

MEMORANDUM

Office of the County Counsel
Rubin E. Cruse, Jr., County Counsel

TO: Members of the Board of Supervisors
Patrick J. Minturn, Acting County Executive Officer

FROM: Rubin E. Cruse, Jr., County Counsel

DATE: September 13, 2022 (Board of Supervisors Meeting)

RE: Preservation of November 2020 General Election Ballots and Identification Envelopes

In connection with the Board of Supervisors meeting scheduled for September 13, 2022, concerning the preservation of ballots and identification envelopes from the November 2020 General Election, I have gathered the following information for the Board's information and consideration.

Please note this memorandum should not be considered an exhaustive legal analysis of the various issues presented. The focus of this memorandum is on the requirements related to the ballots and identification envelopes from the November 2020 General Election.

I. THE COUNTY CLERK SERVES AS THE ELECTIONS OFFICIAL

The following is a summary of the law concerning the County Clerk's position in connection with elections.

1. The County Clerk is a county officer. Government Code § 24000(c).
2. Except as provided by law, the County Clerk shall register as voters any electors who apply for registration and shall perform any other duties required of him or her by the Elections Code. Government Code § 26802.
3. In certain counties, the Board of Supervisors may appoint a registrar of voters separate from the County Clerk who would then discharge all duties vested by law in the county elections official that relate to and are a part of the election process. Government Code § 26802.5. Shasta County is **not** one of the counties authorized to make such an appointment under that statute.
4. The County Clerk is identified as being an "elections official" under the Elections Code. Elections Code § 320. The Board of Supervisors is not identified as being an "elections official" under that statute.
5. The Board of Supervisors has the authority to supervise the official conduct of all county officers, including the County Clerk. Government Code § 25303. **However, the Board of**

Supervisors does not have the power to perform a county officer’s statutory duties for him or her, or direct the manner in which the duties are performed. *Dibb v. County of San Diego*, 8 Cal. 4th 1200 fn. 4 (1994); *People v. Langdon*, 54 Cal. App. 3d 384 (1976).

6. Government Code § 25201 does not provide the Board of Supervisors with a general authority to direct the manner in which the County Clerk performs her statutory duties. Government Code § 25201 states:

Subject to the provisions of the Elections Code, the board may establish, abolish, and change election precincts, appoint inspectors, clerks, and judges of election, canvass all election returns, declare the result, and order the county elections official to issue certificates of election.

As indicated by the language in bold, the Board of Supervisors’ authority under Government Code § 25201 is expressly limited by the provisions of the Elections Code.

II. STATE LAW REQUIREMENTS CONCERNING THE NOVEMBER 2020 GENERAL ELECTION BALLOTS AND IDENTIFICATION ENVELOPES

Elections Code § 17301 establishes the requirements for the preservation of ballots and identification envelopes for those elections where candidates for one or more of the following offices are voted upon: President, Vice President, United States Senator, and United States Representative. As such, Elections Code § 17301 applies to the November 2020 General Election. A copy of Elections Code § 17301 is attached. In summary:

1. The packages containing the ballots and identification envelopes enumerated in Elections Code § 17301 shall be kept by the elections official unopened, and unaltered, for 22 months from the date of the election. Elections Code § 17301(b). Federal law also requires that these materials be retained and preserved for a period of 22 months from the date of the election. 52 U.S.C. § 20701.
2. If a contest is not commenced within the 22-month period, or if a criminal prosecution involving fraudulent use, marking or falsification of ballots, or forgery of vote by mail voters' signatures is not commenced within the 22-month period, either of which may involve the vote of the precinct from which voted ballots were received, **the elections official shall have the ballots destroyed or recycled.** The packages shall otherwise remain unopened until the ballots are destroyed or recycled. Elections Code § 17301(c).
3. The usual rule with California codes is that “shall” is mandatory and “may” is permissive unless the context requires otherwise. *Walt Rankin & Associates, Inc. v. City of Murrieta*, 84 Cal. App. 4th 605 (2000). “**After 22 months have passed the ballot packages must be destroyed or recycled.**” *Citizens Oversight, Inc. v. Vu*, 35 Cal. App. 5th 612 (2019).
4. A “contest” is a court proceeding by which any elector of the county may contest an election for various reasons, including, but not limited to, (1) that illegal votes were cast, or (2) that there was an error in the vote-counting programs or summation of ballot counts. Elections Code §§ 16100, 16400.

5. Criminal prosecutions are court proceedings commenced by public prosecutors, such as the District Attorney or the Attorney General. *See, e.g.*, Government Code §§ 12550, 26500.
6. If no contest or criminal prosecution, as described in Elections Code § 17301(c), has been commenced within the 22-months after the November 2020 General Election, then the County Clerk shall have the ballots destroyed or recycled. Elections Code § 17301(c).

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Attachment

West's Annotated California Codes

Elections Code (Refs & Annos)

Division 17. Retention and Preservation of Election Records (Refs & Annos)

Chapter 4. Precinct Supplies and Ballots (Refs & Annos)

West's Ann.Cal.Elec.Code § 17301

§ 17301. Elections for President, Vice President, United States Senator, and United States Representative; ballots and identification envelopes to be kept unopened; destruction or recycling

Effective: January 1, 2015

[Currentness](#)

(a) The following provisions shall apply to those elections where candidates for one or more of the following offices are voted upon: President, Vice President, United States Senator, and United States Representative.

(b) The packages containing the following ballots and identification envelope shall be kept by the elections official, unopened and unaltered, for 22 months from the date of the election:

- (1) Voted polling place ballots.
- (2) Paper record copies, as defined by [Section 19271](#), if any, of voted polling place ballots.
- (3) Voted vote by mail voter ballots.
- (4) Vote by mail voter identification envelopes.
- (5) Voted provisional voter ballots.
- (6) Provisional ballot voter identification envelopes.

(7) Spoiled ballots.

(8) Canceled ballots.

(9) Unused vote by mail ballots surrendered by the voter pursuant to [Section 3015](#).

(10) Ballot receipts.

(c) If a contest is not commenced within the 22-month period, or if a criminal prosecution involving fraudulent use, marking or falsification of ballots, or forgery of vote by mail voters' signatures is not commenced within the 22-month period, either of which may involve the vote of the precinct from which voted ballots were received, the elections official shall have the ballots destroyed or recycled. The packages shall otherwise remain unopened until the ballots are destroyed or recycled.

Credits

(Stats.1994, c. 920 (S.B.1547), § 2. Amended by Stats.2005, c. 718 (A.B.1636), § 1; Stats.2007, c. 508 (A.B.1243), § 107; Stats.2009, c. 611 (S.B.740), § 2; Stats.2014, c. 909 (A.B.2562), § 13, eff. Jan. 1, 2015.)

[Notes of Decisions \(2\)](#)

West's Ann. Cal. Elec. Code § 17301, CA ELEC § 17301

Current with urgency legislation through Ch. 239 of 2022 Reg.Sess. Some statute sections may be more current, see credits for details.

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