April 13, 2011

The Honorable Jon Husted
Secretary of State
180 East Broad Street, 16th Floor
Columbus, Ohio 43215

SYLLABUS: 2011-012

1. A provisional ballot envelope is subject to state elections laws mandating the seal and preservation of ballots until any possible recount or election contest is completed; state law, within the meaning of R.C. 149.43(A)(1)(v) and R.C. 3501.13(C), prohibits the release of provisional ballot envelopes during the time a board of elections is required to preserve ballots under seal. A provisional ballot envelope is a "public record" subject to release once the time has passed during which a board of elections is required to preserve ballots under seal. (2004 Op. Att'y Gen. No. 2004-050, syllabus, paragraph 1, approved and followed.)

2. R.C. 3505.181(B)(5)(b) does not prohibit the release of provisional ballot envelopes. Rather, R.C. 3505.181(B)(5)(b) prohibits the release of particular voter information through the free access system to anyone other than the voter to whom that information pertains. The free access system established pursuant to R.C. 3505.181(B)(5)(b) may be used only by a voter to gain access to information about his individual provisional ballot.

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April 13, 2011

OPINION NO. 2011-012

The Honorable Jon Husted
Secretary of State
180 East Broad Street, 16th Floor
Columbus, Ohio 43215

Dear Secretary of State Husted:

You have requested an opinion on three questions regarding public access to provisional ballot envelopes.[1] Specifically, you wish to know:[2]

1. Is a provisional ballot envelope a public record under R.C. 149.43?

2. If a provisional ballot envelope is a public record, is it subject to disclosure only after any possible recounts or election contests are completed?[3]

3. Is the release of a provisional ballot envelope prohibited by R.C. 3505.181(B)(5)(b) and/or the Help America Vote Act § 302 (42 U.S.C. 15482(a)(5)(B)), or do those statutes govern the free access system itself

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[1] Legislation is pending in the Ohio General Assembly that significantly alters the language of several of the statutes discussed in this opinion, including R.C. 3505.18, R.C. 3505.181, R.C. 3505.182, and R.C. 3505.183. H.B. 76, 129th Gen. A. (2011) (introduced Feb. 1, 2011); Am. H.B. 159, 129th Gen. A. (2011) (introduced March 15, 2011); S.B. 148, 129th Gen. A. (2011) (introduced April 12, 2011); H.B. 194, 129th Gen. A. (2011) (introduced April 12, 2011).

[2] We have reordered your questions for ease of discussion.

[3] R.C. 149.43(B)(1) requires that, "[u]pon request …, all public records responsive to the request shall be promptly prepared and *made available for inspection* to any person at all reasonable times during regular business hours" and "upon request, a public office or person responsible for public records *shall make copies of the requested public record available* at cost and within a reasonable period of time." (Emphasis added.) Thus, the statutory requirement is to permit inspection and copying of public records upon request. Analogous terms such as "release," "disclose," and "access" are used regularly by courts and other legal authorities to describe this mandate.

> such that they only limit access to information about an individual ballot through the free access system?

Statutory Definition of "Public Record"

We begin by addressing your first and second questions together. To determine whether a provisional ballot envelope is a public record under Ohio law, we begin with the statutory definitions of "record" and "public record." A "record" means "any document, device, or item, regardless of physical form or characteristic, … created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G). Generally, a "public record" is a "record" "kept by any public office, including, but not limited to, state, [and] county" offices, subject to several statutory exceptions. R.C. 149.43(A)(1); *see* R.C. 149.43(A)(1)(a)-(aa).

A "public office" "includes any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government." R.C. 149.011(A). A board of elections is established in each county of Ohio, and consists of four qualified electors of the county, for the general purpose of serving as the Secretary of State's representatives. R.C. 3501.06. Given that boards of elections are established by Ohio law to serve a function of government, a board of elections is a "public office" for purposes of R.C. Chapter 149. *See generally* R.C. 309.09(A) (the county "prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and boards"). Thus, a provisional ballot envelope is plainly a (1) document or item that is (2) created and received by and coming under the jurisdiction of a public office of the state or county.

