SOUTH DAKOTA DEPARTMENT OF BUREAU OF ADMINISTRATION
OFFICE OF HEARING EXAMINERS
Pierre, South Dakota

IN THE MATTER OF THE PUBLIC RECORDS REVIEW REQUEST OF SOUTH DAKOTA CANVASSING GROUP OF MINNEHAHA COUNTY, LINCOLN COUNTY, DAVISON COUNTY, AND PENNINGTON COUNTY.

PRR No. 23-005

REPLY TO RESPONSE TO REQUEST FOR DOCUMENTS OR INFORMATION

INTRODUCTION

South Dakota Canvassing Group's request for information is a case of "first impression." The requests for information cited by the Counties in regard to a previous request by another entity is distinctly different. The facts asserted by the Counties in the other case were incomplete and ultimately incorrect. The law in the other case was wrongly argued and applied, and therefore the outcome in the other case would be incorrect to apply to this matter.

The procedural history in the other matter was not as robust as one would hope to see. Discovery was limited due to the fact that the state / Counties did not fully understand the possible use and scope of the information available to them. As a result, those Counties then provided incorrect, false, incomplete, and / or misleading information to both the requesting parties and to the Hearing Officer and the Court.

Because of the efforts of several law makers and interested parties, additional information has been obtained which contradicts assertions made by the Counties and which ultimately caused the previous decisions to be based upon incorrect information. (See transcript of meeting in Nebraska with election services vendor on June 16, 2023, as follows:

a) Page 31 Line 3 - Chris Wlaschin, VP of Security ES&S says
b) Our machines, our tabulators do produce cast vote records.
c) Page 31 Line 18-19 Page 31 line 1-2 Chris Wlaschin, VP of Security ES&S says
d) There's nothing-- I'm going to (inaudible) over to the lawyer. There's nothing in

the cast vote record that I am aware of that is proprietary. Nothing that we would want to protect. What it is-- Imagine if you could visualize a spreadsheet that shows every ballot that was counted-- "

e) Page 32 Line 4 & 6 - Chris Wlaschin, VP of Security ES&S says

f) It's not linked to a voter in any way.

g) No exposure of voter privacy or anything like that.

h) Page 33 Lines 10-20 MS. ANDERSON: Okay. Would those records-- Since there's nothing proprietary and it doesn't identify a voter, and the NIST standards specifically state what cast vote records are for, which is for election officials to do an audit. It's for manufacturers to make sure the machines are running properly, and it's also-- It lists for public record. So that's pretty clear in my mind, but then now we have lawsuits in our state where they are-- And even my own state's attorney is telling me I can't release any of that because it's not public record, but it specifically states that they are public record.
MR. WLASCHIN: And that is standard.

i) Page 69 Line 1-11 - ES&S Executive says MR. ???: Just so we're all on the same page, I just want to point out that when you cast a ballot to an ES&S tabulator, two items are created. One is a ballot image. The other is a cast vote record. They are two separate entities. They are not merged together. They do not exist together, but they relate to one another. They're tied together, but they are two separate documents. All right? And since we don't capture images in South Dakota, when you try to bring in the software to look at that image, it simply says, "No image available," because that image was not captured. The cast vote record is a hundred percent, always available.

j) Page 71 Line 9-12 MR. WLASCHIN: We build the machines, the hardware, and we sell them to you. Some Counties lease them, but South Dakota we sell. The county owns the hardware. We license the software. You own the data that is generated--

k) Page 71 Line 2-7 MS. ANDERSON: I have a question. Not software related question, but I know you guys own the software. So technically who owns the data that we have?

MR. WLASCHIN: The Counties do.

MS. ANDERSON: Okay.

MR. ???: You own the data.

Certainly, the trier of fact and law will want to ensure that the facts and the law are correctly applied in this matter. It is quite clear that any of the previous Findings of Fact and Conclusions of Law are based upon incorrect information and, therefore, an incorrect application of the law.

The Counties should not be allowed to now rely upon a previous decision which was based upon the false information *they* provided, whether that was done knowingly, unknowingly, or by inattention or indifference, and then claim that the Administrative Law Judge is bound by any previous ruling.

It is a fundamental right of the people of South Dakota to have secure elections. It is also the right of the people of South Dakota to know that their Judges are making decisions based upon accurate information to then be able to render just decisions.

LEGAL ANALYSIS AND ARGUMENT

Let us begin with some basics. What is the "Rule of Law"?

One definition of the "Rule of Law" is that it is "... a durable system of laws, institutions, norms, and community commitment that delivers four universal principles: accountability, just law, open government, and accessible and impartial justice." ***Houston Law Review***. Robert A. Stein, *What Exactly Is the Rule of Law?,* 57 Hous.L.Rev. 185 (2019).

In the instant case there are elements of both Procedural Law and Substantive Law. The Substantive Law is that public records should be available to the public. The Procedural Law is complicated by the fact that the Counties failed to disclose factual information which resulted in a failure to comply with the law of public disclosure, which the Counties now assert should protect them from further disclosure. No one should benefit from their own false reporting.

