

VIA E-MAIL

July 30, 2018

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Dear Mr. Laster:

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 National Archives and Records Administration (“NARA”).

EPIC seeks records concerning Supreme Court nominee Brett M. Kavanaugh and various proposals for surveillance of the American public, created during his time at the White House as Associate Counsel and Senior Associate Counsel in 2001–2003 and then as Staff Secretary in 2003–2006.<sup>1</sup>

### Documents Requested

1. All records from the Collection “Staff Secretary, White House Office of the” in any Series containing “Kavanaugh, Brett” that were created on the following dates:
  - March 1–10, 2004
  - October 1 – December 31, 2004
  - December 1–31, 2005
2. All records from the Collection “Staff Secretary, White House Office of the” in any Series containing “Kavanaugh, Brett” that have titles containing any of these phrases:
  - “President’s Surveillance Program” or PSP
  - “Terrorist Surveillance Program” or TSP
  - STELLARWIND
  - “National Security Agency” or NSA

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<sup>1</sup> See George W. Bush Presidential Library and Museum, *White House Staff Member Office Files* (2018), <https://www.georgewbushlibrary.smu.edu/Research/Finding-Aids/White-House-Staff>.

- Michael Hayden
3. All records from the Collection “Counsel’s Office, White House Office of the” in any Series containing “Kavanaugh, Brett” that have titles containing any of these phrases:
    - “Total Information Awareness”
    - “Terrorist Information Awareness”
    - “Information Awareness Office”
    - Poindexter
  4. All records from the Collection “Staff Secretary, White House Office of the” in any Series containing “Kavanaugh, Brett” that have titles containing any of these phrases:
    - “airport scanners”
    - “Body Scanner”
    - “Whole Body Imaging”
    - “CAPPS-II”
    - “Registered Traveler”
    - “Secure Flight”
    - PNR
  5. All records from the Collection “Staff Secretary, White House Office of the” in any Series containing “Kavanaugh, Brett” that have titles containing any of these phrases:
    - “Patriot Act”
    - Ashcroft
    - Comey
  6. All records from the Collection “Staff Secretary, White House Office of the” in any Series containing “Kavanaugh, Brett” that have titles containing any of these phrases:
    - “REAL ID”
    - Privacy Act
    - Fusion Centers
  7. All records from the Collection “Staff Secretary, White House Office of the” in any Series containing “Kavanaugh, Brett” that have titles containing any of these phrases:
    - “Census data”

## Background

On July 9, 2018, President Trump nominated Judge Brett M. Kavanaugh to replace Justice Kennedy on the Supreme Court.<sup>2</sup>

Since 2006, Judge Kavanaugh has served on the U.S. Court of Appeals for the District of Columbia.<sup>3</sup> Prior to his appointment to the Court, Judge Kavanaugh served in the White House under the George W. Bush administration.<sup>4</sup> From 2001–2003, Judge Kavanaugh served as the Associate Counsel then Senior Associate Counsel and from 2003–2006 he served as Assistant and Staff Secretary to the President.<sup>5</sup> As Staff Secretary, Judge Kavanaugh played a key role in controlling the flow of documents in and out of the Oval Office and circulating documents to senior administration officials for comment. According to Rajesh De, former Staff Secretary to President Obama, the staff secretary “is the last person to review, comment on, or adjudicate differences with respect to material sent to the president, and may need to synthesize or explain differing points of view on issues of significance.”<sup>6</sup>

Many of the post-September 11 surveillance systems that were initiated and implemented occurred during Judge Kavanaugh’s time as Associate Counsel and then Staff Secretary to President George W. Bush. Mass surveillance systems such as the warrantless wiretapping program, Total Information Awareness, airport body scanners,<sup>7</sup> passenger profiling,<sup>8</sup> and the passage of the PATRIOT Act<sup>9</sup> and the REAL ID provisions.<sup>10</sup> These programs sparked widespread public opposition, and many were shut down after they were brought to light.

