



PHILIP D. MURPHY  
*Governor*

SHEILA Y. OLIVER  
*Lt. Governor*

*State of New Jersey*  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
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GURBIR S. GREWAL  
*Attorney General*

MICHELLE L. MILLER  
*Director*

October 25, 2019

VIA EMAIL AND REGULAR MAIL

The Honorable John A. Sweeney, A.J.S.C. (Ret.), Chairman  
New Jersey Council on Local Mandates  
140 East Front Street, 8<sup>th</sup> Floor  
Trenton, New Jersey 08625-0627

Re: Objection to Submission of Alleged Facts  
and Documents Outside of the Record

In the Matter of a Complaint Filed by  
the New Jersey Association of Counties  
Complaint No. 1-19

Dear Judge Sweeney and Council Members:

Please accept this letter on behalf of Respondent, State of New Jersey ("State") objecting to reference to and submission of data and documents in the summation of Claimant, the New Jersey Association of Counties ("NJAC"), that are not in evidence in the above-captioned matter. Pursuant to the direction of the Council at the conclusion of the September 23, 2019 hearing in this matter, the parties were to file their written summations no later than October 23, 2019. NJAC's October 23, 2019 summation includes unverified data and documents that are not in the record.



Therefore, the Council may not consider these materials or the argument that relies upon them.

Attached to NJAC'S October 23, 2019 summation are five documents listed as Appendix A through E. NJAC makes repeated argument throughout its summation based upon these documents and the data contained therein. None of these documents or data was provided to the Council or the State pursuant to the September 13, 2019 deadline set forth in the Council's July 26, 2019 directive for the filing and exchange of documents in this matter. Exhibit A, attached hereto. Nor were these documents provided to the Council or the State at the September 23, 2019 hearing, or submitted into evidence before the Council at that time. The list of documents that NJAC submitted pursuant to the Council's July 26, 2019 directive does not contain any of the five documents attached to NJAC's October 23, 2019 summation. Exhibit B, attached hereto.

As the Council required in its July 26, 2019 correspondence to the parties, "We are directing that each of you exchange and provide a witness list and a list of exhibits at least 10 days prior to the [September 23, 2019] hearing." Exhibit A, supra. Council Rules of Procedures, Rule 12a, requires that "At least 30 days before a scheduled hearing date or by such other date as the Council may direct, a party must file with the Council any

documents or other written information on which it intends to rely at hearing." The documents attached to NJAC's summation, and NJAC's reliance upon them, is in violation of the Council's July 26, 2019 directive. Council Rules of Procedures, Rule 12c, states that the "Council in its discretion may require any party to submit additional information." No such request or requirement has been made by the Council of either party.

Most egregious is the fact that on August 29, 2019, the State, in compliance with Council Rules of Procedures, Rule 12b, filed a motion for discovery and the production of documents from NJAC that set forth the factual basis of the Complaint filed by NJAC. Exhibit C, attached hereto. That motion was opposed by NJAC. Exhibit D, attached hereto. As a result of a telephone conference between the parties and Judge Sweeney on September 5, 2019, the State's motion for discovery was set aside with the understanding and consent of the parties that they were limited to the documents and evidence provided to each other, and to the Council, by the September 13, 2019 directive deadline.

As evidence of NJAC's acknowledgement of this deadline, on September 17, 2019, NJAC requested from the Council (Judge Sweeney) permission to submit an additional document after the September 13, 2019 deadline. Exhibit E, attached hereto. In its email, NJAC states "I know its's beyond the deadline for submitting

discovery items, but the attached article provides a very good summary of the challenges and costs both voters and clerks are facing with the new vote-by mail law." Ibid. While the State consented to this late submission, NJAC was clearly aware of the September 13, 2019 deadline for the submission of documents to be considered as evidence in the instant matter.

NJAC's attachment to its October 23, 2019 summation of documents and data not accepted into evidence by the Council at the September 23, 2019, not only is in violation of the Council's Rules of Procedure and the Council's July 26, 2019 directive, but it also violates fundamental fairness. The entire purpose of the State's discovery request was to obtain information necessary for determining which mail-in ballots were received as a result of the new Amendments and which are ballots that would have sent and received regardless of the new Amendments. NJAC objected to the State's discovery request but now relies upon discovery never provided to the State or submitted into evidence before the Council at the September 23, 2019 hearing. Additionally, there is nothing contained within the documents that either the Council or the State can rely upon. There has been no testimony regarding the authenticity or truthfulness of the documents and data attached to NJAC's October 23, 2019 summation. There has been no opportunity for the State to cross-examine any witness concerning these

documents or the information they contain. Therefore, these documents, and any reliance upon them in NJAC's summation, have no evidential value and must be rejected by the Council.

