

## Re: Freedom of Information Act Request for Specific Correspondence Relating to Recent Municipal Elections Contest

Kevin Carden

Wed 21-Aug-19 08:07

To: E. Jeremy Hutton <ejerryh@gmail.com>

Cc: Comcast <effiemou@comcast.net>

 2 attachments (902 KB)

20190801 Carden email to Ritchie.pdf; 20190805 Kersey response to Carden - Request for guidance regarding elections contest law.pdf;

Good morning Jerry,

Please see the attached correspondences which are subject to your FOIA request. Other materials related to your request may be subject to attorney-client privilege. I have requested an opinion from the Town's attorney on those items.

Also, please note that much of the information that I personally have received from the Secretary of State's office has been through telephone conversations with Mr Donald "Deak" Kersey, General Counsel for the Elections Division, beginning as early as the 18th of June 2019. I do have a small amount of handwritten notes that I took during those conversations, which I am also able to provide at your request.

You will receive follow-up communication from either myself or legal counsel as soon as a determination is made regarding the additional materials which are still under review.

Best regards,

**Kevin Carden | Recorder | Town Council Member | Ordinance Review Committee Member  
| Webmaster**

Corporation of Harpers Ferry | PO Box 217 | Harpers Ferry WV 25425

Cell 304-886-2325 | [kevin.carden@harpersferrywv.us](mailto:kevin.carden@harpersferrywv.us) | [facebook.com/KevinCardenHFWV](https://www.facebook.com/KevinCardenHFWV)

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**From:** E. Jeremy Hutton <ejerryh@gmail.com>

**Sent:** Sunday, August 18, 2019 16:22

**To:** Kevin Carden <kevin.carden@harpersferrywv.us>

**Subject:** Freedom of Information Act Request for Specific Correspondence Relating to Recent Municipal Elections Contest

Kevin:

I am hereby submitting a formal request under the West Virginia Freedom of Information Act for documents held by you under your authority as Harpers Ferry Municipal Government's custodian of public records in accordance with the public's rights under the West Virginia Freedom of Information Act and in accordance with procedures prescribed therein. W. Va. Code § 29B-1 et seq. for the following records:

All correspondence, including emails, briefs or memoranda, received by the Town Council for its public meeting on August 12, 2019, from the Town Attorney Effie Kallas, Zak Ritchie, Greg Bailey and the West Virginia Secretary of State's Office, advising them on the required dates for meeting as Municipal Court to decide the validity of contested ballots from the last Municipal Election on June 11, 2019, relating to its deciding questions on the date of such hearing and the question of recusal of Council Members whose election might be invalidated.

Under § 29B-1-3(4), these documents are clearly "public records" since they are "writing containing ...information relating to the conduct of the public's business...retained by a public body." The West Virginia Supreme Court has ruled:

"A writing in the possession of a public body is a public record required to be disclosed under the Act where the writing relates to the conduct of the public's business and is not specifically exempted from disclosure pursuant to W. Va. Code, 29B-1-4. Conversely, a writing in the possession of a public body is not a public record and need not be disclosed under the Act where the writing does not relate to the conduct of the public's business or where the writing is specifically exempt from disclosure pursuant to W. Va. Code, 29B-1-4." *Shepherdstown Observer, Inc. v. Maghan*, 226 W. Va. 353 at 359, 700 S.E.2d 805 at 811(2010).

In accordance with the deadlines provided by § 29B-1-3(4), I request that you provide me with copies of the requested information no later than close of business August 23, 2019.

Thank you for your assistance and cooperation.

E. Jeremy Hutton

1182 W. Ridge Street

Harpers Ferry, WV 25425-6938

(304)279-1423

## Re: Objection to hearing date for Case v. Johnson

Kevin Carden

Thu 01-Aug-19 17:08

To: Zak Ritchie <zritchie@hfdrlaw.com>

Cc: gbailey@arnoldandbailey.com <gbailey@arnoldandbailey.com>; Ryan Donovan <rdonovan@hfdrlaw.com>

Mr Ritchie,

My interpretation of the statute is informed by multiple legal counselors, primarily Mrs Euphemia "Effie" Kallas, the current general counsel for Harpers Ferry, and Donald "Deak" Kersey, general counsel for the Elections Division at the Secretary of State's office. Additionally, while I am not an attorney myself, my collegiate education is in political science (public administration concentration) and legal studies; my professional career has been in technical and legal writing, and municipal government; and I have spent more than ten years as Recorder.

