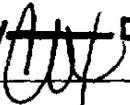


FILED  
Court Administrator

FEB 25 2009

By  Deputy

DISTRICT COURT

SECOND JUDICIAL DISTRICT

151  
STATE OF MINNESOTA

COUNTY OF RAMSEY

In the Matter of the Contest of  
General Election held on November 4, 2008,  
for the purpose of electing a United States  
Senator from the State of Minnesota,

No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,

Contestants,

v.

Al Franken,

Contestee.

**CONTESTEE'S MOTION IN LIMINE  
TO EXCLUDE COUNTY DATA  
PRACTICES ACT "CERTIFICATIONS"**

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## I. INTRODUCTION

Contestee Al Franken respectfully moves this Court for an order in limine excluding catch-all "certifications" sought from dozens of counties in a last-minute effort to force overburdened counties across the state to undertake investigations, express opinions, and create documents which are then to be "certified" and admitted into evidence before this Court. With all due respect, all such "certifications" should be rejected by this Court.

First, as many of the counties have themselves noted, nothing in the Minnesota Data Practices Act requires a governmental entity to undertake investigations, to express opinions or to create documents where none existed before. Second, even if Minnesota counties and cities could be forced through a simple Data Practices Act (or even a subpoena) to create such material, it is plainly inadmissible hearsay. Such documents fall neither within the exception created by Minnesota Evidence Rule 803(6) (business records) or 803(8) (public records and

reports) because such "certifications" are neither created in the normal course of business, nor do they constitute a "public record or report" within the meaning of the rule. Third, and perhaps most importantly, allowing Contestants to introduce essential elements of their case through this device would utterly deprive Contestee of the opportunity to cross examine these witnesses on the foundation for their "certification" of these facts, opinions, and conclusory statements and would deprive this Court of an appropriate record to evaluate the proffered statements. The hearsay rule was designed *precisely* to avoid that result.

For all three reasons, Contestee respectfully requests an order excluding all such "certifications" from evidence.

## II. RELEVANT FACTS

On Tuesday morning, February 24, 2009, Contestants transmitted by email dozens of requests under the Minnesota Data Practices Act seeking to have county election officials compile information, investigate various election-related records, and express opinions, and then summarize their findings in "certifications" to Contestants, apparently to be introduced into evidence before this Court. Contestants' emails read as follows:

As counsel for Norm Coleman in the election contest venued in Ramsey County, Minnesota, we request pursuant to the Minnesota Government Data Practices Act that the custodian of records or other person authorized to make a certification pursuant to Minn. R. Evid. 902(4) certify, for each of the individuals listed on the attached Exhibit A, that:

1. The rejected absentee ballot has not been counted;
2. If no application for an absentee ballot can be found, the official believes that the voter did submit an application but the county/municipality has been unable to locate it;
3. The voter was registered to vote or, if sent a non-registered voter ballot package, has included a voter registration application in the return or secrecy envelope;
4. The voter did not otherwise vote on November 4, 2008 (either in person or by another absentee ballot);
5. The witness was either a registered voter or a notary who placed his or her stamp or seal on the envelope;

6. The ballot was received in time to have been counted on November 4, 2008. See, e.g., Ex. A (request to Blue Earth County dated Feb. 24, 2009).<sup>1</sup>

To date, a few of the smaller counties have responded to these requests, several have objected and refused to respond, and most of the counties have yet to respond. As both Contestee and several counties have noted, these requests are improper under the Data Practices Act and are burdensome and costly to respond to. Indeed, in many instances the information called for is *already* in the hands of the Contestants (such as whether the ballot has already been counted, or the date ballots were received by the counties, or whether the voter or witness was or is properly registered to vote); or would involve extensive investigation (such as whether the voter otherwise voted in the November 4, 2008 general election); or is already the subject of disputed evidence and testimony in the record before this Court (such as whether a voter or witness was registered when the ballot was cast or witnessed, or whether an absentee ballot application existed once and was lost or never existed at all).

It is the Contestants' burden to marshal relevant and admissible evidence to prove their case, not to devote literally weeks of trial time to other purposes, only then to serve sweeping requests seeking to force the *counties and cities* to bear the burden and cost of establishing elements of the case that Contestants themselves have been unable or unwilling to prove. Even worse, the technique chosen by Contestants will, if allowed to proceed, generate inadmissible hearsay and deprive Contestee of the ability to cross examine these witnesses on the foundation for, extent of, and strength of conclusory statements of fact. The effort is simply improper. The

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<sup>1</sup> As noted, Contestee transmitted its objection to these requests in the early afternoon of February 24, noting that the requests went far beyond any obligation imposed under the Data Practices Act and would be inadmissible in the pending election contest, and advised the counties to consult their respective county attorneys before responding.

Court should exclude any and all such "certifications" and should do so promptly before the unnecessary expenditure of time and funds by the responding counties and cities.

### III. ARGUMENT AND AUTHORITY

This evidence should be excluded for three reasons. First, nothing in the Minnesota Data Practices Act requires a governmental entity to undertake investigations, to express opinions or to create documents where none existed before. Second, even if Minnesota counties and cities could be forced to create such material, it is inadmissible hearsay for which no exception applies. Third, allowing Contestants to introduce essential elements of their case through this device would deprive Contestee of the opportunity to cross examine these witnesses on the foundation for their "certification" of these facts, opinions, and conclusions and would deprive this Court of an appropriate record upon which to evaluate these conclusory statements.

#### A. Contestants' Requests Are Improper Under the Data Practices Act

First, these requests are improper under the Minnesota Government Data Practices Act because they purport to require county officials (1) to create documents that do not currently exist, and (2) to perform tasks, including reviewing and analyzing other documents and forming conclusions about the import or significance of those documents. Neither task can be required under the Data Practices Act.<sup>2</sup>

The Minnesota Government Data Practices Act, Minn. Stat. Ch. 13 (2008) ("Data Practices Act"), requires government officials to provide access to existing public information and data. Data Practices Act, Minn. Stat. § 13.02, subd. 7. The Data Practices Act, however, most assuredly does *not* require government officials to create documents that do not already

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<sup>2</sup> To be clear, to the extent that Contestants seek only certified copies of absentee ballot envelopes, election day incident reports, machine tape printouts, canvassing board reports or other similar official and existing government records, then Contestee has no objections. Beyond that, however, the Data Practices Act cannot be utilized to require counties or cities to create documents, conduct investigations, express opinions, or conduct, compile or summarize the findings of investigations.

exist. *Cf. WDSI, Inc. v. County of Steele*, 672 N.W.2d 617, 622 (Minn. Ct. App. 2003) (government entity had no obligation to produce data not in its possession). Similarly, the Data Practices Act does *not* provide a basis for Contestants to ask county officials to research and review other documents and describe the conclusions they reach. (See, for example, Contestants' second request: "If no application for an absentee ballot can be found, the official believes that the voter did submit an application but the county/municipality has been unable to locate it.")

As Ramsey County District Judge Lindman noted in connection with a Data Practices Act lawsuit filed last November in connection with this election, "there has been no authority cited to this court that would make the unwritten reasoning process of election officials public, government data. The MGDPA applies to written data only. Accordingly, Plaintiff is not entitled to orally query election officials regarding their reasoning." Ex. B (*Al Franken for Senate v. Ramsey County*, No. 62-CV-08-11578, Order for Temporary Restraining Order and Temporary Injunction, Ramsey County Dist. Ct. Nov. 19, 2008) (copy attached).

Indeed, for precisely these reasons, some counties have refused to provide the requested "certifications." For example, Ramsey County responded as follows:

As we discussed on the phone, Ramsey County contends that this request goes far beyond any obligation imposed on the County under the Data Practices Act. In addition, the information requested is not the type of information that can be certified by the County under Rule 902(4). Ramsey County would like to work with you to make sure all appropriate evidence is made available to the candidates and the Court. However, complying with this request would be extremely time consuming when all the underlying information has been previously provided.

Ex. C (response of Ramsey County dated Feb. 24, 2009); *see also* Ex. D (response of Scott County dated Feb. 24, 2009); Ex. E (response of City of Maple Grove dated Feb. 24, 2009); Ex. F (response of Anoka County dated Feb. 24, 2009).<sup>3</sup>

**B. Any Responses Or "Certifications" Received in Response to Contestants' Requests Are Not Admissible Evidence**

Even if Minnesota counties and cities could be forced to create and certify such material, it is inadmissible hearsay, without foundation or personal knowledge. Such documents fall neither within the exception created by Minnesota Evidence Rule 803(6) (business records) or 803(8) (public records and reports) because such "certifications" are neither created in the normal course of business, nor do they constitute a "public record or report" within the meaning of the rule.

