ALAN WILSON
ATTORNEY GENERAL

September 07, 2022

The Honorable Thomas Corbin
Member
South Carolina Senate
District No. 5
P.O. Box 142
Columbia, SC 29202

The Honorable Dwight A. Loftis
Member
South Carolina Senate
District No. 6
501 Gressette Bldg.
Columbia, SC 29201

The Honorable James M. Burns
Member
South Carolina House of Representatives
District No. 17
326B Blatt Bldg.
Columbia, SC 29201

Dear Senators Corbin, Loftis, and Representative Burns:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states:

> Recently it has come to my attention that the State Election Commission is refusing to honor Freedom of Information Act requests for the Cast Vote Record from 2020. As you are aware, the ES&S vote-tallying machines used by South Carolina for our elections are electronic proprietary devices which do not include a way for the public to supervise how votes are technically being added to the count. The only way is to look at the paper ballots themselves or the tally of those votes: the Cast Vote Record.
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> From my understanding, the Cast Vote Record (CVR) is an index of votes cast for candidates over time which is distinguishable from the individual cast ballots and in no way exposes a voter's candidate selections. If the CVR does identify voters, or if the ballots themselves can be used to identify voters, then I would ask whether the SEC has failed in its Constitutional duty to protect the secrecy of the vote. If these documents do not, then I would ask whether the SEC is violating state law and the state Constitution by failing to release the documents so the votes can be publicly counted.

...

One of the reasons being given by the SEC in refusing to release the CVR is an opinion letter from your office dated September 28, 2020, addressed to Marci Andino. This letter was delivered in response to an inquiry from Ms. Andino, former SEC director, regarding the public access of voted ballots, scanned images of voted ballots, and vote cast records.

The opinion identified public release of individual voters' cast ballots as a possible violation of our South Carolina Constitution Article II, Section 1, which protects secrecy of the ballots. The relevant clause states, "All elections by the people shall be by secret ballot, but the ballots shall not be counted in secret." I would ask whether South Carolina can rightly deny the enforcement of the latter because of a state agency's inability to guarantee the former?

[S]ince the SEC essentially claims they are unable to comply with state law and admits the potential for egregious maladministration, to the degree that the ballot records are not able to be made available for public investigation and oversight, it would appear to directly follow those elections using such ballots must likewise be nullified. It is an interesting question whether the protections due the ballots would then be nullified as well - allowing the public broad latitude to review the SEC's failures. The SEC is denying public access to the Cast Vote Record and ballots based upon your office's previous opinion which indicates that the potential for personally identifiable ballots, a reflection of election maladministration, should negate the oversight of election administration by a duly informed public. The Constitution provides that the ballots are to be counted in public. Is not refusal to release the ballots to the public for counting a violation of the State Constitution?

If the SEC can provide evidence that the release of Cast Vote Records and/or ballot images would render those ballots not secret, and thus prevents the ballots from being reviewed in any meaningful way by the public, are all elections in South Carolina currently being conducted in violation of the State Constitution, because the SEC is unable to maintain both the secrecy of the ballots and provide that the ballots are not counted in secret? Must all elections in which ballots could possibly be identified be nullified? Further, is not the public entitled to examine the ballots to see if this is the case?

On the other hand, if the SEC is unable to provide such evidence, do they have an obligation under the State Constitution and/or our Freedom of Information Act to release these records?

## Law/Analysis

### 1. The S.C. FOIA does not require the disclosure of cast vote records and ballot images.

At the outset, it appears necessary to restate the conclusion of this Office's September 28, 2020 opinion issued to Marci Andino (the "Andino Opinion").

