



**STATE OF ARIZONA**  
**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>KRIS MAYES ATTORNEY GENERAL</p> <p>May 18, 2023</p>	<p>No. I22-004 (R22-010)</p> <p>Re: Ariz. Att’y Gen. Op. I22-004 regarding discretion to conduct a 100% hand count audit in Cochise County (Superseding Opinion)</p>
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To: The Honorable David Gowan  
Arizona State Senate

This is to inform you that Ariz. Att’y Gen. Op. I22-004, dated October 28, 2022, is withdrawn and superseded by the following formal Opinion of the same number dated May 18, 2023. Please discard the opinion dated October 28, 2022.

**Introduction**

On October 28, 2022, the Attorney General’s Office issued Opinion I22-004 in response to your inquiry whether a board of supervisors may “audit the results of an electronically tabulated general election by hand counting all of the election ballots of their county.” I22-004 states that it is an “informal opinion” that was not subjected to the usual layers of review for formal opinions, and is signed by a Deputy Solicitor General rather than the Attorney General. The informal opinion concluded that “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.” Ariz. Att’y Gen. Op. I22-004 (Oct. 28, 2022), at 1.

On November 7, 2022, the Cochise County Superior Court issued a ruling interpreting the same statute discussed in the informal opinion. See Ruling, *Ariz. All. for Retired Ams., Inc. et al. (“AARA”) v. Crosby et al.*, No. CV 2022-00518 (Cochise Cnty. Super. Ct. Nov. 7, 2022). Upon further review of the statute and the *AARA* decision, the Office has concluded that the informal opinion misinterpreted the governing statutes. Nor should an informal opinion unsigned by the Attorney General have been issued in a similar manner as a formal opinion. Accordingly, the informal opinion I22-004 dated October 28, 2022 is withdrawn and superseded by the following formal Opinion of the same number, dated May 18, 2023.

### **Discussion**

Counties are creatures of statute and have only those powers given to them by statute. *Hancock v. McCarroll*, 188 Ariz. 492, 498 (App. 1996). Counties are authorized to conduct hand counts of ballots cast at precincts<sup>1</sup> and early ballots under A.R.S. § 16-602(B) and (F), respectively, to verify the accuracy of voting results.

#### **I. Hand count of ballots cast at precincts.**

A.R.S. § 16-602 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.” A.R.S. § 16-602(B). “The hand count shall be conducted as prescribed by this section.” *Id.* At the beginning of the hand count, “[a]t least two percent of the precincts in that county,

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<sup>1</sup> Pursuant to the 2019 Elections Procedures Manual (“EPM”), for purposes of the hand count of votes cast in-person on Election Day, “precinct” means either “precinct” or “vote center.” 2019 EPM, Ch. 11, Part III.A at 215 (2019), [https://azsos.gov/sites/default/files/2019\\_ELECTIONS\\_PROCEDURES\\_MANUAL\\_APPROVED.pdf](https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf) (“In counties that utilize vote centers, each vote center is considered to be a precinct/polling location . . .”). Cochise County uses vote centers, but to align with the language of § 16-602, the term precinct will be used throughout this opinion to discuss where votes are cast in-person on Election Day in Cochise 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 precincts shall be selected by lot . . . .” *Id.* As *AARA* held, the fact that hand count precincts “shall be selected at random” and “by lot” shows that the hand count must be of a subset of the precincts. “By common definition, a selection of precincts is not random if all precincts are chosen. In this regard, any directive to begin a hand count under A.R.S. § 16-602(B) by counting [all] votes cast exceeds the authority granted by statute.” *AARA*, No. CV 2022-00518, at \*8; *see also Ariz. Republican Party v. Richer*, No. 1 CA-CV 21-0201, 2023 WL 3013295, at \*1, ¶ 2 (Ariz. Ct. App. Apr. 20, 2023) (explaining that under A.R.S. § 16-602(B)(1) “party chairs take turns *randomly* choosing a few polling places to be audited” (emphasis added)).

This reading is further supported by subsections C, D, and E of § 16-602, which provide instructions for additional hand counts to be conducted when the initial hand count for a race has a margin of error equal to or greater than the designated margin when compared to the electronic tabulation for those same ballots. A.R.S. § 16-602(C)-(E). Specifically, § 16-602(C) states that if a second hand count of ballots returns a margin of error equal to or greater than the designated margin, the county must conduct a third hand count of “a total of twice the original number of randomly selected precincts.” If that expanded count still results in a difference equal to or greater than the designated margin, the hand count should be expanded to the entire jurisdiction for that race. A.R.S. § 16-602(D). And that expanded “final” hand count shall be repeated until identical hand count results are achieved. A.R.S. § 16-602(E). As recognized in *AARA*, interpreting § 16-602(B) to permit “a hand count audit of all ballots cast in person at 100% of the precincts or voting centers located in Cochise County,” as informal opinion I22-004 did, would render subsections C, D, and E superfluous in violation of Arizona law. *AARA*, No. CV 2022-00518, at \*8–9 (citing *Nicaise v. Sundaram*, 245 Ariz. 566, 568, ¶ 11 (2019)).

