

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE PROTECT DEMOCRACY PROJECT, INC.
2020 Pennsylvania Avenue NW, #163
Washington, DC 20006

Plaintiff

vs.

Case No. _____

DEPARTMENT OF HOMELAND SECURITY
3801 Nebraska Avenue NW
Washington, DC 20016

CUSTOMS AND BORDER PROTECTION
1300 Pennsylvania Avenue NW
Washington, DC 20229

OFFICE OF MANAGEMENT AND BUDGET
725 17th Street NW
Washington, DC 20503

OFFICE OF PERSONNEL MANAGEMENT
1900 E Street NW
Washington, DC 20415

Defendants.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF
(Freedom of Information Act)

Plaintiff, The Protect Democracy Project, Inc., brings this action against Defendants, the Department of Homeland Security, Customs and Border Protection, Office of Management and Budget, and Office of Personnel Management, to compel compliance with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and for related declaratory and injunctive relief. Plaintiff alleges as follows:

PARTIES

1. Plaintiff, The Protect Democracy Project, Inc., is a 501(c)(3) tax-exempt organization, incorporated under the laws of the District of Columbia, and headquartered at 2020 Pennsylvania Avenue NW, #163, Washington, DC 20006.

2. Plaintiff's mission is to protect our democracy from descending into a more autocratic form of government by preventing those in power from depriving Americans of a free, fair, and fully-informed opportunity to exercise ultimate sovereignty. As part of this mission, Plaintiff seeks to inform public understanding of operations and activities of the government by gathering and disseminating information that is likely to contribute significantly to the public understanding of Executive Branch operations and activities.

3. Plaintiff regularly requests information pursuant to FOIA. Consistent with its regular practice, Plaintiff intends to give the public access to documents obtained via these FOIA requests on its website, www.protectdemocracy.org, and to provide information about and analysis of those documents as appropriate.

4. Defendant Department of Homeland Security ("DHS") is an agency of the United States of America under 5 U.S.C. § 552(f)(1) and 5 U.S.C. § 551(1). Defendant DHS is headquartered at 3801 Nebraska Avenue NW, Washington, DC 20016. Defendant DHS has possession, custody, and control of the documents that Plaintiff seeks in response to the FOIA request sent to DHS.

5. Defendant Customs and Border Protection ("CBP") is a component of DHS. Defendant CBP is headquartered at 1300 Pennsylvania Avenue NW, Washington, DC 20229. Defendant CBP has possession, custody, and control of the documents that Plaintiff seeks in response to the FOIA request sent to CBP.

6. Defendant Office of Management and Budget (“OMB”) is a component of the Executive Office of the President of the United States and is an agency of the United States of America under 5 U.S.C. § 552(f)(1) and 5 U.S.C. § 551(1). Defendant OMB is headquartered at 725 17th Street NW, Washington, DC 20503. Defendant OMB has possession, custody, and control of the documents that Plaintiff seeks in response to the FOIA request sent to OMB.

7. Defendant Office of Personnel Management (“OPM”) is an agency of the United States of America under 5 U.S.C. § 552(f)(1) and 5 U.S.C. § 551(1). Defendant OPM is headquartered at 1900 E Street NW, Washington, DC 20415. Defendant OPM has possession, custody, and control of the documents that Plaintiff seeks in response to the FOIA request sent to OPM.

JURISDICTION & VENUE

8. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. §§ 2201-2202.

9. Venue is proper pursuant to 5 U.S.C. § 552(a)(4)(B).

STATEMENT OF FACTS

10. On January 25, 2017, President Trump issued an Executive Order directing DHS to hire an additional 5,000 Border Patrol agents “as soon as is practicable” and stating that OPM “shall take appropriate action as may be necessary to facilitate hiring personnel to implement this order.”¹ In a separate Executive Order issued on the same date, President Trump directed DHS to hire an additional 10,000 Immigration and Customs Enforcement (“ICE”) officers.²

¹ Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

² Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

11. On February 20, 2017, then-DHS Secretary John Kelly issued memoranda to CBP and ICE directing the agencies to begin the process of hiring 5,000 additional Border Patrol agents and 10,000 additional ICE officers³ – in effect, an order to increase the Border Patrol’s staff by 25% and to triple ICE’s workforce.⁴ To meet these hiring needs, Administration officials have suggested that they will seek to reduce what they view as overly restrictive hiring barriers, including with respect to polygraph examinations and background checks.

12. The Administration’s approach to border enforcement and illegal immigration is an issue of widespread public interest – an issue that is the subject of significant press attention,⁵ and that has raised concerns among both current and former government officials. These officials have suggested that the loosening of hiring standards may undermine the integrity of CBP and ICE and have negative consequences for border security.⁶ They have observed that the

³ Dept. of Homeland Security, “Implementing the President’s Border Security and Immigration Enforcement Improvements Policies” (Feb. 20, 2017); Dept. of Homeland Security, “Enforcement of the Immigrations Laws to Serve the National Interest” (Feb. 20, 2017).

⁴ See Greg Moran, *Trump’s plans to rapidly expand Border Patrol comes with big risks*, L.A. Times (Mar. 13, 2017), <http://www.latimes.com/local/lanow/la-me-border-patrol-20170313-story.html>.

⁵ See generally *infra*, notes 6-8.

⁶ See, e.g., Dan Frosch and Laura Meckler, *In Rush for New Agents, Border Patrol Weighs Changing Polygraph Program*, Wall St. J. (Apr. 13, 2017), <https://www.wsj.com/articles/in-rush-for-new-agents-border-patrol-weighs-changing-polygraph-program-1492084802> (quoting the DHS Inspector General, John Roth, as saying that the “proposed changes [to the agency’s hiring practices] fail to achieve the goal of shortening the hiring process” and “increase the risk that unsuitable candidates may be hired”); Amanda Holpuch, *White House plan to hire more border agents raises vetting fear, ex-senior official says*, The Guardian (Feb. 26, 2017), <https://www.theguardian.com/us-news/2017/feb/26/trump-plan-border-agents-vetting-james-tomscheck> (quoting the former Head of Internal Affairs at CBP, James Tomscheck, as observing that the loosening of hiring standards “would very likely compromise the future integrity of CBP and have strong negative implications on border security, and therefore national security”).

CBP's last surge in hiring (from 2006-2008) was fraught with problems and led to an increase in misconduct by Border Patrol agents.⁷ A recent report by the DHS Inspector General also calls into question the practicality, and the necessity, of the Administration's rapid hiring plans.⁸

13. In light of the evident difficulty in ramping up hiring to the levels ordered by the President and the Secretary of Homeland Security, the Administration's plan to increase the number of CBP and ICE personnel raises concerns about whether – and to what extent – the Administration intends to rely on private contractors to provide services related to the enforcement of immigration law and border security, which are services that have traditionally been performed by government employees.

14. Consistent with its mission, The Protect Democracy Project submitted FOIA requests to DHS, CBP, OMB, and OPM seeking information from the Trump Administration about its policies and plans for the hiring of new personnel to assist with border enforcement and illegal immigration. Specifically, The Protect Democracy Project is requesting information

⁷ See Caroline Kelly and Todd Gillman, *Trump's plan for Border Patrol, ICE hiring surges face timing, security obstacles*, Dallas News (July 6, 2017), <https://www.dallasnews.com/news/politics/2017/07/06/trumps-plan-border-patrol-ice-hiring-surges-face-timing-security-obstacles> (quoting the former Commissioner of the Immigration and Naturalization Service as stating that “[l]owering and changing standards can lead to integrity issues in the force several years later, and that did happen in the 2000s”).

