

GARDNER DIGEST

09/09/06

(attorney objections and comments omitted)

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DISTRICT COURT DENVER COUNTY

CASE NO. 06CV6072

DEPOSITION OF: JOHN H. GARDNER, JR. - VOLUME I

EXAMINATION DATE: August 29, 2006

MYRIAH SULLIVAN CONROY, et al.,

Plaintiffs,

v.

GINNETTE DENNIS, et al.,

Defendants.

PURSUANT TO THE SECOND AMENDED NOTICE, the deposition of JOHN H. GARDNER, JR., Volume I, was taken at 9:0A.m., on August 29, 2006, at 1801 California Street, Suite 3600, Denver, Colorado 80202, before Patricia S. Newton,

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JOHN H. GARDNER, JR.

The deponent herein, being first duly sworn to testify to the truth in the above cause, was examined and testified on his oath as follows:

EXAMINATION BY MR. HULTIN:

Q Please state your name and address for the record.

A My name is John Gardner. I live at 502 Spring Creek Court in Colorado Springs, Colorado.

Gardner John; 08/29/06 - Page 6:25 - 7:9

Q Mr. Gardner, are you the person who was in charge of writing the certification standards and procedures for electronic voting systems that are embodied in Election Rule 45?

A Yes.

Q Are you the person who wrote Election Rule 45.5.2, which established the minimum standards for electronic voting systems as required by Colorado Revised Statutes Section 1-5-616(1)(a) through (g)?

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A Yes, with advice from my superiors.

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Gardner John, 08/29/06 – Page 8:7-21

Q Are you the, quote, expert, closed quote, appointed by the Secretary pursuant to Section 1-5-617(2) to assist in the examination and testing of the four electronic voting systems that are challenged in this case which we will be referring to generally as the subject DREs?

A Yes, I believe so.

Q Did you personally examine each of the subject DREs and advise the Secretary that all of the mandatory requirements of Title 1, Parts 6, 7, and 8 of the Colorado statutes and the Election Rules of the Colorado Secretary of State were satisfied in that each of the subject DREs should be certified?

Gardner John; 08/29/06 - Page 8:24 - 9:16

A. Okay. I presented a recommendation, and some of those recommendations had certain conditions to the Secretary.

Q (BY MR. HULTIN) So you recommended, subject to certain conditions, that each of the subject DREs satisfied all of the requirements of Colorado law, Colorado statutes, and the election rule that you drafted?

A Yes, with the exceptions as noted.

Q As noted in the certification qualification reports?

A Correct.

Q And I take it, then, based on your expert examination and your recommendations, that the Secretary did so certify each of the subject DREs?

A Yes.

Gardner John; 08/29/06 - Page 17:21 - 18:10

Q And then I take it you went to the University of Miami in Coral Gables, Florida, for two years and studied architecture; is that correct?

A Yes.

Q And then you transferred to Montana State University in Bozeman, Montana; is that correct?

A Yes.

Q And when did you graduate from Montana State?

A 1994.

Q So it took you seven years to complete your undergraduate degree?

A Yes.

Gardner John; 08/29/06 - Page 20:15-21

Q While you were in college, did you take any courses in computer science?

A No.

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Q Since you've graduated from college, did you take -- have you taken any technical courses in computer science?

A Not in computer science, no.

Gardner John; 08/29/06 - Page 21:9-20

Q Are you a computer programmer?

A No.

Q Other than the Executrain Microsoft certification, do you have any other training in information technology?

A I don't believe so, no.

Q Do you have any technical training in computer security?

A Not to my knowledge, no.

Q Do you have any technical training in the evaluation of computer systems?

A I don't believe so.

Gardner John; 08/29/06 - Page 22:9-14

Q So your real-world experience would have been whatever you learned as the director of information systems for The Larson Group and the information systems manager for El Paso County; is that correct?

A Yes.

Gardner John; 08/29/06 - Page 23:17-19

Q And how many employees did The Larson Group have while you were employed there?

A As low as seven and as high as 50.

Gardner John; 08/29/06 - Page 24:2325

Q And what was your position in El Paso County?

A Information systems manager.

Gardner John; 08/29/06 - Page 43:3-20

Q (BY MR. HULTIN) Okay. Have you ever published any papers involving electronic voting systems or electronic voting-systems security?

A No.

Q Have you ever spoken in any public forums other than in connection with your job for the Secretary of State on issues pertaining to electronic voting systems and electronic voting-systems technology and security?

A No, I have not.

Q So I guess it would be -- Would it be fair to say, Mr. Gardner, that you have no formal academic training involving electronic -- rather, computer science, computer programming, or the evaluation and security of data-processing systems?

Gardner John; 08/29/06 - Page 43:24 - 44:10

A I believe that is correct.

Q (BY MR. HULTIN) And all of your expertise, to the extent that you possess expertise, would have been expertise that you gained while working for The Larson Group and El Paso County prior to your employment by the Secretary of State?

A Yes, that is correct.

Q Have you ever been qualified as an expert in any court or administrative proceeding?

A I don't believe so, no.

Gardner John; 08/29/06 - Page 46:23 - 47:1

Q And that's Rule 45, right?

A Yes.

Q And that's the rule that you wrote?

Gardner John; 08/29/06 - Page 47:5-6

Q (BY MR. HULTIN) You were the principal --

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scrivener of that?

A That is true, yes.

Gardner John; 08/29/06 - Page 51:23 - 53:5

Q (BY MR. HULTIN) Mr. Gardner, could you please explain why you were qualified by education, training, or experience to write the minimum standards for electronic and electro-mechanical voting systems regarding functional requirements, performance levels, physical and design characteristics, documentation requirements, evaluation criteria, audit capacity, security requirements, telecommunications requirements, and accessibility?

A Sure. My experience is really what's dictating the ability to know how these systems are used in a -- a real voting environment where -- where the machine will be used. So having the understanding of how the machines are set up, what kind of environment that should be in, how the machines are deployed, and the situations around that, how the judges operate the machines, what's required at the end of election day, what information comes back, having that perspective of the full scope of the election process assists with the ability to

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understand what is required in a voting system not only from a computer perspective, but probably more importantly from the state's perspective, of the -- the election environment that is in use.

Q So your answer is really your experience in El Paso County?

A Yes.

Q Is this the first time you've ever written any standards or regulations?

A Yes.

Gardner John; 08/29/06 - Page 53:22 - 54:6

Q And I believe you testified earlier that you are the expert appointed by the Secretary of State to do this work, correct?

A I believe that is true.

Q Are you the person that produced the written report on each system?

A Yes.

Q And those are the reports that were produced dated May 30 of 2006?

A Yes, that's correct.

Gardner John; 08/29/06 - Page 54:15-22

Q Now, you're not an expert in mechanical engineering, are you?

A I don't believe so.

Q And you're not an expert in public administration, are you?

A I am not familiar with the definition of "public administration." I don't know what that means.

Gardner John; 08/29/06 - Page 55:5-8

Q Are you an expert in data processing?

A Same thing: I don't know what that definition is for "data processing."

Gardner John; 08/29/06 - Page 55:25 - 56:18

Q (BY MR. HULTIN) But you are the expert that was appointed by the Secretary of State pursuant to this Section 1-5-617(2) to assist in the examination and testing of the subject DREs, correct?

A Yes, I believe so.

Q Okay. So you must be an expert in something, correct?

A I would believe so.

Q And what is it -- what is your claim to expertise, Mr. Gardner?

A I don't believe I claim an expertise. My experience is what it is, and I was brought on by the Secretary of State's office as the expert. I don't know which of the two outstanding

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areas they are claiming I am an expert in. I just don't -- I don't want to speak to what the definition is since I'm not really sure.

Gardner John; 08/29/06 - Page 56:22 - 57:1

Q Do you, as you sit here today, believe you are an expert in data processing?

A I wouldn't lean that way.

Q So you are saying you are not an expert in data processing?

Gardner John; 08/29/06 - Page 57:7 - 58:9

A I personally wouldn't say that, but I may have the wrong view of what "data processing" means in this statute.

Q (BY MR. HULTIN) So as we sit here today, you don't consider yourself an expert in data processing; is that correct?

A In the context of this statute and what they're asking for, from my understanding, I would say no.

Q Do you consider yourself as an expert in public administration?

A And, again, this is from my understanding: In this context of this statute and the intent -- keeping in mind I'm not a lawyer, didn't write this statute -- but I would say yes, based on this context.

Q You're saying that for purposes of subsection (2) of 1-5-617, it's your understanding that you are an expert in public administration for purposes of the statute?

A By that definition and my understanding of that definition, yes.

Q What is your understanding of that definition?

A To me, I understand that "public administration" and this definition would be the public administration of elections and tabulation of votes cast in an election.

Gardner John; 08/29/06 - Page 60:20-24

Q (BY MR. HULTIN) Did you understand -- did you understand that the legislature had commanded that the Secretary of State promulgate a certification rule?

A Yes.

Gardner John; 08/29/06 - Page 65:12-15

Q But you couldn't certify a voting system if it didn't meet all of the explicit requirements of the statute, correct? Would you agree with that?

Gardner John; 08/29/06 - Page 65:21

A That was our intent, yes.

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Gardner John; 08/29/06 - Page 65:22 - 66:3

Q (BY MR. HULTIN) But is that your understanding of the way the law works: If the statute says the voting system shall do something, then if your testing and evaluation shows that the voting system doesn't do what the statute says "shall" about, then you cannot as a matter of law certify the voting system?

Gardner John; 08/29/06 - Page 66:7-25

Q (BY MR. HULTIN) Is that your understanding?

A I have two understandings: I have the understanding on July 26th of 2005, when this was written, and I have an understanding now.

Q Well, let's talk about your understanding in July of 2005.

A At the time of this, that was my understanding: If it didn't meet everything, it couldn't pass.

Q What's your understanding now?

A Now, because of the -- the way the certification process has evolved and has continued on, I understand that there could be exceptions, and there are times where you look at substantial compliance or a -- you may have to make a judgment call on some things. Those situations are clearly noted.

Gardner John; 08/29/06 - Page 68:22 - 70:3

Q So here what you're saying is that the Automark is going to be probably disqualified from certification because it requires a step that, in your interpretation, violated the final step of casting a ballot without assistance, correct?

A That is the question I am posing here to Len.

Q Right. Right. And that in fact is what happened with the Automark, isn't it?

A Yes, after review by other folks -- you know, the folks that are identified there, Patti, as well as Len, Bill Hobbs, the AG's office.

Q And that's because there was a specific subsection of Section 704 that did not -- it did not meet, correct?

A Yes, it's paragraph (n) of Section 704.

Q (n)(I) says, "Audio ballots shall meet the following standards: (I) After the initial instruction from an election official, the elector shall be able to independently operate the voter interface device through the final step of casting a ballot without assistance," correct?

A Yes, that is correct.

Q And because the Automark -- the ES&S Automark optical-scan system did not meet that requirement, you did not certify it, correct?

A Yes, that is correct.

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(attorney objections and comments omitted)

Gardner John; 08/29/06 - Page 70:18 - 71:13

Q So for a system to qualify as an accessible voting system, it had to meet each and every minimum standard specified in 704(1), correct?

A That was the intent, yes.

Q That's your understanding of what the legislature required?

A I -- yes, I believe so.

Q And is that the process that you followed in certifying each and every of the subject DREs that's been certified?

A Yes.

Q Can you identify Exhibit 10?

A Yes.

Q What is Exhibit 10?

A This is the qualification report for the ES&S package that was certified by our office.

Q Okay. Did you prepare that report?

A Yes.

Gardner John; 08/29/06 - Page 71:25 - 72:14

Q Go to page 7 of Exhibit 10. Okay. And you see "iVotronic DRE" with "RTAL printer"? Do you see that?

A At the top of the page, yes.

Q Okay. And then the first warning under "Audio" says, "The iVotronic DRE when used for audio ballots does not provide the ability to use the audio and video components at the same time." Was that your finding?

A Yes.

Q And that was based on your functional testing and evaluation of the machine, correct?

A That is correct.

Gardner John; 08/29/06 - Page 72:23 - 73:3

Q So you're saying that the fact that, in your opinion, as the so-called expert who was evaluating and certifying the machines, recommending -- making recommendations to the Secretary, that this was a minor deficiency, correct?

Gardner John; 08/29/06 - Page 73:13-14

A Yes, I made a judgment call on that, correct.

Gardner John; 08/29/06 - Page 73:23-25

Q Did you discuss that with the Secretary?

A Yes, I did.

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(attorney objections and comments omitted)

Gardner John; 08/29/06 - Page 74:18-22

Q When you reviewed Appendix M with the Secretary, did you advise the Secretary of the requirements of 1-5-704(d) that "Devices providing audio and video access shall be able to work both separately and simultaneously"?

Gardner John; 08/29/06 - Page 75:1-5

A I presented this document to her with the understanding that all of the issues identified were insufficient to either rule or statute. I wasn't specific as to which one was what.

Gardner John; 08/29/06 - Page 78:1-15

Q And notwithstanding the fact that it did not meet that requirement, you recommended to the Secretary that she certify that voting system because, in your opinion, that was minor, correct?

A After the discussion, the determination was made to certify the system, yes.

Q And you characterized that as "minor," didn't you?

A Yes, I did.

Q And on your test notes you say that was minor?

A Yes, it does appear in my test notes.

Gardner John; 08/29/06 - Page 79:12-21

Q (BY MR. HULTIN) I'm asking for -- in plain English what does the word "shall" mean to you, Mr. Gardner?

A Must, the same as must. Must.

Q Must?

A Must do, must have, must be.

Q Mandatory, correct?

A Yes.

Q Required?

A It's a requirement, yes.

Gardner John; 08/29/06 - Page 80:24 - 81:7

Q You didn't certify the Automark because it didn't meet the requirements of 1-5-704(n)(I), correct?

A I see what you're saying. Yes.

Q Correct?

A Yes, that's correct.

Q And that's the reason -- the explicit reason that you didn't do that, correct?

A Yes.

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(attorney objections and comments omitted)

Gardner John; 08/29/06 - Page 81:14-16

Q So my question is: Why is subsection (d) of 1-5-704(1) worthy of less respect than subsection (n)(I) of 1-5-704?

Gardner John; 08/29/06 - Page 81:20-25

Q (BY MR. HULTIN) In your mind, you said one is okay, one isn't. Why?

A I made a value judgment on that.

Q What was the basis for that value judgment?

A I don't -- do not know.

Gardner John; 08/29/06 - Page 82:7-11

Q And the fact of the matter is, isn't it, Mr. Gardner, that you were in a big hurry to certify the ES&S Unity system 3.0 because Jefferson County and Mesa County wanted to use it in the primary election?

Gardner John; 08/29/06 - Page 82:15

A Yes, that's sort of true.

Gardner John; 08/29/06 - Page 84:22-24

Q Mesa County bought a bunch of new ES&S equipment, correct?

A That is correct, yes.

Gardner John; 08/29/06 - Page 86:1-14

Q (BY MR. HULTIN) Yeah, there were, in your words, complications involving the certification of the ES&S, correct?

A Yes, that is correct.

Q And that's because there were a number of areas where the system did not meet the requirements of the statute and/or Rule 45; isn't that right?

A Yes, that is correct.

Q And at least with respect to the audio requirement, you recommended to the Secretary that she certify the machine notwithstanding the explicit and mandatory requirements of Section 1-5-704(d)?

Gardner John; 08/29/06 - Page 86:18-19

A I believe the answer is "yes" to that.

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(attorney objections and comments omitted)

Gardner John; 08/29/06 - Page 86:20-25

Q (BY MR. HULTIN) And you recommended, and the Secretary accepted your recommendation, that the Automark not be certified because it did not meet the mandatory requirements of 1-5-704(n)(I)?

A That is correct, as well.

Gardner John; 08/29/06 - Page 92:21 - 93:6

Q Yeah, right. And isn't it a fact that Senate Bill 206 was effective on May 28 of 2004?

A I don't know that date. Sorry.

Q You knew that the law had been around for a while when you got there, right?

A Yes.

Q And you knew that the Secretary of State hadn't done anything to promulgate these rules from the effective date of the law until the time you got there, right?

Gardner John; 08/29/06 - Page 93:10-11

A Yes, I believe so. That is correct.

Gardner John; 08/29/06 - Page 93:22 - 94:6

Q But you knew that you were playing catchup, weren't you?

A Yes.

Q And that you were -- through no fault of your own, you were sort of starting behind the eight ball, so to speak?

A Yes, except there were no applications for systems to be certified at that time, and any requests that we had were asked to be put on hold until the adoption of the rules.

Gardner John; 08/29/06 - Page 99:20 - 100:2

Q Where are the minimum standards regarding evaluation criteria?

A I believe the evaluation criteria is covered in the functional testing that's identified in 45.6.

Q So you're saying 45.6 testing is the evaluation criteria?

A I would consider it so, yes.

Gardner John; 08/29/06 - Page 101:1-9

Q And isn't that the evaluation criteria of Rule 45 that you go through when you do these tests and you've got to pass all the tests? And if you don't pass all the tests, then you fail, correct?

A That is correct.

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(attorney objections and comments omitted)

Q Okay. Where does it say you only have to pass the tests that John Gardner thinks are not minor tests?

Gardner John; 08/29/06 - Page 101:13

A It does not state that.

Gardner John; 08/29/06 - Page 101:21-25

Q (BY MR. HULTIN) But the fact of the matter is, John, you didn't follow your own rules and your own procedures in evaluating at least the ES&S certification application; isn't that right?

Gardner John; 08/29/06 - Page 102:5-9

A I presented documentation to the Secretary of requirements that weren't met; and through that discussion, it was determined that the system should be certified with the conditions that were placed on the document.

Gardner John; 08/29/06 - Page 106:7 - 107:4

Q But there were phone calls that were made during the course of that meeting?

A Yes.

Q Who made the phone calls?

A Well, it would be the Secretary and myself.

Q Were you on the speakerphone with her?

A Uh-huh, yes.

Q Who did you speak with?

A At a minimum, I know we spoke with Mesa County. I don't recall if there were others or not.

Q Who did you talk to at Mesa County?

A The clerk and recorder and some of her staff. Janice Ward is the clerk for Mesa County. Sorry.

Q And who else?

A At Mesa County?

Q Yes.

A I'm not sure what other staff she had. I don't recall.

Gardner John; 08/29/06 - Page 109:5-22

Q So tell me about this conversation with the Secretary. Tell me what -- you went in. What did you say to her? I want a back-and-forth as much as we can on the substance of everything that was discussed.

A I -- I -- I don't recall the exact details of the conversation. As I said before, the -- in the back of the document, I provided the tables that I used, page 63 and 64, Exhibit 10. This is what I presented to Gigi. We went through these item by item to talk about them and the impact of each one.

Q Uh-huh.

A From there, the specifics of what she came back to me on, I don't recall that conversation.

Q You don't recall what she said?

A No.

Gardner John; 08/29/06 - Page 112:3-10

Q So what was their take on the table?

MR. HULTIN: Mesa County's take.

A I think overall, they felt that none of the issues that we had were realistic issues; that they --

Gardner John; 08/29/06 - Page 112:11-19

Q (BY MR. HULTIN) Even though the legislature had said they were mandatory?

A Remember, I'm answering from Mesa County from my limited recollection of the call, but I believe that they did not have much concern about any of the issues.

Gardner John; 08/29/06 - Page 114:3 - 115:9

Q (BY MR. HULTIN) I'm having trouble understanding why you were calling these people, because surely, the Secretary was going to -- because you were her expert, she was going to accept your report on your tests, correct?

A I believe so, yes.

Q So I don't understand. Why call Mesa County?

A I think because this was a unique situation where the number of issues outstanding was greater than any of the other systems we had looked at, and here maybe she felt she could trust another county to bring additional perspective into the conversation. But I'm speaking for the Secretary as to -- And I don't recall exactly how we got to calling Mesa County, as I've already said, so, you know, I'm kind of guessing at these sort of things here.