Contestants advance several purported theories of admissibility, none of which are applicable to the "certification" of a document specially created in response to Contestants' requests.

Initially, Contestants take the position that the responses are admissible under Minnesota Rule of Evidence 902(4). Rule 902(4) provides:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: . . . (4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Legislative Act or rule prescribed by the Supreme Court pursuant to statutory authority.

Rule 902(4) is not even remotely applicable to the certifications sought by Contestants.

Perhaps most obviously, the county's responses are neither "official record[s] or report[s]" nor are

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<sup>3</sup> By contrast, some of the smaller counties have provided responses to Contestants' requests and have purported to "certify" the responses, which generally take the form of an email or chart. *See, e.g.*, Ex. G (response of Kandiyohi County dated Feb. 24, 2009), Ex. H (response of Cass County dated Feb. 24, 2009). The majority of the counties, however, have not yet responded to the requests.

they "recorded or filed in a public office." Minn. R. Evid. 902(4); *see generally State v. Stotts*, 144 Ariz. 72, 82, 695 P.2d 1110 (1985) (letter regarding plea agreement prosecutor retrieved from his office's files not a "public record" under Rule 901(b)(7), which provides for authentication of public records by testimony rather than certification but contains same public record requirement). Rule 902(4) makes official records and reports and documents recorded or filed in a public office self-authenticating because it is generally agreed that "public employees having custody of such records will carry out their public duty to receive and maintain only genuine official papers and reports." McCormick on Evidence § 226. "Thus it is the official duty of custody, rather than the duty of preparation, which constitutes the document a genuine public record." *Id.* Rule 902(4) might well and properly be used if Contestants asked for a certified copy of, for example, an absentee ballot envelope or a canvassing board report. But Contestants did not ask officials to copy existing records and certify that the copies are accurate, which is all that Rule 902(4) speaks to. Instead, they asked for narrative or opinion responses to questions, dependent upon opinion or special investigations and containing opinion testimony or conclusions based on investigations not typically performed in the normal course of business. Rule 902(4) simply does not apply in these circumstances.

Moreover, Rule 902(4) only addresses authentication. Even if the requirements of Rule 902(4) were met, Contestants would still need to establish that the responses fall into a hearsay exception in order to be admissible. *See* McCormick on Evidence § 226 ("The question of the authenticity of official records is not determinative of the ultimate admissibility of such records. It is quite possible for a public record to be perfectly genuine and yet remain inadmissible, typically for reasons of hearsay.") This they cannot do. Contestants argue that these "certifications" constitute either business records within the meaning of Rule 803(6) or governmental records under Rule 803(8), but neither exception to the hearsay rule is applicable.

First, the "certifications" plainly do not fall within Rule 803(6), which provides that the following business records are not hearsay:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. A memorandum, report, record, or data compilation prepared for litigation is not admissible under this exception.

Minn. R. Evid. 803(6). The "certifications" do not meet this definition because they were prepared for this litigation, and they were not made at the time of the event by someone with personal knowledge of the event who was under a duty to record it, they were not made in the regular course of business, and were not kept in the regular course of business. The business record exception to the hearsay rule exists because business records are presumed to be reliable because (1) the regularity of the records produces habits of precision in the record keeper, (2) the records are regularly checked, (3) employees are motivated to make accurate records because the businesses that employ them function in reliance on these records, and (4) employees are required to be accurate and risk embarrassment or dismissal if they fail. *In re the Welfare of L.Z.*, 396 N.W.2d 214, 220 (Minn. 1986). None of these factors are present for the "certifications," which were explicitly and expressly prepared for this litigation. In fact, such documents are never admitted under Rule 803(6). Rule 803(6) ("A memorandum, report, record, or data compilation prepared for litigation is *not admissible* under this exception.") (emphasis added); *id.* 1989 Comm. cmnt. ("Documents prepared solely for litigation purposes do not qualify under this exception.").

Second, and similarly, the requested "certifications" do not fall within Rule 803(8) ("Public records and reports"), which provides that public records are not hearsay when:

Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases and petty misdemeanors matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings except petty misdemeanors and against the State in criminal cases and petty misdemeanors, factual findings resulting from an investigation made pursuant to authority granted by law.

Minn. R. Evid. 803(8). The rule is simply inapplicable to emailed responses to inquiries by a party to litigation. Rather, the exception is designed to create an exception for official government reports and existing public records, which have many of the same guarantees of trustworthiness that underlie the business records exception: they are routinely made by persons with knowledge, are relied upon by government officials in the conduct of public business, and are made and maintained as part of the government officials public obligation and duty.

None of this can be said with respect to responses generated in response to inquiries from parties to litigation. Indeed, many portions of the requests made by the Contestants ask for information which is not "the activities of the office or agency," does not relate to a matter about which the officials had "a duty to report," and does not consist of "factual findings resulting from an investigation made pursuant to authority granted by law." *Id.* These responses are not government reports or existing public records, they are not filed and maintained by the responding government entities and they have none of the guarantees of trustworthiness or foundation that provide the very basis for this narrow exception to the hearsay rule.

For example, the request for the "certification" of an opinion or belief that an absentee ballot application that cannot be found once existed but cannot now be found is not a "public record or report." It is instead a request for improper opinion on an issue that is very much at

issue in this election contest and an opinion that, if allowed, would not be subject to examination on the factual foundation for such an opinion (as noted below). Election officials do not regularly prepare such opinions, do not embody them in public records or reports, and do not maintain such records as part of their official duties and responsibilities.

Similarly, whether a voter or witness was or was not registered, or whether a voter did or did not otherwise vote in the election are matters for this Court to determine based on the record before it; summary email responses to questions transmitted are assuredly *not* public records or reports. It is not difficult to apprehend the critical limitations such an approach would place on the record – what steps were taken and what records were reviewed to determine whether a voter was or was not registered and when? What steps were taken and what records were reviewed to determine whether a voter did or did not otherwise vote in the election, and when were those records accessed and reviewed? Did the responding official review original documents or rely on others' conclusions? Did they investigate only in the voter's precinct, neighboring precincts, county, or on some other basis? What records were reviewed to reach that conclusion? When, if ever, are those records or sources of information to be made available to this Court, to counsel, or to the public record for examination by this Court, a reviewing appellate court, or the public itself.<sup>4</sup>

Contestants are, of course, entirely free to call county and city election officials to testify, under oath and subject to cross examination, on these issues – an option that Contestants have utilized for the past four and a half weeks of testimony before this Court. Contestants were free

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<sup>4</sup> Indeed, as this Court has frequently noted, public confidence in the outcome of this election contest requires transparency and a clear factual record, subject to examination (and cross examination) of admissible, relevant, and appropriate "best evidence" of source documents. Of all of cases, an election contest testing public confidence in the outcome of a critical and hotly contested U.S. Senate election is the *least* appropriate occasion for introducing summary evidence without a fair opportunity for counsel, this Court and the public to assess and test the foundation for conclusory statements.

to ask those and any other election officials to testify with respect to these questions, but only under oath, before this Court, and subject to cross examination.

Moreover, even if otherwise admissible under Rule 803(8), public records should be excluded if they are not "trustworthy," which is patently the case here. *See* Rule 803(8) 1989 Comm. cmnt. ("The rule was amended to clarify that records and reports qualifying under each subdivision (A), (B) and (C) should be excluded if the report is not trustworthy. Among other matters, the court should consider the qualifications, bias, and motivation of the authors, the timeliness and methods of investigation or hearing procedures, and the reliability of the foundation upon which any factual finding, opinion, or conclusion is based."). Summary emails transmitted in response to Contestants' inquiries are not prepared under oath, provide no assurances to this Court that they were produced upon a reliable factual record, and provide none of the guarantees normally applicable to governmental records. They should, accordingly, be rejected in favor of actual sworn testimony of knowledgeable witnesses, subject to cross examination, or actual public records or reports prepared in the ordinary course and carrying with them indicia of reliability.

