



On November 18, 2021, Respondent denied Petitioner’s RTKL request on the basis that “[t]he contents of ballot boxes and voting machines are not public pursuant to the Election Code, 25 P.S. § 2648.”<sup>4</sup> On November 24, 2021, Petitioner appealed that decision to the Pennsylvania Office of Open Records (“OOR”),<sup>5</sup> which solicited briefing and other relevant information from the parties.

On January 6, 2022, the OOR issued a Final Determination denying Petitioner’s appeal. In the Final Determination, the OOR first discussed § 2648 and its exception to public inspection. The OOR reviewed the affidavit of Forrest Lehman (“Mr. Lehman”), Director of Elections for Lycoming County, which provided information about the process by which votes are scanned and stored in Lycoming County. Mr. Lehman ultimately asserted Respondent’s belief that CVRs fall under the exception to public inspection in § 2648 because “[r]eviewing a CVR is the digital equivalent of inspecting the contents of a ballot box, one ballot at a time.” The OOR also reviewed Petitioner’s argument that CVRs do not fall under the exception in § 2648 but are instead analogous to other records that are available for public inspection.

After considering the parties’ arguments, the OOR denied Petitioner’s appeal on the basis that it found Mr. Lehman credible and knowledgeable, rendering it improper for the OOR to “substitute its judgment for that of those with far more

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tabulator is a similar spreadsheet showing raw data associated with every ballot cast in Lycoming County.

<sup>4</sup> Section 2648 of the Election Code provides that most records and documents in the possession of each county’s board of elections are open to public inspection, except for “the contents of ballot boxes and voting machines and records of assisted voters....” 25 P.S. § 2648.

<sup>5</sup> Section 1101(a)(1) of the RTKL allows a requester to appeal a local agency’s denial of a RTKL request to the OOR within 15 days of the denial.

familiarity with the issues.” Specifically, the OOR determined that “the CVR is the digital equivalent of the contents of ballot boxes,” and thus not a public record under § 2648 of the Election Code.

***PETITION FOR JUDICIAL REVIEW***

**A. Petition for Review**

Petitioner filed the instant Petition seeking this Court’s review of the OOR’s Final Determination on February 3, 2022. In the Petition, Petitioner reiterates her argument that the phrase “contents of ballot boxes and voting machines” does not cover Clear Vote CVRs, and disagrees with Respondent’s position below that the CVR is the “digital equivalent” of the contents of a ballot box. In support of this contention, Petitioner argues that the policy underlying both the RTKL and § 2648 of the Election Code is the promotion of transparency and public trust in the workings of the Pennsylvania government, weighing in favor of public accessibility. Petitioner highlights that the CVR is not a photocopy of a ballot but consists of a “spreadsheet that shows the adjudication of every choice on every ballot cast in the election,” containing many rows of identification numbers and data representing votes cast. Petitioner stresses that a CVR does not contain information to identify a particular voter, such as name or address, arguing that “there is nothing in the CVR that could possibly associate a ballot with an individual voter.”

Petitioner raises six points in the argument section of the Petition:

First, Petitioner notes that § 2648 excludes “the contents of ballot boxes” from public inspection but not their “digital equivalents”; therefore, to the extent

Respondent contends a CVR is the “digital equivalent” of the contents of ballot boxes, the Election Code does not support withholding CVRs from public inspection.

Second, Petitioner argues that “contents of a ballot box” are those things physically inside of a ballot box, highlighting Respondent’s acknowledgment that a CVR is never physically located in a ballot box but is instead a spreadsheet of data that is stored electronically until it is printed.

Third, Petitioner points to various other provisions of the Election Code, arguing that they support a narrow construction of the exception to public inspection in § 2648.<sup>6</sup>

Fourth, Petitioner reiterates her position that CVRs are less similar to “contents of ballot boxes” than they are to the various records and documents that § 2648 explicitly lists as available for public inspection, such as “tally papers” and “reports” of elections.

Fifth, Petitioner cites a 2012 determination from the OOR, *Kesich v. Tioga County*, in which the OOR approved of a request to obtain CVRs in similar circumstances to those presented here.<sup>7</sup>

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<sup>6</sup> For instance, Petitioner cites the Act of October 31, 2019, P.L. 552, No. 77 – a recent amendment to the Election Code widely known as “Act 77” – which makes voted mail-in ballots “public records.” Petitioner argues that it would be absurd for a CVR consisting of numerical information to be inaccessible to the public when actual mail-in ballots themselves appear to be publicly accessible under Act 77.

<sup>7</sup> *Kesich v. Tioga County* (OOR Docket AP 2012-0205). In *Kesich*, when the issue reached the OOR, the local agency had already decided on its own to provide a CVR, but did so in a format other than what was requested. In an opinion denying the appeal as to the format of the information, the OOR remarked “[t]he County properly granted access to the ballot images....” Petitioner characterizes “[t]he OOR’s failure to follow its prior interpretation” as “inexplicable.” However, because the question of whether the County was required to produce the CVR was not before the OOR, the quoted statement is clearly dicta, and therefore does not carry precedential weight. Additionally, as the OOR noted in its Final Determination in this case, “a separate agency’s decision on whether to grant access to records in response to a RTKL request” – such as the decision of Tioga County to release

Finally, Petitioner appeals to broad policy concerns, arguing that because CVRs “allow the public to inspect the adjudication process” and “sum the votes for each candidate and confirm that county’s reported results are consistent with the record of votes cast,” a finding that CVRs are public records would affirm the “critical importance of election transparency and the public’s faith in election integrity.”

Petitioner attached a number of exhibits to the Petition. These included the parties’ correspondence with the OOR and between each other as well as various pieces of evidence submitted as part of the OOR appeal.

Upon receipt of the Petition, this Court held an initial conference between the parties and ultimately scheduled an evidentiary hearing for June 16, 2022.

#### **B. Response to Petition**

On April 18, 2022, Respondent filed a Brief in Opposition to the Petition. Respondent first notes that the OOR’s Final Determination in this case is consistent with numerous recent decisions of the OOR addressing the same issue in other counties and concluding that a CVR “is the digital equivalent of the contents of a ballot box and therefore explicitly made non-public by virtue of the Election Code.” Noting that the RTKL does not override explicit provisions of other laws such as the Election Code,<sup>8</sup> respondent asserts that accessing the CVR is akin to “inspecting the contents of a ballot box, one ballot at a time, which is not permitted by the Pennsylvania Election Code.” Respondent characterizes a CVR as a “digital ballot

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the CVRs in *Kesich* – “does not prove that such records are public records under the RTKL.” Therefore, *Kesich* is not relevant to the resolution of the Petition here.

<sup>8</sup> 65 P.S. § 67.3101.1 provides that “[i]f the provisions of [the RTKL] regarding access to records conflict with any other Federal or State law, the provisions of [the RTKL] shall not apply.”

box,” and argues that § 2648 does not specify that a ballot box must be physical in light of technological developments. The fact that a CVR contains enough information to perform “an independent audit of the ClearCount<sup>9</sup> system,” Respondent argues, “is, in and of itself, proof that the records are comprised of contents of ballot boxes/voting machines.”

Additionally, Respondent raises a second argument that was not included in its initial denial of Petitioner’s RTKL request: that Petitioner lacks standing to obtain any records from Respondent because she is a registered voter in Lebanon County rather than Lycoming County.<sup>10</sup> Noting that under § 2648 a county election board’s records and documents are available for public inspection only by “qualified elector[s] of [that] county,” Respondent argues that Petitioner is not entitled to obtain or inspect any documents in Respondent’s custody regardless of whether they are available for public inspection under § 2648.

**C. Petition to Intervene for Petitioner**

On May 16, 2022, three registered electors of Lycoming County – Joseph D. Hamm, Donald C. Peters, and Jeffrey J. Stroehmann (“Petitioner Intervenors”) – filed a counseled Petition to Intervene as Petitioners. Petitioner Intervenors asserted that their interests were aligned with Petitioner’s, that they could have brought or joined the action as an original party, and that the ultimate outcome in this matter will affect their rights as registered electors of Lycoming County. They further averred that their intervention would not delay, complicate, or otherwise negatively affect the

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<sup>9</sup> Certain portions of the ClearVote system are also referred to as “ClearCount” or “ClearBallot.”

<sup>10</sup> Respondent raised this issue for the first time in its filings before the OOR.

proceedings. The Court heard argument on the Petition to Intervene on June 7, 2022, and subsequently granted the Petition to Intervene.<sup>11</sup>

**D. Petition to Intervene for Respondent**

On June 9, 2022, the Acting Secretary of the Commonwealth of Pennsylvania, Leigh M. Chapman, acting through the Department of State (collectively “Department Intervenors”), moved to intervene as Respondents. Noting that “the Secretary of the Commonwealth has been entrusted by the General Assembly with maintaining and safeguarding voter records,” the Department Intervenors claimed “a keen interest in the subject of this litigation as it has potential to affect how... requests for these records are handled throughout the Commonwealth and the security of the information of Pennsylvania voters.” After argument, the Court granted the Petition to Intervene.

***EVIDENTIARY HEARING***

The evidentiary hearing in this matter took place on June 16 and June 24, 2022. Petitioner appeared *pro se*, and Petitioner Intervenors appeared represented by counsel. Respondent and Department Intervenors each appeared represented by counsel.

To accommodate the witnesses’ schedules, the parties agreed to present witnesses in the order they were available. The first of two witnesses to testify on

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<sup>11</sup> Although the parties cited Pa. R.C.P. 2327, which governs intervention in civil actions, the Commonwealth Court of Pennsylvania has explained that “[t]he intervention rules in the Pennsylvania Rules of Civil Procedure are not applicable to statutory appeals” such as appeals from OOR determinations in RTKL cases. *Allegheny County Dept. of Administrative Services v. A Second Chance, Inc.*, 13 A.3d 1025, 1033 (Pa. Cmwlth. 2011). Because there is no express statutory authority governing intervention in such cases, the Court noted, “the trial court has discretion to rule on the matter.”

June 16 was Mr. Lehman, called by Respondent. The second witness of the first day of the hearing was Kenneth Roy Bennett (“Secretary Bennett”), who served as Arizona’s Secretary of State from 2009 to 2015 and testified as Petitioner’s expert on the Clear Vote system and CVRs. On the second day of trial, Department Intervenors called Jonathan Marks (“Mr. Marks”), Deputy Secretary for Elections and Commissions with the Pennsylvania Department of State. Next, Petitioner Heather Honey testified. Finally, Petitioner called Andrew Poli as a witness.

The remainder of this section summarizes the relevant portions of each witness’s testimony.

**A. Forrest Lehman**

On direct examination, Mr. Lehman explained that he has been Lycoming County’s Director of Elections and Registration for seven years, prior to which he served as Assistant Director of Elections for a year and a half. He and his office are responsible for the administration of both the primary and general elections each year in Lycoming County, from voter registration and the petition process through managing polling places on election day and counting votes.

Respondent introduced Respondent’s Exhibit 1, Petitioner’s Right-to-Know Request seeking a digital copy of the Clear Vote CVR. Mr. Lehman explained that Clear Vote is the name of the voting system Lycoming County uses, which consists of ballot programming equipment, vote scanners, the equipment at each precinct, and the software that supports those devices. Mr. Lehman testified that prior to Clear Vote, Lycoming County used the AccuVote TSX system, under which each voter touched a screen to make their votes which were then recorded with no paper



ballot involved. Conversely, under the Clear Vote system, each voter fills out a paper ballot. Once a voter at a precinct has filled out their paper ballot, they insert it into a scanner which reads the ballot and deposits it into a secured bag. The votes on the ballot, as read by the scanner, are counted by a “tabulator” attached to the scanner.

Mr. Lehman explained that a Cast Vote Record, or CVR, is a spreadsheet that contains a row of data for each ballot cast in an election. Mr. Lehman testified that each row contains a variety of information, including a column indicating which choice the voter selected in each individual race.

Respondent introduced Respondent’s Exhibit 2, a redacted CVR for McHenry Township.<sup>12</sup> Mr. Lehman explained that the spreadsheet’s 72 rows indicated that 72 ballots were cast on election day in McHenry Township, with each row corresponding to a unique ballot cast by a voter. Mr. Lehman testified that after each ballot is scanned into the precinct’s tabulator, the data from that ballot is ultimately transferred into the central computer at Respondent’s headquarters, which creates a CVR for the county as a whole as well as each precinct. The first few columns of the CVR indicate the numerical order of each ballot, a “box ID number” identifying the location and method of scanning, and other identifying information.<sup>13</sup>

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<sup>12</sup> Respondent chose McHenry Township’s CVR as an example of a typical CVR for one of Lycoming County’s eighty-one voting precincts.

<sup>13</sup> For example, the seventy-two votes cast in McHenry Township corresponded to rows numbered 23,959 through 24,030 in the Lycoming County CVR. Each of these rows contained the same “box ID” number, 33466, which indicated they were all scanned on election day at the McHenry Township precinct. Each row also contained a separate identifying number for the scanned image of the ballot; these numbers increased by two with each ballot because the image of each ballot’s front and the image of each ballot’s back are stored in different files (beginning with 1, 3, 5, and so on).

