No. 94848-8

SUPREME COURT
OF THE STATE OF WASHINGTON

TIMOTHY WHITE

Petitioner,

vs.

CLARK COUNTY,

Respondent.

REPLY IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

The Court should review the Published Opinion because it fundamentally undermines the Public Records Act ("PRA"). The Published Opinion, *for the first time*, allows a state regulation to exempt records from disclosure under the "other statute" exemption of RCW 42.56.070(1), and it conflicts with this Court's recent mandate that Courts find an "other statute" exemption only where the statutory exemption is "explicitly clear."

In *John Doe A. v. Wash. State Patrol*, 185 Wn.2d 363 (2016), this Court recognized that the Public Records Act would be jeopardized by an expansive application of the "other statute" exemption under RCW 42.56.070(1). The Court therefore adopted a strict standard that allows that exemption to apply "only *when the legislature* has made it *explicitly clear* that a specific record, or portions of it, is exempt or otherwise prohibited from production." *Id.*, 185 Wn.2d at 373 (emphasis added). The Published Opinion fundamentally conflicts with this standard.

Here, the Published Opinion found an *implied* PRA exemption in the statute that requires tabulated ballots to remain "sealed in a container" after an election, to be opened only by the canvassing board in case of a recount or certain other election challenges. RCW 29A.60.110.

The Published Opinion's reading of the statute is so flawed that it cannot withstand any scrutiny, and certainly cannot withstand the rigorous scrutiny mandated by *Wash. State Patrol.*

Beyond lacking an "explicitly clear" PRA exemption, RCW ***29A.60.110 does not even apply to the requested documents at all***. Petitioner only sought electronic images of tabulated ballots, and the Published Opinion simply assumes that such images meet the definition of "ballots" and therefore deserve equal security as paper ballots under RCW 29A.60.110.

But the Legislature's definition of "ballot" contains four different definitions and states that the choice of which applies is based upon the "context." RCW 29A.04.008(1). The mandate that ballots be "sealed in containers," and "consolidated into a one sealed container for storage purposes" and only "opened by the canvassing board" is *exclusively* about the fourth definition – "The physical document on which the voter's choices are to be recorded." The Court of Appeals erred in finding that electronic images of paper ballots need to be or can be "sealed in containers."

In addition, the Court should review the Published Opinion to restore the ability of academics, journalists, and citizens to assist in protecting our election system from cyberattack, which is critically important now that it is confirmed that foreign governments are trying to

hack our election systems and that those systems are vulnerable. Indeed, due to this urgent threat, the Department of Homeland Security recently deemed our election systems to be part of the Nation's critical infrastructure, a designation established by the Patriot Act and given to "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."[1]

Clark County states that this Court should deny review because previous cases by Petitioner were resolved against him and were not granted review by this Court. However, as the Published Opinion recognized, previous cases involved a very different records request that does not control this case.

More importantly, those decisions were decided *before* the Supreme Court mandated that courts apply a rigorous standard for the "other statutes" exemption in *Wash. State Patrol*. They were also issued before we knew that foreign governments were *in fact* seeking to hack into Washington State's voting systems. Finally, those cases although erroneous did not

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[1] https://www.eac.gov/assets/1/6/starting_point_us_election_systems_as_Critical_Infrastructure.pdf

fundamentally alter the PRA by allowing a state regulation to constitute an "other statute" PRA exemption, thereby opening up an avenue for agencies to exempt their own documents from disclosure – which has never been allowed in this State.

The Court should grant review of this important case.

II. REPLY ARGUMENT IN SUPPORT OF PETITION.

A. This Court should accept review under rap 13.4 (b)(1) because the Published Opinion's decision that an agency rule can constitute an "other statute" PRA exemption conflicts with Supreme Court precedent and threatens the PRA.

The Published Opinion unambiguously holds for the first time that a state agency's rule can constitute an "other statute" exempting records from disclosure under RCW 42.56.070(1). Published Opinion, 199 Wn.App. at 937. ("WAC 434-261-045 also provides an 'other statute" exemption to the PRA.")

Clark County is wrong in arguing that this is existing law. The Supreme Court has held that an "other statute" exemption can be found "***only when the Legislature*** has made it explicitly clear that a specific record, or portions of it, is exempt or otherwise prohibited from production." *Wash. State Patrol*, 185 Wn.2d at 373 (emphasis added).

The only case that Clark County cites for the proposition that regulations can create an exemption is *Ameriquest Mortg. Co. v. Office of*

Attorney Gen., 170 Wn.2d 418, 241 P.3d 1245 (2010), but that case is entirely different because it involved a federal law and implementing federal regulation.