West Virginia Code § 3-7-6 *et seq.*, although written in a rather unwieldy manner, guides a process and timeline for an elections contest. The Harpers Ferry Town Council and all Contestees received notice of the elections contest during the afternoon of Monday, the 8th of July 2019, and our regular monthly meeting was held that very evening. Based on advice from Mr Kersey, the contest should have been docketed for a hearing at that meeting. His interpretation came from W. Va. Code § 3-7-7: "The notice of contest shall be presented to the county court **at its first term after the same is delivered to the person whose election is contested**, and **the same shall be docketed for trial in such court.**" (See also W. Va. Code § 3-7-6, which states that "the governing body of the municipality is the judge of any contest of a municipal election.") Mrs Kallas, acting in an abundance of caution due to her unfamiliarity at that time with the relevant provisions of Code, wished to research those legal requirements before offering her own advice. That advice was received on 15th July, after which I emailed a date of 5th August 2019 for trial and you replied that that was not enough time to prepare "given the factual and legal issues raised by the Notice of Contest..." As of today, we are 24 days overdue to set a date for the hearing and 41 days from the statutory requirement to issue a final decision, which is made clear by W. Va. Code § 3-7-7:

"The hearing may be continued by the court from time to time, if it be shown that justice and right require it, but **not beyond three months from the day of election. At the final trial of such contest the court shall declare the true result of such election**, and cause the same to be entered on the records of the court."

I can appreciate the need for ample time to prepare for this legal proceeding; however, in order to meet the requirements laid down by West Virginia Code and relevant judicial precedent, we simply cannot continue to wait to schedule this trial for hearing. Time is of the essence for everyone.

Please consult with your clients and determine as soon as possible a set of dates and times for this hearing on or before Wednesday, 21st August 2019.

Thank you,

**Kevin Carden | Recorder | Town Council Member | Ordinance Review Committee Member  
| Webmaster**

Corporation of Harpers Ferry | PO Box 217 | Harpers Ferry WV 25425

Cell 304-886-2325 | [kevin.carden@harpersferrywv.us](mailto:kevin.carden@harpersferrywv.us) | [facebook.com/KevinCardenHFWV](https://www.facebook.com/KevinCardenHFWV)

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**From:** Zak Ritchie <zritchie@hfdrlaw.com>  
**Sent:** Wednesday, July 31, 2019 11:20  
**To:** Kevin Carden <kevin.carden@harpersferrywv.us>  
**Cc:** gbailey@arnoldandbailey.com <gbailey@arnoldandbailey.com>; Ryan Donovan <rdonovan@hfdrlaw.com>  
**Subject:** Re: Objection to hearing date for Case v. Johnson

Mr. Carden:

Thanks for reaching out. We do not agree with your interpretation of the statute and are not aware of what legal authority vests power in the Recorder to set a trial date. Please let us know the basis for your demand.

In any event, we have communicated with Mr. Bailey about finding a date that is acceptable to all involved. Once we do, we anticipate that the Town Council can set the trial date and all other related deadlines in the normal course and under authority vested in that body under law.

Thanks,  
Zak

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**From:** Kevin Carden <kevin.carden@harpersferrywv.us>  
**Date:** Wednesday, July 31, 2019 at 10:57 AM  
**To:** Zak Ritchie <zritchie@hfdrlaw.com>, Ryan Donovan <rdonovan@hfdrlaw.com>  
**Cc:** "gbailey@arnoldandbailey.com" <gbailey@arnoldandbailey.com>  
**Subject:** Re: Objection to hearing date for Case v. Johnson

Good morning Mr Ritchie,

On Thursday, 18th July, you notified me by way of the email immediately below that you would "be reaching out to Mr Bailey to determine the most efficient way forward for the parties to the contest" in the case of *Case v. Johnson*, No. 2019-HFTC-01. Later on the same date, you filed a response notice on behalf of the Contestees, your clients, and acknowledged by email on 19th July the need to resolve this matter within a reasonable time. I have received no further communication from you.

