

November 5, 2018

Via Certified Mail

Sam Kaplan
Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane, SW, Stop 0655
Washington, D.C. 20528-0655

Re: FOIA and Request for Expedited Processing and Fee Waiver

Dear Sir/Madam:

Eversheds Sutherland (US) LLP represents the Brennan Center for Justice at NYU School of Law (the “Brennan Center”). This is a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Department of Justice regulations relating to requests for disclosure of records, 28 C.F.R. §§ 16.1 to 16.11. The Brennan Center seeks records related to the Data Analysis System (“DAS”) in use by the Department of Homeland Security (“DHS”). The Brennan Center also seeks expedited processing under 28 C.F.R. §§ 16.5(e)(1)(ii) and (iv) and requests a fee waiver under 6 C.F.R. §§ 5.11(d) and (k).

I. Background

According to DHS’s September 29, 2017 Privacy Impact Assessment,¹ the Data DAS is an analytical database that collects personally identifiable information (“PII”) and is maintained by Enforcement and Removal Operations, a subcomponent of U.S. Immigration and Customs Enforcement (“ICE”).² Within Enforcement and Removal Operations, the National Criminal Analytics and Targeting Center uses DAS to assist “field offices in locating aliens convicted of criminal offenses and other aliens who are amenable to removal.”³

¹ *DHS/ICE/PIA – 048 Data Analysis System (DAS)*, DEP’T OF HOMELAND SEC., <https://www.dhs.gov/publication/dhsicepia-048-data-analysis-system-das> (last visited Sept. 29, 2017).

² DEP’T OF HOMELAND SEC., *DHS/ICE DAS/PIA-048, PRIVACY IMPACT ASSESSMENT FOR THE DATA ANALYSIS SYSTEM (DAS) 1* (Sept. 29, 2017), available at <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-das-september2017.pdf>.

³ *Id.*

DAS generates leads known as “Information Referrals”⁴ by taking information from DHS and non-DHS sources that contain PII, including biographical information, immigration and criminal history, custody data, naturalization information, and vehicle and insurance information.⁵ According to the Privacy Impact Assessment, the DHS sources used by DAS include ICE’s Enforcement Integrated Database, U.S. Citizenship and Immigration Services (“USCIS”) Computer Linked Application Information Management System 3, and USCIS’s Central Index System, among other DHS systems.⁶ The non-DHS sources used by DAS include the Federal Bureau of Prisons SENTRY System, the Federal Bureau of Investigation Interstate Identification Index, and the California Department of Corrections and Rehabilitation Strategic Offender Management System.⁷ In addition, the Privacy Impact Assessment references “two commercial sources”⁸ used by DAS—(i) the United States Post Office; and (ii) an unnamed commercial source.⁹

Based on the information in the Privacy Impact Assessment and other publicly available information about DAS, DAS may collect and analyze American citizens’ PII without providing proper privacy protection. For example, the Privacy Impact Assessment notes that although data within DAS is “primarily about aliens,” “information about U.S. citizens may be included in some datasets,” and DAS uses datasets that “will include information on U.S. citizens.”¹⁰ The Privacy Impact Assessment does not elaborate on whether and what policies exist to protect the Americans’ data that may be housed in federal databases. It simply concludes that “privacy risks are sufficiently mitigated” because DAS only has a three-year retention period for the datasets.¹¹

This data, including the PII of American citizens, may be shared with other DHS components and with “certain federal and international government agencies for the purpose of safeguarding national security.”¹² The Privacy Impact Assessment does not explain what circumstances would require safeguarding a national security interest and would justify disseminating PII.

In addition, DAS may disseminate PII of American citizens to third parties. The Privacy Impact Assessment provides that ICE “discloses limited identifying information to a single contracted commercial data vendor on a routine basis” so that the vendor may conduct searches and return information to the National Criminal Analytics and Targeting Center.¹³ The National Criminal Analytics and Targeting Center also “provides alien names

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and dates of birth”¹⁴ to the unnamed commercial data vendor on a weekly basis.¹⁵ The commercial data vendor then conducts searches within its systems using public sources to “identify and provide updated information” about the aliens, and then returns the results to the National Criminal Analytics and Targeting Center.¹⁶

