

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

_____)	
THE JAMES MADISON PROJECT and)	
NOAH SHACHTMAN,)	
)	
Plaintiffs,)	
)	
v.)	No. 1:17-cv-00390-CKK
)	
DEPARTMENT OF JUSTICE and)	
DEPARTMENT OF HOMELAND)	
SECURITY,)	
)	
Defendants.)	
_____)	

ANSWER

The United States Department of Justice (“DOJ”) and the United States Department of Homeland Security (“DHS”) (collectively, “Defendants”) hereby answer the numbered paragraphs of Plaintiffs’ First Amended Complaint, ECF No. 7 (“Complaint”), in the above-captioned action. The initial, unnumbered paragraph consists of Plaintiffs’ characterization of their Complaint, to which no response is required.

1. This paragraph asserts legal conclusions regarding jurisdiction, to which no response is required.
2. This paragraph asserts legal conclusions regarding venue, to which no response is required.
3. Defendants lack knowledge or information sufficient to form a belief as to the allegations in this paragraph.
4. Defendants lack knowledge or information sufficient to form a belief as to the allegations in this paragraph.

5. Defendant DOJ admits that DOJ is an agency of the United States Government and that the Office of Legal Counsel (“OLC”) is a component of DOJ. The remainder of this paragraph sets forth legal conclusions, to which no response is required. To the extent a response is deemed required, Defendant DOJ denies the remaining allegations in this paragraph.

6. Defendant DHS admits that DHS is an agency of the United States Government and that the Transportation Security Administration (“TSA”), U.S. Customs and Border Protection (“CBP”), Immigration and Customs Enforcement (“ICE”), and U.S. Citizenship and Immigration Services (“USCIS”) are components of DHS. The remainder of this paragraph sets forth legal conclusions, to which no response is required. To the extent a response is deemed required, Defendant DHS denies the remaining allegations in this paragraph.

7. This paragraph consists of Plaintiffs’ characterization of their Complaint and reasons for filing this action, to which no response is required.

8. This paragraph consists of Plaintiffs’ characterization of news reports and does not set forth a claim for relief or aver facts in support of a claim to which a response is required.

9. This paragraph consists of Plaintiffs’ characterization of news reports and does not set forth a claim for relief or aver facts in support of a claim to which a response is required.

10. This paragraph consists of Plaintiffs’ characterization of news reports and does not set forth a claim for relief or aver facts in support of a claim to which a response is required.

11. This paragraph repeats and re-alleges paragraphs 7 through 10 of the Complaint. To the extent a response is deemed required, Defendants refer the Court to their responses to paragraphs 7 through 10 of the Complaint.

12. Defendant DOJ admits the allegations in this paragraph.

13. This paragraphs consist of Plaintiffs' characterization of their FOIA request to OLC, which does not require a response. To the extent a response is deemed required, Defendant DOJ avers that a true and correct copy of the request received by OLC is attached hereto as Exhibit 1, and respectfully refers the Court to the request for a full and accurate statement of its contents.

14. This paragraphs consist of Plaintiffs' characterization of their FOIA request to OLC, which does not require a response. To the extent a response is deemed required, Defendant DOJ avers that a true and correct copy of the request received by OLC is attached hereto as Exhibit 1, and respectfully refers the Court to the request for a full and accurate statement of its contents.

15. This paragraphs consist of Plaintiffs' characterization of their FOIA request to OLC, which does not require a response. To the extent a response is deemed required, Defendant DOJ avers that a true and correct copy of the request received by OLC is attached hereto as Exhibit 1, and respectfully refers the Court to the request for a full and accurate statement of its contents.

16. This paragraphs consist of Plaintiffs' characterization of their FOIA request to OLC, which does not require a response. To the extent a response is deemed required, Defendant DOJ avers that a true and correct copy of the request received by OLC is attached hereto as Exhibit 1, and respectfully refers the Court to the request for a full and accurate statement of its contents.

17. This paragraphs consist of Plaintiffs' characterization of their FOIA request to OLC, which does not require a response. To the extent a response is deemed required, Defendant DOJ avers that a true and correct copy of the request received by OLC, and date-

stamped by OLC to mark its receipt, is attached hereto as Exhibit 1, and respectfully refers the Court to the request for a full and accurate statement of its contents.

18. Defendant DOJ admits the allegations in the first sentence of this paragraph. The second sentence of this paragraph asserts legal conclusions regarding exhaustion, to which no response is required.

19. This paragraph sets forth legal conclusions, to which no response is required. To the extent a response is deemed required, Defendant DOJ denies the allegations in this paragraph.

20. This paragraph repeats and re-alleges paragraphs 7 through 10 of the Complaint. To the extent a response is deemed required, Defendants refer the Court to their responses to paragraphs 7 through 10 of the Complaint.

21. Defendant DHS admits the allegations in this paragraph.

22. This paragraph repeats and re-alleges paragraphs 13 through 17 of the Complaint and consists of Plaintiffs' characterization of their FOIA request to DHS, which does not require a response. To the extent a response is deemed required, Defendant DHS avers that a true and correct copy of the request received by DHS is attached hereto as Exhibit 2, and respectfully refers the Court to the request for a full and accurate statement of its contents.

23. Defendant DHS admits the allegations in this paragraph.

24. Defendant DHS admits the allegations in the first sentence of this paragraph. The second sentence of this paragraph asserts legal conclusions regarding exhaustion, to which no response is required.

25. This paragraph sets forth legal conclusions, to which no response is required. To the extent a response is deemed required, Defendant DHS denies the allegations in this paragraph.

26. This paragraph repeats and re-alleges paragraphs 7 through 10 of the Complaint. To the extent a response is deemed required, Defendants refer the Court to their responses to paragraphs 7 through 10 of the Complaint.

27. Defendant DHS admits the allegations in this paragraph.

28. This paragraph repeats and re-alleges paragraphs 13 through 17 of the Complaint and consists of Plaintiffs' characterization of their FOIA request to TSA, which does not require a response. To the extent a response is deemed required, Defendant DHS avers that a true and correct copy of the request received by TSA is attached hereto as Exhibit 3, and respectfully refers the Court to the request for a full and accurate statement of its contents.

29. Defendant DHS denies the allegations in the first sentence of this paragraph, and avers that TSA acknowledged receipt of the FOIA request in a letter dated February 2, 2017, and assigned it Request Number 2017-TSFO-00135. Defendant DHS admits the allegations in the second sentence of this paragraph.

30. Defendant DHS denies the allegations in the first sentence of this paragraph, and avers that TSA released records to Plaintiffs on May 24, 2017. The second sentence of this paragraph asserts legal conclusions regarding exhaustion, to which no response is required.

31. This paragraph sets forth legal conclusions, to which no response is required. To the extent a response is deemed required, Defendant DHS denies the allegations in this paragraph.

32. This paragraph repeats and re-alleges paragraphs 7 through 10 of the Complaint. To the extent a response is deemed required, Defendants refer the Court to their responses to paragraphs 7 through 10 of the Complaint.

33. Defendant DHS admits the allegations in this paragraph.

34. This paragraph repeats and re-alleges paragraphs 13 through 17 of the Complaint and consists of Plaintiffs' characterization of their FOIA request to CBP, which does not require a response. To the extent a response is deemed required, Defendant DHS avers that a true and correct copy of the request received by CBP is attached hereto as Exhibit 4, and respectfully refers the Court to the request for a full and accurate statement of its contents.

35. Defendant DHS denies the allegations in this paragraph. Defendant DHS avers that CBP acknowledged receipt of Plaintiffs' FOIA request by letter dated February 8, 2017, and assigned it Request Number CBP-2017-027279. Defendant DHS further avers that CBP's letter dated February 8, 2017, stated that CBP was transferring the request to the DHS Privacy Office for processing and direct response to Plaintiffs' counsel.

