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# RIEMER LAW LLC

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1125 West Street, Suite 200  
Annapolis, MD 21401

October 7, 2024

The Honorable Susan Beals  
Commissioner  
Virginia Department of Elections  
1100 Bank St.  
Richmond, VA 23219

**Re: Notice of Violation of Section 8(i) of the National Voter Registration Act**

Dear Commissioner Beals,

My firm represents Electoral Process Education Corporation (EPEC), a nonprofit organization whose mission is promoting voter participation, analyzing election technology, and educating the public about best practices in managing election technology systems. This letter constitutes a notice of claim pursuant to 52 U.S.C. § 20510(b) because the recent decision of the Virginia Department of Elections (“ELECT”) to withhold full birthdates (*i.e.*, a voter’s birth month, day, and year) from voter registration records disclosures violates the National Voter Registration Act of 1993 (“NVRA”).

Specifically, this new anti-disclosure policy violates the NVRA’s requirement that states “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)(1) (“Section 8(i)”).

Given the proximity to the General Election, the NVRA entitles EPEC to sue you without notice.<sup>1</sup> However, my client wishes to resolve this issue without litigating and will provide ELECT until October 28, 2024 to cease these indisputable and ongoing violations of federal law. If ELECT fails to do so, EPEC intends to vindicate its rights immediately thereafter by suing you in the U.S. District Court for the Eastern District of Virginia (“Eastern District”). § 20510(b)(2).

The result of any litigation is largely preordained because the Eastern District has already issued an order binding ELECT, that Section 8(i) requires it to disclose full birthdates when producing voter registration records. *Project Vote v. Long*, 889 F. Supp. 2d 778 (E.D. Va. 2012).<sup>2</sup> In *Long*, the court flatly rejected the request of ELECT and the Norfolk General Registrar that they be permitted to “redact . . . the month and day of birth of the [registration] applicant, while leaving the birth year subject to disclosure.” *Id.* at 781. As the court wrote at the time, “[t]he plain meaning of the

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<sup>1</sup> 52 U.S.C. § 20510(b)(3).

<sup>2</sup> The *Long* defendants included the then-Secretary of the State Board of Elections (“SBE”), who at the time, had virtually identical administrative responsibilities as the Commissioner of Elections does today. These include serving as the head of the administrative agency charged with carrying out Virginia’s election administration activities at the state level and the “chief state election officer responsible for the coordination of responsibilities under the [NVRA].” Virginia Code § 24.2-404.1; *see also* VA LEGIS 542 (2013), 2013 Virginia Laws Ch. 542 (S.B. 1229).

NVRA's disclosure requirement is that disclosure of completed voter registration applications containing the address, birth date, and signature of applicants includes disclosure of that information." *Id.* Accordingly, "to the extent that any Virginia law, rule, or regulation forecloses disclosure" of voter birthdates, such law is "preempted by the NVRA." *Id.* at 782.<sup>3</sup>

Indeed, the Eastern District was compelled to reach these conclusions upon remand from the Fourth Circuit, citing the higher court's statement of law: "It is not the province of this court . . . to strike the proper balance between transparency and voter privacy. That is a policy question properly decided by the legislature, not the courts, and Congress has already answered the question by enacting NVRA Section 8(i)(1), which plainly requires disclosure of completed voter registration applications." *Id.* (quoting *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 339 (4th Cir. 2012)). In other words, even if ELECT were not bound by *Long*, the Eastern District is.

In a more recent case, the District Court of Maryland applied *Long* to hold that the NVRA requires states to disclose full birthdates when providing the public with lists of registered voters. *Judicial Watch, Inc. v. Lamone*, 455 F. Supp. 3d 209 (D. Md. 2020). *Lamone's* facts are especially relevant. Similar to ELECT's recent actions, the case involved a challenge to the Maryland Administrator of Elections' decision to modify the available fields of data listed on the application used to request Maryland's registered voter list. Specifically, the Administrator removed full birthdates from the data fields Maryland disclosed. The court soundly rejected this action: "Because full voter birth dates appear on completed voter registration applications, the Administrator may not bypass the [National Voter Registration] Act by unilaterally revising the [a]pplication" used to request lists. *Id.* at 225.

The *Lamone* court also clarified what other courts around the county have. It is immaterial whether the public seeks to access information found on completed voter registration applications or registration lists created from those applications. That is because the lists are "simply a pared down compilation of voter registrations." *Id.* at 214-15 (citing *Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425, 440 (D. Md. 2019)).