DHS states that “the vendor’s use of the data is limited by the terms of the contract and subject to ICE security standards for the use and handling of sensitive PII.”¹⁷ But the contract and these standards are not publicly available. Furthermore, although DHS denies that **DAS** uses “technology that conducts electronic searches, or analyses to identify a predictive pattern or anomaly,” it does not indicate whether the “project”—including the unidentified commercial data vendor—otherwise use this technology when conducting its searches and providing results.¹⁸

The use of commercial vendors, external data sources, and private proprietary systems puts American citizens’ data at risk. Enforcement of immigration laws should not come at the expense of infringing on Americans’ privacy rights. The public should be informed about the data uploaded to DAS, the sources and inputs used to inform DAS’s immigration recommendations, and the procedures for handling the PII used by this system. For these reasons, the Brennan Center intends to share any information obtained from this request about the use of DAS with the public.

The Brennan Center is well-positioned as an expert in matters of national security and civil liberties to convey this information to a “reasonably broad audience of persons interested in the subject.” 28 C.F.R. § 16.10(k)(2)(ii)(B). The Brennan Center has published extensively on civil liberties and national security policy issues in the last decade, and in the last year, on issues around immigration and privacy,¹⁹ including blogs assessing DHS’s attempts to use sensitive PII from social media to predict national security threats from foreigners and to use data analytics tools to target travelers entering the United States.²⁰ The

¹⁴ *Id.* at 9.

¹⁵ *Id.* at 9, 14-15.

¹⁶ *Id.* at 14-15.

¹⁷ *Id.* at 15.

¹⁸ *Id.* at 11.

¹⁹ See, e.g. *ICE Extreme Vetting Initiative: A Resource Page*, BRENNAN CTR FOR JUSTICE, (Nov. 16, 2018), <https://www.brennancenter.org/analysis/ice-extreme-vetting-initiative-resource-page>) FAIZA PATEL, *Trump Administration’s Fuzzy Math on Terrorist Origins is More than Misleading – It’s Dishonest*, JUST SECURITY (Jan. 16, 2018), <https://www.justsecurity.org/51084/trump-administrations-fuzzy-math-terrorist-origins-misleading-its-dishonest/>; HARSHA PANDURANGA, FAIZA PATEL, & MICHAEL W. PRICE, BRENNAN CENTER FOR JUSTICE, *EXTREME VETTING AND THE MUSLIM BAN* (2017); HARSHA PANDURANGA, FAIZA PATEL, & MICHAEL PRICE, BRENNAN CTR FOR JUSTICE, *EXTREME VETTING: MYTHS AND FACTS* (OCT. 11, 2017), available at <http://www.brennancenter.org/analysis/extreme-vetting-myths-and-facts>; Faiza Patel, *Extreme Vetting by Algorithm*, JUST SECURITY (Nov. 20, 2017), <https://www.justsecurity.org/47239/extreme-vetting-algorithm/>.

²⁰ Rachel Levinson-Waldman, *Why the Government Should Abandon Its Plan to Vet Foreigners On Facebook*, WASH. POST (Dec. 4, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/12/04/why-the-government-should-abandon-its-plan-to-vet-foreigners-on-facebook/?utm_term=.e12f0cb85969; Andrew Lindsay, *Trump’s ‘Extreme*

Brennan Center also played a leading role in advocating for ICE to scrap its efforts to build a data analytics tool to identify—using social media and other sources—travelers who may be detrimental to homeland security.²¹

II. Formal Request

In consideration of the information above, the Brennan Center seeks the following records pursuant to the listed agencies' obligations under FOIA and accompanying regulations:

1. All memoranda, policies, procedures, guidance, guidelines, training modules, and directives that reference DAS or that apply to the use or functioning of DAS.
2. Documents sufficient to identify the “Commercial Vendor” referenced in Section 2.3 of the September 2017 Privacy Impact Assessment (DHS/ICE DAS/PIA-048).
3. All records that constitute or contain agreements with outside agencies, private companies, and/or their respective employees about DAS, including, but not limited to, memoranda of understanding, statements of work, and purchase orders.
4. All communications (including email correspondence) with outside agencies, private companies and/or their respective employees about DAS.
5. All memoranda, policies, procedures, guidance, guidelines, training modules, and directives that apply to the datasets and data inputs used by the DAS or related systems, and that apply to the generation and use of “Information Referrals” as defined in the September 2017 Privacy Impact Assessment (DHS/ICE DAS/PIA-048).
6. All records that constitute or contain ICE’s security and privacy standards for using PII.²²
7. All records that contain or constitute the results of testing or evaluations of DAS or the tools used by non-DHS entities, including, but not limited to, commercial vendors.

