



April 12, 2018

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**Re: Request Under Freedom of Information Act
(Expedited Processing Requested, Fee Waiver/Limitation
Requested)**

To Whom It May Concern:

The Campaign Legal Center submits this Freedom of Information Act (“FOIA”) request (the “Request”) for Election Assistance Commission’s (“EAC” or the “Commission”) records pertaining to state requests for updates to the state-specific instructions on the National Mail Voter Registration Form (“Federal Form”) and EAC updates to the Federal Form. Given the importance of the right to vote and the impending federal elections, we request that the Commission expedite processing of this request.

I. Background

The National Voter Registration Act (“NVRA”) mandates that the EAC develop and provide a voter registration form that shall be accepted for voter registration in federal elections nationwide. 52 U.S.C. § 20508. The Federal Form must instruct registrants of the eligibility requirements for registering to vote in each state. 52 U.S.C. § 20508(b)(2)(A). State election officials are required to inform EAC of any changes to eligibility requirements within 30 days so that EAC may update the form. 11 C.F.R. § 9428.6.

II. Requested Records

CLC requests copies of the following documents pursuant to the Freedom of Information Act, 5 U.S.C. § 552.

For the time period from January 2016 to the present, any and all documents—including draft and final versions of the Federal Form, draft and final memoranda, recommendations, legal opinions, policy advisories or evaluations, educational materials, and all correspondence and communications, including emails,¹ letters, social media posts, and social media direct messages—within the following categories:

- Notifications from state election officials of changes to their eligibility requirements for voting registration.
- Requests from state election officials to change the state-specific instructions on the Federal Form for their state.
- Updates and changes to the Federal Form.
- Policies, procedures, or ad hoc determinations related to updating the Federal Form.
- Policies, procedures, or ad hoc determinations related to responding to requests to update the Federal Form or notifications of changed registration requirements in any state.

With respect to the form of production, CLC requests that responsive electronic records be provided electronically in their native file format, if possible. *See* 5 U.S.C. § 552(a)(3)(B). Alternatively, CLC requests that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency’s possession, and that the records be provided in separate, Bates-stamped files.

III. Application for Waiver or Limitation of Fees

CLC requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

¹ Please note that this request applies to all emails, sent and received, on governmental email addresses, as well as to all emails, sent and received, on all other email addresses and accounts used to conduct official business.

It is extraordinarily important that the public understand how the EAC maintains and updates the Federal Form since the Federal Form serves as a critical “backstop” to provide citizens with “simple means of registering to vote in federal elections.” *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 13 (2013). It is therefore of the utmost public importance that the Federal Form contain accurate and up-to-date eligibility requirements for all fifty states.

CLC is not filing this request to further its commercial interest. CLC is a nonprofit, nonpartisan 501(c)(3) organization. Any information disclosed to CLC by way of this request will be made available to the public at no cost. CLC will also use documents responsive to the request to create analytical content—from op-eds to reports to blogs—that will further educate the public about these matters. Thus, CLC satisfies all the criteria for a fee waiver. A fee waiver would further Congress’s intent in providing for waivers for noncommercial requesters. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.”).

CLC also requests a fee waiver on the grounds that CLC qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). The CLC meets the statutory and regulatory definitions of a “representative of the news media” because it is an “entity that gathers information of potential interest to a segment of the public uses its editorial skills to turn the raw materials into a distinct work and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III).

As the D.C. Circuit has held, the “representative of the news media” test is focused on the requestor rather than the specific FOIA request. *Cause of Action v. FTC*, 799 F.3d 1108, 1121 (D.C. Cir. 2015). CLC satisfies this test. CLC maintains a website² that provides a wealth of editorial content about democracy law issues, including campaign finance, voting rights, redistricting, and ethics. CLC also publishes a regularly updated blog with original editorial and educational content,³ and communicates its research analysis through multiple social media platforms such as Facebook, Twitter, and Medium.⁴ CLC also disseminates original editorial and educational content to the public

² CAMPAIGN LEGAL CENTER, www.campaignlegalcenter.org.

³ *Blog*, CAMPAIGN LEGAL CENTER, <http://www.campaignlegalcenter.org/news/262>.

⁴ *Campaign Legal Center*, FACEBOOK, <https://www.facebook.com/CampaignLegalCenter/>; *Campaign Legal Center*, TWITTER, <https://twitter.com/CampaignLegal>; *Campaign Legal Center*, MEDIUM, <https://medium.com/clc-blog>.

through op-eds,⁵ press releases,⁶ email newsletters, public reports⁷, fact sheets,⁸ videos,⁹ and other materials. CLC staff is frequently interviewed for news stories.¹⁰ CLC additionally applies editorial skill to analyze and disseminate materials to other news media outlets, which regularly cite and rely upon CLC's work.

