



July 26, 2013

VIA FACSIMILE: (202) 203-4585

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Re: Freedom of Information Act Appeal

Dear Mr. Kollmer-Dorsey,

This letter constitutes an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted to the Broadcasting Board of Governors ("BBG") by the Electronic Privacy Information Center ("EPIC").

On May 31, 2013, EPIC requested, via facsimile, agency records related to BBG's involvement in the development and operation of The Onion Router ("Tor") software. Specifically, EPIC requested the following:

1. All agreements and contracts concerning BBG funding or sponsorship of The Tor Project, Inc., Tor Solution Corporation, and Tor Solutions Group
2. Technical specifications of all BBG computers running Tor nodes
3. All reports related to BBG's modification of the Tor software
4. All agreements and contracts between the BBG and The Tor Project, Inc., Tor Solution Corporation, and Tor Solutions Group regarding features or capabilities in the Tor software.

See Appendix 1. EPIC is appealing for a lack of responsiveness from the BBG.

Factual Background

The Onion Router ("Tor") is software currently maintained by The Tor Project, Inc. and the Tor Solution Corporation.¹ Internet users around the world use Tor to maintain anonymity and circumvent Internet restrictions.² It works by encrypting Internet data and routing it through a series of "nodes" hosted by volunteers to create a secure relay between the user and their

¹ Moody, Famigietti, & Andronico, *Consolidated Financial Statements and Reports Required for Audits in*

² Tor, *Tor: Overview*, <https://www.torproject.org/about/overview.html.en>.

destination.³ This obscures both the origin and destination of the user.⁴ Tor is used by academics, political dissidents, law enforcement, journalists, whistleblowers, NGOs, the U.S. Navy, and everyday individuals.⁵

The BBG has been a sponsor of Tor since 2006, and has contributed over \$1m in funding since then.⁶ There have been various meetings and agreements between the organizations responsible for Tor and the BBG. A Tor blog post from January 2010 states that several members of the Tor project met with BBG to discuss “various topics.”⁷ A Tor report from June 2012 says that Andrew Lewman, Tor’s Executive Director, “[n]egotiated and signed a contract with BBG.”⁸

On July 24th, 2012, Tor announced in a blog post that it was implementing a new program that paid people to host “fast exit” nodes.⁹ Exit nodes function as a crucial part of the Tor network, as they mediate between the encrypted Tor network and the desired final destination of a Tor user’s connection.¹⁰ From the perspective of the destination computer, the Tor user’s request will seem to originate from the exit node.¹¹ Necessarily, the connection between an exit node and the destination of a request originating inside the Tor network is unencrypted.¹² A “fast” exit node is essentially an exit node with a large amount of bandwidth.¹³ The July blog post said that the BBG was TOR’s first funder for the project to create more “fast exit” nodes, and wanted to sponsor at least 125.¹⁴ News media reports indicate that the BBG has already given an “undisclosed amount” of funding for the project.¹⁵

In its 2012 Technology, Services, & Innovation Annual Performance Report, the BBG wrote that “[t]hanks to a substantial increase in funding for Internet AntiCensorship (IAC) activities . . . the IAC group [was able] to expand anti-censorship circumvention software, servers and bandwidth (Ultrasurf, TOR, and Psiphon).”¹⁶ The same report says Iranian-based Internet access has been made possible by “additional investment in the (The Onion Router) TOR system.”¹⁷

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See Tor, *Tor: Sponsors*, <https://www.torproject.org/about/sponsors.html.en>.

⁷ Tor, *January 2010 Progress Report* (Feb 13, 2010), <https://blog.torproject.org/blog/january-2010-progress-report>.

⁸ Andrew Lewman, *Andrew’s June 2012* (Jul. 6, 2012), <https://lists.torproject.org/pipermail/tor-reports/2012-July/000005.html>.

