

Citizens' Oversight Projects (COPs)

CitizensOversight.org
771 Jamacha Rd 148
El Cajon, CA 92019
raylutz@citizenoversight.org
619-820-5321

March 22, 2020

Shannon Bushey
Registrar of Voters
Santa Clara County
1555 Berger Drive, Bldg. 2, P.O. Box 611360
San Jose, CA 95161-1360



PUBLIC RECORDS REQUEST

We make this request per California Public Records Act (Cal Code Section 6250 et seq).

In the March 3, 2020 primary election, we understand that your office used equipment that produced relatively high-resolution ballot images in the process of recognizing the vote on paper ballots. These images must be retained by elections departments.

We therefore request the ballot images and related cast-vote records and other files, which we will detail below.

1.0 Disclosure is Mandated by law

Ballot images are an electronic record that is produced in the process of conducting the election. Newer machines that use ballot images do not detect marks directly from the page but first generate a ballot image, and then process that image to register the page and extract the votes. This is a public record which is not exempted under Cal Code 6250 et seq. ("Public Records Act").

The Public Records Act was so important that our state went further with Proposition 59 of 2004 which made disclosure of public records a constitutional amendment.¹ This carried the notion further by emphasizing the value of disclosure, and would generally override existing statutes that allow nondisclosure. This excerpt is important:

Similarly, it strengthens the case for access in cases where, under existing statutory exemptions, records can be withheld when the public's interest in non-disclosure clearly outweighs the public's interest in disclosure.[4] This is so because most interests in non-disclosure are not constitutionally based and thus will be of significantly less importance when weighed against a now-constitutional right of access.

2.0 There is no basis to deny our request

To save time in our interaction, we want to cover some of the typical claims that ballot images cannot be disclosed. Officials have suggested that these are exempted from production because:

1. ballots may contain "personal information" and therefore cannot be disclosed,

[1https://en.wikipedia.org/wiki/2004_California_Proposition_59](https://en.wikipedia.org/wiki/2004_California_Proposition_59)

2. voter signatures on affidavits are "confidential" and therefore ballots are exempted from disclosure by the California Public Records Act per code section 6254.4,
3. voters have the right to a secret ballot as guaranteed by Election Code Section 2300 (a) (4), and
4. ballot images are sealed and cannot be disclosed.

Each of these issues are covered in turn below.

2.1. Personal Information does not provide a basis for nondisclosure

A. CA 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.

B. CA 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).

C. CA 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).

This issues was brought initially into law by SB 183, Correa. Ballots: identifying information. (2011)² The following excerpt is the critical portion.

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

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

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.

Therefore, ballots, once received and duplicated as provided in Election Code 15208 will not include any personal identifiable information. Consequently, any signatures will also be expunged by that statutory procedure. Accordingly, ballot images will not have any such information. Therefore, voter added marks do not present a risk to voter privacy and ballot images may be released to the public.

The fact that the legislature included this change (as reflected in SB 183) implies 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.

2.2. Ballot Images do not have signatures.

Ballots are not affidavits and do not contain signatures. But if such signatures were inadvertently included by the voter, all such personal information is expunged before scanning as described above.

2.3. Disclosing Ballot Images does not violate ballot secrecy

Ballot images do not contain any personal information and therefore there is no violation of privacy. Ballots do not contain any personal information so that it is possible to look at a ballot and determine who voted. We do not have sufficient information to pair up any voter to how they voted.

Voter privacy is very important to us and we will work with you in those few cases that might exist where through a process of elimination, voter identity might be possible to determine. We do not attempt to

determine voter identity in our review of the ballot images.

Please consolidate as much as possible the ballots into larger categories to avoid a chance that the ballots would remain in small categories that may have to be redacted from the ballot images provided.

2.4. Ballot Images are not "sealed".

Ballots are the official record of the election and are required to be maintained. Federal law mandates that they must be maintained for 22 months. We believe that with all the work of expunging signatures as provided in SB 183 (2011) means that the legislature intended that the ballots themselves are also public records.

Some states DO recognize the ballots as public records and allow inspection of those ballots. As of this writing, there has been resistance in California to allow direct access of the ballots without an active judicial contest or a recount.

It is clear that paper ballots are difficult to provide due to their importance as they must be in pristine condition should there be any judicial contests or recounts. It is time consuming and requires extensive manual labor to both provide access and to perform inspection. Such inspection is not compatible with social distancing issues now at play due to COVID19.

Such is not the case for ballot images. They are an important digital record in the flow of processing ballots. As such, they must be saved as part of the record of the election. Furthermore, since there is no threat of possible corruption of the ballots or ballot images when they are provided. Therefore, there is no rationale for "sealing" the ballot images.

Furthermore, such disclosure has already been demonstrated in California by San Francisco County in the Nov 2018 election.

We have already accessed a number of ballot image sets also from other counties and states, which you can review on our file sharing site at this URL:

<https://citizenoversightinc.sharefile.com/d-sbf4d52995e545678>

- San Francisco, CA (Dominion)
 - November 2018
- Dane County, WI (ES&S)
 - November General 2016, Spring Primary 2019, Spring General 2019
- Leon County, FL (Dominion)
 - General 2018
- Volusia County, FL (ES&S)
 - November 2018
- Wakulla County, FL (ES&S)
 - November 2018

This demonstrates that providing ballot images is embraced by California and other states.