⁸ See Lisa Rein, *Trump plan to hire 15,000 border and immigration personnel isn't justified, federal watchdog says*, Wash. Post (Aug. 2, 2017), https://www.washingtonpost.com/politics/trump-plan-to-hire-15000-border-and-immigration-personnel-isnt-justified-federal-watchdog-says/2017/08/02/c9345136-77a1-11e7-8839-ec48ec4cae25_story.html?utm_term=.e5e27a1733b2 (summarizing a recent report by the DHS Inspector General that concluded that DHS would be required to vet 750,000 applicants to identify 5,000 qualified personnel); Max Greenwood, *Homeland Security Department cannot prove need for Trump's promised officer surge*, The Hill (Aug. 2, 2017), <http://thehill.com/policy/national-security/345070-dhs-cannot-prove-need-for-trumps-promised-officer-surge> (citing a portion of the same report by the DHS Inspector General that concluded CBP and ICE were not able to identify how many additional personnel they needed to hire).

concerning the means by which the government will meet the increased levels of personnel called for in President Trump's Executive Orders, and whether the implementation of these Executive Orders will involve the use of private contractors.

15. As detailed below, Defendants have failed to comply with these requests within the statutorily-prescribed period for doing so under FOIA.

I. AUGUST 4, 2017 DHS REQUEST

16. On August 4, 2017, The Protect Democracy Project submitted a FOIA request to DHS ("the August 4 DHS Request") seeking fifteen categories of records related to the agency's plans for addressing border enforcement and illegal immigration. The August 4 DHS Request also sought a fee waiver and expedited processing. A true and correct copy of the August 4 DHS Request is attached as Exhibit 1.⁹

17. On August 31, 2017, The Protect Democracy Project received a response from DHS acknowledging that DHS had received the request on August 29, 2017 and assigned it DHS FOIA number 2017-HQFO-01293. In its response, DHS granted Plaintiff's request for a fee waiver and expedited processing. DHS also stated in the response that it was invoking the 10-day extension to comply with the request pursuant to 6 C.F.R. Part 5 § 5.5(c).¹⁰ The response did not indicate the scope of the documents DHS would produce or the exemptions DHS would claim with respect to any withheld documents.

⁹ The attached letter is dated August 3, 2017. However, The Protect Democracy Project submitted the request to DHS on August 4, 2017.

¹⁰ 6 C.F.R. Part 5 § 5.5(c) is the federal regulation that implements the 10-day extension provided by 5 U.S.C. 552(a)(6)(B)(i). This statutory provision and the corresponding regulation are referred to interchangeably throughout the Complaint.

18. Pursuant to FOIA, within 30 business days of receipt of Plaintiff's request, DHS was required to "determine . . . whether to comply with such request" and to "immediately notify" Plaintiff of "such determination and the reasons therefor," and, in the case of an adverse determination, Plaintiff's appeal rights. 5 U.S.C. §552(a)(6)(A)(i); 5 U.S.C. § 552(a)(6)(B)(i). DHS received the request on August 4, 2017. DHS's response was due no later than September 18, 2017.

19. To date, The Protect Democracy Project has received no further response from DHS related to the August 4 DHS Request.

II. AUGUST 4, 2017 CBP REQUEST

20. On August 4, 2017, The Protect Democracy Project submitted a FOIA request to CBP ("the August 4 CBP Request") seeking fifteen categories of records related to the agency's plans for addressing border enforcement and illegal immigration. The August 4 CBP Request also sought a fee waiver and expedited processing. A true and correct copy of the August 4 CBP Request is attached as Exhibit 1.¹¹

21. On August 4, 2017, The Protect Democracy Project received an automated response from CBP confirming submission of the August 4 CBP Request and assigning it CBP FOIA number 2017-077953. CBP revised the FOIA number for the August 4 CBP Request on several occasions thereafter, most recently to CBP FOIA number OA-2017-077953.¹²

¹¹ The attached letter is dated August 3, 2017. However, The Protect Democracy Project submitted the request to CBP on August 4, 2017.

¹² There have been several changes to the FOIA number for the August 4 CBP Request. Specifically, on August 14, 2017, CBP revised the FOIA number from 2017-077953 to OA-2017-077953. Then, on August 22, 2014, CBP revised the FOIA number from OA-2017-077953 back to 2017-077953. On August 25, 2017, CBP revised the FOIA number from 2017-077953 to OTIA-2017-077953, and then, later that day, CBP revised the FOIA number back to OA-2017-077953.

22. On August 11, 2017, The Protect Democracy Project received another automated notice from CBP acknowledging receipt of the August 4 CBP Request on August 4, 2017. CBP's response did not indicate the scope of the documents CBP would produce or the exemptions CBP would claim with respect to any withheld documents.

23. On August 14, 2017, The Protect Democracy Project received an email from CBP granting its request for a fee waiver.

24. On August 25, 2017, The Protect Democracy Project received an email from CBP granting its request for expedited processing.

25. On August 29, 2017, The Protect Democracy Project received an email from CBP stating that the August 4 CBP Request was "very broad in scope" and that, with respect to The Protect Democracy Project's requests for communications on certain topics, CBP was seeking additional information regarding the "offices and positions you wish CBP to search." In this email, CBP did not ask Plaintiff to perfect its request and did not state that it was seeking to toll its statutory timeline for making a determination as to The Protect Democracy Project's request.

26. On September 20, 2017, The Protect Democracy Project sent an email responding to CBP's request for additional information. In this email, The Protect Democracy Project stated that the relevant offices were set forth in the August 4 CBP Request, and directed CBP to the relevant language in the August 4 CBP Request. With respect to CBP's request for a list of "positions . . . to search," The Protect Democracy Project stated that it lacked sufficient information to compile such a list but was willing to discuss potential solutions with CBP.

27. On October 3, 2017, CBP sent an email to The Protect Democracy Project stating: "In reviewing your request it appears we need to narrow the scope a little further, which employees or positions in the offices do you wish us to search, upper level management? I.e.

Assistant Commissioner, Chief of Border patrol?” In its October 3 email, CBP did not state that it was seeking to toll CBP’s statutory timeline for making a determination as to The Protect Democracy Project’s request.

28. On the same date, The Protect Democracy Project sent a response to CBP stating that it would be “happy to be narrow the scope if possible,” while reiterating that it “lack[s] sufficient information about the organization of these offices to identify possible custodians in more detail without further information from [CBP].” The Protect Democracy Project asked CBP to “provide further information on the names and natures of the positions in the offices listed,” and further stated that, “[t]o the extent you have undertaken an initial assessment of which employees may have responsive documents – through questionnaires or otherwise – we would certainly be happy to discuss whether there are appropriate ways to narrow the scope in light of that information.”

29. Pursuant to FOIA, within 20 business days of receipt of Plaintiff’s request, CBP was required to “determine . . . whether to comply with such request” and to “immediately notify” Plaintiff of “such determination and the reasons therefor,” and, in the case of an adverse determination, Plaintiff’s appeal rights. 5 U.S.C. § 552(a)(6)(A)(i). CBP received the request on August 4, 2017. CBP’s response was due no later than September 1, 2017.

30. In its August 11 correspondence, CBP referenced the potential availability, under 6 C.F.R. Part 5 § 5.5(c), of a 10 business day extension to FOIA’s 20 business day response deadline. However, CBP did not invoke this extension; nor did it specify any claimed “unusual circumstances” that would have permitted it to invoke the extension. Even if CBP had properly invoked the 10-day extension, its response would have been due no later than September 18, 2017.

31. To date, The Protect Democracy Project has received no further response from CBP related to the August 4 CBP Request.

