

VIA EMAIL

July 31, 2019

Bobbie Parsons
Acting Deputy Chief FOIA Officer
Immediate Office of the Secretary
Office of Privacy and Open Government
U.S. Department of Commerce
1401 Constitution Avenue, NW
Mail Stop 61013
Washington, DC 20230
eFOIA@doc.gov

Dear Ms. Parsons:

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

EPIC seeks documents about planned transfers of citizen information from several agencies in the executive branch to the Department of Commerce.

Documents Requested

EPIC seeks the following categories of records created between 2017 and the present:

1. All records, including but not limited to communications and memorandums, about the creation and implementation of Executive Order 13,880 (titled “Collecting Information About Citizenship Status in Connection With the Decennial Census”);
2. All policies concerning the protection of personal information obtained by the Commerce Department from administrative records pursuant to Executive Order 13,880.

Background

The Addition of the Citizenship Question to the 2020 Census

On March 26, 2018, Secretary of Commerce Wilbur Ross abruptly ordered the U.S. Census Bureau to add a question concerning citizenship status to the 2020 Census.¹ Secretary Ross stated that he “ha[d] determined that reinstatement of a citizenship question on the 2020 decennial census [wa]s necessary” and that he was “directing the Census Bureau to place the citizenship question last on the decennial census form.”²

In his decision letter, Secretary Ross claimed that the citizenship question was added in response to a December 2017 request from the Department of Justice (“DOJ”), which purportedly sought to obtain citizenship data to enable “more effective enforcement” of the Voting Rights Act.³ However, this explanation is at odds with the extensive evidence uncovered in subsequent litigation, which demonstrates that Secretary Ross discussed the possibility of a citizenship question months before the DOJ made any such request.⁴

In addition to adding the citizenship question to the 2020 Census, Secretary Ross also instructed the agency to compile “as many additional Federal and state administrative records as possible” to determine the citizenship status of the United State population.⁵

The DOJ’s request for citizenship data, and Secretary Ross’s attempted addition of the citizenship question to the census, raised alarm and opposition from members of Congress, the attorneys general of at least twenty states, and mayors across the country.⁶ The decision was also

¹ Letter from Wilbur Ross, Secretary of Commerce, to Karen Dunn Kelley, Under Secretary for Economic Affairs, at 1, 8 (Mar. 26, 2018) [hereinafter Ross Letter], *available at* <https://epic.org/privacy/litigation/pia/epic-v-commerce/EPIC-v-Commerce-PI-Motion-Exhibit-1.pdf>.

² *Id.* at 8.

³ *Id.* at 1.

⁴ *See, e.g.*, Defs.’ Second Suppl. Resps. to Pls.’ First Set of Interrogatories 2–3, *N.Y. Immigration Coal. v. U.S. Dep’t of Commerce*, 18-5025 (S.D.N.Y. Oct. 11, 2018), *available at* https://ag.ny.gov/sites/default/files/second_supp_res_to_rog_1_final_2018.10.11.pdf; E-mail from Kris Kobach, Sec’y, Kan. Dep’t of State, to Wilbur Ross, Sec’y, Dep’t of Commerce (Jul. 21, 2017), *available at* <https://epic.org/foia/censusbureau/EPIC-18-03-22-Census-Bureau-FOIA-20180611-Production-Kobach-Emails.pdf>.

⁵ Ross Letter at 4.

⁶ *See* Letter from Sen. Dianne Feinstein et al. to Wilbur Ross, Secretary of Commerce (Jan. 5, 2018), https://www.feinstein.senate.gov/public/_cache/files/3/7/376f8dcd-7f35-4913-9e80-cd1e48e3b312/7E4C59B2988E2CC14866543EDD7E01A6.2018.01.05-census-citizenship-letter.pdf; Letter from Attorneys General of Twenty U.S. States to Wilbur Ross, Secretary of Commerce (Feb. 12, 2018), *available at* <https://www.brennancenter.org/sites/default/files/legal-work/Multi-State-Army-General-Letter-re-2020-Census.pdf>; U.S. Conference of Mayors, Nation’s Mayors to Secretary Ross: Don’t Politicize Census. Remove the Citizenship Question (Mar. 27, 2018), <https://www.usmayors.org/2018/03/27/nations-mayors-to-secretary-ross-dont-politicize-census-remove-the-citizenship-question/>.

