IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER

Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al.*

Defendants.

Civ. Action No. 17-1320 (CKK)

PLAINTIFF'S RESPONSE TO THE COURT'S JULY 10, 2017 ORDER

In the Order of July 10, 2017, the Court asked Plaintiff to indicate "how they intend to proceed in this matter." EPIC intends to amend its complaint, naming the Director of the White House Information Technology as an additional Co-defendant. EPIC intends to indicate in the amended complaint how the representations contained in Defendants' response and declaration of July 10, 2017, further support the relief EPIC seeks.

The Commission may not play "hide the ball" with the nation's voter records. With such vast demands for personal information come commensurate responsibilities to provide security and privacy, and to comply with all legal obligations. Surely that is fundamental for an organization charged with promoting "election integrity."

Given the facts alleged in EPIC's complaint, the arguments presented in EPIC's motion and subsequent filings, the facts conceded by the Commission, the facts established in the exhibits, the facts and arguments put forward by the Commission, and the representations made in the Commission's supplemental brief, it is clear that EPIC has established (1) a substantial

likelihood of success on the merits, (2) that it would suffer irreparable harm absent injunctive relief, (3) that the balance of the equities favors relief, and (4) that the public interest favors relief.

The Court should now enter a temporary restraining order and, following any further briefing as the Court deems necessary, enter a preliminary injunction pending final resolution of EPIC's claims.

Summary of the Matter

1. Following a letter sent by the Vice Chair of the Commission ("Kobach") to all 50 states and the District of Columbia seeking the production of detailed voter information, otherwise protected by state privacy law, EPIC filed its complaint for injunctive relief and emergency motion for a temporary restraining order on July 3, 2017. ECF Nos. 1, 3. EPIC alleged that "Defendants' collection of state voter data prior to creating, reviewing, and publishing a Privacy Impact Assessment" was unlawful under the E-Government Act, the APA, and the FACA. Compl. ¶¶ 36, 46. EPIC also alleged that that Defendants' collection of sensitive voter data would "violate the informational privacy rights of millions of Americans," including EPIC's members who are registered voters, and that failure to provide any notice or opportunity to challenge this collection violated their constitutional right to procedural due process. Compl. ¶¶ 51, 54.
2. In the July 5, 2017, opposition to EPIC's motion, Kobach provided details about the intended use of the data and operational assignments for the Commission that further underscored the need for entry of a temporary restraining order.

a. In the first declaration, Kobach stated that he "intended that the states use" the File Exchange system operated by the Department of Defense to transfer "voter roll data" to the Commission, despite the fact that his letter instructed the states to "submit [their] responses electronically to ElectionIntegrityStaff@ovp.eop.gov" or via the File Exchange system. First Kobach Decl. ¶ 5.

b. Kobach stated that the Commission intends to make a "public release of documents" based on the voter roll data. First Kobach Decl. ¶ 5.

c. Kobach stated that the Commission "intends to maintain the data on the White House computer system." First Kobach Decl. ¶ 5.

3. Prior to the July 7, 2017, hearing, EPIC filed a notice of supplemental exhibits relevant to the questions raised in the Court's July 6, 2017, Order. Pl.'s Notice, ECF No. 20. Supplemental Exhibit 5 showed that the Department of Defense file exchange system referenced in the Vice Chair's letter and declarations was not approved to be used to "collect, maintain, use, and/or disseminate PII about . . . members of the general public." Supp. Ex. 5, ECF No. 20-1.

4. At the July 7, 2017, hearing, the Commission revealed for the first time that voter data had already been submitted from the State of Arkansas via the Department of Defense file exchange system. TRO Hr'g Tr. 41, July 7, 2017. Counsel for the Commission was unable to provide any details at the hearing concerning where the voter data would be stored, whether it would be secured, and what government entities would be involved in the collection and storage of the data. Hr'g Tr. 33–36.

Significance of Defendant's July 10, 2017, Response

5. The July 10, 2017, Response concedes three key points that support EPIC's Motion for a TRO.

    a. First, the Commission states that it "no longer intends to use the DOD SAFE system to receive information from the states . . . ." Def.'s Supp. Br. ¶ 1.a, ECF No. 24.

    b. Second, the Commission states that it has "sent the states a follow-up communication requesting the states not submit any data until Court rules on plaintiff's TRO motion." Def.'s Supp. Br. ¶ 1.b.

    c. Third, the Commission states that "it will not download the data that Arkansas has already transmitted to SAFE and this data will be deleted from this site." Def.'s Supp. Br. ¶ 1.a, ECF No. 24.

6. However, the July 10, 2017, Response raises new concerns

    a. The Commission stated it "intends instead to use alternative means of receiving the information." Def.'s Supp. Br. ¶ 1.a, ECF No. 24.

    b. The Commission stated that an agency official "is repurposing an existing system" to collect the data. The Commission claimed that "[t]he system is anticipated to be fully functional by 6:00 pm EDT today [July 10, 2017]." Def.'s Supp. Br. ¶ 1.a.

    c. The Commission did not provide any indication it would complete a Privacy Impact Assessment prior to a subsequent request for data from the states.

d. The Commission did not provide any indication it would publish the Privacy Impact Assessment pursuant to the FACA.

e. The Commission did not explain how it could delegate White House personnel to manage the facilities for the Commission when both the Executive Order and the Commission Charter make clear that the General Services Administration ("GSA") is the "agency responsible" for this function.

7. If the private voter data were collected and stored within a system controlled by the Director of White House Information Technology, the collection would still be unlawful under the APA and the E-Government Act.

a. White House components, including the Director of White House Information Technology, are subject to the APA and the requirements of the E-Government Act.

b. The Executive Office of the President ("EOP") and subcomponents of the EOP are agencies for the purposes of the APA. *E.g.*, *Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549, 551 (D.C. Cir. 1993) ("Public Citizen must rest its claim for judicial review [of U.S. Trade Representative's Action] on the Administrative Procedure Act."); *Armstrong v. Bush*, 924 F.2d 282, 291 (D.C. Cir. 1991) ("[W]e find that there is APA review of the [National Security Council]'s recordkeeping guidelines and instructions . . . ."); *Armstrong v. Exec. Office of the President*, 810 F. Supp. 335, 338 (D.D.C.) (citing *Armstrong*, 924 F.2d at 291–293) ("The Court of Appeals . . . approved of this Court's holding that the APA

provides for limited review of the adequacy of the NSC's and EOP's recordkeeping guidelines and instructions pursuant to the FRA."); *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971) ("[T]he [Office of Science and Technology] must be regarded as an agency subject to the APA . . . ."); *Citizens for Responsibility & Ethics in Washington (CREW) v. Exec. Office of President*, 587 F. Supp. 2d 48, 63 (D.D.C. 2008) (holding that the EOP was properly named as a defendant in an APA and Federal Records Act suit).

c. The cases cited by the Commission are distinguishable: they concern confidential advice to the President, not activities that implicate the concrete privacy interests of registered voters in the United States. *E.g.*, *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993); *Armstrong v. Exec. Office of the President*, 90 F.3d 553 (D.C. Cir. 1996). The justification underlying those decisions—enabling certain close aides "to advise and assist the President" without fear that their communications will be publicly disclosed, *Meyer v. Bush*, 981 F.2d 1288 (citing *Armstrong*, 877 F. Supp. at 705–06)—simply does not apply when the Court reviews "action[s] affecting the rights and obligations of individuals . . . ." *Dong v. Smithsonian Inst.*, 125 F.3d 877, 881 (D.C. Cir. 1997) (quoting James O. Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U. Pa. L. Rev. 1, 9 (1970)); *see also Armstrong*, 924 at 289 ("The legislative history of the APA indicates that Congress wanted to avoid a formalistic definition of 'agency' that might exclude any authority

within the executive branch that should appropriately be subject to the requirements of the APA."); *Washington Research Project, Inc. v. Dep't of Health, Ed. & Welfare*, 504 F.2d 238, 248 (D.C. Cir. 1974) ("The important consideration is whether [the entity] has any authority in law to make decisions."); *cf. Meyer v. Bush*, 981 F.2d 1288, 1299 (D.C. Cir. 1993) (Wald, J., dissenting) ("[W]e can surmise congressional intent on the definition of an agency to the following extent: It includes establishments within the Executive Office of the President, excepting only the President's 'immediate personal staff' or units whose 'sole function' is to advise and assist the President.").

d. The Director of White House Information Technology was established in 2015 and has "the primary authority to establish and coordinate the necessary policies and procedures for operating and maintaining the information resources and information systems provided to the President, Vice President, and EOP." Memorandum on Establishing the Director of White House Information Technology and the Executive Committee for Presidential Information Technology § 1, 2015 Daily Comp. Pres. Doc. 185 (Mar. 19, 2015), attached as Ex. 3. This authority includes:

> providing "policy coordination and guidance for, and periodically review[ing], all activities relating to the information resources and information systems provided to the President, Vice President, and EOP by the Community, including expenditures for, and procurement of, information resources and information systems by the Community. Such activities shall be subject to the Director's coordination, guidance, and review in order to ensure consistency with the Director's strategy and to strengthen the quality of the Community's decisions

> through integrated analysis, planning, budgeting, and evaluating process.

Id. § 2(c). The Director may also "advise and confer with appropriate executive departments and agencies, individuals, and other entities as necessary to perform the Director's duties under this memorandum." § 2(d).

e. The Director has the independent authority to oversee and "provide the necessary advice, coordination, and guidance to" the Executive Committee for Presidential Information Technology, which "consists of the following officials or their designees: the Assistant to the President for Management and Administration; the Executive Secretary of the National Security Council; the Director of the Office of Administration; the Director of the United States Secret Service; and the Director of the White House Military Office." § 3.

f. In *CREW v. Office of Admin.*, 566 F.3d 219 (D.C. Cir. 2008), the D.C. Circuit held that an EOP component is not an agency under the Freedom of Information Act. That case concerned a *request for agency records*. But the case now before the Court concerns *agency conduct*, reviewable under the APA, *see, e.g., Armstrong*, 924 F.2d at 282, even if it is not an agency under the FOIA, *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 559 (D.C. Cir. 1996).

Conclusion

8. The Commission has not established that the proposed collection of voter data is in compliance with the law.

a. The Commission has not provided any details on which government entities and agencies would operate, control, or otherwise oversee their proposed collection and storage of voter data.

b. The Commission has not indicated that it would undertake and publish a Privacy Impact Assessment concerning the collection of sensitive voter data.

c. The Commission has conceded that no harm would result from suspending collection of voter data pending the Court's resolution of EPIC's motion. The Commission has failed to identify any harm that could result from suspending collection of voter data pending the Court's resolution of this case.

d. The GSA, not the Department of Defense or the White House, is the "Agency Responsible for Providing Support" to the Commission, including "administrative services, funds, facilities, staff, equipment, and other support services." Executive Order, § 7(A); Commission Charter, § 6.

e. The Commission is authorized only to "study" election integrity, not to undertake an investigation or gather voter data from all Americans. Executive Order, § 3; Commission Charter, § 3.

9. The Court should not permit the Commission to evade judicial review by using non-GSA facilities.

a. To the extent that the Commission might evade the E-Government Act's PIA requirement by using non-GSA facilities to collect voter data, EPIC

would face certain informational injury due to the non-disclosure of a PIA. The Court must hold such action unlawful and restrain it.

b. The President's Executive Order and the Commission's Charter clearly establish that the GSA "shall provide the Commission with such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission . . . ." Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017).

Respectfully Submitted,

/s/ Marc Rotenberg
Marc Rotenberg, D.C. Bar # 422825
EPIC President and Executive Director

Alan Butler, D.C. Bar # 1012128
EPIC Senior Counsel

ELECTRONIC PRIVACY
INFORMATION CENTER
1718 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20009
(202) 483-1140 (telephone)
(202) 483-1248 (facsimile)

Dated: July 11, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al.*,

Defendants.

Civil Action No. 17-1320 (CKK)

ORDER
(July 11, 2017)

The Court is in receipt of Plaintiff's [27] Response to the Court's July 10, 2017 Order. Therein, Plaintiff indicates that it intends to further amend the Complaint in this action, by "naming the Director of the White House Information Technology as an additional" Defendant. Plaintiff has filed a [30] Motion for Leave to File a Second Amended Complaint for this purpose. By **5:00 P.M. today, July 11, 2017**, Defendants shall indicate whether they oppose Plaintiff's [30] Motion for Leave to File a Second Amended Complaint, and if so, on what basis.

In light of this request for a further amendment, and Plaintiff's amendment as-of-right on July 7, 2017, which added the Department of Defense as a Defendant, and given the substantial changes in factual circumstances since this action was filed, to the extent Plaintiff continues to seek injunctive relief, it shall file an amended motion for injunctive relief by **Thursday, July 13, 2017** at **4:00 P.M.**

Defendants shall respond to that motion by Monday, **July 17, 2017**, at **12:00 P.M.** and Plaintiff may file a reply by **4:00 P.M.** on the same day. Given Defendants' representation that no additional voter roll information will be collected until this Court's issues a ruling, and that information that has already been collected will be purged, it is this Court's view that such briefing is warranted and will not be prejudicial to either side. See Third Decl. of Kris W. Kobach, ECF No. 24-1.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al.*,

Defendants.

Civil Action No. 1:17-cv-1320 (CKK)

DEFENDANTS' POSITION REGARDING PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Plaintiff seeks to amend the Complaint a second time to add, as new defendants, the Director of White House Information Technology, Charles C. Herndon, the Executive Committee for Presidential Information Technology, and the United States Digital Service. ECF No. 30. The government does not believe that plaintiff can state a valid cause of action against these entities. For example, Mr. Herndon is a Deputy Assistant to the President, an official located within the White House Office, who provides only operational and administrative assistance in direct support of the President and does not exercise any regulatory powers or independent authority. Hence, his office is not an "agency" within the meaning of the E-Government Act of 2002 or the Administrative Procedure Act. *See Citizens for Resp. & Ethics in Wash. v. Office of Admin.*, 566 F.3d 219, 222-24 (D.C. Cir. 2009).

Thus, while adding these defendants is arguably futile, as a procedural matter, the government does not oppose plaintiff's motion to amend. The government will provide more argument on the issue of whether plaintiff has a cause of action as to any of the new or existing defendants in its response to plaintiff's amended motion for injunctive relief, due Monday at 12:00 p.m., and later when it files a response to the amended complaint.

Dated: July 11, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director

/s/ Carol Federighi
CAROL FEDERIGHI
Senior Trial Counsel
JOSEPH E. BORSON
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Phone: (202) 514-1903
Email: carol.federighi@usdoj.gov

Counsel for Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al.*,

Defendants.

Civil Action No. 17-1320 (CKK)

MEMORANDUM OPINION
(July 24, 2017)

This case arises from the establishment by Executive Order of the Presidential Advisory Commission on Election Integrity (the "Commission"), and a request by that Commission for each of the 50 states and the District of Columbia to provide it with certain publicly available voter roll information. Pending before the Court is Plaintiff's [35] Amended Motion for Temporary Restraining Order and Preliminary Injunction, which seeks injunctive relief prohibiting Defendants from "collecting voter roll data from states and state election officials" and directing Defendants to "delete and disgorge any voter roll data already collected or hereafter received." Proposed TRO, ECF No. 35-6, at 1-2.

Although substantial public attention has been focused on the Commission's request, the legal issues involved are highly technical. In addition to the Fifth Amendment of the Constitution, three federal laws are implicated: the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* ("APA"), the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 ("E-Government Act"), and the Federal Advisory Committee Act, codified at 5 U.S.C. app. 2 ("FACA"). All three are likely unfamiliar to the vast majority of Americans, and even seasoned legal practitioners are unlikely to have encountered the latter two.

Matters are further complicated by the doctrine of standing, a Constitutional prerequisite for this Court to consider the merits of this lawsuit.

Given the preliminary and emergency nature of the relief sought, the Court need not at this time decide conclusively whether Plaintiff is, or is not, ultimately entitled to relief on the merits. Rather, if Plaintiff has standing to bring this lawsuit, then relief may be granted if the Court finds that Plaintiff has a likelihood of succeeding on the merits, that it would suffer irreparable harm absent injunctive relief, and that other equitable factors—that is, questions of fairness, justice, and the public interest—warrant such relief.

The Court held a lengthy hearing on July 7, 2017, and has carefully reviewed the parties' voluminous submissions to the Court, the applicable law, and the record as a whole. Following the hearing, additional defendants were added to this lawsuit, and Plaintiff filed the pending, amended motion for injunctive relief, which has now been fully briefed. For the reasons detailed below, the Court finds that Plaintiff has standing to seek redress for the informational injuries that it has allegedly suffered as a result of Defendants declining to conduct and publish a Privacy Impact Assessment pursuant to the E-Government Act prior to initiating their collection of voter roll information. Plaintiff does not, however, have standing to pursue Constitutional or statutory claims on behalf of its advisory board members.

Although Plaintiff has won the standing battle, it proves to be a Pyrrhic victory. The E-Government Act does not itself provide for a cause of action, and consequently, Plaintiff must seek judicial review pursuant to the APA. However, the APA only applies to "agency action." Given the factual circumstances presently before the Court—which have changed substantially since this case was filed three weeks ago—Defendants' collection of voter

roll information does not currently involve agency action. Under the binding precedent of this circuit, entities in close proximity to the President, which do not wield "substantial independent authority," are not "agencies" for purposes of the APA. On this basis, neither the Commission or the Director of White House Information Technology—who is currently charged with collecting voter roll information on behalf of the Commission—are "agencies" for purposes of the APA, meaning the Court cannot presently exert judicial review over the collection process. To the extent the factual circumstances change, however—for example, if the *de jure* or *de facto* powers of the Commission expand beyond those of a purely advisory body—this determination may need to be revisited. Finally, the Court also finds that Plaintiff has not demonstrated an irreparable informational injury—given that the law does not presently entitle it to information—and that the equitable and public interest factors are in equipoise. These interests may very well be served by additional disclosure, but they would not be served by this Court, without a legal mandate, ordering the disclosure of information where no right to such information currently exists. Accordingly, upon consideration of the pleadings,[1] the relevant legal authorities, and the record as a whole, Plaintiff's [35] Motion for a Temporary Restraining Order and Preliminary Injunction is **DENIED WITHOUT PREJUDICE**.[2]

---

[1] The Court's consideration has focused on the following documents:

- Mem. in Supp. of Pl.'s Am. Mot. for a TRO and Prelim. Inj., ECF No. 35-1 ("Pls. Am. Mem.");
- Defs.' Mem. in Opp'n to Pl.'s Am. Mot. for a TRO and Prelim. Inj., ECF No. 38 ("Am. Opp'n Mem.");
- Reply in Supp. of Pl.'s Am. Mot. for a TRO and Prelim. Inj., ECF No. 39 ("Am. Reply Mem.").

[2] For the avoidance of doubt, the Court denies without prejudice both Plaintiff's motion for a temporary restraining order, and its motion for a preliminary injunction.

I. BACKGROUND

The Commission was established by Executive Order on May 11, 2017. Executive Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017) ("Exec. Order"). According to the Executive Order, the Commission's purpose is to "study the registration and voting processes used in Federal elections." *Id.* § 3. The Executive Order states that the Commission is "solely advisory," and that it shall disband 30 days after submitting a report to the President on three areas related to "voting processes" in federal elections. *Id.* §§ 3, 6. The Vice President is the chair of the Commission, and the President may appoint 15 additional members. From this group, the Vice President is permitted to appoint a Vice Chair of the Commission. The Vice President has named Kris W. Kobach, Secretary of State for Kansas, to serve as the Vice Chair. Decl. of Kris Kobach, ECF No. 8-1 ("Kobach Decl."), ¶ 1. Apart from the Vice President and the Vice Chair, there are presently ten other members of the Commission, including Commissioner Christy McCormick of the Election Assistance Commission (the "EAC"), who is currently the only federal agency official serving on the Commission, and a number of state election officials, both Democratic and Republican, and a Senior Legal Fellow of the Heritage Foundation. *Lawyers' Committee for Civil Rights Under the Law v. Presidential Advisory Commission on Election Integrity*, No. 17-cv-1354 (D.D.C. July 10, 2017), Decl. of Andrew J. Kossack, ECF No. 15-1 ("Kossack Decl."), ¶ 1; Second Decl. of Kris W. Kobach, ECF No. 11-1 ("Second Kobach Decl."), ¶ 1. According to Defendants, "McCormick is not serving in her official capacity as a member of the EAC." Second Kobach Decl. ¶ 2. The Executive Order also provides that the General Services Administration ("GSA"), a federal agency, will "provide the Commission with such administrative services, funds, facilities, staff, equipment, and other

support services as may be necessary to carry out its mission on a reimbursable basis," and that other federal agencies "shall endeavor to cooperate with the Commission." Exec. Order, § 7.

Following his appointment as Vice Chair, Mr. Kobach directed that identical letters "be sent to the secretaries of state or chief election officers of each of the fifty states and the District of Columbia." Kobach Decl. ¶ 4. In addition to soliciting the views of state officials on certain election matters by way of seven broad policy questions, each of the letters requests that state officials provide the Commission with the "publicly available voter roll data" of their respective states, "including, if publicly available under the laws of [their] state, the full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information." Kobach Decl., Ex. 3 (June 28, 2017 Letter to the Honorable John Merrill, Secretary of State of Alabama). The letters sent by Mr. Kobach also indicate that "[a]ny documents that are submitted to the full Commission will . . . be made available to the public." *Id.* Defendants have represented that this statement applies only to "narrative responses" submitted by states to the Commission. *Id.* ¶ 5. "With respect to voter roll data, the Commission intends to de-identify any such data prior to any public release of documents. In other words, the voter rolls themselves will not be released to the public by the Commission." *Id.* The exact process by which de-identification and publication of voter roll data will occur has yet to be determined. Hr'g Tr. 36:20–37:8.

Each letter states that responses may be submitted electronically to an email address, ElectionIntegrityStaff@ovp.eop.gov, "or by utilizing the Safe Access File Exchange ('SAFE'), which is a secure FTP site the federal government uses for transferring large data files." Kobach Decl., Ex. 3. The SAFE website is accessible at https://safe.amrdec.army.mil/safe/ Welcome.aspx. Defendants have represented that it was their intention that "narrative responses" to the letters' broad policy questions should be sent via email, while voter roll information should be uploaded by using the SAFE system. *Id.* ¶ 5.

According to Defendants, the email address named in the letters "is a White House email address (in the Office of the Vice President) and subject to the security protecting all White House communications and networks." *Id.* Defendants, citing security concerns, declined to detail the extent to which other federal agencies are involved in the maintenance of the White House computer system. Hr'g Tr. 35:2-10. The SAFE system, however, is operated by the U.S. Army Aviation and Missile Research Development and Engineering Center, a component of the Department of Defense. Second Kobach Decl. ¶ 4; Hr'g Tr. 32:6–9. The SAFE system was "originally designed to provide Army Missile and Research, Development and Engineering Command (AMRDEC) employees and those doing business with AMRDEC an alternate way to send files." Safe Access File Exchange (Aug. 8, 2012), *available at* http://www.doncio.navy.mil/ContentView.aspx?id=4098 (last accessed July 20, 2017). The system allows "users to send up to 25 files securely to recipients within the .mil or .gov domains[,]" and may be used by anyone so long as the recipient has a .mil or .gov email address. After an individual uploads data via the SAFE system, the intended recipient receives an email message indicating that "they have been

given access to a file" on the system, and the message provides instructions for accessing the file. The message also indicates the date on which the file will be deleted. This "deletion date" is set by the originator of the file, and the default deletion date is seven days after the upload date, although a maximum of two weeks is permitted.

Defendants portrayed the SAFE system as a conduit for information. Once a state had uploaded voter roll information via the system, Defendants intended to download the data and store it on a White House computer system. Second Kobach Decl. ¶ 5. The exact details of how that would happen, and who would be involved, were unresolved at the time of the hearing. Hr'g Tr. 34:3–35:10; 35:23–36:9. Nonetheless, there is truth to Defendants' description. Files uploaded onto the system are not archived after their deletion date, and the system is meant to facilitate the transfer of files from one user to another, and is not intended for long-term data storage. As Defendants conceded, however, files uploaded onto the SAFE system are maintained for as many as fourteen days on a computer system operated by the Department of Defense. Hr'g Tr. 31:7–32:5; 36:1–9 (The Court: "You seem to be indicating that DOD's website would maintain it at least for the period of time until it got transferred, right?" Ms. Shapiro: "Yes. This conduit system would have it for – until it's downloaded. So from the time it's uploaded until the time it's downloaded for a maximum of two weeks and shorter if that's what's set by the states."). Defendants stated that as, of July 7, only the state of Arkansas had transmitted voter roll information to the Commission by uploading it to the SAFE system. Hr'g Tr. 40:10–18. According to Defendants, the Commission had not yet downloaded Arkansas' voter data; and as of the date of the hearing, the data continued to reside on the SAFE system. *Id.*

Shortly after the hearing, Plaintiff amended its complaint pursuant to Federal Rule

of Civil Procedure 15(a)(1)(A), and added the Department of Defense as a defendant. Am. Compl., ECF No. 21. The Court then permitted Defendants to file supplemental briefing with respect to any issues particular to the Department of Defense. Order, ECF No. 23. On July 10, Defendants submitted a Supplemental Brief, notifying the Court of certain factual developments since the July 7 hearing. First, Defendants represented that the Commission "no longer intends to use the DOD SAFE system to receive information from the states." Third Decl. of Kris W. Kobach, ECF No. 24-1 ("Third Kobach Decl."), ¶ 1. Instead, Defendants stated that the Director of White House Information Technology was working to "repurpos[e] an existing system that regularly accepts personally identifiable information through a secure, encrypted computer application," and that this new system was expected to be "fully functional by 6:00pm EDT [on July 10, 2017]." *Id.* Second, Defendants provided the Court with a follow-up communication sent to the states, directing election officials to "hold on submitting any data" until this Court resolved Plaintiff's motion for injunctive relief. *Id.*, Ex. A. In light of these developments, Plaintiff moved to further amend the complaint pursuant to Federal Rule of Civil Procedure 15(a)(2), to name as additional defendants the Director of White House Information Technology, the Executive Committee for Presidential Information Technology, and the United States Digital Service, which the Court granted. Pl.'s Mot. to Am. Compl., ECF No. 30; Order, ECF No. 31.

Given the "substantial changes in factual circumstances" since this action was filed, the Court directed Plaintiff to file an amended motion for injunctive relief. Order, ECF No. 31. Plaintiff filed the amended motion on July 13, seeking to enjoin Defendants from "collecting voter roll data from states and state election officials" and to require

Defendants to "disgorge any voter roll data already collected or hereafter received." Proposed Order, ECF No. 35-6, at 1–2. Defendants' response supplied additional information about how the voter roll data would be collected and stored by the "repurposed" White House computer system. *See* Decl. of Charles Christopher Herndon, ECF No. 38-1 ("Herndon Decl."), ¶¶ 3–6. According to Defendants, the new system requires state officials to request an access link, which then allows them to upload data to a "server within the domain electionintergrity.whitehouse.gov." *Id.* ¶ 4. Once the files have been uploaded, "[a]uthorized members of the Commission will be given access" with "dedicated laptops" to access the data through a secure White House network. *Id.* ¶ 4–5. Defendants represent that this process will only require the assistance of "a limited number of technical staff from the White House Office of Administration . . . ." *Id.* ¶ 6. Finally, Defendants represented that the voter roll data uploaded to the SAFE system by the state of Arkansas—the only voter roll information known to the Court that has been transferred in response to the Commission's request—"ha[d] been deleted without ever having been accessed by the Commission." *Id.* ¶ 7.

II. LEGAL STANDARD

Preliminary injunctive relief, whether in the form of temporary restraining order or a preliminary injunction, is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)); *see also Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." (emphasis in original;

quotation marks omitted)). A plaintiff seeking preliminary injunctive relief "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014) (quoting *Sherley*, 644 F.3d at 392 (quoting *Winter*, 555 U.S. at 20) (alteration in original; quotation marks omitted)). When seeking such relief, "'the movant has the burden to show that all four factors, taken together, weigh in favor of the injunction.'" *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014) (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009)). "The four factors have typically been evaluated on a 'sliding scale.'" *Davis,* 571 F.3d at 1291 (citation omitted). Under this sliding-scale framework, "[i]f the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Id.* at 1291–92.[3]

III. DISCUSSION

A. Article III Standing

As a threshold matter, the Court must determine whether Plaintiff has standing to

[3] The Court notes that it is not clear whether this circuit's sliding-scale approach to assessing the four preliminary injunction factors survives the Supreme Court's decision in *Winter*. *See Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 105 F. Supp. 3d 108, 112 (D.D.C. 2015). Several judges on the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") have "read *Winter* at least to suggest if not to hold 'that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.'" *Sherley*, 644 F.3d at 393 (quoting *Davis*, 571 F.3d at 1296 (concurring opinion)). However, the D.C. Circuit has yet to hold definitively that *Winter* has displaced the sliding-scale analysis. *See id.*; *see also Save Jobs USA*, 105 F. Supp. 3d at 112. In any event, this Court need not resolve the viability of the sliding-scale approach today, as it finds that Plaintiff has failed to show a likelihood of success on the merits and irreparable harm, and that the other preliminary injunction factors are in equipoise.

bring this lawsuit. Standing is an element of this Court's subject-matter jurisdiction under Article III of the Constitution, and requires, in essence, that a plaintiff have "a personal stake in the outcome of the controversy . . . ." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Consequently, a plaintiff cannot be a mere bystander or interested third-party, or a self-appointed representative of the public interest; he or she must show that defendant's conduct has affected them in a "personal and individual way." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). The familiar requirements of Article III standing are:

> (1) that the plaintiff have suffered an "injury in fact"—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 167 (1997) (citing *Lujan*, 504 U.S. at 560–61). The parties have briefed three theories of standing. Two are based on Plaintiff's own interests—for injuries to its informational interests and programmatic public interest activities—while the third is based on the interests of Plaintiff's advisory board members. This latter theory fails, but the first two succeed, for the reasons detailed below.

1. Associational Standing

An organization may sue to vindicate the interests of its members. To establish this type of "associational" standing, Plaintiff must show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Ass'n of Flight Attendants-CWA, AFL-CIO v. U.S. Dep't of Transp.*, 564 F.3d 462, 464 (D.C. Cir. 2009) (internal

quotation marks omitted). Needless to say, Plaintiff must also show that it has "members" whose interests it is seeking to represent. To the extent Plaintiff does not have a formal membership, it may nonetheless assert organizational standing if "the organization is the functional equivalent of a traditional membership organization." *Fund Democracy, LLC v. S.E.C.*, 278 F.3d 21, 25 (D.C. Cir. 2002). For an organization to meet the test of functional equivalency, "(1) it must serve a specialized segment of the community; (2) it must represent individuals that have all the 'indicia of membership' including (i) electing the entity's leadership, (ii) serving in the entity, and (iii) financing the entity's activities; and (3) its fortunes must be tied closely to those of its constituency." *Washington Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 208 (D.D.C. 2007) (citing *Fund Democracy*, 278 F.3d at 25).

Plaintiff has submitted the declarations of nine advisory board members from six jurisdictions representing that the disclosure of their personal information—including "name, address, date of birth, political party, social security number, voter history, active/inactive or cancelled status, felony convictions, other voter registrations, and military status or overseas information"—will cause them immediate and irreparable harm. ECF No. 35-3, Exs. 7–15. The parties disagree on whether these advisory board members meet the test of functional equivalency. For one, Plaintiff's own website concedes that the organization "ha[s] no clients, no customers, and no shareholders . . . ." *See* About EPIC, http://epic.org/epic/about.html (last accessed July 20, 2017). Contrary to this assertion, however, Plaintiff has proffered testimony to the effect that advisory board members exert substantial influence over the affairs of the organization, including by influencing the matters in which the organization participates, and that advisory board members are

expected to contribute to the organization, either financially or by offering their time and expertise. Hr'g Tr. 16:1–18:19; *see also* Decl. of Marc Rotenberg, ECF No. 35-5, Ex. 38, ¶¶ 8–12. In the Court's view, however, the present record evidence is insufficient for Plaintiff to satisfy its burden with respect to associational standing. There is no evidence that members are *required* to finance the activities of the organization; that they have any role in electing the leadership of the organization; or that their fortunes, as opposed to their policy viewpoints, are "closely tied" to the organization. *See id.*; About EPIC, http://epic.org/epic/about.html (last accessed July 20, 2017) ("EPIC *works closely with* a distinguished advisory board, with expertise in law, technology and public policy. . . . EPIC is a 501(c)(3) nonprofit. We have no clients, no customers, and no shareholders. We need your support." (emphasis added)); *see also Elec. Privacy Info. Ctr. v. U.S. Dep't of Educ.*, 48 F. Supp. 3d 1, 22 (D.D.C. 2014) ("defendant raises serious questions about whether EPIC is an association made up of members that may avail itself of the associational standing doctrine").

Furthermore, even if the Court were to find that Plaintiff is functionally equivalent to a membership organization, the individual advisory board members who submitted declarations do not have standing to sue in their own capacities. First, these individuals are registered voters in states that have declined to comply with the Commission's request for voter roll information, and accordingly, they are not under imminent threat of either the statutory or Constitutional harms alleged by Plaintiff. *See* Am. Opp'n Mem., at 13. Second, apart from the alleged violations of the advisory board members' Constitutional privacy rights—the existence of which the Court assumes for purposes of its standing analysis, *see Parker v. D.C.*, 478 F.3d 370, 378 (D.C. Cir. 2007), *aff'd sub nom. D.C. v. Heller*, 554 U.S.

570 (2008)—Plaintiff has failed to proffer a theory of individual harm that is "actual or imminent, [and not merely] conjectural or hypothetical . . . [,]" *Bennett*, 520 U.S. at 167. Plaintiff contends that the disclosure of sensitive voter roll information would cause immeasurable harm that would be "impossible to contain . . . after the fact." Pl.'s Am. Mem., at 13. The organization also alleges that the information may be susceptible to appropriation for unspecified "deviant purposes." *Id.* (internal citations omitted). However, Defendants have represented that they are only collecting voter information that is already publicly available under the laws of the states where the information resides; that they have only requested this information and have not demanded it; and Defendants have clarified that such information, to the extent it is made public, will be de-identified. *See supra* at [•]. All of these representations were made to the Court in sworn declarations, and needless to say, the Court expects that Defendants shall strictly abide by them.

Under these factual circumstances, however, the only practical harm that Plaintiff's advisory board members would suffer, assuming their respective states decide to comply with the Commission's request in the future, is that their already publicly available information would be rendered more easily accessible by virtue of its consolidation on the computer systems that would ultimately receive this information on behalf of the Commission. It may be true, as Plaintiff contends, that there are restrictions on how "publicly available" voter information can be obtained in the ordinary course, such as application and notification procedures. Hr'g Tr. 8:2–21. But even granting the assumption that the Commission has or will receive information in a manner that bypasses these safeguards, the only way that such information would be rendered more accessible for nefarious purposes is if the Court further assumes that either the Commission systems are

more susceptible to compromise than those of the states, or that the de-identification process eventually used by Defendants will not sufficiently anonymize the information when it is publicized. Given the paucity of the record before the Court, this sequence of events is simply too attenuated to confer standing. At most, Plaintiff has shown that its members will suffer an increased *risk* of harm if their already publicly available information is collected by the Commission. But under the binding precedent of the Supreme Court, an increased risk of harm is insufficient to confer standing; rather, the harm must be "certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013). Indeed, on this basis, two district courts in this circuit have concluded that even the disclosure of *confidential, identifiable* information is insufficient to confer standing until that information is or is about to be used by a third-party to the detriment of the individual whose information is disclosed. *See In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 25 (D.D.C. 2014); *Welborn v. IRS*, 218 F. Supp. 3d 64, 77 (D.D.C. 2016). In sum, the mere increased risk of disclosure stemming from the collection and eventual, anonymized disclosure of already publicly available voter roll information is insufficient to confer standing upon Plaintiff's advisory board members. Consequently, for all of the foregoing reasons, Plaintiff has failed to show that it has associational standing to bring this lawsuit.[4]

[4] This obviates the need to engage in a merits analysis of Plaintiff's alleged Constitutional privacy right claims, which are based on the individual claims of its advisory board members. *See generally* Pl.'s Am. Mem., at 30. Nonetheless, even if the Court were to reach this issue, it would find that Plaintiff is unlikely to succeed on these claims because the D.C. Circuit has expressed "grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information." *Am. Fed'n of Gov't Emps., AFL-CIO v. Dep't of Hous. & Urban Dev.*, 118 F.3d 786, 791 (D.C. Cir. 1997).

