

BY EMAIL

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June 30, 2023

Mason Clutter
Acting Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
2707 Martin Luther King Jr. Ave SE
STOP-0655
Washington, D.C. 20528-0655

Dear Ms. Clutter,

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 the 2020 DHS Data Mining Report and all subsequent DHS data mining reports, which must be published annually and made publicly available under the Federal Agency Data Mining Reporting Act of 2007.¹

Documents Requested

All DHS data mining reports from December 2020 to present.

Background

Under the Federal Agency Data Mining Reporting Act of 2007, 42 U.S.C. § 2000ee-3, any federal department or agency “engaged in any activity to use or develop data mining” must “submit a report to Congress on all such activities of the department or agency.”² The report must be made publicly available.³

The Act defines data mining as “pattern-based queries” conducted by federal departments or agencies to “discover or locate a predictive pattern or anomaly indicative of terrorist or criminal activity,” where the queries are not associated with a specific individual.⁴ The report should include, among other things:

¹ Federal Agency Data Mining Reporting Act of 2007, 42 U.S.C. § 2000ee-3 (2021).

² *Id.* § 2000ee-3(c)(1).

³ *Id.*

⁴ *Id.* § 2000ee-3(b)(1).

- (1) A description of the data mining activity, the data sources, and the agency's goals;⁵
- (2) An assessment of the efficacy of the data mining in meeting its goals;⁶
- (3) An assessment of the impact of the data mining on privacy and civil liberties, and a discussion of procedures in place to protect privacy and civil liberties;⁷ and
- (4) A list of governing laws.⁸

Additionally, the report must be updated “not less frequently than annually” to reflect new data mining activity during the past year.⁹ DHS has publicly released data mining reports every year from 2007 to 2019.¹⁰ It published its last publicly available report, the 2019 Report, on December 2, 2020, and it has failed to publish any reports for 2020 and beyond.¹¹

Transparency over DHS data mining practices is important to protecting privacy and civil liberties. As the National Research Council warned, data mining for counterterrorism efforts can infringe on the privacy of innocent individuals and can lead to “individuals being inaccurately represented by data mining algorithms as a threat when they are not.”¹² DHS's data mining uses large swaths of personal data including biometric data, location data, vehicle data, license plates, DMV records, and Internet data like “video and audio clips, pictures, or any other information the user determines is relevant,” among other data sources.¹³ Flaws in DHS's data management have leaked sensitive biometric data to hackers and have even enabled DHS employees to “exploit their access to these databases...to carry out personal schemes and vendettas.”¹⁴ Data mining has also produced inaccurate and harmful characterizations. For example, in 2015, DHS mistakenly started deportation proceedings for an American citizen, and in 2018, it seized and downloaded a Muslim American woman's phone data without cause.¹⁵

⁵ *Id.* § 2000ee-3(c)(2).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* § 2000ee-3(c)(4)(B).

¹⁰ *DHS Data Mining Reports*, U.S. Dep't of Homeland Sec. (Sept. 7, 2022), <https://www.dhs.gov/publication/dhs-data-mining-reports>.

¹¹ *Id.*

¹² National Research Council of the National Academies, *Protecting Individual Privacy in the Struggle Against Terrorists* 74 (2008).

¹³ DHS Privacy Off., *2019 Data Mining Report to Congress* 35-36, 54, 58 (2020).

¹⁴ Dean DeChiaro, *Privacy of biometric data in DHS hands in doubt*, Roll Call (Sept. 20, 2020), <https://rollcall.com/2020/09/29/privacy-of-biometric-data-in-dhs-hands-in-doubt-inspector-general-says>; Dhruv Mehrotra, *ICE Records Reveal How Agents Abuse Access to Secret Data*, WIRED (Apr. 17, 2023), <https://www.wired.com/story/ice-agent-database-abuse-records/>.

