



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**JONATHAN ALDERFER,
Requester**

v.

**MONTGOMERY COUNTY,
Respondent**

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Docket No: AP 2022-1779

INTRODUCTION

Jonathan Alderfer (“Requester”) submitted a request (“Request”) to Montgomery County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, a copy of the County “Batch Manifest Report” also called “Tabulator Batch Report” (“Report”) for the November 3, 2020 General Election. The County denied the Request, arguing that the requested election records are confidential pursuant to the Pennsylvania Election Code (“Election Code”), 25 P.S. § 2648. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the County is required to take further action as directed below.

FACTUAL BACKGROUND

On June 21, 2022,¹ the Request was filed, stating:

¹ The Request was dated June 20, 2022 but not received by the County until June 21, 2022.

Pursuant Pennsylvania Right to Know Law, 65 §66.1 et seq., I am requesting a copy of the Montgomery County county [sic] “Batch Manifest Report” also called the “Tabulator Batch Report” for all the elections that were on the ballot for the November 3, 2020 General Election.

The Pennsylvania Right to Know Law requires a response time within five business days. If access to the records I am requesting will take longer than this amount of time, please contact me with information about when I might expect copies or the ability to inspect the requested records.

On June 27, 2022,² the County invoked a thirty-day extension during which to respond. 65 P.S. § 67.902(b). On July 28, 2022, the County denied the Request, arguing that the records requested are confidential pursuant to the Election Code.

On August 1, 2022, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.³ 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 August 10, 2022, the County submitted the attestations of Joshua Stein, the County Solicitor, and Anthony Olivieri, Chief Information Officer for the Department of Information and Technology Solutions for the County.

On August 15, 2022, the Requester submitted a position statement arguing that the “requested information is subject to public access ...under the Pennsylvania Election Code 25 P.S. § 2648.”

On September 14, 2022, the OOR, noting that the County submitted evidence relevant to OOR Dkt. AP 2022-1777, asked the County to submit additional evidence. *See* OOR

² In response to the OOR’s inquiry, on September 22, 2022, the County provided the OOR a copy of its thirty-day extension letter. *See* September 22, 2022 correspondence.

³ The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1).

Correspondence dated September 14, 2022. In response, on September 19, 2022, the County submitted the supplemental attestation of Attorney Stein.⁴

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” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 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.* Here, neither party requested a hearing.

The County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the 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.

⁴ On September 20, 2022, the OOR asked the Requester for a two-week extension to issue the final determination and to provide the Requester with an opportunity to respond. Again, on September 22, 2022, the OOR contacted the parties indicating that the Requester had not responded and that, if more time is needed, to provide the OOR with additional time to issue a final determination. To date, the Requester has not contacted the OOR.

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 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)(1). 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)).

The County, through Attorney Stein’s supplemental attestation,⁵ argues that the requested records are confidential pursuant to the Election Code, which provides:

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, and may be inspected and copied by any qualified elector of the county during ordinary business hours, at any time when they are not necessarily being used by the board, or its employees have duties to perform thereto: Provided, however, That such public inspection thereof shall only be in the presence of a member or authorized employee of the county board, and shall be subject to proper regulation for safekeeping of the records and documents, and subject to the further provisions of this act: And provided further, That general and duplicate returns, tally papers, affidavits of voters and others, and all other papers required to be returned by the elections officers to the county board sealed, shall be open to public inspection only after the county board shall, in the course of the computation and canvassing of the returns, have broken such seals and finished for the time, their use of said papers in connection with such and canvassing.

25 P.S. § 2648.

⁵ *See* Stein Supplemental Attestation at ¶¶ 5-20.

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. When examining the conflict between the Election Code and the RTKL, the OOR has found that, while the Election Code makes many records in the custody of the Election Board subject to public inspection by qualified electors, 25 P.S. § 2648, it does not make these records unconditionally available to the public. *See Obernier v. Crawford Cnty.*, OOR Dkt. AP 2017-2107, 2018 PA O.O.R.D. LEXIS 110 (analyzing that section of the Election Code and noting that it “creates a separate process for obtaining these records and conditions public inspection and copying: 1) to qualified electors of the county, 2) during ordinary business hours, and 3) when the records are not being used by the elections board”); *see also Bloch v. Adams Cnty.*, OOR Dkt. AP 2018-2227, 2019 PA O.O.R.D. LEXIS 95. In addition, because the records are not unconditionally public under the Election Code, the OOR would be required to examine any exemptions from disclosure under the RTKL asserted by an agency when records of a County Elections Board are sought by a RTKL request. *See Pa. Dep’t of Labor & Indus. v. Heltzel*, 90 A.3d 823, 833 (Pa. Commw. Ct. 2014).