All of these programs were subject to high-profile public scrutiny, including intense media coverage, and would likely have been reviewed within the White House. For example, in November 2002, the New York Times reported that the Defense Advanced Research Projects Agency was developing a massive surveillance system called “Total Information Awareness,” that would “peek at personal data of Americans.”<sup>11</sup> The program was spearheaded by John

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<sup>2</sup> *President Donald J. Trump Announces Intent to Nominate Judge Brett M. Kavanaugh to the Supreme Court of the United States*, White House (July 9, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judge-brett-m-kavanaugh-supreme-court-united-states/>.

<sup>3</sup> *Brett M. Kavanaugh*, District of Columbia Circuit, U.S. Court of Appeals, <https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+BMK>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Charlie Savage, *Bush Claimed Power to Override a Torture Ban. What Did Brett Kavanaugh Think About That?*, N.Y. Times (July 29, 2018), <https://www.nytimes.com/2018/07/29/us/brett-kavanaugh-signing-statements.html>.

<sup>7</sup> EPIC, *Whole Body Imaging Technology and Body Scanners (“Backscatter” X-Ray and Millimeter Wave Screening)* (2018), <https://epic.org/privacy/airtravel/backscatter/>.

<sup>8</sup> EPIC, *Passenger Profiling* (2017), <https://www.epic.org/privacy/airtravel/profiling.html>.

<sup>9</sup> See EPIC, *USA PATRIOT Act* (2015), <https://www.epic.org/privacy/terrorism/usapatriot/>.

<sup>10</sup> See EPIC, *National ID and the REAL ID Act* (2017), [https://www.epic.org/privacy/id\\_cards/](https://www.epic.org/privacy/id_cards/).

<sup>11</sup> John Markoff, *Threats and Responses: Intelligence; Pentagon Plans a Computer System That Would Peek at Personal Data of Americans*, N.Y. Times (Nov. 9, 2002),

Poindexter, head of DARPA's new "Information Awareness Office." Admiral Poindexter resigned under increasing Congressional scrutiny and, on September 24, 2003, the President signed a budgetary bill that eliminated funding for the project and closed the Pentagon component office that developed the system.<sup>12</sup>

The "warrantless wiretapping" program, which was first revealed by the New York Times during Judge Kavanaugh's tenure as Staff Secretary, was one of the most controversial scandals of the Bush Presidency.<sup>13</sup> The program was first created in November 2001 and was tightly controlled by the White House until 2004, when Department of Justice officials were informed of its existence and called into question the legality of the program.<sup>14</sup> This led to a dramatic encounter between White House and Justice Department officials at the hospital bed of then-Attorney General John Ashcroft in March of 2004.<sup>15</sup> Reporters were prepared to publish an expose of the program in the fall of 2004, but officials working in the Bush White House convinced the New York Times to hold the story for more than 13 months.<sup>16</sup> Some have suggested that the decision impacted the outcome of the 2004 election.<sup>17</sup>

Materials of the Office of the Staff Secretary are under custody of NARA, which houses these records in the respective presidential library. The George W. Bush Presidential Library and Museum maintains records related to Judge Kavanaugh's service during the George W. Bush Administration. In particular, the Library holds textual records from the White House Counsel's Office and the White House Office of the Staff Secretary.<sup>18</sup>

### Request for Expedition

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<https://www.nytimes.com/2002/11/09/us/threats-responses-intelligence-pentagon-plans-computer-system-that-would-peek.html>.

<sup>12</sup> H.R. Rep. 108-283, at 327 (2003) (Conf. Rep.), <https://www.congress.gov/108/crpt/hrpt283/CRPT-108hrpt283.pdf>.

<sup>13</sup> James Risen & Eric Lichtblau, *Bush Let U.S. Spy on Callers Without Courts*, N.Y. Times (Dec. 16, 2005), <https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html>.