> [I]t is this Office's opinion that a court would likely hold the S.C. FOIA, S.C. Code § 30-4-10 *et seq.*, does not require the production of voted ballots, scanned images of voted ballots, and vote cast records. The South Carolina State Constitution guarantees the secrecy of the ballot. Article II, section 1 states, "All elections by the people shall be by secret ballot, but the ballots shall not be counted in secret." S.C. Const. art. II, § 1 (emphasis added). Moreover, Article II, section 10 directs the General Assembly to "insure secrecy of voting." S.C. Const. art. II, § 10. The South Carolina Supreme Court has explained the dominant purpose of these provisions "is to insure the integrity of the voting process. It is calculated to secure privacy, personal independence and freedom from party or individual surveillance. It tends to promote an independent and free exercise of the elective franchise." State ex rel. Edwards, 270 S.C. 87, 92, 240 S.E.2d 643, 645-46 (1978). To the extent that the disclosure of materials related to a cast ballot would lead to the identification of a voter, it is this Office's opinion that a court would hold such a disclosure is not required by the S.C. FOIA and violates the South Carolina Constitution.

Op. S.C. Att'y Gen., 2020 WL 5985610, at 5 (September 28, 2020). The body of the opinion more fully developed the reasons why the S.C. FOIA, by its own terms, does not require the disclosure of these documents.

> The S.C. FOIA provides that "[a] person has a right to inspect, copy, or receive an electronic transmission of any public record of a public body, except as otherwise provided by Section 30-4-40, or other state and federal laws, in accordance with reasonable rules concerning time and place of access." S.C. Code § 30-4-30(A)(l). The S.C. FOIA defines "Public record" to include:
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> > [A]ll books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. ... [O]ther records which by law are required to be closed to the public are not considered to be made open to the public under the provisions of this act.

> S.C. Code Ann. § 30-4-20(C) (emphasis added). Section 30-4-40(A)(4) also permits a public body to exempt from disclosure those "[m]atters specifically exempted from disclosure by statute or law."

Id. at 2. In summary, because the State Constitution and several statutes mandate a secret ballot, these document fall outside the statutory definition of "public record" and, therefore, the S.C. FOIA does not compel their disclosure. See also Perry v. Bullock, 409 S.C. 137, 761 S.E.2d 251 (2014) (holding autopsy reports are excluded from disclosure under the S.C. FOIA).

This Office's opinions cannot find facts but will often assume the facts presented by the requestor for purposes of analysis. See Op. S.C. Att'y Gen., 2006 WL 1207271 (April 4, 2006) ("Because this Office does not have the authority of a court or other fact-finding body, we are not able to adjudicate or investigate factual questions."). The request letter for the Andino opinion presented several examples of how published voted ballots could be used to identify voters and why even redacting before disclosure would not guarantee their anonymity. Op. S.C. Att'y Gen., 2020 WL 5985610, at 1 (September 28, 2020) ("Considering the number of ways or reasons information on published ballots could be used to identify voters, any attempt to manually redact problematic information from ballots that would inevitably fail to protect the secrecy of every vote cast.").

It is this Office's long standing policy, like that of our state courts, to defer to an administrative agency's reasonable interpretation of the statutes and regulations that it administers. See Op. S.C. Att'y Gen., 2013 WL 3133636 (June 11, 2013). In Kiawah Development Partners, II v. S.C. Department of Health & Environmental Control, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014), the South Carolina Supreme Court explained, "[W]e give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations." The Court stated that the determination of whether deference is afforded to an agency's interpretation of the statutes and regulations it administers involves two separate steps. Id.

> First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. See Brown v. Bi–Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." (citations omitted)); Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning."). If the statute or regulation "is silent or ambiguous with respect to the specific issue," the court then must give deference to the agency's interpretation of

> the statute or regulation, assuming the interpretation is worthy of deference. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); see also Brown v. Bi–Lo, 354 S.C. at 440, 581 S.E.2d at 838.

Kiawah Dev. Partners, II, 411 S.C. at 32–33, 766 S.E.2d at 717. The South Carolina Code requires the Commission, through its executive director, to supervise the conduct of elections and voter registration for compliance state and federal law. S.C. Code § 7-3-20 (2019). Therefore, this Office defers to the Commission's reasonable interpretations of the state election laws where statutes and regulations are silent or ambiguous in regards to a specific issue.