36. Defendant DHS denies the allegations in the first sentence of this paragraph, and avers that CBP responded to Plaintiffs' FOIA request by referring it to the DHS Privacy Office for processing and direct response to Plaintiffs' counsel. The second sentence of this paragraph asserts legal conclusions regarding exhaustion, to which no response is required.

37. This paragraph sets forth legal conclusions, to which no response is required. To the extent a response is deemed required, Defendant DHS denies the allegations in this paragraph.

38. This paragraph repeats and re-alleges paragraphs 7 through 10 of the Complaint. To the extent a response is deemed required, Defendants refer the Court to their responses to paragraphs 7 through 10 of the Complaint.

39. Defendant DHS admits the allegations in this paragraph.

40. This paragraph repeats and re-alleges paragraphs 13 through 17 of the Complaint and consists of Plaintiffs' characterization of their FOIA request to ICE, which does not require a response. To the extent a response is deemed required, Defendant DHS avers that a true and correct copy of the request received by ICE is attached hereto as Exhibit 5, and respectfully refers the Court to the request for a full and accurate statement of its contents.

41. Defendant DHS denies the allegations in this paragraph, and avers that ICE acknowledged receipt of Plaintiffs' FOIA request by letter dated March 28, 2017, and assigned it Request Number 2017-ICFO-14622. Defendant DHS further avers that ICE's letter dated March 28, 2017, stated that ICE was referring the request to the Deputy FOIA Officer for DHS for processing and direct response to Plaintiffs' counsel.

42. Defendant DHS denies the allegations in the first sentence of this paragraph, and avers that ICE responded to Plaintiffs' FOIA request by referring it to the Deputy FOIA Officer for DHS for processing and direct response to Plaintiffs' counsel. The second sentence of this paragraph asserts legal conclusions regarding exhaustion, to which no response is required.

43. This paragraph sets forth legal conclusions, to which no response is required. To the extent a response is deemed required, Defendant DHS denies the allegations in this paragraph.

44. This paragraph repeats and re-alleges paragraphs 7 through 10 of the Complaint. To the extent a response is deemed required, Defendants refer the Court to their responses to paragraphs 7 through 10 of the Complaint.

45. Defendant DHS admits the allegations in this paragraph.

46. This paragraph repeats and re-alleges paragraphs 13 through 17 of the Complaint and consists of Plaintiffs' characterization of their FOIA request to USCIS, which does not require a response. To the extent a response is deemed required, Defendant DHS avers that a true and correct copy of the request received by USCIS is attached hereto as Exhibit 6, and respectfully refers the Court to the request for a full and accurate statement of its contents.

47. Defendant DHS admits that USCIS acknowledged receipt of Plaintiffs' FOIA request on February 2, 2017, and that USCIS granted Plaintiffs' fee-waiver and expedited-processing requests. Defendant DHS denies that USCIS assigned Plaintiffs' FOIA request Request Number 2017-HQFO-00282, and avers that USCIS assigned it Request Number COW2017000101.

48. Defendant DHS admits the allegations in the first sentence of this paragraph. The second sentence of this paragraph asserts legal conclusions regarding exhaustion, to which no response is required.

49. This paragraph sets forth legal conclusions, to which no response is required. To the extent a response is deemed required, Defendant DHS denies the allegations in this paragraph.

The remaining paragraph of the Complaint contains Plaintiffs' requested relief, to which no response is required.

Defendants hereby deny all allegations of the Complaint not otherwise specifically answered above.

Dated: May 24, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director

/s/ Matthew J. Berns
MATTHEW J. BERNES
Trial Attorney (DC Bar No. 998094)
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530
Telephone: (202) 616-8016
Fax: (202) 616-8470
Matthew.J.Bernes@usdoj.gov

Counsel for Defendants

Exhibit 1

OLC Request

The James Madison Project
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

(202) 498-0011
(202) 330-5610 fax

E-Mail: FOIA@JamesMadisonProject.org
<http://www.JamesMadisonProject.org>

March 24, 2017

VIA E-MAIL

Melissa Golden
FOIA Specialist
Department of Justice
Office of Legal Counsel
950 Pennsylvania Avenue, NW
Room 5511
Washington, D.C. 20530-0001

Re: FOIA Request – Immigration Executive Order

Dear Ms. Golden:

This is a request on behalf of The James Madison Project (“JMP”) and The Daily Beast’s Executive Editor, Noah Shachtman (“Mr. Shachtman”)(hereinafter referred to jointly as “the Requesters”) under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* This request seeks copies of Department of Justice Office of Legal Counsel (“DOJ OLC”) records, including cross-references, memorializing the following:

- 1) Any records memorializing discussions between DOJ OLC staff and private staff, Presidential transition staff, and/or White House staff of President Donald J. Trump (“President Trump”) regarding the legality of (and recommended means of implementing) an Executive Order barring entry of certain categories of foreign nationals based strictly on their nationality, including, but not limited to, individuals who qualify as refugees, U.S. legal permanent residents, and holders of a valid U.S. visa;
- 2) Any records memorializing discussions between DOJ OLC staff and other Federal agencies regarding an Executive Order that falls within the scope of category #1, including, but not limited to, issues of legality and implementation;

“Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives.”

James Madison, 1822

- 3) Any records memorializing discussions among DOJ OLC staff regarding an Executive Order that falls within the scope of category #1, including, but not limited to, issues of legality and implementation;
- 4) Any records memorializing discussions between DOJ OLC staff and Members of Congress (as well as Congressional staff members) regarding an Executive Order that falls within the scope of category #1, including, but not limited to, issues of legality and implementation;
- 5) Any records memorializing final determinations by DOJ OLC staff regarding the extent to which an Executive Order that falls within the scope of category #1 would apply to U.S. citizens who hold dual citizenship; and
- 6) Any records memorializing final determinations by DOJ OLC staff regarding the legality of an Executive Order that falls within the scope of category #1.

For context, President Trump issued an Executive Order on January 27, 2017, entitled “Protecting the Nation from Foreign Terrorist Entry into the United States”. <https://www.nytimes.com/2017/01/27/us/politics/refugee-muslim-executive-order-trump.html?mtrref=www.nytimes.com&gwh=B456165D1D10E39DE6FBC6134CD77963&gwt=pay> (last accessed January 30, 2017). The Executive Order suspended the U.S. Government refugee program, indefinitely barred Syrian refugees, and temporarily barred entry into the United States foreign nationals from seven countries. https://www.nytimes.com/2017/01/29/us/trump-refugee-ban-muslim-executive-order.html?_r=0 (last accessed January 30, 2017).

In the aftermath of the issuance of the Executive Order, chaos erupted at U.S. airports on January 28, 2017, as hundreds of individuals were detained and prevented from entering the United States despite holding valid entry paperwork. By the evening of January 29, 2017, at least four different U.S. district court judges had issued emergency injunctions preventing the U.S. Government from deporting individuals who had been detained pursuant to the Executive Order. <http://edition.cnn.com/2017/01/28/politics/donald-trump-executive-order-immigration-reaction/index.html> (last accessed January 30, 2017).

Media reports quickly emerged revealing how little proactive coordination or planning had gone into vetting the legality of the Executive Order, let alone preparing to implement its requirements. The Department of Homeland Security only learned of the details as the Executive Order itself was being signed, and conflicting reports emerged about the extent to which DOJ OLC had conducted a standard legal review and issued approval. <http://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/index.html> (last accessed January 30, 2017). News reports also indicate that individual Congressional staff members (without the knowledge of their respective Congressional employers) had assisted the Trump transition team in early drafting of

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James Madison, 1822

the Executive Order. <http://www.politico.com/story/2017/01/trump-immigration-congress-order-234392> (last accessed January 30, 2017).

