

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: North Carolina State Board of Elections

RULE CITATION: 08 NCAC 04 .0308

DEADLINE FOR RECEIPT: September 9, 2022

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

Page 1, Lines 7-9, (a), the first sentence does not seem to be necessary as the requirements and authority are already detailed within G.S. §§ 163-165.7 and 163-165.9A. Consider removing. Alternatively, in line 8, place “be” between “to” and “a”.

Page 1, Lines 11-12, (a): What is the agency’s authority to place limits on the number of requests?

Page 1, Line 13, (a): The language “is not intended to” is vague and arguably unenforceable. Consider “shall not” or “does not” in its place.

Page 1, Lines 15-36, and Page 2, Lines 1-18: Are the subparagraphs in paragraph (b) intended to be a list of requirements to be an “authorized person”, each of which is required to be such “authorized person”? If so, the subparagraphs need to end with a semi-colon and subparagraph (5)’s semi-colon should be followed by “and”. It would seem some type of a list exists as to (2)-(5), based on part (d)(3)(F). Should subparagraphs (b)(1) and (b)(2)-(5) be separated?

Page 1, Lines 17-22: Why is this language reasonably necessary? Does not the statute already state this?

Page 1, Line 25, (b)(2): Change “include” to “shall be” to eliminate any ambiguity as to what is disqualifying. The use of “include” can be viewed as there being more disqualifying offenses beyond those listed.

Page 1, Line 25, (b)(2): Is “offense” defined? Must a conviction be rendered? Who determines whether the offense involves one of the listed disqualifiers?

Page 1, Line 26, (b)(2): Misdemeanor should be plural.

Page 2, Line 7, (b)(3)(B): Explain how the addition of “criminal” claims is not a substantially different from the published rule.

William W. Peaslee
Commission Counsel

Date submitted to agency: August 30, 2022

Page 2, Line 8, (b)(3)(B): “Secrets” should be plural.

Page 2, Line 11, (b)(3)(B), place an “and” or an “or” after the semicolon depending on the agency’s desires as to the attestation requirements.

Page 2, Lines 16-17, (b)(5): Explain how the addition of this requirement is not a substantially different from the published rule.

Page 2, Lines 16-17, (b)(6): Explain how the addition of this requirement is not a substantially different from the published rule.

Page 2, Line 28, (d)(1): What is a “secure” facility?

Page 2, Line 33, (d)(1)(A): Change “must” to “shall”.

Page 2, Line 34, (d)(1)(A): Place a period after “prohibited”. Capitalize “Each”.

Page 2, Line 36, (d)(1)(B): Change “will” to “shall”.

Page 3, Lines 1-4, (d)(1)(C): Change “must” to “shall”. Consider making these requirements rather than just an example for clarity.

Page 3, Lines 5-6, (d)(1)(D): Change “must” to “shall” and remove “immediately” as it creates unnecessary ambiguity.

Page 3, Line 10, (d)(1)(F): Is the term “tamper-evident seals” an industry term? Is it widely known? What is it?

Page 3, Line 14, (d)(2): Change “must” to “shall”

Page 3, Line 14, (d)(2): Is the term “air-gapped” an industry term? Is it widely known? What is it?

Page 3, Line 22, (d)(3)(A): If a secured facility is not already secured from unauthorized access, then what is a secured facility secured from? Consider “The facility must be secured from access by any person not designated under paragraph (b) of this Rule as an “authorized person.”

Page 3, Line 29, (d)(3)(C): Logged by whom? How long must the log be maintained? Is there a particular format for the log? Does the log need to be sent to the SBOE?

Page 3, Line 30, (d)(3)(D): What does the agency mean by “equipment”? Is that the same as the three computers?

Page 4, Lines 2, (d)(3)(F): What does the agency mean by “inspection”? Stop and frisk?

William W. Peaslee
Commission Counsel

Date submitted to agency: August 30, 2022

Page 4, Lines 2, (d)(3)(F): Change “may” to “shall” or state the criteria upon which the state personnel will consider in making the determination to “inspect”.

Page 4, Line 4, (d)(3)(F): Do state personnel have “rights” in this context or authority? Consider striking “have the right to”. If the personnel may inspect the computers, state the criteria upon which the state personnel make that the determination.

Page 4, Line 2, (d)(3)(F): Remove the “and/” so only “or” is left. Use of “and/or” is discouraged, since typically one or the other is desired. Here, “or” would achieve the desired result.

Page 4, Lines 6-7, (d)(3)(g): Explain how the addition of this requirement is not a substantially different from the published rule.

