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7 Attorneys for Plaintiffs

8 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
9
10 THIRD JUDICIAL DISTRICT AT ANCHORAGE

11 ALASKA DEMOCRATIC PARTY,)
12 and JAKE METCALFE,)

13 Plaintiffs,)

14 -vs-)

Case No. 3AN-06-_____ CIV

15 LOREN LEMAN,)
16 WHITNEY BREWSTER, and)
17 STATE OF ALASKA, DIVISION)
18 OF ELECTIONS,)

19 Defendants.)

20 **COMPLAINT**

21 COME NOW the plaintiffs, the Alaska Democratic Party and Jake Metcalfe, by
22 and through counsel, and for their complaint state and allege:

23 **The Parties**

24 1. Plaintiff Alaska Democratic Party (ADP) is one of the major political parties in
25 the State of Alaska.

26 2. Plaintiff Jake Metcalfe is the chairman of the ADP.

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1 3. Defendant Loren Leman is the lieutenant governor of the State of Alaska and
2 is in charge of the state Division of Elections.

3 4. Defendant Whitney Brewster is the director of the state Division of Elections.

4 5. Defendant Division of Elections is a political subdivision within the State of
5 Alaska.
6

7 Jurisdiction

8 6. This Court has jurisdiction of this matter pursuant to AS 22.10.020.
9

10 Alaska Law

11 7. The Alaska Public Records Act, AS 40.25.110 et seq., provides the people
12 of Alaska with a broad and far-reaching right to inspect the public records in the
13 possession of their state government.

14 8. Under the Public Records Act, "[u]nless specifically provided otherwise, the
15 public records of all public agencies are open to inspection by the public under
16 reasonable rules during regular office hours." AS 40.25.110(a).

17 9. A state agency receiving a public records request must provide the records
18 within ten working days. 6 A.A.C. §96.325(a). The public agency may extend the 10-
19 working-day deadline by an additional ten working days if, for example, there are
20 voluminous records to be searched or there is a need to consult with legal counsel. 6
21 A.A.C. § 96.325(d). If responding to a public records request will take a period of time
22 longer than twenty working days, the agency must seek any additional extension from
23 the attorney general. 6 A.A.C. § 96.325(e).
24
25
26

1 vote totals, such as the total number of votes case for statewide candidates. However,
2 the documents were mutually contradictory, and the DOE has been unable to provide
3 correct vote totals.
4

5 15. For one-half of the state's 40 House districts, the DOE's official reports show
6 more ballots cast than there were registered voters to cast them. In 16 House districts,
7 the voter turnout was more than 200 percent, an obvious impossibility.
8

9 16. For example, the district-by-district posted results in the Statement of Votes
10 Cast, when added, showed 292,268 votes cast for George Bush, but his official vote
11 total in the Statewide summary was 190,889, a difference of 101,379, or about 34
12 percent. Similarly, the district totals when added resulted in Lisa Murkowski receiving
13 226,992 votes, but the summary showed her receiving 149,446, a difference of 77,546,
14 again about a 34 percent difference.
15

16 17. There were also numerous discrepancies in state races. State Senate
17 candidate Rita Allee in District E, received 5,366 votes according to the district-by-district
18 totals, but only 4,854 votes according to the Statewide Summary. Gary Wilken was
19 credited with 8,506 in the district-by-district totals, but only 7,871 in the Statewide
20 Summary.
21

22 18. A meeting was held at the DOE offices in Anchorage on December 14, 2005
23 to discuss these and other discrepancies in the Division's voting totals. Defendant
24 Brewster and others explained that "early votes," as well as some of the absentee and
25 questioned ballots, had been counted multiple times and that the district-by-district totals
26 were incorrect and should be ignored. However, the DOE took the position that it was

1 not known whether accurate district-by-district totals could be assembled. The DOE
2 acknowledged it had received numerous requests for accurate vote totals from many
3 individuals and groups, including the Republican National Committee. To this day,
4 neither defendant Leman, defendant Brewster, nor defendant DOE has been able to
5 provide an accurate district-by-district count of the 2004 election results.
6

7 19. On December 19, 2005, the ADP filed a public records request seeking,
8 among other things, the "central tabulator file" taken from the Global Election
9 Management Software (GEMS), a part of the computerized voting system purchased
10 by the state from Diebold Elections Systems. The ADP also requested a copy of the
11 electronic voter file as it existed immediately following entry of the data for the 2004
12 general election.
13

