

BRENNAN CENTER FOR JUSTICE

March 21, 2022

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Via: Department of Homeland Security Freedom of Information Act Public Access Portal

Re: Freedom of Information Act Request

To Whom It May Concern:

This is a request to the Department of Homeland Security (DHS), the Office of Intelligence and Analysis (I&A), and the DHS Office of Inspector General (OIG) (also collectively referred to below as “DHS” or “the Department”), under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and DHS implementing regulations, 6 C.F.R. §§ 5.1-5.13. It is also a request for expedited processing under 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(e), and for a fee waiver under 5 U.S.C. §§ 552(a)(4)(A)(ii) and (iii) and 6 C.F.R. §§ 5.11(d) and (k).

Background

I&A is a component of DHS that carries out surveillance within the United States in support of “authorized intelligence missions,” including counterterrorism.¹ It shares information with federal, state, local, tribal, and territorial entities, many of which are law

¹ Office of Intelligence and Analysis, *Office of Intelligence and Analysis Intelligence Oversight Guidelines*, DHS, January 19, 2017, 3–4, <https://www.dhs.gov/sites/default/files/publications/office-of-intelligence-and-analysis-intelligence-oversight-program-and-guidelines.pdf>.

enforcement agencies, shaping their perception of and response to threats within their jurisdictions. Because I&A focuses on activity within the United States that often closely overlaps with political speech, it must take particular care to stay true to its specific security mission and observe constitutional limits on what it may do.

I&A transgressed these limits in the summer of 2020 during its scrutiny of racial justice protests in Portland, Oregon. Prompted by an executive order,² I&A issued guidance justifying intelligence gathering to address the supposed “significant threat to homeland security” posed by racial justice demonstrators vandalizing monuments, memorials, and statues.³ The disclosure of this guidance raised alarms in Congress and among the public. For example, in a letter to the acting Secretary of Homeland Security, Rep. Adam Schiff (D-CA), chairman of the House Intelligence Committee, wrote: “[N]ever before has the Department sought to so aggressively counter potential threats of graffiti, vandalism, or other minor damage...in the same fashion as it would seek to counter acknowledged threats...such as terrorism[.]”⁴ I&A’s intelligence reporting on two journalists covering this guidance – and what emerged more broadly about its activities connected to the 2020 protests in Portland – ultimately triggered a number of oversight efforts, including a review by the Department’s general counsel’s office, an investigation by the OIG, and disclosure obligations pursuant to the Intelligence Authorization Act for Fiscal Year 2021.⁵

The general counsel’s review is the most extensive critical examination of I&A’s activities in summer 2020 that is publicly available. It was completed in January 2021 and made public in redacted form later that year by Sen. Ron Wyden (D-OR). The review detailed failures of leadership, management, and rule compliance and raised questions about the overall value of I&A. In particular, it recommended a “holistic review of the strategic direction of I&A,” and highlighted numerous issues including poor training of staff, the lack of safeguards for the dissemination of Americans’ information, the inefficacy

² 85 Fed. Reg. 40,081 (June 26, 2020).

³ Steven Vladeck and Benjamin Wittes, *DHS Authorizes Domestic Surveillance to Protect Statues and Monuments*, LAWFARE BLOG (July 20, 2020), <https://www.lawfareblog.com/dhs-authorizes-domestic-surveillance-protect-statues-and-monuments>.

⁴ Rep. Adam B. Schiff to Chad F. Wolf, acting secretary of homeland security, and Brian Murphy, acting under secretary for intelligence and analysis (July 22, 2020), https://intelligence.house.gov/uploadedfiles/20200722hpsci_chm_letter_to_dhs.pdf.

⁵ DHS Office of the General Counsel, *Report on DHS Administrative Review into I&A Open Source Collection and Dissemination Activities During Civil Unrest, Portland, Oregon, June Through July 2020*, DHS (Jan. 6, 2021), <http://cdn.cnn.com/cnn/2021/images/10/01/internal.review.report.20210930.pdf>. The inspector general’s review, if it has been completed, has not been made publicly available. The general counsel’s report indicates that it was underway as of January 6, 2021. *Id.* at 8. Office of Intelligence and Analysis, *Office of Intelligence and Analysis Operations in Portland*, DHS (April 20, 2021), https://www.dhs.gov/sites/default/files/2022-01/Portland%20Report%20Signed_Final%20Draft%20Redactions.pdf.

of I&A's reporting on threats, and a failure to structure intelligence collection in accordance with standard intelligence community practices.⁶

