STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION By MARK BRNOVICH ATTORNEY GENERAL November 13, 2017	No. I17-006 (R17-005) Re: Voter Registration Database Requirements

To: Michele Reagan
Arizona Secretary of State

Questions Presented

1. Does federal or State law prohibit Arizona counties from maintaining separate, county-based voter registration databases?

2. If counties may legally maintain separate voter registration databases, what information is the county required to provide the statewide voter registration database? For example, must that include information on cancelled or rejected registrations and/or provisional voting information?

3. Is it lawful for the Secretary of State to refer proper public records requests to other agencies if the Secretary also has access to that information? Does the answer depend on what statute is cited by the requesting party?

4. Is the Secretary permitted to refer a request for production in litigation or subpoena to the county?

Summary Answer

1. No. Neither State nor federal law prohibits counties from maintaining their own voter registration databases so long as counties comply with the additional statutory requirements pertaining to independent databases. Nonetheless, the official voter registration database for all elections is the statewide database created and maintained by the Arizona Secretary of State's Office.

2. Under federal and State law, each county must provide all voter registration information it receives to the statewide voter registration database contemporaneously or as near as contemporaneously as possible. This information must include, among other things, an applicant or registered voter's name, address, correspondence with the counties, cancelled and rejected registrations, early and provisional ballot information, and records demonstrating when and how a change to a voter's or applicant's record was made.

3. No. The Secretary may not refer proper requests for public records of voter registration information to another agency if the Secretary has access to or control over that information, regardless of what statute (if any) the requesting party cites. The Secretary may, nevertheless, object to a records request or assert any applicable privilege.

4. No. The Secretary may not refer proper litigation requests for information to another agency if the Secretary has access to or control over those records. The Secretary may object to such discovery requests or assert any applicable privilege.

Background

Voter registration and election administration are primarily governed by State law. U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations[.]"). State legislatures retain broad authority to prescribe voter registration requirements and administer voter registration and elections processes. *Wesberry v. Sanders*, 376 U.S. 1, 23 (1964) (States have "plenary power to select their allotted Representatives in accordance with any method of popular election they please, subject only to the supervisory power of Congress").

Two federal laws have helped standardize state voter registration practices: the National Voter Registration Act of 1993 ("NVRA") and the Help America Vote Act of 2002 ("HAVA"). NVRA requires each State to produce certain voter registration information as public records and provides a private cause of action if the State fails to meet any of NVRA's requirements. 52 U.S.C. §§ 20507(i), 20510. NVRA also requires States to maintain and produce "all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." 52 U.S.C. § 20507(i)(1).

HAVA, enacted in response to voter-registration and other elections-administration problems in the 2000 Presidential election, requires each State to maintain a "single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level." 52 U.S.C. § 21083(a)(1)(A). This statewide database "shall serve as the official voter registration list for the conduct of all elections for Federal office in the State" and must include, at a minimum, the name, registration information, and a unique identifier for each voter. 52 U.S.C. § 21803(a)(1)(A)(viii). Additionally, HAVA

mandates that the voter registration database capture sufficient information to ensure compliance with NVRA, including *inter alia*, notices sent to notify voters of potential cancellation and steps they can take to avoid cancellation, as well as any response to voter provided. 52 U.S.C. § 21083(a)(2)(A). The voter registration database must be accessible to local election officials and must also cross-reference with other applicable databases, such as motor vehicle and death records, to allow for maintenance of the voter rolls. 52 U.S.C. § 21083(a)(1)(A)(iv)-(vii). These are minimum requirements; States are explicitly authorized to require voter registration databases to track additional information. 52 U.S.C. § 21084.

Nonetheless, HAVA expressly contemplates that a county may choose to maintain its own database. If it does, HAVA requires that the county transmit "[a]ll voter registration information" it maintains to the official statewide database. 52 U.S.C. § 21083(a)(1)(A)(vi) (requiring the statewide database to include "[a]ll voter registration information obtained by any local election official in the State"). Any information that is not transferred to the statewide voter registration database is not part of the official voter record. 52 U.S.C. § 21083(a)(1)(A)(viii).

