

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:

This firm 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 U.S. Department of Homeland Security (“DHS”) records recently disclosed in a National Archives and Records Administration Request for Records Disposition Authority (the “NARA Request”).¹ 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

The NARA Request, dated January 2017, named and described the use, retention period, and disposition status of eleven categories of records used by ICE. Specifically, the NARA Request named the following categories: (i) Privacy Complaint Files; (ii) Compliance Review Files; (iii) Disclosure Advice Records; (iv) Rulemaking Files; (v) Requests for System Waivers and Exceptions; (vi) Information Sharing Agreement Files; (vii) Testing Questionnaire Files; (viii) Investment Reviews; (ix) Social Media Operational Use Template (“SMOUT” or “Template”); (x) Data Access Request Analysis (“DARA”); and (xi) Overdue A-File FOIA Request Report.

¹ NAT’L ARCHIVES AND RECORDS ADMINISTRATION, DAA-0567-2016-0002, REQUEST FOR RECORDS DISPOSITION AUTHORITY [hereinafter “NARA/ICE RRDA”] (PDF created on Jan. 4, 2017), https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-homeland-security/rg-0567/daa-0567-2016-0002_sf115.pdf.

Ten of the above-listed categories are critical to the enforcement of DHS's data collection and privacy policies.² According to the NARA Request, these records relate to ICE's Information Management Compliance Records, including ICE policies on conducting Privacy Threshold Analyses and on disclosing and sharing information in accordance with the Privacy Act. One category of records—the SMOUT—governs the collection and use of social media data and appears to be used by several other DHS components, including U.S. Citizenship and Immigration Services (“USCIS”) and U.S. Customs and Border Patrol (“CBP”). While the NARA Request describes these records, the files themselves are not publicly available.

Based on publicly available information, DHS appears to dedicate considerable time and resources to expanding data collection initiatives. But even though DHS releases privacy compliance documents like Privacy Impact Assessments and Systems of Records Notices that refer to such initiatives, those documents do not provide a comprehensive understanding of DHS's collection and privacy policies. Accordingly, the public and even Members of Congress are left without the full information that they need to assess the initiatives and related privacy protections.³ There is little transparency about how DHS ensures compliance with privacy guidelines, DHS's collection and use of the information, and DHS's rules on the sharing and disclosure of such information. Without these details, the public cannot evaluate the lawfulness or effectiveness of ICE's collection information, including its recent attempts to automate social media vetting—an issue with potentially significant consequences for Americans' privacy.⁴

Furthermore, without the requested records, the public cannot understand the scope of audits conducted by components such as the DHS Office of the Inspector General (“OIG”). For example, in February 2017, the DHS-OIG released a report evaluating the effectiveness of pilot programs targeting travelers using collected social media information.⁵ The report concluded that DHS may not be “measuring and evaluating the pilots to determine how well

² This FOIA Request does not request records related to the Overdue A-File FOIA Request Report unless such files relate to one of the other requests herein.

³ Letter from the House Homeland Sec. Comm. to the Hon. Jeh Johnson, Sec'y of the Dep't of Homeland Sec. (Dec. 17, 2015) [hereinafter “House Comm. Letter to DHS”], available at <http://homeland.house.gov/wp-content/uploads/2015/12/Homeland-Security-Committee-Letter-on-Social-Media-Vetting.pdf>.

⁴ See OFFICE OF INSPECTOR GENERAL, DEP'T OF HOMELAND SEC., OIG-17-40, DHS' PILOTS FOR SOCIAL MEDIA SCREENING NEED INCREASED RIGOR TO ENSURE SCALABILITY AND LONG-TERM SUCCESS (Feb. 27, 2017) [hereinafter “DHS-OIG REPORT”], <https://web.archive.org/web/20170311201529/https://www.oig.dhs.gov/assets/Mgmt/2017/OIG-17-40-Feb17.pdf>; Jake Laperruque, *ICE Backs Down on “Extreme Vetting” Automated Social Media Scanning*, PROJECT ON GOVERNMENT OVERSIGHT (May 23, 2018), <http://www.pogo.org/blog/2018/05/ice-backs-down-on-extreme-vetting-automated-social-media-scanning.html>;

⁵ OFFICE OF INSPECTOR GENERAL, DEP'T OF HOMELAND SEC., OIG-17-40, DHS' PILOTS FOR SOCIAL MEDIA SCREENING NEED INCREASED RIGOR TO ENSURE SCALABILITY AND LONG-TERM SUCCESS (Feb. 27, 2017) [hereinafter “DHS-OIG REPORT”], <https://web.archive.org/web/20170311201529/https://www.oig.dhs.gov/assets/Mgmt/2017/OIG-17-40-Feb17.pdf>.

they are performing.”⁶ The DHS-OIG report highlighted the importance of the audits and that releasing the records identified in the NARA Request and described above would provide additional information about the results of these audits.

The Brennan Center therefore seeks the release of the documents pertaining to DHS’s data collection and privacy policies as described in the NARA Request in order to expand the public’s knowledge and understanding of DHS’s data collection and privacy policies.

A. Privacy Complaint Files

The NARA Request defines Privacy Complaint Files as “[d]ocumentation on complaints that the actions of ICE employees or contractors have violated privacy rights, or the requirements of federal privacy laws or policies.”⁷ This documentation may also include the original complaint, reviews, assessments, correspondence, and the final response letter.

B. Compliance Review Files

According to the NARA Request, Compliance Review Files include “[r]eview and guidance on policies, procedures, presentations, record schedules, multimedia projects, and other associated materials to ensure they are in compliance with privacy laws or rules.”⁸ These files document assistance provided to USCIS in their Alien Case File audits, and may include correspondence, training reviews, and final recommendations as well as other documentation.

C. Disclosure Advice Records

According to the NARA Request, Disclosure Advice Records document “advice given to program offices about what information they may and may not disclose pursuant to the Privacy Act.”⁹ These records may also include the “initial request for advice, correspondence, response, and other associated materials.”¹⁰

D. Rulemaking Files

The NARA Request describes Rulemaking Files as “[r]ecords explaining, justifying, and documenting the development and publication of a notice of proposed rulemaking or final rule supporting the exemptions claimed under the Privacy Act.”¹¹ These files may

⁶ Memorandum from Francis X. Taylor, Under Secretary for Intelligence & Analysis, Dep’t of Homeland Sec., to John Roth, Inspector General, Dep’t of Homeland Sec., concerning OIG Draft Report, “DHS’ Pilots for Social Media Screening Need Increased Rigor to Ensure Scalability and Long-term Success” 2 (Dec. 29, 2016).

⁷ NARA/ICE RRDA, *supra* note 1, at 3.

⁸ *Id.*

⁹ *Id.* at 4.