The third requirement of R.C. 149.011(G), that such an item serve to document the functions, decisions, procedures, or other activities of the public office, also is fulfilled by a provisional ballot envelope. R.C. 3505.182 makes clear the essential function of the provisional ballot envelope in addition to its practical function as a paper container for a provisional ballot: "[e]ach individual who casts a provisional ballot under [R.C. 3505.181] shall execute a written affirmation. The form of the written affirmation shall be printed upon the face of the provisional ballot envelope." The written affirmation requires a voter to sign a statement swearing or affirming that the voter is a registered, eligible voter in the proper jurisdiction; affix the voter's date of birth; and furnish the last four digits of the voter's social security number if the voter cannot provide a valid photo identification or other document showing the voter's name and current address. *See* R.C. 3505.182. This affirmation "shall" be executed by each individual who casts a provisional ballot. *Id*. Insofar as a provisional ballot envelope contains the statutorily-required affirmation of a provisional voter, it contains a critical component of a person's provisional vote. A provisional ballot envelope thus serves to document an essential function of a board of elections and the decisions a board makes in determining the validity of a particular provisional ballot. *See* R.C. 3505.182; R.C. 3505.183. Having met this third requirement of R.C. 149.011(G), a provisional ballot envelope is a "record" pursuant to R.C. 149.011(G).

To be a "public record" under R.C. 149.43(A)(1), a "record" must be "kept by" a public office. It is evident from the statutory requirements governing boards of elections that a provisional ballot envelope must be in the possession of a board of elections after it is cast and retained by a board of elections for a specified period of time. *See, e.g.*, R.C. 3505.181(B)(3) ("[a]n election official at the polling place shall transmit … the voter information contained in the written affirmation executed by the individual [on the provisional ballot envelope] … to an appropriate local election official for verification"); R.C. 3505.183(A) ("[w]hen the ballot boxes are delivered to the board of elections from the precincts, the board … shall place the sealed provisional ballot envelopes in a secure location within the office of the board. The sealed provisional ballot envelopes shall remain in that secure location until the validity of those ballots is determined"); R.C. 3505.183(C)(2) ("[p]rovisional ballots that are rejected … shall be preserved in their provisional ballot envelopes unopened until the time provided … for the destruction of all other ballots"). It is clear from these statutes that a provisional ballot envelope is "kept by" a board of elections.

Furthermore, R.C. 3501.13(C) declares that, "[e]xcept as otherwise provided by state or federal law, the *records* of the board [of elections] and papers and books filed in its office *are public records* and open to inspection under such reasonable regulations as shall be established by the board." (Emphasis added.) Thus, since a provisional ballot envelope is a "record" of a board of elections, as we have determined above, a provisional ballot envelope also is, pursuant to R.C. 3501.13(C), a "public record" for purposes of R.C. 149.43, unless a state or federal law provides otherwise.

In addition to the exception in R.C. 3501.13(C) for state or federal laws that limit the public records status of records of a board of elections, one of the 27 exemptions from the definition of "public record" in R.C. 149.43(A)(1)(a)-(aa) is for "[r]ecords the release of which is prohibited by state or federal law." R.C. 149.43(A)(1)(v). Thus, the exception to R.C. 3501.13(C) as well as the exception to the definition of public record found in R.C. 149.43(A)(1)(v) are of particular interest for the purpose of evaluating the status of provisional ballot envelopes as public records.

Voting By Provisional Ballot

R.C. Title 35 governs elections in Ohio and R.C. Chapter 3505 addresses, *inter alia*, provisional ballots. To determine whether any provision of R.C. Title 35 prohibits the release of a provisional ballot envelope, it is helpful to review the process by which a provisional ballot is cast and the path a provisional ballot travels after being cast by a provisional voter.

