



September 17, 2009

**VIA FACSIMILE (202-282-9186)**

David J. Palmer  
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RE: Freedom of Information Act Appeal (PRIV 09-765)

Dear Mr. Palmer:

This letter constitutes an appeal under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552,<sup>1</sup> and is submitted to the Department of Homeland Security (“DHS”) by the Electronic Privacy Information Center (“EPIC”).

**Procedural Background**

On June 25, 2009 EPIC requested documents regarding appointments and meetings of Mary Ellen Callahan, Chief Privacy Officer for DHS. Specifically, EPIC requested:

- 1) All agency records concerning appointments and meetings between Mary Ellen Callahan, Chief Privacy Officer for the Department of Homeland Security, and all nongovernmental individuals or entities from the date of her appointment, March 9, 2009, to the present. Such nongovernmental individuals and entities include, but are not limited to, trade associations, industry representatives, and/or business owners. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.<sup>2</sup>
- 2) All agency records concerning Ms. Callahan's appointments and

<sup>1</sup> 5 U.S.C. § 552 (LexisNexis 2009).

<sup>2</sup> See Appendix 1

meetings for May 29, 2009. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.<sup>3</sup>

On July 2, 2009, DHS wrote to EPIC, acknowledged receipt of EPIC's FOIA Request, and invoked the 10-day extension that is permissible under FOIA.<sup>4</sup>

On July 30, 2009, DHS produced a heavily redacted copy of Ms. Callahan's calendar for the relevant time period and asserted exemptions set forth in subsections b(2)low and (b)(6).<sup>5</sup>

On August 25, 2009, DHS provided additional documents in response to EPIC's FOIA Request.<sup>6</sup> The documents consist of partially redacted emails and other communications, asserting exemptions set forth in subsections b(2)low, b(5), and (b)(6).<sup>7</sup>

#### EPIC Appeals DHS's Failure to Disclose Records in Full and its Assertions of Exemptions

EPIC is appealing both DHS's failure to disclose relevant records in its possession and DHS's overly broad assertion of statutory exemptions in the records it did disclose.

##### *1) EPIC Appeals DHS's Failure to Disclose Records in Full*

EPIC specifically asked for "All agency records concerning appointments and meetings between Mary Ellen Callahan, Chief Privacy Officer for the Department of Homeland Security, and all nongovernmental individuals or entities from the date of her appointment, March 9, 2009, to the present. Such nongovernmental individuals and entities include, but are not limited to, trade associations, industry representatives, and/or business owners. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters."<sup>8</sup>

EPIC has attached a copy of the conference program for the European E-Identity Management Conference in Brussels on June 25th, at which Ms. Callahan

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<sup>3</sup> See *id.*

<sup>4</sup> See Appendix 2.

<sup>5</sup> See Appendix 3; see also Appendix 4; 5 U.S.C. § 552(b).

<sup>6</sup> See 5 U.S.C. § 552(a)(6)(LexisNexis 2009); see also Appendix 5; Appendix 6.

<sup>7</sup> See Appendix 5; see also 5 U.S.C. § 552(b).

<sup>8</sup> See Appendix 1.

was a keynote speaker.<sup>9</sup> This document falls within the relevant time frame and shows that Ms. Callahan was meeting with nongovernmental entities and individuals on that day, but on the documents disclosed to EPIC by DHS, the entire day of June 25th is wrongly redacted as “non responsive.”<sup>10</sup>

Similarly, in an email communication<sup>11</sup> with Ms. Callahan’s office, EPIC provided the agency with information regarding the May 29, 2009, which would obviously be in possession of the agency and responsive to the request for “All agency records concerning Ms. Callahan's appointments and meetings for May 29, 2009.”<sup>12</sup> These records were also not provided.

These two examples are sufficient to establish that the agency has failed to fulfill its statutory obligation under the Act to provide records in its possession responsive to the request. DHS is required to comply with FOIA and disclose responsive documents.<sup>13</sup>

#### *EPIC Appeals DHS's Assertion of Exemptions*

#### **Exemption b(2)**

DHS’s assertion of “Exemption b(2) low” is improper. The Exemption b(2) exempts records “related solely to the internal personnel rules and practices of an agency.”<sup>14</sup> Courts have held that the threshold requirement of whether or not the records in question are “internal” is met when the material is “used for predominantly internal purposes.”<sup>15</sup> “Once the threshold requirement is met, the agency may withhold two categories of information: trivial matters that are not of genuine public interest (known as Exemption “low” 2) or matters that, if disclosed, could result in circumvention of applicable statutes or agency regulations (known as Exemption “high” 2).”<sup>16</sup> The b(2) low exemption permits agencies to withhold from disclosure “internal agency matters in which the public could not reasonably be expected to have an interest.”<sup>17</sup> The exemption also

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<sup>9</sup> See Appendix 8.

<sup>10</sup> See Appendix 4.

<sup>11</sup> See Appendix 7.

<sup>12</sup> See Appendix 1.

<sup>13</sup> 5 U.S.C. § 552(a)(2)(LexisNexis 2009).

<sup>14</sup> 5 U.S.C. § 552(b)(2); see also *Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992).

<sup>15</sup> *Id.*; see also *Crooker v. ATF*, 670 F.2d 1051, 1073 (D.C. Cir. 1981) (holding “As a threshold matter, the agency must demonstrate that it uses the information for predominantly internal purposes.”).

<sup>16</sup> *Jordan v. United States DOJ*, No. 07-02303, 2009 U.S. Dist. LEXIS 81081, at \*32 (D. Colo. Aug. 14, 2009); see also *Schiller*, 964 F.2d at 1207; *Schwanner v. Dep't of Air Force*, 898 F.2d 793, 794 (D.C. Cir. 1990); *Founding Church of Scientology v. Smith*, 721 F.2d 828, 829-31 n.4 (D.C. Cir. 1983).

