

MINNEHAHA COUNTY
OFFICE OF THE STATE'S ATTORNEY

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May 3, 2022

TO: Office of Hearing Examiners, ATTN Catherine Williamson
523 East Capitol Avenue
Pierre, SD 57501

Cindy Meyer
Jessica Pollema
Pennington County Auditor
Pennington County State's Attorney
Lincoln County Auditor
Lincoln County State's Attorney

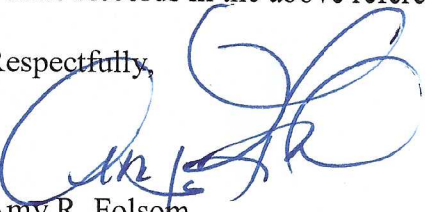
RE: In the Matter of the Public Records Review Request of Cindy Meyer and Jessica Pollema

OHE File No. PRR 22-03

Dear Hearing Officer Williamson and Parties:

Enclosed please find Minnehaha County's Response to Notice of Request for Disclosure of Public Records in the above referenced matter.

Respectfully,


Amy R. Folsom
Deputy State's Attorney
Minnehaha County

SOUTH DAKOTA
OFFICE OF HEARING EXAMINERS

CINDY MEYER; JESSICA POLLEMA,)
)
) Petitioners,)
)
 v.)
)
) LINCOLN COUNTY, South Dakota;)
) PENNINGTON COUNTY, South Dakota;)
) and MINNEHAHA COUNTY, South)
) Dakota,)

PRR 22-03

MINNEHAHA COUNTY RESPONSE

Respondents.

Minnehaha County, by and through the undersigned Deputy State’s Attorney, hereby submits this Response to Notice of Request for Disclosure of Public Records dated April 25, 2022¹:

FACTS and PROCEDURAL HISTORY

On February 15, 2022, Minnehaha County (County) received a request for records constituting a “Cast Vote Record” (CVR) from Petitioner Cindy Meyer (Meyer). Meyer specifically requested the following:

[C]opies of public records that are known as CVR (Cast Vote Records) from the November 3rd, 2020 election (specifically) and November 8, 2016 election (if still available.) I am requesting a text, comma, or tab delimited file, or a text based report listing, in the sequence processed by the county, every ballot, its sequential ID, its timestamp, its method of voting..., the batch id and tabulator id.... To be clear, I am not requesting a summary report of votes I am requesting a per ballot report. This information being requested is either called a cast vote record, ballot log, or a summary of ballots....

¹ Minnehaha County expressly joins the arguments proffered by Lincoln and Pennington Counties, but because the factual background in Minnehaha County varies slightly, Minnehaha County files separately for clarity.

Meyer FOIA Request to Minnehaha County, 2/3/22 (emphasis added). The Minnehaha County Auditor, Ben Kyte (Kyte), denied the request in writing on February 25, 2022. Meyer re-asserted the request on March 8, 2022, which was again denied on March 18, 2022.

On April 25, 2022, Minnehaha County received notice of its duty to file a response to Petitioner's Notice of Request for Disclosure of Public Records.

On April 27, 2022, Kyte received additional, supplemental argument from Meyer, which clarified the detail that she is seeking:

This report includes the following fields: Unique ID for each CVR, Tabulator, ID/name/number/ Batch ID/name/number, Ballot position within a batch imprinted ID (if applicable), record of which vote or mark for every contest on each ballot which should contain the name of the contest, candidate, and vote/mark (or override if applicable). Over and under-vote selections should be used as appropriate. Please not that any links to ballot images are NOT accessible to us as they reside in a server that we cannot access. Even if we could access it, ballots themselves have no personally identifiable information....

Letter by Jessica Pollema and Cindy Meyer, April 27, 2022 (emphasis added).

Shortly after Meyer made her first request in February 2022, Minnehaha County IT staff discovered that, due to the unique manner in which the County had saved data, the County did, in fact, have the ability to generate a report which lists on a per ballot basis, the record of each vote or mark for every contest on each ballot along with information from the tabulating machine which identified how and when it was counted. More simply stated, the report Meyer requests (and which the County was asked to disclose) identifies for each individual ballot, the precinct in which the voter voted, the sequence in which the ballot was counted (and therefore the order in which a voter appeared at the polling place), and just like the paper ballot, the exact choice of the individual voter in each and every race.

APPLICABLE LAW

The South Dakota Public Records Act of 2009, provides in relevant part:

Except as otherwise expressly provided by statute, all citizens of this state, and all other persons interested in the examination of the public records, as defined in § 1–27–1.1, are hereby fully empowered and authorized to examine such public record, and make memoranda and abstracts therefrom during the hours the respective offices are open for the ordinary transaction of business and, unless federal copyright law otherwise provides, obtain copies of public records in accordance with this chapter.