A person may cast a provisional ballot once he is determined eligible to so vote and executes the written affirmation required by R.C. 3505.181(B)(2).[4] An election official at the polling place

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[4] Among other reasons, a provisional ballot is used when a person is unable or unwilling to provide precinct election officials any of the forms of identification required by R.C. 3505.18(A)(1) (current and valid photo identification, military identification, a copy of a current utility bill, bank statement, government check, paycheck, etc.). R.C. 3505.18(A)(2)-(6).

"transmits" the cast provisional ballot, along with the information contained in the written affirmation executed by the voter, to the "appropriate local election official" to determine whether the person is eligible to vote and thus whether the provisional ballot should be counted. R.C. 3505.181(B)(3), (4).

While "transmit" is not defined for purposes of R.C. Chapter 3505, R.C. 3505.183(A) offers insight as to how provisional ballots are treated in comparison to other ballots. "When the ballot boxes are delivered to the board of elections from the precincts, the board shall separate the provisional ballot envelopes from the rest of the ballots." R.C. 3505.183(A). The sealed provisional ballot envelopes are then placed in "a secure location within the office of the board … [and] shall remain in that secure location until the validity of those ballots is determined." *Id.*

Preservation of Provisional Ballot Envelopes

If a person is deemed ineligible to vote pursuant to R.C. 3505.183(B)(4), the "provisional ballot envelope shall not be opened, and the ballot shall not be counted." R.C. 3505.183(B)(4)(a). "Provisional ballots that are rejected … shall not be counted but shall be preserved in their provisional ballot envelopes unopened until the time provided by [R.C. 3505.31] for the destruction of all other ballots used at the election …, at which time they shall be destroyed." R.C. 3505.183(C)(2).

If a person is deemed eligible to vote pursuant to R.C. 3505.183(B)(3), the "provisional ballot envelope shall be opened, and the ballot shall be placed in a ballot box to be counted." R.C. 3505.183(B)(3). Provisional ballots "shall be counted in the same manner as provided for other ballots" in R.C. 3505.27. R.C. 3505.183(D). The statutes and administrative rules do not specify how or whether a provisional ballot envelope is preserved after a provisional ballot is deemed eligible to be counted and removed from the envelope. All provisional ballot envelopes are kept by boards of elections during the time that determinations are made as to whether the provisional ballots are valid and eligible to be counted. *See* R.C. 3505.183(A) ("the board … shall place the sealed provisional ballot envelopes in a secure location within the office of the board. The sealed provisional ballot envelopes shall remain in that secure location until the validity of those ballots is determined").

The implications of other elections laws dictate that empty provisional ballot envelopes—after valid ballots are removed to be counted—are to be kept by boards of elections for at least as long as

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The statutes addressing voting procedure and provisional ballots offer alternatives to the requirement that a person execute a written affirmation prior to casting a provisional ballot. R.C. 3505.181(B)(6) ("[i]f, at the time that an individual casts a provisional ballot, the individual … declines to execute such an affirmation, the appropriate local election official shall record … the fact that the individual declined to execute such an affirmation and include that information with the transmission of the ballot…. If the individual declines to execute such an affirmation, the appropriate local election official shall record the individual's name and include that information with the transmission of the ballot"); R.C. 3505.18(A)(5) ("if the elector declines to execute an affirmation under [R.C. 3505.18(A)(4)], the elector may cast a provisional ballot under [R.C. 3505.181], the envelope of which ballot shall include the elector's name").

