

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

AMERICAN CIVIL LIBERTIES
UNION OF NEW MEXICO,
Plaintiff,

vs.

No. D-202-CV-2011-07257

DIANNA J. DURAN, and CHRISTIANA SANCHEZ,
Defendants.

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 1-056 NMRA, Plaintiff moves the Court for a Summary Judgment requiring Defendants to produce all of the material sought by Plaintiff pursuant to the Inspection of Public Records Act, NMSA 1978, §§14- 2-1 to -12 (1947, as amended through 2011) (“IPRA”) and awarding damages, costs, and reasonable attorneys’ fees to Plaintiff. After defendants wrongfully refused to produce the material sought by Plaintiff, this action was brought to enforce the provisions of IPRA pursuant to NMSA 1978, §14-2-12.

After the lawsuit was filed, Defendants relented and produced approximately 111 pages of material which was previously claimed to be protected from disclosure. They subsequently produced more records. However, Defendants continue to refuse to produce documents that were sought by Plaintiff in its IPRA requests.

Plaintiff assumes that Defendants oppose this Motion, Rule 1-007.1 C. NMRA. Plaintiff does not anticipate that any witnesses will be called at a hearing scheduled to consider this Motion. *See* NM R 2 DIST LR2-123.

There is no genuine issue as to any material fact and Plaintiff is entitled to a judgment as a matter of law. *See* Rule 1-056 A NMRA.

INTRODUCTION

On March 15, 2011, Ms. Duran testified before a legislative committee that she had conducted an investigation that revealed 117 cases of foreign nationals who had illegally registered to vote. Further, she stated that her investigation showed that thirty-seven of those foreign nationals had actually voted in New Mexico elections. Thus, Ms. Duran concluded that the New Mexico voting system was a “culture of corruption that has given all New Mexicans a black eye.” After learning of Ms. Duran’s statements, Plaintiff sought the records on which the Secretary of State based her claims. Defendants refused to produce them. Months later, after Plaintiff filed a lawsuit and engaged in discovery, Defendants have finally produced some of the requested documents. However, Defendants still refuse to produce documents including: the list (“List 2”) of the 117 non-citizens who allegedly registered to vote illegally, the list (“List 3”) of the thirty-seven non-citizens who allegedly voted illegally, signature rosters and voter lists indicating that these individuals voted illegally, and any other documents that show that foreign nationals illegally registered to vote and/or voted in elections. Defendants claim that the lists of voters who allegedly registered to vote and voted illegally, along with the signature rosters and voting lists indicating that these people allegedly voted, are protected from disclosure because these individuals were identified by comparing records from the Motor Vehicle Department (MVD) against voter records. Thus, by utilizing the methods chosen by Defendants in their investigation, they claim that public voter records have been somehow converted to protected information that is outside of the reach of the IPRA. Additionally, Defendants claim that some of the disputed documents (“List 3”) are protected by executive privilege.

UNDISPUTED MATERIAL FACTS

No genuine issue exists as to the following facts:

1. Defendant Dianna J. Duran is the Secretary of State (“SOS”) for the State New Mexico and is a member of the executive branch of the State of New Mexico government. Defendants admitted this fact. *See Answer*, ¶16.
2. Defendant Christiana Sanchez is the Records Custodian for the Office of the SOS. Defendants admitted this fact. *See Answer*, ¶17.
3. On March 15, 2011, Defendant Dianna J. Duran announced purported findings of an investigation as follows:

The Secretary of State’s Office has so far been able to match 117 voter registrations to names and dates of birth in the MVD Foreign National database – all 117 of those have Social security numbers that do not match up with their names. The records make it clear that at least 37 of those identified have voted in New Mexico elections. These are still under investigation to verify the accuracy of the information.

Defendants admitted Ms. Duran made this statement. *See Answer*, ¶18.

4. On or about March 15, 2011 Bobbi Shearer, Director of the New Mexico Bureau of Elections, stated that “There’s evidence that they’re in the foreign national database, that their name and date of birth matches, and their social security number in our data base is not valid, and that they did cast votes.” Defendants admitted that Ms. Shearer made this statement. *See Answer*, ¶19.
5. On March 15, 2011, in a press release entitled SECRETARY OF STATE ANNOUNCES FINDINGS (attached as Exhibit A), Ms. Duran announced: “This culture of corruption that has given all New Mexicans a black eye is unacceptable and I will not tolerate it as the Secretary of State. I know that New Mexicans will agree that even one illegal vote is too many. For every illegal vote by a non-citizen, an honest vote is disenfranchised.”

Defendants admit that Exhibit A is a true and correct copy of the Ms. Duran's press release. *See* Defendants' Response to Plaintiff's Request for Admission, ¶1.