**C. Admission of "Certifications" Received in Response to Contestants' Requests Would Deprive Contestee of a Fair Opportunity to Cross Examine the Responding Counties on the Content of the "Certifications"**

Perhaps most fundamentally, the admission of the proposed "certifications" would utterly deprive Contestee of a fair opportunity to cross examine the responding counties and cities on the foundation, scope and strength of the requested certifications. Here, almost every aspect of the requests seeks information that is disputed; is the subject of contested testimony before this Court, including in many instances on an essential element of Contestants' claims; or is already contained in the record before the Court. This is precisely the purpose of the hearsay rule—to

preclude the admission of out-of-court statements that, if admitted, would deprive the opposing party from cross examining and confronting the testifying speakers with conflicting evidence, testimony or documents to test their assertions. See *Barnes v. N.W. Airlines*, 233 Minn. 410, 433, 47 N.W.2d 180, 193 (1951) (holding it was error for the trial court to admit hearsay report of public officials and noting that the defendant "had no oppo[r]tunity to cross-examine with reference to the report nor anyone making it").

For example, the second item requested is a certification that "the official believes that the voter did submit an [absentee ballot] application but the county/municipality has been unable to locate it." The admission of a certification of the election official's "belief" would deprive Contestee from examining the election official on the basis for this belief, conflicting alternative explanations, and the extent to which the official may—or may not—be confident in any such conclusions or opinions. This is hardly the purpose of "certifying" a government record and, far from advancing the efficiency or reliability of the truth-finding function of this trial, would instead serve to fundamentally undermine that function by eliminating any possibility for examination on the basis of or foundation for any such opinion. It would undermine the record before this Court, eliminate this Court's ability – and indeed, the public's ability -- to assess the opinion and its foundation.

Similarly, certifications that the voter did not otherwise vote, or was registered (or that his or her witness was registered) would deprive Contestee of a fair opportunity to examine the basis of or foundation for any such certifications. The record before the Court has demonstrated a variety of interpretation from counsel, witnesses and even voters as to their understanding of the requirements of state law on these elements. Allowing certification of conclusory statements of fact would deprive both Contestee and the Court of any possibility of the examination of the premises and understandings underlying the certified opinions and conclusions of the counties.

Moreover, the record demonstrates that a voter could have voted in another precinct or even another county but with only a "certification" before the Court, it is entirely unclear on what factual foundation such an opinion was or may have been reached. Such an approach is uniquely inappropriate in an election contest under the glare of public scrutiny, where public confidence in this Court and its processes is critical.

None of this is appropriate and admission of such conclusory factual statements would work a serious and fundamental injustice not only to Contestee but to this Court, and to the record before it.

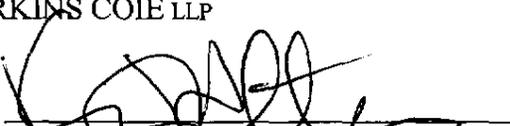
#### IV. CONCLUSION

For these reasons, Contestee respectfully submits that the requested "certifications" be excluded in favor of actual testimony of persons with knowledge, copies of the original source materials, and other relevant evidence, all subject to cross examination on the public record before this Court, on the record, and before the public.

Dated: February 25, 2009

PERKINS COIE LLP

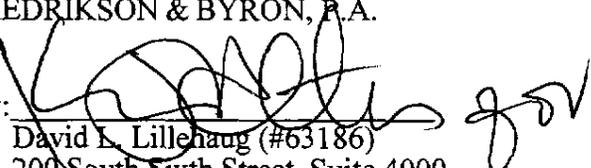
By:

  
Marc E. Elias (DC Bar #442007)  
Kevin J. Hamilton (Wash. Bar #15648)  
David J. Burman (Wash. Bar #10611)  
607 Fourteenth Street, N.W., Suite 800  
Washington, D.C. 2005-2011  
Telephone: (202) 628-6600

*Admitted Pro Hac Vice*

FREDRIKSON & BYRON, P.A.

By:

  
David L. Lillehaug (#63186)  
200 South Sixth Street, Suite 4000  
Minneapolis, Minnesota 55402  
Telephone: (612) 492-7000

*Attorneys for Contestee Al Franken*

#### ACKNOWLEDGMENT

Applicants acknowledge that sanctions may be imposed under Minn. Stat. § 549.211.

**From:** Keane, Bryan [Keane.Bryan@dorsey.com]  
**Sent:** Tuesday, February 24, 2009 8:32 AM  
**To:** Ross.Arneseon@co.blue-earth.mn.us; patty.oconnor@co.blue-earth.mn.us  
**Cc:** dlillehaug@fredlaw.com; \*Franken Perkins Attys; Langdon, Jim  
**Subject:** In re Contest of General Election held on November 4, 2008 for the purpose of electing a United States Senator from the State of Minnesota

**Attachments:** Blue Earth County.doc

As counsel for Norm Coleman in the election contest venued in Ramsey County, Minnesota, we request pursuant to the Minnesota Government Data Practices Act that the custodian of records or other person authorized to make a certification pursuant to Minn. R. Evid. 902(4) certify, for each of the individuals listed on the attached **Exhibit A**, that:

1. The rejected absentee ballot has not been counted;
2. If no application for an absentee ballot can be found, the official believes that the voter did submit an application but the county/municipality has been unable to locate it;
3. The voter was registered to vote or, if sent a non-registered voter ballot package, has included a voter registration application in the return or secrecy envelope;
4. The voter did not otherwise vote on November 4, 2008 (either in person or by another absentee ballot);
5. The witness was either a registered voter or a notary who placed his or her stamp or seal on the envelope;
6. The ballot was received in time to have been counted on November 4, 2008.

We commit to pay reasonable costs associated with this request. As this request relates to the ongoing election contest, Court File No. 62-CV-09-56, we ask respectfully that the information be provided on an expedited basis, preferably via email or fax.

Please call me if you need any additional information regarding this request. Your continued cooperation is appreciated.

<<Blue Earth County.doc>>  
**Bryan C. Keane**  
Attorney

.....  
**DORSEY & WHITNEY LLP**  
Suite 1500, 50 South Sixth Street  
Minneapolis, MN 55402-1498  
P: 612.492.6638 F: 612.340.2868

.....  
**CONFIDENTIAL COMMUNICATION**

*E-mails from this firm normally contain confidential and privileged material, and are for the sole use of the intended recipient. Use or distribution by an unintended recipient is prohibited, and may be a violation of law. If you believe that you received this e-mail in error, please do not read this e-mail or any attached items. Please delete the e-mail and all attachments, including any copies thereof, and inform the sender that you have deleted the e-mail, all attachments and any copies thereof.*

*Thank you.*

Ex. A

2/25/2009

# EXHIBIT A

Blue Earth County

COUNTY	PRECINCT	FIRST NAME	LAST NAME	ADDRESS	CITY	STATE	ZIP
BLUE EARTH		JACOB	FRITZ	307 3RD AVE SE	MAPLETON	MN	56065
BLUE EARTH		ELIZABETH ANN	HAUSER	100 DUBLIN RD APT 1114	MANKATO	MN	56001
BLUE EARTH	W5 P11	DANIEL ADAM	SMITH	1117 WOODLAND AVE	MANKATO	MN	56001
BLUE EARTH		ANGELA NICOLE	WINTER	18103 628TH AVE	JANESVILLE	MN	56048

a)

FILED  
Court Administrator

STATE OF MINNESOTA

DISTRICT COURT

NOV 19 2008

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT  
CASE TYPE: CIVIL OTHER

By fb Deputy

Al Franken for Senate,

Court File No. 62-CV-08-11578

Plaintiff,

vs.

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

**ORDER FOR TEMPORARY  
RESTRAINING ORDER AND  
TEMPORARY INJUNCTION**

Defendants.

This matter came before the Court on the Motion by Plaintiff for a Temporary Restraining Order and Temporary Injunction. Appearances of counsel are noted in the record.

Based on all the files and proceedings herein, and the argument of counsel, and the Court being duly advised in the premises, the Court makes the following:

**FINDINGS OF FACT**

1. Plaintiff Al Franken for Senate Committee (the "Campaign" or "Plaintiff") is the campaign organization through which Al Franken, candidate for United States Senate, conducted his candidacy for that office in the election held on November 4, 2008.

2. Defendant Ramsey County is a political subdivision of the State of Minnesota. Ramsey County administers elections pursuant to Minnesota Election Law, Minn. Stat. Ch. 200-211C (2008).

3. Defendant Joseph Mansky ("Mansky") is the Elections Manager for Ramsey County and is the principal county officer charged with duties relating to elections. Mansky is the individual responsible for the collection, use, and dissemination of any set of data related to the conduct of

Ex. B

elections in Ramsey County pursuant to Minnesota Election Law, Minn. Stat. Ch. 200-211C (2008) and the *Minnesota Government Data Practices Act*, Minn. Stat. Ch. 13 (2008) ("MGDPA").

