

Dear Secretary of State and County Auditors,

I believe we are going in the wrong direction, when it comes to election security and transparency, the very idea that we would not save the ballot images after the election to have them backed up is not based upon sound reasoning. First when we look at being able to have the evidence to confirm that our elections are secure and working properly, we need to maintain the evidence, if there is ever a claim. Secondly, the tabulators take a picture of the ballots when they are fed into them, and then they use those images to then interpret how the voters voted by creating a result file of how the machine read the ballot. Both of those files are records and are called cast vote records and ballot images, the very term “record “ when used during a Federal election contest, activates Federal requirements of maintaining that data for a period of 22 months. The public’s access to these records is a separate issue.

When the Office of Hearing Examiners reviewed case PRR 22-03 in 2022, it only looked if the auditor violated public records law in regard to two items; the machine logs and the electronic report from the ballot tabulating machines, that sets out in a database format. It was decided that those two records were not public records, there was no decision made on ballot images. There certainly was not a statement of direction to turn off the retention of election records. Point 15 of the Findings of Fact is not accurate on two counts, first the codified law 12-17B-2 states, “*No ballot marking device may save or tabulate votes marked on any system.*“ The ES&S ExpressVote is a ballot marking device, and the tabulation is turned off for those devices in our state. The tabulators are not a ballot marking device, and therefor are not prohibited in saving images, since that is their base function. Those ballot images are indeed kept on the internal hard drive of all tabulators, until maintenance is performed, but at the end of the election night, during the backup process the ballot images and cast vote records are stored in an encrypted format on a flash drive. We have confirmation from the 2020 and 2022 elections, in working with multiple counties in the State, that they upheld the Federal Election records retention requirements. Secondly, it was also discovered for the four counties with the Electionware software the CVR data does exist due to the reporting software available to those counties. Furthermore, the reasoning for the denial of the CVR reports was based upon misinformation, and a lack of understanding of how ES&S meets the Election Assistance Commission Voting Standard requirements to ensure that no ballot can be linked to a voter. Due to the randomization of the sequence of naming the files, and the time stamps all being the same for all ballot images, records would not be in the same order as a voter appeared at the voting location, due to the required randomization. There was no direction by the Office of Hearing Examiners or any South Dakota Court to turn off the saving of ballot images, and it is not supported by either State or Federal Law.

## The Secrecy Issue and how it is addressed:

First, we are bound by the South Dakota State Constitution, requires the secrecy of voting be maintained.

*Article VII Section 3. **The Legislature shall by law** define residence for voting purposes, **insure secrecy in voting** and provide for the registration of voters, absentee voting, the administration of elections, the nomination of candidates and the voting rights of those serving in the armed forces.*

Source: [Constitutional Article 7 | South Dakota Legislature \(sdlegislature.gov\)](https://legis.sd.gov/Constitutional/Article%207)

Secondly, the South Dakota Codified Law gives us two paths when dealing with the counting of ballots.

- 1) Hand Counting, which is found in **12-20-1. Delivery of supplies to counting board--Certificate of transmittal and receipt--Commencement of count--Continuation without adjournment--Comparison and correction of poll lists--Penalty.**

*As soon as the polls are closed, the precinct superintendent and precinct deputies shall audit the ballot count as prescribed in §§ 12-20-2 and 12-20-3. The precinct superintendent and precinct deputies shall then immediately deliver the ballot boxes, registration book, pollbook, and other election supplies, including voided and unused ballots, to the counting board, if appointed, and sign a certificate of transmittal and receipt as prescribed by the State Board of Elections. **The members of the precinct election board or the counting***

**board, if appointed, shall then immediately proceed to count publicly, in the presence of all persons desiring to attend the count, the votes received at the polls, and continue without leaving the site of the count until the count is completed.** A person charged with implementing this section may not delay the counting of ballots other than to authorize short recesses for the health and wellbeing of those employed to implement this section. In counting the votes, the members of the precinct election board or counting board shall use the tally sheets provided.

