

STATE OF NEW MEXICO
BERNALILLO COUNTY
SECOND JUDICIAL DISTRICT

AMERICAN CIVIL LIBERTIES
UNION OF NEW MEXICO,

Plaintiff,

v.

Case No. D-202-cv-2011-07257

DIANNA J. DURAN and CHRISTIANA SANCHEZ,

Defendants.

DEFENDANTS' PRIVILEGE LOG

Defendants have withheld the following documents from production pursuant to the Inspection of Public Records Act:

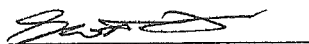
1. A spreadsheet listing the names, Social Security Numbers, and match codes for registered New Mexico voters whose information was checked against information contained in records maintained by the Social Security Administration. The match codes indicate whether there is some question about the information and, if so, more particularly describe what that question is. This document has been withheld on the basis that it contains information protected by the Help America Vote Act and the Social Security Act and is thus otherwise protected by law.
2. A list of 117 names whose information did not match between the Secretary of State's and the Motor Vehicle Division's databases but did appear in the Motor Vehicle Division's Foreign National Database. This document has been withheld on the basis that it contains information protected by the federal and New Mexico Driver Privacy Protection Acts.
3. A list of 37 names of registered voters who may not be New Mexico citizens but appear to have voted in a New Mexico election. This document has been withheld on the basis

that it contains information protected by the federal and New Mexico Driver Privacy Protection Acts and on the basis of executive privilege because the investigation concerning these names is not yet complete.

Defendants reserve the right to supplement this privilege log as necessary.

Respectfully submitted,

GARY K. KING
NEW MEXICO ATTORNEY GENERAL



Scott Fuqua
Assistant Attorney General
408 Galisteo Street
Santa Fe, NM 87501
(505)827-6920 – Telephone
(505)827-6036 – Facsimile

Attorney for Defendants

Ed Macy

From: Fuqua, Scott <sfuqua@nmag.gov>
Sent: Wednesday, November 02, 2011 10:52 AM
To: Alexandra Smith
Cc: Ed Macy
Subject: RE: Privilege Log

I apologize for the unexpected delay on this. The report resulting from the Social Security Administration database was generated on March 28, 2011. The lists of 117 names matching the MVD Foreign Nationals Database and the 37 names from that list that appear to have voted were both generated on March 14, 2011. I believe that covers the documents on the privilege log, but please let me know if you have any questions.

Scott

On Oct 31, 2011 10:51 AM, "Alexandra Smith" <asmith@aclu-nm.org> wrote:

Will you please provide the dates for the documents on your privilege log?

From: Fuqua, Scott [mailto:sfuqua@nmag.gov]
Sent: Monday, October 24, 2011 2:01 PM
To: Alexandra Smith
Cc: Ed Macy
Subject: Re: Privilege Log

Of course. I don't have them handy, but will provide them as soon as I can.

On Mon, Oct 24, 2011 at 1:58 PM, Alexandra Smith <asmith@aclu-nm.org> wrote:

Will you please tell us the dates for these three documents on the privilege log?

From: Fuqua, Scott [mailto:sfuqua@nmag.gov]
Sent: Thursday, October 20, 2011 10:17 AM
To: Ed Macy; Alexandra Smith
Subject: Privilege Log

Counsel-

I've attached a .pdf copy of the privilege log in your IPRA case against the Secretary of State. I apologize for the delay - I was pressed into service yesterday to chair the quarterly meeting of the Law Enforcement Academy

Exhibit L



STATE OF NEW MEXICO
DIANNA J. DURAN
SECRETARY OF STATE

November 3, 2011

Attorney General Gary King
P.O. Drawer 1508
Santa Fe, New Mexico 87504-1508

Re: Voter Registration and Voting by non-citizens

Dear Attorney General King:

As you know, our office has been reviewing information concerning the issue of voter registration and voting by individuals who are not U.S. citizens.

Recently, an individual came to my office who told me that he is a legal resident and a non-citizen. In 1998, his employer encouraged him to register to vote. He stated that he did not believe that he could, but one of his employers stated that she believed he was eligible. That person brought him a voter registration form which was filled out with his personal information. He signed the form and was registered to vote. He has voted in almost every state, federal and local election in his precinct since 1998.

This gentleman recently went to apply for U.S. citizenship, and at that time learned that he was not eligible to vote. He learned that having registered and voted was an impediment to his application for citizenship. He went to the county clerk and asked that his name be removed from the voter rolls. He also voluntarily came to my office to explain his situation. This gentleman is a 22-year employee of a county government and is the primary financial support for his family. He now faces concerns that he could be prosecuted or deported.

Based upon his statements and his voluntary visit to attempt to address the violation of the law, it does not appear that this man intended to violate the Election Code. However, the statute requires me to report potential violations to you or a district attorney.

A second individual was identified to our office who is a non-citizen who was registered to vote, but did not cast a vote in any election. The second non-citizen was apparently pressured by a third party to register, although she was uncertain as to her eligibility. When she applied for citizenship she learned that she was not eligible, and that her voter registration was an impediment to obtaining citizenship. Like the first individual, this woman voluntarily requested that she be removed from the voter rolls.

Exhibit M

In addition, our office has investigated instances where individuals who obtained drivers' licenses using foreign national credentials also appear to be registered to vote. A number of those individuals who registered to vote subsequently used foreign documentation to obtain a driver's license. This creates a significant concern that they were non-citizens at the time they registered to vote.

Additionally, a number of those individuals checked "no" on the question of whether or not they were U.S. citizens. The fact that they indicated they were non-citizens leads me to believe that, like the specific instances mentioned above, there may have not been any intent to violate the law. Those individuals may have been misled by third party registration agents, or may have misunderstood the law at the time they registered.

