IN THE CIRCUIT COURT OF GREENE COUNTY
THIRTY-FIRST JUDICIAL CIRCUIT
STATE OF MISSOURI

SHANE SCHOELLER,

Plaintiff,

v.

LAURIE HUDDLESTON,

Defendant.

Case No. 2231-CC00975

CONSENT JUDGMENT

The parties having stipulated and consented to the relief set forth below and the entry of this Consent Judgment, the Court rules as follows:

FINDINGS OF FACT

1. Plaintiff Shane Schoeller is the duly elected County Clerk for Greene County, Missouri, and in this capacity he is tasked with overseeing Greene County's elections and insuring the integrity of those elections.
2. Huddleston is a resident of Greene County, Missouri.
3. On August 30, 2022, Huddleston sent the Plaintiff a public records request pursuant to Chapter 610 of the Missouri Revised Statutes asking the "Cast Vote Record for the General Election 2020."
4. Schoeller initiated this lawsuit pursuant to § 610.027.6, RSMo., because he was uncertain as to whether, in light of § 115.493, RSMo., it would be legal for

his office to produce the records that Huddleston had requested.

5. Section 115.493, RSMo., does not permit election authorities to open or allow the inspection of "voted ballots, ballot cards, processed ballot materials in electronic form, and write-in forms... except upon order of a legislative body trying an election contest, a court or a grand jury" within 22-months after the date of the election.

6. Because of the volume of cast vote record requests he received prior to the 22-months after the date of the 2020 general election, Schoeller voluntarily retained possession of all records and electronic data relating to that election past the period required by law and chose not to destroy any of those records or data.

7. The U.S. Department of Commerce's National Institute of Standards and Technology defines "cast vote record" ("CVR") as an electronic record of voters' selections that allow for tabulating election responses and auditing elections by comparing paper ballots or paper records of voter selections against the CVR.

8. For the 2020 general election, the Greene County Clerk's Office ("the Office") used the Election Systems & Software ("ES&S") DS200 and DS450 as election tabulation equipment.

9. Each of these types of electronic voting machines reads and stores data based on marks made on voted ballots and also captures images of each voted ballot.

10. All of the information generated by these electronic voting machines – raw data

and ballot images alike – is stored on an encrypted, removable USB flash drive which can be used to transfer results to the Election Reporting Manager program.

11. For purposes of Huddleston's request, the raw data collected from electronic voting machines that was transferred to the Election Reporting Manager program constitutes "cast vote records;" it is distinguishable from the images that the electronic voting machines preserve of the voted ballots themselves.

12. The parties agree that the ballot images stored by the electronic voting machines do not constitute "cast vote records" and are not responsive to Huddleston's request.

13. The Office currently retains the raw data that electronic voting machines generated and transferred to the Election Reporting Manager in connection with the 2020 general election; the data is stored on an external hard drive at the Office.

14. The raw data generated by the electronic voting machines and transferred to the Election Reporting Manager may be used to generate a "report," commonly in a format such as Microsoft Excel or a similar type of program, that allows for the review and assessment of the cast vote records that are responsive to Huddleston's request.

15. In good faith, the parties believe that, with the permission of the Court, this raw data can be incorporated into a report in such a way that it will not allow a person reviewing the report to connect any particular voting choice back to

the individual voter who made that choice.

16. Although the Office's Petition raised the question of whether the Sunshine Law requires it to produce this sort of a report absent a Court Order, this question is moot because the Office has decided (with permission of the Court) to voluntarily produce CVR reports as requested by Ms. Huddleston to the extent it is permitted to do so by law to ensure the secrecy of the ballot on behalf of the voter is not compromised. *See* RSMo. § 115.635(9).

17. Consequently, this consent judgment leaves open the question of whether the Sunshine Law *requires* the Office to produce such a report when a citizen asks them to do so.

CONCLUSIONS OF LAW

"Missouri law properly recognizes the public interest in an open government." *Librach v. Cooper*, 778 S.W.2d 351, 356 (Mo. App. E.D. 1989). Section 610.011.1, RSMo., states "[i]t is the public policy of this state that... records... of public governmental bodies be open to the public unless otherwise provided by law. Sections 610.010 to 610.200 shall be liberally construed and their exceptions strictly construed to promote this public policy." In other words, public records are open to the public unless a statute protects their disclosure and even in the context of this state's election laws, "[e]xceptions to the Sunshine Law must be strictly construed in favor of open records." *Roland v. St. Louis City Bd. of Election Comm'rs*, 590 S.W.3d 315, 320 (Mo. banc 2019).

The data constituting the cast vote records that Huddleston has requested are "public records" within the meaning of § 610.010(6), RSMo., because they are electronically stored and retained by the Office. *See Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 882 (Mo. banc 1999) (even records permitted to be destroyed on a regular basis are subject to production under Sunshine Law if retained at the time a request is submitted). Section 610.029, RSMo., allows a public governmental body to produce to citizens public records that are stored in an electronic format that allows "viewing and printing of the records." The manuals for the electronic voting machines used by the Office specify that cast vote records may be produced "in various formats including: Microsoft Excel Sheet (.xlsx); PDF; HTML," and the manuals also describe the process for producing reports in these formats. As no provision of Missouri law forbids the production of the requested cast vote records, they may be produced in an electronic format as contemplated by § 610.029, so long as it is in a manner that protects the secrecy of the ballot as is required in § 115.635(9), RSMo.

