

October 15, 2019

Freedom of Information Act Appeal

Via E-Mail and FedEx

U.S. Immigration and Customs Enforcement
Office of the Principal Legal Advisor
Government Information Law Division
500 12th Street, SW
Mail Stop 5900
Washington, D.C. 20536-5900
ICE-FOIA@dhs.gov

Department of Homeland Security
Privacy Office
Attn: FOIA Appeals
245 Murray Lane, SW
Mail Stop 0655
Washington, D.C. 20528-0655
FOIA@hq.dhs.gov

**Re: Administrative Appeal – DHS Tracking Number 2019-HQFO-00825; ICE
Case Number 2019-ICFO-44618 (DAS Request)**

To Whom it May Concern:

This letter serves as an administrative appeal of (1) the June 17, 2019 email and letter from the Department of Homeland Security (“DHS”), attached as **Exhibit A** (DHS Tracking Number 2019-HQFO-00825) (“DHS Response”); and (2) the July 2, 2019 letter from the Immigration and Customs Enforcement (“ICE”) Freedom of Information Act (“FOIA”) Office, attached as **Exhibit B** (Case Number 2019-ICFO-44618) (“ICE Response”).

Both the DHS Response and the ICE Response were issued in response to a November 5, 2018 FOIA request submitted by the Brennan Center for Justice at NYU School of Law (the “Brennan Center”) to DHS and ICE. This FOIA request, attached as **Exhibit C**, sought records related to the Data Analysis System (“DAS”) in use by DHS and its components, including ICE. The Brennan Center hereby appeals the letters and email and requests all documents requested in the document attached as Exhibit C and incorporated herein. Pursuant to 6 CFR § 5.8(a)(1), this administrative appeal is timely submitted within 90 working days of the DHS Response and the ICE Response.

Factual Background

The Brennan Center sent substantively identical FOIA requests to DHS and ICE seeking the DAS records on November 5, 2018. (**Exhibit C.**) On June 17, 2019, DHS sent a letter to counsel for the Brennan Center stating that it was transferring the FOIA request it received to the ICE FOIA Office. (**Exhibit A.**) The cover email states that the transfer letter would be DHS's "final response to your request." (**Exhibit A.**)

On July 2, 2019, the ICE FOIA Office sent a clarification letter to counsel for the Brennan Center stating in part that "[a]fter careful review of your FOIA request, we determined that your request is **too broad in scope**, did not specifically identify the records which you are seeking, or only posed questions to the agency." (**Exhibit B**, emphasis in original.) The ICE FOIA office requested that the Brennan Center resubmit a "request containing a reasonable description of the records" sought, and that if the Brennan Center did not respond within 30 days the agency would administratively close the request (Exhibit B).

On July 17, 2019, counsel for the Brennan Center sent a response email to ICE official Toni Fuentes and the ICE FOIA office (Exhibit D). In this email, counsel for the Brennan Center attempted to begin negotiations with ICE regarding possible modifications to the FOIA Request. The ICE FOIA office did not respond to this email.

Argument

1. *DHS failed to complete an adequate search of its own records to determine whether it maintains responsive records prior to transferring the FOIA request to the ICE FOIA Office.*

According to DHS's September 29, 2017 Privacy Impact Assessment, DAS is an analytical database containing personally identifiable information ("PII") that is maintained by Enforcement and Removal Operations, a subcomponent of ICE.¹ While DAS resides on an encrypted server behind ICE's firewall, the Privacy Impact Assessment states that DAS extracts its data "from various DHS and non-DHS sources," including U.S. Citizenship and Immigration Services ("USCIS").² The Privacy Impact Assessment also states that ICE may share the DAS data, including the PII of U.S. citizens, with other DHS components and with "certain federal and international government agencies for the purpose of safeguarding national security."³ Further, the Privacy Impact Statement states that DHS

¹ DEP'T OF HOMELAND SEC., DHS/ICE DAS/PIA-048, PRIVACY IMPACT ASSESSMENT FOR THE DATA ANALYSIS SYSTEM (DAS) 1 (Sept. 29, 2017), *available at* <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-das-september2017.pdf>.

² *Id.* at 1-2.

³ *Id.* at 15.

was authorized to collect information for the DAS pursuant to a number of statutory authorities, and that DHS delegated that authority to ICE.⁴

DHS's regulations state that "[w]here a component's FOIA office determines that a request was misdirected within DHS, the receiving component's FOIA office shall route the request to the FOIA office of the proper component(s)." 6 C.F.R. 5.4(c). However, this does not relieve DHS of its burden to determine whether any responsive documents are in its possession. "[T]he agency bears the burden of establishing that any limitations on the search it undertakes in a particular case comport with its obligation to conduct a reasonably thorough investigation." *McGehee v. CIA*, 697 F.2d 1095, 1101 (D.C. Cir. 1983). DHS has not met its burden to show that it made a reasonably thorough search of its records prior to transferring the FOIA request to ICE and stating that such transfer would be DHS's final response to the request.

To the extent that DHS maintains records related to DAS, the Brennan Center's FOIA request properly seeks the release of those records. The Brennan Center's request is not merely seeking DAS records from ICE, but instead seeks records from all of DHS.

2. ICE failed to establish an adequate basis for the nondisclosure of responsive documents and has failed to establish the adequacy of its search.

In the ICE Response, the ICE FOIA Office states that the Brennan Center's FOIA request was "too broad in scope, did not specifically identify the records which you are seeking, or only posed questions to the agency." (**Exhibit B**, emphasis omitted.) The ICE Response's statement is incorrect and conclusory, and appears designed to shield agency records that are not exempt from FOIA from public disclosure.

The Brennan Center's FOIA request seeks the release of seven discrete categories of records that all concern the DAS database. The Brennan Center properly seeks the release of the documents pertaining to DAS in order to expand the public's knowledge and understanding of the agencies' collection of PII and related privacy policies. Contrary to the ICE FOIA Office's response letter, the Brennan Center's FOIA requests related to DAS are not overly broad, they clearly identify the records sought, and they do not pose any questions whatsoever to the agencies. Further, the records requested do not fall into any of the exemptions to FOIA listed at 5 U.S.C. § 552(b), nor did the ICE Response invoke any of these exemptions.

The seven categories of requested DAS-related documents are clearly defined in Exhibit B and incorporated herein. Among other things, the request seeks records such as memoranda, policies, procedures, and guidelines that reference DAS or that apply to the use of DAS. The request also seeks communications with outside agencies and private companies about DAS, records that constitute or contain ICE's security and privacy standards for using PII, and records that contain or constitute the results of testing or evaluations of DAS. These requests are clear and specific, but the ICE Response includes

⁴ *Id.* at 4.

only a generic statement that the requests were too broad without any attempt to explain why the agencies could not respond, as required by FOIA and the courts.

