

State of Wisconsin\Government Accountability Board

212 East Washington Avenue, 3rd Floor
Post Office Box 7984
Madison, WI 53707-7984
Voice (608) 266-8005
Fax (608) 267-0500
E-mail: gab@wisconsin.gov
<http://gab.wi.gov>



JUDGE THOMAS H. BARLAND
Chair

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: July 7, 2011

TO: All Municipal Clerks

FROM: Nathaniel E. Robinson, Elections Division Administrator
Government Accountability Board

SUBJECT: Guidance regarding Wisconsin Citizens for Election Protection request

Municipal clerks in the senate districts conducting recall elections this summer have received a request from Attorney James Mueller on behalf of an organization called Wisconsin Citizens for Election Protection (WCEP), dated July 1, 2011. Several clerks have requested guidance from the Government Accountability Board in responding to the request. This memorandum provides the Board's guidance and recommendations specifically for clerks currently conducting recall elections, but also for all municipalities which may receive similar inquiries in the future.

WCEP makes two requests of clerks, which apparently are intended to illustrate whether machine counting of ballots is unreliable or inaccurate. As you know, the recent statewide recount, in which many of the ballots originally counted by machine were recounted by hand, gave us a direct demonstration of the overall accuracy of the voting equipment.

The first request of WCEP is to encourage municipal clerks in municipalities over 7,500 to request a waiver from the G.A.B. from the statutory requirement to use electronic voting equipment. That decision, of course, is up to each municipality and the G.A.B. will respond to any such requests. Section 5.40(5m), Wis. Stats. requires the governing body of the municipality seeking such a waiver to petition the G.A.B. for permission to use paper ballots and voting booths for a specific election.

Attorney Mueller's correspondence also indicates that, in municipalities which use voting equipment, WCEP observers may submit a public records request, asking that the observers be allowed to visually inspect each ballot on Election Night as election inspectors sort through them to identify write-in votes. While you and your election inspectors may wish to accommodate such a request, we do not believe that any provision of Wisconsin's election laws or Public Records Law requires that you do so on Election Night.

Observers are certainly entitled to watch the process of canvassing ballots after the polls close, but they are not permitted to interfere with or disrupt the process. Wis. Stats. §7.41. In the Board's opinion, election inspectors should focus on their specific statutory duties to canvass and secure ballots, and to forward results to the municipal clerk. If the request to view or photograph individual ballots will disrupt the canvassing process, distract inspectors from their duties, or delay completion of the process, we would discourage inspectors from granting the request of WCEP to inspect individual ballots on Election Night.

In addition, if a public records request is made to inspect ballots, such requests should be directed to the clerk as custodian of those records, not to election inspectors. Also, clerks should keep in mind that ballots must be secured until the time allowed for filing a recount petition, or appealing a recount, has expired, pursuant to §7.23(2), Wis. Stats. Absent a recount request or a pending public records request, ballots involving a federal office may be destroyed after 22 months, and ballots without a federal office may be destroyed 30 days after other elections. §7.23, Wis. Stats.

We suggest that you consult with your municipal attorney to use the balancing test for any public records request. However, because the election process is not completed until all recount deadlines have expired, it is the Board's opinion that public access to ballots should be denied prior to the expiration of any applicable recount deadline in order to preserve the integrity of the election.

We hope that this information is helpful and we are available to consult further with you or your municipal attorney regarding this guidance. If you have questions or comments, please feel free to contact our Help Desk at 608-261-2028.