4. Defendants John Doe and Jane Doe are unidentified Defendants who are designated by law or by Ramsey County as an individual responsible for the collection, use, and dissemination of any set of data related to the conduct of elections in Ramsey County.

5. On November 4, 2008, the State of Minnesota conducted an election for the office of United States Senator.

6. Interim vote totals published by Secretary of State's Office show that the two leading candidates in that election, Al Franken and Norm Coleman, are separated by 206 votes in an election contest in which more than 2.9 million votes were cast. Consequently, the total vote margin between these two candidates is less than one one-hundredths of one percent of the almost 2.9 million votes cast for that office.

7. If, as here, the total votes separating the candidates are certified by the state canvassing board to be less than one-half of one percent (0.5%) of the total of all votes cast for the office of United States Senator, Minnesota Election Law directs the Secretary of State to oversee a mandatory manual recount of all votes cast in the State for that office. Minn. Stat. § 204C.35, subd. 1(b)(1).

8. The Secretary of State has scheduled that recount to commence on November 19, 2008.

9. On November 9, 2008, David Lillehaug ("Counsel"), in his capacity as counsel for the Campaign, sent a letter to Mansky, care of Ramsey County Assistant Attorney Darwin Lookingbill ("Lookingbill"), requesting information pursuant to the MGDPA.

10. In the letter, Counsel requested that Mansky produce "the names and addresses of all persons who submitted absentee ballots in connection with the general election of November 4, 2008, but whose absentee ballots were rejected or otherwise not counted." Counsel informed Mansky that

the request was "urgent" and that the Campaign would pay reasonable costs for collecting and copying the information.

11. On November 11, 2008, Counsel provided Ramsey County, through Mr. Lookingbill, with a memorandum entitled "Absentee Ballot Data Practices Request," which further iterated and explained the Campaign's earlier request for information related to absentee ballots, and also sought production of the reasons why the absentee ballots were rejected.

12. The memorandum argues that pursuant to the MGDPA and Minn. Stat. § 203B.12, subd. 7, the identity of absentee ballot voters may be made available for public inspection after the close of voting on election day.

13. On November 12, 2008, Ramsey County and Mensky denied the Campaign's requests, citing Minn. Stat. § 203B.12, subd. 7 as purported justification.

14. The Campaign has requested public information that has been collected and maintained by the Defendants. The requested information has not been classified so as to deny the Campaign access by any statutory section, temporary classification, or provision of federal law, including Minn. Stat. § 203B.12, subd. 7.

15. The Campaign has not been provided access to or copies of the requested information.

16. Plaintiff has satisfied all of the prerequisites for a temporary restraining order and temporary injunction.

17. The preexisting relationship between the parties is based on the Minnesota Government Data Practices Act (MGDPA) and sections the Election Code. Under these provisions, the Plaintiff has a right to access the public data 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.

18. The harm that Plaintiff would suffer absent a temporary restraining order and temporary injunction far outweighs any harm to Defendant. With each passing hour, the Franken Campaign is irreparably harmed in its efforts to ensure that each valid vote is properly counted and to prepare for 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.

19. Plaintiff is likely to prevail on the merits. The MGDPA creates a presumption that, unless otherwise provided by law, all government data are public. *See* Minn. Stat. § 13.03, subd. 1. The MGDPA deals specifically with certain aspects of absentee ballots by link to the election code. *See* Minn. Stat. § 13.607, subd. 7 (“Disclosure of names of voters submitting absentee ballots is governed by section 203B.12, subdivision 7.”). Section 203B.12, subd. 7, in turn, states that: “The 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 provision keeps the names of absentee voters private until the close of voting, at which time the general rule set forth in Minn. Stat. § 13.03, subd. 1 again applies, and the data are no longer classified as anything other than public data.

20. Public policy militates in favor of a temporary restraining order and temporary injunction. The MGDPA represents a fundamental commitment to making the operations of our public institutions open to the public, and courts must construe the MGDPA in favor of public access.

21. The administrative burdens would be minimal. Plaintiff does not seek a remedy that would require significant Court administration. Governmental entities routinely provide information of this nature, and this request imposes no significant burden.

## CONCLUSIONS OF LAW

1. That certain of the data requested by Plaintiff is public data, the production of which is required by the MGDPA.

2. Defendants' refusal to produce public data requested by Plaintiff is in violation of Minn. Stat. § 13.03, subd. 3(a), and has prevented Plaintiff from receiving public data as required by Minnesota law.

3. Plaintiff has met all of the requirements of, and is entitled to receive, a temporary restraining order and temporary injunction as follows.

## ORDER

1. Plaintiff has the right to obtain or access all public data, according to the provisions of the MGDPA. The Court finds that the following is public data that must be produced for inspection and or copying:

- i. Names of voters who have submitted an absentee ballot return envelope.  
Minn. Stat. 203B.12, Subd. 7.
- ii. The envelopes of absentee ballots that have not been opened by an election judge.
- iii. Data already compiled in written form or routinely compiled by election officials, regarding the number of absentee votes, absentee voters, etc.
- iv. Existing written information regarding the reason for accepting or rejecting an absentee ballot must be produced. However, there has been no authority cited to this court that would make the unwritten reasoning process of election officials public, government data. The MGDPA applies to written data only. Accordingly, Plaintiff is not entitled to orally query election

officials regarding their reasoning. However, if that reasoning has been reduced to written form it is public data and must be produced.

2. Defendants, and all persons acting in concert with them, are hereby restrained and enjoined from refusing to provide the public data Plaintiff has requested under the MGDPA.

3. Defendants must produce by the close of business on this date the requested public data at a fee fairly representing Defendants' reasonable production costs.

4. This Order shall be immediately effective, the Plaintiff having filed with the Court a bond in the sum of \$ 2000 or tendering a check to the Clerk of the Court to hold in lieu of a bond in the sum of \$ 2000, for the payment of such costs and damages as may be incurred or suffered by such party who is found to have wrongfully enjoined or restrained.

5. Service of this Order on Defendants may be made by delivery or facsimile transmission to the Office of the Ramsey County Attorney and counsel for other defendants, and shall be deemed sufficient service for all purposes.

SO ORDERED:

BY THE COURT:

Dated: 11/19/08

  
Dale B. Lindman  
Judge of District Court

**From:** Lookingbill, Darwin [darwin.lookingbill@CO.RAMSEY.MN.US]  
**Sent:** Tuesday, February 24, 2009 2:32 PM  
**To:** Keane, Bryan; Mansky, Joseph  
**Cc:** dlillehaug@fredlaw.com; \*Franken Perkins Attys; Langdon, Jim  
**Subject:** RE: In re Contest of General Election held on November 4, 2008 for the purpose of electing a United States Senator from the State of Minnesota  
Mr. Keane,

As we discussed on the phone, Ramsey County contends that this request goes far beyond any obligation imposed on the County under the Data Practices Act. In addition, the information requested is not the type of information that can be certified by the County under Rule 902(4). Ramsey County would like to work with you to make sure all appropriate evidence is made available to the candidates and the Court. However, complying with this request would be extremely time consuming when all the underlying information has been previously provided.

You indicated in your last voice mail that you may choose to subpoena the original records if Ramsey County is unable to comply with this request. If that is the only other route available, Ramsey County will be prepared to respond to the request. Please call if you would like to discuss this matter further.

Darwin Lookingbill  
651.266.2755(w)  
651.334.5685(c)

---

**From:** Keane, Bryan [mailto:Keane.Bryan@dorsey.com]  
**Sent:** Tuesday, February 24, 2009 10:08 AM  
**To:** Lookingbill, Darwin; Mansky, Joseph  
**Cc:** dlillehaug@fredlaw.com; frankenperkinsattys@perkinscoie.com; Langdon, Jim  
**Subject:** In re Contest of General Election held on November 4, 2008 for the purpose of electing a United States Senator from the State of Minnesota

As counsel for Norm Coleman in the election contest venued in Ramsey County, Minnesota, we request pursuant to the Minnesota Government Data Practices Act that the custodian of records or other person authorized to make a certification pursuant to Minn. R. Evid. 902(4) certify, for each of the individuals listed on the attached **Exhibit A**, that:

1. The rejected absentee ballot has not been counted;
2. If no application for an absentee ballot can be found, the official believes that the voter did submit an application but the county/municipality has been unable to locate it;
3. The voter was registered to vote or, if sent a non-registered voter ballot package, has included a voter registration application in the return or secrecy envelope;
4. The voter did not otherwise vote on November 4, 2008 (either in person or by another absentee ballot);
5. The witness was either a registered voter or a notary who placed his or her stamp or seal on the envelope;
6. The ballot was received in time to have been counted on November 4, 2008.

