LIST OF EXHIBITS

Exhibit 1	Memorandum Opinion (July 24, 2017)
Exhibit 2	Letter from Kris Kobach, Vice Chair, Presidential Advisory Commission on Election Integrity, to Alex Padilla, Secretary of State, California (July 26, 2017)
Exhibit 3	Exec. Order. No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017)
Exhibit 4	Letter from Kris Kobach, Vice Chair, Presidential Advisory Commission on Election Integrity, to Elaine Marshall, Secretary of State, North Carolina (June 28, 2017)
Exhibit 5	Transcript of Temporary Restraining Order Hearing Before U.S. District Court for the District of Columbia (July 7, 2017).
Exhibit 6	E-mail from Andrew Kossack, Designated Federal Officer, Presidential Advisory Commission on Election Integrity to state election officials (July 10, 2017, 09:40 AM ET)
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Exhibit 8	Order of U.S. District Court for the District of Columbia (July 11, 2017)

Exhibit 1

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]

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[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

Exhibit 2

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

Exhibit 3

Federal Register
Vol. 82, No. 93
Tuesday, May 16, 2017

Presidential Documents

Title 3—

The President

Executive Order 13799 of May 11, 2017

Establishment of Presidential Advisory Commission on Election Integrity

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to promote fair and honest Federal elections, it is hereby ordered as follows:

Section 1. *Establishment*. The Presidential Advisory Commission on Election Integrity (Commission) is hereby established.

Sec. 2. *Membership*. The Vice President shall chair the Commission, which shall be composed of not more than 15 additional members. The President shall appoint the additional members, who shall include individuals with knowledge and experience in elections, election management, election fraud detection, and voter integrity efforts, and any other individuals with knowledge or experience that the President determines to be of value to the Commission. The Vice President may select a Vice Chair of the Commission from among the members appointed by the President.

Sec. 3. *Mission*. 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 the following:

(a) 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;

(b) those laws, rules, policies, activities, strategies, and practices that undermine the American people's confidence in the integrity of the voting processes used in Federal elections; and

(c) 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.

Sec. 4. *Definitions*. For purposes of this order:

(a) The term ''improper voter registration'' means any situation where an individual who does not possess the legal right to vote in a jurisdiction is included as an eligible voter on that jurisdiction's voter list, regardless of the state of mind or intent of such individual.

(b) The term ''improper voting'' means the act of an individual casting a non-provisional ballot in a jurisdiction in which that individual is ineligible to vote, or the act of an individual casting a ballot in multiple jurisdictions, regardless of the state of mind or intent of that individual.

(c) The term ''fraudulent voter registration'' means any situation where an individual knowingly and intentionally takes steps to add ineligible individuals to voter lists.

(d) The term ''fraudulent voting'' means the act of casting a non-provisional ballot or multiple ballots with knowledge that casting the ballot or ballots is illegal.

Sec. 5. *Administration*. The Commission shall hold public meetings and engage with Federal, State, and local officials, and election law experts, as necessary, to carry out its mission. The Commission shall be informed by, and shall strive to avoid duplicating, the efforts of existing government entities. The Commission shall have staff to provide support for its functions.

Sec. 6. *Termination*. The Commission shall terminate 30 days after it submits its report to the President.

Sec. 7. *General Provisions*. (a) 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 on a reimbursable basis.

(b) Relevant executive departments and agencies shall endeavor to cooperate with the Commission.

(c) Insofar as the Federal Advisory Committee Act, as amended (5 U.S.C. App.) (the ''Act''), may apply to the Commission, any functions of the President under that Act, except for those in section 6 of the Act, shall be performed by the Administrator of General Services.

(d) Members of the Commission shall serve without any additional compensation for their work on the Commission, but shall be allowed travel expenses, including per diem in lieu of subsistence, to the extent permitted by law for persons serving intermittently in the Government service (5 U.S.C. 5701–5707).

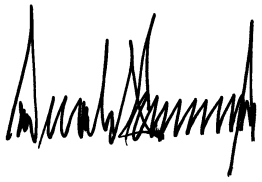
(e) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(f) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(g) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,

May 11, 2017.

[FR Doc. 2017–10003

Filed 5–15–17; 8:45 am]

Billing code 3295–F7–P

Exhibit 4

Presidential Advisory Commission on Election Integrity

June 28, 2017

The Honorable Elaine Marshall
Secretary of State
PO Box 29622
Raleigh, NC 27626-0622

Dear Secretary Marshall,

I serve as the Vice Chair for the Presidential Advisory Commission on Election Integrity ("Commission"), which was formed pursuant to Executive Order 13799 of May 11, 2017. The Commission is charged with studying the registration and voting processes used in federal elections and submitting a report to the President of the United States that identifies laws, rules, policies, activities, strategies, and practices that enhance or undermine the American people's confidence in the integrity of federal elections processes.

As the Commission begins it work, I invite you to contribute your views and recommendations throughout this process. In particular:

1. What changes, if any, to federal election laws would you recommend to enhance the integrity of federal elections?
2. How can the Commission support state and local election administrators with regard to information technology security and vulnerabilities?
3. What laws, policies, or other issues hinder your ability to ensure the integrity of elections you administer?
4. What evidence or information do you have regarding instances of voter fraud or registration fraud in your state?
5. What convictions for election-related crimes have occurred in your state since the November 2000 federal election?
6. What recommendations do you have for preventing voter intimidation or disenfranchisement?
7. What other issues do you believe the Commission should consider?

In addition, in order for the Commission to fully analyze vulnerabilities and issues related to voter registration and voting, I am requesting that you provide to the Commission the publicly-available voter roll data for North Carolina, 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.

You may 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. You can access the SAFE site at https://safe.amrdec.army.mil/safe/Welcome.aspx. We would appreciate a response by July 14, 2017. Please be aware that any documents that are submitted to the full Commission will also be made available to the public. If you have any questions, please contact Commission staff at the same email address.

On behalf of my fellow commissioners, I also want to acknowledge your important leadership role in administering the elections within your state and the importance of state-level authority in our federalist system. It is crucial for the Commission to consider your input as it collects data and identifies areas of opportunity to increase the integrity of our election systems.

I look forward to hearing from you and working with you in the months ahead.

Sincerely,

Kris W. Kobach
Vice Chair
Presidential Advisory Commission on Election Integrity

Exhibit 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff,

vs. 1:17-cv-1320

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; MICHAEL PENCE, in his official capacity as 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; EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES; OFFICE OF THE VICE PRESIDENT OF THE UNITED STATES,

Defendants.

TRANSCRIPT OF TEMPORARY RESTRAINING ORDER

BEFORE THE HONORABLE COLLEEN KOLLAR-KOTELLY

UNITED STATES DISTRICT JUDGE

JULY 7, 2017

Court Reporter:
Richard D. Ehrlich, RMR, CRR
Official Court Reporter
United States District Court
333 Constitution Avenue, NW
Washington, DC 20001
(202) 354-3269

Proceedings reported by stenotype.

Transcript produced by computer-aided transcription.