As I am certain you are aware, West Virginia Code §3-7-7 mandates that the trial may not extend beyond three months from the date of the election, which was held on Tuesday, 11th June. To be clear, a final decision must be rendered on or before Wednesday, 11th September. In order to allow a sufficient timeframe for arranging necessary accommodations, issuing subpoenas, conducting the hearing before the Town Council, deliberating the merits of the case, and preparing our final adjudicatory order, I am hereby directing that the trial date be set for no later than Wednesday, 21st August. Please notify me at your *very earliest convenience* of the agreed-upon date for the hearing. If no sooner date is determined by mutual agreement of both sides *and received by me before close of business tomorrow* (4:30 p.m. on Thursday, 1st August), the hearing for the above-referenced case will be docketed for Wednesday, 21st August 2019.

I eagerly await your replies.

Best regards,

Kevin Carden  
Recorder | Town Council member | Webmaster  
Corporation of Harpers Ferry, West Virginia  
Mobile 304-886-2325 | kevin.carden@harpersferrywv.us  
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**From:** Zak Ritchie <zritchie@hfdrlaw.com>  
**Sent:** Thursday, July 18, 2019 13:09  
**To:** Kevin Carden  
**Cc:** Ryan Donovan; gbailey@arnoldandbailey.com; Wayne Bishop; Christian Pechuekonis; Jay Premack  
**Subject:** Objection to hearing date for Case v. Johnson

Mr. Carden:

My colleague Ryan Donovan and I have been engaged to represent Hardy Johnson, Barbara Humes, Charlotte Thompson, Midge Yost in the election contest proceedings before the Harpers Ferry Town Council that have been commenced by Nancy Singleton Case and Deborah McGee, by counsel Greg Bailey, under West Virginia Code § 3-7-6. Please direct all further communications regarding this matter to me and Ryan, and by email will work just fine.

We have been advised that you have proposed a hearing—which we construe as the trial on the contest pursuant to West Virginia Code §§ 3-7-6 & 3-7-7—for 6:00 p.m. on Monday, August 5, 2019, at the Harpers Ferry Town Hall. We appreciate you soliciting objections, because we do object to this date and time. Although we appreciate the need to resolve the contest in a timely manner and consistent with the statutory parameters, August 5 is too soon given the factual and legal issues raised by the Notice of Contest and the unusual nature of the statutory contest mechanism. We will be reaching out to Mr. Bailey to determine the most efficient way forward for the parties to the contest, as well as the Town Council as adjudicator.

Please let me know that you have received our objection. Thank you.

Sincerely,  
Zak Ritchie

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J. Zak Ritchie  
*Lawyer*

HISSAM FORMAN DONOVAN RITCHIE PLLC  
[www.hfdrlaw.com](http://www.hfdrlaw.com)  
707 Virginia Street East, Suite 260  
Charleston, WV 25301  
c: 304-615-2887  
t: 681-265-3802

## RE: Request for guidance regarding elections contest law

Donald Kersey <DKersey@wvsos.com>

Mon 05-Aug-19 12:47

To: Kevin Carden <kevin.carden@harpersferrywv.us>

You're welcome, Kevin.

I believe I have located additional helpful information, which is summarized below. As a reminder from previous discussions, this information is merely being provided as general guidance under this Office's duty pursuant to W. Va. Code § 3-1A-1 *et seq.*, and is in no way intended or provided as legal advice. For an affirmative answer, you must contact your legal representative(s).

It appears that W. Va. Code §§ 2-2-1 and 2-2-4, when read together, make the deadline September 11, 2019 unless that day is deemed a legal holiday, at which time the following non-holiday/non-weekend day is the deadline. I do not believe September 11 has been deemed a "legal holiday", but it's certainly necessary for you to confirm before the deadline hits.

