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YEARS

*at New York University School of Law*

## **Examples of Legal Risks to Providing Voter Information to Fraud Commission**

### **I. Introduction**

On May 11, 2016, President Trump signed executive order 13799 to establish the Presidential Advisory Commission on Election Integrity (the “Commission”). Chaired by the Vice President and Kansas Secretary of State Kris Kobach, the Commission’s stated objective is to “study the registration and voting processes used in Federal elections.”<sup>1</sup>

On or about June 28, 2017, the Commission “requested” (as it lacks the legal authority to compel) from each state’s Secretary of State (in some states election administration is entrusted to a Chief Elections Official or official with another title, but for ease of reference in this memorandum we refer to the ultimate state voting authority as the “Secretary of State” or “Secretary”) that such official:

provide to the Commission the publicly- available voter roll data for [such 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.

The Commission further explained that “any documents that are submitted to the full Commission will also be made available to the public.”

In most states, the Secretary of State has a legal duty to oversee the election process, to protect the citizens of the state from efforts to interfere with voting rights, and to maintain public confidence in the state’s elections. Of course, the public disclosure of a registrant’s personal information or voting history may compromise the integrity of the electoral process and may itself undermine voters’ confidence in the state’s electoral process and voter registration system. Such disclosure in the absence of a clear legal obligation may also create a series of specific

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<sup>1</sup> Charter dated June 23, 2017, at ¶ 3.

adverse legal consequences for a Secretary who furnishes the requested information to the Commission. Here, as detailed below, the Commission's request is not legally binding on any state and the Commission lacks *any* authority under law to enforce its request.

Without purporting to provide a comprehensive analysis, this memorandum identifies certain of the most significant legal risks created by the public disclosure of the requested voting information to a third party. The biggest concern is voter privacy and laws designed to protect those privacy interests. Giving the information to the Commission may be problematic both because the Commission will make the information public, and because the Commission itself may be otherwise using the information in a manner not provided for under state law.

It is imperative that each Secretary be mindful of the irreversible character of a decision to comply with a request for voter information. Once released, the adverse consequences identified here may follow notwithstanding any subsequent determination that such disclosure was imprudent or unlawful or any effort to remedy its impact. As of this writing, it has been reported that a significant number of the states have indicated at least provisionally that they will not provide the requested information, while some have indicated that they intend to provide it.

Of course, the Brennan Center generally supports voluntary state efforts to share public information in connection with research efforts, and with federal bodies. We do not, in any way want to suggest state governments should not be transparent in their dealings. The Commission request, however, is unusual in the risk it imposes on sensitive private voter information. Accordingly, Chief Election Officers, and their legal counsel, should carefully consider state and federal law, and the implications of the Commission's request before responding.

## **II. Will the Secretary Face Legal Risks if the Requested Voter Information is Disclosed?**

Yes. Intentional disclosure of the requested voter information by Secretaries of State likely violates one or more provisions of state or federal law, depending upon the state in question. We have identified below certain of the most significant and common requirements of state law that such disclosure may violate. But each Secretary of State should review the specific provisions of his or her state's laws to determine whether and which requirements prohibit such disclosure to the Commission.<sup>2</sup>

### **A. Notice Requirements**

The Commission's plan to collect and publicly disclose detailed voter roll information may run afoul of voters' rights to be notified before their personal information is disclosed. Certain states are required to obtain written authorization from a registered voter before disclosing confidential personal information. For instance:

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<sup>2</sup> The Commission's information request may also violate the Paperwork Reduction Act, 44 U.S.C. §§ 3501–3521. We have explained this in greater detail in correspondence sent to you under separate cover.

- North Carolina requires its Board of Election to keep voters' dates of birth confidential unless the disclosure of that information has been expressly authorized in writing by the relevant individual.<sup>3</sup>
- Alaska similarly prohibits the release of confidential information—including social security number, driver's license number, voter ID number, place of birth, signature, and date of birth—absent written authorization from a voter consenting to the release.<sup>4</sup>

More generally, compliance with the Commission's requests and plan for public disclosure of voter roll data would violate voters' legitimate expectation in many states that the privacy rights that have been created by state statute will be respected and that their personal, confidential information will be protected by government officials. For example:

- Arizona expressly limits the use of their voter information to political purposes.<sup>5</sup>
- Georgia expressly notifies its voters in its voter registration form that social security numbers are kept confidential.<sup>6</sup>
- New Mexico voter registration website notifies voters that birth date and social security numbers will not be released to the public.<sup>7</sup>

## **B. Limitations on the Use of Voter Registration Information**

Many states prohibit the use of voter registration information for specific purposes, such as commercial or advertising purposes, or restrict the use of voter registration information to specific purposes, such as political campaigning. For example:

- New Hampshire requires that a person not use *or permit* the use of voter checklist information for commercial purposes. A person who knowingly violates this section is guilty of a misdemeanor if a natural person, and of a felony otherwise.<sup>8</sup>
- Washington forbids its voter registration lists from being used for advertising purposes, unless such advertising is political in nature. A person who uses voter registration information for advertising purposes is guilty of a Class C felony. A person who does not

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<sup>3</sup> N.C. Code § 163.82.10B.

