

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

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LEAGUE OF WOMEN VOTERS, <i>et al.</i> ,	:	
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Plaintiff,	:	
	:	Case No. 3:05-CV-7309
v.	:	
	:	Chief Judge Carr
J. KENNETH BLACKWELL, <i>et al.</i> ,	:	
	:	
Defendants.	:	
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PLAINTIFFS' STATUS REPORT ON DISCOVERY

Pursuant to the Court's March 23, 2006 Order, Plaintiffs hereby submit the following status report on outstanding discovery issues and disputes.

BACKGROUND

As the Court instructed during the last status conference, on March 24, 2006 Plaintiffs sent Defendants a letter, a copy of which is attached hereto as Exhibit A, setting forth outstanding discovery issues, including scheduling depositions and deficiencies in Defendants' document production.¹ Counsel met and conferred telephonically on March 30, 2006 about the issues identified in that March 24 letter.

During the March 30 meet and confer, counsel for Defendants stated that he was unable to discuss the outstanding disputes with respect to Defendant Blackwell and could only provide

¹ A copy of Defendants' Response to Plaintiffs' First Set of Document Requests is attached hereto as Exhibit B.

information about Defendant Taft.² Defense counsel reported that the office of Defendant Taft had but two responsive documents, although counsel is re-checking that assertion as to one category of documents. Defense counsel also reported that Defendant Taft was making a blanket assertion of “high ranking government official” privilege with respect to many of the potential witnesses and deponents identified by Plaintiffs. Defendants also maintained their prior assertions that neither the Governor nor the Secretary of State has even a single e-mail about election issues. Despite Plaintiff’s efforts, defense counsel have not provide any updates regarding the questions raised about Defendant Blackwell’s document production (except for obvious field reports), or the availability of witnesses from the Secretary of State’s office.

The parties also discussed the status of Plaintiffs’ discovery obligations, although without the benefit of prior notification from Defendants’ counsel about what specific issues would be raised during the meet and confer session. Nonetheless, the only outstanding dispute raised by Defendants and not resolved during the meet and confer involved two 30(b)(6) depositions which Plaintiffs believe were improperly and defectively noticed by Defendants.³ Plaintiffs are preparing a more formal response to those deposition notices, hopefully to resolve the matter short of a motion for a protective order.

DEPOSITION DISCOVERY

On November 18, 2005, prior to the discovery stay, Plaintiffs served three 30(b)(6) deposition notices, attached hereto as Exhibits C, D, and E, on Defendants. As discussed with

² Mr. Coglianese further stated that he had made repeated requests to Defendant Blackwell’s office for information relevant to the disputes and had not yet received a response.

³ Defendants also attempted to resurrect the issue of discovering the Plaintiff Leagues’ membership lists, but Plaintiffs believe that has been conclusively resolved against Defendants by their failure to move to compel production of such information prior to the deadline set by the Court in its October 21, 2005 Order (which deadline was November 15, weeks prior to the Court’s Order staying discovery).

this Court during the March 23 status conference, Plaintiffs' March 24 letter informed Defendants that Plaintiffs planned to proceed with the depositions during the first two week of April and requested that Defendants provide Plaintiffs with the availability of their 30(b)(6) witnesses for depositions. Plaintiffs also informed Defendants that they intended to serve a fourth 30(b)(6) notice in the interest of further streamlining discovery. To date, Plaintiffs have not heard back from Defendants regarding the availability of 30(b)(6) witnesses. As such, Plaintiffs plan to notice 30(b)(6) witnesses for April 12, 13, and 14, 2006.

Similarly, on November 11, 2005 and November 22, 2005, Plaintiffs sent letters to Defendants, attached hereto as Exhibits F and G, identifying certain of Defendants' former and current employees for deposition. Defendants' March 24 letter repeated an earlier request that Defendants advise Plaintiffs as to whether Defendants' counsel represented the individuals named and requested that Defendants provide the witnesses' availability for deposition during the period April 15, 2006 - May 15, 2006. To date, Defendants have not provided Plaintiffs with any of this information with respect to individuals from the Secretary of State's office. With respect to individuals from the Governor's office, defense counsel provided some information orally about the employment status of a few persons, including descriptions of their scope of duties. But in response to Plaintiffs identification of the Governor's Chief of Staff, Deputy Chief of Staff, and Chief Counsel, defense counsel made blanket assertions of a so-called "high ranking government official" privilege.

