

VIA E-MAIL

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Dear Mr. Cantor,

This letter constitutes an urgent request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a)(3), and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Department of Homeland Security (“DHS”).

EPIC seeks records in possession of the DHS concerning the efforts of the Presidential Commission on Election Integrity’s (the “Commission”) and its Chair to collect personal data from the DHS, as discussed during the July 19, 2017 Commission meeting.<sup>1</sup>

## Background

On June 28, 2017, the Vice Chair of the Commission attempted to collect detailed voter histories from all fifty states and the District of Columbia. In letters to state officials, the Commission sought:

the full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information.<sup>2</sup>

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<sup>1</sup> Meeting Notice, 82 Fed. Reg. 31,063 (July 5, 2017).

<sup>2</sup> 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>.

While the Commission suspended the collection following EPIC lawsuit *EPIC v. Commission*, No. 17-1320 (D.D.C. filed July 3, 2017), on July 26, 2017 Mr. Kobach renewed the Commission's attempt to collect state voter data.<sup>3</sup>

On July 19, 2017, the Commission held its first meeting and discussed the collection of data from other federal agencies, including the DHS.<sup>4</sup> Commission member Hans Anatol von Spakovsky expanded on "other data that [he] think[s] we need to get" from federal databases.<sup>5</sup> Mr. Von Spakovsky then described, without naming, a DHS database on immigration detentions:

The databases at the Department of Homeland Security that have information on all non-citizens who legally are in the United States and information on all individuals who are illegally in the United States who have been detained and a record has been created.<sup>6</sup>

He continued, describing a DHS database of interest for citizenship applications:

There is also information in the Department of Homeland Security's files on individuals who apply for citizenship. One of the questions on the application form for naturalization is a question that specifically asks: have you registered or voted in elections? We need to know from DHS, and we need data on those files. How many files do they have of individuals, noncitizens, who answered yes to that question? What do they do with that information?<sup>7</sup>

Vice Chair Kobach responded by tasking Commission staff with collecting this data before the next Commission meeting:

If there's no objection from the Commission, I think that might be one task we can delegate to staff is to, in the interim between now and the next meeting and the next meeting, is to start trying to collect whatever data there is that's already in the possession of the federal government that might be helpful to us.<sup>8</sup>

The Vice Chair has elsewhere made clear his intent to collect federal data, stating "You start where the evidence is.... the federal government has that evidence," and that the "Commission will

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<sup>3</sup> Letter from Kris Kobach, Vice Chair, Presidential Advisory Comm'n on Election Integrity, to John Merrill, Sec'y of State, Ala. (July 26, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/letter-vice-chair-kris-kobach-07262017.pdf>.

<sup>4</sup> 82 Fed. Reg. 31,063.

<sup>5</sup> *Presidential Advisory Commission on Election Integrity, Mission, Procedures and Topics for Consideration*, C-Span (July 19, 2017), <https://www.c-span.org/video/?431521-3/presidential-advisory-commission-election-integrity-mission-procedures-topics-consideration&start=1831>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

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

gather national level data and present it to the public.”<sup>9</sup> “Why not collect evidence and just get the facts on the table?” Mr. Kobach has said.<sup>10</sup>

EPIC now seeks one category of records from DHS concerning the Commission’s attempts to collect DHS data.

### Documents Requested

All communications between the Commission and / or its chair and the DHS concerning the transfer of personal data from the agency to the Commission.

### 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, EPIC’s FOIA 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 at issue is Commission’s attempt to sensitive data stored in DHS databases. The Commission expressly determined commission staff would seek federal data, including DHS data on immigration detentions and citizenship application during its July 19th meeting.<sup>11</sup>

“Urgency” to inform the public about this activity is also clear given the sensitivity of the data the Commission seeks, combined with grave questions about the Commission’s data security, privacy, and transparency practices. The Commission seeks personal data is almost certainly protected by the Privacy Act, which restricts disclosure of personal data maintained by federal agencies. 5 U.S.C. § 552a. Yet the Commission’s treatment of data security, privacy, and transparency interests has consistently fallen short. The Commission previously employed insecure methods for receipt of personally identifiable information,<sup>12</sup> published individual e-mails to the Commission and personal information without warning,<sup>13</sup> and delayed publishing the

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<sup>9</sup> *Kris Kobach talks his role on Trump's voter fraud commission*, Fox News (May 12, 2017), <http://video.foxnews.com/v/5431579603001/>.

