

BRENNAN
CENTER
FOR JUSTICE
TWENTY
YEARS

at New York University School of Law

Via Certified Mail and Electronic Submission

July 20, 2017

Nelson D. Hermilla
Chief, FOIA/PA Branch
Civil Rights Division
Department of Justice
BICN Bldg., Room 3234
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Re: Freedom of Information Act Request, Request for Expedited Processing and Fee Waiver

Dear Mr. Hermilla:

This is a request on behalf of the Brennan Center for Justice at NYU School of Law (“Brennan Center”) under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. It is also a request for expedited processing under 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(e)(1), and for a fee waiver under 5 U.S.C. § 552(a)(4)(A)(ii) & (iii) and 28 C.F.R. § 16.5(k).

I. Background

On June 28, 2017, T. Christian Herren, Jr., the Chief of the Department of Justice’s Voting Section, sent a letter to all states covered by the National Voter Registration Act (“NVRA”). In this letter (“the Letter”), the Department of Justice “request[ed] information regarding the State’s procedures for compliance with the statewide voter registration list maintenance provisions of the National Voter Registration Act, 52 U.S.C. § 20501 et seq. and the Help America Vote Act (“HAVA”), 52 U.S.C. § 20901 et seq.”¹

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

According to the Letter, the Department of Justice plans to “review[] voter registration list maintenance procedures in each state covered by the NVRA” in an effort “to assess compliance with these [HAVA and NVRA] provisions” The Letter also said that the Department of Justice plans to “include an analysis of voter registration data reported by each state to the U.S. Election Assistance Commission (“EAC”) as part of its biennial Election Administration and Voting Survey (“EAVS”).” The Letter requests information about each states’ statutes, regulations, policies relating to voter registration, and “data regarding confirmation notices, removals from the voter registration list, and active and inactive registered voters[.]” Finally, the Letter requests that this information be provided to them within thirty days of its June 28 mail date.

II. Formal Request

The Brennan Center for Justice at NYU School of Law requests, to the extent the following are in the possession, custody, or control of the Civil Rights Division as of the date of the FOIA search:

1. All documents the Department of Justice (“DOJ” or “Department”) received or receives from state or local election officials in response to the Letter.
2. All communications and documents, including but not limited to emails and memoranda, between any DOJ officer, employee, or agent, or any White House liaison to the Department, and any other person, including but not limited to any officer, employee, or agent of the White House or the Presidential Advisory Commission on Election Integrity concerning the Letter.

We also request that responsive electronic records be provided electronically, in a text searchable, static-image (PDF) format (in the best image quality available to the agency), pursuant to 5 U.S.C. § 552(a)(3)(A)(B) and (C).

Definitions

As used in this request—

“*Collaborative Work Environment*” means a platform used to create, edit, review, approve, store, organize, share, and access documents and information by and among authorized users, potentially in diverse locations and with different devices. Collaborative Work Environments include Google Docs sites, Microsoft Sharepoint sites, eRooms, document management systems (e.g., iManage), intranets, web content management systems (CMS) (e.g., Drupal), wikis, and blogs.

“*Communications*” means disclosure, transfer, or exchange of information or opinion, however made, including any transmission of information by oral, graphic, written, pictorial, electronic, or other perceptible means.

“*Documents*” means all written, printed, or electronically stored information of any kind in the possession, custody, or control of the Department, including information stored on

social media accounts like Twitter or Facebook, chats, instant messages, and documents contained in Collaborative Work Environments and other document databases. The term includes agreements; letters; telegrams; inter-office communications; memoranda; reports; records; instructions; notes; notebooks; diaries; plans; diagrams; photographs; photocopies; charts; descriptions; drafts, whether or not they resulted in a final document; agendas and minutes of meetings, conferences, and telephone or other conversations or communications; recordings; published or unpublished speeches or articles; publications; transcripts of telephone conversations; phone mail; electronic-mail; and computer printouts.

“Including” means including, but not limited to.

