

OPINION NO. 2004-050**Syllabus:**

1. Except as provided by R.C. 3505.31 or R.C. 3505.32 and absent a valid court order to the contrary, a board of elections has a duty to preserve ballots in sealed containers until any possible recount or election contest is completed. The release of 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). Such ballots are not, therefore, "public records" for purposes of R.C. 149.43 while they remain under seal or where

they are subject to a court order prohibiting their release. Similarly, for purposes of R.C. 3501.13, the right of the public to inspect such ballots prior to the completion of any recount or election contest has been "otherwise provided by state or federal law." R.C. 3501.13 does not, therefore, entitle the public to inspect ballots cast in an election until after any possible recount or election contest is completed.

2. Once the time within which a possible recount or election contest may occur has passed, a board of elections remains under a duty to "carefully preserve" ballots used in an election for the remainder of the preservation period prescribed by R.C. 3505.31. Pursuant to R.C. 3501.13, such ballots are subject to public inspection "under such reasonable regulations as shall be established by the board."
3. Following the completion of the canvass of election returns under R.C. 3505.32, pollbooks used in an election are public records of a board of elections and are subject to public inspection in accordance with any reasonable regulations the custodian board of elections has established under R.C. 3501.13, except as may be provided by a proper order of a court.

To: J. Kenneth Blackwell, Secretary of State, Columbus, Ohio
By: Jim Petro, Attorney General, December 27, 2004

You have submitted an opinion request in which you ask whether ballots that have been cast in a public election, as well as pollbooks, that are held by a county board of elections, are public records that must be made available to the public for inspection under R.C. 149.43.

Right of Access to Public Records under R.C. 149.43

The fundamental requirement of Ohio's public records law is set forth in R.C. 149.43(B)(1), which requires, with limited exceptions, a public office to promptly prepare its public records and make them available for inspection to any person "at all reasonable times during regular business hours." R.C. 149.43(B)(1) further requires a public office to make copies of its public records available at cost within a reasonable time. R.C. 149.43(A)(1) defines the term "public record," as used in R.C. 149.43, as meaning, with numerous exceptions set forth therein, "records kept by any public office."¹

Records of Boards of Elections

The General Assembly has specifically provided for public access to records of boards of elections. As stated in R.C. 3501.13, "[e]xcept as otherwise provided by state or federal law, the records of the board 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

¹R.C. 149.43(A)(1) creates exceptions from the definition of "public record" for various types of information, including, among others, medical records, peace officer, firefighter, or EMT residential and familial information, and records the release of which is prohibited by state or federal law.

board,” (emphasis added).² R.C. Title 35 does not contain separate definitions of the terms “records” or “public records,” as used therein. We will presume, therefore, that the General Assembly intends that these terms be read in accordance with the general public records law established by R.C. 149.43. *See generally Eggleston v. Harrison*, 61 Ohio St. 397, 404, 55 N.E. 993 (1900) (“[t]he presumption is that laws are passed with deliberation and with knowledge of all existing ones on the subject. Therefore acts upon the same subject are to be construed as a whole with reference to an entire system of which all are parts”).

Ballots and Pollbooks as Records for Purposes of R.C. 149.43 and R.C. 3501.13

The next part of our analysis requires us to determine whether ballots and pollbooks³ constitute “records,” as that term is used in R.C. 149.43 and R.C. 3501.13. As used in R.C. 149.43, the word “records” “includes any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in [R.C. 1306.01],⁴ 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) (footnote and emphasis added). In order to determine whether ballots and pollbooks are “records” for purposes of R.C. 149.43, we must examine the statutory scheme for the use, preservation, and disposition of ballots and pollbooks.

Ballots in Various Forms

Turning first to ballots, we note that R.C. 3505.08(A) imposes upon each county board of elections a duty to provide ballots for all general and special elections.⁵ As used in R.C. Title 35, except R.C. Chapter 3504,⁶ the word “ballot” means “the official election presentation of offices and candidates, including write-in candidates, and of questions and issues, *and the means by which votes are recorded.*” R.C. 3506.01(B) (emphasis added).

In determining whether ballots are “records” of a board of elections, we must bear in mind that ballots exist in various forms. R.C. Chapter 3506 specifically authorizes and

²*See generally* R.C. 3599.161(B) (in part, establishing the offense of preventing the inspection, “under reasonable regulations established and posted by the board of elections,” of “the public records filed in the office of the board of elections”).

