

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 submission portal

Re: Freedom of Information Act Request

Dear Ms. Dupree:

This is a request to 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

The intelligence activities of the Department of Homeland Security, especially those of its Office of Intelligence and Analysis (I&A)—an element of the U.S. Intelligence Community—have been under heavy scrutiny of late.¹ Given the department’s posture and I&A’s direction from the President in Executive Order 12,333 to support “national and departmental missions,” I&A is one of the federal government’s few intelligence agencies that has a directly domestic mandate.² And it has the broad discretion memorialized in its intelligence oversight guidelines to work across a wide set of

¹ Office of the General Counsel, *Report on DHS Administrative Review Into I&A Open Source Collection and Dissemination Activities During Civil Unrest*, U.S. DEP’T OF HOMELAND SEC. (January 6, 2021), <https://s3.documentcloud.org/documents/23257042/ia-and-ogc-portland-reports.pdf>.

² Exec. Order No. 12,333 § 1.7 (i) (1981), as amended by Exec. Order No. 13470, § 1.11, 3 C.F.R. 218 (2008); 6 U.S.C § 121(d) (2018).

missions, including to target “other threats to homeland security” and provide intelligence support to other DHS decision-makers.³

We file this request to understand and inform the American public about DHS’s asserted legal basis for its vast operations.

FOIA Request

The Brennan Center requests that the DHS Office of the General Counsel (OGC) release copies of all legal memoranda in DHS’s possession or control from January 24, 2003, to the date of the production related to DHS I&A or any of its predecessor entities, including the Directorate for Information Analysis and Infrastructure Protection. This request seeks memoranda on topics including, but not limited to:

- The access, collection, retention, and dissemination of publicly available information, such as social media collection;
- The development and execution of I&A’s overt collection program;
- The development of I&A’s 2017 Intelligence Oversight Guidelines and any predecessor documents, such as I&A’s interim procedures;
- Proposals to change Executive Order 12,333 or I&A’s legal authorities;
- Restrictions on use of U.S. Persons information;
- Freedom of Information Act policies and practices;
- Analysis relating to rights protected by the U.S. Constitution or its amendments;
- Potential acquisition of access, collection, or analytic tools for use in intelligence or technical assistance operations;
- I&A and other agencies’ collection, monitoring, tracking, and analysis of misinformation, disinformation, or malinformation, or other information-related campaigns, regardless of whether it constitutes foreign intelligence;
- Information sharing, including bulk data transfers, sharing with the U.S. Intelligence Community, and sharing with state and local recipients, such as via fusion centers;
- The Nationwide Suspicious Activity Reporting Initiative, the National Threat Evaluation and Reporting Program, and other such efforts, including those related to the implementation of the statutory information sharing environment;

³ 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 1, 15, <https://www.dhs.gov/sites/default/files/publications/office-of-intelligence-and-analysis-intelligence-oversight-program-and-guidelines.pdf>.

- Legal and policy discussions about counterterrorism, such as the definition of terrorism information, potential distinctions between international and domestic terrorism, and the creation of the term “homegrown violent extremism”; and
- Development of the DHS domestic violent extremism lexicon.

This list is not exhaustive: Our request seeks all legal memoranda issued by the OGC Intelligence Law Division (ILD), regardless of whether they directly relate to I&A. It also seeks memoranda issued by other elements of OGC, DHS, or the U.S. government that were either partly or entirely authored by ILD (e.g., intelligence legal memoranda issued directly by the General Counsel or a Deputy General Counsel, or memoranda co-authored with other OGC divisions, DHS component counsel, or counsel from other agencies).

For the purpose of this request, by “legal memoranda” we mean any memorandum containing legal advice, not only finalized, signed memoranda. A legal memorandum may be unsigned or issued informally. Or it may never have been formally issued but was provided to a client or interagency attorney or policy-maker to inform an agency decision.

This request seeks records regardless of their level of classification, or draft or final status.

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 2011.⁴ *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).

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)).

⁴ 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>.

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