

Date of Hearing: March 20, 2024

ASSEMBLY COMMITTEE ON ELECTIONS
Gail Pellerin, Chair
AB 2249 (Pellerin) – As Introduced February 8, 2024

SUBJECT: Elections: retention of election records.

SUMMARY: Requires specified election records to be destroyed or recycled after the end of the required retention period. Adds to the list of election records that must be retained for a specified period of time after the election. Requires an elections official to seek a court order to allow the official to inspect the inside of packages of election materials that are otherwise required to remain sealed if such inspection is necessary to preserve materials that were damaged. Specifically, **this bill:**

- 1) Requires an elections official to destroy rosters or combined rosters and voter lists from an election after a required five year retention period.
- 2) Requires an elections official to include the following election records in packages that the elections official is required to preserve unopened and unaltered for a specified period of time after an election:
 - a) Completed forms used to account for the ballots delivered to the polling place, including forms issued to the precinct board and any machine reports, as specified.
 - b) Completed forms used for the 1% manual tally of ballots required by existing law, including forms issued to the counting board and any machine reports, as specified.
- 3) Requires specified election records that are required to be preserved for a specified period of time after an election to be destroyed or recycled at the end of the required retention period.
- 4) Requires an elections official, if election records that are required to be preserved unopened and unaltered for a specified period of time after an election are destroyed or damaged due to natural disaster or other unforeseeable and unavoidable circumstances before the end of the retention period, to take all reasonable steps to prevent further damage to the paper record of the election. Requires the elections official, if further damage to the paper record cannot be prevented without inspecting the inside of any damaged packages, to notify the Secretary of State (SOS) of the election official's intent to seek a writ of mandate authorizing them to inspect the inside of the packages and to seek such a writ.
- 5) Clarifies that voters' signatures may not be copied or distributed when a person inspects specified election records that are open for public inspection for a specified period of time after the election.
- 6) Deletes a provision of law that requires an elections official, for specified elections, to preserve a copy of the roster used as the voting record or, if an electronic poll book is used, a copy of the electronic data file, for a period of six months after the election. A separate

provision of existing law requires these records to be preserved for five years after the election.

- 7) Makes technical, clarifying, and conforming changes.

EXISTING STATE LAW:

- 1) Defines the term “roster,” for the purpose of the Elections Code, to mean the official list of voters for an election, which may be in paper or electronic form. Provides that the roster becomes the official list of voters who have voted in the election once signed by the voter or marked by the elections official. (Elections Code §349.5)
- 2) Defines the term “voter list,” for the purpose of the Elections Code, to mean the list of registered voters in a single or consolidated precinct or in an entire county. Requires the voter list to be updated by the elections official with public information related to who has voted in an election. (Elections Code §359.2)
- 3) Requires the elections official to preserve all rosters or combined rosters and voter lists from an election until five years after the date of the election. Permits the elections official to destroy those materials after that five year period. (Elections Code §17300)
- 4) Requires the elections official to keep the ballots, paper record copies of ballots, ballot identification envelopes, and ballot receipts from an election in packages that remain unopened and unaltered for 22 months from the date of the election in case of a federal election (any election that includes candidates for one or more of the following offices: President, Vice President, United States (US) Senator, or US Representative), and for six months for any other election. Requires the elections official to destroy or recycle the ballots (in the case of a federal election) or the packages (in the case of an election that is not a federal election) at the end of the retention period unless an election contest or criminal prosecution, as specified, is commenced during that period. Requires the packages to otherwise remain unopened until the ballots are destroyed or recycled. (Elections Code §§17301, 17302)
- 5) Requires the elections official to keep any tally sheets used for manually tallying ballots, lists of challenged voters, and lists of assisted voters from an election in packages for 22 months from the date of a federal election and for six months from the date of any election that is not a federal election. Requires those packages to include, in the case of an election that is not a federal election, the copy of the roster used as the voting record (or a copy of the electronic data file if an electronic poll book was used). Permits the elections official to destroy or recycle the packages at the end of the retention period unless an election contest or criminal prosecution, as specified, is commenced during that period. Permits all voters to inspect the contents of the package or packages at all times following commencement of the official canvass of the votes. (Elections Code §§17303, 17304)
- 6) Requires the elections official, in the case of an election where a court ordered a recount of the election, as specified, and upon completion of that recount, to keep all ballot cards for 22 months from the date of a federal election and for six months from the date of any election that is not a federal election, or as long thereafter as any election contest involving the vote at

