

 **09hr_SC-LEUA_sb0435_pt01**



Details:

(FORM UPDATED: 08/11/2010)

**WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS**

2009-10

(session year)

Senate

(Assembly, Senate or Joint)

**Committee on ... Labor, Elections, and Urban
Affairs (SC-LEUA)**

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
 - (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
 - (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

Senate

Record of Committee Proceedings

Committee on Labor, Elections and Urban Affairs

LRB 3860/1 → **became SB 435**

Relating to: the period for retention of certain election materials in state and local elections.

December 15, 2009 **EXECUTIVE SESSION HELD**

Present: (5) Senators Coggs, Wirch, Lehman, A. Lasee and Grothman.

Absent: (0) None.

Moved by Senator Wirch, seconded by Senator Lehman that **LRB 3860/1** be recommended for Introduction.

Ayes: (5) Senators Coggs, Wirch, Lehman, A. Lasee and Grothman.

Noes: (0) None.

INTRODUCTION RECOMMENDED, Ayes 5, Noes 0

Adam Plotkin
Committee Clerk

Senate

Record of Committee Proceedings

Committee on Labor, Elections and Urban Affairs

Senate Bill 435

Relating to: the period for retention of certain election materials in state and local elections.

By Committee on Labor, Elections and Urban Affairs, by request of Government Accountability Board.

December 21, 2009 Referred to Committee on Labor, Elections and Urban Affairs.

April 8, 2010 **PUBLIC HEARING HELD**

Present: (4) Senators Coggs, Wirch, Lehman and Grothman.

Absent: (1) Senator A. Lasee.

Appearances For

- Kevin Kennedy — Government Accountability Board
- Shane Falk — Government Accountability Board

Appearances Against

- John Washburn

Appearances for Information Only

- None.

Registrations For

- None.

Registrations Against

- None.

Registrations for Information Only

- None.

April 15, 2010 **EXECUTIVE SESSION HELD**

Present: (5) Senators Coggs, Wirch, Lehman, A. Lasee and Grothman.

Absent: (0) None.

Moved by Senator Wirch, seconded by Senator A. Lasee that **Senate Substitute Amendment 1** be recommended for adoption.

Ayes: (5) Senators Coggs, Wirch, Lehman, A. Lasee and Grothman.

Noes: (0) None.

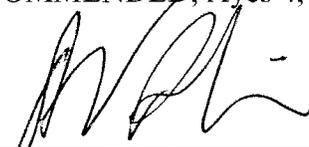
ADOPTION OF SENATE SUBSTITUTE AMENDMENT 1
RECOMMENDED, Ayes 5, Noes 0

Moved by Senator Wirch, seconded by Senator Coggs that **Senate Bill 435** be recommended for passage as amended.

Ayes: (4) Senators Coggs, Wirch, Lehman and A. Lasee.

Noes: (1) Senator Grothman.

PASSAGE AS AMENDED RECOMMENDED, Ayes 4, Noes 1



Adam Plotkin
Committee Clerk

Vote Record

Committee on Labor, Elections and Urban Affairs

Date: Tuesday, Dec. 15, 2009

Moved by: WIRCH Seconded by: LEHMAN

AB _____ SB _____ Clearinghouse Rule _____
 AJR _____ SJR _____ Appointment _____
 AR _____ SR _____ Other LRB 3860/1

A/S Amdt _____
 A/S Amdt _____ to A/S Amdt _____
 A/S Sub Amdt _____
 A/S Amdt _____ to A/S Sub Amdt _____
 A/S Amdt _____ to A/S Amdt _____ to A/S Sub Amdt _____

LRB 3860/1 → became SB 435

Be recommended for:

- Passage Adoption Confirmation Concurrence Indefinite Postponement
 Introduction Rejection Tabling Nonconcurrence

Committee Member

	<u>Aye</u>	<u>No</u>	<u>Absent</u>	<u>Not Voting</u>
Senator Spencer Coggs, Chair	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Robert Wirch	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator John Lehman	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Alan Lasee	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Glenn Grothman	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Totals:	<u>5</u>	<u>0</u>	_____	_____

Motion Carried

Motion Failed

Vote Record

Committee on Labor, Elections and Urban Affairs

Date: Thursday, April 15, 2010

Moved by: Wirch Seconded by: Lasee

AB _____ SB 435 _____ Clearinghouse Rule _____
 AJR _____ SJR _____ Appointment _____
 AR _____ SR _____ Other _____

A/S Amdt _____
 A/S Amdt _____ to A/S Amdt _____
 S Sub Amdt 1 _____
 A/S Amdt _____ to A/S Sub Amdt _____
 A/S Amdt _____ to A/S Amdt _____ to A/S Sub Amdt _____

Be recommended for:

- Passage Adoption Confirmation Concurrence Indefinite Postponement
 Introduction Rejection Tabling Nonconcurrence

Committee Member

	<u>Aye</u>	<u>No</u>	<u>Absent</u>	<u>Not Voting</u>
Senator Spencer Coggs, Chair	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Robert Wirch	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator John Lehman	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Alan Lasee	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Glenn Grothman	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Totals:	<u>5</u>	<u>0</u>	_____	_____

Motion Carried

Motion Failed

State of Wisconsin Government Accountability Board

Post Office Box 7984
212 East Washington Avenue, Third Floor
Madison, WI 53707-7984
Voice (608) 266-8005
Fax (608) 267-0500
E-mail: gab@wisconsin.gov
<http://gab.wi.gov>



- keep memory cards from optical scan + DRE's
- keep for 22 months for Fed's
- data retention vs. costs vs. access to hardware

November 18, 2009

The Honorable Spencer Coggs, Chair
Senate Committee on Labor, Elections and Urban Affairs
Room 123 South, State Capitol
Madison, WI 53702

Dear Senator Coggs:

On behalf of the Government Accountability Board, I request the Senate Committee on Labor, Elections and Urban Affairs introduce legislation which has been drafted to address specific issues relating to the administration of the state's election laws. The jacketed legislation accompanies this correspondence.

The legislation, LRB 3860/1, revises §7.23, Wis. Stats., to allow clearing and reactivation of voting machine recorders 14 days after a primary for state and local elections and 21 days after any other state or local election, subject to retention for purposes of a recount or election contest. Current law requires the transfer of the election data from detachable recording units and compartments to an electronic medium, which may not be erased or destroyed for 22 months after an election regardless of whether the election was federal, state, or local. While there is a federal requirement to retain all election data from federal elections for 22 months, there is no similar sound reason to require the same for state and local elections.

became SB 435

The costs of maintaining the electronic data from federal elections for 22 months is significant; however, there is a compelling purpose for doing so, namely the requirements of 42 U.S.C. 1974. Without a corresponding compelling purpose for preserving state and local electronic data for 22 months, the Board recommends that a shorter period of retention is warranted. This shorter period will be embraced by clerks due to the avoidance of significant additional costs for retention of electronic election data for state and local elections.

This allows clerks to reuse the recording devices for consecutive elections, while at the same time preserving election materials for recounts or election contests should they occur. This practice is consistent with the procedures of other states with respect to election materials from state and local elections. In addition, many municipalities have optical scan voting equipment that was acquired in the 1990s, with a lot of this older equipment, the supply of extra detachable memory devices is not available, even if the municipalities could afford the cost.

Other than the purpose of preserving election materials for recounts or election contests, there is no additional state or local purpose to preserve election materials beyond the time of a recount or election contest. There is no need to preserve election materials for state and local elections for the 22 months required for federal elections.

The Honorable Spencer Coggs

November 18, 2009

Page 2

If you have questions about the legislation, please contact our staff counsel, Shane Falk at 608-266-2094 or me at 608-261-8683. Thank you for your attention to our request.

Sincerely,

A handwritten signature in cursive script that reads "Kevin J. Kennedy". The signature is written in black ink and is positioned above the printed name and title.

Kevin J. Kennedy

Director and General Counsel

Government Accountability Board



Plotkin, Adam

From: Falk, Shane - GAB [Shane.Falk@wisconsin.gov]
Sent: Wednesday, December 02, 2009 9:43 AM
To: Plotkin, Adam
Cc: Kennedy, Kevin - GAB; Robinson, Nathaniel E - GAB; Haas, Michael R - GAB
Subject: Re: LRB 3860/1 (Revising 7.23 and Retention of Electronic Election Records)
Attachments: 09-3860.1 Senate 7.23.pdf

→ became SB 435

Adam,

I just received your voicemail this morning. I did call your office, but was told you were out till tomorrow, but may be checking emails. Please find attached the electronic version of LRB 3860/1, as you requested.

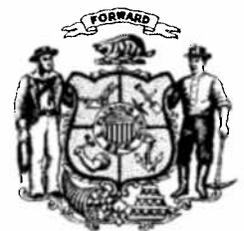
This also confirms that Sen Coggs will submit LRB3860/1 to the Exec Comm for introduction on 12/15/09. You asked if someone from our office could be there in case there are any questions. I checked with your office and they thought that the Exec Committee was meeting on 12/15/09 at 1 p.m. in 201SE. Is that correct? If so, we will have a G.A.B. representative there.

Thanks again. Sorry I missed your call yesterday.

Shane W. Falk
Staff Counsel
Wisconsin Government Accountability Board
212 E. Washington Avenue, Third Floor
PO Box 7984
Madison, WI 53707-7984
Office: 266-8005
Direct: 266-2094
Shane.Falk@wisconsin.gov



WISCONSIN STATE LEGISLATURE



December 15, 2009

To: Adam Plotkin
Clerk, Committee on Labor, Elections, and Urban Affairs
Office of Senator Spencer Coggs

became SB 435

Dear Mr. Plotkin:

The draft of LRB 3860/1 has two serious flaws.

The first is the elimination of paragraph 7.23(1)(b). This deletion allows for the destruction of election records which federal statute (title 42 chapter 20 subchapter II section 1974). Currently, the City of Milwaukee and other municipalities with Automarks are destroying election record covered by paragraph 7.23(1)(b). This proposed statute change is an attempt by the clerks to make their current election record destroying practices legal by changing the statute so the statutes come in line with current custom. Even with the change to state statute the federal requirement to retain these Automark records remains.

The second problem is the narrowing the scope of paragraph 7.23(1)(g) to those elements which tabulate votes. This narrowing of scope again puts the state statute at variance with the federal statutes for those pieces of equipment which require removable media to operate properly, but which do not do addition.

Lastly, I believe the retention period of 14 days to be too short and that a back-up of the memory cards must be made and retained for at least 60 days for non-federal elections.

