

VIA EMAIL

March 22, 2018

Bobbie Parsons  
Immediate Office of the Secretary  
Office of Privacy and Open Government  
U.S. Department of Commerce  
14th and Constitution Avenue NW  
Mail Stop 52010FB  
Washington, DC 20230

Dear Ms. Parsons:

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

EPIC seeks all records related to the Department of Justice’s (“DOJ”) request to the agency to consider adding a citizenship question in the 2020 Census.

### Documents Requested

- (1) Records, including memorandum and communication, regarding any proposal to add a question about citizenship to the 2020 Census;
- (2) Briefing material prepared for Secretary Ross regarding the 2020 Census; and
- (3) Records, including memorandums and communications regarding the “15-20 considerations” that factor into the decision of whether to include a citizenship question to the 2020 Census, described by the Secretary during the March 22, 2018 hearing before the House Ways and Means Committee.

### Background

Secretary Wilbur Ross appeared today before the House Committee on Ways and Means.<sup>1</sup> During the hearing, Representative Judy Chu (D-CA) asked the Commerce Secretary whether the Department of Commerce is considering adding a citizenship question to the 2020 Census. Secretary Ross responded:

The Department of Justice, as you know, initiated the request for an inclusion of the citizenship question. We have been talking on the phone and received written

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<sup>1</sup> *Hearing with Commerce Secretary Ross Before the H. Comm. on Ways & Means*, 115th Cong. (2018), <https://waysandmeans.house.gov/event/hearing-commerce-secretary-ross/>.

correspondence from quite a lot of parties on both sides of that question. . . . We have not made a final decision as of yet because it is a very important and very complicated question. **We will make a decision by March 31<sup>st</sup>**, which is the date on which we're required to report to the Congress for final questions for the 2020 decennial census.<sup>2</sup>

When Representative Chu asked whether the Department of Commerce factored in the additional cost of adding this question, Secretary Ross stated:

Cost is one of the considerations. The comparison with the American Community Survey and annual sampling which does ask the question is another consideration. There are probably 15 or 20 different very complicated issues involved in the request. Because it is from the Department of Justice, we have taken it very seriously and we will issue a fulsome documentation of whatever conclusion we finally come to.<sup>3</sup>

The Census Bureau, which is a component agency of the Commerce Department, has not asked Americans about their citizenship status in almost 70 years.<sup>4</sup> Many experts have stated that asking this question could discourage people from participating in the census for fear that their personal data would be then be transferred to other government agencies.<sup>5</sup> In fact, a related EPIC Freedom of Information Act case revealed that the Census Bureau transferred personal data of Muslim Americans to the Department of Homeland Security after 9-11.<sup>6</sup>

In a memo by Census Bureau staff, researchers noted “a recent increase in respondents spontaneously expressing concerns about confidentiality” in their 2017 field test studies.<sup>7</sup> The researchers noticed a “new phenomenon” of increased fear among immigrant participants when sharing personal information with the government.<sup>8</sup>

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<sup>2</sup> *Id.* (emphasis added).

<sup>3</sup> *Id.*

<sup>4</sup> See 1950 (Population) Census Questionnaire, Census Bureau, [https://www.census.gov/history/www/through\\_the\\_decades/index\\_of\\_questions/1950\\_population.html](https://www.census.gov/history/www/through_the_decades/index_of_questions/1950_population.html) (asking the question “If foreign born, is the person naturalized?”).

<sup>5</sup> Michael Wines, Critics Say Questions About Citizenship Could Wreck Changes For An Accurate Census, New York Times (Jan. 2, 2018), <https://www.nytimes.com/2018/01/02/us/census-citizenship-status-immigrants.html>.

<sup>6</sup> See *Freedom of Information Documents on the Census: Department of Homeland Security Obtained Data on Arab Americans From Census Bureau*, EPIC.org, <https://epic.org/privacy/census/foia/>.