Specifically, the term "month" is defined as "calendar month." Thus, "three months from the day of the election" most likely means the same calendar day, beginning on election day, and ending on the same calendar day three calendar months later. (Please note that the Code does not define "calendar month," so I consulted Merriam-Webster's online dictionary; link below.)

### Calculation Breakdown:

- June 11 = Election Day
- "Calendar month" = the period from a day of one month to the corresponding day of the next month if such exists or if not to the last day of the next month (as from January 3 to February 3 or from January 31 to February 29) (source: <https://www.merriam-webster.com/dictionary/calendar%20month>)
- 3 calendar months from election day = the day of election day of the 3<sup>rd</sup> month
- June 11 + 3 calendar months = September 11

Finally, with regard to the initial question about when the contest should be held, I came across a case that held, "An election contest should be held at the earliest possible time and should be commenced and ended within a comparatively short space of time." *State ex rel. Chafin v. County Court of Mingo County*, 156 W.Va. 171, syl. pt. 1 (1972) (quoting *State ex rel. Palumbo v. County Court of Kanawha County*, 151 W.Va. 61, 150 S.E.2d 887 (1966) (overruled on other grounds).

I highly recommend that you and the Town Council review and discuss those cases with legal representative(s).

Respectfully,  
Deak

Donald Kersey  
*General Counsel*  
**West Virginia Secretary of State's Office**  
[304-558-6000](tel:304-558-6000) (Office)  
[304-368-6344](tel:304-368-6344) (Direct Dial)  
[304-558-0900](tel:304-558-0900) (Fax)

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**From:** Kevin Carden <[kevin.carden@harpersferrywv.us](mailto:kevin.carden@harpersferrywv.us)>  
**Sent:** Monday, August 5, 2019 11:51 AM  
**To:** Donald Kersey <[DKersey@wvsos.com](mailto:DKersey@wvsos.com)>  
**Subject:** Re: Request for guidance regarding elections contest law

Thank you so much!

Kevin Carden  
Recorder | Town Council member | Webmaster  
Corporation of Harpers Ferry, West Virginia  
[kevin.carden@harpersferrywv.us](mailto:kevin.carden@harpersferrywv.us) | Mobile 304-886-2325  
Sent from [Outlook](#) for iPhone

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**From:** Donald Kersey <[DKersey@wvsos.com](mailto:DKersey@wvsos.com)>  
**Sent:** Monday, August 5, 2019 8:39:35 AM  
**To:** Kevin Carden <[kevin.carden@harpersferrywv.us](mailto:kevin.carden@harpersferrywv.us)>  
**Subject:** RE: Request for guidance regarding elections contest law

My apologies, Kevin, I overlooked that question.

Code is unclear whether “three months” means the same day of the 3<sup>rd</sup> month, or some other calculation (e.g. 30 days x 3, 31 days x 3, etc.). I think it’s most logical to presume “three months” means the deadline ends at the close of business (or perhaps midnight) of the same day of the 3<sup>rd</sup> following month, but that presumption is based solely on logic and is without an express statutory provision.

What’s clear is that the deadline is *sometime* in around September 11, possibly +/- a couple days. For now, I recommend trying to conclude the contest proceedings prior to September. I’ll research the date calculation issue in the meantime and provide a more definite answer if necessary.

Best,  
Deak

Donald Kersey  
*General Counsel*  
**West Virginia Secretary of State’s Office**  
[304-558-6000](tel:304-558-6000) (Office)  
[304-368-6344](tel:304-368-6344) (Direct Dial)  
[304-558-0900](tel:304-558-0900) (Fax)

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**From:** Kevin Carden <[kevin.carden@harpersferrywv.us](mailto:kevin.carden@harpersferrywv.us)>  
**Sent:** Sunday, August 4, 2019 9:26 PM  
**To:** Donald Kersey <[DKersey@wvsos.com](mailto:DKersey@wvsos.com)>  
**Subject:** Re: Request for guidance regarding elections contest law

Hi Deak,

I greatly appreciate the informative reply. Just to be clear about the second question in my email below, must the Town Council conclude the hearing and issue its final decision no later than the 11th of September, given that election day was the 11th of June?