It must be emphasized that NJAC opposed the efforts of the State to obtain the necessary information that both the State and the Council require in order to analyze the costs NJAC alleges are a result of the new Amendments. Further, there has never been evidence offered by NJAC as to the number of mail-in ballots, and the associated costs, received from voters who requested mail-in ballots without relying upon the new Amendments. The State has consistently argued that such information is essential for the Council to have a basis upon which to determine if an unfunded mandate exists, apart from the constitutional exemption arguments the State has put forth. The State's summation argues that, based upon the record in evidence before the Council and, significantly, the evidence that is not in the record, NJAC has failed to meet its burden to demonstrate the existence of an unfunded mandate. To permit NJAC's summation to argue otherwise based upon evidence that was never provide or submitted into evidence, in addition to there being no basis as to the reliability of such data and documents, would not only be in violation of the Council's Rules of Procedure, but undermines the integrity of the Council's process.

For these reasons, the Council must reject any consideration of evidence not in the record and further reject NJAC's summation to the extent it relies upon such documents and data.

Respectfully submitted,

GURBIR S. GREWAL  
ATTORNEY GENERAL OF NEW JERSEY

By:   
George N. Cohen  
Deputy Attorney General  
Attorney ID# 002941985  
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c: John G. Donnadio, Esq.



**State of New Jersey**  
COUNCIL ON LOCAL MANDATES  
140 EAST FRONT STREET  
TRENTON, NJ  
(609) 984-9738  
(609) 984-9737 FAX

Hon. John A. Sweeney, AJSC (ret.)  
Chair

*Mailing Address:*  
PO Box 627  
Trenton, NJ 08625-0627

July 26, 2019

Counsel:

Following oral arguments on the State's motion to dismiss the Complaint, the members of the Council met in closed session to discuss the case. We have determined that the motion to dismiss be denied without prejudice. We will detail our rationale in a written opinion following a full hearing on all of the issues. We have scheduled a hearing for September 23, 2019 at 9:30 AM at a place to be determined. I strongly urge you to review our prior decisions regarding the issue of revising and easing existing law. The burden of proof remains with the complainant to prove all allegations in the complaint.

We are directing that each of you exchange and provide a witness list and a list of exhibits at least 10 days prior to the hearing.

You may direct all inquiries to me by email or by calling my cell phone at 609-864-1437.

Sincerely,

A handwritten signature in cursive script, appearing to read "John A. Sweeney".

John A. Sweeney, Chair

**EXHIBIT A**

## VOTE-BY-MAIL DOCUMENTS

APPENDIX	DOCUMENT
A	Vote-By-Mail Costs 2019
B	Vote-By-Mail Ballots Cast
C	Provisional Ballots Summary 2019
D	S-4069 082319
E	S-4069 Legislative Fiscal Estimate 090419
F	S-4069 Governor's Statement Upon Signing 082619
G	Vote-By-Mail Application Reimbursement 2019
H	S-647 Committee Statement 020118
I	S-647 Committee Statement 021518
J	S-647 Committee Statement 061818
K	S-647 Legislative Fiscal Estimate 022818
L	NJTV News Article 082619
M	WYYY News Article 082619
N	NJ Advanced Media Article 082719
O	Press of Atlantic City Article 082719
P	NJ Globe Article 090519



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GURBIR S. GREWAL  
*Attorney General*

MICHELLE L. MILLER  
*Director*

August 29, 2019

VIA HAND DELIVERY AND EMAIL

Shawn D. Slaughter  
Executive Administrator & Coordinator  
New Jersey Council on Local Mandates  
140 East Front Street, 8th Floor  
Trenton, New Jersey 08625-0627

Re: In the Matter of Complaint Filed by  
the New Jersey Association of Counties  
Complaint No. NJAC 0001-19

Respondent State's Motion to Compel Discovery  
and Production of Supporting Documents Pursuant  
to Council Rule 12(b)

Dear Executive Director Slaughter:

Enclosed for filing please find an original and two copies of a notice of motion to compel discovery and production of documents, letter brief, form of order and certification of service on behalf of Respondent State of New Jersey in the above-captioned matter.

Respectfully submitted,

GURBIR S. GREWAL  
ATTORNEY GENERAL OF NEW JERSEY

By: s/George N. Cohen  
George N. Cohen  
Deputy Attorney General  
Attorney ID# 002941985  
George.Cohen@law.njoag.gov

c. John G. Donnadio, Esq.

