

BRENNAN
CENTER
FOR JUSTICE

Brennan Center for Justice
at New York University School of Law

120 Broadway, Suite 1750
New York, NY 10271
646.292.8310 Fax 212.463.7308
www.brennancenter.org

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Via Certified Mail and Electronic Submission

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

Jill Eggleston
U.S. Citizenship and Immigration Services
National Records Center, FOIA/PA Office
P.O. Box 648010
Lee's Summit, MO 64064-8010

Catrina Pavlik-Keenan
U.S. Immigration and Customs Enforcement
500 12th Street, SW, Mail Stop 5009
Washington, D.C. 20536-5009

Brendan Henry
Office of Intelligence and Analysis
U.S. Department of Homeland Security
Washington, D.C. 20528-0001

Re: Freedom of Information Act Request and Request for Expedited Processing and Fee Waiver

Dear Sir/Madam:

This is a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Department of Homeland Security implementing regulations, 6 C.F.R. §§ 5.1 through 5.36. It is also a request for expedited processing under 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(d)(1), and for a fee waiver under 5 U.S.C. §§ 552(a)(4)(ii) and (iii) and 6 C.F.R. §§ 5.11(d) and (k).

I. Background

In February 2017, the Department of Homeland Security (DHS) Office of the Inspector General released a report evaluating the effectiveness of social media screening pilot programs targeting travelers.¹ These programs, which are tied to expanding background checks, attempt to search for, read, interpret, and categorize posts on social media.

Considering the report's conclusion that DHS may not be "measuring and evaluating the pilots' results to determine how well they are performing,"² the use of these and other social media screening programs by the federal government is of significant public concern. In the absence of adequate measurement criteria, the implications for individuals' privacy and First Amendment rights, as well as the possibility of errors or misinterpretations, are great. There is currently little transparency regarding when and how federal agencies use social media screening, how such use is overseen, and how the resulting information is used, retained, and shared. Accordingly, we seek information about the nature of the social media screening pilot programs used by DHS.

DHS Social Media Task Force

Following the December 2, 2015, terrorist attack in San Bernardino, California, DHS established a Social Media Task Force ("Task Force") to review the Department's current use of social media and identity options.³ The Task Force comprises senior representatives and staff from DHS, U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and the Transportation Security Administration (TSA), as well as DHS oversight offices, including the Office for Civil Rights and Civil Liberties (CRCL), the Office of General Counsel, and the Privacy Office.⁴

The Task Force, led by former Under-Secretary for Intelligence and Analysis Francis X. Taylor, concluded that DHS should develop the capacity to conduct systematic social media screening of travelers, refugees, immigrants, and others.⁵ DHS therefore initiated several research and development projects, referred to as "pilots," to "assess the feasibility of developing such a capacity."⁶ Task Force activities and pilots' performance are "memorialized in a weekly agenda, discussed during a weekly conference call with Task Force members, and disseminated to the Task Force and DHS leadership in weekly summaries."⁷ In addition, project milestones are reported on a weekly basis to the Task Force using "a Plan of Action and Milestones reporting function."⁸

DHS Shared Social Media Screening Service (formerly "Center for Excellence")

¹ 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>.

² *Id.* at 2.

³ *Id.* at 1.

⁴ *Id.*

⁵ 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" 1 (Dec. 29, 2016) [hereinafter "Taylor Memorandum"]; DHS-OIG REPORT, *supra* note 1, at 7.

⁶ DHS-OIG REPORT, *supra* note 1, at 7; Taylor Memorandum, *supra* note 5, at 1.

⁷ DHS-OIG REPORT at 9; Taylor Memorandum at 3.

⁸ DHS-OIG REPORT at 9; Taylor Memorandum at 3.

To expand social media screening across DHS components, the Task Force recommended, and the Secretary approved, the formation of a DHS Social Media Center of Excellence (COE);⁹ however, the name was later changed to Shared Social Media Screening Service (“the Service”).¹⁰ According to the Office of the Inspector General, the Service “identif[ies] new social media tools and opportunities, test[s] and evaluates new and emerging technologies, and identif[ies] best practices for the appropriate sharing and collaborative use of social media within DHS and with external partners.”¹¹ In addition, the Service “set[s] standards for social media use in relevant DHS operations while ensuring privacy and civil rights and civil liberties protections.”¹²

The Task Force developed a proposal for the creation of a social media board and social media council to replace the Service. The social media board will establish awareness of “social media use and capabilities among DHS leadership and control DHS’s social media use programs.”¹³ The social media council will “ensure working-level communication for social media use and capabilities, develop new policies and procedures, oversee performance management, and promote information sharing.”¹⁴