I am concerned that these specific cases demonstrate that New Mexico's voter registration process is failing both citizens and non-citizens alike. The fact that non-citizens are registered, and in some instances voting in New Mexico elections is detrimental to the integrity of the election process for state, federal and local elections.

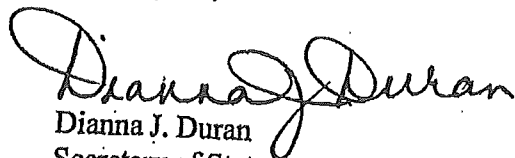
Second, non-citizens who have registered and/or voted appear to be finding themselves in the position of having, perhaps unintentionally, committed a crime, and may be subject to prosecution and/or deportation.

The purpose of this letter is advise you, as required by statute, of possible violations of the Election Code. As I have stated, several of these individuals have already voluntarily requested that their names be removed from the voter rolls. I am attempting to contact the remaining individuals to inquire further, and, if necessary, allow them to request removal from the voter rolls if they are still non-citizens.

Since March of this year I have requested guidance from your office as to disclosure of the names of the individuals identified pursuant to the Inspection of Public Records Act, and taking into account the confidentiality provisions of the Driver Privacy Protection Act, the New Mexico Driver Privacy Protection Act and the Help America Vote Act. To date I have still not received clear guidance as to such disclosure or non-disclosure.

I await written direction from you as to further investigation or action to be taken by your office.

Best regards,


Dianna J. Duran
Secretary of State



STATE OF NEW MEXICO
DIANNA J. DURAN
SECRETARY OF STATE

November 4, 2011

Dear Clerks,

As you all know, we in the Office of the Secretary of State (SOS) continue to work on verification of our voter file to ensure the accuracy of our database. Many counties have diligently and continuously followed procedures to attempt to maintain accurate files at the local level. We are aware of those efforts and appreciate the hard work of those clerks and their staffs.

In addition to the ongoing work at the local level, one of our goals at the SOS has been to initiate a comprehensive *statewide* effort that will ensure integrity in our electoral system. Among the procedures to be followed will be the correction of voter files, verification of voter registration, and the identification of ineligible voters. We want to assist in any way we can with these procedures, in keeping with our statutory duty to maintain the statewide voter file.

Unfortunately, according to the Department of Justice (DOJ), in both 2007 and 2009 New Mexico failed to comply with the National Voter Registration Act (NVRA) confirmation process that would have allowed us to conduct statewide purges of inactive and ineligible voters in both 2011 and 2013. According to DOJ, we are the only state that failed to comply with those procedures. We are committed to bringing our state into compliance; however, due to those earlier failures to follow the law, a purge cannot be conducted until 2015. Meanwhile we will be working with an inflated and inaccurate data base.

As frustrating as this situation may be, all we can do in the meantime is work diligently to ensure that our statewide data base is as accurate as we can make it. With that goal in mind, I am sending the following information to you today in an effort to inform you of some of the issues we have been dealing with over the past few months. Considering that this kind of information is directly related to the conscientious work you are engaged in every day, I wanted to send this letter to you prior to any formal correspondence I will be having with the Attorney General (AG), legislators, or the media.

We have come to a point in our review that requires us to send certain information to the Attorney General. We are sending a letter to the Attorney General with information this office has received regarding non-citizens who have been registered to vote in our state - one who has been voting for many years, and one who is registered but has not voted. Both of these individuals have voluntarily notified my office of their situations and have had their names removed from the voter file at their request through their county clerk's office. As required under state law, I am referring this information to the Attorney General.

Exhibit N

In addition to the above letter being sent to the AG, beginning on Monday, November 7, we will be sending letters to a number of individuals who appear to have irregularities in their voter information and we will be asking that they complete new registration applications. A copy of the letters sent to voters in your individual counties will also be sent to you for your review.

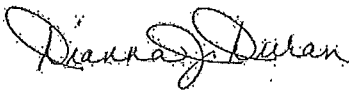
Also, at the request of the Courts, Corrections and Criminal Justice interim committee members, we will be sending a report of our review of the voter file to all 112 legislators, hopefully by next Wednesday, November 9. We will be e-mailing each of you a copy of that report on that day as well.

Finally, I know that many of you have been concerned about discussions I have had regarding records we have discovered of deceased voters who are still shown as active. We did not want to send these names to each of you without the necessary supporting documentation that would allow you to take appropriate action. We are working with the Vital Records Office (VRO) to verify those records and to obtain documentation to send to you to authorize the removal of the names of those deceased voters. Concurrently, we have conducted an investigation to determine why you have not been receiving correct notification and complete documentation of deceased voters. It appears, in working with Election Systems and Software (ES&S), that there has been a long-time problem with the monthly lists of deceased voters received from VRO and processed through Agency Central. We are working with ES&S and VRO to correct this problem.

My objective in communicating this information to each of you today is that you will be informed of our actions on these issues prior to any questions that may arise. Please know that I very much appreciate the work you do day in and day out. I also know that I can count on your continued dedication to these tasks as we move forward in the process of establishing the accuracy of our statewide voter database and ensuring the integrity of New Mexico's electoral system.

Thank you again for all you do. Please don't hesitate to call on any issue of concern to you.

