

May 16, 2019

President Donald J. Trump
The White House
1600 Pennsylvania Ave. NW
Washington, DC 20500

Dear Mr. President:

We write to you regarding the form that was placed on the White House website concerning social media platforms and the freedom of speech.¹ The White House seeks to collect detailed sensitive personal information, yet there is no indication that privacy interests were considered. The White House form also raises substantial First Amendment concerns. For reasons explained below, we believe that this data collection is unlawful, unconstitutional, and itself a violation of the First Amendment. We ask you to suspend this collection of personal data pending further review.

Privacy Obligations for Collecting Personal Data

On the White House form, respondents are asked to provide detailed, personal data, including first name, last name, email address, citizenship status, age, phone number, personally identifiable profile links to social media platforms (including Facebook, Instagram, Twitter, and YouTube), unique usernames, and user posts and tweets.

According to Typeform, the third-party website where the White House chose to host the form, additional personal data is also collected “on behalf of Typeform users,” including device and application data such as IP address, browser type, and operating system.² The company also collects, on behalf of Typeform users, referral data about the source that referred the respondent to the form, such as a link on a website or in an email. Typeform uses third-party tracking services that employ cookies and web bugs to collect data about visitors. The company notes that it may “infer the geographic location based on the Respondent IP address.” These techniques allow the White House to collect personal data about individuals who may not intend to provide any personal information to the government.

As you may be aware, the collection and use of personal information by the federal government implicates fundamental rights. Federal agencies that collect such data are required to conduct a Privacy Impact Assessment before initiating a new collection of personal information.³

¹ <https://whitehouse.typeform.com/to/Jti9QH>.

² Typeform, Privacy Policy, <https://admin.typeform.com/to/dwk6gt/>.

³ E-Government Act, Pub. L. No. 107-347, § 208, 116 Stat. 2899, 2921 (Dec. 17, 2002) (codified at 44 U.S.C. § 3501 note).

Federal agencies that create record systems are also required to publish a notice in the Federal Register.⁴

A Privacy Impact Assessment requires all federal agencies that seek to collect and use personal data to identify and evaluate:

- What information is to be collected;
- Why the information is being collected;
- The intended use of the information;
- With whom the information will be shared;
- What notice or opportunities for consent will be provided to individuals;
- How the information will be secured;
- What the privacy risks of collecting and using the information will be;
- Whether alternate processes would better mitigate the privacy risks of collection;
- Whether a system of records is being created under the Privacy Act.

Agencies are then expected to review the assessment and to determine whether collection is necessary and appropriate. A Privacy Impact Assessment may lead an agency to modify or withdraw a proposed data collection. The agency is also required to publish the Privacy Impact Assessment for review.

There is no indication that the White House undertook a Privacy Impact Assessment prior to the decision to collect this sensitive personal information.

The collection of personal information regarding First Amendment protected speech by the government is of particular concern. The Privacy Act, which governs the conduct of all federal agencies, simply prohibits it.⁵ This follows from an important Supreme Court decision which made clear that efforts by the government to collect information about the political values of citizens poses a direct threat to the First Amendment and our constitutional form of government.⁶

Absent the required Privacy Impact Assessment, this collection of personal data by the federal government is unlawful. The fact that the data collection concerns First Amendment activity underscores the need to suspend collection pending a thorough review.

The First Amendment and the Right of Anonymity

The United States Supreme Court has made clear that the people have the right to express their views without being required to reveal their actual identities.⁷ As the Court has noted, the

⁴ 5 U.S.C. § 552a(e)(4).

⁵ 5 U.S.C. § 552a(e)(7) (“Each agency that maintains a system of records shall . . . maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity[.]”)

⁶ *Baird v. State Bar of Ariz.*, 401 U.S. 1 (1971).

⁷ *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002).

Federalist Papers—among the foundational documents of the U.S. government—were published under pseudonyms precisely because the authors feared retribution.⁸

The form that appears on the White House website regarding concerns about the First Amendment requires each respondent to provide their first name, their last name, and a yes/no response to the question of whether they are “a U.S. citizen or permanent resident.” Asterisks indicate that these are required fields. And if the respondent fails to provide any of this information, the following message appears:

Unfortunately, we can't gather your response through this form.
Please feel free to contact us at [WhiteHouse.gov/contact](https://www.whitehouse.gov/contact).

This collection of personal data occurs before the individual has even decided what he or she might say to the federal government about the sensitive issue of First Amendment freedoms.

If—and only if—the individual provides identifying personal information to the government, their views may be subsequently conveyed to the White House. This is itself a violation of the First Amendment right to express political views without a requirement of identification by the government. It is unlawful and unconstitutional.

The First Amendment and Non-Citizens

There is a second First Amendment problem with the form. The form asks respondents to indicate whether they or not they are “citizens or permanent residents.” But the First Amendment makes no such distinction. As the Supreme Court has long emphasized, “Freedom of speech and of press is accorded aliens residing in this country.”⁹

The presence of this question on a survey concerning the First Amendment suggests that personal data is, in fact, being gathered for purposes unrelated to the First Amendment. This is similar to the recent decision of the Census Bureau to add a question about citizenship the 2020 Census for purposes unrelated to the tabulation of the census. That decision has led to multiple lawsuits.¹⁰

In 2017, Vice President Pence undertook to collect state voter without first conducting a Privacy Impact Assessment. That effort was widely opposed. The Presidential Advisory Commission on Election Integrity was eventually shuttered and the data unlawfully obtained was deleted.¹¹

Americans across the country share a deep commitment to the First Amendment and the protection of personal privacy. The White House should protect these fundamental rights.

⁸ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995).

⁹ *Bridges v. Wixon*, 326 U.S. 135, 148 (1945).

¹⁰ *E.g.*, *EPIC v. U.S. Dep't of Commerce*, No. 19-5031 (D.C. Cir. argued May 8, 2019).

¹¹ Fifth Decl. of Charles C. Herndon, *EPIC v. Presidential Advisory Comm'n on Election Integrity*, No. 17-1320 (D.D.C. Aug. 20, 2018), available at <https://epic.org/privacy/litigation/voter/epic-v-commission/EPIC-v-Commission-fifth-Herndon-declaration-082018.pdf>.

We appreciate your consideration of our views. We urge you to suspend this data collection pending a thorough review of the legal and constitutional interests.

Sincerely,

/s/ Marc Rotenberg
Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald
Caitriona Fitzgerald
EPIC Policy Director

/s/ Jeramie Scott
Jeramie Scott
EPIC Senior Counsel

/s/ John Davisson
John Davisson
EPIC Counsel

Cc: The Honorable Lindsey Graham, Chairman, Senate Committee on the Judiciary
The Honorable Dianne Feinstein, Ranking Member, Senate Committee on the Judiciary
The Honorable Jerry Nadler, Chairman, House Committee on the Judiciary
The Honorable Doug Collins, Ranking Member, House Committee on the Judiciary
The Honorable Elijah Cummings, Chairman, House Committee on Oversight and Reform
The Honorable Jim Jordan, Ranking Member, House Committee on Oversight and Reform
The Honorable Ron Johnson, Chairman, Senate Committee on Homeland Security and Governmental Affairs
The Honorable Gary Peters, Ranking Member, Senate Committee on Homeland Security and Governmental Affairs