In *Ameriquest*, the federal Gramm-Leach-Bliley Act ("GLBA"), 15 USCS § 6801(a), and implementing regulations, 16 CFR § 313, unquestionably prohibited disclosure of the requested information. The Court held that "By force of the supremacy clause of the United States Constitution, federal law can preempt state law. Preemption principles apply equally when the federal law is a regulation promulgated by a federal agency rather than a statute passed by Congress." 170 Wn.2d at 440 (citations omitted). Rather than finding that the GLBA preempted the State Public Records Act, the Court conclude that "the GLBA (together with the FTC rule enforcing it) is an 'other statute'" creating an exemption under RCW 42.56.070(1). *Id.*

Just as an "explicitly clear" statute by our legislature can create an "other statute" exemption under *Wash. State Patrol*, federalism requires that this is equally true for an explicitly clear federal law or regulation.

The Published Opinion, in contrast, allows for the first time a *state* regulation to constitute an "other statute" exemption. This is contrary to Supreme Court precedent set out in *Wash. State Patrol* and the many other cases cited in the Petition. Allowing state regulation to create exemptions

– and thereby allowing agencies to exempt their own records -- raises critical policy concerns that were not present in *Ameriquest. See Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 131 (1978) ("Leaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization."); *Progressive Animal Welfare Soc'y v. Univ. or Wash.*, 125 Wn.2d 243, 252-53 (1994) (the Legislature "does not want judges any more than agencies to be wielding broad and malleable exemptions.")

The Court should accept review and reverse the published opinion's ruling that an agency can exempt records from the PRA through regulation.

B. This Court should accept review under RAP 13.4 (b)(1) and (b)(2) because the Published Opinion applies a standard for the "other statutes" exemption that conflicts with Supreme Court precedent.

Clark County fails to respond to the Petition's argument that the Published Opinion departs from *Wash. State Patrol* and other precedents which adopt a strict and specific standard for when a Court can find an "other statutes" exemption from the PRA.[2]

Here, the Published Opinion ignored that standard and found an "implied" exemption in a statute dealing with ballot secrecy and security.

[2] Clark County just says that the decision is consistent with Petitioner's earlier cases (*White I and II)*, but those cases were decided before *Wash. State Patrol* and involved requests for pre-tabulated ballots. This Court's decision not to review them is not precedential.

In addition to violating the proper standard, the Published Opinion's entire argument for the exemption is based upon a misreading of statutes and a faulty premise about ballot secrecy and security.

1. The Published Opinion improperly "implies" an "other statute" exemption.

The Published Opinion is inconsistent with the precedents stating that an "other statute" exemption will ***not*** be implied. "[I]f the exemption is not found within the PRA itself, we will find an 'other statute' exemption only when the legislature has made it ***explicitly clear that a specific record, or portions of it, is exempt or otherwise prohibited from production in response to a public records request.***" *Wash. State Patrol*, 185 Wn.2d at 373 (emphasis added).

Clark County argues that because the statute only allows unsealing of ballot containers in four situations, the exemption should be implied from the statute's silence about public records requests. Answer, at 11. But this is exactly opposite of the standard mandated by *Wash. State Patrol:* "Where the legislature has not made a PRA exemption in an 'other statute' explicit, we will not. Thus, 'the lack of prohibitory language … or explicit

exemption' means that a statute does not qualify as an 'other statute' exemption." *Wash. State Patrol,* 185 Wn.2d at 384.

Clark County relies upon *Adams v. King County,* 164 Wn.2d 640, 650 (2008) for the proposition that "Omissions are deemed to be exclusions." Answer, at 11. However, *Adams* was not a Public Records Act case and did not involve the "other statute" exemption, so it cannot be interpreted to weaken this Court's holding in *Wash. State Patrol.*

Nowhere in RCW 29A.60.110 is an explicitly clear exemption as required by *Wash. State Patrol.* The Published Opinion ignores that standard altogether. By instead adopting a lenient and subjective standard, the Published Opinion will undermine future PRA enforcement.

2. The implied exemption found by the Published Opinion is based upon a blatant misrepresentation of the Statute.

The entire basis for Division Two's implying a statutory exemption is based upon its flawed premise that the legislature has defined "ballots" to include electronic images of ballots and, therefore, electronic images of ballots deserve the same security as the ballots themselves. Thus, Clark County argues that "Electronic copies of voted ballots must be maintained in sealed and secured storage" just like paper ballots. Answer at 9.

However, the definition of "ballots" as used in RCW 29A.60.110 obviously only includes the physical, paper ballots that may be later used to

conduct a recount, not the images of those ballots stored on various election systems and computers.

The Legislature did not define ballots to include all electronic images of ballots as the Published Opinion and Clark County suggest. Rather, the statute adopts four different definitions of ballots and states that the "context" determines which applies:

> (1) ***"Ballot" means, as the context implies, either***:
> (a) The issues and offices to be voted upon in a jurisdiction or portion of a jurisdiction at a particular primary, general election, or special election;
> (b) A facsimile of the contents of a particular ballot whether printed on a paper ballot or ballot card or as part of a voting machine or voting device;
> (c) A physical or electronic record of the choices of an individual voter in a particular primary, general election, or special election;
> ***or***
> ***(d) The physical document on which the voter's choices are to be recorded;***

RCW 29A.04.008 (emphasis added). Thus, this Court must consider the context in deciding the definition that applies.