Page 4, Lines 6-7 (d)(3)(G): This sentence could use some improvement. “Access allowed” may be conditioned? Consider a re-write.

Page 4, Lines 6, (d)(3)(G): If the search is going to be discretionary, who will be making the determination and upon what criteria will the decision be made? Who will be conducting the search?

Page 4, Lines 7, (d)(3)(G): Define “searches”.

Page 4, Line 7, (d)(3)(G): Change “or” to “of”.

Page 4, Line 11,(d)(4): If the authorized person is not testing “software components” what are they reviewing?

Page 4, Lines 12-14, (d)(5): Are the business hours 9 AM through 5 PM, or the normal hours for the vendor? Also, is the “two work weeks” requirement supposed to be ten business days? Stating it in days would clear ambiguity on how the days are calculated.

Page 4, Line 20,(d)(7): Which “conditions”?

Page 4, Lines 20-22, (d)(7): Do state personnel have “rights” in this context or authority? Consider striking “have the right to”. If the personnel may monitor the review, state the criteria upon which the state personnel will make the determination.

Page 4, Line 21, (d)(7): What is meant by representatives shall not “interfere”? It is stated twice in this subparagraph. Is this defined? Interference is vague and can mean just about anything, depending on the determining party.

Additionally, per the Administrative Rule Style Guide, when deleting any punctuation, the word immediately preceding the punctuation should be deleted along with the punctuation, then the word retyped. Therefore, in subparagraph (d)(7), line 19, the rule should read “~~review~~, review and”.

William W. Peaslee
Commission Counsel

Date submitted to agency: August 30, 2022

Please review and state whether and why each of the following laws are applicable in the authority section: 42 U.S.C. 5195c and G.S. §§ 132-1.2, 132-1.7, 163-166.7, and 163-275.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

William W. Peaslee
Commission Counsel
Date submitted to agency: August 30, 2022

1 **INTRODUCTORY STATEMENT**

2 The following rule, 08 NCAC 04 .0308, was adopted by the State Board of Elections on July 14, 2022 with changes.
3 Notice of the proposed rule was published in the North Carolina Register on April 1, 2022, Volume 36, Issue 19, pages
4 1524 –1527.

5
6 **08 NCAC 04 .0308 AUTHORIZED ACCESS TO VOTING SYSTEM INFORMATION IN ESCROW**

7 (a) Subject to the provisions of this Rule, upon written request from a person or entity authorized under G.S. 163-
8 165.7(a)(6) to a vendor of a certified voting system in this state, the vendor shall make available for review and
9 examination any information placed in escrow under G.S. 163-165.9A to an authorized person. The person or entity
10 making the request shall simultaneously provide a copy of the request to the State Board. The State chairs of each
11 political party recognized under G.S. 163-96 who otherwise satisfy the requirements as “authorized persons” shall be
12 granted no more than one request for review and examination of a certified version of a voting system every two years.
13 This Rule is not intended to address or restrict the pre-certification review of a vendor’s source code under G.S. 163-
14 165.7(e).

15 (b) Authorized Persons. Only authorized persons may review and examine the information placed in escrow by a
16 voting system vendor. For the purpose of this Rule, “authorized person” means a person who:

- 17 (1) Is an agent:
- 18 (A) designated by majority vote in a public meeting by the State Board or a purchasing county’s
 - 19 board of commissioners;
 - 20 (B) designated in writing by the chair of a political party recognized under G.S. 163-96; or
 - 21 (C) designated in writing by the Secretary of Department of Information Technology. No more
 - 22 than three people may be designated by an authorized entity under G.S. 163-165.7(f)(9).
- 23 (2) ~~Has submitted to a criminal background history record check, to be facilitated by the State Board, as~~
24 ~~provided for in G.S. 163-27.2(b) and been approved by the Executive Director of the State Board~~
25 has not been convicted a disqualifying offense. Disqualifying offenses include all felonies, and any
26 misdemeanor that involves theft, deception, the unlawful concealment or dissemination of
27 information, falsification or destruction of records, or the unlawful access to information or
28 facilities. The Executive Director of the State Board has the discretion to deny a person authorization
29 ~~under this Rule based on one or more convictions returned by the criminal background check~~
30 ~~indicating the person is unsuitable to review and examine the information placed in escrow. The~~
31 ~~Executive Director shall resolve any doubts concerning the person's suitability in favor of election~~
32 ~~integrity and security. A single conviction for a minor offense, as defined in the State Board of~~
33 ~~Elections' Criminal Background Check Policy, does not constitute a basis to deny a person~~
34 ~~authorization.~~ The requirement to submit to a criminal background history record check does not
35 apply to State employees who have already submitted to a criminal background history record check
36 for State employment.