USCIS Social Media Screening Pilot Programs

In December 2015, USCIS started manually and automatically screening the social media accounts of a limited number of individuals applying to travel to the United States. According to the Office of the Inspector General, the Task Force intended to use the December 2015 pilot and lessons learned from other DHS components’ use of social media screening to “develop policies and processes for standardized use of social media department-wide.”¹⁵ Additionally, the pilot attempted to “examine the feasibility of using social media screening with [an unnamed] automated search tool.”¹⁶ However, the Office of the Inspector General determined that although the pilot had an objective, it lacked definitions of what would constitute success and what metrics would be used to assess program results. Certain program findings were nevertheless produced from the population screened by the unnamed automated search tool, including the number of individuals with confirmed social media accounts; individuals who likely had a social media account; individuals with unconfirmed accounts; and individuals with no identified social media account.¹⁷

In April 2016, USCIS tested another unnamed automated tool in a different pilot. The purpose of this program was to expand screening to additional applicants (including refugees) through the use of a tool developed through the Defense Advanced Research Projects Agency (DARPA).¹⁸ Applicants were asked to voluntarily give their social media user names, after which USCIS screened usernames against a redacted instrument or tool to determine “whether the refugees were linked to derogatory social media information that could impact their eligibility for immigration benefits or admissibility into the United States.”¹⁹ In reviewing the pilot, USCIS determined that the tool used in screening was “not a viable option for automated social media screening” and had “low match confidence,” before concluding that “manual review was more effective” because the accounts identified by the tool did not always match up with

⁹ DHS-OIG REPORT at 1.

¹⁰ *Id.* at n. 2.

¹¹ *Id.* at 11.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 1.

¹⁶ *Id.*

¹⁷ *Id.* at 3.

¹⁸ *Id.* at 3.

¹⁹ *Id.*

applicants and officers had to manually check the matches in any event.²⁰ Similar to the December 2015 pilot, this program failed to have objective criteria to measure against, making it impossible to know what would constitute success or failure.²¹

ICE Social Media Screening Pilot Program

In August 2016, ICE started a pilot to screen the social media activity of a category of nonimmigrant visa applicants (about which additional details were redacted from the report).²² The pilot uses an automated web search tool that “specializes in social media data exploitation by analyzing social media data and funneling it into actionable information.”²³ Specifically, the pilot attempts to appraise the aptitude of the unnamed tool “to conduct initial screening of social media activity during visa application and continue social media monitoring” for an undisclosed period.²⁴

Per the Office of the Inspector General’s description of the pilot plan, the expectation is for the program to supplement existing background checks conducted together with the Department of State and “help identify potential derogatory information not found in Government databases.”²⁵ This program likely targets “nonimmigrant visas authorizing temporary visits to the United States for individuals who do not intend to become permanent residents.”²⁶

Unidentified ICE, USCIS, and CBP Social Media Screening Programs

According to Under Secretary Taylor’s memorandum to the Office of the Inspector General, a myriad of other social media screening tools has been developed and assessed by DHS. For example, the memorandum indicates that as of December 2016, DHS had completed seven social media monitoring pilots: five USCIS pilots, one CBP pilot slated to begin in January 2017, and one ICE pilot. In addition, USCIS had an ongoing pilot, and CBP had a pilot in the initiation phase.²⁷

Finally, the memo indicated that the Task Force undertook a market survey of 275 tools, from which DHS identified five tools “for further testing and research on operational data based on Component mission requirements.”²⁸ The memo does not specify whether the five tools identified here are the ones identified in the Office of the Inspector General report.

Metrics and Tool Performance

According to an attachment to Under Secretary Taylor’s memorandum, although the various pilots lacked benchmarks for future success, the programs “consistently collect and analyze a comprehensive collection of metrics” such as: (a) processing time per case, (b) number of queries conducted, (c) number of cases where relevant information was returned, (d) number of returned documents for each query, (e) number of social media accounts found, (f) number of documents collected, (g) number of travel

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 3.

²³ *Id.* at n. 9.

²⁴ *Id.*

²⁵ *Id.* at 4.

²⁶ *Id.* at n. 3.

²⁷ Taylor Memorandum, *supra* note 5, at 2.

²⁸ *Id.*

confirmations, and (h) number of Social Media Assessment reports written when information of interest is found.²⁹

In addition, DHS has compiled other criteria for measuring tool performance. According to an unclassified attachment in response to the Office of Inspector General's recommendations, these efforts were presented in a Homeland Security Advanced Research Projects interim report titled "Social Media Analytics Capability Testing: Independent Assessment," dated June 30, 2016, and a final report, dated October 28, 2016. The metrics were divided into the following categories: Analysis, Data Management, Information Sources, Language, Technology, Reporting System, and Usability.³⁰ By June 2017, DHS "intend[ed] to have developed mechanisms to collect metrics on the outcome of cases where relevant social media information was returned to determine how frequently social media information is relied on during the screening process."³¹