To be clear, the scope of the six categories of information should encompass discussions and final determinations that occurred both prior and subsequent to President Trump's signing of the Executive Order on January 27, 2017. The Requesters ask that DOJ OLC uses, but does not limit itself to, the search terms "religious test", "Christian ban", "Jewish ban", and "Muslim ban".

DOJ OLC can limit the timeframe of its search from November 8, 2016, up until the date the agency begins conducting searches for records responsive to this request. The scope of the searches should not be limited to DOJ OLC-originated records and should be construed to include records that are currently in the possession of a U.S. Government contractor for purposes of records management.

The Requesters are pre-emptively waiving any objection to the redaction of the names of any U.S. Government officials below a GS-14 position or whom otherwise were not acting in a supervisory position. The Requesters similarly waive any objection to redactions of the names of any U.S. Government contractors in a position of authority similar to that of a GS-13 series civilian employee or below.

In terms of all other third parties who work or worked for the U.S. Government and whose names appear in records responsive to this request, the Requesters submit that the privacy interests of those individuals have been diminished by virtue of their involvement in one or more of the U.S. Government functions described above as falling within the scope of this request. There is a recognized inverse relationship between the position of authority that a government employee holds and the strength of that employee's privacy interests. See Stern v. FBI, 737 F.2d 84, 92 (D.C. Cir. 1984); Jefferson v. Dep't of Justice, 2003 U.S. Dist. LEXIS 26782, *11 (D.D.C. Nov. 14, 2003); see also Perlman v. Dep't of Justice, 312 F.3d 100, 107-109 (2d. Cir. 2002)(setting forth five factors to consider in weighing government employee's privacy interests against public interest in disclosure, including employee's rank and whether information sheds light on a government activity).

The work performed by these U.S. Government third parties (whether they be Government officials or contractors) was part of their official responsibilities on behalf of the U.S. Government and was not of a personal nature. They served in a position of trust and authority to, among other things, evaluate the relevant legal and policy factors that would be implicated by an Executive Order seeking to severely restrict entry for entire categories of individuals based solely on their nationality and notwithstanding vetting that had already been conducted by the U.S. Government. Given that responsive records memorializing the work they performed will shed light on government activity, particularly by revealing official DOJ OLC discussions about and determinations regarding President Trump's controversial Executive Order, it would be

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James Madison, 1822

reasonable to conclude that the relevant third parties' respective (and diminished) privacy interests are outweighed by the public interest in disclosure of the information indexed to their name.¹

We are also requesting a waiver of or, at a minimum, a reduction in fees. At a minimum, both JMP and Mr. Shachtman qualify – in their own respective right – for designation as representatives of the news media.

JMP is a non-partisan organization dedicating to promoting government accountability and the reduction of secrecy. <http://jamesmadisonproject.org/> (last accessed August 7, 2015). Mr. Shachtman is the Executive Editor of The Daily Beast, a New York-based media outlet with an estimated 40 million readers per month. <http://www.thedailybeast.com/company/about-us.html> (last accessed August 10, 2015).

The Requesters have the ability to disseminate information on a wide scale and intend to use information obtained through this FOIA request in an original work, particularly through news articles published by The Daily Beast. According to 5 U.S.C. § 552(a)(4)(A)(ii),

the term ‘a representative of the news media’ means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

The Requesters can demonstrate their intent and ability to publish or otherwise disseminate information to the public. See Nat'l Security Archive v. Dep't of Defense, 880 F.2d 1381, 1386 (D.C. Cir. 1989). The Daily Beast maintains the ability to produce news articles explaining the content of any responsive records received as part of this request. In the event that fees are ultimately assessed, do not incur expenses beyond \$25 without first contacting our office for authorization.

There is considerable public interest in disclosure of the requested records. Protests spread across the country on January 28, 2017, and January 29, 2017, and at numerous different U.S. airports. <http://mashable.com/2017/01/28/airport-protests-muslim-ban/#lEiZInn4eOqa> (last accessed January 30, 2017). Countless lawyers raced to the various U.S. airports to provide pro bono legal services to those who were impacted by the new entry restrictions. <https://www.yahoo.com/news/trump-travel-ban-galvanizes-young-lawyers-action-023327562.html> (last accessed January 30, 2017). In the aftermath of the court rulings and protests, revisions have already been made to exclude application of the entry restrictions to U.S. permanent legal

¹ We acknowledge, of course, that some redactions or narrowly focused withholdings might ultimately be appropriate as DOJ OLC processes the responsive records.

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James Madison, 1822

residents. http://nymag.com/daily/intelligencer/2017/01/priebus-says-green-card-holders-exempt-from-entry-ban.html?mid=twitter_nymag (last accessed January 30, 2017). At least two lawsuits have already been filed challenging the legality of the Executive Order in and of itself, <https://www.yahoo.com/news/us-state-washington-files-suit-against-trump-travel-202035930.html> (last accessed January 30, 2017); <https://www.cair.com/press-center/press-releases/14069-cair-files-federal-suit-challenging-constitutionality-of-trump-s-muslim-ban-executive-order.html> (last accessed January 30, 2017), and acting Attorney General Sally Yates was fired by President Trump after she publicly stated that DOJ would not defend the Executive Order in court. https://www.washingtonpost.com/world/national-security/meet-the-acting-attorney-general-fired-by-trump-and-accused-of-betraying-the-justice-department/2017/01/30/05d4478c-e750-11e6-80c2-30e57e57e05d_story.html?utm_term=.093d0ec54fcc (last accessed January 30, 2017).

Finally, and again in reliance upon the same public interest reasons outlined above, the Requesters are seeking expedited processing of their FOIA request. FOIA permits expedited processing when a “compelling need” exists. 5 U.S.C. § 552(a)(6)(E)(v). Specifically, “compelling need” means “with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.” *Id.* at § 552(a)(6)(E)(v)(II).

The records responsive to this FOIA request clearly qualify as information regarding U.S. Government activity that the public has an urgent and active need to know. The bureaucratic dysfunction surrounding the implementation of the Executive Order is effectively a case study on how not to prepare for a major policy change. The impact of the Executive Order continues to this day.

If DOJ OLC denies all or part of this request, please cite the specific exemptions you believe justify your refusal to release the information or permit the review and notify us of your appeal procedures available under the law. We request that any documents or records produced in response to this request be provided in electronic (soft-copy) form wherever possible. Acceptable formats are .pdf, .jpg, .gif, .tif. Please provide soft-copy records by email or on a CD if email is not feasible. However, the Requesters do not agree to pay an additional fee to receive records on a CD, and in the instance that such a fee is required, the Requesters will accept a paper copy of responsive records.

Your cooperation in this matter would be appreciated. If you wish to discuss this request, please do not hesitate to contact me at (202) 907-7945 or via e-mail at brad@jamesmadisonproject.org.

“Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives.”

James Madison, 1822

Sincerely,

/s/

Bradley P. Moss
Deputy Executive Director

“Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives.”