III. AUGUST 4, 2017 OMB REQUEST

32. On August 4, 2017, The Protect Democracy Project submitted a FOIA request to OMB (“the August 4 OMB Request”) seeking three categories of records related to the agency’s plans for addressing border enforcement and illegal immigration. The August 4 OMB Request also sought a fee waiver and expedited processing. With respect to its request for expedited processing, The Protect Democracy Project certified that its request met the criteria for expedited processing under Defendant OMB’s regulations, 5 C.F.R. § 1303.10(d)(ii), (iv), because there is an “urgency to inform the public about an actual or alleged Federal Government activity,” the request is “made by a person who is primarily engaged in disseminating information,” and the request concerns “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that could affect public confidence.” A true and correct copy of the August 4 OMB Request is attached as Exhibit 2.

33. On August 28, 2017, The Protect Democracy Project sent an email to OMB attaching the August 4 OMB Request and asking OMB to confirm receipt of the request.

34. On September 8, 2017, The Protect Democracy Project received a response from OMB stating that the August 4 OMB Request had been received on September 7, 2017 and assigned OMB FOIA number 2017-426. The response did not address Plaintiff’s fee waiver and expedited processing requests, and did not indicate the scope of the documents OMB would produce or the exemptions OMB would claim with respect to any withheld documents.

35. Pursuant to FOIA, within 20 business days of receipt of Plaintiff’s request, OMB was required to “determine . . . whether to comply with such request” and to “immediately

notify” Plaintiff of “such determination and the reasons therefor,” and, in the case of an adverse determination, Plaintiff’s appeal rights. 5 U.S.C. § 552(a)(6)(A)(i). OMB received the request on August 4, 2017. OMB’s response was due no later than September 1, 2017.

36. To date, The Protect Democracy Project has received no further response from OMB related to the August 4 OMB Request.

IV. AUGUST 4, 2017 OPM REQUEST

37. On August 4, 2017, The Protect Democracy Project submitted a FOIA request to OPM (“August 4 OPM Request”) seeking three categories of records related to the agency’s plans for addressing border enforcement and illegal immigration, including, among other requests, “[a]ll documents, including communications, memoranda, assessments, and final determinations, related to the requests by [DHS] for various hiring authorities outlined . . . [in] [DHS’s] ‘90-day Progress Report to the President on Executive Order 13767: Border Security and Immigration Enforcement Improvements.’”

38. The August 4 OPM Request also sought a fee waiver and expedited processing. With respect to its request for expedited processing, The Protect Democracy Project certified that its request met the criteria for expedited processing under 5 U.S.C. § 552(a)(6)(E)(v)(ii) because there is an “urgency to inform the public about an actual or alleged Federal Government activity,” the request is “made by a person who is primarily engaged in disseminating information,” and the request concerns “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that could affect public confidence.” A true and correct copy of the August 4 OPM Request is attached as Exhibit 3.

39. On August 4, 2017, The Protect Democracy Project received an automated response from OPM stating that the August 4 OPM Request had been received and would be “forwarded to the appropriate OPM office for response as quickly as possible.”

40. On August 10, 2017, The Protect Democracy Project received a letter from OPM stating that the August 4 OPM Request had been received and assigned OPM FOIA number 2017-05971. OPM’s response also stated that it had placed the request on the “complex track” reserved for “complex requests involving voluminous records, [and] extensive searches or consultations (requiring more than 20 workdays to respond).” The response did not address Plaintiff’s fee waiver and expedited processing requests, and did not indicate the scope of the documents OPM would produce or the exemptions OPM would claim with respect to any withheld documents.

41. On August 28, 2017, OPM sent an email to The Protect Democracy Project requesting that The Protect Democracy Project provide a copy of the “Border Security and Immigration Enforcement Improvements” document referenced in the August 4 OPM Request. On the same date, The Protect Democracy Project responded by email and provided OPM with the requested document.

42. Pursuant to FOIA, within 20 business days of receipt of Plaintiff’s request, OPM was required to “determine . . . whether to comply with such request” and to “immediately notify” Plaintiff of “such determination and the reasons therefor,” and, in the case of an adverse determination, Plaintiff’s appeal rights. 5 U.S.C. § 552(a)(6)(A)(i). OPM received the request on August 4, 2017. OPM’s response was due no later than September 1, 2017.

43. To date, The Protect Democracy Project has received no further response from OPM related to the August 4 OPM Request.

COUNT I - FAILURE TO COMPLY WITH FOIA

44. The Protect Democracy Project incorporates each of the foregoing paragraphs of this Complaint.

45. Pursuant to FOIA, 5 U.S.C. § 552(a), The Protect Democracy Project has a statutory right to access requested agency records.

46. Pursuant to 5 U.S.C. § 552(a)(6)(E), the Protect Democracy Project is entitled to expedited processing of the FOIA requests described in this complaint.

47. Pursuant to 5 U.S.C. § 552(a)(4)(A), the Protect Democracy Project is entitled to a waiver of all fees, other than reasonable standard charges for document duplication.

48. Defendants have failed to comply with the time limits prescribed by FOIA, 5 U.S.C. §§ 552(a)(6)(A)(i)-(ii) and 5 U.S.C. §§ 552(a)(6)(B)(i)-(ii).

49. Defendants have failed to conduct a reasonable search for records responsive to the requests.

50. Defendants have failed to properly respond to The Protect Democracy Project's record requests.

51. Defendants OMB and OPM have failed to respond to The Protect Democracy Project's fee waiver requests.

52. Defendants OMB and OPM have failed to respond to The Protect Democracy Project's requests for expedited processing.

PRAYER FOR RELIEF

WHEREFORE, The Protect Democracy Project respectfully requests that this Court enter a judgment for Plaintiff and award the following relief:

- a. Order Defendants, by a date certain, to conduct searches that are reasonably likely to lead to the discovery of any and all records responsive to Plaintiff's requests;

- b. Order Defendants, by a date certain, to demonstrate that they have conducted adequate searches;
- c. Order Defendants, by a date certain, to produce to Plaintiff any and all non-exempt records or portions of records responsive to Plaintiff's requests, as well as *Vaughn* indices of any records or portions of records withheld due to a claim of exemption;¹³
- d. Enjoin Defendants from withholding the requested records;
- e. Order Defendants OMB and OPM to grant the fee waivers requested in Plaintiff's submissions to OMB and OPM of August 4, 2017;
- f. Issue a declaration that the failure of Defendants OMB and OPM to respond to Plaintiff's fee waiver requests violates 5 U.S.C. § 552(a)(4)(A);
- g. Order Defendants OMB and OPM to expedite the processing of Plaintiff's requests submitted to OMB and OPM on August 4, 2017;
- h. Issue a declaration that the failure of Defendants OMB and OPM to respond to Plaintiff's requests for expedited processing violates 5 U.S.C. § 552(a)(6)(E);
- i. Pursuant to 5 U.S.C. § 552(a)(4)(E), award Plaintiff its costs and attorney's fees reasonably incurred in this action; and
- j. Grant Plaintiff such other and further relief as the Court may deem just and proper.

¹³ See *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) (agency opposing a FOIA request should provide an itemized index correlating each withheld document (or portion) with a specific exemption justification).

October 13, 2017

Respectfully submitted,

/s/ Kevin Barnett

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ATTORNEYS FOR PLAINTIFF

** Application pending for admission to the District Court Bar.*

Exhibit 1

**The Protect -
Democracy
Project**

August 3, 2017

Sam Kaplan
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

Sabrina Burroughs
FOIA Officer
Customs and Border Patrol
1300 Pennsylvania Avenue, NW, Room 3.3D
Washington, D.C. 20229
Phone: 202-325-0150

Re: Freedom of Information Act

To Whom It May Concern:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, The Protect Democracy Project hereby requests that your office produce within 20 business days the following records (see below for clarity on the types of records sought):

1. All documents setting forth policies, procedures, guidelines, guidance, best practices, or requirements for contracting with any non-government entity to provide services related to enforcing any immigration law at the border or in the interior of the United States.
2. Documents sufficient to show the number of contracts currently in force between DHS (or its components or representatives) and any non-governmental corporate entity that has been hired or otherwise contracted to provide services related to enforcing any immigration law at the border or in the interior of the United States.