The Brennan Center requests that all records be provided electronically, in a text-searchable, static-image (PDF) format (in the best image quality available to the agency), pursuant to 5 U.S.C. § 552(a)(3)(A)(B) and (C).

Vetting’ Could Criminalize Islam, HUFFPOST (Mar. 22, 2017), https://www.huffingtonpost.com/entry/trumps-extreme-vetting-could-criminalize-islam_us_58d2aaece4b02d33b747b398.

²¹ *ICE Abandons Efforts for Social Media Vetting Algorithm*, BRENNAN CTR. FOR JUSTICE (May 18, 2018), <https://www.brennancenter.org/press-release/ice-abandons-efforts-social-media-vetting-algorithm>.

²² This request includes drafts utilized for policy guidance so that they become the “working law” of the agency.

The Brennan Center requests the opportunity to meet and discuss the aforementioned requests, and – to the extent necessary – is amenable to narrowing the scope of the requests to ensure an expeditious response.

III. Application for Expedited Processing

The Brennan Center requests expedited processing pursuant to 5 U.S.C. 552(a)(6)(E) and 28 C.F.R. §§ 16.5(e)(1)(ii) and (iv). The Brennan Center has a “compelling need” for these records as there is “widespread and exceptional media interest in which there exist possible questions about the government’s integrity that affect public confidence.” 5 U.S.C. § 552(a)(6)(E); 28 C.F.R. § 16.5(e)(1)(ii); 28 C.F.R. § 16.5(e)(1)(iv).

The Brennan Center, a 501(c)(3) organization, regularly publishes reports on a wide range of U.S. policy issues, including counterterrorism and security. The Brennan Center has released over forty publications in the form of reports in the last four years. As such, the Brennan Center meets the definition of an organization that is “primarily engaged in disseminating information” under 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(e)(1)(ii).²³ Recently, the Brennan Center has published a report, several fact sheets, and multiple articles on the intersection of national security and immigration policy.²⁴ The Brennan Center regularly writes and publishes reports and newspaper articles and makes appearances on various media outlets, addressing U.S. policy on issues ranging from counterterrorism efforts to voting rights to campaign finance laws and beyond, and it will continue to do so for the foreseeable future.²⁵

The Brennan Center urgently needs access to this information to inform the public of federal government activity that concerns the general public interest. See 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(d)(1)(ii). The information requested herein concerns the federal government’s use of data collection and analytics tools. Many public interest and advocacy organizations are seeking greater clarity about the collection and analysis of data by federal immigration and border control agencies, such as ICE and the U.S. Customs and Border Protection.²⁶ In November 2017, more than 50 of these groups advocated for ICE to

²³ See also *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)).

²⁴ See, e.g. HARSHA PANDURANGA, FAIZA PATEL, & MICHAEL W. PRICE, BRENNAN CENTER FOR JUSTICE, *EXTREME VETTING AND THE MUSLIM BAN* (2017); HARSHA PANDURANGA, FAIZA PATEL, & MICHAEL PRICE, BRENNAN CTR FOR JUSTICE, *EXTREME VETTING: MYTHS AND FACTS* (OCT. 11, 2017), available at <http://www.brennancenter.org/analysis/extreme-vetting-myths-and-facts>; Faiza Patel, *Extreme Vetting by Algorithm*, JUST SECURITY (Nov. 20, 2017), <https://www.justsecurity.org/47239/extreme-vetting-algorithm/>.

²⁵ *Commentary*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/commentary> (last visited July 17, 2017); *Analysis*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/analysis> (last visited July 17, 2017).