A P P E A R A N C E S

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Joseph.Borson@usdoj.gov

THE COURT: Good afternoon, everyone.

All right. Go ahead and call.

THE CLERK: Civil Case 17-1320, *Electronic Privacy Information Center vs. Presidential Advisory Commission On Election Integrity, et al.*

Counsel, would you please come forward and identify yourself for the record?

MR. ROTENBERG: Your Honor, good afternoon. My name is Marc Rotenberg. I am counsel for the Electronic Privacy Information Center. With me is Alan Butler, also counsel for EPIC.

THE COURT: All right. Good afternoon.

MS. SHAPIRO: Good afternoon, Your Honor. I'm Elizabeth Shapiro from the Department of Justice, and with me at counsel's table is Joseph Borson and Carol Federighi, also from the Department of Justice.

THE COURT: All right. Thank you.

All right. I reviewed the motion for the temporary restraining order, the opposition, or reply, a sur-reply, and a very recently sur sur-reply that I just received.

So I have to say that the last document I've received I've looked at very quickly but

have not been able to look at everything, but I did look at some of the exhibits, et cetera.

So, obviously, I will need to take a look at that a little bit more. I've also reviewed the pertinent case law.

I'm going to start by stating my overview of what I consider a framework in very summary forms what I would consider in informing my decision when I make it. I will tell you I'm not making it from the bench today. I do need some information, and that's part of the reason for the hearing.

So I'm going to start with the standing arguments as I understand them in looking at the case law. I'm going to start with informational standing or injury and the general principles that you start by looking at the statute that's at issue that requires a disclosure of information. It would appear from the cases that there would be no informational standing if the statute has a prerequisite to the disclosure of the information. That has not yet happened. There would be no informational injury because the Government has not yet been obligated to disclose the information; however, if you

consider the E-Government Act, which is the statute at issue in this case, it requires that there be a Privacy Impact Assessment and disclosure of that assessment before the, in this case, the election data is collected. So it would appear that it could apply in this particular case.

The Commission moved forward in collecting the electronic -- the election data, rather, where the statute requires an impact statement regarding the collection, and it requires also a disclosure of that impact statement before the collection of the data.

So I think this case fits more into that category when you look at the E-Government Act itself which requires all of this before you start collecting.

So we're talking about -- in this there's been no impact statement done or disclosed prior to collecting the data at issue, which the E-Government Act requires, and the injury here would be the nondisclosure of the impact statement prior to collecting the election data.

In terms of organizational standing, there are at least two theories at issue. One is that

the -- which the plaintiff argues that their members are injured or will be injured if the privacy impact statement is not done. It's not clear to me what harm there would be to the individual members, what they would suffer where the Commission is collecting, according to them, only publicly available information and would only publish in an anonymous form. So I need more information relating to the membership and harm.

Looking at another theory, which is in the PETA case, which is a DC circuit case, the DC circuit recognized a somewhat unique concept of organizational standing; namely, that an organization has standing if it can show, quote, "A concrete and demonstrable injury to its activities mindful that under our precedent a mere setback to abstract social interest is not sufficient."

This would mean that EPIC has standing if it can show that its public interest activities -- I'm assuming educating the public regarding privacy -- will be injured by the defendants' failing to abide by the E-Government Act.

So the injury here, it's argued, would be its public interest activities, educating the public, or whatever, and they would not have the information from the Privacy Impact Assessment prior to the collection of the electronic data.

So the failure would be to provide EPIC important information that they argue vital to its public interest activities. I need more information about this one as well.

So those are, in very summary forms, what I see as the arguments and the framework on which to make a decision on obviously the initial decision which is going to be standing.

Now, I have a series of questions that I'd like to ask, and at the end of all of the questions, I'll give you an opportunity to respond to my overview, to my two views of the informational injury and the organizational.

So I'm going to start with the plaintiff. So why don't you come on up and let me ask a couple of questions here.

So I'm going to start with the members. What concrete harms will EPIC members suffer if their publicly available voter information is collected and publicized by defendants in an

anonymous form?

MR. ROTENBERG: Okay. Thank you, Your Honor. Let me begin by saying that EPIC will take the position that, as a matter of law, none of the information sought by the Commission is, in fact, publicly available to the Commission. I will explain that I believe it is one of the questions you set out in your hearing for today.

The information that is sought from the EPIC members is information that is currently protected under state privacy law. Those state privacy laws limit the collection and use of state voter record information to particular parties and for particular purposes. In our view, the Commission falls outside the bounds of almost all of those exceptions found in the state privacy law for the release of the information that the Commission seeks. That's the basis upon which we say that there is nothing as a matter of law that's publicly available to the Commission given the request in the June 28th letter.

THE COURT: Well, it seemed to me -- and I only got to look at the chart very quickly as one of the exhibits, but it looked as if a

number of states were providing some; a number of states were indicating that they couldn't under their state statutes. There may be some federal statutes relating to Social Security. The Commission has argued that it's only publicly available that they're seeking, and if a state has statutes that would not allow it to produce it, then they are not expecting to get the information.

MR. ROTENBERG: Right. We understand that, Your Honor, and we've attached by way of example the response from the Secretary of State of the State of Georgia, which was similar to the responses from many of the states in which the state secretary says simply much of the information that is sought by the Commission we could not release.

But then you see the state secretary goes on to suggest that there are additional conditions prior to the disclosure. So, for example, the method that has been proposed by the Commission to receive the voter data from the State of Georgia, even that could be permissibly disclosed by the State, the State would not accept, and the State said we would

have to find a different technique, one that is password encrypted and authenticated to permit the release of the personal data; moreover, the State of Georgia also said to the Commission there are fees associated when requests are made for the release of state voter data.

The June 28th letter that was sent to the 50 state secretaries provided no indication that the Commission was prepared to pay any of the fees associated with a release of the data it was seeking.

So you see, there are three different ways to understand how it is that when the Commission approaches the State and asks for so-called publicly available information, the state secretary properly responds under the terms of this letter, "There's, in fact, nothing we can provide to you."

THE COURT: So your idea would be that if they had done an impact -- Privacy Impact Assessment, they would've figured this all out?

MR. ROTENBERG: Well, Your Honor, that's the second category of our objection to the Commission's request. Not only do we believe that the states could not release the

information to the Commission, we further believe that the Commission could not receive the information from the states, and this has to do with the obligations that fall on the Commission by virtue of being within the Executive Office of the President and subject to the Federal Advisory Committee Act and the E-Government Act to undertake certain steps before it could request any type of personal data. It was expected to undertake the Privacy Impact Assessment, which may very well have revealed that the method of transmission proposed in this instance was simply inadequate.

So you see, in requesting the so-called publicly available information, the Commission actually committed two flaws. In the first instance, it did not comply with the requests of the 50 states.

In the second instance, it did not fulfill its own obligations to safeguard the information it was intending to collect.

THE COURT: Okay. But let's get -- that one gets a little bit more to the merits it seems to me.

MR. ROTENBERG: Yes.

THE COURT: Let me get back to sort of the standing question. I appreciate the information.

