



August 14, 2019

Via Electronic Mail

FOIA Officer
U.S. Customs and Border Protection
90 K Street, NE
FOIA Division
Washington, DC 20229

**RE: Request Under the Freedom of Information Act U.S. Customs and Border Protection
Operational Use of Social Media Data**

To whom it may concern:

This letter constitutes a request under the Freedom of Information Act (“FOIA”) and is submitted on behalf of the Center for Democracy & Technology (“CDT”)¹ to United States Customs and Border Protection (“CBP”). CDT respectfully requests records pertaining to CBP’s monitoring of social media information.

I. Requested Documents

- 1) CBP Directive 5410-003 – Operational Use of Social Media (Jan. 2, 2015).

II. Background

On March 25, 2019, CBP issued a Privacy Impact Assessment (PIA), “Publicly Available Social Media Monitoring and Situational Awareness Initiative DHS/CBP/PIA-058,” examining CBP’s implementation of operational social media monitoring.² The PIA states that CBP searches public social media posts to further the agency’s “situational awareness”³ including identifying “natural disasters, threats of violence, and other harmful events and activities”⁴ that may threaten the safety

¹ The Center for Democracy & Technology is a 501(c)(3) organization that advocates for global online civil liberties and human rights. CDT drives policy outcomes that keep the internet open, innovative, and free. The organization supports laws, corporate policies, and technology tools that protect privacy, and advocates for stronger legal controls on government surveillance. <https://cdt.org/about/>.

² U.S. Dep’t of Homeland Sec., Customs and Border Protection, DHS/CBP/PIA-058, Privacy Impact Assessment for the Publicly Available Social Media Monitoring and Situational Awareness Initiative, 1 (March 25, 2019), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp58-socialmedia-march2019.pdf>.

³ *Id.*

⁴ *Id.*

of CBP personnel or facilities, including ports of entry. CBP makes use of Internet-based platforms as well as government and commercially developed tools that facilitate the monitoring of social media sites. Many of these tools use keywords to search for and pull content.⁵ CBP employees then review the content captured by these tools for their relevance to “situational awareness and threat monitoring.”⁶ The PIA refers to “appropriate uses of social media”; additionally, the PIA makes note of “rules of behavior” that employees must follow when handling social media data.⁷ Each reference to these procedures cites CBP Directive 5410-003, “Operational Use of Social Media,” as the document implementing previous directives and dictating operational social media policy for the agency.⁸ CBP personnel also receive training to conform their conduct to this document.⁹ This Directive, which appears to play a significant role in CBP’s efforts to safeguard rights, is not publicly available. We respectfully request its release.

The guidance CBP personnel receive for monitoring and using social media information is of great public interest. Government surveillance of social media raises considerable constitutional and privacy concerns. Indeed, CBP has recently faced scrutiny for targeting activists, journalists and lawyers for surveillance and enhanced scrutiny at ports of entry because they were associated with asylum seekers.¹⁰ Leaked documents from a joint U.S.-Mexico task force suggested that CBP helped compile a “secret database” of journalists and activists, which included social media information.¹¹

Rather than quell public concern, this PIA—published only a couple of weeks after that story broke—describes an initiative that appears to invite CBP to regard much online social media activity as relevant for review and retention. For example, situational awareness, defined as “information gathered from a variety of sources that, when communicated to emergency managers and decision makers, can form the basis for incident management decision making”¹² could permit CBP to monitor and retain a broad swath of innocent expressive conduct and First Amendment protected activity. Furthermore, CBP’s keyword lists “may be developed for high interest events (e.g., trials or conferences where there may be an increased threat risk).”¹³ While

⁵ *Id.* at 2.

⁶ *Id.*

⁷ *Id.* at 8.

⁸ *Id.*

⁹ *Id.* at 12.

¹⁰ See, e.g., Tom Jones, Mari Payton & Bill Feather, *Source: Leaked Documents Show the U.S. Government Tracking Journalists and Immigration Advocates Through a Secret Database*, NBC 7 San Diego (Mar. 6, 2019), <https://www.nbcsandiego.com/investigations/Source-Leaked-Documents-Show-the-US-Government-Tracking-Journalists-and-Advocates-Through-a-Secret-Database-506783231.html>; Mari Payton, Paul Krueger & Tom Jones, *Critics Blast Secret US Government Surveillance of Journalists, Attorneys, and Border Activists*, NBC 7 San Diego (March 8, 2019), <https://www.nbcsandiego.com/news/local/Critics-Blast-Secret-US-Government-Surveillance-of-Journalists-Attorneys-and-Border-Activists-506860971.html>.

