STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	)	**IN THE COURT OF COMMON PLEAS**
SC SAFE ELECTIONS and [redacted], Plaintiff,[1] v. THE BOARD OF ELECTIONS FOR AIKEN COUNTY, BEAUFORT COUNTY, CHARLESTON COUNTY, DORCHESTER COUNTY, GREENVILLE COUNTY, LEXINGTON COUNTY, SPARTANBURG COUNTY, YORK COUNTY, and THE SOUTH CAROLINA ELECTION COMMISSION, HOWARD KNAPP IN HIS OFFICIAL CAPACITY, Defendant.	)	Civil Action No. 2022-CP-40-04438 AMENDED ORDER ORDER GRANTING SEC DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Introduction

On August 25, 2020, the executive director of the SEC requested an Attorney General's opinion

> 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*.[2] (footnote omitted)

[1] The caption uses the singular "Plaintiff" and "Defendant" which should be plural in both instances.

[2] "Vote cast record" is the same as CVR.

("2020 SEC Request"). Ex. 7 at 1 (emphasis added). The executive director noted in the 2020 SEC Request that a review of the South Carolina Election Code "suggests the Legislature may not have intended for voted ballots to be subject to public disclosure." *Id.* The 2020 SEC Request was made prior to the 2020 General Election, and that election would be the first time South Carolina used the new ES&S Voting System which produced a paper ballot. Ex. 11 at 57:16-58:3; Ex. 3 at 38:18-39:11.

In a September 28, 2020 opinion ("2020 Opinion"), the Attorney General's Office determined that: (1) South Carolina's constitutional provisions and statutes make it abundantly clear that the Legislature did not intend to make voted ballots subject to FOIA (citation omitted) (*Id.* at 4); and (2) if the voted ballots, scanned images of voted ballots and vote cast records are subject to FOIA, they are not to be made public under FOIA, assuming the facts in the 2020 SEC Request. *See* Ex. 8 at 3. The 2020 Opinion concluded: "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." *Id.* at 2.

In August of 2022, at the behest of Plaintiff SCSE (Ex. 3 at 145:12-146:13), six (6) members of the S.C. House of Representatives filed a request asking that the Attorney General reverse his 2020 Opinion ("2022 Representatives' Request"). The 2022 Representatives' Request urged the Attorney General opine that CVRs are public records, open to inspection and copying under FOIA. Ex. 9 at 1-3.[3]

[3] The 2022 Representative's Request also questioned whether the SEC's refusal "to release the ballots to the public for counting constituted a violation of the State Constitution" (e.g. the ballots are not counted in public in violation of Art. II, sec. 1 of our Constitution); and if the 2020 Election "ballot records are not able to be made available for public investigation and oversight," should the 2020 Election be nullified. *Id.* at 2. This issue is not raised in the Complaint before this Court and is not relevant to whether Cast Vote Records are public records under FOIA.

On September 7, 2022, the Attorney General affirmed his 2020 Opinion and determined, *inter alia,* that a Court would likely hold: (1) the FOIA does not require production of voted ballots, scanned images of voted ballots and vote cast records "because the State Constitution and several statutes mandate a secret ballot, these documents fall outside the statutory definition of 'public record' and, therefore, the S.C. FOIA does not compel their disclosure" (Ex. 9 at 3); and (2) by adopting the statutory scheme in Title 7 the General Assembly satisfied its constitutional obligations both to "insure secrecy of voting" and to "enact other provisions necessary to the fulfillment and integrity of the election process" (S.C. Const. art. II §§ 1 and 10).

This matter is before this Court on Defendants South Carolina Election Commission's ("SEC" or "Commission") and Howard Knapp's[4] ("Knapp") in his official capacity (collectively, "SEC Defendants") Motion for Summary Judgment ("MSJ") on Plaintiffs SC Safe Elections' ("SCSE") and [redacted] (collectively, Plaintiffs") Complaint and on SEC Defendants' Counterclaim pursuant to Rule 56, SCRCP and Plaintiffs' Motion for Partial Summary Judgment as to Counterclaims of Defendants South Carolina State Election Commission, Howard Knapp in his Official Capacity, the Board of Voter Registration, and Elections for Aiken County and the Board of Voter Registration and Elections of Charleston County with regard to Defendants request for permanent injunction. A motions hearing was held on October 9, 2023. Plaintiffs submitted an updated affidavit of their expert witness on April 26, 2024, however, this affidavit does not change this Court's ruling based on the reading of the Attorney General opinion cited below. After a thorough review of the parties' oral arguments,

[4] Knapp's name is only mentioned in the case caption and there is no allegation in the Complaint made against Knapp.

written submissions, the record and relevant law, the Court **GRANTS in full** the SEC Defendants' Motion for Summary Judgment on the Complaint.