This FOIA request is for the full, unredacted versions of the general counsel's review and other assessments that examine I&A's actions in the summer of 2020, as further specified below. It also seeks a full, unredacted version of a March 4, 2022, OIG report that discusses I&A's activities in summer 2020 in the context of examining the office's failure to warn in advance of the events of January 6, 2021.⁷ So far, public disclosures of oversight documents have been substantially redacted. For instance, the version of the general counsel's report provided to and released by Senator Wyden contains over 300 redactions, including some that appear to relate to substantive issues such as I&A's intelligence reporting practices. Full disclosure would be consistent with the stated commitments of leadership likely to take the reins at I&A. Kenneth Wainstein, the nominee to head I&A, wrote in a March 7, 2022, letter to Sen. Wyden that he would complete a review considering how I&A could "maximize transparency" over its intelligence gathering efforts. He wrote: "If confirmed, I will prioritize disclosing as much information regarding I&A's activities in Portland as possible."⁸

Request

The Brennan Center specifically requests the following records:

1. A full, unredacted version of the January 6, 2021, report by the DHS Office of the General Counsel, *Report on DHS Administrative Review into I&A Open Source Collection and Dissemination Activities during Civil Unrest Portland, Oregon, June through July 2020*;
2. A full, unredacted version of the April 20, 2021, report prepared on behalf of the Secretary of Homeland Security pursuant to the Intelligence Authorization Act of 2021, *Office of Intelligence and Analysis Operations in Portland*;
3. A full, unredacted version of the DHS OIG report, if completed, examining I&A's inappropriate dissemination of open-source intelligence reports on journalists in the summer of 2020, as referenced on page 8 of the January 6, 2021, report by the Office of the General Counsel;

⁶ DHS Office of General Counsel, *supra* note 5.

⁷ DHS Office of Inspector General, *I&A Identified Threats Prior to January 6, 2021, but Did not Issue Any Intelligence Products Before the U.S. Capitol Breach (REDACTED)*, DHS (Mar. 4, 2022), <https://www.oig.dhs.gov/sites/default/files/assets/2022-03/OIG-22-29-Mar22-Redacted.pdf>.

⁸ Kenneth Wainstein, nominee for under secretary for intelligence and analysis, to Sen. Ron Wyden (Mar. 7, 2022), <https://www.wyden.senate.gov/imo/media/doc/Wyden%20Letter%20DHS%20Portland%20Report.pdf>.

4. A full, unredacted version of the March 4, 2022, report by the DHS OIG, *I&A Identified Threats prior to January 6, 2021, but Did not Issue Any Intelligence Products before the U.S. Capitol Breach*;
5. Any other DHS examination of I&A's activities in Portland, Oregon during the summer of 2020, whether or not such materials have been publicly disclosed.

Expedited Processing

The Brennan Center requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(e). There is a “compelling need” for these records because the information requested is urgently required by an organization “primarily engaged in disseminating information” to “inform the public concerning actual or alleged Federal Government activity.” U.S.C. §§ 552(a)(6)(E)(i)(I), (a)(6)(E)(v); 6 C.F.R. § 5.5(e)(1)(ii).

The Brennan Center is a section 501(c)(3) non-profit organization that is “primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(v)(II) and 6 C.F.R. § 5.5(e)(1)(ii). The U.S. District Court for the District of Columbia has found that a non-profit, public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” is “primarily engaged in disseminating information” within the meaning of the statute and regulations. *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)). The Brennan Center regularly writes and publishes reports and articles and makes appearances on various media outlets, addressing U.S. policy issues ranging from counterterrorism efforts to voting rights to campaign finance laws, and it will continue to do so for the foreseeable future.⁹ *Brennan Ctr. for Just. at NYU Sch. of L. v. Dep’t of Commerce*, 498 F. Supp. 3d 87, 98 (D.D.C. 2020) (“Defendants do not dispute the Brennan Center’s status as an organization ‘primarily engaged in disseminating information,’ and other courts have found that similar organizations meet this standard.”).

Furthermore, the Brennan Center urgently requires the information sought by this request to inform the public of federal government activity: I&A’s activity in response to the protests in Portland in 2020. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(e)(1)(ii). This information is of interest to the many members of the general public concerned with holding I&A accountable for the surveillance of political dissent.¹⁰ Indeed, other civil

⁹ A complete list of the Brennan Center’s recent publications is available at, <https://www.brennancenter.org/library/?langcode=en&>.

¹⁰ *See, e.g.,* Shane Harris, *DHS compiled ‘intelligence reports’ on journalists who published leaked documents*, WASHINGTON POST (July 30, 2020), https://www.washingtonpost.com/national-security/dhs-compiled-intelligence-reports-on-journalists-who-published-leaked-documents/2020/07/30/5be5ec9e-d25b-11ea-9038-af089b63ac21_story.html; Francis X. Taylor, *I Ran the DHS Intelligence Unit. Its Reports on*

society organizations are also seeking greater clarity about the failures within the Department that led to intelligence reports on journalists from the *New York Times* and *Lawfare* Blog.¹¹ The Brennan Center intends to share any information it obtains through this request with the public.

Fee Waiver

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

First, the Brennan Center plans to analyze, publish, and publicly disseminate information obtained from this request. The requested records are not sought for commercial use and will be disclosed to the public at no cost.

