



November 13, 2017

By Electronic Mail ([foia@hq.dhs.gov](mailto:foia@hq.dhs.gov))

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***RE: Freedom of Information Act Request***

Dear FOIA Officer:

The Campaign Legal Center (“CLC”) submits this request pursuant to the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, for records pertaining to the nominee for Secretary of the Department of Homeland Security, Kirstjen Nielsen.

**I. Background**

On October 11, 2017, the White House announced that President Trump intended to nominate Kirstjen Nielsen for the position of Secretary of the Department of Homeland Security.<sup>1</sup> Both the initial nomination announcement<sup>2</sup> and the

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<sup>1</sup> Elizabeth Landers, Jeff Zeleny, Jim Acosta, Noah Gray and Miranda Green, *Trump to nominate Kirstjen Nielsen for DHS secretary*, CNN (Oct. 11, 2017), <http://www.cnn.com/2017/10/11/politics/kirstjen-nielsen-department-of-homeland-security/index.html>.

<sup>2</sup> *See, e.g.*, Eliana Johnson, Andrew Restuccia, and Daniel Lippman, *Trump to nominate Kelly’s White House deputy as DHS secretary*, POLITICO (Oct. 11, 2017), <https://www.politico.com/story/2017/10/11/kirstjen-nielsen-dhs-department-of-homeland-security-secretary-243672>; Julie Hirschfeld Davis, *Kirstjen Nielsen, White House Aide, Is Picked to Run Homeland Security*, N.Y. TIMES (Oct. 11, 2017), [https://www.nytimes.com/2017/10/11/us/politics/kirstjen-nielsen-homeland-security-secretary.html?\\_r=0](https://www.nytimes.com/2017/10/11/us/politics/kirstjen-nielsen-homeland-security-secretary.html?_r=0).

confirmation hearing on November 8, 2017<sup>3</sup> generated substantial press attention. The full Senate vote is expected imminently; as of this writing, the vote before the Senate Committee on Homeland Security and Governmental Affairs is scheduled for November 14, 2017.<sup>4</sup>

On November 6, 2017, *Cyberscoop* reported that, in a break with precedent, former lobbyist Thad Bingel was leading Nielsen's preparation for her confirmation hearing.<sup>5</sup> Two days later, it was revealed that another lobbyist, Stewart Verdery, had also been playing a central role in Nielsen's confirmation preparation.<sup>6</sup> Therefore, due to these recent revelations and the substantial public interest in Nielsen's nomination, records likely to be disclosed in response to this request will contribute significantly to the public's understanding of the confirmation process, among other matters of public interest.

## II. Requested Records

This request encompasses:

- Communications mentioning Kirstjen Nielsen;
- Communications between the Department of Homeland Security and Kirstjen Nielsen, or anyone acting on her behalf;
- Communications pertaining to Thad Bingel; and
- Communications pertaining to Stewart Verdery.

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<sup>3</sup> See, e.g., Donovan Slack, *Kirstjen Nielsen, Trump's nominee to lead DHS, opposes wall along length of Mexican border*, U.S.A. TODAY (Nov. 8, 2017), <https://www.usatoday.com/story/news/politics/2017/11/08/kirstjen-nielsen-trumps-nominee-lead-dhs-opposes-wall-along-length-mexican-border/842162001/>; Nick Miroff, *Kirstjen Nielsen, Trump's nominee to lead Homeland Security, sails through confirmation hearing*, WASH. POST (Nov. 8, 2017), [https://www.washingtonpost.com/world/national-security/kirstjen-nielsen-trumps-nominee-to-lead-homeland-security-sails-through-confirmation-hearing/2017/11/08/1b8ca08e-c4ad-11e7-84bc-5e285c7f4512\\_story.html?utm\\_term=.1f37534cfb96](https://www.washingtonpost.com/world/national-security/kirstjen-nielsen-trumps-nominee-to-lead-homeland-security-sails-through-confirmation-hearing/2017/11/08/1b8ca08e-c4ad-11e7-84bc-5e285c7f4512_story.html?utm_term=.1f37534cfb96); Ron Nixon, *Homeland Security Pick Defends Her Experience Amid Democrats' Questions*, N.Y. TIMES (Nov. 8, 2017), <https://www.nytimes.com/2017/11/08/us/politics/kirstjen-nielsen-homeland-security-confirmation-hearing.html>.