6. On March 16, 2011, Laura Schauer Ives, Managing Staff Attorney, ACLU of New Mexico, acting on behalf of Plaintiff, submitted a written Request for Public Records to the Custodian of Records, Office of the Secretary of State. Defendants admitted that Ms. Ives made this IPRA request. *See* Answer, ¶22.
7. Plaintiff's First Request to the SOS is attached hereto as "Exhibit B." Defendants admitted that these were Plaintiff's First IPRA requests. *See* Answer, ¶22.
8. The First Response from the SOS is attached hereto as "Exhibit C." Defendants admitted that this was Defendants' response to Plaintiff's First IPRA. *See* Defendants' Answer, ¶25.
9. In response to Plaintiff's First IPRA requests, Defendants produced heavily redacted emails, which are attached as "Exhibit D."
10. The redacted emails contained at least seven attachments. None of the attachments was produced by Defendants. Defendants admitted that no attachments were initially produced. *See* Answer, ¶33.
11. On March 25, 2011, Defendant Dianna Duran sent materials derived from Voter Files and MVD files to Bill Hubbard, New Mexico State Police for "criminal investigation by your agency." Produced by Defendants and attached as "Exhibit E."
12. By letter dated April 11, 2011 ("Second Request to the SOS"), Alexandra Freedman Smith, Staff Attorney, ACLU of New Mexico, acting on behalf of Plaintiff, requested Defendant Christiana Sanchez to produce the referenced voter information, i.e., voters certificates of registration (except for the voter's social security number and date of birth),

against which the MVD records were checked. Defendants admitted that Ms. Smith made this request. *See Answer*, ¶58.

13. In the Second Request to the SOS, Alexandra Freedman Smith pointed out that, pursuant to NMSA 1978, §1-4-12, the contents of the requested voter information (excluding social security numbers and dates of birth) were public records. Defendants admitted that Ms. Smith made this statement in her IPRA request. *See Answer*, ¶59

14. Plaintiff's Second Request to the SOS is attached hereto as "Exhibit F." Defendants admitted that these were Plaintiff's Second IPRA requests. *See Answer*, ¶60.

15. Nevertheless, by a letter dated April 26, 2011 ("Second Response from the SOS"), Defendant Christiana Sanchez, declined to produce any additional records except for:

- a. The letter dated March 25, 2011 from Defendant Dianna J. Duran to Bill Hubbard, New Mexico State Police.
- b. A letter dated April 26, 2011 signed by Defendant Christiana Sanchez in which she forwarded the Second Request to the Records Custodian for the New Mexico Department of Public Safety ("DPS") for action.

Defendants admitted these facts. *See Answer*, ¶61.

16. The Second Response from the SOS is attached hereto as "Exhibit G." Defendants admitted that Exhibit G was their Second Response. *See Answer*, ¶62.

17. On September 9, 2011, counsel for Defendants provided a document entitled SECRETARY OF STATE VOTER REGISTRATION CROSS-CHECK PROCESS. Attached as "Exhibit H."

18. On October 7, 2011, Defendants belatedly produced approximately 111 pages of documents in response to Plaintiff's discovery requests that were also responsive to

Plaintiff's IPRA requests. *See* Cover Letter from Scott Fuqua, Asst. Attorney General, attached as "Exhibit I," and documents labeled "IPRA 2" through "IPRA 115" attached as "Exhibit J."

19. Included in the 111 pages of documents is an *Excel* spreadsheet attached to an email dated March 10, 2011 from Rao Chad of the Transportation and Revenue Department to Ken Ortiz of the Secretary of State's Office that was compiled from SOS and MVD records. "Attached file has details of people with no SSN from the file produced by SOS." *See* Exhibit J, at IPRA 3-4. This *Excel* file contains individuals' full names, gender, address with zip codes and counties.
20. Another *Excel* spreadsheet included in the documents was from another email sent later on March 10, 2011, from Rao Chad to Ken Ortiz that was compiled from SOS and MVD records. "Attached file contains duplicate SSN information." *See* Exhibit J, IPRA 5, 9-35. This file contains individuals' full names, gender, year of birth, address with zip codes and counties. The individuals' SSNs were redacted.
21. Another *Excel* spreadsheet that was attached to an email from Rao Chad from the MVD to Ken Ortiz from the SOS dated March 11, 2011 was compiled from SOS and MVD records. "As per your request the document contains the data of the duplicate SSN records that matches with MVD and addresses from MVD also provided for your ref." *See* Exhibit J, IPRA 36-41. This file contains individuals' full names, gender, year of birth, address with zip codes and counties. The individuals' Driver Identification Numbers, SSNs, dates of birth, MVD addresses, and MVD Cities were redacted. *See* Exhibit J, IPRA 37-80.

22. On October 20, 2011, Defendants provided Defendants' Privilege Log, attached as "Exhibit K," in which they identified three documents requested in discovery that Defendants withheld on the claimed grounds of privilege.¹
23. The document identified as Document 2 in Defendants' Privilege Log--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"-- was created on March 14, 2011. *See* Email from counsel for Defendants, attached as "Exhibit L."
24. The document identified as Document 3 in Defendants' Privilege Log-- 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"-- was created on March 14, 2011. *See* Email from counsel for Defendants, attached as "Exhibit L."
25. On November 3, 2011, Defendant Dianna Duran sent a letter to the New Mexico Attorney General regarding "Voter Registration and Voting by non-citizens." Attached as "Exhibit M."
26. In her November 3, 2011, letter to the New Mexico Attorney General, Ms. Duran states the following:

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.*

¹ Defendants listed three documents on their privilege log. Plaintiff is only seeking two of these withheld documents—the list of 117 alleged foreign nationals who registered to vote illegally (Document 2), and the list of the thirty-seven alleged foreign nationals who voted illegally (Document 3).