3. All contracts currently in force between DHS (or its components or representatives) and any non-governmental entity that has been hired or otherwise contracted to provide services related to enforcing any immigration law at the border or in the interior of the United States.
4. All communications between any component of DHS and any other federal agency or the White House concerning hiring or contracting with any non-governmental corporate entity for purposes of providing services related to enforcing any immigration law at the border or in the interior of the United States.
5. All communications between any component of DHS and any non-governmental corporate entity related to hiring or contracting with any non-governmental corporate entity for purposes of providing services related to enforcement of any immigration law at the border or in the interior of the United States.
6. All documents currently in effect reflecting any determinations regarding which functions related to enforcement of any immigration law at the border or in the interior of the United States constitute “commercial activities” and which constitute “inherently governmental activities” as those terms are used in Office of Management and Budget Circular No. A-76. The search for documents responsive to this request should include, but not be limited to, documents in the custody of the agency’s competitive sourcing official. For this request, we ask that you conduct a search for records extending from January 1, 2004 to the date of the search.
7. All documents related to DHS’s efforts to comply with the directive in Section 8 of Executive Order 13767, “Border Security and Immigration Enforcement Improvements” (Jan. 25, 2017) (“EO 13767”) that DHS “take all appropriate action to hire 5,000 additional Border Patrol agents,” including but not limited to any assessment of the steps needed to effectuate that directive, any assessment of the role non-government corporate entities may play in expanding the Border Patrol’s work force, any communications with non-governmental corporate entities who may provide personnel or services relevant to that directive, and any Requests for Proposals or similar documents related to that directive.
8. All communications between DHS and the Office of Personnel Management (“OPM”) regarding the directive in Section 16 of EO 13767 that OPM “take appropriate action as may be necessary to facilitate hiring personnel to implement this order.”
9. All documents supporting, assessing, or contradicting the following assertion on page 5 of DHS’s “90-day Progress Report to the President on Executive Order 13767: Border Security and Immigration Enforcement Improvements” (“90-Day Progress Report”): “CBP is aggressively working to hire agents required under the statutory floor, and is assessing how modifications and improvements to various parts of our rigorous multi-step frontline hiring process, which is intended to ensure that only the best qualified applicants are hired, may impact the time to onboard the additional 5,000 agents.”

10. All documents relating to following assertion on page 12 of the 90-Day Progress Report: “CBP has made requests for the following authorities from OPM, which are currently pending OPM review/approval:
 - Amendment to qualifications standard for Border Patrol Agents, GS-1896
 - Special salary rates for remote and hard-to-fill locations”
11. All documents relating to the directive in Section E of the Secretary’s February 17, 2017 Memorandum, “Enforcement of the Immigration Laws to Serve the National Interest,” that the director of Immigration and Customs Enforcement “take all appropriate action to expeditiously hire 10,000 agents and officers, as well as additional operational and mission support and legal staff and support activities,” including all documents:
 - a. Reflecting the legal authority to implement that directive;
 - b. Reflecting budgetary authorization to implement that directive;
 - c. Discussing the need to expeditiously hire 10,000 ICE agent and officers;
 - d. Assessing the benefits or costs of implementing that directive;
 - e. Discussing the role of non-governmental corporate entities in providing personnel or services in implementing that directive.
12. All documents supporting, assessing, or contradicting the assertion, in Section B of the Secretary’s February 20, 2017 Memorandum, “Implementing the President’s Border Security and Immigration Enforcement Improvement Policies,” that “CBP has insufficient agents/officers to effectively detect, track, and apprehend all aliens illegally entering the United States.”
13. Any written acquisition plan, as that phrase is used in Title 48 of the Federal Code of Regulations, relating to any non-government entity providing services related to enforcing any immigration law at the border or in the interior of the United States.
14. All documents containing, discussing, or memorializing communications with any officer or member of the National Border Patrol Council or National ICE Council regarding any non-governmental corporate entity that has been hired or otherwise contracted to provide services related to enforcing any immigration law at the border or in the interior of the United States.
15. In addition to the records requested above, we also request records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched, and any tracking sheets used to track the processing of this request. If your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

Except where otherwise noted, the timeframe for this request is November 8, 2016 through the date that searches are conducted for records responsive to this FOIA request.

For purposes of this request, the phrase “enforcing any immigration law at the border or in the interior of the United States” refers to any activity related to any of the following: monitoring border crossing; questioning, apprehending, or transporting individuals suspected of unlawfully crossing the border; investigating or identifying individuals suspected of being in the country unlawfully; apprehending individuals suspected of being in the country unlawfully; or any logistical or administrative support related to any of those activities (including but not limited to transportation, surveillance, or data-maintenance). For purposes of this request, the phrase “enforcing any immigration law at the border or in the interior of the United States” does not encompass activities related exclusively to the management or maintenance of detention facilities.

RESPONSIVE RECORDS

We ask that you search for records from all components of DHS that may be reasonably likely to produce responsive results, including but not limited to the Office of the Secretary and its component offices, the Commissioner (or acting Commissioner) of CBP, the Deputy Commissioner (or acting Deputy Commissioner of CBP), the CBP Office of Field Operations, the U.S. Border Patrol, Office of the Director of Immigrations and Customs Enforcement (ICE), ICE Enforcement and Removal Operations, ICE Management and Administration, ICE Office of Acquisition Management, the Chief Human Capital Officer, the Undersecretary for Management, the Chief Financial Officer, and CBP’s Frontline Hiring Program Management Office. We also ask that you search all systems of record, including electronic and paper, in use at your agency, as well as files or emails in the personal custody of your employees, such as personal email accounts, as required by FOIA and to the extent that they are reasonably likely to contain responsive records. The Protect Democracy Project would prefer records in electronic format, saved as PDF documents, and transmitted via email or CD-rom.

We ask that all types of records and all record systems be searched to discover records responsive to our request. We seek records in all media and formats. This includes, but is not limited to: agendas, manifests, calendars, schedules, notes, and any prepared documentation for meetings, calls, teleconferences, or other discussions responsive to our request; voicemails; e-mails; e-mail attachments; talking points; faxes; training documents and guides; tables of contents and contents of binders; documents pertaining to instruction and coordination of couriers; and any other materials. However, you need not produce press clippings and news articles that are unaccompanied by any commentary (e.g., an email forwarding a news article with no additional commentary in the email thread).

If you make a determination that any responsive record, or any segment within a record, is exempt from disclosure, we ask that you provide an index of those records at the time you transmit all other responsive records. In the index, please include a description of the record and the reason for exclusion with respect to each individual exempt record or exempt portion of a record, as provided by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). When you deem a portion of a record exempt, we ask that the remainder of the record to be provided, as required by 5 U.S.C. § 552(b).

EXPEDITED PROCESSING REQUEST

We request that you expedite the processing of this request pursuant to 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(e). This request meets the criteria for expedited processing because there is “[a]n urgency to inform the public about an actual or alleged Federal Government activity,” this request is “made by a person who is primarily engaged in disseminating information;” and this request concerns “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that could affect public confidence.” 6 C.F.R. § 5.5(e)(ii), (iv). As explained below in more detail in the section of this request regarding a fee waiver, The Protect Democracy Project intends to disseminate the information obtained in response to this request.

