

VIA MAIL

April 25, 2018

U.S. Immigration and Customs Enforcement
Office of the Principal Legal Advisor
U.S. Department of Homeland Security
500 12th Street, S.W., Mail Stop 5900
Washington, D.C. 20536-5900

Freedom of Information Act Appeal, Case No. 2018-ICFO-17666

This letter constitutes an appeal of the U.S. Immigration and Customs Enforcement's ("ICE") denial of expedited processing under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(6)(E)(i). The FOIA request at issue was submitted on behalf of the Electronic Privacy Information Center ("EPIC") to the U.S. Department of Homeland Security ("DHS") on September 11, 2017 ("EPIC's FOIA Request") and was transferred to the ICE office on October 5, 2017.

EPIC's FOIA Request sought records in possession of the ICE concerning the efforts of the Presidential Commission on Election Integrity's ("Commission") and its Chair to collect personal data from the DHS, as discussed during the July 19, 2017 Commission meeting.¹ EPIC's FOIA Request established an "urgency to inform the public" about a matter "concerning actual or alleged Federal government activity" and EPIC is "primarily engaged in disseminating information." *See* Appendix A.

In a letter from the ICE FOIA Office, dated February 1, 2018, the ICE denied EPIC's request for expedited processing of EPIC's FOIA Request. The letter stated "[w]hile you may be primarily engaged in the dissemination of information, you have not detailed with specificity why you feel there is an urgency to inform the public about the information you have requested." It further stated that the qualifying urgency "would need to exceed the public's right to know about government activity generally." The letter stated that EPIC "did not offer sufficient supporting evidence of public interest that is any greater than the public's general interest in the information." Furthermore, the letter stated that EPIC's request was "conclusory in nature" and did not present facts to justify expedited processing. *See* Appendix B.

EPIC has reviewed the determination and it is not correct. According to the agency regulation, requests will be processed on an expedited basis whenever they involve "an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information." 6 C.F.R. § 5.5(e)(1)(ii). The original EPIC request made clear that EPIC is "primarily engaged in disseminating information" and there is an "urgency to inform the public" about a government activity. EPIC's FOIA Request presented

¹ Meeting Notice, 83 Fed. Reg. 31,063 (July 5, 2017).

specific facts which demonstrated that the Commission discussed attempts to collect data from two unnamed DHS databases, constituting an alleged government activity. Furthermore, EPIC established that there is an urgency to inform the public because, at the time, the Commission planned to hold its second meeting on September 12, 2017 as a follow up to the first July meeting. The Commission's treatment of data security, privacy, and transparency interests had previously fallen short. The public urgently needed to know whether sensitive data about immigration and citizenship would be transferred to the Commission. And by definition a statement supported by specific facts cannot be "conclusory in nature."

EPIC hereby appeals the ICE's denial of expediting processing of EPIC's FOIA Request. EPIC should be granted expedited processing.

Procedural Background

On September 11, 2017, EPIC submitted EPIC's FOIA Request to the DHS via e-mail. EPIC specifically 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.

EPIC also requested expedited processing and a fee waiver.

On October 2, 2017, EPIC sent a revised FOIA request listing offices and search terms that EPIC would like the agency to use. *See* Appendix C. EPIC included the ICE office in the revised request. In an acknowledgement letter dated February 1, 2018, the ICE invoked a 10-day extension to respond to EPIC's request, granted EPIC's fee waiver request, and denied EPIC's expedited processing request. EPIC's request was assigned case number 2018-ICFO-17666.

EPIC's FOIA Request Satisfies the "Compelling Need" Test For Expedited Processing

EPIC is entitled to expedited processing of this request because this request involves a "compelling need." 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(e)(1). Under the "compelling need" test, EPIC established that this request first, involves "an urgency to inform the public about an actual or alleged federal government activity," and, second, is made by "a person primarily engaged in disseminating information." 6 C.F.R. § 5.5(e)(1)(ii). As previously stated, EPIC reviewed the ICE's earlier determination and is certain that the determination is incorrect.