3.0 Our Request

Therefore, please provide the following:

1. The complete (or nearly complete) set of ballot images for the March 3 primary election. We accept the format as produced by your election system as further described below. We understand that it may be practical to exclude a small set of ballots for privacy concerns. If so, then please provide the total vote counts for each contest included in the set of ballots that are excluded so we may add this to the total of the other ballots.
2. The set of "cast-vote records" which can be paired up with each ballot image, as your process has determined voter intent. Please include the "style(s)" designator(s) for each record for each sheet, and whether the ballot is from a BMD (ballot marking device) or not.
3. The "voted/non-voted" file, sometimes also called the "poll list" which provides the number of voters who cast a vote from the standpoint of polling place sign-in sheets or e-pollbooks.
4. If available, a file containing the actual text printed as the title and description of each contest if they vary on each style of ballot. Generally, we find that the text is the same for a given contest on all styles except for those based on language differences, but that the text on the ballot differs from the official contest name. If this is not a easy to provide export, we can reconstruct this data by examining the ballots.
5. In the future, we hope to also be able to obtain a file containing SHA-256 message digests of each ballot image as originally scanned by the ballot scanner device, especially if such devices are used in the precinct. As we are still working on standards regarding how these are to be produced, we understand if this is not available but if you do have such a file, we would appreciate it.
6. Please also provide the ballot images used in the Logic & Accuracy test, and the corresponding cast-vote records so we can review that as well. As this has no privacy or other concerns, and is not related to the certification cycle, please provide this portion separately and earlier than the rest of the request.

3.1 Logistics to provide the data

We want to make the production of these images and other files as easy for you as possible, as follows:

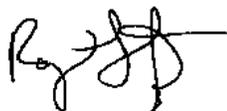
1. Ballot images should be produced in the format provided by your EMS (election management system). Formats such as PDF, TIF, PNG, PBM, are examples of popular image formats. We accept the formats produced by your EMS. This request includes all counted mail-ballot format and QR format ballots and the files that together comprise the associated cast vote records as produced by the EMS.
2. If redaction is found to be necessary please only modify the specific affected files by adding black so that the redaction is apparent. Please do not change the format or rename the files during redaction. Please also provide a list of any redacted files. When exporting scanned images please for Dominion ballots, set the checkbox not to overlay the extra diagnostic information (boxes around timing marks, etc.) If ballots are excluded, please provide the grand totals of all contests included in those ballots so we can add those values back in to the totals to arrive at the final totals of the election.

3. These image formats are internally compressed (except for PBM) and therefore do not need to be further compressed. However, due to the number of files, it is essential that they be combined into ZIP archives. Please include no more than 32K image files in any single ZIP archive and in no case can they be greater than 10GB each. We recommend for ease in handling that they be limited to about 5GB or less. Your EMS will probably help you create these ZIP archives.
4. Cast-vote record files are accepted as .XLSX, .CSV, XML, or JSON formats. Please limit the number of records per .XLSX file to fewer than 100,000. The format of these files can be any format normally produced by the EMS as long as you provide documentation. Please include the style number as a field in each record. The file structure can be composed of a number of folders, such as by precinct and party. Again, your EMS will help you create these ZIP archives. Please note that the "AuditMark(R)" which is included in Dominion ballot images is not the cast vote record file we are requesting because it is not a machine readable format. Since you do have the data in machine readable format, please provide that.
5. The archives and other files can be recorded on a "USB Thumb Drive." Such USB Thumb Drives are commonly available today with capacities of say 128 GB for about \$20. We find that ballot images from an ES&S system can be written with about 15,000 per 1 GB. Using the Dominion system, the files are about twice as large, so expect about 7,500 per 1 GB. For these two election system vendors, a single USB thumbdrive of 128 GB could contain about 1.9 million (ES&S) or 905,000 (Dominion) ballot images where each comprises a full ballot sheet (two sides). Therefore, it is certainly technically feasible to provide the images economically in this manner.
6. If possible, we prefer that you upload the data directly to "the cloud." Please use a file sharing service that offers "trusted timestamps" which do not allow back-dating. Sharefile.com provides this feature. You can set up your own account or upload to ours. Depending on your bandwidth, uploading can take about 30 minutes per 1 GB. Their limit is 10GB per file, but we recommend that you keep the files smaller to allow incremental uploading if there are any connection issues from your location. Although these take time and bandwidth to upload, the uploading process takes almost no staff time and their uploading interface is easy to use and is robust.

If you opt to use this method, then email the location of the files on the file sharing service you choose or let us know so we can provide a link to a folder in our Sharefile.com account.

Thanks very much for your service to your county and to the citizens of the state and thanks for upgrading your county election technology to one that is far more transparent and accountable than what was available in the past. Thanks very much for assisting me in this transparency project. Please advise if I can make it more efficient. Although we are sending this request by certified mail as well as by email, please save time and money by sending your response by email.

Sincerely,



Ray Lutz
Executive Director
Citizens' Oversight
raylutz@citizenoversight.org