

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

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**The PUBLIC INTEREST LEGAL  
FOUNDATION,**

*Plaintiff,*

v.

**KATHY BOOCKVAR, in her official  
capacity as Acting Secretary of the  
Commonwealth of Pennsylvania,  
JONATHAN M. MARKS, in his official  
capacity as Deputy Secretary for Elections  
and Commissions, and the BUREAU OF  
COMMISSIONS, ELECTIONS AND  
LEGISLATION,**

*Defendants.*

No. 1:19-cv-00622-CCC

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**Plaintiff’s Response to Defendants’ Statement of Undisputed Material Facts in  
Support of their Motion for Summary Judgment**

Pursuant to Rule 56.1 of the Local Rules of Court for the Middle District of Pennsylvania, Plaintiff Public Interest Legal Foundation (“Foundation”) submits its responses to the Defendants’ statement of undisputed material facts filed in support of their motion for summary judgment. (Doc. 63.)

1. By means of letters dated October 23, 2017 and December 4, 2017, which were resubmitted on March 20, 2019, Plaintiff Public Interest Legal Foundation (“PILF”) requested access to four categories of records pursuant to the public disclosure provision in the National Voter Registration Act (“NVRA”), 52 U.S.C. § 20507(i)(1). *See* Compl. ¶ 119 & Exs. H, I, N, O.

**Response: Admitted in part and denied in part.** The Foundation admits that by letters dated October 23, 2017 and December 4, 2017, the Foundation requested records pursuant to the NVRA's Public Disclosure Provision. *See* Doc. 1-9 (Ex. H to Complaint) at 1 and 1(a); Doc. 1-10 (Ex. I to Complaint). The Foundation denies that its requests were "resubmitted" on March 20, 2019. Rather, the Foundation included, for reference, copies of its October 23 and December 4 records requests in correspondence notifying Defendants that the Secretary of the Commonwealth's office was violating the NVRA by refusing to disclose the requested records. *See* Doc. 1-15 (Ex. O to Complaint).

2. The first category of records sought by PILF are records relating to comparison of the SURE database with the PennDOT driver license database. *See* Oct. 23, 2017 and Dec. 4, 2017 Letters (attached to Compl. as Exs. H & I).

**Response: Admitted in part and denied in part.** The Foundation admits that the Foundation's first category of requested records **included** records relating to Defendant's voter list maintenance activities that included a comparison of voter registration records with PennDOT and other databases. *See* Doc. 1-9 ¶¶ 1 and 1(a); Doc. 1-10 bullet point one. The Foundation denies that the first category of requested records is limited to the records described in this paragraph. Rather, the Foundation's first request sought "[d]ocuments regarding **all registrants** who were identified as potentially not satisfying the citizenship requirements for registration **from any official information source** ... since January 1, 2006." Doc. 1-9 ¶ 1 (emphasis added). Paragraph 1(a) of the first request provides that "[t]his request

**includes** all voter records that were referenced in recent news media reports regarding individuals improperly exposed to registration prompts due to a “glitch” in PennDOT’s Motor Voter compliance system.” Doc. 1-9 ¶ 1(a) (emphasis added). Furthermore, the Foundation’s December 4, 2017 letter specifies that the documents sought in “Request **1(a)**”—as opposed to the entirety of Request 1—”**include** results (full or interim) from an aforementioned official ‘review’ of voter data compared against PennDOT’s database of customers to identify voters with matching driver profiles containing noncitizen designations.” Doc. 1-10 bullet point one (emphasis added).

3. By Memorandum and Order dated December 13, 2019, this Court ruled that the records requested by PILF are protected from disclosure and not required to be disclosed to the extent such records include personal information obtained from PennDOT in connection with a motor vehicle record. *See Public Interest Legal Found. v. Boockvar*, 431 F. Supp. 3d 553, 563 (M.D. Pa. 2019).