<sup>14</sup> See Office of Inspector General, Report No. 2009-0013-AS *Unclassified Report on the President's Surveillance Program 1* (July 10, 2009), available at <https://oig.justice.gov/special/s0907.pdf>; EPIC, *EPIC v. DOJ – Warrantless Wiretapping Program* (2017), <https://epic.org/privacy/nsa/foia/>.

<sup>15</sup> Colleen Shalby, *Comey, Mueller and the Showdown at John Ashcroft's Hospital Bed*, L.A. Times (May 17, 2017), <http://www.latimes.com/politics/la-na-pol-mueller-comey-ashcroft-domestic-surveillance-20170517-story.html>.

<sup>16</sup> James Risen, *The Biggest Secret*, The Intercept (Jan. 3, 2018), <https://theintercept.com/2018/01/03/my-life-as-a-new-york-times-reporter-in-the-shadow-of-the-war-on-terror/>. See also, Paul Fahri, *At the Times, a Scoop Deferred*, Wash. Post (Dec. 17, 2005) ("the Times said in its story that it held off publishing the 3,600-word article for a year after the newspaper's representatives met with White House officials."), <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/16/AR2005121601716.html>.

<sup>17</sup> Margaret Sullivan (Public Editor), *Lessons in a Surveillance Drama Redux*, N.Y. Times (Nov. 9, 2013), <https://www.nytimes.com/2013/11/10/public-editor/sullivan-lessons-in-a-surveillance-drama-redux.html>.

<sup>18</sup> See George W. Bush Presidential Library and Museum, *George W. Bush Presidential Library – Collections Guide to Open Records* (2018), <https://www.georgewbushlibrary.smu.edu/Research/Finding-Aids/~media/40CC3E16C0454A80B995B7F9EBDD61B5.ashx>.

EPIC is entitled to expedited processing of this request under the FOIA and the NARA's FOIA regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 36 C.F.R. § 1250.28. Specifically, this request is entitled to expedited processing because, first, there is an "urgent need to inform the public about an actual or alleged Federal Government activity" and, second, because the request is "a matter of widespread . . . interest in which there exist possible questions that affect public confidence in the Government's integrity." 36 C.F.R. §§ 1250.28(3)–(4).

First, there is an "urgent need to inform the public about an actual or alleged Federal Government activity" 36 C.F.R. § 1250.28(3). The "actual . . . federal government activity" at issue is Judge Kavanaugh's participation in the post-September 11 mass surveillance systems during his tenure as the White House Associate Counsel and Senior Counsel, and as Staff Secretary. As Associate Counsel and then Senior Associate Counsel, Judge Kavanaugh provided "legal guidance on administration policy and administrative matters to the President and White House staff."<sup>19</sup> As Staff Secretary, Judge Kavanaugh acted as "a clearinghouse for nearly all documents intended for the President, and for any paperwork to be disseminated among administration officials."<sup>20</sup>

The "urgent" need to inform the public about this activity is clear given the significance of the pending confirmation hearing for the Supreme Court. On July 26, 2018, Senate Minority Leader Chuck Schumer (D-NY) wrote a letter to former President George W. Bush to request the complete release of all Judge Kavanaugh's records during his service in the White House and noted that his Republican colleagues in the Senate refuse to sign a bipartisan document requesting the full release.<sup>21</sup> On July 27, 2018, Senate Judiciary Committee Chairman Chuck Grassley (R-IA) sent a letter to the George W. Bush Presidential Library and Museum to request Judge Kavanaugh's records when he served as White House counsel and documents related to his nomination to the U.S. Court of Appeals for the D.C. Circuit.<sup>22</sup> The request did not include records from the period where Judge Kavanaugh served as Staff Secretary.

Judge Kavanaugh's Supreme Court confirmation hearing will likely be scheduled in the coming weeks.

This urgency criterion in granting an expedition applies because EPIC is an organization "primarily engaged in disseminating information to the public." 36 C.F.R. § 1250.28(3). 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 the FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

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<sup>19</sup> *Id.* at 1.