Arizona law requires the Secretary of State, as Arizona's chief elections officer for HAVA and NVRA purposes, A.R.S. § 16-142(a)(1); 52 U.S.C. § 21003(e), to "develop and administer a statewide database of voter registration information that contains the name and registration information of every registered voter in this state." A.R.S. § 16-168(J). And like federal law, State law contemplates that counties may maintain their own voter registration databases. Maricopa and Pima counties maintain their own databases, while Arizona's thirteen rural, "PowerProfile" counties use the statewide database as their own. State law authorizes the Secretary to certify county databases to ensure the seamless transfer of information. *Id.*

County recorders, in turn, must "provide for the electronic transmittal of [voter registration] information to the Secretary of State on a real-time basis" and in a standardized format. A.R.S. § 16-168(J). County recorders remain the primary point of contact for individuals registering to vote. Arizona counties are responsible for (1) providing voter registration forms and information to voters, A.R.S. §§ 16-131, -141, -151(A); (2) rejecting applications that do not include sufficient proof of citizenship, A.R.S. § 16-166(F); (3) entering voter information, A.R.S. §§ 16-112(A), -120, -134(C) (noting a voter is registered when a complete application is received by a county recorder); (4) contacting voters regarding issues with their applications and voting status, A.R.S. § 16-134(B), -166; and (5) canceling voters, A.R.S. § 16-165. Only county recorders may change individual voter records, such as by updating a voter's address. *See* A.R.S. § 16-166(B) (requiring the county recorder to change the voter registration record when the voter provides new information).]

Analysis

A. Neither Federal Nor State Law Prohibits Counties From Maintaining Their Own Voter Registration Databases.

As explained above, federal and state law not only permit counties to maintain voter registration databases, they expressly contemplate it. *E.g.*, 52 U.S.C. § 21083(a)(iv); A.R.S. § 16-168(J). To ensure compliance with HAVA, "each county voter registration system is subject to approval by the Secretary of State for compatibility with the statewide voter registration database system," A.R.S. § 16-168(J), which is the State's sole official voter registration list, 52 U.S.C. § 21803(a)(1)(A)(viii).

B. Counties Must Provide the Statewide Database All the Voter Registration Information That They Maintain.

Both federal and state law impose requirements on the kinds of information counties must provide to the statewide database, which must include, at minimum:

- Official communications by and between a voter or applicant and elections officials (52 U.S.C. § 20507(i), A.R.S. § 16-168(10));
- The voter's voting history (52 U.S.C. §§ 20507(b)-(d), 21083(a)(1)(A), (a)(2), and (a)(4); A.R.S. § 16-168(C));
- Permanent early voter list ("PEVL") and other vote-by-mail activities, including ballot requests, date that a ballot was sent, date the ballot was received, and the reason an early ballot was rejected (as applicable) (A.R.S. § 16-168(C)(11));
- Provisional voting history, including reason for provisional ballot and an image of the provisional ballot affidavit (52 U.S.C. § 21083(a)(1)(A)(vi); A.R.S. § 16-168(C)(10));
- The voters' precinct (A.R.S. § 16-168(C));
- The voter or applicant's status and information tracking back-end changes made to an applicant or voter's record (*e.g.* the date of party change and the user who made the change) (52 U.S.C. § 20507(i); A.R.S. § 16-168(D)(10)).

Federal law. As noted above, federal law requires any county that chooses to maintain its own database to transmit "[a]ll voter registration information" it maintains to the official statewide database, 52 U.S.C. § 21083(a)(1)(A)(vi). HAVA requires that the database "contain[] the name and registration information of every legally registered voter in the State and assign[] a unique identifier to each legally registered voter in the State[.]" 52 U.S.C. § 21803(a)(1)(A)(ii)-(iii). It further requires the Secretary to "provide such support as may be required so that local election officials are able to enter" into the statewide database "[a]ll voter registration information obtained by any local official in the State[.]" 52 U.S.C. § 21803(a)(1)(A)(vi)–(vii).

NVRA requires the State to maintain data used to process voter registration or "maintain the accuracy and currency" of the voter rolls. 52 U.S.C. § 20507(i). This includes not only the voter registration information on the face of the form and official correspondence with voters, but also a record of each change that was made to a registrant's information—such as a move to inactive status or cancellation—in order to ensure that elections officials are complying with NVRA. *See, e.g.*, *Project Vote v. Kemp*, 208 F. Supp. 3d 1320, 1341–43 (N.D. Ga. 2016) (NVRA required, *inter alia*, the reason an applicant was rejected, each change in a voter's status, and whether the change was made mechanically or by staff, in addition to the definition of tables and data fields, with a schematic explaining their relationship).