Q So in effect, really, the only person who could answer these questions is the Secretary, correct?

A I -- I believe so, yeah.

Q As to why -- because you don't recall anything about the meeting other than you talked about those two pages of your report, right?

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(attorney objections and comments omitted)

I don't remember the back-and-forth dialogue we had, correct.

Q And all you remember is the outcome?

A Correct.

Gardner John; 08/29/06 - Page 117:20 - 118:3

Q Now, talking about the test requirements, page 118, we go to 45.6.2.2, Secretary of State's "Requirements for Testing." Do you see that?

A Yes, I do.

Q We've already talked about the failure criteria, which is, the voting systems shall successfully complete all of the requirements of this rule, right?

Gardner John; 08/29/06 - Page 118:8

A Yes, right.

Gardner John; 08/29/06 - Page 119:1 - 120:13

A It begins -- I'm not sure what page number, but it's Appendix G. It starts with Form 9.1, continues on to Form 9.3.

Q Appendix G and H?

A Correct. Yes. Sorry.

Q 9.1 is the "Demonstration Checklist," and 9.3 is the "General Testing Matrix - Cumulative" summary, correct?

A Oh, yes. Yes.

Q Rule 45.6.2.3 says that the test log shall, among other things, show the test number and a test description. Show me in Form 9.3 where there is any test description.

A Well, it's -- Form 9.3 has a section for instructions. So we may not have spelled out, you know, step-by-step instructions to do the test; but we have the instructions of what the test needs to accomplish.

Q If a test is to be a test, doesn't the test have to be repeatable, Mr. Gardner?

A Yes, I believe so.

Q Okay. If there aren't any, you know, written test protocols, how is the test repeatable?

A Well, by our understanding of the voting system and our understanding of how elections work. So, you know, you could identify one of these test numbers; and from our knowledge, we know how -- you know, if you have to add precincts to the tabulation system, we didn't write out the steps to go through to add precincts, but you would notice it at the laptop and add precincts. So it's from our knowledge of the voting-system environment that we know how to sit down and do these on a repeatable basis.

Gardner John; 08/29/06 - Page 121:12 - 122:4

Q Let's go over to 9 -- Test No. 9.3.3.5. Do you have that in front of you?

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(attorney objections and comments omitted)

A I do.

Q This is a test for unauthorized changes. It says, "Demonstrate the systems' ability to prevent unauthorized changes to: DEFINING BALLOT FORMATS." What is the test that you did to determine that that passed?

A If the system allows for a multiuser environment -- so I can assign an administrator and a poll worker or election judge or something like that -- by restricting the permissions that that user group would have or that specific user would have, they would be an unauthorized person. So if I log onto the system as that unauthorized person, can I make a change to a ballot definition or the format of a ballot?

Gardner John; 08/29/06 - Page 123:13 - 124:1

Q Uh-huh. So I take it for the rest of these through 9.3.3.14, the unauthorized changes to the eight things, basically you did the same thing: You determined that if the computer had the administrative preferences set to limit the casting and recording of votes to a specific person, if you weren't that person who was authorized, you couldn't make those changes; is that -- did I understand you correctly?

A Right. I mean, there's some -- there's some fine tweaking you can get into in there for each of the different systems; but that's the essence of what we're doing for those tests, yes.

Gardner John; 08/29/06 - Page 126:6-11

Q Now, the Rule 45.5.2, "State Standards," which we talked about, do you agree that these are minimum standards that are prescribed by Rule 45.5. And its subparts that must be met -- each of them must be met in addition to the federal standards?

Gardner John; 08/29/06 - Page 126:14

A That is the objective, yes.

Gardner John; 08/29/06 - Page 126:15-25

Q (BY MR. HULTIN) That's your understanding of the rule. And when you're administering the rule, you have a set of federal standards that have to be met. And in addition to those federal standards and supplemental to those federal standards, you've got the state standards. And those all have to be met, and the question of whether or not they're met sufficiently is ultimately up to the Secretary, correct?

A I think that's correct, yes.

Gardner John; 08/29/06 - Page 128:12-17

Q Mr. Gardner, I've given you Exhibit 13. Have you seen that before?

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(attorney objections and comments omitted)

A I have.

Q This is an affidavit that you signed on August 9 of 2006, correct?

A Yes.

Gardner John; 08/29/06 - Page 128:23 - 129:2

Q This was an affidavit that you were submitting in support of the Secretary's assertion of privilege in an attempt to prevent the plaintiffs in this case from gaining access to --

Gardner John; 08/29/06 - Page 129:4-15

Q -- certain security documents relating to the subject DREs, right?

A Yes.

Q Do you know whether or not any of the documents that are over in the Attorney General's office that are being kept from -- or are subject to a stringent protective order and that are not allowed to be copied by the plaintiffs in this action or their counsel, do you know whether any of those documents are in the public domain?

A Oh. I don't know.

Gardner John; 08/29/06 - Page 131:6 - 132:2

Q Now, you were responsible for working with the Attorney General for all assertions of confidentiality with respect to the documentation of the various DRE systems, correct?

A I believe so, yes.

Q Not only the documents that were subject to the attorneys' eyes-only protective order but the general designation of confidentiality, correct?

A I believe so, yes.

Q You personally went through and looked at those and made a determination that it was necessary to protect that information for that information -- to protect the security of Colorado elections, correct?

A Yes, I believe I went through all of them.

Q So as to any of those documents that are in the public domain, you would have to say that you were negligent in the performance of that duty, correct?

Gardner John; 08/29/06 - Page 132:5-10

A I am not aware of what documents are in the public domain and did not research which documents were in the public domain. All I did was go through the documents we had to look at to determine if there was a security issue at stake.

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(attorney objections and comments omitted)

Gardner John; 08/29/06 - Page 133:22 - 134:12

Q Now, isn't it a fact that when you go through your certification report, the first part of it, Appendix 8.1, Appendix F, 8.1 -- and that's the documentation review, right?

A Yes, that's correct.

Q -- basically, that's a paper review where you go through all of this stuff that's submitted by the vendor in support of their application, and all you do, so far as security is concerned, you see that they have something in their documentation that addresses it; you don't make a qualitative evaluation to see if their documentation meets any minimum standards, correct?

A If they provide the documentation that's listed in 45.5.2.6, we move on.

Gardner John; 08/29/06 - Page 134:18-21

Q So you don't make a substantive or qualitative or informed review of the content of the documentation, correct?

A That is correct, yes.

Gardner John; 08/29/06 - Page 136:17 - 137:9

Q Let's go to 45.5.2.6.2. Now, it says, "The voting system provider shall submit to the" Secretary of State "its recommended policies and guidelines governing software access controls, hardware access controls, data communications, effective password management, protection abilities of a particular operating system, general characteristics of supervisory access privileges, segregation of duties, and any additional relevant characteristics." Do you see that?

A I do.

Q What are the minimum standards that are set forth there?

A Well, I think the rule is asking for the voting-system provider to give documentation explaining each of those characteristics.

Gardner John; 08/29/06 - Page 137:23 - 138:15

Q What is the minimum standard that is prescribed by Rule 45 for software access controls?

A I -- I think this is the only place you'll find it: in Rule 45.

Q What is the minimum standard that is provided for hardware access controls?

A My answer is the same: It's what is requested here.

Q So whatever a voting-system provider submits is good enough, correct?

A That is all that's requested by the rule.

Q And all that you do to determine that it's good enough is you look and see that it's present in the documentation, correct?

A Yes.

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(attorney objections and comments omitted)

Gardner John; 08/29/06 - Page 146:21 - 147:1

- Q Yeah. Do you see any conflict of interest in the vendors setting security standards for their voting equipment when they're trying to sell it to political subdivisions of the State of Colorado for a profit?
- A No, I don't believe there's any.

Gardner John; 08/29/06 - Page 150:25 - 151:16

- Q (BY MR. HULTIN) Do you have any -- You're required to approve the county procedures for security for electronic voting systems, aren't you?
- A Yes.
- Q What standards do you apply to determine whether or not to approve those?
- A I'm going to call from recollection, but there's two rules that address the checklist of items that have to be contained in their security document, and that's what we check off: Do they have this in their security document?
- Q Okay. What rule is that?
- A Not the rules -- here are the rules: Rule 4 And Rule 38.

Gardner John; 08/29/06 - Page 152:1-11

- Q Where does the Rule 43 deal with software access controls?
- A I don't -- well, 43.7(i) -- 43.7.1(i). Sorry.
- Q Okay. What are the minimum standards there?
- A That they submit this document to us that identifies the controls that they're using.
- Q That they have controls?
- A Right.

Gardner John, 08/29/06 -- Page 158:22 -- 159:15

- Q Do you have any minimum standards that you utilize when reviewing and approving these security procedures that the counties are required to send to you?
- A We use this list as a checklist to make sure their security plan addresses each of these items.
- Q And do you do that personally?
- A I did this year.
- Q So you get a plan, you go through, and if they are lacking -- the same kind of review that you do with the documentation of the vendors?
- A It's similar.
- Q Similar. You don't review it substantively; you just see that they address each of these subjects?
- A That's mostly correct, yes.

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(attorney objections and comments omitted)

Gardner John; 08/29/06 - Page 160:4-10

Q So essentially, what these various lists of security concerns are, are checklists for you to see that there's something in the file that pertains to that subject matter, and that's as far as you go unless something really glaring jumps out at you?

A That is correct, yes.

Gardner John; 08/29/06 - Page 154:9 - 155:4

Q Then, as to security requirements, 45.5.2.6, the minimum standards there are contained in the documentation: recommended policies and guidelines provided by the vendors, correct?

A Yes.

Q And that the Secretary of State's office, when examining an electronic voting system for certification, reviews the documentation to determine that it is present in those areas, correct?

A Yes.

Q And does not make a qualitative or analytical examination of that documentation but just looks to see that there is -- that it is present, correct?

A Unless there is reason to believe otherwise, yes.

Q But presumptively, if it's there, it's good enough?

A As a general rule, yes.

Gardner John; 08/29/06 - Page 158:4-6

Q Okay. Let's look at the county security procedures: 43.7.

A Okay.

Gardner John; 08/30/06 - Page 525:6 - 526:3

Q Now, are all the county plans consistent? Have you reviewed them for consistency as to each county in which the Diebold system is used?

A No. We check them for consistency against the rule, as required.

Q And you're -- the way you check them for consistency against the rule is just like you do everything else here, which is to say, is there something that says locking mechanisms and seals? And if it says locking mechanisms and seals, you check it and say, Good enough, right?

A As long as there's some description to that, yes.

Q But you don't look at the description to see if it's substantively adequate, do you?

A We are doing a minimum evaluation of those. I mean, we -- you know, we want to make sure that they are addressing those issue, not just titling a section of their document of that.

Gardner John; 08/30/06 - Page 526:23 - 527:23

- Q And you haven't looked at them substantively, other than to go through and see if they have words that contain each of the elements of 43.7.1(a) through (j)? They have to have a provision that pertains to security training of election judges. But you don't look to see what that training is, correct?
- A Not the specific details of their training.
- Q And they have to have internal controls for the voting system, including software and hardware access controls and password management, but you don't look at it to see what those controls are, correct?
- A Not the specific details of that, correct.
- Q And you look to see that they have something to do with security cameras or other surveillance, but you don't look to see what the details of that are?
- A Correct.
- Q And you need to see that they have something pertaining to locking mechanisms and seals, but you don't look at that to see what the details of that are, correct?
- A Yes, that is correct.

Gardner John; 08/30/06 - Page 528:13 - 529:7

- Q You said you didn't even read them unless you thought there might be something in there that you needed to know.
- A Additional documentation, right.
- Q Right.
- A The security plans that come in, I mean, we do have to go through and look to make sure they have those items that are listed.
- Q Who, besides you, looks at these?
- A Catherine Mikeworth, Wayne Munster.
- Q What's Catherine Mikeworth's background?
- A I'm not familiar with her background.
- Q What's Wayne Munster's background?
- A I'm not familiar with his background either. I know they've worked in our office for four or five years.

Gardner John; 08/29/06 - Page 161:21 - 162:12

- Q There's no other record of the testing that you did other than Form 9.3?
- A There are some potentially hand-written notes that may have been destroyed afterwards that helped us to write the qualification report, you know, just in -- in our providing the summary of things, but it was typical to notes that you see there, which is just a simple bullet with a line note with some kind of outcome.
- Q I believe when we interviewed Mr. Garcia, I think he made reference to notes that he had made. Have you destroyed his notes?

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(attorney objections and comments omitted)

A I would have to go back and look to see which notes we have and which ones we don't have. Everything that I had, I turned over as part of the discovery request.

Q We've seen no test notes.

Gardner John; 08/29/06 - Page 162:24 - 163:9

Q (BY MR. HULTIN) So that means you destroyed them?

A That means we no longer have them, correct, because they got compiled into that document.

Q So after you compiled this document, then you destroyed your notes, destroyed Mr. Garcia's notes, and Mr. Popovich's notes?

A Any note that was irrelevant, because it was contained in that document, yes.

Gardner John; 08/29/06 - Page 167:16 - 168:10

Q Right. So this is something that was out of the ordinary as far as the procedure was concerned?

A Correct. Mesa County is offering to set this up for ES&S.

Q Okay. Why?

A Because ES&S didn't have the resources to set it up themselves.

Q I saw an e-mail that said ES&S was in desperate straits at this time. Were they in financial trouble?

A Not to my knowledge.

Q Were they shorthanded?

A I believe so.

Q They didn't have enough people to take care of business?

A I'm not exactly sure what the issue is. They were having trouble delivering equipment to other states; that was the reports we were hearing.

Gardner John; 08/29/06 - Page 168:21 - 169:15

Q How did that come to pass? Tell me what happened.

A ES&S had not submitted anything for certification. Mesa County wanted something certified from them. And I called ES&S and asked what their schedule looked like, when they were beginning to apply, and they really didn't have any ideas. Then we started talking about what their schedule was looking like and how, if they wanted to be certified, we could accomplish that. And, you know, several options were discussed: them coming here, us going there, doing it in Mesa County, all those ideas. And I went to Gigi and asked, "What do you think would be the best idea here?"

Q And what did she say?

A "Go to Omaha."

Q "Take your people to Omaha"?

A Yes.

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(attorney objections and comments omitted)

Gardner John; 08/29/06 - Page 172:3-11

Q This was unusual, to say the least, correct?

A I agree with that.

Q And it was a bit of an emergency because of timing and because of the pressure from Mesa County to get this done?

A Yes that's true.

Gardner John; 08/29/06 - Page 178:25 - 180:4

Q Handing you what's been marked as Exhibit 18, have you seen that before today?

A I would think so, but possibly -- yes.

Q Okay. Did you review that in connection with the preparation for your deposition?

A No.

Q I want to read the fourth paragraph on page 2267, which is an e-mail from you to Ed Neuberg of the Denver Election Commission. "We are currently in the process of testing voting systems for certification, and will have 3 out of 4 vendors who market voting systems in Colorado certified for use by March 15th. We have encouraged counties and municipalities where possible to enter into contract agreements with the voting system vendors with the anticipation of receiving a certification from the state by the time the contract is signed with the vendor." And the date of this e-mail is February 6 of '06. Now, my question to you: Isn't it a fact, Mr. Gardner, that you are telling Edward Neuberg of the Denver Election Commission that you are going to have Diebold, Sequoia, and HART certified no later than March 15, and you're telling him this on February 6th?

Gardner John; 08/29/06 - Page 180:11 - 181:5

Q And, in fact, Mr. Gardner, isn't it a fact, sir, that you knew that there was a significant regulatory issue with Diebold as of February 6, 2006?

A I don't recall the date that we found the issue with Diebold, but there was an issue.

Q And you knew, because of the "holy smokes" e-mail from Patti Fredrick, that as of early January of 2006, that there was illegal interpretive code present in the Diebold system and that that required a review and examination by both the California Secretary of State and their special people and by the ITAs for Diebold; isn't that right, sir?

A Yes, that is right.

Q And that was pending when you're telling Mr. Neuberg and Lisa Doran, who is your public-relations person, that "Not to worry, Diebold is going to be certified by March 15"?

Gardner John; 08/29/06 - Page 181:12 - 182:13

A We are -- were at that time -- I was trying to keep the counties moving forward with a contracting process, to not have a delay on the back end. We were very clear with our

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(attorney objections and comments omitted)

problems with Diebold in putting them on hold and waiting for what we needed from the EAC and NASED to move forward. However, I needed to provide a pretty clear message to the counties; remembering, of course, that I send this to one county, this is going to go out to the 64 other counties, on what the state is saying about the status of getting voting systems and DREs accomplished for 2006 elections.

Q (BY MR. HULTIN) So you were putting on a happy face for the counties?

A I'm providing hope to the counties that keep moving forward. I think you'll see that consistently in my e-mails throughout that time period: that when I'm talking to the counties, I'm pretty optimistic.

Q I'm handing you what's been marked as Deposition Exhibit 19, which is an e-mail dated February 17 of 2006. That's sent to, it looks like, the county clerks for all the counties in the state, right?

A Yes.

Gardner John; 08/29/06 - Page 182:24 - 183:10

Q And it says, "Of those" -- Okay. Go to page 2 of Exhibit 19. Paragraph 2 says, "However, we believe it is essential that we advise you that only 3 vendors have applied for certification in Colorado: Diebold, HART, and Sequoia. Of those, it appears that only HART and Sequoia will be able to complete certification in a timely enough manner to make procurement of their systems feasible." And then it goes on to talk about the Diebold problem.

A Uh-huh.

Gardner John; 08/29/06 - Page 184:8-24

Q Okay. It says, "Diebold has applied for state certification and CDOS," which I guess is the Colorado Secretary of State, "is going to test their equipment; however, several of Diebold's components have yet to be certified by NASED and will not be certified by CDOS until the federal certification is completed and confirmed." Did I read that correctly?

A Yes.

Q Was that your understanding as of February 17, '06?

A You know, the dates are fuzzy. I don't recall the dates that we learned of the issue with the interpreter's software and when it went back to the ITAs, but it seems to be in the right kind of time frame for that.

Gardner John; 08/29/06 - Page 185:15-25

Q Did you have problems with Patti Fredrick and her communications with the counties?

A At times.

Q She was your boss, wasn't she?

A That is correct.

Q Did you have problems with her as your boss?

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(attorney objections and comments omitted)

A At times.

Q And what were those problems?

A Communication was a big one.

Gardner John; 08/29/06 - Page 186:10 - 187:1

Q So your message was more optimistic than her message and that created problems for you; is that right?

A That's a fair statement, yeah.

Q You were, in effect, a cheerleader for getting this done, weren't you?

A To the counties.

Q (BY MR. HULTIN) Cheerleader to the counties?

A Right. The counties don't -- don't -- you know, counties don't have the money, they don't want to buy it. I've got to ensure we get this done.

Gardner John; 08/29/06 - Page 190:18-21

Q (BY MR. HULTIN) Okay. I've handed you No. 20. Does this refresh your recollection about other problems in February of '06?

Gardner John; 08/29/06 - Page 191:5-17

Q Explain. What's the problem with the Diebold software?

A The specific versions 1-17-2 and 1-17-23 were not tested to the 2002 voting system standards.

Q Okay. And were those -- Where were those software versions being utilized in Colorado as of February '06?

A It was utilized in -- oh, as of February '06, there were probably 18 or so counties that had used that.

Q Including El Paso County?

A Yes, that is correct.

Gardner John; 08/29/06 - Page 191:25 - 192:4

Q So based on this development, there were 18 counties that weren't in a position to use the hardware and software from Diebold that they owned; is that correct?

A The software, correct.

Gardner John; 08/29/06 - Page 194:2-6

Q (BY MR. HULTIN) Mr. Gardner, I'm handing you Deposition Exhibit 21. This is an e-mail from you to Sandy, I guess who is the clerk of Rio Grande County; is that right?

