

Subject: FW: Open Records Law Request (ND-SOS-21-1641)
Date: Tuesday, November 16, 2021 at 2:13:00 PM Eastern Standard Time
From: Newby, Brian
To: AO Records
Attachments: image001.png, image002.png, ND-SOS-21-1641.pdf, 211116141831_0001.pdf

EXTERNAL SENDER

Hello.

This is in response to your request from yesterday, attached.

Our office does not have any responsive records to item 1 and has included responsive records, redacted when necessary, to item 2.

Please let me know if you have any questions.

Thank you,

Brian D. Newby, CERA
State Election Director | North Dakota Secretary of State
600 E Boulevard Ave | Dept 108
Bismarck, ND 58505-0500
Desk: 701.328.3721
bnewby@nd.gov | sos.nd.gov



Newby, Brian

From: Newby, Brian
Sent: Saturday, June 6, 2020 9:02 AM
To: Newby, Brian
Subject: Signature Litigation Update, Due Process Cure Period Procedures
Attachments: Doc. 31.pdf

Good morning, North Dakota County Auditors.

This email follows yesterday's distribution of Document 31 in the United States District Court case of Self Advocacy Solutions, et al, vs. Alvin Jaeger, et al. I have again attached the Final Order in this case.

The Order requires that the Secretary of State instruct county auditors to follow the procedures outlined in the Order. The Order is effective immediately. Thus, these are the procedures you must follow for the June 9 election that is currently underway.

Suggested verbiage for written notifications that signatures do not match will be sent later this weekend. However, in the interest of being responsive and compliant with the Court Order, I am sending the procedures here, as outlined in the Order.

Important: You must maintain a log to show the name of each voter in question, the method used to contact the voter, the date the contact was attempted, initial status, date of resolution (if any), and resolution (if any). This log must be taken into your Canvass Board meeting and retained for 22 months after the election.

The Order specifically references N.D.C.C. § 16.1-07-12:

“if the affidavit on the outer envelope of a returned absentee ballot is found to be insufficient, or that the signatures on the application and affidavit do not correspond, or that the applicant is not then a duly qualified elector of the precinct, the vote may not be allowed, but without opening the absent voter's envelope, the election inspector or election judge shall mark across the face thereof "rejected as defective" or "rejected as not an elector", as the case may be. These rejected ballots are then turned over to the county canvassing board for final determination of eligibility.”

If an absentee ballot received on or before election day (in the current election, June 9, 2020) because the signatures on the application and the affidavit on the outer envelope of a returned absentee ballot do not match, a county auditor, or county official designated by the county auditor shall:

1. Take reasonable steps as soon as practicable to inform the voter that his or her ballot has been identified as having a signature mismatch and will be rejected if not verified by the voter.
2. Reasonable steps shall include but not be limited to calling the elector if the phone number is available.
3. If the voter is unreachable by phone (no phone number available, no answer, or only able to leave a message), the auditor shall mail a notice informing the voter of the information listed in step 1. The notice should also include instructions to respond that explains:
 - a. The voter shall have until the meeting of the Canvass Board, on the sixth day after the election (June 15, 2020, in this election at a time your board has established) to confirm or deny the legitimacy of the signatures in question.
 - b. The voter may confirm the legitimacy of the signatures by a response using:
 - i. Any form of written communication
 - ii. Phone call, or
 - iii. In-person visit.

- c. The response must be received from voter before the adjournment of the Canvass Board.
 - d. A note or log of the county auditor memorializing the phone call, in person visit, or the written communication from the voter must be presented to the Canvass Board and retained with all election materials for 22 months after the election.
4. If the voter does not respond to the notice, and if the Canvass Board determines that the signatures do not match, the ballot shall not be counted.
 5. For absentee ballots received after election day (after June 9, 2020, in the current election) with postmarks not later than the day prior to election day (June 8, 2020, in the current election), the county auditor will follow the same procedure as listed in item 3 above for any affidavits on envelopes with signatures that do not match the application for the ballot.
 6. All voters whose absentee ballots were not counted will be sent a written notice explaining that the ballot was rejected and the reason for the rejection. Suggested verbiage for this notice will be sent by the Secretary of State's office to county auditors before the June 9, 2020, canvass date.

I will be emailing later this weekend with suggested verbiage for your written communication to voters if the signatures are in question. Verbiage for the communication related to the final item (7) in the Court Order will be sent next week (it does not apply until after the Canvass Board adjourns).

