

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

JEFFREY STROEHMANN,	:	CV-22-00574
Petitioner	:	
vs.	:	
	:	
LYCOMING COUNTY OFFICE OF	:	
VOTER SERVICES,	:	
Respondent	:	

**OPINION AND ORDER**

AND NOW, this 8<sup>th</sup> day of May 2023, the Court hereby issues the following OPINION and ORDER regarding the Petition for Review of the May 26, 2022 Final Determination, No. 2022-0855, of the Pennsylvania Office of Open Records.

**BACKGROUND**

**A. Petitioner's RTKL Request**

On March 21, 2022, Petitioner Jeffrey Stroehmann ("Stroehmann") submitted a request to the Lycoming County Office of Voter Services ("Respondent") under Pennsylvania's Right-to-Know Law ("RTKL"),<sup>1</sup> seeking:

- "All mail-in ballot images from the 2020 general election (pursuant to 25 P.S. § 3150.17....";
- "All other ballot images from the 2020 general election"; and

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<sup>1</sup> 65 P.S. § 101 *et seq.* This Opinion discusses the RTKL in detail *infra*.

- “[A] [d]igital copy of the ClearVote Cast Vote Record (CVR)<sup>2</sup> file for every precinct tabulator and central tabulator used in the 2020 general election.”<sup>3</sup>

On March 30, 2022, Respondent denied Stroehmann’s RTKL request on the grounds that “[t]he Election Code provides that the contents of ballot boxes, including mail-in ballots and the CVR, are not accessible under the RTKL.” On April 12, 2022, Stroehmann appealed that denial to the Pennsylvania Office of Open Record (“OOR”),<sup>4</sup> which received briefing and additional information from the parties.

On May 26, 2022, the OOR issued a Final Determination denying Stroehmann’s appeal. First, the OOR reviewed Stroehmann’s request for mail-in ballots. Citing the plain language of 25 P.S. § 3150.17(a), the OOR granted Stroehmann’s request and ordered Respondent to produce records responsive to this request.<sup>5</sup>

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<sup>2</sup> ClearVote is the election management system that Respondent uses to conduct elections in Lycoming County. The CVR for each precinct tabulator is a spreadsheet showing raw data associated with the ballots cast at that precinct, and the CVR for the central tabulator is a similar spreadsheet showing raw data associated with every ballot cast in Lycoming County.

<sup>3</sup> As discussed in detail below, the first and third of these requests have since been resolved for the purposes of this action; the only issue before the Court is whether Respondent properly denied Petitioner’s RTKL request concerning ballot images other than those specified in 25 P.S. § 3150.17.

<sup>4</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.

<sup>5</sup> Respondent did not appeal this determination and has since produced the requested records.

Next, the OOR reviewed 25 P.S. § 2648, the provision of the Election Code governing public inspection of elections documents, which provides that such documents are generally accessible with the exception of “the contents of ballot boxes and voting machines and records of assisted voters...” The OOR noted that it had consistently classified ballot images for non-mail-in ballots as “the contents of a ballot box or voting machine,” and thus not subject to access under the RTKL. On these grounds, the OOR denied Stroehmann's second request.

Finally, regarding the request for the CVR, the OOR reviewed the affidavit of Forrest Lehman (“Lehman”), Director of Elections for Lycoming County, who asserted the County’s position that a CVR is essentially the digital equivalent of the contents of ballot boxes and therefore excluded from access under § 2648. The OOR discussed Stroehmann’s argument that the CVR, which takes the form of a digital spreadsheet containing data, is not akin to the contents of ballot boxes, *i.e.*, the actual voted ballots. The OOR concluded that Lehman was credible and knowledgeable in the area of elections, rendering it improper for the OOR to substitute its judgment for his. On this ground, the OOR agreed with Respondent’s reading of § 2648 as applicable to CVRs, and denied Stroehmann’s third request.

On June 13, 2022, Stroehmann filed a Petition for Review of the OOR’s Final Determination to this Court, asking the Court to reverse the Final Determination as to his second and third requests. At the time Stroehmann filed his Petition for Review, another Petition for Review of a RTKL Request, filed on February 3, 2022

by Heather Honey (“Honey”; “Honey’s Petition”), was pending before the Court.<sup>6</sup> Like Stroehmann, Honey had previously requested that Respondent provide her a copy of the CVR, and asked this Court to review the OOR’s Final Determination upholding Respondent’s denial of her request.

**B. Honey’s Petition and Appeal**

On December 16, 2022, this Court issued a 74-page Opinion and Order addressing Honey’s Petition. This section summarizes the relevant procedural history of that case.

**1. Petitions to Intervene**

After Honey filed her Petition on February 3, 2022, the Court directed the parties to provide briefs and scheduled argument for June. On May 16, 2022, Stroehmann and two other registered electors of Lycoming County, Joseph D. Hamm and Donald C. Peters (collectively, “Honey’s Intervenors”), filed a Petition to Intervene in support of Honey. Following argument, the Court granted their petition to intervene.

On June 9, 2022, the Acting Secretary of the Commonwealth of Pennsylvania, Leigh M. Chapman, acting through the Department of State (collectively, the “Department”), moved to intervene in support of Respondent. Following argument, the Court granted the Department’s motion to intervene.

