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OF COUNSEL

ROBERT ROSENMAN  
CHRISTINE BESHAR

May 9, 2007

Dear Ms. Layson:

We represent the Brennan Center for Justice ("Brennan Center") in its Freedom of Information Act ("FOIA") request to the United States Election Assistance Commission ("EAC"). We write in response to your December 12, 2006, and March 29, 2007, letters concerning the Brennan Center's FOIA request. On October 11, 2006, the Brennan Center made an original FOIA request 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 (the "voting fraud report"). The EAC's response of October 17, 2006, did not provide the Brennan Center with copies of those reports.

On November 8, 2006, the Brennan Center appealed your denial of its FOIA request for the two reports and provided the reasons for reconsideration. In that letter, the Brennan Center also made further requests for the following materials: (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 to outside reviewers.

In its response dated December 12, 2006, the EAC mistakenly treated the Brennan Center's November 8, 2006 letter as the first FOIA request for the voter ID and the voting fraud reports (that response is attached as Exhibit A). The Brennan Center's first FOIA request for those reports was actually made on October 11, 2006, and it properly appealed your denial of this request on November 8, 2006. The EAC's December 12, 2006, response did not address the fact that the Brennan Center had already appealed your denial. The December 12, 2006, response also did not provide copies of the requested reports.

On December 12, 2006, the EAC did produce a handful of documents responsive to the Brennan Center's request and withheld others on a claim of deliberative process privilege. On March 29, 2007, the EAC produced additional materials, consisting of printouts of certain e-mails dealing with the requested reports. However, although the EAC indicated that it was producing 1500 pages of responsive materials, its actual production consisted of only about 800 pages. From our review of the documents produced, we believe that the EAC's production does not reflect the "reasonable" searches required by FOIA. 5 U.S.C. §§ 552(a)(3)(C) and (D). The EAC has a duty to search for responsive documents wherever it is reasonable to expect that such documents may be located. *See Valencia-Lucena v. U. S. Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999) (holding search inadequate when "the record . . . reveals positive indications of overlooked materials", including "failure to search the center [the agency] had identified as a likely place where the requested documents might be located" and failure to speak to the person who "would be a likely source for information"); *Juda v. U. S. Customs Service*, No. 99-5333, 2000 U.S. App. LEXIS 17985, at \*2 (D.C. Cir. Jun. 19, 2000) (denying summary judgment to agency because agency not only failed "to pursue clear leads to other existing records", but also that the agency itself had "identified at least one other record system . . . that is likely to produce the information" requested).

The EAC's production is deficient in several respects. First, it appears that the EAC has searched the files of only two employees: Margaret Sims and Karen Lynn-Dyson. The e-mails produced from their files establish that several other EAC employees, whose files were not searched, communicated with the two sets of researchers and/or participated in other communications concerning the two reports at issue. Second, the EAC's production includes no other documents aside from those e-mails; there are no attachments to the e-mails, nor are there other documents reflecting communications about the reports. Third, the EAC's production is in an unclear format: the e-mails all run together without any clear separators between documents, some of the e-mails are incomplete or cut off and the redactions are inconsistent.

To remedy those deficiencies, we ask the EAC to provide all documents (including e-mails, attachments, and non-e-mail communications) from the other EAC Commissioners and employees relating to the two reports at issue, including but not limited to correspondence with the two sets of researchers, peer reviewers, employees of the U.S. Department of Justice, Commissioners and staff members of the Federal Election Commission, other administration officials, members of Congress and members of the general public. The EAC Commissioners and other employees in question include, but are not limited to: Donetta Davidson, Paul DeGregorio, Gavin Gilmour, Brian Hancock, Gracia Hillman, Julie Thompson Hodgkins, Caroline Hunter, Ray Martinez, Brian Whitener and Thomas Wilkey. We also request all non-e-mail communications from Margaret Sims and Karen Lynn-Dyson. Finally, although we are entitled to production of all the missing e-mail attachments, as Ms. Wendy Weiser had discussed with you, we will provide you a list of the particular missing e-mail attachments we seek at this point.