¹⁰ *Id.*

¹¹ *Id.*

“include draft rule, reviews, routing information, notices of proposed rulemaking, final rules, related comments and other associated documentation.”¹²

E. Requests for System Waivers and Exceptions

According to the NARA Request, Requests for System Waivers and Exceptions are records “documenting the review and recommendations for ICE systems needing an exception or waiver of the provisions of the DHS Sensitive Systems Policy Directive 4300A.”¹³ These records may also include correspondence and the final recommendations, in addition to other documentation.

F. Information Sharing Agreement Files

The NARA Request describes Information Sharing Agreement Files as “[r]eviews of agreements with other entities for sharing information.”¹⁴ These reviews may include copies of the agreement with the entity involved and related documents, such as “review documentation, correspondence, suggested changes, and other associated materials.”¹⁵

G. Testing Questionnaire Files

According to the NARA Request, these files document whether to authorize the use of real data and the conditions under which they are to be authorized. The files also document “processes showing that risks to privacy and security are minimized while allowing necessary tests to proceed.”¹⁶ These records may include a “questionnaire, correspondence, reviews, routing information, final recommendation, and associated documentation.”¹⁷

H. Investment Reviews

According to the NARA Request, the Investment Reviews include a “[r]eview of OMB 300 packages for systems to ensure or document that the privacy component of the OMB 300 component of the package is completed or updated.”¹⁸ The Investment Reviews also may include copies of the OMB 300 form and correspondence, in addition to other documentation.

I. Social Media Operational Use Template

The NARA Request defines the SMOUT used by ICE as “documentation used to outline the agency’s collection of PII from social media sources and determine privacy

¹² *Id.*

¹³ The Policy Directive provides specialized techniques and procedures for implementing the requirements of the DHS Information Security Program for DHS systems that process sensitive information.
<https://www.dhs.gov/publication/dhs-4300a-sensitive-systems-handbook>

¹⁴ NARA/ICE RRDA, *supra* note 1, at 5.

¹⁵ *Id.*

¹⁶ *Id.* at 6.

¹⁷ *Id.*

¹⁸ *Id.*

compliance.”¹⁹ On June 8, 2012, DHS announced the creation of the SMOUT to guide department-wide social media data collection and operational use.²⁰ According to DHS, the SMOUT, a document reviewed and adjudicated by the DHS Chief Privacy Officer,²¹ identifies the appropriate authorities for the collection of personally identifiable information (“PII”) from social media.²² The Template also is used to identify DHS’s “information technology systems, technologies, rulemakings, programs, or pilot projects that involve collecting PII from social media.”²³ The SMOUT is not publicly available,²⁴ even though it is used by multiple DHS components.

The SMOUT requires submission of “Rules of Behavior, which include “requirements for operational use of social media and the consequences of failure to adhere to those requirements.”²⁵ Component Privacy Officers, in collaboration with other officials, draft these rules and “submit them with the Template to the Chief Privacy Officer for review and approval.”²⁶

DHS acknowledged that CBP also uses the SMOUT in its response to a FOIA request by journalist Aliya Sternstein.²⁷ A Privacy Threshold Analysis produced as part of that response reveals that CBP uses the SMOUT to permit its use of social media vetting tools on Electronic System for Travel Authorization (“ESTA”) applicants entering the United States.²⁸ The October 27, 2017 Privacy Compliance Review of the ESTA program corroborates the Privacy Threshold Analysis’s findings and notes that the SMOUT was used

¹⁹ *Id.* at 7.

²⁰ DEP’T OF HOMELAND SEC., INSTRUCTION # 110-01-001, PRIVACY POLICY FOR OPERATIONAL USE OF SOCIAL MEDIA [hereinafter “DHS INSTRUCTION # 110-01-001”] (June 8, 2012), *available at* https://www.dhs.gov/sites/default/files/publications/Instruction_110-01-001_Privacy_Policy_for_Operational_Use_of_Social_Media.pdf.

²¹ *Id.* § IV(M) at 5.

²² *Id.* § IV(L) at 4.

²³ *Id.* § IV(L) at 4-5.

²⁴ A CBP FOIA response to the Brennan Center in 2018 included an earlier version of the SMOUT dated July 24, 2012. This SMOUT was responsive to updates in the Automated Targeting System (ATS) and Analytical Framework for Intelligence (AFI). The SMOUT listed law enforcement intelligence, criminal investigations, and situational awareness as among the operational use categories for collecting PII from social media sources. (DEP’T OF HOMELAND SEC., PRIVACY OFFICE, DHS OPERATIONAL USE OF SOCIAL MEDIA (July 24, 2012) (on file with author)). The Brennan Center is seeking copies of all versions of the SMOUT from the date of July 24, 2012, to the date of this request. See item 11 of the Brennan Center’s Formal Request under Section II below.

²⁵ DHS INSTRUCTION # 110-01-001, *supra* note 20, at § VI(D) at 8.

²⁶ *Id.*

²⁷ *See, e.g.* DEP’T OF HOMELAND SEC., PRIVACY OFFICE, PRIVACY THRESHOLD ANALYSIS VERSION NO. 01-2014 at 3, [hereinafter “SOCIAL MEDIA VETTING PTA”] *available at* <https://foiaonline.regulations.gov/foia/action/getContent?objectId=A7aC6yX6e91kxJAZiiM9DES6gbc-DAVW>; Aliya Sternstein, *Obama Team Did Some ‘Extreme Vetting’ of Muslims Before Trump, New Documents Show*, DAILY BEAST (Jan. 2, 2018), <https://www.thedailybeast.com/obama-team-did-some-extreme-vetting-of-muslims-before-trump-new-documents-show>.

²⁸ SOCIAL MEDIA VETTING PTA, *supra* note 26, at 3-4, 9.

“to gain a complete understanding of the use of information collected within the ESTA application, specifically social media identifiers.”²⁹

While there are no publicly available DHS documents that detail the use of the SMOUT by USCIS, Congressional correspondence with DHS suggests USCIS has also been using the Template since at least 2015. On December 17, 2015, the U.S. House of Representatives Committee on Homeland Security sent a letter to then-DHS Secretary Jeh Johnson requesting information on the social media review process for visa applicants. In this letter, the Committee noted that USCIS has used social media to vet immigrants and has used “approved Operational Use of Social Media Templates.” The Committee requested copies of these Templates.³⁰

J. Data Access Request Analysis

The NARA Request describes Data Access Request Analysis (“DARA”) as a document that replaces a Privacy Threshold Analysis when agency records are shared from DHS’s Automated Biometric Identification System (“IDENT”).³¹ DARA is a joint document between ICE and the “IDENT system owner”—the DHS Office of Biometric Identify Management—and “is used to understand how data are shared and protected.”³²

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 records created since January 1, 2015 that contain or constitute “Privacy Complaint Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
2. All records created since January 1, 2015 that contain or constitute “Compliance Review Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
3. All records created since January 1, 2015 that contain or constitute “Disclosure Advice Records” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.