(1) There is a Clear "Urgency to Inform the Public" About an Actual Government Activity

First, this request self-evidently involves "an urgency to inform the public about an actual or alleged federal government activity." § 5.5(e)(1)(ii). The "actual" government activity at issue is the Commission's attempt to transfer sensitive personal data stored in the ICE's databases. As described in EPIC's FOIA Request, the Commission discussed the collection of data from other federal agencies, including the DHS. Commission member Hans Anatol von Spakovsky described, without naming, two separate DHS databases that the Commission should get information from — a database on immigration detentions and a database on citizenship

applications.² Communications between the Commission and the DHS exist and these communications undeniably constitute an “actual” government activity. In a court ordered document index from a separate Commission-related lawsuit, the Commission produced a list of all records generated for or by the Commission as of September 2017.³ The document index not only identifies states that have transferred state voter data to the Commission, the document index also identifies several instances of communications between the Commission and the DHS such as:

- 5/12/17: Email chain from DHS requesting information about the scope of the Commission’s work
- 5/15/17–5/16/17: Email chain re: scheduling a telephone call
- 6/19/17–6/20/17: Email about setting up time to talk about Commission
- 6/19/17–6/20/17: Email setting up call with a DHS official
- 6/21/17: Planner for a call with DHS personnel
- 6/28/17: Follow-up email with DHS official
- 6/28/17: Follow-up scheduling email with DHS personnel
- 7/1/17: Follow-up email re: getting response
- 7/6/17: Email about potential future coordination/overlap between entities
- 7/6/17: Email re: setting up time to talk
- 7/8/17: Email discussion about time for meeting
- 7/27/17: Scheduling call
- 8/1/17: Email chain and planner setting a time for call [related to litigation]
- 8/1/17: Call about litigation
- 8/2/17: Email chain and planner setting a time for call [related to litigation]
- 8/3/17: Email chain and planner setting a time for call [related to litigation]
- 8/15/17–8/16/17: Email chain and planner setting a time for call [related to litigation]
- 8/22/17: Email chain re: phone call with Kobach, OVP, and DHS staff
- 8/22/17–8/24/17: Email chain and planner about setting up a time to speak
- 8/24/17: Email about setting-up meeting⁴

There is also a clear “urgency to inform the public” about whether the Commission contacted the ICE about the transfer of sensitive personal data stored in the agency’s databases. § 5.5(e)(1)(ii). On January 3, 2018, President Trump terminated the Commission by Executive Order.⁵ White House Director of Information Technology Charles Herndon stated in a court declaration that the “state voter data will not be transferred to or accessed or utilized by . . . any other agency, except to the National Archives and Records Administration (‘NARA’), pursuant

² *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/presidentialadvisory-commission-election-integrity-mission-procedures-topics-consideration&start=1831>.

³ See Document Index, *Lawyers’ Comm. for Civil Rights Under Law v. Presidential Advisory Comm. on Election Integrity et. al*, No. 17-1354 (D.D.C. Sep. 29, 2017), ECF No. 33-3, <https://epic.org/privacy/litigation/voter/epic-v-commission/Lawyers-Committee-v-Commission-document-index-092917.pdf>.

⁴ *Id.*

⁵ Exec. Order No. 13,820, 83 Fed. Reg. 969 (Jan. 3, 2018).

to federal law, if the records are not otherwise destroyed. . . . [P]ending consultation with NARA, the White House intends to destroy all state voter data.”⁶ He further stated that “[n]on-public Commission records will continue to be maintained as Presidential Records” and that they will not “be transferred to . . . another agency, except to NARA, if required, in accordance with federal law.”⁷

In addition to EPIC’s lawsuit, at least fourteen other lawsuits have been filed concerning the work of the Commission.⁸ Following the termination of the Commission, the White House still possesses sensitive state voter data from at least 20 states as well as other Commission records, and there have not been any affirmative plans to destroy this data — only a declaration of intent. It is within the public’s interest to determine whether any of the data collected by the Commission included data from an ICE database or if there was an agreement to transfer data from the agency to the Commission.

Since its inception, the Commission has come under fire for its lack of transparency and its unprecedented attempt to unlawfully collect millions of state voter records. Many advocacy groups, public officials, editorial boards, and academics suspected the Commission to be used as a tool to enable voter suppression, rather than a legitimate attempt to study elections.⁹ The confirmation of whether the Commission had access to immigration and citizenship databases is critical to the public debate.