So far as Plaintiffs are aware, based on preliminary research, there is no such "high ranking government official" privilege recognized either in Ohio or federal law. In addition, since privileges are to be narrowly construed, it is improper to assert them in comprehensive fashion to block any and all questioning of a witness. Moreover, if "high ranking government

official” privilege is to be some sub-species of legally recognized governmental protection, such as executive or deliberative process privilege,⁴ Defendants’ assertion should be accompanied by evidence that the necessary factual predicates for each assertion of each privilege is really present. Defendants have not supplied or even proffered such evidence.

Plaintiffs plan to begin issuing deposition subpoenas for the requested employees shortly.

DOCUMENT DISCOVERY

Plaintiffs’ March 24 letter also set forth questions and concerns raised by Plaintiffs’ review of Defendants’ document production.

For the Court’s convenience, Plaintiffs’ outstanding concerns regarding Defendants’ document production are summarized below.

A. General Concerns Regarding Defendants’ Document Production

- As set forth in Plaintiffs’ March 24 letter, Defendants’ production does not appear to be made as the documents were maintained in the ordinary course of business, as it is not possible to determine the custodian for the documents Defendants have produced to date. Plaintiffs asked Defendants to confirm that documents were produced as kept in the ordinary course of business, and, if so, asked that Defendants provide a means of determining the custodian of produced documents.
- Plaintiffs’ November 11 letter, as well as its March 24 letter noted that there were significant deficiencies in Defendants’ e-mail and electronic production, including the fact that it appears neither Defendant Blackwell nor Defendant Taft produced any responsive e-mail. In particular, Plaintiffs’ November 11 letter specifically lists the individuals whose e-mail Plaintiffs believe are responsive and requested that these individuals’ e-mail be produced.
- Contrary to the Court’s instructions on December 2, Defendants have failed to provide a privilege log of all withheld/redacted documents, a memorandum explaining the claimed privileges and, in camera, a set of withheld/redacted documents.

⁴ In colloquy during the meet and confer session, Plaintiffs’ counsel specifically inquired whether Defendants were really asserting some form of executive privilege or deliberative process privilege, but Defendants’ counsel argued that the “high ranking government official” privilege is separate and distinct from those recognized, limited privileges.

B. Failure to Produce Reports or Other Required Documentation Generated by Defendants' Offices

Pursuant to federal and state law as well as directives and advisories issued by the Secretary of State, Defendants are required to issue certain election related reports and other election related documentation. However, Plaintiffs' March 24 letter noted a number of areas where Plaintiffs did not see any such required documentation or where the documentation was incomplete. In particular, Plaintiffs' letter requested that Defendants either produce such documents or confirm that they do not exist.

Some examples of reports that have not been produced in their entirety include reports generated pursuant to R.C. §3501.05(O) requiring the Secretary of State to provide the Governor with reports concerning, among other things, election costs, reports created by the Secretary of State's office compiling the annual expenses of conducting elections, and reports and other types of communications from field representatives.⁵ In other examples, certain statutes, such as R.C. §3501.19(C), and directives, such as Directives No. 94-19, 96-23, 98-21, 2002-23, and 2004-30, provide that county Boards of Elections can apply for waivers from certain election law requirements. While Defendants produced documentation showing that such waivers were requested, Plaintiffs have not seen corresponding documentation reflecting that Defendants considered, granted or denied such waivers. In a final example, R.C. §3501.27(B) requires the county Boards of Elections to establish poll worker training programs "prescribed by the secretary of state," however, Plaintiffs only received one poll worker training manual provided

⁵ Having produced none whatsoever to date from the Governor's office, counsel stated during the meet and confer session that Defendants were re-checking whether Defendant Taft's office has responsive documents in the form of reports to the Governor about election issues. Furthermore, Defendants have written to Plaintiffs since the meet and confer session to state that they have located additional field representative reports.

by the Secretary of State to the county Boards of Elections. If these materials do not exist, Plaintiffs request that Defendants confirm this fact. If they do exist, however, such materials should be produced.