The D.C. Circuit has held that a requester may qualify as a news media entity if it “‘distribute[s] [its] work’ by issuing press releases to media outlets in order to reach the public indirectly.” *Cause of Action*, 799 F.3d. at 1125–26. Courts have found that other organizations with functionally similar missions engaged in similar public education activities qualify as “representatives of the news media,” even if engaged in litigation or other advocacy beyond educating the public about the operations of government. *See, e.g., id.* at 1121-25 (finding a public interest advocacy organization that comments to other media outlets about documents it obtains under FOIA a news media requester); *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 10–15 (D.D.C. 2003) (finding nonprofit public interest group that published a biweekly email newsletter a news media requester); *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding “public interest law firm” Judicial Watch a news media requester).

“It is critical that the phrase ‘representative of the news media’ be interpreted broadly if the act is work as expected In fact, *any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a ‘representative of the news media.’*” 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986), cited in *Nat’l Sec. Archive v. U.S. Dep’t of Def.*, 880 F.2d 1381, 1386 (D.C. Cir. 1989). Given the foregoing, there can be no doubt that CLC performs important functions as a

⁵ *See, e.g.*, Trevor Potter, *Donald Trump Hasn’t Solved Any of His Conflicts of Interest*, WASH. POST (Jan. 11, 2017), https://www.washingtonpost.com/posteverything/wp/2017/01/11/donald-trump-hasnt-solved-any-of-his-conflicts-of-interest/?utm_term=.0e80b538fb8f.

⁶ *Press Releases*, CAMPAIGN LEGAL CENTER, <http://www.campaignlegalcenter.org/news/286>.

⁷ *See, e.g.*, MAKE DEMOCRACY COUNT: ENDING PARTISAN GERRYMANDERING, CAMPAIGN LEGAL CENTER (Aug. 10, 2016), <http://www.campaignlegalcenter.org/document/make-democracy-count-ending-partisan-gerrymandering>; RUTH GREENWOOD, ANALYSIS: PARTISAN GERRYMANDERING IN THE 2016 ELECTION, CAMPAIGN LEGAL CENTER (Jan. 9, 2017), <http://www.campaignlegalcenter.org/news/blog/analysis-partisan-gerrymandering-2016-election>; LAWRENCE M. NOBLE & BRENDAN M. FISCHER, FUNDING THE PRESIDENTIAL NOMINATING CONVENTIONS: HOW A TRICKLE OF PRIVATE MONEY TURNED INTO A FLOOD, CAMPAIGN LEGAL CENTER (June 14, 2016), <http://www.campaignlegalcenter.org/document/funding-presidential-nominating-conventions-how-trickle-private-money-turned-flood>.

⁸ *See, e.g.*, BACKGROUND: RECORD OF SUPREME COURT NOMINEE NEIL GORSUCH ON DEMOCRACY LAW, CAMPAIGN LEGAL CENTER (Feb. 2, 2017), <http://www.campaignlegalcenter.org/news/update/background-record-supreme-court-nominee-neil-gorsuch-democracy-law>.

⁹ *See, e.g.*, *Meet the Victims of Texas’ Voter Photo ID Law*, CAMPAIGN LEGAL CENTER <http://www.campaignlegalcenter.org/news/press-releases/meet-victims-texas-voter-photo-id-law>.

¹⁰ *Media Coverage*, CAMPAIGN LEGAL CENTER, <http://www.campaignlegalcenter.org/news/241>.

“representative of the news media,” as defined by the relevant statute and regulations.

In the event the fee waiver is not granted, I may not be charged for the first two hours of search time, or for the first hundred pages of duplication. Please contact me and advise me of the cost of this request if processing costs exceed \$100. You can contact me at (202) 868-4799 or at jkenswil@campaignlegalcenter.org.

IV. Request for Expedited Processing

Campaign Legal Center requests expedited processing of this records request. 5 U.S.C. § 552(a)(6)(E); 11 CFR § 9405.7(h). CLC certifies that this is a true and correct statement detailing the basis for our request for expedited processing.

CLC requests expedited processing because there is an “urgency to inform the public” about the “actual or alleged federal government activity” covered by the request and CLC is an organization “primarily engaged” in “disseminating information.” 11 CFR § 9405.7(h)(1); 5 U.S.C. § 552(a)(6)(E)(v)(II).

CLC is primarily engaged in disseminating information to the public about actual or alleged government activity because it is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III); see also, *ACLU v. DOJ*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding that such organizations are “representative[s] of the news media” and are “primarily engaged in disseminating information”). As discussed above, CLC disseminates information to the public through numerous avenues, both through our own avenues such as our website, and through major media outlets.