What concrete harms -- I'm talking about this is -- the EPIC members would suffer if -- assuming that there is any publicly available voter information that can actually be collected. I believe that they've indicated -- I mean, if they're not publicly available, they're not going to receive it, and you've indicated that -- I don't know whether anybody has actually sent anything or whether any of the states can say that they can send it. They're meeting all of the requirements. Do you know?

MR. ROTENBERG: Well, let me say based on the declaration of Mr. Kobach on July 5th, two days ago, the Commission had not received any data from any of the states.

So, at this moment, we're relying on that declaration as to the current status regarding the transfer of the data that's being sought.

But to your question, Your Honor, let's understand two different types of information that the State is seeking. So by the terms of the letter, they ask, for example, for the last

four digits of the Social Security number. Members of EPIC's voter information may well contain the Social Security number. It is often used in the state administration of election systems to avoid duplication and reduce the risk of fraud, but it is not the case that information is generally made available to the public. If it were made available to the public, the last four digits of the Social Security number have been identified by the Department of Justice and consumer protection agencies as contributing to the commission of identity theft and financial fraud because those last four digits are the default passwords for many commercial services such as cell phone or online banking.

So you see, the Commission has asked the states to turn over particular personal information the states would not routinely make available concerning EPIC members that if it were made public could lead to identity theft.

THE COURT: But that assumes -- I think they've indicated, however, that publicly available -- they've left it to the states to figure out, or whatever statutes. So if there's

a federal statute or some other way that they should not be giving out Social Security numbers, or the last four digits of Social Security numbers, the expectation would be that the states would not provide it.

MR. ROTENBERG: I understand your point, Your Honor, but I would add also, I frankly find it striking that a commission on election integrity would make such a broad request to the states for such detailed personal information and then put it back on the states to determine which information the states may lawfully release.

Let me take a simple category. Home addresses. So there is agreement, for example, in the report of the National Conference of State Legislatures, the 2016 report which we've appended to our filing, that surveys the privacy laws of all 50 states. And it says, 29 states, as a general matter, will give out home address -- name and address, I should say precisely, name and address information.

And you could well say, "Well, that appears to be publicly available information. Why can't they just, you know, send back the name and

address information?"

And then you read more closely, and you see that, in fact, even though that information may be made available, many people in the states also have the right to restrict the disclosure of name and address information.

Texas, in fact, restricts the disclosure of the name and address information from the judiciary.

So none of these categories lend themselves to an easy release of state data.

THE COURT: Well, it sounds as if there's not going to be any basis for them to get anything. So your request to hold it back, if they're not going to give it, doesn't seem to work.

I'm still trying to get in terms -- what are the EPIC -- let me ask it this way: Who do you consider the EPIC members? Their advisory board. What does the advisory board do? I mean, the members that you're talking about, the ones you attached were advisory board members and also voters. So what are the rights and responsibilities of EPIC's advisory board members?

MR. ROTENBERG: Okay. So we have approximately 100 members of our advisory board. They are leading experts in law, technology, and public policy that contribute to the support of the organization. They participate in the work of the organization. They help select award recipients for the organization.

THE COURT: Do they pay any kind of dues?

MR. ROTENBERG: There is no formal dues requirement, but most of the members do contribute in some manner to the work of the organization. And in this particular matter, 30 of our 100 members signed a statement to the National Association of Secretaries of State asking state officials not to release the voter data to the Commission.

So we are, in effect, also representing their interest when we appear before --

THE COURT: Who is their interest?

MR. ROTENBERG: I'm sorry?

THE COURT: Who is their interest?

MR. ROTENBERG: Those members of our advisory board who are actively participating and expressing their opposition to the data collection.

THE COURT: Okay. Do they control the activities of the organization?

MR. ROTENBERG: They do not directly control the activities of the organization. There is a separate board of directors, but it is not uncommon for an organization such as EPIC to have this structure, and the members of the advisory board actively participate in the program activities and the direction and selection of matters that the organization pursues.

THE COURT: So exactly what -- the board of directors runs the organization?

MR. ROTENBERG: Yes, that's correct.

THE COURT: And the advisory board advises on what matters to get involved with?

MR. ROTENBERG: Yes, Your Honor, and actively participates in those activities and provides financial support.

THE COURT: But it's a voluntary financial support?

MR. ROTENBERG: That's correct. But they could not -- to be clear on this point, they could not be a member of the advisory board unless they formally accepted that

responsibility, and they may choose to withdraw their participation as an advisory board member as well.

THE COURT: Accepted what responsibility?

MR. ROTENBERG: Participating in the work of the organization.

THE COURT: Okay.

MR. ROTENBERG: Contributing to its activities.

THE COURT: And the contribution you're talking about is contributing in terms of if you decide to take on a particular task such as this one, this particular case, that they would contribute to providing information, pursuing it? Is that what you're saying?

MR. ROTENBERG: Financial support including personal donations are routinely made by members of the advisory board, their time and their expertise.

THE COURT: All right. So what informational harms will EPIC suffer if the defendants don't comply with the E-Government Act, which requires disclosure of this Privacy Impact Assessment to be done and then disclosed before the collection of the data?

Again, I'm talking about EPIC in the context of either membership or otherwise.

MR. ROTENBERG: Right. Well, apart from the individual harm to our members, also as an organization that was specifically established to focus public attention on emerging privacy issues, and has been involved in the voter privacy matter for almost 20 years, this particular controversy directly impacts our mission. This is not a speculative type of arrangement. This is a circumstance where we have for many years sought to advance an interest in voter privacy here in the United States. The actions by the Commission have required us to undertake a number of activities to work with citizen organizations, to discuss with media outlets the impact of the Commission's activity upon the public. That is an educational function which we would not be doing at this point to the extent that we are but for the Commission's request to gather state voter record information.

THE COURT: So as you've described it, I take it that's what you would consider your public interest activities?

MR. ROTENBERG: Well, yes. I mean, there is, in fact, also related litigation. We are seeking under the Open Government Act to obtain information about the Commission's activity. That is also activity undertaken, a cost to the organization, and in response to the Commission's act.

THE COURT: All right. And in terms of educating the public regarding data privacy or other activities, do you use routinely information from the Government?

MR. ROTENBERG: Yes, we do, and I should point out also central to our educational activity is the maintenance of one of the most popular websites in the world on privacy issues, which is simply EPIC.org. So for the last week, as a consequence of the Commission's act, we put aside the other work on our website and focused solely on providing public information related to this current controversy.

So there are two pages of EPIC.org with extensive information about the Commission as well as this litigation.

THE COURT: You started off the discussion by indicating all of the difficulties and

barriers there would be to provide -- having the states provide the voter registration data to the Commission based on various statutes, regulations, or whatever. I take it you're really getting to the merits that this is not publicly available for the most part? Is that the point of this --

MR. ROTENBERG: Correct, Your Honor. And we thought it was important to state that at the outset. We understood in the questions that you had posed to the parties for today's hearing, and certainly Mr. Kobach in his letter to the state secretaries, uses this phrase, "publicly available." He places a great deal of weight on it. But, in fact, we could not find the phrase in any of the state voter privacy laws that we looked at. The states talk about public records in some instances, or they talk about exemptions which permit the release of voter record information. But we thought it was very important to make clear that this phrase is actually not a phrase that helps us understand the permissible circumstances under which the data may be released.

