

Burgos, Alexander N

Subject: FW: Request for Changes BOE
Attachments: NCSBE Response to RRC Request for Changes - 01.2024 - Board of Elections.docx; 08 NCAC 04 .0308 Authorized Access to Escrow Materials - revisions per RRC staff recs.docx

From: Cox, Paul <paul.cox@ncsbe.gov>
Sent: Thursday, January 11, 2024 4:41 PM
To: Rules, Oah <oah.rules@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Peaslee, William W <bill.peaslee@oah.nc.gov>; SBOE_Grp - Legal <Legal@ncsbe.gov>
Subject: RE: Request for Changes BOE

Bill and colleagues,

Please find responses in green typeface to staff's request for changes to 08 NCAC 04 .0308. Also attached is the rule that is proposed to be revised accordingly.

With best regards,

Paul Cox
General Counsel
NORTH CAROLINA STATE BOARD OF ELECTIONS
RALEIGH, NC 27611
919.814.0700
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REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: State Board of Elections

RULE CITATION: 08 NCAC 04 .0308

DEADLINE FOR RECEIPT: January 12, 2024

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 27-29: Explain why this Subparagraph is necessary. It does not appear that the Board has established any threshold criteria concerning training or experience for one to be designated an authorized person. Accordingly, why is the resume necessary? What will the Board do with this information? This is reasonably necessary for the State Board to know the background of the person accessing highly technical source code materials and using the applications referred to in (d)(1) of the Rule. Note in GS 163-165.9A(a)(1) the types of items that are placed in escrow, many of which a person with no relevant technical experience will have no idea how to make sense of. A person with no technical background will not know how to use these tools or how to examine source code. Knowing the person's technical background will help the State Board work with the requesting party, if necessary, to ensure their designated representative will be able to accomplish the type of review the requesting party is seeking. Additionally, if a designated reviewer provides a report of a perceived flaw to the State Board, DIT, or federal authorities per (b)(4)(D) in the Rule, the person's experience and knowledge will be relevant to understand how to interpret such a report.

Page 2, Lines 11-12: As written, an authorized person could not file a claim in court or seek injunctive relief upon the discovery of a flaw. Is that correct? The intent here is not to prohibit redress in court of a valid legal claim. It is to prohibit dissemination of proprietary and security-sensitive information. Intellectual property litigation routinely occurs with parties sealing proprietary information from public view but filing unredacted information with a court of law. The agency proposes to add language to (b)(4)(D)(i) and (ii) to account for this possibility.

Page 2, Lines 19: From whom would the authorization come and what is the procedure to request authorization? The agency proposes to clarify this by referring back to (b)(4)(D)(i) and (ii), which was the intent here.

Page 2, Line 29: 21-26: Consider "consents in writing". The agency agrees.

William W. Peaslee
Commission Counsel

Date submitted to agency: December 28, 2023

Page 3, Lines 8-9: By what process are the tools “preapproved”? What criteria will be used in the approval process? The agency agrees to remove the reference.

Page 3, Lines 19-20: Consider making the second sentence its own Part. The agency agrees.

Page 3, Line 36: Change “must” to “shall”. The agency agrees.

Page 4, Line 2: Change “must” to “shall”. The agency agrees.

Page 4, Lines 2-3: As written, a campus identification card issued by a community college will suffice. Is that correct? Yes.

Page 4, Line 10: Change “may” to “shall”. The agency agrees.

Page 4, Line 12: Change “may” to “shall”. The agency agrees.

Page 4, Lines 12-13: Consider making the second sentence its own Part. The agency agrees.

Page 4, Lines 18-21: Consider making each sentence its own Part. The agency agrees.

Page 4, Line 22: Define “manual” source code review. This is sufficiently clear when read in context—in opposition to source code review using “code analysis tools”—and will be readily understood by anyone equipped to conduct source code review.

Page 4, Line 22: What are “code analysis tools”? How will these be considered, using what criteria, and by whom? The code analysis tools are identified by reference to (d)(1).

