

November 8, 2006

Mr. Tom Wilkey  
Executive Director  
U.S. Election Assistance Commission  
1225 New York Ave., N.W., Suite 1100  
Washington, DC 20005

Re: Request for Records Pursuant to the Freedom of Information Act

Dear Mr. Wilkey:

I write to follow up on the Freedom of Information Act (“FOIA”) request I made to the Election Assistance Commission (“EAC”) on October 11, 2006 for: (1) the report on voter identification prepared by the Eagleton Institute of Politics and the Moritz College of Law (“the voter ID report”), and (2) the report on voting fraud and voter intimidation prepared by Tova Wang and Job Serebrov, in consultation with a bipartisan work group (“the voting fraud report”).<sup>1</sup> Both reports were prepared using federal funds distributed by the EAC and both were finalized and submitted to the EAC several months ago. I received your October 17, 2006 letter and the accompanying EAC status report, EAC board resolutions, and the report on provisional voting prepared by the Eagleton Institute of Politics and the Moritz College of Law. I thank you for the report on provisional voting and the other information, but unfortunately, the material you provided is only partially responsive to my request because it failed to include a copy of the voter ID report and the voting fraud report.

Under FOIA, any federal agency, including the EAC, is required to make records “promptly available to any person” who properly requests them. 5 U.S.C. § 552(a)(3)(A) (2006). If an agency decides to withhold the requested records, it must “immediately notify” the person making the request of the “reasons” for the agency’s decision and of the person’s right to appeal that decision. *Id.* § 552(a)(6)(A)(i). Your October 17 response, in addition to excluding the requested reports, provided no explanation as to why they were being withheld, as required by federal law. Since there is no basis for the EAC to withhold the voter ID and voting fraud reports, proffered or otherwise, I respectfully appeal your decision to deny access to those reports and also request expedited review.<sup>2</sup> Immediate disclosure of those reports is both in the public interest and within the EAC’s statutory mandate to serve as a national clearinghouse on election-related information and to make studies available to the public.

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<sup>1</sup> Unlike the usage adopted by the EAC in its October 26, 2006 public meeting, the term “report” in this letter does not refer to a report authored by the EAC or officially approved by the EAC and containing EAC recommendations. Rather, the term should be construed in its ordinary English meaning.

<sup>2</sup> Expedited review of our FOIA request is warranted under 5 U.S.C. § 552(a)(6)(E)(v)(II) (2006).

## **Immediate Disclosure of the Requested Reports is in the Public Interest**

The information and research contained in the voter ID and voting fraud reports are urgently needed to assist citizens, policymakers, and courts in their ongoing deliberations on issues of the highest public concern. As you are no doubt aware, the issues of voter ID and voting fraud are currently being considered in the courts, in Congress, and in the state legislatures.

Indeed, on October 20, 2006, three days after the EAC denied my request for the voter ID and voting fraud reports, a unanimous United States Supreme Court underscored the need for more research on voting fraud and the effects of voter ID requirements in the context of a case challenging Arizona's new voter ID law.<sup>3</sup> Justice Stevens explained in his concurrence that factual information is needed to determine "the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements." The two factual issues identified by the Court are precisely the subjects of the voter ID and voting fraud reports being withheld by the EAC.

Public disclosure of the voter ID and voting fraud reports is important not only to assist the courts in examining the constitutionality of recently-enacted voter ID laws, but also to assist Congress and state legislatures in their deliberations over proposed voter ID legislation. For example, this summer, the U.S. House of Representatives passed a voter ID bill, H.R. 4844, which is currently being considered by the United States Senate. Given the dearth of studies and research on voter ID and voting fraud, the Senate's deliberations would be greatly enhanced by disclosure of the voter ID and voting fraud reports.

Given how quickly the issues of voter ID and voting fraud are being raised in the courts and in the legislatures, the public simply cannot afford any further delay in the release of the highly-anticipated voter ID and voting fraud reports. Scholars, advocates, and policy makers have long awaited the release of these reports, and many have refrained from undertaking similar studies in the interim. Because the data and other research in those reports were gathered over the course of many months, it would be impossible for others to collect similar information in time to inform the public debate.