**Response: Denied as stated.** This Court’s Memorandum and Order dated December 13, 2019 provides, “The glitch-related records and derivative lists created during the Commonwealth’s investigation are protected by the [Driver’s Privacy Protection Act (“DPPA”)] to the extent they include personal information obtained by the DMV in connection with a motor vehicle record.” *Public Interest Legal Found. v. Boockvar*, 431 F. Supp. 3d 553, 563 (M.D. Pa. 2019). As used in the DPPA, “personal information” is limited to “information that identifies an individual, including an individual’s photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone

number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.'" *Id.* at 562 (quoting 18 U.S.C. § 2725(3)).

4. The Department of State provided PILF with copies of letters sent to registrants in 2018 advising them of the Motor Voter software issue and asking them to affirm their eligibility to vote or submit a request to cancel their registration, press statements and other communications concerning the letters, summary data concerning the letters and responses and related communications with county election officials. *See* Marks Decl. ¶ 29; *see also* Summary Chart attached to Defs.' Supp. Mem. as Exhibit D.

**Response: Admitted in part and denied as stated.** The Foundation admits that this paragraph generally describes some of the records that were produced to the Foundation in response to discovery requests propounded on Defendants. *See, e.g.,* Defendants' Statement of Undisputed Material Facts (Doc. 63) ¶¶ 11, 33-34. The Foundation denies the remainder of this paragraph as stated. The "copies of letters" referenced in this paragraph were form letters that omit all registrant-specific information (*e.g.,* name, address, and statement confirming/denying eligibility). *See* Doc. 64-1 at 15; Doc. 66-11. The Foundation further denies this paragraph to the extent it suggests that Defendants have produced *all* non-exempt records responsive to the Foundation's first request. *See* Doc. 1-9 ¶¶ 1 and 1(a); Doc. 1-10 bullet point one; *see also* Plaintiff's Response to Defendants' Fact No. 2.

5. Other than information derived from protected driver license records, the Department of State received no documents within the relevant period from any official government source identifying potential non-citizens on the voting roll

and has no other non-privileged documents responsive to the first category request in PILF's letters. *See* Marks Decl. ¶ 30.

**Response: Denied and denied as stated.** The Foundation denies that the Foundation's first category of requested records is limited to documents "identifying potential non-citizens on the voting roll." The first request includes "[d]ocuments **regarding** all registrants who were identified as potentially not satisfying the citizenship requirements for registration ...." Doc. 1-9 ¶ 1 (emphasis added). Specific requested non-identifying records include, but are not limited to, the "results" of the "official 'review' of voter data compared against PennDOT's database of customers," "records indicating [voter list] maintenance actions taken as a result of the 'review,'" and "communications/written guidelines for methodology of said 'review.'" Doc. 1-10 bullet point one. To the extent identifying information is exempt under the DPPA, the Foundation is entitled to receive responsive records with that information redacted. *Boockvar*, 431 F. Supp. 3d at 563 (DPPA exemption applies only "to the extent [records] include personal information") (emphasis added).

The Foundation further denies that Defendants possess no other responsive documents other than "information derived from protected driver license records[.]" As explained in the Foundation's response to Defendants' Fact No. 2, Defendants inappropriately confined the Foundation's first request to records relating to comparison of the Systematic Uniform Registry of Electors ("SURE")

database with the PennDOT driver license database, which renders Defendants' search and production inadequate. *See also* Defendants' Memorandum of Law in Support of Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56 at 1 (Doc. 64). Furthermore, Defendants are withholding information relating to the PennDOT database comparison that was not obtained by PennDOT in connection with a motor vehicle record, including information obtained from registrants. *See* Plaintiff's Statement of Material Facts ("SMF") ¶¶ 24-26, 32, 36-39, 45-46 64, 70, 72, 74 (Doc. 66); *see also* Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment at 16-18 (Doc. 67).

The Foundation further denies this paragraph to the extent it purports that Defendants have complied with their duty to produce responsive records with exempt information redacted. This Court held that records are exempt only "to the extent they include personal information obtained by the DMV in connection with a motor vehicle record." *Boockvar*, 431 F. Supp. 3d at 563. There are numerous records in existence relating to Defendants' list maintenance activities that should be disclosed with redactions applied, where authorized. *See, e.g.*, Doc. 66 ¶¶ 49-54, 55-61, 64.

