



VIA U.S. MAIL

July 18, 2018

U.S. Department of State

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Director, Office of Information Programs and Services
Building SA-2
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Washington, D.C. 20522-8100

Office of the Director of National Intelligence

FOIA/Privacy Act Office
Washington, DC 20511

Federal Bureau of Investigation

Attn: FOI/PA Request
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170 Marcel Drive
Winchester, VA 22602-4843

U.S. Department of Homeland Security

Sam Kaplan
Chief FOIA Officer
Privacy Office
245 Murray Lane SW
STOP-0655
Washington, DC 20258-0655

To whom it may concern:

On behalf of Muslim Advocates (“Requestor”), I submit this letter to the U.S. Department of State (“Agency”) as a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.* and related regulations, 22 C.F.R. § 171.10 *et seq.* I ask that this request be expedited pursuant to 5 U.S.C. § 552(a)(6)(E) and that Muslim Advocates be granted a fee waiver. I also ask that the Agency refer the requests contained in this letter to any other agency or component agency as appropriate.

I. Background

In June 2018, the *Guardian* reported new developments about the Tip-Off U.S./Canada (“TUSCAN”) Arrangement, a program that allows the United States to share a list of names and

other basic information about known or suspected terrorists with Canadian border and immigration officials.¹

Established in 1997, only very limited information about the TUSCAN Arrangement has been publicly available. News reports have claimed that the names shared pursuant to the TUSCAN Arrangement come from U.S. government databases, including the Terrorist Identities Datamart Environment (TIDE) and the Terrorist Screening Database (TSDB).²

The *Guardian* has reported that in June 2016, the United States and Canada signed a new TUSCAN Arrangement that provided for the “development of a TUSCAN governance document continued at year’s end.”³ Although the new TUSCAN Arrangement is now in place, according to Public Safety Canada spokeswoman Karine Martel, “government officials are currently working on finalizing procedures that will help guide its operationalization.”⁴

II. Description of Records

The term “TUSCAN agreement” refers to the Tip-Off U.S./Canada Arrangement. The term “TUSCAN database” refers to the database of individuals and related information that is shared with the Canadian government pursuant to the TUSCAN agreement. Unless otherwise stated, all records requested are from January 1, 1997 to the time of the Agency’s search for records responsive to this request.

1. The operative version of the TUSCAN agreement and all prior operative versions of the agreement.
2. Any governance documents and implementing protocols relating to the TUSCAN agreement, including any memorandum of understanding.
3. Records reflecting the number of individuals in the TUSCAN database and the breakdown of those individuals by country of residence, place of birth, and religion.

¹ Justin Ling, *Revealed: Canada uses massive US anti-terrorist database at borders*, The Guardian (Jun. 21, 2018), <https://www.theguardian.com/world/2018/jun/21/canada-us-tuscan-anti-terrorist-database-at-borders>, attached to this request as **Attachment 1**.

² Attachment 1; Justin Ling, *Inside Tuscan: the other no-fly list Canada didn’t tell you about*, The Guardian (June 30, 2018), <https://www.theguardian.com/world/2018/jun/30/canada-us-tuscan-database-no-fly-list-trudeau>.

³ United States Department of State, *Country Reports on Terrorism 2016 – Canada* (July 2017), <https://www.state.gov/j/ct/rls/crt/2016/272234.htm>.

⁴ Jim Bronskill, *Privacy questions linger as new Canada-U.S. terror list sharing kicks in*, The Globe and Mail (Jun. 21, 2018), <https://www.theglobeandmail.com/politics/article-privacy-questions-linger-as-new-canada-us-terror-list-sharing-kicks/>.

