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VIA E-MAIL

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Dear Mr. Kaplan:

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 created in preparation for a briefing on election security by the DHS Secretary to members of the U.S. House of Representatives on May 22, 2018.[1]

Documents Requested

All records, including but not limited to notes, communications, reports, guidance, and/or other memoranda, created and used to prepare for the May 22, 2018, briefing on election security.

Background

In early 2017, the U.S. Intelligence Community determined that Russia interfered in the 2016 U.S. Presidential Election.[2] The intelligence agencies determined this was a "significant escalation" in Russia's attempts to disrupt U.S. democratic institutions.[3] According to the intelligence agencies, high level Russian leadership was involved with interference in the

[1] *See* Morgan Chalfant, *Congress to Receive Classified Briefing on Election Security Tuesday*, The Hill (May 21, 2018), http://thehill.com/policy/cybersecurity/388639-congress-to-receive-classified-briefing-on-election-security-tuesday.
[2] *See* Office of the Dir. Of Nat'l Intelligence, *Assessing Russian Activities and Intentions in Recent U.S. Elections* (2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf.
[3] *Id.*

election and favored then-candidate Donald Trump.[4] The Senate Intelligence Committee's report on the Russian meddling further outlined how Russian agents "scanned databases for vulnerabilities, attempted intrusions, and in a small number of cases successfully penetrated a voter registration database."[5] In some states, the Committee found, "these cyber actors were in a position to, at a minimum, alter or delete voter registration data."[6] The DHS has said that through these efforts, Russian hackers probed the voting systems of 21 states and compromised networks, though they have not uncovered evidence that votes themselves were changed.[7] Officials in DHS and other federal agencies have since stated that Russia is continuing its campaign against our democratic institutions by working to interfere with the upcoming 2018 midterm elections.[8]

Intelligence officials, including those at the DHS, have addressed these concerns to a certain extent. On January 6, 2017, then-Secretary Jeh Johnson designated the election systems as "critical infrastructure," declaring that election infrastructure would "be a priority for cybersecurity assistance and protections that the Department of Homeland Security provides to a range of private and public sector entities."[9] The DHS has said that it is helping 48 states with their election security, with an emphasis on making systems reviewable and anticipating possible issues with planning and drills.[10] And the DHS is assessing threats from multiple sources. DHS Secretary Kirstjen Nielsen has said that other countries, such as China and Iran, also could attempt to interfere with U.S. elections and, "[w]e need to be prepared."[11]

As part of these efforts, Secretary Nielsen, Federal Bureau of Investigation Director Christopher Wray, and Director of National Intelligence Dan Coats held a classified briefing for members of the U.S. House of Representatives on May 22, 2018. The purpose of the briefing was to inform Members of the risks to the election process and the steps that the administration is taking to assist state officials in ensuring election security.[12] Secretary Nielsen, Director Wray, and Director Coats issued a joint statement after the briefing.[13] In the statement, they explained that "[f]ollowing the threats to our democratic process in 2016, DHS, ODNI, and the FBI each

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[4] David Shepardson, *U.S. Officials Warn Congress on 2018 Election Hacking Threats*, Reuters (May 22, 2018), https://www.reuters.com/article/us-usa-election-security/u-s-officials-warn-congress-on-2018-election-hacking-threats-idUSKCN1IN25H.

[5] S. Comm. on Intelligence, 115th Cong., Russian Targeting of Election Infrastructure During the 2016 Election: Summary of Initial Findings and Recommendations 1 (May 8, 2018), https://www.burr.senate.gov/imo/media/doc/RussRptInstlmt1-%20ElecSec%20Findings,Recs2.pdf.

[6] *Id.*

[7] Shepardson, *supra* note 4.

[8] *Id.*

[9] Press Release, Office of the Press Secretary, U.S. Dep't of Homeland Sec., Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector (Jan. 6, 2017), https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical.

[10] Shepardson, *supra* note 4.

[11] *Id.*

[12] Chalfant, *supra* note 1.

[13] Joint Statement, DHS Secretary Kirstjen M. Nielsen, FBI Director Christopher Wray, and Director of National Intelligence Daniel Coats, Regarding Today's Capitol Hill Briefing on Election Security (May 22, 2018), https://www.dhs.gov/news/2018/05/22/joint-statement-dhs-secretary-kirstjen-m-nielsen-fbi-director-christopher-wray-and.

prioritized our defined roles in working with state and local election officials to assist them in their threat understanding and risk management practices."[14] They said that "[i]n the face of a rapidly evolving threat environment, our collaborative efforts with those on the front lines of administering our elections at the state and local levels are critical to enhancing the security of our nation's election."[15] Yet, DHS has not released additional information regarding the security threat to the 2018 midterm elections, or its work to avert that threat.

