

November 24, 2009

BY CERTIFIED MAIL
NSA/CSS FOIA Appeal Authority (DJP4)
National Security Agency
9800 Savage Road STE 6248
Ft. George G. Meade, MD 20755-6248

RE: Freedom of Information Act Appeal (FOIA Case 58987)

Dear FOIA Appeals Officer:

This letter constitutes an appeal under the Freedom of Information Act (“FOIA”), 5 USC § 552, and is submitted to the National Security Agency (“NSA”) by the Electronic Privacy information Center (“EPIC”).

On June 25, 2009, EPIC requested agency records regarding National Security Presidential Directive 54 (the “Directive”) and the Comprehensive National Cybersecurity Initiative (the “Initiative”). Specifically, EPIC requested the following:

1. The text of National Security Presidential Directive 54, otherwise referred to as 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. Any privacy policies related to either the Directive or the 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.

Factual Background

The documents sought are clearly in possession of the agency. In January 2008, George W. Bush issued the Directive, but it was never released to the public.¹ Under this secret Directive,² the Comprehensive National Cybersecurity Initiative (CNCI) was

¹ Jill R. Aitoro, *The Comprehensive National Cybersecurity Initiative*, NEXTGOV, June 1, 2009, http://www.nextgov.com/the_basics/tb_20090601_8569.php.

² “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 cybersecurity will lead to a fundamental shift in the way the Department approaches the security of U.S. networks.” Letter from Joseph

formed to “improve how the federal government protects sensitive information from hackers and nation states trying to break into agency networks.”³ In February 2009, President Obama appointed Melissa Hathaway as the head of a 60-day review of government’s cybersecurity efforts (the “Hathaway Report”).⁴ 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.⁵

Since the Directive was issued, the NSA has pursued policies set out in the still-secret document.⁶ In fact, the Washington Post noted the NSA, along with FBI and CIA, as agencies charged with the responsibility of implementing the CNCI.⁷ The March 2009 resignation letter of the former head of the DHS National Cybersecurity Center, Rod Beckstrom, confirms that the NSA did in fact gain tremendous influence over DHS cybersecurity operations. In his letter, Mr. Beckstrom asserted that the “NSA effectively controls DHS cyber efforts through . . . technology insertions, and the proposed move of two organizations under DHS (the National Protection and Programs Directorate and the National Cybersecurity Center) to a Fort Meade NSA facility.”⁸

Though privacy is highlighted in the Hathaway Report, such considerations are noticeably absent from any practical application of the Cybersecurity Act. As Senators Joseph Lieberman and Susan Collins noted in their May 1, 2008 letter to DHS Secretary Michael Chertoff, efforts to “downgrade the classification or declassify information regarding [CNCI] would . . . permit broader collaboration with the privacy sector and outside experts.”⁹ President Obama’s recent focus on Transparency, Participation, and Collaboration between the public and executive agencies further justifies a renewed effort to disclose such information to the public. Releasing the documents sought in this request would provide the opportunity for meaningful public participation in the development of new security measures that may have a significant impact on civil liberties, such as

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.

³ *Id.*

⁴ Jaikumar Vijayan, *Obama Taps Bush Aide Melissa Hathaway to Review Federal Cybersecurity Efforts*, COMPUTER WORLD: SECURITY, Feb. 9, 2009, <http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=9127682>.

⁵ Thomas, S.773 Bill Summary, *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:s.00773>: see also Jennifer Granick, *Federal Authority Over the Internet? The Cybersecurity Act of 2009*, ELECTRONIC FRONTIER FOUNDATION, Apr. 10, 2009, <http://www.eff.org/deeplinks/2009/04/cybersecurity-act>.

⁶ Jill R. Aitoro, *The Comprehensive National Cybersecurity Initiative*, NEXTGOV, June 1, 2009, http://www.nextgov.com/the_basics/tb_20090601_8569.php.

