



February 15, 2011

The Hon. Darrell E. Issa (R-CA), Chairman
House Committee on Oversight and Government Reform
Washington, DC 20510

The Hon. Elijah Cummings (D- MD), Ranking Member
House Committee on Oversight and Government Reform
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Dear Chairman Issa and Ranking Member Cummings,

We are writing to support the House Committee on Oversight and Government Reform's decision to examine FOIA oversight by investigating the Department of Homeland Security's ("DHS") FOIA policies and procedures. The broad coalition of privacy and civil liberties groups signing on to this letter has a shared interest in open government policies and procedures.

We understand that your investigation intends to focus primarily on DHS's practice of vetting FOIA requests through political appointees before they are processed. We suggest that your investigation of DHS policy begin from the creation of the agency, because, as we note later in this letter, the policy of political vetting of FOIA requests has been in place for many years.

We would ask in addition that, in order to facilitate FOIA oversight in the future, your hearing also inquire into the scope of authority allowed the Office of Government Information Services ("OGIS") and the Government Accountability Office ("GAO") to conduct investigations of FOIA practices at government agencies.

Open Government and Transparency Issues

President Obama made open government and transparency a hallmark of his administration by issuing a memorandum about its importance as his first executive action. "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails."¹ He directed agencies to be more proactive in their disclosure and act cooperatively with the public. He explained, "At that heart of that commitment [to transparency] is the idea that accountability is in the interest of the Government and the citizenry alike."² To further his goals, President Obama directed the Attorney General to issue new guidelines for implementing FOIA and the

¹ President Barak Obama, Memorandum, "Freedom of Information Act," Jan. 21, 2009.

² *Id.*

Director of the Office of Management and Budget to issue guidelines for the agencies as they “increase and improve information dissemination to the public.”³

Unfortunately, under a DHS policy in effect since 2006, political appointees have received detailed information about the identity of FOIA requesters and the topics of their requests in weekly reports before FOIA career staff could complete the processing of the requests.⁴ The policy requires DHS career staff to provide Secretary Napolitano’s political staff with information, including where a requester lives, the requester’s affiliation, and descriptions of the requesting organization’s mission. Despite DHS protestations that the policy has been retracted, there has been no publication about the new policy or the end of the old policy.

This policy is contrary to federal law and Supreme Court holdings, as the FOIA does not permit agencies to select FOIA requests for political scrutiny of either the request or the requester. The Supreme Court has clearly stated that disclosure of documents under FOIA will not depend on either the identity of the requester nor the reasons for the request. *See Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170, 172 (2004); *see also United States Dep’t of Justice v. Reporters Comm. For Freedom of the Press*, 89 U.S. 749, 771 (1989) (stating that the requester’s identity has “no bearing on the merits of his...FOIA request”).

The DHS policy of requiring political review came to light after the Associated Press (“AP”) submitted a FOIA request in January 2010 to DHS seeking agency documents from 2009 directing FOIA staff to submit FOIA requests to political appointees prior to processing the requests.⁵ OGIS mediated disputes between the AP and the agency concerning the AP’s FOIA request, securing the disclosure of more than 1,000 pages of agency records. The over 1,000 agency documents released reveals a persistent agency practice of flagging FOIA requests from watchdog organizations for referral to political appointees.

EPIC’s review of the released documents demonstrates that DHS required political appointees to review the determinations of FOIA career staff assessments to certain requests before documents were disclosed by the agency. EPIC discovered that the policy had been ongoing since 2006. The documents indicate that requests by EPIC and other watchdog groups were improperly flagged for review by political appointees and likely delayed in processing as a result, by the Department of Homeland Security’s unlawful policy. This is a violation of the FOIA’s statutorily mandated deadlines for processing requests. 5 U.S.C. 552(a)(6)(A), (B).

³ *Id.* For the guidelines developed by OMB in compliance with President Obama’s directive, *see* <http://www.whitehouse.gov/omb/open>.

⁴ *See* “FOIA Section of the DHS Cabinet Report to the White House Submission Guidelines Updated August 4, 2006,” and “Guidelines for Reporting o Significant FOIA Activity for Inclusion in the Cabinet Report to the White House July 7, 2009.”

⁵ Kim Zetter, “Report: Political Appointees Vetted DHS Public Records Request,” *wired.com*, July 22, 2010, <http://www.wired.com/threatlevel/2010/07/foia-filtered/>.

