

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

**IN THE MATTER OF THE REVIEW
OF PUBLIC RECORDS REQUESTS
OF SD CANVASSING GROUP OF
MINNEHAHA COUNTY, DAVISON
COUNTY, PENNINGTON COUNTY,
AND LINCOLN COUNTY**

PRR 23-05

DECISION AND ORDER

This office received requests for review of denial of disclosure of public records pursuant to SDCL §1-27-38 from the South Dakota Canvassing Group (Petitioner) on July 14, 2023. Petitioner's attorney, Steven R. Haugaard, filed a Notice of Appearance on July 31, 2023. The Respondent Counties, Minnehaha, Davison, Pennington are represented in this matter by Attorneys Lisa Hansen Marso and David Hieb. Lincoln County is represented by their State's Attorney Thomas Wollman and Deputy Joseph Meader. The Respondents requested an extension, which was granted. Responses were made on September 18, 2023. A Final Reply was made by Petitioner on October 6, 2023. Pursuant to SDCL §1-27-40, no good cause was offered or shown necessitating a hearing.

The Notice of Review, Request for Disclosure of Public Records, are of the same nature and are made by the same Petitioner listing four separate counties. The Review is consolidated; this is appropriate and is allowed pursuant to SDCL 15-6-42(a).

ISSUE

Whether the Office of Hearing Examiners should reconsider the Decision previously made on May 17, 2022, regarding the same question of election records? Does res judicata apply in this matter now pending before the Office?

The question answered by the May 17, 2022, Decision was whether the County Auditors violated public records law by denying public records requests made to the County by Petitioner.

JUDICIAL NOTICE

Judicial notice is taken of the the underlying case. Both parties have referred to this case in their submissions to this Office. The title of the matter at the Office of Hearing Examiners; Docket PRR 22-03: 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). The Matter was appealed to Circuit Court – Second Judicial Circuit, Docket 41CIV22-000298.

Judicial Notice is also taken of Docket 41CIV22-463, We the People for Free and Transparent Elections v. Lincoln County.

FINDINGS OF FACT

1. On May 17, 2022, the Office of Hearing Examiners issued a Decision and Order on the Request for Public Records made by Cindy Meyer and Jessica Pollema to the Lincoln, Minnehaha, and Pennington Counties. PRR 22-03.
2. Appellants Meyer and Pollema appealed the Decision to the Second Judicial Circuit Court on June 15, 2022. 41CIV22-000298
3. On August 31, 2022, We The People For Free and Transparent Elections, LLC (WTP-FFTE) filed a Summons and Complaint against Lincoln County demanding the court require disclosure of the same public records sought in PRR 22-03. This matter is docketed at 41CIV22-000463.
4. Jessica Pollema and Tracy Meyer are organizers of WTP-FFTE. The Domestic LLC was formed by filing at the S.D. Office of the Secretary of State on August 29, 2022.
5. On May 11, 2023, a Hearing was held in Circuit Court on a Motion to Dismiss brought by Minnehaha and Pennington Counties, the Honorable John Pekas presiding. All parties were represented at hearing. 41CIV22-000298.
6. On June 2, 2023, Judge Pekas granted the Motion to Dismiss and entered a Judgment of Dismissal with Prejudice. 41CIV22-000298
7. On May 11, 2023, a Hearing was held in Circuit Court on a Motion for Summary Judgment brought by Lincoln County, the Honorable John Pekas presiding. All parties were represented at hearing. 41CIV22-000298
8. On June 5, 2023, Judge Pekas granted the Motion for Summary Judgment. Judge Pekas entered a Judgment of Dismissal with prejudice. 41CIV22-000298
9. On June 6, 2023, Judge Pekas ordered that the Decision of the Office of Hearing Examiners issued on May 17, 2022, be upheld and affirmed and the records that were requested were not to be disclosed. 41CIV22-000298
10. The Appellants in that matter made no further appeal. 41CIV22-000298
11. On May 9, 2023, Jessica Pollema, Cindy Meyer, and Linda Montgomery filed articles of incorporation with the S.D. Secretary of State for a domestic non-profit corporation entitled South Dakota Canvassing Group (SDCG).
12. On May 23, 2023, the S.D. Canvassing Group sent requests for public records to Lincoln, Pennington, Davison and Minnehaha County.

