

October 18, 2019

The Honorable Xochitl Torres Small, Chairwoman  
The Honorable Dan Crenshaw, Ranking Member  
U.S. House Committee on Homeland Security  
Subcommittee on Oversight, Management, and Accountability  
H2-176 Ford House Office Building  
Washington, D.C. 20515

Dear Chairwoman Small and Ranking Member Crenshaw:

We write to you in regarding your hearing on “The Public’s Right to Know: FOIA at the Department of Homeland Security”<sup>1</sup> to share our perspective and Freedom of Information Act (“FOIA”) work. The Electronic Privacy Information Center (“EPIC”) is a nonpartisan research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.<sup>2</sup> EPIC is a leading advocate for open government and democratic values in the information age. We value FOIA and the work of this committee to promote open government.

### *Importance of FOIA*

The FOIA is critical for the functioning of democratic government because it helps ensure that the public is informed about matters of public concern. Public awareness of our government's activity through the FOIA not only allows for a more informed public debate over the activities of government, but also ensures accountability for government officials. Public debate fosters the development of more robust security systems and leads to solutions that better respect the nation's democratic values. EPIC's FOIA litigation has resulted in disclosure of critical information about the activities of the government. Our litigation has also generated case law that benefits the FOIA requesters and the open government community across the country.

This is particularly true in matters concerning privacy and civil liberties. Among EPIC’s most significant undertakings in our twenty-five years was the litigation against DHS that led to the removal the backscatter x-ray devices from U.S. airports. Those devices were ineffective, invasive, and unlawful. In *EPIC v. DHS*, 653 F.3d 1 (D.C. Cir. 2011), the DC Circuit Court of Appeals held that the agency failed to conduct a public rulemaking as required by law and must also ensure that passengers are given the opportunity to opt-out if they so choose. We are now litigating similar

---

<sup>1</sup> *The Public’s Right to Know: FOIA at the Department of Homeland Security*, House Comm. on Homeland Security, Subcomm. on Oversight, Management, and Accountability, 116th Cong. (Oct. 17, 2019), <https://homeland.house.gov/the-publics-right-to-know-foia-at-the-department-of-homeland-security>.

<sup>2</sup> See EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

regarding DHS' use of facial recognition technology, uncovering similar problems with the technology and the agency's failure to undertake a rulemaking prior to deployment.<sup>3</sup>

In *EPIC v. DHS*, 18-1268 (D.D.C. filed May 30, 2018), EPIC sued to obtain records about—and to block the development of—a DHS system designed to monitor journalists, news outlets, and social media accounts. This “Media Monitoring Service” platform would have included an “unlimited” database of personal information from journalists and media influencers, including location data, contact information, employer affiliation, and past content. Because of EPIC’s lawsuit, the DHS suspended the controversial program. In a settlement with EPIC, the agency acknowledged that it would discontinue use of the system and agreed to complete the required Privacy Impact Assessments before restarting the program. EPIC also obtained records through the lawsuit showing that the DHS ignored the harms that media monitoring would have caused to privacy and press freedom.<sup>4</sup> In an earlier FOIA lawsuit, *EPIC v. DHS*, 11-2261 (D.D.C. filed Dec. 20, 2011), EPIC obtained documents that revealed that the DHS is monitoring social networks and media organizations for criticism of the agency. EPIC also obtained a list of very broad search terms used by the agency to monitor social media. As a result of EPIC’s findings, Congress held a hearing on “DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy.”<sup>5</sup>

And in response to a FOIA request to Customs and Border Protection, CBP released documents detailing the agency’s scramble to implement the flawed Biometric Entry-Exit system, a system that employs facial recognition technology on travelers entering and exiting the country.<sup>6</sup> The documents describe the administration’s plan to extend the faulty pilot program to the Transportation Security Administration, Immigration and Customs Enforcement, and the Coast Guard. The released information also includes a memorandum of understanding that shows there are no limitations on how partnering airlines can use the facial recognition data collected at airports. The documents obtained by EPIC were covered in-depth by *Buzzfeed News*<sup>7</sup> and cited by members of Congress commenting on their concerns of facial recognition.

These are just three examples of the many FOIA cases EPIC has pursued with DHS over the years. They demonstrate the importance of the Freedom of Information Act and the oversight like the Subcommittee is conducting today.

