



WASHTENAW COUNTY APPORTIONMENT COMMISSION

October 5, 2021

3:00 PM

Remote (Zoom) Meeting, Details Follow Below

Members:

Lawrence Kestenbaum, Washtenaw County Clerk/Register of Deeds

Catherine McClary, Washtenaw County Treasurer

Eli Savit, Washtenaw County Prosecuting Attorney

David Frey, Washtenaw County Republican Party Chairperson

Chris Savage, Washtenaw County Democratic Party Chairperson

AGENDA

1. Call to Order
2. Approval of Previous Meeting Minutes – September 27, 2021
3. Public Comment and Apportionment Commission Response
4. New Business
5. Other Business
 - a. Proposal from Livingston County Apportionment Commission to petition the Court of Appeals to extend the deadline for Apportionment Plan approval
6. Adjournment

Join from a PC, Mac, iPad, iPhone or Android device:

Please click this URL to join.

<https://us06web.zoom.us/j/81903976883?pwd=WmxxMHZ2R3MyOUROYINpY1YrajFjZz09>

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+16465588656,,81903976883#,,,,*091121# US (New York)

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Archived: Tuesday, October 5, 2021 12:15:58 PM

From: [Lawrence Kestenbaum](#)

Sent: Mon, 27 Sep 2021 19:38:16

To: [Edward Golembiewski](#); [Patricia L. Reilly](#)

Subject: FW: Court of Appeals Petition

Sensitivity: Normal

This letter should be made available to members of the Apportionment Commission.

Larry

From: Elizabeth Hundley

Sent: Monday, September 27, 2021 11:25 AM

To:

Subject: Court of Appeals Petition

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Colleagues,

The Livingston County Apportionment Commission met this morning. Mr. David Stoker of Cohl, Stoker & Toskey, P.C. provided our members an update in regards to options available to county apportionment commissions in light of the conflicting opinions on what the official release date of the census data is. He provided our apportionment commission with two options. First, we can adopt a plan prior to the October 11, 2021 deadline in case a court ultimately determines the August 12, 2021 as the official release date of the data. We then would need to hold a second meeting after October 17th but before November 15th to adopt the same plan again. This option requires the county clerk to submit the same plan two times to the Secretary of State. The second option available to us is to petition the Court of Appeals for an extension pursuant to MCL 46.407.

The Livingston County Apportionment Commission unanimously passed a motion instructing our legal counsel to petition the Court of Appeals for an extension under MCL 46.407. Mr. Stoker then asked members of our apportionment commission if we would allow other counties to join our petition if other counties so requested. Again, members of our apportionment commission agreed to allow other counties to join our petition seeking an extension if their county apportionment commission so desires.

I am in no way recommending any other county apportionment commission join our petition. Joining the petition is a decision of each county apportionment commission. I am merely passing along the information and making you aware of this option as many of you do not have access to your own legal counsel. Please contact Cohl, Stoker & Toskey, P.C. directly as I will not play a role in this matter as it moves forward from this point. Mr. Stoker can be reached at

Sincerely,

[Elizabeth Hundley, Esq.](#)

Livingston County Clerk
200 E. Grand River Ave.
Howell, MI 48843



STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



DANA NESSEL
ATTORNEY GENERAL

M E M O R A N D U M

September 10, 2021

TO: Mike Brady, Chief Legal Counsel
Department of State

Jonathan Brater, Director of Elections
Department of State

FROM: Heather S. Meingast, Division Chief
Erik A. Grill, Assistant Attorney General
Civil Litigation, Employment, and Elections Division

RE: **Timing for county re-apportionment plans**

Issue Presented

You have asked whether the statutory obligations imposed on county apportionment commissions to redraw county commissioner districts commenced upon the release of non-tabulated, legacy format census data by the U.S. Census Bureau on August 12, 2021, or will commence upon the release of final, tabulated census data by the Census Bureau on September 16, 2021.

Short Answer

The 60 days within which county apportionment commissions must apportion counties under MCL 46.401(1) will commence on September 16, 2021, with the U.S. Census Bureau's release of the final, tabulated PL 94-171 data. This is because the final, tabulated data constitutes the "latest" "official" census data that will be published by the Bureau. Likewise, the Secretary of State's duty to provide the latest, official census figures to the county apportionment commissions within 15 days of the Bureau's publication will commence on September 16. MCL 46.404(a). While the August 12 legacy format data is not the "official" census data, county apportionment commissions may use the legacy format data to begin the reapportionment process.

