

VIA E-MAIL

June 30, 2017

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Civil Rights Division
Department of Justice
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Dear Mr. Hermilla,

This letter constitutes a 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 Department of Justice (“DOJ”).

On June 28, 2017, the DOJ wrote to all states covered by the National Voter Registration Act (“NVRA”) with a sweeping request for information regarding state voter registration list maintenance including “All statutes, regulations, written guidance, internal policies, or database user manuals that set out the procedures” the states have in place related to voter registration requirements, any other relevant procedures, and an explanation of the officials responsible for maintaining voter registration lists. The DOJ also sought, for local election officials, descriptions of the steps taken to ensure list maintenance is in “full compliance with the NVRA.”¹ The DOJ gave the states 30 days to comply with the request. The DOJ offered no explanation or justification for the unprecedented time-bound request, stating only that the agency “reviewing voter registration list maintenance procedures in each state covered by the NVRA.”²

Also on June 28, 2017, the Kris Kobach, the Vice Chair of the Presidential Advisory Commission on Election Integrity (“PACIE”), sent a letter to the Secretaries of State for all 50 states and the District of Columbia asking that the states provide the Commission detailed voter information, including

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

¹ See, e.g., Letter from T. Christian Herren, Jr., Chief, Voting Section, U.S. Dep’tment of Justice, to Kim Westbrook Strach, Exec. Dir., North Carolina State Bd. Of Elections (June 28, 2017), <https://www.documentcloud.org/documents/3881855-Correspondence-DOJ-Letter-06282017.html>.

² *Id.*

convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information.³

EPIC seeks two categories of records concerning the DOJ's June 28th request for information on state voter list procedures.

Records Requested

(1) All records, including memoranda, legal analyses, and communications, concerning the DOJ's June 28, 2017 request to the states regarding voter list maintenance; and

(2) All communications between the DOJ and the Presidential Advisory Commission on Election Integrity ("PACEI") regarding the June 28, 2017 PACEI request for state voter data as well as any legal memoranda concerning the authorities of the PACEI.

Request for Expedition

EPIC is entitled to expedited processing of this FOIA request. 5 U.S.C. § 552(a)(6)(E)(v)(II). To warrant expedited processing, under DOJ FOIA regulations a FOIA request must concern a matter of (1) "urgency to inform the public about an actual or alleged federal government activity," and, (2) the request must be "made by a person who is primarily engaged in disseminating information." 28 C.F.R. § 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 DOJ's request to the states covered by the National Voter Registration Act ("NVRA") for information concerning each state's "voter registration list maintenance procedures." The DOJ concedes this activity in letters to the states.⁴

"Urgency" to inform the public about this activity is clear given the extraordinary nature and unusual breadth of the DOJ's request. On June 28, 2017, DOJ requested that all states covered by the NVRA provide to the DOJ *within 30 days* a sweeping list of information about state voting list maintenance. Indeed, former DOJ civil rights official and professor Justin Levitt told *ProPublica* that "he did not recall a time when the DOJ has previously requested such broad information."⁵ Former senior litigator with the DOJ's Voting Section, David Becker called the move "unprecedented":

³ See, e.g. Letter from Presidential Advisory Commission on Election Integrity to Hon. Elaine Marshall, Secretary of State, North Carolina (June 28, 2017), <https://www.documentcloud.org/documents/3881856-Correspondence-PEIC-Letter-to-North-Carolina.html>; See generally EPIC, *Voter Privacy and the PACEI*, <https://epic.org/privacy/voting/pacei/>.

⁴ *Id.*

⁵ Jessica Huseman, *Presidential Commission Demands Massive Amounts of State Voter Data*, *ProPublica* (June 29, 2107), <https://www.propublica.org/article/presidential-commission-demands-massive-amounts-of-state-voter-data>.