those uncounted provisional ballot envelopes containing invalid ballots are kept pursuant to R.C. 3505.183(C)(2) and R.C. 3505.31. It is essential to preserve the integrity of ballots cast in a given election for the sake of election recounts and contests to election results. *See* R.C. 3515.04 (concerning election recounts, "the board of elections, in the presence of all observers who may be in attendance, shall open the *sealed* containers containing the ballots to be recounted, and shall recount them" (emphasis added)); R.C. 3505.31 ("[t]he board shall *carefully preserve* all ballots prepared and provided by it for use in an election, *whether used or unused*, for sixty days after the day of the election" (emphasis added)). "The reason ballots are kept for a certain period of time following an election is to ensure that, should the ballots need to be recounted or otherwise examined, the manner in which the ballots were voted can be accurately discerned." 2004 Op. Att'y Gen. No. 2004-050, at 2-428. *See also State ex rel. Byrd v. Summit County Bd. of Elections*, 65 Ohio St. 2d 40; 417 N.E.2d 1375 (1981) (syllabus, paragraph 1) (election contests are the "exclusive remedy for a recounting of the votes, or a correction of all errors, frauds, and mistakes which may occur at an election"). The provisional ballot envelope is integral to the determination of whether a ballot is valid and eligible to be counted, and therefore the provisional ballot envelope may be pivotal in a challenge to election results. Thus, empty provisional ballot envelopes should be preserved along with and in a fashion similar to the ballots themselves.

Exceptions to the Definition of Public Record

To explain how R.C. 149.43(A)(1)(v), R.C. 3501.13(C), and the provisions of R.C. Title 35 affect a provisional ballot envelope's status as a "public record," we turn to 2004 Op. Att'y Gen. No. 2004-050, which considered whether ballots cast and pollbooks used in an election, which are held by a county board of elections, are public records under R.C. 149.43. 2004 Op. Att'y Gen. No. 2004-050 concludes that it is a duty of a board of elections "to preserve ballots in sealed containers until any possible recount or election contest is completed." 2004 Op Att'y Gen. No. 2004-050 (syllabus, paragraph 1). *See also* R.C. 3505.31; R.C. 3505.32; R.C. 3515.04. The opinion advises that the release of such ballots "during the time a board of elections is required to preserve them under seal is, therefore, prohibited by state law within the meaning of R.C. 149.43(A)(1)(v)." 2004 Op Att'y Gen. No. 2004-050 (syllabus, paragraph 1). Further, the public's right of inspection is otherwise provided for in state law for purposes of R.C. 3501.13. *Id.* at 2-427. "Such ballots are not, therefore, 'public records' … while they remain under seal." *Id.* (syllabus, paragraph 1). In support of these conclusions, the Attorney General explained that, because the statute governing election recounts requires the ballot containers to be sealed upon the commencement of a recount, ballot containers must be resealed after an election canvass and remain sealed—thus not available for public inspection and copying—until the time for a possible recount has passed. *Id.* at 2-426.

As established at the outset of this opinion, provisional ballot envelopes, like the ballots addressed in 2004 Op. Att'y Gen. No. 2004-050, satisfy the definition of "public record." Nonetheless, pursuant to the exceptions in R.C. 3501.13(C) and R.C. 149.43(A)(1)(v), a state or federal law may prohibit their release. *See* 2004 Op. Att'y Gen. No. 2004-050, at 2-425 ("[b]ecause ballots that have been cast in an election … are 'records' of a board of elections for purposes of R.C. 3501.13, they are: (1) 'public records' for purposes of R.C. 3501.13, '[e]xcept as otherwise provided by state or federal law,' and (2) 'public records' for purposes of R.C. 149.43, unless they are …

'[r]ecords the release of which is prohibited by state or federal law'" (citations and footnote omitted)). Therefore, we apply the same analysis here as was applied in 2004 Op. Att'y Gen. No. 2004-050 to determine how provisional ballot envelopes are to be treated for purposes of public records requests during the time a board of elections is required to preserve ballots under seal. Because state elections laws require ballots to be sealed upon commencement of election recounts or contests to election results, and because provisional ballot envelopes are an essential element of a determination of the validity of a particular provisional ballot and thus crucial to an election recount or contest, provisional ballot envelopes should be withheld from public inspection and copying along with and in a fashion similar to the ballots themselves. That is, provisional ballot envelopes should not be available for public inspection and copying during the time a board of elections is required to preserve ballots under seal.[5]

