

BRENNAN  
CENTER  
FOR JUSTICE  
TWENTY  
YEARS

# The Protect - Democracy Project

*at New York University School of Law*

Via Certified Mail and Electronic Submission

May 17, 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

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

Dear Mr. Cantor:

This is a request to the Department of Homeland Security 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 6 C.F.R. § 5.5(e), and for a fee waiver under 5 U.S.C. §§ 552(a)(4)(A)(ii) & (iii) and 6 C.F.R. § 5.11.

## **I. Background**

President Trump issued Executive Order 13799, creating a “Presidential Advisory Commission on Election Integrity” (the “Commission”), supposedly “to promote fair and honest Federal elections.” According to the Executive Order, the Commission shall “study the registration and voting processes used in Federal elections... and shall submit a report to the President that identifies... those laws, rules, policies, activities, strategies, and practices” that either “enhance” or “undermine... the American people’s confidence in the integrity of the voting processes used in Federal elections;” and “those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting, including fraudulent voter registrations and fraudulent voting.”

The Commission is chaired by the Vice President of the United States and, per the Executive Order, “shall be informed by, and shall strive to avoid duplicating, the efforts of existing government entities.”

The Order also provides for “staff to provide support for [the Commission’s] functions.” Further, “subject to the availability of appropriations, the General Services Administration shall provide the Commission with such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission on a reimbursable basis.”

## **II. Formal Request**

The Brennan Center for Justice at NYU School of Law and The Protect Democracy Project request, to the extent the following are in the possession, custody, or control of the Department of Homeland Security:

1. All communications, including but not limited to emails and memoranda, between any Department of Homeland Security (“DHS” or “Department”) officer, employee, or agent, or any White House liaison to DHS, and any other person, including but not limited to any officer, employee, or agent of the White House or DHS, or any member of the presidential transition team or the presidential campaign of Donald Trump, regarding the Presidential Advisory Commission on Election Integrity or any other effort since November 8, 2016 to establish a commission, task force, or committee to study voter fraud or any aspect of the voting system.
2. All communications, including but not limited to emails and memoranda, between any DHS officer, employee, or agent, or any White House liaison to DHS, and any member of the Presidential Advisory Commission on Election Integrity, other than Vice President Michael Pence, since November 8, 2016.<sup>1</sup>
3. All documents relating to the Presidential Advisory Commission on Election Integrity or any other effort since November 8, 2016 to establish a commission, task force, or committee to study voter fraud or any aspect of the voting system, including all documents discussing or making reference to the following subjects:
  - a) The Executive Order creating the Presidential Advisory Commission on Election Integrity;

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<sup>1</sup> According to a public announcement from the White House, the following individuals are currently members of the Presidential Advisory Commission on Election Integrity: Vice President Michael Pence, Kansas Secretary of State Kris Kobach, Indiana Secretary of State Connie Lawson, New Hampshire Secretary of State William Gardner, Maine Secretary of State Matthew Dunlap, former Ohio Secretary of State J. Kenneth Blackwell, and EAC Commissioner Christy McCormick. The White House, Office of the Press Secretary, President Announces Formation of Bipartisan Presidential Commission on Election Integrity, May 11, 2017, <https://www.whitehouse.gov/the-press-office/2017/05/11/president-announces-formation-bipartisan-presidential-commission>.

- b) The reasons for forming the Presidential Advisory Commission on Election Integrity;
- c) The goals and mission of the Presidential Advisory Commission on Election Integrity;
- d) The membership of the Presidential Advisory Commission on Election Integrity, including the criteria for selection of its members; and
- e) The staffing of the Presidential Advisory Commission on Election Integrity, including job descriptions, organization charts, and criteria for hiring.

## **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 DHS, 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 print-outs.

“*Including*” means including, but not limited to.

“*Presidential Advisory Commission on Election Integrity*” means the commission created pursuant to the Executive Order on “Establishment of Presidential Advisory Commission on Election Integrity,” signed by President Donald Trump on May 11, 2017, or any effort to establish any task force, commission, or committee, whether through a government

agency or not, to investigate voter fraud, vote suppression, or any other aspect of the voting system.

We 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).

### **III. Application for Expedited Processing**

The Brennan Center and The Protect Democracy Project request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(e). 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 which affect public confidence.” 6 C.F.R. § 5.5(e)(1)(ii) and (iv). As explained below in more detail in the section of this request regarding a fee waiver, the Brennan Center and The Protect Democracy Project intend to disseminate the information obtained in response to this request to enable the public to effectively monitor, evaluate, participate in, and respond to the work of the Commission, which is scheduled to begin immediately.

The Brennan Center and The Protect Democracy Project are section 501(c)(3) non-profit organizations that are “primarily engaged in disseminating information” within the meaning of 5 U.S.C. § 552(a)(6)(E)(v)(II) and 6 C.F.R. § 5.5(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 regularly writes and publishes reports and newspaper articles and makes appearances on various media outlets regarding the fight to preserve and expand the right to vote for every eligible citizen. Through practical policy proposals, litigation, advocacy, and communications, the Brennan Center works to ensure that voting is free, fair, and accessible for all Americans.<sup>2</sup>

The core mission of The Protect Democracy Project, a new organization awaiting 501(c)(3) status, is to inform public understanding on operations and activities of the government. This request is submitted in accordance with the organization’s mission to gather and disseminate information that is likely to contribute significantly to the public understanding of executive branch operations and activities. The Protect Democracy Project has no commercial interests.

