

**STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT**

**SOUTHWEST PUBLIC POLICY
INSTITUTE,**

Plaintiff,

v.

No. D-101-CV-2022-01994

**NEW MEXICO SECRETARY OF STATE
Defendant.**

**DEFENDANT'S VERIFIED MOTION TO DISMISS
PLAINTIFF'S COMPLAINT FOR VIOLATION OF IPRA**

Operating on the incorrect assumption of which statutory provisions governs his request for voter data, Plaintiff alleges that the New Mexico Office of the Secretary of State ("SOS") improperly denied his request for voter data pursuant to the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1, *et seq.* ("IPRA"), and is consequently liable for damages, costs and attorney's fees and is entitled to an Order the production of voter data without complying with the mandated procedure in the Election Code. Because the Election Code governs the production of voter data and not IPRA, pursuant to Rule 1-012(B)(6) NMRA, Defendant SOS, by and through its General Counsel, moves this Court to dismiss Plaintiff's claims against it for Plaintiff has failed to state a claim on which relief can be granted. As grounds for its Motion, the SOS states as follows¹:

BACKGROUND

¹ Pursuant to Rule 1-007.1 NMRA, due to the nature of the motion, Plaintiff's concurrence was not sought, and this motion is deemed opposed.

Plaintiff filed suit claiming the SOS denied an IPRA request based on what it believes to be an “unreasonable failure to provide a complete and timely response to Plaintiff’s public records request. *Complaint* at ¶ 1. It is important to note here, that Plaintiff’s request for voter data is not governed by IPRA but is governed by the Election Code; and therefore IPRA, including its penalties, are inapplicable to Plaintiff’s request.

Plaintiff filed one request for voter data records at two different times. The first was on October 28, 2021. Mr. Brenner requested:

First names, last names and email addresses which were affirmatively provided to the SOS through the New Mexico Online Voter Registration Portal located at <https://portal.sos.state.nm.us/ovr/webpages/instructionsstep1.aspx> for both new registrants and voters changing their registration information.

(*Complaint* at **Exhibit 1**). This is a clear request for voter data as it seeks information from New Mexico’s voter file which is made up of voter registration data. The SOS responded clearly that this was a voter data request, and Plaintiff must comply with the Election Code, NMSA 1978, Section 1-4-5.5, for our office to process the request. *Id.* The SOS provided a weblink to where Plaintiff could sign the required affidavit and properly submit a request voter data. *Id.* This response was sent on November 9, 2021. *Id.* Mr. Brenner never submitted the required affidavit to process a voter data request pursuant to the Election Code.

Plaintiff states that it “revived” this same request on August 5, 2022. *Complaint* at ¶ 14. Plaintiff goes on to plead that “Defendant has failed to confirm receipt, provide a written denial, or otherwise claim any exemption regarding Plaintiff’s Second Request.” *Complaint* at ¶ 16. Though Plaintiff makes this allegation, Plaintiff does not and cannot point to any actual denial of these records pursuant to IPRA, or the Election Code, or explain why he did not comply with the statutory requirements to receive voter data, after being told how to obtain the requested voter data.

Plaintiff has only made one inquiry into receiving voter data, on October 28, 2021, for which

Defendant timely responded regarding the statutory process that he must follow. To date, Plaintiff has never submitted a complete voter data authorization form or affidavit related to the voter data requested.

**RELEVANT STATUTES OF THE ELECTION CODE AND ADMINISTRATIVE RULES
GOVERNING THE PRODUCTION OF VOTER DATA**

The Election Code, not IPRA governs the Defendant's obligation to produce voter data from the voter file. NMSA 1978, Section 1-5-2(M), defines *voter data* as "selected information derived from the voter file. Section 1-5-2(N) defines *voter file* as "all voter registration information required by law and by the secretary of state that has been extracted from the certificate of registration of each voter in the county, stored on data recording media and certified by the county clerk as the source of all information required by the Voter Records System Act." NMSA 1978, Section 1-4-5.5(C) states the requirements for all requests of voter data:

Each requester of voter data, mailing labels or special voter lists shall sign an affidavit that the voter data, mailing labels and special voter lists shall be used for governmental or election and election campaign purposes only and shall not be made available or used for unlawful purposes.

The Legislature further requires that "[f]ile maintenance reports and *updated voter files* shall be provided in a manipulable digital format and *shall not include* the voter's social security number, codes used to identify the agency where the voter registered, the voter's day and month of birth, *the voter's email address*, or, if prohibited by the voter, the voter's telephone number." NMSA 1978, § 1-5-14(D) (*emphasis added*). This is also stated clearly on New Mexico Voter Registration Form. *See (Exhibit A)*. The Legislature also prohibits the release of registration information if the person learned of that information from the voter's certificate of registration. NMSA 1978, § 1-4-50.