Defendant Duran's November 3, 2011, letter attached as "Exhibit M." (emphasis supplied)

27. On November 4, 2011, Defendant Dianna Duran sent a letter to County Clerks throughout New Mexico stating that the Office to the Secretary of State had received information regarding non-citizen voting which would be sent to the Attorney General for investigation. The letter also stated that the Secretary of State's Office would be sending letters to "a number of individuals who appear to have irregularities in their voter information", and that the County Clerks would receive copies of these letters. Attached as "Exhibit N."
28. On November 16, 2011, Defendant Dianna Duran disseminated a document entitled INTERIM PROGRESS REPORT: ONGOING EFFORTS BY THE SECRETARY OF STATE TO IMPROVE THE ACCURACY AND INTEGRITY OF THE STATEWIDE VOTER FILE which discusses the 117 alleged illegal registered voters identified as alleged non-citizen voters on March 15, 2011. Attached as "Exhibit O."
29. On November 30, 2011, Defendants agreed to produce the voter registration cards for the 117 purported non-citizens who allegedly registered to vote illegally which includes the voter registration cards for the thirty-seven purported non-citizens who allegedly voted illegally. Attached as "Exhibit P."
30. On December 6, 2011, Defendants produced copies of voter registration cards for 115 of the 117 voters that Defendant Dianna Duran identified as potentially criminal registrations. (At least four of the registrants checked "No" in response to the question: "Are you a citizen of the United States?") Also, on December 7, 2011, counsel for Plaintiff received 98 (presumably of the 117) letters sent by the SOS to the registered

voters who were identified as possible illegal registrants. Cover letter from counsel for Defendants, attached as “Exhibit Q.”

ARGUMENT

I. Plaintiff’s IPRA Requests.

The IPRA requests at the heart of this lawsuit requested:

1. For those individuals that have been identified as suspected non-citizens who have voted or have registered to vote, all documents regarding these individuals including, but not limited to, voter registration documents for these individuals, signature rosters and/or checklists of voters indicating that these individuals may have voted, voter lists identifying these individuals, and any other documents that the Secretary of State’s Office has created, reviewed, received, or possesses that may indicate non-citizen voting.
2. All lists of individuals identified by any state agency as being suspected non-citizens who may have voted in any New Mexico election and all documents including, but not limited to, correspondence, memoranda, and spreadsheets that discuss or refer to these lists.

In response to these requests, Defendants refused to produce the lists of the 117 suspected non-citizens who allegedly registered to vote illegally and the thirty-seven suspected non-citizens who allegedly voted illegally as well as the signature rosters and/or voting lists indicating that these individuals actually voted. Defendants claim that they need not provide these documents pursuant to NMSA 1978, §14-2-1 A(12), a catch-all exception to the IPRA statute that permits withholding public records “as otherwise provided by law.” *See* Exhibits C and D. Defendants claim that because they compared records from the Motor Vehicle Department with voter registration documents, the federal Driver Privacy Protection Act (DPPA) and the New Mexico Driver Privacy Protection Act (NMDPPA) prohibit disclosure of these documents. *See id.* Defendants further claim that the withheld List #3, but not List #2, is also protected from disclosure by executive privilege. *See* Exhibit K. Neither of Defendants’ asserted reasons, however, permits them to withhold the requested documents.

II. The IPRA Framework

The legislature declared in IPRA that it is New Mexico’s public policy “that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees.” NMSA 1978, §14-2-5. Providing citizens with the greatest possible access to public information “is an essential function of representative government and an integral part of the routine duties of public officers and employees.” *Id.* The Courts have strongly enforced the Act. “[A] citizen has a fundamental right to have access to public records.” *State ex rel. Newsome v. Alaric*, 90 N.M. 790, 797, 568 P.2d 1236, 1243 (1977). “The citizen's right to know is the rule and secrecy is the exception.” *Id.* “People have a right to know that the people they entrust with the affairs of government are honestly, faithfully and competently performing their function as public servants.” *Cox v. New Mexico Dept. of Pub. Safety*, 2010-NMCA-096, ¶ 6, 148 N.M. 934 (internal quotation marks and citation omitted).

Because of New Mexico’s strong public policy favoring disclosure of public records, courts “begin [their] analysis with the strong presumption that the public has a right to inspect the [documents] at issue.” *Id.* at ¶ 16. “Each inquiry starts with the presumption that public policy favors the right of inspection. To overcome this presumption, a public entity seeking to withhold public records bears the burden of proving why their disclosure would be prejudicial to the public interest.” *Bd. of Comm'rs of Doña Ana County*, 2003–NMCA–102, ¶ 11, 134 N.M. 283.

III. The DPPA and NMDPPA Do Not Prevent Disclosure of the Requested Documents.

Defendants have refused to disclose the disputed documents because some of the records within the requests allegedly consist of information “obtained from the New Mexico Motor

Vehicle Department”, and are therefore “protected from disclosure under the Driver Privacy Protection Act (DPPA) and New Mexico Driver Privacy Protection Act (NMDPPA).” *See* Exhibit C. Defendants’ argument fails for three reasons: (A) neither the federal DPPA nor the state NMDPPA protects voting records; (B) the documents can simply be redacted to conceal the MVD information; and (C) even if the withheld documents were protected from disclosure by the DPAA and NMDPPA, the Defendants have waived this protection.