The requested reports will provide an invaluable contribution to the national discussion on voter ID and voting fraud. Both reports were prepared by nationally-known experts on election administration. The voting fraud study was also prepared in consultation with a bipartisan working group that held a full-day meeting with the EAC and the researchers on May 18, 2006 to discuss the research results.<sup>4</sup> Both reports consumed substantial time and resources: the EAC granted scholars from the Moritz College of Law and the Eagleton Institute of Politics the voter ID research contract in late 2004, and Tova Wang and Job Serebrov the voting fraud contract in September 2005. Both reports contain substantial data collected over many months of research. And, in both cases, the authors prepared and submitted final reports of their research

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<sup>3</sup> *Purcell v. Gonzalez*, 549 U.S. \_\_\_, 2006 WL 2988365, at \*3 (2006) (noting that facts are "hotly contested").

<sup>4</sup> U.S. Election Assistance Commission, *Status Report on the Voting Fraud-Voter Intimidation Research Project*, at 11 (May 17, 2006).

to the EAC several months ago.<sup>5</sup> The EAC is doing the public a disservice by refusing to release these important reports, at least one of which is within its exclusive control, in a timely manner.

Moreover, the EAC's decision to withhold these reports starkly contrasts with the express policies of other federal agencies that distribute public funds for studies. For example, policy of both the National Institutes of Health and National Science Foundation is to disclose as much information as possible so that the public, including other researchers, can examine and benefit from federally-funded research.<sup>6</sup>

The Brennan Center publishes and disseminates reports, publications, and other informational materials to educate individuals, institutions, the press, legislators, and other policymakers on a variety of issues, including issues related to voting and elections. As an organization primarily engaged in disseminating information, the Brennan Center is well-situated to make the information in the voter ID and voting fraud reports available to the public. The Center also intends to make use of the research in those reports to assist in our own research and proposals on issues of national concern.

### **Disclosure of the Requested Reports Is Within the EAC's Mandate**

As you know, the Election Assistance Commission was established by Congress in the Help America Vote Act of 2002 ("HAVA") to "serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections."<sup>7</sup> In other words, the EAC's primary function is to make information available to the public. It is inconsistent with this mission for the EAC to delay the release of valuable research, to suppress research with which some or even all Commissioners disagree, or to withhold research while the EAC determines its own position on the issues addressed by the requested reports.

The requested voter ID and voting fraud reports were prepared at the request of the EAC pursuant to the Commission's statutory duty to "conduct and *make available to the public* studies regarding . . . election administration issues."<sup>8</sup> HAVA specifically mandated the EAC to make available studies concerning "nationwide statistics and methods of identifying, deterring, and investigating voting fraud in elections for Federal office," and "identifying deterring, and investigating methods of voter intimidation," among other things.<sup>9</sup> It was in light of these statutory provisions that the EAC provided federal funding to well-respected experts to conduct research and prepare the voter ID and voting fraud reports. Those same provisions require the EAC to make those reports "available to the public."

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<sup>5</sup> *Cf. id.* ("After convening the project working group, the consultants will draft a final report summarizing the results of their research and the working group deliberations.")

<sup>6</sup> See Nat'l Insts. of Health, NIH Grants Policy Statement: Availability of Research Results: Publications, Intellectual Property Rights, and Sharing Research Resources (2003), *available at* [http://grants1.nih.gov/grants/policy/nihgps\\_2003/NIHGPs\\_Part7.htm#\\_Availability\\_of\\_Research](http://grants1.nih.gov/grants/policy/nihgps_2003/NIHGPs_Part7.htm#_Availability_of_Research); Nat'l Science Found., Policies & Important Links, *available at* <http://www.nsf.gov/policies/foia.jsp>.

<sup>7</sup> 42 U.S.C.S. § 15322 (2006).

<sup>8</sup> 42 U.S.C.S. § 15381(a) (2006) (emphasis added).

