

March 18, 2022

Lynn Parker Dupree
Privacy Office, Mail Stop 0655
Department of Homeland Security
2707 Martin Luther King Jr. Avenue, SE
Washington, D.C. 20528-065

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

Re: Freedom of Information Act Request

Dear Sir or Madam:

This is a request to the Department of Homeland Security (DHS) and the Science and Technology Directorate (S&T) (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 through 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(6), 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

On March 7, 2022, the DHS Office of Inspector General released a report, *S&T Needs to Improve Its Management and Oversight of R&D Projects*. This report detailed several failures of management and oversight that have led to privacy infringements within S&T research and development products.¹ The inspector general’s investigation began after the office received a tip regarding potential privacy violations pertaining to S&T’s Night Fury project, conducted by the Office of Science & Engineering (OSE).² Through Night Fury, which began in September 2018 and cost \$443,000, “OSE sought to test and develop analytic capabilities to identify potential terrorism risks on publicly available

¹ Department of Homeland Security, Office of Inspector General, *S&T Needs to Improve its Management and Oversight of R&D Projects* (March 7, 2022),

<https://www.oig.dhs.gov/sites/default/files/assets/2022-03/OIG-22-30-Mar22.pdf>.

² *Id.* at 4.

social media and other open source platforms.”³ As part of the project, OSE contracted a university to collect social media data for S&T.

The Brennan Center has not been able to find any information on Night Fury, and the contracts with the university mentioned in the inspector general’s report do not appear to be publicly available.

Request

The Brennan Center specifically requests records under FOIA that were in DHS’s possession or control from January 1, 2018, through the date of the production of records, in the following categories:

1. **Contracting Documents:** All records reflecting or referencing a contract or agreement for services and research support relating to the Night Fury project, including but not limited to the university contract to collect social media data on behalf of OSE that is referenced in the inspector general’s report, including both the final contract and any preliminary or draft contracts.⁴
2. **Research Products:** All research products pertaining to the Night Fury project, including drafts, and including but not limited to white papers, research reports, or presentations.
3. **Training Materials:** All training documents pertaining to the Night Fury project, including drafts, and including but not limited to PowerPoint presentations, handouts, manuals, or lectures.
4. **Communications:** All email communications concerning or referencing the Night Fury project, including the attachments to those emails. This includes but is not limited to emails with the contracted university and between personnel within OSE that worked on the Night Fury project.
5. **Compliance Documents:** All records submitted to the DHS Privacy Office as part of the Night Fury project to demonstrate the project’s compliance with privacy laws and DHS privacy policies, including but not limited to any Privacy Threshold Analyses, Social Media Operational Use Templates (SMOUTs), Privacy Impact Assessments, and Checklist for Sensitive Information.⁵

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 5.

6. **Policies.** Any additional policies applicable to Night Fury, including policies regarding the retention, storage, use, and/or dissemination of any data, including social media data, collected through or as a result of the Night Fury project.

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.⁶ *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: S&T’s Night Fury project and efforts to use information from social media to find indicators of terrorism. *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 about DHS collecting intelligence on First

⁶ A complete list of the Brennan Center’s recent publications is available at, https://www.brennancenter.org/search/?type=analysis,archive,policy_solution,report,resource,statement,testimony,fact_sheet,explainer,series,expert_brief,legislation,newsletter,project&.

Amendment-protected activity, particularly from social media.⁷ DHS's monitoring of social media has also been widely reported, demonstrating the interest of the news media and the general public.⁸ Civil society organizations are also seeking greater clarity about the collection of social media data by federal agencies.⁹ 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.

⁷ See, e.g., Kevin Matthews, *Don't Spy on Immigrants' Social Media*, CARE2 PETITIONS, <https://www.thepetitionsite.com/143/518/650/dont-spy-on-immigrants-social-media-accounts-dhs/> (last visited Mar. 14, 2022); *BREAKING: Homeland Security is spying on 40 million Americans and anyone they talk to online*, ACTION NETWORK, <https://actionnetwork.org/petitions/breaking-dhs-will-begin-collecting-social-media-information-on-immigrants-green-card-holders-naturalized-citizens-and-anyone-in-touch-with-them> (last visited Mar. 14, 2022).

⁸ See, e.g., Ken Dilanian, *DHS Launches Warning System to Find Domestic Terrorism Threats on Public Social Media*, NBC NEWS, May 10, 2021, <https://www.nbcnews.com/politics/national-security/dhs-launches-warning-system-find-domestic-terrorism-threats-public-social-n1266707>; Rachael Levy, *Homeland Security Considers Outside Firms to Analyze Social Media After Jan. 6 Failure*, WALL ST. J., Aug. 15, 2021, <https://www.wsj.com/articles/homeland-security-considers-outside-firms-to-analyze-social-media-after-jan-6-failure-11629025200>; Sam Levin, *US Capitol Attack: Is the Government's Expanded Online Surveillance Effective?*, GUARDIAN, Jan. 7, 2022, <https://www.theguardian.com/us-news/2022/jan/07/us-capitol-attack-government-online-surveillance>.

⁹ See, e.g., Faiza Patel, et al., *Social Media Monitoring*, BRENNAN CENTER FOR JUSTICE (May 22, 2019), <https://www.brennancenter.org/our-work/research-reports/social-media-monitoring>; *ACLU v. DOJ: FOIA Lawsuit Seeking Information on Federal Agencies' Surveillance of Social Media*, AM. CIV. LIBERTIES UNION <https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-seeking-information-federal-agencies-surveillance-social-media> (last updated Mar. 26, 2019); *Rights Groups Warn Against DHS's Use of Social Media Monitoring of Immigrants*, HUMAN RIGHTS WATCH (Nov. 19, 2019), <https://www.hrw.org/news/2019/11/19/rights-groups-warn-against-dhss-use-social-media-monitoring-immigrants>.

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.¹⁰ *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 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 S&T’s Night Fury project. 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 efforts to collect, analyze, and monitor information from social media. *See* 6 C.F.R. §§ 5.11(k)(2)(ii). Given the dearth of public information on the Night Fury project, disclosure will significantly enhance the public’s understanding of this subject. *See* 6 C.F.R. § 5.11(k)(2)(iv).

¹⁰ *See, e.g.*, Rachel Levinson-Waldman, Harsha Panduranga, & Faiza Patel, *Social Media Surveillance by the U.S. Government*, BRENNAN CENTER FOR JUSTICE (Jan. 7, 2022), <https://www.brennancenter.org/our-work/research-reports/social-media-surveillance-us-government>; Rachel Levinson-Waldman & Harsha Panduranga, *Invasive and Ineffective: DHS Surveillance Since 9/11*, AMERICAN CONSTITUTIONAL SOCIETY (Sept. 15, 2021), <https://www.acslaw.org/expertforum/invasive-and-ineffective-dhs-surveillance-since-9-11/>; Patel et al., *supra* note 9.

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 levinsonr@brennan.law.nyu.edu.

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 levinsonr@brennan.law.nyu.edu or by phone at 202-249-7193.

Sincerely,



Rachel Levinson-Waldman

Deputy Director, Liberty & National
Security Program
Brennan Center for Justice at NYU School
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