The protections and production procedures of voter data are further supported by the SOS in its administrative rules. Part 1.10.35.10(A) NMAC states, “[a]ll requesters of voter file data or public service requests shall complete the affidavit of authorization prescribed by the secretary of state.” Part 1.10.35.11 states that “[i]n accordance with Sections 1-4-5.5 to -5.6, and 1-4-50 NMSA 1978, the SOS and county clerk offices shall take measures to minimize the risk of unauthorized disclosure, unauthorized acquisition, unauthorized access or other situation that would provide access to voter registration records outside what is allowable by law.”

ARGUMENT

Plaintiff’s IPRA claims rely on the untenable legal premise that the SOS violated IPRA or denied his request for voter data pursuant to IPRA. Plaintiff is wrong on both counts as his request is not governed by IPRA, but rather the Election Code, and Plaintiff failed to comply with the plain language of the more specific statutory provision that demands a requester for voter data complete an affidavit affirming that the data will not be used for unlawful purposes. § 1-4-5.5(C). IPRA is a general statute and does not apply to voter data which is governed specifically by Section 1-4-5.5 of the Election Code. Therefore, Plaintiff has failed to state a claim for relief that can be granted under IPRA, and this case should be dismissed.

I. Motion to Dismiss Standard Under Rule 12(b)(6) NMRA

"A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint, not the factual allegations of the pleadings which, for purposes of ruling on the motion, the court must accept as true." *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 2, 134 N.M. 43. Dismissals under Rule 1-012(B)(6) NMRA are proper when the claim asserted is legally deficient. *Delfino v. Griffo*, 2011- NMSC-015, , ¶ 9, 150 N.M. 97. In other words, a complaint "may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to

support a claim of the sort made, or facts sufficient to make a good claim." *C&H Const. & Paving, Inc. v. Found Reserve Ins. Co.*, 1973-NMSC-076, , ¶ 9, 85 N.M. 374.

II. IPRA Does Not Apply For A Request For Voter Data

IPRA and the Election Code establish statutory schemes with distinct scopes and objectives. IPRA creates a records inspection scheme of general application, granting, with various exceptions, to “every person ... a right to inspect public records of this state... unless otherwise provided by law.” §§ 14-2-1(A), (H); *see also Crutchfield v. N.M. Dep't of Tax. & Rev.*, 2005-NMCA-022, 137 N.M. 26 (IPRA is a statutory scheme of general application). The Election Code has prescribed the specific requirements to receive voter data and has required an affidavit to be signed for any requester of voter data, to protect the voter information from unlawful use, dating back to 1975. *See* NMSA 1958, § 3-5-29(B) (1975) (**Exhibit B**). This affidavit is essential to ensure that this data is not used for unlawful purposes and only used in one of the legislatively permitted ways. This restriction is now even more important due to the rise of election mis and disinformation and the rise of harassment of voters and election workers. The voter data affidavit accomplishes these goals by subjecting unlawful use of the data to criminal penalties. Attached for reference is the current Voter Information Authorization Form. (**Exhibit C**). *See also* NMSA 1978, § 1-4-5.6 (each unlawful use of voter data constitutes a fourth-degree felony). Never has there been a suit in New Mexico in which a voter data requester tries to circumvent the specific statutory requirements that govern the production of voter data with the general requirements of IPRA. This is because the rule of statutory interpretation privileges the specific statute over the general.

When two statutes deal with the same subject, one general and one specific, the specific statute controls." *Stinbrink v. Farmers Inc. Co.*, 111 N.M. 179, 182, 803, P.2d 664, 667 (1990); *see also Prod. Credit Ass'n of S. N.M. v. Williamson*, 1988-NMSC-041, ¶ 5, 107 N.M. 212 (“A

well-established principle of statutory construction recognizes that when one statute deals with a subject in general terms and another deals with a part of the same subject more specifically, the more specific statute will be considered an exception to the general statute, and will apply.”); *Lopez v. Barreras*, 1966-NMSC-209, ¶ 12, 77 N.M. 52 (“Conflicts between general and specific statutes are resolved by giving effect to the specific statute.”).

