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August 8, 2022

VIA CM/ECF

The Honorable Freda L. Wolfson, Chief Judge
United States District Court
District of New Jersey - Trenton Vicinage
Clarkson S. Fisher Building
402 East State Street, Courtroom 5E
Trenton, New Jersey 08608

Re: *Public Interest Legal Foundation, Inc. v. Way*
Docket No. 22-cv-02865

Dear Judge Wolfson:

This office represents the Defendant, New Jersey Secretary of State Tahesha Way, in the above-referenced matter. Please accept this letter in lieu of a formal brief in reply to Plaintiff's opposition to the Secretary's Motion to Dismiss.

First, nothing in Plaintiff's opposition overcomes the fact that the Voter Module, which is a technical instructional manual for authorized users of the secure State Voter Registration System ("SVRS"), does not fall under the disclosure provision of the National Voter Registration Act ("NVRA"). 52 U.S.C. § 20507(i).

That is because the Voter Module is not a record "concerning the implementation of



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programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.” *Id.* It is simply an instruction manual for the operation of computer software. Put simply, the Voter Module is not a record about the “implementation of programs and activities.” Rather, it provides technical instruction for how to operate a particular system. It is the user of the system that determines what “activities” it wants to conduct—be it lawful “adding and removing” of entries or illicit actions regarding the same. Indeed, Defendant’s concern about public disclosure of the Voter Module is precisely the potential for third parties to use it to compromise the SVRS and to *undermine* the “accuracy and currency of official lists of eligible voters.” *Id.*; *see* Compl. Ex. B, ECF No. 1-3 (“[T]he documents you seek ... are confidential because its disclosure would expose critical vulnerability within the State’s election process.”).

That is why Plaintiff has identified no precedent suggesting that the NVRA requires disclosure of such technical manuals. Instead, all their cases involve records of substantive outputs like voter rolls, which Plaintiff requested and *received* from the Division of Elections (“DOE”) in March 2021 and March 2022. *See* SOS Br., ECF 10-1 at 12, n.4; Zyriek Decl., ECF 10-2, ¶¶ 17-18. As the Secretary explained in her opening brief—which went undisputed by Plaintiff—cases interpreting the NVRA limit the Disclosure Provision to records whose disclosure would help ensure

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the accuracy and currency of official lists of eligible voters, which the Voter Module does not do. *See* SOS Br., ECF 10-1 at 10-15.

Second, the information that Plaintiff seeks—the state’s “voter list maintenance obligations”—are found in public records already provided. As the Secretary’s opening brief explains, New Jersey law itself sets forth the specific process for when voters may be removed from the SVRS. *See* SOS Br., ECF 10-1 at 17 (citing N.J. Stat. Ann. §§ 19:31-15, 19:31-16, and 19:33-1). While Plaintiff seeks “manuals, guidance, instructions, and other written procedures” for removing duplicate voters from New Jersey’s voter rolls from the Secretary, Plaintiff ignores the fact that Title 19 – New Jersey’s election laws – outlines all of the requirements for adding or removing voters from the rolls. *See generally* N.J. Stat. Ann. §§ 19:31-1 to -38.¹ Other information about these activities is in the two responsive records provided to Plaintiff: 1) the Implementing the National Voter Registration Act of 1993 guidance document and 2) the Rutgers Basic County Elections Administration Manual for New Jersey Elections. ECF 1-3.

¹ Plaintiff also mistakenly asserts that “[t]he Secretary plainly conducts programs and activities to keep New Jersey’s voter roll current and accurate.” Notwithstanding that this is not exactly what Plaintiff requested, it also ignores that New Jersey law specifically provides, “The commissioner of registration shall have complete charge of the registration of all eligible voters within their respective counties.” N.J. Stat. Ann. § 19:31-2. Thus, the Secretary and the DOE play no role in adding or removing voters from the rolls; rather, the commissioners of registration at the county level have the “complete charge.” *Id.*

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Third, Plaintiff's contention—made for the first time in its opposition to the motion to dismiss—that there is a “a broader set of records” responsive to its request beyond the Voter Module is specious. Pl.'s Br, ECF 16 at 11. Some of what Plaintiff now suggests—such as “hand written notes ... regarding individual applicant or registrant records”—is simply not what Plaintiff requested, which is “manuals, guidance, instructions, and other written *procedures*.” Pl.'s Br., ECF 16 at 11. In other words, Plaintiff conflates its arguments about the NVRA with what it actually requested. *Id.* at 11-16.

