

BRENNAN CENTER FOR JUSTICE

January 27, 2023

Lynn Parker Dupree
Chief Privacy Officer and Chief FOIA Officer
Privacy Office, Mail Stop 0655
Department of Homeland Security
2707 Martin Luther King Jr. Avenue, SE
Washington, DC 20528

Via: Department of Homeland Security Freedom of Information Act SecureRelease submissions portal

Re: Freedom of Information Act Request

Dear Ms. Dupree:

This is a request to several headquarters offices and operational components of the United States Department of Homeland Security (DHS) 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.

Background

DHS is a federal agency best characterized by its vast data holdings and access to the data of the U.S. Intelligence Community and other federal, state, local, and foreign agencies. Officers combine this information with information received from data brokers and contractors to assist with social media surveillance and network analysis, assessing connections between people they deem threats to homeland security.

Extensive media reports suggest that during questioning and detention of travelers, U.S. Customs and Border Protection (CBP) seizes phones, laptops, and other electronic devices, copies them, and engages in an intelligence practice called document and media exploitation (DOMEX).¹ CBP takes an aggressive view of how invasive it may be at the

¹ See, e.g., Drew Harwell, *Customs Officials Have Copied Americans' Phone Data at Massive Scale*, WASH. POST (Sept. 15, 2022), <https://www.washingtonpost.com/technology/2022/09/15/government-surveillance-database-dhs/>; Todd Feathers, *CBP Now Has a Massive Searchable Database for Devices Seized at the Border*, VICE (Aug. 24, 2020), <https://www.vice.com/en/article/v7gjay/cbp-now-has-a-massive-searchable-database-for-devices-seized-at-the-border>. See also Philip S. Kaplan, *Privacy Impact Assessment Update for CBP Border Searches of Electronic Devices*

U.S. border under the Fourth Amendment, suggesting it may believe there are few limits on the devices it may take and what it may do with them.² And Congress has looked into how the DHS Office of Intelligence and Analysis (I&A) may have itself seized electronic devices from racial justice protestors in Portland, Oregon.³ Today, DOMEX involves the scraping and analysis of information on phones and laptops—often very personal information people may carry with them while they travel—in combination with data from large government datasets, social media, secretive watchlists, and other records.

DOMEX is not a practice unique to DHS. The U.S. Intelligence Community maintains a program called the National Media and Exploitation Center (NMEC), where DHS has embedded personnel to facilitate these activities.⁴ Public online sources suggest that DHS’s operation in partnership with the NMEC has been spearheaded by I&A on behalf of the department, and at times called either the DHS Joint Analysis Group or the I&A Homeland Identities, Targeting, and Exploitation Center, or HITEC.⁵

I&A HITEC holds itself out in informational materials as working in digital forensics and “network-based intelligence to counter national security threat actors . . . by adopting and applying advanced exploitation methods, emerging technologies, and sound tradecraft.”⁶ HITEC boasts a toolkit of digital forensic examination, language translation, network analysis, and identity-based research, biometrics, and watchlisting. It claims to provide intelligence support to DHS—perhaps including CBP agents who seize electronic devices at the border—and other law enforcement, operational, and intelligence partners.

DHS/CBP/PIA-008(a), U.S. DEP’T OF HOMELAND SEC. (Jan. 4, 2018), <https://www.dhs.gov/sites/default/files/publications/PIA-CBP%20-%20Border-Searches-of-Electronic-Devices%20-January-2018%20-%20Compliant.pdf>.

² See *EPIC v. CBP (Border Search Audits of Electronic Devices)*, ELEC. PRIVACY INFO. CTR. (last visited Dec. 21, 2022), <https://epic.org/documents/epic-v-cbp-border-search-audits-of-electronic-devices/>; *FAQs – Searches of Electronic Devices at the Border*, PRINCETON UNIV. (last visited Dec. 21, 2022), https://informationsecurity.princeton.edu/sites/g/files/toruqfl121/files/searches_of_electronic_devices_at_the_border_-_faqs_-_march_2017_0.pdf.

³ Olivia Beavers, *DHS Official Says He Heard of Request to Extract Information from Protesters’ Cellphones*, HILL (Oct. 2, 2020), <https://thehill.com/policy/national-security/519347-dhs-official-say-he-has-heard-of-a-request-to-extract-information/>.

