

VIA FACSIMILE

March 31, 2017

Jonathan Cantor
Acting Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane SW
STOP-0655
Washington, D.C. 20528-0655

Dear Mr. Cantor,

This letter constitutes a 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 Department of Homeland Security (“DHS”).

EPIC seeks records related to DHS’s designation of the election system as critical infrastructure.

The Russian interference in the 2016 presidential election represented a “significant escalation” in efforts to undermine U.S. democratic institutions.¹ On the heels of a joint U.S. intelligence report on the inference, , then Department of Homeland Security Secretary Jeh Johnson designated election infrastructure as a critical infrastructure subsector on January 6, 2017.² The designation occurred precisely to ensure that election cybersecurity become top priority.³ Yet, in the nearly three months since the change, DHS has released no further information on the significance or implementation of the new designation.

EPIC now seeks five categories of records related to the new DHS designation.

Documents Requested

1. Policies, procedures, directives, and memos for implementing the designation of election infrastructure as a critical infrastructure subsector;

¹ See generally Office of the Dir. of Nat’l Intelligence, *Assessing Russian Activities and Intentions in Recent US Elections* (2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf.

² Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector (Jan. 6, 2017), <https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical>.

³ *Id.*

2. Policies, procedures, directives, and memos describing any changes to the DHS plans to implement the designation resulting from the change in administration; and
3. Policies, procedures, directives, and memos describing the division or balance of federal and state responsibilities for elections under the new designation.

Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes. *EPIC v. Dep’t of Def.*, 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).

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. 6 C.F.R. § 5.11(k)(1); § 552(a)(4)(A)(iii). EPIC’s request satisfies this standard based on CBP’s considerations for granting a fee waiver. §§ 5.11(k)(2-3).

(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 “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” § 5.11(k)(2). DHS evaluates the following four 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 meaningfully informative about government operations or activities in order to be ‘likely to contribute’ to an increased public understanding of those operations or activities”; (iii) “disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester” and it “shall be presumed that a representative of the news media will satisfy this consideration”; and/or (iv) the “public’s understanding of the subject in question must be enhanced by the disclosure to a significant extent.” *Id.*

As to the first consideration, the subject of the request self-evidently concerns “identifiable operations or activities of the federal government.” § 5.11(k)(2)(i). The requested documents involve the DHS operations and activities to protect newly designated critical infrastructure. Securing critical infrastructure is, today, a basic, yet essential, DHS domestic security responsibility.

As to the second consideration, disclosure would also be “meaningfully informative about” these operations or activities and is thus “‘likely to contribute’ to an increased understanding of government operations or activities.” § 5.11(k)(2)(ii). DHS has offered no further updates on the implementation of the new designation, or any public details about the significance of the change

aside from a single public statement in January of this year.⁴ These materials will, as a result, meaningfully contribute to the public understanding of the DHS operations or activities.

As to the third consideration, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject” because, as provided in DHS FOIA regulations, DHS will “presum[e] that a representative of the news media will satisfy this consideration.” § 5.11(k)(2)(iii).

Finally, as to the fourth consideration, the public’s understanding will “be enhanced by the disclosure to a significant extent” because, as just described, close to nothing is known about the implementation and the impact of DHS’s designation. § 5.11(k)(2)(iv).

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

Second, “[d]isclosure of the information is not primarily in the commercial interest” of EPIC. § 5.11(k)(3). In determining whether this second requirement is met, CBP evaluates the following two considerations: (i) whether there is “any commercial interest of the requester... that would be furthered by the requested disclosure”; and/or (ii) whether “the public interest is greater than any identified commercial interest in disclosure,” and “[c]omponents ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.” *Id.*

As to the first consideration, there is not “any commercial interest of the requester... that would be furthered by the requested disclosure.” § 5.11(k)(3)(i). EPIC has no commercial interest in the requested records. EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.⁵

As to the second consideration, “the public interest is greater than any identified commercial interest in disclosure.” § 5.11(k)(3)(ii). Again, EPIC has no commercial interest in the requested records, and, as noted above, there is significant public interest in the requested records. Moreover, DHS should presume that EPIC has satisfied § 5.11(k)(3)(ii). The FOIA regulations state “[c]omponents ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.” *Id.* As established in the sections above, EPIC is a news media requester, and its request 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)(A)(i), I will anticipate your determination on our request within twenty working days.

⁴ Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector (Jan. 6, 2017), *supra* note 2.

⁵ *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.

For questions regarding this request I can be contacted at 202-483-1140 x111 or FOIA@epic.org.

Respectfully submitted,

Eleni Kyriakides

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