

PETITION FOR REVIEW

Respondent / Appellant, Fulton County, seeks review of a final determination of the Office of Open Records in the above-captioned case.

JURISDICTION AND VENUE

Jurisdiction and venue arise under the authority vested in this Court by virtue of 65 P.S. §67.1302(a).¹ Section 9 of Article V of the Constitution of Pennsylvania provides that “there shall be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court.” Under 42 Pa. C.S. § 5101, there is a right of appeal from the final order (including an order defined as a final order by general rule) of every...[g]overnment unit which is an administrative agency within the meaning of section 9 of Article V of the Constitution of Pennsylvania to the court having jurisdiction of such appeals.

BACKGROUND

On April 25, 2022, ostensibly pursuant to Pennsylvania’s Right-to-Know Law (RTKL), 65 P.S. § 67.101 et seq., Requester / Appellee, Dominion Voting Systems Corporation (“Dominion” or “Requester”) sent a request for information to the Fulton County Clerk and the Fulton County Board of Commissioners (hereafter “the County”).

The Right-to-Know request was objected to on several grounds in a letter dated June 3, 2022. The Requester appealed. (Attachment 2). In its appeal letter dated June 27, 2022, the Requester claims that it was still requesting the following after receiving the County’s objections:

- Fulton County Records regarding reviews and audits of the County’s voting machines and election procedures conducted by Wake Technology Services (“Wake TSI”) following the

¹ Within 30 days of the mailing date of the final determination of the appeals officer relating to a decision of a local agency issued under section 1101(b), or of the date a request for access is deemed denied, a requester or local agency may file a petition for review or other document as required by rule of court with the court of common pleas for the county where the local agency is located.

November 2020 elections, including agency communications with external individuals and entities;

- Policies and procedures for ensuring the accuracy of voting systems in the 2020 election, including machine certifications and post-election reviews.

On or about July 11, 2022, the County filed a reply to the appeal, raising several legal issues for review and advancing several arguments. (Attachment 3).

On August 2, 2022, the OOR Appeals Officer issued a decision disagreeing with the County's presentation of the issues and legal arguments in support. (Attachment 1).

Fulton County files this Notice of Appeal and Petitions this Court for a review of the Appeals Officer's Final Determination.

ARGUMENTS AND ASSIGNMENTS OF ERROR

I. The Appeals Officer erred in concluding that the Requester did not waive a majority of its requests for information.

1. Applicable Law

Generally, a party appealing a decision to a lower administrative or executive entity must raise the "issues" or "questions presented" for review to the appellate tribunal. Requester must properly raise issues in its appeal to the Appeals Officer, as required by Section 1101(a)(1) of the Right-to-Know Law, 65 P.S. §67.1101(a)(1). See, e.g., *In re Appeal of Johnson*, 254 A.3d 796, 802 (Pa. Cmwlth. 2021).

In this case, Requester's only "questions presented" section to the Appeals Officer appears on page 1 of its appeal letter dated June 27, 2022. (Attachment 2). The Requester's "appeal" only takes issue with its prior request "regarding reviews and audits of the County's voting machines and election procedures conducted by 'Wake Technology Services (Wake TSI)' following the November 2020 election, including agency communications with external individuals and entities"; and "[p]olicies and procedures for ensuring the accuracy of voting systems in the 2020 election, including

machine certifications and post-election reviews.” *Id.* “Issue preservation is foundational to proper appellate review.” *Wing v. Com., Unemployment Comp. Bd. of Review*, 496 Pa. 113, 436 A.2d 179, 181 (Pa. 1981). The Pennsylvania rules of appellate procedure mandate that “[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Pa. R.A.P. 302(a). Without proper presentation or preservation, the appellate tribunal cannot properly consider an issue or rule upon it for a subsequent appellate court to review. This reasoning applies to administrative appellate and adjudicative proceedings. As articulated by the Pennsylvania Supreme Court:

[An] administrative law tribunal must be given the opportunity to correct its errors as early as possible; diligent preparation and effective advocacy before the tribunal must be encouraged by requiring the parties to develop complete records and advance all legal theories; and the finality of the lower tribunals' determinations must not be eroded by treating each determination as part of a sequence of piecemeal adjudications. See *Wimms v. City of Philadelphia*, 2013 Phila. Ct. Com. Pl. LEXIS 151, *10-11.

“To preserve an issue, a party must raise it at every stage of the proceeding. *Nabisco Brands, Inc. v. Workers' Comp. Appeal Bd. (Tropello)*, 763 A.2d 555 (Pa. Cmwlth. 2000). Where an issue is not raised in an appeal to an administrative agency, it has been waived. See also *K.J. v. Pa. Dep't of Pub. Welfare*, 767 A.2d 609 (Pa. Cmwlth. 2001). Where, as here, an issue was not raised in exceptions to an administrative or executive entity's decision, it has been waived. *Id.* See also, *Barbour v. Mun. Police Officers' Educ. & Training Comm'n*, 52 A.3d 392, 405 n.6 (Pa. Cmwlth. 2012).