⁴ *Intelligence Community Directive Number 302: Document and Media Exploitation*, OFF. OF THE DIR. OF NAT’L INTEL. (Jan. 19, 2017), <https://irp.fas.org/dni/icd/icd-302.pdf>; *Department of Defense Directive Number 2200.03: DoD Document and Media Exploitation (DOMEX)*, U.S. DEP’T OF DEF. (Jan. 11, 2011), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/330003p.PDF?ver=sp2CG3B5Ff7OeYEApLQAFw%3D%3D>; Cyber Crime Ctr., *DC3 Host to External Elements*, U.S. DEP’T OF DEF. (last visited Jan. 24, 2023), <https://www.dc3.mil/Partnerships/External-Elements-Embeds-Stakeholders-and-Mission-Partners/>.

⁵ *I&A Reconceived: Defining a Homeland Security Intelligence Role: Hearing Before the Subcomm. on Intel., Info. Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Sec.*, 111th Cong. (2009), <https://www.govinfo.gov/content/pkg/CHRG-111hhrg54224/html/CHRG-111hhrg54224.htm> (I&A’s managerial tasks includes oversight of contributions to “support of elements such as the Joint Analysis Group”).

⁶ *Other Intelligence Elements*, U.S. DEP’T OF HOMELAND SEC. (last updated July 13, 2022), <https://www.dhs.gov/other-intelligence-elements>.

Manipulating electronic devices, HITEC engages in “advanced technical exploitation” of electronic devices such as mobile phones.⁷ I&A itself has a broad legal authority to provide “specialized equipment, technical knowledge, or assistance of expert personnel” to law enforcement at all levels of government.⁸

HITEC also manages the DHS watchlisting program. At times these various DOMEX, network analysis, and watchlisting activities appear to intersect: In 2018, I&A’s HITEC received the Secretary of Homeland Security’s award for adding 1,000 new or enhanced “terrorism identities” to government watchlists.⁹

Aside from a few informational materials, congressional testimony, and oversight records, little is known about this apparently powerful office, its integration with other parts of DHS and the government, or the tools it uses. We file this request to help the public uncover this secretive program and develop a more sophisticated understanding of what the government does on its behalf under an assertion of homeland security.

FOIA Request

The Brennan Center specifically requests all records that were in DHS’s possession or control from January 1, 2008, through the date of the production for records, that relate to, describe, or discuss the following programs:

1. DHS Joint Analysis Group (D-JAG);
2. National Media Exploitation Center (NMEC);
3. DHS I&A Homeland Identities, Targeting, and Exploitation Center (HITEC); and
4. Document and Media Exploitation (DOMEX).

This request seeks all records about one or more of the above programs, including but not limited to:

- A. Operational documents, such as concepts of operations, operations proposals, approval and decision memoranda, plans, job aids, and decision matrices;
- B. Policy documents;
- C. Legal analyses;

⁷ *Id.*; Ken Klippenstein, *A Former White House Adviser Was Involved in DHS’s Response to Portland Protests*, NATION (Oct. 28, 2020), <https://www.thenation.com/article/society/white-house-advisor-portland-surveillance/>.

⁸ Office of Intelligence and Analysis, *Instruction IA-1000: Office of Intelligence and Analysis Intelligence Oversight Program and Guidelines*, U.S. DEP’T OF HOMELAND SEC. (Jan. 19, 2017), app. B at 26, <https://www.dhs.gov/sites/default/files/publications/office-of-intelligence-and-analysis-intelligence-oversight-program-and-guidelines.pdf>.

⁹ *The Secretary’s Unit Award 2018*, U.S. DEP’T OF HOMELAND SEC. (last updated Sept. 7, 2021), <https://www.dhs.gov/unit-award-2018>.

- D. Civil rights, civil liberties, or privacy assessments;
- E. Information sharing agreements or arrangements with non-DHS agencies, including federal, state, local, and foreign agencies;
- F. Contracting documents with third-party providers (including corporate vendors, federally funded research and development centers, and academics), informational and promotional materials received from such third parties, and any products (see H below) received from such third parties;
- G. Copies of captured hard drives, cell phones, and other media acquired or collected by an agency, regardless of whether the agency disseminated the copy, and other raw material underlying intelligence records;
- H. Products or records created by or during one or more of these programs such as intelligence reports and cables, homeland exploitation leads (HELs), intelligence information reports (IIRs), tips and leads, memoranda, intelligence assessments, and records relating to immigration, border, or counterterrorism determinations;
- I. Communications between components and offices of DHS, or any DHS component or office and the U.S. Intelligence Community;
- J. Records (including communications, cables, and products) relating to technical or other assistance to any agency, including those not within DHS or the federal government; and
- K. Emails, including attachments to those emails.