After the columns with identifying information, the “status column” and “remade column” indicated whether a particular ballot needed to be reviewed after the election, such as when a voter made a mark that the scanner had difficulty interpreting.<sup>14</sup>

Following these columns, the CVR contains the columns indicating the choice a voter made in each race. For instance, in the McHenry Township CVR from the 2020 general election, there were columns for “Joseph R. Biden,” “Donald J. Trump,” and all others on the presidential ballot. If a voter casts a vote for a particular candidate, the column corresponding to that candidate will have a “1”; otherwise, the column will have a “0”. If a voter votes for a write-in candidate, the CVR records a “1” in the “write-in” column but does not include the name of the write-in candidate, and Voter Services is required to look at the ballot to determine whom the voter wrote in. Because the CVR contains information for every possible race on the ballot, Mr. Lehman testified, the CVR could reveal the contents of a particular person’s ballot if the numerical order in which that person voted was known.

Respondent introduced Respondent’s Exhibit 3, the publicly available sample ballot for McHenry Township’s 2020 general election. Mr. Lehman stated that each individual contest on the ballot corresponded to a set of rows on the CVR that when populated would ultimately reflect each particular voter’s choices in those contests; the only information that would be on the ballot but not in the CVR is the name of any write-in candidate a voter voted for. Mr. Lehman testified that if there is a need

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<sup>14</sup> Mr. Lehman explained that sometimes a voter will make a faint tick or check mark in an oval to indicate their vote, but the scanner may not pick this up. Mr. Lehman stated that Voter Services strives to ensure that it counts all legal votes.

to review ballots after the election, he would generally look at the CVR rather than individual ballots, though it would depend on the situation. There is rarely a need, Mr. Lehman stated, to review individual ballots or go line-by-line in CVRs.

Mr. Lehman testified that he considers a CVR to be a “digital version of the contents of the ballot” because “someone who has a CVR... could use the [CVR] to recreate all of the contents of a ballot box.” Essentially, Mr. Lehman explained, someone with one blank ballot for each line on the CVR could fill out those ballots using the information in the CVR; at the end of this process, the stack of ballots filled out using the information in the CVR would be identical to the stack of ballots in the secure bag attached to the scanner.<sup>15</sup> Mr. Lehman testified that, in responding to Petitioner’s RTKL request, he reviewed the Election Code and other relevant statutes and cases, and worked with counsel and the Pennsylvania Department of State to decide how to respond.

Mr. Lehman stated that Voter Services makes many records public in an effort to keep elections open and transparent, which the Election Code envisions.<sup>16</sup> Mr. Lehman testified that § 2648 of the Election Code, however, excludes contents of ballot boxes from public view. Inasmuch as Voter Services views CVRs as the digital equivalent of contents of ballot boxes, Mr. Lehman explained, he would not permit a member of the public to inspect the CVR, and this was one of the reasons Respondent denied Petitioner’s RTKL request.

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<sup>15</sup> Except for the omission of the names of write-in candidates.

<sup>16</sup> Such public records, Mr. Lehman explained, include nomination petitions, campaign finance reports, Board of Election records, precinct returns and worksheets, all of which are available for the public to view and copy.

Mr. Lehman also testified that he had constitutional concerns about the release of the CVR, with his primary concern that public release could violate the Pennsylvania Constitution's guarantee of secrecy in voting. Mr. Lehman feared that the identifying data in the CVR could be used in conjunction with observation or other public records to "gain insight into how individual voters cast their ballots." Specifically, under the Election Code, precinct workers are required to keep a "numbered list of voters," which is a public record. Mr. Lehman testified that because ballots are stored in the CVR sequentially, a person in possession of both the CVR and the numbered list of voters could determine which selections an individual voter made by comparing their place in the CVR to their place on the numbered list.<sup>17</sup> As an example of a numbered list of voters, Respondent introduced Respondent's Exhibit 4, the numbered list from the 2020 general election in McIntyre Township.

Respondent introduced Respondent's Exhibit 5, a photograph of the display screen of a precinct ballot scanner, in order to demonstrate what a voter would see when casting their ballot. The display screen indicates to each voter whether the scanner has accepted the ballot they inserted, and maintains a running numerical count of the number of ballots cast.<sup>18</sup> Thus, Mr. Lehman explained, a person who

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<sup>17</sup> Mr. Lehman pointed out that the numbered list of voters records the order in which voters *received* their ballots, whereas the CVR records the order in which voters *cast* them; therefore, the correspondence between the two lists may not be exact. Additionally, after the hearing, Respondent provided newly discovered information regarding how the Clear Vote CVR stores ballots, indicating that the CVR introduces a randomization element when ordering ballots within the CVR. This means that ballots in the CVR are listed roughly – but not exactly – in the order they were cast. This specific information and its relevance to the parties' arguments is discussed in detail *infra*.

<sup>18</sup> That is, the number begins at "0", increases to "1" after the first ballot is cast, and so on. Mr. Lehman explained the Election Code mandates this counter.

observed the number change after a voter cast their ballot would be able to determine not just the order in which that voter received a ballot (from the numbered list of voters) but also the order in which that voter cast their ballot.

Mr. Lehman testified that only certain people are permitted to be in a polling place on election day: poll workers, voters, people waiting in line to vote, and poll watchers. Mr. Lehman explained that in larger districts this could still be a large number of people, each of whom could see the numerical counter on the scanner's display screen. Mr. Lehman testified that each screen must remain unobstructed because poll workers need to be able to observe if there is a problem with a voter's attempt to cast their ballot. Ultimately, Mr. Lehman stated that he believed making the CVR a public record would violate the Pennsylvania Constitution's guarantee of secrecy in voting.

Next, Petitioner cross-examined Mr. Lehman. Mr. Lehman testified that he did not recall providing the Department of State with a copy of Petitioner's RTKL request, though he did contact them following the OOR determination and received an email, which the Department of State sent to all 67 of Pennsylvania's counties on November 8, 2021, providing guidance on RTKL requests concerning elections. Petitioner introduced a copy of that email as Petitioner's Exhibit 22.

Mr. Lehman agreed with Petitioner that when Respondent initially denied Petitioner's RTKL request, it listed the belief that a CVR is the digital equivalent of the contents of a ballot box as the sole reason for the denial, and did not propose the fact that Petitioner is not a Lycoming County resident as an alternative basis until later. Mr. Lehman explained that the frequency of RTKL requests served on Voter

Services varies, with some months having no requests and some having up to six. He stated that Voter Services does not typically consult with the Department of State on RTKL requests, though the Department of State occasionally promulgates guidance on various topics.

Mr. Lehman explained the relationship between poll books and numbered lists of voters, both of which are kept by precinct workers on election day. Some precincts have only one poll book, which is a list of voters that a voter signs before receiving a ballot, but larger precincts have multiple poll books. Mr. Lehman explained that the precinct workers are required to keep a separate numbered list of voters for each poll book. Although each voter signs only one poll book, that voter's name is then placed on *each* numbered list of voters. Therefore, at the end of election day at a precinct with multiple poll books, there will be the same number of identical numbered lists of voters.

Mr. Lehman detailed the process by which a voter casts a ballot at a precinct. The voter will arrive, and a poll worker will find the voter's name in a poll book. The voter signs the poll book, and the poll workers record the voter in the numbered list of voters. The voter then receives a ballot, fills it out, places it into the scanner, and exits the precinct. Mr. Lehman reiterated that voters may take different amounts of time to fill out their ballots, and therefore the order of voters in the numbered list of voters may not exactly match the order in which voters scan their ballots. He clarified that no record lists the particular time at which a given voter cast their ballot. Mr. Lehman suggested that despite the fact that the numbered list of voters may not always be in one-to-one correspondence with the CVR, the fact that these

documents could even sometimes be used to gain insight into a particular voter's selections violates the constitutional guarantee to secrecy in voting. This guarantee of secrecy, Mr. Lehman testified, means that each voter has a right to keep the contents of their ballot secret even from poll workers.

Mr. Lehman testified that Pennsylvania does not have, and has never had, a unified voting system, as each county is free to use varied equipment for voting. Regarding the phrase "contents of a ballot box" as used in the Election Code, Mr. Lehman interpreted that to encompass a variety of systems, both physical and electronic. For instance, one county's ballot box may be a bag, and another county's may be a different kind of container. Mr. Lehman reiterated that after a vote is scanned in Lycoming County it goes into a secure black bag, which is then transported to Voter Services' headquarters; this black bag, Mr. Lehman agreed, is essentially a ballot box.

Mr. Lehman next testified that he is familiar with Act 77, and its provisions ostensibly describing mail and absentee ballots as public records.<sup>19</sup> Mr. Lehman stated that if he received a RTKL request for mail-in or absentee ballots, he would first have to consult with counsel before determining how to respond, though his initial impression was Act 77 would likely support the grant of such a request.

Mr. Lehman testified that the ClearVote system has been certified by the Secretary of the Commonwealth of Pennsylvania. Although Mr. Lehman agreed with Petitioner that a bad actor could use the information in Voter Services' possession to ascertain how some individual electors voted, he stated that merely possessing that

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<sup>19</sup> Act of October 31, 2019, P.L. 552, No. 77, which amended the Pennsylvania Election Code.

information is not a Constitutional violation. Rather, Mr. Lehman explained, Voter Services workers are ethically obligated not to use the information they collect in such a manner.

Petitioner introduced Petitioner's Exhibit 3, containing a portion of the CVR from the 2020 general election in Allegheny County, Pennsylvania as well as a letter indicating that Allegheny County had agreed to produce both the CVR and ballot images from that election. Mr. Lehman acknowledged that Allegheny County had made its own decision, though it differed from Respondent's. Mr. Lehman pointed out that Allegheny County does not use the ClearVote system, and therefore the CVR in Petitioner's Exhibit 3 was created by a different voting system; differences between two voting systems, Mr. Lehman suggested, could theoretically support a different conclusion about whether their CVRs were the contents of ballot boxes or their digital equivalent.

On cross-examination by Petitioner Intervenors, Mr. Lehman agreed with counsel that the need for privacy and secrecy in voting and the need for transparency and public confidence in elections are both important interests under the Election Code. Mr. Lehman stated that these interests are often in tension, and it can be a struggle for the Election Code or the courts to balance them appropriately.

Mr. Lehman stated that he is responsible for responding to RTKL requests involving Voter Services and election documents after consultation with counsel. Mr. Lehman was not aware of whether the RTKL allows consideration of a requester's intended use of documents when granting or denying a RTKL request. In this



particular case, Mr. Lehman explained, he believed the constitutional concerns regarding the right to secrecy in voting were sufficient to legally justify the denial of Petitioner's RTKL request independent of the specific language of the RTKL as it relates to the requestor's intended or potential use of the document requested.

Mr. Lehman next reiterated the voting process between a voter's arrival and the scanning of that voter's ballot, and then explained what occurs after a ballot has been scanned and the polls close. Each ballot goes through the scanner and into the attached secure black bag; Mr. Lehman clarified that each precinct has exactly one scanner and attached bag. Nothing is placed in the bags other than the ballots themselves. After the polls close, the poll workers close the two openings in the bag, place security seals over the closed openings, and transport the bag to Voter Services headquarters. Additionally, at the close of voting, poll workers must turn in a large number of documents, including a general return accounting for each ballot cast, the numbered lists of voters, results from the scanner, the record of assisted voters, and other information relating to certain ballots. Each of these documents is retained until the start of the official canvass of votes.

In addition to the black bag containing ballots, each scanner has a USB drive inserted that stores data from the scanner; the poll workers bring this USB drive to Voter Services headquarters. Voter Services workers then transfer the data from the USB drive to the central computer, which is never connected to the internet. The central computer compiles the data received from the eighty-one precincts' USB drives into a countywide database, which allows Voter Services to generate countywide and more specific CVRs and reports. These reports contain information

on how many people voted for each candidate, and it is this information that is posted publicly on election night, constituting the unofficial results.

Mr. Lehman explained that, in addition to the eighty-one precincts' in-person ballots, Lycoming County also receives mail-in, absentee, and military ballots. Mr. Lehman testified that Lycoming County does not use drop boxes; rather, to vote a mail ballot, a voter must complete the ballot, follow the proper procedures for its mailing, and either place the ballot in the mail or drop it off at Voter Services' central office. Mr. Lehman stated that Voter Services begins canvassing mail-in and absentee ballots at 7:00 a.m. on election day, which consists of reconciling the mail-in and absentee ballots received against lists of voters from each precinct as well as opening envelopes and scanning individual ballots. Ballots received through the mail, or dropped off at Voter Services' central office, are scanned through high-volume scanners that are connected to the central computer. Although pre-canvassing begins in the morning, Voter Services is not permitted to publish results until after the close of polls.

Mr. Lehman explained that a person who arrives at a polling place but is not in the voter rolls may vote a provisional ballot. A provisional ballot is not scanned, but is placed into a secrecy envelope and delivered to Voter Services' headquarters along with affidavits signed by both the voter and a poll worker. During the canvassing process, Voter Services determines which provisional ballots should be counted; those that are valid are scanned through the central scanners. Mr. Lehman testified that although the 2020 general election had many more provisional ballots than usual, they comprised a relatively small portion of the overall ballots cast, with

approximately half of the county's precincts having ten or fewer provisional ballots and approximately ten precincts having only one or two provisional ballots.

