

August 18, 2022

Governor Kristi Noem
CC: Mark Vargo, Acting Attorney General
500 E Capitol Ave
Pierre, SD 57501

Dear Governor Noem,

We would appreciate your support in defense of South Dakota laws and government transparency as we continue to see new challenges to our freedoms and values both across the country and in our state. Currently in South Dakota, we see two pressing issues that need your leadership and support. One is access to election records, and two, is the removal of the absentee ballot drop boxes across the state.

It has come to our attention that the Board of Hearing Examiners, the State's Attorneys and County Auditors across the state are refusing to honor Freedom of Information Act requests for the Cast Vote Record from recent elections. The ES&S vote tallying machines used by South Dakota for our elections are electronic proprietary devices which do not include a way for the public to supervise how votes are technically being added to the vote count. The only way is to look at the paper ballots or the tally of those votes: the Cast Vote Record.

From our understanding, the Cast Vote Record (CVR) is an index of votes cast for candidates over time which is distinguishable from the individual cast ballots and in no way exposes a voter's candidate selections. If the CVR does identify voters, or if the ballots themselves can be used to identify voters, then we would ask whether the State Board of Elections has failed in its Constitutional duty to protect the secrecy of the vote. If these documents do not identify a voter, then we would ask whether the State Officials are violating the state law and the state Constitution by failing to release the documents so the votes can be publicly reviewed.

A citizen watchdog group in our state has repeatedly been denied FOIA requests for the CVR from the 2020 general election, and the June 7, 2022 primary election. The Cast Vote Record is very simply a text list (spreadsheet) of all ballots received, the district and precinct of the voter, how it was cast (in person/absentee), the vote choices on the ballot, and the order those ballots were processed. The text file is simply a presentation of how the votes that make up the final, public totals were received. This does not contain any identifying voter information, or images of the ballots. As it contains only a text representation of the votes which make up the final, published vote totals, it cannot be considered the "contents of the ballot box" unless you would also consider the final vote totals published on election night also un-releasable for the same reason.

Identical CVR records have been released to the public in other states such as California, Colorado, Florida, Georgia, Illinois, Michigan, Nevada, and New Jersey. The release of these records allows citizens of these states to evaluate trends in voting patterns which might indicate susceptibility to electronic manipulation by bad actors. Whether we believe this susceptibility exists in South Dakota or not, we are encouraged that our citizens are seeking to bulwark our own election systems and procedures against irregularities and fraud discovered in other states.

Below is an example of the CVR data report:

2020 General E.S.10.50.85														PRESIDENT AND VICE PRESIDENT (Vo		PRESIDENT AND VICE PRESIDENT (Vo		
CvrNumber	TabulatorNum	BatchId	RecordId	ImprintedId	CountingGroup	PrecinctPortion	BallotType	ImagePath	SessionType	VoterFlag	Modified	CardInfo	PdfName	UniqueVotingIdentifier	VotingSessionIdentifier	DEM	REP	
1	4	1	430-4-1-430	Vote by Mail	0352105 (352105-36)	36 (36)	D:\NAS\2020 Ge	ScannedVote		1	0	53 (0352105 - BT-36 - English.pdf					0	1

One of the reasons being given by the State Officials for refusing the FOIA requests is stated identically in the denials as such: “Cast Vote Records, and ‘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 time stamp, it’s method of voting (early in person, absentee mail-in, in person), the batch ID and tabulator ID’ do not exist and are therefore not a public record.”

The CVR’s are stored on a thumb drive at the auditor’s office, and some auditors have said the drives are currently in their desks. These are not sealed in the ballot box. Most concerning is the fact that most counties in the state do not have the Election Ware software needed to open and read the encrypted files. Auditors who have tried to open the files cannot read the data saved from the elections in their county. If our auditors are using tabulating machines, at the very least they should be provided with the corresponding Election Ware software required to retrieve the data from the election.

The definition of a public record in SDCL [1-27-1.1](#). states:
Public records defined.

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. Data which is a public record in its original form remains a public record when maintained in any other form. For the purposes of §§ [1-27-1](#) to [1-27-1.15](#), inclusive, a tax-supported district includes any business improvement district created pursuant to chapter [9-55](#).