We commit to pay reasonable costs associated with this request. As this request relates to the ongoing election contest, Court File No. 62-CV-09-56, we ask respectfully that the information be provided on an expedited basis, preferably via email or fax.

Ex. C  
2/25/2009

Please call me if you need any additional information regarding this request. Your continued cooperation is appreciated.

<<EXHIBIT A Ramsey County.doc>>

**Bryan C. Keane**

Attorney

.....  
**DORSEY & WHITNEY LLP**

Suite 1500, 50 South Sixth Street

Minneapolis, MN 55402-1498

P: 612.492.6638 F: 612.340.2868

.....  
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*Thank you.*

**From:** Kes, Mary Kay [MKes@co.scott.mn.us]

**Sent:** Tuesday, February 24, 2009 12:46 PM

**To:** Keane, Bryan

**Cc:** dlillehaug@fredlaw.com; \*Franken Perkins Attys; Langdon, Jim

**Subject:** RE: In re contest of General Election held on November 4, 2008 for the purpose of electing a United States Senator from the State of Minnesota

We are in receipt of your most recent request for certifications as to specific pieces of information surrounding a number of absentee ballots in Scott County. We have determined that your request is not appropriate under the Minnesota Government Data Practices Act request and that we cannot verify the information as you requested, therefore we will not be supplying the certifications that you have requested at this time.

We have provided copies of documents requested on a number of occasions, however, the only information that we are able to certify is that the copy you sent is a true and accurate copy of the document we have in our possession. Certifications of any other information would not be pursuant to the data practices act and we therefore will not entertain such requests.

Your request encompasses information that the County would need to create solely in response to your request such as is the case with witness registration information. As testimony at the hearing indicated, Scott County does not verify the registration of witnesses. Verifying this information and the other information you have requested would require considerable time and expense for the County. If you are willing to pay the actual expenses of the preparation of the documents, including staff salaries, and provide a subpoena, we can entertain your request.

*Mary Kay Kes*

Scott County Election Supervisor

200 4th Ave W

Shakopee MN 55379

952-496-8161

952-496-8174 Fax

---

**From:** Keane, Bryan [mailto:Keane.Bryan@dorsey.com]

**Sent:** Tuesday, February 24, 2009 9:53 AM

**To:** Ciliberto, Pat; Kes, Mary Kay

**Cc:** dlillehaug@fredlaw.com; frankenperkinsattys@perkinscoie.com; Langdon, Jim

**Subject:** In re contest of General Election held on November 4, 2008 for the purpose of electing a United States Senator from the State of Minnesota

As counsel for Norm Coleman in the election contest venued in Ramsey County, Minnesota, we request pursuant to the Minnesota Government Data Practices Act that the custodian of records or other person authorized to make a certification pursuant to Minn. R. Evid. 902(4) certify, for each of the individuals listed on the attached **Exhibit A**, that:

1. The rejected absentee ballot has not been counted;
2. If no application for an absentee ballot can be found, the official believes that the voter did submit an application but the county/municipality has been unable to locate it;
3. The voter was registered to vote or, if sent a non-registered voter ballot package, has included a voter registration application in the return or secrecy envelope;
4. The voter did not otherwise vote on November 4, 2008 (either in person or by another

Ex. D  
2/25/09

absentee ballot);

5. The witness was either a registered voter or a notary who placed his or her stamp or seal on the envelope;

6. The ballot was received in time to have been counted on November 4, 2008.

We commit to pay reasonable costs associated with this request. As this request relates to the ongoing election contest, Court File No. 62-CV-09-56, we ask respectfully that the information be provided on an expedited basis, preferably via email or fax.

Please call me if you need any additional information regarding this request. Your continued cooperation is appreciated.

<<EXHIBIT A.Scott Co.doc>>

**Bryan C. Keane**

Attorney

.....  
**DORSEY & WHITNEY LLP**

Suite 1500, 50 South Sixth Street

Minneapolis, MN 55402-1498

P: 612.492.6638 F: 612.340.2868

.....  
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*Thank you.*

**From:** Justin Templin [jtemplin@hbklaw.com]  
**Sent:** Tuesday, February 24, 2009 12:58 PM  
**To:** Maikkula.Myrna@dorsey.com  
**Cc:** dlillehaug@fredlaw.com; \*Franken Perkins Attys; langdon.jim@dorsey.com; Stevie Koll Anderson; George Hoff; amadsen@ci.maple-grove.mn.us  
**Subject:** Election Contest  
Ms. Maikkula

Please forward the following information to Mr. Keane in reference to the MGDPA request of this morning, February 24, 2009.

I am an attorney representing the City of Maple Grove. The City of Maple Grove and its staff are not under any MGDPA obligation to "certify" anything as to the matters about which you inquired and will not do so. If you have a proper MGDPA request for documents, we will respond to the same on an expedited basis as has been our practice in this matter to date.

**Justin Templin** | Attorney | Hoff, Barry & Kozar, P.A.  
775 Prairie Center Drive, Suite 160 | Eden Prairie, Minnesota 55344  
direct: 952.746.2710 | main: 952.941.9220 | toll-free: 800.989.9220  
fax: 952.941.7968 | web: [www.hbklaw.com](http://www.hbklaw.com)

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Ex: E

2/25/2009

Ex. F Anoka

From: Rava, William C. (Perkins Coie)  
Sent: Tuesday, February 24, 2009 1:12 PM  
To: \*Franken Perkins Attys; 'Stafford, Christopher'  
Subject: FW: Franken Response to Coleman 2/24 Data Practice Act Request

-----Original Message-----

From: Thomas Haluska [mailto:Thomas.Haluska@co.anoka.mn.us]  
Sent: Tuesday, February 24, 2009 12:32 PM  
To: abarnard@bestlaw.com; Devin.Montero@brooklynpark.org;  
rcolotti@ci.champlin.mn.us; jsmitharens@ci.corcoran.mn.us; tbodem@ci.corcoran.mn.us;  
dmangen@ci.edina.mn.us; svirnic@ci.golden-valley.mn.us;  
bjohnson@ci.greenfield.mn.us; skollanderson@ci.maple-grove.mn.us;  
chad.adams@ci.medina.mn.us; lisa.needham@ci.minneapolis.mn.us;  
Peter.Ginder@ci.minneapolis.mn.us; thaarstad@ci.minnetrista.mn.us;  
lvee@ci.orono.mn.us; tmarshall@ci.robbinsdale.mn.us; sdboszenski@ci.rogers.mn.us;  
bsuciu@ci.saint-anthony.mn.us; bonnieritter@cityofmound.com;  
ngibbs@cityofrichfield.org; tscott@ck-law.com; jratz@co.aitkin.mn.us;  
kpeysar@co.aitkin.mn.us; mdfritz@co.becker.mn.us; rltange@co.becker.mn.us;  
kay.mack@co.beltrami.mn.us; timothy.faver@co.beltrami.mn.us;  
jneyssen@co.benton.mn.us; patty.oconnor@co.blue-earth.mn.us;  
Ross.Arneson@co.blue-earth.mn.us; paul.gassert@co.carlton.mn.us;  
thom.pertler@co.carlton.mn.us; jkeeler@co.carver.mn.us; mlundgren@co.carver.mn.us;  
cass.atty@co.cass.mn.us; chris.strandlie@co.cass.mn.us;  
sharon.k.anderson@co.cass.mn.us; djfreed@co.chisago.mn.us; jareite@co.chisago.mn.us;  
attorney@co.clay.mn.us; auditor@co.clay.mn.us; doug.storey@co.cottonwood.mn.us;  
jan.h.johnson@co.cottonwood.mn.us; cwcauditor@co.crow-wing.mn.us;  
don.ryan@co.crow-wing.mn.us; brian.roverud@co.faribault.mn.us;  
john.thompson@co.faribault.mn.us; sboelter@co.fillmore.mn.us;  
webmaster@co.fillmore.mn.us; craig.nelson@co.freeborn.mn.us;  
dennis.distad@co.freeborn.mn.us; carolyn.holmsten@co.goodhue.mn.us;  
Steve.Betcher@co.goodhue.mn.us; auditor@co.grant.mn.us;  
Char.meiners@co.houston.mn.us; suzanne.bublitz@co.houston.mn.us;  
ddearstyne@co.hubbard.mn.us; pheeren@co.hubbard.mn.us; jeff.edblad@co.isanti.mn.us;  
terry.treichel@co.isanti.mn.us; attorneys.office@co.itasca.mn.us;  
jeff.walker@co.itasca.mn.us; Audit@co.jackson.mn.us; sherry.haley@co.jackson.mn.us;  
amy.brosnahan@co.kanabec.mn.us; denise.cooper@co.kanabec.mn.us;  
county.attorney@co.kandiyohi.mn.us; sam\_m@co.kandiyohi.mn.us;  
bob.peterson@co.koochiching.mn.us; philip.miller@co.koochiching.mn.us;  
Attorney@co.lake.mn.us; elections@co.lake.mn.us; paulavanoverbeke@co.lyon.mn.us;  
rickmaes@co.lyon.mn.us; cindy.schultz@co.mcleod.mn.us;  
michael.junge@co.mcleod.mn.us; barb.loch@co.meeker.mn.us;  
stephanie.beckman@co.meeker.mn.us; brianm@co.morrison.mn.us;  
russn@co.morrison.mn.us; dougg@co.mower.mn.us; kristenn@co.mower.mn.us;  
bkennedy@co.nicollet.mn.us; attorneyoffice@co.nobles.mn.us;  
sbalster@co.nobles.mn.us; krupski.mark@co.olmsted.mn.us;  
ostrem.mark@co.olmsted.mn.us; dhauser@co.ottertail.mn.us; wstein@co.ottertail.mn.us;  
agrogalla@co.pennington.mn.us; ktolson@co.pennington.mn.us; CCJohnso@co.pine.mn.us;  
JkCarlso@co.pine.mn.us; joyce.steinhoff@co.pipestone.mn.us;  
gerald.amiot@co.polk.mn.us; greg.widseth@co.polk.mn.us;  
belvin.doebbert@co.pope.mn.us; donna.quandt@co.pope.mn.us;  
darwin.lookingbill@CO.RAMSEY.MN.US; Joseph.Mansky@CO.RAMSEY.MN.US;  
Jean\_P@co.redwood.mn.us; Pat\_R@co.redwood.mn.us; david\_t@co.renville.mn.us;  
larry\_j@co.renville.mn.us; david@co.sibley.mn.us; pfarrl@co.sibley.mn.us;  
bjorklundg@co.st-louis.mn.us; dicklichd@co.st-louis.mn.us;  
marcus.miller@co.stearns.mn.us; randy.schreifels@co.stearns.mn.us;  
Attorney@co.steele.mn.us; auditor@co.steele.mn.us; jleisen@co.wabasha.mn.us;  
jNordstrom@co.wabasha.mn.us; doug.johnson@co.washington.mn.us;  
Kevin.corbid@co.washington.mn.us; auditor@co.watonwan.mn.us;  
Lamar.Piper@co.watonwan.mn.us; cmaclen@co.winona.mn.us; cmaclennen@co.winona.mn.us;  
bob.hiivala@co.wright.mn.us; brian.asleson@co.wright.mn.us;  
tom.kelley@co.wright.mn.us; keith.helgeson@co.yellow-medicine.mn.us;

