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FILED
Court Administrator

STATE OF MINNESOTA

DEC 31 2009

DISTRICT COURT

COUNTY OF RAMSEY

By BH Deputy

SECOND JUDICIAL DISTRICT

KSTP-TV, KSTC-TV, WDIO-TV,
KAAL-TV and KSAX-TV

File No. 62-CV-09-9240

Plaintiff,

VS.

Ramsey County, a political subdivision of
The State of Minnesota,

Defendant,

ORDER

This matter came on for hearing before the Honorable Dale B. Lindman on December 10, 2009 pursuant to the motion for dismissal pursuant to Rule 12.02(e) of the Minnesota Rules of Civil Procedure (MRCP), or in the alternative, for summary judgment pursuant to MRCP, Rule 56. Mark R. Anfinson, Esq. appeared on behalf of the Plaintiff. Darwin J. Lookingbill, Esq. appeared on behalf of the Defendant. Based upon the arguments of counsel at the time of the hearing, the memorandums and affidavits submitted by counsel and all of the records and proceedings herein, the Court makes the following:

ORDER

1. Defendant's motion for dismissal pursuant to MRCP, Rule 12.02(e) is **DENIED.**
2. All rejected and unopened absentee ballots from Minnesota's 2009 general election in the possession of Ramsey County are hereby declared public data that may be viewed and copied by the Plaintiffs subject to the voter's right of privacy.

3. Ramsey County is ordered to take all steps necessary, including redaction, to assure that the privacy of the voter and the sanctity of the ballot is maintained.

Dated: December 31, 2009

BY THE COURT:

A handwritten signature in black ink, appearing to read "Dale B. Lindman", written over a horizontal line.

Dale B. Lindman
Judge of District Court

MEMORANDUM

The Plaintiffs in this matter are television news organizations headquartered in Minnesota. By this action the Plaintiffs “seek a declaratory judgment establishing that certain information maintained by Ramsey County relating to absentee ballots cast in the 2008 state general election is classified as accessible to the public pursuant to the provisions of the Minnesota Government Data Practices Act.” (MGDPA). Plaintiffs seek access to thousands of rejected absentee ballots cast in the 2008 general election. These ballots were rejected under the criteria found in Minnesota Statute §203B.12 or §203B.24 and never counted. These unopened ballots remain in the possession of local election officials, including those in Ramsey County.

Plaintiffs, through their attorney, previously submitted a letter to Ramsey County in June 2009 requesting that pursuant to MGDPA they be allowed to inspect and copy “all rejected and therefore uncounted absentee ballots that were received in connection with the November, 2008 Minnesota General Election.” Plaintiffs have also requested access to other data maintained by Ramsey County including data “that would disclose the reason why the absentee ballots were rejected.”

Ramsey County has denied Plaintiffs access to these rejected absentee ballots and now moves for dismissal of the action pursuant to Minnesota Rules of Civil Procedure Rule 12.02(e) stating that the Plaintiffs’ complaint fails to state a claim upon which relief can be granted. In the alternative, the County seeks summary judgment on its claim for judgment declaring the unopened and rejected absentee ballots to be private data as defined in M.S. §13.02.

ISSUE

The issue to be decided in this case is whether, pursuant to the MGDPA, the rejected and unopened absentee ballots become public data which may be viewed and copied when the general election, including all challenges and recounts, is finally concluded; or do those rejected and unopened absentee ballots remain private data not available for review and copying by Plaintiffs. The parties agree that this issue is a question of law to be decided by the Court.

ANALYSIS

It should first be noted that the information sought by the Plaintiffs is not limited to the "rejected absentee ballots." Indeed, that phrase is somewhat of a misnomer. It is not the ballots that have been rejected but rather the envelopes containing the ballots which allegedly do not comply with state election laws. If all that the Plaintiffs were attempting to view was information "which would disclose the reasons why the absentee ballots were rejected," there is no need to open the envelopes containing the ballots. Acceptance or rejection of the unopened ballots was presumably based solely on the sufficiency of the information contained on the face of the unopened envelope. Accordingly, opening the envelope will provide no additional information regarding why the ballot was rejected. All information related to the reason for rejection should be on the face of the unopened envelope.