THE COURT: Okay. All right. I have some

questions for the defendant. I'll get back to you.

MR. ROTENBERG: Okay. Thank you.

THE COURT: So my first question is: What's the authority, if any, relied on by the Commission to systematically collect this voter registration information?

I didn't see anything in the materials establishing or anything else that talked about it.

MS. SHAPIRO: Well, I think the main authority is the executive order which sets out the mission of the Commission and the charter based on the executive order. And in order to carry out the work that is defined in those documents, the Commission needs to collect and analyze information so that it can best advise the president in the report that it's charged with creating.

THE COURT: But you would agree that there's nothing in the executive order that suggests that you -- that this data should be collected?

MS. SHAPIRO: There's nothing specific about that, but I don't believe that authority

would be required because it's not a demand for information. It's a request, and the Commission is not empowered to enforce that. It doesn't have the ability to say you must do it. So it's simply a request to the states and nothing more than that.

THE COURT: Do you want to respond to the issue in terms of what he brought up initially relating to the fact that, as it appears that most states, if not all of them, have restrictions, and that there's really nothing that's totally publicly available about the request?

MS. SHAPIRO: So I think if I'm understanding correctly, I think what EPIC is saying is that they don't have standing because the way I understand what they're saying is that the states are not going to provide the information because the information is protected under state law, in which case there won't be information going to the Commission. So there can't possibly be any injury because if the information is not going to the Commission, there's no injury. There's no Article III standing.

THE COURT: Are you talking about in the context of the EPIC injury to EPIC members? Is that what you're talking about?

MS. SHAPIRO: EPIC members.

I also wanted to address the alleged organizational injury because I think that they fail standing on numerous levels. Not only do the members not have standing because their states are not providing the information, but, organizationally, everything that EPIC just discussed now relates to its advocacy mission. And I think the cases are quite clear that simply choosing where to allocate resources when advocating --

THE COURT: But that's only one piece of what he talked about. I mean, if you look at the PETA case, it certainly is -- the argument would be its public interest activities, which in this case is educating the public is that by not having the information relating to the assessment, the impact assessment, they're not in a position to put that information out.

So, I mean -- leaving aside allocating different things. The questions I asked really related to what was the role of the members in

order to make a decision as to whether, you know, the first theory of organizational standing based on membership as opposed to the PETA case, which I think is premised on activities, not on membership.

MS. SHAPIRO: Correct. Though the PETA case identified a concrete injury to the organization, a perceptible injury they called it, because they were not -- in that case, there was agency -- some agency inaction that prevented the organization from filing complaints with the agency. So there was a perceptible injury to the organization.

Here you have an organization whose mission is advocacy. They may be very, very interested in privacy, and they may be expert --

THE COURT: Advocacy but also in terms of informing the public, if I understood. The educational aspect would be informing the public of this information, and they're not getting it.

MS. SHAPIRO: Correct, but the information doesn't exist, and I guess that goes to the informational standing because I believe that the cases require that the information actually be in existence in order to --

THE COURT: You have to look at the statute first. And if you look at the statute, the E-Government Act requires that before the collection of the data take place, that you would've done this impact statement, which is different than the cases that have indicated where the statute requires. What I said is that the prerequisite to the disclosure hadn't happened in the other case, which I think is -- I can't remember which case it is.

MS. SHAPIRO: It was Friends of Animals, I think.

THE COURT: Yeah, in terms of that one, which is not what we're talking about.

E-Government Act doesn't require -- it requires it up front before you would've collected data.

MS. SHAPIRO: Yes. But I think, then, it's a question of the Commission not being subject to the E-Government. So it has no requirement to create that --

THE COURT: That's why we're getting back to some of these standing things.

MS. SHAPIRO: Right.

THE COURT: So let's get back to some of

the other questions that I had.

So your view of it is it's implicit in the executive order that they can collect whatever they think is important for their mission?

MS. SHAPIRO: Right. And I would refer back to the Mayer case, which was the Reagan Task Force on Deregulation that was addressed in *Mayer v. Bush*, a similar kind of commission chaired by the vice president also gathering information in order to make recommendations.

It's not uncommon to think that in the ordinary task of preparing a report and studying an issue, that you would need information.

THE COURT: Okay. I just was curious as to whether there was something I had missed.

What services have or will be provided by GSA to the Commission? Because I notice that the executive order says that, "GSA shall provide the Commission with administrative services, funds, facilities, staff, equipment, other support services as be necessary."

So have they -- is the Commission fully operational? Have they set up an office? Where is it located? Are you using any GSA services?

MS. SHAPIRO: So the Commission is in its

infancy. There has not yet been a meeting. GSA is tasked with specific limited administrative support, like arranging travel for the members, maybe assistance with booking meeting locations. Mostly logistical. That's what's envisioned at this stage.

THE COURT: Okay. Is that what you're expecting it to do in the future?

MS. SHAPIRO: Yes. Of course, the Commission is not really up and running, you know, to any great extent.

THE COURT: Where is it located at this point? Does it have an office?

MS. SHAPIRO: Well, I don't know that it has dedicated office space. I believe it's the Office of the Vice President, since the vice president is the chair of the Committee.

THE COURT: All right. What has been or will be the involvement of Commissioner Christy McCormick and/or the Election Assistance Commission in the decision-making process of the Commission since she heads the Election Assistance Commission?

MS. SHAPIRO: She's a member of the Commission but not there as part of her EAC

role. It's completely distinct from that. She's there as just a member of the Commission due to her expertise, and she would participate in the decision-making and the deliberations to the extent she's present at the meetings.

THE COURT: So there's not going to be any role or any information provided or any role by Election Assistance Commission? Is that what you're saying?

MS. SHAPIRO: Well, she would not be there as part of -- in her capacity -- in that capacity as --

THE COURT: Well, that's not quite what I asked.

MS. SHAPIRO: Okay.

THE COURT: What I asked is -- she's maybe not as the head assigned to it like the state secretary of a particular state, but my question is whether the Election Assistance Commission is going to provide assistance to the Commission?

So you have her -- I mean, there's cases that talk about dual role of being in sort of a private in the government.

MS. SHAPIRO: Right. I'm not aware that they would be providing any assistance. I can

double-check that for the Court, but my understanding is that they would not be providing assistance, and she is on the board simply as a member of the Commission.

THE COURT: All right. The executive order talks about other federal agencies will, quote, "Cooperate with the Commission."

Any other federal agencies currently cooperating with the Commission?

MS. SHAPIRO: No. Right now there are no other federal members of the Commission. I don't know of any other federal agencies working with the Commission.

THE COURT: So let me move into the website in terms of which -- it appears to be an Army website?

MS. SHAPIRO: Yes.

THE COURT: So that's not going to be -- that doesn't involve a federal agency?