For the reasons set forth above, and in answer to your first and second questions, a provisional ballot envelope is subject to state elections laws mandating the seal and preservation of ballots until any possible recount or election contest is completed; state law, within the meaning of R.C. 149.43(A)(1)(v) and R.C. 3501.13(C), prohibits the release of provisional ballot envelopes during the time a board of elections is required to preserve ballots under seal. A provisional ballot envelope is a "public record" subject to release once the time has passed during which a board of elections is required to preserve ballots under seal.[6] *See* 2004 Op. Att'y Gen. No. 2004-050 (syllabus, paragraph 1).

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[5] Preserving the integrity of Ohio's electoral system requires that Ohio elections officials remain vigilant against fraudulent activities that would undermine the system. *See generally State ex rel. Conner v. Noctor*, 106 Ohio St. 516, 527-28, 140 N.E. 878 (1922) ("[e]lection laws are designed to preserve the purity and sanctity of the ballot, and to prevent fraud in the conduct of elections"); *In re Contest of Election of County Comm'r*, 31 Ohio Dec. 130, 135, 1919 Ohio Misc. LEXIS 59 (C.P. Franklin County 1919) ("[*f*]*raud* in contemplation of the election law is any artifice, or unfair practice, undue advantage, or secret or intentional violation of duty, trust or confidence, the tendency of which may be to cause actual injury in those interested in elections, the public and parties"). Prohibiting public inspection and copying of provisional ballot envelopes until the time for all election recounts and contests has expired is one way by which elections officials may guard against elections fraud.

[6] Certain personal information appearing on a provisional ballot envelope may be subject to redaction prior to release. "'Redaction' means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a 'record' in [R.C. 149.011]." R.C. 149.43(A)(11).

Opinions of the Attorney General have found that, because persons possess a constitutionally protected privacy right in their social security numbers, such numbers are not public records for purposes of R.C. 149.43. 2005 Op. Att'y Gen. No. 2005-047 (syllabus, paragraph 1); 2004 Op. Att'y Gen. No 2004-045 (syllabus, paragraph 2). *See also State ex rel. Beacon Journal Publ'g Co. v. City of Akron*, 70 Ohio St. 3d 605, 640 N.E.2d 164 (1994) (finding a constitutionally protected right of

The Meaning of R.C. 3505.181(B)(5)(b)

This brings us to your third question. Specific provisions of the federal Help America Vote Act and Ohio's implementation of that Act, 42 U.S.C. § 15482(a)(5)(B) and R.C. 3505.181(B)(5)(b), respectively, require the establishment of a "free access system" for the use of persons who vote provisionally. In Ohio, the free access system is "a toll-free telephone number, that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted," and if not, the reason the vote was not counted. R.C. 3505.181(B)(5)(b). The federal and

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privacy in social security numbers provided by city employees to the city for payroll purposes); *State ex rel. Highlander v. Rudduck*, 103 Ohio St. 3d 370, 2004-Ohio-4952, 816 N.E.2d 213 (2004), at ¶25 (concluding that, because the divorce records in that case had not been properly sealed, the clerk had a duty to disclose such records after the judge had made "any appropriate redactions, e.g., Social Security numbers"); *State ex rel. WLWT-TV5 v. Leis*, 77 Ohio St. 3d 357, 361, 673 N.E.2d 1365 (1997) (stating that social security numbers contained in the investigatory files of a county sheriff or prosecuting attorney "are exempt under R.C. 149.43(A)(1) and the federal constitutional right to privacy"); *Bardes v. Todd*, 139 Ohio App. 3d 938, 944, 746 N.E.2d 229 (Hamilton County 2000) (concerning a court's release of information contained in its divorce records, the court stated, "social security numbers are exempt from the Public Records Act under R.C. 149.43(A)(1) and subject to the federal constitutional right to privacy"). *Cf.* 1996 Op. Att'y Gen. No. 96-034, at 2-135 (suggesting, based on the decision in *State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St. 3d 374, 662 N.E.2d 334 (1996), that a person's expectation of privacy in her social security number may vary depending upon the specific context in which it is furnished to a public office).

