

SPECIAL INVESTIGATION REPORT

IN THE MATTER OF
WAUKESHA COUNTY CLERK
KATHY NICKOLAUS
G.A.B. CASE # 2011-04

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INTRODUCTION

In a contest that drew national attention, sitting Justice David Prosser faced Assistant Attorney General JoAnne Kloppenburg during the spring 2011 general election for a non-partisan seat on the Wisconsin Supreme Court. Early news accounts characterized the race to be “predictable,” but by April the contest had grabbed the national spotlight.

Only weeks before the general election, in the primary election held on February 15, 2011, Mr. Prosser gained 55 percent of the vote, compared with 25 percent for Ms. Kloppenburg. The balance of the votes went to two other candidates. The primary, however, was held just days after newly-elected Republican governor, Scott Walker, unveiled the controversial budget repair bill.

That piece of legislation, announced on February 11, 2011, included a plan to eliminate collective bargaining rights and curtail benefits for public workers. In the weeks following the governor’s proposal, protestors rallied at the Capitol on a daily basis. Crowd-size estimates ranged from 70,000 to 100,000 on various dates. The race for Supreme Court transformed into what observers described as a proxy battle for the governor’s political position and much less a fight about the court itself.

Prior to the election, neither candidate publicly expressed views about the proposed changes to collective bargaining. However campaign ads denounced Mr. Prosser, a one-time Republican speaker of the State Assembly, as a “rubber stamp” for Governor Walker, and other ads contended Ms. Kloppenburg was receiving support from union leaders, protestors and others who opposed the contents of the repair bill. The race had become highly charged, and on the eve of the election, the New York Times featured the race in a story under the headline “Wisconsin Election Is Referendum On Governor.”

Following the election on April 5, 2011, with all counties in Wisconsin reporting unofficial results, the Supreme Court race appeared to be decided by a razor-thin margin. Out of approximately 1.5 million votes cast, Ms. Kloppenburg seemed to have emerged victorious by 204 votes. On Wednesday, April 6, 2011, the Associated Press reported unofficial totals that had Ms. Kloppenburg receiving 740,090 votes and Mr. Prosser receiving 739,886 votes. In a prepared statement, Ms. Kloppenburg declared victory and thanked Mr. Prosser for his more than 30 years of public service.

At the time Ms. Kloppenburg made her statement, a crucial piece of information had not been released to the public. More than 14,000 votes from the City of Brookfield had not been included in the unofficial results Waukesha County Clerk Kathy Nickolaus released to the media on election night. This information was not released publicly for two days. On Thursday, April 7, 2011, immediately after the Waukesha County Board of Canvass completed its work, Ms. Nickolaus called a press conference.

During the press conference, Ms. Nickolaus disclosed she had misreported her unofficial results for the Supreme Court election released to the media on election night. Ms. Nickolaus explained that she had inadvertently excluded the entire City of Brookfield from the county totals. Ms. Nickolaus reported the City of Brookfield actually cast a total of 14,315 votes in the Supreme Court election. Of those votes, 10,859 votes were for Mr. Prosser. The remaining 3,456 votes went to Ms. Kloppenburg. As a result, Ms. Nickolaus reported the official vote total in Waukesha County for the Supreme Court was 92,263 votes for Mr. Prosser and 32,758 votes for Ms. Kloppenburg. This swing resulted in a 7,316-vote lead for Mr. Prosser statewide.

Ms. Nickolaus was unable to clearly articulate a reason for the error. She stated it was the result of human error, but also indicated the error was, in part, due to the use of a Microsoft-based program, an Access 2007 database. This database, which had been created for Ms. Nickolaus by the Department of Administration in conjunction with the Government Accountability Board (G.A.B.) in approximately November 2010, was specifically designed to assist Ms. Nickolaus in accumulating voting results that are uploaded to the G.A.B.'s online statewide Canvass Reporting System.

In her public explanation, Ms. Nickolaus stated the error was related to "the saving of the data." This explanation would later be challenged by members of the public familiar with the Microsoft Access program. But even Ms. Nickolaus seemed uncertain if a failure in "saving of the data" was the true cause of the error. Asked by a reporter if the problem was human error or software error, Ms. Nickolaus stated, "They have some, some macros that sometimes aren't enabled. That's a possibility. I don't know what it is." By the conclusion of the press conference, Ms. Nickolaus apologized for the error and took responsibility for it.

Reporters also questioned Ms. Nickolaus about when she first realized there was a possible error with the vote totals. Ms. Nickolaus stated the error was discovered as part of the official canvass. Another reporter who sat through the Brookfield count in the canvass asked why, if the discrepancy was found during the canvass, the topic of 14,000 votes from Brookfield

was not discussed during that portion of the canvass. Ms. Nickolaus then stated she discovered the problem “when I was uploading the data from the election night results to the state system so we could start our canvass at noon” on Wednesday, April 6, 2011.

The disclosure of Ms. Nickolaus' error caused both the public and media outlets to express significant concerns. The G.A.B. received approximately 2,000 questions and complaints demanding an investigation into Ms. Nickolaus' actions on election night and the events leading up to the announcement of the official canvass results in Waukesha County.

The concerns were exacerbated by Waukesha County's reputation as a Republican-dominant county, Ms. Nickolaus' ties to the Republican Party and her apparent ties to Mr. Prosser. Prior to her election as Waukesha County's Clerk, Ms. Nickolaus spent 13 years as a data analyst and computer specialist for state Assembly Republicans. While working for the state, she prepared software to track political donations. In 2001, she also was granted immunity from criminal prosecution by the district attorney after she cooperated with an inquiry into misconduct and corruption in the legislative caucus system. In an unrelated matter, she was later cleared by the Ethics Board of any ethics violations tied to allegations that she used state resources to order voter list for her planned run for Waukesha County Clerk.

In response to the problems with the Waukesha results, G.A.B. staff immediately conducted a review. The initial review was conducted on Friday, April 8, 2011 and included an interview with Ms. Nickolaus and the inspection of election returns from the City of Brookfield. Through this process, G.A.B. staff verified the vote totals sent from the City of Brookfield matched the vote totals entered into the G.A.B.'s Canvass Reporting System. The results from Brookfield, in addition to the unofficial election night results for Waukesha County, added up to the results from the official canvass results.

The G.A.B. sent a second team of staff members to Waukesha County between Thursday, April 14, 2011 and Tuesday, April 19, 2011. This team also interviewed Ms. Nickolaus, reviewed election documentation of all reporting units in Waukesha County, and examined the Access 2007 database used in Waukesha's election. G.A.B. staff scanned, photographed, recorded and verified information provided on documents and ballot bags from all reporting units in Waukesha County. The G.A.B. review revealed areas for improvement, but did not immediately reveal any intentional misconduct on the part of Ms. Nickolaus, nor did the review detect any significant flaws in Waukesha County's official canvass process.

On April 20, 2011, Ms. Kloppenburg requested a statewide recount of the Supreme Court election. The recount, which included a recount of ballots by boards of canvass in all of Wisconsin's 72 counties, was completed on May 23, 2011. Based on the results of the recount, the G.A.B. ultimately certified Mr. Prosser as the winning candidate in the spring Supreme Court election. The G.A.B.'s certification indicated Mr. Prosser received a total of 752,694 votes and Ms. Kloppenburg received 745,690 votes, a difference of 7,004 votes, or approximately 0.46 percent. In Waukesha County, the original canvass submitted to the state, which included the results from the City of Brookfield, showed 92,263 votes for Mr. Prosser and 32,758 votes for Ms. Kloppenburg. The recount in Waukesha County showed 92,331 votes for Mr. Prosser and 32,777 votes for Ms. Kloppenburg.

On the same day Ms. Kloppenburg requested a recount, her campaign manager, Melissa Mulliken, filed a complaint with the G.A.B. pursuant to Wis. Stat. §§ 5.06 and 5.05(2m)(c)2. The complaint alleged Ms. Nickolaus violated state election laws in carrying out her duties for the spring election. The complaint raised questions as to how and why the City of Brookfield returns were not included in the results posted on election night; whether the omission of the City of Brookfield returns was intentional; whether Ms. Nickolaus' explanation for underreporting was truthful; why Ms. Nickolaus failed to inform the G.A.B. of the error but instead held a press conference; why she failed to immediately issue a correct report to the public or media; whether Ms. Nickolaus informed anyone else about the error prior to the press conference; and what steps would be taken in the future.

The complaint also suggested a deeper conspiracy in the election results, alleging that on April 6, 2011, "Justice Prosser was observed entering the Governor's Office late in the evening" and attended a private, one-on-one meeting with Governor Walker. This allegation was coupled with a claim that also on April 6, 2011, the day before Ms. Nickolaus held her press conference, Governor Walker publicly commented that there might be "ballots somewhere, somehow found out of the blue that weren't counted before."

The complaint specifically alleged a violation of Wis. Stat. § 7.60(1), which requires the county clerk on election night to receive reports from ward inspectors and post all returns. The complaint also alleged various violations of Wis. Stat. Chapter 12, which prohibits election officials from intentionally making a false statement, canvass or return of votes cast; tampering with voting equipment or records; or intentionally violating any other provision of the election

laws. Finally, the complaint alleged various violations of Wis. Stat. Chapter 946, which prohibits the destruction or concealing of public records, as well as misconduct in office.

SCOPE OF THIS INVESTIGATION AND REPORT

On May 17, 2011, the six members of the State of Wisconsin Government Accountability Board unanimously passed a resolution authorizing an independent investigation in G.A.B. Case No. 2011-04, In the Matter of Waukesha County Clerk Kathy Nickolaus. The purpose of the investigation was to learn if there was probable cause to believe Ms. Nickolaus violated Wis. Stat. § 7.60(1) by failing to keep the county clerk's office open to receive reports from the ward inspectors and posting all results as it relates to the spring 2011 Wisconsin Supreme Court race.

This report addresses specific allegations contained in the complaint filed by the Kloppenburg campaign, including whether Ms. Nickolaus' actions constituted possible violations of Wis. Stat. § 7.60(1), Wis. Stat. Chapter 12, and Wis. Stat. Chapter 946. It also addresses allegations contained in the complaint that Mr. Prosser and Governor Walker had a private meeting on April 6, 2011, the day after the election, as well as public statements Governor Walker made on April 6, 2011 that there might be "ballots somewhere, somehow found out of the blue that weren't counted before."

This report also addresses why the Access 2007 database was designed for use in Waukesha County, how it was used for the spring 2011 election, the likely cause for the error in reporting votes from the City of Brookfield on election night, whether Ms. Nickolaus' explanation of the error during the press conference was accurate, whether Ms. Nickolaus violated state law, and whether her actions rise to the level of a possible criminal violation.

