epic.org

Electronic Privacy Information Center
1718 Connecticut Avenue NW, Suite 200
Washington, DC 20009, USA

+1 202 483 1140
+1 202 483 1248
@EPICPrivacy
https://epic.org

VIA E-MAIL

July 31, 2018

Deborah Moore
Acting FOIA Officer/Public Liaison
Transportation Security Administration
TSA-20, East Tower
FOIA Branch
601 South 12th Street
Arlington, VA 20598-6020
Email: FOIA@tsa.dhs.gov

Dear Ms. Moore:

This letter constitutes an urgent 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") to the Transportation Security Administration ("TSA").

EPIC seeks records concerning the "Quiet Skies" program.[1]

Documents Requested

(1) The Systems of Record Notice associated with the Quiet Skies program that is required for the collection of personal information on U.S. citizens;

(2) The Privacy Impact Assessment ("PIA") for the Quiet Skies program, including the PIA for any database that contains information obtained from the Quiet Skies program;

(3) Any Privacy Threshold Analysis or similar initial privacy assessment that assessed the need for a PIA for the Quiet Skies program;

(4) All TSA Information Bulletins referencing the "Quiet Skies" program; and

(5) The full list of criteria for Quiet Skies screening.

[1] EPIC requests all responsive documents in electronic format to be emailed to FOIA@epic.org or alternatively sent via mail to EPIC's office at 1718 Connecticut Ave NW, STE 200, Washington, DC 20009.

Privacy is a Fundamental Right.

Background

On July 28, 2018 the Boston Globe reported that the TSA program "Quiet Skies" deploys federal air marshals to target and assess U.S. travelers.[2] According to the news report, travelers selected for the Quiet Skies program are covertly followed and observed by armed, undercover marshals while in airports and on flights.[3]

The travelers have been targeted by this program for spending time in certain countries or because their email address or phone number is in some way associated to an individual on a terrorism watch list. Once selected marshals collect extensive information based on a broad checklist of behaviors. The behavior checklist includes face touching, rubbing hands, excessive fidgeting, and sleeping on the flight.[4] The marshals also take notes on whether the travelers under surveillance use a phone or the restroom.[5] In response to a media inquiry, TSA officials declined to provide any information on whether the program has actually stopped any threats.[6]

The Quiet Sky program has raised widespread concern.[7] EPIC is pursuing this Freedom of Information request to determine whether the TSA has the legal authority to undertake these surveillance activities.

Request for Expedited Processing

EPIC is entitled to expedited processing of this FOIA request under FOIA and DHS's FOIA regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(e)(1)(ii). This request should be granted expedited processing because, first, there is an "urgency to inform the public about an actual or alleged federal government activity," and, second, the request is "made by a person who is primarily engaged in disseminating information." 6 C.F.R. § 5.5(e)(1)(ii).

First, there is an "urgency to inform the public about an actual or alleged federal government activity." 6 C.F.R. § 5.5(e)(1)(ii). The "actual" federal government activity is the

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[2] Jana Winter, *Welcome to the Quiet Skies*, The Boston Globe (July 28, 2018), http://apps.bostonglobe.com/news/nation/graphics/2018/07/tsa-quiet-skies/.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *See, e.g.*, Kris Van Cleave, *Lawmakers want answers about TSA program that tracked Americans*, CBS News (July 30, 2018), https://www.cbsnews.com/news/tsa-quiet-skies-lawmakers-want-answers-from-tsa-about-program-that-tracked-americans/; Missy Ryan & Ashley Halsey III, *Air marshals have conducted secret in-flight monitoring of U.S. passengers for years*, Washington Post (July 29, 2018), https://www.washingtonpost.com/world/national-security/air-marshals-have-conducted-secret-in-flight-monitoring-of-us-passengers-for-years/2018/07/29/b50ffe94-9370-11e8-810c-5fa705927d54_story.html; Elizabeth Chuck, *TSA's 'Quiet Skies' program raises legal and civil liberty questions*, NBC News (July 30, 2018), https://www.nbcnews.com/news/us-news/tsa-s-quiet-skies-program-raises-legal-civil-liberty-questions-n895806; James Bovard, *Have you gained or lost weight? Congrats, TSA is now tracking you for suspicious activity*, USA Today (July 31, 2018), https://www.usatoday.com/story/opinion/2018/07/31/tsa-transportation-security-administration-secretly-watching-quiet-skies-surveillance-column/862810002/.

TSA's operation of the Quiet Skies program. The agency has acknowledged its used of the previously secret program, stating that the program is "a practical method of keeping another act of terrorism from occurring at 30,000 feet."[8]

"Urgency" to inform the public about this activity is clear given that this program that has remained largely a secret until the Boston Globe obtained agency documents about the program. The program has been in existence since 2010, yet the public is learning about the program this past weekend.[9] Little information has been revealed about the details of the program, such as the efficacy of the behavioral checklist being used. In the past, a government audit found that the TSA's "Screen of Passengers by Observation Techniques" to be ineffective and that there was no scientifically valid evidence for behavior indicators and TSA screeners cannot reliable interpret passenger behavior.[10]

Second, EPIC is an organization "primarily engaged in disseminating information." 6 C.F.R. § 5.5(e)(1)(ii). As the Court explained in *EPIC v. DOD*, "EPIC satisfies the definition of 'representative of the news media'" entitling it to preferred fee status under FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003). EPIC's mission is to focus public attention on emerging privacy and civil liberties issues and it consistently disseminates the information obtained through the FOIA on its website, https://epic.org.[11]

In submitting this request for expedited processing, I certify that this explanation is true and correct to the best of my knowledge and belief. 6 C.F.R. § 5.5(e)(3); 5 U.S.C. § 552(a)(6)(E)(vi).

