

VIA FACSIMILE

February 3, 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 “Compliance With Court Orders and the President’s Executive Order” (“EPIC FOIA Request”).

On January 29, 2017, the DHS issued a press release titled “DHS Statement On Compliance With Court Orders And The President’s Executive Order” (“DHS Statement”) (see Attachment I).¹ The DHS Statement described the agency’s compliance with both recent court orders and the Executive Order, “Protecting the Nation from Foreign Terrorist Entry into the United States.”²

EPIC seeks six categories of records described in the DHS Statement.

Documents Requested

1. Records of DHS “steps to comply with the [court] orders;”
2. Communications between DHS and the Department of Justice to implement the Executive Order;

¹ Press Release, Dep’t of Homeland Sec., DHS Statement On Compliance With Court Orders And The President’s Executive Order (Jan. 29, 2017), <https://www.dhs.gov/news/2017/01/29/dhs-statement-compliance-court-orders-and-presidents-executive-order>.

² 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>.

3. Communications between DHS and the Department of State to implement the Executive Order;
4. Memos and legal analyses of DHS action “ensuring that all individuals affected by the executive orders, including those affected by the court orders, are being provided all rights afforded under the law;”
5. Communications between DHS and “airline partners to prevent travelers who would not be granted entry under the executive orders from boarding international flights to the U.S.,” and
6. Records discussing the origin, development, meaning, application, or implementation of the phrase “significant derogatory information indicating a serious threat to public safety and welfare.”³

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 in this instance under two distinct DHS standards. EPIC’s request satisfies the agency regulation 6 C.F.R. § 5.5(e)(1)(ii) because this request involves “[a]n urgency to inform the public about an actual or alleged federal government activity . . . made by a person who is primarily engaged in disseminating information.” EPIC’s request also satisfies § 5.5(e)(1)(iv) because this request involves “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence.”

(1) Urgency to Inform the Public, § 5.5(e)(1)(ii)

EPIC’s FOIA Request is entitled to expedited processing because there is 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” federal government activity at issue is the DHS implementation of the January 27 Executive Order; there is no dispute as to the existence of the Executive Order, the court orders that followed, or the DHS Statement concerning “Compliance With Court Orders And The President’s Executive Order.” “Urgency” to inform the public about this activity is clearly established because of the serious, immediate consequences of the DHS implementation of the Order: individuals are being barred entry to the U.S. About 90,000 people “received either nonimmigrant or immigrant visas” in fiscal year 2015 from the seven countries

³ See also Press Release, Dep’t of Homeland Sec., Statement By Secretary John Kelly On The Entry Of Lawful Permanent Residents Into The United States (Jan. 29, 2017), <https://www.dhs.gov/news/2017/01/29/statement-secretary-john-kelly-entry-lawful-permanent-residents-united-states>.

affected by the Order.⁴ There is also domestic and international confusion about the reach of the Order.⁵ Because of these serious, immediate consequences of the agency’s action, urgency is plainly established. Urgency is also established because the Order may violate the Constitution’s Due Process and Equal Protection guarantees. *Darweesh v. Trump*, No. 17 Civ. 480 (AMD), 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017).

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).

(2) *Widespread and Exceptional Interest in Questions about the Government’s Integrity*, § 5.5(e)(1)(iv)

The EPIC FOIA Request also satisfies § 5.5(e)(1)(iv) because it involves “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence.” This is clearly a “matter of widespread and exceptional media interest,” having consistently dominated press attention and public debate since the Executive Order was issued.⁶ There are also clearly “questions about the government’s integrity which affect public confidence.” Two days after the Order, members of Congress asked the DHS Inspector General to “immediately initiate a comprehensive investigation” into the DHS implementation of the Executive Order, in part citing allegations that the DHS refused to allow

⁴ Glenn Kessler, *The number of people affected by Trump’s travel ban: About 90,000*, WASH POST (Jan. 30, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/01/30/the-number-of-people-affected-by-trumps-travel-ban-about-90000/?utm_term=.6d1cc9c396af

⁵ See, e.g., *Trump’s executive order: Who does travel ban affect?*, BBC NEWS, (Jan. 30, 2017), <http://www.bbc.com/news/world-us-canada-38781302>; Japan firms confused about Trump’s immigration order, JAPAN NEWS (Feb. 2, 2017), <http://the-japan-news.com/news/article/0003496308>; *Immigration move ‘is not a Muslim ban’ - Donald Trump*, RTE (Jan. 29, 2017), <https://www.rte.ie/news/2017/0129/848487-us-politics-immigration/>; Ted Hesson & Jennifer Scholtes, *Confusion over Trump’s travel ban deepens*, POLITICO (Jan. 20, 2017), <http://www.politico.com/story/2017/01/trump-immigration-travel-ban-chaos-234410>.