My questions are:

1. How do enter these specific concerns into the official record.
2. What documentation if any do you need supporting my claim that ES&S destroyed election records covered by 7.23 for the November 4, 2008 election?
3. What documentation do you need supporting my claim that the City of Milwaukee Election Commission destroyed election records covered by 7.23 for the November 4, 2008 election?
4. Would you like a copy of the criminal complaint currently before the office of AG Van Hollen regarding the destruction of election records covered by 7.23 by the Clerk of Washington county November 7, 2006 election?

If you would like to discuss these concerns, you may contact me at 414-375-5777 during business hours or at my home phone of 262-238-8940.

Thank you for your time on this matter.

In Liberty,

John Washburn



Plotkin, Adam

From: John Washburn [john@washburnresearch.org]
Sent: Thursday, February 04, 2010 7:10 AM
To: Plotkin, Adam
Subject: In prep for hearing on SB 435

Attachments: My Version of SB-435.pdf; 20100127-the GAB The Johnny Yoo of Election Administration.pdf



My Version of 20100127-the GAB
SB-435.pdf (200 ... The Johnny Yo...

Dear Mr Plotkin:

Please find attached two documents in preparation for the public hearing you will hold sometime in February. The first is a bit of background on why the legislation is before you and the second is my proposed version and the reasons underlining my proposed language.

I look forward to attend and presenting testimony at the upcoming public hearing. If you have any question you may call me at 414-375-5777

In Liberty,
John Washburn

-----Original Message-----

From: Plotkin, Adam [mailto:Adam.Plotkin@legis.wisconsin.gov]
Sent: Tuesday, January 12, 2010 1:31 PM
To: john@WashburnResearch.org
Subject: RE: LRB 3860/1 --> Bill Number ???

John, I apologize for not getting back to you sooner, it's been very busy lately. The bill number is Senate Bill 435.

We have not yet scheduled a hearing on SB 435, but if you go to this website - <http://notify.legis.state.wi.us/> - you can sign up to get notice when the bill is scheduled. And of course the hearing will be public and you will be able to testify.

Thank you,
Adam

Adam Plotkin
Clerk, Committee on Labor, Elections, and Urban Affairs Office of Senator Spencer Coggs
phone, 608-266-2500 fax, 608-282-3546 -----Original Message-----
From: john@WashburnResearch.org [mailto:john@WashburnResearch.org]
Sent: Wednesday, December 30, 2009 3:40 PM
To: Plotkin, Adam
Subject: FW: LRB 3860/1 --> Bill Number ???

Dear Mr. Plotkin:

My contact information is:
John Washburn
N128W12795 Highland Road
Germantown, WI 53022
414-375-5777 (Cell/Office)

Original Message:

From: john@WashburnResearch.org john@WashburnResearch.org
Date: Wed, 30 Dec 2009 16:32:30 -0500

To: Adam.Plotkin@legis.wisconsin.gov
Subject: LRB 3860/1 --> Bill Number ???

To Adam Plotkin

Dear Mr. Plotkin:

I have three requests.

1) What is the senate bill number for LRB 3860/1 (Relating to: the period for retention of certain election materials in state and local elections)

which was introduced during the December 15, 2009 Executive session of the Senate Committee on Labor, Elections, and Urban Affairs? I would like to track the progress of this piece of legislation.

2) How do I sign up to receive notification of when testimony on the destructive, deleterious, and felonious effects of this proposed legislation?

3) I would like to present testimony of the history and effects of this legislation as a counter-point to the testimony to be presented Kevin Kennedy, Executive Director of the Government Accountability Board.

mail2web - Check your email from the web at <http://link.mail2web.com/mail2web>

mail2web LIVE - Free email based on Microsoft(r) Exchange technology -
<http://link.mail2web.com/LIVE>

No virus found in this incoming message.

Checked by AVG - www.avg.com

Version: 8.5.432 / Virus Database: 270.14.138/2618 - Release Date: 01/13/10 07:35:00

2009 Senate Bill-435

1
2
3
4 AN ACT to amend 7.23 (1) (f), 7.23 (1) (g), 7.23 (1) (h), 7.23 (2) and 7.24; and to create 5.02
5 (4s) and 5.91(19) of the statutes; relating to: the period for retention of certain election materials
6 in state and local elections.
7

8 **Section 1.** 5.02 (4s) of the statutes is created to read:

9 5.02 (4s) "Federal election" means any election at which candidates for the office of
10 President, Vice President, presidential elector, Member of the Senate, or Member of the House of
11 Representatives appears on the ballot.
12

13 **Section 2.** 5.02 (26) of the statutes is created to read:

14 "Election Record" means any nomination paper, ballot application, financial report, affidavit,
15 ballot, poll list, form, statement, or other record created pursuant to some provision of chs. 5 to
16 12.
17

18 **Section 3.** 5.05(5s)(e)5 of the statutes is created to read:

19 5.05(5s)(e)5 Any records obtained or prepared by the board, including the full text of any
20 complaint received by the board, in connection with any investigation initiated under chs. 5.
21

22 **Section 4.** 5.91(19) of the statutes is created to read:

23 If the system includes an electronic voting machine, the system must support transferring the
24 contents of any detachable recording units or compartments to disk or other recording medium as
25 provided in s. 7.23 (1)(g). The disk or other recording medium must be of a form as can be
26 retained in the manner provided in s. 7.24(2) and in a for which can be retained for duration
27 provided in s. 7.23 (1)(g).
28

29 **Section 5.** 7.23(1)(b) of the statutes is amended to read:

30 Subject to 7.23(1)(g), detachable recording units and compartments used by a voting machine
31 recorders Machines which are essential for proper operation of voting machines may be cleared
32 and reactivated 14 days after any primary and 21 days after any other election.

1
2 **Section 6.** 7.23(1)(g) of the statutes is amended to read:

3 Detachable recording units and compartments for use with electronic voting machines may
4 be cleared or erased 14 days after any primary and 21 days after any other election. Before
5 clearing or erasing the units or compartments, a municipal clerk shall transfer the ~~data contained~~
6 in the contents of the units or compartments to a disk or other recording medium which may be
7 erased or destroyed 22 months after the election to which the data relates.
8

9 **Section 7.** 7.23(1)(h) of the statutes is amended to read:

10 7.23(1)(h) ~~Ballots~~ Except as provided in par. (f), ballots may be destroyed 30 days after an
11 election.
12

13 **Section 8.** 7.23(2) of the statutes is amended to read:

14 7.23 (2)(a) If a recount is pending or if the time allowed for filing a recount petition at any
15 election or an appeal or petition for review of any recount determination or decision at an
16 election has not expired, no materials may be destroyed until after the recount is completed and
17 the applicable time period has expired. In addition, if there is a demand for a recount, notice of
18 an election contest or any contest or litigation pending with respect to a recount at an election,
19 materials may be destroyed and recorders, recording units or compartments may be cleared or
20 erased only by order of the judge in whose court in which litigation is pending or if no litigation
21 is pending, by order of any circuit judge for the affected jurisdiction.

22 7.23 (2)(b) Upon petition of the attorney general or a district attorney or U.S. attorney for the
23 affected jurisdiction, a circuit judge for the affected jurisdiction may order that specified
24 materials not be destroyed or that specified recorders, units or compartments not be cleared or
25 erased as otherwise authorized under this subsection until the court so permits. The governor
26 may by order permit the clearing of voting machine recorders on machines needed to conduct a
27 special election prior to the time authorized under this subsection, unless there is a demand for
28 recount, notice of an election contest or a contest or litigation pending, or a court of record orders
29 that the recorders not be cleared.

30 7.23 (2)(c) Upon receipt by the Board of a complaint initiated under s 5.06 or under s 5.061,
31 no election records related to the complaint may be destroyed until after the Board has disposed
32 of the complaint. In addition, election records may be destroyed and recording units or

1 compartments may be cleared or erased prior to the disposition of the complaint only with the
2 written permission of the Board.

3
4 **Section 9.** 7.24 of the statutes is amended to read:

5 7.24(1) The filing of a nomination paper, ballot application, financial report, affidavit, or
6 other form or statement with the appropriate official or agency responsible for accepting such
7 materials under chs. 5 to 12 irrevocably transfers the legal title to such official or agency,
8 regardless of the sufficiency of the filing.

9 (2) Election records are presumed to have an absolute right of access. Election records shall
10 be kept in the custody of a municipal clerk, a county clerk, an election commission, or the
11 Government Accountability Board. The custodial official or agency ~~shall retain~~ is required to
12 keep all election materials records until destruction or other disposition is authorized under s.
13 7.23.

1
2
3
4 **Analysis by John Washburn**

5 **Section 1.**

6 The definition of “federal election” comports better with the definition of “federal election”
7 found in federal statutes. For example is US Senator a “national office” given the jurisdiction of
8 Senator is limited to the State of Wisconsin?

9 **Section 3.**

10 The Wisconsin Legislature erred grievously when the statutory changes which created the
11 Government Accountability Board also made election complaints secret. The changes to
12 5.05(5s) define all investigations by the GAB as secret. This is bad policy with regard to
13 complaints of election law violations. The kinds of investigations the Board may investigate are
14 those initiated under:

- 15 1. Chapter 5. These are investigation into complaints that allege:
- 16 a. Election law has been or will be violated which are reported directly to the Board
 - 17 (s. 5.06), or
 - 18 b. An action or in action by an election official must be corrected in order to enforce
 - 19 state election law. (s. 5.08)
 - 20 c. A violation of the Help America Vote Act) has or will occur. (s. 5.061)
- 21 2. Chapter 11. These are investigation into complaints regarding the violation of state
- 22 campaign finance laws.
- 23 3. Subch. III of ch. 13. These are investigation into violations of the lobbying and expense
- 24 reporting.
- 25 4. Subch. III of ch. 19. These are investigation into ethics violations.

26
27 The statutory change proposed in section 3 is to remedy this error and make the investigation
28 of election misconduct a matter open to public view.

29
30 **Section 4.**

31 Currently the GAB has certified for use in the state voting systems which do not support the
32 statutory provision to make backup ups of the removable memory cards used in those systems.

1 This addition to the statutes makes express that a minimum requirement of a voting system
2 certified for use in the state is that that electronic voting system can make the backup required
3 under 7.23(1)(g) and that the resulting records can be retained by the clerk, commission, or
4 Board staff as required by 7.24.

5
6 **Section 5.**

7 The legislation proposed by the GAB moves to repeal 7.23(1)(b). This is a grave mistake for
8 two reasons; the contents should not be allowed to be cleared on election night and all vital
9 memory cards should be retained and preserved not a vendor-selected subset of memory cards.