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<sup>6</sup> That matter was docketed to CV-22-00115.

## **2. Evidentiary Hearing<sup>7</sup>**

The Court held an evidentiary hearing over two full days, June 16 and June 24, 2022. Testifying for Respondent, Lehman provided a comprehensive description of Lycoming County's election process, including its facilities, equipment, and procedure prior to, during, and subsequent to voting. Lehman explained how voters in Lycoming County fill out a paper ballot which they then insert into an "optical scanner," which reads the marks the voter has made on the ballot to indicate their selections. The scanner deposits the ballot into a sealed bag, and the data is transmitted to a "tabulator," a computer running the Clear Vote election software. That software arranges the data into a spreadsheet, known as the CVR. Each precinct has a single scanner and tabulator, and therefore each precinct has one CVR. After polls closed, the data from each tabulator is returned to Respondent's office, where it is entered into a "central tabulator." Mail-in, absentee, and military ballots are scanned directly into the central tabulator, as are any provisional ballots ultimately adjudicated valid. The central tabulator compiles this data into a single, countywide CVR. Ultimately, Lehman explained why Respondent believes CVRs fall within the exception to public access for "contents of ballot boxes and voting machines" described in § 2648.

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<sup>7</sup> As discussed below, the parties in the instant proceeding have stipulated to the entirety of the record from the June 16 and 24, 2022 evidentiary hearing addressing Honey's Petition being made a part of the record in the instant case.

Between the two trial days, the parties stipulated to enter a string of emails into evidence, addressing a question about certain features of the CVR. Lehman's discussion with Clear Vote employees, detailed in the email exchange, revealed that these features were part of a randomization element inherent in the Clear Vote system. Specifically, the stipulated testimony showed that each CVR does not list the ballots in the strict order in which the tabulator scanned them; rather, the CVR would randomize the order of each set of ten ballots cast. Lehman noted that this assuaged Respondent's concerns that disclosure of the CVR would violate the Pennsylvania Constitutions' guarantee of secrecy in voting, though it did not alter Respondent's position that a CVR is not publicly accessible under § 2648.

The Department called Jonathan Marks ("Marks"), who had worked for the Department for over 25 years, becoming the Deputy Secretary for Elections and Commissions in February 2019. Marks detailed the ways in which the Department interacts with each county's board of elections. Marks explained the Department's position on electronic voting systems and CVRs, describing how the Department issued guidance to the counties explaining its determination that a CVR is not publicly accessible. Marks further described Pennsylvania election procedures generally, addressing the Pennsylvania Constitution's guarantee of secrecy in voting and the history of the Department's implementation of that guarantee.

Honey called Kenneth Roy Bennett ("Secretary Bennett"), who served as the Secretary of State of Arizona from 2009 to 2015.<sup>8</sup> The Court admitted Secretary Bennett as an expert in elections generally and the Clear Vote system and CVRs specifically. Secretary Bennett discussed his experience with CVRs, explaining his position that principles of election transparency and the need for voter confidence weigh in favor of the public accessibility of CVRs, including Clear Vote CVRs. Secretary Bennett explained why he did not believe their disclosure would undermine voter secrecy.

Honey testified on her own behalf, laying out the timeline of her RTKL request and subsequent appeal and explaining her position that CVRs do not constitute the contents of ballot boxes under § 2648. She further argued that the public disclosure of CVRs would not violate the Pennsylvania Constitution's guarantee of secrecy in voting.

Finally, Andrew Poli testified for Honey, discussing his work to convert CVRs into a searchable electronic format and noting that some Pennsylvania counties have agreed to provide CVRs in response to RTKL requests.

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<sup>8</sup> Secretary Bennett explained that the Arizona Secretary of State is Arizona's chief elections official in charge of upholding the Arizona Constitution and all Arizona statutes relating to elections.



### **3. Opinion and Order**

On December 16, 2022, the Court issued an Opinion and Order addressing Honey's Petition. The Opinion began by recounting each witness's testimony and the evidence presented in detail.

The Court next discussed the relevant provisions of the RTKL and Elections Code, reviewing relevant appellate cases interpreting those statutes. The Court also reviewed the history and application of the Pennsylvania Constitution's guarantee of secrecy in elections. The Court then discussed the Statutory Construction Act and principles of statutory interpretation.

In its analysis, the Court first concluded that although Honey was not entitled to inspect Lycoming County election records because she was not a registered elector in Lycoming County, the intervention of Honey's Intervenors – who are registered electors in Lycoming County – allowed the Court to proceed to the merits of Honey's Petition.

Turning to the merits, the Court determined that it is unclear from the language of § 2648 whether a CVR constitutes the "contents of a ballot box or voting machine." Thus, the statute contains an ambiguity as applied to Honey's request, which required the Court to construe the legislature's intent under principles of statutory construction. The Court determined that the optical scanning system used by Lycoming County did not fall under the definition of "voting machine," and therefore a CVR was not the "contents of [a] voting machine." Reviewing the



relevant principles of statutory construction, the Court further determined that CVRs did not fall under the “contents of ballot boxes.”