<sup>9</sup> *Id.* § 15381(b)(6) - (7).

In short, by withholding the requested reports, not only does the EAC violate the broad disclosure provisions of FOIA, discussed more fully below, but it also shirks its statutory responsibility to be a source of public information regarding election administration.

### **There is No Basis in Law for the EAC to Withhold the Requested Reports**

Under FOIA, the EAC is required to disclose all requested documents within its control unless they fall into one of the enumerated statutory exemptions.<sup>10</sup> These exemptions are very narrowly construed, because “[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”<sup>11</sup> Moreover, to qualify for an exemption, the EAC is required to explain its reasons for withholding a document with specificity.<sup>12</sup> The EAC has simply not satisfied its burden of showing that the voter ID and voting fraud reports qualify for an exemption. Indeed, it cannot.

#### *The Withheld Reports Do Not Qualify for a FOIA Exemption*

Despite the fact that you gave no reason for the EAC’s decision to withhold the requested documents, based on your counsel’s statement at the Commission’s public meeting held on October 26, 2006,<sup>13</sup> we assume that you intend to assert the deliberative process privilege under Exemption 5 of FOIA. That exemption, however, applies only to: (a) intra-agency memoranda that are both (b) predecisional, and (c) deliberative.<sup>14</sup> The voter ID and voting fraud reports meet none of these criteria. Neither report can be said to reveal the decision-making or thought processes of the Commission in any way—which is the essence of the deliberative process privilege. That privilege does not apply here for three independent reasons.

First, although the requested reports are within the EAC’s exclusive control, they cannot be withheld as “intra-agency” memoranda because they were independently prepared by experts outside of the EAC. The mere receipt of federal funds to perform research does not transform an outsider into an arm of the agency.<sup>15</sup> We do not dispute that, under certain circumstances, persons outside an agency can so actively participate in an agency’s policymaking process that they are appropriately considered part of the agency. But in this case, the report authors were essentially grantees whose work product lacked the “extensive, detailed, and virtually day-to-day supervision” that “convert[s] the acts of the [fund] recipient from private acts to governmental acts.”<sup>16</sup>

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<sup>10</sup> 5 U.S.C. § 552(a)-(b); *U. S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144-46 (1989) (documents over which agency obtains control are covered by FOIA).

<sup>11</sup> *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); see also *Klamath*, 532 U.S. at 8; *id.* at 9 (purpose of exemptions “is not to protect Government secrecy pure and simple”).

<sup>12</sup> 5 U.S.C. § 552(a); see also *Parke, Davis & Co. v. Califano*, 623 F.2d 1, 6 (6th Cir. 1980) (holding that “specificity and detail” are required in support of an Exemption 5 claim).

<sup>13</sup> See [http://www.eac.gov/public\\_meeting\\_102606.asp](http://www.eac.gov/public_meeting_102606.asp).

<sup>14</sup> *Nat’l Council of La Raza v. U.S. Dep’t of Justice*, 411 F.3d 350, 356 (2d Cir. 2005).

<sup>15</sup> *Forsham v. Harris*, 445 U.S. 169, 180 (1980); see also *Missouri v. U.S. Dep’t of Interior*, 297 F.3d 745, 750 (8th Cir. 2002).

<sup>16</sup> *Forsham*, 445 U.S. at 180.

Second, the withheld reports are not “predecisional” because they were not prepared to assist the EAC in making a policy decision, but rather were commissioned pursuant to the agency’s statutory obligations under HAVA to disseminate studies.<sup>17</sup> Predecisional documents are those “prepared in order to assist an agency decisionmaker in arriving at his decision.”<sup>18</sup> They are typically drafts or “suggestions or recommendations as to what agency policy should be,” or “advice to a superior,” or “suggested dispositions of a case.”<sup>19</sup> A document is only predecisional if the agency can demonstrate that the document is related to a specific decision confronting the agency. Here, however, “[n]o ‘decision’ is being made or ‘policy’ being considered”<sup>20</sup> in connection with the voter ID and voting fraud reports. The EAC did not fund those reports with the expectation that the reports would effectuate policies with the force of law or complete an adjudicatory process. Instead, the reports are “resource opinion[s]” about a state of facts completely unrelated to a tangential policy decision that the EAC may make.<sup>21</sup> As a result, they are not predecisional. To the extent that the EAC claims that the reports relate to “a decision that possibly may be made at some undisclosed time in the future,” that is an insufficient basis to withhold them under Exemption 5.<sup>22</sup>

