

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 2249 (Pellerin)
Version: June 5, 2024
Hearing Date: June 18, 2024
Fiscal: Yes
Urgency: No
AM

SUBJECT

Elections: retention of election records

DIGEST

This bill adds conditional voter registration voter identification envelopes, voted conditional voter registration ballots, forms and any machine reports used to account for the ballots delivered to the polling places, and completed forms issued to the counting board and any machine reports used for the 1 percent manual tally to the elections materials that must be sealed and only opened in response to an election challenge or specified criminal prosecutions. The bill requires elections officials to destroy voter rosters and voter lists after existing law's five-year retention period, instead of authorizing the election official to destroy them. The bill requires an elections official, in cases where sealed records are damaged or destroyed due to a natural disaster or other unforeseeable and unavoidable circumstances, to take all reasonable steps to prevent election records from being further damaged, as provided.

EXECUTIVE SUMMARY

This bill addresses two issues related to elections law. First, in response to a recent court case out of Nevada County, the bill seeks to ensure that certain election materials will not be subject to a California Public Records Act (CPRA) request and can only be produced if there is an elections challenge or certain specified criminal prosecutions. The bill also enacts a mechanism for preserving elections materials that are at threat of being damaged or destroyed due to a natural disaster or other unforeseen event. This bill is sponsored by the California Association of Clerks and Election Officials, and supported by the California Association of Counties and the City Clerks Association of California. The bill passed the Senate Elections Committee on a vote of 6 to 0.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides, pursuant to the California Constitution, that the people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies are required to be open to public scrutiny. (Cal. const. art. I, § 3(b)(1).)
 - a) Requires a statute to be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. (Cal. const. art. I, § 3(b)(1).)
 - b) Requires a statute that limits the public's right of access to be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest. (Cal. const. art. I, § 3(b)(1).)
- 2) Governs the disclosure of information collected and maintained by public agencies pursuant to the CPRA. (Gov. Code §§ 792.000 et seq.)
 - a) States that, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Gov. Code § 7921.000.)
 - b) Defines "public records" as any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. (Gov. Code § 7920.530.)
 - c) Defines "public agency" as any state or local agency. (Gov. Code § 7920.525(a).)
- 3) Provides that all public records are accessible to the public upon request, unless the record requested is exempt from public disclosure. (Gov. Code § 7922.525.)
 - a) Some records are prohibited from being disclosed and other records are permissively exempted from being disclosed. (See e.g. Gov. Code §§ 7920.505 & 7922.200.)
 - b) There are several general categories of documents or information that are permissively exempt from disclosure under the CPRA essentially due to the character of the information. The exempt information can be withheld by the public agency with custody of the information, but it also may be disclosed if it is shown that the public's interest in disclosure outweighs the public's interest in non-disclosure of the information. (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, at 652.).
- 4) Provides that the following are not public records:
 - a) a statewide, county, city, or district initiative, referendum, or recall petition;
 - b) a petition circulated pursuant to Section 5091 of the Education Code;

- c) a petition for reorganization of school districts submitted pursuant to Article 1 (commencing with Section 35700) of Chapter 4 of Part 21 of Division 3 of Title 2 of the Education Code;
 - d) a petition for reorganization of community college districts submitted pursuant to Part 46 (commencing with Section 74000) of Division 7 of Title 3 of the Education Code; and
 - e) a memorandum prepared by a county elections official in the examination of a petition, indicating which registered voters signed that particular petition. (Gov. Code § 7924.110(a).)
- 5) Requires an elections official to preserve all rosters or combined rosters and voter lists from an election until five years after the date of the election.
- a) Authorizes the elections official to destroy those materials after that five year period. (Elec. Code § 17300.)
 - b) Defines “roster” 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. (Elec. Code § 349.5.)
 - c) Defines “voter list” 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. (Elec. Code § 359.2.)
- 6) Requires the elections official to keep all 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 the case of any federal election – election for President, Vice President, Senator, or Representative – and for six months for any other election.
- a) Requires the elections official to destroy those materials at the end of the retention period unless an election contest or criminal prosecution, as specified, is commenced during that period.
 - b) Requires the packages to otherwise remain unopened until the ballots are destroyed or recycled. (Elec. Code §§ 17301 & 17302.)
- 7) 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 other election. (Elec. Code §§ 17303 & 17304.)
- a) In the case of an election that is not a federal election, requires those packages to include 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. (Elec. Code § 17304(b)(2).)
 - b) 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. (Elec. Code §§ 17303(d) & 17304(d).)
- 8) Provides that where a court ordered a recount of an election and upon the completion of that recount, the elections official is required to keep all ballot cards for 22 months from the date of a federal election and for six months from the date of any other election, or as long thereafter as any election contest involving the vote at the election remains undetermined. (Elec. Code §§ 17305(b) & 17306(b).)
 - a) Requires, notwithstanding any other provision of the Elections Code, that the final disposition of all such voted ballot is to be determined by the elections official. (Elec. Code §§ 17305(c) & 17306(c).)
 - b) Allows 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. (Elec. Code §§ 17305(d) & 17306(d).)
 - 9) Prohibits an elections official, after ballots are counted and sealed, from opening any ballots or permitting ballots to be opened, except as expressly specified. (Elec. Code § 15370.)
 - 10) 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. (Elec. Code §§ 17000-17200; 17400-17506.)
 - 11) Requires an 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 (generally referred to as the 1 percent 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 percent 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 percent of the precincts chosen at random by the elections official; and
 - ii. a public manual tally of not less than 1 percent of the VBM ballots canvassed in the semifinal official canvass, as specified. (Elec. Code § 15360.)