Officials who attended the briefing have expressed apprehension about the threat of Russian interference on U.S. election systems. Representative Michael McCaul (R-TX), chair of the House Homeland Security Committee, said that the House Members were concerned that "not only Russia but possibly other foreign adversaries are now going to start looking at how they can meddle in the midterm elections and we need to be prepared."[16] Bennie Thompson (D-MS), the senior Democrat on the House Homeland Security Committee stated, "It is clear that our government must do more and whatever possible to secure our elections from foreign interference. The integrity of our democracy is at stake."[17]

Polls and surveys indicate there is great concern in the country, by both experts and the public, about threats to election security. The Washington Post recently conducted an inquiry with "more than 100 cybersecurity leaders from across government, the private sector, academia and the research community" and found that "an overwhelming 95 percent" claimed "state election systems are not sufficiently protected against cyberthreats."[18] In a Quinnipiac poll, 61% of voters said that the Trump administration "should do more to protect the 2018 U.S. elections from Russian interference," while only 28% responded that the current efforts are sufficient.[19] A CNN poll offered similar results, with 60% of people asserting that they do not believe that President Trump is taking efforts to prevent foreign interference in U.S. elections, and 72% expressing worry about interference by foreign governments in U.S. elections generally.[20] More recently, an Axios/Survey Monkey poll determined that 58% of the respondents answered "Very/Somewhat" in response to the question "How likely is it that a foreign government will try to interfere with the midterm elections?"[21] Confidence in the integrity of the midterm elections

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[14] *Id.*
[15] *Id.*
[16] Shepardson, *supra* note 4.
[17] *Id.*
[18] Derek Hawkins, *The Cybersecurity 202: We surveyed 100 security experts. Almost all said state election systems were vulnerable*, Wash. Post (May 21, 2018), https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2018/05/21/the-cybersecurity-202-we-surveyed-100-security-experts-almost-all-said-state-election-systems-were-vulnerable/5b0189b030fb0425887995e2/.
[19] Quinnipiac Univer., *Trump Gets Most Votes as Worst President Since WWII, Quinnipiac University National Poll Finds; Reagan, Obama Top Trump 4-1 as Best President* 2 (Mar. 7, 2018), https://poll.qu.edu/images/polling/us/us03072018_uplm87.pdf/.
[20] *See* Jennifer Agiesta, *CNN Poll: 6 in 10 Concerned Trump Isn't Doing Enough to Protect U.S. Elections*, CNN (Feb. 27, 2018), https://www.cnn.com/2018/02/27/politics/cnn-poll-trump-russia-protect-elections/index.html.
[21] *See* Shannon Vavra, *Exclusive Poll: Majority Expects Foreign Meddling in Midterms*, Axios (June 5, 2018), https://www.axios.com/exclusive-poll-majority-expects-foreign-meddling-in-midterms-515c9556-be3e-4d51-b575-ff3ae47af205.html.

was limited, with only 64% demonstrating confidence that the votes will be counted accurately.[22] Reporting indicates that elections officials have heard from voters who have fears about the integrity of the country's elections.[23] Matt Dietrich, the public information officer for the Illinois State Board of Elections, said, "I've gotten calls from voters who you could tell had just been watching the news and were calling with concerns like, 'How do I know my vote is even going to count?'"[24] Dietrich added, "When the state board of elections has to reassure people that elections aren't rigged, that shows there was some success in sowing the seeds of doubt, if that was the goal."[25] Other officials—including Alex Padilla, the Secretary of State of California—agree that a critical issue in election security is ensuring voter confidence in the safety of their votes.[26]

Request for Expedited Processing

EPIC is entitled to expedited processing of this FOIA request under FOIA and DHS's FOIA regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(e)(1)(ii). This request should be granted expedited processing because, first, there is an "urgency to inform the public about an actual or alleged federal government activity," and, second, 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 is the DHS holding a classified meeting before the members of the House regarding election security. The creation and compilation of materials used to prepare for this election security briefing constitutes a government activity.

"Urgency" to inform the public about this activity is clear given the upcoming 2018 midterm elections. In the last major election, 21 states were targeted by people connected with the Russian government.[27] These hackers attempted to hack voter registration files or public election sites in the states, and even successfully penetrated computer systems in Illinois.[28] Although not every targeted state has been made public, officials announced that Alabama, Colorado, Connecticut, Iowa, Illinois, Maryland, Minnesota, Ohio, Oklahoma, Pennsylvania, Virginia, Wisconsin, and Washington all are among the affected states.[29] According to the Cook

[22] *Id.*
[23] Derek Hawkins, *The Cybersecurity 202: Voters' Distrust of Election Security is Just as Powerful as an Actual Hack, Officials Worry*, Wash. Post (June 5, 2018), https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2018/06/05/the-cybersecurity-202-voters-distrust-of-election-security-is-just-as-powerful-as-an-actual-hack-officials-worry/5b1567091b326b08e883912f/.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *See* Sari Horwitz, Ellen Nakashima & Matea Gold, *DHS Tells States About Russian Hacking During 2016 Election*, Wash. Post (Sept. 22, 2017), https://www.washingtonpost.com/world/national-security/dhs-tells-states-about-russian-hacking-during-2016-election/2017/09/22/fd263a2c-9fe2-11e7-8ea1-ed975285475e_story.html.
[28] *Id.*
[29] *See id.* (explaining that DHS allowed each state to choose whether to make this information public).