The cases cited by the opposing parties all revolve around the notion that the facts of the matter are unchanged and were, or could have been, fully litigated in a previous action. **Again we must account for the fact that the previous requesting entity was given false information**

by the Counties. The South Dakota Canvassing Group seeks information that should now be known as available to the public.

The Counties previously incorrectly asserted that the information did not exist. ***We now know that is not true.*** *The Counties previously incorrectly asserted that the information was proprietary.* ***We now know that is not true.***

This is now a case of 'first impression.' The facts in the other case were wrong, the application of the law in the other case was wrong, and the outcome in the other case is now known to be wrong.

Neither "res judicata" nor "collateral estoppel" are appropriately applied in the this case because:

- There are new facts in evidence which fundamentally change the likely outcome;
- The previous action was essentially dismissed by the Plaintiffs due to the lack of important procedural action;
- South Dakota Canvassing Group is a new entity;
- Res Judicata and Collateral Estoppel are ***'principles' NOT 'rules;'***
- The previous decision was not based upon:
    - a full exposure to the facts of the case,
    - or a clear / full application of the law (The respondents incorrectly states that the "materials sought by Petitioners are not public record," but the vendor asserts that they are and the law indicates that they are.
        - Those items are not protected as a trade secret. AND if they were, why would the state enter into such an agreement as to have no ultimate certainty about the conduct of our elections?
- The South Dakota Canvassing Group DID NOT have access to the fact that the information sought was owned by the state.
    - That came as a result of a meeting with the election services vendor and inspection of their equipment and facilities.

In ***SDDS, Inc. vs. State of South Dakota***, 843 F. Supp. 546 (D.S.D. 1994), at paragraph 15, the Court recites the **four tests** that must be met to sustain collateral estoppel. They are:

1) The issue decided in the prior adjudication was identical with the one presented in the action in question;
2) There was a final judgment on the merits;
3) The party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and

4) The party against whom the plea is asserted had a full and fair opportunity to litigate the issue in the prior adjudication.

The Responses to each of those tests are:

1) The information sought is similar, HOWEVER the issue to be decided is not identical in light of the fact that the claims of the Counties were incorrect and the company producing the election equipment and software declared that the information does exist and the use of the software application is NOT proprietary. The Counties previously made the opposite assertions;
2) There was a final Order entered, but only based upon the agreed dismissal of the action. Voluntary Dismissal is an exception to the principle of Res Judicata. In addition to that, neither the ALJ nor the Court were exposed to the facts, but instead all parties were operating based upon the false information asserted by the Counties.
3) The party is an entity registered with the Secretary of State and is distinct from the previous entity, even though the parties managing the entity are the same individuals. The reason organizations are represented by counsel is due to the fact that individuals cannot 'practice law' in our courts, and, **each individual organization** is entitled to **'their day in court'**; and
4) The requesting entity did not have their full and fair opportunity to litigate the issue in the prior case "on the merits" because the Counties provided false information to the requesting entity and the Court. "On the merits" presumes that factual information has been provided.

The United States Supreme Court stated in ***Lawlor v. National Screen Service Corp.***, 349 U.S. 322 (1955):

> "... res judicata does not bar a suit, even if it involves the same course of wrongful conduct as alleged earlier, so long as the suit alleges ***new facts*** or a worsening of the earlier conditions." Citing *State of Ohio ex rel. Susan Boggs, et al. v. City of Cleveland*, 655 F.3d 516 (6th Cir. 2011) In 2006 the 6th Circuit Court of Appeals held that, unripe claims cannot later serve as a basis for res judicata. *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 529-20 (6th Cir. 2006) (Emphasis added.)

In the instant case, there are "new facts" so whether you call it "res judicata," "collateral estoppel," or "issue preclusion," those principles no longer apply in this case.

The Counties have collaborated to ensure their response shows a united front, even though some officials have disagreed with the advice that has been forced upon them. This isn't a groundswell of opposition but is an effort to insulate the Counties from simply doing their job. The public has a right to know that their elections are secure. That being true, then there should never be a concern about disclosing anything and everything that is possessed by the public. The requested information exists, and the creator of the election software affirms that the requested information is public property.

The instant case is NOT the same nucleus of operative facts. They are starkly different due the fact that efforts were made by individuals (not parties to this action) to obtain new and relevant information. In fact, it is information that the Counties themselves should have sought out to fully understand and utilize the election system they purchased. That new evidence was obtained over the past several months from the vendor of the election system.

This is now a case of "first impression" in light of the fact that the requesting party, South Dakota Canvassing, is a new entity with new information. The responding parties assert that this question of the availability of the requested public records has already been decided. The previous requesting entities did not have access to the information which now exists, nor did they follow the procedure that was expected by the responding parties.

