

The County subsequently invoked a thirty-day extension to respond; however, as the County did not respond within the extension period, the Request was deemed denied on January 13, 2024.¹ *See* 65 P.S. § 67.902(b)(2).

On January 29, 2024, the Requester appealed to the Office of Open Records (“OOR”), stating grounds for disclosure.² The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On February 7, 2024, the County submitted a verified position statement from its Open Records Officer, Michael Vargo, Esq., contending that records responsive to Items 1 and 2 of the Request are election records; as such, the County asserts that access to those records is governed by Pennsylvania’s Election Code, 25 P.S. §§ 2601 *et seq.* With regard to Item 3 of the Request, the County maintains that the security camera footage requested is a judicial record based on a prior Opinion and Order of the Northampton Court of Common Pleas, *Northampton County v. Cap*, No. C-48-CV-2010-13666 (Northampton Co. Com. Pl. Jan. 9, 2011) and a decision of the OOR, *Mezacappa v. Northampton County*, Dkt. AP 2023-1562, 2023 PA O.O.R.D. LEXIS 1959. Along with its submission, the County also included a February 5, 2021 attestation from Sheriff Richard Johnston that was utilized in a prior RTKL appeal.

¹ Its unclear from the record on what exact date the County invoked its thirty-day extension to respond to the Request. Nevertheless, the extension was invoked within five business days of the agency’s receipt of the Request and such does not affect the timeliness of this appeal.

² The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

LEGAL ANALYSIS

1. Records responsive to Items 1 and 2 of the Request are subject to access in accordance with the Election Code.

The County argues that the records responsive to Items 1 and 2 of the Request are governed by the Election Code and that the OOR does not have jurisdiction over such records.

Section 2648 of the Election Code provides as follows:

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 voters, shall be open to public inspection, except as herein provided...

25 P.S. § 2648 (emphasis added). Additionally, Section 3150.17 of the Election Code further provides, as follows:

(a) General rule. 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.

(b) Record. For each election, the county board shall maintain a record of the following information, if applicable, for each elector who makes application for a mail-in ballot:

(1) The elector's name and voter registration address.

(2) The date on which the elector's application is received by the county board.

(3) The date on which the elector's application is approved or rejected by the county board.

(4) The date on which the county board mails or delivers the mail-in ballot to the elector.

(5) The date on which the elector's completed mail-in ballot is received by the county board.

(c) Compilation. The county board shall compile the records listed under subsection (b) and make the records publicly available upon request within 48 hours of the request.

25 P.S. § 3150.17 (emphasis added). The Election Code contains nearly identical language regarding absentee ballots. 25 P.S. § 3146.9.

Section 3101.1 of the RTKL states that “[i]f the provisions of this act regarding access to records conflict with any other federal or state law, the provisions of this act shall not apply.” 65 P.S. § 67.3101.1. In addition, Section 306 of the RTKL states that “[n]othing in [the RTKL] shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree.” 65 P.S. § 67.306. In a recent *en banc* opinion, *Honey v. Lycoming County Offices of Voter Services*, No. 57 C.D. 2023, the Commonwealth Court determined that 25 P.S. § 2648 creates a statutory exemption wherein “the contents of ballot boxes and voting machines” are exempt from disclosure when requested under the RTKL. This is because 25 P.S. § 2648 lists various records open to public access, “except the contents of ballot boxes and voting machines and records of assisted voters.” Pursuant to *Honey*, the only records sought via a RTKL request that are deemed exempt under 25 P.S. § 2648 are those records. Thus, it can be logically inferred from *Honey* that records under Section 2648 can be accessed through a RTKL request; otherwise, the matter in *Honey* would have been dismissed for a lack of jurisdiction. Similarly, requests or applications for ballots and outer envelopes which are declared to be public under Section 3150.17 of the Code are likewise available through a RTKL request and subject to any access conditions set forth in the Election Code.

In her appeal, the Requester contends that the responsive records should not be redacted. However, the County does not assert that the responsive records should be redacted and there is no evidence before us indicating that the Requester was given records in response to the Request

that were redacted. Thus, redaction is not an issue before us for determination. Moreover, a reading of the plain language of the statute suggests that “[a]ll 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...” with enumerated exceptions. 25 P.S. § 3150.17(a). Therefore, based on the plain language of the statute, certain records related to mail-in ballots, including applications and envelopes, are public records. *Id.*

The Requester also argues that she has been prevented from accessing the requested records because the County has prohibited the Requester from inspecting the records due to her actions in posting certain election-related records on social media. Attorney Vargo, however, attests that the Requester’s access to election records held by the County has been restored. Thus, we need not address this argument posed by the Requester.³

In sum, the records sought by Items 1 and 2 of the Request are public records which may be sought through a RTKL request. *Honey, supra.* Such records, however, are subject to the access conditions set forth in the Election Code. *See Heltzel*, 90 A.3d at 831-33 (noting that the OOR is not in a position to enforce conditions on public access imposed by another law, and that there is a difference between statutes establishing the public nature of records and statutes that also proscribe a means of access). As such, the County is directed to provide access to the records sought in Items 1 and 2 in accordance with the Election Code. *See Heltzel, supra.*

2. The OOR lacks jurisdiction over the requested surveillance video.

Item 3 of the Request seeks “video recordings of the 2023 November general election ballot counting on all relevant dates and times...” The evidence submitted by the County indicates that

³ Under the RTKL, statement made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

“[b]allot counting for [the County] occurs in the cafeteria directly below Courtroom #2 of the Northampton County Courthouse.” Vargo Att. at ¶ 15. While the Requester argues that the surveillance video is essentially an election record, the County maintains that, the recording of the ballot counting process is incidental to the surveillance video’s primary purpose as a critical component of the courthouse security system. *Id.* at 17. As also noted by the County, the accessibility of the video recordings of ballot counting within the County’s courthouse were addressed in previous Final Determinations of the OOR, including *Mezzacappa v. Northampton County*, OOR Dkt. AP 2023-1562, 2023 PA O.O.R.D. LEXIS 1959. The OOR, relying on the Northampton County Court of Common Pleas decision, *Northampton County v. Cap*, No. C-48-CV-2010-13666 (Northampton Co. Com. Pl. Jan. 9, 2011) previously determined that such video recordings were judicial records. We see no reason to disturb that conclusion in the instant case. Therefore, consistent with the Court’s ruling in *Cap* and the OOR’s previous *Mezzacappa* decision, the video footage taken from the courthouse cafeteria, where the County’s ballot counting occurs, is a judicial record over which the OOR lacks jurisdiction. See also *Snover v. Northampton County*, OOR Dkt. AP 2021-0080, 2021 PA O.O.R.D. LEXIS 379.⁴

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **dismissed in part**, and subject to the provisions of the Election Code as set forth above, the County is required to provide access to responsive records which the Requester is entitled to under that law. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Northampton County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have

⁴ On her appeal form, the Requester asserts that the County acted in in bad faith, stating “bad faith denial of previously litigated subject matter.” The Requester, however, does not develop that argument any further.

an opportunity to respond according to court rules as per 65 P.S. § 67.1303, but as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁵ All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: March 28, 2024

/s/ Angela Edris

ANGELA EDRIS
APPEALS OFFICER

Sent via OOR Appeals Portal to: Tricia Mezzacappa;
Michael Vargo, Esq., AORO

⁵ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).