IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff, v. PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al.*, Defendants.	Civil Action No. 1:17-cv-1320 (CKK)

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

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INTRODUCTION

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

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

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

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

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

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

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

BACKGROUND

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

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

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

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

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

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

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

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

ARGUMENT

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

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

A. Plaintiff Lacks Standing.

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

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

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

1. Plaintiff lacks organizational standing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Plaintiff lacks informational standing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The Presidential Commission is not an agency.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. PLAINTIFF HAS NOT DEMONSTRATED IRREPARABLE HARM

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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Respectfully submitted,

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