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Details:

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## 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**
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### INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

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  - (**ab** = Assembly Bill)                      (**ar** = Assembly Resolution)                      (**ajr** = Assembly Joint Resolution)
  - (**sb** = Senate Bill)                              (**sr** = Senate Resolution)                              (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

STATEMENT  
a

SUPPORTING DOCS

JOHN WASHBURN

SB-435

## 2009 Senate Bill-435

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 (4s) and 5.91(19) of the statutes; relating to: the period for retention of certain election materials in state and local elections.

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

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

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

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

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

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

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

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

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

Subject to 7.23(1)(g), detachable recording units and compartments used by a voting machine recorders machines which are essential for proper operation of voting machines may be cleared 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.

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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.

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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 2.**

10 There needs to be a definition of “election record” in order to use that term in later sections.  
11

12 **Section 3.**

13 The Wisconsin Legislature erred grievously when the statutory changes which created the  
14 Government Accountability Board also made election complaints secret. The changes to  
15 5.05(5s) define all investigations by the GAB as secret. This is bad policy with regard to  
16 complaints of election law violations. The kinds of investigations the Board may investigate are  
17 those initiated under:

- 18 1. Chapter 5. These are investigation into complaints that allege:
- 19 a. Election law has been or will be violated which are reported directly to the Board
  - 20 (s. 5.06), or
  - 21 b. An action or in action by an election official must be corrected in order to enforce
  - 22 state election law. (s. 5.08)
  - 23 c. A violation of the Help America Vote Act) has or will occur. (s. 5.061)
- 24 2. Chapter 11. These are investigation into complaints regarding the violation of state  
25 campaign finance laws.
- 26 3. Subch. III of ch. 13. These are investigation into violations of the lobbying and expense  
27 reporting.
- 28 4. Subch. III of ch. 19. These are investigation into ethics violations.  
29

30 The statutory change proposed in section 3 is to remedy this error and make the investigation  
31 of election misconduct a matter open to public view.  
32

1 **Section 4.**

2 Currently the GAB has certified for use in the state voting systems which do not support the  
3 statutory provision to make backup ups of the removable memory cards used in those systems.  
4 This addition to the statutes makes express that a minimum requirement of a voting system  
5 certified for use in the state is that that electronic voting system can make the backup required  
6 under 7.23(1)(g) and that the resulting records can be retained by the clerk, commission, or  
7 Board staff as required by 7.24.  
8

9 **Section 5.**

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

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

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

1 technical aspects of the voting system they have purchased, these election records are hidden  
2 even from the clerk who uses them. Because of this secrecy the vendor, in oracle-like  
3 pronouncement, will dictate which electronic, election records can and cannot be retained and  
4 preserved.

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

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

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

1 the memory card used to recognize the marks on hundreds if not thousands of ballots would not  
2 be retained or preserved. It is a trade secret whether the central count scanning in Juneau and  
3 Sauk counties with Optech IV central count scanners tabulate or work like the Diebold/Premier  
4 central count scanning.

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

11  
12 **Section 6.**

13 I believe the legislative changes proposed by the GAB for 7.23(1)(g) are deeply flawed and  
14 that the current statute as is quite serviceable. The problem with the current law is that it has  
15 never been tried because compliance has never been enforced. My slight change to the existing  
16 statute is to remove the arbitrary data/non-data distinction. My change requires the whole  
17 contents of the removable memory cards be retained and preserved, regardless of any arbitrary,  
18 vendor designation as to what the 1's and 0's mean; i.e. which 1's and 0's are "data" and which  
19 1's and 0's are not data.

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

29  
30 **Section 7.**

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

1  
2 **Section 8.**

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

7 Paragraph a is the language proposed by the GAB.

8 Paragraph b is the language of the existing statute.

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

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

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

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

9  
10 **Section 9.**

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

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

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

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

27  
28 Election records under the current provisions of ch. 5 to 12 currently have all the same  
29 properties as “*must keep*” records defined under ch. 59. The creation of election records are  
30 expressly mandated by statute; e.g. Tally sheets and inspectors’ reports [s. 7.51(4)(a)], Official  
31 registration list [s. 6.36], registration forms [s. 6.33], etc. The custodian of election records is  
32 expressly mandated by statute [s. 7.24]. The retention period of election records is expressly

1 mandated by statute [s the various paragraphs of 7.23]. Election records are not simple ordinary  
2 open records but are records as vital or more vital than the registry of prisoners; a record required  
3 to be kept by all county sheriffs. Because of this, election records should be accorded the same  
4 extraordinary public 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"<sup>1</sup>,
  - audit logs,
  - event logs,
  - vote totals at various levels of aggregation,
  - "ballot definition files"<sup>2</sup>,
  - 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"<sup>1</sup> 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.

<sup>1</sup> "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.

<sup>2</sup> "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.

# State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS CANE  
Chairperson

KEVIN J. KENNEDY  
Director and General Counsel

## MEMORANDUM

**DATE:** For December 17, 2008 Meeting

**TO:** Members, Government Accountability Board

**FROM:** Kevin J. Kennedy  
Director and General Counsel  
Government Accountability Board

Prepared and Presented by:  
Ross Hein, Elections Administration Specialist  
Shane W. Falk, Staff Counsel  
Government Accountability Board

**SUBJECT:** Clarification of § 7.23 (1) (g), Wis. Stats.  
Maintenance of Electronic Voting Records

### Issue

For compliance with § 7.23 (1) (g), Wis. Stats., what election data are required to be transferred to an electronic medium and maintained for 22 months?

### Background

The Government Accountability Board (G.A.B.) staff received a request that G.A.B. require clerks' compliance with § 7.23 (1) (g), Wis. Stats. Staff has been gathering information on what actions clerks are taking in order to comply with this statute. Staff finding: There is no consistent manner in which Wisconsin clerks are following § 7.23 (1) (g). Exactly what § 7.23 (1) (g) requires is an issue that needs to be clarified.

“7.23 (1) (g): Detachable recording units and compartments for use with electronic voting machines may be cleared or erased 14 days after any primary and 21 days after any other election. Before clearing or erasing the units or compartments, a municipal clerk shall transfer the data contained in the units or compartments to a disk or other recording medium which may be erased or destroyed 22 months after the election to which the data relates.”

Cost a Major Consideration: There has been much concern expressed by municipal and county clerks regarding the cost of transferring election data from memory devices to an electronic medium, such as a compact disk or a hard drive. Election costs within the last 5 years have increased dramatically with state and federal mandates leaving many of the municipalities struggling to fund all the statutorily required election mandates.

One of the principle issues is the cost of transferring the data to an electronic medium, which is then stored for 22 months. Depending on the voting equipment manufacturer/programmer, the costs of transferring the memory device data can range from \$50-\$200 for each election for each voting equipment unit. For example, the cost to transfer the memory device results to a recording medium for the City of Marinette, a municipality with a population of less than 12,000, is \$1,400 for 2008.

Unlike most other states that provide state funds to support the local electoral process, the State of Wisconsin does not award any General Purpose Revenue (GPR) to local governmental units to help prepare for or conduct elections. In Wisconsin, the cost and financial support for funding elections are incurred at the local level. In addition to complying with the Federal Help America Vote Act (HAVA) of 2002, local officials also have to adhere to an array of HAVA companion state laws codified in 2003 Wisconsin Act 265 (published April 29, 2004); 2005 Wisconsin Act 92 (published January 19, 2006); 2005 Wisconsin Act 333 (published April 28, 2006); and, 2005 Wisconsin Act 451 (published June 9, 2006).