The most recent case to uphold these principles in an IPRA context is *TexasFile LLC v. Bd. of Cnty. Commissioners of Cnty. of Lea*, 2019-NMCA-038, 446 P.3d 1173. In this case, a public-records requester sought real property image and index records and did not want to pay the fee associated with the production of those records pursuant to the Recording Act and instead argued that the fee schedule under IPRA should apply and filed suit against county. The Court held that “the Recording Act, as the more specific statute, governed the County's production obligation with respect to TexasFile's records request, and that the complaint failed to allege any violation of that [Recording] Act.” *Id.* at ¶ 8. The *TexasFile* holding should be applied under our facts as well.

Section 14-2-1 of IPRA specifically addresses requests for public records generally, while, Section 1-4-5.5 is the specific statute governing voter data requests. As Section 1-4-5.5 is the specific statute governing voter data requests, Section 1-4-5.5, not IPRA, must control the SOS's response to the request. *See Crutchfield*, 2005-NMCA-022, (holding that section of Public Records Act governing requests for copies of electronic databases maintained by the state, not IPRA, applied to plaintiff's records request). As *Crutchfield* explains, when this kind of conflict arises because of a public records request, we look to the statute most specifically addressing the “type of record” sought to determine the custodian's obligation in responding. *See Id.* at ¶ 24.

Under our facts, the type of records sought by Plaintiff was for voter data; and therefore, the SOS's obligation in responding is pursuant to the Election Code and not IPRA. Therefore, any

penalties under IPRA do not apply to Plaintiff's request. Importantly as well, Plaintiff has not pled an Election Code violation here, and would not have standing to do so either. As such, there are no facts that would allow Plaintiff to be able to change his voter data request into an IPRA request to seek standing and redress from this Court under IPRA. For this reason, Plaintiff's IPRA claims fail, and Count I and II of the Complaint must be dismissed.

III. Plaintiff has No Standing to Enforce the IPRA

The Legislature created a private right of action for enforcement of IPRA. Section 14-2-12(A) provides:

An action to enforce the [IPRA] may be brought by:

...

(2) a person whose written request has been *denied*.

(*emphasis added*). The allegations in the Complaint plainly demonstrate that Plaintiff lacks standing to bring an enforcement action against the SOS under IPRA. Plaintiff requested voter data on October 28, 2021. The SOS responded on November 9, 2021, after seeking reasonable specificity from Mr. Brenner on November 4, and providing Mr. Brenner with instructions on how to request the data sought under the Election Code. As such, there was and is no denial.

Under the plain language of Section 14-2-12(A)(2), there is no private cause of action for a Non-profit corporation or its agents to enforce IPRA when there has been no denial of a public records request or if records requested are governed by a different statute. *Sims v. Sims*, 1996-NMSC-078, ¶ 17, 122 N.M. 618, 930 P.2d 153 (recognizing that the plain meaning rule requires a court to give effect to the statute's language and refrain from further interpretation when the language is clear and unambiguous). As such, Plaintiff lacks standing to pursue a claim for violation of IPRA against the SOS and, therefore, Count I and II of the Complaint must be dismissed.

IV. Email Addresses Will Not Be Produced Pursuant To Law

To the extent the Court wants to look beyond the clear deficiencies in Plaintiff's pleadings, email addresses collected on voter registration documents are part of the voter file and are not to be provided in voter data requests pursuant to the Election Code. Section 1-5-14(D) is unequivocal that updated voter files *shall not* include the voter's email address.... The Legislature is clear in its directive as NMSA 1978, Section 1-1-3 states that "shall" is mandatory as used in the Election Code. So, even if a voter request is deemed to be an IPRA request, which is against the established principles of statutory construction, email addresses will not be provided pursuant to IPRA's exception found in NMSA 1978, Section 12-2-1(H). To the extend Plaintiff's only denial of records claimed is the SOS's lack of responding to his "revived" request, there is no denial under IPRA, as IPRA does not govern Plaintiff's request and Plaintiff cannot by osmosis bring a cause of action for violating a statute that does not govern its request.

In Plaintiff's "revived" request he reference incorrectly a federal court case as somehow being persuasive in providing the voter data he requested against the express directives of the Election Code. It must be said that this Federal Court Order on a preliminary injunction dispute did not hold that IPRA trumps the Election Code in producing voter data, or otherwise articulate how a federal order on preliminary injunction applies to his request at all. Plaintiff's Complaint does not reference this case and so any alleged violation of IPRA due to an ongoing federal case in which a party made a proper request for voter data, must be ignored, and cannot not fix the clear deficiencies of this Complaint. *See Ballard v. Chavez*, 1994-NMSC-007, 117 N.M.1 (Courts only review "all well pleaded facts in the complaint," when considering a motion to dismiss for failure to state a claim.).