### *EPIC's Previous FOIA Reform Efforts at DHS*

#### 1) Political Review of FOIA Requests

---

<sup>3</sup> *EPIC v. CBP (Biometric Entry/Exit Program)*, No. 17-1438 (D.D.C. filed July 19, 2017), See <https://epic.org/foia/dhs/cbp/biometric-entry-exit/>; *EPIC v. CBP (Alternative Screening Procedures)*, No. 19-cv-689 (D.D.C. filed Mar. 12, 2019); See <https://epic.org/foia/dhs/cbp/alt-screening-procedures>.

<sup>4</sup> EPIC, *EPIC v. DHS (Media Monitoring Services)*, <https://epic.org/foia/dhs/media-monitoring-services/>.

<sup>5</sup> *DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy*, H. Comm. on Homeland Security, Subcomm. on Counterterrorism and Intelligence, 112th Cong. (2012).

<sup>6</sup> EPIC, *EPIC v. CBP (Biometric Entry/Exit Program)*, <https://epic.org/foia/dhs/cbp/biometric-entry-exit/>.

<sup>7</sup> Davey Alba, *The US Government Will Be Scanning Your Face At 20 Top Airports, Documents Show* (Mar. 11, 2019), <https://www.buzzfeednews.com/article/daveyalba/these-documents-reveal-the-governments-detailed-plan-for>.

In 2011, EPIC testified before the House Oversight Committee regarding Homeland Security’s political review of FOIA requests and the effects of the agency’s policies on requesters.<sup>8</sup> The hearing arose after reports that DHS career staff repeatedly questioned the political review policy.<sup>9</sup> The hearing followed an earlier release of 1,000 agency documents revealing the long-standing process of vetting FOIA requests by political appointees. In a previous letter to the Committee, EPIC and a coalition of open government groups wrote that FOIA does not permit agencies to select requests for political scrutiny.<sup>10</sup> Thanks to the bipartisan work at the time of the House Oversight Committee, that practice was suspended.

## 2) FOIA and Fee Waivers

Beginning in 2012, EPIC led an effort to reform the DHS practice of unnecessarily failing to grant fee waivers. As we explained “the DHS and its components routinely deny fee waiver requests to individuals and groups. This practice is harmful to requesters and contravenes the purpose of FOIA and the specific reason for the fee waiver provision.”<sup>11</sup> In the letter to the Office of Government Information Services, the FOIA Ombudsman, EPIC urged an investigation to assess the impact of this agency practice. EPIC asked: How often does the DHS deny a FOIA requesters’ request for a blanket fee waiver? What percentage of FOIA requesters in receipt of a constructive denial follow up with the Agency and, when they do not, has the fee waiver request ever been deemed abandoned? Has a FOIA requester who requester a blanket fee waiver ever had fees assessed against them?

The OGIS investigated and the DHS reformed its practices regarding fee waivers. As the OGIS explained later that year, the DHS implemented a new department wide policy where the agency conditionally grants fee waiver requests if the request meets the six analytical factors required under DOJ guidelines for a fee waiver and that the requester cannot appeal a conditional fee waiver grant because it is not a final decision.<sup>12</sup> OGIS also told EPIC that DHS will start informing non-commercial requesters who chose not to pay fees that they are entitled to two free hours of search time and 100 free pages of duplication. DHS also agreed to provide requesters with an itemized breakdown of fees—an action the agency previously did not undertake.

## 3) Reforming Impermissible Administrative Closures

In 2014, EPIC and a coalition of open government groups wrote to OGIS to investigate the Transportation Security Agency and other agencies impermissibly closing FOIA requests and

---

<sup>8</sup> Testimony and Statement for the Record of John Verdi, Senior Counsel, EPIC: Before the House Committee on Oversight and Government Reform (Mar. 31, 2011), [https://republicans-oversight.house.gov/wp-content/uploads/2012/01/Verdi\\_Testimony.pdf](https://republicans-oversight.house.gov/wp-content/uploads/2012/01/Verdi_Testimony.pdf).

<sup>9</sup> See Jake Sherman, *Probe Reveals Tensions at DHS*, Politico (Mar. 29, 2011), <https://www.politico.com/story/2011/03/probe-reveals-tensions-at-dhs-052114>.

<sup>10</sup> Letter from Marc Rotenberg, et al. to Darrell Issa, Chairman and Elijah Cummings, Ranking Member, House Comm. on Oversight and Gov’t Reform (Feb. 15, 2011), [https://epic.org/open\\_gov/foia/Issa\\_FOIA\\_Oversight\\_Ltr\\_02\\_15\\_11.pdf](https://epic.org/open_gov/foia/Issa_FOIA_Oversight_Ltr_02_15_11.pdf).