⁶ See, e.g., Rachel Weiner & Justin Jouvenal, *Government reveals more than 100,000 visas revoked due to travel ban*, WASH. POST (Feb. 3, 2017), https://www.washingtonpost.com/local/public-safety/government-reveals-over-100000-visas-revoked-due-to-travel-ban/2017/02/03/7d529eec-ea2c-11e6-b82f-687d6e6a3e7c_story.html?hpid=hp_rhp-top-table-main_visas-1246pm%3Ahomepage%2Fstory&utm_term=.6c0a46b9178e; Michael D. Shear, Nicholas Kulish, & Alan Feuer, *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, N.Y. TIMES (Jan. 28, 2017), <https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html>; *Ryan calls immigration order rollout ‘regrettable,’ defends Trump*, FOXNEWS.COM (Jan. 31, 2017), <http://www.foxnews.com/politics/2017/01/31/ryan-calls-immigration-order-rollout-regrettable-defends-trump.html>.

detained legal permanent residents to meet with counsel for prolonged periods of time.⁷ The Inspector General of the DHS has stated that specifically that he will review “allegations of individual misconduct on the part of DHS personnel” arising from the implementation of the Executive Order (see Attachment II).⁸

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 Agreement 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 implementation of the Executive Order. § 5.11(k)(2)(i). As to factor two, disclosure would be “meaningfully informative about government operations or activities” because DHS has not provided further public details about the measures taken to secure the rights of individuals facing action under the Order, communications between the agency, airlines, and other federal agencies to facilitate implementation, or any guidance concerning the standard for case-by-case determinations of entry to the U.S. § 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’s protections for rights, communications with airlines and agencies, or determinations for entry into the U.S. § 5.11(k)(2)(iv). This information will, therefore, meaningfully inform public debate around the DHS’s implementation of the Order.

⁷ Letter from Sens. Tammy Duckworth and Dick Durbin to John Roth, Inspector Gen. Dep’t of Homeland Sec. (Jan. 29, 2017), <https://www.duckworth.senate.gov/content/duckworth-durbin-request-immediate-investigation-department-homeland-security’s>.

⁸ 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>.

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.⁹ 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,

Eleni Kyriakides
Eleni Kyriakides
EPIC Fellow

⁹ *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.

ATTACHMENT I



DHS Statement On Compliance With Court Orders And The President's Executive Order

Release Date: January 29, 2017

For Immediate Release
Office of the Press Secretary
Contact: 202-282-8010

WASHINGTON - Upon issuance of the court orders yesterday, U.S. Customs and Border Protection (CBP) immediately began taking steps to comply with the orders. Concurrently, the Department of Homeland Security continues to work with our partners in the Departments of Justice and State to implement President Trump's executive order on protecting the nation from foreign terrorist entry into the United States.

We are committed to ensuring that all individuals affected by the executive orders, including those affected by the court orders, are being provided all rights afforded under the law. We are also working closely with airline partners to prevent travelers who would not be granted entry under the executive orders from boarding international flights to the U.S. Therefore, we do not anticipate that further individuals traveling by air to the United States will be affected.

As Secretary Kelly previously stated, in applying the provisions of the president's executive order, the entry of lawful permanent residents is in the national interest. Accordingly, absent significant derogatory information indicating a serious threat to public safety and welfare, lawful permanent resident status will be a dispositive factor in our case-by-case determinations.

We are and will remain in compliance with judicial orders. We are and will continue to enforce President Trump's executive order humanely and with professionalism. DHS will continue to protect the homeland.

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Topics: [DHS Enterprise](#), [Homeland Security Enterprise](#), [Transportation Security](#)

Keywords: [Executive Order](#), [cbp](#)

Last Published Date: January 30, 2017

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ATTACHMENT II



OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

FOR IMMEDIATE RELEASE

Wednesday, February 1, 2016

FOR INFORMATION CONTACT:

Public Affairs (202) 254-4100

Inspector General Announces Review of Implementation of Executive Order

Today, the Department of Homeland Security Office of Inspector General (DHS OIG) announced that it will review DHS' implementation of the recent Executive Order, "Protecting the Nation from Foreign Terrorist Entry into the United States." The review is being initiated in response to congressional request and whistleblower and hotline complaints.

In addition to reviewing the implementation of the Executive Order, the OIG will review DHS' adherence to court orders and allegations of individual misconduct on the part of DHS personnel. If circumstances warrant, the OIG will consider including other issues that may arise during the course of the review.

At the culmination of its review, the DHS OIG will provide a final report to Secretary Kelly, the Congress, and the public.