This bill:

- 1) Requires elections officials to destroy voter rosters and voter lists after existing law's five-year retention period, instead of authorizing the election official to destroy them.
- 2) Expands the list of items that must be kept unopened and unaltered for 22 months from the date of a federal election and for six months from the date of any other election to include: conditional voter registration voter identification envelopes, voted conditional voter registration ballots, forms and any machine reports used to account for the ballots delivered to the polling places, and completed forms issued to the counting board and any machine reports used for the 1 percent manual tally.
- 3) Deletes the requirement that the copy of the roster used as the voting record or a copy of the electronic data be preserved in the case of non-federal elections.
- 4) Requires an elections official, in cases where sealed records are damaged or destroyed due to a natural disaster or other unforeseeable and unavoidable circumstances, to take all reasonable steps to prevent election records from being damaged further.
 - a) If the elections official cannot prevent further damage to election records without inspecting the inside of any damaged packages that are required to be kept unopened and unaltered, the elections official must do both of the following:
 - i. notify the Secretary of State (SOS) of the election official's intent to seek a writ of mandate authorizing the official to inspect the inside of the packages; and
 - ii. seek the writ of mandate.

COMMENTS

1. Stated need for the bill

The author writes:

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. This bill seeks to address a situation that arose where a trial court ordered certain elections documents to be produced under seal by the County of Nevada pursuant to a California Public Records Act request even though the Secretary of State advised the county not to release the records

Access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Gov. Cod § 7921.000.) In 2004, the right of public access was enshrined in the California Constitution with the passage of Proposition 59 (Nov. 3, 2004, statewide general election),¹ which amended the California Constitution to specifically protect the right of the public to access and obtain government records: "The people have the right of access to information concerning the conduct of the people's business, and therefore . . . the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. I, sec. 3 (b)(1).) In 2014, voters approved Proposition 42 (Jun. 3, 2014, statewide direct primary election)² to further increase public access to government records by requiring local agencies to comply with the CPRA and the Ralph M. Brown Act³, and with any subsequent statutory enactment amending either act, as provided. (Cal. Const., art. I, sec. 3 (b)(7).)

Under the CPRA, public records are open to inspection by the public at all times during the office hours of the agency, unless exempted from disclosure. (Gov. Cod § 7922.525-7922.530.) A public record is defined as any writing containing information relating to the conduct of the public's business that is prepared, owned, used, or retained by any public agency regardless of physical form or characteristics. (Gov. Code § 7920.530.) Under the CPRA, there is a "catch all" provision that provides an agency can withhold a record "that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." (Gov. Code § 7922.000.)

The CPRA expressly provides that certain election petitions are not public records. (Gov. Code § 7924.110(a).) Additionally, they are not open to inspection except to specified public officials or, if a petition is found to be insufficient, by the proponent of the petition in order to determine which signatures were disqualified and the reasons therefor. (*Id.* at (b).) The language in Sections 17301 and 17302 of the Elections Code that require certain records to be sealed except for when there is a contest of an election or a specified criminal prosecution act in a similar manner as Section 7924.110 of the Government Code by essentially making those records not accessible to the public since they are placed under seal, with certain limited exceptions.

¹ Prop. 59 was placed on the ballot by a unanimous vote of both houses of the Legislature. (SCA 1 (Burton, Ch. 1, Stats. 2004).

² Prop. 42 was placed on the ballot by a unanimous vote of both houses of the Legislature. (SCA 3 (Leno, Ch. 123, Stats. 2013).