<sup>4</sup> Nick Miroff, *Democrats want DHS nominee to return to Senate panel for more questioning*, WASH. POST (Nov. 10, 2017), [https://www.washingtonpost.com/world/national-security/democrats-want-dhs-nominee-to-return-to-senate-panel-for-more-questioning/2017/11/10/860ee1f6-c615-11e7-a441-3a768c8586f1\\_story.html?utm\\_term=.913371a82594](https://www.washingtonpost.com/world/national-security/democrats-want-dhs-nominee-to-return-to-senate-panel-for-more-questioning/2017/11/10/860ee1f6-c615-11e7-a441-3a768c8586f1_story.html?utm_term=.913371a82594).

<sup>5</sup> Shaun Waterman, *'Sherpa' leading Nielsen DHS confirmation effort is lobbyist tied to agency contractors*, CYBERSCOOP (Nov. 6, 2017), <https://www.cyberscoop.com/kirstjen-nielsen-dhs-conformation-effort-thad-bingel-border-wall/>.

<sup>6</sup> Jennifer Bendery, *Trump Finds Key Ally For Confirming His Homeland Security Secretary: The Swamp*, HUFF. POST (Nov. 8, 2017), [https://www.huffingtonpost.com/entry/kirstjen-nielsen-trump-homeland-security-lobbyist\\_us\\_5a01f634e4b06ff32c93d14a/](https://www.huffingtonpost.com/entry/kirstjen-nielsen-trump-homeland-security-lobbyist_us_5a01f634e4b06ff32c93d14a/).

**This request encompasses both digital and physical records. The timeframe for this request is from July 28, 2017 to date.**

If some portions of the requested records are exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. 5 U.S.C. § 552(b). If any portion of the requested records is exempt from disclosure, please provide an index of the withheld materials as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972).

### **III. Application for Fee Waiver or Limitation of Fees**

#### **A. The request is made for non-commercial purposes and will contribute significantly to public understanding of the operations or activities of government.**

FOIA provides that the agency shall furnish requested records without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

As described above in Part I, the requested materials involve matters of significant public interest. Records likely to be disclosed in response to this request will contribute significantly to the public’s understanding of the nominee’s confirmation process. These details are not already publicly available and the records would provide a more thorough public understanding of the operations of the government.

CLC will use records responsive to this request in the creation of widely disseminated materials and analysis that will educate the public about these matters and the operations of the government. CLC anticipates analyzing the materials gathered through this FOIA request to develop reports,<sup>7</sup> write blogs,<sup>8</sup> and author op-eds.<sup>9</sup> CLC’s research and reports are widely disseminated on its blog,<sup>10</sup>

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<sup>7</sup> See, e.g., Lawrence M. Noble and Brendan M. Fischer, *Funding the Presidential Nominating Conventions: How a Trickle of Money Turned Into a Flood*, Campaign Legal Center (July 26, 2016), <http://www.campaignlegalcenter.org/sites/default/files/Funding%20the%20Presidential%20Nominating%20Conventions%20Report.pdf>.

<sup>8</sup> See, e.g., Brendan M. Fischer, *How Trump’s Plan to Repeal the Johnson Amendment Could Unleash ‘Super Dark Money’ Into Our Elections*, Campaign Legal Center blog (Feb. 3, 2017), <http://www.campaignlegalcenter.org/news/blog/how-trump-s-plan-repeal-johnson-amendment-could-unleash-super-dark-money-our-elections>; *Filling the Swamp: Inauguration and Transition Funding*, Campaign Legal Center blog (Jan. 19, 2017), <http://www.campaignlegalcenter.org/news/blog/filling-swamp-inauguration-and-transition-funding>;

<sup>9</sup> See, e.g., Trevor Potter, *Donald Trump Hasn’t Solved Any of His Conflicts of Interest*, WASH. POST (Jan. 11, 2017), [https://www.washingtonpost.com/posteverything/wp/2017/01/11/donald-trump-hasnt-solved-any-of-his-conflicts-of-interest/?utm\\_term=.0e80b538fb8f](https://www.washingtonpost.com/posteverything/wp/2017/01/11/donald-trump-hasnt-solved-any-of-his-conflicts-of-interest/?utm_term=.0e80b538fb8f).

