IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

VOTERGA, LLC,	)	
	)	
Plaintiff,	)	CIVIL ACTION FILE
	)	
v.	)	NO. 20-A-08626-2
	)	
GWINNETT COUNTY BOARD OF REGISTRATIONS AND ELECTIONS	)	
	)	
Defendant.	)	
	)	

REPLY BRIEF IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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The Board's Response Brief suffers from four fundamental flaws. First, it fails to acknowledge the distinction between the redundant electronic copies of Ballot Images residing on the county election supervisor's computer server, and the separate and distinct items that are placed under seal by O.C.G.A. § 21-2-500. In doing so, the Board ignores the text of the statute and attempts to expand its application beyond its actual terms, without any legal authority and in direct contravention of the law's admonition that "*any* purported statutory exemption from disclosure under the Open Records Act must be narrowly construed." *City of Atlanta v. Corey Ent., Inc.,* 278 Ga. 474, 476 (2004) (emphasis in the original).

Second, the Board defends its erroneous interpretation of the statute by arguing that "weighty policy reasons" existed that justified it in taking "the cautious approach it has [in refusing to produce the requested documents without forcing VoterGA to pursue costly litigation]." It is the General Assembly, and not county election boards, that is charged with weighing competing policy objectives and codifying its decision into governing statutes. The General Assembly made those determinations when it enacted O.C.G.A. § 21-2-500 and again when it thereafter enacted Georgia's new election laws in 2019 and chose not to amend Section 21-2-500 to include the requested Ballot Images among those records to be placed under seal. No legal authority exists to allow the Gwinnett Board to embellish on or second guess the legislature's decision.

Third, the Board argues that, because it acted in good faith, it should not be found to have lacked substantial justification when it failed to comply with the Open Records Act's requirements. Nowhere, however, does the Act make an award of fees contingent on bad faith, nor does it provide a negligence or "mistake" exception to the Act's mandatory fees provision. A simple failure to produce records covered by the Act without substantial justification is all that is required, and an agency's misinterpretation of the law is not a substantial justification for violating the Act.

Fourth, the Board admits that, in reaching its decision, it took into consideration VoterGA's history of opposing paperless voting systems and the fact that VoterGA might use the requested records as part of its ongoing study and analysis of election integrity issues. The ORA prohibits agencies from using such subjective evaluations to alter their legal obligations, and they certainly cannot serve as "special circumstances" that would substantially justify violations of the Act.

ARGUMENT AND CITATION OF AUTHORITIES

A. O.C.G.A. § 21-2-500 Does Not Cover the Requested Ballot Images.

Courts must interpret *any* exception to disclosure under the Open Records Act narrowly[1], and purported exceptions found outside of the ORA can only prevent disclosure if they are "directly applicable" and "specifically exempt" the precise records being requested.[2] Courts in Georgia thus apply the "most narrow construction of the [statutory] term" in determining the scope of an exception.[3]

Section 21-2-500, by its own terms, places under seal the paper ballots from an election and the external storage devices (e.g., CD-ROMS and similar medium) containing electronic records that an election superintendent delivers to the clerk of the superior court or its designee in a sealed container. The additional copies of electronic Ballot Images that remain on a county election superintendent's computer server are by definition not placed in the sealed container delivered to

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[1] *See City of Atlanta v. Corey Ent., Inc.*, 278 Ga. 474, 476 (2004); O.C.G.A. § 50-18-71(a); *id.* § 50-18-72 ("This Code section shall be interpreted narrowly so as to exclude from disclosure only that portion of a public record to which an exclusion is directly applicable.").

[2] O.C.G.A. § 50-18-71(a); *Hardaway Co. v. Rives*, 262 Ga. 631, 634 (1992) ("we find that it would be incongruous were the same standard of narrow construction [in Section 50-18-72] not applied to exemptions found in other parts of the Code. … Accordingly, we conclude that *any* purported statutory exemption from disclosure under the Open Records Act must be narrowly construed." (emphasis in the original)).

