

STATE BOARD OF ELECTIONS

STATE OF ILLINOIS

2329 S. MacArthur Blvd.
Springfield, Illinois 62704-4503
217/782-4141
Fax: 217/782-5959

James R. Thompson Center
100 W. Randolph St., Ste. 14-100
Chicago, Illinois 60601-3232
312/814-6440
Fax: 312/814-6485



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MEMORANDUM

TO: Chairman Cadigan, Vice Chairman Keith, Members of the Board
Executive Director Steven S. Sandvoss

From: Kenneth R. Menzel, General Counsel

Re: Presidential Advisory Commission on Election Integrity

Date: August 17, 2017

As you will recall, on July 5, 2017 the Illinois Secretary of State received a letter dated June 28, 2017, from Kris W. Kobach, the Vice Chairman of the Presidential Advisory Commission on Election Integrity (“PACEI”), which was immediately forwarded to the State Board of Elections (“SBE”). This letter (the “First Request”) requested that SBE provide PACEI with a copy of the state’s publicly available voter database and answer several questions. My letter dated July 7, 2017 advised PACEI that Illinois does not have any publicly available voter data,¹ and that SBE would address the questions at a later date.

On July 27, 2017, SBE received a revised request from PACEI, dated July 26, 2017 (the “Revised Request”). The Revised Request seeks such information as would be provided to “political candidates, journalists, and other interested members of the public.” PACEI says that voter data provided by the states will not be released to the public, without giving any detail as to PACEI’s authority for withholding the same. The Revised Request is rather artlessly phrased, since we have already informed PACEI that such information is only available to political committees and governmental entities, and is not available to the general public. However, I believe it appropriate to treat the Revised Request as a request by a governmental entity for governmental purposes for the limited voter data set (the “Dissemination File”).²

The Revised Request did not include payment of the \$500.00 fee which SBE charges political committees and governmental entities for the Dissemination File.³

¹ My letter dated July 7 referred to the restrictions under 10 ILCS 5/1A-25, 4-8, 5-7 and 6-35, which protect the confidentiality and privacy of voter registration data, limiting its release to registered political committees for political purposes and to governmental entities for governmental purposes.

² The Dissemination File includes name, address, dates of birth and registration, political subdivision, voter status (active or inactive), sex, telephone number and email address (if provided by the voter), and voting history for the 15 most recent elections to the extent the data exists. The Dissemination File does not include the driver’s license number or any portion of the SSN.

³ It is likely PACEI is unaware of the fee or the amount of the same. To my knowledge, it has not been discussed with the commission.

Staff from the Illinois Attorney General's Public Interest Division has contacted me with concerns about the revised PACEI request, essentially raising two points. First, the AG staff believes that, contrary to PACEI's assertion, any information provided to the advisory commission would have to be made available to the public under the Federal Advisory Committee Act ("FACA") and the Federal Freedom of Information Act ("FOIA"). While it appears that there has not been a case directly on point as to the treatment of voter data under those acts, the AG staff relies on the strong, general requirements of public access in raising this concern.

Second, the AG staff questions whether PACEI is pursuing a proper governmental purpose, so as to qualify to receive voter data under the Illinois Election Code. I share the widespread concerns that any analysis of the limited items of voter data that PACEI would have to work with would generate at least a couple hundred (and potentially several hundred) false positives for every actual double registration or double vote that would be identified, and that a federal commission is not in a practical position to undertake the necessary follow up work to get to accurate final determinations. However, in the same way that federal agency officials should not generally insert themselves into concluding that state government is being unwise or inefficient in the conduct of state business, I don't believe it is the place of state agency officials to second guess the wisdom or efficiency of federal entity exercises of discretion.

Finally, the response to the original PACEI request indicated that we would answer the commission's set of seven questions at a later time. Staff has worked on a proposed narrative statement to address the items raised, which is attached hereto for the Board's consideration.

With regard to the Revised Request, it would be my recommendation that the SBE:

- (a) inform PACEI that governmental entities seeking the Dissemination File are required to tender the requisite fee of \$500,
- (b) advise PACEI that the Illinois AG does not believe that the voter data could be kept confidential under FACA and FOIA, and ask PACEI to provide its legal basis for claiming exemption from disclosure under those acts,
- (c) inquire as to precisely what PACEI will do with the data (e.g. what sort of statistical analysis will be done), what investigative work will be done to filter out false positives generated in the statistical analysis, and what details will be released to the public, and
- (d) transmit the narrative statement answering the First Request questions.

At such point as PACEI tenders payment for the Dissemination File and provides further information as to its legal authority to maintain the confidentiality of the voter data, a final decision may be made as to whether PACEI qualifies to receive Illinois voter data under 10 ILCS 5/1A-25, 4-8, 5-7 and 6-35.

Respectfully submitted,



Kenneth R. Menzel

