



STATE OF INDIANA

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August 22, 2008¹

J. Bradley King
Co-Director, Indiana Election Division
302 West Washington Street; Room E204
Indianapolis, Indiana 46204

Re: Informal Inquiry 08-INF-28 regarding provisional ballot materials

Dear Mr. King:

This is in response to your informal inquiry dated July 15, 2008. You write on behalf of the Indiana Election Division to inquire whether provisional ballot materials are disclosable public records pursuant to the Access to Public Records Act ("APRA") (Ind. Code 5-14-3). Pursuant to I.C. § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

BACKGROUND

Your inquiry concerns records, maintained by county circuit court clerks, containing information about provisional voters. You indicate that several circuit court clerks have recently received requests for access to records which contain information about the identities of provisional voters, information related to the validity of provisional voters' ballots, and information regarding whether particular provisional ballots were counted. Specifically, the requests are for copies of completed state forms PRE-4 (Challenge Affidavit of a Voter by a Challenger or Member of the Precinct Election Board/Affidavit of a Challenged Voter), PRO-2 (Provisional Ballot Security Envelope), and PRO-10 (Affidavit of Challenged Voter Concerning Proof of Identification Requirement) for the 2008 primary election.

As you explain and as Ind. Code 3-11.7 provides, the provisional ballot process is initiated by the execution of the PRE-4. The PRE-4 contains the affidavit of the challenger, setting forth the reason(s) for the challenge. In addition, it contains the voter's affidavit in response to the challenge and sets forth the voter's belief the voter is in fact a qualified voter in the precinct. Once the voter has completed the affidavit, the

¹ This opinion was originally issued on August 22, 2008. The Public Access Counselor amended the opinion on September 30, 2008, making two changes. Those two changes can be found in footnotes 2 and 3, both of which appear on page 7.

voter is provided a provisional ballot, upon which the voter indicates his or her selection of candidates and votes on public questions.

The voter then places the ballot in an envelope imprinted with a PRO-2 affidavit and completes that PRO-2 affidavit. In some counties, the PRE-4 and PRO-2 are printed on the same envelope to keep them from being separated. The completed and sealed provisional ballots resemble absentee ballots, and they are kept inside sealed envelopes until they are opened after the county election board makes a determination whether each ballot should be counted. All provisional ballots are kept separate from the other ballots in a precinct on election day. The provisional ballots are returned to the county election board after the polls close, and the board must determine, by noon on the tenth day after the election, whether the ballots are to be counted.

The county election board makes its determination regarding the validity of the provisional ballot using “all the information available to the county election board,” including any information on the PRO-10. The proceedings of the county election board in determining the validity of a provisional ballot are subject to the Open Door Law (Ind. Code 5-14-1.5). The board’s determination may be recorded on the PRO-2.

If the county election board determines the provisional ballot is invalid, the provisional ballot is marked “provisional ballot determined invalid.” The envelope containing the ballot remains sealed and is placed with other invalid provisional ballots in a sealed envelope or bag along with other ballot materials for each precinct. If the board determines the ballot is valid, the provisional ballot envelope is opened, the ballot is counted, and all counted ballots and related materials are placed in the same sealed envelope or bag as invalid provisional ballots. Political parties, certain independent candidates, and media are entitled to watchers at the location for counting provisional ballots.

The federal Help America Vote Act of 2002 (“HAVA”) required states to implement a provisional ballot program and required election officials to provide a free access system so provisional voters can find out the disposition of their ballots. 42 USC 15482(5)(B) provides that the appropriate election official shall establish a free access system by which individuals can learn the disposition of their ballots and learn why a ballot deemed invalid was not counted. The subsection provides the following:

The appropriate State or local official shall establish and maintain reasonable procedures necessary to protect the security, confidentiality, and integrity of personal information collected, stored, or otherwise used by the free access system established under paragraph 5(B). Access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot. *Id.*

Further, Indiana law contains language analogous to the HAVA provisions:

(a) As required by 42 U.S.C. 15482, a county election board shall establish a free access system such as a toll-free telephone number or an Internet web site that enables a provisional voter to determine:

(1) whether the individual's provisional ballot was counted; and

(2) if the provisional ballot was not counted, the reason the provisional ballot was not counted.