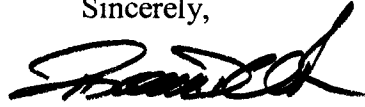
Furthermore, for the reasons set forth in the Brennan Center's letter of November 8, 2006, we believe that the EAC is improperly invoking the deliberative process

privilege. We ask that the EAC produce a detailed index of the documents that the EAC has withheld, including but not limited to the 300 pages that were mentioned in the EAC's March 29, 2007, response, along with any additional documents the EAC has withheld under a claim of privilege. See *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). *Vaughn* suggests that agencies should provide this type of index during the FOIA request process and before it is required in litigation to ensure that "a party's right to information is not submerged beneath governmental obfuscation and mischaracterization...", and to prevent "a situation in which the Government need only carry its burden of proof against a party that is effectively helpless and a court system that is never designed to act in an adversary capacity". 484 F.2d at 826. See also *Judicial Watch v. Food & Drug Admin., et al.*, 449 F.3d 141, 146 (D.C. Cir. 2006) ("The Vaughn index...[helps] restore a healthy adversarial process [by forcing] the government to analyze carefully any material withheld, [enabling] the trial court to fulfill its duty of ruling on the applicability of the exemption, and [enabling] the adversary system to operate by giving the requester as much information as possible, on the basis of which he can present his case to the trial court"); *Oglesby v. U. S. Dep't of Justice*, No. 02-603, 2007 U.S. Dist. LEXIS 13229, at \*6 (D.D.C. Feb. 27, 2007) ("In order for a FOIA challenge to be meaningful, the agency resisting disclosure of the records must disclose sufficient information about the records to permit a FOIA plaintiff to make an informed opinion about whether the agency has complied with the law and to present its case effectively to the court") (internal citations omitted).

Finally, in the EAC's December 12, 2006, and March 29, 2007, letters, the EAC advised that its productions of documents were only a "partial response" to the Brennan Center's FOIA requests and requested that the Brennan Center "hold any appeal until [its] request has been fully addressed". More than six months have passed since the Brennan Center's original FOIA request. The Brennan Center has exhausted all of its

administrative remedies.<sup>1</sup> We ask that the EAC either complete its response immediately or act on the Brennan Center's appeal.

Sincerely,



Rowan D. Wilson  
Yani Indrajana Ho

Jeannie Layson  
Director of Communications  
U.S. Election Assistance Commission  
1225 New York Avenue, N.W., Suite 1100  
Washington, DC 20005

VIA E-MAIL AND FIRST CLASS MAIL

Copy to:

Wendy R. Weiser  
Myrna Pérez  
Brennan Center for Justice  
161 Avenue of the Americas, 12th Floor  
New York, NY 10013

VIA E-MAIL AND FIRST CLASS MAIL

Copies to:

Honorable Dianne Feinstein  
Chairman, Committee on Rules and Administration  
United States Senate  
305 Russell Building  
Washington, DC 20510

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<sup>1</sup> The EAC was statutorily obligated to rule on the Brennan Center's November 8, 2006 appeal within 20 days. 5 U.S.C. § 552(a)(6)(A)(ii). Its failure to do so constitutes exhaustion of the Brennan Center's administrative remedies. See 5 U.S.C. 552(a)(6)(C)(i); *The New York Times Company v. U. S. Dep't. of Labor*, 340 F. Supp. 2d 394 (S.D.N.Y. 2004).

Honorable Robert F. Bennett  
Ranking Member, Committee on Rules and Administration  
United States Senate  
305 Russell Building  
Washington, DC 20510

Honorable Robert A. Brady  
Chairman, Committee on House Administration  
United States House of Representatives  
1309 Longworth Building  
Washington, DC 20515

Honorable Vernon J. Ehlers  
Ranking Member, Committee on House Administration  
United States House of Representatives  
1309 Longworth Building  
Washington, DC 20515

Honorable Zoe Lofgren  
Chair, House Administration Subcommittee on Elections  
United States House of Representatives  
102 Cannon House Office Building  
Washington, DC 20515

Honorable Maurice D. Hinchey  
United States House of Representatives  
2431 Rayburn House Office Building  
Washington, DC 20515

Honorable Carolyn B. Maloney  
United States House of Representatives  
2331 Rayburn House Office Building  
Washington, DC 20515

Honorable José E. Serrano  
United States House of Representatives  
2227 Rayburn House Office Building  
Washington, DC 20515