Finally this report addresses concerns that were not alleged in the complaint, but were raised by certain individuals during the course of the investigation. These concerns include the possibility of larger conspiracy to engage in fraudulent election practices, lapses in ballot bag security, and breaks in the chain of custody for ballots. Some concerns raised in the complaint, such as allegations of prior misconduct by Ms. Nickolaus, are not addressed in this report, as they have previously been investigated or are beyond the scope of this investigation.

To compile this report, this investigator interviewed election officials including Ms. Nickolaus, municipal clerks, members of the Waukesha County Board of Canvass, citizens who worked as observers during the recount, Mr. Prosser, staff at the Government Accountability

Board, computer programmers who designed the Access 2007 database for use in Waukesha County and programmers who assisted Ms. Nickolaus during the spring 2011 election. The investigator also reviewed telephone records, email records, press conference transcripts, media reports, photographs, the 2010 audit of the Waukesha County Clerk's Office, the Access 2007 database used in Waukesha County on election night, the G.A.B. investigative report prepared by Katie Mueller, and minutes from the statewide recount.

APPLICABLE LAW

Section 7.60(1) of the Wisconsin Statutes sets forth the duties imposed on county clerks on any given election night. The Statute reads as follows:

7.60 County canvass. (1) KEEP OFFICE OPEN. On election night the county clerk shall keep the clerk's office open to receive reports from the ward inspectors and shall post all returns.

The Government Accountability Board takes the position that the law requires separate reporting of each municipality independently. The G.A.B.'s position is that county clerks who receive returns by ward or reporting unit should post the results by ward or reporting unit.

Chapter 12 of the Wisconsin Statutes generally addresses prohibited election practices. Wis. Stat. § 12.13 applies to election fraud, and Wis. Stat. §12.13(2)(a) governs election fraud as it applies to the conduct of election officials. It states:

(2) ELECTION OFFICIALS. (a) The willful neglect or refusal by an election official to perform any of the duties prescribed under chs. 5 to 12 is a violation of this chapter.

Wis. Stat. § 12.13(2)(b) also prohibits election officials from engaging in certain intentional conduct. For example, Wis. Stat. § 12.13(2)(b)4 states no election official may "intentionally assist or cause to be made a false statement, canvass, certificate or return of votes cast at any election." Finally, Wis. Stat. § 12.13(2)(b)7 makes it unlawful for an elected official, in the course of the person's official duties or on account of the person's official position to "intentionally violate or intentionally cause any other person to violate any provision of chs. 5 to 12 for which no other penalty is expressly prescribed."

Chapter 946 of the Wisconsin Statutes applies to crimes against government and its administration. Misconduct in public office is addressed in Chapter 946.12 of the statutes. Wis. Stat. § 946.12(1) subjects a public officer or employee who "intentionally fails or refuses to perform a known mandatory, nondiscretionary, ministerial duty of the officer's or employee's

office or employment within the time or in the manner required by law” to criminal liability. Likewise, Wis. Stat. § 946.12(4) makes it unlawful for a public officer or employee, acting in a capacity as such officer or employee, to make an entry in an account or record book or return, certificate, report or statement which in a material respect the officer or employee intentionally falsifies.

HISTORY OF THE ACCESS 2007 DATABASE IN WAUKESHA COUNTY

Ms. Nickolaus’ reference to the Access 2007 database at the press conference sparked rumors that the state created a special election program for Waukesha County. It also was rumored that Ms. Nickolaus stored the information on a personal computer.

It is true that the Department of Administration set up the Access 2007 database specifically for Ms. Nickolaus’ use during elections. On election night, county clerks gather results from local municipalities. These results are later compiled and transmitted to the G.A.B. via computer. Some counties provide unofficial results prior to the start of the official county canvass. The Access 2007 database was created in an effort to streamline the manner in which Waukesha County reported election results to the state and eliminate the need for Ms. Nickolaus to enter municipal results by hand before transmitting the countywide results to the G.A.B., which she had done prior to the creation of the Access 2007 database. The Department of Administration also provided tools and technical assistance to help other counties in Wisconsin.

In early 2010, the G.A.B. entered into an agreement with the Wisconsin Department of Administration, Division of Enterprise Technology for the Division to build a new, statewide online Canvass Reporting System. The Canvass Reporting System was designed as the standard tool that all counties would use statewide to provide certified election results to the state and is now the uniform system for counties to report results to the state. David Grassl was the section leader from the Division of Enterprise Technology assigned to supervise this project. As part of developing the Canvass Reporting System, Mr. Grassl worked with each county to understand their canvass process and ensure the Canvass Reporting System would meet their needs.

The Access 2007 database was developed as a tool to assist Waukesha County in aggregating election results from multiple types of voting equipment into one data file that could be imported into the Canvass Reporting System. While Waukesha County is the only county

that used the Access 2007 database tool, it was and is available for other counties to use if they desire to do so. Special assistance, tools, and procedures were provided to multiple counties in addition to Waukesha County to help ensure the Canvass Reporting System would meet county clerks' needs.

As part of election results reporting, the G.A.B. requires county clerks to submit certified election results to the state using the Canvass Reporting System. Results can be uploaded directly into the Canvass Reporting System from a data file, or they can be entered using a web-based screen. Municipal clerks are required to report election results to county clerks on election night. County clerks use a variety of different tools and processes to gather and record this information on election night. The type of voting equipment used in a municipality determines how results are reported to a county clerk.¹ However, because a variety of voting machines are used in each municipality, there is no uniform system to gather, compile and transmit results from the municipal clerk to the county clerk. Some municipalities submit results to the county clerk via modem. Other municipalities report results via telephone. Other municipalities submit vote counts on a spreadsheet/template via email to the county clerk.

¹ Of the five possible G.A.B.-approved voting equipment manufacturers, municipalities in Waukesha County use various types of electronic voting equipment manufactured by two different vendors: Sequoia Voting Systems (acquired by Dominion Voting Systems Corporation) and Election Systems and Software (ES&S). Each municipality uses an optical scan voting system and an accessible voting system, which allows a voter with a disability to vote independently and privately. The majority of municipalities use as an accessible voting component a direct recording electronic (DRE) voting system, more commonly known as a touch screen voting system, which allows voters to select candidates by touching the voting equipment screen, review all of their selections and then cast their ballot. The DRE system is required to produce a voter verifiable paper record that may be verified by the voter before casting his/her ballot, and once the polls have closed will produce a tabulation report for the named candidates and write-in candidates. The other municipalities use an accessible ballot marking device voting system that functions similar to a DRE but does not tabulate votes. Instead, the ballot marking device will electronically mark the voter's selection and will produce the marked paper ballot. These ballots are then tabulated by the optical scan voting equipment. The optical scan voting system operates by processing paper ballots that contain voter sections made by either completing an arrow or filling in an oval next to the candidate the voter selects. After the voter makes his/her selections, the paper ballot is inserted into the optical scan voting equipment, which tabulates all of the votes.

The optical scan voting systems that are used in Waukesha County are the Optech Eagle and Sequoia Insight. The accessible devices used in Waukesha County are the Sequoia Edge (DRE) and the ES&S AutoMARK (ballot marking device). Only voting systems that are tested and certified together may be utilized together at an election. Therefore, each municipality differs in the specific voting equipment used, and some municipalities use different types of voting equipment at wards in the municipality. In the spring 2011 election, for example, the City of Brookfield utilized three types of voting equipment, the Optech Eagle (optical scan), the Sequoia Insight (optical scan) and the Sequoia Edge (DRE). The City of Brookfield also served as a location at which central count of absentee ballots is conducted.

Once county clerks have received vote totals from the municipalities, they follow the statutory Board of Canvass process to certify election results. After the results are certified, they must be provided to the state using the Canvass Reporting System. Some county clerks use the Canvass Reporting System for the entire process, including entering unofficial results into the Canvass Reporting System on election night. Some county clerks enter results into the Canvass Reporting System immediately before convening their Board of Canvass and use the Canvass Reporting System to help complete their canvass. Some counties wait until their results are canvassed before entering them into the Canvass Reporting System. All of these methods are acceptable to the G.A.B.

Because of these differing methods of reporting results to the county clerk, prior to the development of the Access 2007 database used in Waukesha County, Ms. Nickolaus was required to hand enter data she received from certain municipalities into a file that could be transmitted to the G.A.B.'s Canvass Reporting System.

In February 2010, Ms. Nickolaus and members of her staff met with representatives from the G.A.B. and Department of Administration to discuss the possibility of creating a tool to assist her in accumulating vote totals to be sent to the Canvass Reporting System. Ms. Nickolaus did not recall if she initiated the request or if the G.A.B. approached her. Ms. Nickolaus stated she was aware the G.A.B. directed all counties to use the Canvass Reporting System. Ms. Nickolaus stated from her perspective the request to have a clerk manually enter the data and upload it to the state on election night was unreasonable. Ms. Nickolaus stated, "I can't sit on election night, I can't sit and hand enter all of that information. I can't do it. There's got to be some way to go from my machines to that machine."

Following the meeting between the G.A.B. and Ms. Nickolaus, Mr. Grassl developed a tool to accumulate and compile votes for Waukesha County using Microsoft's Access 2007 program. Mr. Grassl confirmed that several other counties in Wisconsin, like Waukesha County, had to input data by hand before having the ability to upload it to the state. However Mr. Grassl stated Waukesha County was unique due to the municipalities that used DRE touchscreen equipment, optical-scan equipment and processed absentee ballots at a central count location. These different voting systems and methods of tabulating votes meant data had to be recorded and accumulated in multiple formats.

Through the Access 2007 database, Mr. Grassl stated he was able to create a Microsoft Excel spreadsheet/template for municipalities in Waukesha County to tally their votes, which

then can be imported into the Access 2007 database. The tool allowed certain municipalities, including the City of Brookfield, to return the voting data to Ms. Nickolaus via the spreadsheet/template. Ms. Nickolaus could in turn upload the spreadsheet/template information into the Access 2007 database. Once uploaded into the Access 2007 database, the information could be sent to the G.A.B.'s Canvass Reporting System without requiring Ms. Nickolaus to enter the data by hand.

Mr. Grassl stated the database was not designed to be an overall audit of votes, review of votes, or oversight of how the clerk conducts an election. Mr. Grassl stated he simply designed the application to be a tool to automate what Ms. Nickolaus was doing manually.

Ms. Nickolas stated she did not receive any specific, formal training from the G.A.B. on how to use the Access 2007 database, nor did she receive any written material or guidance. Ms. Nickolaus, however, conceded she did not seek any such assistance or information. Mr. Grassl stated before constructing the tool for Ms. Nickolaus, he asked if she was familiar with Access 2007, which is a commonly-used productivity tool included in the Microsoft Office suite. She indicated that she was very familiar with Access. The tool uses features that are inherent in any Access database, so Mr. Grassl did not provide training on how to use the standard Microsoft functionality.