4. Records reflecting the number of individuals added to and/or removed from the TUSCAN database, the reason for each individual's addition and/or removal, and, if possible, the breakdown of that number of individuals by country of residence, place of birth, and religion.
5. All policy directives, procedures, and guidances concerning the criteria used to add or remove an individual on the TUSCAN database.
6. All policy directives, procedures, and guidances concerning the information-sharing processes between the U.S. and Canada under the TUSCAN agreement.
7. All policy directives, procedures, and guidances establishing who has access to the TUSCAN database.
8. All policies, procedures, guidances, and evaluations regarding the use and accuracy of the TUSCAN database and any procedures to correct errors or remove names from those lists.
9. Records related to the September 7, 2017 meeting between Canadian government officials and James Nealon (Assistant Deputy Secretary for International Affairs) and Andrea Yarosh and Caitlin Del Sole (U.S. Department of Homeland Security Policy Analysts).
10. Records related to the September 8, 2017 meeting between Canadian government officials and Kelli Ann Burriesci (Principal Deputy Director, FBI Terrorist Screening Center), Jason Betz, Sharon Geddes, Lynn Conklin, and Cheryl Klotter-Weeks.
11. Records describing the processing of this request, including but not limited to records sufficient to identify the search terms used and the search queries conducted; records sufficient to identify the locations and custodians searched; any tracking sheets used to track the processing of this request; and any FOIA questionnaires or certifications completed by individual custodians or components used to determine whether they possess responsive materials or to describe how they conducted searches.

III. Processing the Records

The Requestor requests disclosure of the following records⁵ that were prepared, received, transmitted, collected and/or maintained by the Recipients and any other agency components thereof.

⁵ The terms "records" is intended in the broadest possible sense and includes without limitation all records or communications preserved in electronic or written form, including but not limited to correspondence, regulations, directives, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, standards, evaluations, instructions, analyses, legal and policy

Please search all records regarding agency business. Please do not rely solely on custodian-driven searches; the government-wide requirements to manage information electronically by the end of 2016 have rendered it unreasonable to rely exclusively on custodian-driven searches.⁶ However, please do perform custodian-driven searches; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts. Please do not exclude searches of files or emails in the personal custody of agency officials, such as personal email accounts; records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.⁷ Please do not omit such searches merely because the agency has policies and procedures requiring officials to move records to official systems within a certain period of time; separate searches are still necessary in case the policies or procedures were not followed.⁸ Please use the most up-to-date technologies to search for responsive information and take steps to ensure that

memoranda, minutes or notes of meetings and phone calls, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, text communications between phones or other electronic devices (including, but not limited to, communications sent via SMA or other text, Blackberry Messenger, iMessage, WhatsApp, Signal, Gchat, or Twitter direct message), training materials or studies, including records kept in written form, or electronic format on computers and/or other electronic storage devices, electronic communications and/or videotapes, as well as any reproductions thereof that differ in any way from any other reproduction, such as copies containing marginal notations. No category of material should be omitted from search, collection, and production.

⁶ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

⁷ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149-50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955-56 (D.C. Cir. 2016).

⁸ See Order, *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765,*8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)), ECF no. 31.

the most complete repositories of information are searched.⁹ The Requestor is available to work with you to craft appropriate search terms, if necessary.

Please produce records in electronic form. Where possible, please provide responsive material in electronic format by email to matthew@muslimadvocates.org. Please furnish any responsive material being sent by mail to:

Matthew Callahan
Muslim Advocates
P.O. Box 66408
Washington, DC 20035

Please produce electronic records in their native format. With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the Requestor requests that responsive electronic records be provided electronically in their native file format, if possible. In particular, please produce electronic files in a format that contains the original metadata of the files.¹⁰ If the records cannot be produced in their native format, please (1) provide an explanation why the records cannot be so produced; and (2) please produce records electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and in separate, Bates-stamped files.

Please produce documents as they become available. The Requester would prefer a rolling production. I would be happy to discuss a search priority and schedule for production.

