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SENT VIA EMAIL ONLY

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Re: Response to Follow-up Questions, Town of Windham Election Results

Attorney Campbell:

Thank you to the Town of Windham and the responding officials for the follow-up response letter of October 12, 2021, after our letter of September 1, 2021. We write again to provide additional analysis and conclusions.

Unfortunately, it appears that some town officials are still critical of the State recount and describe it inaccurately, including in testimony to the Ballot Law Commission. It is important to clarify that the results of the State's November recount were nearly identical to the results of the forensic audit. The total difference between the State's recount and the forensic audit was five votes out of more than 10,000. The State recount was conducted according to long-used and long-proven protocols and returned a result consistent with that of the forensic audit.

Windham's election night results were not just imprecise, they were fundamentally flawed. For an exhaustive review, please see the report of the forensic audit team. But simply put, town election officials cut corners. Some of those shortcuts created errors—such as using an uncalibrated folding machine—which were unintentional and perhaps unforeseeable, but ultimately resulted in ballots not being accurately counted. Other errors, such as the use of only six test ballots instead of the recommended fifty, ignored legal obligations and are of continuing concern as they are indicative of an election that was not executed to the standard of the law or expectations of voters.

We appreciate the historic challenges election officials faced during the November 2020 election, in particular, conducting the election during a pandemic and

managing a significant increase in the number of absentee ballots cast presented unique challenges. At the same time, we are under a statutory obligation to ensure an appropriate response where election returns have significant deficiencies. The importance of every qualified voter being able to cast a ballot that is accurately counted makes it essential that the officials who conduct an election comply with the requirements of law, which are intended to ensure all lawfully submitted ballots are cast and accurately counted. Through the CARES Act grants, distribution of Personal Protective Equipment, specialized training, and other efforts, the State provided significant additional resources to the towns and cities to help address these added challenges. To fulfill our duties to protect and honor the right to vote, it is essential that we meet such exceptional challenges with exceptional effort that ensures elections are conducted in full compliance with the law. We detail our conclusions in the following sections.

Absentee Ballots Not Counted – Rejections

The Forensic Audit Report and the November 2020 Ballot Law Commission hearing related to the Windham election and recount identified absentee ballot envelopes that likely contained marked absentee ballots that were not counted, but on their face appeared improperly rejected.

However, three voted ballots were found in opened affidavit envelopes. Under New Hampshire election procedures, absentee ballots that are challenged and rejected are retained in their unopened affidavit envelopes. (A total of 71 rejected ballots were found in box #1.) We therefore tentatively conclude that these ballots were accepted but never recorded, cast, or counted. This is an unfortunate procedural failure.

New Hampshire SB 43 Forensic Audit Report, page 78-79.

The November 2020 Ballot Law Commission hearing on the Windham recount included an examination of rejected absentee ballot envelopes. That examination indicated a number of absentee ballots where the rejection reason was “no affidavit or no signature.” However, there was an affidavit and/or signature visible on the ballot envelopes, raising doubt as to the validity of the rejection.

<u>Transcript Page</u>	<u>Reason</u>	<u>Observation</u>
103 – line 13	Rejected, no affidavit	Envelope contained signed affidavit
105 – line 6	Rejected, no affidavit	Envelope contained signed affidavit
108 – line 16	Rejected, no affidavit	Envelope contained signed affidavit

Insufficient evidence is available to conclude that each of these absentee ballots should have been cast and counted. However, the available evidence on its face supports a conclusion that these absentee ballots were not properly processed. If any were properly rejected, the documentation of why a rejection occurred was not accurate or complete.

The moderator has a duty to accurately count all legally submitted ballots. "If any moderator shall intentionally neglect to cause an accurate count to be made of the votes cast as required by law, for which no other penalty is provided, he or she shall be guilty of a violation." RSA 659:77, I. See also RSA 659:47 to RSA 659:55, Processing Absentee Ballots and EPM pages 146 to 151, stating the law and best practices for processing absentee ballots. There is no evidence that the inaccurate count was the result of intentional acts.

