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Court Administrator

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By [illegible] Deputy

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF RAMSEY	SECOND JUDICIAL DISTRICT

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,

Cullen Sheehan and Norm Coleman,

Contestants,

vs.

Al Franken,

Contestee.

ORDER GRANTING CONTESTEE'S MOTION IN LIMINE

Ct. File No. 62-CV-09-56

The above-entitled matter came before the Court upon Contestee's Motion in Limine. Counsel noted their appearances on the record. The Court having heard and read the arguments of counsel, and the files, records, and proceedings herein, makes the following:

ORDER

1. Contestee's Motion in Limine is GRANTED.
2. The Court's Memorandum, filed herewith, is incorporated herein.
3. Any other relief not specifically ordered herein is DENIED.

IT IS SO ORDERED.

BY THE COURT:

Elizabeth A. Hayden
Judge of District Court

Kurt J. Marben
Judge of District Court

Denise D. Reilly
Judge of District Court

Dated this 26th day of February, 2009.

MEMORANDUM

I. Introduction

Contestants Cullen Sheehan and Norm Coleman ("Contestants") filed a Notice of Contest with the Ramsey County District Court on January 6, 2009 contesting the general election of November 4, 2008 pursuant to Minnesota Statute § 209.021. In accordance with Chapter 209, trial commenced on January 26, 2009. We are nearing the end of our fifth week of trial and the end of Contestants' case. Earlier this week, Contestants' counsel represented to the Court that they would conclude their case this week and provided the Court with the names of their final witnesses. On February 24, 2009, Contestants transmitted an email to county election officials stating:

> 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)[1] 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;

[1] Contestants' request is based on Rule 902(4) of the Minnesota Rules of Evidence, which provides that:

> 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.

Minn. R. Evid. 902(4). Rule 902(4) allows for the self-authentication of certain classifications of government records but does not otherwise create an independent exception to the hearsay rule. This rule is specifically cross-referenced in Rule 803(10) of the Minnesota Rules of Evidence.

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.

(Ex. A.) The email concluded by requesting that the information be provided on an expedited basis. (Id.) On the same date, Contestee responded to Contestants' request by sending an email to county election officials advising the counties that Contestee believes the requests go beyond the Minnesota Government Data Practices Act and urging officials to discuss the issue with a county or city attorney. (Ex. F.) As of the date of this Order, some counties have responded to Contestants' request. (Exs. G & H.) Certain counties have objected to Contestants' request as inappropriate under the Data Practices Act. (Exs. C, D & E.) The remaining counties have not yet responded.

On February 25, 2009, Contestee filed a motion in limine to exclude the certifications sought by Contestants. The Court heard oral argument on the same day. Both Contestants and Contestee filed memoranda in support of their respective positions. For the reasons set forth below, the Court grants Contestee's motion on the grounds that Contestants' requested certifications do not fall within the hearsay exceptions articulated in Rules 803 or 807 of the Minnesota Rules of Evidence.

II. Contestee's Motion in Limine is Granted

a. The Minnesota Government Data Practices Act

The Minnesota Government Data Practices Act (the "MGDPA"), Minn. Stat. §§ 13.001-13.90, regulates:

> the collection, creation, storage, maintenance, dissemination, and access to government data in government entities. It establishes a presumption that government data are public and are accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public.

Minn. Stat. § 13.01, subd. 3. The MGDPA "represents a fundamental commitment to making the operations of our public institutions open to the public," and is construed in favor of public access in the interest of furthering the court's commitment to transparency in public institutions. *International Broth. of Elec. Workers, Local No. 292 v. City of St. Cloud*, 750 N.W.2d 307, 312 (Minn. Ct. App. 2008)(internal citations omitted). Minnesota statutes define "government data" as "all data collected, created, received, maintained or disseminated by any government entity regardless of its physical form, storage media or conditions of use." Minn. Stat. § 13.02, subd. 7. It does not include "mental impressions formed by public employees during the course of employment[.]" *Keezer v. Spickard*, 493 N.W.2d 614, 617 (Minn. Ct. App. 1992). While the MGDPA requires a government official to provide access to existing public data, nothing in the language of the Act compels an official to create data, to undertake an investigation, or to summarize the official's conclusions or opinions in writing for use in litigation.

b. Motion in Limine Legal Standard

Minnesota law provides a mechanism by which a party may bring a motion to the Court to exclude evidence before such evidence is offered during trial. *See Wood v. Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 353 N.W.2d 195, 197 (Minn. Ct. App. 1984). A motion in limine functions as a device to "prevent injection into trial of matters which are irrelevant, inadmissible and prejudicial." *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 419 (Minn. Ct. App. 2003). The court's decision whether to grant

or deny a motion in limine is reviewed under an abuse of discretion standard. *Gale v. County of Hennepin*, 609 N.W.2d 887, 890 (Minn. 2000). Here, Contestee moves to exclude any information that may be received through Contestants' certifications on the grounds that such certifications are inadmissible hearsay. For the reasons set forth below, the Court agrees.

c. The Certifications Requested by Contestants Are Inadmissible Hearsay and do not Fall within the Hearsay Exceptions Provided for under the Minnesota Rules of Evidence

i. Minnesota Rule of Evidence 803(8)

The public records and reports exception provides that:

> 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).

