

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT
CASE TYPE: CIVIL OTHER

Al Franken for Senate,

Case No. _____

Plaintiff,

vs.

Ramsey County, Joseph Mansky,
and John Does and Jane Does,

**PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION FOR A
TEMPORARY RESTRAINING ORDER
AND TEMPORARY INJUNCTION**

Defendants,

Minnesota has codified its “fundamental commitment” to making the operations of its institutions open to the public. *Prairie Island Indian Cmty. v. Minn. Dep’t of Pub. Safety*, 658 N.W.2d 876, 883 (Minn. Ct. App. 2003). As the Minnesota Government Data Practices Act (MGDPA) plainly states, absent some express provision to the contrary, a “presumption [exists] that government data are public and are accessible by the public for both inspection and copying.” Minn. Stat. § 13.03, subd. 1. Yet defendant Ramsey County has disregarded these mandates with respect to information that most critically requires public oversight: information relating to the disenfranchisement of would-be voters. As a result, plaintiff Al Franken for Senate (“the Franken Campaign”) has been forced to seek access to the information through this request for emergency relief.

The need for the information is urgent. In less than a week, a manual recount will begin in a Senate race between Al Franken and Norm Coleman. Before the recount can begin, the

State Canvassing Board must convene to certify the results of the initial vote count. As a result of these expedited timelines, preparations by all involved parties are already underway, with governmental officials in the process of tallying the votes for next week's certification. As the certification, recount, and related processes unfold, the importance of transparency, accessibility, and timeliness cannot be overstated. Minnesota law reflects the urgency of these requirements. Exercising its right under the MGDPA, the Franken Campaign asked Ramsey County to provide it with the names, addresses, and reason for rejection attributable to each absentee ballot rejected by Ramsey County election officials. The defendant has refused access to this information, and, as a result, the Franken Campaign has already been irreparably harmed.

The Franken Campaign respectfully requests that this Court issue a temporary restraining order and temporary injunction requiring that Ramsey County disclose immediately the data the Franken Campaign has requested.

Statement of Facts

The election between Al Franken and Norm Coleman for a seat in the United States Senate took place on Tuesday, November 4, 2008. This election resulted in a virtual tie, with the number of votes counted for each candidate differing by fewer than 210 out of a total of nearly 3 million cast. A difference this slight triggers an automatic recount, pursuant to Minn. Stat. § 204C.35.

Before the recount can begin, however, the State Canvassing Board must convene on Tuesday, November 18, 2008, for the purpose of preparing and certifying a report detailing the votes received and allowing the manual recount of the ballots to begin. Minn. Stat. § 204C.33, subd. 3. Certification requires county canvassing boards to canvass the general election returns and the State Canvassing Board to canvass the certified copies of the county canvassing board

reports. Minn. Stat. § 204C.33, subs. 1, 3. The recount is scheduled to begin the day following the certification (November 19), and an election contest may be initiated at any time. At the time of the instant filing, the process of canvassing had already begun and is currently well in progress.

In the few weeks that will decide the outcome of the election, one issue will remain critical: the treatment of absentee ballots. Pursuant to statute, there are only four specific grounds upon which an absentee ballot may be rejected. *See* Minn. Stat. § 203B.12, subd. 3 (“There is no other reason for rejecting an absentee ballot.”) Determining whether the governing law has been applied properly is possible only if certain data—the absentee voters’ names, their addresses, and the reasons for any rejections—are made available. Without this data, neither the candidates nor the public can tell whether a ballot should be accepted or denied. Nor is it possible to gather additional evidence that might be necessary to establish a ballot’s validity.

On November 9, the Franken Campaign provided Ramsey County with a written MGDPA request, and on November 11, 2008 provided a supplemental request and legal authority for the requests. The Franken Campaign asked for the names and addresses of all persons who submitted absentee ballots for the November 4 general election, but whose absentee ballots were rejected, and the reasons for the rejection. Ramsey County refused to provide this information. In an e-mail dated November 12, County Attorney Darwin Lookingbill stated that “Ramsey County’s position remains the same”: It would not provide the information.