A. The DPPA and NMDPPA Do Not Protect Voting Records.

The DPPA and the NMDPPA protect motor vehicle records, not voting records. The DPPA provides: “A State department of motor vehicles...shall not knowingly disclose or otherwise make available to any person or entity personal information...about any individual obtained by the department in connection with a motor vehicle record...”. 18 U.S.C. § 2721. The NMDPPA states: “It is unlawful for any department or bureau employee...to disclose to any person other than another employee of the department or bureau any personal information about an individual obtained by the department or bureau in connection with a driver's license...”. NMSA 1978, §66-2-7.1 (1995). In *Republican Party of N.M. v. N.M. Dept. of Tax. & Rev. Dept.*, 2010-NMCA-080, ¶ 13, 148 N.M. 877, the Court of Appeals held that motor vehicle records were protected from disclosure under IPRA.

This case is unlike *Republican Party* in an important respect: In this case, Plaintiff has requested voting records, not MVD records. These voting records include signature rosters and voting lists that show that any alleged non-citizens voted along with the lists of the 117 alleged non-citizens who registered to vote and the thirty-seven alleged non-citizens who voted. These documents are all documents pertaining to voting, not MVD records.

Contrary to Defendants' position, the New Mexico legislature has stated that voter registration documents are public records. The election code of the New Mexico statutes specifically provides that "The contents of certificates of [voter] registration, except for the voter's social security number and date of birth, are public records." NMSA 1978, §1-4-12C. Plaintiff seeks documents that are simply lists of registered voters. Additionally, opposing counsel in the Attorney General's IPRA Compliance Guide, has taken the position that: "Voter registration lists maintained by the secretary of state and voter registration certificates filed with the county clerks are...public records that must be disclosed as provided by law." *Inspection of Public Records Act, Compliance Guide for New Mexico Public Officials and Citizens*, Gary K. King, Attorney General, Sixth Edition 2009, page 17. Thus, the requested lists must be disclosed as public records under New Mexico law.

Despite the fact that the voter documents are public records, Defendants nonetheless refuse to produce the documents. According to Defendants, the process used to identify the alleged non-citizen registered voters was to compare the people listed in the registered voter file who had irregularities in their social security numbers with people listed in the MVD database for foreign nationals who have obtained a driver's license. *See* Exhibit J, IPRA 81-85. Defendants are withholding the requested documents because the individuals on the lists were identified through a comparison of MVD records with voter registration records. *See* Exhibits C, F, and K. Therefore, according to Defendants, the requested voter records are now protected by the DPPA and NMDPPA. These documents, however, are not lists of MVD records. Rather they are lists of registered voters. The mere fact that the lists were generated by comparing information from MVD and information from registered voter information does not automatically convert the public voter registration information into protected MVD information.

While this issue has not previously been addressed in New Mexico, California has examined situations where public records are derived from information that might be protected, and has held that the records must be disclosed. One instructive case is *Int'l Fed'n of Prof'l & Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th 319, 344, 165 P.3d 488, 503 (2007). In that case, a police officers association objected to the production of city payroll records on the ground that the amounts of the officers' pay was determined, in part, by consideration of information contained in the officers' personnel files, which were protected from disclosure. The Court rejected the officers' claims. California laws "do not mandate that city payroll records reflecting peace officer salary information be excluded from disclosure merely because some of the facts relied upon in determining the amount of salary may be recorded in the agency's personnel files." *Int'l Fed'n of Prof'l & Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 165 P.3d 488, 503 (Cal. 2007).

In a similar case, a county retirement association refused to disclose the amount of pension benefits being paid to retired county employees because these benefit amounts were derived from information contained in protected personnel files. The court rejected this argument stating: "The fact that benefit amounts might be calculated using confidential information does not affect our conclusion. The California Supreme Court specifically rejected an argument that police officer salaries should not be publicly disclosed because the salaries were calculated using information contained in personnel records made confidential by statute." *Sonoma County Employees' Ret. Ass'n v. Superior Court*, 130 Cal. Rptr. 3d 540, 553 (Cal. Ct. App. 2011). This case is similar to the California cases because, as in those cases, Defendants argue here that a statute prohibits the disclosure of the documents because the documents were created by reference to protected information. That argument was rejected in California, and

should be rejected here as well. Furthermore, voter information has specifically been rejected as being part of the material protected by the DPPA. There is overlap between MVD information and voter information because both federal and New Mexico law require the MVD to provide its customers the opportunity to apply to register to vote, or update voting information, during a driver's license or photo identification (ID) card transaction. *See* National Voter Registration Act (NVRA) 42 U.S.C.A. § 1973gg-3; NMSA 1978, §1-4-5.2. Motor Vehicle Division employees must transmit the completed voter registration portion of an application for a State motor vehicle driver's license accepted at the MVD to the appropriate State election official not later than 10 days after the date of acceptance. Because state MVDs must provide people who are applying for a driver's license with the opportunity to register to vote, MVDs receive a large amount of voter information that is identical to the driver's license information that MVDs collect. In *Lake v. Neal*, 585 F.3d 1059, 1061 (7th Cir. 2009), the court considered whether these voter registration documents collected at MVDs were protected by the DPPA, and held that they were not. "Other than the fact that it is filled out simultaneously with a driver's license application, the voter form has nothing to do with, nor does it "pertain" to, a motor vehicle operator's permit." *Id.* This demonstrates that voter information is not automatically protected by the DPPA simply because it tangentially relates to MVD information. The fact that MVD data was compared to registered voter data to identify possible non-citizen voters does not automatically bring it under the ambit of the DPPA.

