

Sam Kaplan, Esq.
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

Fish & Richardson P.C.
One Marina Park Drive
Boston, MA 02210-1878
617 542 5070 main
617 542 8906 fax

Adam J. Kessel
Principal
Kessel@fr.com
617 368 2180 direct

May 16, 2018

To whom it may concern:

This letter constitutes a request pursuant to the Freedom of Information Act, 5 U.S.C. § 552 made to the Department of Homeland Security. The Request is submitted jointly on behalf of the American Civil Liberties Union Foundation of Massachusetts and certain members thereof, Mr. Thomas Miano and Mr. Daniel Pedraza, all of whom this firm represents in this matter.

The Request seeks information about facial recognition technology and systems¹ in use and/or under consideration for potential use by the United States Customs and Border Protection (CBP) agency and the Transportation Security Administration (TSA). Please provide documents created, modified, or updated since January 1, 2014.

Documents Sought

Re: CBP and TSA facial recognition systems, and related matters

1. Any records—including but not limited to memoranda, emails, database files, and other documentation, both digital and analog—containing the names of the persons or entities responsible for designing, creating, programming, and/or implementing the algorithm(s) used in CBP's and/or TSA's facial recognition systems, including systems historically in use, systems currently in use, or systems under consideration for potential future use. If CBP and/or TSA uses more than one facial recognition algorithm, please provide records containing the respective names of the persons or entities responsible for each algorithm.
2. All audits, performance reviews, and/or other documents describing the accuracy rates of the facial recognition system(s) in use by CBP and/or TSA, including systems historically in use as well as systems currently in use.
3. All records containing information about the accuracy of the facial recognition algorithm(s) in use by CBP and/or TSA, including algorithms included in systems

¹ The term "facial recognition" is used broadly in this Request so as to encompass any computational facial processing technology or system, including those that perform face detection, face recognition, and any machine, or algorithm- or data-driven process, for analyzing faces and processing data about them.

historically in use, systems currently in use, or systems under consideration for potential future use. Specifically, please provide documents or records containing information about how accurate the algorithm(s) is (are) depending on the race, gender, national origin, and/or ethnicity of the data subject.

4. All policy directives, internal memos, and/or other guidance, whether formal or informal, related to CBP's and/or TSA's use or potential use of any facial recognition system(s).
5. All memoranda of understanding and/or agreement with any external agencies or entities, including but not limited to airlines, airports, and foreign governments, regarding any facial recognition system(s) by CBP and/or TSA.
6. All contracts with any external agencies or entities, including but not limited to airlines, airports, and foreign governments, regarding any facial recognition system(s) by CBP and/or TSA.
7. All CBP and TSA privacy policies pertaining to any facial recognition system(s).
8. Records describing CBP and TSA data retention and access policies or procedures pertaining to any facial recognition system(s).
9. Any document containing the legal authorization for and/or a legal analysis of CBP's facial recognition system(s).
10. Any document containing the legal authorization for and/or a legal analysis of TSA's facial recognition system(s).

Requester is entitled to a fee waiver

ACLUM is entitled to a fee waiver under the FOIA statute and Department of Justice Regulations for two reasons. First, ACLUM qualifies as a representative of the news media. Second, release of the records requested is in the public interest and not in any commercial interest of the requester.

1. ACLUM is a representative of the news media as defined in the statute and regulations.

ACLUM is entitled to a fee waiver because it is a representative of the news media under both the FOIA statute and the Department of Justice regulations regarding FOIA fees. 5 U.S.C §552(a)(4)(A)(ii); 28 CFR 16.11(d)(1). ACLUM is a representative of the news media in that it is an organization “actively gathering news for an entity that is organized and operated to publish or broadcast news to the public,” where “news” is defined as “information that is about current events or that would be of current interest to the public.” 5 U.S.C. § 552(a)(4)(A)(ii)(II); 28 CFR § 16.11(b)(6).

In addition, ACLUM meets the statutory definition 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 raw materials into a distinct work, and distributes that work to an audience.” *Nat's Security Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir 1989). *See also Electronic Privacy Information Ctr. v. Dep't of Defense*, 241 F.

Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit interest group that disseminated an electronic newsletter and published books was a “representative of the media” for purposes of FOIA.)