<sup>4</sup> Alaska Stat. § 15.07.195. This statute provides for release of confidential information to government agencies for governmental purposes authorized under law, and to other states or groups of states for the purpose of ensuring the accuracy of voter registration lists, only if these entities maintain the confidentiality of the information. These exceptions would not appear to apply to the Commission's requests as the Commission is neither a government agency nor a State, and the Commission intends to make the records public.

<sup>5</sup> Ariz. Stat. § 16-168.

<sup>6</sup> Georgia Secretary of State, State of Georgia Application for Voter Registration, *available at* [https://registertovote.sos.ga.gov/GAOLVR/images/reg\\_form.pdf](https://registertovote.sos.ga.gov/GAOLVR/images/reg_form.pdf).

<sup>7</sup> New Mexico Secretary of State, Voter Registration Information, *available at* [www.sos.state.nm.us/Voter\\_Information/Voter\\_Registration\\_Information.aspx](http://www.sos.state.nm.us/Voter_Information/Voter_Registration_Information.aspx).

<sup>8</sup> N.H. Rev. Stat. § 654:31(VI).

take “reasonable precautions” after receiving such information to prevent its use for advertising purposes, where the information is then used by another for such purposes, is civilly liable for damages.<sup>9</sup>

- Arizona requires that precinct registers and other lists and information derived from registration forms may be used only for political and campaign purposes, or other purposes specifically authorized by law, and may not be used for a commercial purpose.<sup>10</sup>

The Commission has already stated in its request to states that it intends to make public the voter registration information it receives. By disclosing the requested information to the Commission, therefore, Secretaries of State may run afoul of their states’ usage limitations.

### **C. Confidentiality Restrictions**

States will not reveal confidential voter registration information such as social security numbers and dates of birth, and provide even greater confidentiality provisions for victims of domestic violence and sexual assault, and for public servants such as judges. For instance:

- In addition to information such as social security numbers, Utah considers dates of birth to be confidential information. To access such information, a requester must be a “qualified person,” must describe the reasons and purposes for obtaining the information, may not use the information for any other purposes not listed, and must ensure, “using industry standard security measures,” that no one but the qualified person may access the information. Obtaining the date of birth of a voter under false pretenses or using it in a manner not permitted by law is a Class A misdemeanor, and may also involve civil fines.<sup>11</sup>
- Oklahoma keeps confidential the residences and mailing addresses of individuals such as judges and law enforcement personnel, and their spouses and dependents, and participants in the state’s Address Confidentiality Program, such as victims of domestic violence, sexual assault, and stalking.<sup>12</sup>
- Ohio allows the Secretary of State to share confidential voter registration information with only three types of organizations: (1) other state of Ohio agencies, (2) the interstate voter registration cross-check program, and (3) ERIC, or the electronic registration information center.<sup>13</sup>

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<sup>9</sup> Wash. Rev. Code § 29A.08.720 & 740.

<sup>10</sup> Ariz. Stat. § 16-168(E).

<sup>11</sup> U.C.A. § 20A-2-104(4). A “qualified person” may be a government official, health care provider, insurance company, financial institution, political party, or their employees or agents. *Id.*

<sup>12</sup> 26 Okla. St. Ann. § 4-115.2.

<sup>13</sup> Ohio Rev. Code Ann. § 3503.15(A)(3)(b); Ohio Admin. Code 111:3-4-06.

The foregoing confidentiality restrictions notwithstanding, the Commission has sought confidential information such as social security numbers (or portions of such numbers), dates of birth, and in many cases, addresses.

#### **D. Threshold Requirements for Voter Information Requests.**

The Commission's request likely fails to satisfy many states' threshold requirements for the form or substance of such requests, or for the satisfaction of certain conditions to obtain such information.

