July 3, 2017

The Honorable Mick Mulvaney
Director
The Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Sent via E-MAIL and FACSIMILE

Dear Director Mulvaney,

We write pursuant to 44 U.S.C. 3517(b) to request that you take appropriate action to remedy sweeping requests by the Presidential Advisory Commission on Election Integrity (“Advisory Commission”) to collect information from state election officials in violation of the Paperwork Reduction Act (“PRA”). The Advisory Commission asked election officials around the country to provide information and opinions on complex issues of election administration and to produce voluminous and sensitive information about individual voters. Yet the Advisory Commission failed to adhere to the PRA’s clear requirements. The PRA exists to protect the public – including state governments – from burdensome requests, especially requests that do not provide adequate safeguards for sensitive information. We therefore ask that, as directed by the statute, you take the “appropriate remedial action” necessary to ensure compliance with the PRA.

1. Relevant PRA Requirements

The PRA sets out the legal framework that governs federal agencies when they collect information from individuals, companies, or other non-federal actors, including state governments. Specifically, it applies to agencies when they initiate a “collection of information.” 44 U.S.C. § 3502(3).¹ Under the statute, an agency “shall not” conduct or sponsor

¹ A “collection of information” includes, among other things, “obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public of facts or opinions by or for an agency, regardless of form or format, calling for … [] answers to identical questions posed to . . . ten or more persons.” 44 U.S.C. § 3502(3). As OMB has recognized, that term is meant to be understood quite broadly. See 5 C.F.R. § 1320.3(c)(1). Significantly, “[t]he requirements of
the collection of information unless it complies with detailed procedural requirements. Id. § 3507(a). Those requirements include analyzing the need for the collection, the burdens it will impose, and the systems in place for conducting the collection consistently with the overall mandate of the statute; providing a 60-day notice in the Federal Register seeking public comment on the contemplated collection of information; certifying to the Director of the Office of Management and Budget ("OMB") that the proposed collection comports with the requirements of the statute; and publishing a second notice in the Federal Register describing the proposed collection and notifying commenters that their response may be submitted to the Director. Id. (cross-referencing 44 U.S.C. § 3506(c)(1)-(3)). After satisfying those requirements, an agency may only proceed if the Director of OMB has approved the proposed collection and issued a control number to be displayed on the collection of information. Id.²

Congress imposed these requirements to advance important values. Among other things, the purposes of the PRA are to avoid undue burdens on the public, including state governments, and to “ensure that the creation, collection, maintenance, use, dissemination, and disposition of information by or for the Federal Government is consistent with applicable laws,” including the protections guaranteed by the Privacy Act. Id. at § 3501(1) & (8).

2. The Advisory Commission’s Unlawful Collections of Information About State Voting Systems

The Advisory Commission was established by President Trump on May 11, 2017. See Executive Order 13799.³ On or about June 28, 2017, it sent what we believe to be identical letters to Secretaries of State or other election officials in all 50 states.⁴ The letter was signed by Advisory Commission Vice Chair Kris Kobach and appeared on the Advisory Commission’s letterhead. It “invited” recipients to provide information and opinions on several complex policy

² Under some circumstances, the Director’s approval may be inferred rather than express. 44 U.S.C. § 3507(c)(3).

³ The Advisory Commission is an “agency” for purposes of the PRA. See 44 U.S.C. § 3502(a) (defining “agency” to mean, among other things, an “establishment in the executive branch of the Government (including the Office of the President)”). We note that, in addition to being established by Executive Order, the Advisory Commission is chaired by the Vice President.

⁴ Because the Advisory Commission has not published anything concerning the letters, we are not aware of any public compendium of all letters that were sent. However, letters sent to individual states that have been publicized, as well as responses from several other state governments, suggest that substantially identical letters were sent to election officials in every state. See generally Brennan Center for Justice, “State Responses to Commission Requests,” available at https://www.brennancenter.org/latest-updates-fraud-commission.
questions relating to election administration. It sought, for example, opinions on potential changes to federal election law related to election integrity, “evidence or information” relating to voter fraud, and recommendations for preventing voter intimidation or disenfranchisement. It went on to “request[]” that recipients “provide to the Commission the publicly-available voter roll data for [a recipient’s state], including, if publicly available under the laws of [the recipient’s] 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 [the recipient’s] 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 request directed recipients to submit responses via email or a secure FTP site administered by the Federal government. It advised recipients that “any documents that are submitted to the full Commission will also be made available to the public.” It stated that the Commission “would appreciate a response by July 14, 2017.”