With its refusal, Ramsey County has broken from the precedent set by City of Brooklyn Center, which on November 12, 2008, provided the Franken Campaign with exactly the information it requested: the names of voters whose absentee ballots were rejected, the address

for each voter, and the reason for the rejection. Officials at Brooklyn Center made no indication that provision of this information posed legal or logistical burdens.

Ramsey County's refusal also has the effect of denying representatives from Norm Coleman's campaign the information to which the public is entitled. Representatives from Norm Coleman's campaign have submitted analogous data practices requests, and they presumably have been met with the same response.

As a result of the Ramsey County's refusal to comply with the MGDPA, the Franken Campaign has respectfully sought relief from this Court.

Legal Argument

I. THE STANDARD FOR A TEMPORARY RESTRAINING ORDER.

A temporary restraining order ("TRO") is available under Minn. R. Civ. P. 65.01 to preserve the status quo until a hearing on an application for a temporary injunction can be conducted. The standard for a TRO is the same as that for a temporary injunction. *See M.G.M. Liquor Warehouse Int'l, Inc. v. Forsland*, 371 N.W.2d 75, 77 (Minn. Ct. App. 1985).

A court is to weigh five factors when determining whether it should issue a TRO or a temporary injunction:

1. The nature and background of the relationship between the parties preexisting the dispute.
2. The harm to be suffered by plaintiff if relief is denied as compared to that inflicted on defendant if it is granted pending trial.
3. The likelihood that one party or the other will prevail on the merits.
4. The aspects of the fact situation, if any, which permit or require consideration of public policy.

5. The administrative burdens involved in judicial supervision and enforcement.

Metropolitan Sports Facilities Commission v. Minnesota Twins Partnership, 638 N.W.2d 214, 221 (Minn. Ct. App. 2002), *review denied* (Feb. 4, 2002) (citing *Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965)).

II. THE FRANKEN CAMPAIGN IS ENTITLED TO A TEMPORARY RESTRAINING ORDER.

A. The Preexisting Relationship Favors a TRO.

The preexisting relationship between the parties is based on the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. § 13.01 *et seq.*, and Minnesota's Election Laws. Under these provisions, as discussed below, the Franken Campaign has a right to access the data it has requested. The refusal of defendant to provide the data impermissibly alters the relationship between the parties by infringing on clearly established rights under both election law and the MGDPA.

B. The Harm that Plaintiff Would Suffer Absent a Temporary Restraining Order Far Outweighs Any Harm to Defendant

With each passing hour, the Franken Campaign is irreparably harmed in its efforts to ensure that each vote validly cast is counted and to prepare for its participation in the procedures that will decide this election. By contrast, the County of Ramsey will suffer no harm from providing information that, even absent plaintiff's request, it must organize and maintain.

The Franken Campaign's paramount goal is to ensure that every vote validly cast in this election be counted. Nearly 3 million votes were cast across 87 counties. Some percentage were cast by absentee ballot — and, in all likelihood, some percentage of those were erroneously rejected. *See* Minn. Stat. § 203B.12, subd. 3 (setting forth the limited grounds upon which an absentee ballot may be rejected). Without the information it has requested, the Franken Campaign cannot so much as identify the number of voters whose absentee ballots should have

been counted, much less prepare for and respond to the disenfranchisement of these individuals. It cannot determine whether and when the governing law has been applied properly, and it cannot gather additional evidence that might be necessary to establish a ballot's validity. Meanwhile, the clock is ticking: Within a week, the state canvassing board will have met and the recount begun; and, soon thereafter, the time for a contest will have passed. In short, the process of determining which candidate Minnesota voters have placed into office is already well underway, and, as a result of defendant's refusal to comply with the law, the Franken Campaign has its hands tied.

