

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRENNAN CENTER FOR JUSTICE
AT THE NEW YORK UNIVERSITY SCHOOL OF LAW,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND
SECURITY, UNITED STATES CUSTOMS AND
BORDER PROTECTION, and UNITED STATES
IMMIGRATION AND CUSTOMS ENFORCEMENT,

Defendants.

No. 1:20-cv-00427

COMPLAINT

Plaintiff Brennan Center for Justice at the New York University School of Law (the “Brennan Center”) hereby complains as follows against Defendants the United States Department of Homeland Security (“DHS”), United States Customs and Border Protection (“CBP”), and United States Immigration and Customs Enforcement (“ICE”):

INTRODUCTION

1. This is an action for the production of public records and injunctive relief pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.

2. On November 5, 2018, the Brennan Center sent separate and substantively identical FOIA requests to Defendants DHS and ICE seeking records related to the Data Analysis System (“DAS”) in use by ICE and contributed to by DHS and at least two of its agency components (the “DAS Requests”).

3. Also on November 5, 2018, the Brennan Center sent separate and substantively identical FOIA requests to Defendants DHS, ICE, and CBP seeking records named and described in a Request for Records Disposition Authority submitted by ICE to the National Archives and Records Administration (“NARA”) in January 2017 (the “NARA Requests” and, together with the DAS Requests, “the FOIA Requests”).

4. The Brennan Center sought expedited processing for each and every one of these FOIA record requests under 6 C.F.R. §§ 5.5(e)(1)(ii) and (iii) and requested fee waivers under 6 C.F.R. §§ 5.11(d) and (k).

5. To date, none of the Defendants has released any records responsive to the DAS Requests or the NARA Requests.

6. Plaintiff has exhausted its administrative remedies to enforce the FOIA Requests and seeks relief from this Court as a last resort to obtain information that should be publicly available.

PARTIES

7. Plaintiff 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 40 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). Recently, the Brennan Center has published a report, several fact sheets, and multiple articles on the intersection of national security and immigration policy.¹

¹ See, e.g., *Social Media Surveillance by Homeland Security Investigations: A Threat to Immigrant Communities and Free Expression*, Brennan Ctr. for Justice (2019), <https://www.brennancenter.org/our-work/research-reports/social-media-surveillance-homeland->

8. The Brennan Center regularly writes and publishes reports and newspaper articles and appears 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.

9. Defendant DHS is an “agency” within the meaning of 5 U.S.C. § 552(f).

10. Defendants CBP and ICE are components of DHS and thus similarly qualify under the meaning of 5 U.S.C. § 552(f).

11. DHS, CBP, and/or ICE have possession and control over some or all of the requested records.

JURISDICTION AND VENUE

12. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

13. Venue is appropriate in this District under 5 U.S.C. § 552(a)(4)(B).

security-investigations-threat; Raya Koreh, *Border Agents’ Secret Facebook Group Highlights Social Media Vetting Risks for Immigrants*, Brennan Ctr. for Justice (2019), <https://www.brennancenter.org/our-work/analysis-opinion/border-agents-secret-facebook-group-highlights-social-media-vetting-risks>; Faiza Patel, *Stop Collecting Immigrants’ Social Media Data*, Brennan Ctr. for Justice (2019), <https://www.brennancenter.org/our-work/analysis-opinion/stop-collecting-immigrants-social-media-data>; Tim Lau, *Flawed Terrorism Report Shows Administration’s Skewed Priorities*, Brennan Ctr. for Justice (2019), <https://www.brennancenter.org/our-work/analysis-opinion/flawed-terrorism-report-shows-administrations-skewed-priorities>; Rachel Levinson-Waldman, *How ICE and Other DHS Agencies Mine Social Media in the Name of National Security*, Brennan Ctr. for Justice (2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-ice-and-other-dhs-agencies-mine-social-media-name-national-security>; Harsha Panduranga, *Social Media Vetting of Visa Applicants Violates the First Amendment*, Brennan Ctr. for Justice (2019), <https://www.brennancenter.org/our-work/analysis-opinion/social-media-vetting-visa-applicants-violates-first-amendment>; Faiza Patel et al., *Social Media Monitoring*, Brennan Ctr. for Justice (2019), <https://www.brennancenter.org/our-work/research-reports/social-media-monitoring>.

BACKGROUND

14. Based on publicly available information, DHS and its components appear to dedicate considerable time and resources to expanding data collection initiatives. Although DHS releases compliance documents like Privacy Impact Assessments (“PIA”) and Systems of Records Notices that refer to such initiatives, the publicly available documents do not provide a comprehensive understanding of DHS’s data collection and privacy policies. There is little transparency about DHS’s collection and use of personal information, DHS’s rules on the sharing and disclosure of such information, and DHS’s process for ensuring compliance with privacy guidelines.

