

VIA E-MAIL

March 8, 2019

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
E-mail: foia@hq.dhs.gov

Dear Chief FOIA Officer:

This letter constitutes an urgent 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 Department of Homeland Security (“DHS”) on behalf of the DHS’s Office of Immigration Statistics (“OIS”).

EPIC seeks documents about the planned transfer of personal data concerning noncitizens from OIS to the U.S. Census Bureau (“Bureau”).

Documents Requested

1. The written agreement between OIS and the Census Bureau by which the Bureau would “acquire Arrival and Departure Information System (ADIS) data,” as described in a March 7, 2019 Census Bureau press release.¹
2. All current Privacy Impact Assessments and Systems of Records Notices for (a) the agreement described above and (b) the information technology systems implicated in the agreement described above.

¹ 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>.

Background

The Addition of the Citizenship Question to the 2020 Census

On March 26, 2018, Commerce Secretary Wilbur Ross abruptly ordered the U.S. Census Bureau to add a question concerning citizenship status to the 2020 Census.² 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.”³

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.⁴ 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.⁵

Secretary Ross’s decision marked a dramatic departure from recent administrations of the decennial census, which has not featured a citizenship question for 70 years.⁶ It has been the Census Bureau’s longstanding position that “any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count” and that “[q]uestions as to citizenship are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate.”⁷ As the Bureau’s chief scientist recently warned, the addition of a citizenship question would be “very costly, harms the quality of the census count, and would [result in] substantially less accurate citizenship status data than are available from administrative sources.”⁸

The DOJ’s request for citizenship data, and Secretary Ross’s 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.⁹ The decision was also

² 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>.

³ *Id.* at 8.

⁴ *Id.* at 1.

⁵ *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>.

⁶ Ross Letter at 2.

⁷ *Fed’n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980).

⁸ Memorandum from John M. Abowd, Chief Scientist, U.S. Census Bureau, to Wilbur L. Ross, Sec’y of Commerce, at 1 (Jan. 19, 2018), *available at* <https://epic.org/privacy/litigation/pia/epic-v-commerce/EPIC-v-Commerce-PI-Motion-Exhibit-4.pdf>.

⁹ *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),

challenged in numerous federal lawsuits brought by state attorneys general, nonprofit organizations, and U.S. residents.¹⁰

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 2002¹¹ before introducing the citizenship question—despite the extraordinary privacy risks of collecting citizenship information from every person in the country.¹² EPIC’s suit revealed a Census Bureau document in which the Bureau 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.”¹³ DOJ officials have also “privately discussed the possibility that in the future census information could be shared with law enforcement.”¹⁴ EPIC’s case is currently pending before the U.S. Court of Appeals for the D.C. Circuit.¹⁵

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.¹⁶ 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.”¹⁷ 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.¹⁸

available at <https://www.brennancenter.org/sites/default/files/legal-work/Multi-State-Attorney-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/>.

¹⁰ See e.g., Brennan Center for Justice, *Litigation About the 2020 Census*, <https://www.brennancenter.org/analysis/2020-census-litigation>.

¹¹ Pub. L. No. 107-347, 116 Stat. 2899 (Dec. 17, 2002) (codified at 44 U.S.C. § 3501 note).

¹² *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/>.

¹³ 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>.

¹⁴ 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).

¹⁵ *EPIC v. Dep’t of Commerce*, No. 19-5031 (D.C. Cir. docketed Feb. 21, 2019).

¹⁶ *New York v. U.S. Department of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019).

¹⁷ *Id.* at 518.

¹⁸ *Id.* at

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.¹⁹ The court found that Secretary Ross made an arbitrary decision to include the citizenship question, then engaged in a “cynical search to find some reason, any reason” to “justify that preordained result.”²⁰

The Data Transfer Agreements Between the DHS and the Census Bureau

On the same day as the California court’s ruling, the Associated Press (“AP”) reported that the Census Bureau was “quietly seeking comprehensive information about the legal status of millions of immigrants” from U.S. Citizenship and Immigration Services.²¹ As the AP explained:

Under a proposed plan, the Department of Homeland Security would provide the Census Bureau with a broad swath of personal data about noncitizens, including their immigration status, The Associated Press has learned. A pending agreement between the agencies has been in the works since at least January, the same month a federal judge in New York blocked the administration from adding the citizenship question to the 10-year survey. . . .

The data that Homeland Security would share with Census officials would include noncitizens’ full names and addresses, birth dates and places, as well as Social Security numbers and highly sensitive alien registration numbers, according to a document signed by the Census Bureau and obtained by AP.²²

Census Bureau spokesman Michael Cook told the AP that “the agreement was awaiting signatures at DHS, but that Census expected it would be finalized ‘as soon as possible.’”²³

The following day, the Census Bureau confirmed in a statement that it has “pending agreement with U.S. Citizen and Immigration Services” to “receive administrative records[.]”²⁴ The Bureau stated that it was “also in discussion with other agencies, including the U.S. Customs and Border Protection and the Department of Homeland Security’s Office of Immigration Statistics to acquire Arrival and Departure Information System (ADIS) data to fulfill [the Bureau’s] mission.”²⁵

¹⁹ *California v. Ross*, No. 18-1865, 2019 WL 1052434, at *70 (N.D. Cal. Mar. 6, 2019).

