

June 7, 2011

VIA FACSIMILE: (540) 868-4997

David M. Hardy, Section Chief, Record/Information Dissemination Section
Federal Bureau of Investigation
Record/Information Dissemination Section
170 Marcel Drive
Winchester, VA 22602-4483

RE: Freedom of Information Act Request and Request for Expedited Processing

Dear Mr. Hardy:

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”). EPIC seeks documents detailing the criteria by which individuals are placed on the No Fly List and Selectee List, the criteria used to remove a person from the No Fly List and Selectee List, the total number of individuals on these lists, the total number of United States citizens on these lists, and records indicating whether individuals have been notified that they are on either the No Fly List or Selectee List.

Background

The Terrorist Screening Center (“TSC”) was created in 2003 pursuant to Homeland Security Presidential Directive 6 (“HSPD-6”) and was tasked with creating a unified terrorist screening watchlist.¹ The primary database administered by the TSC, the Terrorist Screening Database (“TSDB”), was created to fulfill this mandate.²

Both the No Fly List and Selectee List were created by the FBI before being transferred to the purview of the Transportation Security Administration (“TSA”) in 2002.³ When the TSC was created, it began maintaining and administering the No Fly List and Selectee List on December 1, 2003.⁴ Today, the No Fly List and Selectee List are subsets of the TSDB, and entries on these lists must meet specific requirements above the baseline set by the TSDB.⁵

The limited available public information about how the TSC adds names to the TSDB suggests that it does so if there is “reasonable suspicion that they are known or

¹ Terrorist Screening Center Frequently Asked Questions, http://www.fbi.gov/about-us/nsb/tsc/tsc_faqs (last visited May 31, 2011).

² *Id.*

³ TSA Watch List Presentation, released as part of a settlement in *Gordon v. FBI*, No. C-03-1779 (N.D.Ca. Jan. 24, 2006), available at http://www.aclunc.org/cases/landmark_cases/asset_upload_file371_3549.pdf.

⁴ Department of Justice, Inspector General, Audit Division, Audit Report No. 05-27, *Review of the Terrorist Screening Center* iii (June 2005), www.justice.gov/oig/reports/FBI/a0527/final.pdf.

⁵ Terrorist Screening Center Frequently Asked Questions, http://www.fbi.gov/about-us/nsb/tsc/tsc_faqs (last visited May 31, 2011).

reasonably suspected of terrorism.”⁶ However, there have been few public statements about what criteria elevate a person to the No Fly List or the Selectee List.

TSC spokesperson Trent Duffy said on February 16, 2011 that “[individuals on the No Fly List] have to (be) believed to be a threat to the aircraft or to the airspace in which that aircraft is set to travel. They also have to be operationally capable of bringing down said aircraft.”⁷ In 2009, TSC Director Timothy Healy testified before Congress that “[t]he ‘No Fly’ list has its own minimum substantive derogatory criteria requirements which are considerably more stringent than the Terrorist Watchlist’s reasonable suspicion standard.”⁸

Since the beginning of 2010, multiple news outlets have reported that the TSC relaxed these criteria, thus making it easier for individuals to be placed on the No Fly List; presumably, a similar change has occurred regarding the Selectee List.⁹

Similarly, the TSC maintains criteria for determining whether an individual should be removed from the No Fly List or the Selectee List. In 2009, the FBI told the Senate Judiciary Committee that as many as 600 names per day are suggested by other executive agencies to be removed from the TSDB, but it is not clear how many of these names overlap with those on the No Fly List.¹⁰ Nevertheless, the apparent trimming of the No Fly List and Selectee List that occurred before December 2009¹¹ indicates that specific criteria exist for removing individuals.

In the past five years, reports of the size of the No Fly List and Selectee List have varied from 44,000 and 75,000, respectively, in 2006,¹² to 3,400 individuals on the No Fly List in 2009.¹³ Most recently, the No Fly List was said to have increased to 6,000 individuals between December 2009 and May 2010.¹⁴ There is a clear lack of accurate information in the public domain on the size of the No Fly List and Selectee List. There also appears to be no recent data on the number of United States citizens on the lists, even though tens of thousands of Americans are potentially affected.

⁶ *Id.*

⁷ Linda Nguyen, *Civil rights group raises concerns with disclosure of passenger flight information*, CANADA.COM, February 16, 2011, <http://www.canada.com/news/British+list+headed+home+after+delay+Canada/4295487/story.html>.