The spring 2011 election was the third time Waukesha County used the Access 2007 database. Although Mr. Grassl was not physically present to assist her during each election, he was available via phone or email during the first two elections to assist her with questions as they arose. Mr. Grassl stated he provided significant technical assistance to Ms. Nickolaus regarding use of the tool, both initially and during the first two elections it was used. He stated he provided in-person assistance on one occasion and on several other occasions via telephone in importing and uploading test files on her office computer. Ms. Nickolaus recalled speaking with Mr. Grassl during the first two elections in which it was used regarding minor issues with the database. By all accounts, the first two elections in which the database was used went smoothly.

At the time of the spring 2011 election, Mr. Grassl was no longer working for the Department of Administration/Division of Enterprise Technology. Instead, the Department of Administration/Division of Enterprise Technology provided Steven Hirscher to the G.A.B. as a resource to provide technical assistance regarding the Access 2007 database used by Waukesha County. Mr. Hirscher, who is employed by Stratagem, Inc., works on a contract

basis for the Department of Administration/Division of Enterprise Technology. Mr. Hirscher began working on election projects for the G.A.B. in November 2010.

ACCESS 2007 DATABASE PREPARATION FOR USE IN AN ELECTION

To use the Access 2007 database in an election, Ms. Nickolaus provides the G.A.B. with information regarding the various races and the method by which each municipality intends to report to the county clerk after the polls close. Computer programmers working with the G.A.B. then configure the Access 2007 database for the election and send it to Ms. Nickolaus. The programmers also prepare the blank Excel spreadsheets/templates to be used by municipalities reporting results in that fashion and send them to Ms. Nickolaus.

Ms. Nickolaus stores the blank spreadsheets/templates in a file on her office laptop. This is not Ms. Nickolaus' personal computer. It is owned by Waukesha County and docked and connected to the county network.² Ms. Nickolaus identifies the blank spreadsheets/templates by the word "template" and the name of the municipality for which it is intended. In the 2011 spring election, for example, the City of Brookfield was designated as "templateCityofBrookfield" (see Attachment A). The templates, broken down by ward, contain the contest, candidate, vote, vote total and adjust columns.³

Prior to the election, Ms. Nickolaus transmits a copy of the blank spreadsheet/template via email to the municipalities that report results in that manner. On election night, the municipal clerks and their staff record the local election results on the spreadsheet/template and return a completed version to Ms. Nickolaus by email. Ms. Nickolaus then saves the completed version of the spreadsheet/template and imports the information into the Access 2007 database. After

² In August 2010, the Waukesha County Board's Executive Committee ordered an audit of the election equipment and system used in Ms. Nickolaus' office. The audit stemmed from concerns about the integrity of old equipment used, the system she used and whether she had adequate backup. This audit was completed after Ms. Nickolaus removed certain election results collection and tallying equipment from the Waukesha County computer network. Although the audit concluded the system generally complied with state guidelines, it also recommended implementing various procedures to address security and backup concerns. The laptop on which Ms. Nickolaus stores the spreadsheets/templates and the Access 2007 database was not one of the computers that were the subject the audit. Ms. Nickolaus indicated she did not have security concerns with this laptop because it is used to gather unofficial results in an election. She also stated the laptop must be on the network to send the data to the Canvass Reporting System.

³ The columns in the spreadsheet/template map to columns in the Access 2007 database. For municipalities using the spreadsheet/template, the vote totals for each reporting unit go in the "vote" column, and are repeated in the "vote total" column. The adjust column is not used. In the Access 2007 database, all three columns are used in order to account for votes that are imported from LST files or from the spreadsheet/templates, or entered by hand.

votes are accumulated in the Access 2007 database, the unofficial county totals are exported to the G.A.B.'s Canvass Reporting System. The upload into the Canvass Reporting System may be completed on election night, but it is not required to be done at that time. Ms. Nickolaus did not upload data to the Canvass Reporting System on election night in the spring 2011 election.

In addition to functioning as an accumulator, the Access 2007 database includes a report that provides a running tally of countywide election results by candidate for a particular race. On election night, Ms. Nickolaus used the report feature to produce countywide vote totals for various races, including the Supreme Court, which she published to the media and members of the public throughout the evening.

EVENTS DURING THE DAY AND NIGHT OF THE SPRING 2011 ELECTION

At approximately 7:30 a.m. on April 5, 2011, Ms. Nickolaus sent via email copies of the blank spreadsheets/templates to the municipal clerks who would be reporting using that system. The email warned the municipal clerks, "Do not change the name or add any columns to the spreadsheet." Ms. Nickolaus included this warning because if changed, the spreadsheet could not be used with the Access 2007 database in a manner that would allow Ms. Nickolaus to simply upload results to the G.A.B.'s Canvass Reporting System.

During the afternoon on election day, Ms. Nickolaus encountered some minor, technical problems with the Access 2007 database. Mr. Hirscher stated he received an email from Ms. Nickolaus on Tuesday afternoon that indicated the Supreme Court contest was showing up improperly as "Circuit Court #4" in the Access 2007 database. Mr. Hirscher requested Ms. Nickolaus to send him a copy of the database. Mr. Hirscher stated he reviewed the information sent, but did not observe anything wrong. Mr. Hirscher indicated the report showed the first contest as "JUSTICE OF THE SUPREME COURT," as expected. Mr. Hirscher stated he had to leave to attend a meeting, but upon his return, he received an email from Ms. Nickolaus indicating she had deleted the file she was using and opened a new file from the original zip file. She also indicated, "Everything looks great. Thanks for all your help."

Mr. Hirscher stated he received a second message regarding potential problems in Waukesha later that evening. Mr. Hirscher stated he was contacted by Ann Oberle, the SVRS UAT Lead at the G.A.B., who told him Ms. Nickolaus was having problems with the Access 2007 database. Mr. Hirscher stated at approximately 8:30 p.m., he contacted Ms. Nickolaus who informed him that she had figured out the problem and no longer needed assistance. Mr.

Hirscher indicated the problem appeared to be that Ms. Nickolaus entered data into the wrong field. Mr. Hirscher stated he did not have any contact with Ms. Nickolaus again on election night.

Although the spring 2011 election was the third time Ms. Nickolaus had used the Access 2007 database, its use was not well known among municipal clerks. City of Brookfield Clerk Kris Schmidt said she knew nothing about the Access 2007 database used by Ms. Nickolaus before the spring 2011 election.

Ms. Schmidt stated that through the 2008 presidential election, Brookfield had used a modem to transmit results to the Waukesha County Clerk's Office. Ms. Schmidt stated that in more recent elections, Ms. Nickolaus provided a spreadsheet to Brookfield for the purpose of transmitting election results. Ms. Schmidt indicated Brookfield had modified the previous spreadsheets it received to include numbers for each of the machines used, as well as absentee ballots. When this was done, the City of Brookfield used an IT specialist to assist in modifying the spreadsheet returned to Ms. Nickolaus.

Ms. Schmidt stated she did not recall whether Ms. Nickolaus warned the municipalities not to alter the spreadsheets in elections prior to Spring 2011. Ms. Schmidt stated she also did not recall whether or not Ms. Nickolaus accepted or rejected spreadsheets in the past that the City of Brookfield had altered.

Ms. Schmidt stated that in past elections, Ms. Nickolaus provided the spreadsheet approximately one to two days before an election. In the spring 2011 election, however, Ms. Schmidt stated she received the spreadsheet to be used on the morning of the election.

Ms. Schmidt stated that as a matter of practice, when receiving vote totals, an IT worker, a CPA and multiple observers assist to input the data into the spreadsheet. Ms. Schmidt stated a minimum of two-to-three observers watch the process to ensure the data is input correctly. Once complete, the spreadsheet is sent via email to Ms. Nickolaus.

Ms. Schmidt stated that from her perspective, the only aspect of the spring election that was different from previous elections in the City of Brookfield was the fact that touchscreen voting equipment was available but generally not used. Ms. Schmidt indicated the touchscreen equipment was used in a single ward for the spring 2011 election because poll workers believed there was a possibility of running out of paper ballots. Ms. Schmidt stated that ward had voters use the touchscreen rather than risk running out of ballots.

In the spring 2011 election, Ms. Schmidt stated that Brookfield modified the blank spreadsheet/template provided by Ms. Nickolaus, adding columns to account for each machine, a column for central count and a column for vote totals. Ms. Schmidt stated it only came to her attention that Ms. Nickolaus wanted a single column in the spreadsheet with the name of the candidate and the vote totals after the spreadsheet had been returned to Ms. Nickolaus.

At approximately 9:57 p.m. on election night, a member of the Brookfield City Clerk's Office, Mary Schulz, sent the spreadsheet containing Brookfield's unofficial election results to Ms. Nickolaus. The results were contained in attached file titled "Spring General 4-5-11 results county form.xls" (see Attachment B). These results were sent in the spreadsheet that had been modified by the Brookfield City Clerk's Office. Ms. Schmidt stated her office also made telephone contact with the Waukesha County Clerk's Office to verify Brookfield's election results had been received.

At approximately 9:58 p.m., Ms. Nickolaus responded to the email from Ms. Schultz with a message to Ms. Schmidt that stated, "Kris, The spreadsheet columns can not be changed or the program doesn't read it." Ms. Schmidt stated that after election workers in Brookfield were informed that Ms. Nickolaus was requiring the additional column to be removed from the spreadsheet, a deputy clerk from her office stayed on the phone with Ms. Nickolaus while the changes were made. The spreadsheet was sent again to Ms. Nickolaus via email at approximately 10:05 p.m. (see Attachment C).

According to Ms. Nickolaus, she received the second email from Brookfield and opened it to make sure it contained the necessary information. Ms. Nickolaus indicated the spreadsheet contained the voting results from Brookfield. Ms. Nickolaus stated she then moved the attachment to a "C drive" on her computer. Ms. Nickolaus stated she believed she then uploaded the spreadsheet into the Access 2007 database, as she received a pop-up message indicating there had been a "successful upload." Ms. Nickolaus stated she also clicked on an icon in the database that appears to be a "save" tab. The icon depicts what looks like a computer disk and is generally used in Microsoft products, such as Word, to save data or documents.

According to Ms. Nickolaus, the blank spreadsheet/template sent to municipalities is saved in the same folder from which she imports data into the Access 2007 database. Both Mr. Grassl and Mr. Hirscher indicated the Access 2007 database does not include a feature to prevent a user from uploading a template that did not contain any data. It also does not have a

feature to prevent a user from uploading a template that previously had been uploaded into the database. Mr. Grassl indicated the Access 2007 database did not include these features because it was intended only as a tool to add vote results from different sources, not to audit data that was imported and exported.