10 The first reason is that with the repeal of 7.23(1)(b) a would be within the bounds of the law
11 if he/she were to make the 7.23(1)(g) backups and clear the contents of the removable memory
12 cards on election night. The requirement to keep the contents of the memory card in situ for 14
13 to 21 days allows candidates and the public the time to access whether the contents of the
14 removable memory cards should or should not be included in a recount, contest, complaint or
15 other action regarding the election. Allowing the contents of the removable memory cards
16 within days of an election infringes on the fundamental right of the public, political parties, and
17 candidates to oversee the election administered on their behalf.

18 The second reason the repeal is a grave mistake is that the repeal of this section greatly limits
19 which removable memory cards must be backed up. This repeal coupled with the GAB proposed
20 language for 7.23(1)(g), "*tabulating equipment*", limits the requirement to retain and preserve
21 the contents of memory cards to only those cards used in voting equipment which the vendor
22 acknowledges do addition. Depending on the equipment vendor to decide which if any memory
23 card contents will preserved and retained is poor public policy. Make no mistake it will be the
24 equipment vendors which decide which if any memory cards will be backed up, because only the
25 vendors can determine what is or is not tabulating equipment and what is contents are data and
26 what contents are non-data. This is because, as with other electronic election records, exact the
27 contents of a removable memory card are secret and vigorously protected by the equipment
28 vendors as trade secrets. Since many of the contracts between the vendors and election clerks
29 forbid the clerks from examining the contents of the memory cards or from examining other
30 technical aspects of the voting system they have purchased, these election records are hidden
31 even from the clerk who use them. Because of this secrecy the vendor, in oracle-like,
32

1 pronouncement will dictate which electronic, election records can and cannot be retained and
2 preserved.

3 Two examples should suffice to illustrate these dangers. The first is the removable memory
4 card for the AutoMark ballot marking device (BMD) and the second is the removable memory
5 card for a central count scanner.

6 Currently, the City of Milwaukee does not retain or preserve the contents of the removable
7 memory cards used by the AutoMark BMD's. An AutoMark will not mark a ballot if the
8 removable memory card is not present in the machine. Thus, the removable memory card is
9 "*essential for proper operation*" of the AutoMark. The City Election Commission maintains that
10 s 7.23(1)(g) as currently written does not apply to the AutoMark BMD's for two reasons. The
11 first reason is that the AutoMark is not an "*electronic voting system*" as that term is defined in s
12 5.02(4m). The second reason is that even if the AutoMark is an "*electronic voting system*"
13 7.23(1)(g) does not apply because the AutoMark does not tabulate votes; i.e. does no addition.
14 The removable memory card for an AutoMark contains the *ballot definition file* which in turn
15 controls how and if a touch on the screen will be translated into a mark on the ballot it prints.
16 The removable memory card also presumably (the exact truth in this case is a trade secret)
17 contains the audio files which provide audio instruction to the blind. I believe the contents of a
18 removable memory card used by an AutoMark BMD should be preserved because the ballot
19 definition file and audio files should be retained and preserved.

20 The second example concerns central count scanners. Central count scanning is where large
21 volumes of ballots (usually from many wards) are processed in one central location by a single
22 optical scanner designed to scan stacks of dozens or hundreds of ballots in a single operation. For
23 the Diebold/Premier systems, if a central count scanner is employed then the removable memory
24 card for the scanner contains the ballot definition file for each ballot for every ward the scanner
25 is expected to receive and the scanner is networked directly to the Diebold/Premier election
26 management software, GEMS. The stack of ballots is placed in the hopper. The ballot definition
27 file is used to determine how and if a mark on the ballot should accrue to a candidate. That
28 recognition information is sent over the wire to GEMS and the GEMS software tabulates the
29 votes encoded on the ballot to the designated candidate(s). In this scenario the central count
30 scanner is not *tabulating equipment*. Under the language proposed by the GAB for 7.23(1)(g),
31 the memory card used to recognize the marks on hundreds if not thousands of ballots would be
32 retained or preserved. It is a trade secret whether the central count scanning in Juneau and Sauk

1 counties with Optech IV central count scanners tabulate or work like the Diebold/Premier central
2 count scanning.

3 I believe the removable memory cards for AutoMarks, central count scanners, precinct
4 scanners, and DRE touch screens all should be retained and preserved. The test for what should
5 and should not be preserved and retained is a reasonable test. If the voting machine cannot work
6 without the removable memory card, then the contents of that card should be retained and
7 preserved. If the voting machine can work without the removable memory card present, then the
8 contents of that card need not be retained and preserved.

9
10 **Section 6.**

11 I believe the legislative changes proposed by the GAB for 7.23(1)(g) are deeply flawed and
12 that the current statute as is quite serviceable. The problem with the current law is it has never
13 been tried because compliance has never been enforced. My slight change to the existing statute
14 is to remove the arbitrary data/non-data distinction. My change requires the whole contents of
15 the removable memory cards be retained and preserved, regardless of any arbitrary, vendor
16 designation as to what the 1's and 0's mean; I.e. which 1's and 0's are "data" and which 1's and
17 0's are not data.

18 The second flaw in the changes proposed by the GAB for 7.23(1)(g) is that state and local
19 election are exempted from the 22 month retention requirement. This means for non-federal
20 elections the backup made of the contents of a removable memory cards made pursuant to
21 7.23(1)(g) would be retain for only 90 days [7.23(1)(k)]. This is a retention period shorter than
22 for the poll lists used in the election [24 or 48 months 7.23(1)(e)]. I believe the contents of the
23 memory cards should be retained for as long as poll list for the same election are retained. Given
24 the limited bulk of CD-ROMs as compared to paper poll lists this seems reasonable, but, the
25 current statute is for the fixed retention term of 22 months and absent a compelling reason the
26 retention time of the current statute should not be altered.

27
28 **Section 7.**

29 I agree the alterations proposed by the GAB. This change removed the contradiction
30 between 7.23(1)(f) and 7.23(1)(h) regarding the retention period for the retentions of ballots.

31
32 **Section 8.**

1 If an election is contested, under investigation, or has had a complaint filed against it, the
2 records for that election should not be destroyed. The changes here make explicit the three
3 separate and distinct situations under which an election may be under investigation or litigation.

4 To aid in this organization each case is separated out into a separate paragraph.

5 Paragraph a is the language proposed by the GAB.

6 Paragraph b is the language of the existing statute.

7 Paragraph c is my addition to cover the case when the election is subject to a contest covered
8 by the phrase “*or any contest*” in the current statutes. This concern arises out of my own
9 personal experience in filing a complaint to the State Election Board back in March 2005. The
10 complaint was in-artfully written, but alleged the following for the November 2, 2004 election:

- 11 1. Ballot box stuffing in some wards in the City of Milwaukee,
- 12 2. The failure to perform a local board of canvassing pursuant to s 7.51 in the following
13 jurisdictions:
 - 14 a. Several wards within the City of Milwaukee,
 - 15 b. Two wards within the Village of Menomonee Falls
 - 16 c. District #1 of the Village of Germantown
- 17 3. The use of the poll tape generated by the Village of Germantown after the election
18 workers for District #1 of the Village of Germantown used even though the officials
19 knew the numbers printed on it were incorrect. The village Clerk and the poll workers for
20 district #1 had conclusively proved the Diebold AccuVote OS optical scanner had failed
21 to correctly generate the statistic: “*Number of Ballots Counted*”. I contended that this
22 failure of the machine (publically acknowledged by Diebold/Premier on January 25, 2008
23 with Product Advisory Notice, PAN2008-005), fatally pierced the “presumption of
24 correctness” established by 7.51(2)(h) and that it was improper for the Clerk of the
25 village of Germantown to accept the numbers generated the optical scanner as if those
26 numbers were correct when the clerk and the poll workers had spent more than 3.5 hours
27 proving the first number printed by the machine (*Number of Ballots Counted*) was
28 incorrect.

29
30 The merits of these allegations are neither part of nor relevant to this analysis.
31
32

1 The State Elections Board finally deigned to hear the matter 30 months later on September
2 12, 2007 by which time all the election records from Menomonee Falls and Germantown had
3 been destroyed. Without any of the election records to examine the SEB dismissed the
4 complaint. The staff of the then SEB contended there was no violation of 7.23(2) because a
5 complaint before the Board initiated under some provision of ch. 5 did fall within the definition
6 of “*or any contest*” of 7.23(2). My addition of paragraph 7.24(2)(c) is to insure no one else
7 enjoys a similar destruction of records in the future.

8
9 **Section 9.**

10 The purpose of this section is to first define election records as open record and second to put
11 election records on the same legal footing as the “*required to be kept*” records defined in ch. 59.
12 Many electronic, election records are not even open records let alone “*required to be kept*”
13 records. “*required to be kept*” records are defined in s. 59.20(3) and include records such as:

- 14 1. Records of the proceedings of a County Board [s. 59.23(2)(a)]
- 15 2. A true and correct account of the receipt and expenditure for the county [59.25(2)(d)]
- 16 3. Keep a true and exact register of all prisoners committed to any jail under the charge of a
17 county sheriff. [59.27(2)]
- 18 4. Records of a county circuit court [59.40(2)(a) and 59.40(2)(b)]
- 19 5. Recordings of all deeds and mortgages within a county [59.43(1)(a)]

20
21 These records have three characteristics which distinguish them from the general records
22 covered by s. 19.31 to 19.37 which are:

- 23 1. The creation of the record is expressly mandated by statute.
- 24 2. The custodian of the record is expressly mandated by statute.
- 25 3. The retention period of the record is expressly mandated by statute.

26
27 Election records under the current provisions of ch. 2 to 12 currently have all the same
28 properties as “*must keep*” records defined under ch. 59. The creation of election records are
29 expressly mandated by statute; e.g. Tally sheets and inspectors’ reports [s. 7.51(4)(a)], Official
30 registration list [s. 6.36], registration forms [s. 6.33], etc. The custodian of election records is
31 expressly mandated by statute [s. 7.24]. The retention period of election records is expressly
32 mandated by statute [s the various paragraphs of 7.23]. Election records and not simple ordinary

1 open records but are records as vital or more vital than the registry of prisoners. Because of this
2 election records should be accorded the same extraordinary access accorded to other "*required to*
3 *be kept*" records.
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The Wisconsin GAB: The Johnny Yoo of Election Administration

My blogging has been very sparse (nothing since May 2, 2009). That is not for lack of things to write about, but for the lack of time to write. One of the things consuming my time for the last year has been the usual and customary practice of election clerks in Wisconsin to destroy certain electronic election records and the legal cover provided by the Government Accountability Board (GAB) to carry out the destruction of those records. In the same way that John Yoo provided and continues to provide legal cover to President Bush and President Obama to violate federal law, the GAB provides legal cover to clerks so that the clerks may destroy election records which the clerks deem too inconvenient to preserve and retain.