⁸ *FBI reveals claimed No-Fly Criteria*, PAPERS PLEASE, December 13, 2009, <http://www.papersplease.org/wp/2009/12/13/fbi-reveals-claimed-no-fly-criteria/>.

⁹ Elise Labott, *U.S. Lowers Threshold for Inclusion on No-Fly Lists*, CNN, January 5, 2010, http://articles.cnn.com/2010-01-05/travel/terrorism.watch.list_1_no-fly-list-terrorist-identities-datamart-environment-umar-farouk-abdulmutallab?_s=PM:TRAVEL.

¹⁰ Walter Pincus, *1,600 are suggested daily for FBI’s list*, WASH. POST, November 1, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/31/AR2009103102141.html>.

¹¹ Eric Lipton, *Officials Regret Curbs on Adding to Terror Watch List*, N.Y. TIMES, January 21, 2010, http://www.nytimes.com/2010/01/21/us/politics/21terror.html?_r=1&ref=umarfaroukabdulmutallab.

¹² Steve Kroft, *UNLIKELY TERRORISTS ON NO FLY LIST*, 60 MINUTES 2151 (2007), <http://www.cbsnews.com/stories/2006/10/05/60minutes/main2066624.shtml>.

¹³ Eileen Sullivan, *NO-FLY LIST NEARLY DOUBLES SINCE CHRISTMAS ATTACK* (2010), http://www.huffingtonpost.com/2010/03/10/no-fly-list-nearly-double_n_492816.html.

¹⁴ *Id.*

Documents Requested

EPIC requests copies of the following agency records:

1. All documents detailing the criteria used to place an individual who is already in the TSDB on the No Fly List
2. All documents detailing the criteria used to place an individual who is already in the TSDB on the Selectee List
3. All documents detailing the criteria used to remove an individual from the No Fly List.
4. All documents detailing the criteria used to remove an individual from the Selectee List.
5. All documents relating to the current number of individuals of the No Fly List.
6. All documents relating to the current number of individuals of the Selectee List.
7. All documents relating to the current number of United States citizens on the No Fly List.
8. All documents relating to the current number of United States citizens on the Selectee List.
9. All documents detailing whether individuals on the No Fly List have been notified of their presence on the list.
10. All documents detailing whether individuals on the Selectee List have been notified of their presence on the list.

Request for Expedited Processing

This request warrants expedited processing because it is made by “a person primarily engaged in disseminating information . . .” and it pertains to a matter about which there is an “urgency to inform the public about an actual or alleged federal government activity.” 5. U.S.C. § 552(a)(6)(E)(v)(II) (2008); *Al-Fayed v. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001).

EPIC is “primarily engaged in disseminating public information.” *American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

There is a particular urgency for the public to obtain information about the criteria used to place an individual on the No Fly List or Selectee List, as well as the sizes of these lists, because of the large number of individuals who fly each year. The Federal

Aviation Administration (“FAA”) estimates that there will be 737.4 million airline passengers this year in the United States.¹⁵ Given the large number of Americans who partake in flying, the potential impact of the No Fly List and Selectee List is enormous. The documents requested by EPIC will inform the public about the effectiveness of these lists and the potential for being adversely affected by them.

Request for “News Media” Fee Status

EPIC is a “representative of the news media” for fee waiver purposes. *EPIC v. Department of Defense*, 241 F. Supp. 2d 6 (D.D.C. 2003). Based on our status as a “news media” requester, we are entitled to receive the requested record with only duplication fees asserted. Further, because disclosure of this information will “contribute greatly public understanding of the operation or activities of the government,” and duplication fees should be waived.

Thank you for your consideration of this request. As 5 U.S.C. § 552(a)(6)(E)(ii)(I) provides, I will anticipate your determination on our request within ten (10) calendar days.

Sincerely,

Andrew Christy
EPIC Law Clerk

John Verdi
Director
EPIC Open Government Project

¹⁵ Roger Yu, *FAA estimates air travel will more than double in next 20 years*, USA TODAY (Feb. 19, 2011) <http://travel.usatoday.com/flights/post/2011/02/faa-estimates-air-travel-will-more-than-double-in-next-20-years/143090/1>.