³Your question refers to “pollbooks.” For ease of discussion, this opinion will use the term “pollbooks” to refer to pollbooks and poll lists in which voters place their signatures prior to voting. *See generally* R.C. 3501.30(A) (stating, in pertinent part, “[t]he pollbooks or poll lists shall have certificates appropriately printed on them for the signatures of all the precinct officials, by which they shall certify that, to the best of their knowledge and belief, the pollbooks or poll lists correctly show the names of all electors who voted in the polling place at the election indicated in the pollbook or poll list”).

⁴*See* R.C. 1306.01(G) (defining “electronic record” as meaning “a record created, generated, sent, communicated, received, or stored by electronic means”).

⁵As used in sections of the Ohio Revised Code relating to elections and political communications, “general election” means “the election held on the first Tuesday after the first Monday in each November,” R.C. 3501.01(A), and “special election” means “any election other than those elections defined in other divisions of this section,” R.C. 3501.01(D).

⁶The definition of the word “ballot” prescribed by R.C. 3506.01(B) has no application to R.C. Chapter 3504, which addresses presidential election voting by former residents.

governs the use of ballots, other than paper ballots. For example, R.C. 3506.02 authorizes the use of voting machines in any county if authorized by the county's board of elections, by the county commissioners on recommendation of the board of elections, or by the affirmative vote of a majority of the electors in the county. As defined by R.C. 3506.01(E), "voting machines" are "mechanical or electronic equipment for the direct recording and tabulation of votes." Thus, where voting machines are used to cast ballots, the votes are recorded and counted directly by the machine. As a "means by which votes are recorded," a voting machine also constitutes a "ballot," as that term is defined in R.C. 3506.01(B).⁷

R.C. 3506.02 also authorizes the use of "marking devices" and "automatic tabulating equipment" in a county, if authorized in the same manner as voting machines. *See generally* R.C. 3506.01(A) (defining "marking device," as used in R.C. 3506.02, as meaning "an apparatus operated by a voter to record the voter's choices through the piercing or marking of ballots enabling them to be examined and counted by automatic tabulating equipment"); R.C. 3506.01(C) (defining "automatic tabulating equipment," as used in R.C. 3506.02, as meaning "a machine or interconnected or interrelated machines that will automatically examine and count votes recorded on ballots"). The physical item on which a marking device records a voter's selection is referred to as a "ballot card," R.C. 3506.08, or as a "punch card ballot," R.C. 3506.16(B).⁸ Because punch card ballots record votes, they are another form of "ballot," as defined in R.C. 3506.01(B).

Because votes may be cast through use of paper, punch cards, or mechanical or electronic means, the term "ballots" includes any forms in which a record of a vote exists. *See generally State ex rel. Automatic Registering Machine Co. v. Green*, 121 Ohio St. 301, 308, 168 N.E. 131 (1929) ("the word 'ballot,' as used in the Constitution, the statutes, and in political literature generally, means secret voting in contradistinction to *viva voce*, or open voting"). For purposes of R.C. 149.43, because "ballots" serve as the record of the votes in a public election, and are used by election officials and boards of elections in determining the outcome of elections, *see, e.g.*, R.C. 3505.26(E) (counting voted ballots); R.C. 3505.32 (cavass of returns), they constitute "records" of boards of elections.

Pollbooks

Let us now consider whether pollbooks are "records" of a board of elections for purposes of R.C. 149.43 and R.C. 3501.13. Pursuant to R.C. 3505.18, an elector who wishes to vote at a polling place must first write his name or mark and address in the pollbook. The signature is then compared with the voter's signature on his voter registration card for identification purposes. R.C. 3505.18. The voter's receipt of a ballot is then indicated in the pollbook. *Id.* After the polling place is closed, the pollbook is then used as part of the process of reconciling the number of ballots issued with the number of ballots cast. R.C. 3505.26. Because pollbooks serve to document a board of elections' conduct of an election, they constitute "records" of the board for purposes of R.C. 149.43.

⁷Special provision is made for the recount of an election in which ballots are cast using a direct recording electronic voting machine with a voter verified paper audit trail. Pursuant to R.C. 3506.18(A), in such circumstances, "the voter verified paper audit trail shall serve as the official ballot to be recounted." R.C. 3506.18(B) mandates that all voter verified paper audit trails "be preserved in the same manner and for the same time period as paper ballots are preserved under [R.C. 3505.31]."