It is nonsensical to believe that the Legislature sought to force all counties to give electronic ballot images the same security as the paper ballots that are used in recounts and election challenges. It is equally absurd that the Legislature sought to force all counties to seal their election computers in a container for months after every election, only to be released

in the case of a recount. Such a sequestration of the election systems would obviously hinder preparations for future elections and would be useless.

When the Court considers which definition of ballot applies in the "context" of RCW 29A.60.110, the only one that makes sense is the definition of RCW 29A.04.008(1)(d) – "***The physical document on which the voter's choices are to be recorded."***

> The context is RCW 29A.60.110, which provides:
>
> > Immediately after their tabulation, ***all ballots counted at a ballot counting center must be sealed in containers*** that identify the primary or election and be retained for at least sixty days or according to federal law, whichever is longer.
> >
> > In the presence of major party observers who are available, ***ballots may be removed from the sealed containers at the elections department and consolidated into one sealed container for storage purposes. The containers may only be opened by the canvassing board as part of the canvass, to conduct recounts, to conduct a random check under RCW 29A.60.170, or by order of the superior court in a contest or election dispute.*** If the canvassing board opens a ballot container, it shall make a full record of the additional tabulation or examination made of the ballots. This record must be added to any other record of the canvassing process in that county.

The context clearly indicates that this statute is about "The physical document on which the voter's choices are to be recorded." RCW 29A.04.008(1)(d).

First, only physical ballots can be "sealed in a container" "for storage purposes." Indeed, the election code in other places confirms that

only the actual physical ballots are to be sealed in containers. 29A.40.110(2) ("After opening the return envelopes, the county canvassing board shall place all of the ballots in secure storage until processing.") It would be absurd to order counties to seal all electronic ballot images (which are stored on computers) in containers. That would likely be impossible and at the very least would require sequestering critical equipment for many months.

Second, the statute only applies to the ballots that are "counted at a counting center," and this is only true of the physical ballots. Thus, this statute on its face does not apply to digital images. This is a vote by mail state where we count physical ballots. *See* RCW 29A.40.110 ("Ballots may be taken from the inner envelopes and all the normal procedural steps may be performed to prepare these ballots for tabulation."); RCW 29A.60.040 (prohibiting counting of ballots that are "found folded together").

Third, the entire point of sealing the ballots in secure containers is to preserve the ballots so that they can "only be opened by the canvassing board as part of the canvass, to conduct recounts, to conduct a random check under RCW 29A.60.170, or by order of the superior court in a contest or election dispute." RCW 29A.60.110. Such procedures use only the physical ballots, not images stored on computers. *See e.g.* 29A.64.041 ("At a time and place established for the recount, the canvassing board …

shall open the sealed containers containing the ballots to be recounted … Ballots shall be handled only by the members of the canvassing board…")

Fourth, the entire chapter of RCW 29A.60 is about the physical ballots. That's why it talks about ballots that are "folded," "damaged" and ultimately "sealed in containers." *See* RCW 29A.60.040 ("A ballot is invalid … if it is found folded together with another ballot."); RCW 29A.60.120 ("All voted ballots must be manually inspected for damage, write-in votes, and incorrect or incomplete marks."); RCW 29A.60.110 (requiring ballots be sealed in containers).

This is all extremely obvious, but also made clear by the Washington Secretary of State's description of election security in Washington. The Secretary of State – the State's chief election officer – explains that our security systems differentiate the paper ballots – which require sealing and are used in recounts – from the election equipment on which ballot images are stored.

As for the paper ballots, the Secretary of State confirms:

> ***We use a paper-based system, which always allows Washington elections officials the opportunity to see first-hand the voter's intent. We can go back to the paper ballot marked by the voter and hand count a race, particularly when the races are very close.***

In contrast, here are the type of precautions that are required for the computers containing the ballot images in question:

> **Network Based Security:**
>
> - All elections systems are protected by state of the art Intrusion Prevention Systems (IPS) and firewalls. Only authorized Internet Protocol (IP) address are allowed access to these systems. This access is running on a network that is only used by authorized partners and the accessible web servers are isolated on a network demilitarized zone (DMZ) with the database servers placed in another secured inside a isolated network.[3]
>
> **Physical Security:**
>
> - The servers are housed in a secure single tenant modern facility with dual redundant alarms, security cameras, and FM200 protection. Physical access to the data center is restricted to only three authorized OSOS full-time IT staff members using security proximity cards and unique keypad pin numbers. The data center is located next door to the police station and response times for alarms average 2 to 8 minutes.[4]

Finally, the Legislature's intent to *not* require security for electronic images can be found in RCW 29A.60.095 which governs "electronic voting systems." Electronic voting systems have both a digital image and must also produce a paper record, yet the Legislature requires only the paper record to be sealed. RCW 29A.60.095 ("The paper record

[3] https://www.sos.wa.gov/elections/System-Security.aspx

[4] https://www.sos.wa.gov/elections/System-Security.aspx

produced under RCW 29A.12.085 must be stored and maintained for use only in the following circumstances:(a) In the event of a manual recount; (b) By order of the county canvassing board; (c) By order of a court of competent jurisdiction; or (d) For use in the random audit of results described in RCW 29A.60.185.")