EXHIBIT C





Local Mandates, pursuant to Council Rule 12(b), for an Order granting Respondent's Motion for the production of documents and answers to discovery setting forth the factual basis of the Complaint of the New Jersey Association of Counties. Specifically, Respondent requests the Counsel order Claimant New Jersey Association of Counties to provide certified answers and supporting documents to Respondent and the Council in response to the following discovery requests:

- 1) The number of mail-in ballots sent out by each county for the primary and general elections for the years 2015, 2016, 2017 and 2018.
- 2) The number of mail-in ballots sent out by each county for the November 2018 general election and June 2019 primary elections to voters who received mail-in ballots for the November 2016 general election.
- 3) The number of sample ballots sent out by each county for the primary and general elections for the years 2015, 2016, 2017, 2018 and the June 2019 Primary Election.
- 4) The number of mail-in ballot applications received by each county for the primary and general elections for the years 2015, 2016, 2017 and 2018.
- 5) The number of "all general elections" mail-in ballot

requests on file with each county for the years 2015, 2016, 2017 and 2018.

- 6) The number of voters by county who chose to "opt out" from receiving a mail-in ballot for the 2018 general election or thereafter through the June 2019 primary election.

In support of this motion, the undersigned shall rely upon the Notice of Motion and supporting letter brief.

GURBIR S. GREWAL  
ATTORNEY GENERAL OF NEW JERSEY

By: s/George N. Cohen  
George N. Cohen  
Deputy Attorney General

DATED: August 29, 2019

## George Cohen

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**From:** John Donnadio <jdonnadio@njac.org>  
**Sent:** Tuesday, September 3, 2019 9:42 AM  
**To:** Slaughter, Shawn; George Cohen  
**Subject:** [EXTERNAL] Vote By Mail  
**Attachments:** VBM Ballots Division of Elections .pdf

Good morning Judge Sweeney, Shawn, and George. I hope all is well and that you enjoyed the long weekend.

As we discussed on Friday, please let me know what time you're available today to discuss the State's motion to compel discovery. I've had the opportunity to review the documents and submit that the information requested has already been produced in NJAC's initial complaint, NJAC's response to the State's motion to dismiss the complaint, and NJAC's summary of the vote-by-mail ballot costs. Additionally, the information concerning vote-by-mail ballots is readily available on the website of the Division of Elections and I've attached a copy for your review.

As noted in Table 2 of NJAC's initial complaint, vote-by-mail ballots increased from 143,094 for the general election in 2014 to 400,136 in 2018 with a corresponding percentage increase in those who voted-by-mail from 7.3% to 12.3% respectively. Please note that these figures were taken from the attached document in preparing NJAC's brief and include data from each election since 2003. As noted on page 5 of NJAC's response to the State's motion to dismiss, provisional ballots increased from 14,000 in 2014 to 56,000 in 2018 as the 2018 vote-by-mail law lead to confusion among voters who may not have reviewed the separate notice clerks were required to send voters concerning their ability to opt-out of voting-by-mail in writing for the 2018 general election. As noted in Table 1 of NJAC's response to the State's motion to dismiss, at least 127,600 voters automatically received vote-by-mail ballots without their consent for the 2018 general election (*Essex, Middlesex, Passaic, Salem, and Sussex did not respond to our request for information in time and are not included in this Table*). To recap, 257,042 more voters voted by mail in 2018 than in a comparable election in 2014 following implementation of the 2018 vote-by-mail; at least 127,600 voters automatically received vote-by-mail in ballots for the 2018 general election; 42,000 more voters voted provisionally than in a comparable election in 2014; and a single vote-by-mail ballot costs approximately \$1.91 more to produce than a single sample ballot, so any cost savings are illusory nor has the Council ever found cost savings to equal adequate funding.

Additionally, the State's motion to compel discovery misses the mark in terms of the initial expenses the clerks incurred to implement the 2018 law as it ignores the fact that the clerks were required to send a separate notice to voters forcing the clerks to incur labor, postage, printing, and other unanticipated expenses at an estimated \$1.5 million in 2018 - all noted in NJAC's briefs. The clerks must now endure a similar notification process for 2017 and 2018 voters as Governor Murphy recently signed into law **SENATE, No. 4069** (*Sweeney, Egan Jones*)(*Talkaferro, Zwicker, Reynold Jackson*), which requires voters who filed vote-by-mail applications from 2016 to 2018 to automatically receive mail-in-ballots. Although this new law appropriates \$2.0 million to offset the costs associated with mailing the costlier vote-by-mail ballots and the above noted notification process, the Governor has frozen the monies until the State generates enough revenue to support the additional costs pursuant to **EXECUTIVE ORDER. 73** signed on June 30th, which authorizes the State Treasurer to release the funds when enough revenue is collected to maintain an \$875.0 million surplus and deposit an additional \$401.0 million into the State's rainy-day fund. In other words, the monies are not currently available despite the Legislature acknowledging, on the record, that these two new laws imposed an unfunded mandate on county governments.

