

The Identity Project

www.PapersPlease.org

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December 16, 2009

Privacy Office
Department of Homeland Security
245 Murray Drive, S.W.
Washington, DC 20528

DHS Office of Inspector General/MAIL STOP 2600
Attention: Office of Investigations - Hotline
245 Murray Drive, SW, Building 410
Washington, DC 20528

Complaint of violation of FOIA and criminal violation of the Privacy Act by TSA

The addresses of the TSA FOIA office and the TSA Privacy Act office, and the address for postal submission of FOIA and Privacy Act requests to the TSA, have changed without public notice.

The TSA is not currently accepting delivery of FOIA or, we suspect, Privacy Act requests sent to their officially designated addresses.

To our knowledge, this has been the situation at least since October 16, 2009, and we believe that it continues today.

Because the TSA is not accepting delivery of these requests, it is impossible for requesters to obtain confirmation of receipt of their requests. Without evidence of the date of receipt, it is impossible for requesters to appeal constructive denial of their requests, or to litigate constructive denial of requests or appeals.

TSA and DHS are required by FOIA and the Privacy Act to publicly designate, through notices in the Federal Register, addresses at which FOIA and Privacy Act requests are accepted. Failure to designate such addresses or to accept delivery at those addresses, or instructing the Postal Service not to deliver requests sent to those addresses, are violations of FOIA and/or the Privacy Act on the part of the responsible DHS and/or TSA officials.

The most recent DHS FOIA regulations, as published in the Federal Register (60 FR 4056-4069, January 27, 2003) and codified at 6 CFR Part 5, list the TSA FOIA address as:

Transportation Security Administration
400 Seventh Street, SW.
Washington, DC 20590

We have been told by phone, on a rare occasion when the TSA FOIA or Privacy Act office answered their phone, that that address is obsolete.

The DHS.gov and TSA.gov Web sites have listed a different FOIA request address:

Transportation Security Administration
Freedom of Information Act Office, TSA-20
601 S. 12th Street
11th Floor, East Tower
Arlington, VA 22202-4220

However, we believe that neither of these addresses is correct. The U.S. Postal Service has told me that they were unable to deliver our FOIA request sent by Express Mail to the Arlington address above.

According to the USPS, my Express Mail letter arrived in the Arlington Post Office on October 16, 2009. According to the USPS, the TSA zip code has changed to 20598, and the TSA has instructed the USPS not to deliver mail sent to that address and zip code 22202. Because the TSA has instructed the USPS not to attempt delivery of such mail, the USPS was unable to provide proof of delivery, proof of non-delivery, or proof of refusal to accept delivery, and our letter was not returned to us.

Although this happened to our letter on October 16th, no new TSA or DHS FOIA notice, no new TSA Privacy Act SORN for any system of records, and no update to the TSA or DHS FOIA regulations in 6 CFR Part 5 has yet been published in the Federal Register.

We presume that TSA was aware that their address was to be changed, and that it had been changed, and could have published notices of changes in advance on their Web sites and in the Federal Register. Standard operating procedures for compliance with FOIA and the Privacy Act should have provided for the issuance and publication in the Federal Register of a new FOIA notice, updates to the FOIA regulations in 6 CFR Part 5, and new SORNs, *prior* to the effective date of the change of address, and special care in instructing the USPS and TSA mailroom staff to ensure that requests continued to be delivered without interruption.

Since that was not done, and until it can be done, the USPS and other carriers should have been directed to continue delivery of requests sent to the officially designated addresses. The DHS and TSA have an affirmative legal duty under FOIA and the Privacy Act to promulgate valid addresses and ensure that they accept delivery of requests sent to those addresses. To direct that requests be sent to an address that, by TSA directive to the Postal Service, has been rendered a "black hole", constitutes *de facto* summary, secret denial of all such requests.

One of our FOIA requests -- sent by e-mail and Express Mail on October 15, 2009 -- included a request for expedited processing. Under FOIA, the TSA was required to make a decision on that request for expedited processing within 10 days, that is, by October 25, 2009. Although we were eventually told by telephone that our request was received by the TSA FOIA office, we received no written or electronic confirmation until after the deadline for expedited processing of our request.

Under FOIA, we were entitled to commence litigation to challenge the constructive denial of our request for expedited processing 10 days after the receipt of our request. But since the TSA's refusal to accept delivery made it impossible for us to prove when our request was received, it effectively barred the courthouse door, and prevented us from seeking judicial review of their constructive denial, or administrative review (if they had actually responded), until they provided confirmation of when they received our request.

This is an extremely grave due process violation. Until corrected through proper new Federal Register notices and instructions to the USPS and other delivery services, it categorically precludes FOIA and Privacy Act requests and appeals or litigation of constructive denials.

We believe that these actions clearly constitute mismanagement by the DHS and TSA, and violations of FOIA and probably also the Privacy Act.

We request that the Office of the Inspector General and the DHS Privacy and FOIA offices investigate this complaint and bring appropriate enforcement action for sanctions against the responsible DHS and/or TSA officials.

Even if these violations were to be corrected by new notices in the Federal Register tomorrow, the damage of several months during which the TSA refused to accept properly addressed FOIA requests has been done, and I request that you proceed with your investigation of this complaint.

Most requesters, of course, will not even know that their request was not delivered, and may never know why they never receive a response. As part of your investigation, we request that you attempt to determine how many other such requests may not have been delivered. And I urge that the TSA and DHS be required, as part of

their mitigation of their violations of the law, to publish prominent notices -- through their usual press release distribution channels and on the DHS and TSA home pages and FOIA and Privacy Act Web pages -- that requests may not have been delivered, and advising past requesters of the need to re-send their requests.

Our request for expedited processing was made as a news media organization, and we have reported publicly on this incident at:

<http://www.papersplease.org/wp/2009/10/27/tsa-sends-our-foia-request-into-a-black-hole/>

We originally sent this complaint by e-mail on November 2, 2009 to <privacy@dhs.gov>, <DHSOIGHOTLINE@dhs.gov>, <foia.tsa@dhs.gov>, and <foia@hq.dhs.gov>, and have repeatedly attempted to report it by phone to those offices as well as the Postal Service (who referred it to the USPS Office of the Inspector General). We were told that our complaint had been assigned case #CA100394971 by the Postal Service, and DHS OIG report #DHS091104031. But as of today, we have received no written acknowledgment or response.

Please reply to confirm your receipt of this report and complaint, and any tracking or reference number assigned to this complaint and/or to your investigation. Please advise us of the outcome of this complaint and provide us with a copy of any report produced by your office in response to this complaint and your investigation. Please feel free to contact me if you need any additional information from us, or if we can be of any assistance to you in investigating and prosecuting this complaint. Please also confirm that this complaint has been logged as a complaint of violation of FOIA and the Privacy Act, and will be included in your reporting of statistics regarding such complaints.

We are copying this complaint to the OIG and to TSA and DHS privacy offices, with a request that it be logged in OIG, TSA, and DHS complaint statistics, investigated, and acted on as a complaint of violation of FOIA and (criminal) violation of the Privacy Act by TSA and DHS officials.

Sincerely,

Edward Hasbrouck
The Identity Project