

VIA FACSIMILE

June 16, 2017

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Dear Ms. Day,

This letter constitutes a 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 Justice (“DOJ”).

EPIC seeks records in possession of the DOJ concerning the “long standing” DOJ practice not to share “communications” between the Attorney General and the President or “comment on [such] conversations,” described by the Attorney General in testimony before the Senate Select Committee on Intelligence on June 13, 2017.¹

On June 13, 2017, Attorney General Sessions testified in an open hearing before the Senate Intelligence Committee as a part of the Committee’s investigation of the Russian interference in the 2016 Presidential election. In his opening testimony, the Attorney General stated that, in accordance with “long standing Department of Justice practice, I cannot and will not violate my duty to protect confidential communications I have with the president.”² In response to a question from Senator Mark Warner (D-VA), the Attorney General continued, stating that this policy applied to “high conversations with officials within the White House,” and said “it’s a long

¹ *Hearings*, U.S. Senate Select Committee on Intelligence, <https://www.intelligence.senate.gov/hearings/open-hearing-open-testimony-attorney-general-united-states-jeff-sessions> (displaying AG Sessions Testimony in open hearing before Senate Intelligence Committee on June 13, 2017).

² Politico Staff, *Transcript: Jeff Sessions’ testimony on Trump and Russia*, Politico (June 13, 2017),

<http://www.politico.com/story/2017/06/13/full-text-jeff-session-trump-russia-testimony-239503>.

standing policy [of] the Department of Justice not to comment on conversations that the Attorney General has had with the President of the United States for confidential reasons that really are founded in the coequal branch powers and the Constitution of the United States.”³ The Attorney General invoked this DOJ policy in response to Senators’ questions throughout the hearing.⁴

Document Requested

The “long standing Department of Justice” policy not to share with the United States Congress “communications” or “comment on conversations” between the Attorney General and the President “for confidential reasons,” described by the Attorney General in testimony before the Senate Select Committee on Intelligence on June 13, 2017.⁵

Request for Expedited Processing

EPIC is entitled to expedited processing of this request. 5 U.S.C. § 552(a)(6)(E)(v)(II). Under the DOJ’s FOIA regulations, a FOIA request should be granted expedited processing when 1) there is an “urgency to inform the public about an actual or alleged federal government activity,” and 2) where the request is “made by a person who is primarily engaged in disseminating information.” § 16.5(e)(1)(ii). This request satisfies both requirements.

First, there is an “urgency to inform the public about an actual or alleged federal government activity.” § 16.5(e)(1)(ii). The “actual or alleged federal government activity” at issue is the DOJ policy not to disclose communications with the President of the United States, cited by Attorney Sessions. On June 13, 2017, Mr. Sessions stated in an open hearing before the Senate Intelligence Committee that “it’s a long standing policy [of] the Department of Justice not to comment on conversations that the Attorney General has had with the President of the United States.”⁶

“Urgency” to inform the public about this activity is clearly established by the democratic and national security significance of the Attorney General’s refusal to answer Senators’ questions related to an investigation a foreign power’s attack on the U.S. Throughout the hearing, Mr. Sessions refused to claim executive privilege, only citing a “long standing policy” of the DOJ in support of his refusal to answer questions. Yet, as Senator King (D-NM) contended:

I don’t understand how you can have it both ways.... you’ve testified that only the president can assert [executive privilege] and yet I just don’t understand the legal basis for your refusal to answer.⁷

³ *Id.*

⁴ *Id.*

⁵ *Hearings, supra* note 1.

⁶ *Id.*

⁷ *Id.*

Indeed, Mr. Sessions would also not answer with certainty that this DOJ policy exists writing, stating only “I believe they are.”⁸

The Senate Intelligence Committee is investigating a “significant escalation” of Russian efforts to “undermine the US-led liberal democratic order.”⁹ As Senator Wyden (D-OR) said

[T]he American people have had it with stonewalling...

Americans don't want to hear the answers are privileged and off limits or they can't be provided in public or it would be inappropriate for witnesses to tell us what they know. We are talking about an attack on our democratic institutions and stonewalling of any kind is unacceptable.”¹⁰

Senator Sessions’ refusal to answer is “impeding this investigation,” said Senator Heinrich (D-NM).¹¹ The public has a right to know - and to know immediately - the full DOJ policy for protecting communications with the President from disclosure in order to ensure the administration is fully and fairly complying investigation into a foreign power’s attack on the U.S.

Second, EPIC is an organization “primarily engaged in disseminating information.” § 16.5(e)(1)(ii). As the 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).

In submitting this request for expedited processing, I certify that this explanation is true and correct to the best of my knowledge and belief. § 16.5(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. Dep’t of Def.*, 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 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 and is not primarily in the commercial interest” of EPIC. 28 C.F.R. § 16.10(k)(1); § 552(a)(4)(A)(iii). EPIC’s request satisfies the DOJ’s three factors for granting a fee waiver. § 16.10(k)(2).

First, this request self-evidently “concerns identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.” §

⁸ *Id.*

⁹ Office of the Dir. of Nat’l Intelligence, *Assessing Russian Activities and Intentions in Recent US Elections* ii (2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf.

¹⁰ *Hearings, supra* note 1.

¹¹ *Id.*

16.10(k)(2)(i). The requested documents concern a DOJ policy concerning the disclosure of communications with the United States President.

Second, disclosure is “likely to contribute significantly to public understanding of those operations or activities” according to the two sub-factors. § 16.10(k)(2)(ii)(A-B). As to the first sub-factor, disclosure would be “meaningfully informative about government operations or activities,” because the DOJ policy governing the disclosure of communications between the Attorney General and the White House have not been made public. § 16.10(k)(2)(ii)(A). Indeed, the ongoing confusion over the reach and applicability of the DOJ policy cited by Mr. Sessions, as well as the policy’s relationship to executive privilege, expressed by multiple U.S. Senators throughout Mr. Sessions’ testimony this week reveals that additional public disclosure concerning the DOJ policy is necessary. As to the second sub-factor, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject,” because, as stated in the DOJ FOIA regulations, components will “presume that a representative of the news media will satisfy this consideration.” § 16.10(k)(2)(ii)(B).

Third, disclosure of the requested information is not “primarily in the commercial interest” of EPIC according to the two sub-factors. § 16.10(k)(2)(iii)(A-B). As to the first sub-factor, EPIC has no “commercial interest...that would be furthered by the requested disclosure.” § 16.10(k)(2)(iii)(A). EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.¹² As to the second sub-factor, “the component must determine whether that is the primary interest furthered by the request” because, as stated in the FOIA regulations, the DOJ “ordinarily will presume that where a news media requester has satisfied [the public interest standard], the request is not primarily in the commercial interest of the requester.” § 16.10(k)(2)(iii)(B). As already described above, EPIC is a news media requester and satisfies the public interest standard.

For these reasons, a fee waiver should be granted.

Conclusion

Thank you for your consideration of this request. I anticipate your determination on our request within ten calendar days. 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(e)(4).

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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¹² *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.