If you withhold records or parts of records, please provide the justification for the withholding. If it is your position that any portion of the requested records is exempt from disclosure, please provide an index of those records as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and describe each document claimed as exempt with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA."¹¹ Please ensure that the *Vaughn* index "describe[s] each document or portion thereof withheld, and

⁹ For example: agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians' files. For example, a custodian may have deleted a responsive email from his or her email program, but the agency's archiving tools would capture that email under Capstone.

¹⁰ As a non-exhaustive list of examples: Microsoft Excel spreadsheets are to be produced as files that open in Excel, with all original data and formulas intact; Microsoft Word documents are to be produced in the same file format they are stored in, such that they contain all tracked changes and comments present in the documents; and emails are to be produced with all metadata fields intact, including but not limited to the date and time the email was sent, the full names and email addresses of all recipients, any data contained in the bcc: field, and all attachments.

¹¹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

for each withholding . . . discuss[es] the consequences of disclosing the sought-after information.”¹² Please also “supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”¹³

If you withhold portions of a record, please produce all segregable portions. In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.¹⁴ Please state claims of non-segregability with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

IV. Application for Waiver or Limitation of Fees

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

- A. *This request 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 Requestor.*

An agency must waive or limit FOIA-related fees if a request 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). This Request meets both these requirements.

These records will shed light on current government practices regarding an important agreement between the United States and Canada which likely affects large numbers of

¹² *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

¹³ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

¹⁴ *Mead Data Central, Inc.*, 566 F.2d at 261.

Americans and travelers to/from America. According to one news report, information about over 680,000 individuals is being shared pursuant to the TUSCAN agreement.¹⁵

Further, the information in these documents has the potential to either reveal or confirm the absence of government misconduct, which is inherently in the public interest. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1313-14 (D.C. Cir. 2003) (“[T]he public is always well served when it knows how government activities, particularly matters touching on legal and ethical questions, have been conducted.”). Government discrimination against Muslim individuals has been extensively covered in almost every major media outlet.¹⁶ Specifically, concerns about overrepresentation of Muslims on federal government watchlists and databases have been the source of litigation and has been reported by media outlets.¹⁷ Statistics by the Canadian government confirm that immigrants are three times more likely to experience discrimination at the Canadian border than non-immigrants.¹⁸ Because there is little public knowledge about the TUSCAN agreement, the Requestor seeks to share this information with the public in order to hold the government accountable and contribute to public understanding of an issue of profound public importance.

The Requestor is not filing this Request to further its commercial interest. Requester Muslim Advocates is a 501(c)(3) non-profit organization. Any information disclosed by the Requestor as a result of this FOIA request will be made available to the public at no cost through a combination of outreach to media outlets and the Requestor’s website (available at www.muslimadvocates.org). Thus, granting a fee waiver for this Request would fulfill Congress’s legislative intent in amending the FOIA. *See Rossotti*, 326 F.3d at 1312 (“Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.” (internal quotation marks omitted)).

¹⁵ Attachment 1.

¹⁶ *See e.g.*, Faiza Patel and Rachel Levinson-Waldman, *The Islamophobic Administration*, Brennan Center for Justice, https://www.brennancenter.org/sites/default/files/publications/BCJ_Islamophobic_Administratio_n.pdf (collecting sources); Bronskill, *supra*, note 4.

¹⁷ *See e.g.*, *Kadura v. Lynch*, No. 14-cv-13128, 2017 WL 914249 (E.D. Mich. Mar. 08, 2017); Cristina Maza, *Muslim Americans sue FBI for being put on a terror watch list for no reason*, Newsweek (Jan. 18, 2018), <http://www.newsweek.com/muslim-americans-sue-fbi-being-put-terror-watch-list-without-due-process-784739>; Jeremy Scahill & Ryan Devereaux, *Watch Commander: Barack Obama’s Secret Terrorist-Tracking System, by the Numbers*, The Intercept (Aug. 5, 2014), <https://theintercept.com/2014/08/05/watch-commander/>.