For the reasons set forth in above, NJAC submits that the State's motion to compel discovery is unwarranted; and, NJAC respectfully requests the Council to enjoin the State from implementing P.L. 2019, c.265, which amended P.L. 2018, C.72, as county governments continue to incur financial hardships as a direct result of the passage of both laws. Thank you again for your time and consideration, and please let me know when you're available to discuss this matter further at 908-963-7777.

John G. Donnadio, Esq.  
Executive Director  
New Jersey Association of Counties  
Government Finance Officers Association of New Jersey  
150 West State Street  
Trenton, New Jersey 08608  
Telephone (609) 394-3467  
[www.njac.org](http://www.njac.org)

## George Cohen

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**From:** John Donnadio <jdonnadio@njac.org>  
**Sent:** Tuesday, September 17, 2019 11:31 AM  
**To:** John Sweeney; George Cohen  
**Subject:** [EXTERNAL] Vote By Mail  
**Attachments:** Appendix Q - NJ Spotlight Article 091719 .pdf

Good morning Judge Sweeney. I hope all is well.

I know it's beyond the deadline for submitting discovery items, but the attached article provides a very good summary of the challenges and costs both voters and clerks are facing with the new vote-by-mail law. George and I spoke about submitting the article this morning. Thank you for your time and consideration, and I look forward to hearing back from you.

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EXHIBIT E

# LATE CHANGES TO ELECTION LAW THROW VOTERS, COUNTY CLERKS FOR A LOOP — AGAIN

COLLEEN O'DEA | SEPTEMBER 17, 2019

*With opt-out forms for voting by mail just reaching some voters, and county clerks buried in paperwork, meeting Saturday's deadline is looking increasingly doubtful.*

For the second year in a row, a last-minute change in New Jersey election law has tens of thousands of registered voters confused and county clerks scrambling to meet a Saturday deadline for sending out vote-by-mail ballots to those who want them.

On August 28, Gov. Phil Murphy signed a law requiring county clerks to send a mail-in ballot to all those who had used a vote-by-mail ballot in 2017 and 2018. The bill **(S-4069)** had been introduced just five days earlier, on a Friday, then sped through both houses of the Legislature without any hearings on the following Monday and Tuesday in rare summer-voting sessions. The measure was the only bill before the Assembly on August 27.

Legislative leaders and Murphy were rushing because of fast-approaching election-related deadlines, but some clerks and Republican lawmakers questioned the need for the change. Clerks said the new law is costing them extra time and money. And they wondered why the state did not learn a lesson from last year's similar late August change, which prompted larger numbers of voters than usual to be forced to cast provisional ballots at the polls when they arrived to vote and were told they had already been sent a mail-in ballot.

"When you are not anticipating something, there are budget problems," said Scott Colabella, the Ocean County clerk and president of the Constitutional Officers Association of New Jersey. "We were told we are going to get reimbursed, but that's not 100 percent certain. It puts pressure on our offices. We did 12,000 vote-by-mail ballots in Ocean County in 2017 and 2018."

## **Will county clerks get paid?**

The law includes \$2 million to reimburse the clerks for the opt-out letters and additional vote-by-mail ballots, but in a bill-signing statement, Murphy said he was asking the state director of budget and accounting to determine whether the spending should be considered "discretionary" and would not be given out unless the state ends the year with a healthy surplus.

"It's causing us additional time and money to send the opt-out letters," said Paula Sollami Covello, the Mercer County clerk.

Because of the change in the law, county clerks sent letters to the thousands of people who voted using a paper ballot last year and the year before. This includes people who mailed in a ballot and those who voted early in person at a county clerk's office using a paper ballot — a voting machine is not typically available for those who vote prior to Election Day so they vote using the same paper ballots that are sent to those voting by mail. The letters inform voters that the law requires clerks to automatically send them a vote-by-mail ballot this year and for all future elections unless they inform the clerks in writing that they don't want to continue to vote by mail.

It's unclear how many letters had to be sent, but last November more than 400,000 New Jerseyans — a new record — used a mail-in ballot.

