

# 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

Federal Bureau of Investigation  
Attn: Initial Processing Operations Unit  
Record/Information Dissemination Section  
200 Constitution Drive  
Winchester, VA 22602

Via: Department of Homeland Security Freedom of Information Act SecureRelease submission portal and Federal Bureau of Investigation eFOIPA submission portal

Re: Freedom of Information Act Request

Dear Sir or Madam:

This is a request to several headquarters offices and operational components of the United States Department of Homeland Security (DHS) and the Federal Bureau of Investigation (FBI), including the Terrorist Screening Center (TSC), under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, DHS implementing regulations, 6 C.F.R. §§ 5.1 through 5.13, and Department of Justice implementing regulations, 28 C.F.R. §§ 16.1 through 16.11.

## **Background**

The U.S. Government has for years maintained extensive terrorism-related watchlists that operate in secrecy and harm the rights of Americans. The standards for these watchlists are either unknown or extremely broad (e.g., the Terrorism Screening Database (TSDB)

maintained by TSC) and it is near-impossible for Americans to obtain redress from unwarranted listing.<sup>1</sup>

It appears that this flawed watchlisting regime is being expanded beyond terrorism under a set of Trump Administration executive orders and directives that have not been withdrawn.<sup>2</sup> DHS privacy documentation shows that the DHS Watchlist Service—the department’s mechanism for accessing the TSDB—has been expanded to include other “national security threats” beyond terrorism.<sup>3</sup> Most notably, this expansion includes transnational organized crime (TOC) and DHS’s participation in a government-wide TOC watchlist pilot program, also known as the TOC Actor Detection Program. Although the privacy documentation states that presently the TOC watchlist will not include American citizens or lawful permanent residents, it is only a pilot—presumably subject to change—and the existing terrorism watchlisting regime has reached deeply into the lives of Americans.<sup>4</sup>

Similarly, while a focus of the TOC watchlist will be drug cartels and large-scale narcotics and human trafficking, it also appears to capture much smaller operations that may include Americans and activities far removed from foreign groups. Some of these activities may be only tenuously connected with national security, more appropriate for the jurisdiction of state and local police. Indeed, different government documents define “transnational criminal organization” differently, creating confusion as to the actual

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<sup>1</sup> Eric Halliday and Rachel Hanna, *Case Summary: Fourth Circuit Upholds Terrorism Watchlist Database*, LAWFARE BLOG (June 17, 2021), <https://www.lawfareblog.com/case-summary-fourth-circuit-upholds-terrorism-watchlist-database>; and App., Opp’n to Pl.’s Second Mot. to Compel, Ex. 7, *Elhady v. Piehota*, 303 F. Supp. 3d 453 (E.D. Va. 2018) (No. 16CV375), [https://www.aclu.org/sites/default/files/field\\_document/ex\\_7\\_elhady\\_overview\\_of\\_watchlisting\\_system\\_-\\_4-27-18\\_cover.pdf](https://www.aclu.org/sites/default/files/field_document/ex_7_elhady_overview_of_watchlisting_system_-_4-27-18_cover.pdf).

<sup>2</sup> See *Enforcing Federal Law With Respect to Transnational Criminal Organizations and Preventing International Trafficking*, Exec. Order No. 13,773, 82 Fed. Reg. 10,691 (Feb. 9, 2017), <https://www.federalregister.gov/documents/2017/02/14/2017-03113/enforcing-federal-law-with-respect-to-transnational-criminal-organizations-and-preventing>; *Taking Additional Steps to Address the National Emergency With Respect to Significant Transnational Criminal Organizations*, Exec. Order 13,863, 84 Fed. Reg. 10,255 (Mar. 15, 2019), <https://www.federalregister.gov/documents/2019/03/19/2019-05370/taking-additional-steps-to-address-the-national-emergency-with-respect-to-significant-transnational>; and memorandum from Rex Tillerson, Secretary of State, et al., to Michael Pence, Vice President, “National Security Presidential Memorandum –7” (Oct. 5, 2017), <https://trumpwhitehouse.archives.gov/presidential-actions/national-security-presidential-memorandum-7/>.