To allow Defendants to withhold documents whenever those documents have been compiled with reference to some protected information would allow the government to shield a wide array of public documents. Under this contention, the narrow exceptions to the IPRA

statute would swallow the rule favoring broad disclosure. Instead, this Court should find that the DPPA and NMDDPA do not protect the requested lists of voters.

B. The Documents Can Be Redacted To Conceal Any MVD Information.

Not only are the requested documents not protected by the DPPA/NMDPPA, but even if they were, the documents could simply be redacted to remove any information from MVD records. The legislature anticipated that public records might contain information that was not subject to disclosure when it enacted IPRA. To address this issue, it enacted NMSA 1978, §14-2-1B of the New Mexico Inspection of Public Records Act, which provides: “Protected personal identifier information contained in public records may be redacted by a public body before inspection or copying of a record. *The presence of protected personal identifier information on a record does not exempt the record from inspection.*” NMSA 1978, §14-2-1B. (Amended by 2011, c. 134, s. 2, eff. 7/1/2011) (emphasis supplied). Opposing counsel has explained in the Attorney General’s Inspection of Public Records Compliance Guide: “In some instances, a record kept by a public body will contain information that is exempt from the right to inspect as well as information that must be disclosed. The Act requires the applicable records custodian to separate out the exempt information in a file or document before making the record available for inspection. *The fact that a file may contain some information that may not be disclosed does not protect all the information from public disclosure.*” *Inspection of Public Records Act, Compliance Guide for New Mexico Public Officials and Citizens*, Gary K. King, Attorney General, Sixth Edition 2009, page 37 (emphasis supplied).

Moreover, in this case, Defendants have already shown that they can redact the documents to conceal any information from the MVD database. This is exactly what Defendants did when they produced to Plaintiff another list that was created by comparing MVD records

with voter registration (“SOS”) documents in their document production. *See* Exhibit J, IPRA 37 - 80. This list is a side-by-side comparison of MVD records and voter registration records. On this list, the Defendants simply redacted the MVD information. Similarly, they could redact the MVD information from any other documents they are withholding including the list of 117 alleged non-citizens who illegally registered to vote and the list of thirty-seven alleged non-citizens who illegally voted.

C. Defendants Waived Any Protection the DPPA or NMDPPA might have provided.

Even if these withheld documents were protected by the DPPA and the NMPPA, the Defendants waived this protection. While New Mexico courts have not addressed the issue of whether a party can waive the exceptions to disclosure under the IPRA statute, other jurisdictions that have considered this issue have held that these exceptions can be waived. *See State of North Dakota v. Andrus*, 581 F.2d 177, 179 (8th Cir. 1978) (holding that Defendant waived FOIA exemption by disclosing documents to another party in a previous proceeding); *Shell Oil v. I.R.S.*, 772 F. Supp. 202, 211 (D. Del. 1991) (holding that Defendant waived FOIA exemption by verbally disclosing much of the contents of a report it was withholding); *Lawyers Comm. for Human Rights*, 721 F. Supp. 552, 569 (S.D.N.Y. 1989) (holding that Defendant waived FOIA exemptions by releasing information to third party and by releasing information to the media); *Washington Post v. U.S. Dept. of Air Force*, 617 F. Supp. 602, 605 (D.D.C. 1985) (holding that Defendant waived FOIA exemption by releasing summary of information contained in the withheld document); *Education/Instruccion Inc. v. U.S. Dept. of Housing & Urban Development*, 471 F. Supp. 1074, 1081-82 (D. Mass. 1979) (holding Defendant waived FOIA exemption by disclosing documents to a non-federal party); *Oregonian Pub. Co. v. Portland School Dist.*, 952 P.2d 66, 68 (Or. Ct. App. 1998) (holding that exceptions to its disclosure of public records

statutes can be waived). This Court should follow these jurisdictions and find that the exceptions to the IPRA statutes can be waived by conduct such as that of the SOS here.

In this case, Defendants waived their claim that the DPPA and NMDPPA protect the documents at issue from disclosure in two ways. First, they waived this argument when they voluntarily disclosed names and addresses of individuals in a side-by-side comparison of MVD information and voter registration information when they produced the comparisons to Plaintiff. Second, by releasing a detailed report regarding the alleged non-citizen registered voters to the legislature and the public at large, the Defendants waived any claimed protections. *See* Exhibit O.

1. The Defendants have already produced documents that were created by comparing voter data to MVD data.

In response to Plaintiff's discovery requests, Defendants produced a list that was generated using the exact same process that Defendants argue violates the DPPA and NMDPPA. The list Defendants already produced is a comparison of MVD records against voter registration documents containing irregular social security numbers. *See* Exhibit J, IPRA 37 to 80. Like the lists that Defendants are withholding, the list produced by Defendants was also generated by comparing MVD information and voter registration information. They reveal the names and addresses of people who appear in both the MVD records and the registered voter records. These disclosed lists raise the same issues regarding the DPPA and NMDPPA as the withheld lists, yet Defendants did not claim that disclosing these lists would violate the DPPA and NMDDPA. Therefore, Defendants' disclosure of these lists waives any argument that the withheld lists are protected from disclosure.