3. The PRA Requires OMB to Remedy These Statutory Violations

The Advisory Commission’s attempt to collect sweeping information about state voting systems violates the PRA. The statute imposes detailed requirements, which the Advisory Commission plainly failed to meet. It was an effort by an agency to collect information from state governments. It did not contain an OMB-issued control number, and it was not subject to advance notice with an opportunity for public comment, much less the two rounds of Federal Register publication and particularized solicitations of public comments mandated by the statute. These violations of the statute’s black-letter requirements suffice to justify intervention by OMB.

Compliance with the PRA’s requirements is especially critical in this context. The request seeks to enlist State officials to compile complex facts and opinions on a tight timeline. It asks them to assemble extensive information about all voters in their states, including categories of information that may be housed in multiple state agencies. It asks them to opine on thorny policy questions and to preform potentially complicated legal analysis to determine at what point disclosing the requested information would transgress state law. The PRA protects state governments from precisely this kind of onerous request.

The reason for the statute’s painstaking procedural requirements is to ensure that agencies carefully balance their desire to collect information against the harms that might flow from doing so without proper safeguards. This is why the statute provides for two rounds of public notice and comment – when an agency enlists non-federal actors into this kind of fact-finding, it should be informed by the views of impacted stakeholders. This is especially true in the context of election administration, where state-level officials have uniquely valuable insight into the potential impact of the requests on voters in their states. Consider the Advisory Commission’s sweeping request for individual voter information. That request – seeking information about how individual Americans exercise fundamental constitutional rights and asking that highly sensitive information be transmitted via email – highlights the importance of the statutory requirement that agencies (among other things) “evaluat[e] the need for the collection of information,” propose a “plan for the collection of the information” and for “the efficient and
effective management and use of the information to be collected,”44 U.S.C. § 3506(c)(1)(A), and “ensure that the creation, collection, maintenance, use, dissemination, and disposition of the information” is consistent with legal requirements relating to privacy, confidentiality, and security of information, id. § 3501(8).5 The fact that the Advisory Commission sought such sensitive information without engaging in the careful planning prescribed by the PRA likely explains why a diverse array of state officials have already declined to comply with the requests. See Michael Wines, “Asked for Voters’ Data, States Give Trump Panel a Bipartisan ‘No,’” New York Times (June 30, 2017). State officials should have a chance to weigh in before the Federal government requests information whose management implicates the foundation of our democracy; so should the voters whose information will be transmitted. The PRA mandates that an agency like the Advisory Commission provide that opportunity.

The PRA also charges you with the responsibility to ensure that federal agencies comply with the statute’s requirements. It also directs you to take action when agencies fail to do so. It provides that “[a]ny person may request the Director [of OMB] to review any collection of information conducted by or for an agency to determine if . . . a person shall maintain, provide, or disclose the information to or for the agency.” Id. at § 3517(b). The statute further directs you to respond to the request within 60 days and to “take appropriate remedial action, if necessary.” Id. We therefore request that you review the collections of information described in this letter and take necessary remedial action as soon as possible. We further ask that you undertake a review in time to prevent the unlawful collection of information. Because the Advisory Commission seeks responses by July 14, 2017, we ask that you review this matter and take action sufficiently in advance of that deadline to ensure that unlawful collections of sensitive voter information do not go forward.

The PRA reflects a longstanding recognition that when agencies collect information from the public, they must do it in a way that balances legitimate governmental need with the burdens such collections may impose. To ensure that balance, the statute requires agencies to engage with the public before embarking on such collections. The Advisory Commission has plainly violated those requirements. The PRA charges you with overall responsibility to ensure compliance with the statute. Pursuant to 44 U.S.C. 3517(b), we therefore ask that you take immediate action to ensure that collections of information in violation of the statute stop immediately.

5 It is particularly significant that the Advisory Commission flouted the PRA’s procedures, which expressly require that agencies ensure consistency with the Privacy Act. The Advisory Commission’s requests for sensitive personal information – including information relating to First Amendment-protected party affiliation – likely violate that statute as well. See, e.g., 5 USC 552a(e)(7) (requiring that agency record systems “maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity”).
Sincerely,

Larry Schwartztol
Counsel, United to Protect Democracy
Larry.Schwartztol@protectdemocracy.org
(202) 599-0466

Wendy Weiser
Director, Democracy Program
Brennan Center for Justice
weiserw@brennan.law.nyu.edu
(646) 292-8310

CC: All Attorneys General for States, the District of Columbia, and U.S. Territories

CC: All Secretaries of State for States, the District of Columbia, and U.S. Territories

CC: General Counsel
The Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

CC: Administrator
Office of Information and Regulatory Affairs
725 17th Street, NW
Washington, DC 20503