As Federal and State laws governing elections administration continue to grow in number and complexity, the financial burden on local election officials grows proportionally. Local elections partners are having and will continue to experience a difficult enough time struggling to support even the most basic/core election requirements.

### **Discussion**

With the advent and increased use of electronic voting equipment, the legislature passed 1987 Act 391, which revised §7.23(1)(g), Wis. Stats., to address the emerging fact that some election materials were created and stored in electronic forms. The legislative intent surrounding the adoption of the current version of §7.23(1)(g), Wis. Stats., was to capture the electronic forms of election materials for retention, just as had been the practice for lever machines, paper and hard copies of election materials. In addition, the revisions to §7.23(1)(g), Wis. Stats., were consistent with requirements of 42 U.S.C. §1974 of the Civil Rights Act of 1960, which requires retention of all election records from Federal elections for 22 months.

The November 4, 2008 General Election contained Federal offices on the ballot. This fact brings into play §7.23(1)(f), Wis. Stats., which requires elections officials to retain for 22 months the following election materials: “ballots, applications for absentee ballots, registration forms, or other records and papers requisite to voting.” The application of §7.23(1)(g), Wis. Stats., provides election officials with a means to preserve the electronic election materials for the same retention period of 22 months and specifically authorizes the transfer of electronic elections materials to disk or other recording medium to allow for the erasure of the memory devices for re-use in the next election. Under the current status of §7.23(1)(g), Wis. Stats., and despite the fact that it was originally intended to apply to Federal elections, elections officials have an obligation to retain election materials for 22 months for Federal, State, and local elections in Wisconsin.

With respect to electronic/computerized vote recording or tabulation equipment utilizing removable programmable data storage devices (memory devices or PROMs) or other similar storage devices, the United States Department of Justice, Public Integrity Unit, recommends that election officials retain an electronic record of the program by which votes are to be recorded or tabulated, which is captured prior to the election, and the hard copy output from each detachable recording unit or compartment (memory device or PROM), i.e. the results tape. The electronically stored program and the results tapes should then be retained for 22

months. From speaking with ES&S and Command Central representatives, it appears that the memory devices for Insight and Eagle optical scan equipment only possess the final results totals and no other programming data can be transferred. This raises a large cost issue for preservation of results data that is actually preserved in paper form. To comply with U.S. DOJ recommendations, the results tape from the voting equipment and the original programming is sufficient.

A. Some jurisdictions in Wisconsin actually own their own programming software, which will make it easier to comply with the U.S. DOJ policy of retaining an electronic record of the program by which votes are to be recorded or tabulated and the results tape. In fact, the programming software likely can also be used to transfer data from the memory devices to electronic media. Other than labor costs associated with transferring programming data, other costs associated with retaining the original programming should be minimal. (NOTE: ES&S currently offers Elections Results Manager software for \$8,000.00 plus \$1,500.00 for training (total cost \$9,500.)

Per a representative of ES&S, the following counties (and City of Milwaukee) have their own programming software:

- Brown
- Columbia
- Dane
- Jefferson
- La Crosse
- Marathon
- City of Milwaukee
- Rock

Per a representative of Command Central (programmer for Sequoia voting systems,) the following counties have their own programming software:

- Chippewa
- Eau Claire
- Fond du Lac
- Racine
- Sheboygan
- Waukesha

Per a representative of Premier, the following counties (and two cities) have their own programming software:

- Chippewa
- Dodge
- Door
- Green
- Kenosha
- Ozaukee
- Sauk
- St. Croix
- Walworth
- Washington
- Winnebago
- City of Kenosha
- City of Oshkosh

**B.** For those elections officials using both the Premier AccuVote OS and AccuVote TSX, or similar systems, the manufacturer has provided instructions to download all election programming and materials from each memory device to hard drive or disk before erasure and reprogramming. Those elections officials who possess these and similar elections management software should also be able to download all election programming and materials from each device to hard drive or disk before erasure and reprogramming. The electronically stored data then should be retained for 22 months. Other than labor costs associated with transferring programming and election data, other costs associated with retaining the original programming and election materials should be minimal.

Per a representative of Premier, the following jurisdictions are able to readily transfer all election data:

- Calumet County (17 municipalities)
- Chippewa County (31 municipalities)
- Dodge County (42 municipalities)
- Door County (19 municipalities)
- Green County (22 municipalities)
- Kenosha County (13 municipalities)
- Ozaukee County (16 municipalities)
- Sauk County (37 municipalities)
- St. Croix County (26 municipalities)
- Vilas County (15 municipalities)
- Walworth County (28 municipalities)
- Washington County (21 municipalities)
- Winnebago County (21 municipalities)
- City of Mauston in Juneau County
- Town of Three Lakes in Oneida County
- Town of Marion in Waushara County
- Town of Wautoma in Waushara County

**C.** Election officials may make arrangements with the manufacturers or programmers to have them retain the programming data for the retention period of 22 months. After speaking with representatives of ES&S and Command Central, we learned that they still possess the election programming data from the November 4, 2008 election. Arrangements could be made to either have them retain this programming data in-house for 22 months or transfer it to electronic media for the municipalities to retain. In the future, new understandings could be reached between ES&S and Command Central to deal with this programming data retention as part of the original writing of the programming. It is likely that storage and transfer fees may be charged by the manufacturers.

**D.** Election officials may transfer the data contained on the memory devices to electronic media. One manufacturer (Premier) has already provided the means and ability to do this transfer after an election. Another manufacturer (ES&S) sells a drive that costs \$600.00 and it can read and transfer all data from PCMCIA memory cards to electronic media. There is substantial cost associated with having the manufacturers transfer data on the memory devices to electronic media, but only for two of the manufacturers serving Wisconsin, one of which also sells the drive which would allow the election officials to complete the transfer on their own.

Premier: Labor costs, but no additional costs. See B above.

## Command Central (Sequoia):

Edge results cartridges: \$200 first unit per year for 4 elections, then \$50 per unit thereafter per year for up to 4 elections;

Optech memory pack: \$225 first unit per year for 4 elections, then \$50 per unit thereafter per year for up to 4 elections.

## ES&amp;S:

M100: OmniDrive to copy PCMCIA cards: \$600

Email Zip Drive copy of programming: \$125/unit

E. Finally, the electronic election materials contained on the memory devices may be retained on the device itself for the period of 22 months. In light of the frequency of Federal elections (every two years) and should §7.23(1)(g), Wis. Stats., be revised to have a shorter retention period for State and local elections, election officials would likely need two sets of memory devices in order to have one set in storage at a time for the 22 month retention period. Per discussions with representatives of the manufacturers of voting equipment used in Wisconsin, the following cost estimates are applicable for this option:

## Command Central (Sequoia):

Edge results cartridges: \$200/unit to 100; \$150/unit over 100

Optech Insight memory pack: \$250/unit

Optech Eagle memory pack: \$250/unit

## Premier:

AccuVote OS memory card: \$275/unit

AccuVote TSX memory card: \$195/unit

Rental option: \$95/unit

## ES&amp;S:

M100 PCMCIA Card: \$90/unit plus delivery

Eagle RAM pack (new): \$350/unit plus delivery

Eagle RAM pack (used): \$300/unit plus delivery

I-Votronic compact flash card: \$75/unit plus delivery

## Rentals:

M100 PCMCIA Card: \$10/unit per election plus delivery

Eagle RAM pack: \$75/unit per election plus delivery

I-Votronic compact flash card: \$10/unit/election plus deliv.

