



GOVERNMENT INFORMATION WATCH

Tracking Openness and Accountability in Government

August 7, 2018

Ms. Jennifer Jessup
Departmental Paperwork Clearance Officer
Department of Commerce
Room 6616
14th and Constitution Avenue, NW
Washington, DC 20230

RE: Comments on Proposed Information Collection on 2020 Census, Docket No. USBC-2018-0005

Dear Ms. Jessup,

On behalf of Government Information Watch, I write to offer comments on the 2020 Census proposed information collection. Government Information Watch is focused on open and accountable government. Our mission is to monitor access to information about government policy, process, and practice and to ensure and preserve open, accountable government through advocacy. This comment addresses the proposed citizenship question and urges its removal from the data collection forms, and also urges the Department of Commerce to assure the public as to the confidentiality of and privacy protections for all data collected, and to share information with Congress and the public as to the steps being taken and tested to ensure the secure collection and safe storage of this data.

The decennial census is constitutionally mandated in order to apportion seats in the U.S. House of Representatives among the 50 states, based on an enumeration of the “whole number of persons in each state.”¹ The goal of the decennial census must be a full, fair, and accurate count of persons residing in the country.

The Supreme Court recently confirmed in a unanimous opinion in *Evenwel v. Abbott*, that “representatives serve all residents, not just those eligible or registered to vote.”² The Court stated that its past decisions support allowing states and localities to design districts based on total population. It quoted Reynolds³ for stating that “equal representation for equal numbers of people” is “the fundamental principle of representative government in this country.” It also cited to prior decisions that suggested that districting based on total population serves a state’s interests in (1) preventing vote dilution and (2) representation equality. The Court additionally said that, since Reynolds, it has been consistent in looking to total population counts when considering if a districting map violates the Equal Protection Clause by not having population equality.

¹ U.S. Constitution, 14th Amendment, section 2.

² *Evenwel v. Abbott*, 578 U.S. ____, 2016, pg. 18.

³ *Reynolds v. Sims*, 377 U.S. 533 (1964), p.16.

Is the information collected through the citizenship question necessary to facilitate the functions of the agency, and does it have “practical utility?”

The decision to add a citizenship question to the 2020 Census allegedly was based on a December 12, 2017 request from the Department of Justice (DOJ) to the Census Bureau to “reinstate a citizenship question on the decennial census to provide census block level citizenship voting age population (“CVAP”) data that are not currently available from government survey data (“DOJ request”),” according to the March 26, 2018 memorandum from Secretary of Commerce Wilbur Ross to Under Secretary for Economic Affairs Karen Dunn Kelley.

Through documents that have come to light through litigation challenging the decision⁴ it is clear, however, that DOJ officials were not the genesis of the late request for block-level citizenship data in order to facilitate enforcement of section 2 of the Voting Rights Act (VRA). Rather, Secretary Ross acknowledged that administration officials — including the president’s chief strategist Steve Bannon — raised the idea of collecting citizenship data in the 2020 Census.

This revised explanation calls into question the truthfulness of the explanation in DOJ’s December 2017 letter of request. In fact, documents released as part of the litigation reveal that Secretary Ross and his staff suggested to DOJ that it should assert the usefulness of data from a census citizenship question for enforcement of the VRA, and then worked with DOJ officials to facilitate the formal request to the Census Bureau.

This process for the decision to add the citizenship question circumvented a longstanding, comprehensive process for determining the content of the decennial census. The Census Bureau has guidelines to determine whether it should collect data in the decennial census and ACS (previously the census “long form”), in order to ensure that the census only collects data “required by federal programs.” More specifically, the census and ACS will include topics because “federal law or regulation specifically mandates their inclusion in the census, the legal system requires that the data be collected, or federal law requires it for program implementation and the census is the only source for the information.”⁵ As other commenters have noted, the decennial census is neither the only nor the appropriate source for the information apparently sought in the proposed additional question.

