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November 23, 2010

Miriam M. Nisbet
Director
Office of Government Information Services (OGIS)
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001

Dear Ms. Nisbet:

EPIC is writing to request that the Office of Government Information Services (“OGIS”), as the FOIA Ombudsman, investigate the FOIA policies and practices of the Department of Defense (“DoD”).

EPIC submitted a FOIA request to DoD and was threatened with an “administrative withdrawal” of its request. EPIC believes that this a statutorily barred assertion by DoD about the scope of a federal agency’s authority to process requests under FOIA. The Department of Defense wrongly claims the authority to administratively withdraw FOIA requests without the consent or input of the FOIA requester. *See Appendix 2.*

OGIS should investigate the practices and policies DoD has been employing to unlawfully withdraw FOIA requests.

Factual Background about EPIC FOIA request to DoD

Project Vigilant, in existence since 1996, is an organization “monitor[ing]” the traffic of 12 regional Internet service provides” and “hand[ing] much of that information

to federal agencies.”¹ Project Vigilant is sponsored by a company called BBHC Global and also receives funding from U.S. government research projects.²

Project Vigilant professes to tracking more than 250 million IP addresses a day and claims that it can develop portfolios on any name, screen name, or IP address.³ The group primarily focuses on monitoring and revealing alleged domestic terrorist activity and illegal hacking though it also claims to have assisted in cases involving drug trafficking and child endangerment.⁴

Project Vigilant was recently featured in several news stories because the group claimed credit for helping to identify U.S. Army Intelligence Analyst Bradley Manning as the alleged source of a leak of a sensitive cache of documents that was ultimately published on WikiLeaks.⁵

Procedural Background about EPIC FOIA Request to DoD

On August 23, 2010, EPIC filed a FOIA request with the Department of Defense regarding Project Vigilant as the DoD was investigating the WikiLeaks. EPIC sought the following agency records:

1. All communications between any federal government agency and any representative, officer, or member of Project Vigilant.
2. All contracts, agreements, or memoranda of understanding between any government agency and Project Vigilant (or its representatives).

EPIC also requested expedited processing. *See Appendix 1.*

¹ Andy Greenberg, *Stealthy Government Contractor Monitors U.S. Internet Providers, Worked with Wikileaks Informant*, Forbes, August 1, 2010, <http://blogs.forbes.com/firewall/2010/08/01/stealthy-government-contractor-monitors-u-s-internet-providers-says-it-employed-wikileaks-informant/>.

² Robert McMillan, *Secretive Group Seeks Recruits at Defcon, Finds Skepticism*, Computer World, August 2, 2010, http://www.computerworld.com/s/article/9180047/Secretive_group_seeks_recruits_at_Defcon_finds_skepticism?taxonomyID=17.

³ *Supra* at 1.

⁴ Mark Albertson, *Secret Group Aids Fight Against Terror*, San Francisco Technology Examiner, June 21, 2010, <http://www.examiner.com/x-27653-SF-Technology-Examiner~y2010m6d21-Secret-group-aids-fight-against-terror>.

⁵ *Supra* at 3.

On September 7, 2010, the DoD responded to EPIC's request finding that the request was imprecise. DoD requested that we consider amending the request. DoD also denied EPIC's request for expedited processing. The DoD then wrongly asserted that it not only had the authority to withdraw a FOIA request on behalf of the FOIA requester, it could do so without the consent or input of the FOIA requester. *See Appendix 2.*

On September 16, 2010, EPIC filed an amended request with the DoD and stated that it would pursue the statutory question of whether a federal agency has the authority to withdraw a FOIA request on behalf of the requester. *See Appendix 3.*

As of the date of this letter, well beyond the statutorily required response period of 20 working days, DoD has not responded, even to acknowledge receipt, to the amended request.

DoD's Impermissible Assertion of the Authority to "Administratively Withdraw" a FOIA Request Without the Requester's Permission

The DoD has asserted extra-legal authority to withdraw a FOIA request on behalf of the requester. In its September 7, 2010 letter to EPIC, the DoD wrote, "in the event we do not receive [an amended request (referenced above)] from you within 30 days from the date of this letter, we will administratively close your request on the assumption that you have elected to withdraw your request." *See Appendix 2.*

This is patently unauthorized. Neither in the FOIA nor in the DoD FOIA regulations is there the statutory authority for an agency to administratively withdraw a FOIA request on an "assumption" that the requester has "elected to withdraw" a request.