### **Recommendations For All Elections Until Legislative Changes May Occur**

1. For those election officials using electronic/computerized vote recording or tabulation equipment utilizing memory devices such as a PROM or other similar memory storage devices, the "data" that should be transferred and maintained electronically for 22 months pursuant to §7.23(1)(g), Wis. Stats., and 42 U.S.C. §1974, is the electronic record of the program by which votes are to be recorded or tabulated, which is captured prior to the election, plus the hard copy output from each detachable recording unit or compartment (memory device or PROM), i.e. results tape.

If there is no removable initial programming contained on the detachable recording unit or compartment (memory device or PROM), then the costs of simply retaining an electronic copy of the results tape is excessive. The Government Accountability Board staff may coordinate contact between local election officials and manufacturer and programming representatives to arrive at a uniform policy and escrow arrangement for programming, if necessary.

2. As an alternate way to comply with §7.23(1)(g), Wis. Stats., and 42 U.S.C. §1974, election officials using electronic/computerized vote recording or tabulation equipment utilizing removable programmable data storage devices (memory devices or PROMs) or other similar storage devices may also retain the actual devices for the period of 22 months.
3. For those elections officials using both the Premier AccuVote OS and AccuVote TSX, the “data” that should be transferred and maintained electronically for 22 months pursuant to §7.23(1)(g), Wis. Stats., and 42 U.S.C. §1974, is all election programming and materials from each device which can be downloaded to hard drive or disk before erasure and reprogramming.
4. For those elections officials who possess elections management software the “data” that should be transferred and maintained electronically for 22 months pursuant to §7.23(1)(g), Wis. Stats., and 42 U.S.C. §1974, is the following: A) all election programming (programmable code,) and B) for each memory device programmed by election officials, the accumulation of election results will be incorporated into the election management system in order to obtain and retain aggregate election results. This programming and results data can be downloaded to hard drive or disk before erasure and reprogramming of the memory devices.

### **Next Steps**

1. The Government Accountability Board should pursue a 2009 Legislative Agenda that includes legislative changes to establish two separate retention periods for electronic and other election materials: A) 22 months for elections with a Federal office on the ballot; and B) a shorter period tied to the right to contest/recount for elections with only State or local offices on the ballot.
2. The Government Accountability Board should continue to gather information regarding the costs and ranges of options available for election materials retention, including discussions with our local election partners, manufacturers and programming representatives (specifically regarding retention of programming data,) and the United States Department of Justice—noting any additional updates to the U.S. DOJ data retention policy with respect to audit logs and other data that might be available on some removable memory devices.

# State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS CANE  
Chairperson

KEVIN J. KENNEDY  
Director and General Counsel

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**DATE:** December 18, 2008

**TO:** Wisconsin County Clerks  
Wisconsin Municipal Clerks  
City of Milwaukee Election Commission  
Milwaukee County Election Commission

**FROM:** Nathaniel E. Robinson  
Administrator Elections Division  
Government Accountability Board

**SUBJECT:** Government Accountability Board's Ruling  
Maintenance of Electronic Voting Records  
Application of § 7.23 (1) (g), Wis. Stats.

I am writing to bring you up to date on the Government Accountability Board's December 17, 2008, ruling on how § 7.23 (1) (g), Wis. Stats., may be applied for maintaining electronic voting records.

Background: On October 30, 2008, we provided the following guidance and information to all Clerks:

1. For the November 4, 2008, General Election, all election vote returns and data MUST be maintained in original formats until further notice is provided by the G.A.B.
2. Staff counsels will attempt to ascertain legislative intent of § 7.23 (1) (g) and determine which electronic information is required to be transferred to disk or other recording medium prior to clearing or erasing the memory devices.
3. Consideration will be given to adding this issue to G.A.B.'s 2009 Legislative Agenda.

Staff counsel thoroughly researched this matter and presented a report to the Government Accountability Board's December 17, 2008, meeting. The detailed background briefing memorandum is attached for your information. Below is the Board's ruling on how § 7.23 (1) (g), Wis. Stats., may be applied for maintaining electronic voting records.

Since 1960, there has been a requirement to preserve election materials for 22 months following elections in which there was a Federal office on the ballot. The Wisconsin legislature adopted § 7.23(1)(g), Wis. Stats., to assist with these requirements. The sole purpose for these requirements is simply to preserve electronic election materials, along with hard copies of all other materials, for 22 months to permit Federal investigations and potentially prosecutions for voting and civil rights violations. These requirements have no relationship to the recount process and they also have no relationship to and do not derive from any HAVA requirements. These are requirements that have existed at the Federal level since 1960 and more recently at the State level since 1987.

Specific Direction to All Election Officials: Taking into consideration the delicate balance between the cost and the requirements of the State and Federal election material retention statutes, the Government Accountability Board adopted the following electronic data retention policies and specifically determined that these policies would meet the requirements of State and Federal data retention statutes:

For All Elections Until Legislative Changes May Occur:

1. For those election officials using electronic/computerized vote recording or tabulation equipment utilizing memory devices such as a PROM or other similar memory storage devices, the “data” that should be transferred and maintained electronically for 22 months pursuant to §7.23(1)(g), Wis. Stats., and 42 U.S.C. §1974, is the electronic record of the program by which votes are to be recorded or tabulated, which is captured prior to the election, plus the hard copy output from each detachable recording unit or compartment (memory device or PROM), i.e. results tape.

If there is no removable initial programming contained on the detachable recording unit or compartment (memory device or PROM), then the costs of simply retaining an electronic copy of the results tape is excessive. The Government Accountability Board staff may coordinate contact between local election officials and manufacturer and programming representatives to arrive at a uniform policy and escrow arrangement for programming, if necessary.

2. As an alternate way to comply with §7.23(1)(g), Wis. Stats., and 42 U.S.C. §1974, election officials using electronic/computerized vote recording or tabulation equipment utilizing removable programmable data storage devices (memory devices or PROMs) or other similar storage devices may also retain the actual devices for the period of 22 months.
3. For those elections officials using both the Premier AccuVote OS and AccuVote TSX, the “data” that should be transferred and maintained electronically for 22 months pursuant to §7.23(1)(g), Wis. Stats., and 42 U.S.C. §1974, is all election programming and materials from each device which can be downloaded to hard drive or disk before erasure and reprogramming.
4. For those elections officials who possess elections management software the “data” that should be transferred and maintained electronically for 22 months pursuant to §7.23(1)(g), Wis. Stats., and 42 U.S.C. §1974, is the following: A) all election programming (programmable code,) and B) for each memory device programmed by election officials, the accumulation of election results will be incorporated into the election management system in order to obtain and retain aggregate election results. This programming and results data can be downloaded to hard drive or disk before erasure and reprogramming of the memory devices.

Questions or Concerns:

If you have questions or concerns regarding the required course of action, please contact Ross Hein, Election Administration Specialist, at 608/ 267-3666 or [Ross.Hein@wi.gov](mailto:Ross.Hein@wi.gov), or you may contact Shane W. Falk, Staff Counsel, at 608/ 266-2094 or [Shane.Falk@wi.gov](mailto:Shane.Falk@wi.gov). Thank you!