Background

Every ten years following the decennial United States Census, Michigan adjusts its state legislative and congressional district boundaries based on the population changes reflected in the census. Under the Michigan Constitution, as amended in 2018, the Independent Citizens Redistricting Commission (ICRC or Commission) is charged with redrawing state legislative and congressional district maps. See Const 1963, art 4, § 6.

Michigan counties also engage in redistricting. The governing body of a county is the board of county commissioners. See Const 1963, art 7, § 7; 1966 PA 261, as amended, MCL 46.401 *et seq.* By statute, counties must be apportioned into a certain number of county commissioner districts based on population as reported in the U.S. Census. See MCL 46.401(1). The body that conducts county reapportionment is the county apportionment commission, which consists of either the board of county commissioners or the county clerk, the county treasurer, the prosecuting attorney, and the county chairperson of the two political parties that received the greatest number of votes cast for the office of Secretary of State in the last election. MCL 46.403(1). The county apportionment commissions must apportion districts “[w]ithin 60 days after the publication of the latest United States official decennial figures[.]” MCL 46.401(1).¹

For both the ICRC and the county apportionment commissions, the release of the U.S. Census data is a necessary component of the reapportionment process. See Const 1963, art 4, § 6(2)(a)(i), (c)-(f), (5), and (7); MCL 46.401(1), MCL 46.404(a). The U.S. Secretary of Commerce oversees the U.S. Census Bureau and the decennial census activities. 15 USC 1511(5), 13 USC 2. The decennial census data, specifically the population count, is important because it determines the number of representatives representing each state in Congress for the following decade. The more detailed dataset known as redistricting counts, or the Census PL 94-171 data, is critical for redistricting because it provides geographic and spatial detail on where people live and their key demographic characteristics.

¹ The provisions relating to apportionment in charter counties are set forth in 1966 PA 293, MCL 45.501 *et seq.*, specifically, MCL 45.505. The apportionment requirements for charter counties track those of non-charter counties set forth in 1966 PA 261, as amended.

The following provisions are codified in the Census Act, 13 USC 1 *et seq.*, which governs U.S. Census Bureau activities:

- Decennial census of population shall occur on April 1. 13 USC 141(a).²
- Tabulation of total population required for apportionment of the U.S. House of Representatives “shall be completed within 9 months after the census date and reported by the Secretary [of the U.S. Census Bureau] to the President of the United States.” 13 USC 141(b).
- States shall have the opportunity to identify the small area geography for which they need data to conduct legislative redistricting or apportionment and deliver this data (PL 94-171 data) no later than one year from census day. 13 USC 141(c).

Based on these statutes, under federal law, the relevant dates for the 2020 census cycle are: census date of April 1, 2020, apportionment data due to the President by December 31, 2020, and redistricting data released to the states by April 1, 2021.

However, earlier this year representatives from the U.S. Census Bureau announced a four-month delay for apportionment data³ and a 6-month delay⁴ for redistricting data.⁵ The U.S. Census Bureau cited the COVID-19 pandemic, wildfires in the western states, and the active hurricane season, among others, as causes of the delay in their 2020 census operations. See *Ohio v Raimondo*, 2021 WL 1118049 at *1-2 (March 24, 2021, SD Ohio).

² “Census of population” is defined in 13 USC 141(g) as “census of population, housing and matters related to population and housing.”

³ See *Census Bureau Statement on Apportionment Counts*, Release Number CB21-RTQ.06, 1/28/21, available at [Census Bureau Statement on Apportionment Counts](#).

⁴ See *Census Bureau Statement on Redistricting Data Timeline*, Release Number CB21-CN.14, 2/12/21, available at [Census Bureau Statement on Redistricting Data Timeline](#).

⁵ The redistricting data includes counts of population by race, ethnicity (Hispanic or Latino origin), voting age, housing occupancy status, and group quarters population at the smallest geographic level, which is a census block.