2. Informational Standing

In order to establish informational standing, Plaintiff must show that "(1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016). "[A] plaintiff seeking to demonstrate that it has informational standing generally 'need not allege any additional harm beyond the one Congress has identified.'" *Id.* (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1544 (2016)). Plaintiff has brought suit under the APA, for the failure of one or more federal agencies to comply with Section 208 of the E-Government Act. That provision mandates that before "initiating a new collection of information," an agency must "conduct a privacy impact assessment," "ensure the review of the privacy impact assessment by the Chief Information Officer," and "if practicable, after completion of the review . . . , make the privacy impact assessment publicly available through the website of the agency, publication in the Federal Register, or other means." E-Government Act, § 208(b). An enumerated purpose of the E-Government Act is "[t]o make the Federal Government more transparent and accountable." *Id.* § 2(b)(9).

Plaintiff satisfies both prongs of the test for informational standing. First, it has espoused a view of the law that entitles it to information. Namely, Plaintiff contends that Defendants are engaged in a new collection of information, and that a cause of action is available under the APA to force their compliance with the E-Government Act and to require the disclosure of a Privacy Impact Assessment. Second, Plaintiff contends that it has suffered the very injuries meant to be prevented by the disclosure of information

pursuant to the E-Government Act—lack of transparency and the resulting lack of opportunity to hold the federal government to account. This injury is particular to Plaintiff, given that it is an organization that was "established . . . to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age." About EPIC, https://www.epic.org/epic /about.html (last accessed July 20, 2017). Plaintiff, moreover, engages in government outreach by "speaking before Congress and judicial organizations about emerging privacy and civil liberties issues[,]" *id.*, and uses information it obtains from the government to carry out its mission to educate the public regarding privacy issues, Hr'g Tr. 20:12–23.

Defendants have contested Plaintiff's informational standing, citing principally to the D.C. Circuit's analysis in *Friends of Animals*. *See* Am. Opp'n Mem., at 14–20. There, the court held that plaintiff, an environmental organization, did not have informational standing under a statute that required the Department of the Interior ("DOI"), *first*, to make certain findings regarding whether the listing of a species as endangered is warranted within 12 months of determining that a petition seeking that relief "presents substantial scientific or commercial information," and *second*, after making that finding, to publish certain information in the Federal Register, including under some circumstances, a proposed regulation, or an "evaluation of the reasons and data on which the finding is based." *Friends of Animals*, 828 F.3d at 990–91 (internal quotation marks omitted) (citing 16 U.S.C. § 1533(b)(3)(B)). For example, part of the statute in *Friends of Animals* required that:

> (B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings: . . .
>
> > (ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

16 U.S.C. § 1533(b)(3)(B)(ii). At the time plaintiff brought suit, the 12-month period had elapsed, but the DOI had yet to make the necessary findings, and consequently had not published any information in the Federal Register. In assessing plaintiff's informational standing, the D.C. Circuit focused principally on the structure of the statute that allegedly conferred on plaintiff a right to information from the federal government. *Friends of Animals*, 828 F.3d at 993. Solely on that basis, the court determined that plaintiff was not entitled to information because a right to information (e.g., a proposed regulation under subsection (B)(ii) or an evaluation under subsection (B)(iii)) arose only *after* the DOI had made one of the three findings envisioned by the statute. True, the DOI had failed to make the requisite finding within 12 months. But given the statutorily prescribed sequence of events, plaintiff's challenge was in effect to the DOI's failure to make such a finding, rather than to its failure to disclose information, given that the obligation to disclose information only arose after a finding had been made. As such, the D.C. Circuit concluded that plaintiff lacked informational standing.

The statutory structure here, however, is quite different. The relevant portion of Section 208 provides the following:

> (b) PRIVACY IMPACT ASSESSMENTS.—
> (1) RESPONSIBILITIES OF AGENCIES.
> (A) IN GENERAL.—An agency shall take actions described under subparagraph (B) before
> (i) developing or procuring information technology that collects, maintains, or disseminates information that is in an identifiable form; or
> (ii) initiating a new collection of information that—
> (I) will be collected, maintained, or disseminated using information technology; and
> (II) includes any information in an identifiable form permitting the physical or online contacting of a specific individual, if identical questions have been posed to, or identical reporting requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the Federal Government.
> (B) AGENCY ACTIVITIES.—To the extent required under subparagraph (A), each agency shall—
> (i) conduct a privacy impact assessment;
> (ii) ensure the review of the privacy impact assessment by the Chief Information Officer, or equivalent official, as determined by the head of the agency; and
> (iii) if practicable, after completion of the review under clause (ii), make the privacy impact assessment publicly available through the website of the agency, publication in the Federal Register, or other means.

E-Government Act, § 208(b). As this text makes clear, the statutorily prescribed sequence of events here is reversed from the sequence at issue in *Friends of Animals*. There, the DOI was required to disclose information only *after* it had made one of three "warranted" findings; it had not made any finding, and accordingly, was not obligated to disclose any information. Here, the statute mandates that an "agency *shall* take actions described under subparagraph (B) *before* . . . initiating a new collection of information . . . ." *Id.* (emphasis added). Subparagraph (B) in turn requires the agency to conduct a Privacy Impact Assessment, to have it reviewed by the Chief Information Officer or his equivalent, and to publish the assessment, if practicable. The statute, given its construction, requires all three of these events, including the public disclosure of the assessment, to occur *before* the

agency initiates a new collection of information. Assuming that the other facets of Plaintiff's interpretation of the law are correct—namely, that Defendants are engaged in a new collection of information subject to the E-Government Act, that judicial review is available under the APA, and that disclosure of a privacy assessment is "practicable"—then Plaintiff is presently entitled to information pursuant to the E-Government Act, because the disclosure of information was already supposed to have occurred; that is, a Privacy Impact Assessment should have been made publicly available before Defendants systematically began collecting voter roll information. Accordingly, unlike in *Friends of Animals*, a review of the statutory text at issue in this litigation indicates that, under Plaintiff's interpretation of the law, Defendants have already incurred an obligation to disclose information.

Defendants make three further challenges to Plaintiff's informational standing, none of which are meritorious. First, Defendants contend that Plaintiff lacks standing because its informational injury is merely a "generalized grievance," and therefore insufficient to confer standing. Am. Opp'n Mem., at 15 (citing *Judicial Watch, Inc. v. FEC*, 180 F.3d 277, 278 (D.C. Cir. 1999)). Plainly, the E-Government Act entitles the public generally to the disclosure of Privacy Impact Assessments, but that does not mean that the informational injury in this case is not particular to Plaintiff. As already noted, Plaintiff is a public-interest organization that focuses on privacy issues, and uses information gleaned from the government to educate the public regarding privacy, and to petition the government regarding privacy law. *See supra* at [•]. Accordingly, the informational harm in this case, as it relates to Plaintiff, is "concrete and particularized." Moreover, the reality of statutes that confer informational standing is that they are often not targeted at a

particular class of individuals, but rather provide for disclosure to the public writ large. *See, e.g.*, *Friends of Animals*, 824 F.3d at 1041 (finding that public interest environmental organization had standing under statutory provision that required the Department of the Interior to publish certain information in the Federal Register). Even putting aside the particularized nature of the informational harm alleged in this action, however, the fact that a substantial percentage of the public is subject to the same harm does not automatically render that harm inactionable. As the Supreme Court observed in *Akins*: "Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact.'" *FEC v. Akins*, 524 U.S. 11, 24 (1998). The Court went on to hold, in language that is particularly apt under the circumstances, that "the informational injury at issue . . . , directly related to voting, the most basic of political rights, is sufficiently concrete and specific . . . ." *Id.* at 24–25.

Defendants next focus on the fact that the information sought does not yet exist in the format in which it needs to be disclosed (i.e., as a Privacy Impact Assessment). Am. Opp'n Mem., at 17. In this vein, they claim that *Friends of Animals* stands for the proposition that the government cannot be required to create information. The Court disagrees with this interpretation of *Friends of Animals*, and moreover, Defendants' view of the law is not evident in the controlling Supreme Court and D.C. Circuit precedents. As already detailed, the court in *Friends of Animals* looked solely to the statutory text to determine whether an obligation to disclose had been incurred. No significance was placed by the D.C. Circuit on the fact that, if there were such an obligation, the federal government would potentially be required to "create" the material to be disclosed (in that case, either a

proposed regulation, or an evaluative report). Furthermore, *Friends of Animals* cited two cases, one by the D.C. Circuit and the other by the Supreme Court, as standing for the proposition that plaintiffs have informational standing to sue under "statutory provisions that guarantee[] a right to receive information *in a particular form*." *Friends of Animals*, 828 F.3d at 994 (emphasis added; citing *Zivotofsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 615–19 (D.C. Cir. 2006), and *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–75 (1982)). Furthermore, in *Public Citizen*, the Supreme Court found that plaintiff had informational standing to sue under FACA, and thereby seek the disclosure of an advisory committee charter and other materials which FACA requires advisory committees to create and make public. Presumably those materials did not exist, given defendants' position that the committee was not subject to FACA, and in any event, the Court made no distinction on this basis. *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 447 (1989). And in *Akins*, the information sought was not in defendants' possession, as the entire lawsuit was premised on requiring defendant to take enforcement action to obtain that information. 524 U.S. at 26. Ultimately, the distinction between information that already exists, and information that needs to be "created," if not specious, strikes the Court as an unworkable legal standard. Information does not exist is some ideal form. When the government discloses information, it must always first be culled, organized, redacted, reviewed, and produced. Sometimes the product of that process, as under the Freedom of Information Act, is a production of documents, perhaps with an attendant privilege log. *See, e.g., Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 146 (D.C. Cir. 2006) (explaining the purpose of a *Vaughn* index). Here, Congress has mandated that disclosure take the form of a Privacy Impact Assessment, and that is what Plaintiff has standing to

seek, regardless of whether an agency is ultimately required to create the report.

Lastly, Defendants contend that Plaintiff lacks informational standing because Section 208 only requires the publication of a Privacy Impact Statement if doing so is "practicable." Am. Opp'n Mem., at 17 n.2. As an initial matter, Defendants have at no point asserted that it would be impracticable to create and publish a Privacy Impact Assessment; rather, they have rested principally on their contention that they are not required to create or disclose one because Plaintiff either lacks standing, or because the E-Government Act and APA only apply to federal agencies, which are not implicated by the collection of voter roll information. Accordingly, whatever limits the word "practicable" imposes on the disclosure obligations of Section 208, they are not applicable in this case, and therefore do not affect Plaintiff's standing to bring this lawsuit. As a more general matter, however, the Court disagrees with Defendants' view that merely because a right to information is in some way qualified, a plaintiff lacks informational standing to seek vindication of that right. For this proposition, Defendants again cite *Friends of Animals*, contending that the D.C. Circuit held that "informational standing only exists if [the] statute 'guaranteed a right to receive information in a particular form . . . .'" *Id.* (citing *Friends of Animals*, 828 F.3d at 994). That is not what the D.C. Circuit held; rather that language was merely used to describe two other cases, *Haven* and *Zivotofsky*, in which the Supreme Court and D.C. Circuit determined that plaintiffs had informational standing. *See supra* at [•]. One only need to look toward the Freedom of Information Act, under which litigants undoubtedly have informational standing despite the fact that the Act in no way provides an unqualified right to information, given its numerous statutory exemptions. *See Zivotofsky*, 444 F.3d at 618. Moreover, the available guidance indicates that the qualifier "practicable" was meant

to function similarly to the exemptions under the Freedom of Information Act, and is therefore not purely discretionary. *See* M-03-22, OMB Guidance for Implementing the Privacy Provisions of the E-Government Act of 2002 (Sept. 26, 2003) ("Agencies may determine to not make the PIA document or summary publicly available to the extent that publication would raise security concerns, reveal classified (i.e., national security) information or sensitive information (e.g., potentially damaging to a national interest, law enforcement effort or competitive business interest) contained in an assessment. *Such information shall be protected and handled consistent with the Freedom of Information Act* . . . ." (footnote omitted; emphasis added)). Accordingly, for all of the foregoing reasons, the Court concludes that Plaintiff has satisfied its burden at this stage regarding its informational standing to seek the disclosure of a Privacy Impact Assessment pursuant to Section 208 of the E-Government Act.

Moreover, because the Court assumes the merits of Plaintiff's claims for standing purposes, the Court also finds that Plaintiff has informational standing with respect to its FACA claim, which likewise seeks the disclosure of a Privacy Impact Assessment. *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 583 F.3d 871, 873 (D.C. Cir. 2009) ("Here the injury requirement is obviously met. In the context of a FACA claim, an agency's refusal to disclose information that the act requires be revealed constitutes a sufficient injury.)

3. Organizational Standing Under PETA

For similar reasons to those enumerated above with respect to informational standing, the Court also finds that Plaintiff has organizational standing under *PETA v. USDA*, 797 F.3d 1087 (D.C. Cir. 2015). In this circuit, an organization may establish standing if it has "suffered a concrete and demonstrable injury to its activities, mindful that,

under our precedent, a mere setback to . . . abstract social interests is not sufficient." *Id.* at 1093 (internal quotation marks and alterations omitted) (citing *Am. Legal Found. v. FCC*, 808 F.2d 84, 92 (D.C. Cir. 1987) ("The organization must allege that discrete programmatic concerns are being directly and adversely affected by the defendant's actions."). "Making this determination is a two-part inquiry—we ask, first, whether the agency's action or omission to act injured the organization's interest and, second, whether the organization used its resources to counteract that harm." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (internal quotation marks and alterations omitted). In *PETA*, the D.C. Circuit found that an animal rights organization had suffered a "denial of access to bird-related . . . information including, in particular, investigatory information, and a means by which to seek redress for bird abuse . . . ." *PETA*, 797 F.3d at 1095. This constituted a "cognizable injury sufficient to support standing" because the agency's failure to comply with applicable regulations had impaired PETA's ability to bring "violations to the attention of the agency charged with preventing avian cruelty and [to] continue to educate the public." *Id.*

Under the circumstances of this case, Plaintiff satisfies the requirements for organizational standing under *PETA*. Plaintiff has a long-standing mission to educate the public regarding privacy rights, and engages in this process by obtaining information from the government. Pl.'s Reply Mem. at 17 ("EPIC's mission includes, in particular, educating the public about the government's record on voter privacy and promoting safeguards for personal voter data."). Indeed, Plaintiff has filed Freedom of Information Act requests in this jurisdiction seeking the disclosure of the same type of information, Privacy Impact Assessments, that it claims has been denied in this case. *See, e.g., Elec. Privacy Info. Ctr.*

v. DEA, 208 F. Supp. 3d 108, 110 (D.D.C. 2016). Furthermore, Plaintiff's programmatic activities—educating the public regarding privacy matters—have been impaired by Defendants' alleged failure to comply with Section 208 of the E-Government Act, since those activities routinely rely upon access to information from the federal government. *See* Hr'g Tr. at 20:8–16. This injury has required Plaintiff to expend resources by, at minimum, seeking records from the Commission and other federal entities concerning the collection of voter data. *See* Decl. of Eleni Kyriakides, ECF No. 39-1, ¶ 6. Accordingly, Plaintiff has organizational standing under the two-part test sanctioned by the D.C. Circuit in *PETA*.

B. Likelihood of Success on the Merits

Having assured itself of Plaintiff's standing to bring this lawsuit, the Court turns to assess the familiar factors for determining whether a litigant is entitled to preliminary injunctive relief; in this case, a temporary restraining order and preliminary injunction. The first, and perhaps most important factor, is Plaintiff's likelihood of success on the merits.

The E-Government Act does not provide for a private cause of action, and accordingly, Plaintiff has sought judicial review pursuant to Section 702 of the APA. *See Greenspan v. Admin. Office of the United States Courts*, No. 14CV2396 JTM, 2014 WL 6847460, at *8 (N.D. Cal. Dec. 4, 2014). Section 704 of the APA, in turn, limits judicial review to "final agency action for which there is no other adequate remedy . . . ." As relevant here, the reviewing court may "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The parties principally disagree over whether any "agency" is implicated in this case such that there could be an "agency action" subject to this Court's review. *See* Pl.'s Am. Mem., at 19–30; Am. Opp'n Mem., at 20–33.

"Agency" is broadly defined by the APA to include "each authority of the

Government of the United States, whether or not it is within or subject to review by another agency . . . ." 5 U.S.C. § 551(1). The statute goes on to exclude certain components of the federal government, including Congress and the federal courts, but does not by its express terms exclude the President, or the Executive Office of the President ("EOP"). *Id.* Nonetheless, the Supreme Court has concluded that the President is exempted from the reach of the APA, *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992), and the D.C. Circuit has established a test for determining whether certain bodies within the Executive Office of the President are sufficiently close to the President as to also be excluded from APA review, *see Armstrong v. Exec. Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996) (citing *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993)). In determining whether the Commission is an "agency," or merely an advisory body to the President that is exempted from APA review, relevant considerations include "whether the entity exercises substantial independent authority," "whether the entity's sole function is to advise and assist the President," "how close operationally the group is to the President," "whether it has a self-contained structure," and "the nature of its delegated authority." *Citizens for Responsibility & Ethics in Washington v. Office of Admin.*, 566 F.3d 219, 222 (D.C. Cir. 2009) ("*CREW*") (internal quotation marks omitted). The most important consideration appears to be whether the "entity in question wielded substantial authority independently of the President." *Id.*

The record presently before the Court is insufficient to demonstrate that the Commission is an "agency" for purposes of the APA. First, the Executive Order indicates that the Commission is purely advisory in nature, and that it shall disband shortly after it delivers a report to the President. No independent authority is imbued upon the

Commission by the Executive Order, and there is no evidence that it has exercised any independent authority that is unrelated to its advisory mission. Defendants' request for information is just that—a request—and there is no evidence that they have sought to turn the request into a demand, or to enforce the request by any means. Furthermore, the request for voter roll information, according to Defendants, is ancillary to the Commission's stated purpose of producing an advisory report for the President regarding voting processes in federal elections. The Executive Order does provide that other federal agencies "shall endeavor to cooperate with the Commission," and that the GSA shall "provide the Commission with such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission." Exec. Order § 7(a). Nonetheless, Defendants have represented that the GSA's role is currently expected to be limited to specific "administrative support like arranging travel for the members" of the Commission, and that no other federal agencies are "cooperating" with the Commission. Hr'g Tr. at 27:25–28:6; 30:10–13. Finally, although Commissioner Christy McCormick of the Election Assistance Commission is a member of the Commission, there is currently no record evidence that she was substantially involved in the decision to collect voter information, or that her involvement in some fashion implicated the Election Assistance Commission, which is a federal agency. Hr'g Tr. 28:24–30:4; *cf. Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20, 39–40 (D.D.C. 2002) (citing *Ryan v. Dep't of Justice*, 617 F.2d 781 (D.C. Cir. 1980)).

This would have ended the inquiry, but for the revelation during the course of these proceedings that the SAFE system, which the Commission had intended for states to use to transmit voter roll information, is operated by a component of the Department of

Defense. Moreover, the only voter roll information transferred to date resided on the SAFE system, and consequently was stored on a computer system operated by the Department of Defense. Given these factual developments, the Department of Defense—a federal agency—was added as a defendant to this lawsuit. *See* Am. Compl., ECF No. 21, ¶¶ 37–42. Shortly after that occurred, however, Defendants changed gears, and represented that "[i]n order not to impact the ability of other customers to use the [SAFE] site, the Commission has decided to use alternative means for transmitting the requested data." ECF No. 24, at 1. In lieu of the SAFE system, Defendants had the Director of White House Information Technology ("DWHIT") repurpose "an existing system that regularly accepts personally identifiable information through a secure, encrypted computer application within the White House Information Technology enterprise." *Id.* Furthermore, Defendants have represented that the data received from the State of Arkansas via the SAFE system has been deleted, "without ever having been accessed by the Commission." Herndon Decl. ¶ 7. Accordingly, while the legal dispute with respect to the use of the SAFE system by Defendants to collect at least some voter roll information may not be moot—data was in fact collected before a Privacy Impact Assessment was conducted pursuant to the E-Government Act—that potential legal violation does not appear to be a basis for the prospective injunctive relief sought by Plaintiff's amended motion for injunctive relief; namely, the prevention of the further collection of voter roll information by the Commission. In any event, Plaintiff has not pursued the conduct of the Department of Defense as a basis for injunctive relief.

Given the change of factual circumstances, the question now becomes whether any of the entities that will be involved in administering the "repurposed" White House system

are "agencies" for purposes of APA review. One candidate is the DWHIT. According to the Presidential Memorandum establishing this position, the "Director of White House Information Technology, on behalf of the President, shall have the primary authority to establish and coordinate the necessary policies and procedures for operating and maintaining the information resources and information systems provided to the President, Vice President, and the EOP." Mem. on Establishing the Director of White House Information Technology and the Executive Committee for Presidential Information Technology ("DWHIT Mem."), § 1, *available at* https://www.gpo.gov/fdsys/pkg/DCPD-201500185/pdf/DCPD-201500185.pdf (last accessed July 16, 2017). The DWHIT is part of the White House Office, *id.* § 2(a)(ii), a component of the EOP "whose members assist the President with those tasks incidental to the office." *Alexander v. F.B.I.*, 691 F. Supp. 2d 182, 186 (D.D.C. 2010), *aff'd*, 456 F. App'x 1 (D.C. Cir. 2011); *see also* Herndon Decl. ¶ 1. According to the Memorandum, the DWHIT "shall ensure the effective use of information resources and information systems provided to the President, Vice President, and EOP in order to improve mission performance, and shall have the appropriate authority to promulgate all necessary procedures and rules governing these resources and systems." DWHIT Mem., § 2(c). The DWHIT is also responsible for providing "policy coordination and guidance" for a group of other entities that provide information technology services to the President, Vice President, and the EOP, known as the "Presidential Information Technology Community." *Id.* § 2(a), (c). Furthermore, the DWHIT may "advise and confer with appropriate executive departments and agencies, individuals, and other entities as necessary to perform the Director's duties under this memorandum." *Id.* § 2(d).

Taken as a whole, the responsibilities of the DWHIT based on the present record

amount to providing operational and administrative support services for information technology used by the President, Vice President, and close staff. Furthermore, to the extent there is coordination with other federal agencies, the purpose of that coordination is likewise to ensure the sufficiency and quality of information services provided to the President, Vice President, and their close staff. Given the nature of the DWHIT's responsibilities and its proximity to the President and Vice President, it is not an agency for the reasons specified by the D.C. Circuit in *CREW* with respect to the Office of Administration ("OA"). In that case, the D.C. Circuit held that the OA was not an "agency" under FOIA[5] because "nothing in the record indicate[d] that OA performs or is authorized to perform tasks other than operational and administrative support for the President and his staff . . . ." *CREW*, 566 F.3d at 224. Relying on its prior holding in *Sweetland*, the court held that where an entity within the EOP, like the DWHIT, provides to the President and his staff "only operational and administrative support . . . it lacks the substantial

[5] Plaintiff argues that *CREW* and similar cases by the D.C. Circuit interpreting whether an entity is an agency for purposes of FOIA are not applicable to determining whether an entity is an agency for purposes of the APA. *See* Pl.'s Reply Mem. at 2. The Court disagrees. The D.C. Circuit established the "substantial independent authority" test in *Soucie*, a case that was brought under FOIA, but at a time when the definition of "agency" for FOIA purposes mirrored the APA definition. In that case, the D.C. Circuit held that "the APA apparently confers agency status on any administrative unit with *substantial independent authority* in the exercise of specific functions." *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971) (emphasis added); *Meyer*, 981 F.2d at 1292 n.1 ("[b]efore the 1974 Amendments, FOIA simply had adopted the APA's definition of agency"); *see also Dong v. Smithsonian Inst.*, 125 F.3d 877, 881 (D.C. Cir. 1997) ("[o]ur cases have followed the same approach, requiring that an entity exercise substantial independent authority before it can be considered an agency for § 551(1) purposes"—that is, the section that defines the term "agency" for purposes of the APA). The *CREW* court applied the "substantial independent authority" test, and the Court sees no basis to hold that the reasoning of *CREW* is not dispositive of DWHIT's agency status in this matter.

independent authority we have required to find an agency covered by FOIA . . . ." *Id.* at 223 (citing *Sweetland v. Walters*, 60 F.3d 852, 854 (D.C. Cir. 1995)). This conclusion was unchanged by the fact that the OA, like the DWHIT here, provides support for other federal agencies to the extent they "work at the White House complex in support of the President and his staff." *Id.* at 224. Put differently, the fact that the DWHIT coordinates the information technology support provided by other agencies for the President, Vice President, and their close staff, does not change the ultimate conclusion that the DWHIT is not "authorized to perform tasks other than operational and administrative support for the President and his staff," which means that the DWHIT "lacks substantial independent authority and is therefore not an agency . . . ." *Id.* However, to the extent that DWHIT's responsibilities expand either formally or organically, as a result of its newfound responsibilities in assisting the Commission, this determination may need to be revisited in the factual context of this case.

The other candidates for "agency action" proposed by Plaintiff fare no better. The Executive Committee for Presidential Information Technology and the U.S. Digital Service, even if they were agencies, "will have no role in th[e] data collection process." Herndon Decl. ¶ 6. According to Defendants, apart from the DWHIT, the only individuals who will be involved in the collection of voter roll information are "a limited number of . . . technical staff from the White House Office of Administration." *Id.* Finally, Plaintiff contends that the entire EOP is a "parent agency," and that as a result, the activities of its components, including those of the DWHIT and the Commission, are subject to APA review. However, this view of the EOP has been expressly rejected by the D.C. Circuit and is at odds with the practical reality that the D.C. Circuit has consistently analyzed the

agency status of EOP components on a component-by-component basis. *United States v. Espy*, 145 F.3d 1369, 1373 (D.C. Cir. 1998) ("it has never been thought that the whole Executive Office of the President could be considered a discrete agency under FOIA"). Accordingly, at the present time and based on the record before the Court, it appears that there is no "agency," as that term is understood for purposes of the APA, that is involved in the collection of voter roll information on behalf of the Commission. Because there is no apparent agency involvement at this time, the Court concludes that APA review is presently unavailable in connection with the collection of voter roll information by the Commission.

The last remaining avenue of potential legal redress is pursuant to FACA. Plaintiff relies on Section 10(b) of FACA as a means to seek the disclosure of a Privacy Impact Assessment, as required under certain circumstances by the E-Government Act. *See* Am. Compl, ECF No. 33, ¶¶ 73–74. That section provides that an advisory committee subject to FACA must make publicly available, unless an exception applies under FOIA, "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by [the] advisory committee . . . ." 5 U.S.C. app. 2 § 10(b). The flaw with this final approach, however, is that FACA itself does not require Defendants to produce a Privacy Impact Assessment; only the E-Government Act so mandates, and as concluded above, the Court is not presently empowered to exert judicial review pursuant to the APA with respect to Plaintiff's claims under the E-Government Act, nor can judicial review be sought pursuant to the E-Government Act itself, since it does not provide for a private cause of action. Consequently, for all of the foregoing reasons, none of Plaintiff's avenues of potential legal redress appear

to be viable at the present time, and Plaintiff has not demonstrated a likelihood of success on the merits.

C. Irreparable Harm, Balance of the Equities, and the Public Interest

Given that Plaintiff is essentially limited to pursuing an informational injury, many of its theories of irreparable harm, predicated as they are on injuries to the private interests of its advisory board members, have been rendered moot. *See* Pl.'s Am. Mem., at 34–40. Nonetheless, the non-disclosure of information to which a plaintiff is entitled, under certain circumstances itself constitutes an irreparable harm; specifically, where the information is highly relevant to an ongoing and highly public matter. *See, e.g.*, *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 41 (D.D.C. 2006) ("EPIC will also be precluded, absent a preliminary injunction, from obtaining in a timely fashion information vital to the current and ongoing debate surrounding the legality of the Administration's warrantless surveillance program"); *see also Washington Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 75 (D.D.C. 2006) ("Because the urgency with which the plaintiff makes its FOIA request is predicated on a matter of current national debate, due to the impending election, a likelihood for irreparable harm exists if the plaintiff's FOIA request does not receive expedited treatment."). Indeed, the D.C. Circuit has held that "stale information is of little value . . . [,]" *Payne Enters, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988), and that the harm in delaying disclosure is not necessarily redressed even if the information is provided at some later date, *see Byrd v. EPA*, 174 F.3d 239, 244 (D.C. Cir. 1999) ("Byrd's injury, however, resulted from EPA's failure to furnish him with the documents until long after they would have been of any use to him."). Here, however, the Court concludes that Plaintiff is not presently entitled to the information that it seeks, and accordingly, Plaintiff

cannot show that it has suffered an irreparable informational injury. To hold otherwise would mean that whenever a statute provides for potential disclosure, a party claiming entitlement to that information in the midst of a substantial public debate would be entitled to a finding of irreparable informational injury, which cannot be so. *See, e.g., Elec. Privacy Info. Ctr. v. Dep't of Justice*, 15 F. Supp. 3d 32, 45 (D.D.C. 2014) ("surely EPIC's own subjective view of what qualifies as 'timely' processing is not, and cannot be, the standard that governs this Court's evaluation of irreparable harm").

Finally, the equitable and public interest factors are in equipoise. As the Court recently held in a related matter, "[p]lainly, as an equitable and public interest matter, more disclosure, more promptly, is better than less disclosure, less promptly. But this must be balanced against the interest of advisory committees to engage in their work . . . ." *Lawyers' Comm. for Civil Rights Under Law v. Presidential Advisory Comm'n on Election Integrity*, No. CV 17-1354 (CKK), 2017 WL 3028832, at *10 (D.D.C. July 18, 2017). Here, the disclosure of a Privacy Impact Assessment may very well be in the equitable and public interest, but creating a right to such disclosure out of whole cloth, and thereby imposing an informational burden on the Commission where none has been mandated by Congress or any other source of law, is not.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiff's [35] Motion for a Temporary Restraining Order and Preliminary Injunction is **DENIED WITHOUT PREJUDICE**.

An appropriate Order accompanies this Memorandum Opinion.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al.*,

Defendants.

Civil Action No. 17-1320 (CKK)

ORDER
(July 24, 2017)

For the reasons stated in the accompanying Memorandum Opinion, Plaintiff's [35] Motion for a Temporary Restraining Order and Preliminary Injunction is **DENIED WITHOUT PREJUDICE**.

SO ORDERED.

Dated: July 24, 2017

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5171 **September Term, 2016**

1:17-cv-01320-CKK

Filed On: July 31, 2017 [1686465]

Electronic Privacy Information Center,

Appellant

v.

Presidential Advisory Commission on Election Integrity, et al.,

Appellees

ORDER

Upon consideration of appellant's unopposed motion to expedite, it is

ORDERED that the following briefing schedule, which was proposed by the parties, will apply in this case:

Appellant's Brief	August 18, 2017
Appendix	August 18, 2017
Appellees' Brief	September 15, 2017
Appellant's Reply Brief	September 22, 2017

All issues and arguments must be raised by appellant in the opening brief. The court ordinarily will not consider issues and arguments raised for the first time in the reply brief. To enhance the clarity of their briefs, the parties are cautioned to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statutes with widely recognized initials, briefs should not contain acronyms that are not widely known. See D.C. Circuit Handbook of Practice and Procedures 41 (2017); Notice Regarding Use of Acronyms (D.C. Cir. Jan. 26, 2010).

Parties are strongly encouraged to hand deliver the paper copies of their briefs to the Clerk's office on the date due. Filing by mail could delay the processing of the brief. Additionally, parties are reminded that if filing by mail, they must use a class of mail that is at least as expeditious as first-class mail. See Fed. R. App. P. 25(a). All briefs and

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5171 **September Term, 2016**

appendices must contain the date that the case is scheduled for oral argument at the top of the cover, or state that the case is being submitted without oral argument. See D.C. Cir. Rule 28(a)(8).

The Clerk is directed to schedule this case for oral argument on the earliest available date following the completion of briefing.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Rebecca L. Thompson
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5171 **September Term, 2016**

1:17-cv-01320-CKK

Filed On: July 31, 2017 [1686465]

Electronic Privacy Information Center,

Appellant

v.

Presidential Advisory Commission on Election Integrity, et al.,

Appellees

ORDER

Upon consideration of appellant's unopposed motion to expedite, it is

ORDERED that the following briefing schedule, which was proposed by the parties, will apply in this case:

Appellant's Brief	August 18, 2017
Appendix	August 18, 2017
Appellees' Brief	September 15, 2017
Appellant's Reply Brief	September 22, 2017

All issues and arguments must be raised by appellant in the opening brief. The court ordinarily will not consider issues and arguments raised for the first time in the reply brief. To enhance the clarity of their briefs, the parties are cautioned to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statutes with widely recognized initials, briefs should not contain acronyms that are not widely known. See D.C. Circuit Handbook of Practice and Procedures 41 (2017); Notice Regarding Use of Acronyms (D.C. Cir. Jan. 26, 2010).

Parties are strongly encouraged to hand deliver the paper copies of their briefs to the Clerk's office on the date due. Filing by mail could delay the processing of the brief. Additionally, parties are reminded that if filing by mail, they must use a class of mail that is at least as expeditious as first-class mail. See Fed. R. App. P. 25(a). All briefs and

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5171 **September Term, 2016**

appendices must contain the date that the case is scheduled for oral argument at the top of the cover, or state that the case is being submitted without oral argument. See D.C. Cir. Rule 28(a)(8).

The Clerk is directed to schedule this case for oral argument on the earliest available date following the completion of briefing.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Rebecca L. Thompson
Deputy Clerk

[redacted]

JUL 19 2017

WHS MC-ALEX ESD Mailbox OSD-JS FOIA Requester Service Center

From: FOIA Requests <foia@democracyforward.org>
Sent: Tuesday, July 18, 2017 3:59 PM
To: WHS MC-ALEX ESD Mailbox OSD-JS FOIA Requester Service Center
Subject: [Non-DoD Source] DOD FOIA Request
Attachments: FINAL 2017-07-18 DOD Kobach Commission.docx (1).pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Ms. Carr,

Please find attached a FOIA request for the Department of Defense Office of the Secretary and Joint Staff.

If you need clarification as to the scope of the request, have any questions, or foresee any obstacles to releasing fully the requested records within the 20 day period, please contact me at foia@democracyforward.org < Caution-mailto:foia@democracyforward.org > or (202) 448-9090 < tel:%28202%29%20448-9090 > .

Best,

[redacted]

DEMOCRACY
FORWARD
FOUNDATION

P.O. Box 34553
Washington, DC 20043
202-448-9090
foia@democracyforward.org

July 18, 2017

VIA EMAIL

Stephanie Carr
FOIA Contact
OSD/JS FOIA Requester Service Center, Office of Freedom of Information
1155 Defense Pentagon
Washington, DC 20301-1155
(b)(6)

whs.mc-alex.esd.mbx.osd-js-foia-requester-service-center@mail.mil

Re: Freedom of Information Act Records Request

Dear Ms. Carr:

Democracy Forward Foundation makes this request pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq. and Department of Defense regulations at 32 C.F.R. Part 286.

