

June 7, 2011

VIA E-MAIL (stfoia@dhs.gov) and U.S. MAIL (CERTIFIED DELIVERY)

Department of Homeland Security
Science and Technology Directorate
Washington, D.C. 20528
Attn: Diane Saunders, Acting FOIA Officer/Requester Service Center

RE: Freedom of Information Act Request and Request for Expedited Processing

Dear Ms. Saunders:

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 seeks records in possession of the Department of Homeland Security (“DHS”) regarding the Department’s Future Attribute Screening Technology (“FAST”) Project.

Background

DHS’s Science and Technology Directorate (“S&T”) is the sponsor of FAST, an ongoing research program, which aims to develop a means to remotely view and analyze a subject to assess the likelihood that the subject will commit a crime. According to news reports, the FAST Project recently underwent field-testing at an undisclosed location in “the northeastern United States.”¹ The first round of testing was completed in March, however, tests will “continue throughout coming months.”²

DHS completed a Privacy Impact Assessment (“PIA”) of the FAST Project in December 2008. The PIA was limited to the initial laboratory testing phases of the Project, which were conducted on volunteer subjects by third-party engineers working under contract with S&T.³ The PIA does not address field-testing of the Project.

¹ Sharon Weinberger, *Terrorist 'pre-crime' detector field tested in United States*, Nature News, May 27, 2011, at <http://www.nature.com/news/2011/110527/full/news.2011.323.html>.

² Id.

³ Privacy Impact Assessment for the Future Attribute Screening Technology (FAST) Project, DHS, 3-4, December 15, 2008 [hereinafter *PIA*] available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_st_fast.pdf.

According to S&T, FAST is “an initiative to develop a prototype screening facility containing a suite of real-time, non-invasive sensor technologies to detect cues indicative of mal-intent (the intent or desire to cause harm) rapidly, reliably, and remotely.”⁴ By using a mix of “physiological and behavioral signals,” FAST assesses an individual, determining the probability that he or she will commit a criminal act.⁵

FAST is funded by S&T’s Homeland Security Advanced Research Projects Agency and is managed by S&T’s Human Factors Behavior Sciences Division.⁶ The laboratory testing scrutinized by DHS’s 2008 PIA was designed to be in compliance with federal law on test subjects⁷ and an Institutional Review Board oversaw testing methodology.⁸

FAST is designed to capture biological and behavioral information from subjects. According to DHS’s 2008 PIA, the FAST Project might incorporate monitoring of “video images, audio recordings, cardiovascular signals, pheromones, electrodermal activity, and respiratory measurements.”⁹ While the test subjects in the initial phase of laboratory testing consented to these measures, the recently completed field-testing would likely not include any consent from the subjects. Similarly, while the laboratory testing data was anonymized and held exclusively by the contractors, the agency has not indicated that the same will be true for field-test subjects.

DHS has not provided initial testing results or the location of the field-testing site. According to a news report, DHS spokesman John Verrico refused to provide test results (though stated the Project achieved a 70% success rate) and would state only that field-testing occurred in the “northeast” and in a “large venue that is a suitable substitute for an operational setting” (but not an airport).¹⁰

Relation to EPIC’s Ongoing Interests

EPIC has previously expressed concern about screening techniques deployed by the DHS and has sought under the FOIA documents that help the public and the Congress fully assess the scope of these programs. EPIC previously filed FOIA requests regarding body scanners¹¹ and in July 2010, filed suit to suspend DHS’s body scanner program.¹² In

⁴ U.S. Department of Homeland Security, Human Factors/Behavioral Sciences Projects, http://www.dhs.gov/files/programs/gc_1218480185439.shtm#6, last reviewed/modified on May 27, 2011.

⁵ *Id.*

⁶ PIA, *supra* note 3, at 2.

⁷ *See* 45 CFR §46.111(a)(7).

⁸ PIA, *supra* note 3, at 3.

⁹ *Id.*

¹⁰ Weinberger, *supra* note 1.

¹¹ *See, e.g.*, Letter from John Verdi, Director, EPIC Open Government Project, to Catherine M. Papoi, Deputy Chief FOIA Officer (April 14, 2009), http://epic.org/foia/FOIA_041409.pdf; Letter from John Verdi, Director, EPIC Open Government Project, to Catherine M. Papoi, Deputy Chief FOIA Officer (July 2, 2009), http://epic.org/foia_1/gov20/07_02_09_WBI_EPIC_FOIA_Letter.pdf.

¹² *EPIC v. the Department of Homeland Security*, Case No. 10-1157 (D.C. Cir. filed July 2, 2010).

2005, EPIC raised privacy concerns in its comments to the Transportation Security Administration regarding “the use of biometric technology in connection with access control systems in the nation's airports.”¹³

In order to assess the potential privacy intrusiveness of FAST, it is necessary that the public be made aware of the type of sensors and technology to be used, the type of information collected, the legal justifications of this type of sensory data collection, and for how long the data will be retained.

Documents Requested

EPIC requests copies of the following agency records:

1. “Final legal assessment of Federal, State, and local laws regarding collecting each type of data from each sensor (and combinations of sensors) in an operational setting versus in a research setting with volunteer participants who have consented to the collection”¹⁴;
2. Final redress options for individuals being screened using the FAST technologies;
3. All technical specifications for data retention from sensors (and combinations of sensors) deployed in field-testing;
4. All agreements, contracts, or communications (including but not limited to Memoranda of Agreement/Understanding) with host site;
5. All Requests for Proposal, contracts, grant allocations, and Statements of Work for performing field-testing operations;
6. Final report(s) on initial laboratory testing of FAST Project and similar reports and evaluations;
7. Final report(s) on field-testing of FAST Project and similar reports and evaluations;
8. All documents related to future field-testing of FAST technologies (including but not limited to Plan of Action and Milestones, Memoranda of Agreement/Understanding, and contracts); and
9. Privacy Impact Assessment for the March 2011 field-testing of the FAST Project.