Ballot Counting Device – Pre-Election Test Procedures

In Windham's October 12, 2021, letter, the Windham town clerk reported that six ballots were used in the pre-election test of the Ballot Counting Device. Windham provided a PDF scan of the six test ballots.

RSA 656:42, the Electronic Ballot Counting Devices, Rules statute provides in pertinent part:

The town or city clerk shall mark the test ballots in such a way as to demonstrate a vote for each candidate on at least one test ballot, as well as votes for less than and more than the number of candidates that may be voted for an office, write-ins, multiple votes for a candidate who appears in more than one party column for the same office on a general election ballot, and ballots on which there are no votes. **The clerk shall mark as many as possible of the combinations of choices that a voter may indicate on the ballot.**

RSA 656:42, VIII, e(4)(emphasis added). The mandate that the clerk mark "as many as possible of the combinations of choices," if fully applied, would require a very large test deck. To provide both reasonable testing rigor and to keep the device testing manageable, the Secretary of State issues 50 ballots for testing purposes. The Secretary of State's guidance recommends using all 50 ballots. A properly conducted test with 50 ballots, each put through the ballot counting device 4 times, simulates the counting of 200 ballots.

The Windham ballot counting device test did not fulfill statutory requirements.

RSA 656:42, VIII, e (4), explicitly requires marking "votes for less than and more than the number of candidates that may be voted for an office"

- Of the 13 races on the ballot, only the Executive Council race had a test ballot marked for “more than the number of candidates that may be voted for.” The test did not test whether the device properly tabulated overvotes in the other 12 races.
- The State Representative race was a “vote for no more than 4.” That is, a voter could vote for 1, 2, 3, or 4 candidates. The test deck had 1 ballot where no candidate was selected, but failed to have ballots testing the device for circumstances where the voter voted for only 2 or only 3 candidates. A test deck that marks “as many as possible of the combinations of choices that a voter may indicate on the ballot” would have ballots testing these combinations.

RSA 656:42, VIII, e (5) explicitly requires that “[t]he town or city clerk shall run each of the test ballots through the counting device in the following orientations: Top first with side one face up, bottom first with side one face up, top first with side one face down, and bottom first with side one face down.” (Emphasis added.)

In our prior correspondence we asked Windham town officials: “How many times was each test ballot run through each device? (Were they systematically put through at least four times, ensuring that each ballot went through at least once in each orientation?)”

Windham officials replied: “For the test of each of the 7 memory cards, the 6 test ballots were run through the counting device once. They were inserted in all orientations. The memory cards marked Precinct 1, 2, and 3 were tested and used in Machines 1, 2, and 3 respectively. Memory card labeled “Spare Machine ID 1” was tested and used in the School Machine.”

Windham officials provided documentation of the hand count of the test ballots. See Test Handcount – Attachment X. That document shows 6 votes cast in each “vote for no more than 1” race with no indication that those results would be multiplied by 4 (for the 4 different times each ballot was inserted).

Windham officials provided a scan of the test result tapes from the Accuvote. Each tape reports 6 ballots counted. If RSA 656:42, VIII, e (5) were complied with using a test deck of 6 ballots, a total of 24 ballots would have been reported.

Windham officials’ procedure of inserting each test ballot only one time in a ballot counting device fails to effectively test that device’s ability to count a ballot regardless of the orientation of the ballot when inserted. That one of the device/memory card combinations counted the ballot in each orientation does not mean that each device was tested with each ballot in all four orientations. This procedure of using a test ballot only one time in each device diminishes the total ballots counted, in effect the test was 25% of the testing required by law.

One purpose of testing is to provide evidence that a ballot counting device has not been "hacked," and does not have malicious programming that changes a vote for one candidate to a vote for a different candidate one time out of some set number of votes. Election cybersecurity experts theorize that were a device hacked to change a vote for one candidate to a vote for a different candidate on every ballot, zero votes for a competitive candidate would make the hack obvious. Therefore, the experts theorize that a hack is more likely to change only one of every x number of ballots voted for a candidate to a vote for the opponent. For example, changing only the 20th or 30th ballot. Using 50 test ballots, each cast 4 times (once in each orientation) effectively results in a test of 200 ballots. Particularly, in a vote for one race with only two candidates, the test results provide evidence that this type of hack or mis-programming has not occurred.

