

As the County did not respond by July 8, 2016, the Request was deemed denied on that date. *See* 65 P.S. § 67.901. On July 11, 2016, the County sent correspondence to the Requester, stating that the Request is insufficiently specific to enable it to respond. *See* 65 P.S. § 67.703.

On July 19, 2016, the Requester appealed to the OOR, stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On July 22, 2016, the County sent PDF files of example ballots to the Requester. In response, the Requester sent correspondence stating that the PDF files were not what was requested, as the Request, instead, sought “the electronic files from which the voting machine faces were printed. In other words ... the electronic source files from which these PDFs were printed/copied/scanned.”

On July 27, 2016, the OOR asked the parties whether they desired to participate in the OOR’s Informal Mediation Program. On July 28, 2016, the County notified ELECTEC Election Services, Inc. (“ELECTEC”) of this appeal and advised them as to their ability to participate in this matter. On that same date, the County stated that it was “unable to respond to the mediation request at this time” and that “[o]ur voting system contains proprietary software which we license from a vendor.”¹

The OOR reopened the record in order to allow the parties, as well as any potential third parties, to provide relevant evidence and legal support. On August 3, 2016, the County provided a notarized attestation from its Open Records Officer, who affirms that “I do not know what he is asking for. Our election system software is licensed from a vendor and is proprietary.”

¹ To the extent that the County argues that the requested records are trade secrets or confidential proprietary information, 65 P.S. § 67.708(b)(11), as a reason for denying access for the first time on appeal, it is permitted to do so. *See Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

On August 3, 2016, the OOR asked the Requester to indicate whether he was satisfied with the records provided by the County during the appeal. On August 5, 2016, the Requester submitted an additional statement reiterating that he has not been provided with the electronic files from which the specific voting machine faces were created.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here, neither party requested a hearing, and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65

P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The Request is sufficiently specific

The County argues that the Request is insufficiently specific to enable it to locate responsive records. *See* 65 P.S. § 67.703. Section 703 of the RTKL states that “[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.” *Id.* When interpreting a RTKL request, agencies should rely on the common meaning of words and phrases, as the RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 (Pa. Commw. Ct. 2012) (citing *Bowling*, 990 A.2d 813). In determining whether a particular request under the RTKL is sufficiently specific, the OOR uses the three-part balancing test employed by the Commonwealth

Court in *Pa. Dep't of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013).

First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Pa. Dep't of Educ.*, 119 A.3d at 1125. When considering the specificity of a request, the item or phrase must be construed in the request’s overall context. *Pa. State Police v. Office of Open Records*, 995 A.2d 515, 516-17 (Pa. Commw. Ct. 2010). In *Carey*, the Commonwealth Court found a request for unspecified records (“all documents/communications”) related to a specific agency project (“the transfer of Pennsylvania inmates to Michigan”) that included a limiting timeframe to be sufficiently specific “to apprise [the agency] of the records sought.” 61 A.3d 367 (Pa. Commw. Ct. 2013). Second, the scope of the request must identify a discrete group of documents (e.g., type or recipient). *See Pa. Dep't of Educ.*, 119 A.3d at 1125. Finally, “[t]he timeframe of the request should identify a finite period of time for which records are sought.” *Id.* at 1126. This factor is the most fluid and is dependent upon the request’s subject matter and scope. *Id.* Failure to identify a finite timeframe will not automatically render a sufficiently specific request overbroad; likewise, a short timeframe will not transform an overly broad request into a specific one. *Id.*

In the present case, the County argues that the Request does not identify what records are at issue. The Request identifies a discrete subject matter: records used in the creation of voting machine faces in two identified elections for specific precincts. Additionally, the Request identifies a somewhat broad, but specific, type of records (“**electronic files** used in the creation used to create the voting machine faces...”).² Further, the Request is necessarily limited in time

² While the County provided certain PDF files to the Requester, the County has failed to provide any evidence that these PDF files, which are made up of documents which were printed and then scanned, are the records actually “used to create the voting machine faces.”

by the dates of the two elections. Accordingly, based on a review of the totality of the Request, the Request is sufficiently specific to enable the County to identify what records are sought.