State Law. State law requires "county recorders [to] provide for the electronic transmittal of [voter registration] information to the Secretary of State on a real-time basis." A.R.S. § 16-168(J). This information includes each voter's (1) full name, including title; (2) party preference; (3) date of registration; (4) residence address; (5) mailing address, if different from residence address; (6) zip code; (7) telephone number, if given; (8) birth year; (9) occupation, if given; (10) voting history for all elections in the prior four years, as well as any other information regarding registered voters that the county recorder or city or town clerk maintains electronically that is public information; and (11) all data relating to permanent early voters and nonpermanent early voters, including ballot requests and returns. A.R.S. § 16-168(C)(1)-(11). "Any other information regarding registered voters that the county recorder or city or town clerk maintains electronically" and "all data relating to . . . early voters" includes provisional voting history and the database also must include images of original voter registration forms, all cancelled registration forms, and applications to cancel registration. A.R.S. § 16-163(D).

In other words, state law requires Arizona's voter registration database to include a number of different types of data not present on the basic voter registration form, including voting history, PEVL participation, precinct number, and any other record associated with a voter's individual voting history. *Id.*

The statewide voter registration system is "the heart of our elections system," and the sole "official voter registration for the conduct of all elections for Federal office in the State." 148 Cong. Rec. H7837 (statement of Rep. Ney) (Oct. 10, 2002). If a county chooses to maintain its own database, it must transmit all the voter registration information it maintains to the official statewide database in the manner prescribed by the Secretary "to ensure that the submissions are uniform from all counties in this state, that all submissions are identical in format, including the level of detail for voting history, and that information may readily be combined from two or more counties." A.R.S. § 16-168(C). This requirement includes a continuing duty to provide an explanation of the county database system and any revision to the Secretary, A.R.S. § 16-173, so she can properly integrate that data into the statewide voter registration database as required by federal and state law.

C. The Secretary May Not Refer Public Records Requests to Another Agency if She Has Access to or Control Over the Information Requested.

State Law. Under Arizona law, "[a]ll officers and public bodies shall maintain all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by monies from this state or any political subdivision of this state." A.R.S. § 39-121.01(B). "Public records and other matters in the custody of any officer shall be open to inspection by any person at all times during officer hours." A.R.S. §39-121. So, as a general rule, "all records required to be kept under A.R.S. § 39-121.01(B), are presumed open to the public for inspection as public records."

Carlson v. Pima Cnty., 141 Ariz. 487, 491 (1984). And a record that is "required to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said or done," generally is a public record. *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz. 531, 538 (1991) (quoting *Mathews v. Pyle*, 75 Ariz. 76, 78 (1952)).

State law specifically identifies voter registration information as "an official public record," A.R.S. § 16-161, and requires that non-confidential voter information be produced by the Secretary or other elections official upon the receipt of a proper request and payment of a fee, A.R.S. § 16-168(E). The Secretary is legally required to maintain such voter registration information in the "statewide database" that she must "develop and administer." A.R.S. § 16-168(J). It is therefore likely a public record in her "custody," and she should respond to any proper request to produce it. *See* A.R.S. § 39-121; *Rogers*, 168 Ariz. at 538; *Carlson*, 141 Ariz. at 491 (hold[ing] that A.R.S. § 39-121.01(B) "requires the keeping of records sufficient to provide the public with 'knowledge' of all of the activities of a public officer and of the manner in which he conducts his office and performs his duty").

Nothing prevents the Secretary from interposing objections or asserting applicable privileges in response to any records request. And by law the Secretary may *not* provide sensitive information such as social security numbers, mother's maiden name, and other information exempted from disclosure by A.R.S. § 16-168(F). The Secretary also may not provide information on voters protected from disclosure pursuant to A.R.S. §§ 16-153(A) and 41-165(A).

Federal Law. NVRA requires "[t]he State to produce all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy

and currency of official lists of eligible voters." 52 U.S.C. § 20507(i). This includes voter registration information. *See, e.g., Project Vote/Voting for America, Inc. v. Long*, 682 F.3d 331, 336 (4th Cir. 2012) ("the phrase 'all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters' unmistakably encompasses completed voter registration applications").

