

Citizens' Oversight Projects (COPs)

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June 10, 2019



CITIZENS' OVERSIGHT PROJECTS
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San Luis Obispo County Registrar of Voters and Clerk Tommy Gong
c/o Rita L. Neal, San Luis Obispo County Counsel
County Government Center, Room 0320
San Luis Obispo, CA 93408
(805) 781-5400

Re: Your response dated October 31, 2018

Greetings:

We appreciate your letter and points raised regarding our request that you allow video cameras to record both the 1% manual tally random draw and the manual tally process itself. Please accept our apologies for taking so long to respond to your reply.

1. We agree that Election Code 15360, which defines the 1% manual tally, does not define a public meeting which falls under the definition of a legislative body and thus it is not automatically covered by the Ralph M. Brown Act (Cal. Code 54950 et seq, AKA "Brown Act"). It is clear hearings where a single administrator makes decisions does not comprise a multi-member body that is automatically subject to the elements of the act. A court has held that the Brown Act does NOT apply to a proceeding presided over by a single hearing officer. *Wilson v San Francisco Municipal Railway*, 29 Call. App. 3d 870 (1973), or to individual review by several staff members who do not engage in collective activity. *Golightly v. Molina*, 229 Cal. App. 4th 1501 (2014).

2. Election Code 15360 does, however, define that the 1% manual tally is a public process (underlining added):

15360 (a) ... shall conduct a public manual tally...

15360 (a) (1) (A) A public manual tally of the ballots...

15360 (a) (2) A two-party public manual tally...

15360 (a) (2) (A) A public manual tally of the ballots...

15360 (a) (2) (B) (i) A public manual tally...

15360 (e) The manual tally shall be a public process, with the official conducting the election providing at least a five-day public notice of the time and place of the manual tally and of the time and place of the selection

of the precincts, batches, or direct recording electronic voting machines subject to the public manual tally before conducting the selection and tally.

3. The Brown Act was defined so it would take effect on any public meeting which meets the criteria defined by the Brown Act itself or related case law. Indeed, the 1% manual tally is NOT a public meeting which would automatically cause it to be regarded as such an event which then would be granted all other requirements for such meetings, such as appropriate public notice and publishing an agenda, allowing the public to attend and providing those members of the public with certain rights at the meeting, including the right to any materials being processed by the body, the right to record the meeting, public comment, etc.

4. However, the 1% manual tally is, by statute, defined as a public process. Cal Code. 15360 (e). The same statute also describes that the process must have a five-day public notice for the random selection and tally of precincts. Such notice is also required for public meetings. Election Code 15360 makes no mention that there are any restrictions to rights of the public in similar situations, such as those defined by the Brown Act.

4. In your letter of October 31, 2018, you state that "the Elections Code (including the Voter Bill of Rights) does not compel the Registrar to permit video recording of the manual tally process..." We agree that it does not explicitly compel the Registrar to allow video recording. However, it does not explicitly restrict it either. Any restriction of such video recording should be based on compelling need. There is no reason to restrict video recording of either the Random Draw or manual tally, because there is no voter-identifiable information available, as described below.

5. Election Code Section 14287 defines personal information

14287 No voter shall place personal information upon a ballot that identifies the voter. "Personal information" includes all of the following:

- (a) The signature of the voter.
- (b) The initials, name, or address of the voter.
- (c) A voter identification number.
- (d) A social security number.
- (e) A driver's license number.

6. Election Code Section 15154 concerns whether ballots are rejected for personal information, and they are not:

15154: (a) Any ballot that is not marked as provided by law shall be rejected. The rejected ballots shall be placed in the package marked for voted ballots or in a separate container as directed by the elections official. All rejected ballots shall have written on the ballot the cause for rejection and be signed by a majority of processing board members who are assigned by the elections official to process ballots.

(b) The following ballot conditions shall not render a ballot invalid:

- (1) Soiled or defaced.
- (2) Two or more impressions of the voting stamp or mark in one voting square.
- (3) Contains personal information, as defined in Section 14287.

(c) If a voter indicates, either by a combination of both marking and writing in, a choice of more

names than there are candidates to be elected or nominated for any office, or if for any reason the choice of the voter is impossible to determine, the vote for that office shall not be counted, but the remainder of the ballot, if properly marked, shall be counted.

(d) This section applies to all ballots counted pursuant to this chapter and Chapter 4 (commencing with Section 15300).

7. Election Code Section 15208 provides that any ballots that contain personal information shall be duplicated as soon as it is received so as to remove the personal information (i.e. prior to the creation of ballot images).

SB 183, Correa. Ballots: identifying information. (2011)

http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201120120SB183

Existing law prohibits a voter from placing any mark upon a ballot that will make the ballot identifiable. Under existing law, a ballot that is not marked as provided by law or that is marked or signed by the voter so that the ballot can be identified by others is required to be rejected. If a ballot is marked in a manner so as to identify the voter, the ballot is required to be marked "Void" and placed in a container for void ballots.

This bill would instead prohibit a voter from placing personal information, as defined, upon a ballot that identifies the voter. The bill would provide that a ballot that contains personal information is not invalid. The bill would delete the requirement that a ballot marked in a manner so as to identify the voter is void and instead require a ballot that contains personal information to be segregated in a specified manner and would require that a duplicate ballot be prepared. By adding to the duties of local elections officials, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement. This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

SEC. 4. Section 15208 of the Elections Code is amended to read:

15208. (a) Each container of ballots shall be opened and its contents removed. The ballots shall be checked to ascertain if the ballots are properly grouped and shall be arranged, if necessary, so that all similar ballots from the precinct are together.

(b) Any ballot that contains personal information, as defined in Section 14287, or is torn, bent, or mutilated shall be segregated in the manner directed by the elections official and a duplicate shall be prepared as provided in Section 15210.

8. Therefore, ballots, once received and duplicated as provided in Election Code 15208 will not include any personal identifiable information. Of course, this includes that any signatures will also be expunged by that statutory procedure. Accordingly, ballot images will not have any such information either. Therefore, your reliance on the need for voter privacy is not supported.

9. The fact that the legislature included this change as reflected in SB 183 implies also that there was an appreciation that ballots are not exempted by the California Public Records Act (Cal Code 6250 et seq), and the legislative intent was not to exempt them from disclosure. The legislature could have handled the voter privacy issue by instead clarifying that ballots were exempted from disclosure, but they did not, instead making sure that they could be disclosed without any risk to the voter's privacy through this method of expunging any voter-identifiable information.

10. Election Code 15360, in defining the "public process" of the 1% manual tally, includes also the "selection" of random precincts or batches. The selection process itself includes no ballots at all, only the numbers of precincts or batches, which reveal no information that need be kept private.

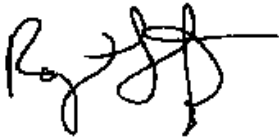
Therefore, any reliance on restricting recording devices in this meeting due to voter privacy is unfounded.

Please answer the following questions:

1. Are you in compliance with Election Code Section 15208 as amended by Senate Bill 183 of 2011?
2. And if so, then why is there any voter-identifiable information on ballots?
3. And if there is no voter-identifiable information on ballots, what is the basis for restricting the public from recording the "public process" which is defined by statute?

We thank you for your kind assistance and to discuss this issue as we prefer to handle this issue without the need for the cost of litigation in court.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ray Lutz', with a long horizontal line extending to the right.

Raymond Lutz
National Coordinator, Citizens' Oversight Projects