

**United States District Court
Middle District of Pennsylvania
Harrisburg Division**

**The PUBLIC INTEREST LEGAL
FOUNDATION**

Plaintiff,

v.

**ROBERT TORRES, in his official capacity as
Acting Secretary of the Commonwealth of
Pennsylvania, and JONATHAN M. MARKS,
in his official capacity as the Commissioner of
the Bureau of Commissions, Elections, and
Legislation**

Defendants.

No. 1:18-cv-00463-CCC

**Plaintiff Public Interest Legal Foundation’s
Sur-Reply in Opposition to Defendants’ Motion to Dismiss**

Plaintiff Public Interest Legal Foundation (the “Foundation”) hereby files this sur-reply in response to Defendants’ Reply Memorandum in Further Support of Motion to Dismiss (Dkt. 17) and states the following in support thereof:

The Foundation filed this action to compel Defendants Torres and Marks (together, the “Secretary”) to abide by their obligation under the National Voter Registration Act to make available for public inspection records concerning the Secretary’s programs and activities designed to ensure the accuracy and currency of the voter rolls. 52 U.S.C. § 20507(i)(1). The Foundation requested the right to

inspect four categories of records—including records related to the Secretary’s analysis of decades of voter registration by noncitizens at PennDOT offices. (Dkt. 14 at 6).

In his reply memorandum, the Secretary make assertions concerning his activities, and records responsive to the Foundation’s request, that are contradicted by newly-discovered evidence that was not available to the Foundation prior to the filing of its response to the Secretary’s Motion to Dismiss (Dkt. 14). Specifically, the Secretary states:

To the extent PILF is suggesting in its brief that it is only seeking access to cancellation records and communications with registrants and third parties concerning cancellation of non-citizen registrations . . . it has no claim [T]he Commonwealth does not have a systematic removal program regarding non-citizens and therefore there are no documents responsive to PILF’s request for such records.

(Dkt. 17 at 12 n.8.)

On April 27, 2018, five days *prior* to making these statements to the Court, the Pennsylvania Department of State quietly released a statement to select media concerning its activities to identify and remove noncitizens who were registered to vote through a so-called “programming error in the PennDOT Motor Vehicle electronic system” (hereafter, the “Statement,” attached as Exhibit A).¹ In other

¹ See, e.g., Davies, *Number of noncitizens registered to vote in Pa. may be far below 100,000*, April 27, 2018, <https://whyy.org/segments/27ddvoters/>; Davies, *PA Addresses Non-Citizen Voter Issue*, April 30, 2018, <https://wskg.org/news/pa-addresses-non-citizen-voter-issue/>.

words, the Statement describes the Secretary's activities about which the Foundation requested the right to inspect records.

The Statement reveals list maintenance actions undertaken by the Secretary in the past, as well as actions the Secretary is currently taking and plans to take in the future. Regarding list maintenance actions already conducted, the Statement explains that prior to the end of 2017, "an intense data analysis and process was conducted that yielded a responsible list of individuals for whom voter registration status required further confirmation." Exhibit A at 1. The Statement continues, "As a result of that work, the Department of State is mailing the attached letter today to 7,702 individuals whose citizenship status merits further due diligence." *Id.* A copy of the letter sent to suspected noncitizen registrants is attached as Exhibit B.

Regarding present and future activities, the Statement explains that "there is more analysis to be done" and that the department is "[c]urrently . . . continuing its analysis." *Id.* "After the primary"—which is scheduled for May 15, 2018—"officials will take additional steps to ensure that affected individuals affirm their eligibility or request cancellation,"² including "reach[ing] out to the individuals through another mailing." *Id.* The Secretary's Statement, as written, raises more

² The Foundation specifically requested records concerning requests by registered voters to cancel their registrations. (*See* Dkt. 1-8 at 2.)

questions as to the scope and breadth of both the analysis and the number of registered voters affected.

The Statement also reveals the existence of records in the Secretary's possession related to these activities, including the "list of individuals for whom voter registration status required further confirmation" and correspondence with 7,702 registered voters. *Id.* All of these records—and others related to them—are responsive to the Foundation's requests.

The Statement contradicts several assertions made by the Secretary in his reply memorandum. First, the Statement contradicts the Secretary's assertion that he possesses "no documents" concerning "communications with registrants and third parties concerning cancellation of non-citizen registrants." (Dkt. 17 at 12 n.8.) Indeed, the list generated through the Secretary's investigation and the letters sent to suspected noncitizen registrants are "documents" that concern cancellation. The Statement indicates that the letters already sent to registrants—and those that will be sent in the future—are part of the process the Secretary is using to identify and remove registrants who might be ineligible for reasons of citizenship. Exhibit A at 1 ("Individuals who do not respond to the subsequent notifications may be subject to additional processes before removal from the voter rolls.").

To be clear, the Foundation is *not* "only seeking access to cancellation records and communications with registrants and third parties concerning

cancellation of non-citizen registrations.” (Dkt. 17 at 12 n.8.) The Foundation is seeking, in part, *all* records and results related to the analysis conducted to assess and remedy the so-called “programming error” at PennDOT offices that allowed noncitizens to register to vote. The Statement, and the records it describes, reveals the existence of certain records that the Secretary possesses and which are responsive to the Foundation’s requests.

Second, the Statement contradicts the assertion that the Secretary does not have a “systematic removal program regarding non-citizens.” (Dkt. 17 at 12 n.8). The Statement plainly describes a methodical process for identification and removal of noncitizen registrants, a process that included an “intense data analysis . . . that yielded a responsible list of individuals for whom voter registration status required further confirmation.” Exhibit A. Each of these individuals received or will receive a form letter (Exhibit B) that asks each registrant to confirm his or her eligibility to vote. *Id.*

To be clear, the NVRA’s Public Disclosure Provision is not limited to records concerning *systematic* removal programs. Rather, the Public Disclosure Provision permits public inspection of “*all records* concerning the implementation of *programs and activities* conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.” 52 U.S.C. § 20507(i)(1). Nevertheless, the “programs and activities” described by the Statement are in fact systematic, and

to that extent, the Statement contradicts the assertions made by the Secretary in his reply memorandum.

The Statement and the letter referenced therein (Exhibit B) are clear evidence of the Secretary's programs and activities designed to ensure the accuracy and currency of the voter rolls. Records concerning these activities—and all other responsive records in the Secretary's possession—fall squarely within the Secretary's obligations under the NVRA and must be made available for public inspection.

For these reasons, and those described in the Foundations response memorandum, the Secretary's Motion to Dismiss should be denied.

Dated: May 8, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.8(b)(3)

I hereby certify that the foregoing memorandum is in compliance with Local Rule 7.8(b)(2). The brief contains 1,093 words as computed by the word-count feature of Microsoft Office Word.

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