²⁹ DEP’T OF HOMELAND SEC., PRIVACY COMPLIANCE REVIEW OF THE U.S. CUSTOMS & BORDER PROTECTION ELECTRONIC SYSTEM FOR TRAVEL AUTHORIZATION 7 (Oct. 27, 2017), *available at* <https://www.dhs.gov/sites/default/files/publications/CBP-ESTA%20PCR%20final%20report%2020171027.pdf>.

³⁰ House Comm. Letter to DHS, *supra* note 3.

³¹ NARA/ICE RRDA, *supra* note 1, at 7.

³² *Id.*

4. All records created since January 1, 2015 that contain or constitute “Rulemaking Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
5. All records created since January 1, 2015 that contain or constitute “Requests for System Waivers and Exceptions” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
6. All records created since January 1, 2015 that contain or constitute “Information Sharing Agreement Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
7. All records created since January 1, 2015 that contain or constitute “Testing Questionnaire Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
8. All records created since January 1, 2015 that contain or constitute “Investment Reviews” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
9. All records, including but not limited to, memoranda, policies, procedures, guidance, guidelines, training modules, and directives, that constitute or apply to the use of Social Media Operational Use Templates, SMOUT, or Templates used by DHS, including by components CBP, ICE, or USCIS.
10. All records that contain, constitute, or reference “Rules of Behavior” submitted pursuant to a SMOUT used by CBP, ICE, or USCIS.
11. All versions, including draft versions, of the SMOUT or Template from July 24, 2012 through November 2, 2018.
12. All versions, including draft versions, of the DHS Management Directive 110-01, Privacy Policy for Operational Use of Social Media.
13. All records created since January 1, 2015 that contain or constitute “Data Access Request Analysis” or “DARA” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.

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).

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 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).³³ Recently, the Brennan Center has published a report, several fact sheets, and multiple articles on the intersection of national security and immigration policy.³⁴ 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.³⁵

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 policies for data collection and dissemination, and the use of social media monitoring tools. In the absence of these records, such as the SMOUT, the Compliance Review Files, and the Rulemaking Files, publicly available audits like Privacy Impact Assessments and Systems of Records Notices do not provide sufficient information for the public to evaluate the legality and efficacy of the federal government’s collection of information and the potential implications for citizens’ privacy rights. It is also unknown what systems the federal government is using to collect this information and whether those systems are designed to comply with privacy requirements. In addition to privacy concerns, DHS’s use of social media risks chilling First Amendment activity and infringing on privacy rights.³⁶ The Brennan Center intends to share any information obtained from this request with the public. See 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(d)(1)(ii).

³³ 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)).

³⁴ 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/>.

³⁵ *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).

³⁶ See *DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy*, *Hearing Before the Subcomm. on Counterterrorism and Intelligence, H. Comm. on Homeland Sec.*

Many public interest and advocacy organizations are seeking clarity about the rules and guidance used for collecting, monitoring, and analyzing this data, including social media data. In the past year, organizations including the Brennan Center, American Civil Liberties Union, Electronic Privacy Information Center, and MuckRock have submitted FOIA requests related to social media monitoring.³⁷ Members of Congress have also petitioned DHS to release guidance governing these initiatives, such as the SMOUT, in recent years.³⁸

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 legislative intent that FOIA be "liberally construed in favor of waivers for noncommercial requesters."³⁹

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

111th Cong. (2012) (Rep. Jackie Speier (D-Cal.), among others, interrogated the impact of social media monitoring on freedom of speech); *see also* Andrea Stone, *DHS Monitoring of Social Media Under Scrutiny By Lawmakers*, HUFFPOST (Feb. 16, 2012, 3:38 PM), https://www.huffingtonpost.com/2012/02/16/dhs-monitoring-of-social-media_n_1282494.html.

³⁷ *FOIA Request on Social Media Surveillance*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/legal-document/foia-request-social-media-surveillance> (last visited May 29, 2018);

³⁸ House Comm. Letter to DHS, *supra* note 3.

³⁹ *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)).

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).⁴⁰

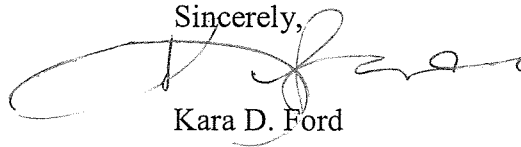
The Brennan Center also qualifies as a “representative of the news media” because it is “primarily engaged in dissemination of information”—i.e., it “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III).⁴¹ The Brennan Center has released over 100 publications in the form of reports and papers on various issues of public importance since January 2011.⁴² 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(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

⁴⁰ *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).

⁴¹ *Id.* at 1381.

⁴² *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 (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 (2013), available at <https://www.brennancenter.org/sites/default/files/publications/Data%20Retention%20-%20FINAL.pdf>; Michael Price, National Security and Local Police (2013), available at https://www.brennancenter.org/sites/default/files/publications/NationalSecurity_LocalPolice_web.pdf.

November 5, 2018

Via Certified Mail and E-Mail

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Dear Sir/Madam:

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¹ NAT’L ARCHIVES AND RECORDS ADMINISTRATION, DAA-0567-2016-0002, REQUEST FOR RECORDS DISPOSITION AUTHORITY [hereinafter “NARA/ICE RRDA”] (PDF created on Jan. 4, 2017), https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/departments-of-homeland-security/rg-0567/daa-0567-2016-0002_sf115.pdf.

Ten of the above-listed categories are critical to the enforcement of DHS's data collection and privacy policies.² According to the NARA Request, these records relate to ICE's Information Management Compliance Records, including ICE policies on conducting Privacy Threshold Analyses and on disclosing and sharing information in accordance with the Privacy Act. One category of records—the SMOUT —governs the collection and use of social media data and appears to be used by several other DHS components, including U.S. Citizenship and Immigration Services (“USCIS”) and U.S. Customs and Border Patrol (“CBP”). While the NARA Request describes these records, the files themselves are not publicly available.

Based on publicly available information, DHS appears to dedicate considerable time and resources to expanding data collection initiatives. But even though DHS releases privacy compliance documents like Privacy Impact Assessments and Systems of Records Notices that refer to such initiatives, those documents do not provide a comprehensive understanding of DHS's collection and privacy policies. Accordingly, the public and even Members of Congress are left without the full information that they need to assess the initiatives and related privacy protections.³ There is little transparency about how DHS ensures compliance with privacy guidelines, DHS's collection and use of the information, and DHS's rules on the sharing and disclosure of such information. Without these details, the public cannot evaluate the lawfulness or effectiveness of ICE's collection information, including its recent attempts to automate social media vetting—an issue with potentially significant consequences for Americans' privacy.⁴

Furthermore, without the requested records, the public cannot understand the scope of audits conducted by components such as the DHS Office of the Inspector General (“OIG”). For example, in February 2017, the DHS-OIG released a report evaluating the effectiveness of pilot programs targeting travelers using collected social media information.⁵ The report concluded that DHS may not be “measuring and evaluating the pilots to determine how well

² This FOIA Request does not request records related to the Overdue A-File FOIA Request Report unless such files relate to one of the other requests herein.