For example, many states require requests be directed to a particular government official or agency other than the state's chief election official:

- New Hampshire only permits public release of voter registration information at a municipal level from town and city officials.<sup>14</sup>

States also prescribe the form and content of voter registration requests. For example:

- Indiana requires the requesting party execute an agreement with the election division in a form prescribed under state law.<sup>15</sup>
- Texas requires the requesting person sign a statement swearing "that the information obtained from the copy of the State Master Voter File will not be used to advertise or promote commercial products or services."<sup>16</sup>
- Washington requires a requesting party complete an online form.<sup>17</sup>

Certain states limit release of voter registration data to particular individuals or entities:

- Indiana limits access to state political organizations, state legislative leaders, candidates for elected office, certain members of the judiciary, and the media.<sup>18</sup>
- Rhode Island limits access to voter registration lists to political parties' state chairpersons, those claiming to be duly qualified candidates for state/congressional office, and canvassing authorities from its cities and towns.<sup>19</sup>

The Commission made no apparent effort to review or comply with any of these requirements. Instead, it sent a substantively identical form letter nationwide.

Most states also impose a charge for disclosure of voter information, from a few dollars to several thousand dollars. For example:

- Alaska imposes a fee of \$20.<sup>20</sup>

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<sup>14</sup> N.H. Rev. Stat. § 654:31.

<sup>15</sup> Ind. Code § 3-7-26.4-9.

<sup>16</sup> Tex. Elec. Code § 18.066(d); Texas Voter Registration Form, *available at* <https://www.sos.state.tx.us/elections/forms/pi.pdf>.

<sup>17</sup> Wash. Rev. Code § 29A.08.720(2); Wash. Sec'y of State, Washington Voter Registration Database Extract, *available at* <https://www.sos.wa.gov/elections/vrdb/extract-requests.aspx>.

<sup>18</sup> Ind. Code § 3-7-26.4-6.

<sup>19</sup> Gen. Laws of R.I. Ann., § 17-6-5(a), 8.

- Arizona and Texas have a substantially identical sliding fee schedule varying on the size of the request, from \$93.75 plus \$0.0005 per record for requests up to 124,999 records to \$328.13 plus \$0.0000625 per record for requests over 1 million records.<sup>21</sup>
- Utah charges requesting parties \$1,050 for the voter database.<sup>22</sup>
- Indiana charges requesting parties \$5,000.<sup>23</sup>

State officials generally have little if any discretion to waive fees for disclosure of voter information. Some states set fee amounts by statute without any provision allowing a waiver of such fee.<sup>24</sup> States that authorize election officials to set fees do not generally provide for case-by-case discretion to waive such fees altogether.<sup>25</sup> States that permit fee waivers often do so based on the identity of the requesting party—not subject to the discretion of election officials.<sup>26</sup> Official discretion, where allowed, nevertheless may be conditional—for example, to waive fees in Utah, an official may determine that “releasing the record primarily benefits the public rather than a person.”<sup>27</sup>

The Commission failed to include the requisite fees with its request or to justify its failure to do so. To the extent election officials have any discretion to waive fees, the Commission did not request (or claim eligibility for) such waiver.

### **III. Could the Commission Maintain the Confidentiality of the Requested Information Even If It Chose To Do So?**

Not likely. As noted already, Kobach has stated explicitly that “any documents that are submitted to the full Commission will also be made available to the public.” But even if there were some desired backtracking on this point, it may be difficult to do so under federal law, primarily under the Federal Advisory Committee Act (“FACA”).

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<sup>20</sup> See State of Alaska Division of Election, Index of Resources, *available at* <http://www.elections.alaska.gov/doc/forms/H23.pdf>.

<sup>21</sup> Ariz. Revised Stat. § 16-168(E); Tex. Elec. Code § 18.066(e); The State of Texas Secretary of State, Voter Registration Public Information Request Form, *available at* <http://www.sos.state.tx.us/elections/forms/pi.pdf#search=voter%20records>.

<sup>22</sup> Utah Code § 20A-2-104(3)(d); Utah Voter Database, *available at* <https://elections.utah.gov/voterdatabase>.

<sup>23</sup> Ind. Code § 3-7-26.4-12.

<sup>24</sup> See Ariz. Revised Stat. § 16-168(E); Tex. Elec. Code § 18.066(e).

<sup>25</sup> Alaska Stat. Ann. § 15.07.127 (“any person may obtain a copy of the [statewide voter registration] list by applying to the director and paying to the state treasury a fee as determined by the director [of elections]”); Ga. Code Ann. § 21-2-225(c) (“the Secretary of State shall establish the cost to be charged for [voter registration] data.”).