²⁶ See, e.g., Letter from Rachel Levinson-Waldman, Senior Counsel, Brennan Ctr. for Justice, et al., to U.S. Customs and Border Protection, et al., concerning Freedom of Information Act Request on Social Media Vetting Tools (Sept. 5, 2017), <https://www.brennancenter.org/sites/default/files/analysis/358280176-Brennan-Center-Files-FOIA-Request-for-Information-on-DHS-Social-Media-Screening-Software%20%281%29.pdf>; Letter from Hugh Handeyside, Nat’l Sec. Project, American Civil Liberties Union Foundation, and Matt Cagle, American Civil Liberties Union of Northern California, to Dep’t of Justice, Dep’t of Homeland Sec., et al., concerning Freedom of Information Act Request on Social Media Content (May 26, 2016),

end the Life Cycle Visa Initiative, a data analytics initiative targeting immigrants and foreign visitors.²⁷ ICE abandoned the project—which was built to automatically mine social media and other Internet sources for criminal or terrorist acts—six months later.²⁸ These organizations included the Brennan Center, ACLU, Center for Democracy and Technology, Leadership Conference on Civil and Human Rights, and National Hispanic Media Coalition.

Moreover, the Federal Agency Data Mining Reporting Act of 2007 (the “Act”), 42 U.S.C. § 2000ee-3, requires DHS to report annually to Congress on DHS’s activities that meet the Act’s definition of data mining or “a program involving pattern-based queries, searches, or other analyses of 1 or more electronic databases.”²⁹ The Act applies to both federal entities and non-federal entities acting on the government’s behalf. As noted above, DHS’s claim that DAS does not use electronic searches does not mean that the commercial sources using the data and providing Information Referrals do not use them. If commercial sources are using these searches, there may be a violation of the Act, which may affect the public’s confidence in the government’s integrity.

IV. Application for Waiver or Limitation of All Fees

The Brennan Center requests a waiver of all fees for document search, duplication, and review associated with this request. The Brennan Center is eligible for a waiver of fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. §§ 5.11(k)(1) and 5.11(d)(2), and pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 6 C.F.R. §§ 5.11(d) and (k).

The Brennan Center is eligible for a waiver of all fees, including duplication fees, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k) because it is a 501(c)(3) non-profit organization and does not seek the records requested herein for commercial use. Disclosure is not primarily in the Brennan Center’s commercial interests. *See* 6 C.F.R. § 5.11(k)(3). The Brennan Center intends to analyze, publish, and publicly disseminate the information requested to the public at no cost. A fee waiver would therefore fulfill Congress’s

https://www.aclunc.org/docs/20160526-aclu_foia_request.pdf; Letter from Ginger P. McCall, Associate Dir., Electronic Privacy Info. Ctr., to Sabrina Burroughs, FOIA Officer/Public Liason, concerning Freedom of Information Act Request on Analytical Framework for Intelligence (April 8, 2014),

<https://epic.org/foia/dhs/cbp/afi/18.2-CBP-MSJ-Ex-1.pdf>.

²⁷ Dave Gershgor, *More Than 50 Experts Just Told DHS That Using AI for “Extreme Vetting” is Dangerously Misguided*, QUARTZ (Nov. 16, 2017), <https://qz.com/1131472/more-than-50-experts-just-told-dhs-that-using-ai-for-extreme-vetting-is-dangerously-misguided/>.

²⁸ Drew Harwell & Nick Miroff, *ICE Just Abandoned Its Dream of ‘Extreme Vetting’ Software That Could Predict Whether A Foreign Visitor Would Become A Terrorist*, WASH POST (May 17, 2017), https://www.washingtonpost.com/news/the-switch/wp/2018/05/17/ice-just-abandoned-its-dream-of-extreme-vetting-software-that-could-predict-whether-a-foreign-visitor-would-become-a-terrorist/?utm_term=.8762e4c625a7.

²⁹ DEP’T OF HOMELAND SEC., PRIVACY OFFICE: 2016 DATA MINING REPORT TO CONGRESS (April 2017), available at

<https://www.dhs.gov/sites/default/files/publications/2016%20Data%20Mining%20Report%20FINAL.pdf>

legislative intent that FOIA be “liberally construed in favor of waivers for noncommercial requesters.”³⁰

In addition, the subject of the requested records clearly concerns “the operations or activities of the federal government.” The request seeks records and information concerning federal government activity because the documents requested concern the federal government’s collection, processing, and use of PII. 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 in the public interest because it is likely to contribute significantly to public understanding of how the government is using PII, which directly impacts the public’s privacy rights. *See* 6 C.F.R. §§ 5.11(k)(2)(ii) and (iii). As there is a dearth of information currently available on the federal government’s collection, processing, and use of PII, disclosure of these records will significantly enhance the public’s understanding of this subject. *See* 6 C.F.R. § 5.11(k)(2)(iv).