³ Letter from the House Homeland Sec. Comm. to the Hon. Jeh Johnson, Sec'y of the Dep't of Homeland Sec. (Dec. 17, 2015) [hereinafter “House Comm. Letter to DHS”], available at <http://homeland.house.gov/wp-content/uploads/2015/12/Homeland-Security-Committee-Letter-on-Social-Media-Vetting.pdf>.

⁴ See OFFICE OF INSPECTOR GENERAL, DEP'T OF HOMELAND SEC., OIG-17-40, DHS' PILOTS FOR SOCIAL MEDIA SCREENING NEED INCREASED RIGOR TO ENSURE SCALABILITY AND LONG-TERM SUCCESS (Feb. 27, 2017) [hereinafter “DHS-OIG REPORT”], <https://web.archive.org/web/20170311201529/https://www.oig.dhs.gov/assets/Mgmt/2017/OIG-17-40-Feb17.pdf>; Jake Laperruque, *ICE Backs Down on “Extreme Vetting” Automated Social Media Scanning*, PROJECT ON GOVERNMENT OVERSIGHT (May 23, 2018), <http://www.pogo.org/blog/2018/05/ice-backs-down-on-extreme-vetting-automated-social-media-scanning.html>;

⁵ OFFICE OF INSPECTOR GENERAL, DEP'T OF HOMELAND SEC., OIG-17-40, DHS' PILOTS FOR SOCIAL MEDIA SCREENING NEED INCREASED RIGOR TO ENSURE SCALABILITY AND LONG-TERM SUCCESS (Feb. 27, 2017) [hereinafter “DHS-OIG REPORT”], <https://web.archive.org/web/20170311201529/https://www.oig.dhs.gov/assets/Mgmt/2017/OIG-17-40-Feb17.pdf>.

they are performing.”⁶ The DHS-OIG report highlighted the importance of the audits and that releasing the records identified in the NARA Request and described above would provide additional information about the results of these audits.

The Brennan Center therefore seeks the release of the documents pertaining to DHS’s data collection and privacy policies as described in the NARA Request in order to expand the public’s knowledge and understanding of DHS’s data collection and privacy policies.

A. Privacy Complaint Files

The NARA Request defines Privacy Complaint Files as “[d]ocumentation on complaints that the actions of ICE employees or contractors have violated privacy rights, or the requirements of federal privacy laws or policies.”⁷ This documentation may also include the original complaint, reviews, assessments, correspondence, and the final response letter.

B. Compliance Review Files

According to the NARA Request, Compliance Review Files include “[r]eview and guidance on policies, procedures, presentations, record schedules, multimedia projects, and other associated materials to ensure they are in compliance with privacy laws or rules.”⁸ These files document assistance provided to USCIS in their Alien Case File audits, and may include correspondence, training reviews, and final recommendations as well as other documentation.

C. Disclosure Advice Records

According to the NARA Request, Disclosure Advice Records document “advice given to program offices about what information they may and may not disclose pursuant to the Privacy Act.”⁹ These records may also include the “initial request for advice, correspondence, response, and other associated materials.”¹⁰

D. Rulemaking Files

The NARA Request describes Rulemaking Files as “[r]ecords explaining, justifying, and documenting the development and publication of a notice of proposed rulemaking or final rule supporting the exemptions claimed under the Privacy Act.”¹¹ These files may

⁶ Memorandum from Francis X. Taylor, Under Secretary for Intelligence & Analysis, Dep’t of Homeland Sec., to John Roth, Inspector General, Dep’t of Homeland Sec., concerning OIG Draft Report, “DHS’ Pilots for Social Media Screening Need Increased Rigor to Ensure Scalability and Long-term Success” 2 (Dec. 29, 2016).

⁷ NARA/ICE RRDA, *supra* note 1, at 3.

⁸ *Id.*

⁹ *Id.* at 4.

¹⁰ *Id.*

¹¹ *Id.*

“include draft rule, reviews, routing information, notices of proposed rulemaking, final rules, related comments and other associated documentation.”¹²

E. Requests for System Waivers and Exceptions

According to the NARA Request, Requests for System Waivers and Exceptions are records “documenting the review and recommendations for ICE systems needing an exception or waiver of the provisions of the DHS Sensitive Systems Policy Directive 4300A.”¹³ These records may also include correspondence and the final recommendations, in addition to other documentation.

F. Information Sharing Agreement Files

The NARA Request describes Information Sharing Agreement Files as “[r]eviews of agreements with other entities for sharing information.”¹⁴ These reviews may include copies of the agreement with the entity involved and related documents, such as “review documentation, correspondence, suggested changes, and other associated materials.”¹⁵

G. Testing Questionnaire Files

According to the NARA Request, these files document whether to authorize the use of real data and the conditions under which they are to be authorized. The files also document “processes showing that risks to privacy and security are minimized while allowing necessary tests to proceed.”¹⁶ These records may include a “questionnaire, correspondence, reviews, routing information, final recommendation, and associated documentation.”¹⁷

H. Investment Reviews

According to the NARA Request, the Investment Reviews include a “[r]eview of OMB 300 packages for systems to ensure or document that the privacy component of the OMB 300 component of the package is completed or updated.”¹⁸ The Investment Reviews also may include copies of the OMB 300 form and correspondence, in addition to other documentation.

I. Social Media Operational Use Template

The NARA Request defines the SMOUT used by ICE as “documentation used to outline the agency’s collection of PII from social media sources and determine privacy

¹² *Id.*

¹³ The Policy Directive provides specialized techniques and procedures for implementing the requirements of the DHS Information Security Program for DHS systems that process sensitive information. <https://www.dhs.gov/publication/dhs-4300a-sensitive-systems-handbook>

¹⁴ NARA/ICE RRDA, *supra* note 1, at 5.

¹⁵ *Id.*

¹⁶ *Id.* at 6.

¹⁷ *Id.*

¹⁸ *Id.*

compliance.”¹⁹ On June 8, 2012, DHS announced the creation of the SMOUT to guide department-wide social media data collection and operational use.²⁰ According to DHS, the SMOUT, a document reviewed and adjudicated by the DHS Chief Privacy Officer,²¹ identifies the appropriate authorities for the collection of personally identifiable information (“PII”) from social media.²² The Template also is used to identify DHS’s “information technology systems, technologies, rulemakings, programs, or pilot projects that involve collecting PII from social media.”²³ The SMOUT is not publicly available,²⁴ even though it is used by multiple DHS components.