The chart below demonstrates the progression of the delays in census data:

Action/Sent to	Deadline Under Title 13 “Statutory Plan”	Deadline under the Executive Summary ⁶ “Original Plan”	Updated Deadlines per 2020 Census Update ⁷ “COVID Plan”	Updated Deadlines per Press Releases ⁸ “Current Plan”
President (population counts for apportionment)	by December 31, 2020	by December 31, 2020	by April 30, 2021	by April 30, 2021
States (redistricting counts for redistricting)	by April 1, 2021	by March 31, 2021	by July 30, 2021	by September 30, 2021

In addition to the unprecedented delay, the Census Bureau is also taking the unprecedented approach of releasing two sets of redistricting data: non-tabulated “legacy” format data and final, tabulated PL 94-171 data. Legacy format data is a non-tabulated version of census data that must be processed before use. The data in the legacy format files is identical to the PL 94-171 redistricting data files and subject to the same quality assurance processes. The difference is in the format the census data is presented.

On August 12, 2021, the Census Bureau made available on its website the non-tabulated, legacy format data.⁹ The ICRC is currently utilizing the August 12 legacy format data to commence drawing state legislative and congressional district maps; however, the ICRC plans to reconcile the legacy format data with the final, tabulated data.¹⁰ Notably, on September 1, 2021, the Census Bureau announced

⁶ See *2020 Census Operational Plan, Executive Summary, Prepared by the Decennial Census Management Division, U.S. Census Bureau Version 1.0, December 2015*. The document notes Final Version 1.0 was adopted November 6, 2015.

⁷ On January 27, 2021, Kathleen Styles, an official at the U.S. Census Bureau, announced during a 2020 Census Update Meeting hosted by the National Conference of State Legislatures that the bureau intended to deliver redistricting data to the states by July 31, 2020.

⁸ On January 27, 2021, Styles announced the bureau intended to deliver its final apportionment report. On February 12, 2021, the census bureau announced that it would delay transmission of redistricting data to the states.

⁹ See 2020 Census Statistics Highlight Local Population Changes and nation’s racial and ethnic Diversity, August 12, 2021, available at [Local Population Changes and Nation’s Racial and Ethnic Diversity \(census.gov\)](https://www.census.gov/newsroom/2020-census-statistics-highlight-local-population-changes-and-nation-racial-ethnic-diversity), and Decennial Census PL. 94-171 Redistricting Data, August 12, 2021, available at [Decennial Census P.L. 94-171 Redistricting Data Summary Files](https://www.census.gov/decennial-census/pl-94-171-redistricting-data).

¹⁰ See August 13, 2021, [With census data in hand, Michigan’s redistricting commission to start drafting new political maps next week - mlive.com](https://www.mlive.com/news/michigan/2021/08/13/with-census-data-in-hand-michigan-redistricting-commission-to-start-drafting-new-political-maps-next-week/).

that it intends to release the final, tabulated PL 94-171 redistricting data by September 16, 2021, instead of September 30.¹¹ The Census Bureau advised that the final, tabulated data will be available online through a tool, but will also be delivered to state officials on DVDs and flash drives.¹²

Not long after the legacy format data became available on August 12, the Bureau of Elections began to receive inquiries from county clerks regarding whether the county apportionment commissions' statutory obligations to redraw county commission districts stem from the release of the legacy format data or the final format data now set to be released on September 16.

The Bureau of Elections has advised county clerks that, in its opinion, the impending release of the final, tabulated census data triggers the county apportionment commissions' 60-day window to re-draw county commission districts. The Bureau, however, has further advised county clerks that the county apportionment commissions may commence drawing districts using the August 12 legacy format data if the county has the capability of using the non-tabulated data. The Bureau has shared with the county clerks the Census Bureau's link to the August 12 legacy format data, and the Bureau has created an optional tool that counties may use to draw county commission districts, which works with the legacy format data and is expected to work with the final data as well.

While the Bureau has informed county clerks that county apportionment commissions may begin working with the legacy format data, you have asked for our opinion regarding whether the counties must finish reapportionment work 60 days from the release of the legacy format data on August 12 or 60 days from the release of the final, tabulated data on September 16.

Legal Analysis

When interpreting statutory language, the goal is to discern the Legislature's intent, the best indicator of which is the plain and ordinary meaning of the language used. *Odom v Wayne Co*, 482 Mich 459, 467 (2008). "Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *In re Apportionment of Wayne Cty – 2001*, 250 Mich App 614, 617–618 (2002) (citations omitted). See also MCL 8.3a ("All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and

¹¹ See Census Bureau Announces Release Date for Easier-to-Use Formats for Redistricting Data, September 1, 2021, available at [Release Date for Easier-to-Use Formats for Redistricting Data \(census.gov\)](#)

¹² *Id.*

appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.”). “Further, the language must be applied as written, and nothing should be read into a statute that is not within the manifest intent of the Legislature as indicated by the act itself.” *In re Apportionment of Wayne Cty*, 250 Mich App at 617-618 (citations omitted).