the election remains undetermined. Provides, notwithstanding any other provision of the Elections Code, that the final disposition of all such voted ballot cards shall be determined by the elections official. Permits sealed ballot containers to be opened if the elections official determines it necessary in a shredding or recycling process. Requires the packages or containers to otherwise remain unopened until the ballots are destroyed or recycled.

(Elections Code §§17305, 17306)

- 7) Prohibits an elections official, after ballots are counted and sealed, from opening any ballots or permitting ballots to be opened, except as expressly specified. (Elections Code §15370)
- 8) Requires the elections official, during the official canvass of an election in which a voting system is used, to conduct a public manual tally of ballots tabulated by those devices (commonly referred to as the 1% manual tally), using either of the following methods:
 - a) A public manual tally of the ballots canvassed in the semifinal official canvass, including vote by mail (VBM) ballots but not including provisional ballots, cast in 1% of the precincts chosen at random by the elections official, as specified; or,
 - b) A two-part public manual tally, which includes both of the following:
 - i) A public manual tally of the ballots canvassed in the semifinal official canvass, not including VBM or provisional ballots, cast in 1% of the precincts chosen at random by the elections official; and,
 - ii) A public manual tally of not less than 1% of the VBM ballots canvassed in the semifinal official canvass, as specified. (Elections Code §15360)
- 9) Requires an elections official to preserve various other election materials for a specified period of time, including voter registration affidavits; nomination documents; signatures in lieu of filing fee petitions; initiative, referendum, and recall petitions; and records related to the appointment of precinct board members. (Elections Code §§17000-17200, 17400-17506)

EXISTING FEDERAL LAW requires every officer of election to retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives are voted for, all records and papers which come into the officer's possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, as specified. (52 U.S.C. §20701)

FISCAL EFFECT: Unknown. State-mandated local program; contains reimbursement direction.

COMMENTS:

- 1) **Purpose of the Bill:** According to the author:

In the pursuit of transparent elections, the preservation of the paper and electronic record of the election is of the utmost importance. However, courts and the

Secretary of State have come to different conclusions regarding what documents can be safely shared by elections officials without compromising the security of an election. As elections and elections materials evolve, so too must our retention guidelines for local elections officials. AB 2249 provides clarity of the elections code so that local elections officials know exactly which materials they are required to retain and for how long.

- 2) **Retention of Election Materials:** As detailed above, existing state and federal law generally require elections officials to preserve election records for a specified period of time after the election. Among other purposes, this retention period ensures that relevant materials are available if needed for a recount, election contest, criminal prosecution, or other similar purpose.

Certain materials, including, notably, ballots and ballot identification envelopes, are required to be kept in packages that must remain unopened and unaltered until the end of the retention period, except in limited circumstances. Other election materials, including lists of voters who were challenged at a voting location and lists of voters who received assistance in casting their ballots, must be preserved for the duration of the retention period, but generally are open for inspection by the public during that time.

The retention period for these records differs depending on whether the election included any candidates for federal office. If so, federal law requires those election materials to be retained for 22 months, a retention period that is mirrored in state law. For elections that do not include candidates for federal office, state law requires the materials to be retained for six months. (The rosters and lists of voters who voted in an election are required to be retained for five years for all elections, regardless of whether the election included any candidates for federal office.)