In order to set the context for the last two years on this matter I will show my fundamentalist, Christian roots and begin with a creedal statement:

- I believe there cannot be effective oversight of an election (by an election official or by the public) if any election records are secret.
- I believe ballots are not secret, but anonymous.
- I believe the content of a removable memory card used by a voting machine during an election is an election record as that term is used in state and federal law.
- I believe that **ALL** of the content of a removable memory card is an election record.
- I believe the contents of a removable memory card contain an admixture of some or all of the following:
 - programming,
 - ballot "images"¹,
 - audit logs,
 - event logs,
 - vote totals at various levels of aggregation,
 - "ballot definition files"²,
 - audio files,
 - screen text,
 - page/screen layout,
 - whole, mountable file systems.
- I believe the above list is likely incomplete because the exact contents of a removable memory card are secret and vigorously protected as trade secrets.
- I believe election records should not be secret.
- I believe election records are records that should have an "absolute right of access". Under current law some election records in whole or in part are not even open records, much less records with an "absolute right of access".
- I believe the contents of a removable memory card used to aid in the administration of an election should be preserved and retained by jurisdictions for the same length of time as the jurisdiction is required to preserve and retain the poll registration lists used to administer the same election.
- I believe state law, WI Stats. 7.23(1)(g), requires the contents of a removable memory card used by a voting machine in the administration of an election be preserved and retained for 22 months

- I believe federal law, Title 42, Chapter 20, Subchapter II, § 1974, for federal elections, requires the same; preservation and retention for 22 months
- I believe state law, WI Stats. 7.24, requires the backups made of the contents of a removable memory card pursuant to WI Stats. 7.23(1)(g) remain in the custody and control of the election official for the entire retention period.
- I believe the contents of a removable memory card used in a voting machine is **MORE** important than the voter poll lists used in the same election. This is because the contents of the memory card actively and directly determine how the election is administered, where the poll books do not. If nothing else (and there is more), the contents of the removable memory card control how or if marks on the paper ballot or touches on the touch screen will be recognized and to whom votes will accrue based on those marks or touches. These are the election officials' duties under WI Stats. 7.50 even if those duties have been delegated to an inscrutable black box.

The Government Accountability Board (GAB), its staff, and the clerks who head the Wisconsin Towns Association, Wisconsin County Clerks Association, and the Wisconsin Municipal Clerks Association do not agree with most, if any, of the above credos.

I object to the notion that there can be such things as secret election records. No paper election record is secret.

- The ballot is not secret. It is anonymous.
- The confidential poll lists of WI. Stats 6.47 are not secret. They are confidential. They are known to those election officials for whom the knowledge is necessary in order to administer the election and only for the time needed to administer the election.

In contrast though, many electronic election records generated by electronic voting machines are regarded by the state as secret; more precisely trade secreted. The contents of these records are not available for inspection by the public and in many cases are not even known to the election officials who use those records to aid them in administering an election.

Again, I believe there cannot be effective oversight of an election (by an election official or by the public) if any of the election records are a secret.

In the summer of 2007, I began looking for election records which were not governed by the Help America Vote Act (HAVA), not part of the new equipment purchases, not part of the new security regulations, not part of administrative rule GAB5, but which were likely to be considered secret. I selected the 20-year old requirement to backup the contents of removable memory cards. The backups made under WI Stats. 7.23(1)(g) fit my criteria as election records of long standing, but which were likely be kept secret — via trade secrecy claims — from both the public and the election officials who rely on them.

My assumption that the backups were records of long-standing was incorrect as I reported here and here. I discovered the statutory requirement to backup the contents of removable memory cards, in the 20-year history of the statute, had **never** been obeyed by any election official at any time.

Naïvely thinking breaking the law might be a crime, I reported my discovery to the local District Attorney, who declined to investigate. In January 2008, I elevated my report to the Office of the Attorney General of Wisconsin, who immediately kicked it over to the newly-created Government Accountability Board. I appeared before the GAB for nearly every meeting in 2008 arguing that obeying the statutes by preserving and retaining the contents of removable memory cards was not just good policy, but that failing to comply with WI Stats. 7.23(1)(g) is felony election fraud under WI Stats. 12.13(2)(b)7.

From minute 1:35:00 to 1:44:10 of the recording of the GAB August 10, 2009 meeting is a summary of my contention that the GAB is "all promulgation and no enforcement"; an assessment which applies to the preservation and retention of the contents of removable memory cards. Since at least 1995, again in 2006, as part of the Election Administration Manual, and as part of the official record retention schedule, the GAB and its predecessor, the State Election Board, informed clerks of the State of their duty to make the backups required by WI Stats. 7.23(1)(g), however neither Board has done anything to verify that these election records were preserved and retained.

My concerns expressed in the August 10, 2009 meeting culminated in two documents prepared by the GAB staff addressing the issue of maintaining electronic election records: the December 17, 2008 Memo and the December 18, 2008 Memo. I believe both to be flawed in that both documents counsel the municipal and county clerks to violate WI Stats. 7.23(1)(g) and/or WI Stats. 7.24 in any one of several GAB-approved ways.

- Option C of the December 17, 2008 memo is best paraphrased as: "Let the vendors retain the records." This is an express violation of WI Stats. 7.24, which reads [emphasis mine]:

The official or agency shall retain all election materials until destruction or other disposition is authorized under s. 7.23.

Prohibiting the outsourcing of record retention is not just good law it is good public policy. For examples of the problems associated with outsourcing election administration to private corporations and third parties, see "Vendors are Undermining the Structure of U.S. Elections" by Ellen Theisen of VotersUnite.org.

- Option A of the December 17, 2008 memo counsels the clerks to backup the programming and data stored on the central election management software rather than retain the actual contents of the memory cards. This is advice to retain what **ought** to have been on the memory card in lieu of what was **actually** on the memory card. One only needs to watch Hacking Democracy to understand why this is bad policy and why the GAB promulgated rules in order to ensure what **ought** be on a removable memory cards is what is **actually** on the memory cards when those contents administer an election on behalf of the clerk. But, the GAB's policy is in direct opposition to the legislature's mandate. Backing up what is convenient and *might* be on a removable memory card rather than what is *actually* present on the memory card is expressly forbidden by WI Stats. 7.23(1)(g).

- Option 1 of the December 18, 2008 memo to the municipal clerks is a restatement of Option A, "*Backup whatever the vendors say is convenient to backup*" with the addition that if it is **claimed** the PROM pack has no initial programming on it, then don't backup the event logs or ballot "images"¹ or other information on the PROM pack either.
- Option 4 of the December 18, 2008 memo is a restatement and clarification of Option A: "*Backup what **ought** to be on the memory cards in lieu of backing up what is **actually** on the memory cards*".

I spent the spring, summer, and fall of 2009 surveying which of the statute-violating GAB recommendations various clerks have adopted. Specifically, I asked various county clerks (and, in Oneida County, the municipal clerks) for the backups made on or before February 17, 2009 pursuant to WI Stats. 7.23(1)(g) of the memory cards used in the November 4, 2008 election. The results so far are:

- **City of Milwaukee:** No backups of Automark cards made. The City Election Commission contends both that the AutoMark is not a voting machine as that term is used in WI. Stat. 5.08(4m) and that even if it were a voting machine no backups are required because the Automark neither stores vote totals on the removable memory card nor tabulates votes. A file which is not the contents of the Optech memory card is kept in lieu of an actual backup of the Optech memory cards.
- **Washington County:** All copies of the backups I requested had been made, copies were delivered to me, and the copies seem to be complete backups of the binary data found on the memory cards used by the AccuVote OS and AccuVote TSx machines.
- **Sheboygan County:** Files which clearly are not the contents of the M100 memory cards are kept in lieu of a backup of the actual contents of the memory cards.
- **Oneida County:** The "let the vendor do it" approach was used. The vendor, ES&S, destroyed the records, made no backups, and states categorically that ES&S does not and will not retain election records on behalf of a customer jurisdiction. This contradicts the "research" done by the GAB staff described in the December 17, 2008 memo.
- **Waukesha County:** Unknown. I made open records requests for the backups of 8 different memory cards. Seven of those open records are tied up by the County's claim that portions of the requested records are secret and that it will cost \$470 (\$67.14 per requested record) to redact the secret portions of 7 of the 8 backups requested. Access to copies of these 7 backups is contingent on my paying the \$470 fee. I am contesting both the fee and the claim that election records can be secret. Regarding the eighth back up requested, the response was that the unnamed vendor to the Town of Waukesha has gone bankrupt and apparently has taken the records with them.

The GAB staff has submitted to the legislature bills AB-646 and SB-435 in order to "remedy" the memory card backup "problem". The proposed legislation:

- Removes the requirement to make backups for non-federal elections.
- Removes the requirement to save the memory cards in situ for at least 21 days.
- Exempts ballot marking devices and central count scanners if it is claimed the equipment does not tabulate votes. A relevant quote from this report from the California Top to

Bottom Review explaining why a central count scanner (such as used in Sauk and Juneau counties) would be exempted is:

*During the election, the GEMS server is **responsible** for performing image processing on the ballots scanned by the Central Count AV-OS. After the election, the GEMS server **tallies** the election results and is used for generating election result reports and databases.*

- Fails to require voting equipment certified by the GAB actually have the capability to create backups and to create those backups in a form or on a medium over which the clerks can maintain custody and control for the entire retention period.

This proposed legislation demonstrates the failure to communicate when there are fundamental and irreconcilable differences in world views. The GAB staff and I disagree on fundamentals such as:

- Are the contents of a removable memory card used to administer an election an election record?
- Whether records or not, should the contents of a removable memory card be preserved for at least as long as a poll list?
- If preserved, then preserved by whom?
- Does a concept similar to "adverse possession" apply to election statutes? I.e. if a statute has been un-enforced for the past 20 years by the responsible executives, then can the statute continue to be un-enforced for the next 20 years? I might consider that argument concerning Wisconsin's Oleo regulations, but not for something as vital as elections.

The only remedy for parties with such irreconcilable differences is arbitration by a third party whose authority is accepted by the disputing parties. In the case at hand there are only five such parties with the authority to arbitrate the dispute among the GAB, the county and municipal clerks, and myself. I am open to suggestions if there are more than these five:

- The legislature,
- Any of the 72 county District Attorneys of the state,
- The Office of either US Attorney located in the state,
- A Wisconsin state court,
- A Federal court,

The Attorney General of the State of Wisconsin is not included here because under the same statute which created the GAB, the Office of the Attorney General of Wisconsin is prohibited from investigating election crimes unless there is a specific referral from the GAB or from a county DA.

