

**STATE OF SOUTH DAKOTA
OFFICE OF HEARING EXAMINERS**

**IN THE MATTER OF THE REVIEW
OF PUBLIC RECORDS REQUESTS
OF CINDY MEYER AND JESSICA
POLLEMA OF THE LINCOLN
COUNTY AUDITOR, MINNEHAHA
COUNTY AUDITOR, AND
PENNINGTON COUNTY AUDITOR
(CONSOLIDATED)**

PRR 22-03

**DECISION AND
ORDER**

This office received requests for review of denial of disclosure of public records pursuant to SDCL §1-27-38 from Cindy Meyer and Jessica Pollema (Petitioners) on April 20, 2022. Responses were made on May 5, 2022, by Lincoln County, Minnehaha County and Pennington County, through their Deputy State's Attorney Joseph A. Meader, Amy R. Folsom, and Tracey Dollison Decker, respectively. Pursuant to SDCL §1-27-40, no good cause was offered or shown necessitating a hearing.

The requests were all of a similar or the same nature and made by the same Petitioners, so the matters were consolidated into one Review, without objection. A consolidated decision is appropriate and is allowed pursuant to SDCL 15-6-42(a).

ISSUE

Whether the County Auditor violated public records law by denying public records requests made to the County by Cindy Meyer and Jessica Pollema?

FINDINGS OF FACT

1. On February 3, 2022, Cindy Meyer made a request to the Lincoln County Auditor for copies of the Cast Vote Records (CVR) from the November 3rd, 2020 election and November 8, 2016 election. She requested a "per-ballot report" which is designated as "either a cast vote record, ballot log, or a summary of ballots." She specified that she did not wish an aggregated report, but a report for each ballot. She specifically requested that all identifying information be redacted or not included with any report. She requested "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(early in person, absentee mail-in, in person), the batch id and tabulator id."
2. On February 14, 2022, Lincoln County Auditor's Office responded to Ms. Meyer. They indicated that the ballots from the 2016 election no longer exist, but the ballots from the 2020 election do exist. The report requested by Ms. Meyer was not

compiled and did not exist. They did offer to allow Ms. Meyer to view the ballots and create her own CVR report.

3. On February 24, 2022, Jessica Pollema requested from the Lincoln County Auditor the CVR for the 2020 election. She requested the “per ballot and per batch report” for each precinct in Lincoln County. She did not want the Precinct Total Report.
4. On March 1, 2022, the Lincoln County Auditor’s Office responded to Ms. Pollema. They told Ms. Pollema that the record described in the request does not exist and is not generated by the County. “Furthermore, under SDCL §12-17B-15, this information would be considered sealed.”
5. On March 8, 2022, Jessica Pollema requested from the Lincoln County Auditor machine event logs from the ES&S DS850 (voting machines) from October 29 to November 5, 2020. She was requesting “when the machine was turned on or off, time stamps, who logged in, software updates, etc.”
6. On March 15, 2022, the Lincoln County Auditor’s Office responded to the request. They denied the request citing exemption from disclosure under SDCL §§ 1-27-1.5(8) and (3), and SDCL 1-27-1.6.
7. On February 3, 2022, Cindy Meyer made a request for information to the Minnehaha County Auditor. She requested the same information she requested from the Lincoln County Auditor (Finding #1 above).
8. On February 25, 2022, the Minnehaha County Auditor responded to Ms. Meyer. He denied the request pursuant to SDCL §§1-27-1.1, 1-27-3; the South Dakota Constitution, Article 7, §3; SDCL §§ 12-20-20, 12-17B-15, and 12-20-31; and ARSD 5:02:17:06-08.
9. On March 8, 2022, Ms. Meyer made a second request to the Minnehaha County Auditor for reconsideration. She cites SDCL §§ 1-27-1, 1-27-1.1, and 1-27-3. She argues that the digital records derived from the ballots do not fall under the election protection statutes.
10. On March 18, 2022, Minnehaha County again denied Ms. Meyer’s request citing SDCL §12-17B-15.
11. On February 3, 2022, Cindy Meyer made a request for information to the Pennington County Auditor. She requested the same information she requested from the Lincoln County Auditor (Finding #1 above).
12. On February 8, 2022, the Pennington County Auditor’s Office Election Supervisor responded to Ms. Meyer’s request. She indicated that the history record of every voter indicating which election by date and type of ballot is available for purchase.