15. Records responsive to the FOIA Requests would provide the public the details necessary to evaluate the lawfulness and effectiveness of DHS’s information collection practices, including its recent attempts to automate social media vetting—an issue with potentially significant consequences for Americans’ privacy.²

The Data Analysis System (“DAS”) Records

16. According to DHS’s September 29, 2017 PIA,³ DAS is an analytical database that collects personally identifiable information (“PII”) and is maintained by Enforcement and Removal Operations, a subcomponent of ICE.⁴ Within Enforcement and Removal Operations, the

² See Office of Inspector Gen., Dep’t of Homeland Sec., *DHS’ Pilots for Social Media Screening Need Increased Rigor to Ensure Scalability and Long-Term Success*, OIG-17-40 (Feb. 27, 2017), <https://web.archive.org/web/20170311201529/https://www.oig.dhs.gov/assets/Mgmt/2017/OIG-17-40-Feb17.pdf>; Jake Laperruque, *ICE Backs Down on “Extreme Vetting” Automated Social Media Scanning*, Project on Gov’t Oversight (May 23, 2018), <http://www.pogo.org/blog/2018/05/ice-backs-down-on-extreme-vetting-automated-social-media-scanning.html>.

³ Dep’t of Homeland Sec., DHS/ICE DAS/PIA-048, Privacy Impact Assessment for the Data Analysis System (DAS) (Sept. 29, 2017), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-das-september2017.pdf>.

⁴ *Id.* at 1.

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.”⁵

17. DAS generates leads known as “Information Referrals” by taking information that contains PII, including biographical information, immigration and criminal history, custody data, naturalization information, and vehicle and insurance information, from DHS and non-DHS sources.⁶

18. According to the September 29, 2017 PIA, the DHS sources used by DAS include ICE’s Enforcement Integrated Database, the Computer Linked Application Information Management System 3 utilized by DHS component U.S. Citizenship and Immigration Services (“USCIS”), and USCIS’s Central Index System, among other DHS systems.⁷ The non-DHS sources used by DAS include the Federal Bureau of Prisons’ SENTRY System, the Federal Bureau of Investigation’s Interstate Identification Index, and the California Department of Corrections and Rehabilitation’s Strategic Offender Management System.⁸ In addition, the September 29, 2017 PIA references “two commercial sources” used by DAS: (i) the United States Post Office and (ii) an unnamed commercial source.⁹

19. Based on the September 29, 2017 PIA, it appears that DAS may be collecting and analyzing American citizens’ PII without providing adequate privacy protections. The September 29, 2017 PIA notes that although data within DAS is “primarily about aliens ... information about

⁵ *Id.*

⁶ *Id.* at 2. 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 PIA does not identify those capabilities. *Id.* at 1.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 8-9.

U.S. citizens may be included in some datasets.”¹⁰ The September 29, 2017 PIA further notes that DAS uses datasets that “*will* include information on U.S. citizens.”¹¹ The PIA does *not* explain, however, whether policies exist to protect the data of American citizens that is 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.¹²

20. Alarming, 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.”¹³ The September 29, 2017 PIA does not explain what circumstances would require safeguarding a national security interest and would justify disseminating PII, or if any objective relevant standard for determining what qualifies as a national security interest exists whatsoever.

21. Perhaps even more concerning to the public, the September 29, 2017 PIA points out that DHS may disseminate PII of American citizens to private, undisclosed third parties. Specifically, 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.¹⁴ The National Criminal Analytics and Targeting Center also “provides alien names and dates of birth” to the unnamed commercial data vendor on a weekly basis.¹⁵ The commercial data vendor then conducts searches within its systems

¹⁰ *Id.* at 2.

¹¹ *Id.* at 2, 15 (emphasis added).

¹² *Id.* at 15.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 9, 14-15.

using public sources to “identify and provide updated information” about the aliens, and returns the results to the National Criminal Analytics and Targeting Center.¹⁶

22. 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, queries, or analyses to identify a predictive pattern or anomaly,”¹⁸ DHS does *not* indicate whether the project otherwise uses this technology when conducting its searches and providing results.

23. 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.

24. On November 5, 2018, the Brennan Center served the DAS Requests on DHS and ICE in order to bring these issues to light.

25. The DAS Request sought the following records:¹⁹

- a. All memoranda, policies, procedures, guidance, guidelines, training modules, and directives that reference DAS or that apply to the use or functioning of DAS.
- b. Documents sufficient to identify the “Commercial Vendor” referenced in Section 2.3 of the September 2017 Privacy Impact Assessment (DHS/ICE DAS/PIA-048).
- c. 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.

¹⁶ *Id.*

¹⁷ *Id.* at 15.

¹⁸ *Id.* at 11.

¹⁹ True and correct copies of the DAS Requests are attached hereto as Exhibit A.

- d. All communications (including email correspondence) with outside agencies, private companies and/or their respective employees about DAS.
 - e. 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).
 - f. All records that constitute or contain ICE’s security and privacy standards for using PII.²⁰
 - g. 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.
26. The Brennan Center intends to share with the public any information obtained from the DAS Requests.

The National Archive and Records Administration (“NARA”) Records

27. In January 2017, ICE submitted a request to NARA for records disposition authority for eleven categories of records (“NARA Submission”).²¹ The NARA Submission named and described the use, retention period, and disposition status of these records, but the records themselves were not made public.

28. Specifically, the NARA Submission named the following categories of records maintained by DHS and its components, including those relating to DHS policies on individuals’ privacy rights and the collection, tracking, and analysis of individuals’ social media use: (1) Privacy Complaint Files; (2) Compliance Review Files; (3) Disclosure Advice Records; (4)

²⁰ This request includes drafts utilized for policy guidance so that they become the “working law” of the agency.

²¹ Nat’l Archives and Records Administration, DAA-0567-2016-0002, Request for Records Disposition Authority (PDF created on Jan. 4, 2017), https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-homeland-security/rg-0567/daa-0567-2016-0002_sf115.pdf.