I am now pursuing these avenues of arbitration.

- I have filed a statement with the Oneida County sheriff's department documenting my allegation that ES&S destroyed election records from the November 4, 2008 election.
- I have filed a statement with the Milwaukee office of the FBI documenting my allegation that the City of Milwaukee Election Commission destroyed election records from the November 4, 2008 election by failing to comply with WI Stats. 7.23(1)(g).
- I have filed a statement with the Milwaukee Police Department documenting my allegation that the City of Milwaukee Election Commission destroyed election records from the November 4, 2008 election by failing to comply with WI Stats. 7.23(1)(g).
- I am considering a mandamus action to force the GAB and/or the clerks of the state to comply with WI Stats. 7.23(1)(g)
- I am exploring how unmerchantability may affect the certification of a voting system. I do not believe the claim by the voting machine vendors that their systems:
 - can write to a removable memory card,
 - read from the removable memory card, but
 - cannot backup the removable memory card.

Again, I do not believe this, but, if true, then the vendors are admitting their systems are unmerchantable as that term is used in the under the Wisconsin Uniform Commercial Code. Consider the flash drive in your pocket. Do you believe that a system which can write to your flash drive and can read from your flash drive, cannot also make a backup of your flash drive? This is what the clerks claim the vendors have told them about the voting systems the clerks purchased with regard to removable memory cards instead of flash drives.

If voting systems are so poorly designed and constructed that there is no way to make backups of the removable memory cards, then those systems may well be so defective as to be unmerchantable. This because the systems are unfit for the usual and customary purpose for which they were purchased: administering elections in a lawful manner.

That is the story so far with more developments to come.

¹ "Ballot images" are neither pictures nor some graphical representation of the ballot scanned; the terminology is part of the Humpty Dumpty language of the election industry.

² "Ballot Definition File" is another bit of the Humpty Dumpty language of the election industry. Often the "ballot definition file" is neither a single, separate file nor a complete definition of the ballot.



COUNTY CLERK

Brown County

305 E. WALNUT STREET, ROOM 120
P.O. BOX 23600
GREEN BAY, WI 54305-3600

DARLENE K. MARCELLE

PHONE (920) 448-4016

FAX (920) 448-4498

COUNTY CLERK

February 10, 2010

Senator Spencer Coggs
Room 123 South
State Capitol
P.O. Box 7882
Madison, WI 53707-7882

*marcelle - dk@
co.browncounty.wi.us*

Dear Senator Coggs,

I am writing regarding Senate Bill-435 and Assembly Bill-646, relating to the period of retention of certain election materials in state and local elections. It has come to my attention that the bill proposes that my office will be responsible for retaining all data collected from federal elections from our Eagle Tabulating Machines on the memory device for that specific machine for a period of 22 months. This would require the purchase of an additional 470 Eagle memory packs at approximately \$255 each for \$119,850. In addition, the Bill also requires additional memory cards for our Automark (handicap accessible) even though this machine only marks ballots. The cost for 470 additional Automark memory cards at \$50 each would add on \$23,500. This makes no sense at all.

The Eagle voting machine uses paper ballots which are stored for 22 months and the memory pack can be reprogrammed to recreate an election. Therefore, there would be no logical reason to purchase additional memory packs. Likewise, the election results are tabulated, certified, and stored electronically so there isn't any purpose to preserve a memory pack for 22 months. Is the State of Wisconsin prepared to fund counties for the cost of mandates stated in SB-435 and AB-646? In Brown County alone, we are estimating close to \$150,000. And, we are only 1 of 72 counties!

I believe that our current method of storing Election information is completely accurate, acceptable and reliable. All of our past elections results are kept extremely secure within our server and I see no reason to keep the same exact information retained on a memory pack for 22 months. The requirements of SB-435 and AB-646 are an excessive burden for all counties and an unnecessary expense for the taxpayers of the State of Wisconsin.

I look forward to hearing from you regarding SB-455 and AB-646 and please feel free to ask questions.

Thank you,



Darlene Marcelle
Brown County Clerk

Copies – Wisconsin Representatives Jeff Smith and Jeff Stone; Government Accountability Board Kevin Kennedy, Shane Falk and Nat Robinson; Brown County Delegation Senators Lasee, Cowles, and Hansen, and Representatives Bies, Zigmunt, Ott, Montgomery, Nelson, Soletski, Nygren, and Van Roy; and Brown County Executive Tom Hinz, Lobbyist Jamie Sellen; and County Board Chairman Guy Zima



Plotkin, Adam

From: John Washburn [john@washburnresearch.org]
Sent: Wednesday, April 07, 2010 6:42 AM
To: 'Washburn, John'; Plotkin, Adam
Cc: Sen.Coggs; Sen.Wirch; Sen.Lehman; Sen.Lasee; Sen.Grothman
Subject: RE: April 8, 2010 hearing on SB-435
Attachments: My Version of SB-435.pdf; 20100127-the GAB The Johnny Yoo of Election Administration.pdf

Dear Mr. Plotkin:

Attached is my proposal for a substitution of the whole for SB-435. Followed by an analysis of the merits of the proposed changes.

Also attach is a bit of the history which prompted the GAB to come to the legislature with is proposed legislation. This bill is part of the GAB "solution" discussed at the end of the article.

From: Washburn, John [mailto:John.Washburn@manpower.com]
Sent: Tuesday, April 06, 2010 2:29 PM
To: Adam.Plotkin@legis.wisconsin.gov
Cc: 'john@washburnresearch.org'
Subject: April 8, 2010 hearing on SB-435

Dear Mr. Plotkin:

I have three questions.

- 1) Do I have to do anything special in order to submit my written comments to the committee? I will make every effort to appear in person, I will be tied up in Milwaukee testing software for Manpower from 2:00 pm to 5:00 pm. Will the hearing last much past 12:00 pm?
- 2) Will my prior submissions to the clerk of committee be made available the members of the committee?
- 3) Of particular note regarding my prior submissions, will my proposed substitution of the whole for SB-435 be made available to the members of the committee prior to the hearing?

You may reach me at either of the two email address above or by telephone at 414-375-5777.

John Washburn
 Senior QA Analyst
 Global Solutions Delivery

Manpower
 100 Manpower Place
 Milwaukee, WI 53212

Office: +1 414-906-6636
 Cell: +1 414-375-5777

04/07/2010

Email: john.washburn@manpower.com

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Version: 9.0.800 / Virus Database: 271.1.1/2795 - Release Date: 04/06/10 13:32:00

04/07/2010

2009 Senate Bill-435

1
2
3
4 AN ACT to amend 7.23 (1) (f), 7.23 (1) (g), 7.23 (1) (h), 7.23 (2) and 7.24; and to create 5.02
5 (4s) and 5.91(19) of the statutes; relating to: the period for retention of certain election materials
6 in state and local elections.

7
8 **Section 1.** 5.02 (4s) of the statutes is created to read:

9 5.02 (4s) "Federal election" means any election at which candidates for the office of
10 President, Vice President, presidential elector, Member of the Senate, or Member of the House of
11 Representatives appears on the ballot.

12
13 **Section 2.** 5.02 (26) of the statutes is created to read:

14 "Election Record" means any nomination paper, ballot application, financial report, affidavit,
15 ballot, poll list, form, statement, or other record created pursuant to some provision of chs. 5 to
16 12.

17
18 **Section 3.** 5.05(5s)(e)5 of the statutes is created to read:

19 5.05(5s)(e)5 Any records obtained or prepared by the board, including the full text of any
20 complaint received by the board, in connection with any investigation initiated under chs. 5.

21
22 **Section 4.** 5.91(19) of the statutes is created to read:

23 If the system includes an electronic voting machine, the system must support transferring the
24 contents of any detachable recording units or compartments to disk or other recording medium as
25 provided in s. 7.23 (1)(g). The disk or other recording medium must be of a form as can be
26 retained in the manner provided in s. 7.24(2) and in a form which can be retained for duration
27 provided in s. 7.23 (1)(g).

28
29 **Section 5.** 7.23(1)(b) of the statutes is amended to read:

30 Subject to 7.23(1)(g), detachable recording units and compartments used by a voting machine
31 reorders Machines which are essential for proper operation of voting machines may be cleared
32 and reactivated 14 days after any primary and 21 days after any other election.

1
2 **Section 6.** 7.23(1)(g) of the statutes is amended to read:

3 Detachable recording units and compartments for use with electronic voting machines may
4 be cleared or erased 14 days after any primary and 21 days after any other election. Before
5 clearing or erasing the units or compartments, a municipal clerk shall transfer the ~~data contained~~
6 in the contents of the units or compartments to a disk or other recording medium which may be
7 erased or destroyed 22 months after the election to which the data relates.

8
9 **Section 7.** 7.23(1)(h) of the statutes is amended to read:

10 7.23(1)(h) ~~Ballots~~ Except as provided in par. (f), ballots may be destroyed 30 days after an
11 election.

12
13 **Section 8.** 7.23(2) of the statutes is amended to read:

14 7.23 (2)(a) If a recount is pending or if the time allowed for filing a recount petition at any
15 election or an appeal or petition for review of any recount determination or decision at an
16 election has not expired, no materials may be destroyed until after the recount is completed and
17 the applicable time period has expired. In addition, ~~if there is a demand for a recount, notice of~~
18 ~~an election contest or any contest or~~ litigation pending with respect to a recount at an election,
19 materials may be destroyed and ~~recorders,~~ recording units or compartments may be cleared or
20 erased only by order of the ~~judge in whose~~ court in which litigation is pending ~~or if no litigation~~
21 ~~is pending, by order of any circuit judge for the affected jurisdiction.~~

22 7.23 (2)(b) Upon petition of the attorney general or a district attorney or U.S. attorney for the
23 affected jurisdiction, a circuit judge for the affected jurisdiction may order that specified
24 materials not be destroyed or that specified recorders, units or compartments not be cleared or
25 erased as otherwise authorized under this subsection until the court so permits. ~~The governor~~
26 ~~may by order permit the clearing of voting machine recorders on machines needed to conduct a~~
27 ~~special election prior to the time authorized under this subsection, unless there is a demand for~~
28 ~~recount, notice of an election contest or a contest or litigation pending, or a court of record orders~~
29 ~~that the recorders not be cleared.~~

30 7.23 (2)(c) Upon receipt by the Board of a complaint initiated under s 5.06 or under s 5.061,
31 no election records related to the complaint may be destroyed until after the Board has disposed
32 of the complaint. In addition, election records may be destroyed and recording units or

1 compartments may be cleared or erased prior to the disposition of the complaint only with the
2 written permission of the Board.

