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January 5, 2018

Harry Sandick
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Re: *Dunlap v. Presidential Advisory Commission on Election Integrity, et al.*, No. 17-cv-2361 (CKK) (D.D.C.)

Dear Mr. Sandick:

I begin by sincerely wishing you and your colleagues a happy new year.

I write on behalf of the defendants in the above-captioned matter in response to your letter of January 4, 2018. In that letter, you made two demands with respect to the Court's "narrowly tailored preliminary injunction" that was issued on December 22, 2017. *See* Mem. Op., at 23, ECF No. 33. First, you demanded that your client be "consulted and provided information and records that will facilitate his meaningful participation in advance of any decision regarding whether to transfer Commission records or data to any federal agency or the terms of any such transfer." Jan 4 Letter, at 2. Second, you demanded the production of all documents included on Appendix B of your December 15, 2017, letter by January 10, 2018. *Id.* at 2-3. As you know, of course, the Commission has been terminated as of January 3, 2018, and your client is, therefore, no longer a Commission member. *See* Notice of Executive Order, ECF No. 34.

Because the Commission no longer exists, the remaining defendants intend to move for reconsideration of the Court's order granting-in-part and denying-in-part the preliminary injunction on the basis of changed circumstances. *See, e.g.*, *Petties ex rel. Martin v. District of Columbia*, 662 F.3d 564, 571 (D.C. Cir. 2011) (changed circumstances is a basis for concluding that enforcement of a preliminary injunction is contrary to the public interest). In particular, the Commission's dissolution produces at least three significant changes.

First, the Court's conclusion that your client "has a right to access documents that the Commission is considering relying on in the course of developing its final recommendations," Mem. Op. at 15, or that he is "entitled to substantive information so that he can contribute along

the way in shaping the ultimate recommendations of the Commission," *id.* at 17, no longer applies given that the Commission no longer exists and will thus not develop any final recommendations. This situation, then, is unlike *Cummock v. Gore* where the committee made a final recommendation after having not provided plaintiff information to which the D.C. Circuit later concluded she was entitled. *See Cummock v. Gore*, 180 F.3d 282, 284, 292 (D.C. Cir. 1999). Here, the Commission was dissolved without ever issuing any report, much less any recommendation. Moreover, to the extent the Court determined that plaintiff was likely, at least in part, to succeed on the merits of his claim, it was because the Court found that Mr. Dunlap, as a member of the Commission, had greater rights to access than members of the public. With the dissolution of the Commission without issuing any recommendations, Mr. Dunlap's rights are coextensive with that of the public.

Second, the Court concluded that your client's "right to fully participate in the Commission would be irreparably harmed" if he was not provided with the documents that the Court described in its opinion. Mem. Op. at 22. Here, the Commission's activities ceased without it ever issuing any report or recommendation, and therefore there is no prospect of future injury, much less future irreparable injury. Furthermore, I am authorized to report that the state voter data collected by the Commission is not being transferred or utilized, and in any event, neither the Court's opinion nor *Cummock* addressed the right of a former member to control the disposition of materials formerly used by a since-dissolved FACA committee. To the extent that your client believes that he is entitled to documents under the FACA, that claim can be adjudicated in the normal course, without the need for extraordinary injunctive relief.

Finally, the balance of the equities and the public interest have now shifted. As courts have recognized, the immediate release of documents constitutes an irreparable injury to a defendant, particularly if that release would moot the defendant's ability to appeal. *See, e.g.*, *People for the Am. Way Found. v. U.S. Dep't of Educ.*, 518 F. Supp. 2d 174, 177 (D.D.C. 2007).

We intend to move for reconsideration of the Court's order by January 10, 2018. We are happy to discuss a mutually agreeable proposed briefing schedule that will allow the Court to promptly rule on our motion as expeditiously as possible.

In light of our view that the Court ought to reconsider and vacate the preliminary injunction, we do not believe it is appropriate to produce documents pending the Court's resolution of that motion. Furthermore, your request well exceeds the scope of the Court's order. *See* Mem. Op. at 18.

Please provide us with your position with respect to our forthcoming motion for reconsideration, and any proposals you might have with regard to a proposed briefing schedule.

We look forward to discussing these issues further.

Sincerely,

/s/ Joseph E. Borson

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