[3] *Hardaway*, 262 Ga. at 635.

the clerk, and they are not specifically addressed anywhere in Section 21-2-500. Thus, that Code section is simply not "directly applicable" to those Ballot Images, and it clearly does not "specifically exempt" those Ballot Images from the ORA's mandatory disclosure requirement.

It is telling that, in attempting to quote the Code section to support its argument, the Board chose to omit the precise limiting language that prevents its expansive interpretation. Here is the Board's recitation of Section 21-2-500(a), with the relevant limiting language that the Board omitted added back in and highlighted:

> [T[he superintendent shall deliver in sealed containers to the clerk of the superior court or, if designated by the clerk of the superior court, to the county records manager or other officer or officer under the jurisdiction of a county governing authority which maintains or is responsible for records as provided in Code Section 50-18-99, the used and void ballots and … an electronic record of the program by which votes are to be recorded or tabulated, which is captured prior to the election, and which is stored on some alternative medium such as a CD-ROM or floppy disk simultaneously with the program of the PROM or other memory storage device.

As demonstrated by the omitted language, Section 21-2-500(a) applies only to the medium—such as CD-ROMS or other storage devices—that are placed in the sealed container delivered to the clerk of court or its designee.[4] The text simply

[4] *See also Smith v. DeKalb County*, 288 Ga. App. 574, 577 (2007) (confirming that "the CD-ROM is statutorily designated to be kept under seal," as distinct from information that resides on other external medium, such as county election

does not reach additional, redundant copies of electronic Ballot Images that are not themselves placed into such containers and that reside instead on county election supervisors' computer servers or elsewhere. No amount of linguistic gymnastics can allow the counter-interpretation proposed by the Board, and certainly not where the applicable standard is that the exception must be read "narrowly," must be "directly applicable" to the copies of Ballot Images residing on election supervisors' computer servers, and must "specifically exempt" such copies on election supervisors' computer servers from the ORA's mandatory preference for disclosure.

The following chart illustrates precisely what is and is not exempted from disclosure under Georgia law, and copies of Ballot Images residing on a county election supervisor's computer server after the paper ballots and external storage devices are delivered to the clerk of the court in sealed containers, are clearly not exempted from the ORA:

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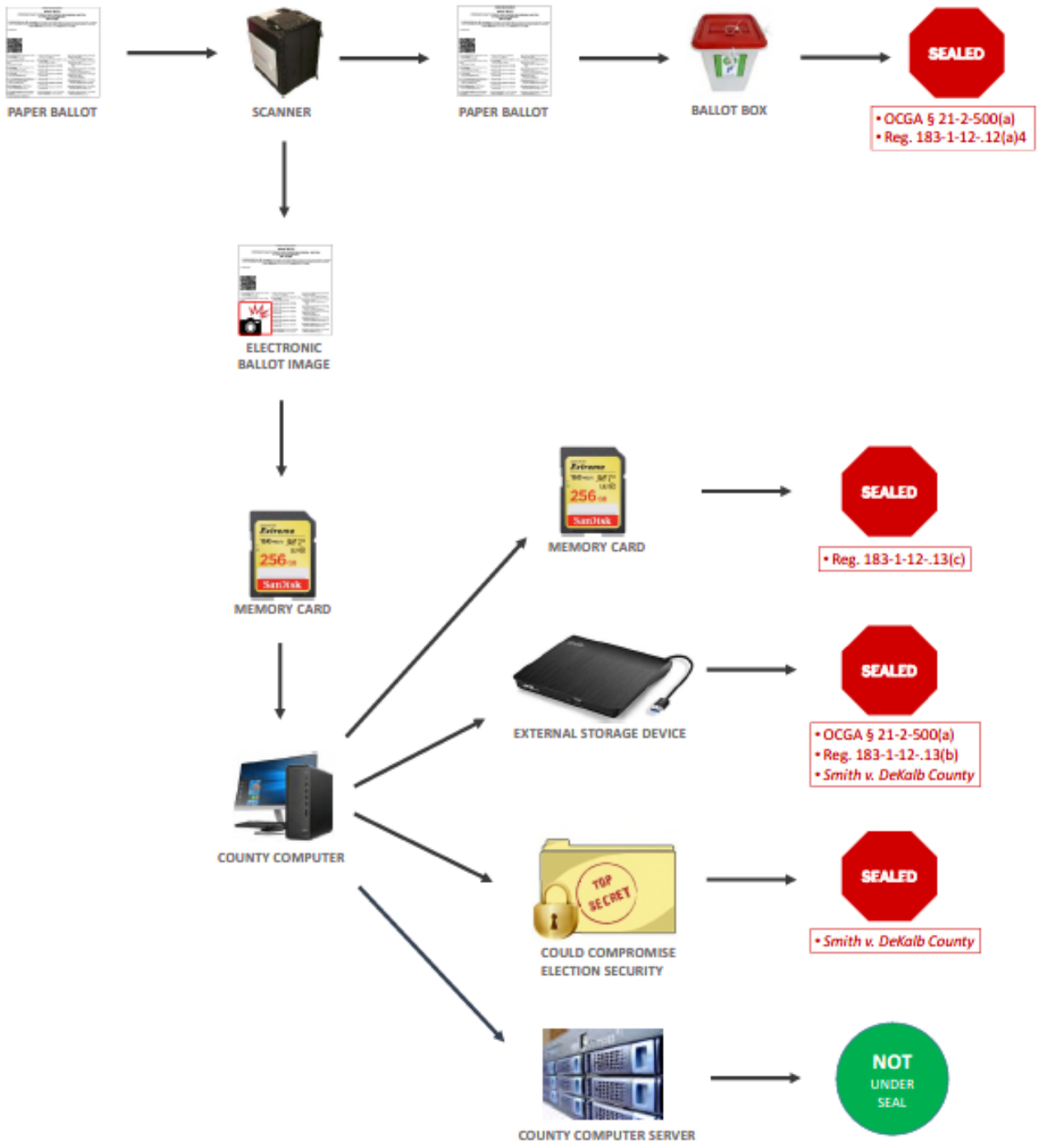
computer servers, that indisputably are not delivered to the clerk of the court and are not under seal (emphasis added)).


