



Office of the Secretary of the State

State of Connecticut

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Re: FOIA interpretation of Title 9 in *Chappelle v. Dennier*

This opinion is issued pursuant to Connecticut General Statutes § 9-3 which states, "The Secretary of the State, by virtue of the office, shall be the Commissioner of Elections of the state, with such powers and duties relating to the conduct of elections as are prescribed by law and, unless otherwise provided by state statute, the secretary's regulations, declaratory rulings, instructions and opinions, if in written form, shall be presumed as correctly interpreting and effectuating the administration of elections and primaries under this title..."

Under *Chappelle v. Dennier*, Docket #FIC 2024-0445, the Freedom of Information Commission (FOIC) made the following findings:

1. CGS § 9-369 limits the Secretary of the State procedures for referenda to only those held in conjunction with a regular or special state or municipal election.
2. CGS §§ 9-309, 9-310, 9-311, 9-311a and 9-311b applies only to *elections*, but not *referenda*.
3. That the above referenced statutes lack of applicability to elections mean that in-person ballots at referenda are subject to disclosure under CGS § 1-210.
4. CGS § 9-369c(f) restricts the disclosure of absentee ballots at stand-alone referenda.

Although FOIC concluded that the written guidance issued by the Secretary of the State ("SOTS") August 27, 2018 is easily dismissed as advice only and that SOTS' interpretation of statutes as applied to referenda holds no weight without asking for an official interpretation, the FOIC has failed to realize two points: One, the FOIC is not the arbiter of what interpretation is correct within Title 9; and, two, under CGS §§ 9-3 and 9-4, the Secretary of the State is the Commissioner of Elections for the State of Connecticut with the authority to both interpret Title 9 and lay out best practices to ensure security and accuracy of counting votes, not the FOIC. Despite this, the FOIC failed to reach out to SOTS for an interpretation under 9-3.

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Under CGS § 9-3 and § 9-4, SOTS is given deference on instructions issued by the office. CGS § 9-3 states "...the Secretary's regulations, declaratory rulings, instructions and opinions, if in written form, and any order issued under subsection (b) of this section, shall be presumed as correctly interpreting and effectuating the administration of elections and primaries."

Under CGS § 9-4, SOTS' deference is extended to local municipalities.

CGS § 9-4 states the Secretary may "...advise local election officials in connection with proper methods of conducting elections and **referenda...**" (Emphasis added.)

Read together, the statutes create the presumption that instructions issued by the Secretary of the State concerning referenda are correct. To the knowledge of this office, no such presumption exists for the Freedom of Information Commission. The election law expertise of the FOIC is spurious at best. SOTS is the correct venue for the interpretation of statutes within Title 9 and the Judiciary is the correct venue to contest that interpretation. In order to correctly evaluate their case, FOIC should have requested a formal opinion from the Secretary pursuant to CGS 9-3.¹

One of the responsibilities of SOTS is to ensure the privacy and security of electors. The moderator's handbook issued by SOTS states that "[a]t the polls, electors will first see a "75-foot" sign outside the entrance to the building. This marks the line where candidates and their staff must stop soliciting for votes and where the elector's right to vote in **peace and privacy** begin." (Emphasis added.) This is a responsibility taken seriously by SOTS.

FOIC erred in its attempt to circumvent voter privacy by stating in paragraph 53 of *Dennier* "that neither Title 9 nor Title 7 of the General Statutes provide for the confidentiality of ballots cast..." If the commission had referred to CGS § 9-236b, it would have seen that in the Voter's Bill of Rights, item 9 reads [Every registered voter in this state has the right to:] **"(9) Vote independently and in privacy at a polling place, regardless of physical**

¹ During the hearing on this matter, the FOIC commented that SOTS essentially missed an opportunity to provide guidance in this hearing, a wholly improper assertion in light of the Commission's failure to notify the Secretary when it had ample opportunity to do so. In fact, the Managing Director & Associate General Counsel of the FOIC contacted the Chief of Staff and General Counsel of SOTS to ask for a copy of a previous opinion written by this office regarding referenda ballots. At no time during that exchange was SOTS informed of this matter or the hearing that was to be held.



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disability.” (Emphasis added.) This statute does not differentiate between referenda and elections, nor does the statute delineate a timeline for when privacy ends. Therefore, privacy continues through the entirety of the voting process.

There are two scenarios which the privacy of a voter is destroyed by the release of the ballots despite the anonymity of the process of voting. In *Dennier*, absentee ballots are protected while poll ballots are not. The average voter valuing their privacy would start voting absentee. Once this occurs, the number of polling ballots will decrease. If the number of voters using poll ballots were to significantly decrease, especially in referenda with already low voter turnout, having a vanishingly small number of voters voting in-person would make it much easier to discern who voted for whom/what. At issue are not just the regular, voter-filled out, ballots, but also those ballots using the voter-assisted machines, designed to assist voters with disabilities to vote independently. Those machines print the markings on the ballot. These markings are easily discernable from regular pen markings. With a decreasing population of poll voters, those individuals needing to use the marking machine will have their voting privacy violated if the ballots are released for inspection.

The result of the FOIC’s decision is that the privacy of the in-person voter and the privacy of the absentee voter is not the same. This is an absurd outcome. To prevent this outcome, this office has advised municipalities to treat referenda as closely to an election as possible. Had the commission applied the advice SOTS has consistently given to the towns on this subject matter which they quoted in the *Dennier* decision, this absurd result could have easily been avoided.

As stated by FOIC, the language found in § 9-310 applies to referenda held in conjunction with a state election. In its guidance to the municipalities, SOTS applied its authority under CGS § 9-3 to ensure voters voting in referenda receive the same protections to their votes as voters during state and municipal elections. As acknowledged by FOIC, § 9-133f provides a mechanism for which absentee ballots are protected. There is no corresponding statute for in-person ballots at stand-alone referenda. To preserve and protect privacy for both types of voters, SOTS extended the privacy to in-person voters under the example set in CGS § 9-133f. The result is to protect the privacy of voters and keep all ballots secret.

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Additionally, allowing any ballots to be subject to disclosure could open the state up to vote-buying schemes. Under Connecticut General Statute § 9-264, anybody "...who gives information to **any person as to what person or persons such elector voted for, or how such elector voted on any question**, shall be guilty of a class D felony." (Emphasis added.) Revealing how a voter voted is a crime, and post-election disclosure of even a subset of ballots could allow voters to mark their ballots in such a way as to make a vote-buyer aware of how the voters cast their ballots. Preventing this disclosure thus protects the integrity of balloting from vote buying and venial voters and is undercut by releasing any ballots after the election.

Therefore, the advice given to municipalities from the Office of the Secretary of the State that referenda should be run as closely as an election is more complete than at first glance.

This office continues to stand by its advice to the municipalities to maintain security on the votes, regardless of the event at which they are cast. The ballots shall remain locked down for a period of 14 days, and after the expiration of the retention period, the ballots are to be destroyed in accordance with the written guidance issued under CGS 9-3 on August 27, 2018.

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