Second, the Brennan Center qualifies as a “representative of the news media” for the same reasons that it is “primarily engaged in dissemination of information.” The Brennan Center “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); *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). It uses this information to draft reports on, and analyses of, issues of public concern.¹² *Cf. Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11-12 (finding that the Electronic

Journalists are Concerning, LAWFARE BLOG (Aug. 7, 2020), <https://www.lawfareblog.com/i-ran-dhs-intelligence-unit-its-reports-journalists-are-concerning>; Maxine Bernstein, *DHS compiled intelligence reports on protesters arrested in Portland without legal justification, report finds*, OREGON LIVE (Oct. 2, 2021), <https://www.oregonlive.com/portland/2021/10/dhs-compiled-intelligence-reports-on-protesters-arrested-in-portland-without-legal-justification-report-finds.html>.

¹¹ See, e.g., *Report: DHS Tracked Journalists and Protesters, Abused Intelligence Collection Process During Summer 2020 Portland Protests*, ELECTRONIC PRIVACY INFORMATION CENTER (Jan. 7, 2022), <https://epic.org/report-dhs-tracked-journalists-and-protesters-abused-intelligence-collection-process-during-summer-2020-portland-protests/>; Jennifer Stisa Granick and Patrick Toomey, *No More Spying on Journalists*, AM. CIV. LIBERTIES UNION (June 11, 2021), <https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-seeking-information-federal-agencies-surveillance-social-media>; Eshani Pandya, *DHS Infringed on First Amendment Rights by Collecting Intel on Portland Protesters*, IMMIGRATION IMPACT (Oct. 6, 2021), <https://immigrationimpact.com/2021/10/06/dhs-collected-intel-george-floyd-protests/#.Yeh8vNXMI2w>.

¹² See, e.g., Mary Pat Dwyer, *LAPD Documents Reveal Use of Social Media Monitoring Tools*, BRENNAN CENTER FOR JUSTICE (Sept. 8, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/lapd-documents-reveal-use-social-media-monitoring-tools>; *LAPD Social Media Monitoring Documents*, BRENNAN CENTER FOR JUSTICE (Sept. 8, 2021),

Privacy Information Center was representative of the news media based on its publication of seven books and a newsletter relating to privacy and civil rights); *see also Nat'l Sec. Archive*, 880 F.2d at 1386 (deeming the 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). 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(e).

The Brennan Center also is also entitled to a waiver because it is an “educational institution.” 6 C.F.R. §§ 5.11(d). The Brennan Center qualifies as an educational institution because it is affiliated with New York University School of Law, which is plainly an educational institution under the definition provided in 6 C.F.R. § 5.11(d)(1).

The Brennan Center is also entitled to a waiver of all fees, including duplication fees. First, the subject of the requested records clearly concerns “the operations or activities of the federal government,” namely I&A’s activities surrounding the protests in Portland during the summer of 2020. 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k)(1). 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 also in the public interest because it is “likely to contribute to an increased public understanding” of the Department’s intelligence collection and dissemination practices. *See* 6 C.F.R. §§ 5.11(k)(2)(ii). Additionally, given the dearth of public information on I&A’s activities in Portland in the summer of 2020, disclosure will significantly enhance the public’s understanding of this subject. *See* 6 C.F.R. § 5.11(k)(2)(iv).

Finally, disclosure is not primarily in the Brennan Center’s commercial interests. *See* 6 C.F.R. § 5.11(k)(3). As stated above, the Brennan Center plans to make any information disclosed as a result of this request available 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.” *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)).

Should DHS choose to charge a fee, please inform me via email of the total charges in advance of fulfilling this request at pandurangah@brennan.law.nyu.edu.

<https://www.brennancenter.org/our-work/research-reports/lapd-social-media-monitoring-documents>; Kelly Percival, *Documents Reveal Trump Administration’s ‘Unprecedented’ Attempts to Influence 2020 Census*, BRENNAN CENTER FOR JUSTICE (Jan. 25, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/documents-reveal-trump-administrations-unprecedented-attempts-influence>.

Response Required

The Brennan Center appreciates DHS's attention to this request and expects to receive a response on its request for expedited processing within ten (10) business days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 6 C.F.R. § 5.5(e)(4). I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi); 6 C.F.R. § 5.5(e)(3).

We also request that you provide us with an estimated completion date, as required by 5 U.S.C. § 552(a)(7)(B)(ii). If the Request is denied in whole or in part, we ask that you justify all withholdings by reference to specific exemptions to FOIA. 5 U.S.C. § 552(a)(2). We expect the release of all segregable portions of otherwise exempt material. 5 U.S.C. § 552(a)(8)(ii)(II).

We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees. We also request that you provide us with the documents in electronic format where possible.

Should you have any questions concerning this request, please contact me via e-mail at pandurangah@brennan.law.nyu.edu.

Sincerely,

/s/ Harsha Panduranga

Harsha Panduranga
Counsel, Liberty & National Security
Program
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of Law