



STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

July 12, 2021

Attorney General Dana Nessel
G. Mennen Williams Building
525 W. Ottawa Street
Lansing, Michigan 48909
by e-mail

Dear Attorney General Nessel:

I write to request an opinion from the Office of the Attorney General (AG) regarding the stated intent of the Auditor General (OAG) to re-audit aspects of the November 2020 election. While the Bureau of Elections (BOE) has no objection to OAG reviewing the Bureau's own procedures, including post-election auditing procedures, the OAG's apparent intent to re-conduct actual precinct procedural audits carried out by *county* and *local* election officials, appears to conflict with federal retention requirements following federal elections and poses additional legal and logistical questions under state law.

Background

The OAG is currently conducting an audit of the BOE following a prior audit conducted in 2019. According to the OAG, another audit is being conducted so soon following the 2019 review because the prior audit included a material finding regarding user access controls in the Qualified Voter File (QVF). In the initial meeting held with the OAG on March 12, OAG staff informed BOE that the audit may include objectives to review BOE procedures in addition to those covered in the 2019 audit.

During the course of subsequent meetings with OAG personnel, OAG personnel asked about post-election audits. Understanding these questions to be about BOE's procedures corresponding to its obligations to conduct and supervise post-election audits under the Michigan Election Law, MCL 168.31a, BOE provided information on request, including BOE's post-election training manuals, documents, and the 2021 post-election audit report.

On May 20, 2021, OAG personnel attended a pilot risk-limiting audit conducted by BOE and the Ottawa County Clerk's office in Holland, Michigan. In this pilot risk-limiting audit, BOE was experimenting with a new potential method of conducting risk-limiting audits in addition to refining procedures used in the November 2020 risk-limiting audit. In June 2021, OAG personnel also attended a precinct procedural audit conducted by the Ottawa County Clerk. OAG personnel also informed BOE that they had attended a precinct procedural audit of the November 2020 election conducted by Kent County (these audits are open to the public).

In June 2021 meetings following the Ottawa County audits, OAG personnel expressed interest to BOE in reviewing audits that were conducted by clerks following the November 2020 election. As BOE understands it, OAG personnel seek to re-create the audits conducted by the county clerks either to verify that records were accurately reviewed or to make the OAG's own determination about whether records and procedures for the audited precincts were audited. This includes manual review of a significant volume of local election records, including pollbooks and other polling place records, public notices issued, and records of testing conducted. It would also include conducting a hand count of ballots for the U.S. Senate race, which were counted and compared to tabulator totals for the November 2020 election.

In subsequent meetings, BOE shared concerns with auditors, further detailed in this letter below, about OAG personnel reviewing or re-creating audits that were conducted by county clerks, rather than BOE. These concerns were acknowledged by OAG personnel, but OAG personnel indicated that they still intended to pursue the precinct procedural audit (pending the formal and legal issues being addressed). On July 6, BOE sent the attached letter to Auditor General Doug Ringer outlining BOE's concerns with the proposed audit. In addition to the legal concerns described below, the OAG re-creating county-run post-election audits poses several practical challenges.

Post-election audits are conducted following the certification of election results and the resolution of any requested recounts. They are conducted by county clerks. During the period in which audits are conducted, local election officials are required to secure election records, including ballots that must be kept in sealed ballot containers, until audits are complete and BOE has allowed for release of security of election materials. Although most election records are retained following the release of security, some are not and those that are retained are not in the same condition they were during the conduct of the audit. For example, ballot containers are unsealed and the ballots are transferred to another container (ballot containers are re-used at subsequent elections, and many jurisdictions have already had an intervening May election following November 2020). Additionally, the contents of electronic pollbooks for specific elections are deleted to safeguard personal identifying information retained on the pollbook, and because the electronic pollbook software can only contain one electronic pollbook file at a time.

