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SC ELECTION COMM.

ALAN WILSON
ATTORNEY GENERAL

September 28, 2020

Marci Andino
Executive Director
South Carolina Election Commission
P.O. Box 5987
Columbia, SC 29250

Dear Director Andino:

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

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

...

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

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

Law/Analysis

It is this Office’s opinion that a court would likely hold the S.C. FOIA, S.C. Code § 30-4-10 *et seq.*, does not require the production of voted ballots, scanned images of voted ballots, and vote cast records. The S.C. FOIA provides that “[a] person has a right to inspect, copy, or receive an electronic transmission of any public record of a public body, except as otherwise provided by Section 30-4-40, or other state and federal laws, in accordance with reasonable rules concerning time and place of access.” S.C. Code § 30-4-30(A)(1). The S.C. FOIA defines “Public record” to include:

[A]ll books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. ... [O]ther records which by law are required to be closed to the public are not considered to be made open to the public under the provisions of this act.

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

The South Carolina State Constitution guarantees the secrecy of the ballot. Article II, section 1 states, “All elections by the people shall be by secret ballot, but the ballots shall not be counted in secret.” S.C. Const. art. II, § 1 (emphasis added). Moreover, Article II, section 10 directs the General Assembly to “insure secrecy of voting.” S.C. Const. art. II, § 10. The General Assembly has, in fact, explicitly directed that the secrecy of the ballot must be preserved in Chapter 13, of Title VII which governs the conduct of elections. See George v. Mun. Election Comm’n of City of Charleston, 335 S.C. 182, 187–88, 516 S.E.2d 206, 209 (1999) (discussing

“evident” legislative intent in several statutory provisions regarding ballot secrecy).¹ Specifically, the General Assembly provided the following directions regarding the layout of polling places to safeguard each voter’s ability to cast their ballot secretly.

The polling places shall be provided with a table for the managers. The polls shall be provided with a guard rail, so that no one except as herein authorized shall approach nearer than five feet to the booths in which the voters are preparing their ballots. The managers at each voting place shall arrange the table, desk or other place upon which the ballot boxes shall be placed so that there shall be no crowding or confusion immediately around the boxes, and suitable means shall be provided to enable each voter to approach the boxes and deposit his ballot without interference or hindrance. The right to vote of each person so entitled and the secrecy of the ballot shall be preserved at all times.

S.C. Code § 7-13-130 (emphasis added). These constitutional provisions and statutes demonstrate abundant authority that ballots are required to be closed to the public. Therefore, it is this Office’s opinion that a court would hold voted ballots are not made open to the public under the S.C. FOIA.

Further, it is this Office’s opinion that scanned images of voted ballots and vote cast records are not made open to the public under the S.C. FOIA. It should be noted that this opinion assumes the facts presented in the request letter as this Office does not have the authority of a court to find facts in an opinion. The request letter describes several scenarios where the disclosure of scanned images of voted ballots and vote cast records could lead to the identification of the person who cast the ballot. In Corn v. Blackwell, 191 S.C. 183, 4 S.E.2d 254 (1939), the South Carolina Supreme Court declared an election for three school district board of trustee members to be null and void because the way the votes were cast could have led to identification of how each person voted. The court explained:

Purely by inadvertence all of the tickets used in this election were printed and numbered regularly from number “one” on up to hundreds. This number was not

¹ George, 335 S.C. at 187–88, 516 S.E.2d at 209.

That legislative goal is evident in several statutory provisions. See S.C. Code Ann. § 7–13–1830 (1976) (after helping a voter understand how to use a voting machine, the poll managers “shall, before the voter has voted, retire and such voter shall cast his ballot in secret”); S.C. Code Ann. § 7–13–771(D) (Supp.1998) (after an elderly or handicapped person votes in his or her vehicle outside a polling place, the voter “must fold [the ballot] so that the secrecy of the ballot is preserved and return it to the managers waiting outside the vehicle. The managers shall carry the ballot to the ballot box, taking care not to violate the secrecy of the ballot, and after detaching the stub, deposit the ballot in the ballot box”); S.C. Code Ann. 7–13–1380 (1976) (“The State Election Commission in specifying the form of the ballot shall provide for ballot secrecy in connection with write-in votes”).

perforated so that it could be torn from the ticket and all but a few of the tickets voted had the numbers on them which corresponded to the numbers opposite the name of the voter, so that it was easy to determine how each man voted. This destroyed the legality of these votes as it violated the secrecy of the ballot, and therefore they should be rejected.

A few of the votes, probably fifteen or sixteen in number, were not voted with the number on them. That is to say, these votes had the numbers torn off and no number or identification mark was on these votes by which it could be determined who voted them, but the stubs were also placed in the ballot box with the ballots and it is easy to identify each of these ballots by comparing the stubs and ballots and thereby determine who voted each of these ballots. This destroyed the legality of these votes as it violated the secrecy of the ballot and therefore they should be rejected. There being no legal votes cast, there was no election.

Id. at 256. The Corn Court's analysis supports the idea that if a voter can be easily identified by disclosing cast ballot and/or related materials, such a disclosure would destroy the legality of those votes.

As a result, it is this Office's opinion that the S.C. FOIA does not require that scanned images of voted ballots and vote cast records are open to the public. This Office has found no evidence of legislative intent in the S.C. FOIA to even indirectly compromise the measures the General Assembly adopted to ensure the secrecy of ballot. Cf. George, 335 S.C. at 191, 516 S.E.2d at 211 ("[W]e are guided both by the constitution and the Legislature's explicit instructions on how to ensure the right to a secret ballot."). Even if the disclosure of ballot related materials was required by the S.C. FOIA, such a requirement may well be held unconstitutional. In State ex rel. Edwards v. Abrams, 270 S.C. 87, 240 S.E.2d 643 (1978), the South Carolina Supreme Court held a statute that permitted spouses to enter the voting both together and discuss the ballot was unconstitutional because it violated the requirement to maintain the secrecy of the ballot.

[T]he right of suffrage is a constitutional right vested in those who possess the qualifications prescribed in the constitution, and such right cannot be denied or abridged by legislative enactment. It is, however, a right which the legislature may regulate under its plenary powers to any extent not expressly or impliedly prohibited by the provisions of the constitution.

Our constitution not only permits, but mandates the General Assembly to regulate and provide for elections. Among those things required is that the legislature "... insure secrecy of voting, ..."

270 S.C. at 91, 240 S.E.2d at 645 (emphasis added). To the extent that the disclosure of materials related to a cast ballot would lead to the identification of a voter, it is this Office's

opinion that a court would hold such a disclosure is not required by the S.C. FOIA and violates the South Carolina Constitution. S.C. Const. art. II, §§ 1, 10.

Conclusion

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

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General