



August 10, 2017

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Office of Information Policy
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Washington, DC 20530-0001

Nelson D. Hermilla
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Civil Rights Division
Department of Justice
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Valerie H. Yancey
FOIA Officer and Executive Officer
Office of the Solicitor General
Department of Justice
950 Pennsylvania Avenue, N.W., Room 6627
Washington, DC 20530-0001

Re: Freedom of Information Act Request

Dear Ms. Day, Mr. Hermilla, and Ms. Yancey,

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq., and Department of Justice (DOJ) implementing regulations, 28 C.F.R. Part 16, the Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") makes the following request for records.

On June 28, 2017, T. Christian Herren, Jr., Chief of the Voting Section of the Civil Rights Division, sent a letter to the chief election officials of all fifty states requesting "information regarding [each] State's procedures for compliance with state voter registration list maintenance provisions of the National Voter



Registration Act (“NVRA”).¹ Former senior DOJ officials indicated that such a request was unprecedented and likely was laying the groundwork for a new federal effort to require states to remove registered voters from their rolls.²

On the same day the Voting Section sent its unprecedented letter, Kansas Secretary of State Kris Kobach sent his own unprecedented letter to all fifty states. Kobach, who serves as the Vice Chair of the Presidential Commission on Election Integrity (the “Commission”), requested that states send the Commission the personal information and voting histories of all registered voters in their states.³ Kobach’s letter generated intense public controversy and has been at the forefront of the national news since it was sent. The timing of the Commission’s and DOJ’s letters also raised questions regarding potential coordination. DOJ has asserted that there was no coordination between the Commission and DOJ in sending their respective letters, even though the letters were sent on the same day, but former DOJ officials are skeptical of this claim.⁴

On July 19, 2017, the Commission held its first public meeting. Present and participating at the meeting were three other members of the Commission who have long worked with Kobach on efforts to purge voter registration lists, purportedly in an effort to prevent voter fraud: J. Kenneth Blackwell; Hans von Spakovsky; and J. Christian Adams. Also at the meeting was the Commission’s Designated Federal Officer, Andrew Kossack. At the meeting, von Spakovsky outlined various types of information he hoped the Commission would collect, and Kobach responded that DOJ had “coincidentally” just sent a letter to states requesting some of that very same information.⁵ Several minutes later Kobach instructed the Commission’s staff to collect information from any relevant databases across the federal government.⁶

¹ Sam Levine, *This DOJ Letter May Be More Alarming Than Trump Commission’s Request For Voter Data*, HuffPost, July 5, 2017, http://www.huffingtonpost.com/entry/department-of-justice-voter-purge_us_595d22b1e4b0da2c7326c38b.

² *Id.*

³ Ltr from Kris Kobach to The Hon. John Merrill, June 28, 2017, <https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/information-requests-to-states-06282017.pdf>

⁴ *Id.*

⁵ See <https://www.youtube.com/watch?v=oZI27wB8-po&feature=youtu.be> (1:35 mark).

⁶ See *id.* (1:37 mark).

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On August 7, 2017, the Solicitor General filed an *amicus* brief in *Husted v. A. Phillip Randolph Institute*, No. 16-980 (2016). That case, which is pending case before the U.S. Supreme Court, concerns the legality under the NVRA of an Ohio law that requires the removal of certain voters from the state's voter rolls. Consistent with the position staked out in the Voting Section's recent letter and with the mandate of the Commission, the Solicitor General's *amicus* brief reversed DOJ's prior position in the case and argued that Ohio's law does not violate the NVRA.⁷

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Given the significant public controversy surrounding DOJ's new efforts to facilitate the removal of voters from state voters rolls, and the Commission's work to further those efforts, there is substantial public interest in any coordination or communications between DOJ and the above individuals who now serve on the Commission, or between DOJ and other individuals and groups who have long worked on efforts to remove voters from state voter rolls.

Requested Records

The Lawyers' Committee requests that your agency produce the following within twenty business days:

1. All records containing, reflecting, documenting, summarizing, or otherwise relating to communications (including emails, telephone call logs, calendar entries, meeting agendas, or any other records reflecting communications) since January 20, 2017 between any employee of your agency and any of the following individuals:
 - a. Kris Kobach
 - b. J. Kenneth Blackwell
 - c. Hans von Spakovsky
 - d. J. Christian Adams
 - e. Andrew Kossack
 - f. H. Christopher Coates
 - g. Robert Popper

⁷ See Ari Berman, *Trump Administration on the Right to Vote: Use It or Lose It*, Aug. 8, 2017, Mother Jones, <http://www.motherjones.com/politics/2017/08/trump-administration-on-the-right-to-vote-use-it-or-lose-it/>.



- h. Any employees or agents of the Public Interest Law Foundation (including anyone with an email address ending in @publicinterestlegal.org).
- i. Any employees or agents of the American Civil Rights Union (including anyone with an email address ending in @theacru.org).
- j. Any employees or agents of Judicial Watch (including anyone with an email address ending in @judicialwatch.org).