In the alternative, the Brennan Center qualifies for a waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 6 C.F.R. §§ 5.11(d) and (k). As noted above, the Brennan Center does not seek the requested records for commercial use, and the Brennan Center is an institution covered by 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Brennan Center qualifies for waivers 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 6 C.F.R. § 5.11(d)(1).³¹

The Brennan Center also qualifies as a “representative of the news media” because it is “primarily engaged in dissemination of information”—i.e., it “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).³² The Brennan Center has released over 100 publications in the form of reports and papers on various issues of public importance since January 2011.³³ The

³⁰ *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)).

³¹ *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1383-85 (D.C. Cir. 1989); *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

³² *Id.* at 1381.

³³ *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). For representative examples of the Brennan Center’s previous publications on issues of public concern, see Harsha Panduranga, Faiza Patel, and Michael Price, [Extreme Vetting & The Muslim Ban](https://www.brennancenter.org/sites/default/files/publications/extreme_vetting_full_10.2_0.pdf) (2017), available at https://www.brennancenter.org/sites/default/files/publications/extreme_vetting_full_10.2_0.pdf; Rachel Levinson-Waldman, [What the Government Does with Americans’ Data](https://www.brennancenter.org/sites/default/files/publications/Data%20Retention%20-%20FINAL.pdf) (2013), available at <https://www.brennancenter.org/sites/default/files/publications/Data%20Retention%20-%20FINAL.pdf>; Michael Price, [National Security and Local Police](https://www.brennancenter.org/sites/default/files/publications/NationalSecurity_LocalPolice_web.pdf) (2013), available at https://www.brennancenter.org/sites/default/files/publications/NationalSecurity_LocalPolice_web.pdf.

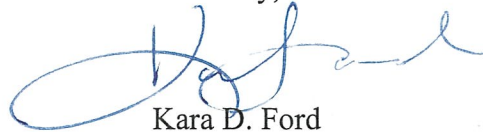
Brennan Center is therefore entitled to a waiver of search and review fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 6 C.F.R. §§ 5.11(d).

V. **Response Requested in 10 Days**

Your attention to this request is appreciated, and the Brennan Center will anticipate your determination regarding this request for expedited processing with ten (10) calendar days. 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(e)(4). I certify that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. 5 U.S.C. § 552(a)(6)(E)(vi); 28 C.F.R. 16.5(e)(3).

If you have any questions regarding this request, please contact me at your earliest convenience at the address above, by telephone at 212-389-5016, or by email at karaford@eversheds-sutherland.com.

Sincerely,



Kara D. Ford

November 5, 2018

Via Certified Mail and E-Mail

Catrina Pavlik-Keenan
U.S. Immigration and Customs Enforcement
500 12th Street, SW, Mail Stop 5009
Washington, D.C. 20536-5009
E-mail: ice-foia@dhs.gov

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¹⁷ *Id.* at 15.

¹⁸ *Id.* at 11.

¹⁹ See, e.g. *ICE Extreme Vetting Initiative: A Resource Page*, BRENNAN CTR FOR JUSTICE, (Nov. 16, 2018), <https://www.brennancenter.org/analysis/ice-extreme-vetting-initiative-resource-page>) FAIZA Patel, *Trump Administration’s Fuzzy Math on Terrorist Origins is More than Misleading – It’s Dishonest*, JUST SECURITY (Jan. 16, 2018), <https://www.justsecurity.org/51084/trump-administrations-fuzzy-math-terrorist-origins-misleading-its-dishonest/>; HARSHA PANDURANGA, FAIZA PATEL, & MICHAEL W. PRICE, BRENNAN CENTER FOR JUSTICE, *EXTREME VETTING AND THE MUSLIM BAN* (2017); HARSHA PANDURANGA, FAIZA PATEL, & MICHAEL PRICE, BRENNAN CTR FOR JUSTICE, *EXTREME VETTING: MYTHS AND FACTS* (OCT. 11, 2017), available at <http://www.brennancenter.org/analysis/extreme-vetting-myths-and-facts>; Faiza Patel, *Extreme Vetting by Algorithm*, JUST SECURITY (Nov. 20, 2017), <https://www.justsecurity.org/47239/extreme-vetting-algorithm/>.