13. On February 23, 2022, Ms. Meyer e-mailed the Pennington County Auditor clarifying her request. She requested CVR data from the “ES&S Ballot Tabulating Machines, model DS850.” She believed the data could be retrieved using a specific software program.
14. A software salesperson had demonstrated to the State Elections Board, a particular type of data report that could be retrieved from state voting machines using his particular software. It is unclear whether the Counties purchased that software. It was not a requirement.
15. E-mails from the Secretary of State’s Office, State Election Coordinator to Ms. Meyer indicates that ballot images are not kept by the voting machines due to state law. The Secretary of State’s Office told Ms. Meyer on March 31, 2022, that the particular CVR that she is requesting does not exist in South Dakota.
16. On April 27, 2022, Petitioners timely filed a Request for Review with this Office. They appeal the denials by the Lincoln, Minnehaha, and Pennington County Auditor’s Office denials of records.
17. Responses to the Review Request were made by Pennington County, Minnehaha County, and Lincoln County State’s Attorneys.
18. Any additional findings of fact included in the Reasoning section of this decision are incorporated herein by reference.
19. To the extent any of the foregoing are improperly designated and are instead Conclusions of Law, they are hereby redesignated and incorporated herein as Conclusions of Law.

REASONING

The Petitioners submitted a request for review of a denial. This review is made pursuant to SDCL §1-27-1. The Office of Hearing Examiners has jurisdiction over this matter. The term “public record” is defined in SDCL §1-27-1.1 as follows:

Unless any other statute, ordinance, or rule expressly provides that particular information or records may not be made public, public records include all records and documents, regardless of physical form, of or belonging to this state, any county, municipality, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. ...

SDCL § 1-27-1.1.

There are basically two types of information sought by Petitioners. The first are machine logs from the automatic tabulating machines in Lincoln County. The second type of request are the CVRs of the ballots counted for the November 3, 2020, election from all three counties.

The machine logs for the automated tabulating machines are protected information under SDCL §1-27-1.5(24).

The following records are not subject to §§ 1-27-1, 1-27-1.1, 1-27-1.3, and § 1-27-1.23 [open records laws]: (24) Internal agency record or information received by agencies that are not required to be filed with such agencies, if the records do not constitute final statistical or factual tabulations, final instructions to staff that affect the public, or final agency policy or determinations, or any completed state or federal audit and if the information is not otherwise public under other state law, including chapter 15-15A and §1-26-21;

The machine logs from the tabulating machines are internal agency records. The machine logs are not required to be filed with the County or the State Election Board. The machine logs are not final tabulations or numbers or final audits. There are no provisions in state law that open up to the general public, vote tabulating machine logs. There is a testing procedure for these machines set out at SDCL §§ 12-17B-5, and 12-27B-12, and ARSD 5:02:09:01.02. The testing is open to the public. The final ballot counting is also open to the public view under §12-17B-10.

As set out by a Respondent, the second type of information sought is an electronic report from the ballot tabulating machines, that sets out in a database format: each individual ballot, the precinct of the voter, the sequence in which the ballot was counted (the order in which a voter appeared at the polling place), and the exact choice of the voter in each race or ballot question. Petitioners described the request as “every ballot, its sequential ID, its timestamp, its method of voting(early in person, absentee mail-in, in person), the batch id and tabulator id.” This information (and subsequently, the requested compilation) is prohibited from disclosure under the State Election laws found at SDCL Chapter 12. Therefore, the requested information is not a public record.

