

VIA FACSIMILE

February 17, 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

RE: Reference No. 2017-HQFO-00395, FOIA Request Resubmission

Dear Mr. Cantor,

This letter is a revised submission of the February 8, 2017 Freedom of Information Act, 5 U.S.C. § 552, submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Department of Homeland Security (“DHS”). The request was assigned Reference No. 2017-HQFO-00395 (“EPIC’s FOIA Request”). This resubmission is in response to DHS’s letter to EPIC dated February 17, 2017 asking EPIC to “Please resubmit your request containing a reasonable description of the records you are seeking.”

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 a hearing entitled “Ending the Crisis: America’s Borders and the Path to Security.” At the hearing, the Secretary described his experience with having his personal data breached, plans to increase aerial surveillance, and the collection of social media passwords of potential entrants to the U.S.¹

Specifically, at the hearing Secretary Kelly stated in regards to having his personal data breached, “I’m very sensitive to this because I was one of the five million or so Americans who had all of their information stolen and the best I got out of the federal government a couple of years ago was ‘General Kelly, all of your data has been stolen with the OPM [hack], good luck.’”

Regarding aerial surveillance, in response to a question concerning Secretary Kelly’s plans to secure the southern border, the Secretary stated, “As we build the wall...we will certainly back that up with... technology. Aerostats work very well, sensors on the ground.”

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>.

Regarding reviewing social media information, Secretary Kelly stated, “If someone wants to come into our country...not only do they bring a passport...we want to say for instance ‘what websites do you visit and give us your passwords’ so that we can see what they do on the internet...if they don’t want to give us that information then they don’t come. We may want to get on their social media with passwords, ‘what do you do what do you say,’ if they don’t want to cooperate then they don’t come in...these are the things that we’re thinking about.”

EPIC now seeks three categories of documents based on the Secretary’s statements.

Documents Requested

1. Any and all records prepared for the Feb. 7, 2017 House Committee on Homeland Security hearing “Ending the Crisis: America’s Borders and the Path to Security,” including memos and talking points, concerning Secretary Kelly’s experience with having his personal data stolen in the Office of Personnel Management data breach;
2. Any and all records prepared for the above named Feb. 7, 2017 hearing, including memos and talking points, concerning DHS plans to increase aerial border surveillance, including but not limited to aerostats; and
3. Any and all records prepared for the above named Feb. 7, 2017 hearing, including memos and talking points, concerning DHS plans to use individuals’ internet and social media information to vet potential entrants to the U.S.

Request for Expedited Processing

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, allegations 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,

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

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).

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

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>.

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>.

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

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

EPIC Policy Fellow

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