

VIA FACSIMILE

March 31, 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

Dear Mr. Cantor,

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Department of Homeland Security (“DHS”).

EPIC seeks records of DHS’s research, integration, and analysis activities related to the Russian interference in the 2016 presidential election.

The Russian interference in the 2016 presidential election represented a “significant escalation” in efforts to undermine U.S. democratic institutions.¹ Yet the House Select Intelligence Committee’s investigation of the interference has been derailed by infighting after Committee Chairman, Rep. Devin Nunes (R-Calif.) abruptly cancelled a critical public hearing and leaked what was likely classified information to the public.² As a result, yesterday Representative Bennie Thompson (D-MS) resorted to introducing House Resolution 235 directing the Secretary of Homeland Security to transmit the Department of Homeland Security’s research, integration, and analysis related to Russian interference directly to the House.³

Following Rep. Thompson’s proposed resolution, EPIC now seeks the following records related to the DHS review of the Russian interference in the 2016 election.

¹ See generally Office of the Dir. of Nat’l Intelligence, *Assessing Russian Activities and Intentions in Recent US Elections* ii (2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf.

² Patricia Zengerle, *House intelligence panel leaders split over session on Russia*, Reuters (Mar. 24, 2017), <http://www.reuters.com/article/us-usa-trump-russia-idUSKBN16V29I>; Matthew Rosenberg, Adam Goldman, and Emmarie Huettelman, *Monitoring May Have ‘Incidentally’ Picked Up Trump Aides, House Member Says*, N.Y. Times (Mar. 22, 2017), <https://www.nytimes.com/2017/03/22/us/politics/devin-nunes-wiretapping-trump.html>.

³ H.Res. 235, 115th Cong. (2017).

Documents Requested

(A) Any document, record, memo, correspondence, or other communication or any portion of any such communication of the Department of Homeland Security that refers or relates to the following:

(1) Research, integration, and analysis activities of the Department relating to interference with the elections for Federal office held in 2016 by or at the direction of the Russian Government, as announced in a joint statement with the Office of the Director of National Intelligence on October 7, 2016, and December 29, 2016.

(2) Dissemination by the Department of information regarding interference with the elections for Federal office held in 2016 by or at the direction of the Russian Government, as announced in a joint statement with the Office of the Director of National Intelligence on October 7, 2016, and December 29, 2016.

(3) Research into cyber compromises of emails of United States persons and institutions by or at the direction of the Russian Government to interfere with the elections for Federal office held in 2016.

(4) Integration, analysis, and dissemination of the Joint Analysis Report detailing the tools and infrastructure used by Russian intelligence services to compromise and exploit networks and infrastructure associated with the elections for Federal office held in 2016 issued by the Secretary of Homeland Security and the Director of the Federal Bureau of Investigation on December 29, 2016.

(B) Any and all information prepared for and/or transmitted to the House of Representatives pursuant to House Resolution 235.⁴

Request for Expedited Processing

EPIC is entitled to expedited processing of this request under the FOIA and the DHS's FOIA regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(e)(1)(ii). Specifically, EPIC's FOIA Request is entitled to expedited processing because, first, there is an "urgency to inform the public about an actual or alleged federal government activity," and, second, because the request is "made by a person who is primarily engaged in disseminating information." § 5.5(e)(1)(ii).

First, there is an "urgency to inform the public about an actual or alleged federal government activity." § 5.5(e)(1)(ii). The "actual" federal government activity at issue is DHS's research, integration, and analysis of the Russian interference. There is no dispute that DHS has carried out such activity; indeed, the DHS previously prepared a joint report on the interference.⁵ "Urgency" to inform the public about this activity is clear given grave questions about adequacy

⁴ *Id.*

⁵ Dept. of Homeland Sec. and Fed. Bureau of Investigations., GRIZZLY STEPPE – Russian Malicious Cyber Activity (2016), https://www.us-cert.gov/sites/default/files/publications/JAR_16-20296A_GRIZZLY%20STEPPE-2016-1229.pdf.

and independence of the House Select Intelligence Committee's inquiry into the Russian interference, the lead investigation in the House. Last week, in a move Ranking Member Adam Schiff (D-CA) called "an attempt to choke off public info," Chairman Devin Nunes (R-Ca) abruptly cancelled a critical open hearing featuring former intelligence and law enforcement officials.⁶ Next, reportedly as a result of the intervention of White House officials, Chariman Nunes publicly revealed what was likely classified information - that the communications of President Trump and his associates were subject to incidental collection by the intelligence community.⁷ Yesterday, Rep. Thompson described the investigation as one "torpedoed by its chairman's bizarre and inappropriate behavior."⁸ Therefore, there is a clear and urgent public need to for DHS to independently release any agency review of the Russian interference to the American public.⁹

Second, EPIC is an organization "primarily engaged in disseminating information." § 5.5(e)(1)(ii). As the Court explained in *EPIC v. Dep't of Def.*, "EPIC satisfies the definition of '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 request for expedited processing, I certify that this explanation is true and correct to the best of my knowledge and belief. § 5.5(e)(3); § 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 (i) "disclosure of the requested information is in the public interest because it is likely to contribute to the public understanding of the operations or activities of the government" and (ii) "disclosure of the information is not primarily in the commercial interest" of EPIC, the requester. 6 C.F.R. § 5.11(k)(1); § 552(a)(4)(A)(iii). EPIC's request satisfies this standard based on DHS's considerations for granting a fee waiver. §§ 5.11(k)(2-3).