2. Analysis

From the foregoing, it is clear that a party appealing a decision by a lower administrative or executive agency must raise the “issues” or “questions presented” for review to the appellate tribunal. In the instant case, Requester's only “questions presented” section to the Appeals Officer appears on page 1 of its appeal letter dated June 27, 2022. In its appeal to the OOR, the Requester claims it was requesting the following after receiving the County's objections:

- Fulton County Records regarding reviews and audits of the County’s voting machines and election procedures conducted by Wake Technology Services (“Wake TSI”) following the November 2020 elections, including agency communications with external individuals and entities;
- Policies and procedures for ensuring the accuracy of voting systems in the 2020 election, including machine certifications and post-election reviews.

It is the County’s position preliminarily that the Requester has accepted the balance of the County’s objections and/or has waived its right to appeal those objections.

The remaining issues in this appeal concern only Requester’s appeal for the County to release (1) information “regarding reviews and audits of the County’s voting machines and election procedures conducted by Wake Technology Services (“Wake TSI”) following the November 2020 elections, including agency communications with external individuals and entities” and (2) “information regarding the policies procedures for ensuring the accuracy of voting systems in the 2020 election, including machine certifications and post-election reviews.” *Id.*

Regarding the ostensibly preserved issues on appeal that remained, the County provides the following supporting arguments and analysis justifying and supporting its original denial and objections. Furthermore, as explained, the release by the County of the information that the Appeals Officer errantly ruled was still within the scope of the Requester’s appeal, despite the County’s arguments that the Requester has waived most of its initial objections, would require at least in camera review *before* release. The automatic stay provisions under the RTKL are also in affect by the filing of this appeal.

II. The Appeals Officer Erred in Denying the County’s Substantive Arguments for Exclusion

Requester asked for communications and/or documentation and/or information that is not included within the meaning of public records under the Right to Know Act, including, but not necessarily limited to, personal and private information. Under Section 305(a) of the RTKL,

information in an agency's possession is presumed to be public record unless: (1) it is exempt under Section 708 of the RTKL; (2) it is protected by a privilege; or (3) it is exempt from disclosure under any other federal or state law or regulation or judicial order or decree. 65 P.S. § 67.305(a). The Right-to-Know Law exempts the disclosure of a record that "would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual." Section 708(b)(1)(ii) of the Right-to-Know Law, 65 P.S. § 67.708(b)(1)(ii). See also, *Pa. State Educ. Ass'n ex rel. Wilson v. Pa. Office of Open Records*, 4 A.3d 1156, 1160 (Pa. Cmwlth. 2010).

In this regard, the law creates exemptions for certain information often contained in a public record related to personal information. Specifically, § 708(b)(6)(i)(A) identifies exemptions for the following information: (A) A record containing *all or part* of a person's...home, cellular or personal telephone numbers, [and] personal e-mail addresses.... (emphasis added). *Id.* To the extent that the remaining records requested by the Requester contained any two-way communications with or by or from or to individuals that are part of the information "regarding reviews and audits of the County's voting machines and election procedures conducted by Wake Technology Services ("Wake TSI") following the November 2020 elections, including agency communications with external individuals and entities," such communications are subject to the exemption in subsection (b)(6)(i)(A).

The Appeals Officer disagreed that these communications were exempt from disclosure. In any event, the County formally requested in camera review of these communications, so that any such part of said communications subject to the exemption can be redacted to safeguard the information as intended by the exemption. The Appeals Officer also denied this request, and the County believes that this was also error, and that such a review should take place.

In its substantive reply, the County also challenged the Requester's appeal to its objections on several other grounds. The County asserted that the request contained a demand for

communications and/or documentation and/or information exempt or excluded from disclosure due to a current or ongoing investigation and/or current and/or anticipated litigation; the request contained a demand for communications and/or documentation and/or information exempt or excluded from disclosure because it is protected by one, or more, statutory and/or common-law privileges, including, but not necessarily limited to, deliberative process privilege; whistle-blower protection act exclusions and protections; attorney-client privilege; and/or work-product doctrine, and; the request contained a demand for communications and/or documentation and/or information that is protected from disclosure because it relates to or touches upon a public body's ongoing security measures, methods, practices, and procedures, and/or regarding security and safety of persons, property, confidentiality, integrity, and/or availability of computer and information systems. The Appeals Officer disagreed with each of these additional grounds. The Appeals Officer concluded that all information requested should be disclosed by the County.