- 2. All records containing, reflecting, documenting, summarizing, or otherwise relating to communications (including emails, telephone call logs, calendar entries, meeting agendas, or any other records reflecting communications) since January 20, 2017 between any employee of your agency and any employee of the Ohio Attorney General's Office (including anyone with an email address ending in @OhioAttorneyGeneral.gov) as it pertains to *Husted v. A. Phillip Randolph Institute*:

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The Lawyers' Committee seeks all records meeting the above criteria regardless of the capacity in which the individuals identified above were acting at the time of the communications, and regardless of the email address the individuals were using at the time of any such communications.

Please ensure that your searches covers all career and political staff (including PAS and PA appointees) in the Attorney General's Office, the Deputy Attorney General's Office, the office of the Acting Assistant Attorney General for the Civil Division, the Solicitor General's Office, and the Civil Rights Division.

In addition to the records requested above, the Lawyers' Committee also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

The Lawyers' Committee seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms "record," "document," and "information" in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as



well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. No category of material should be omitted from search, collection, and production.

Please search all records regarding agency business. You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts. Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.⁸ It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; the Lawyers' Committee has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.⁹

In addition, please note that in conducting a "reasonable search" as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered your agency's prior FOIA practices unreasonable. In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches. Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians' files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency's archiving tools would capture that email under Capstone. Accordingly, the Lawyers' Committee insists that your agency use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. The Lawyers' Committee is available to work with you to craft appropriate search terms. However, custodian searches are still required; agencies

⁸See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149-50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955-56 (D.C. Cir. 2016).

⁹See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) ("The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official's] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work related email in the [personal] account was duplicated in [the official's] work email account." (citations omitted)).

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may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”¹⁰ If it is your position that any portion of the requested records is exempt from disclosure, the Lawyers’ Committee requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”¹¹ Moreover, the *Vaughn* index “must describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of disclosing the sought-after information.”¹² Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”¹³

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document. Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Please institute a preservation hold on information responsive to this request. The Lawyers’ Committee intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, your agency is on notice that litigation is reasonably foreseeable.

¹⁰ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).

¹¹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹² *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

¹³ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).



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To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, the Lawyers' Committee welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, the Lawyers' Committee and your agency can decrease the likelihood of costly and time-consuming litigation in the future. Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to the Lawyers' Committee for Civil Rights Under Law, 1401 New York Ave., NW, Washington DC, 20005. If it will accelerate release of responsive records to the Lawyers' Committee, please also provide responsive material on a rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k), the Lawyers' Committee requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to public understanding of those operations in a significant way.¹⁴ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁵

The Lawyers' Committee requests a waiver of fees because 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 federal government.¹⁶ The disclosure of the information sought under this request will reveal the operations of the federal government, including how public funds are spent and how officials conduct the public's business, as well currently non-public documents related to coordination between your agency and the Commission. In all events, the disclosure will produce information on matters of intense public interest and importance. The Lawyers' Committee "will disseminate the information to a reasonably broad audience of persons" through its social media accounts and its website.

This request is primarily and fundamentally for non-commercial purposes.¹⁷ As a 501(c)(3) nonprofit, the Lawyers' Committee does not have a commercial purpose and the release of the information requested is not in the Lawyers' Committee's financial interest. The Lawyers' Committee was founded in 1963 and is committed

¹⁴ 28 C.F.R. § 16.10(k)(1).

¹⁵ *Id.*

¹⁶ 28 C.F.R. § 16.10(k)(1), (2)(i)-(iii).

¹⁷ 28 C.F.R. § 16.10(k)(1), (2)(iii).



to full and fair enforcement of federal civil rights laws and ensuring equal justice under law for all. The Lawyers' Committee has been at the forefront of the legal struggle to advance and protect the right to vote, and accordingly it has substantial interest in the work of your agency that could affect the voting rights of Americans.

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The Lawyers' Committee uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. The Lawyers' Committee also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter. The Lawyers' Committee has demonstrated its commitment to the public disclosure of documents.

Accordingly, the Lawyers' Committee qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 28 C.F.R. § 16.5(b), (e)(1)(iv), the Lawyers' Committee requests that your agency expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief, that there is widespread and exceptional media interest in, and that there exist possible questions concerning, data collection and/or enforcement efforts by DOJ that will affect the voting rights in this nation. As discussed above, the Voting Section's June 28, 2017 letter to states and the Solicitor General's brief were both unprecedented, and there is strong reason to believe that DOJ is, and has been, coordinating with the individual identified in this request since the change in Administrations. Whether the federal government is undertaking efforts that could affect the fundamental right to vote of Americans is a quintessential example of "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence."¹⁸

Accordingly, the Lawyers' Committee's request satisfies the criteria for expedition.


¹⁸ 28 C.F.R. § 16.5(e)(1)(iv).

Conclusion

We share a common mission to promote transparency in government. The Lawyers' Committee looks forward to working with DOJ on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Ezra Rosenberg at erosenberg@lawyerscommittee.org or (202) 662-8345. Also, if the Lawyers' Committee's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Thank you very much for your assistance.

Sincerely,



Kristen Clarke
Jon Greenbaum
Ezra Rosenberg
Marcia Johnson-Blanco
Lawyers' Committee for Civil
Rights Under Law

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