(b) As required by 42 U.S.C. 15482, the county election board shall establish and maintain reasonable procedures to protect the security, confidentiality, and integrity of personal information collected, stored, or otherwise used on the free access system established by the board under subsection (a).

(c) As required by 42 U.S.C. 15482, the county election board shall restrict access to the information available under subsection (a) about a provisional voter's ballot to the individual who cast the ballot.

(d) The county election board shall prescribe written instructions to inform a provisional voter how the provisional voter can determine whether the provisional voter's ballot has been counted.

I.C. § 3-11.7-6-3.

You provide information about additional state law considerations related to this issue. You indicate that after the election, except for unused ballots or “affidavits received by the county election board under IC 3-14-5-2 for delivery to the foreman of the grand jury,” the circuit court clerk “shall seal the ballots and other material during the time allowed to file a verified petition or cross-petition for a recount of votes or to contest the election.” I.C. § 3-10-1-31.1. You further indicate that affidavits under I.C. § 3-14-5-2 include affidavits prescribed by Title 3 for use on election day to determine the eligibility of a precinct election officer or a person who wishes to cast a ballot. This includes the PRE-4, PRO-2, and PRO-10. Those materials are copied, the copies are provided to the secretary of state, and then the envelope or bag is resealed and delivered to the foreman of the grand jury in the next session. If a recount or contest is filed, the records are typically impounded by order of a court or the Indiana Recount Commission. At that point, they are no longer subject to the disclosure requirements of the APRA. I.C. §§ 3-12-11-16; 3-12-6-19.

Given the foregoing, you ask the following questions:

1. Is some or all of the information about a voter’s provisional ballot, including the information contained on the documents specifically requested (PRE-4, PRO-2, and PRO-10) subject to public inspection and copying at any time after the election or is some or all of this information confidential or otherwise exempt from disclosure?
2. Does it matter when this provisional ballot material is requested? As a related question, should the circuit court clerk even have the original PRE-4, PRO-2 and PRO-10 affidavits since they are required to reseat the bag or envelope which contains these records

and deliver these records to the foreman of the grand jury when next in session after copying and transmission to the secretary of state? As another related question, would copies of these records obtained by the secretary of state or retained by the circuit court clerk be subject to a public records request?

3. If the documents are confidential, do the county election board members and provisional ballot counters have a duty to maintain the confidentiality of these documents to the extent possible while conducting proceedings under I.C. 3-11.7-5 to determine the validity and count provisional ballots?

ANALYSIS

The public policy of the APRA states, "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." I.C. §5-14-3-1. The county election board and circuit court clerk are public agencies for purposes of the APRA. I.C. §5-14-3-2(m). Any person has the right to inspect and copy the public records of a public agency during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a).

Here, the questions you submit relate to forms used by county election boards and circuit court clerk offices in the administration of provisional balloting, a process mandated by the HAVA and set forth at I.C. 3-11.7. The specific forms at issue are the PRE-4, PRO-2, PRO-10, to which I collectively refer as "provisional ballot materials."

Your first question is the following:

Is some or all of the information about a voter's provisional ballot, including the information contained on the documents specifically requested (PRE-4, PRO-2, and PRO-10) subject to public inspection and copying at any time after the election or is some or all of this information confidential or otherwise exempt from disclosure?

Generally, any records created, received, retained, maintained, or filed by or with a public agency must be made available for inspection and copying upon request. *See* I.C. §5-14-3-1, requiring disclosure, and I.C. §5-14-3-2, defining public record. The provisional ballot materials are received by a county election board and circuit court clerk's office, and as such they are public records.

The APRA sets forth a list of types of public records which are excepted from disclosure under section 3 of the APRA and *may not* be disclosed by a public agency unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery. Among those are the following:

- (1) Those declared confidential by state statute.
 - ...
 - (2) Those required to be kept confidential by federal law.
- I.C. §5-14-3-4(a), *emphasis added*.

A public employee or official who knowingly or intentionally discloses information classified as confidential by state statute commits a Class A misdemeanor. I.C. §5-14-3-10(a).