Mr. Lehman agreed that election workers have access to a large amount of information, and that an election worker who is assisting a voter may see the selections that voter makes; Mr. Lehman noted, however, that all election workers swear an oath to uphold the constitution and promise not to disclose information they acquire in their capacities as elections officials. Mr. Lehman testified that he was not aware of any circumstance in which a member of the public has actually used elections information to ascertain how individuals voted. He explained that this has not happened in Lycoming County because Lycoming County has not released the CVRs; although Allegheny County released its CVR, the CVR was generated by a different voting system and therefore Mr. Lehman did not know if it could be used to ascertain individual votes.

When asked if Voter Services could simply release the CVR with redactions to certain columns containing identifying information, Mr. Lehman expressed his concern that the rows would still be in sequential order even if the numbers themselves were obscured, and thus it would still be possible to determine which ballot was cast in what order.

Mr. Lehman agreed with counsel that the Election Code does not reference or define a "digital equivalent" to the contents of a ballot box, but reiterated that he is using this term to express that he believes the CVR is essentially a version of the contents of a ballot box dictated by today's voting equipment technology. Mr. Lehman further agreed that Act 77 defines mail-in ballot images as public records,

and there is no case law contradicting that provision. Mr. Lehman stated that he believes images of ballots to be “contents of a ballot box” generally under § 2648, but acknowledged that the OOR has taken the position that other provisions of the Election Code establish that images of mail-in ballots specifically are public records despite § 2648’s broad rule.

On cross-examination by counsel for Department Intervenors, Mr. Lehman confirmed that the RTKL, Election Code, and Pennsylvania Constitution each factored into Respondent’s decision to deny Petitioner’s RTKL request.

On re-direct, Mr. Lehman elaborated on the appearance of the scanner screen, noting that its display is very large so it can be easily read even by the visually impaired. Mr. Lehman cited this as an example of the tension between transparency and secrecy concerns, with the accessibility provided by the large display also meaning that it can be read by nearby observers. Mr. Lehman stated that the screen never displays protected information, but bad actors who observe the numerical counter on the screen could use that information in conjunction with the CVR to determine the contents of a particular voter’s ballot.

On re-cross, Petitioner asked Mr. Lehman whether, in a precinct with a single provisional ballot determined to be valid, a member of the public could determine the contents of that ballot by comparing the unofficial vote total without the canvassed provisional ballot to the final vote total that included the ballot. Mr. Lehman testified that this would not occur, because although the final results would reflect the contents of the provisional ballot, they would also reflect any changes made when reviewing ambiguous marks or other ballot irregularities. Thus, an observer would

not know if the difference in vote totals for a particular choice was attributable to the provisional ballot or to some other adjudication.

At this time, the Court questioned Mr. Lehman. The Court first focused on the column on the sample CVR that contains a numerical count of ballot images, which Mr. Lehman had previously explained begins with 1 and increases in increments of two (counting the image of the front of the ballot and the image of the back of the ballot separately). The Court noted that this column began with 1, 3, 5... and increased in increments of two until it reached 131. After 131, the next numbers were 135, 137, 141, 143, and 147; the numbers 133, 139, and 145 were missing. Mr. Lehman explained that he did not know why this column appeared to skip certain numbers, but stated he would contact Clear Ballot about this and update the parties and the Court if he discovered any information he received.<sup>20</sup>

Mr. Lehman next confirmed that the ballots given to voters do not have an identifying number printed on them. Mr. Lehman elaborated on the role of poll watchers, explaining that a candidate in a primary election, or a candidate or party in a general election, may appoint a certain number of qualified electors of the county to that role. Only one poll watcher per candidate or party is permitted inside the polling place while polls are open. Under the Election Code, each polling place is divided into an inside compartment (consisting of the registration table, equipment, and voting areas) and an outside compartment (consisting of the remainder of the polling place). Upon arrival, each poll watcher presents their credentials to the poll workers, and is then permitted to position themselves in the outer compartment to

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<sup>20</sup> See note 14, *supra*.

observe the proceedings in the polling place, with Judges of Elections and watchers working together to find an acceptable location. Watchers are permitted to keep their own list of voters, inspect the numbered lists of voters, hear voters' names as they are being checked in, and ask questions of Judges of Elections (but not voters or any other poll workers).

Mr. Lehman explained that Voter Services permanently retains the official results books, which contain various reports of the election's official results. He stated that Voter Services is required to retain all other records concerning federal elections for at least 22 months, with some items (such as the poll books and numbered list of voters) required to be retained for five years. Mr. Lehman testified that there is no statutory requirement to retain the CVR for any period of time, but in practice the CVR would remain in Voter Services' possession for as long as it continues to use the same voting system and central computer.<sup>21</sup> Mr. Lehman explained that even if the County switched from Clear Vote to another system in the future, much of the information in the CVR would have been previously printed as hard copies and would be retained.

Mr. Lehman elaborated that he was both concerned that the CVR was the "digital equivalent" of the contents of a ballot box and also that the CVR could be used to recreate the contents of a ballot box; both circumstances, Mr. Lehman believed, bring the CVR into § 2648's exceptions to public accessibility. He agreed that the CVR, or any ballots recreated from it, would not literally be the physical

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<sup>21</sup> Mr. Lehman explained that, when the County switched from AccuVote to Clear Vote, the County no longer had a license to use AccuVote hardware and software and was thus unable to retain the AccuVote CVRs.

items placed in the ballot box, but they would almost exactly replicate the contents of a ballot box in a way that would be impossible but for the CVR's use.

**B. Kenneth Roy Bennett**

Petitioner called Kenneth Roy Bennett, who served as the Secretary of State of Arizona from 2009 to 2015. On direct examination concerning qualifications, Secretary Bennett explained that the Arizona Secretary of State is that state's chief elections official and is in charge of upholding the Arizona Constitution and all Arizona statutes relating to elections. During his term, he oversaw twelve statewide elections, including the only statewide recount in Arizona's history. In his capacity as chief elections official, he worked with Arizona's fifteen counties and their elections officials, maintained voter data, oversaw the adoption of Arizona's elections procedures manuals, and oversaw the voting process generally.

Secretary Bennett explained that he is familiar with CVRs generally<sup>22</sup> and Clear Ballot CVRs specifically. Although Arizona did not use Clear Ballot while he was Secretary of State, he became familiar with Clear Ballot shortly after taking office. Over the next six years, Clear Ballot was still developing its system, which was not available for use in elections, but Secretary Bennett repeatedly discussed the system with Clear Ballot's founder and other employees as they were developing it. He stated that in addition to his knowledge of Arizona voting law, he has some familiarity with Florida, North Carolina, and Pennsylvania voting law, the latter of which he reviewed in anticipation of his testimony.

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<sup>22</sup> Mr. Bennett explained that every voting system creates something they call a "cast vote record," though different voting systems' CVRs may contain different information or have different characteristics.

On cross-examination concerning qualifications, Secretary Bennett explained that he has continued to volunteer as a poll worker and poll watcher in elections since leaving the Secretary of State office. He acknowledged that Arizona has never certified the Clear Ballot system, and he has never personally worked with the Clear Ballot system during an election. He also agreed that he has no specialized knowledge concerning Pennsylvania's Election Code or the Pennsylvania Constitution.

Secretary Bennett testified that he performed some work related to an audit of the 2020 Maricopa County election after the Arizona Senate President asked him to serve as the Senate's liaison to the audit, but he was not compensated for this work and was not in charge of the audit. He stated that he worked as the chairman of Look Ahead Arizona, a statewide arm of Look Ahead America, for a number of months, working on certain projects before ending his relationship with the organization in late 2021. Secretary Bennett agreed that he had no degrees or certifications with respect to electronic voting systems, and has never worked for an electronic voting company.

After examination concerning qualifications, the Court admitted Secretary Bennett as an expert in elections generally and the Clear Vote system and CVRs.<sup>23</sup>

On direct examination, Secretary Bennett opined that based upon his experience with elections and voting systems, as well as his discussions with the creators of voting systems, CVRs should generally be publicly accessible, because

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<sup>23</sup> The Court admitted Mr. Bennett over Department Intervenors' objection, explaining that to the extent they felt much of Mr. Bennett's experience was not relevant to the issue before the Court, those concerns would go towards the weight given to his testimony rather than to his expertise.



they transparently and comprehensively explain to the public how votes are counted without revealing the identity of individual voters. Secretary Bennett testified that he proposed a bill in Arizona to help make elections more transparent, trackable and publicly verified by requiring counties to release certain information, including CVRs, to allow votes to be confirmed or independently re-tabulated.

Secretary Bennett explained his belief that election transparency is extremely important because citizens must have confidence in their elections, and allowing people to independently verify certain aspects of election results will help sustain democracy. Secretary Bennett testified that no one has expressed a concern that his proposals could undermine Arizona's constitutional guarantee of voter secrecy except in hypothetical situations in which only a single person casts a vote at a particular precinct or voting location.

On cross-examination by Petitioner Intervenors, Secretary Bennett explained that he was familiar with the Help America Vote Act ("HAVA"), which is federal legislation passed in 2002. He explained that HAVA introduced a federal verification and certification process for voting systems to be used in federal elections, and that after a voting system is federally approved most states have their own verification process to approve the system for use in that state. These processes involve reviewing the security, privacy, and other relevant protocols of the voting system, as well as a review of the data that is stored, maintained, and retrieved by the voting system.

On cross-examination by Respondent, Secretary Bennett elaborated on certain differences between Clear Ballot CVRs and certain other voting systems'

CVRs. He discussed his work with the 2020 Maricopa Election, explaining that although Arizona does not use the Clear Ballot system, the audit used Clear Ballot as part of its review process. During this time, Secretary Bennett continually communicated with the founder of Clear Ballot concerning the review process. He explained that he has reviewed Clear Ballot CVRs created in elections in other states, including Maryland.

On cross-examination by Department Intervenors, Secretary Bennett clarified that his opinions were based on his personal experience directing elections and his familiarity with elections generally, but were not specifically based on any considerations particular to Pennsylvania.

**C. Stipulation to Additional Testimony**

Between the two hearing days, counsel for Petitioner forwarded to the Court and all other parties a string of emails, which the parties stipulated could be entered into evidence in lieu of recalling Mr. Lehman to testify to their contents. The emails concerned the question that Mr. Lehman indicated he would look into: why some numbers in the list of scanned ballot images appeared to be “missing” from the column on the CVR that otherwise counted ballot images sequentially in sets of two.

The first email in the chain was from Brett Turner, Senior Project Manager at Clear Ballot, who indicated that there were two possible explanations for the gaps in the sequence. He first indicated that “ClearCast creates ballot IDs in groups of 10 at a time and randomly assigns them to ballots as they are cast. So, the last ballots cast on ClearCast could be non-consecutive if not all 10 ballot [IDs] were used.” He noted another possibility that if “a ballot was cast and given a ballot ID and then later

adjudicated as a non ballot,” that ballot would no longer be valid and would not be contained in the CVR.

The second email was from Mr. Lehman, forwarding Brett Turner’s email to counsel for Respondent and providing additional context. Mr. Lehman indicated that, in addition to the email, he had spoken to Brett Turner via telephone, and during the conversation Turner indicated his answer in the email was based on consultations with several of the company’s engineers and developers. Mr. Lehman explained that because Turner, his point of contact at Clear Ballot, had not been aware of this feature, Mr. Lehman himself had not learned of it until he received the email.

Mr. Lehman stated that “[t]he answer that Mr. Turner has just provided... alleviates the ballot secrecy concerns that I expressed regarding the release of the CVR as a public record.” He reiterated that he still believed, however, that CVRs constitute the digital equivalents of the contents of a ballot box, and are thus exempt from public disclosure under the Election Code.

**D. Jonathan Marks**

Department Intervenors called Jonathan Marks, who has served as the Deputy Secretary for Elections and Commissions in Pennsylvania’s Department of State since February of 2019. Mr. Marks testified that he has worked in various capacities with the Department of State for over twenty-five years, with over eighteen years of elections experience. As Deputy Secretary for Elections and Commissions, he oversees elections administration generally, issues related to

voting system certifying and registration, and bureaus handling lobbying, campaign financing, and other subjects.

Mr. Marks explained that an electronic voting system is one that tabulates votes electronically, including machines that optically scan physical ballots. He then explained the certification process for electronic voting systems. After the federal government examines a voting system's security and usability, the Pennsylvania Department of State works with voting system examiners to conduct additional security and usability testing and ensure that the system complies with Pennsylvania's Election Code. The process of certification at the state level takes approximately a week, after which the examiner writes an initial report, and then the Department of State works with the examiner for several weeks to determine if it will certify a given system and, if so, write a final certification report. Once the Department issues a certification report, county elections boards may begin using that system in their elections.

