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DEPUTY SOLICITOR GENERAL

October 28, 2022

Hon. David Gowan
Arizona State Senate
1700 W. Washington, Ste.
Phoenix, AZ 85007
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Dear Senator Gowan,

You requested a formal opinion from this Office, asking whether a county board of supervisors may “audit the results of an electronically tabulated general election by hand counting all of the election ballots of their county.” As you may be aware, our formal opinion process necessarily involves several layers of review and is not, therefore, conducive to a speedy turnaround. The Office understands that time is of the essence regarding your request, because of the impending 2022 General Election and the Cochise County Board of Supervisors’ (the “Board”) recent decision to authorize an expanded hand count audit of all Cochise County precincts for the General Election. In approving an expanded hand count audit, the Board relied exclusively on A.R.S. § 16-602(B). For these reasons, the Office offers the following informal opinion regarding the scope of Cochise County’s authority under A.R.S. § 16-602(B) (and statutory provisions and regulations referenced therein): Cochise County has discretion to perform an expanded hand count audit of all ballots cast in person at 100% of the precincts or voting centers located in Cochise County, along with 100% of early ballots cast in Cochise County, so long as the expanded hand count audit of statewide and federal races is limited to five contested statewide and federal races appearing on the 2022 General Election ballot.

A.R.S. § 16-602(B) provides that “[f]or each countywide primary, special, general and presidential preference election, the county officer in charge of the election shall conduct a hand count at one or more secure facilities.” In 2011, the Legislature amended § 16-602(B) to provide the Secretary with authority to create procedures for hand count audits through the Election Procedures Manual (“EPM”). More specifically, § 16-602(B) now provides that “[t]he hand count shall be conducted as prescribed by this section and in accordance with hand count procedures established by the secretary of state in the official instructions and procedures manual adopted pursuant to § 16-452.” The EPM, therefore, has heightened significance in the context of hand count audits because the Arizona Legislature has expressly delegated power to the Secretary of State to create hand count audit procedures. Following the 2020 General Election, for example, the Office relied on the EPM’s hand count audit procedures in advising President Fann and Speaker Bowers regarding how such audits should be conducted in counties utilizing voting centers. *See* <https://www.azag.gov/media/interest/letter-pres-fann-speaker-bowers-re-vote-center-audits> (last accessed Oct. 26, 2022). And the Maricopa County Superior Court relied on the EPM’s hand

count audit procedures in later dismissing a claim challenging the manner in which Maricopa County conducted its hand count audit following the 2020 General Election. *See Ariz. Republican Party v. Fontes*, No. CV2020014553 (Maricopa Cnty. Super. Ct. Dec. 21, 2020 Ruling) (“Under the authority of section 16-602(B), the Election Procedures Manual gives detailed instructions to the county officials who conduct hand count audits.”) Thus, in rendering this informal opinion, the Office has relied upon the express provisions of § 16-602 and the hand count audit procedures contained in the 2019 EPM (at pp. 213-232), which is the last version of the EPM approved by the Attorney General and Governor.¹

Both A.R.S. § 16-602(B) and the EPM contain different requirements for (1) hand counting ballots cast in person and (2) hand counting early ballots. Regarding the hand count audit of ballots cast in person, § 16-602(B) provides a floor for the percentage of precincts that should be included in the audit: “At least two percent of the precincts in that county, or two precincts, whichever is greater, shall be selected at random from a pool consisting of every precinct in that county.” A.R.S. § 16-602(B)(1). The EPM contains similar language but also includes broader reference to polling locations: “At least 2% of the precincts/polling locations in the county (rounded to the nearest whole number) or two precincts/polling locations, whichever is greater, shall be selected at random from a lot consisting of every precinct/polling location in that county.” 2019 EPM p. 215. There is no provision in § 16-602 or the EPM (or anywhere else in Arizona law) that imposes a ceiling on the percentage of precincts or vote centers that can be included in the hand count audit of votes cast in person. This why following the 2020 General Election, the Office wrote to the Chairman of the Maricopa County Board of Supervisors, suggesting that Maricopa County should “consider expanding the hand count audit to five per cent of the voting center locations, which it may do in accordance with A.R.S. § 16-602(B)(1) and Chapter 11, Section III(A) of the Elections Procedures Manual.” *See* <https://www.azag.gov/media/interest/letter-hon-hickman-re-hand-count-audit> (last accessed October 26, 2022). Thus, it is the Office’s conclusion that the Board has discretion under A.R.S. § 16-602(B) and the EPM to conduct an expanded hand count audit that includes ballots from 100% of the precincts or voting centers located in Cochise County.

There is similarly no limit in § 16-602(B) or the EPM on the number of ballots that the Board can include in the hand count audit of votes cast in person. To the contrary, the statutory text and purpose strongly suggest that the Board should review all ballots cast at polling places. Section 16-602(B)(1) provides that “[t]he selection of the precincts shall not begin until all ballots voted in the precinct polling places have been delivered to the central counting center.” And the statute makes clear that “[o]nly the ballots cast in the polling places and ballots from direct recording electronic machines shall be included in the hand counts conducted pursuant to this section.” A.R.S. § 16-602(B)(1). Thus, “[p]rovisional ballots, conditional provisional ballots and write-in votes shall not be included in the hand counts.” *Id.* The EPM explains that “[a] post-election hand count audit includes a precinct hand count, which involves a manual count of regular

¹ The Arizona Supreme Court recently concluded that the 2019 EPM remains in effect. *See Leibsohn v. Hobbs*, 517 P.3d 45, 51 ¶25 (2022) (explaining that “The Committee was required to follow the 2019 EPM established by the Secretary and approved by the governor and the attorney general.”).

ballots from selected precincts[.]” 2019 EPM at p. 214. Moreover, one primary purpose of a hand count audit is to ensure that the machine-count totals closely match the hand-count totals, and that exercise could have reduced value if only a subset of ballots cast in person are permitted to be included. The Board, therefore, has discretion to review 100% of the ballots cast in person at 100% of the precincts or voting centers located in Cochise County when conducting the hand count audit required under § 16-602(B).