Rulemaking Files; (5) Requests for System Waivers and Exceptions; (6) Information Sharing Agreement Files; (7) Testing Questionnaire Files; (8) Investment Reviews; (9) Social Media Operational Use Template; (10) Data Access Request Analysis; and (11) Overdue A-File FOIA Request Report.²²

29. The NARA Submission related to ICE's Information Management Compliance Records, including ICE policies on conduction of the Privacy Act. Ten of the categories set forth in the NARA Submission appear to include records critical to the enforcement of Defendants' data collection and privacy policies.²³ One of these categories—Social Media Operational Use Template (“SMOUT”)—governs the collection and use of social media data and appears to be used by several DHS components, including CBP.²⁴

30. As a result, through the NARA Requests, the Brennan Center sought the release of documents pertaining to DHS's data collection and privacy policies.

31. On November 5, 2018, Plaintiff sent substantively identical FOIA requests to DHS, ICE, and CBP for the following records related to the NARA Submission:²⁵

- a. All records created since January 1, 2015 that contain or constitute “Privacy Complaint Files” as referenced in the NARA Submission (DAA-0567-2016-0002) dated January 4, 2017.
- b. All records created since January 1, 2015 that contain or constitute “Compliance Review Files” as referenced in the NARA Submission (DAA-0567-2016-0002) dated January 4, 2017.

²² *Id.*

²³ *Id.* Plaintiffs did not request records in the eleventh category, Overdue A-File FOIA Request Report, except to the extent that they related to the first ten categories.

²⁴ *Id.* at 7; *see also* CBP Smout: <https://www.brennancenter.org/sites/default/files/analysis/FOIA-CBP%20Social%20Media%20Use%20Template.pdf#page=3>; Customs and Border Protection, *DHS Operational Use of Social Media*, July 24, 2012, <https://www.brennancenter.org/sites/default/files/analysis/FOIA-CBP%20Social%20Media%20Use%20Template.pdf>.

²⁵ True and correct copies of the NARA Requests are attached hereto as Exhibit B.

- c. All records created since January 1, 2015 that contain or constitute “Disclosure Advice Records” as referenced in the NARA Submission (DAA-0567-2016-0002) dated January 4, 2017.
 - d. All records created since January 1, 2015 that contain or constitute “Rulemaking Files” as referenced in the NARA Submission (DAA-0567-2016-0002) dated January 4, 2017.
 - e. All records created since January 1, 2015 that contain or constitute “Requests for System Waivers and Exceptions” as referenced in the NARA Submission (DAA-0567-2016-0002) dated January 4, 2017.
 - f. All records created since January 1, 2015 that contain or constitute “Information Sharing Agreement Files” as referenced in the NARA Submission (DAA-0567-2016-0002) dated January 4, 2017.
 - g. All records created since January 1, 2015 that contain or constitute “Testing Questionnaire Files” as referenced in the NARA Submission (DAA-0567-2016-0002) dated January 4, 2017.
 - h. All records created since January 1, 2015 that contain or constitute “Investment Reviews” as referenced in the NARA Submission (DAA-0567-2016-0002) dated January 4, 2017.
 - i. All records, including but not limited to, memoranda, policies, procedures, guidance, guidelines, training modules, and directives, that constitute or apply to the use of Social Media Operational Use Templates, SMOUT, or Templates used by DHS, including by components CBP, ICE, or USCIS.
 - j. All records that contain, constitute, or reference “Rules of Behavior” submitted pursuant to a SMOUT used by CBP, ICE, or USCIS.
 - k. All versions, including draft versions, of the SMOUT or Template from July 24, 2012 through November 2, 2018.
 - l. All versions, including draft versions, of the DHS Management Directive 110-01, Privacy Policy for Operational Use of Social Media.
 - m. All records created since January 1, 2015 that contain or constitute “Data Access Request Analysis” or “DARA” as referenced in the NARA Submission (DAA-0567-2016-0002) dated January 4, 2017.
32. The Brennan Center intends to share with the public any information obtained from the NARA Requests.

AGENCY RESPONSES

Defendant DHS

33. On June 17, 2019, DHS informed Plaintiff by letter that DHS had referred the DAS Requests and the NARA Requests to the ICE FOIA Office (the “DHS Responses”). In these letters, DHS assigned the DAS request tracking number 2019-HQFO-00825 and the NARA request tracking number 2019-HQFO-00826. Emails transmitting the letters from the DHS Privacy Office to counsel for Plaintiff stated that the transfers to ICE would be DHS’s final responses to Plaintiff’s requests.

Defendant ICE

34. ICE did not send any written acknowledgement of the DAS Requests or the NARA Requests. Thus, the Brennan Center does not have relevant tracking numbers.

35. Nonetheless, a FOIA officer from ICE contacted counsel for Plaintiff in December 2018. Plaintiff then spoke with the ICE FOIA officer on the phone ostensibly to reasonably narrow the ICE requests, with the understanding that responses from ICE would be forthcoming. Unfortunately, ICE has failed to respond in any fashion, or to continue discussions to narrow the request, despite subsequent attempts by Plaintiff to contact the ICE FOIA officer.