Attachment

cc: Kevin J. Kennedy  
Director and General Counsel  
Government Accountability Board

# State of Wisconsin\Government Accountability Board

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JUDGE THOMAS CANE  
Chair

KEVIN J. KENNEDY  
Director and General Counsel

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**DATE:** January 2, 2009

**TO:** Wisconsin County Clerks  
Wisconsin Municipal Clerks  
City of Milwaukee Election Commission  
Milwaukee County Election Commission  
Community Partners and Other Interested Parties

**FROM:** Nathaniel E. Robinson  
Elections Division Administrator  
Government Accountability Board

**SUBJECT:** Government Accountability Board's December 17, 2008, Meeting  
Actions Taken Pertaining to Elections Administration

To bring you up-to-date on actions of the Government Accountability Board's actions taken at their December 17, 2008, pertaining to the Elections Administration, I am pleased to summarize them in this memo.

1. Four-Year Voter Records Maintenance: The Board authorized the G.A.B. staff to perform the four-year voter records maintenance function on behalf of all municipalities, in accordance with the standards and procedures summarized in a recommended protocol presented to the Board and previously sent to local election officials for their review and comment on November 28. Information reviewed and approved by the Board includes a timeline that specifies February 2, 2009, as the deadline for mailing notice of suspension letters to voters. (Refer to the Elections Division homepage (Date: 11/28/08, titled, "Memo to Clerks.")
2. Interim Report on Retroactive "HAVA Checks: The Board accepted an interim report on the retroactive "HAVA Check" protocol proposed for 2009. This report includes a May 1 to December 1, 2009, timeline for completing the retroactive checking procedure. The formal recommendation will be reviewed by the Board at its January 15, 2009, meeting, during which time, the Board will rule on staff's recommendation. This draft protocol was also sent to local election officials on November 28, 2008, and remains posted to the Elections Division homepage (Date: 11/28/08, titled, "Memo to Clerks.")
3. Guidance for Clerks on Maintaining Elections Data: The Board approved guidance for Clerks to maintain elections data and directed Elections Division staff to promulgate its decision to local election officials the provided four options the for Clerks to review that will satisfy requirements outlined in Wis. Stats. 7.23 (1) (g). This information was posted to the Elections Division homepage (Date: 12/18/08, titled, "Retention of Electronic Election Data.")

4. Procedure for Conducting On-site Monitoring of Voting System Security: The Board adopted a procedure for conducting on-site monitoring of voting system security, which will be carried out in conjunction with on-site polling place accessibility visits on Election Day. G.A.B. staff will verify memory devices and tamper-evident seals and check the Inspector's Statement (GAB-104) with the Chief Election Inspector. This document is posted on the Elections Division homepage. (Date: 01/02/09, titled, "Protocol, for Conducting On-site Monitoring of Electronic Voting System Security.")
5. Update on Revisions of the Recount Manual: The Board also received an update on revisions of the Recount Manual that had been vetted through an ad-hoc advisory committee comprised of Clerks and representatives from political parties. This document is posted on the Elections Division homepage. (Date: 01/02/09, titled, "Report of the Recount Manual.")

Please let me know if we can provide additional information or assistance. I may be contacted at 608/ 267-0715, or at Nat.Robinson@wi.gov. Thank you!

cc: Kevin J. Kennedy  
Director and General Counsel  
Government Accountability Board

Members, Elections Division Staff Members

## DESTRUCTION OF ELECTION MATERIALS - s.7.23, Stats.

The following chart is designed to assist clerks in determining when to destroy election materials. Materials and supplies associated with an election may be destroyed according to the following chart unless there is a recount, notice of an election contest, or any contest or litigation pending with respect to the election. All materials and documentation associated with a federal election must be retained at least 22 months after the election.

MATERIALS	DESTRUCTION DATE
Contents of a blank ballot box	Designation of clerk*
Unused ballots and materials	Designation of clerk*
Voter serial number slips	Designation of clerk* - 22 months after the election for federal offices
Voting machine recorders	14 days after a primary; - 21 days after an election**
Detachable recording units on electronic voting equipment	14 days after a primary; - 21 days after an election***
Ballots (state, county, local offices)	30 days after election
Ballots (federal offices)****	22 months after election
Applications for absentee ballots (for federal election ballots)	90 days after the election 22 months after the election
Forms associated with the election such as tally sheets, inspectors' statements, and nomination papers	90 days after the election 22 months after the election for federal offices
Official Canvass Statements	10 years after the election
Registration and poll lists - Nonpartisan primaries and elections	2 years after the election for which they were created
Registration and poll lists - Partisan primaries and elections	4 years after the election for which they were created
Canceled Registration Cards	4 years after cancellation
Election Notices	1 year after the election 22 months after the election for federal offices
Proofs of publication and correspondence relative to publications	1 year after the election 22 months after the election for federal offices
Campaign Registration Statements	6 years after termination by the registrant
Campaign Finance Reports	6 years after the date of receipt

\* The suggested destruction time is after the deadline for the filing of a recount petition (3 business days after the canvass is completed), if no recount is pending.

\*\* The Governor may by order permit the clearing of voting machine recorders before this date if a special election is called.

\*\*\* Before units can be cleared or erased, the information must be transferred to a disk or other recording medium and retained for 22 months.

\*\*\*\* Federal offices are President of the United States, United States Senator, and Representative in Congress.

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# Elections Board Forms for Use by Municipal Clerks

## Elections Board Manuals and Information Pamphlets:

Absentee Voting in Wisconsin Nursing Homes, Retirement Homes & Community-Based Residential Facilities		6/90
Ballot Instruction Manual for Wisconsin (includes all ballot forms) (Pages. 28-31, Rev.7/94)		6/91
Calendar of Wisconsin Election and Campaign Events Nov. 2000 – Jul. 2001		9/2000
Cost of Elections		8/2000
Counting Votes at the September Partisan Primary		5/99
Counting Votes at the Spring Primary, Spring Election and General Election		5/99
Destruction of Materials		2/95
Election and Campaign Finance Laws (Chapters 5-12, Statutes)		1/01
Election and Campaign Manual for County and Municipal Clerks	(Page1 revised 9/99)	6/96
Election Day Manual for Wisconsin Election Officials	(updating insert-8/00)	1/92
Election Recount Procedures		4/91
Electronic Voting Systems - Transporting Ballots to Central Counting Place		1/92
Enabling Homeless Individuals to Vote (Memorandum)		9/95
Excerpts from the Wisconsin Code (Administrative Rules)		8/94
Handling Absentee Ballots at the Polling Place		7/00
Information About Filing a Complaint Under the Election and Campaign Finance Law		6/96
Issuing Absentee Ballots		9/95 (Rev.10.2001)
Polling Place Checklist		3/94
Post-Election Checklist		3/94
Procedures for Nomination of Candidates by Caucus		10/94
Recall of Local Elected Officials		2/94

## Ballot Access Forms:

EB-1	Campaign Registration Statement		5/91
EB-162	Declaration of Candidacy	(Reformatted 5/99)	5/97
EB-163	Notification of Noncandidacy	(Reformatted 12/97)	5/94
EB-168	Nomination Paper for Partisan Office		2/2001
EB-169	Nomination Paper for Nonpartisan Office	(Reformatted 2/2001)	11/2000

## Ballot Access Checklists:

EBIS-6	Ballot Access Checklist for Municipal Candidates Where Nomination is by Caucus		2/2001
EBIS-7	Ballot Access Checklist for Municipal Candidates When Nomination Papers are Used		2/2001
EBIS-8	Campaign Finance Checklist for Municipal Candidates		2/2001