<sup>17</sup> *Schiller*, 964 F.2d at 1207.

requires that the documents be "related...to the internal personnel rules and practices of the agency."<sup>18</sup> Only documents that "manifest and implement the rules and practices" have been found to qualify for this exemption.<sup>19</sup> If the records are internal and related to personnel rules and practices, then information may be withheld only when the information is truly trivial and lacks public interest.<sup>20</sup> The burden of proof is on the agency to show that the records withheld qualify for the exemption.<sup>21</sup> "It is the agency's burden to establish that the information is too trivial to warrant disclosure,"<sup>22</sup> a requestor "need not produce dispositive evidence that there is a public interest in this information, he need only provide evidence of a genuine issue of material fact."<sup>23</sup>

The records requested by EPIC could not possibly qualify for a b(2) low exemption. EPIC requested records of meetings, recorded in a calendar maintained by a federal agency, between a government official and *external* individuals and entities,<sup>24</sup> which would certainly disqualify these records from an exemption that only applies to records "related solely to *internal* personnel rules and practices."<sup>25</sup> The records requested are neither "solely internal"<sup>26</sup> nor even "used for predominantly internal purposes"<sup>27</sup> – they are external communications and details of meetings between a public official and private parties. Additionally, the records were not "related to internal personnel rules and practices,"<sup>28</sup> even under the loosest definition of the phrase. These documents do not "manifest and implement"<sup>29</sup> any rules or practices: they are records of communications with nongovernmental, external individuals and entities, made for the purpose of scheduling meetings.

Even if the previous two requirements were satisfied, the records are, undoubtedly, the kind of records in which the public has an interest. The public has a strong interest in knowing what parties are meeting with high-level officials in federal agencies and who may be influencing agency policies. The strong public interest in knowing what parties are meeting with, and possibly influencing, policy makers, was recently acknowledged by both the White House and Ms. Callahan, herself.

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<sup>18</sup> *Schwanner*, at 795.

<sup>19</sup> *Schwanner*, at 795.

<sup>20</sup> *See Schiller* at 1207.

<sup>21</sup> *See Morley v. CIA*, 508 F.3d 1108 (D.C. Cir. 2007).

<sup>22</sup> *Id.* at 1125.

<sup>23</sup> *Id.* at 1125.

<sup>24</sup> Appendix 1.

<sup>25</sup> *Schiller* at 1207.

<sup>26</sup> *Id.*

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

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

<sup>29</sup> *Schwanner* at 795.

On September 4, 2009, the Administration announced a new policy of publicly posting the White House visitor access.<sup>30</sup> The White House will release, on a monthly basis, all previously unreleased access records that are 90 to 120 days old.<sup>31</sup> As President Obama explained, "Americans have a right to know whose voices are being heard in the policymaking process."<sup>32</sup> The President stated the central importance of transparency under his new Administration "We will achieve our goal of making this administration the most open and transparent administration in history not only by opening the doors of the White House to more Americans, but by shining a light on the business conducted inside it."<sup>33</sup> EPIC's request to Ms. Callahan parallels the White House's objective. EPIC is requesting records of meetings with external individuals and entities in the hopes of better understanding Ms. Callahan's priorities and what groups are having the opportunity to influence the decisions and policies of DHS and its privacy office.

Ms. Callahan, conceded that the documents EPIC is seeking have a high public interest value. In an August 26, 2009 general distribution memorandum, Ms. Callahan acknowledged President Obama's White House transparency initiative and stated:

As Chief FOIA Officer, I direct the Department and its components to include the following categories of records on their agency websites and link them to their respective electronic reading rooms:

1. Historical daily schedules of the most senior agency officials (notated to reflect that officials may have deviated from the posted schedule and abridged as appropriate for security and privacy concerns)...<sup>34</sup>

This statement acknowledges the importance of these schedules to the public. In light of this, no reasonable argument could be made by DHS that there is not a high public interest in the disclosure of the redacted information. Exemption b(2)low, which applies only to "internal agency matters in which the public could not reasonably be expected to have an interest."<sup>35</sup> would certainly not apply here.

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<sup>30</sup> White House Voluntary Disclosure Policy Visitor Access Records, <http://www.whitehouse.gov/VoluntaryDisclosure/> (last visited September 14, 2008).

<sup>31</sup> Id.

<sup>32</sup> Posting of Norm Eisen to The White House Blog, <http://www.whitehouse.gov/blog/Opening-up-the-peoples-house/> (Sept. 4, 2008, 09:05 EST)

<sup>33</sup> Id.

<sup>34</sup> Department of Homeland Security, Proactive Disclosure and Departmental Compliance with Subsection (a)(2) of the Freedom of Information Act (FOIA), [http://www.dhs.gov/xlibrary/assets/foia/foia\\_proactive\\_disclosure.pdf](http://www.dhs.gov/xlibrary/assets/foia/foia_proactive_disclosure.pdf), August 26, 2009 (last visited September 16, 2009).

<sup>35</sup> *Schiller*, 964 F.2d at 1207.