⁷ Ellen Nakashima, *Bush Order Expands Network Monitoring*, THE WASHINGTON POST, Jan. 26, 2009, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/25/AR2008012503261.html?wpisrc=newsletter>

⁸ Letter from Rod Beckstrom, Director, National Cybersecurity Center to Janet Napolitano, Secretary, Department of Homeland Security (March 5, 2009), *available at* <http://online.wsj.com/public/resources/documents/BeckstromResignation.pdf>.

⁹ Letter from Lieberman & Collins, *supra* note 2.

privacy.¹⁰ The Senate Committee on Homeland Security and Governmental Affairs recognizes that cybersecurity initiatives must include actions to “...reassure [the public] that efforts to secure cyber networks will be appropriately balanced with respect for privacy and civil liberties.”¹¹

Taken together, these developments underscore the important public interest in making available to the public the Directive that undergirds the government’s policy on cyber security. Without this disclosure, as sought by EPIC in this matter, the government cannot meaningfully make assurances about the adequacy of privacy and civil liberties safeguards.

Procedural Background

On June 29, 2009, EPIC transmitted EPIC’s FOIA request to the NSA. *See* Appendix 1 (“EPIC’s FOIA request”).

On July 1, 2009, the NSA wrote to EPIC, acknowledged receipt of EPIC’s FOIA request, but denied EPIC’s request for expedited processing and did not make any substantive determination regarding EPIC’s FOIA request. *See* 5 U.S.C. § 552(a)(6); *see also* Appendix 2.

On July 30, 2009, EPIC transmitted a written administrative appeal by certified mail to the NSA. *See* Appendix 3. EPIC appealed the NSA’s failure to make a timely substantive determination regarding its request as required under 5 U.S.C. § 552(a)(6), as well as the NSA’s denial of EPIC’s request for expedited processing.

In a letter dated August 12, 2009, the NSA replied to EPIC’s appeal of July 30. *See* Appendix 4. In this response, the NSA FOIA Appeals Authority granted the request for expedited processing, but made no substantive determination regarding EPIC’s FOIA request.

In a subsequent letter, dated August 14, 2009, the NSA acknowledged the grant of expedited processing and stated that it had completed its search for responsive records. *See* Appendix 5. This letter further stated that two documents responsive to part 3 of EPIC’s FOIA request¹² had been released previously under the FOIA in partially redacted form, and these two documents were enclosed with the letter. With respect to other documents identified by the agency, this letter stated only that “the remaining material responsive has been assigned for review to determine releasability and will be completed as expeditiously as possible.”

In a letter dated October 26, 2009, the NSA responded with substantive determinations regarding that remaining material. *See* Appendix 6. This letter stated that

¹⁰ Memoranda from Barack Obama, President of the United States, on Transparency and Open Government (January 21, 2009) *available at* http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/.

¹¹ Letter from Lieberman & Collins, *supra* note 2.

¹² Appendix 1 at 3 (“Any privacy policies related to either the Directive or the 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.”).

the NSA identified one document responsive to part 1 of EPIC's FOIA request,¹³ zero documents as responsive to part 2 of EPIC's FOIA request,¹⁴ and two additional documents as responsive to part 3 of EPIC's FOIA request.¹⁵

With respect to the document identified as responsive to part 1 of EPIC's FOIA request (the text of National Security Presidential Directive 54), the NSA refused to disclose the document. Instead, the NSA stated that because the record "did not originate with" the NSA, the document "has been referred to the National Security Council for review and direct response to" EPIC. The NSA withheld the documents responsive to part 3 of EPIC's FOIA request in full, allegedly pursuant to FOIA Exemption b(5). The NSA also stated that portions of the responsive documents were exempt from disclosure pursuant to Exemptions b(1) and b(3).

EPIC Appeals the NSA's Failure to Disclose Records

Request Part 1: EPIC hereby appeals the NSA's failure to disclose the record identified as responsive to part 1 of EPIC's FOIA request—the document is presumably NSPD 54. The FOIA does not define the term "agency records," but the NSA's published rules defines such records as:

The products of data compilation . . . made or received by an agency of the United States Government under Federal law in connection with the transaction of public business and in NSA/CSS's possession and control at the time the FOIA request is made.