MS. SHAPIRO: Well, it's a site that exists to transfer large data sites, but that is more of an IT tool. It's not -- it doesn't involve their -- the military is not engaged in the work of the Commission in any substantive way.

THE COURT: Let me ask it this way. Who

operates the website that's named in the Commission's request? Is that a component of -- it looks -- they did an impact statement themselves about the website, the DOD did, which is obviously a federal agency, or will be considered under the definition.

So who is going to actually operate the website? Somebody has to. I assume it's not the Commission. Is it the DOD?

MS. SHAPIRO: So the way I understand it works is that the user uploads the data, and then it's downloaded by the Commission; that DOD doesn't play a role in that other than maintaining the site. They don't store the data. They don't archive the data. It deletes after two weeks I believe is the maximum amount of time.

THE COURT: So say this again. They maintain it?

MS. SHAPIRO: Well, it's their site.

THE COURT: Right. So they receive the data and maintain it for the two weeks?

MS. SHAPIRO: Well, the person uploading the data can set the time that --

THE COURT: And who is uploading the data?

MS. SHAPIRO: The states, for example. If they want to upload the data to the site, they can set an expiration date of -- it must be less than two weeks. So a maximum of two weeks that it can remain on the server.

THE COURT: So DOD, according to you, has no role?

MS. SHAPIRO: That's right, other than, of course, that it runs the SAFE system.

I did want to address, since we're talking about that system, the declaration that the plaintiff put in about getting insecure or error messages. If you read through the website for SAFE itself, it's clear that it's tested and certified to work with Windows XP and Microsoft Explorer. So the browsers that EPIC's declarant used were Google and Netscape, I believe, not Explorer. If you plug it into Explorer, it works just fine. And that's in two different places on the website where it makes that clear, that that's the browser that you need to use.

I have actually compiled some of the pertinent information from the SAFE site that I can provide to the Court and a copy for the plaintiff as well, if it's helpful.

THE COURT: Certainly.

So let me see if I understand it. The computer system that's going to operate in terms of this information, you seem to be saying that the website by DOD is sort of like a conduit, shall we say --

MS. SHAPIRO: Yes.

THE COURT: -- to a system of your own.

So you're going to have your own database at the Commission?

MS. SHAPIRO: So I don't know exactly what the Commission -- it will be stored in the White House email, or the White House servers. So it will be on the White House system. But what the Commission is going to do by way of using the data and compiling the data, I can't speak to that yet.

THE COURT: So you're assume it's either going to be the Commission or the White House that would own and operate the computer system on which the data is going to be stored?

MS. SHAPIRO: Yes. And the email address that was provided in the letter to the states is a White House email address that's maintained by the White House, the same system that supports

the president and the vice president and secures their communications.

THE COURT: So it gets on the DOD. Then how is it going to be transferred to the White House computer system? Who is doing that?

MS. SHAPIRO: So my understanding is that the Commission then downloads the information from SAFE, and then it would be kept in the White House systems.

THE COURT: So they have an IT staff that's expected to do this?

MS. SHAPIRO: Well, I don't know how they're using or going to use IT staff, but the Office of Administration, which serves the Office of the President generally is also within the Executive Office of the President and maintains the White House systems.

THE COURT: You also -- I believe it was a letter that gave an email address. Who owns and operates the computer system associated with the email?

MS. SHAPIRO: So that's the White House -- the ovp.gov address.

THE COURT: So this will be on the White House --

MS. SHAPIRO: Yeah.

THE COURT: And so any other agencies, federal agencies provide support services for the White House's computer system?

MS. SHAPIRO: Well, I think that's a complicated question simply because some of the details about how the -- the mechanics of the White House IT is something that may not be appropriate to say in a public setting because --

THE COURT: Well, let me just put it this way. Obviously, I'm trying to see if you're getting any -- your argument is E-Government Act doesn't apply because there's no federal agency that's involved.

MS. SHAPIRO: Yes.

THE COURT: So I'm exploring whether there actually is a federal agency that's involved.

MS. SHAPIRO: I understand, but I think the test is not necessarily to look to see if there's one member or one little piece of support.

THE COURT: No. I'm just trying to see in terms of how the data would be -- would come, be collected, stored, whether you're doing a

separate database or how you're doing this. 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.

THE COURT: And then you also talked about at some point, although it would be allegedly anonymous, but what system is going to be used to publish the voter information?

MS. SHAPIRO: Well, one publication I think is unclear at this point because it's not clear what would be published. I think Mr. Kobach made clear that the raw data would not be published. That's just -- we don't know at this point.

THE COURT: So do you know who would be making it anonymous? Who would be involved in doing this?

I guess the other question is: Is the White House server in a position to take -- I mean, this is a lot of information. Assuming

all these states actually provided you the information, are they going to actually handle it?

MS. SHAPIRO: I assume --

THE COURT: I could see DOD handling it, but do you know?

MS. SHAPIRO: I don't know, but I'm assuming they have a way to handle it.

THE COURT: All right. I guess I'll start with you and then work back to EPIC, but this is sort of your best arguments on irreparable harm.

How are the defendants harmed if they're required to conduct and disclose a privacy assessment before collecting voter information? Is there any harm to you to do this before you had collected it?

MS. SHAPIRO: Well, yes. I mean, because -- our position is that they're not subject to the E-Government Act because they're not an agency, then we would be required to do something that we're not required to do. So I think there's inherent harm there.

And, you know, there's also a certain amount of -- you know, the privacy assessment is normally done by specific officers and agencies.

So it's set up in a way that doesn't fit very well to the Commission. It talks about chief information officers and positions that are appointed as part of the E-Government Act in agencies. But because the Commission is not an agency, it doesn't have those things. So there would be a certain amount of figuring out what to do with that.

THE COURT: Well, I was provided -- I didn't get a chance to look at all of the exhibits, but it looks as if the Government, or DOD, has already done a -- pursuant to the E-Gov Act -- a privacy impact statement for the website issued by DOD that you plan on having all of this data at least be maintained initially?

MS. SHAPIRO: We got the exhibits 30 minutes before we came here. So I haven't studied them, but that's what it appears to be. But DOD is an agency but the Commission is not.

THE COURT: Okay. And any public interest in foregoing this privacy assessment?

MS. SHAPIRO: I'm sorry. Public interest?

THE COURT: Any public interest? I mean, it's one of the things you have to weigh.

What's your public interest in not doing it?

MS. SHAPIRO: Well, I think --

THE COURT: This is around doing a privacy assessment.

MS. SHAPIRO: I understand.

I think initially plaintiff is seeking extraordinary emergency relief. So, really, the burden is on them, but I think --

THE COURT: I'm going to ask them the same thing, but I'm just asking you. I mean, balancing public interest, is there anything in your perspective?

MS. SHAPIRO: I mean, I think the public interest is that there's, you know, been a priority that there's important work to be done by this commission, and that it should be permitted to go forward, and, you know, do the mission that the president thinks is important to have done. That's in the public interest, to be able to carry on that work.

So, you know, I think there's a public interest in proceeding versus we believe no public interest in the contrary because there's no standing and because there's not an agency involved that's required.