James Madison, 1822

Exhibit 2

DHS Request

From: Bradley P. Moss, Esq.
To: [FOIA](#)
Cc: ["Mark Zaid"](#)
Subject: FOIA request
Date: Tuesday, January 31, 2017 11:10:34 PM

Karen Neuman
FOIA Officer
Department of Homeland Security
Headquarters and Privacy Officer
STOP-0655
245 Murray Lane, SW
Washington, D.C. 20528-0655

Re: [FOIA Request – Immigration Executive Order](#)

Dear Ms. Neuman:

This is a request on behalf of The James Madison Project (“JMP”) and The Daily Beast’s Executive Editor, Noah Shachtman (“Mr. Shachtman”)(hereinafter referred to jointly as “the Requesters”) under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* This request seeks copies of Department of Homeland Security (“DHS”) records, including cross-references, memorializing the following:

- 1) Any records memorializing discussions between DHS staff and private staff, Presidential transition staff, and/or White House staff of President Donald J. Trump (“President Trump”) regarding the legality of (and recommended means of implementing) an Executive Order barring entry of certain categories of foreign nationals based strictly on their nationality, including, but not limited to, individuals who qualify as refugees, U.S. legal permanent residents, and holders of a valid U.S. visa;
- 2) Any records memorializing discussions between DHS staff and other Federal agencies regarding an Executive Order that falls within the scope of category #1, including, but not limited to, issues of legality and implementation;
- 3) Any records memorializing discussions among DHS staff regarding an Executive Order that falls within the scope of category #1, including, but not limited to, issues of legality and implementation;
- 4) Any records memorializing discussions between DHS staff and Members of Congress (as well as Congressional staff members) regarding an Executive Order that falls within the scope of category #1, including, but not limited to, issues of legality and implementation;
- 5) Any records memorializing final determinations by DHS staff regarding the extent to which an Executive Order that falls within the scope of category #1 would apply to U.S. citizens who hold dual citizenship; and

- 6) Any records memorializing final determinations by DHS staff regarding the legality of an Executive Order that falls within the scope of category #1.

For context, President Trump issued an Executive Order on January 27, 2017, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States". <https://www.nytimes.com/2017/01/27/us/politics/refugee-muslim-executive-order-trump.html?mtrref=www.nytimes.com&gwh=B456165D1D10E39DE6FBC6134CD77963&gwt=pay> (last accessed January 30, 2017). The Executive Order suspended the U.S. Government refugee program, indefinitely barred Syrian refugees, and temporarily barred entry into the United States foreign nationals from seven countries. https://www.nytimes.com/2017/01/29/us/trump-refugee-ban-muslim-executive-order.html?_r=0 (last accessed January 30, 2017).

In the aftermath of the issuance of the Executive Order, chaos erupted at U.S. airports on January 28, 2017, as hundreds of individuals were detained and prevented from entering the United States despite holding valid entry paperwork. By the evening of January 29, 2017, at least four different U.S. district court judges had issued emergency injunctions preventing the U.S. Government from deporting individuals who had been detained pursuant to the Executive Order. <http://edition.cnn.com/2017/01/28/politics/donald-trump-executive-order-immigration-reaction/index.html> (last accessed January 30, 2017).

Media reports quickly emerged revealing how little proactive coordination or planning had gone into vetting the legality of the Executive Order, let alone preparing to implement its requirements. The Department of Homeland Security only learned of the details as the Executive Order itself was being signed, and conflicting reports emerged about the extent to which DOJ OLC had conducted a standard legal review and issued approval. <http://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/index.html> (last accessed January 30, 2017). News reports also indicate that individual Congressional staff members (without the knowledge of their respective Congressional employers) had assisted the Trump transition team in early drafting of the Executive Order. <http://www.politico.com/story/2017/01/trump-immigration-congress-order-234392> (last accessed January 30, 2017).

To be clear, the scope of the six categories of information should encompass discussions and final determinations that occurred both prior and subsequent to President Trump's signing of the Executive Order on January 27, 2017. The Requesters ask that DHS uses, but does not limit itself to, the search terms "religious test", "Christian ban", "Jewish ban", and "Muslim ban".

DHS can limit the timeframe of its search from November 8, 2016, up until the date the agency begins conducting searches for records responsive to this request. The scope of the searches should not be limited to DHS-originated records and should be construed to include records that are currently in the possession of a U.S. Government contractor for purposes of records management.

The Requesters are pre-emptively waiving any objection to the redaction of the names of any U.S. Government officials below a GS-14 position or whom otherwise were not acting in a supervisory position. The Requesters similarly waive any objection to redactions of the names of any

U.S. Government contractors in a position of authority similar to that of a GS-13 series civilian employee or below.

In terms of all other third parties who work or worked for the U.S. Government and whose names appear in records responsive to this request, the Requesters submit that the privacy interests of those individuals have been diminished by virtue of their involvement in one or more of the U.S. Government functions described above as falling within the scope of this request. There is a recognized inverse relationship between the position of authority that a government employee holds and the strength of that employee's privacy interests. See Stern v. FBI, 737 F.2d 84, 92 (D.C. Cir. 1984); Jefferson v. Dep't of Justice, 2003 U.S. Dist. LEXIS 26782, *11 (D.D.C. Nov. 14, 2003); see also Perlman v. Dep't of Justice, 312 F.3d 100, 107-109 (2d. Cir. 2002)(setting forth five factors to consider in weighing government employee's privacy interests against public interest in disclosure, including employee's rank and whether information sheds light on a government activity).

The work performed by these U.S. Government third parties (whether they be Government officials or contractors) was part of their official responsibilities on behalf of the U.S. Government and was not of a personal nature. They served in a position of trust and authority to, among other things, evaluate the relevant legal and policy factors that would be implicated by an Executive Order seeking to severely restrict entry for entire categories of individuals based solely on their nationality and notwithstanding vetting that had already been conducted by the U.S. Government. Given that responsive records memorializing the work they performed will shed light on government activity, particularly by revealing official DHS discussions about and determinations regarding President Trump's controversial Executive Order, it would be reasonable to conclude that the relevant third parties' respective (and diminished) privacy interests are outweighed by the public interest in disclosure of the information indexed to their name.^[1]

We are also requesting a waiver of or, at a minimum, a reduction in fees. At a minimum, both JMP and Mr. Shachtman qualify – in their own respective right – for designation as representatives of the news media.

JMP is a non-partisan organization dedicating to promoting government accountability and the reduction of secrecy. <http://jamesmadisonproject.org/> (last accessed August 7, 2015). Mr. Shachtman is the Executive Editor of The Daily Beast, a New York-based media outlet with an estimated 40 million readers per month. <http://www.thedailybeast.com/company/about-us.html> (last accessed August 10, 2015).

The Requesters have the ability to disseminate information on a wide scale and intend to use information obtained through this FOIA request in an original work, particularly through news articles published by The Daily Beast. According to 5 U.S.C. § 552(a)(4)(A)(ii),

the term 'a representative of the news media' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

The Requesters can demonstrate their intent and ability to publish or otherwise disseminate information to the public. See *Nat'l Security Archive v. Dep't of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989). The Daily Beast maintains the ability to produce news articles explaining the content of any responsive records received as part of this request. In the event that fees are ultimately assessed, do not incur expenses beyond \$25 without first contacting our office for authorization.

There is considerable public interest in disclosure of the requested records. Protests spread across the country on January 28, 2017, and January 29, 2017, and at numerous different U.S. airports. <http://mashable.com/2017/01/28/airport-protests-muslim-ban/#IEiZInn4eOqa> (last accessed January 30, 2017). Countless lawyers raced to the various U.S. airports to provide pro bono legal services to those who were impacted by the new entry restrictions. <https://www.yahoo.com/news/trump-travel-ban-galvanizes-young-lawyers-action-023327562.html> (last accessed January 30, 2017). In the aftermath of the court rulings and protests, revisions have already been made to exclude application of the entry restrictions to U.S. permanent legal residents. http://nymag.com/daily/intelligencer/2017/01/priebus-says-green-card-holders-exempt-from-entry-ban.html?mid=twitter_nymag (last accessed January 30, 2017). At least two lawsuits have already been filed challenging the legality of the Executive Order in and of itself, <https://www.yahoo.com/news/us-state-washington-files-suit-against-trump-travel-202035930.html> (last accessed January 30, 2017); <https://www.cair.com/press-center/press-releases/14069-cair-files-federal-suit-challenging-constitutionality-of-trump-s-muslim-ban-executive-order.html> (last accessed January 30, 2017), and acting Attorney General Sally Yates was fired by President Trump after she publicly stated that DOJ would not defend the Executive Order in court. https://www.washingtonpost.com/world/national-security/meet-the-acting-attorney-general-fired-by-trump-and-accused-of-betraying-the-justice-department/2017/01/30/05d4478c-e750-11e6-80c2-30e57e57e05d_story.html?utm_term=.093d0ec54fcc (last accessed January 30, 2017).