Conclusory statements that a FOIA request is too broad are an inadequate basis for agency nondisclosure. The burden falls on the agency to demonstrate that responding to the FOIA request would be unduly burdensome. *See New Orleans Workers' Center for Racial Justice v. United States Immigration & Customs Enforcement*, 373 F.Supp.3d 16, 35 (D.D.C. 2019) (although "an agency need not honor a FOIA request that requires it to conduct an unduly burdensome search, the burden falls on the agency to provide sufficient explanation as to why [] a search would be unreasonably burdensome") (citations and internal quotations omitted). The ICE FOIA Office's generic claim that the Brennan Center's request is overly broad does not satisfy that burden. *See Hall v. CIA*, 881 F.Supp.2d 38, 53 (D.D.C. 2012) ("This Court will not find a search unduly burdensome on conclusory statements alone."). Further, the Brennan Center offered to negotiate its FOIA Request, on July 17, 2019, but the ICE FOIA Office did not respond.

Conclusion

DHS has failed to establish an adequate basis for the nondisclosure of responsive documents and has failed to establish the adequacy of its search prior to transferring the request to the ICE FOIA Office. Further, ICE has failed to establish an adequate basis for the nondisclosure of responsive documents and has failed to establish the adequacy of its search. For these reasons, the Brennan Center requests that the DHS transfer letter and email and the ICE FOIA Office response letter be reversed and that all documents within the scope of the FOIA Request attached as Exhibit C and incorporated herein be disclosed. If any documents or portions of documents are withheld, the Brennan Center requests an index or similar statement of the scope of the material withheld and a citation to the specific FOIA exemption section upon which the nondisclosure is based with an adequate explanation for why the exemption is applicable. Such index should also include information identifying the author, recipient and any copyees, a summary of the content, and the title and date.

A reply is requested within 20 working days as prescribed under 5 U.S.C. § 552(a)(6)(A)(iii). The determination on appeal should be sent to:

Francis X. Nolan
Eversheds Sutherland (US) LLP
1114 Avenue of the Americas, 40th Floor
New York, NY 10036-7703

Should you have any questions, please contact me at (212) 389-5083.

Sincerely,



Francis X. Nolan

Attachments

FN/pc

EXHIBIT A





**Homeland
Security**

Privacy Office, Mail Stop 0655

June 17, 2019

SENT VIA E-MAIL TO: karaford@eversheds-sutherland.com

Kara D. Ford
Eversheds Sutherland, LLP
1114 Avenue of the Americas
40th Floor
New York, NY 10036

Re: **2019-HQFO-00825**

Dear Ms. Ford:

This letters acknowledges receipt of your Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), Privacy Office, dated November 5, 2018, and received in this office on June 12, 2019. You requested documents regarding (1) all memoranda, policies, procedures, guidance, guidelines, training modules, and directives that reference DAS (Data Analysis System) or that apply to the use or functioning of DAS, (2) documents sufficient to identify the "Commercial Vendor" referenced in Section 2.3 of the September 2017 Privacy Impact Assessment (DHS/ICE DAS/PIA-048), (3) all records that constitute or contain agreements with outside agencies, private companies, and/or their respective employees about DAS, including, but not limited to, memoranda of understanding, statements of work, and purchase orders, (4) all communications (including email correspondence) with outside agencies, private companies and/or their respective employees about DAS, (5) all memoranda, policies, procedures, guidance, guidelines, training modules, and directives that apply to the datasets and data inputs used by the DAS or related systems, and that apply to the generation and use of "Information Referrals" as defined in the September 2017 Privacy Impact Assessment (DHS/ICE DAS/PIA-048), (6) all records that constitute or contain ICE's security and privacy standards for using PII.22, (7) all records that contain or constitute the results of testing or evaluations of DAS or the tools used by non-DHS entities, including, but not limited to, commercial vendors.

Due to the subject matter of your request, I am transferring this request to the FOIA Officer for ICE. Please see their contact information below.

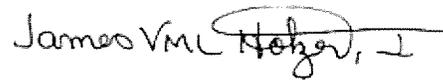
United States Immigration & Customs Enforcement (ICE)

Freedom of Information Act Office
500 12th Street, SW, Stop 5009
Washington, D.C. 20536-5009
FOIA Officer: Catrina Pavlik-Keenan
FOIA Requester Service Center Contact: Fernando Pineiro
Phone: 866-633-1182

Fax: 202-732-4265
E-mail: ice-foia@dhs.gov
ICE Website

If you need to contact our office again about this matter, please refer to **2019-HQFO-00825**.
You may contact this office at 1-866-431-0486 or 202-343-1743.

Sincerely,

A handwritten signature in black ink that reads "James VML Holzer, J." with a stylized flourish at the end.

James Holzer
FOIA Program Specialist

From: foia@hq.dhs.gov
To: [Ford, Kara](#)
Subject: Department of Homeland Security FOIA 2019-HQFO-00825 Final Response
Date: Monday, June 17, 2019 11:58:07 AM
Attachments: [2019-HQFO-00825- Final Response.pdf](#)

Good Morning,

Attached is our final response to your request. If you need to contact this office again concerning your request, please provide the DHS reference number. This will enable us to quickly retrieve the information you are seeking and reduce our response time. This office can be reached at 866-431-0486.

Regards,

DHS Privacy Office
Disclosure & FOIA Program
STOP 0655
Department of Homeland Security
245 Murray Drive, SW
Washington, DC 20528-0655
Telephone: 1-866-431-0486 or 202-343-1743
Fax: 202-343-4011
Visit our [FOIA website](#)

EXHIBIT B



Pinzur, Caren

From: ice-foia@dhs.gov
Sent: Tuesday, July 2, 2019 6:33 AM
To: Ford, Kara
Subject: ICE Clarification Request FOIA Number 2019-ICFO-44618

July 02, 2019

Kara Ford
Eversheds Sutherland, LLP
1114 Avenue of the Americas
40th Floor
New York, NY 10036

RE: ICE FOIA Case Number 2019-ICFO-44618

This e-mail is in regards to your June 17, 2019 ICE FOIA request for 1. All memoranda, policies, procedures, guidance, guidelines, training modules, and directives that reference DAS or that apply to the use or functioning of DAS. 2. Documents sufficient to identify the "Commercial Vendor" referenced in Section 2.3 of the September 2017 Privacy Impact Assessment (DHS/ICE DAS/PIA-048). 3. All records that constitute or contain agreements with outside agencies, private companies, and /or their respective employees about DAS, including, but not limited to, memoranda of understanding, statements of work, and purchase orders. 4. All communications (including email correspondence) with outside agencies, private companies and/or their respective employees about DAS. 5. All memoranda, policies, procedures, guidance, guidelines, training modules, and directives that apply to the datasets and data inputs used by the DAS or related systems, and that apply to the generation and use of "Information Referrals" as defined in the September 2017 Privacy Impact Assessment (DHS/ICE DAS/PIA- 048). 6. All records that constitute or contain ICE's security and privacy standards for using PII.22 7 . All records that contain or constitute the results of testing or evaluations of DAS or the tools used by non-DHS entities, including, but not limited to, commercial vendors..