challenged in numerous federal lawsuits brought by state attorneys general, nonprofit organizations, and U.S. residents.⁷

EPIC v. Commerce and Other Census-Related Litigation

On November 20, 2018, EPIC filed suit against the Census Bureau alleging that the Bureau had failed to conduct numerous privacy impact assessments required by the E-Government Act of 2002⁸ before introducing the citizenship question—despite the extraordinary privacy risks of collecting citizenship information from every person in the country.⁹ EPIC’s suit revealed a Census Bureau document in which the agency indicated that census response data—including individuals’ citizenship status information—may be transferred in “[b]ulk” to other federal agencies “[f]or criminal law enforcement activities.”¹⁰ DOJ officials also “privately discussed the possibility that in the future census information could be shared with law enforcement.”¹¹

On January 15, 2019, the U.S. District Court for the Southern District of New York entered final judgment against the government in a separate lawsuit challenging the addition of the citizenship question.¹² The court found that Secretary Ross’s decision to add a citizenship question “violated the [Administrative Procedure Act] in several respects” and “violated the public trust.”¹³ Accordingly, the court “vacat[ed] Secretary Ross’s decision to add a citizenship question to the 2020 census questionnaire” and “enjoin[ed] Defendants from implementing Secretary Ross’s March, 26, 2018 decision or from adding a question to the 2020 census questionnaire without curing the legal defects identified” by the court.¹⁴

On March 6, 2019, the U.S. District Court for the Northern District of California also “enjoined [the government] from including the citizenship question on the 2020 Census,” declaring the addition of the question unlawful under both the Administrative Procedure Act and the Enumeration Clause of the U.S. Constitution.¹⁵ The court found that Secretary Ross made an

⁷ See e.g., Brennan Center for Justice, *Litigation About the 2020 Census*, <https://www.brennancenter.org/analysis/2020-census-litigation>.

⁸ Pub. L. No. 107-347, 116 Stat. 2899 (Dec. 17, 2002) (codified at 44 U.S.C. § 3501 note).

⁹ *EPIC v. Dep’t of Commerce*, No. 18- 2711, 2019 WL 498520 (D.D.C. Feb. 8, 2019); see also EPIC, *EPIC v. Commerce (Census Privacy)* (Mar. 1, 2019), <https://epic.org/privacy/litigation/pia/epic-v-commerce/>.

¹⁰ U.S. Dep’t of Commerce, *Privacy Impact Assessment for the CEN08 Decennial Information Technology Division (DITD)* at 5, 7, 9 (approved Sep. 28, 2018), available at <https://epic.org/privacy/litigation/pia/epic-v-commerce/EPIC-v-Commerce-PI-Motion-Exhibit-6.pdf>.

¹¹ Tara Bahrapour, *Trump Administration Officials Suggested Sharing Census Responses with Law Enforcement, Court Documents Show*, Wash. Post (Nov. 19, 2018), https://www.washingtonpost.com/local/social-issues/trump-administration-officials-suggested-sharing-census-responses-with-law-enforcement-court-documents-show/2018/11/19/41679018-ec46-11e8-8679-934a2b33be52_story.html; see also Decl. of Andrew Case in Supp. of Pls.’ Opp’n to Defs.’ Mot. Summ. J. at Ex. B, *San Jose v. Ross*, No. 18-2279 (N.D. Cal. Filed Nov. 16, 2018).

¹² *New York v. Department of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019).

¹³ *Id.* at 518.