ACLUM, a not-for-profit, non-partisan organization with over 80,000 members and supporters across Massachusetts is dedicated to the principles of liberty and equality. As the Massachusetts affiliate of the national ACLU, a not-for-profit, non-partisan organization with nearly 2 million members nationwide, ACLUM distributes information outside of Massachusetts.

Gathering and disseminating current information to the public is a critical and substantial component of ACLUM’s mission and work. ACLUM publishes newsletters, news briefings, reports, and other printed materials that are disseminated to the public. *See* Exhibits A – C. These materials are widely available to everyone, including tax-exempt organizations, not-for-profit groups, law students and faculty, at no cost. ACLUM also disseminates information through its heavily subscribed website, www.aclum.org, a blog, www.privacysos.org/blog, reports, press releases and advisories, and regular posts on social media sites such as Facebook and Twitter. *See* Exhibits D – F. ACLUM’s web postings address civil liberties issues in depth, provide features on civil liberties issues in the news, and contain hundreds of documents that relate to the issues addressed by ACLUM.

These characteristics are typically sufficient to convey “representative of the news media” status on FOIA requesters. Courts have held that “[i]t is critical that the phrase ‘representative of the new media’ be broadly interpreted if the act is to work as expected ... I[n] fact, any person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a ‘representative of the news media.’” *Electronic Privacy Ctr., 241 F. Supp.* at 5.

On account of these factors, the ACLU has not been charged fees associated with responding to FOIA requests on numerous occasions.²

² The following are examples of requests in which government agencies did not charge the ACLU or ACLUM fees associated with responding to a FOIA request: (1) Immigration and Customs Enforcement granted the ACLU of Massachusetts a waiver of all search fees for a request submitted on Jan. 25, 2007; (2) The Office of Science and Technology Policy in the Executive Office of the President told the ACLU that it would waive the fees associated with a FOIA request submitted by the ACLU in August 2003; (3) The Federal Bureau of Investigation did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002; (4) The Office of Intelligence Policy and Review did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002; and (5) The Office of Information and Privacy in the Department of Justice did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

2. The records sought are in the public interest and ACLUM has no commercial interest in the disclosure.

In addition, ACLUM is entitled to a waiver or reduction of fees because “[d]isclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government,” and “[d]isclosure of the information is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 28 CFR § 16.11(k)(1)(i) and (ii).

This request seeks to further public understanding of government conduct, and specifically, help the public understand how CBP uses and evaluates the accuracy of facial recognition algorithms. Many Massachusetts residents, including ACLU members, are concerned about government use of facial recognition, and the use of facial recognition systems in concert with private corporations. We are aware, for example, that JetBlue is collaborating with CBP on a pilot using facial recognition technology to allow passengers to self-board at Boston Logan Airport.³ When this plan was publicly announced, it attracted significant media attention in the Boston area.

ACLUM is a non-profit organization whose sole purpose is the protection of civil rights and liberties for all persons in the Commonwealth of Massachusetts and, as such, has no “commercial interest” in the information.

Conclusion

If our request is denied in whole or part, we ask that you justify all denials (and any deletions from materials that you produce) by reference to specific exemptions of the FOIA. We expect you to release all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

If there are questions about this FOIA request, please feel to contact me directly at (617) 368-2180 or by email at the above address. As the FOIA statute requires, we look forward to your response within 20 business days,⁴ or if “unusual” or “exceptional” circumstances apply (as the statute uses those terms) we look forward to your notification of these circumstances.⁵ Thank you for addressing our request in a timely fashion.

Thank you for your prompt attention to this matter.

³ *CBP Deploys Biometric Exit Technology to Miami International Airport*, US CUSTOMS AND BORDER PATROL (October 20th, 2017), <https://www.cbp.gov/newsroom/local-media-release/cbp-deploys-biometric-exit-technology-miami-international-airport>; *see also* Asma Khalid, *JetBlue Experiments With Using Your Face As A Boarding Pass*, WBUR (June 21, 2017) <http://www.wbur.org/bostonmix/2017/06/21/jetblue-facial-recognition-pilot>.

⁴ *See* 5 U.S.C. § 552(a)(6)(A)(i).

⁵ *See* 5 U.S.C. § 552(a)(6)(B)-(C).

Sincerely,

A handwritten signature in black ink, appearing to be 'AK', written in a cursive style.

Adam Kessel

CC: Matthew Segal, Esq.
ACLU of Massachusetts
211 Congress Street
Boston, MA 02110
(617) 482-3170