<sup>10</sup> *Voting Commissioner Kris Kobach Defends U.S. Request For Voter Information*, NPR (June 30, 2017), <http://www.npr.org/2017/06/30/535059231/voting-commissioner-kris-kobach-defends-u-s-request-for-voter-information>.

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

<sup>12</sup> Lewis Decl. Ex. 11., *EPIC v. Commission*, No. 17-1320 (D.D.C. filed July 3, 2017).

<sup>13</sup> Christopher Ingraham,

*White House releases sensitive personal information of voters worried about their sensitive personal information*, Wash. Post (July 14, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/07/14/white-house-releases-sensitive->

information required by the Federal Advisory Committee Act (FACA). The Commission will hold its second meeting on September 12, 2017.<sup>14</sup> Ahead of that meeting, the public must know whether, how, and for what purpose a federal Commission is seeking new, sensitive data from DHS, and how the federal agency has responded to any attempt to collect this data.

Second, EPIC is an organization “primarily engaged in disseminating information.” § 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. § 5.5(e)(3); § 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); § 552(a)(4)(A)(iii). EPIC’s request satisfies this standard based on DHS’s considerations for granting a fee waiver. §§ 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 “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” § 5.11(k)(2). DHS evaluates the following 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 it “shall be presumed that a representative of the news media will satisfy this consideration”; and/or (iv) the “public’s understanding of the subject in question must be enhanced by the disclosure to a significant extent.” *Id.*

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personal-information-of-voters-worried-about-their-sensitive-personal-information/?utm\_term=f28429bc2cb0.

<sup>14</sup> Meeting Notice, 82 Fed. Reg. 40,581 (Aug. 25, 2017).

As to the first consideration, the subject of the request self-evidently concerns “identifiable operations or activities of the federal government.” § 5.11(k)(2)(i). The requested documents involve the DHS’s communication with a federal commission concerning the transfer of data stored in federal databases.

As to 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.” § 5.11(k)(2)(ii). While the Commission stated an intent to pursue multiple types of federal data, including two types of DHS-housed data, no further information has been forthcoming from DHS or the Commission about the status of any data transfer. The requested materials will, as a result, meaningfully contribute to the public understanding of the DHS operations or activities.

As to 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 will “presum[e] that a representative of the news media will satisfy this consideration.” § 5.11(k)(2)(iii).

Finally, as to the fourth consideration, the public’s understanding will “be enhanced by the disclosure to a significant extent” because, as just described, little specific is known about the DHS communication with, or potential or completed transfer of data to the Commission. § 5.11(k)(2)(iv).

*(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, DHS evaluates 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.*

As to the first consideration, there is not “any commercial interest of the requester... that would be furthered by the requested disclosure.” § 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.<sup>15</sup>

As to the second consideration, “the public interest is greater than any identified commercial interest in disclosure.” § 5.11(k)(3)(ii). Again, EPIC has no commercial interest in the requested records, and, as noted above, there is significant public interest in the requested records. Moreover, DHS should presume that EPIC has satisfied § 5.11(k)(3)(ii). The FOIA regulations

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

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.* As established in the sections above, EPIC is a news media requester, and its request satisfies the public interest standard.

For these reasons, a fee waiver should be granted.

### Conclusion

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. For questions regarding this request I can be contacted at 202-483-1140 x111 or FOIA@epic.org.

Respectfully submitted,

/s/ Eleni Kyriakides

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/s/ Enid Zhou

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