

November 27, 2012

**VIA CERTIFIED MAIL**

NSA/CSS Freedom of Information Act Appeal Authority (DJ4)  
National Security Agency  
9800 Savage Road STE 6248  
Ft. George G. Meade, MD 20755-6248

**Re: Freedom of Information Act Appeal (Case Number 69164)**

FOIA Appeals Officer:

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

On November 14, 2012, EPIC requested, via facsimile, the text of Presidential Policy Directive 20 (“PPD 20”) (“EPIC’s FOIA Request”).<sup>1</sup> PPD 20 is a final Presidential Directive with legal force.<sup>2</sup> EPIC also requested expedited processing of EPIC’s FOIA Request as well as news media fee status and a waiver of duplication fees.<sup>3</sup>

On November 20, 2012, the NSA responded via facsimile.<sup>4</sup> The NSA’s response explained referred EPIC’s FOIA Request had been referred to the National Security Staff (“NSS”) in order for the NSS to make a determination on the releasability of the record. On the basis of information provided by NSS, the NSA notified EPIC that PPD 20 would be withheld in its entirety and asserted FOIA Exemption 5 and FOIA Exemption 1.<sup>5</sup> The NSA then approved EPIC’s request for news media fee status but failed to make a determination as to EPIC’s request for expedited processing.<sup>6</sup>

EPIC Appeals the NSA’s Use of the FOIA Exemption 5 to Withhold PPD 20

The NSA asserts that PPD 20 is “under the control of the [NSS]”.<sup>7</sup> In support of this assertion, the NSA relies on the fact that PPD 20 did not originate with the NSA.<sup>8</sup> However, the

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<sup>1</sup> Letter from Amie Stepanovich, EPIC and Ginger McCall, EPIC to National Security Agency (Nov. 14, 2012), available at <http://epic.org/privacy/cybersecurity/EPIC-NSA-PPD20-Ltr-11-14-12.pdf> [hereinafter *EPIC’s FOIA Request*] (Appendix 1).

<sup>2</sup> See *Memorandum for the Counsel to the President* (Jan. 29, 2000), <http://www.justice.gov/olc/predirective.htm> (“a presidential directive has the same substantive legal effect as an executive order.”).

<sup>3</sup> *EPIC’s FOIA Request*, *supra* n. 1.

<sup>4</sup> Letter from Pamela N. Phillips, Chief, FOIA/PA Office, NSA to Amie Stepanovich, EPIC (Nov. 20, 2012), available at <http://epic.org/foia/nsa/EPIC-PPD-20-FOIA-NSA-Reply.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

origination of a record otherwise subject to disclosure under the FOIA is only one factor in determining what Agency has control of that record. The United States Court of Appeals for the District of Columbia Circuit evaluates an agency's "control" of a given record by using four factors:

- (1) the intent of the document's creator to retain or relinquish control over the records;
- (2) the ability of the agency to use and dispose of the record as it sees fit;
- (3) the extent to which agency personnel have read or relied upon the document;
- and (4) the degree to which the document was integrated into the agency's record system or files.<sup>9</sup>

The NSA bears the burden of demonstrating that the record sought is not under the NSA's control.<sup>10</sup> In order to establish lack of control, DCAA must explain how the four factors listed above—intent, use or disposition, reliance, and degree of integration—produce the conclusion that no agency records exist. However, in its response the NSA failed to meet this burden by demonstrating, for example, that PPD 20 has not been relied upon by Agency personnel or integrated into the Agency's system.

"It is true that agencies that receive FOIA requests and discover responsive documents that were created by another agency may forward...those requests to the agency that 'originated' the document."<sup>11</sup> However, "a referral of a FOIA request could be considered a 'withholding' if 'its net effect is to impair the requester's ability to obtain the records or significantly increase the amount of time he must wait to obtain them.'"<sup>12</sup> In this case, the NSA's referral of EPIC's FOIA Request to the NSS for a determination on the substance resulted in the improper withholding of the entire record, and as such was improper under the terms of the FOIA.

### EPIC Appeals the NSA's Use of the FOIA Exemption 5 to Withhold PPD 20

EPIC hereby appeals the NSA's determination that FOIA Exemption 5 may be asserted to withhold PPD 20. Exemption 5 provides that an Agency is not required to produce a record otherwise responsive to a FOIA request if that record is an "inter-agency or intra-agency memorand[a] or letter[]" which would not be available by law to a party other than an agency in litigation with the agency."<sup>13</sup> The NSA does not argue that PPD 20 is a pre-decisional record of the sort that is typically exempt under Exemption 5. Instead, the NSA contends that PPD 20 qualifies for Exemption 5 protection because it is a "confidential communication[]" between the President and his advisors."<sup>14</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *United We Stand Am., Inc. v. I.R.S.*, 359 F.3d 595, 599 (D.C. Cir. 2004) (quoting *Tax Analysts v. Dep't of Justice*, 845 F.2d 1060, 1069 (D.C. Cir. 1988)).

<sup>10</sup> *Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989).