If the Published Opinion had considered the proper definition of "ballots" as required by RCW 29A.04.008, it would have found that the ballot security provisions have no application to the images at issue in this case. Indeed, Clark County knows that it never sealed up its computers along with the paper ballots, and that would have been a pointless process.

3. The images do not implicate ballot secrecy or security.

The digital images sought by Petitioner – long after the election was certified and final – have nothing to do with the security of the sealed containers of paper ballots at issue in RCW 29A.60.110. Rather, the Published Opinion improperly "implies" an exemption, which is prohibited. *Wash. State Patrol,* 185 Wn.2d at 387.

Petitioner just learned that another Court has recently looked at this identical issue and rightly found that statutes and rules governing the security of paper ballots simply have nothing to do with whether electronic ballot images should be released for public inspection. *See Matter of*

Kosmider v. Whitney, 56 Misc. 3d 354; 46 N.Y.S.3d 403; 2017 N.Y. Misc. LEXIS 327 (2017), attached.

The question in *Kosmider* was whether the Legislature intended the ballot "sealing" laws to prevent the public disclosure of electronic images of the ballots after the election. The test for an exemption there was lenient compared to the "explicitly clear" standard under *Wash. State Patrol.* Yet, the court found that the ballot security laws evidenced no intent to create an exemption:

> Respondent Ferebee reads much more into Election Law § 3-222 [2] than is presented in the statute's text. Under Election Law § 3-222 [2], "Voted ballots shall be preserved for two years after such election and the *packages thereof* may be opened and the contents examined only upon order of a court or judge of competent jurisdiction..."(emphasis added). Affording this language its "natural and most obvious sense" as required by Statutes Law §94, the Court cannot conclude that electronic images of ballots are included in the term "voted ballots" as "voted ballots" are accompanied by "the packages thereof."
> …
>
> Once the electronic images of the voted ballots are preserved, the likelihood that the images and related data and information can be tampered with and impact the outcome of an election becomes remote, if not non-existent. As a result, in the absence of "a clear legislative intent to establish and preserve confidentiality of records" (*Wm. J. Kline & Sons v County of Hamilton*, 235 AD2d at 46), the Court is constrained to conclude that electronic ballot images must be disclosed under FOIL.

46 N.Y.S.3d 408 *et seq.* Notably, New York votes on electronic voting machines so there – unlike here – electronic images are secured and could

be used for canvassing and recounts, but still the court found that images could be disclosed.

Petitioner's case here is much stronger than in *Kosmider* because the Washington Legislature has no interest whatsoever in sealing or securing images, since we use the paper ballots for all canvasses and recounts. The electronic images are never used.

Moreover, the release of ballot images should have no impact on ballot secrecy because the ballot images do not have the voter's name on them. As every voter is aware, the outer envelope and return envelope contain voter information, but the voted ballot indicating the voter's preference – the images of which are at issue here – contains no such information.

Thus, not only is there no exemption, there is no security or secrecy policy that would support the exemption. The only purpose of the exemption will be to prevent academics, journalist, and citizens from watchdogging the election process to keep it secure, at a time when we should be doing the exact opposite.

By eliminating the Supreme Court's "explicitly clear" standard, the Published Opinion fundamentally undermines the PRA.

C. This Court should accept review under RAP 13.4(b)(4) because the Published Opinion hampers public oversight of our

elections and undermines voter confidence.

Clark County's view of election security is simply out-of-date and fails to recognize the threat posed to our election infrastructure. It blithely argues that this appeal does not implicate substantial public interest because its election systems "cannot be hacked" and there is "no evidence of successful election tampering, either specifically in the present case, or with Washington's election system in general." *See* Answer at 17. It claims that disclosure of voted ballots to test voting systems is unnecessary because election integrity is protected by decades-old procedures allowing election observers and recounts in close races. *Id.*

Clark County's rosy view is simply out of step with modern reality. On January 6, 2017, the Department of Homeland Security designated U.S. election systems as part of the Nation's critical infrastructure, a designation established by the Patriot Act and given to "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."[5] This was in part in response to evidence

[5] https://www.eac.gov/assets/1/6/starting_point_us_election_systems_as_Critical_Infrastructure.pdf

that foreign governments had targeted and attacked election systems of various states, *including Washington State*. Once state election systems are targeted, they are highly vulnerable – despite Clark County's feigned or misguided confidence. Indeed, earlier this year, the nation's largest "hacker's convention" set up a "Voting Village" that allowed participants to try to hack various voting systems in use in the United States. "The results were sobering. **By the end of the conference, every piece of equipment in the Voting Village was effectively breached in some manner. Participants with little prior knowledge and only limited tools and resources were quite capable of undermining the confidentiality, integrity, and availability of these systems.**"[6]

Clark County is right that as of this date there is "no evidence of successful hacking" of Washington's voting system, but we now know that foreign governments are trying. The solution is not the "head in the sand" approach endorsed by Clark County. Every level of government must take this threat seriously.