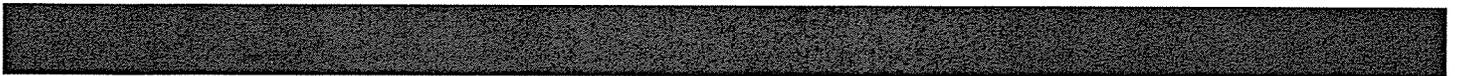
After careful review of your FOIA request, we determined that your request is **too broad in scope**, did not specifically identify the records which you are seeking, or only posed questions to the agency. Records must be described in reasonably sufficient detail to enable government employees who are familiar with the subject area to locate records without placing an unreasonable burden upon the agency. For this reason, §5.3(b) of the DHS regulations, 6 C.F.R. Part 5, require that you describe the records you are seeking with as much information as possible to ensure that our search can locate them with a reasonable amount of effort. Whenever possible, a request should include specific information about each record sought, such as the date, title or name, author, recipients, and subject matter of the records, if known, or the ICE program office you believe created and/or controls the record. The FOIA does not require an agency to create new records, answer questions posed by requesters, or attempt to interpret a request that does not identify specific records. Please resubmit your request containing a reasonable description of the records you are seeking. Upon receipt of a perfected request, you will be advised as to the status of your request.

If we do not hear from you within 30 days from the date of this letter, we will assume you are no longer interested in this FOIA request, and the case will be administratively closed. Please be advised that this action is not a denial of your request and will not preclude you from filing other requests in the future.

Sincerely,

ICE FOIA

EXHIBIT C



November 5, 2018

Via Certified Mail

Sam Kaplan
Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane, SW, Stop 0655
Washington, D.C. 20528-0655

Re: FOIA and Request for Expedited Processing and Fee Waiver

Dear Sir/Madam:

Eversheds Sutherland (US) LLP represents the Brennan Center for Justice at NYU School of Law (the “Brennan Center”). This is a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Department of Justice regulations relating to requests for disclosure of records, 28 C.F.R. §§ 16.1 to 16.11. The Brennan Center seeks records related to the Data Analysis System (“DAS”) in use by the Department of Homeland Security (“DHS”). The Brennan Center also seeks expedited processing under 28 C.F.R. §§ 16.5(e)(1)(ii) and (iv) and requests a fee waiver under 6 C.F.R. §§ 5.11(d) and (k).

I. Background

According to DHS’s September 29, 2017 Privacy Impact Assessment,¹ the Data DAS is an analytical database that collects personally identifiable information (“PII”) and is maintained by Enforcement and Removal Operations, a subcomponent of U.S. Immigration and Customs Enforcement (“ICE”).² Within Enforcement and Removal Operations, the National Criminal Analytics and Targeting Center uses DAS to assist “field offices in locating aliens convicted of criminal offenses and other aliens who are amenable to removal.”³

¹ *DHS/ICE/PIA – 048 Data Analysis System (DAS)*, DEP’T OF HOMELAND SEC., <https://www.dhs.gov/publication/dhsicepia-048-data-analysis-system-das> (last visited Sept. 29, 2017).

² DEP’T OF HOMELAND SEC., *DHS/ICE DAS/PIA-048, PRIVACY IMPACT ASSESSMENT FOR THE DATA ANALYSIS SYSTEM (DAS) 1* (Sept. 29, 2017), available at <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-das-september2017.pdf>.

³ *Id.*

DAS generates leads known as “Information Referrals”⁴ by taking information from DHS and non-DHS sources that contain PII, including biographical information, immigration and criminal history, custody data, naturalization information, and vehicle and insurance information.⁵ According to the Privacy Impact Assessment, the DHS sources used by DAS include ICE’s Enforcement Integrated Database, U.S. Citizenship and Immigration Services (“USCIS”) Computer Linked Application Information Management System 3, and USCIS’s Central Index System, among other DHS systems.⁶ The non-DHS sources used by DAS include the Federal Bureau of Prisons SENTRY System, the Federal Bureau of Investigation Interstate Identification Index, and the California Department of Corrections and Rehabilitation Strategic Offender Management System.⁷ In addition, the Privacy Impact Assessment references “two commercial sources”⁸ used by DAS—(i) the United States Post Office; and (ii) an unnamed commercial source.⁹

Based on the information in the Privacy Impact Assessment and other publicly available information about DAS, DAS may collect and analyze American citizens’ PII without providing proper privacy protection. For example, the Privacy Impact Assessment notes that although data within DAS is “primarily about aliens,” “information about U.S. citizens may be included in some datasets,” and DAS uses datasets that “will include information on U.S. citizens.”¹⁰ The Privacy Impact Assessment does not elaborate on whether and what policies exist to protect the Americans’ data that may be housed in federal databases. It simply concludes that “privacy risks are sufficiently mitigated” because DAS only has a three-year retention period for the datasets.¹¹

This data, including the PII of American citizens, may be shared with other DHS components and with “certain federal and international government agencies for the purpose of safeguarding national security.”¹² The Privacy Impact Assessment does not explain what circumstances would require safeguarding a national security interest and would justify disseminating PII.

In addition, DAS may disseminate PII of American citizens to third parties. The Privacy Impact Assessment provides that ICE “discloses limited identifying information to a single contracted commercial data vendor on a routine basis” so that the vendor may conduct searches and return information to the National Criminal Analytics and Targeting Center.¹³ The National Criminal Analytics and Targeting Center also “provides alien names

⁴ According to the DHS Privacy Impact Assessment, the National Criminal Analysis and Targeting Center also uses “other technical and knowledge-based capabilities” to generate Information Referrals, but the Privacy Impact Assessment does not identify those capabilities. *Id.* at 2.

⁵ *Id.*

⁶ *Id.* at 1.

⁷ *Id.*

⁸ *Id.* at 8-9.

⁹ *Id.* at 2. The Privacy Impact Assessment includes the United States Post Office as one of the commercial vendors.

¹⁰ *Id.* at 2, 15.

¹¹ *Id.* at 15.

¹² *Id.*

¹³ *Id.*

and dates of birth”¹⁴ to the unnamed commercial data vendor on a weekly basis.¹⁵ The commercial data vendor then conducts searches within its systems using public sources to “identify and provide updated information” about the aliens, and then returns the results to the National Criminal Analytics and Targeting Center.¹⁶

DHS states that “the vendor’s use of the data is limited by the terms of the contract and subject to ICE security standards for the use and handling of sensitive PII.”¹⁷ But the contract and these standards are not publicly available. Furthermore, although DHS denies that **DAS** uses “technology that conducts electronic searches, or analyses to identify a predictive pattern or anomaly,” it does not indicate whether the “project”—including the unidentified commercial data vendor—otherwise use this technology when conducting its searches and providing results.¹⁸

The use of commercial vendors, external data sources, and private proprietary systems puts American citizens’ data at risk. Enforcement of immigration laws should not come at the expense of infringing on Americans’ privacy rights. The public should be informed about the data uploaded to DAS, the sources and inputs used to inform DAS’s immigration recommendations, and the procedures for handling the PII used by this system. For these reasons, the Brennan Center intends to share any information obtained from this request about the use of DAS with the public.