Finally, and again in reliance upon the same public interest reasons outlined above, the Requesters are seeking expedited processing of their FOIA request. FOIA permits expedited processing when a "compelling need" exists. 5 U.S.C. § 552(a)(6)(E)(v). Specifically, "compelling need" means "with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity." *Id.* at § 552(a)(6)(E)(v)(II).

The records responsive to this FOIA request clearly qualify as information regarding U.S. Government activity that the public has an urgent and active need to know. The bureaucratic dysfunction surrounding the implementation of the Executive Order is effectively a case study on how not to prepare for a major policy change. The impact of the Executive Order continues to this day.

If DHS denies all or part of this request, please cite the specific exemptions you believe justify your refusal to release the information or permit the review and notify us of your appeal procedures available under the law. We request that any documents or records produced in response to this request be provided in electronic (soft-copy) form wherever possible. Acceptable formats are .pdf, .jpg, .gif, .tif. Please provide soft-copy records by email or on a CD if email is not feasible. However, the Requesters do not agree to pay an additional fee to receive records on a CD, and in the instance

that such a fee is required, the Requesters will accept a paper copy of responsive records.

Your cooperation in this matter would be appreciated. If you wish to discuss this request, please do not hesitate to contact me at (202) 907-7945 or via e-mail at brad@jamesmadisonproject.org.

Sincerely,

/s/

Bradley P. Moss
Deputy Executive Director

This electronic mail (e-mail) transmission is meant solely for the person(s) to whom it is addressed. It contains confidential information that may also be legally privileged. Any copying, dissemination or distribution of the contents of this e-mail by anyone other than the addressee or his or her agent for such purposes is strictly prohibited. If you have received this e-mail in error, please notify me immediately by telephone or e-mail and purge the original and all copies thereof. Thank you.

Bradley Prescott Moss, Esq.
Partner
Mark S. Zaid, P.C.
1250 Connecticut Avenue, NW, Suite 200
Washington, DC 20036
C: (202) 907-7945
F: (202) 558-4432

[\[1\]](#) We acknowledge, of course, that some redactions or narrowly focused withholdings might ultimately be appropriate as DHS processes the responsive records.

Exhibit 3

TSA Request

The James Madison Project
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

(202) 498-0011
(202) 330-5610 fax

E-Mail: FOIA@JamesMadisonProject.org
<http://www.JamesMadisonProject.org>

January 31, 2017

VIA E-MAIL

Regina McCoy
FOIA Officer
Transportation Security Administration
11th Floor, East Tower, TSA-20
601 S. 12th Street
Arlington, VA 22202-4220

Re: FOIA Request – Immigration Executive Order

Dear Ms. McCoy:

This is a request on behalf of The James Madison Project (“JMP”) and The Daily Beast’s Executive Editor, Noah Shachtman (“Mr. Shachtman”)(hereinafter referred to jointly as “the Requesters”) under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* This request seeks copies of Transportation Security Administration (“TSA”) records, including cross-references, memorializing the following:

- 1) Any records memorializing discussions between TSA staff and private staff, Presidential transition staff, and/or White House staff of President Donald J. Trump (“President Trump”) regarding the legality of (and recommended means of implementing) an Executive Order barring entry of certain categories of foreign nationals based strictly on their nationality, including, but not limited to, individuals who qualify as refugees, U.S. legal permanent residents, and holders of a valid U.S. visa;
- 2) Any records memorializing discussions between TSA staff and other Federal agencies regarding an Executive Order that falls within the scope of category #1, including, but not limited to, issues of legality and implementation;

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James Madison, 1822

- 3) Any records memorializing discussions among TSA staff regarding an Executive Order that falls within the scope of category #1, including, but not limited to, issues of legality and implementation;
- 4) Any records memorializing discussions between TSA staff and Members of Congress (as well as Congressional staff members) regarding an Executive Order that falls within the scope of category #1, including, but not limited to, issues of legality and implementation;
- 5) Any records memorializing final determinations by TSA staff regarding the extent to which an Executive Order that falls within the scope of category #1 would apply to U.S. citizens who hold dual citizenship; and
- 6) Any records memorializing final determinations by TSA staff regarding the legality of an Executive Order that falls within the scope of category #1.

For context, President Trump issued an Executive Order on January 27, 2017, entitled “Protecting the Nation from Foreign Terrorist Entry into the United States”. <https://www.nytimes.com/2017/01/27/us/politics/refugee-muslim-executive-order-trump.html?mtrref=www.nytimes.com&gwh=B456165D1D10E39DE6FBC6134CD77963&gwt=pay> (last accessed January 30, 2017). The Executive Order suspended the U.S. Government refugee program, indefinitely barred Syrian refugees, and temporarily barred entry into the United States foreign nationals from seven countries. https://www.nytimes.com/2017/01/29/us/trump-refugee-ban-muslim-executive-order.html?_r=0 (last accessed January 30, 2017).

In the aftermath of the issuance of the Executive Order, chaos erupted at U.S. airports on January 28, 2017, as hundreds of individuals were detained and prevented from entering the United States despite holding valid entry paperwork. By the evening of January 29, 2017, at least four different U.S. district court judges had issued emergency injunctions preventing the U.S. Government from deporting individuals who had been detained pursuant to the Executive Order. <http://edition.cnn.com/2017/01/28/politics/donald-trump-executive-order-immigration-reaction/index.html> (last accessed January 30, 2017).

Media reports quickly emerged revealing how little proactive coordination or planning had gone into vetting the legality of the Executive Order, let alone preparing to implement its requirements. The Department of Homeland Security only learned of the details as the Executive Order itself was being signed, and conflicting reports emerged about the extent to which DOJ OLC had conducted a standard legal review and issued approval. <http://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/index.html> (last accessed January 30, 2017). News reports also indicate that individual Congressional staff members (without the knowledge of their respective Congressional employers) had assisted the Trump transition team in early drafting of

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James Madison, 1822

the Executive Order. <http://www.politico.com/story/2017/01/trump-immigration-congress-order-234392> (last accessed January 30, 2017).

To be clear, the scope of the six categories of information should encompass discussions and final determinations that occurred both prior and subsequent to President Trump's signing of the Executive Order on January 27, 2017. The Requesters ask that TSA uses, but does not limit itself to, the search terms "religious test", "Christian ban", "Jewish ban", and "Muslim ban".

TSA can limit the timeframe of its search from November 8, 2016, up until the date the agency begins conducting searches for records responsive to this request. The scope of the searches should not be limited to TSA-originated records and should be construed to include records that are currently in the possession of a U.S. Government contractor for purposes of records management.

The Requesters are pre-emptively waiving any objection to the redaction of the names of any U.S. Government officials below a GS-14 position or whom otherwise were not acting in a supervisory position. The Requesters similarly waive any objection to redactions of the names of any U.S. Government contractors in a position of authority similar to that of a GS-13 series civilian employee or below.