Finally, the Court determined that public disclosure of the CVR would not violate the Pennsylvania Constitution, as the randomization element and elections procedures specific to CVRs and Lycoming County elections were such that public disclosure would not make it appreciable easier for any person to determine an individual voter’s choices.<sup>9</sup>

Ultimately, the Court concluded that neither § 2648 nor the Pennsylvania Constitution prohibited the disclosure of a CVR under the RTKL, and ordered Respondent to provide Honey’s Intervenors with a copy of the CVR. The Court stayed the execution of this order pending appeal.

#### **4. Appeal**

On January 13, 2023, the Department filed a timely notice of appeal of this Court’s December 16, 2022 Opinion and Order addressing Honey’s Petition.<sup>10</sup> That matter remains pending on appeal before the Commonwealth Court.

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<sup>9</sup> The Court acknowledged that under specific, highly unlikely factual circumstances, an observer could use a CVR in conjunction with publicly available information to determine an individual elector’s vote. This is true, however, even without disclosure of a CVR – for example, it would be trivial to determine an individual voter’s choices in the unlikely event that every person in that voter’s precinct votes identically.

<sup>10</sup> Respondent did not appeal.

## ***PROCEEDINGS BEFORE THIS COURT IN INSTANT MATTER***

### **A. Evidentiary Hearing**

Following a status conference, the Court issued a briefing schedule and scheduled an evidentiary hearing on this matter for November 30, 2022. On October 24, 2022, Petitioner filed a Motion to Compel Discovery, which this Court granted in part and denied in part in an Order dated November 2, 2022. Due to the illness of a witness and the parties' anticipated scheduling difficulties during the holiday season, the Court continued the hearing in this matter to February 21, 2023.

On February 21, 2023, the parties agreed that the transcript and record of the June 16 and 24, 2022 evidentiary hearing addressing Honey's Petition, including all exhibits from that prior hearing, would be made part of the record in the instant case.<sup>11</sup>

Respondent called Lehman to testify to those matters relevant to Stroehmann's request for the images of non-mail-in ballots. Lehman explained that each optical scanner creates an image of the physical ballots it scans, storing that information along with the CVR. Lehman stated that Lycoming County ballots are generally two sides of a single page, and that each tabulator stores a separate image for the front of the ballot and back of the ballot. Lehman reiterated that each

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<sup>11</sup> The Court issued an Order reflecting this stipulation.

scanner deposits scanned ballots into a secure bag which is brought to Respondent's central headquarters following the close of polls. Lehman testified that in the 2020 Lycoming County general election, the county received approximately 45,000 in-person ballots and 800 provisional ballots, with two images (front and back) stored for each ballot.

On cross-examination, Lehman first noted that Respondent did not challenge the OOR's direction to produce mail-in ballots because a review of Act 77<sup>12</sup> showed that the legislature "clearly and unambiguously" declared mail-in ballots to be public records.

Lehman acknowledged that military ballots and provisional ballots are not scanned through a precinct tabulator and deposited into the election box on election day; rather, Respondent takes them to its central headquarters and stores them securely. Lehman agreed that these ballots do not go into the secure bags and are thus not physically in the same ballot box as those ballots voted on election day. Lehman explained that Pennsylvania allows each of its counties to conduct elections as it chooses, and therefore there is no uniform definition of what exactly constitutes a "ballot box." Lehman believed that the containers in which military and valid provisional ballots are securely stored are "ballot boxes" for the purpose of § 2648.

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<sup>12</sup> Act of October 31, 2019, P.L. 552, No. 77, which amended the Pennsylvania Election Code.

Lehman explained that after voting, each secure bag is removed from the scanner it is attached to, zipped, sealed, and brought back to Respondent's headquarters. Each provisional ballot filled out at a precinct is not tabulated there, but rather placed in an individual envelope and returned to Respondent's headquarters where they are adjudicated valid or invalid the following day. Those provisional ballots that are adjudicated valid, Lehman testified, are then scanned by the central tabulator and deposited into a bin.

Lehman explained that Lycoming County uses paper ballots, which are then optically scanned, and highlighted that Pennsylvania's definition of "electronic voting system" ("EVS") includes election systems like Lycoming County's. Lehman explained that the central scanner at Respondent's headquarters can scan 100 to 200 ballots at a high speed, as it is a larger, more powerful version of the single-ballot scanners located at the precincts. Lehman testified that, though rare, scanners can occasionally jam, which Respondent addresses by simply rescanning the batch of ballots (ensuring that information on each ballot is not duplicated).

Lehman stated that Lycoming County generally reuses the same elections equipment at each election, and in fact used the same equipment for the 2020, 2021, and 2022 elections. Lehman testified that between elections all ballot boxes are emptied, and all USB drives used to store or move information are wiped clean or replaced. At no time does a USB drive contain data from multiple elections.

Lehman explained that voted ballots themselves are placed in records retention where they are maintained for the period of time required by statute.

Lehman ultimately conveyed Respondent's belief that the images of ballots stored on Respondent's elections system are "contents of ballot boxes," and that these electronic images are the "digital equivalent" of voted ballots. Lehman agreed that the Elections Code does not contain the phrase "digital equivalent."

At the conclusion of Lehman's testimony, Respondent rested. Petitioner did not call any witnesses. The Court provided the parties time to file briefs in favor of their positions.

