

[SCHEDULED FOR ORAL ARGUMENT ON MAY 8, 2019]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION
CENTER,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF
COMMERCE and BUREAU OF THE
CENSUS,

Defendants-Appellees.

No. 19-5031

**DEFENDANTS-APPELLEES' RESPONSE TO THE COURT'S
ORDER OF MAY 6, 2019**

On May 3, 2019, the Department of Commerce and the Census Bureau filed a letter notifying the Court that, on May 2, 2019, the Census Bureau published a privacy impact assessment regarding CEN08, a primary information technology system that the Bureau uses to administer the decennial census. The Court has ordered the parties to file responses “addressing whether this appeal is now moot.” Because the updated privacy impact assessment relates to only one of the information technology systems used to administer the decennial census, and plaintiff appears to seek relief with regard to other systems as well, the government does not believe the Census Bureau’s update of its assessment regarding the CEN08 system moots this

controversy. But the updated privacy impact assessment underscores the flaws in plaintiff's arguments on standing and on the merits, and its publication further diminishes any arguable stake that plaintiff had in this matter.

1. The Census Bureau regularly updates its privacy impact assessments regarding CEN08 and the other information technology systems through which it administers the decennial census. The updated privacy impact assessment that the government submitted to the Court on May 3, 2019, addresses CEN08, which is a primary information technology system through which the Census Bureau administers the decennial census. JA 246 ¶ 3. CEN08 shares administrative information with several other administrative information technology systems. JA 249 ¶ 14. The Census Bureau is in the process of reviewing its existing privacy impact assessments of information technology systems other than CEN08 to determine whether updates are warranted. *See* JA 250 ¶ 15.

In its reply brief, plaintiff makes clear that it “seeks a preliminary injunction that would last only until the Defendants have conducted, reviewed, and published the full and complete Privacy Impact Assessments required by Section 208(b) of the E-Government Act,” Reply 24 (quotation marks omitted), which plaintiff appears to believe are privacy impact assessments that specifically address the inclusion of a question regarding citizenship on the 2020 Census. And plaintiff specifically contends that the Census Bureau could comply with the requested injunction if it were to “complete and publish the Privacy Impact Assessments required by Section 208.” *Id.*

Accordingly, by plaintiff's description, plaintiff's request for a preliminary injunction will become moot if the Census Bureau updates and publishes all of the privacy impact assessments regarding information technology systems that will contain citizenship information (as well as other information collected from decennial census respondents). Although the recently updated privacy impact assessment provides a significant portion of the relief plaintiff seeks, because the Census Bureau has not updated its privacy impact assessments for information technology systems other than CEN08, the government does not believe that plaintiff's request for a preliminary injunction is moot at this stage.¹

2. The government has argued that plaintiff lacked any Article III injury in this case to begin with, and the Census Bureau's publication of the updated privacy impact assessment regarding CEN08 further undermines plaintiff's claims that it has Article III standing and that it is threatened with imminent irreparable injury sufficient to warrant a preliminary injunction. The updated privacy impact assessment—like prior privacy impact assessments that were available before plaintiff filed this lawsuit—highlights the lack of a threat to the privacy of plaintiff's advisory board, noting both the robust information-security measures that the Census Bureau has put in place to

¹ The Census Bureau's declaration in this case, which is dated January 30, 2019, expresses the Bureau's intent to "review[]" the privacy impact assessments for the other systems "within the next two months" and to "update[]" them, "as appropriate." JA 250 ¶ 15. The process of updating those assessments remains ongoing.

protect information obtained from decennial census respondents and the Census Act's exceptionally stringent restrictions on disclosure of census respondent information. The Census Bureau's publication of the updated privacy impact assessment also undermines any claim that plaintiff's advisory board members are injured by a deprivation of information regarding the inclusion of a citizenship question on the 2020 Census: the updated privacy impact assessment addresses each of the matters identified in Section 208(b)(2)(B) of the E-Government Act of 2002, in the specific context of a census questionnaire that includes the citizenship question.

Thus, the updated privacy impact assessment illustrates that plaintiff lacks any Article III injury, and a preliminary injunction is not warranted, though the Article III deficiency in this case is properly characterized as one of standing rather than mootness.

Respectfully submitted,

s/ Sarah Carroll

MARK B. STERN

(202) 514-5089

SARAH CARROLL

(202) 514-4027

Attorneys, Appellate Staff

Civil Division

U.S. Department of Justice

950 Pennsylvania Ave., N.W.

Room 7511

Washington, D.C. 20530

sarah.w.carroll@usdoj.gov

MAY 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response complies with this Court's order of May 6, 2019, because it contains 782 words according to the count of Microsoft Word.

s/ Sarah Carroll

SARAH CARROLL

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2019, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Sarah Carroll

SARAH CARROLL