¹³ EPIC, Comments of the Electronic Privacy Center, http://epic.org/privacy/biometrics/tsa_comments31705.html (last visited June 2, 2011).

¹⁴ PIA, *supra* note 3, at 4.

Request for Expedited Processing

EPIC's FOIA Request meets the second factor for expedited processing listed in 6 C.F.R. § 5.5(d), which states that requests and appeals will be taken out of order and given expedited treatment whenever it is determined that they involve:

- ii. An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.

a. EPIC's Request Involves An Urgency to Inform the Public About an Actual or Alleged Federal Government Activity and is Made by an Organization Primarily Engaged in Disseminating Information

EPIC's request involves an urgency to inform the public about an actual or alleged federal government activity and is made by an organization primarily engaged in disseminating information. A District of Columbia Circuit Court has articulated a test to determine whether requestors have demonstrated "urgency to inform," and hence "compelling need;" courts must consider at least three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity.¹⁵

EPIC's request satisfies the first prong of this test because it concerns a matter of current exigency to the American public. As discussed above, the FAST Project has recently been field-tested in the northeastern United States, with future field-testing "in the works."¹⁶ The FAST Project is designed to gather "physiological and behavioral signals,"¹⁷ and may have already collected this personal information from members of the public without legal consent.¹⁸ In order to assess any intrusions of privacy created by the FAST Project, either in the past or future, the public must be informed about what information the project seeks to gather, how this information will be used and stored, and when future testing will occur. Moreover, the Congress is currently considering appropriations for the DHS fiscal year 2012 budget, with the House passing a bill containing \$398 million for S&T research funding.¹⁹ With Senate consideration forthcoming the public's opportunity to affect the debate over future spending on this Project is limited.

¹⁵ *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001).

¹⁶ Weinberger, *supra* note 1.

¹⁷ U.S. Department of Homeland Security, Human Factors/Behavioral Sciences Projects, http://www.dhs.gov/files/programs/gc_1218480185439.shtm#6, last reviewed/modified on May 27, 2011.

¹⁸ Weinberger, *supra* note 1.

¹⁹ H.R. 2017, 112th Cong. (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr2017eh/pdf/BILLS-112hr2017eh.pdf>.

EPIC's request also satisfies the second prong of this test: the consequence of delaying a response would compromise a significant recognized interest. A failure by the agency to disclose records detailing its testing of the FAST Project and the information the Project has collected denies the American public the opportunity to make an informed decision about this technology. Congress has expressed concern on programs similar to FAST, including full-body scanners at airports,²⁰ and the GAO recently criticized a passenger behavior detection program for implementation prior to scientific validation of its techniques.²¹ In order for Americans to express their viewpoints to their representatives and participate in the current debate, it is vital that information on the past and future testing of the FAST Project be made accessible before Congress makes further appropriations. Courts have been persuaded to require expedited process when Congress is considering legislation on an issue at the time of the request²² or where Congress has expressed interest in a particular topic.²³

EPIC's request also clearly fulfills the third prong of this test: it concerns federal government activity. DHS S&T funds and manages the FAST Project,²⁴ which has recently been deployed for field-testing. S&T has contracted for the development of this technology.²⁵ As such, this request directly and clearly concerns S&T's operations and activities.

This request warrants expedited processing because it is made by "a person primarily engaged in disseminating information . . ." and it pertains to a matter about which there is an "urgency to inform the public about an actual or alleged federal government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II). EPIC is "primarily engaged in disseminating information." *American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

Request for "News Media" 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. *Epac v. Dep't of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).

Based on our status as a "news media" requester, we are entitled to receive the requested records with only duplication fees assessed. Further, because disclosure of this information will "contribute significantly to public understanding of the operations or activities of the government," as described above, any duplication fees should be waived.

²⁰ H.R. 2200, 111th Cong. (2010), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.2200>:

²¹ Aviation Security: TSA Is Taking Steps to Validate the Science Underlying Its Passenger Behavior Detection Program, but Efforts May Not Be Comprehensive, GAO, April 6, 2011, available at <http://www.gao.gov/new.items/d11461t.pdf>.

²² *Gerstein v. CIA*, 2006 U.S. Dist. LEXIS 89883 (N.D. Cal. Nov 29, 2006)

²³ *Natural Res. Def. Council v. DOE*, 191 F. Supp. 2d 41, 43-44 (D.D.C. 2002).

²⁴ PIA, *supra* note 3, at 2.

²⁵ NewsEdge, *Draper Labs awarded \$2.6 million contract by DHS*, February 6, 2009, at <http://www.securityinfowatch.com/root+level/1289487>.

Thank you for your consideration of this request. As provided in 5 U.S.C. § 552(a)(6)(E)(ii)(I), I will anticipate your determination on our request for expedited processing within ten (10) calendar days.

Sincerely,

Jeramie D. Scott
EPIC Summer Law Clerk

Alex Stout
EPIC Summer Law Clerk

John Verdi
Director
EPIC Open Government Project