¹⁴ *Id.* at

¹⁵ *California v. Ross*, No. 18-1865, 2019 WL 1052434, at *70 (N.D. Cal. Mar. 6, 2019).

arbitrary decision to include the citizenship question, then engaged in a “cynical search to find some reason, any reason” to “justify that preordained result.”¹⁶

On June 27, 2019, the Supreme Court blocked the citizenship question from being added to the 2020 Census, ruling that the Commerce Department’s decision to collect citizenship data “cannot be adequately explained” by the rationale provided by the agency.¹⁷ Following the Supreme Court decision, two federal district courts permanently blocked the Trump administration from asking a citizenship question in any form in the 2020 Census.¹⁸

Census Bureau Compiling Citizenship Data from Agencies

In May 2019, Census Bureau chief scientist John Abowd stated that the Bureau was operating with the understanding that administrative records concerning citizenship status would be assembled regardless of whether courts blocked the citizenship question from inclusion on the 2020 Census.¹⁹

It is known that the Census Bureau has attempted to gain access to personal data from the Social Security Administration (“SSA”), visa and passport data from the State Department, and naturalization information from U.S. Citizenship and Immigration Services (“USCIS”).²⁰ The Census Bureau confirmed in a statement that it has “pending agreement with U.S. Citizen and Immigration Services” to “receive administrative records[.]”²¹ The Bureau stated that it was “also in discussion with other agencies, including the U.S. Customs and Border Protection (“CBP”) and the Department of Homeland Security’s (“DHS”) Office of Immigration Statistics to acquire Arrival and Departure Information System (“ADIS”) data to fulfill [the Bureau’s] mission.”²² The data that DHS would reportedly share with the Census Bureau includes “noncitizens’ full names and addresses, birth dates and places, as well as Social Security numbers and highly sensitive alien registration numbers.”²³

President Trump’s Executive Order Seeking Citizenship Information

On July 11, 2019, President Trump suspended his efforts to obtain citizenship information through the 2020 Census and instead issued Executive Order 13,880, titled

¹⁶ *Id.* at *1.

¹⁷ *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019).

¹⁸ *See Kravitz v. Dep’t of Commerce*, No. 18-1041, ECF No. 203 (D. Md. July 16, 2019); *New York v. Dep’t of Commerce*, No. 18-2921, 2019 WL 3213840 (S.D.N.Y. July 16, 2019).

¹⁹ U.S. Census Bureau, *National Advisory Committee (NAC) Spring Meeting (Day 1)* (May 2, 2019), <https://www.youtube.com/watch?v=5eICccdzfdo&feature=youtu.be&t=19212>.

²⁰ U.S. Census Bureau, Memoranda of Understanding (MOU) Updates: Citizenship Data 661–62 (Mar. 19, 2018), available at <https://www2.census.gov/foia/records/citizenship-records/ar-final-filed-all-docs--certification-index-documents--060818.pdf?#>.

²¹ Press Release, U.S. Census Bureau, U.S. Census Bureau Statement on Data Sharing Agreements (Mar. 7, 2019), <https://census.gov/newsroom/press-releases/2019/data-sharing-agreements.html>.

²² *Id.*

²³ Garance Burke & Frank Bajak, *Ahead of Court Ruling, Census Bureau Seeks Citizenship Data*, Assoc. Press (Mar. 7, 2019), <https://apnews.com/0f33f3454d7f4fd78803455d4da672c6>.

“Collecting Information About Citizenship Status in Connection With the Decennial Census.”²⁴ The executive order requires agencies to share personal citizenship data with the Department of Commerce and establishes an interagency working group to give the Commerce Department greater access to administrative records containing personal citizenship data. The Director of the Census Bureau will chair the working group, and each agency must designate a representative to serve in the working group.²⁵ President Trump also ordered the Secretary of Commerce to “consider mechanisms for ensuring the Department’s existing data-gathering efforts expand the collection of citizenship data in the future,” including efforts to collect data from state governments.²⁶ The order identifies state redistricting as one of the reasons for the Commerce Department to collect citizenship data from other agencies.²⁷

The executive order requires executive agencies to provide the Commerce Department with “the maximum assistance permissible” to help the Department determine the number of citizens and non-citizens in the country, including providing access to each agency’s administrative records.²⁸ The follow agencies are ordered to provide the Commerce Department with the following records:

- Department of Homeland Security, U.S. Citizenship and Immigration Services – National-level file of Lawful Permanent Residents, Naturalizations
- Department of Homeland Security, Immigration and Customs Enforcement – F1 & M1 Nonimmigrant Visas
- Department of Homeland Security – National-level file of Customs and Border Arrival/Departure transaction data
- Department of Homeland Security and State Department, Worldwide Refugee and Asylum Processing System – Refugee and Asylum visas
- State Department – National-level passport application data
- Social Security Administration – Master Beneficiary Records
- Department of Health and Human Services – CMS Medicaid and CHIP Information System²⁹

The executive order also instructs the Secretary of Commerce to “consider initiating any administrative process necessary to include a citizenship question on the 2030 decennial census” and any other policy implementations “to ensure that citizenship data is collected in any other surveys and data-gathering efforts conducted by the Census Bureau”³⁰ The Secretary of Commerce must also “consider expanding the distribution of the American Community Survey,” which includes a citizenship question and currently reaches about 2.5% of households.³¹ In a press conference announcing the executive order, President Trump stated the federal government

²⁴ Exec. Order No. 13,880, 84 Fed. Reg. 33821 (July 11, 2019).

²⁵ *Id.* at § 3.

²⁶ *Id.* at § 1.

²⁷ *Id.*

²⁸ *Id.* at § 3.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

“will leave no stone unturned” when seeking citizenship information from every person residing in the United States.³²

Request for Expedition

EPIC is entitled to expedited processing of this request.³³ Under Department of Commerce FOIA regulations, a request “shall be taken out of order and given expedited treatment”³⁴ when (1) there is an “urgency to inform the public about an actual or alleged Federal Government activity” and the request is “made by a person primarily engaged in disseminating information”;³⁵ and (2) when the request involves “[a] matter of widespread and exceptional media interest involving questions about the Government's integrity which affect public confidence[.]”³⁶ EPIC’s request qualifies for expedited processing on both grounds.

(1) Urgency to Inform the Public About Actual Government Activities

First, there is an “urgency to inform the public about [the] actual or alleged federal government activit[ies]” that are the subject of this request, which is brought by a representative of the news media.³⁷ The actual federal government activities are (1) the Commerce Department’s acquisition of citizenship status information and other highly sensitive personal data from executive branch agencies designated in Executive Order 13,880; (2) the transfer of such data by these agencies to the Commerce Department; (3) the agreements between the Commerce Department and each agency to transfer such data; and (4) the Commerce Department’s assessment of, or failure to assess, the privacy risks posed by the transfer of such data.

The urgency to inform the public about these government activities is clear from the voluminous press coverage of,³⁸ and immense public interest in,³⁹ the Census Bureau’s ongoing efforts to obtain citizenship status information as part of the 2020 Census. The public has a right to know—and has demonstrated that it needs to know—the full scope of the Commerce Department’s planned collection of citizenship information before the 2020 Census is completed.

³² Donald Trump, President of the United States, Remarks by President Trump on Citizenship and Census (July 11, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/>.

³³ 5 U.S.C. § 552(a)(6)(E)(v)(II); 15 C.F.R. § 4.6(f).

³⁴ 15 C.F.R. § 4.6(f)(1).

³⁵ 15 C.F.R. § 4.6(f)(1)(iv).

³⁶ 15 C.F.R. § 4.6(f)(1)(iii).

³⁷ 15 C.F.R. § 4.6(f)(1)(iv).

³⁸ *See, e.g., Census*, N.Y. Times (July 24, 2019), <https://www.nytimes.com/topic/subject/census> (listing over dozens of articles concerning the Census Bureau’s efforts to collect citizenship status information); *Census and Citizenship*, Google News (July 24, 2019), <https://www.google.com/search?q=census+and+citizenship&tbm=nws> (listing over 4,000,000 news articles containing the words “census” and “citizenship”).

³⁹ *See, e.g., Census citizenship question*, Google Trends (July 24, 2019), <https://trends.google.com/trends/explore?date=today%205-y&geo=US&q=Census%20citizenship%20question> (showing a dramatic increase in U.S. Google searches concerning the Census Bureau’s planned citizenship question).

