



MEMORANDUM

TO: Majority Leader Devin LeMahieu
FROM: Rick Champagne, chief; Joe Kreye, chief counsel
DATE: October 28, 2021
SUBJECT: Legislative Audit Bureau's access to absentee ballot certificates

You requested information related to the recent audit of Wisconsin's elections administration conducted by the Wisconsin Legislative Audit Bureau (LAB). Specifically, you asked if a city is required under state law to grant LAB access to election records—in particular, the physical custody of absentee ballot certificates—and if federal law prohibits a city from providing such access.

For the reasons discussed in this memorandum, the LAB has access by law to all of these records. Federal law does not prohibit election officials from relinquishing physical custody of election records, but instead allows and contemplates that election officials can establish administrative procedures to ensure the retention and security of such records.

Introduction

On February 11, 2021, the Joint Legislative Audit Committee directed the LAB to conduct a comprehensive review of elections administration in Wisconsin, including: state and local elections officials' compliance with elections laws, the use of electronic voting systems, and the elections complaints process.¹ Eight months later, on October 22, 2021, the LAB released its audit report on elections administration in Wisconsin, offering 30 recommendations for elections administration improvements and suggesting 18 issues for legislative consideration.²

¹ Wis. Legis. Audit Bureau, *Memorandum to Sen. Robert Cowles and Rep. Samantha Kerkman*, "[Proposed Audit of Elections Administration—Background Information](https://legis.wisconsin.gov/LaB/)," (Madison, WI: Legislative Audit Bureau, February 8, 2021), <https://legis.wisconsin.gov/LaB/>.

² Wis. Legis. Audit Bureau, *Elections Administration*, Report 21-19 (Madison, WI: Legislative Audit Bureau, October 2021), <https://legis.wisconsin.gov/LaB/>.

In the report, LAB also indicated that it was unable to review absentee ballot certificates from the City of Madison because the municipal clerk would not allow the bureau to “physically handle” its certificates. To put this into context, LAB “physically reviewed” 14,710 absentee ballot certificates from 29 other municipalities.³ Madison represents the only municipality out of 30 municipalities selected for review that refused LAB physical access to its certificates.

In response to LAB’s request to physically handle election records, the Madison city clerk sent a letter to LAB to explain why she would not allow LAB staff to physically handle election records “absent a court order or some other legal authority.”⁴ Pointing to recent guidance issued by the U.S. Department of Justice on post-election audits, the clerk said that she and her staff were required to secure and retain election records until their destruction under federal and state laws.⁵ She explained that the security of and chain of custody for election records must be preserved for potential use by the U.S. Department of Justice. The clerk did offer that LAB could obtain copies of “any of the records [the clerk’s office] is able to release under Public Records Law.”⁶

U.S. Department of Justice’s guidance on post-election audits

In July 2021, the U.S. Department of Justice (DOJ) issued two guidance documents to ensure that states comply with federal election laws, one of which discusses federal constraints related to post-election audits.⁷ The guidance discusses how states must comply with federal law when preserving and retaining election records during post-election audits and outlines the criminal penalties associated with the failure to comply with those requirements.

Under federal law, state and local elections officials must “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.”⁸ In interpreting the Civil Rights Act of 1960,⁹ the DOJ guidance document requires that election records “be retained either physically by election officials themselves, or under their direct administrative supervision.”¹⁰

Importantly, according to DOJ, federal law allows for and even contemplates a situation in which “the original election official who has custody of records covered by the Act hands over those

³ *Id.*

⁴ Maribeth Witzel-Behl, Madison City Clerk, [Letter to Dean Swenson, Deputy State Auditor for Performance Evaluation](#), August 24, 2021.

⁵ [52 U.S.C. § 20701](#) and Wis. Stat. § [7.23](#).

⁶ Witzel-Behl, *Letter*, 2. Wis. Stat. §§ [19.31](#) to [19.39](#) provide Wisconsin’s public records statutes.

⁷ U.S. Department of Justice, “[Justice Department Issues Guidance on Federal Statutes Regarding Voting Methods and Post-Election ‘Audits.’](#)” accessed October 28, 2021, <https://www.justice.gov/>.

⁸ [52 U.S.C. § 20701](#).

⁹ Civil Rights Act of 1960, codified as [52 U.S.C. §§ 20701 to 20706](#).

¹⁰ U.S. Department of Justice, Post-Election Audit Guidance, 2 (citing Richard C. Pilger (ed.), [The Federal Prosecution of Election Offenses](#), 8th ed. (Washington, D.C.: December 2017), 79).

election records to other officials (for example, to legislators or other officeholders) or the official turns over the records to private parties (such as companies that offer to conduct ‘forensic examinations’).”¹¹ The DOJ interprets that the act requires “administrative procedures” to be in place that give election officers “ultimate management authority over the retention and security of election records, including the right to physically access and dispose of them.”¹² In this respect, there is no prohibition on an election official handing over physical custody of election records provided that safeguards are in place.