Mr. Grassl and Mr. Hirscher confirmed that if a user inadvertently uploaded a template that did not contain data or inadvertently uploaded a template that previously had been uploaded into the database, the computer still would generate a pop-up message to the user that the file had been "successfully uploaded" into the database. Mr. Grassl and Mr. Hirscher agreed that a user might believe information had been imported into the database when in fact it was not. To ensure this did not happen, a user would perform a manual check to confirm the data had been uploaded.

When interviewed, Ms. Nickolaus acknowledged that she may have inadvertently uploaded a blank template for the City of Brookfield into the Access 2007 database on election night. Ms. Nickolaus also stated that when information must be manually entered into the database, she receives assistance from a deputy clerk. However, Ms. Nickolaus stated she was the sole person in her office responsible for uploading returned spreadsheets into the Access 2007 database on election night 2011.

Given this information, the most likely explanation for the "missing 14,000 votes" from Brookfield is human error. It appears that Ms. Nickolaus received the results from the City of Brookfield via email, but uploaded a blank template to the database. This resulted in a message to Ms. Nickolaus that the file had been "successfully uploaded" into the database. This may have caused Ms. Nickolaus to believe the database included the City of Brookfield results, when in fact it did not. Because Ms. Nickolaus opted not to involve other staff in her office in uploading the results in the database and because she did not manually confirm the upload, there was not a system in place to serve as a check to make sure it was done properly. It appears the pop-up message, as well as Ms. Nickolaus hitting the "save" button caused her to believe the results from Brookfield had been uploaded into the system, but she failed to confirm the information had actually been included before publishing the information.

Mr. Grassl and Mr. Hirscher also believe the most likely cause of the reporting error was due to Ms. Nickolaus importing a blank template into the database. To date, however, Ms. Nickolaus is unable to say what caused the error. Although she agreed that it is possible she may have failed to properly save and upload the data from the City of Brookfield, she reported

she was unable to say with any confidence what transpired in her use of the database that resulted in no results being entered for the City of Brookfield on election night.

"SAVING" VOTE TOTALS

Ms. Nickolaus' use of the word "save" to describe what she did with the information contained in the City of Brookfield spreadsheet/template became an issue as the events surrounding the election unfolded. Almost immediately after the press conference, people familiar with Access 2007 criticized Ms. Nickolaus' explanation of what transpired as inaccurate.

During the press conference, Ms. Nickolaus stated the "spreadsheet from Brookfield was imported into a database that was provided by the G.A.B., but it was inadvertently not saved. As a result, when I ran the report to show the aggregate numbers that were collected from all the municipalities, I assumed the city of Brookfield was included, and it was not." Ms. Nickolaus also stated, "I imported the data. By importing it, I just had to click on a button. It asked me what file I was going to import. I gave it the file. It said that it uploaded properly. I saved many times all night long." Asked about the difference between uploading and saving data, Ms. Nickolaus stated, "When you upload a file, you ask that file to be brought into this program. Then you hit a save key. I'm sure I hit the save key many, many times last, on Tuesday night. But for some reason Brookfield didn't come across."

Although Ms. Nickolaus clearly has a general understanding of how to use Access 2007 and the database created for her use, it appears she relied on technical assistance from Mr. Grassl to use the database in the previous two elections. This may account for her confusion or uncertainty regarding the use and functionality of the "save key." She did not request any assistance from the Department of Administration or the G.A.B. on election night in April 2011.

Mr. Hirscher confirmed a "save" icon does appear on the screen when using Access 2007. However, Mr. Hirscher explained the icon is designed as a "save" shortcut to be used when modifications are made to items such as tables or fields, forms, reports, and custom codes. Actual data stored in the tables is saved automatically. Clicking the "save" icon is not a necessary step to retain information in the database and doing so would have no impact on the information in the database.

Mr. Hirscher stated, "So, for example, if you were to add a new column to the table, that would require you to hit the save button. After that, though, you could enter data into a table, including this new column, and that data would save without the save button." Mr. Hirscher also

stated that Ms. Nickolaus would not have any reason to click on the save button “because the database structure, reports and code were already built and there was no need for modifications. She was just entering data.”

During an interview, Ms. Nickolaus was questioned about what she meant when she indicated she “saved” the data. Ms. Nickolaus was provided with a screen shot from the Access 2007 database used on election night (see Attachment D). Ms. Nickolaus pointed to a “save” icon on the screen. Asked if she was aware that the icon did not actually save data, Ms. Nickolaus indicated she was not aware of that fact.

PUBLISHING THE RESULTS

Throughout the evening on election night, Ms. Nickolaus ran a general report in the Access 2007 database that provided a running total of countywide election results for candidates in particular races, such as the Supreme Court. She posted these unofficial results on a website that was accessible to the public and to the media. The Access 2007 database contained election results by reporting unit that could be viewed for all reporting units in the county via a form in the database, by running a query, or by viewing the data in the table. Access 2007 includes standard features that would allow these results by reporting unit to be exported to Excel or printed from the form, query or table where they were viewed. Using one of these features could have enabled Ms. Nickolaus to see that the City of Brookfield’s votes were not included; however, Ms. Nickolaus did not elect to use these features on election night. Instead, Ms. Nickolaus simply generated the report that provided countywide totals for the Supreme Court race, which she posted on the website.

In generating the reports, Ms. Nickolaus stated she did not choose to generate a new report after each municipality provided election results to the County Clerk’s Office. Ms. Nickolaus stated she generated between five and 10 reports on election night to post on the website. Ms. Nickolaus stated she generated reports at approximately 15-to-20-minute intervals. She said, “If we didn’t get in anything really substantial, I wouldn’t do it. It was a pretty quick night, everybody was getting in their results, so about every 15 minutes. We put stuff in, then we sent out, gave a report on the web or to the media. So it was continual.”

Ms. Nickolaus stated she did not save individual iterations of the reports she posted, but instead made a PDF file and uploaded the information to the internet. Ms. Nickolaus also

indicated she used a standard name for the reports, and as a new report was generated, the updated PDF would overwrite the information.

Ms. Nickolaus believes when she uploaded the data received via spreadsheet from the City of Brookfield, it was the last municipality using the spreadsheet to be entered into the Access 2007 database. Ms. Nickolaus does not believe she immediately generated a report to post to the website after receiving the voting results from the City of Brookfield. Ms. Nickolaus recalled receiving information from other municipalities, such as the Town of Vernon after receiving the totals from the City of Brookfield and before generating the final report posted to the internet.

Ms. Nickolaus stated at the time she posted the final report to the internet she did not notice any problems with the vote total reported. Ms. Nickolaus provided several explanations as to why the final report did not catch her attention. First, she indicated that the total number of votes increased. Second, she indicated she did not know what the overall turnout for the election was, so she had no way to glean information about what the increase in votes represented. Finally, Ms. Nickolaus acknowledged she did not double check the results.

She stated, "As soon as I finished, I hit the 'print report,' and that's what I gave out to the media. I didn't go back after I printed the report to again check totals. We looked over the totals once prior to doing that, and I didn't think about going back and doing it again. So the human error would have been the issue that I didn't go back and check on that."

As reported by the Associated Press, the final report posted for Waukesha County on election night showed Mr. Prosser receiving 81,225 votes and Ms. Kloppenburg receiving 29,332 votes, a total of approximately 110,557 votes, excluding write-in votes. This number did not include the approximately 14,000 votes from the City of Brookfield.

ACCURATE RESULTS POSTED ON ELECTION NIGHT

Although the report Ms. Nickolaus released to the media did not contain the results for the City of Brookfield, accurate totals were presented to the public shortly after the election. City of Brookfield Clerk Kris Schmidt provided results to the county clerk, school districts and any media that requested it. Ms. Schmidt stated on election night, she provided the City of Brookfield's election results to the Milwaukee Journal Sentinel, as well as a local online news outlet, the BrookfieldPatch.

In fact the results from the City of Brookfield were published online at the BrookfieldPatch website within hours after the polls closed. Under a headline that stated, "Brookfield Gives Prosser Nearly 11K Votes," reporter Lisa Sink, wrote that, "As expected, Brookfield City voters ran up a good turnout in the state Supreme Court race and gave incumbent Justice David Prosser nearly 11,000 votes." Ms. Sink went on to report that the unofficial, unaudited results showed 76 percent of the Brookfield residents who voted picked Mr. Prosser with 24 percent voting for Ms. Kloppenburg. The story, which Ms. Sink posted at 12:24 a.m. on April 6, 2011, included a chart with vote totals broken down by ward. Ms. Sink stated she posted the article and the chart on election night using the data handed to her from the City of Brookfield clerk's office, not from Waukesha County. The chart showed the unofficial results as Mr. Prosser receiving 10,859 votes and Ms. Kloppenburg receiving 3,456 votes. These results later were confirmed through the Waukesha County Board of Canvass and the statewide recount certified by the Government Accountability Board.

MS. NICKOLAUS DISCOVERS ERROR

The Waukesha County Board of Canvass was set to begin its review of the election results at noon on Wednesday, April 6, 2011. Ms. Nickolaus stated she arrived at work and began the day by contacting a constituent regarding a marriage license. After she ended the telephone conversation, Ms. Nickolaus stated she began preparing to export the election results from the Access 2007 database to the G.A.B.'s Canvass Reporting System to begin the canvass.

Ms. Nickolaus stated when she opened the Access 2007 database at approximately 8:30 a.m., she immediately realized there was a problem. Ms. Nickolaus stated the information for the City of Brookfield contained zeros in the vote columns. Ms. Nickolaus stated her first concern was there was something wrong with the entire database and that she may have lost all of the voting data, however, she scrolled through it and determined the other results were still in the database.

Ms. Nickolaus stated she immediately contacted the G.A.B., but had difficulty reaching anyone other than the reception desk. Phone records reflect that Ms. Nickolaus contacted the G.A.B. multiple times on the morning of April 6, 2011. Ms. Nickolaus called the main line for the G.A.B., 608-266-8005, six times between 8:48 a.m. and 11:17 a.m. Telephone records show Ms. Nickolaus placed calls to the G.A.B. at 8:48 a.m., 9:18 a.m., 9:19 a.m., 9:52 a.m., 10:46

a.m., and 11:17 a.m. Ms. Nickolaus stated she left voicemails, but was not able to reach anybody who could assist her.

Asked if she believed her voicemails conveyed there was a serious problem with the results in Waukesha County, Ms. Nickolaus stated she left more general messages that she “needed help on the Access database.” However, Ms. Nickolaus stated in her opinion she was attempting to contact and notify the G.A.B. about the problem as soon as she learned of it.