The Brennan Center is well-positioned as an expert in matters of national security and civil liberties to convey this information to a “reasonably broad audience of persons interested in the subject.” 28 C.F.R. § 16.10(k)(2)(ii)(B). The Brennan Center has published extensively on civil liberties and national security policy issues in the last decade, and in the last year, on issues around immigration and privacy,¹⁹ including blogs assessing DHS’s attempts to use sensitive PII from social media to predict national security threats from foreigners and to use data analytics tools to target travelers entering the United States.²⁰ The

¹⁴ *Id.* at 9.

¹⁵ *Id.* at 9, 14-15.

¹⁶ *Id.* at 14-15.

¹⁷ *Id.* at 15.

¹⁸ *Id.* at 11.

¹⁹ See, e.g. *ICE Extreme Vetting Initiative: A Resource Page*, BRENNAN CTR FOR JUSTICE, (Nov. 16, 2018), <https://www.brennancenter.org/analysis/ice-extreme-vetting-initiative-resource-page>) FAIZA Patel, *Trump Administration’s Fuzzy Math on Terrorist Origins is More than Misleading – It’s Dishonest*, JUST SECURITY (Jan. 16, 2018), <https://www.justsecurity.org/51084/trump-administrations-fuzzy-math-terrorist-origins-misleading-its-dishonest/>; HARSHA PANDURANGA, FAIZA PATEL, & MICHAEL W. PRICE, BRENNAN CENTER FOR JUSTICE, *EXTREME VETTING AND THE MUSLIM BAN* (2017); HARSHA PANDURANGA, FAIZA PATEL, & MICHAEL PRICE, BRENNAN CTR FOR JUSTICE, *EXTREME VETTING: MYTHS AND FACTS* (OCT. 11, 2017), available at <http://www.brennancenter.org/analysis/extreme-vetting-myths-and-facts>; Faiza Patel, *Extreme Vetting by Algorithm*, JUST SECURITY (Nov. 20, 2017), <https://www.justsecurity.org/47239/extreme-vetting-algorithm/>.

²⁰ Rachel Levinson-Waldman, *Why the Government Should Abandon Its Plan to Vet Foreigners On Facebook*, WASH. POST (Dec. 4, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/12/04/why-the-government-should-abandon-its-plan-to-vet-foreigners-on-facebook/?utm_term=.e12f0cb85969; Andrew Lindsay, *Trump’s ‘Extreme*

Brennan Center also played a leading role in advocating for ICE to scrap its efforts to build a data analytics tool to identify—using social media and other sources—travelers who may be detrimental to homeland security.²¹

II. Formal Request

In consideration of the information above, the Brennan Center seeks the following records pursuant to the listed agencies' obligations under FOIA and accompanying regulations:

1. All memoranda, policies, procedures, guidance, guidelines, training modules, and directives that reference DAS or that apply to the use or functioning of DAS.
2. Documents sufficient to identify the "Commercial Vendor" referenced in Section 2.3 of the September 2017 Privacy Impact Assessment (DHS/ICE DAS/PIA-048).
3. All records that constitute or contain agreements with outside agencies, private companies, and/or their respective employees about DAS, including, but not limited to, memoranda of understanding, statements of work, and purchase orders.
4. All communications (including email correspondence) with outside agencies, private companies and/or their respective employees about DAS.
5. All memoranda, policies, procedures, guidance, guidelines, training modules, and directives that apply to the datasets and data inputs used by the DAS or related systems, and that apply to the generation and use of "Information Referrals" as defined in the September 2017 Privacy Impact Assessment (DHS/ICE DAS/PIA-048).
6. All records that constitute or contain ICE's security and privacy standards for using PII.²²
7. All records that contain or constitute the results of testing or evaluations of DAS or the tools used by non-DHS entities, including, but not limited to, commercial vendors.

The Brennan Center requests that all records be provided electronically, in a text-searchable, static-image (PDF) format (in the best image quality available to the agency), pursuant to 5 U.S.C. § 552(a)(3)(A)(B) and (C).

Vetting' Could Criminalize Islam, HUFFPOST (Mar. 22, 2017), https://www.huffingtonpost.com/entry/trumps-extreme-vetting-could-criminalize-islam_us_58d2aaece4b02d33b747b398.

²¹ *ICE Abandons Efforts for Social Media Vetting Algorithm*, BRENNAN CTR. FOR JUSTICE (May 18, 2018), <https://www.brennancenter.org/press-release/ice-abandons-efforts-social-media-vetting-algorithm>.

²² This request includes drafts utilized for policy guidance so that they become the "working law" of the agency.

The Brennan Center requests the opportunity to meet and discuss the aforementioned requests, and – to the extent necessary – is amenable to narrowing the scope of the requests to ensure an expeditious response.

III. Application for Expedited Processing

The Brennan Center requests expedited processing pursuant to 5 U.S.C. 552(a)(6)(E) and 28 C.F.R. §§ 16.5(e)(1)(ii) and (iv). The Brennan Center has a “compelling need” for these records as there is “widespread and exceptional media interest in which there exist possible questions about the government’s integrity that affect public confidence.” 5 U.S.C. § 552(a)(6)(E); 28 C.F.R. § 16.5(e)(1)(ii); 28 C.F.R. § 16.5(e)(1)(iv).

The Brennan Center, a 501(c)(3) organization, regularly publishes reports on a wide range of U.S. policy issues, including counterterrorism and security. The Brennan Center has released over forty publications in the form of reports in the last four years. As such, the Brennan Center meets the definition of an organization that is “primarily engaged in disseminating information” under 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(e)(1)(ii).²³ Recently, the Brennan Center has published a report, several fact sheets, and multiple articles on the intersection of national security and immigration policy.²⁴ The Brennan Center regularly writes and publishes reports and newspaper articles and makes appearances on various media outlets, addressing U.S. policy on issues ranging from counterterrorism efforts to voting rights to campaign finance laws and beyond, and it will continue to do so for the foreseeable future.²⁵

The Brennan Center urgently needs access to this information to inform the public of federal government activity that concerns the general public interest. See 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(d)(1)(ii). The information requested herein concerns the federal government’s use of data collection and analytics tools. Many public interest and advocacy organizations are seeking greater clarity about the collection and analysis of data by federal immigration and border control agencies, such as ICE and the U.S. Customs and Border Protection.²⁶ In November 2017, more than 50 of these groups advocated for ICE to

²³ See also *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n. 5 (D.D.C. 2004) (quoting *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F.Supp. 2d 5, 11 (D.D.C. 2003)).