2. Issuing A Detailed Report Regarding Alleged Non-Citizen Registered Voters to the Legislature and General Public Waived Any Claimed Protections from Disclosure.

Furthermore, on November 16, 2011, the SOS issued an interim report detailing the office's efforts to identify non-citizen voting. *See* Exhibit O. In this report, the SOS discussed the list of 117 suspected non-citizen voters at issue in this case in detail. *See* Exhibit O at pp. 11-13. The report states that nine individuals have registered to vote and voted prior to using foreign national documents to obtain a driver's license, ten individuals registered to vote and voted after using foreign national documents to obtain a driver's license, six individuals did not appear to be the same individuals as the person who applied for a driver's license, seven individuals did not provide sufficient information the SOS to determine if the individuals were the same people who applied for drivers licenses, thirty-five individuals had registered to vote prior to using foreign documents to obtain a driver's license, forty-nine individuals registered to voter after using foreign documentation to obtain a driver's license, and two people registered to vote at the same time they submitted foreign documentation to obtain a driver's license. *See id.* The report states that the SOS sent letter to these 117² suspected non-citizen registered voters "asking for clarification." *See id.* They have also forwarded all documentation regarding these individuals to the Attorney General for further investigation. *See id.*

By revealing this detailed summary describing each alleged instance of non-citizens registering to vote and voting to the legislature and the public at large, Defendants waived any claimed protection under IPRA. This issue has arisen in other cases. In *Washington Post Co. v. Dept. of Air Force*, 617 F. Supp. 602, 604 (D.D.C. 1985), the Air Force released a summary of a report regarding the effectiveness of the Air Force's inventory practices to the public. The Washington Post submitted a FOIA request seeking the full report. *See id.* The court held that by releasing the summary, which stated the conclusions reached in the report, but did not include

² There are 118 people identified in the report as non-citizen registered voters, but the report refers to 117 registered voters.

the details, the Air Force had waived any protection under FOIA. *See id.* at 605. The court granted the Washington Post’s motion for summary judgment and ordered the release of the underlying report. *See id.* at 606; *see also Oregonian Pub. Co. v. Portland School Dist.*, 952 P.2d 66, 70 (Or. Ct. App. 1998) (the court held that the exceptions to disclosure under the Oregon public records statutes were waived when an officer testified as to the results of his investigation and his report had to be disclosed).

Similarly, the report issued by Defendants provides a summary of the documents Plaintiff requested in its IPRA requests—the lists of alleged noncitizen registered voters and any documents indicating why they are believed to be noncitizens. The report already explains why these registered voters are suspected of being non-citizens. As in *Washington Post*, the underlying documentation supporting these conclusions in the report must also be released.

IV. Executive Privilege

Defendants further claim that the list of the thirty-seven (“List 3”) purported non-citizens who allegedly voted illegally is protected from disclosure by executive privilege. Exhibit K. However, Defendants have not claimed that executive privilege applies to the list of 117 (“List 2”) suspected non-citizens who allegedly registered to vote illegally.³ Defendants’ claim of executive privilege as to the list of the 37 alleged non-citizen voters is unjustified.

Executive privilege is not absolute. “Nor does the fact that the privilege is of constitutional origin make the privilege absolute. An absolute privilege would conflict with the constitutional duty of the courts to do justice in matters brought before it.” *State ex rel. Atty. Gen. v. First Judicial Dist. Court of New Mexico*, 96 N.M. 254, 258, 629 P.2d 330, 334 (1981). “The purposes of the executive privilege are to safeguard the decision-making process of the government by fostering candid expression of recommendations and advice and to protect this

³ It is unclear if Defendants are claiming executive privilege as to any other documents.

process from disclosure. Executive personnel who fear or expect public dissemination of their remarks may temper their comments because of their concern for their own personal interests, safety, or reputation.” *Id.* (quoting *United States v. Nixon*, 418 U.S. 683 (1974)). Counsel for Defendants in this matter, the New Mexico Attorney General, has recognized that executive privilege is a limited privilege. “The [executive] privilege is not absolute and may not be used unless revelation of a particular document will *truly compromise the agency's decision-making process*, and thus outweighs the public's interest in disclosure.” *Inspection of Public Records Act, Compliance Guide for New Mexico Public Officials and Citizens*, Gary K. King, Attorney General, Sixth Edition 2009, page 22 (6th ed.2009)(emphasis supplied).

Defendants have not shown how disclosure of the list of thirty-seven suspected non-citizen voters would “truly compromise” the Secretary of State’s decision-making process. In fact, Defendants’ dissemination of the document entitled INTERIM PROGRESS REPORT: ONGOING EFFORTS BY THE SECRETARY OF STATE TO IMPROVE THE ACCURACY AND INTEGRITY OF THE STATEWIDE VOTER FILE (“Exhibit O”) implies that any “decision making process” has been completed and Defendants have determined their course of action.