<sup>7</sup> Memorandum from Center for Survey Measurement to Associate Directorate for Research and Methodology 1 (Sept. 20, 2017), <https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-Concerns.pdf>.

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

Concerns surrounding the addition of this question are significant.<sup>9</sup> A decrease in census participation will produce data that is incomplete and unreliable, and could significantly alter how federal dollars are distributed and how congressional seats are allotted.<sup>10</sup>

### Request for Expedition

EPIC is entitled to expedited processing of this request. 15 C.F.R. § 4.6(f); 5 U.S.C. § 552(a)(6)(E)(v)(II). There is (1) an “urgency to inform the public about an actual or alleged Federal Government activity,” and this request (2) is “made by a person who is primarily engaged in disseminating information.” 15 C.F.R. § 4.6(f)(1)(iv).

First, there is an “urgency to inform the public about an actual or alleged Federal Government activity.” § 4.6(f)(1)(iv). The actual government activity is the agency’s decision to add a citizenship question to the 2020 Census. It is undisputed that the administration of the 2020 Census falls under the authority of the Census Bureau, a sub agency of the Department of Commerce. Secretary Ross has the authority to decide whether to include a new question in the census and has directly answered questions in his official capacity as to the current status of the census questionnaire.

There is an urgency to inform the public because the addition of a citizenship question could affect public participation in the 2020 Census, particularly in immigrant communities. A decrease in participation would skew census numbers and drastically change the outcome of Congress and ultimately, elections. Members of Congress and other officials have pushed back on the DOJ’s request to add a citizenship question to the 2020 Census. In a letter to Secretary Ross, Representatives Jose Serrano (D-NY) and Grace Meng (D-NY) have stated that adding this question “will negatively affect response rates, jeopardize the accuracy of the collected surveys, and deter many people from participating.”<sup>11</sup> Democratic Attorney Generals from 19 states as well as the Governor of Colorado sent a letter to Secretary Ross opposing the addition of the question, stating that “requesting citizenship data would undermine the Voting Rights Act and weaken voting rights enforcement.”<sup>12</sup>

The DOJ’s request to include the citizenship question in the census has sparked great public debate on the topic, particularly with an increase criticism that there is a politicization of the census count.<sup>13</sup> For example, the DOJ letter to the Department of Commerce asking that the

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<sup>9</sup> See *The Census and Privacy*, EPIC.org, <https://www.epic.org/privacy/census/>

<sup>10</sup> See Marisa Hotchkiss & Jessica Phelan, *Uses of Census Bureau Data in Federal Funds Distribution*, (U.S. Census Bureau, Working Paper Sept. 2017), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf>.

<sup>11</sup> Letter from Jose E. Serrano, Representative, N.Y. 15th Cong. Dist., et al, to Wilbur Ross, Secretary, Dep’t of Commerce (Jan. 4, 2018), <https://www.documentcloud.org/documents/4343863-FINAL-Census-Letter-to-Secretary-Wilbur-Ross.html>.

<sup>12</sup> Letter from Eric T. Schneiderman, Attorney General, New York, et al., to Wilbur Ross, Secretary, Dep’t of Commerce (Feb. 12, 2018), [https://oag.ca.gov/system/files/attachments/press\\_releases/multi-state\\_letter\\_2020\\_census.pdf](https://oag.ca.gov/system/files/attachments/press_releases/multi-state_letter_2020_census.pdf).

<sup>13</sup> See e.g., Tara Bahrapour, *Trump’s Reelection Campaign Calls for Adding Citizenship Question to 2020 Census Amid Criticism The He Is Politicizing The Count*, Washington Post (Mar. 20, 2018),

citizenship question be included in the census was written by John Gore, a Trump political appointee who has previously worked on defending Republic redistricting efforts around the country.<sup>14</sup>

By law, the Census Bureau has to provide Congress of the final wording of the census questionnaire by March 31<sup>st</sup>. The release of this information is critical to inform the public of the extent of deliberations in deciding whether to include the question in the 2020 Census.