II. Formal Request

In consideration of the information above, the Brennan Center for Justice seeks the following records pursuant to the listed agencies' obligations under the Freedom of Information Act (FOIA):

1. All records, including memoranda, policies, procedures, communications, legal opinions, training modules, directives, guidelines, and correspondence (including over e-mail), that contain, constitute, or reference social media screening programs, including the seven social media screening pilot programs completed between December 15, 2015 and December 29, 2016, the ongoing USCIS pilot, and the CBP pilot that commenced in January 2017.
2. All records that contain, constitute, or reference agreements, contracts, and communications with outside agencies and private companies about DHS participation in social media screening pilot programs, including but not limited to Memoranda of Understanding, Statements of Work, and Purchase Orders.
3. All records that contain, constitute, or reference training materials, guidance or modules for any social media screening program, including descriptions of the types of data inputs used in social media screening.
4. All records that contain, constitute, or reference the testing or evaluation of social media analytical tools, including but not limited to market surveys of vendors of social media analytical tools, and qualitative and quantitative assessments of the capabilities provided by various tools.
5. All records that contain, constitute or reference the metrics collected by DHS Components related to social media, including but not limited to:
 - a. Processing time per case;
 - b. Number of queries conducted;
 - c. Number of cases where relevant information was returned;
 - d. Number of returned documents for each query;
 - e. Number of social media accounts found;
 - f. Number of documents collected;
 - g. Number of travel confirmations; and
 - h. Number of Social Media Assessment reports written when information of interest is found.

²⁹ *Id.* at 3; DHS-OIG REPORT, *supra* note 1, at 9.

³⁰ Taylor Memorandum, *supra* note 5, at 3.

³¹ *Id.*

6. All weekly agendas and reports of Social Media Task Force activities including project milestones, agendas from weekly conference call between members, summaries of weekly conference calls, and activities and performance of pilot programs.
7. The final version of the Homeland Security Advanced Research Projects Agency report titled “Social Media Analytics Capability Testing: Independent Assessment,” dated October 28, 2016.

We request 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).

III. Application for Expedited Processing

The Brennan Center requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and implementing regulation 6 C.F.R. § 5.5(d). There is a “compelling need” for these records because the information requested is urgently required by an organization “primarily engaged in disseminating information” to “inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v); 6 C.F.R. § 5.5(d)(1)(ii).

The Brennan Center is a section 501(c)(3) non-profit organization that is “primarily engaged in disseminating information” within the meaning of 5 U.S.C. § 552(a)(6)(E)(v)(II) and 6 C.F.R. § 5.5(d)(1)(ii). The United States District Court for the District of Columbia has found that a non-profit, public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” is “primarily engaged in disseminating information” within the meaning of the statute and regulations. *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)). 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.³²

Furthermore, the Brennan Center urgently requires the information sought by this request in order to inform the public of federal government activity. 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 social media screening tools. Many public interest and advocacy organizations are seeking greater clarity about the collection of social media data by federal border control agencies.³³ As of June 2017, U.S. visa applicants

³² *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).

³³ See, e.g., *Brennan Center Files FOIA Request for Information on DHS Social Media Monitoring Software*, BRENNAN CTR. FOR JUSTICE (Apr. 28, 2017), <https://www.brennancenter.org/analysis/brennan-center-files-foia-request-information-dhs-social-media-monitoring-software>; 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), https://www.aclunc.org/docs/20160526-aclu_foia_request.pdf; *Brennan Center Condemns DHS Proposal to Collect Media Passwords*, BRENNAN CTR. FOR JUSTICE (Mar. 10, 2017), <https://www.brennancenter.org/analysis/brennan-center-condemns-dhs-proposal-collect-social-media-passwords>; Sophia Cope, *Fear Materialized: Border Agents Demand Social Media Data from Americans*, ELECTRONIC FRONTIER FOUNDATION (Jan. 25, 2017), <https://www.eff.org/deeplinks/2017/01/fear-materialized-border-agents-demand-social-media-data-americans>; *Brennan Center Submits Comments on DHS Plan to Collect Social Media Information Through the Visa Waiver Program*, BRENNAN CTR. FOR JUSTICE (Aug. 22, 2016),

may be required to disclose any social media handles for the last five years and biographical information going back fifteen years, raising concerns about the privacy risks posed to travelers and the Americans with whom they correspond or otherwise communicate.³⁴ A similar procedure approved in December 2016 asks Visa Waiver Program travelers to provide their social media information upon entering the country.³⁵ These types of programs take into consideration a traveler’s associates on social media, a measure which could bring additional scrutiny to law-abiding U.S. citizens who affiliate with family and friends from overseas.³⁶ The Brennan Center intends to share any information about the use of social media for the purposes of border control obtained from this request with the public.

IV. Application for Waiver or Limitation of All Fees

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

First, the Brennan Center plans to analyze, publish, and publicly disseminate information obtained from this request. The requested records are not sought for commercial use and will be disclosed to the public at no cost.