The inefficiencies of the DHS FOIA process have already come under scrutiny. The Government Accountability Office (“GAO”) assessed DHS’s FOIA program in a report published in March 2009, covering the period from May 2008 to January 2009. The GAO explained that the guiding principles of FOIA had changed since the law was enacted in 1966. The report states:

Before [FOIA], the government required individuals to demonstrate “a need to know” before granting the right to examine federal records. FOIA established a “right to know” standard, under which an organization or any member of the public could receive access to information held by federal agencies without demonstrating a need or reason. The “right to know” standard shifted the burden of proof from the individual to government agencies and required agencies to provide proper justification when denying requests for access to records.⁶

The GAO recommended DHS increase its internal monitoring and oversight as one way to reduce the agency’s backlog of FOIA requests.⁷ However, the GAO did not intend the monitoring and oversight to include vetting of requests by political appointees. The GAO also recommended increasing and specializing the training that DHS FOIA staff received as another way to increase efficiency.⁸ The GAO noted that “[w]hile DHS has made advances in ensuring compliance and oversight among its components...opportunities exist for further improvements.”⁹

Scope of Authority Issues:

EPIC has submitted a request to OGIS seeking an independent investigation of the above referenced DHS policy of vetting FOIA requests by political appointees. EPIC also urged OGIS to investigate whether other agencies have similar policies. However, as indicated by a response from the Director of OGIS, Miriam Nisbet,¹⁰ there is uncertainty as to the scope of authority for OGIS to undertake the type of investigation recommended by EPIC. Director Nisbet suggests that the GAO may have the better authority to conduct such an investigation. EPIC and the coalition of privacy organizations request that the Committee examine this issue in a public hearing.

FOIA was amended in 2007 to create the Office of Government Information Services (“OGIS”) within the National Archives and Records Administration. Since 2009, OGIS, acting as the FOIA Ombudsman, has mediated disputes between FOIA requesters and Federal agencies, reviewed agency compliance with FOIA as well agency policies and procedures for administering FOIA. OGIS is authorized to recommend policy changes to Congress and the President to improve the administration of FOIA. § 552(h)(2), (i)

⁶ Government Accountability Office, Freedom of Information Act: DHS has Taken Steps to Enhance Its Program, but Opportunities Exist to Improve Efficiency and Cost-Effectiveness, March 20, 2009, <http://www.gao.gov/new.items/d09260.pdf>

⁷ *Id.* at 14.

⁸ *Id.* at 16.

⁹ *Id.* at 25.

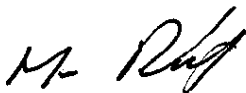
¹⁰ Miriam Nisbet, Letter to EPIC, January 2011, attached.

The GAO serves as the “congressional watchdog” by investigating, among other activities, “how well government programs and policies are meeting their objectives....[The GAO] advise[s] Congress and the heads of executive agencies about ways to make government more efficient, effective, ethical, equitable and responsive.”¹¹ Further, the GAO is authorized to conduct audits of agency operations and investigate alleged illegal or improper activities.

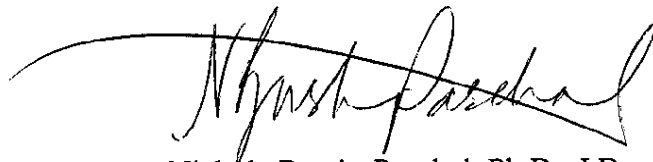
We object to DHS efforts to circumvent the FOIA process. The effectiveness of FOIA depends on agencies adhering to the principles of open government and transparency. Agencies must operate under the “right to know” standard. To ensure the accountability of agencies under this standard, the jurisdictions of OGIS and GAO must be clear so that they might effectively investigate FOIA procedures and advise the Congress and the President.

The House Committee on Oversight and Government Reform must hold rigorous hearing to review these issues.

Sincerely,



Marc Rotenberg
Executive Director, EPIC



Nichole Rustin-Paschal, Ph.D., J.D.
Open Government Fellow, EPIC

American Association of Law Libraries
American Library Association
Association of Research Libraries
Bill of Rights Defense Committee
Center for Financial Privacy & Human Rights
Center for Media & Democracy
Common Cause
Consumer Action
Defending Dissent Foundation
Doctor-Patient Medical Association
Essential Information
Electronic Privacy Information Center
Government Accountability Project
Identity Project
Liberty Coalition
National Coalition Against Censorship
National Workrights institute

¹¹ About GAO, <http://www.gao.gov/about/index.html>.

Patient Privacy Rights
Privacy Rights Clearinghouse
UNITED SIKHS
World Privacy Forum

Experts:

Steven Aftergood
Grayson Barber
David H. Flaherty
Pablo Molina
Dr. Deborah C. Peel
Chip Pitts
Bruce Schneier
Edward Hammond, Former Director of the Sunshine Project

CC:

Senator Patrick J. Leahy (D-VT), Chairman
Senate Committee on the Judiciary

Senator John Cornyn (R-TX)
Senate Committee on the Judiciary

Senator Joseph Lieberman (ID) (CT), Chairman
Senate Committee on Homeland Security & Governmental Affairs

Senator Susan M. Collins (R-ME), Ranking Member
Senate Committee on Homeland Security & Governmental Affairs

Miriam Nisbet
Director, Office of Government Information Services

Elizabeth Johnston,
Government Accountability Office

/Attachment

Attachment

Miriam Nisbet, OGIS, Letter to EPIC, January 7, 2011