Mr. Marks testified that one of his regular duties is helping the Department of State, through the Secretary, provide guidance on elections-related issues to counties. He explained that although each county conducts its own elections, the Department has an interest in promoting uniformity to the extent possible and making sure that counties are efficiently and effectively running elections in a manner compliant with the Elections Code. Mr. Marks stated that the guidance can relate to questions from individual counties, adverse weather events around elections, and any other issues that arise. If the Department issues guidance in response to a question from one or a few particular counties, the Department

typically promulgates that guidance to all sixty-seven counties unless the issue is specific to the counties that raised it. Sometimes the Department provides guidance informally in the form of an email, though the majority of guidance the Department issues is formal and is posted on the Department's website.

Mr. Marks explained that the Department of State expects counties to follow its guidance, though they do not always do so. Communication with the various counties is important to the Department, he testified, to provide this guidance and foster a positive relationship between the Department and counties.

Mr. Marks testified that he is familiar with the voting systems used in Pennsylvania and the CVRs they generate, including Clear Ballot and its CVRs. Mr. Marks believed that eight of Pennsylvania's sixty-seven counties use the Clear Ballot system. He explained that the Department of State does not obtain CVRs from the counties.

Mr. Marks stated that a number of months earlier, some counties informed the Department of State of a number of RTKL requests asking for CVRs. Mr. Marks testified that the Department was concerned the disclosure of CVRs may be impermissible under the Election Code if they were construed as the contents of ballot boxes or voting machines, so the Department issued guidance to the counties to ensure they understood that the Election Code limited the types of documents that were open to public inspection.

Mr. Marks testified that after analyzing the issue, the Department concluded that CVRs are either the contents of ballot boxes or the contents of voting machines. He explained that the Department believed they constitute "contents of ballot boxes"

because each line is, essentially, a recreation of a voted ballot, and the CVRs are generally digital representations of the ballots physically located in ballot boxes. The Department believed they constitute contents of voting machines because they consist of data that resides on the voting machines and must be exported from the machines before it can be accessed.

Mr. Marks testified that Jessica Mathis, the Director of the Department's Bureau of Elections, sent an email to the counties of Pennsylvania summarizing the Department's analysis of those issues. Mr. Marks explained that Ms. Mathis, who has approximately fifteen years of experience at the Department and presently oversees the Department's day-to-day elections-related duties, reporting to him. He testified that he reviewed Ms. Mathis's email before it was sent, and that the Department promulgated this guidance informally via email because it was in response to questions asked by various counties. Mr. Marks explained that, as stated in the email, the Department was concerned not only with the possibility that disclosure of CVRs violated the Election Code but also with the possibility that their disclosure could unconstitutionally jeopardize the secrecy of individual voters' ballots.

Mr. Marks elaborated that the Department views the CVR as a more modern version of the things that the legislature, in the Election Code, chose to exclude from public disclosure. He explained that the Department distinguishes between certain reports and the CVRs, which contain data that must be exported from the voting system before it can be viewed, but emphasized that the Department's primary basis

for concluding that the Election Code excludes the CVR from public disclosure is the language of the Code.

With regard to Act 77, Mr. Marks explained that the Department's understanding of the provision in that Act making mail ballots and absentee ballots public is that public inspection of official, unvoted ballots is definitely permitted, but it is not necessarily the case that voted ballots, maintained by counties in locked ballot boxes just like in-person ballots cast on election day, are similarly available for public inspection.

Mr. Marks testified about the chain of custody of ballots, explaining how each county's board of elections maintains elections materials under lock and seal until the board opens them to conduct the official canvass. When the board is finished using most materials, they become open to public inspection; those items excepted from public inspection remain in the board's custody unless a court orders them to be opened outside of the board's custody (such as during a recount or election contest). Mr. Marks explained that the Election Code contains a penalty for any person attempting to view voted ballots other than in the situations described in the Code.

Mr. Marks stated that he and the Department believe that elections should be transparent, and that the Department and the counties conduct ballot counting in a public place that political parties' and candidates' representatives may attend. The law also provides for any party to request a recount within a five-day period after canvassing. After certification, the Department provides statistics on its website, and gives files of absentee and mail-in ballot requesters to political parties and

candidates, updating them daily concerning ballots being recorded, cancelled, and received late leading up to and following elections. The Department provides additional voter information on a weekly basis. Mr. Marks testified that most or all of Pennsylvania's sixty-seven counties provide additional public information.

Mr. Marks explained that he was aware that certain other states have made CVRs public records, but that this was irrelevant to whether the Pennsylvania Election Code made them public records. He testified that the Department intervened in this matter in the interest of conducting elections uniformly across counties and ensuring that counties do not put themselves in a bad position by disclosing information that is not public under the law.

On cross-examination by Petitioner, Mr. Marks explained that counties generally publish precinct-by-precinct data on their websites, which they compile by taking the data from the voter system (often via USB drive) in a central computer.

Mr. Marks provided additional information about Act 77 and its treatment of mail-in ballots, explaining that the outer envelope and the signed affidavit thereon is a public record, but any photo identification contained within that envelope (along with the secrecy envelope containing the voted mail-in ballot) is not publicly available. Petitioner introduced Petitioner's Exhibit 12, consisting of excerpts from Act 77. Reviewing those excerpts, Mr. Marks testified that he understood how the language may be open to different interpretations concerning whether only unvoted official mail-in ballots, as opposed to voted mail-in ballots, are available for public inspection.



Mr. Marks testified that he is familiar with many types of voting machines, utilizing punch cards, touch screens, scanners, and other mechanisms. He explained that he agrees with the Department's directive that a consideration of how the Election Code would apply to various types of machines of differing complexity is helpful to determine what the Election Code means. This is especially true, he stated, in light of the fact that § 2648 has not been amended since 1937.

Petitioner introduced Petitioner's Exhibit 17, a copy of certain sections of the Election Code. Mr. Marks testified that he has never analyzed a CVR himself. He agreed that it is important to maintain the secrecy of elections as guaranteed by the Pennsylvania Constitution, and stated his understanding that CVRs can be randomized, though he did not specifically know how that process might work. He remarked that some states, like Colorado, issue guidance on randomizing CVRs or other elections information before public disclosure to maintain secrecy.

On cross-examination by Petitioner Intervenors, Mr. Marks affirmed that Clear Vote is one of the many voting systems that has passed federal and Pennsylvania testing for use in elections in the Commonwealth, providing additional detail concerning the certification process. He agreed that evaluating a voting system's privacy and security were two primary components of this process. Petitioner Intervenors introduced Petitioner Intervenors Exhibit 1, the examination certification report for Clear Ballot. Reviewing portions of the certification report, Mr. Marks agreed that the report contains privacy analysis and discussions of voter confidentiality and access, and one section indicating that the system does not allow voter data, including stored ballot images, to be tied back to a particular voter.

Mr. Marks indicated that he has worked with Mr. Lehman for many years, and that Mr. Lehman is very competent at his job. Mr. Marks explained that Lycoming County's system is much like most other counties', in which physical ballots are taken from each precinct to Voter Services headquarters along with a USB drive or other means of conveying data from each scanner. That data is then downloaded into the election management system, the software that essentially constitutes the nerve center of the county voting apparatus. Mr. Marks testified that an election management system is a component of the voting system, but because it is software it would not typically be described as part of a voting machine.

Mr. Marks agreed that the legislature has not amended the list of things that the Election Code excludes from public access – the “contents of ballot boxes and voting machines and records of assisted voters” – to account for advances in technology. Mr. Marks reiterated that he takes no position as to whether the failure to clarify this language to account for modern times constitutes good or bad policy, but that his and the Department's concern was how that language applied to modern analogues of voting machines throughout the Election Code's history. Mr. Marks agreed that the general assembly has never added the contents of “automatic tabulating equipment” – which is defined as “any apparatus which automatically examines and computes votes registered on paper ballots, ballot cards or district totals cards or votes registered electronically and which tabulates such votes” – to the list of items excluded from public access.

Mr. Marks reiterated his position that transparency is an extremely important aspect of elections, but that the ultimate question was what the Election Code

makes public and excepts from public disclosure. He stated that he was not aware of how counties other than Lycoming may have responded to RTKL requests similar to this case. Mr. Marks explained that because each county is ultimately responsible for its own election process, the Department's guidance on how to address such requests is not binding on the counties, and the Department has no true enforcement mechanism to compel counties to comply with that guidance (as opposed to formal regulations and directives).

**E. Heather Honey**

Petitioner testified next, first laying out the timeline of her RTKL request. She testified that after submitting her RTKL request, she spoke to Mr. Lehman. Shortly afterwards, the Department of State sent its email containing RTKL guidance to the sixty-seven counties, containing language from Petitioner's RTKL request. She highlighted that Respondent did not include a lack of standing among the grounds in its initial denial of Petitioner's request. Petitioner introduced Petitioner's Exhibits 15 and 16, the Clear Count Summary of Reports and the Statement of Votes Cast, both created by the Clear Vote system and published by Lycoming County. Petitioner explained her position that a CVR is essentially another report, and therefore may be appropriately disseminated to the public, and that the data contained on USB drives – which is taken directly from precincts and uploaded to the central computer – should not be construed as “contents of a ballot box.”

Petitioner highlighted certain portions of the Election Code referring to how election officials must deal with ballot boxes at various times, noting that certain items that are at some point placed inside of ballot boxes – such as tally sheets –

are public records. Thus, she argued, the legislature clearly did not intend the phrase “contents of ballot boxes” to be read so expansively to exclude from public access any information that was inside of a ballot box regardless of its form. She further argued that the provisions of Act 77 making mail-in ballots public records demonstrate that the legislature clearly did not intend to exclude all ballots from public disclosure at all times; rather, the more reasonable interpretation is that voted ballots are excluded from public disclosure while in the ballot box prior to canvassing. These provisions, Plaintiff contended, demonstrate that the legislature’s primary concern was with tampering and viewing of contents of ballot boxes prior to the tallying and certification of votes, rather than public review of items after final certification.

Petitioner next noted that prior to the Department’s guidance on addressing similar RTKL requests, other counties – such as Allegheny and Tioga – have provided CVRs in response to RTKL requests without objection. She highlighted the Department’s admission that its guidance is not binding on the counties, and pointed out that some members of the legislature have endorsed her interpretation of the Election Code over the Department’s.

Petitioner next noted that in addition to the question of statutory interpretation, the parties also disagree about the application of constitutional provisions to the instant matter. Petitioner explained her belief that the evidence sufficiently establishes that the release of a CVR does not reveal how a given person voted, especially in light of the fact that major voting systems (such as Clear Ballot) take steps to randomize the order of data on the CVR. Petitioner noted that the

requirement of ballot secrecy in the Pennsylvania Constitution prevents not just members of the public but also government officials from ascertaining individuals' votes, and suggested that the voting system certification process inherently reflects that an approved system will keep votes secret from both members of the public and the government alike. Because systems are approved (and thus deemed secret) even though the government has access to the CVR, it follows that access to the CVR does not undermine secrecy.

Petitioner finally argued that it is impossible to completely avoid any possible disclosure of how an individual voted in a certain race, because it is always possible that every voter at a very small precinct chooses the same candidate.

On cross-examination by Respondent, Petitioner affirmed that she is a registered voter in Lebanon County, and does not own property in Lycoming County. Petitioner reiterated her belief that the "contents of voting machines" refers to physical things inside voting machines – especially more old fashioned ones – rather than a CVR, which is more akin to a report compiled from the voting machine's data. With respect to the Clear Vote system utilized in Lycoming County, Petitioner stated that she believes only the physical contents of the bags attached to the scanners constitute the contents of ballot boxes.

On cross-examination by Department Intervenors, Petitioner agreed that none of the legislators who endorsed her view of § 2648 were involved in its drafting in 1937.

On cross-examination by Petitioner Intervenors, Petitioner stated that some of those legislators were involved in the drafting of Act 77. Petitioner Intervenors

introduced Petitioner Intervenors' Exhibit 2 and 3, which were the Lycoming County and precinct-level reports generated from the May 17, 2022 primary election. Petitioner stated that these reports were publicly available on Respondent's website. Petitioner Intervenors also introduced Petitioner Intervenors' Exhibit 4, consisting of additional reports from the recount of the Republican Primary for the United States Senate race in that election.

**F. Andrew Poli**

Finally, Petitioner called Andrew Poli, who worked with Petitioner on her RTKL request. He indicated that he has access to approximately twenty to thirty Pennsylvania counties' CVRs, and has reviewed a CVR from Allegheny County. He explained that he has reviewed that CVR, and others from other states, converting them to a searchable electronic format. Mr. Poli testified that the ability to take CVRs and make them searchable means that people can work with them, and the data contained within, without having to request any proprietary software.

Mr. Poli testified that, although CVRs do not contain ballot images themselves, Allegheny and other counties have released ballot images in addition to CVRs.