On May 11, 2017, the White House issued Executive Order No. 13,799, establishing the Presidential Advisory Commission on Election Integrity Commission (herein "the Commission").[1]

On June 28, 2017, the Commission's Vice Chair, Kris W. Kobach, sent a letter to all 50 States and the District of Columbia requesting the recipients provide voting data on American voters, including: "the full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information."[2]

The letter instructed recipients to "submit your responses electronically to ElectionIntegrityStaff@ovp.eop.gov or by utilizing the Safe Access File Exchange ("SAFE"), which is a secure FTP site the federal government uses for transferring large data files." The

[1] Executive Order No, 13,799, 82 Fed. Reg. 22389 (May 11, 2017), goo.gl/fsYVop.
[2] Letter from Kris W. Kobach to Honorable Elaine Marshall, North Carolina Secretary of State (June 28, 2017).

SAFE website is operated by the U.S. Army Aviation and Missile Research Development and Engineering Center, a component within the U.S. Army, which is one of three military departments within the U.S. Department of Defense.

According to published reports, the Commission plans to use this data to investigate and quantify voter fraud.[3]

In an effort to understand, and explain to the public, the work of the Commission, Democracy Forward Foundation requests that the Department of Defense produce the following within twenty (20) business days:

(1) Any and all records that refer or relate to the Presidential Advisory Commission on Election Integrity, including the storage, collection, maintenance, uploading, or transfer of the data requested by the Commission in its June 28, 2017 letter to states.[4]

The time period for this request is January 20, 2017 to the date the search is conducted.

(2) Any and all records that (i) refer or relate to the Presidential Advisory Commission on Election Integrity and (ii) were sent to or from the U.S. Army Aviation and Missile Research Development and Engineering Center.

The time period for this request is January 20, 2017 to the date the search is conducted.

(3) Any and all records that were sent to or from members or staff of the Presidential Advisory Commission on Election Integrity, including but not limited to: Secretary Kris Kobach, Secretary of State for Kansas, Vice Chair; Secretary Connie Lawson, Secretary of State of Indiana; Secretary Bill Gardner, Secretary of State of New Hampshire; Secretary Matt Dunlap, Secretary of State of Maine; Ken Blackwell, former Secretary of State of Ohio; Commissioner Christy McCormick, Election Assistance Commission; David Dunn, former Arkansas State Representative; Mark Rhodes, Wood County, West Virginia Clerk; Hans von Spakovsky, Senior Legal Fellow, Heritage Foundation; J. Christian Adams, lawyer, Virginia; Alan Lamar King, probate judge, Alabama; Christopher Herndon; or Andrew Kossack.

The time period for this request is January 20, 2017 to the date the search is conducted.

---

[3] See e.g., Jessica Huseman, "Election Experts See Flaws in Trump Voter Commission's Plan to Smoke Out Fraud," ProPublica (Jul. 6, 2017), https://goo.gl/dFCt4D; Bryan Lowry, "Kris Kobach Wants Every US Voter's Personal Information for Trump's Commission," Kansas City Star (Jun. 29, 2017), http://www.kansascity.com/news/politics-.

[4] Supra Note 2.

(4) Any and all records that refer or relate to: (i) the U.S. Army Aviation and Missile Research Development and Engineering Center's (AMRDEC) Safe Access File Exchange (SAFE) application; and (ii) the data requested by the Commission in its June 28, 2017 letter to states.[5]

The time period for this request is January 20, 2017 to the date the search is conducted.

(5) Any and all records that refer or relate to: (i) the Privacy Act of 1974[6]; and (ii) the data requested by the Commission in its June 28, 2017 letter to states.[7]

The time period for this request is January 20, 2017 to the date the search is conducted.

Please limit the search to the following Department of Defense Offices: the Office of the Secretary, the Office of the Deputy Secretary, the Office of the General Counsel, the Office of the Assistant to the Secretary of Defense for Public Affairs, the Under Secretary of Defense for Policy, the Office of Acquisition, Logistics and Technology, and the Office of the Chief Information Officer.

Please search for records regardless of format, including paper records, electronic records, audiotapes, videotapes, photographs, data, and graphical materials. This request includes, without limitation, all correspondence, letters, emails, text messages, calendar entries, facsimiles, telephone messages, voice mail messages, and transcripts, notes, minutes, or audio or video recordings of any meetings, telephone conversations, or discussions.

FOIA requires agencies to disclose information, with only limited exceptions for information that would harm an interest protected by a specific exemption or where disclosure is prohibited by law. 5 U.S.C. §552(a)(8)(A). In the event that any of the requested documents cannot be disclosed in their entirety, we request that you release any material that can be reasonably segregated. *See* 5 U.S.C. § 552(b). Should any documents or portions of documents be withheld, we further request that you state with specificity the description of the document to be withheld and the legal and factual grounds for withholding any documents or portions thereof in an index, as required by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Should any document include both disclosable and nondisclosable material that cannot reasonably be segregated, we request that you describe what proportion of the information in a document is non-disclosable and how that information is dispersed throughout the document. *Mead Data Cent., Inc. v. U.S. Dep't of*

---

[5] Supra Note 2.

[6] The Privacy Act of 1974, 5 U.S.C. § 552a, https://www.justice.gov/opcl/privacy-act-1974

[7] Supra Note 2.

Air Force, 566 F.2d 242, 261 (D.C. Cir. 1977).

If requested records are located in, or originated in, another agency, department, office, installation or bureau, please refer this request or any relevant portion of this request to the appropriate entity.

To the extent that the records are readily reproducible in an electronic format, we would prefer to receive the records in that format. However, if certain records are not available in that format, we are willing to accept the best available copy of each such record.

Please respond to this request in writing within 20 working days as required under 5 U.S.C. § 552(a)(6)(A)(i). If all of the requested documents are not available within that time period, we request that you provide us with all requested documents or portions of documents that are available within that time period. If all relevant records are not produced within that time period, we are entitled to a waiver of fees for searching and duplicating records under 5 U.S.C. § 552(a)(4)(A)(viii)(I).

Democracy Forward Foundation is a nonprofit organization organized under Internal Revenue Code § 501(c)(3) and dedicated to educating the public about the operation of the federal government.[8] As a nonprofit organization, we do not have a commercial interest in the records. The records we obtain from this request will be used to support our public education efforts, and we intend to disseminate publicly an analysis of those records. Dissemination of the information here requested is particularly important to ensure transparency of government. We therefore request a waiver of fees for searching and duplicating records in response to this request under the exception at 5 U.S.C. § 552(a)(4)(A)(iii), which requires waiver of fees if the disclosure is "in the public interest because it 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." If our request for a waiver is denied, we are willing to pay all reasonable fees incurred for searching and duplicating records in responding to this request, up to $250. If the costs of responding to this request should exceed that amount, please contact us before incurring costs exceeding that amount.

If you need clarification as to the scope of the request, have any questions, or foresee any obstacles to releasing fully the requested records within the 20 day period, please contact Josephine Morse as soon as possible at foia@democracyforward.org or 202-448-9090.

We appreciate your assistance and look forward to your prompt response.

[8] https://www.democracyforward.org.

Sincerely,

Josephine Morse
Democracy Forward Foundation

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRENNAN CENTER FOR JUSTICE, 120 Broadway, #1750 New York, NY 10271	)	
THE PROTECT DEMOCRACY PROJECT, INC., 2020 Pennsylvania Avenue, NW, #163 Washington, DC 20006,	)	
Plaintiffs,	)	Civil Action No.:
v.	)	
U.S. DEPARTMENT OF JUSTICE 950 Pennsylvania Avenue, NW Washington, DC 20530	)	
U.S. DEPARTMENT OF HOMELAND SECURITY, 245 Murray Lane, SW Washington, DC 20528	)	
OFFICE OF MANAGEMENT AND BUDGET, 725 17th Street, NW Washington, DC 20503	)	
Defendants.	)	

COMPLAINT

Plaintiffs Brennan Center for Justice ("Brennan Center") and The Protect Democracy Project, Inc. ("Protect Democracy") (collectively, "Plaintiffs") bring this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to compel defendants U.S. Department of Justice ("DOJ"), U.S. Department of Homeland Security ("Homeland Security"), and U.S. Office of Management and Budget ("OMB") (collectively, "Defendants") to disclose records regarding the "Presidential Advisory Commission on Election Integrity" (the "Commission") requested by Plaintiffs under FOIA.

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

2. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

3. Plaintiff Brennan Center for Justice at N.Y.U. School of Law is a not-for-profit nonpartisan law and policy institute that seeks to improve the nation's systems of democracy and justice. The Brennan Center works to eliminate barriers to full political participation and to ensure that public policy and institutions reflect all members of our diverse society. The Brennan Center regularly writes and publishes articles and makes appearances in a wide range of media outlets regarding voting rights, election administration, and government oversight. The Brennan Center maintains offices in New York City and in Washington, DC.

4. Plaintiff Protect Democracy is an organization awaiting section 501(c)(3) status, incorporated under the laws of the District of Columbia. Protect Democracy's mission is to prevent those in power from depriving Americans of a free, fair, and fully-informed opportunity to exercise ultimate sovereignty. As part of this mission, Protect Democracy seeks to inform public understanding of operations and activities of the government by gathering and disseminating information that is likely to contribute significantly to the public understanding of executive branch operations and activities. Protect Democracy regularly requests such government information pursuant to FOIA. Protect Democracy has been held to be an organization that is "primarily engaged in disseminating information."[1]

[1] *Protect Democracy Project, Inc. v. U.S. Dep't of Def.*, No. 17-CV-00842 (CRC), 2017 WL 2992076 (D.D.C. July 13, 2017).

5. Defendant DOJ is an agency of the executive branch of the federal government of the United States and includes the Office of Information Policy and Office of Legal Counsel. DOJ is headquartered at 950 Pennsylvania Avenue, NW, Washington, DC 20530. DOJ is an "agency" within the meaning of 5 U.S.C. § 552(f), and has possession, custody, and control of documents that Plaintiffs seek in response to their FOIA requests.

6. Defendant Homeland Security is an agency of the executive branch of the federal government of the United States. Homeland Security is headquartered at 245 Murray Lane, SW, Washington, DC 20528. Homeland Security is an "agency" within the meaning of 5 U.S.C. § 552(f), and has possession, custody, and control of documents that Plaintiffs seek in response to their FOIA requests.

7. Defendant OMB is an agency of the executive branch of the federal government of the United States. OMB is headquartered at 725 17th Street, NW, Washington, DC 20503. OMB is an "agency" within the meaning of 5 U.S.C. § 552(f), and has possession, custody, and control of documents that Plaintiffs seek in response to their FOIA requests.

STATEMENT OF FACTS

President Trump's Advisory Commission on Election Integrity

8. On May 11, 2017, President Donald J. Trump issued Executive Order 13799 establishing a "Presidential Advisory Commission on Election Integrity," ostensibly to "promote fair and honest Federal elections." According to the Executive Order, the Commission is "study[ing] the registration and voting processes used in Federal elections." The Executive Order provides that the Commission shall submit a report to the President that identifies "those laws, rules, policies, activities, strategies, and practices" that either "enhance" or "undermine" "the American people's confidence in the integrity of the voting process used in Federal

elections," and "those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registration and improper voting, including fraudulent voter registrations and fraudulent voting."

9. The Commission is chaired by the Vice President of the United States, and its vice chair is Kansas Secretary of State Kris Kobach.

10. Other members of the Commission include Hans von Spakovsky (Senior Legal Fellow, Heritage Foundation), J. Christian Adams (President and General Counsel, Public Interest Legal Foundation), and Ken Blackwell (Former Ohio Secretary of State). These commissioners have long records of championing measures that impede eligible voters from participating in elections. For example, von Spakovsky helped lead an effort in 2005 to pass a law in Georgia which required people to present government-issued photo identification to vote as well as efforts to promote aggressive purges of state voter rolls in and around 2008. He is seen as one of the leading figures in the country in promoting policies to reduce access to voting by claiming widespread voter fraud.[2] Similarly, Adams has a history of promoting voting restrictions. He serves as the president and general counsel of the Public Interest Legal Foundation, which works to promote aggressive purges of voter rolls and promotes the idea that non-citizens vote in large numbers.[3] And Blackwell has implemented policies that restricted voting access in Ohio in 2004 and 2006, including a policy of rejecting voter registration forms

---

[2] Alex Horton & Gregory S. Schneider, *Trump's Pick to Investigate Voter Fraud is Freaking Out Voting Rights Activists*, WASHINGTON POST, June 30, 2017, *available at* https://www.washingtonpost.com/news/post-nation/wp/2017/06/30/trumps-pick-to-investigate-voter-fraud-is-freaking-out-voting-rights-activists/?utm_term=.d5e907e50cfd

[3] Meet the Members of Trump's 'Voter Fraud' Commission, Brennan Center for Justice, July 18, 2017, https://www.brennancenter.org/analysis/meet-members

that were not submitted on a certain grade of card stock, and a policy of limiting access to provisional ballots in violation of federal law.[4]

11. In public statements leading up to the creation of the Commission, President Trump has suggested that the Commission's purpose would be to substantiate the President's conviction, not founded in any credible evidence, that voter fraud is rampant in U.S. elections. On November 27, 2016, for instance, President Trump tweeted that "[i]n addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally."[5] On January 23, 2017, President Trump told congressional leaders that 3 to 5 million "illegals" had voted in the 2017 federal election.[6] Subsequently, on January 25, 2017, President Trump tweeted that he would be "asking for a major investigation into VOTER FRAUD."[7]

12. On information and belief, the Commission was also created to justify legislative changes to impose new barriers to exercising the franchise. In recently disclosed emails between Kobach and the Trump transition team on November 9 and 10, 2016, Kobach indicated he was working with other advisors on "legislation drafts for submission to Congress early in the administration," and that he had already started drafting "amendments to the NVRA [National

---

[4] *Id.*

[5] Cleve R. Wootson Jr., *Donald Trump: 'I Won the Popular Vote if You Deduct the Millions of People Who Voted Illegally,* WASHINGTON POST, Nov. 27, 2017, *available at* https://www.washingtonpost.com/news/the-fix/wp/2016/11/27/donald-trump-i-won-the-popular-vote-if-you-deduct-the-millions-of-people-who-voted-illegally/?utm_term=.eed362335b3e.

[6] Abby Phillip & Mike DeBonis, *Without Evidence, Trump Tells Lawmakers 3 Million to 5 Million Illegal Ballots Cost Him the Popular Vote*, WASHINGTON POST, Jan. 23, 2017, *available at* https://www.washingtonpost.com/news/post-politics/wp/2017/01/23/at-white-house-trump-tells-congressional-leaders-3-5-million-illegal-ballots-cost-him-the-popular-vote/?utm_term=.50b6369f474a.

[7] Curt Mills, *Trump Calls for Voter Fraud Investigation*, US NEWS, Jan. 25, 2017, *available at* https://www.usnews.com/news/politics/articles/2017-01-25/donald-trump-tweets-call-for-major-investigation-into-voter-fraud.

Voter Registration Act of 1993] to make clear that proof of citizenship requirements are permitted."[8]

13. On June 28, 2017, Kobach sent letters to chief state election officials requesting that they submit "publicly-available voter roll data" and feedback on how to improve election integrity by July 14, 2017. The requested voter roll data included:

> a. the full first and last names of all registrants, middle names or initials if available,
>
> b. addresses,
>
> c. dates of birth,
>
> d. political party (if recorded),
>
> e. last four digits of social security number if available,
>
> f. voter history (elections voted in) from 2006 onward,
>
> g. active/inactive status, cancelled status,
>
> h. information regarding any felony convictions,
>
> i. information regarding voter registration in another state,
>
> j. information regarding military status, and
>
> k. overseas citizen information.

Kobach also asked state election officials to provide, among other things, recommendations regarding changes to federal election laws that would enhance the integrity of federal elections, information regarding instances of voter fraud or registration fraud, and information regarding convictions for election-related crimes since the November 2000 federal election.

---

[8] Christopher Ingraham, *Vice Chair of Trump's Voter Fraud Commission Wants to Change Federal Law to Add New Requirements for Voting, Email Shows*, WASHINGTON POST, July 17, 2017, *available at* https://www.washingtonpost.com/news/wonk/wp/2017/07/17/vice-chair-of-trumps-voter-fraud-commission-wants-to-change-federal-law-to-make-it-harder-to-vote-email-shows/?utm_term=.77d87d87f27d.

14. In his June 28, 2017 letter requests, Kobach stated that "any documents that are submitted to the full Commission will also be made available to the public," although Kobach has since represented that this statement applies only to "narrative responses" submitted by states to the Commission and that voter roll data will be de-identified prior to any public release of documents.

15. A first meeting of the Commission was held on July 19, 2017. President Trump attended and spoke at that meeting. During his statements, Trump stressed that "voter fraud," including "[a]ny form of illegal or fraudulent voting, whether by non-citizens or the deceased," was something that his administration "can't let . . . happen." He also suggested that states that are unwilling to share the voter roll information requested by Kobach are "worried about" having "something" to hide.[9]

16. On July 26, 2017, Kobach sent letters to chief state election officials renewing his request for voter roll data and feedback on the federal election process.

17. The Commission's next meeting is scheduled for September 2017.

18. The Commission's actions have already had a chilling effect on voter registration. For example, nearly 4,000 people in Colorado canceled their voter registrations after Kobach issued his requests for state voter roll data.[10] Similarly, over 1,715 Florida voters cancelled their voter registrations in the twenty-day period after Kobach requested state voter roll data, a 117

[9] Pam Fessler & Brett Nelly, *Talk of Voter Fraud Dominates First Meeting of Election Integrity Commission*, NPR, July 18, 2017, *available at* http://www.npr.org/2017/07/19/538152713/talk-of-voter-fraud-dominates-first-meeting-of-election-integrity-commission.

[10] Aidan Quigley, *Trump Voter Fraud Probe Sparks Wave of Canceled Registrations in Colorado*, NEWSWEEK, July 17, 2017, *available at* http://www.newsweek.com/thousands-colorado-democrats-and-independents-cancel-voter-registration-after-637996.

percent increase in cancellations over the same period in the prior year.[11] Multiple election officials have said that the volume of registration cancellations in response to Kobach's requests is unprecedented. Far from demonstrating evidence of voter fraud, on information and belief such cancellations suggest that many eligible voters are deeply concerned that their personal information may be shared or disclosed publicly by the Commission.

19. The Commission's actions have also raised questions about its ability to adequately protect the privacy of voters. For example, on July 14, 2017, the Commission published to the general public comments and feedback it had received at a Commission email address without redacting commenters' names or, in many instances, other personal information, including email addresses.[12] This unanticipated, wide release of personal information demonstrates the need for the public to have more information about the Commission's methods for collecting, protecting, and disclosing voter roll data and other information about the federal election process.

20. Neither the President nor any executive branch official has publicly released any legal analysis, memorandum, or other written record of how the Commission will identify practices that enhance or undermine confidence in federal elections or investigate vulnerabilities in voting systems used for federal elections.

21. In order for Congress and state and local elected officials to exercise their roles as representatives of the people, the people must be able to provide their representatives with their

---

[11] Asa Royal, *Florida Voters Cancel Their Own Registration. Is Trump's Fraud Commission the Cause?*, TAMPA BAY TIMES, Aug. 15, 2017, *available at* http://www.tampabay.com/news/florida-voters-cancel-their-own-registration-is-trumps-fraud-commission/2332036.

[12] Scott Neuman, *Vote Fraud Commission Releases Public Comments, Email Addresses and All*, NPR, July 14, 2017, *available at* http://www.npr.org/sections/thetwo-way/2017/07/14/537282309/vote-fraud-commission-releases-public-comments-email-addresses-and-all.

views. The public cannot do this in an informed way about an issue as critically important as their right to vote in the absence of information from Defendant agencies about the Commission.

22. The Commission and the issue of voter fraud have been the focus of widespread and extensive public interest and media coverage, reflecting the public's urgent concern about election integrity, data privacy, and whether the Commission is pursuing an illegitimate or pre-determined agenda for purposes of voter suppression.

23. Because the Commission is proceeding with its effort to collect state voter roll data, and because other actions by the Commission that may lead to increased voter disenfranchisement or voter suppression may also be imminent, it is imperative that the public be informed immediately of the Commission's intentions and processes in order for the public to formulate and communicate their views to state officials, Congress, and President Trump's Commission.

24. Plaintiffs intend to share any documents transmitted via FOIA with the public (subject to any and all appropriate redactions of personal information), and to provide information and analysis about those documents as appropriate.

Plaintiffs' FOIA Requests and Defendants' Responses

DOJ Office of Information Policy and Office of Legal Counsel

25. On May 15, 2017, Plaintiffs sent a FOIA request to Defendant DOJ, and specifically to the Office of Information Policy and Office of Legal Counsel.

26. On information and belief, Defendant DOJ – and the Office of Information Policy and Office of Legal Counsel, specifically – has documents related to the Commission, including documents related to the reasons for forming the Commission, the goals and missions of the Commission, and the Commission's intended activities. This belief is based upon statements

made by Kobach indicating that he would seek "information" from DOJ regarding issues related to voter fraud,[13] statements given at the Commission's first meeting stating that it intends to "find out from the U.S. attorneys' offices all across the country whether they are complying with" the National Voter Registration Act and to seek information regarding whether US attorneys' office are sharing data with states regarding convictions that might disqualify individuals from voting, and statements from senior White House officials indicating that DOJ would be "looking [] very seriously and very hard" at issues of voter fraud.[14]

27. Plaintiffs' May 15, 2017 FOIA request to DOJ sought the following records:

> 1. All communications, including but not limited to emails and memoranda, between any Department of Justice ("DOJ" or "Department") officer, employee, or agent, or any White House liaison to the Department, and any other person, including but not limited to any officer, employee, or agent of the White House or DOJ, or any member of the presidential transition team or the presidential campaign of Donald Trump, regarding the Presidential Advisory Commission on Election Integrity or any other effort since November 8, 2016 to establish a commission, task force, or committee to study voter fraud or any aspect of the voting system.
>
> 2. All communications, including but not limited to emails and memoranda, between any Department officer, employee, or agent, or any White House liaison to the Department, and any member of the Presidential Advisory Commission on Election Integrity, other than Vice President Michael Pence, since November 8, 2016.
>
> 3. All documents relating to the Presidential Advisory Commission on Election Integrity or any other effort since November 8, 2016 to establish a commission, task force, or committee to study voter fraud or any aspect of the voting system, including all documents discussing or making reference to the following subjects:

---

[13] Dave Boyer, *Voter Fraud and Suppression Commission to Meet in July*, WASHINGTON TIMES, June 27, 2017, *available at* http://www.washingtontimes.com/news/2017/jun/27/voter-fraud-and-suppression-commission.

[14] Glenn Kessler, *Stephen Miller's Bushels of Pinocchios for False Voter-Fraud Claims*, WASHINGTON POST, Feb. 12, 2017, *available at* https://www.washingtonpost.com/news/fact-checker/wp/2017/02/12/stephen-millers-bushels-of-pinocchios-for-false-voter-fraud-claims/?utm_term=.1e53ead71b5e.

a) The Executive Order creating the Presidential Advisory Commission on Election Integrity;

b) The reasons for forming the Presidential Advisory Commission on Election Integrity;

c) The goals and mission of the Presidential Advisory Commission on Election Integrity; and

d) The membership of the Presidential Advisory Commission on Election Integrity, including the criteria for selection of its members.

28. Plaintiffs also requested expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(e).

29. Plaintiffs also requested fee waivers pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II), 5 U.S.C. § 552(a)(4)(A)(iii), and 28 C.F.R. § 16.10(k).

30. On May 24, 2017, the DOJ Office of Information Policy acknowledged receipt of the request on May 15, 2017, and assigned it four case reference numbers (DOJ-2017-004083, -004291, -004292, -004293). The Office of Information Policy did not respond to the request for expedited processing or for a fee waiver.

31. On June 8, 2017, the DOJ Office of Legal Counsel acknowledged receipt of the request on May 15, 2017, and assigned it a case reference number (FY17-218). The DOJ Office of Legal Counsel granted the request for expedited processing, but indicated that it had not yet initiated process and stated that, because of the considerable number of FOIA requests received, it was "likely that we will be unable to respond to the request within the twenty-day statutory deadline." The DOJ Office of Legal Counsel further stated that it would make a decision on the request for a fee waiver after determining whether fees would be assessed for the request.

32. Pursuant to FOIA, within 20 business days of receipt of the requests – that is, by June 13, 2017, at the latest – Defendant DOJ was required to "determine . . . whether to comply

with such request" and to "immediately notify" Plaintiffs of "such determination and the reasons therefor," Plaintiffs' right "to seek assistance from the FOIA Public Liaison of the agency," and, in the case of an adverse determination, Plaintiffs' appeal rights. 5 U.S.C. § 552(a)(6)(A)(i) & (B)(i).

33. To date, Defendant DOJ has failed to make the required determination and notifications.

DHS

34. On May 17, 2017, Plaintiffs sent a FOIA request to Defendant DHS.

35. On information and belief, Defendant DHS has documents related to the Commission, including documents related to the reasons for forming the Commission, the goals and missions of the Commission, and the Commission's intended activities. This belief is based upon statements made by Kobach indicating his belief that DHS has "data" regarding issues related to voter fraud,[15] representations from both Kobach and a spokesman for Vice President Pence that the Commission intends to "check" the voter roll information it has requested "against the federal government's database of non-citizens" (*i.e.* against information maintained by DHS),[16] and statements from members at the Commission's first meeting that the Commission intends to collect "helpful" data already in the possession of the federal government, including from DHS databases. Prior to the Commission's creation, Kobach also stated that it would have

[15] Dave Boyer, *Voter Fraud and Suppression Commission to Meet in July*, WASHINGTON TIMES, June 27, 2017, *available at* http://www.washingtontimes.com/news/2017/jun/27/voter-fraud-and-suppression-commission-to-meet-in-/.

[16] Jessica Huseman, *Election Experts See Flaws in Trump Voter Commission's Plan to Smoke out Fraud.* PROPUBLICA, July 6, 2017, *available at* https://www.propublica.org/article/election-experts-see-flaws-trump-voter-commissions-plan-to-smoke-out-fraud.

a "full-time staff" from DHS,[17] and was photographed holding documents emblazoned with the title "Department of Homeland Security."[18]

36. Plaintiffs' May 17, 2017 FOIA request to DHS sought the following records:

> 1. All communications, including but not limited to emails and memoranda, between any Department of Homeland Security ("DHS" or "Department") officer, employee, or agent, or any White House liaison to DHS, and any other person, including but not limited to any officer, employee, or agent of the White House or DHS, or any member of the presidential transition team or the presidential campaign of Donald Trump, regarding the Presidential Advisory Commission on Election Integrity or any other effort since November 8, 2016 to establish a commission, task force, or committee to study voter fraud or any aspect of the voting system.
>
> 2. All communications, including but not limited to emails and memoranda, between any DHS officer, employee, or agent, or any White House liaison to DHS, and any member of the Presidential Advisory Commission on Election Integrity, other than Vice President Michael Pence, since November 8, 2016.
>
> 3. All documents relating to the Presidential Advisory Commission on Election Integrity or any other effort since November 8, 2016 to establish a commission, task force, or committee to study voter fraud or any aspect of the voting system, including all documents discussing or making reference to the following subjects:
>
> a) The Executive Order creating the Presidential Advisory Commission on Election Integrity;
>
> b) The reasons for forming the Presidential Advisory Commission on Election Integrity;
>
> c) The goals and mission of the Presidential Advisory Commission on Election Integrity;

---

[17] Katy Ergen & Bryan Lowry, *Kobach Says he Turned Down White House Job*, KANSAS CITY STAR, June 8, 2017, *available at* http://www.kansascity.com/news/politics-government/article155170989.html.

[18] Caroline Kenny, *Photo of Trump-Kobach Meeting Reveals Apparent DHS Proposal*, CNN, Nov. 21, 2016, *available at* http://www.cnn.com/2016/11/21/politics/kris-kobach-donald-trump-department-of-homeland-security/index.html.

d) The membership of the Presidential Advisory Commission on Election Integrity, including the criteria for selection of its members; and

e) The staffing of the Presidential Advisory Commission on Election Integrity, including job descriptions, organization charts, and criteria for hiring.

37. Plaintiffs also requested expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(e).

38. Plaintiffs also requested fee waivers pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II), 5 U.S.C. § 552(a)(4)(A)(iii), and 28 C.F.R. § 16.10(k).

39. On May 19, 2017, Defendant DHS acknowledged receipt of the request on May 17, 2017, and assigned it a case reference number (2017-HQFO-00794). In its letter, DHS granted Plaintiffs' request for expedited processing and fee waiver, but also indicated that it had not yet initiated processing and claimed unusual circumstances – that the request "seeks documents that will require a thorough and wide-ranging search" – such that it would need an additional 10 days to make a determination.

40. Pursuant to FOIA, within 30 business days of receipt of Plaintiffs' request – that is, by June 28, 2017 – DHS was required to "determine . . . whether to comply with such request" and to "immediately notify" Plaintiffs of "such determination and the reasons therefor," Plaintiffs' right "to seek assistance from the FOIA Public Liaison of the agency," and, in the case of an adverse determination, Plaintiffs' appeal rights. 5 U.S.C. § 552(a)(6)(A)(i) & (B)(i).

41. To date, Defendant DHS has failed to make the required determination and notifications.

OMB

42. On May 17, 2017, Plaintiffs sent a FOIA request to Defendant OMB.

43. On information and belief, Defendant OMB has documents related to the Commission, including documents related to the reasons for forming the Commission, the goals and missions of the Commission, and the Commission's intended activities. Among other things, agencies are statutorily required to request approval from OMB's Office of Information and Regulatory Affairs regarding information collection requests, like that issued from the Commission to the state election officials. The OMB is also generally responsible for assisting the President in overseeing the "implementation of his vision across the Executive Branch,"[19] which, upon information and belief, would include providing assistance to or coordinating with the Commission.

44. Plaintiffs' May 17, 2017 FOIA request to OMB sought the following records:

> 1. All communications, including but not limited to emails and memoranda, within the custody or control of OMB regarding the Presidential Advisory Commission on Election Integrity or any other effort since November 8, 2016 to establish a commission, task force, or committee to study voter fraud or any aspect of the voting system.
>
> 2. All communications, including but not limited to emails and memoranda, within the custody or control of OMB with any member of the Presidential Advisory Commission on Election Integrity, other than Vice President Michael Pence, since November 8, 2016.
>
> 3. All documents relating to the Presidential Advisory Commission on Election Integrity or any other effort since November 8, 2016 to establish a commission, task force, or committee to study voter fraud or any aspect of the voting system, including all documents discussing or making reference to the following subjects:
>
> a) The Executive Order creating the Presidential Advisory Commission on Election Integrity;
> b) The reasons for forming the Presidential Advisory Commission on Election Integrity;
> c) The goals and mission of the Presidential Advisory Commission on Election Integrity;

[19] The White House, Office of Management and Budget, https://www.whitehouse.gov/omb (last visited Aug. 15, 2017).

d) The membership of the Presidential Advisory Commission on Election Integrity, including the criteria for selection of its members;
e) The budget of the Presidential Advisory Commission on Election Integrity, including line items for salaries, research, travel, meetings, hearings, and public materials; and
f) The staffing of the Presidential Advisory Commission on Election Integrity, including job descriptions, organization charts, and criteria for hiring.

45. Plaintiffs also requested expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(e).

46. Plaintiffs also requested fee waivers pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II), 5 U.S.C. § 552(a)(4)(A)(iii), and 28 C.F.R. § 16.10(k).

47. On May 18, 2017, Defendant OMB acknowledged receipt of the request on May 18, 2017, and assigned it a case reference number (2017-231). OMB did not respond to the request for expedited processing or for a fee waiver.

48. Pursuant to FOIA, within 20 business days of receipt of Plaintiffs' request – that is, June 16, 2017 – OMB was required to "determine . . . whether to comply with such request" and to "immediately notify" Plaintiffs of "such determination and the reasons therefor," Plaintiffs' right "to seek assistance from the FOIA Public Liaison of the agency," and, in the case of an adverse determination, Plaintiffs' appeal rights. 5 U.S.C. § 552(a)(6)(A)(i).

49. To date, Defendant OMB has failed to make the required determination and notifications.

COUNT I

50. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 49 as if fully set forth herein.

51. Defendants are in violation of FOIA by failing to respond to Plaintiffs' requests within the statutorily prescribed time limit and by unlawfully withholding records responsive to Plaintiffs' requests.

COUNT II

52. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 51 as if fully set forth herein.

53. Defendants DOJ and OMB are in violation of FOIA by failing to grant expedited processing to Plaintiff under 5 U.S.C. § 552(a)(6)(E).

REQUESTED RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

(1) Order Defendants, by a date certain, to conduct a search that is reasonably likely to lead to the discovery of any and all records responsive to Plaintiffs' requests;

(2) Order Defendants, by a date certain, to disclose all non-exempt records responsive to Plaintiffs' FOIA requests, as a well as a *Vaughn* index of any records or portions of records withheld due to a claim of exemption;

(3) Order Defendants to grant Plaintiffs' requests for a fee waiver;

(4) Order Defendants DOJ and OMB to grant Plaintiffs' request for expedited processing of its request;

(5) Award Plaintiffs its costs and reasonable attorney fees incurred in this action; and

(6) Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

Date: August 21, 2017

Jeremy M. Creelan
David W. Sussman
Emily S. Deininger
Justin O. Spiegel
Derek Stegelmeier
Carl N. Wedoff
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
Phone: (212) 891-1600
jcreelan@jenner.com
dsussman@jenner.com
edeininger@jenner.com
jspiegel@jenner.com
dstegelmeier@jenner.com
cwedoff@jenner.com

Laurence Schwartztol
THE PROTECT DEMOCRACY PROJECT, INC.
2020 Pennsylvania Ave., NW #163
Washington, DC 20006
Phone: (202) 599-0466
larry.schwartztol@protectdemocracy.org

Wendy R. Weiser
BRENNAN CENTER FOR JUSTICE
at New York University
School of Law
161 Avenue of the Americas
New York, New York 10013
Phone: (646) 292-8335
weiserw@brennan.law.nyu.edu

Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al.*,

Defendants.

Civil Action No. 1:17-cv-1320 (CKK)

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S AMENDED MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Administrative and Executive Materials

Other Authorities

INTRODUCTION

Plaintiff Electronic Privacy Information Center ("EPIC") seeks a temporary restraining order and/or preliminarily injunction to prevent the Presidential Advisory Commission on Election Integrity ("Commission") from collecting voter registration data that states already make available to the public under their own laws. EPIC contends that the Commission – an entity established to advise and assist the President – failed to create and publish a Privacy Impact Assessment, which the E-Government Act of 2002 requires of federal agencies (but not Presidential commissions) under certain circumstances. The Court should deny EPIC's request for preliminary relief because it has not shown its entitlement to the extraordinary remedy of emergency injunctive relief.

As a threshold matter, the Court lacks jurisdiction to award preliminary relief because plaintiff has failed to establish its standing. Plaintiff has not alleged any facts that the organization itself has suffered any injury, nor has it identified a single member who is suffering injury. Indeed, neither plaintiff nor its members could be injured by the transfer of public information from one sovereign to another. The doctrine of informational standing does not apply where, as here, the document plaintiff purports to seek is not in existence. Plaintiff's concerns about a possible data breach at some point in the future by unknown third parties fall well short of an imminent and concrete injury that is traceable to the Commission and redressable by this Court.