¹⁵ Kimmy Yam, *U.S. citizen mistakenly put in deportation proceedings finally returns to America*, NBC News (Feb. 4, 2020), <https://www.nbcnews.com/news/asian-america/u-s-citizen-mistakenly-put-deportation-proceedings-finally-returns-america-n1130001>; Cyrus Farivar, *Woman: My iPhone was seized at border, then imaged*, Ars Technica (Aug. 23, 2018), <https://arstechnica.com/tech-policy/2018/08/woman-my-iphone-was-seized-at-border-then-imaged-feds-now-must-delete-data/>.

Transparency through the release of data mining reports can address some of these privacy and civil liberties concerns. After DHS published its 2006 Data Mining Report, the Government Accountability Office identified privacy concerns with ADVISE, a tool that DHS used for data mining at the time.¹⁶ GAO warned that ADVISE could misidentify individuals as terrorists, highlighting DHS's statement in its report that "privacy and civil liberties issues potentially arise in every phase of the data mining process."¹⁷ Subsequently, DHS investigated ADVISE, found unnecessary privacy risks, and scrapped ADVISE entirely.¹⁸ Releasing data mining reports can prompt reform of DHS programs and activities that pose privacy risks.

Request for Expedited Processing

EPIC requests expedited processing because (1) there is "an urgency to inform the public about an actual or alleged government activity" and (2) EPIC is "primarily engaged in disseminating information." 6 C.F.R. § 5.5(e)(1)(ii).

First, there is "an urgency to inform the public about an actual or alleged government activity." 6 C.F.R. § 5.5(e)(1)(ii). The government activity in question is DHS's data mining from 2020 to present, which poses significant risk to privacy and civil liberties, as mentioned above. Yet DHS has not published a data mining report since 2020. So, the public is in the dark about DHS's recent data mining practices and their impacts.

State officials also lack insight into DHS's activity within their state. Georgetown Law's Center on Privacy & Technology emphasized the "lack of awareness of political leaders" surrounding data analysis by ICE in particular.¹⁹ For example, when asked about ICE searching through drivers' license records, one state's representative said, "[T]his has never been shared with us."²⁰ With government officials in the dark, ICE has "evaded Congressional oversight" and "evaded state laws and lawmakers' efforts to reign in its surveillance capabilities."²¹ Due to the ongoing civil liberties violations associated with DHS's data mining combined with the lack of transparency around its data mining, there is an urgent need to release the data mining reports in question.

Second, EPIC is "primarily engaged in dissemination information." § 5.5(e)(1)(ii). EPIC is a nonprofit research organization that distributes the records we obtain on our website or through our newsletter.²² As the Court explained in *EPIC v. Dep't of Def.*, "EPIC satisfies the definition of 'representative of the news media.'" 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

¹⁶ U.S. Gov't Accountability Off., GAO-07-293, Data Mining: Early Attention to Privacy in Developing a Key DHS Program Could Reduce Risks 21 (2011).

¹⁷ *Id.* at 18.

¹⁸ Hugh D'Andrade, *DHS Scraps ADVISE Data-Mining Software*, EFF (Sept. 10, 2017), <https://www.eff.org/deeplinks/2007/09/dhs-scraps-advise-data-mining-software>.

¹⁹ *American Dragnet*, Georgetown Ctr. on Priv. & Tech. (May 10, 2022), <https://americandragnet.org>.

²⁰ *Id.*

²¹ *Id.*

²² *About EPIC*, EPIC.org (2023), <http://epic.org/epic/about.html>.

In submitting this request for expedited processing, EPIC certifies that this explanation is true and correct to the best of my knowledge and belief. § 5.5(e)(3); 5 U.S.C. § 552(a)(6)(E)(vi).

Request for 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); 6 C.F.R. § 5.11(d)(1).

Further, any duplication fees should also be waived because disclosure of the requested documents (1) is “likely to contribute significantly to public understanding of the operations or activities of the government” and (2) is “not primarily in the commercial interest” of EPIC. 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k).