C. Failure to Produce Reports or Other Required Documentation Provided by the County Boards of Elections to Defendants

Similarly, in certain cases the county Boards of Elections are required under federal or state law or directives and advisories issued by the Secretary of State to provide reports or other types of documentation to the Secretary of State. Plaintiffs' March 24 letter noted a number of examples where Defendants' production was deficient in producing such documentation. For example, R.C. §3501.11(N) and various directives from the Secretary of State, including Directives No. 98-32, 2000-3, 2000-34, 2004-3, and 2004-59, require the county Boards to provide annual reports to the Secretary of State. However, Defendants produced few of these reports and certainly not a comprehensive set. In another examples, Directive No. 2004-41, requires that the county Boards report to the Secretary of State both the total numbers of registered voters eligible to vote in the 2004 election and estimates of voter turnout. Defendants produced no documentation demonstrating enforcement of this Directive.

Similarly, Defendants failed to produce documentation demonstrating enforcement of Directives No. 2005-12 and 2001-05, requiring the county Boards to provide the Secretary of State with receipts certifying compliance with Ohio's voting records maintenance program. Finally, Plaintiffs saw evidence in Defendants' production that Defendants required county Boards to fill out and send back surveys concerning compliance with federal laws governing voter registration. However, Defendants' production of completed surveys was incomplete. For example, with regard to one type of form, Plaintiffs only saw a completed response from one county. As such, Plaintiff have requested that Defendants simply confirm that aforementioned

documents do not exist or produce the requested materials.

D. Failure to Produce Documents Reflecting Reviews or Analysis of Election Practices

As set forth in Plaintiffs' March 24 letter, there were a number of common sense categories of documents that one would expect to see in conjunction with the administration of an election that Defendants have not produced. For these categories, Plaintiffs requested that Defendants merely confirm that such documents did not exist or, if they did exist, that the documents be produced.

For example, Plaintiffs expected to see, but did not find, documents reflecting that Defendants ever considered, sought, or reviewed the adequacy of election funding,⁶ that Defendants considered voter turnout estimates or planned for elections based on heightened turnout, or that Defendants investigated or otherwise responded to voter complaints, including, but not limited to complaints concerning a lack of notification regarding precinct location changes. In addition, Plaintiffs expected to see, but did not find, documents reflecting communications between Defendants and members of the Ohio State Legislature relating to elections, funding, or proposed changes in election law. Plaintiffs further expected to see, but did not find, documentation, including summary lists, reflecting an analysis or review of the county Boards of Elections' removal of voters from voter registration lists and documentation reflecting reports or analysis on the part of Defendants regarding the casting of provisional ballots by voters on a precinct by precinct basis.

Moreover, Plaintiffs expected to see in Defendants' production, but did not find, policies

⁶ Defendants' counsel stated that he was still attempting to verify that the Secretary of State's budget requests are not submitted through or after consideration by the Governor's office.

or procedures governing the processing of absentee ballots and provisional ballots, including documents governing (1) the time frame in which absentee ballots must be processed, (2) the process by which individuals who requested, but did not receive a ballot on election day, can vote, (3) the process by which provisional ballots are counted, and (4) the process by which provisional ballots are distributed to precincts and voters on election day. Further, given the outcome in *White, et al. v. Blackwell, et al*, Case No. 3:04 CV 7689 (N.D. Ohio, Jan. 21, 2006), Plaintiffs would have expected to find, but did not see, documents reflecting compliance with Judge Katz's orders concerning absentee ballots. Plaintiffs further expected to see, but did not find, documentation reflecting training materials created by the Secretary of State's office for county Boards of Elections concerning the removal of voters from registration lists.

Plaintiffs also are aware from press reports that on at least seven occasions the Secretary of State investigated or removed members or employees of certain county Boards, yet Plaintiffs did not see complete records in Defendants' productions concerning these investigations or any other instances of investigations of or administrative oversight over county Boards. Further Plaintiffs expected to see, but did not find, any correspondence or memoranda concerning why or why not an investigation of a county Board was or was not pursued.

For all of these categories of documents, Plaintiffs simply request confirmation that the documents do not exist. If they do exist, they should be produced.

Dated: April 3, 2006

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PROOF OF SERVICE

This is to certify that a copy of the foregoing has been filed electronically this 3rd day of April, 2006. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. All other parties will be served by regular US mail.

By: /s/ Jason A Hill
Counsel for Plaintiffs