

Voting and the media: Elements of a healthy democracy

A few weeks from now, this state's residents will be involved in what used to be a quiet and noncontroversial act of citizenship — casting our ballots on election day. But in more recent years, the entire process of voting has drawn significantly more attention. This seems like a good time to address a few factors that may arise as we undergo the process again.

First, I know in August, at least one member of the media called the hotline to report they were prohibited from bringing a camera into the polling place. That is wrong. The Missouri statute that governs this is Section 115.409 and it wouldn't hurt to send a copy of that statute with any photographer going out to take election day photographs.

That statute specifically includes in the category of persons admitted to a polling place "members of the news media who present identification satisfactory to the election judges ... provided that such coverage does not disclose how any voter cast the voter's ballot on any question or candidate or in the case of a primary election on which party ballot they voted or does not interfere with the general conduct of the election."

So, a member of the news media definitely has every right to photograph outside AND inside the polling place, so long as a photograph doesn't reveal how a voter voted.

What about "selfies" taken with a person's own camera? Can a voter post a photo of their marked ballot on social media? Technically, that's a Class Four election offense — a misdemeanor — it can be punished by "imprisonment of not more than one year" or by a fine of not more than \$2,500, or by both imprisonment and fine. The technical language of which a person would be charged is "allowing his or her ballot to be seen by any person with the intent of letting it be known how he or she is about to vote or has voted...." (Missouri Section 115.637.)

No, that's not new language. It was

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probably inserted in connection with efforts to prevent folks from attempting to "buy" votes many years ago. And no, there is no case law discussing the application of this Missouri statute in the social media era we now live in.

While this is a hot-enough issue, according to the National Conference of State Legislatures, that it appears all states in 2022 have either constitutional or statutory provisions guaranteeing secrecy in voting, today's young voters apparently believe it is a mark of pride to share a ballot photo with their peers. So, a number of states, not including Missouri, surprisingly, now explicitly prohibit sharing a photo of a marked ballot on social media. At the same time, at least one state has found such a law unconstitutional as a violation of your First Amendment rights.

Ballots are counted after the election closes, of course, and then what happens to those election materials? The election authorities, according to Section 115.493 of the Missouri statutes, must keep all "voted ballots, ballot cards, processed ballot materials in electronic form and write-in forms, and all applications, statements, certificates, affidavits and computer programs relating to each election" for a period of 22 months post-election.

Authorities are charged by that Missouri statute to not open or inspect the materials, or let anyone else do so, unless they receive an order from a court, a grand jury or a legislative body

trying an election contest that orders them to do so (Section 115.493).

And the statute says after that 22-month period is over, the materials "may" be destroyed. (Obviously, if a contest of a race is pending, the materials related to that contest are not to be destroyed until after that contest is decided.) But what does that use of the word "may" indicate?

I recently heard a discussion among county election clerks suggesting that this was a poor use of the word "may," raising questions whether some clerks choose not to destroy such material, or whether that word inferred that there was any obligation to store such materials forever, in a time when space for such non-digital materials can be expensive to maintain.

Regardless, there is nothing that suggests such materials are ever public records open to a sunshine law request. There are statutes that allow candidates or their representatives to access applications for absentee ballots under certain circumstances, but that access has certain time limits put on it.

On the other hand, Section 115.158 specifically provides that lists of registered voters may be obtained as an open record but may not be used "for commercial purposes." Section 115.157 limits the data elements that are permitted to be provided from this data bank to specific listed items.

And there are provisions contained in the Missouri statutes to remove from voter registration lists the names and addresses of certain protected individuals, such as, for example, undercover officers, persons in witness protection programs and domestic abuse victims.



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