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ATTORNEY GENERAL OPINION NO. 2025-25

Honorable Mike Thompson
Kansas Senate, District 10
State Capitol
300 SW 10th St., Room 136-E
Topeka, Kansas 66612

Re: Elections—Voting Places and Materials Therefore—Preservation of
Ballots and Election Records

Synopsis: County election officers' duty to destroy ballots pursuant to K.S.A. 25-2708(b) is directory and not mandatory, and such duty must give way to a search warrant or subpoena compelling the production or preservation of such ballots pursuant to a criminal prosecution or investigation. However, mere notice of a pending criminal investigation is likely not enough to forestall the directive to destroy ballots. Cited herein: K.S.A. 25-2708

Dear Senator Thompson:

As a member of the Kansas Senate and as Chairman of the Committee on Federal and State Affairs, you request our “opinion on the authority of the Johnson County Election Commissioner to destroy paper copies of cast ballots, when those ballots are subject to a pending criminal investigation by the Johnson County Sheriff.”

In your letter, you reference this office’s letter to Johnson County Election Commissioner Fred Sherman, in which we noted that the “Commission had voted to move forward with a ballot destruction process pursuant to K.S.A. 25-2708(b),

which dictates a particular timeline for ballot destruction following an election.” It is our understanding that the ballots in question have subsequently been destroyed. Thus, the specific question you ask has become moot.

The larger question, however, remains: whether ballots may be destroyed when a criminal investigation is pending and law enforcement has requested retention of such ballots. We will answer that question as it may be relevant to future elections.

Ballot Destruction Statute

Since 1893, Kansas has had a statute governing ballot destruction.¹ The statute, now codified at K.S.A. 25-2708, requires that the county election officer preserve all ballots and make them available to canvassing boards.² The statute also requires the county election officer to “preserve all county, city, school district and township ballots for six months and all state and national ballots for 22 months.”³ However, at the expiration of such time, “the county election officer shall destroy them without previously opening any of the envelopes”⁴ The statute further provides that if any election is being contested, “the ballots shall not be destroyed until such contest is finally decided.”⁵

Kansas law also limits access to election ballots. For example, the law prohibits disclosing or exposing the contents of any ballot, except as ordered by a court in an election contest, or inducing any voter to show how the voter has marked a ballot.⁶ The county election officer must also ensure that a ballot cannot be associated with the voter who cast it.⁷

Kansas law prescribes criminal penalties for those who engage in election fraud, which includes voting without being qualified,⁸ election tampering,⁹ voting machine fraud,¹⁰ falsely impersonating a voter,¹¹ and voting more than once.¹² These particular election crimes are all felonies. But the investigation, determination, and prosecution of such crimes can take longer than 6 or 22 months, creating a conflict

¹ 1893 Kan. Sess. Laws, Ch. 78, § 25.

² K.S.A. 25-2708(a).

³ K.S.A. 25-2708(b). Federal law requires that ballots for federal office be retained and preserved for 22 months. 52 U.S.C. § 20701.

⁴ K.S.A. 25-2708(b).

⁵ *Id.* Other than for questions submitted, notice of an election contest must be filed within five days after the certificate of election is issued. K.S.A. 25-1439. Because it is unlikely that a contest would extend beyond six months, the destruction statute is probably not implicated.

⁶ K.S.A. 25-2422.

⁷ K.A.R. 7-29-3.

⁸ K.S.A. 25-2416.

⁹ K.S.A. 25-2423.

¹⁰ K.S.A. 25-2425.

¹¹ K.S.A. 25-2431.

¹² K.S.A. 25-3434.

with the directive to destroy ballots at 6 or 22 months and the need to prosecute and deter election crime. Thus, the operative language in K.S.A. 25-2708(b), stating that county election officers “shall destroy” ballots after a specified period of time, is the operative text to be interpreted in order to answer the question presented.

The Term “Shall” in K.S.A. 25-2708(b) is Directory

It is well established in Kansas law that the Legislature’s use of the word “shall” is in most contexts to be considered mandatory, while in other contexts it is merely directory.¹³ Generally speaking, mandatory provisions deal with substance while directory provisions deal with form.¹⁴ “The distinction between mandatory and directory provisions of a statute lies in the consequence of nonobservance. An act done in disobedience of a mandatory provision is void. While a directory provision should be obeyed, an act done in disobedience of it may still be valid.”¹⁵ Put another way, in instances where they are not adhered to, the difference between mandatory and directory provisions is one of effect. Neither type of provision is to be disregarded, but a violation of a directory provision has no consequences, while the failure to comply with a mandatory provision causes affirmative legal liabilities.¹⁶ “No absolute test exists by which it may be determined whether a statute is directory or mandatory. Each case must stand largely on its own facts, to be determined on an interpretation of the particular language used.”¹⁷

Our review of K.S.A. 25-2708(b) leads us to conclude that its provisions are merely directory. While the ballot destruction provision furthers election finality, the preservation of voter privacy, and ballot secrecy, it contains no sanction for an election officer’s failure to destroy ballots after 6 or 22 months, respectively. In contrast, the immediately preceding provisions requiring ballot preservation and retention exist for the purposes of protecting the right to vote and ensuring election integrity.¹⁸ And the corresponding federal law contains penalties for failing to

¹³ *State v. Raschke*, 289 Kan. 911, 914-15, 219 P.3d 481 (2009).

