

April 25, 2005

Sharon Bisco, FOIA & Privacy Act Officer
National Institute of Standards and Technology
100 Bureau Drive, STOP 3220
Gaithersburg, MD 20899-3220

Re: Freedom of Information Act Request

Attention:

This is a request pursuant to the Freedom of Information Act (5 U.S.C. § 552) for all agency records (including, but not limited to letters, correspondence, tape recordings, notes, data, memoranda, reports, email, computer source and object code, technical manuals, technical specifications, or any other materials) held by the National Institute of Standards and Technology (NIST) regarding the testing and evaluation of radio frequency identification (RFID)¹ chips for use in United States passports. This request includes all records related to testing of RFIDs and passports by NIST last summer at the National Biometric Security Project facilities in Morgantown, WV, and all subsequent rounds of testing.²

Please grant expedited review of this FOIA. Specifically, we request expedited access pursuant to 5 U.S.C. § 552(a)(6)(E)(v)(II), which allows such processing when a requester “primarily engaged in disseminating information” shows an “urgency to inform the public of an actual or alleged Federal government activity.” We further note that this “exceptional need or urgency for the records” is such that it is “beyond the public’s right generally to know about government activity” and “warrants prioritization” of this request “over other requests that were made earlier.”

The American Civil Liberties Union Foundation (ACLU Foundation) is a requestor primarily engaged in disseminating information. The ACLU foundation meets the criteria laid out in *National Security*

¹ RFID chips have achieved common public understanding as describing all technologies that allow remote reading of a microchip tag. This request should be understood to include tests on all remote reading technologies such as contactless integrated circuit chips or contactless smart cards.

² Frank Moss, Deputy Assistant Secretary, Passport Services Bureau of Consular Affairs, for the State Department described a subsequent round of testing in a presentation at the 2005 Computers, Freedom & Privacy Conference in Seattle, WA. This request should be read to explicitly include any records from this round of testing.

Archive v. Department of Defense, where a representative of the news media is defined as an entity that "gathers information of potential interest to a segment of the public" and "uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience" 880 F. 2d at 1387. The ACLU Foundation publishes newsletters, frequent press releases, news briefings, right to know handbooks, and other materials that are disseminated to the public. Its material is widely available to everyone, including tax-exempt organizations, not-for-profit groups, law students, and faculty, not to mention our 400,000 members. The ACLU Foundation disseminates information through publications available on-line at www.aclu.org, as well. The web site addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The website specifically includes information obtained on the passport process and would feature any information obtained through the FOIA. See www.aclu.org/passport. The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail. Thus the organization meets the pertinent regulatory requirements for expedited access.

Our request also meets the second criteria for expedition because it warrants promotion over other requests. The decision on whether and how to use RFID chips is happening very quickly. The State Department recently published a notice of proposed rulemaking stating its intent to issue the first passport containing a RFID by "mid-2005" and that within a year of that date "all passports would be issued in this format." 70 Fed. Reg. 8305-8309, "Electronic Passports," RIN 1400-A893. This decision has generated considerable controversy. Security experts, RFID manufactures and advocacy groups have all objected to the lack of measures adopted to assure the privacy and security of this information. See Matthew L. Wald, *New high-tech passports raise snooping concerns*, THE NEW YORK TIMES, November 29, 2004; John Carey, *Big Brother's Passport to Pry*, BUSINESSWEEK, November 5, 2004. According to media reports more than 1500 comments were filed on these proposed regulations, many in opposition. David Coursey, *Coming to Your Pocket: A Terrorist Beacon?*, E WEEK, April 5, 2005. The use of RFID's in passports is clearly an impending policy decision to which the public has expressed a strong desire to contribute.

Further, the use of these chips involves an enormous investment of resources – the passport must be completely redesigned, chip technologies developed, personnel trained, and readers purchased and placed around the world. Once this vast infrastructure is in place it will be difficult or impossible to undo it, no matter how unsafe or inappropriate the technology might be. This process is complicated by the fact that the United States is taking the lead in developing international standards. This would mean that

a change would involve altering standards for the entire world. In short, if RFID are to be stopped, it must happen now. The requested FOIA records describe test of the efficacy and security of RFIDs. They could not be more relevant to the process of evaluating the use of these chips in passports. This information must be available to the public immediately.

Finally we request a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) & (iii), because as discussed above, the subject matter of the requested records concerns the operations and activities of the Federal government, the disclosure is likely to contribute to an understanding of Federal government operations or activities, disclosure of the requested information is in the public interest, the contribution to public understanding of Federal government operations or activities will be significant, and, as a non-profit 501(c)(3) organization, we do not have a commercial interest that would be furthered by the disclosure of the requested information.

We have enclosed certification (for the purposes of expedited access) with this letter. If our request is denied in whole or part, we ask that you justify all deletions by reference to specific exemptions of the act. We expect you to release all segregable portions of otherwise exempt material, and we wish to have copies made and furnished of all such material. We reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

We look forward to your reply within ten calendar days, as required under 5 U.S.C. § 552(a)(6)(E)(ii)(I).

Sincerely,

Christopher Calabrese
Counsel, Technology and Liberty Program

Barry Steinhardt
Director, Technology and Liberty Program