Best Regards,



Dianna J. Duran

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(800) 477-3632 • www.sqs.state.nm.us

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**INTERIM PROGRESS REPORT: ONGOING EFFORTS BY THE SECRETARY
OF STATE TO IMPROVE THE ACCURACY AND INTEGRITY OF THE
STATEWIDE VOTER FILE**

NOVEMBER 16, 2011

Mission and Purpose

The Office of the Secretary of State is committed to the primary goal of ensuring the integrity of our electoral system. Trust and confidence in our entire voter registration and elections processes are fundamental to a representative form of government. The people have to know, and believe, that each of their votes will count, and that each vote will count only once. They also have to believe that only eligible voters are taking part in the elections of their statewide and local officeholders. Failure to ensure that these things take place delegitimizes elections and can create an atmosphere of doubt and cynicism, which undermines the democratic process and the very forms of government our country is based on. Another key component of the system is the concept of equal protection of the laws. New Mexico voters need to know and believe that the same standards of voter registration, participation eligibility and electoral procedures are applied everywhere throughout the state in the same, consistent manner, according to the law. As Supreme Court Justice John Paul Stevens has written:

“There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear...Public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process...The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud...”¹

Integrity in voter registration procedures, maintenance of the statewide voter file, and the conduct of honest, open elections and vote-counting procedures are all vital components of the electoral system to which we are committed and to which we will remain continuously dedicated.

¹ Crawford v. Marion County Election Board, et al., 553 U.S. 181, 196-197 (2008)

Secretary of State Statutory Role

The Voter Records System Act, §§ 1-5-1 et seq. NMSA 1978, requires the Secretary of State (SOS) to “maintain the official state voter file...” This requirement is based on the federal Help America Vote Act (HAVA) of 2002, which requires states to develop a “single uniform, official, centralized, interactive computerized statewide voter database which contains the name and registration information of each legally registered voter in the state.” Election officials are charged with performing regular maintenance regarding the accuracy of the registration lists.

In our initial review of the statewide voter file (which, again, is an ongoing process, and not merely a one-time project) the SOS has taken into consideration that there have been a number of practices that have contributed to inaccuracies in the statewide voter file, and a comprehensive review has never been conducted at the state level. Additionally, there have been persistent allegations of fraud and error in years past. These allegations have been made by voters, special interest groups, and elections officials themselves.

Illegal Practices under Federal and State Law

Federal Law:

Registering to vote, or voting in a federal election, by persons who are not entitled to vote under applicable state law, including persons who have committed serious crimes, and persons who are not United States citizens (18 U.S.C. §§ 1015(f), 611, and 42 U.S.C. § 1973gg-10)

Falsely claiming United States citizenship in connection with registering to vote or voting in any election (18 U.S.C. §§ 911, 1015(f))

Voting in a federal election by anyone who is not a United States citizen (18 U.S.C. § 611)

Providing false information concerning a voter’s name, address or period of residence in order to register to vote, or to vote in a federal election (42 U.S.C. §§ 1973i(c), 1973gg-10)

Causing the submission of voter registrations in any election, or the submission of ballots in federal elections, that are materially defective under applicable state law. (42 U.S.C. § 1973gg-10)

State Law:

Signing or offering to sign a certificate of registration when not a qualified elector (§ 1-20-3(A) NMSA 1978)

Falsifying any information on the certificate of registration (§ 1-20-3(B) NMSA 1978)

Soliciting, procuring, aiding, abetting, inducing or attempting to solicit, procure, aid, abet or induce any person to register or attempt to register with the name of any other person, whether real, deceased or fictitious. (§ 1-20-3(C) NMSA 1978)

False voting consists of:

- A. voting or offering to vote with the knowledge of not being a qualified elector;
- B. voting or offering to vote in the name of any other person;
- C. voting or offering to vote more than once in the same election;
- D. falsifying any information on an absentee ballot official mailing envelope or affixing a signature or mark other than one's own on an absentee ballot official mailing envelope;
- E. inducing, abetting or procuring or attempting to induce, abet or procure a person known to not be a qualified elector to vote;
- F. inducing, abetting or procuring or attempting to induce, abet or procure a person who having voted once in any election, to vote or attempt to vote again at the same election.

Social Security Numbers (SSNs): Assignment and Validity

New Mexico is one of seven states that require a full social security number on voter registration applications. Prior to June 25, 2011, a valid SSN could not begin with the first three digits (referred to as the "area number") between 734 and 749, or above 772, the highest area number which the Social Security Administration (SSA) had allocated. Effective June 25, 2011, SSA assigns SSNs randomly and allows for the assignment of area numbers between 734 and 749, and above 772 through the 800s.

Any number beginning with 000 will never be a valid SSN.²

On the other hand, Individual Taxpayer Identification Numbers (ITINs) are tax processing numbers, only available for certain nonresident and resident aliens, their spouses, and dependents who cannot get a Social Security Number (SSN). ITINs are 9-digit numbers, beginning with the number "9", formatted like an SSN (NNN-NN-NNNN). ITINs cannot be substituted for SSNs for purposes of voter registration.

² <http://www.socialsecurity.gov/employer/stateweb.htm>

Specific Convictions and Allegations of Fraud

In the 2008 election cycle, there were a number of issues regarding fraudulent practices surrounding voter registration which were forwarded to the Secretary of State's office.

In September, 2008, the Bernalillo County clerk reported that she had forwarded approximately 1,300 voter registration forms she suspected to be fraudulent to the U.S. Attorney, the Bernalillo County District Attorney and the Attorney General. The clerk stated that "some examples of such potential false/fraudulent registration certificates are those with names of current voters, but different birth dates and/or social security numbers; voter registration cards which contained information that appeared to have been copied from the phone book and conflicted with information in current voter registration records, and those which are in some cases completely illegible." We are unaware of any attempt by the clerk to review the other registration cards submitted by third party registration agents/employees of an organization involved in nationwide voter registration. Nor are we aware of any action by any of the law enforcement authorities mentioned above.

In a letter dated October 1, 2008, the Bernalillo County Clerk submitted to those same authorities a 6-page list of Third-Party Voter Registration Agents who were listed on approximately 815 voter registration applications that she termed "suspicious." This list and the related discoveries had been given to her by interested parties who asked for her to take action regarding these suspect registrations. We are unaware of any actions by the clerk to review all the voter registration forms that may have been submitted by the third-party agents whose most obvious violations had been brought to her attention. Nor are we aware of any action by any of the law enforcement authorities mentioned above. Without any attempt to determine the scope of the fraud, it is not possible to determine the numbers of improper registrations submitted by these third party agents.

