IN THE MATTER OF	:	**IN THE COURT OF COMMON PLEAS**
	:	
MICHELLE PREVITE,	:	**OF ERIE COUNTY, PENNSYLVANIA**
Appellee/Requester	:	
	:	
VS.	:	
	:	
ERIE COUNTY BOARD OF ELECTIONS,	:	
Appellant/Respondent	:	**No.: 12720 – 2022**
	:	

COMMON PLEAS COURT
ERIE, PA
2023 MAR 30 PM 3:23
DEPARTMENT OF RECORDS
PROTHONOTARY

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

AND NOW, comes the Erie County Board of Elections ("Board" herein), by and through its counsel, **CARNEY & GOOD**, and files these Proposed Findings of Fact and Conclusions of Law for this Honorable Court's consideration as follows:

Ms. Previte's Right to Know Request

Ms. Previte filed three (3) form Right-to-Know Law Requests with the Board on August 1, 2022 in which she sought:

1. An electronic copy of the *images* of all polling place ballots from the November 2020 election;
2. An electronic copy of the *images* of all mail-in ballots (including absentee ballots from the November 2020 election, and;
3. An electronic copy of the *images* of all outer envelopes (containing each voter's declaration) for the mail-in ballots (including absentee ballots) from the November 2020 election.

This Honorable Court found that Ms. Previte had formally withdrawn[1] her request for

[1] Page 62, lines 7-8 of the February 10, 2023 De Novo Hearing transcript. ("Transcript" herein).

the images of all outer envelopes referenced at #3 above. Consequently, the only outstanding requests relate to images of the three types of ballots cast in the November 2020 general election: in-person, mail-in and absentee.

Proposed Finding of Fact #1

Ms. Previte Never Alleged that She is a Qualified Elector of Erie County

As will be seen *infra*, this proposed finding of fact is important. At no point in these proceedings has Ms. Previte ever alleged, much less proven, that she is a qualified elector of this County. Indeed, the "Factual Background" section appearing within her self-prepared and verified Brief in Opposition filed on December 8, 2022 in this matter fails to state any such allegation. At no point when she addressed the Court or testified did she make this allegation or offer any proof in this regard.

Proposed Finding of Fact #2

The New Apparatus Utilized for the November 2020 Election was a Voting Machine

Tonia Fernandez, Director of Elections for the Erie County Elections Department, appeared pursuant to a subpoena issued by Ms. Previte and testified[2] about the different procedures that the Board implemented between the 2018 and 2020 General Elections. (Transcript, Pg. 16, Ln. 9-25). Most notably, she testified that for the 2020 General Election "we introduced *new voting machines* and the mail in ballot." Id. (Emphasis supplied). She explained that the machines were an optical scan ballot system from Dominion Voting Systems. Id. It was a part of her job duties to maintain this System. (Transcript, Pg.18, Ln. 20-22). She explained what an optical scan paper ballot system is, and that the process by which in-person, absentee, and mail-in ballots are scanned either at a polling place or centrally at the Elections Office and summarized that these processes

[2] The Board called Ms. Fernandez as its first witness on direct examination.

are "in essence the same thing." (Transcript, Pg. 17, Ln. 7-17). Ultimately, she was asked to describe what was a ballot box, what was a voting machine for the November 2020 General Election, and her unrebutted answer was as follows:

> A. A voting machine has the scanner attached to it so when you scan [ ] your ballot at the polls, as I said earlier you scan the ballot it takes an image, it falls down into the larger part of the machine. After the election – that's a voting machine. Right? So after the election we remove the ballots from the voting machine and we put them in a box which is sealed and kept in a secure location. (Transcript, Pg. 17-18 , Ln. 22-4).

Ms. Fernandez subsequently testified without equivocation that the scanner is a part of the voting machine. (Transcript, Pg. 18, Ln. 9-13). In fact, Ms. Previte stated in her Brief [3] that the "[Board] used Dominion *machines* to tabulate the votes which were cast via absentee/mail-in ballots" and "As a Dominion *machine* scans a ballot and tabulates the votes cast, it takes an image of the ballot and stores it electronically." [4] (Emphasis added). While those general characterizations were fundamentally correct about the Dominion machines as a whole, they were not exactly correct as it relates to the storage element. The ultimate storage element will be discussed *infra*.