The role of private contractors in implementing immigration policy is a matter of urgent public importance. As an initial matter, immigration policy is currently a matter of the highest public concern. It was a driving issue in the 2016 presidential campaign,¹ and has been the subject of high-profile executive action in the new administration.² Beyond formal policy, the day to day implementation of immigration policy generates intense public interest.³ Critically relevant to this public debate is the question of what means the

See, e.g., Janelle Ross, *From Mexican Rapists to Bad Hombres, the Trump Campaign in Two Moments*, Wash. Post, Oct. 16, 2016; Fox News, *Trump Stands by Statements on Mexican Illegal Immigrants, Surprised by Backlash*, Fox News, July 4, 2015, available at <http://www.foxnews.com/politics/2015/07/04/trump-stands-by-views-dangerous-mexican-illegal-immigrants-admits-surprised-by.html>.

² *See, e.g.,* Julie Hirschfeld Davis et. al. *Trump to Order Mexican Border Wall and Curtail Immigration*, New York Times, Jan. 24, 2017; White House, Office of the Press Secretary, *President Donald J. Trump Taking Action Against Illegal Immigration*, June 28, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/06/28/president-donald-j-trump-taking-action-against-illegal-immigration>.

³ *See, e.g.,* Scott Martelle, *We're Seeing the Results of Trump's New Border Enforcement System. They Aren't Pretty*, L.A. Times, Feb. 27, 2018; Jonathan Blitzer, *The Border*

government will utilize to meet the increased levels of personnel called for in connection with border and interior enforcement.⁴ The public has a right to learn precisely what role private contractors may play in implementing those policies. In the absence of such information, the public cannot adequately assess the contours of federal immigration policy.

The core mission of The Protect Democracy Project, a new organization awaiting 501(c)(3) status, is to inform public understanding on operations and activities of the government. This request is submitted in accordance with the organization's mission to gather and disseminate information that is likely to contribute significantly to the public understanding of executive branch operations and activities. The Protect Democracy Project has routinely demonstrated the ability to disseminate information about its FOIA requests to a wide audience.⁵ The Protect Democracy Project has been recognized as an organization that meets the statutory criteria for expedited processing. *Protect Democracy Project, Inc. v. U.S. Dep't of Def.*, No. 17-CV-00842 (CRC), 2017 WL 2992076 (D.D.C. July 13, 2017). The Protect Democracy Project has no commercial interests.

It is therefore incumbent upon the government and urgent for your office to share any responsive records in an expedited. The Department's policies and practices

Patrol Was Primed for President Trump, The New Yorker, Feb. 17, 2017, available at <http://www.newyorker.com/news/news-desk/the-border-patrol-was-primed-for-president-trump>.

⁴ See, e.g., Dan Frosch & Laura Meckler, *In Rush for New Agents, Border Patrol Weighs Changing Polygraph Program*, Wall Street Journal, Apr. 13, 2017; Amanda Holpuch, *White House Plan to Hire More Border Agents Raises Vetting Fear, Ex-Senior Official Says*, The Guardian, Feb. 26, 2017, available at <https://www.theguardian.com/us-news/2017/feb/26/trump-plan-border-agents-vetting-james-tomscheck>; Brian Naylor, *Trump's Plan To Hire 15,000 Border Patrol And ICE Agents Won't Be Easy*, NPR, Feb. 23, 2017, available at <http://www.npr.org/2017/02/23/516712980/trumps-plan-to-hire-15-000-border-patrol-and-ice-agents-wont-be-easy-to-fulfill>.

⁵ See, e.g., Lisa Rein, *Watchdog group, citing "integrity of civil service," sues Trump to find out if feds are being bullied*, Wash. Post, Apr. 27, 2017; Ben Berwick, *Going to Court for Civil Servants*, Take Care, April 28, 2017, <https://takecareblog.com/blog/going-to-court-for-civil-servants>; Charlie Savage, *Watchdog Group Sues Trump Administration, Seeking Legal Rationale Behind Syria Strike*, N.Y. Times, May 8, 2017, <https://nyti.ms/2pX82OV>; Justin Florence, *What's the Legal Basis for the Syria Strikes? The Administration Must Acknowledge Limits on its Power to Start a War*, Lawfare, May 8, 2017, <https://www.lawfareblog.com/whats-legal-basis-syria-strikes-administration-must-acknowledge-limits-its-power-start-war>.

regarding private contractors will inform public understanding of immigration enforcement priorities, the efficacy of federal immigration policy, and the safeguards protecting individuals at the border. The public must have an opportunity to understand the full picture of how the Department navigates those issues.

Under penalty of perjury, I hereby affirm that the foregoing is true and correct to the best of my knowledge and belief.

FEE WAIVER

FOIA provides that any fees associated with a request are waived if “disclosure of the 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 is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). The core mission of The Protect Democracy Project, a new organization awaiting 501(c)(3) status, is to inform public understanding on operations and activities of the government. This request is submitted in connection with the organization’s mission to gather and disseminate information that is likely to contribute significantly to the public understanding of executive branch operations and activities. The Protect Democracy Project has no commercial interests.

In addition to satisfying the requirements for a waiver of fees associated with the search and processing of records, The Protect Democracy Project is entitled to a waiver of all fees except “reasonable standard charges for document duplication.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). Federal law mandates that fees be limited to document duplication costs for any requester that qualifies as a representative of the news media. *Id.* The Protect Democracy Project operates in the tradition of 501(c)(3) good government organizations that qualify under FOIA as “news media organizations.” Like those organizations, the purpose of The Protect Democracy Project is to “gather information of potential interest to a segment of the public, use its editorial skills to turn the raw materials into distinct work, and distribute that work to an audience.” *Nat’s Sec. Archive v. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). Indeed, The Protect Democracy Project has routinely demonstrated the ability to disseminate information about its FOIA requests to a wide audience.⁶ The Protect Democracy Project will

⁶ See, e.g., Lisa Rein, *Watchdog group, citing “integrity of civil service,” sues Trump to find out if feds are being bullied*, Wash. Post, Apr. 27, 2017, https://www.washingtonpost.com/news/powerpost/wp/2017/04/27/watchdog-group-citing-integrity-of-civil-service-sues-trump-to-find-out-if-feds-are-being-bullied/?utm_term=.8647ab128f3e; Ben Berwick, *Going to Court for Civil Servants*, Take Care, April 28, 2017, <https://takecareblog.com/blog/going-to-court-for-civil-servants>; Charlie Savage, *Watchdog Group Sues Trump Administration, Seeking Legal Rationale Behind Syria Strike*, N.Y. Times, May 8, 2017, <https://nyti.ms/2pX82OV>; Justin Florence, *What’s the*

disseminate information and analysis about this request – and any information obtained in response – through its website (protectdemocracy.org); its Twitter feed (<https://twitter.com/protctdemocracy>), which has more than 10,000 followers; its email list of approximately 20,000 people; and sharing information with other members of the press.

* * *

Given the 20-day statutory deadline, we hope to be as helpful as possible in clarifying or answering questions about our request. Please contact me at larry.schwartztol@protectdemocracy.org or (202) 516-7885 if you require any additional information. We appreciate your cooperation, and look forward to hearing from you very soon.

Sincerely,



Larry Schwartztol
Counsel
The Protect Democracy Project

Legal Basis for the Syria Strikes? The Administration Must Acknowledge Limits on its Power to Start a War, Lawfare, May 8, 2017, <https://www.lawfareblog.com/whats-legal-basis-syria-strikes-administration-must-acknowledge-limits-its-power-start-war>.