The Commission still maintains the release of voted ballots, scanned images of voted ballots, and CVR would likely lead to identification of voters. The Commission's General Counsel, Thomas W. Nicholson, offered the following explanation of what constitutes CVR in South Carolina.

> [T]here is no precise uniformity in what it means across jurisdictions. Sometimes what people refer to as constituting a CVR is significantly different from what we're talking about, and may either exclude information we consider to be part of a CVR, or include information that we don't consider part of a CVR.
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> Here is the generic definition of "cast vote record" given by the United States Election Assistance Commission: "Permanent record of all votes produced by a single voter whether in electronic, paper or other form. Also referred to as ballot image when used to refer to electronic ballots."
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> Note that the second sentence in that definition does not apply, as stated, to South Carolina's voting system. The EAC definition of a CVR refers to the electronic version of the CVR, not an electronic image of the ballot itself. ... In South Carolina, the CVR includes the paper ballot itself, the scanned image of the ballot from the ballot scanner at the time the vote is cast, and the digital (electronic) record of the contents of the cast ballot.

(emphasis added). This definition of "CVR" is broader than the understanding of CVR in the current request letter; it includes electronic images of scanned ballots. While this Office cannot find facts in an opinion, to the extent we must choose between competing definitions for sake of analysis, we will defer to the Commission's understanding of the term because, as stated above, the Commission is tasked with administering state election law. It is this Office's opinion that the Commission's determination, that disclosure of CVR could compromise the secrecy of the ballot, addresses an ambiguity created by the intersection of the state election laws and the S.C. FOIA. See e.g. S.C. Code § 7-13-130 ("The right to vote of each person so entitled and the secrecy of the ballot shall be preserved at all times."). Because the Commission's determination

addresses an ambiguity related to the laws and regulations it administers, it is this Office's opinion that our state courts may well defer to this conclusion.

In summary, the Andino Opinion concluded the S.C. FOIA does not require the production of voted ballots, scanned images of voted ballots, nor CVR to the extent that the disclosure would lead to the identification of a voter. Here, the focus is on the last category: CVR. This opinion further develops the Commission's understanding of CVR, but no change in the law, either related to the S.C. FOIA or state election law, has been identified. There appears to be disagreement regarding how likely the disclosure of information would lead to voter identification, but the resolution of that dispute requires findings of fact. Again, this Office's opinions cannot find facts; fact finding is more appropriately reserved to our state courts. The issue of law, whether the S.C. FOIA requires disclosure, is unchanged. As there has been no change in relevant law, this Office reaffirms the conclusions in the Andino Opinion that disclosure of the CVR is not required by the S.C. FOIA. Ops. S.C. Atty. Gen., 2017 WL 3438532 (July 27, 2017) ("This Office recognizes a long-standing rule that it will not overrule a prior opinion unless it is clearly erroneous or there has been a change in applicable law.").

**2. Article II, § 1 of the South Carolina State Constitution does not require disclosure of cast vote records and ballot images.**

It is this Office's opinion that our state courts would not nullify an election because the Commission determines CVR are not subject to disclosure under the S.C. FOIA. For the reasons discussed more fully below, even assuming a decision to withhold CVR from disclosure is incorrect, such a violation of the S.C. FOIA would not impact the casting of a vote nor the conduct of an election.

In George v. Mun. Election Comm'n of City of Charleston, 335 S.C. 182, 516 S.E.2d 206 (1999), the South Carolina Supreme Court explained that perfect compliance with all statutes governing elections is rare. We quote at length the Court's description of when nullification may be appropriate.