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(attorney objections and comments omitted)

A Yes: Sandy Jackson.

Gardner John; 08/29/06 - Page 194:17 - 195:20

Q At the end of the first paragraph, you state, "We have always had the stance that the 4 vendors currently doing business in Colorado would be certified - We just didn't know the time line that would go along with this." Would you characterize this as some more of your, quote, cheerleading, closed quote, to the counties?

A Absolutely, yes. I had no reason, other than the Diebold exception, to think that they wouldn't be certified; and we're really -- we've got to make sure people buy the equipment after it's certified.

Q So you knew at this time there were some big issues with Diebold?

A Yes.

Q But you didn't tell this person?

A Yes.

Q You didn't see any reason to put a cloud in their otherwise blue sky; is that right?

A I don't know that their sky was particularly blue, but we were doing our best to encourage them.

Q I'm handing you what's been marked as Deposition Exhibit 22, which bears Bates Nos. AG 2596 and 2597, which is an e-mail from you to Jessica Lovingier --

Gardner John; 08/29/06 - Page 196:1-2

Q Do you remember that e-mail?

A Yes, I do.

Gardner John; 08/29/06 - Page 197:16 - 198:20

Q And you wrote her back with a plan, didn't you?

A I wrote her back with the thoughts that were bouncing around our office at that time.

Q And you say that "...we have been working with three of the four vendors to come up with creative solutions." You say that in the first sentence, right?

A Oh, yes. Right. Right.

Q What did you mean by "creative solutions"?

A To Jessica -- and, remember -- keep in mind, I am writing with the intention that what I say to one county will be distributed to 64 counties. So my intent of this e-mail is to get her to start thinking outside of the box. I don't recall -- I think she had ES&S prior to this; maybe it was Diebold. But, you know, that there is the possibility of doing mix/match systems. You have ES&S for this component, Diebold for this component; or HART for this component and Sequoia for this component. And that's okay, and that was some of the creative solutions. If there was a component of your system that was still certified -- maybe it was just certified for absentee use -- you could continue to use that for absentee but your DREs come from this vendor over here. So, "Think outside the box."

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(attorney objections and comments omitted)

Gardner John; 08/29/06 - Page 199:19 - 200:3

- Q Then you say, "Working with Diebold to certify and allow for a," quote, temporary use, closed quote, "of the equipment prior to receiving all of the...EAC documentation for 2006." What are you referring to there?
- A Just that: as a thought in our mind, if it came down to the wire, we do always have the backup plan of allowing for a temporary use.

Gardner John; 08/29/06 - Page 200:13 - 201:21

- A . . .What I'm saying here to Jessica is a little bit of a stretch on that.
- Q Explain to me why it's a "stretch."
- A Well, because it's not exactly what we were talking about. Because here – I say here we would allow a temporary use prior to receiving all of the necessary EAC documentation. That's my words in the e-mail message.
- Q And you really can't do that? That would be contrary to the plain, explicit language in the rules, right?
- A That is correct.
- Q So you're kind of blowing smoke at her to make her feel better?
- A That is correct, trying to brighten the sky here. That there are other things that we're thinking about and talking about. And clearly, we didn't do a temporary use; we didn't have to. Remember, information changes, you know, on a week-by-week basis.
- Q So in effect, what you're telling the Gilpin County clerk was with the expectation that she's going to pass this on to all of the other 64 -- I guess 63 other county clerks – is that if necessary, you'll do something illegal with the Diebold system to allow its use in 2006, if necessary?

Gardner John; 08/29/06 - Page 201:18-21

- Q (BY MR. HULTIN) Correct?
- A What I'm saying is, there are solutions that we are talking about in our office to make this work.

Gardner John; 08/29/06 - Page 202:10-17

- Q Let's just focus on paragraph 2. You said you sent this to Jessica Lovingier, who is the Gilpin County clerk and reporter -- recorder, in response to her e-mail of February 17, and you sent it to her with the understanding that she very well may pass it on to all the other county clerks, right?
- A Yes.

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(attorney objections and comments omitted)

Gardner John; 08/29/06 - Page 202:25 - 203:10

- Q And so what you told all of the county clerks -- or this was written with the intent that it very well may be shared with all the county clerks -- in paragraph 2 is that you were going to illegally certify Diebold for a temporary use so it could be used in 2006, if necessary, correct?
- A I don't think that was our intention, but if you isolate the e-mail to just that one paragraph, I could see why you would say that.

Gardner John; 08/29/06 - Page 203:19-24

- Q Looking at doing something illegal, and you're telling the Gilpin County clerk that you're willing to do something illegal if that's what it takes to meet her needs, right?
- A I think that's a stretch.
- Q Isn't that what it says?

Gardner John; 08/29/06 - Page 204:3

THE DEPONENT: Yeah.

Gardner John; 08/29/06 - Page 205:24 - 206:3

- Q So you'd be willing to allow an uncertified DRE to be used for a year under a temporary-use certification prior to receiving the EAC documentation? That's what you're saying here in paragraph 2?

Gardner John; 08/29/06 - Page 206:6-14

- Q (BY MR. HULTIN) Is that right?
- A No, that's not what I intended for that sentence to come across as.
- Q Well, whatever you intended is one thing. We're talking about the plain language of the words, Mr. Gardner. Are you saying that you didn't get your words aligned with your intent?
- A Apparently

Gardner John; 08/29/06 - Page 206:17 - 207:1

- Q All right. Then, "3: Working with ES&S to certify their new system on a,"quote, temporary use "as well, to allow counties to choose from them if they desired." Now, as of this date, ES&S hadn't even applied; isn't that right?
- A That is correct.
- Q So you were kind of puffing this one up a little bit, too, weren't you?

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(attorney objections and comments omitted)

A Yes, I was.

Gardner John; 08/29/06 - Page 208:1-4

Q (BY MR. HULTIN) So you just wanted these machines to be used, didn't you?

A I wanted the counties to have a choice.

Gardner John; 08/29/06 - Page 214:8-14

Q Handing you what's been marked as No. 24. This is an e-mail starts with an e-mail from you to Terry Sholdt, who is your old boss in El Paso County. Terry is a personal friend; is that right?

A Yes.

Gardner John; 08/29/06 - Page 214:22 - 215:1

Q Now, the message starts with the subject, "What a shocker!" Why was February 24th a shocker?

A That was the day we found out Patti resigned.

Gardner John; 08/29/06 - Page 215:9-16

Q Then you say, "Did Bob tell you what we are trying to accomplish with Diebold? We're going to try to allow the 1.7.23, 1.94W, and TS R6 units to be allowed in 2006 - try to extend this out for another year. I think that would help everyone tremendously. I think we have a meeting with the Secretary on Tuesday to discuss."

Gardner John; 08/29/06 - Page 215:23 - 216:5

A And at the time that this was written, we were going to meet with the Secretary to talk about how we were going to handle 1-17-23, the software; 194W, the firmware; and the TS R6 units.

Q That this was one of your creative solutions?

A It was on the table.

Gardner John; 08/29/06 - Page 216:11-16

Q Wasn't the 1-17-23 one of the versions that was not allowed?

A Yes.

Q Yes. So why are you going to allow something that had not been certified to be used with these other components?

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(attorney objections and comments omitted)

Gardner John; 08/29/06 - Page 216:19-20

A This was just discussionary at this point; nothing has been decided.

Gardner John; 08/29/06 - Page 217:6-8

Q You were in favor of this by this e-mail, right, this --

A Yes.

Gardner John; 08/29/06 - Page 217:14-23

Q Why did it not work?

A Because clearly, we could not move forward on 1-17-23 or the TS R6 units.

Q Why were you willing to consider this for one year if you knew it was illegal?

A I'm a problem-solver, so I like to put everything out on the table and then flush out the ones that clearly you can't do. So, you know, if you've got 10 good ideas or maybe three of those are really bad ideas . . .

Gardner John; 08/29/06 - Page 218:17 - 219:4

Q Mr. Gardner, I've handed you what's been marked as Deposition Exhibit 25, which is a March 6, 2006 e-mail from you to Howard Cramer at Sequoia, with a copy to Stuart Bennett at Sequoia. Who is Howard Cramer?

A Howard Cramer, I believe his title is the regional sales manager for Sequoia, I believe.

Q Okay. As of March 6, had the Sequoia system been certified?

A I don't recall the date that we certified the Sequoia system.

Gardner John; 08/29/06 - Page 219:17 - 220:3

Q (BY MR. HULTIN) On March 10, the system was certified. On March 6th, you're telling Mr. Cramer to go down to Elbert County and sell some systems that haven't been certified yet; isn't that right?

A To get a contract going.

Q "Elbert County has confirmed their desire to go with Sequoia, so Steve, work some magic down there," exclamation point.

A Uh-huh.

Q Is that what you said?

A That is what I said.

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(attorney objections and comments omitted)

Gardner John; 08/29/06 - Page 222:21 - 223:4

- Q So Mesa County is putting pressure on you and on the Secretary to get this ES&S certification going?
- A Moving, right.
- Q And the conference call -- so the county clerk was scheduling a conference call with the Secretary to talk about "how we get ES&S certified"; is that the gist of it?
- A That is, yes.

Gardner John; 08/29/06 - Page 225:19 - 226:2

- Q And then when you and Secretary Dennis met on the phone with Sheila (sic) Ward when you had the meeting about the complications and the certification review, there was political pressure from Mesa County to grant the certification; isn't that right?
- A Are you referring to Janice Ward?
- Q Janice Ward, yes.
- A Okay.

Gardner John; 08/29/06 - Page 226:9-14

- A Yes. Sure. Yes, there was some pressure.
- Q She said, "Do it"?
- A Essentially.
- Q And the Secretary did it?
- A With some conditions, yes.

Gardner John; 08/29/06 - Page 229:1-9

- Q Okay. In fact, the way you worked with Mr. Garcia and Mr. Popovich is that they were essentially performing a clerical function, correct?
- A I'm sorry, say that again.
- Q They essentially performed a clerical function?
- A More so with ES&S, Sequois, and Diebold than with Hart.

Gardner John; 08/29/06 - Page 229:25 - 231:22

- Q Okay. Now, Mr. Garcia in fact, at least in terms of his resume, is more qualified to do this work than you are, isn't he?
- A I don't believe so. Mr. Garcia does not have elections experience, administering tabulation of votes.
- Q (BY MR. HULTIN) In terms of his technical computer background and experience and education, he's significantly more qualified than you are, isn't he?
- A I'm not familiar with his qualifications or his resume.

- Q (BY MR. HULTIN) Oh, really? He worked for you and you don't know what his qualifications were?
- A I did not hire Mr. Garcia. He was assigned to me after his project was decommissioned.
- Q Did you understand that he had a master's degree in information technology from Central Michigan University?
- A No, I did not. And those qualifications are not what is necessary to do functional testing on voting systems. He was not able to perform the basic tests for the HART voting system without causing us major setbacks.
- Q So did Mr. Popovich cause you major setbacks in the work that he did?
- A Yes.
- Q What were the major setbacks that he caused?
- A They were in the same realm: They were unable to -- you know, they essentially fed off of each other's problems. When one was having issues, the other would jump in and try to assist, and they would send us in a backwards direction.
- Q Why did you continue to utilize these people if they were causing problems and not moving the project forward?
- A They were assigned to me by Patti Fredrick as who would be assisting me with the process, and I was unable to shuffle them to other projects.

Gardner John; 08/29/06 - Page 232:1-25

- Q (BY MR. HULTIN) So would it be fair to say that you were severely dissatisfied with their work?
- A Yes.
- Q Would it be fair to say that you considered them to be incompetent?
- A At the tasks that I was asking them to do, yes, because of their lack of election knowledge.
- Q So it sounds like in this environment, that you had problems with Patti Fredrick, Michael Garcia -- excuse me -- David Garcia, Michael Popovich; so you were the only member of the team that knew what he was doing?
- A With regards to election processes, yes. They could determine if a requirement had passed. You know, you put 10,000 ballots through a machine, did you get the right results? They were able to make those conclusions. But as far as being able to structure any of the order of the tests to be efficient or how to recover from a programming issue without causing other programming issues, no, they weren't able to do that.

Gardner John; 08/29/06 - Page 233:19 - 234:3

- Q Do you have Exhibit 10 [ES&S Certification Report approving ES&S DRE] in front of you, Mr. Gardner?
- A Yes, I do.
- Q Who wrote this?
- A I wrote this.
- Q Did you have any help in writing this?

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(attorney objections and comments omitted)

A There was some assistance on some of the comments from either David Garcia or Michael Popovich.

Gardner John; 08/29/06 - Page 242:19 - 243:10

Q Okay. Under Test No. 9.3.8.23, it says, "Verify how the system notifies the voter that they will not be allowed another modification after verifying the third ballot - does this match documentation provided by the vendor?" And that's really what you're talking about on page 10 here, right?

A Yes, that is correct.

Q All right. And you passed it, but read what your note says there in that section.

A My note in that section says, "Shaky at best."

Q But "shaky at best" is good enough, right?

A It met the requirement.

Gardner John; 08/29/06 - Page 246:10 - 247:15

Q So as we sit here today, you can't tell me what the basis is for saying that each of the four subject DREs is going to last for eight years?

A It's in their documentation. I'd have to research that.

Q Is that something that you would simply look to see that it's there or is that something that you would want to examine the basis for that?

A We would look to see that it's there.

Q And that's all?

A I believe so.

Q So all the vendor needs to do is say, "My system is good for eight years," and you say, "Attaboy"?

A It meets the requirement.

Q Okay. On page 10, "Hardware Problems Identified," paragraph 1, there is a battery for the M100 and the DRE. What is that?

A The M100 is the precinct-level optical scanner; the DRE is the iVotronic. This is the alternative power supply in the case of a power failure.

Q Okay. So in your test, it only lasted two and a half hours, correct?

A Yes.

Q And the regs say you have to have a three-hour minimum?

A Yes.

Gardner John; 08/29/06 - Page 247:21 - 248:3

Q Okay. "Hardware Problems Identified": "2. DRE precinct report prints a unique" print system precinct ID number, "not the 10-digit precinct number. And this is contrary to 45.5.2.1.8(d); isn't that right?

A Yes. And that was also submitted to the Secretary.

GARDNER DIGEST

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(attorney objections and comments omitted)

Gardner John; 08/29/06 - Page 256:16-25

Q Okay. Then we have a failure under the physical environments, where you say, "Ok, see attached documents." What's that?

A Right. I believe we had additional documentation from the vendor about certain issues like that.

Q What are the "attached documents"?

A I thought it was at the end here. Yeah, I don't see it in the appendix.

Gardner John; 08/29/06 - Page 266:10-21

Q Well, someone with Access and a little bit of knowledge could easily manipulate votes within the Microsoft Access database, correct?

A That statement is true, but in a live election environment, that is not true.

Q What's your basis for saying that?

A Experience, knowledge of how a counting center or a counting room operates on election night or over the period of counting ballots.

Gardner John; 08/29/06 - Page 268:8 - 269:15

Q Okay. Certainly if the system was subject to a Trojan Horse attack, any one of these unauthorized changes would be -- could be compromised, correct?

A These are not networked computers; these are stand-alone devices that do not have access to the Internet or connection to the outside world. So the -- Q The ES&S are all stand-alone?

A I'm sorry?

Q The ES&S system is all stand-alone?

A Yes. That applies to all the systems that we have here. These are stand-alone systems, not on a computer network. So the -- the limitation of the Trojan Horse infection is reduced to the key staff who have access to those servers.

Q. Okay. So as long as you trust the key staff, then everything is cool?

A Well, the key staff are deputized to perform a function.

Q Right. But there's no redundancy in the system to prevent the key staff from making those -
- There's nothing in the architecture of the computer system itself to prevent a dishonest key staffer from inserting the Trojan Horse?

A No. The protection is in the election environment. Remember, we're going to conduct a postelection audit which is a hand-count of live voted ballots to what the machine count equals from election night.

Gardner John; 08/29/06 - Page 274:14 - 275:2

Q Do you think if Harri Hursti had access to these machines, that he could get them to change?

A Yes. His tests do not consider the other security aspects of a live voting environment.

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(attorney objections and comments omitted)

Q So you're not saying that the systems are invulnerable to unauthorized changes, to defining ballot formats, casting and recording votes, and so on; it's just that, in your judgment, someone in an elections environment would not be able to do it? Is that what your tests are designed to show?

A Yes.

Gardner John; 08/29/06 - Page 276:4-11

Q The Hursti 2 does. And he was given access to a DRE machine for a relatively short period of time, and he was able to completely reprogram it, wasn't he?

A In two minutes. Yes, he was.

Q In two minutes, he was able to do it?

A Yes.

Gardner John; 08/29/06 - Page 277:3-21

Q So your demonstration of the system -- your functional testing that demonstrates the finding that the systems will not allow unauthorized changes to defining ballot formats, casting and recording votes, calculating vote totals, consistent with the defined ballot formats, and the other criteria in 45.5.2.6.1(a) through (j), you're not saying that there's anything about the ES&S system that makes it particularly invulnerable to that; it's just that based on your experience and the elections environment, that it's not possible to do that?

A That is correct. Yes.

Q And your test is -- you don't have any test procedure or any test protocol for that; it's just that you got in there and kind of fussed around with it, and you were satisfied, based on your experience in elections in El Paso County, that it was good enough?

Gardner John; 08/29/06 - Page 277:25 - 278:17

Q (BY MR. HULTIN) Is that your testing?

A I determined that it met the requirements.

Q And you have no test protocol, correct?

A If you mean -- I'm not sure what you mean by "protocol."

Q Well, a test protocol -- if I were to replicate your test, I really couldn't replicate your test, because you couldn't tell me precisely what you did, because you didn't follow anything other than you played around with it a little bit and were satisfied, correct?

A I could probably walk you through the steps, you know, with the system in front of us to show you where I went to evaluate that requirement.

Gardner John; 08/29/06 - Page 279:21-25

Q I mean, how do you prove a negative?

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(attorney objections and comments omitted)

A The rule is what it is, and I have to test for -- I have to determine if that requirement, as written in the rule, has passed or failed.

Gardner John; 08/29/06 - Page 280:3-16

(The pending question was read.)

A I don't know the answer to that question, except to say this is the requirement in the rule. We tested for that requirement.

Q (BY MR. HULTIN) Okay. So I asked you, How do you test for a negative. You said, I don't know. How do you test for the absence of something, Mr. Gardner?

A Isn't that the same thing? I mean, I -- this is the requirement in the rule.

Q Okay.

A It met the requirement of the rule.

Gardner John; 08/29/06 - Page 281:16-24

Q Now, you've said that Harri Hursti could come in and demonstrate an unauthorized change to each of these 10 functions, correct?

A I said the potential is there. I don't know for certain if he could or not. I mean, he does things that are well above and beyond what we do, because we are testing in a functional elections environment.

Gardner John; 08/29/06 - Page 283:9-24

Q But isn't it possible to do a software attack that would compromise both the electronic record of the vote and, at the same time, synchronize the VPAT record to the compromised electronic record of the vote? That's been well documented. That's --

A Well, again, I go back to there's no system that's completely invulnerable. There are -- you know, you have a computer. There's a way to get in there and do stuff if you have unscrupulous people, if you work outside of the normal election process.

Q Isn't that the history of elections in this country: is that unscrupulous people have always attempted to manipulate elections?

Gardner John; 08/29/06 - Page 284:2

A I don't know the answer to that.

Gardner John; 08/29/06 - Page 291:19-21

Q Okay. What are the other security tests you did?

A 9.3.4.25.

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(attorney objections and comments omitted)

Gardner John; 08/29/06 - Page 293:2-8

Q So you took the PEB and played around with it and tried to make it --

A Right.

Q -- do something?

A Right.

Q So this test probably took about 90 seconds?