---

[3] Brief in Opposition filed in this matter on December 8, 2022.
[4] Id. at page 4, §B 4. Indeed, in reference to non-military and duplicated military ballots, she states these "are scanned by the Dominion tabulators which create an image of each ballot at the time it is scanned."

Proposed Finding of Fact #3

The Requested Ballot Images are Votes

It should be noted that the Election Code at 25 Pa.C.S. § 3031.2 authorized any county or municipality "the use of an electronic voting system for registering or recording and computing the vote at all elections and primaries held at polling places in such county or municipality."

Ms. Previte cross examined Ms. Fernandez about the way ballot images are stored and how those images were transmitted to or received by the Board. Ms. Fernandez testified in response as follows:

> A. Sure, sure, I can go over that. So on election night **as the results come back** from the poll, you're correct, they come back on a little - - on a little flash drive we call them. (Emphasis supplied).
>
> Q. Yeah.
>
> A. And then we upload that information into the Dominion Voting system. So then everything is stored centrally. (Transcript, Pg. 26, Ln. 6-18).

The point must be made: on any given election night, the "results" coming back from polls are, undeniably, votes.

Ms. Fernandez subsequently explained to Ms. Previte during separate questioning that a couple of options exist for the central tabulators. She confirmed that central tabulators also have a removeable flash drive or "you can program it to go right into, right into the voting, the Dominion voting system." (Transcript, Pgs. 26-27, Lns.20-2).

The Court accepted into evidence the Board's Exhibits 1-3. (Transcript, Pg. 24, Ln. 13). These were copies of the front and back pages of ballots cast via the in-person, mail-in and absentee methods that Ms. Fernandez randomly selected from the Dominion Voting System and were

printed for evidentiary purposes. (Transcript, Pg. 19, Ln. 15-17). Each exhibit contained a third page, an audit page, "that tells us how the machine interpreted the votes and the scanner that it was scanned on and the ballot ID." (Transcript, Pg. 19, Ln. 23; Pg.21, Ln. 21; Pg. 22, Ln. 21). Ms. Fernandez testified further that there was no way to separate the third page from the first two pages digitally as "They're all considered one image." (Transcript, Pg. 23, Ln. 24). She testified that there was no functional difference between these three exhibits in the way that they were cast, tabulated, interpreted, recorded or stored. (Transcript, Pg. 24, Ln. 3-7). Indeed, Ms. Previte stated at the hearing "All right, so Counsel is right when he says there's virtually no difference between the images of the mail-in ballots, images of the absentee ballots, images of the in-person ballots." (Transcript, Pg. 10 , Ln. 18-21). In other words, there is no evidence disputing that these exhibits are homogeneous. That characterization aligns with Ms. Fernandez's similarly homogeneous descriptions of them.

Exhibit 1 was an example of a ballot cast in person. When asked to describe what were on the first two pages of Exhibit 1, Ms. Fernandez answered, without hesitation, "Votes." (Transcript, Pg.20, Ln. 8-9). Exhibit 2 was an example of a mail-in ballot. She described it as "a voted mail-in ballot" and "the front and back of a voted ballot." (Transcript, Pg. 21, Ln. 11-19). Exhibit 3 was an example of an absentee ballot. Again, Ms. Fernandez described it as "a voted absentee ballot." (Transcript, Pg. 22 , Ln. 10). When asked what the three exhibits represented, Ms. Fernandez unequivocally testified that "**These are votes.**" (Transcript, Pg.24, Ln. 2). (Emphasis supplied). Ms. Previte never challenged or disagreed with these characterizations or, more importantly, presented any evidence to the contrary.