²⁴ See, e.g. HARSHA PANDURANGA, FAIZA PATEL, & MICHAEL W. PRICE, BRENNAN CENTER FOR JUSTICE, *EXTREME VETTING AND THE MUSLIM BAN* (2017); HARSHA PANDURANGA, FAIZA PATEL, & MICHAEL PRICE, BRENNAN CTR FOR JUSTICE, *EXTREME VETTING: MYTHS AND FACTS* (OCT. 11, 2017), available at <http://www.brennancenter.org/analysis/extreme-vetting-myths-and-facts>; Faiza Patel, *Extreme Vetting by Algorithm*, JUST SECURITY (Nov. 20, 2017), <https://www.justsecurity.org/47239/extreme-vetting-algorithm/>.

²⁵ *Commentary*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/commentary> (last visited July 17, 2017); *Analysis*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/analysis> (last visited July 17, 2017).

²⁶ See, e.g., Letter from Rachel Levinson-Waldman, Senior Counsel, Brennan Ctr. for Justice, et al., to U.S. Customs and Border Protection, et al., concerning Freedom of Information Act Request on Social Media Vetting Tools (Sept. 5, 2017), <https://www.brennancenter.org/sites/default/files/analysis/358280176-Brennan-Center-Files-FOIA-Request-for-Information-on-DHS-Social-Media-Screening-Software%20%281%29.pdf>; Letter from Hugh Handeyside, Nat’l Sec. Project, American Civil Liberties Union Foundation, and Matt Cagle, American Civil Liberties Union of Northern California, to Dep’t of Justice, Dep’t of Homeland Sec., et al., concerning Freedom of Information Act Request on Social Media Content (May 26, 2016),

end the Life Cycle Visa Initiative, a data analytics initiative targeting immigrants and foreign visitors.²⁷ ICE abandoned the project—which was built to automatically mine social media and other Internet sources for criminal or terrorist acts—six months later.²⁸ These organizations included the Brennan Center, ACLU, Center for Democracy and Technology, Leadership Conference on Civil and Human Rights, and National Hispanic Media Coalition.

Moreover, the Federal Agency Data Mining Reporting Act of 2007 (the “Act”), 42 U.S.C. § 2000ee-3, requires DHS to report annually to Congress on DHS’s activities that meet the Act’s definition of data mining or “a program involving pattern-based queries, searches, or other analyses of 1 or more electronic databases.”²⁹ The Act applies to both federal entities and non-federal entities acting on the government’s behalf. As noted above, DHS’s claim that DAS does not use electronic searches does not mean that the commercial sources using the data and providing Information Referrals do not use them. If commercial sources are using these searches, there may be a violation of the Act, which may affect the public’s confidence in the government’s integrity.

IV. Application for Waiver or Limitation of All Fees

The Brennan Center requests a waiver of all fees for document search, duplication, and review associated with this request. The Brennan Center is eligible for a waiver of fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. §§ 5.11(k)(1) and 5.11(d)(2), and pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 6 C.F.R. §§ 5.11(d) and (k).

The Brennan Center is eligible for a waiver of all fees, including duplication fees, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k) because it is a 501(c)(3) non-profit organization and does not seek the records requested herein for commercial use. Disclosure is not primarily in the Brennan Center’s commercial interests. *See* 6 C.F.R. § 5.11(k)(3). The Brennan Center intends to analyze, publish, and publicly disseminate the information requested to the public at no cost. A fee waiver would therefore fulfill Congress’s

https://www.aclunc.org/docs/20160526-aclu_foia_request.pdf; Letter from Ginger P. McCall, Associate Dir., Electronic Privacy Info. Ctr., to Sabrina Burroughs, FOIA Officer/Public Liason, concerning Freedom of Information Act Request on Analytical Framework for Intelligence (April 8, 2014),

<https://epic.org/foia/dhs/cbp/afi/18.2-CBP-MSJ-Ex-1.pdf>.

²⁷ Dave Gershgorin, *More Than 50 Experts Just Told DHS That Using AI for “Extreme Vetting” is Dangerously Misguided*, QUARTZ (Nov. 16, 2017), <https://qz.com/1131472/more-than-50-experts-just-told-dhs-that-using-ai-for-extreme-vetting-is-dangerously-misguided/>.

²⁸ Drew Harwell & Nick Miroff, *ICE Just Abandoned Its Dream of ‘Extreme Vetting’ Software That Could Predict Whether A Foreign Visitor Would Become A Terrorist*, WASH POST (May 17, 2017), https://www.washingtonpost.com/news/the-switch/wp/2018/05/17/ice-just-abandoned-its-dream-of-extreme-vetting-software-that-could-predict-whether-a-foreign-visitor-would-become-a-terrorist/?utm_term=.8762e4c625a7.

²⁹ DEP’T OF HOMELAND SEC., PRIVACY OFFICE: 2016 DATA MINING REPORT TO CONGRESS (April 2017), available at

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legislative intent that FOIA be “liberally construed in favor of waivers for noncommercial requesters.”³⁰

In addition, the subject of the requested records clearly concerns “the operations or activities of the federal government.” The request seeks records and information concerning federal government activity because the documents requested concern the federal government’s collection, processing, and use of PII. This connection to the federal government is “direct and clear, not remote or attenuated.” *See* 6 C.F.R. § 5.11(k)(2)(i). Disclosure of the requested records is in the public interest because it is likely to contribute significantly to public understanding of how the government is using PII, which directly impacts the public’s privacy rights. *See* 6 C.F.R. §§ 5.11(k)(2)(ii) and (iii). As there is a dearth of information currently available on the federal government’s collection, processing, and use of PII, disclosure of these records will significantly enhance the public’s understanding of this subject. *See* 6 C.F.R. § 5.11(k)(2)(iv).

In the alternative, the Brennan Center qualifies for a waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 6 C.F.R. §§ 5.11(d) and (k). As noted above, the Brennan Center does not seek the requested records for commercial use, and the Brennan Center is an institution covered by 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Brennan Center qualifies for waivers as an “educational institution” because it is affiliated with the NYU School of Law, which is plainly an educational institution under the definition provided in 6 C.F.R. § 5.11(d)(1).³¹

The Brennan Center also qualifies as a “representative of the news media” because it is “primarily engaged in dissemination of information”—i.e., it “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III).³² The Brennan Center has released over 100 publications in the form of reports and papers on various issues of public importance since January 2011.³³ The

³⁰ *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 CONG. REC. 27, 190 (1986) (Statement of Sen. Leahy)).

³¹ *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1383-85 (D.C. Cir. 1989); *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

³² *Id.* at 1381.