⁹ Tor, *Turning Funding Into More Exit Relays* (July 24, 2012), <https://blog.torproject.org/blog/turning-funding-more-exit-relays>.

¹⁰ See EFF, *What is a Tor Relay*, <https://www.eff.org/torchallenge/what-is-tor/>.

¹¹ *Id.*

¹² Tor, *Tor Overview*, <https://www.torproject.org/about/overview.html.en>.

¹³ See Tor, *Turning Funding Into More Exit Relays* (July 24, 2012), <https://blog.torproject.org/blog/turning-funding-more-exit-relays>.

¹⁴ *Id.*

¹⁵ Darren Pauli, *Tor Project mulls \$100 cheque for exit relay hosts*, SC MAGAZINE (Jul. 25, 2012), <http://www.scmagazine.com.au/News/309813,tor-project-mulls-100-cheque-for-exit-relay-hosts.aspx>.

¹⁶ BBG, *2012 Technology, Services, & Innovation Annual Performance Report*, <http://www.bbg.gov/wp-content/media/2013/01/FY-2012-TSI-Annual-Report-FINAL.pdf>.

¹⁷ *Id.*

A message on the Tor website from January 10, 2013 says that Rodger Dingleline, a Project Leader at Tor, “[m]et with BBG to give them a status update on our task list, and on our plans for funding exit relays. They are happy with our progress so far.”¹⁸

In its May 2013 Internet Anti-Censorship Fact Sheet, the BBG wrote that “[t]he BBG is working with the Tor Solutions Group to significantly increase the number of high-speed Tor exit relays and bridges to improve the speed of the Tor network. IAC is also developing several enhancements to the Tor software to improve its usability and performance for users subject to Internet censorship.”¹⁹

Procedural Background

On May 31, 2013, EPIC faxed a FOIA request to the BBG, resulting in a fax confirmation sheet confirming the fax was successfully sent. *See Appendix 2*. EPIC’s FOIA request stated that EPIC was a news media organization, and requested a waiver of all fees associated with the request.

BBG’s statutory deadline to respond to EPIC’s request passed on June 28, 2013.

As of the time of this appeal, EPIC has not received a determination, response, or even an acknowledgement from the BBG. It has been 38 working business days since EPIC’s FOIA request was submitted.

EPIC Appeals the BBG’s Failure to Disclose Records

EPIC hereby appeals the BBG’s failure to make a timely determination regarding EPIC’s FOIA request. The Freedom of Information Act requires the agency to make a “determination” regarding a FOIA request with twenty working days.²⁰ Under BBG regulations, the twenty days begins once the request is received by the appropriate office.²¹

A “determination” for the purposes of the FOIA must include:

(1) a statement of what the agency will release and will not release, including a list of the documents that are releasable and withheld; (2) a statement of the reasons for not releasing the withheld records; (3) a statement notifying the requesting person of his right to appeal to the head of the agency or seek judicial review of any adverse determination; and (4) if a fee is charged for releasing documents, a statement of why the agency believes that waiver or reduction of the fee is not in the public interest and does not

¹⁸ Rodger Dingleline, *Rodger's status report, Dec 2012* (Jan. 10, 2013), <https://lists.torproject.org/pipermail/tor-talk/2013-January/027012.html>.

¹⁹ BBG, *Internet Anti-Censorship Fact Sheet* (May 2013), <http://www.bbg.gov/wp-content/media/2013/05/Anti-Censorship-Fact-Sheet-May-2013.pdf>.

²⁰ 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 Enters. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1998)) (“FOIA was created to foster public awareness, and failure to process FOIA requests in a timely fashion is ‘tantamount to denial.’”).