Exhibit 2

**The Protect -
Democracy
Project**

August 4, 2017

Dionne Hardy
FOIA Officer
Office of Management and Budget
725 17th Street NW, Suite 9204
Washington, DC 20503

Re: Freedom of Information Act

To Whom It May Concern:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, The Protect Democracy Project hereby requests that your office produce within 20 business days the following records (see below for clarity on the types of records sought):

1. All communications with the Department of Homeland Security (DHS), or any component within DHS, regarding DHS's efforts to hire 5,000 additional Border Patrol agents, as directed by Executive Order 13767, "Border Security and Immigration Enforcement Improvements" (Jan. 25, 2017), or its efforts to hire 10,000 additional Immigration and Customs Enforcement agents and officers, as directed by Sec. of Homeland Security, Memorandum, "Enforcement of the Immigration Laws to Serve the National Interest" (Feb. 17, 2017).
2. All documents reflecting the determinations by DHS, or any of its components, as to which activities related to enforcement of any immigration law at the border or in the interior of the United States constitute "commercial activities" and which constitute "inherently governmental activities" as those terms are used in Office of Management and Budget Circular No. A-76.
3. In addition to the records requested above, we also request records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched, and any tracking sheets used to track the processing of this request. If your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

The timeframe for this Request 1 is November 8, 2016 to the date that searches are conducted for records responsive to this FOIA request; the timeframe for Request No. 2 is January 1, 2005 through the date that searches are conducted for records responsive to this FOIA request; the timeframe for Request No. 3 is the date this request is received by OMB to the date that searches are conducted for responsive records.

For purposes of this request, the phrase “enforcing any immigration law at the border or in the interior of the United States” refers to any activity related to any of the following: monitoring border crossing; questioning, apprehending, or transporting individuals suspected of unlawfully crossing the border; investigating or identifying individuals suspected of being in the country unlawfully; apprehending individuals suspected of being in the country unlawfully; or any logistical or administrative support related to any of those activities (including but not limited to transportation, surveillance, or data-maintenance). For purposes of this request, the phrase “enforcing any immigration law at the border or in the interior of the United States” does not encompass activities related exclusively to the management or maintenance of detention facilities.

RESPONSIVE RECORDS

We ask that all types of records and all record systems be searched to discover records responsive to our request. We seek records in all media and formats. This includes, but is not limited to: agendas, manifests, calendars, schedules, notes, and any prepared documentation for meetings, calls, teleconferences, or other discussions responsive to our request; voicemails; e-mails; e-mail attachments; talking points; faxes; training documents and guides; tables of contents and contents of binders; documents pertaining to instruction and coordination of couriers; and any other materials. However, you need not produce press clippings and news articles that are unaccompanied by any commentary (e.g., an email forwarding a news article with no additional commentary in the email thread).

We ask that you search for records from all components of OMB that may be reasonably likely to produce responsive results. We also ask that you search all systems of record, including electronic and paper, in use at your agency, as well as files or emails in the personal custody of your employees, such as personal email accounts, as required by FOIA and to the extent that they are reasonably likely to contain responsive records. The Protect Democracy Project would prefer records in electronic format, saved as PDF documents, and transmitted via email or CD-rom.

If you make a determination that any responsive record, or any segment within a record, is exempt from disclosure, we ask that you provide an index of those records at the time you transmit all other responsive records. In the index, please include a description of the record and the reason for exclusion with respect to each individual exempt record or exempt portion of a record, as provided by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). When you deem a portion of a

record exempt, we ask that the remainder of the record to be provided, as required by 5 U.S.C. § 552(b).

EXPEDITED PROCESSING REQUEST

We request that you expedite the processing of this request pursuant to 5 U.S.C. § 552(a)(6)(E) and 5 C.F.R. § 1303.10(d). This request meets the criteria for expedited processing because there is “[a]n urgency to inform the public about an actual or alleged Federal Government activity,” this request is “made by a person who is primarily engaged in disseminating information;” and this request concerns “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that could affect public confidence.” 5 C.F.R. § 1303.10(d) (ii), (iv). As explained below in more detail in the section of this request regarding a fee waiver, The Protect Democracy Project intends to disseminate the information obtained in response to this request.

The role of private contractors in implementing immigration policy is a matter of urgent public importance. As an initial matter, immigration policy is currently a matter of the highest public concern. It was a driving issue in the 2016 presidential campaign,¹ and has been the subject of high-profile executive action in the new administration.² Beyond formal policy, the day to day implementation of immigration policy generates intense public interest.³ Critically relevant to this public debate is the question of what means the government will utilize to meet the increased levels of personnel called for in connection with border and interior enforcement.⁴ The public has a right to learn

¹ See, e.g., Janelle Ross, *From Mexican Rapists to Bad Hombres, the Trump Campaign in Two Moments*, Wash. Post, Oct. 16, 2016; Fox News, *Trump Stands by Statements on Mexican Illegal Immigrants, Surprised by Backlash*, Fox News, July 4, 2015, available at <http://www.foxnews.com/politics/2015/07/04/trump-stands-by-views-dangerous-mexican-illegal-immigrants-admits-surprised-by.html>.

² See, e.g., Julie Hirschfeld Davis et. al. *Trump to Order Mexican Border Wall and Curtail Immigration*, New York Times, Jan. 24, 2017; White House, Office of the Press Secretary, *President Donald J. Trump Taking Action Against Illegal Immigration*, June 28, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/06/28/president-donald-j-trump-taking-action-against-illegal-immigration>.

³ See, e.g., Scott Martelle, *We're Seeing the Results of Trump's New Border Enforcement System. They Aren't Pretty*, L.A. Times, Feb. 27, 2018; Jonathan Blitzer, *The Border Patrol Was Primed for President Trump*, The New Yorker, Feb. 17, 2017, available at <http://www.newyorker.com/news/news-desk/the-border-patrol-was-primed-for-president-trump>.

⁴ See, e.g., Dan Frosch & Laura Meckler, *In Rush for New Agents, Border Patrol Weighs Changing Polygraph Program*, Wall Street Journal, Apr. 13, 2017; Amanda Holpuch, *White House Plan to Hire More Border Agents Raises Vetting Fear, Ex-Senior Official Says*, The Guardian, Feb. 26, 2017, available at <https://www.theguardian.com/us->

precisely what role private contractors may play in implementing those policies. In the absence of such information, the public cannot adequately assess the contours of federal immigration policy.

The core mission of The Protect Democracy Project, a new organization awaiting 501(c)(3) status, is to inform public understanding on operations and activities of the government. This request is submitted in accordance with the organization's mission to gather and disseminate information that is likely to contribute significantly to the public understanding of executive branch operations and activities. The Protect Democracy Project has routinely demonstrated the ability to disseminate information about its FOIA requests to a wide audience.⁵ The Protect Democracy Project has been recognized as an organization that meets the statutory criteria for expedited processing. *Protect Democracy Project, Inc. v. U.S. Dep't of Def.*, No. 17-CV-00842 (CRC), 2017 WL 2992076 (D.D.C. July 13, 2017). The Protect Democracy Project has no commercial interests.

It is therefore incumbent upon the government and urgent for your office to share any responsive records in an expedited. The administration's policies and practices regarding private contractors will inform public understanding of immigration enforcement priorities, the efficacy of federal immigration policy, and the safeguards protecting individuals at the border. The public must have an opportunity to understand the full picture of how the administration navigates those issues.

Under penalty of perjury, I hereby affirm that the foregoing is true and correct to the best of my knowledge and belief.

FEE WAIVER

FOIA provides that any fees associated with a request are waived if "disclosure of the 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 is not

news/2017/feb/26/trump-plan-border-agents-vetting-james-tomsheck; Brian Naylor, *Trump's Plan To Hire 15,000 Border Patrol And ICE Agents Won't Be Easy*, NPR, Feb. 23, 2017, available at <http://www.npr.org/2017/02/23/516712980/trumps-plan-to-hire-15-000-border-patrol-and-ice-agents-wont-be-easy-to-fulfill>.