¹⁸ According to the 2014 General Social Survey (GSS) on Canadians’ Safety (Victimization), 12% of immigrant victims, compared to 4% of non-immigrant victims, felt discrimination while crossing the Canadian border. *See Dyna Ibrahim, Violent victimization, discrimination and perceptions of safety: An immigrant perspective, Canada, 2014*, Statistics Canada (April 12, 2018), <https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54911-eng.htm>.

- B. *The Requestor is a representative of the news media and the records are not sought for commercial use.*

The Requestor also requests a waiver of search fees on the grounds that the Requestor qualifies as “representative[s] of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Requestor meets the statutory and regulatory definitions of “representative[s] of the news media” because they gather information, exercise editorial discretion in selecting and organizing documents, and “distribute the resulting work to the public.” *Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). The Requestor is therefore a “representative of the news media” for the same reasons: it is “primarily engaged in [the] dissemination of information.” 5 U.S.C. § 552(a)(4)(A)(ii)(II), (6)(E)(v)(II).

Courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the Requestor’s to be “representative[s] of the news media” as well. The Requestor has pursued FOIA litigation against many agencies that resulted in the disclosure of previously withheld information, including against the FBI in 2009 and multiple suits against DHS in 2017. *Cf. Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester); *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 11-12 (D.D.C. 2003) (finding legal advocacy non-profit qualifies as news media requester).

Because these factors weigh in favor of a fee waiver, fees associated with responding to FOIA requests should be waived for the Requestor as a “representative[s] of the news media.”

V. Conclusion

I would welcome the chance to discuss this matter with you. If you would like to discuss any part of this Request, please contact Matthew Callahan at matthew@muslimadvocates.org or (202) 897-2622.

Thank you for your prompt attention to this matter.

Very truly yours,



Matthew Callahan
Staff Attorney*
Muslim Advocates

*Admitted in California, supervised by members of the D.C. bar.

Attachment 1

The Guardian

Revealed: Canada uses massive US anti-terrorist database at borders

Documents released to the Guardian show Tuscan contains more than 680,000 names provided to every border guard Database is effectively a second Canadian no-fly list, run by the US



Barack Obama welcomes Justin Trudeau at a White House visit in March 2016 during which the two leaders agreed to expand the Tuscan border database, but made no public mention of it by name. Photograph: UPI / Barcroft Media

Justin Ling in Toronto

Thu 21 Jun 2018 06.00 EDT

Canadian border guards have been screening travellers using a huge, secretive US anti-terrorism database that is almost never referred to publicly, new documents reveal.

The database, called Tuscan, is provided to every Canadian border guard and immigration officer, and empowers them to detain, interrogate, arrest and deny entry to anyone found on it.

Hundreds of pages of documents obtained by the Guardian through Canada's access to information system reveal the fullest picture yet of a database that, although employed in Canada, is maintained exclusively by the US. It contains the personal information of as many as 680,000 people believed by US authorities to be linked with terrorism, and functions effectively as a second no-fly list that is cloaked in secrecy.

Canada's official no-fly list is called the Passenger Protect Program, which lists known and suspected terrorists who are forbidden from flying to or from Canada. One estimate concludes it has around 100,000 names, and the government has offered a redress so travellers can apply to have their name removed.

Tuscan, however, is much larger and is managed entirely by the US government. There is no clear process in Canada to have your name removed from the list - nor would the US be required to oblige.

What's more, while Canada's no-fly list only applies to airports, Tuscan extends to every land and sea border in Canada, as well as visa and immigration applications.

Ottawa has never formally recognised the scope of Tuscan, although it is forging ahead with a closely guarded plan to expand and update it. Originally created in 1997 as a consular aid, the list was repurposed and expanded after 9/11, and in 2016 Justin Trudeau and Barack Obama agreed to expand it still further.

The list effectively means that people cleared by the Canadian government to travel in and out of the country might still be detained because of the American list.

It could also explain why certain travellers are searched and questioned more frequently or extensively, or why others have visas or immigration applications denied.