The FOIA does not allow a federal agency to administratively withdraw a FOIA requester's request. In fact, FOIA provides for affirmative disclosure of agency records. § 552(a)(3)(A) requires that agencies release all records not covered by (a)(1) and (a)(2) or exempted from mandatory disclosure by § 552(b).

Furthermore, the DoD FOIA regulations explicitly state that a proper reason for not releasing a record is that the "[t]he request is withdrawn by the requester." C5.2.2.2. The DoD can only make a determination whether it will deny the request in whole or in part. C5.2.5. The DoD FOIA regulations require that the agency's annual FOIA report include the "number of times a request and/or appeal was withdrawn by a requester." C7.1.2.2.2.3. There is no category for appeals "administratively withdrawn" by the agency.

The DoD has clearly exceeded its authority in presuming it can administratively withdraw a request on behalf of a FOIA requester. Furthermore, the DoD has clearly flouted its own FOIA regulations.

EPIC requests the following assistance from the FOIA Ombudsman.

OGIS, as FOIA Ombudsman, is authorized to review policies and procedures of administrative agencies, review compliance by administrative agencies, and recommend policy changes to Congress and the President. § 552(h)(2). OGIS is also required to conduct audits of agencies' FOIA implementation and issue reports. § 552(i).

As a frequent FOIA litigant, EPIC has a strong interest in ensuring that FOIA requests are processed in a timely, lawful, and responsive manner. In addition, as the publisher of the leading FOIA litigation handbook, *Litigation Under the Federal Open Government Laws*, EPIC has expertise regarding FOIA's statutory requirements and deadlines.

EPIC therefore urges OGIS to investigate the policies raised by DoD's impermissible assertion of the authority to administratively withdraw a FOIA request without the consent or input of the FOIA requester. Has the DoD been making a regular practice of "administratively withdrawing" FOIA requests? To what extent have people and organizations who are legally entitled to request DoD records, been denied that access because the DoD had "assumed" the authority to withdraw requests without the requester's consent? Under what authority does the DoD claim the right to "administratively withdraw" FOIA requests?

EPIC requests that the FOIA Ombudsman advise the Department of Defense that DoD lacks the legal authority under FOIA to withdraw, on its own initiative, an individual's or organization's FOIA request. EPIC recommends additional training be provided to DoD FOIA staff regarding implementation of FOIA as required by the DoD's FOIA regulations. C.8.1.3.

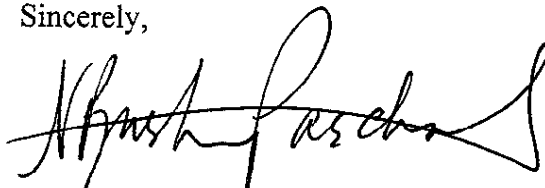
EPIC requests that the OGIS publish a report of its findings in this matter. In addition, OGIS should issue guidance that makes clear that FOIA requests cannot be administratively withdrawn by the agency on behalf of a FOIA requester without the FOIA requester's consent or input.

Privacy Consent Statement

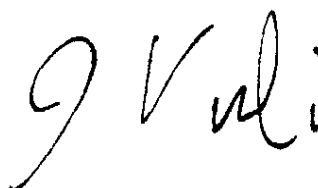
In accordance with the Privacy Act of 1974 as amended, EPIC hereby authorizes the Office of Government Information Services to make inquiries on its behalf, including the right to review all documentation that OGIS deems necessary in connection with EPIC's request for assistance regarding the Freedom of Information Act appeal that it has referenced above. EPIC understands that any documents it provides to OGIS may be copied and forwarded to officials of the referenced agency as a part of the mediation/resolution process. EPIC authorizes any Federal department, agency or component to release to OGIS information and records related to its Freedom of Information Act request.

Thank you for your attention to this matter. We look forward to your continued work on this issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Nichole Rustin-Paschal". The signature is fluid and cursive, with a large loop at the end.

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

A handwritten signature in black ink, appearing to read "John Verdi". The signature is cursive and somewhat stylized.

John Verdi
Director, EPIC Open Government Project