

MARK R. ANFINSON

ATTORNEY AT LAW

LAKE CALHOUN PROFESSIONAL BUILDING
3109 HENNEPIN AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55408

(612) 827-5611

FAX: (612) 827-3564

mrانfinson@lawyersofminnesota.com

June 23, 2009

Re: Request for Access to Rejected Absentee Ballots
And Related Documentation Pursuant to Minnesota
Government Data Practices Act

Dear Data Practices Responsible Authority and County Elections Official:

I write on behalf of KSTP-TV, KSTC-TV, WDIO-TV, KAAL-TV, and KSAX-TV for the purpose of requesting access to all rejected and therefore uncounted absentee ballots that were received in connection with the November, 2008 Minnesota general election. This request is made pursuant to the Minnesota Government Data Practices Act, Minn. Stat., ch. 13, and includes inspection along with possible copying of the documents.

We are also asking for access to any data that you maintain referring to rejected absentee ballots that were identified by the campaigns of U. S. Senate candidates Franken or Coleman as being subject to objection or challenge in conjunction with the post-election proceedings that followed the general election. Additionally, we desire to examine the return envelopes separate from the ballots, and other data you might maintain, that would disclose the reasons why the absentee ballots were rejected.

The absentee ballots themselves are subject to a data practices request because they clearly fall within the definition of "government data" found in section Minn. Stat., §13.02, subd. 7 ("all data collected, created, received, maintained or disseminated by any government entity regardless of its physical form, storage media or conditions of use."). Consequently, they are also subject to the presumption of public access that appears in §13.03, subd. 1 ("[a]ll government data . . . shall be public unless classified" otherwise). There would appear to be no such classification covering the ballots under either state or federal law.

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I am familiar with language appearing in §13.37, subd. 2 stating that "sealed absentee ballots prior to opening by an election judge" are private data on individuals. In my judgment, however, this statute does not restrict access to an absentee ballot itself, because the ballot contains no information that could be used to identify the voter. Most absentee ballots are of course mailed to election officials in return envelopes, and typically enclosed in a security envelope as well. While the envelopes may contain identifying data, once the envelopes are separated from the enclosed ballot, there is nothing by which the voter can be identified.

Thus the ballot is no longer "private data on individuals," since "data on individuals" is defined in §13.02, subd. 5 as "government data in which any individual is or can be identified as the subject of the data."

The same would be true of rejected absentee ballots received by other means, such as where the voter appeared in person to cast the ballot.

In making this request, I emphasize that my clients are not seeking access to any information by which the decisions of individual voters could be determined. We fully respect the sanctity of the private ballot, and the importance of voter confidentiality in the electoral process.

I would note that under §13.03, subd. 3, a government entity is required to allow any person to inspect and copy public government data at reasonable times and places, and "may not charge for separating public from not public data." Furthermore, section 13.03, subd. 3 directs that access to public government data shall be permitted "upon request," which has been interpreted to mean promptly and within a reasonable time.

If you conclude that you will not permit inspection of the ballots or other data as requested in this letter, the statute requires that you "shall cite the specific statutory section, temporary classification, or specific provision of federal law on which the determination is based," and that you do so "either orally at the time of the request, or in writing as soon after that time as possible." See §13.03, subd. 3(f). In addition, if you do decide to deny our request, then this letter serves as notice that you "certify in writing that the request has been denied and cite the specific statutory section, temporary classification, or specific provision of federal law upon which the denial was based," pursuant to the same statute.

Please contact me (and not my clients) as soon as you have reviewed my letter so that we can make arrangements to inspect the documents identified. For your information, our request for access has been submitted to all of the counties in the state, and the Secretary of State has been notified as well.

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If you or your attorney should have any questions or would like to discuss our request, simply let me know . I appreciate your assistance.

Yours truly,

Mark R. Anfinson