1. *Disclosure will contribute significantly to public understanding of DHS’s data mining activity because recent data mining reports have yet to be published.*

Disclosure of the data mining reports will contribute significantly to public understanding of DHS’s data mining practices. In determining whether the disclosure will contribute to the public understanding, DHS considers: (i) whether the subject concerns identifiable operations or activities of the federal government; (ii) whether disclosure of the records is meaningfully informative in order to be ‘likely to contribute’ to an increased public understanding; (iii) whether the disclosure contributes to the understanding of a reasonably broad audience, as opposed to the individual understanding of the requester; and (iv) whether the public’s understanding of the subject in question is enhanced by the disclosure to a significant extent.²³

First, the request concerns “identifiable operations or activities” of DHS.²⁴ The agency is required by law to publish a report on its data mining activities to Congress.²⁵

Second, this information will be meaningfully informative. Each report must contain updates on new data mining activity for the year in question; the 2019 Data Mining Report even identified two entirely new programs engaging in data mining.²⁶ Similarly, the data mining reports that EPIC requests are expected to shed light on novel, significant data mining activity and programs that will be meaningfully informative.

Third, EPIC’s request will contribute to the understanding of a reasonably broad audience because “it shall be presumed that a representative of the news media will satisfy this consideration”; as mentioned above, EPIC is a “representative of the news media.”²⁷ EPIC routinely publishes

²³ 6 C.F.R. § 5.11(k)(2).

²⁴ 6 C.F.R. § 5.11(k)(2)(i).

²⁵ Federal Agency Data Mining Reporting Act of 2007, 42 U.S.C. § 2000ee-3 (2021).

²⁶ *Id.*; DHS Privacy Off., 2019 Data Mining Report to Congress 14 (2020).

²⁷ 6 C.F.R. § 5.11(k)(2)(iii); *EPIC v. Dep’t of Def.*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

records from its FOIA requests on epic.org, and EPIC's FOIA work is frequently covered by news outlets.²⁸

Fourth, the disclosure will significantly enhance the public's understanding of the activity. The data mining reports from 2020 to present have not yet been published on DHS's website.²⁹ Release of these reports will publicize previously inaccessible information about DHS's recent data mining activity, goals, efficacy in meeting its goals, and potential privacy and civil liberties implications.³⁰

2. *Disclosure is not primarily in the commercial interest because EPIC is a nonprofit seeking this information for public education.*

The disclosure is "not primarily in the commercial interest" of EPIC.³¹ DHS considers two factors to determine whether this is met: (i) whether there is "any commercial interest of the requester...that would be furthered by the requested disclosure"; and (ii) whether "the public interest is greater than any identified commercial interest in disclosure."³²

Under the first factor, EPIC has no commercial interest in the information. EPIC is a 501(c)(3) nonprofit dedicated to privacy, civil liberties, and open government. EPIC intends to use this information for public education, often publishing records obtained through the FOIA on its website EPIC.org. The request also satisfies the second factor because "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."³³ As a "representative of the news media," EPIC primarily serves the public interest in making this request.³⁴

For these reasons, EPIC's request for a fee waiver should be granted.

²⁸ See *EPIC in the News*, EPIC.org (2023) https://epic.org/news/epic_in_news.php/.

²⁹ *DHS Data Mining Reports*, U.S. Dep't of Homeland Sec. (Sept. 7, 2022), <https://www.dhs.gov/publication/dhs-data-mining-reports>.

³⁰ Federal Agency Data Mining Reporting Act of 2007, 42 U.S.C. § 2000ee-3 (2021).

³¹ 6 C.F.R. § 5.11(k)(3).

³² *Id.*

³³ 6 C.F.R. § 5.11(k)(3)(ii).

³⁴ *EPIC v. Dep't of Def.*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

Conclusion

Thank you for your consideration of this request. EPIC anticipates your determination on our request within ten calendar days per 5 U.S.C. § 552(a)(6)(E)(ii)(I). For questions and correspondence regarding this request contact Jeramie Scott at FOIA@epic.org cc: jscott@epic.org.

Respectfully Submitted,

/s/ Jeramie Scott

Jeramie Scott
EPIC Senior Counsel

/s/ Katrina Zhu

Katrina Zhu
EPIC Summer Clerk