⁵ See, e.g., Lisa Rein, *Watchdog group, citing "integrity of civil service," sues Trump to find out if feds are being bullied*, Wash. Post, Apr. 27, 2017; Ben Berwick, *Going to Court for Civil Servants*, Take Care, April 28, 2017, <https://takecareblog.com/blog/going-to-court-for-civil-servants>; Charlie Savage, *Watchdog Group Sues Trump Administration, Seeking Legal Rationale Behind Syria Strike*, N.Y. Times, May 8, 2017, <https://nyti.ms/2pX82OV>; Justin Florence, *What's the Legal Basis for the Syria Strikes? The Administration Must Acknowledge Limits on its Power to Start a War*, Lawfare, May 8, 2017, <https://www.lawfareblog.com/whats-legal-basis-syria-strikes-administration-must-acknowledge-limits-its-power-start-war>.

primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). The core mission of The Protect Democracy Project, a new organization awaiting 501(c)(3) status, is to inform public understanding on operations and activities of the government. This request is submitted in connection with the organization’s mission to gather and disseminate information that is likely to contribute significantly to the public understanding of executive branch operations and activities. The Protect Democracy Project has no commercial interests.

In addition to satisfying the requirements for a waiver of fees associated with the search and processing of records, The Protect Democracy Project is entitled to a waiver of all fees except “reasonable standard charges for document duplication.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). Federal law mandates that fees be limited to document duplication costs for any requester that qualifies as a representative of the news media. *Id.* The Protect Democracy Project operates in the tradition of 501(c)(3) good government organizations that qualify under FOIA as “news media organizations.” Like those organizations, the purpose of The Protect Democracy Project is to “gather information of potential interest to a segment of the public, use its editorial skills to turn the raw materials into distinct work, and distribute that work to an audience.” *Nat’s Sec. Archive v. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). Indeed, The Protect Democracy Project has routinely demonstrated the ability to disseminate information about its FOIA requests to a wide audience.⁶ The Protect Democracy Project will disseminate information and analysis about this request – and any information obtained in response – through its website (protectdemocracy.org); its Twitter feed (<https://twitter.com/protctdemocracy>), which has more than 10,000 followers; its email list of approximately 20,000 people; and sharing information with other members of the press.

* * *

Given the 20-day statutory deadline, we hope to be as helpful as possible in clarifying or answering questions about our request. Please contact me at larry.schwartztol@protectdemocracy.org or (202) 516-7885 if you require any additional

⁶ See, e.g., Lisa Rein, *Watchdog group, citing “integrity of civil service,” sues Trump to find out if feds are being bullied*, Wash. Post, Apr. 27, 2017, https://www.washingtonpost.com/news/powerpost/wp/2017/04/27/watchdog-group-citing-integrity-of-civil-service-sues-trump-to-find-out-if-feds-are-being-bullied/?utm_term=.8647ab128f3e; Ben Berwick, *Going to Court for Civil Servants, Take Care*, April 28, 2017, <https://takecareblog.com/blog/going-to-court-for-civil-servants>; Charlie Savage, *Watchdog Group Sues Trump Administration, Seeking Legal Rationale Behind Syria Strike*, N.Y. Times, May 8, 2017, <https://nyti.ms/2pX82OV>; Justin Florence, *What’s the Legal Basis for the Syria Strikes? The Administration Must Acknowledge Limits on its Power to Start a War*, Lawfare, May 8, 2017, <https://www.lawfareblog.com/whats-legal-basis-syria-strikes-administration-must-acknowledge-limits-its-power-start-war>.

information. We appreciate your cooperation, and look forward to hearing from you very soon.

Sincerely,



Larry Schwartztol
Counsel
The Protect Democracy Project

Exhibit 3

**The Protect -
Democracy
Project**

August 4, 2017

U.S. Office of Personnel Management
FOIA Requester Service Center
1900 E Street, N.W.
Room 4458
Washington, D.C. 20415-7900

Re: Freedom of Information Act

To Whom It May Concern:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, The Protect Democracy Project hereby requests that your office produce within 20 business days the following records (see below for clarity on the types of records sought):

1. All documents, including communications, memoranda, assessments, and final determinations, related to the requests by the Department of Homeland Security (“DHS”) for various hiring authorities outlined on pages 12 and 13 of the Department of Homeland Security’s “90-day Progress Report to the President on Executive Order 13767: Border Security and Immigration Enforcement Improvements” (Apr. 25, 2017), *available at* <https://assets.documentcloud.org/documents/3553905/Borderreport.pdf>, including but not limited to:
 - a. Any request by the DHS Chief Human Capital Officer or any other representative of DHS for “Direct Hire Authority” related to personnel whose duties relate to enforcement of any immigration law at the border or in the interior of the United States
 - b. Any request by DHS to amend the qualifications standard for Border Patrol Agent
 - c. Any request from DHS for special salary rates for remote and hard-to-fill locations
 - d. Any request from DHS for Dual Compensation Waivers
 - e. Any request by DHS to conduct a National Agency check or possible alternatives

- f. Any request by DHS relating to interchange agreements relating to enforcement of any immigration law at the border or in the interior of the United States
 - g. Any request by DHS to extend the probationary period for employees involved in the enforcement of any immigration law at the border or in the interior of the United States
2. All communications with DHS or other documents regarding which functions related to enforcement of any immigration law at the border or in the interior of the United States constitute “commercial activities” and which constitute “inherently governmental activities” as those terms are used in Office of Management and Budget Circular No. A-76.
3. In addition to the records requested above, we also request records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched, and any tracking sheets used to track the processing of this request. If your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

The timeframe for Request 1 is January 20, 2017 to the date that searches are conducted for records responsive to this FOIA request; the timeframe for Request No. 2 is January 1, 2005 through the date that searches are conducted for records responsive to this FOIA request; the timeframe for Request No. 3 is the date this request is received by OPM to the date that searches are conducted for responsive records.

For purposes of this request, the phrase “enforcing any immigration law at the border or in the interior of the United States” refers to any activity related to any of the following: monitoring border crossing; questioning, apprehending, or transporting individuals suspected of unlawfully crossing the border; investigating or identifying individuals suspected of being in the country unlawfully; apprehending individuals suspected of being in the country unlawfully; or any logistical or administrative support related to any of those activities (including but not limited to transportation, surveillance, or data-maintenance). For purposes of this request, the phrase “enforcing any immigration law at the border or in the interior of the United States” does not encompass activities related exclusively to the management of detention facilities.

RESPONSIVE RECORDS

We ask that all types of records and all record systems be searched to discover records responsive to our request. We seek records in all media and formats. This includes, but is not limited to: agendas, manifests, calendars, schedules, notes, and any prepared documentation for meetings, calls, teleconferences, or other discussions

responsive to our request; voicemails; e-mails; e-mail attachments; talking points; faxes; training documents and guides; tables of contents and contents of binders; documents pertaining to instruction and coordination of couriers; and any other materials. However, you need not produce press clippings and news articles that are unaccompanied by any commentary (e.g., an email forwarding a news article with no additional commentary in the email thread).

We ask that you search for records from all components of OPM that may be reasonably likely to produce responsive results. We also ask that you search all systems of record, including electronic and paper, in use at your agency, as well as files or emails in the personal custody of your employees, such as personal email accounts, as required by FOIA and to the extent that they are reasonably likely to contain responsive records. The Protect Democracy Project would prefer records in electronic format, saved as PDF documents, and transmitted via email or CD-rom.

If you make a determination that any responsive record, or any segment within a record, is exempt from disclosure, we ask that you provide an index of those records at the time you transmit all other responsive records. In the index, please include a description of the record and the reason for exclusion with respect to each individual exempt record or exempt portion of a record, as provided by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). When you deem a portion of a record exempt, we ask that the remainder of the record to be provided, as required by 5 U.S.C. § 552(b).