Rule 803(8) "makes no distinction among findings of historical fact, factual conclusions, or opinion" under subdivision (C). Minn. R. Evid. 803(8) 1989 comm. cmt. In 1988, the United States Supreme Court held that factually-based conclusions or opinions are not excluded from the scope of Rule 803(8)(C) and should be admissible, "[a]s long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement[.]" *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170, 109 S.Ct. 439, 450 (1988). The Committee Comments for Rule 803(8) also indicate that records and reports should be excluded if the report is not trustworthy and further advises

the Court to "consider the qualifications, bias, and motivations 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." Minn. R. Evid. 803(8) 1989 comm. cmt. Thus, "the primary concern of the rule is a determination of whether the factual finding, conclusion, or opinion is trustworthy and helpful to the resolution of the issues." (Id.)

The Court finds the certifications requested of county officials do not bear the hallmarks of trustworthiness required by the Rules. Rule 803(8) exists to create an exception for official government reports and existing public records which carry an indicia of reliability. A certification created anew by a government official in response to a request from a party engaged in litigation does not carry the same assurance of trustworthiness.[2]

ii. Minnesota Rule of Evidence 803(10)

Contestants seek a certification from government officials that the voter did not otherwise vote on Election Day. A county election official may properly certify pursuant

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[2] For many of the same reasons, the information requested by Contestants does not fall within the business records exception, which provides in full that:

> [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 statute is clear that a record "prepared for litigation is not admissible under this exception." (Id.) Contestants intend to use the certifications prepared by county officials for evidentiary purposes in this election contest. The clear language of the business records exception to the hearsay rules acts as an absolute bar to the Court receiving these certifications. To the extent Contestants seek to admit these certifications under Rule 803(6), the business records exception does not apply.

to Rule 803(10) that, upon review of the poll books and voter rolls for the voter's precinct, the official is unable to find any proof that the individual voted. The absence of public record or entry exception provides that:

> To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

Minn. R. Evid. 803(10).[3]

Contestee indicated in his moving papers and during oral argument that he does not object to requests seeking 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" in accordance with the MGDPA. (Contestee's Mem. at 4, fn. 2.) This could also include voter registration materials. Under Rule 803(10), a county official could conduct a review of official records such as poll books and voter rolls, identify for the Court which records were reviewed, and certify that there is no record of a particular individual having voted in his or her precinct or within the county on Election Day. Thus, certified copies of Election Day incident reports and voter rolls could properly be entered into evidence as an element of proof on Contestants' case. To the Court's knowledge, Contestants did not make this request to the counties and municipalities as part of the email transmitted on February 24, 2009. In the event such evidence was presented, the Court would take the information garnered therein into

[3] The Committee Comments (1989) for Rule 803(10) refer the Court to Rule 44.02 of the Minnesota Rules of Civil Procedure, which provide for the lack of an official record in civil trials as follows:

> A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, [properly authenticated], is admissible as evidence that the records contain no such record or entry.

Minn. R. Civ. P. 44.02.

consideration when making its determination whether an individual voted on Election Day.

d. Cross Examination

The certifications requested by Contestants are inadmissible hearsay and do not fall within one of the clearly-defined exceptions to the hearsay rule. As such, the admission of these certifications into evidence would deprive Contestee, and this Court, of meaningful cross-examination of county officials. *See, e.g., Barnes v. Northwest Airlines*, 47 N.W.2d 180, 193 (Minn. 1951). Contestee is entitled to cross-examine county officials on the foundation for their statements and opinions regarding individual voters and the scope and strength of the requested certifications.

The information Contestants seek to obtain through these certifications are in dispute. This election contest is nearing the end of its fifth week of trial. The Court has heard a tremendous amount of evidence. The testimony from the witnesses has been vital to this Court's function as fact-finder. A proffer of evidence made through email requests from county officials who may or may not have personal knowledge of the information Contestants seek would deprive the Court of the opportunity to evaluate the county officials' testimony in the same manner it has evaluated the testimony of the witnesses already called.[4]

[4] When determining an election contest, the court shall proceed in the manner provided for the trial of civil actions "so far as practicable." Minn. Stat. § 209.065. Throughout, the Court has conducted this election contest as expeditiously as possible. The Court shares Contestants' concern that witnesses should be spared unnecessary expense and inconvenience. However, this does not abrogate the Rules of Evidence which apply to this trial proceeding.

III. Conclusion

The information sought by Contestants does not fall within the enumerated hearsay exceptions provided by Rules 803 or 807 of the Minnesota Rules of Evidence.[5] The hearsay exception applies to existing public records. Here, Contestants are asking officials to create new documents in response to their request. County and municipal officials are under no obligation to create new documents that are not already in existence and kept in the regular conduct of governmental business. Under the Minnesota Rules of Evidence and the MGDPA, Contestants would have been entitled to request existing government records that the county is under a duty to create pursuant to Rule 803(8), or in the alternative, a certification that the record does not exist pursuant to Rule 803(10). To the extent either party's requests are outside of these parameters, the Court will sustain hearsay objections. For the aforementioned reasons, the Court grants Contestee's motion in limine. Any other relief not specifically ordered herein is denied.

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[5] Finally, Contestants' proferred certifications would not fall into the 'catch-all' exception to the hearsay rules. Rule 807 provides that:

> [a] statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing, to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name, address and present whereabouts of the declarant.

Minn. R. Evid. 807. The Court does not believe that such certifications, if provided, would be more probative than other evidence which could be procured. Indeed, as mentioned, the Court has found live testimony and affidavits and declarations submitted by individual voters both probative and compelling. Further, the Court doubts that the interests of justice will best be served by admitting certifications into evidence without the opportunity for meaningful cross-examination. Lastly, Contestants have not provided Contestee, or this Court, with sufficient notice that Contestants intended to offer such certifications into evidence in their case in chief.