**B. Petitioner's Brief**

Petitioner first addressed Respondent's position that images of voted ballots are "contents of ballot boxes or voting machines" under § 2648, arguing that this Court's analysis in the Opinion and Order addressing Honey's Petition is equally applicable to ballot images as to CVRs. Petitioner further argued that Respondent's position is further undermined by its admission that Act 77 rendered mail-in and absentee ballots public records.

Petitioner turned to Respondent's second argument, that by explicitly stating in Act 77 that absentee ballots and mail-in ballots are public records but not making the same pronouncement about other ballots, the legislature implied that those other ballots are *not* public records. Petitioner first argues that this assertion necessarily renders some portion of the Election Code without effect, a situation to be avoided

when construing statutes. Specifically, Petitioner states that “if Respondent’s interpretation of Section 2648... is correct,” then “[e]ither the absentee and mail-in ballot images are public records under [Act 77], and Section 2648 has no legal effect; or the absentee and mail-in ballot images are non-public under Section 2648, and [Act 77] has no legal effect.” Petitioner next contends that it would be absurd for the General Assembly to intend to make absentee and mail-in ballot images public records while excluding access to other ballot images. Finally, Petitioner suggests that the most natural reason why the legislature would specifically mention absentee and mail-in ballots, is that Act 77 significantly expanded those two categories of voting, and therefore felt the need to clarify that these new forms of voting would be public records. The legislature had no need to make the same pronouncement about other methods of voting, Petitioner contends, because they already fell within those documents accessible under § 2648; inasmuch as Act 77 did not affect these methods of voting, their status as public records did not change and therefore the legislature had no need to explicitly restate what is already accepted law.

**C. Respondent’s Brief**

Respondent first argued that ballot images are the “contents of ballot boxes” under § 2648, even under the Court’s reasoning in its Opinion and Order addressing the Honey Petition. Noting that the Court defined a “ballot box” as the “locked box into which ballots are deposited after voting,” including “sealed bags attached to

scanners,” Respondent asserts that “images of the ballots as they existed in the ballot boxes” are clearly the “contents of ballot boxes.” Respondent similarly notes that although provisional ballots are not scanned and deposited into sealed bags attached to scanners at each precinct, they are placed in sealed envelopes, which Respondent argues also fit the definition of “ballot boxes,” prior to being counted if approved.

Turning to Act 77, Respondent notes that the Act explicitly states that all official mail-in ballots and absentee ballots are “declared to be public records.” Respondent notes that the General Assembly “made no such similar amendment for provisional or in-person ballots,” despite having many opportunities to do so. Specifically, Respondent points out that Act 77 amended 25 P.S. § 2968, governing “Forms of ballots on file and open to public inspection; ballots and diagrams to be furnished to candidates and parties,” and suggests that amendment would have been a “prime opportunity to also declare in person ballots to be public...”<sup>13</sup>

Respondent contends that at the time it passed Act 77, the legislature would have known that § 2648 made the contents of ballot boxes inaccessible to the public, and would have understood images of voted ballots to fall under this

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<sup>13</sup> The prior version of 25 P.S. § 2968 required each county board of elections to make sample ballots available for public inspection in person prior to each election and to deliver three sample ballots to each candidate; it also provided that candidates may have more sample ballots printed at their own expense. The Act 77 Amendment to § 2968 compelled county boards of elections to publish sample ballots on their publicly accessible website and deleted the provisions allowing candidates to pay for additional sample ballots.



exclusion. Respondent disputes that its interpretation of Act 77 creates problems of statutory interpretation, arguing that there is nothing unusual about a new law carving out specific exceptions to an earlier, more general law to the contrary.

## ***RELEVANT LAW***

### **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>14</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>15</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>16</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

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<sup>14</sup> 65 P.S. § 66.2, *repealed*.

<sup>15</sup> *Bowling v. Office of Open Records*, 75 A.3d 453, 455-56 (Pa. 2013).

<sup>16</sup> 65 P.S. § 67.305.

or judicial order or decree.”<sup>17</sup> The RTKL defines a “local agency” to include “[a]ny local... agency, authority, council, board, commission or similar governmental entity.”<sup>18</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>19</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... and whether the agency has possession, custody or control of the identified record....”<sup>20</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>21</sup>

In addition to establishing a new procedure for agency review of public records requests, the RTKL created the OOR.<sup>22</sup> Requesters must first appeal agency denials to the OOR, which may – but need not – take additional evidence and issue a written decision.<sup>23</sup> A dissatisfied party may appeal an OOR decision to the court of common pleas,<sup>24</sup> which may then take additional evidence and must

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<sup>17</sup> *Id.*

<sup>18</sup> 65 P.S. § 102.

<sup>19</sup> 65 P.S. § 67.708(a)(1).

<sup>20</sup> 65 P.S. § 67.901.

<sup>21</sup> 65 P.S. § 67.302.

<sup>22</sup> *Bowling*, 75 A.3d at 457-58.

<sup>23</sup> *Id.*

<sup>24</sup> Or the Commonwealth Court when the matter arises from a determination of a Commonwealth agency.

make findings of fact.<sup>25</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>26</sup>

In the present case, the parties do not dispute that Respondent is a “local agency,” and agree that whether ballot images are a public record subject to public access turns on the question of whether ballot images 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 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

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<sup>25</sup> *Bowling*, 75 A.3d at 476.

