

STATE OF COLORADO
Department of State
1700 Broadway, Suite 550
Denver, CO 80290



Jena M. Griswold
Secretary of State
Judd Choate
Elections Division Director

BEFORE THE ELECTIONS DIVISION
OF DEPARTMENT OF STATE

1700 Broadway, Suite 550

Denver, Colorado 80290

IN THE MATTER OF
KIRKWOOD ET. AL

FINAL AGENCY ORDER OF DISMISSAL

This matter comes before the Elections Division (“Division”) upon Timothy Kirkwood, Kenneth DeGraaf, and Scott Bottoms’ (“Complainants”) filing of a consolidated Election Complaint pursuant to C.R.S. § 1-5-621.¹ Having reviewed and considered all of the evidence gathered during its investigation, the Division now dismisses this matter.

Applicable Law

Pursuant to C.R.S. § 1-5-621, the Secretary of State shall investigate complaints relating to electronic or electromechanical voting systems of a political subdivision. The Secretary must determine – after inspection or reviewing a report submitted by the political subdivision pursuant to C.R.S. § 1-5-621(3) – whether the system complies with applicable standards or deviates from a certified system. C.R.S. § 1-5-621(4).

The Department follows the timeline and processes for Election Complaints as set forth in Rule 13 of the Colorado Secretary of State Election Rules. 8 CCR 1505-1. After a complaint is made, the Secretary’s designee will begin an investigation. 8 CCR 1505-1(13.1.5). After the investigation, the Secretary may dismiss the complaint as

¹ Although this complaint does not comport with the requirements of an Election Complaint under C.R.S. § 1-5-621, the Division has determined to treat the complaint as such for the purposes of this order for the clarity of the administrative record.

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not supported by credible evidence, refer the complaint to a prosecuting authority, or find a violation and forward a recommendation for resolution to the Secretary of State. 8 CCR 1505-1(13.1.6).

Procedural History and Factual Findings

On August 19, 2022, Timothy Kirkwood and Paul Prentice, through attorney John Case, filed a Verified Petition for Relief under C.R.S. Section 1-1-113 in El Paso County. The petition alleges that the electronic computer-based voting system used in El Paso County is illegal because it deletes “election records” required to be preserved under federal and state law. On October 10, 2022, District Court Judge Michael McHenry dismissed the case stating that the Petitioner’s claims for relief were not allowable under C.R.S. § 1-1-113.

On September 27, 2022, Timothy Kirkwood filed an Elections Complaint with the Department of State alleging a number of violations of state statutes and the 2002 Voting Systems Standards. Ex. A. Subsequently, two additional complaints were filed by Kenneth DeGraaf and Scott Bottoms making the same allegations. Exs. B and C, respectively. As a standard practice, the Department of State consolidates identical complaints and addresses them in a single order.

The Department has conducted a thorough investigation of the allegations made by Complainants. On October 5, 2022, members of the Elections division contacted El Paso County to make them aware of the substance of the complaint and that they would be required to submit a response. El Paso provided a written response on October 19, 2022, affirming that (1) Democracy Suite software utilized on the Dominion Voting System in El Paso County is the same 5.13 version installed during the Trusted Build that took place in El Paso County on June 1, 2021, and (2) that El Paso County has retained election records required by Election Rules and law prior to the Trusted Build event. Ex. D.

On November 2, 2022, a designee from the Elections division also investigated the claim on-site in El Paso County. The investigation confirmed that El Paso County was utilizing Democracy Suite 5.13 and had retained records prior to the Trusted Build event. On November 16, the Division received a supplemental filing from the El Paso County Clerk and Recorder consisting of a declaration from Ryan Macias, an



election technology and security expert, dated November 15. Ex. I. The Division has reviewed this declaration and considered it in its analysis below.

Analysis

The Election Complaint at issue contains two claims. First, Complainants claim the voting system in El Paso County is illegal because normal operation of the system destroys electronic files required to be retained by federal and state law. Second, Complainants claim the voting system destroys records of previous elections during the trusted build procedure, again in violation of federal and state law. The Division has considered both claims and finds them to be without merit, as discussed below.

Claim 1: Regular Destruction of Election Records

Complainants first argue that normal operation of the Dominion system used in El Paso County, “destroys electronic files” required to be retained by federal and state law. Ex. A. Specifically, Mr. Kirkwood’s complaint points to his previously filed lawsuit to argue that the Dominion system in use deletes or omits logfiles, and other electronic files required to be retained. Ex. E.