Thank you,

Brian D. Newby, CERA

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Newby, Brian

From: Newby, Brian
Sent: Monday, June 8, 2020 10:07 AM
To: Newby, Brian
Subject: Signature Litigation Update, Due Process Cure Period Procedures update #3b (Slight Correction)
Attachments: sample log.xlsx

Good morning, all.

This is a corrected version with an important "not" slipped in where it was once missing.

I'm sorry for sending this a second time.

Following up on this from last night, please see draft language you can use for the written portion of your notification for voters when the signatures on the envelope affidavit and the application for the ballot do not match.

This language is for situations where the signatures do not match. You likely already are calling voters when there is no signature on the ballot, and that should continue. (NDCC 16.1-11.1-05 says "a voter's marked mail ballot may not be returned to the voter for any reason other than to complete any missing information required on the affidavit on the back of the return envelope," and if the voter included a telephone number on the application you can try calling the voter if there is a missing signature.)

However, you could use the attached log, or a different one you create, to include attempts to contact the voter in cases where signatures are missing. The suggested language below is for your written notice to the voter, if you cannot reach the voter by phone, when signatures did not match. Again, you are free to use this language or other language—it is just provided if you need it.

Some counties are considering including copies of the signatures when notifying voters. There is nothing that prohibits that. Whatever information is sent, it is recommended that it have your letterhead or artwork as some assurance to the voter that the notice is authentic.

Finally, please remember that after the election, as a result of this recent Court Order, ALL voters who submitted ballots that were not accepted to be counted must be sent a letter to notify them of this disposition. Our office will work to draft up recommended language for that notice later this week.

Following is suggested language when notifying voters by mail that their ballot signature and the application signature do not match.

Attention North Dakota Voter—Urgent Action Required:

Your ballot envelope for the June 9, 2020, North Dakota election did not contain a signature that the election board could verify against the signature on your application for a ballot. While signature variations are not uncommon, the _____ County Auditor requires your verification that you submitted a ballot in this election in order for it be counted.

You may call the office at _____, email at _____, or come to the office before the Canvassing Board certifies the election and adjourns on Monday, June 15, 2020, to confirm the ballot was submitted by you, or to alert us that the ballot was not submitted by you. The Canvassing Board is scheduled to meet Monday, June 15, 2020, at _____.

Without your verification, ballots in envelopes with affidavit signatures that do not match the signature on the application may not be counted, according to state law. If you are unable to respond by the Canvassing Board meeting time and your ballot was not counted, you will receive a follow-up notification that confirms this.

Make sure your voice is heard! Please contact our office immediately.

Thank you,

Brian Newby

Voter Name	Contact Method	Date Attempted to Contact	Status	Resolved (Y/N)
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Date of Resolution (if any) Resolution (if any)

Newby, Brian

From: Newby, Brian
Sent: Monday, June 15, 2020 12:31 PM
To: Newby, Brian
Subject: Signature Litigation Update, Due Process Cure Period Procedures update #4
Attachments: Ballot letter template - Revised.docx

Good afternoon, all.

As a final follow-up to the signature cure period litigation, attached are two draft letters you could use when notifying any voters that their ballots were unable to be counted.

I have confirmed that a notification must go out to known voters for any ballots that could not be counted, including those that arrive after canvass day, after the postmark day, or other reason for any voter, including UOCAVA voters.

One of the suggested drafts is for situations related to signatures, while the other draft is for all other situations. Of course, these drafts can be modified to fit your style.

Thank you for working through this new change.

Take care,

Brian D. Newby, CERA

State Election Director | North Dakota Secretary of State

600 E Boulevard Ave | Dept 108

Bismarck, ND 58505-0500

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For non-signature or non-signature matches

June 15, 2020

Dear Voter (or customized if possible)

This is an informational notice alerting you of action related to the June 9, 2020, election in North Dakota.

The [Insert County] Canvassing Board was unable to accept your ballot in accordance with state law because of one of the following reasons:

____ Signature on Envelope/Affidavit Did Not Match the Signature from the Ballot Application* (include either 1, 2, or 3 below)

____ No Signature on Envelope/Affidavit* (include either 1, 2, or 3 below)

*1 We called the phone number you listed on your absentee ballot application, but did not receive an answer. We sent you a notice dated _____, but we did not receive the response requested of you.

*2 We called and left a message and sent you a notice dated _____, but we did not receive the response requested of you.

*3 We did not have a phone number for you and were unable to call. Instead, we sent you a notice dated _____, but we did not receive the response requested of you.

Our representative republic and democratic process rely upon voter participation, and we regret that your ballot was unable to be counted in accordance with state law. If you have questions about your ballot, please call the [Insert County] Auditor office at _____.