The SMOUT requires submission of “Rules of Behavior, which include “requirements for operational use of social media and the consequences of failure to adhere to those requirements.”²⁵ Component Privacy Officers, in collaboration with other officials, draft these rules and “submit them with the Template to the Chief Privacy Officer for review and approval.”²⁶

DHS acknowledged that CBP also uses the SMOUT in its response to a FOIA request by journalist Aliya Sternstein.²⁷ A Privacy Threshold Analysis produced as part of that response reveals that CBP uses the SMOUT to permit its use of social media vetting tools on Electronic System for Travel Authorization (“ESTA”) applicants entering the United States.²⁸ The October 27, 2017 Privacy Compliance Review of the ESTA program corroborates the Privacy Threshold Analysis’s findings and notes that the SMOUT was used

¹⁹ *Id.* at 7.

²⁰ DEP’T OF HOMELAND SEC., INSTRUCTION # 110-01-001, PRIVACY POLICY FOR OPERATIONAL USE OF SOCIAL MEDIA [hereinafter “DHS INSTRUCTION # 110-01-001”] (June 8, 2012), *available at* https://www.dhs.gov/sites/default/files/publications/Instruction_110-01-001_Privacy_Policy_for_Operational_Use_of_Social_Media.pdf.

²¹ *Id.* § IV(M) at 5.

²² *Id.* § IV(L) at 4.

²³ *Id.* § IV(L) at 4-5.

²⁴ A CBP FOIA response to the Brennan Center in 2018 included an earlier version of the SMOUT dated July 24, 2012. This SMOUT was responsive to updates in the Automated Targeting System (ATS) and Analytical Framework for Intelligence (AFI). The SMOUT listed law enforcement intelligence, criminal investigations, and situational awareness as among the operational use categories for collecting PII from social media sources. (DEP’T OF HOMELAND SEC., PRIVACY OFFICE, DHS OPERATIONAL USE OF SOCIAL MEDIA (July 24, 2012) (on file with author)). The Brennan Center is seeking copies of all versions of the SMOUT from the date of July 24, 2012, to the date of this request. See item 11 of the Brennan Center’s Formal Request under Section II below.

²⁵ DHS INSTRUCTION # 110-01-001, *supra* note 20, at § VI(D) at 8.

²⁶ *Id.*

²⁷ *See, e.g.* DEP’T OF HOMELAND SEC., PRIVACY OFFICE, PRIVACY THRESHOLD ANALYSIS VERSION NO. 01-2014 at 3, [hereinafter “SOCIAL MEDIA VETTING PTA”] *available at* <https://foiaonline.regulations.gov/foia/action/getContent?objectId=A7aC6yX6e91kxJAZiiM9DES6gbc-DAVW>; Aliya Sternstein, *Obama Team Did Some ‘Extreme Vetting’ of Muslims Before Trump, New Documents Show*, DAILY BEAST (Jan. 2, 2018), <https://www.thedailybeast.com/obama-team-did-some-extreme-vetting-of-muslims-before-trump-new-documents-show>.

²⁸ SOCIAL MEDIA VETTING PTA, *supra* note 26, at 3-4, 9.

“to gain a complete understanding of the use of information collected within the ESTA application, specifically social media identifiers.”²⁹

While there are no publicly available DHS documents that detail the use of the SMOUT by USCIS, Congressional correspondence with DHS suggests USCIS has also been using the Template since at least 2015. On December 17, 2015, the U.S. House of Representatives Committee on Homeland Security sent a letter to then-DHS Secretary Jeh Johnson requesting information on the social media review process for visa applicants. In this letter, the Committee noted that USCIS has used social media to vet immigrants and has used “approved Operational Use of Social Media Templates.” The Committee requested copies of these Templates.³⁰

J. Data Access Request Analysis

The NARA Request describes Data Access Request Analysis (“DARA”) as a document that replaces a Privacy Threshold Analysis when agency records are shared from DHS’s Automated Biometric Identification System (“IDENT”).³¹ DARA is a joint document between ICE and the “IDENT system owner”—the DHS Office of Biometric Identify Management—and “is used to understand how data are shared and protected.”³²

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 records created since January 1, 2015 that contain or constitute “Privacy Complaint Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
2. All records created since January 1, 2015 that contain or constitute “Compliance Review Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
3. All records created since January 1, 2015 that contain or constitute “Disclosure Advice Records” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.

²⁹ DEP’T OF HOMELAND SEC., PRIVACY COMPLIANCE REVIEW OF THE U.S. CUSTOMS & BORDER PROTECTION ELECTRONIC SYSTEM FOR TRAVEL AUTHORIZATION 7 (Oct. 27, 2017), available at <https://www.dhs.gov/sites/default/files/publications/CBP-ESTA%20PCR%20final%20report%2020171027.pdf>.

³⁰ House Comm. Letter to DHS, *supra* note 3.

³¹ NARA/ICE RRDA, *supra* note 1, at 7.

³² *Id.*

4. All records created since January 1, 2015 that contain or constitute “Rulemaking Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
5. All records created since January 1, 2015 that contain or constitute “Requests for System Waivers and Exceptions” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
6. All records created since January 1, 2015 that contain or constitute “Information Sharing Agreement Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
7. All records created since January 1, 2015 that contain or constitute “Testing Questionnaire Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
8. All records created since January 1, 2015 that contain or constitute “Investment Reviews” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
9. All records, including but not limited to, memoranda, policies, procedures, guidance, guidelines, training modules, and directives, that constitute or apply to the use of Social Media Operational Use Templates, SMOUT, or Templates used by DHS, including by components CBP, ICE, or USCIS.
10. All records that contain, constitute, or reference “Rules of Behavior” submitted pursuant to a SMOUT used by CBP, ICE, or USCIS.
11. All versions, including draft versions, of the SMOUT or Template from July 24, 2012 through November 2, 2018.
12. All versions, including draft versions, of the DHS Management Directive 110-01, Privacy Policy for Operational Use of Social Media.
13. All records created since January 1, 2015 that contain or constitute “Data Access Request Analysis” or “DARA” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.

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).

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 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).³³ Recently, the Brennan Center has published a report, several fact sheets, and multiple articles on the intersection of national security and immigration policy.³⁴ 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.³⁵

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 policies for data collection and dissemination, and the use of social media monitoring tools. In the absence of these records, such as the SMOUT, the Compliance Review Files, and the Rulemaking Files, publicly available audits like Privacy Impact Assessments and Systems of Records Notices do not provide sufficient information for the public to evaluate the legality and efficacy of the federal government’s collection of information and the potential implications for citizens’ privacy rights. It is also unknown what systems the federal government is using to collect this information and whether those systems are designed to comply with privacy requirements. In addition to privacy concerns, DHS’s use of social media risks chilling First Amendment activity and infringing on privacy rights.³⁶ The Brennan Center intends to share any information obtained from this request with the public. See 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(d)(1)(ii).