<sup>26</sup> *Id.* at 474.

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 employees having duties to perform thereto....”<sup>27</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....”

### C. Act 77

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 an honest election return....’”<sup>28</sup> To those ends, the Election Code provides a robust

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<sup>27</sup> 25 P.S. § 2648 (emphasis added).

<sup>28</sup> *Pennsylvania Democratic Party v. Boockvar*, 238 A.3 345, 356 (Pa. 2020) (quoting *Perles v. Hoffman*, 213 A.2d 781, 783 (Pa. 1965)).

scheme of directives and requirements governing many aspects of elections and voting in the Commonwealth.<sup>29</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.

The Act of October 31, 2019, P.L. 552, No. 77, typically abbreviated as “Act 77,” “effected major amendments to the Pennsylvania Election Code,” including “establishing state-wide, universal mail-in voting... eliminat[ing] the option for straight-ticket voting; mov[ing] the voter registration deadline... allocat[ing] funding to provide for upgraded voting systems; and reorganiz[ing] the pay structure for poll workers....”<sup>30</sup> At issue in the present case are Section 1309 of Act 77, which amended 25 P.S. § 3146.9, and Section 1307-D of Act 77, which created 25 P.S. § 3150.17.

Prior to the enactment of Act 77, 25 P.S. § 3146.9, titled “Public records,” read as follows:

“All official absentee ballots, files, applications for such ballots and envelopes on which the executed declarations appear, and all information and lists are hereby designated and declared to be public records and shall be safely kept for a period of two years, except that no proof of identification shall be made public, nor shall information concerning a military elector be made public which is expressly forbidden by the Department of Defense because of military security.”

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<sup>29</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>30</sup> *McLinko v. Department of State*, 279 A.3d 539, 543 (Pa. 2022).

Act 77 did not change this language, but designated it § 3146.9(a) and added the following language to § 3146.9:

“(b) For each election, the county board shall maintain a record of the following information, if applicable, for each elector who makes application for an absentee ballot:

- (1) The elector’s name and voter registration address.
- (2) The date on which the elector’s application is received by the county board.
- (3) The date on which the elector’s application is approved or rejected by the county board.
- (4) The date on which the county board mails or delivers the absentee ballot to the elector.
- (5) The date on which the elector’s completed absentee ballot is received by the county board.

(c) The county board shall compile the records listed under subsection (b) and make the records publicly available upon request within forty-eight hours.”<sup>31</sup>

Act 77 also created 25 P.S. § 3150.17, establishing parallel requirements for mail-in ballots:

“(a) General Rule.—All official mail-in ballots, files, applications for ballots and envelopes on which the executed declarations appear and all information and lists are designated and declared to be public records and shall be safely kept for a period of two years, except that no proof of identification shall be made public, nor shall information concerning a military elector be made public which is expressly forbidden by the Department of Defense because of military security.

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<sup>31</sup> Section 3146.9(c) was further amended in 2020, with the sole change being the addition of the words “of the request” after “within forty-eight hours.”



(b) Record.—For each election, the county board shall maintain a record of the following information, if applicable, for each elector who makes application for a mail-in ballot:

- (1) The elector's name and voter registration address.
- (2) The date on which the elector's application is received by the county board.
- (3) The date on which the elector's application is approved or rejected by the county board.
- (4) The date on which the county board mails or delivers the mail-in ballot to the elector.
- (5) The date on which the elector's completed mail-in ballot is received by the county board.

(c) Compilation.—The county board shall compile the records listed under subsection (b) and make the records publicly available upon request within 48 hours.”<sup>32</sup>

#### **D. Statutory Construction**

When the language of a statute “is clear and free from ambiguity,” the Court must apply it as written, as an unambiguous statute clearly states the legislature’s intent.<sup>33</sup> “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.”<sup>34</sup> Only if a statute is not

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<sup>32</sup> Like 25 P.S. § 3146.9, 25 P.S. § 3150.17 was amended in 2020 to append the words “of the request” to subsection (c). See note 31, *supra*.

<sup>33</sup> See *Snyder Brothers, Inc. v. Pennsylvania Public Utility Commission*, 198 A.3d 1056, 1071 (Pa. 2018).

<sup>34</sup> *Id.*



explicit or ambiguous may the Court construe it, utilizing the Statutory Construction Act.<sup>35</sup>

Here, the parties disagree about the interaction between Act 77 and 25 P.S. § 2648. Act 77 did not amend 25 P.S. § 2648, but altered numerous other provisions of the Election Code. The Supreme Court of Pennsylvania has summarized the relevant considerations to determine whether two provisions of a law are in such tension as to create an ambiguity:

“We must read all sections of a statute ‘together and in conjunction with each other,’ construing them ‘with reference to the entire statute.’ When construing one section of a statute, courts must read that section not by itself, but with reference to, and in light of, the other sections. Statutory language must be read in context, ‘together and in conjunction’ with the remaining statutory language. Accordingly, in determining whether an ambiguity exists in [a statute] requiring the application of principles of statutory construction, [the relevant sections of that statute] must be construed and considered together].”<sup>36</sup>