32 C.F.R. § 299.2(c)(1). This definition is consistent with the standard established by the Supreme Court in *Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989).

In its letter to EPIC dated October 26, 2009, the NSA admitted that the Directive is in its possession and control. That the NSA received the Directive in connection with the transaction of public business is well established above. The NSA's sole justification for refusing to disclose the Directive is that the record "did not originate" with the agency.

Although the agency cited no authority in the October 26 letter for the decision to refer the request to the National Security Council, presumably the NSA took the action pursuant to the relevant agency regulation, which reads:

Records or portions thereof originated by other agencies or information of primary interest to other agencies found in NSA/CSS records shall be handled as follows:

- (1) The originating agency's FOIA Authority shall be provided with a copy of the request and the stated records.

¹³ Appendix 1 at 3 ("The text of National Security Presidential Directive 54, otherwise referred to as Homeland Security Presidential Directive 23.").

¹⁴ Appendix 1 at 3 ("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.").

¹⁵ *supra* note 12.

- (2) The requester shall be advised of the referral, except when notification would reveal exempt information.

32 C.F.R. § 299.5(k). This regulation does not apply here, however, because the National Security Council is not an “agency” under the FOIA. *Armstrong v. Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996). As such, the Directive is not a record originated by another agency, under the meaning of the applicable regulation. Additionally, the National Security Council has no designated FOIA Authority, making compliance with this regulation impossible in this case.

Even if it did apply here, the regulation itself is overbroad with no justification in the statute. The FOIA makes no provision for referring requests to outside entities. Instead it allows for a showing of “unusual circumstances” and includes in that definition “the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request.” 5 U.S.C. § 552(a)(6)(B)(iii). The D.C. Circuit has held that “when an agency receives a FOIA request for ‘agency records’ in its possession it must take responsibility for processing the request. *It cannot simply refuse to act on the ground that the documents originated elsewhere.*” *McGehee v. CIA*, 697 F.2d 1095, 1110 (D.C. Cir. 1983), *vacated in part and aff’d in part*, 712 F.2d 1076 (D.C. Cir. 1983) (emphasis added). The D.C. Circuit held that forwarding requests to another body constitutes improper withholding “if its net effect is significantly to impair the requester’s ability to obtain the records or significantly to increase the amount of time he must wait to obtain them” and the agency fails to make “a showing that the procedure significantly improves the quality of the process.” *Id.*¹⁶

McGehee is only the first in a line of cases upholding the principle that unjustified referral to another entity in place of response constitutes improper withholding agency records. The D.C. Circuit repeated and clarified the rule in a second case almost immediately. *Paisley v. CIA*, 712 F.2d 686, 691 (D.C. Cir. 1983), *vacated in part*, 724 F.2d 201 (D.C. Cir. 1984). In that case, the court found that documents in possession of the FBI and CIA were agency records and subject to the FOIA even though they had originated in Congress or the Department of Justice. *Id.* In *Peralta v. U.S. Attorney’s Office*, 136 F.3d 169 (D.C. Cir. 1998), the Executive Office for U.S. Attorneys had forwarded the plaintiff’s FOIA request to the FBI and the district court had ruled that this satisfied its obligations. Even though the U.S. Attorneys and the FBI are both components of the Department of Justice, the D.C. Circuit reversed and ordered the district court to consider the referral question in light of *McGehee* on remand. *Id.* at 175. The rule is so well-established in the D.C. Circuit that it has even been used as the basis for vacating an order with a simple per curiam opinion, as in *Williams v. FBI*, 1993 U.S. App. Lexis 16937 (D.C. Cir. 1993) (per curiam).