## Exemption b(5)

The records requested would not qualify for Exemption b(5), which applies to matters that are “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”<sup>36</sup> The purpose of this exemption was to codify the government’s common law privilege from discovery in litigation.<sup>37</sup> To qualify, a document must thus satisfy two conditions: its source must be a government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.<sup>38</sup> Exemption 5 applies only to inter-agency or intra-agency documents, which the D.C. Circuit Courts have defined using a “functional rather than a literal test.”<sup>39</sup> The Courts have used this test to allow documents that pass from one entity to another to be covered under Exemption 5 when there is a formalized, non-adversarial consulting relationship with the agency, and the information was prepared at the agency’s request for the benefit of its internal decision-making.<sup>40</sup> Where the outside party is not acting on behalf of the agency, the exemption does not apply.<sup>41</sup>

The documents requested by EPIC are not inter or intra-agency memorandums or letters. EPIC explicitly requested information regarding communications and meetings with external, nongovernmental individuals and entities. The documents requested by EPIC would not have qualified under even the loosest interpretation of “inter-agency or intra-agency”, because they are not documents that are part of a formalized, non-adversarial consulting relationship with the agency. The external, nongovernmental individuals and entities in question are completely independent from DHS, not consultants with the agency. Therefore, any communications and meetings they have with DHS should not qualify under Exemption b(5).

Even if the parties involved did somehow qualify as consultants, the communications themselves would still have to qualify for one of a very small number of privileges. The Supreme Court has narrowed the Exemption b(5) by holding that the rules for discovery should be applied to FOIA cases only “by way of rough analogies.”<sup>42</sup> The Supreme Court has recognized five privileges under

<sup>36</sup> Freedom of Information Act, 5 U.S.C. § 552(b)(5) (LexisNexis 2009).

<sup>37</sup> *Litigation Under the Federal Open Government Laws 2008*, 138 (Harry A. Hammitt, Marc Rotenberg, John A. Verdi, and Mark S. Zaid, eds., 2008) (citing H.R. Rep. No. 89-1497 (1966), S. Rep. No. 89-813 (1965), and S. Rep. No. 88-1219 6-7, 12-14 (1964)).

<sup>38</sup> See *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001).

<sup>39</sup> *Litigation Under the Federal Open Government Laws 2004* at 139 (citing *Ryan v. Dep’t of Justice*, 617 F.2d 781, 789-790 (D.C. Cir. 1980)).

<sup>40</sup> *Id.* at 139

<sup>41</sup> *Id.* (citing *County of Madison, NY v. Dep’t of Justice*, 641 F.2d 1036, 1049-42 (1st Cir. 1981)).

<sup>42</sup> *Id.* at 138 (citing *EPA v. Mink*, 410 U.S. 73, 86 (1973)).

Exemption 5; these protect deliberative processes, work product, attorney client communications, confidential commercial communications, and factual statements made to the government in the course of an air crash investigation.<sup>43</sup> Work product protects mental processes of the attorney that reveal the theory of his case or litigation strategy, while deliberative process covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.<sup>44</sup> Attorney-client privilege protects confidential communications, including facts (a) from a client to an attorney and (b) from an attorney to a client, if the communication is based on confidential information provided by the client.<sup>45</sup> Confidential commercial communications are defined as information generated by the government itself in the process leading up to awarding a contract.<sup>46</sup> Factual statements made to the government in the course of an air crash investigation is an exemption that was created to encourage witnesses and crash participants to speak freely about the facts of the incident.<sup>47</sup>

It is clear that EPIC's FOIA request to DHS does not qualify for any of these privileges. The records that EPIC has seeks do not qualify for the work product privilege. There do not appear to be any attorneys at all involved in the communications or meetings in question. Even if there were attorneys, there is still no pending litigation that would necessitate the assertion of this exemption in order to protect the attorneys' mental processes and trial strategy. The records sought are not related to any deliberative process – they are merely records of meetings, business contact information for meeting participants, and scheduling communications between Ms. Callahan's office and external individuals and entities. These records in no way reflect advisory opinions, recommendations or deliberations comprising part of a process by which governmental decisions and policies are formulated. Attorney-client privilege would also not apply here. The records that EPIC has requested could not possibly qualify for this privilege because EPIC requested information and communication regarding meetings with nongovernmental, external individuals and entities. None of the information requested would concern confidential communications between a client and an attorney. Because EPIC's request obviously does not involve any information generated by the government during the process leading up to a contract or any information regarding a plain crash, the request cannot qualify under either of the final two privileges.

EPIC's request, then, fails to meet either of the two requirements necessary for a proper b(5) Exemption.

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<sup>43</sup> *Id.* at 143.

<sup>44</sup> *See Klamath*, at 8.

<sup>45</sup> *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975).

<sup>46</sup> *See Fed. Open Mkt. Comm. of the Fed. Reserve Sys v. Merrill*, 443 U.S. 340, 360 (1979).

<sup>47</sup> *See United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984).

## Exemption b(6)

The records requested by EPIC also could not qualify for Exemption b(6), which applies to “personnel or medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”<sup>48</sup> While the Supreme Court has found that the phrase “similar files” has a broad meaning,<sup>49</sup> the phrase is still limited to “detailed government records on an individual which can be identified as applying to that individual.”<sup>50</sup> The documents in question must “constitute a clearly unwarranted invasion of that person’s privacy.”<sup>51</sup> In order to determine if a piece of information would constitute a clearly unwarranted invasion of personal privacy, courts use a balancing test – pitting the individual’s right to privacy against the preservation of the basic purpose of the Freedom of Information Act: “to open agency action to the light of public scrutiny.”<sup>52</sup> Exemption b(6) protects personal, but not business privacy.<sup>53</sup> Corporations, business entities and partnerships have no privacy interest in Exemption 6. The phrase “clearly unwarranted” has been interpreted to “instruct the court to tilt the balance in favor of disclosure.”<sup>54</sup> In order for a cognizable privacy interest to exist, the information must usually be “personal” or “intimate details” of a person’s life.<sup>55</sup> The following have been found to be “similar files” for the purpose of the Exemption: reports of interviews with persons who unsuccessfully sought to immigrate to the United States,<sup>56</sup> lists of names and home addresses of present government employees,<sup>57</sup> lists of names and home addresses of private citizens,<sup>58</sup> financial disclosure forms submitted to an agency by its outside consultants.<sup>59</sup> Business addresses have routinely been found to have low privacy interest.<sup>60</sup>

The records that EPIC has requested could not qualify for Exemption b(6), because they are not personnel or medical files or similar files. Much of the information redacted in the documents appears to be business or organization information, not the personal information of individuals. Any business

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<sup>48</sup> Freedom of Information Act, 5 U.S.C. § 552(b)(6) (LexisNexis 2009).

