

**KRIS W. KOBACH**  
Secretary of State



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## STATE OF KANSAS

### MEMORANDUM

TO: Kansas County Counselors c/o Kansas County Election Officers  
FROM: Ryan Kriegshauser, Deputy Assistant Secretary of State, Office of Legal Counsel and Policy  
DATE: November 8, 2012  
RE: Provisional Ballot Information

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It has come to our attention that numerous parties are making requests to obtain personal information identifying specific voters, whether or not such voters cast provisional ballots, the reason for the issuance of a provisional ballot related to a particular individual, etc. This information may include lists from the Election Voter Information System (ELVIS), provisional ballot envelopes, and poll books with provisional ballot information notated on the face of the document. Our office has reached the legal conclusion that such disclosures are not allowed by law and are excluded from the Kansas Open Records Act (KORA) for the reasons outlined in this memorandum. Additionally, these requests impede the function of your offices and provide an additional burden on you at a very busy time. It is important to the administration of elections in Kansas that you prepare for the upcoming canvasses and not be distracted from the essential functions of your office.

The Secretary of State's Office generally defers to county counselors regarding the legal advice that they give to your offices as your legal representatives. Nothing in this memorandum should be interpreted as changing that approach or providing legal representation to you directly. However, because of the complicated nature of election law and the possibility of inconsistent applications from county to county, we are issuing this memorandum for guidance to your county counselor. There are certain aspects of the law of which your county counselor should be aware. This memorandum is intended to inform you and your county counselor as to our position.

#### Federal and State Law

Most importantly, the disclosures discussed above would be in violation of federal law. Specifically, 42 U.S.C. 15482 states "[a]ccess to information *about an individual provisional ballot* shall be restricted to the individual who cast the ballot." The use of the word "about" indicates the restriction applies to: (1) the reason such a ballot was provisional, (2) the information on the face of the ballot envelope, and (3) the ballot itself.

Additionally, Kansas Law also restricts the disclosure of this information. K.S.A. 25-2422 states that an "[u]nauthorized voting disclosure is, while being charged with any election duty, intentionally: (a) Disclosing or exposing the contents of any ballot *or the manner in which the*

*ballot has been voted*, except as ordered by a court of competent jurisdiction.” (emphasis added). We interpret this law to mean, *inter alia*, that whether a ballot is “regular” or “provisional” should not be disclosed, unless authorized by a court. Although, the law does allow such disclosure under the supervision of a court and through a court order, it is unlikely that this disclosure would be appropriate until the point at which an election contest is filed.

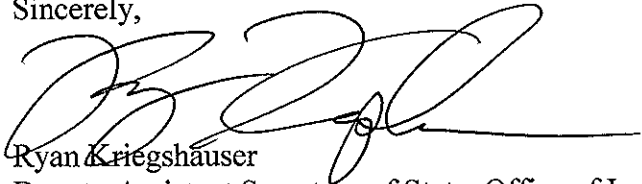
Finally, depending on the size of the jurisdiction involved and the ultimate disposition of a particular ballot, by making this disclosure, there would be a risk that disclosing such individuals’ names could result in violating the confidentiality of their ballots. If the number of provisional ballots is small, then the following scenario is increasingly likely: x provisional ballots were cast, and a particular candidate received x additional votes after provisional ballots were counted. In that scenario, disclosure of individual names would reveal how these voters voted. Kansas law assigns a high value to protecting ballot confidentiality. See K.S.A. 25-433 and 25-1120. Accordingly, violating the confidentiality of a ballot should not be allowed by the disclosure of this information.

### **The Kansas Open Records Act**

This information is also excluded from the Kansas Open Records Act, because K.S.A. 45-221(a)(1) excludes records “the disclosure of which is specifically prohibited or restricted by federal law, [or] state statute.” As stated above, there are numerous areas in the law that prohibit such disclosure. Additionally, the reasons for which this information is gathered by your office may also place it outside of KORA. For example, K.S.A. 45-221(a)(11) arguably excludes records of agencies compiled in the process of detecting violations of civil law or administrative rules and regulations. Generally, this type of information is used to determine whether there have been violations of election law or administrative regulations. This information might also be used to detect possible incorrect implementations of the SAFE Act. While review of this information is necessary within the administration of Kansas elections, and the information may be shared between election officials for that purpose, it may not be disclosed outside of that process. Accordingly, it is excluded from KORA. Along the same lines, K.S.A. 45-221(a)(24) excludes records which are compiled for research purposes and that pertain to identifiable individuals. The information discussed in this memorandum is also used to research the implementation of the SAFE Act within the election administration process. However, if this information is disclosed outside of the election administration process, then it should be provided in abstract or statistical form that does not disclose individual identities for the reasons state herein. Finally, K.S.A. 45-221(a)(30) excludes records containing information of a personal nature where the public disclosure would constitute a clearly unwarranted invasion of privacy. Individuals who cast provisional ballots may not wish their names to be publicly disclosed in connection with the reason their ballot was made provisional. Indeed, the fact that a voter cast a provisional ballot may be embarrassing to a voter. For all of these reasons, our agency has had a policy against the public disclosure of the reason for a provisional ballot in association with an identifiable individual.

Please feel free to contact our office with any questions. I can be reached by phone at (785) 368-8030 or by email at [ryan.kriegshauser@sos.ks.gov](mailto:ryan.kriegshauser@sos.ks.gov).

Sincerely,

A handwritten signature in black ink, appearing to read 'Ryan Kriegshauser', written over a horizontal line.

Ryan Kriegshauser

Deputy Assistant Secretary of State, Office of Legal Counsel and Policy