<sup>26</sup> See, e.g., Alaska Stat. § 15.07.140 (political parties receive voter registration information free of charge); Ind. Code § 3-7-26.4-12 (waiving Indiana’s fee for qualified judicial personnel); Nev. Rev. Stat. Ann. § 293.440(1) (“any person” may obtain a voter registration list by applying at the office of the county clerk and paying a sum equal to 1 cent per name on the list, but such a list shall be provided free of charge to political party committees).

<sup>27</sup> Utah Code. § 63G-2-203(4)(a).

The Commission was established by the President’s executive order under FACA, which was enacted in 1972 to ensure that Congress and the public would be kept informed of the activities of advisory committees.<sup>28</sup> As a “commission ... established or utilized by the President ... in the interest of obtaining advice or recommendations for the President,” the Commission is an “advisory committee” as defined in the FACA and is therefore subject to the statute’s requirements.<sup>29</sup>

FACA requires the Commission to comply with a number of requirements designed to ensure due process, transparency, and balanced public input, including filing a detailed charter, and holding public meetings.<sup>30</sup> In addition, FACA requires the Commission to make available for public inspection “the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to” it.<sup>31</sup> As “records, reports ... or other documents ... made available” to the Commission, voter registration and voting history information provided to the Commission must be made available for public inspection under FACA unless it falls within one of certain exceptions borrowed from the federal Freedom of Information Act (the “FOIA”). It would be difficult for the Commission to avail itself of a FOIA exemption at a later date given its claims that the Commission only sought publicly available information from the states. This is particularly true given the additional mandate of FACA to promote the transparency and availability of records obtained by the Commission.

#### **IV. Can the Commission Require States to Comply?**

No. Even if state law does not prohibit a state from providing the requested information to the Commission, a state has no *obligation* under federal law to provide that information. Executive Order 13799, which created the Commission, provides the Commission with no subpoena authority, or any other similar legal authority to require any state, person, agency, or entity to comply with its requests. To the contrary, the Executive Order merely provides that the Commission should “engage with Federal, State, and local officials,”<sup>32</sup> and instructs “[r]elevant executive departments and agencies”—but not states—to “endeavor to cooperate with the Commission.”<sup>33</sup> Similarly, the Commission’s Charter nowhere indicates that it has any formal power to compel compliance with its requests.<sup>34</sup>

Although certain Federal Advisory Committees created by Congress have been granted subpoena power,<sup>35</sup> such committees—like any executive agency—lack that power if it was not explicitly

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<sup>28</sup> 5 U.S.C.A. § App. 2 § 2(b).

<sup>29</sup> U.S.C.A. § App. 2 § 3(2). FACA’s definition of “advisory committee” excludes “(i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration.” *Id.* Neither of these exclusions applies.

<sup>30</sup> 5 U.S.C.A. § App. 2 §§ 9(c), 10(a).

<sup>31</sup> 5 U.S.C.A. § App. 2 § 10(b).

<sup>32</sup> Exec. Order § 5.

<sup>33</sup> *Id.* § 7(b).

<sup>34</sup> *See generally* Presidential Advisory Commission on Election Integrity, Charter, *available at* <http://www.facadatabase.gov/committee/charters.aspx?cid=2612&aid=74>.

<sup>35</sup> *See, e.g.,* Wendy R. Ginsberg, Congressional Research Service, *Federal Advisory Committees: An Overview* (Apr. 16, 2009), at 19 (noting that “[v]esting a committee with subpoena power ... is done on a

granted by Congress.<sup>36</sup> We are aware of no reported case in which any person or entity was charged with improperly failing to comply with a request from a Federal Advisory Committee, much less a case when a failure to comply with such a request was found actionable.

Accordingly, even if the Commission could have been vested by the Executive Order with the power to issue compulsory requests—a doubtful proposition—the lack of *any* provision in the Executive Order or in the Charter regarding the Commission’s powers to compel compliance with its requests makes clear that states are entirely free to disregard the Commission’s request for voter-related information.

## **Conclusion**

Chief Election Officers, and their legal counsel, should safeguard individual privacy and consider state and federal law, and the implications of the Commission’s requests before proceeding.

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very selective basis,” and that, as of the time of the article, “no current advisory committee charters [] provide subpoena powers”).

<sup>36</sup> Indeed, federal agencies generally have no inherent administrative subpoena power, and may only exercise such power when granted by congressional authorization. *See, e.g.*, 5 U.S.C. § 555(c) (“Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced [by an administrative agency] except as authorized by law.”).