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<sup>35</sup> 1 Pa. C.S.A. § 1501 *et sub.*

<sup>36</sup> *Trust Under Agreement of Taylor*, 164 A.3d 1147, 1155 (Pa. 2017). In *Taylor*, the Supreme Court of Pennsylvania found that an ambiguity arose out of the interplay of two provisions of the Uniform Trust Act (“UTA”): Section 7740.1, a general provision governing “modifications” of trust agreements, and section 7766, specifically governing “removal of trustees.” The beneficiaries of the trust maintained that they could modify the trust, satisfying the fairly insubstantial requirements of section 7740.1, to provide that they could remove a trustee without complying with section 7766’s onerous requirements; under this reading, section 7766 only provided the default rule. Conversely, the trustee argued that the more specific section 7766 necessarily applied to the removal of all trustees, carving out an exception from the general rule in section 7740.1. The Supreme Court found that “both interpretations plausibly give effect to the plain language of the two provisions,” and therefore “a latent ambiguity exist[ed]” in the UTA. Ultimately, the Court applied numerous canons of statutory interpretation and eventually determined that the trustee’s reading reflected the legislature’s intent.

Thus, it is possible for an ambiguity to arise from the interaction of two statutes which are not *per se* ambiguous.

## **ANALYSIS**

### **A. Previous Analysis of § 2648**

In the Opinion and Order addressing Honey's Petition, the Court discussed § 2648 in the context of whether a CVR – a spreadsheet with each line of data reflecting most of the information of a voted and scanned ballot<sup>37</sup> – fell within the “contents of ballot boxes or voting machines” and was thus exempted from public disclosure. The Court determined that § 2648 was ambiguous as to whether “contents of ballot boxes” referred to physical items inside of the ballot box or “intangible information or ideas that are ‘within’ a ballot box... in a less-than-physical sense.”

The Court applied the factors detailed in the SCA to § 2648 generally and its exception to public disclosure specifically. Regarding the history of the Election Code, the Court found that the exception to public disclosure could have been enacted to serve multiple purposes, including preservation of secrecy, minimization of fraud, and ease of administration. The Court found that because § 2648 is a provision “designed to promote access to official government information,” any “exemptions from disclosure must be narrowly construed.”<sup>38</sup> The Court noted that

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<sup>37</sup> If an elector writes in a candidate's name, the CVR would reflect that the elector cast a vote for a write-in candidate but would not include the name the elector wrote.

<sup>38</sup> *Bowling*, 990 A.2d at 824.

the legislature had amended the Election Code numerous times since the enactment of § 2648 in 1937, continually implementing and refining the use of new technology in elections; in spite of this, the legislature never updated the language of § 2648 to reflect the fact that the interpretation of the phrase “contents of ballot boxes” may not be straightforward in the context of voting systems that use paper ballots but then lift the information from those ballots and compile it in an electronic format. The Court noted that the Department’s interpretation of the exception in § 2648 to shield CVRs from public access was a factor in favor of the application of the exception to CVRs, thought its force was softened by its explicit expansion of the exception beyond its plain terms. The Court noted that each party’s interpretation would have both positive and negative consequences. Finally, the Court found that the disclosure of CVRs would not violate the Pennsylvania Constitution’s guarantee of secrecy in voting.

Ultimately, the Court held that in light of the directive to construe exceptions to public disclosure statutes narrowly, the exception to public disclosure in § 2648 did not apply to CVRs. The Court found that an endorsement of Respondent’s and the Department’s position would require it to expand the exception to public disclosure to include not just the “contents of ballot boxes,” but their “digital equivalents” as well. Such an expansion of the exception is inconsistent with the Court’s duty to narrowly construe exceptions from general public disclosure statutes.

## **B. Issues Before the Court**

Here, the Court is once again called upon to interpret the scope of the phrase “contents of ballot boxes” as used in § 2648 of the Election Code. The ultimate question before the Court is straightforward: does an image of a ballot that has been scanned and deposited in a ballot box constitute the “contents of a ballot box,” when that image is an exact physical copy of the voted ballot, but is not actually the voted ballot itself?

Although the issue before the Court concerns the same provision of the Election Code as the prior case concerning Honey’s Petition, there are significant differences between the two cases. First, this case implicates provisions of the Election Code – specifically, the aforementioned sections of Act 77 – that were not at issue in the prior case. The interplay between these sections of the Election Code and § 2648 may introduce factors that were not present earlier. Second, Respondent in this case does not raise Constitutional concerns; the issue before the Court here is squarely a matter of statutory interpretation. Third, and perhaps most importantly, Respondent does not claim that images of voted in-person ballots are the “digital equivalent” of the contents of ballot boxes; rather, Respondent contends that an image of a voted ballot *is*, essentially, the voted ballot. In other words, whereas Respondent contended in the prior case that a voted ballot was “analogous to” a line in a spreadsheet containing most of the information on that ballot – implicitly acknowledging that these items were different in nature – here Respondent

contends that a voted ballot and its image are actually identical for relevant purposes.

As before, the Court's task will first be to determine whether the phrase "contents of ballot boxes" is ambiguous as it applies to the images of voted ballots. If it is, the Court must proceed to an analysis of relevant canons of statutory construction, determining if the differences between CVRs and images of voted ballots are sufficient to compel different treatment under the Election Code.