Third, the withheld reports are not “deliberative” because they do not “reflect[] the give-and-take of the [agency’s] consultative process.”<sup>23</sup> The requested reports cannot become exempted from disclosure merely because the EAC is reviewing them.<sup>24</sup> A document is deliberative if its disclosure is likely “to stifle honest and frank communication within the agency.”<sup>25</sup> There is no danger that disclosure of the voter ID and voting fraud reports would stifle the agency’s communications, since they were prepared independently of the EAC and thus cannot reveal anything about any deliberations or candid communications within the EAC.

#### *The Preparation of an EAC Report is no Justification for Withholding the Requested Reports*

The EAC is obligated under FOIA and HAVA to disclose the requested reports regardless of whether it intends to write its own report on voter identification, as your letter suggests.<sup>26</sup>

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<sup>17</sup> See 42 U.S.C.S. § 15381.

<sup>18</sup> *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975); see also *Nat’l Council of La Raza*, 411 F.3d at 356; *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 39 (D.C. Cir. 2002); *Carter v. U.S. Dep’t of Corr.*, 307 F.3d 1084, 1089 (9th Cir. 2002); *Ethyl Corp. v. U.S. Evtl. Prot. Agency*, 25 F.3d 1241, 1248 (4th Cir. 1994); *Fl. House of Representatives v. U. S. Dep’t of Commerce*, 961 F.2d 941, 945 (11th Cir. 1992).

<sup>19</sup> *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Assembly of Cal. v. U.S. Dep’t of Commerce*, 968 F.2d 916, 921 (9th Cir. 1992).

<sup>23</sup> *Coastal States*, 617 F.2d at 866.

<sup>24</sup> The DC Circuit has also rejected an interpretation of predecisional that “would result in a huge mass of material being forever screened from public view,” because “[t]he public has an interest in decisions deferred, avoided, or simply not taken for whatever reason, equal to its interest in decisions made, which from their very nature may more easily come to public attention than those never made.” *Vaughn v. Rosen*, 523 F.2d 1136, 1146 (D.C. Cir. 1975).

<sup>25</sup> *Coastal States*, 617 F.2d at 866.

<sup>26</sup> It is unclear as to why the EAC’s intent to write a report on voter identification would have any bearing on the EAC’s decision to withholding of the fraud report. Likewise, the inaccuracies in the provisional voting report alleged in your October 17 letter are wholly immaterial to the issue of whether the reports on voter ID and voting fraud should be disclosed. In any event, while inaccuracies may explain why the EAC would choose not to adopt a particular report, it is insufficient to support withholding the documents under FOIA. See *Petroleum Info. Corp. v. U.S. Dep’t of Interior*, 976 F.2d 1429, 1437 n.10 (D.C. Cir. 1992) (holding risk of public confusion “does not

Neither the voting fraud report nor the voter ID report could “inaccurately reflect or prematurely disclose the views of the agency,”<sup>27</sup> because both reports were written and reviewed by scholars outside the EAC and submitted to the EAC in final form. Factual material that does not reveal an agency’s deliberative process is not protected under Exemption 5,<sup>28</sup> nor are expert opinions that do not reflect the agency’s own deliberations concerning its own decision- or policy-making.<sup>29</sup> Moreover, the mere fact that the EAC might rely on information in the voter ID or voting fraud reports to issue its own report does not transform those reports into deliberative agency materials. As the United States Court of Appeals for the D.C. Circuit explained,

[A]nyone making a report must of necessity select the facts to be mentioned in it; but a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material. If this were not so, every factual report would be protected as a part of the deliberative process.<sup>30</sup>

### *Any Segregable Information Must Be Released*

Irrespective of any claimed exemptions, the EAC is under an obligation to release any “reasonably segregable” nonexempt information to requestors.<sup>31</sup> Both the voter ID and voting fraud reports are unlikely to reveal anything about the deliberative process of the EAC, and to the extent that either does, those limited portions can be excised and the balance of the reports released.

