



FLORIDA DEPARTMENT *of* STATE

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October 19, 2022

Florida Democratic Party
c/o Marc Burton, Esq.
2875 N.E. 191st Street
Suite 403
Tallahassee, Florida 33180

Florida Democratic Party
c/o Stephen F. Rosenthal, Esq.
1 S.E. 3rd Avenue
Suite 2300
Miami, Florida 33131

Republican Party of Florida
c/o Benjamin Gibson, Esq.
215 South Monroe Street
Suite 804
Tallahassee, Florida 32301

Re: DE 22-08 Release of Information About
Votes Cast or Results of any Election; Ballot
Duplication; Affidavit Non-disclosure of
Election Results – §§ 101.5614(4)(a),
101.5614(8), Florida Statutes

Dear Mr. Burton, Mr. Gibson and Mr. Rosenthal:

This letter responds to your requests for advisory opinions concerning section 101.5614(4)(a) and (8), Florida Statutes. Mr. Gibson requested an advisory opinion on behalf of the Republican Party of Florida, and Mr. Rosenthal and Mr. Burton requested on behalf of the

Division of Elections
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Florida Democratic Party. Because the political parties are proposing to act related to Florida's election laws, the Division of Elections is authorized to issue an opinion under section 106.23(2), Florida Statutes.

FACTS

Mr. Gibson requested that an advisory opinion that answers three questions:

1. Does the phrase "other person" in section 101.5614(8) apply to a person designated by the Republican Party of Florida chairman to observe ballot duplication under section 101.5614(4)?
2. If yes, is a Republican Party of Florida designee under section 101.5614(4) permitted to take written notes of his or her observations of the duplication process, any objections made to the duplication of ballots, and the results of those objections, including determinations by the canvassing board as to the voter's definite choice of candidate or issue on the ballot?
3. If so, does section 101.5614(8) prevent a Republican Party of Florida designee under section 101.5614(4) from transmitting those written notes and other similar information to the Republican Party of Florida and its chairman?

Mr. Rosenthal and Mr. Burton requested an advisory opinion that answers two questions:

1. What information about votes cast for or against any candidate or ballot measure may an authorized person communicate privately, prior to the closing of the polls in the county in which the person is authorized, with other authorized persons volunteering or working on behalf of the same political party, candidate, or campaign?
2. What information about votes cast for or against any candidate or ballot measure may an authorized person communicate publicly prior to the closing of the polls in the county in which the person is authorized?

ANALYSIS

I. Mr. Gibson's First Question

Mr. Gibson asked: does the phrase “other person” in section 101.5614(8) apply to a person designated by the Republican Party of Florida chairman to observe ballot duplication under section 101.5614(4)?

Under section 101.5614(4)(a),

Upon request, a physically present candidate, *a political party official*, a political committee official, *or an authorized designee thereof*, must be allowed to observe the duplication of ballots upon signing an affidavit affirming his or her acknowledgment that disclosure of election results discerned from observing the ballot duplication process while the election is ongoing is a felony, as provided under subsection (8).

§ 101.5614(4)(a), Fla. Stat. (emphasis added). In other words, section 101.5614(4)(a) allows a political party official to authorize a designee to “observe the duplication of ballots.” *Id.*

In turn, section 101.5614(8) provides that:

Any supervisor of elections, deputy supervisor of elections, canvassing board member, election board member, election employee, or *other person authorized* to observe, review, or inspect ballot materials or observe canvassing who releases any information about votes cast for or against any candidate or ballot measure or any results of any election before 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.

§ 101.5614(8), Fla. Stat. (emphasis added). When section 101.5614(8) is read with section 101.5614(4)(a), an “other person authorized” under section 101.5614(8) applies to a political party official’s authorized designee under section 101.5614(4)(a).

The discussion so far tees up a broader question about who, generally, is a “person authorized” under the statute. Authorize means “[t]o formally approve; to sanction.” Authorize, Black’s Law Dictionary (11th ed. 2019). The Division interprets “person authorized” therefore to mean an individual who is given some “formal[] approv[al]” to either “observe, review, or inspect ballot materials” or to “observe canvassing.” § 101.5614(8), Fla. Stat. That is, a “person

authorized” is a person who is given specific access to either the ballots or the canvassing process by the election laws.

