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STATE OF ALASKA
Division of Elections
Office of the Lieutenant Governor

February 22, 2006

Jake Metcalfe, Chairman
Alaska Democratic Party
PO Box 231230
Anchorage, AK 99523-1230

Re: Public Records Request - Records from the November 2004 General Election

Dear Mr. Metcalfe:

This correspondence is in response to your letter sent via email by Kay Brown dated February 7, 2006 and a follow-up to my letter dated February 13, 2006. Your patience is appreciated as I have reviewed your technical request for information from the 2004 General Election.

In your letter dated February 7, 2006 you requested more specific information within the Global Election Management System (GEMS) and stated the following:

We suggest that you follow this procedure: in MS-Windows, make a copy of the MDB database file, call it "copy of [original filename.mdb]". Load that into GEMS, remove passwords and phone numbers, save it, burn it to a CD, and then provide this CD to us. This will be quick and easy and will preserve the integrity of the copy of the data you are providing to us as well as the original data.

The two necessary modifications in question - changing or removing passwords and phone number - can be done within the Diebold GEMS product, rather than going into Microsoft Access to do the editing. These modifications will show up in the audit log, if these modifications are done in GEMS. We believe that this is the proper procedure, rather than doing the alterations in Microsoft Access, where no tracking or audit trail would be created.

We are concerned about the reference in your letter to "user ID's". We believe "user ID's" and the associated "audit log" are public records, and these records are part of our request. Each audit log entry includes the name of the logged-in user.

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(ie., the "user ID") performing the action; the audit log tracks which human did what and when they did it. We have a right to know which human performed each operation on the tabulator, and at what time (to the extent that this information was recorded). To delete that information, one would have to delete the entire audit log - and this would not be acceptable.

Since my last correspondence on February 13, 2006, the Division has obtained an opinion regarding your request from State Chief Security Officer Darrell Davis, of Enterprise Technology Services, Department of Administration. I have included the letter from Mr. Davis with this correspondence. Mr. Davis states in his letter that delivery of the database presents numerous security risks to the State of Alaska. Providing the information within the database (.mdb) and its back up file (.gbf) would be providing an outside entity with the ability to modify the structure using commonly available tools such as Microsoft Access. Mr. Davis goes on to state that "release of any security related information creates a serious threat to our ability to ensure the confidentiality, integrity, and availability of our systems and services..."

2 AAC 96.210 states:

Subject to the provisions of AS 40.25.110 - 40.25.220, a public record maintained by a public agency is available for inspection and copying in the format in which that agency maintains or disseminates the record. A public agency shall duplicate and provide copies of a public record upon request and upon payment of the applicable fee as described by this chapter.

(b) A public agency is not required to compile or summarize its public records in response to a request for public records.

(c) A public agency is not required to manipulate its data to create new records in response to a request for public records. A public agency may manipulate its data to create electronic services and products if

(1) the public agency can do so without impairing its functioning;

(2) the data is protected from intentional or accidental modification or destruction; and

(3) the requestor pays for the cost of developing the requested electronic service or

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product, based on fees established by the public agency under 2 AAC 96.460.

(d) When providing public records or electronic services or products, a public agency shall ensure that access to confidential information and proprietary software is protected. Except as provided by law, if the request is for a public record that contains confidential information, the public agency shall delete or mask the nondisclosable confidential information and provide the requested public records upon payment of the applicable fee as described in 2 AAC 96.360.

Because of the associated security risks involved in providing the .mdb and .gbf files in the specific format you request, and as stated in AS 40.25.120 (a) (10) (A) (B) (C) as referenced in Mr. Davis' letter, the Division of Elections is denying this request.

As stated in 2 AAC 96.430:

When a request for electronic services or products is denied because the public agency cannot reasonably provide the requested work, the public agency shall provide a response to the requestor explaining that the requested service or product cannot be provided. To the extent possible, the response must further inform the requestor of how to obtain the public records that would have been used to satisfy the request for electronic services and products.

The Division cannot provide the information in the specific format you have requested. However, I have offered the information contained within the .mdb and .gbf files in a common file format, such as Excel, in order for you to review the information. You refused this information in your letter dated January 23, 2006. I again offer you the information in a common file format in order for you to review the contents of the .mdb and .gbf files. Please indicate if you would like the information in Excel format.

The Division of Elections has provided you the memory card results tapes from the machines used for early voting in the 2004 General Election. These tapes confirmed the early voting results reported in GEMS on election night. Please note that the provided tapes were run for each machine used for early voting prior to the upload of the results from these machines into GEMS.