Furthermore, an argument may be made that other personal information that appears on a provisional ballot envelope does not meet the definition of "record" because that information does not serve to "document the organization, functions, policies, decisions, procedures, operations, or other activities of the [public] office." R.C. 149.011(G). While a board of elections may use a voter's personal information to determine eligibility to vote, and it may be relevant what information a person provides to prove eligibility, that information may not be relevant to the organization, functions, policies, decisions, procedures, or operations of a board of elections. For example, upon receiving a public records request for a provisional ballot envelope, a board of elections could indicate that a person provided a bank statement to prove his identity, but redact the specific bank account number or other sensitive information based upon the argument that such specific identifying information is not a "record" of the office. *But see* 2004 Op. Att'y Gen. No. 2004-045, at 2-395 ("[w]hile we appreciate the potential harm to an individual whose personal financial information is subject to inspection by the public, neither the language of R.C. 149.43 nor any judicial decisions interpreting that language have determined that information concerning an individual's personal finances is, by its nature, excepted from the definition of "public record" for purposes of R.C. 149.43…. Rather, as recently emphasized by the court in *State ex rel. WBNS TV, Inc. v. Dues*, [101 Ohio St. 3d 406, 2004-Ohio-1497, 805 N.E.2d 1116 (2004),] at ¶ 31, the Ohio Supreme Court 'has not authorized courts or other records custodians to create new exceptions to R.C. 149.43 based on a balancing of interests or *generalized privacy concerns,*' (emphasis added)").

Ohio provisions contain nearly identical language, so for the purpose of our discussion we will refer to the Ohio law.[7] The focus of your question is the second paragraph of R.C. 3505.181(B)(5)(b), which declares:

> The appropriate state or local election official shall establish and maintain reasonable procedures necessary to protect the security, confidentiality, and integrity of *personal information* collected, stored, or otherwise used by the free access system…. Access to information about an individual ballot shall be restricted to the individual who cast the ballot. (Emphasis added.)

R.C. 3505.181(B)(5)(b) is part of R.C. Title 35, addressing elections, and R.C. Chapter 3505, addressing election ballots. This provision does not reference public records in general or Ohio's public records law in particular; rather, it refers to personal information.

You have asked whether this language of R.C. 3505.181(B)(5)(b) prohibits the release of provisional ballot envelopes. Secretary of State Permanent Directive 2010-97 suggests that R.C. 149.43(A)(1)(v)'s exception to the definition of "public record" for records "the release of which is prohibited by state or federal law" applies to provisional ballot envelopes in light of R.C. 3505.181(B)(5)(b). We respectfully disagree with that conclusion.

First, it is critical to note the distinction between records and information in order to understand the operation of R.C. 3505.181(B)(5)(b) and its relationship to R.C. 149.43. R.C. 3505.181(B)(5)(b) requires the protection of *information* used by the free access system.[8] For

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[7] We are not able to provide authoritative interpretations of federal law. 1999 Op. Att'y Gen. No. 99-007, at 2-55. *See, e.g.*, 1997 Op. Att'y Gen. No. 97-025, at 2-146; 1989 Op. Att'y Gen. No. 89-001, at 2-1 n.1; 1988 Op. Att'y Gen. No. 88-007, at 2-21 and 2-22.

[8] R.C. Chapter 1347, Ohio's personal information systems act, concerns systems of personal information maintained by state and local government agencies in Ohio. This chapter does not affect the public's right to access under the public records law:

> The provisions of [R.C. Chapter 1347] shall not be construed to prohibit the release of public records, or the disclosure of personal information in public records, as defined in [R.C. 149.43]….
>
> The disclosure to members of the general public of personal information contained in a public record, as defined in [R.C. 149.43], is not an improper use of personal information under [R.C. Chapter 1347].