³³ *Cf. Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11-12 (finding that the Electronic Privacy Information Center was representative of the news media based on its publication of seven books about national and international policies relating to privacy and civil rights); *see also Nat’l Sec. Archive*, 880 F.2d at 1386 (deeming National Security Archive a representative of the news media after it published one book and indicated its intention to publish a set of documents on national and international politics and nuclear policy). For representative examples of the Brennan Center’s previous publications on issues of public concern, see Harsha Panduranga, Faiza Patel, and Michael Price, [Extreme Vetting & The Muslim Ban](https://www.brennancenter.org/sites/default/files/publications/extreme_vetting_full_10.2_0.pdf) (2017), available at https://www.brennancenter.org/sites/default/files/publications/extreme_vetting_full_10.2_0.pdf; Rachel Levinson-Waldman, [What the Government Does with Americans’ Data](https://www.brennancenter.org/sites/default/files/publications/Data%20Retention%20-%20FINAL.pdf) (2013), available at <https://www.brennancenter.org/sites/default/files/publications/Data%20Retention%20-%20FINAL.pdf>; Michael Price, [National Security and Local Police](https://www.brennancenter.org/sites/default/files/publications/NationalSecurity_LocalPolice_web.pdf) (2013), available at https://www.brennancenter.org/sites/default/files/publications/NationalSecurity_LocalPolice_web.pdf.

Brennan Center is therefore entitled to a waiver of search and review fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 6 C.F.R. §§ 5.11(d).

V. **Response Requested in 10 Days**

Your attention to this request is appreciated, and the Brennan Center will anticipate your determination regarding this request for expedited processing with ten (10) calendar days. 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(e)(4). I certify that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. 5 U.S.C. § 552(a)(6)(E)(vi); 28 C.F.R. 16.5(e)(3).

If you have any questions regarding this request, please contact me at your earliest convenience at the address above, by telephone at 212-389-5016, or by email at karaford@eversheds-sutherland.com.

Sincerely,



Kara D. Ford

November 5, 2018

Via Certified Mail and E-Mail

Catrina Pavlik-Keenan
U.S. Immigration and Customs Enforcement
500 12th Street, SW, Mail Stop 5009
Washington, D.C. 20536-5009
E-mail: ice-foia@dhs.gov

Re: FOIA and Request for Expedited Processing and Fee Waiver

Dear Sir/Madam:

Eversheds Sutherland (US) LLP represents the Brennan Center for Justice at NYU School of Law (the “Brennan Center”). This is a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Department of Justice regulations relating to requests for disclosure of records, 28 C.F.R. §§ 16.1 to 16.11. The Brennan Center seeks records related to the Data Analysis System (“DAS”) in use by the Department of Homeland Security (“DHS”). The Brennan Center also seeks expedited processing under 28 C.F.R. §§ 16.5(e)(1)(ii) and (iv) and requests a fee waiver under 6 C.F.R. §§ 5.11(d) and (k).

I. Background

According to DHS’s September 29, 2017 Privacy Impact Assessment,¹ the Data DAS is an analytical database that collects personally identifiable information (“PII”) and is maintained by Enforcement and Removal Operations, a subcomponent of U.S. Immigration and Customs Enforcement (“ICE”).² Within Enforcement and Removal Operations, the National Criminal Analytics and Targeting Center uses DAS to assist “field offices in locating aliens convicted of criminal offenses and other aliens who are amenable to removal.”³

¹ *DHS/ICE/PIA – 048 Data Analysis System (DAS)*, DEP’T OF HOMELAND SEC., <https://www.dhs.gov/publication/dhsicepia-048-data-analysis-system-das> (last visited Sept. 29, 2017).

² DEP’T OF HOMELAND SEC., *DHS/ICE DAS/PIA-048, PRIVACY IMPACT ASSESSMENT FOR THE DATA ANALYSIS SYSTEM (DAS) 1* (Sept. 29, 2017), available at <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-das-september2017.pdf>.

³ *Id.*

DAS generates leads known as “Information Referrals”⁴ by taking information from DHS and non-DHS sources that contain PII, including biographical information, immigration and criminal history, custody data, naturalization information, and vehicle and insurance information.⁵ According to the Privacy Impact Assessment, the DHS sources used by DAS include ICE’s Enforcement Integrated Database, U.S. Citizenship and Immigration Services (“USCIS”) Computer Linked Application Information Management System 3, and USCIS’s Central Index System, among other DHS systems.⁶ The non-DHS sources used by DAS include the Federal Bureau of Prisons SENTRY System, the Federal Bureau of Investigation Interstate Identification Index, and the California Department of Corrections and Rehabilitation Strategic Offender Management System.⁷ In addition, the Privacy Impact Assessment references “two commercial sources”⁸ used by DAS—(i) the United States Post Office; and (ii) an unnamed commercial source.⁹

Based on the information in the Privacy Impact Assessment and other publicly available information about DAS, DAS may collect and analyze American citizens’ PII without providing proper privacy protection. For example, the Privacy Impact Assessment notes that although data within DAS is “primarily about aliens,” “information about U.S. citizens may be included in some datasets,” and DAS uses datasets that “will include information on U.S. citizens.”¹⁰ The Privacy Impact Assessment does not elaborate on whether and what policies exist to protect the Americans’ data that may be housed in federal databases. It simply concludes that “privacy risks are sufficiently mitigated” because DAS only has a three-year retention period for the datasets.¹¹

This data, including the PII of American citizens, may be shared with other DHS components and with “certain federal and international government agencies for the purpose of safeguarding national security.”¹² The Privacy Impact Assessment does not explain what circumstances would require safeguarding a national security interest and would justify disseminating PII.

In addition, DAS may disseminate PII of American citizens to third parties. The Privacy Impact Assessment provides that ICE “discloses limited identifying information to a single contracted commercial data vendor on a routine basis” so that the vendor may conduct searches and return information to the National Criminal Analytics and Targeting Center.¹³ The National Criminal Analytics and Targeting Center also “provides alien names

⁴ According to the DHS Privacy Impact Assessment, the National Criminal Analysis and Targeting Center also uses “other technical and knowledge-based capabilities” to generate Information Referrals, but the Privacy Impact Assessment does not identify those capabilities. *Id.* at 2.

⁵ *Id.*

⁶ *Id.* at 1.

⁷ *Id.*

⁸ *Id.* at 8-9.

⁹ *Id.* at 2. The Privacy Impact Assessment includes the United States Post Office as one of the commercial vendors.

¹⁰ *Id.* at 2, 15.

¹¹ *Id.* at 15.

¹² *Id.*

¹³ *Id.*

and dates of birth”¹⁴ to the unnamed commercial data vendor on a weekly basis.¹⁵ The commercial data vendor then conducts searches within its systems using public sources to “identify and provide updated information” about the aliens, and then returns the results to the National Criminal Analytics and Targeting Center.¹⁶

DHS states that “the vendor’s use of the data is limited by the terms of the contract and subject to ICE security standards for the use and handling of sensitive PII.”¹⁷ But the contract and these standards are not publicly available. Furthermore, although DHS denies that **DAS** uses “technology that conducts electronic searches, or analyses to identify a predictive pattern or anomaly,” it does not indicate whether the “project”—including the unidentified commercial data vendor—otherwise use this technology when conducting its searches and providing results.¹⁸

The use of commercial vendors, external data sources, and private proprietary systems puts American citizens’ data at risk. Enforcement of immigration laws should not come at the expense of infringing on Americans’ privacy rights. The public should be informed about the data uploaded to DAS, the sources and inputs used to inform DAS’s immigration recommendations, and the procedures for handling the PII used by this system. For these reasons, the Brennan Center intends to share any information obtained from this request about the use of DAS with the public.