Plaintiff's claim of standing is also self-defeating. Plaintiff insists that states are not permitted to release much of the information that the Commission has requested, and on that basis most states have refused to provide it. If plaintiff is correct, plaintiff will never suffer any

injury because the Commission will never receive the information. If, on the other hand, states only provide the Commission with information that state law makes available to the public, plaintiff will again lack any injury because no private information will be imperiled. Either way, plaintiff has suffered – and will suffer – no harm from the Commission's failure to perform a Privacy Impact Assessment.

Even assuming the Court had jurisdiction over this action, plaintiff is unlikely to succeed on the merits because it lacks any viable claims. It contends that the E-Government Act requires the Commission to conduct a Privacy Impact Assessment. However, the Administrative Procedure Act ("APA"), on which plaintiff must rely for a cause of action, and the E-Government Act of 2002, which allegedly creates the substantive duty, apply only to "agencies." The Commission is not an "agency" within the meaning of these statutes because its sole purpose is to advise the President. EPIC's claim that the voluntary collection of publicly available voter information violates a constitutional right to informational privacy is similarly meritless. Neither the Supreme Court nor the D.C. Circuit has held that such a right exists. And even if such a right did exist, it would not apply to information that is already publicly available.

Plaintiff has also failed to show that it will suffer irreparable harm in the absence of preliminary relief. The voter data that EPIC seeks to enjoin the Commission from collecting is already made publicly available by the states. And, as plaintiff argues, states are limited in what they may publicly release. Therefore, even assuming plaintiff has alleged a cognizable injury, it has failed to demonstrate irreparable harm from the Commission's request that states share voter information that is publicly available.

Finally, the public interest weighs against emergency injunctive relief. The President established the Commission "in order to promote fair and honest Federal elections." Executive Order No. 13,799, 82 Fed. Reg. 22,389, 22,389 (May 11, 2017). By collecting voter data from the states, the Commission seeks to "enhance the American people's confidence in the integrity of the voting processes used in Federal elections." *Id.* Plaintiff seeks to halt this important work with meritless claims but without a personal stake in the outcome of this case. Accordingly, plaintiff's motion for preliminary relief should be denied.

BACKGROUND

The President established the Presidential Advisory Commission on Election Integrity in Executive Order No. 13,799. 82 Fed. Reg. 22,389 (May 11, 2017) [hereinafter Exec. Order No. 13,799]; *see also* Mem in Opp'n to Pl.'s Emergency TRO, Declaration of Kris W. Kobach ("First Kobach Decl.") ¶ 3 & Exh. 1, ECF No. 8-1. The Commission is charged with "study[ing] the registration and voting processes used in Federal elections," "consistent with applicable law." Exec. Order No. 13,799, § 3. Vice President Pence is the Chairman of the Commission. *Id.* § 2. Kansas Secretary of State Kris Kobach is the Vice Chair. First Kobach Decl. ¶¶ 2, 3. The members of the Commission come from federal, state, and local jurisdictions across the political spectrum. *Id.* ¶ 3; *see also* Defs.' Resp. to July 5, 2017 Order, Second Declaration of Kris W. Kobach ("Second Kobach Decl.") ¶ 1, ECF No. 11-1.

In furtherance of the Commission's mandate, the Vice Chair has sent letters to the states and the District of Columbia requesting publicly available data from state voter rolls and feedback on how to improve election integrity. First Kobach Decl. ¶ 4. Among other things, the letters sent by the Vice Chair requested:

> the *publicly-available* voter roll data for [the State], including, *if publicly available under the laws of your state*, the full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information.

See, e.g., *id.*, Exh. 3 (letter to Alabama) (emphasis supplied).

The Vice Chair requested responses by July 14, 2017. First Kobach Decl. ¶ 5 & Exh. 3. He provided two methods for the states to respond. *Id.* Narrative responses, not containing data, can be sent via email to the address provided in the letter. *Id.* This email is a White House email address (in the Office of the Vice President) subject to the security protecting all White House communications and networks. *Id.* For data files, which would be too large to send via email, the letter provided that states could use the Department of Defense's ("DOD") Safe Access File Exchange ("SAFE"). *See id.*; Second Kobach Decl. ¶¶ 4-5.

On July 10, 2017, the Commission sent the states a follow-up communication requesting that the states not submit any data until this Court rules on this TRO motion. Defs.' Suppl. Brief Regarding DOD, Third Decl. of Kris W. Kobach ("Third Kobach Decl.") ¶ 2, ECF No. 24-1. It also announced that it no longer intends to use the DOD SAFE system to receive information from the states; instead, it intends to use alternative means of receiving that data. *Id.* ¶ 1. The new system is run by the Director of White House Information Technology ("DWHIT"). Decl. of Charles Christopher Herndon ("Herndon Decl.") ¶¶ 3-5 [attached hereto]. The system allows the states to directly and securely upload the data to a server within the White House domain. *Id.*

¶ 4-5. No federal agency will play a role this data collection, and the only people involved will be the DWHIT and a limited number of technical staff from the White House Office of Administration. *Id.* ¶ 6. The Commission will not send further instructions about how to use the new system until this Court decides this motion. Third Kobach Decl. ¶ 2.

Before Commission staff requested that the states not submit data, Arkansas uploaded information to the SAFE site. *Id.* ¶ 3. The Commission did not access this information, and it has been deleted. Herndon Decl. ¶ 7.

ARGUMENT

"The standard for issuance of the extraordinary and drastic remedy of a temporary restraining order or a preliminary injunction is very high." *Jack's Canoes & Kayaks, LLC v. Nat'l Park Serv.*, 933 F. Supp. 2d 58, 75 (D.D.C. 2013) (citation omitted). An interim injunction is "never awarded as of right," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), and "should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion," *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). A party moving for a temporary restraining order or a preliminary injunction "must demonstrate '(1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction is not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction.'" *Jack's Canoes*, 933 F. Supp. 2d at 75-76 (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995)).

I. PLAINTIFF HAS NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS

A. Plaintiff Lacks Standing.

Plaintiff's request for preliminary relief must be denied because it has failed to establish standing to seek such relief. *See Aamer v. Obama*, 742 F.3d 1023, 1028 (D.C. Cir. 2014) ("We begin, as we must, with the question of subject-matter jurisdiction." (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998))). The doctrine of standing, an essential aspect of the Article III case-or-controversy requirement, demands that a plaintiff have "a personal stake in the outcome of the controversy [so] as to warrant his invocation of federal-court jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). At its "irreducible constitutional minimum," the doctrine requires a plaintiff, as the party invoking the Court's jurisdiction, to establish three elements: (1) a concrete and particularized injury-in-fact, either actual or imminent, (2) a causal connection between the injury and defendants' challenged conduct, and (3) a likelihood that the injury suffered will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Facts demonstrating each of these elements "must affirmatively appear in the record" and "cannot be inferred argumentatively from averments in the [plaintiff's] pleadings." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990) (citation omitted); *see also Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002).

The same rigorous standard applies to organizational plaintiffs suing either on their own behalf or on behalf of their members. *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982)). EPIC brings this lawsuit on both its own behalf and as a representative of its purported members.

See Second Am. Compl. ¶¶ 65, 70, 75, 79, 84, ECF No. 33. Notwithstanding the fact that plaintiff has had multiple opportunities to supplement the record, it has failed to satisfy its burden of demonstrating that either the Commission's solicitation of publicly available voter data or its decision to not prepare a Privacy Impact Assessment has or will cause the organization a cognizable injury-in-fact. Plaintiff has also failed to demonstrate that it has members are the functional equivalent of a traditional membership organization. And even if the Court were to conclude that EPIC could bring this suit on behalf of its Advisory Board members (which it cannot), those members' allegations of imminent injury caused by a feared "disclosure" of their personal information are controverted by the current facts. Plaintiff, therefore, has not satisfied its burden of establishing that it has standing to sue on either its own behalf or as a representative of its purported members.

1. Plaintiff lacks organizational standing.

Plaintiff asserts that it has standing on its own behalf as a "nonprofit organization . . . established . . . to focus public attention on emerging privacy and civil liberties issues." Second Am. Compl. ¶ 5. It contends that it has suffered an injury-in-fact because the Commission's failure to carry out a Privacy Impact Assessment ("PIA") and its "disregard for the informational privacy rights of U.S. voters" have made its "activities more difficult" by "forc[ing] it [to] expand its long-running efforts to protect voter privacy," thereby "creating a direct conflict between the [Commission's] conduct and [EPIC's] mission." Reply in Supp. of Pl.'s Emergency TRO ("EPIC Reply"), at 20, ECF No. 13 (internal quotation marks omitted). Plaintiff, however, fundamentally misunderstands the requirements of organizational standing. Because the efforts

to which EPIC points constitute the very activities EPIC routinely engages in to advance its mission, it has not established organizational standing.

As an initial matter, plaintiff has failed to sufficiently *plead* organizational standing despite the fact that it twice amended its complaint *after* the parties briefed the issue in the context of its first motion requesting preliminary relief. Under Federal Rule of Civil Procedure 8(a)(1), plaintiffs are required to plead "a short and plain statement of the grounds for the court's jurisdiction," and this includes the essential facts of standing. *See Al-Owhali v. Ashcroft*, 279 F. Supp. 2d 13, 20-21 (D.D.C. 2003); *Spartalj-Waters v. United States*, No. 87-1131, 1987 WL 19626, at *1 (D.D.C. Oct. 30, 1987). In this case, the Second Amended Complaint identifies no injury incurred by EPIC, stating only that EPIC is "adversely affected and aggrieved by Defendants' actions." *See* Second Am. Compl. ¶¶ 65, 70, 75. Moreover, although plaintiff has supplemented the record with a declaration from its President and Executive Director addressing certain of its Advisory Board members, *see* Pl.'s Amended TRO & Prelim. Inj. ("EPIC Mem."), Decl. of Marc Rotenberg, Exh. 38, ECF No. 35-4, the declaration does not identify any injuries EPIC itself has or will suffer as a result of the Commission's activities, *see generally id.* These deficiencies in the record cannot be remedied by arguments made by counsel in briefs. *See Sierra Club*, 292 F.3d at 900 ("When the petitioners standing is not self-evident, however, the petitioner must supplement the record [with affidavits or other evidence] to the extent necessary to explain and substantiate its entitlement to judicial review."); *see also id.* at 901 ("[M]ere allegations in a brief" and "representations of counsel" are not evidence and thus are not sufficient to support standing). For this reason alone, the Court should decline to exercise jurisdiction.

But even putting aside plaintiff's pleading deficiencies, it has not established, and cannot not establish, that it has "such a personal stake in the outcome of the controversy as to warrant the invocation of federal court jurisdiction." *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 11 (D.C. Cir. 2011). An organization asserting standing on its own behalf must demonstrate that it has suffered a "concrete and demonstrable injury to [its] activities – with a consequent drain on [its] resources – constitut[ing] . . . more than simply a setback to the organization's abstract social interests." *Id.* (quoting *Havens Realty Corp.*, 455 U.S. at 378-79). Indeed, it has long been clear that "pure issue-advocacy," *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1162 (D.C. Cir. 2005), provides no more basis for an organization's standing than "generalized grievances about the conduct of Government" do for individual standing, *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (citation omitted). Thus, "conflict between a defendant's conduct and an organization's mission is alone insufficient to establish Article III standing." *Nat'l Treasury Emps. Union*, 101 F.3d at 1429; *see also Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995) (finding that "frustrat[ion]" of an organization's objectives "is the type of abstract concern that does not impart standing.").

Instead, an "'organization must allege that discrete programmatic concerns are being directly and adversely affected' by the challenged action." *Nat'l Taxpayers*, 68 F.3d at 1433 (quoting *Am. Legal Found. v. FCC*, 808 F.2d 84, 92 (D.C. Cir. 1987)). Thus, an organization may have standing when the defendant's action makes it harder for the organization to serve its clients. In *Havens Realty*, for example, the Supreme Court relied on the allegation that defendants' "practices have perceptibly impaired [plaintiff's] ability to provide counseling and referral services for low-and-moderate-income homeseekers." 455 U.S. at 379. And, as this

Court noted at oral argument, the D.C. Circuit recently concluded that an animal advocacy organization had standing where the U.S. Department of Agriculture's ("USDA") lack of investigative information regarding bird abuse prevented the organization from bringing violations of the Animal Welfare Act ("AWA") to the agency's attention, a key component of its advocacy activities. *People for the Ethical Treatment of Animals* ("*PETA*") *v. USDA*, 797 F.3d 1087, 1095 (D.C. Cir. 2015).

Plaintiff attempts to rely on *PETA*, but the facts alleged here are quite different. In *PETA*, the court found that the information regarding bird abuse investigations was an essential tool for furthering the organization's advocacy and education activities, and that without the information, PETA's ability to advocate was limited absent expending significant resources to conduct its own investigations and file complaints alleging bird abuse. *See id.* Here, by contrast, EPIC's advocacy and educational activities have not been limited or otherwise impeded by the absence of a PIA. Indeed, EPIC has characterized those activities as having "expanded." *See* EPIC Reply, at 20-21. Thus, plaintiff has not shown that its advocacy and educational activities have been injured by a lack of information.

Nor has plaintiff's expanded activities resulted in a significant drain of its resources. EPIC's expanded efforts range from drafting a letter urging state election officials to not comply with the Commission's request for voter information, to seeking records from the Commission concerning its collection of such data, to developing a webpage to inform the public of the Commission's activities, and to respond to "numerous" requests expressing concern about the impact of the Commission's activities. *Id.*

Like any other advocacy or lobbying organization, the expenditures to which plaintiff points constitute the ordinary activity of EPIC's business and mission. Indeed, another member of this Court reached this very conclusion in a similar action brought by plaintiff. In that case, in which EPIC challenged a regulation implementing the Family Educational Rights and Privacy Act, the court found that EPIC lacked organizational standing because the regulation did "not impede[] EPIC's programmatic concerns and activities, but fueled them." *Elec. Privacy Info. Ctr. v. Dep't of Educ.*, 48 F. Supp. 3d 1, 23 (D.D.C. 2014). Judge Berman Jackson explained that the "expenditures [] EPIC [] made in response to the [new regulation] have not kept it from pursing its true purpose as an organization but have contributed to its pursuit of its purpose." *Id.*; *see also id.* at 5 (holding that EPIC has not alleged an injury in fact and thus did not have organizational standing to challenge the new regulation because defendant's promulgation of the regulation merely "prompted [EPIC] to engage in the very sort of advocacy that is its raison d'etre"). *Cf. Nat'l Consumer League v. Gen. Mills, Inc.*, 680 F. Supp. 2d 132, 136 (D.D.C. 2010) ("Challenging conduct like General Mills' alleged mislabeling is the very purpose of consumer advocacy organizations. As such, General Mills' alleged conduct does not hamper NCL's advocacy effort[s]; if anything it gives NCL an opportunity to carry out its mission."). Plaintiff has thus asserted "nothing more than an abstract injury to its interest that is insufficient to support standing." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 921 (D.C. Cir. 2015).

2. Plaintiff lacks standing to sue in a representational capacity.

Plaintiff contends that it has representational standing "by virtue of representing the interests of its Advisory Board members, many of whom face certainly impending injury as a result of the Commission's collection of personal voter data." Pl.'s Sur-Surreply in Supp. of

Pl.'s TRO ("EPIC Sur-Surreply"), at 1, ECF No. 19-1. To establish representational standing (or as it is sometimes referred to, associational standing), an organization must demonstrate that "its members would otherwise have standing to sue in their own right[.]" *Ass'n of Flight Attendants—CWA v. Dep't of Transp.*, 564 F.3d 462, 464 (D.C. Cir. 2009) (citation omitted). To begin, the organization has to have members. In addition, an organizational plaintiff must demonstrate that "the interests it seeks to protect are germane to the organization's purpose" and "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.*

Plaintiff alleges that its Advisory Board members are "formal[]" members of the organization. *See* EPIC Sur-Surreply, at 2. But plaintiff's website does not support this allegation, stating that it "ha[s] no clients, no customers, and no shareholders[.]" *See* About EPIC, http://epic.org/epic/about.html (last visited July 16, 2017). Further, plaintiff's website does not instruct visitors on how to become a member. Nor does it have a webpage dedicated specifically to its members. Rather, the website simply invites visitors to "support" the organization by providing a monetary donation with no mention of joining the organization. *See* EPIC, https://donatenow.networkforgood.org/epic (last visited July 16, 2017). Accordingly, because EPIC "has no members in the traditional sense," the inquiry turns to "whether the organization is the functional equivalent of a traditional membership organization." *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25 (D.C. Cir. 2002); *see also Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1977). "Three main characteristics must be present for an entity to meet the test of functional equivalency: (1) it must serve a specialized segment of the community; (2) it must represent individuals that have all the 'indicia of membership' . . . ; and

(3) its fortunes must be tied closely to those of its constituency." *Wash. Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 208 (D.D.C. 2007) (citation omitted).

Plaintiff does not appear to serve a specialized segment of the community. Indeed, as a "public interest research center," it pursues a "wide range of activities" designed to "educate the public" regarding the protect[tion of] privacy, the First Amendment, and other constitutional values." Rotenberg Decl. ¶ 2. Nor do plaintiff's Advisory Board Members possess all the indicia of membership—they do not participate in the election of EPIC's leadership; they do not steer EPIC's activities (although they do provide advice and sign onto EPIC's amicus briefs); and although plaintiff alleges they make financial contributions to support the work of the organization, none of the Advisory Board members themselves state that they make financial contributions to the organization. *See id.*; EPIC Mem, Exhs. 7-17, ECF No. 35-3. Finally, plaintiff does not allege that its "fortunes" are linked to the outcome of this lawsuit. Absent members or their functional equivalent, plaintiff has not established that it has representational standing.

Even if plaintiff could proceed as a representative of its Advisory Board members, those members' allegations of imminent injury caused by a feared "disclosure" of their personal information, *see* EPIC Mem, Exs. 7-15, ECF No. 35-3, are controverted by plaintiff's own allegations. Plaintiff reports in its amended motion for preliminary relief that forty-four states and the District of Columbia have refused to provide voter information. EPIC Mem., at 11-12. The six states in which the declarants are registered to vote are among this group. *See* Defs.' Surreply in Opp'n to Pl.'s TRO ("Defs.' Surreply"), at 3, ECF No. 16-1. Further, although not relevant to the claims of plaintiff's declarants, the data that the state of Arkansas uploaded to the

Army's SAFE site has been deleted without having ever been accessed by the Commission. Herndon Decl. ¶ 7.

Nor have plaintiff's declarants established that the feared "disclosure" of information transferred to the Commission is anything more than speculative. Plaintiff's declarants overlook the fact that the Commission only requested from the states information that is already publicly available. Further, the Commission has explained that, "voter rolls themselves will not be released to the public." Defs.' Surreply at 4 (citing First Kobach Decl. ¶ 5). In any event, the amorphous fear of a future data breach by unknown bad actors does not establish imminent and concrete injury. *See In re Sci. Applications Int'l Corp.* ("*SAIC*") *Backup Tape Data Theft Lit.*, 45 F. Supp. 3d 14, 26 (D.D.C. 2014) (increased risk of identity theft alone does not confer standing in data-breach cases); *see also Welborn v. IRS*, 218 F. Supp. 3d 64, 77 (D.D.C. 2016) (holding that even an "objectively reasonable likelihood" of future breach cannot support standing) (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147-48 (2013)), *appeal dismissed by* No. 16-5365, 2017 WL 2373044 (D.C. Cir. Apr. 18, 2017).

3. Plaintiff lacks informational standing.

Plaintiff asserts that it "would suffer an informational injury from nondisclosure" of a Privacy Impact Assessment under the E-Government Act of 2002 and, as such, it has standing to pursue this lawsuit. EPIC Supplemental Br. on Pl.'s Informational Standing, at 1, ECF No. 17. That argument, however, fails. Plaintiff seeks a document that the Commission did not (and, as discussed below, was not required to) create. A plaintiff does not suffer an injury-in-fact sufficient to convey organizational standing when he or she seeks to compel an agency to create a record that does not already exist. *See Friends of Animals v. Jewell*, 828 F.3d 989, 992-93

(D.C. Cir. 2016).[1] Such a claim amounts to a "generalized grievance" and "generalized interest in the enforcement of law," not a specific injury that supports standing. *Am. Farm Bureau v. EPA*, 121 F. Supp. 2d 84, 98 (D.D.C. 2000) (quoting *Judicial Watch, Inc. v. FEC*, 180 F.3d 277, 278 (D.C. Cir. 1999)).

Informational standing is a "narrowly defined" theory of standing. *Common Cause v. FEC*, 108 F.3d 413, 420 (D.C. Cir. 1997). It "arises only in very specific statutory contexts," *Ass'n of Am. Physicians & Surgeons, Inc. v. FDA*, 539 F. Supp. 2d 4, 15 (D.D.C. 2008), where a statutory provision *requires* the government to make public specific, *preexisting* information. *See Friends of Animals*, 828 F.3d at 992-93. Informational standing is not a doctrine that allows a plaintiff to compel an agency to *create* a document to which, once it exists, the plaintiff will have a statutory entitlement. *See id.* And yet that is precisely the situation that plaintiff finds itself in—it seeks to force the Commission to create a PIA which, it claims, it will then be entitled to inspect.

The D.C. Circuit has recently made clear that informational standing cannot be used to force an agency to make a written finding simply because, once made, that finding is required to

[1] The D.C. Circuit's holding in *PETA*, 797 F.3d 1087, is not to the contrary. As explained above, *see supra* § I.A.1, the D.C. Circuit concluded that PETA had *organizational* standing to bring its lawsuit against the USDA because it had alleged facts showing that the denial of specific, investigatory information directly conflicted with its mission of public education and cruelty investigations, thereby forcing the organization to expend significant resources to conduct its own cruelty investigations and submit complaints to local, state, and federal agencies—all of which would have been unnecessary if USDA had enforced AWA with respect to birds. *Id.* at 1095-97. But this holding was not based on any concept of informational standing. Indeed, the investigation and inspection provision in the AWA does not require mandatory disclosure of any information related to USDA's investigatory and inspection activities. *See* 7 U.S.C. § 2146. As discussed below, informational standing only exists when a statute expressly guarantees the public a right to preexisting information.

be made publicly available. In *Friends of Animals*, the court explained this principle in the context of the Endangered Species Act ("ESA"). *Id.* at 990-91. The ESA requires an agency to make a decision within 12 months as to whether a species should be listed on the Endangered Species List, and once it makes that decision, the agency must publish it in the Federal Register. *Id.* The plaintiff in *Friends of Animals* sued, claiming that the agency had not timely published its findings with respect to plaintiff's listing petitions, and therefore, it had not received the published finding to which it said it was entitled, causing it informational injury. Both the district and circuit courts rejected this argument because the information the plaintiff sought did not yet exist. "In truth, then, [plaintiff] is not seeking pre-existing 'information,' but is instead seeking to compel the Department to comply with the ESA by making a decision along the statute's timeline that will *generate* information. . . . [The plaintiff] has not alleged that the Department withheld any specific, concrete information *in its possession* concerning [the animals in question]; its allegations, instead, focus on the Department's repeated failures to meet the various deadlines in the ESA's species-listing process." *Friends of Animals v. Jewell*, 115 F. Supp. 3d 107, 113 (D.D.C. 2015) (emphasis in original). The D.C. Circuit affirmed. The circuit court recognized that, by its terms, the ESA required the agency to "publish [the requisite information] *after* making a given finding," but concluded that the publication requirements did not take effect *until* the agency actually made that finding in the first place. *Friends of Animals*, 828 F.3d at 993; *see also id.* ("By adopting this sequential procedural structure, Congress placed the Secretary under no obligation to publish any information in the Federal Register until after making a . . . finding."). Accordingly, the plaintiff had not suffered an injury that conferred informational standing.

The same principle applies here. The E-Government Act only requires disclosure of a PIA after it has been created. *See* E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, § 208(b)(1)(B)(iii) (stating that a PIA shall be made publicly available, "if practicable," only "after completion of the review"). Just as the *Friends of Animals* plaintiff could not use the fact that an ESA finding must be published to force the agency to issue such a finding, plaintiff cannot use the fact that a PIA should generally be made available as an informational standing "hook" to require the Commission to create a document it has not created (and, as discussed below, is not obligated to create).[2]

At oral argument, this Court asked about sequence, specifically, whether the fact that the E-Government Act allegedly requires that a PIA be created and then disclosed *before* information can be collected creates informational standing. Oral Arg. Tr. at 5:1-7; 26:1-19, ECF No. 22. It does not. In *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C. 2009), this Court considered section 10 of the ESA, which allows the agency to grant exemptions to the ESA's restrictions on "taking" animal species. 16 U.S.C. § 1539. Subsection 10(c) provided that the agency had to "publish notice in the Federal Register of each application for an exemption," and then allow for a thirty-day public comment period (where all information received "shall be [made] available to the public." *Friends of Animals*, 626 F. Supp. 2d at 106

[2] Nor, unlike *Friends of Animals*, is it clear that the E-Government Act has a mandatory disclosure requirement. Section 208 of the E-Government Act states that an agency—which the Commission is not—shall "conduct a privacy impact assessment." 116 Stat. 2899 § 208(b)(1)(B)(i). But it need only disclose the PIA "*if practicable* . . . ." *Id.* § 208(b)(1)(B)(iii) (emphasis added). The qualifier "if practicable" does not create an unqualified right to receive a PIA. *See, e.g.*, *Friends of Animals*, 828 F.3d at 994 (informational standing only exists if statute "*guaranteed* a right to receive information in a particular form" (emphasis added)).

(citing 16 U.S.C. § 1539(c)). If the Secretary decided to grant an exemption, subsection 10(c) required that he "find[] and publish[] his findings in the Federal Register." *Id.* (citing 16 U.S.C. § 1539(d)). The court concluded that subsection 10(c) of the ESA, but *not* subsection 10(d), allowed for informational standing. Subsection 10(c) allowed for informational injury because it allows an interested party to participate in the agency deliberations over whether or not an exemption should be issued. *Id.* at 112-13. In other words, because the statutory provision requires information be provided at the *beginning* of the process that contemplates public involvement, there is actual and imminent injury. *Id.*

Not so with subsection 10(d). That provision only required that information be published at the *end* of the process, and while publication was a necessary step before a legal action could go into effect, it did not create a concrete and particularized injury.

> While, to be sure, subsection 10(d) requires the Secretary to publish her findings, that is different from the subsection 10(c) requirement that information be made available to the public. Importantly, the information provided in subsection 10(c) is necessary for plaintiffs to meaningfully participate in the section 10 process, and therefore deprivation of that information causes a specific, concrete, actual and imminent injury. By contrast, the findings in subsection 10(d) are published at the conclusion of the section 10 process following the mandated public process. . . . [T]his is not an injury to their ability to participate in the section 10 process, but instead reveals a more general interest in the law being followed.

Id. at 113. In other words, merely requiring publication as the final stage of an agency decision process is not enough to create information standing. *See also Cary v. Hall*, No. C 05-4363 VRW, 2006 WL 6198320, at *10 (N.D. Cal. Sept. 30, 2006) (expressing skepticism that §10(b) allowed for informational standing.)

So too here. Plaintiff is relying on a statutory provision that, like subsection 10(d), merely provides that an agency determination be published in the Federal Register (and here,

only if "practicable"). The publication is merely to inform the public of a decision, not to solicit their input as part of an ongoing agency decisionmaking process. Accordingly, the fact that a publication deadline precedes the going-into-effect time of an agency decision does not create informational standing.

Plaintiff contends that the holding in *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 447 (1989), confers informational standing to challenge the Commission's decision not to complete a PIA. *See* Pl.'s Supp. Br., at 2-3. EPIC's reliance is misplaced. As Judge Huvelle explained in *American Farm Bureau*, 121 F. Supp. 2d at 97-98, *Public Citizen* cannot be read to convey informational standing in every instance in which a plaintiff alleges that the government failed to comply with a statutory provision that directs the government to create information. *See id.* at 97-98 ("[p]laintiffs would have the court expand the boundaries of informational standing to encompass every case alleging a governmental failure to implement or enforce any statutory provision simply because government action creates information."). *Id.* at 97-98. In rejecting the plaintiff's arguments, Judge Huvelle noted that the Supreme Court in *Public Citizen* "likened a denial of information under [the Federal Advisory Committee Act] to an agency's denial of documents in response to a request under the Freedom of Information Act," because "both statutes specifically provide for and are intended to promote 'disclosure and public access' to the workings of government and a policy of 'government in sunshine'" *Id.* at 98 (quoting *Pub. Citizen,* 491 U.S. at 449-51. Moreover, the advisory committee records at issue in *Public Citizen* already existed and the FOIA does not require the creation of new documents but rather requires disclosure of preexisting records subject to certain enumerated exemptions.

In contrast, EPIC is seeking to compel the Commission to create a document under the E-Government Act that currently *does not* exist. Unlike FOIA and FACA (for existing documents), the purpose of the E-Government Act of 2002 is not to promote government in sunshine. Instead, it was enacted to, among other things, "enhance the management of and promotion of electronic Government Services." Pub. L. No. 107-347, 116 Stat. 2899. While the disclosure of government information is a certainly contemplated by the E-Government Act of 2002, and in certain specific instances required, it is not the statute's main focus. Indeed, nowhere in the Act's "purpose" provision does it state that statute was enacted to generally promote disclosure of government information. *Public Citizen*, therefore, does not support plaintiff's claim that it has suffered an informational injury under the E-Government Act of 2002.

In sum, plaintiff lacks standing to bring this lawsuit either on its own behalf or on behalf of its Advisory Board members. Accordingly, the Court lacks jurisdiction to issue a temporary restraining order and/or a preliminary injunction.

B. Neither the Commission Nor the Director of White House Information Technology Are Agencies Subject to the APA and E-Government Act.

The APA and E-Government Act only apply to "agencies." *See* 5 U.S.C. § 551(1) (APA); 44 U.S.C. § 3502(1) (E-Government Act).[3] The Commission and the various Executive Office of the President ("EOP") components named as defendants in this suit are not "agencies" under these definitions. Accordingly, plaintiff has no valid claim under the APA, which it must

[3] Section 201 of the E-Government Act, Pub. L. No. 107-347, 116 Stat. 2899, adopts the definition of "agency" set out in 44 U.S.C. § 3502(1).

use to establish a cause of action, as "the E-Government Act of 2002 does not provide a private right of action," *Greenspan v. Admin. Office of the U.S. Courts*, No. 14-cv-2396, 2014 WL 6847460, at *8 (N.D. Cal. Dec. 4, 2014).

1. Entities within the Executive Office of the President are agencies only if they exercise substantial independent authority.

The Supreme Court and this Circuit have consistently recognized that while the statutory definition of "agency" may be broad, it does not encompass entities within the Executive Office of the President that do not exercise substantial independent authority. In *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), for example, the court considered the definition of "agency" under the APA which then, as now, is defined as any "authority of the Government of the United States, whether or not it is within or subject to review by another agency." *Id.* at 1073 (quoting 5 U.S.C. § 551(1)). This circuit concluded that the APA "apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." *Id.* Following this reasoning, the court held that the Freedom of Information Act ("FOIA"), which at the time incorporated the APA's definition of "agency," applied to the Office of Science and Technology Policy ("OSTP"), which is an entity within the Executive Office of the President. *Id.* at 1073-74. It reasoned that OSTP's function was not merely to "advise and assist the President," but it also had an "independent function of evaluating federal programs," and therefore was an agency with substantial independent authority that was therefore subject to the APA. *Id.* at 1075.

The Supreme Court has confirmed the principle that entities that "advise and assist the President" are not "agencies." In *Kissinger v. Reporters Committee for Freedom of the Press*,

445 U.S. 136, 156 (1980), the Supreme Court considered the scope of FOIA, whose definition of "agency" had been amended in 1974 to its current version, where "'agency' as defined in [5 U.S.C. §] 551(1) . . . includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (*including the Executive Office of the President*), or any independent regulatory agency." 5 U.S.C. § 552(f)(1) (emphasis added). The Court concluded that, despite this language, "[t]he legislative history is unambiguous . . . in explaining that the 'Executive Office' does not include the Office of the President." *Kissinger*, 445 U.S. at 156. Rather, Congress did not intend "agency" to encompass "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." *Id.* (quoting H.R. Rep. No. 93-1380, at 15 (1974) (Conf. Rep.)). That Conference Report further specified that "with respect to the meaning of the term 'Executive Office of the President' the conferees intend[ed] the result reached in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971)." *See Rushforth v. Council of Econ Advisers*, 762 F.2d 1038, 1040 (D.C. Cir. 1985) (quoting H.R. Rep. 93-1380, at 14); *see also Meyer v. Bush*, 981 F.2d 1288, 1291 n.1 (D.C. Cir. 1993) (explaining Congress had codified the D.C. Circuit's analysis of EOP entities in *Soucie* in the 1974 FOIA Amendments).

The controlling question in determining whether an entity within the Executive Office of the President is an "agency," therefore, is whether "the entity in question 'wield[s] substantial authority independently of the President.'" *Citizens for Responsibility & Ethics in Wash. ("CREW") v. Office of Admin.*, 566 F.3d 219, 222 (D.C. Cir. 2009) (quoting *Sweetland v. Walters*, 60 F.3d 852, 854 (D.C. Cir. 1995)). This principle is rooted in separation of powers

concerns. The Supreme Court has expressly held that the President's actions are not subject to the APA, as such a review would infringe upon a coordinate branch. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992); *see also Detroit Int'l Bridge Co. v. Gov't of Canada*, 189 F. Supp. 3d 85, 99-100 (D.D.C. 2016) (separation of powers concerns "bar review [of the President's actions] for abuse of discretion" in performance of statutory duties (citation omitted)). These concerns are equally present when exempting entities within the Executive Office of the President that have the sole function of advising and assisting the President, as such an exemption "may be constitutionally required to protect the President's executive powers." *See Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909-10 (D.C. Cir. 1993).

The D.C. Circuit has repeatedly looked to whether EOP entities "wielded substantial authority independently of the President."[4] *CREW*, 556 F.3d at 223 (quoting *Sweetland*, 60 F.3d at 854). Courts have looked to whether these EOP entities have independent regulatory or funding powers or are otherwise embuded with significant statutory responsibilities. For example, as previously mentioned, OSTP was determined to be an agency because it had independent authority to initiate, fund, and review research programs and scholarships. *Soucie*, 448 F.2d at 1073-75. Other courts have found the Council for Environmental Quality to be an agency because it has the power to issue guidelines and regulations to other federal agencies,

[4] The D.C. Circuit has used various tests to formulate its inquiry: "These tests have asked, variously, 'whether the entit[ies] exercise substantial independent authority,' 'whether . . . the entit[ies] sole function is to advise and assist the President,' and in an effort to harmonize these tests, how close operationally the group is to the President,' 'whether it has a self-contained structure,' and 'the nature of its delegate[ed] authority.' However the test has been stated, common to every case in which we have held that an EOP unit is [an agency] . . . has been a finding that the entity in question 'wielded substantial authority independently of the President.'" *CREW*, 566 F.3d at 222-23 (internal citations omitted).

Pac. Legal Found v. Council on Envtl. Quality, 636 F.2d 1259, 1262 (D.C. Cir. 1980), and the Office of Management and Budget to be an agency because it has a statutory duty to prepare the annual federal budget, as well as a Senate-confirmed Director and Deputy Director. *Sierra Club v. Andrus*, 581 F.2d 895, 902 (D.C. Cir. 1978) ("Congress signified the importance of OMB's power and function, over and above its role as presidential advisor, when it provided[] . . . for Senate confirmation of the Director and Deputy Director of OMB."), *rev'd on other grounds*, 442 U.S. 347 (1979).