<sup>10</sup> See Campaign Legal Center blog at <http://www.campaignlegalcenter.org/news/262>.

through its own website,<sup>11</sup> through social media platforms like Facebook<sup>12</sup> and Twitter,<sup>13</sup> and regular emails to its supporters, among other communications outlets.<sup>14</sup>

CLC staff have significant knowledge in ethics and government accountability, and news media regularly rely upon CLC's analysis and expertise.<sup>15</sup> In addition to its own blogs and reports, CLC anticipates analyzing the requested records and disseminating the materials among traditional news outlets.

Requester CLC is a non-profit public interest organization organized under Section 501(c)(3) of the Internal Revenue Code and this request is made for non-commercial purposes.

As such, we request that any applicable fees associated with this request be waived pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). A fee waiver in this instance would fulfill Congress' intent in amending the FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters." (quotation marks omitted)).

#### **B. CLC qualifies for a fee waiver as a “representative of the news media.”**

CLC additionally requests that it not be charged search or review fees for this request because the organization meets the definition of a “representative of the news media” for purposes of the FOIA, since CLC “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.” 5 U.S.C. § 552(a)(4)(A)(ii)(II)-(III).

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<sup>11</sup> See Campaign Legal Center “Reference Materials” library, <http://www.campaignlegalcenter.org/research/reference-materials>.

<sup>12</sup> <https://www.facebook.com/CampaignLegalCenter/>

<sup>13</sup> <https://twitter.com/CampaignLegal>

<sup>14</sup> See Campaign Legal Center blog at MEDIUM, <https://medium.com/clc-blog>.

<sup>15</sup> See, e.g., Elizabeth Williamson, *Highflying Mnuchins Take the Country for a Ride*, N.Y. TIMES (Sept. 14, 2017), <https://www.nytimes.com/2017/09/14/opinion/mnuchin-funds-honeymoon.html>; Walter M. Shaub, Jr., *Walter Shaub: How to Restore Government Ethics in the Trump Era*, N.Y. TIMES (July 18, 2017), <https://www.nytimes.com/2017/07/18/opinion/walter-shaub-how-to-restore-government-ethics-in-the-trump-era.html>; Philip Bump, *Why Ben Carson's appearance in Phoenix was likely a violation of federal law*, WASHINGTON POST (Aug. 23, 2017), [https://www.washingtonpost.com/news/politics/wp/2017/08/23/why-ben-carsons-appearance-in-phoenix-was-likely-a-violation-of-federal-law/?utm\\_term=.175a1f707481](https://www.washingtonpost.com/news/politics/wp/2017/08/23/why-ben-carsons-appearance-in-phoenix-was-likely-a-violation-of-federal-law/?utm_term=.175a1f707481); Manu Raju, *Trump's Cabinet Pick Invested in Company, Then Introduced a Bill to Help It*, CNN (Jan. 17, 2017), <http://www.cnn.com/2017/01/16/politics/tom-price-bill-aiding-company/>; Christina Wilkie and Paul Blumenthal, *Trump Just Completely Entangled His Business and the U.S. Government* HUFFINGTON POST (Jan. 11, 2017), [http://www.huffingtonpost.com/entry/trump-business-conflicts-of-interests-treasury\\_us\\_5876928de4b092a6cae4ec7b](http://www.huffingtonpost.com/entry/trump-business-conflicts-of-interests-treasury_us_5876928de4b092a6cae4ec7b)