A critical part of the solution is to ensure that we test our elections systems against vulnerabilities and uncover future attacks *when* they take place. To achieve this, we must allow academics, journalists, citizens – and

[6] https://www.defcon.org/images/defcon-25/DEF CON 25 voting village report.pdf (emphasis in original).

even democracy-supportive hackers -- to watchdog the process, which requires them to have access to images of voted ballots.

The current law, when properly applied, gives election advocates this access, while also protecting election privacy and security. The Court should grant review so that it can properly apply the law and allow this access.

III. CONCLUSION

For the foregoing reasons, this Court should accept review of the Published Opinion denying Petitioner relief under the Public Records Act. Petitioner respectfully asks the Court to reverse the Court of Appeal, order production of anonymous and/or redacted records, award Petitioner his reasonable fees and costs for all stages of this litigation, and impose a daily penalty on the County for their PRA violations.

Respectfully submitted this 8th day of December, 2017.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on December 8, 2017, I caused the foregoing Petition for Review to be served in the above-captioned matter upon the parties by E-Service:

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Stated under oath this 8th day of December 2017.

_/S/ Kai McDavid_____
Kai McDavid

User Name: KNOLL LOWNEY

Date and Time: Thursday, December 07, 2017 8:36:00 PM EST

Job Number: 57942901

Document (1)

1. *Matter of Kosmider v Whitney, 56 Misc. 3d 354*

   Client/Matter: Secret Ballot PRA

   Search Terms: 2017 N.Y. Misc. LEXIS 327

   Search Type: Natural Language

   Narrowed by:

Content Type	Narrowed by
Cases	Court: Washington

Matter of Kosmider v Whitney

Supreme Court of New York, Essex County

January 19, 2017, Decided

CV16-0265

Reporter
56 Misc. 3d 354 *; 46 N.Y.S.3d 403 **; 2017 N.Y. Misc. LEXIS 327 ***; 2017 NY Slip Op 27021 ****

[**1]** In the Matter of the Application of Bethany Kosmider, Petitioner, against Mark Whitney and Allison McGahay, as Commissioners of the Essex County Board Of Elections, and William B. Ferebee, as Chairman of the Board of Supervisors of Essex County, Respondents.

Core Terms

ballots, Election, voted, records, electronic, images, court order, preserved, machines, copies, memory, removable, exempted, sworn, disclosure, verified, cards, affirmative defense, electronic media, state board, two year, stored, data and information, reasonable basis, attorney's fees, confidentiality, requires

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James Walsh, Esq., Attorney for Respondent, Allison McGahay, Commissioner of the Essex County Board of Elections.

Daniel T. Manning, Esq., Essex County Attorney, Attorney for Respondent, William B. Ferebee, Chairman of the Board of Supervisors of Essex County.

Judges: Hon. Martin D. Auffredou, J.

Opinion by: Martin D. Auffredou

Opinion

[*355] **[**404]** Martin D. Auffredou, J.

In this *CPLR Article 78* proceeding, the Court must interpret *Election Law § 3-222*, entitled "Preservation of ballots and **[**405]** records of voting machines," and decide whether, under that section, copies of electronic voting ballot images are public records subject to release under the Freedom of Information Law ("FOIL") or, whether *§ 3-222* requires that copies of electronic voting ballot images can only be disclosed upon a Court order. The pertinent provisions of *Election Law § 3-222* which give rise to the dispute provide as follows:

> "1. Except as hereinafter provided, removable memory cards or other similar electronic media shall remain sealed against reuse until such time as the information stored on such media has been preserved in a manner consistent with procedures **[***2]** developed and distributed by the state board of elections. Provided, however, that the information stored on such electronic media and all data and figures therein may be examined upon the order **[****2]** of any court or judge of competent jurisdiction. . .
> 2. Voted ballots shall be preserved for two years after such election and the packages thereof may be opened and the contents examined only upon order of a court or judge of competent jurisdiction, . . ."

[*356] In December 2015, petitioner Bethany Kosmider ("petitioner"), asked Essex County Board of Election Commissioners Mark Whitney and Allison McGahay (hereinafter collectively referred to as "respondent Commissioners," or, individually, as "respondent

Whitney" and "respondent McGahay," respectively), for copies of the electronic voting ballot images recorded by the voting machines used by Essex County in the November 3, 2015 general election. When respondent Commissioners could not agree upon a response to petitioner's request, they referred the matter to the Essex County Attorney, Daniel T. Manning, Esq. ("County Attorney"), who also serves as Essex County's Records Access Officer.[1] Based upon his research, the County Attorney interpreted *Election Law § 3-222 [1]* to **[***3]** mean that when voting records stored on removable memory cards or other similar electronic media have been preserved, the information cannot be disclosed or examined except by court order and denied the request. In addition, because the County Attorney could identify no distinction between a voted paper ballot and a copy of a voted ballot which exists in electronic media, he concluded that *Election Law § 3-222 [2]* mandates the records can only be examined upon a court order until expiration of the two year preservation period. In sum and substance, the County Attorney concluded that because *Election Law § 3-222* requires a court order for release of voted ballots, the records are "specifically exempted from disclosure" under *Public Officers Law § 87 [2] [a]*.