In support of this claim, Complainants attached a declaration signed by Douglas Gould on August 12, 2022. Ex. F. Mr. Gould claims to have determined that these logfiles are regularly deleted based on a forensic analysis he completed of an alleged image of the Dominion Election Management System Server utilizing Democracy Suite 5.13 from Mesa County, Colorado. *Id.* Complainants also point to a publication from the Department of Justice regarding post-election “audits” to argue that these deleted logfiles are an election record which must be maintained under federal law.² Ex. H. Ultimately, it appears that Complainants’ claim that election records are regularly destroyed is based only on the assertions of Douglas Gould. Ex. F. The Division finds Mr. Gould’s analysis to be unsupported, uncredible, and inconsistent with the Division’s knowledge of Colorado’s voting system.

A. Douglas Gould’s Report is Not Credible

² Nowhere does the complaint allege that the specific voting system used in El Paso County deviates in any way from the system certified for use in Colorado by the Colorado Department of State pursuant to law. Nonetheless, El Paso County submitted documentation establishing that the system they use follows all state requirements and was certified by the Department of State. Ex. D.

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As a threshold matter, the Division has no ability to confirm the images that Mr. Gould claims to have reviewed are exact replicas of Democracy Suite 5.13, installed in Mesa County in 2021 (or that are currently installed in El Paso County). The district court in Mesa County found that the county clerk's authorization of these images was a breach of her duties under the Election Code and directly resulted in her removal as the designed election official for Mesa County in both 2021 and 2022.³ This misconduct also led to the decertification of equipment in that county, and the criminal prosecution of the clerk involved.⁴

Mr. Gould claims that the image that was apparently taken during this security breach eventually made it to him for his analysis. Ex. F at 1. However, the Division is unable to corroborate a valid chain of custody for the image. The chain of custody is in fact deficient at every level: at the outset, the image was obtained in violation of election rules (and, potentially, criminal laws); the Division is unaware of any intermediate individuals who handled the image after its illicit origins; and the Division does not have a copy of the final image that was actually reviewed by Mr. Gould. In short, the Division has no ability to determine that the analysis performed by Mr. Gould was of an unaltered, exact replica of the image taken in Mesa County. Mr. Gould has offered no evidence to show that he analyzed such an image. Given the total failure of Mr. Gould to provide a credible chain of custody for the materials he purportedly analyzed--and his failure to otherwise support the reliability of his analysis—the Division does not consider Mr. Gould's analysis to be credible.

B. The records identified by Mr. Gould are not election records required to be retained under state or federal law

However, even if the Division were to assume that the analysis performed by Mr. Gould was credible, none of the records which Mr. Gould claims must be maintained are election records in Colorado or under Federal law.

Indeed, his conclusions require Mr. Gould to make a legal determination of what records are necessary to be retained to comply with the law. Mr. Gould's resume

³ See *Griswold v. Peters*, 2021CV30214 (Mesa Cnty.); *Griswold v. Peters*, 2022CV30007.

⁴ "Grand jury indicts Mesa County clerk Tina Peters and deputy clerk in election system breach I investigation." Saja Hindi, *The Denver Post*, 03/09/2022, <https://www.denverpost.com/2022/03/09/tina-peters-grand-jury-indictment-election-breach-allegations-belinda-knisley/>

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recites experience in information and technology security. He has shown no experience applying that background to voting systems used in Colorado (or nationally), nor has he shown experience with state or federal election law. Ex. G.⁵ Simply put, Mr. Gould has no experience or authority to reach a conclusion on the state or federal definitions of “election records.” By contrast, the Secretary of State is the chief election official for the state and Colorado law empowers this office to use its expertise in administering the Election Code and overseeing Colorado’s elections and election systems.

1. *The records identified by Mr. Gould are not “election records” under Colorado law.*

In his complaint, Complainants claims that Democracy Suite 5.13 violates Colorado law regarding the preservation of election records required by Section 1-7-802, C.R.S. Complainants base this claim on Mr. Gould’s analysis of the image he reviewed, in which Mr. Gould argued that the following were “election records” required to be preserved:

1. “audit trails, and operation logfile records;”
2. logfiles greater than 20MB in size; and
3. “detailed software executions, alterations and deletions of files and external connections to the EMS Server.”

Ex. F at 8.

The term, “election records” is defined in Colorado law as “accounting forms, certificates of registration, pollbooks, certificates of election, signature cards, all affidavits, voter applications, other voter lists and records, mail ballot return envelopes, voted ballots, unused ballots, spoiled ballots, and replacement ballots.” Section 1-1-104 (11), C.R.S. Notably absent from this list is any mention of the files that Mr. Gould claims are regularly removed from Democracy Suite 5.13.

Moreover, common sense indicates that the files identified in the complaint are simply not of the same nature as the types of records identified in statute. The records in statute relate entirely to voter records and ballot records, not electronic

⁵ The Division also notes that while Mr. Gould’s resume does show a background in forensic analysis, that analysis appears to have ended in the “Mid-2000’s”, over 15 years ago.



records relating to the software operation of Dominion systems. Therefore, the Division determines that the files named by Mr. Gould are not election records under Colorado state law.