On March 9, 2018, EPIC received documents that revealed discussions between federal voting rights officials about joint efforts to “clean” state voter rolls last year.¹⁰ The records show that the Election Assistance Commission, the Commission, the Voting Section of the Department of Justice’s Civil Rights Division, and the Department of Homeland Security explored ways to cooperate on the “cleaning” and “maintenance” of state voter registration databases.¹¹ These interagency discussions took place during the same time that the Commission sought vast amounts of election data from state election officials and when the Commission held its first meeting to discuss the collection of data from other federal agencies. The “cleaning” of voter registration rolls has become a legal battleground between public officials and voting rights advocates who argue that these purges frequently result in discrimination. The information sought in EPIC’s FOIA Request undeniably involves a matter of widespread interest because the

⁶ *Id.* at ¶ 4.

⁷ *Id.* at ¶¶ 4–5.

⁸ See e.g., *Lasky v. Gardner*, No. 226-2017-cv-00340 (N.H. Sup. Ct. July 10, 2017), *ACLU v. Trump*, No. 17-1351 (D.D.C. July 10, 2017), *Lawyers’ Committee for Civil Rights Under Law v. Commission* (D.D.C. July 10, 2017; D.C. Cir. appeal docketed July 21, 2017), *Public Citizen v. Army*, No. 17-1355 (D.D.C. July 10, 2017), *Joyner v. Commission*, No. 17-22568 (S.D. Fla. July 10, 2017), *Marley v. Denney*, No. CV01-17-12594 (Idaho Dist. Ct. filed July 11, 2017), *Common Cause v. Commission*, No. 17-1398 (D.D.C. filed July 14, 2017), *NAACP Legal Defense Fund v. Trump*, No. 17-5427 (S.D.N.Y. filed July 18, 2017), *United to Protect Democracy v. Commission*, No. 17-2016 (D.D.C. filed Sep. 29, 2017), and *Dunlap v. Commission*, No. 17-2361 (D.D.C. filed Nov. 9, 2017).

⁹ See *Criticisms of the Commission*, Brennan Center for Justice, <https://www.brennancenter.org/deficiencies-trumps-fraud-commission>.

¹⁰ *EPIC FOIA (2018): Federal Voting Rights Officials Sought to ‘Clean’ State Voter Rolls*, EPIC.org, <https://www.epic.org/privacy/voting/#EPICfoia2018>.

¹¹ *Id.*

Commission’s attempt to coordinate with other federal agencies and access federal databases holding sensitive, personally identifiable information on the pretext of studying election fraud raised concerns that diminished the public’s confidence in the democratic process.

(2) *EPIC is an Organization “Primarily Engaged in Disseminating Information”*

Second, EPIC is an organization “primarily engaged in disseminating information” under § 5.5(e)(1)(ii) because, as the D.C. District Court explained in *EPIC v. DOD*, “EPIC satisfies the definition of ‘representative of the news media.’” 241 F. Supp. 2d 5, 15 (D.D.C. 2003). EPIC is therefore an entity that “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)(ii). For instance, as explained by the Court in *EPIC v. DOD*, “EPIC researches issues on privacy and civil liberties, reports on this information, analyzes relevant data, evaluates newsworthiness of material and puts the facts and issues into context, publishing this ‘news’” to the public in books. 241 F. Supp. 2d at 11. Additionally, “every two weeks,” for the past twenty-three years, “EPIC has published and disseminated its newsletter,” sharing “information that is about current interest to the public.” *Id.* at 13 (citations omitted) (internal quotation marks omitted).

EPIC’s FOIA Request Has Qualified for Expedited Treatment Under DHS FOIA Regulations in a Different DHS Component Office

EPIC’s FOIA Request has qualified for expedited treatment under the DHS FOIA regulations. The ICE denied expedited treatment because it stated that EPIC did not qualify for expedited treatment under DHS FOIA regulations. The DHS Privacy Office, however, granted EPIC’s request for expedited processing. *See* Appendix D. EPIC’s FOIA Request, including narrowed search terms and reasoning in support of expedited treatment, are exactly the same for both offices. The DHS Privacy Office makes expedited treatment determinations under the same DHS FOIA regulations that the ICE office uses. The granting of expedited processing should not differ between components of the same agency when the request and reasoning for expedited processing are exactly the same. Because EPIC’s request has previously been granted expedited processing under the same agency standard, the ICE determination denying expedited processing is incorrect.

I certify that this explanation is true and correct to the best of my knowledge and belief. 5 U.S.C. § 552(a)(6)(E)(vi). For the foregoing reasons, EPIC is entitled to expedited processing of EPIC’s FOIA Request. § 552(a)(6)(E)(iii).