In support of the County’s position, Mr. Stein attests, in relevant part, as follows:

8. The “Batch Manifest Report” also called the “Tabulator Batch Report” is akin to the “SQL database back up from the Election Management System (EMS), in a digital format, for all of the elections that were on the ballot for the November 3, 2020 General Election” that Mr. Alderfer is requesting is arguably much more than “a text-file report generated from the County’s Election Management Server” as he broadly contends.
9. A Batch Manifest Report/Tabulator Batch Report is a spreadsheet that must be created, and it lists each batch of ballots that were scanned in a precinct. Batches are limited to 200 ballots and all come from the same precinct. The batch manifest report lists the scanner that was used, the batch number, the precincts, and the number of ballots scanned in a batch.

...

14. The Batch Manifest Report/Tabulator Report is an election record; it contains voter information, and Mr. Alderfer's Request relates to matters more suitably accessed under the Pennsylvania Election Code; therefore, the Pennsylvania Election Code controls the procedure in which to access the requested election records and what types of records are subject to inspection.

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23. As outlined above, the Batch Manifest Report/Tabulation Report file is a computer generated file that is created from the database system that serves as a repository for voter registration data and information of electors who reside in Montgomery County, Pennsylvania.

Under the RTKL, a statement made under 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). In the absence of any evidence that the County acted in bad faith, "the averments in [the attestation] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Here, the County was provided additional time to submit evidence in support of its position and the County submitted the attestation of Attorney Stein who is the County Solicitor. The County did not submit any additional evidence either from its Chief Information Officer for the Department of Information and Technology Solutions⁶ or from an individual in the County's Election Office, who would be better situated to explain how the Report works and what information it contains. There is no evidence demonstrating that Attorney Stein is a person without sufficient knowledge or expertise to credibly speak as to the contents of the records. Further, while Attorney Stein concludes that "[t]he Batch Manifest Report/Tabulator Report is an election

⁶ See evidence submitted at OOR Dkt. AP 2022-1777 and discussion on the County's SQL database.

record ... [that] contains voter information,” he also states that the record “lists each batch of ballots that were scanned in a precinct ... [and] the scanner that was used, the batch number, the precincts, and the number of ballots scanned in a batch.”⁷ Attorney Stein appears to list information in the Report (i.e. “[t]he batch manifest report lists the scanner that was used, the batch number, the precincts, and the number of ballots scanned in a batch”) that does not appear to be covered by the Election Code. Based on that description, it is not clear how individually identifiable voter information is implicated, or how such a record constitutes “the contents of ballot boxes and voting machines” and more detailed evidence from a person with knowledge would have been beneficial in determining whether the requested records are exempt under the Election Code.

As such, the County failed to meet its burden of proof that the responsive records are exempt from access under the Elections Code. Since there is no dispute between the parties that the Requester is a qualified elector within the County, the Requester is able to access the records through the Election Code. Therefore, based on the evidence provided and a lack of an explanation from an individual qualified to explain with sufficient detail what a Report entails,⁸ the responsive records are to be provided to the Requester, subject to the access provisions set forth in the Election Code. *See Shepherd v. Phila. Office of City Commissioners*, OOR Dkt. AP 2021-2929, 2022 PA O.O.R.D. LEXIS 694; *see also Churchwell v. Montgomery County*, OOR Dkt. AP 2021-1331, 2021 PA O.O.R.D. LEXIS 1383; 65 P.S. 67.3101.1.

⁷ Attorney Stein has submitted affidavits in other appeals before the OOR, which the OOR has accepted as credible evidence. However, due to the technical nature of the records at issue here (i.e. specifically seeking different records the “Batch Manifest Report” or “Tabulator Batch Report”), evidence submitted by someone with specialized knowledge explaining how those Reports qualify as the contents of a ballot is necessary. *See* OOR Dkt. AP 2022-1777. No additional affidavits have been submitted here.

⁸ *See Ball v. Washington County*, OOR Dkt. AP 2022-1223, 2022 PA O.O.R.D. LEXIS 1750 (finding that the OOR will not substitute its judgment for that of someone (i.e. the County’s Elections Director) with far more familiarity with the issue).

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the County is required to provide the Requester with access to the responsive records in accordance with the access provisions of the Election Code. 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 Montgomery 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. 65 P.S. § 67.1303. 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.⁹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 30, 2022

/s/ Lyle Hartranft

APPEALS OFFICER
LYLE HARTRANFT, ESQ.

Sent to: Jonathan Alderfer (via email only);
Joshua Stein, Esq., (via email only);
Lauren Raikowski, AORO (via email only)

⁹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).