Proposed Finding of Fact #4

The Imaged Votes are the Contents of a Voting Machine or Ballot Box

A. Contents of a Voting Machine

While partially reproduced *supra*, an expanded reproduction of Ms. Fernandez's testimony provides additional evidence. When asked to describe what was a ballot box, what was a voting machine for the November 2020 general election, she provided the following unimpeached testimony:

A. A voting machine has the scanner attached to it so when you scan your [ ] ballot at the polls, as I said earlier you scan the ballot, it takes an image, it falls down in to the larger part of the machine. After the election – that's a voting machine. Right? So after the election we remove the ballots from the voting machine and we put them in a box which is sealed and kept in a secure location.

Q. Okay. So you mentioned some images. Where are those images stored?

A. **The images are stored on our Dominion Voting System.** (Emphasis supplied).

Q. Okay, and the scanner, is that a part of the voting machine?

A. The scanner is, yes.

Q. The scanner is?

A. Part of the voting machine.

Q. Okay, all right.

A. Yes.

Q. So did this ballot tabulation system also store the ballots cast for the November 2020 general election?

A. Yes. (Transcript, pages 17 -18).

As previously referenced, Ms. Previte stated that the Dominion voting machines tabulates, scans, takes an image of the ballot and stores it electronically. Between those rudimentarily correct characterizations, the uncontradicted testimony of Ms. Fernandez, and Exhibits 1-3 the Board's position is demonstrated: the requested electronic images resulted from and are therefore the contents of a voting machine as they represent actual votes that were interpreted, recorded, and imaged by that machine.

B. Contents of the Ballot Box

Ultimately, those imaged votes "are stored on our Dominion Voting System." (Transcript, Pg.18, Ln.7-8). This system "store[d] the ballots cast for the November 2020 general election." (Transcript, Pg.18, Ln. 16-19). While rudimentarily correct about the general functions of the Dominion machines but not as it relates to storage, Ms. Previte admitted in her Brief in Opposition that "As a Dominion machine scans a ballot and tabulates the votes cast, it takes an image of the ballot *and stores it electronically*." [5] (Emphasis added). A better explanation of the storage element was given by Ms. Fernandez on cross-examination. She explained to Ms. Previte that on election night as the results come back from the polls on a flash drive "we upload that information into the Dominion Voting System. **So then everything is stored centrally**." (Transcript, Pg. 26, Ln. 12-19) (Emphasis supplied). Again, there is no functional difference in the way that the three types of ballots were cast, tabulated, interpreted, recorded or stored, and the process by which these ballots are scanned either at a polling place or centrally at the Elections Office are in essence the

[5] Page 4 of Brief in Opposition filed on December 8, 2022.

same thing. (Transcript, Pgs. 17 and 24, Lns. 7-17 and 3-7). Regarding "everything stored centrally," Ms. Fernandez was referencing the Election Office wherein she testified that the Dominion System is "downstairs on the first floor. We have a glass office, which is highly secure." (Transcript, Pg. 18, Ln.23-25).

The statutory language at issue, "except the contents of ballot boxes and voting machines"[6] was enacted in 1937 and has not been amended since. Appellate court guidance appears to pre-date the statute, and there is just a single decision from a Court of Common Pleas from 1952.[7] However, this statute must have some meaning, and this Court has uncontradicted evidence before it to give it meaning in today's context: the requested imaged votes are stored in what is an electronic ballot box in today's digital age. As will be seen below, the boxes that contain the official cast ballots, absentee ballots, and mail-in ballots in storage are something different entirely than an electronic ballot box.

Proposed Finding of Fact #5

There is a Difference Between the Accessible Official Ballots and the Requested Electronic Images

In her opening statement to the Court, Ms. Previte asked the following question: "[...] except for the contents of the ballot box, which what does that mean, contents of the ballot box? Does that mean the actual paper? Does that mean - - the electronic images that are scanned, that are recorded there?" (Transcript, P.11, 21-25). This was a valid question. There is a distinction between the official in person, mail in and absentee ballots handled by voters and what was created and stored as a result of the Dominion voting machine's electronic interpretation and tabulation of

[6] 25 Pa. C.S. §2648.