> The statutory provisions regulating the conduct of elections are numerous and detailed. S.C. Code §§ 7–13–10 to –2220 (1976 & Supp.1998); S.C. Const. art. II, § 10. This Court, like many others, recognizes that perfect compliance in every instance is unlikely, and the Court is loathe to nullify an election based on minor violations of technical requirements. To that end, courts have developed principles to determine whether such provisions are mandatory or directory.
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> As a general rule, such provisions are mandatory in two instances: when the statute expressly declares that a particular act is essential to the validity of an election, or when enforcement is sought before an election in a direct proceeding. After an election in which no fraud is alleged or proven, when the Court seeks to uphold the result in order to avoid disenfranchising those who voted, such

> provisions are merely directory even though the Legislature used seemingly mandatory terms such as "shall" or "must" in establishing the provisions. "Courts justly consider the main purpose of such laws, namely, the obtaining of a fair election and an honest return, as paramount in importance to the minor requirements which prescribe the formal steps to reach that end, and, in order not to defeat the general design, are frequently led to ignore such innocent irregularities of election officers as are free of fraud, and have not interfered with a full and fair expression of the voter's choice." State ex rel. Parler v. Jennings, 79 S.C. 414, 419, 60 S.E. 967, 968–69 (1908); accord Laney v. Baskin, 201 S.C. 246, 253, 22 S.E.2d 722, 725 (1942); Smoak v. Rhodes, 201 S.C. 237, 241, 22 S.E.2d 685, 686 (1942); Killingsworth v. State Executive Comm. of Democratic Party, 125 S.C. 487, 492, 118 S.E. 822, 824 (1921); State ex rel. Davis v. State Bd. of Canvassers, 86 S.C. 451, 460, 68 S.E. 676, 680 (1910).
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> The Court still may deem such provisions to be mandatory after an election—and thus capable of nullifying the results—when the provisions substantially affect the free and intelligent casting of a vote, the determination of the results, an essential element of the election, or the fundamental integrity of the election. Zbinden v. Bond County Community Unit School Dist. No. 2, 2 Ill.2d 232, 117 N.E.2d 765, 767 (1954); Lewis v. Griffith, 664 So.2d 177, 186 (Miss.1995); O'Neal v. Simpson, 350 So.2d 998, 1005–09 (Miss.1977); Mittelstadt v. Bender, 210 N.W.2d 89, 94 (N.D.1973). Furthermore, "where there is a total disregard of the statute, it cannot be treated as an irregularity, but it must be held and adjudicated to be cause for declaring the election void and illegal." Moon v. Seymour, 182 Ga. 702, 186 S.E. 744, 745 (1936); accord Lewis v. Griffith, supra. "The Court ... will not sanction practices which circumvent the plain purposes of the law and open the door to fraud." May v. Wilson, 199 S.C. at 360, 19 S.E.2d at 470.

Id. at 186–87, 516 S.E.2d at 208–09.

This Office cannot say that a violation of the disclosure provisions in the S.C. FOIA is similar in nature to those provisions described by the Court that justify nullification after an election; namely, those provisions affect the free and intelligent casting of a vote, the determination of the results, an essential element of the election, or the fundamental integrity of the election. Id. The S.C. FOIA is commonly understood as an open-records or sunshine law. See S.C. Code §§ 30-4-10 *et seq.* The modern version of the S.C. FOIA was adopted in 1978. See 1978 Act No. 593, § 1. The General Assembly stated its findings and the purposes of the Act:

> The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this

> end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

S.C. Code § 30-4-15. These statutes apply broadly to the "meetings" and "records" of "public bodies" as those words are defined within the Act. S.C. Code § 30-4-20. The Act is not specific to the state election commission, county boards of voter registration, nor do they relate to the conduct of elections with limited exceptions expressed within the election statutes that are further discussed below. It is this Office's opinion that a court would hold a post-election violation of the S.C. FOIA regarding the failure to disclose public records would not justify nullification of an election because those provisions of the Act have no particular applicability to insuring the validity of elections.

The letter makes reference to Article II, § 1 of the State Constitution in connection to a right of "public investigation and oversight." This provision reads:

> All elections by the people shall be by secret ballot, but the ballots shall not be counted in secret. The right of suffrage, as regulated in this Constitution, shall be protected by laws regulating elections and prohibiting, under adequate penalties, all undue influence from power, bribery, tumult, or improper conduct.

