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County Clerk/Registrar of Voters (CC/ROV) Memorandum # 22216

TO: All County Clerks/Registrars of Voters

FROM: /s/ Steve Reyes
Chief Counsel, Secretary of State

RE: General Election: Preservation of Election Materials

The Secretary of State's office has received questions about the retention of material for federal as well as state and local elections occurring since 2019.

This advisory provides a short overview of the California Elections Code retention requirements that outlines the materials that must be preserved, the applicable retention period, destruction requirements, exceptions to those destruction requirements, and the relevant Elections Code authority.

In short, the overwhelming majority of election materials identified in the California Elections Code sections referenced below, absent very specific and narrow additional circumstances, must remain sealed and must be destroyed at the end of the retention period. State law does not authorize any discretion in the retention of these materials.

Recently, in *Citizens' Oversight, Inc. v. Vu* (2019) 35 Cal.App.5th 612, the California Court of Appeal upheld a lower court ruling concluding ballots cast in the 2016 presidential election were exempt from disclosure under the Public Records Act based on prohibitions specified in the Elections Code. (See Elections Code section 15370 prohibiting sealed ballots to be opened). Additionally, yesterday, the California Court of Appeal summarily denied a writ seeking to prevent Orange County from complying with statutorily required destruction of materials and to prevent the use of electronic voting systems in the upcoming November 2022 election. (See *Urbanek v. Kelley*, Case No. G061762 (Cal Court of Appeal, 4th Dist., Div. 1).

For the 2020 California Presidential General Election, the retention period ended on September 3, 2022. For the 2021 Gubernatorial Recall Election, the retention period ended on March 14, 2022.

Many of your offices have received so-called “litigation hold” demand letters. Given the vague generalities of these letters, which is evidenced to be a form letter circulated *en masse* amongst the state and counties, and not an actual letter in anticipation of any legitimate identifiable legal claim, it is our view that, alone, these are insufficient to ignore California state law governing the retention and destruction of election materials.

FEDERAL ELECTIONS

Materials to be Retained	Code Section	Retention Period	Destruction Requirements
<ul style="list-style-type: none"> • Voted polling place ballots • Paper record copies, as defined by Section 19271, if any, of voted polling place ballots • Voted vote-by-mail voter ballots • Vote-by-mail voter identification envelopes • Voted provisional voter ballots • Provisional ballot voter identification envelopes • Spoiled ballots • Canceled ballots • Unused vote –by-mail ballots surrendered by the voter pursuant to Section 3015 • Ballot receipts 	17301	<p>22 months (ended 9/3/22)</p> <p>MATERIALS MUST REMAIN SEALED</p>	<p>Mandatory destruction (at end of retention period)</p>
<ul style="list-style-type: none"> • Two tally sheets • Challenge lists • Assisted voters’ list 	17303	<p>22 months (ended 9/3/22)</p> <p>Packages of materials must be preserved (voters may inspect these materials)</p>	<p>Discretionary destruction (at end of retention period)</p>
<ul style="list-style-type: none"> • Ballot Cards 	17305	<p>22 months (ended 9/3/22)</p> <p>MATERIALS MUST REMAIN SEALED</p>	<p>Discretionary destruction (at end of retention period)</p>

STATE & LOCAL ELECTIONS

(Elections that are not provided for in sections 17301(a), 17303(a), and 17305(a))

Materials to be Retained	Code Section	Retention Period	Destruction Requirements
<ul style="list-style-type: none"> • Voted polling place ballots • Paper record copies, as defined by Section 19271, if any, of voted polling place ballots • Voted vote-by-mail voter ballots • Vote-by-mail voter identification envelopes • Voted provisional voter ballots • Provisional ballot voter identification envelopes • Spoiled ballots • Canceled ballots • Unused vote-by-mail ballots surrendered by the voter pursuant to Section 3015 • Ballot receipts 	17302	6 months MATERIALS MUST REMAIN SEALED	Mandatory destruction (at end of retention period)
<ul style="list-style-type: none"> • Two tally sheets • Challenge lists • Assisted voters' list 	17304	6 months Packages of materials must be preserved (voters may inspect these materials but may not copy or distribute materials with signatures)	Discretionary destruction (at end of retention period)
<ul style="list-style-type: none"> • Ballot Cards 	17306	6 months MATERIALS MUST REMAIN SEALED	Discretionary destruction (at end of retention period)

DESTRUCTION OF MATERIALS/EXCEPTIONS

The chart above describes the mandatory and discretionary destruction requirements for various types of election materials. The respective Elections Code sections also

describe the types of exceptions to mandatory or discretionary destruction of materials following the end of the retention period.

Generally, based on these above-referenced Election Code sections, materials cannot be destroyed if one of two circumstances exist:

1. An election contest **is commenced** within the applicable retention period; and/or
2. A criminal prosecution **is commenced within the applicable retention period, and that prosecution involves** fraudulent use, marking or falsification of ballots, or forgery of vote-by-mail voters' signatures.

Our office is unaware of any election contests that have been commenced within the applicable 22-month or 6-month periods.

OTHER CONSIDERATIONS

Your office may be subject to other actual election-related litigation that may or may not impact the retention and destruction requirements referenced above. As such, you should consult with your county counsel if you have questions related to the impact of any such litigation, or generally, to the retention or destruction of various materials.