PAPER BALLOT
SCANNER
PAPER BALLOT
BALLOT BOX
SEALED
• OCGA § 21-2-500(a)
• Reg. 183-1-12-.12(a)4
ELECTRONIC BALLOT IMAGE
MEMORY CARD
COUNTY COMPUTER
MEMORY CARD
SEALED
• Reg. 183-1-12-.13(c)
EXTERNAL STORAGE DEVICE
SEALED
• OCGA § 21-2-500(a)
• Reg. 183-1-12-.13(b)
• Smith v. DeKalb County
TOP SECRET
COULD COMPROMISE ELECTION SECURITY
SEALED
• Smith v. DeKalb County
COUNTY COMPUTER SERVER
NOT UNDER SEAL

Thus, the Board's assertion that the "scanned ballot images [that VoterGA requested] are required to remain under seal with the superior court clerk" (Response at 3), is simply wrong. The memory card and the external storage devices that contain electric copies of the scanned ballot images (along with other items) are required to remain under seal, but neither the county election computer servers nor the contents of those servers are placed under seal by Georgia law.

B. The General Assembly Choose Not to Expand O.C.G.A. § 21-2-500 to Cover Ballot Images Residing on County Election Supervisors' Computer Servers, and the Board May Not Disregard that Policy Decision.

The Board suggests throughout its Response that its concern for election integrity led it to reject VoterGA's ORA request "out of an abundance of caution." In essence, the Board's improperly expansive and mistaken legal interpretation of Section 21-2-500 was motivated by the Board's construal of what it saw as the competing policy objectives of the ORA and the new paper-ballot election system enacted by the General Assembly in 2019. However, these are precisely the type of policy-making considerations and balancing of interests that are reserved for the General Assembly in codifying the laws. No authority exists for the Board to usurp this prerogative from the legislature and ignore the letter of the law in pursuit of its own conception of what interpretation, or balancing of interests, would better serve the State.

When the General Assembly overhauled Georgia's election laws in 2019, it drafted a 17,000 word Act that amended 50 different code sections and subsections. Had it intended to expand the scope of Section 21-2-500 to cover copies of these new electronic images of paper ballots that would be residing on county election computer servers, it easily could have done so. But it did not. That was the General Assembly's choice, and it is now the law. And the Board had no right to ignore it, regardless of what the Board may have thought would be better for the State.