As the D.C. Circuit has held, the “representative of the news media” test is focused on the requestor rather than the specific FOIA request. *Cause of Action v. F.T.C.*, 799 F.3d 1108, 1121 (D.C. Cir. 2015). CLC satisfies this test because (as noted in Part III(A)) CLC applies its expertise and editorial skills to turn raw materials into reports, articles, and op-eds that are widely disseminated on its blog,<sup>16</sup> through its own website,<sup>17</sup> through social media platforms and regular emails to its supporters, and through other communications outlets.<sup>18</sup> CLC additionally applies editorial skill to analyze and disseminate materials to other news media outlets, which regularly cite and rely upon CLC’s work. The D.C. Circuit has held that an requester may qualify as a news media entity if it “‘distribute[s] [its] work’ by issuing press releases to media outlets in order to reach the public indirectly” 799 F.3d. at 1125-26.

Courts have found that other organizations with functionally similar missions and engaged in similar public education activities qualify as “representatives of the news media,” even if engaged in litigation or other advocacy beyond educating the public about the operations of government. *See e.g. Cause of Action v. F.T.C.*, 799 F.3d 1108, 1121-25 (D.C. Cir. 2015) (finding a public interest advocacy organization that comments to other media outlets about documents it obtains under FOIA a news media requester); *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding “public interest law firm” Judicial Watch a news media requester); *Elec. Privacy Info. Ctr. V. DOD*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding nonprofit public interest group that published a biweekly email newsletter a news media requester).

“It is critical that the phrase ‘representative of the news media’ be interpreted broadly if the act is work as expected, . . . In fact, *any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a ‘representative of the news media.’*” 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986), cited in *Nat’l Sec. Archive v. U.S. Dep’t of Def.*, 880 F.2d 1381, 1386 (D.C. Cir. 1989).

In the event the fee waiver is not granted, I may not be charged for the first two hours of search time, or for the first hundred pages of duplication. Please contact me and advise me of the cost of this request if processing costs exceed \$100.

#### **IV. Application for Expedited Processing**

I request that the processing of this request be expedited pursuant to 28 C.F.R. § 16.5(e)(1)(iv).

As described in Part I, the subject of the request involves a matter of exceptional media interest,<sup>19</sup> and the initial revelations about Nielsen’s confirmation process

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<sup>16</sup> See Campaign Legal Center blog at <http://www.campaignlegalcenter.org/news/262>.

<sup>17</sup> See Campaign Legal Center “Reference Materials” library, <http://www.campaignlegalcenter.org/research/reference-materials>.

<sup>18</sup> See Campaign Legal Center, MEDIUM, <https://medium.com/clc-blog>.

<sup>19</sup> See sources cited *supra* at nn. 2, 3.

raise questions about the government's integrity that can affect public confidence.<sup>20</sup> Additionally, the imminence of the votes before the Senate Committee on Homeland Security and Governmental Affairs and before the full Senate create a compelling need for expedited processing.

I certify that my statements concerning the need for expedited processing are true and correct to the best of my knowledge and belief.

\* \* \*

In order to expedite delivery of these requested documents and in order to reduce possible fees incurred, I am requesting that these documents be delivered to me either digitally via email (in PDF format), or on a data disk via the U.S. Postal Service.

**Please email copies of responsive documents to:**

[mchrist@campaignlegalcenter.org](mailto:mchrist@campaignlegalcenter.org)

**Or, please mail copies of responsive documents to:**

**Maggie Christ  
Campaign Legal Center  
1411 K St NW, Suite 1400  
Washington, D.C. 20005**

Should you elect, for any reason, to withhold, redact, or deny the release of any record responsive to this request, I request that you provide me with an explanation for each withholding/redaction, along with pertinent legal citations.

Please confirm receipt of this request and provide me with an estimate of processing time.

Thank you.

Sincerely,

/s/ Maggie Christ

Maggie Christ  
Researcher/Investigator  
Campaign Legal Center  
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<sup>20</sup> See sources cited *supra* at nn. 5, 6.