**G. Argument**

Counsel for Respondent argued first, indicating that he did not believe there were any factual disputes on the record. Rather, he believes the primary issue presented is one of statutory interpretation, limited to the question of whether CVRs represent the contents of voting machines and ballot boxes. He suggested that the Department of State's interpretation that they do should carry weight, as should the

purpose of § 2648 as originally enacted. Counsel argued that although Petitioner is correct that the legislature did not update that section to specifically apply to new technology, the decision not to do so can be interpreted as allowing the statute to remain broad enough to cover different circumstances as each county administers its elections how it sees fit. As applied to the Clear Vote system, counsel argued, that section cannot mean anything other than the data in the CVR. Counsel reiterated the argument that the raw data in the CVR is qualitatively different from the reports compiled from that data, and argued that other counties' decisions regarding the release of CVRs are not relevant to the applicability of § 2648 to the CVR at issue in this case. Finally, counsel argued that Petitioner lacks standing to make this request.

Counsel for Department Intervenors agreed that Petitioner lacks standing to bring this request, and reiterated the Department's position that both the Election Code and the Pennsylvania Constitution shield CVRs from public disclosure. Counsel argued that in order to receive constitutional protection, the violation of secrecy need not be a certainty; rather, the chance that the disclosure of a CVR could violate a voter's right to secrecy is enough to require the CVR to remain exempt from public access. Counsel highlighted the testimony of Mr. Marks, who indicated that the CVR is essentially a line-by-line recreation of the information on a ballot that would be read by each precinct's scanner; thus, counsel argued, the CVR falls within the contents of a voting machine.

Petitioner argued that the Election Code is concerned with protecting the contents of ballot boxes from disclosure and tampering during the canvassing

process, but after the election is over there are no contents of ballot boxes to be withheld from public disclosure. She highlighted that the RTKL puts the burden on agencies to establish that a record is not public, rather than on the requester to establish that a record is public. Petitioner argued that a CVR is no different from other reports generated by the voting system and voluntarily released by the various counties.

Counsel for Petitioner Intervenors first argued that their intervention has resolved any standing issues, as they are each registered voters in Lycoming County. Counsel argued that the Court need not expand beyond a plain reading of § 2648 to conclude that a CVR is not the contents of ballot boxes or voting machines. Counsel argued that Lycoming County's voting system does not utilize voting machines as defined by the Election Code, but rather paper ballots and scanners (which are automatic tabulating machines). Thus, the CVR is not the contents of a voting machine, and is similarly not the results of a ballot box because it is a compilation of data from the central machine and not information taken from within the sealed black bags containing voted ballots. Ultimately, counsel contended that the framing of the issue by Respondent and the Department, asserting that CVRs are the "digital equivalent" of non-public items, is without support in the Election Code, RTKL, or Pennsylvania law generally.

### ***RELEVANT LAW***

The parties' arguments primarily touch upon three specific provisions of law: the RTKL, § 2648 of the Election Code, and Article VII, § 4 of the Pennsylvania Constitution.



## **A. Right-to-Know Law**

In 1957, the Pennsylvania legislature enacted the Right to Know Act (“RTKA”), the predecessor to the RTKL. The RTKA provided that public records of agencies “shall, at reasonable times, be open for examination and inspection by any citizen of the Commonwealth of Pennsylvania,”<sup>24</sup> but placed the burden on the party requesting those documents to establish that they were publicly accessible. Under the RTKA, the recourse for challenging an agency’s denial of a request was a direct appeal to the court of common pleas, which reviewed the agency’s determination under a deferential standard.<sup>25</sup>

In 2008, the legislature repealed the RTKA and replaced it with the RTKL, which established that “[a] record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record” unless certain exceptions apply.<sup>26</sup> Those exceptions include a finding that “the record is exempt” under either the RTKL’s enumerated exceptions or “any other Federal or State law or regulation or judicial order or decree.”<sup>27</sup> The RTKL defines a “local agency” to include “[a]ny local... agency, authority, council, board, commission or similar governmental entity.”<sup>28</sup> The RTKL places the burden of proof upon the agency, rather than the requester, to establish by a preponderance of the evidence that an agency record is exempt from public access.<sup>29</sup> When an agency receives a RTKL request, it must “make a good faith effort to determine if the record requested is a public record...

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<sup>24</sup> 65 P.S. § 66.2, *repealed*.

<sup>25</sup> *Bowling v. Office of Open Records*, 75 A.3d 453, 455-56 (Pa. 2013).

<sup>26</sup> 65 P.S. § 67.305.

<sup>27</sup> *Id.*

<sup>28</sup> 65 P.S. § 102.

<sup>29</sup> 65 P.S. § 67.708(a)(1).

and whether the agency has possession, custody or control of the identified record....”<sup>30</sup> The RTKL provides that “[a] local agency may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise prohibited by law.”<sup>31</sup>

In addition to establishing a new procedure for agency review of public records requests, the RTKL created the OOR.<sup>32</sup> Requesters must first appeal agency denials to the OOR, which may – but need not – take additional evidence and issue a written decision.<sup>33</sup> A dissatisfied party may appeal an OOR decision to the court of common pleas,<sup>34</sup> which may then take additional evidence and must make findings of fact.<sup>35</sup> Thus, unlike under the RTKA, courts reviewing RTKL determinations are “the ultimate finders of fact” and are required “to conduct full *de novo* reviews” from OOR decisions.<sup>36</sup>

In the present case, the parties do not dispute that Respondent is a “local agency,” and agree that whether a CVR is a public record subject to public access turns on the question of whether CVRs are “exempt from disclosure under any other Federal or State law,” namely, the Pennsylvania Election Code and Constitution.

## **B. Election Code**

In 1937, the Pennsylvania legislature “codified, revised and consolidated... [t]he laws relating to general, municipal, special and primary elections, the

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<sup>30</sup> 65 P.S. § 67.901.

<sup>31</sup> 65 P.S. § 67.302.

<sup>32</sup> *Bowling*, 75 A.3d at 457-58.

<sup>33</sup> *Id.*

<sup>34</sup> Or the Commonwealth Court when the matter arises from a determination of a Commonwealth agency.

<sup>35</sup> *Bowling*, 75 A.3d at 476.

<sup>36</sup> *Id.* at 474.

nomination of candidates, primary and election expenses and election contests” in the Pennsylvania Election Code, located at Title 25, Chapter 14 of the Pennsylvania Statutes. The Election Code contains nineteen articles comprehensively addressing the responsibilities of various elections officials, elections administration, and the procedures for voting, conducting elections, and tallying results.

Of central importance to this case is 25 P.S. § 2648, which deals with the public inspection of records and documents kept by county boards of elections. This section, establishing the general public accessibility of elections records before detailing a handful of exceptions, begins as follows:

“The records of each county board of elections, general and duplicate returns, tally papers, affidavits of voters and others, nomination petitions, certificates and papers, other petitions, appeals, witness lists, accounts, contracts, reports and other documents and records in its custody, **except the contents of ballot boxes and voting machines and records of assisted voters**, shall be open to public inspection, except as herein provided, and may be inspected and copied by any qualified elector of the county during ordinary business hours, at any time when they are not necessarily being used by the board, or its employes having duties to perform thereto....”<sup>37</sup>

The section goes on to provide that any inspection of records must take place in the presence of an elections board member or employee and subject to regulation for safekeeping, with certain documents only available at the conclusion of a given election after canvassing of votes is complete.

Despite being unchanged for 85 years, only a handful of cases have ever dealt with § 2648, and none appear to have addressed the meaning of the phrase “contents of ballot boxes and voting machines....”

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<sup>37</sup> 25 P.S. § 2648 (emphasis added).

### C. Pennsylvania Constitution

Pennsylvania first enacted a Constitution in 1776; the Constitution of 1776 guaranteed the right to free elections but did not mention secrecy in voting. In 1901, Article VIII, § 4 of the Constitution of 1874 was amended to read as follows:

“All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved.”<sup>38</sup>

Pennsylvania’s current Constitution, the Constitution of 1968, retains this provision unchanged as Article VII, § 4.

The Supreme Court of Pennsylvania has addressed the Pennsylvania Constitution’s guarantee of secrecy in voting, explaining that “[m]aintaining the secrecy of an elector’s vote is supported by a fairly straightforward rationale, namely, that ‘[a] citizen in secret is a free man; otherwise he is subject to pressure and, perhaps, control.’ Such secrecy has historically served as a bastion to the integrity of the election franchise.”<sup>39</sup> The guarantee of secrecy is a “weighty interest” that mandates strict compliance with statutory provisions meant to enforce it.<sup>40</sup>

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<sup>38</sup> See *McLinko v. Department of State*, 279 A.3d 539, 560 (Pa. August 2, 2022).

<sup>39</sup> *Id.* at 577-78.

<sup>40</sup> *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058, 1072 (Pa. 2020). Pennsylvania law draws a distinction between “minor irregularities” in voting, such as using ink of a color other than blue or black, and mandatory provisions based on “weighty interest[s]” such as fraud prevention or secrecy in voting. *Id.* A violation of election procedure is generally excusable or curable if it constitutes a “minor irregularity”; such a provision of law is said to be “directory.” *Id.* at 1072-73. When a provision of the Election Code directs a procedure in a manner intended to safeguard a “weighty interest,” however, a violation of that mandatory procedure will typically disqualify a ballot even if the Election Code does not specifically provide for disqualification. *Id.*

## **ANALYSIS**

### **A. Overview**

#### **1. Guiding Principles**

The question before the Court is straightforward: does the CVR at issue in this case fall under “the contents of a ballot box [or] voting machine”? The resolution of the issues raised, however, touches upon multiple statutory and constitutional issues. In disentangling the various applicable provisions of law, the Court is guided by a number of principles.

First and foremost, the Court recognizes that the public legitimacy of our elections is the bedrock upon which our democracy rests. If the citizens of this Commonwealth and Nation do not trust the *accuracy* of election results, they will not believe in the legitimacy of the government composed of the representatives of the people. Conversely, if the citizens do not trust the *secrecy* of elections, the process of voting itself will be undermined. The Court must strive to vindicate both of these weighty interests, which – as Mr. Lehman noted – are often in tension.

At the heart of those interests, however, are two relatively prosaic questions: what the phrase “contents of ballot boxes and voting machines” means, and whether the CVR from the Lycoming County 2020 General Election falls within that meaning. The Court must follow the traditional rules for ascertaining statutory meaning, as long as those rules do not produce a result that does violence to the constitutional principles underlying our elections.

As discussed below, to interpret a statute, the Court must first determine if it has a plain meaning. If it does, the Court need look no further, and must simply

apply the statute's plain meaning to the issue at hand. However, if the statute is ambiguous because it is susceptible to multiple interpretations, the Court must consider a number of factors to determine which of the competing interpretations best matches the legislature's intent. The Court must then apply that interpretation, unless doing so would violate the Pennsylvania or United States Constitution.

In working through the straightforward question of statutory interpretation presented here, taking care to respect the objectives of accurate election results and secret voting, the Court must view the Petition through the appropriate prism. Here, this dispute reaches the Court on a RTKL appeal. The goal of the RTKL is to facilitate broad access to government documents with limited exceptions, and therefore the burden is on Respondent to show that the CVR is exempt from production. In doing so, however, any underlying law governing access remains in full force, as the RTKL does not overrule any more specific provision of law restricting access. Thus, it is Respondent's burden to show that § 2648 precludes public access of the CVR – or, in the alternative, that the release of the CVR would violate the Pennsylvania Constitution's guarantee of secrecy in voting regardless of the meaning of § 2648.

## **2. Issues before the Court**

As a threshold matter, the Court must first assess whether Petitioner has standing to obtain the CVR. If she does not, the Court must determine if the intervention of Petitioner Intervenors allows the case to proceed to the merits nonetheless.

If at least one requesting party has standing to adjudicate the merits, the Court must then determine whether the CVR at issue, falls under “the contents of ballot boxes or voting machines” as used in § 2648. To do so, the Court must first determine what that phrase means. If the phrase is unambiguous, the Court will apply its plain meaning to the CVR. However, if the phrase is susceptible to multiple meanings, the Court must first determine which plausible meaning best captures the legislature’s intent without violating constitutional provisions.

**B. Standing**

Petitioner is a registered elector in Lebanon County; she neither lives nor owns property in Lycoming County. Although Respondent did not cite this fact as grounds for its initial denial of Petitioner’s RTKL request, it asserted in correspondence with the OOR that Petitioner’s lack of standing constituted an additional, independent ground for the denial of her request. On May 16, 2022, approximately three-and-a-half months after Petitioner filed her Petition before this Court, three electors registered to vote in Lycoming County sought and were granted this Court’s permission to intervene in this matter. The Court must determine whether Petitioner has standing to obtain the CVR and, if not, whether the intervention of Petitioner Intervenors supplies a necessary party with standing to proceed.

**1. Petitioner’s Standing**

The parties have framed this issue as a matter of standing, which broadly refers to “[a] party’s right to make a legal claim or seek judicial enforcement of a duty

or right.”<sup>41</sup> The RTKL defines a “requester” as “[a] person that is a legal resident of the United States and requests a record pursuant to this act.”<sup>42</sup> Thus, Petitioner has standing to make her request under the RTKL. The RTKL provides, however, that it does not require the disclosure of documents that are inaccessible under some other provision of law.<sup>43</sup> Thus, if Petitioner does not have standing to access any documents under § 2648, the RTKL cannot supply standing independently.