<sup>11</sup> *EPIC v. NSA*, 795 F.Supp.2d 85, 92 citing *Schoenman v. FBI*, No. 04-2202, 2009 WL 763065, at \*6 (D.D.C. Mar. 19, 2009).

<sup>12</sup> *Id.* at 94 (citing *McGehee v. CIA*, 697 F.2d 1095, 1110 (D.C. Cir. 1983), *vacated in part and aff'd in part*, 711 F.2d 1076 (D.C. Cir. 1983)).

<sup>13</sup> 5 U.S.C. § 552(b)(5) (2012).

<sup>14</sup> Letter from Pamela N. Phillips, *supra* n. 4.

The presidential communications privilege is grounded “in the President’s need for confidentiality in the communications of his office.”<sup>15</sup> The privilege “covers final and post-decisional materials as well as pre-deliberative ones.”<sup>16</sup> However, “the presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President’s decision-making process is adequately protected.”<sup>17</sup>

“Documents that are subject to...the presidential communications privilege can be withheld pursuant to Exemption 5.”<sup>18</sup> However, the President or Vice-President must personally invoke the presidential communications privilege.<sup>19</sup> This is because, unlike other exemptions to the FOIA, “the presidential communications privilege is specific to the president.”<sup>20</sup> The NSA does not assert that President Obama personally invoked the presidential communications privilege in this case and therefore cannot use Exemption 5 as a basis to withhold PPD 20.

Further, even when the presidential communications privilege is personally invoked, the privilege is qualified and can be overcome by a “focused determination of need.”<sup>21</sup> In the immediate case, EPIC has adequately demonstrated a great public need for PPD to be released:

The Washington Post reported that previous attempts at a Presidential Directive to expand the military’s cybersecurity authority had been dismissed as posing “unacceptable risks” of “harmful unintended consequence[s].” In addition, PPD 20 may violate federal law that prohibits military deployment within the United States without congressional approval. The Washington Post reports that, following the issuance of PPD 20, the Pentagon is “expected to finalize new rules of engagement that would guide commanders when and how the military can go outside government networks to prevent a cyberattack that could cause significant destruction or casualties.”<sup>22</sup>

EPIC also explained that PPD 20 must be released in order to educate the public on cybersecurity policies in order to facilitate meaningful public comment on current and future cybersecurity bills. Further, the publication of PPD 20 would facilitate Congressional and public oversight of NSA activities. Courts have long recognized that

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<sup>15</sup> *Judicial Watch, Inc. v. Dept. of Justice*, 365 F.3d 1108, 1115 (D.C. Cir. 2004) (internal citations omitted); *see also In re Sealed Case*, 121 F.3d at 743 (“a presumptive privilege for Presidential communications, founded on a President’s generalized interest in confidentiality.”) (internal citations omitted).

<sup>16</sup> *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997).

<sup>17</sup> *Judicial Watch, Inc.*, 365 F.3d at 1116 (internal citations omitted).

<sup>18</sup> *Citizens for Responsibility and Ethics in Washington v. Dept. of Homeland Security*, 2008 WL 2872183 at \*2 (D.D.C. July 22, 2008); *see also Judicial Watch, Inc. v. Dept. of Justice*, 365 F.3d 1108 (D.C. Cir. 2004) (“Exemption 5 also has been construed to incorporate the presidential communications privilege.”).

<sup>19</sup> *Id.* at 867 (“the burden of processing the records and asserting exemptions would fall squarely on the President, the Vice President, and their senior advisors – the only people with the information necessary to make the requisite privilege determinations.”); *see also* Appellant’s Cross-Motion for Summary Judgment, Dkt. No. 14 at 11, *EPIC v. NSA*, (No. 10-00196) (filed Feb. 2, 2010).

<sup>20</sup> *Judicial Watch v. Dept. of Justice*, 365 F.3d 1108, 1113-14 (D.C. Cir. 2004).

<sup>21</sup> *In re Sealed Case*, 121 F.3d at 746 (D.C. Cir. 1997); *accord Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (1979).

<sup>22</sup> *EPIC’s FOIA Request*, *supra* n. 1 (internal citations omitted).

the public has a right to be informed.<sup>23</sup> This right is of paramount importance where, as here, the public will be directly affected by the exercise of the NSA's authority.

### EPIC Appeals the NSA's Use of the FOIA Exemption 1 to Withhold PPD 20

EPIC hereby appeals the NSA's determination that FOIA Exemption 1 may be asserted to withhold PPD 20. Exemption 1 allows an agency to withhold a record otherwise responsive to a FOIA request if that record is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy," and is "properly classified pursuant to such Executive order."<sup>24</sup> The relevant Executive Order ("E.O.") for purposes of this FOIA request is E.O. 13526, which was invoked in the NSA's response to EPIC's FOIA Request.<sup>25</sup>

To properly invoke FOIA Exemption 1, the "government must demonstrate that information is in fact properly classified pursuant to both procedural and substantive criteria."<sup>26</sup> E.O. 13526 explains that only specifically enumerated officials have the authority to classify information, and only in certain circumstances.<sup>27</sup> However, the NSA's response fails to sufficiently establish the Agency's basis for classification. The NSA does not indicate which original classification authority made the designation, nor does it "identify or describe the damage" that could reasonably be expected from the disclosure of PPD 20.