The Brennan Center is well-positioned as an expert in matters of national security and civil liberties to convey this information to a “reasonably broad audience of persons interested in the subject.” 28 C.F.R. § 16.10(k)(2)(ii)(B). The Brennan Center has published extensively on civil liberties and national security policy issues in the last decade, and in the last year, on issues around immigration and privacy,¹⁹ including blogs assessing DHS’s attempts to use sensitive PII from social media to predict national security threats from foreigners and to use data analytics tools to target travelers entering the United States.²⁰ The

¹⁴ *Id.* at 9.

¹⁵ *Id.* at 9, 14-15.

¹⁶ *Id.* at 14-15.

¹⁷ *Id.* at 15.

¹⁸ *Id.* at 11.

¹⁹ See, e.g. *ICE Extreme Vetting Initiative: A Resource Page*, BRENNAN CTR FOR JUSTICE, (Nov. 16, 2018), <https://www.brennancenter.org/analysis/ice-extreme-vetting-initiative-resource-page>) FAIZA Patel, *Trump Administration’s Fuzzy Math on Terrorist Origins is More than Misleading – It’s Dishonest*, JUST SECURITY (Jan. 16, 2018), <https://www.justsecurity.org/51084/trump-administrations-fuzzy-math-terrorist-origins-misleading-its-dishonest/>; HARSHA PANDURANGA, FAIZA PATEL, & MICHAEL W. PRICE, BRENNAN CENTER FOR JUSTICE, *EXTREME VETTING AND THE MUSLIM BAN* (2017); HARSHA PANDURANGA, FAIZA PATEL, & MICHAEL PRICE, BRENNAN CTR FOR JUSTICE, *EXTREME VETTING: MYTHS AND FACTS* (OCT. 11, 2017), available at <http://www.brennancenter.org/analysis/extreme-vetting-myths-and-facts>; Faiza Patel, *Extreme Vetting by Algorithm*, JUST SECURITY (Nov. 20, 2017), <https://www.justsecurity.org/47239/extreme-vetting-algorithm/>.

²⁰ Rachel Levinson-Waldman, *Why the Government Should Abandon Its Plan to Vet Foreigners On Facebook*, WASH. POST (Dec. 4, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/12/04/why-the-government-should-abandon-its-plan-to-vet-foreigners-on-facebook/?utm_term=.e12f0cb85969; Andrew Lindsay, *Trump’s ‘Extreme*

Brennan Center also played a leading role in advocating for ICE to scrap its efforts to build a data analytics tool to identify—using social media and other sources—travelers who may be detrimental to homeland security.²¹

II. Formal Request

In consideration of the information above, the Brennan Center seeks the following records pursuant to the listed agencies' obligations under FOIA and accompanying regulations:

1. All memoranda, policies, procedures, guidance, guidelines, training modules, and directives that reference DAS or that apply to the use or functioning of DAS.
2. Documents sufficient to identify the “Commercial Vendor” referenced in Section 2.3 of the September 2017 Privacy Impact Assessment (DHS/ICE DAS/PIA-048).
3. All records that constitute or contain agreements with outside agencies, private companies, and/or their respective employees about DAS, including, but not limited to, memoranda of understanding, statements of work, and purchase orders.
4. All communications (including email correspondence) with outside agencies, private companies and/or their respective employees about DAS.
5. All memoranda, policies, procedures, guidance, guidelines, training modules, and directives that apply to the datasets and data inputs used by the DAS or related systems, and that apply to the generation and use of “Information Referrals” as defined in the September 2017 Privacy Impact Assessment (DHS/ICE DAS/PIA-048).
6. All records that constitute or contain ICE’s security and privacy standards for using PII.²²
7. All records that contain or constitute the results of testing or evaluations of DAS or the tools used by non-DHS entities, including, but not limited to, commercial vendors.

The Brennan Center requests that all records be provided electronically, in a text-searchable, static-image (PDF) format (in the best image quality available to the agency), pursuant to 5 U.S.C. § 552(a)(3)(A)(B) and (C).

Vetting’ Could Criminalize Islam, HUFFPOST (Mar. 22, 2017), https://www.huffingtonpost.com/entry/trumps-extreme-vetting-could-criminalize-islam_us_58d2aaece4b02d33b747b398.

²¹ *ICE Abandons Efforts for Social Media Vetting Algorithm*, BRENNAN CTR. FOR JUSTICE (May 18, 2018), <https://www.brennancenter.org/press-release/ice-abandons-efforts-social-media-vetting-algorithm>.

²² This request includes drafts utilized for policy guidance so that they become the “working law” of the agency.

The Brennan Center requests the opportunity to meet and discuss the aforementioned requests, and – to the extent necessary – is amenable to narrowing the scope of the requests to ensure an expeditious response.

III. Application for Expedited Processing

The Brennan Center requests expedited processing pursuant to 5 U.S.C. 552(a)(6)(E) and 28 C.F.R. §§ 16.5(e)(1)(ii) and (iv). The Brennan Center has a “compelling need” for these records as there is “widespread and exceptional media interest in which there exist possible questions about the government’s integrity that affect public confidence.” 5 U.S.C. § 552(a)(6)(E); 28 C.F.R. § 16.5(e)(1)(ii); 28 C.F.R. § 16.5(e)(1)(iv).

The Brennan Center, a 501(c)(3) organization, regularly publishes reports on a wide range of U.S. policy issues, including counterterrorism and security. The Brennan Center has released over forty publications in the form of reports in the last four years. As such, the Brennan Center meets the definition of an organization that is “primarily engaged in disseminating information” under 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(e)(1)(ii).²³ Recently, the Brennan Center has published a report, several fact sheets, and multiple articles on the intersection of national security and immigration policy.²⁴ The Brennan Center regularly writes and publishes reports and newspaper articles and makes appearances on various media outlets, addressing U.S. policy on issues ranging from counterterrorism efforts to voting rights to campaign finance laws and beyond, and it will continue to do so for the foreseeable future.²⁵

The Brennan Center urgently needs access to this information to inform the public of federal government activity that concerns the general public interest. See 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(d)(1)(ii). The information requested herein concerns the federal government’s use of data collection and analytics tools. Many public interest and advocacy organizations are seeking greater clarity about the collection and analysis of data by federal immigration and border control agencies, such as ICE and the U.S. Customs and Border Protection.²⁶ In November 2017, more than 50 of these groups advocated for ICE to

²³ See also *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n. 5 (D.D.C. 2004) (quoting *Elec. Privacy Info. Ctr. V. Dep’t of Def.*, 241 F.Supp. 2d 5, 11 (D.D.C. 2003)).