EPIC is also an organization “primarily engaged in disseminating information.”⁴⁰ As the Court explained in *EPIC v. Department of Defense*, “EPIC satisfies the definition of ‘representative of the news media’” under the FOIA.⁴¹ To date, EPIC continues to engage in the same activities that the Court deemed appropriate to satisfy the definition of representative of the news media. Accordingly, EPIC is entitled to expedited processing of this request under 15 C.F.R. § 4.6(f)(1)(iv).

(2) *Matter of Widespread and Exceptional Media Interest*

Second, EPIC is separately entitled to expedited processing because this request involves “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that affect public confidence.”⁴²

As noted, the Commerce Department’s planned collection citizenship status information and related personal data has elicited extraordinary concern and opposition from lawmakers, government officials, and the public at large. There is great uncertainty, based on official government documents,⁴³ whether personal citizenship data obtained by the Census Bureau will be used for purposes inconsistent with the tabulation of the census, including criminal and immigration law enforcement.⁴⁴ The Commerce Department and President Trump have also indicated that the aggregated citizenship data collected from administrative records could be made available to states for redistricting purposes, a move that would allow legislative maps to be redrawn to favor Republican-dominated districts and possibly reduce the number of legislative seats in Latino-dominated areas.⁴⁵

Evidence uncovered through litigation over the citizenship question has also thrown into doubt the official explanation for the Census Bureau’s attempts to collect citizenship status information, which—in the words of one federal court—were the product of a “cynical search to find some reason, any reason” to “justify [a] preordained result.”⁴⁶

These matters, which have been the subject of extensive press coverage and public attention, unquestionably bear on the integrity of the government and affect public confidence. EPIC is therefore also entitled to expedited processing of its request under 15 C.F.R. § 4.6(f)(1)(iii).

⁴⁰ 15 C.F.R. § 4.6(f)(1)(iv).

⁴¹ 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

⁴² 15 C.F.R. § 4.6(f)(1)(iii).

⁴³ See, e.g., U.S. Dep’t of Commerce, *Privacy Impact Assessment for the CEN08 Decennial Information Technology Division (DITD)*, *supra* note 10, at 5, 7, 9; Bahrampour, *supra* note 11.

⁴⁴ See, e.g., Tara Bahrampour, *DHS Plan to Share Non-citizens’ Data with Census Bureau Could Further Spook Immigrants, Experts Say*, Wash. Post (Mar. 8, 2019), https://www.washingtonpost.com/local/social-issues/dhs-plan-to-share-non-citizens-data-with-census-bureau-could-further-spook-immigrants-experts-say/2019/03/08/2feafc5c-4129-11e9-9361-301ffb5bd5e6_story.html.

⁴⁵ See Tierney Sneed, *Feds Producing Data For States to Do Anti-Immigrant Redistricting Overhaul*, Talking Points Memo (July 15, 2019), <https://talkingpointsmemo.com/news/citizenship-data-states-redistricting-bureau-directed-data>.

⁴⁶ *California*, No. 18-1865, 2019 WL 1052434, at *1.

In submitting this request for expedited processing, EPIC certifies that this explanation is true and correct to the best of its knowledge and belief.⁴⁷

Request for News Media Fee Status

EPIC is a “representative of the news media” for fee classification purposes, as the Court held in *EPIC v. Department of Defense*.⁴⁸ Based on EPIC’s status as a “news media” requester—and because EPIC, as a non-profit organization, has no commercial interest in the requested records—EPIC is entitled to receive the requested record with only duplication fees assessed.⁴⁹

Request for Fee Waiver

Any duplication fees should be waived because “[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 because “[d]isclosure of the information is not primarily in the commercial interest of” EPIC.⁵⁰

The Commerce Department evaluates four factors to determine whether the “public interest” condition is met: (i) the “subject of the requested records must concern identifiable operations or activities of the Federal Government,”; (ii) “[t]he disclosable portions of the requested records must be meaningfully informative about Government operations or activities”; (iii) disclosure “must contribute to the understanding of a reasonably broad audience of persons interested in the subject”; and (iv) “[t]he public’s understanding of the subject in question prior to the disclosure must be significantly enhanced by the disclosure.”⁵¹ EPIC’s request satisfies all four factors.