<sup>20</sup> *Id.* at 4.

<sup>21</sup> Letter from Chuck Schumer, Senator (D-NY), to George W. Bush, former President of the U.S. (July 26, 2018), *available at* [http://media1.s-nbcnews.com/i/today/z\\_creative/SchumerLettertoBushKavanaughDocs.pdf](http://media1.s-nbcnews.com/i/today/z_creative/SchumerLettertoBushKavanaughDocs.pdf).

<sup>22</sup> Letter from Chuck Grassley, Chairman, S. Judiciary Comm., to Patrick X. Mordente, Director, George W. Bush Presidential Library and Museum (July 27, 2018), <https://www.judiciary.senate.gov/imo/media/doc/2018-07-27%20Grassley%20to%20General%20Mordente%20-%20Special%20Access%20to%20Kavanaugh%20Records.pdf>.

Second, this request is “a matter of widespread . . . interest in which there exist possible questions that affect public confidence in the Government’s integrity.” 36 C.F.R. § 1250.28(4). In 2006, there was strong bipartisan support to request a full and complete record of then Supreme Court nominee Elena Kagan’s service at the White House. During her nomination process, NARA released tens of thousands of pages from Justice Kagan’s service under the Clinton Administration and the public, along with the Senate, was able to review her full records and make an informed decision regarding her nomination. The partisan divide over the extent of review of Judge Kavanaugh’s paper trail could stall the nomination proceedings and affect public confidence in Senate’s ability to impartially and fairly review the record of a nominee for a lifetime appointment to the Supreme Court. A Pew Research survey states that 83% of Americans consider the choice for the next Supreme Court justice is very or somewhat important to them.<sup>23</sup> Senator Patrick Leahy strongly criticized the Senate Judiciary’s incomplete records request stating:

Even for the records that Senate Republicans are seeking, they did not request that the administration tell us what specific documents they are withholding and the basis for doing so. This tainted process and half-production are all the more troubling because the last time Judge Kavanaugh testified before the Senate, he appeared to provide a misleading account of his work on torture and detainee policies in the White House. . . . Senate Republicans are hiding relevant documents from the American people and putting party over country. The American people—whose lives will be shaped for a generation by Judge Kavanaugh if he is confirmed—deserve better.<sup>24</sup>

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 U.S.C. § 552(a)(6)(E)(vi); 36 C.F.R. § 1250.28(c).

#### 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); 36 C.F.R. § 1250.54(b).

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. 5 U.S.C. §

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<sup>23</sup> Americans Divided on Kavanaugh’s Nominations to the Supreme Court, Pew Research Center (July 17, 2018), <http://www.people-press.org/2018/07/17/americans-divided-on-kavanaughs-nomination-to-the-supreme-court/>.

<sup>24</sup> Press Release, Patrick Leahy, Senator for Vermont, Leahy Comment on the Senate Judiciary Committee’s Incomplete Records Request for Judge Brett Kavanaugh (July 27, 2018), <https://www.leahy.senate.gov/press/072718kavanaughrecordsrequest>.

552(a)(4)(A)(iii); 36 C.F.R. § 1250.56(a). EPIC's request satisfies this standard based on the NARA's considerations for granting a fee waiver. 36 C.F.R. §§ 1250.56(a)(1)–(2).

*(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 is in the public interest because it “is likely to contribute significantly to public understanding of the operations or activities of the Government.” 36 C.F.R. § 1250.56(a)(1). The NARA components evaluate these six factors to determine whether this requirement is met: (i) the subject of the request “pertain[s] to the operation and activities of the Federal Government”; (ii) disclosure “will reveal meaningful information that the public does not already know about Federal Government activities”; (iii) disclosure will “advance public understanding of the issue”; (iv) the requester’s “expertise or understanding of the requested records as well as [the requester’s] ability and intention to effectively convey information to the public”; (v) the requester’s intent “to disseminate the requested information to a broad spectrum of the public”; and (vi) disclosure “will lead to a significantly greater understanding of the Government by the public.” § 1250.56(b).