Section 2648 states that those items “open to public inspection... may be inspected and copied by any qualified elector of the county during ordinary business hours” unless they are being used. Although § 2648 does not explicitly say that such documents may *not* be accessed by people *other than* qualified electors of the county in all circumstances, it is clear that such people do not have a right to do so. It would be nonsensical for the legislature to specify that members of a certain class possess a right if that right is available to all persons. Thus, because Petitioner is not a qualified elector in Lycoming County, the Election Code does not allow her to access any records in the custody of Respondent.

That Petitioner’s request is made pursuant to the RTKL does not change this analysis. Such an interpretation of the RTKL would effectively excise the phrase “by any qualified elector of the county” from § 2648. The various provisions of the RTKL, however, repeatedly affirm that they were not intended to repeal provisions of law *sub silentio* or otherwise conflict with specific statutory provisions. Therefore,

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<sup>41</sup> Black’s Law Dictionary (11<sup>th</sup> ed. 2019), standing.

<sup>42</sup> 65 P.S. § 67.102.

<sup>43</sup> 65 P.S. § 67.701.



Petitioner does not have the right to obtain the Lycoming County election records described in § 2648 from the RTKL.<sup>44</sup>

## **2. Standing of Petitioner's Intervenors**

As noted above, the Rules of Civil Procedure governing intervention do not apply to RTKL requests, and therefore it is within the reviewing court's discretion to grant a petition to intervene. Although Rule 2327 regarding intervention in civil matters is not controlling, the factors it enumerates are informative with respect to the ultimate purposes of intervention. Rule 2327 requires approval of intervention where, *inter alia*, the party "could have joined as an original party in the action" or "the determination of such action may affect any legally enforceable interest of such person," regardless of whether a judgment will be entered against that person.

Here, Petitioner Intervenors asserted that they could have joined this action as an original party. Indeed, a few months after Petitioner filed her request for the CVR, Petitioner Intervenor Jeffrey Stroehmann filed his own request seeking the CVR and other records.<sup>45</sup> Petitioner Intervenors further argued that a determination in this case could affect their legal rights, as a ruling excluding a CVR from public access would impact their interest in seeking documents under § 2648 as qualified electors.

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<sup>44</sup> Petitioner argues that Respondent initially indicated it would not deny her request on standing grounds, and suggests that Respondent's failure to include this ground in its initial denial of her RTKL request results in waiver. However, the Supreme Court of Pennsylvania has explained that an agency's failure to include a reason for denial in its initial written response *does not* result in waiver as long as it raises the issue before the OOR. See *Levy v. Senate of Pennsylvania*, 65 A.3d 361, 383 (Pa. 2013). Here, Respondent raised Petitioner's lack of standing before the OOR, thus preserving the argument.

<sup>45</sup> Jeffrey Stroehmann's Petition for Judicial Review is presently before this Court at docket CV-22-00574.

Although Petitioner Intervenors could have each brought their own identical RTKL requests, the Court discerns no reason it could not have consolidated those matters with this one. Such a procedure would have resulted in a legal posture identical to this case but for distinctions of form. Having been permitted to intervene, Petitioner Intervenors have joined Petitioner’s RTKL request as though they had originally filed it (which they could have). In light of their intervention, the dismissal of this case because Petitioner lacks standing would needlessly waste the resources of both the parties and the Court. Indeed, because Petitioner Intervenor Jeffrey Stroehmann has independently requested the same materials as Petitioner – and Respondent has denied that request on § 2648 grounds – dismissal would necessitate days of testimony and evidence entirely duplicative of that presented here. Thus, the Court holds that it may proceed to the merits of the parties’ arguments, as Petitioner Intervenors have the right to obtain records that are publicly accessible under § 2648 from Respondent.

**C. Meaning of § 2648**

**1. Overview**

The question at the heart of this case is whether the CVR is publicly accessible under § 2648 of the Election Code. The parties agree that the words of that section control, barring their violation of constitutional provisions. The parties’ interpretations of those words, however, differ greatly.

Petitioner argues that the “contents of ballot boxes” consist only of those things physically inside a ballot box between the time they are deposited and the time votes are tallied, after which they cease to fall under the exception to § 2648.

Petitioner Intervenors similarly argue that CVRs are not “contents of ballot boxes” because they are never inside of a ballot box but rather consist of data typically viewed in spreadsheet form like any other publicly accessible election report. Petitioner Intervenors assert that CVRs are not “contents of voting machines” for a similar reason. Alternatively, they argue, Lycoming County does not use “voting machines” but rather automatic tabulating machines comprised of paper ballots and visual scanners.

Respondent and Department Intervenors primarily argue that the exception in § 2648 is robust enough to account for new technology, and thus the restriction of the exception to tangible items physically inside ballot boxes and voting machines would be overly formalistic and defeat the legislature’s intent. Respondent distinguishes CVRs from other election reports, highlighting that CVRs consist of raw data; thus, Respondent argues, they are at least the “digital equivalent” of “contents of ballot boxes” covered by the exclusion in § 2648. Department Intervenors similarly argue that because each line on a CVR corresponds to information read by a scanner and stored on each voting machine’s USB drive, the CVR constitutes “contents of... voting machines....” Petitioner and Petitioner Intervenors, of course, view these positions as unwarranted expansions of the statute’s clear language to include “digital equivalents.”

To resolve this dispute, the Court must first ascertain whether the phrase “contents of ballot boxes and voting machines,” as used in § 2648, has a single plain meaning. In so doing, the Court will look at the phrase’s individual components –

“ballot boxes,” “voting machines,” and “contents” – to determine if any of those parts are themselves susceptible to differing interpretations.

If the key phrase is ambiguous, the Court must engage in statutory construction to ascertain the legislature’s intent in enacting the statute. If the Court must do so, it will review the Statutory Construction Act (“SCA”),<sup>46</sup> weighing the appropriate factors and considerations that the SCA enumerates. These factors include the reasons underlying the enactment of the statute, prior law and legislative history, present legislative and administrative interpretations, and the consequences of competing interpretations.

Finally, in the event that the Court concludes the statute is best read as permitting disclosure of the CVR, the Court must ensure that such disclosure does not violate the Pennsylvania or United States Constitution.

## **2. Is the Phrase “Contents of Ballot Boxes and Voting Machines” Ambiguous?**

The Supreme Court of Pennsylvania has explained the general framework a Court must apply when determining the meaning of a statute:

“Pursuant to the SCA, the overriding object of all statutory interpretation ‘is to ascertain and effectuate the intention of the General Assembly’ in enacting the statute under review. Correspondingly, [a court is] required to interpret or construe a statute so as to give effect to all of its provisions, ‘if possible.’ If statutory language is ‘clear and free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.’ Thus, when the words of a statute have a plain and unambiguous meaning, it is this meaning which is the paramount indicator of legislative intent.”<sup>47</sup>

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<sup>46</sup> 1 Pa. C.S. § 1501 *et sub.*

<sup>47</sup> *Snyder Brothers, Inc. v. Pennsylvania Public Utility Commission*, 198 A.3d 1056, 1071 (Pa. 2018) (internal citations omitted).

When determining if the “words of a statute have a plain and unambiguous meaning,” definitions of those words in the statute themselves are binding.<sup>48</sup> In the absence of statutory definitions, a court may consult sources such as dictionaries to determine if a word or phrase has a single accepted meaning or is susceptible to multiple, potentially contradictory, meanings.<sup>49</sup>

**a. Components of the Phrase**

In determining whether the phrase “contents of ballot boxes and voting machines” is ambiguous, the Court must determine the definitions of the terms within that phrase – “ballot boxes,” “voting machines,” and “contents.” If one or more of these terms is ambiguous, then the phrase will be ambiguous in its entirety unless the statute’s context forecloses all but one possible interpretation.

**i. Ballot Box**

The Election Code does not explicitly define the term “ballot box,” though a number of provisions shed light on the meaning of that term. Under § 3261 and § 3263 of the Election Code, electors may petition a court to “open the ballot box” in a precinct to determine whether fraud or error occurred in the tabulation of results.<sup>50</sup> Section 3525, enumerating prohibited actions, includes “deposit[ing] fraudulent ballots in the ballot box or certify[ing]... a [fraudulent] return of ballots in the ballot box....”<sup>51</sup> Section 3062 discusses the process, after polls are closed, of “open[ing] the ballot box, and tak[ing] therefrom all ballots therein....”<sup>52</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> See *id.* at 1072 (finding ambiguity based on multiple, “diametrically opposed” meanings of the word “any” as acknowledged by *Black’s Law Dictionary*).

<sup>50</sup> 25 P.S. § 3261, 3263.

<sup>51</sup> 25 P.S. § 3525.

<sup>52</sup> 25 P.S. § 3062.

Each of these sections of the Election Code is consistent with the plain meaning of the term “ballot box,” which Black’s Law Dictionary defines as “[a] locked box into which ballots are deposited after voting.”<sup>53</sup> Here, no party disputes that the sealed bags attached to scanners, into which ballots fall after they are scanned, are “ballot boxes.”

**ii. Voting Machine**

Article VII, § 6 of Pennsylvania Constitution refers to “the use of voting machines, or other mechanical devices for registering or recording and computing the vote....” This strongly implies that not every item or device that assists with voting is a “voting machine,” and the use of the phrase “other mechanical devices” could be read to imply that a voting machine is necessarily mechanical in nature. The Pennsylvania Constitution, however, does not shed further light on what exactly is a voting machine.

The Election Code similarly does not define the term “voting machine.” However, the Election Code provides some illumination of that term by drawing a distinction between “voting machines” and “electronic voting systems” (“EVS”). This distinction is inherent in the structure of the Election Code: Article XI of the Election Code deals with voting machines, and Article XI-A deals with EVSs.

Article XI-A defines an EVS as “a system in which one or more voting devices are used to permit the registering or recording of votes and in which such votes are computed and tabulated by automatic tabulating equipment. The system shall provide for a permanent physical record of each vote cast.”<sup>54</sup> Article XI-A

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<sup>53</sup> Black’s Law Dictionary (11<sup>th</sup> ed. 2019), ballot box.

<sup>54</sup> 25 P.S. § 3031.1.

contemplates that EVSs may but need not “register[] the vote electronically” or “provide[] for the computation and tabulation of votes at the district level... at a central counting center, or [both]....”<sup>55</sup> Conversely, Article XI contemplates that a voting machine may but need not “print[] paper proof sheets....”<sup>56</sup>

Pennsylvania Courts have occasionally touched upon the definition of “voting machines.” A year before the enactment of the Election Code in 1937, the Supreme Court of Pennsylvania addressed certain requirements for voting machines, generally referring to the “lever” or “mechanism” used to cast a vote.<sup>57</sup>

More recently, the Court explained the history of voting machines and EVSs in *Banfield v. Cortes*.<sup>58</sup> In *Banfield*, the Court first explained that the Election Code “initially permitted voting with paper ballots or mechanical lever voting machines,” but “[i]n 1980, the General Assembly amended the Election Code to allow the use of electronic voting systems, which include optical scanners, punch card systems, and [direct-recording electronic voting systems, known as ‘DREs’].”<sup>59</sup>

The Court found insight into the contours of “voting machines” in another structural parallel in the Election Code, contrasting § 3261 and § 3262. As noted above, § 3261 governs petitions to open ballot boxes to conduct a recount of ballots therein; § 3262 governs petitions to recanvass voting machines. The *Banfield* Court explained that:

“The Legislature... clarified in the 2004 amendments [to the Election Code] that... electronic systems that use paper ballots, similar to a traditional ballot box, should be subject to a recount under Section

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<sup>55</sup> 25 P.S. § 3031.7(10),(16),(17).

<sup>56</sup> 25 P.S. § 3007(t).

<sup>57</sup> *Davidowitz v. Philadelphia County*, 187 A. 585 (Pa. 1936).

<sup>58</sup> *Banfield v. Cortes*, 110 A.3d 155 (Pa. 2015).

<sup>59</sup> *Id.* at 159.

3261 and electronic systems that register votes without paper ballots, similar to paperless voting machines, should be subject to a recanvass under Section 3262.”<sup>60</sup>

Earlier this year, the Commonwealth Court explicitly flagged a party’s treatment of “voting systems” and “voting machines” as interchangeable terms, declining to adopt that use.<sup>61</sup> Instead, the Court noted that its opinion used the word “system” to mean “electronic voting technology that was approved by the Secretary for use across the Commonwealth.”<sup>62</sup>

Together, these factors suggest that at least some EVSs are not “voting machines.” The exception in § 2648 applies to the contents of “ballot boxes and voting machines.” The Election Code utilizes a parallel structure in § 3261 and 3262, which respectively establish *recount* provisions for elections with paper ballots and *recanvassing* provisions for elections without paper ballots. Whereas § 3262 explicitly covers “voting machines,” the Legislature and Supreme Court have explained that EVSs that utilize paper ballots – such as the optical scanners used in Lycoming County – fall under § 3261. This suggests that optical scanners are not “voting machines.”