⁸R.C. 3506.16(A)(2) defines the term "punch card ballot" as meaning "a ballot card that contains small perforated designated positions that a marking device must pierce to form a hole that records a voter's candidate, question, or issue choice."

Exceptions to the Term “Public Records” for Purposes of R.C. 149.43 and R.C. 3501.13

Because ballots that have been cast in an election and pollbooks used 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,” R.C. 3501.13,⁹ and (2) “public records” for purposes of R.C. 149.43, unless they are excepted from the definition of “public records” set forth in R.C. 149.43(A)(1). One exception to the latter definition is set forth in R.C. 149.43(A)(1)(v), *i.e.*, “[r]ecords the release of which is prohibited by state or federal law.” In order to determine whether ballots that have been cast in a public election and pollbooks used in such an election fit within either exception we must examine the statutory scheme governing the use and custody of ballots and pollbooks.

Use, Disposition, and Preservation of Ballots

According to R.C. 3505.23, “[n]o elector shall leave the polling place until the elector returns to the precinct election officials every ballot issued to the elector ..., whether the elector has or has not placed any marks upon the ballot.”¹⁰ Once the polls are closed, the precinct officials must, among other things, count the voted ballots and then count and tally the votes in accordance with the procedure prescribed by R.C. 3505.27 or as otherwise provided by the Secretary of State or the board of elections. R.C. 3505.26; R.C. 3505.27.¹¹ After determining the results of the ballots, the precinct polling place judges are to prepare a summary of the results for the board of elections, which then transmits the results to the Secretary of State “or to the board of the most populous county of the district which is authorized to canvass the returns.” R.C. 3505.30.

R.C. 3505.31 provides for the disposition of ballots after they have been counted and the results have been certified by precinct officials, in part, as follows:

[The precinct officials], before leaving the polling place, *shall place all ballots that they have counted in containers* provided for that purpose by the board of elections, and *shall seal* each container in a manner that it cannot be opened without breaking the seal or the material of which the container is made. They *shall also seal the pollbook, poll list or signature pollbook*, and

⁹R.C. 3599.161(B) lists certain records that are not public records of a board of elections, *i.e.*, “[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.”

¹⁰Pursuant to R.C. 3505.23, should a voter tear, soil, deface, or erroneously mark a ballot, the voter may return the ballot to the precinct election officials who may issue the voter a new ballot; the returned ballot is then marked as “Defaced.” No more than three ballots may be issued to any voter. R.C. 3505.23. *See generally* R.C. 3599.20 (making it a fifth degree felony to mishandle a ballot in specific ways, including “remov[ing] from the polling place or be[ing] found in unlawful possession of a lawful ballot outside the enclosure provided for voting”).

¹¹*See generally* R.C. 3505.27 (providing, in part, for the segregation of disputed ballots, to be placed in an envelope marked “Disputed Ballots”); R.C. 3505.28 (prohibiting the counting of any ballot that is “marked contrary to law” and requiring any such ballot to be marked “Fraudulent” and placed in an envelope marked “Not Counted” with the reasons for such finding).

tally sheet in a manner that the data contained in these items cannot be seen without breaking the seals. On the outside of these items shall be a plain indication that they are to be filed with the board. The presiding judge shall then deliver to the board the containers of ballots and the sealed pollbook, poll list, and tally sheet, together with all other election reports, materials, and supplies required to be delivered to the board. (Emphasis added.)

Thus, after the polls have closed, R.C. 3505.31 requires precinct officials to place all counted ballots in containers under seal.

The containers of sealed ballots delivered to a board of elections remain sealed until the board, not earlier than the eleventh day or later than the fifteenth day after a general election, begins the canvass of election returns, which must be completed by the day prescribed by the Secretary of State under R.C. 3501.05(U). R.C. 3505.32. In conducting the canvass, the board of elections "shall first open all envelopes containing uncounted ballots and shall count and tally them." R.C. 3505.32(C). *See generally* note 11, *supra*. Then, "the board shall open the sealed container containing the ballots that were counted in the polling place at the election and count those ballots." *Id.* Upon completion of the canvass, "the board shall promptly certify abstracts of the results of such elections within its county, in such forms as the secretary of state prescribes." R.C. 3505.33. It is clear, therefore, that until a board of elections conducts its canvass of election returns under R.C. 3505.32, the ballots from that election are sealed, and cannot be opened by anyone other than the board of elections, and then only in accordance with the procedures set forth in R.C. 3505.32.¹²