But many other EOP entities – including those sued here – lack such independent authority. For example, President Reagan's Task Force on Regulatory Relief, which was comprised of senior White House staffers and cabinet officials who headed agencies, is not itself an agency because, while it reviewed proposed rules and regulations, it could not itself *direct* others to take action. *Meyer*, 981 F.2d at 1294 ("we see no indication that the Task Force, *qua* Task Force, directed anyone . . . to do anything."). The Council of Economic Advisors similarly lacks regulatory or funding power, and therefore is not an agency. *Rushforth*, 762 F.2d at 1042. Nor is the National Security Council an agency, because it only advises and assists the President in coordinating and implementing national security policy. *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 560-61 (D.C. Cir. 1996). The Office of Administration, which provides "operational and administrative support of the work of the President and his EOP staff," including IT support, is not an agency, *CREW*, 566 F.3d at 24-25, nor is the Executive Residence Staff, which supports the President's ceremonial duties, *see Sweetland*, 60 F.3d at 854. The White House Office is similarly not an agency, *see Sculimbrene v. Reno*, 158 F. Supp. 2d 26, 35-36 (D.D.C. 2001), and neither is the White House Counsel's Office, *National Security Archive v.*

Archivist of the United States, 909 F.2d 541, 545 (D.C. Cir. 1990), which is within the White House Office. In short, under this Circuit's authority, EOP entities that implement binding regulations (CEQ), grant funding (OSTP), or have important statutorily defined functions (OMB) constitute agencies; those that advise the President (CEA, Task Force), coordinate policy among different entities (NSC), provide administrative support for the President's activities (OA, Executive Residence), or constitute his closest advisors (White House Office) do not.

2. The "substantial independent authority" test applies to both the APA and the E-Government Act.

The "substantial independent authority" definition of agency – and its construction – applies to the APA and the E-Government Act. To begin, *Soucie* itself was a case interpreting the *APA's* definition of "agency." *See Soucie*, 448 F.2d at 1073 ("The statutory definition of 'agency' is not entirely clear, but *the APA* apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions.") (emphasis added). The D.C. Circuit has since made clear that this definition applies to the APA generally. *See Dong v. Smithsonian Inst.*, 125 F.3d 877, 881 (D.C. Cir. 1997) ("Our cases . . . requir[e] that an entity exercise substantial independent authority before it can be considered an agency for [5 U.S.C.] § 551(1) purposes."); *McKinney v. Caldera*, 141 F. Supp. 2d 25, 32 n.14 (D.D.C. 2001) ("As the D.C. Circuit explained in a later case, the 'substantial independent authority' standard derives from both the statutory language of the APA and the legislative history characterizing the type of authority required ('final and binding').") (citing *Dong*, 125 F.3d at 881). Plaintiff's attempt to characterize *Soucie* as applying only to FOIA, EPIC Mem. at 24-26, cannot be

squared with the actual holding of the case, much less its subsequent history, which makes clear that the rule it established applies to the APA writ large.

Nor do plaintiff's remaining efforts to limit *Soucie* to FOIA alone fare any better. It cites *Alexander v. FBI*, 971 F. Supp. 603, 606 (D.D.C. 1997), for the proposition that the Privacy Act and the FOIA (which share the same textual definition of "agency") need not be construed similarly because the statutes serve "very different purposes." EPIC Mem. at 26. What plaintiff fails to mention, however, is that this holding has been explicitly overturned. Thirteen years after issuing the opinion plaintiff cites, Judge Lamberth reconsidered and reversed his earlier decision, holding that "[s]ubsequent case law now makes clear that this Court's prior interpretation of the Privacy Act in [the 1997 *Alexander* decision] is no longer the correct one." *Alexander v. FBI*, 691 F. Supp. 2d 182, 189 (D.D.C. 2010), *aff'd* 456 F. App'x 1 (D.C. Cir. 2011). Rather, "[t]he Court of Appeals made clear in *Dong v. Smithsonian* that the Privacy Act's definition of 'agency' is to be interpreted coextensively with the term as used in FOIA." *Id.* at 189-90 (citing *Dong*, 125 F.3d at 878-89). In other words, the purpose of the statutes does not control how "substantial independent authority" is defined.

Finally, the E-Government Act's definition of "agency" should follow the same definition as the APA, FOIA, and the Privacy Act. As plaintiff acknowledges, the E-Government Act, which borrows the definitions established in the Paperwork Reduction Act ("PRA"), 44 U.S.C. § 3502(1), has essentially the same definition as the FOIA. EPIC Mem. at 29; *compare* 5 U.S.C. § 552(f)(1), *with* 44 U.S.C. § 3502(1). The PRA was passed in 1980, six years after the FOIA was amended to include its current definition of "agency," which, as mentioned previously, incorporated the *Soucie* "substantial independent authority" test. "[W]hen

judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006) (ellipses and citation omitted); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 384 (1992) (applying same interpretation to identical words in similar statutes). Here, the PRA, Privacy Act, and FOIA all serve similar purposes; they manage government access to and control over information, and the PRA adopts essentially the same language as the FOIA, which by the time of adoption had a settled judicial construction. Accordingly, this Court should apply the same definition of "agency" to the E-Government Act as it does to the APA. In any event, because it is undisputable that the E-Government Act lacks a private cause of action, plaintiff can proceed only through the APA. Accordingly, it is the APA's definition of agency that controls here, and the D.C. Circuit has definitively spoken to that definition in *Soucie*.

3. The Presidential Commission is not an agency.

The Commission is not an agency subject to the APA and the E-Government Act, because it lacks "substantial independent authority in the exercise of specific functions." *Soucie*, 448 F.2d at 1073. The Commission reports directly to the President and is "solely advisory." Exec. Order No. 13,799 § 3; *see also* Charter, Presidential Advisory Commission on Election Integrity ¶ 4 ("The Commission will function solely as an advisory body."). First Kobach Decl., Exh. 2, ECF No. 8-1. It is chaired by the Vice President (Exec. Order No. 13, 799 § 2a), a constitutional officer who is also not an agency. *See Wilson v. Libby*, 535 F.3d 697, 707-08 (D.C. Cir. 2008) (holding that the Office of the Vice-President was not an agency under the Privacy Act); *Dong*, 125 F.3d at 878 (Privacy Act definitions incorporates FOIA definitions) .

Its purpose is to "submit a report to the President" that identifies rules and activities that enhance and undermine the "American people's confidence in the integrity of the voting process used in Federal elections" and to identify "vulnerabilities in voting systems . . . that could lead to improp[rieties]." *Id.* § 3(a)-(c). The Commission has no regulatory, funding, or enforcement powers, nor does it have any independent administrative responsibilities. Instead, it exists solely to provide research and advice to the President. It is not, therefore, an "agency."

This conclusion accords with controlling D.C. Circuit case law. The Council of Economic Advisors, like the Commission, gathers information, develops reports, and makes recommendations to the President. *See* 15 U.S.C. § 1023(c). The Council is not an agency, as it, like the Commission, "has no regulatory power under the statute," "[i]t cannot fund projects based on [its] appraisal, . . . nor can it issue regulations." *Rushforth*, 762 F.2d at 1043. And in *Meyer*, the D.C. Circuit held that the President's Task Force on Regulatory Relief, which, like the Commission, was chaired by the Vice President, was not an agency, because while it reviewed federal regulations and made recommendations, it did not have the power to "direct[] anyone . . . to do anything." 981 F.2d at 1294. The Commission here is situated the same way. Plaintiff focuses on the fact that the Commission will "investigate[], evaluate[], and make[] recommendations." EPIC Mem. at 28.[5] But so did the Council of Economic Advisors and the

[5] Plaintiff draws this language from *Energy Research Found. v. Def. Nuclear Facilities Safety Bd.*, 917 F.2d 581 (D.C. Cir. 1990). But in that case, unlike here, the board "ha[d] at its disposal the full panoply of investigative powers commonly held by other agencies of government," had the power to "force[] public decisions about health and safety," and "ha[d] the additional authority to impose reporting requirements on the Secretary of Energy. *Id.* at 584-85. The Commission has no such powers.

Task Force on Regulatory Reform. What those entities lacked, as the Commission lacks here, was independent authority beyond their presidential advisory roles.

In any event, even apart from the functional test establishing that the Commission exists to advise and assist the President, and is therefore not an "agency" under the APA or E-Government Act, it is clear that an entity cannot be at once both an advisory committee (as plaintiff claims the Commission is) and an agency. *See Heartwood, Inc. v. U.S. Forest Serv.*, 431 F. Supp. 2d 28, 36 (D.D.C. 2006) (noting that an "advisory committee cannot have a double identity as an agency") (quoting *Wolfe v. Weinberger*, 403 F. Supp. 238, 242 (D.D.C. 1975)). Nor does the involvement of federal officials or federal agencies in an advisory committee transform that committee into an "agency." In *Meyer*, the Presidential Task Force at issue included "various cabinet members . . . [who were] unquestionably officers who wielded great authority as heads of their departments." 981 F.2d at 1297. But that did not turn the Task Force into an agency; the relevant inquiry is the function exercised, not the job title. The court of appeals concluded that "there is no indication that when *acting as the Task Force* they were to exercise substantial independent authority . . . . Put another way, the whole does not appear to equal the sum of its parts." *Id.* (emphasis added).

Similarly, the mere presence of a federal agency that provides some administrative support – but does not exercise "substantial independent authority" – does not transform an otherwise non-agency "whose sole function is to advise and assist" into an agency. *Id.* at 1297-98. Were it otherwise, every advisory committee that received support from federal employees or agencies – *i.e.*, all of them, *see* 5 U.S.C. app. 2 § 10(e) (requiring advisory committees to have support from a designated federal officer or employee) – would be an agency, a conclusion

impossible to square with this Circuit's precedent. *See, e.g.*, *Meyer*, 981 F.2d at 1296 (Presidential Task Force on Regulatory reform was not an agency); *Judicial Watch v. Dep't of Energy*, 412 F.3d 125, 127 (D.C. Cir. 2005) (Vice President Cheney's National Energy Policy Development Group was not an agency). Consistent with these decisions, this Court should similarly conclude that the Commission is not an agency, meaning that plaintiff cannot invoke the APA's cause of action, and the E-Government Act's requirements do not apply.

4. The Director of White House Information Technology is not an agency.

The Director of White House Information Technology ("DWHIT") is also not an agency. The DWHIT "on behalf of the President, shall have the primary authority to establish and coordinate the necessary policies and procedures for operating and maintaining the information resources and information systems provided to the President, Vice President, and EOP." Mem. on Establishing the Director of White House Information Technology and the Executive Committee for Presidential Information Technology § 1 (Mar. 19, 2015) [hereinafter "DWHIT Mem."], https://www.gpo.gov/fdsys/pkg/DCPD-201500185/pdf/DCPD-201500185.pdf (last visited July 16, 2017). The DWHIT is a member of the White House Office, *id.* § 2(a)(ii), and reports to the Deputy Chief of Staff for Operations, *id.* § 2(b); Herndon Decl. ¶¶ 1-2. The DWHIT is responsible for providing IT services to the President, Vice President, and their staffs. *See id.* § 2(c) ("The Director shall ensure the effective use of information resources and information systems provided to the President, Vice President, and EOP in order to improve mission performance, and shall have the appropriate authority to promulgate all necessary procedures and rules governing these resources and systems."). The DWHIT is also charged

with providing "coordination and guidance" for IT use by other entities serving the President. *See id.* §§ 2(c), 3.

Fundamentally, the DWHIT is not an agency because, as plaintiff acknowledges, the DWHIT is part of the White House Office. EPIC Mem. 21 n.18; *see also* DWHIT Mem. § 2(a)(ii); Herndon Decl. ¶ 1. Controlling authority holds that the White House Office is not an agency. *Wilson*, 535 F.3d at 708; *see also Alexander*, 691 F. Supp. 2d at 190. Even if this Court looks to the DWHIT's functional responsibilities, rather than his organizational status, the conclusion is the same. The DWHIT provides IT support for the President and his staff. As this Circuit has held in the context of the EOP's Office of Administration ("OA"), an entity that provides "operational and administrative" support for the President is not an agency. *See CREW*, 566 F.3d at 224. "As its name suggests, everything the Office of Administration does is directly related to the operational and administrative support of the work of the President and his EOP staff." *Id.* This included, at the time, "information services." *Id.* (quoting Exec. Order No. 12,028 (1977)). Such tasks were quintessential advice and assist functions. So too, here – the DWHIT, like OA, provides IT services to "the President and his EOP staff." *Id.*

Nor does it matter that the DWHIT may coordinate IT activities with other entities that may themselves be agencies. *See* DWHIT Mem. §§ 2(c), 3; EPIC Mem. at 21-22. The *CREW* court specifically rejected this argument. *See CREW*, 566 F.3d at 224 ("CREW contends that OA's support of non-EOP entities – including the Navy, the Secret Service, and the General Services Administration – undermines the government's argument. But those units only receive OA support if they work at the White House complex in support of the President and his staff. Assisting these entities in these activities is consistent with OA's mission."). It is also consistent

with the DWHIT's mission. Moreover, even to the extent that the DWHIT provides coordination to other agencies in support of the President, such coordination, as this Circuit held in the context of the National Security Council, does not transform the entity into an agency. *Armstrong*, 90 F.3d at 565.

Finally, plaintiff also brings suit against the Executive Committee for Presidential Information Technology and the U.S. Digital Service. EPIC Mem. at 6. Neither of these entities, however, has any involvement with the Commission's work, and neither will be involved with the management of the collected data. Herndon Decl. ¶ 6. Therefore an order against them could not remedy any injury supposedly faced by plaintiff.

5. The Executive Office of the President is not a discrete "agency."

Plaintiff also argues that even if the individual subcomponents of the EOP did not qualify as agencies, "the EOP would be answerable for their actions under the APA because it is a parent agency." EPIC Mem. at 23. The D.C. Circuit has specifically rejected the claim that the EOP is the proper unit of analysis for determining whether an EOP entity is an "agency." "[I]t has never been thought that the whole Executive Office of the President could be considered a discrete agency under FOIA." *United States v. Espy*, 145 F.3d 1369, 1373 (D.C. Cir. 1998); *see also Int'l Counsel Bureau v. CIA*, No. 09-2269 (JDB), 2010 WL 1410561 (D.D.C. Apr. 2, 2010). Indeed, were it otherwise, none of the D.C. Circuit's *Soucie* case law would make sense: if a party could simply sue the "EOP," there would be no need for a component-by-component analysis. And given that the APA and the E-Government Act use the same definition, the *Espy* holding applies equally here.

6. GSA is not obligated to provide the Commission data storage, nor does the fact that GSA is an agency transform an EOP component into an agency.

Finally, plaintiff argues that because GSA is an agency, if GSA had collected personal voter data, it would have been obligated to conduct a PIA under the E-Government Act. EPIC Mem. at 30. But the GSA has not collected any voter data, nor are there any plans for it to do so. Second Kobach Decl. ¶ 3, ECF No. 11-1. Plaintiff never explains how something that a federal agency did not do and has no plans to do transforms an advice and assist EOP component into an agency. Instead, plaintiff avoids that question, and argues that the Executive Order requires that GSA be responsible for collecting any data. The Executive Order imposes no such requirement. Instead, it merely states that GSA will provide the Commission administrative services "as may be necessary." Exec. Order No. 13,799 § 7(a). But nothing in that Executive Order says that *all* services must be provided through GSA, or which service must be provided through GSA. Rather, the Executive Order states that "[t]he Commission shall have staff to provide support for its functions," *id.* § 5, and that other federal entities "shall endeavor to cooperate with the Commission," *id.* § 7(b). Again, even if GSA could have collected data, it has not done so, and plaintiff provides no explanation for how an action not taken by an agency transforms a non-agency entity into an agency.

C. Neither the Supreme Court Nor the D.C. Circuit Has Recognized a Constitutional Right to Informational Privacy, But Even If There Were Such a Right, It Would Not Prohibit The Federal Government From Requesting Publicly Available Information From States.

Plaintiff's claim of a constitutional right to informational privacy fails because neither the Supreme Court nor the D.C. Circuit has held that a federal constitutional right to informational

privacy exists. Although the Supreme Court has assumed, without deciding, that the Constitution protects the individual "interest in avoiding disclosure of personal matters," *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 138 (2011) (citation omitted), the Court has not specifically held that a supposed constitutional right to informational privacy actually exists.[6] For its part, the D.C. Circuit has expressed "grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information." *Am. Fed'n of Gov't Emps. v. Dep't of Hous. & Urban Dev.*, 118 F.3d 786, 791 (D.C. Cir. 1997).

Even assuming such a right exists, plaintiff's claim would still fail because the Commission has only requested information that is "publicly available." First Kobach Decl., Exh. 3, at 1-2. Whatever the bounds of a supposed constitutional right to informational privacy, it does not extend to matters already in the public record. Indeed, courts have repeatedly held that "there is no question that an individual cannot expect to have a constitutionally protected privacy interest in matters of public record." *Doe v. City of N.Y.*, 15 F.3d 264, 268 (2d Cir. 1994) (citing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 493-96 (1975)); *Lewis v. Delarosa*, No. C-15-2689, 2015 WL 5935311, at *3 (N.D. Cal. Oct. 13, 2015) ("Plaintiff's allegations that his right to informational privacy was violated when his non-private identification information was published on the internet is not included in even the outer confines of a federal right to

---

[6] At least two justices have criticized that approach and expressly questioned the existence of a constitutional right to informational privacy. *See Nelson*, 562 U.S. at 159-60 (Scalia, J., concurring in the judgment) ("'[I]nformational privacy' seems like a good idea . . . [b]ut it is up to the People to enact those laws, to shape them, and, when they think it appropriate, to repeal them. A federal constitutional right to 'informational privacy' does not exist."); *id.* at 169 (Thomas, J., concurring in the judgment) ("I agree with Justice Scalia that the Constitution does not protect a right to informational privacy. No provision in the Constitution mentions such a right.").

informational privacy."); *Jones v. Lacey*, 108 F. Supp. 3d 573, 584-85 (E.D. Mich. 2015) (no right to informational privacy with respect to information that had been publicly released); *Pelosi v. Spota*, 607 F. Supp. 2d 366, 373 (E.D.N.Y. 2009) (same).

Plaintiff has not pled – much less established – that the Commission's explicit request only for "publicly-available voter roll data," First Kobach Decl. ¶ 4, encompasses *private* sensitive personal information not already available to the general public as a matter of public record.[7] Nor has plaintiff challenged the states' collection of that voter data or their designation of that information as publicly available. Because the Commission has only requested public information from the states, plaintiff could never show that a constitutional right to informational privacy – even if it were to exist – has been violated.[8]

---

[7] The last four digits of a social security number are not generally considered private information. For example, Federal Rule of Civil Procedure 5.2(a)(1) provides that filings on a public docket may include "the last four digits of the social-security number." Fed. R. Civ. P. 5.2(a)(1). Furthermore, 52 U.S.C. § 21083(c), which governs computerized statewide voter registration list requirements as part of the Help America Vote Act, states that the last four digits of a social security number may be used as part of the voter registration process for an election for Federal Office without running afoul of the Privacy Act.

[8] The Supreme Court's decision in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), is not to the contrary. There, the Court held that for purposes of the Freedom of Information's Act's statutory limitation on the release of information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(7)(C), federal "rap sheets" need not be disclosed. The Court concluded that "[a]lthough much rap-sheet information is a matter of public record, the availability and dissemination of the actual rap sheet to the public is limited." *Reporters Comm.*, 489 U.S. at 753. Additionally, the fact that there was a "web of federal statutory and regulatory provisions that limits the disclosure of rap-sheet information," *id.* at 764-65, combined with "the fact that most States deny the general public access to their criminal-history summaries," *id.* at 767, permitted an agency to withhold the requested information under FOIA.

The *Reporters Committee* Court was explicit, however, that "[t]he question of the statutory meaning of privacy under the FOIA is, of course, not the same as . . . the question [of] whether an individual's interest in privacy is protected by the Constitution." *Id.* at 762 n.13

II. PLAINTIFF HAS NOT DEMONSTRATED IRREPARABLE HARM

Plaintiff's motion should also be denied because plaintiff has not established that it will suffer irreparable injury absent preliminary relief. The D.C. Circuit "has set a high standard for irreparable injury." *In re Navy Chaplaincy*, 534 F.3d 756, 766 (D.C. Cir. 2008) (citation omitted). It is a "well known and indisputable principle[]" that a "unsubstantiated and speculative" harm cannot constitute "irreparable harm" sufficient to justify injunctive relief. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam).

Plaintiff cannot demonstrate irreparable injury for the same reason it lacks standing. It cannot establish that the organization or a member has suffered or will suffer a concrete or "certainly impending" injury, much less that such injury would be "beyond remediation," *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). Plaintiff speculates that the Commission will publicly disclose the information it obtains, or that it will obtain private information, but the Commission has only requested data that is *already* publicly available, much, if not all, of it pursuant to the National Voter Registration Act, 52 U.S.C. § 20507(i)(1), or through public access laws of individual states. *See* Nat'l Conference of State

---

(citing *Paul v. Davis*, 424 U.S. 693, 712-14 (1976) (no constitutional privacy right affected by publication of name of arrested but untried shoplifter)). Following this direction, courts have "repeatedly stressed that *Reporters' Committee* is inapposite on the issue of those privacy interests entitled to protection under the United States Constitution." *A.A. v. New Jersey*, 176 F. Supp. 2d 274, 305 (D.N.J. 2001) (citing *E.B. v. Verniero*, 119 F.3d 1077, 1100 n.21 (3d Cir. 1997)), *aff'd in part, remanded in part sub nom. A.A. ex rel. M.M. v. New Jersey*, 341 F.3d 206 (3d Cir. 2003); *see also Cutshall v. Sundquist*, 193 F.3d 466, 481 (6th Cir. 1999) (holding that *Reporters Committee* did not establish a constitutional right to prevent disclosure).

In any event, the instant case may be distinguished on its facts. Here, the Commission requested only publicly available information from the states, and plaintiff has not pled, much less proved, that such information is restricted or available to the public only for limited access.

Legislatures, The Canvass: States and Election Reform (2016), http://www.ncsl.org/Documents/Elections/The_Canvass_February_2016_66.pdf (discussing availability of voter information under state laws) (last visited July 16, 2017); *see also Project Vote v. Long*, 682 F.3d 331, 336 (4th Cir. 2012) (holding that 52 U.S.C. § 20507(i)(1) "unmistakably encompasses completed voter registration applications").

Indeed, plaintiff argues that most of the states limit what voter information may be publicly disclosed. *See* EPIC Mem. at 38 ("According to a preliminary survey by EPIC, states could provide the Commission with little more than name and address of registered voters without running afoul of state law."). But if this is so, then plaintiff will suffer no injury, much less an irreparable one, because private information will not be shared with the Commission.[9] Plaintiff's argument, then, is premised on the theory that the Commission, despite only requesting publicly available information, has actually requested information that is private under state law *and* that the states – in violation of their own laws – will send that information. But absent evidence to the contrary, courts "presume [that a public entity] follows its statutory commands and internal polices in fulfilling its obligations." *Garner v. Jones*, 529 U.S. 244, 256 (2000); *see also United States v. Aviles*, 623 F.2d 1192, 1198 (7th Cir. 1980) (absent evidence to the contrary, "the presumption of regularity attends official acts of public officers and the courts presume that their official duties have been discharged properly.").

[9] Or, to state the inquiry differently, if individual voters – of which plaintiff, of course, is not – did suffer an injury because their information was made public, that injury would be caused by the states whose laws put such information in the public domain, not by the Commission.

Here, the available evidence indicates that states only intend to send the Commission information that can be shared pursuant to state law. *See, e.g.*, Letter from John H. Merrill, Alabama Secretary of State, to Kris Kobach (July 5, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/responses-public-officials.pdf (stating that "Alabama Code § 17-4-38 does not allow me to simply send Alabama's voter data," and further noting that "[p]ublically available voter roll data **does not** include social security numbers, driver's license numbers, political party affiliation, felony convictions, information regarding for whom an individual voted, or any information on a voter previously removed from the active rolls"). Accordingly, there is no reason to believe that the Commission will collect any non-public information, and therefore no risk of injury by the release of private information.

Furthermore, the Commission has no intention of publicly disclosing data that are personally identifiable. First Kobach Decl. ¶ 5. Plaintiff's speculative fear of a future breach of White House information systems by unknown third parties causing the release of information already available to the public cannot establish irreparable injury. Courts have repeatedly held that speculation about the potential of future data breaches is insufficient to establish injury. *See, e.g.*, *Welborn*, 218 F.3d at 77 ("The likelihood that any Plaintiff will suffer additional harm remains entirely speculative and depends on the decisions and actions of one or more independent, and unidentified, actors(s). . . . Thus, Plaintiff's allegations that they face an increased risk of future harm [is insufficient to establish injury]."). Moreover, even without the Commission's collection of the information, the possibility of a breach will always exist (unfortunately) at the state level; moreover, as the Commission has only requested information that is otherwise publicly available, there is nothing to prevent members of the public from

accessing that information through a lawful request. Accordingly, the Commission's request for information has done nothing to increase any risk to plaintiff's members and certainly does not create "irreparable injury" caused by the Commission and justifying emergency injunctive relief.

Plaintiff's claim of irreparable injury based on a violation of a supposed constitutional right to informational privacy also fails. As discussed above, there is no constitutional right to informational privacy for information that is already public. Because plaintiff fails to establish irreparable harm, there is no basis for the Court to invoke its emergency powers.

III. THE BALANCE OF HARMS AND THE PUBLIC INTEREST WEIGH AGAINST INJUNCTIVE RELIEF

A party seeking a temporary restraining order or preliminary injunction must also demonstrate "that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Here, the public interest cuts against an injunction. The President charged the Commission with the important task of "study[ing] the registration and voting processes used in Federal elections." Exec. Order No. 13,799, § 3. The Commission must prepare a report that identifies laws that either enhance or undermine the American people's confidence in the integrity of the voting processes used in Federal elections. The Commission must also investigate "those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting." *Id.*

As a necessary first step toward achieving these objectives, the Commission requested that information from the states be provided on a voluntary basis. Plaintiff seeks to enjoin these

first steps, which will prevent the Commission from even beginning its work. The public interest lies in favor of allowing the Commission to move forward to satisfy its directive.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiff's amended motion for a temporary restraining order and/or preliminary injunction.

Dated: July 17, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director

/s/ Joseph E. Borson
CAROL FEDERIGHI
Senior Trial Counsel
JOSEPH E. BORSON
KRISTINA A. WOLFE
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Phone: (202) 514-1944
Email: joseph.borson@usdoj.gov

Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al.*,

Defendants.

Civil Action No. 1:17-cv-1320 (CKK)

DECLARATION OF CHARLES CHRISTOPHER HERNDON

I, Charles C. Herndon, declare as follows:

1. I am the Director of White House Information Technology ("WHIT") and Deputy Assistant to the President. I am the senior officer responsible for the information resources and information systems provided to the President, Vice President and Executive Office of the President. I report to White House Deputy Chief of Staff for Operations and Assistant to the President, and through him to the Chief of Staff and the President. I am part of what is known as the White House Office. This declaration is based on my personal knowledge and upon information provided to me in my official capacity.

2. A number of components make up the Executive Office of the President, including the White House Office (also referred to as the Office of the President). Components of the White House Office include the President's immediate staff, the White House Counsel's Office and the Staff Secretary's Office. The White House Office serves the President in the performance of the many detailed activities incident to his immediate office, and the various

Assistants and Deputy Assistants to the President aid the President in such matters as he may direct. My role is to ensure the effective use of information resources and systems to the President. I am also a member of the Executive Committee for Presidential Information Technology, as established in the March 19, 2015, Presidential Memorandum creating my position. See, https://obamawhitehouse.archives.gov/the-press-office/2015/03/19/presidential-memorandum-establishing-director-white-house-information-te. The Executive Committee is chaired by the Deputy Chief of Staff Operations.

3. I was asked by the Office of the Vice President to assist in creating a mechanism by which data could be securely loaded and stored within the White House computer systems. To do that I repurposed an existing system that regularly accepts personally identifiable information through a secure, encrypted computer application within the White House Information Technology system.

4. States that wish to provide information to the Presidential Advisory Commission on Election Integrity ("Commission") can email the Commission to request an access link. Once a staff member verifies the identity of the requester and the email address, a one-time unique uniform resource locator ("URL") link will be emailed to that state representative. Data can be uploaded via that one-time link to a server within the domain electionintegrity.whitehouse.gov. Authorized members of the Commission will be given access to the file directory identified to house the uploaded information. Once the files have been uploaded, there is no further transfer of the data from that location. The technology is similar to a shared folder in Microsoft SharePoint.

5. The Commission will receive dedicated laptops, which can access the data provided by states through the White House network over an SSL (Secure Sockets Layer)

connection. The SSL connection ensures that all data passed between the web server and browsers remain private and secure. The laptops use Personal Identity Verification (PIV) and the data at rest is encrypted.

6. The Executive Committee for Information Technology will have no role in this data collection process. The U.S. Digital Service (which is within the Office of Management and Budget) will also have no role, nor will any federal agency. The only people who will assist are a limited number of my technical staff from the White House Office of Administration. They will have access to the data, but all access will be logged and recorded by our network monitoring tools.

7. I can confirm, based on information provided to me from the Department of Defense, that the data the state of Arkansas uploaded to the Army's SAFE site has been deleted without ever having been accessed by the Commission.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

***

Executed this 16th day of July 2017.

Digitally signed by CHARLES HERNDON
DN: c=US, o=U.S. Government, ou=Executive Office of the President, cn=CHARLES HERNDON, 0.9.2342.19200300.100.1.1=11001003426249
Date: 2017.07.17 06:36:16 -04'00'

Charles C. Herndon

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al*,

Defendants.

Civil Action No. 1:17-cv-1320 (CKK)

[PROPOSED] ORDER

It is hereby ORDERED that Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction, ECF No. 35, is DENIED.

DATE:_____

_____

HON. COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

ORAL ARGUMENT NOT YET SCHEDULED

No. 17-5171

IN THE UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER
Plaintiff-Appellant,

v.

PRESIDENTIAL ADVISORY COMMISSION
ON ELECTION INTEGRITY, *et al.*,
Defendants-Appellees.

On Appeal from an Order of the
U.S. District Court for the District of Columbia
Case No. 17-cv-1320(CKK)

BRIEF FOR APPELLANT

MARC ROTENBERG
ALAN BUTLER
CAITRIONA FITZGERALD
JERAMIE SCOTT
JOHN DAVISSON
Electronic Privacy Information Center
1718 Connecticut Ave. NW, Suite 200
Washington, DC 20009
(202) 483-1140
Counsel for Plaintiff-Appellant

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel for Appellant hereby provides the following information:

I. PARTIES AND *AMICI* APPEARING BELOW

The parties and *amici* who appeared before the U.S. District Court were:

1. Electronic Privacy Information Center, *Plaintiff-Appellant*.
2. Presidential Advisory Commission on Election Integrity; Michael Pence, in his official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity; Kris Kobach, in his official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity; Charles C. Herndon, in his official capacity as Director of White House Information Technology; Executive Office of the President of the United States; Office of the Vice President of the United States; General Services Administration; United States Department of Defense; United States Digital Service; Executive Committee for Presidential Information Technology, *Defendants-Appellees*.

II. PARTIES AND *AMICI* APPEARING IN THIS COURT

1. Electronic Privacy Information Center, *Plaintiff-Appellant*.
2. Presidential Advisory Commission on Election Integrity; Michael Pence, in his official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity; Kris Kobach, in his official capacity as

Vice Chair of the Presidential Advisory Commission on Election Integrity; Charles C. Herndon, in his official capacity as Director of White House Information Technology; Executive Office of the President of the United States; Office of the Vice President of the United States; General Services Administration; United States Department of Defense; United States Digital Service; Executive Committee for Presidential Information Technology, *Defendants-Appellees*.

III. RULINGS UNDER REVIEW

The ruling under review in this case is United States District Court Judge Colleen Kollar-Kotelly's July 24, 2017, Order and Memorandum Opinion denying Appellant's Motion for a Temporary Restraining Order and Preliminary Injunction. *EPIC v. Presidential Advisory Comm'n on Election Integrity et al.*, No. 17-1320 (D.D.C. July 24, 2017).

IV. RELATED CASES

Apart from the proceedings in the court below, this case has not previously been filed with this Court or any other court. Counsel is aware of the following cases qualifying as "related" under Circuit Rule 28(a)(1)(C):

- *ACLU v. Trump*, No. 17-1351 (D.D.C. filed July 10, 2017)
- *Lawyers' Committee for Civil Rights Under Law v. Presidential Advisory Comm'n on Election Integrity*, No. 17-1354 (D.D.C. filed July 10, 2017)

- *Common Cause v. Presidential Advisory Comm'n on Election Integrity*, No. 17-1398 (D.D.C. filed July 14, 2017)

- *Lawyers' Committee for Civil Rights Under Law v. Presidential Advisory Comm'n on Election Integrity*, No. 17-5167 (D.C. Cir. filed July 21, 2017)

V. CORPORATE DISCLOSURE STATEMENT

EPIC is a 501(c)(3) non-profit corporation. EPIC has no parent, subsidiary, or affiliate. EPIC has never issued shares or debt securities to the public.

Respectfully Submitted,

/s/ Marc Rotenberg
MARC ROTENBERG
EPIC President and Executive Director

Dated: August 18, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

---

* Authorities principally relied upon are designated by an asterisk (*).

Statutes

Other Authorities

GLOSSARY

APA	Administrative Procedure Act
Commission	Presidential Advisory Commission on Election Integrity
D-WHIT	Director of White House Information Technology
E-Government Act	E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899
EOP	Executive Office of the President
EPIC	Electronic Privacy Information Center
FOIA	Freedom of Information Act
GSA	General Services Administration
JA ___	Citation to the Joint Appendix
NSC	National Security Council
OMB	Office of Management and Budget
OVP	Office of the Vice President
PIA	Privacy Impact Assessment

INTRODUCTION

The failure to safeguard personal data gathered by government agencies is a national crisis. The breach of the Office of Personnel Management in 2015 exposed millions of government employees, their families, and their friends to identity theft and fraud. Federal agencies are required to undertake extensive Privacy Impact Assessments prior to data collection to mitigate privacy risks. In some instances, a Privacy Impact Assessment may yield the conclusion that that the program proposed is simply too risky to pursue. In other instances, a PIA will lead to refinements and improvements. Yet despite the well documented dangers to the privacy of Americans, a government authority established by the President undertook to collect state voter records from state election officials across the country without first completing the required Privacy Impact Assessment. This is an exercise of government authority, subject to the Administrative Procedure Act, that is contrary to law and must be enjoined.

The court below erred when it misapplied the *Soucie* test to shield a government authority from judicial review under the Administrative Procedure Act. 5 U.S.C. §§ 701 *et seq*. And the court erred when it failed to require the General Services Administration to manage the data collection undertaken by the Commission, as mandated by the Executive Order and the Commission Charter. We

respectfully ask this Court to issue a preliminary injunction halting the Commission's collection of state voter data.

EPIC's case comes before this Court on expedited review following denial of a motion for a preliminary injunction to prohibit the Commission from collecting personal voter data before completing and publishing a Privacy Impact Assessment as required under the E-Government Act. The lower court denied EPIC's motion on the grounds that neither the Commission nor any of the other named Defendants are subject to judicial review under the APA. The lower court concluded that the "substantial independent authority" test adopted in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), and the subsequent line of cases concerning the interpretation of "agency" in 5 U.S.C. §§ 552(f) and 551(1) should apply to the APA Judicial Review Chapter, 5 U.S.C. §§ 701 *et seq*. This conclusion runs contrary to established precedent and must be reversed because the definition of "agency" in 5 U.S.C. § 701(b)(1) is not construed so narrowly. This Court has subjected government authorities to judicial review under the APA even where those entities do not meet the *Soucie* "substantial independent authority" test.

