

March 12, 2018

Senator Chuck Grassley, Chairman
Senator Dianne Feinstein, Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510-6050

Dear Chairman Grassley and Ranking Member Feinstein:

We write to you in advance of the hearing “The Freedom of Information Act: Examining the Administration’s Progress on Reforms and Looking Ahead”¹ to share our perspective and Freedom of Information Act (“FOIA”) work. The Electronic Privacy Information Center (“EPIC”) is a nonpartisan research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.² EPIC is a leading advocate for open government and democratic values in the information age. We value FOIA and the work of this committee to promote open government.

The FOIA is critical for the functioning of democratic government because it helps ensure that the public is fully informed about matters of public concern. Public awareness of our government's activity through the FOIA not only allows for a more informed public debate over new surveillance proposals, but also ensures accountability for government officials. Public debate fosters the development of more robust security systems and leads to solutions that better respect the nation's democratic values. EPIC's FOIA litigation has resulted in disclosure of critical information about the activities of the government. Our litigation has also generated case law that benefits the FOIA requesters and the open government community across the country.

EPIC’s FOIA Work – The 2018 FOIA Gallery

Since 2001, EPIC has produced an annual FOIA gallery in honor of Sunshine Week to highlight EPIC’s FOIA achievements over the past year. For EPIC's Open Government Project, 2017 was a year filled with great success stories.³ A 2017 report from the TRAC FOIA Project shows that EPIC is among the nation's leading FOIA litigators, ranking fifth among nonprofit and advocacy groups nationwide.⁴ In 2017, EPIC obtained formerly secret records from government agencies including the CBP, DHS, DOJ, FBI, IRS, and prevailed in several leading FOIA cases. Below are a few highlights of EPIC’s recent FOIA work:

¹ *The Freedom of Information Act: Examining the Administration’s Progress on Reforms and Looking Ahead*, S. Judiciary Comm., 115th Cong. (March 13, 2018), <https://www.judiciary.senate.gov/meetings/the-freedom-of-information-act-examining-the-administrations-progress-on-reforms-and-looking-ahead>.

² See EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

³ EPIC, *FOIA Gallery 2018*, <https://epic.org/foia/gallery/2018/>.

⁴ TRAC FOIA Project, *Dramatic Rise in FOIA Lawsuits Filed by Nonprofit Advocacy Groups* (July 26, 2017), <http://foiaproject.org/2017/07/26/nonprofit-advocacy-groups/>.

- EPIC sued the Federal Bureau of Investigation (“FBI”) for its failure to respond to EPIC's FOIA request for privacy impact assessments and the agency was ordered to address the inadequacy of its search and the basis for its exemption.⁵
- EPIC filed a separate lawsuit against the FBI and obtained the agency’s “Victim Notification Procedures.”⁶ Based on the documents uncovered by EPIC, an Associated Press investigation found that the FBI, the lead agency for cyber response, failed to notify U.S. officials that their email accounts were compromised by Russian hackers during the 2016 Presidential election.⁷
- EPIC sued⁸ the Department of Justice (“DOJ”) National Security Division and obtained a report⁹ detailing the FBI's use of foreign intelligence data for a domestic criminal investigation. The report obtained by EPIC also shows that a FBI analyst failed to follow internal guidance to notify superiors of the search, raising questions about whether the FBI is accurately reporting these searches.
- In a response to EPIC's FOIA lawsuit,¹⁰ the DOJ admitted¹¹ that the United States Sentencing Commission never produced an evaluation of “risk assessment” tools in criminal sentencing. Former Attorney General Holder called on the Sentencing Commission to study the problem and produce a report. But after EPIC requested that study and sued the DOJ to obtain it, the DOJ conceded that the report was never produced. Through the suit, EPIC obtained emails¹² confirming the existence of a 2014 DOJ report about "predictive policing" algorithms, but the agency also withheld that report.

Last week, in response to a FOIA request to the DOJ, EPIC obtained over four hundred pages of records showing that the Election Assistance Commission, the now-defunct Presidential Advisory Commission on Election Integrity, the Voting Section of the DOJ’s Civil Rights Division, and the Department of Homeland Security discussed ways to cooperate on the “cleaning” and “maintenance” of state voter registration databases.¹³ In one set of emails,¹⁴ Christy McCormick — an Election

⁵ *EPIC v. FBI (Privacy Assessments)*, <https://epic.org/foia/fbi/pia/default.html>,

⁶ *EPIC v. FBI (Russian Hacking)*, <https://epic.org/foia/fbi/russian-hacking/>.

⁷ Raphael Satter, Jeff Donn, & Desmond Butler, *FBI Gave Heads-Up to Fraction of Russian Hackers’ US Targets*, Associated Press (Nov. 28, 2017), <https://www.apnews.com/f1a5570b7ce04d39bab00ae3a9041460/FBI-didn't-tell-US-targets-as-Russian-hackers-hunted-emails>.

⁸ *EPIC v. NSD (Section 702 Query Report)*, <https://epic.org/foia/nsd/702-query-report/>.

⁹ Kevin J. O’Connor, Chief, Oversight Section NSD, *Letter to Judge Collyer* (Jan. 23, 2017), <https://epic.org/foia/epic-v-NSD/EPIC-17-05-15-NSD-FOIA-20180108-Production.pdf>.

¹⁰ *EPIC v. DOJ (Criminal Justice Algorithms)*, <https://epic.org/foia/doj/criminal-justice-algorithms/>.