VIA FACSIMILE AND FIRST CLASS MAIL

# EXHIBIT A



**U.S. ELECTION ASSISTANCE COMMISSION**  
**1225 New York Ave. NW - Suite 1100**  
**Washington, DC 20005**

December 12, 2006

Ms. Wendy R. Weiser  
Deputy Director, Democracy Program  
Brennan Center for Justice  
161 Avenue of the Americas, 12<sup>th</sup> Floor  
New York, NY 10013

Dear Ms. Weiser:

This letter is in response to your Freedom of Information Act (FOIA) request received by the U. S. Election Assistance Commission (EAC) on November 13, 2006. The request sought certain agency records concerning two agency draft reports, *The Voter Fraud and Intimidation Report* and *The Voter Identification Report*. Specifically, the request sought: (1) "the report on voter identification prepared by the Eagleton Institute of Politics and the Moritz College of Law," (2) "the report on voter fraud and voter intimidation prepared by Tova Wang and Job Serebrov," (3) The voter identification and voting fraud report requests for proposals and contracts, and (4) communications relating to the above reports between the EAC and Eagleton Institute of Politics, the Moritz College of Law, Ms. Tova Wang, Mr. Job Serebrov, or other third parties.

This letter is a partial response to your request and deals only with your request for documents consistent with items (1) – (3), above. With regard to item (4), we continue to search our files, e-mails and computers for all relevant communications. We expect to have all relevant, releasable documents collected, reviewed and sent to you within five working days. If you have any questions regarding this process, please contact the undersigned.

With regard to items (1) – (3) above, please find copies of all responsive contracts and request for proposals enclosed. Upon review of the records, you will find a few places where small portions of information have been redacted (in black). As required by FOIA exemption 6, the EAC has redacted certain pieces of personal information, including home addresses, telephone numbers, and personal e-mail addresses. The EAC has also redacted confidential commercial information as mandated by FOIA exemption 4. Specifically, the EAC has redacted information that can be used to calculate unit costs regarding a contractor's labor rates. With regard to your requests for "the report on voter identification prepared by the Eagleton Institute of Politics and the Moritz College of Law," and "the report on voter fraud and voter intimidation prepared by Tova Wang and Job Serebrov," these draft documents are predecisional drafts protected by the Deliberative Process Privilege and exempted from release under 5 U.S.C. §522(b)(5).

As you may know, the Deliberative Process Privilege protects intra-agency documents that are (1) predecisional in nature and (2) part of the deliberative process. In other words, the documents must be part of a process that recommends or presents opinions on a policy matter or governmental decision before that matter is finally decided. It is a well settled matter of law that the work of contract employees and

contractors (“consultants”) constitute intra-agency documents.<sup>1</sup> This is true even where the consultants are deemed to be independent contractors and are not subject to the degree of control that agency employment entails.<sup>2</sup> The courts have made this determination after recognizing that agencies have a special need for the opinions and recommendations of temporary consultants.<sup>3</sup> Ultimately, deliberative documents are exempt from release (1) to encourage open and frank discussions on policy matters between agency subordinates and superiors, (2) to protect against premature disclosure of proposed policies and (3) to protect against public confusion that might result from disclosure of rationales that were not in fact the ultimate basis for agency action.<sup>4</sup>

In both cases, the reports you have requested are drafts, representing one phase of the deliberative process—before the document was vetted by staff, approved by the executive director and reviewed and approved by the Commissioners (the relevant policy makers). Ultimately, the draft documents were created by experts to aid the EAC’s Commissioners in their decisions. The consultants had no personal interest in their submissions and had no agency decision-making authority. Each was tasked with simply providing pre-decisional research and information to the EAC. Their efforts were limited to creating truthful and comprehensive draft reports. Finally, both reports when finalized would constitute an EAC decision or a policy determination.