<sup>49</sup> *Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 599-600 (1982).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Dep’t of Air Force v. Rose*, 425 U.S. 352, 372 (1976); accord *Dep’t of State v. Ray*, 502 U.S. 164 (1994); quoting Freedom of Information Act, 5 U.S.C. § 552(b)(5) (LexisNexis 2009).

<sup>53</sup> *Wash. Post Co. v. Dep’t of Agric.*, 943 F.Supp. 31, 37 n.6 (D.C. Cir. 1996).

<sup>54</sup> *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971).

<sup>55</sup> S. Rep. No. 89-813, at 9 (1965); H.R. Rep. No. 89-1497, at 11 (1966).

<sup>56</sup> *Dep’t of State v. Ray*, 502 U.S. 164 (1991).

<sup>57</sup> *Dep’t of Defense v. FLRA*, 510 U.S. 487 (1994).

<sup>58</sup> *Minnis v. Dep’t of Agric.*, 737 F.2d 784, 786 (9<sup>th</sup> Cir. 1984).

<sup>59</sup> *Wash. Post Co. v. Dep’t of Health & Human Servs.*, 690 F.2d 252 (D.C. Cir. 1982).

<sup>60</sup> See *Sun-Sentinel Co. v. DHS*, 431 F. Supp. 2d 1258, 1272 (S.D. Fl. 2006); see also *Wash. Post Co. v. Dep’t of Agric.*, at 35.



information, would not qualify under this exemption, because the exemption only protects personal information. The individual information that is redacted appears to be individual's work or business contact information, which also would likely not qualify for this exemption. Work emails, addresses, and phone numbers have not been accepted as a clearly unwarranted invasion of privacy under this exemption: only home addresses have been.<sup>61</sup> Individuals' work addresses are hardly private or intimate information, courts have found that the privacy interest in these documents is low.<sup>62</sup>

This weak privacy interest is weighed against the high public interest in knowledge regarding who is meeting with Ms. Callahan and possibly influencing DHS's policies. As discussed above, the strong public interest in knowing who is meeting with key agency officials – and possibly influencing policy decisions – has been recognized by the Obama Administration in its recent implementation of the new White House transparency policy, which will disclose White House visitor records to the public,<sup>63</sup> as well as by DHS itself, in its recent announcement that it will make certain records, including senior officials' schedules, available to the public.<sup>64</sup>

#### Failure to Comply With the President's Open Government Initiative

In addition to the statutory claims, EPIC also notes that the agency has failed to comply with the open government directive that the President set out in January and the specific, and directly applicable determination made recently by the White House with respects to the records of agency officials who meet with members of the public.<sup>65</sup>

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<sup>61</sup> See *Dep't of Defense v. FLRA*, 510 U.S. 487 (1994); see also *Minnis v. Dep't of Agric.*, 737 F.2d 784, 786 (9<sup>th</sup> Cir. 1984).

<sup>62</sup> See *Sun-Sentinel Co.* at 1272; see also *Wash. Post Co. v. Dep't of Agric.*, at 35.

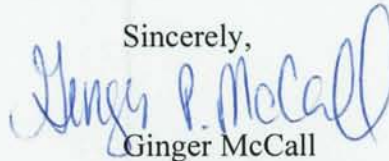
<sup>63</sup> White House Voluntary Disclosure Policy Visitor Access Records, <http://www.whitehouse.gov/VoluntaryDisclosure/> (last visited September 14, 2008).

<sup>64</sup> Department of Homeland Security, Proactive Disclosure and Departmental Compliance with Subsection (a)(2) of the Freedom of Information Act (FOIA), [http://www.dhs.gov/xlibrary/assets/foia/foia\\_proactive\\_disclosure.pdf](http://www.dhs.gov/xlibrary/assets/foia/foia_proactive_disclosure.pdf), August 26, 2009 (last visited September 16, 2009).

<sup>65</sup> Memorandum for the Heads of Executive Departments and Agencies, [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct/](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/) (last visited September 17, 2009).

While we note that Ms. Callahan has advised the DHS of her intent to comply with the requirements of the White House policy, she has still failed to make available the documents that we have requested and which we are entitled by law to receive.

Sincerely,



Ginger McCall  
EPIC Staff Counsel

/enclosures

**Appendix 1**

EPIC's June 25, 2009, FOIA Request to DHS



June 25, 2009

**VIA FAX: (703) 235-0443**

Ms. Catherine M. Papoi, FOIA Officer  
U.S. Department of Homeland Security  
Privacy Office  
Director, Disclosure & FOIA  
245 Murray Drive SW, Building 410  
STOP-0550  
Washington, DC 20528-0550

RE: Freedom of Information Act Request

Dear Ms. Papoi,

This letter constitutes a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center (EPIC).

EPIC requests copies of the following agency records:

- 1) All agency records concerning appointments and meetings between Mary Ellen Callahan, Chief Privacy Officer for the Department of Homeland Security, and all nongovernmental individuals or entities from the date of her appointment, March 9, 2009, to the present. Such nongovernmental individuals and entities include, but are not limited to, trade associations, industry representatives, and/or business owners. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.
- 2) All agency records concerning Ms. Callahan's appointments and meetings for May 29, 2009. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.

