

August 25, 2020

The Honorable Alan M. Wilson
South Carolina Attorney General
P.O. Box 11549
Columbia, SC 29211

Dear General Wilson:

The State Election Commission (SEC) respectfully requests an opinion of your Office as to whether voted ballots and certain data concerning voted ballots are public records subject to public inspection or copying under the S.C. Freedom of Information Act (FOIA). With the new statewide voting system, votes on paper ballots are cast when inserted into tabulators which scan each ballot, creating a saved image of each and recording data as to the votes cast on each ballot. Our request specifically concerns each of these three records: voted ballots, scanned images of voted ballots, and vote cast records.¹

Whether the public has a right to inspect voted ballots appears to be a somewhat novel question in South Carolina as no statutory provision expressly states whether FOIA applies, and we are not aware of any court decision or prior opinion of the Attorney General addressing the issue. However, granting the public unfettered access to voted ballots and related data raises concerns as to the secrecy of ballots. A review of relevant sections of our Election Code also suggests the Legislature may not have intended for voted ballots to be subject to public disclosure.

State law is clear that ballots must be cast in secret, but the counting of ballots is a process that must be conducted in view of the public. See S.C. Const. Art. II, § 1 (“All elections by the people shall be by secret ballot, but the ballots shall not be counted in secret...”); S.C. Code § 7-13-130 (“the secrecy of the ballot shall be preserved at all times”); § 7-13-1430 (“Processing and counting of voted ballots and the preparation of summary sheets shall be done in the presence of witnesses”); § 7-13-1440 (“Witnesses shall not be allowed in the polling place but shall file their certificates of appointment at the proper counting station after the polls close and may observe all functions there”).

¹ A vote cast record is a pdf file created for each scanned ballot image file that documents how the votes cast were recorded. It includes information such as the polling location, precinct, voting method (e.g., absentee in-person, emergency ballot), tabulator serial number, each vote cast, and whether each vote cast was ultimately counted.

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Election results, however, must be timely reported or published. See § 7-13-1110 (following an election, poll workers must “proceed publicly to open the ballot boxes and count the ballots therein,” and upon completion must publish “the statement and return of votes ... in a conspicuous site at the polling places”).

Whether in paper or electronic form, voted ballots are ultimately sealed or locked following an election with public access limited to mere observation of these functions. See § 7-13-1410(g) (“voted ballots shall be placed in designated containers ..., *sealed*, and the containers *shall be sealed*”) (emphasis added); § 7-13-1420 (“Poll watchers ... *may observe* the processing of ballots and sealing of the containers”) (emphasis added). With regards to voting machines, § 7-13-1890 states:

After being locked or sealed by the managers of election, the voting machines shall remain locked or sealed for as long as may be necessary or advisable because of any contest of the result of the election, except as may be necessary to prepare the machines for another election and except that they may be opened and all data examined by the authority responsible for conducting the election in order to ascertain or verify the machine results of the election; however, this examination may be conducted only if all candidates in an affected race, or their representatives, are notified and given an opportunity to be present, or upon the order of a court of competent jurisdiction.

(Emphasis added).

