



CITY OF COEUR D'ALENE

LEGAL DEPARTMENT

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April 26, 2012

VIA E-MAIL

Barry McHugh, Kootenai County Prosecutor
R. David Ferguson, Civil Deputy Prosecutor
P.O. Box 9000
Coeur d'Alene, ID 83816

Dear Barry and Dave,

I write to request that you investigate a violation of I.C. 34-202 by County Clerk Cliff Hayes and that you reconsider your decision to bring suit against the City of Coeur d'Alene and four of its elected officials.

As you are aware, the Secretary of State is the chief election officer of this state, and it is his responsibility to obtain and maintain uniformity in the application, operation and interpretation of the election laws. See, I.C. 34-201. In carrying out his responsibility under I.C. 34-201, the Secretary of State is charged with providing the various county clerks with written directives and instructions concerning the interpretation and application of the state's election laws. See, I.C. 34-202. This obligation is reiterated at I.C. 34-1401 where the Secretary of State is charged with providing directives and instructions to the county clerks from time to time for the purposes of achieving uniformity. His office is also charged with providing assistance and advice to the county clerks regarding the operation, application and interpretation of the state's election laws. See, I.C. 34-203. In fact, I.C. 34-202 requires the county clerk to comply with the directives and instructions (including corrections) from the Secretary of State's office. I have attached a copy of I.C. 34-202 for your convenience.

As you are aware, on April 18, 2012 the Secretary of State's office sent the attached instruction letter to City Clerk Susan Weathers regarding the correct interpretation and application of I.C. 34-1704 and I.C. 34-1706. As you can see from the attached email to Ms. Weathers and Mr. Hayes, this instruction letter was also provided directly to Mr. Hayes. Specifically, Chief Deputy Secretary of State Tim Hurst informed Ms. Weathers and Mr. Hayes that the 75 day period allowed under I.C. 34-1704 for the perfection of recall petitions with the required number of certified signatures necessarily includes the period of time (up to 15 business days) given to the county clerk to certify the petition signatures under I.C. 34-1706. This morning I confirmed with Mr. Hurst that this is the official position of the Secretary of State's office. As you can read in the attached email, Mr. Hurst indeed confirmed that this is how the statutes are to be interpreted.

Unfortunately, Mr. Hayes has not followed the instructions from the Secretary of State's office. Instead a suit has been filed against the City of Coeur d'Alene and four of its elected officials challenging the interpretation contained in Mr. Hurst's instructions. Mr. Hayes continues to disregard this instruction as a "city opinion" and continues to insert himself into a process that, by statute, is to be administered by the City Clerk.

Mr. Hurst's letter clearly provides direction on the proper interpretation and application of the referenced code sections. While the position taken in Mr. Hurst's directive may be considered a change in position based on the 2004 amendments to the relevant code sections, it clearly falls within the requirement of I.C. 34-202 that the county clerk must comply with corrected instructions from the Secretary of State. Mr. Hurst clearly states in his letter, no less than four times, that the county clerk's time to certify petition signatures is part of the 75 day period for perfecting a recall petition with the required number of certified signatures. Today he once again reiterated that instruction by email.

Idaho Code Section 34-212(1), a copy of which is attached, provides:

Any person having knowledge of any failure of a county clerk to comply with a lawful directive or instruction prepared and distributed or given under the authority of the secretary of state may notify the prosecuting attorney of the county. Upon receipt of such notification the prosecuting attorney shall proceed immediately to investigate the alleged failure of the county clerk to comply. Upon the conclusion of the investigation the prosecuting attorney shall advise and direct the county clerk with regard to how he must proceed in connection with the matter. The county clerk shall proceed immediately to comply with the directive of the prosecuting attorney.

(Emphasis added). I am officially asking that you investigate this matter as required by I.C. 34-212.