BACKGROUND

Plaintiffs filed this lawsuit on August 26, 2022, pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. §§ 30-4-10 (2018) ("FOIA"), alleging the SEC Defendants and eight defendant County Boards of Voter Registration and Elections ("CBVRE Defendants")[5] wrongfully denied Plaintiffs' FOIA requests to produce "Cast Vote Records" ("CVR") for the November 3, 2020 general election ("2020 Election").

Plaintiffs' First Cause of Action alleges that Defendants violated FOIA by wrongfully failing to allow Plaintiffs to inspect public records from the 2020 Election listed in Plaintiffs written FOIA requests and "by improperly claiming such materials are not public records subject to disclosure." Plaintiffs seek a declaratory judgment ordering Defendants to provide "all of the un-redacted public records listed in their FOIA requests," and seek an award of attorney's fees and costs. *See* Compl. ¶¶ 33-42. The Second Cause of Action seeks a declaratory judgment that CVR reports are subject to FOIA and not exempt from public disclosure. *See Id.* ¶¶ 43-45. Plaintiffs seek award of attorney's fees and costs pursuant to S.C. Code Ann. §§ 30-4-100(a), 15-77-300, and 15-35-100.[6]

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438

[5] The eight CBVRE defendants are from Aiken, Beaufort, Charleston, Dorchester, Greenville, Lexington, Spartanburg, and York counties.

[6] Section 15-53-100 only authorizes the Court to award costs as it deems advisable and does not authorize the award of attorney's fees.

(2003)*(*quoting *George v. Fabri*, 345 S.C.440, 452, 548 S.E.2d 868, 874 (2001)). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Town of Summerville v. City of N. Charleston*, 253 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). Summary judgment is proper when there is no issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Quality Towing Inc. v. City of Myrtle Beach*, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000).

DISCUSSION

For the reasons set forth below, this Court finds the SEC Defendants are entitled to summary judgment on both the Complaint and on their first Counterclaim Cause of Action.

A. SUMMARY JUDGMENT ON THE COMPLAINT.

1. The General Assembly Did Not Intend that CVRs or CVR Reports Be Subject to FOIA.

The SEC Defendants argue that as a matter of law, the General Assembly did not intend for CVRs or CVR Reports to be subject to FOIA. The question before the Court is whether, as a matter of statutory construction, CVRs and CVR Reports are public records subject to FOIA, or whether the Attorney General was correct in his 2020 and 2022 opinions that the Legislature never intended them to be subject to FOIA[7] and CVRs and CVR Reports do not meet the definition of "public record."

[7] As stated in the 2020 Opinion: "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

"The cardinal rule of statutory construction is to ascertain and effectuate legislative intent." *Hodges v. Rainey,* 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *Beaufort Cnty. v. S.C. State Election Comm'n,* 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011)(quoting *State v. Sweat,* 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010)). "The plain language of a statute is considered the best evidence of the legislature's intent." *Perry v. Bullock,* 409 S.C. 137, 140, 761 S.E.2d 251, 253 (2014). "If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing the rules of statutory interpretation. The court has no right to look for or impose another meaning." *Miller v. Doe,* 312, S.C. 444, 447, 441 S.E.2d. 319, 321 (1994).

Here, this Court need not look any further than the clearly articulated purpose of the FOIA to find that the General Assembly did not intend CVRs and CVR Reports to be subject to the statute.

> The General Assembly finds that it is vital in a democratic society that *public business* be performed in an open and public manner so that citizens shall be advised of the *performance of public officials* and of the *decisions that are reached in public activity and in the formulation of public policy*. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, *to learn and report fully the activities of their public officials* at a minimum cost or delay to the persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15 (emphasis added). These "Findings and Purposes" in the text of the statute are unequivocal and constitute the best evidence of legislative intent.

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secrecy of ballot. … Even if the disclosure of ballot related materials was required by the S.C. FOIA, such a requirement may well be held unconstitutional." Ex. 9 at 4.