<u>Request for "News Media" Fee Status and Fee Waiver</u>

EPIC is a "representative of the news media" for fee classification purposes. *EPIC v. DOD*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC's status as a "news media" requester, EPIC is entitled to receive the requested record with only duplication fees assessed. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

Further, any duplication fees should also be waived because (i) "disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government" and (ii) "disclosure of the information is not primarily in the commercial interest" of EPIC, the requester. 6 C.F.R. §

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[8] Camila Domonoske, TSA's 'Quiet Skies' Program Tracks, Observes Travelers in the Air, NPR (July 30 2018), https://www.npr.org/2018/07/30/633980912/tsas-quiet-skies-program-tracks-observes-travelers-in-the-air.
[9] Elizabeth Chuck, *TSA's 'Quiet Skies' Program Raises Legal and Civil Liberties Questions*, NBC News (July 30, 2018), https://www.nbcnews.com/news/us-news/tsa-s-quiet-skies-program-raises-legal-civil-liberty-questions-n895806.
[10] U.S. Gov't Accountability Office, GAO-14-159, Aviation Security: TSA Should Limit Future Funding for Behavior Detection Activities (2013), https://www.gao.gov/assets/660/658923.pdf.
[11] *See* EPIC, https://epic.org/.

5.11(k)(1); § 552(a)(4)(A)(iii). EPIC's request satisfies this standard based on the considerations that DHS uses in determining whether to grant a fee waiver. 6 C.F.R. §§ 5.11(k)(2-3).

(1) Disclosure of the requested information is likely to contribute to the public understanding of the operations or activities of the government.

First, disclosure of the requested documents is "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." 6 C.F.R. § 5.11(k)(2). The DHS evaluates four factors to determine whether this requirement is met: (i) the "subject of the request must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated"; (ii) disclosure "must be meaningfully informative about government operations or activities in order to be 'likely to contribute' to an increased public understanding of those operations or activities"; (iii) "disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester"; and (v) "[t]he public's understanding of the subject in question must be enhanced by the disclosure to a significant extent." *Id.*

On the first consideration, the subject of the request self-evidently concerns "identifiable operations or activities of the federal government." 6 C.F.R. § 5.11(k)(2)(i). The TSA has acknowledged and defended its use of the Quiet Skies program to multiple media outlets.[12]

On the second consideration, disclosure would also be "meaningfully informative about" these operations or activities and is thus "'likely to contribute' to an increased understanding of government operations or activities." 6 C.F.R. § 5.11(k)(2)(ii). There is little detailed information as to specifics of the Quiet Skies Program. The TSA had not previously acknowledged the programs existence until the reports surfaced yet the program has been operating for eight years. The requested materials would meaningfully enhance the public understanding of the agency's program.

On the third consideration, disclosure will "contribute to the understanding of a reasonably broad audience of persons interested in the subject" because, as provided in the DHS FOIA regulations, the DHS shall "presum[e] that a representative of the news media will satisfy this consideration." 6 C.F.R. § 5.11(k)(2)(iii).

Finally, on the fourth consideration, the public's understanding will "be enhanced by the disclosure to a significant extent" because the surveillance program raises potential legal and civil liberties questions. The release of this information will be meaningfully informative as to whether the TSA is using credible screening methods, whether privacy implications were

[12] *See e.g.*, Brett Samuels, *TSA Defends 'Quiet Skies' Monitoring Program*, The Hill (July 30, 2018), http://thehill.com/policy/transportation/399555-tsa-defends-quiet-skies-surveillance-program; Rene Marsh, *Previously Undisclosed TSA Program Tracks Unsuspecting Passengers*, CNN (July 30, 2018), https://www.cnn.com/2018/07/29/politics/tsa-passenger-tracking/index.html; Elizabeth Chuck, *supra* note 8.

considered prior to the launch of Quiet Skies, and whether the extent of collection and use of this data violates the Privacy Act.

(2) Disclosure of the information is not primarily in the commercial interest of the requester

Second, "[d]isclosure of the information is not primarily in the commercial interest" of EPIC. To determine whether this second requirement is met, the DHS evaluates two considerations: (i) whether there is "any commercial interest of the requester . . . that would be furthered by the requested disclosure"; and/or (ii) whether "the public interest is greater than any identified commercial interest in disclosure," and "[c]omponents ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester." *Id.*

On the first consideration, there is not "any commercial interest of the requester . . . that would be furthered by the requested disclosure." 6 C.F.R. § 5.11(k)(3)(i). EPIC has no commercial interest in the requested records. EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.[13]

On the second consideration, "the public interest is greater than any identified commercial interest in disclosure." 6 C.F.R. § 5.11(k)(3)(ii). Again, EPIC has no commercial interest in the requested records and there is significant public interest in the requested records. Moreover, the DHS should presume that EPIC has satisfied 6 C.F.R. § 5.11(k)(3)(ii). The DHS FOIA regulations state, "[c]omponents ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester." *Id.* EPIC is a news media requester and, as set out above, this request satisfies the public interest standard.

For these reasons, a fee waiver should be granted for EPIC's request.

Conclusion

Thank you for your consideration of this request. I anticipate your determination on our request within ten working days. 5 U.S.C. § 552(a)(6)(E)(ii)(I). For questions regarding this request contact Enid Zhou at 202-483-1140 x104 or FOIA@epic.org.

Respectfully submitted,

/s Enid Zhou
Enid Zhou
EPIC Open Government Fellow

/s Jeramie D. Scott
Jeramie D. Scott
EPIC National Security Counsel

[13] *About EPIC*, EPIC.org, http://epic.org/epic/about.html.