Minnehaha County discovered that they have the ability to generate a report listing the record of each vote for every contest and how and when each vote was counted. This information is not readily available in Pennington County or Lincoln County. All Respondents make the argument that even if the information was able to be produced, the law does not allow the requested data to be an open public record

The S.D. Constitution, Article 7, §3, directs the Legislature to “insure secrecy in voting.” To that end, the statutes regarding ballots and ballot secrecy are found at SDCL Title 12 and more specifically, Chapters 12-1, 12-14, 12-16, 12-17B, 12-18, 12-20, 12-21, and 12-22.

SDCL §12-17B-15 directs that “After the tabulating procedure is completed, the ballots shall be placed in boxes and resealed. Any program board which may be used in the automatic tabulating equipment shall be removed and stored similarly to the ballots.” This directs the County Election Boards to remove and store the “program board” of an automatic ballot machine with the ballots. The ballots, after counted by the Election Board, are stored and sealed. SDCL §§ 12-16-20, 12-16-26, 12-19-42, and 12-19-43.

SDCL §12-20-20 specifies that counted ballots are “wrapped, sealed, and deposited in the ballot box. The precinct superintendent and precinct deputies, after the counting of ballots and deposit of the ballots counted in the ballot box, shall properly seal, with seals furnished pursuant to §12-16-26, any ballot box opening and the place where the clasp and box connect, and each place where a ballot box may be opened before turning the ballot box over to the person deputed to deliver it.” This sealed ballot box will also contain the “program board” specified under SDCL §12-17B-15.

After the ballot boxes are sealed, and all materials are collected, then the whole of the materials are transported to the officer in charge of the election. SDCL §12-20-21.

The sealed ballot box, together with the pollbook and duplicate tally sheet, registration lists, and the envelope containing the unofficial returns and all supplies and returns required, shall be returned by the precinct superintendent or a precinct deputy designated by the precinct superintendent, to the officer in charge of the election immediately after completion of the vote count. **No person may deface, destroy, or tamper with the ballot box, envelope, pollbook, duplicate tally sheet, or registration lists or remove any seals.** A violation of this section is a Class 6 felony. SDCL §12-20-21.

As noted above, any tampering of the ballot box or breaking of a seal, is a Class 6 Felony. The boxes of ballots are only reopened upon cases of a recount, upon order of the Circuit Court or to destroy the ballots per SDCL §12-20-31. In the case of a recount, SDCL §12-21-24 specifies the materials transmitted to the recount board appointed by the Court. At that time, the sealed ballot boxes are opened by the recount board. This process may be witnessed by the candidates or representatives to the ballot question. SDCL §12-21-26. This recount is filed at the local Circuit Court and is done by Order of the Court. SDCL §12-21-20.

The Legislature gave the State Board of Elections the authority to promulgate rules regarding how an election is held. SDCL §12-17B-17. The State Board of Elections has promulgated a number of rules regarding the elections, found at ARSD 5:02. Pertinent to this case is ARSD 5:02:16:42 regarding the return of counted ballots to the precinct and county chairperson. This Rule mirrors SDCL §12-20-21.

5:02:16:42. Return of election material. The sealed ballot box together with the sealed pollbook, sealed duplicate tally sheet and official vote count, sealed provisional ballot return envelope, registration lists, and envelopes

containing the unofficial returns and all supplies and returns required shall be returned by the precinct superintendent or a precinct deputy designated by the precinct superintendent to the officer in charge of the election immediately after completing the vote count. The person delivering the supplies may not deface, destroy, or remove any seals or the pollbook, duplicate tally sheet, and registration lists or otherwise tamper with them.

After the materials are returned to the County Auditor, the ballot boxes and pollbooks are kept safe under SDCL §12-20-32. "The county auditor shall keep the ballot boxes and pollbooks in the same condition as when received, until the meeting of the county canvassing board, when he shall deliver the pollbooks to such board. A violation of this section is a Class 6 felony." This felony penalty for violating the sanctity of the ballot box, after the ballots are counted, is indicative of the importance of ballot secrecy.