Based upon the clear and unambiguous legislative purposes and findings in enacting FOIA, I conclude as a matter of law that the General Assembly did not intend to subject CVRs or CVR Reports to FOIA.

2. CVRs Are Not Public Records Under FOIA.

Based on the Attorney General opinion, I further find as a matter of law that CVRs and CVR Reports are not public records as defined by FOIA. FOIA defines "public record" as:

> "Public record" includes all 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. Records such as income tax returns…, and *other 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. § 30-4-30(2) (emphasis added). The clear and unambiguous language in the definition of "public record" plainly states that any record required by law to be closed to the public is not, by definition, a public record. Thus, FOIA is not intended to and does not make CVRs or CVR reports open to the public.

Article II, sections 1 and 10, of the South Carolina Constitution require the Legislature, *inter alia*, to provide for the "secrecy of voting" and "the fulfillment and integrity of the election process." These constitutional provisions and Title 7 of the S.C. Code Ann. specifically address the secrecy of the ballot and of the voting administration process. There is nothing in either Art. II or Title 7 that suggests that any record of a person's vote should be subject to public inspection, be it in the voting or vote counting process.

As a review of the legislative scheme enacted in Title 7 clearly demonstrates, the General Assembly historically – and prior to FOIA's enactment – has gone to great lengths to protect the confidentiality of a citizen's vote. The Legislature has carried out its constitutional duty to adopt laws ensuring the secrecy of the ballot, the secrecy of the voting process and the fulfillment and

integrity of the election process through the enactment, *inter alia*, S.C. Code Ann. § 7-13-130 ("secrecy of the ballot shall be preserved at all times."); § 7-13-771 (secrecy of ballot for handicapped and elderly); § 7-13-860 (candidates/watchers located to maintain secrecy); § 7-13-1340 (vote recorder or optical scanner permits voting "in absolute secrecy"); § 7-13-1380 (write-in ballot form shall provide ballot secrecy); § 7-13-1640 (SEC can only approve voting machines that shall "ensure voting in absolute secrecy"); § 7-13-1830 (after assisting with voting machine instructions, two managers shall give instructions and leave booth before electors vote); § 7-15-240 (during tabulation of absentee ballots, candidates or watchers must be located at a distance to maintain right to observe and secrecy of ballots); and § 7-25-80 (unlawful for a voter to allow his vote to be seen or place a mark on the ballot for later identification).

In *George v. Municipal Election Commission of City of Charleston*, the Supreme Court thoroughly discussed of the history behind the requirement for the secrecy of the voting process and the mandatory nature of election provisions "when the statute expressly declares that a particular act is essential to the validity of an election." 335 S.C. 182, 186, 516 S.E.2d 206, 298 (1999). As the Supreme Court held in *George*, legislative intent to protect and preserve the secrecy of the ballot is evident in several statutes in Title 7, citing specifically to S.C. Code Ann. § 7-13-1830 and § 7-13-771(D). Neither of those two statutes have been altered or amended since *George* was decided.

"A basic presumption exists that the legislature has knowledge of previous legislation when later statutes are passed on a related subject." *Berkebile v. Outen*, 311 S.C. 50, 53, 426 S.E.2d 760, 762 (1993). When the General Assembly passed FOIA in 1978, its members certainly knew the constitutional and statutory secrecy mandates regarding voting and the voting process. If the Legislature had intended for voted ballots, in any form, to be subject to public inspection under

FOIA, it would have said so – it did not. The South Carolina Constitution tasks the Legislature with the responsibility of promulgating laws to "provide for the administration of elections and for absentee voting, insure secrecy of voting, establish procedures for contested elections, and enact other provisions necessary to the fulfillment and integrity of the election process." *See Kerr v. Richland Memorial Hosp.*, 383 S.C. 146, 148, 678 S.E.2d 809, 811 (2009). When the Legislature defined "public record" to exclude those "other records which by law are required to be closed to the public," it was presumed to know that the Constitution and statutory scheme of Title 7 required that cast ballots are secret. S.C. Code Ann. § 30-4-20(c).

This Court concludes, as a matter of law, that CVRs and CVR Reports are not "public records" as defined by FOIA because they are required by South Carolina law to remain closed to the public.

