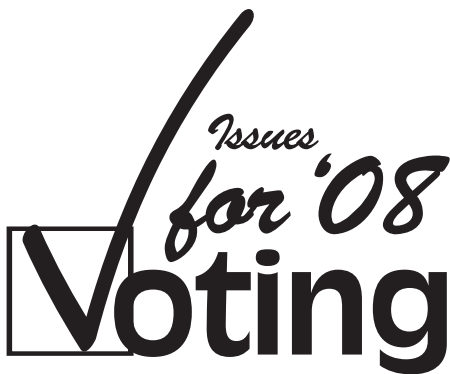




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## SoS to County Clerks: Don't ask, won't tell on voting machines



BY CHRIS BRAGG  
THE COLORADO STATESMAN

Memo to county clerks: If you ask the secretary of state's office a question over the next couple of months about the recertification of your electronic voting equipment, don't expect a call or e-mail back.

The secretary of state's office has cut off direct communication with county clerks about the recertification of electronic voting machines until after the recertification process is done. In an Oct. 1 letter obtained by *The Colorado Statesman*, sent by Deputy Secretary of State Bill Hobbs to nine county clerks, Hobbs expresses his concern that direct communication with counties could be used against the Department of State in a lawsuit.

Hobbs writes: "Because of various open records requests we have received...and because of the expectation that there will be litigation again this year concerning the certification process, we have tried to make as much information as possible available via our web site, while trying to avoid communications that might be viewed as compromising the integrity of the certification process."

As a basis for the direct communications cutoff, Hobbs cites litigation before the 2006 election attacking the certification process. Plaintiffs opposing electronic voting charged

that the Mesa County clerk's office exerted improper influence over Secretary of State Gigi Dennis, in order to obtain certification for Mesa County's voting system. As evidence of that influence, plaintiffs presented in court a series of e-mail exchanges and phone calls between Mesa County and the Department of State.

That precedent has led to the current communications cutoff between counties and the state, as a protection in the case of future litigation.

Some clerks say they feel handcuffed by the state-imposed communications blackout. As clerks try to plan the 2008 elections, they're unsure if they should purchase more voting equipment and whether their current equipment will be certified.

"The clerks and the vendors are really the ones that are caught in the middle of all of this," said Adams County Clerk Karen Long. "You really cannot get through to anyone [with the secretary of state] to talk about voting equipment."

Jefferson County Clerk Pamela Anderson said it was difficult not having a clear idea whether the equipment would be certified. "We have a very tight timeline and a lot to do and we literally can't plan," she said. "Our entire job is based on a calendar. And we're running out of time." At this point, she said, county clerks are getting no more information about the recertification process than the public.

The decision on whether to recertify the four electronic voting systems Colorado uses was supposed to occur this summer, but has been pushed back until at least Dec. 1. The state would first use the equipment in primary elections in August 2008.

Hobbs' letter to the nine clerks was prompted by a prior unanswered e-mail from Douglas County Clerk Jack Arrowsmith. Arrowsmith's e-mail had asked for a "project plan and timeline that will drive the October 1 completion date [which has since been moved back]." Arrowsmith also requested a "contingency plan should

the target date not be reached," the name of the certification project's manager and the "criteria and process being used for the retesting efforts."

But the secretary of state's office never responded, prompting Arrowsmith and a frustrated group of eight other county clerks, wondering why their e-mails about recertification were not being answered, to send a formal letter requesting the same information. "Armed with this information, Douglas County could then better determine what options they had in future equipment purchases," they wrote. "Every clerk would benefit from the timeline schedule."

Hobbs responded to the letter from the nine clerks, stating that a number of other clerks as well as activist groups and members of the public had asked for the same information, but that there are "limitations we are facing in responding to the information needs of the county clerks during the recertification process." Instead, Hobbs wrote, information that the secretary of state could offer would be posted on the Department website.

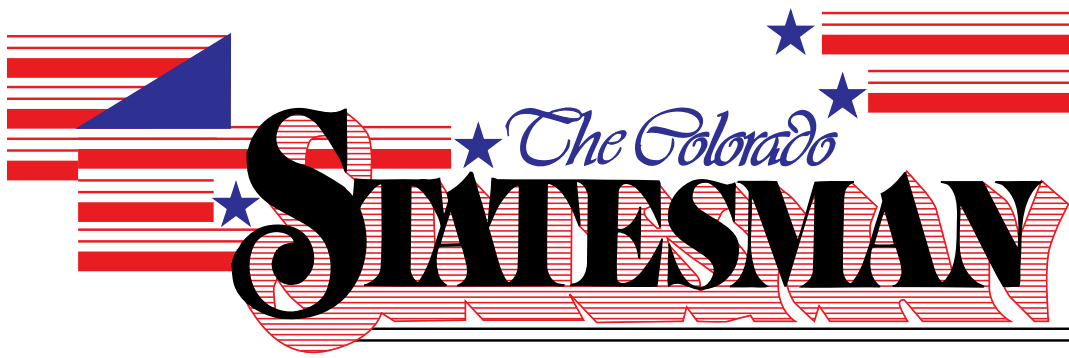
The letter from the county clerks was signed by Long, Arrowsmith and Anderson as well as Nancy Doty, Arapahoe; Hillary Hall, Boulder; Russ Ragsdale, Broomfield; Stephanie O'Malley, Denver; Scott Doyle, Larimer; and Steve Moreno, Weld.

