

October 30, 2014

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

Re: Unlawful Administrative Closures

Dear Director Nisbet,

The undersigned organizations are writing to inform the Office of Government Information Services (“OGIS”), as the FOIA Ombudsman, of a particular problem with administration of the Freedom of Information Act (“FOIA”) by the Transportation Security Agency (“TSA”), the Department of Justice (“DOJ”), the Environmental Protection Agency (“EPA”), the Department of State (“State”), and other agencies. Federal agencies are improperly closing FOIA requests and breaching their obligations under the FOIA. We are writing to ask that you proceed with an investigation of this matter.

FOIA requesters have reported frequently encountering improper administrative closures across a variety of federal agencies. We are including evidence of several examples. Attachments 2-7. One particularly troubling instance of administrative closure arose from a request that the Electronic Privacy Information Center (“EPIC”) made to the TSA.

Over the years, EPIC and other organizations have pursued many FOIA requests submitted to the TSA. This is a reflection of the significant role that the agency plays in collecting information on Americans and undertaking controversial screening activities. *See e.g.* EPIC v. TSA, Case No. 11-0290 (RWR) (D.D.C. filed Feb. 2, 2011). EPIC has frequently faced substantial delays caused by the TSA, and has been forced to file suit to obtain documents that the agency has failed to disclose within the deadline mandated by the Act. *Id.*

On May 21, 2014, EPIC received a response from TSA regarding a FOIA request EPIC had filed with the agency in June 2010. *See* Attachment 1, 2. In the letter, the agency stated:

Before we begin this time-consuming review process, we want to ensure that you are still interested in continuing the processing of this request. Please indicate your continued interest in pursuing these records within 20 days from the date of this letter. Accordingly, we ask that you respond to this notice by June 9, 2014. If we do not receive your response by that date, we will assume you are no longer interested in this FOIA request, and the case will be administratively closed. (emphasis added)

Attachment 2.

After waiting four years to respond to EPIC's request, the agency informed EPIC that if EPIC did not reply to TSA's letter within 20 days, the agency would automatically close EPIC's FOIA request. The agency cited no statutory basis for closing the request, nor did it advise EPIC of any appeal rights regarding this decision. *See id.* In fact, the agency did not even tell EPIC where to address a response. *See id.*

The FOIA plainly states:

Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. §552(A)(3).

In TSA's response to EPIC, the agency did not attempt to argue that EPIC's request did not reasonably describe records or that EPIC's request did not comply with the agency's regulations. In other words, it presented no evidence as to why it should not simply process the request. *See Attachment 2.*

We know of no provision in the Act that allows for administrative closure simply due to the lapse of time, and in this case, the delay was only caused by the TSA. Nor is there a provision under the DHS FOIA Regulations (6 C.F.R. 5) that allows for administrative closure due to the age of a request. In fact, under the agency's current regulations, the only scenario under which DHS is permitted to administratively close a request is if a requester fails to agree to pay fees. 6 C.F.R. 5.3(c) ("If you do not provide a firm commitment to pay the anticipated fee within the time period specified by the component, the request will be administratively closed.")

Other FOIA requesters, including some of the undersigned requesters, have received similar letters. We have attached letters by the DHS, DOJ, EPA, and State. Attachments 3-7. In meetings with transparency advocates, the Department of Justice's Office of Information has publicly stated that it supports this practice.

We know agencies often have insufficient resources to devote to FOIA requests and we certainly agree those resources should not be consumed satisfying requests in which the requester no longer has an ongoing interest. But the approach discussed above goes well beyond addressing this concern, and runs the risk legitimate FOIA requests will be improperly closed because the requester fails to respond within an arbitrary time period the agency has imposed.

We ask that OGIS investigate this practice and its impact on FOIA requesters as a barrier to pursuing government records. How often are letters like the one that EPIC received sent to requesters? How widespread is this practice across federal agencies? What is the source of this tactic – what trainings and guidance created it? What percentage of requests subject to administrative closure letters end up being closed?

Based on this investigation, the undersigned organizations request that OGIS develop guidance advising agencies how to deal with the issue of older requests in a manner that complies with the FOIA, yet recognizes the agency interest in conserving scant FOIA resources. We further request that OGIS publish a report of its findings in this matter.

Thank you for your attention to this matter. We look forward to your continued work on this issue. If you would like to follow up with us regarding this investigation, please contact Ginger McCall, Director, EPIC Open Government Project at mccall@epic.org or (202) 483-1140 x 111.

Sincerely,

Cause of Action
Center for Effective Government
Citizens for Responsibility and Ethics in Washington
Electronic Privacy Information Center
Government Accountability Project
James Madison Project
Law Offices of Mark Zaid
MuckRock
National Security Archive
National Security Counselors
Openthegovernment.org
Project on Government Oversight
Public Employees for Environmental Responsibility
Sunlight Foundation