Political Report, thirty-six of the ninety-nine races for seats in the House of Representatives that are the most competitive are in these targeted states.[30]

Experts are also concerned about readiness for the midterm elections. Chris Painter, the State Department's top cyber diplomat under both the Obama and Trump administrations, has said, "Given the gravity of the nation-state threats we face, much more needs to be done at every level—including a strong declarative policy that this activity is unacceptable and will trigger a strong response."[31] This expert consensus also reflected in public opinion: state officials from states as disparate as Illinois and California have stated that their constituents doubt the safety of the elections.[32] The DHS itself has said that "[w]ith primaries already underway across the United States, and the general elections less than six months away, it is critical—now more than ever—to safeguard and secure our election infrastructure."[33] The most recent federal spending bill included $380 million in grants for states to support their election infrastructure and security.[34] However, DHS senior cybersecurity adviser Matthew Masterson, has said this funding will go "mostly to standard security measures."[35] Because of this uncertainty and anxiety, it is essential for the public to know the work that DHS is doing to secure federal election systems.

Second, EPIC is an organization "primarily engaged in disseminating information." 6 C.F.R. § 5.5(e)(1)(ii). As the Court explained in *EPIC v. DOD*, "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). EPIC's mission is to focus public attention on emerging privacy and civil liberties issues and it consistently disseminates the information obtained through the FOIA on its website https://epic.org.[36]

In submitting this request for expedited processing, I certify that this explanation is true and correct to the best of my knowledge and belief. 6 C.F.R. § 5.5(e)(3); 5 U.S.C. § 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. DOD*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC's status as a "news media" requester,

[30] *See 2018 House Race Ratings*, The Cook Political Report (June 20, 2018), https://www.cookpolitical.com/ratings/house-race-ratings.
[31] Hawkins, *supra* note 18.
[32] Hawkins, *supra* note 23.
[33] Joint Statement, *supra* note 13.
[34] Thomas Kaplan, *Congressional Leaders Agree on $1.3 Trillion Spending Bill as Deadline Looms*, N.Y. Times (Mar. 21, 2018), https://www.nytimes.com/2018/03/21/us/politics/congress-spending-deal-government-shutdown.html.
[35] Joseph Marks, *State Election Officials Are Mostly Using New Election Security Money to Shore Up the Basics*, Nextgov (June 12, 2018), https://www.nextgov.com/cybersecurity/2018/06/heres-how-380-million-election-security-funding-being-spent/148953/.
[36] *See* EPIC, https://epic.org/.

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 significantly to 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 the considerations that DHS uses in determining whether to grant a fee waiver. §§ 5.11(k)(2-3).

*(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 is "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." 6 C.F.R. § 5.11(k)(2). The DHS evaluates four factors 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 (v) "[t]he public's understanding of the subject in question must be enhanced by the disclosure to a significant extent." *Id.*

On the first consideration, the subject of the request self-evidently concerns "identifiable operations or activities of the federal government." 6 C.F.R. § 5.11(k)(2)(i). Secretary Nielsen, along with other intelligence officials, conducted a briefing before Members of the House regarding election security.

On 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." 6 C.F.R. § 5.11(k)(2)(ii). There is little detailed information as to the content of the briefing, and there also is a lack of information about DHS's efforts to prepare for the 2018 midterm elections. These materials would meaningfully enhance the public understanding of the agency's work.

On 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, the DHS shall "presum[e] that a representative of the news media will satisfy this consideration." 6 C.F.R. § 5.11(k)(2)(iii).

Finally, on the fourth consideration, the public's understanding will "be enhanced by the disclosure to a significant extent" because the public must know what the DHS is doing to ensure the safety of our democratic institutions, particularly in terms of the 2018 midterm elections: not

even elected officials are being fully informed of the DHS's efforts regarding these elections that are fewer than five months away.[37]

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

Second, "[d]isclosure of the information is not primarily in the commercial interest" of EPIC. To determine whether this second requirement is met, the DHS evaluates 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.*

On the first consideration, there is not "any commercial interest of the requester . . . that would be furthered by the requested disclosure." 6 C.F.R. § 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.[38]

On the second consideration, "the public interest is greater than any identified commercial interest in disclosure." 6 C.F.R. § 5.11(k)(3)(ii). Again, EPIC has no commercial interest in the requested records and there is significant public interest in the requested records. Moreover, the DHS should presume that EPIC has satisfied 6 C.F.R. § 5.11(k)(3)(ii). The DHS 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.* EPIC is a news media requester and, as set out above, this request satisfies the public interest standard.

For these reasons, a fee waiver should be granted for EPIC's request.

[37] *See* Martin Matishak, *Silence on Russian Election Meddling Frustrates Lawmakers*, Politico (June 24, 2018), https://www.politico.com/story/2018/06/24/russia-election-meddling-congress-667174.
[38] *About EPIC*, EPIC.org, http://epic.org/epic/about.html.

Conclusion

Thank you for your consideration of this request. I anticipate your determination on our request within ten working days. 5 U.S.C. § 552(a)(6)(E)(ii)(I). For questions regarding this request contact Enid Zhou at 202-483-1140 x104 or FOIA@epic.org.

Respectfully submitted,

*/s Carroll B. Neale*
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