**C. Section § 2648 Generally**

In the previous case, the Court determined that the phrase "contents of ballot boxes and voting machines," as used in § 2648 of the Election Code, is ambiguous as applied to CVRs. Reviewing the terms "ballot box," "voting machine," and "contents" first separately and then in conjunction, the Court found that "the text and context of [§ 2648], 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."

Ultimately, the Court concluded "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 working of voting machines, rather than the information 'contained' in those physical items." As noted above, because the CVR was at most "analogous" or "digitally equivalent" to those voted ballots, and each

line of information in the CVR was not a “voted ballot[] physical deposited into [a] ballot box[],” this determination was sufficient to resolve the ambiguity as to CVRs.

That resolution, however, is not dispositive of the issue here, for the reason stated above: Respondent argues that an image of a voted ballot – identical in every way to the actual ballot scanned and deposited into the ballot box save for the sheet of paper it is printed on – is not just “analogous” or “equivalent to” a voted ballot, but *is* that voted ballot.

This argument is consistent with a commonsense understanding of what a document is. In most situations, if some law or order of court forbids the disclosure of a document, it would be absurd to argue that a party in possession of that document could publicly disclose (or be compelled to disclose) an exact photocopy, on the grounds that it is not literally the physical piece of paper that the parties signed in ink.

Of course, this background principle is only a starting point. Because § 2648 and the rest of the Election Code do not specifically state whether images of voted in-person ballots are public records, the exception to public accessibility in § 2648 is ambiguous in its application to that question. The Court will thus proceed to review the relevant principles of statutory construction, beginning by considering § 2648 in the context of § 3146.9 and § 3150.17 of the Election Code.



**D. Relevance of Act 77 to Interpretation of § 2648**

Among the numerous well-accepted canons of statutory construction is the doctrine of “*expressio unius est exclusion alterius*,” meaning “the inclusion of a specific matter in a statute implies the exclusion of other matters.”<sup>39</sup> Pennsylvania courts have “long recognized” the similar principle “that as a matter of statutory interpretation, ‘although one is admonished to listen attentively to what a statute says; one must also listen attentively to what it does not say.’”<sup>40</sup> The Supreme Court of Pennsylvania has applied this doctrine to specific disputes under the Election Code.<sup>41</sup> Like most other canons of statutory construction, however, this doctrine “is a flexible rule not to be applied in all cases,” and is still only one consideration in statutory construction that “should always be considered in the context of the particular statute....”<sup>42</sup>

Here, § 2648 was enacted on June 3, 1937 and has remained unaltered for nearly 86 years. That section states a general rule: all “records of each county

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<sup>39</sup> See *Thompson v. Thompson*, 223 A.3d 1272, 1277 (Pa. 2020).

<sup>40</sup> *Id.* (quoting *Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co.*, 788 A.2d 955, 962 (Pa. 2001)).

<sup>41</sup> *Com. ex rel. Maurer v. Witkin*, 25 A.2d 317, 319 (Pa. 1942). In *Maurer*, the Supreme Court noted that the Election Code provided for special elections to fill vacancies only in the offices of United States Senator, Congressional Representative, and Member of the General Assembly. The Court found that this conclusively established that the Election Code did not permit special elections to fill vacancies in the office of Philadelphia City Councilman.

<sup>42</sup> *Big Beaver Falls Area School Dist. V. Cucinelli*, 535 A.2d 1205, 1208 (Pa. Cmwlth. 1988).



board of elections... shall be open to public inspection... except the contents of ballot boxes and voting machines and records of assisted voters....”

Next, § 3146.9 states that “[a]ll official absentee ballots, files, applications for such ballots and envelopes on which the executed declarations appear, and all information and lists are hereby designated and declared to be public records....”

This language was present in the version of § 3146.9 enacted in 1963.<sup>43</sup> The 2019 amendment to § 3146.9 specified the information that each county board of elections must maintain for electors who apply for absentee ballots, but did not alter the classification of absentee ballots as public records.

Finally, in 2019, Act 77 established a comprehensive system of mail-in ballots, and created § 3150.17. This section classifies mail-in ballots as public records in a manner identical to the classification of absentee ballots as public records in § 3146.9.

There is no language in Act 77 or the Election Code that states that any other type of ballot is a public record. Thus, the doctrine of *expressio unius est exclusion alterius* suggests that the legislature’s decision to explicitly list absentee ballots and mail-in ballots as public records implies their intention that other types of ballots are not public records under the Election Code.

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<sup>43</sup> Respondent notes that “absentee ballots were first made public through Act 1963-379, P.L. 707,” which was enacted on August 13, 1963.