³³ 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)).

³⁴ 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/>.

³⁵ *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).

³⁶ See *DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy*, *Hearing Before the Subcomm. on Counterterrorism and Intelligence, H. Comm. on Homeland Sec.*

Many public interest and advocacy organizations are seeking clarity about the rules and guidance used for collecting, monitoring, and analyzing this data, including social media data. In the past year, organizations including the Brennan Center, American Civil Liberties Union, Electronic Privacy Information Center, and MuckRock have submitted FOIA requests related to social media monitoring.³⁷ Members of Congress have also petitioned DHS to release guidance governing these initiatives, such as the SMOUT, in recent years.³⁸

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 legislative intent that FOIA be "liberally construed in favor of waivers for noncommercial requesters."³⁹

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

111th Cong. (2012) (Rep. Jackie Speier (D-Cal.), among others, interrogated the impact of social media monitoring on freedom of speech); *see also* Andrea Stone, *DHS Monitoring of Social Media Under Scrutiny By Lawmakers*, HUFFPOST (Feb. 16, 2012, 3:38 PM), https://www.huffingtonpost.com/2012/02/16/dhs-monitoring-of-social-media_n_1282494.html.

³⁷ *FOIA Request on Social Media Surveillance*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/legal-document/foia-request-social-media-surveillance> (last visited May 29, 2018);

³⁸ House Comm. Letter to DHS, *supra* note 3.

³⁹ *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)).

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).⁴⁰

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).⁴¹ The Brennan Center has released over 100 publications in the form of reports and papers on various issues of public importance since January 2011.⁴² 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(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

⁴⁰ *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).

⁴¹ *Id.* at 1381.

⁴² *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 (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 (2013), available at <https://www.brennancenter.org/sites/default/files/publications/Data%20Retention%20-%20FINAL.pdf>; Michael Price, National Security and Local Police (2013), available at https://www.brennancenter.org/sites/default/files/publications/NationalSecurity_LocalPolice_web.pdf.

November 5, 2018

Via Certified Mail

Sabrina Burroughs
FOIA Officer/Public Liaison
U.S. Customs and Border Protection
1300 Pennsylvania Avenue, NW, Room 3.3D
Washington, D.C. 20229

Re: FOIA and Request for Expedited Processing and Fee Waiver

Dear Sir/Madam:

This firm 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 U.S. Department of Homeland Security (“DHS”) records recently disclosed in a National Archives and Records Administration Request for Records Disposition Authority (the “NARA Request”).¹ 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

The NARA Request, dated January 2017, named and described the use, retention period, and disposition status of eleven categories of records used by ICE. Specifically, the NARA Request named the following categories: (i) Privacy Complaint Files; (ii) Compliance Review Files; (iii) Disclosure Advice Records; (iv) Rulemaking Files; (v) Requests for System Waivers and Exceptions; (vi) Information Sharing Agreement Files; (vii) Testing Questionnaire Files; (viii) Investment Reviews; (ix) Social Media Operational Use Template (“SMOUT” or “Template”); (x) Data Access Request Analysis (“DARA”); and (xi) Overdue A-File FOIA Request Report.

¹ NAT'L ARCHIVES AND RECORDS ADMINISTRATION, DAA-0567-2016-0002, REQUEST FOR RECORDS DISPOSITION AUTHORITY [hereinafter “NARA/ICE RRDA”] (PDF created on Jan. 4, 2017), https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-homeland-security/rg-0567/daa-0567-2016-0002_sf115.pdf.

Ten of the above-listed categories are critical to the enforcement of DHS's data collection and privacy policies.² According to the NARA Request, these records relate to ICE's Information Management Compliance Records, including ICE policies on conducting Privacy Threshold Analyses and on disclosing and sharing information in accordance with the Privacy Act. One category of records—the SMOUT—governs the collection and use of social media data and appears to be used by several other DHS components, including U.S. Citizenship and Immigration Services (“USCIS”) and U.S. Customs and Border Patrol (“CBP”). While the NARA Request describes these records, the files themselves are not publicly available.

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Furthermore, without the requested records, the public cannot understand the scope of audits conducted by components such as the DHS Office of the Inspector General (“OIG”). For example, in February 2017, the DHS-OIG released a report evaluating the effectiveness of pilot programs targeting travelers using collected social media information.⁵ The report concluded that DHS may not be “measuring and evaluating the pilots to determine how well

² This FOIA Request does not request records related to the Overdue A-File FOIA Request Report unless such files relate to one of the other requests herein.

³ Letter from the House Homeland Sec. Comm. to the Hon. Jeh Johnson, Sec'y of the Dep't of Homeland Sec. (Dec. 17, 2015) [hereinafter “House Comm. Letter to DHS”], available at <http://homeland.house.gov/wp-content/uploads/2015/12/Homeland-Security-Committee-Letter-on-Social-Media-Vetting.pdf>.

⁴ See OFFICE OF INSPECTOR GENERAL, DEP'T OF HOMELAND SEC., OIG-17-40, DHS' PILOTS FOR SOCIAL MEDIA SCREENING NEED INCREASED RIGOR TO ENSURE SCALABILITY AND LONG-TERM SUCCESS (Feb. 27, 2017) [hereinafter “DHS-OIG REPORT”], <https://web.archive.org/web/20170311201529/https://www.oig.dhs.gov/assets/Mgmt/2017/OIG-17-40-Feb17.pdf>; Jake Laperruque, *ICE Backs Down on “Extreme Vetting” Automated Social Media Scanning*, PROJECT ON GOVERNMENT OVERSIGHT (May 23, 2018), <http://www.pogo.org/blog/2018/05/ice-backs-down-on-extreme-vetting-automated-social-media-scanning.html>;

⁵ OFFICE OF INSPECTOR GENERAL, DEP'T OF HOMELAND SEC., OIG-17-40, DHS' PILOTS FOR SOCIAL MEDIA SCREENING NEED INCREASED RIGOR TO ENSURE SCALABILITY AND LONG-TERM SUCCESS (Feb. 27, 2017) [hereinafter “DHS-OIG REPORT”], <https://web.archive.org/web/20170311201529/https://www.oig.dhs.gov/assets/Mgmt/2017/OIG-17-40-Feb17.pdf>.

they are performing.”⁶ The DHS-OIG report highlighted the importance of the audits and that releasing the records identified in the NARA Request and described above would provide additional information about the results of these audits.

The Brennan Center therefore seeks the release of the documents pertaining to DHS’s data collection and privacy policies as described in the NARA Request in order to expand the public’s knowledge and understanding of DHS’s data collection and privacy policies.