As an aside, it turns out that not only did the Board improperly usurp the General Assembly's power and prerogative, its usurpation also was pointless and unwarranted. To the extent the Board was concerned with election integrity, the General Assembly apparently decided that, by preserving the actual paper ballots, and the memory cards with electronic copies of all of the ballot images, and the CD-ROMs with yet another copy of the ballot images, sufficient steps had been taken to safeguard the integrity of elections, including the ability to conduct official recounts and audits. By law, election audits involve analysis of the actual paper ballots cast, which reside under seal with the clerk of court.[5] The memory

[5] *See* O.C.G.A. § 21-2-379.23 ("The paper ballot marked and printed by the electronic ballot marker shall constitute the official ballot and shall be used for, and govern the result in, any recount conducted pursuant to Code Section 21-2-495 and any audit conducted pursuant to Code Section 21-2-498"); *id.* § 21-2-498 ("Audits performed under this Code section shall be conducted by manual

cards are also under seal and available if a recount of the election is requested.[6] And the electronic copies of the paper ballots and Ballot Images that are preserved under seal on external storage devices with the clerk of court can provide back-up redundancy.[7] The General Assembly chose not to add to this redundancy the additional, redundant electronic copies of Ballot Images that happen to reside on a county supervisor's computer server or elsewhere, and it is not the Board's place to second guess that decision, nor to expand Section 12-2-500 beyond its actual language, nor to depart from the mandatory language of the Open Records Act.

C. The Board's Misinterpretation of the Law Does not Constitute "Substantial Justification" or "Special Circumstances."

The Board begins its discussion of substantial justification by incorrectly declaring that "[a]n award of attorneys' fees is discretionary in an action to enforce the ORA," citing O.C.G.A. § 50-18-73(b) and *Richmond Cnty. Hosp. Auth. v. SE Newspapers Corp.*, 252 Ga. 19 (1984) in support. To the contrary, Section 50-18-73(b) explicitly states that the court "shall" (i.e., must) award fees, and *Richmond Cnty. Hosp. Auth.* was decided before the General Assembly amended the Act in 1992 to make an award of fees mandatory. *Compare* O.C.G.A. § 50-18-73 (1982) ("The court

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inspection of random samples of the paper official ballots"); O.C.G.A. § 21-2-500(a) (placing the paper ballots under seal).

[6] *See* Ga Comp. R. & Regs. 183-1-12-.13(c); O.C.G.A. § 21-2-500(a).

[7] *See* Ga Comp. R. & Regs. 183-1-12-.13(b); O.C.G.A. § 21-2-500(a).

may award to the prevailing party reasonable attorney's fees and other litigation expenses …") *with id.* § 50-18-73(b) (1992) ("the court shall, unless it finds that special circumstances exit, assess in favor of the complaining party reasonable attorney's fees and other litigation costs …") (emphasis added).

The Board then argues that, because its erroneous interpretation of the law was made in good faith, it had substantial justification for failing to comply with the Open Records Act's requirements. Nowhere, however, does the ORA make an award of fees contingent on bad faith, nor does it provide a negligence or "mistake" exception to the Act's mandatory fees provision. A simple failure to produce records covered by the Act without substantial justification is all that is required, and no court has ever found that an agency's misinterpretation of the law can rise to a substantial justification that deprives a plaintiff of its statutory right to fees.[8] The Board is charged with knowledge of what the law required, and its misinterpretation of that law, and resulting violation of it, is no justification, and certainly not one rising to the level of "substantial." *See* O.C.G.A. § 1-3-6 ("after

[8] The paradigmatic example of what constitutes substantial justification or special circumstances is when an agency tries its best, but ultimately fails, to produce the requested records in a timely manner. Thus, in *Schick v. Board of Regents of University System of Georgia*, 334 Ga. App. 425, 458-59 (2015), the court found "substantial justification" where the Board produced the requested documents, but nonetheless violated the Act by producing some (less than 6%) of them late, where there was no evidence that certain documents were singled out for delay or otherwise withheld, and where evidence was presented that the Board and its employees worked nights and during holidays to ensure the production was completed.

they take effect, the laws of this state are obligatory upon all inhabitants thereof. Ignorance of the law excuses no one.")

