers-got-data-of-millions.html?\\_r=0](https://www.nytimes.com/2015/07/10/us/office-of-personnel-management-hackers-got-data-of-millions.html?_r=0).

<sup>7</sup> *U.S. Citizen Travel to International Regions*, Nat'l Travel & Tourism Office (Jan. 31, 2017), <http://travel.trade.gov/view/m-2016-O-001/index.html>.

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

### Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes. *EPIC v. Dep’t of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplication fees assessed. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

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

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

First, disclosure of the requested documents “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” § 5.11(k)(2). CBP evaluates the following four considerations to determine whether this requirement is met: (i) the “subject of the request must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.”; (ii) disclosure “must be meaningfully informative about government operations or activities in order to be ‘likely to contribute’ to an increased public understanding of those operations or activities”; (iii) “disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester” and it “shall be presumed that a representative of the news media will satisfy this consideration”; and/or (iv) the “public’s understanding of the subject in question must be enhanced by the disclosure to a significant extent.” *Id.*

As to the first consideration, the subject of the request concerns “identifiable operations or activities of the federal government” because the requested documents involve CBP biometric review of U.S. citizens. § 5.11(k)(2)(i). These policies, procedures, and acts by CBP directly and clearly involves the agency’s security and immigration activities and, therefore, self-evidently constitute activities of the federal government.

As to the second consideration, disclosure would also be “meaningfully informative about” these operations or activities and is thus “‘likely to contribute’ to an increased understanding of government operations or activities.” § 5.11(k)(2)(ii). CBP provides little information about its continued or expanded use of eye scans of U.S. citizens. For instance, the component website on biometric identification offers only outdated basic information, such as press releases and fact sheets on initial biometric identification pilot programs, and privacy impact assessments for the 1-

to-1 Facial Comparison Project that do not describe any CBP use of eye scans.<sup>8</sup> The public report to Congress on the matter is outdated by nearly a year and also provides none of the information requested.<sup>9</sup> These materials will, as a result, substantively contribute to the public understanding of the CBP operations or activities.

As to the third consideration, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject” because, as provided in the relevant FOIA regulations, CBP will “presum[e] that a representative of the news media will satisfy this consideration.” § 5.11(k)(2)(iii).

Finally, as to the fourth consideration, the public’s understanding will “be enhanced by the disclosure to a significant extent” because, as just described, little is known about the details of CBP’s procedures and activities in conducting eye scans of U.S. citizens, or the evidentiary basis and any complaints in carrying out the scans. § 5.11(k)(2)(iv).

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

Second, “[d]isclosure of the information is not primarily in the commercial interest” of EPIC. § 5.11(k)(3). In determining whether this second requirement is met, CBP evaluates the following two considerations: (i) whether there is “any commercial interest of the requester... that would be furthered by the requested disclosure”; and/or (ii) whether “the public interest is greater than any identified commercial interest in disclosure,” and “[c]omponents ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.” *Id.*

As to the first consideration, there is not “any commercial interest of the requester... that would be furthered by the requested disclosure.” § 5.11(k)(3)(i). EPIC has no commercial interest in the requested records. EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.<sup>10</sup>

As to the second consideration, “the public interest is greater than any identified commercial interest in disclosure.” § 5.11(k)(3)(ii). Again, EPIC has no commercial interest in the requested records, and, as noted above, there is significant public interest in the requested records. Moreover, CBP should presume that EPIC has satisfied § 5.11(k)(3)(ii). The FOIA regulations state “[c]omponents ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.” *Id.* As established in the sections above, EPIC is a news media requester, and its request satisfies the public interest standard.

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<sup>8</sup> *Biometric Travel Security Initiatives*, *supra* note 1.

<sup>9</sup> Dep’t Homeland Sec., Comprehensive Biometric Entry/Exit Plan: Fiscal Year 2016 Report to Congress (2016), <https://www.dhs.gov/sites/default/files/publications/Customs%20and%20Border%20Protection%20-%20Comprehensive%20Biometric%20Entry%20and%20Exit%20Plan.pdf>.

<sup>10</sup> *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.

For these reasons, a fee waiver should be granted.

Conclusion

Thank you for your consideration of this request. As provided in 5 U.S.C. § 552(a)(6)(E)(ii)(I) and 6 C.F.R. § 5.5(e)(4), I will anticipate your determination on our request within ten calendar days.

For questions regarding this request I can be contacted at 202-483-1140 x111 or FOIA@epic.org.

Respectfully submitted,

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