Although the General Assembly has not expressly addressed the resealing of ballot containers after a board of elections has completed its canvass, R.C. Chapter 3515 clearly indicates the General Assembly's intent that a board of elections maintain the ballots under seal until any possible recount or election contest is completed. For example, R.C. 3515.04, concerning election recounts, states, in part, that at the time of a recount, "the board of elections, in the presence of all witnesses who may be in attendance, shall open the *sealed* containers containing the ballots to be recounted, and shall recount them." (Emphasis added.) Because a "recount" occurs only after a board of elections has completed its canvass,¹³ the board must reseal the containers after the canvass in order that the containers be sealed in the event of a recount. Similarly, a contest to an election, which may be filed later than a request for a recount,¹⁴ may require that ballots be recounted. R.C. 3515.13.

¹²*See generally, e.g.,* R.C. 3599.19(A) (prohibiting a judge or clerk of elections from, among other things, knowingly and unlawfully opening or permitting to be opened "the sealed package containing registration lists, *ballots*, blanks, pollbooks, and other papers and material to be used in an election" (emphasis added)); R.C. 3599.23(A)(1) (prohibiting certain persons from, among other things, knowingly and unlawfully opening or permitting to be opened a sealed package containing ballots).

¹³R.C. 3515.02 (stating, in part, that an "application for recount shall be filed within five days after the day upon which the board of elections of such county declares the results of such election").

¹⁴*See* R.C. 3515.09 (stating, in part, "[a] contest of election shall be commenced by the filing of a petition with the clerk of the appropriate court ... within fifteen days after the results of any such nomination or election have been ascertained and announced by the proper authority, or if there is a recount, within ten days after the results of the recount of such nomination or election have been ascertained and announced by the proper authority").

While R.C. 3515.13 does not mention the opening of sealed containers in which the ballots are contained, I believe that R.C. 3515.13 must be read *in pari materia* with R.C. 3515.04, which establishes the manner in which a recount is to be conducted, to require that ballots subject to such a recount, whether pursuant to a request for recount or in the process of an election contest, be presented for recount in sealed containers as is required by R.C. 3515.04. During the period in which ballots are under seal, (1) the release of such ballots is prohibited by state law for purposes of R.C. 149.43, and (2) the public's right of inspection is otherwise provided for in state law for purposes of R.C. 3501.13. Thus, neither R.C. 149.43 nor R.C. 3501.13 authorizes the public to inspect such ballots while they remain under seal.

In addition to the procedure for the sealing and unsealing of ballot containers under R.C. 3505.31 and R.C. 3505.32, R.C. 3505.31 imposes upon a board of elections a broader duty to "carefully preserve" ballots provided by the board for use in an election.¹⁵ According to *The American Heritage Dictionary* 980 (2d college ed. 1985), the transitive verb "preserve" means, in part: "1. To keep safe from injury, peril, or other adversity; protect. 2. To keep in perfect or unaltered condition; maintain unchanged. 3. To keep or maintain intact." See generally R.C. 1.42 (unless a word has acquired a technical or particular meaning, it shall be

¹⁵R.C. 3505.31, in part, describes the board's duty to preserve ballots, as follows:

The 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, *except* that, if an election includes the nomination or election of candidates for any of the offices of president, vice-president, presidential elector, member of the senate of the congress of the United States, or member of the house of representatives of the congress of the United States, the board shall carefully preserve all ballots prepared and provided by it for use in that election, whether used or unused, for *twenty-two months* after the day of the election. *If an election is held within that sixty-day period, the board shall have authority to transfer those ballots to other containers to preserve them until the sixty-day period has expired.* After that sixty-day period, the ballots shall be disposed of by the board in a manner that the board orders, or where voting machines have been used the counters may be turned back to zero; provided that the secretary of state, within that sixty-day period, may order the board to preserve the ballots or any part of the ballots for a longer period of time, in which event the board shall preserve those ballots for that longer period of time.