Rather, the issue is whether the Secretary failed to produce records that are responsive to Plaintiff's request *and* are within the scope of the NVRA. The answer is no: the Voter Module is responsive to Plaintiff's request, but is not within the scope of the NVRA, and the other two documents that are arguably responsive and within the NVRA's scope were disclosed. There are no other documents at issue, and Plaintiff has failed to plead facts to the contrary. There is nothing in the Complaint that suggests the Secretary failed to consider other records responsive to Plaintiff's request. Instead, DOE's original response on March 25, 2022 confirms that there were two documents responsive to Plaintiff's request for “[c]opies of all manuals, guidance, instructions, and other written procedures for identifying, merging, and/or cancelling duplicate voter registration records” that could be

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provided: the NVRA Implementation guidance document and the Rutgers Manual. ECF 1-3.¹ The same letter confirmed that an unidentified document was being withheld as confidential “because its disclosure would expose critical vulnerability within the State’s election process.” *Id.* (citing N.J.S.A. 47:1A-1.1). The Complaint contains no allegations to suggest the Secretary illegally withheld any other documents not referenced in the March 25 letter, and Plaintiff cannot now transform its Complaint into a different claim in opposition to a motion to dismiss. *See Com. of Pa. ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988) (“[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.” (citation omitted)).

Finally, the Court can dismiss Plaintiff’s Complaint now. In evaluating a motion to dismiss, a court may consider documents “integral to or explicitly relied upon” in the complaint. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997). This is in order to allow the court to “consider the full context of the document.” *Rapid Models & Prototypes, Inc. v. Innovated Solutions*, 71 F. Supp. 3d 492, 500 (D.N.J. 2014) (citing *Burlington Coat Factory*, 114 F.3d at 1426)). Plaintiff’s Complaint relies on DOE’s March 25, 2022 letter, which makes clear that the SOS withheld a document that “is deemed confidential because its

¹ While DOE mistakenly omitted the copies of the implementation guidance and the Rutgers manual from its response, it later provided these documents to Plaintiffs.

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disclosure would expose critical vulnerability within the State's election process." Compl. Ex. B, ECF 1-3. Plaintiff alleges that this withholding violates the NVRA. Compl., ECF 1, ¶¶ 18-21. The Zyriek Declaration merely provides context for the March 25 letter: that the Voter Module is the document referenced. ECF 10-2 ¶ 5. Plaintiff does not contest the veracity of this information, and thus there is no factual dispute to resolve. *See Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

Plaintiff's suggestion that it needs to explore "the contents of the Voter Module" and "the claim that those contents pose a security risk" is wrong: because the Voter Module is not a record that falls under the scope of the NVRA, dismissal of the Complaint can be resolved as a matter of law. And Plaintiff's suggestion regarding discovery on the scope of the search is also wrong. And as discussed above, there is nothing in the Complaint alleging that the Secretary failed to adequately *search* for documents, as Plaintiff belatedly suggests without basis. Because there is no need for discovery to resolve the case as a matter of law, dismissal is appropriate on the pleadings. But should the Court convert the motion into one for summary judgment, it should not allow Plaintiff free rein to seek discovery into claims it never alleged, and into issues that are not germane to the

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legal question of whether the Voter Module falls within the NVRA's disclosure provision.

For these reasons and those expressed more thoroughly in the Secretary's moving brief, the Secretary respectfully requests that the Court dismiss the Complaint with prejudice.

Respectfully submitted,

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