April 26, 2012

VIA FAX (202) 482-2552  
Freedom of Information Act Appeal  
Assistant General Counsel for Administration  
U.S. Department of Commerce  
Office of General Counsel, Room 5898-C  
14th Street and Constitution Avenue, NW  
Washington, D.C. 20230

Re: Freedom of Information Act Appeal—Request Ref: BIS 12-046

Dear FOIA Appeals Officer:

This letter constitutes an appeal 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 Bureau of Industry and Security (“BIS”).

On March 28, 2012, EPIC submitted to BIS via facsimile a FOIA request regarding the export of surveillance technology by U.S. firms. Specifically, EPIC requested:


2. Any agency records concerning reports filed by U.S. exporters regarding technology used or marketed for surveillance purposes under the Wassenaar Arrangement and 15 C.F.R. § 743(b) from March 19, 2010-March 19, 2012.

3. Any agency records concerning licenses obtained or requested by U.S. exporters for dual-use technology used or marketed for surveillance purposes under the EAR from March 19, 2010-March 19, 2012.

See Appendix 1 (“EPIC’s FOIA Request”). In addition, EPIC’s FOIA Request stated that EPIC was a news media organization and requested both a waiver of all fees associated with the request and expedited processing.

On April 20, 2012, EPIC received a letter from BIS in response to EPIC’s FOIA Request. See Appendix 2 (“BIS Letter”). The BIS Letter assigned the request the Reference Number BIS 12-046 and stated that BIS had completed its search for information regarding each category of documents. BIS stated that it found no records
responsive to category two. BIS also stated that it was withholding information related to categories one and three under FOIA exemption 3, citing Section 12(c) of the Export Administration Act of 1979, which allows for the withholding of “information obtained for the purpose of, or concerning, license applications.” 50 App. U.S.C. § 2411(c).

EPIC Appeals the Adequacy of BIS’s Segregability Analysis


Here, BIS simply states that it “has determined that all information related to [categories one and three] be withheld in full under FOIA exemption (b)(3).” This is a conclusory statement that does not explain in adequate detail the reasons for withholding the records in full. See Mead Data Cent., Inc., 566 F.2d at 260 (rejecting an affidavit stating that there “were no factual portions . . . which could be reasonably segregated” because “[n]o supporting justification was offered for this conclusion.”). Indeed, BIS has previously released information in response to a similar FOIA request. In Wisconsin Project on Nuclear Arms Control v. U.S. Dept. of Commerce, plaintiffs requested “information relating to license applications for dual-use items that the Agency has approved, denied, suspended, or returned without action, for export to the People’s Republic of China (including Hong Kong), India, Israel, Pakistan, and Russia for the period from January 1, 1995, through July 25, 1999.” No. 99-2673, at 2 (D.D.C. Sept. 4, 2001), aff’d, 317 F.3d 275 (D.C. Cir. 2003). As in this case, the agency sought to withhold documents under Exemption 3, citing the same statute, the Export Administration Act of 1979. Id. at 3. However, the agency released a report setting forth aggregate licensing information by country. Id. at 2. Here, BIS did not release any aggregate data. Aggregate licensing data from the 2011 Annual Report does not include many of the countries that prompted the initial FOIA request, such as Syria, nor does it contain information from 2012. The failure to adequately justify the claim that no

segregable portions of records exist violates FOIA, especially given the past practice of releasing aggregate data in response to substantially similar requests.

**EPIC Renews its Request for “News Media” Fee Status**

At this time, EPIC renews all arguments that it should be granted “news media” fee status. EPIC is a “representative of the news media” for fee waiver purposes. Based on our status as a “news media” requester, we are entitled to receive the requested record with only duplication fees assessed. Further, because disclosure of this information will “contribute significantly to public understanding of the operations or activities of the government,” any duplication fees should be waived.

**EPIC Renews its Request for Expedited Processing**

EPIC reiterates its request for expedited processing of its FOIA request. This appeal warrants expedited processing for the same reasons as the initial FOIA request: 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.”

EPIC is “primarily engaged in disseminating information.”

There is a particular urgency for the public to obtain information about the export of surveillance technology by U.S. firms to repressive regimes. These activities have been the subject of numerous reports by the national media, requests for information by members of Congress, and even federal lawsuits. Many of the firms in question also

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6 See Kirk, Casey, & Coonz *supra* note 18.
sell their products and services in the United States. There is uncertainty over whether current legal regimes are able to hold these firms accountable. Thus, one of the only remaining accountability options is consumer spending patterns, a mechanism which requires that consumers possess sufficient information about the firms’ business activities.

Furthermore, subsequent to the filing of EPIC’s FOIA Request, President Obama signed an executive order authorizing U.S. officials to impose sanctions against persons involved in the use of information and communications technology to facilitate human rights abuses in Syria and Iran.8 The existence of this order provides further support for the importance and timeliness of this issue.

Conclusion

By failing to conduct a sufficient segregability analysis, BIS is in violation of 5 U.S.C. § 552(b). EPIC appeals BIS’s segregability analysis and requests expedited processing for this appeal.

Thank you for your prompt response to this appeal. I anticipate that you will produce responsive documents within 10 working days. If you have any questions, please feel free to contact me at (202) 483-1140 x102 or foia@epic.org.

Respectfully Submitted,

Ginger McCall
Director, EPIC Open Government Program

David Jacobs
EPIC Consumer Protection Fellow

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Appendix 1: EPIC’s FOIA Request
Appendix 2: BIS Letter