The following facts should be known to and undisputed by ELECT:

- EPEC has requested and received various registration records from ELECT since November of 2021. These records included voters' full dates of birth.
- On August 26, 2024, ELECT informed EPEC by email that "going forward with the date of birth column on the monthly update subscription, a small change has taken place. Whereas, it use[d] to have the mm/dd/yyyy, only the year will be listed."<sup>4</sup>
- EPEC immediately sought an explanation for this policy change.<sup>5</sup>
- ELECT responded, in pertinent part:

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<sup>3</sup> Virginia does not appear to have made any changes to state statutes or the Virginia Administrative Code since the decision in *Long* that would even superficially justify ELECT's change in policy for disclosing the full date of birth or release ELECT from the *Long's* binding force.

<sup>4</sup> See Exhibit A, Email correspondence between Andrea Walker and Erin Joyce, August 26-27, 2024.

<sup>5</sup> *Id.*

The Code of Virginia §§ 24.2-405, 24.2-406, 24.2-706 and 24.2-710, requires the Department of Elections (ELECT) to sell datasets to specific entities for specific purposes. The lists ELECT sells contain data elements that are not required under the aforementioned laws but provide additional elements that are beneficial for the entities authorized to receive such lists.

Pursuant to § 2.2-3803(A)(1) of the Code of Virginia, agencies that maintain personal information should only “[c]ollect, maintain, use, and disseminate only that personal information permitted or required by law to be so collected, maintained, used, or disseminated, or necessary to accomplish a proper purpose of the agency;”.

Additionally, pursuant to 1VAC20-20-20 of the Code of Virginia, an individual’s day and month of birth is classified as sensitive personal information that must be redacted or encrypted prior to transmitting any individual's information.<sup>6</sup>

- EPEC’s Executive Director/Chief Technology also sought an explanation from you regarding this sudden policy change but received no response.<sup>7</sup>
- On August 29, 2024, ELECT provided EPEC with registration lists that included voters’ birth year but omitted both birth day and birth month.
- Until sometime shortly after ELECT’s August 26 notification about the policy change, ELECT’s Client Services website stated that “data sets include . . . date of birth.”<sup>8</sup>
- Sometime shortly after ELECT notified EPEC about the policy change, ELECT updated the Client Services website to state that data sets would only “include . . . year of birth.”<sup>9</sup>
- As of today, the Client Services website states that data sets will only “include . . . year of birth.”<sup>10</sup>

ELECT’s August 26 explanation justifying the denial of full birthdates is unavailing. The correspondence referred to Virginia Code § 2.2-3803(A)(1), which states that agencies maintaining personal information should “[c]ollect, maintain, use, and disseminate only that personal information permitted or required by law to be so collected, maintained, used or disseminated . . . .” This statute provides no independent basis to withhold full birthdates and, here, their disclosure is not only permitted but, as explained above, is **required** by federal law.

ELECT also cited to 1VAC20-20-20, which classifies an individual’s day and month of birth as “sensitive personal information that must be redacted or encrypted prior to transmission.” However, because Section 8(i) mandates the disclosure of full birthdates, the appropriate way to

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<sup>6</sup> *Id.*

<sup>7</sup> See Exhibit B, Email correspondence from Jon Lareau to Susan Beals, August 26-27, 2024.

<sup>8</sup> Screen Capture from the Internet Archive’s Wayback Machine reflecting “date of birth” in the files provided to clients at <https://web.archive.org/web/20240825190808/https://www.elections.virginia.gov/candidatepac-info/client-services/>.

<sup>9</sup> Additional archived Screen Capture taken three weeks later at <https://web.archive.org/web/20240920072051/https://www.elections.virginia.gov/candidatepac-info/client-services/>.

<sup>10</sup> <https://www.elections.virginia.gov/candidatepac-info/client-services/>.

comply with the regulation, to the extent it is not fully preempted, is to encrypt the sensitive information. Federal law clearly precludes the ability to redact it. ELECT's existing process for disclosing registration lists already utilizes encryption. And although the NVRA does not require it, EPEC is willing to work with ELECT to consider other reasonable security measures it may request.

ELECT's clients such as EPEC rely on the agency to provide complete information, including full birthdates, in accordance with the NVRA's requirements. ELECT's failure to fulfill these obligations, despite collecting payment for the full data, deprives EPEC of essential information it requires to assess the Commonwealth's compliance with NVRA and state statutory requirements to "ensure[] the accuracy and currency" of Virginia's voter registration records. 52 U.S.C. § 20507(i)(1).

Given the unmistakable legal precedent mandating that ELECT disclose full birthdates and EPEC's sincere desire to resolve this matter amicably, I strongly encourage ELECT to reverse course immediately and no later than October 28, 2024. Doing so would entail providing full birthdates on all data sets ELECT provides to EPEC, including those it has recently transmitted without that information. Failure to cease these ongoing violations of the NVRA entitles EPEC to bring a civil action in the Eastern District and collect reasonable attorneys' fees, litigation expenses, and other costs. 52 U.S.C. § 20510(b)-(c).

Thank you for your attention to this matter. Please feel free to contact me at [REDACTED] or [REDACTED] if you or your legal counsel would like to discuss this issue further.

