



## **Misleading and Incorrect Framing of the Issues**

2. The discovery issues and requests before the Court are incorrectly framed at page 2 of the Brief by Plaintiffs characterizing their first issue in the form of an allegation of misconduct by the Defendant (i.e. withholding information) and their second issue narrowly rooted in the context of a Texas Attorney General's opinion about redaction of voter registration records.

3. The discovery issues to be decided by the Court are as follows:

Whether or not Defendant has adequately responded to Plaintiffs' discovery in this case?

Whether additional discovery involving unconditional access to Defendant's database is a fishing expedition or would be justified and, if justified, under what conditions (redaction; protective order, etc.)?

4. To address these issue the Court should first look to what discovery has already been provided and second to what justification and precedent, if any, may exist for the extraordinary request to wander freely in a government database filled with highly sensitive personal information, made confidential by statute.

## **Plaintiffs' Discovery To Date**

5. Contrary to the assertions and innuendo in Plaintiffs' "Background" at page 2-5 of the Brief, Defendant has provided extensive good-faith discovery including producing 18,850 pages of redacted discoverable documents, answering extensive interrogatories, responding to requests for admissions and presenting six witnesses for deposition, all at Harris County taxpayers expense.

6. In addition, Defendant complied with the Court's Minute Order of May 28, 2009, and produced additional detailed information on a CD which included details concerning the voter registration applicants who received a letter of incomplete or were rejected initially plus the

registered voters who were either cancelled or purged. Plaintiffs erroneously assert that “the CD contains little information.” (Brief page 4). In fact, the CD contains four lists of voter applicants or registrants that are in two formats, one is a text delimited format that can be transferred into any database and one is in the ACCESS database format. These lists include the name, address, date of birth and response code information for each entry. The lists produced on CD complied with the Court’s Minute Order.

7. For further clarity, Defendant is attaching hereto as Exhibit A an expanded index of all the information previously provided on the CD.

8. With the names and other details of the individuals identified on the lists provided on the CD Plaintiffs have adequate information to contact those individuals named in the lists and investigate any theoretical wrongdoing to determine if anyone who was actually finally rejected (as opposed to not registered due to an incomplete application) should have been registered. The details on the lists already provided also allow Plaintiffs to contact those individuals involved in purges and cancellations.

9. This is not a case where little or no discovery has been provided. But discovery aside, on December 1, 2008, when the First Amended Complaint was filed Plaintiffs represented to the Court that “**Plaintiffs have collected evidence** that the Defendant has taken the following actions, in addition to others, that has resulted in the loss of the voting franchise by thousands of voters...” (Doc # 10 at item 5). If that allegation was true then there is even less justification for the extraordinary discovery sought since Plaintiffs already have evidence of wrongdoing to make their case and the additional discovery requested would be unjustified.

#### **Mandatory Unconditional Access/Outside The Normal Rules of Civil Procedure**

. Plaintiffs’ first argument (Brief pages 5 to 10), is as follows:

“I. Disclosure of voter registration records is mandatory under the NVRA, and not subject to court discretion or limitation of scope.”

10. At page 6 of the Brief, Plaintiffs argue that (1) “unconditional access” to all relevant voter registration records is “mandatory” and (2) Plaintiffs’ request for unconditional access is to be handled “outside the normal rules of civil procedure for discovery requests.” Plaintiffs cite 42 U.S.C.A. § 1973gg-6(i), but that statute expressly addresses “each State” (not local officials). If the doctrine of *express mention, implied exclusion*, referred to by Plaintiffs (Brief page 15) is correct then the *express mention* of the term “each State” to the *implied exclusion* of a county or elected official means just what it says and the section applies only to a State. While their arguments may be true as to the Attorney General of the United States under § 1973gg-6(i), Plaintiffs have not shown themselves to be entitled to stand in the shoes of the Attorney General.

11. The cases of *Kennedy v. Lewis* and *Kennedy v. Lynd* that Plaintiffs cite for their extraordinary argument are both cases from the 1960’s involving the United States Attorney General, not involving individuals or organizations.

12. Plaintiffs cite no case where private citizens or organizations have been allowed unconditional access to wander in a government database. Such action would not be justified in this case.

13. Plaintiffs argue “there is no justification for treating Plaintiffs in this case any differently” than the Attorney General of the United States. But the Plaintiffs are indeed different than the Attorney General because they are private citizens and private entities who are significantly different from the Attorney General in that they are not subject to the political controls of elected officials and the voters. Furthermore, they have shown no concern or respect for the private information of the citizens when they show disdain for the Defendant’s efforts to follow the law and protect the confidential information of Harris County citizens.

14. Finally, and most astonishingly, Plaintiffs assert that **“This Court, under the statutes, does not have discretion to deny Defendant’s production of the federal election records, or limit its scope.”** (Brief page 10).