In the past your office has been very diligent in avoiding involvement in issues where the prosecuting attorneys office may be called upon to provide legal advice to county officers concerning future conduct or areas where there may be an appearance of impropriety if your office were to get involved. In this case, your office may be called upon to provide advice to the county clerk's office during their review of the recall petition signatures such as whether illegible signatures should count or whether signatures that are not dated should count. Additionally, your office may also be called upon to provide advice concerning the conduct of the recall election should it get that far. I am afraid that choosing to instigate a purely optional lawsuit, where your office does not have standing, has resulted in the appearance that your office is taking sides in the recall petition drive. This is especially true when I.C. 34-1715 provides a method for the recall petitioners to challenge the city's position if they elect to do so.

Further, because you are the chief law enforcement officer in the county, I fear that your decision to sue the City and the four named elected officials also creates the unwarranted impression that the City has behaved in an illegal or unethical manner. This is especially unfortunate given that the four named officials, who have played absolutely no role in this matter, are subject to a recall petition drive that is very publicly questioning their integrity.

I can assure you that the City Attorney's office and the City Clerk have gone to great lengths to ensure that this process is handled in a professional and ethical manner. We have screened the elected

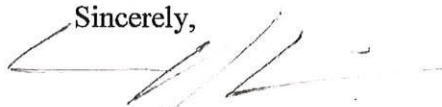
officials from involvement in decision making regarding this issue and have provided our level best assistance to both the recall petitioners and the citizens who are opposing the recall. This includes notifying the recall petitioners of a potentially fatal flaw in the petition when they failed to include a reason for the recall as required by I.C. 34-1703 and notifying the petitioners immediately when we determined they needed to complete the certification process within 75 days.

In reaching that conclusion, we spent considerable time evaluating I.C. 34-1704 and I.C. 34-1706 and it was only after consulting with the Attorney General's office that we determined that the statutes require the county clerk to complete the certification process within the allowed 75 days. Later communication with the Secretary of State's office confirmed this decision. We had hoped to meet with you to discuss this conclusion however you requested that we meet with Mr. Hayes instead. While that discussion was cordial and professional and we were able to address other potential issues, we were unable to discuss the merits of this conclusion with the county's legal representatives in an adult and sober manner. Rather, we were simply informed that the county would be suing the city. I understand from talking with your office that Mr. Hayes did not want anyone from your office present for the meeting.

I have always appreciated the close working relationship we have had with the county's civil attorneys and the ability we have had to meet and confer when issues have arisen. It is in that spirit that I respectfully request that, in addition to reviewing the violation of I.C. 34-202, you withdraw the ill-considered lawsuit against the city and the four named elected officials. Frankly, I'm not sure how your office can continue to ethically pursue this litigation while investigating Mr. Hayes. My fear is that the county risks an award of sanctions and/or attorney's fees if it continues on this course.

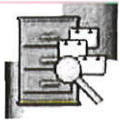
Thank you for your consideration. If you have any questions please do not hesitate to contact me.

Sincerely,



Warren Wilson
Deputy City Attorney

CC: Mayor
City Council
Mike Gridley
Wes Somerton
Mike Haman
Susan Weathers
Cliff Hayes



Idaho Statutes

TITLE 34 ELECTIONS

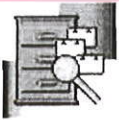
CHAPTER 2 DUTIES OF OFFICERS

34-202. SECRETARY OF STATE TO DISTRIBUTE COMPREHENSIVE DIRECTIVES AND INSTRUCTIONS RELATING TO ELECTION LAWS TO ALL COUNTY CLERKS. In carrying out his responsibility under section 17 [34-201], the secretary of state shall cause to be prepared and distributed to each county clerk detailed and comprehensive written directives and instructions relating to and based upon the election laws as they apply to elections, registration of electors and voting procedures which by law are under the direction and control of the county clerk. Such directives and instructions shall include sample forms of ballots, papers, documents, records and other materials and supplies required by such election laws. The secretary of state shall prescribe a form for voter registration cards based on the voter registration laws and, from time to time, shall cause to be prepared and distributed to each county clerk such written corrections of such directives and instructions and of the form for registration cards as are necessary to maintain uniformity in the application, operation and interpretation of and to reflect changes in the election laws. Each county clerk affected thereby shall comply with such directives and instruction, and corrections thereof, and shall provide voter registration cards prepared in accordance with the prescribed form.