As you indicate, the HAVA required states to implement a provisional ballot program and required election officials to provide a free access system so provisional voters can find out the disposition of their ballots. 42 USC 15482(5)(B) provides that the appropriate election official shall establish a free access system by which individuals can learn the disposition of their ballots and learn why a valid deemed invalid was not counted. The subsection provides the following:

The appropriate State or local official shall establish and maintain reasonable procedures necessary to protect the security, confidentiality, and integrity of personal information collected, stored, or otherwise used by the free access system established under paragraph 5(B). Access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot.”

42 USC 15482

Further, Indiana law contains language analogous to the HAVA provisions:

(a) As required by 42 U.S.C. 15482, a county election board shall establish a free access system such as a toll-free telephone number or an Internet web site that enables a provisional voter to determine:

- (1) whether the individual's provisional ballot was counted; and
- (2) if the provisional ballot was not counted, the reason the provisional ballot was not counted.

(b) As required by 42 U.S.C. 15482, the county election board shall establish and maintain reasonable procedures to protect the security, confidentiality, and integrity of personal information collected, stored, or otherwise used on the free access system established by the board under subsection (a).

(c) As required by 42 U.S.C. 15482, the county election board shall restrict access to the information available under subsection (a) about a provisional voter's ballot to the individual who cast the ballot.

(d) The county election board shall prescribe written instructions to inform a provisional voter how the provisional voter can determine whether the provisional voter's ballot has been counted.

I.C. § 3-11.7-6-3.

Subsection (c) provides specific guidance regarding what shall be restricted – “access to the information available under subsection (a) about a provisional voter’s ballot.” The information listed in subsection (a) is information concerning whether the individual’s ballot was counted and if not, the reason it was not counted. Subsection (c) provides that access to this information shall be restricted only to the individual who cast the ballot. Based on this provision, it is my opinion it is clear that I.C. § 3-11.7-6-3 requires the election board (and as such the clerk) to withhold from public inspection and copying information concerning whether an individual’s ballot was counted and if not, the reason it was not counted. It is my opinion the election board does not violate the provision by providing a general summary of the results of provisional ballots (e.g. number received, number counted, tally of votes for the number counted). In fact, this information is necessary to complete the election results. Further, I.C. §§ 3-11.7-5-28 and 29 require the ballot counters to make and deliver to the news media a certificate showing the total number of provisional ballot votes received by each candidate and on each public question.

The statute does not provide a definition for “personal information,” which is required by I.C. § 3-11.7-6-3(b) to be maintained as confidential. “When interpreting a statute the words and phrases in a statute are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself.” *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. Ct. App. 1998). Definitions for and references to the term “personal information” can be found in a number of other sections in the Indiana Code. Those definitions and references generally refer to any information which describes, locates or indexes anything about an individual, including but not limited to name, social security number, address, telephone number, and driver license number. *See* I.C. § 4-1-6-1(b); I.C. § 4-1-11-3; I.C. § 5-14-3-4(b)(20) and (21); I.C. § 9-14-3.5-5; I.C. § 24-4.9-2-10.

It is my opinion that, as applied here, personal information refers to any information which can identify an individual voter. I.C. § 3-11.7-6-3(b) requires the election board to maintain the confidentiality of any personal information maintained in the free access system. Based on this provision, it is my opinion the Indiana General Assembly has declared confidential any information which identifies an individual voter and is maintained in the free access system. From a practical standpoint, it is my opinion this means any information collected from the provisional ballot materials and used in the free access system must be maintained as confidential.

In my opinion, the provisional ballot statutes make the provisional ballot materials (PRE-4, PRO-2, and PRO-10) confidential. Further, the provisional ballot statute lacks a provision that clarifies the confidentiality applies only to certain aspects of the materials and would allow release of certain materials. A provision related to absentee ballot materials, found at I.C. § 3-10-1-31.1(f), does that:

This subsection does not apply to ballots [which are confidential under I.C. § 3-10-1-31.1(c)]. Notwithstanding subsection (c), if a county voter registration office determines that the inspection and copying of precinct

election materials would reveal political parties, candidate, and public questions for which an individual cast an absentee ballot, the county voter registration office *shall keep confidential only that part of the election material necessary to protect the secrecy of the voter's ballot.*
I.C. § 3-10-1-31.1(f), *emphasis added.*

Absent a provision like the foregoing, it is my opinion all provisional ballot materials have been declared confidential by state statute. As such, a public agency may not disclose the records unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery. *See* I.C. § 5-14-3-4(a)(1).