Conclusion

Thank you for your consideration of this appeal. I anticipate your determination on our request within twenty working days. 5 U.S.C. § 552(a)(6)(A)(ii). For question regarding this request, I can be contacted at I can be contacted at 202-483-1140 x104 or Zhou@epic.org, cc: FOIA@epic.org.

Respectfully submitted,

/s Enid Zhou

Enid Zhou

EPIC Open Government Fellow

APPENDIX A

VIA E-MAIL

Sept. 11, 2017

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
foia@hq.dhs.gov

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.¹

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.²

¹ Meeting Notice, 82 Fed. Reg. 31,063 (July 5, 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>.

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.³

On July 19, 2017, the Commission held its first meeting and discussed the collection of data from other federal agencies, including the DHS.⁴ Commission member Hans Anatol von Spakovsky expanded on "other data that [he] think[s] we need to get" from federal databases.⁵ 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.⁶

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?⁷

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.⁸

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

³ 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>.

⁴ 82 Fed. Reg. 31,063.

⁵ *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>.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

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

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.¹¹

“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,¹² published individual e-mails to the Commission and personal information without warning,¹³ and delayed publishing the

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

¹⁰ *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>.

¹¹ *Id.*

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

¹³ 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, 2017.¹⁴ 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.*

personal-information-of-voters-worried-about-their-sensitive-personal-information/?utm_term=f28429bc2cb0.

¹⁴ 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.¹⁵

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

¹⁵ *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

Eleni Kyriakides
EPIC Fellow

/s/ Enid Zhou

Enid Zhou
EPIC Fellow

APPENDIX B

From: kyriakides@epic.org
Subject: FW: ICE FOIA Request 2018-ICFO-17666
Date: February 1, 2018 at 1:04 PM
To: Enid Zhou zhou@epic.org



More foia! :)

-----Original Message-----

From: ice-foia@dhs.gov
Sent: Thursday, February 1, 2018 12:57
To: kyriakides@epic.org
Subject: ICE FOIA Request 2018-ICFO-17666

February 01, 2018

Eleni Kyriakides
EPIC
1718 Connecticut Ave, N.W. Suite 200

Washington, DC 20009

RE: ICE FOIA Case Number 2018-ICFO-17666

Dear Kyriakides:

This acknowledges receipt of your Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement (ICE), dated September 11, 2017, your request for a waiver of all assessable FOIA fees, and your request for expedited treatment. Your request was received in this office on October 05, 2017. Specifically, you requested 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.

Due to the increasing number of FOIA requests received by this office, we may encounter some delay in processing your request. Per Section 5.5(a) of the DHS FOIA regulations, 6 C.F.R. Part 5, ICE processes FOIA requests according to their order of receipt. Although ICE's goal is to respond within 20 business days of receipt of your request, the FOIA does permit a 10-day extension of this time period. As your request seeks numerous documents that will necessitate a thorough and wide-ranging search, ICE will invoke a 10-day extension for your request, as allowed by Title 5 U.S.C. § 552(a)(6)(B). If you care to narrow the scope of your request, please contact our office. We will make every effort to comply with your request in a timely manner.

ICE evaluates fee waiver requests under the legal standard set forth above and the fee waiver policy guidance issued by the Department of Justice on April 2, 1987, as incorporated into the Department of Homeland Security's Freedom of Information Act regulations^[1]. These regulations set forth six factors to examine in determining whether the applicable legal standard for fee waiver has been met. I have considered the following factors in my evaluation of your request for a fee waiver:

- (1) Whether the subject of the requested records concerns "the operations or activities of the government";
- (2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;
- (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons;
- (4) Whether the contribution to public understanding of government operations or activities will be "significant";
- (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and

(6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor.

Upon review of your request and a careful consideration of the factors listed above, I have determined to grant your request for a fee waiver.

Your request for expedited treatment is hereby denied.

Under the DHS FOIA regulations, expedited processing of a FOIA request is warranted if the request involves "circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual," 6 C.F.R. § 5.5(e)(1)(i), or "an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information," 6 C.F.R. § 5.5(e)(1)(ii). Requesters seeking expedited processing must submit a statement explaining in detail the basis for the request, and that statement must be certified by the requester to be true and correct. 6 C.F.R. § 5.5(e)(3).

