

**SUPREME COURT OF THE STATE OF WASHINGTON**

JAMES E. BROE, KENNETH R. SEAL, ROBERT BAKER, MARK SUSSMAN, STAN WALTER, BILL WISE, ANDY STEVENS, ED CRAWFORD, JASON LAGEN, LOUISE WORKMAN, JOCELYN MURCELLI, MIKE MURCELLI, and KEVIN MCDOWELL, American Citizens, Washington Residents and Registered Voters in the State of Washington,

Petitioners,

v.

SAMUAL S. REED, Secretary of State for the State of Washington,

Respondent.

RESPONSE TO  
MOTION FOR  
EXPEDITED  
DISCOVERY AND FOR  
AUTHORITY TO ISSUE  
SUBPOENAS

**I. INTRODUCTION**

Respondent, Secretary of State Sam Reed, responds as follows to the Petitioners' Motion For Expedited Discovery And For Authority To Issue Subpoenas ("Mot. For Expedited Disc."). Petitioners seek leave to issue two different subpoenas, and ask this Court to require the responding parties (Secretary Reed in one case, and the Director of the Department of

Health for the state of Hawaii in the other) to produce specified documents within a week of receiving the subpoenas.

## II. ARGUMENT

### A. Expedited Discovery Is Unnecessary Because This Case Is Plainly Without Merit

No purpose would be served by expediting discovery, or by ordering discovery at all, because the case is plainly without merit. *See* Secretary of State's Resp. to Pet. for Writ of Mandamus and Mot. to Dismiss. The case should, instead, be dismissed.

### B. No Subpoena To The Secretary Of State Is Necessary Because He Has Already Provided The Closest Equivalents To Records That The Petitioners Request

Petitioners seek two categories of records from Secretary Reed. Neither category exists as Petitioners describe them, but comparable records addressing the subjects in which Petitioners express an interest are attached to the accompanying Declaration of Nick Handy.

First, Petitioners seek, "the Declaration of Candidacy of Barack Obama as filed in the State of Washington". Mot. For Expedited Disc. at 2. Under Washington law, however, candidates for President and Vice-President of the United States do not file declarations of candidacy. RCW 29A.24.030 (requiring a declaration of candidacy from all candidates for all offices "other than president of the United States [and]

vice president of the United States”); Decl. of Handy, ¶ 3. Accordingly, no declaration of candidacy by President-elect Obama, or any other Presidential candidate, exists. Instead, Presidential and Vice-Presidential candidates nominated by major political parties (i.e., the Democrats and Republicans) qualify to the ballot by being certified as the nominees of their parties. RCW 29A.56.360 (requiring certification by the proper authorities under party rules). The parties additionally certify slates of electors, who cast the state’s electoral votes if their candidate prevails in the popular vote. RCW 29A.56.320.

The records most similar to a “declaration of candidacy” for President-elect Obama accordingly consist of (1) the certification from the Democratic National Convention that Barack Obama and Joe Biden were the nominees of that convention for President and Vice-President; and (2) the slate of electors for the Democratic Party submitted by the state party chair to the Secretary of State. True and correct copies of those documents are attached to the Declaration of Nick Handy. Decl. of Handy, Exs. A & B.

Second, Petitioners ask for “all records concerning the candidacy and disallowance of Socialist Worker’s Party candidate Frank Colero within the Secretary of State’s Office”. Mot. For Expedited Disc. at 2. Elsewhere in their pleadings, Petitioners identify the candidate about

whom they inquire as “Roger Calero,” a difference in both the first name and spelling of the last name. *Id.* at 7. The Secretary received no records regarding a Presidential candidacy in 2008 under either name. Decl. of Handy, ¶ 4. Rather, the Socialist Workers Party identified its Presidential candidate as James E. Harris. *Id.* As Petitioners acknowledge (Mot. for Expedited Disc. at 7), neither the name of “Frank Colero” nor “Roger Calero” appeared on the ballot in Washington. The simple reason is that the Secretary received no filing on behalf of such a candidate.