²⁰ Rachel Levinson-Waldman, *Why the Government Should Abandon Its Plan to Vet Foreigners On Facebook*, WASH. POST (Dec. 4, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/12/04/why-the-government-should-abandon-its-plan-to-vet-foreigners-on-facebook/?utm_term=.e12f0cb85969; Andrew Lindsay, *Trump’s ‘Extreme*

Brennan Center also played a leading role in advocating for ICE to scrap its efforts to build a data analytics tool to identify—using social media and other sources—travelers who may be detrimental to homeland security.²¹

II. Formal Request

In consideration of the information above, the Brennan Center seeks the following records pursuant to the listed agencies' obligations under FOIA and accompanying regulations:

1. All memoranda, policies, procedures, guidance, guidelines, training modules, and directives that reference DAS or that apply to the use or functioning of DAS.
2. Documents sufficient to identify the “Commercial Vendor” referenced in Section 2.3 of the September 2017 Privacy Impact Assessment (DHS/ICE DAS/PIA-048).
3. All records that constitute or contain agreements with outside agencies, private companies, and/or their respective employees about DAS, including, but not limited to, memoranda of understanding, statements of work, and purchase orders.
4. All communications (including email correspondence) with outside agencies, private companies and/or their respective employees about DAS.
5. All memoranda, policies, procedures, guidance, guidelines, training modules, and directives that apply to the datasets and data inputs used by the DAS or related systems, and that apply to the generation and use of “Information Referrals” as defined in the September 2017 Privacy Impact Assessment (DHS/ICE DAS/PIA-048).
6. All records that constitute or contain ICE’s security and privacy standards for using PII.²²
7. All records that contain or constitute the results of testing or evaluations of DAS or the tools used by non-DHS entities, including, but not limited to, commercial vendors.

The Brennan Center requests that all records be provided electronically, in a text-searchable, static-image (PDF) format (in the best image quality available to the agency), pursuant to 5 U.S.C. § 552(a)(3)(A)(B) and (C).

Vetting’ Could Criminalize Islam, HUFFPOST (Mar. 22, 2017), https://www.huffingtonpost.com/entry/trumps-extreme-vetting-could-criminalize-islam_us_58d2aaece4b02d33b747b398.

²¹ *ICE Abandons Efforts for Social Media Vetting Algorithm*, BRENNAN CTR. FOR JUSTICE (May 18, 2018), <https://www.brennancenter.org/press-release/ice-abandons-efforts-social-media-vetting-algorithm>.

²² This request includes drafts utilized for policy guidance so that they become the “working law” of the agency.

The Brennan Center requests the opportunity to meet and discuss the aforementioned requests, and – to the extent necessary – is amenable to narrowing the scope of the requests to ensure an expeditious response.

III. Application for Expedited Processing

The Brennan Center requests expedited processing pursuant to 5 U.S.C. 552(a)(6)(E) and 28 C.F.R. §§ 16.5(e)(1)(ii) and (iv). The Brennan Center has a “compelling need” for these records as there is “widespread and exceptional media interest in which there exist possible questions about the government’s integrity that affect public confidence.” 5 U.S.C. § 552(a)(6)(E); 28 C.F.R. § 16.5(e)(1)(ii); 28 C.F.R. § 16.5(e)(1)(iv).

The Brennan Center, a 501(c)(3) organization, regularly publishes reports on a wide range of U.S. policy issues, including counterterrorism and security. The Brennan Center has released over forty publications in the form of reports in the last four years. As such, the Brennan Center meets the definition of an organization that is “primarily engaged in disseminating information” under 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(e)(1)(ii).²³ Recently, the Brennan Center has published a report, several fact sheets, and multiple articles on the intersection of national security and immigration policy.²⁴ The Brennan Center regularly writes and publishes reports and newspaper articles and makes appearances on various media outlets, addressing U.S. policy on issues ranging from counterterrorism efforts to voting rights to campaign finance laws and beyond, and it will continue to do so for the foreseeable future.²⁵

The Brennan Center urgently needs access to this information to inform the public of federal government activity that concerns the general public interest. See 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(d)(1)(ii). The information requested herein concerns the federal government’s use of data collection and analytics tools. Many public interest and advocacy organizations are seeking greater clarity about the collection and analysis of data by federal immigration and border control agencies, such as ICE and the U.S. Customs and Border Protection.²⁶ In November 2017, more than 50 of these groups advocated for ICE to

²³ See also *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)).