Many of the clerks said they had been unaware of any internal Department of State policy of not responding to calls or e-mails before receiving the letter from Hobbs. Some also expressed doubt that the kind of information they were seeking could be used in a lawsuit.

"I think it would have helped this situation tremendously had there been any kind of response sent back to Mr. Arrowsmith," said Ragsdale, the Broomfield clerk. "That leads to a lot of frustration, thinking that it's a black hole out there."

Ragsdale added that while there are certainly "those out there that will question

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## ...County clerks just want info from Secretary of State

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every step of [the recertification process]" the secretary of state "might be guilty of being overly cautious."

In an interview with *The Statesman*, Hobbs clarified the purpose of the new communications policy. He said that while some communications were clearly not attempts to influence the recertification process — such as Arrowsmith's request for a timeline — having any direct communications with clerks could open up a legal Pandora's box.

"There are a whole series of questions that can't be raised [by the clerks] because they arguably could be viewed as putting pressure on us," Hobbs said. "The prospect of litigation causes us to be more circumspect in our communications. Any statements that are loose and not in context can be used in a lawsuit." He said substantial open records requests concerning the recertification had already been made by some of the same people who filed the 2006 lawsuit.

He said, therefore, that it was difficult to hold any sort of one-on-one dialogue with county clerks on any recertification topic, no matter how benign.

Hobbs added that a good deal of information has been posted on the Department's website about recertification — including all of the Department's written correspondences with electronic voting machine vendors.

Paul Hultin, the attorney for the group of 13 plaintiffs who filed the 2006 lawsuit to prevent the use of electronic voting systems, said in an interview that he doesn't believe the recent requests for information are something he could use as evidence against the secretary of state. "It doesn't seem to me like political pressure," he said.

That wasn't the case in 2006, when Hultin argued in Denver District Court that Mesa County exerted improper pressure on the secretary of state's office, then headed by Gigi Dennis, to approve the ES&S Unity system that Mesa County uses.

Hultin argued that because ES&S was short staffed in the lead up to the 2006 elections, it did not follow normal procedures and failed to bring its voting equipment to Denver for testing. But Mesa County was so desperate to use the ES&S system, Hultin

said, that it pressured Secretary Dennis to instead send Department of State staff to ES&S headquarters in Omaha to certify the equipment.

Secretary Dennis sent John Gardner, the Department's testing director, who had no formal training in equipment certification, to Omaha for the test.

Gardner approved the ES&S system even though it clearly had problems. For instance, the system didn't meet the requirements of state law because audio and video functions for the visually impaired didn't work at the same time.

Gardner later confirmed in a deposition that there were a number of areas where his examination of the system did not meet state statutes. But Mesa County pressured the Department to approve the certification despite the problems, Hultin argued.

To prove his claim of improper influence, Hultin offered into evidence e-mails between the state and county as well as Gardner's testimony about phone calls between the parties. It was the plaintiff's use of this evidence that has prompted the Department of State's current stand on communications with the counties.

In his opinion on the 2006 lawsuit, Denver District Judge Lawrence Manzanares addressed the relationship between Mesa County and the Department of State:

"In particular, with respect to Mesa County, it's been shown that there was pressure because they had a lot of machines, and if they weren't certified, they were going to be in a world of hurt," he said. "And so there was certainly some economic, political, and time pressure to get all of this done. And Mr. Gardner undertook to get it done. And he did."

Manzanares ruled that the state had failed to adopt minimum standards to test machine security and done an "abysmal" job of documenting the testing. Still, he permitted the machines to be used in the 2006 election because he said decertifying them six weeks before an election would cause more problems than it would solve. He also ruled the state would have to retest the electronic voting systems before they could be used in future elections.

The 2006 court ruling led the new secre-

tary of state, Mike Coffman, who took office in January 2007, to implement far more stringent standards for electronic voting recertification this spring. The certification process for each system now requires 437 tests and the secretary of state's office will produce around 2,000 pages of documentation evaluating each system.

But it appears that a new battle could be brewing over that recertification between electronic voting vendors, those opposing electronic voting and the Department of State, with county clerks stuck in the middle.

There's the possible conflict between vendors and the Department of State. At the end of August, Coffman chided the four electronic voting companies up for recertification — Premier Elections Solutions, Hart InterCivic, ES&S and Sequoia — for being too slow in providing hardware and documentation needed to test and recertify the machines. Coffman has said the "threat is real" that one or more of the vendors could fail recertification and has directed county clerks not to buy new equipment until a decision is made.

The deadline for vendors to comply, originally July 1, then Oct. 1, is now Nov. 16. Hobbs said his office was shooting for a final decision about recertification by Dec. 1, but that no hard date had been set.

That worries county clerks, some of whom say the new standards for voting certification are impossibly high and that's why the recertification deadline keeps getting pushed back. Anderson, the Jefferson County clerk, said if one or more of the voting systems are not approved it will create "unfunded chaos." In Jefferson County, she estimated, there is \$750,000 left to spend on voting equipment and replacing their ES&S voting system if it's not recertified would cost about \$14.5 million.

And there's also the strong possibility of another lawsuit if the machines are recertified. Hultin, the plaintiff's attorney in the 2006 case, said the California secretary of state's recent decision to greatly restrict the use of electronic voting equipment in that state increases the likelihood of another lawsuit here. "In light of that, I think it would be very dubious to recertify [in Colorado]," he said.