15. Defendant strongly disagrees and will continue in good faith to follow the law and the orders of this Court.

**Production Pursuant to Federal Election Laws Versus State Disclosure Restrictions**

16. Plaintiffs’ second argument (Brief pages 11 to 19), is as follows:

**“II. Plaintiffs’ demand for production of voter registration records was made pursuant to federal election laws and therefore this request is not subject to disclosure restrictions imposed by state Open Records Laws.”**

17. Defendant has resisted producing un-redacted confidential information because (1) Texas Election Code § 13.004(c-1) requires that **“the registrar shall ensure that the information listed in Subsection (c) is excluded from disclosure”**, (2) with identify theft rampant in current society personal information must be handled carefully and (3) Plaintiffs have demonstrated a cavalier lack of care or concern for the confidential information of the citizens of Harris County.<sup>1</sup>

18. Texas Election Code § 13.004 limits what the Harris County Voter Registrar can do with information in his possession, as follows in relevant part:

**§13.004 of the Election Code. Recording and Disclosure of Certain Information by Registrar**

(c) the following information furnished on a registration application is confidential and does not constitute public information for purposes of Chapter 552, Government Code:

- (1) a social security number;
- (2) a Texas driver’s license number;
- (3) a number of a personal identification card issued by the Department of Public Safety;
- (4) an indication that an applicant is interested in working as an election judge; or

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<sup>1</sup> Plaintiffs have already provided to Defendant documents containing un-redacted social security and Texas driver’s license numbers.

(5) the residence address of the applicant, if the applicant is a federal judge or state judge, or defined by Section 13.0021, and included an affidavit submitted under Section 15.0215.

(c-1) The registrar shall ensure that the information listed in Subsection (c) is excluded from disclosure.

19. Further, Texas Election Code § 65.060 makes the same basic information confidential when placed on a provisional ballot affidavit.

20. Plaintiffs references on page 18 of the Brief to correspondence from Andy Taylor and from Mike Stafford, and references on page 19 to an Open Records Letter Ruling by the Texas Attorney General do not change the clear and unequivocal duty placed on the Voter Registrar by § 13.004(c) and (c-1) of the Election Code to exclude the specific information from disclosure.

21. Throughout the discovery process Defendant has made every effort to follow the Federal Rules of Civil Procedure and to follow the other statutory authority relevant to his office including both the Texas Election Code and the Texas Open Records Act.<sup>2</sup>

22. Defendant understands that Plaintiffs claim this Court has no authority to control Plaintiffs' unconditional access to anything they seek from the Defendant's voter registration records and that Texas statutes are pre-empted by federal law as Plaintiffs interpret that law. Defendant believes that Plaintiffs misinterpret and overstate the law concerning both the lack of authority of this Court and Plaintiff's right to the unconditional disclosure of confidential information.

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<sup>2</sup> Confidential information protected by Texas Government Code, Chapter 552 generally, including §§ 552.101-2 (generally; personnel file; personal ID number from the Texas Department of Public Safety), 552.117 (information of a government official or government employee), 552.1175 (information of a peace officer, jailer, security officer, or TDCJ employee), 552.130 (driver's license number), 552.147 (social security number), (any indication that the individual is interested in working as an election judge), and/or which is protected by the Constitutional right to privacy and for which Plaintiff has not demonstrated a compelling need. Fed. R. Evid. 403.

23. In conclusion, Defendant points out that (1) Plaintiffs misstate the facts concerning the amount of detailed discovery already provided in this case, (2) Plaintiffs present no justification for their dismissive attitude toward the authority of this Court and (3) Plaintiffs present no justification or authority for the overbroad unconditional fishing expedition that they request. Plaintiffs have no basis in law or in equity for the extraordinary discovery which they seek. The taxpayers of Harris County should be protected from the ongoing financial and resource costs of the overreaching of Plaintiffs' discovery.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22<sup>nd</sup> day of June, 2009, a true and correct copy of the foregoing pleading was served in accordance with the Federal Rules of Civil Procedure on the following:

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TEXAS DEMOCRATIC PARTY v. LEO VASQUEZ

Cause No. 4:08-CV-3332

Index to CD--Response to court request 05/28/09

Document #	Description
0022	Vemacs Notice with codes to describe reasons for sending the following categories of notices: (A) Cancellation Notices, (B) Examination/Confirmation Notices, (C) Incomplete Notices, (D) Reject Notices, (E) Correction Notice
0023	Vemacs Notice with codes to describe reasons for sending (A) Cancellation Notices
0024-0042	Sample cancellation letter for non-citizens  Example of a voter who received the above Notice letter —Voter file of Jesus Martinez
0043-0056	Sample cancellation letter for felons  Example of a voter who received the above Notice letter —Voter file of Roger Darnell Scyrus
0057-0080	Sample cancellation letter for mentally incompetent persons  Example of a voter who received the above Notice letter —Voter file of Charles Nicholas Underwood
0081-0109	Sample cancellation letter for persons whose residence address is out of Harris County  Example of a voter who received the above Notice letter —Voter file of Andrew Powell Brice
0110-0125	Sample cancellation letter for persons who have moved out of county  Example of a voter who received the above Notice letter —Voter file of Cory Allen Rasmussen
0126-0145	Sample cancellation letter for voters who have submitted a written request to cancel their registration  Example of a voter who received the above Notice letter —Voter file of Scott Anthony Guysi
0146	Vemacs Notice with codes to describe reasons for sending (B) Examination/Confirmation Notices
0147-0176	Sample letter to confirm a voter's residence address

