

VIA FACSIMILE

February 13, 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 in a February 9, 2017 interview with NPR.

During the interview, the Secretary described DHS plans to increase vetting of potential immigrants to the U.S. Secretary Kelly stated that DHS was “considering” asking potential immigrants to “give us a list of websites that they visit and the passwords to get on those websites to see what they're looking at.”¹ He also stated that the DHS might examine “social media to see what they tweet; cell phones - cell phone conversations or cell phone contact books to where we can run them against databases, telephone numbers, people's names.”²

Regarding future Executive Orders, the Secretary described a new agency procedure to coordinate determinations and public announcements with the White House. The Secretary stated, in the future, he will say to the White House, “OK, give that [Order] to me, and I will roll it out . . . And that rollout would have included notification to select members of Congress - the leadership for sure, as I say - and even a press rollout.”³ The Secretary further clarified, concerning this new procedure between the White House and DHS, “I would say that we have an agreement. We developed a policy jointly.”⁴

¹ *Homeland Security Secretary: Travel Vetting Could Include Passwords, Tweets*, NPR (Feb. 9, 2017), <http://www.npr.org/templates/transcript/transcript.php?storyId=514175464>.

² *Id.*

³ *Id.*

⁴ *Id.*

EPIC seeks three categories of records based on the DHS activity described by DHS Secretary Kelly during the NPR interview on February 9, 2017.

Documents Requested

1. Records, including memos and talking points prepared for the NPR interview, concerning DHS plans to require entrants to the U.S. to provide Internet browsing history and passwords to their website accounts, including but not limited to their social media profiles;
2. Records, including memos and talking points prepared for the NPR interview, concerning DHS plans to require entrants to the U.S. to provide their cell phone conversations and cell phone contact books; and
3. Records, including memos and talking points prepared for the NPR interview, concerning a policy between the White House and Secretary Kelly, or DHS, to facilitate rollout of Executive Orders, including any procedure to notify of members of Congress and the press.

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). Specifically, EPIC’s request satisfies 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 “actual or alleged” federal government activity at issue is the DHS plans to require entrants to the U.S. to provide Internet account and cell phone contact information, as well as its procedures for Executive Orders. Secretary Kelly publicly cited each of these DHS activities. “Urgency” to inform the public about such immigration vetting procedures and implementation of Orders is clear following DHS’s chaotic implementation of the January 27 Executive Order on immigration.⁵ Indeed, irregular, disorderly DHS implementation of the January 27 Executive Order on immigration supported court decisions suspending the Order. *Washington v. Trump*, No. 17-35105, 2017 WL 526497 (9th Cir. Feb. 9, 2017). Secretary Kelly himself has stated that, in “retrospect,” he “should have delayed” implementation of the Order.⁶ Allegations of agency misconduct in implementing the Order also

⁵ 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>.

⁶ Alicia A. Caldwell & Kevin Freking, *DHS chief: Travel, immigration ban should have been delayed*, CHI. TRIB. (Feb. 7, 2017). <http://www.chicagotribune.com/sns-bc-us--congress-homeland-security-20170207-story.html>.

emerged, including that DHS disobeyed a court order by denying detainees access to counsel.⁷ It is imperative that DHS consistently provide the upmost transparency in any plans to initiate new, sensitive immigration operations and procedures to implement future Executive Orders.

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).

In submitting this request for expedited processing, I certify that this explanation is true and correct to the best of my knowledge and belief. § 5.5(e)(3); § 552(a)(6)(E)(vi).

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 directly involve DHS plans to vet entrants to the U.S. and its implementation of Executive Orders. § 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 public with details of its new plans to vet entrants or its agreement with the White House to ensure Executive Orders are implemented properly. § 5.11(k)(2)(ii). 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 changes in immigration vetting procedures or procedures to implement new Executive Orders. § 5.11(k)(2)(iv). This information will, therefore, meaningfully inform public debate around each of these critical issues.

⁷ 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>.

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.⁸ 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) and 6 C.F.R. § 5.5(e)(4), 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 x111 or FOIA@epic.org.

Respectfully submitted,

/s/ Eleni Kyriakides
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EPIC Fellow

⁸ *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.