## Sample Certification & Oath Forms:

EB-153	Certificate of Election	(Reformatted 11/97)	7/86
EB-154	Official Oath	(Reformatted 11/98)	6/86
EB-155	Oath of Special Voting Deputy	(Reformatted 12/97)	5/95

## Absentee Ballot Forms:

EB-121	Application for Absentee Ballot	6/00
EB-122	Absentee Ballot Certificate Envelope †	6/00
EB-140	Application for Absentee Presidential Ballot - Former Wisconsin Resident	8/2000
EB-141	Application for Presidential Ballot - New Wisconsin Resident	8/2000

## Election Day Forms:

EB-101	Ballot Container Certificate †	5/85
EB-102	Certificate of Rejected Absentee Ballots †	7/00
EB-103	Used Certificate - Affidavit Envelopes of Absentee Ballots †	7/00
EB-104	Inspectors' Statement†	Pending
EB-105	General Purpose Tally Sheet†	5/90
EB-106	Board of Canvassers Report	8/98
EB-107	General Purpose Poll List† (Reformatted 12/97)	10/87
EB-111	Notice of Election Fraud†	6/86 or 7/95
EB-112	Notice of Crossover Voting	7/98
EB-112m	Notice of Crossover Voting (optical scan/marksense)	7/98
EB-114	Effect of Crossover Voting at a Presidential Preference Primary	10/95

## Voter Registration Forms:

EB-131	Application for Voter Registration	8/2000
EB-138	Authorization to Cancel Registration	8/2000
EB-139	Authorization to Cancel Registration (Presidential) Revised & Renumbered	4/92
EB-146	Elector Request for Confidential Listing	9/2000
EB-147	Affidavit of Sheriff or Chief of Police with Respect to Elector Request for Confidential Listing	9/2000
EB-149	Notice of Cancellation of Registration and Confidential Listing	9/2000
EB-177	Voter Identification Affidavit† (Rev.Pending)	4/85
EB-180	Voter Address Verification Card†	1/2001
EB-181	Notice of Proper Registration† (Rev.Pending)	4/85
EB-182	Notice of Improper Registration† (Rev.Pending)	4/85
EB-183	Notice of Cancellation of Voter Registration†	Pending

## Campaign Finance Forms:

EB-2	Campaign Finance Report	6/91 or 5/97
EB-2a	Campaign Finance Report (Short Form)	9/95
EB-6	Voluntary Oath for Committees and Individuals Making Independent Expenditures	6/88
EB-7	Report of Independent Disbursements	6/86

## Petition Forms:

EB-170	Recall Petition	5/2001
EB-171	Petition for Ballot Status	8/2001
EB-172	Petition for Direct Legislation	10/2000
EB-173	Petition for Referendum to Require Voter Registration	5/85
EB-186	Petition for Recount (Reformatted 12/97)	9/88

## Election, Registration & Clerk Statistics:

EB-190	Election Voting and Registration Statistics Report	9/99
EB-191	Survey of Municipal Clerks	9/99
EB-192	Polling Place Accessibility Survey	Rev. 9/99
EB-367	Forms and Manuals Order Form	9//2000

# State of Wisconsin \ Elections Board

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CARL HOLBORN  
Chairperson

KEVIN J. KENNEDY  
Executive Director

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## MEMORANDUM

**TO:** Members of the State Elections Board

**FROM:** Kristofer Frederick  
Elections Director and HAVA Coordinator

**DATE:** For June 23, 2006 Elections Board Meeting

**SUBJECT:** Voting System Security Procedures

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The State Elections Board approved the Diebold AccuVote OS optical scan and TSX DRE Touch Screen voting systems at the March 22, 2006 meeting. This approval also included a series of security recommendations for use in conjunction with this equipment. At that time, board members expressed an interest in having these recommendations expanded to include all electronic voting systems.

In addition, the National Association of State Elections Directors (NASSED) recently adopted an official addendum to the qualification of all voting systems that include a memory card that stores and transfers ballot images or tabulation data. The security recommendations, which are based on the NASSED addendum, are premised on documentation as the primary security measure, as memory cards must be tracked with a written chain of custody. The recommendations require the use of security seals and that any access ports on voting devices must be closed and sealed.

Finally, 2005 Wisconsin Act 92 requires the State Elections Board to "promulgate rules to ensure the security, review and verification of software components used with each electronic voting system approved by the board. The verification procedure shall include a determination that the software components correspond to the instructions actually used by the system to count votes."

The attached security recommendations reflect an attempt to address these concerns and comply with these requirements. The recommendations also attempt to address concerns raised regarding the initial draft from the county and municipal clerks.

The primary concern offered by clerks was expressed regarding the original requirement that the memory card be in the possession of at least two individuals at all times. Many clerks pointed out that enforcing this requirement would be difficult, especially when using outside programming services. The current draft makes this a recommended, but not required, practice. A written chain-of-custody document, however, must be maintained.

The second most commented upon recommendation required that a memory card be immediately inserted into the voting unit and locked into place using a security seal. Many clerks have commented that this is impossible for those clerks who do not program their own memory cards. The revised procedures allow clerks discretion regarding programmed memory cards, but requires that memory cards be maintained in a location with secure access.

While staff has attempted to incorporate as many suggestions as possible, the diversity of comments prohibited the incorporation of all input offered. Therefore, while this draft will not please everyone, staff believes that it reflects a workable set of procedures that provides the desired level of security. In order to ensure that these procedures are used for the Fall 2006 elections, staff requests that the Board adopt these procedures and direct staff to develop administrative rules which incorporate these procedures.

Attachment

- ✓ Security Recommendations for Electronic Voting Systems

# VOTING EQUIPMENT

## Summary

The proper use and security of voting equipment is integral to ensuring accuracy and maintaining voter confidence in the electoral process. Voting equipment accuracy and security has been a topic of concern for many individuals. Careful execution and documentation of the procedures detailed in this section will alleviate many concerns, and ensure that the voting equipment used in your municipality is reliable and accurate.

## Voting Equipment Types

The State of Wisconsin uses a mixed voting equipment system. This means that some municipalities use hand-count paper ballots, some use optical scan equipment, and some use direct recording electronic (DRE) equipment (also known as “touchscreen”). Many municipalities use a combination of these equipment types.

1. Municipalities with a population of 7,500 or more are required to use electronic voting equipment in every ward in every election.
  - a. Electronic voting equipment is equipment that tabulates votes electronically and includes optical scan and DRE.
  - b. Ballot marking devices, such as the AutoMARK, do not electronically tabulate votes. Therefore, it is not considered electronic voting equipment.
2. All polling places must be equipped with at least one accessible voting equipment component to permit all voters to vote privately and independently.

More information on accessible voting equipment can be found in the Accessibility section of this manual beginning on page 81.

## Voting Equipment Certification and Approval

Before any voting equipment manufacturer can market voting equipment in the State of Wisconsin, they must first achieve certification through a federal process and then approval through a state process.

### *Federal Certification*

In order to achieve federal certification, a voting equipment manufacturer must:

1. Apply to the U.S. Election Assistance Commission (EAC).
2. Submit the equipment to an Independent Testing Authority (ITA), which reviews all firmware, software, and hardware. The ITA issues a report to the EAC.
3. Receive an EAC-accredited certification number. The EAC issues certification numbers after reviewing the ITA reports and confirming that the voting equipment conforms to the Voluntary Voting System Guidelines established by the EAC.