Although there is no limit on the number of precincts or voting centers or the number of ballots that can be included in the hand count audit of votes cast in person, there is a limit on the number of statewide and federal races that can be included in the hand count audit. Both A.R.S. § 16-602(B) and the EPM reflect that the required hand count audit shall include up to five contested races. *See* A.R.S. § 16-602(B)(2) (“The races to be counted on the ballots from the precincts that were selected pursuant to paragraph 1 of this subsection for each primary, special and general election *shall include up to five contested races.*” (emphasis added)); 2019 EPM p. 217 (“The races to be counted in the hand count audit generally includes up to five contested races[.]”). For a general election, the races to be included are determined by selecting by lot from the ballots cast for one statewide ballot measure, one contested statewide race for statewide office, one contested race for federal office, and one contested race for state legislative office. *See* A.R.S. § 16-602(B)(2)(a)-(d). Moreover, “[i]n elections in which there are candidates for president, the presidential race shall be added to the four categories of hand counted races.” *Id.* § 16-602(B)(5). If additional races are needed to fill out the number of races that the Board decides to count, according to the EPM, “[t]he priority for selecting other categories, if needed, is as follows: statewide candidate, statewide ballot measure, federal candidate and then state legislative.” 2019 EPM p. 220. Thus, for example, if the Board chooses to count five contested races for the 2022 General Election, because there is no presidential election in 2022, the Board should choose two contested races for statewide office, one statewide ballot measure, one contested race for federal office, and one contested race for state legislative office.

Turning to Board authority under § 16-602 regarding a hand count audit of early ballots, as stated, § 16-602 handles ballots cast in person differently than early ballots. As to early ballots, § 16-602(B)(1) directs that “the early ballots shall be grouped separately by the officer in charge of elections² for purposes of a separate manual audit pursuant to subsection F of this section.” Thus, § 16-602(B)(1) incorporates by reference the procedures set forth in § 16-602(F) for a hand count audit of early ballots.

While early ballots are not cast in precincts or voting centers, and therefore the discussion above about the percentage of precincts or voting centers that can be included in a hand count audit is inapplicable to early ballots, § 16-602(F) requires that “the chairmen or the chairmen’s designees shall randomly select one or more batches of early ballots that have been tabulated to include at least one batch from each machine used for tabulating early ballots.”

² In Cochise County, the “officer in charge of elections” for purposes of A.R.S. § 16-602 appears to be the Director of the County Elections Department.

Regarding the number of early ballots that can be included as part of a hand count audit, § 16-602(F) instructs that “[t]he chairmen or the chairmen's designees shall randomly select from those sequestered early ballots a number equal to one percent of the total number of early ballots cast or five thousand early ballots, whichever is less.” *See also* 2019 EPM p. 215. This statutory language does not set a maximum limit on the number of early ballots that can be included in the hand count audit, and at the very least, it is ambiguous. As discussed, the Secretary has been delegated statutory authority to create hand count audit procedures through the EPM. And she did so with respect to the number of early ballots that can be included in the hand count audit. More specifically, the EPM grants the Board discretion to include additional early ballots (with no limit) in the hand count: “Counties may elect to audit a higher number of ballots at their discretion.” 2019 EPM p. 215. Thus, the Board at its discretion may include up to 100% of early ballots in an expanded hand count audit.

Like with ballots cast in person, there is a limit on the number of statewide and federal races that can be included in the hand count audit of early ballots. In fact, the races included in the hand count audit of early ballots must be the same races included in the hand count audit of ballots cast in person. *See* A.R.S. § 16-602(F) (“[T]he county officer in charge of elections shall conduct a manual audit of the same races that are being hand counted pursuant to subsection B of this section.”). Thus, the Board is limited to conducting an expanded hand count audit of early ballots cast in the same races as those audited for ballots cast in person.

In sum, the Office concludes that, pursuant to A.R.S. § 16-602, the Board is permitted to perform an expanded hand count audit of all ballots cast in person at 100% of the precincts or voting centers located in Cochise County. Moreover, the Board is permitted to perform an expanded hand count audit of 100% of early ballots cast in Cochise County. The Board must limit the number of competitive statewide and federal races audited to five. Finally, if the Board chooses to conduct a hand count audit of five statewide and federal races for the 2022 General Election, the Board should choose, by random lot, two contested races for statewide office, one statewide ballot measure, one contested race for federal office, and one contested race for state legislative office.

Please note this informal opinion does not address any of the following issues: (1) whether Cochise County has authority for a hand count outside the scope of A.R.S. § 16-602, including for races not mentioned in A.R.S. § 16-602³, (2) the procedures Cochise County should use for any hand count conducted outside the scope of A.R.S. § 16-602, and (3) what effect, if any, a full or expanded hand count might have on the official outcome of the 2022 General Election.

³ For example, in an informal opinion from Justice John R. Lopez IV (then Solicitor General), in 2015, the Office concluded that “A.R.S. § 16-602(B)(2)(f) does not affirmatively bar hand counts outside of A.R.S. § 16-602. That section only provides instructions for the county official in charge of elections on what races to count in an A.R.S. § 16-602 hand count.” *Ariz. Att’y Gen. Op. I15-009* (available at <https://www.azag.gov/opinions/i15-009-r15-021>).

Sen. David Gowan
October 28, 2022
Page 5

Sincerely,

A handwritten signature in black ink, appearing to read "Michael S. Catlett". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Michael S. Catlett
Deputy Solicitor General