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	<p>Example of a voter who received the above Notice letter —Voter file of Thomas Patrick Cox Sr.</p>
0177-0188	<p>Sample letter stating that we have received information that voter is not a citizen</p> <p>Example of a voter who received the above Notice letter —Voter file of An Cong Le</p>
0189-0205	<p>Sample letter to the family to verify that a voter is deceased</p> <p>Example of a voter who received the above Notice letter —Voter file of Raymond P. Jones</p>
0206-0222	<p>Sample letter that we have received a notice that a registered voter has claimed to be a non-citizen on a jury summons</p> <p>Example of a voter who received the above Notice letter —Voter file of Carlos R. Padilla-Lopez</p>
0223	<p>Vemacs Notice with codes to describe reasons for sending (C) Incomplete Notices</p>
0224-0248	<p>Sample letter stating that the residence address on the application is not found on the Harris County Street Guide. Additional information is required, such as the subdivision, apartment complex, and cross street</p> <p>Example of a voter who received the above Notice letter —Voter file of Patrick Weldon Covington</p>
0249-0270	<p>Sample letter stating that the citizenship question on the application is not checked</p> <p>Example of a voter who received the above Notice letter —Voter file of Rose Marie Melle Passaretti</p>
0271-0294	<p>Sample letter stating that an applicant failed to provide a valid residence address</p> <p>Example of a voter who received the above Notice letter —Voter file of Susan Denise Imhoff Pace</p>
0295-0336	<p>Sample letter stating that an applicant failed to include TDL, Personal ID #, or SSN</p>

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Index to CD--Response to court request 05/28/09

	<p>Example of a voter who received the above Notice letter —Voter file of Shirley Ann Medina</p>
0337-0357	<p>Sample letter stating that the application was not signed</p> <p>Example of a voter who received the above Notice letter —Voter file of Walter Lee Hill Jr.</p>
0358-0372	<p>Sample letter stating applicant did not list a date of birth</p> <p>Example of a voter who received the above Notice letter —Voter file of Vernon L. Morgan</p>
0373-0387	<p>Sample letter stating that the signature does not match the printed name on the application</p> <p>Example of a voter who received the above Notice letter —Voter file of Lindsey Erin Fitzpatrick</p>
0388-0415	<p>Sample letter stating that a business address was used as a residence address</p> <p>Example of a voter who received the above Notice letter —Voter file of Christina Ezquivel</p>
0416-0441	<p>Sample letter stating that the applicant did not check either the “yes” or “no” box in answer to the citizenship question</p> <p>Example of a voter who received the above Notice letter —Voter file of Ryan Matthew Soroka</p>
0442	<p>Vemacs Notice with codes to describe the reasons for (D) Reject Notices</p>
0443-0453	<p>Sample letter to applicants who have not reached 17 years, 10 months of age</p> <p>Example of a voter who received the above Notice letter —Voter file of Joshua Allan Washington</p>
0454-0466	<p>Sample letter to an applicant who claimed to be a non-citizen on the voter registration application</p> <p>Example of a voter who received the above Notice letter —Voter file of Adekunle F. Ngwa</p>
0477-0490	<p>Sample letter to a voter who has been declared mentally</p>

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	<p>incompetent by a court</p> <p>Example of a voter who received the above Notice letter—Voter file of Andrew D. Novak</p>
0491-0506	<p>Sample letter to an applicant who attempted to use a Statement of Residency form as an initial voter registration application</p> <p>Example of a voter who received the above Notice letter—Voter file of David Craig Clewis</p>
0507	<p>Vemacs Notice with the code to describe a (E) Correction Notice that is sent to a voter who was issued duplicate certificate numbers</p>
0508-0523	<p>Sample letter to a voter who was issued duplicate certificates numbers</p> <p>Example of a voter who received the above Notice letter --Voter file of Paula Isabel Collins</p>
Excel spreadsheet	<p>Spreadsheet that lists the categories of cancellations, and the number of cancellations in each category</p>
Comma delimited text file	<p>Cancelled Voters—can be converted to any database</p>
Comma delimited text file	<p>Incomplete Notices—can be converted to any database</p>
Comma delimited text file	<p>Purged Voters—can be converted to any database</p>
Comma delimited text file	<p>Reject Notices—can be converted to any database</p>
Access Database	<p>Four databases:  Voters whose registrations were cancelled;  Voters who received Incomplete Notices;  Purged voters; and  Voters who received Reject Notices</p>