THE COURT: Then, obviously, I have to find standing before we got to this issue.

MS. SHAPIRO: Yes.

THE COURT: I just wanted to see what your answer would be.

Okay. Thank you.

MS. SHAPIRO: I wanted to say one more thing before I forgot.

THE COURT: Certainly.

MS. SHAPIRO: When Mr. Kobach filed his declaration, his first declaration I think on July 5th, we said that no information had come into the site. But yesterday the State of Arkansas did transmit information, and it has not been downloaded. So it hasn't been accessed, but it is in the SAFE site.

THE COURT: So it's on the DOD site?

MS. SHAPIRO: Yes.

THE COURT: That you called a SAFE site.

MS. SHAPIRO: Yes.

THE COURT: Okay.

MS. SHAPIRO: Would Your Honor want a copy?

THE COURT: Yes. If you pass it up to Ms. Patterson, I'd appreciate it, and give it to plaintiffs.

MS. SHAPIRO: Your Honor, I have one more handout, if Your Honor wants it, that relates to standing. It's simply a copy of a decision from 2014, from Judge Amy Berman Jackson that involves EPIC. It's called *EPIC vs. Department of Education,* and it addresses the organizational standing really in very closely analogous circumstances.

THE COURT: Yeah. I'm familiar with the case. I know what it is.

MS. SHAPIRO: I know you are. Okay.

THE COURT: Thank you.

But let me just ask one last question. Since DOD is maintaining -- their website is maintaining the data, why shouldn't they do the assessment? They're a federal agency, and they're basically involved in at least maintaining of the data that's being collected. So why shouldn't they, as a federal agency, do an impact statement relating to the data that they have on their website?

MS. SHAPIRO: So I understand that they've done an assessment for the site, and it can't --

THE COURT: But for the site in general.

MS. SHAPIRO: Right. But it can't be the

case that when you have a sharing site like this, it acts as a conduit, that every time information is uploaded, that you have to have a separate Privacy Impact Assessment.

THE COURT: I don't know that that's necessarily true. I mean, it seems to me -- I'll have to go back and look at the E-Gov Act, but it seems to me if you were dealing with issues of data and privacy, certainly election registration data may be different than some other data in terms of what it would -- what would be done, why they wouldn't be obliged to do one.

MS. SHAPIRO: Because there are very specific requirements. Even in the E-Government Act, they have to be collecting the information. And I think when they are passive --

THE COURT: Well, aren't they collecting it?

MS. SHAPIRO: Well, no, because they're a passive website that -- I mean, a passive site that people upload the information to. You know, DOD is not monitoring what information is being uploaded. It is a way to be able to send large data sets.

THE COURT: But that's true of anything that they use this website for, but they went ahead and did one.

MS. SHAPIRO: They did one for the system.

THE COURT: Right. But, obviously, they thought that it was appropriate to do it. I don't understand the distinction.

MS. SHAPIRO: So I think the distinction is to do it for the security of the site. Writ large is one thing, but to do it every time a user anywhere in the country happens to upload information into it, I don't think it's either required or would be rational.

THE COURT: Well, it may depend on what the information is that's, you know, that's being collected and maintained on the website.

MS. SHAPIRO: I don't think DOD would even know that.

THE COURT: I mean, it may be that they would say their impact statement says there isn't anything further to be said. It's safe as we said before. But I'm just saying, I don't understand why you wouldn't do it if the information is of this type of nature, the nature of this voting registration information.

MS. SHAPIRO: DOD is not monitoring the substance of the information that's coming in. They're not going to know people are uploading different data sets.

THE COURT: Well, it does make a difference. The information is going to sit there. Certainly people could potentially have access to it. It could be hacked or whatever else. Why would you not -- why would they not be required to do one?

MS. SHAPIRO: I think for the reason that the operation of the system, one doesn't fit within the definition of when they're required to do one because they're not collecting as the passive site, but also the practicality of any time somebody uploads information to that site, be it for a day or for the maximum of two weeks, DOD is not monitoring that. They don't know that. They don't know what's in the data. It's a secure passageway.

So the idea --

THE COURT: So are you relying on the E-Gov Act to say that they would not need to do it based on their role in this particular case? I'm trying to figure out what you're relying on.

MS. SHAPIRO: Well, I think that's part of it, yes. So we haven't -- that issue was not before us, so we haven't fully analyzed the requirements of the E-Government Act as applied to DOD, but it does require some active collection.

THE COURT: Okay. All right.

MS. SHAPIRO: Thank you.

THE COURT: Thank you.

MR. ROTENBERG: Your Honor, if I may. I think I have the precise answer to the question you just posed to counsel.

THE COURT: All right.

MR. ROTENBERG: We attached in our supplementary motion this afternoon Exhibit 5, which is, in fact, the Privacy Impact Assessment for the SAFE system, and the very first question asks regarding who the information will be received from. The first box, which is "yes" --

THE COURT: Hold on one second. This is the very last one you put in the file, right?

MR. ROTENBERG: Yes. This is the Notice of Filing of Supplemental Exhibits --

THE COURT: Okay.

MR. ROTENBERG: -- relevant to the

questions raised in the Court's order.

THE COURT: I'm sorry. And you're looking at -- which exhibit number is it?

MR. ROTENBERG: We're looking at Exhibit 5, the very first page.

THE COURT: Okay. I see it.

MR. ROTENBERG: And do you see, there are different scenarios. In fact, the DOD is very much aware of who makes use of the website. The first option refers to receiving information from members of the general public. That box is not checked. It's the subsequent box which says from federal personnel and/or federal contractors. That box is checked. And state secretaries would not qualify on that basis.

Moreover, if I may point out, these are pages 32 and 33 in the ECF, the PIA sets out a fairly narrow set of circumstances under which it may be used for the transfer of official information. And as to the question do individuals have the opportunities to object, the basis of saying "yes" is by not sending personally identifiable information through the transfer system.

So we would say by the terms of the

agencies' own Privacy Impact Assessment, it is not suitable for the purpose that the Commission proposes.

But if I may make one other point that is also relevant to this. We actually don't believe that the Commission had the authority to turn to the military agency to receive the information because if you look at both the executive order and the Commission's charter, it is the GAO that is described as providing not only administrative services but also --

THE COURT: GAO or GSA?

MR. ROTENBERG: GSA. Thank you.

It is the GSA that provides not simply administrative services, this is not just, you know, arranging travel plans, this is also facilities and equipment. Those words appear in the president's executive order. And in the charter implementing the work of the Commission, paragraph 6 describes, quote, "The agency responsible for providing support."

And in that paragraph, these terms "administrative services, facilities, and equipment" appear as well.

So it's entirely unclear to us upon what

legal basis the vice chair had to direct the state secretaries of state to send this information to the proposed military website. And this, by the way, is entirely apart from the factual concerns that have been raised about the adequacy of the security techniques that are deployed with this site for personal information.

THE COURT: All right. Let me get back, then, in terms of looking at the -- back to the standing issues in terms of -- you've indicated -- if you want to respond to what she indicated, why you would not be under the theory that it requires that there be this assessment before you collect -- no, it's the organizational. Excuse me. The organizational in terms of your public interest activities.