The use of 6 test ballots, each of which was only counted one time by a device, not only violates state law, but it also fails to provide the evidence that the device counts accurately as called for by the law.

Windham officials provided the LHS pretesting instructions to our Offices. Those instructions state, in pertinent part, "Following your state guidelines for testing . . ." then list minimal detail on how test ballots should be marked. The list alone does not completely address the requirements of New Hampshire law.

Windham officials provided the "Testing of ACCUVOTE Electronic Ballot Counting Device" document sent to clerks by the Secretary of State at each election, indicating that Windham officials had followed these instructions. That document cites RSA 654:42, VIII, drawing attention to section 8 (e), which requires that the test "shall be completed no later than the Wednesday immediately prior to the election." In pertinent part, the instructions state:

2. Fifty (50) extra ballots are being sent with your official ballots for use in testing the devices. Remove them from the box of ballots and keep them separate and secure from the remaining official ballots.

Note: AVS test ballots. Use three of the extra ballots to test your AVS tablet and printer. Make sure you follow the full AVS instructions (found in Help>Instructions) for set up.
(The test ballots for the AVS do not get marked by clerk as indicated in steps 4-7 below)."

The instructions follow the language of RSA 654:42, VIII, including, "The clerk shall mark as many as possible of the combinations of choices that a voter may indicate on the ballot" in paragraph 4.

Paragraph 6 instructs, "Hand count the votes marked on the test ballots that are run through the electronic ballot counting device and multiply the results by 4 to account for the 4 different orientations."

The Election Procedure Manual ("EPM") also addresses Ballot Counting Device testing. "Extra ballots are supplied to towns that use AccuVote electronic ballot counting devices. These ballots must be used to test the devices for accuracy in tabulating votes. See instructions for security and testing electronic ballot counting devices at page 316. RSA 656:42, VII and VIII." Page 78 (2020-2021 ed).

In the November 2020 General Election, Windham officials did not follow all of the necessary instructions and statutory requirements.

Moderator

In the "Duties of Moderators" chapter, the EPM states: "Certify that all electronic ballot counting devices and memory cards passed testing requirements and deposit evidence of testing in the front pocket of the canvas bag for the device." "Do not put a ballot counting device into use that has not been properly tested or which is not properly sealed." Page 135 (2020-2021 ed.). The Duties of Moderator's Checklist of Responsibilities repeat these requirements of the law. Page 163 (2020-2021 ed.).

Pages 316 through 319 in the EPM provide a detailed guide to "Electronic Ballot Counting Device Procedures." Those testing instructions explicitly state "the Secretary of State recommends fifty ballots per election," and "[t]he clerk shall run each of the test ballots through the counting device in the following orientations: Top First with side one face up, Bottom First with side one face up, Top first with side one face down, Bottom first with side one face down." Page 318 (2020-2021 ed.).

The "Election Day – Moderator" section reiterates the duty of the moderator to "certify that there is evidence at the polling place that pre-election testing was conducted on each electronic ballot counting device and each memory card in the clerk's possession, and that these devices and cards have passed the test." Page 319 (2020-2021 ed.).

RSA 656:42, VIII, e (11) explicitly requires: "Prior to placing the electronic ballot counting device or any memory device into service in an election, the moderator shall certify that there is evidence that pre-election testing was conducted on each electronic ballot counting device and each memory device in the town or city clerk's possession, and that these ballot counting devices and memory devices have passed the test."

Windham's moderator should have detected the failure of the testing to comply with New Hampshire law either by being present at the testing or by examining the record of the test. New Hampshire law imposes a duty on the moderator to ensure that the testing complied with state law prior to using the device at an election.