¹¹ Tom Jones, Mari Payton & Bill Feather, *Source: Leaked Documents Show the U.S. Government Tracking Journalists and Immigration Advocates Through a Secret Database*, NBC 7 San Diego (Mar. 6, 2019), <https://www.nbcsandiego.com/investigations/Source-Leaked-Documents-Show-the-US-Government-Tracking-Journalists-and-Advocates-Through-a-Secret-Database-506783231.html>.

¹² U.S. Dep’t of Homeland Sec., Customs and Border Protection, DHS/CBP/PIA-058, Privacy Impact Assessment for the Publicly Available Social Media Monitoring and Situational Awareness Initiative, 1 (March 25, 2019), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp58-socialmedia-march2019.pdf>.

¹³ *Id.* at 3.

the PIA does state that CBP makes efforts “to minimize collecting information related to First Amendment activities,”¹⁴ disclosure of the Directive on the Operational Use of Social Media could provide information about the scope and effectiveness of such efforts. For example, does the Directive permit monitoring of the use of a hashtag associated with a planned protest, or efforts to provide humanitarian aid? Such monitoring would chill the exercise of constitutional rights including the rights to free speech and association.

The PIA describes other behavioral restrictions placed on CBP personnel. The PIA states that the majority of CBP personnel will not collect, store or disseminate personally identifying information (PII), however such activity may occur if, among other justifications, the data will “allow CBP to protect [] facilities as well as to ensure the efficient functioning of CBP field locations.”¹⁵ This provides CBP broad discretion to retain much PII, which may result in chilling public expression on social media platforms for fear that CBP could collect an individual’s PII due to their discussion of an issue of interest to CBP. The requested Directive may assuage the public of this concern, or show it to be well-placed. Additionally, the PIA states that CBP personnel are permitted to conceal their identity when viewing social media, “consistent with CBP policy and procedures.”¹⁶ Here, the PIA cites the requested Directive for the policy guiding this CBP conduct. Reading the PIA though, it is not clear what this policy is, and why CBP needs to use masked identities online. Indeed, the PIA states that CBP policy prohibits CBP from posting information on social media sites; connecting or engaging with other social media platform users; and accepting invitations to connect or interact on social media sites.¹⁷ Without access to the relevant CBP directive, the general public has no way of assessing the circumstances in which CBP agents will use masked identities, and no way of assessing what CBP social media monitoring policies permit and whether they are sufficiently rights protecting. In the wake of notable reports of social media surveillance by CBP, the public has a right to be concerned about CBP’s Situational Awareness Initiative, and an interest in reviewing the requested Directive.

III. Application for Waiver of Fees

CDT requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure is "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). CDT also requests a waiver of search fees on the grounds that the CDT qualifies as a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

- 1. Disclosure of the requested records is likely to contribute significantly to public understanding of operations or activities of the government and is not primarily in the commercial interest of CDT.*

¹⁴ *Id.* at 11.

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 2.

There is significant interest in CBP surveillance and enforcement conduct at and between Ports of Entry, and numerous news accounts reflect the considerable public interest in the collection of social media information by government agencies.¹⁸ The Trump administration's plans to expand collection of social media information as part of President Trump's "extreme vetting" proposal has also received extensive news coverage.¹⁹ While CBP has been unclear about how and when it is utilizing social media monitoring, leaked documents from a joint U.S.-Mexico task force showed that CBP had helped compile slides and dossiers on journalists, activists, and lawyers that included social media information.²⁰ Finally, with recent security breaches from a CBP contractor releasing sensitive biometric data on the Internet,²¹ there is substantial interest in the methods CBP is using to collect and store social media information and other personal data.

CDT is not filing this FOIA to fulfill a commercial interest. This request is made in furtherance of the work CDT does for the public interest.

2. *CDT qualifies as "a representative of the news media" and the records requested are not sought for commercial use.*

¹⁸ See, e.g., Matt Novak, *US Homeland Security Says Tracking Social Media of Immigrants is Nothing New*, Gizmodo (Sept. 28, 2017), <https://gizmodo.com/us-homeland-security-says-tracking-social-media-of-immi-1818875395>; Shirin Jaafari, *The new DHS plan to gather social media information has privacy advocates up in arms*, PRI (Oct. 12, 2017), <https://www.pri.org/stories/2017-10-12/new-dhs-plan-gather-social-media-information-has-privacy-advocates-arms>; Rachel Levinson-Waldman, *How ICE and Other DHS Agencies Mine Social Media in the Name of National Security*, Common Dreams (June 5, 2019), <https://www.commondreams.org/views/2019/06/05/how-ice-and-other-dhs-agencies-mine-social-media-name-national-security>.