A. Privacy Complaint Files

The NARA Request defines Privacy Complaint Files as “[d]ocumentation on complaints that the actions of ICE employees or contractors have violated privacy rights, or the requirements of federal privacy laws or policies.”⁷ This documentation may also include the original complaint, reviews, assessments, correspondence, and the final response letter.

B. Compliance Review Files

According to the NARA Request, Compliance Review Files include “[r]eview and guidance on policies, procedures, presentations, record schedules, multimedia projects, and other associated materials to ensure they are in compliance with privacy laws or rules.”⁸ These files document assistance provided to USCIS in their Alien Case File audits, and may include correspondence, training reviews, and final recommendations as well as other documentation.

C. Disclosure Advice Records

According to the NARA Request, Disclosure Advice Records document “advice given to program offices about what information they may and may not disclose pursuant to the Privacy Act.”⁹ These records may also include the “initial request for advice, correspondence, response, and other associated materials.”¹⁰

D. Rulemaking Files

The NARA Request describes Rulemaking Files as “[r]ecords explaining, justifying, and documenting the development and publication of a notice of proposed rulemaking or final rule supporting the exemptions claimed under the Privacy Act.”¹¹ These files may

⁶ Memorandum from Francis X. Taylor, Under Secretary for Intelligence & Analysis, Dep’t of Homeland Sec., to John Roth, Inspector General, Dep’t of Homeland Sec., concerning OIG Draft Report, “DHS’ Pilots for Social Media Screening Need Increased Rigor to Ensure Scalability and Long-term Success” 2 (Dec. 29, 2016).

⁷ NARA/ICE RRDA, *supra* note 1, at 3.

⁸ *Id.*

⁹ *Id.* at 4.

¹⁰ *Id.*

¹¹ *Id.*

“include draft rule, reviews, routing information, notices of proposed rulemaking, final rules, related comments and other associated documentation.”¹²

E. Requests for System Waivers and Exceptions

According to the NARA Request, Requests for System Waivers and Exceptions are records “documenting the review and recommendations for ICE systems needing an exception or waiver of the provisions of the DHS Sensitive Systems Policy Directive 4300A.”¹³ These records may also include correspondence and the final recommendations, in addition to other documentation.

F. Information Sharing Agreement Files

The NARA Request describes Information Sharing Agreement Files as “[r]eviews of agreements with other entities for sharing information.”¹⁴ These reviews may include copies of the agreement with the entity involved and related documents, such as “review documentation, correspondence, suggested changes, and other associated materials.”¹⁵

G. Testing Questionnaire Files

According to the NARA Request, these files document whether to authorize the use of real data and the conditions under which they are to be authorized. The files also document “processes showing that risks to privacy and security are minimized while allowing necessary tests to proceed.”¹⁶ These records may include a “questionnaire, correspondence, reviews, routing information, final recommendation, and associated documentation.”¹⁷

H. Investment Reviews

According to the NARA Request, the Investment Reviews include a “[r]eview of OMB 300 packages for systems to ensure or document that the privacy component of the OMB 300 component of the package is completed or updated.”¹⁸ The Investment Reviews also may include copies of the OMB 300 form and correspondence, in addition to other documentation.

I. Social Media Operational Use Template

The NARA Request defines the SMOUT used by ICE as “documentation used to outline the agency’s collection of PII from social media sources and determine privacy

¹² *Id.*

¹³ The Policy Directive provides specialized techniques and procedures for implementing the requirements of the DHS Information Security Program for DHS systems that process sensitive information.
<https://www.dhs.gov/publication/dhs-4300a-sensitive-systems-handbook>

¹⁴ NARA/ICE RRDA, *supra* note 1, at 5.

¹⁵ *Id.*

¹⁶ *Id.* at 6.

¹⁷ *Id.*

¹⁸ *Id.*

compliance.”¹⁹ On June 8, 2012, DHS announced the creation of the SMOUT to guide department-wide social media data collection and operational use.²⁰ According to DHS, the SMOUT, a document reviewed and adjudicated by the DHS Chief Privacy Officer,²¹ identifies the appropriate authorities for the collection of personally identifiable information (“PII”) from social media.²² The Template also is used to identify DHS’s “information technology systems, technologies, rulemakings, programs, or pilot projects that involve collecting PII from social media.”²³ The SMOUT is not publicly available,²⁴ even though it is used by multiple DHS components.

The SMOUT requires submission of “Rules of Behavior, which include “requirements for operational use of social media and the consequences of failure to adhere to those requirements.”²⁵ Component Privacy Officers, in collaboration with other officials, draft these rules and “submit them with the Template to the Chief Privacy Officer for review and approval.”²⁶

DHS acknowledged that CBP also uses the SMOUT in its response to a FOIA request by journalist Aliya Sternstein.²⁷ A Privacy Threshold Analysis produced as part of that response reveals that CBP uses the SMOUT to permit its use of social media vetting tools on Electronic System for Travel Authorization (“ESTA”) applicants entering the United States.²⁸ The October 27, 2017 Privacy Compliance Review of the ESTA program corroborates the Privacy Threshold Analysis’s findings and notes that the SMOUT was used

¹⁹ *Id.* at 7.

²⁰ DEP’T OF HOMELAND SEC., INSTRUCTION # 110-01-001, PRIVACY POLICY FOR OPERATIONAL USE OF SOCIAL MEDIA [hereinafter “DHS INSTRUCTION # 110-01-001”] (June 8, 2012), *available at* https://www.dhs.gov/sites/default/files/publications/Instruction_110-01-001_Privacy_Policy_for_Operational_Use_of_Social_Media.pdf.

²¹ *Id.* § IV(M) at 5.

²² *Id.* § IV(L) at 4.

²³ *Id.* § IV(L) at 4-5.

²⁴ A CBP FOIA response to the Brennan Center in 2018 included an earlier version of the SMOUT dated July 24, 2012. This SMOUT was responsive to updates in the Automated Targeting System (ATS) and Analytical Framework for Intelligence (AFI). The SMOUT listed law enforcement intelligence, criminal investigations, and situational awareness as among the operational use categories for collecting PII from social media sources. (DEP’T OF HOMELAND SEC., PRIVACY OFFICE, DHS OPERATIONAL USE OF SOCIAL MEDIA (July 24, 2012) (on file with author)). The Brennan Center is seeking copies of all versions of the SMOUT from the date of July 24, 2012, to the date of this request. See item 11 of the Brennan Center’s Formal Request under Section II below.

²⁵ DHS INSTRUCTION # 110-01-001, *supra* note 20, at § VI(D) at 8.