²⁰ *Id.* at *1.

²¹ Garance Burke & Frank Bajak, *Ahead of Court Ruling, Census Bureau Seeks Citizenship Data*, Assoc. Press (Mar. 6, 2019), <https://apnews.com/0f33f3454d7f4fd78803455d4da672c6>.

²² *Id.*

²³ *Id.*

²⁴ U.S. Census Bureau, Press Release, *supra* note 1.

²⁵ *Id.*

EPIC's FOIA Request for the OIS Agreement and Related Documents

EPIC is aware of no Privacy Impact Assessment under the E-Government Act, and no System of Records Notice under the Privacy Act,²⁶ that addresses the staggering privacy consequences of OIS's planned bulk transfer of personal data to the Census Bureau.

Accordingly, EPIC seeks (1) the written agreement between the OIS and the Census Bureau to transfer personal data concerning noncitizens, as described in the Bureau's March 7, 2019 press release; and (2) all current Privacy Impact Assessments and Systems of Records Notices for the OIS-Census Bureau agreement and the information technology systems implicated in that agreement.

Request for Expedition

EPIC is entitled to expedited processing of this request.²⁷ Under DHS FOIA regulations, a request “shall be processed on an expedited basis”²⁸ 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 who is primarily engaged in disseminating information”;²⁹ and (2) when the 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.”³⁰ 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.³¹ The actual federal government activities are (1) the Census Bureau’s acquisition of highly sensitive personal data from OIS; (2) OIS’s transfer of such data to the Census Bureau; (3) the agreement between OIS and the Census Bureau to transfer such data; and (4) OIS’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,³² and immense public interest in,³³ the Census Bureau’s ongoing efforts to obtain citizenship status information and related personal data. The public has a right to know—and has demonstrated that it needs to know—the full scope of the Census Bureau’s

²⁶ 5 U.S.C. § 552a.

²⁷ 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(e)(1).

²⁸ 6 C.F.R. § 5.5(e)(1).

²⁹ 6 C.F.R. § 5.5(e)(1)(ii).

³⁰ 6 C.F.R. § 5.5(e)(1)(iv).

³¹ *Id.*

³² *See, e.g., Census*, N.Y. Times (Mar. 8, 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 (Mar. 8, 2019), <https://www.google.com/search?q=census+and+citizenship&tbm=nws> (listing 795,000 news articles containing the words “census” and “citizenship”).

³³ *See, e.g., Census citizenship question*, Google Trends (Mar. 8, 2018), <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).

planned collection of citizenship information and related personal data before the 2020 Census is finalized in June of this year.³⁴

Moreover, the public has an urgent need to know the nature of the planned data transfer from OIS to the Census Bureau, and whether appropriate privacy safeguards are in place, (1) before any such transfer occurs, and (2) before the March 14, 2019 hearing of the House Committee on Oversight and Reform, at which Secretary Ross will testify on subjects including the Census Bureau's collection of citizenship status information.³⁵

EPIC is also an organization "primarily engaged in disseminating information."³⁶ As the Court explained in *EPIC v. Department of Defense*, "EPIC satisfies the definition of 'representative of the news media'" under the FOIA.³⁷ Accordingly, EPIC is entitled to expedited processing of this request under 6 C.F.R. § 5.5(e)(1)(ii).

(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."³⁸

As noted, the Census Bureau's planned collection citizenship status information has elicited extraordinary concern and opposition from lawmakers, government officials, and the public at large. There is great uncertainty, based on official government documents,³⁹ whether citizenship statute and other related personal data obtained by the Census Bureau will be used for purposes inconsistent with the tabulation of the census, including criminal and immigration law enforcement.⁴⁰ And the public is fearful that attempts to obtain citizenship status information and related personal data will adversely affect the quality of the census⁴¹—a concern that the Census Bureau has itself repeatedly expressed.⁴²

³⁴ U.S. Census Bureau, *2020 Census Operational Plan: A New Design for the 21st Century* at 89 (Sept. 2017), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf>.

³⁵ Press Release, U.S. House Comm. on Gov't Oversight & Reform, Commerce Secretary Wilbur Ross to Testify Before Oversight Committee (Jan. 22, 2019), <https://oversight.house.gov/news/press-releases/commerce-secretary-wilbur-ross-to-testify-before-oversight-committee>.

³⁶ 6 C.F.R. § 5.5(e)(1)(ii).

