



VIA EMAIL, FACSIMILE, AND CERTIFIED MAIL

April 4, 2022

The Hon. Tahesha Way
New Jersey Secretary of State
Division of Elections
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RE: Notice of NVRA Violation

Dear Secretary Way:

Pursuant to 52 U.S.C. § 20510(b)(1), this letter serves as statutory notice to you as New Jersey's chief election official that the Office of the New Jersey Secretary of State ("NJSOS") is in violation of the National Voter Registration Act (NVRA) for failure to permit inspection and reproduction of public records as required by the NVRA, 52 U.S.C. § 20507(i)(1).

You are hereby notified that you now face federal litigation if you continue to deny access to the requested records.

Background

The NVRA requires each state and the District of Columbia to make available for public inspection "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). The records the NVRA describes are commonly referred to as "voter list maintenance" records.

On September 21, 2021, pursuant to the NVRA, the Foundation requested from NJSOS the opportunity to inspect or receive certain voter list maintenance records, namely: "copies of all manuals, guidance, instructions, and other written procedures for identifying, merging, and/or cancelling duplicate voter registration records." A copy of the Foundation's September 21, 2021, request is enclosed with this notice.

Timeline of Correspondence from NJSOS

NJSOS has repeatedly delayed this matter well into calendar year 2022. Email records maintained by the Foundation show:

- On October 8, 2021, the NJSOS’s Open Public Record Act or “OPRA” Tracking System assigned the Foundation’s request to matter number “W177449.”
- On January 14, 2022, NJSOS made contact to request a 7-day extension of time to respond per local statute N.J.S.A. 47:1A-5.i. The Foundation did not object.
- On January 26, 2022, NJSOS made contact to request a 7-day extension of time to respond per local statute N.J.S.A. 47:1A-5.i. The Foundation did not object.
- On February 10, 2022, NJSOS made contact to request a 15-day extension of time to respond per local statute N.J.S.A. 47:1A-5.i. The Foundation did not object.
- On February 25, 2022, NJSOS made contact to request a 15-day extension of time to respond per local statute N.J.S.A. 47:1A-5.i. The Foundation did not object.
- On March 14, 2022, NJSOS made contact to request a 15-day extension of time to respond per local statute N.J.S.A. 47:1A-5.i. The Foundation did not object.

On March 25, 2022—more than six months after the initial request—NJSOS denied the Foundation’s request in full and closed the matter.

NJSOS Denies the Foundation’s Request

In NJSOS’s unsigned March 25 denial letter, officials deny the Foundation’s request pursuant to N.J.S.A. 47:1A-1.1, arguing that disclosure “would expose [a] critical vulnerability within the State’s election process.” The letter adds, “A government record shall not include . . . administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security.”

The NJSOS also argued that a disclosure would “detail how the State’s election systems function and how to make discrete changes within the systems. If disclosed, this information would create a grave risk to the integrity of New Jersey’s election system.”

Violation of the National Voter Registration Act

As explained in the Foundation’s September 21, 2021 request, the NVRA requires election officials to make available for public inspection “**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) (emphasis added). The requested records fall within the scope of this broad disclosure mandate—particularly because the Foundation seeks documents concerning *how* NJSOS ensures the accuracy and currency of official lists of voters. See *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1341 (N.D. Ga. 2016) (NVRA requires disclosure of “records regarding the processes a state implements to ensure the accuracy and currency of voter rolls” as well as “individual applicant records.”). The NVRA exempts only two pieces of information— (1) a declination to register to vote, and (2) the identity of a voter

registration agency through which any particular voter is registered. 52 U.S.C. § 20507(i)(1). The Foundation does not seek either of those things and the NVRA exempts no other records.

Any New Jersey law that limits disclosure is inapplicable to our request because the NVRA, as a federal enactment, is superior to conflicting state laws under the Constitution's Elections and Supremacy Clauses. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 12-15, 133 S. Ct. 2247, 2255-57 (2013).

Failure to permit public inspection or otherwise provide copies of the requested records is a violation of federal law for which the NVRA provides a private-right-of-action. 52 U.S.C. § 20510(b).

Secretary Way is hereby notified that her office is violating the NVRA and that litigation may commence against her if the violations described herein are not cured within 20 days of the receipt of this letter. 52 U.S.C. § 20510(b)(2). The violation must be cured within 20 days because the violation is occurring within 120 days of an election for federal office.¹ *See* 52 U.S.C. § 20510(b)(2). For lawsuits initiated by a private party, an award of attorney's fees, expenses, and costs incurred is available under 52 U.S.C. § 20510(c). The Foundation was recently awarded attorney's fees and litigation expenses as the prevailing party in actions to enforce the NVRA's public inspection rights.²

If the violation described herein is not cured in the time afford by law, we will have no choice but to pursue remedies in federal court.

Please contact me to arrange for secure transmission of the requested records, if necessary.

Thank you for your continued attention on this matter.

Sincerely,



Logan Churchwell
Research Director
Public Interest Legal Foundation

¹ *See* N.J.S.A. 19:2-1; N.J.S.A. 19:23-4 (“The primary election for the general election shall be held for all political parties upon the Tuesday next after the first Monday in June between the hours of 6:00 A.M. and 8:00 P.M., Standard Time.”).

² Doc. 97, *Public Interest Legal Foundation v. Bennett*, No. 4:18-cv-0981 (entered June 30, 2021).