III. Application for Expedited Processing

The Brennan Center requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(e)(1)(ii), (iv). This request meets the criteria for expedited processing because there is “[a]n urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information;” and this request concerns “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that could affect public confidence.” 28 C.F.R. § 16.5(e)(1)(ii) and (iv). As explained below in more detail in the section of this request regarding a fee waiver, the Brennan Center intends to disseminate the information obtained in response to this request to enable the public to effectively monitor, evaluate, and respond to information provided by state election officials regarding voter purging and to any analysis provided by the Department of Justice on these procedures.

The Brennan Center is a section 501(c)(3) non-profit organization that is “primarily engaged in disseminating information” within the meaning of 5 U.S.C. § 552(a)(6)(E)(v)(II) and 28 C.F.R. § 16.5(e)(1)(ii). The United States District Court for the District of Columbia has found that a non-profit, public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” is “primarily engaged in disseminating information” within the meaning of the statute and regulations. *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (quoting *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003)). The Brennan Center is a think tank and public interest law center that regularly writes and publishes reports and newspaper articles and makes appearances on various media outlets regarding voting rights, voter registration, and voter list maintenance. Through practical policy proposals, litigation, advocacy, and public communications, the Brennan Center works to ensure that voting is free, fair, and accessible for all Americans.

The Brennan Center is the author of a comprehensive report on state voter list maintenance practices.² This report has received national attention.³ The Center seeks to

² MYRNA PEREZ, BRENNAN CENTER FOR JUSTICE, VOTER PURGES (2008).

³ See also Pia Malbran, *Red Flag on Purging Voter Rolls*, CBS EVENING NEWS, Sept. 30, 2008, <http://www.cbsnews.com/news/red-flag-on-purging-voter-rolls/>.

update the information in that report to better inform the public on a matter of broad public interest and importance. Voter registration lists are a foundational piece of the voting process. If a citizen's name does not appear on the voter registration rolls because it was purged through a state's list maintenance practices, the citizen typically cannot cast a vote.

The Brennan Center urgently also requires the information sought by this request in order to inform the public of federal government activity with regard to the conduct and integrity of federal elections. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(e)(1)(ii). The Department's studies of list maintenance practices, and efforts to interpret and enforce list maintenance provisions of federal law, can have a significant impact on state purging practices. Those state practices could, in turn, have a significant impact on voters' rights. This information is of vital interest to the Brennan Center and the general public. Indeed, when information about voter purges is made public, serious problems are often revealed and can be remedied.⁴

Further, the Letter is itself the subject of heightened public interest, as demonstrated in recent media coverage of the Letter and its possible implications.⁵ That interest is supplemented by the public's demonstrated interest in the activities of the Presidential Advisory Commission on Election Integrity and its simultaneous request for voter file data from states.⁶ As a result, the information sought with regard to voter list maintenance procedures is especially urgent and timely.

IV. Application for Waiver or Limitation of All Fees

The Brennan Center requests a waiver of all search, review, and duplication fees associated with this request. The Brennan Center is eligible for a waiver of search and review fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.10(k), and for a waiver of all fees, including duplication fees, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k).

⁴ PEREZ, *supra* note 2, at 2 (Cataloging examples of examples of erroneous purges from Georgia, Louisiana, and Mississippi).

⁵ *See, e.g.,* Vanita Gupta, *The Voter Purges are Coming*, N.Y. TIMES, July 19, 2017, https://www.nytimes.com/2017/07/19/opinion/donald-trump-voting-rights-purge.html?_r=0; Justice Department pushes states on voter roll purge, THE RACHEL MADDOW SHOW, July 6, 2017, <http://www.msnbc.com/rachel-maddow/watch/justice-department-pushes-states-on-voter-roll-purge-985548867591>; Kristina Torres, *U.S. Justice Department also seeks voter information from Georgia*, ATLANTA JOURNAL-CONSTITUTION, July 6, 2017, <http://www.ajc.com/news/state--regional-govt--politics/justice-department-also-seeks-voter-information-from-georgia/GJ5nQS1nUHhz4r2c88nmeN/>; Austin Jenkins, *U.S. Department of Justice Also Seeks Voter Information From States*, NORTHWEST NEWS NETWORK, July 3, 2017, <http://nwnewsnetwork.org/post/us-department-justice-also-seeks-voter-information-states>.

