



One Hundred Sixteenth Congress  
Committee on Homeland Security  
U.S. House of Representatives  
Washington, DC 20515

September 18, 2020

The Honorable Chad F. Wolf  
Department of Homeland Security  
Washington, DC 20528

Dear Mr. Wolf:

We write to renew our request for four categories of documents regarding the decision made by the Department of Homeland Security (DHS) to summarily exclude residents of the state of New York from enrolling or re-enrolling in the Trusted Traveler programs (TTPs) administered by U.S. Customs and Border Protection (CBP). Together with the testimony of four Departmental employees, these documents are essential to enabling the Committee to complete its investigation of the facts and circumstances surrounding the inaccurate and misleading testimony it received from senior officials regarding this decision. This testimony, whether intentionally misleading or unintentionally inaccurate, has raised serious concerns regarding the Department's management of the TTPs and demands a full accounting. By not providing the requested documents, DHS is severely limiting the Committee's ability to carry out its Constitutional responsibility to oversee our nation's homeland security and to ensure that DHS treats all U.S. citizens equitably. Should the Department fail to produce the four categories of documents—in complete and unredacted form—by September 25, 2020, the Committee will be forced to consider the use of compulsory process to obtain these documents.

**Requests for Transcribed Interviews and Documents**

On July 25, 2020, we wrote to you to request that the Department make four employees available to complete transcribed interviews no later than September 4, 2020.<sup>1</sup> As none of those individuals have been made available to complete transcribed interviews, the Subcommittee on Border Security, Facilitation, and Operations has scheduled a hearing on September 30, 2020, and has requested testimony from each of these four individuals at the hearing.

In our letter of July 25, we also requested that the Department provide by August 21, 2020, four categories of documents and communications pertaining to the Department's decision to bar residents of the State of New York from enrolling in TTPs.<sup>2</sup> The Department has failed to provide any documents in response to this request. We note that on May 29, 2020, the Department

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<sup>1</sup> Letter from Chairman Bennie G. Thompson, Committee on Homeland Security, and Chairwoman Kathleen Rice, Subcommittee on Border Security, Facilitation, and Operations, to Mr. Chad Wolf, Department of Homeland Security (July 25, 2020) (online at <https://homeland.house.gov/imo/media/doc/DHS%20Wolf%20Letter.pdf>).

<sup>2</sup> *Id.*

produced 64 pages of documents to the Committee in response to a prior request. These documents are highly and improperly redacted.<sup>3</sup> Further, it appears that this production is woefully incomplete. A “report” dated September 4, 2020, and filed by the office of the Acting United States Attorney for the Southern District of New York with the District Court indicates that Department of Justice (DOJ) officials reviewed “more than two thousand emails and documents” regarding this issue, and it is likely that many of these materials would be responsive to the Committee’s requests.<sup>4</sup> The Committee requests that the Department provide all responsive documents—in unredacted form—no later than September 25, 2020.

### **Department’s Assertions to the Committee Were Inaccurate and Misleading**

As our prior correspondence has detailed, the Committee is examining the facts and circumstances surrounding the assertions made in testimony before the Committee by senior Departmental officials that have proven to be inaccurate and misleading. For example, on March 3, 2020, in testimony before the Committee, you stated:

“I would just say, again, New York law specifically prohibits CBP from going into that DMV [Department of Motor Vehicles] database. They need information contained there that they can only get there to vet trusted travelers. They’ve done that above and beyond any other state, there is no other state that prohibits that information so, that specifically why [sic.] we took that action with New York and for that action alone.”<sup>5</sup>

While information contradicting this testimony was already available in a letter submitted by the office of the Acting United States Attorney for the Southern District of New York to Federal District Court in July, additional details have now come to light.<sup>6</sup> As already mentioned, earlier this month, the office of the Acting United States Attorney filed a report “to list any and all inaccurate or misleading statements or representations in the record; to explain, with respect to each such statement, why it is inaccurate or misleading; and who made the statement” as ordered by the District Court.<sup>7</sup> According to the summary compiled by the office of the Acting United States Attorney of the revised declaration submitted to the District Court by Robert Perez, the Deputy Commissioner of CBP, contrary to the claims he made in his original June declaration, “DMV data is not, and was not at the time” of his signature on his original declaration, “available,

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<sup>3</sup> Letter from Assistant Secretary for Legislative Affairs Beth Spivey, Department of Homeland Security, to Chairman Bennie G. Thompson, Committee on Homeland Security (May 29, 2020).