13. The 2023 requests for records were nearly identical to the requests for records made in 2022 by Pollema and Meyer. The requests were for the same reports or records related to balloting and elections that were requested in 2022.
14. Both requests to the Counties in 2022 and 2023 are for the CVR (cast vote records) from the November 3, 2022, general election, the June 7, 2022 primary, and the November 8, 2023 general election. The Petitioner, in both years, specifically asked that the CVR Data be produced in a “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.”
15. On June 1, 2023, Davison County denied both of Petitioner’s requests. Davison County stated the Machine Log Data was protected as an “internal agency record” under SDCL 1-27-5-(24). They also cited SDCL 12-17B-16 (sealing of ballots and election materials) and 12-20-21 (prohibiting the removal of sealed election materials), and S.D. Const. Art.7, Sec. 3 (requiring the Legislature to ensure secrecy in voting). They also indicate that the 2023 request is the same as the 2022 request and the matter has already been determined at Court.
16. On June 6, 2023, Minnehaha County denied the requests based upon the previous decision of the Circuit Court on June 2, 2023.
17. On June 6, 2023, Lincoln County denied the requests for the CVR, and Machine Logs for the 3 specific elections. The County cited SDCL §§ 1-27-1.5(8) and (3) and 1-27-1.6 (the requested items are not public records). Furthermore, they cite SDCL §12-17B-15 indicting these records are sealed. They also remind the requestors that “the Office of Hearing Examiners ruled such information is protected...”
18. On June 6, 2023, in response to the request for absentee envelopes from the 2020 general election, 2022 primary election, and 2022 general election, Lincoln County suggests that the requestors contact the “Secretary of State’s office regarding purchase of voter history from the registration database.”
19. On June 13, 2023, Pennington County denied the request for the CVR and Machine Logs based upon the May 17, 2022, Decision of the Office of Hearing Examiners.
20. On June 22, 2023, Petitioner made a subsequent request to Lincoln County for precinct total reports or precinct total receipts from the DS 850 tabulators.
21. On June 27, 2023, Lincoln County did not deny this request, but referred Petitioner to view the county election canvass results on the County webpage and gave the webpage.

22. On July 14, 2023, Petitioner timely filed a Request for Review with this Office. They appeal the denials by the Davison, Lincoln, Minnehaha, and Pennington County Auditor's Offices.
23. On July 26, 2023, the WPT-FFTE signed a Stipulation for Dismissal with prejudice in the matter of 41CIV22-000463.
24. Petitioner is requesting that the Decision made by the Office of Hearing Examiners in May 2022, be reversed or reconsidered.
25. Responses to the Review Request were made by Davison County, Pennington County, Minnehaha County, and Lincoln County.
26. Any additional findings of fact included in the Reasoning section of this decision are incorporated herein by reference.
27. 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 determination made by the Office of Hearing Examiners in May 2022 was affirmed by the Second Judicial Circuit Court in June 2023. Summary Judgment was granted in favor of the Counties and the pending appeals were Dismissed with Prejudice. The Decision by the Office of Hearing Examiners was affirmed. The Circuit Court ordered that all records requested by Ms. Pollema and Ms. Meyer were to be declared confidential and were not to be released. The dismissal was not appealed to the Supreme Court and the Order went into effect.

At the same time, Ms. Pollema and Ms. Meyer along with some other organizers, create a corporation entitled "We the People for Free and Transparent Elections." This group filed suit against Lincoln County demanding the same information they had requested from Lincoln County in the public records request.

Just prior to the ruling by the Judge Pekas in the initial matter, Ms. Pollema and Ms. Meyer created another corporation called the South Dakota Canvassing Group. This group proceeded to again make informal requests for the same information from the same counties but included Davison County. The Counties denied the requests.