Finally, the Division provided to you the statewide absentee and questioned ballot count reports printed from the Voter Registration and Election Management System (VREMS)

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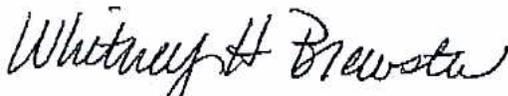
that show the number of ballots received and the count code determination for every ballot processed by the Division in each House district. Every voted absentee and questioned ballot was logged into VREMS on the individual voter's record. As I stated in my letter to you dated February 17, 2006, the VREMS information is stand-alone and does not interact with the Division's ballot tabulation system GEMS. By looking at the VREMS reports, the number of absentee and questioned voted ballots received and logged by the Division can be compared to the Division count of those ballots using GEMS. Since VREMS is real time, the information within the reports is close to but not exactly as it was following the 2004 General Election as the Division has removed voter records that were duplicate as well as those for voters who requested that their registration be canceled or who have died. Although the VREMS information is slightly different due to the system being real time, it is within a few of votes of what was reported in GEMS and confirms the results reported in GEMS on election night.

The Division of Elections has met face-to-face with Alaska Democratic Party officials, as well as several times over the phone, to address specific questions about reading and interpreting election results. Additionally, the Division has consistently met the Alaska Democratic Party's public information requests. The information provided has consistently upheld the results of the 2004 General Election. The Division will continue to meet your public information requests as long as the requests do not jeopardize the security of the Division's system or the election process.

Pursuant to 2 AAC 96.335, I have provided a copy of 2 AAC 96.335 – 2 AAC 96.350 with this correspondence. You may administratively appeal this denial by complying with the procedures in 2 AAC 96.340. Under AS 40.25.125, you may obtain immediate judicial review of this denial by seeking an injunction from the superior court. An election not to pursue injunctive remedies in superior court will have no adverse effects on your rights before the Division of Elections. An administrative appeal of this denial requires no appeal bond.

If you have questions, please feel free to contact me at (907) 465-4611.

Sincerely,



Whitney Brewster
Director

Enclosures

cc: Lieutenant Governor Loren Leman
Marjorie Vandor, Assistant Attorney General

FRANK H. MURKOWSKI, GOVERNOR

DEPARTMENT OF ADMINISTRATION
ENTERPRISE TECHNOLOGY SERVICES

5900 E Tudor Road
ANCHORAGE, ALASKA 99507
PHONE: (907) 269-5744
FAX: (907) 269-5562

Date: Feb 21, 2006

Ms. Whitney Brewster
Director
Division of Elections
State of Alaska

Re: Democratic Party Request for Information

Dear Ms. Brewster:

In further response to our conversation regarding the distribution of GEMS database files, to the Democratic Party, the State Security Office is advising the Division of Elections that the release of the database, the database backup file, and the audit files all contain data that if released presents a significant security risk to the confidentiality, integrity, and availability of the Election System and information.

Although Mr. Owen, from Diebold Election Systems, Inc., has consented to the release of the database, the State Security Office, after careful consideration, will not authorize the release of the GEMS database or audit files.

As you're aware, the State of Alaska is undergoing major changes to improve our security structure to ensure the confidentiality, integrity, and availability of our systems and services. Delivery of the database itself, and some of the information contained within this database, presents numerous security risks to the State of Alaska Government.

By providing the database (.mdb) and the corresponding backup file (.gbf) intact, we would be providing an outside entity with the ability to modify the structure and data, using commonly available tools such as Microsoft Access. We would also be providing them with information, such as userid's, passwords, and system communication numbers.

It is the opinion of the State Security Office that all security related information for our systems, services, topology, and applications, and any data containing security related information is protected from public information requests. Release of any security related information creates a serious threat to our ability to ensure the confidentiality, integrity, and availability of our systems and services and as such will not be released without a court ordered subpoena.

To address the specific requests in Mr. Jake Metcalfe's letter, dated February 7, 2006, he is requesting a copy of the .mdb with the passwords and phone numbers removed. He continues on to state that it is their opinion that the userid's and associated audit logs are public records.

Userid's are considered protected information within the State of Alaska Government and we enforce this via our State Security Policies, (Acceptable Use Policy SP-017), whereby it is defined that sharing of user account information is a violation of State Policy.