Similarly, a discussion of **"Stare Decisis / With Prejudice"** was found in the Military Justice Court of Appeals wherein they stated:

> "(courts do not lightly overrule precedent, but stare decisis is a principle of decision making, not a rule, and need not be applied when the precedent at issue is badly reasoned)". ***United States v. Mangahas***, 77 M.J. 220.

Regardless of whether the Counties assert res judicata, collateral estoppel, or issue preclusion, they all suffer the same fate in that this is a new case, with new evidence, and should have a new outcome.

ARGUMENT

1) The basic question is "Are Cast Vote Records (CVR) and associated voting information public record?" The nature of the case is complex, and testimony is necessary to flesh out the

details involved in this case. There needs to be a clear explanation of the CVR and associated voting information and why it is essential.

What is its purpose?

Who controls the information?

How is it controlled?

What information does it provide?

Does it protect voter privacy?

Auditors have said CVRs don't exist, but we now know that they do exist.

How is the information retrieved?

Some of the 'software' might be proprietary, but the data produced IS NOT proprietary.

A hearing will allow essential information to be provided to and clarified for the fact finder.

Once we clarify the existence of these records, then the next question is:

2) What is a "public record"?

SDCL **1-27-1.1. 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.

Source: SL 2009, ch 10, § 2. (Emphasis supplied.)

3) There are several witnesses who will testify including expert witnesses, in regard to **a)** proprietary information, **b)** public data, **c)** systems testing and verification, **d)** Security issues and vulnerabilities associated with voting documents and electronic devices, **e)** examples of use and abuse of the related systems, and **f)** federal law / national security compliance in regard to elections.

4) Discretionary decisions such as whether to have a hearing must not be arbitrary and should be based on what is just and equitable. Because of the complex nature of this case, it would be just and equitable to allow a hearing so that the Hearings Examiner is made aware of the correct

information involved in this matter, and to more fully develop the record in the event the decision is appealed by either side.

6) Due process requires that procedures in civil cases such as this take into consideration both the private and public interest affected, the risk of deprivation of that interest and the government interest at stake. This case involves election integrity which is a private and public interest of the people of South Dakota and is of great importance. If there is no hearing, it may well deprive the public of their interest in free and fair elections.

Further, it is well understood that our system of justice is also cognizant of even the *appearance of injustice.* In this matter one would expect that the mandates of an open and honest system of elections would be of paramount importance. **Now, we have been informed by the actual developers of the election equipment and software that the information sought by SDCG is NOT proprietary and DOES exist.** Thus, the arguments previously advanced by the Counties have been refuted with this new evidence.

7) The volume of information presented in the over 500 page appeal is difficult to absorb strictly by reading. A hearing would help the Hearings Examiner to make a determination in this matter by providing further information from live witnesses and expert testimony to help understand the various documents provided, and it will allow the Hearing Examiner to pose questions and receive answers which might not otherwise be clearly addressed in the evidence submitted.

8) Finally, there is a basic right of fairness which would require a hearing to allow SDCG to present testimony regarding the appeal and also to supplement the over 500 page submission.

Questions of both fact and law remain to be considered in this matter.

CONCLUSION

As stated above, the Counties should not be allowed to rely upon a previous decision which was based upon the false information ***they*** provided, whether that was done knowingly, unknowingly, or by inattention or indifference.

There is nothing to fear in transparency. This is no small matter, and the public interest is

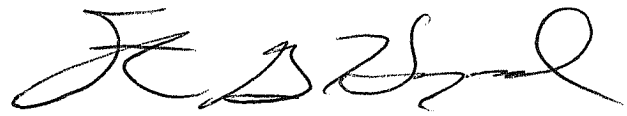
best served by instilling confidence in our elections systems based upon fact. Counties should disclose and know that they should disclose public information to enhance transparency.

It is the right of the people of South Dakota to have secure elections. It is also the right of the people of South Dakota to know that their Judges are making decisions based upon accurate information and then able to render just decisions.

Again, this is a case of first impression in South Dakota and needs to be thoroughly developed, and that requires a hearing.

Dated this 4th day of October, 2023.

HAUGAARD LAW OFFICE, P.C.



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CERTIFICATE OF SERVICE

I, Steven G. Haugaard, of Haugaard Law Office, P.C., counsel of record for South Dakota Canvassing Group, hereby certifies that a true and correct copy of the Reply to Response to Request for Documents of Information was served upon all parties by the U. S. mail first class prepaid envelope to the parties at the addresses listed below, on the 4th day of October, 2023, to:

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Dated at Sioux Falls, South Dakota this the 4th day of October, 2023.

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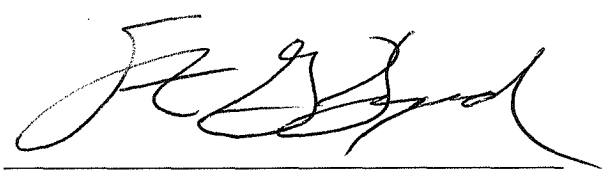

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