S.C. Const. art. II, § 1. This Office understands the letter to propose that the language "the ballots shall not be counted in secret" as supportive of public disclosure of the CVR under the S.C. FOIA discussed above. This Office does not believe that is the case. The practice of publicly counting ballots is certainly a time-honored feature of our state elections. Article II, § 1 was most recently amended in 1971. See 1971 (57) 319. The Editor's Note in the South Carolina Code states the first sentence to this provision remains quite similar to how it read prior to the 1971 amendment.[1] The 1971 Amendment, of course, predates the 1978 adoption of the S.C. FOIA. So when the electorate approved this amendment, they were unlikely to understand the S.C. FOIA was a mechanism for ensuring ballots are not counted in secret.

Article II, § 1 should be read in combination with Article II, § 10. See State ex rel. Edwards v. Abrams, 270 S.C. 87, 240 S.E.2d 643 (1978) (discussing both provisions to hold a statute allowing husbands and wives to vote together violated the Constitution's guarantee of the secrecy of the ballot); see also Penman v. City of Columbia, 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010) (Where statutes deal with the same subject matter, it is well established that they "are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result."). It states:

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[1] See Corn v. Blackwell, 191 S.C. 183, 4 S.E.2d 254, 255 (1939) (quoting pre-1971 provision of Article II, § 1 to read "All elections by the people shall be by ballot, and elections shall never be held or the ballots counted in secret."); see also George, 335 S.C. at 187–88, 516 S.E.2d at 209 ("Section 1 of Article II was amended in 1971 to include the term "secret ballot." Act No. 277, 1971 Acts 319.").

> The General Assembly shall provide for the nomination of candidates, regulate the time, place and manner of elections, provide for the administration of elections and for absentee voting, insure secrecy of voting, establish procedures for contested elections, and enact other provisions necessary to the fulfillment and integrity of the election process.

S.C. Const. art. II, § 10.[2] Here, Article II, § 10 tasks the General Assembly with guaranteeing the promises of Article II, § 1. "[S]ecrecy of the voting" of course mirrors the "secret ballot" and "provisions necessary to the fulfillment integrity of the election process" relates to both the public process of counting of ballots and avoiding undue influence in elections. To this end, the General Assembly codified much of the state election law in Title 7 of the South Carolina Code. See Smith v. Hendrix, 265 S.C. 417, 421, 219 S.E.2d 312, 313 (1975) (discussing election protest statues then codified at Title 23 of the 1962 Code).

There are several statutes that relate to permitting the public to observe the election process, the counting of ballots, canvassing of votes, and election protests. Prior to the election, sections 7-13-1390 and 7-13-1750 require county election officials to provide public notice of the time and place of display and testing of tabulating machines and voting machines to "ascertain that they will correctly count the votes cast for all offices and on all questions." S.C. Code § 7-13-1390. "Representatives of political parties and bodies, candidates, news media and the public shall be permitted to observe such tests." Id.

During the election, section 7-13-1420 authorizes poll watchers "to remain in the polling place after the polls close and may observe the processing of the ballots and the sealing of the containers." S.C. Code § 7-13-1420. "Poll watchers" are appointed by opposed candidates at voting places where the candidate's name appears to a ballot. S.C. Code § 7-13-860. Witnesses are allowed to observe functions at counting stations. S.C. Code Ann. § 7-13-1440.

Once the polls are closed, section 7-13-1880 requires the following procedures.

> [The election] managers shall immediately lock or seal the voting machine against further voting and open the counter compartment in the presence of all persons who may be lawfully present at the time giving full view to the results, and they shall canvass and announce the results, including the votes recorded for each office on the independent ballots. They shall also announce the vote upon every amendment, proposition, or question voted upon, as provided by Section 7-13-110. The vote as registered shall be duly certified and sworn to and returned and filed as provided in this title for returning and filing election returns.