During that same timeframe, the clerk submitted an e-mail to the Secretary of State's office in which she stated that she believed the Association of Community Organizations for Reform Now (ACORN) or others had submitted fake cards with the names of properly registered voters. Again, in this instance this was a result of an outside interest group informing the clerk of these violations and asking for resolution of these violations. To our knowledge, no comprehensive review has been undertaken to determine if any of the "registrations" resulted in any additional or "substituted" votes. Nor do we know if these cards, or any report of these facts, were transmitted to statutorily-defined legal authorities for review.

Also in 2008, a woman received a letter from the Bernalillo County Clerk's office stating it had received her application for voter registration but needed a copy of her social

security card. The woman responded that she had not completed a new voter registration card, and the card in question represented a fraudulent request.

In August, 2008, the Cibola County Clerk advised the Secretary of State's office that she had received several voter registration applications which contained a number of irregularities. In one instance, there were two applications with the same names and physical and mailing addresses, but different dates of birth and social security numbers. The applications were submitted by two different persons who signed as the third party registration agents, but used the same agent number. The clerk also received an application from a woman whose listed address was not legible. When the clerk contacted the woman to verify the address, the woman responded that she had not submitted a voter registration.

In November, 2008, the Torrance County clerk notified the Secretary of State's office that a voter had gone to vote in Socorro County and learned that his registration had been transferred to Torrance County. The Torrance County clerk had received a federal voter registration application (available on the internet) that had transferred the voter's registration, but that application had not been submitted by that voter.

Also in 2008, Third-Party agents registered a 12-year old boy, who was subsequently called as many as five times by a political party in get-out-the-vote efforts.

Other instances involving voter fraud or violations of election integrity:

In 2006, Chaves County officials discovered what appeared to be forged signatures of registered voters on absentee ballots. Charges were brought against an individual, and, in lieu of facing trial on felony charges, that individual entered into a pre-trial sentence agreement and paid a substantial fine.

In 2009, a municipal court judge in Doña Ana County was convicted of false voting, making a false statement on his candidate declaration and falsifying documents in a municipal election.

In 2010, also in Doña Ana County, a woman was convicted of voting in two elections with the knowledge she was not qualified to vote.

Also, there are vote fraud cases going back to the 1990s, including the conviction of the Rio Arriba County Clerk.

Comments related to some of these cases.

What some of the above-described instances demonstrate is that legitimate voters have been and can be victims of a form of identity theft: the person whose name appears in the

voter rolls is not the person who has committed any fraud. Instead, an unknown person who cannot be identified has changed or attempted to change the information on the voter's registration.

The SOS seeks to protect the voting rights of New Mexico voters by checking the accuracy of the statewide voter file, and working with county clerks to improve the accuracy and integrity of the file. Additionally, protection of voters' privacy is a paramount consideration of the SOS.

Even if fraudulent registrations can possibly be caught in cases where the names of already-registered voters are used, the same cannot be said in instances where a name is used that is not the name of someone who is already registered to vote.

It is important to note that a number of elections officials at various levels give somewhat defensive "assurances" that all errors are caught, and many have claimed at various times that no cases of illegal voting ever takes place. There are a couple of observations to be made about the hardened positions taken by many New Mexico officials on these issues.

First, there is no logical reason to presume defensive attitudes, or to automatically and reflexively deny that any violations of elections law ever take place. (Such approaches or attitudes may be appropriate for political organizations, parties, special interest groups, bloggers, or even media, but even if so, elections officials should not emulate those attitudes.) Elections officials should approach their tasks dispassionately and objectively, open-mindedly reviewing facts and keeping in mind always that our foremost duty is to ensure the integrity of the electoral system.

Second, considering the inherent complexities in managing the voting lists and elections processes, instant, reflexive claims that there are "never" instances of unlawful voting appear to be, at best, dubious. The Indiana Secretary of State has properly asked, "How would you know if people using fake names had cast votes in states without strict ID laws?" Indiana won a major US Supreme Court case upholding that state's photo identification law. The Indiana SOS also makes a cogent point when he states, "[Fraudulent voting] is almost impossible to detect, and once the fraudulent voter leaves the precinct or casts an absentee ballot, that vote is thrown in with other secret ballots; there's no way to trace it."

Problems Found in the Statewide Voter File

Data Entry Errors

In another instance in 2008, a voter was improperly removed from the statewide voter file in Sandoval County due to a data entry in her social security number. This caused her to be identified as having a felony conviction.

Voter registration forms are usually hand-written, and then are manually entered into the electronic system at county clerks' offices. This creates several opportunities for errors: errors by the registrant, errors by the clerk, or an error as a result of illegible registrations.

Based on our review, some voter registration records appear to have incorrect dates of birth. Since voters are required to give their year of birth when they appear at the polls or submit an application for an absentee ballot, errors in the date of birth have the potential to disenfranchise voters.

Duplicate Social Security Numbers (SSNs), and other SSN issues

As of March, 2011, the statewide voter file contained 2,608 records with duplicate social security numbers (the same number assigned to two different individuals) and six instances where the same social security number is assigned to three individuals.

While the Voter Registration and Election Management System (VREMS) has a setting which disallows duplicate social security numbers, the vendor advised that the setting has been turned "off" and "on" at various times over recent years during prior administrations in the Secretary of State's office, and may have been turned off at the county level in certain instances.

The SOS forwarded these records to the county clerks for resolution, and the clerks have been in the process since September of working to resolve those duplicates. The SOS will be requesting that the clerks provide detailed reports on the resolution of these discrepancies and the correction of their voter files.

