

VIA FOIAONLINE & MAIL

Sept. 11, 2017

Deputy Executive Director  
Office of Public Disclosure  
Office of the General Counsel  
Social Security Administration  
6401 Security Boulevard  
Baltimore, MD 21235.

Dear Deputy Executive Director,

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 Social Security Administration (“SSA”).

EPIC seeks records in possession of the SSA concerning the efforts of the Presidential Commission on Election Integrity’s (the “Commission) and its Chair to collect personal data from the SSA, 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 SSA.<sup>4</sup> Commission member Hans Anatol von Spakovsky expanded "other data that [he] think[s] we need to get" from federal databases.<sup>5</sup> Mr. Von Spakovsky, described SSA data of interest to the Commission:

Part of inquiry into deciding how accurate the voter rolls and what can be done to improve them, is to also inquire to the states.... are they consulting federal data bases? For example, are they doing data comparisons with the Social Security Master Index of death records, and not just are they doing it and how often are they doing it?

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>6</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 gather national level data and present it to the public."<sup>7</sup> "Why not collect evidence and just get the facts on the table?" Mr. Kobach has said.<sup>8</sup>

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

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

<sup>8</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>.

## Documents Requested

All communications between the Commission and / or its chair and the SSA 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 SSA's FOIA regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 20 C.F.R. § 402.140(d). Specifically, EPIC's FOIA Request is entitled to expedited processing because, first, the "request is from a person primarily engaged in disseminating information (such as a member of the news media)" and there is an "urgency to inform the public concerning actual or alleged Federal Government activity." § 402.140(d).

First, EPIC is an organization "primarily engaged in disseminating information." § 402.140(d). 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).

Second, there is an "urgency to inform the public concerning actual or alleged Federal Government activity." § 402.140(d). The "actual" federal government activity at issue is Commission's attempt to sensitive data stored in SSA databases. The Commission expressly determined commission staff would seek federal data, including SSA data from the Social Security Death Index during its July 19th meeting.<sup>9</sup>

"Urgency" to inform the public about this activity is also clear given the personal nature 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.<sup>10</sup> 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>11</sup> published individual e-mails to the Commission and personal information without warning,<sup>12</sup> and delayed publishing the information

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<sup>9</sup> *Id.*

<sup>10</sup> Further, access to data the Commission may have been referring to - the Social Security Full Death Master File - is restricted, and is obtained through an extensive request form, requiring details about the requester's security practices and plans to share the data. *Requesting The Full Death Master File (DMF)*, SSA.gov, [https://www.ssa.gov/dataexchange/request\\_dmf.html](https://www.ssa.gov/dataexchange/request_dmf.html).

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

<sup>12</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-personal-information-of-voters-worried-about-their-sensitive-personal-information/?utm\\_term=.f28429bc2cb0](https://www.washingtonpost.com/news/wonk/wp/2017/07/14/white-house-releases-sensitive-personal-information-of-voters-worried-about-their-sensitive-personal-information/?utm_term=.f28429bc2cb0).

required by the Federal Advisory Committee Act (FACA). The Commission will hold its second meeting on September 12, 2017.<sup>13</sup> Ahead of that meeting, the public must know whether, how, and for what purpose a federal Commission is seeking new personal data from SSA, and how the federal agency has responded to any attempt to collect this data.

In submitting this request for expedited processing, I certify that this explanation is true and correct to the best of my knowledge and belief. § 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); 20 C.F.R. § 402.155 (b)

Further, any duplication fees should also be waived because disclosure is (1) “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government” and (2) “not primarily in the commercial interest” of EPIC, the requester. 20 C.F.R. §§ 402.185(a)(1-2); § 552(a)(4)(A)(iii). EPIC’s request satisfies this standard based on the SSA’s considerations for granting a fee waiver. §§ 402.185(b-c).

*(1) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to 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.” 20 C.F.R. § 402.185(b). The SSA considers the following four factors to determine whether this requirement is met: (1) the how “the records to be disclosed pertain to the operations or activities of the Federal Government,” (2) whether “disclosure of the records reveal any meaningful information about government operations or activities,” or is “already public knowledge,” (3) whether disclosure will “advance the understanding of the general public as distinguished from a narrow segment of interested persons” including consideration for “whether the requester is in a position to contribute to public understanding,” and/or (4) whether “the contribution to public understanding [will] be a significant one.” §§ 402.185(b)(1-4).

As to the first consideration, the subject of the request self-evidently “pertains to the operations or activities of the Federal Government.” § 402.185(b)(1). The requested documents involve the SSA’s communication with a federal commission concerning the transfer of data stored in federal databases.

As to the second consideration, disclosure would also be “disclosure of the records reveal any meaningful information about government operations or activities,” and is not “already public knowledge,” § 402.185(b)(2) While the Commission stated an intent to pursue multiple types of

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<sup>13</sup> Meeting Notice, 82 Fed. Reg. 40,581 (Aug. 25, 2017).

federal data, including SSA-housed data, no further information has been forthcoming from the SSA 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 SSA's operations or activities.

As to the third consideration, disclosure will “advance the understanding of the general public as distinguished from a narrow segment of interested persons.” § 402.185(b)(3). As provided in the SSA FOIA regulations, SSA should consider “whether the requester is in a position to contribute to public understanding,” § 402.185(b)(3), and EPIC, as a news media requester, regularly distributes information it obtains through the FOIA in a bi-weekly newsletter and on its leading website EPIC.org.<sup>14</sup>

Finally, as to the fourth consideration, disclosure of the requested records will be a “significant” “contribution to public understanding,” because, as described throughout this request, while the debate concerning the Commission's data collection activities continues to garner enormous public attention, little is known about the SSA communications with or transfer of data to the Commission. § 402.185(b)(4).

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

Second, disclosure of the information is “not primarily in the commercial interest” of EPIC, the requester. 20 C.F.R. § 402.185(c). In determining whether this second requirement is met, the SSA considers the following two factors: (i) whether disclosure would “further a commercial interest of the requester, or of someone on whose behalf the requester is acting”; and/or (ii) if it “would further a commercial interest of the requester” whether that “effect outweigh[s] the advancement of the public interest.” §§ 402.185(c)(1-2).

As to the first consideration, this request concerns no “commercial interest of the requester, or of someone on whose behalf the requester is acting.” § 402.185(c)(1). 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>

The SSA need not reach the second consideration, because disclosure would not “further a commercial interest of the requester.” § 402.185(c)(2). Again, EPIC has no commercial interest in the requested records. Further, 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

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<sup>14</sup> EPIC.org, <https://epic.org>.

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

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

Respectfully submitted,

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