

April 17, 2013

To: David Caron, Jaffrey Town Manager

From: Deborah Sumner

Re: Requests

Copies: Marc Tieger, Jaffrey Citizens

1. That the Jaffrey Select Board publicly correct misinformation given to March 16, 2013 Town Meeting re: Article 30

2. The public records information requested April 1 (and way past due for a response) be complied with ASAP.

Update: April 17: received response to three of seven items requested:

1. Total AccuVote costs for the town for 2012 was \$3,606 (and additional school district costs, which amounted to \$1,014 in 2010 and I expect would be about the same for 2012).

LHS supplies ballots for town @ \$.28/ballot and school district @\$.34/ballot elections. State supplies ballots for other elections at about \$.12/ballot.

2. Mr. Dowd (Town Counsel) was paid \$3,937.50 for the period prior to and during Town Meeting. This included guidance on issues unrelated to Town Meeting.

3. The March 15 legal memorandum from Mr. Dowd was sent to the moderator, with copies to the Town Manager and Acting Town Manager.

3. An answer to the question posed at the end of the April 16, 2013 chronology:

What does the Jaffrey Select Board plan to do to make sure there is no fraud in future elections?

4. When can I expect a response to each item above?

**2010-2013 Chronology of Events Re: Possible Election Fraud
in Nov. 2010 Election**

April 16, 2013 (Updated May 4, 2013 and October 5, 2015 for discussion with Select Board on Oct. 26, 2015)

To: David Caron, Jaffrey Town Manager
From: Deborah Sumner
Copies: Marc Tieger, Jaffrey citizens

2010

April 5— Three Jaffrey citizens (members of town Democratic Committee) met with town moderator and town clerk, with request for November parallel hand count of key race. Moderator agreed, if it was okay with town Republican committee.

Before September 14— Frank Sterling (former selectman, then state representative and chair of Jaffrey Republican committee) gave go-ahead for parallel hand count. Moderator confirmed he would do it.

Prior to Oct. 25 – Secretary of State’s Office contacted Jaffrey Town Clerk and told her this was a “recount” and illegal. Moderator checked with the Attorney General’s office, verified it was legal and planned to go ahead.

Oct. 27— Peterborough moderator responds to me (**sent 2:46 pm**) with copies to the Peterborough Town Clerk, administrator and Jaffrey and Rindge moderators. After talking with Bill Gardner, he decided not to do a parallel hand count as requested by more than 100 Peterborough citizens.

Deputy Secretary of State David Scanlan (**sent 3:27**) communicates with town clerks in Jaffrey, Rindge, Peterborough and Swanzey with copies to Bud Fitch and Matthew Mavrogeorge at DOJ. At this time, ONLY the Jaffrey moderator was planning to conduct a hand count check. (See Exhibit A, below)

Oct. 29— About 4:30 p.m., Jaffrey moderator calls to say he's rethinking his decision.

Nov. 1— I forward this info to Jaffrey, Peterborough, and Rindge Town Clerks and Moderators

Here's some information in response to David Scanlan's memo of Oct. 27 (Ex.A).

Wally Fries was a member of the electronic voting advisory group, who conducted parallel hand counts for each election.

I'm willing to speak with any moderator or town clerk that wants to give me a call. There is no good reason for the resistance to parallel hand counts either legally or procedurally (including time and cost because it takes very little time to count a single race even with a couple of thousand plus ballots on the table). Neither Scanlan or Gardner has ever expressed any opposition to the parallel count procedure. I have always stressed the importance of public confidence in the process and suspect most moderators would share that sentiment upon careful reflection. On Monday I will be in a meeting until late in the day but leave me a message at ----- and I will return the call. The SoS and DS words of guidance may, as a result of the cautious tone of there phrasing, be misinterpreted by those moderators offering resistance. The resistance can come about for other reasons as well, viz., afraid of the work associated with something unfamiliar or as a reaction to the strident tone or not knowing how to say no to accepting someone as a counter whose independence they hold in question, etc.

Wally

Nov. 2 - Assistant Attorney General Matthew Mavrogeorge responds by email to my request to confirm “election night hand counts are legal for any polling place, including those that have vote counting machines.”

He wrote, “Moderators are given significant authority to determine what procedures at their polling place are necessary to ensure an accurate count.”

Nov. 6– Communication with Jaffrey Select Board (Ex. B), saying, that since the Oct. 27 communication from David Scanlan (Ex. A) was page 2 and the email address for the Town Clerk was wrong, “I’m guessing David Scanlan sent a bcc to someone who gave it to Maria. You might want to check on who that someone was.”

Nov. 15 – Requested election information from the Jaffrey Town Clerk, including the moderator’s worksheet. She told me that was required for the primary election, not the general election. Copies of the information she gave me didn’t include the number of people checked in on the checklist (and ballot inventory information, among other items), as required by law (RSA 659:73).

Nov. 19 – Learned that moderators in Brookline and Hollis had done a parallel hand count of the Executive Council race (they selected the race) on request from a citizen, who was also a candidate for office. This individual reported full support from the Secretary of State in making the request and documenting the process. The Brookline moderator had done this previously at her request.

