



COUNTY CLERK'S OFFICE

WAUKESHA COUNTY

KATHY NICKOLAUS, MPA, CERA
County Clerk

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July 17, 2012

Attorney James J. Mueller
4064 Timber Lane
Cross Plains, WI 53528

Sent via e-mail to JimMueller@charter.net

Dear Attorney Mueller:

On July 2, 2012, you faxed to my office a Public Records Request directed to me as "County Clerk of this Wisconsin County" on behalf of your clients who you describe as "individuals and groups who work to protect the integrity of elections in Wisconsin." The fax was not actually received by me until July 3, 2012 at 2:35 pm. As my Deputy Clerk notified you in an e-mail that day, the fax machine was not operating correctly and when it was fixed on July 3rd, your fax printed out.

Your Public Records Request

On behalf of your clients, you have asked me to preserve the following election materials for Waukesha County from the June 5, 2012 Recall Election:

1. Voted ballots
2. Unvoted ballots
3. Print out tapes and the electronically stored memory from the voting machines
4. Tally Sheets
5. Inspectors' Statements
6. Used absentee ballot envelopes
7. Poll lists
8. Board of Canvass reports
9. Spreadsheets or other summaries of the vote totals from the June 5, 2012 Recall Elections for all voting districts in Waukesha County

Your faxed request also asks that I provide a time or times during which your clients will be able to inspect these materials, count the votes cast on the ballots of all types, make photographs or photocopies of paper records and make copies of the data on the electronic memory devices from the optical scan and touch screen voting machines.

My Response to the Request

After considering all relevant factors, including Wisconsin Statutes, the common law of Wisconsin as created by our courts, the guidance of the State of Wisconsin Governmental

Accountability Board (hereinafter "GAB"), and public policy, and after having consulted with counsel, I have made the following decisions regarding inspection of election materials from the June 5, 2012 Recall Election in Waukesha County. I will address the items in your request in consecutive order.

1. Voted ballots

I have the voted ballots of Waukesha County in my office. However, I am denying this part of your request for inspection or copying for the reasons stated below.

2. Unvoted ballots

I do not have any election materials that are responsive to this request. The municipalities do not give me their unvoted ballots after an election.

3. Print out tapes and the electronically stored memory from the voting machines

I have the print out tapes from the voting machines used in Waukesha County in my office and your clients may inspect or copy them, subject to my no-touch requirement, as explained below.

I have the memory cards from the voting machines used in Waukesha County in my office, except for the memory cards from Menomonee Falls and the Village of Mukwonago. Your clients may inspect the memory cards, subject to my no-touch requirement, as explained below. If your clients want to copy the memory cards, please be more specific in the extent of information they seek to copy. To the extent that your clients want voting information from the card, I can provide copies of the printed records. To the extent that your clients want to copy other information from the cards, I would need to consult with the vendor to determine if there is any information that is protected by copyright, trademark, patent or other exceptions.

4. Tally Sheets

The tally sheets that I have in my office are the tally sheets from the municipal board of canvass for each municipality in Waukesha County. Your clients may inspect or copy the tally sheets, subject to my no-touch requirement, as stated below.

5. Inspectors' Statements

I have the inspector's statements used in Waukesha County in my office and your clients may inspect or copy them, subject to my no-touch requirement, as explained below.

6. Used absentee ballot envelopes

I have the used absentee ballot envelopes of Waukesha County in my office. However, I am denying this part of your request for inspection or copying for the reasons stated below.

7. Poll lists

I have the county's set of the poll books used in Waukesha County for the June 5, 2012 Recall Election in my office and your clients may inspect or copy them, subject to my no-touch requirement, as explained below.

8. Board of Canvasser' reports

I have the Waukesha County Board of Canvasser report for the June 5, 2012 Recall Election in my office and your clients may inspect or copy it, subject to my no-touch requirement, as explained below.

9. Spreadsheets or other summaries of the vote totals from the June 5, 2012 Recall Elections for all voting districts in Waukesha County

I do not have any records of spreadsheets that are responsive to this request. The other summaries of the vote totals, including breakdowns by municipality and reporting units, appear on the Waukesha County internet website at www.waukeshacounty.gov. Select the tab for Elected Officials, select County Clerk, select Election Information and select Official Election Results.

Reasons for the partial denial of your request:

Your request to inspect and hand count the voted ballots is denied pursuant to Wis. Stat. § 19.35(1)(h), which provides that a request for records without a reasonable limitation as to subject matter or length of time does not constitute a reasonable request. The subject matter of this part of your request makes it overly burdensome for my office to complete because it would severely impair the normal functioning of this office. Likewise, your request to inspect and hand count the used absentee ballot envelopes is denied for the same reasons.

