

March 13, 2019

The Honorable Elijah E. Cummings, Chairman
The Honorable Jim Jordan, Ranking Member
U.S. House Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Cummings and Ranking Member Jordan:

We write to you in advance of the hearing “FOIA: Examining Transparency Under the Trump Administration”¹ to share our perspective and Freedom of Information Act (“FOIA”) work. The Electronic Privacy Information Center (“EPIC”) is a nonpartisan research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.² EPIC is a leading advocate for open government and democratic values in the information age. We value FOIA and the work of this committee to promote open government.

The FOIA is critical for the functioning of democratic government because it helps ensure that the public is fully informed about matters of public concern. Public awareness of our government's activity through the FOIA not only allows for a more informed public debate over new surveillance proposals, but also ensures accountability for government officials. Public debate fosters the development of more robust security systems and leads to solutions that better respect the nation's democratic values. EPIC's FOIA litigation has resulted in disclosure of critical information about the activities of the government. Our litigation has also generated case law that benefits the FOIA requesters and the open government community across the country.

EPIC's FOIA Work – The 2019 FOIA Gallery

Since 2001, EPIC has produced an annual FOIA gallery in honor of Sunshine Week to highlight EPIC's FOIA achievements over the past year. For EPIC's Open Government Project, 2018 was a year filled with great success stories.³ A 2018 report from the TRAC FOIA Project shows that EPIC is among the nation's leading FOIA litigators, ranking fifth among nonprofit and advocacy groups nationwide.⁴ In 2018, EPIC obtained formerly secret records from government agencies including the CBP, DHS, FTC, IRS, and prevailed in several leading FOIA cases. Below are a few highlights of EPIC's recent FOIA work:

¹ *FOIA: Examining Transparency Under the Trump Administration*, House Comm. on Oversight and Government Reform, 116th Cong. (March 13, 2019), <https://oversight.house.gov/legislation/hearings/foia-examining-transparency-under-the-trump-administration>.

² See EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

³ EPIC, *FOIA Gallery 2019*, <https://epic.org/foia/gallery/2019/>.

⁴ TRAC FOIA Project, *FOIA Suits Filed by Nonprofit/Advocacy Groups Have Doubled Under Trump* (Oct. 18, 2018), <http://foiaproject.org/2018/10/18/nonprofit-advocacy-groups-foia-suits-double-under-trump/>

EPIC Obtains CPB Documents Detailing Scramble to Implement Flawed Biometric Entry-Exit Program

In response to EPIC's Freedom of Information Act request, U.S. Customs and Border Protection released 346 pages of documents detailing the agency's scramble to implement its flawed Biometric Entry-Exit system, a system that employs facial recognition technology on travelers entering and exiting the country. The documents obtained by EPIC describe the administration's plan to extend the faulty pilot program to major U.S. airports. We obtained a memorandum of understanding that indicates that there are few limits on how airlines can use the facial recognition data collected at airports.

The documents obtained by EPIC were covered in-depth by BuzzFeed this week.⁵ And subsequent to the BuzzFeed article about the FOIA disclosure, Senator Markey (D-MA) and Senator Lee (R-UT) called for the CBP to suspend facial recognition at the border to ensure that travelers are able to opt-out of facial recognition if they wish. Without the FOIA, it would simply not be possible for EPIC to uncover -- and for Congress to stop - this unlawful expansion of surveillance programs implicating the privacy rights of Americans.

EPIC Obtains Communications Between Facebook-FTC About 2011 Consent Order Showing FTC's Failure to Enforce the Order

As a result of Freedom of Information Act lawsuit *EPIC v. FTC*, EPIC received communications from the Federal Trade Commission about Facebook's failure to comply with the 2011 Consent Order.⁶ The documents show that the FTC failed to act on evidence that Facebook violated the consent order. Even when the FTC did see evidence of violations, widely reported in the national media, the Commission did not use its specific legal authority to oversee Facebook. Instead, the FTC provided gentle reminders to Facebook about the company's obligations under the order and amiably inquired about these possible violations, often taking Facebook's word at face value without additional follow up or inquiry. In 2015, Facebook discovered that Cambridge Analytical harvested data of millions of Facebook users because of the company's failure to police the use of personal data it disclosed to third parties. But none of the documents released to EPIC indicate that Facebook notified the FTC of this finding—a clear violation of the consent order. The 2017 Assessment, conducted by third party auditor PwC, also erroneously certified that the privacy controls were operating with “sufficient effectiveness,” during the same period as the massive Cambridge Analytica data breach.

EPIC has since launched a campaign -- #EnforceTheOrder, @FTC – to urge the Commission to finally take action against Facebook. Again, documents obtained by EPIC under the FOIA have made possible public oversight of government functions.

⁵ Davey Alba, *The US Government Will Be Scanning Your Face At 20 Top Airports, Documents Show* (Mar. 11, 2019), <https://www.buzzfeednews.com/article/daveyalba/these-documents-reveal-the-governments-detailed-plan-for>.

⁶ *EPIC v. FTC (Facebook Assessments)*, <https://epic.org/foia/ftc/facebook/>.

In EPIC v. IRS, Appeals Court Rules IRS ‘Misunderstands’ FOIA Obligations, but Trump’s Tax Returns Still Withheld

In the Freedom of Information Act lawsuit *EPIC v. IRS*, the D.C. Circuit ruled that the IRS “misunderstands its FOIA disclosure obligations.”⁷ This is one of two EPIC cases filed to obtain public release of President Trump's tax returns. EPIC argued that the IRS has the authority, under a legal provision known as “(k)(3),” to disclose the President's returns to correct numerous misstatements of fact concerning his financial ties to Russia. For example, President Trump falsely tweeted that “Russia has never tried to use leverage over me. I HAVE NOTHING TO DO WITH RUSSIA - NO DEALS, NO LOANS, NO NOTHING.” It has been well documented through news outlets and in Special Counsel Mueller’s investigation that President Trump had ties to Russia. Although the D.C. Circuit ruled that EPIC could not compel the IRS to use “(k)(3),” the Court rebuked the IRS for “disregard[ing] the plain statutory text” of FOIA and held that EPIC's request was wrongly “met with a closed door.”

The public release of the President’s tax returns remains a vital concern to ensure that the private interests of the President have not trumped the public interests of the people.

We ask that our statement be entered into the hearing record. Please feel free to contact us if you would like additional information about EPIC’s FOIA matters. We look forward to working with the Committee on open government issues of vital importance to the public.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg
EPIC President

/s/ Enid Zhou

Enid Zhou
EPIC Open Government Counsel

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald
EPIC Policy Director

⁷ *EPIC v. IRS (Donald Trump's Tax Records)*, <https://epic.org/foia/irs/trump-taxes/>.