In counties where voting machines are used, if an election is to be held within the sixty days immediately following a primary, general, or special election or within any period of time within which the ballots have been ordered preserved by the secretary of state or a court of competent jurisdiction, the board, after giving notice to all interested parties and affording them an opportunity to have a representative present, shall open the compartments of the machines and, without unlocking the machines, shall recanvass the vote cast in them as if a recount were being held. The results shall be certified by the board, and this certification shall be filed in the board's office and retained for the remainder of the period for which ballots must be kept. After preparation of the certificate, the counters may be turned back to zero, and the machines may be used for the election. (Emphasis added.)

construed according to its common usage). 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. See *Portis v. Summit County Bd. of Elections*, 67 Ohio St. 3d 590, 591-92, 621 N.E.2d 1202 (1993) (“[a]n election contest, under the statute, is to ascertain and decide which candidate received the highest number of legal votes.’ 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’” (citations omitted)).¹⁶ Thus, although ballots used in an election will not necessarily remain under seal throughout the entire period for which a board of elections must carefully preserve them, the board’s duty to “carefully preserve” the ballots requires the board to keep such ballots safe, in an unaltered condition, as they were voted for the entire period of preservation.¹⁷ R.C. 3501.13, which makes board of elections records “open to inspection under such reasonable regulations as shall be established by the board [of elections],” provides the means by which a board of elections may ensure that ballots will be carefully preserved, *i.e.*, unaltered, even during their inspection by the public.

We also note that there have been instances in which the preservation or inspection of ballots, as well as pollbooks, used in an election has been otherwise provided for by court order. See, *e.g.*, *In re Election of June 2, 1992*, 64 Ohio St. 3d 1215, 597 N.E.2d 516 (1992) (ordering certain boards of elections, in the course of an election contest, to allow inspection of pollbooks); *In re Election of November 6, 1990*, 57 Ohio St. 3d 605, 565 N.E.2d 824 (1991) (ordering, in great detail, the manner in which ballots and pollbooks from particular election were to be preserved by boards of elections for purposes of election contest). See generally R.C. 3515.12 (stating, in part, “[t]he court with which a petition to contest an election is filed may summon and compel the attendance of witnesses, including officers of such election, and compel the production of all ballot boxes, marking devices, lists, books, ballots, tally sheets, and other records, papers, documents, and materials which may be required at the hearing”). Thus, there may be circumstances in which the preservation or inspection of ballots, as well as pollbooks, will be governed by court order, rather than by statute. See generally 1993 Op. Att’y Gen. No. 93-080 at 2-401 (“[i]t is a well-settled principle of law in Ohio that when an agency of the state is the subject of a court order, the agency may: (1) obey that order; (2) seek to have the order changed by the courts; or (3) disobey the order at its peril”).

Summary of Board of Elections’ Duties Concerning Public Inspection of Ballots

Based upon the foregoing, we conclude that, except as provided by R.C. 3505.31 or R.C. 3505.32 and absent a valid court order to the contrary, a board of elections has a duty

¹⁶See generally, *e.g.*, R.C. 3515.13 (stating in part, “[i]f any contest of election involves a recount of the ballots in any precincts, the court shall immediately order the ballots of the precincts in which the recount is demanded to be sent to the court in such manner as the court designates, and such court may appoint two master commissioners of opposite political parties to supervise the making of the recount”); *State v. Jackson*, 102 Ohio St. 3d 380, 2004-Ohio-3206, 811 N.E.2d 68 (2004), at ¶ 36 (finding that the purpose of the prohibitions established by R.C. 3599.20, *see n.10, supra*, is “to serve the broader purpose of protecting electors from any treatment of the ballot inconsistent with the right to vote”).

¹⁷R.C. 3505.31 has not prescribed a uniform method of preservation for all ballots in the event that an election occurs prior to the expiration of the preservation period for those ballots. See n.15, *supra*. Although the General Assembly has provided preservation alternatives for ballots that must be preserved for sixty days, there is no similar preservation alternative for those ballots that must be preserved for twenty-two months.

to preserve ballots in sealed containers until any possible recount or election contest is completed. The release of 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). Such ballots are not, therefore, "public records" for purposes of R.C. 149.43 while they remain under seal or where they are subject to a court order prohibiting their release. Similarly, for purposes of R.C. 3501.13, the right of the public to inspect such ballots prior to the completion of any recount or election contest has been "otherwise provided by state or federal law." R.C. 3501.13 does not, therefore, entitle the public to inspect ballots cast in an election until after any possible recount or election contest is completed.