On the first factor, the subject of the request self-evidently concerns identifiable “operations or activities of the federal government.” 36 C.F.R. § 1250.56(b)(i). Judge Kavanaugh served as the former White House Counsel and Staff Secretary to President George W. Bush. Records related to his service are maintained and preserved at the George W. Bush Presidential Library and Museum.

On the second factor, disclosure “will reveal meaningful information that the public does not already know about Federal Government activities” because little information has been released about Judge Kavanaugh’s participation in mass surveillance while serving as counsel and staff secretary for President Bush. 36 C.F.R. § 1250.56(b)(ii). The release will be meaningfully informative because the public will be able to gain valuable insight into Judge Kavanaugh’s legal thinking.

On the third factor, disclosure will “advance public understanding of the issue” because little information is known about Judge Kavanaugh’s tenure in the White House, other than highly redacted material released by the George W. Bush Presidential Library and Museum. 36 C.F.R. § 1250.56(b)(iii). Judge Kavanaugh has stated that his time serving as Staff Secretary was “the most interesting and, in many ways, among the most instructive” to his work as a judge.<sup>25</sup> The release of this information will allow the public to understand how his service as Staff Secretary shaped his viewpoints as a legal scholar and provide insight into how he might rule if confirmed to the Supreme Court.

On the fourth factor, as provided in the NARA FOIA regulations, the NARA components will “presum[e] that a representative of the news media satisfies this consideration.” 36 C.F.R. §

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<sup>25</sup> Jessica Gresko, *Senators Spar on Access to Kavanaugh’s Staff Secretary Work*, AP (July 27, 2018), <https://www.apnews.com/4e272e40fe914e19a1d67212bae99056/Senators-spar-on-access-to-Kavanaugh's-staff-secretary-work>.

1250.56(b)(iv). As previously stated, EPIC is considered a representative of the news media for fee calculation purposes. *EPIC v. Dep't of Defense*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

On the fifth factor, EPIC intends “to disseminate the requested information to a broad spectrum of the public.” 36 C.F.R. § 1250.56(b)(v). EPIC consistently publishes important documents obtained through the FOIA and through litigation on its robust website.<sup>26</sup> EPIC publishes an award-winning email and online newsletter that always highlights the critical documents obtained through the FOIA.<sup>27</sup> EPIC’s FOIA work has also been featured in numerous national news publications.<sup>28</sup>

Finally, on the sixth factor, disclosure “will lead to a significantly greater understanding of the Government by the public” because again, there is little information publicly available about Judge Kavanaugh’s role as Counsel and Staff Secretary during the period in which the Bush Administration oversaw mass surveillance systems of significant concern to the public. 36 C.F.R. § 1250.56(b)(vi).

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

Second, disclosure of the information “is not primarily in [EPIC’s] commercial interest.” 36 C.F.R. § 1250.56(a)(2). EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.<sup>29</sup> EPIC has no commercial interest in the requested records and has established that there is significant public interest in the requested records.

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. 5 U.S.C. § 552(a)(6)(E)(ii)(I); 36 C.F.R. § 1250.28(d). For questions regarding this request contact Enid Zhou at 202-483-1140 x104 or Zhou@epic.org, cc: FOIA@epic.org.

Respectfully submitted,

*/s Enid Zhou*

Enid Zhou

EPIC Open Government Fellow

*/s Natasha Babazadeh*

Natasha Babazadeh

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<sup>26</sup> EPIC.org, <https://www.epic.org/>.

<sup>27</sup> EPIC, *EPIC Alert*, <https://www.epic.org/alert/>.

<sup>28</sup> See *EPIC in the News*, EPIC.org, [https://epic.org/news/epic\\_in\\_news.php/](https://epic.org/news/epic_in_news.php/).

<sup>29</sup> *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.

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/s Alan Butler

Alan Butler

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