

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

GORDON J. MACDONALD
ATTORNEY GENERAL



JANE E. YOUNG
DEPUTY ATTORNEY GENERAL

January 5, 2020

Bernard Campbell, Esq.
Town of Windham
1 Stiles Road, Suite 107
Salem, NH 03079

Re: Town of Windham Election Results (2020146288)

Dear Attorney Campbell:

New Hampshire has a long-standing tradition of well-run, public, open, and transparent elections and that tradition was on full view during the 2020 General Election. And, in accordance with Part II, Article 32 of the New Hampshire Constitution, all of our record-breaking number of ballots were received and publicly counted. On Election Day, the New Hampshire Attorney General's Office had more than 100 State employees inspect or monitor more than 99% of the State's polling places, including Windham's. We fielded more than 275 calls and emails on our Election Day hotline to make sure that all voters qualified to vote were able to vote. Since Election Day, we have responded to numerous, additional emails and calls providing detailed information to voters who were concerned about whether their ballots were cast and counted, or who raised issues about their polling places or the election itself.

Many of the concerns raised in emails after the Election related to the ballot counting devices currently in the news in other states. Those devices are different than the ones used in New Hampshire. The AccuVote optical scanner used in New Hampshire is older technology. The device is used only to count paper ballots at a polling place; it is not used in the canvas or aggregation of votes from multiple polling places. Each moderator uses the device's results tape as part of the election night count of ballots, adding the votes from any hand counted ballots to the device totals. The aggregated results are then reported to the public at the polling place on election night and recorded on a paper "Return of Votes" form, completed by the clerk. The New Hampshire State Police transport the paper Return of Votes forms to the Secretary of State's office in Concord.

The AccuVote devices have been in use in New Hampshire for over 25 years and are approved by the New Hampshire Ballot Law Commission. The device was originally manufactured by Unisys, then by Global Elections Systems, Inc., which are no longer in business. The device used in New Hampshire is no longer being manufactured. Dominion owns

the intellectual property of the AccuVote and its related elections management system, but does not manufacture the device.

The AccuVote device's memory cards are programmed in advance of the election and local election officials are required to test each device using marked test ballots. Local officials can use the device at an election only if the test shows that the device is programmed properly and accurately counts the test ballots which are separately hand counted as confirmation of each device's results.

After the 2020 General Election, New Hampshire conducted 16 recounts of election night results. A recount is done entirely by people, assigned by the Secretary of State, who count each ballot by hand. Recounts provide the opportunity to compare the ballot counting devices' results to carefully conducted recounts of each ballot by teams of people. The Secretary of State does not use a ballot counting device at the recounts. Decades of recount results confirm the accuracy and reliability of the ballot counting devices in use at the 2020 General Election. And, the 2020 General Election recounts were no different.

On November 12, 2020, the Secretary of State's Office conducted a recount of the State Representative – Rockingham District 7 race. This was the race involving Windham.

The Secretary of State conducted the recount using a process that was fully transparent. Each candidate had the opportunity, directly or through their representatives, to see each ballot as it was counted and to see the tally sheet on which each vote was recorded. A system using a document camera projected onto two monitor screens allowed the candidate's observers to view both the ballot that was being counted and the tally sheet that was being marked for each vote. Any candidate or representative could stop the counting process at any moment if he or she had a concern that the ballot was not being accurately counted or that the tally sheet was not being accurately marked to reflect vote observed on the ballot.

Counting teams first separated the ballots into three groups. All ballots where the voter voted for all four Democratic candidates were put into one pile. There were 2,447 ballots where the voter voted for all four Democratic candidates. All ballots where the voter voted for all four Republican candidates were put into a second pile. There were 4,038 ballots where the voter voted for all four Republican candidates. The remaining ballots, where the voter voted for one or more candidates from both parties and/or did not mark four candidates (under voted), were put into a third pile.

The number of ballots that were exclusively for all the candidates from one party (straights) were counted. That total number of ballots was added to the tally of votes for each candidate from that party.

The pile of ballots where the voter either marked less than four choices or voted for one or more candidates from different parties were then counted with one counting team member reading off the name of each candidate who received a vote and a second making a harsh mark on a tally sheet under the name of that candidate for each vote.

Upon completion of this process, the tally sheets from each team were added together. The results was:

District No. 7 (4)	Soti, r	Griffin, r	Lynn, r	McMahon, r		
Windham	4,480	5,292	4,786	5,256		
Recount	4,777	5,591	5,089	5,554		
District No. 7	St.Laurent, d	Azibert, d	Roman, d	Singureanu, d		Scatter
Windham	4,456	2,787	3,415	2,764		19
Recount	4,357	2,808	3,443	2,782		

Following the recount, there was no change in winners.

On November 19, 2020, this Office received your letter, on behalf of the Town of Windham, requesting “an opportunity to re-canvass the votes, using the Town’s Election equipment if necessary, conduct another recount by hand, including all the data required to verify the total number of votes cast.”