Courts in other jurisdictions have relied on similar state law provisions protecting the secrecy of ballots or granting the public the right to observe election processes to conclude voted ballots or images thereof are not subject to production or inspection. See Citizens Oversight, Inc. v. Vu, 35 Cal. App. 5th 612, 247 Cal. Rptr. 3d 521 (2019), review denied (2019) (finding counted ballots are protected from disclosure by statutes requiring them to be kept sealed and “unopened and unaltered,” and noting state laws grant public “a right to observe the election process, but does not provide any other right to inspect the ballots”); Kosmider v. Whitney, 34 N.Y.3d 48, 132 N.E.3d 592, reargument denied, 33 N.Y.3d 1134, 132 N.E.3d 1099 (2019) (noting “[t]he Election Law’s closely regulated framework for handling of ballots and reviewing their contents balances ballot secrecy, anti-tampering measures, accuracy and finality,” and allowing unfettered public access to voted ballots would circumvent the “established process for ensuring the accuracy and transparency of election results in a timely, orderly, and transparent manner”); Sumner v. New Hampshire Sec’y of State, 168 N.H. 667, 136 A.3d 101 (2016) (rejecting state constitutional challenge to statutes exempting cast ballots from state’s Right-to-Know laws, noting “New Hampshire law enables public oversight of the vote counting process in ways that, unlike public ballot inspection, do not increase the risk of lost or damaged ballots, fraudulent election challenges, or infringement upon voter privacy”); White v. Skagit Cty., 188 Wash. App. 886, 355 P.3d 1178 (2015) (finding voted ballots exempt from disclosure due to concerns that identities of individual voters could be revealed

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in violation of constitutional mandate for secret ballots, and noting state election code "provides no procedures to protect the secrecy of the vote upon Public disclosure because public disclosure is not contemplated").

We are likewise concerned that individual voters' cast ballots could be identified in violation of Article II, § 1, if cast ballots are subject to public inspection. Examples of problematic situations include: voters whose ballots have a unique set of offices or questions due to the location of their residence; voters who cast emergency or failsafe ballots in election with few or no other emergency or failsafe ballots; voters who cast provisional (challenge) as these ballots are either counted or rejected during a hearing open to the public; voters who cast write-in votes²; and voters who mark a ballot with the intent of later identifying the ballot in violation of state law (see § 7-25-100(A)(3) (making it unlawful for voter to "place a mark upon his ballot by which it may be identified")). 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 would be a daunting task that would inevitably fail to protect the secrecy of every vote cast.³

The public inspection of voted ballots also appears to be inconsistent with the statutory framework established by the Legislature and discussed above for the handling and counting of ballots. Elsewhere in Title 7, statutory provisions expressly grant the public the right to inspect certain registration and election records. See § 7-13-1740 ("sample ballots shall be open to public inspection at such polling place during the day of election"); § 7-5-170 (registration applications "shall become a part of the permanent records of the board to which it is presented and which must be open to public inspection"). The absence of any such provision concerning voted ballots, along with the repeated references in Title 7 to the public's right to *observe* processes associated with the counting of ballots, suggests the Legislature did not intend for voted ballots to be subject to public disclosure.

Allowing public access to voted ballots could also compromise the security and integrity of the counting process and of the ballots themselves. Original voted ballots would be subject to risk of misplacement, damage, or tampering. See White, 355 P.3d at 1183 ("Each time ballots are handled, there is the potential to misplace, damage, or lose them"). In the absence any statutory provision expressly making ballots open to public inspection at some designated

² Only a few votes, or even a single vote, may be written in for a candidate in an election making it easier to identify these voters' ballots. Voters may also use unique spelling for a write-in candidate's name or have handwriting that may be uniquely identifiable. Write-in votes can also be used by a voter to unlawfully mark a ballot (e.g., writing in a unique name or word) for the purpose of later identifying his or her ballot in violation of § 7-25-100(A)(3).

³ See White, 355 P.3d at 1185 (concluding "[r]edaction will not eliminate the risk that disclosing copies of ballots will reveal the identity of individual voters" and providing a detailed analysis of the issues associated with attempting to redact ballots).

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time following an election,⁴ allowing public inspection prior to the certification of results, any recount, or the conclusion of any election challenges could call into question the election results entirely.

Your assistance is greatly appreciated. Please do not hesitate to contact me or Harrison Brant if you have any questions about this request.

Sincerely,



Marci Andino

⁴ In Colorado, for example, state law provides that voted ballots are open to public inspection except during the period beginning forty-five days prior to an election and ending with either the certification of votes cast or the completion of any recount, whichever is later. Colo. Rev. Stat. Ann. § 24-72-205.5.