Once the time within which a possible recount or election contest may occur has passed, a board of elections remains under a duty to "carefully preserve" ballots used in an election for the remainder of the preservation period prescribed by R.C. 3505.31, *see* note 15, *supra*. Pursuant to R.C. 3501.13, such ballots are subject to public inspection during the remainder of the preservation period "under such reasonable regulations as shall be established by the board."

Disposition and Preservation of Pollbooks

Turning now to the question whether the release of information in the pollbooks is prohibited by state or federal law for purposes of R.C. 149.43(A)(1)(v) or whether public inspection of pollbooks that have been used in an election has been otherwise provided for by law for purposes of R.C. 3501.13, we begin by noting that R.C. 3505.31, in part, requires precinct officials, after determining the polling place's election results, to "seal the pollbook, poll list or signature pollbook, and tally sheet in a manner that the data contained in these items cannot be seen without breaking the seals.... The presiding judge shall then deliver to the board [of elections] the ... sealed pollbook, poll list, and tally sheet." Once a sealed pollbook has been delivered to a board of elections, R.C. 3505.32(D) authorizes the board, prior to the tenth day following an election, to examine the pollbook and other records and to make certain corrections in them.¹⁸ No other statute provides for the unsealing of pollbooks or for the resealing of pollbooks after their use under R.C. 3505.32. Thus, following the canvass of election returns, a board of elections may be in possession of both sealed and unsealed pollbooks.

In addition to the statutory provisions concerning the sealing of pollbooks and the use of pollbooks by boards of elections in the ten-day period immediately following the

¹⁸R.C. 3505.32(D) states:

Prior to the tenth day after a primary, general, or special election, the board may examine the pollbooks, poll lists, and tally sheets received from each polling place for its files and may compare the results of the voting in any polling place with the summary statement received from the polling place. If the board finds that any of these records or any portion of them is missing, or that they are incomplete, not properly certified, or ambiguous, or that the results of the voting in the polling place as shown on the summary statement from the polling place are different from the results of the voting in the polling place as shown by the pollbook, poll list, or tally sheet from the polling place, or that there is any other defect in the records, *the board may make whatever changes to the pollbook, poll list, or tally sheet it determines to be proper in order to correct the errors or defects.* (Emphasis added.)

election in which they were used, the General Assembly has imposed upon boards of elections additional duties concerning the safeguarding of pollbooks. As described, in part, by R.C. 3505.31:

The board *shall carefully preserve* the pollbook, poll list or signature pollbook, and tally sheet delivered to it from each polling place *until it has completed the official canvass of the election* returns from all precincts in which electors were entitled to vote at an election, and has prepared and certified the abstracts of election returns, as required by law. The board *shall not break*, or permit anyone to break, the *seals upon the pollbook*, poll list or signature pollbook, and tally sheet, *or make*, or permit any one to make, *any changes or notations in these items, while they are in its custody*, except as provided by [R.C. 3505.32].

....

Pollbooks, poll lists or signature pollbooks, tally sheets, summary statements, and other records and returns of an election delivered to it from polling places shall be *carefully preserved by the board for two years* after the day of the election in which they were used, and shall then be disposed of by the board in a manner that the board orders. (Emphasis added.)

Thus, R.C. 3505.31 requires a board of elections to “carefully preserve” pollbooks delivered to it, not only until “it has completed the official canvass of the election returns from all precincts in which electors were entitled to vote at an election, and has prepared and certified the abstracts of election returns,” but for two years from the date of the election in which they were used.

In determining the scope of the public’s right to inspect pollbooks used in an election, we must consider the effect of the prohibition in R.C. 3505.31 against breaking the seal on a pollbook. By its terms, this prohibition applies to the period in which sealed pollbooks are in the “custody” of a board of elections. R.C. 3505.31 does not define the word “custody” as used therein. The common meaning of the word “custody,” however, is set forth in *Black’s Law Dictionary* 384 (6th ed. 1990), in part, as follows:

The care and control of a thing or person. The keeping, guarding, care, watch, inspection, *preservation* or security of a thing, carrying with it the idea of the thing being within the *immediate personal care and control* of the person to whose custody it is subjected. Immediate charge and control, and not the final, absolute control of ownership, implying responsibility for the *protection and preservation* of the thing in custody. (Emphasis added.)