Page 1

Ex. F

EX. F Anoka

lois.bonde@co.yellow-medicine.mn.us; daniel-hanover@comcast.net;  
kporta@edenprairie.org; dmaeda@eminnetonka.com; rgstulz@frontiernet.net;  
mglawmkr@hickorytech.net; TerryO@HOPKINSmn.com; ooblaw@iw.net; jake.sieg@lqpc.com;  
chris.karpan@mail.co.douglas.mn.us; t.reddick@mail.co.douglas.mn.us;  
cityhall@mapleplain.com; wlewin@mchsi.com; Rava, William C. (Perkins Coie);  
ilk@runestone.net; nstroth@stlouispark.org; sandy@wayzata.org  
Cc: Bryan Keane; langdon.jim@dorsey.com  
Subject: Re: Franken Response to Coleman 2/24 Data Practice Act Request

Mr. Rava:

Thank you for your email of today's date. We will take your concerns into consideration as we provide our response to the Coleman campaign.

Tom Haluska  
Anoka County Attorney's Office  
Government Center  
2100 3rd Ave.  
Anoka, MN 55303-2265

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-----

>>>  
From: "Rava, William C. (Perkins Coie)" <WRava@perkinscoie.com>  
To: <jneyssen@co.benton.mn.us>, <daniel-hanover@comcast.net>,  
<jratz@co.aitkin.mn.us>, <kpeysar@co.aitkin.mn.us>, <attorney@co.anoka.mn.us>,  
<thomas.haluska@co.anoka.mn.us>, <mdfritz@co.becker.mn.us>,  
<rltange@co.becker.mn.us>, <timothy.faver@co.beltrami.mn.us>,  
<kay.mack@co.beltrami.mn.us>, <Ross.Arneson@co.blue-earth.mn.us>,  
<patty.oconnor@co.blue-earth.mn.us>, <thom.pertler@co.carlton.mn.us>,  
<paul.gassert@co.carlton.mn.us>, <jkeeler@co.carver.mn.us>,  
<mlundgren@co.carver.mn.us>, <cass.atty@co.cass.mn.us>,  
<chris.strandlie@co.cass.mn.us>, <sharon.k.anderson@co.cass.mn.us>,  
<attorney@co.clay.mn.us>, <auditor@co.clay.mn.us>,  
<doug.storey@co.cottonwood.mn.us>, <jan.h.johnson@co.cottonwood.mn.us>,  
<don.ryan@co.crow-wing.mn.us>, <cwcauditor@co.crow-wing.mn.us>,  
<chris.karpan@mail.co.douglas.mn.us>, <t.reddick@mail.co.douglas.mn.us>,  
<brian.roverud@co.faribault.mn.us>, <john.thompson@co.faribault.mn.us>,  
<webmaster@co.fillmore.mn.us>, <sboelter@co.fillmore.mn.us>,  
<craig.nelson@co.freeborn.mn.us>, <dennis.distad@co.freeborn.mn.us>,  
<Steve.Betcher@co.goodhue.mn.us>, <carolyn.holmsten@co.goodhue.mn.us>,  
<ddearstyne@co.hubbard.mn.us>, <pheeren@co.hubbard.mn.us>,  
<attorneys.office@co.itasca.mn.us>, <jeff.walker@co.itasca.mn.us>,  
<sherry.haley@co.jackson.mn.us>, <Audit@co.jackson.mn.us>,  
<jareite@co.chisago.mn.us>, <djfreed@co.chisago.mn.us>, <ilk@runestone.net>,  
<auditor@co.grant.mn.us>, <dmangen@ci.edina.mn.us>, <sam\_m@co.kandiyohi.mn.us>,  
<county.attorney@co.kandiyohi.mn.us>, <TerryO@HOPKINSmn.com>,  
<sdoboszanski@ci.rogers.mn.us>, <suzanne.bublitz@co.houston.mn.us>,  
<Char.meiners@co.houston.mn.us>, <jeff.edblad@co.isanti.mn.us>,  
<terry.treiche@co.isanti.mn.us>, <abarnard@bestlaw.com>,  
Page 2

