

VIA EMAIL

April 14, 2020

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Dear Ms. Purvis:

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

EPIC seeks records concerning the Commerce Department’s request to Congress to extend the deadline for delivering final apportionment counts from the 2020 Census.

Documents Requested

All records concerning the Commerce Secretary Wilbur Ross request to Congress for “120 additional calendar days to deliver final apportionment counts” from the 2020 Census.¹

Background

On April 13, 2020, Commerce Secretary Wilbur Ross and Census Bureau Director Steven Dillingham issued a joint statement requesting “statutory relief from Congress of 120 additional calendar days to deliver final apportionment counts” from the 2020 Census.² As grounds for the proposed delay, Secretary Ross and Director Dillingham cited the ongoing COVID-19 crisis and the current suspension of field data collection activities.

Rep. Carolyn B. Maloney, Chairwoman of the House Oversight Committee, has sought information from the Commerce Department regarding the basis of the request. But she said

¹ Press Release, Census Bureau, U.S. Department of Commerce Secretary Wilbur Ross and U.S. Census Bureau Director Steven Dillingham Statement on 2020 Census Operational Adjustments Due to COVID-19 (Apr. 13, 2020), <https://www.census.gov/newsroom/press-releases/2020/statement-covid-19-2020.html>.

² *Id.*

yesterday that the administration is “stonewalling in providing information” to Congress that is “vital in assessing” the proposed extension of census reporting deadlines.³

EPIC favors the collection and use of census data and has long argued that the census “performs many useful functions for society.”⁴ As EPIC told Congress in 2018:

EPIC supports the work of the Census Bureau and the use of statistical analysis in policymaking and other government initiatives. The Census is an essential part of understanding the changing demographics in America. The census helps ensure evidence-based policy decisions and census data is the source of much political and economic planning in the United States.⁵

The public has the right to know the reason that Secretary Ross is proposing to delay the reporting of census data.

Request for Expedition

EPIC is entitled to expedited processing of this request.⁶ Under Department of Commerce FOIA regulations, a request “shall be taken out of order and given expedited treatment”⁷ when (1) there is an “urgency to inform the public about an actual or alleged Federal Government activity” and the request is “made by a person primarily engaged in disseminating information”;⁸ and (2) when the request involves “[a] matter of widespread and exceptional media interest involving questions about the Government's integrity which affect public confidence[.]”⁹ EPIC’s request qualifies for expedited processing on both grounds.

(1) Urgency to Inform the Public About Actual Government Activities

First, there is an “urgency to inform the public about [the] actual or alleged federal government activit[ies]” that are the subject of this request, which is brought by a representative of the news media.¹⁰ The actual federal government activity is the Commerce Department request that Congress allow a 120-day delay on data reporting deadlines. Commerce Secretary Wilbur Ross and Census Bureau Director Steven Dillingham issued a joint statement stating that the Census Bureau is seeking statutory relief from congress.¹¹

The urgency to inform the public about this government activity is clear from the immense public interest in conducting a complete, accurate, and timely 2020 Census. The administration’s

³ Matthew Choi, *Trump Admin Requests Delays in Census Deadlines*, POLITICO (Apr. 13, 2020), <https://www.politico.com/news/2020/04/13/trump-census-deadline-delays-184273>.

⁴ EPIC, *The Census and Privacy* (2020), <https://epic.org/privacy/census/>.

⁵ Statement from EPIC to U.S. Senate Comm. on Homeland Sec. & Gov’t Affairs (Oct. 2, 2018), <https://epic.org/testimony/congress/EPIC-SHGSA-Census-Oct2018.pdf>.

⁶ 5 U.S.C. § 552(a)(6)(E)(v)(II); 15 C.F.R. § 4.6(f).

⁷ 15 C.F.R. § 4.6(f)(1).

⁸ 15 C.F.R. § 4.6(f)(1)(iv).

⁹ 15 C.F.R. § 4.6(f)(1)(iii).

¹⁰ 15 C.F.R. § 4.6(f)(1)(iv).

¹¹ Census Bureau Press Release, *supra* note 1.

proposed delay in census data reporting is particularly concerning because the Trump administration is “stonewalling” Congress from obtaining vital information about the delay.¹² According to Rep. Carolyn B. Maloney, chairwoman of the House Oversight Committee, the committee has repeatedly requested, but has been unable to secure, a briefing with Director Dillingham.¹³

EPIC is also an organization “primarily engaged in disseminating information.”¹⁴ As the Court explained in *EPIC v. Department of Defense*, “EPIC satisfies the definition of ‘representative of the news media’” under the FOIA.¹⁵ Accordingly, EPIC is entitled to expedited processing of this request under 15 C.F.R. § 4.6(f)(1)(iv).

(2) *Matter of Widespread and Exceptional Media Interest*

Second, EPIC is separately entitled to expedited processing because this request involves “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that affect public confidence.”¹⁶

The content, administration, results of the 2020 Census have received extraordinary media attention.¹⁷ Yesterday, the *Washington Post* reported that Census Director Dillingham had not briefed the committee on the agency’s request and was excluded from a White House-organized conference call concerning the delay.¹⁸ These matters unquestionably bear on the integrity of the government and affect public confidence in the census, which is crucial for apportionment, redistricting, planning, emergency relief, and funding for infrastructure. EPIC is therefore also entitled to expedited processing of its request under 15 C.F.R. § 4.6(f)(1)(iii).

In submitting this request for expedited processing, EPIC certifies that this explanation is true and correct to the best of its knowledge and belief.¹⁹

¹² Choi, *supra* note 3.

¹³ *Id.*

¹⁴ 15 C.F.R. § 4.6(f)(1)(iv).

¹⁵ 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

¹⁶ 15 C.F.R. § 4.6(f)(1)(iii).