See generally R.C. 1.42 (common meaning of language used in statute).

Although the General Assembly has imposed upon boards of elections the duty to “carefully preserve” pollbooks used in an election for two years thereafter, the General Assembly could not reasonably have intended that the board members maintain “immediate personal care and control,” *Black’s Law Dictionary* 384 (defining “custody”), and thus “custody,” of such pollbooks for the entire two-year preservation period.

Rather, the statutory scheme governing the use of pollbooks in an election provides for a board of elections’ use of pollbooks in executing its duties under R.C. 3505.32, *i.e.*, correcting certain errors and canvassing election returns. During such process, a board of elections may actually correct or use information contained in the pollbooks. The election

process does not, thereafter, require a board of elections otherwise to make use of such pollbooks. Thus, following the canvass of election returns, a board of elections retains the duty to “carefully preserve” the pollbooks under such reasonable regulations that the board must adopt.¹⁹ This duty does not, however, require the board members to retain personal care and control, *i.e.*, “custody,” of such pollbooks, but merely to keep such pollbooks safe, in an unaltered condition, as they were used in the election process. We conclude, therefore, that the prohibition in R.C. 3501.31 against breaking the seal on a pollbook applies only to the period in which a board of elections has custody of the pollbooks for purposes of carrying out its duties under R.C. 3505.32, and not to the entire two-year period following the election in which the pollbooks were used.

Following the completion of the canvass of election returns, R.C. 3505.31 does not prohibit the release of, or otherwise provide for the inspection of, pollbooks, whether sealed or unsealed, for purposes of R.C. 149.43 and R.C. 3501.13. Therefore, once a board of elections has completed the canvass of election returns, pollbooks used in an election are subject to public inspection under any reasonable regulations adopted by the board of elections in accordance with R.C. 3501.13.

As a final matter, we note that, as is the case with ballots used in an election, the use, disposition, and preservation of pollbooks used in an election may, in certain instances, be governed by a court order rather than by statute. *See, e.g.*, R.C. 3515.12 (in the event of an election contest, a court may order the production of, among other things, pollbooks); *In re Election of June 2, 1992*, 64 Ohio St. 3d 1215, 597 N.E.2d 516 (1992); *In re Election of November 6, 1990*, 57 Ohio St. 3d 605, 565 N.E.2d 824 (1991).

Summary of Board of Elections’ Duties Concerning Public Inspection of Pollbooks

Following the completion of the canvass of election returns under R.C. 3505.32, pollbooks used in an election are public records of a board of elections and are subject to public inspection in accordance with any reasonable regulations the custodian board of elections has established under R.C. 3501.13, except as may be provided by a proper order of a court.

Conclusions

In answer to your questions, we conclude that:

1. Except as provided by R.C. 3505.31 or R.C. 3505.32 and absent a valid court order to the contrary, a board of elections has a duty to preserve ballots in sealed containers until any possible recount or election contest is completed. The release of 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). Such ballots are not, therefore, “public records” for purposes of R.C. 149.43 while they remain under seal or where they are subject to a court order prohibiting their release. Similar-

¹⁹As with the safeguarding of ballots, the safeguarding of the contents of a pollbook is a matter that should be addressed by each board of elections in the rules of inspection they must adopt under R.C. 3501.13. We strongly advise, therefore, that boards of elections include in such regulations reasonable safeguards to protect against the destruction, loss, or alteration of pollbooks throughout the entire period the board must preserve them.

ly, for purposes of R.C. 3501.13, the right of the public to inspect such ballots prior to the completion of any recount or election contest has been "otherwise provided by state or federal law." R.C. 3501.13 does not, therefore, entitle the public to inspect ballots cast in an election until after any possible recount or election contest is completed.

2. Once the time within which a possible recount or election contest may occur has passed, a board of elections remains under a duty to "carefully preserve" ballots used in an election for the remainder of the preservation period prescribed by R.C. 3505.31. Pursuant to R.C. 3501.13, such ballots are subject to public inspection "under such reasonable regulations as shall be established by the board."
3. Following the completion of the canvass of election returns under R.C. 3505.32, pollbooks used in an election are public records of a board of elections and are subject to public inspection in accordance with any reasonable regulations the custodian board of elections has established under R.C. 3501.13, except as may be provided by a proper order of a court.