

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:

1. Any agency records concerning licenses obtained or requested by U.S. exporters for “communications intercepting devices” under 15 C.F.R. § 742.13 from March 19, 2010-March 19, 2012.
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

EPIC is appealing the adequacy of BIS’s segregability analysis. The Freedom of Information Act provides that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). Although the agency seeks to withhold documents based upon FOIA Exemption 3, “it must nonetheless disclose all reasonably segregable, nonexempt portions of the requested record(s).” *Roth v. U.S. Dep’t of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011); *North v. U.S. Dep’t of Justice*, 774 F. Supp. 2d 217, 222 (D.C. Cir. 2011) (citing *Oglesby v. U.S. Dep’t of the Army*, 79 F.3d 1172, 1178 (D.C. Cir. 1996)). The agency bears the burden of demonstrating that withheld documents contain no reasonably segregable factual information. *Mokhiber v. U.S. Dept. of Treasury*, 335 F. Supp. 2d 65, 69 (D.D.C. 2004) (citing *Army Times Pub. Co. v. U.S. Dep’t of Air Force*, 998 F.2d 1067, 1068 (D.C. Cir. 1993); *Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 556 F.2d 242, 260 (D.C. Cir. 1977).

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 Report¹ 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

¹ Available at http://www.bis.doc.gov/news/2012/bis_annual_report_2011.pdf.

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.² 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.”³

EPIC is “primarily engaged in disseminating information.”⁴

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,⁵ requests for information by members of Congress,⁶ and even federal lawsuits.⁷ Many of the firms in question also

² *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).

³ 5 U.S.C. § 552(a)(6)(E)(v)(II) (2008); *Al-Fayed v. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001).

⁴ *American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

⁵ See James Temple, *Bay Area Firms' Technology Used for Oppression*, San. Fran. Chronicle, Mar. 11, 2012, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2012/03/10/BUU01NIMCF.DTL>; Paul Sonne & Steve Stecklow, *U.S. Products Help Block Mideast Web*, Wall St. J., Mar. 27, 2011, available at <http://online.wsj.com/article/SB10001424052748704438104576219190417124226.html>; Ben Elgin & Vernon Silver, *Syria Crackdown Gets Italy Firm's Aid With U.S.-Europe Spy Gear*, Bloomberg, Nov. 3, 2011, available at <http://www.bloomberg.com/news/2011-11-03/syria-crackdown-gets-italy-firm-s-aid-with-u-s-europe-spy-gear.html>; *The Technology Helping Repressive Regimes Spy*, NPR, Dec. 14, 2011, <https://www.npr.org/2011/12/14/143639670/the-technology-helping-repressive-regimes-spy>; Sari Horwitz & Shyamantha Asokan, *U.S. Probing Use of Surveillance Technology in Syria*, Wash. Post, Nov. 17, 2011, available at http://www.washingtonpost.com/world/national-security/us-probes-use-of-surveillance-technology-in-syria/2011/11/17/gIQAS1iEVN_story.html.

⁶ See Kirk, Casey, & Coonz *supra* note 18.

⁷ See Rainey Reitman, *Cisco and Abuses of Human Rights in China: Part 1*, Electronic Frontier Foundation, Aug. 22, 2011, <https://www.eff.org/deeplinks/2011/08/cisco-and-abuses-human-rights-china-part-1>.

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,

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David Jacobs
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⁸ Exec. Order No. 13606, 77 Fed. Reg. 24571 (Apr. 22, 2012) available at <http://www.gpo.gov/fdsys/pkg/FR-2012-04-24/html/X12-10424.htm>.

Appendix 1: EPIC's FOIA Request

Appendix 2: BIS Letter