<sup>3</sup> Dena Kozanas, *Privacy Impact Assessment Update for the Watchlist Service, DHS/ALL/PIA-027(d)*, U.S. DEP’T OF HOMELAND SEC. (July 10, 2020), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhsall027d-watchlistservice-july2020.pdf>.

<sup>4</sup> While the privacy documentation states that “TOC actor information” will not include Americans, it is not clear that incidental or indirect references are totally prohibited. The patchwork of terrorism watchlists has impacted many Americans, often detrimentally. Andrew Cohen, *It’s About Time a Federal Judge Declared the ‘Terrorist Watchlist’ Unconstitutional*, BRENNAN CTR. FOR JUST. (Sept. 6, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/its-about-time-federal-judge-declared-terrorist-watchlist>.

scope of the TOC watchlist and criteria for inclusion.<sup>5</sup> And as we have seen in the government's counterterrorism activities, these watchlisting operations often rely on discriminatory profiling to capture innocent Americans or those only tenuously associated with national security issues by way of community membership, national origin, religion, and geographic location.<sup>6</sup>

The Brennan Center is concerned that the admitted privacy risks<sup>7</sup> of expanding a flawed watchlisting framework to loosely defined transnational organized crime may harm a significantly broader set of Americans, immigrants, and travelers. We file this request to help the public understand this program, its reach, and its potential value and harms.

### **FOIA Request**

The Brennan Center specifically requests all records that were in DHS's or the FBI's possession or control from January 1, 2016, through the date of the production for records that relate to the following presidential policies or programs:

1. National Security Presidential Memorandum-7 (NSPM-7);
2. The Transnational Organized Crime Actor Detection Program (TADP); or
3. The Transnational Organized Crime Watchlist (TOC Watchlist), a program managed by the FBI's Terrorism Screening Center.

This request seeks all records about any of the above, including but not limited to:

- A. Operational documents, such as concepts of operations, operations proposals, approval and decision memoranda, job or decision aids to assist operators, and plans;
- B. Policy documents;
- C. Legal analyses;
- D. Civil rights, civil liberties, and 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;

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<sup>5</sup> Compare the privacy impact assessment with National Security Presidential Memorandum-7 ("activity involving a foreign jurisdiction and the United States or the jurisdictions of at least two sovereign states"). Kozanas, *supra* note 3; and Tillerson et al., *supra* note 2.

<sup>6</sup> See Cohen, *supra* note 4.

<sup>7</sup> See Kozanas, *supra* note 3.

- G. Records acquired or collected from state, local, tribal, territorial, and private sector entities, regardless of whether the agency disseminated the record, and other raw material underlying intelligence records;
- H. Products or records created by or during a program, such as intelligence reports and cables, intelligence information reports (IIRs), watchlist nominations or enhancements, justification packages for nominations, tips and leads, memoranda, intelligence assessments, and records relating to immigration, border, or counterterrorism determinations; and
- I. Emails, including the attachments to those emails.

This request seeks records regardless of their level of classification, or draft or final status. At DHS headquarters, this is a request to the following offices:

- DHS 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. Coast Guard;
- U.S. Customs and Border Protection;
- U.S. Immigration and Customs Enforcement; and
- Transportation Security Administration.

At FBI, it is a request for the Terrorist Screening Center and all other FBI offices, divisions, or subcomponents that may maintain responsive records.

### **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.<sup>8</sup> *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. §

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<sup>8</sup> 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>.

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](mailto:lns.foia@brennan.law.nyu.edu) if you have any questions. Thank you for your assistance.

Sincerely,

/s/ Spencer Reynolds

Spencer Reynolds  
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Brennan Center for Justice at NYU School of Law