Sincerely,

A handwritten signature in black ink that reads "J. Justin Riemer". The signature is written in a cursive, flowing style.

J. Justin Riemer

CC:

The Honorable John O'Bannon, Chairman, State Board of Elections  
The Honorable Rosalyn R. Dance, Vice-Chairman, State Board of Elections  
The Honorable Georgia Alvis-Long, Secretary, State Board of Elections  
The Honorable Donald W. Merricks, Member, State Board of Elections  
The Honorable Matthew Weinstein, Member State Board of Elections  
Steven Popps, Chief Deputy Attorney General

**EXHIBIT A**

## RE: Monthly Update Subscription

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From Walker, Andrea [REDACTED]  
To Erin Marie Joyce [REDACTED]  
Date Tuesday, August 27th, 2024 at 11:20 AM

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Good morning,

Ms. Joyce,

The Code of Virginia §§ 24.2-405, 24.2-406, 24.2-706 and 24.2-710, requires the Department of Elections (ELECT) to sell datasets to specific entities for specific purposes. The lists ELECT sells contain data elements that are not required under the aforementioned laws but provide additional elements that are beneficial for the entities authorized to receive such lists.

Pursuant to § 2.2-3803(A)(1) of the Code of Virginia, agencies that maintain personal information should only “[c]ollect, maintain, use, and disseminate only that personal information permitted or required by law to be so collected, maintained, used, or disseminated, or necessary to accomplish a proper purpose of the agency;”.

Additionally, pursuant to 1VAC20-20-20 of the Code of Virginia, an individual’s day and month of birth is classified as sensitive personal information that must be redacted or encrypted prior to transmitting any individual's information.

ELECT consistently aims to minimize the personal information and sensitive information that is processed and accessed to only that which is legally necessary for the purposes for which it was collected or derived in accordance with ELECT’s privacy policy.

Therefore, to enhance compliance with existing statutes, ELECT’s privacy policy, and to increase voter privacy, ELECT is removing day and month of birth from our client services lists. However, we are still providing a voter’s year of birth which offers the critical age demographic information that is beneficial to individuals and organizations.

Let us know if you have any questions.

Andrea

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**From:** Erin Marie Joyce [REDACTED]  
**Sent:** Monday, August 26, 2024 11:39 AM  
**To:** Walker, Andrea (ELECT) [REDACTED]

**Subject:** Re: Monthly Update Subscription

**Caution:** This Email Originated Outside ELECT. Exercise Caution When Opening Attachments or Clicking Links, Especially From Unknown Senders.

Hi Andrea,

Can you explain why the sudden change to the DOB? This is a critical detail for voter participation efforts. How do we find out how this policy was made?

Thanks much, Erin

Erin Marie Joyce

Electoral Process Education Corp.

██████████ (O) ~ ~ ██████████ (M)

To Donate: [EPEC.info](http://EPEC.info) ~ ~ ~ [DigitalPollWatchers.org](http://DigitalPollWatchers.org)

On Monday, August 26th, 2024 at 11:28 AM, Walker, Andrea (ELECT) ██████████ wrote:

Good morning,

Ms. Joyce, I just wanted to make you aware that going forward with the date of birth column on the monthly update subscription, a small change has taken place. Whereas, it use to have the mm/dd/yyyy, only the year will be listed.

Thank you,

Andrea T. Walker

Client Service Specialist

Department of Elections

1100 Bank Street First Floor

Richmond, Virginia 23219

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**EXHIBIT B**



**Re: Reason for changes to Monthly Update Subscription data content?**

From CTO <[redacted]>  
To **Beals**, Susan <[redacted]>  
Date Tuesday, August 27th, 2024 at 9:16 AM

My apologies for misspelling Beals in the salutation of that message.

On Mon, Aug 26, 2024 at 3:26 PM, CTO <[redacted]> wrote:

Commissioner Beales,

I was just notified that going forward the department of elections will be removing the full date of birth information, and replacing it with only the year of birth, from the records we have purchased. I was wondering if you could elaborate as to the reasoning for making this change just before the 2024 Election takes place?

The full date of birth information is a critical component of enabling examination and review of the registered voter lists by of Campaigns, Candidates, Parties, Political Action Groups, Voter Registration Organizations, Public Charities and citizens alike. This change will have a direct negative impact on multiple (both partisan and non-partisan) efforts and organizations and operations. Many organizations will have to perform significant retooling of their data ingest and conditioning logic in order to adapt to this change so near to the start of early voting. This change is also a deviation from the product that we and others have paid for to receive from the department of elections as part of our subscription.

There has been no recent change in federal statute, VA law or court proceedings that requires this change that I am aware of, so I am curious as to what the reasoning is behind this change in Policy?

Jon Lareau  
CTO / Executive Director  
Electoral Process Education Corporation  
[redacted]  
[redacted]