You also ask the following questions:

Does it matter when this provisional ballot material is requested? As a related question, should the circuit court clerk even have the original PRE-4, PRO-2 and PRO-10 affidavits since they are required to reseal the bag or envelope which contains these records and deliver these records to the foreman of the grand jury when next in session after copying and transmission to the secretary of state? As another related question, would copies of these records obtained by the secretary of state or retained by the circuit court clerk be subject to a public records request?

In my opinion, it does not matter when the provisional ballot materials are requested. The confidentiality provisions of I.C. § 3-11.7-6-3 do not contain a start or end time or period. As such, it is my opinion the confidentiality exists from the time the records are created until they are destroyed pursuant to Title 3. If the records are not destroyed, they would be accessible for public inspection seventy-five years after creation. *See* I.C. § 5-14-3-4(d).

As a related issue, you inquire whether the clerk should even have the original provisional ballot materials. I.C. § 3-11.7-5-2² requires the county election board to mail a copy of each affidavit against an illegal voter to the secretary of state and then replace the affidavits within the bag or envelope, reseal the bag or envelope and deliver it to the foreman of the grand jury when next in session. Nothing in the provision allows or requires the county election board or clerk to make or retain copies of the materials. Based on a lack of any instruction to retain a copy of the materials, it is my opinion that neither the county election board nor clerk should retain copies of the materials.³ To the extent the clerk retains a copy of the materials, it is my opinion the materials remain confidential, pursuant to I.C. § 5-14-3-4(a)(1).

² This citation should be I.C. § 3-14-5-2(b).

³ While I believe this statement is true as it relates to I.C. § 3-14-5-2, there appears to be at least some ambiguity or perhaps conflicting guidance on this issue. I.C. § 3-11.7-5-19 through I.C. § 3-11.7-5-24 seem to require the clerk to retain the records or copies of the records. Because there is some conflict or ambiguity, I retract my statement that the clerk should not retain copies of the materials. Because of the ambiguity, this may be a matter better addressed by a court or the legislature.

I.C. § 3-11.7-5-2(b)(2) specifically requires the county election board to mail a copy of each affidavit to the secretary of state. I.C. § 5-14-3-6.5 provides the following:

A public agency that receives a confidential public record from another public agency shall maintain the confidentiality of the public record.

The secretary of state is a public agency, pursuant to I.C. § 5-14-3-2(m). Because the provisional ballot materials are confidential public records, the secretary of state must maintain the confidentiality of provisional ballot materials received from the county election board.

Finally, you pose the following question:

If the documents are confidential, do the county election board members and provisional ballot counters have a duty to maintain the confidentiality of these documents to the extent possible while conducting proceedings under I.C. 3-11.7-5 to determine the validity and count provisional ballots?

In short, my answer to this question is yes. The county election board members and provisional ballot counters have a duty to maintain the confidentiality of the provisional ballot materials to the extent possible while conducting proceedings under I.C. 3-11.7-5 to determine the validity and count provisional ballots. While I.C. 3-11.7-5 sets forth specific guidelines for handling voted provisional ballots (e.g. I.C. § 3-11.7-5-7 regarding order of counting and laying ballots upon table), it is my opinion the county election board and provisional ballot counters can follow those specific requirements while still maintaining the confidentiality of the provisional ballot materials. Based on my experience at a recount hearing for a state senate primary race for which uncounted absentee ballots were discovered during the recount process and considered and counted during the public hearing, I know that maintaining the confidentiality of the records will require careful handling of and attention to the ballots and ballot materials. But unless or until the provisional ballot statutes are amended to allow otherwise, it is my opinion the confidentiality of the provisional ballot materials must be maintained during the ballot counting proceedings.

Please do not hesitate to contact me if I can further assist in any way.

Best regards,



Heather Willis Neal
Public Access Counselor