Petitioner appealed the denial of the request to respondent William B. Ferebee, Chairman of the Board of Supervisors of Essex County ("respondent Ferebee"). Respondent Ferebee denied the appeal, stating, "The second sentence of *Section 3-222(1)* provides that the information on removable memory cards may be examined only upon court order. There is nothing in *Section 3-222(1)* which addresses voted ballots copied on to electronic media. This section only relates to the removable memory cards and the prohibition of their reuse." Like the County **[***4]** Attorney, respondent Ferebee concluded there is no distinction between a voted paper ballot and a copy of a ballot electronically recorded. Thus, respondent Ferebee **[*357]** concluded that *Election Law § 3-222 [2]* requires that **[**406]** a court order be obtained to examine all voted ballots until expiration of the two year preservation period.

Of note, in the decision denying the appeal, respondent Ferebee stated:

> "At the outset, neither Mr. Manning nor I would have a problem releasing the requested information but for the language of *Section 3-222* which requires a Court Order. It would be much easier and less time consuming for the County to simply comply with your request, however the vagary and inartfullness of the statute, and its lack of clarity forces me to err on the side of caution and to respectfully deny your request."

Petitioner then commenced this *CPLR Article 78* proceeding. Petitioner maintains that the denial of the FOIL request is erroneous as a matter of law and that the electronic images and cast vote records created by the ballot scanners are accessible pursuant to FOIL. In addition, **[****3]** petitioner maintains that there was no reasonable basis to deny the FOIL request and, therefore, the Court should award petitioner attorneys fees under *Public Officers Law § 89 [4] [c] [i]*.

[*5]** In support of the petition, petitioner presents the affidavit of Douglas A. Kellner, who serves as Co-Chair and one of four Commissioners of the New York State Board of Elections. Mr. Kellner maintains that *Election Law § 3-222 [2]* "requires a court order for examination of original voted ballots," and, in contrast, *Section 3-222 [1]* provides that "a court order is required for examination of voting machines' removable cards 'until such time as the information stored on such media has been preserved.'" According to Mr. Kellner, "once the ballot images and cast vote records have been transferred to permanent storage media, there is no longer any reason to limit public access to copies of those electronic records, even though the original voted paper ballots must remain sealed for two years, unless there is a court order." In further support of the petition, petitioner references a February 21, 2014 advisory opinion of Robert J. Freeman, Executive Director of the State of New York Department of State Committee on Open Government, in which Mr. Freeman offers his interpretation of *Election Law § 3-222*. According to Mr. Freeman, "there is nothing in the language of *subdivision (1) of §3-222* specifying that electronic images of ballots cast are **[*358]** confidential or 'exempted from disclosure.'" Mr. Freeman emphasizes a distinction between *subdivisions [1]* and *[2]* and opines that *subdivision [2]* expressly exempts voted ballots from disclosure during the two year preservation period absent a court order.[2]

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[1] The request was not denominated as a request under FOIL; however, once the request was referred to the County Attorney, it was treated as a request for public records under FOIL.

[2] In the advisory opinion Mr. Freeman refers to "voted ballots" interchangeably with "paper ballots." Of note, the Court finds nothing in *Election Law § 3-222 [3]* to support a conclusion

Respondent Whitney supports the petition. Respondent Whitney's position is that the electronic images created by ballot scanners are accessible under FOIL.

Respondent McGahay opposes the petition and asserts nine affirmative defenses in her verified answer. With respect to affirmative defenses "First," "Second" and "Fourth" through "Eighth," the Court finds that these affirmative defenses are misplaced because petitioner does not challenge the results of the November 3, 2015 general election. Rather, petitioner seeks access to public records under FOIL. In the "Third" affirmative defense, respondent McGahay asserts that this proceeding is barred by the doctrine of laches. The Court finds this affirmative defense unavailing. Respondent McGahay's "Ninth" **[**407]** affirmative defense asserts that the County Attorney, as the Records Access Officer for Essex County, is a necessary party and petitioner has failed to name the County Attorney as a party. The Court disagrees. Respondent Ferebee made **[***6]** the final determination which is challenged in this *CPLR Article 78* proceeding. Respondent McGahay presents no legal argument or case citation to support the contention that the County Attorney is a necessary party in this proceeding.