2. The Request may seek records in possession of a third party contractor

The Request seeks records that may be solely in the possession of a third party, ELECTEC, which has received notice of this appeal and has not participated before the OOR. Records in the possession of a third party contractor may be accessible under 65 P.S. § 67.506(d)(1). Section 506(d)(1) states that:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

65 P.S. § 67.506(d)(1); *see also Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1039 (Pa. Commw. Ct. 2011) (holding that records “in the possession of a party with whom an agency has contracted to perform a governmental function on behalf of the agency” are presumptively public records subject to public access, “so long as the record (a) directly relates to the governmental function and (b) is not exempt under the RTKL”).

In *Indiana University of Pennsylvania v. Atwood*, the Commonwealth Court addressed a situation where an agency purportedly lacked possession of public records in the context of 65 P.S. § 67.506(d)(1):

Section 506(d) mandates that if such records still exist, albeit solely in the possession of the third-party contractor, the contracting agency must produce them. Essentially, these records are deemed to be in the constructive possession of the agency, and this would be true even if the agency had never been in actual physical possession of the records.

No. 633 C.D. 2010, 2011 Pa. Commw. Unpub. LEXIS 668 (Pa. Commw. Ct. 2011).

In the present case, the County confirms that a contract exists between the County and ELECTEC. Similarly, the County does not dispute that the records relate to the constitutionally required governmental function of fostering elections and voting. Accordingly, the question becomes whether the records are “directly related” to the County’s governmental function of providing election services. “[T]o satisfy the ‘directly relates’ prong, the records must relate to the performance of the governmental function.” *Eiseman*, 86 A.3d at 940. In determining whether records directly relate to a third party’s governmental function, the Commonwealth Court has consistently looked to whether the records are relevant to the third party’s performance of its governmental function. *See Buehl v. Office of Open Records*, 6 A.3d 27 (Pa. Commw. Ct. 2010) (“[W]hat [a third party contractor] paid for the items is beyond the parameters of its contract with the Department – it does not directly relate to performing or carrying out this governmental function”); *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613 (Pa. Commw. Ct. 2011) (“[A third party contractor’s] independent contractor agreements with interpreters who have not actually performed translation services under the Contract are indirectly related to the Contract because of the possibility that the interpreters might perform services under the Contract”).

In the present case, the Request seeks records used in creating the voting machine faces used in two elections, and the County contracted the creation of voting machine faces to ELECTEC. Accordingly, as the records are directly relevant to the conduct of elections, the records are directly related to this government function.

3. The County has not established that the records are protected as confidential proprietary information

On appeal, the County asserts that the records are exempt as confidential proprietary information. Section 708(b)(11) of the RTKL exempts from disclosure a record that “constitutes

or reveals a trade secret or confidential proprietary information.” *See* 65 P.S. § 67.708(b)(11). The RTKL defines “confidential proprietary information” as “[c]ommercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.” 65 P.S. § 67.102. An agency must establish that both elements of this two-part test are met in order for the exemption to apply. *See, e.g., Sansoni v. Pa. Hous. Fin. Agency*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375. In determining whether certain information is “confidential,” the OOR must consider “the efforts the parties undertook to maintain their secrecy.” *Commonwealth v. Eiseman*, 85 A.3d 1117, 1128 (Pa. Commw. Ct. 2014), *rev’d in part* 125 A.3d 19 (Pa. 2015). In order to demonstrate that “disclosure of confidential information will cause ‘substantial harm to the competitive position’ of the person from whom the information was obtained, an entity needs to show: (1) actual competition in the relevant market; and (2) a likelihood of substantial competitive injury if the information were released.” *Id.*

In the present case, the County has not provided any evidence or legal argument in support of its position. From a review of the scanned PDF files provided by the County, it is evident that a software program³ was used in the creation of the electronic files sought by the Requester. Although the County notified ELECTEC of this appeal and informed it of its ability to participate, ELECTEC has not sought to participate before the OOR or provided any evidence in support of denying access to the requested records. Accordingly, the County has not met its burden of proof to withhold the requested records. *See* 65 P.S. § 67.708(a)(1).

³ Possibly a custom program created by ELECTEC, although this is not clear based on the evidence presented.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted**, and the County is required to provide all responsive records within thirty days. 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 Delaware 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 an opportunity to respond as per Section 1303 of the RTKL. However, 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.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 17, 2016

/s/ J. Chadwick Schnee, Esq.

APPEALS OFFICER/ ASSISTANT CHIEF COUNSEL
J. CHADWICK SCHNEE, ESQ.

Sent to: Eric Friedman (via e-mail only);
Anne Coogan (via e-mail only)

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).