### *State Approval*

In order to achieve Wisconsin state approval, a voting equipment manufacturer must:

1. Submit an application to the State of Wisconsin.  
No voting equipment manufacturer can apply to the State of Wisconsin unless it has received federal certification.
2. Prepare the voting system for testing by the Elections Board staff.  
The voting system is tested for three mock elections.
3. Hold a public demonstration.
4. Submit equipment to the Election Administration Council for review.  
The Election Administration Council is comprised of municipal clerks, county clerks, and members of the disability community.
5. Receive approval at a public meeting from the State Elections Board permitting the use of the voting system for any election in the State of Wisconsin.

### *Approved Vendors*

The following is a list of all manufacturers of voting equipment currently approved for use in the State of Wisconsin. Approved voting equipment version numbers and contact numbers for each of the vendors can be found on the agency website.

1. Diebold Election Systems, Inc.
2. Election Systems & Software (ES&S).
3. Populex Corporation.
4. Sequoia Voting Systems.
5. Vote-PAD\*.
6. Voting Technologies International (VTI).

\*Vote-PAD is only approved for use in municipalities with populations less than 7,500 who hand-count paper ballots.

### Pre-Election Electronic Voting Equipment Testing

Wisconsin statutes require that all municipalities test the software of electronic voting equipment for correctness and accuracy. The purpose of testing electronic voting equipment is to ensure that the equipment will correctly tabulate votes for all offices and referenda.

#### *Public Notice*

The testing of electronic voting equipment, either DRE or optical scan equipment, shall be open to the public.

1. The test may not be conducted earlier than ten (10) days before Election Day.
2. Public notice of the time and location of the testing shall be given by the clerk at least 48 hours before.

#### *Procedure*

In order to conduct a pre-election test for accuracy, the municipal clerk must create a test deck, which is a plan detailing a predetermined number of valid votes for

each candidate and on each referendum. The test deck should reflect all of the required testing components described in this section.

1. Optical Scan Equipment.

- a. Ballots should be marked to reflect a pre-determined number of valid votes for each candidate and referendum.
- b. Pre-marked ballots shall be run through the optical scan voting unit.
- c. The actual tabulation of the pre-marked ballots shall then be compared to the pre-determined number to verify the voting equipment is tabulating properly.

2. Direct Recording Electronic (DRE) Equipment.

- a. Votes shall be cast on the DRE unit in a manner reflecting a pre-determined number of valid votes for each candidate and referendum.
- b. The print out of the tabulation of the votes cast shall then be compared to the pre-determined number to verify the voting equipment is tabulating properly.
- c. At least two individuals should participate in the DRE test to ensure votes selected on the test deck are entered correctly in the voting system.

3. Errorless Count Requirement.

- a. If an error is detected during the testing, the municipal clerk shall determine the cause and correct the error.
- b. The clerk must make an errorless count before the electronic tabulating equipment is approved by the clerk for use in the election.

**Note:** The Elections Board recommends that municipalities formulate a test desk that is unique to the municipality, and refrain from using test desks provided by the vendor or manufacturer. This is to ensure any errors not discovered by the vendor will be uncovered by the clerk during the test. Examples of sample test decks are available on the agency website.

*Testing Components Requirement*

1. Each candidate for every office, for every party, needs to be tested.
2. Overvotes need to be tested for every office and ballot measure on the ballot.

- a. Overvotes are votes in excess of the number allowed by law.
  - b. Overvotes shall be rejected by the voting equipment.
3. Blank Ballots.
- a. Blank ballots are ballots that have no votes recorded.
  - b. A blank ballot shall be tested to ensure that they are rejected by the voting equipment and notify the elector that no votes have been recorded.
4. Write-in votes.
- a. On DRE equipment, the write-in function for each office shall be tested to ascertain that it is functioning properly.
  - b. On optical scan voting equipment it shall be tested to determine that ballots containing write-in votes for each office are properly separated into the write-in bin.
5. September Partisan Primary
- The clerk shall test for one or more ballots that have votes cast for a candidate of more than one recognized party are rejected.
6. November General Election
- The clerk shall test that the straight party function is properly working and that votes cast outside the selected party are tabulated correctly.

#### *Election Day Zero-Count Requirement*

Before any ballots on Election Day have been cast on the electronic voting equipment, the election officials shall witness a test of the tabulation component by engaging the printing mechanism and securing a printed result showing a zero count for every candidate and referendum.

### Security Procedures for Electronic Voting Systems

The State Elections Board has developed a series of security procedures for electronic voting systems. These procedures should be followed for each election, recount, or for any other situation in which voting systems or memory cards must be accessed. These procedures apply to all memory devices, including, but not

limited to, prom packs, memory cards, and any other removable memory devices that can be programmed or function to store and transfer ballot images or tabulation data. These procedures are intended to protect against malicious breaches to electronic voting equipment components as well as provide transparency of justifiable access.

### *Procedures*

The complete list of Security Procedures for Electronic Voting Systems is available on the agency website. These procedures encompass activities from pre-election to Election Day to post-election. Generally, these procedures provide:

1. Chain-of-custody documentation for storage, access, and transport of memory devices and access keys (if applicable).
2. Use of securing mechanisms, such as serialized and tamper-resistant tags or seals for voting equipment components.
3. Procedures for ensuring the accuracy of programmed components once installed on the equipment.
4. Documentation of authorized access to secured components by election officials.

### *Alternative Security Procedures*

The State Elections Board recognizes the need for flexibility when implementing these security procedures, and acknowledges that alternative means may be used to achieve and ensure the same level of security. Therefore, the State Elections Board will consider requests from municipalities and counties to implement alternative security procedures.

1. Procedures shall be submitted in writing to the State Elections Board (SEB) and received by that office for approval no later than sixty (60) days before the election date. The State Elections Board shall review the alternative procedures and shall either approve the procedures submitted or notify the requesting election official of recommended changes.
2. Approved security procedures will remain in effect until the municipality requests, in writing, a revision or the State Elections Board determines that a change is necessary.
3. Revision requests to previously-filed security procedures shall clearly state which part of the procedures previously filed have been revised.

4. Alternative security procedures shall, at a minimum, detail:
  - a. Physical security of election equipment, software and firmware, and memory cards including but not limited to:
    - i. Locking mechanisms and seals
    - ii. Chain-of-custody procedures and logs
    - iii. Equipment maintenance procedures.
  - b. Verification security including but not limited to:
    - i. Pre-election verification of software and firmware versions
    - ii. Pre-election zero status
    - iii. Receipt of a signed “Certificate of Performance Compliance: Memory Card Security” from each vendor that provides services to the municipality.

## Post-Election Audit

Wisconsin statutes require a post-election audit of the performance of each voting system used in the state of Wisconsin. The audit is designed to assess how electronic voting systems performed on Election Day through a hand-count of electronically tallied ballots. The audit is required following each November general election. However, nothing in these procedures prevents a municipality or county from conducting an audit after other elections or from auditing a larger number of voting machines or reporting units than those selected by the State Elections Board or required under these procedures.

### *Selection*

1. Fifty (50) reporting units will be randomly selected by the State Elections Board, through the use of a random-number generator, the Wednesday following the November general election.
  - a. At least five (5) reporting units for each type or version of voting system used throughout the state will be selected.
  - b. If five (5) reporting units are not represented in the original 50, additional reporting units will be selected until all types or versions are represented. For example, in 2006, 67 reporting units were selected for audit.

