ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. MICHAEL MILLER

CASE NO. 20072073

COURT REPORTER: NONE

DATE: May 23, 2008

DEMOCRATIC PARTY OF PIMA COUNTY,
Plaintiff,

v.

PIMA COUNTY BOARD OF SUPERVISORS, a body politic,
Defendant.

## UNDER ADVISEMENT RULING

***Re:***

1. Plaintiff's Motion To Amend Findings Of Fact Or Law, Or For A New Trial
2. Plaintiff's Motion For Disclosure Of All Election Data Files
3. Defendant's Rule 60(c) Motion for Relief from Order

**Introduction**

On December 18, 2007 the Court made findings of fact and conclusions of law in this statutory special action requesting Pima County to disclose all election computer databases created by the GEMS software. The Court granted Plaintiff's initial request to disclose the final mdb and gbf files for the 2006 General and Primary Elections. It denied Plaintiff's subsequently-made request for disclosure of every such database file, without prejudice for Plaintiff to reurge the record request in the future.

Plaintiff's motions seek an amendment to the findings pursuant to Rule 52(b) or a new trial pursuant to Rule 59(a)(8), and the disclosure of all election databases pursuant to the Court's December 18, 2007 Ruling. Pima County opposes any amendments or the release of additional databases, but agrees that a new trial could be held on the limited issue of whether portions of the databases should

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ever be released. Additionally, Pima County moves for relief from any conclusion by this Court that it has waived its statutory argument that A.R.S. § 16-455(D) prohibits disclosure of the database files. Plaintiff did not file an opposition to Defendant's motion.

As part of the briefing on Plaintiff's motions, the Court invited both parties to submit supplemental expert declarations to address new information learned since the disclosure of the 2006 databases. The Court also allowed the parties to depose each other's experts on their declarations. Plaintiff submitted the following materials:

A. Dr. David Jefferson declaration only.

B. Dr. Thomas W. Ryan declaration and deposition.

C. Attorney Thomas P. Ryan declaration and deposition.

Defendant proffered:

D. Dr. John Moffat declaration and deposition.

E. Attorney Joseph Kanefield deposition.

Many of the documents included voluminous exhibits. Additionally, the parties asked the Court to take judicial notice of the report by the Brennan Center Task Force on Voting System Security: "The Machinery of Democracy - Protecting Elections in an Electronic World" (2007). (The printed version of the report included additional material by Lawrence D. Norden and Eric Lazarus; the electronic version of the report was released in 2006 at www.brennancenter.org.) The Court will not repeat its December 18, 2007 findings of fact and conclusions of law, but incorporates them as an integral part of this Ruling.

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**Motion To Amend and Motion For New Trial**

Plaintiff first challenges the conclusion that County Administrator Charles Huckelberry has final authority to make individual decisions on specific record requests. Plaintiff does not address the delegation of authority to County employees. *See* Pima County Code 2.12.090. In any event, it is undisputed that the proper parties have been named in the Complaint.

Plaintiff also challenges various findings relating to the definition of the "final[1]" mdb database, the plausibility of attacks on mdb files, and the timing of disclosure of mdb files for future elections. These issues, however, become moot in view of the Court's ruling on the release of all database files.

IT IS HEREBY ORDERED ***denying*** Plaintiff's Motion To Amend and alternative Motion For New Trial.

**Motion For Disclosure of All Election Data Files**

Plaintiff's Motion For Disclosure of All Election Data Files involves those for past elections, as well as injunctive relief for future elections. There are different considerations between the two sets of files, and they are separately addressed.

The Court initially ordered the release of two database files. *See* December 18, 2007 Ruling at 19. Subsequently, Pima County decided to release the entire series of mdb files for the 2006 General and Primary Elections, as well as the 2006 RTA Election. This means that the number of separate

[1] "Final" refers to the last in the series of mdb database files for a specific election. As Plaintiff acknowledges, for any particular election there is a "series" of database files. Plaintiff's Motion at 3. The "final" database is the last one to be generated.

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election database files increased from two to more than 300. The reasons for the disclosure by the Board of Supervisors were not conveyed to the Court and do not affect this Ruling. Nonetheless, the Court takes note of the fact of the disclosure of many more mdb files.