MCL 46.401(1) provides, in part, that “[w]ithin 60 days after *the publication of the latest United States official decennial census figures*, the county apportionment commission in each county of this state shall apportion the county into not less than 5 nor more than 21 county commissioner districts as nearly of equal population as is practicable[.]” (Emphasis added).

MCL 46.404(a) provides the guidelines for conducting apportionment, and states, in part, that:

In apportioning the county into commissioner districts, the county apportionment commission shall be governed by the following guidelines in the stated order of importance:

(a) All districts shall be single-member districts and as nearly of equal population as is practicable. *The latest official published figures of the United States official census shall be used in this determination*, except that in cases requiring division of official census units to meet the population standard, an actual population count may be used to make such division. Other governmental census figures of total population may be used if taken subsequent to the last decennial United States census and the United States census figures are not adequate for the purposes of this act. *The secretary of state shall furnish the latest official published figures to the county apportionment commissions . . . within 15 days after publication of . . . United States official census figures.* [Emphasis added.]

And MCL 46.407 addresses the failure of county apportionment commissions to timely adopt apportionment plans:

If the apportionment commission has failed to submit a plan for its county within 60 days but not less than 30 days *after the latest official published census figures are available* or within such additional time as may be granted by the court of appeals for good cause shown on petition from the apportionment commission, any registered voter of the county may submit a plan to the commission for approval. The commission shall choose from among those submitted to it a plan meeting the requirements of the laws of this state and file such plan in the office of the county clerk as set forth in section 5 within 30 days

after the deadline for the filing of the commission's own plan or any extension granted thereon. [Emphasis added.]

Under subsection 1(1), MCL 46.401(1), the 60 days within which a county apportionment commission must approve an apportionment plan starts to run “after the publication of the latest United States official decennial census figures.” The statutes do not define the phrase “latest United States official decennial census figures” or “the latest official published census figures” as used in the above provisions.

The reference to United States decennial census figures must be understood to mean the specific population data compiled for each state and reported to the Governor and other public officials for each state under 13 USC 141(c),¹³ which data is commonly referred to as redistricting data or the PL 94-171 data.¹⁴

As discussed above, the August 12 legacy format data is a version of the PL 94-171 data provided for in 13 USC 141(c). However, the question is whether it is the “latest,” “official” census data that will be “published” by the Census Bureau as those terms are used in MCL 46.401 and the other relevant statutes. It is not for two reasons.

First, even if the August 12 legacy format data could presently be considered the “latest” census data, it is undisputed that the Census Bureau intends to publish and physically provide to the states a final, tabulated version of the PL 94-171 data by September 16. The word “latest,” in its ordinary sense, may be understood to mean the “most recent; newest.” Webster’s New World Dictionary (3rd ed, 1988), p 763. See *Oakland Cty Bd of Cty Rd Comm’rs v Michigan Prop & Cas Guar Ass’n*, 456 Mich 590, 604 (1998) (“A court may consult dictionary definitions when terms are not expressly defined by a statute.”) Thus, the tabulated PL 94-171 data set to be published on September 16 will be the “most recent” and “newest” census data published by the Census Bureau, and therefor the “latest” data as that term is used in MCL 46.401(1) and related statutes.

¹³ 13 USC 141(c) provides, in part:

. . . . Tabulations of population for the areas identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date.

¹⁴ The apportionment data tabulated by the Census Bureau and reported to the President under 13 USC 141(b) reflects only the total population of each state and does not include or contain any county-level population data.

Second, the August 12 legacy format data is not the Census Bureau’s “official” “decennial census figures.” As used in the relevant statutes, the word “official” may be understood to mean “by, from, or with the proper authority; authorized or authoritative,” or “formally set or prescribed.” Webster’s New World Dictionary (3rd ed, 1988), p 941.