A number of individuals have registered to vote using an ITIN number (a number beginning with a "9"). In reviewing the entire statewide voter file, the Secretary of State's office identified a total of 442 records with numbers beginning with "9" in place of the SSN. Some of those appear to be data entry errors, some of them are "dummy" SSNs in which the voter registration card number was used in place of a social security number, and some of them appear to be ITINs. The Office is also in the process of reviewing SSN's in the statewide voter file beginning with "000" to determine the types of errors that exist in those records.

Serious Violations of Federal Law in 2007 and 2009

New Mexico is also required to comply with federal law—the National Voter Registration Act (NVRA)—it must follow prescribed procedures to remove voters who have permanently moved from their registered address. The SOS is required to send a forwardable notice to any voter who "it appears has changed address from the voter's precinct of registration." The notice must inform the voter that if the voter still resides at the same address and does not return the notice by the stated deadline, the voter may need to affirm the voter's address before voting. The notice must also state that if the voter 1) does not return the notice, 2) and does not vote in either of the following two general federal elections, the voter may be removed from the registration list.

The program is to be conducted every two years. New Mexico failed to conduct the program at all in 2007, and conducted it improperly in 2009. As a result, the Department of Justice has advised the current SOS that names of those registrants cannot be removed from the statewide voter file.³ The DOJ also informed us that New Mexico is the only state which failed to conduct this program in both 2007 and 2009. As a result, we will be unable to purge inactive voters in 2011 or 2013. Instead, the next time a purge of non-resident or inactive voters can be conducted is 2015.

These major errors committed under the previous Secretary of State's administration have resulted in tens of thousands of names of individuals in the statewide voter file who have actually either moved, perhaps out of state, or who should no longer be registered to vote at their previous addresses. By some estimates our statewide voter registration totals may be inflated by 10-15%, meaning we may have as many as 100,000-150,000 voters in the statewide voter file who are not eligible to vote. Some believe this number may be slightly lower, but the problem of a bloated, inaccurate file is nonetheless a significant problem.

This could have a tremendous, and unfortunate, effect on projections of voter turnout as well as budgeting for elections. The ordering of thousands of extra, unneeded ballots costs taxpayers thousands of dollars. It also impacts legislators who send out letters to constituents during the legislative session. A number of legislators have complained that a significant amount of their constituent mailings are returned as undeliverable, resulting in wasted postage and resources by the state. Counties, municipalities, school districts, and local special districts may all be affected in the same way—with communication with their voters and constituencies being inflated unnecessarily. Obviously, the same added costs and returned mail affects political parties, candidates and interest groups. All these examples are directly attributable to an inflated and inaccurate statewide voter file.

Additionally, erroneous lists, as well as lists with thousands of extra names, offer ample opportunities for voter fraud. The presence of names of non-existent voters (or voters who no longer reside in New Mexico for example) presents opportunities for "substitute

³ September 14, 2011 letter from the Department of Justice (DOJ)

voters,” who may vote in place of the voter who is named on the roll, but is not actually present in the state, or in the listed precinct. Another unusual result of the bloated file is that it has certainly contributed to the extraordinary phenomenon in which the current number of registered voters in some New Mexico precincts actually exceeds the voting age population of those precincts as shown in the 2010 Census.

Use of fraudulent, erroneous, fake, or “dummy” Social Security Numbers (SSNs)

The statewide voter system is designed to reject entries that do not include social security numbers. As recently as 2010, some registrations have been entered into the statewide system with numbers other than social security numbers. For instance, registrants have been entered using the bar code number on their voter registration cards, or by using the voter’s birth date and adding trailing zeros to it, so as to stretch the number out to the required 9-digits. In this way, some entries rely on an invented number that is used to "mimic" the SSN.

During the 1990s, there appears to have been a practice of entering the voter registration card number as the social security number when no SSN was provided. At that time, the voter registration application said “social security number, if any.” Those registrations that do not have social security numbers, but were valid at the time they were entered, may not necessarily require correction immediately. However, in order to ensure that all voters are treated equally, there should be an ongoing effort to correct the information on earlier registrations and bring all of them into compliance with current state law. Registrations that do not have SSNs may very well belong to individuals who are qualified to vote, but these registrations must be reviewed to confirm eligibility and accuracy.

The current New Mexico law is unequivocal. It, and the voter registration form, states “your social security number and date of birth are required to register to vote.”

In 2010, over 100 voter registration applications were entered in Bernalillo County despite the absence of a valid social security number. The clerk’s office used the voter registration card number, or used the "birth date plus zeros" method, to create a number to be used in place of the social security number, which the voter had not provided, or did not have. A letter has been sent to the county clerk requesting that she investigate the voter registrations entered with fraudulent, erroneous, fake, or “dummy” numbers.

The current practice of using the card number where the voter has not supplied a social security number is not uniform and therefore is not non-discriminatory across the state. This is another practice that raises questions of due process and equal protection. In some counties, incomplete registrations are rejected. In other counties, it appears that incomplete applications have been processed and entered using some other number, such

as the voter registration card number allowing the registrant to vote. These procedures violate the requirement that voter registration processes be uniform and non-discriminatory, and such practices do not provide equal protection to voters.

Voter registration forms which do not contain a social security number are incomplete. The SOS is sending letters to registrants who have submitted incomplete registrations that have already been processed; informing them that their application contains an error and offering them an opportunity to fill out a new registration form with valid identifying information

Since New Mexico law requires a social security number for voter registration, these errors need to be corrected in the statewide voter file. Going forward, education, guidelines, directives and processes for handling voter registration applications will be continuously emphasized and reiterated.