The Foundation further denies this paragraph to the extent it claims that responsive documents are privileged and that such privilege exempts them from the federal disclosure mandates of the NVRA. *See* Docs. 64-1, 64-3. The Foundation also denies that Defendants' affidavit factually establishes the validity

of any privilege and denies Defendants have provided a privilege log or otherwise asserted privileges on a document-by-document basis. *See* Docs. 64-1, 64-3.

6. The second category of documents sought by PILF are documents and records of communication received or maintained by DOS from registered voters or their representatives requesting cancellation from the voter roll due to non-citizenship and list maintenance relating thereto. *See* Oct. 23, 2017 and Dec. 4, 2017 Letters (attached to Compl. as Exs. H & I).

**Response: Denied as stated.** The Foundation denies that this paragraph accurately reflects the complete language of the Foundation's second request. For example, this paragraph omits the requests starting date of January 1, 2006. *See* Doc. 1-9 ¶ 2. The Foundation's requests, in their entirety, were filed in this case as docket entries 1-9 and 1-10.

7. The Department of State provided PILF with copies of records received from county election officials relating to requests directed to and maintained by county election officials from registrants or their agents requesting cancelation of voter registration due to non-citizenship. *See* Marks Decl. ¶ 33.

**Response: Admitted in part and denied in part.** The Foundation admits that this paragraph generally describes some of the records that were produced to the Foundation in response to discovery requests propounded on Defendants. Doc. 63) ¶¶ 11, 33-34. The Foundation denies the remainder of this paragraph as stated.

The Foundation further denies this paragraph to the extent it suggests that Defendants have produced all non-exempt records responsive to the Foundation's second request. Defendants inappropriately confined the Foundation's second request to records requested from county officials in 2017 relating to the Initial

Statewide Analysis, which renders Defendants’ search and production inadequate.<sup>1</sup> *Compare* records requested by Foundation (Doc. 1-9 ¶¶ 1 and 1(a)) *with* records requested by Department (Exhibit A at 2); Doc. 63 ¶ 7; Doc. 64-1 ¶ 33 (explaining that production was limited to the Initial Statewide Analysis and potentially only three counties); Doc. 64-1 ¶ 34 (explaining production of “redacted” list, but not underlying SURE records); Email from Jonathan Marks dated December 8, 2017, attached herein as Exhibit A; Email from Jonathan Marks dated February 27, 2018, attached herein as Exhibit B; Email from SURE dated December 15, 2017, attached herein as Exhibit C; Defendants’ evidence does not establish that at any time Defendants conducted their own search for responsive records maintained in the SURE system. *See* Doc. 66 ¶ 25 (“The Department of State has ‘instant access to a commission’s registration records maintained on the [SURE] system.’”). Defendants concede that records responsive to the Foundation’s second request were produced “during discovery in this case,” Doc. 64-1 ¶ 33, which was not served until April 20, 2020, and not complied with—as it relates to the Foundation’s second request—until February 3, 2021. Emails between counsel dated January 13, 2021, attached herein as Exhibit D (“Given the anticipated production of additional records, we are proposing to postpone and reschedule all depositions pursuant to the understanding below.”); Doc. 53 ¶ 3 (“Since the

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<sup>1</sup> The Initial Statewide Analysis is described in testimony of Defendant Marks (Doc. 66-2) and in the Foundation’s Statement of Material Facts (Doc. 66 ¶¶ 55-61).



depositions were noticed, additional documents were identified that require review for potential production to PILF.”); Letter to Noel Johnson dated February 11, 2021, attached herein as Exhibit E. *See also*, Pennsylvania Department of State document, attached herein as Exhibit F; Defendant Kathy Boockvar’s Objections and Responses to Plaintiff’s First Request for Documents, attached herein as Exhibit G; Letter to Noel Johnson date February 3, 2021, attached herein as Exhibit H.

8. The Department of State also produced a redacted list of 1,160 persons who apparently self-reported and cancelled their registration because they were not citizens. *See* Marks Decl. ¶ 34; *see also* Summary Chart.

***Response: Admitted in part and denied in part.*** The Foundation incorporates its response to Statement of Fact #7.

The Foundation further denies that the NVRA permits the broad redactions Defendants applied to the records described in this paragraph. *See* Doc. 66-10 (redaction applied to entire table save for Table ID, county name, registered date, state change date, and status reason).