Furthermore, under Alaska Statute Sec. 40.25.120 (a) (10) (A) (B) (C). Public records: exceptions; certified copies; it states:

(a) Every person has a right to inspect a public record in the state, including public records in recorders' offices, except

(10) records or information pertaining to a plan, program, or procedures for establishing, maintaining, or restoring security in the state, or to a detailed description or evaluation of systems, facilities, or infrastructure in the state, but only to the extent that the production of the records or information

(A) could reasonably be expected to interfere with the implementation or enforcement of the security plan, program, or procedures;

(B) would disclose confidential guidelines for investigations or enforcement and the disclosure could reasonably be expected to risk circumvention of the law; or

(C) could reasonably be expected to endanger the life or physical safety of an individual or to present a real and substantial risk to the public health and welfare;.

It is the opinion of the State Security Office that all security related information, system structures, to include databases, userid's, passwords, phone numbers used by our systems, and any logs containing this type of information are protected from public information requests and are not public records.

Sincerely,



Darrell Davis

State Chief Security Officer
State Security Office
Department of Administration
Enterprise Technology Services (ETS)
5900 Tudor Road
Anchorage, AK 99507
907-269-6733

2 AAC 96.335. Denial of request

- (a) A request for a public record that complies with this chapter may be denied only if
- (1) the record is not known to exist after the public agency makes a diligent search for it;
 - (2) the record is not in the public agency's possession, and after a diligent search the public agency does not know where the record is to be found;
 - (3) the record has been destroyed in accordance with an applicable record-retention schedule;
 - (4) nondisclosure of the record is authorized by a federal law or regulation, or by state law; or
 - (5) the record is believed to be in the agency's possession but has not yet been located, in which case the public agency shall proceed under (f) of this section.
- (b) A request may be denied by the public agency head or by an agency employee to whom denial authority has been delegated by the public agency head.
- (c) An initial denial of a written request must be in writing; must state the reasons for the denial, including any specific legal grounds for the denial; and must be dated and signed by the person issuing the denial. If a request is denied by a public agency employee to whom denial authority has been delegated, the notice of denial must reflect this delegation. A copy of 2 AAC 96.335 - 2 AAC 96.350 must be enclosed with the denial.
- (d) A denial of a written request, in whole or in part, must state that
- (1) the requestor may administratively appeal the denial by complying with the procedures in 2 AAC 96.340;
 - (2) the requestor may obtain immediate judicial review of the denial by seeking an injunction from the superior court under AS 40.25.125 ;
 - (3) an election not to pursue injunctive remedies in superior court shall have no adverse effects on the rights of the requestor before the public agency; and
 - (4) an administrative appeal from a denial of a request for public records requires no appeal bond.
- (e) A denial of a written request is considered to be issued at the time the denial is either delivered to the United States Postal Service for mailing, or hand-delivered to the requestor by an employee or agent of the public agency.
- (f) If a written request is denied because a record has not yet been located and the record is believed to exist in the agency's possession, the office in the public agency responsible for maintaining the record is believed to exist in the agency's possession, the office in the public agency responsible for maintaining the record shall continue to search until the record is located or until it appears that the record does not exist or is not in the public agency's possession. The public agency shall periodically inform the requestor of its progress in searching for the requested record.
- (g) A record that is the subject of a public records request that has been denied shall not be destroyed or transferred from the public agency's custody, except that records may be transferred to state archives and records management services as provided by AS 40.21 and regulations adopted under AS 40.21. A public agency may not destroy or transfer custody of a record to which access has been denied or restricted until at least 60 working days after the requestor is notified in writing that the request has been denied, or if there is an administrative or judicial appeal or other legal action pending at the end of the 60-working-day period, until the requestor has exhausted those actions.

History: Eff. 11/6/94, Register 132

Authority: AS 40.25.110

AS 40.25.120

AS 40.25.123

AS 40.25.125

Editor's note: As of Register 176 (January 2006), and acting under AS 44.62.125 (b)(6), the regulations attorney relocated former 6 AAC 96.335 to 2 AAC 96.335, and made conforming technical changes to 2 AAC 96.335(c) and (d)(1), to reflect Executive Order 113 (2005). Executive Order 113 eliminated the Telecommunications Information Council and transferred its functions to the governor and to the Department of Administration. The history note for 2 AAC 96.335 carries forward the history from former 6 AAC 96.335.

As of Register 158 (July 2001), the regulations attorney made technical revisions under AS 44.62.125 (b)(6), to reflect the 2000 renumbering of former AS 09.25.100 - 09.25.220 by the revisor of statutes. The provisions of former AS 09.25.100 - 09.25.220 were relocated to AS 40.25.100 - 40.25.220.

2 AAC 96.340. Appeal from denial; manner of making

(a) A requestor whose written request for a public record has been denied, in whole or in part, may ask for reconsideration of the denial by submitting a written appeal to the agency head.

