



FLORIDA DEPARTMENT *of* STATE

CHARLIE CRIST
Governor

DAWN K. ROBERTS
Interim Secretary of State

August 10, 2010

Honorable Mark Andersen
Bay County Supervisor of Elections
830 W. 11th Street
Panama City, Florida 32401

RE: DE 10-10
Early Voting and Absentee Ballot Results
§§101.5614, 101.657, and 101.68, Florida Statutes

Dear Supervisor Andersen:

This letter responds to your request for an advisory opinion. As the Supervisor of Elections for Bay County, the Division of Elections has the authority to issue you an opinion pursuant to section 106.23(2), Florida Statutes (2009). You have asked essentially the following question:

May early voting and absentee ballot results be uploaded into the election management system prior to 7:00 p.m. on election day?

The short answer is yes. Nothing in state law prohibits the pre-election day upload of early voting and absentee ballots cast to an election management system. It is important to remember, however, that the law prohibits making available to the public, releasing, or otherwise reporting the election results, in whole or in part, prior to 7 p.m. on election day.

We infer that the intent is for a Supervisor of Elections: 1) To be able to facilitate the more timely and orderly consolidation of precinct-level election results prior to making them available or to releasing them as soon after 7 p.m. on election day, and 2) To be better able to meet post-election reporting or certification deadlines.

Section 97.021(22), Florida Statutes, defines early voting as the "casting and deposit of a voted ballot in the tabulation system prior to election day at a location designated by the Supervisor of Elections." By its very definition, the ballot is tabulated the day it is cast, which is before election day. The early voting period for federal, statewide, and county elections spans two weeks, beginning on the 15th day before election day and ending on the 2nd day before election day. See s. 101.657, Florida Statutes. That means that the early votes cast are completely tabulated and ready for upload to the election management system two days before election day.

As to absentee ballots, the canvassing board can begin canvassing and running those ballots through the tabulation machine as early as 7 a.m. on the sixth day prior to election day. See s. 101.68(2)(a), Florida Statutes. This means that the results of absentee ballots that are tabulated are likewise ready to be uploaded to the election management system. The canvassing and tabulation of timely received absentee ballots continues through election day and beyond until completed.

After the polls close at 7 p.m. on election day, the law states that the election board that comprises the inspectors and clerk is required to post the results or tabulation of votes at the polls as the count is completed. See s. 102.071, Florida Statutes. Then the election board is required to sign a certificate of returns that is delivered under secure seal to the Supervisor of Elections for delivery to the canvassing board. The canvassing board then reviews the returns by examining the tabulation of the ballots cast and then canvassing the returns. See s. 102.141(3), Florida Statutes.

Strict post-election deadlines apply. Within 5 hours after the polls close, preliminary results are due. See s. 102.141(4), Florida Statutes. Two and half days after the primary election, the first unofficial results are due. See s. 102.141(5), Florida Statutes. For the general election, the first unofficial results are due three and half days after the general election. If a machine recount has to be done, the second set of unofficial returns are then due no later than 3 p.m. on the fifth day after the primary election and on the ninth day after the general election. See s. 102.141(7), Florida Statutes. Regardless of a recount or not, the official results are then due no later than 5 p.m. on the 7th day following a primary election and by noon on the 12th day following a general election.

In order to meet these deadlines, it is important, to the extent possible, for the Supervisors of Elections to take as many preparatory steps as possible. One key step is the upload of election results into the election management system. The election management system is an integral part of laying the preliminary groundwork for compiling elections results for subsequent availability, release, and certification. The upload of data from the memory card may be done by modem or by direct connection. Traditionally, Supervisors of Elections have waited until after the polls close on election day to combine their upload of results of early votes and absentee ballots already tabulated prior to election day with election day precinct-level election results. If a Supervisor of Elections were to upload these results to the election management system either on the Sunday or Monday before election day, all that would be left to upload on election day would be precinct-level election results and any outstanding absentee ballot and provisional ballot results. This could streamline preparations for compiling the results for subsequent release, mitigate upload issues, and minimize delays in reporting results on election night. We find nothing in state law that would prohibit the pre-election day upload of early voting and absentee ballot results into the election management system.

What the law clearly prohibits, however, is the release or availability of those results, in whole or in part, to the public prior to 7 p.m. on election day. The penalties are severe for doing so, i.e., a third degree felony. The relevant sections are as follows:

- For early votes cast, “the results or tabulations of votes cast during early voting may not be made before the close of polls on election day.” See s. 101.657(1)(a), Florida Statutes. [Note that as earlier stated, a vote cast during the early voting period is by its very definition already tabulated. Therefore, this provision is still consistent with the ones below in that it prohibits the release or making any part of the results public prior to 7 p.m. on election day.]
- For absentee ballots, the law states “. . . notwithstanding any such authorization to begin canvassing or otherwise processing absentee ballots early, no result shall be released until after the closing of the polls in that county on election day.” Any Supervisor of Elections, deputy Supervisor of Elections, canvassing board member, election board member, or election employee who releases the results of a canvassing or processing of absentee ballots prior to the closing of the polls in that county on election day commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.” See s. 101.68(2)(a), Florida Statutes.
- For mail ballot elections, the canvassing board can begin canvassing mail ballots at 7 a.m. on the sixth day before the election, including processing the ballots through the tabulating equipment but the law says “. . . results may not be released until after 7 p.m. on election day. Any canvassing board member or election employee who releases any result before 7 p.m. on election day commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.” See s. 101.6103, Florida Statutes.
- For results of ballots tabulated at precinct locations on election day, “[a]ny Supervisor of Elections, deputy Supervisor of Elections, canvassing board member, election board member, or election employee who releases the results of any election prior to the closing of the polls in that county on election day commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.” See s. 101.5614(9), Florida Statutes.

If a Supervisor of Elections chooses to upload early voting results or absentee ballots (already tabulated) into the election management system, the process must be secure. The upload must be conducted in a manner that is consistent with established procedures in rule and law, including all security procedures applicable pursuant to Rule 1S-2.015, Florida Administrative Code and section 101.015, Florida Statutes. Additionally, this means that the security procedures must include a description of this process including how it will be handled and how it will be secured. Consistent with current practice, the results tape must still be produced after 7 p.m. on election day.

Provided all these procedures are followed, the results of early voting and absentee ballots tabulated prior to election day may be transmitted to the election management system prior to election day in preparation for compiling election returns as required by law. See s. 101.5614(3), Florida Statutes. This will facilitate timely compilation, public availability, release, reporting and certification of election results shortly after the polls close on election day and within the other timelines provided in law.

Honorable Mark Andersen

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SUMMARY

Supervisors of Elections are not precluded from uploading early voting and absentee ballots results to the election management system prior to election day, provided this process is secure and reflected in the Supervisor of Elections' security procedures. However, election results, in whole or in part, shall not be made available, released, or otherwise reported prior to 7 p.m. on election day.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Palmer', with a long horizontal line extending to the right.

Donald L. Palmer

Director, Division of Elections