Second, the Brennan Center qualifies as a “representative of the news media” for the same reasons that it is “primarily engaged in dissemination of information” – i.e., because the Brennan Center “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III); *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *see also supra*, Part III; *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11. The Brennan Center has released seventeen publications in the form of reports and papers on various issues of public importance in the period since January 2017.³⁷ *Cf. Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11-12 (finding that the Electronic Privacy Information Center was representative of the news media based on its publication of seven books about national and international policies relating to privacy and civil rights); *see also Nat’l Sec. Archive*, 880 F.2d at 1386 (deeming National Security Archive a representative of the news media after it published one book and indicated its intention to publish a set of documents on national and international politics and nuclear policy). The Brennan Center is therefore entitled to a waiver of search and review fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 6 C.F.R. §§ 5.11(d).

<https://www.brennancenter.org/analysis/brennan-center-submits-comments-dhs-plan-collect-social-media-information-through-visa>; *Civil Liberties Coalition Submits Comments on DHS Plan to Collect Travelers’ Social Media*, BRENNAN CTR. FOR JUSTICE (Oct. 3, 2016), <https://www.brennancenter.org/research/liberty-national-security>.

³⁴ Yeganeh Torbati, *Trump Administration Approves Tougher Visa Vetting, Including Social Media Checks*, REUTERS (May 31, 2017), <http://www.reuters.com/article/us-usa-immigration-visa-idUSKBN18R3F8>.

³⁵ Tony Romm, *U.S. Government Begins Asking Foreign Travelers About Social Media*, POLITICO, <http://www.politico.com/story/2016/12/foreign-travelers-social-media-232930> (last visited Mar 21, 2017).

³⁶ *See* Andrew Lindsay, *Trump’s ‘Extreme Vetting’ Could Criminalize Islam*, HUFFINGTON POST (Mar. 22, 2017), http://www.huffingtonpost.com/entry/trumps-extreme-vetting-could-criminalize-islam_us_58d2aaece4b02d33b747b398.

³⁷ *Publications*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/publications> (last visited Aug. 18, 2017).

As a noncommercial requester, the Brennan Center also qualifies for waivers as an “educational institution” pursuant to 6 C.F.R. §§ 5.11(d). The Brennan Center qualifies as an educational institution because it is affiliated with the NYU School of Law, which is plainly an educational institution under the definition provided in 6 C.F.R. § 5.11(d)(1); *see also* Nat’l Sec. Archive v. Dep’t of Def., 880 F.2d 1381 (D.C. Cir. 1989).

The Brennan Center is also entitled to a waiver of all fees, including duplication fees, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(k)(1). First, the subject of the requested records clearly concerns “the operations or activities of the federal government.” As noted above, this request seeks records and information concerning federal government activity because the documents requested concern federal government purchase and use of social media monitoring products or services. 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 therefore in the public interest because it is likely to contribute significantly to public understanding of how the government is engaging in social media monitoring activity that directly impacts the privacy and social media use of the public. *See* 6 C.F.R. §§ 5.11(k)(2)(ii) and (iii). Finally, because of the dearth of information currently available on the federal government’s involvement with social media screening tools, disclosure will significantly enhance the public’s understanding of this subject. *See* 6 C.F.R. § 5.11(k)(2)(iv). Moreover, disclosure is not primarily in the Brennan Center’s commercial interests. *See* 6 C.F.R. § 5.11(k)(3). As stated above, the Brennan Center plans to make any information disclosed as a result of this request available to the public at no cost. A fee waiver would therefore fulfill Congress’s legislative intent that FOIA be “liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 CONG. REC. 27, 190 (1986) (Statement of Sen. Leahy)).

V. Response Requested in 10 Days

Your attention to this request is appreciated, and the Brennan Center will anticipate your determination regarding our request for expedited processing within ten (10) calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 6 C.F.R. § 5.5(d)(4). I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi); 6 C.F.R. § 5.5(d)(3).

We also request that you provide us with an estimated completion date, as required by 5 U.S.C. § 552(a)(7)(B)(ii). If the Request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

Please furnish all applicable records to:

Andrew Lindsay
Research & Programs Associate, Liberty & National Security Program
Brennan Center for Justice
120 Broadway, Suite 1750
New York, NY 10271
lindsaya@brennan.law.nyu.edu

Should you have any questions regarding this request, please contact us at your earliest convenience at the address above, or by telephone at (646) 292-8382, or by email at lindsaya@brennan.law.nyu.edu.

Very truly yours,

Rachel Levinson-Waldman
Senior Counsel, Liberty and National
Security Program
Brennan Center for Justice
1140 Connecticut Ave. NW, Suite 1150
Washington, D.C. 20036
levinsonr@brennan.law.nyu.edu