<sup>4</sup> Letter from Acting United States Attorney Audrey Strauss, Southern District of New York, Department of Justice, to the Honorable Jesse M. Furman, United States District Judge, Re: *New York v. Chad F. Wolf, et al.*, No. 20 Civ. 1127 (JMF) (S.D.N.Y.); *Lewis-McCoy, et al. v. Chad Wolf, et al.*, No. 20 Civ. 1142 (JMF) (S.D.N.Y.) (Sept. 4, 2020).

<sup>5</sup> Testimony of Acting Secretary Chad F. Wolf, Department of Homeland Security, Committee on Homeland Security, *Hearing on Fiscal 2021 Budget Request for the Homeland Security Department* (116<sup>th</sup> Congress) (March 3, 2020).

<sup>6</sup> Letter from Audrey Strauss, Acting United States Attorney, Southern District of New York, to the Honorable Jesse M. Furman, United States District Judge, Southern District of New York (Case 1:20-cv-01127-JMF Document 89) (July 23, 2020).

<sup>7</sup> Letter from Acting United States Attorney Audrey Strauss, Southern District of New York, Department of Justice, to the Honorable Jesse M. Furman, United States District Judge, Re: *New York v. Chad F. Wolf, et al.*, No. 20 Civ. 1127 (JMF) (S.D.N.Y.); *Lewis-McCoy, et al. v. Chad Wolf, et al.*, No. 20 Civ. 1142 (JMF) (S.D.N.Y.) (Sept. 4, 2020).

either in whole or in part, to the TTP vetting officers for a number of jurisdictions, including New York.” Nonetheless, according to the report of the Acting United States Attorney:

“Despite other jurisdictions not providing DMV access via Nlets (in whole or in part), CBP continued to process and approve applications for TTPs without access to such information—including applications from Guam and the Virgin Islands, which are the two jurisdictions that do not provide any DMV data to any user via Nlets (excluding New York which has specifically cut off CBP’s access to such information).”<sup>8</sup>

Extensive information that appears on the basis of context to be relevant to the understanding of exactly how and when DMV information is used to review TTP applications is redacted in the publicly available version of the report filed by the Acting United States Attorney for the Southern District of New York. However, the supplemental (and redacted) declaration submitted to the court by Pete Acosta, the Director of Trusted Traveler Programs, Admissibility and Passenger Programs with the Office of Field Operations at CBP, appears to raise questions about how and whether DMV data is used in every case to vet a TTP applicant. For example, as discussed in his supplemental declaration, Mr. Acosta stated in his original declaration:

“In addition to the above databases, CBP queries Nlets for driver license and certain vehicle data. [FN 7: Such driver license information includes—but is not limited to—customer name, date of birth, mailing address, gender, and license status. Vehicle information includes—but is not limited to—data such as year, make, model, vehicle weight, vehicle identification number, vehicle registration number, effective registration date, registration expiration date, status and certain vehicle related criminal and offenses.] *CBP does so regardless of whether the Trusted Traveler applicant has provided driver license information or whether the applicant has indicated that he or she has a driver license.*”<sup>9</sup>

However, in his revised declaration, Mr. Acosta states that, regarding the italicized sentence in the passage cited above:

“while available DMV records may be manually queried through Nlets by TTP vetting officers to complete risk assessments and determine program eligibility and admissibility for TTP applicants, [REDACTED] TTP does not, as a matter of policy, require that vetting officers initiate manual queries of Nlets for every TTP applicant, but as a matter of practice, a vetting officer may, at their discretion, initiate a manual query of available DMV records through Nlets.”<sup>10</sup>

Mr. Acosta further states that the italicized sentence:

“requires clarification because such queries are [REDACTED] Instead, the driver’s license query may be manually done as part of the option to query DMV records. Moreover,

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<sup>8</sup> *Id.*

<sup>9</sup> Declaration by Pete R. Acosta, *New York v. Chad F. Wolf, et al.*, No. 20 Civ. 1127 (JMF) (S.D.N.Y.) *Lewis-McCoy, et al. v. Chad Wolf, et al.*, No. 20 Civ. 1142 (JMF) (S.D.N.Y.) (Sept. 4, 2020).

