

Sunshine Laws Include Access to Voting Information

Robin Luce Herrmann

Butzel Long
luce-herrmann@butzel.com
248-593-3044

Certain documents relating to voting can be retrieved under Michigan's Freedom of Information Act ("FOIA"). On March 9, 2010, the Michigan Court of Appeals ruled in *Practical Political Consulting, Inc v Land* 287 Mich. App. 434; 789 N.W.2d 178 (2010), that the government should turn over certain information regarding voters in Michigan's 2008 Presidential Primary election.

The case originated with a FOIA request by a company called Practical Political Consulting. The company asked the Michigan Secretary of State Terri Lynn Land to turn over the printed name, address, and qualified voter file number of each elector in Michigan's 2008 Presidential Primary, as well as the "participating political party" ballot selected by that elector. Fulfilling the request would therefore have allowed Practical Political Consulting to see whether particular individuals chose Republican or Democratic ballots. The Secretary of State instead denied the request and relied on a statute that allegedly forbade the disclosure of the documents, as well as a provision under FOIA that protects individuals' privacy.

The Court of Appeals agreed with the trial court that the government should release the documents. The appellate court began by noting that the legislation that allegedly prevented disclosure of the documents had been repealed, and therefore couldn't relieve the obligation to produce the documents under FOIA.

The court then analyzed the Secretary's argument that the documents fit an exemption under FOIA that allows the government to withhold "information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." The information sought by Practical Political Consulting was not "of a personal nature" primarily because, although it disclosed

what type of ballot voters requested (e.g. Republican, Democratic), it did not disclose which candidates that voter ultimately supported.

Further, the court decided that releasing the information would not constitute a clearly unwarranted invasion of privacy because "[e]lections constitute the bedrock of democracy and the public's interest in the purity of such elections is of paramount importance." The Court of Appeals noted that "we cannot hold our election officials accountable if we do not have the information upon which to evaluate their actions," and losing accountability in our public officials would "risk the franchise itself."

In another development, an Attorney General Opinion issued in May 2010 (AG Op. # 7247) provides that voted ballots are subject to disclosure under FOIA. In very brief summary, this AG Opinion provides that:

Voted ballots, which are not traceable to the individual voter, are public records subject to disclosure under the Freedom of Information Act, MCL 15.231 *et seq.* The Secretary of State, in her role as the Chief Elections Officer, or the Director of Elections through the authority vested in that office, may exercise supervisory authority over local elections officials responding to a FOIA request for voted ballots by issuing directions for the review of the ballots in order to protect their physical integrity and the security of the voted ballots.

A person must be allowed to inspect or examine voted ballots, which are not traceable to the individual voter, and to receive copies of the ballots upon request subject to reasonable restrictions prescribed by the Secretary of State. The public body may charge a fee for the copying of the voted ballots as provided in FOIA.

A person requesting access to voted ballots, which are not traceable to the individual voter, under FOIA, is entitled to a response from a public body granting or denying the request within 5 to 10 business days. However, the public body in possession of the voted ballots may not provide access to the ballots for inspection or copying purposes until 30 days after certification of the election by the relevant board of canvassers.

If you have questions about these issues or any other FOIA/OMA issues, please contact a member of the Butzel Media Team:

Robin Luce Herrmann

Tel 248.593.3044

Email luce-herrmann@butzel.com

Joseph E. Richotte

Tel 313.225.7045

Email richotte@butzel.com

Jonathan F. Jorissen

Tel 248.258.3860

Email jorissen@butzel.com

Jennifer Dukarski

Tel 734.213.3427

Email dukarski@butzel.com