



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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May 11, 2011

Mr. Shane Falk  
Staff Counsel  
Government Accountability Board  
212 East Washington Avenue, 3rd Floor  
Madison, WI 53707

Dear Mr. Falk:

You have advised our office that numerous municipal clerks have received public records requests from the Election Defense Alliance for the following information:

- A. [A] copy of the entire contents of the removable memory card (as those contents existed on or after 8:01 pm on April 5, 2011 or when the last ballot was cast for that polling location, whichever is later) used by the voting system which processed ballots of electors from the [municipality.]
- B. [A]ll system logs from all election sites within your jurisdiction.
- C. [A]ll event audit logs from each polling location within your jurisdiction.
- D. [A]ll error logs from each polling location within your jurisdiction.
- E. [A]ll audit logs from each polling location within your jurisdiction.
- F. [A]ll the absentee ballot envelopes from all election sites within your jurisdiction.
- G. [A]ny documents that account for the following:
  - a. how many ballots were delivered to each ward within your jurisdiction
  - b. how many ballots were used (voted, spoiled, duplicate, etc.) at each ward within your jurisdiction
  - c. how many ballots were unused from each ward within your jurisdiction
- H. [T]he roster book reconciliation pages signed by the poll workers from all election sites within your jurisdiction.
- I. [A] copy of the front of the bag that contains all the ballots made by poll workers during the course of the April 5, 2011 election.
- J. [T]he first page of the Inspectors' report GAB-104 for each ward within your jurisdiction.

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You also have advised us that numerous county clerks have received very similar public records requests from the Election Defense Alliance.

You further have advised us that the Government Accountability Board (“GAB”) has instructed all Wisconsin County Clerks and the Milwaukee County Election Commission (collectively, the “county clerks”) to maintain all spring election and recount election materials for all voting jurisdictions in their counties.

Update #11 dated May 2, 2011, from GAB Elections Division Administrator Nathaniel E. Robinson (“Mr. Robinson”) instructed the county clerks:

Please make sure that all election materials from both the Spring Election and Boards of Canvassers are maintained in the original format. Do not send any of your electronic voting equipment memory devices to the manufacturers / programmers until after the time period for appeals to the circuit court has passed. With potential litigation, the election materials may be necessary for any court action. The G.A.B. will provide notification to all county clerks when both the spring election and recount materials may be addressed per § 7.23 Wis. Stats. Thank you.

Update #12 dated May 3, 2011, from Mr. Robinson further instructed the county clerks:

In Update #11, the G.A.B. addressed retaining both the Spring Election and Boards of Canvassers records until after [sic] time period for appeal to the Circuit Court has passed. To further clarify, the county needs to retain all the election materials at the county headquarters until further notice is provided by the G.A.B.

As is widely known, a recount of the April 5, 2011, supreme court election is underway. As has been publicly reported, the time for Waukesha County to complete its recount has been extended by court order to May 26, 2011.

Pursuant to Wis. Stat. § 7.23(2), election materials may not be destroyed until a recount has been completed and the applicable appeal time has expired. Wisconsin Stat. § 7.23(2) also provides that “if there is litigation pending with respect to a recount at an election, materials may be destroyed and recording units or compartments may be cleared or erased only by order of the court in which litigation is pending.”

Wisconsin Stat. § 7.23(2) evinces a legislative determination that the integrity of election materials must be maintained until a recount has been completed; the applicable appeal time has expired, if no appeal is taken; or until a court order authorizes destruction, if litigation is pursued. The instructions GAB provided to the county clerks in Updates #11 and #12 effectuate the secure

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preservation of election materials necessary to comply with Wis. Stat. § 7.23(2) and to protect the evidentiary integrity of those materials if needed for subsequent litigation. The security and integrity of those materials cannot be assured if they are disrupted before conclusion of the Wis. Stat. § 7.23(2) time periods for copying, extraction, or other physical processes necessary to create copies responsive to the recent Election Defense Alliance public records requests described above.

You have explained that all Items A-J requested in the Election Defense Alliance public records requests are included in the election materials that must be preserved pursuant to Wis. Stat. § 7.23(2) and that GAB has instructed the county clerks to retain.

The right of access conferred by the Wisconsin Public Records Law applies only to records that exist at the time a request is made. The law contemplates custodial decisions being made with respect to a specific request at the time the request is made. 73 Op. Att’y Gen. 37, 44 (1984). An authority receiving a public records request that cannot be granted at the time the request is received need not hold that request open indefinitely until such time as access to the requested records may be provided.

The balancing test applicable to public records requests for records not specifically confidential by law requires a records custodian to balance the presumed public interest in disclosure of the records with other public interests weighing against disclosure of the records. Cf. Wis. Stat. § 19.35(1). This is a fact-specific analysis, based on the totality of circumstances that exist at a particular point in time. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 62, 284 Wis. 2d 162, 699 N.W.2d 551; *State ex rel. Morke v. Record Custodian*, 154 Wis. 2d 727, 733, 454 N.W.2d 21 (Ct. App. 1990) (sufficiency of denial measured as of time request was denied). The record custodian must determine whether the surrounding circumstances create an exceptional case not governed by the strong presumption of openness. *Hempel*, 284 Wis. 2d 162, ¶ 63.

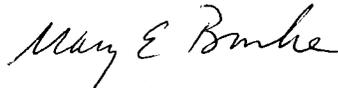
Under the totality of circumstances now existing with respect to the April 5 election records and Boards of Canvassers materials now in the custody of the county clerks, including the preservation mandate imposed by Wis. Stat. § 7.23(2) and the possibility of subsequent litigation regarding which the integrity of these materials must be maintained, municipal and county clerks could conclude that the Wis. Stat. § 19.35(1) balancing test requires denying the Election Defense Alliance public records requests at this time. Any possibility of inadvertent loss, damage, or other alteration that might occur in copying, extraction, or other duplication processes must be avoided to comply with the Wis. Stat. § 7.23(2) preservation requirements and the underlying public interests that statute embodies. A municipal or county clerk reasonably could determine that the public interests in satisfying those statutory preservation requirements by retaining the requested election records intact as they currently are secured by the county

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clerks outweighs any public interest in disclosure at this time, and therefore deny the pending Election Defense Alliance public records requests on that basis.

This advice about the public records law is provided pursuant to Wis. Stat. § 19.39. It does not constitute an opinion of the Attorney General pursuant to Wis. Stat. § 165.015.

Sincerely,

A handwritten signature in cursive script that reads "Mary E. Burke".

Mary E. Burke  
Assistant Attorney General

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