36. On July 2, 2019, ICE sent two emails to Plaintiff regarding the two transferred DHS requests, referenced above. These emails assigned new tracking numbers of 2019-ICFO-44618 for the ICE DAS Request and 2019-ICFO-44628 for the ICE NARA Request. In both emails, the ICE FOIA officer stated that ICE had determined that the requests were too broad in scope, did not specifically identify the records sought, or only posed questions to the agency. The emails asked Plaintiff to resubmit its request “containing a reasonable description of the records” sought.

37. The July 2, 2019 emails further stated that “[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.”

38. On July 17, 2019, within the 30-day deadline set forth in ICE’s July 2, 2019 emails, Plaintiff sent an email to the ICE FOIA Office asking to discuss clarifications to the DAS and NARA FOIA requests originally sent to DHS. In addition, Plaintiff stated its understanding that the July 2, 2019 ICE Responses related only to the transferred DHS requests and did not relate to the requests originally set to ICE.

39. ICE did not respond to Plaintiff’s July 17, 2019 email and has not provided any documents responsive to the original ICE FOIA requests or to the transferred DHS FOIA requests.

40. On October 15, 2019, Plaintiff submitted a Point of Contact Change notice to the ICE FOIA office in regards to 2019-ICFO-44618 and 2019-ICFO-44628.

41. On October 18, 2019, the ICE FOIA Office responded to the Point of Contact Change notice by email, stating that ICE had administratively closed 2019-ICFO-44618 and 2019-ICFO-44628 because ICE claimed that it did not receive the clarification it needed to proceed with the requests. ICE’s email did not acknowledge Plaintiff’s July 17, 2019 email asking to discuss clarifications to the FOIA requests.

Defendant CBP

42. On December 4, 2018, CBP sent Plaintiff an email issuing tracking number CBP-2019-015055 for the CBP NARA Request.

43. On July 22, 2019, CBP sent Plaintiff an email changing the tracking number for the CBP NARA Request to CBP-OT-2019-015055.

44. CBP has not made any further response to Plaintiff's NARA Request and has not provided any responsive documents.

ADMINISTRATIVE APPEALS

45. On October 15, 2019, the Brennan Center sent administrative appeals to DHS and ICE requesting that the DHS Responses and the ICE Responses be reversed and that all documents within the scope of the DAS Requests and NARA Requests be disclosed.

46. Pursuant to 6 C.F.R. § 5.8(a)(1), these administrative appeals were timely submitted within 90 working days of the DHS Responses and the ICE Responses.

47. Specifically, in the DAS administrative appeal, the Brennan Center appealed (1) DHS's failure 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, (2) ICE's failure to establish an adequate basis for the nondisclosure of responsive documents, and (3) ICE's failure to establish the adequacy of its search.

48. Similarly, in the NARA Request administrative appeal, the Brennan Center appealed (1) DHS's failure 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, (2) ICE's failure to establish an adequate basis for the nondisclosure of responsive documents, and (3) ICE's failure to establish the adequacy of its search.

49. Neither ICE nor DHS responded to the administrative appeals within the 20 working day statutory deadline. 5 U.S.C. § 552(a)(6)(A)(ii).

CLAIMS FOR RELIEF

Count I

Violation of FOIA 5 U.S.C. § 552

50. Plaintiff repeats and re-alleges the foregoing allegations as if set forth herein verbatim.

51. Defendants failed to comply with the requisite statutory periods that govern compliance under FOIA with respect to Plaintiff's requests. 5 U.S.C. §§ 552(a)(6)(A)(i), 552(a)(6)(A)(ii). Moreover, Defendants have shown no indication that they will substantively respond, at all, to the FOIA Requests. Defendants have thus violated their obligations by wrongfully withholding information from Plaintiff.

52. Plaintiff has exhausted all required administrative remedies.

53. Plaintiff has a legal right under FOIA to obtain the information it seeks, and there is no legal basis for the denial by Defendants of said right.

Count II

Violation of FOIA 5 U.S.C. § 552

54. Plaintiff repeats and re-alleges the foregoing allegations as if set forth herein verbatim.

55. On information and belief, Defendants DHS and ICE have a pattern and practice of violating FOIA's timing and procedural requirements set forth in 5 U.S.C. §552(a)(6)(A), (B), and (C) in connection with the response to and processing of FOIA requests.

56. In particular, Defendants have adopted and endorsed a pattern or practice of regularly failing or refusing to produce requested records or otherwise demonstrate that requested

records are exempt from production within the time period required by FOIA or within a reasonable period of time.

57. Defendants carry out this policy by disregarding responsive emails from requestors, needlessly forwarding requests between agency components, administratively closing requests without cause, and failing to contact requestors within statutory deadlines in order to request or provide an explanation for the extra time needed to process the requests.

58. Upon information and belief, the agencies' FOIA violations are not isolated instances. This pattern is demonstrated by what are, in total, five separate FOIA Requests served by Plaintiff in 2018, none of which has generated a single substantive response or document. In addition, Defendant DHS publicly reported that DHS's initial response time to "simple requests" exceeded 26 days and to "complex requests" in an average exceeding 97 days.²⁶

59. Defendants should not be permitted to violate their obligations under FOIA by simply delaying, failing to respond, or pushing requests within and between agencies in an effort to slow the process or wear down the patience of requesting parties like Plaintiff.