Ex. F Anoka

<svirnic@ci.golden-valley.mn.us>, <sandy@wayzata.org>, <amy.brosnahan@co.kanabec.mn.us>, <denise.cooper@co.kanabec.mn.us>, <rcolotti@ci.chaplin.mn.us>, <tscott@ck-law.com>, <nstroth@stlouispark.org>, <tbodem@ci.corcoran.mn.us>, <jsmitharens@ci.corcoran.mn.us>, <kporta@edenprairie.org>, <skollanderson@ci.maple-grove.mn.us>, <dmaeda@eminnetonka.com>, <thaarstad@ci.minnetrista.mn.us>, <ngibbs@cityofrichfield.org>, <lvee@ci.orono.mn.us>, <tmarshall@ci.robbinssdale.mn.us>, <Devin.Montero@brooklynpark.org>, <bsuciu@ci.saint-anthony.mn.us>, <bjohnson@ci.greenfield.mn.us>, <bonnieritter@cityofmound.com>, <cityhall@mapleplain.com>, <chad.adams@ci.medina.mn.us>, <wlewin@mchsi.com>, <lisa.needham@ci.minneapolis.mn.us>, <Peter.Ginder@ci.minneapolis.mn.us>, <Pat\_R@co.redwood.mn.us>, <Jean\_P@co.redwood.mn.us>, <philip.miller@co.koochiching.mn.us>, <bob.peterson@co.koochiching.mn.us>, <stephanie.beckman@co.meeker.mn.us>, <barb.loch@co.meeker.mn.us>, <brianm@co.morrison.mn.us>, <russn@co.morrison.mn.us>, <kristenn@co.mower.mn.us>, <doug@co.mower.mn.us>, <mglawmkr@hickorytech.net>, <bkennedy@co.nicollet.mn.us>, <ostrem.mark@co.olmsted.mn.us>, <krupski.mark@co.olmsted.mn.us>, <agrogalla@co.pennington.mn.us>, <ktolson@co.pennington.mn.us>, <JkCarlso@co.pine.mn.us>, <CCJohnso@co.pine.mn.us>, <greg.widseth@co.polk.mn.us>, <gerald.amiot@co.polk.mn.us>, <belvin.doebbert@co.pope.mn.us>, <donna.guandt@co.pope.mn.us>, <david\_t@co.renville.mn.us>, <larry\_j@co.renville.mn.us>, <Attorney@co.lake.mn.us>, <elections@co.lake.mn.us>, <michael.junge@co.mcleod.mn.us>, <cindy.schultz@co.mcleod.mn.us>, <rgstulz@frontiernet.net>, <jake.sieg@lqpc.com>, <attorneysoffice@co.nobles.mn.us>, <sbalster@co.nobles.mn.us>, <dhauser@co.ottertail.mn.us>, <wstein@co.ottertail.mn.us>, <ooblaw@iw.net>, <joyce.steinhoff@co.pipestone.mn.us>, <darwin.lookingbill@CO.RAMSEY.MN.US>, <Joseph.Mansky@CO.RAMSEY.MN.US>, <rickmaes@co.lyon.mn.us>, <paulavanoverbeke@co.lyon.mn.us>, <keith.helgeson@co.yellow-medicine.mn.us>, <lois.bonde@co.yellow-medicine.mn.us>, <david@co.sibley.mn.us>, <pfarrl@co.sibley.mn.us>, <tom.kelley@co.wright.mn.us>, <brian.asleson@co.wright.mn.us>, <bob.hiivala@co.wright.mn.us>, <Lamar.Piper@co.watonwan.mn.us>, <auditor@co.watonwan.mn.us>, <cmacllean@co.winona.mn.us>, <cmaclennen@co.winona.mn.us>, <doug.johnson@co.washington.mn.us>, <kevin.corbid@co.washington.mn.us>, <jnordstrom@co.wabasha.mn.us>

CC: <langdon.jim@dorsey.com>, "Keane, Bryan" <Keane.Bryan@dorsey.com>

Date: 02/24/2009 2:13 PM

Subject: Franken Response to Coleman 2/24 Data Practice Act Request

As counsel for Al Franken, we write in response to the request you received this morning (pasted below) from representatives of the Norm Coleman campaign, seeking to obtain from your jurisdiction a certification of a variety of facts concerning an attached list of voters from your jurisdiction, all purportedly pursuant to the Minnesota Data Practices Act, Minn. Stat. § 13.01 et seq., and Minn. R. Evid. 902(4). Nothing in the Minnesota Data Practices Act (or the Minnesota Rules of Evidence) requires that your county undertake the investigation that would be required in order to respond to this request or to provide a "certification" to the facts identified by the request. Indeed, many of these facts are very much in dispute in the on-going election contest currently pending in Ramsey County. For example, in connection with the request that the county certify the records custodian's "belief" that a voter may have submitted an absentee ballot application, such a "belief" is not properly the subject of a governmental certification of any sort, much less a certification under Rule 902(4). Similarly, it is entirely unclear on what basis your jurisdiction could make a certification that a voter did not "otherwise vote" in the November 4, 2008, General Election absent an extensive and likely costly investigation. Nothing in the Data Practices Act requires that your jurisdiction divert its resources to conducting such an investigation and incur the attendant expenses.

The request that you certify that a ballot has not been already counted is, for many of the jurisdictions to which these requests have been directed, simply redundant: Many jurisdictions have already provided that information, in some instances on

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multiple occasions. Moreover, to the extent that request number 5 seeks to require the county to investigate anew the registration status of dozens or in some cases hundreds of witness registrations, then such a request goes far beyond anything required by the statute. Finally, the request for a certification that the ballots were received in time is similarly improper as it seeks to require the county to review documents that have already been provided to the Coleman campaign and that information can just as easily be compiled by the Coleman representatives as it can by your jurisdiction and thus is improper.

In any event, please be advised that the Franken Campaign believes that the requests go far beyond anything required by the Minnesota Data Practices Act, and will object to the introduction of such certifications into evidence in the on-going election contest in the Ramsey County District Court. Should your jurisdiction choose to respond, please be aware that the Franken campaign will move to exclude such evidence at trial and that, if it is allowed into evidence, will serve a similar request upon you for voters omitted from the Coleman request and may require the certifying custodian to appear in Ramsey County District Court to explain the factual foundation for all such certifications. We urge that you discuss this issue with your county or city attorney.

William C. Rava | Perkins Coie LLP  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
PHONE: 206.359.6338  
FAX: 206.359.7338  
MOBILE: 206.295.2629  
E-MAIL: wrava@perkinscoie.com

-----  
As counsel for Norm Coleman in the election contest venued in Ramsey County, Minnesota, we request pursuant to the Minnesota Government Data Practices Act that the custodian of records or other person authorized to make a certification pursuant to Minn. R. Evid. 902(4) certify, for each of the individuals listed on the attached Exhibit A, that:

1. The rejected absentee ballot has not been counted;
  2. If no application for an absentee ballot can be found, the official believes that the voter did submit an application but the county/municipality has been unable to locate it;
  3. The voter was registered to vote or, if sent a non-registered voter ballot package, has included a voter registration application in the return or secrecy envelope;
  4. The voter did not otherwise vote on November 4, 2008 (either in person or by another absentee ballot);
  5. The witness was either a registered voter or a notary who placed his or her stamp or seal on the envelope;
  6. The ballot was received in time to have been counted on November 4, 2008.
- We commit to pay reasonable costs associated with this request. As this request relates to the ongoing election contest, Court File No. 62-CV-09-56, we ask respectfully that the information be provided on an expedited basis, preferably via email or fax.

Please call me if you need any additional information regarding this request. Your continued cooperation is appreciated.

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Ex. F Anoka

contents. Thank you.

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**From:** Sam Modderman [sam\_m@co.kandiyohi.mn.us]

**Sent:** Tuesday, February 24, 2009 12:32 PM

**To:** 'Keane, Bryan'

**Cc:** 'dlillehaug@fredlaw.com'; \*Franken Perkins Attys

**Subject:** RE: In re Contest of General Election held on November 4, 2008 for the purpose of electing a United States Senator from the State of Minnesota

In response to the questions concerning Miles Edinburgh of Willmar, MN and Lyndsey Paffrath of Spicer, MN:

**MILES EDINBURGH:**

1. The absentee ballot from Miles Edinburgh was not counted in the November 4, 2008 General Election.
2. We have an absentee ballot application from Miles Edinburgh.
3. Miles Edinburgh is a non-registered voter and did not include a voter registration application in the return envelope or secrecy envelope.
4. Miles Edinburgh did not otherwise vote on November 4, 2008.
5. The witness on the return envelope of Miles Edinburgh was a registered voter in the State of Minnesota.
6. The return envelope from Miles Edinburgh was received in time to have been counted on November 4, 2008.

**LYNDSEY PAFFRATH:**

1. The absentee ballot from Lyndsey Paffrath was not counted in the November 4, 2008 General Election.
2. We have an absentee ballot application from Lyndsey Paffrath.
3. Lyndsey Paffrath is a non-registered voter and did not include a voter registration application in the return envelope or secrecy envelope.
4. Lyndsey Paffrath did not otherwise vote on November 4, 2008.
5. The witness on the return envelope of Lyndsey Paffrath was a registered voter in the State of Minnesota.
6. The return envelope from Lyndsey Paffrath was received in time to have been counted on November 4, 2008.

I hereby certify that the above information is true and correct to the best of my knowledge.