Because the retention period for these materials differs for federal and non-federal elections, the Elections Code includes separate code sections that govern the retention of materials depending on whether the election includes candidates for federal office or not. When they were first enacted in the 1980s, these code sections were functionally identical except for the length of the retention period. Over time, however, subsequently-approved legislation has created slight differences between the rules for retention of records for federal elections and for non-federal elections. There is nothing in the legislative history to suggest that those differences were intentional; instead, it appears that they were inadvertent.

Among other changes, this bill makes various minor changes to the election record retention provisions of the Elections Code so that the retention requirements for federal and non-federal elections are more closely aligned. Additionally, this bill makes technical amendments to those provisions by changing the term “paper record copies” to “paper cast vote records” to reflect a change in terminology made in AB 2252 (Ting), Chapter 75, Statutes of 2016.

- 3) **Nevada County Litigation:** This bill is a response, in part, to litigation that was brought against the Nevada County Registrar of Voters in the Nevada County Superior Court by an individual who sought access to certain materials related to the November 2020 presidential

general election and the September 2021 gubernatorial recall election under the California Public Records Act (CPRA). Specifically, the petitioner in that case sought access to cast vote records,¹ an audit log of adjudicated ballots,² tabulator tapes,³ and digital ballot images.⁴

While the registrar of voters ultimately agreed to provide the petitioner with access to the cast vote records, it objected to providing the other materials. The court subsequently ruled that under the CPRA, the registrar must provide the audit log of adjudicated ballots (though the court allowed the registrar to redact certain information) and the tabulator tapes. In ordering the registrar of voters to provide the petitioner with access to these materials, the court specifically noted that state law governing the retention of election materials other than ballots and identification envelopes did not specifically require those materials to be kept unopened and unaltered during the retention period and did not require those materials to be destroyed or recycled at the end of the retention period. In the case of the audit logs, the court required the registrar to provide those logs even though the registrar had not produced them during the election and the subsequent canvass of election results. The court found that because the registrar still possessed those logs in electronic form and could retrieve and export them into a separate record that could be provided to the petitioner, the registrar was required to produce those logs under the CPRA.

The court denied the petitioners' request for access to the digital ballot images. In denying that request, the court found that provisions of the California Constitution protected the right to secret voting and ballots, and found that existing Elections Code provisions related to the preservation and destruction of ballots after an election "manifest a legislative intent...to protect ballot secrecy by maintaining the integrity of all ballot processing, tabulation, maintenance and disposition."

Among other provisions, this bill clarifies the retention requirements for election materials related to the chain of custody of ballots and the 1% manual tally of ballots by requiring those materials to be kept with the unopened and unaltered packages that include ballots and voter identification envelopes. At the end of the required retention period, this bill would require all those materials to be destroyed.

- 4) **Destruction of Election Materials After Retention:** As detailed above, existing law generally requires the elections official to destroy or recycle ballots from an election (in the case of a federal election) or the packages containing ballots and identification envelopes (in the case of an election that is not a federal election) at the end of the retention period. By contrast, other sections of law expressly permit, but do not require, the elections official to

¹ A cast vote record is an auditable document that corresponds to the selection made on the voter's ballot and lists the contests on the ballot and the voter's selection for those contests.

² When tabulating ballots, voting systems are designed to set aside ballots for human review in situations where the voter's intent may not be clear. Common reasons why a ballot might be flagged for adjudication include that it contains undervotes, overvotes, or write-in votes.

³ According to the Court's decision in this lawsuit, the voting system used in Nevada County produces tabulator tapes in every election, which are printed receipts that the precinct-based ballot scanners print at the start and end of each day of in-person voting. Each tape contains information about the scanner that produced it and the votes on each election contest that the machine recorded.

⁴ Ballot images are digital scanned copies of the actual paper ballots cast by voters.

destroy or recycle other election materials (including rosters and lists of challenged and assisted voters) at the end of the retention period. This bill *requires* the destruction of these materials at the end of the retention period. While such a change would reduce the discretion of county elections officials, the sponsor of this bill, the California Association of Clerks and Election Officials, believes that such a change is warranted because they believe that it is important for ensuring consistency among counties in the disposition of election records after the retention period has ended.