R.C. 1347.04(B). Furthermore, R.C. 1347.08, addressing the rights of persons who are the subject of personal information in a personal information system, "does not limit the authority of any person, including a person who is the subject of personal information maintained in a personal information system, to inspect or have copied, pursuant to [R.C. 149.43], a public record as defined in that

context, we note that in Ohio, a voter who calls the free access system telephone number is transferred to the appropriate county board of elections. A county elections official then accesses the pertinent *record*—namely, the voter's provisional ballot envelope—to determine whether the voter's ballot was counted, and if not, the reason it was not counted. The purpose and function of the free access system are to provide voters with access to information about their individual provisional ballots. The free access system itself is not a record, nor does implementation of the free access system create any records. The free access system also is not a gateway for public records requests inasmuch as it cannot be used by the public to request inspection or copying of public records. While a county elections official may access a board of elections record such as a provisional ballot envelope in order to provide information to an individual caller, that record is not released by way of the free access system.

The stated intent of the second paragraph of R.C. 3505.181(B)(5)(b) is to protect the confidentiality of a voter's personal information and to restrict access to information about a particular ballot to only the person who cast that ballot. Examples of personal information used by the free access system include social security numbers and driver's license numbers. The validity and status of a voter's provisional ballot arguably also may be considered personal information. Elections officials should establish and follow "reasonable procedures" to ensure the integrity of the system and, in particular, that a voter receives information about only her provisional ballot through the free access system. R.C. 3505.181(B)(5)(b).

Legal Standards for Interpreting the Public Records Law

Should a board of elections receive a public records request for a provisional ballot envelope, that request must be honored pursuant to R.C. 149.43(B)(1) so long as the time has passed during which a board of elections is required to preserve ballots under seal. *But see also* note 6, *supra*. It is well established by Ohio courts that public records statutes should be construed "liberally to effectuate broad access to records." *Kish v. City of Akron*, 109 Ohio St. 3d 162, 2006-Ohio-1244, 846 N.E.2d 811, at ¶19. *See also State ex rel. Plain Dealer v. Ohio Dep't of Ins.*, 80 Ohio St. 3d 513, 518, 687 N.E.2d 661 (1997); *State ex rel. Gannett Satellite Info. Network, Inc. v. Petro*, 80 Ohio St. 3d 261, 264, 685 N.E.2d 1223 (1997); *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St. 3d 619, 621, 640 N.E.2d 174 (1994). An exception to the public records law's access mandate should be interpreted narrowly. *See State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St. 3d 81, 2008-Ohio-1770, 886 N.E.2d 206, at ¶10 ("[a] custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception"); *State ex rel. Carr v. City of Akron*, 112 Ohio St. 3d 351, 2006-Ohio-6714, 859 N.E.2d 948, at ¶30 ("[i]nsofar as Akron asserts that some of the requested records fall within certain exceptions to disclosure under R.C. 149.43, 'we strictly construe exceptions against the public-records custodian, and the custodian has the burden to establish

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section." R.C. 1347.08(E)(1). *See generally* 1990 Op. Att'y Gen. No 90-007, at 2-33 (explaining why R.C. Chapter 1347 does not apply to the public records statute and stating that "[i]nteraction between R.C. 149.43 and R.C. Chapter 1347 is minimal due to provisions of both that expressly limit the effect of the other").

the applicability of an exception'"). Moreover, "any doubt is resolved in favor of disclosure of public records." *State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St. 3d 374, 376, 662 N.E.2d 334 (1996).