At least one member of the G.A.B.’s staff spoke directly with Ms. Nickolaus on the morning of April 6, 2011. However, it appears the exact nature of the problem was not understood. Adam Harvell, an SVRS specialist with the G.A.B., described Ms. Nickolaus as sounding “genuinely concerned” that morning. Email records show that at the time he spoke with Ms. Nickolaus, he believed the problem was that the Access 2007 database was aggregating totals incorrectly.

Mr. Harvell indicated he spoke with Ms. Nickolaus at approximately 11:15 a.m. During the conversation, Ms. Nickolaus indicated she had a vote discrepancy in her Access 2007 database. However Mr. Harvell had not seen her Access 2007 database at that point, and did not have shadowing capability to view it. Mr. Harvell stated he did not attempt to explore the problem in depth with Ms. Nickolaus. He instead contacted Ms. Oberle via telephone, and emailed Mr. Hirscher and other tech staff Ms. Oberle asked him to include. Mr. Harvell indicated he remembered Ms. Nickolaus telling him her vote counts were off, but he does not recall her saying anything about the City of Brookfield at that time. “I knew there was a problem, but not that involved Brookfield,” Mr. Harvell stated. “I knew her numbers in the Access database had been off, but did not know if she had too many or too few votes in the Access database, and did not know that the unofficial results she reported on election night were wrong.”

Ms. Nickolaus also made contact with Mr. Hirscher late in the morning of April 6, 2011. At approximately 11:22 a.m., Ms. Nickolaus sent an email to Mr. Hirscher. The email simply stated, “I need help!” According to Mr. Hirscher, he received an email from Mr. Harvell a few minutes later stating there was an emergency in Waukesha.

Email records show that at 11:29 a.m., Mr. Harvell contacted Mr. Hirscher asking Mr. Hirscher to either contact him or Ms. Nickolaus directly because the Access 2007 database was showing “a large vote count discrepancy, and she’s meeting with her canvass board in 45

minutes.” Mr. Hirscher stated he called Ms. Nickolaus and left his cell phone number for her to call, as she was on another line. Phone records reflect that at approximately 11:44 a.m., Ms. Nickolaus contacted Mr. Hirscher on his cell phone. Records also reflect the conversation lasted approximately 19 minutes.

Mr. Hirscher described Ms. Nickolaus’ demeanor as “very flustered” and “very upset.” He stated he was attempting to troubleshoot the problem, and Ms. Nickolaus kept “jumping around.” Mr. Hirscher stated it appeared Ms. Nickolaus simply wanted him to tell her what was wrong with the Access 2007 database program but was unable to provide specific information. Mr. Hirscher stated Ms. Nickolaus initially told him there were reporting units that were incorrectly showing all zeros in the Access 2007 database.

Mr. Hirscher asked Ms. Nickolaus to forward to him a copy of the database. Mr. Hirscher indicated he was confused by what Ms. Nickolaus was saying because the copy of the database she sent to him had the numbers in it for the City of Brookfield. Mr. Hirscher stated he scrolled through the results and did not see any zero vote values other than the expected “scattering” (write-in) records. Mr. Hirscher indicated that Ms. Nickolaus then said the problem was that the database wasn’t “saving.” Mr. Hirscher stated he started to try to reproduce the problem and asked questions about what Ms. Nickolaus meant by the word “saving.”

Mr. Hirscher stated that before he was able to finish looking for any irregularities, Ms. Nickolaus said the real problem was that the total vote number on the Election Results Report generated through the Access database was wrong because it was showing 124,971 votes for the Supreme Court race, and she believed the total results should be 110,643. Mr. Hirscher said Ms. Nickolaus did not offer an explanation of why she believed the 110,643 number should be the correct number, but it appears Ms. Nickolaus was referring to the difference between the unofficial totals she posted to the media on election night and the additional votes from the City of Brookfield that went unreported on election night.

Mr. Hirscher said he began to formulate queries to determine if he could find one or more reporting units that would explain the difference. Before he could finish, however, Ms. Nickolaus informed him she would simply export the current results, upload them to the G.A.B.’s Canvass Reporting System, and address any problems through the canvass.

Mr. Hirscher then assisted Ms. Nickolaus in exporting her unofficial results to the Canvass Reporting System. Mr. Hirscher stated that during this process, Ms. Nickolaus

appeared to be having difficulties with the Access 2007 database. Mr. Hirscher recalled that at one point, Ms. Nickolaus clicked "upload" and then went to look for the file she had just exported, but couldn't find where she had saved it. Mr. Hirscher stated Ms. Nickolaus eventually located a "results.csv file" and attempted to upload that file, but it failed. Mr. Hirscher stated Ms. Nickolaus then realized this was a results file from a previous election.

Mr. Hirscher stated he had Ms. Nickolaus run the export again. He assisted Ms. Nickolaus in saving it to a location on her work computer where she could easily find it. Ms. Nickolaus then went back and exported the results file to the Canvass Reporting System. Mr. Hirscher stated he had Ms. Nickolaus change the file list to the "details view" so she could verify it was the correct one based on the last modified date and time. Mr. Hirscher stated the file processed correctly, and Ms. Nickolaus indicated she would work through any discrepancies using the canvass process.

Because the copy of the database sent to Mr. Hirscher contained results for Brookfield, it appears that at some point in the morning on April 6, 2011, Ms. Nickolaus properly uploaded the spreadsheet/template into the database after she found the error. As part of this investigation, Mr. Grassl reviewed computer records to determine that the spreadsheet/template was imported into the Access 2007 database at approximately 11:16 a.m. on April 6, 2011. When asked when she believed this happened, Ms. Nickolaus stated she thought Mr. Hirscher assisted her in properly uploading the spreadsheet into the database, although she was not certain he did this. Ms. Nickolaus indicated she believed she imported the Brookfield file while on the telephone to be certain that if something in the nature of a problem resulted, he would be able to know it immediately. However, Ms. Nickolaus indicated it is possible she imported the data, and Mr. Hirscher simply assisted in exporting the information to the Canvass Reporting System. Mr. Hirscher did not recall assisting Ms. Nickolaus in importing the data from Brookfield into the database that morning.

Ms. Nickolaus stated that after she finished re-importing the Brookfield information into the database and exporting the results to the Canvass Reporting System, she was aware the totals sent to the Canvass Reporting System differed from those she had posted and released to the media on election night. However Ms. Nickolaus stated that at the time she was still uncertain as to why the vote totals were inconsistent. She did not know if she had properly uploaded the Brookfield results on election night or not. Ms. Nickolaus stated she was concerned that if the originally-posted numbers were accurate, the totals sent to the G.A.B.

would reflect a double counting for votes in Brookfield. At the same time, if she had failed to properly import Brookfield's votes into the database on election night, she recognized the results originally posted on the website would have been inaccurate. Ms. Nickolaus stated she felt the only way to know was through the Board of Canvass.

Asked why she did not immediately disclose to the public there was a possible error with the results reported on election night, Ms. Nickolaus gave two explanations. First, she stated she did not have time to do so before the start of the official canvass. The Board of Canvass was set to begin at noon on Wednesday, April 6, and she did not finish her conversation with Mr. Hirscher until after noon that day. Second, Ms. Nickolaus stated she was reluctant to publicly report the error until she confirmed there was an error. Ms. Nickolaus stated she believed she could only confirm this information through the official canvass.

Ms. Nickolaus stated, "Well, I knew what I had from the night before, yes. I did. But I wasn't sure if now, is there a possibility that I imported them in Brookfield and that was in the report? And now I've done it again. I don't know. It was, to me, it was, is it best for me to go out right now and say, 'Oh, I didn't have Brookfield in, 14,000, and I go into that room with my canvassers and find out that Brookfield was in that original report and somehow I wrote over, and now I've got 28,000 in Brookfield's column. I didn't know that, and the only way I could be absolutely sure that, when I came out and said there was a problem, that I knew what the problem really was."

BOARD OF CANVASS

The County Board of Canvass is made up of the county clerk and two qualified electors of the county appointed by the clerk. One member of the Board of Canvass is required to be a member of a political party other than the county clerk's. Pursuant to Wis. Stat. § 7.60(3), the County Board of Canvass are required to meet and "open and publicly examine the [election] returns." The process of examining the election returns varies by county.

Prior to the meeting of the County Board of Canvass, the county clerk receives election material from each municipality. The county clerk and his/her staff organize and prepare the election materials for the Board of Canvass and work in conjunction with the municipal clerks to retrieve any absent documentation. The County Board of Canvass reviews the election documentation (inspectors' statements and poll lists) and election returns (voting equipment results reports and hand-written tally sheets) in each municipality. Any provisional ballots or late

arriving military absentee ballots that are eligible to be counted after election day are opened and counted by the Board of Canvass. The County Board of Canvass prepares minutes to document the review of election documentation and election returns. The minutes also document any corrections, changes or updates made to the canvass based on the review of election material and provisional or military ballots.

The Board of Canvass then prepares a statement that contains the total number of votes cast for each office, the names of the ballot candidates for each office, and the number of votes cast for each ballot candidate. County Boards of Canvass may omit the names of individuals who do not appear on the ballot and who receive a comparatively small number of write-in votes. Votes cast for such individuals are designated as "scattering." The election results on the statement are then certified by all members of the County Board of Canvass.

When the Waukesha County Board of Canvass began its work on April 6, 2011, Ms. Nickolaus chose not to share the information regarding potential problems with the Brookfield results with members of the board. Ms. Nickolaus stated the only people who were aware of a possible error were her, Mr. Harvell, Mr. Hirscher and Waukesha County Deputy Clerk Kelly Yaeger. Ms. Nickolaus indicated she told Ms. Yaeger about the potential problem on the morning of April 6, 2011.

Ms. Nickolaus later told a fourth individual about the potential problem with the City of Brookfield votes. Ms. Nickolaus stated she spoke with Ellen Nowak, then chief of staff to Waukesha County Executive Dan Vrakas, on the morning of Thursday, April 7. Ms. Nickolaus stated she approached Ms. Nowak on Thursday morning because the Board of Canvass was preparing to review the results from the City of Brookfield at that time. Ms. Nickolaus stated she suspected the results of the canvass would confirm the difference between the actual vote totals from Brookfield and the results she posted on election night. Ms. Nickolaus stated this difference would result in the need to hold a press conference. Ms. Nickolaus stated she told Ms. Nowak, who informed Ms. Nickolaus she would begin making arrangements for a press conference if one was necessary.

Ms. Nickolaus stated she would have preferred to review Brookfield's totals earlier in the canvass, but the board did not receive Brookfield's material until the late afternoon on Wednesday, April 6. Ms. Nickolaus confirmed she did not contact Brookfield Clerk Kris Schmidt after receiving Brookfield's material to inform her there may be issues with the city's results.

Asked why she failed to do so, Ms. Nickolaus stated, "I just didn't have the time. Everything was moving so fast."