²⁶ *Id.*

²⁷ *See, e.g.* DEP’T OF HOMELAND SEC., PRIVACY OFFICE, PRIVACY THRESHOLD ANALYSIS VERSION NO. 01-2014 at 3, [hereinafter “SOCIAL MEDIA VETTING PTA”] *available at* <https://foiaonline.regulations.gov/foia/action/getContent?objectId=A7aC6yX6e91kxJAZiiM9DES6gbc-DAVW>; Aliya Sternstein, *Obama Team Did Some ‘Extreme Vetting’ of Muslims Before Trump, New Documents Show*, DAILY BEAST (Jan. 2, 2018), <https://www.thedailybeast.com/obama-team-did-some-extreme-vetting-of-muslims-before-trump-new-documents-show>.

²⁸ SOCIAL MEDIA VETTING PTA, *supra* note 26, at 3-4, 9.

“to gain a complete understanding of the use of information collected within the ESTA application, specifically social media identifiers.”²⁹

While there are no publicly available DHS documents that detail the use of the SMOUT by USCIS, Congressional correspondence with DHS suggests USCIS has also been using the Template since at least 2015. On December 17, 2015, the U.S. House of Representatives Committee on Homeland Security sent a letter to then-DHS Secretary Jeh Johnson requesting information on the social media review process for visa applicants. In this letter, the Committee noted that USCIS has used social media to vet immigrants and has used “approved Operational Use of Social Media Templates.” The Committee requested copies of these Templates.³⁰

J. Data Access Request Analysis

The NARA Request describes Data Access Request Analysis (“DARA”) as a document that replaces a Privacy Threshold Analysis when agency records are shared from DHS’s Automated Biometric Identification System (“IDENT”).³¹ DARA is a joint document between ICE and the “IDENT system owner”—the DHS Office of Biometric Identify Management—and “is used to understand how data are shared and protected.”³²

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 records created since January 1, 2015 that contain or constitute “Privacy Complaint Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
2. All records created since January 1, 2015 that contain or constitute “Compliance Review Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
3. All records created since January 1, 2015 that contain or constitute “Disclosure Advice Records” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.

²⁹ DEP’T OF HOMELAND SEC., PRIVACY COMPLIANCE REVIEW OF THE U.S. CUSTOMS & BORDER PROTECTION ELECTRONIC SYSTEM FOR TRAVEL AUTHORIZATION 7 (Oct. 27, 2017), *available at* <https://www.dhs.gov/sites/default/files/publications/CBP-ESTA%20PCR%20final%20report%2020171027.pdf>.

³⁰ House Comm. Letter to DHS, *supra* note 3.

³¹ NARA/ICE RRDA, *supra* note 1, at 7.

³² *Id.*

4. All records created since January 1, 2015 that contain or constitute “Rulemaking Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
5. All records created since January 1, 2015 that contain or constitute “Requests for System Waivers and Exceptions” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
6. All records created since January 1, 2015 that contain or constitute “Information Sharing Agreement Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
7. All records created since January 1, 2015 that contain or constitute “Testing Questionnaire Files” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
8. All records created since January 1, 2015 that contain or constitute “Investment Reviews” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.
9. All records, including but not limited to, memoranda, policies, procedures, guidance, guidelines, training modules, and directives, that constitute or apply to the use of Social Media Operational Use Templates, SMOUT, or Templates used by DHS, including by components CBP, ICE, or USCIS.
10. All records that contain, constitute, or reference “Rules of Behavior” submitted pursuant to a SMOUT used by CBP, ICE, or USCIS.
11. All versions, including draft versions, of the SMOUT or Template from July 24, 2012 through November 2, 2018.
12. All versions, including draft versions, of the DHS Management Directive 110-01, Privacy Policy for Operational Use of Social Media.
13. All records created since January 1, 2015 that contain or constitute “Data Access Request Analysis” or “DARA” as referenced in the NARA Request (DAA-0567-2016-0002) dated January 4, 2017.

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).

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 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).³³ Recently, the Brennan Center has published a report, several fact sheets, and multiple articles on the intersection of national security and immigration policy.³⁴ 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.³⁵

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 policies for data collection and dissemination, and the use of social media monitoring tools. In the absence of these records, such as the SMOUT, the Compliance Review Files, and the Rulemaking Files, publicly available audits like Privacy Impact Assessments and Systems of Records Notices do not provide sufficient information for the public to evaluate the legality and efficacy of the federal government’s collection of information and the potential implications for citizens’ privacy rights. It is also unknown what systems the federal government is using to collect this information and whether those systems are designed to comply with privacy requirements. In addition to privacy concerns, DHS’s use of social media risks chilling First Amendment activity and infringing on privacy rights.³⁶ The Brennan Center intends to share any information obtained from this request with the public. See 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(d)(1)(ii).

³³ 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)).

³⁴ 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/>.

³⁵ *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).

³⁶ See *DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy*, *Hearing Before the Subcomm. on Counterterrorism and Intelligence, H. Comm. on Homeland Sec.*

Many public interest and advocacy organizations are seeking clarity about the rules and guidance used for collecting, monitoring, and analyzing this data, including social media data. In the past year, organizations including the Brennan Center, American Civil Liberties Union, Electronic Privacy Information Center, and MuckRock have submitted FOIA requests related to social media monitoring.³⁷ Members of Congress have also petitioned DHS to release guidance governing these initiatives, such as the SMOUT, in recent years.³⁸

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 legislative intent that FOIA be "liberally construed in favor of waivers for noncommercial requesters."³⁹

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

111th Cong. (2012) (Rep. Jackie Speier (D-Cal.), among others, interrogated the impact of social media monitoring on freedom of speech); *see also* Andrea Stone, *DHS Monitoring of Social Media Under Scrutiny By Lawmakers*, HUFFPOST (Feb. 16, 2012, 3:38 PM), https://www.huffingtonpost.com/2012/02/16/dhs-monitoring-of-social-media_n_1282494.html.

³⁷ *FOIA Request on Social Media Surveillance*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/legal-document/foia-request-social-media-surveillance> (last visited May 29, 2018);

³⁸ House Comm. Letter to DHS, *supra* note 3.

³⁹ *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)).

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).⁴⁰

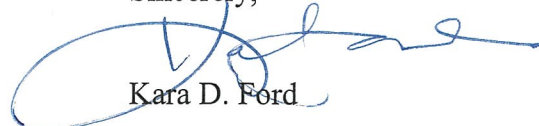
The Brennan Center also qualifies as a “representative of the news media” because it is “primarily engaged in dissemination of information”—i.e., it “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III).⁴¹ The Brennan Center has released over 100 publications in the form of reports and papers on various issues of public importance since January 2011.⁴² 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(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

⁴⁰ *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).

⁴¹ *Id.* at 1381.

⁴² *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* (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* (2013), available at <https://www.brennancenter.org/sites/default/files/publications/Data%20Retention%20-%20FINAL.pdf>; Michael Price, *National Security and Local Police* (2013), available at https://www.brennancenter.org/sites/default/files/publications/NationalSecurity_LocalPolice_web.pdf.