Source: [Codified Law 12-20-1 | South Dakota Legislature \(sdlegislature.gov\)](#)

- A) In this first path we can clearly see that the counting of the ballots is in public, “**in the presence of all persons desiring to attend the count**”. Since it is impossible to connect a voter to a ballot during this process, this law has not been challenged. The important note here is that all in attendance can see and hear the process of the count and review of the tallies for each of the races on the ballots and easily see and hear any issues regarding a ballot and how it is resolved.
- 2) Automatic Tabulating, which is more complicated, is found in 3 areas, the codified law, an administrative rule, and then the US Election Assistance Commission(EAC) standards through it’s Voluntary Voting System Guidelines (VVSG). Starting here we can see how all three are connected:

A) **12-17B-2. Requirements for automatic tabulating, electronic ballot marking, and election voting equipment systems--Approval of changes or modifications.**

*Any automatic tabulating or electronic ballot marking system used in an election shall enable the voter to cast a vote for all offices and on all measures on which the voter is entitled to vote. No automatic tabulating, electronic ballot marking, or election voting equipment system may be connected to the internet. No ballot marking device may save or tabulate votes marked on any system. Each system shall fulfill the requirements for election assistance commission standards certification and be approved by the State Board of Elections prior to distribution and use in this state. No system may be approved unless the system fulfills the requirements as established by the State Board of Elections. Any changes or modifications to an approved system shall be approved by the State Board of Elections prior to distribution and use.*

Source: [Codified Law 12-17B-2 | South Dakota Legislature \(sdlegislature.gov\)](#)

B) Now we turn to the South Dakota State Board of Elections Administrative Rule **5:02:09:02. Approval of automatic tabulating systems required before distribution.** *Prior to distribution in South Dakota, a company or corporation dealing in automatic tabulating or electronic ballot marking systems shall give written notice to the state board of elections and demonstrate that its system complies with SDCL [12-17B-2](#) and § 5:02:09:02.01 or 5:02:09:02.03 and is certified as fulfilling the requirements of the Election Assistance Commission 2015 voting system standards by an independent test authority accredited by the Election Assistance Commission. If the State Board of Elections approves the system, it shall issue a certificate of approval.*

*Any changes or modifications in an approved automatic tabulating or electronic ballot marking system may be certified by the State Board of Elections with or without the demonstration described in this section for initial approval. The modification for the already approved system must have been certified as fulfilling the requirements of the Election Assistance Commission voting system 2015 standards by an independent test authority accredited by the Election Assistance Commission or been certified to meet the national standard by another state. Any change or modification determined to be de minimis by the independent test authority does not need state board of elections certification.*

Source: [Administrative Rule 05:02:09:02 | South Dakota Legislature \(sdlegislature.gov\)](#)

C) Now we turn to the US Election Assistance Commission(EAC) 2015 Voting System Standards, which is VVSG 1.1 of the EAC, which is required by South Dakota Codified Law and further required by the Administrative Rule.

- 1) The VVSG 1.1 Section 1.5.1.3 guidelines for requirements is clear in that, “*When a device that is submitted for certification testing combines functions of more than one of the categories referred to in the Guidelines, that device must comply with all of the requirements that would*

apply to either or both categories of devices. For example, an electronic vote-capture device that is capable of recording votes either on an optical scan paper ballot or in electronic memory must comply with the requirements for paper-based systems when a paper record is created, and must comply with the requirements for DREs when electronic records are created.”

Source: [VVSG.1.1.VOL.1.FINAL1.pdf \(eac.gov\)](#)

- 2) The VVSG 1.1 4.3.3.2 Use Case (informative) also clearly discusses failures in this way for cast vote records, aka ballot images, **“Disenfranchisement,” defined as any failure that results in all cast vote records pertaining to a given ballot becoming unusable or that makes it impossible to determine whether or not a ballot was cast, was assigned a benchmark of zero (i.e., can’t happen).**

Source: [VVSG.1.1.VOL.1.FINAL1.pdf \(eac.gov\)](#)

- 3) In fact in several sections the ballot images and results file are required under sections 2.4.4.2 and 7.8.3 to be stored in a randomized fashion as to not allow for any connecting of a ballot image to a voter, so for 7.8.3 of the VVSG 1.1:

### **7.8.3 Electronic and Paper Record Structure**

*a. Electronic ballot images shall be recorded in a randomized order by the voting system for the election. NIST Special Publication 800-90: Recommendation for Random Number Generation Using Deterministic Random Bit Generators specifies techniques for the generation of random numbers that can be used to randomize the order of ballot images in a cryptographically sound way. For each voted ballot, this includes:*