These conclusions are born out in the facts surrounding the projects at issue, including the attached contract documents. First, the voter fraud and intimidation study you have requested is a draft of a final document that has already been released after being vetted by staff and approved by the EAC Commissioners. It is available in its final form on EAC’s website ([www.eac.gov](http://www.eac.gov)). The draft document at issue was created by two contract employees hired pursuant to 5 U.S.C. §3109 (see 42 U.S.C. §15324(b)). Individuals hired under this authority enter into an employment relationship with the EAC. The contract employees were supervised by an EAC program director who participated directly in the project. For example, the supervisor approved, facilitated, scheduled and participated in interviews conducted for the project. Further, the contract employees were provided research materials and other support from EAC law clerks and staff. As stated by their contract, these consultants were hired so that the EAC could “...obtain consulting services from an individual who can provide advice drawn from broad professional and technical experience in the area of voter fraud and intimidation.”<sup>5</sup> Moreover, the contracts clearly forbid the consultants from releasing the draft they created consistent with the privilege the EAC is asserting. The contract states:

All research, information, documents, and any other intellectual property (including but not limited to policies, procedures, manuals, and other work created at the request or otherwise while laboring for the EAC) shall be owned exclusively by the EAC, including copyright. All such work product shall be turned over to the EAC upon completion of your appointment term or as directed by the EAC. The EAC shall have exclusive rights over this material. You may not release government information or documents without the express written permission of the EAC.<sup>6</sup>

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<sup>1</sup> Department of the Interior v. Klamath Water Users Protective Association, 532 U.S. 1, 9-11 (2001) (Citing Harry E. Hoover v. Dept. of the Interior, 611 F.2d 1132, at 1138 (1980); Lead Industries Assn. v. OSHA, 610 F.2d 70, 83 (C.A.5 1980) (applying exemption 5 to draft reports prepared by contractors); and Government Land Bank v. GSA, 671 F.2d 663, 665 (CA1 1982)); See also Hertzberg v. Veneman, 273 F. Supp. 2d 67, 76 n.2 (D.D.C. 2003).

<sup>2</sup> Klamath, at 10.

<sup>3</sup> Hoover, 611 F.2d at 1138.

<sup>4</sup> NLRB v. Sears, Roebuck & Co., 41 U.S. at 151.

<sup>5</sup> See the consultant contracts for Job Serebrov and Tova Wang, enclosed.

<sup>6</sup> See *Id.*



Finally, the purpose or subject of the draft report at issue was to make an EAC determination on how voter fraud should be studied by the agency. This was to be done by (1) accessing the nature and quality of the information that presently exists on the subject matter, (2) defining the terms and scope of EAC study as proposed by HAVA, (3) determining what is to be studied and (4) determining how it is to be studied. EAC's interpretation of HAVA and its determination of what it will study and how it will use its resources to study it are matters of agency policy and decision.

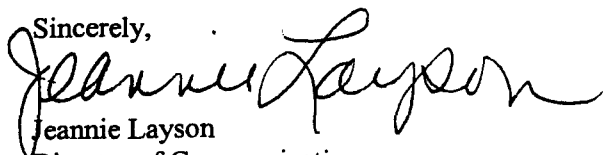
With regard to the Voter Identification draft, it was created by Rutgers University in conjunction with the Moritz College of Law (Ohio State University) to "...provide research assistance to the EAC for the development of voluntary guidance on provisional voting and voting identification procedures."<sup>7</sup> The stated objective of the contract was to:

...obtain assistance with the collection, analysis and interpretation of information regarding HAVA provisional voting and voter identification requirements for the purpose of drafting guidance on these topics... The anticipated outcome of this activity is the generation of concrete policy recommendations to be issued as voluntary guidance for States.<sup>8</sup>

As with the voter fraud and intimidation study mentioned above, the contractors were provided guidance, information, and were directed by EAC personnel. The final product they delivered (draft report sought) was identified as "a guidance document for EAC adoption." Clearly, as noted by the contract, the issuance of Federal guidance to states is a matter of government policy and limited to official EAC action.

The EAC has decided to waive the processing fees for your request. If you interpret any portion of this response as an adverse action, you will have an opportunity to appeal it to the Election Assistance Commission. However, as this letter is only partially responsive to your request, please hold any appeal until your request has been fully addressed. At that time, your appeal must be in writing and sent to the address noted on the above letterhead. Any appeal submitted, must be postmarked no later than 60 calendar days from the date of EAC's final response letter. Please include your reasons for reconsideration and attach a copy of this and subsequent EAC responses.

Sincerely,



Jeannie Layson  
Director of Communications  
U.S. Election Assistance Commission

Attachments:

1. Your Request Letter (dated November 8, 2006)
2. Responsive Documents

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<sup>7</sup> See EAC Contract, Act Number E4014127 (enclosed).

<sup>8</sup> See *Id.*