Ms. Nickolaus indicated she did make contact with Ms. Schmidt on Thursday morning with a general question. Ms. Schmidt confirmed that Ms. Nickolaus called her on Thursday morning regarding questions about Brookfield's absentee central count. Ms. Schmidt stated when they spoke, Ms. Nickolaus appeared to be upset. Ms. Schmidt specifically recalled Ms. Nickolaus stating, "This is the worst day of my life." Ms. Schmidt stated Ms. Nickolaus did not provide any additional information and never revealed there were possible problems with the results posted on election night for the City of Brookfield.

Ms. Nickolaus recalled making an allusion to potential problems when she spoke with Ms. Schmidt, telling her, "We're going to need to speak after I finish this." Asked if she believed she provided Ms. Schmidt with a sufficient amount of detail regarding the problem, Ms. Nickolaus stated she simply told Ms. Schmidt, "We're going to need to talk." According to Ms. Schmidt, the first time she heard about a potential problem with votes in Brookfield was at noon on Thursday from a relative who indicated he heard rumors about problems with the vote totals in Brookfield. Given the timing, it is likely information about the situation began to be leaked publicly after the decision to hold a press conference and as arrangements for it was made.

According to both Ramona Kitzinger and Pat Karcher, long-time members of the Waukesha Board of Canvass, the canvass process in the spring election 2011 appeared to function normally. Ms. Karcher stated the only aspect of the canvass that seemed unusual was the media presence beginning on Thursday, April 7, 2011. Ms. Karcher stated the canvass did not yield any discrepancy with the results sent to the Canvass Reporting System. Ms. Karcher and Ms. Kitzinger confirmed that Ms. Nickolaus did not mention potential problems with the Brookfield results until after the board finished the entire canvass on the afternoon Thursday, April 7, 2011.

Ms. Karcher and Ms. Kitzinger both indicated that after finishing the canvass, they were asked to stay. Ms. Karcher and Ms. Kitzinger indicated they met in Ms. Nickolaus' office with Ms. Nickolaus and Ms. Nowak. Ms. Karcher stated that Ms. Nickolaus informed them there was a problem with Brookfield's numbers. Ms. Karcher recalled Ms. Nickolaus telling them the numbers were "sent and instead of saving them and sending them," Ms. Nickolaus had "pushed send but omitted to save." Ms. Karcher stated Ms. Nickolaus indicated it was her mistake and took responsibility for the error.

Ms. Kitzinger had a similar recollection of Ms. Nickolaus' explanation of why she was calling a press conference. Ms. Kitzinger stated Ms. Nickolaus already was present in her office when she and Ms. Karcher arrived. Ms. Kitzinger said Ms. Nickolaus closed the door to her office and made a statement that "on Tuesday night she put the numbers in for Brookfield and pressed the save button, but when she came in on Wednesday morning they were gone." Ms. Kitzinger, who ultimately made a statement at the press conference in which she indicated she was satisfied that the results of the canvass were correct, stated she was not planning to speak at the press conference. Ms. Kitzinger stated Ms. Nickolaus did not request her to make a statement ahead of time.

Ms. Nickolaus stated after the Board of Canvass finished reviewing Brookfield's results, she informed Ms. Nowak a press conference would be necessary. Ms. Nickolaus stated she attempted to contact the G.A.B. to inform officials there about the press conference. Telephone records reflect that Ms. Nickolaus made two calls to the G.A.B. The first was made at 4:15 p.m. and the second at 4:32 p.m. Ms. Nickolaus stated she attempted to contact G.A.B. Director and General Counsel Kevin Kennedy, as well as Elections Division Administrator Nat Robinson. Ms. Nickolaus stated neither Mr. Kennedy nor Mr. Robinson was available, and she left messages for them.

Ms. Nickolaus did speak again with Mr. Harvell. Ms. Nickolaus informed Mr. Harvell totals for Waukesha would be changing by 14,000 votes and that she would be holding a press conference to address the issue. Mr. Harvell recalled asking Ms. Nickolaus, "Kathy, what happened?" Mr. Harvell recalled Ms. Nickolaus responded by saying, "I have to prepare a press conference. You will find out when everybody else does." Mr. Harvell stated he believed that although Ms. Nickolaus knew there was a problem, she did not know how it occurred. Email records also reflect that Ms. Nickolaus did not explain why the press conference was being held. "[S]he wouldn't tell me," Mr. Harvell noted in an email sent to Mr. Kennedy at approximately 4:34 p.m. on Thursday, April 7, 2011.

During an interview, Ms. Nickolaus was asked if she believed she sufficiently conveyed the urgency of the situation in her messages to the G.A.B. Ms. Nickolaus said, "Well, I think the second call I did. I think the first call I did not. And that's why I called back." Asked why she did not demand to speak with Mr. Robinson or Mr. Kennedy to explain the nature of the press conference before holding it, Ms. Nickolaus stated, "I don't think I had the authority to tell them to be pulled out of anything." Ms. Nickolaus indicated also she contacted the campaigns to

leave messages prior to the press conference. Ms. Nickolaus indicated she missed a return call from Mr. Robinson at approximate 5:05 p.m., and the press conference began at 5:30 p.m.

PRESS CONFERENCE

At the press conference, Ms. Nickolaus explained that the election results verified through the canvass differed from the “unofficial numbers that were distributed on election night.” Ms. Nickolaus provided information regarding slight changes due to errors in the City of New Berlin and Town of New Lisbon. Most significantly, Ms. Nickolaus stated she “discovered that the data that was sent to me from the City of Brookfield was not transferred to the final report that was given to the media on Tuesday night.” She stated the spreadsheet from Brookfield was imported into the Access 2007 database but was inadvertently not saved. Ms. Nickolaus reported, “As a result, when I ran the report to show the aggregate numbers that were collected from all the municipalities, I assumed the City of Brookfield was included, and it was not.”

Ms. Nickolaus stated that she “noticed the discrepancy during the canvass.” Ms. Nickolaus stated it was discovered when the results were being entered into the Canvass Reporting System on Wednesday morning. She indicated that, through the canvass process, the results had been verified and properly reported to the G.A.B. Ms. Nickolaus stated the results did not reflect extra votes or extra ballots being found. “This is human error, which I apologize for, which is common in this process, which is why the state requires us to conduct a canvass,” she said. “This issue was unrelated to the election system. This was a(n) Access Database file that was on our regular system, and it was just a matter of the save, and it was just human error. Again, I apologize.”

CONNECTION BETWEEN JUSTICE PROSSER AND GOVERNOR WALKER

In her complaint against Ms. Nickolaus to the G.A.B., Ms. Mulliken drew a correlation between Mr. Prosser and Governor Walker that suggested a conspiratorial nature to the Supreme Court race and the voting results from the City of Brookfield. Paragraph 17 of the complaint alleges that in the late evening of April 6, 2011, Mr. Prosser was observed entering the Governor’s Office to attend a private, one-on-one meeting with the governor. The following paragraph alleges that also on April 6, 2011, Governor Walker publicly commented “that there might be ‘ballots somewhere, somehow found out of the blue that weren’t counted before.’” The complaint, however, does not set forth the context in which the statement was made.

Governor Walker's comments came at a press conference following the signing ceremony for Senate Bill 12, the fiscal portion of the Budget Repair Bill, held at approximately 1:15 p.m. on April 6, 2011. The press conference video is available to the public on the WisconsinEye Network. Immediately after the ceremony, Governor Walker took questions from the media. The first question asked by a reporter was the following:

Governor, can you talk about the election last night? The Supreme Court race is still very, very close and is expected to turn into some sort of a recount effort. It appears Kloppenburg may be ahead at this point in time. What do you make of that? They tried to turn it into a referendum on your agenda.

Governor Walker responded:

I think it's pretty clear. The results show, and obviously a lot will change probably in the next couple hours and in the next day or two, depending on what happens with the recount. But I think it's pretty clear. You have two very different worlds in this state. You've got a world driven by Madison and a world driven by everybody else out across the majority of the rest of the state of Wisconsin. What that tells me is just as you've seen in past elections for president, for governor, for other offices, Wisconsin is not a red state. It's not a blue state. In many ways, it's a purple state, and it's divided on these issues. And what we're charged with having to do, I believe, is find ways to bring this state together. And one of the best ways, and why I was pleased, why there was bipartisan votes for this measure, is to get back talking about jobs because I think that's the thing that can unite the state. It's not Republican jobs. They're not Democrat jobs. They're ultimately Wisconsin jobs. And we get focused on that, I think we're going to bring people together.

Following the exchange, Governor Walker was asked, and commented about the outcome of other races in the state, including the county executive contests in Outagamie County and Milwaukee County. The third question from a reporter was the following:

Do you worry if there is a long, drawn out, contentious recount effort -- certainly understandable why both sides would want that with this close, as close as it is -- but that would be one more thing that would make people feel disgusted with government being one big fight?

The Governor responded with the following statement:

I don't think so, as long as it's fair. I mean to me, democracy makes, it guarantees you give everybody a right, and everybody has a right to have a say. And in this case, if it takes a few days or a week or so to effectively and fairly go through that recount, I think where people get frustrated with recounts is if where they think people are changing the rules. *As long as the rules are clear, as long as there aren't ballots somewhere, somehow found out of the blue that weren't counted before, things of that nature.* As long as everything is above board and people understand what's at stake here, I think that's fair. I think what frustrates

people is if somehow we allow what may or may not happen with a recount in the Supreme Court race to keep us from doing the work that we were elected to do here in the state of Wisconsin. That's, I think overwhelmingly at least for the people who elected me and even for those who didn't, they want us to focus on jobs. They want us to focus on our goal of 250,000 new jobs, and as long as we're not distracted from that, I don't think you're going to see that kind of frustration. I think the bigger frustration in the Supreme Court, not only with this but the last election, is the amount of money coming in from outside of the candidates and outside of the state. And I think that's probably the biggest frustration that most voters have in Wisconsin.

From this statement, bloggers and members of the media have circulated reports that Governor Walker forecast what would happen in Waukesha County. However, when taken in context, it appears the governor's statements were more generally directed at the concept that a fair, transparent recount of the votes was an appropriate reaction to a very close race in a politically-heated climate.

As for a face-to-face meeting between Mr. Prosser and Governor Walker on April 6, 2011, Mr. Prosser denied the allegation.⁴ "There is not a single word of truth to that," Mr. Prosser said when interviewed for this investigation. Mr. Prosser stated he believes the allegations were included in the complaint to help justify in the public eye the Kloppenburg campaign's request for a statewide recount. During the interview, however, Mr. Prosser acknowledged he did speak with Governor Walker in a telephone conversation in the morning of April 6, 2011.