⁶ @RepAdamSchiff, Twitter (Mar. 24, 2017, 11:16 AM), <https://twitter.com/RepAdamSchiff/status/845293157055107072> ("BREAKING: Chairman just cancelled open Intelligence Committee hearing with Clapper, Brennan and Yates in attempt to choke off public info.").

⁷ Matthew Rosenberg, Maggie Haberman, and Adam Goldman, *2 White House Officials Helped Give Nunes Intelligence Reports*, N. Y. Times (Mar. 30, 2017), https://www.nytimes.com/2017/03/30/us/politics/devin-nunes-intelligence-reports.html?_r=0

⁸ Tim Starks, *Open questions about Nunes' surveillance claims*, Politico (Mar. 31, 2017), <http://www.politico.com/tipsheets/morning-cybersecurity/2017/03/open-questions-about-nunes-surveillance-claims-219528>.

⁹ *U.S. Citizen Travel to International Regions*, Nat'l Travel & Tourism Office (Jan. 31, 2017), <http://travel.trade.gov/view/m-2016-O-001/index.html>.

(1) Disclosure of the requested information is likely to contribute to the public understanding of the operations or activities of the government.

First, disclosure of the requested documents “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” § 5.11(k)(2). DHS evaluates the following four considerations to determine whether this requirement is met: (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 meaningfully informative about government operations or activities in order to be ‘likely to contribute’ to an increased public understanding of those operations or activities”; (iii) “disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester” and it “shall be presumed that a representative of the news media will satisfy this consideration”; and/or (iv) the “public’s understanding of the subject in question must be enhanced by the disclosure to a significant extent.” *Id.*

As to the first consideration, the subject of the request self-evidently concerns “identifiable operations or activities of the federal government.” § 5.11(k)(2)(i). The requested documents involve the DHS’s research, integration, and analysis in response to a cyberattack and influence campaign directed against the U.S. DHS’s response to such an attack is basic to the agency’s domestic security and cybersecurity operations and activities.

As to the second consideration, disclosure would also be “meaningfully informative about” these operations or activities and is thus “‘likely to contribute’ to an increased understanding of government operations or activities.” § 5.11(k)(2)(ii). While DHS contributed to a joint report describing general technical details of the interference, the report described cyber espionage at a general level but did not “clearly ma[p] out the evidence linking the cyber espionage operations to Russia.”¹⁰ No further information has been forthcoming from DHS. The requested materials will, as a result, meaningfully contribute to the public understanding of the DHS operations or activities.

As to the third consideration, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject” because, as provided in the DHS FOIA regulations, DHS will “presum[e] that a representative of the news media will satisfy this consideration.” § 5.11(k)(2)(iii).

Finally, as to the fourth consideration, the public’s understanding will “be enhanced by the disclosure to a significant extent” because, as just described, little specific is known about the DHS review of the Russian interference. § 5.11(k)(2)(iv).

(2) Disclosure of the information is not primarily in the commercial interest of the requester.

¹⁰ Ronald Deibert, *The DHS/FBI Report on Russian Hacking was a Predictable Failure*, Just Security (Jan. 4, 2017), <https://www.justsecurity.org/35989/dhsfbi-report-russian-hacking-predictable-failure/>.

Second, “[d]isclosure of the information is not primarily in the commercial interest” of EPIC. § 5.11(k)(3). In determining whether this second requirement is met, CBP evaluates the following two considerations: (i) whether there is “any commercial interest of the requester... that would be furthered by the requested disclosure”; and/or (ii) whether “the public interest is greater than any identified commercial interest in disclosure,” and “[c]omponents ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.” *Id.*

As to the first consideration, there is not “any commercial interest of the requester... that would be furthered by the requested disclosure.” § 5.11(k)(3)(i). EPIC has no commercial interest in the requested records. EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.¹¹

As to the second consideration, “the public interest is greater than any identified commercial interest in disclosure.” § 5.11(k)(3)(ii). Again, EPIC has no commercial interest in the requested records, and, as noted above, there is significant public interest in the requested records. Moreover, DHS should presume that EPIC has satisfied § 5.11(k)(3)(ii). The FOIA regulations state “[c]omponents ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.” *Id.* As established in the sections above, EPIC is a news media requester, and its request satisfies the public interest standard.

For these reasons, a fee waiver should be granted.

Conclusion

Thank you for your consideration of this request. As provided in 5 U.S.C. § 552(a)(6)(E)(ii)(I), I anticipate your determination on our request within ten calendar days. For questions regarding this request I can be contacted at 202-483-1140 x111 or FOIA@epic.org.

Respectfully submitted,

/s/ Eleni Kyriakides
Eleni Kyriakides
EPIC Fellow

CC: Chairman Jason Chaffetz, House Committee on Oversight and Government Reform
Ranking Member Elijah Cummings, House Committee on Oversight and Government Reform

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