3
4 **Section 9.** 7.24 of the statutes is amended to read:

5 7.24(1) The filing of a nomination paper, ballot application, financial report, affidavit, or
6 other form or statement with the appropriate official or agency responsible for accepting such
7 materials under chs. 5 to 12 irrevocably transfers the legal title to such official or agency,
8 regardless of the sufficiency of the filing.

9 (2) Election records are presumed to have an absolute right of access. Election records shall
10 be kept in the custody of a municipal clerk, a county clerk, an election commission, or the
11 Government Accountability Board. The custodial official or agency ~~shall retain~~ is required to
12 keep all election materials records until destruction or other disposition is authorized under s.
13 7.23.

Analysis by John Washburn

Section 1.

The definition of “federal election” comports better with the definition of “federal election” found in federal statutes. For example is US Senator a “national office” given the jurisdiction of Senator is limited to the State of Wisconsin?

Section 3.

The Wisconsin Legislature erred grievously when the statutory changes which created the Government Accountability Board also made election complaints secret. The changes to 5.05(5s) define all investigations by the GAB as secret. This is bad policy with regard to complaints of election law violations. The kinds of investigations the Board may investigate are those initiated under:

1. Chapter 5. These are investigation into complaints that allege:
 - a. Election law has been or will be violated which are reported directly to the Board (s. 5.06), or
 - b. An action or in action by an election official must be corrected in order to enforce state election law. (s. 5.08)
 - c. A violation of the Help America Vote Act) has or will occur. (s. 5.061)
2. Chapter 11. These are investigation into complaints regarding the violation of state campaign finance laws.
3. Subch. III of ch. 13. These are investigation into violations of the lobbying and expense reporting.
4. Subch. III of ch. 19. These are investigation into ethics violations.

The statutory change proposed in section 3 is to remedy this error and make the investigation of election misconduct a matter open to public view.

Section 4.

Currently the GAB has certified for use in the state voting systems which do not support the statutory provision to make backup ups of the removable memory cards used in those systems.

1 This addition to the statutes makes express that a minimum requirement of a voting system
2 certified for use in the state is that that electronic voting system can make the backup required
3 under 7.23(1)(g) and that the resulting records can be retained by the clerk, commission, or
4 Board staff as required by 7.24.

5
6 **Section 5.**

7 The legislation proposed by the GAB moves to repeal 7.23(1)(b). This is a grave mistake for
8 two reasons; the contents should not be allowed to be cleared on election night and all vital
9 memory cards should be retained and preserved not a vendor-selected subset of memory cards.

10 The first reason is that with the repeal of 7.23(1)(b) it would be within the bounds of the law
11 for a clerk to make the 7.23(1)(g) backups and clear the contents of the removable memory cards
12 on election night. The requirement to keep the contents of the memory card in situ for 14 to 21
13 days allows candidates and the public the time to access whether the contents of the removable
14 memory cards should or should not be included in a recount, contest, complaint or other action
15 regarding the election. Allowing the contents of the removable memory cards to be destroyed
16 within days of an election infringes on the fundamental right of the public, political parties, and
17 candidates to oversee the election administered on their behalf.

18 The second reason the repeal is a grave mistake is that the repeal of this section greatly limits
19 which removable memory cards must be backed up. This repeal coupled with the GAB proposed
20 language for 7.23(1)(g), "*tabulating equipment*", limits the requirement to retain and preserve
21 the contents of memory cards to only those cards used in voting equipment which the vendor
22 acknowledges do addition. Delegating the decision of which, if any, memory card contents will
23 be preserved and retained to the equipment vendor is poor public policy. Make no mistake it will
24 be the equipment vendors which decide which if any memory cards will be backed up, because
25 only the vendors can determine what is or is not tabulating equipment and what contents are data
26 and what contents are non-data. This is because, as with other electronic election records, exact
27 the contents of a removable memory card are secret and vigorously protected by the equipment
28 vendors as trade secrets. Since many of the contracts between the vendors and election clerks
29 forbid the clerks from examining the contents of the memory cards or from examining other
30 technical aspects of the voting system they have purchased, these election records are hidden
31 even from the clerk who use them. Because of this secrecy the vendor, in oracle-like
32

1 pronouncement, will dictate which electronic, election records can and cannot be retained and
2 preserved.

3 Two examples should suffice to illustrate these dangers. The first is the removable memory
4 card for the AutoMark ballot marking device (BMD) and the second is the removable memory
5 card for a central count scanner.

6 Currently, the City of Milwaukee does not retain or preserve the contents of the removable
7 memory cards used by the AutoMark BMD's. An AutoMark will not mark a ballot if the
8 removable memory card is not present in the machine. Thus, the removable memory card is
9 "*essential for proper operation*" of the AutoMark. The City Election Commission maintains that
10 s 7.23(1)(g) as currently written does not apply to the AutoMark BMD's for two reasons. The
11 first reason is that the AutoMark is not an "*electronic voting system*" as that term is defined in s
12 5.02(4m). The second reason is that even if the AutoMark is an "*electronic voting system*"
13 7.23(1)(g) does not apply because the AutoMark does not tabulate votes; i.e. does no addition.
14 The removable memory card for an AutoMark contains the *ballot definition file* which in turn
15 controls how and if a touch on the screen will be translated into a mark on the ballot it prints.
16 The removable memory card also presumably (the exact truth in this case is a trade secret)
17 contains the audio files which provide audio instruction to the blind. I believe the contents of a
18 removable memory card used by an AutoMark BMD should be preserved because the ballot
19 definition file and audio files should be retained and preserved.

20 The second example concerns central count scanners. Central count scanning is where large
21 volumes of ballots (usually from many wards) are processed in one central location by a single
22 optical scanner designed to scan stacks of dozens or hundreds of ballots in a single operation. For
23 the Diebold/Premier systems, if a central count scanner is employed then the removable memory
24 card for the scanner contains the ballot definition file for each ballot for every ward the scanner
25 is expected to receive and the scanner is networked directly to the Diebold/Premier election
26 management software, GEMS. The stack of ballots is placed in the hopper. The ballot definition
27 file is used to determine how and if a mark on the ballot should accrue to a candidate. That
28 recognition information is sent over the wire to GEMS and the GEMS software tabulates the
29 votes encoded on the ballot to the designated candidate(s). In this scenario the central count
30 scanner is not *tabulating equipment*. Under the language proposed by the GAB for 7.23(1)(g),
31 the memory card used to recognize the marks on hundreds if not thousands of ballots would not
32 be retained or preserved. It is a trade secret whether the central count scanning in Juneau and

1 Sauk counties with Optech IV central count scanners tabulate or work like the Diebold/Premier
2 central count scanning.

3 I believe the removable memory cards for AutoMarks, central count scanners, precinct
4 scanners, and DRE touch screens all should be retained and preserved. The test for what should
5 and should not be preserved and retained is a reasonable test. If the voting machine cannot work
6 without the removable memory card, then the contents of that card should be retained and
7 preserved. If the voting machine can work without the removable memory card present, then the
8 contents of that card need not be retained and preserved.

9
10 **Section 6.**

11 I believe the legislative changes proposed by the GAB for 7.23(1)(g) are deeply flawed and
12 that the current statute as is quite serviceable. The problem with the current law is that it has
13 never been tried because compliance has never been enforced. My slight change to the existing
14 statute is to remove the arbitrary data/non-data distinction. My change requires the whole
15 contents of the removable memory cards be retained and preserved, regardless of any arbitrary,
16 vendor designation as to what the 1's and 0's mean; i.e. which 1's and 0's are "data" and which
17 1's and 0's are not data.

18 The second flaw in the changes proposed by the GAB for 7.23(1)(g) is that state and local
19 election are exempted from the 22 month retention requirement. This means for non-federal
20 elections the backup made of the contents of a removable memory cards made pursuant to
21 7.23(1)(g) would be retain for only 90 days [7.23(1)(k)]. This is a retention period shorter than
22 for the poll lists used in the election [24 or 48 months 7.23(1)(e)]. I believe the contents of the
23 memory cards should be retained for as long as poll list for the same election are retained. Given
24 the limited bulk of CD-ROMs as compared to paper poll lists this seems reasonable, but, the
25 current statute is for the fixed retention term of 22 months and absent a compelling reason the
26 retention time of the current statute should not be altered.

27
28 **Section 7.**

29 I agree with the alterations proposed by the GAB. This change removed the contradiction
30 between 7.23(1)(f) and 7.23(1)(h) regarding the retention period for the retentions of ballots.

31
32 **Section 8.**

1 If an election is contested, under investigation, or has had a complaint filed against it, the
2 records for that election should not be destroyed. The changes here make explicit the three
3 separate and distinct situations under which an election may be under investigation or litigation.
4 To aid in this organization each case is separated out into a separate paragraph.

5 Paragraph a is the language proposed by the GAB.

6 Paragraph b is the language of the existing statute.

7 Paragraph c is my addition to cover the case when the election is subject to a contest covered
8 by the phrase “*or any contest*” in the current statutes. This concern arises out of my own
9 personal experience in filing a complaint to the State Election Board back in March 2005. The
10 complaint was in-artfully written, but alleged the following for the November 2, 2004 election:

- 11 1. Ballot box stuffing in some wards in the City of Milwaukee,
- 12 2. The failure to perform a local board of canvassing pursuant to s 7.51 in the following
13 jurisdictions:
 - 14 a. Several wards within the City of Milwaukee,
 - 15 b. Two wards within the Village of Menomonee Falls
 - 16 c. District #1 of the Village of Germantown
- 17 3. The use of the poll tape generated by the Village of Germantown after the election
18 workers for District #1 of the Village of Germantown. The poll tape was used even
19 though the officials knew the numbers printed on it were incorrect. The village Clerk and
20 the poll workers for district #1 had conclusively proved the Diebold AccuVote OS optical
21 scanner had failed to correctly generate the statistic: “*Number of Ballots Counted*”. I
22 contended that this failure of the machine (publically acknowledged by Diebold/Premier
23 on January 25, 2008 with Product Advisory Notice, PAN2008-005), fatally pierced the
24 “presumption of correctness” established by 7.51(2)(h) and that it was improper for the
25 Clerk of the village of Germantown to accept the numbers generated the optical scanner
26 as if those numbers were correct when the clerk and the poll workers had spent more than
27 3.5 hours proving the first number printed by the machine (*Number of Ballots Counted*)
28 was incorrect.