⁶ *See, e.g.,* Spencer S. Hsu, *Trump voting panel tells states to hold off sending data while court weighs privacy impact*, WASH. POST, July 10, 2017, https://www.washingtonpost.com/local/public-safety/trump-voting-panel-tells-states-to-hold-off-sending-data-while-court-weighs-privacy-impact/2017/07/10/c4c837fa-6597-11e7-a1d7-9a32c91c6f40_story.html?utm_term=.81ec44fb56fa; Sam Levine, *This DOJ Letter May Be More Alarming Than Trump Commission's Request For Voter Data*, HUFFINGTON POST, July 5, 2017, http://www.huffingtonpost.com/entry/departement-of-justice-voter-purge_us_595d22b1e4b0da2c7326c38b; Michael Wines, *Asked for Voters' Data, States Give Trump Panel a Bipartisan 'No'*, N.Y. TIMES, July 1, 2017, <https://www.nytimes.com/2017/06/30/us/politics/kris-kobach-states-voter-fraud-data.html>.

First, the Brennan Center plans to analyze, publish, and publicly disseminate information obtained from this request. The requested records are not sought for commercial use and will be disclosed to the public at no cost.

Second, the Brennan Center qualifies as a “representative of the news media” for the same reasons that it is “primarily engaged in dissemination of information,” i.e., because the Brennan Center “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III); *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). The Brennan Center has released dozens of publications regarding voting issues in the form of reports and papers on various issues of public importance. *Cf. Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11-12 (finding that the Electronic Privacy Information Center was representative of the news media based on its publication of seven books about national and international policies relating to privacy and civil rights); *see also Nat’l Sec. Archive*, 880 F.2d at 1386 (deeming the National Security Archive a representative of the news media after it published one book and indicated its intention to publish a set of documents on national and international politics and nuclear policy). The Brennan Center is therefore entitled to a waiver of search and review fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.10(k).

As a noncommercial requester, the Brennan Center also qualifies for waivers as an “educational institution” pursuant to 28 C.F.R. § 16.10(d)(1). The Brennan Center qualifies as an educational institution because it is affiliated with the NYU School of Law, which is plainly an educational institution. *See also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381 (D.C. Cir. 1989).

The Brennan Center is also entitled to a waiver of all fees, including duplication fees, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k). First, the subject of the requested records clearly concerns “the operations or activities of the federal government.” This request seeks records and information concerning federal government activity because the materials requested concern allegations by the President of voter fraud in the conduct of federal elections and proposed changes to federal law. This connection to the federal government is “direct and clear, not remote or attenuated.” Disclosure of the requested records is therefore in the public interest because it is likely to contribute significantly to public understanding of how the government is regulating elections, which is plainly of interest to the public. Disclosure will significantly enhance the public’s understanding of this subject.

Moreover, disclosure is not primarily in the Brennan Center’s commercial interests. As stated above, the Brennan Center plans to make any information disclosed as a result of this request available to the public at no cost. A fee waiver would therefore fulfill Congress’s legislative intent that FOIA be “liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 CONG. REC. 27, 190 (1986) (Statement of Sen. Leahy)).

In the event you deny our waiver request, please contact us if you expect the costs to exceed the amount of \$500.00.

V. Response Requested in 10 Days

Your attention to this request is appreciated, and the Brennan Center will anticipate your determination regarding our request for expedited processing within ten (10) calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5. I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi).

We also request that you provide us with an estimated completion date, as required by 5 U.S.C. § 552(a)(7)(B)(ii). If the request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

Please furnish all applicable records to:

Jonathan Brater
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Brennan Center for Justice at NYU School of Law
120 Broadway, Suite 1750
New York, NY 10271
(646) 292-8310
www.brennancenter.org

Should you have any questions regarding this request, please contact Ms. Weiser at the address above, by telephone at (646) 292-8310, or by e-mail at weiserw@brennan.law.nyu.edu.

Sincerely,



Wendy Weiser
Tomas Lopez
Brennan Center for Justice at NYU School of Law