

VIA EMAIL

February 9, 2018

Sam Kaplan
Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane SW
STOP-0655
Washington, D.C. 20528-0655

Dear Mr. Kaplan:

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Department of Homeland Security (“DHS”).

EPIC seeks records about DHS’s role in the investigations of voter fraud.

Documents Requested

- (1) All records or communications between the agency and state and county election officials concerning voter fraud.
- (2) All policies, guidelines, or memorandums about the Department’s program(s) concerning voter fraud.

Background

On May 11, 2017, President Trump established the Presidential Advisory Commission on Election Integrity (“Commission”) to investigate allegations of fraudulent voter registrations and fraudulent voting.¹ In an unprecedented government request, the Commission attempted to collect detailed voter data from all fifty states and the District of Columbia.² President Trump later

¹ Exec. Order No. 13,7999, 82 Fed. Reg. 22389 (May 11, 2017).

² See, e.g., Letter from Kris Kobach, Vice Chair, Presidential Advisory Comm’n on Election Integrity, to Hon. Elaine Marshall, Sec’y of State, N.C. (June 28, 2017), <https://www.documentcloud.org/documents/3881856-Correspondence-PEIC-Letter-to-North-Carolina.html>.

terminated the Commission and instructed the DHS to “review its initial findings and determine next courses of action.”³

On January 23, 2018, Reps. Bennie Thompson (D-Miss.) and Robert Brady (D-Pa.) sent a letter to DHS Secretary Nielson to clarify what the agency’s responsibilities are in relation to the now-defunct Commission.⁴ Reps. Thompson and Brady expressed concern that President Trump’s order to the DHS will distract the agency from its obligation to protect U.S. election systems from foreign interference and undermine the relationship that the DHS is building with state election officials. They asked DHS Secretary Nielson what new activities the DHS will pursue in taking over the Commission’s responsibilities and what the agency is doing to preserve the cooperative relationship between the agency and states. The Reps stated, “to the best of our knowledge, the Commission was unable to produce any evidence of improper voter registration and improper voting, including fraudulent voter registrations and fraudulent voting.”⁵

When asked in a Senate Judiciary Committee Hearing about the Department’s prior experiences in investigating allegations of voter fraud, Secretary of Homeland Security Kristjen Nielson testified that the DHS has an existing “program where states come to [DHS] with concern about illegal immigrants voting in a federal election” that is purely voluntary.⁶

Secretary Nielson described this current program as:

[A] voluntary system right now whereby a state is concerned that those who are not appropriately registered to vote, or who perhaps not even registered to vote, vote [sic] . . . from an immigration perspective [DHS] will work with states to help them to determine if voters are in fact not appropriately registered for federal elections.⁷

Later when asked by the Senator Amy Klobuchar about voter registrations, Secretary Nielson stated, “If somebody requests us to run some questionable in their mind [sic] voters we are happy to do so” against agency databases.⁸

³ Statement, The White House Press Secretary, Statement by the Press Secretary on the Presidential Advisory Commission on Election Integrity (Jan. 3, 2018), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-presidential-advisory-commission-election-integrity/>.

⁴ Letter from Bennie G. Thompson, Ranking Member, Comm. on Homeland Sec. et. al, to Hon. Kristjen Nielson, Sec’y, U.S. Dep’t of Homeland Sec. (Jan. 23, 2018), https://lofgren.house.gov/uploadedfiles/180123_t_nielson_re_dhs_responsibilities_election_integrity_comm_ission.pdf.

⁵ *Id.*

⁶ *Oversight of the United States Department of Homeland Security before the S. Comm. on the Judiciary Pt.2*, 115th Cong. (2018), C-Span (Jan. 16, 2018), <https://www.c-span.org/video/?439257-3/homeland-security-oversight-part-2&start=975>.

⁷ *Oversight of the United States Department of Homeland Security before the S. Comm. on the Judiciary Pt.1*, 115th Cong. (2018), C-Span (Jan. 16, 2018), <https://www.c-span.org/video/?439257-2/homeland-security-oversight-part-1&start=6916>.

⁸ *Id.*

Tyler Houlton, a DHS spokesperson, stated that the Department is currently “working with a ‘limited number’ of states and counties that wish to verify the citizenship status of voters through a program managed by the U.S. Citizenship and Immigration Services.”⁹ Additionally, the agency is evaluating how it might provide additional assistance to the states, said Mr. Houlton.¹⁰ While the DHS has no immediate plans to probe additional voter fraud, the agency emphasized that it continues to work with state election officials with an effort to secure elections from those who seek to undermine election systems or election integrity.¹¹

Request for Expedited Processing

EPIC is entitled to expedited processing of this request under the FOIA and the DHS’s FOIA regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(e)(1)(ii). Specifically, this request is entitled to expedited processing because, first, there is an “urgency to inform the public about an actual or alleged federal government activity,” and, second, because the request is “made by a person who is primarily engaged in disseminating information.” § 5.5(e)(1)(ii).

First, there is an “urgency to inform the public about an actual or alleged federal government activity.” § 5.5(e)(1)(ii). The “actual” federal government activity is the DHS being tasked by President Trump to review the Commission’s initial findings of voter fraud and determine appropriate courses of action.

“Urgency” to inform the public about this activity is clear because in 2017, DHS designated election infrastructure as a critical infrastructure subsector.¹² As part of this designation, the DHS’s focus is to secure election systems and election integrity from cyber-attacks. Diverting agency resources to investigate claims of voter fraud may undermine the cooperation with state and county election officials that is crucial in keeping election’s secure.¹³ States are scrambling to secure their election security in time for the 2018 Midterm Elections, with some states waiting almost nine months for the DHS’s intensive security screening.¹⁴ It is critical that the public be informed of what proactive measures both the agency and the states are doing in securing federal election systems and how much of those resources are devoted to investigating voter fraud.