60. The delay in responding to and processing Plaintiff's requests is not attributable to Plaintiff. Plaintiff is being and will continue to be irreparably harmed unless Defendants are compelled to comply fully with FOIA's procedural requirements. Because Plaintiff relies on FOIA requests from Defendants to produce and disseminate its reports on counterterrorism and national security issues, Plaintiff faces a significant likelihood of imminent future harm from Defendants' policy and practice.

²⁶ U.S. Dep't of Homeland Sec., 2018 Freedom of Information Act Report to the Attorney General of the United States and the Director of the Office of Government Information Services at ii n.3 (March 2019), [https:// www.dhs.gov/sites/default/files/publications/dhs_fy2018_foia_report_updated.pdf](https://www.dhs.gov/sites/default/files/publications/dhs_fy2018_foia_report_updated.pdf)

PRAYER FOR RELIEF

WHEREFORE, Plaintiff the Brennan Center prays that the Court grant the following relief:

- (1) Order Defendants to conduct a thorough search for any and all records responsive to Plaintiff's FOIA requests and demonstrate that it employed search methods reasonably calculated to uncover all records responsive to each request;
- (2) Order Defendants to promptly produce, by a date certain, all nonexempt documents or portions of documents that are responsive to the requested information, including any such items referred to other Government agencies, in their entirety and make copies promptly available to Plaintiff;
- (3) Order Defendants to promptly provide an index pursuant to *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and its progeny, inventorying all responsive records and itemizing and justifying all withholdings of responsive documents;
- (4) Order Defendants to certify that all responsive records have either been produced or inventoried on Defendant's *Vaughn* index;
- (5) Enjoin Defendants from failing or refusing to produce all non-exempt records responsive to Plaintiff's FOIA requests or otherwise demonstrate that requested records are exempt from production within the time period required by FOIA or, in the alternative, within a reasonable period of time;
- (6) Enjoin Defendants from charging Plaintiff search, review, processing, and duplication fees in connection with responding to the Requests;
- (7) Expedite this action in every way pursuant to 28 U.S.C. § 1657(a);

- (8) Award Plaintiff reasonable costs and attorneys' fees as provided for in 5 U.S.C. § 552(a)(4)(E), 5 U.S.C. § 552a(g)(1) and/or 28 U.S.C. § 2412(d); and
- (9) Such other and further relief as the Court may deem just and proper.

This 16th day of January, 2020.

Respectfully submitted,

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EXHIBIT A

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November 5, 2018

Via Certified Mail and E-Mail

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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 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 <https://www.dhs.gov/sites/default/files/publications/2016%20Data%20Mining%20Report%20FINAL.pdf>

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 (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 (2013), available at <https://www.brennancenter.org/sites/default/files/publications/Data%20Retention%20-%20FINAL.pdf>; Michael Price, National Security and Local Police (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 karafordeversheds-sutherland.com.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Kara D. Ford', with a long horizontal flourish extending to the right.

Kara D. Ford

EXHIBIT B



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November 5, 2018

Via Certified Mail and E-Mail

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FOIA Officer
U.S. Immigration and Customs Enforcement
500 12th Street, SW, Mail Stop 5009
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Re: FOIA and Request for Expedited Processing and Fee Waiver

Dear Sir/Madam:

This firm 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 U.S. Department of Homeland Security (“DHS”) records recently disclosed in a National Archives and Records Administration Request for Records Disposition Authority (the “NARA Request”).¹ 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

The NARA Request, dated January 2017, named and described the use, retention period, and disposition status of eleven categories of records used by ICE. Specifically, the NARA Request named the following categories: (i) Privacy Complaint Files; (ii) Compliance Review Files; (iii) Disclosure Advice Records; (iv) Rulemaking Files; (v) Requests for System Waivers and Exceptions; (vi) Information Sharing Agreement Files; (vii) Testing Questionnaire Files; (viii) Investment Reviews; (ix) Social Media Operational Use Template (“SMOUT” or “Template”); (x) Data Access Request Analysis (“DARA”); and (xi) Overdue A-File FOIA Request Report.

¹ NAT’L ARCHIVES AND RECORDS ADMINISTRATION, DAA-0567-2016-0002, REQUEST FOR RECORDS DISPOSITION AUTHORITY [hereinafter “NARA/ICE RRDA”] (PDF created on Jan. 4, 2017), https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/departments-of-homeland-security/rg-0567/daa-0567-2016-0002_sf115.pdf.

Ten of the above-listed categories are critical to the enforcement of DHS's data collection and privacy policies.² According to the NARA Request, these records relate to ICE's Information Management Compliance Records, including ICE policies on conducting Privacy Threshold Analyses and on disclosing and sharing information in accordance with the Privacy Act. One category of records—the SMOUT—governs the collection and use of social media data and appears to be used by several other DHS components, including U.S. Citizenship and Immigration Services (“USCIS”) and U.S. Customs and Border Patrol (“CBP”). While the NARA Request describes these records, the files themselves are not publicly available.