Sincerely,

County Auditor

Ballots postmarked after June 8, or other

June 15, 2020

Dear Voter (or customized if possible)

This is an informational notice alerting you of action related to the June 9, 2020, election in North Dakota.

The [Insert County] Canvassing Board was unable to accept your ballot in accordance with state law because of one of the following reasons:

_____ Ballot Postmarked After June 8, 2020

_____ Ballot Left at Dropbox After 4 p.m. on June 9

_____ Other Reason: _____

Our representative republic and democratic process rely upon voter participation, and we regret that your ballot was unable to be counted in accordance with state law. If you have questions about your ballot, please call the [Insert County] Auditor office at _____.

Sincerely,

County Auditor

Newby, Brian

From: Newby, Brian
Sent: Thursday, October 15, 2020 10:47 AM
To: Newby, Brian
Subject: Signature Cure Process: FW: November 3, 2020, Election Auditor Update #2c
CORRECTION, USE THESE INSTRUCTIONS
Attachments: Absentee Voting Instructions final .docx
Importance: High

Good morning, everyone.

With the election underway and more ballot-by-mail requests expected, this is just a reminder that all of your ballots by mail that you send must include page one of these new instructions. The instructions do not have to be printed on your envelopes but, if not, as the instructions below say, must be otherwise included with the ballots you send out.

This is a requirement as an outcome of a Judge's order in a Federal lawsuit against the State and the Counties, so it is imperative that all ballots are mailed with these instructions.

Should you have any questions about this, please email me or Brian Nybakken, or discuss with your State's Attorney.

Have a great day,

Brian D. Newby, CERA
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Subject: November 3, 2020, Election Auditor Update #2

Good evening, everyone,

This is the second numbered update related to the November 3 election. The previous update was sent on August 13.

2. New Voter Instructions for Absentee Ballots

Just before the June election, we sent out an order from a U.S. District Court judge related to a signature cure period that was to be established for the 2020 elections. By all accounts, the auditors incorporated this new process well and county logs and other items were sent to the court to verify compliance with the Judge's Order.

The process for November will be very similar to June. The biggest difference comes from the attached instructions related to absentee ballots. The first page of the document lists instructions for auditors and the second page has instructions for voters. These voter instructions should either be printed on your privacy envelope or sleeve, for absentee ballots, or otherwise included with the ballot when you mail it out.

Counties were encouraged to keep a log in June and are strongly encouraged to use the attached spreadsheet as that log for November. We believe the plaintiffs in the original lawsuit will expect 53 logs to be provided after November. Please keep a log even if it just demonstrates that there were no signatures that did not appear to match. If, at the end of the election cycle, you had no situations of signatures that did not appear to match, simply write "No Occurrences" in the first line of the spreadsheet.

Instructions for the process, again, are as follows:

Important: You must maintain a log to show the name of each voter in question, the method used to contact the voter, the date the contact was attempted, initial status, date of resolution (if any), and resolution (if any). This log must be taken into your Canvass Board meeting and retained for 22 months after the election.

The Order specifically references N.D.C.C. § 16.1-07-12:

"if the affidavit on the outer envelope of a returned absentee ballot is found to be insufficient, or that the signatures on the application and affidavit do not correspond, or that the applicant is not then a duly qualified elector of the precinct, the vote may not be allowed, but without opening the absent voter's envelope, the election inspector or election judge shall mark across the face thereof "rejected as defective" or "rejected as not an elector", as the case may be. These rejected ballots are then turned over to the county canvassing board for final determination of eligibility."

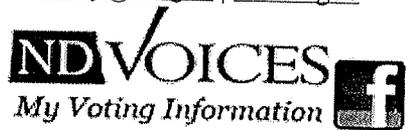
If an absentee ballot received on or before election day (in the current election, June 9, 2020) because the signatures on the application and the affidavit on the outer envelope of a returned absentee ballot do not match, a county auditor, or county official designated by the county auditor shall:

1. Take reasonable steps as soon as practicable to inform the voter that his or her ballot has been identified as having a signature mismatch and will be rejected if not verified by the voter.
2. Reasonable steps shall include but not be limited to calling the elector if the phone number is available.
3. If the voter is unreachable by phone (no phone number available, no answer, or only able to leave a message), the auditor shall mail a notice informing the voter of the information listed in step 1. The notice should also include instructions to respond that explains:
 - a. The voter shall have until the meeting of the Canvass Board, on the sixth day after the election (June 15, 2020, in this election at a time your board has established) to confirm or deny the legitimacy of the signatures in question.
 - b. The voter may confirm the legitimacy of the signatures by a response using:
 - i. Any form of written communication
 - ii. Phone call, or
 - iii. In-person visit.
 - c. The response must be received from voter before the adjournment of the Canvass Board.
 - d. A note or log of the county auditor memorializing the phone call, in person visit, or the written communication from the voter must be presented to the Canvass Board and retained with all election materials for 22 months after the election.
4. If the voter does not respond to the notice, and if the Canvass Board determines that the signatures do not match, the ballot shall not be counted.
5. For absentee ballots received after election day (after June 9, 2020, in the current election) with postmarks not later than the day prior to election day (June 8, 2020, in the current election), the county auditor will follow

- the same procedure as listed in item 3 above for any affidavits on envelopes with signatures that do not match the application for the ballot.
6. All voters whose absentee ballots were not counted will be sent a written notice explaining that the ballot was rejected and the reason for the rejection.

Have a great night,

Brian D. Newby, CERA
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Absentee Voting Instructions

Prescribed by the Secretary of State in Accordance With Section 16.1-07-08(3) of the NDCC
(Revised August 2020)

Absentee voting instructions should be printed in a conspicuous manner on the return envelope or be provided on a conspicuous insert to be included with every absentee ballot.

Absentee voting instructions should be labeled as such and should reasonably contain the following core components when applicable and possible:

- Reminder to voter, that after marking the ballot, conceal the ballot(s) by folding the ballot(s) for insertion into the secrecy envelope or sleeve, which is then to be inserted into the return envelope provided and sealed for delivery.
- Instruction to voter to complete the voter's affidavit found on the back of the return envelope.
- Reminder to voter, signature on affidavit will be compared to signature on ballot application. If the signatures do not appear to match, the ballot could be rejected—however, not before an attempt will be made to contact the voter to provide the opportunity to verify the authenticity of the signatures.
- Reminder to voter to affix the proper postage if returned by mail.
- Reminder to voter, if returning ballot by mail, that it must be postmarked no later than the day before the election.
- Reminder to voter, if returning ballot in person to the County Auditor's office, that it must be returned by 5:00 p.m. on the day before the election.
- Reminder to voter, set out and emphasized in a conspicuous manner (larger print, underlined, bolded, etc.), that he or she is entitled to complete his or her absentee ballot(s) in secrecy.

For assistance, please refer to the examples of absentee voting instructions provided.

Instructions to Absentee Voters

N.D.C.C. § 16.1-07-08(3)

Make sure you do the following:

- ⇒ After voting your absent voter's ballot, fold it to conceal your vote.
- ⇒ Place your folded, completed ballot in the provided secrecy envelope or sleeve.
- ⇒ Place the secrecy envelope or sleeve containing the ballot in the self-addressed return envelope provided and seal it.
- ⇒ Complete and sign the voter's affidavit found on the back of the return envelope. **Your signature will be compared to the signature on the ballot application and the ballot could be rejected if the signatures do not match. If the signatures do not appear to match, your County Auditor will attempt to contact you to provide you the opportunity to verify the authenticity of the signatures.**
- ⇒ If you choose to return your absentee ballot by mail, be certain to affix the proper postage before mailing.
- ⇒ **Absentee ballots returned by mail must be postmarked *no later than the day before the election*.** If you choose to return your ballot by mail on the day before the election, it is advisable to take the ballot to the service window at the US Post Office and request that the ballot be "hand cancelled" to ensure it is properly postmarked.
- ⇒ Mailed ballots, postmarked by the day before the election must be received in the mail by the County Auditor by the Monday after the election. The US Postal Service recommends voters mail their return ballot at least one (1) week prior to the due date. Please plan accordingly.
- ⇒ Absentee ballots may be returned in person to County Auditor's office until 5:00 p.m. on the day before the election.
- ⇒ Ballots cannot be mailed or returned in person on election day. Please visit your polling place to cast a ballot if you have not returned your absentee ballot by the day before the election.
- ⇒ If you happen to make a mistake while voting, you have the right to return your spoiled ballot to the County Auditor and receive a new ballot. (N.D.C.C. § 16.1-13-32)
- ⇒ In the June Election, crossover voting is not allowed between the political parties in the consolidated primary portion of the ballot – this means that you may vote for only those candidates listed under the column heading of one of the political parties in the political party primary section of the ballot – failure to stay within the column will result in the rejection of your votes in this section of the ballot. (N.D.C.C. § 16.1-11-22(4))

**Remember, You Are Entitled to Complete Your
Absentee Voter's Ballot in Secrecy**