For purposes of FOIA fee assessments, we request that EPIC be placed in the category of "news media" requester. The U.S. District Court for the District of Columbia has determined that EPIC qualifies for "news media," fee status, *EPIC v. Department of Defense*, 241 F.Supp.2d 5 (D.D.C. 2003). We also request a waiver of all processing fees, as release of this information will contribute significantly to the public's understanding of the activities and operation of the government.

1718 Connecticut Ave NW

Suite 200

Washington DC 20009

USA

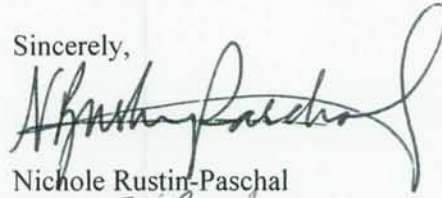
+1 202 483 1140 [tel]

+1 202 483 1248 [fax]

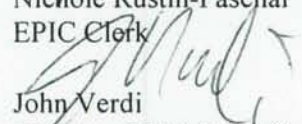
[www.epic.org](http://www.epic.org)

Thank you for your consideration of this FOIA request. As the FOIA provides, I look forward to your response within 20 working days. Should you require additional information, please contact me at 202-483-1140 or by e-mail at [Rustin-Paschal@epic.org](mailto:Rustin-Paschal@epic.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Nichole Rustin-Paschal", written in a cursive style.

Nichole Rustin-Paschal  
EPIC Clerk

A handwritten signature in black ink, appearing to read "John Verdi", written in a cursive style.

John Verdi

Director, EPIC Open Government Project

**Appendix 2**

July 2, 2009 DHS response invoking 10-day extension



# Homeland Security

*Privacy Office, Mail Stop 0655*

July 2, 2009

Mr. John Verdi  
Director  
EPIC Open Government Project  
1718 Connecticut Avenue NW, Suite 200  
Washington, D.C. 20009

Re: **DHS/OS/PRIV 09-765**

Dear Mr. Verdi:

This acknowledges receipt of your Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), dated June 24, 2009, and received in this office on June 25, 2009. You requested copies of the following agency records:

1. All agency records concerning appointments and meetings between Mary Ellen Callahan, Chief Privacy Officer for the Department of Homeland Security, and all nongovernmental individuals or entities from the date of her appointment, March 9, 2009, to the present. Such nongovernmental individuals and entities include, but are not limited to, trade associations, industry representatives, and/or business owners. Such records include, but are not limited to, appointment books, calendars, e-mails, agenda, and letters.
2. All agency records concerning Ms. Callahan's appointments and meetings for May 29, 2009. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.

Due to the increasing number of FOIA requests received by this office, we may encounter some delay in processing your request. Per Section 5.5(a) of the DHS FOIA regulations, 6 C.F.R. Part 5, the Department processes FOIA requests according to their order of receipt. Although DHS' goal is to respond within 20 business days of receipt of your request, the FOIA does permit a 10-day extension of this time period. As your request seeks numerous documents that will necessitate a thorough and wide-ranging search, DHS will invoke a 10-day extension for your request, as allowed by Title 5 U.S.C. § 552(a)(6)(B). If you care to narrow the scope of your request, please contact our office.

As it relates to your fee waiver request, your request will be held in abeyance pending the quantification of responsive records. The DHS FOIA Regulations, 6 CFR § 5.11(k)(2), set forth six factors to examine in determining whether the applicable legal standard for a fee waiver has been met: (1) Whether the subject of the requested records concerns "the operations or activities of the government;" (2) Whether the disclosure is "likely to contribute" to an understanding of

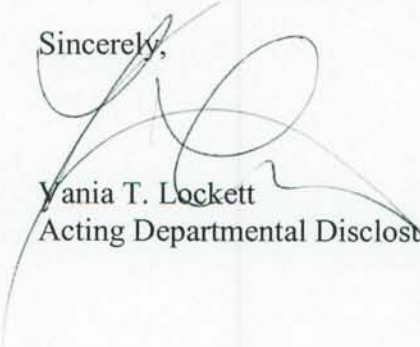
government operations or activities; (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons; (4) Whether the contribution to public understanding of government operations or activities will be "significant;" (5) Whether the requestor has a commercial interest that would be furthered by the requested disclosure; and (6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor. If any responsive records are located, we will consider these factors in our evaluation of your request for a fee waiver.

In the event that your fee waiver is denied, we shall charge you for records in accordance with the DHS Interim FOIA regulations as they apply to media requestors. As a media requestor you will be charged 10-cents a page for duplication, although the first 100 pages are free. You will be promptly notified once a determination is made regarding your fee waiver request.

We have queried the appropriate component of DHS for responsive records. If any responsive records are located, they will be reviewed for determination of releasability. Please be assured that one of the processors in our office will respond to your request as expeditiously as possible. We appreciate your patience as we proceed with your request.

Your request has been assigned reference number **DHS/OS/PRIV 09-765**. Please refer to this identifier in any future correspondence. You may contact this office at 866-431-0486.

Sincerely,



Yania T. Lockett  
Acting Departmental Disclosure Officer



**Appendix 3**

July 30, 2009 DHS response (sent along with documents)



# Homeland Security

July 30, 2009

Mr. John Verdi  
Director, EPIC Open Government Project  
EPIC  
1718 Connecticut Avenue, NW  
Washington, DC 20009

Re: **PRIV 09-765**

Dear Mr. Verdi:

This is the first interim response to your Freedom of Information Act (FOIA) request to the U.S. Department of Homeland Security, dated June 25, 2009. On behalf of the Electronic Privacy Information Center (EPIC), you requested copies of the following agency records:

- 1) All agency records concerning appointments and meetings between Mary Ellen Callahan, Chief Privacy Officer for the Department of Homeland Security, and all nongovernmental individuals or entities from the date of her appointment, March 9, 2009, to the present. Such nongovernmental individuals and entities include, but are not limited to, trade associations, industry representatives, and/or business owners. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.
- 2) All agency records concerning Ms. Callahan's appointments and meetings for May 29, 2009. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.

