



VIA EMAIL, CERTIFIED MAIL

November 4, 2022

ATTN: Elections Bureau/SERVIS
The Hon. Maggie Toulouse Oliver
New Mexico Secretary of State
325 Don Gaspar, Suite 300
Santa Fe, NM 87501
Email: sos.elections@state.nm.us; elections@sos.nm.gov

RE: Notice of NVRA Violation

Dear Secretary Toulouse Oliver:

Pursuant to 52 U.S.C. § 20510(b)(1), this letter serves as notice to you as New Mexico’s chief election official that the Office of the New Mexico Secretary of State (“NMSOS”) 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 or condition 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 October 11, 2022, pursuant to the NVRA, the Foundation requested from NMSOS the opportunity to inspect or receive certain voter list maintenance records, specifically:

1. Copies of any procedural guide or employee training manual containing instructions for processing and completing a New Mexico Voter Data Request under 1.10.35 NMAC Rule *et seq.* for voter information records with voting history in electronic format as outlined on the NMSOS website¹;

¹ <https://www.sos.state.nm.us/voting-and-elections/data-and-maps/voter-data-information/>

2. Records showing costs covered under the “\$15.00 Setup Fee” for SERVIS-related requests²;
3. A copy of the current and accurate listing of registered voter counts by county as was originally offered on the NMSOS website (the hyperlink to this information on the SERVIS webpage is broken as of today³); and,
4. A copy of the most current listing of SERVIS data (active and inactive/suspense) in electronic form with voting history. SERVIS data (i.e., the voter roll) is public data under the NVRA.⁴ The NVRA allows states to charge requestors for only the “reasonable cost” of “photocopying.” 52 U.S.C. § 20507(i)(1). SERVIS data that can be produced electronically therefore must be produced at no cost to the requestor.

Due to the upcoming election and in the interest of defraying costs borne by the NMSOS, the Foundation stated that it was willing to send a representative to Office on November 1, 2022, “to provide necessary storage media resources and applicable hardware to complete the data transfer.”

A copy of the Foundation’s October 11, 2022, request is enclosed with this notice.

Post-Request Facts and Inspection Attempt

Following the October 11 request, no formal response or human communication were provided by NMSOS beyond an automated message stating that an email was received to the elections@sos.nm.gov address. As the aforementioned November 1 visit date approached, the Foundation sent a follow-up email on October 25, asking for an acknowledgment of the request and confirmation that a staff member would be available on the planned date to assist with a transfer of data. Again, only an automated message was given in response.

On November 1, Foundation representative Logan Churchwell registered his appearance with NMSOS reception, submitting to a photograph being taken, and provided paper copies of the cover email thread and October 11 request letter. He was not invited past the reception area, but rather was met by a staff member to discuss the requests in the 3rd floor rotunda area.

As for Request 4, the staffer provided a printout of the SERVIS pricing schedule, which indicated that the cost to receive the records was approximately \$5,000. Mr. Churchwell explained that the requests were made pursuant to the NVRA, which permits states to charge

² *Ibid.*

³ https://www.sos.state.nm.us/Elections_Data/Voter_Registration_Statistics.aspx

⁴ “Faced with the need to decide the issue, the Court concludes that the Voter File is a ‘record[] concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters’ within the meaning of the Public Disclosure Provision and thus is subject to disclosure under the NVRA. 52 U.S.C. § 20507(i)(1). In making this determination, the Court finds persuasive and adopts the relevant reasoning of the Fourth Circuit and a federal district court in Maryland. *See Project Vote/Voting for America v. Long*, 682 F.3d 331, 335-36 (4th Cir. 2012); *Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425, 437-38 (D. Md. 2019).” *Pub. Interest Legal Found., Inc. v. Bellows*, No. 1:20-cv-00061-GZS, 2022 U.S. Dist. LEXIS 38875, at *13 (D. Me. Mar. 4, 2022).

requestors only for the “reasonable cost[s]” of “photocopying” or, in this case, reproducing the digital file[s]. 52 U.S.C. § 20507(i)(1). To reduce or eliminate those reproduction costs, Mr. Churchwell offered to provide all necessary hardware to securely transfer SERVIS data, including a DVD writer, 100 blank DVD-Rs, and a 64-gigabyte flash drive. All storage media were still in original packaging. The staffer declined to carry the flash drive back into the office to speak with whomever else she was acting as an intermediary for. Finally, the staffer returned to the rotunda area and explained that New Mexico statutes require payment of the full \$5,000. The meeting ended shortly thereafter.