In its November 8, 2021 email, the Pennsylvania Department of State explained to county officials that “[v]oting machines’ is a term referring to

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<sup>60</sup> *Id.* at 170-71. This discussion is consistent with the Commonwealth Court’s statement that “[a] recount is the opening of a ballot box and the recount of the votes if the voting was done by paper ballots... [whereas] [a] recanvass is the opening of a voting machine in order to check the counters inside the machine which record the number of votes cast if the voting was done by voting machines.” *In re General Election for Tp. Supervisor of Morris Tp., Washington County*, 620 A.2d 565, 568-69 (Pa. Cmwlth. 1993).

<sup>61</sup> *County of Fulton v. Secretary of Commonwealth*, 276 A.3d 846, 849 n.3 (Pa. Cmwlth. May 23, 2022).

<sup>62</sup> *Id.*



mechanical voting devices, but is also commonly used to refer to modern electronic voting systems.” The Department ultimately indicated its belief that the CVR of an optical scanner’s tabulator constitutes the “contents” of a “modern voting machine,” as it is the “modern analog of the counters of the [older, mechanical] voting machines, in that the CVR and the counters both represented raw, unreviewed data.”

The “common use” of the term “voting machines” to refer to all EVSs, however, is insufficient to require a reinterpretation of the meaning of that term in the Election Code, especially in light of the Commonwealth Court’s refusal to endorse such an interpretation. Ultimately, there is no explicit statutory or appellate guidance on the exact definition of “voting machines,” and thus there may be some ambiguity as to whether a particular EVS is a “voting machine.” The Court finds, however, that the phrase “voting machine” does not include optical scanners that read paper ballots. Thus, as applied to this case, the term is not ambiguous: Lycoming County’s EVS is not a “voting machine.”

### iii. **Contents**

The Election Code does not define the term “contents.” The Merriam-Webster dictionary defines “contents” as “something contained.”<sup>63</sup> There are multiple definitions of “contain,” some physical (“to have within; hold,” as in “the box contains old letters”) and others intangible (“comprise, include,” as in “the bill contains several new clauses”; “restrain, control,” as in “could hardly contain her

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<sup>63</sup> “Content.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/content>. Accessed 28 Nov. 2022.

enthusiasm”).<sup>64</sup> Clearly, the term “contents” as used in the Election Code covers at least the physical sense of ballots physically inside of a ballot box. However, it is unclear whether the term also includes things that are contained in “ballot boxes and voting machines” more abstractly, such as intangible information or ideas that are “within” a ballot box or voting machine in a less-than-physical sense.

**b. “Contents of Ballot Boxes or Voting Machines”**

The Court finds that the phrase “contents of ballot boxes or voting machines” as used in § 2648 is susceptible to multiple reasonable readings, and thus does not have a single plain and unambiguous meaning. This is primarily because the text and context of the section, and the Election Code generally, does not conclusively establish whether the word “contents” refers solely to the physical contents of a ballot box or voting machine or more broadly to things contained within them, whether physical or intangible.

The Court will therefore proceed to an analysis of the phrase under the SCA, considering the enumerated factors and presumptions to resolve the ambiguity.

**3. Resolution of Ambiguity**

The Supreme Court of Pennsylvania has directed that “in situations where the words of a statute ‘are not explicit,’ the legislature’s intent may be determined by considering any of the factors enumerated in Section 1921(c) [of the SCA].”<sup>65</sup> Those factors are:

“(1) The occasion and necessity for the statute.

(2) The circumstances under which it was enacted.

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<sup>64</sup> “Contain.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/contain>. Accessed 28 Nov. 2022.

<sup>65</sup> *Snyder Brothers, Inc.*, 198 A.3d at 1071.

- (3) The mischief to be remedied.
- (4) The object to be attained.
- (5) The former law, if any, including other statutes upon the same or similar subjects.
- (6) The consequences of a particular interpretation.
- (7) The contemporaneous legislative history.
- (8) Legislative and administrative interpretations of such statute.”<sup>66</sup>

Furthermore, in construing a statute, it is presumed that the legislature did not intend the statute to achieve an absurd result, be ineffective or uncertain, work a constitutional violation, or favor private interests over public interests.<sup>67</sup>

To determine the meaning of § 2648 in this case, the Court will first analyze the factors in § 1921(c) of the SCA as they apply to the phrase “contents of ballot boxes or voting machines” to determine the legislature’s likely intent. Because many of these factors touch upon the history and purpose of the statute at issue, the Court will briefly review the enactment and meaning of the Election Code generally, and § 2648 specifically, before directly addressing the enumerated factors. The Court will then address the constitutionality of the interpretation that best reflects the legislature’s intent, both generally and as applied to Petitioner’s RTKL request.

a. **History and Purpose of Election Code and § 2648**

The Supreme Court of Pennsylvania has explained that “the purpose and objective of the Election Code... is ‘to obtain freedom of choice, a fair election and

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<sup>66</sup> 1 Pa. C.S. § 1921(c).

<sup>67</sup> 1 Pa. C.S. § 1922.

an honest election return....”<sup>68</sup> To those ends, the Election Code provides a robust scheme of directives and requirements governing many aspects of elections and voting in the Commonwealth.<sup>69</sup> Ultimately, the Election Code implements Article VII of the Pennsylvania Constitution and federal law related to voting while enabling open, accurate, and efficient elections.

Article III of the Election Code<sup>70</sup> establishes a county board of elections for each county, and grants that board “jurisdiction over the conduct of primaries and elections in such county.”<sup>71</sup> The county board has numerous powers and duties related to conducting elections, tabulating and posting results, investigating irregularities, and maintaining records. Article III, § 2648 was enacted on June 3, 1937 and has not been changed since. That section creates a general rule that “the records of each county board of elections [are] open to public inspection,” with the exception of “the contents of ballot boxes and voting machines and records of assisted voters....”<sup>72</sup> A later provision of the election code provides criminal penalties for the refusal of a person affiliated with the county board of elections to permit such inspection.<sup>73</sup> Thus, it is clear that one of the ways the legislature

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<sup>68</sup> *Pennsylvania Democratic Party v. Boockvar*, 238 A.3 345, 356 (Pa. 2020) (quoting *Perles v. Hoffman*, 213 A.2d 781, 783 (Pa. 1965)).

<sup>69</sup> The Election Code is not so comprehensive, however, as to preempt all local ordinances and rules governing matters on which the Election Code is silent. See *Nutter v. Dougherty*, 938 A.2d 401 (Pa. 2007).

<sup>70</sup> Section 2648 is located within Article III of the Election Code.

<sup>71</sup> 25 P.S. § 2641.

<sup>72</sup> 25 P.S. § 2648. Other provisions of the Election Code enact more specific public inspection requirements; for instance, § 3152 provides that “[t]he general returns from the various districts which have been unsealed shall be open to public inspection at the office of the county board as soon as they are received from the judges of elections.”

<sup>73</sup> 25 P.S. § 3504 provides that the refusal of “any member, chief clerk or other employe of any county board of elections” to permit public inspection of county board documents in accordance with the Election Code is a misdemeanor punishable by up to two years’ imprisonment and a \$1,000 fine.

intended the Election Code to ensure “honest election returns” is by allowing the public to inspect the vast majority of documents in the possession of county boards of elections.

No party has provided – and the Court has not found – legislative history or other historical information explaining the specific reasoning behind the exception to § 2648. There are at least three potential motivations for the exception. First, as Respondent and Department Intervenors argue, the exception may have been included to protect the constitutional guarantee of secrecy in voting. Second, the exception may have been intended to ensure an honest and accurate election return by guarding against fraud or tampering.<sup>74</sup> Third, it is possible that the legislature deemed disclosure of the contents of ballot boxes or voting machines, which cannot be filed in the same manner as many documents and records, to be too burdensome.<sup>75</sup>

**b. Application of Enumerated Factors to § 2648**

**i. Factors Directly Dependent upon Text and History**

The information available regarding the history and purpose of the Election Code, § 2648, and the specific exception at issue, supports Petitioner’s and Petitioner Intervenors’ position. One of the primary purposes of the Election Code is to “obtain... an honest election return,” and one of the ways the Election Code accomplishes that purpose is by ensuring most records held by county boards of

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<sup>74</sup> Whereas a bad actor’s destruction or alteration of many election document would not call ultimate results into question, a member of the public who gained access to voted ballots or the interior workings of a voting machine could alter actual votes and counts.

<sup>75</sup> It is of course possible that the exception was included to advance some combination of these and other goals.

elections are subject to public inspection after the election. Providing for public access to documents strongly discourages fraud or incompetence, and promotes accountability in the administration of elections, as the Election Code provides the records of each election to the electorate at large, who may check for errors or inaccuracies. Importantly, this promotes both the accuracy of election results as well as public confidence in the accuracy of elections, each one vital to our democracy.

When a law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions, the exemptions from disclosure must be narrowly construed.”<sup>76</sup> The more broadly the exception to the public access provision is read, the more the goals of public access are undermined.

Respondent’s and Department Intervenors’ argument for an expansive reading of the exception that includes more items as time and technology progress, risks swallowing the general rule that in addition to those items specifically enumerated in § 2648, “reports and other documents and records in [the county board of elections] custody... shall be open to public inspection....” An interpretation of the exception that includes, therefore, not just “contents of ballot boxes and voting machines” but other items “analogous to” or “the digital equivalent of” those contents is an expansive interpretation contrary to the legislature’s clear intent to provide broad public access to election records.

It is notable that although the legislature has amended the Election Code on numerous occasions, often to reflect advancements in technology and modern

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<sup>76</sup> *Bowling*, 990 A.2d at 824.

elections practice, § 2648 has remained unchanged since its enactment 85 years ago. In permitting the use of EVSs, the legislature would have been aware that these new technologies would store records in a manner that could not have been contemplated in 1937. Even so, the legislature has never updated the section of the Election Code discussing the documents and records of county boards of elections to account for these developments. It is well-established that neither courts nor agencies are permitted to “add statutory language where [they] find the extant language somehow lacking” or to “supply omissions in [a] statute when it appears that the matter may have been intentionally omitted.”<sup>77</sup> The legislature’s failure to update § 2648 reflects a deliberate choice to not widen the exception to public access but instead to make all modern documents and records public whether or not they are “analogous to” or “the digital equivalent of” to the contents of ballot boxes and voting machines.

ii. **Present Legislative and Administrative Interpretations**

As Respondent and Department Intervenors point out, the Department of State has interpreted the exception in § 2648 to include CVRs. “It is well settled that construction of a statute by those charged with its execution and application is entitled to great weight and should not be disregarded or overturned except for

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<sup>77</sup> *Sivick v. State Ethics Commission*, 238 A.3d 1250, 1264 (Pa. 2020). In *Sivick*, the statute at issue provided for restitution when a public official obtains a benefit unethically. The Supreme Court held that the statute could not be expanded to provide for restitution when a public official’s unethical actions result in a benefit to his son, despite the State Ethics Commission’s contention that a failure to do so would “be illogical and result in an inconsistent application of the Ethics Act....”

cogent reasons, and unless it is clear that such construction is clearly erroneous.”<sup>78</sup>

In its November 8, 2021 email, the Department explained its position as follows:

“ [Section 2648] can be used to deny any request to inspect voted ballots, or to receive copies of voted ballots, or to examine voting machines, as the Election Code specifically exempts these records and equipment from public disclosure. Regarding the CVR, the CVR is the raw record that is created by a single tabulator, and is created as part of the Election Management System (EMS) of the particular electronic voting system used in that county. The CVR of any one tabulator has not been added to the CVR found on other tabulators in an election district, or added to the central tabulator CVR developed from processing absentee and mail-in ballots for that election district. Thus, the CVR for any tabulator is a subset of the record for a particular election district. In addition, the tabulation and computation of votes has not occurred when a tabulator’s CVR has been produced. Overvotes may be displayed, being resolved through other aspects of the EMS software. In other words, the data will be unprocessed and considering it on its face will be problematic. Further, different electronic voting systems create CVRs in different ways, using unique propriety software. And some of the systems even capture scans of the ballots, similar to photocopies or photographs.

It is the Department’s perspective that CVR data is a modern version of those items excluded from public review under Section 308 of the Election Code, where ‘the contents of ballot boxes and voting machines’ are unavailable for public review. This position recognizes that a CVR is raw evaluation of ballots, even capturing overvotes contained on the ballots. In some cases the ballots themselves are scanned, producing a facsimile of the ballot. It is logical that the exclusion of a ballot from the records available for public review under Section 308 would lead to the exclusion of an exact copy of the ballot, as well.

Section 308 also excludes voting machines from access. ‘Voting machines’ is a term referring to mechanical voting devices, but is also commonly used to refer to modern electronic voting systems. The Department believes that this exclusion also applies to the modern components of electronic voting systems and their contents, one of which is the CVR of any tabulator. The exclusion would also apply when considering what was excluded from public examination with an older, all mechanical voting machine. Those devices included counters for each race, similar to odometers, that were available for

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<sup>78</sup> *Kirsch v. Public School Employees’ Retirement Bd.*, 929 A.2d 663, 668 (Pa. Cmwlth. 2007) (citing *Spicer v. Department of Public Welfare*, 428 A.2d 1008 (Pa. Cmwlth. 1981)).



checking only by removal of locked covers. The CVR is the modern analog of the counters of the voting machines, in that the CVR and the counters both represented raw, unreviewed data.