Due to the voluminous amount of records that must be located, compiled, and reviewed, we need additional time to search for possible additional responsive records and, to the extent that more responsive records are found, to make a determination about production of those records. Therefore, we are providing an interim response to your request at this time. Additional searches are being conducted, and if more responsive documents are found as a result of those searches, we will provide them to you as soon as possible. As we discussed yesterday, I expect to complete my review on or before August 7, 2009.

In our preliminary search for records responsive to the multi-part request, we have located a total of 16 pages. Of those pages, we have determined that they can be partially released but with certain information withheld pursuant to Title 5 U.S.C. § 552 (b)(2)(low), and (b)(6).

Explanations used in the withholding are described below.

**FOIA Exemption 2(low)** protects information applicable to internal administrative personnel matters to the extent that the information is of a relatively trivial nature and there is no public interest in the document.

**FOIA Exemption 6** exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor in the aforementioned balancing test.

We have redacted information that was not responsive to your request.

Based on our discussion, I understand that EPIC plans to withhold any appeal until the production is complete. When all responsive records have been released to you, you will be provided with information pertaining to your appeal rights.

If you need to contact our office again about this matter, please refer to PRIV 09-765. If you have any questions, please contact me at (202) 282-9735.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Palmer', with a long horizontal flourish extending to the right.

David J. Palmer  
Deputy Associate General Counsel - Legal Counsel  
Office of the General Counsel  
Department of Homeland Security

**Appendix 4**

Calendar disclosed by DHS

# May 25 - May 31

May 2009							June 2009						
S	M	T	W	T	F	S	S	M	T	W	T	F	S
					1	2		1	2	3	4	5	6
3	4	5	6	7	8	9	7	8	9	10	11	12	13
10	11	12	13	14	15	16	14	15	16	17	18	19	20
17	18	19	20	21	22	23	21	22	23	24	25	26	27
24	25	26	27	28	29	30	28	29	30				
31													

Monday, May 25

Thursday, May 28

9:30am 10:15am Panel Participant: CDT's Panel Discussion on the Future of Privacy in the Federal Government (CDT's Office, 1634 I Street, NW, Washington, DC)

Tuesday, May 26

Friday, May 29

2:00pm 3:00pm AILA Meeting (1621 North Kent Street, 9th Floor, Rosslyn, VA 22209)

1:00pm 2:00pm MAY 2009 Privacy Update - (ABA Brown Bag Program)

4:00pm 5:00pm Follow-up Meeting w Montserrat Miller (1621 North Kent Street, 9th Floor, Rosslyn, VA 22209)

Wednesday, May 27

Saturday, May 30

Sunday, May 31

# June 01 - June 07

June 2009

S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30				

July 2009

S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

Monday, June 01

Thursday, June 04

2:00pm - 2:30pm Interview with AP Re: RFID/WHTI (Amy - please call - [redacted])

3:15pm - 5:15pm CFP - MEC SHOULD REALLY LISTEN TO THIS ONE  
Towards a Global Information Privacy Regime  
(Webcast)

Tuesday, June 02

Friday, June 05

9:15am - 10:30am CFP (MEC TO TRY TO LISTEN TO WEBCAST) Keynote panel: Computers, Freedom and the Obama Administration  
10:45am - 12:00pm CFP (MEC TO TRY LISTEN TO WEBCAST) The Future of Security vs. Privacy

Wednesday, June 03

Saturday, June 06

Sunday, June 07

**Appendix 5**

August 25, 2009 Response by DHS (delivered along with documents)



# Homeland Security

August 25, 2009

Mr. John Verdi  
Director, EPIC Open Government Project  
EPIC  
1718 Connecticut Avenue, NW  
Washington, DC 20009

Re: **PRIV 09-765**

Dear Mr. Verdi:

This is the final response to your Freedom of Information Act (FOIA) request to the U.S. Department of Homeland Security, dated June 25, 2009. On behalf of the Electronic Privacy Information Center (EPIC), you requested copies of the following agency records:

- 1) All agency records concerning appointments and meetings between Mary Ellen Callahan, Chief Privacy Officer for the Department of Homeland Security, and all nongovernmental individuals or entities from the date of her appointment, March 9, 2009, to the present. Such nongovernmental individuals and entities include, but are not limited to, trade associations, industry representatives, and/or business owners. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.
- 2) All agency records concerning Ms. Callahan's appointments and meetings for May 29, 2009. Such records include, but are not limited to, appointment books, calendars, e-mails, agendas, and letters.

In our final search for records responsive to the multi-part request, we have located a total of 84 pages. Of those pages, we have determined that 40 pages can be released in their entirety and 44 pages can be partially released, but with certain information withheld pursuant to Title 5 U.S.C. § 552 (b)(2)(low), (b)(5), and (b)(6).

Explanations used in the withholding are described below.

**FOIA Exemption 2(low)** protects information applicable to internal administrative personnel matters to the extent that the information is of a relatively trivial nature and there is no public interest in the document.



**FOIA Exemption 5** protects from disclosure those inter- or intra- agency documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work product privilege, and the attorney-client privilege. After carefully reviewing the responsive documents, we have determined that portions of the responsive documents qualify for protection under the deliberative process privilege. The deliberative process privilege protects the integrity of the deliberative or decision-making processes within the agency by exempting from mandatory disclosure opinions, conclusions, and recommendations included within inter-agency or intra-agency memoranda or letters. The release of this internal information would discourage the expression of candid opinions and inhibit the free and frank exchange of information among agency personnel.