EXPEDITED PROCESSING REQUEST

We request that you expedite the processing of this request pursuant to 5 U.S.C. § 552(a)(6)(E). This request meets the criteria for expedited processing because there is “[a]n urgency to inform the public about an actual or alleged Federal Government activity,” this request is “made by a person who is primarily engaged in disseminating information;” and this request concerns “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that could affect public confidence.” 5 U.S.C. § 552(a)(6)(E)(v)(ii). As explained below in more detail in the section of this request regarding a fee waiver, The Protect Democracy Project intends to disseminate the information obtained in response to this request.

The role of private contractors in implementing immigration policy is a matter of urgent public importance. As an initial matter, immigration policy is currently a matter of the highest public concern. It was a driving issue in the 2016 presidential campaign,¹

¹ See, e.g., Janelle Ross, *From Mexican Rapists to Bad Hombres, the Trump Campaign in Two Moments*, Wash. Post, Oct. 16, 2016; Fox News, *Trump Stands by Statements on Mexican Illegal Immigrants, Surprised by Backlash*, Fox News, July 4, 2015, available at <http://www.foxnews.com/politics/2015/07/04/trump-stands-by-views-dangerous-mexican-illegal-immigrants-admits-surprised-by.html>.

and has been the subject of high-profile executive action in the new administration.² Beyond formal policy, the day to day implementation of immigration policy generates intense public interest.³ Critically relevant to this public debate is the question of what means the government will utilize to meet the increased levels of personnel called for in connection with border and interior enforcement.⁴ The public has a right to learn precisely what role private contractors may play in implementing those policies. In the absence of such information, the public cannot adequately assess the contours of federal immigration policy.

The core mission of The Protect Democracy Project, a new organization awaiting 501(c)(3) status, is to inform public understanding on operations and activities of the government. This request is submitted in accordance with the organization's mission to gather and disseminate information that is likely to contribute significantly to the public understanding of executive branch operations and activities. The Protect Democracy Project has routinely demonstrated the ability to disseminate information about its FOIA requests to a wide audience.⁵ The Protect Democracy Project has been recognized as an organization that meets the statutory criteria for expedited processing. *Protect*

² See, e.g., Julie Hirschfeld Davis et. al. *Trump to Order Mexican Border Wall and Curtail Immigration*, New York Times, Jan. 24, 2017; White House, Office of the Press Secretary, *President Donald J. Trump Taking Action Against Illegal Immigration*, June 28, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/06/28/president-donald-j-trump-taking-action-against-illegal-immigration>.

³ See, e.g., Scott Martelle, *We're Seeing the Results of Trump's New Border Enforcement System. They Aren't Pretty*, L.A. Times, Feb. 27, 2018; Jonathan Blitzer, *The Border Patrol Was Primed for President Trump*, The New Yorker, Feb. 17, 2017, available at <http://www.newyorker.com/news/news-desk/the-border-patrol-was-primed-for-president-trump>.

⁴ See, e.g., Dan Frosch & Laura Meckler, *In Rush for New Agents, Border Patrol Weighs Changing Polygraph Program*, Wall Street Journal, Apr. 13, 2017; Amanda Holpuch, *White House Plan to Hire More Border Agents Raises Vetting Fear, Ex-Senior Official Says*, The Guardian, Feb. 26, 2017, available at <https://www.theguardian.com/us-news/2017/feb/26/trump-plan-border-agents-vetting-james-tomsheck>; Brian Naylor, *Trump's Plan To Hire 15,000 Border Patrol And ICE Agents Won't Be Easy*, NPR, Feb. 23, 2017, available at <http://www.npr.org/2017/02/23/516712980/trumps-plan-to-hire-15-000-border-patrol-and-ice-agents-wont-be-easy-to-fulfill>.

⁵ See, e.g., Lisa Rein, *Watchdog group, citing "integrity of civil service," sues Trump to find out if feds are being bullied*, Wash. Post, Apr. 27, 2017; Ben Berwick, *Going to Court for Civil Servants*, Take Care, April 28, 2017, <https://takecareblog.com/blog/going-to-court-for-civil-servants>; Charlie Savage, *Watchdog Group Sues Trump Administration, Seeking Legal Rationale Behind Syria Strike*, N.Y. Times, May 8, 2017, <https://nyti.ms/2pX82OV>; Justin Florence, *What's the Legal Basis for the Syria Strikes? The Administration Must Acknowledge Limits on its Power to Start a War*, Lawfare, May 8, 2017, <https://www.lawfareblog.com/whats-legal-basis-syria-strikes-administration-must-acknowledge-limits-its-power-start-war>.

Democracy Project, Inc. v. U.S. Dep't of Def., No. 17-CV-00842 (CRC), 2017 WL 2992076 (D.D.C. July 13, 2017). The Protect Democracy Project has no commercial interests.

It is therefore incumbent upon the government and urgent for your office to share any responsive records in an expedited manner. The administration's policies and practices regarding private contractors will inform public understanding of immigration enforcement priorities, the efficacy of federal immigration policy, and the safeguards protecting individuals at the border. The public must have an opportunity to understand the full picture of how the administration navigates those issues.

Under penalty of perjury, I hereby affirm that the foregoing is true and correct to the best of my knowledge and belief.

FEE WAIVER

FOIA provides that any fees associated with a request are waived if "disclosure of the 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 is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). The core mission of The Protect Democracy Project, a new organization awaiting 501(c)(3) status, is to inform public understanding on operations and activities of the government. This request is submitted in connection with the organization's mission to gather and disseminate information that is likely to contribute significantly to the public understanding of executive branch operations and activities. The Protect Democracy Project has no commercial interests.

In addition to satisfying the requirements for a waiver of fees associated with the search and processing of records, The Protect Democracy Project is entitled to a waiver of all fees except "reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(II). Federal law mandates that fees be limited to document duplication costs for any requester that qualifies as a representative of the news media. *Id.* The Protect Democracy Project operates in the tradition of 501(c)(3) good government organizations that qualify under FOIA as "news media organizations." Like those organizations, the purpose of The Protect Democracy Project is to "gather information of potential interest to a segment of the public, use its editorial skills to turn the raw materials into distinct work, and distribute that work to an audience." *Nat's Sec. Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). Indeed, The Protect Democracy Project has routinely demonstrated the ability to disseminate information about its FOIA requests to a wide audience.⁶ The Protect Democracy Project will

⁶ See, e.g., Lisa Rein, *Watchdog group, citing "integrity of civil service," sues Trump to find out if feds are being bullied*, Wash. Post, Apr. 27, 2017, <https://www.washingtonpost.com/news/powerpost/wp/2017/04/27/watchdog-group-citing-integrity-of-civil-service-sues-trump-to-find-out-if-feds-are-being->

disseminate information and analysis about this request – and any information obtained in response – through its website (protectdemocracy.org); its Twitter feed (<https://twitter.com/protctdemocracy>), which has more than 10,000 followers; its email list of approximately 20,000 people; and sharing information with other members of the press.

* * *

Given the 20-day statutory deadline, we hope to be as helpful as possible in clarifying or answering questions about our request. Please contact me at larry.schwartztol@protectdemocracy.org or (202) 516-7885 if you require any additional information. We appreciate your cooperation, and look forward to hearing from you very soon.

Sincerely,



Larry Schwartztol
Counsel
The Protect Democracy Project

bullied/?utm_term=.8647ab128f3e; Ben Berwick, *Going to Court for Civil Servants*, Take Care, April 28, 2017, <https://takecareblog.com/blog/going-to-court-for-civil-servants>; Charlie Savage, *Watchdog Group Sues Trump Administration, Seeking Legal Rationale Behind Syria Strike*, N.Y. Times, May 8, 2017, <https://nyti.ms/2pX82OV>; Justin Florence, *What's the Legal Basis for the Syria Strikes? The Administration Must Acknowledge Limits on its Power to Start a War*, Lawfare, May 8, 2017, <https://www.lawfareblog.com/whats-legal-basis-syria-strikes-administration-must-acknowledge-limits-its-power-start-war>.