History:

[34-202, added 1970, ch. 140, sec. 18, p. 351.]

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Idaho Statutes

TITLE 34 ELECTIONS

CHAPTER 2 DUTIES OF OFFICERS

34-212. REPORTS TO PROSECUTING ATTORNEY OF NONCOMPLIANCE WITH ELECTION LAWS BY COUNTY CLERK. (1) Any person having knowledge of any failure of a county clerk to comply with a lawful directive or instruction prepared and distributed or given under the authority of the secretary of state may notify the prosecuting attorney of the county. Upon receipt of such notification the prosecuting attorney shall proceed immediately to investigate the alleged failure of the county clerk to comply. Upon the conclusion of the investigation the prosecuting attorney shall advise and direct the county clerk with regard to how he must proceed in connection with the matter. The county clerk shall proceed immediately to comply with the directive of the prosecuting attorney.

(2) If the prosecuting attorney, upon the conclusion of an investigation under subsection (1) of this section, determines that the county clerk has failed to comply with a lawful directive or instruction prepared and distributed or given under the authority of the secretary of state, and that such failure to comply involves a violation by the county clerk of any statute, the violation of which is punishable by a criminal penalty or forfeiture of office, the prosecuting attorney shall promptly proceed to prosecute such violation by the county clerk.

(3) The remedy provided in this section is cumulative and does not exclude any other remedy provided by law against a county clerk who fails to comply with a lawful directive or instruction prepared and distributed or given under the authority of the secretary of state, or who violates any statute.

History:

[34-212, added 1970, ch. 140, sec. 28, p. 351.]

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STATE OF IDAHO
OFFICE OF THE SECRETARY OF STATE
BEN YSURSA

April 18, 2012

Susan K. Weathers
Coeur d'Alene City Clerk
710 East Mullan
Coeur d'Alene, Idaho 83816

Re: Deadline for Submission of Recall Petitions

Dear Susan,

Thank you for sending me a copy of your correspondence with Mr. Orzell regarding your interpretation of the deadline for submission of petitions in the proposed recall of the mayor and members of the city council in Coeur d'Alene.

I have reviewed them with Secretary Ysursa and with the Attorney General's Office and it appears that your interpretation is legally defensible. The reference to "certified signatures" was not removed when the recall statutes were amended in 2004. As you point out, in order for the signatures to be certified, the petitions have to have been examined by the county clerk and the petition must have the clerk's certificate, as provided in section 34-1807, Idaho Code, attached. The requirement to submit the petitions with certified signatures within 75 days, as required by section 34-1704, Idaho Code, does include the 15 business days that the county clerk has to check the signatures.

An additional legislative change will need to be made to give petitioners the full 75 days to gather signatures for a recall. Until that happens, the time required to certify signatures is included within the 75 days.

We agree with you, in order to avoid a court challenge of the recall election, petitioners need to submit their petitions to you well in advance of the June 19th deadline so the signatures can be examined and certified by the county clerk within that deadline.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy A. Hurst".

TIMOTHY A. HURST
Chief Deputy
Secretary of State

TAH/lm

WILSON, WARREN

From: WEATHERS, SUSAN
Sent: Thursday, April 26, 2012 8:29 AM
To: WILSON, WARREN
Subject: FW: CDA Recall Petition Deadlines

Warren, below is the email that both Cliff Hayes and I received from the Secretary of State's office.

Susan

From: Tim Hurst [<mailto:thurst@sos.idaho.gov>]
Sent: Wednesday, April 18, 2012 12:15 PM
To: WEATHERS, SUSAN
Cc: County Clerk-Kootenai-Cliff Hayes
Subject: CDA Recall Petition Deadlines

Susan,

Attached is a copy of my letter agreeing with your interpretation that the 15 business day review and certification of signatures by the county clerk is part of the 75 days allowed to submit recall petitions.

Tim

Tim Hurst
Chief Deputy
Idaho Secretary of State
700 W. Jefferson, Room E205
Boise, Idaho 83720
phone: 208-334-2852
thurst@sos.idaho.gov