**FOIA Exemption 6** exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor in the aforementioned balancing test.

You have a right to appeal the above withholding determination. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to: Associate General Counsel (Legal Counsel), U.S. Department of Homeland Security, Washington, D.C. 20528, following the procedures outlined in the DHS regulations at 6 C.F.R. § 5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at [www.dhs.gov/foia](http://www.dhs.gov/foia).

Provisions of the FOIA allow us to recover part of the cost of complying with your request. In this instance, because the cost is below the \$14 minimum, there is no charge. 6 CFR § 5.11(d)(4).

If you need to contact our office again about this matter, please refer to PRIV 09-765. If you have any questions, please feel free to contact me at (202) 282-9735.

Sincerely,

*David Palmer / NDG*

David J. Palmer  
Deputy Associate General Counsel - Legal Counsel  
Office of the General Counsel  
Department of Homeland Security

**Appendix 6**

Email and communication records disclosed by DHS

**From:** Callahan, Mary Ellen [REDACTED]  
**Sent:** Wednesday, February 25, 2009 10:48 AM  
**To:** Kropf, John; Hawkins, Sandra L.  
**Subject:** FW: INVITATION: 2009 CDT Gala

[REDACTED]

---

**From:** [REDACTED]  
**Sent:** Tuesday, February 24, 2009 7:37 PM  
**To:** Callahan, Mary Ellen  
**Subject:** INVITATION: 2009 CDT Gala

February 24, 2009

Mary Ellen Callahan  
Department of Homeland Security  
[REDACTED]

[REDACTED]

Dear Mary Ellen:

I write to you on behalf of The Center for Democracy and Technology (CDT) to cordially invite you to the 2009 CDT Gala on Tuesday, March 10, at the J.W. Marriott in Washington, D.C. The evening will begin with a VIP reception from 6 p.m. until 6:30 p.m. followed by the program and dinner, which will conclude at 9 p.m. sharp. Attending the event will be 700 leaders from the technology community and we would be honored if you would join us.

As you know, CDT is a non-profit, non-partisan public interest organization dedicated to developing and implementing public policies to protect and advance civil liberties and democratic values on the Internet. With expertise in law, technology, and policy, CDT seeks practical solutions to enhance free expression and privacy in global communications technologies. CDT is dedicated to building consensus among all parties interested in the future of the Internet and other new communications media.

Attached is a formal invitation. We have consulted the House and Senate ethics rules and are confident that congressional staff may accept invitations to this event, under gift rule exceptions for "widely attended events" or charity fundraisers. We believe that Department of Homeland Security staff are permitted to accept invitations for the same reasons, but we have not talked directly to ethics personnel. We're happy to provide any ethics-related information you might need if you are required to get clearance and please do not hesitate to contact [REDACTED] at [REDACTED] if you have any questions.

Sincerely,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

=====  
=====

**From:** [REDACTED]  
**Sent:** Wednesday, March 25, 2009 10:40 AM  
**To:** Holzerland, William; [REDACTED]  
**Cc:** [REDACTED]  
**Subject:** RE: Scheduling meeting with DHS CPO

Bill --

Thanks for your note. I just left you a voice message to follow-up. I am adding in [REDACTED] and [REDACTED] AILA members who are the chair and vice-chair of our DHS FOIA/PA Office Liaison Committee, as well as Ms. Sandra Hawkins. We have had meetings in the past with Mr. Teufel and Ms. Papoi on FOIA/PA issues, and your suggestion to reach out to Ms. Hawkins is timely and appropriate.

With reference to [REDACTED] specific issue regarding processing of FOIA requests for cases in proceedings, the requirement that a copy of the hearing notice be part of the "fast track" request is one we would likely offer for discussion.

I hope to talk to you at your convenience.

Thanks again,

[REDACTED]  
and (b)(6)

[REDACTED]

---

**From:** Holzerland, William [REDACTED]  
**Sent:** Wednesday, March 25, 2009 10:20 AM  
**To:** [REDACTED]  
**Subject:** Scheduling meeting with DHS CPO

Good morning gentlemen,

I spoke with [REDACTED] last week regarding various FOIA matters. [REDACTED] I saw that you were copied on one of [REDACTED] emails to me last week. It would stand to reason you might share some of [REDACTED] opinions on the FOIA process in general. When I spoke with [REDACTED], he expressed a desire to set up a meeting with the new DHS Chief Privacy Officer/Chief FOIA Officer, Ms. Callahan, to discuss FOIA-related issues and concerns. I just want to follow up on that idea and suggest that it might be best to have our colleagues from AILA involved in a potential meeting as well. I suggest contacting the Privacy Office's Director of Administration,

Sandra L. Hawkins, in order to get something set up. Ms. Hawkins can be reached at [REDACTED] and (b)(6)

[REDACTED]. Thanks again and have a good day!  
Regards,  
Bill

William H. Holzerland, CIPP/G  
U.S. Department of Homeland Security  
Associate Director,  
Disclosure Policy & FOIA Program Development  
[REDACTED]

**Appendix 7**

Email communication between EPIC and DHS regarding scheduling Ms.  
Callahan's appearance at Privacy Coalition meeting

From: "Hawkins, Sandra L." <Sandra.L.Hawkins@dhs.gov>  
Subject: **Re: Courtesy Meeting with Mary Ellen Callahan, DHS Chief Privacy Officer**  
Date: March 20, 2009 6:29:45 PM EDT  
To: <coney@epic.org>

*Mary 27  
set for PC  
meeting*

Hi Lillie,

Mary Ellen is not available on the 27th. She is completely booked next week. What is your avail the following week?