<sup>11</sup> Letter from EPIC to Miriam Nisbet, Director, Office of Gov’t Info. Serv. (June 1, 2012), <https://epic.org/foia/dhs/EPIC-DHS-FOIA-OGIS-Ltr-06-01-12.pdf>.

<sup>12</sup> Letter from Miriam Nisbet, Director, Office of Gov’t Info. Serv., to Amie Stepanovich, EPIC (Oct. 12, 2012), [https://epic.org/open\\_gov/foia/OGIS-to-EPIC-re-DHS-10-19-12.pdf](https://epic.org/open_gov/foia/OGIS-to-EPIC-re-DHS-10-19-12.pdf).

breaching their FOIA obligations.<sup>13</sup> Through “still interested” letters, some federal agencies notify FOIA requesters that unprocessed requests will be closed by the agency if there is no further communication. In the letter, EPIC and the open government groups objected to the practice and reminded OGIS that “no provision in the [FOIA] allows for administrative closures.”

OGIS undertook an investigation in the FOIA practices of six DHS component agencies later that year.<sup>14</sup> The OGIS Director also directed the OGIS Compliance Team to review the use of “still interested” letters government wide. In its findings, OGIS found that “there is no guidance or standard for reporting requests that agencies close using still interested letters.”<sup>15</sup> OGIS recommended better reporting on these letters and that the agencies regularly communicate with requesters about the status of their request without having to resort to using still interested letters.<sup>16</sup>

#### 4) Improvement of Processing FOIA Requests

In 2016, the DHS released revised FOIA regulations that implemented some of EPIC’s recommendations to revise the agency’s regulation and incorporate new procedures that would ease the public’s efforts to learn about the activities of the government.<sup>17</sup> EPIC had submitted extensive comments on the proposed changes to the agency’s open government practices.<sup>18</sup> The DHS agreed to make some changes that improved the processing of FOIA requests. The agency maintained a broad definition of “education institutions” so individual researchers can access government records at minimal cost, and clarified steps that could be taken to delay “administrative closure,” a controversial agency practice.

EPIC offers further recommendations to improve transparency at the agency.

#### *DHS Needs to Improve the Processing of FOIA Requests*

The Department is one of the largest federal agencies, with an annual budget of 92.1 billion for FY2020.<sup>19</sup> The agency now has 14 components.<sup>20</sup> The annual budget for the Transportation

---

<sup>13</sup> Letter from EPIC et al., to Miriam Nisbet, Director, Office of Gov’t Info. Serv. (Oct. 30, 2014), [https://foia.rocks/OGIS\\_Letter\\_final.pdf](https://foia.rocks/OGIS_Letter_final.pdf).

<sup>14</sup> Letter from James Holzer, Director, Office of Gov’t Info. Serv., to EPIC et al. (Aug. 27, 2015), <https://epic.org/foia/ogis/OGIS-Letter-20150828-Administrative-Closures.pdf>.

<sup>15</sup> Office of Gov’t Info. Serv., Nat’l Archives and Records Admin., *Compliance Review of the Use of “Still Interested” Letters Part 1* (May 11, 2016), <https://www.archives.gov/files/ogis/assets/still-interested-part-1-final.pdf>.

<sup>16</sup> Office of Gov’t Info. Serv., Nat’l Archives and Records Admin., *Compliance Review of the Use of “Still Interested” Letters Part 3* (May 11, 2016), <https://www.archives.gov/files/ogis/assets/still-interested-part-3-final.pdf>.

<sup>17</sup> Freedom of Information Act Regulations, 6 C.F.R. Part 5 (2016).

<sup>18</sup> Comments of EPIC to the Dept. of Homeland Sec.: Freedom of Information Regulations 6 CFR Part 5, Docket No. DHS-2009-0036, Notice of Proposed Rulemaking (Sept. 28, 2015), <https://epic.org/apa/comments/EPIC-DHS-FOIA-Comments-Final.pdf>.

<sup>19</sup> Dept. of Homeland Sec., *FY 2020 Budget in Brief 1*, [https://www.dhs.gov/sites/default/files/publications/19\\_0318\\_MGMT\\_FY-2020-Budget-In-Brief.pdf](https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_FY-2020-Budget-In-Brief.pdf).

<sup>20</sup> *Operational and Support Components*, Dept. of Homeland Sec. (Nov. 20, 2018), <https://www.dhs.gov/operational-and-support-components>.

