

VIA E-MAIL

Sept. 11, 2017

Kevin Krebs, Assistant Director, FOIA/Privacy Staff
Executive Office for United States Attorneys
Department of Justice
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Dear Mr. Krebs,

This letter constitutes an urgent 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 Executive Office for United States Attorneys (“EOUSA”).

EPIC seeks records in possession of the EOUSA concerning the efforts of the Presidential Commission on Election Integrity’s (the “Commission) and its Chair to collect personal data from the EOUSA, as discussed during the July 19, 2017 Commission meeting.¹

Background

On June 28, 2017, the Vice Chair of the Commission attempted to collect detailed voter histories from all fifty states and the District of Columbia. In letters to state officials, the Commission sought:

the full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information.²

¹ Meeting Notice, 82 Fed. Reg. 31,063 (July 5, 2017).

² See, e.g. Letter from Kris Kobach, Vice Chair, Presidential Advisory Comm’n on Election Integrity, to Hon. Elaine Marshall, Sec’y of State, N.C. (June 28, 2017), <https://www.documentcloud.org/documents/3881856-Correspondence-PEIC-Letter-to-North-Carolina.html>.

While the Commission suspended the collection following EPIC lawsuit *EPIC v. Commission*, No. 17-1320 (D.D.C. filed July 3, 2017), on July 26, 2017 Mr. Kobach renewed the Commission's attempt to collect state voter data.³

On July 19, 2017, the Commission held its first meeting and discussed the collection of data from other federal agencies, including the EOUSA.⁴ Commission member Hans Anatol von Spakovsky expanded on "other data that [he] think[s] we need to get" from federal databases.⁵ Mr. Von Spakovsky specifically indicated the Commission's interest in the EOUSA's data:

We also need to find out from the U.S. Attorney's offices all across the country whether they are complying with a provision in the National Voter Registration Act which requires U.S. Attorneys to send information about felony convictions obtained in federal court to state election officials so those state election officials in states that take away the right to vote, whether you are convicted of a felony conviction, whether they have that information available. My understanding is that many of the U.S. Attorney's offices across the country pay no attention to this federal requirement.⁶

Vice Chair Kobach responded by tasking Commission staff with collecting this data before the next Commission meeting:

If there's no objection from the Commission, I think that might be one task we can delegate to staff is to, in the interim between now and the next meeting and the next meeting, is to start trying to collect whatever data there is that's already in the possession of the federal government that might be helpful to us.⁷

The Vice Chair has elsewhere made clear his intent to collect federal data, stating "You start where the evidence is.... the federal government has that evidence," and that the "Commission will gather national level data and present it to the public."⁸ "Why not collect evidence and just get the facts on the table?" Mr. Kobach has said.⁹

³ Letter from Kris Kobach, Vice Chair, Presidential Advisory Comm'n on Election Integrity, to John Merrill, Sec'y of State, Ala. (July 26, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/letter-vice-chair-kris-kobach-07262017.pdf>.

⁴ 82 Fed. Reg. 31,063.

⁵ *Presidential Advisory Commission on Election Integrity, Mission, Procedures and Topics for Consideration*, C-Span (July 19, 2017), <https://www.c-span.org/video/?431521-3/presidential-advisory-commission-election-integrity-mission-procedures-topics-consideration&start=1831>.

⁶ *Id.*

⁷ *Id.*

⁸ *Kris Kobach talks his role on Trump's voter fraud commission*, Fox News (May 12, 2017), <http://video.foxnews.com/v/5431579603001/>.

⁹ *Voting Commissioner Kris Kobach Defends U.S. Request For Voter Information*, NPR (June 30, 2017), <http://www.npr.org/2017/06/30/535059231/voting-commissioner-kris-kobach-defends-u-s-request-for-voter-information>.

EPIC now seeks one category of records from EOUSA concerning the Commission's attempts to collect EOUSA data.

Documents Requested

All communications between the Commission and / or its chair and the EOUSA concerning the transfer of personal data from the agency to the Commission.