29
30 The merits of these allegations are neither part of nor relevant to this analysis.
31
32

1 The State Elections Board finally deigned to hear the matter 30 months later on September
2 12, 2007 by which time all the election records from Menomonee Falls and Germantown had
3 been destroyed. Without any of the election records to examine the SEB dismissed the
4 complaint. The staff of the then SEB contended there was no violation of 7.23(2) because a
5 complaint before the Board initiated under some provision of ch. 5 did fall within the definition
6 of “*or any contest*” of 7.23(2). My addition of paragraph 7.24(2)(c) is to insure no one else
7 enjoys a similar destruction of records in the future.

8
9 **Section 9.**

10 The purpose of this section is to first define election records as open record and second to put
11 election records on the same legal footing as the “*required to be kept*” records defined in ch. 59.
12 Many electronic, election records are not even open records let alone “*required to be kept*”
13 records. “*required to be kept*” records are defined in s. 59.20(3) and include records such as:

- 14 1. Records of the proceedings of a County Board [s. 59.23(2)(a)]
- 15 2. A true and correct account of the receipt and expenditure for the county [59.25(2)(d)]
- 16 3. Keep a true and exact register of all prisoners committed to any jail under the charge of a
17 county sheriff. [59.27(2)]
- 18 4. Records of a county circuit court [59.40(2)(a) and 59.40(2)(b)]
- 19 5. Recordings of all deeds and mortgages within a county [59.43(1)(a)]

20
21 These records have three characteristics which distinguish them from the general records
22 covered by s. 19.31 to 19.37 which are:

- 23 1. The creation of the record is expressly mandated by statute.
- 24 2. The custodian of the record is expressly mandated by statute.
- 25 3. The retention period of the record is expressly mandated by statute.

26
27 Election records under the current provisions of ch. 2 to 12 currently have all the same
28 properties as “*must keep*” records defined under ch. 59. The creation of election records are
29 expressly mandated by statute; e.g. Tally sheets and inspectors’ reports [s. 7.51(4)(a)], Official
30 registration list [s. 6.36], registration forms [s. 6.33], etc. The custodian of election records is
31 expressly mandated by statute [s. 7.24]. The retention period of election records is expressly
32 mandated by statute [s the various paragraphs of 7.23]. Election records are not simple ordinary

1 open records but are records as vital or more vital than the registry of prisoners; a record required
2 to be kept by all county sheriffs. Because of this, election records should be accorded the same
3 extraordinary access accorded to other "*required to be kept*" records.
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The Wisconsin GAB: The Johnny Yoo of Election Administration

My blogging has been very sparse (nothing since May 2, 2009). That is not for lack of things to write about, but for the lack of time to write. One of the things consuming my time for the last year has been the usual and customary practice of election clerks in Wisconsin to destroy certain electronic election records and the legal cover provided by the Government Accountability Board (GAB) to carry out the destruction of those records. In the same way that John Yoo provided and continues to provide legal cover to President Bush and President Obama to violate federal law, the GAB provides legal cover to clerks so that the clerks may destroy election records which the clerks deem too inconvenient to preserve and retain.

In order to set the context for the last two years on this matter I will show my fundamentalist, Christian roots and begin with a creedal statement:

- I believe there cannot be effective oversight of an election (by an election official or by the public) if any election records are secret.
- I believe ballots are not secret, but anonymous.
- I believe the content of a removable memory card used by a voting machine during an election is an election record as that term is used in state and federal law.
- I believe that **ALL** of the content of a removable memory card is an election record.
- I believe the contents of a removable memory card contain an admixture of some or all of the following:
 - programming,
 - ballot "images"¹,
 - audit logs,
 - event logs,
 - vote totals at various levels of aggregation,
 - "ballot definition files"²,
 - audio files,
 - screen text,
 - page/screen layout,
 - whole, mountable file systems.
- I believe the above list is likely incomplete because the exact contents of a removable memory card are secret and vigorously protected as trade secrets.
- I believe election records should not be secret.
- I believe election records are records that should have an "absolute right of access". Under current law some election records in whole or in part are not even open records, much less records with an "absolute right of access".
- I believe the contents of a removable memory card used to aid in the administration of an election should be preserved and retained by jurisdictions for the same length of time as the jurisdiction is required to preserve and retain the poll registration lists used to administer the same election.
- I believe state law, WI Stats. 7.23(1)(g), requires the contents of a removable memory card used by a voting machine in the administration of an election be preserved and retained for 22 months

- I believe federal law, Title 42, Chapter 20, Subchapter II, § 1974, for federal elections, requires the same; preservation and retention for 22 months
- I believe state law, WI Stats. 7.24, requires the backups made of the contents of a removable memory card pursuant to WI Stats. 7.23(1)(g) remain in the custody and control of the election official for the entire retention period.
- I believe the contents of a removable memory card used in a voting machine is **MORE** important than the voter poll lists used in the same election. This is because the contents of the memory card actively and directly determine how the election is administered, where the poll books do not. If nothing else (and there is more), the contents of the removable memory card control how or if marks on the paper ballot or touches on the touch screen will be recognized and to whom votes will accrue based on those marks or touches. These are the election officials' duties under WI Stats. 7.50 even if those duties have been delegated to an inscrutable black box.

The Government Accountability Board (GAB), its staff, and the clerks who head the Wisconsin Towns Association, Wisconsin County Clerks Association, and the Wisconsin Municipal Clerks Association do not agree with most, if any, of the above credos.

I object to the notion that there can be such things as secret election records. No paper election record is secret.

- The ballot is not secret. It is anonymous.
- The confidential poll lists of WI Stats 6.47 are not secret. They are confidential. They are known to those election officials for whom the knowledge is necessary in order to administer the election and only for the time needed to administer the election.

In contrast though, many electronic election records generated by electronic voting machines are regarded by the state as secret; more precisely trade secreted. The contents of these records are not available for inspection by the public and in many cases are not even known to the election officials who use those records to aid them in administering an election.

Again, I believe there cannot be effective oversight of an election (by an election official or by the public) if any of the election records are a secret.

In the summer of 2007, I began looking for election records which were not governed by the Help America Vote Act (HAVA), not part of the new equipment purchases, not part of the new security regulations, not part of administrative rule GAB5, but which were likely to be considered secret. I selected the 20-year old requirement to backup the contents of removable memory cards. The backups made under WI Stats. 7.23(1)(g) fit my criteria as election records of long standing, but which were likely be kept secret — via trade secrecy claims — from both the public and the election officials who rely on them.

My assumption that the backups were records of long-standing was incorrect as I reported here and here. I discovered the statutory requirement to backup the contents of removable memory cards, in the 20-year history of the statute, had **never** been obeyed by any election official at any time.

Naïvely thinking breaking the law might be a crime, I reported my discovery to the local District Attorney, who declined to investigate. In January 2008, I elevated my report to the Office of the Attorney General of Wisconsin, who immediately kicked it over to the newly-created Government Accountability Board. I appeared before the GAB for nearly every meeting in 2008 arguing that obeying the statutes by preserving and retaining the contents of removable memory cards was not just good policy, but that failing to comply with WI Stats. 7.23(1)(g) is felony election fraud under WI Stats. 12.13(2)(b)7.

From minute 1:35:00 to 1:44:10 of the recording of the GAB August 10, 2009 meeting is a summary of my contention that the GAB is "all promulgation and no enforcement"; an assessment which applies to the preservation and retention of the contents of removable memory cards. Since at least 1995, again in 2006, as part of the Election Administration Manual, and as part of the official record retention schedule, the GAB and its predecessor, the State Election Board, informed clerks of the State of their duty to make the backups required by WI Stats. 7.23(1)(g), however neither Board has done anything to verify that these election records were preserved and retained.

My concerns expressed in the August 10, 2009 meeting culminated in two documents prepared by the GAB staff addressing the issue of maintaining electronic election records: the December 17, 2008 Memo and the December 18, 2008 Memo. I believe both to be flawed in that both documents counsel the municipal and county clerks to violate WI Stats. 7.23(1)(g) and/or WI Stats. 7.24 in any one of several GAB-approved ways.

- Option C of the December 17, 2008 memo is best paraphrased as: "Let the vendors retain the records." This is an express violation of WI Stats. 7.24, which reads [emphasis mine]:

The official or agency shall retain all election materials until destruction or other disposition is authorized under s. 7.23.

Prohibiting the outsourcing of record retention is not just good law it is good public policy. For examples of the problems associated with outsourcing election administration to private corporations and third parties, see "Vendors are Undermining the Structure of U.S. Elections" by Ellen Theisen of VotersUnite.org.

- Option A of the December 17, 2008 memo counsels the clerks to backup the programming and data stored on the central election management software rather than retain the actual contents of the memory cards. This is advice to retain what **ought** to have been on the memory card in lieu of what was **actually** on the memory card. One only needs to watch Hacking Democracy to understand why this is bad policy and why the GAB promulgated rules in order to ensure what **ought** be on a removable memory cards is what is **actually** on the memory cards when those contents administer an election on behalf of the clerk. But, the GAB's policy is in direct opposition to the legislature's mandate. Backing up what is convenient and *might* be on a removable memory card rather than what is *actually* present on the memory card is expressly forbidden by WI Stats. 7.23(1)(g).

- Option 1 of the December 18, 2008 memo to the municipal clerks is a restatement of Option A, "*Backup whatever the vendors say is convenient to backup*" with the addition that if it is **claimed** the PROM pack has no initial programming on it, then don't backup the event logs or ballot "images"¹ or other information on the PROM pack either.
- Option 4 of the December 18, 2008 memo is a restatement and clarification of Option A: "*Backup what **ought** to be on the memory cards in lieu of backing up what is **actually** on the memory cards*".

I spent the spring, summer, and fall of 2009 surveying which of the statute-violating GAB recommendations various clerks have adopted. Specifically, I asked various county clerks (and, in Oneida County, the municipal clerks) for the backups made on or before February 17, 2009 pursuant to WI Stats. 7.23(1)(g) of the memory cards used in the November 4, 2008 election. The results so far are:

- **City of Milwaukee:** No backups of Automark cards made. The City Election Commission contends both that the AutoMark is not a voting machine as that term is used in WI. Stat. 5.08(4m) and that even if it were a voting machine no backups are required because the Automark neither stores vote totals on the removable memory card nor tabulates votes. A file which is not the contents of the Optech memory card is kept in lieu of an actual backup of the Optech memory cards.
- **Washington County:** All copies of the backups I requested had been made, copies were delivered to me, and the copies seem to be complete backups of the binary data found on the memory cards used by the AccuVote OS and AccuVote TSx machines.
- **Sheboygan County:** Files which clearly are not the contents of the M100 memory cards are kept in lieu of a backup of the actual contents of the memory cards.
- **Oneida County:** The "let the vendor do it" approach was used. The vendor, ES&S, destroyed the records, made no backups, and states categorically that ES&S does not and will not retain election records on behalf of a customer jurisdiction. This contradicts the "research" done by the GAB staff described in the December 17, 2008 memo.
- **Waukesha County:** Unknown. I made open records requests for the backups of 8 different memory cards. Seven of those open records are tied up by the County's claim that portions of the requested records are secret and that it will cost \$470 (\$67.14 per requested record) to redact the secret portions of 7 of the 8 backups requested. Access to copies of these 7 backups is contingent on my paying the \$470 fee. I am contesting both the fee and the claim that election records can be secret.
Regarding the eighth back up requested, the response was that the unnamed vendor to the Town of Waukesha has gone bankrupt and apparently has taken the records with them.