Together with a verified answer and return, in opposition to the petition, respondent Ferebee presents the affidavit of Daniel T. Manning, Esq., the affidavit of respondent Ferebee and the affidavit of Peter S. Kosinski, a Co-Chair and a Commissioner of the New York State Board of Elections. According to Mr. Kosinski, "The memory devices for the voting systems contain exact copies of the voted ballots and they are sealed against reuse for a limited time, but there is no provision which allows access to the voted ballots." Further, "the Election Law is **[****4]** clear in providing for finality in elections once the counting of ballots and statutorily allowed challenges have occurred. Ballot images contained on removable memory devices are **[*359]** copies of the ballots and as such may not be released absent a court order or upon the request of the committee of the legislature." Mr. Kosinski maintains that judicial intervention is available to review ballots, through a court action, which **[***7]** "allows transparency while at the same time providing a control against frivolous complaints or fishing expeditions designed to undermine the legitimacy of the election." Respondent Ferebee asserts in his affidavit in opposition to the petition:

> "In my opinion, *Section 3-222(2)* is very clear that any 'voted' ballots whether they be the actual ballots, copies of ballots or electronic ballot images must be preserved for two (2) years after the election and may only be opened and examined by court order or a senate or assembly committee."

It is well settled that the "purpose of FOIL is '[t]o promote open government and public accountability, with the law imposing a broad duty on government to make its records available to the public (*Tuck-It-Away Associates, LP v Empire State Development Corp., 54 AD3d 154, 162, 861 N.Y.S.2d 51 [1st Dept 2008]*, quoting *Gould v New York City Police Dep't, 89 N.Y.2d 267, 274, 675 N.E.2d 808, 653 N.Y.S.2d 54 [1996])*, and that Courts are required to construe FOIL liberally so that government records are presumptively available for public inspection unless a statutory exemption applies (*Schenectady County Socy. for Prevention of Cruelty to Animals, Inc. v Mills, 74 AD3d 1417, 1418, 904 N.Y.S.2d 512 [3d Dept 2010])*. Under FOIL, a public agency may deny access to records or portions thereof if they are "specifically exempted from disclosure by state or federal statute" (*Public Officers Law § 87 [2] [a]*]. "So long as there is a clear legislative intent to establish and preserve confidentiality of records, a State statute need not expressly **[***8]** state that it is intended to establish a FOIL exemption (see, *Matter of Capital Newspapers Div. v Burns, 67 NY2d 562, 567, 496 N.E.2d 665, 505 N.Y.S.2d 576*; *Matter of Earbman & Sons v New York City Health & Hosps. Corp., 62 NY2d 75, 81, 464 N.E.2d 437, 476 N.Y.S.2d 69)*" (*Wm. J. Kline & Sons v County of Hamilton, 235 AD2d 44, 46, 663 N.Y.S.2d 339 [3d Dept 1997])*.

The Court has considered the legislative history of *Election Law § 3-222* and, in particular, the 2011 amendments thereto which were enacted through Chapters 169 and 282 of the Laws of 2011. The justification **[**408]** for the amendments set forth in the Bill Jacket to Ch. 169 reads, in part:

> **[*360]** "The logistical transition to the new HAVA compliant voting system in New York State and hence paper-based system with a large electronic storage component mandates that selected provisions of the Election Law be amended to reflect these changes in the voting system. *Section 3-222(1)* is one such provision. As presently constituted, this section currently speaks to locking voting machines used in elections and sets out the

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that electronic ballot images are not exempt from disclosure under FOIL.

> conditions under which such machines may be unlocked and the results examined. In recognition that the results of elections administered with the new HAVA compliant machines are stored on portable memory devices, rather than on the machines themselves, this bill applies similar security and disclosure procedures in place for lever machines and applies them to new HAVA compliant machines."

(Sponsor's Mem, Bill Jacket, L. 2011, ch 169.)

The Division of Budget **[***9]** Bill Memorandum in the Bill Jacket states that the subject and purpose of the Ch. 169 amendments to the bill is, in part:

> "...that the removable memory cards, or other similar electronic data storage devices that are used by the new voting systems, must be retained and preserved in accordance with State Board of Elections regulations. This will ensure that all data collected during an election will be available for any subsequent examination pursuant to a court order or at the direction of a Senate or Assembly committee."

The recommendation included therein provides:

> "This bill adapts current law to reflect the change from mechanical lever voting systems to the new electronic voting systems. It establishes procedures designed to ensure that election data recorded on the new voting systems are safeguarded and protected throughout the tabulation process."

(Division of Budget Bill Mem, Bill Jacket, L 2011, ch 169.)

According to the legislative record for Ch.282, the only amendment to *subdivision [2] of Section 3-222* was the replacement of the term "write-in" which appeared before "ballots" in the original text with the word "voted." Nowhere in the legislative record is there an indication what the State Legislature meant **[***10]** to include in the term "voted ballots" **[*361]** (Bill Jacket, L 2011, ch 282), and the Election Law does not contain a description or definition of "voted ballots."

The Court interprets *Election Law § 3-222 [1]* to mean that the data and information stored on the removable memory cards or other similar electronic media is sealed until such time as it has been preserved. Before preservation, the data and information may only be examined upon court order or at the direction of a Senate or Assembly committee, meaning it is not subject to disclosure under FOIL prior to preservation. However, there is nothing in *Election Law § 3-222 [1]* which addresses accessing the data and information post-preservation. As set forth above, the most that can be discerned from the legislative record concerning *subdivision [1]* is that the amendments were intended to "establish procedures" so that the data recorded on the new electronic voting machines is safeguarded "throughout the tabulation process." This seems to suggest that when the tabulation process is completed, the data and information is no longer in need of safeguarding.