In terms of all other third parties who work or worked for the U.S. Government and whose names appear in records responsive to this request, the Requesters submit that the privacy interests of those individuals have been diminished by virtue of their involvement in one or more of the U.S. Government functions described above as falling within the scope of this request. There is a recognized inverse relationship between the position of authority that a government employee holds and the strength of that employee's privacy interests. See Stern v. FBI, 737 F.2d 84, 92 (D.C. Cir. 1984); Jefferson v. Dep't of Justice, 2003 U.S. Dist. LEXIS 26782, *11 (D.D.C. Nov. 14, 2003); see also Perlman v. Dep't of Justice, 312 F.3d 100, 107-109 (2d. Cir. 2002)(setting forth five factors to consider in weighing government employee's privacy interests against public interest in disclosure, including employee's rank and whether information sheds light on a government activity).

The work performed by these U.S. Government third parties (whether they be Government officials or contractors) was part of their official responsibilities on behalf of the U.S. Government and was not of a personal nature. They served in a position of trust and authority to, among other things, evaluate the relevant legal and policy factors that would be implicated by an Executive Order seeking to severely restrict entry for entire categories of individuals based solely on their nationality and notwithstanding vetting that had already been conducted by the U.S. Government. Given that responsive records memorializing the work they performed will shed light on government activity, particularly by revealing official TSA discussions about and determinations regarding President Trump's controversial Executive Order, it would be

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James Madison, 1822

reasonable to conclude that the relevant third parties' respective (and diminished) privacy interests are outweighed by the public interest in disclosure of the information indexed to their name.¹

We are also requesting a waiver of or, at a minimum, a reduction in fees. At a minimum, both JMP and Mr. Shachtman qualify – in their own respective right – for designation as representatives of the news media.

JMP is a non-partisan organization dedicating to promoting government accountability and the reduction of secrecy. <http://jamesmadisonproject.org/> (last accessed August 7, 2015). Mr. Shachtman is the Executive Editor of The Daily Beast, a New York-based media outlet with an estimated 40 million readers per month. <http://www.thedailybeast.com/company/about-us.html> (last accessed August 10, 2015).

The Requesters have the ability to disseminate information on a wide scale and intend to use information obtained through this FOIA request in an original work, particularly through news articles published by The Daily Beast. According to 5 U.S.C. § 552(a)(4)(A)(ii),

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There is considerable public interest in disclosure of the requested records. Protests spread across the country on January 28, 2017, and January 29, 2017, and at numerous different U.S. airports. <http://mashable.com/2017/01/28/airport-protests-muslim-ban/#lEiZInn4eOqa> (last accessed January 30, 2017). Countless lawyers raced to the various U.S. airports to provide pro bono legal services to those who were impacted by the new entry restrictions. <https://www.yahoo.com/news/trump-travel-ban-galvanizes-young-lawyers-action-023327562.html> (last accessed January 30, 2017). In the aftermath of the court rulings and protests, revisions have already been made to exclude application of the entry restrictions to U.S. permanent legal

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Finally, and again in reliance upon the same public interest reasons outlined above, the Requesters are seeking expedited processing of their FOIA request. FOIA permits expedited processing when a “compelling need” exists. 5 U.S.C. § 552(a)(6)(E)(v). Specifically, “compelling need” means “with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.” *Id.* at § 552(a)(6)(E)(v)(II).

The records responsive to this FOIA request clearly qualify as information regarding U.S. Government activity that the public has an urgent and active need to know. The bureaucratic dysfunction surrounding the implementation of the Executive Order is effectively a case study on how not to prepare for a major policy change. The impact of the Executive Order continues to this day.

If TSA denies all or part of this request, please cite the specific exemptions you believe justify your refusal to release the information or permit the review and notify us of your appeal procedures available under the law. We request that any documents or records produced in response to this request be provided in electronic (soft-copy) form wherever possible. Acceptable formats are .pdf, .jpg, .gif, .tif. Please provide soft-copy records by email or on a CD if email is not feasible. However, the Requesters do not agree to pay an additional fee to receive records on a CD, and in the instance that such a fee is required, the Requesters will accept a paper copy of responsive records.

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Sincerely,

/s/

Bradley P. Moss
Deputy Executive Director

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Exhibit 4

CBP Request

The James Madison Project
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

(202) 498-0011
(202) 330-5610 fax

E-Mail: FOIA@JamesMadisonProject.org
<http://www.JamesMadisonProject.org>

January 31, 2017

VIA ONLINE PORTAL

Sabrina Burroughs
FOIA Officer
U.S. Customs and Border Protection
MS 1181
1300 Pennsylvania Avenue, NW
Washington, D.C. 20229-1181

Re: FOIA Request – Immigration Executive Order

Dear Ms. Burroughs:

This is a request on behalf of The James Madison Project (“JMP”) and The Daily Beast’s Executive Editor, Noah Shachtman (“Mr. Shachtman”)(hereinafter referred to jointly as “the Requesters”) under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* This request seeks copies of Customs and Border Protection (“CBP”) records, including cross-references, memorializing the following:

- 1) Any records memorializing discussions between CBP staff and private staff, Presidential transition staff, and/or White House staff of President Donald J. Trump (“President Trump”) regarding the legality of (and recommended means of implementing) an Executive Order barring entry of certain categories of foreign nationals based strictly on their nationality, including, but not limited to, individuals who qualify as refugees, U.S. legal permanent residents, and holders of a valid U.S. visa;
- 2) Any records memorializing discussions between CBP staff and other Federal agencies regarding an Executive Order that falls within the scope of category #1, including, but not limited to, issues of legality and implementation;

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- 3) Any records memorializing discussions among CBP staff regarding an Executive Order that falls within the scope of category #1, including, but not limited to, issues of legality and implementation;
 - 4) Any records memorializing discussions between CBP staff and Members of Congress (as well as Congressional staff members) regarding an Executive Order that falls within the scope of category #1, including, but not limited to, issues of legality and implementation;
 - 5) Any records memorializing final determinations by CBP staff regarding the extent to which an Executive Order that falls within the scope of category #1 would apply to U.S. citizens who hold dual citizenship; and
 - 6) Any records memorializing final determinations by CBP staff regarding the legality of an Executive Order that falls within the scope of category #1.

For context, President Trump issued an Executive Order on January 27, 2017, entitled “Protecting the Nation from Foreign Terrorist Entry into the United States”. <https://www.nytimes.com/2017/01/27/us/politics/refugee-muslim-executive-order-trump.html?mtrref=www.nytimes.com&gwh=B456165D1D10E39DE6FBC6134CD77963&gwt=pay> (last accessed January 30, 2017). The Executive Order suspended the U.S. Government refugee program, indefinitely barred Syrian refugees, and temporarily barred entry into the United States foreign nationals from seven countries. https://www.nytimes.com/2017/01/29/us/trump-refugee-ban-muslim-executive-order.html?_r=0 (last accessed January 30, 2017).

In the aftermath of the issuance of the Executive Order, chaos erupted at U.S. airports on January 28, 2017, as hundreds of individuals were detained and prevented from entering the United States despite holding valid entry paperwork. By the evening of January 29, 2017, at least four different U.S. district court judges had issued emergency injunctions preventing the U.S. Government from deporting individuals who had been detained pursuant to the Executive Order. <http://edition.cnn.com/2017/01/28/politics/donald-trump-executive-order-immigration-reaction/index.html> (last accessed January 30, 2017).