"If you do not notify my office by September 13th of your preference not to receive a VBM ballot, you must cast your vote using the Mail-in ballot mailed to you or by paper ballot (known as a 'provision ballot') at your polling place for the November 5th, 2019 General Election. You cannot cast your vote on the voting machine," read a letter from Middlesex County Clerk Elaine Flynn.

### **Letters came too late**

But a number of people in Middlesex County did not even receive the letter from Flynn until Saturday, the day after the deadline, according to several posts on the Facebook page of the Central Jersey Progressive Democrats.

"We took a trip last November and voted by mail, didn't think it was going to stay that way and then we get this letter a day late!" wrote one member.

Even some who got letters by the deadline did not have time to mail back a letter or form stating they want to vote in person and do not want to automatically receive mail-in ballots.

"We're having a nightmare of a time here," said John Wojtaszek, the deputy clerk in Morris County. He said that Morris had also set a deadline of last Friday for returning opt-out notices, yet he received 1,000 in the mail yesterday and was still getting angry phone calls from registered voters.

Wojtaszek said the problem is all a matter of timing. The state Division of Election provided a suggested letter for clerks to mail out, but that didn't arrive at the Morris clerk's office until after offices had closed on the Friday before Labor Day. It then took time to get the letters printed and the envelopes properly addressed, stuffed and mailed. Some letters apparently arrived late, or late enough that the voters were unable to return the opt-out notices to the clerk by the deadline.

Flynn announced last night that she was extending the deadline for opting out of receiving a vote-by-mail ballot until noon on Friday and people can either send written notice or the form to the clerk's office by mail or fax or email it to [middlesexvotes@co.middlesex.nj.us](mailto:middlesexvotes@co.middlesex.nj.us)

### **Extending the deadline**

The Morris clerk is extending the deadline for another day or two, "but we have to cut it off because we have to send out the ballots on Saturday," Wojtaszek said. That ballot-mailing date is required by law, he added, and before then the office has to print the proper number of ballots for people in each municipality, as well as mailing labels, and then prepare the mailings, which include multiple envelopes for returning the ballots. Wojtaszek said that this is a big lift in a medium-sized county like Morris, which had about 26,000 mail-in ballots for the 2016 presidential election and 37,000 for last year's midterms.

"They made this change at the last minute," Wojtaszek said. "I don't think they fully thought it out."

Others questioned the urgency of the change, with some Republicans charging the Democrats were just trying to give themselves an advantage in the election this year and in the future. Experts say that a greater use of vote-by-mail ballots favors Democrats.

Democratic sponsors said only that the measure is meant to increase turnout, which had been declining steadily until last year. About 55 percent of registered voters cast ballots in the 2018 midterms, the highest turnout in at least 20 years. Last August, Murphy signed a law requiring all those who had voted by mail in the 2016 presidential election to automatically get a mail-in-ballot unless they opted out.

### **Sweeney invokes 'healthier' democracy**

"We are Democrats and we want people to vote," Sen. President Steve Sweeney (D-Gloucester) said in a statement on the passage of the bill. "The statistics show, making voting more accessible increases voter participation. It's striking to me that we even have to be here, the last week of August, to prevent us from losing the improvements we have made to voter convenience and participation over the past couple of years. The greater the civic engagement, the healthier the democracy. This isn't political, it's fundamental, and we need New Jersey to have the strongest democracy possible."

In his signing statement, Murphy commended lawmakers for quickly passing the measure and said, "I continue to believe that our democracy is stronger when we make it easier for New Jersey citizens to participate, and that is why I will continue to advocate for reforms that would expand access to the ballot box."

Monmouth County Clerk Christine Giordano Hanlon put out a statement on Monday alerting voters to the change and reminding them that her office needs to receive opt-out forms by Thursday.

"It is important that voters be on the lookout for this letter," Hanlon said, adding that more than 13,000 Monmouth voters are impacted.

Other counties, such as Hunterdon, gave voters until this Friday to opt out.

Colabella predicted the last-minute change will lead to more confusion at the polls this November.

Once a person has been issued a vote-by-mail ballot, they cannot be allowed to vote at the polls using a voting machine because each person is allowed to vote only once. An individual can, however, vote by a provisional paper ballot. These are checked after all other votes are counted and as long as a person is registered and has not returned a mail-in ballot, their provisional ballot is counted.

Because there were so many provisional ballots to check and count last November — more than 3,000 in Ocean County alone — it took several days for officials to determine that Democrat Andy Kim had unseated Tom McArthur in the 3rd Congressional District race.

*You may view this article online at <https://www.njspotlight.com/stories/19/09/16/last-minute-changes-to-election-law-throw-voters-county-clerks-for-a-loop-again/#>*