Given that the Commission and its codefendants are engaged in a "collection of information" triggering the Privacy Impact Assessment requirements of the E-Government Act, EPIC has established a substantial likelihood of success on the merits of its statutory claims. And because EPIC has established that the Defendants

have violated their statutory obligation to conduct and publish a Privacy Impact Assessment prior to initiating collection of the voter data, EPIC is likely to suffer an irreparable harm absent an order requiring the agencies to comply with the E-Government Act. Both the public interest and the balance of the equities also clearly favor an injunction requiring the Defendants to comply with their statutory obligations and inform the public about the nature and scope of their proposed data collection.

JURISDICTIONAL STATEMENT

Appellant filed a motion for a temporary restraining order and preliminary injunction in the United States District Court for the District of Columbia pursuant to Fed. R. Civ. P. 65. The lower court had jurisdiction under 28 U.S.C. § 1331, 5 U.S.C. § 702, and 5 U.S.C. § 704. This Court has jurisdiction to review the lower court's decision denying a preliminary injunction. 28 U.S.C. § 1292(a)(1).

PERTINENT STATUTORY PROVISIONS

The full text of the pertinent federal statutes is reproduced in the addendum to this brief.

STATEMENT OF ISSUES FOR REVIEW

This case involves the following issues:

1. Whether the District Court erred in holding that this Court's interpretation of "agency" in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), controls the meaning of "agency" under Chapter 7 of the

Administrative Procedure Act, 5 U.S.C. § 701, even though this Court has previously found that section 701 applies to agencies that do not have "substantial independent authority" under *Soucie*.

2. Whether the District Court erred in holding that APA review is unavailable for the collection of state voter data by Defendant Presidential Advisory Commission on Election Integrity.

3. Whether the plain text of the Executive Order and the Commission Charter require the Defendant General Services Administration to provide all the services, funds, facilities, staff, and equipment necessary to carry out the Commission's collection of state voter data.

STATEMENT OF THE CASE

I. The President created the Commission as an authority within the Executive Office of the President.

The Presidential Advisory Commission on Election Integrity was "established within the Executive Office of the President and is chaired by the Vice President." Declaration of Kris W. Kobach ¶ 3, JA 50; *see also* Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017) ("Order"), JA 54–56. The Commission is "composed of not more than 15 additional members" appointed by the President, and the Vice President may select a Vice Chair of the Commission from among the members. Order § 2, JA 55. Vice President Pence named Kansas Secretary of State Kris Kobach to serve as Vice Chair of the Commission. Kobach Decl. ¶ 1, JA 50.

The Commission is authorized to "study the registration and voting processes used in Federal elections" and is responsible for preparing and submitting a report on specified election issues. Order § 3, JA 55.

The Commission reports to the President; will receive support services, including "administrative services," "facilities," and "equipment," from the General Services Administration ("GSA"); will have an annual operating budget of $250,000; and will have approximately three full-time equivalent employees plus a Designated Federal Officer ("DFO"). Charter, Presidential Advisory Commission on Election Integrity ¶¶ 5–8, JA 58–59. The Vice President "may also select an executive director and any additional staff he determines necessary to support the Commission." *Id.* ¶ 11, JA 59. The Chair of the Commission is authorized "in consultation with the DFO" to "create subcommittees as necessary to support the Commission's work." *Id.*, JA 59. The records of the Commission "shall be maintained" both pursuant to both the Presidential Records Act of 1978, 44 U.S.C. §§ 2201–2207, and the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. 2 §§ 1–16. Charter ¶ 13, JA 59. The Administrator of General Services is responsible for performing any FACA functions on behalf of the Commission "except for those in section 6 of the Act." Order § 7(c), JA 56.

II. The Commission's efforts to obtain millions of state voter records are an exercise of substantial authority that subjects the Commission to judicial review.

The Commission was chartered to "study" election integrity. Yet the Vice Chair Kobach initiated a controversial collection of state voter data from state election officials shortly after the Commission was created. On June 28, 2017, Mr. Kobach undertook an unprecedented effort to obtain detailed personal information on voters nationwide. He sent letters to election officials in all fifty states and the District of Columbia demanding:

> the full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information.

See, e.g., Letter from Kris Kobach, Vice Chair, Presidential Advisory Comm'n on Election Integrity, to Elaine Marshall, Secretary of State, North Carolina (June 28, 2017), JA 221 ("Commission Letter").[2] Kobach warned that "any documents that are submitted to the full Commission w[ould] also be made available to the public." *Id.*, JA 222. Indeed, under the FACA all "records, reports, transcripts, minutes,

---

[2] *See* Remarks at a Meeting of the Presidential Advisory Commission on Election Integrity, 2017 Daily Comp. Pres. Doc. 476 (July 19, 2017) ("[M]ore than 30 States have already agreed to share the information with the Commission. And the other States, that information will be forthcoming.").

appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be made available for public inspection." 5 U.S.C. app. 2 § 10(b).

The Commission demanded a response from the states by July 14, 2017—approximately ten business days after the date of the initial request—and instructed state election officials to submit state voter data "electronically to ElectionIntegrityStaff@ovp.eop.gov or by utilizing the Safe Access File Exchange" system. Commission Letter, JA 222.

Neither the email address nor the file exchange system proposed by the Commission provided a secure mechanism for transferring sensitive personal information. In fact, an attempt to access the File Exchange system linked in the letter led to a warning screen with a notification that the site is insecure. *See* Screenshot: Google Chrome Security Warning for Safe Access File Exchange ("SAFE") Site (July 3, 2017 12:02 AM), JA 223. Email is also not a secure way to transfer personal information and leaves the Commission open to receiving fake data from a sender purporting to be a state election official. *See, e.g.*, *White House Officials Tricked by Email Prankster*, CNN (Aug. 1, 2017).[3] The Commission had originally planned to "download the files from SAFE onto White House computers"

---

[3] http://www.cnn.com/2017/07/31/politics/white-house-officials-tricked-by-email-prankster/.

after the states had uploaded the personal voter data to the Defense Department File Exchange system. Second Kobach Decl. ¶ 5, JA 65. However, the File Exchange system was not only insecure: it was not even certified to be used to "collect, maintain, use, and/or disseminate" personally identifiable information from "members of the general public." U.S. Dep't of Def., Privacy Impact Assessment for the Safe Access File Exchange Privacy Impact Assessment, JA 209.

After EPIC submitted a copy of the File Exchange PIA to the lower court demonstrating the failure to safeguard the personal data sought and filed an amended complaint adding the Department of Defense as a defendant, the Commission abandoned its initial plan. First, the Commission contacted state election officials and instructed that the "states not submit any data until [the lower court] rule[d] on th[e] TRO motion." Third Kobach Decl. ¶ 2, JA 130. Second, the Commission announced that it "no longer intend[ed] to use the DOD SAFE system to receive information from the states." *Id.* ¶ 1, JA 129. Third, the Commission stated that it would "not download the data that Arkansas already transmitted" to the Defense Department website and that the data would be "deleted from the site." *Id.* ¶ 3, JA 130.

But the Commission pressed on. Following the lower court's denial of EPIC's motion for a preliminary injunction, the Commission sent another letter to state election officials "to renew the June 28 request" and to urge officials to turn

over state voter records to the Commission. *See, e.g.*, Letter from Kris Kobach, Vice Chair, Presidential Advisory Comm'n on Election Integrity, to Alex Padilla, Cal. Sec'y of State (July 26, 2017), ADD 38–39. The July 26 letter raised new concerns about possible misuses of the personal data sought by the Commission, as well as uncertainty about the future handling of the data: "Once the Commission's analysis is complete, the Commission will dispose of the data as permitted by federal law." *Id.* at 2. The Commission's July 26 letter did not indicate whether in fact the data will be deleted, who will have access to the data collected while in possession of the Commission, why the data is being collected, for what purposes the data will be used, how the data will be secured, whether a Privacy Act notice will be pursued, whether individuals will have the opportunity to "opt out" of the data collection, whether the data will be retained, or how any conclusions drawn from the Commission's "analysis" may be contested.

III. The Commission ordered the Director of White House Information Technology to create a system of records and to collect sensitive voter data, even though the General Services Administration is designated under the Executive Order and the Commission Charter to provide "facilities," "equipment," and "administrative services" to the Commission.

Under the text of the Executive Order and the Charter of the Commission, the General Services Administration ("GSA") is designated as the "Agency Responsible for Providing Support" to the Commission. Order § 7(a), JA 56; Charter ¶ 6, JA 58; By-Laws and Operating Procedures, Presidential Advisory

Commission on Election Integrity at sec. VII, ADD 37. The GSA was specifically tasked with providing the Commission, *inter alia*, "administrative services," "facilities," "equipment" and "other support services as may be necessary to carry out its mission . . ." Order § 7(a), JA 56. The only derogation from the assignment of these responsibilities to the GSA is a single provision stating that "the President's designee will be responsible for fulfilling the requirements of subsection 6(b) of the FACA." Charter ¶ 6, JA 58. As the "Agency Responsible for Providing Support" to the Commission, the GSA is required to manage the collection and storage of any data that the Commission might obtain. The GSA routinely conducts and publishes Privacy Impact Assessments when it collects, maintains, and uses personal information on individuals. *See* Gen. Serv. Admin, Privacy Impact Assessments (PIA), JA 231.

Nevertheless, the Commission contends that "the White House is responsible for collecting and storing data for the Commission." Second Kobach Decl. ¶ 5, JA 65. The Vice Chair stated, in response to the lower court's inquiry, that the "Commission's Designated Federal Officer (an employee within the Office of the Vice President) will work with White House Information Technology staff to facilitate collection and storage" of personal voter data. *Id.*, JA 65. Following the Commission's abrupt decision to discontinue use of the Department of Defense File Exchange system, the Vice Chair declared that "the Director of White House

Information Technology [was] repurposing an existing system" within the White House, which he indicated would be "fully functional by 6:00 p.m. Eastern [that same day]." Third Kobach Decl. ¶ 1, JA 129.

The Director of White House Information Technology ("D-WHIT") was established in 2015 and has "the primary authority to establish and coordinate the necessary policies and procedures for operating and maintaining the information resources and information systems provided to the President, Vice President, and EOP." Memorandum on Establishing the Director of White House Information Technology and the Executive Committee for Presidential Information Technology § 1, 2015 Daily Comp. Pres. Doc. 185 (Mar. 19, 2015), JA 215. This authority includes:

> providing "policy coordination and guidance for, and periodically review[ing], all activities relating to the information resources and information systems provided to the President, Vice President, and EOP by the Community, including expenditures for, and procurement of, information resources and information systems by the Community. Such activities shall be subject to the Director's coordination, guidance, and review in order to ensure consistency with the Director's strategy and to strengthen the quality of the Community's decisions through integrated analysis, planning, budgeting, and evaluating process.

Id. § 2(c), JA 216. The D-WHIT may "advise and confer with appropriate executive departments and agencies, individuals, and other entities as necessary to perform the Director's duties under this memorandum." *Id.* § 2(d), JA 216. The D-WHIT also has the authority to oversee and "provide the necessary advice, coordination,

and guidance to" the Executive Committee for Presidential Information Technology, which "consists of the following officials or their designees: the Assistant to the President for Management and Administration; the Executive Secretary of the National Security Council; the Director of the Office of Administration; the Director of the United States Secret Service; and the Director of the White House Military Office." *Id.* § 3, JA 216.

Following the Commission's announcement that the D-WHIT was creating a new system of records to collect personal voter data, EPIC filed a Second Amended Complaint naming the Director and the Executive Committee for Presidential Information Technology as codefendants. Second Am. Compl. ¶¶ 10, 13, JA 134.

IV. The Defendants failed to conduct and publish a Privacy Impact Assessment prior to the collection of personal data in a government system of records.

Section 208 of the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, requires that any federal agency "initiating a new collection of information that (I) will be collected, maintained, or disseminated using information technology; and (II) includes any information in an identifiable form permitting the physical or online contacting of a specific individual" complete a Privacy Impact Assessment *before* initiating such collection. E-Government Act § 208 (codified at 44 U.S.C. § 3501 note).

A Privacy Impact Assessment includes:

> (I) what information is to be collected;
> (II) why the information is being collected;
> (III) the intended use of the agency of the information;
> (IV) with whom the information will be shared;
> (V) what notice or opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared;
> (VI) how the information will be secured; and
> (VII) whether a system of records is being created under section 552a of title 5, United States Code, (commonly referred to as the ''Privacy Act'').

Id. § 208(b)(2)(B)(ii).

Given the sensitivity of voter data and the fact that adversaries have targeted U.S. voter registration records, a Privacy Impact Assessment may well have led to the conclusion that the Commission simply should not collect state voter record information as proposed. A PIA would also have triggered obligations under the federal Privacy Act that would have established procedural safeguards against adverse determinations arising from computer matching programs undertaken by a federal agency. Moreover, under the Federal Advisory Committee Act, the Commission would have been required to make available the PIA to the public. 5 U.S.C. app. 2 § 10(b).

None of the defendant agencies have conducted a Privacy Impact Assessment for the Commission's proposed collection of state voter data. None of the defendant

agencies have ensured review of a PIA by any Chief Information Officer or equivalent official. The Commission has not made any PIA available to the public.

V. States election officials, election experts, and more than 150 members of the Congress have opposed the Commission's attempt to collect voter data.

The vast majority of states have refused to turn over the voter data the Commission is seeking. *Forty-four states and DC have refused to give certain voter information to Trump commission,* CNN (July 5, 2017).[4] California Secretary of State Alex Padilla stated on June 29, 2017, that "[t]he President's commission has requested the personal data and the voting history of every American voter–including Californians. As Secretary of State, it is my duty to ensure the integrity of our elections and to protect the voting rights and privacy of our state's voters." Press Release, Secretary of State Alex Padilla Responds to Presidential Election Commission Request for Personal Data of California Voters (June 29, 2017).[5] Nebraska Secretary of State John Gale stated on July 6, 2017: "I also have a concern about data privacy. I have no clear assurances about the security that this national database will receive. In light of the domestic and foreign attacks in 2016 on state voter registration databases, the commission will need to assure my office

---

[4] http://www.cnn.com/2017/07/03/politics/kris-kobach-letter-voter-fraud-commission-information/index.html.

[5] http://www.sos.ca.gov/administration/news-releases-and-advisories/2017-news-releases-and-advisories/secretary-state-alex-padilla-responds-presidential-election-commission-request-personal-data-california-voters/.

of a high level of security." Press Release, Sec. Gale Issues Statement on Request for NE Voter Record Information (July 6, 2017).[6] And on July 3, 2017, Arizona Secretary of State Michele Reagan said:

> I share the concerns of many Arizona citizens that the Commission's request implicates serious privacy concerns. [...] Since there is nothing in Executive Order 13799 (nor federal law) that gives the Commission authority to unilaterally acquire and disseminate such sensitive information, the Arizona Secretary of State's Office is not in a position to fulfill your request.
>
> [...]
>
> Centralizing sensitive voter registration information from every U.S. state is a potential target for nefarious actors who may be intent on further undermining our electoral process. [...] Without any explanation how Arizona's voter information would be safeguarded or what security protocols the Commission has put in place, I cannot in good conscience release Arizonans' sensitive voter data for this hastily organized experiment.

Letter from Michele Reagan, Arizona Sec. of State, to Kris Kobach (July 3, 2017).

The Commission's plan to aggregate all state voter roll data is contrary to efforts underway in the states to establish safeguards for state voter records. Indeed, the Georgia state Director of Elections said in response to the Commission's June 28, 2017, letter that the Commission's instructions were not consistent with state "security protocol." Letter from Chris Harvey, Director of Elections, Georgia

---

[6] http://www.sos.ne.gov/admin/press_releases/pdf-2017/nr-20170707.pdf.

Secretary of State's Office, to Kris W. Kobach, Vice Chair, Presidential Advisory Commission on Election Integrity (July 3, 2017), JA 228.

The Commission has ignored calls from state election officials, experts in election system security, twenty-four members of the United States Senate, and over seventy members of the United States House of Representatives to withdraw its request for voter data. *See* Press Release, Senator Amy Klobuchar, *Klobuchar, Reed, Senators Demand that Presidential Advisory Commission Rescind Request for State Election Officials' Voter Roll Data* (July 6, 2017) ("This request is unprecedented in scope and raises serious privacy concerns. The requested data is highly sensitive and after recent data breaches and cyber-attacks targeting our election infrastructure, we are deeply concerned about how the Commission will maintain the security and privacy of the data.");[7] *see also* Letter from Representative Anna G. Eshoo, et al. to Kris Kobach (July 18, 2017) ("The federal government has an obligation to protect the personally identifiable information of the American people. We believe your June 28 request to the States would do the opposite by ignoring the critical need for robust security protocols when

[7] https://www.klobuchar.senate.gov/public/index.cfm/2017/7/klobuchar-reed-senators-demand-that-presidential-advisory-commission-rescind-request-for-state-election-officials-voter-roll-data.

transmitting and storing sensitive personally identifiable information and by centralizing it in one place.").[8]

SUMMARY OF THE ARGUMENT

The lower court denied EPIC's motion for a preliminary injunction in this case because it held, incorrectly, that the "substantial independent authority" test established in *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971), determines the meaning of "agency" under the APA's Judicial Review Chapter, 5 U.S.C. §§ 701 *et seq*. This Court should reverse the decision below and enter a preliminary injunction because the court below erred when it applied *Soucie* and because EPIC has established that all four factors favor injunctive relief in this case. First, EPIC has demonstrated a substantial likelihood of success on the merits because the Commission and its codefendants have initiated a collection of personal information without first complying with Section 208 of the E-Government Act. Second, the Defendants are agencies within the definition of 5 U.S.C. § 701(b)(1) because they are each an "authority of the Government of the United States." This Court has previously found that agencies are subject to judicial review under the APA even where they do not meet the *Soucie* "substantial independent authority" test. If it were otherwise, the President "could set up 'fronts' to carry out all sorts of

---

[8] http://eshoo.house.gov/wp-content/uploads/2017/07/7.18.17-Letter-to-Election-Integrity-Commission-re-voter-data-request.pdf.

functions, while retaining practically total control over their operations . . . merely to circumvent" federal law. *Pub. Citizen Health Research Grp. v. Dep't of Health, Ed. & Welfare*, 668 F.2d 537, 547 (D.C. Cir. 1981) (Mikva, J., dissenting). But even under the *Soucie* test, EPIC would have a substantial likelihood of success because of the actions taken by the Commission and because the General Services Administration has a mandatory duty to take part in the Commission's data collection. And third, EPIC has shown that it will suffer irreparable harm as a result of the Commission's failure to conduct and release a Privacy Impact Assessment prior to collecting voter data and that both the equitable and public interest factors favor injunctive relief.

ARGUMENT

I. This Court should enter a preliminary injunction because all four factors favor EPIC.

A party seeking a preliminary injunction must show "that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest." *League of Women Voters v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016); *see also Winter v. NRDC*, 555 U.S. 7, 20–22 (2008). On appeal from a lower court's denial of a preliminary injunction, this Court can "independently grant an injunction after considering the proper factors." *League of Women Voters*, 838 F.3d at 7 (citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 305

(D.C. Cir. 2006)). The independent entry of a preliminary injunction by this Court is especially appropriate where, as here, "time is of the essence." *League of Women Voters*, 838 F.3d at 7.

This case turns on the application of the first factor—likelihood of success on the merits. In particular, the case turns on a question of law: whether the Commission's collection of Americans' voter data involves "agency action" reviewable under the Administrative Procedure Act, 5 U.S.C. §§ 702, 704, and "collection of information" by an "agency" under Section 208 of the E-Government Act (codified at 44 U.S.C. § 3501 note). The lower court found that EPIC had both informational and organizational standing to bring the APA and E-Government Act claims. Mem. Op. 16–26, JA 29–39. The lower court also found that "the non-disclosure of information to which a plaintiff is entitled, under certain circumstances itself constitutes an irreparable harm; specifically, where the information is highly relevant to an ongoing and highly public matter." Mem. Op. 34, JA 47. However, the lower court denied EPIC's motion for a preliminary injunction because it found that no "'agency' is implicated in this case and that there was no 'agency action' subject to this Court's review." Mem. Op. 26, JA 39.

The lower court erred in denying EPIC's motion for a preliminary injunction for three reasons. First, the court incorrectly concluded that the Commission is not an "agency" under the APA. Second, the court incorrectly concluded that the GSA

is not implicated in the Commission's collection of voter data. And third, the court incorrectly concluded that the irreparable harm, equitable, and public interest factors do not favor EPIC because the Commission is not an agency.

Because the Commission's collection of voter data involves both "agency action" under the APA and the "collection of information" by an "agency" under the E-Government Act, EPIC is likely to succeed on the merits of its statutory claims. The Defendants have made no attempt to comply with the Privacy Impact Assessment requirements of Section 208 of the E-Government Act, which are clearly applicable to the collection of sensitive, personal information from state voter databases. The Defendants' actions therefore violate the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A).

As the Department of Justice has explained, "Privacy Impact Assessments ("PIAs") are required by Section 208 of the E-Government Act for all Federal government agencies that develop or procure new information technology involving the collection, maintenance, or dissemination of information in identifiable form or that make substantial changes to existing information technology that manages information in identifiable form." Office of Privacy & Civil Liberties, U.S. Dep't of Justice, *E-Government Act of 2002* (June 18, 2014).[9] A Privacy Impact Assessment is "an analysis of how information is handled: (i) to ensure handling conforms to

[9] https://www.justice.gov/opcl/e-government-act-2002.

applicable legal, regulatory, and policy requirements regarding privacy, (ii) to determine the risks and effects of collecting, maintaining and disseminating information in identifiable form in an electronic information system, and (iii) to examine and evaluate protections and alternative processes for handling information to mitigate potential privacy risks." Joshua B. Bolten, Director, Office of Mgmt. & Budget, Executive Office of the President, M-03-22, Memorandum for Heads of Executive Departments and Agencies, Attachment A (Sept. 26, 2003) [hereinafter Bolten Memo], JA 149.

The E-Government Act requires that an agency "shall take actions described under subparagraph (B)" of Section 208 "before . . . initiating a new collection of information that—(I) will be collected, maintained, or disseminated using information technology; and (II) includes any information in an identifiable form permitting the physical or online contacting of a specific individual, if identical questions have been posed to, or identical reporting requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the Federal Government." E-Government Act § 208(b)(1)(A)(ii). The actions described in subparagraph (B), which the Commission must take *before* collecting this information, include "(i) conduct[ing] a privacy assessment; (ii) ensur[ing] the review of the privacy impact assessment by the Chief Information Officer, or equivalent official, as determined by the head of the agency; and (iii) if practicable,

after completion of the review under clause (ii), mak[ing] the privacy impact assessment publicly available through the website of the agency, publication in the Federal Register, or other means." E-Government Act § 208(b)(1)(B).

The Commission has already "initiated a new collection" of personal information, but it has not complied with any of these requirements. The APA prohibits federal agencies from taking any action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). The Commission's actions are "not in accordance with law." The APA authorizes this Court to "compel agency action unlawfully withheld." 5 U.S.C. § 706(1). Such a claim may proceed "where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wildlife Alliance*, 542 U.S. 55, 64 (2004) (emphasis in original). An agency's failure to comply with the PIA requirements of the E-Government Act is reviewable under both provisions of APA § 706. *Fanin v. Dep't of Veteran Affairs*, 572 F.3d 868, 875 (11th Cir. 2009).

The E-Government Act defines "information technology" as "any equipment or interconnected system . . . used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the executive agency, if the equipment is used by the executive agency directly . . . ." 40 U.S.C. §

11101(6); *see* E-Government Act § 201 (applying definitions from 44 U.S.C. §§ 3502, 3601); 44 U.S.C. § 3502(9) (applying the definition of 40 U.S.C. § 11101(6)). Courts have found that a "minor change" to "a system or collection" that does not "create new privacy risks," such as the purchasing of a new external hard drive, would not require a PIA. *Perkins v. Dep't of Veteran Affairs*, No. 07-310, at *19 (N.D. Ala. Apr. 21, 2010) (quoting Bolten Memo § II.B.3.f). However, an agency is obligated to conduct a PIA before initiating a new collection of data that will be "collected, maintained, or disseminated using information technology" whenever that data "includes any information in identifiable form permitting the physical or online contacting of a specific individual" and so long as the questions have been posed to 10 or more persons. E-Government Act § 208(b)(1)(A)(ii). The term "identifiable form" means "any representation of information that permits the identity of an individual to whom the information applies to be reasonably inferred by either direct or indirect means." E-Government Act § 208(d).

There is no question that the PIA requirement applies in this case. The Commission's decision to initiate collection of comprehensive voter data by requesting personal information from Secretaries of State of all fifty states and the District of Columbia, including sensitive, personal information about hundreds of millions of voters, triggers the obligations of the E-Government Act § 208(b)(1)(A)(ii). The letter sent by Commission Vice Chair Kobach requests that

the Secretary of State provide "voter roll data" including "the full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas information." Commission Letter 1–2, JA 221–222. The states are instructed to submit their "responses *electronically* to ElectionIntegrityStaff@ovp.eop.gov or by utilizing the Safe Access File Exchange ("SAFE")," a government website used to transfer files. *Id.* (emphasis added).[10] This sensitive voter roll data is precisely the type of "personal information" in "identifiable form" that the PIA provision was intended to protect, and the transfer of large data files via email or otherwise clearly involves the use of information technology.

As the court explained in *Perkins*, PIAs are necessary to address "(1) what information is collected and why, (2) the agency's intended use of the information, (3) with whom the information would be shared, (4) what opportunities the [individuals] would have to decline to provide information or to decline to share the

[10] The government file exchange website is not actually "safe." In fact, any user who follows the link provided in the Commission Letter will see a warning that the site is insecure. *See* JA 223.

information, (5) how the information would be secured, and (6) whether a system of records is being created." *Perkins v. Dep't of Veteran Affairs*, No. 07-310, at *19 (N.D. Ala. Apr. 21, 2010); *see* E-Government Act § 208(b)(2)(B); Bolten Memo § II.C.1.a. These types of inquiries are "certainly appropriate and required" when an agency "initially created" a new database system and "began collecting data." *Perkins*, No. 07-310, at *19–20.

II. The lower court erred in concluding that the Commission's collection of voter data is not reviewable under the APA.

The lower court erred in finding that the Commission, the Executive Office of the President ("EOP"), and the D-WHIT are exempt from APA judicial review because they do not qualify as "agencies" under 5 U.S.C. § 701(b)(1). To the contrary: all three entities fit squarely within the APA's broad definition of an "agency"—a definition which has not been narrowed by the FOIA-specific "substantial independent authority" test of *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971). But even under the *Soucie* test, the Commission and other subcomponents of the EOP are agencies because they exercise substantial independent authority. Moreover, the Executive Order assigns to the GSA a mandatory duty to provide "facilities," "equipment," and "other support services" as "may be necessary to carry out [the Commission's] mission." Order § 7(a), JA 56. It is thus the GSA—indisputably an agency subject to APA judicial review—that is obligated to host any voter data the Commission may collect.

A. The Defendants are "agencies" as defined in the APA's judicial review chapter, which does not incorporate the "substantial independent authority" test established in *Soucie*.

The Executive Office of the President and its constituent offices are "agenc[ies]" within the meaning of the Administrative Procedure Act's judicial review provisions, 5 U.S.C. §§ 701 *et seq*. The lower court, in reaching the opposite conclusion, erroneously assumed that cases interpreting the term "agency" under 5 U.S.C. §§ 552(f) and 551(1) control the meaning of that term under 5 U.S.C. § 701(b)(1). Not so: the precedents of this Court and the legislative history of the APA plainly demonstrate that "agency" carries distinct meanings in these two separate chapters.

In the APA Judicial Review chapter, 5 U.S.C. §§ 701 *et seq*., "each authority of the Government of the United States" is an agency "whether or not it is within or subject to review by another agency[.]" 5 U.S.C. § 701(b)(1). The broad scope of the term "agency" in §706(b)(1) is confirmed by the legislative history of the statute, "which indicates that Congress wanted to avoid a formalistic definition of 'agency' that might exclude any authority within the executive branch that should appropriately be subject to the requirements of the APA." *Armstrong v. Bush* (*Armstrong I*), 924 F.2d 282, 291 (D.C. Cir. 1991). The APA empowers a court to review the actions of a government authority unless there is a "showing of clear and convincing evidence of a legislative intent to restrict access to judicial review."

Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (quotation marks omitted), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). And the APA's legislative history reveals no intent to shield the actions of the EOP and its subcomponents from APA judicial review—quite the opposite.

As Congress explained when it first enacted the APA, the term "agency" is "defined substantially" as it was in the Federal Reports Act of 1942, Pub. L. No. 77-831, § 7(a), 56 Stat. 1078, 1079–80 (1942) (current version at 44 U.S.C. § 3502), and the Federal Register Act, Pub. L. No. 74-220, § 4, 49 Stat. 500, 501 (1935) (current version at 44 U.S.C. § 1501). Administrative Procedure Act, Legislative History, S. Doc. No. 248, at 12–13 (1946); *see also Washington Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1449 (D.C. Cir. 1994). The Federal Reports Act defined "agency" in exceptionally broad terms: "any executive department, *commission*, independent establishment, corporation owned or controlled by the United States, board, bureau, division, service, *office*, authority, or administration in the executive branch of the Government . . . ." § 7(a), 56 Stat. at 1079–80 (emphases added). The Federal Register Act's definition of "agency" even encompassed "the President of the United States," as well as "any executive department, independent board, establishment, bureau, agency, institution, *commission*, or *separate office* of the administrative branch of the Government of the United States[.]" § 4, 49 Stat. at 501 (emphases added).

Congress subsequently split the APA into separate subchapters with separate definitions for the "Administrative Procedure" provisions in 5 U.S.C. § 551 *et seq.* and the "Judicial Review" provisions in 5 U.S.C. § 701 *et seq*. Government Organization and Employees, Pub. L. 89-554, 80 Stat. 387 (1966). Congress further modified the definition of "agency" under the Freedom of Information Act, Pub. L. 93-502, 88 Stat. 1561 (1974), incorporating the *Soucie* test into that modified definition. *See Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (noting that even though the FOIA's definition explicitly includes the Executive Office of the President, the Conference Report "indicates that 'the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President' are not included within the term 'agency' under the FOIA"). But the definition of "agency" in the APA's judicial review sections has retained its broad scope, and this Circuit has never applied the *Soucie* test to those sections.

In *Soucie*, this Court held that a subcomponent of the EOP, the Office of Science and Technology ("OST"), was an agency subject to the FOIA because it possessed "substantial independent authority in the exercise of specific functions."[11]

---

[11] In the early years of the FOIA, the statute was sometimes characterized as a subpart of the APA. *E.g., Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 678 n.16 (D.C. Cir. 1976) (citing Statement by the President Upon Signing Bill

Soucie, 448 F.2d at 1073, 1075. Wary of potential conflicts between the FOIA's presumption of openness and the President's power to assert executive privilege, the Court added a narrow caveat in dicta: "If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency." *Id.* at 1071 n.9, 1075 (emphasis added).

Yet the *Soucie* test, which was adopted in a case concerning the APA records provision and subsequently incorporated into the FOIA definition, has no bearing on the availability of judicial review under APA §§ 702, 704, and 706. As this Court's precedents illustrate, a subcomponent of the Executive Office of the President may be sued under the APA even if it does not have "substantial independent authority" under the *Soucie* test. *Compare Armstrong I*, 924 F.2d at 297 ("[W]e affirm the district court's decision that the APA authorizes judicial review of plaintiffs' claim that the [National Security Council] ("NSC") recordkeeping guidelines and directives are arbitrary and capricious."), *with Armstrong v. Exec. Office of the President* (*Armstrong III*), 90 F.3d 553, 557–66 (D.C. Cir. 1996) (holding that the NSC is not an "agency" under the FOIA because it fails the *Soucie* test). This Court's holdings in *Armstrong I* and *Armstrong III*

Revising Public Information Provisions of the Administrative Procedure Act, Weekly Comp. Pres. Doc. 895 (July 4, 1966)).

would be logically impossible if—as the lower court assumed—the *Soucie* test limited APA judicial review of EOP subcomponents. It does not.

Following in *Armstrong I*'s footsteps, this Court has repeatedly declined to apply the *Soucie* test in APA suits against the EOP or to otherwise exempt EOP offices from judicial review. *See, e.g.*, *Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549, 550 (D.C. Cir. 1993) (subjecting the U.S. Trade Representative ("USTR") to APA judicial review without invoking *Soucie* test); *Citizens for Responsibility & Ethics in Washington v. Exec. Office of President* (*CREW*), 587 F. Supp. 2d 48, 57–58, 63 (D.D.C. 2008) (subjecting the EOP to APA judicial review without invoking *Soucie* test); *Pub. Citizen Health Research Grp. v. Comm'r, Food & Drug Admin.*, 724 F. Supp. 1013, 1023 (D.D.C. 1989) (applying APA judicial review to the Office of Management and Budget ("OMB") without invoking *Soucie* test).

Dong v. Smithsonian Institution, a subsequent case in which this Court invoked the *Soucie* test, is not to the contrary. First, *Dong* concerned the definition of "agency" for the purposes of the Privacy Act, which happens to borrow its meaning from 5 U.S.C. § 552(f) and 5 U.S.C. § 551(1). *Dong v. Smithsonian Inst.*, 125 F.3d 877, 879 (D.C. Cir. 1997). But this case—like *Armstrong I*—concerns the term "agency" as it is defined in 5 U.S.C. § 706(1), a separate provision found in the Judicial Review chapter of the APA. Second, the *Dong* Court invoked the *Soucie* test to determine whether the Smithsonian Institution exercised any

governmental authority *at all*, or whether it was instead analogous to a "private research university" or "private museum." *Id.* at 882. As the Court explained:

> In the most literal sense, of course, the Smithsonian's broad, Congressionally-granted latitude over spending its federally allocated funds and over its own personnel and collections indicates that it possesses "authority in law to make decisions." But every private organization possesses the power to order its own affairs and carry out transactions with others within the limits set by law. To the extent the Smithsonian exercises anything approaching public authority, that authority appears to be entirely ancillary to its cultural and educational mission. Authority must be governmental in nature to count for § 551(1) purposes.

Id. That is not the issue confronting the Court today. The EOP, the Commission, and the D-WHIT unquestionably exercise *governmental* authority—indeed, they carry out functions at the very "[epi]center of gravity in the exercise of administrative power." *Id.* at 881–82 (quoting *Lombardo*, 397 F. Supp. at 796). *Dong* is thus irrelevant to the rule set by *Armstrong I* and—like *Soucie*—inapposite to this case.

Moreover, application of the *Soucie* test to the APA judicial review provisions is inconsistent with the underlying purpose of the *Soucie* test. The *Soucie* Court was concerned with the EOP's nondisclosure of records under FOIA and the "[s]erious constitutional questions [that] would be presented by a claim of executive privilege as a defense to a suit under the Freedom of Information Act." *Soucie*, 448 F.2d at 1071. *Soucie* was thus about the public availability of EOP records and the President's qualified privilege to withhold them. By contrast, this case seeks APA

review of substantive EOP conduct that "affect[s] the rights and obligations of individuals," such as the mass collection of personal voter data. The two interests are distinct. *See Dong*, 125 F.3d at 881.