Media reports quickly emerged revealing how little proactive coordination or planning had gone into vetting the legality of the Executive Order, let alone preparing to implement its requirements. The Department of Homeland Security only learned of the details as the Executive Order itself was being signed, and conflicting reports emerged about the extent to which DOJ OLC had conducted a standard legal review and issued approval. <http://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/index.html> (last accessed January 30, 2017). News reports also indicate that individual Congressional staff members (without the knowledge of their respective Congressional employers) had assisted the Trump transition team in early drafting of

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the Executive Order. <http://www.politico.com/story/2017/01/trump-immigration-congress-order-234392> (last accessed January 30, 2017).

To be clear, the scope of the six categories of information should encompass discussions and final determinations that occurred both prior and subsequent to President Trump's signing of the Executive Order on January 27, 2017. The Requesters ask that CBP uses, but does not limit itself to, the search terms "religious test", "Christian ban", "Jewish ban", and "Muslim ban".

CBP can limit the timeframe of its search from November 8, 2016, up until the date the agency begins conducting searches for records responsive to this request. The scope of the searches should not be limited to CBP-originated records and should be construed to include records that are currently in the possession of a U.S. Government contractor for purposes of records management.

The Requesters are pre-emptively waiving any objection to the redaction of the names of any U.S. Government officials below a GS-14 position or whom otherwise were not acting in a supervisory position. The Requesters similarly waive any objection to redactions of the names of any U.S. Government contractors in a position of authority similar to that of a GS-13 series civilian employee or below.

In terms of all other third parties who work or worked for the U.S. Government and whose names appear in records responsive to this request, the Requesters submit that the privacy interests of those individuals have been diminished by virtue of their involvement in one or more of the U.S. Government functions described above as falling within the scope of this request. There is a recognized inverse relationship between the position of authority that a government employee holds and the strength of that employee's privacy interests. See Stern v. FBI, 737 F.2d 84, 92 (D.C. Cir. 1984); Jefferson v. Dep't of Justice, 2003 U.S. Dist. LEXIS 26782, *11 (D.D.C. Nov. 14, 2003); see also Perlman v. Dep't of Justice, 312 F.3d 100, 107-109 (2d. Cir. 2002)(setting forth five factors to consider in weighing government employee's privacy interests against public interest in disclosure, including employee's rank and whether information sheds light on a government activity).

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reasonable to conclude that the relevant third parties' respective (and diminished) privacy interests are outweighed by the public interest in disclosure of the information indexed to their name.¹

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Finally, and again in reliance upon the same public interest reasons outlined above, the Requesters are seeking expedited processing of their FOIA request. FOIA permits expedited processing when a “compelling need” exists. 5 U.S.C. § 552(a)(6)(E)(v). Specifically, “compelling need” means “with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.” *Id.* at § 552(a)(6)(E)(v)(II).

The records responsive to this FOIA request clearly qualify as information regarding U.S. Government activity that the public has an urgent and active need to know. The bureaucratic dysfunction surrounding the implementation of the Executive Order is effectively a case study on how not to prepare for a major policy change. The impact of the Executive Order continues to this day.

If CBP denies all or part of this request, please cite the specific exemptions you believe justify your refusal to release the information or permit the review and notify us of your appeal procedures available under the law. We request that any documents or records produced in response to this request be provided in electronic (soft-copy) form wherever possible. Acceptable formats are .pdf, .jpg, .gif, .tif. Please provide soft-copy records by email or on a CD if email is not feasible. However, the Requesters do not agree to pay an additional fee to receive records on a CD, and in the instance that such a fee is required, the Requesters will accept a paper copy of responsive records.

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Sincerely,

/s/

Bradley P. Moss
Deputy Executive Director

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Exhibit 5

ICE Request

The James Madison Project
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

(202) 498-0011
(202) 330-5610 fax

E-Mail: FOIA@JamesMadisonProject.org
<http://www.JamesMadisonProject.org>

January 31, 2017

VIA E-MAIL

Catrina Pavlick-Keenan
FOIA Officer
U.S. Immigration and Customs Enforcement
Mail Stop 5009
500 12th Street, SW
Washington, D.C. 20536-5009

Re: FOIA Request – Immigration Executive Order

Dear Ms. Keenan:

This is a request on behalf of The James Madison Project (“JMP”) and The Daily Beast’s Executive Editor, Noah Shachtman (“Mr. Shachtman”)(hereinafter referred to jointly as “the Requesters”) under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* This request seeks copies of Immigration and Customs Enforcement (“ICE”) records, including cross-references, memorializing the following:

- 1) Any records memorializing discussions between ICE staff and private staff, Presidential transition staff, and/or White House staff of President Donald J. Trump (“President Trump”) regarding the legality of (and recommended means of implementing) an Executive Order barring entry of certain categories of foreign nationals based strictly on their nationality, including, but not limited to, individuals who qualify as refugees, U.S. legal permanent residents, and holders of a valid U.S. visa;
- 2) Any records memorializing discussions between ICE staff and other Federal agencies regarding an Executive Order that falls within the scope of category #1, including, but not limited to, issues of legality and implementation;

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- 3) Any records memorializing discussions among ICE staff regarding an Executive Order that falls within the scope of category #1, including, but not limited to, issues of legality and implementation;
- 4) Any records memorializing discussions between ICE staff and Members of Congress (as well as Congressional staff members) regarding an Executive Order that falls within the scope of category #1, including, but not limited to, issues of legality and implementation;
- 5) Any records memorializing final determinations by ICE staff regarding the extent to which an Executive Order that falls within the scope of category #1 would apply to U.S. citizens who hold dual citizenship; and
- 6) Any records memorializing final determinations by ICE staff regarding the legality of an Executive Order that falls within the scope of category #1.

For context, President Trump issued an Executive Order on January 27, 2017, entitled “Protecting the Nation from Foreign Terrorist Entry into the United States”. <https://www.nytimes.com/2017/01/27/us/politics/refugee-muslim-executive-order-trump.html?mtrref=www.nytimes.com&gwh=B456165D1D10E39DE6FBC6134CD77963&gwt=pay> (last accessed January 30, 2017). The Executive Order suspended the U.S. Government refugee program, indefinitely barred Syrian refugees, and temporarily barred entry into the United States foreign nationals from seven countries. https://www.nytimes.com/2017/01/29/us/trump-refugee-ban-muslim-executive-order.html?_r=0 (last accessed January 30, 2017).

In the aftermath of the issuance of the Executive Order, chaos erupted at U.S. airports on January 28, 2017, as hundreds of individuals were detained and prevented from entering the United States despite holding valid entry paperwork. By the evening of January 29, 2017, at least four different U.S. district court judges had issued emergency injunctions preventing the U.S. Government from deporting individuals who had been detained pursuant to the Executive Order. <http://edition.cnn.com/2017/01/28/politics/donald-trump-executive-order-immigration-reaction/index.html> (last accessed January 30, 2017).

Media reports quickly emerged revealing how little proactive coordination or planning had gone into vetting the legality of the Executive Order, let alone preparing to implement its requirements. The Department of Homeland Security only learned of the details as the Executive Order itself was being signed, and conflicting reports emerged about the extent to which DOJ OLC had conducted a standard legal review and issued approval. <http://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/index.html> (last accessed January 30, 2017). News reports also indicate that individual Congressional staff members (without the knowledge of their respective Congressional employers) had assisted the Trump transition team in early drafting of

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the Executive Order. <http://www.politico.com/story/2017/01/trump-immigration-congress-order-234392> (last accessed January 30, 2017).

To be clear, the scope of the six categories of information should encompass discussions and final determinations that occurred both prior and subsequent to President Trump's signing of the Executive Order on January 27, 2017. The Requesters ask that ICE uses, but does not limit itself to, the search terms "religious test", "Christian ban", "Jewish ban", and "Muslim ban".

