

Citizens' Oversight Projects (COPs)

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TO ALL ELECTIONS OFFICIALS:

Introduction

The California Secretary of State (CA SOS) published the "County Clerk/Registrar of Voters (CC/ROV) Memorandum #20070" on March 26, 2020, sent to "All County Clerks / Registrars of Voters" (Memo). The Memo is attached as "Attachment A."

This letter is a response to the Memo for two reasons:

1. The logic in the Memo is unsound and not support by law, and therefore we suggest that county clerks and registrars of voters should not blindly follow that guidance.
2. We recently submitted a public records request (PRR) to many counties. We believe that the Memo may not be specifically a response to our PRR, however, because there are many mentions of either the one-percent manual tally or risk-limiting audits, and our PRR is not related to those procedures. However, since some counties may be tempted to use it as an excuse for not providing records as required by law, we provide this letter to clarify our PRR with regard to the Memo.

Our Public Records Request (PRR)

On March 21, we emailed a PRR to the most populous 24 counties in California, and followed that up with a hardcopy sent using certified mail on Monday, March 23. A typical PRR letter is attached as Attachment B. The PRR letter includes the request for ballot images, cast-vote records, and other related files; a description of the legal basis of our request, and logistics information for providing these public records.

It is possible that Registrars may have received this PRR and inquired to the CA SOS for guidance and this prompted the Memo. However, there are some discrepancies which may indicate that the Memo was prompted by other questions to registrars that were not submitted as a formal PRR.

Summary

The Memo attempts to restrict the release of public information and obfuscate our elections instead of pushing for election transparency. Specifically, the Memo:

1. Relies on the new regulations for Risk Limiting audits (which no county is currently fully implementing) to be able to restrict the release of information. Our PRR does not mention risk limiting audits nor the one-percent manual tally.

2. Claims that cast-vote records are voter registration cards that contain personal voter information, and therefore are restricted,
3. Claims that ballot images are cast-vote records, and therefore are also voter registration cards that contain personal voter information, and therefore are restricted,

We will show in our comments below that the legal basis for the opinion that records are not to be produced is nonexistent.

Regardless of whether the Memo was sent in response to our PRR, we provide this response to those counties to clarify what we believe is your legal obligation to provide these records. Other counties that did not receive our PRR may have other members of the public making these requests.

To this end, we will comment on each section of the Memo and compare it with respect to our PRR for ballot images and other records.

CA SOS Refers to one-percent manual tally process, we do not.

The Memo starts with this line (underlining added):

The Secretary of State's office has received numerous inquiries regarding ballot image requests relating to the one percent manual tally process.

Our PRR, however, was not related to the "one percent manual tally process." We made no mention of that process nor do we rely on the laws and regulations controlling that procedure.

However, it is the case that many counties are currently working to finish or have recently finished the one percent manual tally, as specified in Election Code 15360. This year, elections officials may also conduct, at their option, a comprehensive Risk Limiting Audit (RLA) per Elections Code Section 15365, although we understand that no county has decided to do that. We understand that Orange County will be conducting both a one-percent manual tally and concurrently a limited RLA on a pilot basis.

The Memo continues (underlining added):

Specifically, counties have asked if they are required to provide those ballot images to a requestor. It is the opinion of the Secretary of State's office that ballot images can be viewed by an observer during the one percent manual process, but copies shall not be provided to a requestor.

Again, our request has nothing to do with the one-percent manual tally process. This is why we think the Memo may be regarding other requests for ballot image review. (We note that forcing people to come into the Registrar of Voter's office is not compliant with social distancing concerns we must respect in this era of COVID-19.) Our request is social distancing compliant. We do not want to visit your office.

Our PRR is unrelated to the one-percent manual tally.

This paragraph includes the strongest language, that "copies shall not be provided to the requestor." However, this is merely the opinion and does not change your legal obligation under the Public Records Act which was later enshrined in the California Constitution. See our PRR letter for more detail.

We agree that ballot images are scanned copies of ballots.

The Memo continues as follows:

The phrase "ballot image(s)" is not defined by the Elections Code. In the absence of a

definition our office understands that requestors may be referring to a digital scanned copy of a ballot.

We generally agree with this definition, however, the term is defined by the Election Assistance Commission of the federal government, and the PRR provided a detailed definition and description of the exact files and format requested.

