



STATE OF MICHIGAN
TERRI LYNN LAND, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

MEMORANDUM

DATE: September 29, 2009
TO: Allegan County Election Officials
FROM: Christopher M. Thomas, Director of Elections
SUBJECT: Requirements for Handling Voted Ballots if Disclosed Under the Freedom of Information Act (FOIA)

Questions have recently been raised regarding the applicability of Michigan's Freedom of Information Act (FOIA), MCL 15.231 et. seq., to requests to inspect or receive copies of voted ballots secured under the 22-month Federal retention law. While this directive does not address whether such ballots are subject to disclosure under FOIA, it does provide direction to election officials on how the disclosure must be handled should their jurisdiction determine that ballots must be disclosed under FOIA. The manner in which disclosure is carried out is critical given the Federal retention law, 18 U.S.C. §1974, which is designed to maintain election ballots and other materials as evidence should a criminal investigation occur.

The United States Department of Justice publication on this subject states:

"Section 1974 requires that administrative procedures be in place giving election officers ultimate management authority over the retention and security of those election records. Those administrative procedures should ensure that election officers retain ultimate responsibility for the retention and security of covered election records, that they also retain the right to physically access and dispose of them, and that the terms and conditions of storage conform to the retention requirements of the statute." (Federal Prosecution of Election Offenses, Seventh Edition, <http://www.usdoj.gov/criminal/pin/docs/electbook-rvs0807.pdf>)

Evidence for a criminal investigation requires a verifiable chain of custody to ensure that the evidence has not been compromised. Securing ballots under seal and recording the seal numbers are essential to the protection and maintenance of the chain of custody. Should ballots be disclosed under FOIA, it is absolutely critical that no person, other than the clerk or office staff designated by the clerk, have any form of direct or indirect access to the ballots, ballot containers or ballot bags.

Ballot Disclosure Procedures

A city, township or village clerk who honors a request from a person to inspect or receive copies of ballots voted in an election shall proceed as follows:

- In an instance where the person wishes to inspect the voted ballots, the clerk having custody of the ballots or office staff designated by the clerk shall be present in the room where the inspection takes place for the entire time the ballots are being examined. At no time during

the course of the examination shall the person or persons inspecting the ballots be permitted to touch or handle the ballots, touch or handle the container or ballot bag in which the ballots are secured or be left unattended in the room where the examination is carried out when secured or unsecured ballots are present.

- In an instance where the person wishes to receive copies of the voted ballots, the clerk having custody of the ballots or office staff designated by the clerk shall perform the necessary photocopying. At no time during the course of the photocopying shall the person or persons requesting the photocopies be permitted to touch or handle the ballots, touch or handle the container or ballot bag in which the ballots are secured or be left unattended in the room where the photocopying is taking place when secured or unsecured ballots are present.
- The clerk shall maintain a complete written record of the measures taken to protect and preserve the integrity of the ballots including the following information: 1) the serial numbers appearing on the election seals removed from the ballot containers or ballot bags involved 2) the serial numbers appearing on the election seals used to reseal the ballots into the ballot containers or ballot bags after the conduct of the ballot examination or the photocopying of the ballots 3) the names and titles of the authorized individual or individuals who removed and replaced the election seals 4) the date and time the seals were removed and replaced 5) the names and addresses of any individuals who witnessed the removal and replacement of the election seals and 6) the names and titles of the authorized individual or individuals who supervised the examination of the ballots and/or performed any necessary photocopying of the ballots. The record shall be maintained in a secure place by the clerk having custody of the ballots.

A city, township or village clerk who receives a request from a person to inspect or receive copies of voted ballots should consult the jurisdiction's legal counsel for advice in connection with responding to a particular FOIA request, including whether to recover any actual costs associated with retrieving any information that may be disclosed pursuant to FOIA.

Nothing provided under this directive shall be construed to allow the public disclosure of voted ballots prior to 1) the release of the ballots under Michigan's ballot security provisions or 2) the conduct and completion of any recounts requested after the election.

Questions?

Please do not hesitate to contact me if you have any questions regarding this directive. Bradley Wittman of this office is also available to assist with any questions you may have.

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