2. The records identified by Mr. Gould are not required to be maintained under Federal law.

Complainants alternatively claim that Democracy Suite 5.13 used in El Paso County violates Colorado law because it does not meet the requirements of the 2002 Voting System Standards (VSS). Specifically, Complainants allege that Democracy Suite 5.13 does not comply with VSS sections 2.2.11, 2.2.5.1, 2.2.5.3, “2.2.2.5.2.1(e)” (this standard does not exist, so the Division assumes the complainant was referring to standard 2.2.5.2.1(e)), and “2.2/4.1(h)” (this standard also does not exist, so the Division assumes the complainant was referring to standard 2.2.4.1(h)). These claims are again based on Mr. Gould’s analysis that logfiles, and other electronic records, are deleted or not maintained by the system. After a review of the evidence and arguments presented here, the Division rejects Complainants arguments.

Colorado law requires voting systems used in the state to meet the Federal 2002 VSS. Section 1-5-601.5, C.R.S.; 8 CCR 1505-1 (21.4.2). These standards have been incorporated into the certification process for voting systems in Colorado and were part of the certification for Democracy Suite 5.13.⁶ During that certification process, the Division reviewed the VSS sections in question and found that Democracy Suite 5.13 satisfied each.⁷ That certification process was performed on the system in use in El Paso County.

Nowhere in the standards cited is there any mention of “logfiles” or the myriad of other electronic files that Mr. Gould cites in his analysis. In fact, the standards indicate that the only records election officials must maintain are those found in

⁶ DVS Democracy Suite 5.13 requirements matrix.

<https://www.coloradosos.gov/pubs/elections/VotingSystems/DVS-DemocracySuite513/index.html>

⁷ VS Democracy Suite 5.13 requirements matrix.

<https://www.coloradosos.gov/pubs/elections/VotingSystems/DVS-DemocracySuite513/index.html>. The Division notes that standard 2.2.5.1 does not prescribe specific requirements but instead is a heading for specific requirements found later.



election-specific databases. 2002 Voting System Standards, 2.2.11.⁸ Instead, the VSS defines those records that should be maintained as “audit records.” Section 4.4 of the VSS notes, “The audit record data in the following subsections are essential to the complete recording of election operations and reporting of the vote tally.” 2002 Voting System Standards, 4.4.1.⁹ The VSS then describes those audit records in detail with no mention of the logfiles or other electronic records referenced in the complaint.

This finding is bolstered by the declaration submitted by El Paso County from Ryan Macias. Ex. I. Unlike Mr. Gould, Mr. Macias’ resume shows extensive experience with election technology and federal and state election law. Mr. Macias has over 17 years of experience with election technology, security, and policy. Ex. I at 1-2. Mr. Macias has served as the Acting Director of the U.S. Election Assistance Commission’s Voting System Testing and Certification Program. *Id.* at 3. In that role Mr. Macias worked to modernize the Voluntary Voting System Guidelines, version 2.0, which the Division notes is a federal voting system standard meant to modernize the 2002 voting system standards currently adopted in Colorado. With this experience, the Division considers Mr. Macias’ analysis of the 2002 VSS to be credible and persuasive.

In his declaration, Mr. Macias notes that “[e]ach of the [Democracy Suite 5.13] devices produces the required audit log data for the function or functions it performs and provides the capability to maintain and retain that data.” *Id.* at 11. Mr. Macias also notes that audit trail information required by the 2002 VSS is found in Section 4.4 of those standards. *Id.* at 6. Having reviewed the information submitted by the complainants, along with other publicly available data, Mr. Macias concluded that, “Democracy Suite 5.13-CO voting system produces the necessary data for El Paso County to audit and reconstruct the outcome of the election.” *Id.* at 7.

During certification of Democracy Suite 5.13, the Division looked specifically for those audit records required to be maintained by standards 4.4.1 - 4.4.4, finding that the system did comply. An independent, accredited test lab confirmed these findings.¹⁰

⁸ https://www.eac.gov/sites/default/files/eac_assets/1/28/Voting_System_Standards_Volume_I.pdf. (“In many voting systems, the source of election-specific data (and ballot formats) is a database or file.”).

⁹ https://www.eac.gov/sites/default/files/eac_assets/1/28/Voting_System_Standards_Volume_I.pdf.

¹⁰ VS Democracy Suite 5.13 requirements matrix.

<https://www.coloradosos.gov/pubs/elections/VotingSystems/DVS-DemocracySuite513/index.html>.



Accordingly, the Division rejects Complainants' argument that Democracy Suite 5.13 does not maintain records required by the 2002 VSS.