Based on publicly available information, DHS appears to dedicate considerable time and resources to expanding data collection initiatives. But even though DHS releases privacy compliance documents like Privacy Impact Assessments and Systems of Records Notices that refer to such initiatives, those documents do not provide a comprehensive understanding of DHS's collection and privacy policies. Accordingly, the public and even Members of Congress are left without the full information that they need to assess the initiatives and related privacy protections.³ There is little transparency about how DHS ensures compliance with privacy guidelines, DHS's collection and use of the information, and DHS's rules on the sharing and disclosure of such information. Without these details, the public cannot evaluate the lawfulness or effectiveness of ICE's collection information, including its recent attempts to automate social media vetting—an issue with potentially significant consequences for Americans' privacy.⁴

Furthermore, without the requested records, the public cannot understand the scope of audits conducted by components such as the DHS Office of the Inspector General (“OIG”). For example, in February 2017, the DHS-OIG released a report evaluating the effectiveness of pilot programs targeting travelers using collected social media information.⁵ The report concluded that DHS may not be “measuring and evaluating the pilots to determine how well

² This FOIA Request does not request records related to the Overdue A-File FOIA Request Report unless such files relate to one of the other requests herein.

³ Letter from the House Homeland Sec. Comm. to the Hon. Jeh Johnson, Sec'y of the Dep't of Homeland Sec. (Dec. 17, 2015) [hereinafter “House Comm. Letter to DHS”], available at <http://homeland.house.gov/wp-content/uploads/2015/12/Homeland-Security-Committee-Letter-on-Social-Media-Vetting.pdf>.

⁴ See OFFICE OF INSPECTOR GENERAL, DEP'T OF HOMELAND SEC., OIG-17-40, DHS' PILOTS FOR SOCIAL MEDIA SCREENING NEED INCREASED RIGOR TO ENSURE SCALABILITY AND LONG-TERM SUCCESS (Feb. 27, 2017) [hereinafter “DHS-OIG REPORT”], <https://web.archive.org/web/20170311201529/https://www.oig.dhs.gov/assets/Mgmt/2017/OIG-17-40-Feb17.pdf>; Jake Laperruque, *ICE Backs Down on “Extreme Vetting” Automated Social Media Scanning*, PROJECT ON GOVERNMENT OVERSIGHT (May 23, 2018), <http://www.pogo.org/blog/2018/05/ice-backs-down-on-extreme-vetting-automated-social-media-scanning.html>;

⁵ OFFICE OF INSPECTOR GENERAL, DEP'T OF HOMELAND SEC., OIG-17-40, DHS' PILOTS FOR SOCIAL MEDIA SCREENING NEED INCREASED RIGOR TO ENSURE SCALABILITY AND LONG-TERM SUCCESS (Feb. 27, 2017) [hereinafter “DHS-OIG REPORT”], <https://web.archive.org/web/20170311201529/https://www.oig.dhs.gov/assets/Mgmt/2017/OIG-17-40-Feb17.pdf>.

they are performing.”⁶ The DHS-OIG report highlighted the importance of the audits and that releasing the records identified in the NARA Request and described above would provide additional information about the results of these audits.

The Brennan Center therefore seeks the release of the documents pertaining to DHS’s data collection and privacy policies as described in the NARA Request in order to expand the public’s knowledge and understanding of DHS’s data collection and privacy policies.

A. Privacy Complaint Files

The NARA Request defines Privacy Complaint Files as “[d]ocumentation on complaints that the actions of ICE employees or contractors have violated privacy rights, or the requirements of federal privacy laws or policies.”⁷ This documentation may also include the original complaint, reviews, assessments, correspondence, and the final response letter.

B. Compliance Review Files

According to the NARA Request, Compliance Review Files include “[r]eview and guidance on policies, procedures, presentations, record schedules, multimedia projects, and other associated materials to ensure they are in compliance with privacy laws or rules.”⁸ These files document assistance provided to USCIS in their Alien Case File audits, and may include correspondence, training reviews, and final recommendations as well as other documentation.

C. Disclosure Advice Records

According to the NARA Request, Disclosure Advice Records document “advice given to program offices about what information they may and may not disclose pursuant to the Privacy Act.”⁹ These records may also include the “initial request for advice, correspondence, response, and other associated materials.”¹⁰

D. Rulemaking Files

The NARA Request describes Rulemaking Files as “[r]ecords explaining, justifying, and documenting the development and publication of a notice of proposed rulemaking or final rule supporting the exemptions claimed under the Privacy Act.”¹¹ These files may

⁶ Memorandum from Francis X. Taylor, Under Secretary for Intelligence & Analysis, Dep’t of Homeland Sec., to John Roth, Inspector General, Dep’t of Homeland Sec., concerning OIG Draft Report, “DHS’ Pilots for Social Media Screening Need Increased Rigor to Ensure Scalability and Long-term Success” 2 (Dec. 29, 2016).

⁷ NARA/ICE RRDA, *supra* note 1, at 3.

⁸ *Id.*

⁹ *Id.* at 4.

¹⁰ *Id.*

¹¹ *Id.*

“include draft rule, reviews, routing information, notices of proposed rulemaking, final rules, related comments and other associated documentation.”¹²

E. Requests for System Waivers and Exceptions

According to the NARA Request, Requests for System Waivers and Exceptions are records “documenting the review and recommendations for ICE systems needing an exception or waiver of the provisions of the DHS Sensitive Systems Policy Directive 4300A.”¹³ These records may also include correspondence and the final recommendations, in addition to other documentation.