Exceptions to disclosure, however, are well recognized. Pursuant to SDCL 1–27–1.1, the presumption of openness is qualified where “any other statute, ordinance, or rule expressly provides that particular information or records may not be made public....” SDCL 1–27–1.1. Furthermore, SDCL 1-27-3 provides that “[s]ection 1-27-1 shall not apply to such records as are specifically enjoined to be held confidential or secret by the laws requiring them to be so kept.” SDCL 1-27-3.

The presumption of secrecy in voting is not only well established-- but zealously protected as the foundation of a free and democratic society. The South Dakota Constitution provides:

§ 3. Elections

The Legislature shall by law define residence for voting purposes, insure secrecy in voting and provide for the registration of voters, absentee voting, the administration of elections, the nomination of candidates and the voting rights of those serving in the armed forces.

S.D. Const.Art. VII, § 3. *See also*, SDCL 19–19–506 (“Every person has a privilege to refuse to disclose the tenor of his vote at a public election conducted by secret ballot.”)

Heeding its constitutional mandate, the South Dakota Legislature has enacted a comprehensive scheme laws to ensure that a voter has absolute secrecy in preparing and depositing a ballot. By way of example (and not limitation), ballot boxes must be constructed to “preclude the removal of any material therefrom, and prevent tampering....” SDCL 12-16-26. Sealed ballots are delivered to precincts on the morning of election day. SDCL 12-16-18. Absentee ballots are kept “closed” until they are delivered to the absentee ballot board. SDCL 12-19-42. It is a class 6 felony to “deface, destroy, or tamper with the ballot box, envelope, pollbook, duplicate tally sheet, or registration lists or remove any seals.” SDCL 12-20-21.

The Legislative scheme to ensure secrecy even extends to the individual. In South Dakota, a voter is prohibited from publicizing his or her *own vote* or soliciting someone to do the same:

[n]o person may publicize an official ballot after it is marked to any person in such a way as to reveal the contents of the official ballot, or the name of any candidate for whom the person has marked a vote. No person may solicit a voter to show the voter's official ballot. Immediately after marking the official ballot the voter shall deposit the official ballot in the ballot box, if necessary, leaving the official stamp exposed.

SDCL 12-18-27. After counting, cast ballots are required to be sealed for twenty-two (22) months following the election. *See* SDCL 12-20-20; 12-20-31. Even program boards used in tabulating equipment are required to be sealed. *See* SDCL § 12-17B-15.

Significantly for purposes of this discussion, where the Legislature intended ballots to be exposed, it expressly said so. *See, e.g.* SDCL 12-18-24 (spoiled ballots), SDCL 12-20-1 *et. seq*, and South Dakota Administrative Rules 5:02 16:00 *et. seq* (counting and canvassing), SDCL Chapter 12-21 (recounts) and SDCL Chapter 12-22 (election contests.)

ARGUMENT

Meyer argues, *inter alia*, that her request should be granted because (1) she is not asking for paper or original “ballots” as defined by statute; (2) that SDCL 12-20-31 “permits” auditors to unseal the information with “proper security,” and (3) that there is “no personally identifiable information contained in the report.” However, interpreting South Dakota statutes regarding the handling and storage of ballots in light of the Constitutional mandate to insure ballot secrecy, compels a determination that the requested information impermissibly intrudes on the secrecy and privacy guaranteed to South Dakota voters.

As expressly stated in her April 27, 2022 letter, Meyer seeks the “*record of which vote or mark for every contest on each ballot which should contain the name of the contest, candidate, and vote/mark....*” What she hopes to acquire is the digital record of the actual, voted ballot, *abiet* in a different form. Meyer suggests that her request is permissible because it does not ask for the “paper ballot.” This argument fails for several reasons. First, while it is true that South Dakota law defines “ballot” as “paper ballots containing the names of candidates and statements of measures to be voted on,” this definition is in the context of “automatic tabulating systems,” *i.e.* defining the item that needs to go into the tabulating machine. *See*, SDCL 12-17B-1. Moreover, the substance of the definition of “ballot” in light of the entire statutory scheme is instructive—a ballot is that which “contains the names of candidates and statements of measures to be voted on.” This substantive definition, considered against the backdrop of the Constitution and South Dakota statutes, lends a conclusion that a digital record of the physical document on which a voter makes marks is just as much a “ballot” as the paper document itself. Finally,

nothing in South Dakota statutes suggests that the legislature intended for *digital records of ballots* containing votes cast for specific candidates to be *more* public than the *actual ballot itself*. In fact, the numerous, comprehensive laws designed to insure ballot secrecy evidences a legislative intent to protect ballot information except where it expressly allows it to be exposed.