Ramsey County, by contrast, suffers no harm by providing the requested information. The data is neither burdensome to compile nor voluminous. Indeed, it almost certainly has already been compiled either as a part of the precinct reconciliation process or the county canvassing board process. The City of Brooklyn Center made this clear when, on November 12, 2008, it provided the Franken Campaign with exactly the information it requested: the names of voters whose absentee ballots were rejected, the address for each voter, and the reason for the rejection. At no time did the Brooklyn Center officials indicate that provision of this information posed any legal or logistical burden.

C. The Franken Campaign Is Likely to Prevail on the Merits.

1. The MGDPA Entitles the Franken Campaign to the Data It Has Requested.

The law is clear: the Franken Campaign is entitled to the data identified in its MGDPA request.

The MGDPA "establishes a presumption that government data are public and are accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public." Minn.

Stat. § 13.01, subd. 1. “Because of [Minnesota’s] commitment to transparency in our public institutions, courts construe the MGDPA ‘in favor of public access.’” *International Broth. of Elec. Workers, Local No. 292 v. City of St. Cloud*, 750 N.W.2d 307, 312 (Minn. Ct. App. 2008) (internal quotation marks omitted). The names, addresses, and reasons for rejection associated with uncounted absentee ballots are government data that must be made available to the public—which is not only the right answer, but the obvious answer.

In denying the Franken Campaign’s request, Ramsey County cited Minn. Stat. § 203B.12, subd. 7 as purported justification. The MGDPA explains that “[d]isclosure of names of voters submitting absentee ballots is governed by section 203B.12, subdivision 7.” Minn. Stat. § 13.607, subd. 7. Section 203B.12, subd. 7, in turn, states that “[t]he names of voters who have submitted an absentee ballot return envelope to the county auditor or municipal clerk may not be made available for public inspection until the close of voting on election day.” This supplement to the MGDPA’s general rule comes as no surprise. Though absentee voters can vote earlier than regular voters, information about those votes cannot be released early. Section 203B.12, subd. 7 applies to a certain, narrow subset of data for a certain, limited period of time. After that time has expired, the provision has no effect, and no justification exists to withhold the information the Franken Campaign has requested. There is no “specific statutory section, temporary classification, or specific provision of federal law” that exempts the requested information from disclosure. Minn. Stat. § 13.01, subd. 1.

This conclusion is entirely consistent with the rest of Minnesota election law, which provides that the name, address, year of birth, and voting history of each registered voter in the county is part of a “public information list” available for inspection. *See* Minn. Stat. § 201.091, subd. 4. The identification of absentee ballots that were rejected is even more important, and it is

no surprise that Minnesota law requires the disclosure of this very information. “Voting history” specifically includes late or rejected absentee ballots. *See* Minn. Stat. § 201.171 (“Although not counted in an election, a late or rejected absentee or mail ballot must be considered a vote for the purpose of continuing registration.”). Rejecting an absentee ballot is a step that no government should take lightly nor seek to conceal by refusing to disclose such information. Public trust and confidence in our electoral process demands transparency and disclosure of such information.

Accessibility to governmental data is so important that the MGDPA provides that anyone who has been denied public data may recover damages, costs, and attorney fees, and, in some instances civil penalties and exemplary damages, while willful violation of the MGDPA is a misdemeanor and is just cause for suspension without pay or dismissal. *See* Minn. Stat. § 13.09. There is ample case law emphasizing the need to construe the MGDPA in favor of transparency. *See, e.g., Prairie Island Indian Cmty. v. Minn. Dep’t of Pub. Safety*, 658 N.W.2d 876, 883-84 (Minn. Ct. App. 2003). It is difficult to imagine an area in which the need for transparency is greater than in the administration of our electoral system. Public confidence and trust in our elections depend to a great degree upon public participation in the process and public access to information about the administration of the electoral system, with “[c]onfidence in the integrity of our electoral processes . . . essential to the functioning of our participatory democracy.” *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006).