---

**From:** Lillie Coney  
**To:** Hawkins, Sandra L.  
**Sent:** Fri Mar 20 18:26:47 2009  
**Subject:** Re: Courtesy Meeting with Mary Ellen Callahan, DHS Chief Privacy Officer

Sandy,

EPIC hosts a meeting of the privacy advocacy community.  
The next meeting is Friday, March 27, from Noon-2PM.

We would like to have Mary Ellen Callahan join us.

Thank you,  
Lillie Coney  
Associate Director  
EPIC  
202-483-1140 x 111

On Mar 18, 2009, at 9:51 AM, Hawkins, Sandra L. wrote:

Lillie –

Can you please give me a call regarding this request? I haven't heard back from Marc.

Thank you.

Sandy

Sandra L. Hawkins  
Director of Administration  
Privacy Office  
U.S. Department of Homeland Security  
245 Murray Lane, SW, Mail Stop 0655  
Arlington, VA 20598-0655  
Telephone: (703) 235-0756  
Fax: (703) 235-0442  
E-mail: [Sandra.L.Hawkins@dhs.gov](mailto:Sandra.L.Hawkins@dhs.gov)

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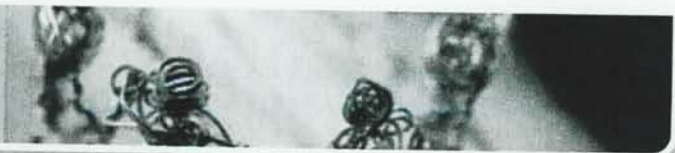


## **Appendix 8**

Conference Program for European E-Identity Management Conference (at which  
Ms. Callahan was a keynote speaker)

# Conference Programme: Day 1

> Thursday 25th June 2009



09.30 Registration, Coffee & Network Meeting Area

10.30 WELCOME AND MORNING KEYNOTE SESSIONS The Auditorium

- **Introductions, Scene-Setting and Opening Comments**
  - Conference Chair: David Goodman, Chairman, eema, UK
- **Welcome Address**
  - June Leung, Senior Manager of Security and Business Recovery, FundSERV Inc. and Chair, OASIS IDTrust Member Section Steering Committee, USA
- **Market Overview: eidentity Comes of Age**
  - Kim Cameron, Chief Architect of Identity, Microsoft, USA
- **Keynote:**
  - Howard Schmidt, President of the Information Security Forum and President and CEO of R & H Security Consulting LLC, UK
- **Keynote: Identity in a Cloud**
  - Tim Brown, VP and Chief Architect for Security Management, CA, Inc., UK
- **Keynote: Identity and Privacy; Policy, Governance, Barriers and Compliance**
  - Mary Ellen Callahan, Chief Privacy Officer, U.S. Department of Homeland Security, USA

12.30 Lunch Break and Networking

13.45 CONCURRENT BREAKOUT TRACKS

Choice of **two** interactive breakout tracks (interchangeable throughout the day)

- eema Track, SESSION A** Auditorium 2  
- Chaired by Ronny Bjones, Microsoft, Belgium  
> Getting to Grips with National eID Interoperability
- **Authentication Procedures for eID/eGovernment-Services in Europe, an overview and outlook**
    - Detlef Hühnlein, SECUNET Security Networks AG, Germany and Detlef Houdeau, Infineon, Germany
  - **Architecture and Interface Specifications for Cross-Border eSignature**
    - Jon Ølnes, Difi, Norway
  - **STORK as part of the European Strategy to Overcome Interoperability Difficulties in Relation to the Member States' eID Schemes**
    - Herbert Leitold, A-SIT, Austria
  - **eRecognition Agreements Scheme for Business to Government, a growth model in the Netherlands**
    - Theo Hooghiemstra, ICTU, Netherlands

**OASIS Track, SESSION B**

Auditorium 1

- > Complexity of Protecting Personal Identity and Achieving Security, Privacy and Trust
- **Information Privacy and Standards Development**
    - John Sabo, CA, Inc., USA
  - **Digital Signatures and e-Identity: Getting the Best Out of Digital Signature Services (DSS)**
    - Andreas Kuehne, Trustable Ltd. and Member of OASIS DSS-X Technical Committee, Germany
  - **National Identity Card Defenses and Your Privacy**
    - Giles Hogben, European Network & Information Security Agency (ENISA), Greece
  - **IdM Market Update**
    - Gerry Gebel, Burton Group Identity and Privacy Strategies, USA

15.45 Tea / Coffee Break and Networking

16.15 CONCURRENT BREAKOUT TRACKS

Choice of **two** interactive breakout sessions (interchangeable throughout the day)

- eema Track, SESSION C** Auditorium 2  
- Chaired by Nader Henein, Research In Motion, Egypt  
> Getting to Grips with Mobile eID
- **Perfect Storm: How Mobile and Contactless Technologies will Change the Electronic Identity Landscape Permanently**
    - Dave Birch, Consult Hyperion, UK
  - **Secure SOA-Based mGovernment Systems Based on JAVA Mobile Application**
    - Milan Markovic, Mathematical Institute, SANU, Serbia
  - **Best Practices in Launching Mobile eidentity**
    - Antti Vihavainen, Valimo, Finland

**OASIS Track, SESSION D**

Auditorium 1

- > Challenges with eidentity and Authentication on a Global Level
- **Lowering Implementation Costs through Global Collaboration**
    - Søren Peter Nielsen, Danish Ministry of Science, Denmark
  - **ID Cards - New Game for Governments**
    - Bob Carter, Identity and Passport Service, UK
  - **Driving Uptake of a Shared Government Authentication Service**
    - Bill Young, Government Technology Services, New Zealand

18.15 Close of Day One Conference

18.15 CONFERENCE COMPLIMENTARY DRINKS RECEPTION AND NETWORKING

Special networking event for delegates, speakers and sponsors