⁹ Christina A. Cassidy, *Trump’s Attempts to Show Voter Fraud Appear to Have Stalled*, Associated Press (Jan. 21, 2018), <https://www.apnews.com/16be5158af764b0388c40a421a8b0a64>.

¹⁰ *Id.*

¹¹ Dustin Volz & Julia Harte, *DHS Election Unit Has No Plans For Probing Voter Fraud: Sources*, Reuters (Jan. 5, 2018, 3:28 PM), <https://www.reuters.com/article/us-usa-election-dhs/dhs-election-unit-has-no-plans-for-probing-voter-fraud-sources-idUSKBN1EU1YF>.

¹² Statement, Jeh Johnson, Sec’y of Homeland Sec., Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector (Jan. 6, 2017), <https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical>.

¹³ Volz, *supra* note 11.

¹⁴ Tim Starks, *The Latest 2018 Election-Hacking Threat: 9-Month Wait for Government Help*, Politico (12/29/17, 5:05 PM), <https://www.politico.com/story/2017/12/29/2018-election-hacking-threat-government-help-231512>.

Second, EPIC is an organization “primarily engaged in disseminating information.” 6 C.F.R. § 5.5(e)(1)(ii). As the Court explained in *EPIC v. DOD*, “EPIC satisfies the definition of ‘representative of the news media’” entitling it to preferred fee status under FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

In submitting this request for expedited processing, I certify that this explanation is true and correct to the best of my knowledge and belief. 6 C.F.R. § 5.5(e)(3); 5 U.S.C. § 552(a)(6)(E)(vi).

Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes. *EPIC v. DOD*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplication fees assessed. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

Further, any duplication fees should also be waived because (i) “disclosure of the requested information is in the public interest because it is likely to contribute to the public understanding of the operations or activities of the government” and (ii) “disclosure of the information is not primarily in the commercial interest” of EPIC, the requester. 6 C.F.R. § 5.11(k)(1); 5 U.S.C. § 552(a)(4)(A)(iii). EPIC’s request satisfies this standard based on the DHS’s considerations for granting a fee waiver. 6 C.F.R. §§ 5.11(k)(2–3).

(1) Disclosure of the requested information is likely to contribute to the public understanding of the operations or activities of the government.

First, disclosure of the requested documents is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” 6 C.F.R. § 5.11(k)(2). DHS components evaluate these four considerations to determine whether this requirement is met: (i) the “subject of the request must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated”; (ii) disclosure “must be meaningfully informative about government operations or activities in order to be ‘likely to contribute’ to an increased public understanding of those operations or activities”; (iii) “disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester,” and (iv) “[t]he public’s understanding of the subject in question must be enhanced by the disclosure to a significant extent.” *Id.*

On the first consideration, the subject of the request self-evidently concerns “identifiable operations or activities of the federal government.” 6 C.F.R. § 5.11(k)(2)(i). Secretary Neilson testified in front of the Senate Judiciary Committee that the DHS has a voluntary program in place to investigate voter fraud and will continue to work with states in securing their election systems under this election systems as critical infrastructure designation.

On the second consideration, disclosure would also be “meaningfully informative about” these operations or activities and is thus “‘likely to contribute’ to an increased understanding of government operations or activities.” 6 C.F.R. § 5.11(k)(2)(ii). There is very little detailed information regarding how many states have asked the DHS to investigate voter fraud or to match

state voter data against agency databases. This information will provide substantial new information to the public, allowing the public to assess how much of its resources are diverted to investigating state voter fraud claims.

On the third consideration, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject” because, as provided in the DHS FOIA regulations, DHS components will “presum[e] that a representative of the news media will satisfy this consideration.” 6 C.F.R. § 5.11(k)(2)(iii).

Finally, on the fourth consideration, the public’s understanding will “be enhanced by the disclosure to a significant extent” because it is critical for the public to know to what extent the DHS has provided support to state and county election officials regarding voter fraud and election integrity.

(2) Disclosure of the information is not primarily in the commercial interest of the requester

Second, “[d]isclosure of the information is not primarily in the commercial interest” of EPIC. § 5.11(k)(3). In determining whether this second requirement is met, the DHS components evaluate the following two considerations: (i) whether there is “any commercial interest of the requester . . . that would be furthered by the requested disclosure”; and/or (ii) whether “the public interest is greater than any identified commercial interest in disclosure,” and “[c]omponents ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.” *Id.*

On the first consideration, there is not “any commercial interest of the requester . . . that would be furthered by the requested disclosure.” 6 C.F.R. § 5.11(k)(3)(i). EPIC has no commercial interest in the requested records. EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.¹⁵

On the second consideration, “the public interest is greater than any identified commercial interest in disclosure.” 6 C.F.R. § 5.11(k)(3)(ii). Again, EPIC has no commercial interest in the requested records and has established that there is significant public interest in the requested records. Moreover, the DHS should presume that EPIC has satisfied 6 C.F.R. § 5.11(k)(3)(ii). The DHS FOIA regulations state “[c]omponents ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.” *Id.* EPIC is a news media requester and, as set out above, this request satisfies the public interest standard.

For these reasons, a full fee waiver should be granted for EPIC’s request.

Conclusion

¹⁵ *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.

Thank you for your consideration of this request. As provided in 5 U.S.C. § 552(a)(6)(E)(ii)(I), I anticipate your determination on our request within ten calendar days. I can be contacted at Zhou@epic.org, cc: FOIA@epic.org, 202-483-1140, extension 104.

Respectfully submitted,

/s/ Enid Zhou

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