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

³⁸ 6 C.F.R. § 5.5(e)(1)(iv).

³⁹ See, e.g., U.S. Dep't of Commerce, *Privacy Impact Assessment for the CEN08 Decennial Information Technology Division (DITD)*, *supra* note 14, at 5, 7, 9; Bahrapour, *supra* note 15.

⁴⁰ See, e.g., Tara Bahrapour, *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

⁴¹ See, e.g., PRRI, *American Democracy in Crisis: The Fate of Pluralism in a Divided Nation* (Feb. 19, 2019), <https://www.prii.org/research/american-democracy-in-crisis-the-fate-of-pluralism-in-a-divided-nation/> ("Approximately three-quarters (76%) of Americans say it is at least somewhat likely that the Census will not get an accurate count because some people will be worried about answering this question, including a majority (53%) of Americans who say this is very likely.").

⁴² *Fed'n for Am. Immigration Reform*, 486 F. Supp. at 568.

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—was the product of a “cynical search to find some reason, any reason” to “justify [a] preordained result.”⁴³ 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 6 C.F.R. § 5.5(e)(1)(iv).

In submitting this request for expedited processing, EPIC certifies that this explanation is true and correct to the best of our knowledge and belief.⁴⁴

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*.⁴⁵ 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.⁴⁶

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.⁴⁷

The DHS evaluates four factors to determine whether the “public interest” condition is met: (i) the “subject of the request must concern identifiable operations or activities of the federal government”; (ii) disclosure 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 must be enhanced by the disclosure to a significant extent.”⁴⁸ EPIC’s request satisfies all four factors.

First, the requested records clearly “concern identifiable operations or activities of the Federal Government,”⁴⁹ namely: (1) the Census Bureau’s acquisition of highly sensitive personal data from OIS; (2) OIS’s transfer of such data to the Census Bureau; (3) the agreement between OIS and the Census Bureau to transfer such data; and (4) OIS’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

⁴³ *California*, No. 18-1865, 2019 WL 1052434, at *1.

⁴⁴ 5 U.S.C. § 552(a)(6)(E)(vi); 6 C.F.R. § 5.5(e)(3).

⁴⁵ 241 F. Supp. 2d 5.

⁴⁶ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 6 C.F.R. § 5.11(d)(1).

⁴⁷ 6 C.F.R. § 5.11(k)(1)–(2); *see also* 5 U.S.C. § 552(a)(4)(A)(iii).

⁴⁸ 6 C.F.R. § 5.11(k)(2).

⁴⁹ *Id.* § 5.11(k)(2)(i).

public understanding of those operations or activities.”⁵⁰ Disclosure would be “meaningfully informative about government operations or activities”⁵¹ because—apart from a brief Census Bureau statement—little is known about the planned transfer of sensitive personal data from the OIS to the Census Bureau. For example, it is unknown which databases OIS would draw personal data from, what limitations will be placed on the Census Bureau’s use of information obtained from OIS, and whether appropriate privacy safeguards are in place for such a transfer of data.

Third, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject,” because DHS components must “presume[] that a representative of the news media,” such as EPIC, “will satisfy this consideration.”⁵² 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.⁵³

Fourth, “[t]he public’s understanding of the subject in question [will] be enhanced by the disclosure to a significant extent.”⁵⁴ The precise terms of the agreement between OIS and the Census Bureau, the limitations that will be placed on the Census Bureau’s use of information obtained from OIS, and the extent of any privacy safeguards are in place for such a transfer 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.⁵⁵ EPIC has no “commercial interest . . . that would be furthered by the requested disclosure.”⁵⁶ EPIC is a registered non-profit organization committed to open government, privacy, and civil liberties.⁵⁷ Moreover, DHS components “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.”⁵⁸ 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.

⁵⁰ *Id.* § 5.11(k)(2)(ii).

⁵¹ *Id.*

⁵² *Id.* § 5.11(k)(2)(iii).

⁵³ See EPIC, *EPIC in the News*, https://epic.org/news/epic_in_news.php/.

⁵⁴ 6 C.F.R. § 5.11(k)(2)(iv).

⁵⁵ *Id.* § 5.11(k)(3).

⁵⁶ *Id.* § 5.11(k)(3)(i).

⁵⁷ EPIC, *About EPIC* (2019), <https://epic.org/epic/about.html>.

⁵⁸ *Id.* § 5.11(k)(3)(ii).

Conclusion

Thank you for your consideration of this request. We anticipate your determination on our request within ten calendar days.⁵⁹ For questions regarding this request, contact John Davisson at 202-483-1140 x120 or FOIA@epic.org.

Respectfully submitted,

/s John Davisson

John Davisson
EPIC Counsel

/s Enid Zhou

Enid Zhou
EPIC Open Government Counsel

⁵⁹ 5 U.S.C. § 552(a)(6)(E)(ii)(I).