Page 4, Lines 23-25: What is the difference between “review and examination” as used in the statute and “interact with and perform testing”? First, the agency recommends revising this language to clarify what is intended here: that the person reviewing the source code and other proprietary information will be using only the tools preloaded onto the computers supplied for the review, which include “software tools necessary for use in viewing, searching, and analyzing the information subject to review, including tools permitting automated source code review.” Technically, a reviewer is “interacting with” the material when using these tools, so removing the “interact with” phrase and clarifying this language as proposed will hopefully address the concern raised by staff. Second, to the extent there is still a concern that offering these tools does not allow the reviewer to engage in testing on the material, the agency believes such testing would exceed what the General Assembly authorized outside entities to do with vendors’ proprietary materials. According to the Cambridge Dictionary, to “review” is “to consider something in order to make changes in it, study it, or give an opinion about it.” (Note that the “changes” part is a forward-looking purpose, not part of the action.) And “examination” is “the act of looking at or considering something

carefully in order to discover something.” The plain meanings of these words do not entail performing tests on the materials being reviewed.

Page 4, Line 32: “designated in writing” to whom? The agency agrees to clarify this.

Page 4, Line 34: Define or delete “reasonable”. The agency agrees.

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

08 NCAC 04 .0308 is adopted, following publication in the North Carolina Register, Volume 38:01 at pages 3 through 6, with revisions, as follows:

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

(a) Subject to the provisions of this Rule, upon written request from a person or entity authorized under G.S. 163-165.7(a)(6) to a vendor of a certified voting system in this state, the vendor shall make available for review and examination any information placed in escrow under G.S. 163-165.9A to an authorized person. The person or entity making the request shall simultaneously provide a copy of the request to the State Board. Any request from the State chairs of a political party recognized under G.S. 163-96 shall be made no later than 90 days before the start of ~~one-stop absentee~~ early voting in the state. This Rule does not address or restrict the pre-certification review of a vendor's source code under G.S. 163-165.7(e).

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

- (1) Is an agent:
 - (A) designated by majority vote in a public meeting by the State Board or a purchasing county's board of commissioners;
 - (B) designated in writing by the chair of a political party recognized under G.S. 163-96; or
 - (C) designated in writing by the Secretary of Department of Information Technology. No more than three people may be designated by an authorized entity under G.S. 163-165.7(f)(9);
- (2) Has submitted to a criminal history record check, to be facilitated by the State Board, as provided for in G.S. 163-27.2(b) and has not been convicted of a disqualifying offense. Disqualifying offenses shall be all felonies, and any misdemeanors that involve theft, deception, the unlawful concealment or dissemination of information, falsification or destruction of records, or the unlawful access to information or facilities. The requirement to submit to a criminal history record check does not apply to State employees who have already submitted to a criminal history record check for State employment;
- (3) Has submitted to the State Board a résumé detailing the person's experience with voting systems and information technology, to include any training or experience pertaining to computer code development or analysis;
- (4) Has submitted to the State Board a sworn affidavit, under penalty of perjury, attesting that the person:
 - (A) has never been found by a court of law, administrative body, or former or current employer to have disclosed without authorization confidential information that the person had access to;
 - (B) has never been, either in their private capacity or in any capacity as an agent for another person or entity, subject to any civil or criminal claims alleging misappropriation of a trade secret, violation of confidentiality agreement or nondisclosure agreement, copyright