Respondent Ferebee reads much more into *Election Law § 3-222 [2]* than is presented **[**409]** in the statute's text. Under *Election Law § 3-222 [2]*, "Voted ballots shall be preserved for two years after such **[***11]** election and the *packages thereof* may be opened and the contents examined only upon order of a court or judge of competent jurisdiction..."(emphasis added). Affording this language its "natural and most obvious sense" as required by Statutes Law §94, the Court cannot conclude that electronic images of ballots are included in the term "voted ballots" as "voted ballots" are accompanied by "the packages thereof." It is unclear whether "packages" includes electronic ballot images, absent a declaration by the State Legislature of its intention. As conceded by the parties, the term "voted ballots" includes paper ballots, which are confidential and expressly exempted under *Election Law § 3-222 [2]*. That the term "voted ballots" includes electronic images of the paper ballots is less clear. Respondents have not demonstrated the State Legislature intended to provide electronic ballot images with the same cloak of confidentiality as paper ballots. To conclude otherwise would cause the Court to resort to "an artificial or forced construction" of *Election Law § 3-222*, contrary to Statutes Law §94. If the State Legislature intended to include electronic ballot images in the term "voted ballots" in *Election Law § 3-222*, it could easily have done so in **[*362]** the legislation. The Court will not do **[***12]** so here. Once the electronic **[****5]** images of the voted ballots are preserved, the likelihood that the images and related data and information can be tampered with and impact the outcome of an election becomes remote, if not non-existent. As a result, in the absence of "a clear legislative intent to establish and preserve confidentiality of records" (*Wm. J. Kline & Sons v County of Hamilton, 235 AD2d at 46*), the Court is constrained to conclude that electronic ballot images must be disclosed under FOIL.

Turning to petitioner's request for an award of attorney's fees under *Public Officers Law § 89 [4] [c] [i]*, the Court concludes, that in this instance, an award of attorney's

fees is not warranted (*see* *Mineo v New York State Police, 119 AD3d 1140, 1141, 990 N.Y.S.2d 147 [3rd Dept 2014]* [Court has discretion whether attorney's fees should be awarded]). The record reveals that respondents had a reasonable basis to deny the FOIL request. The County Attorney employed extraordinary efforts to obtain input on interpretation of *Election Law § 3-222*, including reaching out to other County Attorneys and the New York State Board of Elections, and made the initial denial of the FOIL request after conducting exhaustive research and analysis. That respondent Ferebee reached the same conclusion when considering the FOIL appeal cannot be viewed as lacking in reasonable basis. The most compelling evidence **[***13]** of a reasonable basis is that respondent Ferebee's interpretation of *Election Law § 3-222* is supported by Peter S. Kosinski, New York State Board of Election Commissioner, as well as respondent McGahay. The fact that the Committee on Open Government rendered an advisory opinion contrary to the interpretation and determination of respondent Ferebee, does not, by itself, compel a finding that respondent Ferebee lacked a reasonable basis to deny access to the records. In addition, the Court finds that *Election Law § 3-222* is incohesive and in need of examination by the State Legislature. In sum, respondents should not be penalized for a good faith interpretation of *Election Law § 3-222*.

Based upon the foregoing, it is hereby

[410]** ORDERED, that the petition is granted insofar as respondents are directed to release to petitioner copies of the electronic ballot images and cast vote records for the general election held on November 3, 2015 maintained by Essex County, pursuant to the provisions of **[*363]** FOIL; and it is further

ORDERED, that petitioner's request for reasonable attorneys fees pursuant to *Public Officers Law § 89 [4] [c] [i]* is denied.

The within constitutes the Decision and Order of this Court.

Dated: January 19, 2017

Hon. Martin D. Auffredou

Justice of the Supreme Court

List of papers considered: **[***14]**

Verified Petition, sworn to June 16, 2016, with Exhibits A - C;

Affidavit of Douglas A. Kellner, sworn to June 13, 2016;

Affidavit of Peter S. Kosinski, sworn to August 10, 2016;

Affidavit of Mark C. Whitney, sworn to October 19, 2016;

Verified Answer of Allison McGahay, verified October 20, 2016, with Attachment A;

Affidavit in Opposition to Petition of Daniel T. Manning, Esq., sworn to October 21, 2016;

Affidavit in Opposition to Petition of William B. Ferebee, sworn to October 21, 2016;

Verified Answer and Return of William B. Ferebee, verified October 21, 2016;

Respondent's Record/Return, dated October 21, 2016, with Record 1 - 14;

Reply Affirmation of Bryan Liam Kennelly, Esq., dated November 10, 2016;

Affidavit of Sharon M. Boisen, sworn to November 10, 2016, with Exhibits A-B; and

Affidavit in Response to Affidavit of Bryan Liam Kennelly of Daniel T. Manning, Esq., sworn to November 18, 2016, with Schedules A and B.

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SMITH & LOWNEY

December 08, 2017 - 2:47 PM

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