

State of Wisconsin \ Government Accountability Board

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KEVIN J. KENNEDY
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MEMORANDUM

DATE: For December 17, 2008 Meeting

TO: Members, Government Accountability Board

FROM: Kevin J. Kennedy
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Government Accountability Board

Prepared and Presented by:
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SUBJECT: Clarification of § 7.23 (1) (g), Wis. Stats.
Maintenance of Electronic Voting Records

Issue

For compliance with § 7.23 (1) (g), Wis. Stats., what election data are required to be transferred to an electronic medium and maintained for 22 months?

Background

The Government Accountability Board (G.A.B.) staff received a request that G.A.B. require clerks' compliance with § 7.23 (1) (g), Wis. Stats. Staff has been gathering information on what actions clerks are taking in order to comply with this statute. Staff finding: There is no consistent manner in which Wisconsin clerks are following § 7.23 (1) (g). Exactly what § 7.23 (1) (g) requires is an issue that needs to be clarified.

“7.23 (1) (g): Detachable recording units and compartments for use with electronic voting machines may be cleared or erased 14 days after any primary and 21 days after any other election. Before clearing or erasing the units or compartments, a municipal clerk shall transfer the data contained in the units or compartments to a disk or other recording medium which may be erased or destroyed 22 months after the election to which the data relates.”

Cost a Major Consideration: There has been much concern expressed by municipal and county clerks regarding the cost of transferring election data from memory devices to an electronic medium, such as a compact disk or a hard drive. Election costs within the last 5 years have increased dramatically with state and federal mandates leaving many of the municipalities struggling to fund all the statutorily required election mandates.

One of the principle issues is the cost of transferring the data to an electronic medium, which is then stored for 22 months. Depending on the voting equipment manufacturer/programmer, the costs of transferring the memory device data can range from \$50-\$200 for each election for each voting equipment unit. For example, the cost to transfer the memory device results to a recording medium for the City of Marinette, a municipality with a population of less than 12,000, is \$1,400 for 2008.

Unlike most other states that provide state funds to support the local electoral process, the State of Wisconsin does not award any General Purpose Revenue (GPR) to local governmental units to help prepare for or conduct elections. In Wisconsin, the cost and financial support for funding elections are incurred at the local level. In addition to complying with the Federal Help America Vote Act (HAVA) of 2002, local officials also have to adhere to an array of HAVA companion state laws codified in 2003 Wisconsin Act 265 (published April 29, 2004); 2005 Wisconsin Act 92 (published January 19, 2006); 2005 Wisconsin Act 333 (published April 28, 2006); and, 2005 Wisconsin Act 451 (published June 9, 2006).

As Federal and State laws governing elections administration continue to grow in number and complexity, the financial burden on local election officials grows proportionally. Local elections partners are having and will continue to experience a difficult enough time struggling to support even the most basic/core election requirements.

Discussion

With the advent and increased use of electronic voting equipment, the legislature passed 1987 Act 391, which revised §7.23(1)(g), Wis. Stats., to address the emerging fact that some election materials were created and stored in electronic forms. The legislative intent surrounding the adoption of the current version of §7.23(1)(g), Wis. Stats., was to capture the electronic forms of election materials for retention, just as had been the practice for lever machines, paper and hard copies of election materials. In addition, the revisions to §7.23(1)(g), Wis. Stats., were consistent with requirements of 42 U.S.C. §1974 of the Civil Rights Act of 1960, which requires retention of all election records from Federal elections for 22 months.

The November 4, 2008 General Election contained Federal offices on the ballot. This fact brings into play §7.23(1)(f), Wis. Stats., which requires elections officials to retain for 22 months the following election materials: “ballots, applications for absentee ballots, registration forms, or other records and papers requisite to voting.” The application of §7.23(1)(g), Wis. Stats., provides election officials with a means to preserve the electronic election materials for the same retention period of 22 months and specifically authorizes the transfer of electronic elections materials to disk or other recording medium to allow for the erasure of the memory devices for re-use in the next election. Under the current status of §7.23(1)(g), Wis. Stats., and despite the fact that it was originally intended to apply to Federal elections, elections officials have an obligation to retain election materials for 22 months for Federal, State, and local elections in Wisconsin.