<sup>10</sup> *Id.*

whether or not such a manual query is conducted is based upon the TTP vetting officer's risk assessment of the TTP applicant.”<sup>11</sup>

Taken as a whole, it appears from these court filings that, at a minimum, numerous senior officials at CBP had a disturbingly inaccurate understanding of how DMV data were actually used to vet applications for these programs (including whether or not such data were needed to ensure that the admission of an applicant to a Trusted Traveler program did not in any way threaten the safety and security of the Homeland). That inaccurate or misleading statements were potentially made to the Committee due to the Department's lack of understanding of its own programs does not in any way reduce the Committee's concerns. The TTPs are widely used and have become a central component of security and screening operations at our nation's Ports of Entry. If DHS officials were—or are—unaware of the basic functioning of the programs (including whether applicant vetting actually assesses all relevant applicant data), this constitutes a dereliction by DHS of its critical responsibility to safely and securely manage entry into our country.

It is, however, also clear from the few—and heavily redacted—documents made available to the Committee that (1) the Department began to query operational components on the nature and extent of limitations on their access to DMV data in late December 2019, and (2) some information on some limitations on DMV data access affecting some operational components—including limitations on the availability of driver history—was available to the Department relatively soon after that querying process began. Given this background and the information that continues to come to light in DOJ filings in Federal court, critical questions remain unanswered regarding what Departmental officials actually did and did not know and when about the availability of DMV data from U.S. jurisdictions and how it was used to vet TTP applicants. It is thus impossible for the Committee to understand all of the facts and circumstances surrounding the inaccurate testimony provided to the Committee without obtaining the documents and information necessary to answer these questions.

We also note that the Department has asserted to the Committee that:

“As an initial matter, it is important to clarify that this action was not in the least taken by DHS to ‘punish the people of New York’ or to ‘retaliate against Americans with different political views.’ Rather, this decision involves the Department's primary objective of ensuring that our Homeland, and all those within it, are kept safe and secure.”<sup>12</sup>

In the absence of all responsive documentation regarding this decision, it is impossible to evaluate the accuracy of this statement. Whether New York residents were expelled from the TTPs due to the apparently profound misunderstandings of senior Department officials about how the TTPs actually worked or for reasons obscured by a willing or unwilling obfuscation of facts, the Committee is obligated to continue its investigation until all of the facts are clear.

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<sup>11</sup> *Id.*

<sup>12</sup> Letter from Assistant Secretary for Legislative Affairs Christine M. Ciccone, Department of Homeland Security, to Chairman Bennie G. Thompson, Committee on Homeland Security (Feb. 14, 2020).

## **Transcribed Interview of Mr. John Wagner**

In addition to requesting transcribed interviews with four current DHS employees, on July 25, 2020, the Committee also requested a transcribed interview with Mr. John Wagner, the former Deputy Executive Assistant Commissioner of CBP's Office of Field Operations, who testified before the Committee on February 6, 2020.<sup>13</sup> The Committee has completed Mr. Wagner's transcribed interview.

We note that Mr. Wagner permitted counsel from both the Department and CBP to participate in the interview and counsel raised numerous objections to questions posed to Mr. Wagner by Committee staff. Some of these objections appear to have been of limited or no merit based on the information subsequently made available in the DOJ's filing in Federal District Court. For example, an attorney for CBP objected to a question posed to Mr. Wagner regarding how DMV information was used to vet an applicant to the Trusted Travel programs, apparently because answering the question would have required the provision of relevant details:

“[Committee Staff]: Okay. So, to your knowledge, would the New York State database have been queried regarding an applicant's driver's license in every case, every time there was an applicant, or only if there was a question about the validity of the person's driver's license?”