Those records that are retained are organized and stored differently than they are during the post-election security period. Although all records should be retained, it will be logistically difficult to ensure that all records are organized and preserved in the exact same format as was the case during the audit. Any damage, misplacement, or difficulty in retrieving public records could lead to a different audit result, which might be attributable to local record storage and retention issues rather than audit deficiencies or audit guidance provided by BOE.

Were the OAG to come to an audit result different from county clerks because of these inherent practical challenges, such an outcome would doubtless feed the many baseless false, fabricated, and misleading claims involving the November 2020 election. Although BOE believes the OAG's interest in recreating these audits is well-intentioned, BOE fears that the outcome will become another avenue to cast doubt upon and re-litigate the outcome of the November election.

Thus, while BOE remains committed to full transparency and has no objection to OAG continuing to review BOE's own auditing procedures, directly reviewing the work of county and local officials in this manner raises significant concerns. It also raises at least two significant legal questions, which BOE requests the AG's assistance in addressing.

Ballots and other records required for the requested audits must remain in the custody of election officials to ensure compliance with federal law.

The Civil Rights Act of 1960 requires election officials to maintain for 22 months following federal elections “all records and papers” relating to any “act to voting in such election.” 52 U.S.C. § 20701. As the United States Department of Justice (DOJ) explains in the attached letter, DOJ interprets this act to require that election records be retained either physically by election officials themselves or under their direct administrative supervision. Election officials must have ultimate management authority over the retention and security of those election records, including the right to physically access them.

Election records are public and may be inspected under FOIA. However, BOE’s longstanding interpretation of the application of federal law to records subject to the federal retention period is that while members of the public may *view* records, they may not physically *handle* them. All records must be physically handled and remain in the physical custody of election officials at all times. Yet for OAG personnel to conduct an audit, even if county and local election officials were present, they would need to physically handle and would take some form of custody of the records.

Therefore, while OAG may view election records, BOE’s view is that OAG physically handling records while conducting the audit would violate federal record retention laws by removing ultimate management authority and physical retention of the records from election officials. Once control and custody is lost, it is impossible to ensure that records have been maintained continuously as required by law. The Bureau seeks the AG’s opinion on this question.

Review of county-run audits would be beyond the scope of the Auditor General’s authority to audit the Bureau of Elections, which provides procedures and training for county-run audits but does not conduct or re-conduct county-run audits.

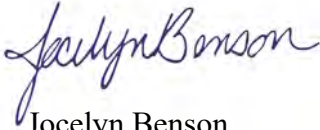
The Michigan Election Law, MCL 168.31a, provides for BOE to provide procedures, training and supervision for county clerks in conducting county-wide audits. The Election Law does not require the Bureau of Elections to “re-conduct” audits conducted by county officials, nor does BOE have the practical capability to do so with more than 200 county-run audits conducted following the general election. Instead, the BOE establishes procedures for the audits and ensures counties have confirmed they have performed the audits and submitted required documentation to the Bureau of Elections.

In re-conducting an audit performed by a county clerk, rather than the BOE, the OAG would therefore not be reviewing the work of the BOE but rather reviewing the work of independently elected or appointed county and local election officials. The BOE understands that the OAG’s view is that they would not be directly auditing local election officials, or election results, but BOE believes OAG would be doing just that by performing an election auditing function that BOE itself does not perform.

Election records are maintained at the local and county level. The BOE has reviewed previous AG opinions shared by the OAG, purporting to show that the OAG has authority to review local records under certain circumstances. As applied to this scenario, however, the BOE does not believe the OAG has statutory authority to request these materials outside of the issuance of a subpoena or other request for records. However, such request would be subject to restrictions on state and federal law, and for the reasons stated above BOE does not believe local officials can

hand over these records consistent with federal law.¹ The Bureau seeks the AG's opinion on this question as well.

Sincerely,

A handwritten signature in blue ink that reads "Jocelyn Benson". The signature is written in a cursive, flowing style.

Jocelyn Benson
Michigan Secretary of State

¹ For the same reason, BOE does not have the authority under federal law to authorize OAG to access records governed by federal record retention requirements for the purpose of re-conducting a county-run audit.