Your request for expedited processing is denied because you do not qualify for either category under 6 C.F.R. § 5.5(e)(1). You have not established that lack of expedited treatment in this case will pose an imminent threat to the life or physical safety of an individual. While you may be primarily engaged in the dissemination of information, you have not detailed with specificity why you feel there is an urgency to inform the public about the information you have requested. Qualifying urgency would need to exceed the public's right to know about government activity generally. You also did not offer sufficient supporting evidence of public interest that is any greater than the public's general interest in the information you have requested. Your letter was conclusory in nature and did not present any facts to justify a grant of expedited processing under the applicable standards.

If you deem the decision to deny expedited treatment of your request an adverse determination, you have the right to appeal. Should you wish to do so, you must send your appeal and a copy of this letter, within 90 days of the date of this letter following the procedures outlined in the DHS FOIA regulations at 6 C.F.R. Part 5 § 5.5(e)(2), to

U.S. Immigration and Customs Enforcement
Office of the Principal Legal Advisor
U.S. Department of Homeland Security
500 12th Street, S.W., Mail Stop 5900
Washington, D.C. 20536-5900

Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

ICE has queried the appropriate program offices within ICE for responsive records. If any responsive records are located, they will be reviewed for determination of releasability. Please be assured that one of the processors in our office will respond to your request as expeditiously as possible. We appreciate your patience as we proceed with your request.

Your request has been assigned reference number **2018-ICFO-17666**. Please refer to this identifier in any future correspondence. To check the status of an ICE FOIA/PA request, please visit <http://www.dhs.gov/foia-status>. Please note that to check the status of a request, you must enter the 2017-ICFO-XXXXX or 2018-ICFO-XXXXX tracking number. If you need any further assistance or would like to discuss any aspect of your request, please contact the FOIA office. You may send an e-mail to ice-foia@ice.dhs.gov, call toll free (866) 633-1182, or you may contact our FOIA Public Liaison, Fernando Pineiro, in the same manner. Additionally, you have a right to right to seek dispute resolution services from the Office of Government Information Services (OGIS) which mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. You may contact OGIS as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Regards,

ICE FOIA Office
Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street, S.W., Stop 5009
Washington, D.C. 20536-5009
Telephone: 1-866-633-1182
Visit our FOIA website at www.ice.gov/foia

[1] 6 CFR § 5.11(k).

APPENDIX C

VIA E-MAIL

October 2, 2017

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
foia@hq.dhs.gov

Dear Mr. Cantor,

This letter constitutes an REVISION of 2017-HQFO-01353, an urgent request under the Freedom of Information Act (“FOIA”) 5 U.S.C. § 552(a)(3) 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.¹

EPIC is submitting a revised request following Director Angela Washington’s October 2, 2017 letter asking EPIC to “resubmit your request containing the names and/or offices within DHS you would like searched as well as any search terms you would like us to use.” In addition to the original information provided, EPIC submits the following offices and search terms we would like used:

- Offices:
 - U.S. Citizenship and Immigration Services, Headquarters Office of Service Center Operations
 - U.S. Immigration and Customs Enforcement, Headquarters
- Search terms:
 - Kris Kobach
 - Andrew Kossack
 - ElectionIntegrityStaff@ovp.eop.gov
 - Presidential Advisory Commission on Election Integrity
 - Federal Data
 - CrossCheck
 - Registered to vote AND non-citizens

¹ Meeting Notice, 82 Fed. Reg. 31,063 (July 5, 2017).

- Detained

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.²

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.³

On July 19, 2017, the Commission held its first meeting and discussed the collection of data from other federal agencies, including the DHS.⁴ Commission member Hans Anatol von Spakovsky expanded on "other data that [he] think[s] we need to get" from federal databases.⁵ 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.⁶

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

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>.

³ 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>.

⁴ 82 Fed. Reg. 31,063.

⁵ *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>.

⁶ *Id.*

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?⁷

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.⁸

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."⁹ "Why not collect evidence and just get the facts on the table?" Mr. Kobach has said.¹⁰

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

⁷ *Id.*

⁸ *Id.*

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

¹⁰ *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>.

determined commission staff would seek federal data, including DHS data on immigration detentions and citizenship application during its July 19th meeting.¹¹

“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,¹² published individual e-mails to the Commission and personal information without warning,¹³ and delayed publishing the information required by the Federal Advisory Committee Act (FACA). The Commission will hold its second meeting on September 12, 2017.¹⁴ 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); §

¹¹ *Id.*

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

¹³ 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.

¹⁴ Meeting Notice, 82 Fed. Reg. 40,581 (Aug. 25, 2017).