In a March 15, 2021, press release, the Census Bureau confirmed that it intended to release the legacy format data in August because it recognized the timing difficulties the September 30 release date for the tabulated data caused states. Releasing the legacy data allowed states to attempt to process the data, but the Bureau warned that states did so at their own risk:

In recognition of the difficulties this timeline creates for states with redistricting and election deadlines prior to Sept. 30, we have reviewed our timeline to identify any opportunities to shorten the processing schedule. Our review confirms that all steps of data processing and formatting will be complete by Sept. 30. However, the final steps in our process include creating “tabulations” (data tables) from the data we have collected for each state and creating a user-friendly system for data access. We have determined that states should be given the opportunity to use an outside vendor to process legacy format summary redistricting data files if states do not have the capacity to tabulate the data on their own. The declarations filed March 12 [in the case of *Ohio v. Raimondo*] note that given the difficulty of using the data in this format, any state using legacy format summary redistricting data files would have to accept responsibility for how they process these files; whether correctly or incorrectly.¹⁵

In its August 12, 2021, press release, the Census Bureau stated the following with respect to the legacy format data:

Legacy Data vs. Final Delivery of PL 94-171 Redistricting Data

These data released today are in the same format that the 2000 and 2010 redistricting data were provided. The term “legacy” refers to its prior use. By September 30, we will release these same data to state officials with an easy-to-use toolkit of DVDs and flash drives and we will make it available to the public on data.census.gov. The Census

¹⁵ See U.S. Census Bureau Statement on Release of Legacy Format Summary Redistricting Data File, available at [Statement on Release of Legacy Format Summary Redistricting Data File \(census.gov\)](https://www.census.gov/legacy/redistricting/summary/redistricting_data_file.html).

Bureau will notify the public in September when it makes these same data available.¹⁶

And the September 1, 2021, press release announcing that the Census Bureau intended to release the final formatted version of the PL 94-171 data by September 16, states:

The U.S. Census Bureau will release easier-to-use formats of the [2020 Census Redistricting Data \(Public Law 94-171\) Summary File on September 16](#).

Also on September 16, redistricting data will be available through the Census Bureau's primary data dissemination tool, [data.census.gov](#). *The Census Bureau will also deliver an easy-to-use toolkit of DVDs and flash drives to state officials and public bodies responsible for their state's legislative apportionment or districting.*

These data — first [released August 12](#) — are currently available in a legacy format on the Census Bureau's FTP site. These data are also available through various [data visualizations](#). . . .[Emphasis added.]¹⁷

Given that it is not the practice of the Census Bureau to make legacy format data available, the Bureau's stated concerns regarding the states' abilities to utilize the legacy format data, and the Bureau's intent to release a final, tabulated version of the PL 94-171 data—and to send only that version of the data directly to the states—it cannot be concluded that the August 12 legacy format data constitutes the “official decennial census figures” contemplated by MCL 46.401(1) and the related statutes. While the underlying data is the same in both sets, the present circumstances support a conclusion that the final, tabulated version of the PL 94-171 data to be released on September 16 constitutes the “official”—meaning “authorized,” “authoritative,” or “formal”—version of the “decennial census figures” contemplated by the statutes.

Accordingly, in answer to your question, the 60 days within which county apportionment commissions must apportion counties under MCL 46.401(1) will commence on September 16, 2021, with the release of the final PL 94-171 data. Likewise, the Secretary of State's duty to “furnish the latest official published

¹⁶ See 2020 Census Statistics Highlight Local Population Changes and nation's racial and ethnic Diversity, August 12, 2021, available at [Local Population Changes and Nation's Racial and Ethnic Diversity \(census.gov\)](#).

¹⁷ See Census Bureau Announces Release Date for Easier-to-Use Formats for Redistricting Data, September 1, 2021, available at [Release Date for Easier-to-Use Formats for Redistricting Data \(census.gov\)](#).

figures to the county apportionment commissions . . . within 15 days after publication of . . . United States official census figures,” will commence on September 16. MCL 46.404(a).¹⁸ If the Census Bureau does not meet its September 16 deadline, the time periods will start on whatever date the Bureau publishes the final version of the census data.

Finally, while the August 12 legacy format data is not the “official” census data, nothing in Public Act 261 prohibits county apportionment commissions from utilizing that data to begin the apportionment process. As noted above, the ICRC has commenced its work using the August 12 legacy format data, but intends to reconcile that data with the final version of the data to be released on September 16.

This memorandum is unofficial advice at the division level and should not be considered a formal opinion of the Attorney General.

¹⁸ The Department of Attorney General is in receipt of a legal opinion provided to the Michigan Association of County Clerks dated August 23, 2021, that concluded the 60 days commenced with the release of the legacy format data on August 12, 2021. But for the reasons stated herein, we disagree with that conclusion.