

ADVISORY 2008-22

September 4, 2008

To: ALL COUNTY BOARDS OF ELECTIONS

Re: Privacy of Provisional Voter and Provisional Ballot Information

The Secretary of State's office has received questions about the privacy of personal information disclosed by voters in connection with provisional voting. Specifically, the issue has been presented whether personal information disclosed on provisional ballot envelopes is a public record or is protected from disclosure by law. This advisory is intended to provide clear guidance to the 88 county boards of elections on this issue to ensure that every county board of elections treats similar information in a similar manner. This will ensure that all Ohio elections are administered fairly, consistently and according to law.

Background

Ohio voters casting a provisional ballot pursuant to R.C. 3505.18 through .183 must complete a provisional ballot envelope and affirmation statement in addition to voting the ballot itself. The voter casting a provisional ballot must provide personal information so that the appropriate county board of election may determine:

- whether the voter is the person he or she purports to be;
- whether the voter is properly registered to vote;
- whether the voter cast his or her provisional ballot in the correct precinct; and
- whether the provisional ballot should count toward the official results of the election.

A voter who casts a provisional ballot records personal information on the provisional ballot envelope, may supply other information for the purposes of identification and may complete an affirmation statement including, but not limited to, the voter's:

- name
- address
- date of birth
- driver's license number
- social security number (or part thereof)
- bank account or other financial information
- other residential information (e.g., utilities)
- employment information (paychecks)
- other information that meets Ohio's identification requirements

Under federal and Ohio law, state or local elections officials must create a "free access system" for every election. Every voter whose ballot was cast provisionally may use this free access system to determine whether the provisional ballot he or she cast has been or will be counted, and if not, the reason the board disqualified the ballot.

Relevant Law

Generally speaking, Ohio's public records law provides that any item containing information on a fixed medium that is created, received, or sent under the jurisdiction of a public office, and that evidences or documents the organization, functions, policies, decisions, procedures, operations, or other activities of the office, is a public record (see R.C. 149.011(G)). Additionally, R.C. 149.43(B) generally provides that, upon request, all public records must promptly be made available for inspection and that copies of public records must be made available within a reasonable time to someone who requests copies.

However, R.C. 149.43(A) provides that certain types or classes of records held by government agencies and offices are not public records and are not subject to mandatory disclosure. Specifically, R.C. 149.43(A)(1)(v) recognizes that records "the release of which is prohibited by state or federal law," are not public records and are not subject to disclosure.

Ohio law governing statutory construction also provides that, if:

"a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail." R.C. 1.51.

Both federal and state law provide for confidentiality of personal information provided by a voter that is used by a board of elections to determine whether a provisional ballot cast by a voter is to be counted, and this personal information is also used by the voter to gain access to the board's records to determine if his or her ballot was counted:

The appropriate state or local election 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 [provisional voter] free access system . . .** R.C. 3505.181(B)(5)(b) and 42 U.S.C. 15482(a)(5)(B). (Emphasis added).

Further, R.C. 3505.181(B)(5)(b) provides that:

[a]ccess to **information about an individual ballot shall be restricted to the individual who cast the ballot . . .**
(Emphasis added.)

Correspondingly, 42 U.S.C. 15482(a)(5)(B) also provides, that

[a]ccess to **information about an individual provisional ballot shall be restricted to the individual who cast the ballot.** (Emphasis added.)

Discussion

R.C. 149.43(A)(1)(v) expressly provides that records, “the release of which is prohibited by state or federal law,” are not public records. The three statutory sections last quoted above do expressly prohibit disclosure, except to the voter, of certain information provided by a voter in connection with provisional voting. Moreover, R.C. 3505.181(B)(5)(b) contains a specific prohibition against disclosure which prevails over the general requirement that Ohio’s governmental records be disclosed to the public upon request.

