

Marilyn Marks

Subject: FW: Response to Colorado Open Records Act request dated August 9, 2011

From: Marilyn Marks
Sent: Friday, August 12, 2011 7:28 AM
To: Josh Liss
Cc: David Wunderlich; Pam Anderson; Gary VanDeStouwe
Subject: RE: Response to Colorado Open Records Act request dated August 9, 2011

All,
I respectfully disagree with Josh that my request for the cast vote records is the issue at play in Gessler v Myers. That issue in front of the court is the SOS power and authority to review the voted paper ballots in Saguache. Gessler's case is certainly not a CORA case.

The records I seek are indeed the cast vote records available under CORA, and this request has little to do with the Gessler v. Myers request, or the issues in front of the Saguache court.

I also respectfully remind you that "taking a step back for a day or so," is not compliant with the Open Records Act which requires compliance in 3 working days.

Yes, as Josh states, the rule requires that the system be able to produce the files,--a requirement which I assume that the Jeffco system meets, without question. If Jeffco officials reject the efficient route of just producing the ES&S designed and structured reports, (EL155, and EL152) I am willing to accept the underlying data in standard decrypted format and develop my own reports.

Under CORA, the election data is defined as a "writing." [(7) "Writings" means and includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics. "Writings" includes digitally stored data, including without limitation electronic mail messages, but does not include computer software.] To be clear, I am not seeking computer software.

I agree with Josh that you are not obligated to debate with me, nor do I desire that. I merely seek the public records of the iVotronics election data as requested, which is due today under the CORA statutes.

If you continue to withhold the requested data, please recall my initial request, "If you are not the custodian of these records, please notify me forthwith and state in detail to the best of your knowledge, their location, and what person or persons has custody or control of the records, as required by C.R.S. § 24-72-203(2).

If you deny access to any of the above public records, please provide a written statement of the grounds for the denial, citing the law or regulation under which access is denied as required by C.R.S. § 24-72-204(4)."

Please let me know if you have questions.
Marilyn Marks

From: Josh Liss [mailto:jliss@co.jefferson.co.us]
Sent: Thursday, August 11, 2011 6:11 PM
To: Marilyn Marks

Cc: David Wunderlich; Pam Anderson; Gary VanDeStouwe

Subject: Re: Response to Colorado Open Records Act request dated August 9, 2011

David,

This is getting into "ballots as open records" territory i.e. Gessler v Saguache. I'd suggest taking a step back for a day or so. I don't think we are obligated to debate with her.

That rule requires that the syst gives authorized users have the ability to produce the files, not that we must produce them.

Josh.

Sent from my iPhone

On Aug 11, 2011, at 5:24 PM, "Marilyn Marks" <marilyn@aspenoffice.com> wrote:

Mr. Wunderlich,

Thank you again for your very prompt response, and your effort to review your files again.

I disagree with your opinion that the data in the form of the cast vote records is not an open public record. While I am awaiting for my attorney to return from vacation, I request that any such data be preserved as electronic election data and considered as data that is in controversy and subject to my previously

stated notice under CRS 24-72-204 (5).

I also want to ask you to clarify your statement, " Under Colorado law, raw data is not considered a public record as it is not a writing made, maintained, or kept by by the County." I am assuming that the record has been kept by the county, and not destroyed, but that you do not consider it an open public record. If I misunderstood your statement, please clarify.

I would also refer you to SOS Rule 45.5.2.1.7—*"The voting system application shall provide authorized users with the capability to produce electronic files including election results in either ASCII (both comma-delimited and fixed-width) or web-based format that shall contain (a) all data or (b) any user selected data elements from the database. The software shall provide authorized users with the ability to generate these files on an "on-demand" basis. After creating such files, the authorized users shall, at their discretion, have the capability to copy the files to diskette, tape, CD-ROM or to transmit the files to another information system."*

The cast vote records are certainly data that must be able exportable in standard format, that would not require decoding.

I will be back in touch with you regarding my interest in obtaining the individual cast vote records from the iVotronics machines.

Thank you again for your timely response.

