



STATE OF NEW MEXICO

MAGGIE TOULOUSE OLIVER

SECRETARY OF STATE

February 11, 2022

VIA ELECTRONIC MAIL AND U.S. POSTAL SERVICE

Gerald Matherly, Couy Griffin, and Vickie Marquardt
Otero County Commission
1101 New York Avenue
Alamogordo, NM 88310

Re: Otero County Audit of 2020 Election

County Commissioners:

The Office of the New Mexico Secretary of State (“SOS”) is aware that Otero County has contracted with an outside vendor to perform a “forensic audit” of the 2020 General Election. It is the understanding of SOS that this audit may seek to obtain access to SOS protected property, including voting systems, as defined by NMSA 1978, § 1-9-1. SOS asserts that the forty-four (44) tabulators currently in the custody of the Otero County Clerk are SOS property that has been provided to the Otero County Clerk exclusively for the uses statutorily authorized by Section 1-9-5 and Section 1-9-6(A). SOS explicitly prohibits Otero County from providing access in any form to third parties to SOS tabulators currently in the custody of the Otero County Clerk.

Furthermore, there are contractual, state laws, and federal regulations that restrict access to tabulators to unauthorized individuals. SOS-owned tabulators are designated as federally protected critical infrastructure and shall be protected from the public domain, damage, and unauthorized intrusion. 6 CFR Part 29.8 and 6 U.S.C.A. § 671. It would be a violation of federal law to allow third party access to critical infrastructure. Outside of voting and canvassing periods, access to tabulators is restricted to authorized individuals of SOS or the tabulator vendor only. Additionally, tabulators themselves are not public records subject to inspection under IPRA as they are not public records.

Should Otero County provide unauthorized access to SOS-owned tabulators to an unauthorized third-party, the SOS will take physical control of the tabulators and, as owners of said property, pursue all remedies available at law. SOS will also decertify those tabulators, as authorized to do by NMSA 1978, Section 1-9-7.4, and we will seek damages and any costs associated with the acquisition and certification of additional tabulators from Otero County.

The Election Code provides for criminal penalties for opening of a voting machine, possessing keys to a voting machine, and for general violations of the Election Code by officers and other individuals. §§ 1-20-5 to 1-20-6, and 1-20-22 through 1-20-23. All these violations are potentially implicated by unauthorized third-party access to tabulators which has been requested. We will

refer any criminal violations of the Election Code immediately to the New Mexico Attorney General.

Our office remains committed to free and fair elections in New Mexico, and again asserts that Otero County is prohibited from providing access to any tabulators currently in the custody of the Otero County Clerk to outside parties not authorized by law or SOS. If you have further questions or concerns regarding this matter, please contact elections@state.nm.us, or call the office directly at (505) 827-3600.

Respectfully,

A handwritten signature in black ink that reads "Dylan K. Lange". The signature is written in a cursive, flowing style.

Dylan K. Lange
General Counsel

cc: Robyn Holmes, Otero County Clerk
RB Nichols, Otero County Attorney