Mr. Prosser indicated on election night, he stayed in Delafield with members of his campaign team. The next day, April 6, 2011, Mr. Prosser stated he went to his campaign manager's office. As the voting results were being updated, Mr. Prosser stated it appeared he was losing the election. Mr. Prosser stated he made and received several telephone calls while at the office. Mr. Prosser stated he received calls from Senator Ron Johnson, former Governor Tommy Thompson, and a telephone call from Governor Walker. Mr. Prosser described the telephone call from Governor Walker as lasting less than two minutes and essentially amounted to Governor Walker telling Mr. Prosser to "keep your chin up." Mr. Prosser denied any substantive discussion about the election.

According to Mr. Prosser, the telephone conversation on April 6, 2011, was the first and only time they have spoken in person. "I have never met personally with the governor," he said.

⁴ This investigator attempted to facilitate an interview with Governor Walker for purposes of the report, but was unable to do so in time for the final report due scheduling conflicts with the Governor's Office.

In a news story that ran on April 28, 2011, a Madison television reporter interviewed Mr. Prosser about the face-to-face meeting alleged in the complaint. In that news account, Mr. Prosser was quoted as saying it was possible he went to the governor's office during the week of the election to obtain gubernatorial mementos for visiting international students. Mr. Prosser was quoted as saying, "It is conceivable that during that week, I stopped down to the governor's office." However, he stated he never met with the governor personally in his office. "I certainly never went beyond the reception person," Mr. Prosser told WKOW-27 News about his possible presence in the governor's office.

Mr. Prosser stated that a group of international students was visiting on Friday, April 8, 2011. Mr. Prosser stated he often provides the student groups gubernatorial pens as souvenirs. According to Mr. Prosser, after the interview with WKOW-27, he spoke with members of his judicial staff and determined it was his staff, not he, who made the arrangements to obtain the pens that week.

When interviewed for this investigation, Mr. Prosser stated as the election drew closer, he was attempting to distance himself from the Governor. Following the introduction of the budget repair bill, campaign advertisements and rhetoric directly associated a vote for Mr. Prosser as being a vote for Governor Walker. In a story published by the New York Times on April 4, 2011, the eve of the election, Mr. Prosser reflected upon how the Supreme Court race changed in the few weeks after he won 55 percent of the votes cast in the primary election. Mr. Prosser was quoted as saying, "I feel like the victim of a drive-by shooting." He went on to state, "Here I am, I'm walking along, I should win this race going away. But I mean, not if people aren't thinking about what they're doing."

As for any type of relationship with Ms. Nickolaus, Mr. Prosser stated he does not have one. Political observers and the media have drawn a tie between Mr. Prosser and Ms. Nickolaus due to her previous employment as a data analyst for the state Assembly Republicans. Mr. Prosser served as the Republican Leader in the Assembly, but said he had no involvement in hiring Ms. Nickolaus, nor did he interact with her during his tenure. "I have no recollection of ever meeting Kathy Nickolaus," he said.

OTHER CONCERNS RAISED DURING INVESTIGATION

Aside from a possible connection between Mr. Prosser and Governor Walker, allegations of a large-scale conspiracy among officials to engage in election fraud were not

raised in the complaint against Ms. Nickolaus to the G.A.B. However, such allegations surfaced from certain individuals interviewed during this investigation. Similar allegations circulated on the internet, particularly among bloggers. These allegations generally focused on three areas, security concerns for ballot bags used in the spring 2011 election, chain of custody issues with ballots, and memory devices used in voting machines.

A. Ballot Bags

Concerns about ballot bags were not limited to internet speculation. Following the spring 2011 election, G.A.B. staff members reviewed Ms. Nickolaus' election night process, examined the Access 2007 database and reviewed documentation of all reporting units. A May 17, 2011 report prepared by G.A.B. Elections Specialist Katie Mueller stated the ballot bags that were examined from all reporting units were sealed with tamper evident seals. In her report, Ms. Mueller noted "there were some discrepancies with the serial numbers recorded in some reporting units." Some of the serial numbers on the tamper evident seals did not match what was recorded on the ballot container certificate or did not match what was recorded on the sealed document record or the inspectors' statement.

Ms. Mueller's report also indicated various ballot bags were found with holes in the bags, and several bags were not completely closed at the top. The review revealed ballot bags had the tamper evident seal fastened in the center of the top of the bag, leaving the sides open with enough space to potentially remove some of the narrower ballots or tamper with the ballots without leaving visible interference. At least one bag had a tamper evident seal attached, but was held closed with a rubber band.

These same concerns about the security and chain of custody of ballot bags also were raised during the statewide recount. These concerns are reflected in the minutes from the election recount, published on the G.A.B. website. The minutes note "some bags were not completely sealed. Some were damaged by handling. In two or three cases, duct tape was used where the ballot bags had ripped." Photographs of the ballot bags also appeared on various websites, such as THE BRAD BLOG, and depict ballot bags, though sealed, with gaps large enough for a person to insert a hand into the bag.

B. Chain of Custody

The recount minutes also describe other security issues, such as cases where the three numbers (bags, seals and security statements) did not match. The minutes note "most of the

time human error reversed two digits. Sometimes the serial numbers were not recorded on the Inspectors' Statement; sometimes no signatures appeared next to the serial numbers on the Inspectors' Statement. In one case, no poll worker signatures appeared on the bag."

One observer for the Kloppenburg campaign, Darcy Gustavsson, was among those who expressed concerns with ballots cast in the election. She was contacted and interviewed for this report at the request of Ms. Kloppenburg's campaign manager, Ms. Mulliken.

During the statewide recount, Ms. Gustavsson objected to ballots cast in the Town of Delafield in Wards 1, 2, 5, and 6 on the grounds that the Inspectors' Statement did not record the seal number of the third bag, demonstrative of a break in the chain of custody. Ms. Gustavsson also raised concerns with ballots from Wards 3 and 4 in the Town of Delafield. Ms. Gustavsson stated that during the recount two ballot bags were placed on the table. Bag 1 of 2 was closed, tagged and labeled on the Inspectors' Statement with seal #3167633. Bag 2 of 2 was closed, tagged and labeled with seal #3164850. Seal #3165447 originally was listed on the Inspectors' Statement. Ms. Gustavsson stated that Donna Vrakas, who signed the Inspectors' Statement, said she wrote down the wrong number on the Inspectors' Statement and then corrected it.

Ms. Gustavsson also expressed concerns with ballots from Wards 7 and 8 in the Town of Delafield. Ms. Gustavsson indicated when Bag 1 of 1 was placed on the ballot counting table, it was immediately apparent the original seal number #3166588 had been crossed out on the label. The new tag seal #3165444 matched the new number reported on the final Inspectors' Statement initialed by Delafield Municipal Clerk Mary Elsner, not a chief inspector. The Inspectors' Statement originally showed seal tag #3167090 crossed off and replaced with #3165444.

According to both Ms. Gustavsson and the recount minutes, Ms. Elsner offered a written explanation. She stated, "When the Chief Inspector delivered the ballot bags to the Town Hall on the evening of 4/5/11, it was discovered that the weight of the ballots caused a slight tear in the bag. We replaced the seal, crossed out the original seal number, initialed the cross out and entered a new number on the ballot bag and resealed it with a new number."

Ms. Elsner also testified to the Board. The Waukesha Canvass Board minutes reflect Ms. Elsner stated that when the bag came to her with seal #316588, the corners were not turned in like they were supposed to be. It was not sealed in a way that the county clerk would

accept it. She put a new seal on the bag, #3167090. In handling the bag, it was determined it would be too heavy and could possibly rip. The clerk and the deputy clerk took the ballots out of the intact original bag and put them into an unlabeled bag and then inserted them back into the original bag and sealed it with seal #316544. The rebagging took place in her office in the town hall. After the Board of Canvass received this information, the ballots were included in the recount.

C. Memory Devices

In preparation for each election, county clerks generally assume responsibility for programming the electronic voting equipment and supply the ballots for use in the municipal polling places. Programming the machines may be done by the county clerk performing the programming in-house or contracting with a vendor to perform the programming. In a 2010 survey, 48 Wisconsin counties reported using a vendor to perform programming; 12 counties performed programming in house; two counties did some programming in house and also used a vendor; and 10 counties did not respond to the survey.

In Waukesha County, Ms. Nickolaus personally performs the programming in-house for all but two municipalities. The programming for these municipalities is contracted to a vendor due to equipment from different vendors in use at those locations. Because the clerk is responsible for ballot costs related to all federal, state, and county races, Ms. Nickolaus stated there is a financial advantage to performing programming in-house. She estimated the cost per election to have a vendor perform the programming to be \$100,000.00.

Ms. Nickolaus stated the memory devices for each piece of equipment are programmed and tested by her office. Upon completion of the testing, the memory devices are secured in a sealed bag. Prior to an election, the municipal clerks pick up from the county clerk the bag and break the seal on it. A public test of the memory device is again conducted, and the memory devices are placed into the machines. Following the election, the memory devices are then sealed and locked by the municipal clerk and returned to the county clerk's office.

Issues with chain of custody and condition of ballot bags prompted election observers, such as Ms. Gustavsson, to question the integrity of the system. On a larger scale, Ms. Gustavsson and election observers like Sue Trace, a member of Wisconsin Citizens for Election Protection, fear election results may be manipulated as part of or prior to an election. For

example, both Ms. Gustavsson and Ms. Trace shared concerns about the potential for fraudulent programming of memory devices in voting equipment to record votes.

In most elections, they assert, the programming of a memory device may go undetected because ballots are not hand counted during a canvass. In close elections, where a recount is likely, they assert ballots could be removed prior to the recount to ensure the number of ballots cast for a particular candidate matched the results programmed into the memory device. "It's not stuffing a ballot bag," Ms. Gustavsson stated, adding that swaying an election could be possible by removing one-to-two dozen votes in a number of wards in a few municipalities. Ms. Gustavsson agreed this practice would take a larger-scale conspiracy that involved both the county clerk and individuals on the local level.

But Ms. Trace disagreed. She stated it may be possible a single clerk could manipulate an election, given enough time. By programming a memory device, the clerk could remove ballots from bags that were not sealed properly to ensure the results matched the ballots casts. This could be done over a couple of days after the ballots were returned to the clerk's office.

The overarching concern from these individuals is that if memory devices were fraudulently programmed and ballots were removed, detection of mass election fraud would be difficult because the unofficial results, the canvass results and the recount results would all match. The result would be the ability for the outcome of an election to be altered in a manner that is very difficult to detect.