[7] In re Allegheny County Election, 171 A. 694, 314 Pa. 183, Sup. (1934); Austin v. Dauphin County Bd. Of Elections, 79 Pa. D&C 562 (1952).

those ballots. The latter, as per Ms. Fernandez's testimony, contains a 3rd page audit that is inseparable from the ballot images themselves as they are all considered one image. On the other hand, the official ballots would have no similar audit page.

In his opening statement, the undersigned alluded to the Court that the Board did not think Ms. Previte was asking for access "to what is in essence over 40,000 paper copies of absentee and mail in ballots" and "The official ballots, those are up at the county warehouse off of Liberty Street, excess of 40,000 of those." (Transcript, Pg. 6, Ln. 8-9; Pg. 8, 9-11). Ms. Fernandez provided the evidence to support this proposed finding of fact. She testified that "after the election we remove the ballots from the voting machine and we put them in a box which is sealed and kept in a secure location" in reference to the physical ballots kept in the county's warehouse. Indeed, the Election Code directs that "Upon completion of the count, all ballots, absentee ballots and district total cards shall be securely packaged, suitably labeled and sealed, and delivered to the county board of elections. The board shall likewise package and seal a true copy of the ballot label used in each election district. Thereafter *these packages are to be retained* and disposed of in the same manner as paper ballots and related materials are disposed of under the provisions of this act. 25 Pa. C.S. §3031.16 (a). (Emphasis supplied). This statute imposes further packaging, retention, preservation and maintance requirements upon the county board of elections for tabulating cards and other materials used in the preparation of the automatic tabulating equipment. [8]

As further support for this proposed finding of fact, compare and consider the following two statutory sections of the Election Code declaring that certain items are public records:

25 Pa. C.S. § 3146.9. Public Records

(a) All official absentee ballots, files, applications for such ballots and envelopes on which the executed declarations appear, and all information and lists are hereby designated and declared to be public records and shall be safely kept for a period

[8] 25 Pa.C.S. §3031.16 (b).

of two years, except that no proof of identification shall be made public, nor shall information concerning a military elector be made public which is expressly forbidden by the department of defense because of military security.

25 Pa. C.S. § 3150.17 Public records.

(a) All official mail-in ballots, files, applications for ballots and envelopes on which the executed declarations appear, and all information and lists are designated and declared to be public records and shall be safely kept for a period of two years, except that no proof of identification shall be made public, nor shall information concerning a military elector be made public which is expressly forbidden by the Department of Defense because of military security.

These statutes refer to tangible items: official absentee and mail in ballots, applications for same, and the envelopes on which the voter's executed declarations appear. Referencing in person-voting, Ms. Fernandez testified what an optical scan *paper* ballot system was, how a voter makes their choices on the ballot, and then, after the voted ballot is taken to the scanner and scanned, it literally falls down into the back of the machine. (Transcript, Pgs.17-21). She further explained similar processes for the casting and recording of absentee and mail in ballots when received by the Board. (Transcript, Pgs. 21-24). Consider also Ms. Previte's withdrawn request for the images of "all outer envelopes (containing each voter's declaration)" – a physical, tangible thing also contemplated by these two statutes. Additionally, Ms. Previte asked Julie Slomski, Clerk for the County of Erie, if the "physical outer envelopes" where the voter's declarations were signed for the 2020 election were retained. (Transcript, Pg. 49, Ln. 7-12). Finally, consider the legislative histories of these two statutes. While the statute that permitted mail in ballots first became effective March 27, 2020, the absentee ballots statute became effective January 1, 1964. It can hardly be argued with any credibility that absentee ballots were anything but tangible paper copies when that statute first came into existence.

Proposed Conclusion of Law #1

Ms. Previte's Right to Know Request for Images Should Be Denied as Exempt from Disclosure Pursuant to the Pennsylvania Election Code.