¹¹ *EPIC v. DOJ*, D.D.C., Civil Action No. 17-410 (Dec. 14, 2017), <https://epic.org/foia/doj/criminal-justice-algorithms/EPIC-v-DOJ-17-410-JSR-121417.pdf>.

¹² DOJ-FOIA-20171031-Production-3, <https://epic.org/foia/doj/criminal-justice-algorithms/EPIC-16-06-15-DOJ-FOIA-20171031-Production-3-emails-re-predictive-policing.pdf>.

¹³ *EPIC FOIA (2018): Federal Voting Rights Officials Sought to ‘Clean’ State Voter Rolls*, <https://www.epic.org/privacy/voting/#EPICfoia2018>.

Assistance Commissioner and member of the Presidential Commission — dismissed concerns about the federal government’s sweeping demands for state voter information as “conspiracy theories.” Writing to a top voting rights attorney at the DOJ, McCormick said she hoped the DOJ and the Presidential Commission could “clean up the voter rolls” together. The revelations follow last year’s sweeping requests for state election information by the Presidential Commission and the DOJ, both issued on the same day. Many states refused to provide the Presidential Commission the state voter data, citing the privacy rights of their voters and the states’ power to administer their own elections. These documents, obtained by EPIC under the FOIA, confirm that the states were correct to oppose the Commission’s demand for state voter information.

EPIC v. IRS: Presidential Tax Returns

EPIC is now seeking the release of President Trump’s tax returns. The release of the President’s tax records is necessary to correct misstatements of fact and to determine the extent of Russian interference with the 2016 Presidential election. In our view, at no time in American history has a stronger claim been presented to the Internal Revenue Service (“IRS”) for the public release of tax records to under the FOIA.¹⁵ If the Freedom of Information Act means anything, it means that the American public has the right to know whether records exist in a federal agency which reveal that the U.S. president has financial dealings with a foreign adversary. The public supports this effort. According to a recent Quinnipiac poll, 67% of American voters believe President Trump should release his tax returns.¹⁶

This EPIC FOIA case arises from statements made by President Trump. Following the election, President Trump tweeted that “Russia has never tried to use leverage over me. I HAVE NOTHING TO DO WITH RUSSIA - NO DEALS, NO LOANS, NO NOTHING.”¹⁷ That claim was “plainly contradicted by his own attorneys, family members, and business partners,” as EPIC described in its brief.¹⁸ President Trump has also alleged that he has been subject to an unusual number of audits because of his political and religious beliefs.¹⁹ Former IRS Commissioner John Koskinen disputed this claim.²⁰

There is a key provision in the Internal Revenue Code that permits the release of tax records in these circumstances. The provision was enacted to ensure the “integrity and fairness [of the IRS] in administering the tax laws” following the impeachment proceedings against President Richard M. Nixon.²¹

¹⁴ DOJ-FOIA-20180309-McCormick-Gore-Emails, <https://epic.org/foia/DOJ/EPIC-17-06-30-DOJ-FOIA-20180309-McCormick-Gore-Emails.pdf>.

¹⁵ 26 U.S.C. § 6103(k)(3).

¹⁶ Quinnipiac University Poll, *American Voters Still Want to See Trump's Tax Returns, Quinnipiac University National Poll Finds; Approval Dips Back Below 40 Percent* (Feb. 21, 2018), <https://poll.qu.edu/national/release-detail?ReleaseID=2522>.

¹⁷ *EPIC v. IRS*, 261 F. Supp. 3d 1, 4 (D.D.C. 2017).

¹⁸ Br. for Appellant at 1, *EPIC v. IRS*, No. 17-5225 (D.C. Cir.) (filed Feb. 21, 2018).

¹⁹ *Id.* at 13–14.

²⁰ Br. for Appellant at 14, *EPIC v. IRS*, No. 17-5225 (D.C. Cir.) (filed Feb. 21, 2018).

²¹ *Confidentiality of Tax Return Information: Hearing Before the Comm. on Ways and Means, 94th Cong. 22–23* (1976) (statement of Donald C. Alexander, Commissioner of Internal Revenue).

Section 6103(k)(3) allows the IRS to release tax records “with respect to any specific taxpayer to the extent necessary for tax administration purposes to correct a misstatement of fact.”²² Former IRS Commissioner Margaret Milner Richardson stated that the provision “permits the IRS to disclose tax return information to correct misstatements of fact without a waiver from the taxpayer.”²³ The IRS recently admitted to EPIC that it has used this authority at least ten times in one year.²⁴

EPIC v. IRS, No. 17-5225, concerning the release of President Trump’s tax returns, is now before the D.C. Circuit Court of Appeals.

We ask that our statement be entered into the hearing record. Please feel free to contact us if you would like additional information about *EPIC v. IRS* or EPIC’s other FOIA matters.

We look forward to working with the Committee on open government issues of vital importance to the public.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg
EPIC President

/s/ Enid Zhou

Enid Zhou
EPIC Open Government Fellow

/s/ Christine Bannan

Christine Bannan
EPIC Administrative Law
and Policy Fellow

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald
EPIC Policy Director

²² 26 U.S.C. § 6103(k)(3).

²³ *Final Remarks by Margaret Milner Richardson, Commissioner of Internal Revenue*, Fed. B.A. Sec. Tax’n Rep., Spring 1997, at 6, 9.

²⁴ Final FOIA Response from IRS to EPIC (Sept. 14, 2017), <https://epic.org/foia/irs/trump-taxes/EPIC-17-04-27-IRS-FOIA-20170914-final-response.pdf>.