Finally, conducting a full hand count would trigger the automatic review requirements set forth in A.R.S. § 16-602(J). That provision requires that, if a full hand count of all precincts in the jurisdiction

occurs, the Secretary of State shall provide the electronic tabulation source code to the superior court and the superior court shall appoint a special master to draft a report identifying the source of the discrepancy between the electronic tabulation and the hand count. A.R.S. § 16-602(J). Simply put, a full hand count is only expected to occur if there are discrepancies with the electronic tabulation—not as a matter of course. This further supports the conclusion that § 16-602(B) does not permit an initial full hand count of all ballots.

## **II. Hand count of early ballots.**

Early ballots are not to be included in the hand count specified in § 16-602(B). *See* A.R.S. § 16-602(B)(1) (“Only 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.”). Instead, that subsection provides that “early ballots shall be grouped separately by the officer in charge of elections for purposes of a separate manual audit pursuant to subsection F of this section.” *Id.* The manual audit of early ballots shall be of “a number equal to one percent of the total number of early ballots cast or five thousand early ballots, whichever is less.” A.R.S. § 16-602(F).

If the initial hand count results “in a difference in that race that is equal to or greater than the designated margin when compared to the electronically tabulated results,” the audit shall be repeated and, if needed, expanded to include “a number of additional early ballots equal to one percent of the total early ballots cast or an additional five thousand ballots, whichever is less, to be randomly selected from the batch or batches of sequestered early ballots.” *Id.*

Pursuant to authority granted to her under A.R.S. § 16-452(A), the Secretary of State promulgated rules in the 2019 EPM<sup>2</sup> pertaining to “procedures for early voting and voting,” including hand counts. With respect to early ballots, the EPM instructs that the officer in charge of the elections “conduct a hand count of 1% of the total number of early ballots cast, or 5,000 ballots, whichever is

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<sup>2</sup> The 2019 EPM remains in effect because it is the most recent EPM approved by the Secretary, Attorney General, and Governor, as required by statute. *See* A.R.S. § 16-452(B).

less.” EPM, Ch. 11, Part III.B at 215. The EPM further states that “[c]ounties may elect to audit a higher number of ballots at their discretion.” *Id.* Informal opinion I22-004 relied on this statement to reach its conclusion that Cochise County has discretion to hand count 100% of early ballots under § 16-602(F). But the text of § 16-602(F) limits the number of early ballots to be initially audited to the lesser of 1% of early ballots cast or 5,000 early ballots, and therefore necessarily forecloses that *all* early ballots may be initially audited. “[A]n EPM regulation that contradicts statutory requirements does not have the force of the law.” *AARA*, No. CV 2022-00518, at \*5 (quoting *Leibsohn v. Hobbs*, 254 Ariz. 1, 46, ¶ 22 (2022)).

Interpreting § 16-602(F) to preclude a hand count of 100% of early ballots is also supported by the remaining text of the subsection, which provides that early ballots subject to the hand count must be “randomly selected.” A.R.S. § 16-602(F); *see also AARA*, No. CV 2022-00518, at \*8 (explaining that, by definition, a random selection of ballots cannot consist of all ballots). And, finally, an initial hand count of all early ballots would violate Arizona law by rendering superfluous the procedure specified in § 16-602(F) for additional, expanded early ballot hand counts when necessary. *See Nicaise*, 245 Ariz. at 568, ¶ 11 (“A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous.”). In sum, § 16-602(F) does not provide a county discretion to conduct a hand count of 100% of early ballots.

### **Conclusion**

Informal opinion I22-004 misinterpreted A.R.S. § 16-602 and mistakenly concluded that the statute gave Cochise County discretion to conduct a hand count of all ballots cast at precincts or voting centers located in the county as well as discretion to hand count all early ballots cast in the county. Based on the Office’s review of the statute and the *AARA* decision, § 16-602 does not provide such discretion. Informal opinion I22-004 dated October 28, 2022 is withdrawn and superseded by this

formal Opinion I22-004, dated May 18, 2023.

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