[Counsel]: I will object to the specificity that it's [sic.] called for.

Mr. Wagner. Yeah. I would refer back to CBP on that, as to how that's handled.”<sup>14</sup>

As already discussed, information made publicly available in the filing with the District Court submitted on September 4 by the office of the Acting United States Attorney for the Southern District of New York appears to address in considerable detail the very issue about which Mr. Wagner was questioned. Further, the Committee regularly receives—and safeguards—law enforcement sensitive information and such information could have been provided during the Committee's interview. As such, it is unclear why a CBP attorney objected to the question regarding that issue during Mr. Wagner's transcribed interview. This is only one of several instances in which the numerous objections that were raised—and the comments that were made—could potentially create the impression, accurate or not, that DHS intended to impede the Committee's interview with Mr. Wagner. Efforts to limit the Committee's information-gathering only necessitate additional investigative action.

The Committee appreciates Mr. Wagner's decision to participate voluntarily in the interview. However, his interview did not answer all of the Committee's questions regarding the exclusion of New York residents from the Trusted Traveler programs. At times, he referred matters about which he was questioned back to the Department. Interestingly, we note that in the filing with the District Court made by the office of the Acting United States Attorney for the Southern District of New York, it appears that the Department itself accorded at least some authority to Mr. Wagner's pronouncements on the operation of the Trusted Traveler programs, including on the availability

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<sup>13</sup> Letter from Chairman Bennie G. Thompson, Committee on Homeland Security, and Chairwoman Kathleen Rice, Subcommittee on Border Security, Facilitation, and Operations, to Mr. John Wagner (July 25, 2020) (online at <https://homeland.house.gov/imo/media/doc/Wagner%20Letter.pdf>).

<sup>14</sup> Committee on Homeland Security, Interview of: John Wagner (Sept. 3, 2020).

and use of DMV data to screen program applicants. For example, as already noted, Mr. Pete Acosta, the Director of Trusted Traveler programs, Admissibility and Passenger Programs, filed a new declaration with Federal District Court earlier this month to correct assertions he made about the operation of the Trusted Traveler programs in a previous declaration. The report of the Acting United States Attorney for the Southern District of New York notes that the errors in Mr. Acosta's original declaration "did not raise any new concerns" because his "statements about the uniqueness of the data restrictions imposed by New York" had "mirrored those in the April Wagner declaration submitted" in earlier litigation.<sup>15</sup>

In any event, when questioned about the new information that has come to light as a result of the DOJ's federal court filings, Mr. Wagner stated the following:

"Q: Okay. Given your position as the Deputy Executive Assistant Commissioner of CBP at the time, is it something that you should have been aware of, that two territories were not sharing this DMV information?

Mr. Wagner: Yes, I should've been aware of that.

Q: And what about the several States, the District of Columbia, and the territory that were not providing access to their driving history, including their criminal driving history? Is that something that you should have been aware of?

[Counsel]: You know, is Mr. Wagner qualified here as an expert as to what the agency should know at a particular time? This really is calling for his opinion, his judgment. This is not factual – it's not a particularly factual question. It doesn't have much grounding in fact at all.

[Committee Staff]: Do I hear some objection there, or what is that?

[Counsel]: Yeah. It calls for speculation.

Mr. Wagner: And maybe I'll clarify to say: My opinion is I should've known."<sup>16</sup>

Mr. Wagner's statements certainly contribute to the impression that officials within CBP and the Department did not have basic information that they should have had about apparently long-standing limitations on access to DMV data—particularly when assertions about such limitations were cited to justify the exclusion from a federal program of the residents of an entire U.S. state even as foreign nationals were continued to allowed to enroll in the program.

The new information that has come to light also raises questions about whether risks have in fact been created by the inclusion of applicants to the TTPs from jurisdictions that did not provide any or all DMV database information. Mr. Wagner referred such questions back to the Department:

"Q: Was it unnecessary for CBP to validate driver information from applicants to the Trusted Traveler Program from U.S. territories?