Sam Modderman  
Kandiyohi County Auditor/Treasurer  
P.O. Box 936  
Willmar, MN 56201

320.231.6262  
[sam\\_m@co.kandiyohi.mn.us](mailto:sam_m@co.kandiyohi.mn.us)

-----Original Message-----

**From:** Keane, Bryan [mailto:Keane.Bryan@dorsey.com]

**Sent:** Tuesday, February 24, 2009 10:27 AM

**To:** Sam Modderman; County Attorney - General Email Box

**Cc:** dlillehaug@fredlaw.com; frankenperkinsattys@perkinscoie.com; Langdon, Jim

**Subject:** In re Contest of General Election held on November 4, 2008 for the purpose of electing a United States Senator from the State of Minnesota

As counsel for Norm Coleman in the election contest venued in Ramsey County, Minnesota, we request pursuant to the Minnesota Government Data Practices Act that the custodian of records or other person authorized to make a certification pursuant to

F. A.

Minn. R. Evid. 902(4) certify, for each of the individuals listed on the attached **Exhibit A**, that:

1. The rejected absentee ballot has not been counted;
2. If no application for an absentee ballot can be found, the official believes that the voter did submit an application but the county/municipality has been unable to locate it;
3. The voter was registered to vote or, if sent a non-registered voter ballot package, has included a voter registration application in the return or secrecy envelope;
4. The voter did not otherwise vote on November 4, 2008 (either in person or by another absentee ballot);
5. The witness was either a registered voter or a notary who placed his or her stamp or seal on the envelope;
6. The ballot was received in time to have been counted on November 4, 2008.

We commit to pay reasonable costs associated with this request. As this request relates to the ongoing election contest, Court File No. 62-CV-09-56, we ask respectfully that the information be provided on an expedited basis, preferably via email or fax.

Please call me if you need any additional information regarding this request. Your continued cooperation is appreciated.

<<Kandiyohi County.doc>>

**Bryan C. Keane**  
Attorney

.....  
**DORSEY & WHITNEY LLP**  
Suite 1500, 50 South Sixth Street  
Minneapolis, MN 55402-1498  
P: 612.492.6638 F: 612.340.2868

.....  
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*Thank you.*

**From:** Sharon K. Anderson [sharon.k.anderson@co.cass.mn.us]  
**Sent:** Tuesday, February 24, 2009 12:08 PM  
**To:** 'Keane, Bryan'; cass.atty@co.cass.mn.us; chris.strandlie@co.cass.mn.us  
**Cc:** dlillehaug@fredlaw.com; \*Franken Perkins Attys; 'Langdon, Jim'  
**Subject:** RE: In re Contest of General Election held on November 4, 2008 for the purpose of electing a United States Senator from the State of Minnesota

**Attachments:** US Senate Contest Cass County (2) Feb 24.doc  
Mr. Keane,

The attached list and answers in red below constitute my response.

*Sincerely,*

*Sharon K Anderson  
Cass County Auditor-Treasurer  
P.O. Box 3000  
Walker, MN 56484  
218-547-7260 or 7295 Direct  
218-547-7278 FAX  
[www.co.cass.mn.us](http://www.co.cass.mn.us)*

---

**From:** Keane, Bryan [mailto:Keane.Bryan@dorsey.com]  
**Sent:** Tuesday, February 24, 2009 10:31 AM  
**To:** cass.atty@co.cass.mn.us; chris.strandlie@co.cass.mn.us; sharon.k.anderson@co.cass.mn.us  
**Cc:** dlillehaug@fredlaw.com; frankenperkinsattys@perkinscoie.com; Langdon, Jim  
**Subject:** In re Contest of General Election held on November 4, 2008 for the purpose of electing a United States Senator from the State of Minnesota

As counsel for Norm Coleman in the election contest venued in Ramsey County, Minnesota, we request pursuant to the Minnesota Government Data Practices Act that the custodian of records or other person authorized to make a certification pursuant to Minn. R. Evid. 902(4) certify, for each of the individuals listed on the attached **Exhibit A**, that:

1. The rejected absentee ballot has not been counted; None of these rejected absentee ballots have been counted.
2. If no application for an absentee ballot can be found, the official believes that the voter did submit an application but the county/municipality has been unable to locate it; None of these fall into this category.
3. The voter was registered to vote or, if sent a non-registered voter ballot package, has included a voter registration application in the return or secrecy envelope; None of these fall into this category.
4. The voter did not otherwise vote on November 4, 2008 (either in person or by another absentee ballot); None of these fall into this category.
5. The witness was either a registered voter or a notary who placed his or her stamp or seal on the envelope; None of these fall into this category.
6. The ballot was received in time to have been counted on November 4, 2008. Fourteen (14) of these were received late, marked on list in red "LATE". All others on the list were on my

Ex. H

certified list of February 4, 2009.

We commit to pay reasonable costs associated with this request. As this request relates to the ongoing election contest, Court File No. 62-CV-09-56, we ask respectfully that the information be provided on an expedited basis, preferably via email or fax.

Please call me if you need any additional information regarding this request. Your continued cooperation is appreciated.

<<Cass County.doc>>

**Bryan C. Keane**

Attorney

.....  
**DORSEY & WHITNEY LLP**

Suite 1500, 50 South Sixth Street

Minneapolis, MN 55402-1498

P: 612.492.6638 F: 612.340.2868

.....  
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*Thank you.*

# EXHIBIT A

Cass County

COUNTY	PRECINCT	FIRST NAME	LAST NAME	ADDRESS	LATE	CITY	STATE	ZIP
CASS	NONE LISTED	SCOTT	AMUNDSON	1387 12TH STREET		NONE LISTED	MN	
CASS	NOT LISTED	DEBRA	ANDERSON	14958 IOWANA BEACH RD NW		BENA	MN	56626
CASS	LOON LAKE TWP	DUSTIN	BERGERSON	6394 21ST AVE SW	LATE	LOON LAKE	MN	
CASS	PILLAGER	BENJAMIN	ERICKSON	4086 112TH ST SW		PILLAGER	MN	56473
CASS	PINE RIVER	LOIS	FISHER	400 5TH ST	LATE	PINE RIVER	MN	56474
CASS	BIRCH LAKE TWP	RICHARD	GJEVRE	4285 TOWER VIEW DR NW	LATE	BIRCH LAKE	MN	
CASS	SYLVAN TWP	KATHY	GOFF	988 135TH ST NW		SYLVAN TWP	MN	
CASS	EAST GULL LAKE	JOHN	GOIHL	1240 GREEN GABLES RD		EAST GULL LAKE	MN	56401
CASS	EAST GULL LAKE	MARY ANN	GOIHL	1240 GREEN GABLES RD		EAST GULL LAKE	MN	56401
CASS	TURTLE LAKE TWP	KATHLEEN	HENDRICKS	5097 TAMARACK TRL NW	LATE	TURTLE LAKE TWP	MN	
CASS	BARCLAY TWP	TINA	HOLETS	1764 STATE 84 SW	LATE	PINE RIVER	MN	56474
CASS	BRAINERD	THOMAS	HUMPHREY	10916 EAST GULL ROAD		BRAINERD	MN	
CASS	TURTLE LAKE TWP	DARRELL	JUDKINS	7704 AGENCY NARROWS DR NW	LATE	TURTLE LAKE TWP	MN	
CASS	TURTLE LAKE TWP	VICTORIA	JUDKINS	7704 AGENCY NARROWS DR NW	LATE	TURTLE LAKE TWP	MN	
CASS	NONE LISTED	PATRICK	KENNEDY	1295 SUN VALLEY DR		BRAINERD	MN	56401
CASS	HACKENSACK	TODD	MCCORMICK	5055 LOWER TEN MILE LAKE RD NW		HACKENSACK	MN	56452
CASS	LOON LAKE TWP	ROBERT	MORGAN	6453 S SLUETTER	LATE	LOON LAKE	MN	
CASS	EAST GULL LAKE	CLAIRE	NORTHWAY	1490 SUNSETVIEW	LATE	EAST GULL LAKE	MN	56401
CASS	NOT LISTED	JEAN	OTTO	6591 CO #1 SW	LATE	PEQUOT LAKES	MN	
CASS	NOT LISTED	CHARLAINE	PERKL	9856 BIRCH BAY DR SW		NISSWA	MN	56468
CASS	NOT LISTED	DONALD	PERKL	9856 BIRCH BAY DR SW		NISSWA	MN	56468
CASS	FAIRVEIW TWP	DOUGLAS	SELTZ	10361 FOREST LANE SW	LATE	FAIRVEIW	MN	
CASS	WABEDO TWP	SUZANNE	SIETSEMA	4087 FOX RUN LN NE		WABEDO TWP	MN	
CASS	BLACKED OUT	DALE	SPAULDING	8229 ROBINHOOD WAY		BLACKED OUT	MN	
CASS	WILLOW RIVER	JAMES	SWANKIER	7527 STATE 6 NE	LATE	WILLOW RIVER	MN	
CASS	BYRON TWP	JOHN	TURNER	7446 88TH ST SW	LATE	BYRON TWP	MN	
CASS	NON LISTED	CRAIG	WHITING	1177 SHAEFER PAINT ROAD	LATE	LAKE SHORE	MN	