With respect to electronic/computerized vote recording or tabulation equipment utilizing removable programmable data storage devices (memory devices or PROMs) or other similar storage devices, the United States Department of Justice, Public Integrity Unit, recommends that election officials retain an electronic record of the program by which votes are to be recorded or tabulated, which is captured prior to the election, and the hard copy output from each detachable recording unit or compartment (memory device or PROM), i.e. the results tape. The electronically stored program and the results tapes should then be retained for 22

months. From speaking with ES&S and Command Central representatives, it appears that the memory devices for Insight and Eagle optical scan equipment only possess the final results totals and no other programming data can be transferred. This raises a large cost issue for preservation of results data that is actually preserved in paper form. To comply with U.S. DOJ recommendations, the results tape from the voting equipment and the original programming is sufficient.

A. Some jurisdictions in Wisconsin actually own their own programming software, which will make it easier to comply with the U.S. DOJ policy of retaining an electronic record of the program by which votes are to be recorded or tabulated and the results tape. In fact, the programming software likely can also be used to transfer data from the memory devices to electronic media. Other than labor costs associated with transferring programming data, other costs associated with retaining the original programming should be minimal. (NOTE: ES&S currently offers Elections Results Manager software for \$8,000.00 plus \$1,500.00 for training (total cost \$9,500.)

Per a representative of ES&S, the following counties (and City of Milwaukee) have their own programming software:

- Brown
- Columbia
- Dane
- Jefferson
- La Crosse
- Marathon
- City of Milwaukee
- Rock

Per a representative of Command Central (programmer for Sequoia voting systems,) the following counties have their own programming software:

- Chippewa
- Eau Claire
- Fond du Lac
- Racine
- Sheboygan
- Waukesha

Per a representative of Premier, the following counties (and two cities) have their own programming software:

- Chippewa
- Dodge
- Door
- Green
- Kenosha
- Ozaukee
- Sauk
- St. Croix
- Walworth
- Washington
- Winnebago
- City of Kenosha
- City of Oshkosh

B. For those elections officials using both the Premier AccuVote OS and AccuVote TSX, or similar systems, the manufacturer has provided instructions to download all election programming and materials from each memory device to hard drive or disk before erasure and reprogramming. Those elections officials who possess these and similar elections management software should also be able to download all election programming and materials from each device to hard drive or disk before erasure and reprogramming. The electronically stored data then should be retained for 22 months. Other than labor costs associated with transferring programming and election data, other costs associated with retaining the original programming and election materials should be minimal.

Per a representative of Premier, the following jurisdictions are able to readily transfer all election data:

- Calumet County (17 municipalities)
- Chippewa County (31 municipalities)
- Dodge County (42 municipalities)
- Door County (19 municipalities)
- Green County (22 municipalities)
- Kenosha County (13 municipalities)
- Ozaukee County (16 municipalities)
- Sauk County (37 municipalities)
- St. Croix County (26 municipalities)
- Vilas County (15 municipalities)
- Walworth County (28 municipalities)
- Washington County (21 municipalities)
- Winnebago County (21 municipalities)
- City of Mauston in Juneau County
- Town of Three Lakes in Oneida County
- Town of Marion in Waushara County
- Town of Wautoma in Waushara County

C. Election officials may make arrangements with the manufacturers or programmers to have them retain the programming data for the retention period of 22 months. After speaking with representatives of ES&S and Command Central, we learned that they still possess the election programming data from the November 4, 2008 election. Arrangements could be made to either have them retain this programming data in-house for 22 months or transfer it to electronic media for the municipalities to retain. In the future, new understandings could be reached between ES&S and Command Central to deal with this programming data retention as part of the original writing of the programming. It is likely that storage and transfer fees may be charged by the manufacturers.

D. Election officials may transfer the data contained on the memory devices to electronic media. One manufacturer (Premier) has already provided the means and ability to do this transfer after an election. Another manufacturer (ES&S) sells a drive that costs \$600.00 and it can read and transfer all data from PCMCIA memory cards to electronic media. There is substantial cost associated with having the manufacturers transfer data on the memory devices to electronic media, but only for two of the manufacturers serving Wisconsin, one of which also sells the drive which would allow the election officials to complete the transfer on their own.

Premier: Labor costs, but no additional costs. See B above.