Non-Citizens

Some individuals who obtained a New Mexico driver's license using non-citizen credentials have also registered to vote and/or voted in New Mexico. It is possible that some registrants who are non-citizens may have been misled into believing that they were eligible to vote, and may have lacked intent to violate the law. No one can be sure of the intent by these individuals absent the kind of thorough investigation the SOS is currently not staffed to conduct, nor may be authorized to pursue. It is also possible that non-citizens may have been victims of the same type of identity theft as qualified voters, where a voter registration form was filled out in their names, and someone else voted by impersonation. Again, there is no way of knowing. However, it does not change the fact that invalid votes have been cast.

County clerks have reported that non-citizens have contacted them and asked to be removed from the voter rolls. In most instances the non-citizens have stated that it is because they were misled into believing that they were eligible to register and vote. This raises the question of the legitimacy of certain third-party registration agents and organizations. We need to be constantly vigilant regarding those whose practices have been called into question.

Recently, an individual came to the SOS office who stated that he is a legal resident, and a non-citizen. He further stated that in 1998, his employer had encouraged him to register to vote. He stated that he did not believe that he could, but one of his employers stated that she believed he was eligible. That person brought him a voter registration form which was filled out with his personal information. He signed the form and was registered to vote. He has voted in almost every state, federal and local election in his precinct since 1998.

When this individual went to apply for U.S. citizenship, he learned that he was not eligible to vote. He also learned that having registered and voted was an impediment to his application for citizenship. He went to the county clerk and asked that his name be removed from the voter rolls. He also voluntarily came to the SOS office to explain his situation. He is a 22-year employee of a county government, and is the primary financial support for his family. He now faces concerns that he could be prosecuted or deported.

A second individual was identified to our office, who is a non-citizen who was registered to vote, but did not cast a vote in any election. The second non-citizen indicated that she was pressured by a third party to register, although she was uncertain as to her eligibility. When she applied for citizenship, she learned that she was not eligible, and that her voter registration was an impediment to obtaining citizenship. Like the first individual, this woman voluntarily requested that she be removed from the voter rolls.

Some media outlets have written stories, or "reported" that these two individuals were identified as a result of a months-long "investigation" by the SOS. The story has been presented by some reporters that we started with 117 possible non-citizens on the voter rolls and that at the end of a months-long review there are only two of the 117 that turned out to be non-citizens. These reports are untrue. These two individuals have nothing to do with voters who have been identified in statewide voter file reviews. They are not a part of the original 117 individuals who were identified earlier. They are simply people who have recently contacted our office to give us this information.

In March, the Secretary did refer to 117 possible non-citizens identified in a preliminary report in March—those who were matches between registered voters in the statewide voter file and the individuals who had obtained New Mexico drivers licenses using foreign national documentation. The SOS compared the dates of voter registrations with the dates of the drivers' license applications, as well as the addresses of the individuals in both databases.

It was noted that a number of individuals checked "no" on the question of whether or not they were U.S. citizens. While it is possible those individuals were misled or confused as to the law at the time they were registered, there is, in the final analysis, no way to know if this is true or not.

These cases involving non-citizens indicate that New Mexico's voter registration process is failing both citizens and non-citizens alike. The fact that non-citizens are registered and, in some instances, voting, in New Mexico elections is detrimental to the integrity of the election process for state, federal and local elections.

Of the individuals originally identified:

- Nine individuals registered to vote prior to using foreign-national documents to obtain a driver's license. These nine have a history of voting in one or more elections, based on their voting history shown in the statewide voter file. It seems unlikely that a US Citizen would wait for the change in state law so that he or she could use foreign national credentials to obtain a driver's license. The presumption is that these nine individuals are not citizens, or were not at the time they registered and voted. The SOS has written to them asking for clarification. All documentation relating to these individuals is in the process of being referred to the Attorney General for further investigation and disposition pursuant to Section 1-2-2 NMSA 1978.
- Another ten individuals registered to vote after using foreign national credentials to obtain their driver's license. It is possible that those individuals had obtained citizenship by the time they registered to vote. It is also possible they had not. Three of those registrants, however, had checked "no" on the citizenship question on the voter registration form. These ten individuals also have a history of voting in New Mexico elections. The SOS has written to them asking for clarification. All documentation relating to these individuals is in the process of being referred to the Attorney General for further investigation and disposition pursuant to Section 1-2-2 NMSA 1978.
- On further review, six individuals do not appear to be the same individual as the person who applied for a New Mexico Driver's License.
- There were seven instances in which MVD was not able to provide sufficient information for the SOS to make a determination as to whether the individual who registered to vote was the same individual who applied for the driver's license. Discrepancies in these files will be addressed as more information becomes available.
- Thirty-five individuals who do not show a voting history, registered to vote prior to using foreign documentation to obtain a driver's license. While it is possible some or all of them are citizens, it is likely they are not. The SOS has written to them asking for clarification. All documentation relating to these individuals is in the process of being referred to the Attorney General for further investigation and disposition pursuant to Section 1-2-2 NMSA 1978.
- Forty-nine individuals, who do not show a voting history, registered to vote after using foreign national documentation to obtain a driver's license. While it is possible they are citizens, it is possible they are not. The SOS has written to them asking for clarification. All documentation relating to these individuals is in the

process of being referred to the Attorney General for further investigation and disposition pursuant to Section 1-2-2 NMSA 1978.

- There were two individuals who do not show a voting history where the voter registration application was contemporaneous with the use of foreign national documentation submitted to obtain a driver's license. The SOS has written to them asking for clarification. All documentation relating to these individuals is in the process of being referred to the Attorney General for further investigation and disposition pursuant to Section 1-2-2 NMSA 1978.