Petitioner argues that the application of that doctrine here as an endorsement of Respondent's position, however, would create an absurd result and necessarily render some portion of the Election Code ineffective. Petitioner notes that when interpreting a statute, the Court should strive to give effect to all of a statute's provisions.<sup>44</sup> Indeed, a specific provision of the SCA addresses the situation where a general provision, such as § 2648, allegedly conflicts with a more specific provision, such as § 3146.9 or § 3150.17:

"Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision...."<sup>45</sup>

Here, Petitioner argues that the only way to give effect to all three sections of the Election Code at issue is to read "contents of ballot boxes" to not cover images of voted ballots (be they mail-in, absentee, or in-person). This is because, if the phrase "contents of ballot boxes" does include images of voted ballots, one of two scenarios results: either § 2648 is effective to shield images of mail-in ballots and absentee ballots from public disclosure, in which case the provisions of § 3146.9 and § 3150.17 to the contrary are without effect; or § 3146.9 and § 3150.17 are effective to render the images of mail-in ballots and absentee ballots publicly

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<sup>44</sup> *Snyder Brothers, Inc.*, 198 A.2d 1056, 1071.

<sup>45</sup> 1 Pa. C.S.A. § 1933. This section contains certain exceptions that are not applicable to the instant case.

accessible, in which case the provisions of § 2648 shielding them from disclosure are without effect.

This argument is not forceful, for two reasons. First, if § 2648 is read to allow voted ballots (be they in-person, mail-in, or absentee) to not be the contents of the ballot box and therefore subject to public disclosure, then the language of § 3146.9 and § 3150.7 allowing public disclosure of mail-in and absentee ballots is superfluous, as § 2648 would have already made these ballots subject to public disclosure. It is an axiom of statutory construction that “whenever possible each word in a statutory provision is to be given meaning and not to be treated as surplusage.”<sup>46</sup> Second, and conversely, if § 2648 is read to mean that voted ballot images are the contents of ballot boxes and not subject to disclosure, then applying § 1933 gives meaning to all language in all three statutes. The special provisions of § 3146.9 and § 3150.7 as to mail-in and absentee ballots are an exception to the general language of § 2648 barring disclosure of voted ballot images.

Furthermore, there is a plausible reason why the legislature may have wanted to prevent public access to images of in-person ballots while specifying that mail-in ballots and absentee ballots are public records. There is wide concern that mail-in ballots are more likely than in person ballots to be subject to voter fraud. Making mail-in and absentee ballot images subject to public disclosure, increases

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<sup>46</sup> See *Myers v. Commw.*, 289 A. 3d 915, 927 (Pa.2023)

public confidence in the accuracy and reliability of such votes. As discussed at some length in this Court's Honey Opinion, public faith in the accuracy and reliability of our election results is paramount. Mail-in and absentee ballots present unique challenges, so it makes sense that they warrant special provisions to deal with them.

**E. Practical Effect of Disclosure**

As discussed above, the Court addressed many of the same considerations presented here in the Opinion and Order addressing Honey's Petition. Thus, the parties have naturally addressed whether that Opinion and Order necessitates the same result here. Respondent has suggested that CVRs are qualitatively different from images of voted ballots, in that the former is "analogous" or the "digital equivalent" to a ballot, while the latter "is" the ballot.

There is another difference between CVRs and images of ballots, which presents further reason why the legislature may have intended for CVRs to be publicly accessible while exempting ballot images from public access. A CVR contains *almost* all information that is on a ballot, with one exception: a CVR will record when an elector votes for a write-in candidate, but will not list the name of the write-in candidate. An image of a ballot, on the other hand, will not only reveal who an elector has written in, *but will display that elector's handwriting*.

In the Opinion and Order addressing Honey's Petition, the Court noted that although a CVR could be used to ascertain an individual elector's selections in certain hypothetical cases, a person attempting to do so would need to utilize other

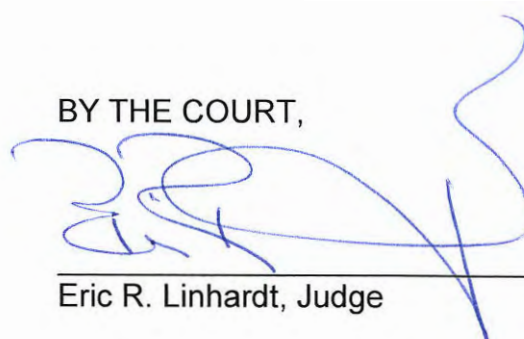
public information and take affirmative actions beyond merely reviewing the CVR, such as watching the order of electors as they cast their ballots. A person who views a ballot image, however, may learn the selections of an individual elector with whose handwriting they are familiar, without taking any action beyond viewing the image of the voted ballot. In smaller counties, or in small precincts, where members of a community are more likely to know one another, such a possibility extends beyond the hypothetical. When considering the Pennsylvania Constitution's guarantee of secrecy in voting, this is a compelling reason why the legislature may have intended CVRs to be publicly accessible while shielding images of voted ballots from public disclosure.

### **CONCLUSION**

As discussed in detail above, the plain language of § 2648 does not explicitly establish whether the image of a voted in-person ballot constitutes the “contents of a ballot box” excepted from public access, and thus the Court must resolve this ambiguity through statutory construction. Various principles of statutory construction suggest that if a voted in-person ballot is among the “contents of a ballot box,” so too is an image of that ballot. For this reason, the Court **DENIES** Petitioner's Petition for Review of the May 26, 2022 Final Determination, No. 2022-0855, of the Pennsylvania Office of Open Records, as to the request for “all other ballot images from the 2020 general election.”

IT IS SO ORDERED.

BY THE COURT,



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Eric R. Linhardt, Judge

ERL/jcr

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