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VIA FACSIMILE

February 8, 2017

Jonathan Cantor
Acting 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

Dear Mr. Cantor,

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Department of Homeland Security (“DHS”).

EPIC seeks records in possession of the agency concerning statements made by Secretary of Homeland Security John Kelly on February 7, 2017 before the House Committee on Homeland Security. At the hearing, the Secretary described his experience with identity theft, plans to increase aerial surveillance, and the collection of social media passwords.¹

Documents Requested

1. Records concerning Secretary Kelly’s experience with data breach;
2. Records concerning DHS plans to increase aerial surveillance; and
3. Records concerning DHS plans to monitor social media.

Request for Expedited Processing

¹ *Ending the Crisis: America’s Borders and the Path to Security Before the Comm. on Homeland Security*, 115th Cong. (2017); *Border Security and Immigration Enforcement, Part 1*, hearing before the House Homeland Security Committee, Feb. 7, 2017, <https://www.c-span.org/video/?423321-1/homeland-security-secretary-john-kelly-testifies-us-border-security>.

EPIC is entitled to expedited processing of the EPIC FOIA Request under the FOIA. 5 U.S.C. § 552(a)(6)(E)(v)(II). Expedited processing is justified under the agency regulation 6 C.F.R. § 5.5(e)(1)(ii) because this request involves an “urgency to inform the public about an actual or alleged federal government activity,” and because the request is “made by a person who is primarily engaged in disseminating information.” § 5.5(e)(1)(ii)

First, there is an “urgency to inform the public about an actual or alleged federal government activity.” § 5.5(e)(1)(ii). The “alleged” federal government activity at issue is the DHS plans to increase aerial and social media surveillance. An “urgency” to inform the public about these sensitive domestic security operations is clear following recent allegations of DHS misconduct in such operations. During its implementation of the recent Executive Order on immigration, allegation emerged that DHS disobeyed a court order by denying detainees access to counsel and detained a child.² Despite these allegations, in a congressional hearing yesterday, Secretary Kelly asserted there was still a need to enhance screening, including using social media identifiers, and that if immigrants “don’t want to cooperate, don’t come in.”³ In short, these allegations and the rhetoric of the Secretary establish an urgent need for public need for immediate, regular DHS transparency in sensitive domestic security operations like aerial and social media surveillance.

Second, EPIC is an organization “primarily engaged in disseminating information.” § 5.5(e)(1)(ii). As the Court explained in *EPIC v. Dep’t of Def.*, “EPIC satisfies the definition of ‘representative of the news media’” entitling it to preferred fee status under FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes. *EPIC v. Dep’t of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplication fees assessed. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

² Letter from Sen. Patrick Leahy to the Honorable Rex Tillerson, Sec. of State, and the Honorable John Kelly, Sec. of the Dept. of Homeland Sec. (Feb. 3, 2017), <https://www.leahy.senate.gov/imo/media/doc/020317%20Leahy%20to%20Tillerson-Kelly%20on%20EO.pdf>; Executive order: Protecting the Nation from Foreign Terrorist Entry into the United States (Jan. 27, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>; Press Release, Office of the Inspector Gen. Dep’t of Homeland Sec., Inspector General Announces Review of Implementation of Executive Order (Feb. 1, 2017) (“DHS IG Statement”), <https://www.oig.dhs.gov/assets/pr/2017/oigpr-020217.pdf>.

³ *Border Security and Immigration Enforcement, Part 1*, *supra* note 1; Tony Romm, *DHS weighs collecting foreigners’ social media passwords*, POLITICOPRO, <https://www.politicopro.com/cybersecurity/whiteboard/2017/02/dhs-weighs-collecting-foreigners-social-media-passwords-083503>.

Further, any duplication fees should also be waived because disclosure of the documents requested is “in the public interest” since (i) “it is likely to contribute significantly to public understanding of the operations or activities of the government” and (ii) “is not primarily in the commercial interest” of EPIC. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k)(1). EPIC’s request satisfies the DHS’s factors for granting a fee waiver. §§ 5.11(k)(2-3).

First, disclosure of the documents is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government” according to the four DHS factors. § 5.11(k)(2). As to factor one, the subject of the request concerns “identifiable operations or activities of the federal government” because the requested documents involve changes being contemplated to DHS operations and advice given to the Secretary by the government after his personal information had been compromised. § 5.11(k)(2)(i). As to factor two, disclosure would be “meaningfully informative about government operations or activities” because DHS has not provided the with public details about the measures being contemplated regarding border security and immigration. § 5.11(k)(2)(ii). With regard to identity theft, identity theft has been the leading concern of American consumers for a number of years and now that identity theft is an issue in the federal government the public should know what advice the government is providing to individuals.⁴ As to factor three, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject” because, as stated in the DHS FOIA regulations, DHS will “presum[e] that a representative of the news media will satisfy this consideration.” § 5.11(k)(2)(iii). Finally, as to factor four, the public’s understanding will “be enhanced by the disclosure to a significant extent” because, as just stated, little is known about the DHS’s plans to improve border security or changes in immigration vetting procedures or what information the government has provided to protect individuals when government databases have been compromised. § 5.11(k)(2)(iv). This information will, therefore, meaningfully inform public debate around changes DHS is making surrounding border security and immigration as well as steps individuals may take to protect themselves when their data has been compromised.

Second, “[d]isclosure of the information is not primarily in the commercial interest” of EPIC according to the two DHS factors. § 5.11(k)(3). As to the first factor, EPIC has no “commercial interest...that would be furthered by the requested disclosure.” § 5.11(k)(3)(i). EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.⁵ As to the second factor, “the public interest is greater than any identified commercial interest in disclosure” because, as stated in the FOIA regulations, DHS “shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. § 5.11(k)(3)(ii). As already described above, EPIC is a news media requester and satisfies the public interest standard.

For these reasons, a fee waiver should be granted.

Conclusion

⁴ *FTC Releases Annual Summary of Consumer Complaints*, FTC, Mar. 1, 2016, <https://www.ftc.gov/news-events/press-releases/2016/03/ftc-releases-annual-summary-consumer-complaints>.

⁵ *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.

Thank you for your consideration of this request. As provided in 5 U.S.C. § 552(a)(6)(E)(ii)(I), I will anticipate your determination on our request within ten calendar days.

For questions regarding this request I can be contacted at 202-483-1140 x107 or FOIA@epic.org.

Respectfully submitted,

Kim Miller

Kim Miller
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