As explained in his Petition, Schoeller brought this lawsuit because § 115.493, RSMo., prohibits election authorities from opening or allowing the inspection of "voted ballots, ballot cards, processed ballot materials in electronic form and write-in forms... except upon order of a legislative body trying an election contest, a court or a grand jury;" he was uncertain whether this prohibition applied to the records Huddleston has requested.[1] It is apparent that cast vote records are not "voted ballots," "ballot cards," or "write-in forms," so the question is whether they constitute

[1] Section 610.027.6, RSMo., specifically authorizes a public governmental body that is in doubt about its authority to withhold records to bring suit for the purpose of ascertaining the propriety of doing so.

"processed ballot materials in electronic form." The parties agree that the purpose of § 115.493 is to ensure the confidentiality of individual ballots and the preferences of individual voters as displayed on those voted ballots. *See State ex rel. Miller v. O'Malley*, 117 S.W.2d 319, 326 (Mo. banc 1938).

Consequently, they agree that insofar as the electronic voting machines preserve images of voted ballots, the statutory term "processed ballot materials in electronic form" applies to those images. But the manuals for the electronic voting machines the Office used in relation to the 2020 election state that they can "export a set of cast vote level data" in such a way that there is "[n]o compromise of voter privacy." Insofar as the raw data gathered by electronic voting machines can be produced in such a way that neither replicates the appearance of any voted ballot nor reveals the preferences of any individual voter, the raw data itself does not constitute "processed ballot materials in electronic form."

Schoeller's First Amended Petition also notes that § 115.493 makes reference to "computer programs relating to each election" and raises the question of whether the statute might prohibit the production of cast vote records if they fall into this category. A careful reading of § 115.493 reveals that even if cast vote records *are* "computer programs relating to" an election, this category is *not* among those that the statute makes confidential. Instead, the statute merely requires election authorities to maintain such computer programs for at least "twenty-two months after the date of the election" and allows for—but does not require—their destruction after that period has elapsed. Because § 115.493 does not prohibit election authorities

from producing "computer programs relating to" an election and because Schoeller still voluntarily retained the requested records at the time he initiated this lawsuit, this Court need not answer the question of whether the cast vote records Huddleston has requested would fall into this category.[2]

The First Amended Petition raised the question of whether the Sunshine Law required the Office to produce what it termed "a report that does not already exist." Huddleston responded that the cast vote records are public information stored in an electronic format and that § 610.029.1, RSMo., says that if a public governmental body "keeps a record on a system capable of allowing the copying of electronic documents into other electronic documents, the public governmental body shall provide data to the public in such electronic format, if requested." Schoeller has since clarified that his goal in this matter is to produce to Huddleston all public records that Missouri law allows him to produce, so long as the secrecy of the ballot is not compromised.

In light of this position and the Court's clarification that § 115.493 does not prohibit Schoeller from providing the cast vote records that Huddleston has requested, there is no remaining dispute between the parties that requires this Court to address the question of whether the Office would be *required* to produce the requested information if the data requested can be randomized in such a manner as to protect the secrecy of the ballot.

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[2] Once litigation has begun regarding specific records that a citizen has requested, the public records at issue may not be transferred, altered, destroyed, or otherwise disposed of "until the court directs otherwise." § 610.027.1, RSMo. This consent judgment expresses no opinion as to whether § 115.493 requires election authorities to retain cast vote records on the basis that they constitute "computer programs relating to" an election.

Huddleston has requested an award of her costs and reasonable attorney fees. Where a public governmental body brings a declaratory judgment action pursuant to § 610.027.6, it "*must* shoulder the costs for both itself and the party against whom it filed suit." *City of Byrnes Mill v. Limesand*, 599 S.W.3d 466, 477 (Mo. App. E.D. 2020) (emphasis in original) (citing *Hemeyer*, 6 S.W.3d at 883); *see also Roland*, 590 S.W.3d at 323. Here, Schoeller specifically brought this action pursuant to § 610.027.6. As such, the Office is required to pay Huddleston an amount sufficient to cover the costs and reasonable attorney fees accrued in defending her position in this case.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

A. The records Huddleston requested by way of her public records request pursuant to Chapter 610 of the Missouri Revised Statutes dated August 30, 2022 may be lawfully produced by Schoeller and the Office to Huddleston, provided that the secrecy of the ballot be maintained; and

B. The term "processed ballot materials in electronic form" as used in § 115.493, RSMo., refers to electronic images of voted ballots, but does not refer to other raw data gathered by electronic voting machines which may be anonymized and produced in the form of an electronic spreadsheet such as a Microsoft Excel file;

C. Within forty-five (45) days of the entry of this Judgment, the Office shall produce to Huddleston a Microsoft Excel file that contains the cast vote records from the 2020 general election; and

D. Although the Office expressed concern that in certain limited circumstances ballot style information and precinct location information could potentially be used to connect a particular voter to a specific ballot's information in a cast vote record and the Office would have preferred to withhold all information regarding ballot style and precinct location from the cast vote record data to be produced, the Court accepts the compromise the parties have reached under which the Office is permitted to remove ballot style and precinct location information from the parts of the cast vote record that relate to intrastate voters, military and overseas voters, ballots cast at the Central Polling Location, or any precinct in which fewer than fifty voters were eligible to use a particular ballot style; and

E. The Court retains continuing jurisdiction over this lawsuit during the pendency of the production of the records. In the event the Office identifies and presents evidence demonstrating that some additional part of the information responsive to Huddleston's requests might allow a person reviewing the records to discern the choices specific individual voters made on their ballots, or if the Office experiences unforeseen technical difficulties or is otherwise unable create such an Excel file as contemplated above within the forty-five (45) days due to circumstances outside of its control, the Office shall be entitled to request appropriate relief from the Court.

F. Within forty-five (45) days of the entry of this Judgment, the Office shall pay Huddleston all costs and reasonable attorney fees in the amount of Twenty Thousand dollars and 00/100 ($20,000.00).

The Honorable Joshua Christensen

1/25/2024
Date