2. Additional reporting units will be selected to be audited by State Elections Board staff.
  - a. The number audited is not to exceed one percent (1%) of the reporting units in the state.
  - b. The State Elections Board staff will audit different reporting units than those identified to be audited by the municipal clerk.
3. Four (4) contests on the ballot will be selected, including the highest office on the ballot (president or governor).

The remaining three will be drawn by lot from all other contests on every ballot statewide.

### *Notification*

1. Municipalities with reporting units selected for audit will be notified the day following the election.
  - a. The affected county clerks will also be notified.
  - b. It is the responsibility of the municipal clerk to make arrangements with the county to have election materials returned for the purpose of the audit following the county canvass.
  - c. Materials needed for conducting the audit include voter lists, inspectors' statement, tally sheets, reports printed or generated by the voting systems, ballots, and any other required materials.
2. The municipal clerk and county clerk may choose to have the county conduct the audit and the county may choose to conduct the audit following the county canvass.
3. The audits must be completed within two weeks following certification by the county board of canvassers.
4. The audit is considered a public meeting and proper notice shall be posted or published no later than 48 hours in advance.

### *Procedure*

A list of procedures, instructions, and documentation forms will be provided to municipalities selected for audit at the time of notification. Generally, the procedure for conducting a post-election audit is as follows:

1. Two individuals shall conduct independent counts of the ballots from the voting system.

Note that for direct recording electronic systems, the official ballots are the voter verified paper audit trail.

2. The individual tallies shall be compared to each other and any discrepancies shall be resolved to an agreed upon final hand-count tally total.

If the hand counts differ from each other, the paper records/ballots must be recounted.

3. The final hand-count tally total shall then be compared to the Election Night results tally tape and discrepancies noted.

4. Each municipality conducting an audit must submit the designated reporting form(s) and supporting documents from the audit, including tally sheets, to the State Elections Board to indicate that the audit was completed and whether any discrepancies were found.

5. The State Elections Board staff will request that the vendor investigate and explain the reasons for any unexplained differences between the machine tally and the paper record tally.

- a. Should the vendor fail to provide a sufficient written explanation, including recommendations for preventing future occurrences, within 30 days of notification, the State Elections Board will suspend approval of all voting systems manufactured or serviced by the vendor in Wisconsin.

- b. This suspension will be implemented immediately, pending an appeal by the vendor to the Board, which must be filed within 30 days.

- c. Investigations of discrepancies shall be open and transparent, with active involvement of interested parties.

6. Based upon the results of the audit, the State Elections Board may, at its sole discretion, choose to re-test the voting system per ElBd Chapter 7 of the Wisconsin Administrative Code. The test is a condition of continuing approval of the voting system.

## Frequently Asked Questions

### *1. What is a voter-verified paper audit trail?*

Wisconsin law, §5.91(18), Wis. Stats., requires that all direct recording electronic (DRE) voting systems produce a complete, permanent paper record showing all votes cast by the elector. The voter-verified paper audit trail (VVPAT) is considered the official ballot and is to be used in a recount of each vote cast by the elector.

### *2. Should we be conducting pre-election tests in “testing mode” or in “election mode?”*

The State Elections Board recommends that municipalities conduct pre-election testing in election mode. By testing in election mode, any apparent errors that may not be triggered in testing mode shall be discovered. If you have questions on how to determine whether your equipment is set in test mode or election mode, you should contact your voting equipment vendor.

### *3. Can we reuse memory cards?*

Nothing prohibits reuse of memory cards, though municipalities must comply with §7.23(1)(g), Wis. Stats.:

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

## List of Related Forms and Publications

All forms and publications are available on the agency website or can be ordered from the State Elections Board.

### *Other Publications*

EIBd Chapter 7, Wisconsin Administrative Code  
Security Procedures for Electronic Voting Systems

# **DRAFT Security Recommendations for Electronic Voting Systems**

## **Introduction and Scope**

These recommendations apply to all memory devices, including, but not limited to, prom packs, memory cards or any other removable memory devices that can be programmed or function to store and transfer ballot images or tabulation data.

Nothing prohibits reuse of memory cards, though municipalities must comply with section 7.23(1)(g) Wis. Stats.: "Detachable recording units and compartments for use with electronic voting machines may be cleared or erased 14 days after any primary and 21 days after any election. Before clearing or erasing the units or compartments, a municipal clerk shall transfer the data contained in the units or compartments to a disk or other recording medium which may be erased or destroyed 22 months after the election to which the data relates."

The Wisconsin State Elections Board recognizes the need for flexibility when implementing these recommendations, and acknowledges that alternative means may be used to achieve and ensure the same level of security. Therefore, the State Elections Board will consider requests from municipalities and counties to implement alternative security procedures.

## **General Statements**

1. Throughout the life of the voting system, the municipal clerk shall maintain control of all memory cards and keep a separate, perpetual, written chain-of-custody record for each memory card used with a voting system. Memory cards shall be stored securely at all times and each access and transfer shall be logged in the record.

Upon the agreement of the municipal clerk, the county clerk may store memory cards in secure location. In this instance, both clerks must maintain a separate, perpetual, written chain-of-custody records for each memory card used with a voting system.

An additional written log shall record everyone who accesses the voting system. This log shall include the name of the person, the date and time the access begins, the purpose of the access, and the time the access ends. Such documentation does not apply to election day procedures.

The recommended, but not required, practice is that memory cards shall at no time be in the possession of a single individual. Regardless of compliance with this recommended practice, a separate, perpetual, written chain-of-custody record must be maintained for each memory card used with a voting system.

2. Each memory card shall have or be assigned a unique and permanent serial number. If the memory card does not have a permanent and fixed serial number affixed by the manufacturer, a clerk may affix a label to the cards which contains the clerk's original signature.

3. The municipality shall use controlled, serialized seals that are tamper-resistant and resistant to inadvertent breakage along with a written log of all seals and associated serial numbers. The municipal clerk, or county clerk if applicable, should maintain a written log that records which memory cards and which serialized tamper-evident seals are assigned to which voting stations or units.
4. If applicable, the municipal and/or county clerk(s) shall maintain an additional written inventory of all keys that may be used to gain access to the voting systems. The municipal and/or county clerk(s) shall keep a perpetual, written chain-of-custody record for all such keys.
5. These procedures shall be followed for each election, recount, or for any other situation in which the voting system or memory cards must be accessed.

### **Pre-Election Procedures**

6. The municipal clerk, or county clerk if applicable, shall check the locks and security seals and compare to the logs to verify who accessed the voting systems or memory cards since the previous election.
7. Memory cards shall, if possible, be programmed to print a list of the software and firmware versions of the voting system on each beginning-of-election-day zero report and end-of-day zero report. This information shall also be printed on any reports generated during the pre-election testing, including the public test.

For existing systems that cannot accommodate this requirement, this information may be recorded from the system start-up screen, either by municipal or county staff during the pre-election testing or by election inspectors during election day.

The records for both the pre-election test and election day reports must be maintained by the municipal or county clerk.

8. Except when necessary to program, test, or operate the system, each system must be closed and locked with a tamper-resistant seal which can be tracked using a unique and permanent serial number. Each input slot or access port, including serial or modem ports, must be closed and locked using a tamper resistant seal which can be recorded using a unique and permanent serial number.

Alternately, these slots or ports may be disabled, with written documentation of the dates and times maintained by the municipal or county clerk.

Any door by which access can be gained to the system controls must be closed and locked using a tamper-resistant seal which can be tracked using a unique and permanent serial number. The municipal or county clerk shall maintain a written record of such serial numbers.