3. Even if CVR Reports are "public records" under FOIA, they are exempt from disclosure under § 30-4-40(a)(2).

S.C. Code Ann. § 30-4-40(a)(2) exempts from disclosure public records which constitute "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy." When the privacy exemption is invoked, a court must "resort to general privacy principles, which examination involves balancing of conflicting interests—the interest of the individual in privacy on the one hand against the interest of the public's need to know on the other." *Glassmeyer v. City of Columbia,* 414 S.C. 213, 220, 777 S.E.2d 835, 839 (Ct. App. 2015)(quoting *Burton v. York Cnty. Sheriff's Dep't,* 358 S.C. 339, 352, 594 S.E.2d 888, 895 (Ct. App. 2004)). In *Glassmeyer,* the Court of Appeals applied the privacy exemption in a case where a records requestor sought disclosure of the home addresses, telephone numbers, and e-mail addresses of the City's top applicants for the position of City Manager. The requestor "assert[ed] the disclosure of the information would serve the public's interest by

demonstrating whether the applicants were truthful in their applications." *Id.* at 223. The Court rejected requestor's argument, holding that "balancing the interests of protecting personal information against the public's need to know the information, we find no evidence in the record demonstrates disclosure would further the FOIA's purpose of protecting the public from secret government activity." *Id.*

Applying the holding in *Glassmeyer* here, resolution of the balancing test is not a close call in this case. Art. II, secs. 1 and 10 of the Constitution require secrecy in voting and require the General Assembly to adopt laws that insure the secrecy of the ballot and integrity of the election process. As the 2020 AG Opinion states, "[t]he South Carolina State Constitution guarantees the secrecy of the ballot" and the Legislature has "explicitly directed that the secrecy of the ballot must be preserved in Chapter 13, of Title VII which governs the conduct of elections" Ex. 8, p. 2. In carrying out its duties which include ensuring ballot secrecy and election integrity, the General Assembly has adopted numerous statutes that exempt CVR from disclosure. *See supra* at 20-21. The privacy interests of individual voters in the secrecy of their ballots starkly outweighs any interest Plaintiffs' might have in conducting a private audit or analysis of the 2020 Election for an election that has long been certified (which is not authorized by Title 7).

The 2020 Opinion Request reflects the SEC's real concern that "individual voters' cast ballots could be identified in violation of Article II, § 1, if cast ballots are subject to public inspection" and identified problematic situations that could result in vote disclosure. Ex. 7, p. 3. During their depositions, SEC Executive Director Howard Knapp, Database Supervisor James Posey, and former Public Information Officer Chris Whitmire each testified that releasing CVRs for public inspection could result in an individual elector's votes being identified. In addition to other information, the SEC employees testified that CVRs include a voter's ballot style, (Ex. 11,

p. 60:11 – 61:18; Ex. 12, p. 21:13-23:1) whether the voter cast an emergency or failsafe ballot (Ex. 12, p 21:19-22:11), whether the voter voted provisional and was challenged; and any markings on the ballot Ex. 12, p. 22:12-23:1; Ex. 10, p. 70:9-20; and using the CVR information, a person can cross-reference the voter information with other publicly available information to discover a voter's identity, thus how the voter voted. Ex., 11, pp. 60:17—61:18; and Ex. 12, pp. 21:13—23:5.

Plaintiffs suggested that any concerns about identifying voters can be addressed through a simple redaction of identifying information from the CVRs. Ex. 21, ¶ 17. But as the SEC wrote to the Attorney General, "[c]onsidering 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." Ex. 7, p. 3. Posey testified that the SEC cannot remove a voter's ballot style information prior to running a CVR Report. Ex. 11, p .65:23-67:25; Ex. 24, ¶ 5. There were approximately 5,082 ballot style created and used in the 2020 Election, *Id.*, ¶ 2. The only way to remove a voter's ballot style manually. *Id*., p. 67:19-25.

B. SUMMARY JUDGMENT ON THE FIRST COUNTERCLAIM CAUSE OF ACTION.

The SEC Defendants filed their Counterclaim pursuant to S. C. Code Ann. §§ 30-4-110(A), 15-53-10 and Rule 65, SCRCP seeking a declaratory judgment and injunctive relief pursuant to S.C. Code Ann. § 30-4-110(A). The Counterclaim stated two causes of action. The First Cause of Action seeks a declaration that the FOIA requests subject to the Complaint are not subject to FOIA and a declaration that the other FOIA requests subject to the Counterclaim are also not subject to FOIA and are also overly broad, unduly burdensome, vague, repetitive and submitted

for an improper purpose under FOIA and that the SEC Defendants acted in good faith in responding to the FOIA requests. Counterclaim, ¶ 99.a, .b. and .f. The Second Cause of action seeks preliminary and permanent injunctive relief prohibiting the Plaintiffs, SCSE Plaintiffs and SCSE members and agents from making any *additional* FOIA requests relating to the "administration and/or results of the 2020 Election in South Carolina." Counterclaim, ¶ 101