Furthermore, the Voluntary Voting System Guidelines¹ of the Election Assistance Commission may provide a newly refined definition of the term "ballot image." In the past, this term referred to a memory image of a touch-screen voting machine. However, the elections industry has largely moved away from these DRE (Direct Recording Electronic) machines and toward hand-marked paper ballots or paper ballots marked by a ballot marking device (BMD) and those paper records are then scanned and ballot images result. These images are routinely produced by all newly acquired ballot scanners.

The current generation equipment first scans the ballots to produce a digital ballot image, and then this image is processed to recognize voter intent and produce the cast-vote record. The ballot image is not the cast-vote record. The ballot image is produced first, and then the cast-vote record is produced by reviewing the ballot images.

In contrast, in the DRE machines, the memory record of the voter's selections did not need further review. It was indeed the same as the cast vote record and there was no need to process it to recognize voter intent. So the prior definition in the VVSG has been discussed by election experts (including our representatives) to clarify this definition so it can be applied to this new reality.

Ballot images and cast-vote records are not voter-registration affidavits and contain no personal information

The Memo continues as follows:

Newly enacted Section 20119(b) of the California Code of Regulations (CCR) (applicable to Risk Limiting Audits) states that cast vote record data shall not be published on the elections official's website, but can be made available to the public at the location where the audit is being conducted.

This is actually a mis-quote of what the regulations and the law actually does provide.

The risk limiting audit provisions of recently enacted Elections Code Section 15365 provided that the CA SOS was required to define regulations to regulate those audits. Section 20119(b) of the California Code of Regulations are the regulations defined by the CA SOS in response to RLA statutes in the election code. This section is as follows:

§ 20119. Data Publication Prior to Audit.

(a) ...

(b) Subject to Elections Code section 2194(a), cast vote record data shall not be posted to the elections official's website, but shall be made available to the public at the location where the audit is being conducted.

The term "cast-vote record" is defined per Elections Code section 15366(d):

(d) "Cast vote record" means an auditable document or electronic record that purports to reflect

1 The new VVSG documents are currently open for comment at this URL: <https://www.regulations.gov/document?D=EAC-2020-0002-0001>

the selections a voter made on a ballot. It lists the contests on the ballot and the voter's selections in each of those contests.

According to the National Institute of Standards and Technology (NIST) "Common Data Format -- Cast Vote Record"² specification, the term "cast vote record" is defined:

This document presents an interoperable, common data format specification for cast vote records (CVR), which are produced by vote-capture devices such as ballot scanners. **A CVR is an electronic record of a voter's selections, with usually one CVR created per sheet (page) of a ballot.** Election results are produced by tabulating the collection of CVRs, and audits can be done by comparisons of the paper ballots or paper records of voter selections against the CVRs.

The cast vote record is an electronic record typically in tabular CSV, XLSX, XML, or JSON format. The NIST specification provides a standard format for this data to clarify what the various fields mean so it can be produced and consumed by election and voting equipment by various vendors. This format does not contain any voter personal information. Further, the contents of this file is under the control of the election management system (EMS) and is therefore, its content is not random or out of control, but strictly controlled and there is no basis for withholding it in its entirety.

There is no legal basis for SOS regulations to restrict ballot images nor cast-vote records

The SOS memo refers to § 20119 Subsection (b) to support the notion that posting of the cast-vote records is not allowed. That regulation says cast vote records are "Subject to" Elections Code section 2194(a) which is used as a basis for limiting the posting of the cast vote record.

However, Election Code Section 2194(a) refers to **registration affidavits**, and has nothing to do with the cast-vote record, as the cast-vote record does not contain voter registration card information.

The following is Election Code section 2194(a):

2194. (a) The voter registration card information identified in subdivision (a) of Section 6254.4 of the Government Code:

- (1) Shall be confidential and shall not appear on any computer terminal, list, affidavit, duplicate affidavit, or other medium routinely available to the public at the county elections official's office.
- (2) Shall not be used for any personal, private, or commercial purpose, including, but not limited to:
 - (A) The harassment of any voter or voter's household.
 - (B) The advertising, solicitation, sale, or marketing of products or services to any voter or voter's household.
 - (C) Reproduction in print, broadcast visual or audio, or display on the Internet or any computer terminal unless pursuant to paragraph (3).
- (3) Shall be provided with respect to any voter, subject to the provisions of Section 2188, to any candidate for federal, state, or local office, to any committee for or against any initiative or referendum measure for which legal publication is made, and to any person for election, scholarly, journalistic, or political purposes, or for governmental purposes, as determined by the Secretary of State.