Even if executive privilege applied, that does not necessarily mean that the documents should be withheld. “Trial courts are first required to determine whether the claim of executive privilege has been properly invoked in each situation. Once it is found that the privilege applies, the trial court must balance the public's interest in preserving confidentiality to promote intra-governmental candor with the individual's need for disclosure of the particular information sought.” *Id.* “The need for confidentiality among the executive is worthy of protection through an evidentiary privilege. However, when this privilege comes into confrontation with other

values or interests which are also protected by law, a balancing of the protected interests must be undertaken by the courts.” *State ex rel. Atty. Gen. v. First Judicial Dist. Court of New Mexico*, 96 N.M. 254, 258, 629 P.2d 330, 334 (1981). “In administering this balancing test, certain procedures are followed. The movant must first show good cause for the production of the requested information. If good cause can be shown, the court must then conduct an *in camera* examination of the requested material.” *Id.*

In this case, the public interest would certainly be served by the dissemination of more information regarding the State’s electoral system; that is, whether foreign nationals have actually registered to vote and have voted, and whether the State’s electoral system is, in fact, a “culture of corruption.” This issue goes to the very heart of our democratic government. Claims of voter fraud cast doubt on the integrity of our entire system of government, and therefore the need to substantiate these claims is of paramount importance. In *Republican Party*, the Court of Appeals approved the district court’s finding that: “Plaintiffs had shown that their interest in protecting the integrity of the voting process constituted good cause for requesting the information; and that in order to properly evaluate the privilege, it would reserve ruling whether the privilege applied ‘pending an *in camera* review of the communications at issue.’” *Republican Party of New Mexico v. N. M. Taxation & Rev. Dept.*, 2010-NMCA-080, ¶ 27, 148 N.M. 877, *cert. granted*, 2010-NMCERT-008, 148 N.M. 943, 242 P.3d 1289. Likewise, this Court should conduct an *in camera* review of the list of alleged non-citizen voters Defendants are withholding.

A review by this Court will show that that the public's interest in preserving confidentiality does not outweigh the needs of Plaintiff, and the public, to obtain this information.

A. Waiver of Executive Privilege.

Even if executive privilege applies to the list Defendants are withholding, Defendants waived this privilege when they voluntarily disclosed the contents of the list to the County Clerks, to the individuals who appear on the list, and by agreeing to disclose the voter registration cards for each individual on the list to Plaintiff. *See* Exhibit P.

On November 4, 2011, Defendant Dianna Duran sent a letter to the County Clerks wherein she explained that there had been problems with some of the registered voter files and suspected non-citizen voting. *See* Exhibit N. She stated that letters would be sent to these individuals, and copies of these letters would be sent to the County Clerks. *See id.* Thus, the County Clerks have now seen the letters that identify the people on the list the Defendants are withholding. These County Clerks are not within the Secretary of State's Office, or even within the State's executive branch. Any executive privilege regarding this list does not apply to them, and by disclosing them to the County Clerks, Defendants have waived the privilege.

Similarly, by sending these letters to the individuals who appear on the list, Defendants have also waived any executive privilege regarding this list. *See* Exhibit N. The individuals are now aware that they are members of the thirty-seven suspected non-citizens who allegedly voted illegally. There is no executive privilege between these people and the Defendants. There is nothing to stop them from communicating this fact with the public at large. Therefore, executive privilege has been waived by disclosing the contents of the list to the individuals. Executive privilege "does not protect communications, whether intended as confidential or not, between the executive department and members of the public or others not employed in the executive department." *State ex rel. Atty. Gen. v. First Judicial Dist. Court of New Mexico*, 96 N.M. 254, 258, 629 P.2d 330, 334 (1981).

Furthermore, Defendants have disclosed the voter registration cards for the thirty-seven suspected non-citizen voters who appear on the withheld list. By making these voter registration cards available to Plaintiff, they have disclosed the contents of the list, and have therefore waived any executive privilege that may have applied to it. *See Washington Post Co. v. Dept. of Air Force*, 617 F. Supp. 602, 605 (D.D.C. 1985), (by releasing the summary which stated the conclusions reached in the report the Air Force had waived any protection), *Shell Oil v. I.R.S.*, 772 F. Supp. at 210-11 (court held privilege waived as to documents where defendant read a significant portion of the document out loud in a meeting).

Thus, having disclosed significant portions of the lists, Defendants have waived any executive privilege that may have existed. “A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.” Rule Evid. 11-511 NMRA.

According to Defendant’s privilege log, executive privilege is claimed because “the investigation concerning these names is not yet complete.” Almost ten months have passed since Lists 2 and 3 were created and Ms. Duran testified at the legislature. Her claim that more time is needed to complete her “investigation” is not credible. This is especially true in light of the fact that she appears to have completed her investigation by sending letters to the individuals on the list, the County Clerks, and the Attorney General regarding her findings. *See Exhibits M and N.* Moreover, she issued a detailed report to the legislature purporting to explain the results of her investigation. *See Exhibit O.*

Finally, Defendants' privilege log is inadequate. "Plaintiff's privilege log together with any supplemental affidavits must affirmatively demonstrate an objectively reasonable basis for each assertion of privilege. See *Hartman v. Texaco, Inc.*, 1997-NMCA-032, ¶¶ 18-25, 123 N.M. 220, 937 P.2d 979 (discussing level of detail required to properly assert work-product immunity)." *Pina v. Espinoza*, 2001-NMCA-055 {24}, 130 N.M. 661, 668, 29 P.3d 1062, 1069. "We expressly disapprove of the practice of permitting the proponent of a privilege to rely on an initial conclusory assertion of a privilege and to gradually unveil the basis for her claims of privilege." *Pina*, at 2001-NMCA-055 {25}, 130 N.M. 668, 29 P.3d 1069.