S.C. Code Ann. § 7-13-1880 (emphasis added). The Commission clarified to this Office that those persons who may lawfully be present when election managers open the counter

[2] Article II, § 10 was also most recently amended in 1971. See 1971 (57) 319.

compartment include poll watches, observers,[3] press, and public individuals as may reasonably be accommodated in the space to watch the process. The Commission further provided this statement in the Poll Manager's Handbook regarding public observation in the polling place after the polls close:

> [P]oll watchers and observers can remain in the polling place to observe the canvassing process. The Clerk may establish a new designated area for watchers and observers to allow for the viewing of the closing process. They must remain in a designated observation area during this time apart from viewing the totals tape once it is posted publicly. They may take a picture of the totals tape once it's posted outside of the immediate voting area. Watchers and observers will be dismissed from the polling place after the totals tapes have been printed, signed, and posted AND the ballot boxes have been locked and sealed.

South Carolina Election Commission, Poll Manger's Handbook (2022 Ed.). Thereafter, one of the managers of the election delivers a "sealed envelope having endorsed thereon a certificate of the managers of election stating the number of the machine, the voting precinct, the numbers on the seals, and the number on the protective counter and containing all used seals for this election endorsed by the managers of election" to the county board of voter registration and elections or other electoral board from whom the envelope was received. S.C. Code § 7-13-1890.

Next, the commissioners of election organize as the county board of canvassers. See S.C. Code § 7-17-10. The county board of canvassers then "proceed to canvass the votes of the county and make such statements of such votes as the nature of the election shall require ... and transmit to the State Board of Canvassers the results of their findings." S.C. Code § 7-17-20. The Board of State Canvassers are required to

> convene a meeting scheduled through the office of the Election Commission within ten days after any general election for the purpose of canvassing the vote for all officers voted for at such election, including the vote for the electors for President and Vice President, and for the purpose of canvassing the vote on all Constitutional Amendments and questions and other issues. Nothing in this section prohibits the meeting from being conducted by using telephone conference or other means of telecommunication or electronic communication. Any meeting of the Board of Canvassers as provided in this section must be accessible and without cost to the public and must comply with the notice requirements of Chapter 4, Title 30, the Freedom of Information Act.

S.C. Code § 7-17-220 (emphasis added). The Board of State Canvassers, in reliance on the statements made by the county boards of canvassers, "make a statement of the whole number of

[3] "An observer is a member of the public who isn't performing a specific role (manager, clerk, voter, watcher, etc.). Since elections are a public process, anyone should be allowed to observe under certain conditions." South Carolina Election Commission, Poll Manger's Handbook (2022 Ed.).

votes given at such election for and against constitutional amendments and other questions and issues and for the various officers." S.C. Code § 7-17-240. Finally, the Board "determines and declares what persons have been duly elected to such office." S.C. Code § 7-17-250.

The statutes summarized above are certainly not exhaustive of the General Assembly's efforts to insure that ballots are not counted in secret.[4] See S.C. Const. art. II, §§ 1, 10. They demonstrate how opportunities for public observation are provided throughout the process of preparing for elections, during elections, throughout transmission of the votes from the election managers to the boards of county canvassers, and to the Board of State Canvassers. Notably, the Board of State Canvassers' meeting is explicitly made open to the public and directly incorporates the notice requirements of the S.C. FOIA. See S.C. Code § 7-17-220. This, of course, is when the ultimate count of the votes occurs and the winners of elections are declared. See S.C. Code § 7-17-250.

Further, in the case of election protests, before both the county board of canvassers and the Board of State Canvassers, hearings are held in public. See S.C. Code § 7-17-50 ("The protestant and each other candidate in the protested race have the right to be present at the hearing, to be represented by counsel, to examine and cross-examine witnesses, and to produce evidence relevant to the grounds of the protest."); S.C. Code § 7-17-250 ("The [Board of State Canvassers] shall act in an appellate judicial capacity in all cases contested or protested that come before it on appeals from county boards of canvassers.").[5]

It is this Office's opinion that by adopting the statutory scheme in Title 7 the General Assembly has satisfied its obligations to both "insure secrecy of voting" as well as to "enact

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[4] For instance, S.C. Code § 7-15-420(f) requires the process of examining absentee ballots to be conducted "in the presence of any candidate who elects to be present, and of any watchers who have been appointed pursuant to Section 7-13-860." Notably, this statute expressly balances allowing observation with maintaining the secrecy of the ballot. Id. ("Provided, any candidates or watchers present must be located a reasonable distance in order to maintain both the right to observe and the secrecy of the ballots.").