The Legislature amended § 30-4-110 of the FOIA effective May 19, 2017. Section 30-4-110(A) provides:

> A public body may file a request for hearing with the circuit court to seek relief from *unduly burdensome*, overly broad, *vague*, *repetitive, or otherwise improper requests*, or where it has received a request but it is unable to make a good faith determination as to whether the information is exempt from disclosure. (Emphasis added).

The Code Commission explained the effect of the amendment, stating that it rewrote the section "*providing rights and remedies of public bodies* from whom requests are made …." S.C. Code Ann. § 30-4-110, HISTORY. (Emphasis added) Those rights and remedies provided to public bodies include, but are not limited to, the right to request declaratory relief, actual or compensatory damages, injunctive relief, reasonable attorney's fees and other costs, and a finding of good faith regarding the request. *See* § 30-4-110(A), (B), (C), (D) and (E).

a. Counterclaim—First Cause of Action (Declaratory Relief—Not Subject to FOIA).

The First Cause of Action addresses CVRs and CVR Reports and seeks a declaration that the CVRs and CVR Reports are not subject to FOIA because they are not public records, the General Assembly did not intend for them to be subject to FOIA and, even assuming they are public records, the CVRs and CVR Reports are exempt from FOIA pursuant to S.C. Code § 30-4-40(a)(2).

1. *CVRs and CVR Reports are not subject to FOIA.* For the reasons stated in my grant of Summary Judgment on the Complaint regarding the non-public nature of CVRs and CVR

Reports, I conclude as a matter of law that the General Assembly did not intend that CVRs or CVR Reports be subject to FOIA, that CVRs and CVR Reports do not fall within the FOIA definition of "public record" and that, even if they do fall within the definition of "public record", CVRs and CVR Reports are exempt from disclosure or inspection pursuant to S.C. Code Ann. § 30-4-40(a)(2) as "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy." Summary judgment should be granted as to the First Counterclaim Cause of Action, ¶ 99.a and .b.

2. *The SEC Defendants acted in good faith.*

Based on the concern that "granting unfettered public access to voted ballots and related data raises concerns as to the secrecy of ballots", in August 2020, in a good faith effort to ensure that the votes of all South Carolina electors remained secret, the SEC sought an opinion from the Attorney General "whether voted ballots and certain data concerning voted ballots are public records subject to public inspection or copying under" FOIA. Ex. 2, p. 1. This opinion request was made significantly prior to the time Plaintiffs and SCSE Plaintiffs started sending FOIA requests for CVRs and CVR Reports. The 2020 Opinion concluded that a court would hold that FOIA "does not require the production of voted ballots, scanned images of voted ballots, and vote cast records." *Id.*, p. 5. Also, the SEC cannot generate CVRs or CVR records for any election it oversees because it does not have possession of any of the election data generated during the 2020 General Election. Ex 11, p. 31:5-7

This Court concludes, as a matter of law that the SEC Defendants acted in good faith in responding to the FOIA requests. Summary judgment should be granted as to the First Counterclaim Cause of Action, ¶ 99.f.

Based upon the above findings, this Court concludes that, as a matter of law, summary judgment should be granted as to SEC Defendants' First Cause of Action.

This Court denies the motion for summary judgment as to the Second Counterclaim Cause of Action, which reasoning is outlined in the Court's separate order granting Plaintiff's Motion for Summary Judgment. This Court has the discretion to issue injunctive relief, but chooses not to.

CONCLUSION

For the reasons stated above, it is therefore **ORDERED** that SEC Defendants' Motion for Summary Judgment on the Complaint is **GRANTED**.

AND IT IS SO ORDERED.

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Daniel M. Coble, Circuit Judge

Columbia, South Carolina
August __, 2024

Richland Common Pleas

Case Caption: Sc Safe Elections , plaintiff, et al vs Aiken County Board Of Elections , defendant, et al

Case Number: 2022CP4004438

Type: Order/Other

So Ordered

s/ Daniel Coble, 2774