There are no laws or rules that allow the general public to peruse the ballots, look at when a specific ballot came into the voting place, or be given a database of information about the counted ballots, besides the vote count. The information Petitioners seek includes, among other things, the sequence a voter appeared at the voting booth and/or voted for specific candidates or questions. Revealing that information violates the secrecy of the ballot box. The counting of the ballots on election day by poll workers may be witnessed by the public. SDCL §12-20-1. In South Dakota, this is a public process.

Petitioners make the argument that a CVR is available from other states, as it appears this same request is being made by other individuals in other states. Each state has different voting laws and different public record laws. The information sought may be available under another state's laws, but it is not available under South Dakota law.

Whether a document is public record, and whether it may be ordered by a Court are entirely different questions. The Circuit Court orders a ballot box seal to be broken when a recount is ordered. Absent an Order by the Court upon occasion of a recount, the ballot box seals are not to be broken by anyone prior to destruction of ballots. The sealed ballot boxes are supposed to contain the information sought by Petitioners in this case. The sealed boxes and the CVR's of the vote tabulating machines are not public record.

CONCLUSIONS OF LAW

1. The Office of Hearing Examiners has jurisdiction over the parties and subject matter of this appeal and the authority to conduct the appeal pursuant to the provisions of SDCL Chapters 1-26D and 1-27.
2. Petitioners made a timely appeal of a denial made by the Counties of Lincoln, Minnehaha, and Pennington.
3. Pursuant to SDCL §1-27-40 no good cause was offered or shown necessitating a hearing and no request was made by either party for a hearing.

4. The machine logs from the tabulating machines in Lincoln County are not public record pursuant to SDCL §1-27-1.5(24).
5. SDCL §12-17B-15 directs all “program boards” of automatic tabulating machines to be sealed inside the ballot boxes.
6. SDCL §§12-20-20 and 12-20-21 directs poll workers to deliver counted ballots in sealed boxes to the person in charge of the election. Sealed boxes are not to be opened without order of the Circuit Court at the time of a recount.
7. The materials within the ballot boxes are destroyed pursuant to SDCL §12-20-31. This destruction law does not allow the information contained within to become a public record.
8. The materials sought by Petitioners are not public record under South Dakota public records laws, election laws, and election rules.
9. Any additional conclusions of law included in the Reasoning section of this decision are incorporated herein by this reference.
10. To the extent any of the foregoing are improperly designated and are instead findings of fact, they are hereby redesignated and incorporated herein as findings of fact.

ORDER

IT IS HEREBY ORDERED that the responses by the Counties to Petitioners regarding their requests are upheld and affirmed. The machine logs are not public records pursuant to SDCL §1-27-1.5(24). The database materials requested by Petitioners are not public records pursuant to SDCL §§ 12-17B-15, 12-20-20, and 12-20-21.

Dated this 17th day of May, 2022.



Catherine Williamson
Office of Hearing Examiners

CERTIFICATE OF SERVICE

I CERTIFY THAT ON May 17, 2022 at Pierre, South Dakota, a true and correct copy of the Decision and Order was mailed by First Class Mail to the parties listed below.


Catherine Williamson

CINDY MEYER
26154 466TH AVE
HARTFORD SD 57033

JESSICA POLLEMA
415 QUARTZITE AVE
TEA SD 57064

LINCOLN CO AUDITOR
104 N MAIN ST STE 110
CANTON SD 57013

LINCOLN CO STATES ATTORNEY
103 N MAIN ST STE 200
CANTON SD 57013-1708

MINNEHAHA CO AUDITOR
415 N DAKOTA AVE
SIOUX FALLS SD 57104

MINNEHAHA CO STATES ATTORNEY
415 N DAKOTA AVE
SIOUX FALLS SD 57104

PENNINGTON CO AUDITOR
130 KANSAS CITY ST STE 230
RAPID CITY SD 57700

PENNINGTON CO STATES ATTORNEY
130 KANSAS CITY ST #300
RAPID CITY SD 57701