Ballot storage box sealing and storage boxes

RSA 659:95, Sealing and Certifying Ballots provides:

Immediately after the ballots cast at a state election have been tabulated and the result has been announced and the return has been made, the moderator or the moderator's designee, in the presence of the selectmen or their designee, shall place the cast, cancelled, and uncast ballots, including such ballots from any additional polling places, and further including the successfully challenged and rejected absentee ballots still contained in their envelopes, **in the containers provided by the secretary of state as required by RSA 659:97 and shall seal such container with the sealer provided by the secretary of state as required by RSA 659:97.** The moderator or the moderator's designee shall then enter in the appropriate blanks on such sealer on each container the number of cast, cancelled, and uncast ballots in such container and shall endorse in the appropriate place on such sealer a certificate in substance as follows: Enclosed are the ballots from the state election in the town of _____ (or in ward _____ in the city of _____) held on _____, 20____, Box _____ of _____, to be preserved in accordance with RSA 33-A:3-a. **The moderator and the selectmen or their designee shall sign their names in the appropriate blanks on the sealer.**

RSA 659:95, I (emphasis added). See also RSA 659:22, preserving spoiled ballots, RSA 659:51, III, preserving unopened envelopes of successfully challenged absentee ballots, RSA 659:52, preserving affidavit envelope of cast absentee ballots, RSA 659:53, preserving successfully challenged unopened absentee envelopes, RSA 659:101, preserving absentee ballot affidavits, applications forms, and absentee ballots challenged and rejected.

RSA 659:97 provides:

The secretary of state shall, before any state election, prepare and distribute to each town and ward clerk containers to be used for preserving ballots and sealers to seal each such container. He shall prepare special containers and sealers to be used for preserving any special and separate ballots for questions to voters. The secretary of state shall prescribe the size and form of such

containers and sealers and shall prescribe the form of any endorsement blank printed upon the sealers, provided that the blank is in substance consistent with the provisions of RSA 659:95.

Starting in 2020, the Secretary of State prepared and distributed ballot storage boxes to each town and city printed with different color labels. Boxes with a red label, "New Hampshire Ballots," were provided for cast ballots, uncast – blank ballots, and canceled – spoiled ballots. Boxes with a blue label, "New Hampshire Absentee Voting Materials," were provided for absentee ballot materials. The Secretary of State's records indicate that Windham was provided with empty ballot storage boxes—18 of the red label boxes and 18 of the blue label boxes. This was in addition to approximately 7 shipping boxes with red labels used to ship the printed ballots to Windham.

Windham provided the Secretary of State's office with ballots and absentee voting materials in non-standard boxes. When asked about the use of non-standard boxes, Windham responded: "The red and blue ink labeled additional storage boxes from the Secretary of State did not arrive until after Election Day and were not used for that reason." However, a supply of statutory boxes was shipped to Windham. United Parcel Service records indicate the final delivery of storage boxes was received by Windham on Friday October 30, 2020, 3 days before the November 3, 2020 General Election.

An examination of the seals used on the boxes of ballots and absentee materials picked up from Windham for the recount shows:

1. In the area of the label, required by statute, that states "Box _____ of _____."
 - 2 were labeled with 1 in the box number position
 - 2 were labeled 2 in the box number position
 - 2 were labeled 3 in the box number position
 - 2 were labeled 4 in the box number position
 - 2 were labeled 5 in the box number position
 - 2 were labeled 6 in the box number position
 - 2 were labeled 7 in the box number position
 - 2 were labeled 8 in the box number position
 - 2 were labeled 9 in the box number position
 - 2 were labeled 10 in the box number position
 - 1 was labeled 11 in the box number position
 - 1 was labeled 12 in the box number position
 - 3 had no entry in the spot for the total number of boxes;
 - 5 were labeled of 11 boxes
 - 8 were labeled of 12 boxes
 - 10 were labeled of 16 boxes

The statutory requirement that the moderator and selectmen complete the label using a "box x of y boxes" is intended to ensure a clear record of how many boxes are being transferred from the town to the State. Each box should have a box number that is unique in the first position and the same number for the total number of boxes in the second position. Windham failed to comply with this statutory requirement.

The Secretary of State ultimately took possession of 26 boxes. As is addressed below, the Secretary of State received a box containing rejected absentee ballots on November 20, 2020.