Nov. 30 – Shared the following information with Jaffrey moderator, from 2006 Princeton report which identified the two major attacks problematic with Diebold

technology, vote stealing and denial of service. Same info was shared with Select Board in May, 2011.

“To avoid detection a vote-stealing attack must transfer votes from one candidate to another, leaving the total number of votes unchanged so that poll workers do not notice any discrepancy in the number of votes reported. Attacks that only add votes would be detected when poll workers compared the total vote count to the number of voters who checked in at the front desk,” the report says.

Dec. 17—email to Attorney General Michael Delaney (followed up sending by certified mail) and copies to legislative leaders, my representatives and some citizens, requesting investigation of three possible violations of law regarding Nov. 2, 2010 election, including RSA 659:73. Two were in other towns. (No investigation was conducted.)

2011

May 31 – after talking with attorneys at both the USDOJ (voting rights division) and EAC to see if they could help (both said elections are state concern and if laws aren't being followed, I should hire a lawyer), contacted the Ballot Law Commission to report AG's failure to investigate what appeared to be clear violation of two election laws, maybe three. No response.

Nov. 10 – Contacted Attorney General Michael Delaney to ask if reporting requirements of RSA 659:73 and rules outlined in RSA 656:42 would be followed and enforced for the Jan. 2012 Presidential Primary. No response.

Nov. 18— Met with Jaffrey and Rindge moderators, Jeanne LaBrie, Frank Sterling and Susan Emerson. Rep. Emerson later met with Bill Gardner and David Scanlan. Reporting requirements have been followed in past elections.

2012

May 14 – Contacted Secretary of State William Gardner requesting his support to review ballots from the Nov. 2010 election in Jaffrey because of the irregularities and inappropriate interference and misinformation from David Scanlan.

May 17— Denial of request was signed by an assistant SOS. The State has never confirmed that William Gardner has seen or responded to the request.

August 20 -- Filed Right to Know Petition in Cheshire Superior Court to review ballots for the Nov. 2010 election in Jaffrey.

August 22— Left copy of petition with Jaffrey Select Board with request it be shared with Town Clerk and Moderator.

August 27— Called Town Clerk to make sure ballots were still available. She

checked the vault, said they weren't there but were probably in storage away from Town Hall and she would check by the end of the week.

August 30 – Left a copy of RSA 91 A:9 with Select Board and Town Clerk, which states it's illegal to destroy public records involved in a legal action.

Sept. 2 – Sent email to Jaffrey Select Board members, with copy to Town Clerk, saying I would bring a copy of the email and court's order on Sept. 4 and "Please confirm that the ballots are still available." No response.

Sept. 4 – Town Clerk told me they weren't available, probably since spring when she had cleaned out the storage unit. Couldn't tell me exactly when she had destroyed them.

Sept. 6 – Asked in Court filing, to whom did Mr. Scanlan send a copy of the Oct. 27 communication and "After May 14, did Mr. Scanlan or anyone else in the Secretary of State's Office communicate to the Jaffrey Town Clerk and suggest she destroy the ballots from the Nov. 2010 election? And "Did Mr. Scanlan know, prior to the Petition being filed on Aug. 20, that the Jaffrey ballots for the Nov. 2, 2010 election had already been destroyed?"

Oct. 3 – Asked for Attorney General investigation of destruction of ballots prior to 22 months retention required by federal law, including questions asked above.

2013

Feb. 21, 2013 – Received third anonymous message. This one said, "Please stop harassing Jaffrey officials....We think you are nuts!" Ex. C

Feb. 28, 2013 – The AG investigation didn't ask the above questions. The Town Clerk told the investigator she knew the Nov. 2010 ballots were in the vault when she cleaned it out between April and June 2012, but believed they were for state elections that needed to be retained for 60 days. After she had disposed of them, she "learned from the Secretary of State's Office that the November 2010 election was a federal election" and needed to be retained until Sept. 2, 2012.

Summary: Hand count checks of the computer are legal, constitutional, recommended by experts as a "best practice" and a deterrent to fraud. In November 2010, the Secretary of State inappropriately interfered in what should have been a local decision. He, and it appears someone else (who sent the Town Clerk the Oct. 27 communication from David Scanlan (Ex. A), didn't want the Jaffrey moderator to hand count one of the federal races chosen at random. The SOS had no objection to two other moderators conducting a hand count of an Executive Council race.

Did the SOS (and this unknown individual) have reason to believe the hand and computer count for one or both federal races would be substantially different in

Jaffrey?

Who sent the Oct. 27, 2010 (Ex. A) communication to the Town Clerk?

Conclusion: The Jaffrey Select Board has a legal and ethical responsibility to prevent fraud in all aspects of government, including our elections. Did fraud occur in November 2010? We can't know.

Could it have occurred? Yes. It also could have occurred in **ANY** past election because there is nothing in place, no internal controls, to prevent it.

What does the Jaffrey Select Board plan to do to make sure there is no fraud in future elections?