As explained in the December 18, 2007 Ruling, the reason for limited disclosure of the mdb files was to allow the parties "to study the mdb files for the 2006 elections and to address the current (and any future) security concerns." *Id.* at 19. The reason for caution was founded, in part, on the lack of public disclosure of mdb files anywhere in the world, except for a single 2006 Alaska election. *Id.* at 16-17. Although Plaintiff contested (and continues to contest) the conclusion that disclosure of multiple databases in multiple elections could increase security risk, the additional opportunity to assess the impact of disclosing multiple databases over at least three elections provides additional evidence not available previously. The Court encouraged the parties, through expert testimony, to assess whether the disclosure of additional database files supported their pretrial positions on security concerns. The parties and their experts reached similar factual findings in their declarations, but continued to disagree on conclusions that can be drawn from those facts.

Professor Merrill King, Executive Director of the Center for Election Systems at Kennesaw State University, testified at trial about his regular monitoring of threats to election software. Although he was listed as a possible expert, Professor King did not make a declaration supporting increased security risks arising from the release of the mdb files. Dr. John Moffatt, Director of the Pima County Office of Strategic Technology Planning, provided a detailed declaration with a careful analysis of security

concerns and risk prevention measures. He also suggested that a non-public analysis of databases could detect discrepancies that would trigger a forensic computer analysis. Completely absent from his declaration, however, was any indication that the release of the 2006 databases compromised the integrity of future elections. Certainly, he repeated concerns expressed at trial that release of mdb databases would allow hacking of elections. Dr. Moffatt's opinion is either unaffected by or does not take into account any possible impact from the release of the 2006 database files.

Plaintiff presents three experts who address the possibility of increased security risk from the disclosure of all database files: 1) Dr. David Jefferson, a former professor of computer science at the University of Southern California and UCLA, who works on supercomputing applications at Lawrence Livermore National Laboratory and has extensive experience on technical issues related to elections and voting; 2) Dr. Thomas W. Ryan is a professional computer scientist with 25 years of experience in the design of software systems; and, 3) Attorney Thomas Ryan, who primarily works with software developers, including IBM.

All three of Plaintiff's experts explain in great detail their rationale for the opinion that releasing multiple databases would not increase security concerns. None of the experts, however, attempted to measure the impact of the release of the 2006 election databases. At the most, the experts inferred in response to deposition questions that release of the 2006 databases had no impact. *See, e.g.*, deposition of Thomas W. Ryan, April 9, 2008 at 6-7.

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The Court also takes into account the absence of adverse consequences from the release of the 2006 databases. Although counsel for Pima County argued that there may not have been sufficient time to observe a negative consequence, there is no evidence supporting the argument. Pima County must present evidence overcoming the presumption in favor of disclosure of public records. It has failed to overcome that presumption.

The Court concludes from the evidence at the trial, and as supplemented by expert declaration and deposition testimony, that the presumption of disclosure under the public records law has not been overcome by a showing that the best interests of the state (which includes the overall interest of the government and the people) require past election database files to be kept secret. All existing election database records must be disclosed.

**Should Future Database Records Be Ordered Disclosed?**

Plaintiff requests disclosure of databases for future elections. Although courts are generally hesitant to order a defendant to obey a law in the future, prospective relief under the public records law is appropriate where it is expected that the same type of record will be produced on a regular basis and it is possible to make a clear and unambiguous request for those records. *See West Valley View, Inc. v. Maricopa County Sheriff's Office*, 216 Ariz. 225, ¶¶ 17-18, 165 P.3d 203 (App. 2007). Election database files are a regular and necessary part of elections conducted by Pima County. The database files are readily identifiable. Moreover, the findings that support disclosure of past election database files apply equally to future elections. In the event that Pima County contends that the election database

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files for a particular election present significantly different public interest concerns, it can request specific relief from this order. Plaintiff is entitled to disclosure of future databases.

The parties have not addressed the timing of disclosure of election database files in detail. Plaintiff argues that the database files do not need to be provided before the polls close, but "it sees no reason why a copy could not be provided to all political parties that evening." Motion at 4. Pima County does not offer a proposed disclosure deadline.

The disclosure of election database files will not occur in a vacuum. It is possible that premature disclosure could interfere with the many post-election procedures. For instance, unofficial results may be released pursuant to A.R.S. § 16-622(A) on Election Day. If the election database files were released after the polls close but before the unofficial results were announced, the release of the databases would essentially mean that the political parties would "announce" the results. This result would usurp the statutory authority of Pima County to release unofficial results. *Id.*

Plaintiff also argues that the release of the records days or weeks after the election would be too late to inform the governing body of potential errors or to challenge election results. A.R.S. § 16-642(A) provides that the governing body holding an election cannot meet and canvass the election sooner than six days nor more than twenty days after the election. Challenges to the official results can be made within five days after completion of the canvass of the election and declaration of the result. A.R.S. § 16-673(A); *Hunsaker v. Deal*, 135 Ariz. 616, 663 P.2d 608 (App. 1983).

