

Via Electronic Transmission

The Honorable Kevin K. McAleenan
Acting Secretary
U.S. Department of Homeland Security
Washington, D.C. 20528

May 1, 2019

Dear Acting Secretary McAleenan:

We are a coalition of 103 civil liberties, civil rights, corporate responsibility, faith-based, human rights, immigrant rights, journalism, media, privacy, and government transparency organizations, legal service providers, and trade associations. We write to express our deep concern with reports of surveillance and targeting of activists, journalists, and lawyers by the Department of Homeland Security (DHS). Those reports indicate that Customs and Border Protection (CBP) created dossiers on activists, journalists, and lawyers, and targeted these individuals for heightened border screening based on their association with migrants seeking asylum.¹ They also indicate that Immigration and Customs Enforcement Homeland Security Investigations (ICE-HSI) documented and shared a spreadsheet of “Anti-Trump” protests in New York City.²

The actions of CBP and ICE-HSI may violate the Privacy Act of 1974 and threaten the exercise of First Amendment-protected activities, including freedom of speech and association and freedom of the press, as well as the delivery of legal services. These actions also diminish public confidence that the power granted to DHS and its agencies is wielded with appropriate discretion. Below, we further detail our concerns and request a series of remedial steps, including greater transparency by CBP and ICE with respect to their enforcement actions that may touch on these First Amendment rights.

CBP Targeting of Activists, Journalists, and Lawyers

Leaked CBP slides dated January 9, 2019 included photographs and biographic information of 59 activists, journalists, and lawyers, approximately 40 of whom are U.S. citizens. The slides

¹ 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 (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>; Julia Ainsley, *More lawyers, reporters stopped and questioned at border by U.S. officials*, NBC News (Mar. 17, 2019), <https://www.nbcnews.com/politics/immigration/more-lawyers-reporter-stopped-questioned-border-u-s-officials-n984256?cid=recommended>; Ryan Devereaux, *Journalists, Lawyers, And Activists Working On The Border Face Coordinated Harassment from U.S. and Mexican Authorities*, The Intercept (Feb. 8, 2019), <https://theintercept.com/2019/02/08/us-mexico-border-journalists-harassment/>.

² Jimmy Tobias, *Exclusive: ICE Has Kept Tabs on ‘Anti-Trump’ Protests in New York City*, The Nation (Mar. 6, 2019), <https://www.thenation.com/article/ice-immigration-protest-spreadsheet-tracking/>.

categorized each target’s alleged association to migrants seeking asylum at the southern border as “instigator,” “associate,” “journalist,” “organizer,” “media,” “lawyer,” “Administrator on Caravan Support Network Facebook page,” “coordinator,” or “unknown.”³ Alerts were placed in records about each target so that the target would be subject to heightened scrutiny when entering the United States, or, in the case of non-U.S. citizens, excluded from entry altogether.

In the case of the U.S. citizen targets, alerts were placed in records about many of their passports. Targets were interrogated at the border, had their electronic devices detained and possibly searched, and some had their visas revoked. The source that leaked the slides stated that, in addition to creating the slides, CBP compiled dossiers on the surveillance targets. Reports in February 2019 indicated that for months, activists, journalists, and lawyers faced a pattern of harassment including lengthy detentions, interrogations, and device detentions and searches in the San Diego area.⁴ Targeted individuals and groups report indications from Mexican authorities that harassment at the border and denial of entry into Mexico may have been at the behest of American authorities.⁵ And an official at DHS stated that the seal on the leaked slides, which include American and Mexican Flags, suggests that the documents are a product of intelligence coordination between Mexico and the United States.⁶ CBP reportedly also subjected lawyers and journalists to heightened scrutiny at border stations in Arizona and Texas.⁷ The attendant concerns with this alleged conduct are legion.

First and foremost, CBP’s creation of a database of and dossiers on journalists, activists, and lawyers based on their First Amendment-protected activities likely violates the Privacy Act of 1974. A government agency cannot create records of U.S. citizens and lawful permanent residents’ First Amendment activities when they are not pertinent to and within the scope of its authorized law enforcement activity.⁸ Our concerns about this potential Privacy Act violation

³ 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 (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>.

⁴ *Several journalists say U.S. border agents questioned them about migrant coverage*, Committee to Protect Journalists (Feb. 11, 2019), <https://cpj.org/2019/02/several-journalists-say-us-border-agents-questione.php>.

⁵ Ryan Devereaux, *Journalists, Lawyers, And Activists Working On The Border Face Coordinated Harassment from U.S. and Mexican Authorities*, The Intercept (Feb. 8, 2019), <https://theintercept.com/2019/02/08/us-mexico-border-journalists-harassment/>.

⁶ 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 (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>.