The closest equivalent documents that the Secretary possesses to those that Petitioners request consist of the documents filed in support of Socialist Workers Party candidate James E. Harris.<sup>1</sup> Those documents have been provided, and consistently show the name of Mr. Harris as their nominee, and in which neither the names “Colero” nor “Calero” appear. Decl. of Handy, Ex. C. Additionally, the Secretary’s search for such records produced one email discussion in which staff discussed a question posed by a reporter asking why Roger Calero did not appear on the ballot, as well as why another candidate of another minor party did appear, despite a question about being old enough. Decl. of Handy, Ex. D.

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<sup>1</sup> These records differ from those regarding the candidacy of President-elect Obama because minor parties must satisfy additional requirements to qualify Presidential and Vice-Presidential candidates to the ballot. RCW 29A.20.121(2).

Petitioners explain that they seek discovery related to the candidacy of “Colero” or “Calero” because they suspect that the Secretary of State may have engaged in discretionary acts or made factual determinations in order to disqualify a candidate. Mot. For Expedited Disc. at 8. The records demonstrate the contrary; the names of “Colero” or “Calero” did not appear on the ballot because no effort was made to qualify them, not because of any act of the Secretary. Decl. of Handy, Exs. C & D.

**C. This Court Lacks Jurisdiction To Authorize Subpoenas Directed At The State of Hawaii Or Its Department of Health**

The undersigned counsel does not represent the state of Hawaii or its Department of Health. Nor are those entities parties to this case. Nonetheless, a few words should be sufficient to dispose of Petitioners’ request for authorization to issue a subpoena to an agency of a sister state purporting to require its expedited return. First, the state of Hawaii and its agencies and departments are not within the jurisdiction of this Court. *In re Detention of Stout*, 159 Wn.2d 357, 376, 150 P.3d 86 (2007) (“A reluctant out-of-state witness cannot be compelled to testify by subpoena in a civil matter.”).

Moreover, the question of whether Petitioners are entitled to any records from the state of Hawaii depends upon the operation of Hawaii

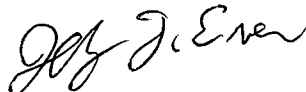
law. Hawaii law prohibits the inspection of public health statistics records, or the issuance of a certified copy of any such record, “unless it is satisfied that the applicant has a direct and tangible interest in the record.” Haw. Rev. Stat. § 338-18(b) (copy attached). Even if this Court had jurisdiction over the state of Hawaii, determining whether Petitioners are entitled to the record would depend upon satisfaction of the standard set forth in Hawaii law, a matter reserved for Hawaii’s courts.

### III. CONCLUSION

For these reasons, this Court should deny Petitioners’ Motion For Expedited Discovery And For Authority To Issue Subpoenas.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of December, 2008.

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West's Hawai'i Revised Statutes Annotated Currentness  
Division 1. Government  
Title 19. Health  
Chapter 338. Vital Statistics  
Part I. State Public Health Statistics Act

→§ 338-18. Disclosure of records

(a) To protect the integrity of vital statistics records, to ensure their proper use, and to ensure the efficient and proper administration of the vital statistics system, it shall be unlawful for any person to permit inspection of, or to disclose information contained in vital statistics records, or to copy or issue a copy of all or part of any such record, except as authorized by this part or by rules adopted by the department of health.