CONCLUSION

As shown above, The SOS's obligation in responding to Plaintiff's request is governed by the Election Code and as such, our office never denied any IPRA request. Plaintiff may have attempted to "revive" his voter data request through IPRA on August 5, 2022 but did comply with the instructions provided to its agent for requesting voter data in 2021. Mr. Brenner has been told that he must comply with the Election Code in requesting this data, but never did. As such, the SOS respectfully requests this Court enter an Order granting its Motion to Dismiss, dismissing all of Plaintiff's claims against it with prejudice, and awarding any such other and further relief as the Court deems just and proper.

Respectfully submitted,

SECRETARY OF STATE
MAGGIE TOULOUSE OLIVER

/s/ Dylan K. Lange

Dylan K. Lange
General Counsel
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Santa Fe, NM 87501
(505) 827-3600
Dylan.lange@sos.nm.gov

CERTIFICATE OF SERVICE


I certify that on November 28, 2022, I served the foregoing on counsel of record for all parties via the CM/ECF system.

/s/ Dylan K. Lange
Dylan K. Lange

VERIFICATION

I, Mandy Vigil, state and affirm that I am a representative of the Secretary of State in this matter and have read the *Secretary of State's Verified Motion to Dismiss*, am familiar with the facts therein, and verify that the factual statements contained are true and correct to the best of my knowledge.

DATE: 11/28/2022


Mandy Vigil
State Elections Director

ATTACH COPY OF ID INFORMATION HERE (IF REQUIRED)
SEE "REGISTRATION ID REQUIREMENTS" ON BACK OF RECEIPT

DO NOT ATTACH OR ENCLOSE ORIGINAL ID INFORMATION

PERSONAL INFORMATION				This information <u>not</u> to be copied.			
1	NAME Last	First	Middle Name or Initial	Gender	Birth Date	Social Security Number	
PHYSICAL STREET ADDRESS WHERE YOU LIVE NOW							
2	Street Address		Apartment, Unit, or Lot #		City	Zip	
ADDRESS WHERE YOU GET YOUR MAIL (if different from above)							
3	Mailing Address		City		Zip		
4	If you are changing your name on this application, under what full name were you previously registered? Last, First, Middle				5	E-Mail Address (*optional)	
POLITICAL PARTY			DAYTIME TELEPHONE NUMBER (optional)		POLL WORKER		
6	NOTE: You must name a major political party to vote in primary elections. ▶▶▶▶		Party	If you choose NO PARTY check this box <input type="checkbox"/>	May the county clerk make this telephone number public <input type="checkbox"/> YES <input type="checkbox"/> NO		Would you like to serve as an election day <input type="checkbox"/> YES <input type="checkbox"/> NO preinct worker?
8	I hereby authorize you to cancel my previous registration in the following county and state.			City or Township	County	State	
Please answer the following questions:							
9	Are you a citizen of the United States? Will you be at least eighteen years of age on or before the next general election?			<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No		
If you checked "NO" to any of the questions above, do not complete this form. If you have been convicted of a felony and are currently on parole or supervised probation, do not complete this form.							
* S S 0 0 1 0 6 6 1 *			TODAY'S DATE: Month / Day / Year		SIGN YOUR FULL NAME OR MARK ON THE YELLOW LINE BELOW:		
10	Name of person who assisted you in filling out this form:			VRAID #			
DO NOT WRITE IN SHADED AREAS - FOR OFFICIAL USE ONLY							
Accepted for filing In County Registration Records				PCT.	MUN.	PRC DIST.	
Date / /				REP. DIST.	SEN. DIST.	SCHOOL	
County Clerk				Filing Clerk	C.C.		

MOISTEN, FOLD UP AND SEAL HERE BEFORE MAILING

MOISTEN TO SEAL

MOISTEN TO SEAL



VOTER REGISTRATION APPLICATION

1. Complete the application
2. Detach and Retain your receipt
3. Moisten where indicated, fold, seal and mail.

* PRIVACY NOTICE

Your Social Security number and date of birth are required to register to vote. Pursuant to New Mexico law, the secretary of state, county clerk or any other registration agent shall not release to the public a voter's social security number or date of birth. A person who unlawfully copies, conveys, or uses information from a certificate of registration is guilty of a fourth degree felony. See NMSA, 1978 § 1-4-5 and NMSA, 1978, 1-4-5.4. Per NMSA, 1978 § 1-5-14(D) voter files provided to the public shall not include email address.

