

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC PRIVACY INFORMATION CENTER)
1718 Connecticut Avenue, N.W.)
Suite 200)
Washington, DC 20009,)
)
Plaintiff,)
)
v.)
) Civil Action No.
DEPARTMENT OF DEFENSE)
The Pentagon)
Washington, DC 20301,)
)
Defendant.)
_____)

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Plaintiff seeks injunctive and other appropriate relief for the expedited processing and release of agency records requested by Plaintiff from the Defense Intelligence Agency, a component of Defendant Department of Defense.

Jurisdiction and Venue

2. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(E)(iii). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

3. Plaintiff Electronic Privacy Information Center (“EPIC”) is a public interest research organization incorporated as a not-for-profit corporation in Washington, DC. EPIC’s activities include the review of federal law enforcement activities and policies to determine their possible impacts on civil liberties and privacy interests. Among its other activities, EPIC publishes books, reports and a bi-weekly electronic newsletter. EPIC also maintains a heavily-visited site on the World Wide Web (www.epic.org) containing extensive information on privacy issues, including information EPIC has obtained from federal agencies under the FOIA.

4. Defendant Department of Defense (“DOD”) is a Department of the Executive Branch of the United States Government. DOD is an “agency” within the meaning of 5 U.S.C. § 552(f).

5. The Defense Intelligence Agency (“DIA”) is a component within Defendant DOD.

DIA and the Verity K2 Enterprise Data Mining Program

6. In February 2003, Secretary of Defense Donald Rumsfeld created the Technology and Privacy Advisory Committee (“TAPAC”) to examine the Total Information Awareness (“TIA”) data mining program and to develop safeguards “to ensure that the application of this or any like technology developed within DOD is carried out in accordance with U.S. law and American values related to privacy.”

7. TAPAC was created after publicly available information about the TIA data mining program proposed by DOD “sparked controversy in Congress and the press, due in large part to the threat it was perceived as posing to informational privacy.”

8. In March 2004, TAPAC released a report titled “Safeguarding Privacy in the Fight Against Terrorism.” The TAPAC report concluded that “*rapid action is necessary* to address the host of government programs that involve data mining concerning U.S. persons and to provide clear direction to the people responsible for developing, procuring, implementing, and overseeing those programs.” The report recommended that the “DOD should safeguard the privacy of U.S. persons when using data mining to fight terrorism.” (emphasis added)

9. In May 2004, a U.S. General Accounting Officer report disclosed that the Defense Intelligence Agency operates a data mining program identified as “Verity K2 Enterprise” for the purpose of analyzing intelligence and detecting terrorist activities.

Plaintiff’s FOIA Request and Request for Expedited Processing

10. On May 21, 2004, Plaintiff wrote to the DIA and requested under the FOIA:

all agency records (included but not limited to electronic records) concerning Defense Intelligence Agency (“DIA”) use of a program or system known as “Verity K2 Enterprise” for the purpose of analyzing intelligence and detecting terrorist activities.

11. Plaintiff requested expedited processing of its request and explained the urgency of disseminating information about DOD data mining activities to the public.

Plaintiff stated:

The government activity at issue here — use of data mining technology to detect potential terrorist activity — implicates serious privacy and security issues that have received considerable news media attention. The issue is particularly timely now, in the wake of the release earlier this week of the Defense Department’s Technology and Privacy Advisory Committee (“TAPAC”) report titled “Safeguarding Privacy in the Fight Against Terrorism.”

12. Plaintiff further highlighted the urgency of its request by referring to the TAPAC report's assertion that "*rapid action is necessary* to address the host of government programs that involve data mining concerning U.S. persons and to provide clear direction to the people responsible for developing, procuring, implementing, and overseeing those programs." (emphasis added)

13. Plaintiff demonstrated the considerable news media attention concerning the government activity at issue by noting that in the week prior to Plaintiff's request there had been newspaper articles focused on the DOD's data mining programs.