F. Information Sharing Agreement Files

The NARA Request describes Information Sharing Agreement Files as “[r]eviews of agreements with other entities for sharing information.”¹⁴ These reviews may include copies of the agreement with the entity involved and related documents, such as “review documentation, correspondence, suggested changes, and other associated materials.”¹⁵

G. Testing Questionnaire Files

According to the NARA Request, these files document whether to authorize the use of real data and the conditions under which they are to be authorized. The files also document “processes showing that risks to privacy and security are minimized while allowing necessary tests to proceed.”¹⁶ These records may include a “questionnaire, correspondence, reviews, routing information, final recommendation, and associated documentation.”¹⁷

H. Investment Reviews

According to the NARA Request, the Investment Reviews include a “[r]eview of OMB 300 packages for systems to ensure or document that the privacy component of the OMB 300 component of the package is completed or updated.”¹⁸ The Investment Reviews also may include copies of the OMB 300 form and correspondence, in addition to other documentation.

I. Social Media Operational Use Template

The NARA Request defines the SMOUT used by ICE as “documentation used to outline the agency’s collection of PII from social media sources and determine privacy

¹² *Id.*

¹³ The Policy Directive provides specialized techniques and procedures for implementing the requirements of the DHS Information Security Program for DHS systems that process sensitive information.
<https://www.dhs.gov/publication/dhs-4300a-sensitive-systems-handbook>

¹⁴ NARA/ICE RRDA, *supra* note 1, at 5.

¹⁵ *Id.*

¹⁶ *Id.* at 6.

¹⁷ *Id.*

¹⁸ *Id.*

compliance.”¹⁹ On June 8, 2012, DHS announced the creation of the SMOUT to guide department-wide social media data collection and operational use.²⁰ According to DHS, the SMOUT, a document reviewed and adjudicated by the DHS Chief Privacy Officer,²¹ identifies the appropriate authorities for the collection of personally identifiable information (“PII”) from social media.²² The Template also is used to identify DHS’s “information technology systems, technologies, rulemakings, programs, or pilot projects that involve collecting PII from social media.”²³ The SMOUT is not publicly available,²⁴ even though it is used by multiple DHS components.

The SMOUT requires submission of “Rules of Behavior, which include “requirements for operational use of social media and the consequences of failure to adhere to those requirements.”²⁵ Component Privacy Officers, in collaboration with other officials, draft these rules and “submit them with the Template to the Chief Privacy Officer for review and approval.”²⁶

DHS acknowledged that CBP also uses the SMOUT in its response to a FOIA request by journalist Aliya Sternstein.²⁷ A Privacy Threshold Analysis produced as part of that response reveals that CBP uses the SMOUT to permit its use of social media vetting tools on Electronic System for Travel Authorization (“ESTA”) applicants entering the United States.²⁸ The October 27, 2017 Privacy Compliance Review of the ESTA program corroborates the Privacy Threshold Analysis’s findings and notes that the SMOUT was used

¹⁹ *Id.* at 7.

²⁰ DEP’T OF HOMELAND SEC., INSTRUCTION # 110-01-001, PRIVACY POLICY FOR OPERATIONAL USE OF SOCIAL MEDIA [hereinafter “DHS INSTRUCTION # 110-01-001”] (June 8, 2012), *available at* https://www.dhs.gov/sites/default/files/publications/Instruction_110-01-001_Privacy_Policy_for_Operational_Use_of_Social_Media.pdf.

²¹ *Id.* § IV(M) at 5.

²² *Id.* § IV(L) at 4.

²³ *Id.* § IV(L) at 4-5.

²⁴ A CBP FOIA response to the Brennan Center in 2018 included an earlier version of the SMOUT dated July 24, 2012. This SMOUT was responsive to updates in the Automated Targeting System (ATS) and Analytical Framework for Intelligence (AFI). The SMOUT listed law enforcement intelligence, criminal investigations, and situational awareness as among the operational use categories for collecting PII from social media sources. (DEP’T OF HOMELAND SEC., PRIVACY OFFICE, DHS OPERATIONAL USE OF SOCIAL MEDIA (July 24, 2012) (on file with author)). The Brennan Center is seeking copies of all versions of the SMOUT from the date of July 24, 2012, to the date of this request. See item 11 of the Brennan Center’s Formal Request under Section II below.

²⁵ DHS INSTRUCTION # 110-01-001, *supra* note 20, at § VI(D) at 8.

²⁶ *Id.*

²⁷ *See, e.g.* DEP’T OF HOMELAND SEC., PRIVACY OFFICE, PRIVACY THRESHOLD ANALYSIS VERSION NO. 01-2014 at 3, [hereinafter “SOCIAL MEDIA VETTING PTA”] *available at* <https://foiaonline.regulations.gov/foia/action/getContent?objectId=A7aC6yX6e91kxJAZiiM9DES6gbc-DAVW>; Aliya Sternstein, *Obama Team Did Some ‘Extreme Vetting’ of Muslims Before Trump, New Documents Show*, DAILY BEAST (Jan. 2, 2018), <https://www.thedailybeast.com/obama-team-did-some-extreme-vetting-of-muslims-before-trump-new-documents-show>.

²⁸ SOCIAL MEDIA VETTING PTA, *supra* note 26, at 3-4, 9.