On November 30, 2020, this Office also received the decision by the Ballot Law Commission on an appeal filed by state representative candidate, Kristi St. Laurent. The Ballot Law Commission (BLC) met on November 23, 2020, to consider Ms. St. Laurent’s appeal, during which, she stated that her request was that the BLC request the Attorney General’s Office “conduct a general review and investigation of the machines and conduct of the election.” The BLC also heard testimony from Windham Moderator Peter Griffin, and Assistant Moderator Elizabeth Dunn.

The BLC voted unanimously to uphold the results of the recount of the Town of Windham’s ballots. In addition, the BLC noted there was no allegation of wrong-doing or fraud. However, the BLC requested the Attorney General “review the operation of the voting machines in Windham, and conduct a general review of the conduct of the election, to see if it can determine the reasons for the unusual variation between the machine and hand counts.”

As a preliminary matter, there is no statutory authority for the Attorney General’s Office to conduct an audit of the ballot counting devices where there is no basis to suspect an election law violation. This Office similarly cannot authorize election officials to conduct an independent re-canvass of the 2020 General Election ballots as requested by the Windham officials. Further, the Ballot Law Commission, as it recognized in its order, does not have the legal authority to require an audit of an election, either of the ballot counting devices or the ballots themselves, except those specifically challenged as part of a recount appeal. In fact, New Hampshire’s law prescribes a specific process for the recounts (Chapter 660), the appeal of a recount to the BLC (Chapter 665), and the appeal to the Supreme Court of the BLC’s decision (RSA 665:16). No appeal was taken to the Supreme Court related to the Windham recount.

You have proposed a “re-canvass” and others have raised conducting an “audit.” New Hampshire’s election law currently does not use the term “audit” in the context of any post-election procedure applicable to these circumstances. To the extent that a “re-canvas” or “audit” might involve recounting the Windham ballots, the law explicitly prohibits more than one recount. “In no event shall a discrepancy result in a second recount for the same candidate, as

provided in RSA 660:3.” RSA 660:5. See also RSA 660:3. “In no case may the ballot law commission order a second recount.” RSA 665:8 I and II.

However, the Attorney General does have general authority to uphold the election laws and to provide training to election officials, in conjunction with the Secretary of State’s Office, on compliance with proper procedures for reviewing how the election was conducted, counting ballots, reporting election results, and performing recounts. That review can include working with local election officials to implement or refine their protocols and procedures.

Given your request for our Office to complete a review Windham’s election process, it is necessary to first understand the conduct of Windham’s election officials in preparation for and on Election Day. As a result, this Office is requesting the Town of Windham election officials prepare a written report explaining in detail, but not limited to, the following matters:

- How Town election officials managed Windham’s ballot counting devices prior to the election. (*i.e.* Copy of the Canvas Bag - Electronic Ballot Counting Device Activity Log, Counting Device - Ballot Counting Device Activity Log, Memory Card Bar Slot - Ballot Counting Device Activity Log, Memory Card Storage & EBCD Access to Storage Area Log. How were the devices tested? The training of the individuals who tested and set up the devices? Information on any contact with LHS regarding concerns with the devices – either before or after the election? Please provide copies of all documents used in the pre-election testing of the devices and the results of those tests.)
- How Town election officials managed Windham’s ballot counting devices on Election Day (*i.e.* Who supervised the devices? How often were the devices emptied of processed ballots? How were counted ballots maintained in comparison to the ballots that required hand counting at the end of the night? Where were the ballots located once they were removed from the devices?)
- Copies of Windham’s long report of the result tapes for all its ballot counting devices used during the November 3, 2020 General Election.
- Did the ballot diverter function operate correctly on each of Windham’s ballot counting devices? If yes, for those ballots that were deflected into the hand count compartment of the ballot counting device, how were these ballots stored and tracked prior to the hand count?
- A description of the election night counting process, including applicable hand counting processes as well as recording of the device counts. (What number of people assisted in the counting? Were new teams of people who had not been working the polls all day brought in to do the hand counting? How many ballots were hand counted? Where were these ballots stored after the count was completed? How were the hand count ballots separated? How were the counting teams set up? How were vote tallies recorded? Who was involved in the aggregation of results from hand count totals and ballot counting device result tapes?)

- A description of the reconciliation process, including copies of the worksheets used by officials to tally and ultimately complete the "Return of Votes" form submitted to the Secretary of State's Office.
- We request that Windham continue to preserve the primary and back-up memory cards programmed for the November general election. We understand this will require you to work with LHS to obtain substitute memory cards for programming your Spring 2021 town election.

We understand that we are requesting a significant amount of information and appreciate your cooperation in providing it so that we can respond to your request for our review of your process.

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

Sincerely,



Nicholas A. Chong Yen
Assistant Attorney General
Election Law Unit
(603) 271-3650
Nicholas.ChongYen@doj.nh.gov



Orville B. Fitch, II
Assistant Secretary of State
Secretary of State's Office
(603) 271-5335
Orville.Fitch@sos.nh.gov

cc: Ballot Law Commission