Ohio’s Public Records Act and the more specific statutes governing provisional voting discussed above illustrate competing public policies. In general, Ohio public records law reflects a legislative determination that governmental records should be freely available to the public. On the other hand, specific legislative enactments of both the U.S. Congress and the Ohio General Assembly mandate that information about an individual provisional *ballot* is restricted to the person who cast the ballot. Personal information provided on the provisional ballot envelope and used in connection with the provisional voting free access system is not a public record and access to the information is restricted to the individual who cast the ballot. These two legislative goals, one of free access to governmental records, and the other of protecting a voter’s confidential information, may be harmonized only as to the names of persons who voted provisionally and the election precincts in which they voted, since the statutory prohibition is as to information about *an individual provisional ballot*.

R.C. 3505.181(B)(5)(b) and 42 U.S.C. 15482(a)(5)(B), quoted above, expressly provide that the “confidentiality” of personal information “used by” the provisional voter free access systems must be “protected.” Confidentiality is defined as “secrecy; the state of having the dissemination of certain information restricted.” Black’s Law Dictionary Seventh Edition, 1999, p. 294. The statutes at issue also provide that “[a]ccess to information about” a particular ballot “shall be restricted to the individual who cast the ballot.”

When a voter casts a ballot provisionally, the personal information he or she provides is necessarily “used by” the provisional ballot free access system. This is so because personal information is necessary to allow election officials to implement the system (i.e., election officials must be able to identify a person attempting to use the free access system as the person who cast a specific ballot provisionally). Election officials do this by comparing information provided by the caller to information provided by the person who cast the ballot.

When a voter appears at a polling place to vote, he or she must supply not only his or her name, but also his or her address and a form of required identification. Information “about an individual ballot” includes personal information supplied to authorize the casting of the ballot as well as information concerning the validity of the ballot.

The statutes thereby authorize only “the individual who cast the ballot” to access “information about an individual ballot.” This means that only the voter who cast a ballot provisionally is entitled to discover whether his or her ballot was counted, and only the names of voters and the precincts in which they cast their provisional ballots is subject to public disclosure. Any other information should not be released to anyone other than a voter himself or herself, including whether or not that ballot was counted as valid.

I understand that there may be valid policy reasons why it might be deemed appropriate to release further public information than the names of voters who cast provisional ballots and the precincts in which they cast such ballots, such as contact information for those voters and whether their ballots counted. However, I am constrained by both federal and state law as discussed in this advisory. I may not disregard that law.

I therefore interpret R.C. 3505.181(B)(5)(b) and 42 U.S.C. 15482(a)(5)(B) as precluding the release of personal information, except for the name and precinct of the voter, provided by a voter in connection with the provisional voting process. Personal information other than the name and precinct of the voter is entitled to confidentiality, including information as to whether a particular ballot voted provisionally was counted.

This conclusion does not prohibit the release of records maintained by boards of elections that indicate in general or collective figures the number of provisional ballots cast, the number of provisional ballots rejected, the reasons for the rejection of classes of provisional ballots, or the number of provisional ballots within those classes, or any other general or collective information, as long as those records do not associate names of voters with counting or rejection or reasons for rejection of provisional ballots in a precinct, county or this state.

Conclusion

The controlling statutes cited above establish that “personal information” provided by a voter casting a provisional ballot is exempt from Ohio’s public records law. The names of provisional voters and the precincts in which they voted may be released, but personal information about an individual provisional ballot, including information as to whether the voter’s ballot was counted, is exempt from disclosure and must not be released in compliance with the specific provisions of R.C. 3505.181(B)(5)(b) and 42 U.S.C. 15482(a)(5)(B).

Accordingly, only lists of the names of provisional voters and the precincts in which they cast their provisional ballots are subject to disclosure, and any other information about the voter, including whether or not his or her ballot was counted or rejected, **may not** be disclosed, except to the individual provisional voter. Such information must remain protected and confidential whether requested during the ten-day period following an election or thereafter.

If you have additional questions about this advisory, please contact any of the elections attorneys in my office, at 614-466-2585.

Sincerely,

Jennifer Brunner