The Foundation further denies this paragraph to the extent it purports that Defendants have provided to the Foundation all SURE system records for each of the registrants on this list, including voting histories. *See* Response to Defendants’ Fact No. 7.

9. The third category of records sought by PILF are communications with jury selection officials relating to individuals who claimed to be non-U.S. citizens when attempting to avoid serving on jury duty and maintenance actions

taken as a result. *See* Oct. 23, 2017 and Dec. 4, 2017 Letters (attached to Compl. as Exs. H & I).

**Response: Denied as stated.** The Foundation denies that this paragraph accurately reflects the complete language of the Foundation's third request. The Foundation's requests, in their entirety, were filed in this case as docket entries 1-9 and 1-10.

10. The Department of State occasionally receives letters from jury officials identifying persons who were summoned for jury duty and who asked to be excused because they were not citizens. When the Department receives such letters, they are forwarded to the respective county to take appropriate action. *See* Marks Decl. ¶¶ 37-38.

**Response: Admitted in part and denied in part.** The Foundation admits that Defendant Jonathan M. Marks testified in deposition that Defendants periodically receive letters from federal district courts showing registered voters who recused themselves from jury duty because they are not United States citizens. *See* Doc. 66 ¶ 46. The Foundation denies this paragraph to the extent it purports that Defendants do not maintain copies of those letters or records of their transmission to county election officials. *See* Doc. 66 ¶ 46.

11. The Department of State did not locate any letters from jury officials during the relevant period. *See* Marks Decl. ¶ 40.

**Response: Denied.** The Foundation denies this paragraph to the extent it purports that Defendants conducted an adequate search for records responsive to the Foundation's third request. Defendants' Declaration of Jonathan M. Marks explains that Defendants' search for records was limited to the period between

October 2015 and March 2019. Doc. 64-1 ¶ 40. The Foundation’s third request sought records dating to January 1, 2006. Doc. 1-9 ¶ 3. Defendants’ limited search is based on the untenable position that the NVRA does not require production of records more than two years old. *See* Doc. 64 at 17 n.9. “[I]f a state chooses to retain a record beyond two years, the NVRA requires the state to produce that record.” *Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425, 441 (D. Md. 2019); *see also Ill. Conservative Union v. Illinois*, No. 20 C 5542, 2021 U.S. Dist. LEXIS 102543, at \*20 n.3 (N.D. Ill. June 1, 2021).

12. PILF’s fourth request for records relates to communications with prosecutors and law enforcement agencies concerning voting by non-citizens. *See* Oct. 23, 2017 and Dec. 4, 2017 Letters (attached to Compl. as Exs. H & I).

**Response: Denied as stated.** The Foundation denies that this paragraph accurately reflects the complete language of the Foundation’s fourth request. For example, the Foundation’s fourth request was not limited to communications concerning “voting” activities. Rather, the Foundation sought “communications regarding list maintenance activities.” Doc. 1-9 ¶ 4. The Foundation’s requests, in their entirety, were filed in this case as docket entries 1-9 and 1-10.

13. The Department of State has not communicated with federal or state prosecutors concerning any individual who was identified as a non-citizen or who sought to cancel his or her registration based on non-citizenship. The Department has no records to produce in response to the fourth category. *See* Marks Decl. ¶¶ 42-43.

**Response: Cannot admit or deny.** The Foundation lacks sufficient information to admit or deny this paragraph. Defendants’ summary judgment

memorandum suggests that Defendants search was limited to registrants who registered to vote at DMV offices as a result of the so-called PennDOT “glitch.” See Doc. 64 at 18. Defendants’ affidavit does not otherwise establish that Defendants’ search for responsive records was reasonable temporally or in scope. See Doc. 64-1 ¶ 42.

Dated: June 14, 2021.

Respectfully submitted,

For the Plaintiff Public Interest Legal Foundation:

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**Certificate of Service**

I hereby certify that on June 14, 2021, I electronically filed the foregoing using the Court's ECF system, which will serve notice on all parties.

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