The two separate cases at the Circuit Court, one an initial lawsuit and the other an appeal from this Office, were both dismissed with prejudice.

The legal principles of *Res Judicata* and Collateral Estoppel prohibit the disclosure of this election information and prohibit the matter from being heard again by the Office of Hearing Examiners. "The doctrines of collateral estoppel and res judicata shall be

applied by the court to prevent multiplicity of suits.” SDCL 34A-10-13. This statute is found under the Chapter regarding Remedies for Protection of Environment, but the statement is pertinent for this situation as well. It lays out in statute the reason for applying the principles.

The South Dakota Supreme Court has made clear the principles of res judicata and collateral estoppel in South Dakota law. In a recent case of *Healy Ranch, Inc. v. Healy* at 2022 S.D. 43, the Justices looked at these principles and wrote:

“Res judicata consists of two preclusion concepts: issue preclusion and claim preclusion.” *Am. Family Ins. Grp. v. Robnik*, 2010 S.D. 69, ¶ 15, 787 N.W.2d 768, 774 (citation omitted). We have previously defined these two concepts in the following terms:

Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit[.]

Id. (quoting *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 894 n.1, 79 L. Ed. 2d 56 (1984)).

...

Res judicata arguments are analyzed under a well-established four-part test:

(1) the issue in the prior adjudication must be identical to the present issue, (2) there must have been a final judgment on the merits in the previous case, (3) the parties in the two actions must be the same or in privity, and (4) there must have been a full and fair opportunity to litigate the issues in the prior adjudication.

Dakota, Minn. & E. R.R. Corp. v. Acuity, 2006 S.D. 72, ¶ 17, 720 N.W.2d 655, 661; see also *Lippold v. Meade Cnty. Bd. of Comm'rs*, 2018 S.D. 7, ¶ 28, 906 N.W.2d 917, 925, as modified on denial of reh'g (Mar. 13, 2018).

We have frequently applied these elements to res judicata arguments under both issue preclusion and claim preclusion theories. See, e.g., *Estes v. Millea*, 464 N.W.2d 616, 618 (S.D. 1990) (applying the elements to invoke issue preclusion); ... *Frigaard v. Seffens*, 1999 S.D. 123, ¶ 8, 599 N.W.2d 646, 648 (applying the elements to invoke claim preclusion); ...see also *SDDS, Inc. v. State*, 1997 S.D. 114, ¶ 16, 569 N.W.2d 289, 295 (noting that “[w]e apply the same principles” to claim and issue preclusion).

However, as it relates to claim preclusion, we have generally not required exacting “issue-identity” with the earlier action. We have held, instead, that “our review is not restricted to whether the specific question posed by the parties in both actions was the same or whether the legal

question posed by the nature of the suit was the same." *Farmer*, 2010 S.D. 35, ¶ 10, 781 N.W.2d at 660 (emphasis added). Rather, when analyzing the application of claim preclusion we look to whether the second action "attempt[s] to relitigate a prior determined cause of action[.]" *Bank of Hoven v. Rausch*, 449 N.W.2d 263, 266 (S.D. 1989) (emphasis added).{fn9}

"For purposes of [claim preclusion], a cause of action is comprised of the facts which give rise to, or establish, the right a party seeks to enforce. The test is a query into whether the wrong sought to be redressed is the same in both actions." *Glover v. Krambeck*, 2007 S.D. 11, ¶ 18, 727 N.W.2d 801, 805 (cleaned up). "If the claims arose out of a single act or dispute and one claim has been brought to a final judgment, then all other claims arising out of that same act or dispute are barred." *Farmer*, 2010 S.D. 35, ¶ 10, 781 N.W.2d at 660.

Healy Ranch, Inc. v. Healy at 2022 S.D. 43, ¶40, 42-45, 978 N.W.2d 786, 798-799 (2022) (some internal citations omitted, footnote omitted).

In analyzing the current case and whether res judicata applies, the four-part test is applied to the facts in this case:

1. The issue in the prior adjudications of 41CIV22-000298 and 41CIV22-000463 are identical to the present issue. The issues presented here and what was presented prior seek the CVR Data and Machine Log Data for the November 3, 2022 general election, the June 7, 2022 primary, and the November 8, 2023 general election from the ES&S Tabulating Machines. The issues are identical.