²¹ 22 C.F.R. § 503.4.

benefit the general public, and a statement for the charges for document search and duplication of the releasable documents.²²

“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.”²³ Courts have noted that “an agency’s failure to comply with the FOIA’s time limits is, by itself, a violation of the FOIA, and is an improper withholding of the requested documents.”²⁴

EPIC’s FOIA request complied with all requirements that the BBG has identified in its regulations and on its website.²⁵ EPIC’s request was written and sent by facsimile.²⁶ EPIC included “as many details as possible that will help [BBG] find the records”.²⁷ EPIC included its telephone number and contact information.²⁸ The request was addressed to the appropriate FOIA office, based on the current BBG website.²⁹ The request specifically mentioned that it was made under the FOIA, and the facsimile coversheet was addressed to the FOIA officer.³⁰ The request specified EPIC’s fee category and described how EPIC believed the criteria for a fee waiver was met.³¹

Thirty-eight working days have elapsed since EPIC’s FOIA request was sent by facsimile. The BBG has made no response of any kind to EPIC’s request for documents, and therefore has not made a “determination.” Because EPIC’s request was complete and in accordance with the FOIA and BBG regulations, the BBG’s failure to make a “determination” within twenty days 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” for fee waiver purposes.³² Based on our status as a “news media” requester, we are entitled to receive the requested records with only duplication fees assessed.

²²*Shermco Indus. Inc. v. Sec’y of Air Force*, 452 F. Supp. 306, 317 (N.D. Texas 1978) *rev’d on other grounds*, 613 F.2d 1314 (5th Cir 1980).

²³ *Id.* at 317 n 7; *see also Oglesby v. Dep’t of Army*, 920 F.2d 57, 65 (D.C. Cir. 1990) (citing *Shermco Indus.*, 452 F. Supp. 306).

²⁴ *Gilmore v. U.S. Dep’t of Energy*, 33 F. Supp. 2d 1184, 1187 (N.D. Cal. 1998) *citing McGehee v. CIA*, 697 F.2d 1095, 1110 (D.C. Cir. 1983). *See also Oregon Natural Desert Ass’n v. Gutierrez*, 409 F. Supp. 2d 1237, 1248 (D. Or. 2006) (holding that “an untimely response is a violation of FOIA, regardless of the final outcome of the request.”)

²⁵ *See* BBG, *FOIA Guidelines*, <http://www.bbg.gov/about-the-agency/research-reports/foia/foia-guidelines/> (last accessed Jul. 18, 2013); 22 C.F.R. § 503.2.

²⁶ *See* 22 C.F.R. § 503.2.

²⁷ *Id.*

²⁸ *Id.*; BBG, *FOIA Guidelines*, *supra* note 25.

²⁹ *See* BBG, *FOIA Guidelines*, *supra* note 25.

³⁰ *See id.*

³¹ *See id.*; 22 C.F.R. § 503.7.

³² *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).

Further, in accordance with 5 U.S.C. § 552(4)(A), any duplication fees should be waived because the subject of this request will “contribute significantly to the public understanding of the operations or activities of the government”. This request concerns both expenditures of the federal government and interactions between the federal government and the development of a crucial piece of software that enables individuals to maintain anonymity and circumvent Internet restrictions.

Conclusion

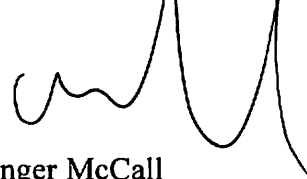
By failing to reply to EPIC’s FOIA Request within the required time period, the BBG is in violation of 5 U.S.C. § 522(a)(6). EPIC appeals the BBG’s non-responsiveness for EPIC’s FOIA request.

Thank you for your prompt response to this appeal. In accordance with BBG regulations, I anticipate that you will produce responsive documents within 20 days of this appeal.³³ If you have any questions, please feel free to contact me at (202) 483-1140 or foia@epic.org.

Sincerely,



Adam Marshall
EPIC IPIOP Clerk



Ginger McCall
EPIC Open Government Director

/enclosures

³³ 22 C.F.R. § 503.4(b).

Appendix 1

EPIC's May 31, 2013 FOIA Request to the BBG