CLC is not filing this request to further its commercial interest. CLC is a nonprofit, nonpartisan 501(c)(3) organization. Any information disclosed to CLC by way of this request will be made available to the public at no cost. CLC will also use documents responsive to the request to create analytical content—from op-eds to reports to blogs—that will further educate the public about these matters.

An urgent need for expedited processing exists where the records requested touch on an issue that is “the subject of current news coverage.” *Al-Fayed v. CIA*, 254 F.3d 300, 308 (D.C. Cir. 2001). CLC’s efforts to correct improper statements of voter qualifications on registration forms have gained significant news coverage. These efforts have generated news coverage in

Nevada,¹¹ Delaware,¹² Arizona,¹³ and Nebraska¹⁴ regarding incorrect statements on the registration forms in each of these states.

This is a matter of utmost public importance. Voting is a fundamental constitutional right. *Reynolds v. Sims*, 377 U.S. 533, 561–2 (1964). Knowledge of eligibility requirements is a prerequisite to determining ability to vote. If citizens are misinformed of their eligibility to vote by what should be an authoritative government document, they will be disenfranchised. The requested documents are necessary to determine whether states are properly making requests to reflect changes in eligibility requirements and when these changes are subsequently made.

The need to inform the public is urgent. Registration deadlines for the 2018 primary elections are fast approaching in many states. For instance, in Nebraska, the mail-in registration deadline is April 30 and in Nevada, the mail-in registration deadline is May 14.¹⁵ Every state in the nation has a registration filing deadline for the primary and/or general election between now and November. As each deadline passes, more voters who are in fact eligible are disenfranchised by any incorrect eligibility information currently on the Federal Form.

V. Conclusion

Pursuant to Department regulations, CLC expects notification of a decision on its request for expedited processing within ten days. 11 CFR § 9405.7(h)(3). Even if expedited processing should be rejected, CLC expects a response to this Request within twenty working days, as required by statute. 5 U.S.C. § 552(a)(6)(A). If the Request is denied in total or in part, CLC asks that you justify all deletions by reference to specific FOIA exemptions. If some portions of the requested records are exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. 5 U.S.C. § 552(b). If any portion of the requested records is exempt from

¹¹ James DeHaven, *Attorneys suspect tens of thousands of Nevadans wrongly stripped of right to vote*, RENO GAZETTE JOURNAL (March 8, 2018), <https://www.rgj.com/story/news/politics/2018/03/08/attorneys-suspect-tens-thousands-nevadans-wrongly-stripped-right-vote/405258002/>.

¹² Scott Goss, *Delaware changing voter registration forms amid legality concerns*, NEWS JOURNAL (Feb. 2, 2018), <https://www.delawareonline.com/story/news/politics/2018/02/03/delaware-changing-voter-registration-forms-amid-legality-concerns/300159002/>.

¹³ Rachel Leingang, *Advocacy group says Arizona misleads ex-felons on voting rights*, ARIZONA CAPITOL TIMES (Feb. 7, 2018), <https://azcapitoltimes.com/news/2018/02/07/arizona-campaign-legal-center-michele-reagan-ex-felons-voting-rights/>.

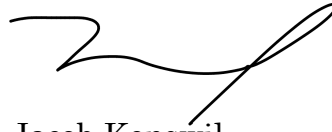
¹⁴ Emily Nitcher, *Federal form gives incorrect info on felon voting rights in Nebraska*, OMAHA WORLD-HERALD (Feb. 26, 2018), www.omaha.com/news/nebraska/federal-form-gives-incorrect-info-on-felon-voting-rights-in/article_cb80be7b-270b-5d9d-a340-87cd3e6250c9.html.

¹⁵ Secretary of State, Official Election Calendar State of Nebraska at 3, www.sos.ne.gov/elec/2018/pdf/2018-election-calendar.pdf; Elections, Nevada Secretary of State, <https://nvsos.gov/sos/sos-information/office-facts/faqs-all-division/elections#109>.

disclosure, please provide an index of the withheld materials as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

Thank you for your prompt attention to this matter. Where possible, please send the requested records electronically via email to jkenswil@campaignlegalcenter.org or on a data drive to the address listed below. Please furnish all applicable paper records to: Campaign Legal Center, c/o Jacob Kenswil, 1411 K Street NW, Suite 1400, Washington, DC 20005.

Respectfully,

A handwritten signature in black ink, appearing to read 'JKenswil', with a large, sweeping flourish extending to the right.

Jacob Kenswil
Fellow, Voting Rights Institute*
Campaign Legal Center
1411 K St. NW, Suite 1400
Washington, DC 20005

*Admitted only in New York;
supervision by Danielle Lang, a
member of the D.C. Bar.