Gardner John; 08/29/06 - Page 293:14 - 294:5

Q "Demonstrate the prohibited access to voted ballots by anyone until after the point of polls closing," correct?

A Yes.

Q And it looks like this failed, and then you crossed out the failed and put a pass in.

A I think it was one of those days when I was getting tired, because the "F" was intended to be on the requirement above it. I just wrote in the -- you know, we were doing the ballot -- the battery test there. I was kind of off a line.

Q Then, the one above you called both a pass/fail and then said it was minor.

A Right. That wasn't a security issue.

Gardner John; 08/29/06 - Page 300:22 -- 302:3

Q Okay. Now, you say the "DRE does not have a 'tilt' function...."
That's a requirement of the rule, isn't it?

A Uh-huh, yes.

Q Okay. You failed that, as well, correct?

A Uh-huh, yes.

Q And we've talked about the DRE can't run the audio and the video together. That was a violation of the statute, correct?

A Yes.

Q The summary report cannot print 10-digit precinct numbers. That was another functional requirement that was failed, right?

A Yes.

Q And then we have the "No method of mixing results together from DRE and the M100," and you can't tell me whether that's a violation of the rule or not right now, correct?

A That is correct.

Q And then the Unity software has no lockdown for preventing changes to the ballot layout after cards have been downloaded. That's another violation of the regs, right?

A We allowed that with the procedures in place by the county because it's a modular software.

Q But it was a violation of the requirements of the rule?

A Well, it was an issue. I believe we came up with a acceptable workaround for that.

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(attorney objections and comments omitted)

Gardner John; 08/30/06 - Page 306:0-13

DISTRICT COURT
DENVER COUNTY
CASE NO. 06CV6072

DEPOSITION OF: JOHN GARDNER - VOLUME II
EXAMINATION DATE: AUGUST 30, 2006

MYRIAH SULLIVAN CONROY, et al.,
Plaintiffs,
v.
GINNETTE DENNIS, et al.,
Defendants.

PURSUANT TO THE SECOND AMENDED NOTICE,
the deposition of JOHN GARDNER - VOLUME II was taken at 9:0A.m. on August 30, 2006,
at 1801 California Street, Suite 3600, Denver, Colorado,

Gardner John; 08/30/06 - Page 312:7 - 314:4

E X A M I N A T I O N
BY MR. HULTIN:

Q Good morning, Mr. Gardner.

A Good morning.

Q You acknowledge that you're still under the oath that was administered yesterday?

A Yes, I do.

Q Mr. Gardner, I'm handing you what was marked yesterday as Exhibit 14. And this is an Affidavit that you signed on August 4th of this year; is that correct?

A Yes, it is.

Q Okay. And do you remember making that Affidavit?

A Yes.

Q I'll hand you what's been marked as Exhibit 29. Have you seen Exhibit 29 before?

A Possibly.

Q I would represent to you that Exhibit 29 was an attachment to the pleading filed by the Attorney General on behalf of the Secretary of State, which was -- also included Exhibit 14 to your Affidavit and is the privilege log that contained the security documents, which are described in your Affidavit, Exhibit 14. Does that refresh your recollection?

A Yes.

Q And in fact, you assisted the Attorney General's office in identifying all of the documents that you believed needed to be protected from public disclosure and even any copying; isn't that right?

A Yes, I believe so.

Q And as the person who is the statutory expert and the person responsible for the certification process at the Secretary of State's office, you are the person in the state government that has

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(attorney objections and comments omitted)

the most knowledge about the extremely confidential and sensitive nature of the information that's identified in Exhibit 29; isn't that right?

A I believe so.

Q There's nobody in the state government that knows any more about that than you?

A Not to my knowledge.

Q And you are the expert on this?

A Yes, I believe so.

Gardner John; 08/30/06 - Page 314:14-17

Q But it is your position that the disclosure of even one of these documents on this list would jeopardize the security and integrity of elections in Colorado?

Gardner John; 08/30/06 - Page 316:3-6

MR. HULTIN: Please read the question back.

(The last question was read back.)

A To the best of my ability, yes.

Gardner John; 08/30/06 - Page 316:14 - 317:13

Q Let me try to explain it. It's your position that every document on Exhibit 29 is confidential and is not in the public domain, correct?

A Oh, I didn't say that, no. I did not verify if they were in the public domain or not. I simply looked at the documents that I had in my possession and reviewed them to determine if there was a security issue within the document.

Q So you made no effort whatsoever to determine whether or not any of these documents were in fact public documents?

A I did not, no. Correct.

Q Do you know whether or not any of these documents are, in fact, public documents?

A I have no knowledge of that, no.

Q Would you be surprised to learn that all but one of the Diebold documents is in the public domain?

A I would be.

Q And that would mean that your assertion of privilege with respect to these documents, that there was no good-faith basis for; isn't that right?

Gardner John; 08/30/06 - Page 317:17 - 318:1

A No. I don't agree with that. I believe I was doing a good-faith effort in the time frame that I had to review just the basic documents that I had in my possession to determine if there was a security issue or not.

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(attorney objections and comments omitted)

Q (BY MR. HULTIN) Did you even pick up the phone and call Diebold and say, Hey, as to any of this stuff, is any of it in the public domain?

A I did not, no.

Gardner John; 08/30/06 - Page 329:1-6

Q (BY MR. HULTIN) Mr. Gardner, I'm handing you what's been marked as Exhibit 34, which is the qualification report for Sequoia Voting Systems, Voting System 5.0. What in addition to 31 would constitute the qualification report for Sequoia Voting System 5.0-A?

Gardner John; 08/30/06 - Page 330:3 - 331:7

A There is no qualification report for System 5.0-A at this time. What is missing is the additional documentation that we might have received, the compilation of the test matrix, any necessary tiebacks that need to be made. For example, if we have a document that's missing that's just a documentation-type request, we try to put those in the qualification report. So pulling that file, getting it in this report, scanning these in so that they're in electron -- I'm sorry. When I say "scanning these in," I'm referring to in Exhibit 31, these test matrix, we scan those documents in so that when we post this or print it out, it's all in an electronic format that's a compiled document, so it's not pieces of documents assembled together every time a request is made for that document.

Q Okay.

A Also, the warnings, the findings, and the testing notes that are made in the General Comments section of the qualification report would have to be documented and written up.

Q So that hasn't been done?

A Correct.

Q Are you not required by law to do that within 30 days of certification?

A Yes, we are.

Gardner John; 08/30/06 - Page 331:17-23

Q Who has purchased 5.0-A?

A Nobody at this time.

Q So other than a bunch of paper that's laying around your office or some other offices, all we have now as pertains to the certification of 5.0-A is Exhibit 31?

A At this point, yes.

[NOTE: The Sequoia 5.0A was, in fact, used by Denver in the August 8, 2006 primary election and as of the date of this digest, no certification report has been prepared.]

Gardner John; 08/30/06 - Page 339:13 - 340:5

Q But what we did as we were going through your documentation, which are the appendices to Exhibit 10, the Form 7.3, the Application Review Form; Form 8.1, the Requirements Review Form; Form 9.1, the Demonstration Checklist and Form 9.3, the General Testing Matrix - Cumulative Summary. And that's essentially the test log and the detailed record of the certification process, correct?

A Yes, that is correct.

Q And that's a compilation of the test notes that the test board maintained?

A Yes, it is.

Q And that is the record of what you did or didn't do in the certification process?

A Yes. To the best of my knowledge, yes.

Gardner John; 08/30/06 - Page 340:11 - 341:9

Q Now, what I tried to do yesterday was identify each security test that you did. And I've marked these, and I'll go through them quickly so we can hopefully confirm this, and then we'll see if we've got a complete listing of them. We have the -- you know, the security documentation that is contained -- or identified in Form 8.At 45.5.2.6.1 through (j) at pages 16 and 17. And this is in Form 8.1, correct?

A Yes, that is correct.

Q And what we have there is we -- you have to determine whether or not there is documentation of those security standards, and then, in the absence of -- or I guess, in addition to the documentation, you do a functional test to confirm that the system will not permit unauthorized changes to casting or recording votes and so on, correct?

A Yes.

Q So you have two elements there. One is documentation. The other is a functional test, correct?

A Yes.

Gardner John; 08/30/06 - Page 341:14 - 343:17

Q Then we go to Form 9.3, page 30, 9.3.And 9.3.3?

A I'm sorry. Could I clarify that as the second one is 9.3.2.3?

Q Yes. Thank you. You're correct. And this is functional testing to demonstrate these two requirements?

A Yes, that is correct.

Q And the functional testing, there is no written test protocol or test procedure; that all of the functional testing was done by you based on your experience, your practical experience, in conducting elections and reflects your judgment that in an election environment it would not be possible for someone to make unauthorized changes to ballot formats or to -- and so on in connection with the security tests at 45.5.2.6.1(a) through (j), correct?

A Yes. We tested those requirements.

Q And tested them in the manner that I just described?

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(attorney objections and comments omitted)

A Yes, to the best of my ability.

Q And then when we get to 9.3.2.2's Database - Security and Permissions, that you're to demonstrate the things specified there, again, you are -- you know, talking about John Gardner based on his experience in El Paso County doing whatever John Gardner says is necessary to so demonstrate?

A Based on what the requirement requests.

Q Yes.

A Yes.

Q But the test -- there isn't any test protocol or test procedure? This is John Gardner goes in and does what John Gardner thinks needs to be done to demonstrate these things?

A Well, I think in these two cases, the procedure is pretty clear.

Q But I'm talking about the general process of functional testing. Have I stated that correctly?

A Yes. We follow the form of the matrix and the instructions that are given on the matrix for each test.

Q And then you bring your experience in El Paso County in the conduct of elections and make a determination that based on your understanding of the election environment, that you're able to demonstrate and test and confirm that the requirements of a particular subsection have been met?

A Yes.

Gardner John; 08/30/06 - Page 346:23 – 347:16

Q All right. Let's go back to the -- before we do that, John, have we now got identified every single security test that --

A I believe so, yes.

Q -- you do? Okay. And this would be the same for each and every one of the four subject DRE systems?

A Yes, the test is the same.

Q And this would be the same for the Sequoia 5.0-A system?

A Yes.

Q This would be the same process that you would go through with your documentation of security and then functional testing?

A Yes, that is correct.

Q And we've -- the way I've described the functional testing that you do today, you agree with?

A Yes, I believe so.

Gardner John; 08/30/06 - Page 357:6-18

Q (BY MR. HULTIN) Mr. Gardner, as part of your certification process, did you -- and with reference to Exhibit 30 -- [List of "Security Information" compiled by the AG's office]

A Okay.

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(attorney objections and comments omitted)

Q -- which I believe to be a complete compilation of all of the confidential documents, including, but not limited to, the ITA documents, did you -- with reference to all of the ITA documents, did you make a careful review of those?

A Of the ITA documents?

Q Yes.

A No, I don't believe so.

Gardner John; 08/30/06 - Page 358:1 - 359:5

Q So all you did was go to the front of those and see if it had the same system specifications and the same components. That was the beginning, the middle, and the end of your inquiry?

A For the most part, yes. There may be an exception here or there. You know, as I made mention in the previous documentation, if there was something strange that we couldn't find in other documentation, we might have gone to those to fill a gap in documentation somewhere.

Q Do you think the ITAs do a good job of evaluating the security and the code and the robustness of the architecture of the various DREs?

A I don't believe that's my job to determine that.

Q Okay. But do you have an opinion on that?

A No, I do not.

Q Have you ever carefully read a single ITA report?

A No, I have not.

Q Even though you have not carefully reviewed any of the ITA reports or even read one of them carefully, you signed an affidavit that said disclosure of those ITA reports would compromise the security of Colorado's elections, didn't you?

A Yes, I did.

Gardner John; 08/30/06 - Page 359:17 - 360:6

Q . . . having not read any of the ITA reports, you don't have an opinion as to whether Wyle does a better job than CIBER or vice versa or --

A No, sir, I don't.

Q -- whether any of them are any good at all in the technical sense?

A No, sir. I believe that they are evaluated by the Election Assistance Commission.

Q Okay. And that's good enough for you?

A I don't believe it's my job to make that determination.

Q And you don't think it's your job to read the ITA reports, apparently, either?

A That is correct.

Gardner John; 08/30/06 - Page 366:18 - 367:6

Q Well, I'm confused, because your form is buggered up, to use the legal term.

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(attorney objections and comments omitted)

A That's not an acronym for something, is it, that I'm not aware of?

Q No, it's not.

A Yes, I agree that there are nonalignment issues with our form, correct.

Q And the regulations?

A Not with the regulations, just with the matrix. They just don't match each other, which happens. However, if you read the text of the matrix, you can find the associated rule that that goes to. I mean, we can clean this up.

Gardner John; 08/30/06 - Page 367:7 - 368:6

Q All right. Well, let's start with the rule. 45.5.2.7.3. "The voting system provider is required to provide the Secretary of State an affidavit of compliance with the State's 'Minimum IT Architecture Standards' and is further required to indicate to the State any variance between the vendor's systems and the State's standards within the documentation submitted for certification of the voting system." Where do I find that on the checklist?

A On the checklist, that is item 45.5.2.7.2. Because you'll note the rule up above in the rule, the 45.5.2.7.2, that matches the actual documentation test, if you will, that we really need, meeting the minimum IT architecture standards. The second one, 45.5.2.7.3, is simply an affidavit from the vendor of that fact.

Q Okay. Do you have such an affidavit from the vendor?

A I am not sure if we do.

Q Would you please produce that?

A I will do the research on that. [NOTE: The required affidavits for the four vendors were not supplied by the vendors until requested in Gardner's deposition more than five months after certification.]

Gardner John; 08/30/06 - Page 369:5 - 372:1

A So that's -- I think that's what happened there. In the rule, we skipped over 7.3. We moved on, but the numbers on the matrix did not move on. So on the matrix, the item that's 7.3 should really be 7.4, and so on from that point.

Q So going on to the next page, 45.5.2.7.6 really is referring to 45.2 -- 45.5.2.7.7?

A Yes, that's correct.

Q And in each of these cases, from 45.5.2.7.2, which should have been .3, would be the rule. So .3, .4, .5, .6, and .7, these were all instances pertaining to telecommunications functional requirements of the rule that Mr. Garcia determined had failed and that you overrode his failure, correct?

A Yes, that's correct. And --

Q And what's the basis for overriding his failure?

A Well, each one is a different situation. I believe I've discussed the first three.

Q Well, the first one was the documentation and the affidavit and -- requiring documentation and requiring an affidavit. Are you telling me that you found documentation that he didn't?

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(attorney objections and comments omitted)

A Yes. I mean, if you understand the flow of how we do things, the documentation is completed in Phase II. We send a letter to the vendor, which is included in this exhibit, that identifies items that we have not found, if that's truly the case.

Q Okay. And is that letter part of the application here?

A It's in this qualification report. Then we move on to functional testing, and we pick up those pieces of documentation that we're missing through either a functional test, as I've explained, or through additional documentation, as I've explained.

Q Can you show me the letter where you asked for this documentation?

A On page 26, you'll see -- oh, golly, you know what? The wrong letters are in this document.

Q Page 26? Is that up at the front?

MS. MIRBABA: Yeah.

A Yeah. They're the incorrect letters.

Q (BY MR. HULTIN) Okay. So what you're telling me, then, is that this qualification report doesn't contain the documentation?

A What I'm saying is this qualification report needs to be revised. It's got incorrect information in it.

Q What is the information that's incorrect in this qualification report?

A The two -- the information that starts on page 26 and goes to page 30.

Q Page 26 to 30 is incorrect?

A Yes.

Q Why is that?

A These are applicable to the application that was withdrawn by ES&S. And I'm able to recognize that based on the certification number that our office assigned to them does not match the certification number for this qualification report.

Gardner John; 08/30/06 - Page 372:13 - 373:9

Q Right. So in addition to having the numbers wrong and the numbers not lining up with the regulation, the documentation that you put in to show that the documentation that you had requested that pertained to the wrongly numbered verification form was also incorrect; is that right?

A Boy, that was a long question, but yes, that is correct.

Q Okay. So it was sort of doubly wrong?

A It was an oops.

Q A double oops?

A Yes, it's a double oops. Unfortunately, that number that's on our matrix will be consistent with all four certification reports.

Q Okay. So each of the four certification reports is wrong in that regard, as well?

A On the matrix, the number will be out of sync with the rule.

Gardner John; 08/30/06 - Page 380:5 - 381:9

Q Now, as to Rule 45 and specifically 45.5.2.6, the security requirements, we've seen various drafts of the rule. We looked at those yesterday. And what I would like to know is, what is

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(attorney objections and comments omitted)

the source of 45.5.2.6, as it exists in the rule that was adopted and applied by you in this certification process?

A I do not know the source of that requirement. The specific source, I don't recall.

Q Do you know who wrote that?

A I don't recall specifically who wrote that. If I knew where the source was, I'd probably know where the language came from, because it could have been -- remember, we had the initial Drew Durham document, where some of the stuff came from, other stuff got axed out. We had other documents brought into it. We added some things from the voting system standards. We took those back out. I just can't say which ones came from which document or

Q So the fact of the matter is, even though you're the principal author of Rule 45, you have no idea where 45.5.2.6 came from?

A Not off the top of my head. I mean, with some research, I could probably get pretty close, you know, if I go back and trace the history.

Gardner John; 08/30/06 - Page 381:20 - 382:10

Q Right. And then the next one, which is .18, actually refers to .19, which says, "The V-VPAT shall allow a voter to spoil his or her paper record no more than two times. Upon spoiling, the voter shall be able to modify and verify selections on the DRE without having to reselect all of his choices." And the next one were both failures/verify, and you have "See 9.1, notes," as your reference on that, correct?

A Yes, that's what it says there.

Q And is this the issue that was discussed in the text of the note, on page 10, when you say, "It should be noted the true paper summary does not appear at the end of the ballot"?

A Yes.

Gardner John; 08/30/06 - Page 382:16-24

Q Well, here. When you say, "It should be noted that a true paper summary does not appear at the end of the ballot," when a voter changes his mind twice and on the third time. That was the problem, right?

A Yes, but a piece of paper wouldn't show that statement. You would need the DRE and the paper to really see how that paper's working in conjunction with the DRE.

Gardner John; 08/30/06 - Page 382:25 - 385:12

Q Okay. You say, "This type of processing makes it quite challenging to conduct an audit of the records." Could you explain why that is?

A Sure. If you have a voter who -- remember, for the audit, they have to hand-count the ballots on the V path tape.

Q Exactly.

A Okay. So you're --

- Q 'Cause that's the record of the vote for purposes of a recount?
- A It's -- yes, correct.
- Q By statute?
- A It's a record of the vote, yes.
- Q It's the record that's used on the recount?
- A I don't know the answer to that.
- Q Thought you were the expert on elections.
- A On voting system certification.
- Q Okay.
- A There's -- elections are pretty broad. Okay. The initial question, why is it hard for the post-election audit to verify this? You've got a voter that is selecting president, we'll say. You select Kerry, so it prints, President, John Kerry, and partner -- I don't remember the running mate's name. Then they go through and they select senator. So they go through and they get their Senate races. Then they pick county judge. Got four of those. President is way up off of the screen by now because you've selected all these other races, but they think, you know what? I maybe want to change my presidential vote.
- Q I don't like John Kerry, and I don't like George Bush, but I like George Bush much less, or not -- I don't dislike him as much as I dislike Kerry, so I'm going to vote for Bush?
- A The scenarios are infinite, right. So they hit the back button on the DRE to go back to that race. They deselect John Kerry, down at the bottom. President deselected, John Kerry. Then they select President Bush so it now prints President Bush down here. So that record of deselection of Kerry happened, you know, several inches down the paper away. If the voter does that process three or four times or on three or four races, the canvass board is going to have to be very careful to make sure that they're getting that particular ballot correctly in the audit to match the machine count. So it's just a procedural issue that they have to kind of take their time and go slow through that process.
- Q Okay. And this is something that is unique to the ES&S system? The other systems make a summary change of things?
- A Yes, that is correct.
- Q Okay. And the ES&S doesn't?
- A Yes.

