

ELECTIONS:
BALLOTS:

Section 111.591, RSMo 1969, does not authorize the prosecuting attorney or other public officer to inspect ballots in the custody of the county clerk or board of election commissioners, unless some judicial proceeding, grand jury investigation, or other investigation authorized by law is pending.

OPINION NO. 461

September 15, 1970

Honorable G. William Weier
Prosecuting Attorney
Jefferson County Court House
Post Office Box 246
Hillsboro, Missouri 63050



Dear Mr. Weier:

This official opinion is issued in response to your recent letter, in which you advise us that there was a discrepancy between the number of ballots shown on the poll sheets and the number of ballots tallied in a recent election and ask whether the custodian of the ballots may permit an inspection of these ballots, in the absence of any pending civil or criminal litigation or grand jury proceeding.

The statutory authority for inspection of ballots is contained in Section 111.591, RSMo 1969. This provision establishes the county clerk or board of election commissioners as official custodian of ballots following the election. Such section provides in part as follows:

"All ballots, after being counted, shall be sealed up in a package and delivered to the county clerk or board of election commissioners who shall deposit them in their offices, where they shall be safely preserved for twelve months and shall not allow them to be inspected except in case of contested elections, investigations, or in the trial of all civil or criminal cases in which a violation of any law relating to elections, including

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primary elections, is under investigation or at issue, and then only on the order of the proper court, or a judge thereof in vacation, and under such restrictions for their safekeeping and return as the court or judge making the same deems necessary. . . ."

This statutory provision must be read in the light of the language of Article VIII, Section 3 of the Constitution of Missouri, which reads as follows:

"All elections by the people shall be by ballot or by any mechanical method prescribed by law. Every ballot voted shall be numbered in the order received and its number recorded by the election officers on the list of voters opposite the name of the voter. All election officers shall be sworn or affirmed not to disclose how any voter voted: Provided, that in cases of contested elections, grand jury investigations and in the trial of all civil or criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation or at issue, such officers may be required to testify and the ballots cast may be opened, examined, counted, compared with the list of voters and received as evidence.

Essentially identical provisions of the Constitution of 1875 were construed in the case of State ex rel Hollman v. McElhinney, 315 Mo. 731, 286 S.W. 951 (1926), in which the Supreme Court of Missouri held that provisions for inspection of ballots which went beyond the authority specified in the above-quoted constitutional provision were invalid.

We are of the opinion that the provision for inspection of ballots in the case of "investigations" as set out in Section 111.591 must be construed as applying only to grand jury investigations, or other investigations in the course of judicial proceedings. Such a construction would harmonize the statutory provisions with those of Article VIII, Section 3 of the state constitution, which refers expressly to "grand jury investigations".

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Such a harmonizing construction should be employed if possible. Mobil Oil Corp. v. Danforth, 455 S.W.2d 505 (Mo. 1970). The McElhinney case cited above indicates, furthermore, that the policy behind Article VIII, Section 3 is to guard the access to ballots following elections and to forbid inspection except under the circumstance expressly set out.

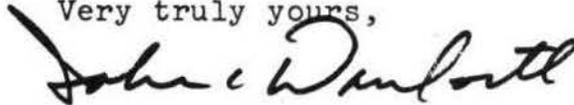
It follows that an informal inspection by public officials is not authorized by the statute.

CONCLUSION

The custodian of ballots following an election cannot permit an inspection by the prosecuting attorney or other public officers, under the authority of Section 111.591, RSMo 1969, in the absence of any pending grand jury investigation or judicial proceeding.

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, Charles B. Blackmar.

Very truly yours,



JOHN C. DANFORTH
Attorney General