ICE can limit the timeframe of its search from November 8, 2016, up until the date the agency begins conducting searches for records responsive to this request. The scope of the searches should not be limited to ICE-originated records and should be construed to include records that are currently in the possession of a U.S. Government contractor for purposes of records management.

The Requesters are pre-emptively waiving any objection to the redaction of the names of any U.S. Government officials below a GS-14 position or whom otherwise were not acting in a supervisory position. The Requesters similarly waive any objection to redactions of the names of any U.S. Government contractors in a position of authority similar to that of a GS-13 series civilian employee or below.

In terms of all other third parties who work or worked for the U.S. Government and whose names appear in records responsive to this request, the Requesters submit that the privacy interests of those individuals have been diminished by virtue of their involvement in one or more of the U.S. Government functions described above as falling within the scope of this request. There is a recognized inverse relationship between the position of authority that a government employee holds and the strength of that employee's privacy interests. See Stern v. FBI, 737 F.2d 84, 92 (D.C. Cir. 1984); Jefferson v. Dep't of Justice, 2003 U.S. Dist. LEXIS 26782, *11 (D.D.C. Nov. 14, 2003); see also Perlman v. Dep't of Justice, 312 F.3d 100, 107-109 (2d. Cir. 2002)(setting forth five factors to consider in weighing government employee's privacy interests against public interest in disclosure, including employee's rank and whether information sheds light on a government activity).

The work performed by these U.S. Government third parties (whether they be Government officials or contractors) was part of their official responsibilities on behalf of the U.S. Government and was not of a personal nature. They served in a position of trust and authority to, among other things, evaluate the relevant legal and policy factors that would be implicated by an Executive Order seeking to severely restrict entry for entire categories of individuals based solely on their nationality and notwithstanding vetting that had already been conducted by the U.S. Government. Given that responsive records memorializing the work they performed will shed light on government activity, particularly by revealing official ICE discussions about and determinations regarding President Trump's controversial Executive Order, it would be

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reasonable to conclude that the relevant third parties' respective (and diminished) privacy interests are outweighed by the public interest in disclosure of the information indexed to their name.¹

We are also requesting a waiver of or, at a minimum, a reduction in fees. At a minimum, both JMP and Mr. Shachtman qualify – in their own respective right – for designation as representatives of the news media.

JMP is a non-partisan organization dedicating to promoting government accountability and the reduction of secrecy. <http://jamesmadisonproject.org/> (last accessed August 7, 2015). Mr. Shachtman is the Executive Editor of The Daily Beast, a New York-based media outlet with an estimated 40 million readers per month. <http://www.thedailybeast.com/company/about-us.html> (last accessed August 10, 2015).

The Requesters have the ability to disseminate information on a wide scale and intend to use information obtained through this FOIA request in an original work, particularly through news articles published by The Daily Beast. According to 5 U.S.C. § 552(a)(4)(A)(ii),

the term ‘a representative of the news media’ means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

The Requesters can demonstrate their intent and ability to publish or otherwise disseminate information to the public. See Nat'l Security Archive v. Dep't of Defense, 880 F.2d 1381, 1386 (D.C. Cir. 1989). The Daily Beast maintains the ability to produce news articles explaining the content of any responsive records received as part of this request. In the event that fees are ultimately assessed, do not incur expenses beyond \$25 without first contacting our office for authorization.

There is considerable public interest in disclosure of the requested records. Protests spread across the country on January 28, 2017, and January 29, 2017, and at numerous different U.S. airports. <http://mashable.com/2017/01/28/airport-protests-muslim-ban/#lEiZInn4eOqa> (last accessed January 30, 2017). Countless lawyers raced to the various U.S. airports to provide pro bono legal services to those who were impacted by the new entry restrictions. <https://www.yahoo.com/news/trump-travel-ban-galvanizes-young-lawyers-action-023327562.html> (last accessed January 30, 2017). In the aftermath of the court rulings and protests, revisions have already been made to exclude application of the entry restrictions to U.S. permanent legal

¹ We acknowledge, of course, that some redactions or narrowly focused withholdings might ultimately be appropriate as ICE processes the responsive records.

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residents. http://nymag.com/daily/intelligencer/2017/01/priebus-says-green-card-holders-exempt-from-entry-ban.html?mid=twitter_nymag (last accessed January 30, 2017). At least two lawsuits have already been filed challenging the legality of the Executive Order in and of itself, <https://www.yahoo.com/news/us-state-washington-files-suit-against-trump-travel-202035930.html> (last accessed January 30, 2017); <https://www.cair.com/press-center/press-releases/14069-cair-files-federal-suit-challenging-constitutionality-of-trump-s-muslim-ban-executive-order.html> (last accessed January 30, 2017), and acting Attorney General Sally Yates was fired by President Trump after she publicly stated that DOJ would not defend the Executive Order in court. https://www.washingtonpost.com/world/national-security/meet-the-acting-attorney-general-fired-by-trump-and-accused-of-betraying-the-justice-department/2017/01/30/05d4478c-e750-11e6-80c2-30e57e57e05d_story.html?utm_term=.093d0ec54fcc (last accessed January 30, 2017).

Finally, and again in reliance upon the same public interest reasons outlined above, the Requesters are seeking expedited processing of their FOIA request. FOIA permits expedited processing when a “compelling need” exists. 5 U.S.C. § 552(a)(6)(E)(v). Specifically, “compelling need” means “with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.” *Id.* at § 552(a)(6)(E)(v)(II).

The records responsive to this FOIA request clearly qualify as information regarding U.S. Government activity that the public has an urgent and active need to know. The bureaucratic dysfunction surrounding the implementation of the Executive Order is effectively a case study on how not to prepare for a major policy change. The impact of the Executive Order continues to this day.

If ICE denies all or part of this request, please cite the specific exemptions you believe justify your refusal to release the information or permit the review and notify us of your appeal procedures available under the law. We request that any documents or records produced in response to this request be provided in electronic (soft-copy) form wherever possible. Acceptable formats are .pdf, .jpg, .gif, .tif. Please provide soft-copy records by email or on a CD if email is not feasible. However, the Requesters do not agree to pay an additional fee to receive records on a CD, and in the instance that such a fee is required, the Requesters will accept a paper copy of responsive records.

Your cooperation in this matter would be appreciated. If you wish to discuss this request, please do not hesitate to contact me at (202) 907-7945 or via e-mail at brad@jamesmadisonproject.org.

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Sincerely,

/s/

Bradley P. Moss
Deputy Executive Director

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Exhibit 6

USCIS Request

The James Madison Project
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

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(202) 330-5610 fax

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VIA E-MAIL

Jill Eggleston
FOIA Officer
U.S. Citizenship and Immigration Services
National Records Center
FOIA/PA Office
P.O. Box 648010
Lee's Summit, MO 64064-8010

Re: FOIA Request – Immigration Executive Order

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- 1) Any records memorializing discussions between USCIS staff and private staff, Presidential transition staff, and/or White House staff of President Donald J. Trump (“President Trump”) regarding the legality of (and recommended means of implementing) an Executive Order barring entry of certain categories of foreign nationals based strictly on their nationality, including, but not limited to, individuals who qualify as refugees, U.S. legal permanent residents, and holders of a valid U.S. visa;
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If USCIS denies all or part of this request, please cite the specific exemptions you believe justify your refusal to release the information or permit the review and notify us of your appeal procedures available under the law. We request that any documents or records produced in response to this request be provided in electronic (soft-copy) form wherever possible. Acceptable formats are .pdf, .jpg, .gif, .tif. Please provide soft-copy records by email or on a CD if email is not feasible. However, the Requesters do not agree to pay an additional fee to receive records on a CD, and in the instance that such a fee is required, the Requesters will accept a paper copy of responsive records.

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