She indicated that -- and there was a distinction in terms of what are considered in that Public Interest Activities, what are allowed and what are not allowed in terms of providing you under this PETA case theory organizational standing.

If you want to respond to -- that's where your activities don't fit it.

MR. ROTENBERG: Right. Well, I think we've done this, Your Honor, in our reply brief, if I can just point to pages 20 and 21. In fact, we are relying on PETA in making the argument that we do have organizational standing and the activities we describe is the participation and work of our experts and to seek records from the Commission and to respond to the requests that had been made by the public.

What the language from PETA is relevant on this point is that our activities are, quote, "In response to and to counteract the effects of defendant's alleged unlawful conduct."

That's page 20 in the reply.

THE COURT: All right. The other question that I had is -- obviously, there needs to be some sort of federal agency connection to the Commission in order for the E-Gov Act to apply. So what is your best argument as to what federal agency is associated with it?

MR. ROTENBERG: Well, we think the Commission itself is an agency for purposes of the E-Government Act. That agency tracks the definition of the Freedom of Information Act and includes the Executive Office of the President.

So, therefore, the obligation to complete the Privacy Impact Assessment would fall upon the Commission as an agency.

THE COURT: You know, there is a case that talks about -- and I forgot which of the -- it was in the, I believe, the vice president's office, and it indicated that they provided basically personnel issues, those kinds of assistance. It was the executive office of either the president or the vice president. I forgot which, and it was -- that commission had not viewed itself as a federal agency.

MR. ROTENBERG: I'm not familiar with the case, Your Honor. If we could find the cite, we would be happy to provide a response.

I do want to point out, also --

THE COURT: Let me find it for you. It was *Crew vs. The Office Of Administration.* It was the Office of Administration within the Executive Office of the President. In fact, it was one of my cases relating to disclosure of documents to the White House's alleged loss of millions of emails, and they found that that commission, based on its functions, was not -- you know, was not considered a federal agency

for different purposes.

MR. ROTENBERG: All right. But I don't think that case implicated either the E-Government Act or the Federal Advisory Committee Act. So at least in the first instance, we would need to look at whether those statutes are relevant in Crew. I would be happy to look more closely, Your Honor.

THE COURT: Okay. So besides indicating that you think the Commission itself is a federal agency, any other argument?

MR. ROTENBERG: Well, yes. The GSA, in providing functional services to the Commission, which, as we set out we believe is the expectation contained within the executive order and also the charter of the Commission, would be subject to the agency status. And as you have also suggested, the member of the EAC, by virtue of the association with the EAC, could raise agency concerns.

We found it interesting, for example, that the Election Assistance Commission, not this commission, but the one that Ms. McCormick is a member of, has been subject to scrutiny under the Privacy Impact Assessment by that agency's

Office of Inspector General for similar activity.

Now, there's no wrongdoing. That's not what I'm suggesting. But, rather, the point being with far less data collection at the EAC, for more than 10 years the Office of Inspector General has paid careful attention to the E-Government obligation. That is my point.

THE COURT: But the problem, at least as she presents -- as Ms. Federighi presents it, is that the person that's on the Commission is not there in her official capacity.

MR. ROTENBERG: That's the representation.

THE COURT: Well, I know, but do you have something to counter it?

MR. ROTENBERG: Well, the person who is on the Commission is also affiliated with the most significant election commission apart from the president's commission that would address these issues.

THE COURT: Do you think -- the Department of Defense is not a defendant in this case, but is there any argument as we pursued this issue of the DOD having basically the website and all of this material uploaded to it and maintaining

it at least for a period of time until it gets transferred?

MR. ROTENBERG: Well --

THE COURT: Is that an agency that you would argue is involved with the Commission or not? Do you agree with the argument that it's not?

MR. ROTENBERG: We would say that, in fact, it is involved by virtue of the letter from the vice chair. But by law, under the executive order, it should not be involved. The fact that it is receiving data, and is most certainly subject to the Government Act as is evidenced by the fact they've already had a Privacy Impact Assessment, that is relevant. But the Privacy Impact Assessment reveals that the military website is not set up to receive the personal data that the vice chairman is seeking.

THE COURT: Well, I'm trying to see whether there is -- you agree with her argument that you view that it shouldn't be there. That doesn't get me anywhere in terms of your argument that the Commission is subject to the E-Gov Act. I still need a connection to a federal agency. So I'm just trying to figure

out whether that's an argument you're making or not making.

MR. ROTENBERG: Yes. Well, I would rely in part on opposing counsel's comment that the State of Arkansas has, in fact, transmitted voter data to the military website. So the fact that the military website is now in possession of that data beyond what the authorities provided in the Privacy Impact Assessment under which it is currently operating, and we would argue as well beyond the authority set out in the executive order in the Commission charter, necessarily makes it relevant to the proceeding.

THE COURT: All right. Anything else either one of you wants to say? I'm going to take a very short break. I know we're at 5:00, but I need to take a short break and figure out what additional questions, if any, I want to make because I would like to have this be the only hearing, and I'll go through all the information that you've got and then make a ruling.

MR. ROTENBERG: Thank you, Your Honor.

Just very briefly. We raised five counts. There is the Privacy Impact Assessment that

should've been completed. There's the Privacy Impact Assessment that was required as a condition of receiving the data. There is the obligation to publish that privacy impact under the Federal Advisory Committee Act, and we believe the informational privacy constitutional claims are actually quite strong here, and we would like the opportunity at some point to be able --

THE COURT: At this point, to make a constitutional argument I don't think you're going to do well in this circuit.

MR. ROTENBERG: I understand, Your Honor. Thank you.

THE COURT: Okay.

Anything you want to say at the end? I'm going to hear whatever you have to say, and then I need to take a quick break and look through and make sure -- I did a scramble of a bunch of notes because you've been filing things one after the other in terms of my being able to look through it to make sure that this is it and I have the information I need.

MS. SHAPIRO: Yes. Just very briefly. I just wanted to make two points. One is that

using the SAFE site as a tool I don't think makes that part of the Commission's work. It would be like saying that the Commission can use the post office to mail letters because that would make the post office somehow part of the Commission. It is a tool for getting the information.

THE COURT: Well, it's not getting the information. I mean, as a practical matter -- are you talking about the computer? The DOD thing?

MS. SHAPIRO: Yes.

THE COURT: Well, you're uploading it. They're maintaining the information. I don't know that I'd call it a tool as the post office would be.

I would agree, mailing things through the post office is not going to make them a federal agency as part of the Commission.

MS. SHAPIRO: And my second point is I wanted to just make clear the cases that set out the tests for the agency requirements, in other words, the functional test. The case that you referred to, the *Crew vs. Office Of Administration*, the case that Your Honor

handled, that involved the Office of Administration within the Executive Office of the President, was determined not to be an agency subject to FOIA. And the E-Government Act uses the same definition. That's the point I wanted to make clear, that the definition of agency is the same that's in FOIA. So the whole including the Executive Office of the President, we go back to the line of cases of *Soucie v. David, Mayer v. Bush,* which I think is the task force that Your Honor was referring to. That was the deregulation Reagan task force with the vice president as chair. So you have the *Mayer v. Bush,* the *Soucie vs. David.*

So all of those cases mean that the E-Government Act has to apply that same body of case law, and there's -- the functional test that's described in our papers, and we think is very clear that it's not satisfied here.