Gardner John; 08/30/06 - Page 393:4 - 395:13

- 9.3.5.5. "Demonstrate how the extraction of data is disabled until the proper sequence of events for reporting has occurred." What's the rule that you're demonstrating compliance with here? This is audit requirement.
- A I don't -- I don't see it in the rule.
- Q What's the concern with this section?
- A Well, this could be a statutory requirement. Essentially, you do not want to have the ability to print results prior to 7 p.m. on election night.
- Q Okay. And you say, "This is poor, but essentially handled through procedure rather than in the system." Did I read your handwriting correctly there?
- A Yes.

Q Explain why the 9.3.5.5 on 43 is poor.

A If you have a early voting location -- that's a remote location, not at your central office -- when you close the polls at the end of early voting, in procedures, you need to run some kind of report or document that allows you to verify that the number of cards cast matches the number of ballots issued for that early voting location. And the only way to do that is to run the summary report, which has votes on it. So the two procedure things you can do to handle this are: At the beginning of the report is where it prints the total cards cast. So you can pull the plug on the printer, stop it from printing the remainder of the report.

Q So essentially, to make this work, you'd have to take the electricity away from the printer to stop it at the point to get the report that you need?

A That's a solution. Other solutions could be to have two judges there, and as the tape's coming off, you fold the tape over in such a way to not expose any of the votes that are cast.

Q I didn't see that this was -- is this noted in a warning in your report?

A I don't recall.

Q So it's not in your report?

A I did not see it in there, no.

Q Did you discuss this with the Secretary?

A I did not, as we felt that this was able to be handled through procedure.

Q But you didn't make any note of this to the counties or anyplace in the procedure, that this was a problem, did you?

A Other than the note that is contained right here.

Q That's it?

A That's it, yes.

Gardner John; 08/30/06 - Page 405:9-20

"Demonstrate that the booth provides privacy while it is occupied and is designed to prevent observation of the ballot by any person other than the voter." Now, you passed that. What does your note say?

A The note there says, "Care must be taken to angle the iVo's so as not to see other people's votes."

Q So there's a concern that you had about secrecy of the voting process because of the design of the iVotronic DRE, correct?

A Yes, that's correct.

Gardner John; 08/30/06 - Page 407:4-16

Q Going to page 49. Test 9.3.7.22, which is based on 45.2.8.4 -- 8.4(i), which are accessibility requirements. It says, "Documentation of the accessibility of the voting system shall include the following items at a minimum: (i), User adjustability of color settings, screen contrasts, and screen angles/tilt if the system uses a display screen." And what does your note say?

A I'll read the note, but just for clarity, the rule that this requirement refers to is incorrect in the notes of the matrix. It says 45.5.2.8.4(i), but, in fact, it's 45.5.2.8.2(i).

Gardner John; 08/30/06 - Page 407:18 - 408:4

A Just wanted to make sure that was clear. My note there says that the items underlined, the color and the angle and tilt, cannot be user-adjusted. Those have to be adjusted by a poll worker.

Q Mm-hmm. So -- and the rule requires "User adjustability of the color settings," and it requires user adjustability of the tilt, correct?

A Yes.

Q And you're saying that that can't be done by the user?

Gardner John; 08/30/06 - Page 408:8 - 409:7

Q (BY MR. HULTIN) Correct? Is that what your note says?

A Yes.

Q And you passed this, correct?

A Yes.

Q Why did you pass it, when your note says that two of the required elements can't be used or adjusted?

A This was on a list of items discussed with the Secretary of State's office -- I'm sorry -- with the Secretary of State, and from our discussions, it was determined that that would be okay.

Q Okay. Well, I guess I'm interested in the difference between a failure which is minor and a pass which doesn't pass but you discuss and say it's okay to call it a pass, even though it's clear that it doesn't pass.

A It's just a judgment call on the item.

Q So your judgment was, is that even though this one failed to meet two explicit mandatory requirements of Rule 45.5.2.8.2(i), it was a pass?

A Yes, that's correct.

Gardner John; 08/30/06 - Page 409:8 - 410:7

Q So it takes somebody to read your test matrix pretty closely to determine whether something passes or doesn't pass, right?

A. I think -- I don't know the answer to that question. It depends on who's reading.

Q Well, I guess I'm really mystified. I'm really mystified, Mr. Gardner, how you can put in your own handwriting that something can't do what the rule says it's supposed to do, and then you say it passes. What's your thought process for that?

A I don't recall how that determination was made for that item.

Q But clearly, it didn't pass?

A To my recollection, those two items, based on my note, were not met.

Q And a plain reading of the rule would say that if you can't adjust the color settings and if you can't -- if the user can't adjust the color settings and if the user can't adjust the tilt of the screen angle, the angle and tilt of the screen, it doesn't pass, right?

A I have testified that I am not a lawyer to interpret certain things.

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(attorney objections and comments omitted)

Gardner John; 08/30/06 - Page 410:11-25

A Well, that's where I was headed with this. The rule says "user adjustability."

Q Right.

A And I don't know who is defining what a user is. It doesn't say voter. It says user. Is the user the poll worker providing instructions to the voter? I mean, technically, you're allowed to give assistance to the voter prior to them voting.

Q You wrote the rule, didn't you?

A I have written the rule with advice and assistance. I've also testified I don't have the rule memorized. I don't know the source of some of the rules. I'm just reading the English.

Gardner John; 08/30/06 - Page 411:1-19

Q Did you understand the user to be the voter?

A Well, I think that's up for discussion. In order for it to pass, we could define the user as the poll worker. And if the poll worker can adjust it, well, then, it's fine.

Q What did Secretary Dennis say when you told her about this?

A As I just mentioned, I don't recall how the conversation went with the Secretary.

Q You don't remember anything about that conversation?

A I don't remember the days of the conversation.

Q You just remember you had it, and at the end of the day you certified the ES&S DRE?

A I recommended that the system be certified with the conditions.

Gardner John; 08/30/06 - Page 411:23 - 412:9

Going on to page 51, 9.3.8.23. This is 45.5.2.9.18 -- .19, rather. And this was the "shaky at best" for a pass, right?

A Yes, that's correct.

Q Why did you say "shaky at best"?

A This item goes back to our earlier discussion this morning of how the VPAT prints a realtime record of a voter's choices, and only the DRE prevents the voter from spoiling a third time upon reviewing the entire ballot of the choices made. So this was a little complicated.

Gardner John; 08/30/06 - Page 441:17 - 443:10

Q Now, Mr. Gardner, we've spent a lot of time over the last day and a half talking about the certification process and certification regulations and the way you apply those and the various forms that you use and the various tests that you employ and so on. You recall that testimony, I'm sure.

A I do recall it, and most of it was specific to ES&S.

Q That's correct. And my question is, in terms of the process of certifying an application and the regs you apply and the process you go through and the forms that you use and the tests

that you employ, were those essentially the same for the Hart certification as they were for the ES&S certification?

A Yes, they should be essentially the same.

Q And that would also be the same for Diebold and Sequoia?

A Yes. There will be a few exceptions, but the essence will be the same.

Q But in terms of the regulations you applied, the manner in which you applied them, the process that you employed, the persons that were involved, the roles of those people, that's essentially the same for all four of these applications; is that correct?

A It's close. The roles of the people changed throughout the process. Michael and David were explicitly the people that were involved, but the allowance of the types of things that they could do changed from vendor to vendor.

Q Other than the latitude, if you will, that they were given in the process, were there any other differences between the ES&S testimony that you've given as to the rules that you applied, the tests that you employed, the procedures for those tests, the way you kept the records, the forms that you used, and, in general, the process that you employed to examine and make a determination on whether or not a voting system should be certified?

Gardner John; 08/30/06 - Page 443:16

A None that I can recall.

Gardner John; 08/30/06 - Page 443:17 - 444:3

Q Let me ask it another way. We've had -- you've given detailed testimony about how you certified the ES&S application, correct?

A That is correct.

Q In terms of the process, what was -- what, if anything, was different about what you did with Hart as opposed to what you did with ES&S? Do you understand the question?

A I do. I believe, if you would like me to recall that, I would take -- need to take a few minutes to re- --

Gardner John; 08/30/06 - Page 444:6 - 445:14

Q I'm just trying -- no secrets here. I'm just trying to say, if there's anything different about Hart than what we talked about, I'd like to you tell me about it so I can ask you about it, okay?

A Understand.

Q Then I'm going to do the same thing with the other two, and then we'll go in and ask some specific questions. And I think that will save us a lot of time.

A Okay. Okay. The process appears to be the same.

Q I'm handing you what's been marked as Exhibit 38 (sic). Would you identify that.

A This is the Certificate for Approval of the Diebold Election Systems, the Voting System 1-18-24, and its Components.

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(attorney objections and comments omitted)

Q And this is dated March 3rd of 2006?

A Yes, correct.

Q And this is the Certificate that is put up on the Secretary of State's web page to tell the world that the Diebold Voting System identified therein has been authorized for use in Colorado elections?

A I believe that is true.

Q And would you please identify Exhibit 38.

A This is the qualification report for the Diebold Election System 1-18-24.

Q Now, the certificate was 37, right?

A Yes.

Gardner John; 08/30/06 - Page 446:3 - 447:13

Q (BY MR. HULTIN) Okay. With respect to the Diebold certification process, that is, referring to the regulatory process whereby you reviewed the application and made findings that the Diebold system met the requirements of Colorado law for use in Colorado elections, would it be your testimony -- or is it your testimony, Mr. Gardner, that the process, in the sense of the authorities that you applied, the investigations that you made, the forms that you used, and so on is substantially the same process that you testified about regarding the ES&S application that we've discussed at length in this deposition?

A Yes, to my recollection.

Q Can you think of any respects in which the process that you utilized was different than that that you testified about concerning ES&S?

A Not that I can think of.

Q Okay. So as to the four systems -- I guess, really, five systems -- two Sequoia systems, 5.0 and 5.0-A, the ES&S system, the Hart system, and the Diebold system, is it your testimony that the process, the certification process, that you undertook to review and examine and test and ultimately recommend approval of those systems for use in Colorado elections, that that process was the same?

A With the, you know, the exception that I did think of was that ES&S was conducted off-site, and the other three were at our office --

Q Yes.

A -- yes, they're essentially the same.

Gardner John; 08/30/06 - Page 461:5 - 462:15

Q Mr. Garcia has written the number 4, pages 40 through 45, as the basis for the failure. What does that refer to?

A There was a list that David Garcia had made which matched a note like that Note 4 --

Q Right.

A -- to a page number. And I have looked for that prior to this, and I don't believe it's in this document.

Q Would that be some of the test notes that were in the folder that you gave to Ms. Mirbaba?

GARDNER DIGEST

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(attorney objections and comments omitted)

- A I actually don't believe that that document existed in that notes folder.
- Q Where did it exist?
- A I don't believe it was retained.
- Q Who made decisions on what to retain or not to retain?
- A I believe, through this process, at this time, it would have been me.
- Q How can I evaluate what Mr. Garcia's basis for saying that this failed was, if it's item 4 and pages 40 to 45, without knowing what item 4 is?
- A We would have to recreate that list.
- Q What is item 4?
- A I don't know.
- Q What is item 2?
- A I don't have recollection of the numbers associated with the page numbers without going back and reviewing through those.
- Q So as far as you're concerned, all of these numbers could be written in Arabic or Swahili --

Gardner John; 08/30/06 - Page 462:18 - 463:10

- Q (BY MR. HULTIN) -- without the code?
- A What's important is that the item meets the requirements.
- Q Well, you say it "meets the requirements." I'm not able to measure what you say against the stated basis for Mr. Garcia's objection, correct?
- A That is a fair statement.
- Q And he has an advanced degree in information technology, correct?
- A Mr. Garcia does not have elections knowledge or experience.
- MR. HULTIN: Please read my question back to him. (The last question was read back.)
- A I am not familiar with Mr. Garcia's resume or qualifications.

Gardner John; 08/30/06 - Page 464:6 - 465:6

- Q (BY MR. HULTIN) But to have a transparent process, if two people who are involved in the process disagree, you'd need to know the basis for the opinion of each of them, wouldn't you?
- A I don't know the answer to that question.
- Q Is transparency or accountability something that you gave any weight to in this process?
- A Yes. That was the idea behind having more than one person do the functional tests.
- Q Isn't it important to have a transparent, repeatable process to keep all of the pertinent records pertaining to the testing and the review that was done by everybody?
- A As well as accuracy, yes.
- Q And, in fact, you didn't keep all those records, did you?
- A That is correct. I made a mistake, and I did not keep that record.
- Q Mr. Garcia also did the review of the ES&S documentation, didn't he? Go to Appendix F for me. It's going to be in the notebook.

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(attorney objections and comments omitted)

Gardner John; 08/30/06 - Page 466:19 - 467:20

Q Going back to the Hart application, which is Exhibit 36, going on to 8.1, page 15, "Physical - Life," 45.5.2.3.20. It says, "Physical - design." "Document the physical life of voting systems to be at least eight years." And he failed it, and you passed it, and you didn't tell us why. What is the basis for this override?

A The note in the margin is my explanation, because I -- I say up above that the documentation of these three items, that's the three passes, was presented during the functional testing.

Q And what is the documentation that the physical life of the Hart system is at least eight years?

A I do not have that information at this time.

Q And I asked you that question about the ES&S system yesterday, as well, correct?

A I believe so.

Q And you didn't have that either?

A I believe that is correct, yes.

Q Do you have any documentation that the physical life of the Diebold system is eight years?

Gardner John; 08/30/06 - Page 468:1 - 469:13

A Yes.

Q (BY MR. HULTIN) What is it?

A I don't have that in front of me. It's in one of the documents provided by the vendor.

Q And what is that document?

A I don't have the title of the document.

Q What are you referring to?

A Exhibit 38, their qualification report, page --

Q May I look over your shoulder?

A Yeah, you bet. Page 15.

Q That, again, is what, Mr. Garcia's code --

A Correct.

Q -- Appendix C? But you don't know what it is, and you have no way of knowing, because you didn't retain that document, right?

A Oh, I didn't say that. We've retained the document. We have the vendor's documentation. I'm just not sure which one matches up with that without doing some research.

Q Okay. But it says here at page 15 that -- it is circled Number 8, which is this sort of master list of sources for -- presumably, for Diebold that Mr. Garcia had, right? Is that what that 8 means to you?

A Can you say that again.

MR. HULTIN: Please read it back. (The last question was read back.)

A It's a list that he created, yes.

Q (BY MR. HULTIN) And you don't have that list?

A I don't have the list. I have the documents.

Q But you don't know what Appendix C is?

GARDNER DIGEST

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(attorney objections and comments omitted)

Gardner John; 08/30/06 - Page 469:23 - 470:1

Q Is that what it takes to meet the requirement; they just have to say it?

A If it's presented by the vendor, yes.

Gardner John; 08/30/06 - Page 470:16-24

Q That's conclusory and self-serving and circular, sir. My question is, 18 8 to meet the requirement, does it take anything more than the vendor coming in and giving you a piece of paper that says it's going to last eight years?

A If I have documentation, as requested, that meets the requirement, it receives a passing score.

Gardner John; 08/30/06 - Page 470:25 - 471:11

Q So if I'm Diebold and I come in and you say, Hey, I've got this requirement in my rule that the system last for eight years, and Diebold says, I'll send you a letter that our system is good for eight years, is that sufficient?

A If it meets the requirement of the rule --

Q Don't give me that circular stuff. Answer the question that's asked, or I'm going to go to the court and get him to command you to answer that question.

Gardner John; 08/30/06 - Page 471:20-21

Q (BY MR. HULTIN) Answer the question.

Gardner John; 08/30/06 - Page 471:24 - 472:6

A Well, I -- that is what I'm attempting to do by stating if it meets the requirement and it meets the requirement on our matrix, it receives a passing score.

MR. HULTIN: Make a special notation in the margin about this question, and I'm going to want an expedited transcript of this prepared.

Gardner John; 08/30/06 - Page 472:15-20

Q (BY MR. HULTIN) Please answer that question.

A Okay. For this specific requirement, because we don't have a way to do a functional test to determine that, yes.

Q That wasn't so hard now, was it?

Gardner John; 08/30/06 - Page 473:16 - 474:20

- Q Going over to page 17, "Security Standards," (e), (f), (g), and (j). "Vendor shall document how the system prevents unauthorized changes to alteration of voting system audit trails." And you say, "These four items were verified during the functional testing." Was this because you tested for this?
- A Yes. This was handled in the same manner as ES&S. We had the same issue, where they had to be verified on the system functionally.
- Q So -- but doesn't Rule 45.5.2.6 require documentation of each of those requirements, as well? Go to page 110, Rule 54.
- A Yes, that is what the rule states.
- Q Mr. Garcia says that there was no documentation provided in these four areas, correct?
- A Yes. But in addition, in the document in this exhibit, in Appendix I, there is the documentation submitted by the vendor, which I believe covers (e), (f), (g), and (j).
- Q Did you make any substantive review of this documentation to determine whether it was adequate in any --adequate or complete in any respect?
- A No. I believe our functional test provided the additional visual information that was necessary.

Gardner John; 08/30/06 - Page 475:6-20

- Q Okay. Did you do the same functional tests on the Hart system for these security standards that you did on the ES&S system?
- A They are essentially the same, yes. The names to the modules and access to those modules are a little bit different. But essentially, the process is the same.
- Q Let's just briefly go through each one of these things, (a) through (j) for the "Security Standards," and tell me what your test is. So for 45.5.2.6.1(a), preventing unauthorized changes to system capabilities for defining ballot formats, what is your functional test?

Gardner John; 08/30/06 - Page 475:24 - 478:9

- A Bear with me one second. I want to make sure I get my terminology correct. Okay. In the BOSS system -- this is the Ballot Origination. This is where the ballots are defined -- you're allowed to create two users -- I'm sorry -- multiple users and give them specific roles. So we created a second user, removed the ability to change ballot formats after they were established, logged off, logged on with that user, and verified that they weren't able to make that change.
- Q (BY MR. HULTIN) And that's the extent of your test?
- A I believe so, yes.
- Q Okay.
- A This is a software test, yes.
- Q And then for 4.5.2.6.1(b), "Document how the system prevents unauthorized changes to casting and recording votes," what's the test you did there?

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(attorney objections and comments omitted)

- A This happens on the absentee scanners. There's a variety of them with this package, the eScan device as well as the DRE. So if I cast a vote, what abilities do I have to change my cast vote or record additional votes after my vote has been cast?
- Q And what's the test you do?
- A Well, we're trying to cast additional ballots for that voter, trying to reuse programmed numbers that have been assigned for activation, things along those lines.
- Q And that was -- for all of these, these are the same basic tests that you performed on all four of the systems, taking into account the difference in the hardware and the terminology and so on, correct?
- A Yes, I believe that's correct.
- Q All right. Okay. For (c), 45.5.2.6.1(c), "Vendor shall document how system prevents unauthorized changes to calculating vote totals consistent to defined ballot formats." What's the functional test that you did to satisfy this for all four systems?
- A Well, the terminology's a little different, but this is -- they call this piece of software Tally, where you bring those vote totals together from the different media that has been downloaded. And the idea is that you have a result on the media cartridge that's been verified at the device, and now, through the process of uploading that card, when I stick it in the machine, the Tally software, what abilities do I have to make a change to those votes as they come in? So we're attempting to disrupt the process as the vote total is being loaded.
- Q What did you do to disrupt the vote total?
- A Aside from being able to stop and restart the process, there really wasn't anything we were able to do.