2. Arguments Proffered by Defendant Are Unavailing.

When Ramsey County denied the Franken Campaign’s MGDPA request, it responded with a short statement suggesting that three concerns led to its refusal. None is availing.

Ramsey County first claimed that nothing in the MGDPA required it to identify the names of voters whose ballots were rejected. This is incorrect. The MGDPA creates a

presumption that government data are public and are accessible by the public for both inspection and copying, *see* Minn. Stat. § 13.01, subd. 1, and the data the Franken Campaign requested falls under this presumption.

Second, Ramsey County claimed that the MGDPA does not require it to create data. This is a non sequitur. The Franken Campaign is asking for information already in Ramsey County's possession: the names, addresses, and reason for rejection attributable to each absentee ballot rejected by Ramsey County election officials. It is the same information provided by the City of Brooklyn Center. If Ramsey County's claim is based on the assumption that it does not have this information on hand and available for review, then the County has violated other provisions of the MGDPA, including Minn. Stat. § 13.03, subd. 1 ("The responsible authority in every government entity shall keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use.") and subd. 2 (a) ("The responsible authority in every government entity shall establish procedures, consistent with this chapter, to insure that requests for government data are received and complied with in an appropriate and prompt manner.").

Finally, Ramsey County made a vague reference to its aversion to opening ballot envelopes. Again, this is a non sequitur: If Ramsey County rejected a ballot without opening the envelope, the reason necessarily should be evident from the outside of the envelope. If Ramsey County's aversion is to opening the envelopes containing rejected ballots, which Ramsey County has a duty to securely maintain, the statutes provide that the secure envelopes may be "opened by proper authority for examination" and a "record of access ... maintained during the period for contesting elections." Minn. Stat. § 204C.28, subd. 1.

D. Public Policy Militates In Favor of a Temporary Restraining Order.

Public policy militates in favor of a temporary restraining order, for numerous reasons. At the outset, the MGDPA represents a “fundamental commitment to making the operations of our public institutions open to the public.” *Prairie Island Indian Cmty.*, 658 N.W.2d at 883-84. As a result, courts must construe the MGDPA “in favor of public access.” *Id.*; *see also International Broth. of Elec. Workers, Local No. 292 v. City of St. Cloud*, 750 N.W.2d 307, 312 (Minn. Ct. App. 2008); *Demers v. City of Minneapolis*, 468 N.W.2d 71, 73 (Minn. 1991).

In addition, disclosure of the information helps the Franken Campaign ensure that all valid votes are counted, thereby protecting the most fundamental of rights. The right to vote is the defining and singular privilege of citizenship. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’”); *see also Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 729 (Minn. 2003) (“[N]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”) (quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992)); *In re Candidacy of Independence Party Candidates Moore v. Kiffmeyer*, 688 N.W.2d 854, 860 (Minn. 2004) (“Denial of a candidate’s access to the ballot implicates important constitutional rights that are central to preservation of our democracy: the right to vote and the right to associate in pursuit of common political ends.”) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983)). Not only the Franken Campaign, but the voters whose ballots were rejected and thus deprived of an opportunity to vote in this election, have an overriding interest in knowing whether these votes was counted and, if not, why they were not counted.

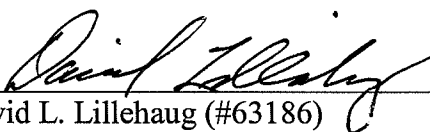
E. The Administrative Burdens Would Be Minimal.

The Franken Campaign does not seek a remedy that would require significant Court administration. Governmental entities routinely provide information of the nature the Franken Campaign has requested. What is more, as demonstrated by the ease with which the City of Brooklyn Center was able to provide the information in question, the request imposes no particular burden and is easily fulfilled.

Conclusion

For all of these reasons, a temporary restraining order and temporary injunction should issue. A proposed order is submitted herewith.

Dated: November 13, 2008


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