Command Central (Sequoia):

Edge results cartridges: \$200 first unit per year for 4 elections, then \$50 per unit thereafter per year for up to 4 elections;

Optech memory pack: \$225 first unit per year for 4 elections, then \$50 per unit thereafter per year for up to 4 elections.

ES&S:

M100: OmniDrive to copy PCMCIA cards: \$600

Email Zip Drive copy of programming: \$125/unit

E. Finally, the electronic election materials contained on the memory devices may be retained on the device itself for the period of 22 months. In light of the frequency of Federal elections (every two years) and should §7.23(1)(g), Wis. Stats., be revised to have a shorter retention period for State and local elections, election officials would likely need two sets of memory devices in order to have one set in storage at a time for the 22 month retention period. Per discussions with representatives of the manufacturers of voting equipment used in Wisconsin, the following cost estimates are applicable for this option:

Command Central (Sequoia):

Edge results cartridges: \$200/unit to 100; \$150/unit over 100

Optech Insight memory pack: \$250/unit

Optech Eagle memory pack: \$250/unit

Premier:

AccuVote OS memory card: \$275/unit

AccuVote TSX memory card: \$195/unit

Rental option: \$95/unit

ES&S:

M100 PCMCIA Card: \$90/unit plus delivery

Eagle RAM pack (new): \$350/unit plus delivery

Eagle RAM pack (used): \$300/unit plus delivery

I-Votronic compact flash card: \$75/unit plus delivery

Rentals:

M100 PCMCIA Card: \$10/unit per election plus delivery

Eagle RAM pack: \$75/unit per election plus delivery

I-Votronic compact flash card: \$10/unit/election plus deliv.

Recommendations For All Elections Until Legislative Changes May Occur

1. For those election officials using electronic/computerized vote recording or tabulation equipment utilizing memory devices such as a PROM or other similar memory storage devices, the "data" that should be transferred and maintained electronically for 22 months pursuant to §7.23(1)(g), Wis. Stats., and 42 U.S.C. §1974, is the electronic record of the program by which votes are to be recorded or tabulated, which is captured prior to the election, plus the hard copy output from each detachable recording unit or compartment (memory device or PROM), i.e. results tape.

If there is no removable initial programming contained on the detachable recording unit or compartment (memory device or PROM), then the costs of simply retaining an electronic copy of the results tape is excessive. The Government Accountability Board staff may coordinate contact between local election officials and manufacturer and programming representatives to arrive at a uniform policy and escrow arrangement for programming, if necessary.

2. As an alternate way to comply with §7.23(1)(g), Wis. Stats., and 42 U.S.C. §1974, election officials using electronic/computerized vote recording or tabulation equipment utilizing removable programmable data storage devices (memory devices or PROMs) or other similar storage devices may also retain the actual devices for the period of 22 months.
3. For those elections officials using both the Premier AccuVote OS and AccuVote TSX, the “data” that should be transferred and maintained electronically for 22 months pursuant to §7.23(1)(g), Wis. Stats., and 42 U.S.C. §1974, is all election programming and materials from each device which can be downloaded to hard drive or disk before erasure and reprogramming.
4. For those elections officials who possess elections management software the “data” that should be transferred and maintained electronically for 22 months pursuant to §7.23(1)(g), Wis. Stats., and 42 U.S.C. §1974, is the following: A) all election programming (programmable code,) and B) for each memory device programmed by election officials, the accumulation of election results will be incorporated into the election management system in order to obtain and retain aggregate election results. This programming and results data can be downloaded to hard drive or disk before erasure and reprogramming of the memory devices.

Next Steps

1. The Government Accountability Board should pursue a 2009 Legislative Agenda that includes legislative changes to establish two separate retention periods for electronic and other election materials: A) 22 months for elections with a Federal office on the ballot; and B) a shorter period tied to the right to contest/recount for elections with only State or local offices on the ballot.
2. The Government Accountability Board should continue to gather information regarding the costs and ranges of options available for election materials retention, including discussions with our local election partners, manufacturers and programming representatives (specifically regarding retention of programming data,) and the United States Department of Justice—noting any additional updates to the U.S. DOJ data retention policy with respect to audit logs and other data that might be available on some removable memory devices.