That interpretation makes sense structurally because the election laws are replete with provisions that give certain individuals special access to either the ballot materials or the canvassing process. For example, a “candidate, a political party official, a political committee official, or an authorized designee thereof,” is authorized “to observe the duplication of ballots.” § 101.5614(4)(a), Fla. Stat. Likewise, “[d]uring each meeting of the county canvassing board, each political party and each candidate may have one watcher able to view directly or on a display screen ballots being examined for signature matching and other processes.” § 101.5612(2), Fla. Stat. And when individuals are given special access to the ballots or the canvassing process, it makes sense to demand that they (like the election supervisors and canvassers) do not publicly disclose information about the electoral count before the polls close.

The Division’s reading also makes sense against the backdrop of Florida’s public and transparent electoral system. By law, canvassing meetings are public. § 102.141(2)(a), Fla. Stat. It would make little sense to restrict the public release of information that is already publicly available. By contrast, by restricting the release of information given to individuals granted special, private access to the electoral process, the Division’s reading balances the goals of electoral transparency and ensuring that electoral tabulations do not leak before the polls close.

II. Mr. Gibson’s Second and Third Questions, and Mr. Rosenthal and Mr. Burton’s First and Second Questions

As for the remaining questions, Mr. Gibson, Mr. Rosenthal, and Mr. Burton ask substantially the same question: what information can be shared by the authorized designee under sections 101.5614 (4)(a) and (8), F.S.?

Section 101.5614(4)(a) does not prohibit the sharing of any information; rather, it allows certain people (“a physically present candidate, a political party official, a political committee official, or an authorized designee thereof...”) to “observe the duplication of ballots,” as long as those people first sign “an affidavit” acknowledging that they know the “disclosure of election results”—“discerned from observing the ballot duplication”—constitutes a “felony” under “subsection 8.” It is section 101.5614(8) that prohibits the release of certain information. More specifically, 101.5614(8), F.S., states that any “person authorized to observe” the duplication process, among other things, “commits a felony” when that person “releases” “information about votes cast” or “any results” “before the closing of the polls.” *Id.* § 101.5614(8).

The operative word in 101.5614(8), F.S. is “release.” The word “release” is not defined in the statute. “Release” means “to make available to the public” or “to give permission” for the

same.¹ The ordinary meaning guides the Division’s analysis. *See, e.g., Alachua County v. Watson*, 333 So. 3d 162, 169 (Fla. 2022). As does Florida agency law, which makes clear that designees act on behalf of their principals. *See, e.g., Goldschmidt v. Holman*, 571 So. 2d 422, 424 n.5 (Fla. 1990) (citing Restatement (Second) of Agency § 1 (1957)).

The Division interprets section 101.5614(8) to prohibit *making public* (i.e., releasing) non-public information “about votes cast for or against any candidate or ballot measure or any results of any election before the closing of the polls in that county on election day.” Naturally read, this prohibition would not extend to an authorized designee reporting vote tallies, objections, and the outcome of objections made during the duplication process, to the candidate, designating political party, or designating political committee. The designee is an agent participating in the process on the party-principal’s behalf and the party principal itself is among those “authorized” to observe the same process.

Authorized designees may thus share privately, prior to the closing of the polls, whatever they observe with their respective principals such as candidates, political party officials, and political committee officials. And none are liable for sharing information that has already become public as this may occur, for example, through the release of information to the public by the local election official at a publicly noticed meeting.

That leaves the question of what information cannot be made public. Section 101.5614(8) restricts releasing “any information about votes cast for or against any candidate or ballot measure or any results of any election before the closing of the polls.” Read in context, the Division interprets that phrase to restrict reports about either the final tally in an election or pre-results tabulations that reveal the number of votes a candidate or measure has received. Thus, for example, the statute would prohibit an “authorized person” with access to the ballot duplication process from publishing a statement that, on a given day, Candidate A received 10 votes out of the 20 duplicated ballots. The prohibition would not, however, prohibit a person from stating that a canvassing board reviewed 1,000 ballots in a day or that 20 ballots were duplicated on a particular day.

Again, the Division interprets section 101.5614(8) as only restricting the release of information (either “results” or “votes cast for or against any candidate or ballot measure”) until the “closing of the polls.” In the Division’s view, once the polls close, section 101.5614(8) no longer restricts the release of information.

¹ <https://www.merriam-webster.com/dictionary/release>.

SUMMARY

In sum, the Division finds that section 101.5614(4) applies to persons designated by a candidate, party, or committee as observers of the ballot duplication process. These authorized designees may take written notes and communicate those notes and any other information pertaining to the duplication of ballots, objections, and the results of those objections (including determinations of a canvassing board) to the principal that authorized the designees to observe on their behalf without violating section 101.5614(4)(a) or (8).

Respectfully,

/Maria I. Matthews/

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Director, Division of Elections