APPLICANT KEEP THIS RECEIPT

If you have not received confirmation of your voter registration within fifteen days of submitting the form, you may use the receipt number below to track your application. Please have the receipt number available and call your County Clerk at the number listed in the reverse side of your receipt, or check the status of your receipt number by visiting the Secretary of State's website at: www.sos.state.nm.us/voter_registration.

SS0010661

TODAY'S DATE:

Month / Day / Year

VRAID #

EXHIBIT A

media, files, records, instructions and lists or parts thereof by any person.

B. Any person who commits unlawful destruction or alteration of active data processing media, voter file, file maintenance lists, program records, instructions or voter lists is guilty of a fourth degree felony."

Section 78. A new Section 3-5-29 NMSA 1953 is enacted to read:

"3-5-29. REQUESTS FOR STATISTICAL DATA, VOTER DATA, MAILING LABELS OR SPECIAL VOTER LISTS.--

A. The county clerk shall authorize the data processor to furnish statistical data, voter data, mailing labels or special voter lists only upon written request to the county clerk and after compliance with the requirements of this section, provided, however, all requesters shall be treated equally by the data processor in regard to the charges and the furnishing of the materials.

B. Each requester of voter data, mailing labels or special voter lists shall sign an affidavit that the voter data, mailing labels and special voter lists shall be used for governmental or election and election campaign purposes only, and shall not be made available or used for commercial or unlawful purposes.

C. Each requester of statistical data shall sign an affidavit that such statistical data shall be used for information or research purposes only, and shall not be made available or used for commercial or unlawful purposes.

D. The secretary of state shall prescribe the form of the

EXHIBIT B

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affidavit."

Section 79. A new Section 3-5-30 NMSA 1953 is enacted to read:

"3-5-30. UNLAWFUL USE OF STATISTICAL DATA--UNLAWFUL USE OF VOTER DATA, MAILING LABELS OR SPECIAL VOTER LISTS--PENALTIES.--

A. Unlawful use of statistical data shall consist of use of statistical data in such a manner as to derive information, the use or possession of which would be otherwise prohibited under the Automated Voter Records System Act.

B. Unlawful use of voter data, mailing labels or special voter lists shall consist of the knowing and willful use of such information for purposes prohibited by the Automated Voter Records System Act.

C. Any person, organization or corporation or agent, officer, representative or employee thereof who commits unlawful use of statistical data, voter data, mailing labels or special voter lists shall be guilty of a fourth degree felony and upon conviction shall be fined ten dollars (\$10.00) for each and every line of voter information which was unlawfully used.

D. Each and every unlawful use of statistical data, voter data, mailing labels or special voter lists shall constitute a separate offense."

Section 80. A new Section 3-5-31 NMSA 1953 is enacted to read:

"3-5-31. CONTRACTUAL AGREEMENT REQUIRED WITH DATA PROCESSOR.--

A. Each county implementing the Automated Voter Records System Act shall enter into a written contractual agreement with the data processor notwithstanding the fact that the data processor may be a department of county, municipal or state government. Parties to the con-



Voter Data Request Form

Please select one of the following:

____ Electronic File ____ Printed List ____ Mailing Labels

VOTER INFORMATION AUTHORIZATION

NOTE: Minimum charge for any request is \$15.00

Please indicate the purpose of this request ☐ Campaign Use

Please provide a description of your intended use of voter data: ☐ Governmental Use

Please select the jurisdiction that you are requesting:

- ☐ Statewide ☐ District _____
☐ County(s) _____
☐ Other: _____

Please indicate all information that you are requesting:

NOTE: All files come with registrant name, address (both physical and mailing), year of birth, party affiliation, precinct assignment jurisdiction and registrant ID number. Any additional fields must be indicated below.

- ☐ Districts (all districts associated with a voter) ☐ Voting History (elections a voter has participated in) ☐ Method Voted (i.e. absentee, early or Election Day)

Information of Requestor

Name: _____ Organization: _____

Address: _____ Phone: (____) _____ - _____

Email Address: _____ Date: ____/____/____

Authorization

Unlawful use of the information requested on this form shall consist of willful selling, loaning, providing access to or otherwise surrendering, duplicating or alteration of information as stated in the Voter Records System Act (§1-5-1 through 1-5-31 NMSA 1978).

I hereby swear that the requestor will not: (INITIAL EACH)

- ____ sell, loan, provide access to, or otherwise surrender voter information received as a result of this request.
____ alter voter information received as a result of this request.
____ use voter information for any purpose other than those authorized on this form.
____ use voter information for any commercial purposes.

Signature of Requestor

For Office Use Only

Total Cost: \$ _____ Date Received: ____/____/____ Date Completed: ____/____/____

Comments: _____ Receipt Number: _____