

MEMORANDUM

TO: The Neighborhood Council Election Procedures Working Group (“Working Group”)

FROM: Gwendolyn R. Poindexter
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RE: Legal Questions Pertaining to the Public Records Act and Neighborhood Council Election Ballots

DATE: March 30, 2004

During discussion by the Working Group related to the retention of Neighborhood Council election materials, questions have been raised regarding: 1) whether certain election materials, in particular voted ballots, would be treated as public records under the Public Records Act and; 2) the obligation of Neighborhood Councils to retain their election materials, and for how long. I have rephrased your questions and provided answers to those questions as follows:

Question 1:

Will ballots that have been marked and counted (“voted” ballots) in Neighborhood Council elections be treated as public records under the Public Records Act and be required to be disclosed upon request.

Answer 1:

No. Analogizing the City’s election rules and procedures under state law relating to the secrecy of ballots and the need to secure the integrity of the ballots pending an election challenge, Neighborhood Council voted ballots, while considered “public records,” would be exempt from disclosure.

Discussion

The California Public Records Act (also “Act”), Government (“Gov’t”) Code § 6250, *et seq.*, generally requires “public records” to be “open for inspection” and allows members of the public to inspect and obtain copies of those records. Gov’t Code § 6253. “Public records” are “writing[s] containing information relating to the conduct of the public’s business, prepared, owned, used, or retained by any state or local agency”

Documents that a Neighborhood Council might retain are not *expressly* discussed in the Act. However, as a general rule records of the Neighborhood Council, as official advisory bodies to the City of Los Angeles, if retained by the Neighborhood Councils, are covered by the Act because the Act applies to “local agencies.” The Act defines a local agency to include any subdivision or agency of a chartered city. Gov’t Code § 6252(b). Neighborhood Councils fall within that definition because they are advisory bodies of the City established under the Los Angeles City Charter. See attached, *The Public Records Act and Neighborhood Councils*, Congress of Neighborhoods 2003. Thus, as a general rule, because of the broad definition of “writings” under the Act, Neighborhood Council election materials will be treated as public records under the Act.

Although the Act requires the disclosure of existing “records,” it does not require state and local government agencies to create records in order to respond to a request. The Act also lists several categories of documents that are exempt from disclosure. Of particular relevance to your inquiries are several exemptions that relate to elections and voting and a general exemption that is known as the “balancing test.”

Exemptions under the Act.

Gov’t Code § 6254(k) exempts: “[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.”

State law appears to exempt state and local election officials from being required to disclose, or make available to the public, the voted ballots from an election.¹ Following state or local elections, the state Elections Code provides that certain information, such as voted ballots and identification envelopes, must be preserved for six months following the election. Specifically, the statute mandates that the packages containing voted polling place ballots must be kept *unopened and unaltered* for six months. See, Elections Code § 17302. Another provision of the Elections Code,

¹ While the Office of the City Attorney has already concluded that neither the State Elections Code nor the City Election Code are applicable to Neighborhood Council elections, the public policies addressed in these provisions are instructive as analogy.

§ 17304, allows for other information such as the tally sheets (of the voted ballots) to be kept, again for six months, and *expressly* allows for public inspection of the contents of this package of election materials. Reading these two sections together and the fact that Section 17302 uses the terms “unopened” and “unaltered” strongly suggests that, under state law, the packages that contain voted ballots must be preserved and cannot be tampered with; thus, they are not subject to public inspection or disclosure under the Public Records Act.

Interestingly, the City’s Election Code, perhaps borrowing language from state law, treats voted ballots in City elections similarly. Section 316 of that Code provides that: “[t]he tally lists, rosters of voters, and semiofficial results of votes cast sheets of any election and all other supplies and records used therein, *except the voted ballots*, shall be open to the public for inspection for a period of six months thereafter, and shall then be disposed of as *are the voted ballots*.” (emphasis added)

These city and state law provisions appear designed to allow public access to documents that *summarize* the results of any particular election, but protect the actual ballots themselves from tampering.

Other election materials, such as the home address, telephone number, occupation, precinct number and prior registration information on voter registration cards, are also treated as confidential under the Public Records Act. See, e.g. Section 6254.4.²

Elsewhere in the Act, Section 6276.46 exempts documents related to voting under Evidence Code § 1050. Section 1050 identifies a legal privilege that protects the secrecy of a vote. Application of this exemption is particularly relevant in that the current draft of the Election Procedures will allow Neighborhood Councils to provide a “tracking” number that could identify the actual voter by comparison to voter registration materials, for the purpose of resolving administrative election challenges. Section 6276.46, through asserting the secrecy of voting privilege under Evidence Code § 1050 would exempt from disclosure records that would identify who voted and how, in Neighborhood Council elections.

² However, as the City Attorney concluded in a letter to the City Clerk concerning the disclosure of voter information from City elections, names of registered voters who voted in City elections, and information on voter registration cards, other than the voters’ telephone numbers, home address, precinct number or prior registration information, may be disclosed. See, City Attorney letter dated October 31, 2001 to the City Clerk.