¹⁹ See, e.g., Tal Kopan, *US to require would-be immigrants to turn over social media handles*, CNN (March 29, 2018), <https://www.cnn.com/2018/03/29/politics/immigrants-social-media-information/index.html>; Saagar Enjeti, *Trump administration to ask most US visa applicants for social media information*, The Hill (May 31, 2019), <https://thehill.com/hilltv/rising/446336-trump-admin-to-ask-most-us-visa-applicants-for-social-media-information>; Faiza Patel, *Snooping on Foreigners' Facebook Feeds Is Ineffective and Creepy*, The Atlantic (June 14, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/if-us-takes-visa-applicants-social-media-handles/591544/>.

²⁰ See, e.g., Tom Jones, Mari Payton & Bill Feather, *Source: Leaked Documents Show the U.S. Government Tracking Journalists and Immigration Advocates Through a Secret Database*, NBC 7 San Diego (Mar. 6, 2019), <https://www.nbcsandiego.com/investigations/Source-Leaked-Documents-Show-the-US-Government-Tracking-Journalists-and-Advocates-Through-a-Secret-Database-506783231.html>; Salvador Hernandez, *The US Compiled A Secret List Of Journalists, Attorneys, And Activists To Question At The Border*, BuzzFeed News (Mar. 7, 2019), <https://www.buzzfeednews.com/article/salvadorhernandez/government-list-journalists-border-immigration-question>; Elliot Spagat, *Border agency watchdog looking into caravan database*, Associated Press (Mar. 7, 2019), <https://www.apnews.com/b990c949e7ad4884a2a7dac389885e9a>; Ryan Devereaux, *The U.S. Targeted Journalists On The Border. Two Senators Want to Know Why.*, The Intercept (Mar. 11, 2019), <https://theintercept.com/2019/03/11/southern-us-border-mexico-journalists/>.

²¹ See, e.g., Drew Harwell, *U.S. Customs and Border Protection says photos of travelers were taken in a data breach*, The Washington Post (June 10, 2019), <https://www.washingtonpost.com/technology/2019/06/10/us-customs-border-protection-says-photos-travelers-into-out-country-were-recently-taken-data-breach/>; Sidney Fussell, *This Is Exactly What Privacy Experts Said Would Happen*, The Atlantic (June 11, 2019), <https://www.theatlantic.com/technology/archive/2019/06/travelers-images-stolen-attack-cbp/591403/>; Maggie Miller, *Lawmakers demand answers on Border Patrol data breach*, The Hill (June 11, 2019), <https://thehill.com/policy/cybersecurity/448015-lawmakers-demand-answers-on-border-patrol-breach>; Russell Bandom, *US border agency cuts ties with breached surveillance contractor*, The Verge (July 4, 2019), <https://www.theverge.com/2019/7/4/20682143/perceptics-us-customs-border-breach-surveillance-suspended>.

CDT also requests a waiver of search fees on the grounds that CDT qualifies as a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). CDT meets the statutory and regulatory definitions of a "representative of the news media" because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(III). CDT maintains an active website and social media presence that helps it distribute its commentary and reporting on topical issues related to its mandate.²² CDT also maintains a bi-weekly newsletter through which it disseminates new material like blog posts and insights to subscribers. CDT will release the requested documents to the public without charge.

For these reasons CDT requests that fees for this FOIA request be waived.

Please furnish materials associated with this request to:

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Thank you for your attention to this matter.

Respectfully,

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²² See, e.g., Natasha Duarte, *5 Takeaways from the New DHS Privacy Guidance*, Ctr. For Democracy & Tech. (May 17, 2017), <https://cdt.org/blog/5-takeaways-from-the-new-dhs-privacy-guidance/>; Mana Azarmi, *Location Data: The More They Know*, Ctr. For Democracy & Tech. (Nov. 27, 2017), <https://cdt.org/blog/location-data-the-more-they-know/>; Greg Nojeim & Mana Azarmi, *Court Steps in to Protect Constitutional Rights at the Border*, Ctr. For Democracy & Tech. (May 11, 2018), <https://cdt.org/blog/courts-step-in-to-protect-constitutional-rights-at-the-border>; Mana Azarmi, *CBP's Border Searches Struggle to Comply with Constitution and Agency Policy*, Ctr. For Democracy & Tech. (Dec. 18, 2018), <https://cdt.org/blog/cbps-border-searches-struggle-to-comply-with-constitution-and-agency-policy/>.