Thus, the restrictions referred to by CA SOS regulations §20119 Subsection (b), that cast-vote records are

2 <https://pages.nist.gov/CastVoteRecords/> -- "National Institute of Standards and Technology (NIST) Special Publication 1500-103, Cast Vote Records Common Data Format Specification Version 1"

"subject to" the restrictions in Elections Code section 2194 (a) makes it sound like there is a basis in law to fully restrict cast-vote records. However, 2194(a) has no relevance to cast-vote records unless they have voter registration card information. But cast vote records produced by the election equipment have no such information. Thus, there is no basis for restricting the cast-vote records.

However, we admit that if there was any information on a ballot or cast-vote record that was personal information of the vote, indeed, there would be a need to redact that information. This redaction process is already specified in Election Code section 15208, as follows (with underlining added):

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

Furthermore, since ballot-images are not cast-vote records, they are not controlled by CA SOS regulations §20119 Subsection (b), but even if they were, that section again has no basis in law to restrict them because they have no personal information either.

Ballot images and cast vote records are not voter registration cards.

The CA SOS CC/ROV Memo #20070 continues to try to connect ballot images to the cast-vote record and then to claim that these are both voter registration cards.

For the definition of a cast vote record, CCR section 20111(f) refers to Elections Code section 15366(d) and states that a cast vote record shall be generated by the voting system. Elections Code section 15366(d) defines "cast vote record" as "an auditable document or electronic record that purports to reflect the selections a voter made on a ballot. It lists the contests on the ballot and the voter's selections in each of those contests."

Based on the above, and while CCR section 20119 applies to Risk Limiting Audits, the Secretary of State is of the opinion that a ballot image is a cast vote record, and as such, a copy should not be provided to a requestor.

Even if the SOS may have "the opinion" that ballots images are cast vote records, in fact they are not. But even if they were, since there is no personal information included, the controlling provision in law only restricts them to the extent that they do contain personal information, and thus, they are not actually restricted. The legal basis described by the SOS is simply nonexistent.

Our request also is not related to the one-percent manual tally.

The Memo then attempts to use the new RLA regulations, that do not restrict the release anyway, to apply to counties that are implementing the one-percent manual tally:

Additionally, pursuant to Elections Code section 15360, county elections officials are not required to provide a ballot image or any other materials when conducting the one percent manual tally.

Indeed, Elections Code section 15360 does not mention ballot images nor cast-vote records. To the extent these documents are generated by our government, they are subject to the provisions of the California Public Records Act, California Code section 6250 eq seq. (CPRA) regardless of whether they are used in the one-percent manual tally or not. The CA SOS does not have the power to override the obligation to provide public records without legal rationale. The claim that cast vote records and ballot images are ballot registration cards or contain that information is incorrect.

Therefore, any counties that have been requested to provide the information under the CPRA are obligated by law to provide it.

File Sharing Services are one option you should consider.

The CA SOS then makes one final assertion that election officials cannot transmit this public information using third party services.

We further understand that requestors may have asked you to provide documents using third party services. We advise against connecting your networks to any untrusted services.

We note that we did suggest in our PRR that one option for providing the public records is to upload it to a secure file-sharing service, either using that county's account or to our account. We are not suggesting that you "connect your networks" to those services. You can use these services without impacting the security of your isolated network.

We suggest Sharefile.com because we know they offer trusted timestamps which are infeasible to backdate. Once the files are loaded on the server, they cannot be changed without evidence of a changed date.

Of course, we don't mind if election officials want to provide the information using USB Drives. One 128 GB Thumbdrive costs less than \$20 and will hold about one million ballot images.

Since these are public records, they can be transmitted to the public by posting on a file sharing service to reduce the number of requests an election official must process. However, if you prefer, we will accept these records on USB "Thumbdrive" and we are happy to reimburse you for the cost of the device.

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Conclusion

Ballot images and cast-vote records are public records, this is not disputed. They are not voter registration cards nor do they contain voter registration information. Cast vote records are generated by the election system and contain no personal information. Ballot images are created generally after any personal information must be redacted by law.

These records are not exempted from the CPRA. Therefore, elections officials are obligated by law to provide these records.

These records are not requested in conjunction with Risk Limiting Audits nor with respect to the one-percent manual tally. Regulations that restrict those procedures are irrelevant to our request. As described above, the CA SOS has no legal basis for restricting the release of these public records even if they were related to these audit procedures.

If there are any legitimate reasons to redact portions of these records, they must be minimally redacted. Such redactions do not provide a rationale to withhold all such records.

We are happy to work with you to comply with our request given delays that we expect might exist due to the COVID-19 restrictions. Please be safe.

Sincerely,

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

Ray Lutz
Executive Director
Citizens' Oversight