- 1 infringement, patent infringement, or unauthorized disclosure of any information protected
2 from disclosure by law, except to the extent any such claims were dismissed with prejudice
3 and not pursuant to a settlement agreement;
- 4 (C) has never had a security clearance issued by a federal agency revoked for any reason other
5 than expiration of the clearance;
- 6 (D) if granted access to review and examine the information placed in escrow:
- 7 (i) will not disclose or reveal any proprietary information to which the Authorized Person
8 is granted access, pursuant to G.S. 132-1.2, to any person outside of the individuals or
9 entities identified in G.S. 163-165.7(a)(6), testing and certification program staff at the U.S.
10 Election Assistance Commission, ~~or~~ election infrastructure security staff for the U.S.
11 Department of Homeland Security's Cybersecurity and Infrastructure ~~Security~~; Security,
12 or a court of law using the court's procedures to file such information under seal;
- 13 (ii) will not disclose or reveal any feature, component, or perceived flaw or vulnerability
14 of the information placed in escrow by a voting system vendor, pursuant to G.S. 132-
15 1.7(a2), G.S. 132-1.7(b), and G.S. 132-6.1(c), to any person outside of other persons
16 authorized under this Rule, the State Board, the vendor, testing and certification program
17 staff at the U.S. Election Assistance Commission, ~~or~~ election infrastructure security staff
18 for the U.S. Department of Homeland Security's Cybersecurity and Infrastructure ~~Security~~;
19 Security, or a court of law using the court's procedures to file such information under seal;
- 20 (iii) will submit copies of any notes taken during the examination of the information in
21 escrow to the State Board;
- 22 (iv) acknowledges that, should the person disclose ~~without authorization~~ any information
23 placed in escrow that is protected under state or federal ~~law~~, law in contravention of
24 subdivisions (b)(4)(D)(i) or (ii) of this Rule, the person will be subject to any remedies
25 provided by law ~~for such unauthorized disclosure~~, which could include monetary damages;
26 and
- 27 (v) will provide the vendor and the State Board with prompt written notice if the person
28 becomes or is likely to be compelled by law to disclose any of the escrow information, will
29 cooperate with the vendor and the State Board to obtain a protective order or other
30 appropriate remedy, and, in the event any escrow information must be disclosed pursuant
31 to legal compulsion, will disclose only the portion of information that the person is legally
32 required to disclose in the written opinion of its counsel; and
- 33 (5) ~~Has consented~~ Consents in writing to searches of their person and effects, similar in nature to
34 searches that members of the public submit to when entering the office buildings of the General
35 Assembly, to be conducted upon entry into the secure facility described in Subparagraph (d)(1) of
36 this Rule; and
- 37 (6) Is a citizen of the United States.

(c) Within 30 days of meeting the definition of an authorized person in Paragraph (b) of this Rule, the Executive Director of the State Board shall issue a written authorization to the person or entity making the request under Paragraph (a) of this Rule to review and examine information placed in escrow by a voting system vendor. The authorization shall be presented by the person or entity to the vendor prior to gaining access to such information under this Rule.

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

(1) The information in escrow shall be made available by the vendor on up to three computers provided by the vendor (one for each potentially designated agent under G.S. 163-165.7(f)(9)) that are not connected to any network and are located within a secure facility, as described in Part (d)(3)(A) below, designated by the State Board of Elections. Such computers shall be preloaded with software tools necessary for use in viewing, searching, and analyzing the information subject to review, including tools permitting automated source code review ~~that are preapproved by the vendor and the State Board~~. Such computers shall have the following access controls:

(A) Credentials shall be traceable to individuals. Generic login accounts are not authorized. Sharing of accounts and reuse of credentials is prohibited. Each user must have their own assigned login account.

(B) Only one administrative account shall be present on the system to allow for the initial provisioning of necessary applications and setup of security controls.

(C) Where passwords are used to authenticate authorized individuals, login accounts shall use complex passwords. A sufficiently complex password is one that is not based on common dictionary words and includes no fewer than 10 characters, and includes at least one uppercase letter, one lowercase letter, one number, and a special character.

(D) Screen lock times shall be set to no longer than 10 minutes.

~~(E)~~ All computers shall be locked or logged out from whenever they are not being attended and used.

~~(F)~~ (F) The entire hard drive on any computer must have full disk encryption. Where possible, the minimum encryption level shall be AES-256.

~~(F)~~ (G) After the information subject to review and software tools for viewing are loaded on the computers, all ports shall be sealed with tamper-evident seals.

~~(G)~~ (H) After the ports are sealed, no input/output or recording devices may be connected to the computers. The State Board shall provide for the secure storage of any equipment used for the duration of the review.