9. Once a memory card is programmed for the election, it shall be immediately inserted into its assigned unit and sealed against unauthorized access with a serialized, tamper-evident seal which can be tracked using a unique and permanent serial number. The voting station shall not be set into election mode until after the memory card is sealed inside.

Alternately, memory cards may be locked in a secure location with controlled access; written documentation of access to programmed memory cards must be maintained.

10. The municipality or county should obtain a signed "Certificate of Performance Compliance: Memory Card Security" from each vendor that provides voting systems, equipment, programming services, or memory cards to the municipality.

### **Election Day Procedures**

11. On Election Day, before any ballots are cast on any unit, the integrity of the tamper-evident seals shall be verified by the chief election inspector before accessing compartments containing the memory card and unit power switch. The chief election inspector shall record this information on the Inspectors' Statement (EB-104) and chain-of-custody document for the memory card.
12. Once the polls have been opened on Election Day, ballot removal from an optical scan machine or paper roll removal or replacement on a Direct Recording Electronic (DRE) must be conducted with at least two election inspectors (or other sworn election team members appointed by the municipal clerk) present. The removal process, names of the election inspectors or sworn election team members, and time must be recorded on the Inspectors' Statement (EB-104).
13. In post-election mode, election officials must print the results report before the removal of the memory card from the voting stations or units. If additional reports other than the results reports are available, these reports must also be printed before the removal of the memory card.
14. One copy of the results report and the memory cards shall be secured in a separate, sealed container or envelope by the chief election inspector. The chief election inspector and two additional election inspectors shall sign their names across the seal of the secured envelope or container. The memory cards shall be promptly returned to the municipal clerk.

If results are transmitted by modem, the municipal clerk may access the memory card for transmission purpose, but must reseal and sign his or her name across the seal of the secured envelope or container. Before transmitting the results via modem, the clerk must print an additional results report from the system and record the transmission time on the Inspectors' Statement (EB-104).

As an alternate procedure, the memory cards may remain sealed in the voting stations or units. The numbers of the security seals shall be recorded on the Inspectors' Statement (EB-104).

### **Post-Election Procedures**

15. After each election, the clerk responsible for storing the voting system shall conduct an inspection to ensure that each system is locked and secured. Written documentation shall note the date and time of the inspection and any applicable security seal numbers.
16. Prior to the next election or recount, the municipal clerk, or county clerk if applicable, shall inspect the security seals to ensure that each seal number matches the initial ending documentation from the previous election.

**CERTIFICATE OF PERFORMANCE COMPLIANCE:  
MEMORY CARD SECURITY**

The undersigned supplier of voting system services certifies that documented procedures for assuring memory card security and chain of custody have been provided to the Wisconsin State Elections Board and have been utilized while the supplier had control or access the memory cards with the following serial numbers:

The undersigned further certifies that no codes, files, programs or language have been added to the memory card that deviate in any way from the approved version in escrow with the Wisconsin State Elections Board. The undersigned understands and agrees that any deviation from this agreement subjects the undersigned to: (1) de-certification of any or all voting systems or services provided by the undersigned supplier; (2) a rebate of full purchase price to all municipalities which have purchased said system; and (3) any applicable civil or criminal penalties that may be available to the purchaser of such services or the State Elections Board, including, but not limited to the election fraud provisions provided in section 12.13 Wis. Stats.

N128W12795 Highland Road  
Germantown, WI 53022  
August 4, 2009

Susan Edman, Executive Director  
City of Milwaukee Election Commission  
City Hall, Room 501  
200 East Wells Street  
Milwaukee, WI 53202

Dear Ms. Edman:

I would like to make several open records request under WI Stats. §19. I would like the following election records from the November 4, 2008 election.

1. The electronic copy (aka electronic backup) of the contents of removable memory card from the optical scanner used in Ward 114 during the November 4, 2008 election. The creation of this electronic election record and the retention of this record for 22 months are required separately under Wisconsin [WI Stats. §7.23(1)(g)] and federal [Title 42, Chapter 20, Subchapter 2, Section 1974] law.
2. The electronic copy (aka electronic backup) of the contents of removable memory card from the disability device (AutoMark) used in Ward 114 during the November 4, 2008 election. The creation of this electronic election record and the retention of this record for 22 months are required separately under Wisconsin [WI Stats. §7.23(1)(g)] and federal [Title 42, Chapter 20, Subchapter 2, Section 1974] law.
3. The electronic copy (aka electronic backup) of the contents of removable memory card from the optical scanner used in Ward 207 during the November 4, 2008 election. The creation of this electronic election record and the retention of this record for 22 months are required separately under Wisconsin [WI Stats. §7.23(1)(g)] and federal [Title 42, Chapter 20, Subchapter 2, Section 1974] law.
4. The electronic copy (aka electronic backup) of the contents of removable memory card from the disability device (AutoMark) used in Ward 207 during the November 4, 2008 election. The creation of this electronic election record and the retention of this record for 22 months are required separately under Wisconsin [WI Stats. §7.23(1)(g)] and federal [Title 42, Chapter 20, Subchapter 2, Section 1974] law.
5. The electronic copy (aka electronic backup) of the contents of removable memory card from the optical scanner used in Ward 215 during the November 4, 2008 election. The creation of this electronic election record and the retention of this record for 22 months are required separately under Wisconsin [WI Stats. §7.23(1)(g)] and federal [Title 42, Chapter 20, Subchapter 2, Section 1974] law.
6. The electronic copy (aka electronic backup) of the contents of removable memory card from the disability device (AutoMark) used in Ward 215 during the November 4, 2008 election. The creation of this electronic election record and the retention of this record for 22 months are required separately under Wisconsin [WI Stats. §7.23(1)(g)] and federal [Title 42, Chapter 20, Subchapter 2, Section 1974] law.
7. The electronic copy (aka electronic backup) of the contents of removable memory card from the optical scanner used in Ward 255 during the November 4, 2008 election. The creation of this electronic election record and the retention of this record for 22 months are required separately under Wisconsin [WI Stats. §7.23(1)(g)] and federal [Title 42, Chapter 20, Subchapter 2, Section 1974] law.
8. The electronic copy (aka electronic backup) of the contents of removable memory card from the disability device (AutoMark) used in Ward 255 during the November 4, 2008 election. The creation of this electronic election record and the retention of this record for 22 months are required separately under Wisconsin [WI Stats. §7.23(1)(g)] and federal [Title 42, Chapter 20, Subchapter 2, Section 1974] law.

**Severability** – The above open requests are separate and severable and are only including in this single correspondence in order to ease the administration of these requests and the thematic similarity among the requests. It is expected any delay in the production of records for one request will not impair or delay the production of records for another request.

**Denial of Request** – As required by Wisconsin's open records law as codified in §19, any denial, in whole or in part, of one or more of the public records requests above must state in writing and with specificity as to the reasons and statutory authority for denying the request. For the purposes of this requirement, an email response will be considered a written response.

**Redaction** – A redaction is a denial in part of requested record. There shall be a log which states in writing and with specificity to the reasons and statutory authority each redaction.

**Duplication** – If a single record satisfies one or more of the above requests, then only one copy of the record needs to be produced provide said record is accompanied by a notation as to which, multiple requests are satisfied by the record.

**Promptness** – The records requested above shall be provided “as soon as practicable” as required by Wisconsin statute.

Please contact me at your earliest convenience as to the costs of providing these electronic records in electronic form. If you have any questions, regarding this request you may contact me at this email address or at 414-375-5777.

In Liberty  
John Washburn