Indeed, on January 19, 2018, John M. Abowd, the Census Bureau Chief Scientist and Associate Director for Research and Methodology, warned Commerce Secretary Wilbur Ross that adding a citizenship question would be “very costly, harms the quality of the census count, and would use substantially less accurate citizenship status data than are available.”⁶ Secretary Ross, nonetheless, in a memo dated March 26, 2018,⁷ instructed the Census Bureau to add the untested question – arguing that further

⁴ State of New York, et al. v. U.S. Dep’t of Commerce, et al., 18-CV-2921 (JMF).

⁵ “A Compass for Understanding and Using American Community Survey Data: What Congress Needs to Know,” U.S. Census Bureau, November 2008, pg. 2.

⁶ John M. Abowd, “Technical Review of the Department of Justice Request to Add Citizenship Question to the 2020 Census,” Census Bureau memo to Secretary Wilbur Ross, Jan. 19, 2018, at <http://www.osec.doc.gov/opog/FOIA/Documents/AR%20-%20FINAL%20FILED%20-%20ALL%20DOCS%20%5bcERTIFICATION-INDEX-DOCUMENTS%5d%206.8.18.pdf#page=1289>.

⁷ Secretary Wilbur Ross, “Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire,” Memo to Karen Dunn Kelley, Under Secretary for Economic Affairs, March 26, 2018, at https://www.commerce.gov/sites/commerce.gov/files/2018-03-26_2.pdf.

testing of the question is unnecessary because a citizenship question is already asked in the American Community Survey (ACS).

Ways to enhance the quality, utility, and clarity of the information to be collected

To the question above, it is necessary to add consideration of ways to ensure the public of the privacy and confidentiality of personally identifiable information— including to other entities within the U.S. government and any other entities who may seek access, and the security of the data as it is transmitted and stored.

To the former, the current administration has been very aggressive in exempting collections of information from the strictures of the Privacy Act. Public assurance is needed that this information is, and will remain, entirely protected from disclosure under the Act.⁸ Moreover, given the provenance of the request for the addition of the citizenship question, were it to be retained, it is strongly urged that the Attorney General (and possibly other cabinet level officers) issue a clear written statement affirming that personally-identifiable information collected under the 2020 Census cannot and will not be furnished to any public or private entity including federal and state government agencies for any purpose other than the apportionment of House of Representatives seats, and not under any circumstances be used to deport or detain anyone.

Finally, concerns have been expressed by a dozen former officials who wrote⁹ to the bureau last month about their concerns that the first electronic census in our nation’s history that it is unclear that the Census Bureau has sufficiently address the secure collection and safe storage of census information. I join them in urging

“the leadership of the Bureau and of the Department of Commerce to share publicly their plans for protecting information vital to the future of American voting but also tempting for adversaries that seek to harm our country and its foundational democratic processes.

Such transparency and leadership would boost public confidence and also allow cybersecurity experts outside the government to offer assistance in addressing any concerns that they might identify.

At a minimum, and as an alternative if deemed preferable, we urge Commerce Department and Census Bureau leadership to retain a reputable outside cybersecurity firm to conduct an end-to-end audit of current plans for data protection associated with the 2020 Census and, in turn, to have such a firm either confirm (ideally publicly) the adequacy of existing cybersecurity protocols and procedures or assist in addressing any gaps or vulnerabilities identified.”

⁸ CONDITIONS OF DISCLOSURE.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—...(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13...

<https://www.gpo.gov/fdsys/pkg/USCODE-2012-title5/pdf/USCODE-2012-title5-partI-chap5-subchapII-sec552a.pdf>

⁹ <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/07/Census-Cybersecurity-Letter.pdf>

For the reasons outlined above, I strongly oppose asking about citizenship status in the 2020 Census and urge the Department of Commerce to remove the proposed citizenship question from the data collection forms. I also urge the Department of Commerce to assure the public as to the confidentiality of and privacy protections for all data collected, and to share information with Congress and the public as to the steps being taken and tested to ensure the secure collection and safe storage of this data.

Sincerely,

Patrice McDermott, Director
Government Information Watch