



BY EMAIL

Email: foia@hq.dhs.gov

September 9, 2016

Jonathan Cantor
Acting Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane SW
STOP-0655
Washington, D.C. 20528-0655

Dear Mr. Cantor,

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 Department of Homeland Security (“DHS”).

EPIC seeks documents related to the DHS’s use of drones—also known as “unmanned aircraft systems” (“UAS”)—including but not limited to drones used by Customs and Border Protection (“CBP”).

Documents Requested

- (1) All policies and procedures concerning the collection, use, retention, and dissemination of information obtained by the DHS using drones/UAS.
- (2) All policies and procedures concerning the training and oversight of individuals who work on DHS drone/UAS programs and/or have access to personally identifiable information collected by the DHS using drones/UAS.
- (3) All policies and procedures concerning the DHS’s processing of privacy, civil rights, and civil liberties complaints that arise from the DHS’s use of drones/UAS.

- (4) All annual summaries of DHS drone/UAS operations, publication of which is mandated by the presidential memorandum of February 15, 2015.¹
- (5) The status report required by the presidential memorandum of February 15, 2015.²

Background

On February 15, 2015, President Barack Obama issued a presidential memorandum to federal agencies concerning the domestic use of drones.³ Emphasizing the “privacy, civil rights, and civil liberties concerns” raised by the technology,⁴ the President ordered agencies to ensure that any use of drones by the federal government in U.S. airspace comply with “the Constitution, Federal law, and other applicable regulations and policies.”⁵

Among other measures, President Obama instructed each agency using drones in U.S. airspace to:

- Create and periodically re-examine “policies and procedures relating to the collection, use, retention, and dissemination of information obtained by [drones]”;⁶
- Institute policies and procedures “that provide meaningful oversight of individuals” who have access to personally identifiable information collected by drones;⁷
- Establish procedures “to receive, investigate, and address, as appropriate, privacy, civil rights, and civil liberties complaints” arising from the use of drones;⁸ and
- Keep the public informed of how and where the agency uses drones, including through a required annual summary “of the agency’s [drone] operations during the previous fiscal year, to include a brief description of types or categories of

¹ President Barack Obama, *Presidential Memorandum: Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems*, The White House (Feb. 15, 2015), <https://www.whitehouse.gov/the-press-office/2015/02/15/presidential-memorandum-promoting-economic-competitiveness-while-safegua>.

² *Id.* § 1(e).

³ *Id.*

⁴ *Id.*

⁵ *Id.* § 1.

⁶ *Id.* § 1(a).

⁷ *Id.* § 1(c).

⁸ *Id.* § 1(b).

missions flown, and the number of times the agency provided assistance to other agencies, or to State, local, tribal, or territorial governments.”⁹ (Fiscal Year 2015 ended 345 days ago on September 30, 2015.)

In addition, President Obama ordered each agency to publish within one year of the memorandum “information on how to access [the agency’s] publicly available policies and procedures implementing this section.”¹⁰ That deadline arrived 207 days ago on February 15, 2016.

Request for Expedited Processing

Expedited processing is justified because the request: (1) is made by an organization “primarily engaged in disseminating information”; and (2) covers information about which there is an “urgency to inform the public about an actual or alleged federal government activity.”¹¹ EPIC is an organization “primarily engaged in disseminating information.”¹²

There is an “urgency to inform the public” about the DHS’s use of drones, as President Obama’s memorandum makes clear.¹³ Drones have been in use by the DHS for over ten years,¹⁴ and as the department acknowledges, it is important to ensure that such technology “is not used in a manner that erodes or violates an individual’s statutory or constitutional rights.”¹⁵ The documents requested by EPIC will inform the public as to (1) the scope and nature of the DHS’s drone usage and (2) the policies the DHS has in place for the collection, use, retention, handling, and dissemination of information obtained using drones.

Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee waiver purposes.¹⁶ Based on our status as a “news media” requester, we are entitled to receive the requested record with only duplication fees assessed.

Further, any duplication fees should be waived,¹⁷ as (1) disclosure of the documents requested herein “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government”;

⁹ *Id.* § 1(d).

¹⁰ *Id.* § 1(e).

¹¹ See 5 U.S.C. § 552(a)(6)(E)(v)(II) (2012); *Al-Fayed v. CIA*, 254 F.3d 306 (D.C. Cir. 2001).

¹² *ACLU v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.C. Cir. 2004).

¹³ See *Presidential Memorandum*, *supra* note 1, § 1(d)-(e).

¹⁴ U.S. Dep’t of Homeland Security, *Best Practices for Protecting Privacy, Civil Rights & Civil Liberties In Unmanned Aircraft Systems Programs* at 1 (Dec. 18, 2015), <https://www.dhs.gov/sites/default/files/publications/UAS%20Best%20Practices.pdf>.

¹⁵ *Id.*

¹⁶ *EPIC v. Dep’t of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).

¹⁷ 5 U.S.C. § 552(a)(6)(E)(v)(II) (2012); *Al-Fayed*, 254 F.3d at 306.

and (2) “[d]isclosure of the information is not primarily in the commercial interest” of EPIC.¹⁸

The first fee waiver requirement is met because (i) the subject of the request concerns “identifiable operations or activities of the federal government”;¹⁹ (ii) disclosure is “likely to contribute” to an understanding of government operations or activities and the information is not already in the public domain;²⁰ (iii) the disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject,” and EPIC has the “expertise in the subject area” and the “ability and intention to effectively convey information to the public” (as DHS regulations note, “[i]t shall be presumed that a representative of the news media will satisfy this consideration”);²¹ and (iv) the public’s understanding will “be enhanced by the disclosure to a significant extent.”²²

This FOIA request concerns the government’s use of drones in U.S. airspace and its collection of personally identifiable information via those drones—conduct that has clear privacy and constitutional implications. Responsive documents will be highly informative as to government activities and will have a significant public impact.

Further, EPIC routinely and systematically disseminates information to the public. EPIC’s flagship website, EPIC.org, is a heavily visited destination for breaking news that implicates privacy and civil liberties issues. The site consistently appears at the top of search engine rankings for searches related to “privacy.” EPIC also publishes a bi-weekly electronic newsletter, the EPIC Alert, which is distributed to around 20,000 readers, many of whom report on technology and privacy issues for major news outlets.²³

The second fee waiver requirement is also satisfied. EPIC is a non-profit, public interest research center that was established in 1994 to direct public attention to emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values.²⁴ EPIC’s work is distributed freely through our website and through the EPIC Alert newsletter. EPIC has no commercial interest that would be furthered by disclosing the requested records.

Conclusion

Thank you for your consideration of this request. As provided in 5 U.S.C. § 552(a)(6)(E)(ii)(I), I will anticipate your determination on our request within ten business days. For questions regarding this request I can be contacted at 202-483-1140 x120 or foia@epic.org.

¹⁸ § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k)(1) (2016).

¹⁹ § 5.11(k)(1)(i).

²⁰ § 5.11(k)(1)(ii).

²¹ § 5.11(k)(1)(iii).

²² § 5.11(k)(1)(iv).

²³ See *EPIC Alert*, EPIC.org (2016) <http://epic.org/alert/>.

²⁴ *About EPIC*, EPIC.org (2016), <http://epic.org/epic/about.html>.

Respectfully Submitted,

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