The DOJ concludes that the “obligation to retain and preserve election records remains intact regardless of who has physical possession of those records.”¹³

LAB’s authority

Wis. Stat. § [13.94](#) establishes LAB’s authority and responsibilities to conduct financial and program audits to support the Wisconsin Legislature in its oversight and lawmaking functions. In this respect, LAB plays a vital role in assisting the legislature in carrying out its core legislative duties. The LAB’s audit authority extends to all state agencies and offices in each branch of state government,¹⁴ and under certain circumstances to any county, city, village, town, or school district.¹⁵

Current law grants LAB, during the course of a lawfully authorized audit investigation, access to all documents and records—including those that are confidential by law—in order to fulfill its statutory responsibilities.¹⁶ Wis. Stat. § [13.94](#) does not require the LAB to submit public records requests or seek court orders to obtain records of a state or local government entity that is the subject of an audit investigation. The LAB must “at all times” before releasing its reports to the legislature “keep confidential the report and investigation and any information arising from the investigation, except as necessary to conduct the investigation.”¹⁷

Discussion

The Madison city clerk would not allow LAB staff to physically handle the absentee ballot certificates, relying on the federal DOJ guidance document. It is important to note that the guidance document does not prohibit an election official from handing over election records to

¹¹ U.S. Department of Justice, Post-Election Audit Guidance, 3.

¹² U.S. Department of Justice, Post-Election Audit Guidance, 3 and Pilger, *Prosecution of Election Offenses*, 79.

¹³ U.S. Department of Justice, Post-Election Audit Guidance, 3.

¹⁴ Wis. Stat. §§ [13.94 \(intro.\)](#) and [\(4\) \(a\)](#).

¹⁵ Wis. Stat. § [13.94 \(1\) \(m\)](#).

¹⁶ Wis. Stat. § [13.94 \(intro.\)](#) states that the bureau has access “at all times with or without notice” 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 “any such books, records, or other documents that are confidential by law.” In the context of this memo, Wis. Stat. § [13.94 \(4\) \(a\)](#) defines the term “department” to mean “[e]very state department, board, examining board, affiliated credentialing board, commission, independent agency, council or office in the executive branch of state government,” and the term includes “[a]ny county, city, village, town or school district.”

¹⁷ Wis. Stat. § [13.94 \(1\) \(br\) 3](#).

another person or entity. In fact, the guidance document specifically contemplates that these election records could be handed over to legislators, other officeholders, or even to private parties. All the guidance document requires is that “administrative procedures” be established to ensure that the election officer “has ultimate management authority” over the retention and security of the records when their physical custody is transferred to another person or entity. The guidance document does not authorize an election official to refuse to provide physical access or custody to election records in every instance.

The guidance document also recognizes that post-election audits “are governed, in the first instance, by state law” but that federal law “imposes additional constraints.”¹⁸ In this way, federal law does not completely supersede or entirely eliminate state law. Instead, federal law imposes constraints on how state law will be applied in post-election audits. Wis. Stat. § [13.94](#) gives LAB access to all records during an audit investigation, even to confidential records. In the case of absentee ballot certificates, were there no federal constraints, a city clerk would be required by law to provide LAB access to the certificates in a manner that LAB determines is necessary to complete its audit investigation.

But with the federal constraints, LAB can continue to have full access—indeed, even physical custody of the certificates—if the city clerk would establish the necessary “administrative procedures.” Because state law requires the city clerk to allow for LAB access to election records and because the federal guidance allows for and contemplates that the election records may be handed over to other persons and entities, there is no direct conflict between state and federal laws. All that is needed is for the Madison city clerk to implement the necessary “administrative procedures.”

The Madison city clerk does suggest two ways in which LAB may have access to the absentee ballot certificates. The first way is through a court order or by directive by “some other legal authority.” However, there is nothing in the federal guidance document that requires a person or entity that wishes physical access to election documents to seek a court order. All that is required is for the election official to establish “administrative procedures” to ensure the retention and security of the election records. There is no mention in the city clerk’s letter or in the LAB audit report that the clerk offered or discussed implementing any “administrative procedures” that would allow LAB staff to physically review the certificates in such a manner as to ensure the clerk’s “ultimate management authority” over the certificates.

The second way suggested by the city clerk was for LAB to make a public records request for copies of the absentee ballot certificates. To our knowledge, this is highly unusual. Because the LAB has access by law, under Wis. Stat. § [13.94](#), to all records of a governmental unit during an audit investigation, there is no need for the LAB to rely on the state’s Public Records Law and

¹⁸ U.S. Department of Justice, Post-Election Audit Guidance, 1.

request records from the clerk's office. State law provides LAB with access to all absentee ballot certificates, subject to the federal constraints.

Finally, the clerk writes that "There is no information or data in the election records that can be observed through physical handing that cannot be viewed using our protocols of obtaining copies." While this statement may certainly capture the view and opinion of the city clerk, it is not an LAB conclusion. The veracity of this statement, for purposes of an audit investigation, can be determined only by the LAB after having access to the actual election records.

Conclusion

State law gives LAB complete access to all records during an audit investigation. LAB is not required to submit public records requests to obtain records relevant to an audit investigation. Federal law and guidance do not prohibit an election official from handing over election records. In fact, federal law and guidance allow for and contemplate that legislators, officeholders, and even private parties may have access to and physical custody over election records. Federal law does not require a person or entity to seek a court order to have access to election records. All that is required is for an election official to establish "administrative procedures" to ensure the retention and security of the election records. This was presumably done in all of the 30 municipalities under LAB review except Madison.

We hope you find this information useful. Please let us know if you have any questions or if we can provide any additional assistance.