



June 8, 2012

**VIA FACSIMILE: 703-874-8910**

FOIA Officer  
Office of the Director of National Intelligence  
Washington, DC 20511

**Re: Freedom of Information Act Appeal**

Dear FOIA Officer:

This letter constitutes an appeal under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted to the Office of the Director of National Intelligence (“ODNI”) by the Electronic Privacy Information Center (“EPIC”).

On March 28, 2012, EPIC requested, via facsimile, the following:

1. The “priority list” of databases that the National Counterterrorism Center plans to copy.<sup>1</sup>

#### Procedural Background

On March 28, 2012, EPIC transmitted a request for the preceding document (“EPIC’s FOIA Request”), as well as a request for news media fee status and a waiver of duplication fees.<sup>2</sup>

In a letter dated March 29, 2012, ODNI responded to EPIC’s FOIA Request. The agency responded with an acknowledgment of EPIC’s FOIA Request.<sup>3</sup>

EPIC has received no further communication from the ODNI in response to EPIC’s FOIA Request. More than twenty working days have passed since the ODNI acknowledged EPIC’s FOIA Request.

#### EPIC Appeals the ODNI’s Failure to Disclose Records Responsive to Category 1

EPIC hereby appeals the ODNI’s failure to make a timely determination regarding EPIC’s FOIA Request. Typically, an agency must make a determination regarding a FOIA

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<sup>1</sup> Appendix 1.

<sup>2</sup> *Id.*

<sup>3</sup> Appendix 2.

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request within twenty working days.<sup>4</sup> EPIC received ODNI's acknowledgment letter on March 29, 2012. That letter acknowledged that ODNI had received EPIC's FOIA request. The agency's statutory deadline to respond expired on April 26, 2012.

ODNI's March 29, 2012 acknowledgment letter is not a determination. A "determination" must include at least a list of the documents to which the requester is being denied access and reasons for the withholding. "Denial of this information would in all likelihood be a violation of due process as well as effectively gutting the reasons for applying the exhaustion doctrine in FOIA cases."<sup>5</sup> More than twenty working days have passed since the ODNI acknowledged EPIC's FOIA Request.

An agency's "acknowledgement" of a request "cannot be construed as a 'determination' . . . if it does not grant or deny the right to appeal."<sup>6</sup> The ODNI has not responded to EPIC's FOIA Request, and therefore a determination has not been made as to the documents under these categories. The failure to make a determination violates the FOIA.

#### EPIC Renews Its Request for "News Media" Fee Status

At this time, EPIC reiterates and renews all arguments that it should be granted "news media" fee status. EPIC is a non-profit, educational organization that routinely and systematically disseminates information to the public. EPIC is a representative of the news media.<sup>7</sup>

EPIC's status as a "news media" requester entitles it to receive requested records with only duplication fees assessed. In addition, 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.

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<sup>4</sup> 5 U.S.C. § 552(a)(6); *see also* Wash. Post v. Dep't of Homeland Sec., 459 F. Supp. 2d 61, 74 (D.D.C. 2006) (citing Payne Enterprises v. United States, 837 F.2d 486, 494 (D.C. Cir. 1998)) (stating, "FOIA was created to foster public awareness, and failure to process FOIA requests in a timely fashion is 'tantamount to denial.'").

<sup>5</sup> Shermco Indus., Inc. v. Sec'y of Air Force, 452 F. Supp. 306, 317 n.7 (N.D. Texas. 1978) *rev'd on other grounds*, 613 F.2d 1314 (5th Cir. 1980); *see also* Oglesby v. Dep't of Army, 920 F.2d 57, 65 (D.C. Cir. 1990) (citing Shermco Indus., Inc. v. Sec'y of Air Force, 452 F. Supp. 306 (N.D. Tex. 1978)).

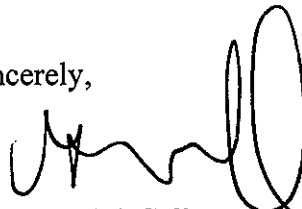
<sup>6</sup> Martinez v. F.B.I., No. 82-1547 (D.D.C. Oct. 11, 1983) (citing Shermco Indus., Inc., v. Sec'y of Air Force, 452 F. Supp. 306 (N.D. Tex. 1978) and Marschner v. Dep't of State, 470 F. Supp. 196, 199 (D. Conn. 1979)).

<sup>7</sup> EPIC v. Dep't of Defense, 241 F. Supp. 2d. 5 (D.D.C. 2003).

Conclusion

Thank you for your prompt response to this appeal. I anticipate that you will produce responsive documents within twenty working days of this appeal. If you have any questions, please feel free to contact me at (202) 483-1140 x 102 or FOIA@epic.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ginger P. McCall', with a large, stylized loop at the end.

Ginger P. McCall  
Director, EPIC Open Government Project

/enclosure