This Court has previously ruled on the issue of production for viewing and copying of the absentee ballot envelopes. That ruling provided that the envelopes not be opened. It is significant that that prior ruling occurred in advance of the challenge

and ballot recount. The question is now that the recount and legal challenges have been concluded, what becomes of the unopened rejected absentee ballots. It is the position of the Defendant that these documents are subject to the MGDPA. The only statutory provision dealing with the status of unopened absentee ballots is M.S. §13.37, subd. 2 of the MGDPA which provides that “sealed absentee ballots prior to opening by an election judge” are classified as nonpublic data and thus are not available for viewing or copying. However, the statute and the MGDPA do not specify what becomes of unopened rejected absentee ballots after the election, including all challenges, are complete. It is the position of the Plaintiffs that these ballots then become public data. Since the legislature has failed to definitively state what becomes of rejected absentee ballots, it becomes the function of this Court to determine what was intended.

Minnesota Statute 13.01, subd. 3 entitled “Scope” provides that 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.” In *Prairie Island Indian Community v. MN. Dept. of Public Safety*, 658 N.W.2d 876, (Minn. App. Ct. 2003) the Court decided that Minnesota courts should construe such laws as the MGDPA in favor of public access. The Prairie Island Court also determined that when a document contains both public and nonpublic information, it is appropriate to redact protected nonpublic information and produce only the public information. *Id.* Thus it appears that both legislative intent and stare decisis favor public access when the issue is in doubt.

Applying these stated objectives to the case in question, it appears that prior to

final determination of the election results the rejected absentee ballots constitute not public data and/or nonpublic data pursuant to M.S. §13.02 subd. 8a and subd. 9.

However, once the election has concluded, and all challenges have been exhausted, the policy of the MGDPA, i.e. that there is a presumption that records maintained by governmental agencies are open and accessible to the public, weigh strongly in favor of finding that the rejected absentee ballots are now either public data not on individuals and/or public data on individuals. See M.S. §13.02, subd.14 and 15.

The Defendant has argued that allowing the rejected absentee ballots to be opened at this time will in some way breach the sanctity of the polling booth and the privacy of the voter. However, that right of privacy is no greater breached by the opening of the rejected ballots as it is by the opening of the non-rejected ballots. In normal course the non-rejected absentee ballots are opened by the election judge and the ballot itself is separated from the envelope. That is exactly the same process that can be used if the rejected absentee ballots are opened. The identity of the voter and the content of his ballot is at no greater risk whether opened by an election judge or by an authorized individual after the election has ended. The ballot itself can be separated from the envelope immediately, and if handled properly, the voters privacy will be safe. Further, if any information can be gleaned from the opening of the rejected absentee ballot which is contrary to the right of privacy, the nonpublic information can be redacted and separated from the public information.

Defendant has also argued that the temporary injunction issued by the Supreme Court in 2008 during the recount process requires dismissal of this case. However, there is no indication by the Supreme Court that the injunction was intended to be

permanent. The injunction was issued during the recount as a determination of which absentee ballots could be opened and counted and which could not. The election is now at an end and there is no reason to believe the injunction was intended to outlive its intended purpose.

Defendant argues further that the provisions of M.S. §203B.12 and M.S. §204B.40 prohibit the opening of the absentee ballots. As with M.S. §13.37, however, these statutes only provide for the handling of absentee ballots while the election process, including any recount or legal challenge, is under way. These statutes do not address the status of the rejected absentee ballots after the election process has ended.

CONCLUSION

During the election process, including any recounts and/or court challenges, sealed absentee ballots are classified as nonpublic data prior to opening by an election judge. However, once the election process and all challenges have been concluded, the MGDPA is silent on what becomes of the rejected absentee ballots. The statutory scheme of the MGDPA strongly favors a finding that those rejected absentee ballots become public data. If a voter's right to a private vote is deemed to be at risk, the procedure for opening the ballot can easily be designed to assure that the identity of the voter and the sanctity of the ballot is not breached. This Court does not believe that the Supreme Court's temporary injunction was intended to determine public data status of the rejected and unopened absentee ballots upon final conclusion of the general election. Finally, the Minnesota election statutes do not address the MGDPA status of the rejected absentee ballots after the election process has ended.

Based on the above, this Court finds that the Plaintiffs complaint does state a valid claim for relief and that Defendant's motion for dismissal pursuant to Minnesota Rules of Civil Procedure Rule 12.02 (e) is hereby denied. Further, this court finds as a matter of law that the unopened and rejected absentee ballots in question in this case are public data which may be reviewed and copied by the Plaintiffs.

D.B.L.