*i. Ballot style and reporting context such as precinct or election district;*

*ii. For each contest:*

*o The choice recorded, including undervotes and write-ins; and*

*o Any information collected by the vote-capture device electronically about each write-in;*

*iii. Information specifying whether the ballot is provisional, early voting or election day voting.*

*Types of provisional ballots (such as “regular provisional”, “extended hours provisional”, and “regular extended hours”) are jurisdiction-dependent.*

*iv. Information linking the electronic ballot image to a paper record, if such functionality is enabled in the voting system.*

*b. The voting system shall provide the capability to export the collection of electronic ballot images in a publicly documented format, such as XML, or include a utility to export the records into a publicly documented format for offline viewing.*

*c. Electronic ballot images shall be digitally signed by the voting system. The digital signature shall be generated using a NIST-approved digital signature algorithm with a security strength of at least 112 bits implemented within a FIPS 140-2 validated cryptographic module operating in FIPS mode.*

*d. The human-readable contents of the paper record should be created in a manner that is machine-readable by optical character recognition.*

Source: [VVSG.1.1.VOL.1.FINAL1.pdf \(eac.gov\)](#)

In reviewing both options, we see that voter privacy is protected and maintained. When we dig further into the automatic tabulator we see that the ballots are scanned and images are created and are interchangeably called both ballot images and cast vote records...These definitions are from the Appendix of the VVSG 1.1:

1) ballot image: Electronically produced record of all votes cast by a single voter. See also cast vote record.

2) Cast Vote Record (CVR): Permanent record of all votes produced by a single voter whether in electronic, paper or other form. Also referred to as ballot image when used to refer to electronic ballots.

Source: [VVSG.1.1.VOL.1.FINAL1.pdf \(eac.gov\)](#)

Let's not forget what the EAC review process shows us about our voting system:

- 1) In the testing of the base system 6.0.0.0, by the EAC, the following are stated in the test plan and then later certified.
  - a) **DS200** is a polling place paper-based voting system, specifically a digital scanner and tabulator that simultaneously scans the front and back of a paper ballot and/or vote summary card in any of four orientations for conversion of voter selection marks to electronic Cast Vote Records (CVR). Once the CVRs are stored, they can be transferred into Electionware software for vote tabulation, adjudication and reporting of election results. After the voter marks a paper ballot either manually or digitally, their ballot is inserted into the unit and tabulated to a USB flash drive and internal vote counter. If issues are detected, the system may provide a warning or flag the scanned ballot for review. Some examples include overvotes, undervotes, if so configured, damaged ballots, and ballots not configured for the device or election. Once the ballot is tabulated, the ballot is dropped into an integrated ballot box. The scanned voter selections are stored to a USB flash drive. The USB flash drive is removable from the system for transport to a central election location where vote totals are consolidated for reporting.
  - b) **DS450** is a central scanner and tabulator that simultaneously scans the front and back of a paper ballot and/or vote summary card in any of four orientations for conversion of voter selection marks to electronic Cast Vote Records (CVR). Once the CVRs are stored, they can be transferred into Electionware software for vote tabulation, adjudication and reporting of election results. The DS450 sorts tabulated ballots into discrete output bins without interrupting scanning, based on pre-defined sort criteria, such as the ballot being unreadable, having write-ins, overvotes, undervotes, blank ballots or invalid election or ballot style ID.
  - c) **DS850** is a central scanner and tabulator that simultaneously scans the front and back of a paper ballot and/or vote summary card in any of four orientations for conversion of voter selection marks to electronic Cast Vote Records (CVR). Once the CVRs are stored, they can be transferred into Electionware software for vote tabulation, adjudication and reporting of election results.
  - d) The Results group in Electionware contains the post voting capability to process, review, and report election results data from the tabulation media. This group includes all of the tools used for loading results, machine logs, **cast vote records, and ballot images**; creates the results reports; ballot review and adjudication; and write-in review and management.
  - e) Electionware can configure the DS200, DS450 and DS850 so that ballot images captured on the devices can be viewed in Electionware.
  - f) Ballot images captured by the DS200 can be viewed in Electionware.
  - g) Ballot images captured by the DS450 can be viewed in Electionware.
  - h) Ballot images captured by the DS850 can be viewed in Electionware.
  - i) **The Electionware Reporting module can be used to export decrypted ballot images for FOIA purposes.**

Source:

[https://www.eac.gov/sites/default/files/voting\\_system/files/ESS\\_EVS6000\\_EAC\\_Certification\\_Test\\_Plan\\_v1\\_2.pdf](https://www.eac.gov/sites/default/files/voting_system/files/ESS_EVS6000_EAC_Certification_Test_Plan_v1_2.pdf)

- 2) On the second page of the Certificate from the EAC shows us very clearly, that the inserted ballots are being converted into electronic records called Cast Vote Records.