Of the 117 individuals identified earlier this year, letters have been sent to those whose voter registration information, when cross-checked with other data bases, appears to indicate that they are or may be non-citizens. The information they provide in their responses may be used to ensure that no one who is in fact a citizen, but who is merely a victim of identity theft or some other error, is not identified incorrectly as having violated the law.

The summary of the review of these 117 voter registrations in no way indicates that these are the only possible non-citizens, let alone the only ineligible voters, contained in the statewide voter file. Scrutiny of the statewide voter file is, and will continue to be an ongoing process.

Citizenship Question on the Voter Registration Form

Under both federal and state law, registrants are required to check "yes" on two questions on the voter registration form in order to be qualified to register to vote. The first question asks "Are you a citizen of the United States?" The second question asks "Will you be 18 years of age on or before election day?"

A number of voter registration applications have been processed and entered into the system where applicants either checked "no" on the citizenship question, or left the question blank. These applications should not have been entered into the statewide voter file. This particular issue is of paramount importance, and cannot be discounted, glossed over or treated lightly.

The voter registration card is very clear. It not only asks these questions in a very straightforward manner, it tells the applicant or agent: "If you checked "NO" to any of the questions above, do not complete the form. It also contains a sworn ATTESTATION OF QUALIFICATION in which the applicant swears/affirms he or she is a citizen of the United States and meets all the qualifications for voting. Applicants, agents, county clerk

employees and county clerks cannot treat this issue as a minor technical or accidental oversight. The voter registration form is the basic building block for electoral integrity.

Agency Registrations by the Motor Vehicle Division and Human Services Department

Settlement agreements in cases filed under the National Voter Registration Act against the Motor Vehicle Division (MVD), the Human Services Department (HSD) and the former Secretary of State require that voter registrations forms be offered to all applicants for driver's licenses, and to all applicants for public assistance. Both groups include non-citizens.

A federal voter registration form is included in every packet for public assistance that is mailed out by the Human Services Department. Ironically, these court-ordered practices work against the efforts to prevent voter fraud. One does not have to be a citizen to obtain either public assistance or a driver's license, and indeed thousands of non-citizens apply for and receive both public assistance and driver's licenses each year. When a law requires that every applicant be given a voter registration form, one consequence is that the state is offering ineligible voters the opportunity to register, and is doing so every single day. It is very easy to understand that a non-citizen has just been sent a very strong message that he or she is eligible to vote in New Mexico elections. Their acting on such an invitation should perhaps not be unexpected.

These practices have resulted in non-citizens being misled into believing that they are eligible to register and vote, as registrations have been received from these applicants which have checked "no" on citizenship, or on which an individual tax I.D. number (ITIN) or a 942 Temporary ID number has been entered in lieu of a social security number. Such registrations are required to be rejected.

In fact, in recent months, a significant portion of the voter registration applications received from the Human Services Department have been rejected because they do not contain SSNs, or because the applicants either checked "no" on the citizenship box.

The SOS will encourage MVD and HSD to seek clarification or modifications in those provisions of their settlement agreements that openly encourage non-citizens to break New Mexico and federal law by inviting non-citizens to register to vote.

Deceased Individuals

Anecdotally, people in New Mexico have complained about deceased individuals appearing on the voter rolls. In reviewing the statewide voter file, the SOS did find 641

names of individuals for whom a death record exists. The SOS is working with the Vital Records Office (VRO) to verify those records and to obtain documentation to send to the county clerks to authorize the removal of the names of those deceased individuals. Concurrently, the SOS has conducted an investigation into the Voter Registration and Election Management System (VREMS) and its interface with the VRO to determine why county clerks have not been receiving correct notification and complete documentation of deceased individuals. It appears, in working with the vendor and the VRO, that there has been a long-time problem with the monthly lists of deceased individuals. We are working with Election Systems & Software (ES&S) and the VRO to correct this problem.

Summary of Findings

The issues described above have resulted in cumulative errors in the statewide voter file. Going forward, it is the intention of the SOS to implement stronger processes to allow county clerks to more accurately verify voter registration information.

VREMS is the software and database that contain the statewide voter file. The SOS proposes to utilize existing functionality in the software to allow a link to the MVD database so that invalid SSNs can be flagged by the system and corrected by county clerks. This will prevent both data entry errors and entry of fraudulent registrations. It should be noted that the SOS is not proposing additional restrictions on the acceptance of voter registration applications, nor is the SOS proposing an automatic rejection of these applications if there is a non-match with the MVD database, or the Social Security Administration database (which is linked to the MVD database). Clerks are expected to attempt to verify any information that appears to be a non-match, and follow existing state law regarding acceptance or rejection of voter registration applications.

Additionally, the system has a function that would ensure that the county clerks have checked to see that the citizenship question has been answered and that the registrant has stated that he or she is a U.S. citizen. We intend to increasingly encourage an emphasis on quality control in the processing of voter registration applications, with special attention to the use of this function and appropriate use of available tools to ensure accuracy and eligibility.

The SOS proposes to issue directives prohibiting the use of “dummy” SSNs. At this time, this is under review, as there may be rare cases where a conflict in available information may—very temporarily—allow for some exception. Even in those cases however, a special report will have to be generated by any office using that method.

The SOS will conduct a valid mail process in 2012, prior to the General Election, and in accordance with state and federal law, which will allow for inactive voters, and voters

who have moved, to be removed from the statewide voter file after the lists are reviewed by local Boards of Registration in each county in 2015.

The SOS also proposes to issue a letter to all Third Party Registration Agents reminding them of their duties under the Election Code and the consequences of submitting false or incomplete voter registration applications.

The SOS will continue to refer potential violations of the Election Code to the Attorney General, for disposition, as required by state law.