This request seeks records regardless of their level of classification, or draft or final status. And this request seeks records from several DHS entities. Specifically, at DHS headquarters, this is a request to the following offices:

- Office for Civil Rights and Civil Liberties;
- Office of the General Counsel;
- Office of Intelligence & Analysis;
- Office of Legislative Affairs;
- Secretary's Office;
- Office of Strategy, Policy, and Plans;
- Privacy Office; and
- Science & Technology Directorate.

It is also a request to the following DHS operational components:

- U.S. Citizenship and Immigration Services;
- U.S. Customs and Border Protection; and
- Immigration and Customs Enforcement.

Request for Fee Waiver

The Brennan Center respectfully requests a waiver of all fees for document search, duplication, and review associated with this request in accord with 5 U.S.C. §§ 552(a)(4)(A)(ii)-(iii), because disclosure of the records sought is in the public interest, because they are likely to contribute significantly to public understanding of the operations or activities of the federal government’s national security, immigration, and law enforcement agencies and operations, and because the Brennan Center has no commercial interest in this information. The Brennan Center is an independent, nonpartisan law and policy organization organized under 26 U.S.C. § 501(c)(3) that works to reform, revitalize, and when necessary, defend the nation’s systems of democracy and justice. The Brennan Center has a demonstrated ability to analyze, synthesize, and report on matters of public concern, in a manner that is available to and reaches the public on a widespread basis.

The Brennan Center qualifies as a “representative of the news media” for the same reasons that it is “primarily engaged in dissemination of information,” because 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)(III); 28 C.F.R. § 16.10(b)(6); *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *see also Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 11 (D.C. Cir. 2003). The Brennan Center has released over 100 publications in the form of reports and papers on various issues of public importance in the period since January 2011.¹⁰ *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 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). 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 28 C.F.R. § 16.10(d)(1).

¹⁰ For representative examples of the Brennan Center’s previous publications on issues of public concern, *see, e.g.*, Michael Price, *National Security and Local Police*, BRENNAN CTR. FOR JUST. (Dec. 10, 2013), <https://www.brennancenter.org/our-work/research-reports/national-security-and-local-police>; Faiza Patel, et al., *Social Media Monitoring*, BRENNAN CTR. FOR JUST. (May 22, 2019), <https://www.brennancenter.org/our-work/research-reports/social-media-monitoring>; *Social Media Surveillance by Homeland Security Investigations: A Threat to Immigrant Communities and Free Expression*, BRENNAN CTR. FOR JUST. (Nov. 15, 2019), <https://www.brennancenter.org/ourwork/research-reports/social-media-surveillance-homeland-security-investigations-threat>; Faiza Patel, et al., *A Course Correction for Homeland Security*, BRENNAN CTR. FOR JUST. (Apr. 20, 2022), <https://www.brennancenter.org/our-work/research-reports/course-correction-homeland-security>; Harsha Panduranga and Faiza Patel, *Stronger Rules Against Bias*, BRENNAN CTR. FOR JUST. (Sept. 15, 2022), <https://www.brennancenter.org/our-work/policy-solutions/stronger-rules-against-bias>.

As a noncommercial requester, the Brennan Center also qualifies for waivers as an “educational institution” pursuant to 28 C.F.R. § 16.10 (c)(1)(i). The Brennan Center qualifies 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 28 C.F.R. § 16.10(b)(4). *See also Nat’l Sec. Archive*, 880 F.2d at 1381. Moreover, disclosure is not primarily in the Brennan Center’s commercial interests. *See* 28 C.F.R. § 16.10(d)(1). 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. Patrick Leahy)).

We look forward to your response within twenty (20) working days from the date you receive this request, as required by 5 U.S.C. § 552(a)(6)(A)(i). Please email the undersigned at lns.foia@brennan.law.nyu.edu if you have any questions. Thank you for your assistance.

Sincerely,

/s/ Spencer Reynolds

Spencer Reynolds
Counsel, Liberty & National Security Program
Brennan Center for Justice at NYU School of Law