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The time between the election and the official canvass is necessary for the governing body to address and to resolve problems and allegations of irregularities. As was recognized by the Territorial Supreme Court more than 100 years ago, the canvassing body has the authority to investigate and resolve such problems. *Territory ex rel. Sherman v. Board of Sup'rs. of Mohave County*, 2 Ariz. 248, 251-52, 12 P. 730 (Ariz.Terr. 1887). A court will not go behind the canvassing body's certificate but must limit its authority to the statutory grounds established by the Legislature. *Id.*; *see also Brown v. Superior Court*, 81 Ariz. 236, 303 P.2d 990 (1956). Moreover, "no mere irregularity can be considered, unless it be shown that the result has been affected by such irregularity." *Sherman, supra*, 2 Ariz. at 253; *see also Moreno v. Jones*, 213 Ariz. 94, 102, ¶ 42, 139 P.3d 612 (2006). The forced disclosure of election database files during this period before the canvass of the election is complete could compromise the responsibilities of the governing body. It is well known that the period following a highly contested election may be the occasion of rumors and innuendo. Disclosure of the election database files before the official canvass could complicate or compromise the responsibilities of the governing body during that period. Equally important, there is a significant question about whether there is a "public record" prior to the conclusion of the official canvass. The mere fact that an electronic file is in the possession of a public officer or agency does not make it a public record. *Salt River Pima-Maricopa Indian Community v. Rogers*, 168 Ariz. 531, 538, 815 P.2d 900 (1991). It is the nature and purpose of the document that determines its status. *Id.* To determine its status, the Court looks to the election statutes that specify when and how election records are made public.

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Canvass of the election returns must be made in public. A.R.S. § 16-643. The official canvass must be entered on the official record of the election district. A.R.S. § 16-646(A). Generally, the official canvass must be mailed immediately to the secretary of state who preserves it as a permanent public record. A.R.S. § 16-646(B). The board of supervisors must declare the election results and issue certificates of election that are authenticated with the seal of the office. A.R.S. § 16-647. Prior to the official canvass and declaration of the results, most election records cannot be disclosed. *See e.g.*, A.R.S. §§ 16-550, -564, -602(A), and –603. Plaintiff has not shown statutory authority for disclosure of the election database files prior to the recording of official canvass and declaration of the results. Additionally, based on the events that occurred in the context of this case and the testimony of the witnesses regarding pre- and post-election procedures, the Court has serious concerns about whether the public interest would be served by earlier release of the database files.

Although the Court declines Plaintiff's request for disclosure of the election database files prior to the official canvass, the question remains of how soon after the declaration of the results must the records be disclosed. Resolution of this issue turns on the time requirements in the elections statutes and the ease with which the database files can be disclosed.

The recording of the official canvass and the declaration of the election results mandate immediate creation of multiple public election records that are of significant general interest. A request for the election database files that are an integral part of these multiple public election records is appropriate and should be expected. For instance, declaration of the results starts the clock running for

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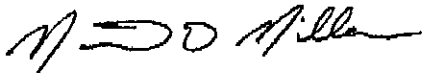
the five-day period in which an election may be contested. Failure to timely file an election contest precludes jurisdiction and requires dismissal of the challenge. *Hunsaker v. Deal, supra,* 135 Ariz. at 617. Fortunately, unlike paper records, the time required to locate and "copy" one or more election database files is measured in minutes rather than days or weeks. Moreover, when a public database file request is made beforehand, preparations can be undertaken to deliver the electronic files shortly after the recording of the official canvass and the declaration of the election results. The Court concludes this is the latest date by which election database files should be released in response to a prior, specific request for them under the public records law.

IT IS HEREBY ORDERED ***granting*** Plaintiff's Motion For Disclosure Of All Election Data Files, including future elections, which disclosure shall be made no later than the recording of the official canvass and the declaration of the election results.

IT IS FURTHER ORDERED ***denying*** Defendant's Rule 60(c) motion for the reason that the determination of "waiver" is reserved to the appellate courts. The Court affirms its December 18, 2007 ruling that A.R.S. § 16-445(D) does not prohibit disclosure of the database files.

Dated this 23rd day of May 2008.



Judge Michael Miller

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cc: Hon. Michael Miller
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