⁷ Julia Ainsley, *More lawyers, reporters stopped and questioned at border by U.S. officials*, NBC News (Mar. 17, 2019), <https://www.nbcnews.com/politics/immigration/more-lawyers-reporter-stopped-questioned-border-u-s-officials-n984256?cid=recommended>.

⁸ Privacy Act 1974, 5 U.S.C. § 552a(e)(7) (“Each agency that maintains a system of records shall . . . maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.”).

extend to each category of target; our concerns specific to the targeting of each of these groups are set forth below.

The targeting of activists chills freedom of association and speech. The reporting suggests that activists and humanitarian aid workers were targeted for heightened scrutiny because they engaged in speech and association—actions that are at the core of First Amendment protections—and, more specifically, because they spoke and acted in opposition to government policies regarding the treatment of asylum seekers, including by means of social media. For example, the *Intercept* reported that every volunteer with Pueblo Sin Fronteras, a group providing humanitarian assistance to migrants traveling from Central America, has been subject to secondary screening since December 2018, which has included lengthy detentions, interrogations, and at least one electronic device search.⁹ Furthermore, one of those targeted was a pastor who met with migrants to offer religious services.¹⁰ She traveled to Tijuana as part of a “Sanctuary Caravan,” a movement of individuals who “felt morally compelled to meet, witness, and accompany these migrants.”¹¹ Finally, some of the data on the leaked documents maintained on activists came from their use of social media.¹²

CBP’s use of its border authority to intimidate activists or to frustrate their advocacy for migrants’ rights is highly damaging to the exercise of First Amendment rights and an inappropriate application of power. Targeting individuals based on their associations with migrants at the border will chill such association. Likewise, the compilation of information from activists’ social media activities can chill their online activities as well.

CBP’s targeting of journalists undermines press freedom and government accountability. Reports indicate that CBP targeted journalists for heightened border screening because they were reporting about the treatment and activities of asylum seekers at the southern border. Journalists subjected to secondary screening were interrogated about their reporting and their observations about the migrant shelters. Some were separated from their electronic devices which may have been searched, some had their cameras searched, and some were denied re-entry to Mexico.

⁹ Ryan Devereaux, *Journalists, Lawyers, And Activists Working On The Border Face Coordinated Harassment from U.S. and Mexican Authorities*, *The Intercept* (Feb. 8, 2019), <https://theintercept.com/2019/02/08/us-mexico-border-journalists-harassment/>.

¹⁰ Kaji Dousa, *Opinion: I Prayed With Migrants. Now The Government Is Tracking Me.*, *Buzzfeed News* (Mar. 24, 2019), <https://www.buzzfeednews.com/article/kajidousa/opinion-i-prayed-with-migrants-now-the-government-is>.

¹¹ *Id.*

¹² Tom Jones, Mari Payton & Bill Feather, *Photos: Leaked Documents Show Government Tracking Journalists, Immigration Advocates*, *NBC 7* (Mar. 7, 2019), <https://www.nbcsandiego.com/multimedia/PHOTOS-Leaked-Documents-to-NBC-7-Investigates-506782041.html>.

CBP should not misuse its power at ports of entry to compel journalists to reveal their sources or information on their electronic devices. If journalists cannot guarantee the confidentiality of the information that is shared with them and the identity of their news sources, sources will be chilled from coming forward. The Committee to Protect Journalists reported that even the possibility of a border search of a journalist's electronic device can chill a freelancer or foreign journalist from reporting on controversial issues—particularly when the journalist needs a U.S. visa to do his or her job.¹³ If journalists are targeted for and deterred from reporting on issues of public interest, like the treatment of migrants at the border, an important tool of government accountability is lost. It effectively takes away the public's ability to engage in open debates and provide a check on government overreach. Furthermore, by preventing journalists' and the public's access to people or places by cancelling visas or encouraging a foreign power to do so, the government is actively inhibiting the public's right to receive and access information about its activities, and undermining the role of the free press in our democratic society.

Finally, targeting lawyers because they represent migrants threatens access to needed legal services and the confidentiality of client information. Lawyers with *Al Otro Lado* were barred from re-entering Mexico in February 2019, a prohibition they allege came at the behest of the U.S. government.¹⁴ For those still able to cross the border, searches and detentions of their electronic devices, extended interrogations, and detention may deter their representation of asylees. One attorney who works with asylum-seekers stated that she was discouraged from crossing the border again after a prolonged interrogation at the border during which she was questioned about her clients and their communications, and asked to turn over her cell-phone. Another stated he acquiesced to a device search after four hours of interrogation.¹⁵

Targeting immigration lawyers at the border for heightened screening deters and may prevent attorneys from reaching their prospective clients seeking asylum, thereby cutting off access to needed legal services. Furthermore, interrogations about their work and searches of a lawyers' electronic devices threaten to erode the bedrock principle of attorney-client privilege.