Meyer also argues that SDCL 12-20-31 “permits” auditors to unseal the information with “proper security.” That statute provides in full:

Destruction of ballots and pollbooks--Period for which held--Pending recount or contest.

The officer in charge of an election may destroy voted ballots and pollbooks from a nonfederal election sixty days following the election at which such ballots were voted. However, they may not be destroyed if any recount or contest of such election is pending. The officer in charge of an election may destroy voted ballots, pollbooks and all other election material relating to a federal election twenty-two months after the election at which the ballots were voted. For the purpose of this section, a federal election is any election to nominate or elect persons to the United States Congress or other national elected position, including national issues or questions. If a ballot is used for a federal election and a state or local election, the ballots and all other election material shall be maintained for twenty-two months. All federal election material may be removed from the ballot box if it is maintained in such a manner as to guarantee the safety and integrity of such material.

SDCL 12-20-31. Meyer’s use of this statute to support her request is misplaced. The plain terms of this statute define *how long* election materials must be kept *under seal* before destruction. The phrase which allows removal of “federal election material” if it can be done so as to “guarantee the safety and the integrity” of the ballots implicitly contemplates a lawful reason to remove the material in the first place. To read it otherwise would mean that the exception (“all federal election material may be removed”) would swallow the rule (ballots are required to be sealed for twenty-two (22) months following the election). *See*, SDCL12-20-20.

See also, Ibrahim v. Dep't of Pub. Safety, 956 N.W.2d 799, 802–03 (S.D. 2021)(statutes must not be construed in a way which arrives at a strained, impractical, or illogical conclusion).

Finally, Meyer argues that the information she requests does not contain personally identifiable information. However, the County submits that releasing the records creates an actual risk of revealing the identity of the individual voter, and therefore individual votes. This is because the records requested not only contain the actual marked votes of the voter, but also the voter's precinct, as well as the timing and order of the ballot tabulation. This information presents a significant risk in precincts with few people or where turnout is low. In such situations, knowing in what precinct a voter voted and at approximately what day or time according to the sequence in which it was counted, could allow a cast ballot to be tied back to a voter by comparing it with voters identified as having executed ballots on a certain day. Certainly, in rural precincts where only a handful of voters cast a ballot, it would be no stretch to thereafter connect a voter to a vote. Again, heeding the Constitutional mandate and legislative schemes to ensure ballot secrecy, the County submits that this risk, however small, should be an intolerable one.

As one out of state jurisdiction court recognized when analyzing a request for ballot images:

Given the numerous and unpredictable ways ballot disclosure could be used to ascertain voters' identities, given the possibility of human error if we rely on people to individually redact thousands of ballots for identifying information, given the constitutional requirement for absolute secrecy, given the disruption to public confidence in election results that could be caused by endless private reviews of ballots, the court determined that the legislature did not intend to subject ballots to the Public Records Act.

White v. Skagit Cty., 188 Wash. App. 886, 891, 355 P.3d 1178, 1181 (2015)(internal quotations and additional citations to lower court omitted).

Finally, it must be noted that there are a multitude of other options available to the public if they wish to participate in the electoral process and examine the integrity thereof. *See*, SDCL § 12-17B-5 (allowing public participation in the testing of automatic tabulating equipment no more than ten days prior to the election); SDCL § 12-17B-13 (requiring that returns of the automatic tabulating equipment “shall be open to the public.”); SDCL § 12-18-9 (“Any person . . . may be present at any polling place for the purpose of observing the voting process. Any person may be present to observe the counting process.”). There are also options available post-election as well. *See generally* SDCL § 12-22-3 (granting the right for “any registered voter” to initiate an election contest); *McGruder v. Phillips Cty. Election Comm'n*, 850 F.2d 406, 409 (8th Cir. 1988) (“Plaintiffs have the option, of course, for filing for an election contest in the Arkansas state court.”).

CONCLUSION

For the foregoing reasons, and in express furtherance of South Dakota’s commitment to voter secrecy, Minnehaha County respectfully requests the Office of Hearing Examiners deny the Petitioners’ Request for Disclosure of Public Records.

Dated this May 4, 2022.

/s/ Amy Folsom
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CERTIFICATE OF SERVICE

Amy Folsom, Minnehaha County Deputy State's Attorney, hereby certifies that a true and correct copy of the foregoing **Response to Notice of Request for Disclosure of Public Records** in the above-entitled matter was mailed to each party below:

Dated this 4th day of May, 2022

/s/ Amy Folsom
Amy Folsom
Deputy State's Attorney
Minnehaha County

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