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<sup>2</sup> A list of the Brennan Center’s recent publications is available at <http://www.brennancenter.org/content/resources/publications>.

Furthermore, the Brennan Center and The Protect Democracy Project urgently require the information sought by this request in order to inform the public of federal government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(e)(1)(ii). The information requested herein concerns federal government activity with regard to the conduct and integrity of federal elections, which is at the core of the missions for both the Department and the newly established Commission. This information is of vital interest to the general public. Both the Commission and the issue of voter fraud have generated extensive public interest and media coverage, reflecting the public’s urgent concern about election integrity. The Brennan Center and The Protect Democracy Project intend to share any new information about the Commission and the integrity of federal elections obtained from this request with the public. The Commission’s charge includes recommending changes to the nation’s “laws, rules, policies, activities, strategies, and practices” regarding voting—all of which are of critical importance to the public and the integrity of American democracy, as well as to the missions of the Brennan Center for Justice and The Protect Democracy Project.

In order to adequately inform the public and to monitor the Commission, the Brennan Center and The Protect Democracy Project need this information expeditiously. According to news reports, the Commission will begin its work shortly,<sup>3</sup> and according to the White House’s official announcement, a final report will be submitted to the President next year.<sup>4</sup> Before this summer, the Commission will likely name additional members (fewer than half of a possible total of fifteen are currently named), hire staff, and establish a meeting and hearing calendar, as provided for in the Executive Order. The information sought in this request is critical for the public’s monitoring and evaluation of and response to those immediate activities. The information is also critical to public evaluation and monitoring of the Commission’s work, to pursue its mission of determining which “laws, rules, policies, activities, strategies, and practices” enhance or undermine public confidence in elections and what vulnerabilities exist in America’s voting systems—work which the Commission plans to begin expeditiously. Effective public monitoring and involvement is urgently needed given the importance of the topics the Commission is charged with addressing.

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<sup>3</sup> *See* Ali Vitali, Peter Alexander, & Kelly O’Donnell, *Trump Establishes Voter Fraud Commission*, NBC NEWS, May 11, 2017, <http://www.nbcnews.com/politics/white-house/trump-establish-vote-fraud-commission-n757796>; Jenna Johnson & John Wagner, *White House launches a commission to study voter fraud and suppression*, WASH. POST, May 11, 2017, [https://www.washingtonpost.com/news/post-politics/wp/2017/05/11/white-house-to-launch-a-commission-to-study-voter-fraud-and-suppression/?utm\\_term=.a495285c5a69](https://www.washingtonpost.com/news/post-politics/wp/2017/05/11/white-house-to-launch-a-commission-to-study-voter-fraud-and-suppression/?utm_term=.a495285c5a69); Pam Fessler, *Despite Little Evidence of Fraud, White House Launches Voting Commission*, NAT’L PUB. RADIO, May 11, 2017, <http://www.npr.org/2017/05/11/527924633/white-house-expected-to-announce-voting-fraud-commission>; DEBORAH BARRY & DAVID JACKSON, *Trump orders “voter fraud” commission as FBI firing fallout lingers*, USA Today, May 11, 2017, <https://www.usatoday.com/story/news/politics/2017/05/11/donald-trump-voter-fraud-mike-pence-kris-kobach/101544112/>.

<sup>4</sup> The White House, Office of the Press Secretary, *President Announces Formation of Bipartisan Presidential Commission on Election Integrity*, May 11, 2017, <https://www.whitehouse.gov/the-press-office/2017/05/11/president-announces-formation-bipartisan-presidential-commission>.

#### **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 6 C.F.R. § 5.11(k), and for a waiver of all fees, including duplication fees, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(k).

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 6 C.F.R. § 5.11. 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 6 C.F.R. § 5.11(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 and The Protect Democracy Project 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); 6 C.F.R. § 5.5(e)(4). 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).

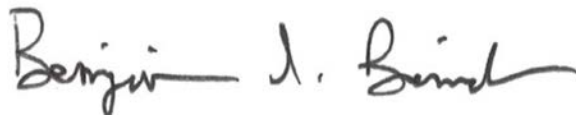
We also request that you provide us with an estimated completion date, as required by 5 U.S.C. § 552(a)(7)(B)(ii). If the request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. We expect the release of all segregable portions of otherwise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

Wendy R. Weiser  
Director, Democracy Program  
Brennan Center for Justice at NYU School of Law  
120 Broadway, Suite 1750  
New York, NY 10271  
(646) 292-8310  
[www.brennancenter.org](http://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](mailto:weiserw@brennan.law.nyu.edu); or Ben Berwick by email at [ben.berwick@protectdemocracy.org](mailto:ben.berwick@protectdemocracy.org).

Sincerely,



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Ben Berwick, Counsel  
The Protect Democracy Project



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Wendy Weiser, Director  
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