Canadian border officials can use Tuscan to request so-called 'derogatory information', which includes any evidence on file of the traveller's ties to terrorist activity or groups. Photograph: William Campbell/Corbis via Getty

In March of 2015, Abdisalam Wilwal and his family were stopped at the Minnesota border on their return from visiting relatives in Canada. On the outbound border crossing, Canadian border guards said his file "included a notation from US authorities that might result in US authorities questioning him more than usual when he sought to re-enter the

United States,” according to a lawsuit filed by the American Civil Liberties Union (ACLU). Wilwal was detained upon returning to the US, and later released after authorities determined he had no connection to terrorism.

Although the language used by the Canadian border guard suggests Wilwal was on Tuscan, it can be difficult to confirm given that there is no way of checking who is on the database. The names come from the US Terrorist Identities Datamart Environment (Tide), which is vetted by the FBI’s Terrorist Screening Center and populates various US traveller databases, as well as Canada’s Tuscan and an equivalent in Australia called Tactics.

Whenever a traveller crosses a Canadian land or sea border, enters the country through airport passport control, applies for a visa, or attempts to immigrate into Canada, their name is checked against the database. If there is a match, the border official can request so-called “derogatory information”, which includes any evidence on file of the traveller’s ties to terrorist activity or groups.

American anti-terrorism lists have frequently been accused of including names of people with no links to terrorism. In 2014, the Intercept obtained data showing that 40% of the 680,000 names in the FBI’s list had no known ties to any terrorist group. Internal audits have found high error rates and incomplete records that could mix up people with similar names.

The ACLU has challenged the constitutionality of databases such as Tide, contending the process for being added to these lists is vague, the effects can be severe and the databases are prone to errors. “Non-citizens can even be watchlisted based on innocent associations with others who are watchlisted,” said Hugh Handeyside, a senior staff attorney at the ACLU.

Databases such as Tuscan pose “significant civil liberties concerns,” said Lex Gill, a research fellow at the University of Toronto Citizen Lab. Legal and human rights experts, she notes, have “consistently raised the issue of false positives, as well as the risk that these databases facilitate the practice of racial and ethnic profiling, which has particularly acute impacts for those of Muslim and Arab descent”.

Canada’s own official no-fly list has come under intense scrutiny after children as young as three were listed. But whereas Ottawa has trumpeted a program to help travellers get their names removed from that no-fly list, Tuscan offers no such obvious redress.

In fact, Tuscan - which stands for Tipoff US/Canada - is mentioned almost nowhere in Canadian government documents except an obscure 2005 Citizenship and Immigration Canada report [pdf], where it is described as a way for both governments to “share data in order to deny entry to foreign terrorists who may attempt to travel to Canada and/or the United States”. There is a similarly passing reference [8.6MB pdf] in a commission of inquiry from 2006 into the detention of Canadian citizen Maher Arar, who was flown to Syria and tortured.

Despite this, Ottawa is forging ahead with an update to the system. The briefing notes

obtained by the Guardian, prepared for Ralph Goodale, Canada's public safety minister, reveal the Canadian government has worked for the past three years to expand its involvement in Tuscan, without public acknowledgment or public consultation.

A spokesperson for Public Safety Canada confirmed that Tuscan is provided to all Canadian border and immigration officials "for the purpose of guiding decisions on admissibility to Canada".

The spokesperson said that, while an agreement was signed in June 2016 to expand and modernize the program, negotiations were ongoing between the two countries to finalize the details.

When asked what Ottawa is doing to ensure that the database is accurate, and to ensure that innocent travellers aren't caught up in the database, the spokesperson said: "Procedures have been introduced to allow for the consideration of exculpatory and clarifying information, as well as to update and correct information when errors are detected. Protocols also exist around the use and protection of information."

The spokesperson refused to confirm the number of names on Tuscan, citing "operational reasons".

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