¹³ *Nothing to Declare: Why U.S. border agency's vast stop and search powers undermine press freedom*, Committee to Protect Journalists (Oct. 22, 2018) at 13, https://cpj.org/reports/US_Report_Singles.pdf.

¹⁴ Kate Linthicum, Cindy Caramaco & Molly O'Toole, *Immigrant rights attorneys and journalists denied entry into Mexico*, (Feb. 1, 2019), <https://www.latimes.com/nation/immigration/la-me-immigration-attorneys-detained-20190202-story.html>.

¹⁵ Julia Ainsley, *More lawyers, reporters stopped and questioned at border by U.S. officials*, NBC News (Mar. 17, 2019), <https://www.nbcnews.com/politics/immigration/more-lawyers-reporter-stopped-questioned-border-u-s-officials-n984256?cid=recommended>.

ICE Monitoring and Dissemination of Protest Activity

In addition to CBP, ICE engaged in questionable conduct that threatens the rights of free expression and association. ICE-HSI created a spreadsheet of protests that occurred in New York City between July 21 and August 17, 2018.¹⁶ The list contained the names of the groups sponsoring each protest, the political goal of the protest, and the number of people who signed up on Facebook to attend the protest. One spreadsheet was labeled “Anti-Trump Protests.”¹⁷ ICE’s surveillance activity does not appear to be predicated upon any suspected violation of a law ICE enforces.

While we do not see evidence that ICE created records with personally identifying information, it is unambiguous that ICE documented First Amendment-protected activity, which may violate the Privacy Act of 1974 and warrants further investigation. To the extent ICE is monitoring and creating records of First Amendment-protected activity of U.S. citizens and lawful permanent residents, and to the extent such records are not pertinent to and within the scope of its authorized law enforcement activity, such conduct is in violation of the Privacy Act.

Government monitoring and documentation of peaceful political activity also chills freedom of speech and association. In this instance, the spreadsheet of protests was shared, allegedly to achieve “situational awareness.”¹⁸ However, the identification of sponsoring groups, as well as the labeling of a list as “Anti-Trump” protests, suggest that this monitoring was politically motivated. Such politically-motivated surveillance, viewed beside other ICE enforcement actions against immigrant activists and reporters, raises extremely serious First Amendment concerns.¹⁹

Much of the information in the spreadsheet of protest information was obtained by monitoring the use of social media. Of the 12 listed protests, 11 included a number of participants under a column titled “Facebook-Going.” Digital platforms have become important tools to facilitate political activity and organizing. The government’s monitoring of such platforms and subsequent documentation of political activity chills the exercise of fundamental rights. “Situational awareness” cannot be a pretext for monitoring and disseminating information about protected activities.

* * *

We are encouraged that the DHS Inspector General is investigating CBP’s actions, and members of Congress are investigating the conduct of both CBP and ICE. However, in view of the serious

¹⁶ Jimmy Tobias, *Exclusive: ICE Has Kept Tabs on ‘Anti-Trump’ Protests in New York City*, The Nation (Mar. 6, 2019), <https://www.thenation.com/article/ice-immigration-protest-spreadsheet-tracking/>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Maria Sacchetti and David Weigel, *ICE has detained or deported prominent immigration activists*, Washington Post (Jan. 18, 2019), https://www.washingtonpost.com/powerpost/ice-has-detained-or-deported-foreigners-who-are-also-immigration-activists/2018/01/19/377af23a-fc95-11e7-a46b-a3614530bd87_story.html?noredirect=on&utm_term=.1156cae6b756.

threat these activities pose to the freedoms of expression and association, more can and must be done.

We respectfully request that DHS:

1. Cease any targeting and monitoring of activists, journalists, and lawyers—including through social media—based upon their First Amendment-protected speech and associational activities;
2. Cease searching and detaining electronic devices at the border held by activists, journalists, and lawyers absent a warrant based on probable cause that they are involved in criminal or immigration violations;
3. Take steps to ensure that enforcement activities are not politically motivated and do not amount to retaliation against or interference with the exercise of First Amendment rights;
4. Task the DHS Civil Rights and Civil Liberties Office and the DHS Privacy Office with investigating the targeting and monitoring activity that occurred and publicly reporting their findings;
5. Disclose the investigative guidelines, handbooks and criteria that govern this conduct, as well as those that specifically guide ICE and CBP investigations, including for example CBP Directive 5410-003 “Operational Use of Social Media” (January 2, 2015), and any legal analysis of the agency’s authority to engage in this conduct under the Constitution or applicable statutes and regulations;
6. Disclose the training materials provided to ICE and CBP investigators, and in particular, any training materials related to First Amendment protected activities;
7. Disclose the CBP policies governing encounters with journalists, to which CBP spokesman Andrew Meehan referred in a statement on March 7, 2019;²⁰
8. Disclose any policies related to the treatment of journalists and lawyers by CBP and ICE;
9. Disclose whether DHS communicated with foreign governments about activists, lawyers, and journalists in order to further restrict their lawful travel; and
10. Disclose the categories of information DHS shared with foreign governments about activists, lawyers, and journalists, as well as the categories of information collected by foreign governments that those governments shared with DHS.