Application of Public Records Law Standards to R.C. 3505.181(B)(5)(b)

With these standards in mind, we look to the language of R.C. 3505.181(B)(5)(b). The provision does not reference the public records law, R.C. 149.43, and does not use the terms "record" or "public record." Nowhere does R.C. 3505.181 or any other provision in R.C. Chapter 3505 set forth an explicit prohibition on the disclosure of public records. Furthermore, R.C. 3505.181(B)(5)(b) specifically addresses information, not records.

In addition, when the General Assembly intends to exclude a record from the definition of public record for purposes of R.C. 149.43, it makes that intention clear in explicit language. *See, e.g.*, R.C. 9.312(A) ("[a] state agency or political subdivision shall keep additional financial information it receives pursuant to a request under this division confidential, except under proper order of a court. The additional financial information is not a public record under [R.C. 149.43]"); R.C. 101.30(B) ("a legislative document arising out of this confidential relationship [between legislative staff and general assembly members and staff] is not a public record for purposes of [R.C. 149.43]"); R.C. 3121.76 ("[i]nformation obtained from a financial institution pursuant to an account information access agreement is not a public record for the purposes of [R.C. 149.43]"); R.C. 3506.18(C) ("[a] voter verified paper audit trail shall be treated as are other ballots for purposes of [R.C. 149.43] and shall be retained in accordance with the county records retention schedule established under [R.C. 149.38] after the relevant time period prescribed for its preservation in [R.C. 3505.31], or as ordered by the secretary of state or a court of competent jurisdiction"). Indeed, within R.C. Title 35, the General Assembly has identified specific types of elections records that are excluded from the definition of "public record." R.C. 3599.161(B) ("[r]ecords relating to the declination of a person to register to vote and to the identity of a voter registration agency through which any particular person registered to vote are not public records for purposes of this section").

Exceptions to the public records law should be interpreted narrowly. Interpreting R.C. 3505.181(B)(5)(b) narrowly, we find no explicit prohibition to the release of public records. R.C. 3505.181(B)(5)(b) does not prohibit the release of provisional ballot envelopes. Rather, R.C. 3505.181(B)(5)(b) prohibits the release of particular voter information through the free access system to anyone other than the voter to whom that information pertains. The free access system established pursuant to R.C. 3505.181(B)(5)(b) may be used only by a voter to gain access to information about his individual provisional ballot.

The analysis and conclusions set forth in this opinion are based upon existing Ohio statutes and Ohio courts' prevailing standards for the interpretation of Ohio's public records statute. If different conclusions are desired, appropriate legislative changes may be made. *See Bd. of Educ. v. Fulton County Budget Comm'n*, 41 Ohio St. 2d 147, 156, 324 N.E.2d 566 (1975); 2010 Op. Att'y Gen. No. 2010-011, at 2-76; 2009 Op. Att'y Gen. No. 2009-006, at 2-47. For example, the General

Assembly may wish to amend R.C. 149.43, R.C. 3505.181(B)(5)(b), or R.C. 3599.161 to exclude provisional ballot envelopes from the definition of public record.

In conclusion, it is my opinion, and you are hereby advised that:

1. A provisional ballot envelope is subject to state elections laws mandating the seal and preservation of ballots until any possible recount or election contest is completed; state law, within the meaning of R.C. 149.43(A)(1)(v) and R.C. 3501.13(C), prohibits the release of provisional ballot envelopes during the time a board of elections is required to preserve ballots under seal. A provisional ballot envelope is a "public record" subject to release once the time has passed during which a board of elections is required to preserve ballots under seal. (2004 Op. Att'y Gen. No. 2004-050, syllabus, paragraph 1, approved and followed.)

2. R.C. 3505.181(B)(5)(b) does not prohibit the release of provisional ballot envelopes. Rather, R.C. 3505.181(B)(5)(b) prohibits the release of particular voter information through the free access system to anyone other than the voter to whom that information pertains. The free access system established pursuant to R.C. 3505.181(B)(5)(b) may be used only by a voter to gain access to information about his individual provisional ballot.

Respectfully,

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