**DS200**® is a polling place paper-based voting system, specifically a digital scanner and tabulator that simultaneously scans the front and back of a paper ballot and/or vote summary card in any of four orientations for conversion of voter selection marks to electronic cast vote records (CVR).

**DS450**® is a central scanner and tabulator that simultaneously scans the front and back of a paper ballot and/or vote summary card in any of four orientations for conversion of voter selection marks to electronic CVRs.

**DS850**® is a central scanner and tabulator that simultaneously scans the front and back of a paper ballot and/or vote summary card in any of four orientations for conversion of voter selection marks to electronic CVRs.

Source:

## Election Records Retention Requirements (Federal and a South Dakota Codified Law):

First, when we review the Federal Law 52 USC 20701, we see the term “all records”:

**52 USC 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.

Source: <https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title52-section20701&num=0&saved=%7CKHRpdGxIjUyIHNIY3Rpb246MjA3MDIlgZWRpdGljbjpwcmVsaW0p%7C%7C%7C0%7Cfalse%7Cprelim>

Secondly, when we review Federal Law 52 USC 20702, we are cautioned against destroying, concealing or altering any record.

**52 USC 20702: Theft, destruction, concealment, mutilation, or alteration of records or papers; penalties** Any person, whether or not an officer of election or custodian, who willfully steals, destroys, conceals, mutilates, or alters any record or paper required by section 20701 of this title to be retained and preserved shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

Source: <https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title52-section20702&num=0&saved=%7CKHRpdGxIjUyIHNIY3Rpb246MjA3MDIlgZWRpdGljbjpwcmVsaW0p%7C%7C%7C0%7Cfalse%7Cprelim>

Thirdly, we can clearly see who is held accountable here.

**52 USC 20706: "Officer of election" defined** As used in this chapter, the term "officer of election" means any person who, under color of any Federal, State, Commonwealth, or local law, statute, ordinance, regulation, authority, custom, or usage, performs or is authorized to perform any function, duty, or task in connection with any application, registration, payment of poll tax, or other act requisite to voting in any general, special, or primary election at which votes are cast for 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.

Source: <https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title52-section20706&num=0&saved=%7CKHRpdGxIjUyIHNIY3Rpb246MjA3MDIlgZWRpdGljbjpwcmVsaW0p%7C%7C%7C0%7Cfalse%7Cprelim>



Finally, when we look at our own South Dakota Codified Law we are warned about our own enforcement mechanisms regarding the recoding of votes, the very idea of turning off ballot images from being saved, is an affront to the maintaining of the records.

**12-26-23.1 Tampering with automatic ballot counting devices, direct recording electronic voting machines, and electronic ballot marking systems as felony.** *No person may intentionally program or alter an automatic ballot counting device, direct recording electronic voting machine, or electronic ballot marking system to erroneously mark, record, or count voted ballots or to render an erroneous total. A violation of this section is a Class 5 felony.*

Source: [Codified Law 12-26-23.1 | South Dakota Legislature \(sdlegislature.gov\)](https://legis.sd.gov/CodifiedLaw/12-26-23.1)

Additionally, the VVSG 1.1 as adopted by our state requires the following:

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### 2.1.10 Data Retention

- a. United States Code Title 42, Sections 1974 through 1974e state that election administrators **shall** preserve for 22 months “all records and paper that came into (their) possession relating to an application, registration, payment of poll tax, or other act requisite to voting.” This retention requirement applies to systems that will be used at any time for voting of candidates for federal offices (e.g., Member of Congress, United States Senator, and/or Presidential Elector).
- b. Therefore, all voting systems **shall** provide for maintaining the integrity of voting and audit data during an election and for a period of at least 22 months thereafter.