Second, EPIC is an organization “primarily engaged in disseminating information.” § 4.6(f)(1)(iv). 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. 15 C.F.R. § 4.6(f)(3); 5 U.S.C. § 552(a)(6)(E)(vi).

#### Request for “News Media” Fee Status and Public Interest 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); *see* 15 C.F.R. § 4.11(b)(6). Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplication fees assessed. 15 C.F.R. § 4.11(c)(1); 5 U.S.C. § 552(a)(4)(A)(ii)(II).

Further, any duplication fees should also be waived because (i) “[d]isclosure 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 (ii) [d]isclosure of the information is not primarily in the commercial interest” of EPIC, the requester. 15 C.F.R. § 4.11(l)(i); § 552(a)(4)(A)(iii). The subject of the request concerns the Department of Commerce’s consideration in adding a citizenship question on the 2020 Census. Secretary Ross has publicly stated that the agency will make a decision as to whether to include the citizenship question by March 31, 2018, after weighing almost 20 different considerations. Very little information has been released to the public about what types of considerations are included in the deliberation and the procedural mechanisms used by the agency when deciding to include an

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[https://www.washingtonpost.com/local/social-issues/trump-campaign-calls-for-adding-citizenship-question-to-2020-census-amid-accusations-that-the-president-is-politicizing-the-annual-count/2018/03/20/dd5929fe-2c62-11e8-b0b0-f706877db618\\_story.html](https://www.washingtonpost.com/local/social-issues/trump-campaign-calls-for-adding-citizenship-question-to-2020-census-amid-accusations-that-the-president-is-politicizing-the-annual-count/2018/03/20/dd5929fe-2c62-11e8-b0b0-f706877db618_story.html); Lydia Wheeler, *Citizenship Question Drives Uncertainty Over 2020 Census*, The Hill (Feb. 6, 2018), <http://thehill.com/regulation/372445-citizenship-question-drives-uncertainty-over-2020-census>; Justin Elliot, *Census Rushes to Respond to Request to Add Citizenship Question*, ProPublica (Feb. 23, 2018), <https://www.propublica.org/article/census-rushes-to-respond-to-request-to-add-citizenship-question>; Hansi Lo Wang, *Adding Citizenship Question Risks ‘Bad Count’ for 2020 Census, Experts Warn*, NPR (Jan. 10, 2018), <https://www.npr.org/2018/01/10/575145554/adding-citizenship-question-risks-bad-count-for-2020-census-experts-warn>.

<sup>14</sup> Justin Elliot, *The Trump Appointee Behind The Move To Add A Citizenship Question To The Census*, ProPublica (Mar. 7, 2018), <https://www.propublica.org/article/john-gore-trump-appointee-citizenship-question-census>.

additional question that may not have been carefully field-tested. Disclosure of the requested records will contribute to the public understanding of the agency's decision-making process as well as meaningfully contribute to the already robust level of debate surrounding the 2020 Census.

As a news media requester, release of the requested records to EPIC will contribute to the understanding of a broad audience. EPIC consistently publishes critical documents obtained through the FOIA and through litigation on its website for educational purposes.<sup>15</sup> Moreover, EPIC publishes an award-winning email and online newsletter that always highlights critical documents obtained through the FOIA.<sup>16</sup> EPIC also has no commercial interest in the requested records because EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.<sup>17</sup>

For these reasons, a full fee waiver should be granted for EPIC's request.

### Conclusion

Thank you for your consideration of this request. I anticipate your determination on our request within ten calendar days. 15 C.F.R. § 4.6(f)(4); 5 U.S.C. § 552(a)(6)(E)(ii)(I). For questions regarding this request 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

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<sup>15</sup> EPIC.org, <https://www.epic.org/>.

<sup>16</sup> *EPIC Alert*, EPIC.org, <https://www.epic.org/alert/>.

<sup>17</sup> *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.