[5] The statutes authorizing such hearings are time limited. The Supreme Court has articulated that the General Assembly intended for election disputes to be "disposed of with the maximum dispatch consistent with due process of law. It is self-evident that protracted election disputes produce an instability in government inimical to the public welfare." Smith v. Hendrix, 265 S.C. 417, 421, 219 S.E.2d 312, 313–14 (1975); see also S.C. Code § 7-17-30 ("Any protest or contest must be filed in writing with the chairman of the [county boards], together with a copy for each candidate in the race, by noon Wednesday following the day of the declaration by the board of the result of the election."); S.C. Code § 7-17-260 ("The state board shall decide all cases under protest or contest that may arise in the case of federal officers, state officers, members of the State Senate and the State House of Representatives, and offices involving more than one county. Any such protest or contest shall be filed in writing with the chairman of the board... not later than noon five days following the canvassing of the votes for such offices by the board...").

other provisions necessary to the fulfillment and integrity of the election process." S.C. Const. art. II, § 10. Further, it is this Office's opinion that a court likely would not construe the language "the ballots shall not be counted in secret" in Article II, § 1 of the South Carolina State Constitution to subject ballot images or CVR to review by the public itself. We quote the South Carolina Supreme Court's description of the historical reasons compelling our State's adoption of the secret ballot.

> History demonstrates the importance of the secret ballot. In the early years of our nation, voters expressed their preferences orally or by a showing of hands. With the advent of paper ballots in the late 1700s, individuals prepared their own handwritten ballots at home, marked them, and took them to the polling place. Later, political parties and candidates printed their own specially colored or designed paper ballots for voters to use. None of the methods was secret and all were open to widespread intimidation of voters, fraud, and violence. Burson v. Freeman, 504 U.S. 191, 200–206, 112 S.Ct. 1846, 1852–54, 119 L.Ed.2d 5, 15–19 (1992) (upholding Tennessee statute prohibiting solicitation of votes and display of campaign materials within 100 feet of entrance to polling place); G.H. Utter and R.A. Strickland, Campaign and Election Reform: A Reference Handbook, 8–9 (1997); Wright and Graham, Federal Practice and Procedure: Evidence, § 5632 (1992) (discussing history of secret ballot in connection with rejected rule of evidence on voter's privilege).
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> Polling places on Election Day, unlike today's typical experience of waiting quietly in line, often were "scenes of battle, murder, and sudden death." In addition to real violence, sham battles were staged to frighten away elderly and timid voters. Burson v. Freeman, 504 U.S. at 202–04, 112 S.Ct. at 1853–54, 119 L.Ed.2d at 16–17. One writer described Election Day in 1856, for example, as a "knock-down, dragged-out fight" in many areas of the country. Thugs forced voters at the polls to reveal their voting ticket, then beat or shot them and forcibly tore up the opposing party's ticket if they refused to vote as ordered. Sheriffs were unable to find men willing to risk their lives to control the violent mobs. In his 1931 autobiography, journalist Lincoln Steffens, commenting on a more peaceable form of vote solicitation, observed that the going rate for a vote in his Connecticut hometown was $2.50 to $2.75. J. Mitchell, How to Get Elected: An Anecdotal History of Mud–Slinging, Red–Baiting, Vote–Stealing and Dirty Tricks in American Politics, 45–46, 88 (1992).
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> To combat violence and corruption, most states adopted the secret ballot—sometimes called the Australian ballot system because it was first used in that country—and other measures in the 1880s and 1890s. Burson v. Freeman, supra; Utter & Strickland, at 42–46. When explaining the importance of the secret ballot to our system of representative democracy, the reasons most often given are to