We request a meeting with you and your designees to discuss these important issues. Please direct your response to this letter, and any questions you may have about it, to Policy Counsel Mana Azarmi (mazarmi@cdt.org; 202.407.8828) and Director of the Freedom, Security & Technology Project Greg Nojeim (gnojeim@cdt.org; 202.407.8815) at the Center for Democracy & Technology.

²⁰ Julia Ainsley, *Congress, DHS Investigating if U.S. border agents targeted journalists*, NBC News (Mar. 7, 2019), <https://www.nbcnews.com/politics/immigration/congress-dhs-investigating-if-u-s-border-agents-targeted-journalists-n980771>.

Sincerely,

Access Now
Albuquerque Center for Peace and Justice
Alliance for Justice
American Muslim Empowerment Network
(AMEN)
American Society of Journalists and Authors
(ASJA)
American Society of Magazine Editors
American Society of News Editors
American-Arab Anti-Discrimination
Committee (ADC)
Americans for Prosperity
Arab American Institute
Archivists Round Table of Metropolitan
New York (ART)
Asian Americans Advancing Justice | AAJC
Asian Counseling and Referral Services
Asian Law Alliance
ASISTA Immigration Assistance
Associated Press Media Editors
Association of Alternative Newsmedia
Brennan Center for Justice at NYU School
of Law
CAIR California
CAIR-MA
Californians Aware
CALinnovates
CD4 Indivisible Network
Center for Constitutional Rights
Center for Democracy & Technology
Center on Privacy and Technology at
Georgetown Law
Chula Vista Partners in Courage
Coalition for Humane Immigrant Rights
(CHIRLA)
Coalition on Human Needs
Colectiva Legal del Pueblo

Columbia Law School Immigrants' Rights
Clinic
Committee to Protect Journalists
Congregation of Sisters of St. Agnes
Council on American-Islamic Relations
(CAIR)
Defending Rights & Dissent
Detention Watch Network
Electronic Frontier Foundation
Free Press
Free Speech Coalition
Freedom for Immigrants
Freedom Network USA
Government Accountability Project
Government Information Watch
Human Rights Watch
ICE Out of Marin
Indivisible for Immigration
Indivisible Marin
Indivisible Petaluma
Indivisible Sausalito
Indivisible Sonoma County
Institute for Free Speech
The Interfaith Center on Corporate
Responsibility
International Documentary Association
Iranian American Bar Association (IABA)
The Knight First Amendment Institute at
Columbia University
The Leadership Conference on Civil and
Human Rights
Media Coalition Foundation
The Media Institute
Migrant Center for Human Rights
Mill Valley Community Action Network
Muslim Advocates
Muslim Public Affairs Council
National Association of Black Journalists

National Coalition Against Censorship
National Hispanic Media Coalition
National Immigrant Justice Center
National Immigration Law Center
National Iranian American Council
National Lawyers Guild
National Press Photographers Association
(NPPA)
National Survivor Network
New America's Open Technology Institute
Novato Stands United
OneAmerica
Open MIC (Open Media and Information
Companies Initiative)
Open the Government
Pangea Legal Services
PEN America
People For the American Way
Pueblo Sin Fronteras
Project On Government Oversight
Project South
The Radio Television Digital News
Association

Reformed Church of Highland Park
Reporters Committee for Freedom of the
Press
Reporters Without Borders
Restore The Fourth
S.T.O.P. – Surveillance Technology
Oversight Project
San Francisco Peninsula People Power
Secure Justice
Sister District Project Marin
Society of Professional Journalists
South Bay People Power
SURJ Marin
Swing Left Marin
TechFreedom
The Tully Center for Free Speech
UndocuBlack Network
United We Dream
Veterans For Peace (VFP)
Washington Immigrant Solidarity Network
(WAISN)
Woodhull Freedom Foundation
World Privacy Forum

cc:

John Sanders
Acting Commissioner, U.S. Customs and Border Protection

Matthew T. Albence
Acting Director, U.S. Immigration and Customs Enforcement

Cameron Quinn
Officer for Civil Rights and Civil Liberties, DHS Office for Civil Rights and Civil Liberties

Jonathan Cantor
Acting Chief Privacy Officer, DHS Privacy Office

John Kelly
Senior Official Performing the Duties of the Inspector General, DHS Office of Inspector General