Public trust in the election process is essential. The poor condition of ballot bags and potential breaks in the chain of custody of ballot bags can foster an environment where members of the public begin to doubt the integrity of an election and begin to engage in conspiracy theories. But given the number of individuals in addition to Ms. Nickolaus who would have to be involved in a conspiracy to engage in the type of fraudulent election practices described above, it appears highly unlikely to have occurred. The likelihood of a conspiracy also is negated when one looks at the results of the election. The vote totals for the City of Brookfield were provided to a reporter on election night and published to the public by BrookfieldPatch. These are the same vote totals ultimately reported to the state Canvass Reporting system the morning after the election, certified by the Waukesha Board of Canvass and confirmed during the statewide recount.

LEGAL ANALYSIS

The specific purpose of this investigation was to determine if there was a violation of Wis. Stat. § 7.60(1) in Waukesha County in the 2011 Supreme Court race. Moreover, this investigator was asked to determine if a violation occurred, did it rise to the level of a criminally prosecutable offense.

Section 7.60(1) of the Wisconsin Statutes sets forth the duties imposed on county clerks on any given election night. The Statute requires the county clerk to keep the clerk's office open to receive reports from the ward inspectors and shall post all returns.

A plain reading of the statute suggests Waukesha County Clerk Kathy Nickolaus failed to comply with her mandatory duty to post all countywide returns on the night of April 5, 2011. The Waukesha County Clerk's Office was kept open to receive reports from the ward inspectors on election night. Ms. Nickolaus also regularly published a running, countywide total of election returns on the internet. The website, accessible to the media and general public, contained results for the Supreme Court race, as well as other elections. The results were posted according to race and the total votes received in Waukesha County.

As indicated in the *Applicable Law* section of this report, the G.A.B. takes the position that the law requires separate reporting of each municipality independently. Under this view, Ms. Nickolaus violated the law by posting a countywide total instead of the ward by ward returns she received. But the statutory language is somewhat vague because it imposes the duty to "post all returns," but does not specify the returns shall be posted by ward. This would provide a clerk the ability to argue that the statutory duty is fulfilled by simply posting countywide results. Even if the law is interpreted to permit the posting of a countywide total, Ms. Nickolaus violated it by failing to include the City of Brookfield in the results she did post. Simply put, she failed to comply with her mandatory duty to post all returns.

Despite the likely violation of Wis. Stat. § 7.60(1), however, it does not appear that Ms. Nickolaus' failure to post the returns on election night rises to the level of a criminal violation. Section 12.13(2)(a) of the Wisconsin Statutes governs election fraud as it applies to the conduct of election officials. A violation occurs when an election official willfully neglects or refuses to perform any duty prescribed under Chapter 5 to Chapter 12 of the Wisconsin Statute.

Ms. Nickolaus' failure to post the Brookfield results appears to be either an honest mistake or ineffectiveness. As described in this report, her conduct does not appear to rise to

the level of conduct that can be described as willful neglect or a refusal to comply with the law. It is my opinion that if the government decided to issue criminal a charge against Ms. Nickolaus, it would be highly unlikely all members of a 12-person jury would be convinced beyond a reasonable doubt that Ms. Nickolaus' actions involved willful neglect of a duty or the refusal to perform a duty.

Similarly, it does not appear that the failure to include the City of Brookfield returns in the website posting satisfies the requirements of Wis. Stat. § 12.13(2)(b)4, which requires an election official to "intentionally assist or cause to be made a false statement, certificate or the return of the votes cast at any election." Although Ms. Nickolaus failed to post the returns, her actions appear to be the result of either mistake or poor practices, not an intentional act.

It is the lack of intent that also prevents Ms. Nickolaus' actions (or failure to act according to law) from being regarded as criminal conduct under Wis. Stat. § 12.13(2)(b)7, which prohibits an elected official, in the course of the person's official duties or on account of the person's official position from intentionally violating or causing any other person to violate any provision of Chapter 5 to Chapter 12 of the statutes.

Similar problems pose a barrier to initiating a prosecution using a theory of liability under Wisconsin's misconduct in public office laws. Wis. Stats. § 946.12(1) makes it illegal for any public officer or employee to intentionally fail or refuse to perform a known, mandatory, nondiscretionary, ministerial duty of the officer's or employee's office or employment within the time or in the manner required by law. Likewise, Wis. Stat. § 946.12(4) makes it unlawful for an public officer or employee, acting in capacity as such officer or employee, to make an entry in an account or record book or return, certificate, report or statement which in a material respect the officer or employee intentionally falsifies. A lack of proof regarding intent makes criminal prosecution an unlikely proposition.

At the time the Waukesha Board of Canvass began its work on Wednesday, April 6, 2011, Ms. Nickolaus was aware the unofficial results posted on election night differed from those she submitted to the Canvass Reporting System. An argument could be made that she had an ongoing duty to post the results and her failure to do so demonstrates intent to violate the law. There are two problems with this argument. First, Wis. Stat. § 7.60(1) is silent as to the timeframe in which the results must be posted after an error is detected. Second, Ms. Nickolaus' statements reflect that although she was aware the results posted on election night differed from those results reported to the Canvass Reporting System, she was uncertain as to

which result was accurate and was reluctant to provide information until she was able to confirm the results. The results ultimately were confirmed through the Board of Canvass and verified the information posted on election night was not accurate. Ms. Nickolaus conducted a press conference to announce the results after the canvass was complete. These facts likely would be used to argue she did not intend to violate the law.

CONCLUSIONS

The evidence establishes this is not a situation in which a number of ballots were discovered, hidden or surreptitiously added to the vote totals. Evidence of this is the fact that City of Brookfield Clerk Kris Schmidt provided the results for Brookfield to reporter Lisa Sink on election night. The unofficial results for the City of Brookfield were posted in news account by Ms. Sink and available to the public at the BrookfieldPatch only hours after the election. The article showed Mr. Prosser received 10,859 votes and Ms. Kloppenburg received 3,456 votes in the City of Brookfield. Although she did not include these votes in her unofficial report published on election night, these are the same vote totals for the City of Brookfield Ms. Nickolaus reported to the state via the Canvass Reporting System after reimporting the City of Brookfield spreadsheet/template into the Access 2007 database on the morning of April 6, 2011. They are the same results for the City of Brookfield that were certified through Waukesha Board of Canvass on April 7, 2011. They are the same results for the City of Brookfield that were certified during the statewide recount, which included the hand counting of ballots, in May 2011. This information directly contradicts and undercuts speculation of a grand conspiracy.

By failing to include the City of Brookfield in the unofficial results Waukesha County posted on election night, it appears Kathy Nickolaus violated the state law that requires her to post all returns. Her actions, however, do not appear to be the result of an intentional act, the refusal to perform a statutory duty or willful neglect. Therefore, her actions do not likely rise to the level of criminal misconduct.

It appears, instead, Ms. Nickolaus simply inadvertently uploaded a blank template into the database that did not contain the vote totals for Brookfield and posted inaccurate results on election night. While this error may be fairly characterized as a human error, the problem appears to stem from potentially larger issues.

Ms. Nickolaus was the sole person responsible for uploading the spreadsheet/templates into the Access 2007 database on election night. There was not a system in place to check for

potential errors in this process. Ms. Nickolaus also was responsible for posting the results to the website. By her own account, she failed to go back and double check the numbers before posting the final results. The Waukesha County Clerk's Office failed to have adequate systems and procedures in place to receive and verify vote totals before posting the results to the public. The simple step of requiring a second person to verify all results imported into the database and all results published to the website very likely would have resulted in the immediate detection of the omitted City of Brookfield results on election night. Similarly, if Ms. Nickolaus adopted the interpretation of § 7.60 taken by the G.A.B. and published the results independently by ward, rather than a countywide total, she would have detected the error on election night. Instead, Ms. Nickolaus simply relied on the overall report generated through the database without confirming it.

Compounding the problem was the way in which the matter was handled after Ms. Nickolaus discovered the error. There appears to have been a general lack of communication and transparency about the situation. Ms. Nickolaus shared information about the potential problem regarding the Brookfield votes with a very limited number of people. She informed her deputy clerk on the morning after election. But she did not inform members of the Board of Canvass, nor Brookfield Clerk Kris Schmidt prior to the canvass. She told Ms. Nowak about the problems, but it appears Ms. Nickolaus did so only because she suspected the canvass would confirm the results posted on election night were incorrect, and she needed Ms. Nowak's assistance in arranging a press conference.

Based on the statements Ms. Nickolaus made when interviewed, it is clear she believes she was attempting to contact the G.A.B. as soon as she discovered the error. Records confirm she did contact the G.A.B. multiple times on the morning of April 6. But the statements from Mr. Hirscher and Mr. Harvell show that Ms. Nickolaus failed to adequately convey the specific nature and scope of the problem to them. Ms. Nickolaus also acknowledged she conveyed the problems in more general terms, simply saying she needed help with the Access database. She clearly did not convey the urgency of the situation to the G.A.B.

Ms. Nickolaus' failure to immediately inform G.A.B. Director and General Counsel Kevin Kennedy or G.A.B. Elections Division Administrator Nat Robinson about the scope of potential problem with the Brookfield vote totals also shows a lapse in judgment. Had she simply delayed the start of the canvass until she was able to confer with them, it is possible the G.A.B. could have provided immediate assistance and expertise and may have been able to help her in

addressing the issue at the press conference. Instead, after having limited contact with Mr. Hirscher and Mr. Harvell on the morning of April 6, she did not contact anyone from the G.A.B. until immediately before the press conference on the evening of April 7. She never spoke directly to either Mr. Kennedy or Mr. Robinson.

The manner in which Ms. Nickolaus decided to hold the press conference also exacerbated this situation. In an already politically charged election, the release of information that resulted in a shift from what appeared to be a close victory for Ms. Kloppenburg to a victory for Mr. Prosser brought with it high drama. Through the Board of Canvass, Ms. Nickolaus had confirmed the results she posted on election night were inaccurate. But at the time she held the press conference, she clearly did not know exactly how the error occurred. During the press conference, for example, Ms. Nickolaus repeatedly stated the error was the result of failing to properly save the results in the Access 2007 database. This explanation only fueled suspicion of fraud because members of the public familiar with the program were aware the program does not require a user to save data after it is uploaded and were aware the explanation did not make sense.

Had Ms. Nickolaus contacted Mr. Kennedy or Mr. Robinson prior to the press conference, she would have been able to publicly state that she immediately notified the G.A.B. when she first suspected a problem and maintained contact with the G.A.B. throughout the canvass process. This would have added a layer of transparency to the process. Although it may not have eliminated later claims of a conspiracy, it would have bolstered public confidence in the process.

Despite these issues, it does not appear there was any intentional misconduct on the part of Kathy Nickolaus, nor were there significant problems with the manner in which the official canvass was conducted. As previously indicated, the official canvass process, the G.A.B. review, and the statewide recount confirmed the official vote totals are correct, and that the unofficial vote totals published on election night were in error.