A: I'd really have to defer to CBP to answer that.

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<sup>15</sup> Letter from Acting United States Attorney Audrey Strauss, Southern District of New York, Department of Justice, to the Honorable Jesse M. Furman, United States District Judge, Re: New York v. Chad F. Wolf, et al., No. 20 Civ. 1127 (JMF) (S.D.N.Y.); Lewis-McCoy, et al. v. Chad Wolf, et al., No. 20 Civ. 1142 (JMF) (S.D.N.Y.) (Sept. 4, 2020).

<sup>16</sup> Committee on Homeland Security, Interview of: John Wagner (Sept. 3, 2020).

Q: But, to be clear, at the time you testified, when you were Deputy Executive Assistant Commissioner, was it necessary for CBP to validate driver information from applicants to the Trusted Traveler Program who resided in U.S. territories?

A: Well, I testified to the importance of that information and for CBP's ability to determine a person met the criteria.

Q: Okay. So was that information important for applicants from U.S. territories?

A: Yes, it would be.

Q: So, then, may I ask why applicants were accepted from two territories, two U.S. territories, that were not providing the DMV records?

A: I would have to defer to CBP to answer that. But, as I said, I was not aware of that information, and I was not considering that information in how I responded to those questions.”<sup>17</sup>

When he was asked whether he participated in the decision to exclude the residents of New York from the Trusted Traveler program, Mr. Wagner did not provide any information to the Committee:

“Q: Okay. Did you participate in any of the discussion around how CBP or DHS should respond to New York once it cut off CBP's access to the driver database information?

[Counsel]: Again, cautioning the witness not get into issues that would be colored by the deliberative process, that those are internal agency discussions that are protected by the agency's privilege.

Mr. Wagner: I would just say that, you know, referring back to the hearing on facial recognition, I mean, that -- the questions weren't posed to me about my role or in the decisionmaking or, you know, what information or how those decisions were made.

[By Committee Staff]

Q: So you decline to answer the question?

A: Well, the question wasn't asked to me during the hearing, so I don't see how it clarifies what I might have said that was inaccurate during the hearing. You know, I refer back to DHS or CBP on who was involved or what level of decisions or what information was relied on to make the decision.”<sup>18</sup>

## **Conclusion**

It appears that testimony provided in hearings to this Committee by senior officials with the Department of Homeland Security was inaccurate and misleading. It also appears that numerous senior officials with the Department shared a profoundly and disturbingly deficient understanding of a program they were responsible for directing. And now the Department is not fully cooperating with the Committee's examination of the facts and circumstances surrounding both the inaccurate and misleading testimony as well as the many troubling consequences of the Department's mismanagement of the Trusted Traveler programs. This situation is intolerable. The Committee will continue to take every available investigative step to try to uncover the truth regarding what Department officials knew and when about the TTP vetting processes they have inaccurately

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*



described. The Committee therefore demands that the Department produce the following previously requested documents by September 25, 2020:

1. All documents referring or relating to the decision to bar residents of New York State from Trusted Traveler Programs;
2. All communications (a) between DHS personnel; and (b) between DHS personnel and any personnel at the White House; and (c) between DHS personnel and/or any federal agency referring or relating to the decision to bar residents of New York State from Trusted Traveler Programs;
3. All documents referring or relating to any state, territory, or district that limits DHS' access to any type of information pertaining to driver's licenses and/or vehicle registration or to any information contained in any database that stores information on driver's licenses and/or vehicle registrations; and
4. All documents referring or relating to the discovery by DHS that information provided to the office of the U.S. Attorney for the Southern District of New York and/or to any federal court regarding the enrollment of residents of the State of New York in the TTP was in any way inaccurate or misleading.

Should the Department fail to comply with this request, the Committee will be forced to utilize a compulsory process to obtain these materials.

Sincerely,



Bennie G. Thompson  
Chairman  
Committee on Homeland Security



Kathleen Rice  
Chairwoman  
Subcommittee on Border Security,  
Facilitation, and Operations

cc: The Honorable Mike Rogers, Ranking Member, Committee on Homeland Security