The Seventh Circuit has also adopted the rule and applied it to a U.S. Attorney’s office in *In re Wade*, 969 F.2d 241, 247–248 (7th Cir. 1993), holding, “Once a FOIA request has been made to an agency, that agency’s referral to a different agency regarding

¹⁶ The court also noted that a procedure “that resulted in very long delays would be highly difficult to justify.” *Id.* While it is possible that the National Security Council may choose to abide by the spirit of the FOIA and release the record, this particular referral’s effects will likely result in a much worse result: complete non-response.

disclosure does not divest the original agency of responsibility to respond to the FOIA request.” The D.C. District Court acknowledged that the McGehee rule “is well-settled in our circuit,” before ruling that “even though Customs referred [agency records] to other agencies for review and processing, Customs is still responsible for explaining their non-production.” *Greenberg v. U.S. Dep’t of Treasury*, 10 F. Supp. 2d 3, 18 (D.D.C. 1998). In one recent case in the D.C. District, the referral was to a United States probation office, which, like the National Security Council, is not an agency subject to the FOIA. *Maydak v. U.S. Dep’t of Justice*, 254 F. Supp. 2d 23. Although the district court in that case gave the agency the opportunity to supplement the record on this point, the court acknowledged that the plaintiff raised “a genuine legal issue about the propriety” of the referral, and stated that compelling release of the documents “may ultimately be an appropriate remedy.” *Id.* at 40.

The NSA’s failure to disclose the Directive is contrary to federal statute and controlling legal authority. The agency has based its action on a misapplication of its own regulation. EPIC appeals the NSA’s improper withholding of NSPD 54 and urges the agency to disclose the record in its possession as required by the Freedom of Information Act. 5 U.S.C. 552(a)(3)(A).

Request Part 2: EPIC hereby appeals the NSA’s failure to disclose any records responsive to part 2 of EPIC’s FOIA request. The October 26 letter from the Agency states only that no responsive records were located, in spite of a “thorough search.”

Agencies must conduct a search that is “reasonably calculated to uncover all relevant documents.” *Weisberg v. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see also McGehee*, 697 F.2d at 1100 (D.C. Cir. 1983). “If challenged, [the agency] must demonstrate beyond material doubt that the search was reasonable.” *Kowalczyk v. Dep’t of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996) (quoting *Truitt v. Department of State*, 283 U.S. App. D.C. 86, 897 F.2d 540, 542 (D.C. Cir. 1990)). “The adequacy of the [agency’s] search, in turn, is judged by a standard of reasonableness and depends, not surprisingly, upon the facts of each case.” *Natural Res. Def. Council v. Dep’t of Def.*, 388 F. Supp. 2d 1086, 1095 (C.D. Cal. 2005) (quoting *Weisberg v. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). When an agency is unable to locate responsive documents, it bears the burden proving that its less than comprehensive search is reasonable under the circumstances. *McGehee*, 697 F.2d at 1101.

The Lieberman & Collins letter discussed above and cited in EPIC’s original FIOA request clearly states that the CNCI is a very large program involving the participation of multiple agencies over several years. The Washington Post has identified the NSA as one of the primary agencies responsible for its implementation, and its participation is also referred to in Mr. Beckstrom’s resignation letter. *See supra* notes 6–8 and accompanying text.

Given the NSA’s well-established responsibilities with respect to the Comprehensive National Cybersecurity Initiative, it is very unlikely that a truly “thorough search” by the NSA would fail to turn up a single record satisfying request part 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.”

Request Part 3: EPIC hereby appeals the NSA’s failure to disclose the two records identified by the Agency in the October 26 letter as responsive to part 3 of EPIC’s FOIA request. The NSA alleges that both documents are exempt in full pursuant to FOIA Exemption b(5), that portions of one document are partially exempt pursuant to Exemption b(1), and that portions of both documents are exempt pursuant to Exemption b(3).