### **Additional FOIA Request**

In the event that the EAC denies my renewed request for the voter ID and voting fraud reports or delays another week in providing those materials, we respectfully request copies of (1) all requests for proposals and contracts relating to the voter ID and voting fraud reports; and (2) all written and electronic communications concerning the voter ID and voting fraud reports between the EAC and (a) the Eagleton Institute of Politics, (b) the Moritz College of Law, (c) Tova Wang, (d) Job Serebrov, and (e) any other individuals or entities, including but not limited

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support a blanket exemption for information marred by errors”); *Assembly of Cal.*, 968 F.2d at 923 (“[I]t is not among FOIA’s functions to control the use of disclosed information.”); *Carter v. U.S. Dep’t of Commerce*, 186 F. Supp. 2d 1147, 1154 (D. Or. 2001) (“the determination of whether the rejected data is predecisional does not turn on the articulated reasons for its rejection) (internal quotation and citation omitted), *aff’d*, 307 F.3d 1084 (9th Cir. 2002); *Assembly of California v. U.S. Dep’t of Commerce*, 797 F. Supp. 1554, 1565-67 (D. Cal. 1992) (holding that information expressly prepared for public disclosure cannot be withheld under FOIA because it was ultimately rejected), *aff’d*, 968 F.2d 916 (9th Cir. 1992).; *see also Burka v. U.S. Dep’t of Health & Human Servs.*, 87 F.3d 508, 521 (D.C. Cir. 1996) (future publication of agency report is an insufficient justification for asserting an Exemption 5 privilege under FOIA).

<sup>27</sup> *Coastal States*, 617 F.2d at 866.

<sup>28</sup> *Local 3, Int’l Bhd. of Electrical Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988).

<sup>29</sup> *Parke, Davis & Co.*, 623 F.2d at 6.

<sup>30</sup> *Playboy Enters., Inc. v. U.S. Dep’t of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982) (remanding for the lower court to order disclosed investigative facts within a report the government wanted to withhold in its entirety).

<sup>31</sup> 5 U.S.C. § 552(b).

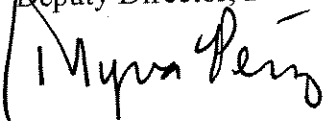
to outside reviewers. The public undoubtedly has a right to know under FOIA what the EAC is "up to."<sup>32</sup>

Thank you for your attention to this matter. Because the country is making decisions concerning voter ID and voting fraud today, we trust that you will respond as soon as possible, and no later than in two weeks.

Sincerely,



Wendy R. Weiser  
Deputy Director, Democracy Program



Myrna Pérez  
Counsel

cc.

Hon. William H. Frist, United States Senate Majority Leader  
Hon. Harry Reid, United States Senate Minority Leader  
Hon. Dennis J. Hastert, Speaker of the House  
Hon. Nancy Pelosi, Minority Leader, United States House of Representatives  
Hon. Trent Lott, Chair, Senate Rules Committee  
Hon. Christopher Dodd, Ranking Member, Senate Rules Committee  
Hon. Vernon Ehlers, Chair, House Administration Committee  
Hon. Juanita Millender-McDonald, Ranking Member, House Administration Committee  
Chair Paul DeGregorio, U.S. Election Assistance Commission  
Commissioner Gracia Hillman, U.S. Election Assistance Commission  
Commissioner Donetta Davidson, U.S. Election Assistance Commission  
Lloyd Leonard, League of Women Voters of the United States

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<sup>32</sup> *Assembly of Cal.*, 968 F.2d at 923 (citing *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).