3. *The Department of Justice Guidance does not require retention of the alleged records.*

Complainants argue that guidance released by the Department of Justice in the summer of 2021 clarifies that these specific files must be maintained to comply with the Voting Rights Act, 52 U.S.C. Sections 20701-20706. This allegation demonstrates a misunderstanding of the requirements of federal law.

The 2002 Voting System Standards also incorporate the requirements of the Voting Rights Act in standard 2.2.11. In 2021, the Department of Justice did release guidance titled, "Federal law Constraints on Post-Election 'Audits'." Ex. H. While that guidance does discuss the requirement that auditable election records be maintained, it does not specify what those records are. Instead, the guidance document only requires election officials to preserve records "that may be relevant to the detection or prosecution of federal civil rights or election crimes." *Id.* at 2. Despite Mr. Gould's conclusory statements to the contrary, the Division has found no authority supporting the idea that the electronic files identified in the complaint are necessary for this purpose.

In fact, the testimony submitted by Mr. Macias directly contradicts the conclusions made by Mr. Gould. In his declaration, Mr. Macias notes that the only voting system component used in El Paso County that would maintain records relevant to compliance with the Voting Rights Act is the Dominion "ImageCast X" (ICX), which Mr. Gould did not include in his analysis and which the Complainants have not discussed. Ex. I at 6. Mr. Macias notes that the ICX "generates a log file, as required by FEC 2002 VSS", while also pointing out that "[a]ll other acts of voting pertaining to the voting system . . . are performed using a hand marked paper ballot and can be maintained by the election official . . ." *Id.* Ultimately, Mr. Macias concluded that Democracy Suite 5.13 does provide the capability for the designated election official to preserve the records necessary to comply with the Voting Rights Act. *Id.* The Division finds Mr. Macias' opinions credible and agrees with his assessment.

Finally, it is important to note that, even if the Division agreed with Mr. Gould's analysis, the fact remains that all counties have discretion to retain any records from

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the voting system that they believe to be important. For example, Democracy Suite 5.13 can retain logfiles in excess of those required to be retained prior to a trusted build. While the Division does not believe this step is necessary to comply with state and federal law, it is available to county clerks who would wish to preserve these excess records.

Given the testimony and other evidence submitted by the Complainants and the El Paso County Clerk and Recorder, the Division rejects Complainants' argument that a failure to maintain these records would, on its own, violate the 2002 Voting System Standards or the Voting Rights Act.

Claim 2: Destruction of Election Records During Trusted Build

In their second claim, Complainants argue that because the trusted build conducted to install Democracy Suite 5.13 deletes data, the system again violates state and federal law. In making this claim, Complainants rely on the same arguments as their first claim; namely that the analysis conducted by Mr. Gould shows that various electronic records, including logfiles, are deleted and these records must be maintained under federal law.

However, the declaration signed by Mr. Macias directly rebuts the argument that the installation of trusted build on El Paso County's voting system components violated 2002 VSS requirements. As Mr. Macias notes, the trusted build process "sanitizes" a voting system by ensuring that the system contains nothing other than the trusted build software. Ex. I at. 14. Mr. Macias then describes, in detail, why the trusted build procedure is, "a best practice from a functional, security, and compliance perspective." *Id.* As Mr. Macias notes, the 2002 VSS does not require all records to be preserved on the device on which it is originally produced, and El Paso County has preserved those records necessary to comply with federal law on external media. *Id.* at 16, Ex. D. As Mr. Macias notes, Democracy Suite 5.13 does produce the records necessary to comply with the law and provides an ability for local election officials to maintain that data for 22 months, regardless of the trusted build process. Ex. I, pgs. 16-17.

Based on this evidence presented by the El Paso County Clerk and Recorder and the lack of evidence presented by the Complainants, the Division rejects this second argument made by the Complainants. The Division does not consider Mr. Gould's

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analysis to be credible, finds that the records which are deleted are not required to be maintained under state or federal law, and agrees with the conclusion made by Mr. Macias that Democracy Suite 5.13 maintains the ability to preserve those records that are legally necessary before the trusted build is conducted.

Conclusion

As a procedural matter, the Division determines that no hearing is necessary in this case. While statute allows the convening of a hearing and taking testimony, in light of the Complainants' failure to come forward with any credible evidence showing any failure of the voting systems in El Paso County, coupled with the Division's finding that the credible evidence shows the systems fully comply with all applicable laws, the Division determines that no hearing is necessary.

Democracy Suite 5.13, which is currently certified for use on voting system components in El Paso County, complies with the requirements of Title 1, Article 5, Part 6, Colorado Revised Statutes. Moreover, the records identified by Mr. Gould are not required to be kept by Federal law. The U.S. Department of Justice's guidance does not suggest otherwise. Accordingly, the consolidated complaint filed by Complainants is *dismissed*.