Further, to the extent CVR data is not randomized, that information, considered together with an election district's numbered list of voters, could create insight into how a person voted. This would be a direct violation of the Pennsylvania Constitution's secrecy in voting guarantee.

For these various reasons the Department does not believe CVR data should be provided to any requester."

The Department describes CVRs as the "modern version" or "modern analog" of the "contents of ballot boxes and voting machines," due to the similarity of a CVR's characteristics and functions to those of ballots and mechanical counters. Although the Department explains why it believes CVRs are similar to voted ballots and mechanical counters, it does not explicate its reasoning for the conclusion that the phrase "contents of ballot boxes and voting machines" is broad enough to cover not just those things, but the "modern versions" or "analogs" of those things.

### **iii. Consequences of Parties' Interpretations**

The parties' competing interpretations each have positive and negative consequences. As discussed above, more documents and records available for public inspection means fewer opportunities for an error or inaccuracy to go unnoticed, which in turn increases public confidence in the accuracy of elections. Accordingly, Petitioner's position would provide the public the means to, essentially, check the math of the board of elections, making sure the line-by-line tally of votes

for each candidate is consistent with the final number reported by the elections board.<sup>79</sup>

Certain consequences of Petitioner's position, however, merit scrutiny even in the absence of constitutional concerns, and support Respondent's position that a CVR is at least the "digital equivalent" of the contents of a ballot box. For instance, a person with a CVR could obtain many blank sample ballots, and fill each one out in accordance with a single row of the CVR, corresponding to an actual voted ballot. At the end of this process, the person would have a stack of filled out ballots that is materially identical to the stack of voted ballots within the ballot box, with only three differences: 1) superficial dissimilarities such as different stray marks or different colored ink; 2) the absence of the names of write-in candidates; and 3) the fact that the pile of sample ballots filled out using the CVR would have never been physically inside of a ballot box.

In comparison, Respondent's position would deprive the public of additional information that could increase public confidence in the accuracy of the election, but could also be used to effectively recreate the contents of a ballot box. However, aside from the constitutional issue – which is addressed below – it is not obvious that the recreation of the ballots inside of a ballot box implicates substantial concerns. Additionally, whereas public access to the physical contents of a ballot box raises potential fraud concerns, the recreation of the contents of that ballot box

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<sup>79</sup> As Respondents and Department Intervenors point out, the numbers would not necessarily match, because the CVR would consist of raw results, potentially containing ballots ultimately deemed ineligible or omitting ballots ultimately deemed valid. However, the Court does not view the fear that a person may draw false conclusions from true data as a valid reason to withhold that data if it is otherwise publicly accessible.

does not. Thus, it is conceivable that the legislature may have wished to prohibit the former of these situations while permitting the latter. The release of a CVR does provide more information than the final results concerning the *distribution* of votes, but no party has suggested any reason why this would be problematic.<sup>80</sup>

Respondents argue – either primarily or in the alternative – that CVRs are not just *analogous to* the contents of ballot boxes or voting machines but *are* the contents of ballot boxes or voting machines despite never having been physically inside of them. Because the parties agree that a CVR is never physically inside of a ballot box or voting machine,<sup>81</sup> this interpretation necessitates a reading of “contents” in an intangible sense, applying to the *information* on voted ballots or within a voting machine. Prohibiting public access to any document or record containing information on voted ballots or within a voting machine, however, could sweep a number of additional documents and records into the exception.<sup>82</sup> Additionally, certain documents and records enumerated as publicly accessible – such as general and duplicate returns – contain information that was taken from the voted ballots or was within voting machines. Thus, such an interpretation would create an irreconcilable conflict within the provisions of § 2648.

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<sup>80</sup> For instance, instead of merely knowing the total number of voters who chose each candidate, the CVR would reveal the number of voters who voted for each *combination* of candidates.

<sup>81</sup> Except in the sense that certain voting machines that create CVRs could physically store the data in a CVR as binary code in the machine’s hardware.

<sup>82</sup> For instance, because the names of write-in candidates are only on voted ballots, a literal interpretation of this position would prohibit public access to any document reflecting which write-in candidates received votes.

**iv. Interpretation of § 2648**

Upon a consideration of the factors enumerated by the SCA, the Court concludes that the legislature intended the exception in § 2648 to be construed narrowly, allowing for broad public access of records and documents unless explicitly made inaccessible. Only three such things have been made inaccessible: the contents of ballot boxes, the contents of voting machines, and the records of assisted voters. The legislature did not exempt records that were the “equivalents” or “analogs” of those things from public access. Thus, in the absence of clear statutory or appellate direction to the contrary, the Court will not expand the exception beyond the narrow items it plainly encompasses.

The Court further concludes that the legislature intended the “contents” of ballot boxes or voting machines to refer to voted ballots physically deposited into ballot boxes and the mechanical inner workings of voting machines, rather than the information “contained” in those physical items. This interpretation is consistent with the narrow nature of the exception, and avoids a reading of § 2648 that would render certain documents simultaneously publicly accessible and inaccessible.

For these reasons, the enumerated factors of the SCA compel a finding that the legislature intended § 2648 to provide broad public access to the documents and records of county boards of elections, and therefore the limited exception to public access found in § 2648, cannot now be expanded to also shield the CVR from public access. Finally, the step remaining in this Court’s analysis is to determine whether this reading of § 2648 would violate the Constitution of Pennsylvania, either generally or in this particular case.

**c. Constitutional Concerns**

In construing a statute, there is a presumption that the legislature did not intend the statute to work a constitutional violation.<sup>83</sup> Thus, even the most natural reading of a statute as suggested by the SCA's factors must be rejected if it violates the Pennsylvania Constitution.

As detailed above, Article VII, § 4 of the Pennsylvania Constitution of 1968 guarantees “[t]hat secrecy in voting be preserved” in “[a]ll elections by the citizens....” Secrecy in elections is paramount, the Supreme Court of Pennsylvania has explained, because it prevents voters from being pressured or coerced into voting against their wishes. Thus, the Pennsylvania Constitution prevents the revelation of the contents of an individual voter’s ballot.

The guarantee of secrecy in voting, however, is not absolute,<sup>84</sup> and it cannot be read to mandate the elimination of any theoretical possibility that a person may use publicly available information to ascertain the contents of a voter’s ballot. Such a requirement would be impossible to satisfy, as there already exists a situation in which the contents of a specific voter’s ballot may become public information: if that voter is the sole person to cast a vote at a precinct in a given election. In that circumstance, that voter would be the sole person listed on the (publicly accessible) numbered list of voters, and the only results from that precinct would be those taken

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<sup>83</sup> 1 Pa. C.S. § 1922.

<sup>84</sup> There is at least one circumstance in which the Constitutional guarantee of secrecy in voting yields. In *Appeal of Orsatti*, the petitioner sought a recount of a primary election in which she trailed in the initial count 1,042 to 1,036. *Appeal of Orsatti*, 598 A.2d 1341 (Pa. Cmwlth. 1991). The petitioner challenged, *inter alia*, a number of ballots apparently cast by voters registered as independents, which was impermissible under Pennsylvania’s closed primary system. The Commonwealth Court held that if a person casts an illegal ballot, “his vote may be ascertained so that it can be deducted from the total.”

from that voter's ballot. Similarly, if every voter in a precinct casts a vote for the same candidate in a given race, each of those voters' selections in that race could be easily deduced from the election return and the numbered list of voters.

In both of these cases, election results and publicly accessible information can be used to ascertain for whom a particular elector voted. Thus, the guarantee of secrecy cannot mean that a voter's choices may never be deduced through the combination of publicly available information.<sup>85</sup>

Here, Respondent and Department Intervenors initially worried that the release of the CVR would essentially create an ordered list of ballot results that could be easily lined up with a numbered list of voters to ascertain nearly every elector's choices. At the hearing in this matter, however, the parties learned for the first time that Clear Ballot CVRs automatically include a randomization element, with the CVR listing each group of ten ballots cast in random, rather than chronological, order. Mr. Lehman indicated that this randomization element "alleviates the ballot secrecy concerns" of Respondent. Department Intervenors, however, did not abandon their concerns that the release of the CVR would violate the guarantee of secrecy in voting.

There are two ways in which a citizen may use a CVR in conjunction with publicly accessible documents and records to ascertain the contents of a voter's

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<sup>85</sup> The guarantee of secrecy clearly protects each voter's right not to have the government reveal their vote or make it publicly accessible. It is similarly apparent that the guarantee of secrecy requires the government to take measures to ensure that other persons cannot access a voter's ballot or the choices that voter makes. However, for the reasons discussed, the guarantee of secrecy cannot be read so absolutely to mean that the government must completely eliminate the possibility that a person, in rare circumstances, could deduce a voter's choices from publicly accessible information. Such a command is impossible to achieve in practice.

ballot. First, because Clear Vote randomizes ballots in sets of ten. If the last “randomization block” has a single ballot in it,<sup>86</sup> a person who knows the identity of the voter who cast the final ballot could use the CVR to ascertain the contents of that person’s ballot. Second, if each of the ten voters in a randomization block casts their ballot for the same candidate in a given race, a person who knows the identity of all ten of those voters would be able to use the CVR to ascertain how those ten electors voted in that given race.

Unlike the situations that already exist without access to a CVR, these situations require the additional information of the chronological order in which the elector cast their ballot. Mr. Lehman testified that the order of the numbered list of voters does not necessarily correspond to the order in which ballots are cast. Therefore, the only way a person could determine an elector’s ordinal position is by personally observing that elector cast their ballot.

Ultimately, public access to a CVR could create additional limited circumstances in which a person could theoretically ascertain individual voter’s selections by using the CVR *in conjunction with other information* – in this case, knowledge of the voter’s identity and observation of the place in the order in which that voter cast their ballot. However, this is similar to the present situation in which public access to the numbered list of voters could allow a person to determine a particular elector’s choices in a handful of limited circumstances. Thus, in the same way that the release of a numbered list of voters does not violate the guarantee of

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<sup>86</sup> For instance, if there are 251 ballots cast, there will be twenty-five randomized sets of ten ballots, and the last randomization block will have only one ballot, the 251<sup>st</sup>.

secrecy in voting, the release of the CVR in this case similarly does not violate the guarantee of secrecy in voting.<sup>87</sup>

### **CONCLUSION**

As our Nation approaches its semiquincentennial, free and fair elections remain the bedrock of our democracy. The importance of public confidence in elections cannot be overstated. That confidence, however, will only exist so long as our elections are transparent, their results are accurate, and the secrecy of our ballots remains guaranteed. As this case demonstrates, these principles are sometimes difficult to balance.

This Court is not so naïve as to not recognize that the parties' and public's interest in this case has much to do with the continuing debate surrounding the accuracy of the 2020 election. However, that debate is not before this Court. Rather, at its core, Petitioner's RTKL Request presents a question of statutory interpretation: what is the meaning of the phrase "the contents of ballot boxes and voting machines" in § 2648 of the Election Code? This question touches upon constitutional issues and principles of democracy, but at its heart it is a question about what certain words mean in the context of Pennsylvania law. For the reasons detailed above, the Court finds that the Clear Ballot CVR from the Lycoming County 2020 General Election does not fall under "the contents of ballot boxes and voting machines" under § 2648 of the Election Code, and that the release of the CVR does not violate the Pennsylvania Constitution's guarantee of secrecy in voting.

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<sup>87</sup> This determination depends upon the randomization element in the Clear Ballot CVR. This Court's determination is limited to the facts before it, as different CVRs with different characteristics could raise different constitutional concerns.



Therefore, the Court will direct Respondent to provide Petitioner Intervenors with access to the CVR as requested.

Although the Court has found that the release of the CVR will not violate the Pennsylvania Constitution, the Department's concerns to the contrary are clearly not frivolous nor contrived. The Court's remedy of public release of documents, once effected, can never be undone, as it is impossible to restore a declassified document to its previous level of confidentiality. The Court must ensure that all interested parties have a full opportunity to argue the merits of their positions as permitted by law. Therefore, the Court will STAY this Order pending appeal. If no appeal is filed within thirty (30) days of the date of this Opinion and Order, the Court will contact the parties to confirm that no appeal has been filed and issue a subsequent Order lifting the stay.

### **ORDER**

AND NOW, this 16<sup>th</sup> day of December 2022, the Court finds that the Lycoming County Clear Vote CVR is not excepted from public access under § 2648 of the Election Code as it is not "the contents of ballot boxes [or] voting machines...." The Court ORDERS Lycoming County Voter Services to provide Petitioner Intervenors with a printed copy of the CVR from the Lycoming County 2020 General Election.

This Order is STAYED for thirty (30) days, pending appeal. If an appeal is filed, this stay will remain in effect until all parties have exhausted their appellate remedies. If no appeal is filed, the Court will contact the parties to confirm such, and issue a subsequent Order lifting this stay.

IT IS SO ORDERED.

BY THE COURT,

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Eric R. Linhardt, Judge

ERL/jcr

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