- 1 (3) Has submitted to the State Board of Elections a sworn affidavit, under penalty of perjury, attesting
2 that the person:
- 3 (A) has never been found by a court of law, administrative body, or former or current employer
4 to have disclosed without authorization confidential information that the person had access
5 to;
- 6 (B) has never been, either in their private capacity or in any capacity as an agent for another
7 person or entity, subject to any civil or criminal claims alleging misappropriation of trade
8 secret, violation of confidentiality agreement or nondisclosure agreement, copyright
9 infringement, patent infringement, or unauthorized disclosure of any information protected
10 from disclosure by law, except to the extent any such claims were dismissed with prejudice
11 and not pursuant to a settlement agreement;
- 12 (C) has never had a security clearance issued by a ~~Federal~~federal agency revoked for any reason
13 other than expiration of the clearance.
- 14 (4) Has entered into the Confidentiality and Nondisclosure Agreement with the vendor and State Board
15 of Elections as provided in 08 NCAC 04 .0309.
- 16 (5) Has consented in writing to searches of their person and effects to be conducted immediately prior
17 to and during review of the subject information.
- 18 (6) Is a citizen of the United States.

19 (c) Within 20 days of ~~Upon~~ meeting the definition of an authorized person in Paragraph (b) of this Rule, the Executive
20 Director of the State Board shall issue a written authorization to the person or entity making the request under
21 Paragraph (a) of this Rule to review and examine information placed in escrow by a voting system vendor. The
22 authorization shall be presented by the person or entity to the vendor prior to gaining access to such information under
23 this Rule.

24 (d) Conditions of Access. When providing access to information in escrow pursuant to this Rule, the State Board and
25 vendor shall ensure the following conditions are met:

- 26 (1) The information in escrow shall be made available by the vendor on up to three computers provided
27 by the vendor (one for each potentially designated agent under G.S. 163-165.7(f)(9)) that are not
28 connected to any network and are located within a secure facility designated by the State Board of
29 Elections. Such computers shall be preloaded with software tools necessary for use in viewing,
30 searching, and analyzing the information subject to review, including tools permitting automated
31 source code review that are preapproved by the vendor and the State Board. Such computers shall
32 have the following access controls:
- 33 (A) Credentials must be traceable to individuals. Generic login accounts are not authorized.
34 Sharing of accounts and reuse of credentials is prohibited, each user must have their own
35 assigned login account.
- 36 (B) Only one administrative account will be present on the system to allow for the initial
37 provisioning of necessary applications and setup of security controls.

- 1 (C) Where passwords are used to authenticate authorized individuals, login accounts must use
2 complex passwords. An example of a sufficiently complex password is one that is not based
3 on common dictionary words and includes no fewer than 10 characters, and includes at
4 least one uppercase letter, one lowercase letter, one number, and a special character.
- 5 (D) Screen lock times must be set to no longer than 10 minutes. All computers shall be locked
6 or logged out from whenever they are not being immediately attended and used.
- 7 (E) The entire hard drive on any computer must have full disk encryption. Where possible, the
8 minimum encryption level shall be AES-256.
- 9 (F) After the information subject to review and software tools for viewing are loaded on the
10 computers, all ports shall be sealed with tamper-evident seals.
- 11 (G) After the ports are sealed, no input/output or recording devices may be connected to the
12 computers. The State Board shall provide for the secure storage of any equipment used for
13 the duration of the review.
- 14 (2) The computers must be air-gapped and shall not be connected to a network, and any feature allowing
15 connection to a network shall be disabled. Prohibited network connections include the Internet,
16 intranet, fax, telephone line, networks established via modem, or any other wired or wireless
17 connection.
- 18 (3) The secure facility designated by the State Board under Subparagraph (1) of this Paragraph is the
19 specific location where the computing equipment will be stored and the review conducted, and may
20 be a secured portion of a building. All conduct within the facility shall meet the following
21 conditions:
- 22 (A) The facility must be secured from unauthorized access for the entire review period.
- 23 (B) Only individuals authorized under Subparagraph (b)(1), Part (d)(3)(F), and Subparagraph
24 (d)(9) of this Rule may enter the facility. Such individuals must present government-issued
25 photo identification upon initial entry, and may be asked to show identification multiple
26 times throughout the review period.
- 27 (C) Each time an individual accesses the facility, the name of the individual, the time of their
28 entry, the time of their departure, and a description of any materials brought in or out of
29 the facility shall be logged.
- 30 (D) All equipment used in the review must remain in the facility during the review period.
- 31 (E) No authorized person pursuant to this Rule may possess any removable media device, cell
32 phone, computer, tablet, camera, wearable, or other outside electronic device within the
33 facility where the person is accessing information in escrow. No authorized person may
34 attempt to connect the computers used in the review to any network.
- 35 (F) State personnel who are designated by the Executive Director of the State Board of
36 Elections and who also satisfy the conditions set forth in Subparagraphs (b)(2) through
37 (b)(5) shall have access to the facility where the review is being conducted at all times, to