Pennsylvania's Right to Know Act at 65 Pa C.S. §67.305 (a) directs that a record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record. However, this presumption does not apply if the record is exempt under section 708 of the Act, is protected by a privilege, or if the record is exempt from disclosure under any other Federal or State law or regulation.[9] In the present matter, the Board has asserted that the images sought by Ms. Previte are exempt from disclosure pursuant to state law, namely 25 Pa. C.S. §2648 of the Pennsylvania Election Code. This statute states, in relevant part:

> The records of each county board of elections, general and duplicate returns, tally papers, affidavits of voters and others, nomination petitions, certificates and papers, other petitions, appeals, witness lists, accounts, contracts, reports and other documents and records in its custody, **except the contents of ballot boxes and voting machines** and records of assisted voter, shall be open to public inspection, except as herein provided, and may be inspected and copied by any qualified elector of the county during ordinary business hours, at any time when they are not necessarily being used by the board, or its employes having duties to perform thereto. [ ] (Emphasis added).

Ms. Previte's August 1, 2022 request for electronic copies of the images of all polling place ballots, mail in ballots, and absentee ballots from the November 2022 General Election should be denied as the requested information are the contents of ballot boxes or voting machines and therefore barred from disclosure pursuant to 25 Pa. C.S. §2648. All credible evidence points to this conclusion. This statute and the highlighted phrase have not been repealed or amended by the Legislature, so meaning must be given to it. Otherwise, the phrase has no purpose. What that

[9] 65 Pa.C.S. §67.305 (a) (1) – (3).

meaning is exactly is up to this Court's interpretation. Again, this Court has more than sufficient and credible evidence before it to give it a contemporary meaning in the current digital age.

Proposed Conclusion of Law #2

Ms. Previte is not Otherwise Entitled to Relief under 25 Pa. C.S. §2648

Assuming, *arguendo*, that this Court determines that the requested images are not the contents of a voting machine or ballot box but instead should be provided to Ms. Previte on the basis that they are a "record of the county board of elections, general or duplicate return, tally paper, affidavits of voters [...] certificates and papers, accounts, reports and other documents and records in its custody" as per 25 Pa. C.S. §2648, such justification is premised upon the request being made by any qualified elector of the county. Id. As referenced *supra*, Ms. Previte has failed to allege, or prove, that she is a qualified elector of this County. Even then, these catchall provisions within the statute would only entitle her to inspect and copy the records identified in the statute – in other words, access to same. Clearly, Ms. Previte has not sought the burdens of access to make copies, but instead has requested that the onerous is placed upon the Board through the production of images.

Respectfully submitted,

CARNEY & GOOD

By: _____

Jay R. Stranahan, Esquire
Attorney I.D. #92658
Attorney for Appellant/Respondent
254 West Sixth Street
Erie, Pa. 16507-1398
Ph. (814) 453-5004
Fax: (814) 453-3506

IN THE MATTER OF	:	**IN THE COURT OF COMMON PLEAS**
	:	
MICHELLE PREVITE,	:	**OF ERIE COUNTY, PENNSYLVANIA**
Appellee/Requester	:	
	:	
VS.	:	
	:	
ERIE COUNTY BOARD	:	
OF ELECTIONS,	:	
Appellant/Respondent	:	**NO.: 12720 – 2022**

CERTIFICATE OF SERVICE

I, Jay R. Stranahan, Esquire, counsel for Appellant/Respondent, hereby certify that a true and correct copy of these Proposed Findings of Fact and Conclusions of Law was served this 30th day of March, 2023, upon the following in the following manners:

First Class Mail:

Michelle Previte
210 West 37th Street
Erie, Pennsylvania 16508

Lyle Hartranft, Esq.,
Appeals Officer
Office of Open Records
333 Market Street
16th Floor
Harrisburg, Pennsylvania 17101-2234
lhartranft@pa.gov

By: _____

Jay R. Stranahan, Esquire
Counsel for Appellant/Respondent
Attorney I.D. #92658
254 West Sixth Street
Erie, Pa. 16507-1398
(814) 453-5004 (v)
(814) 453-5006 (f)