For Waukesha County, 213,332 ballots were cast in 37 municipalities and involved 189 separate reporting units for the June 5, 2012 Recall election. Voted ballots are securely bagged in hundreds of ballot bags that are kept in containers in my office. I estimate that approximately 8,000 to 10,000 absentee ballots were voted in this election. Used absentee ballot envelopes are placed in the containers with the voted ballots by election officials at the polling place before the containers are sealed.

Granting this part of your request to inspect and count more than 213,300 ballots secured in hundreds of sealed ballot bags would require the following steps: opening the secured containers holding the election materials; making a notation in the chain of custody on the tamper-proof seal number on each bag; breaking the seal on each bag and making a record in the chain of custody of the removal of the voted ballots from each bag; making the voted ballots available for inspection; returning the voted ballots to the secure bags from which they were removed; sealing each bag and making a notation in the chain of custody document on the tamper-proof seal number; and, securing all the containers. Following the GAB guidelines regarding security of the ballots, I or my designee would also need to be present throughout the inspection process to handle the voted ballots and used absentee ballot envelopes.

Based on my recent experience in a prior election, I believe that the amount of time your clients would need to inspect and hand count the voted ballots and used absentee ballot envelopes would meet or exceed the time taken by the Waukesha County Board of Canvass to conduct the recount in the 2011 Supreme Court election. Recounting Waukesha County's 125,182 ballots in 2011 required approximately six weeks, including some weekends, working 8 to 10 hours per day with the assistance of approximately 25 to 30 hired tabulators. I note that voter turnout was higher in the June 5, 2012 Recall election and there are approximately 88,000 more ballots now than were recounted in the 2011 election.

Providing staff to assist you in this part of your request to inspect and hand count ballots and used absentee ballot envelopes would require the expenditure of thousands of hours of staff time, causing an undue burden on my staff and severely impairing the functioning of this office. My staff in the Office of the County Clerk for Waukesha County currently consists of myself, a Deputy Clerk, and two full-time clerical support staff. I also have two temporary staff, on an as-needed basis. I and all of my staff have regular duties we must complete to perform the statutory duties of a county clerk's office. Additionally, my office is very busy at this time with elections. Due to the election to recall several Wisconsin elected officials, including the governor, we will experience four elections in the span of six months. We have only halfway completed this activity and are busy at this time preparing for the upcoming August 14, 2012 primary election which will take place before the November 2012 Presidential election. This high level of election activity limits the staff time I have for other activities.

Additionally, my staff is spending time responding to other similar public records requests. Your clients are not the only citizens seeking an inspection of the election materials from the June 5, 2012 Recall election. I have two other pending requests to inspect election materials, each with a component of hand counting the voted ballots. Your request alone is overly burdensome and I raise the fact that other requests are pending to demonstrate the impossible burden the cumulative effect of such concurrent requests pose for this office.

You mentioned that part of the purpose of your inspection is to recount the voted ballots by hand. The public records law in Chapter 19 of Wisconsin Statutes does not allow me to ask the purpose for a records request. However, since you have provided the purpose, I will address it. I don't believe the public records law should be utilized for the purpose of allowing citizens to conduct hand recounts of an election, especially one in which there was such a large quantity of votes cast. Wisconsin Statutes, Chapter 9, governs post-election actions, including a recount. Through this statutory chapter, the Wisconsin Legislature has set forth specific requirements about who has standing to petition for a recount and detailed regulations on how and when it should be conducted. The legislature has also included provisions on payment of the cost of conducting a recount. I believe public policy in Wisconsin requires that any recount of an election must be governed by Chapter 9 of the statutes. Citizens should not be able to conduct their own recount of an election by using the public records law of Chapter 19 with the consequence that my office and the taxpayers of Waukesha County pay for it. The fact

that multiple citizens are now attempting to perform their own recounts by misusing the public records law emphasizes my point and multiplies the cost of time and money to my office and the taxpayers.

Granting part of your request with a “no-touch” requirement

For the parts of your request that I have granted, it is my requirement that your clients will not be allowed to touch any election materials during inspection or copying. Given my duties under Wisconsin Statutes and the guidance from the GAB, I will not allow anyone from the public to touch election materials. Only my staff, as my designee, will be allowed to do so. For the parts of your clients’ public records request that I have granted, it is conditioned on this no-touch requirement.