Congress sharpened this distinction when it passed the 1974 FOIA amendments, formally separating the FOIA's definition of "agency" from that of the APA. *Compare* 5 U.S.C. § 701(b)(1), *and* 5 U.S.C. § 551(1), *with* 5 U.S.C. § 552(f)(1). Though Congress sharpened the textual definition of "agency" under the FOIA in several ways—e.g., making it explicit that the "Executive Office of the President" is subject to the statute—Congress also adopted the *Soucie* court's narrowing construction:

> With respect to the meaning of the term "Executive Office of the President" the conferees intend the result reached in *Soucie v. David* . . . . The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.

H.R. Rep. No. 93-1380, at 232 (1974) (Conf. Rep.); *see also Kissinger*, 445 U.S. at 156 (interpreting the House report to mean that the words "Executive Office" in the FOIA did "not include the Office of the President"). The FOIA amendments were entirely unrelated to the APA's judicial review provision definitions, and the definition of "agency" in § 701 remains as it was before *Soucie* was decided.

Thus, applying the APA's expansive definition of "agency": the EOP is emphatically an "authority of the government" for "getting the business of

government done." 5 U.S.C. § 701(b)(1); *Meyer v. Bush*, 981 F.2d 1288, 1304 (D.C. Cir. 1993); *see Executive Office of the President*, The White House (2017)[12] ("The EOP has responsibility for tasks ranging from communicating the President's message to the American people to promoting our trade interests abroad."). The EOP consists of at least a dozen major subcomponents that oversee and carry out vital government functions, including the NSC (charged with "integrating all aspects of national security policy as it affects the United States"); the Office of Management and Budget (charged with "supervis[ing] and control[ling] the administration of the budget"); and the Office of the United States Trade Representative (an office headed by a "Cabinet-level official" who "acts as the chief representative of the United States in all General Agreement on Tariffs and Trade activities"). *The Executive Office of the President*, The United States Government Manual.[13] The EOP is unquestionably a "center of gravity in the exercise of administrative power," and thus an "agency" under the APA. *See Dong v*, 125 F.3d at 881–82; *cf. Pub. Citizen v. Carlin*, 2 F. Supp. 2d 1, 9 (D.D.C. 1997), *rev'd on other grounds*, 184 F.3d 900 (D.C. Cir. 1999) ("The EOP's status as an agency is also evidenced by the authority it possesses to impose requirements on all of the EOP components in certain matters.").

---

[12] https://www.whitehouse.gov/administration/eop.
[13] https://www.usgovernmentmanual.gov/Agency.aspx?EntityId=p0fnvDxExmY=&ParentEId=+klubNxgV0o=&EType=jY3M4CTKVHY=.

The EOP subcomponents named in EPIC's suit are likewise "agenc[ies]" under the APA. The Commission, which includes both the Vice President and a principal member of the Election Assistance Commission, is authorized to "study[] registration and voting processes" and to identify "which laws, rules, policies, activities, strategies, and practices that enhance or undermine Americans' confidence in the integrity of the federal election process." First Kobach Declaration ¶¶ 1, 3, JA 50–51; Second Kobach Declaration, JA 63. In practice, the Commission has gone well beyond its mandate to engage in substantive conduct that "affect[s] the rights" of individuals. *Dong*, 125 F.3d at 881 (quoting James O. Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U. Pa. L. Rev. 1, 9 (1970)).

In June 2017, the Presidential Advisory Commission on Election Integrity undertook to assemble a database of personal voter information that directly implicates the privacy rights of least 157 million registered voters across fifty states and the District of Columbia. Kobach Decl. ¶ 4, JA 51; U.S. Census Bureau, Voting and Registration in the Election of November 2016 at tbl. 4a (May 2017).[14] This sweeping depository of personal data would put the Internal Revenue Service—with its yearly haul of just 149 million individual returns—to shame. Internal

---

[14] https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html.

Revenue Service, *SOI Tax Stats - Tax Stats at a Glance* (2016).[15] "[A]ny authority within the executive branch" engaged in such far-reaching conduct is "appropriately subject to the requirements of the APA." *Armstrong*, 924 F.2d at 291; *cf. Meyer*, 981 F.2d at 1298 (Wald, J., dissenting) ("Congress contemplated that 'agency' would encompass entities, like the Task Force, which are created solely by executive order.").

Defendant Charles C. Herndon, Director of White House Information Technology ("D-WHIT"), also oversees an "authority of the Government" that is a "center of gravity in the exercise of administrative power."[16] Def. Resp. to Pl. Mot. to Amend, ECF No. 32. The D-WHIT and his staff enjoy "primary authority to establish and coordinate the necessary policies and procedures for operating and maintaining the information resources and information systems provided to the President, Vice President, and EOP." Memorandum on Establishing the Director of White House Information Technology and the Executive Committee for Presidential Information Technology § 1, 2015 Daily Comp. Pres. Doc. 185 (Mar. 19, 2015), JA 215. This authority includes:

---

[15] https://www.irs.gov/uac/soi-tax-stats-tax-stats-at-a-glance.

[16] The White House Office ("WHO"), of which the Director is a part, also qualifies as an agency. The WHO is charged with the authority to "facilitate[] and maintain[] communication with the Congress, the heads of executive agencies, the press and other information media, and the general public." *The Executive Office of the President*, *supra*.

> [providing] policy coordination and guidance for, and periodically review[ing], all activities relating to the information resources and information systems provided to the President, Vice President, and EOP by the Community, including expenditures for, and procurement of, information resources and information systems by the Community. Such activities shall be subject to the Director's coordination, guidance, and review in order to ensure consistency with the Director's strategy and to strengthen the quality of the Community's decisions through integrated analysis, planning, budgeting, and evaluating process.

Id. § 2(c), JA 216. The D-WHIT may also "advise and confer with appropriate executive departments and agencies, individuals, and other entities as necessary to perform the Director's duties . . . ." *Id.* § 2(d), JA 216. These grants of authority and responsibility are quintessential features of an APA agency.

Indeed, the actions of the EOP and its component offices have long been subject to APA review. *Pub. Citizen*, 5 F.3d at 551 ("Public Citizen must rest its claim for judicial review [of USTR's] action] on the Administrative Procedure Act."); *Armstrong*, 924 F.2d at 291 ("[W]e find that there is APA review of the NSC's recordkeeping guidelines and instructions . . . ."); *Armstrong v. Exec. Office of the President*, 810 F. Supp. 335, 338 (D.D.C. 1993) (citing *Armstrong*, 924 F.2d at 291–293) ("The Court of Appeals . . . approved of this Court's holding that the APA provides for limited review of the adequacy of the NSC's and EOP's recordkeeping guidelines and instructions pursuant to the FRA."); *CREW*, 587 F. Supp. 2d at 57–58, 63 (holding that the EOP was properly named as a defendant in an APA and Federal Records Act suit); *Pub. Citizen Health Research Grp.*, 724 F.

Supp. at 1023 (reviewing OMB inaction under the APA). Indeed, the only part of the EOP that courts have categorically excluded from APA review is the President himself—an official who is not named in this suit. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

Notably, even if the Defendant subcomponents of EOP did not qualify as agencies themselves, the EOP would be answerable for their actions under the APA because it is a parent agency. *N. Slope Borough v. Andrus*, 642 F.2d 589, 605 (D.C. Cir. 1980) (ascribing actions by National Oceanic and Atmospheric Administration to parent agency Secretary of the Interior in an APA case); *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 308 (D.C. Cir. 1987) (ascribing actions by Bureau of Land Management to parent agency Department of the Interior in an APA case); *Beverly Health & Rehab. Servs., Inc. v. Thompson*, 223 F. Supp. 2d 73, 75 (D.D.C. 2002); (ascribing actions by Health Care Financing Administration to parent agency Department of Health and Human Services in an APA case); *Indian River Cty. v. Rogoff*, 201 F. Supp. 3d 1, 19 (D.D.C. 2016) (ascribing actions by Federal Railroad Administration to parent agency Department of Transportation in an APA case).

And even if the Commission were solely an advisory committee—which, to be clear, it is not—the EOP would remain a parent agency for the purposes of both the APA and the FACA. *See* TRO Hr'g Tr. 29:14–17, JA 94 (statement of Elizabeth J. Shapiro that Commission is located in "the Office of the Vice President, since the

vice president is chair of the Committee"); *Executive Office of the President*, *supra* (identifying the Office of the Vice President as a subcomponent of the EOP). The EOP would thus be subject to APA review for the Commission's unlawful nondisclosure of records under FACA. *Ctr. for Biological Diversity v. Tidwell*, No. CV 15-2176, 2017 WL 943902, at *9 (D.D.C. Mar. 9, 2017) ("[T]he Court finds that Plaintiff has pleaded a viable claim under the APA for a violation of section 10(b), as the Complaint plausibly alleges that the [committee] was a FACA advisory committee, and that the [parent agency] failed to disclose the materials required by section 10(b).").

If Congress intended for the APA and FOIA definitions of "agency" to be coextensive, it has had ample opportunity to amend the APA since the 1974 FOIA amendments were enacted. It has not done so. There is no basis in statute, legislative history, or case law to apply the *Soucie* test to the APA's definition of "agency," and there are no grounds to insulate the actions of the EOP, the Commission, or the D-WHIT from judicial review. The Supreme Court has previously rejected interpretations that have "no basis in the text, context, or purpose," of the statute. *Milner v. Dep't of Navy*, 562 U.S. 562, 580 (2011) (overturning the "High 2" interpretation of FOIA Exemption 2 adopted in *Crooker v. ATF*, 670 F.2d 1051 (D.C. Cir. 1981)). This Court should as well.

B. The Defendant EOP and its subcomponents are also agencies under the *Soucie* test.

The EOP, the Commission, and the D-WHIT do far more than just "advise and assist the President." *Soucie*, 448 F.2d at 1075. Thus even if the *Soucie* test controls the meaning of "agency" in the APA's judicial review provisions, these entities would still fit within the statutory definition. Under the *Soucie* test, "the APA inquiry into agency status is . . . focused on the functions of the entity, and flexible enough to encompass the 'myriad organizational arrangements for getting the business of government done. . . ." *Meyer*, 981 F.2d at 1304 (quoting *Washington Research Proj., Inc. v. HEW,* 504 F.2d 238, 246 (D.C. Cir. 1974)). "The important consideration is whether [an entity] has any authority in law to make decisions," *Washington Research Project, Inc. v. HEW*, 504 F.2d at 248, and whether the entity is a "center of gravity in the exercise of administrative power." *Dong*, 125 F.3d at 881–82 (quoting *Lombardo v. Handler*, 397 F. Supp. 792, 796 (D.D.C. 1975)).

The EOP, as noted, carries out a wide array of functions that extend well beyond the immediate needs of the President. *See supra* Part II.A. The EOP consists of numerous subcomponents that oversee and carry out vital government functions, many of which—including the NSC, the OMB, and the USTR—have been deemed agencies under the APA in their own right. *See id.* Moreover, the EOP is *expressly named* as an agency by the FOIA definition from which the *Soucie* test arises. 5

U.S.C. § 552(f). It cannot be seriously contended that the EOP eludes the APA's definition of "agency."

The same is true of the Director's office. As noted, the Director and his staff enjoy "*primary authority* to establish and coordinate the necessary policies and procedures for operating and maintaining the information resources and information systems provided to the President, Vice President, *and EOP*." Memorandum on Establishing the Director of White House Information Technology and the Executive Committee for Presidential Information Technology § 1, 2015 Daily Comp. Pres. Doc. 185 (Mar. 19, 2015) (emphases added), JA 215. An entity that has primary authority to set policy and procedures for an *agency* is doing far more than just assisting the President. The Director's authority even extends beyond the EOP. The Director is required to "provide policy coordination and guidance for, and periodically review, all activities relating to the information resources and information systems provided to" both the EOP and the Presidential Information Technology Community ("the Community"), including "expenditures for, and procurement of, information resources and information systems by the Community." *Id.* § 2(c). The Community, in turn, consists of multiple high-level officials: "the Assistant to the President for Management and Administration; the Executive Secretary of the National Security Council; the Director of the Office of Administration; the Director of the United States Secret Service; and the Director of

the White House Military Office." *Id.* Notably, the Director of the Secret Service is a Department of Homeland Security official. *Overview*, United States Secret Service.[17] Given the broad, interagency reach of the Director's oversight authority, the "sole function" exception is likewise inapplicable to his office.

Finally, the Commission's functions also extend well beyond "advis[ing] and assist[ing]" the President. Here, as in *Energy Research Foundation v. Defense Nuclear Facilities Safety Board*, the Commission satisfies the definition of "agency" because it (1) investigates, (2) evaluates, and (3) makes recommendations. 917 F.2d 581, 585 (D.C. Cir. 1990) (citing *Soucie*, 448 F.2d at 1075) ("The Board of course performs precisely these functions. It investigates, evaluates and recommends[.]"); *see* Kobach Decl. ¶¶ 1, 3 (Commission is charged with "studying registration and voting processes"), JA 50–51; Kobach Decl. ¶ 1, JA 50 (Commission's report is to identify "which laws, rules, policies, activities, strategies, and practices that enhance or undermine Americans' confidence in the integrity of the federal election process"). Of course, the Commission does a great deal more than that. It has announced plans to collect, store, and publish the personal data of every registered voter in the country, thereby implicating every voter's individual privacy rights. Kobach Decl. ¶ 4, JA 51. The Commission cannot credibly characterize this behavior as incidental to its advisory role: it is acting with

[17] https://www.secretservice.gov/about/overview/ (last visited June 13, 2017).

the force and effect of an agency. "The record evidence regarding [the Commission]'s actual functions" proves it to be so. *Citizens for Responsibility & Ethics in Washington (CREW) v. Office of Admin.*, 559 F. Supp. 2d 9, 26 (D.D.C. 2008), *aff'd*, 566 F.3d 219.

Thus the *Soucie* test, even if applicable to the APA, poses no bar to judicial review of Defendants' actions.

C. The Defendant GSA, which is an agency, has a mandatory, nondiscretionary duty to participate in the Commission's collection activities.

None of the above analysis would be necessary if the General Services Administration ("GSA") had provided the equipment and facilities for the Commission's proposed data collection as required under both the Executive Order and the Commission's Charter. The court has jurisdiction under 5 U.S.C. § 706(1) to compel GSA to conduct and publish a PIA because the agency has a "mandatory, nondiscretionary duty" to take part in the Commission's proposed collection, which triggers the requirements of Section 208 of the E-Government Act. *See Hamandi v. Chertoff*, 550 F. Supp. 2d 46 (D.D.C. May 6, 2008) (compelling adjudication where USCIS had a "mandatory, nondiscretionary duty" to act). The Charter states that the GSA is the "Agency Responsible for Providing Support" to the Commission. Charter ¶ 6, JA 58. This is consistent with the Executive Order, which assigns to the GSA—and no other entity—responsibility for providing "facilities," "equipment,"

and "other support services" as "may be necessary to carry out [the Commission's] mission." Order § 7(a), JA 56. As the "Agency Responsible for Providing Support" to the Commission, it is the GSA, not the White House, that should be facilitating collection and storage of any data that the Commission obtains.

The APA authorizes this Court to "compel agency action unlawfully withheld." 5 U.S.C. § 706(1). Such a claim may proceed "where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wildlife Alliance*, 542 U.S. 55, 64 (2004) (emphasis in original). The GSA is obligated to comply with the Executive Order. *See Legal Aid Soc. of Alameda County v. Brennan*, 608 F.2d 1319 (9th Cir. 1979) (agency's noncompliance with an executive order is subject to judicial review under the APA). Under the Executive Order, the GSA is required to facilitate the collection of data for the Commission. As the GSA is undeniably an agency, it must conduct a PIA before initiating the collection. *AT&T Info. Sys., Inc. v. GSA*, 810 F.2d 1233 (D.C. Cir. 1987) (applying both the APA and the FOIA to the GSA); E-Government Act § 208. An agency's failure to comply with the PIA requirements of the E-Government Act is reviewable under both provisions of APA § 706. *Fanin v. Dep't of Veteran Affairs*, 572 F.3d 868, 875 (11th Cir. 2009).

III. The lower court erred in concluding that the irreparable harm, equitable and public interest factors do not favor EPIC.

The lower court's conclusion that the remaining preliminary injunction factors—irreparable harm, balance of the equities, and public interest—did not favor EPIC was based on the same incorrect conclusion as the likelihood of success on the merits analysis. Because the Commission's collection of personal voter data clearly involves "agency action" reviewable under the APA and the "collection of information" by an "agency" under Section 208 of the E-Government Act, the other injunction factors favor EPIC. First, EPIC will suffer irreparable harm as a result of the Commission's refusal to conduct and disclose a Privacy Impact Assessment prior to the collection of personal voter data. Second, the equities do not favor the Commission's unlawful refusal to comply with the E-Government Act. And third, there is a strong public interest both in the Commission's compliance with the PIA requirement and in the disclosure of information about how the Commission intends to collect and handle sensitive personal information in the state voter records.

The lower court recognized that "the non-disclosure of information to which a plaintiff is entitled, under certain circumstances itself constitutes an irreparable harm; specifically where the information is highly relevant to an ongoing and highly public matter." Mem. Op. 34, JA 47. The likelihood of irreparable harm based on an agency's refusal to produce relevant records in a timely fashion has been repeatedly recognized by courts in this Circuit. *See, e.g.*, *EPIC v. DOJ*, 416 F.

Supp. 2d 30, 41 (D.D.C. 2006); *Washington Post v. DHS*, 459 F. Supp. 2d 61, 75 (D.D.C. 2006). This Circuit has also found that even with the possibility of future disclosure, the present harm from non-disclosure can be "irreparable." *See Byrd v. EPA*, 174 F.3d 239, 244 (D.C. Cir. 1999). In cases such as this, "stale information is of little value." *Payne Enters, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988).

The lower court only concluded that EPIC would not suffer an irreparable injury because the court found that the Commission was not an agency—and thus, that EPIC was "not presently entitled to the information that it [sought]." Mem. Op. 33–34, JA 46–47. But this conclusion was in error as explained in Part II, *supra*. Under the lower court's logic, the second injunction factor favors EPIC because the Commission is in fact obligated to disclose a Privacy Impact Assessment prior to the collection of personal voter data.

The lower court also erred when it held that the "equitable and public interest factors are in equipoise." Mem. Op. 35, JA 48. The only "factor" that the court identified as "balancing" in favor of the Commission was "the interest of advisory committees to engage in their work." Mem. Op. 35, JA 48. But even the lower court recognized that "the disclosure of a Privacy Impact Assessment may very well be in the equitable and public interest." Mem. Op. 35, JA 48.

The Commission's interest in engaging in "work" cannot justify unlawful agency action or the refusal to provide EPIC and the public with information to which they are entitled. Where a plaintiff has a substantial likelihood of success, that is a "strong indicator that a preliminary injunction would serve the public interest. There is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters*, 838 F.3d at 12. Indeed, there is a "substantial public interest 'in having government agencies abide by the federal laws that govern their existence and operations.'" *Id.* (quoting *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)).

The entire purpose of the E-Government Act is to protect the public interest by requiring agencies to be transparent and accountable in their handling of digital records and personal information. E-Government Act § 2(b)(9) (stating that one of the purposes of the Act is "[t]o make the Federal Government more transparent and accountable."). That is precisely what EPIC seeks to do in this case. The Court should accordingly grant EPIC's motion for preliminary injunctive relief.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the lower court and grant Appellant's motion for a preliminary injunction.

Respectfully Submitted,

/s/ Marc Rotenberg

MARC ROTENBERG
ALAN BUTLER
CAITRIONA FITZGERALD
JERAMIE SCOTT
JOHN DAVISSON
Electronic Privacy Information Center
1718 Connecticut Ave. NW, Suite 200
Washington, DC 20009
(202) 483-1140
Counsel for Plaintiff-Appellant

Dated: August 18, 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e), because it contains 10,881 words, excluding parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Marc Rotenberg
MARC ROTENBERG

ADDENDUM

ADDENDUM TABLE OF CONTENTS

Page

Statutes:

Other Materials Included for the Convenience of the Court:

5 U.S.C. § 551 – Definitions

For the purpose of this subchapter-

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include-

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title-

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

5 U.S.C. § 552 – Public information; agency rules, opinions, orders, records, and proceedings

* * *

(f) For purposes of this section, the term-

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes-

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

5 U.S.C. § 701 – Application; definitions

* * *

(b) For the purpose of this chapter-

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include-

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

5 U.S.C. § 702 – Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief

if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 704 – Actions Reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 706 – Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

40 U.S.C. § 11101 – Definitions

In this subtitle, the following definitions apply:

* * *

(6) Information technology.-The term "information technology"-

(A) with respect to an executive agency means any equipment or interconnected system or subsystem of equipment, used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the executive agency, if the equipment is used by the executive agency directly or is used by a contractor under a contract with the executive agency that requires the use-

(i) of that equipment; or

(ii) of that equipment to a significant extent in the performance of a service or the furnishing of a product;

(B) includes computers, ancillary equipment (including imaging peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including support services), and related resources; but

(C) does not include any equipment acquired by a federal contractor incidental to a federal contract.

44 U.S.C. § 3502 – Definitions

As used in this subchapter-

* * *

(9) the term "information technology" has the meaning given that term in section 11101 of title 40 but does not include national security systems as defined in section 11103 of title 40;

ADMINISTRATIVE PROCEDURE ACT

[PUBLIC LAW 404—79TH CONGRESS]

[CHAPTER 324—2D SESSION]

[S. 7]

AN ACT To improve the administration of justice by prescribing fair administrative procedure

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE

SECTION 1. This Act may be cited as the "Administrative Procedure Act".

DEFINITIONS

SEC. 2. As used in this Act—

(a) AGENCY.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.

(b) PERSON AND PARTY.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(c) RULE AND RULE MAKING.—"Rule" means the whole or any part of any agency statement of general or particular applicability

Public Law 107–347
107th Congress

An Act

To enhance the management and promotion of electronic Government services and processes by establishing a Federal Chief Information Officer within the Office of Management and Budget, and by establishing a broad framework of measures that require using Internet-based information technology to enhance citizen access to Government information and services, and for other purposes.

Dec. 17, 2002
[H.R. 2458]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

E-Government Act of 2002.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

44 USC 101 note.

(a) SHORT TITLE.—This Act may be cited as the "E-Government Act of 2002".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

44 USC 3601 note.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds the following:

(1) The use of computers and the Internet is rapidly transforming societal interactions and the relationships among citizens, private businesses, and the Government.

(2) The Federal Government has had uneven success in applying advances in information technology to enhance governmental functions and services, achieve more efficient performance, increase access to Government information, and increase citizen participation in Government.

(3) Most Internet-based services of the Federal Government are developed and presented separately, according to the jurisdictional boundaries of an individual department or agency, rather than being integrated cooperatively according to function or topic.

(4) Internet-based Government services involving interagency cooperation are especially difficult to develop and promote, in part because of a lack of sufficient funding mechanisms to support such interagency cooperation.

(5) Electronic Government has its impact through improved Government performance and outcomes within and across agencies.

(6) Electronic Government is a critical element in the management of Government, to be implemented as part of a management framework that also addresses finance, procurement, human capital, and other challenges to improve the performance of Government.

(7) To take full advantage of the improved Government performance that can be achieved through the use of Internet-based technology requires strong leadership, better organization, improved interagency collaboration, and more focused oversight of agency compliance with statutes related to information resource management.

(b) PURPOSES.—The purposes of this Act are the following:

(1) To provide effective leadership of Federal Government efforts to develop and promote electronic Government services and processes by establishing an Administrator of a new Office of Electronic Government within the Office of Management and Budget.

(2) To promote use of the Internet and other information technologies to provide increased opportunities for citizen participation in Government.

(3) To promote interagency collaboration in providing electronic Government services, where this collaboration would improve the service to citizens by integrating related functions, and in the use of internal electronic Government processes, where this collaboration would improve the efficiency and effectiveness of the processes.

(4) To improve the ability of the Government to achieve agency missions and program performance goals.

(5) To promote the use of the Internet and emerging technologies within and across Government agencies to provide citizen-centric Government information and services.

(6) To reduce costs and burdens for businesses and other Government entities.

(7) To promote better informed decisionmaking by policy makers.

(8) To promote access to high quality Government information and services across multiple channels.

(9) To make the Federal Government more transparent and accountable.

(10) To transform agency operations by utilizing, where appropriate, best practices from public and private sector organizations.

(11) To provide enhanced access to Government information and services in a manner consistent with laws regarding protection of personal privacy, national security, records retention, access for persons with disabilities, and other relevant laws.

TITLE I—OFFICE OF MANAGEMENT AND BUDGET ELECTRONIC GOVERNMENT SERVICES

SEC. 101. MANAGEMENT AND PROMOTION OF ELECTRONIC GOVERNMENT SERVICES.

(a) IN GENERAL.—Title 44, United States Code, is amended by inserting after chapter 35 the following:

"CHAPTER 36—MANAGEMENT AND PROMOTION OF ELECTRONIC GOVERNMENT SERVICES

"§ 3601. Definitions

"In this chapter, the definitions under section 3502 shall apply, and the term—

"(1) 'Administrator' means the Administrator of the Office of Electronic Government established under section 3602;

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of chapters for title 44, United States Code, is amended by inserting after the item relating to chapter 35 the following:

"36. Management and Promotion of Electronic Government Services 3601".

SEC. 102. CONFORMING AMENDMENTS.

(a) ELECTRONIC GOVERNMENT AND INFORMATION TECHNOLOGIES.—

(1) IN GENERAL.—Chapter 3 of title 40, United States Code, is amended by inserting after section 304 the following new section:

"§ 305. Electronic Government and information technologies

"The Administrator of General Services shall consult with the Administrator of the Office of Electronic Government on programs undertaken by the General Services Administration to promote electronic Government and the efficient use of information technologies by Federal agencies.".

(2) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 3 of such title is amended by inserting after the item relating to section 304 the following:

"305. Electronic Government and information technologies.".

(b) MODIFICATION OF DEPUTY DIRECTOR FOR MANAGEMENT FUNCTIONS.—Section 503(b) of title 31, United States Code, is amended—

(1) by redesignating paragraphs (5), (6), (7), (8), and (9), as paragraphs (6), (7), (8), (9), and (10), respectively; and

(2) by inserting after paragraph (4) the following:

"(5) Chair the Chief Information Officers Council established under section 3603 of title 44.".

(c) OFFICE OF ELECTRONIC GOVERNMENT.—

(1) IN GENERAL.—Chapter 5 of title 31, United States Code, is amended by inserting after section 506 the following:

"§ 507. Office of Electronic Government

"The Office of Electronic Government, established under section 3602 of title 44, is an office in the Office of Management and Budget.".

(2) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 5 of title 31, United States Code, is amended by inserting after the item relating to section 506 the following:

"507. Office of Electronic Government.".

TITLE II—FEDERAL MANAGEMENT AND PROMOTION OF ELECTRONIC GOVERNMENT SERVICES

44 USC 3501 note.

SEC. 201. DEFINITIONS.

Except as otherwise provided, in this title the definitions under sections 3502 and 3601 of title 44, United States Code, shall apply.

(III) the transfer of technology among Federal agencies and between Federal agencies and non-Federal entities; and

(IV) access by policymakers and the public to information concerning Federal research and development activities.

(B) OVERSIGHT.—The Director of the Office of Management and Budget shall issue any guidance determined necessary to ensure that agencies provide all information requested under this subsection. Guidelines.

(2) AGENCY FUNCTIONS.—Any agency that funds Federal research and development under this subsection shall provide the information required to populate the repository in the manner prescribed by the Director of the Office of Management and Budget.

(3) COMMITTEE FUNCTIONS.—Not later than 18 months after the date of enactment of this Act, working with the Director of the Office of Science and Technology Policy, and after consultation with interested parties, the Committee shall submit recommendations to the Director on— Deadline.

(A) policies to improve agency reporting of information for the repository established under this subsection; and

(B) policies to improve dissemination of the results of research performed by Federal agencies and federally funded research and development centers.

(4) FUNCTIONS OF THE DIRECTOR.—After submission of recommendations by the Committee under paragraph (3), the Director shall report on the recommendations of the Committee and Director to Congress, in the E-Government report under section 3606 of title 44 (as added by this Act). Reports.

(5) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated for the development, maintenance, and operation of the Governmentwide repository and website under this subsection—

(A) $2,000,000 in each of the fiscal years 2003 through 2005; and

(B) such sums as are necessary in each of the fiscal years 2006 and 2007.

SEC. 208. PRIVACY PROVISIONS. 44 USC 3501 note.

(a) PURPOSE.—The purpose of this section is to ensure sufficient protections for the privacy of personal information as agencies implement citizen-centered electronic Government.

(b) PRIVACY IMPACT ASSESSMENTS.—

(1) RESPONSIBILITIES OF AGENCIES.—

(A) IN GENERAL.—An agency shall take actions described under subparagraph (B) before—

(i) developing or procuring information technology that collects, maintains, or disseminates information that is in an identifiable form; or

(ii) initiating a new collection of information that—

(I) will be collected, maintained, or disseminated using information technology; and

(II) includes any information in an identifiable form permitting the physical or online contacting of a specific individual, if identical questions have been posed to, or identical reporting requirements

imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the Federal Government.

(B) AGENCY ACTIVITIES.—To the extent required under subparagraph (A), each agency shall—

(i) conduct a privacy impact assessment;

(ii) ensure the review of the privacy impact assessment by the Chief Information Officer, or equivalent official, as determined by the head of the agency; and

Public information. Federal Register, publication.

(iii) if practicable, after completion of the review under clause (ii), make the privacy impact assessment publicly available through the website of the agency, publication in the Federal Register, or other means.

(C) SENSITIVE INFORMATION.—Subparagraph (B)(iii) may be modified or waived for security reasons, or to protect classified, sensitive, or private information contained in an assessment.

(D) COPY TO DIRECTOR.—Agencies shall provide the Director with a copy of the privacy impact assessment for each system for which funding is requested.

(2) CONTENTS OF A PRIVACY IMPACT ASSESSMENT.—

(A) IN GENERAL.—The Director shall issue guidance to agencies specifying the required contents of a privacy impact assessment.

(B) GUIDANCE.—The guidance shall—

(i) ensure that a privacy impact assessment is commensurate with the size of the information system being assessed, the sensitivity of information that is in an identifiable form in that system, and the risk of harm from unauthorized release of that information; and

(ii) require that a privacy impact assessment address—

(I) what information is to be collected;

(II) why the information is being collected;

(III) the intended use of the agency of the information;

(IV) with whom the information will be shared;

(V) what notice or opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared;

(VI) how the information will be secured; and

(VII) whether a system of records is being created under section 552a of title 5, United States Code, (commonly referred to as the "Privacy Act").

(3) RESPONSIBILITIES OF THE DIRECTOR.—The Director shall—

Guidelines.

(A) develop policies and guidelines for agencies on the conduct of privacy impact assessments;

(B) oversee the implementation of the privacy impact assessment process throughout the Government; and

(C) require agencies to conduct privacy impact assessments of existing information systems or ongoing collections of information that is in an identifiable form as the Director determines appropriate.

(c) PRIVACY PROTECTIONS ON AGENCY WEBSITES.—

(1) PRIVACY POLICIES ON WEBSITES.—

(A) GUIDELINES FOR NOTICES.—The Director shall develop guidance for privacy notices on agency websites used by the public.

(B) CONTENTS.—The guidance shall require that a privacy notice address, consistent with section 552a of title 5, United States Code—

(i) what information is to be collected;

(ii) why the information is being collected;

(iii) the intended use of the agency of the information;

(iv) with whom the information will be shared;

(v) what notice or opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared;

(vi) how the information will be secured; and

(vii) the rights of the individual under section 552a of title 5, United States Code (commonly referred to as the "Privacy Act"), and other laws relevant to the protection of the privacy of an individual.

(2) PRIVACY POLICIES IN MACHINE-READABLE FORMATS.— Guidelines.
The Director shall issue guidance requiring agencies to translate privacy policies into a standardized machine-readable format.

(d) DEFINITION.—In this section, the term "identifiable form" means any representation of information that permits the identity of an individual to whom the information applies to be reasonably inferred by either direct or indirect means.

SEC. 209. FEDERAL INFORMATION TECHNOLOGY WORKFORCE DEVELOPMENT. 44 USC 3501 note.

(a) PURPOSE.—The purpose of this section is to improve the skills of the Federal workforce in using information technology to deliver Government information and services.

(b) WORKFORCE DEVELOPMENT.—

(1) IN GENERAL.—In consultation with the Director of the Office of Management and Budget, the Chief Information Officers Council, and the Administrator of General Services, the Director of the Office of Personnel Management shall—

(A) analyze, on an ongoing basis, the personnel needs of the Federal Government related to information technology and information resource management;

(B) identify where current information technology and information resource management training do not satisfy the personnel needs described in subparagraph (A);

(C) oversee the development of curricula, training methods, and training priorities that correspond to the projected personnel needs of the Federal Government related to information technology and information resource management; and

(D) assess the training of Federal employees in information technology disciplines in order to ensure that the information resource management needs of the Federal Government are addressed.

(2) INFORMATION TECHNOLOGY TRAINING PROGRAMS.—The head of each Executive agency, after consultation with the Director of the Office of Personnel Management, the Chief

FEDERAL ADVISORY COMMITTEE ACT

5 U.S.C. app.

As Amended

§1. Short title

This Act may be cited as the "Federal Advisory Committee Act Amendments."

§2. Findings and purpose

(a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

(b) The Congress further finds and declares that--

(1) the need for many existing advisory committees has not been adequately reviewed;

(2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;

(3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;

(4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and

(6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

§3. Definitions

For the purpose of this Act--

(1) The term "Administrator" means the Administrator of General Services.

(2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is--

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration.

(3) The term "agency" has the same meaning as in section 551(1) of Title 5, United States Code.

(4) The term "Presidential advisory committee" means an advisory committee which advises the President.

§4. Applicability; restrictions

(a) The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise.

(b) Nothing in this Act shall be construed to apply to any advisory committee established or utilized by--

(1) the Central Intelligence Agency;

(2) the Federal Reserve System; or

(3) the Office of the Director of National Intelligence, if the Director of National Intelligence determines that for reasons of national security such advisory committee cannot comply with the requirements of this Act.

(c) Nothing in this Act shall be construed to apply to any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

§5. Responsibilities of Congressional committees; review; guidelines

(a) In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction to determine whether such advisory committee should be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

(b) In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall--

(1) contain a clearly defined purpose for the advisory committee;

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by

any special interest, but will instead be the result of the advisory committee's independent judgment;

(4) contain provisions dealing with authorization of appropriations, the date for submission of reports (if any), the duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee determines the provisions of section 10 of this Act to be inadequate; and

(5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

(c) To the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.

§6. Responsibilities of the President; report to Congress; annual report to Congress; exclusion

(a) The President may delegate responsibility for evaluating and taking action, where appropriate, with respect to all public recommendations made to him by Presidential advisory committees.

(b) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate shall make a report to the Congress stating either his proposals for action or his reasons for inaction, with respect to the recommendations contained in the public report.

(c) [Annual report] Repealed by the Federal Reports Elimination and Sunset Act of 1995, Pub. L. No. 104-66, § 3003, 109 Stat. 707, 734-36 (1995), amended by Pub. L. No. 106-113, § 236, 113 Stat. 1501, 1501A-302 (1999) (changing effective date to May 15, 2000).

§7. Responsibilities of the Administrator of General Services; Committee Management Secretariat, establishment; review; recommendations to President and Congress; agency cooperation; performance guidelines; uniform pay guidelines; travel expenses; expense recommendations

(a) The Administrator shall establish and maintain within the General Services Administration a Committee Management Secretariat, which shall be responsible for all matters relating to advisory committees.