Finally, Gov't Code § 6255 provides that: “[t]he agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” This section may also be used to exempt voted ballots from disclosure depending upon the language of the finally adopted Election Procedures. Should the final version of the Procedures include language that currently exists, that allows alternative vehicles, other than viewing the actual voted ballots, to verify the accuracy of any Neighborhood Council election by, for example, public observation of the official canvass of ballots, public observation of any recount (Draft, pages 1-18, Articles K, L) public notice of any Election challenges (Draft, page 19, Article L, par. 2 e, f), and review of the Election Arbitrator’s final Election Report, a compelling argument can be made that the public interest served by preserving the integrity of the voted ballots is outweighed by the public interest in access to the actual ballots, in light of these alternative mechanisms to ascertain the accuracy of any election.

While the voted ballots in Neighborhood Council elections are not expressly exempt under the Act, by application of Section 6254(k) and/or Section 6255, in consideration of the broad principles of preserving the integrity of the vote, the privilege for the secrecy of voting, and the treatment of voted ballots under city and state law, Neighborhood Council voted ballots may be treated as being exempt under the Public Records Act, such that voted ballots would not be required to be disclosed upon request.³

Question 2:

Must Neighborhood Councils retain election materials, and if so, for how long?

Answer 2:

Nothing in state or city law mandates the retention of election materials by Neighborhood Councils. However, to preserve evidence pending a potential legal challenge, it is recommended that the Election Procedures establish some minimum time frames for retention of election materials by Neighborhood Councils.

Discussion

³ However, unless the Act expressly forbids disclosure of particular categories of records, nothing in the Act prevents Neighborhood Councils from *voluntarily* making available to the public, records that are exempt, if they so desire. See, Gov't Code § 6254.

As noted earlier, election materials, other than the voted ballots themselves and certain information on voter registration forms, if a Neighborhood Council uses those, will likely be considered a public record that is required to be disclosed, if retained by the Neighborhood Councils. However, the Public Records Act does not *mandate* the retention of any particular record. Rather, the Act requires the inspection of any document that is “prepared, owned, used or retained by any state or local agency regardless of the physical form or characteristics.” Section 6252(d).

The City of Los Angeles has procedures relating to records retention. See, Los Angeles Administrative Code, Section 12.1 *et seq.* However, by the express provisions in this Code, it appears to mandate “officers” and the heads of City Departments to implement and maintain a records management program; thus, it does not expressly apply to Neighborhood Councils. Neither the Charter, Citywide Plan for Neighborhood Councils, the Ordinance implementing the Plan, nor the Ordinance creating the Department of Neighborhood Empowerment, impose a mandatory obligation upon Neighborhood Councils to retain or maintain any of their records for any particular length of time. Thus, there are no existing rules that mandate that Neighborhood Councils retain their election materials for any particular length of time, or at all.

Borrowing from the City’s practices in municipal elections and from state law, six months is a reasonable length of time for retention, should the Working Group wish to incorporate a retention period into the Certified Neighborhood Council Election Procedures.

Recommendations

The Working Group asked for guidance on these legal questions to assist it in crafting language in its proposed Procedures, particularly at Chapter VI, page 20, relating to the Disposition Of Election Materials after the time for an administrative challenge to Neighborhood Council elections has passed.

Time frame for Retention of Materials: As noted above, while Neighborhood Councils could each choose their own time frame for how long, if at all, they wish to retain election materials, should this Working Group decide to mandate that election materials be retained for a period of time, six months would be a reasonable period which records thereafter could be destroyed, if a Neighborhood Council should wish to do so. Accordingly, the language at Page 20 could read:

At the conclusion of the recount and election challenge resolution period, the Independent Election Administrator shall turn all election materials over to the Neighborhood Council. The Neighborhood Council shall then retain the election materials for six months, after which they [shall] [may] be destroyed.

Ballot Tracking to Voter. The draft Procedures currently has language that provides that:

“If the ballot design and the voter registration allows for a ballot to be tracked to an individual voter, then the Independent Election Administrator shall destroy the actual ballots prior to handing over the balance of the materials to the Neighborhood Councils.”

This language was crafted because some Neighborhood Councils felt that it was important to have this “tracking” process, to be used solely by the Independent Election Administrator or the Third Party Arbitrator to assist in the resolution of election challenges. Based upon the analysis above, voted ballots would not be *required* to be disclosed under state law. However, as noted above, it *is* likely that some information on the voter registration forms *would* be required to be disclosed. Thus, unless the Election Procedures expressly prohibit Neighborhood Councils from voluntarily making voted ballots available for inspection, there may need to be additional language in the Procedures to protect the secrecy of the individual voter’s actual vote in cases where the ballot design and the voter registration forms allow for ballots to be tracked to an individual voter.

To address this scenario, rather than destroying all such ballots, the existing language to the Procedures in the last paragraph of Chapter VI at page 20 could be deleted and substituted with the following language:

If the ballot design and the voter registration allows for a ballot to be tracked to an individual voter, then the Independent Election Administrator will permanently redact the tracking information from the actual ballots prior to handing over the balance of the materials to the Neighborhood Council.

The Working Group may wish to consider this language or other suggestions to address this issue, in light of the issues raised by the Public Records Act.

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