¹⁴ *Id.* at 916.

¹⁵ *Id.* at 917 (quoting *Hooper v. McNaughton*, 113 Kan. 405, 407, 214 P. 613 (1923)).

¹⁶ *Wilcox v. Billings*, 200 Kan. 654, 657, 438 P.2d 108 (1968).

¹⁷ *Id.* at 657. See also *Griffin v. Rogers*, 232 Kan. 168, 174, 653 P.2d 463 (1982) (absence of penalty for noncompliance, lack of effect on essential rights from noncompliance indicates directory provision); *State v. Bishop*, 264 Kan. 717, 720, 957 P.2d 369 (1998) (statutory provisions requiring law enforcement to provide oral and written notice to individuals suspected of DUI before administering breath test mandatory).

¹⁸ The United States Department of Justice takes the view that the purpose of the ballot preservation and retention provision of the Civil Rights Act of 1960, 52 U.S.C. § 20701, is to “secure a more effective protection of the right to vote.” U.S. Dep’t of Just., *Federal Law Constraints on Post-Election “Audits”* (April 2024), <https://www.justice.gov/crt/media/1348586/dl?inline>. See also *Alabama ex rel. Gallion v. Rogers*, 187 F. Supp. 848, 853 (M.D. Ala. 1960) (purpose of section to ensure more effective protection of right to vote); *United States v. Ass’n of Citizens Councils of La.*, 187 F. Supp. 846, 847 (W.D. La. 1960) (chief purpose is to facilitate the investigation of the records before suit is filed).

preserve and retain ballots.¹⁹ Moreover, as we have previously noted, ballots are not to be destroyed during an election contest, suggesting that any directive to destroy ballots is subordinate to election integrity and preservation of the right to vote.

Ballot Destruction Provisions of K.S.A. 25-2708(b) are Subordinate to Judicial Process

We agree with the proposition that mere notice of a pending criminal investigation is likely not enough to forestall the directive to destroy ballots after 6 or 22 months.²⁰ This conclusion is supported by the fact that there is not a common law duty to preserve evidence, and Kansas does not recognize the independent tort of spoliation of evidence.²¹ While destroying evidence with the intent to prevent or hinder a prosecution is a crime,²² a person following the statutory directive to destroy ballots likely lacks such an intent.

However, given the directory nature of K.S.A. 25-2708(b), its ballot destruction provisions must give way to judicial processes which are mandatory given the contempt powers of the court.²³ Absent a reprieve from the court, an election officer is bound to obey, for example, a search warrant²⁴ or subpoena seeking ballots.²⁵ K.S.A. 25-2708(b) tacitly recognizes this as it contains an exception to the ballot destruction directive for election contests, which are judicial proceedings.²⁶ Moreover, a judicially-supervised effort to forestall ballot destruction can include orders to protect voter and ballot confidentiality,²⁷ thus safeguarding the sometimes competing goals of voter and ballot confidentiality and election integrity.

Accordingly, we conclude that the ballot destruction directive contained in K.S.A. 25-2708(b) is directory, and must give way to judicial processes such as a search warrant or subpoena compelling the production or preservation of such ballots.

¹⁹ 52 U.S.C. § 20702.

²⁰ But see 52 U.S.C. § 20703 (any record required to be retained under this section shall be produced to Attorney General upon request).

²¹ *Superior Boiler Works v. Kimball*, 292 Kan. 885, 896, 909, 259 P.3d 676 (2011).

²² K.S.A. 21-5804(a)(2).

²³ See *In re Marriage of Shelhamer*, 50 Kan. App. 2d 152, 155, 323 P.3d 184 (2014) (courts exercise contempt powers to punish those who disrespect its orders).

²⁴ K.S.A. 22-2502 (search warrant issued by magistrate after showing of probable cause).

²⁵ K.S.A. 22-3214(1) (prosecution entitled to use subpoenas and may be issued in same manner as civil cases); K.S.A. 60-245(a)(1)(D) (subpoena may be issued to command production of documents).

²⁶ See K.S.A. 25-1434, *et seq.* (election contest act); K.S.A. 25-1437 (notice of election contest to be filed in district court).

²⁷ K.S.A. 22-2502(e)(4) (magistrate may restrict disclosure of information obtained).

Sincerely,

/s/ Kris W. Kobach

Kris W. Kobach
Attorney General

/s/ Anthony J. Powell

Anthony J. Powell
Solicitor General