1 monitor the process and ensure that all requirements of this Rule are complied with. State
2 personnel may require persons entering and/or leaving the facility to submit to inspection
3 and the removal of any unauthorized devices. State personnel designated pursuant to this
4 subsection shall have the right to inspect the computers used in the review before and after
5 the review.

6 (G) Access allowed to authorized individuals may be conditioned upon their prior submission
7 to searches or their persons and possessions.

8 (4) Authorized persons are permitted to perform manual source code review and use code analysis tools,
9 as provided in Subparagraph (1) of this Paragraph, to analyze the source code. This source code
10 review shall be performed using “read only” access and any authorized person shall not interact with
11 or perform testing of the software components.

12 (5) Any review performed pursuant to this Rule shall occur during regular business hours and shall last
13 no longer than two work weeks. Such review shall not occur during the period from the start of one-
14 stop absentee voting through the conclusion of statewide canvassing of the vote.

15 (6) Authorized persons and the vendor are each responsible for bearing their own costs in conducting
16 the review pursuant to G.S. 163-165.7(a)(6).

17 (7) Up to three representatives of the vendor may be designated in writing by a corporate executive of
18 the vendor to supervise the review at all times. Such representatives shall not interfere with the
19 review; and shall be afforded a reasonable opportunity to inspect the facility for compliance with
20 these conditions prior to the review commencing. State Board staff designated under Subparagraph
21 (3) of this Paragraph shall have the right to monitor the review, without interfering with the review
22 process.

23 (e) Dispute Resolution. Any dispute that arises between an authorized person and a vendor concerning the execution
24 of review pursuant to this Rule may be presented to the State Board of Elections in the form of a petition seeking
25 relief. The party seeking such relief shall serve their petition on the opposing party, and the opposing party shall have
26 14 days to respond. The State Board shall make a decision on the petition based on the written submissions, or it may
27 schedule a hearing to consider the petition.

28
29 *History Note: Authority 42 U.S.C. 5195c; G.S. 132-1.2; 132-1.7; 132-6.1; 163-22; 163-27.2; 163-165.7; 163-*
30 *165.9A; 163-166.7; 163-275;*
31 *Eff.*

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: North Carolina State Board of Elections

RULE CITATION: 08 NCAC 04 .0309

DEADLINE FOR RECEIPT: September 9, 2022

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

Page 1, Lines 8-12: Is the language in the first sentence after “shall execute a confidentiality and nondisclosure agreement” necessary? Why is this language needed? The requirements are set out in the subparagraphs and only lends misunderstanding the requirements of the required agreement.

Page 1, Lines 12-13: The agreement shall require the authorized person to subsequently agree? This is awkward. Consider “The agreement shall contain the following terms and conditions:” This would require some modifications to the language used in the list. For example: (1) the authorized person shall not..., (5) the authorized person shall submit... (6) the authorized person shall pay for any and all damages... Many of the required terms read like a subsequent obligation to agree or acknowledge when the agreement should simply state what the parties are required to do.

Page 1, Lines 17: In subparagraph (1), remove the comma between “Agency” and “any” in line 17 to eliminate potential for considering the proprietary information portion of the sentence a nonrestrictive clause.

Page 1, Line 22: Similarly, in subparagraph (2), remove the comma between “Agency” and “any” in line 22 to avoid separating the subject and verb of the sentence.

Page 2, Lines 3-14, (9): Explain how the addition of this requirement is not a substantially different from the published rule.

Page 2, Lines 3-14, (9): Regarding parts (9)(a) through (c) and subpart (i), the text should be preceded by a tab after the numbering of the subdivision. Also, parts are labelled as (A), (B), (C), etc. Additionally, the subpart (i) should be tabbed over from the parts subdivisions and subpart (ii) should be its own paragraph.