2. There was a final judgment on the merits in 41CIV22-000298. The matter was dismissed pursuant to SDCL 15-6-41(b). The statute states that a dismissal under that statute "operates as an adjudication upon the merits." The parties then stipulated to a dismissal with prejudice to 41CIV22-000463.

3. The parties to all actions are the same or are in privity. Jessica Pollema and Tracy Meyer were parties to the PRR 22-03 and the subsequent appeal 41CIV22-000298. Ms. Pollema and Ms. Meyer are also organizers of the WPT-FFTE and brought the claim in court: 41CIV22-000463. They then organized the SDCG and brought this action. The same attorney represented the Petitioners or Appellant in each of these cases. Petitioner cannot claim to not be in privity with the parties to the prior action.

4. There was a fair and full opportunity to litigate the issues in the prior adjudication. The Circuit Court gave the parties, who were all represented by legal counsel, a fair and full opportunity to present their case. The Judge Dismissed the case on the merits. SDCL 15-6-41(b)

Claim Preclusion or Collateral Estoppel applies to the question of Reconsideration of PRR 22-03 and 41CIV22-000298. The underlying 2022 denial is the claim that has been

adjudicated and answered. Res Judicata Issue Preclusion applies for the 2023 requests for information and the current Request for Review. All four parts of the test for res judicata are answered in the affirmative.

Petitioner is attempting a third bite at the apple with this Motion for Reconsideration or Request for Review of Denial. Petitioner and their organizers have made the same attempt three times for the same information. They fully litigated this issue in court. They then attempted to relitigate the issue but eventually agreed to dismiss it. This is a second attempt to relitigate the matter.

Res Judicata, claim preclusion and issue preclusion, and collateral estoppel stops this Office from rehearing this matter or allowing it to be relitigated. The Orders of the Second Judicial Circuit stand. The documents or data sought by Petitioner are not public record and may not be released to the public.

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 review pursuant to the provisions of SDCL Chapters 1-26D and 1-27.
2. Petitioners made a timely appeal of a denial of records made by the Counties of Davison, Lincoln, Minnehaha, and Pennington.
3. Pursuant to SDCL §1-27-40 no good cause was shown necessitating a hearing.
4. This matter is precluded by the Orders of Dismissal and the Order granting Summary Judgment made by the Second Judicial Circuit Court, in the matters of 41CIV22-000463 and 41CIV22-298.
5. Res Judicata and Collateral Estoppel applies to this matter and no review or reconsideration may be made of PRR 22-003.
6. Any additional conclusions of law included in the Reasoning section of this decision are incorporated herein by this reference.
7. 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 principles of Res Judicata and Collateral Estoppel apply to Petitioner's current request for review. This Office may not and will not reconsider PRR 22-003 as the matter has been fully litigated under 41CIV 22-298 and is precluded by law from being reheard. Under the law, the requested records are not subject to disclosure and shall not be disclosed.

Dated this 26th day of October 2023.

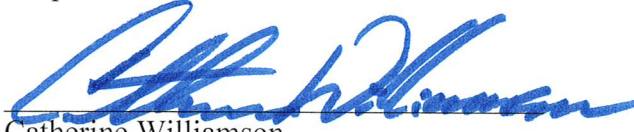


Catherine Williamson
Office of Hearing Examiners

NOTICE: Pursuant to SDCL §1-27-41 an aggrieved party may appeal the decision of the Office of Hearing Examiners to the circuit court pursuant to chapter 1-26. In any action or proceeding under §§ 1-27-35 to 1-27-43, inclusive, no document or record may be publicly released until a final decision or judgment is entered ordering its release.

CERTIFICATE OF SERVICE

I CERTIFY THAT ON October 26, 2023 at Pierre, South Dakota, a true and correct copy of the Decision and Order was mailed by First Class Mail and E-mail to the parties listed below.



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