“to gain a complete understanding of the use of information collected within the ESTA application, specifically social media identifiers.”²⁹

While there are no publicly available DHS documents that detail the use of the SMOUT by USCIS, Congressional correspondence with DHS suggests USCIS has also been using the Template since at least 2015. On December 17, 2015, the U.S. House of Representatives Committee on Homeland Security sent a letter to then-DHS Secretary Jeh Johnson requesting information on the social media review process for visa applicants. In this letter, the Committee noted that USCIS has used social media to vet immigrants and has used “approved Operational Use of Social Media Templates.” The Committee requested copies of these Templates.³⁰

J. Data Access Request Analysis

The NARA Request describes Data Access Request Analysis (“DARA”) as a document that replaces a Privacy Threshold Analysis when agency records are shared from DHS’s Automated Biometric Identification System (“IDENT”).³¹ DARA is a joint document between ICE and the “IDENT system owner”—the DHS Office of Biometric Identify Management—and “is used to understand how data are shared and protected.”³²

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 records created since January 1, 2015 that contain or constitute “Privacy Complaint Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
2. All records created since January 1, 2015 that contain or constitute “Compliance Review Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
3. All records created since January 1, 2015 that contain or constitute “Disclosure Advice Records” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.

²⁹ DEP’T OF HOMELAND SEC., PRIVACY COMPLIANCE REVIEW OF THE U.S. CUSTOMS & BORDER PROTECTION ELECTRONIC SYSTEM FOR TRAVEL AUTHORIZATION 7 (Oct. 27, 2017), *available at* <https://www.dhs.gov/sites/default/files/publications/CBP-ESTA%20PCR%20final%20report%2020171027.pdf>.

³⁰ House Comm. Letter to DHS, *supra* note 3.

³¹ NARA/ICE RRDA, *supra* note 1, at 7.

³² *Id.*

4. All records created since January 1, 2015 that contain or constitute “Rulemaking Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
5. All records created since January 1, 2015 that contain or constitute “Requests for System Waivers and Exceptions” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
6. All records created since January 1, 2015 that contain or constitute “Information Sharing Agreement Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
7. All records created since January 1, 2015 that contain or constitute “Testing Questionnaire Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
8. All records created since January 1, 2015 that contain or constitute “Investment Reviews” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
9. All records, including but not limited to, memoranda, policies, procedures, guidance, guidelines, training modules, and directives, that constitute or apply to the use of Social Media Operational Use Templates, SMOUT, or Templates used by DHS, including by components CBP, ICE, or USCIS.
10. All records that contain, constitute, or reference “Rules of Behavior” submitted pursuant to a SMOUT used by CBP, ICE, or USCIS.
11. All versions, including draft versions, of the SMOUT or Template from July 24, 2012 through November 2, 2018.
12. All versions, including draft versions, of the DHS Management Directive 110-01, Privacy Policy for Operational Use of Social Media.
13. All records created since January 1, 2015 that contain or constitute “Data Access Request Analysis” or “DARA” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.

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).

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 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).³³ Recently, the Brennan Center has published a report, several fact sheets, and multiple articles on the intersection of national security and immigration policy.³⁴ 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.³⁵

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 policies for data collection and dissemination, and the use of social media monitoring tools. In the absence of these records, such as the SMOUT, the Compliance Review Files, and the Rulemaking Files, publicly available audits like Privacy Impact Assessments and Systems of Records Notices do not provide sufficient information for the public to evaluate the legality and efficacy of the federal government’s collection of information and the potential implications for citizens’ privacy rights. It is also unknown what systems the federal government is using to collect this information and whether those systems are designed to comply with privacy requirements. In addition to privacy concerns, DHS’s use of social media risks chilling First Amendment activity and infringing on privacy rights.³⁶ The Brennan Center intends to share any information obtained from this request with the public. See 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(d)(1)(ii).

³³ 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)).

³⁴ 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/>.

³⁵ *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).

³⁶ See *DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy*, Hearing Before the Subcomm. on Counterterrorism and Intelligence, H. Comm. on Homeland Sec.,

Many public interest and advocacy organizations are seeking clarity about the rules and guidance used for collecting, monitoring, and analyzing this data, including social media data. In the past year, organizations including the Brennan Center, American Civil Liberties Union, Electronic Privacy Information Center, and MuckRock have submitted FOIA requests related to social media monitoring.³⁷ Members of Congress have also petitioned DHS to release guidance governing these initiatives, such as the SMOUT, in recent years.³⁸

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 legislative intent that FOIA be "liberally construed in favor of waivers for noncommercial requesters."³⁹

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

111th Cong. (2012) (Rep. Jackie Speier (D-Cal.), among others, interrogated the impact of social media monitoring on freedom of speech); *see also* Andrea Stone, *DHS Monitoring of Social Media Under Scrutiny By Lawmakers*, HUFFPOST (Feb. 16, 2012, 3:38 PM), https://www.huffingtonpost.com/2012/02/16/dhs-monitoring-of-social-media_n_1282494.html.

³⁷ *FOIA Request on Social Media Surveillance*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/legal-document/foia-request-social-media-surveillance> (last visited May 29, 2018);

³⁸ House Comm. Letter to DHS, *supra* note 3.

³⁹ *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)).

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).⁴⁰

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).⁴¹ The Brennan Center has released over 100 publications in the form of reports and papers on various issues of public importance since January 2011.⁴² The 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 karafordeversheds-sutherland.com.

Sincerely,



Kara D. Ford

⁴⁰ *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).

⁴¹ *Id.* at 1381.

⁴² *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* (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* (2013), available at <https://www.brennancenter.org/sites/default/files/publications/Data%20Retention%20-%20FINAL.pdf>; Michael Price, *National Security and Local Police* (2013), available at https://www.brennancenter.org/sites/default/files/publications/NationalSecurity_LocalPolice_web.pdf.