5) **Suggested Amendments:** Committee staff suggests the following amendments to address various issues with the current version of this bill:

- a) **Preservation of Damaged Materials:** The current version of this bill contains a provision that attempts to account for situations where certain election materials are destroyed or damaged due to natural disaster or other unforeseeable and unavoidable circumstances before the end of the retention period. Part of the impetus for this provision is the fact that materials from prior elections have been damaged or destroyed when there have been disasters affecting the building where those records were stored, including an earthquake that damaged the offices in which the Napa County Registrar of Voters was located.

In light of this background, it seems sensible to include language in state law that expressly provides how election materials are to be handled when they are destroyed or damaged before the end of the legally required retention period. As this bill is currently drafted, however, the language about election materials that are destroyed or damaged due to natural disaster or other unforeseeable and unavoidable circumstances applies only to certain election materials that are required to be retained. To ensure consistent policies for the preservation of election materials, committee staff recommends that this bill be amended to make those provisions applicable to all election materials that are required to be maintained under Division 17 (commencing with Section 17000) of the Elections Code.

- b) **Conditional Voter Registration Identification Envelopes and Ballots:** This bill expressly provides that elections officials must preserve conditional voter registration (CVR) voter identification envelopes with other election materials. Under state law, CVR voter identification envelopes are provisional ballot voter identification envelopes, which are already required to be preserved. Accordingly, this appears to be a clarifying, rather than substantive, change.

While this clarification may resolve ambiguity about the rules governing the preservation of CVR voter identification envelopes, it could introduce new ambiguity about whether CVR *ballots* must be preserved, since the preservation rules would expressly speak to CVR identification envelopes while remaining silent about CVR ballots. Accordingly, committee staff recommends that this bill be amended to expressly state that CVR ballots must be preserved together with other voted ballots and voter identification envelopes.

- c) **Technical Amendment:** To correct a drafting error, committee staff recommends the following amendment: On page 4, line 38, strike out “Talley” and insert “Tally”.

- 6) **Arguments in Support:** The sponsor of this bill, the California Association of Clerks and Election Officials, writes in support:

Since the 2020 Presidential General Election, county elections officials have received Public Records Act requests for election records they have preserved under seal. These requests are not submitted as part of an election contest litigation or criminal prosecution. And, the requesting parties have at times disagreed with the county elections official that a document they have requested is covered by Division 17 of the Elections Code. In one dispute litigated in Nevada County Superior Court, a Judge ruled that the county elections official must provide redacted versions of election records under seal.

AB 2249 would clarify that all types of ballots and the envelopes the voters used to return them, as well as paper copies of cast vote records of the ballots, must remain untouched for the specified time period absent a court order issued as part of an election contest litigation or a criminal prosecution. Additionally, [this] proposal would clarify that reports created for the one-percent manual tally audit during the canvass period and ballot chain of custody documents and reports are protected by the statute. Finally, CACEO supports [the] proposal to require counties to destroy the voter rosters used in an election after five years to ensure uniform management and destruction of the records across the state.

- 7) **Related Legislation:** AB 1559 (Jackson) of 2023 would have updated and revised election record retention, preservation, and destruction procedures to provide clear guidance for electronic voting data, as specified. Additionally, AB 1559 would have clarified that it is a felony to knowingly provide unauthorized access to, or break the chain of custody to, certified voting technology and finished or unfinished ballot cards. AB 1559 was approved by the Assembly by a vote of 80-0, but was held on the Senate Appropriations Committee's suspense file.

SB 1328 (Bradford), which is pending in the Senate Elections & Constitutional Amendments Committee, is substantially similar to AB 1559 of 2023.

REGISTERED SUPPORT / OPPOSITION:

Support

California Association of Clerks and Election Officials (Sponsor)

Opposition

None on file.

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