(b) The department shall not permit inspection of public health statistics records, or issue a certified copy of any such record or part thereof, unless it is satisfied that the applicant has a direct and tangible interest in the record. The following persons shall be considered to have a direct and tangible interest in a public health statistics record:

- (1) The registrant;
- (2) The spouse of the registrant;
- (3) A parent of the registrant;
- (4) A descendant of the registrant;
- (5) A person having a common ancestor with the registrant;
- (6) A legal guardian of the registrant;
- (7) A person or agency acting on behalf of the registrant;
- (8) A personal representative of the registrant's estate;
- (9) A person whose right to inspect or obtain a certified copy of the record is established by an order of a court of competent jurisdiction;
- (10) Adoptive parents who have filed a petition for adoption and who need to determine the death of one or more of the prospective adopted child's natural or legal parents;
- (11) A person who needs to determine the marital status of a former spouse in order

to determine the payment of alimony;

(12) A person who needs to determine the death of a nonrelated co-owner of property purchased under a joint tenancy agreement; and

(13) A person who needs a death certificate for the determination of payments under a credit insurance policy.

(c) The department may permit the use [of] the data contained in public health statistical records for research purposes only, but no identifying use thereof shall be made.

(d) Index data consisting of name and sex of the registrant, type of vital event, and such other data as the director may authorize shall be made available to the public.

(e) The department may permit persons working on genealogy projects access to microfilm or other copies of vital records of events that occurred more than seventy-five years prior to the current year.

(f) Subject to this section, the department may direct its local agents to make a return upon filing of birth, death, and fetal death certificates with them, of certain data shown to federal, state, territorial, county, or municipal agencies. Payment by these agencies for these services may be made as the department shall direct.

(g) The department shall not issue a verification in lieu of a certified copy of any such record, or any part thereof, unless it is satisfied that the applicant requesting a verification is:

(1) A person who has a direct and tangible interest in the record but requests a verification in lieu of a certified copy;

(2) A governmental agency or organization who for a legitimate government purpose maintains and needs to update official lists of persons in the ordinary course of the agency's or organization's activities;

(3) A governmental, private, social, or educational agency or organization who seeks confirmation of a certified copy of any such record submitted in support of or information provided about a vital event relating to any such record and contained in an official application made in the ordinary course of the agency's or organization's activities by an individual seeking employment with, entrance to, or the services or products of the agency or organization;

(4) A private or government attorney who seeks to confirm information about a vital event relating to any such record which was acquired during the course of or for purposes of legal proceedings; or

(5) An individual employed, endorsed, or sponsored by a governmental, private, social, or educational agency or organization who seeks to confirm information about a vital event relating to any such record in preparation of reports or publications by the agency or organization for research or educational purposes.

Laws 1949, ch. 327, § 22; R.L. 1955, § 57-21; Laws 1959, 2nd Sp. Sess., ch. 1, § 19; Laws 1967, ch. 30, § 2; H.R.S. § 338-18; Laws 1977, ch. 118, § 1; Laws 1991, ch. 190, § 1; Laws 1997, ch. 305, § 5; Laws 2001, ch. 246, § 2.

CROSS REFERENCES

Paternity, expedited process, see § 584-3.5.

Rulemaking, Administrative Procedure Act, see § 91-1 et seq.

LIBRARY REFERENCES

Health  395.

Westlaw Topic No. 198Hk395.

C.J.S. Health and Environment §§ 24, 28, 30, 74.

NOTES OF DECISIONS

**In general 1**

1. In general

A person seeking to inspect a vital record relating to an event that occurred less than 75 years ago may inspect a vital record without demonstrating that the information is necessary for the determination of personal or property rights, only if the Department of Health is satisfied that the person stands in the spousal, familial, or other relation set forth in section 338-18(b). Conversely, if a person seeking to inspect or copy a vital record does not stand in the spousal, familial or other relation set forth in section 338-18(b), the person may inspect the record only if the Registrar is satisfied that the information is "necessary for the determination of personal or property rights." Whether a person seeking to inspect a vital record stands in the relation to the registrant required by section 338-18(b), is left to the determination of the DOH. Similarly, whether access to vital records is necessary to the determination of personal and property rights must also be determined by the DOH. Haw. Op.Atty.Gen. OIP Opinion Letter No. 90-23 (June 28, 1990), 1990 WL 482371.

H R S § 338-18, HI ST § 338-18

Current through the 2008 Second Special Session of the Hawai'i Legislature.

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