(b) The Administrator shall, immediately after October 6, 1972, institute a comprehensive review of the activities and responsibilities of each advisory committee to determine--

(1) whether such committee is carrying out its purpose;

(2) whether, consistent with the provisions of applicable statutes, the responsibilities assigned to it should be revised;

(3) whether it should be merged with other advisory committees; or

(4) whether it should be abolished.

The Administrator may from time to time request such information as he deems necessary to carry out his functions under this subsection. Upon the completion of the Administrator's review he shall make recommendations to the President and to either the agency head or the Congress with respect to action he believes should be taken. Thereafter, the Administrator shall carry out a similar review annually. Agency heads shall cooperate with the Administrator in making the reviews required by this subsection.

(c) The Administrator shall prescribe administrative guidelines and management controls applicable to advisory committees, and, to the maximum extent feasible, provide advice, assistance, and

guidance to advisory committees to improve their performance. In carrying out his functions under this subsection, the Administrator shall consider the recommendations of each agency head with respect to means of improving the performance of advisory committees whose duties are related to such agency.

(d)(1) The Administrator, after study and consultation with the Director of the Office of Personnel Management, shall establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors. Such regulations shall provide that--

(A) no member of any advisory committee or of the staff of any advisory committee shall receive compensation at a rate in excess of the rate specified for GS-18 of the General Schedule under section 5332 of Title 5, United States Code;

(B) such members, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of Title 5, United States Code, for persons employed intermittently in the Government service; and

(C) such members--

(i) who are blind or deaf or who otherwise qualify as handicapped individuals (within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. §794)), and

(ii) who do not otherwise qualify for assistance under section 3102 of Title 5, United States Code, by reason of being an employee of an agency (within the meaning of section 3102(a)(1) of such Title 5),

may be provided services pursuant to section 3102 of such Title 5 while in performance of their advisory committee duties.

(2) Nothing in this subsection shall prevent--

(A) an individual who (without regard to his service with an advisory committee) is a full-time employee of the United States, or

(B) an individual who immediately before his service with an advisory committee was such an employee,

from receiving compensation at the rate at which he otherwise would be compensated (or was compensated) as a full-time employee of the United States.

(e) The Administrator shall include in budget recommendations a summary of the amounts he deems necessary for the expenses of advisory committees, including the expenses for publication of reports where appropriate.

§8. Responsibilities of agency heads; Advisory Committee Management Officer, designation

(a) Each agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Administrator under section 7 and section 10. Each agency shall maintain systematic information on the nature, functions, and operations of each advisory committee within its jurisdiction.

(b) The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall--

(1) exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency;

(2) assemble and maintain the reports, records, and other papers of any such committee during its existence; and

(3) carry out, on behalf of that agency, the provisions of section 552 of Title 5, United States Code, with respect to such reports, records, and other papers.

§9. Establishment and purpose of advisory committees; publication in Federal Register; charter: filing, contents, copy

(a) No advisory committee shall be established unless such establishment is--

(1) specifically authorized by statute or by the President; or

(2) determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator, with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

(c) No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Administrator, in the case of Presidential advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:

(A) the committee's official designation;

(B) the committee's objectives and the scope of its activity;

(C) the period of time necessary for the committee to carry out its purposes;

(D) the agency or official to whom the committee reports;

(E) the agency responsible for providing the necessary support for the committee;

(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(G) the estimated annual operating costs in dollars and man-years for such committee;

(H) the estimated number and frequency of committee meetings;

(I) the committee's termination date, if less than two years from the date of the committee's establishment; and

(J) the date the charter is filed.

A copy of any such charter shall also be furnished to the Library of Congress.

FEDERAL ADVISORY COMMITTEE ACT

§10. Advisory committee procedures; meetings; notice, publication in Federal Register; regulations; minutes; certification; annual report; Federal officer or employee, attendance

(a)(1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Administrator shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Administrator may prescribe.

(b) Subject to section 552 of Title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

(d) Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of Title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of Title 5, United States Code.

(e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

(f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.

§11. Availability of transcripts; "agency proceeding"

(a) Except where prohibited by contractual agreements entered into prior to the effective date of this Act, agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings.

(b) As used in this section "agency proceeding" means any proceeding as defined in section 551(12) of Title 5, United States Code.

§12. Fiscal and administrative provisions; record-keeping; audit; agency support services

(a) Each agency shall keep records as will fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities. The

General Services Administration, or such other agency as the President may designate, shall maintain financial records with respect to Presidential advisory committees. The Comptroller General of the United States, or any of his authorized representatives, shall have access, for the purpose of audit and examination, to any such records.

(b) Each agency shall be responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise. Where any such advisory committee reports to more than one agency, only one agency shall be responsible for support services at any one time. In the case of Presidential advisory committees, such services may be provided by the General Services Administration.

§13. Responsibilities of Library of Congress; reports and background papers; depository

Subject to section 552 of Title 5, United States Code, the Administrator shall provide for the filing with the Library of Congress of at least eight copies of each report made by every advisory committee and, where appropriate, background papers prepared by consultants. The Librarian of Congress shall establish a depository for such reports and papers where they shall be available to public inspection and use.

§14. Termination of advisory committees; renewal; continuation

(a)(1) Each advisory committee which is in existence on the effective date of this Act shall terminate not later than the expiration of the two-year period following such effective date unless--

(A) in the case of an advisory committee established by the President or an officer of the Federal Government, such advisory committee is renewed by the President or that officer by appropriate action prior to the expiration of such two-year period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(2) Each advisory committee established after such effective date shall terminate not later than the expiration of the two-year period beginning on the date of its establishment unless--

(A) in the case of an advisory committee established by the President or an officer of the Federal Government such advisory committee is renewed by the President or such officer by appropriate action prior to the end of such period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(b)(1) Upon the renewal of any advisory committee, such advisory committee shall file a charter in accordance with section 9(c).

(2) Any advisory committee established by an Act of Congress shall file a charter in accordance with such section upon the expiration of each successive two-year period following the date of enactment of the Act establishing such advisory committee.

(3) No advisory committee required under this subsection to file a charter shall take any action (other than preparation and filing of such charter) prior to the date on which such charter is filed.

(c) Any advisory committee which is renewed by the President or any officer of the Federal Government may be continued only for successive two-year periods by appropriate action taken by the President or such officer prior to the date on which such advisory committee would otherwise terminate.

FEDERAL ADVISORY COMMITTEE ACT

§15. Requirements relating to the National Academy of Sciences and the National Academy of Public Administration

(a) In General- An agency may not use any advice or recommendation provided by the National Academy of Sciences or National Academy of Public Administration that was developed by use of a committee created by that academy under an agreement with an agency, unless--

(1) the committee was not subject to any actual management or control by an agency or an officer of the Federal Government;

(2) in the case of a committee created after the date of the enactment of the Federal Advisory Committee Act Amendments of 1997, the membership of the committee was appointed in accordance with the requirements described in subsection (b)(1); and

(3) in developing the advice or recommendations, the academy compiled with--

(A) subsection (b)(2) through (6), in the case of any advice or recommendation provided by the National Academy of Sciences; or

(B) subsection (b)(2) and (5), in the case of any advice or recommendation provided by the National Academy of Public Administration.

(b) Requirements- The requirements referred to in subsection (a) are as follows:

(1) The Academy shall determine and provide public notice of the names and brief biographies of individuals that the Academy appoints or intends to appoint to serve on the committee. The Academy shall determine and provide a reasonable opportunity for the public to comment on such appointments before they are made or, if the Academy determines such prior comment is not practicable, in the period immediately following the appointments. The Academy shall make its best efforts to ensure that (A) no individual appointed to serve on the committee has a conflict of interest that is relevant to the functions to be performed, unless such conflict is promptly and publicly disclosed and the Academy determines that the conflict is unavoidable, (B) the committee membership is fairly balanced as determined by the Academy to be appropriate for the functions to be performed, and (C) the final report of the Academy will be the result of the Academy's independent judgment. The Academy shall require that individuals that the Academy appoints or intends to appoint to serve on the committee inform the Academy of the individual's conflicts of interest that are relevant to the functions to be performed.

(2) The Academy shall determine and provide public notice of committee meetings that will be open to the public.

(3) The Academy shall ensure that meetings of the committee to gather data from individuals who are not officials, agents, or employees of the Academy are open to the public, unless the Academy determines that a meeting would disclose matters described in section 552(b) of Title 5, United States Code. The Academy shall make available to the public, at reasonable charge if appropriate, written materials presented to the committee by individuals who are not officials, agents, or employees of the Academy, unless the Academy determines that making material available would disclose matters described in that section.

(4) The Academy shall make available to the public as soon as practicable, at reasonable charge if appropriate, a brief summary of any committee meeting that is not a data gathering meeting, unless the Academy determines that the summary would disclose matters described in section 552(b) Title 5, United States Code. The summary shall identify the committee members present, the topics discussed, materials made available to the committee, and such other matters that the Academy determines should be included.

(5) The Academy shall make available to the public its final report, at reasonable charge if appropriate, unless the Academy determines that the report would disclose matters described in section 552(b) of Title 5, United States Code. If the Academy determines that the report would disclose matters described in that section, the Academy shall make public an abbreviated version of the report that does not disclose those matters.

(6) After publication of the final report, the Academy shall make publicly available the names of the principal reviewers who reviewed the report in draft form and who are not officials, agents, or employees of the Academy.

(c) Regulations- The Administrator of General Services may issue regulations implementing this section.

§16. Effective Date

Except as provided in section 7(b), this Act shall become effective upon the expiration of ninety days following October 6, 1972.

Proviso. Obligations of old Board.

the Board at the grades and salaries specified in their respective examinations: *Provided*, That this section shall not be construed to impair any obligation incurred by the old Board.

Rules and regulations.

SEC. 7. The Board with the approval of the Committee is authorized to prescribe rules and regulations to carry out the provisions of this Act.

Separability clause.

SEC. 8. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

Duration of Act.

SEC. 9. This Act shall cease to be in effect and the agencies established hereunder shall cease to exist at the expiration of five years after the date of enactment of this Act.

Approved, July 25, 1935.

[CHAPTER 417.]

July 26, 1935.
[H. R. 6323.]
[Public, No. 220.]

AN ACT

To provide for the custody of Federal proclamations, orders, regulations, notices, and other documents, and for the prompt and uniform printing and distribution thereof.

Federal Register Act.
Proclamations, Executive orders, etc., custody and publication.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Archivist of the United States, acting through a division established by him in the National Archives Establishment, hereinafter referred to as the "Division", is charged with the custody and, together with the Public Printer, with the prompt and uniform printing and distribution of the documents required or authorized to be published under section 5. There shall be at the head of the Division a director, appointed by the President, who shall act under the general direction of the Archivist of the United States in carrying out the provisions of this Act and the regulations prescribed hereunder, who shall receive a salary, to be fixed by the President, not to exceed $5,000 a year.

Division to be established in the National Archives Establishment.

Director; appointment; salary.

Original documents and copies; filing.
Post, p. 1110.

SEC. 2. The original and two duplicate originals or certified copies of any document required or authorized to be published under section 5 shall be filed with the Division, which shall be open for that purpose during all hours of the working days when the Archives Building shall be open for official business. The Director of the Division shall cause to be noted on the original and duplicate originals or certified copies of each document the day and hour of filing thereof: *Provided*, That when the original is issued, prescribed, or promulgated outside of the District of Columbia and certified copies are filed before the filing of the original, the notation shall be of the day and hour of filing of the certified copies. Upon such filing, at least one copy shall be immediately available for public inspection in the office of the Director of the Division. The original shall be retained in the archives of the National Archives Establishment and shall be available for inspection under regulations to be prescribed by the Archivist. The Division shall transmit immediately to the Government Printing Office for printing, as provided in this Act, one duplicate original or certified copy of each document required or authorized to be published under section 5. Every Federal agency shall cause to be transmitted for filing as herein required the original and the duplicate originals or certified copies of all such documents issued, prescribed, or promulgated by the agency.

Notation thereon.

Proviso. When issued outside of District of Columbia.

Availability of copy for public inspection.

Of original document.

Copy for printing; transmission.

Federal Register; printing and distribution.

SEC. 3. All documents required or authorized to be published under section 5 shall be printed and distributed forthwith by the Government Printing Office in a serial publication designated the "Federal

Register." It shall be the duty of the Public Printer to make available the facilities of the Government Printing Office for the prompt printing and distribution of the Federal Register in the manner and at the times required in accordance with the provisions of this Act and the regulations prescribed hereunder. The contents of the daily issues shall be indexed and shall comprise all documents, required or authorized to be published, filed with the Division up to such time of the day immediately preceding the day of distribution as shall be fixed by regulations hereunder. There shall be printed with each document a copy of the notation, required to be made under section 2, of the day and hour when, upon filing with the Division, such document was made available for public inspection. Distribution shall be made by delivery or by deposit at a post office at such time in the morning of the day of distribution as shall be fixed by such regulations prescribed hereunder. The prices to be charged for the Federal Register may be fixed by the administrative committee established by section 6 without reference to the restrictions placed upon and fixed for the sale of Government publications by section 1 of the Act of May 11, 1922, and section 307 of the Act of June 30, 1932 (U. S. C., title 44, secs. 72 and 72a), and any amendments thereto.

Contents; indexing.

Copy of notation.

Distribution of.

Charges for.

Vol. 42, p. 541; Vol. 47, p. 409.

U. S. C., p. 1933.

SEC. 4. As used in this Act, unless the context otherwise requires, the term "document" means any Presidential proclamation or Executive order and any order, regulation, rule, certificate, code of fair competition, license, notice, or similar instrument issued, prescribed, or promulgated by a Federal agency; the terms "Federal agency" or "agency" mean the President of the United States, or any executive department, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the Government of the United States but not the legislative or judicial branches of the Government; and the term "person" means any individual, partnership, association, or corporation.

Definitions.

"Document."

"Federal agency"; "agency."

"Person."

SEC. 5. (a) There shall be published in the Federal Register (1) all Presidential proclamations and Executive orders, except such as have no general applicability and legal effect or are effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof; (2) such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect; and (3) such documents or classes of documents as may be required so to be published by Act of the Congress: *Provided*, That for the purposes of this Act every document or order which shall prescribe a penalty shall be deemed to have general applicability and legal effect.

Documents to be published.

Proviso.
When penalty provisions prescribed.

(b) In addition to the foregoing there shall also be published in the Federal Register such other documents or classes of documents as may be authorized to be published pursuant hereto by regulations prescribed hereunder with the approval of the President, but in no case shall comments or news items of any character whatsoever be authorized to be published in the Federal Register.

Authorization to publish additional documents.

News items; comments.

SEC. 6. There is established a permanent Administrative Committee of three members consisting of the Archivist or Acting Archivist, who shall be chairman, an officer of the Department of Justice designated by the Attorney General, and the Public Printer or Acting Public Printer. The Director of the Division shall act as secretary of the committee. The committee shall prescribe, with the approval of the President, regulations for carrying out the provisions of this Act. Such regulations shall provide, among other things: (a) The manner of certification of copies required to be certified under section 2, which certification may be permitted to be based upon con-

Administrative Committee; composition.

Secretary.

Regulations to be prescribed.

[PUBLIC LAW 831—77TH CONGRESS]

[CHAPTER 811—2D SESSION]

[S. 1666]

AN ACT

To coordinate Federal reporting services, to eliminate duplication and reduce the cost of such services, and to minimize the burdens of furnishing information to Federal agencies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Reports Act of 1942".

SEC. 2. It is hereby declared to be the policy of the Congress that information which may be needed by the various Federal agencies should be obtained with a minimum burden upon business enterprises (especially small business enterprises) and other persons required to furnish such information, and at a minimum cost to the Government, that all unnecessary duplication of efforts in obtaining such information through the use of reports, questionnaires, and other such methods should be eliminated as rapidly as practicable; and that information collected and tabulated by any Federal agency should insofar as is expedient be tabulated in a manner to maximize the usefulness of the information to other Federal agencies and the public.

SEC. 3. (a) With a view to carrying out the policy of this Act, the Director of the Bureau of the Budget (hereinafter referred to as the "Director") is directed from time to time (1) to investigate the needs of the various Federal agencies for information from business enterprises, from other persons, and from other Federal agencies; (2) to investigate the methods used by such agencies in obtaining such information; and (3) to coordinate as rapidly as possible the information-collecting services of all such agencies with a view to reducing the cost to the Government of obtaining such information and minimizing the burden upon business enterprises and other persons, and utilizing, as far as practicable, the continuing organization, files of information and existing facilities of the established Federal departments and independent agencies.

(b) If, after any such investigation, the Director is of the opinion that the needs of two or more Federal agencies for information from business enterprises and other persons will be adequately served by a single collecting agency, he shall fix a time and place for a hearing at which the agencies concerned and any other interested persons shall have an opportunity to present their views. After such hearing, the Director may issue an order designating a collecting agency to obtain such information for any two or more of the agencies concerned, and prescribing (with reference to the collection of such information) the duties and functions of the collecting agency so designated and the Federal agencies for which it is to act as agent. Any such order may be modified from time to time by the Director as circumstances may require, but no such modification

consent to the release of it to a second agency by the agency to which the information was originally supplied; or (4) the Federal agency to which another Federal agency shall release the information has authority to collect the information itself and such authority is supported by legal provision for criminal penalties against persons failing to supply such information.

SEC. 5. No Federal agency shall conduct or sponsor the collection of information, upon identical items, from ten to more persons (other than Federal employees considered as such) unless, in advance of adoption or revision of any plans or forms to be used in such collection,

(a) The agency shall have submitted to the Director such plans or forms, together with copies of such pertinent regulations and other related materials as the Director shall specify; and

(b) The Director shall have stated that he does not disapprove the proposed collection of information.

SEC. 6. The Director is authorized to make such rules and regulations as may be necessary to carry out the provisions of this Act.

SEC. 7. As used in this Act—

(a) The term "Federal agency" means any executive department, commission, independent establishment, corporation owned or controlled by the United States, board, bureau, division, service, office, authority, or administration in the executive branch of the Government; but such terms shall not include the General Accounting Office nor the governments of the District of Columbia and of the Territories and possessions of the United States, and the various subdivisions of such governments.

(b) The term "person" means any individual, partnership, association, corporation, business trust, or legal representative, any organized group of persons, any State or Territorial government or branch thereof, or any political subdivision of any State or Territory or any branch of any such political subdivision.

(c) The term "information" means facts obtained or solicited by the use of written report forms, application forms, schedules, questionnaires, or other similar methods calling either (1) for answers to identical questions from ten or more persons other then agencies, instrumentalities, or employees of the United States or (2) for answers to questions from agencies, instrumentalities, or employees of the United States which are to be used for statistical compilations of general public interest.

SEC. 8. Any person failing to furnish information required by any such agency shall be subject to such penalties as are specifically prescribed by law, and no other penalty shall be imposed either by way of fine or imprisonment or by the withdrawal or denial of any right, privilege, priority, allotment, or immunity, except when the right, privilege, priority, allotment, or immunity, is legally conditioned on facts which would be revealed by the information requested.

SEC. 9. There are hereby authorized to be appropriated annually, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary to carry out the provisions of this Act.

Approved, December 24, 1942.

any defense, right, or benefit under any provision of a statute or constitution of a State or of a territory of the United States, or of any law of the District of Columbia, regulating or limiting the rate of interest which may be charged, taken, received, or reserved, and any such provision is hereby preempted, and no civil or criminal penalty which would otherwise be applicable under such provision shall apply to such member or nonmember association, institution, bank, or affiliate or to any other person."

Effective date, 12 USC 371b-1 note.

SEC. 304. The amendments made by this title shall apply to any deposit made or obligation issued in any State after the date of enactment of this title, but prior to the earlier of (1) July 1, 1977 or (2) the date (after such date of enactment) on which the State enacts a provision of law which limits the amount of interest which may be charged in connection with deposits or obligations referred to in the amendments made by this title.

Approved October 29, 1974.

Public Law 93-502

AN ACT

November 21, 1974
[H. R. 12471]

To amend section 552 of title 5, United States Code, known as the Freedom of Information Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the fourth sentence of section 552(a)(2) of title 5, United States Code, is amended to read as follows: "Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication.".

Public information.

Indexes, publication and distribution.

Publication in Federal Register.

(b)(1) Section 552(a)(3) of title 5, United States Code, is amended to read as follows:

Records, availability to public.

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.".

(2) Section 552(a) of title 5, United States Code, is amended by redesignating paragraph (4), and all references thereto, as paragraph (5) and by inserting immediately after paragraph (3) the following new paragraph:

Document search and duplication fees, regulations.

"(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

the life or physical safety of law enforcement personnel;".

Segregable portions of records.

(c) Section 552(b) of title 5, United States Code, is amended by adding at the end the following: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.".

Reports to Speaker of the House and President of the Senate.

SEC. 3. Section 552 of title 5, United States Code, is amended by adding at the end thereof the following new subsections:

Contents.

"(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

"(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

"(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

Ante, p. 1562.

"(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

"(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

"(5) a copy of every rule made by such agency regarding this section;

"(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

"(7) such other information as indicates efforts to administer fully this section.

Annual report.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

Ante, p. 1561.

"Agency," 5 USC 551.

"(e) For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.".

Effective date. 5 USC 552 note.

SEC. 4. The amendments made by this Act shall take effect on the ninetieth day beginning after the date of enactment of this Act.

CARL ALBERT

Speaker of the House of Representatives.

JAMES O. EASTLAND

President of the Senate pro tempore.

Public Law 89-554

AN ACT

September 6, 1966
[H. R. 10104]

To enact title 5, United States Code, "Government Organization and Employees", codifying the general and permanent laws relating to the organization of the Government of the United States and to its civilian officers and employees.

Title 5, USC, Government Organization and Employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the laws relating to the organization of the Government of the United States and to its civilian officers and employees, generally, are revised, codified, and enacted as title 5 of the United States Code, entitled "Government Organization and Employees", and may be cited as "5 U.S.C., § ", as follows:

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

PART I—THE AGENCIES GENERALLY

CHAPTER 1—ORGANIZATION

§ 101. Executive departments

The Executive departments are:

The Department of State.
The Department of the Treasury.
The Department of Defense.
The Department of Justice.
The Post Office Department.
The Department of the Interior.
The Department of Agriculture.
The Department of Commerce.
The Department of Labor.
The Department of Health, Education, and Welfare.

§ 102. Military departments

The military departments are:

The Department of the Army.
The Department of the Navy.
The Department of the Air Force.

§ 103. Government corporation

For the purpose of this title—

(1) "Government corporation" means a corporation owned or controlled by the Government of the United States; and

SUBCHAPTER III—ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

SUBCHAPTER I—GENERAL PROVISIONS

§ 501. Advertising practice; restrictions

An individual, firm, or corporation practicing before an agency of the United States may not use the name of a Member of either House of Congress or of an individual in the service of the United States in advertising the business.

§ 502. Administrative practice; Reserves and National Guardsmen

Membership in a reserve component of the armed forces or in the National Guard does not prevent an individual from practicing his civilian profession or occupation before, or in connection with, an agency of the United States.

§ 503. Witness fees and allowances

(a) For the purpose of this section, "agency" has the meaning given it by section 5721 of this title.

(b) A witness is entitled to the fees and allowances allowed by statute for witnesses in the courts of the United States when—

(1) he is subpenaed under section 304(a) of this title; or

(2) he is subpenaed to and appears at a hearing before an agency authorized by law to hold hearings and subpena witnesses to attend the hearings.

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

§ 551. Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section; and

CHAPTER 7—JUDICIAL REVIEW

Sec.
701. Application; definitions.
702. Right of review.
703. Form and venue of proceeding.
704. Actions reviewable.
705. Relief pending review.
706. Scope of review.

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of

Presidential Advisory Commission on Election Integrity
By-Laws and Operating Procedures

The following By-Laws and Operating Procedures ("By-Laws") will govern the operations of the Presidential Advisory Commission on Election Integrity ("Commission").

Section I: Purpose, Organization, and Operation

Pursuant to Executive Order 13799 of May 11, 2017, the Commission shall, consistent with applicable law, study the registration and voting processes used in Federal elections. The Commission shall be solely advisory and shall submit a report to the President that identifies those laws, rules, policies, activities, strategies, and practices that enhance the American people's confidence in the integrity of the voting processes used in Federal elections; those laws, rules, policies, activities, strategies, and practices that undermine the American people's confidence in the integrity of voting processes used in Federal elections; and those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting, including fraudulent voter registrations and fraudulent voting. The Commission shall provide its advice and recommendations, analysis, and information directly to the President.

Section II: Authority

The Commission was established by Executive Order 13799 of May 11, 2017, and by the authority vested in the President of the United States by the Constitution and the laws of the United States of America. The Commission has voluntarily agreed to operate in accordance with the Federal Advisory Committee Act, as amended (5 U.S.C. App.) ("FACA"). The Commission filed a charter on June 23, 2017, with the General Service Administration's Committee Management Secretariat.

Section III: Membership

(A) In General. The Commission shall be composed of the Vice President and not more than fifteen (15) additional members ("Members"). The Members shall be appointed by the President and shall represent a bipartisan set of perspectives and experience in elections, election management, election fraud detection, and voter integrity efforts, and may include any other individuals with knowledge or experience determined by the President to be of value to the Commission. The Members of the Commission may include both regular Government Employees and Special Government Employees.

(B) Chair and Vice Chair. The Vice President shall chair the Commission. The Vice President may select a Vice Chair from among those Members appointed by the President, who may perform the duties of the Chair if so directed by the Vice President.

(C) Commission Staff. The Vice President may select an Executive Director of the Commission and any additional staff he determines necessary to support the Commission.

(D) Designated Federal Officer. The Designated Federal Officer ("DFO") will be a full-time officer or employee of the Federal Government appointed by the GSA Administrator, pursuant to 41 CFR § 102-3.105 and in consultation with the Chair of the Commission. The DFO will approve or call all Commission meetings, prepare all meeting agendas, attend all meetings, and adjourn any meeting when the DFO determines adjournment to be in the public interest. Should the Chair designate any subcommittees, the DFO will similarly approve or call all subcommittee meetings,

prepare all subcommittee meeting agendas, attend all subcommittee meetings, and adjourn any subcommittee meeting when the DFO determines adjournment to be in the public interest. In the DFO's discretion, the DFO may utilize other Federal employees as support staff to assist the DFO in fulfilling these responsibilities.

Section IV: Meetings

(A) In General. The Commission shall meet as frequently as needed and called and approved by the DFO. The Chair will preside at all Commission meetings, unless the Chair directs the Vice Chair to perform the duties of the Chair. Members who cannot attend meetings in person may participate by means of conference telephone or similar communications equipment if all Members can hear one another at the same time and members of the public entitled to hear them can do so. A Member who participates by such means will be counted as present for purposes of a quorum, and the Member may participate in any votes and other business as if the Member were physically present at the meeting.

(B) Notice. A notice of each Commission meeting will be published in the Federal Register at least 15 calendar days before the meeting, except in exceptional circumstances. The notice will include (1) the name of the Commission; (2) the time, date, place, and purpose of the meeting; (3) a summary of the agenda, and/or topics to be discussed; (4) a statement as to whether all or part of the meeting is open to the public and, if any part is closed, a statement as to why, citing the specific exemption(s) of the Government in the Sunshine Act (5 U.S.C. § 552b(c)) ("GISA") as the basis for closure; and (5) the name and telephone number of the DFO or other official who may be contacted for additional information concerning the meeting.

(C) Agenda. The Chair or, at the Chair's direction, the Vice Chair, shall establish the agenda for all Commission meetings. The DFO will prepare and distribute the agenda to the Members before each meeting and will make available copies of the agenda to members of the public. Items for the agenda may be submitted to the Chair by any Member. Items may also be suggested by any member of the public.

(D) Quorum. Commission meetings will be held only when a quorum is present. For this purpose, a quorum is defined as a simple majority of the Members (including the Chair) then serving on the Commission.

(E) Open Meetings. Unless otherwise determined in advance, all Commission meetings will be open to the public either in person as space permits or through electronic means as permitted by FACA and its implementing regulations. Once an open meeting has begun, it will not be closed for any reason. However, if, during the course of an open meeting, matters inappropriate for public disclosure arise during discussion, the Chair shall order such discussion to cease and will schedule the matter for closed session in accordance with FACA. All materials brought before, or presented to, the Commission during the conduct of an open meeting will be made available to the public. All such materials will be made available on the Commission's webpage as soon as practicable.

(F) Activities Not Subject to Notice and Open Meeting Requirements. Consistent with 41 CFR §102-3.160, the following activities of the Commission are excluded from the procedural requirements contained in Sections IV(B) and (E):

i. Preparatory work. Meetings of two or more Commission Members or subcommittee Members convened solely to gather information, conduct research, or analyze relevant

issues and facts in preparation for a Commission meeting, or to draft position papers for deliberation by the Commission; and

ii. Administrative work. Meetings of two or more Commission Members or subcommittee Members convened solely to discuss administrative matters of the Commission or to receive administrative information from a Federal officer or agency.

(G) Closed Meetings. Meetings of the Commission will be closed only in limited circumstances and in accordance with applicable law. Where the DFO has determined in advance that a Commission meeting will disclose matters inappropriate for public disclosure, an advance notice of a closed meeting will be published in the Federal Register in accordance with GISA.

(H) Hearings. The Commission may hold hearings to receive testimony or oral comments, recommendations, and expressions of concern from the public. The Commission may hold hearings at open meetings or in closed session in accordance with the standards in these By-Laws for closing meetings to the public. The Chair may specify reasonable guidelines and procedures for conducting orderly hearings, such as requirements for submitting requests to testify and written testimony in advance and placing limitations on the number of persons who may testify and the duration of their testimony.

(I) Minutes. The DFO will prepare minutes of each meeting, distribute copies to each Member, and ensure that the Chair certifies the accuracy of all minutes within 90 calendar days of the meeting to which they relate. Minutes of open or closed meetings will be available to the public, subject to the withholding of matters which are exempt from disclosure under applicable law. The minutes will include: (1) the time, date, and place of the Commission meeting; (2) a list of the persons who were present at the place of the meeting; (3) an accurate description of each matter discussed and the resolution, if any, made by the Commission regarding such matter; and (4) a copy of each report or other document received, issued, or approved by the Commission at the meeting.

(J) Public Comment. Subject to Section IV(E), members of the public may, at the determination of the Chair, offer oral comment at any meeting open to the public. The Chair may decide in advance to exclude oral public comment during a meeting, in which case the meeting announcement published in the Federal Register will note that oral comment from the public is excluded and will invite written comment as an alternative. Members of the public may submit written statements to the Commission at any time.

Section V: Voting

(A) In General. When a decision or recommendation of the Commission is required, the Chair shall request or accept a motion for a vote. Any Member, including the Chair, may make a motion for a vote. No second after a proper motion will be required to bring any issue or recommendation to a vote. A quorum must be present when a vote is taken.

(B) Voting Eligibility. Only the Members, including the Chair, may vote on a motion.

(C) Voting Procedures. Votes will ordinarily be taken and tabulated by a show of hands or by voice vote.

Section VI: Subcommittees

The Chair of the Commission, in consultation with the DFO, is authorized to create subcommittees as necessary to support the Commission's work. Subcommittees may not incur costs or expenses without prior written approval of the Chair or the Chair's designee and the DFO. Subcommittees must report directly to the Commission, and must not provide advice or work products directly to the President or any other official or agency.

Section VII: Administrative Support and Funding

Pursuant to Executive Order 13799, to the extent permitted by law, and subject to the availability of appropriations, the General Services Administration shall provide the Commission with such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission, to the extent permitted by law and on a reimbursable basis. However, the President's designee will be responsible for fulfilling the requirements of subsection 6(b) of the FACA.

Section VIII: Records

The records of the Commission and its subcommittees shall be handled in accordance with the Presidential Records Act of 1978 and FACA.

Section IX: Termination

The Commission shall terminate no more than two (2) years from the date of the Executive Order establishing the Commission, unless extended by the President, or thirty (30) days after it presents its final report to the President, whichever occurs first.

Section X: Amendment of By-Laws

Amendments to the By-Laws must conform to the requirements of the Executive Order, charter establishing the Commission, and FACA, and be agreed to by two-thirds of the Members. The DFO must ensure that all Members receive a copy of the proposed amendment before any vote is taken on it.

Presidential Advisory Commission on Election Integrity

July 26, 2017

Office of the Secretary of State of California
The Honorable Alex Padilla, Secretary of State
1500 11th Street
Sacramento, CA 95814

Dear Secretary Padilla,

In my capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity, I wrote to you on June 28, 2017, to request publicly available voter registration records. On July 10, 2017, the Commission staff requested that you delay submitting any records until the U.S. District Court for the District of Columbia ruled on a motion from the Electronic Privacy Information Center that sought to prevent the Commission from receiving the records. On July 24, 2017, the court denied that motion. In light of that decision in the Commission's favor, I write to renew the June 28 request, as well as to answer questions some States raised about the request's scope and the Commission's intent regarding its use of the registration records. I appreciate the cooperation of chief election officials from more than 30 States who have already responded to the June 28 request and either agreed to provide these publicly available records, or are currently evaluating what specific records they may provide in accordance with their State laws.

Like you, I serve as the chief election official of my State. And like you, ensuring the privacy and security of any non-public voter information is a high priority. My June 28 letter only requested information that is already available to the public under the laws of your State, which is information that States regularly provide to political candidates, journalists, and other interested members of the public. As you know, federal law requires the States to maintain certain voter registration information and make it available to the public pursuant to the National Voter Registration Act (NVRA) and the Help America Vote Act (HAVA). The Commission recognizes that State laws differ regarding what specific voter registration information is publicly available.

I want to assure you that the Commission will not publicly release any personally identifiable information regarding any individual voter or any group of voters from the voter registration records you submit. Individuals' voter registration records will be kept confidential and secure throughout the duration of the Commission's existence. Once the Commission's analysis is

complete, the Commission will dispose of the data as permitted by federal law. The only information that will be made public are statistical conclusions drawn from the data, other general observations that may be drawn from the data, and any correspondence that you may send to the Commission in response to the narrative questions enumerated in the June 28 letter. Let me be clear, the Commission will not release any personally identifiable information from voter registration records to the public.

In addition, to address issues raised in recent litigation regarding the data transfer portal, the Commission is offering a new tool for you to transmit data directly to the White House computer system. To securely submit your State's data, please have a member of your staff contact Ron Williams on the Commission's staff at ElectionIntegrityStaff@ovp.eop.gov and provide his or her contact information. Commission staff will then reach out to your point of contact to provide detailed instructions for submitting the data securely.

The Commission will approach all of its work without preconceived conclusions or prejudgments. The Members of this bipartisan Commission are interested in gathering facts and going where those facts lead. We take seriously the Commissions' mission pursuant to Executive Order 13799 to identify those laws, rules, policies, activities, strategies, and practices that either enhance or undermine the integrity of elections processes. I look forward to working with you in the months ahead to advance those objectives.

Sincerely,

Kris W. Kobach
Vice Chair
Presidential Advisory Commission on Election Integrity

CERTIFICATE OF SERVICE

I, Marc Rotenberg, hereby certify that on August 18, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the CM/ECF system:

Daniel Tenny
Email: daniel.tenny@usdoj.gov
U.S. Department of Justice
(DOJ) Civil Division, Appellate Staff
Firm: 202-514-2000
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Mark B. Stern, Attorney
Email: mark.stern@usdoj.gov
U.S. Department of Justice
(DOJ) Civil Division, Appellate Staff
Firm: 202-514-2000
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

/s/ Marc Rotenberg
MARC ROTENBERG