From W. Va. Code § 3-7-7:

“The hearing may be continued by the court from time to time ... but not beyond three months from the day of election. At the final trial of such contest the court shall declare the true result of such election ...”

Thanks,

Kevin Carden  
Recorder | Town Council member | Webmaster  
Corporation of Harpers Ferry, West Virginia  
[kevin.carden@harpersferrywv.us](mailto:kevin.carden@harpersferrywv.us) | Mobile 304-886-2325  
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**From:** Donald Kersey <[DKersey@wvsos.com](mailto:DKersey@wvsos.com)>  
**Sent:** Friday, August 2, 2019 16:43  
**To:** Kevin Carden  
**Subject:** RE: Request for guidance regarding elections contest law

Kevin,

Thanks for reaching out. You have identified an easily overlooked, but important, provision of this statute.

In short, I believe it can be reasonably inferred from W. Va. Code § 3-7-7 that yes, the contest hearing is required to be scheduled at the first official meeting of the town council following the filing of the Notice. The language referring to continuing the hearing “from time to time” applies only once a hearing has commenced. Practically speaking, something cannot be “continued” if it has yet to begin.

Because the town council has not yet scheduled the hearing, but has had two meetings since receiving the contest Notice, I highly recommend speaking with legal counsel to discuss mitigating any potential harm that may have been caused by the delay.



I can be available at your convenience to discuss further.

Have a nice weekend,  
Deak

Donald Kersey  
*General Counsel*  
**West Virginia Secretary of State's Office**

[304-558-6000](tel:304-558-6000) (Office)

[304-368-6344](tel:304-368-6344) (Direct Dial)

[304-558-0900](tel:304-558-0900) (Fax)

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**From:** Kevin Carden <[kevin.carden@harpersferrywv.us](mailto:kevin.carden@harpersferrywv.us)>  
**Sent:** Friday, August 2, 2019 3:01 PM  
**To:** Donald Kersey <[DKersey@wvsos.com](mailto:DKersey@wvsos.com)>  
**Subject:** Request for guidance regarding elections contest law

Dear Mr Kersey,

As Recorder for the Corporation of Harpers Ferry, I write to request guidance from the Office of the Secretary of State on the laws applicable to the contest of an election. Nancy Case and Debbie McGee contested the 11th June 2019 Harpers Ferry election by serving a notice of the contest to certain Contestees, along with a copy to the Corporation of Harpers Ferry, pursuant to the procedures laid out in W. Va. Code Ann. § 3-7-6. Mrs Case and Mrs McGee served those contest notices before close of business during the afternoon of Monday, 8th July 2019. The Town Council of Harpers Ferry met for its regularly-scheduled monthly meeting that same evening and subsequently met in a special meeting on Monday, 29th July, but the election contest was not considered or scheduled at either of those meetings.

I am seeking your general guidance on and interpretation of the law that applies to the scheduling of a contest proceeding by the Harpers Ferry Town Council, acting as the tribunal for the contest pursuant to

W. Va. Code Ann. § 3-7-7:

"The notice of contest shall be presented to the [Town] at its first term after the same is delivered" on 8th July "and the same shall be docketed for trial in such court."

Does this Code provision mean that the Harpers Ferry Town Council was required to schedule the election contest trial at its 8th July meeting, if the contest notice was delivered to them prior to that meeting? When must the matter be docketed for hearing by the municipal governing body?

W. Va. Code Ann. § 3-7-7 further states that, after the trial is docketed, "[t]he hearing may be continued ... but not beyond three months from the day of the election." As the election in Harpers Ferry was held on 11th June, must the matter be resolved at the municipal trial level by 11th September 2019?

I would appreciate your guidance on the relevant statute. Because this matter has some time urgency, I would be grateful for a response at your earliest convenience.

Best regards,

**Kevin Carden | Recorder | Town Council Member | Ordinance Review Committee Member  
| Webmaster**

Corporation of Harpers Ferry | PO Box 217 | Harpers Ferry WV 25425

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