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MEMORANDUM

To: Whom It May Concern
From: James L. Buchal
Date: February 19, 2013
Re: HB 2199: A Threat and an Opportunity

House Bill 2199, filed at the request of the Secretary of State, enacts changes to Oregon law relating to ballot security. One portion of the bill is a good first step, and the other is a step backwards. For this reason, I am recommending that parties interested in ballot security pursue amendments to the bill as outlined herein. In general, proposed new material is italicized.

Section 1 of the bill amends ORS 254.074, which requires county clerks to file security plans with the Secretary of State. The bill does not change the fundamental problem with existing law, which is that the plans are confidential and not subject to disclosure, so no one other than the Secretary of State can ever audit adequacy or compliance.¹ The law as it stands insulates the plan from a public records act request, which means that only those inside the clerk's or Secretary of State's office can see the plans, yet those parties are often partisan. Removing ORS 254.074(2) would allow public feedback on and promote improvement in the plans; the notion that attacks on election integrity would be facilitated by knowledge of the security plans seems far-fetched.

The bill tightens up the security plan slightly by adding a requirement that the county clerks add information about video recording of the counting areas. I would propose three additions as required elements of the security plan. The first is based on the Clackamas County experience; add a requirement that the plan address:

(K) Procedures to limit access to vote-counting-machine-readable writing instruments in counting areas."

The second relates to treatment of duplicate ballots. This subject is addressed below, but the bill as drafted fails to account for circumstances in which ballots are duplicated in the days before voting is over. So subsection (D) should be amended as follows:

(D) Security procedures for processing ballots, including but not limited to procedures for ensuring that marking duplicated or test ballots are marked and

¹ An enterprising member of the Legislature could try getting a copy of the most recent plan in Multnomah County and releasing it for public feedback.

treated as such, and procedures for ensuring that blank ballots returned to the clerk and not counted remain segregated until destruction or mutilation.

Third, the security plan provides an opportunity to increase citizen involvement in security, as for example by expanding transportation security as follows:

(C) Security procedures for transporting ballots, *including provision for election observers to accompany county agents involved in ballot transportation.*

Section 1 of the bill also expands the county clerk's duties with regard to certification, adding requirements that he or she account for the use of blank ballots within the clerk's office. This change is coupled with a portion of Section 2 removing existing language which requires each county to "provide for the security of, and shall account for, unused ballots". In its place would be detailed requirements to submit a record of ballots printed and their various dispositions. Here the language needs considerable tightening and I would suggest the following:

(3) For each election, at the time the county clerk certifies the results of an election, the clerk shall submit to the Secretary of State a record *accounting for the disposition of all blank ballots received or printed, including:*

- (a) *The number of ballots received or printed by the clerk.*^[2]
- (b) The number of ballots mailed to voters.
- (c) The number of ballots issued to voters at the office of the county clerk.
- (d) *The number of ballots returned after mailing or issuance, but not counted, including:*
 - (i) *The number of ballots returned undeliverable.*
 - (ii) *The number of ballots in rejected envelopes.*
- (e) The number of tallied ballots.
- (f) The number of test ballots.
- (g) The number of ballots used for duplication.
- (h) *The number of unused ballots, not including test ballots, remaining at the end of voting on the day of the election.*

²This covers counties where clerks can print their own ballots, a factor the Secretary of State has carelessly ignored.

- (i) The number of archived ballots.

For purposes of this subsection, "number of ballots" includes a breakdown by ballot type or style where multiple ballot types or styles are used. The Secretary of State shall investigate any county certification where the number reported in response to subsection (a) is not equal to the total of subsections (b)- (c) and (f)- (h) and publicly report the results of such investigation within ninety days after certification.

The purpose of this additional language is to pin down all the ballot uses and true them up. The existing bill does not make it clear how these numbers should add up, if at all. Proposing this language will help smoke out additional uses of ballots that are not covered by the Secretary's proposed language, and produce a more complete accounting. (Since not all ballots are returned by voters, the sum of subsections (d) and (e) will generally be less than (b) plus (c).)

Section 2 of the bill eliminates the requirement that the clerk immediately destroy all absentee and regular ballots after 8:00 p.m. on election night. This is a vital protection that is followed in all civilized countries. In its place is a requirement that the clerks "mark each unused ballot as an unused ballot or seal, secure and account for each unused ballot". I would suggest the following substitute for ORS 254.283:

(1) Each county clerk is responsible for the safekeeping and disposition of ballots.

(2) At the end of voting on the day of the election, the county clerk shall *destroy all unused ballots or physically mutilate them in such a fashion that they can no longer be counted by vote-counting machines, provided that the county may save a single set of ballot types or styles for archival purposes.*³

Some countries, for example, drive a spike through the unused ballots; others actually burn them. The Secretary's suggestion that the unused ballots simply be marked as unused is impractical, as it would require stamping or printing on each ballot; her suggestion that the clerks might simply "seal" and "secure" them is not adequate insofar as this may mean no more than putting them into a locked room to which any number of people have access.

Even the term "seal" is useless in this context. Some counties (albeit perhaps not in Oregon) have been known to use adhesive seals that, like Post-Its®, can be peeled off and replaced. Multnomah County used seals that had places for those sealing them to report their identities and date of sealing, but never filled out the information.

Section 3 of the bill imposes a new requirement that anyone picking up a ballot from a voter deliver it to the clerk's office within two days. One might want to consider shortening this period to 24 hours, though it is difficult to imagine how the rule would be enforced in

³ Current law does not authorize the practice of saving an unused archival set, but counties do this.

practice. Unfortunately, the county clerks may not scan in ballots as delivered until two days after they are delivered to the clerk's office (my personal experience in the last election).