First, the requested records clearly “concern identifiable operations or activities of the Federal Government,”⁵² namely: (1) the Commerce Department’s acquisition of citizenship status information and other highly sensitive personal data from the federal agencies named in Executive Order 13,880; (2) the transfer of such data by these named agencies to the Commerce Department; (3) the agreements between the Commerce Department and these agencies to transfer such data; and (4) the Commerce Department’s assessment of, or failure to assess, the privacy risks posed by the transfer of such data.

Second, disclosure of the requested records is “‘likely to contribute’ to an increased public understanding of [those] operations or activities.”⁵³ Disclosure would be “meaningfully informative about Government operations or activities”⁵⁴ because—apart from President Trump’s statement announcing the executive order and a handful of press accounts based on

⁴⁷ 5 U.S.C. § 552(a)(6)(E)(vi); 15 C.F.R. § 4.6(f)(3).

⁴⁸ 241 F. Supp. 2d 5.

⁴⁹ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 15 C.F.R. § 4.11(d)(1).

⁵⁰ 15 C.F.R. § 4.11(l)(1)(i)–(ii); *see also* 5 U.S.C. § 552(a)(4)(A)(iii).

⁵¹ 15 C.F.R. § 4.11(l)(2).

⁵² *Id.* § 4.11(l)(2)(i).

⁵³ *Id.* § 4.11(l)(2)(ii).

⁵⁴ *Id.*

nonpublic records—little is known about the planned transfers of sensitive personal data from federal agencies to the Commerce Department or the motivations behind the issuance of the executive order. For example, it is unknown which databases agencies would draw personal data from, what limitations will be placed on the Commerce Department’s use of information obtained from these agencies, and whether appropriate privacy safeguards are in place for such transfers of data.

Third, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject,” because the Commerce Department must “presume[] that a representative of the news media,” such as EPIC, “satisfies this consideration.”⁵⁵ The requested records will reach a large audience through EPIC’s widely read website, <https://epic.org>, where EPIC routinely posts and interprets privacy-related government documents obtained under the FOIA. EPIC’s FOIA work is also frequently covered through major media outlets.⁵⁶

Fourth, “[t]he public’s understanding of the subject in question prior to the disclosure must be significantly enhanced by the disclosure.”⁵⁷ The precise limitations that will be placed on the Commerce Department’s use of information obtained from federal agencies, and the extent of any privacy safeguards are in place for such transfers of data are not known to the public. Disclosure of the requested records will provide exactly this information.

Finally, the EPIC’s request satisfies the “commercial interest” condition for a fee waiver because disclosure of the requested information is not “primarily in the commercial interest” of EPIC.⁵⁸ EPIC has no “commercial interest that would be furthered by the requested disclosure.”⁵⁹ EPIC is a registered non-profit organization committed to open government, privacy, and civil liberties.⁶⁰ Moreover, the Commerce Department “ordinarily shall presume that if a news media requester has satisfied the public interest standard, the public interest is the primary interest served by disclosure to that requester.”⁶¹ As described above, EPIC is a news media requester and satisfies the public interest standard.

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

⁵⁵ *Id.* § 4.11(l)(2)(iii).

⁵⁶ See EPIC, *EPIC in the News*, https://epic.org/news/epic_in_news.php/.

⁵⁷ 15 C.F.R. § 4.11(l)(2)(iv).

⁵⁸ *Id.* § 4.11(l)(3).

⁵⁹ *Id.* § 4.11(l)(3)(i).

⁶⁰ EPIC, *About EPIC* (2019), <https://epic.org/epic/about.html>.

⁶¹ 15 C.F.R. § 4.11(l)(3)(ii).

Conclusion

Thank you for your consideration of this request. We anticipate your determination on our request within ten calendar days.⁶² For questions regarding this request, contact Enid Zhou at 202-483-1140 x104 or FOIA@epic.org.

Respectfully submitted,

/s Enid Zhou

Enid Zhou
EPIC Open Government Counsel

/s John Davisson

John Davisson
EPIC Counsel

⁶² 5 U.S.C. § 552(a)(6)(E)(ii)(I).