³ The Ralph M. Brown Act is the open meetings laws that apply to local agencies. (Gov. Code §§ 59450 et. seq.)

The County of Nevada registrar was ordered by a superior court judge to restore the November 2020 archive of the election for the purpose of producing the audit log from the central tabulation system pursuant to a CPRA request, even though there was no elections challenge or a request for a recount of elections results. (*Young v. Diaz* (2023) Nevada County Sup. Ct., Case No. CU0000261.) Pursuant to this order, the county registrar was required to provide cast vote records, audit logs of adjudicated ballots, and ballot tabular tapes. This directly conflicted with the Secretary of State's advice to the county, where they recommended the records not be released for election security purposes. The county registrar was required to open the sealed boxes from the election in order to retrieve the ballot tabular tapes. The court reasoned that since those materials were not expressly included in the provisions of Sections 17301 and 17302 of the Elections Code and the county did not, in the opinion of the court, meet the burden under the "catch all" exception to demonstrate that not disclosing the record clearly outweighs the public interest served by disclosure of the record.

This bill seeks to ensure that conditional voter registration voter identification envelopes, voted conditional voter registration ballots, forms and any machine reports used to account for the ballots delivered to the polling places, and completed forms issued to the counting board and any machine reports used for the 1 percent manual tally will not be subject to a CPRA request and can only be produced if there is an elections challenge or certain specified criminal prosecutions. The bill would also require that these materials and all materials already required to be contained under seal will be destroyed upon the expiration of the five-year retention period. As the SOS has already identified these records as impacting election integrity, making them not subject to public disclosure seems warranted. As the California Constitution requires a statute that limits the public's right of access to be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest, the author may wish to amend the bill to include such findings. (Cal. const. art. I, § 3(b)(1).)

3. This bill seeks to provide a mechanism for an elections official to preserve the sealed records in the case of an emergency

The 2014 earthquake in Napa County damaged some election records and caused the office of the registrar of voters to relocate a mere three months before the 2014 General Election. The bill requires an elections official, in cases where sealed records are damaged or destroyed due to a natural disaster or other unforeseeable and unavoidable circumstances, to take all reasonable steps to prevent election records from being damaged further. If an elections official cannot prevent further damage to election records without inspecting the inside of any damaged packages that are required to be kept unopened and unaltered, the elections official must notify the SOS of the election official's intent to seek a writ of mandate authorizing the official to inspect the inside of the packages and seek that writ. When a writ of mandate is sought it usually requires a petitioner and a respondent. In this case, it is not clear who the respondent would be in such a situation. As the bill already requires the elections official to notify the SOS, the

author may wish to amend the bill to specify that the SOS is to be named as the respondent.

4. Proposed amendments

The specific amendments described above are as follows:⁴

Amendment 1

Section 17504 as added to the Elections Code, is amended to read:

(a) If items that are required to be preserved or kept pursuant to this division are destroyed or damaged due to natural disaster or other unforeseeable and unavoidable circumstances before the end of the applicable retention period, the elections official shall take all reasonable steps to prevent further damage to those items.

(b) If the elections official cannot prevent further damage to election records without inspecting the inside of any damaged packages that are required by this division to be kept unopened and unaltered, the elections official shall do both of the following:

(1) Notify the Secretary of State of the election official's intent to seek a writ of mandate authorizing them to inspect the inside of the packages.

(2) Seek the mandate described in paragraph ~~(1)~~ (1), *which shall name the Secretary of State as respondent.*

Amendment 2

The Legislature finds and declares that Sections 2 and 3 of this act, which amend Sections 17301 and 17302 of the Elections Code, impose a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies within the meaning of Section 3 of Article I of the California Constitution. Pursuant to that constitutional provision, the Legislature makes the following findings to demonstrate the interest protected by this limitation and the need for protecting that interest:

In order ensure election integrity, it is necessary that certain election records are not accessible to the public except when an election is contested or during certain criminal prosecutions.

⁴ The amendments may also include technical, nonsubstantive changes recommended by the Office of Legislative Counsel.

5. Statements in support

The California Association of Clerks and Election Officials Elections Legislative Committee, the sponsor of the bill, write in support stating:

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, your 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.

SUPPORT

California Association of Clerks and Election Officials (sponsor)
California Association of Counties
City Clerks Association of California

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: None known.

PRIOR VOTES

Senate Elections Committee (Ayes 6, Noes 0)
Assembly Floor (Ayes 61, Noes 3)
Assembly Appropriations Committee (Ayes 11, Noes 2)
Assembly Elections Committee (Ayes 7, Noes 0)