The claim that these records do not exist is false. Each county downloads the results from the tabulating machines onto a programmed ES&S thumb drive and are required to keep it. The fact that the county officials do not have the proper central system software to retrieve the data and/or lack the training to retrieve the report does not mean it does not exist.

From a factual standpoint, it is impossible that the CVRs contain any personally identifiable information. Thus, it would appear to us, the state has a legal obligation to release the CVR reports.

This citizen watchdog group has also been repeatedly denied FOIA requests for machine logs. The letters denying the machine logs claim:

- a. “ES&S considers audit logs to be proprietary, confidential and trade secret information which derive potential independent economic value. The information is not readily ascertainable by proper means by competitors who could obtain economic value from its disclosure and is subject of reasonable efforts to maintain its secrecy. SDCL 1-27-1.5(3).
- b. Audit logs are protected under SD Constitution, Article 7, Section 3 to “insure the secrecy in voting.” The disclosure of the report for the general public could potentially expose and create potential vulnerabilities and damages to the integrity of the election systems. Furthermore, the machine’s logs are stored on program boards and proprietary flash drives that are protected under South Dakota’s Election Laws.

- c. Audit logs for the automated tabulating machines are protected information under SDCL 1-27-1.5(24). The audit logs are internal reports and internal agency records and are not final tabulations or final audits.
- d. Audit logs should be protected from disclosure as the audit logs contain sensitive information that if publicized could provide a roadmap to bad actors to attempt to compromise our election systems and so on.

We are in possession of machine logs from more than one of our counties which proves it is simply a data report of transactions recorded on the tabulating machine. Statewide volunteers have reported to us the machine logs are in the auditor's offices, but they refuse to release copies to the citizens on the recommendation of their State's Attorneys.

After reviewing state law, it has also come to our attention that the use of absentee drop boxes may be in direct violation of South Dakota law SDCL 12-19-7. SDCL 12-19-7 states:

12-19-7. Marking and folding ballot--Officer before whom marked--Mailing or delivering ballot.

A voter voting an absentee ballot shall mark it and fold it without revealing the marks to any other person. The voter shall place the voted ballots in the return envelope provided and seal the envelope. The voter shall sign the statement on the return envelope. *The voter shall either mail the ballot, deliver it in person, or have it delivered to the person in charge of the election.*

This law prescribes the method for delivering an absentee ballot to either be by mail, or delivered in-person by the voter or an authorized messenger to the person in charge of the election.

We do not believe delivering absentee ballots to an unsecured drop box is in accordance with the law. Thirty-eight South Dakota counties used drop boxes in 2020. Twenty-nine counties used video surveillance but deleted the video, which is a violation of federal law **§20701. Retention and preservation of records and papers by officers of elections; deposit with custodian; penalty for violation:**

Every officer of election shall retain and preserve, *for a period of twenty-two months* from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

The Wisconsin Supreme Court decision to ban absentee ballot drop boxes is based on election code 6.87(4)(b)1. "The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." We believe Wisconsin Law is in alignment with South Dakota law, therefore the use of absentee drop boxes appears to be illegal. We ask you to remove the drop boxes immediately and discontinue their use prior to the November 8, 2022 election.

We request that you work with the Attorney General to retain all 2020 election material due to the ongoing investigations into the 2020 election and extend their preservation at least 12 months. These records are also the subject of unresolved disputes of FOIA requests.

We request that you direct the Attorney General to direct all County Auditors and State's Attorneys to maintain all election material and comply with statewide FOIA requests.

And lastly, we request that you would issue an executive order declaring the use of absentee drop boxes to be illegal, and direct the Attorney General to immediately send out guidance to all county officials to uphold the laws and the Constitution by following the state law SDCL 12-19-7 by returning an absentee ballot *in person, to the person in charge of the election.*

Please provide a response as early as possible. It is our understanding that the Cast Vote Records and Machine Audit Logs from 2020 will become subject to permanent removal at the end of this month. As you are aware, there is a lawsuit regarding the disclosure of these documents, and it would be imperative that we retain this information statewide as our citizens are actively seeking transparency in our election system. We believe such an event would be a great disservice to South Dakota's people, who have a constitutional right to know how their elections are being conducted, and a great disservice to history.

Thank you for your prompt attention to this vital matter.

Respectfully,