The NSA’s full withholding under FOIA Exemption b(5) was improper. That exemption permits an agency to withhold records that constitute “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 522(b)(5). As acknowledged by the NSA in its explanation for the withholding, this exemption protects “information that is normally privileged in the civil discovery context, such as information that is part of a predecisional deliberative process.” This phrasing by the Agency suggests that these two documents qualify for the deliberative process privilege as recognized by the Supreme Court in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150–54 (1975). Yet records responsive to part 3 of EPIC’s FOIA request would not be properly withheld under this privilege.

When describing this privilege, the Supreme Court specifically differentiated between predecisional documents and post-decisional documents, only finding protection for the former. *Id.* at 151–53. Additionally, the Court has cited the affirmative disclosure requirements of subsection (a)(2) of the FOIA—including “statements of policy and interpretations which have been adopted by the agency”—as evidence of “a strong congressional aversion to secret agency law.” *Id.* at 153 (internal citation omitted). Part 3 of EPIC’s request was for “privacy policies . . . including but not limited to contracts or other documents describing privacy policies for information shared with private contractors.” EPIC did not request draft version of privacy policies, which might qualify as “predecisional.” Rather, EPIC’s FOIA request specifies final privacy policies. Records responsive to this request almost certainly constitute statements of agency policy, rather than predecisional deliberative documents. As such, the NSA’s assertion of Exemption b(5) to withhold these documents is improper. Additionally, to the extent that any of the documents are actually contracts with private enterprises, those records may not be withheld pursuant to Exemption b(5) because voluntary disclosure to non-agency third parties generally constitutes waiver of the exemption. *Chilivis v. SEC*, 673 F.2d 1205, 1212 (11th Cir. 1982); *Cooper v. Dep’t of Navy*, 594 F.2d 484, 486 (5th Cir. 1979).

EPIC also appeals the bases asserted for partially withholding the two records that the NSA has identified as responsive to part 3 of EPIC’s FOIA request. In its letter, the NSA described parts of one record as “currently and properly classified in accordance with Executive Order 12958, as amended,” and therefore exempt from disclosure under 5 U.S.C. § 522(b)(1). Additionally, NSA asserts Exemption b(3) as to portions of both records, and alleges that the information is exempt pursuant to various statutes. The Agency has not established any factual basis for these withholdings. Because the documents were withheld in full pursuant to Exemption b(5), it is impossible for EPIC to determine whether these asserted exemptions are proper without additional information concerning the records.

Conclusion

By improperly referring a request to an outside entity instead of disclosing an agency record in its possession and control, the NSA has failed to comply with the FOIA. The Agency also failed to comply by performing an inadequate search for responsive documents and by asserting inapplicable exemptions in order to improperly withhold other documents. The NSA's improper withholding of these records also flatly contravenes a recent memorandum on the Freedom of Information Act issued by the President of the United States and explicit FOIA guidance promulgated by the Attorney General. On January 21, 2009, President Obama stated that "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. . . . The presumption of disclosure should be applied to all decisions involving FOIA."¹⁷ On March 19, 2009, Attorney General Eric Holder promulgated new FOIA guidelines for heads of all Executive Departments and Agencies to ensure that the "nation's fundamental commitment to open government . . . is realized in practice."¹⁸

EPIC appeals the NSA's failure to disclose responsive documents and its failure to perform an adequate, reasonable search for the agency records described in EPIC's FOIA request. EPIC reiterates its request for expedited processing in this appeal—a request the NSA granted as to EPIC's FOIA request.

Sincerely,

Jared Kaprove
EPIC Domestic Surveillance Counsel

John Verdi
Director, EPIC Open Government Project

/enclosures

¹⁷ President Barack Obama, "Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act," January 21, 2009, available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>

¹⁸ Available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>

Appendix 1

EPIC's June 25, 2009 FOIA request to the NSA

Appendix 2

NSA's July 1, 2009 initial response to EPIC

Appendix 3

EPIC's July 30, 2009 administrative appeal to the NSA

Appendix 4

NSA appeals authority August 12, 2009
letter to EPIC granting expedited processing

Appendix 5

NSA's August 14, 2009 letter to EPIC

Appendix 6

NSA's October 26 letter to EPIC