

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC PRIVACY INFORMATION
CENTER,

Plaintiff,

v.

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

Defendants.

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

**DEFENDANTS' SUPPLEMENTAL BRIEF
REGARDING THE DEPARTMENT OF DEFENSE**

In response to Plaintiff's Amended Complaint (which has not been served in accordance with Fed. R. Civ. P. 4), ECF No. 21, and in compliance with this Court's Order, ECF No. 22, Defendants respectfully submit that the entry of a temporary restraining order against the Department of Defense ("DOD") would be improper:

1. Defendants respectfully update the Court of two factual developments since the July 7, 2017 hearing.
 - a. In order not to impact the ability of other customers to use the DOD Safe Access File Exchange ("SAFE") site, the Commission the Commission has decided to use alternative means for transmitting the requested data. Third Kobach Decl. ¶ 1. 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 *Id.* 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. *Id.* The system is anticipated to be fully functional by 6:00 pm EDT today. *Id.*

- b. Today, July 10, 2017, the Commission also sent the states a follow-up communication requesting the states not submit any data until this Court rules on plaintiff's TRO motion. *Id.* ¶ 2. Furthermore, the Commission will not send further instructions about how to use the new system pending this Court's resolution of the TRO motion. *Id.*
 - c. The Commission will not download the data that Arkansas already transmitted to SAFE and this data will be deleted from this site. *Id.* ¶ 3.
2. In light of these factual developments, any relief against DOD would be inappropriate because DOD systems will not be used by the Commission, and thus an order against DOD would not redress EPIC's supposed injury. *See, e.g., Gerber Prods. Co. v. Vilsack*, No. 16-1696-APM, 2016 WL 4734357, at *5 (D.D.C. Sept. 9, 2016) ("No order directed against [defendants] alone could cure the harm claimed by Plaintiff.").
3. Furthermore, DOD was not the subject of Plaintiff's motion for a TRO. While Plaintiff is entitled to amend its complaint as a matter of right, *see* Fed. R. Civ. P. 15(a)(1)(A), it must also amend and serve its TRO motion making clear what relief it seeks against DOD and why it is entitled to such relief. *See* LCvR 65(a). DOD, in

turn, should be given the opportunity to respond before any order is entered against it, including the opportunity to articulate what harm could be caused by the entry of a restraining order.

Dated: July 10, 2017

Respectfully submitted,

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Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director

/s/ Joseph E. Borson
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Counsel for Defendants

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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.

A handwritten signature in black ink, reading "Kris Kobach", written in a cursive style.

Kris W. Kobach

EXHIBIT A

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