(b) An appeal under (a) of this section must be mailed or hand-delivered to the agency head within 60 working days after the denial is issued and must include the date of the denial and the name and address of the person issuing the denial. The appeal must also identify the records to which access was denied and which are the subject of the appeal. If an appeal is from the failure of the agency to respond to the records request within the appropriate time limit under 2 AAC 96.325, the appeal must so state, must identify the records sought, and must identify the public agency to which the request was directed and the date of the request.

(c) The 60 working days within which an appeal must be filed begins to run upon the issuance of the denial or, if no denial is issued, upon the expiration of the time period within which the public agency should have responded.

History: Eff. 11/6/94, Register 132

Authority: AS 40.25.110

AS 40.25.120

AS 40.25.123

AS 40.25.125

Editor's note: As of Register 176 (January 2006), and acting under AS 44.62.125 (b)(6), the regulations attorney relocated former 6 AAC 96.340 to 2 AAC 96.340, and made a conforming technical change to 2 AAC 96.340(b), to reflect Executive Order 113 (2005). Executive Order 113 eliminated the Telecommunications Information Council and transferred its functions to the governor and to the Department of Administration. The history note for 2 AAC 96.340 carries forward the history from former 6 AAC 96.340.

As of Register 158 (July 2001), the regulations attorney made technical revisions under AS 44.62.125 (b)(6), to reflect the 2000 renumbering of former AS 09.25.100 - 09.25.220 by the revisor of statutes. The provisions of former AS 09.25.100 - 09.25.220 were relocated to AS 40.25.100 - 40.25.220.

2 AAC 96.345. Appeal determinations; time allowed; by whom made

(a) As soon as practicable, but not later than the 10th working day after the close of the record on appeal, the agency head shall issue a written determination stating which of the records that are the subject of the appeal will be disclosed and which records will not be disclosed. The written determination must comply with 2 AAC 96.350.

(b) The agency head may extend the 10-working-day period for a period not to exceed 30 working days upon written request from the requestor, or by sending a written notice to the requestor within the basic 10-working-day period.

(c) The agency head may delegate authority and duties under (a) and (b) of this section to a full-time employee of the public agency not involved in the denial and not subordinate to the employee responsible for the denial. The employee delegated this authority may not subdelegate to another employee.

History: Eff. 11/6/94, Register 132

Authority: AS 40.25.110

AS 40.25.120

AS 40.25.123

AS 40.25.124

Editor's note: As of Register 176 (January 2006), and acting under AS 44.62.125 (b)(6), the regulations attorney relocated former 6 AAC 96.345 to 2 AAC 96.345, and made a conforming technical change to 2 AAC 96.345(a), to reflect Executive Order 113 (2005). Executive Order 113 eliminated the Telecommunications Information Council and transferred its functions to the governor and to the Department of Administration. The history note for 2 AAC 96.345 carries forward the history from former 6 AAC 96.345.

As of Register 158 (July 2001), the regulations attorney made technical revisions under AS 44.62.125 (b)(6), to reflect the 2000 renumbering of former AS 09.25.100 - 09.25.220 by the revisor of statutes. The provisions of former AS 09.25.100 - 09.25.220 were relocated to AS 40.25.100 - 40.25.220.

2 AAC 96.350. Contents of determination denying appeal

A determination under 2 AAC 96.345 responding to an appeal must be in writing, must specify the specific statute, regulation, or court decision that is the basis for the denial, and must state briefly the reason for the denial. A denial under this section is the final agency decision. A denial must further state that, as provided by AS 40.25.124, the requestor may obtain judicial review of the denial by appealing the denial to the superior court.

History: Eff. 11/6/94, Register 132

Authority: AS 40.25.110

AS 40.25.120

AS 40.25.123

AS 40.25.124

AS 40.25.125

Editor's note: As of Register 176 (January 2006), and acting under AS 44.62.125 (b)(6), the regulations attorney relocated former 6 AAC 96.350 to 2 AAC 96.350, and made a conforming technical change to 2 AAC 96.350, to reflect Executive Order 113 (2005). Executive Order 113 eliminated the Telecommunications Information Council and transferred its functions to the governor and to the Department of Administration. The history note for 2 AAC 96.350 carries forward the history from former 6 AAC 96.350.

As of Register 158 (July 2001), the regulations attorney made technical revisions under AS 44.62.125 (b)(6), to reflect the 2000 renumbering of former AS 09.25.100 - 09.25.220 by the revisor of statutes. The provisions of former AS 09.25.100 - 09.25.220 were relocated to AS 40.25.100 - 40.25.220.