Because the purpose of this law is to assist the federal government in discharging its law enforcement responsibilities in connection with civil rights and elections crimes, its scope must be interpreted in keeping with that objective. The appropriate state or local authority must preserve all records that may be relevant to the detection and prosecution of federal civil rights or election crimes for the 22-month federal retention period, if the records were generated in connection with an election that was held in whole or in part to select federal candidates. It is important to note that Section 1974 does not require that election officials generate any specific type or classification of election record. However, if a record is generated, Section 1974 comes into force and the appropriate authority must retain the records for 22 months.

- c. For 22-month document retention, the general rule is that all printed copy records produced by the election database and ballot processing systems **shall** be so labeled and archived.
- d. Regardless of system type, all audit trail information spelled out in Subsection 5.4 **shall** be retained in its original format, whether that is real-time logs generated by the system, or manual logs maintained by election personnel.

The election audit trail includes not only in-process logs of election-night and subsequent processing of absentee or provisional ballots, but also time logs of baseline ballot definition formats, and system readiness and testing results.

In many voting systems, the source of election-specific data (and ballot formats) is a database or file. In precinct count voting systems, this data is used to program each machine, establish ballot layout, and generate tallying files. It is not necessary to retain this information on electronic media if there is an official, authenticated printed copy of all final database information. However, it is recommended that the state or local jurisdiction also retain electronic records of the aggregate data for each voting machine so that reconstruction of an election is possible without data re-entry. The same requirement and recommendation applies to vote results generated by each precinct count voting machine.

The US Department of Justice, in their recent publication, Federal Law Constraints on Post-Election “Audits”, Published July 28<sup>th</sup>, 2021, gives straight forward direction on record retention requirements, which is inclusive to be “all records”.

*The Civil Rights Act of 1960, now codified at 52 U.S.C. §§ 20701-20706, governs certain “[f]ederal election records.” Section 301 of the Act requires state and local election officials to “retain and preserve” all records relating to any “act requisite to voting” for twenty-two 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. The materials covered by Section 301 extend beyond “papers” to include other “records.” **Jurisdictions must therefore also retain and preserve records created in digital or electronic form.***

*The ultimate purpose of the Civil Rights Act’s preservation and retention requirements for federal elections records is to “secure a more effective protection of the right to vote.” State of Ala. ex rel. Gallion v. Rogers, 187 F. Supp. 848, 853 (M.D. Ala. 1960) (citing H.R. Rep. 956, 86th Cong., 1st Sess. 7 (1959)), aff’d sub nom. Dinkens v. Attorney General, 285 F.2d 430 (5th Cir. 1961) (per curiam). **The Act 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 Federal Prosecution of Election Offenses, Eighth Edition 2017 explains that “[t]he detection, investigation, and proof of election crimes – and in many instances Voting Rights Act violations – often depend[s] on documentation generated during the voter registration, voting, **tabulation**, and election certification processes.” *Id.* at 75. **It provides that “all documents and records that may be relevant to the detection or prosecution of federal civil rights or election crimes must be maintained if the documents or records were generated in connection with an election that included one or more federal candidates.” *Id.* at 78.***

*Election audits are exceedingly rare. **But the Department is concerned that some jurisdictions conducting them may be using, or proposing to use, procedures that risk violating the Civil Rights Act.** The duty to retain and preserve election records necessarily requires that elections officials maintain the security and integrity of those records and their attendant chain of custody, so **that a complete and uncompromised record of federal elections can be reliably accessed and used in federal law enforcement matters.** Where 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. This risk is exacerbated if the election records are given to private actors who have neither experience nor expertise in handling such records and who are unfamiliar with the obligations imposed by federal law.*

Source: <https://www.justice.gov/opa/press-release/file/1417796/dl>

## **In Conclusion :**

This is why I am strongly against turning off the ballot image save functionality for our elections in South Dakota, whether it be Federal or any other race. As a best practice, we would be better off as a state to default to the highest standard for all of our elections, so that it becomes common practice for all elections. For election officials, it would be far better to retain the records and know that you are in compliance with all Federal and State laws, versus running into an issue down the road to find out that you had received bad advice. Our laws are written in plain language, so that we can all understand the meaning and intent of the law, it is clear to me that we should be preserving the records, without question.

Please confirm that you will be saving the ballot images and cast vote records for the upcoming 2024 Primary and General Elections.

Thank you,

Rick Weible  
5/17/2024