Request for Expedited Processing

EPIC is entitled to expedited processing of this request under the FOIA and the DOJ's FOIA regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(e)(1)(ii). 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" federal government activity at issue is Commission's attempt to sensitive data stored in EOUSA databases. The Commission expressly determined commission staff would seek federal data, including EOUSA data on its July 19th meeting.¹⁰

"Urgency" to inform the public about this activity is also clear given the personal nature of the data the Commission seeks, combined with grave questions about the Commission's data security, privacy, and transparency practices. The Commission seeks personal data is almost certainly protected by the Privacy Act, which restricts disclosure of personal data maintained by federal agencies. 5 U.S.C. § 552a. Nonetheless, the Commission's treatment of data security, privacy, and transparency interests has consistently fallen short. The Commission previously employed insecure methods for receipt of personally identifiable information,¹¹ published individual e-mails to the Commission and personal information without warning,¹² and delayed publishing the information required by the Federal Advisory Committee Act (FACA). The Commission will hold its second meeting on September 12, 2017.¹³ Ahead of that meeting, the public must know whether, how, and for what purpose a federal Commission is seeking new personal data from EOUSA, and how the federal agency has responded to any attempt to collect this data.

¹⁰ *Presidential Advisory Commission on Election Integrity*, *supra* note 5.

¹¹ Lewis Decl. Ex. 11., *EPIC v. Commission*, No. 17-1320 (D.D.C. filed July 3, 2017).

¹² Christopher Ingraham,

White House releases sensitive personal information of voters worried about their sensitive personal information, Wash. Post (July 14, 2017),

https://www.washingtonpost.com/news/wonk/wp/2017/07/14/white-house-releases-sensitive-personal-information-of-voters-worried-about-their-sensitive-personal-information/?utm_term=.f28429bc2cb0.

¹³ Meeting Notice, 82 Fed. Reg. 40,581 (Aug. 25, 2017).

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’” 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. § 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. 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). *See also* 28 C.F.R. § 16.10(c).

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, the requester. 28 C.F.R. § 16.10(k)(1); § 552(a)(4)(A)(iii). EPIC’s request satisfies this standard based on the DOJ’s considerations for granting a fee waiver. § 16.10(k)(2).

DOJ components, including EOUSA, evaluate three considerations to determine whether this requirement is met: (i) the “subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated”; (ii) disclosure must be “likely to contribute significantly to public understanding of those operations or activities”; and (iii) “disclosure must not be primarily in the commercial interest of the requester.” §§ 16.10(k)(2)(i)–(iii).

(1) The subject of the request concerns identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

First, disclosure of information about EOUSA’s communication with the Commission “concerns identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.” § 16.10(k)(2)(i). The requested documents self-evidently relate to federal government activities. The requested documents involve the EOUSA’s communication with a federal commission concerning the transfer of data stored in federal databases.

(2) Disclosure of the information will likely to contribute significantly to public understanding of the Federal Government’s operations or activities.

Second, disclosure of the requested documents “would be likely to contribute significantly to public understanding of those operations or activities” when two sub-factors are met. §

16.10(k)(2)(ii)(A-B). As to the first sub-factor, disclosure would be “meaningfully informative about” these government operations or activities because while the Commission stated an intent to pursue multiple types of federal data, including EOUSA-housed data, no further information has been forthcoming from EOUSA or the Commission about the status of any data transfer. §16.10(k)(2)(ii)(A). 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 DOJ’s FOIA regulations, components will “presume that a representative of the news media will satisfy this consideration.” § 16.10(k)(2)(ii)(B). Little is known about the EOUSA’s communication with, or potential or completed transfer of data to the Commission. The disclosure of such requested materials will, as a result, be meaningfully informative and is likely to contribute to the public understanding of the EOUSA’s operations or activities.

(3) Disclosure of the information is not primarily in the commercial interest of the requester.

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.¹⁴ 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, DOJ components “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. As provided in 5 U.S.C. § 552(a)(6)(E)(ii)(I), I anticipate your determination on our request within ten calendar days. 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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EPIC Fellow

/s/ Enid Zhou

Enid Zhou
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¹⁴ About EPIC, <https://epic.org/epic/about.html>.