Update May 4, 2013

March 15—Legal Memorandum re: Town Meeting Warrant Art. 30 sent to Moderator and Town Manager from Town Counsel (given as advice to Town Meeting on March 16).

Says: NH Bal. R. 606.5 "does not provide any legal discretion to the Town Moderator to conduct an optional hand-count of the vote."

March 17 – Letter to Select Board, copy to moderator and town counsel, asking what law the attorney was citing and whether he received advice from either the Attorney General or Secretary of State's Office, also that I was willing to work with them in presenting a warrant article for 2014. No response. (See March 15 entry above for Ballot Commission rule he was citing.)

March 18—Letter to Ballot Law Commission Chair and Attorney General, asking the BLC clarify the law re: moderators conducting hand counts as check and balance on computer count and the AG to "inform the Jaffrey Select Board that this article should be presented again in March 2014 ...,with the correct legal interpretation presented." Copy to state reps.

March 28—Response from Assistant AG Stephen LaBonte saying, "...this office is unable to assist with your request."

March 29—Left message for Town Counsel, asking him if he received advice from the SoS or AG and what law he was citing as basis of his recommendation that the meeting vote against Article 30 because it "violated state regulations." No response.

April 1—Letter to Select Board, copy to moderator re: no response to March 17 question and public records request.

April 17–Met with Town Manager, left him with above chronology (prior to May 4 update and questions 1 and 3 (See April 17 communication above). He assured me the Select Board would receive the information and decide whether to respond. He gave me some of the public records requested (see note in Update: April 17: above.) The following were not available:

1. Copy of Oct. 27, 2010 communication between Town Clerk and Secretary of State.
2. Communications between April and June 2012 between the Town, its employees and Secretary of State re: Nov. 2010 election ballots.
3. Copy of Select Board Meeting Minutes when Town Meeting 2013 Article 30 was discussed. (Note: was not discussed in public session.)
4. Copy of any written communications with the Attorney General or Secretary of State's Office re: Article 30 for the Jaffrey Town Meeting (or, other than the memorandum of law supplied, any other written communication between the town and town counsel on this question).

April 21–Follow up email with Ballot Law Committee chair, with copies to state representatives and former Danville Moderator Wally Fries.

I wrote: "Before the Nov. 2010 election, the Attorney General twice confirmed that hand count checks of the computer count are allowed under state law. The town moderator received that information by phone and I received it by email from Assistant Attorney General Matthew Mavrogeorge, who wrote Nov. 1, 2010: **"Moderators are given significant authority to determine what procedures at their polling places are necessary to ensure an accurate count."**

Phone conversation with Wally Fries, who believes he established the legal precedent of hand count checks as a "trust but verify" internal control many years ago. He believes many moderators have done and are doing this now.

April 22–BLC chair responds, saying, "appeals from interpretations of law rendered by the Attorney General are not in our jurisdiction" and that I should check with the Attorney General.

As of Oct. 5, 2015, there has been no response from the Jaffrey Select Board to the following request and question (posed at the end of the April 16, 2013 chronology):

1. That the Jaffrey Select Board publicly correct misinformation given to March 16, 2013 Town Meeting re: Article 30

What does the Jaffrey Select Board plan to do to make sure there is no fraud in future elections?

Ex. A

Note: Copied from original; Swanzey email address incorrect and would have bounced, Jaffrey's was sent to chamberlainm@townofjffrey.com (sic) and also would have bounced.

October 27, 2010, 3:27 pm

To: Town Clerks in Peterborough, Rindge, Jaffrey and Swanzey
Copies: bud.fitch@doj.nh.gov, Mavrogeorge, Matthew
Subject: Requests to have moderators hand count ballots

Dear Town Clerk:

Within the last few days, we have been fielding inquiries from local election officials about citizens and interest groups requesting the moderator conduct a hand count of ballots after they have been counted by an electronic ballot counting device. Our thoughts on this matter follows. Please share with other election officials in your town.

There is no provision in state law that provides a mechanism requiring moderators to conduct a hand count of any contest on ballots that have already been counted by an electronic ballot counting device. If a moderator suspects a problem with the security or functioning of an electronic ballot counting device, the moderator is authorized to take the device out of service (RSA 656:42). Similarly, the moderator at his or her discretion may count any race on the ballot by hand if, for a specific reason, they feel a need to verify the result of the electronic ballot counting device.

Pressure from special interest groups for a moderator to conduct an election in a certain way is inappropriate. The decision of whether or not to use an electronic ballot counting device is made at town meeting by a majority vote of the voters present, and that is the appropriate forum to have that discussion. The moderator is in many ways an election judge, an impartial arbiter at the polling place, who is elected on the basis of being able to run an election fairly and impartially. Moderators should not be placed in the potential position of being a lightning rod for the agenda of a special interest group.

In the specific instance where special interest groups are maneuvering to pressure moderators into conducting hand counts, caution should be used. Some of the pressure comes with offers from the special interest groups to count the ballots themselves. Letting members of these groups count ballots could result in serious chain of custody issues, and loss of the integrity of the election itself.

10/28/2010

Sincerely,
David Scanlan
Deputy Secretary of State