> reduce or eliminate the potential intimidation of voters, to reduce or eliminate the chance for voters who are willing to sell their votes to prove they have "delivered the goods" by allowing someone to watch them cast their ballot, and to ensure the overall integrity of the electoral process. State ex rel. Edwards v. Abrams, 270 S.C. 87, 92, 240 S.E.2d 643, 645–46 (1978); Peterson v. City of San Diego, 34 Cal.3d 225, 193 Cal.Rptr. 533, 666 P.2d 975, 976 (1983); Moon v. Seymour, 186 S.E. at 745; Clark v. Quick, 377 Ill. 424, 36 N.E.2d 563, 566 (1941); Evans v. Reiser, 78 Utah 253, 2 P.2d 615, 625 (1931), *superseded by statute on other grounds as stated in* Mosier v. Gilmore, 635 P.2d 55 (Utah 1981); Sims v. Atwell, 556 S.W.2d 929, 933 (Ky.Ct.App.1977); 26 Am.Jur.2d Elections §§ 299, 328 (1996).

George v. Mun. Election Comm'n of City of Charleston, 335 S.C. 182, 188–89, 516 S.E.2d 206, 209–10 (1999). It is this Office's understanding that the technologies used in our present day elections do not erase these concerns. In a 1975 election protest case before the South Carolina Supreme Court, a petitioner argued the nature of "computer-tabulated elections" made the statutorily prescribed period for contesting elections unreasonable and violated the due process clauses of the United States and South Carolina Constitutions. Smith v. Hendrix, 265 S.C. 417, 422, 219 S.E.2d 312, 314 (1975). The Court rejected the argument as "devoid of any factual basis." Id. In the forty-five years since this decision, the use of computer tabulation in our state elections has, of course, continued and legislation has been adopted to further incorporate the use of voting machines. See 2000 Act No. 392, § 8-9 (H.B. 4751) (requiring voting machines to remain locked after election, and addressing verification of results of an election). It is certainly arguable that future technology may require greater transparency to assure the public trust in our elections process. However, the duty of determining whether additional oversight and transparency is "necessary to the fulfillment and integrity of the election process" is a question of policy assigned to the General Assembly. S.C. Const. art. II, § 10.

## Conclusion

For the reasons discussed more fully above, this Office reaffirms the conclusions in the Andino Opinion that the S.C. FOIA, S.C. Code § 30-4-10 *et seq.*, does not require the production of voted ballots, scanned images of voted ballots, and cast vote records. Op. S.C. Att'y Gen., 2020 WL 5985610, at 5 (September 28, 2020). Further, it is this Office's opinion that a court likely would not construe the language "the ballots shall not be counted in secret" in Article II, § 1 of the South Carolina State Constitution to subject ballot images or cast vote records to review by the public itself. Finally, it is this Office's opinion that by adopting the statutory scheme in Title 7 the General Assembly has satisfied its obligations to both "insure secrecy of voting" as well as to "enact other provisions necessary to the fulfillment and integrity of the election process." S.C. Const. art. II, § 10.

As the South Carolina Supreme Court has recognized, pursuant to the constitution, "the secrecy of the ballot is absolutely essential." Corn v. Blackwell, supra. Moreover, the provision in Article II, § 1 of the South Carolina Constitution requiring that ballots must not be "counted in secret" has been simply held to mean that there must be a public counting of the votes; no more, no less. See McKnight v. Smith, 182 S.C. 378, 189 S.E. 361, 363 (1937). In other words, the public cannot be barred from the counting process. Precluding the public from observing the counting process "would undoubtedly open the door to fraud, thus destroying the purpose of elections–the obtaining of a fair and true expression of the popular will." Id.; see also Sumner v. New Hampshire Sec'y of State, 168 N.H. 667, 672, 136 A.3d 101, 105 (2016) ("[V]ote counting [must] be conducted in public, so that the public may observe the counting process as it occurs.").

Of course, our opinion is advisory only and the courts are available to decide the issues with finality. It is our understanding that a case is currently pending in Richland County where those questions are being litigated.

Sincerely,

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REVIEWED AND APPROVED BY:

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