²⁴ See, e.g. HARSHA PANDURANGA, FAIZA PATEL, & MICHAEL W. PRICE, BRENNAN CENTER FOR JUSTICE, *EXTREME VETTING AND THE MUSLIM BAN* (2017); HARSHA PANDURANGA, FAIZA PATEL, & MICHAEL PRICE, BRENNAN CTR FOR JUSTICE, *EXTREME VETTING: MYTHS AND FACTS* (OCT. 11, 2017), available at <http://www.brennancenter.org/analysis/extreme-vetting-myths-and-facts>; Faiza Patel, *Extreme Vetting by Algorithm*, JUST SECURITY (Nov. 20, 2017), <https://www.justsecurity.org/47239/extreme-vetting-algorithm/>.

²⁵ *Commentary*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/commentary> (last visited July 17, 2017); *Analysis*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/analysis> (last visited July 17, 2017).

²⁶ See, e.g., Letter from Rachel Levinson-Waldman, Senior Counsel, Brennan Ctr. for Justice, et al., to U.S. Customs and Border Protection, et al., concerning Freedom of Information Act Request on Social Media Vetting Tools (Sept. 5, 2017), <https://www.brennancenter.org/sites/default/files/analysis/358280176-Brennan-Center-Files-FOIA-Request-for-Information-on-DHS-Social-Media-Screening-Software%20%281%29.pdf>; Letter from Hugh Handeyside, Nat’l Sec. Project, American Civil Liberties Union Foundation, and Matt Cagle, American Civil Liberties Union of Northern California, to Dep’t of Justice, Dep’t of Homeland Sec., et al., concerning Freedom of Information Act Request on Social Media Content (May 26, 2016),

end the Life Cycle Visa Initiative, a data analytics initiative targeting immigrants and foreign visitors.²⁷ ICE abandoned the project—which was built to automatically mine social media and other Internet sources for criminal or terrorist acts—six months later.²⁸ These organizations included the Brennan Center, ACLU, Center for Democracy and Technology, Leadership Conference on Civil and Human Rights, and National Hispanic Media Coalition.

Moreover, the Federal Agency Data Mining Reporting Act of 2007 (the “Act”), 42 U.S.C. § 2000ee-3, requires DHS to report annually to Congress on DHS’s activities that meet the Act’s definition of data mining or “a program involving pattern-based queries, searches, or other analyses of 1 or more electronic databases.”²⁹ The Act applies to both federal entities and non-federal entities acting on the government’s behalf. As noted above, DHS’s claim that DAS does not use electronic searches does not mean that the commercial sources using the data and providing Information Referrals do not use them. If commercial sources are using these searches, there may be a violation of the Act, which may affect the public’s confidence in the government’s integrity.

IV. Application for Waiver or Limitation of All Fees

The Brennan Center requests a waiver of all fees for document search, duplication, and review associated with this request. The Brennan Center is eligible for a waiver of fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. §§ 5.11(k)(1) and 5.11(d)(2), and pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 6 C.F.R. §§ 5.11(d) and (k).

The Brennan Center is eligible for a waiver of all fees, including duplication fees, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k) because it is a 501(c)(3) non-profit organization and does not seek the records requested herein for commercial use. Disclosure is not primarily in the Brennan Center’s commercial interests. *See* 6 C.F.R. § 5.11(k)(3). The Brennan Center intends to analyze, publish, and publicly disseminate the information requested to the public at no cost. A fee waiver would therefore fulfill Congress’s

https://www.aclunc.org/docs/20160526-aclu_foia_request.pdf; Letter from Ginger P. McCall, Associate Dir., Electronic Privacy Info. Ctr., to Sabrina Burroughs, FOIA Officer/Public Liason, concerning Freedom of Information Act Request on Analytical Framework for Intelligence (April 8, 2014), <https://epic.org/foia/dhs/cbp/afi/18.2-CBP-MSJ-Ex-1.pdf>.

