

State of Wisconsin\Government Accountability Board

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JUDGE DAVID G. DEININGER
Chair

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: July 3, 2012

TO: Wisconsin Municipal Clerks
Milwaukee Election Commission
Wisconsin County Clerk
Milwaukee County Election Commission

FROM: Ross Hein
Elections Supervisor
Government Accountability Board

SUBJECT: Public Records Requests: June 5, 2012 Election Materials

You are receiving this high-priority communication because it contains information that requires immediate attention.

We have received several inquiries regarding public records requests for June 5, 2012 election materials, including inspection of actual ballots and the contents of voting systems memory devices. These public records requests have been made by various requestors upon many clerks. In a [communication from the Director and General Counsel on June 27, 2012](#), clerks were provided with some guidance regarding factors to consider when responding to these public records requests. The June 27, 2012 communication established some requirements regarding maintaining a chain of custody and integrity of the June 5, 2012 election materials. These requirements intersect with the public records law in some circumstances.

It is the G.A.B.'s understanding that clerks and municipal attorneys are seeking more specific guidance regarding how to treat the public records requests, what to produce, and the mechanics of production, including allowable costs for production. Unfortunately, such guidance really is legal advice regarding the application of Wisconsin's public records law found in Wis. Stats. Chapter 19. As we have already informed clerks, the public records law is not within the jurisdiction of the G.A.B. and, therefore, we cannot provide definitive legal advice regarding the application of those statutes to the requirements to maintain a chain of custody and the integrity of the June 5, 2012 election materials. You and your counsel should comply with the G.A.B. requirements regarding maintaining the chain of custody and integrity of the June 5, 2012 election materials, as communicated on June 27, 2012. However, you and your counsel must independently review and apply requirements and limitations of the public records law to these requests.

You and counsel are advised to consider the impact, if any, of the recent Supreme Court decision *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65. In particular, please note the following: "This case is not about a direct denial of public access to records, but the issue in the present case directly implicates the accessibility of government records. The greater the fee imposed on a requester of a public record, the less likely the requester will be willing and able to successfully make a record request. Thus, the imposition of fees limits and may even serve to

deny access to government records. In interpreting the Public Records Law, we must be cognizant that the legislature's preference is for "complete public access" and that the imposition of costs, as a practical matter, inhibits access." *Milwaukee Journal Sentinel* at ¶ 5.

If your counsel requires legal advice regarding the application of the public records laws to these requests, including permissible chargeable location and other costs, and the impact of the requirement to maintain a chain of custody and the integrity of the June 5, 2012 election materials, your counsel should contact the Wisconsin Attorney General's Office as it has the authority to interpret and provide opinions or advice regarding the public records law.

In addition, if clerks are considering passing through vendor costs to produce the contents of the voting systems memory devices, please remind your counsel to consider the amended Wis. Stat. Sec. 19.35(3)(g), which restricts the amount of vendor fees a municipality or county may pass through to records requestors. This relatively recent legislative change was made in response to the Wisconsin Supreme Court decision, *WIREDATA Inc. v. Village of Sussex (WIREDATA II)*, 2008 WI 69, 310 Wis.2d 397 (Wis. 2008). Your counsel will have to analyze and properly weigh your facts with the new requirements of Wis. Stat. Sec. 19.35(3)(g), and the appropriate level of costs to produce any requested records. For example, your counsel may need to consider whether the cost charged by the vendor includes items such as overhead and profit that need to be excluded from the cost charged to the records requestor under Wis. Stat. Sec. 19.35(3)(g).

In the absence of a total withdrawal of the public records request, your counsel should also consider whether Wis. Stat. Sec. 19.35(5), requires that you retain the June 5, 2012 election materials and voting systems memory device records until the public records request is adequately resolved. If your counsel determines that you must retain the June 5, 2012 election materials and voting systems memory devices and you need to prepare for the Partisan Primary Election, your counsel should determine whether it is advisable that you lease different memory devices for the Partisan Primary Election from a vendor or borrow them from a municipality which is not similarly restrained by a public records request. Failure to properly analyze and assess this matter could result in liability of the municipality or county under the public records laws. In this context, your counsel could consider speaking with the requestors to determine whether they would officially withdraw their public records requests as they relate to the voting systems memory devices so that you can conduct Partisan Primary Election with the memory devices used at the June 5, 2012 election. Your counsel could advise that once withdrawn, Wis. Stat. Sec. 19.35(5), retention requirements no longer apply and you would be free to erase and reuse the memory devices.

As a reminder of previous G.A.B. email correspondence, clerks should also seek consultation with their municipal or corporation counsel regarding trade secret and open record provisions, as these issues may relate to specific public records requests. While there are some exemptions from production of certain records in the public records statutes, e.g., for copyrighted material, general trade secret claims do not automatically exempt production, which is why you need to consult with your counsel. For instance, if a manufacturer/programmer claims trade secret protections and requests that you deny a public records request, your counsel will have to carefully apply a balancing test to determine whether the manufacturer/programmer has supplied a sufficient basis to outweigh the strong public policy favoring disclosure of public records. This balancing test is very specific to each public records request and the subject matter, which requires individualized legal advice from your counsel. You should also note that certain manufacturers/programmers have open-source coding which does not hinder any disclosure in response to a public records request, so please be cautious if you do not consult your counsel but instead rely solely on information from another clerk. Your specific situation may be entirely different than another clerk's situation. Along with this Memorandum, please find an informal

opinion from the Attorney General's office which outlines the specific considerations regarding the application of the public records law to requests for claimed trade secret memory device records.

Ultimately, each county and municipality is subject to the application of Wisconsin's public records laws and individually responsible for compliance therewith. Failure to comply with public records laws does expose the counties and municipalities to civil penalties and potential attorney's fees. It is strongly recommended that you each obtain adequate legal counsel to appropriately comply with these public records requests, as well as maintain the chain of custody and integrity of the June 5, 2012 election materials.

If your municipal or corporation counsel has questions regarding these public records requests, they may contact G.A.B. Staff Counsel Shane Falk at (608) 266-2094 or Shane.Falk@wi.gov.