- 17 of the 26 boxes had the seal required by law. 3 boxes had no seal. 6 boxes had a seal that is properly used by the clerk when re-sealing boxes of ballots, when the ballots are checked immediately after the ballots are received by the clerk. Windham had noted that it ran out of the proper seals to use on election night.
- 13 of the boxes were not the State issued storage boxes required by RSA 659:95.
- 19 of the box seals were not signed by the moderator (includes 3 boxes with no seal).
- 7 of the box seals were not signed by the clerk (includes 2 boxes with no seal). Security tape covering the clerk's signature line on one box made it impossible to determine if the clerk signed.
- 4 of the box seals were not signed by a selectman on the first line for a selectman's signature (includes 3 boxes with no seal).
- 4 of the box seals were not signed by a selectman on the second line for a selectman's signature (includes 3 boxes with no seal).
- 5 of the box seals were not signed by a selectman on the third line for a selectman's signature (includes 3 boxes with no seal).
- 6 of the box seals were not signed by a selectman on the fourth line for a selectman's signature (includes 3 boxes with no seal).
- 10 of the box seals were not signed by a selectman on the fifth line for a selectman's signature (includes 3 boxes with no seal).

RSA 659:95 does not require a specific number of selectmen's signatures, only that the selectmen or their designee sign each seal.

Rejected Absentee Ballot Envelopes

RSA 659:95 explicitly requires that "the successfully challenged and rejected absentee ballots still contained in their envelopes," in possession of election officials on election day, be sealed in boxes in the same manner as the cast, canceled, and uncast ballots. The Secretary of State's staff have a standard procedure of requesting all boxes of ballots and absentee ballot materials from the clerk when picking up ballots for a recount.

Windham did not provide the box containing rejected absentee ballots to the Secretary of State's staff when the ballots were picked up for the recount. That box was later delivered to the State Archives by the deputy moderator, on November 20, 2020, when a public session was held to allow interested members of the public to view the envelopes. Windham explained that because absentee ballot envelopes are routinely received following election day, which by law must be rejected as being received too late to count, the clerk held all rejected absentee ballot envelopes in order to box all of them together.

Windham's procedure did not comply with RSA 659:95. Proper procedure is to box and seal all rejected absentee ballot envelopes in the possession of election officials on election day. That sealed box should be kept with all other sealed boxes of ballots and turned over to the Secretary of State if a pickup for a recount occurs. Absentee ballot envelopes received after election day should be separately boxed and ultimately kept in a sealed box with the other ballots from the election.

Conclusion

The failure to comply with legal obligations, coupled with an election return submitted with significant defects, has consequences. RSA 659:77, III. General Neglect by Town or Ward Moderator and Clerk, states:

If a return of votes is not timely submitted or is submitted with significant defects, if a recount discloses that the election night vote count was significantly inaccurate, or if other significant deficiencies in the conduct of an election are documented the secretary of state shall report the same to the attorney general. Upon a finding by the attorney general that the late submission, miscount, or other significant deficiency was due to lack of training, lack of established procedures, negligence, or misconduct, the secretary of state in consultation with the attorney general shall appoint an election monitor who shall be an individual trained in the conduct of elections and who shall attend portions of the ballot casting and all of the ballot counting to monitor the next election conducted in that town or ward.

RSA 659:77, III.

As a result of the concerns and shortcomings described in this and our prior correspondences, the Attorney General makes a finding that the November 2020 General Election returns from Windham had significant deficiencies that were due to a lack of training and a lack of compliance with established procedures. The Secretary of State, in consultation with the Attorney General, will be appointing an election monitor for the next election, the September 13, 2022, primary election.

Please feel free to contact us should you have any questions. Thank you.

Sincerely,



William M. Gardner
Secretary of State



John M. Formella
Attorney General

cc: Town of Windham, Board of Selectmen
Peter Griffin, Windham Town Moderator
Elizabeth Dunn, Windham Town Deputy Moderator
Nicole Merrill, Windham Town Clerk