(2) The computers shall be air-gapped and shall not be connected to a network, and any feature allowing connection to a network shall be disabled. Prohibited network connections include the Internet, intranet, fax, telephone line, networks established via modem, or any other wired or wireless connection.

- (3) The secure facility designated by the State Board under Subparagraph (1) of this Paragraph is the specific location where the computing equipment will be stored and the review conducted, and may be a secured portion of a building. All conduct within the facility shall meet the following conditions:
- (A) For the entire review period, the facility ~~must~~ shall be secured from access by any person not designated under Subparagraph (b)(1), Part (d)(3)(F), and Subparagraph (d)(7) of this Rule.
 - (B) Only individuals authorized under Subparagraph (b)(1), Part (d)(3)(F), and Subparagraph (d)(7) of this Rule may enter the facility. Such individuals ~~must~~ shall present government-issued photo identification upon initial entry, and may be asked to show identification multiple times throughout the review period.
 - (C) Each time an individual accesses the facility, the State Board or its designee shall record the name of the individual, the time of their entry, the time of their departure, and a description of any materials brought in or out of the facility.
 - (D) All equipment used in the review, as specified in Subparagraph (d)(1) of this Rule, must remain in the facility during the review period.
 - (E) No authorized person pursuant to this Rule ~~must~~ shall possess any removable media device, cell phone, computer, tablet, camera, wearable, or other outside electronic device within the facility where the person is accessing information in escrow.
 - (F) No authorized person ~~must~~ shall attempt to connect the computers used in the review to any network.
 - ~~(F)~~(G) State personnel who are designated by the Executive Director of the State Board of Elections and who also satisfy the conditions set forth in Subparagraphs (b)(2) through (b)(5) shall have access to the facility where the review is being conducted at all times, to monitor the process and ensure that all requirements of this Rule are complied with.
 - ~~(H)~~ Persons entering the facility shall submit to inspection, as provided for in ~~Subparagraph~~Subparagraph (b)(5), and shall be denied entry if they possess any unauthorized devices.
 - ~~(I)~~ State personnel designated pursuant to this subsection shall inspect the computers used in the review before and after the review for compliance with Subparagraphs (d)(1) and (d)(2).
- (4) Authorized persons are permitted to perform manual source code review and use code analysis tools, as provided in Subparagraph (1) of this Paragraph, to analyze the source code. This source code review shall be performed using “read only” access and any authorized person shall use only the analysis tools preloaded on the computers, as described in Subparagraph (1) of this Paragraph, to examine the information placed in escrow. ~~not interact with or perform testing of the software components.~~

Burgos, Alexander N

Subject: FW: Request for Changes BOE

From: Peaslee, William W <bill.peaslee@oah.nc.gov>

Sent: Monday, January 15, 2024 2:05 PM

To: Cox, Paul <paul.cox@ncsbe.gov>; Rules, Oah <oah.rules@oah.nc.gov>

Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; SBOE_Grp - Legal <Legal@ncsbe.gov>

Subject: RE: Request for Changes BOE

Thank you for your email.

On Page 4, Line 32: Place a comma after “review” and strike the comma after “tools” unless it is not the intent of the Board.

William W. Peaslee

Rules Review Commission Counsel / Legislative Liaison

Office of Administrative Hearings

1711 New Hope Church Road

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(984) 236-1939

Bill.Peaslee@oah.nc.gov

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Burgos, Alexander N

From: Cox, Paul
Sent: Thursday, December 28, 2023 1:00 PM
To: Peaslee, William W
Cc: Burgos, Alexander N
Subject: RE: Request for Changes BOE

Thank you, Bill, and I hope you had a nice holiday too. We'll take a look at these and get back to you before the 12th.

Paul

From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Thursday, December 28, 2023 12:47 PM
To: Cox, Paul <paul.cox@ncsbe.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: Request for Changes BOE

Good afternoon Paul,

I hope you had a pleasant holiday.

Attached please find the Request for Changes for the BOE rule which will be considered at the January RRC meeting.

As always if you have any questions please feel free to contact me.

William W. Peaslee
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