14. Specifically, Plaintiff referred to, and attached a copy of, a May 17, 2004 New York Times article titled "Panel Urges New Protection On Federal 'Data Mining.'" "

15. Plaintiff additionally demonstrated news media attention by referring to, and attaching a copy of, a New York Times op-ed piece by William Safire published on May 17, 2004, titled "Security With Liberty." As reflective of the immediacy of the debate over data mining activities, Plaintiff quoted the article's assertion that "Congress should debate this Pentagon report balancing personal liberty and national security now, exercising foresight, rather than years from now[.]"

16. In support of its assertion that it is "primarily engaged in disseminating information" within the meaning of the FOIA and DOD regulations, Plaintiff addressed its news collection and dissemination activities:

EPIC is a non-profit, educational organization that routinely and systematically disseminates information to the public. This is accomplished through several means. First, EPIC maintains a heavily visited Web site (www.epic.org) that highlights the "latest news" concerning privacy and civil liberties issues. The site also features scanned images of documents EPIC obtains under the FOIA. Second, EPIC publishes a bi-weekly electronic newsletter that is distributed to

over 15,000 readers, many of whom report on technology issues for major news outlets. The newsletter reports on relevant policy developments of a timely nature (hence the bi-weekly publication schedule). It has been published continuously since 1996, and an archive of past issues is available at our Web site. Finally, EPIC publishes and distributes printed books that address a broad range of privacy, civil liberties and technology issues. A list of EPIC publications is available at our Web site.

17. Plaintiff noted that “the U.S. District Court for the District of Columbia has held that EPIC is a ‘news media’ requester under the FOIA.” (Citing *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)).

DIA’s Failure to Respond and Plaintiff’s Entitlement to Expedited Processing

18. By letter dated May 26, 2004, the DIA acknowledged receipt of Plaintiff’s FOIA request but did not address Plaintiff’s explicit request for expedited processing.

19. To date, the DIA has not responded to Plaintiff’s request for expedited processing of its FOIA request. Plaintiff has exhausted the applicable administrative remedies.

20. Plaintiff is entitled to expedited processing of its FOIA request under the standards set forth in Defendant DOD’s regulations.

21. The DIA, a component of the DOD, has wrongfully withheld the requested records from Plaintiff.

CAUSES OF ACTION

First Cause of Action:

Violation of the Freedom of Information Act for Failure to Timely Respond to Request for Expedited Processing

22. Plaintiff repeats and realleges paragraphs 1-21.

23. Defendant DOD's failure to respond in a timely manner to Plaintiff's request for expedited processing violates the FOIA, 5 U.S.C. § 552(a)(6)(E)(ii), and Defendant DOD's own regulation promulgated thereunder, 32 C.F.R. § 286.4(d)(3).

Second Cause of Action:

Violation of the Freedom of Information Act for Failure to Grant Request for Expedited Processing

24. Plaintiff repeats and realleges paragraphs 1-21.

25. Defendant DOD's failure to grant Plaintiff's request for expedited processing violates the FOIA, 5 U.S.C. § 552(a)(6) (E)(i), and Defendant DOD's own regulations promulgated thereunder, 32 C.F.R. 286.4(d)(3)(i) – (ii)(A).

Third Cause of Action:

Violation of the Freedom of Information Act for Failure to Complete Processing of Plaintiff's Request

26. Plaintiff repeats and realleges paragraphs 1-21.

27. Defendant DOD has failed to comply with the statutory time limits contained in 5 U.S.C. 552(a)(6)(A) with respect to Plaintiff's May 21, 2004 FOIA request.

28. Plaintiff has exhausted the applicable administrative remedies with respect to the above-referenced request.

29. Defendant DOD (and its component DIA) has wrongfully withheld responsive agency records from Plaintiff.

30. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the requested documents.

Requested Relief

WHEREFORE, Plaintiff prays that this Court:

- A. order Defendant DOD (and its relevant components) to immediately process the requested records in their entirety;
 - B. order Defendant DOD (and its relevant components), upon completion of such expedited processing, to disclose the requested records in their entirety and make copies available to Plaintiff;
 - C. provide for expeditious proceedings in this action;
 - D. award Plaintiff its costs and reasonable attorneys fees incurred in this action;
- and
- E. grant such other relief as the Court may deem just and proper.

Respectfully submitted,

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