14 20. DOE responded by stating in part that there was no way to provide the
15 electronic voter file because it represented a "snap shot in time of the system" that was
16 not preserved and could not be retrieved. With regard to the central tabulator file from
17 the GEMS system, the DOE stated in January 2006 that Diebold objected to the release
18 because it claimed the information was "proprietary."
19

20 21. In response, the ADP pointed out that the GEMS software was readily
21 available on the internet and had been available there for several years. Regarding the
22 electronic voter information, the ADP informed the state on January 23, 2005 that it had
23 been able to obtain a copy of this information elsewhere, even though the DOE
24 represented it no longer existed. That database showed numerous additional
25 discrepancies in the DOE's vote totals, including a reference to more than two-thousand
26

1 absentee ballots that appear never to have been counted.

2 22. On February 3, 2006, the DOE informed the ADP that Diebold had agreed
3 to waive whatever claim it might have had that its GEMS system was proprietary, but the
4 state asked for additional time to respond to the ADP's request for the central tabulator
5 file. By now, the ADP had filed another public records request seeking the specific
6 number of votes cast for each candidate in each House district in the U.S. Senate race
7 and the number of questioned, absentee and early ballots case for each candidate in
8 each House District in the general election. In response to this request, the DOE
9 referred the ADP to the state website, which continued to contain the same two reports
10 that contained numerous discrepancies and contradictory information.
11

12 23. On February 7, 2006, the ADP agreed to the DOE's request for additional
13 time to address the ADP's public records requests. The ADP also had requested a copy
14 of the state's contract with Diebold.
15

16 24. On February 17, 2006, the DOE produced a copy of its Diebold contract, but
17 on February 22 denied the ADP's request for the central tabulator file, used to run the
18 GEMS database, on grounds that its disclosure would cause "security risks." The DOE
19 offered to produce the information in a different format. However, such release would
20 not provide a method of verifying the accuracy of the vote totals because the central
21 tabulator file contains linkages that must be analyzed and audited to assure accuracy.
22 Without the information requested in the format requested, there is no way to cross-
23 reference the vote totals in order to come to accurate results.
24
25

26 25. In making its claim of "security risks," the DOE cited AS 40.25.120(a)(10).

1 Subsection (a)(10) is a post-9/11 amendment to the Public Records Act whose
2 legislative history shows it has to do with security against such things as terrorism, and
3 not with voting records and systems. The subsection does not apply to the ADP's
4 requests.
5

6 Liability

7 26. The defendants have violated and continue to violate the Alaska Public
8 Records Act by, among other things, refusing to release the central tabulator file in the
9 format requested, by failing to follow the time limits for the production of public records,
10 and by citing inapplicable legal prohibitions in order to impede the ADP's legitimate
11 request for public records.
12

13 27. Specifically, the defendants, in violation of the Alaska Public Records Act,
14 have not produced the following public records even though such records are within
15 their possession or control and for which there is no statutory or regulatory bar to
16 disclosure:
17

18 a. The central tabulator file taken from the Diebold-supplied computer used to run
19 the GEMS database application in the 2004 Alaska general election. This file is
20 required in order to verify the other information requested.
21

22 b. Documents showing the accurate vote totals for each candidate in each House
23 district in the U.S. Senate race in the 2004 Alaska general election.

24 c. Documents showing the accurate number of early, questioned and absentee
25 ballots cast for each candidate in each House district in the Alaska 2004 general
26 election.

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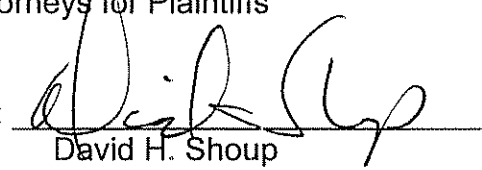
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28. Every Alaska citizen, including the plaintiffs, has the right to be able to verify the results of public elections. The defendants, and each of them, have denied and obstructed the plaintiffs' access to the records that would allow such verification and have aided and abetted in such denial and obstruction.

29. The plaintiffs, and each of them, is a public interest litigant under Alaska law. WHEREFORE plaintiffs pray as follows:

1. For injunctive relief requiring the immediate disclosure of the public records set forth in paragraph 27 above.
2. For costs and reasonable attorney fees.
3. For such other relief as the Court deems just and reasonable.

DATED at Anchorage, Alaska this 18th day of April, 2006.

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