V. Other documents, requested by Plaintiff's IPRA requests, but not produced or withheld by claims of privilege should be produced.

These documents include but are not limited to:

1. The document identified as document 2 in Defendants' privilege Log.
2. The document identified as document 3 in Defendants' privilege Log.
3. The signature rosters, and/or checklists of voters showing that the suspected non-citizens may have voted.
4. The remaining registration cards for the registrants identified by the SOS as potentially criminal registrations.
5. The remaining letter(s) sent by the SOS to persons she identified as potentially criminal registrants.
6. All voter registration documents indicating that a person registering to vote may be a non-citizen including, but not limited to those documents where a person registering to vote checked "no" in response to the question "Are you a citizen?"
7. Any documents not previously disclosed that indicate that any non-citizen registered to vote or voted illegally.

VI. Costs, Expenses and Attorney Fees

IPRA provides that the court shall award damages, costs and reasonable attorneys' fees to any person whose written request has been denied and is successful in a court action to enforce the provisions of the Inspection of Public Records Act. NMSA 1978, §14-2-12D.

In this enforcement action, Plaintiff has incurred damages, costs, expenses and is entitled to an award of reasonable attorneys' fees. Plaintiff has already been successful, in large part, by forcing Defendants to produce a significant number of records that should have been produced long ago in response to Plaintiff's IPRA requests. After Defendants produce the remaining material, this Court should determine the amount of damages, costs and reasonable attorneys' fees to be awarded to Plaintiff.

CONCLUSION

Claims of voter fraud such as those asserted by Ms. Duran regarding a "culture of corruption" must be taken seriously because they tend to undermine voter confidence in the electoral system and thus discourage participation in elections. Ms. Duran recognizes this fact. In her Interim Report, Ms. Duran stated that "Trust and confidence in our entire voter registration and elections process are fundamental to a representative form of government." *See* Exhibit O. By disparaging the New Mexico voting system as a "culture of corruption" in which persons have illegally registered and persons have illegally cast votes, while at the same time refusing to disclose the proof for those statements, Ms. Duran has not enhanced the public's "trust and confidence" in the system. On the contrary, such statements inevitably damage the public's belief in the system and thereby harm the public itself. If her statements were accurate, she should produce the proof, and thereby show that the system works – that such illegality can be

detected and corrected. If her statements were not accurate, she should admit that the system is not broken as she claimed in order to restore the public's confidence in the system.

Furthermore, Ms. Duran's November 3, 2011 letter to her own counsel (Exhibit M) undermines Defendants' claims that the records sought by Plaintiff are in fact protected from disclosure. She states that she has requested guidance from her attorneys regarding appropriate disclosure pursuant to the Inspection of Public Records Act but "[t]o date, I have still not received clear guidance as to such disclosure or non-disclosure." If Defendants' grounds for non-production were legitimate, it seems unlikely that this would be the case.

In this matter, the public's right to access to the public records sought by Plaintiff outweighs any interest in confidentiality. In her press release dated March 15, 2011, Ms. Duran "pledge[d] to keep the citizens of New Mexico informed as this matter moves forward." *See* Exhibit A. She has clearly failed to uphold her promise. "Keeping the citizens of New Mexico informed" includes informing them of the basis for her statements.

IPRA provides that a district court may issue a writ of mandamus or order an injunction or other appropriate remedy to enforce the provisions of the Inspection of Public Records Act. NMSA 1978, §14-2-12B. Accordingly, Plaintiff seeks a Summary Judgment from this Court requiring Defendant to produce the remaining Public Records sought by Plaintiff.

Wherefore, Plaintiff moves the Court for a Summary Judgment:

- A. Ordering Defendants to produce the list ("List 2") of 117 suspected non-citizens who allegedly registered to vote illegally, and the list ("List 3") of 37 suspected non-citizens who allegedly voted illegally.
- B. Ordering Defendants to produce the signature rosters and/or voting lists that demonstrate that 37 alleged non-citizens actually voted illegally.

- C. Ordering Defendants to produce all information, documents, reports and other material that was the basis for her testimony and Press Release on March 15, 2011, in which she announced her purported findings of an investigation.
- D. Ordering Defendants to produce all information, documents, reports and other material that was the basis for the statement by Bobbi Shearer, SOS Bureau of Elections Director, on March 15, 2011, in which she announced that ineligible voters had voted.
- E. Ordering Defendants to produce all records sought by Plaintiff in its Requests (except for documents protected from disclosure by the DPPA and the NMDPPA and protected personal identifier information contained in public records which may be redacted).
- F. Awarding damages, costs and reasonable attorneys' fees to Plaintiff in amounts to be determined by the Court.
- G. Granting such other and further relief as to the Court seems proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 9, 2012, the foregoing pleading was electronically filed and the following parties and/or counsel were served electronically.

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