²⁷ Dave Gershgorin, *More Than 50 Experts Just Told DHS That Using AI for “Extreme Vetting” is Dangerously Misguided*, QUARTZ (Nov. 16, 2017), <https://qz.com/1131472/more-than-50-experts-just-told-dhs-that-using-ai-for-extreme-vetting-is-dangerously-misguided/>.

²⁸ Drew Harwell & Nick Miroff, *ICE Just Abandoned It’s Dream of ‘Extreme Vetting’ Software That Could Predict Whether A Foreign Visitor Would Become A Terrorist*, WASH POST (May 17, 2017), https://www.washingtonpost.com/news/the-switch/wp/2018/05/17/ice-just-abandoned-its-dream-of-extreme-vetting-software-that-could-predict-whether-a-foreign-visitor-would-become-a-terrorist/?utm_term=.8762e4c625a7.

²⁹ DEP’T OF HOMELAND SEC., PRIVACY OFFICE: 2016 DATA MINING REPORT TO CONGRESS (April 2017), available at

<https://www.dhs.gov/sites/default/files/publications/2016%20Data%20Mining%20Report%20FINAL.pdf>

legislative intent that FOIA be “liberally construed in favor of waivers for noncommercial requesters.”³⁰

In addition, the subject of the requested records clearly concerns “the operations or activities of the federal government.” The request seeks records and information concerning federal government activity because the documents requested concern the federal government’s collection, processing, and use of PII. 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 in the public interest because it is likely to contribute significantly to public understanding of how the government is using PII, which directly impacts the public’s privacy rights. *See* 6 C.F.R. §§ 5.11(k)(2)(ii) and (iii). As there is a dearth of information currently available on the federal government’s collection, processing, and use of PII, disclosure of these records will significantly enhance the public’s understanding of this subject. *See* 6 C.F.R. § 5.11(k)(2)(iv).

In the alternative, the Brennan Center qualifies for a waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 6 C.F.R. §§ 5.11(d) and (k). As noted above, the Brennan Center does not seek the requested records for commercial use, and the Brennan Center is an institution covered by 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Brennan Center qualifies for waivers 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 6 C.F.R. § 5.11(d)(1).³¹

The Brennan Center also qualifies as a “representative of the news media” because it is “primarily engaged in dissemination of information”—i.e., it “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).³² The Brennan Center has released over 100 publications in the form of reports and papers on various issues of public importance since January 2011.³³ The

³⁰ *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)).

³¹ *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1383-85 (D.C. Cir. 1989); *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

³² *Id.* at 1381.

³³ *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). For representative examples of the Brennan Center’s previous publications on issues of public concern, see Harsha Panduranga, Faiza Patel, and Michael Price, [Extreme Vetting & The Muslim Ban](https://www.brennancenter.org/sites/default/files/publications/extreme_vetting_full_10.2_0.pdf) (2017), *available at* https://www.brennancenter.org/sites/default/files/publications/extreme_vetting_full_10.2_0.pdf; Rachel Levinson-Waldman, [What the Government Does with Americans’ Data](https://www.brennancenter.org/sites/default/files/publications/Data%20Retention%20-%20FINAL.pdf) (2013), *available at* <https://www.brennancenter.org/sites/default/files/publications/Data%20Retention%20-%20FINAL.pdf>; Michael Price, [National Security and Local Police](https://www.brennancenter.org/sites/default/files/publications/NationalSecurity_LocalPolice_web.pdf) (2013), *available at* https://www.brennancenter.org/sites/default/files/publications/NationalSecurity_LocalPolice_web.pdf.

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(d).

V. **Response Requested in 10 Days**

Your attention to this request is appreciated, and the Brennan Center will anticipate your determination regarding this request for expedited processing with ten (10) calendar days. 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(e)(4). I certify that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. 5 U.S.C. § 552(a)(6)(E)(vi); 28 C.F.R. 16.5(e)(3).

If you have any questions regarding this request, please contact me at your earliest convenience at the address above, by telephone at 212-389-5016, or by email at karaford@eversheds-sutherland.com.

Sincerely,



Kara D. Ford