### EPIC Appeals the NSA's Failure to Conduct a Segregability Analysis

Like all federal agencies, the NSA must disclose all records that do not fall in to a FOIA exemption.<sup>28</sup> When a record is determined to be exempt under one of the enumerated exemptions, the NSA still must disclose any reasonably segregable portion.<sup>29</sup>

In a similar case, the NSA admitted that portions of an otherwise withheld presidential directive were able to be released "without adversely affecting the national security of the United States."<sup>30</sup> In this case, the NSA has failed to indicate if any portion of PPD 20 is segregable, and

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<sup>23</sup> See, e.g., *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971) ("Exemption (6) requires a court reviewing the matter de novo to balance the right of privacy affected individuals against the right of the public to be informed."); *Retired Officers Assn. v. Dept. of Navy*, 744 F. Supp. 1 (D.D.C. 1990) ("court will balance right of privacy of affected persons against right of public to be informed and balance will tilt in favor of disclosure."); *Columbia Broadcasting System, Inc. v. Democratic Nat. Committee*, 412 U.S. 94 (1973) ("the basic criterion governing use of broadcast frequencies is the right of the public to be informed.").

<sup>24</sup> 5 U.S.C. § 552(b)(1) (2012).

<sup>25</sup> See Letter from Pamela N. Phillips, *supra* n. 4.

<sup>26</sup> S. Rep. No. 93-100, at 6 (1974) (Conf. Rep.); see also *Goldberg v. Dept. of State*, 818 F.2d 71, 77 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 904 (1988); *Lesar v. Dept. of Justice*, 636 F.2d 472, 483 (D.C. Cir. 1980); *Allen v. CIA*, 636 F.2d 1287, 1291 (D.C. Cir. 1980).

<sup>27</sup> Exec. Order 13526 § 1.1(a), 1.3(a).

<sup>28</sup> 5 U.S.C. § 552(a)(3) (2012).

<sup>29</sup> 5 U.S.C. § 552(b); see also *Mead Data Ctr., Inc. v. Dept. of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) ("Non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions"); *Schiller v. NLRB*, 964 F.2d 1205, 1210 (D.C. Cir. 1992) ("It is error for a district court to simply approve the withholding of an entire document without entering a finding of segregability, or lack thereof.").

<sup>30</sup> Appellant's Cross-Motion for Summary Judgment, Dkt. No. 14 at 21, *EPIC v. NSA*, (No. 10-00196) (D.D.C. filed Feb. 2, 2010).

therefore may be released. Therefore, the NSA has not met its burden to prove that PPD 20 should be fully exempt from disclosure.<sup>31</sup>

### EPIC Renews its Request for Expedited Processing and Requests Expedited Treatment of this Appeal

As noted above, the NSA did not make a determination as to EPIC's request for expedited processing of EPIC's FOIA Request. EPIC now renews its request for expedited processing. Further, for the reasons set forth in EPIC's FOIA Request, EPIC requests that the agency process this administrative appeal on an expedited basis.

### Conclusion

Thank you for your prompt response to this appeal. Since the NSA has granted EPIC's request for expedited processing of EPIC's FOIA Request, I anticipate that you will produce responsive documents within 10 working days of this appeal. If you have any questions, please feel free to contact me at (202) 483-1140 x 104 or foia@epic.org.

Sincerely,

Amie Stepanovich  
Associate Litigation Counsel  
Electronic Privacy Information Center

/enclosures

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<sup>31</sup> See, e.g., *Beltranena v. Clinton*, 770 F.Supp.2d 175, 186 (“the Department's only explanation as to how it met the segregability requirement is one blanket statement in the last paragraph of Ms. Grafeld's initial declaration that ‘[t]he Department determined that no additional, meaningful, non-exempt information can be released from the documents withheld in full or part.’ This statement is inadequate to meet the Department's burden ‘because it does not show with reasonable specificity why the documents cannot be further segregated and additional portions disclosed.’”) (internal citations omitted); see also *Dean v. FDIC*, 389 F.Supp.2d 780 (E.D.Ky 2005) (“[n]owhere does the [FDIC] describe the process by which it determined that all reasonably segregable material had been released or state why some materials are not reasonably segregable[,]’ other than to state in an equally conclusory fashion that the documents would be rendered unintelligible if produced in redacted form. Thus, the Court finds that the defendants have failed to meet their burden on segregability and, thus, cannot stand on their conclusory claim that the documents are exempt from disclosure in their entirety.”) (internal citations omitted).

**Appendix 1**

EPIC's November 14, 2012 FOIA Request to the NSA

## **Appendix 2**

NSA's November 20, 2012 Acknowledgement and Denial of EPIC's FOIA Request