William W. Peaslee
Commission Counsel

Date submitted to agency: August 30, 2022

Please review and state whether and why each of the following laws are applicable in the authority section: 42 U.S.C. 5195c and G.S. §§ 132-1.2, 132-1.7, and 163-166.7.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

William W. Peaslee
Commission Counsel

Date submitted to agency: August 30, 2022

1 **INTRODUCTORY STATEMENT**

2 The following rule, 08 NCAC 04 .0309, was adopted by the State Board of Elections on July 14, 2022 with changes.
3 Notice of the proposed rule was published in the North Carolina Register on April 1, 2022, Volume 36, Issue 19, pages
4 1524 –1527.

5
6 **08 NCAC 04 .0309 NONDISCLOSURE AGREEMENT FOR REVIEW OF INFORMATION IN**
7 **ESCROW**

8 All persons seeking to gain authorization to review and examine the information placed in escrow by a voting system
9 vendor under 08 NCAC 04 .0308 shall execute a confidentiality and nondisclosure agreement which obligates the
10 authorized person, as that term is defined in 08 NCAC 04. 0308, to exercise the highest degree of reasonable care to
11 maintain the confidentiality of all proprietary and security-related information to which the authorized person is
12 granted access pursuant to 08 NCAC 04 .0308. The agreement shall require the authorized person to agree to the
13 following terms, and no additional terms shall be imposed in the agreement:

- 14 (1) Not disclose or reveal to any person outside of the individuals or entities identified in G.S. 163-
15 165.7(a)(6), testing and certification program staff at the U.S. Election Assistance Commission, or
16 election infrastructure security staff for the U.S. Department of Homeland Security’s Cybersecurity
17 and Infrastructure Security Agency, any proprietary information to which the Authorized Person is
18 granted access, pursuant to G.S. 132-1.2.
- 19 (2) Not disclose or reveal to any person outside of other persons authorized under 08 NCAC 04. 0308,
20 the State Board, ~~or the vendor,~~ testing and certification program staff at the U.S. Election Assistance
21 Commission, or election infrastructure security staff for the U.S. Department of Homeland
22 Security’s Cybersecurity and Infrastructure Security Agency, any feature, component, or perceived
23 flaw or vulnerability of the information placed in escrow by a voting system vendor, pursuant to
24 G.S. 132-1.7(a2), G.S. 132-1.7(b), and G.S. 132-6.1(c).
- 25 (3) Agree that the review of the information placed in escrow by a voting system vendor shall take place
26 in accordance with the terms and conditions of the agreement and 08 NCAC 04 .0308.
- 27 (4) Agree that the authorized person's obligation to exercise the highest degree of reasonable care to
28 maintain the confidentiality of all proprietary and security-related information survives the
29 agreement and shall continue permanently.
- 30 (5) Agree to submit copies of any notes taken during the examination of the information in escrow to
31 the State Board.
- 32 (6) Acknowledge that the authorized person is responsible for any unauthorized disclosure that they
33 cause and shall pay for any and all damages they caused by any through unauthorized disclosure of
34 the information under review ~~by the authorized person, except where such disclosure comports with~~
35 Subparagraph (9) below.
- 36 (7) Acknowledges that the North Carolina State Board of Elections and the voting system vendor may
37 enforce the agreement through any legal remedy provided under North Carolina or federal law.

1 (8) Consent to the personal jurisdiction of the courts of North Carolina and agree that the Superior Court
2 of Wake County is a proper venue for any action arising from the agreement.

3 (9) Where the authorized person becomes or is likely to be compelled by law to disclose any of the
4 escrow information:

5 (a) Notice of Disclosure. The authorized person shall provide the vendor and the State Board with
6 prompt written notice so that such parties, or either of them, may seek a protective order or other
7 appropriate remedy and/or waive compliance with the provisions of this Subparagraph;

8 (b) Cooperation to Seek Protective Order. The authorized person shall cooperate with such parties
9 to obtain a protective order or other appropriate remedy; and

10 (c) Limited Disclosure. In the event that a protective order or other remedy is not obtained, or the
11 other parties waive compliance with the provisions of this Agreement, the authorized person shall:

12 (i) disclose only the portion of information that such person is legally required to disclose in the
13 written opinion of its counsel; and (ii) exercise all reasonable efforts to obtain reliable assurances
14 that confidential treatment will be afforded to the information.

15 The executed agreement shall be delivered to the North Carolina State Board of Elections prior to access being granted
16 pursuant to 08 NCAC 04 .0308.

17
18 *History Note: Authority 42 U.S.C. 5195c; G.S. 132-1.2; 132-1.7; 132-6.1; 163-22; 163-165.7; 163-165.9A; 163-*
19 *166.7;*
20 *Eff.*