Violation of the National Voter Registration Act

As explained in the Foundation’s October 11, 2022 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). A state’s list of eligible voters falls within the scope of this broad disclosure mandate. *See Pub. Interest Legal Found. v. Matthews*, No. 20-cv-3190, 2022 U.S. Dist. LEXIS 40640, at *27 (C.D. Ill. Mar. 8, 2022); *Pub. Interest Legal Found., Inc. v. Bellows*, No. 1:20-cv-00061-GZS, 2022 U.S. Dist. LEXIS 38875, at *13-14 (D. Me. Mar. 4, 2022); *Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425, 446 (D. Md. 2019); *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 723 (S.D. Miss. 2014); *see also 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.

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).

It is also a violation of federal law to restrict or condition access to voter list maintenance records in a way that impedes Congress’s objections. The NVRA, as a federal enactment, is superior to conflicting state laws under the Constitution’s Elections and Supremacy Clauses. *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1, 9 (2013); *see also ACORN v. Edgar*, 880 F. Supp. 1215, 1222 (N.D. Ill. 1995); *Project Vote*, 813 F.Supp.2d at 743 (E.D. Va. 2011); *Bellows*, No. 1:20-cv-00061-GZS, 2022 U.S. Dist. LEXIS 38875, at *14 (“Having concluded that the Voter File falls within the ambit of the NVRA’s Public Disclosure Provision, the Court concludes that Plaintiff has pleaded sufficient facts that, when taken as true, establish a plausible claim of obstacle preemption.”); *Matthews*, No. 20-cv-3190, 2022 U.S. Dist. LEXIS 40640, at *27 (“The Foundation has also shown that Section 5/1A-25 conflicts with, and is preempted by, the Public Disclosure provision insofar as Section 5/1A-25 prohibits the photocopying and duplication of the same list.”).

The imposition of a \$5,000 per-request fee is not “reasonable,” as the NVRA requires, but is exorbitant and arbitrary. *See Greater Birmingham Ministries v. Merrill*, No. 2:22cv205-MHT, 2022 U.S. Dist. LEXIS 181339, at *18 (M.D. Ala. Oct. 4, 2022) (“To ensure that the purposes of the NVRA are not frustrated, however, whatever schedule he develops for reasonable costs must be tethered to the actual costs he incurs in producing responsive voter records.”). New Mexico’s \$5,000 per-request fee precludes access to public records in a way that poses obstacles to the achievement of the NVRA’s objections. The \$5,000 per-request fee is therefore preempted and unenforceable. *See Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1351 (N.D. Ga. 2016) (“The absence of a cost provision in the public inspection provision of the NVRA—and its inclusion in other record disclosure laws—suggests Congress intended States to shoulder the burden about which Defendant now complains.”).

Because the NVRA violation described herein has occurred and continues to occur within thirty (30) days of a federal election, the Foundation does not need to provide pre-litigation notice to the Secretary. 52 U.S.C. § 20510(b)(3). As a courtesy, Secretary Toulouse Oliver is receiving this letter with the hope that this dispute can be resolved without litigation. However, if the violation described herein is not cured by **close of business local time on November 7, 2022**, the Foundation will file an action to enforce the NVRA in the appropriate court. 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.⁵

The Foundation is willing to pay the reasonable cost of producing the requested records in digital format. Please contact me to arrange for secure transmission of the requested records.

Thank you for your continued attention on this matter.

Sincerely,



Logan Churchwell
Research Director
Public Interest Legal Foundation

⁵ Doc. 97, *Public Interest Legal Foundation v. Bennett*, No. 4:18-cv-0981 (entered June 30, 2021).