In Arizona, the Secretary (or her designee) is "[t]he chief state election officer who is responsible for coordination of state responsibilities under [NVRA]." A.R.S. § 16-142(A)(1); *see* 52 U.S.C. § 20509 (requiring "[e]ach State [to] designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under this chapter"). The Secretary therefore may not delegate the State's NVRA obligations to local officials. *See Harkless v. Brunner*, 545 F.3d 445, 452–53 (6th Cir. 2008) ("[T]he Secretary, as [the state's] chief election officer, is responsible for . . . implementation and enforcement of [NVRA]."); *United States v. Missouri*, 535 F.3d 844, 850 (8th Cir. 2008) ("Under the NVRA's plain language, [the State] may not delegate the responsibility to conduct a general program to a local official and thereby avoid responsibility if such a program is not reasonably conducted."). The Secretary may, however, redact certain sensitive information before producing records properly requested under NVRA. *See, e.g.*, *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 736–39 (S.D. Miss. 2014) (redaction of social security numbers and full birth dates does not violate NVRA).

Similar to state law, nothing prevents the Secretary from interposing proper objections or asserting applicable privileges in response to any records request under federal law. If the State wrongfully fails to produce public records, a court may award the requesting party its attorney's fees and costs. 52 U.S.C. § 20510(c), A.R.S. § 39-121.02.

D. The Secretary May Not Refer Proper Litigation Requests to Another Agency If She Has Access to or Control Over Those Records.

The Federal Rules of Civil Procedure require a party to disclose "all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(ii). The Arizona Rules of Civil Procedure require disclosure of even more information, including a description of the factual basis of a party's claims or defenses, the legal theory on which the claim or defense is based, and documents or electronically stored information that the disclosing party plans to use at trial, for impeachment or "that is relevant to the subject matter of the action." Ariz. R. Civ. P. 26.1(a). Each party is required to serve its disclosures promptly and update or supplement a disclosure as new information is discovered throughout the course of litigation. *See* Fed. R. Civ. P. 26(c), (e); Ariz. R. Civ. P. 26.1(d).

Additionally, a party may "obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1); Ariz. R. Civ. P. 26(b)(1)(A). One party may request that another produce "any designated documents or electronically stored information" in "the responding party's possession, custody, or control." Fed. R. Civ. P. 34(a)(1); Ariz. R. Civ. P. 34(a)(1). Additionally, "a nonparty may be compelled to produce documents and tangible things" pursuant to a subpoena. Fed. R. Civ. P. 34(c); Ariz. R. Civ. P. 34(c).

Documents are "within [a party's] 'possession, custody or control' . . . if the party has actual possession, custody or control, or has the right to obtain the documents on demand." *In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995); *see also United States v. Int'l Union of Petrol. & Indus. Workers, AFL-CIO*, 870 F.2d 1450, 1452 (9th Cir. 1989) (citing *Searock v.*

Stripling, 736 F.2d 650, 653 (11th Cir. 1984) ("Control is defined as the legal right to obtain documents upon demand.")).

The Secretary has possession, custody, or control over the information in the statewide database that she must "develop and administer." A.R.S. § 16-168(J). HAVA makes clear that such information is "defined, maintained, and administered at the State level[.]" 52 U.S.C. § 21083(A). And under NVRA, "[e]ach State shall maintain for at least 2 years and shall make available for public inspection . . . all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." 52 U.S.C. § 20507(i).

Accordingly, the Secretary may be required to disclose or produce information in the statewide database in both state and federal court. Indeed, in 2016, the Secretary was required to produce the voter registration database in two federal lawsuits, *Feldman v. Reagan*, 2:16-CV-01065 (D. Ariz. Apr. 15, 2016), and *Project Vote v. Reagan*, 2:16-CV-01253 (D. Ariz. Apr. 27, 2016). In *Feldman*, the Court specifically ordered that the Secretary (rather than co-defendant Maricopa County) produce voter registration information from the database. 2:16-CV-01065, ECF No. 44. Thus, although the Secretary may seek protective orders and take other steps, as appropriate, to protect certain information in response to a discovery request in litigation, she may not broadly refuse to disclose or produce information within her possession, custody, or control without legal justification.

Conclusion

The Arizona statewide voter registration database must contain complete information on the voter, official correspondence with state, county, and local elections officers, early voting information, provisional voting information, and any other records maintained by elections

officials, as explained in sections A and B of this opinion. Furthermore, the Secretary is responsible for responding or objecting to proper public records requests or litigation-related discovery requests, as explained in sections C and D of this opinion.

Dominic Draye
Solicitor General
Attorney General's Office