¹⁷ News Search Results for “2020 Census,” Google (Apr. 14, 2020), <https://www.google.com/search?q=%222020+census%22&tbm=nws> (listing 835,000 news results for “2020 Census”); *see also* Oliver Laughland, *How Trump’s Census Question Could Transform America’s Electoral Map*, *The Guardian* (June 17, 2019), <https://www.theguardian.com/us-news/2019/jun/17/trump-us-census-question-gerrymandering>; Reid Wilson, *Trump Further Politicizes Census*, *The Hill* (July 9, 2019), <https://thehill.com/homenews/administration/452234-trump-further-politicizes-census>; Karen Freifeld & Andy Sullivan, *Trump Administration Retreats on Census Citizenship Question*, *Reuters* (July 2, 2019), <https://www.reuters.com/article/us-usa-census/trump-administration-retreats-on-census-citizenship-question-idUSKCN1TX2SJ>.

¹⁸ Tara Bahrapour, *Trump Administration Asks Congress to Push Back Census by Months Because of Coronavirus*, *Wash. Post* (Apr. 13, 2020), https://www.washingtonpost.com/local/social-issues/trump-administration-asks-congress-to-push-back-census-by-months/2020/04/13/f6303052-7de7-11ea-a3ee-13e1ae0a3571_story.html;

¹⁹ 5 U.S.C. § 552(a)(6)(E)(vi); 15 C.F.R. § 4.6(f)(3).

Request for News Media Fee Status

EPIC is a “representative of the news media” for fee classification purposes, as the Court held in *EPIC v. Department of Defense*.²⁰ Based on EPIC’s status as a “news media” requester—and because EPIC, as a non-profit organization, has no commercial interest in the requested records—EPIC is entitled to receive the requested record with only duplication fees assessed.²¹

Request for Fee Waiver

Any duplication fees should be waived because “[d]isclosure 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 because “[d]isclosure of the information is not primarily in the commercial interest of” EPIC.²²

The Commerce Department evaluates four factors to determine whether the “public interest” condition is met: (i) the “subject of the requested records must concern identifiable operations or activities of the Federal Government,”; (ii) “[t]he disclosable portions of the requested records must be meaningfully informative about Government operations or activities”; (iii) disclosure “must contribute to the understanding of a reasonably broad audience of persons interested in the subject”; and (iv) “[t]he public’s understanding of the subject in question prior to the disclosure must be significantly enhanced by the disclosure.”²³ EPIC’s request satisfies all four factors.

First, the requested records clearly “concern identifiable operations or activities of the Federal Government,”²⁴ namely: the Commerce Department’s request that Congress extend census reporting deadlines due to the COVID-19 crisis.

Second, disclosure of the requested records is “‘likely to contribute’ to an increased public understanding of [those] operations or activities.”²⁵ Disclosure would be “meaningfully informative about Government operations or activities”²⁶ because—apart from the Commerce Department’s April 13, 2020 statement—little is known about the basis of the agency’s decision.

Third, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject,” because the Commerce Department must “presume[] that a representative of the news media,” such as EPIC, “satisfies this consideration.”²⁷ The requested records will reach a large audience through EPIC’s widely read website, <https://epic.org>, where EPIC routinely posts and interprets privacy-related government documents obtained under the FOIA. EPIC’s FOIA work is also frequently covered through major media outlets.²⁸

²⁰ 241 F. Supp. 2d 5.

²¹ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 15 C.F.R. § 4.11(d)(1).

²² 15 C.F.R. § 4.11(l)(1)(i)–(ii); *see also* 5 U.S.C. § 552(a)(4)(A)(iii).

²³ 15 C.F.R. § 4.11(l)(2).

²⁴ *Id.* § 4.11(l)(2)(i).

²⁵ *Id.* § 4.11(l)(2)(ii).

²⁶ *Id.*

²⁷ *Id.* § 4.11(l)(2)(iii).

²⁸ *See* EPIC, *EPIC in the News*, https://epic.org/news/epic_in_news.php/.

Fourth, “[t]he public's understanding of the subject in question prior to the disclosure must be significantly enhanced by the disclosure.”²⁹ Again, little information has been released about the basis of the agency’s decision to seek an extension in census data reporting deadlines. A timely and accurate census of paramount importance, and the public has a right to know the circumstances surrounding the Commerce Department’s decision to seek a reporting delay from Congress.

Finally, EPIC’s request satisfies the “commercial interest” condition for a fee waiver because disclosure of the requested information is not “primarily in the commercial interest” of EPIC.³⁰ EPIC has no “commercial interest that would be furthered by the requested disclosure.”³¹ EPIC is a registered non-profit organization committed to open government, privacy, and civil liberties.³² Moreover, the Commerce Department “ordinarily shall presume that if a news media requester has satisfied the public interest standard, the public interest is the primary interest served by disclosure to that requester.”³³ As described above, EPIC is a news media requester and satisfies the public interest standard.

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

Conclusion

Thank you for your consideration of this request. We anticipate your determination on our request within ten calendar days.³⁴ For questions regarding this request, contact John Davisson at davisson@epic.org, cc’ FOIA@epic.org.

Respectfully submitted,

/s John Davisson

John Davisson
EPIC Counsel

/s Enid Zhou

Enid Zhou
EPIC Open Government Counsel

²⁹ 15 C.F.R. § 4.11(l)(2)(iv).

³⁰ *Id.* § 4.11(l)(3).

³¹ *Id.* § 4.11(l)(3)(i).

³² EPIC, *About EPIC* (2019), <https://epic.org/epic/about.html>.

³³ 15 C.F.R. § 4.11(l)(3)(ii).

³⁴ 5 U.S.C. § 552(a)(6)(E)(ii)(I).