To facilitate inspection or copying, my staff could photocopy or scan the election materials on equipment from my office and provide paper copies or scanned images, or my staff could handle the election materials while your clients view, inspect or photograph them. There will be a per page charge if my staff photocopies the materials and a per image charge if they scan the materials. Your clients will be required to pre-pay the costs of reproduction of records if the cost exceeds \$5.00. Waukesha County charges 25 cents per page for photocopies.

Be advised that I need advance notice to make staff available to assist you in handling the election materials your clients wish to inspect or copy. Because your request will take my staff away from their regular duties, I will only be able to make two staff available for several hours each day to assist you. Also, I must maintain a ratio of no more than my two staff to four of your clients. Please do not have your clients show up with a team of inspectors that consists of more than four people. This 2:4 ratio is necessary because it allows my staff to maintain control and security of the election materials.

Inspection will be allowed in a 2-hour block per day, Monday- Friday, in either the morning or afternoon. I am not able to schedule times between 11:00 am and 1:00 pm due to the lunch hour and office coverage I must maintain. The inspection will take place at the Waukesha County Administration Center where my office is located.

Reasons for my no-touch requirement:

I put in place the no-touch requirement for all members of the public because I am the election official with physical custody of the election materials at this time. I will not allow the materials to be touched, damaged, marked or altered in any way by members of the public. As County Clerk, I have an inherent duty to keep all election materials secure and unaltered. My no-touch requirement is a reasonable restriction of access under the Public Records law in Section 19.35 (1)(k), Wisconsin Statutes because it is imposed for the purpose of safeguarding the original election materials from damage or alteration.

Other statutory sections confirm the duty of a clerk to limit the physical handling of election materials. I see Section 5.87(1), Wisconsin Statutes, to be an example of how election materials should be handled after votes are cast. All proceedings at a polling place and at a central counting location shall be open to the public, but no person, except those employed and authorized for that purpose may touch any ballot, container, envelope, return or equipment. As another example, Section 7.51 describes how voted ballots are to be secured in sealed containers following an election. Also, Section 9.01(1)11, Wisconsin Statutes says that after an election, others are allowed to view and identify election materials and ballots, but mandates that only members of the board of canvassers and tabulators assisting them may touch any of the materials or ballots.

I have also based my no-touch requirement on guidelines from the GAB, which advised Clerks in 2011:

In lieu of paying for copies, the Public Records Law permits inspection of records. However, it is our opinion that election officials must maintain adequate security of all ballots and election records, and ensure supervision of any inspection until such time as the records are destroyed. Even after the recount deadline and retention period have passed, this is necessary in order to ensure the integrity of the election results and to ensure that records are not altered, affecting the ability of others to subsequently view or obtain accurate documents. Therefore, our advice to county and municipal clerks is that they may satisfy your request by taking steps such as monitoring any inspection of the ballots and election materials, requiring designated staff to open bags, maintaining a log of activity related to the inspection, requiring staff to handle original ballots, and, if necessary, scheduling a certain amount of time each day or week for staff to supervise the inspection.

These steps are authorized under section 19.35(1)(k), Wis. Stats., which permits records custodians to impose reasonable restrictions on the manner of access to an original record if the record is irreplaceable or easily damaged. Any mark on or alteration of election records during inspection can subsequently raise questions regarding the content of those records during the election process.

I am sure you would agree that you would want to be confident that you were inspecting ballots and records as they existed at the election if your inspection occurred after those materials were inspected by another requester. Whether there are additional costs associated with accommodating this type of inspection which are charged to the requester is a decision to be made by each records custodian.

My no-touch requirement is also designed out of fairness to other members of the public. As an election official, I must keep the election materials in an unaltered form so

I can assure any other citizens who make a request to inspect the same materials that they have not been damaged or altered. It is fair that they have the same opportunity to view the materials, regardless of the timing of their request.

Conclusion

Please contact me by phone at (262) 548-7010 to schedule a time for inspection or copying of the election materials for the parts of your request that I have granted. Because I am also scheduling inspection times for other citizens, inspection times for your clients might not take place on consecutive days.

If I do not hear from you by August 7, 2012, I will assume that your clients do not intend to proceed with the inspection or copying of these election materials. At that time I will proceed with storage or destruction of the election materials pursuant to statute and GAB guidelines.

I must inform you that my partial denial of your public records request is subject to review under Section 19.37(1) Wisconsin Statutes in an action for mandamus or by application to the local District Attorney or Attorney General.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kathy Nickolaus".

Kathy Nickolaus, MPA
Waukesha County Clerk