
Wisconsin Legislative Council



Anne Sappenfield
Director

TO: SENATOR JANET BEWLEY

FROM: Anne Sappenfield, Director, and Peggy Hurley, Staff Attorney

RE: Legislative Audit Bureau Access to Certain Election Records

DATE: October 26, 2021

This memorandum, prepared at your request, discusses access to records by the Legislative Audit Bureau (LAB) and federal law requiring election officials to retain and preserve records relating to an election. In Audit Report 21-19, *Elections Administration*, the LAB stated that the City of Madison declined to allow LAB to physically handle certain election records pursuant, in part, to the municipal clerk's interpretation of guidance from the U.S. Department of Justice regarding retention and preservation of these records.¹

LAB ACCESS TO RECORDS

Under current law, LAB has broad access to records to fulfill its audit functions²:

...the State Auditor or designated employees shall at all times with or without notice have access to all departments and to any books, records or other documents maintained by the departments and relating to their expenditures, revenues, operations and structure, including specifically any such books, records, or other documents that are confidential by law....

Under current law, in this context, “department” includes any county, city, village, town, or school district. Access to documents of counties, cities, and other political subdivisions, such as election records, is limited to work performed in connection with audits authorized by the Joint Legislative Audit Committee. [s. 13.94 (intro.) and (4) (a) 3., Stats.] The Audit Committee directed LAB to conduct the audit of elections administration at its February 11, 2021 meeting.

¹ According to the audit report, Milwaukee County and the Town of Suamico also did not allow LAB staff to physically handle ballots.

² Current law also provides that, “In the discharge of any duty imposed by law, the state auditor may subpoena witnesses, administer oaths and take testimony and cause the deposition of witnesses to be taken as prescribed for taking depositions in civil actions in circuit courts.” [s. 13.94 (intro.), Stats.]

ELECTION RECORDS RETENTION AND PRESERVATION UNDER FEDERAL LAW

According to Audit Report 21-19, certain clerks did not permit LAB staff to physically handle certain election records, citing federal law relating to retention and preservation of election records.

Federal Law

For federal elections, federal law governs the retention of relevant election records. Specifically, the Civil Rights Act of 1960 requires elections officials to “retain and preserve” all records relating to any “act requisite to voting” for 22 months after the conduct of “any general, special, or primary election” at which citizens vote for “President, Vice President, presidential elector, Member of the Senate, [or] Member of the House of Representatives.” [52 U.S.C. § 20701.]

Wisconsin law complies with the federal directive, requiring all “ballots, applications for absentee ballots, registration forms, or other records and papers requisite to voting at any federal election, other than registration cards” be retained for 22 months, except that data contained in a detachable recording unit or compartment for use with tabulating equipment for an electronic voting system may be transferred to a removable disk, which must be retained for 22 months. [s. 7.23 (1) (f) and (g), Stats.]

U.S. Department of Justice Guidance

On July 28, 2021, the U.S. Department of Justice published a guidance document entitled [Federal Law Constraints on Post-Election “Audits.”](#) A press release accompanying the publication of the guidance document stated that the guidance was issued to protect the right to vote for all Americans.

The guidance document noted that post-election audits are often guided by state law, but stated that “regardless of the relevant state law, federal law imposes additional constraints with which every jurisdiction must comply.” Specifically, the guidance document cited the Civil Rights Act of 1960, the Voting Rights Act of 1965, the National Voter Registration Act of 1993, and the Civil Rights Act of 1957. However, the provisions of the Civil Rights Act of 1960 are most relevant to this memorandum.³

Noting that the Civil Rights Act of 1960 “protects the right to vote by ensuring that federal elections records remain available in a form that allows for the Department to investigate and prosecute both civil and criminal elections matters under federal law,” the guidance document warned that “[w]here election records leave the control of elections officials, the systems for maintaining the security, integrity and chain of custody of those records can easily be broken. Moreover, where elections records are no longer under the control of elections officials, this can lead to a significant risk of the records being lost, stolen, altered, compromised, or destroyed.”

The guidance document stated that in the view of the U.S. Department of Justice, the Civil Rights Act requires the covered election materials to “be retained either physically by election officials themselves, or under their direct administrative supervision.” The guidance document does not define the phrase “direct administrative supervision” but emphasizes that “document retention requirements of this

³ In discussing the possibility of a post-election canvass of voters, as proposed by some proponents of post-election audits, the guidance document cited Section 11(b) of the Voting Rights Act of 1965, Section 12 of the National Voter Registration Act of 1993, and Section 131 of the Civil Rights Act of 1957, as prohibiting potential voter intimidation, coercion, or threat. The guidance document noted that any post-election canvassing or contact with voters “must ensure that the way those reviews are conducted has neither the purpose nor the effect of dissuading qualified citizens from participating in the electoral process.”

federal law place the retention and safekeeping duties squarely on the shoulders of election officers.⁴ Accordingly, if the election officer charged with preserving and retaining election materials turns over those materials to a third party, the guidance document states that the department interprets the Civil Rights Act to require that “administrative procedures be in place giving election officers ultimate management authority over the retention and security of those election records, including the right to physically access” such records. [[The Federal Prosecution of Election Offenses, Eighth Edition 2017](#), at 79.] The guidance document concludes:

In other words, the obligation to retain and preserve election records remains intact regardless of who has physical possession of those records. Jurisdictions must ensure that if they conduct post-election ballot examinations, they also continue to comply with the retention and preservation requirements of [the Civil Rights Act of 1960].

DISCUSSION

According to Audit Report 21-19, the City of Madison clerk did not allow LAB staff to physically handle absentee ballot certificates due, in part, to its interpretation of the U.S. Department of Justice guidance discussed above. Clerks for the City of Madison, Milwaukee County, and the Town of Little Suamico also declined to allow LAB staff to physically handle ballots. However, the majority of clerks requested did permit LAB staff to physically handle these election records.

Based upon the information in the audit report, it appears that application of the U.S. Department of Justice guidance among the clerks in Wisconsin is not uniform. This could be due to legal interpretation or practice. However, it could also be due to the extent to which individual clerks believe they can safeguard records physically handled by a third party. Therefore, assuming that the clerks who declined to allow LAB staff to physically handle election records acted in good faith and consistently apply this interpretation to all third parties, it is arguably reasonable to permit only clerks’ staff to physically handle election records based upon the U.S. Department of Justice guidance. As discussed above, the guidance places the ultimate responsibility for the integrity of federal election records on clerks, with the potential for criminal prosecution if they fail to properly retain and preserve these records.

In addition, although the audit report asserts that LAB staff were not permitted to physically handle the records, the report does not indicate that the clerks refused all methods of accessing the records. An August 24, 2021 letter to LAB staff from the clerk from the City of Madison states, “There is no information or data in the election records that can be observed through physical handling that cannot be viewed using our protocols or copies.”

Please let us know if we can provide any further assistance.

AS:PH:ksm

⁴ It is a federal crime, punishable by fines up to \$1,000 and imprisonment for up to one year for each violation, for “[a]ny officer of election” or “custodian” of election records to willfully fail to comply with the retention and preservation requirements. [52 U.S.C. § 20701.]