Gardner John; 08/30/06 - Page 487:4 - 488:8

- Q (BY MR. HULTIN) Let me try that again. Mr. Gardner, just to sort of bring some closure to this, describe for me, if you will, your test protocol for this security functional testing.
- A In summary, through the steps that I previously described for each individual item, my knowledge of election process, the exposure that I have in our office to the election laws and rules, to my ability, the environment that we created was a mock election. Our tests were done in a -- as much as possible, a true election environment, recreating what would be experienced by a jurisdiction who purchased this system to ensure the security tests identified in this section (a) through (j) were completed successfully.
- Q So in that context, then, you went in and played around and tried to make unauthorized changes in each of those areas for approximately 15 minutes and were unable to do so?
- A Yes, as I described in detail, I believe.
- Q Okay. So that's -- we have now, the two of us, described your functional testing for security with precision? Would you agree with that?
- A To the best of my recollection, yes.

Gardner John; 08/30/06 - Page 494:9-11

- Q Trojan horse attacks can be mounted on the Diebold systems through the flash memory, though? That's been documented, correct?

Gardner John; 08/30/06 - Page 494:15-16

A I believe that is in a report somewhere, yes.

Gardner John; 08/30/06 - Page 494:24 - 495:12

Q (BY MR. HULTIN) Do you know whether or not a software attack on the hard system can be mounted through the MBB?

A I would say that if the MBBs are handled properly according to appropriate security procedures, which, you know, kind of involve the whole system: That these are secured in the possession of the clerk and recorder; only put in devices that are not connected to the Internet; they're only used for their intended purpose, for this voting system, which is a stand-alone, nonnetworked system, that there -- the chance of a Trojan horse infecting an MBB through those processes is extremely low.

Gardner John; 08/30/06 - Page 495:16-25

Q (BY MR. HULTIN) And that's without regard to the procedures, just theoretically?

A I'm not aware if it's possible or not.

Q You don't know, one way or the other?

A No. We don't perform tests for things like that. We treat this as being used in an election environment.

Gardner John; 08/30/06 - Page 496:13-25

Q Did you consider whether or not a software attack was possible, could be mounted through a MBB?

A Not for our testing.

Q Did you consider, in your security testing, whether -- what the other avenues through which a software attack could be mounted?

A We consider the security possibilities for software attacks, for hardware attacks, for the media cards that are being downloaded and uploaded strictly from the perspective of the election's security overall.

Gardner John; 08/30/06 - Page 497:18 - 498:19

Q And you didn't consider whether or not a software attack could be mounted through a mobile ballot box, correct?

A We did from our perspective, but not from any other perspective.

Q And your perspective, meaning that you felt that there were enough procedural safeguards concerning the administration of the election that that wasn't anything you needed to be concerned about? Was that your perspective?

A That's essentially correct, yes.

Q And what are the procedural -- where are the security measures pertaining to the handling of the MBBs set forth?

A I think for a complete answer I'd have to do some research for that. There are various statutes that make reference to devices being sealed and the memory cards and tracking that sealed device from start to finish, from the point where it leaves the hands of the clerk and recorder till it comes back. I just don't know the exact references for that, but . . .

Q It's just whatever the security was for the traditional ballot box are applicable as a matter of law to the electronic ballot box, and you think those are sufficient? Is that your testimony?

Gardner John; 08/30/06 - Page 498:23 - 499:8

A There are similar statutes for handling it like a traditional paper ballot box, but I believe there are some additional requirements.

Q (BY MR. HULTIN) But you can't tell me what they are?

A No, sir, not without some research on that. I'm sorry.

Q But that's what you're relying on, correct?

A Yes.

Gardner John; 08/30/06 - Page 500:15 - 501:23

Q (BY MR. HULTIN) Do you know whether the prior versions of Diebold that have been proven to be vulnerable have the same characteristics as the current version that's been certified?

A I do not know the answer to that.

Q Have you made any investigation of that?

A Yes.

Q And what investigation have you made?

A Well, we make the determination based on the election's security, the overall process; that since these are not connected to the Internet, these are not connected to a network, they're stand-alone devices, the software is protected, to the extent possible, that we feel is comfortable. You know, the physical devices that are out in the fields require a little more extensive tampering with that we feel would be detected by judges, from the information that I have.

Q Now, as to the Diebold system, you didn't make it a certification exception that Diebold be used only as a stand-alone -- in a stand-alone environment, did you?

A I don't think we specifically called that out with any of the systems, to my recollection. I believe that's a general practice. I'm not sure if we have that in our rules or statutes somewhere, but that is the best practices, if you will, that is advertised by our office.

Gardner John; 08/30/06 - Page 507:21

Q Now, you said you've reviewed Exhibit 40 before? [Hursti II Report]

A I have seen this document before, yes.

09/09/06

(attorney objections and comments omitted)

Q Have you read it?

A I believe so.

Q Isn't it a fact that the system, the Diebold TSx that was evaluated on May 11th, 2006, by Harri Hursti is the very same TSx that was certified by you on March 3?

A Yes, that is correct.

Q Do you know whether or not an unexpurgated version of Exhibit 40 is now available on the Internet with source code and detailed instructions on how to hack into a TSx DRE machine?

A I am unaware of that, I believe.

Q Does that concern you, if that were to be true?

A I would have to evaluate what specifically was revealed, but our office did address this document specifically by issuing a requirement for handling the TSx machine, which included additional security tape covering memory card slots, the back panel to be able to detect tampering with the system.

Gardner John; 08/30/06 - Page 508:7-23

Q My question was what specifically did your office do in response to that? What were the explicit certification conditions?

A In response to the entire document as a whole?

Q Yeah. Yeah.

A We required four additional seals on the TSx device.

Q And this is in the certification requirement?

A No. This is in a separate document that was issued by our office. I believe it was Election Alert -- I don't recall the number, if it was -- I don't recall the number, but we issued an election alert. I believe those documents were turned over to you, as well.

Gardner John; 08/30/06 - Page 510:3-25

Q So the election alert regarding the Diebold TSx was an order from the Secretary of State to, you believe, 12 counties to implement additional security procedures regarding any use of the Diebold TSx; is that correct?

A Yes.

Q And what were the additional requirements?

A The additional requirements were four additional seals on the device to cover the memory card slot that is vacant or unused, the memory card slot that is used, and two to cover the front and back panels to detect if the panels have been separated.

Q And that's because all you need is a Phillips head screwdriver to get into the machine and access the programmable mother board of the machine, correct?

A Undetected, yes.

Q Yes. Okay. What else did the election alert for the Diebold TSx provide?

A That was it.

09/09/06

(attorney objections and comments omitted)

Gardner John; 08/30/06 - Page 512:18 - 514:10

Q Were you aware that the California Secretary of State had an independent testing board that tested the Diebold TSx and found the presence of illegal interpreted code?

A I was aware that California had an issue with the Diebold system, but I don't know the specifics or can recall the specifics of that.

Q Were you aware that the California Secretary of State appointed an advisory board to evaluate the -- review the source code of the Diebold TSx Version 4.6.4 Voting Machine?

A No, I am not familiar with the exact processes that California goes through.

Q Were you aware that the California Secretary of State, based on the recommendation of its advisory committee board, Voting Systems Technical Assessment Advisory Board, issued four pages of security conditions that went along with its certification of the Diebold TSx Version 4.6.4?

A Yes, I have seen that report.

Q You have seen those conditions?

A Yes, I have seen those.

Q Hand you what's been marked as Exhibit 42. Are those those conditions?

A I believe this is the same document that I saw earlier.

Q I guess my question to you is, you issued an election alert that said, Put four seals on the machine. The California Secretary of State, as of February 17, well before you certified the Diebold TSx, issued three and a half pages of conditions to enhance the dubious security of the TSx. Why did you not follow the more elaborate procedures adopted by the California Secretary of State?

A I believe we put in place the necessary procedures for successful use of our systems as defined in our election process here in Colorado. Some of these items, we have put into place here.

Gardner John; 08/30/06 - Page 537:8-17

Q I'm handing you what's been marked as Exhibit 44. What's Exhibit 44?

A This is an e-mail communication with Tari Runyan regarding her question submitted to me about the progress and directions we're going on with the functional testing.

Q And doesn't this also have to do with the problems with the GEMS Version 1.17.23 that was not certified?

A Yes.

Gardner John; 08/30/06 - Page 538:19 - 539:24

Q And so after the first line with the number 1 on it, that's your response to her question as of February 3, 2006?

A Yes.

09/09/06

(attorney objections and comments omitted)

Q So what you're saying, "Counties who have the existing AccuVote with the 1.94w and the GEMS...may continue to use those in 2006 if they like, and as long as these systems remain working with equipment just within their package." Is that the way it turned out?

A No, that is not the way it turned out.

Q But you're telling her that it's okay to continue to use the stuff that wasn't certified, right? That was your view?

A At this point in time, this is my response to her questions, and we are still trying to work out an answer to how this works.

Q But what you're saying is that as of -- in response to her question, as of February 3, 2006, you're saying that counties -- she's saying, Are these AccuVote units grandfathered in, and you're saying, Well, sort of, not really. But then you go on to say, "Counties that have existing AccuVote 1.94w and GEMS 1.17.22 or 1.17.23 may continue to use these in 2006...and as long as the systems remain working with equipment just within their package." That's your -- that's your statement as the certification officer of Colorado, correct?

A Yes.

Gardner John; 08/30/06 - Page 540:6-21

Q But it was your recommendation to the Secretary? There's that e-mail that you sent to Terry Sholdt saying, This is what we're trying to work out. We're going to do a temporary certification of this system to allow this use throughout 2006, correct?

A That was an option. This is an option. Using 1.94w with just 1.18.24, that was also on the table. I mean, that's the end result of this whole process. So yes, this is what that says, but it was one of many ideas to the Secretary.

Q And I think you testified yesterday it was a bad idea, right? Right?

A I -- I don't recall saying that, but it's possible. It was a bad idea.

Gardner John; 08/30/06 - Page 542:5-25

Q And would it be fair to say that the trustworthiness of the vendors on quality issues and security issues is dubious?

A The sales and marketing department of the vendors are quite a different animal from the technical support and development side, which is more traditionally what I'm dealing with now. This issue is on the -- you know, the marketing/salespeople, not on the technical development. And no, I think the interest of the vendors has been pretty consistent that security and accuracy is important, from that perspective.

Q Well, what about Diebold not requesting the ITA to examine their interpreter for illegal code, the issue that came up at the turn of the year?

A I think you would have to go to Brian Hancock in this e-mail, who explained to me what happened, in Exhibit 41, and ask for his opinion on that.

09/09/06

(attorney objections and comments omitted)

Gardner John; 08/30/06 - Page 543:16 - 544:15

Q This is Exhibit 47. Please identify Exhibit 47.

A This is an e-mail that I was copied on with a chain of e-mail from a Adams County representative to the Election Assistance Commission.

Q Okay. Karen Long is saying that she's talked to you and told you that her equipment was certified and it was okay to use for this year's election. "There is nothing in Colorado law stating that our old equipment has to meet 2002 standards." Did you make such a statement to Karen Long?

A I don't recall if she was at the meeting. It's possible that -- this was a election statute review committee meeting, I believe. This was brought up. I don't recall the details.

Q It says here, "John claims that Brian Hancock told him that these two versions were OK. When we showed him your letter, John was quite surprised. Said he would do some more checking. But he'd already made some pretty bold statements." Is that the way it came down, John? Do you recall that?

Gardner John; 08/30/06 - Page 545:8-11

Q This is consistent with what you were saying to Tari Runyan on February 3, though; isn't that right? Go ahead and use this stuff?

A It is in that e-mail, yes.

Gardner John; 08/30/06 - Page 546:8-13

Q Well, this is at the same time that you're telling Terry Sholdt in an e-mail that you're going to try to allow 1.17.23, 1.94w, and the TSx units to be allowed in 2006, so we've got a meeting with the Secretary on Tuesday to discuss that; isn't that right?

Gardner John; 08/30/06 - Page 546:24

Q (BY MR. HULTIN) Exhibit 24.

Gardner John; 08/30/06 - Page 547:1-12

A Well, this is prior to that by two days.

Q (BY MR. HULTIN) Yeah. That was your position? That was your position on February 3, and it was your position on February 24?

A Well, things were undecided still at that point.

Q Well, you were at least consistent on February 3 and February 24, right?

A I would say from these notes that you can draw that conclusion.

GARDNER DIGEST

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(attorney objections and comments omitted)

Gardner John; 08/30/06 - Page 548:20 - 549:1

Q And this is what you told the Gilpin County Clerk a few days before this, isn't it, same thing? Actually, it was on the 25th, the next day, when you sent the e-mail to Jessica Lovenger? Same thing you told her, isn't it?

A That is what I told the Gilpin County Clerk, yes.

Gardner John; 08/30/06 - Page 549:9-16

Q Okay. But you do recall that the only thing that you were telling the outside world is that you were going to -- that the Secretary of State's office, or at least John Gardner, as the voting systems specialist, was going to do something that was clearly illegal, to allow the uncertified Diebold software to be used?

Gardner John; 08/30/06 - Page 549:20-21

A In the exhibits provided, that is correct.

DISTRICT COURT
DENVER COUNTY
CASE NO. 06CV6072

DEPOSITION OF: JOHN H. GARDNER, JR. - VOLUME III
EXAMINATION DATE: September 7, 2006

MYRIAH SULLIVAN CONROY, et al.,
Plaintiffs,
v.
GINNETTE DENNIS, et al.,
Defendants.

PURSUANT TO THE SECOND AMENDED NOTICE,
the deposition of JOHN H. GARDNER, JR., Volume III, was taken at 1:21 p.m., on September 7,
2006, at 1801 California Street, Suite 3600, Denver, Colorado 80202, before Patricia S.

Gardner John 090706 - Page 561:1-24

Q The first thing I'm going to do is hand you what's been marked as Exhibit 54, which was an e-mail which I received yesterday, which was the first notice that the plaintiffs had here that

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(attorney objections and comments omitted)

in addition to Sequoia 5.0A, there were other DRE applications pending before your office. I had sent -- Melody and I exchanged some e-mails this morning about this, and there have been several documents that have been produced here. I want to mark -- get these identified, and then I want to get some copies made so I can read it while we're going through it with you. The first is a letter dated June 19 of this year to John Gardner from Sandy Green, the product certification manager of HART Intercivic. It's been marked as Exhibit 55. Would you please identify Exhibit 55 and tell me what that is.

A Yes. This is a cover page to an Application for Certification for the HART voting system 6.2 with a few attachments, as required.

Q What's the date of that?

A The date of the HART letter is June 19, 2006.

Gardner John 090706 - Page 562:6-18

Q Did you or the Attorney General on your behalf give us notice of that before yesterday that that application was pending?

A I'm not aware.

Q What's Exhibit 56?

A This is an Application for Certification of the Diebold election system, which is essentially the 1-18-24 with a Model D tablet.

Q And when was that received by your office?

A This was received August 28th of 2006.

Gardner John 090706 - Page 563:2 - 564:13

Q So you received this the day before your deposition?

A Yes, that's correct.

Q And you were aware of it when you showed up here for your deposition?

A Yes.

Q And you'd had discussions with Diebold before that time, hadn't you, that you knew this was coming; this didn't arrive out of the blue?

A Yes, there was a discussion that Diebold needed to reapply to have this tablet certified.

Q All right. And you didn't disclose this to me during your deposition last week, did you?

A No. I was under the assumption that based on the documents requested for discovery, that the case was limited to the four systems being certified as part of that package. The certificates for those systems were attached.

Q And there's -- in Mr. Knaizer's e-mail, he says that there is another application that you are expecting to receive tomorrow?

A Yes, that is true.

Q And that would be another application from Sequoia?

A Yes, that's correct.

Q And what do you expect to see from Sequoia tomorrow?

GARDNER DIGEST

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(attorney objections and comments omitted)

A The Sequoia application, from what our conversation was, should contain a new version of Win EDS software to be used with all of the components of their system. And I don't believe any of the components have new firmware, but until I see it, I won't be sure.

Gardner John 090706 - Page 564:21 - 566:3

Q Have you had any communication with ES&S about any new application from ES&S?

A Not at this time, no.

Q So you're expecting that the ES&S system that was certified on March 28th that we talked about in your deposition last week is going to be used in the upcoming general election as certified; is that correct?

A At this time, I believe that's the case, yes.

Q And what counties is that going to be used in?

A Currently it's Jefferson County and Mesa -- Mesa County.

Q Just those two?0

A Yes.

Q I believe I asked you last week about the Sequoia 5.0A system that was certified sometime in July, correct?

A Yes, we did talk about that.

Q To your knowledge, has that been acquired by any county?

A And, actually, this is a clarification or a correction to the deposition, because I did answer that question incorrectly last time. The 5.0A was used in the primary election for certain by Denver County, possibly by Arapahoe County, just due to their size. I've not been able to confirm if it's for Pueblo or for Elbert County at this time. So that was already in place, and I need to correct my answer from before on that.

Gardner John 090706 - Page 566:12-17

Q Okay. And you told me at your deposition last week that that had not been acquired by anybody.

A That's correct, yes.

Q But you were wrong?

A I was wrong.

Gardner John 090706 - Page 567:2-7

Q And as of today, which is approximately a month after the August primary, have you completed your certification report as required by 617 of the Colorado statutes of the election code?

A We have not --

Gardner John 090706 - Page 567:12 - 569:2

A We have not completed the qualification report for the 5.0A.

Q (BY MR. HULTIN) I believe I asked you this last week: Mr. Gardner, you recall that we talked at length about the certification process, the forms that you used in the certification process, how you confirmed the documentation, the functional testing, the security testing, and all of that stuff?

A Yes.

Q I'm sure you recall that.

A Yes, I do.

Q And we went through your deposition starting, really, with the ES&S application and went through that at considerable length and talked about the process and the testing and the functional testing and how you did that and what the test logs were and what the documentation was and how all that worked. Do you recall that?

A I do, yes.

Q And then do you recall that I asked you if the process that you utilized for ES&S was essentially the same process for Sequoia, HART, and Diebold?

A Yes, I recall that.

Q And your answer was that, yes, the process of certification, the rules you applied, the way you applied the rules, the processes that you used, the tests that you did, and so on, was essentially the same for all four systems; is that right, sir?

A Essentially the same, yes, that's correct.

Q Yes. And I believe you said the only thing that was different, really, was that the roles of Mr. Garcia and Mr. Popovich were much reduced after your bad experience with them during the examination of the HART system. Is that right, sir?

A Yes, that is correct.

Gardner John 090706 - Page 569:23 - 570:15

Q My question is: When you did the Sequoia 5.0A, the certification process that you did for the Sequoia 5.0A system, was that the same as the process that you utilized for Sequoia 5.0?

A I believe it was the same, yes.

Q Okay. And as to the HART system, an application that's been identified in Exhibit 55, what's the status of that certification?

A We are currently in functional testing of the system.

Q When you say "we," who is assisting you on this application?

A Tim Bishop.

Q When do you anticipate completing this application?

A Our target date is the 15th of September.

Gardner John 090706 - Page 571:6-12

Q Assuming that you meet your target date and certify the HART system 6.2 this month, are there any counties that are planning to use this in the general election?

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(attorney objections and comments omitted)

A My assumption is that because this is a software change to their system, that this would be deployed by all of the counties.

Gardner John 090706 - Page 574:15 - 575:17

Q Okay. The certification process in the examination that you are undertaking with respect to the HART system 6.2, is that essentially the same process that you applied to the HART system that was certified as of February 28, 2006?

A I think the substantial change that we're making is documentation and better controls: a double verification of items, if you will. For example, in Section 8.1, the documentation requirements that we have listed there, the double verification will be an initial review by a person with a better or specific reference to the location of the documentation provided by the vendor and then a second verification by a different person to verify that the first person got the right documentation, if that makes sense.

Q Uh-huh.

A Okay. A similar process for the functional testing will take place with that double verification where it will be done by one, done by another. Overall, I think we'll have -- our goal is, anyway, to have better documentation, photographs, screen shots, things like that that reference the specific test that was being done to the best that we're able to do.