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.*

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.¹⁵

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 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
Eleni Kyriakides
EPIC Fellow

/s/ Enid Zhou
Enid Zhou
EPIC Fellow

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

APPENDIX D



**Homeland
Security**

Privacy Office, Mail Stop 0655

October 5, 2017

SENT VIA E-MAIL TO: kyriakides@epic.org

Eleni Kyriakides
EPIC
1718 Connecticut Ave, N.W. Suite 200
Washington, DC 20009

Re: **2017-HQFO-01353**

Dear Ms. Kyriakides:

This letter acknowledges receipt of your Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), dated September 11, 2017, and to your request for expedited handling and a waiver of all assessable FOIA fees. Our office received your revised request on October 2, 2017. Specifically, you requested communications between the Commission and/or its chair and the following DHS offices: Front Office, U.S. Citizenship and Immigration Services, Headquarters Office of Service Center Operations, U.S. Immigration and Customs Enforcement, Headquarters concerning the transfer of personal data from the agency to the commission: using search terms: Kris Kobach, Andrew Kossack, ElectionIntegrityStaff@ovp.eop.gov, Presidential Advisory Commission on Election Integrity, Federal Data, CrossCheck, Registered to vote AND non-citizens, and Detained.

Your request for expedited processing is hereby granted.

You have requested a fee waiver. The DHS FOIA regulations at 6 C.F.R. Part 5 § 5.11(k) set forth six factors DHS must evaluate to determine whether the applicable legal standard for a fee waiver has been met: (1) Whether the subject of the requested records concerns “the operations or activities of the government,” (2) Whether the disclosure is “likely to contribute” to an understanding of government operations or activities, (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons, (4) Whether the contribution to public understanding of government operations or activities will be “significant,” (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure, and (6) Whether the magnitude of any identified commercial interest to the requester is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

Upon review of the subject matter of your request, and an evaluation of the six factors identified above, DHS has determined that it will conditionally grant your request for a fee waiver. The fee waiver determination will be based upon a sampling of the responsive documents received from the various DHS program offices as a result of the searches conducted in response to your FOIA request. DHS will, pursuant to DHS FOIA regulations applicable to non-commercial requesters, provide two hours of search time and process the first 100 pages at no charge to you. If upon review of these documents, DHS determines that the disclosure of the information contained in those documents does not meet the factors permitting DHS to waive the fees, then DHS will at that time either deny your request for a fee waiver entirely, or will allow for a percentage reduction in the amount of the fees corresponding to the amount of relevant material found that meets the factors allowing for a fee waiver. In either case, DHS will promptly notify you of its final decision regarding your request for a fee waiver and provide you with the responsive records as required by applicable law.

In the event that your fee waiver is denied, and you determine that you still want the records, provisions of the FOIA allow us to recover part of the cost of complying with your request. We shall charge you for records in accordance with the DHS FOIA regulations as they apply to non-commercial requesters. As a non-commercial requester you will be charged for any search time and duplication beyond the free two hours and 100 pages mentioned in the previous paragraph. You will be charged 10 cents per page for duplication and search time at the per quarter-hour rate (\$4.00 for clerical personnel, \$7.00 for professional personnel, \$10.25 for managerial personnel) of the searcher. In the event that your fee waiver is denied, we will construe the submission of your request as an agreement to pay up to \$25.00. This office will contact you before accruing any additional fees.

We have queried the appropriate component(s) of DHS for responsive records. If any responsive records are located, they will be reviewed for determination of releasability. Please be assured that one of the analysts in our office will respond to your request as expeditiously as possible. We appreciate your patience as we proceed with your request.

Your request has been assigned reference number **2017-HQFO-01353**. Please refer to this identifier in any future correspondence. The status of your FOIA request is now available online and can be accessed at: <https://www.dhs.gov/foia-status>, by using this FOIA request number. Status information is updated daily. Alternatively, you can download the DHS eFOIA Mobile App, the free app is available for all Apple and Android devices. With the DHS eFOIA Mobile App, you can submit FOIA requests or check the status of requests, access all of the content on the FOIA website, and receive updates anywhere, anytime.

If you have any questions, or would like to discuss this matter, please feel free to contact this office at 1-866-431-0486 or 202-343-1743.

Sincerely,

A handwritten signature in black ink, appearing to read "Angela Washington". The signature is fluid and cursive, with the first name "Angela" being more prominent than the last name "Washington".

Angela Washington
Director, FOIA Disclosure