The GAB staff has submitted to the legislature bills AB-646 and SB-435 in order to "remedy" the memory card backup "problem". The proposed legislation:

- Removes the requirement to make backups for non-federal elections.
- Removes the requirement to save the memory cards in situ for at least 21 days.
- Exempts ballot marking devices and central count scanners if it is claimed the equipment does not tabulate votes. A relevant quote from this report from the California Top to

Bottom Review explaining why a central count scanner (such as used in Sauk and Juneau counties) would be exempted is:

*During the election, the GEMS server is **responsible** for performing image processing on the ballots scanned by the Central Count AV-OS. After the election, the GEMS server **tallies** the election results and is used for generating election result reports and databases.*

- Fails to require voting equipment certified by the GAB actually have the capability to create backups and to create those backups in a form or on a medium over which the clerks can maintain custody and control for the entire retention period.

This proposed legislation demonstrates the failure to communicate when there are fundamental and irreconcilable differences in world views. The GAB staff and I disagree on fundamentals such as:

- Are the contents of a removable memory card used to administer an election an election record?
- Whether records or not, should the contents of a removable memory card be preserved for at least as long as a poll list?
- If preserved, then preserved by whom?
- Does a concept similar to "adverse possession" apply to election statutes? I.e. if a statute has been un-enforced for the past 20 years by the responsible executives, then can the statute continue to be un-enforced for the next 20 years? I might consider that argument concerning Wisconsin's Oleo regulations, but not for something as vital as elections.

The only remedy for parties with such irreconcilable differences is arbitration by a third party whose authority is accepted by the disputing parties. In the case at hand there are only five such parties with the authority to arbitrate the dispute among the GAB, the county and municipal clerks, and myself. I am open to suggestions if there are more than these five:

- The legislature,
- Any of the 72 county District Attorneys of the state,
- The Office of either US Attorney located in the state,
- A Wisconsin state court,
- A Federal court,

The Attorney General of the State of Wisconsin is not included here because under the same statute which created the GAB, the Office of the Attorney General of Wisconsin is prohibited from investigating election crimes unless there is a specific referral from the GAB or from a county DA.

I am now pursuing these avenues of arbitration.

- I have filed a statement with the Oneida County sheriff's department documenting my allegation that ES&S destroyed election records from the November 4, 2008 election.
- I have filed a statement with the Milwaukee office of the FBI documenting my allegation that the City of Milwaukee Election Commission destroyed election records from the November 4, 2008 election by failing to comply with WI Stats. 7.23(1)(g).
- I have filed a statement with the Milwaukee Police Department documenting my allegation that the City of Milwaukee Election Commission destroyed election records from the November 4, 2008 election by failing to comply with WI Stats. 7.23(1)(g).
- I am considering a mandamus action to force the GAB and/or the clerks of the state to comply with WI Stats. 7.23(1)(g)
- I am exploring how unmerchantability may affect the certification of a voting system. I do not believe the claim by the voting machine vendors that their systems:
 - can write to a removable memory card,
 - read from the removable memory card, but
 - cannot backup the removable memory card.

Again, I do not believe this, but, if true, then the vendors are admitting their systems are unmerchantable as that term is used in the under the Wisconsin Uniform Commercial Code. Consider the flash drive in your pocket. Do you believe that a system which can write to your flash drive and can read from your flash drive, cannot also make a backup of your flash drive? This is what the clerks claim the vendors have told them about the voting systems the clerks purchased with regard to removable memory cards instead of flash drives.

If voting systems are so poorly designed and constructed that there is no way to make backups of the removable memory cards, then those systems may well be so defective as to be unmerchantable. This because the systems are unfit for the usual and customary purpose for which they were purchased: administering elections in a lawful manner.

That is the story so far with more developments to come.

¹ "Ballot images" are neither pictures nor some graphical representation of the ballot scanned; the terminology is part of the Humpty Dumpty language of the election industry.

² "Ballot Definition File" is another bit of the Humpty Dumpty language of the election industry. Often the "ballot definition file" is neither a single, separate file nor a complete definition of the ballot.



Senate Committee on Labor, Elections and Urban Affairs

2009 Senate Bill 435

Testimony of Kevin J. Kennedy
Director and General Counsel
Government Accountability Board
April 8, 2010

Chairperson Coggs and Committee Members:

Thank you for the opportunity to appear before this committee and testify regarding Senate Bill 435. The Government Accountability Board supports this legislation. On May 5, 2009 and by a unanimous vote, the Government Accountability Board decided to recommend that the Legislature amend §7.23, Wis. Stats., in the fashion provided in this legislation.

Senate Bill 435 revises §7.23, Wis. Stats., to allow clearing and reactivation of detachable recording units and compartments for use with tabulating equipment 14 days after a primary for state and local elections and 21 days after any other state or local election, subject to retention for purposes of a recount or election contest. Current law requires the transfer of the election data from detachable recording units and compartments to an electronic medium, which may not be erased or destroyed for 22 months after an election regardless of whether the election was federal, state, or local. While there is a federal requirement to retain all election data from federal elections for 22 months, there is no similar sound reason to require the same for state and local elections.

The costs of maintaining the electronic data from federal elections for 22 months is significant; however, there is a compelling purpose for doing so, namely the requirements of 42 U.S.C. §1974. Without a corresponding compelling purpose for preserving state and local electronic election data for 22 months, the Board recommends that a shorter period of retention is warranted. This shorter period will be embraced by clerks due to the avoidance of significant additional costs for retention of electronic election data for state and local elections.

Currently, in a two year election cycle, there could be as many as 2 primaries, 2 generals, and a presidential preference primary. Excluding recounts and special elections, of which there are dozens and predominately state and local elections, clerks would need at least 5 sets of recording devices in order to maintain all election data on the device for the requisite 22 month period. Manufacturers and vendors of the equipment do not have the supplies necessary to meet this demand. While the current statute provides for transferring the data to another recording medium, those costs are prohibitive and can range from \$50-\$100 per voting equipment unit per election. Municipalities are subject to the Federal mandate to preserve electronic data from federal elections for 22 months and must bear the cost to do so. However, there is no compelling reason to require the same for state and local elections.

Senate Bill 435 allows clerks to reuse the recording devices for consecutive elections, while at the same time preserving election materials for recounts or election contests should they occur. This practice is consistent with the procedures of other states with respect to election materials from state and local elections. In addition, many municipalities have optical scan voting equipment that was acquired in the 1990s and with much of this older equipment, the supply of extra detachable memory devices is not available, even if the municipalities could afford the cost.

Other than the purpose of preserving election materials for recounts or election contests, there is no additional state or local purpose to preserve election materials beyond the time of a recount or election contest. There is no need to preserve election materials for state and local elections for the 22 months required for federal elections.

On behalf of the Government Accountability Board, I appreciate your consideration of these issues with regard to this bill and will answer any questions you may have at this time.

Thank you.

Kevin J. Kennedy
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LEUA Exec + Hearing - 12/15/09

Exec

SB 435

AB 142

nothing

AB 165

nothing

SPB 168

nothing

became SB 435

LRB 3860/1

nothing

Public Hearing

James Wenzler

- James Wenzler

- very short intro

- SC - why selected?

- why been mind?

- SC - experienced many auctions?



LEVA Exec + Hearing

4/8/10

EXEC

SB435

Kunibaya on SB172
no GOP, quick roll

HEARING

~~SB~~ Ronald Polacek

no one showed or registered

SB435

Kevin Kennedy

- has written testimony
- SC - ? on retaining records in financially feasible way
 - paper printout + ballots retained
 - problem is space on memory card
 - cost prohibitive to retain data electronically

John Washburn

- no written testimony, but a lot of supporting material
- takes some shots at Kevin + GAB
- impossible to check election complaints
- goes through his "sub" section by section
- central count tabulation
- concern with a personal challenge that he filed
- wants election records defined as open records

①

SB 435 cont.

- John Washburn cont.

- thinks vendors are lying
- SC? on his "sub"

- disputed vendors claims

- JL? on votes shd be open records

- the totals shd be available

- SL? - alleging ballot box stuffing?

- not that stuffing happened, just a records retention issue

- Shane Falk.

- ~~at~~ addresses Washburn's points

- 78% of state uses large optical scan machine

- cost prohibitive to remove + store

- still required to retain for 22 mos. after fed. election

- ballots only kept for 30 days.

- Assembly added amendment to address new equipment that utilizes flash drives

- keep 22 mo. retention under amendment if on new media

- Ch. 19 exempts products w/ code + other info that is proprietary + ensures security

- canvasses are retained for 10 years

- GAB tests voting equipment

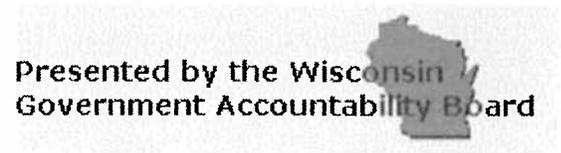
- SC? on flash drive amendment

- AAI to AB 446 (?) explained

- GAB supports

(2)

- ▶ Home
- ▶ Lobbying in Wisconsin
- ▶ Organizations employing lobbyists
- ▶ Lobbyists



as of Wednesday, April 07, 2010

2009-2010 legislative session
Legislative bills and resolutions

(search for another legislative bill or resolution at the bottom of this page)

Senate Bill 435

the period for retention of certain election materials in state and local elections.

TEXT sponsors LRB analysis	STATUS committee actions and votes text of amendments	COST & HOURS of lobbying efforts directed at this proposal
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Organization		These organizations have reported lobbying on this proposal:	Place pointer on icon to display comments, click icon to display prior comments		
Profile	Interests		Date Notified	Position	Comments
●	●	Brown County	2/11/2010	↓	
●	●	League of Wisconsin Municipalities	1/15/2010	↔	

Select a legislative proposal and click "go"

House	Assembly Senate
Proposal Type	Bill Joint Resolution Resolution
Proposal Number	435 (enter proposal number)
Legislative Session	2009 Regular Session ▼
	<input type="button" value="Go"/>