Gardner John 090706 - Page 577:6-21

Q Did Tim Bishop work on 5.0A, the Sequoia?

A Tim was involved in the later part of the functional testing. That's my recollection of that.

Q Okay. So you're going -- for purposes of the HART application, you've -- the two Sequoias, ES&S, the original Diebold, and the original HART were done according to the process that we discussed in your deposition last week, correct?

A Yes.

Q And the qualification report for Sequoia 5.0A has not been completed even though the system has been already used in an election?

A That is correct, yes.

Gardner John 090706 - Page 578:5-24

Q Does he work for you or do you work for him?

A He reports to me.

Q And what's his job?

A He is the voting systems technician.

Q What's his background?

A He has I believe it's three years of experience in information systems, support of applications, support of servers.

Q Does he have a degree?

A I don't believe he has a degree. I know he has college credit.

GARDNER DIGEST

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(attorney objections and comments omitted)

Q He has been to college?

A Yes. I'd have to go back to his resume for that information.

Q And so it was his job to review your process, the process that you designed, and give you critical feedback on it?

A Yes.

Gardner John 090706 - Page 580:15 - 581:23

Q And similarly, that you have -- each of your so-called functional tests be done by more than one person?

A The evaluation of the functional tests would be conducted by both Tim and myself.

Q Okay. And that's a change, because prior to that, the functional testing was done entirely by you, correct?

A To a degree, yes.

Q Now, what do you mean when you say "to a degree," Mr. Gardner?

A From the first certification, there were instances where Mr. Garcia or Mr. Popovich would have attempted to do a test, give it an initial score. I would have to go back and reverify that score by doing the test.

Q And you felt they were not competent to do the functional testing, correct?

A At that time, yes.

Q I guess your entire experience with them is that both of them were basically incompetent, correct?

A They were unable to perform these functions, yes.

Q Okay. Would you agree with me that they were incompetent to do the job that you asked them to do in the certification process?

A Yes.

Q Okay. As to 56, this is the Diebold system. What's new about Diebold?

A Diebold has a new model for their touch-screen unit. It's called a Model D unit, and this is explained in their cover letter that it's due to a hardware upgrade within the unit.

Gardner John 090706 - Page 582:3 - 583:2

Q (BY MR. HULTIN) So everything is going to remain the same as to the Diebold system except they're going to have a new touch-screen tablet that's -- upon which the voter is going to make his votes, right?

A I believe they also have a ExpressPoll increment: from ExpressPoll I believe it was 4000 to ExpressPoll 5000.

Q Now, what's the -- what I see here is ExpressPoll 1.1.5 in the letter of August 25th.

A The 1.1.5 refers to the firmware number.

Q Okay.

A And after my conversation with the vendor, they've changed that to 1.2.55.

Q What is your target date for completion of the Diebold application?

A I believe our target date is September 29th.

GARDNER DIGEST

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(attorney objections and comments omitted)

Q And Diebold, like HART, is going to have the same tests performed, is going to have the same rule applied, is going to have the same process, only you're going to do a better job of documenting what you do, right?

Gardner John 090706 - Page 583:6-7

A Yes, we believe the documentation will be better.

Gardner John 090706 - Page 583:8-18

Q (BY MR. HULTIN) Okay. But as to your process for both HART and Diebold, really, all you're -- the only changes you're talking about making to your process is, you're going to do a more careful job of documenting it, correct?

A Yes. The rest of the process is the same.

Q Okay. So I guess you would acknowledge, Mr. Gardner, that the process of documentation that you utilized, for example, in the ES&S system is inadequate?

Gardner John 090706 - Page 583:23-24

MR. HULTIN: Please read back my question.

Gardner John 090706 - Page 584:1-15

Q (BY MR. HULTIN) Please answer that question.

A No.

Q Now, you did testify in your deposition last week that Mr. Garcia did a lot of the documentation in the sense that he made the record of his examination in that he had a key to his notes and that those notes no longer exist, correct?

A That -- I believe that is correct, yes.

Q And so when you looked to see what Mr. Popovich did, based on the record that's been maintained of what he did, you can't tell what he did, can you?

Gardner John 090706 - Page 584:20 - 585:19

MR. HULTIN: Please substitute "Garcia" for "Popovich."
(The pending question was read.)

A Not initially, no.

Q (BY MR. HULTIN) So how do you know what he did if you can't tell initially?

A From the context of the requirements, you can go back to the documents that we have and --

Q And guess, right?

A -- reference the sections that he was using, sure.

Q Have you done that?

GARDNER DIGEST

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(attorney objections and comments omitted)

A Not that I am aware of.

Q So you think you can do it if you study it hard enough and study the stuff that's in the application? You think you could put it together, but you haven't done that, correct?

A Yes, that's correct.

Q Okay. So the answer to my question is: You think you can reconstruct what he did, but as we sit here today, you really don't know what he did based on the record that's been maintained of what he did?

A I believe that's correct, yes.

Gardner John 090706 - Page 586:15 - 587:5

Q Okay. And you plan to utilize the same process that you utilized on the Diebold application that you certified as of March 3, 2006, with the exception that you are going to keep better records of what you do as to the functional testing and the documentation review, correct?

A Yes, that's correct.

Q The same substantive "tests" to the extent that they are tests, correct?

A I believe that is correct, yes.

Q Okay. And the application of the same minimum standards?

A I'm sorry, could you repeat that?

Q Yes. The rule has not changed

Gardner John 090706 - Page 588:5 - 589:19

Q And so what you're expecting, then, is the Diebold TSx system that was certified in March of this year is going to be used, as well, in the November general election?

A Yes.

Q And then some -- there may be some use by some but not all of the counties that already have Diebold, and that will be used as supplemental equipment or backup equipment?

A Yes.

Q Is that your understanding?

A That is my understanding, yes.

Q So this really doesn't change the picture as to the certification and use of the Diebold TSx system that was certified as of, I think, March 3 of this year, correct?

A That's my understanding, yes.

Q Okay. And the -- I guess the last system that's coming in -- the new system that's coming in is Sequoia, right?

A Yes.

Q What are you told is going to be happening with Sequoia?

A From my discussion with the vendor, the change to their system is a software change to allow more than 12 ballot styles on their DRE machine for a single location. So a county that's doing vote centers that's large, like Denver County, would need this to get all of the ballot styles on one machine.

GARDNER DIGEST

09/09/06

(attorney objections and comments omitted)

Q So as to Sequoia, this may affect some -- it may affect Denver, that uses vote centers, but it would not otherwise affect Sequoia 5.0A, or do you know? And I'm talking about the utilization in the November general election.

A Right. I'm not -- I don't know if the vendor plans on implementing this in other jurisdictions. We just specifically talked about Denver, that it would be a need for them.

Gardner John 090706 - Page 589:25 - 590:3

Q It's not necessarily a good idea to be affecting -- implementing new software 45 days before an election, is it?

A It is not advisable.

Gardner John 090706 - Page 590:20 - 591:6

Q So you don't know. So you really don't know if all the counties, even if there is a software upgrade for HART, are going to be using -- utilizing that software upgrade for the general election?

A I can't confirm either way if HART's going to implement that or not.

Q So you don't know that that is -- that HART's going to implement it, or if HART proposes to implement it, that the counties are going to go along with it, correct?

A Yes, that's correct.

Gardner John 090706 - Page 592:11-21

Q Okay. But so as to whether or not any county -- whether it be Boulder County or Douglas County -- is going to actually decide that it's a good idea at the time you finish the certification of HART system 6.2, you don't know whether or not that's going to be utilized by any county?

A It is a county decision, yes.

Q And have you had any discussion with any of the counties about this?

A I have not.

Gardner John 090706 - Page 594:3-19

Q (BY MR. HULTIN) You have had no communication with -- you have had no communication with any county that's currently utilizing HART about HART system 6.2; isn't that right?

A That is correct.

Q So you have a basis to speculate that some of the counties might have a reason to utilize 6.2 if they decide that it's worth the brain damage of trying to do a software upgrade in the 45 days before the election?

A Yes.

GARDNER DIGEST

09/09/06

(attorney objections and comments omitted)

Q So that's really what your speculation is: that you -- based on what you know, you could see a reason why they might want to consider that, correct?

A A strong reason, yes, correct.

Gardner John 090706 - Page 595:5-21

Q Okay. And then I guess we talked about Sequoia to the extent we know that, and what you're saying there is that that is something that if it can be completed in time, that Denver may want to use that because of the two-face ballot; is that correct?

A No. Denver would want to use it, and I don't see how they would do it any other way without using it because of the ballot-style limitation.

Q Okay.

A Because they use vote centers, and a vote center requires all the ballot styles at that location.

Q Any other counties that use Sequoia that use vote centers?

A I don't believe so.

Gardner John 090706 - Page 596:18-21

Q Okay. Mr. Gardner, is it your view that you can allow the use of -- legally allow the use of a voting system without completing a qualification report?

Gardner John 090706 - Page 596:25 - 597:2

A Yes.

Q (BY MR. HULTIN) And what's the basis for that opinion?

Gardner John 090706 - Page 597:6-10

A The signature of the Secretary on the certification document is the proof that the system is certified. The qualification report is simply a summary of the findings of that certification.

Gardner John 090706 - Page 597:11 - 599:11

Q (BY MR. HULTIN) So you're not particularly troubled by the fact that the Sequoia 5.0A system was used in the primary election and it's now more than 30 days after the primary and almost two months after the system was certified and you still haven't completed your certification or qualification report that is required by statute to be done within 30 days?

A I am troubled that the report is not complete.

Q And you certified five systems, and you haven't been able to complete a single one of the certification reports in the time required by the statute and mandated by the legislature, have you?

A That is correct.

- Q And notwithstanding that, you're spending your time working on these new applications rather than completing the qualification report; isn't that right?
- A Among other things, yes, that is correct.
- Q So you're proceeding to do more -- process three more certifications before you even finish your analysis of what you did or didn't do on the Sequoia 5.0 system; isn't that right?
- A Yes. When an application is received by our office, it starts the -- the clock of certification.
- Q And so if someone such as my clients wanted to challenge the basis for what you had done in certifying Sequoia 5.0A, they wouldn't have the record or the documentation of what you've done to be able to show that to Judge Manzanares, isn't that right, because you haven't done the work to document what you've done?
- A Well, we haven't completed the qualification report, but the other documents are still there. We just haven't summarized those notes from our testing.
- Q So what's the volume of material that Judge Manzanares would have to look at to see whether or not you had complied with your own election rule in reviewing Sequoia 5.0A?
- A I don't think I know the answer to that question.
- Q You don't know how much material he would have to look at to understand your process and see what you did?
- A Not off the top of my head, no.

Gardner John 090706 - Page 600:2-7

- Q What's Exhibit 57?
- A To my understanding, these are the cover pages of documents provided to our office by Sequoia for the certification of their system. This was prepared by the Attorney General's office.

Gardner John 090706 - Page 600:16 - 601:5

I'm going to hand you 58. What's 58?

- A Exhibit 58 is the -- I believe this -- okay. I believe these are the cover pages for the Sequoia 5.0 system for their application. This was also prepared by the Attorney General's office.
- Q So you really don't know what these are other than you were told by your counsel that they put these together, correct?
- A Yes.
- Q And you haven't really looked at them other than what you're looking at them right here in this deposition; isn't that right?
- A This is the first time I've seen this together, yes.

Gardner John 090706 - Page 603:16 - 604:20

- Q (BY MR. HULTIN) All right. Let's get Exhibit 30 out in front of you.
- A 30. Okay.
- Q Okay. You see Exhibit 30, Mr. Gardner?

GARDNER DIGEST

09/09/06

(attorney objections and comments omitted)

A I do.

Q Okay. I asked you at your deposition last week whether that document contained a complete list of all of the information that you relied on to certify that the four subject DREs had met the requirements of the federal standards; is that right? Do you recall that?

A I recall that question, yes.

Q Yes. And have you made an examination of the material that was in the conference room at the Attorney General's office and compared it to Exhibit 30? And can you tell me whether or not this is a complete listing as I requested last week?

A I have not been able to make that evaluation yet, and I'm still unable to verify.

Q Why? That was a week ago, Mr. Gardner.

A Yes. Other priorities have come up.

Q So you have more important priorities than answering my questions under oath about what you did so we can present that evidence to Judge Manzanares; is that right?

Gardner John 090706 - Page 604:24-25

A There were other priorities involving this case that needed to be addressed.

Gardner John 090706 - Page 607:5-23

Q (BY MR. HULTIN) Okay, Mr. Gardner, at page 323, line 9 of your deposition, Volume II, August 30, I said, "And, Mr. Gardner, you're going to go and review those documents and confirm to me that these are, in fact, all of the documents in the possession of the Secretary of State that you rely on to make final lawful certifications of the four subject DREs, correct, as to their federal ITA certification?" Answer: "That's the part that was missing. Yes, I will." Have you done that, Mr. Gardner?

A No, and I don't believe I committed to a date to having that done.

Q When can you get that information to me, sir? That was a week ago.

A I'll have to check my schedule and have Melody get back to you with that.

Gardner John 090706 - Page 608:21-24

Q So without going into the substance of the communication, you and the Attorney General have decided that it was not important for you to answer this question today?

Gardner John 090706 - Page 609:3-14

A I don't believe that was our intent.

Q (BY MR. HULTIN) But that is a result?

A The result is that it has not been done at this time, yes.

Q The result is that you have applied whatever time you have devoted to this litigation to something other than answering this question that I read to you from page 323 of your deposition on August 30?

GARDNER DIGEST

09/09/06

(attorney objections and comments omitted)

A Yes.

Gardner John 090706 - Page 612:21-22

Q (BY MR. HULTIN) What is Exhibit 59, Mr. Gardner?

Gardner John 090706 - Page 613:2-18

A Exhibit 59 is a letter that was sent out to Diebold counties which also contains some photographs, and this is additional security requirements that were required by our office for the Diebold TSx touch screens.

Q (BY MR. HULTIN) Okay. And this is -- as we discussed during your last deposition, this was your office's response to the Hursti II demonstrations: that he was able to hack into a Diebold TSx and completely reprogram the machine and a Trojan Horse attack that was undetectable, correct?

A Yes, that's correct.

Q Could I see Exhibit 59? So your response to this was to just completely set forth in Exhibit 59 with the four seals, right?

Gardner John 090706 - Page 613:24 - 614:16

A Yes, I believe this is complete.

Q (BY MR. HULTIN) And you feel that Exhibit 59 fully and adequately addresses the security risk posed by the Diebold TSx, as demonstrated by Harry Hursti's ability to hack into the TSx in two minutes?

A Yes.

Q Okay. Let's put a clip on that. Mr. Gardner, do you recall that we had some discussions at your last deposition about the State of Colorado's minimum IT standards?

A Yes.

Q And the Rule 45.5.2.7.2 and 45.5.2.7.3 requires an affidavit of compliance from the vendor, correct?

A Yes.

Q And it also requires documentation; is that correct?

Gardner John 090706 - Page 615:6 - 616:9

A Yes.

Q And then 45.5.2.7.3 also requires documentation, doesn't it?

A Yes.

Q Okay. And I asked you about that documentation and whether you had it, and you said you didn't know and you were going to look for it and provide it for me, right?

A Yes.

Q Have you made an investigation to provide that documentation?

GARDNER DIGEST

09/09/06

(attorney objections and comments omitted)

A Yes.

Q And where is it?

A Due to the time required in looking through the finders -- the binders -- I'm sorry -- on my initial search, I didn't see the document there. So I requested the vendor to send you a copy of that to me.

Q Now, do you have those affidavits of compliance from any of the vendors?

A I have asked them all to send that to me, a copy of that. I was unable to locate it upon my initial search through the binders.

Q So it appears that you certified those systems in the absence of those affidavits, correct, all four of them?

A I'd say on initial blush, yes. I just think the documentation is missing.

Gardner John 090706 - Page 617:17 - 618:8

Q Right. And those were in fact letters from an application [ES&S] that had been withdrawn, right?

A That is correct, yes.

Q All right. So do you have the documentation for the application that you processed and certified, or do you have the letters concerning your request for additional documentation from the vendor for the ES&S application or system that's going to be used in Jefferson County and Mesa County in the November general election?

A I do have those letters. I just don't have them in this exhibit. That's . . .

Q Okay. Would you provide those to me?

A Yes, we can provide those.

Gardner John 090706 - Page 621:6 - 622:3

MR. HULTIN: I will say that based on the record of this testimony about these new applications, any suggestion that this or these applications provide a basis for a motion for continuance of the trial I think is very much like Mr. Gardner's affidavit in support of your claim of confidentiality.

MS. MIRBABA: Okay.

MR. HULTIN: There's simply no Rule 11 good-faith basis for it.

MS. MIRBABA: Well, Paul, I would definitely disagree with you on that. You're entitled to your opinion. But if you do contemplate the fact that if these new systems are going to be used, if the Court were to grant everything that you wanted and decertify these systems, the counties could then use the systems that are newly certified. So I don't think that you are at all on the mark with your opinion, but, of course, you are entitled to that. So -- and I'm sure we will be presenting this issue to the Court and he can make that judgment call.

John Gardner

From: John Gardner
Sent: Monday, February 06, 2006 5:37 PM
To: 'edward.neuberg@ci.denver.co.us'
Cc: Lisa Doran
Subject: RE: Voting machines

Hi Ed, pursuant to Colorado Revised Statutes, Article 1, Section 612 voting systems used in the state must be certified by the Secretary of State. Section 613 covers purchases of new voting systems which also identifies that they must be state certified.

There are several thousand vote tabulation devices in use throughout the state that are currently certified. All existing certifications can be found on our web site at: <http://www.elections.colorado.gov/DDefault.aspx?tid=499>. However, only a few of these devices in a few counties meet the HAVA requirements, and therefore most counties are required to purchase new voting systems to comply with this federal law.

Our State Statutes also require any new DRE to contain a Voter-Verifiable Paper Audit Trail (V-VPAT) in Part 8 of Article 5 for any system purchased on and after June 6, 2005. These new DRE's containing the V-VPAT requirement have not yet been certified. In addition to this, it's becoming complex for larger counties to integrate existing voting system technology with the newer technology to produce the one report that's necessary for State and local reporting.

We are currently in the process of testing voting systems for certification, and will have 3 out of 4 vendors who market voting systems in Colorado certified for use by March 15th. We have encouraged counties and municipalities where possible to enter into contract agreements with the voting system vendors with the anticipation of receiving a certification from the State by the time the contract is signed with the Vendor. This allows the counties to move forward and negotiate the necessary timelines and commitments necessary for the acquisition of a new voting system.

At this time, we do not anticipate any delays in the certification progress, nor have we heard from any counties that these dates do not work within their procurement process. We anticipate the State of Colorado being fully HAVA compliant with Voting System requirements by the end of July.

If there's anything else that I can assist you with or discuss regarding voting systems, please feel free to contact me directly.

Thank you,
John Gardner
Voting Systems Specialist
Colorado Department of State
1700 Broadway, Ste 270
Denver, CO 80290
Office: 303.894.2200 ext. 6318
Fax: 303.869.4861



-----Original Message-----

From: Neuberg, Edward - HR/CR [mailto:Edward.Neuberg@ci.denver.co.us]
Sent: Wednesday, February 01, 2006 9:09 AM
To: Lisa Doran
Subject: Voting machines

As told that a voting machine must be certified in order for it to be used. And that there are no new machines as of yet that have been certified. Is this true?

To make sure your accessibility needs are being met, i.e. sign language interpretation, wheelchair access, please contact the Commission for People with Disabilities.