In the quarter-century since passage of the NVRA, of which I spent seven years as a DOJ lawyer enforcing the NVRA, among other laws, *I do not know of the DOJ conducting any other broad-based fishing expedition into list maintenance compliance, whether during Democratic or Republican administrations.*⁶

Former deputy assistant general for civil rights Sam Bagnestos warned: “Let's be clear about what this letter signals: DOJ Civil Rights is preparing to sue states to force them to trim their voting rolls.”⁷

The DOJ's request also represents a selective review of state voting processes,⁸ without any basis offered for its narrow focus. The NVRA was passed not only to ensure “accurate and current voter registration rolls,” but also “to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office” and recognized that “the right of citizens of the United States to vote is a fundamental right.” 52 U.S.C. § 20501. For instance, the DOJ request did not include an information request for compliance NVRA requirements voter registration forms be made easily available for distribution (§ 20505(b)), for simultaneous voter registration while applying for a driver's license (§ 20505(a)), and that state offices that provide public assistance and services to those with disabilities provide voter registration application forms and assistance (§ 20505(a)(4)(A)).

Despite the extraordinary nature of the request the DOJ offered no explanation or justification for the sudden broad-based request. The DOJ merely cited an agency review of “voter registration list maintenance procedures” in these states,⁹ and “did not respond to requests for comment about the letters.”¹⁰

States have thirty days to respond to the DOJ request. There is an urgent public need for immediate release of information explaining the DOJ's unprecedented decision to demand this voting list information from states. Moreover, the coincidental request by the PACEI for similar information from the states raises substantial concerns that the DOJ request was part of a coordinated undertaking. The PACEI has given the states approximately two weeks to respond their request.

Second, EPIC is an organization “primarily engaged in disseminating information.” § 16.5(e)(1)(ii). As the Court explained in *EPIC v. Dep't of Def.*, “EPIC satisfies the definition of

⁶ David Becker, *Why Wednesday's 'Election Integrity' Actions Should Be Watched By States*, Route Fifty (June 29, 2017), <http://www.routefifty.com/management/2017/06/trump-election-integrity-commission-state-voter-data/139107/> (emphasis added).

⁷ @sbagen, Twitter (June 29, 2017, 1:46 PM), <https://twitter.com/sbagen/status/880528035392491520>.

⁸ *Jessica Huseman*, *supra* note 6.

⁹ See Letter from T. Christian Herren, Jr. to Kim Westbrook Strach, Exec. Dir., North Carolina State Bd. Of Elections, *supra* note 1.

¹⁰ *Id.*

‘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 detailed statement in support of 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. 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 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. 28 C.F.R. § 16.10(k)(1); § 552(a)(4)(A)(iii). EPIC’s request satisfies the FBI’s three factors for granting a fee waiver. § 16.10(k)(2).

Under the DOJ FOIA regulations, DOJ components evaluate three considerations to determine whether fee waiver is warranted: (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).

First, disclosure of the requested DOJ records concerning the June 28th request to states for “voter registration list maintenance” self-evidently “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). This request concerns a direct request from the DOJ to states for information, concerning a law that the DOJ is authorized to enforce.

Second, disclosure “would be likely to contribute significantly to public understanding of those operations or activities” according to the two sub-factors. § 16.10(k)(2)(ii)(A-B). As to the first sub-factor, disclosure would be “meaningfully informative about government operations or activities” because the justification and decision-making underlying for the DOJ’s unprecedented request to states covered by the NVRA has not been made public. § 16.10(k)(2)(ii)(A). Any additional information about how why the DOJ is seeking broad based data under only select provisions of NVRA would thus be “meaningfully informative” about the DOJ request. 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 the relevant FOIA regulations, components will “presume that a representative of the news media will satisfy this consideration.” § 16.10(k)(2)(ii)(B).

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.¹¹ 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 “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. I anticipate your determination on our request within ten calendar days 5 U.S.C. § 552(a)(6)(E)(ii)(I). For questions regarding this request I can be contacted at 202-483-1140 x111 or FOIA@epic.org, cc: Kyriakides@epic.org.

Respectfully submitted,

/s/ Eleni Kyriakides

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¹¹ *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.