Security Agency alone is 7.8 b for FY2020.<sup>21</sup> Yet the agency has one of the worst FOIA processing records in the federal government. According to the *Summary of Annual FOIA Reports for Fiscal Year 2018*, DHS is responsible for 41% of backlogged FOIA requests across the entire federal government.<sup>22</sup> Far behind at number two is the Department of Justice with 13% of backlogged requests.<sup>23</sup> And significantly, DHS was asked by other agencies for consultations on FOIA requests less frequently than the DOD, the DOJ, or the CIA.<sup>24</sup> That means the backlog problem at the DHS is even higher than the raw numbers suggest.

In past years, the DHS's Chief FOIA Officer Reports describe instances where the DHS Privacy Office partnered with other sub-components to assist in reducing its backlog. For instance, the DHS achieved a backlog reduction FY 2018 when the DHS Privacy Office partnered with OBIM, CBP, and ICE to reduce the backlogs by 12,000 requests.<sup>25</sup> The DHS should continue these partnerships to reduce the agency's backlogs. But the agency must also prioritize the processing of new FOIA requests.

The DOJ *Assessment of Agency Progress in FOIA Administration* clarifies the problem at DHS.<sup>26</sup> According to the DOJ report, the average number of days to process a FOIA request for expedited processing was 13.05, far over other federal agencies, and earning the lowest rating from the DOJ review.<sup>27</sup> The DHS, as compared with other federal agencies, also received low marks for several other indicators of FOIA compliance, as determined by the Department of Justice:

- The DHS takes far more time to process simple track FOIA requests (39.11 days) than other federal agencies;<sup>28</sup>
- At a time when other agencies are making progress reducing FOIA backlogs, the DHS backlog for FOIA appeals increased over 2018;<sup>29</sup> and
- The agency also received low marks for consultations about the processing of the ten oldest requests.<sup>30</sup>

---

<sup>21</sup> Dept. of Homeland Sec., *FY 2020 Budget in Brief*, at 30.

<sup>22</sup> Dept. of Justice, *Summary of Annual FOIA Reports for Fiscal Year 2018* 10, <https://www.justice.gov/oip/page/file/1170146/download#FY18>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 14.

<sup>25</sup> Dep't of Homeland Security, *2019 Chief Freedom of Information Act Officer Report* 38 (Apr. 2019), [https://www.dhs.gov/sites/default/files/publications/2019\\_chief\\_foia\\_officer\\_report\\_april\\_2019.pdf](https://www.dhs.gov/sites/default/files/publications/2019_chief_foia_officer_report_april_2019.pdf).

<sup>26</sup> Dept. of Justice, *Summary of Agency Chief FOIA Officer Reports for 2018 and Assessment of Agency Progress in FOIA Administration with OIP Guidance for Further Improvement* (June 2018), <https://www.justice.gov/OIP/Reports/2018Summary&Assessment/download#2018>.

<sup>27</sup> *Id.* at 33.

<sup>28</sup> *Id.* at 35.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

DHS Must Respond to Appeal Authorities

The DHS should respond to appeal authorities when it remands a request back down to an agency for additional information. Otherwise, the agency's inaction is considered a final agency action where the only recourse is for a requester to seek redress through the United States District Court. Not all requesters, however, have the resources to litigate and DHS' inaction constructively exhausts a requester's administrative remedies.

As an example, EPIC submitted a FOIA request to the DHS Office of Intelligence and Analysis.<sup>31</sup> The DHS improperly closed EPIC's request stating that the request did not adequately describe the records sought. EPIC appealed the agency decision and the administrative law judge remanded the request back to the Office of Intelligence and Analysis for further clarification. The DHS failed to provide additional information within the deadline and the appeal authority issued a letter constituting a final agency action. This is not how the FOIA is supposed to work.

Continued Oversight is Crucial

Oversight of DHS' FOIA implementation is critical because watchdog groups such as EPIC utilize FOIA to keep the DHS accountable. No federal agency has greater budget authority to develop systems of surveillance directed towards U.S. residents.

We ask that our statement be entered into the hearing record. Please contact us if you would like additional information about EPIC's FOIA matters. We look forward to working with the Subcommittee on open government issues of vital importance to the public.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg  
EPIC President

/s/ Enid Zhou

Enid Zhou  
EPIC Open Government Counsel

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald  
EPIC Policy Director

---

<sup>31</sup> Freedom of Info. Act Request from EPIC to Dept. of Homeland Sec. (June 14, 2016), <http://epic.org/foia/dhs/EPIC-16-06-14-DHS-FOIA-20160614-Request.pdf>.