John Gardner

From: Patti Fredrick
Sent: Friday, February 17, 2006 2:26 PM
To: Adams County Clerk; Alamosa County Clerk; Arapahoe County; Archuleta County Clerk; Baca County Clerk; Bent County Clerk; Boulder County Clerk; Broomfield County Clerk; Chaffee County Clerk; Cheyenne County Clerk; Clear Creek County Clerk; Conejos County Clerk; Costilla County Clerk; Crowley County Clerk; Custer County Clerk; Delta County Clerk; Denver Election Commission 1 Adams; Denver Election Commission 2 Rogers; Denver Election Commission 3 Vaden; Dolores County Clerk; Douglas County Clerk; Eagle County Clerk; El Paso County Clerk; Fremont County Clerk; Garfield County Clerk; Gilpin County Clerk; Grand County Clerk; Gunnison County Clerk; Hinsdale County Clerk; Huerfano County Clerk; Jackson County Clerk; Jefferson County Clerk; Kiowa County Clerk; Kit Carson County Clerk; Lake County Clerk; LaPlata County Clerk; Larimer County Clerk; Las Animas County Clerk; Lincoln County Clerk; Logan County Clerk; Mesa County Clerk; Mineral County Clerk; Moffat County Clerk; Montezuma County; Montrose County Clerk; Morgan County Clerk; Otero County Clerk; Ouray County Clerk; Park County Clerk; Phillips County Clerk; Pitkin County Clerk; Prowers County Clerk; Pueblo County Clerk; Rio Blanco County Clerk; Rio Grand County Clerk; Routt County Clerk; Saguache County Clerk; San Juan Clerk; San Miguel Clerk; Sedgwick County Clerk; Summit County Clerk; Teller County Clerk; Washington County Clerk; Weld County Clerk; Yuma County Clerk
Cc: All Elections
Subject: Update on the Certification and Purchase of HAVA Section 301-Compliant Voting Systems
Attachments: HAVA Alert 06-01.doc



HAVA Alert
01.doc (96 KB)

Attached please find an important HAVA Alert concerning the certification and purchase of voting systems. If you have any questions concerning this Alert, please do not hesitate to call or e-mail either John Gardner or Patti Fredrick. Thank you.



HAVA ALERT

February 17, 2006

Denver, Colorado

Alert No. 06-01

Update on the Certification and Purchase of HAVA § 301- Compliant Voting Systems

Many clerk and recorders have expressed understandable concern about the feasibility of procuring, testing, and learning to use the disability accessible voting systems mandated by § 301 of HAVA in time for the August 8, 2006 primary election. The Colorado Department of State (CDOS) remains confident that this is an achievable goal and is committed to devoting the resources necessary to enable counties to make this a reality.

However, we believe it is essential that we advise you that only 3 vendors have applied for certification in Colorado: Diebold, HART, and Sequoia. Of those, it appears that only HART and Sequoia will be able to complete certification in a timely enough manner to make procurement of their systems feasible. Diebold has applied for state certification and CDOS is going to test their equipment; however, several of Diebold's components have yet to be certified by NASED and will not be certified by CDOS until the federal certification is completed and confirmed. ES&S has not applied for state certification and, based on information we received at the NASS/NASED conference, it appears that ES&S may lack sufficient resources to be able to deliver and sufficiently train on any additional systems at this time.

The Sequoia equipment is scheduled for functional testing beginning the week of February 27, 2006. Based on information we received at the NASS/NASED conference, Sequoia may have a very limited supply of equipment available for purchase now and/or in within the next several months. We are meeting with a representative from Sequoia on Tuesday, February 28th, to discuss equipment availability, training, and support issues.

It is anticipated that HART will complete the certification process by Wednesday, February 22, 2006. We met with a representative from HART this morning to discuss equipment availability, training, and support issues. HART has indicated that it will respond by Monday to our concerns regarding those issues. If HART's responses are satisfactory, in order to secure all currently available equipment and expedite the equipment delivery process, it is likely CDOS will enter into an agreement with HART directly to procure accessible voting systems.

Colorado Secretary of State • 1700 Broadway, #270 • Denver, CO 80290 • 303.894.2200



AG 20869

HAVA ALERT

February 17, 2006

Denver, Colorado

Alert No. 06-01

We are in the process today of contacting all counties that have expressed an interest in the HART system to make sure we have an accurate accounting of the equipment needed statewide. If you have not yet been contacted by our office or have any questions about this Election Alert, please do not hesitate to call John Gardner at 303-894-2200 ext. 6318 or Patti Fredrick at 303-894-2200 ext. 6302.

Colorado Secretary of State • 1700 Broadway, #270 • Denver, CO 80290 • 303.894.2200



AG 20870

John Gardner

From: Patti Fredrick
Sent: Friday, February 17, 2006 3:51 PM
To: sdoyle@larimer.org; Weld County; Carol Snyder; 'Russ Ragsdale'; 'Carole Murray'; 'Robert Balink'; Teller County; Yuma County; Teller County; Pitkin County Clerk 2; 'Ann Eddins'; Montezuma County; La Plata County; ourayclerk@yahoo.com; Hinsdale County E-Mail; Archuleta Clerk; Mineral County E-mail; Saguache County; 'Holly Lowder'; Costilla County E-Mail
Cc: Gigi Dennis; John Gardner; Bill Compton; Wayne Munster
Subject: Diebold Software Not Certified: GEMS Software Versions 1-17-22 & 1-17-23

Good afternoon, all. We wish this e-mail was to bring you good news, but that is sadly not the case. It has come to our attention that the Diebold GEMS software versions 1-17-22 and 1-17-23 have not certified by CDOS as required by Colorado law. This information was shared with several clerk and recorders and Diebold yesterday, but we wanted to make sure everyone using the software has the same information.

Here's our understanding of how events unfolded: In June 2004, former Secretary Davidson issued a certification letter to Diebold concerning its GEMS software versions 1-17-22 and 1-17-23, pursuant to which Diebold was expressly informed that the software could not be used in Colorado for the November 2005 election cycle unless it was ITA certified to the 2002 Federal Election Commission (FEC) standards. The letter was issued to Diebold because of statutory enactments mandating that electronic or electromechanical voting systems used on or after May 28, 2004 be certified by CDOS. Pursuant to Election Rule 38, such systems must be certified to the 2002 FEC standards.

When Diebold submitted the GEMS software for certification by this office in 2004, it had been certified to the 1990 FEC standards, but not to the 2002 standards. While CDOS permitted the GEMS software versions 1-17-22 and 1-17-23 to be used in the 2004 election cycle, it was made clear to Diebold that the software needed to be recertified to the 2002 standards if its use was to be continued.

Diebold did not/has not submitted these versions of the GEMS software to CDOS for recertification. The use of these versions, therefore, is no longer permitted in Colorado.

If you have any questions or need further clarification concerning this matter, please call or e-mail John Gardner or Patti Fredrick. Thank you.



John Gardner

From: John Gardner
Sent: Friday, February 03, 2006 5:15 PM
To: 'RioGrande County'
Subject: RE: es&e

Hi Sandy,

As an update on ES&S and their certification, they have currently withdrawn their application to certify a voting system, but I expect them to reapply within a few weeks. Overall, this may delay them by at most 30 days in being certified in Colorado with their new system - Unity 3.0.1.0. The confusion that could have happened with Terri's comment could be based on the simple fact that having the ES&S system certified so late (later in March) could impact ES&S's ability to deliver equipment to you in a timely manner. We have always had the stance that the 4 vendors currently doing business in Colorado would be certified - we just didn't know the timeline that would go along with this.

ES&S has been busy conducting demo's around the state - they were in Gunnison on Wednesday, in Routt County on Thursday, and will be in Ft. Morgan next week on Wednesday. I'm sure this could be why you haven't been able to get a response. I wish you could see their demonstrations and see the difference in equipment and pricing between the two vendors. You may want to give Stella, Joyce, and even Lawrence a call to see what they were considering after seeing both Hart and ES&S demo their equipment Tuesday in Gunnison.

Sequoia is reconsidering their initial stance on the 40 machines, and is either going to present this new scheme in Ft. Morgan, Prowers county or possibly both.

Based on the timelines of certification and purchasing equipment, there are only 4 vendors in Colorado that currently can have equipment to sell and deliver in time for the counties to be in compliance by the August Primary election.

As a side by side comparison, here's what has been presented to various counties as far as the cost of the voting system goes:

DRE's	ES&S	HART
Base Cost:	3800	2500
V-Vpat:	0	1000
Accessibility:	300	250
DRE Activator:	3800	2500
Memory Device:	75	50

Total DRE Cost:	7975	6300
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Poll Place Scanners:		
Base Cost:	5100	5500

Central Count Scanner:		
Base Cost:	45000	5000
Memory:	150	0
Software:	10000	8200
Additional Item:		2500

Total Central Count:	55,150	15,700
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Software:		
Bundled Software:	60,000	8,200



AG 2247

5/18/2006

Programming: Depends 1,200 flat cost
on size.

So, depending on how you set things up in your county:

	6 DRE's	6 PCT Scanners:	Central Count:	Programming:	Negotiable Items:	Total:
ES&S:	47,850	30,600	55,150	2,500(est.)	4,000	140,100
HART:	37,800	33,000	15,700	1,200	4,000	91,700

I've taken some liberties with the numbers here in not knowing exactly what you would like to do in conducting elections in the future, but these base costs are what was discussed both Wednesday and Thursday from each vendor. These numbers could change, and should be negotiated out in your contracts. These costs are not secured by the State.

I would be happy to discuss these further with you to assist with your purchasing and help you come up with a solution.

Please give me a call on Monday to discuss.
Thanks,
John G.

From: RioGrande County [mailto:riograndecounty@yahoo.com]
Sent: Friday, February 03, 2006 3:43 PM
To: John Gardner
Subject: es&e

John,

I am writing again to see if you can shed any light on where ES&S is in the certification process? I believe when Terri spoke with you a few weeks ago you led her to believe that ES&S was not going to be certified in Colorado. Is this correct?

We have been trying to schedule a DEMO with them but they haven't responded so we were just trying to decide if we should even try to get them to respond.

Also, we've been told by Sequoia that unless we buy 40 machines they don't even want to talk to us. That leaves us with Hart and Diebold right? Is there anyone else out there?

Thanks for any input.

Sandy
Rio Grande

Relax. Yahoo! Mail virus scanning helps detect nasty viruses!

John Gardner

From: John Gardner
Sent: Saturday, February 25, 2006 4:02 PM
To: 'Gilpin County Clerk'
Subject: RE: Update on the Certification and Purchase of HAVA Section 301-Compliant Voting Systems

Jessica, I'm not sure if Patti has gotten back to you on this, but we have been working with three of the four vendors to come up with creative solutions. Please keep in mind that this is a complicated picture right now, and information that I have changes quite frequently. As of Friday, here's what we were working on:

1. Allowing Counties to use existing Diebold equipment for the 2006 elections. This equipment and software would have to then be upgraded in 2007.
2. Working with Diebold to certify and allow for a "temporary use" of the equipment prior to receiving all of the necessary EAC Documentation for 2006. A temporary use certification would allow the system to be used for 1 year while hopefully the vendor gets all the necessary documentation to the State.
3. Working with ES&S to certify their new system on a "temporary use" as well, to allow counties to choose from them if they desired.
4. We have secured production of DRE's and accessory items from Diebold and Hart to ensure the equipment is available to counties when they are ready to purchase it. We are meeting with Sequoia and ES&S next week on accomplishing the same thing with them. Both Hart and Diebold have enough equipment.
5. Certifications - we have three out of the four vendors in our office (Hart, Diebold, Sequoia) and are conducting functional testing on the equipment. This equipment has been certified by the federal government and will through the testing process also be state certified. We are still anticipating completing this process within the next few weeks.

I understand your situation about the large amounts of money that is being spent on equipment, however this is not an option for Colorado and we are ensuring that the equipment is certified, and "in stock" by the vendors, as well as looking at "creative solutions" and necessary "temporary certifications" to assist the counties in getting a solution that fits within your needs.

I would like to discuss this further with you, since this information is probably a different direction than you heard from our office one short week ago, and try to clear up any additional questions that you may have.

Would there be a time on Monday to best reach you to discuss this?

Thank you for your patience and understanding, John Gardner

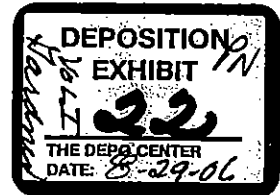
-----Original Message-----

From: Gilpin County Clerk [mailto:gcclerk@co.gilpin.co.us]
Sent: Friday, February 17, 2006 3:55 PM
To: Patti Fredrick
Cc: John Gardner
Subject: RE: Update on the Certification and Purchase of HAVA Section 301-Compliant Voting Systems

Patti & John,

Thank you for the update and while I greatly appreciate you keeping us in the loop of the election equipment saga I am becoming more and more convinced that this election will be the hardest one ever. My comments in this email are only to be frank and not to offend anyone!

I had planned on purchasing all my equipment from Diebold with ES&S as my back-up vendor. Now neither one of these vendors looks promising and the situation with Sequoia is disheartening and frankly I do not like the Hart product at all and feel it is too cumbersome of a product for my community.



find it hard to fathom that the SoS office would offer each county so much money and expect us to blow it on equipment that may or may not meet standards in 2 years or even 1 year for that matter. What is the plan?
what do you recommend a county should do in this situation? Should I purchase the equipment from Diebold and pray that by the time the election gets here it will be certified? Do I fly to DC and lobby for an extension?
Do I run for Secretary of State, so I know the money will be there when all the Counties want to use it? Has it been considered to completely delete the State certification process? I understand that it is in statute, but now would be a good time to lobby getting rid of it, it would save time and money.

The stress that is occurring currently is enough to break a person and I just want an honest answer, one that can guide me in making an educated decision and one that will not hinder this county in the future.

Thank you.

Sincerely,
Jessica Lovingier
Gilpin County Clerk and Recorder
(303) 582-5321
(303) 565-1797 - Fax

-----Original Message-----

From: Patti Fredrick [mailto:Patti.Fredrick@SOS.STATE.CO.US]
Sent: Friday, February 17, 2006 2:26 PM
To: Adams County Clerk; Alamosa County Clerk; Arapahoe County; Archuleta County Clerk; Baca County Clerk; Bent County Clerk; Boulder County Clerk; Broomfield County Clerk; Chaffee County Clerk; Cheyenne County Clerk; Clear Creek County Clerk; Conejos County Clerk; Costilla County Clerk; Crowley County Clerk; Custer County Clerk; Delta County Clerk; Denver Election Commission 1 Adams; Denver Election Commission 2 Rogers; Denver Election Commission 3 Vaden; Dolores County Clerk; Douglas County Clerk; Eagle County Clerk; El Paso County Clerk; Fremont County Clerk; Garfield County Clerk; Gilpin County Clerk; Grand County Clerk; Gunnison County Clerk; Hinsdale County Clerk; Huerfano County Clerk; Jackson County Clerk; Jefferson County Clerk; Kiowa County Clerk; Kit Carson County Clerk; Lake County Clerk; LaPlata County Clerk; Larimer County Clerk; Las Animas County Clerk; Lincoln County Clerk; Logan County Clerk; Mesa County Clerk; Mineral County Clerk; Moffat County Clerk; Montezuma County; Montrose County Clerk; Morgan County Clerk; Otero County Clerk; Ouray County Clerk; Park County Clerk; Phillips County Clerk; Pitkin County Clerk; Prowers County Clerk; Pueblo County Clerk; Rio Blanco County Clerk; Rio Grand County Clerk; Routt County Clerk; Saguache County Clerk; San Juan Clerk; San Miguel Clerk; Sedgwick County Clerk; Summit County Clerk; Teller County Clerk; Washington County Clerk; Weld County Clerk; Yuma County Clerk
Cc: All Elections
Subject: Update on the Certification and Purchase of HAVA Section 301-Compliant Voting Systems

Attached please find an important HAVA Alert concerning the certification and purchase of voting systems. If you have any questions concerning this Alert, please do not hesitate to call or e-mail either John Gardner or Patti Fredrick. Thank you.
<<HAVA Alert 06-01.doc>>

John Gardner

From: John Gardner
Sent: Friday, February 24, 2006 5:39 PM
To: 'Terry Sholdt'
Subject: RE: What a shocker

Groovy, moving forward with everything I possibly can.

Did Bob tell you what we are trying to accomplish with Diebold? We're going to try to allow the 1.17.23, 1.94w, and TS R6 units to be allowed in 2006 - try to extend this out for another year. I think that would help everyone tremendously. I think we have a meeting with the Secretary on Tuesday to discuss.

Thanks,
John G.

-----Original Message-----

From: Terry Sholdt [mailto:TerrySholdt@elpasoco.com]
Sent: Friday, February 24, 2006 5:25 PM
To: John Gardner
Subject: Re: What a shocker

Yes
How's every thing else going

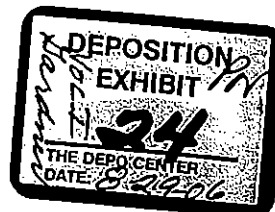
Terry Sholdt (out of office e-mail)
Chief Deputy
Paso County Clerk and Recorder
719-520-6279 - Office
719- 439-5425 - Cell

-----Original Message-----

From: John Gardner <john.gardner@sos.state.co.us>
To: Terry Sholdt <TerrySholdt@elpasoco.com>
Sent: Fri Feb 24 17:09:11 2006
Subject: What a shocker

...today has been. I knew it was coming, but was surprised by the VERY short notice.

John G.



John Gardner

From: John Gardner
Sent: Monday, March 06, 2006 4:00 PM
To: 'Hcramer@sequoiavote.com'
Cc: sbennett@sequoiavote.com
Subject: Draft Document for Voting Systems
Attachments: 2006-DRE-ESTIMATED-PURCHASES-SEQUOIA.xls; Letter to Sequoia Securing Equipment.doc

Howard, please take a look at this draft document and let me know what you think. I haven't heard a commitment either way from Arapahoe county, so that's a bit outstanding still. Elbert county has confirmed their desire to go with Sequoia, so Steve, work some magic down there!

Let me know what you think and thank you for your time last week.

** This is just a draft document at this time **

John Gardner



STATE OF COLORADO
Department of State

1700 Broadway, Suite 270
Denver, CO 80290



Gigi Dennis
Secretary of State

John Gardner
Voting Systems Specialist

**** DRAFT ****

March 03, 2006

Mr. Howard Cramer
Sequoia Voting Systems

Mr. Cramer:

This letter will confirm that the attached list of Counties within the State of Colorado are making a commitment to purchase, subject to successful completion of the state certification process 600 AVC Edge Units with accessibility additions, and voter verifiable paper audit trail (V-VPAT) units.

These units will be delivered to each specified county on or before June 1, 2006. This list represents the minimum commitment of DRE units to satisfy the Help America Vote Act (HAVA) requirement for accessible voting devices for the specific counties within the State of Colorado who choose Sequoia as their voting system vendor.

The purpose of this letter is to have Sequoia Voting Systems build and reserve said equipment for the listed counties within the State of Colorado. Individual counties will contract with Sequoia for the specifics necessary to conduct elections and any accessory components (including professional services and software) to this hardware list.

By your signature below, you are indicating to us that Sequoia agrees to the production and delivery schedule indicated above for the necessary AVC Edge Units and these units will be reserved specifically for the State of Colorado.

Sincerely yours,

Gigi Dennis

Signature

Date

Printed Name

Title

Main Number (303) 894-2200
TDD (303) 869-4867
Fax - Administration (303) 869-4861

Web Site
E-mail

www.sos.state.co.us
john.gardner@sos.state.co.us

Estimates based on 3/3/06 Data

County Number	County	Total Registered Voters (A+)	Number of Precincts	Number of Poll Places	Number of DRE's		Number of Precinct Scanners
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** CONFIRMED
** CONFIRMED

3	ARAPAHOE	364,198	366	207	220		
16	DENVER	387,105	422	292	240		
20	ELBERT	15026	16	13	8		
51	PUEBLO	92635	263	90	90		
	Totals	858,964	1,067	602	558		

Number of Central / Scanners

2	CONFIRMED **
1	CONFIRMED **
3	