The SOS has noted the many comments which have been made, both verbally and in writing, by numerous elected officials, elections officials, political and special interest groups and parties, concerning the overall issue of election integrity. These comments have addressed the registration process, voter list maintenance, voter irregularities and voter fraud. Many have, for whatever motivations, staked out positions that seem quite arbitrary and assertive, to the point of being dogmatic. The Office of the Secretary of State rejects this approach in its pursuit of the goal of establishing and maintaining a system which provides for free, fair and honest elections and electoral procedures.

Instead, regardless of the positions taken by special interests, we will continue to be guided by a dispassionate, neutral, unemotional and unbiased approach to each and every public policy question we must address. Our only mode of operation is an objective, even-handed review of facts and circumstances.

We know, and have noted for example, that those who are on record as having stated that there "have never" been any cases of election law violations or voter fraud, or related incidents, choose simply to ignore cases that do occur. Some will state instead that there is not a "widespread" incidence of vote fraud or irregularities. When two non-citizens made the news by turning themselves in, special interest groups were quick to assert that they must have been the only non-citizens who have ever registered to vote. Similar comments are made each time a review of the statewide voter file is discussed.

These attitudes are reflective of partisan interests, and may very well be appropriate in political and partisan "debate" and contests among candidates, parties and special interest groups. It is conceded by political scientists that competing political groups have their proper roles.

Whatever the case may be, however, our point is that the Office of the Secretary of State has no such role in the political process. Because of that independence from such partisan debate, we are not and cannot be moved or deterred from our very, very different constitutional, non-partisan and protective role. The job of the SOS is to protect the instruments and components of electoral democracy, not to advocate for one side or the other in any dispute.

In this interim report, for example, we have identified thousands of discrepancies, or potential opportunities for voting irregularity and fraud. We are confident that some will say that "it's only a few thousand", or they will vigorously disparage the findings, and assert their strong "belief" that the findings are unimportant. Again, we have no issue with those kinds of talking points, assertions, or attitudes. We expect them from political and partisan interests. We are simply not in that game. Our duty is to the people of New Mexico, their Constitution and their laws; not to parties, candidates, lobbies, special interest groups or political action committees.

We note these actions not because they affect what we do, but simply to inform the legislature that we are involved in the ongoing mission of ensuring the integrity of the electoral system of New Mexico and we will not be deterred, or intimidated by those who have no interest in that mission, or who would prefer that we not pursue that mission.

In 2010, as an example of the importance of the integrity of the electoral system, a county commission election was decided by one vote, 1,004 to 1,003. In several election cycles over the past three decades, elections for such important local offices have been decided by one vote, and several legislative elections have been decided by five votes or fewer. In a number of instances, local elections have ended in a tie. New Mexico has invariably made the national news in those cases because of our unusual system of deciding electoral ties by "games of chance" chosen by the candidates themselves.

We have little doubt that the candidates in these many instances of tied elections, or those decided by between one and five votes, have very little patience for those whose only reply is that only a few thousand discrepancies exist, or only a hundred or so non-citizens have registered, or there are only 641 dead individuals on the rolls, or only 2,608 duplicate social security numbers in the system. We are near certain that the losing candidate in that county commission election decided by one vote last year would like to know for sure that no one voted in that election who was not eligible to vote. Even if he doesn't care, we do, and we will do all we can to ensure that candidates are chosen by eligible voters, and only by eligible, legal voters.

To those who say that vote fraud (if it does exist) is "insignificant," our answer is that no instance of vote fraud, or ineligible registration, or ineligible voting, is now, or ever will be "insignificant" to this office. Every single vote cast by an ineligible voter cancels and invalidates a vote cast by a legal voter, and leaves that law-abiding citizen completely disenfranchised. It may also alter the outcome of an election. That is the sober reality of the electoral system. We will continue in our mission. Our Constitutional duty is clear.

Ed Macy

From: Fuqua, Scott <sfuqua@nmag.gov>
Sent: Wednesday, November 30, 2011 4:27 PM
To: Alexandra Smith; Ed Macy
Subject: IPRA Lawsuit

Counsel-

I had a meeting this afternoon with the Secretary of State and members of her staff. We discussed your IPRA request and the issues that appear to still be alive in the litigation. I write to inform you that the Secretary will make available the voter registration cards of the 117 voters we have previously discussed. Those cards also include the 37 cards we have previously discussed. I have copies of those voter registration cards at the AGO. I am happy to send copies to you along with the cost bill for those copies (which would come to \$29.25). Alternatively, the documents are available for your inspection here at the AGO. Please let me know what you would prefer.

Given our most recent communications, I believe this narrows the dispute in this lawsuit to the reports generated by checking the voter registration list against MVD and Social Security Administration information. Please let me know if you have any questions.

Scott

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New Mexico Attorney General's Office
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Exhibit P



Attorney General of New Mexico

GARY K. KING
Attorney General

ALBERT J. LAMA
Chief Deputy Attorney General

December 6, 2011

Alexandra Freedman Smith
Ed Macy
ACLU of New Mexico
P.O. Box 566
Albuquerque, NM 87103

Re: IPRA Request

Counsel-

This letter accompanies production of two sets of documents. The first set is copies of the voter registration cards for 115 of the 117 voters the Secretary of State identified as possible non-citizens registered to vote in New Mexico. The second set consists of copies of the letter the Secretary of State sent to some of those registered voters concerning the questions that had arisen about the voters' registration status.

There are also 98 letters sent by the Secretary of State to the identified registered voters. You have indicated that you prefer to receive the documents without first inspecting them. As you are aware, the Inspection of Public Records Act provides for a 25 cent per-page copying charge. Accordingly, please remit payment of \$53.75 to the Secretary of State for these 215 pages. I am in the process of verifying with the Secretary of State the existence of any additional documents in these two categories. Do not hesitate to contact me should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Fuqua".

Scott Fuqua
Assistant Attorney General

Exhibit Q