Marilyn Marks

970 429 7535

From: David Wunderlich [mailto:dwunderl@co.jefferson.co.us]
Sent: Thursday, August 11, 2011 4:49 PM
To: Marilyn Marks
Cc: Josh Liss; Pam Anderson; Gary VanDeStouwe
Subject: RE: Response to Colorado Open Records Act request dated August 9, 2011

Dear Ms. Marks,

Thank you for your email regarding your Open Records Act request and the data you have requested. You are correct that Jefferson County uses the ES&S Unity voting system. However, I believe that you may not be fully informed regarding the manner of storage and compilation of the data you requested from the E&SS Unity voting system server.

Except as noted below, the County has generally not had the need to generate reports regarding the data you requested. The data you have requested is not automatically generated as the system log as you indicate. Instead, the data may be stored in raw, unformatted form on the ES&S unity server, and is not accessible without generating the specific reports you requested. You suggested that we reference the user manuals for our system. Upon doing so, we learned that the reports and data you request are not automatically generated as you state below, but instead must be specifically generated by user request.

The reports you attached to your email as examples were generated by other jurisdictions, which may or may not have generated them in the normal course of conducting elections. That information is not available to me. However, as I wrote in my letter to you earlier today, the Jefferson County Clerk and Recorder does not usually generate any such report while conducting elections in Jefferson County. There is, simply put, no need and no requirement for such reports in Jefferson County relating to the elections conducted here.

We have run a comprehensive search on our Unity voting system for the three types of reports or data you requested, and found only one instance of one of the three types of reports or data which you requested. It is an EL68A system log. That instance of the report is attached, and as you may see, only reflects one specific time during the election. As far as we can tell, that was the only time during the election when the report was generated. It does not relate to the election as a whole, only to the time and date when the report was generated.

Under Colorado law, raw data is not considered a public record as it is not a writing made, maintained, or kept by the County. There is no requirement for the custodian of data to create a new public record from such data in response to an Open Records Act request. *Cf. Office of State Court Adm'r v. Background Information Services, Inc.*, 994 P.2d 420, 432 (Colo. 1999). If the reports you requested had been previously generated or kept by the Clerk and Recorder, your Open Records Act request would most likely require disclosure of those reports. However, as I have indicated, except for the one attached to this email the reports you requested simply do not exist in Jefferson County.

Please feel free to contact me with further inquiries regarding this matter.

Yours truly,

David Wunderlich

Assistant County Attorney
Jefferson County Attorney's Office

100 Jefferson County Parkway, Suite 5500

Golden, CO 80401

(303) 271-8939

From: Marilyn Marks [mailto:marilyn@aspenoffice.com]
Sent: Thursday, August 11, 2011 11:53 AM

To: David Wunderlich
Cc: Josh Liss; Pam Anderson
Subject: RE: Response to Colorado Open Records Act request dated August 9, 2011

Mr. Wunderlich,

Thank you for your prompt response.

It appears that further research and clarification is necessary.

As I communicated in my attached emails, the contents of the files is what I am seeking, regardless of the file names used by Jefferson County.

I request that you recheck your files in that context.

The EL68A file is automatically generated in Unity as the system log. It is my understanding that Jefferson County is using ES&S Unity voting system. If so, the audit log should be located on the server or servers which process Unity ERM. (Sample attached.)

EL152 is an event log and EL 155 contains the cast vote records, sometimes called the "ballot image report." I seek the data included in the reports I have requested.

You may see samples of these reports with the relevant data from South Carolina at---

http://www.scvotes.org/2011/08/03/2010_general_election_audit_files

Certainly the data I am seeking exists in Jeffco files although it may be filed under different file names.

Please review your system user manuals and files and produce the data being sought.

Please accept this as notice of my intent to file application with the district court under s to force compliance to produce the files and data if the custodian continues to withhold the information.

Please feel free to contact me if more information is needed.

Marilyn Marks

From: David Wunderlich [mailto:dwunderl@co.jefferson.co.us]
Sent: Thursday, August 11, 2011 10:54 AM
To: Marilyn Marks
Cc: Josh Liss; Pam Anderson
Subject: Response to Colorado Open Records Act request dated August 9, 2011

Dear Ms. Marks,

Attached please find correspondence related to your recent Colorado Open Records Act request. Please feel free to contact me with any questions.

Yours truly,

David Wunderlich

Assistant County Attorney
Jefferson County Attorney's Office

100 Jefferson County Parkway, Suite 5500

Golden, CO 80401

(303) 271-8939