Finally, the Board tries to turn the ORA on its head by arguing that it was VoterGA's burden to pursue litigation to secure documents sought under the ORA (and incur the associated costs) because Section 21-2-500 allows for litigation to unseal sealed records. This argument fails for the simple reason that the Ballot Images sought by VoterGA were not under seal, so resort to litigation under Section 21-2-500 is neither appropriate nor necessary. Moreover, even if such litigation were available and appropriate, that would in no way negate VoterGA's concurrent rights under the ORA.[9] No court has ever held that the availability of a court mechanism to procure public records relieves a government agency from having to produce them in response to a valid ORA request.[10]

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[9] *See Central Atlanta Progress, Inc. v. Baker,* 278 Ga. App. 733, 734-35 (2006) ("the Act must be broadly construed to effect its remedial and protective purposes.")

[10] *Cf. Millar v. Fayette Cnty. Sherriff's Dept.*, 241 Ga. App. 659, 659-60 (1999) ("The rights of an individual under the Open Records Act and the rights of a litigant under discovery statutes are separate and distinct, and nothing in this opinion should be read to require any conflation of the two. Any citizen of this State retains a right to the public records he has requested under the Open Records Act. Citizens also have certain rights to pursue discovery in both criminal and civil actions.")

D. The Board's Decision to Take a "Cautious" Approach Cannot Justify Forcing VoterGA to Incur the Costs of Enforcing Its Rights under the ORA.

The law could not be more clear that neither the identity of a requesting party, nor the purpose to which that party may put the requested records, can abridge the party's right to access records covered by the Open Records Act.[11] Yet the Board admits in its Response that it took into consideration VoterGA's history of concern over the reliability of paperless voting systems and the fact that VoterGA might use the requested records as part of its investigation into the reliability and accuracy of elections. This is highly improper and the opposite of a "special circumstance" that could "substantially justify" allowing the Board to evade the Act's mandatory fees provision and subject VoterGA to the financial burden of enforcing its rights.

CONCLUSION

The Board violated Georgia's Open Records Act when it refused to allow Voter Ga to inspect the requested Ballot Images. Thus, VoterGA is entitled to an

[11] *See Smith v. Northside Hosp.*, 347 Ga. App. 700, 705 (2018) ("[The agency] concedes that the identity and purposes of [the requesting party has] no bearing on whether he has standing to seek access to public documents via an open-records request."); *Parker v. Lee*, 259 Ga. 195, 199 (1989) ("We thus find no reason to distinguish [the plaintiff death row inmate's] (or any other individual citizen's) right of access from [any other requester's] right of access"); Office of the Georgia Attorney General, GEORGIA'S SUNSHINE LAW, A CITIZEN'S GUIDE TO OPEN GOVERNMENT at p. 4 ("It is irrelevant what the purpose of a particular request is.").

Order declaring its right to inspect the Ballot Images and requiring the Board to permit the inspection.

Because ignorance or misinterpretation of the law is no excuse for its violation, the Board acted without justification, and certainly without "substantial justification," in rejecting VoterGA's ORA request and forcing it to incur the costs of litigation to enforce its rights. Similarly, no "special circumstances" existed that would excuse the Board's actions and allow it to avoid reimbursing VoterGA in accordance with the ORA for the reasonable legal fees it incurred in enforcing its rights. Thus, VoterGA is entitled to an Order under O.C.G.A. § 50-18-73 awarding it the reasonable fees and expenses it incurred in this litigation, in an amount to be established in a later proceeding.

Respectfully submitted this 22nd day of March, 2021.

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Defendant.	)	
	)	

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that he has on this day caused the foregoing REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT to be electronically filed with the Clerk of Court using the eFileGA system, which will cause a copy of the same to be sent to counsel of record.

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This 22nd day of March, 2021.

/s/Henry R. Chalmers
Henry R. Chalmers