And the Armstrong case, in addition, makes it clear that just the mere participation of one person doesn't change the character.

THE COURT: Okay. Let me take a short break. I'll figure out if there's anything else, and I'll come back out.

MS. SHAPIRO: Thank you.

(Break.)

THE COURT: I have just one last question. I have not had an opportunity to review really carefully the last missive that I received from plaintiffs. I did look quickly through and noticed the DOD impact statement. So I need to go through and look at all of it more carefully. But if on reflection, in looking at it and reviewing the cases again and considering the arguments that were made and the answers that were given, if I decide that DOD is the federal agency connection to the Commission, since DOD is not a defendant, does it have to be a defendant in order for the Court to basically -- assuming I find standing -- to be able to issue any kind of order since they're the ones at this point maintaining the data on behalf of the Commission?

They're not a defendant now. Would they have to be if I made that decision? I'm not saying I'm going to. I'm just saying if I decided to do it.

Anybody have a position on that?

MR. ROTENBERG: Of course, we just learned

this afternoon that the DOD now possesses data. So we could quickly amend our complaint and add the DOD as a named defendant.

THE COURT: Okay. Any position from DOJ on this?

MS. SHAPIRO: Our position would be that the Court would not be empowered to enter relief against a nonparty so that --

THE COURT: Right. Okay. He would have to make a decision as to whether he wanted to amend the complaint. Let's assume he filed a motion to amend the complaint which would include DOD, what would your position be?

MS. SHAPIRO: That it --

THE COURT: I mean, presumably, at this point they possess data, right? And they're maintaining it, at least at this point?

MS. SHAPIRO: For some ephemeral amount of time.

THE COURT: But they still have it at this point. So if they decided to amend it, I mean, then the Court would have to see whether that works anyway. But I'm just saying that it's clear that if they're not a party, I would not be able to act if I thought that was the -- or

concluded that that was the federal agency connection.

So if they filed a motion to do it, what would your answer be?

MS. SHAPIRO: Well, I think we would respond with arguments similar that the DOD tool that is being used does not convert -- make any difference to the agency -- to the Commission's status as a non-agency or a requirement to do a Privacy Impact Assessment.

THE COURT: So that would -- all right. In terms of doing it, but it doesn't get to whether -- even if he decided to put it in, it doesn't mean that he necessarily will decide that.

So it seems to me, since at this point they do have the data, and they're maintaining it, that they could certainly have grounds to put them in as a party. It doesn't mean I necessarily am going to find, as they would hope, that that is the federal agency connection. But I just wanted to make sure if I started to go down that path, it actually could -- it could be any ruling.

MS. SHAPIRO: I'm sorry. I didn't

understand the last --

THE COURT: All right. I brought this up because this has been a more developed argument about DOD and its role, since that's come out really only in recent times, and the exhibit I got at 3:00. So I haven't had too long to look at it in terms of what's involved with it. And you have indicated that it, at this point, holds data from the State of Arkansas. So it has the information, and it's maintaining it on behalf of the Commission. So that presumably would be their reason to amend it. The Court would still have to make these other decisions. It doesn't change it.

MS. SHAPIRO: Correct.

THE COURT: I just want to see that if I decided to do that, that I actually would be in a position to do it.

MS. SHAPIRO: Okay.

THE COURT: All right. So if you're going to amend it, you need to move swiftly. All right. I don't have anything else, and so I will excuse you.

I will not be doing an oral ruling. Obviously, it's very complicated. I will be

doing something in writing. I will get it out as quickly as I can understanding the time lines that have been set out.

All right? Thank you. Take care.

(Hearing concluded.)

CERTIFICATE OF REPORTER

I, Richard D. Ehrlich, a Registered Merit Reporter and Certified Realtime Reporter, certify that the foregoing is a true, complete, and accurate transcript of the proceedings ordered to be transcribed in the above-entitled case before the Honorable Colleen Kollar-Kotelly, in Washington, DC, on July 7, 2017.

s/Richard D. Ehrlich July 10, 2017

Richard D. Ehrlich, Official Court Reporter

Exhibit 6

From: FN-OVP-Election Integrity Staff
Sent: Monday, July 10, 2017 9:40 AM
Subject: Request to Hold on Submitting Any Data Until Judge Rules on TRO

Dear Election Official,

As you may know, the Electronic Privacy Information Center filed a complaint seeking a Temporary Restraining Order ("TRO") in connection with the June 28, 2017 letter sent by Vice Chair Kris Kobach requesting publicly-available voter data. See *Electronic Privacy Information Center v. Presidential Advisory Commission on Election Integrity* filed in the U.S. District Court for the District of Columbia. Until the Judge rules on the TRO, we request that you hold on submitting any data. We will follow up with you with further instructions once the Judge issues her ruling.

Andrew Kossack
Designated Federal Officer
Presidential Advisory Commission on Election Integrity
ElectionIntegrityStaff@ovp.eop.gov

Exhibit 7

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)

THIRD DECLARATION OF KRIS W. KOBACH

I, Kris W. Kobach, declare as follows:

As described in my declaration of July 5, 2017, I am the Vice Chair of the Presidential Advisory Commission on Election Integrity ("Commission"). I submit this third declaration in support of Defendant's supplemental brief regarding the addition of the Department of Defense ("DOD") as a defendant in plaintiff's Amended Complaint. This declaration is based on my personal knowledge and upon information provided to me in my official capacity as Vice Chair of the Commission.

1. In order not to impact the ability of other customers to use the DOD Safe Access File Exchange ("SAFE") site, the Commission has decided to use alternative means for transmitting the requested data. The Commission no longer intends to use the DOD SAFE system to receive information from the states, and instead intends to use alternative means of receiving the information requested in the June 28, 2017, letter. Specifically, the Director of White House Information Technology is repurposing an existing system that regularly accepts

personally identifiable information through a secure, encrypted computer application within the White House Information Technology enterprise. We anticipate this system will be fully functional by 6:00 p.m. Eastern today.

2. Today, the Commission sent the states a follow-up communication requesting the states not submit any data until this Court rules on this TRO motion. A copy of this communication is attached hereto as Exhibit A. The Commission will not send further instructions about how to use the new system pending this Court's resolution of this TRO motion.

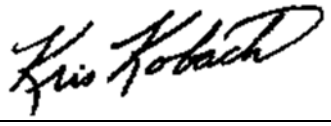
3. The Commission will not download the data that Arkansas already transmitted to SAFE and this data will be deleted from the site.

4. Additionally, I anticipate that the President will today announce the appointment of two new members of the Commission, one Democrat and one Republican.

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

***

Executed this 10th day of July 2017.



Kris W. Kobach

Exhibit 8

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