²⁴ See, e.g. HARSHA PANDURANGA, FAIZA PATEL, & MICHAEL W. PRICE, BRENNAN CENTER FOR JUSTICE, *EXTREME VETTING AND THE MUSLIM BAN* (2017); HARSHA PANDURANGA, FAIZA PATEL, & MICHAEL PRICE, BRENNAN CTR FOR JUSTICE, *EXTREME VETTING: MYTHS AND FACTS* (OCT. 11, 2017), available at <http://www.brennancenter.org/analysis/extreme-vetting-myths-and-facts>; Faiza Patel, *Extreme Vetting by Algorithm*, JUST SECURITY (Nov. 20, 2017), <https://www.justsecurity.org/47239/extreme-vetting-algorithm/>.

²⁵ *Commentary*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/commentary> (last visited July 17, 2017); *Analysis*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/analysis> (last visited July 17, 2017).

²⁶ See, e.g., Letter from Rachel Levinson-Waldman, Senior Counsel, Brennan Ctr. for Justice, et al., to U.S. Customs and Border Protection, et al., concerning Freedom of Information Act Request on Social Media Vetting Tools (Sept. 5, 2017), <https://www.brennancenter.org/sites/default/files/analysis/358280176-Brennan-Center-Files-FOIA-Request-for-Information-on-DHS-Social-Media-Screening-Software%20%281%29.pdf>; Letter from Hugh Handeyside, Nat’l Sec. Project, American Civil Liberties Union Foundation, and Matt Cagle, American Civil Liberties Union of Northern California, to Dep’t of Justice, Dep’t of Homeland Sec., et al., concerning Freedom of Information Act Request on Social Media Content (May 26, 2016),

end the Life Cycle Visa Initiative, a data analytics initiative targeting immigrants and foreign visitors.²⁷ ICE abandoned the project—which was built to automatically mine social media and other Internet sources for criminal or terrorist acts—six months later.²⁸ These organizations included the Brennan Center, ACLU, Center for Democracy and Technology, Leadership Conference on Civil and Human Rights, and National Hispanic Media Coalition.

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²⁸ Drew Harwell & Nick Miroff, *ICE Just Abandoned It’s Dream of ‘Extreme Vetting’ Software That Could Predict Whether A Foreign Visitor Would Become A Terrorist*, WASH POST (May 17, 2017), https://www.washingtonpost.com/news/the-switch/wp/2018/05/17/ice-just-abandoned-its-dream-of-extreme-vetting-software-that-could-predict-whether-a-foreign-visitor-would-become-a-terrorist/?utm_term=.8762e4c625a7.

²⁹ DEP’T OF HOMELAND SEC., PRIVACY OFFICE: 2016 DATA MINING REPORT TO CONGRESS (April 2017), available at

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legislative intent that FOIA be “liberally construed in favor of waivers for noncommercial requesters.”³⁰

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³¹ *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1383-85 (D.C. Cir. 1989); *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

³² *Id.* at 1381.

³³ *Cf. Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11-12 (finding that the Electronic Privacy Information Center was representative of the news media based on its publication of seven books about national and international policies relating to privacy and civil rights); *see also Nat’l Sec. Archive*, 880 F.2d at 1386 (deeming National Security Archive a representative of the news media after it published one book and indicated its intention to publish a set of documents on national and international politics and nuclear policy). For representative examples of the Brennan Center’s previous publications on issues of public concern, see Harsha Panduranga, Faiza Patel, and Michael Price, [Extreme Vetting & The Muslim Ban](https://www.brennancenter.org/sites/default/files/publications/extreme_vetting_full_10.2_0.pdf) (2017), available at https://www.brennancenter.org/sites/default/files/publications/extreme_vetting_full_10.2_0.pdf; Rachel Levinson-Waldman, [What the Government Does with Americans’ Data](https://www.brennancenter.org/sites/default/files/publications/Data%20Retention%20-%20FINAL.pdf) (2013), available at <https://www.brennancenter.org/sites/default/files/publications/Data%20Retention%20-%20FINAL.pdf>; Michael Price, [National Security and Local Police](https://www.brennancenter.org/sites/default/files/publications/NationalSecurity_LocalPolice_web.pdf) (2013), available at https://www.brennancenter.org/sites/default/files/publications/NationalSecurity_LocalPolice_web.pdf.

Brennan Center is therefore entitled to a waiver of search and review fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 6 C.F.R. §§ 5.11(d).

V. **Response Requested in 10 Days**

Your attention to this request is appreciated, and the Brennan Center will anticipate your determination regarding this request for expedited processing with ten (10) calendar days. 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(e)(4). I certify that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. 5 U.S.C. § 552(a)(6)(E)(vi); 28 C.F.R. 16.5(e)(3).

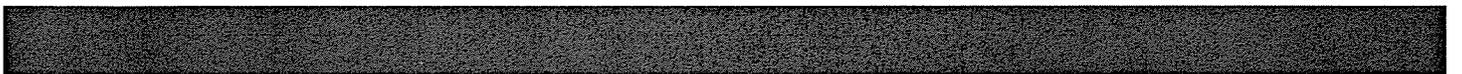
If you have any questions regarding this request, please contact me at your earliest convenience at the address above, by telephone at 212-389-5016, or by email at karaford@eversheds-sutherland.com.

Sincerely,



Kara D. Ford

EXHIBIT D



Pinzur, Caren

From: Gordon, Andrea
Sent: Wednesday, July 17, 2019 12:16 PM
To: Toni.Fuentes@ice.dhs.gov
Cc: Ford, Kara; ICE-FOIA@dhs.gov; Rachel Levinson-Waldman; Greathead, Scott; Noland, Rich; Sand, Alexander
Subject: Brennan Center - NARA and DAS FOIA Requests
Attachments: ICE Clarification Request FOIA Number 2019-ICFO-44628; ICE Clarification Request FOIA Number 2019-ICFO-44618

Dear Ms. Fuentes,

We are writing to follow up on the Brennan Center's November 5, 2018 FOIA requests for ICE records related to NARA and DAS. As you may recall, we spoke on December 13, 2018 and significantly narrowed our requests.

On July 2, 2019, we received the attached ICE clarification requests for FOIA Requests 2019-ICFO-44628 and 2019-ICFO-44618. The letters indicate that the FOIA requests are "too broad in scope." It is our understanding that these letters are in response to requests that DHS's FOIA office transferred to ICE on June 17, 2019. Those requests do not include the modifications discussed on our December 2018 call.

At your earliest convenience, we would like to request a call to discuss the status of the Brennan Center's November 2, 2018 FOIA requests – as modified by our December 13, 2018 call – and to confirm that the July 2, 2019 clarification letters do not relate to the Brennan Center's initial FOIA requests to ICE. Please let us know your availability.

We appreciate your time,

Andrea

Andrea Gordon | Associate | Eversheds Sutherland (US) LLP

T: +1.202.383.0955

[Biography](#) | [vCard](#)

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