1. Applicable Law

Section 102 of the RTKL defines "privilege" as: "The attorney work-product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court incorporating the laws of this Commonwealth." See *Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409, 414 (Pa. Cmwlth. 2014).

In addition, the work-product doctrine, while closely related to the attorney-client privilege, provides broader protections. *Levy v. Senate of Pa. (Levy III)*, 94 A.3d 436 (Pa. Cmwlth. 2014); *Dages v. Carbon Cnty.*, 44 A.3d 89 (Pa. Cmwlth. 2012). Confidential information flows from the client to the attorney, and vice versa, in the attorney-client relationship. *Gillard v. AIG Ins. Co.*, 609 Pa. 65, 15 A.3d 44 (Pa. 2011). The attorney-client privilege protects such confidential communications. *Id.* "By contrast, work-product privilege only applies to records that are the work-product of an attorney, and may extend to the product of an attorney's representative secured in

anticipation of litigation.” *Rittenhouse v. Bd. of Sup’rs*, 41 A.3d 975, 2012 Pa. Comwlth. Unpub. LEXIS 248 (2012) (applying Pa. R.C.P. No. 4003.3 in RTKL context) (work product extends to investigator’s reports prepared for litigation).

At the core of the work-product doctrine is that parties and their attorneys need a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. *Commonwealth v. Kennedy*, 583 Pa. 208, 876 A.2d 939, 945 (Pa. 2005). See also, *Hickman v. Taylor*, 329 U.S. 495, 510-11, 67 S. Ct. 385, 91 L. Ed. 451 (1947)). “The underlying purpose of the work product doctrine is to guard the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client’s case.” *Commonwealth v. Sandusky*, 2013 PA Super 182, 70 A.3d 886, 898 (Pa. Super. 2013).

In the RTKL context, the Pennsylvania Court of Appeals recently held the work-product doctrine protects the “mental impressions, theories, notes, strategies, research and the like created by an attorney in the course of his or her professional duties, particularly in anticipation or prevention of litigation” from disclosure. *Levy III*, 94 A.3d at 443 (emphasis added). Moreover, the “doctrine protects any material prepared by the attorney ‘in anticipation of litigation,’ regardless of whether it is confidential.” *Dages*, 44 A.3d at 93 n. 4 (quoting *Nat’l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Cmwlth. 2001)).

The Pennsylvania Supreme Court also previously held “that, to the extent material constitutes an agency’s work product, it is not subject to compulsory public disclosure pursuant to the RTKL.” *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 225 (Pa. 2014) (citing *LaValle v. Office of Gen. Counsel*, 564 Pa. 482, 769 A.2d 449, 459 (Pa. 2001).

The statutory privileges in the RTKL itself are also copasetic with the common-law jurisprudence regarding privileges and protected work-product. Thus, subsection 708(b)(10)

exempts communications and information concerning “predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, *contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.*” (emphasis added).

Section 708(b)(10) is a “statutory privilege.” This exemption would extend to privileged communications by and between the County and individuals and entities whose reports and information have been or will be used by the County to formulate policies and procedures; and, specifically, with respect to the proper conducting of future elections. According to the language of Section 708(b)(10)(i)[A], “protected records must be predecisional and deliberative.” *Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Cmwlth. 2011). Only information that constitutes “confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice” is protected as “deliberative.” *In re Interbranch Comm’n on Juvenile Justice*, 605 Pa. 224, 238, 988 A.2d 1269, 1277-78 (2010) (quoting plurality opinion in *Commonwealth v. Vartan*, 557 Pa. 390, 399, 733 A.2d 1258, 1263 (1999)).

Section 708(b)(17) also provides another “statutory privilege” exemption for records of an agency relating to a noncriminal investigation, including: (i) complaints; investigative materials, notes, correspondence and reports; records that include the identity of confidential sources, including whistle-blowers; a record that includes information made confidential by law; and any work papers underlying an audit.

2. Analysis

Because these aforementioned common-law and statutory privileges and Exemptions extend

to reports, audits, and communications created for and exchanged by and between attorneys and their clients, and to an agent's communications about such reports, the balance of documents and information (and communications) requested are protected by both attorney-client privilege and the work-product doctrine. See *Bagwell, supra* at 415-16. The information sought by the requester contains both communications and reports and agent's communications about reports that are the basis for anticipated litigation. The work-product doctrine also protects the nature of these communications precisely because their disclosure would inevitably divulge privileged communications and work-product that the County must be able to protect in developing its litigation strategies.

Moreover, there is an ongoing active, non-criminal investigation into the conducting of the 2020 election, which necessarily implicates and bears upon the County's proper and lawful conducting of future election cycles. Such information requested by the Requester falls within not only the common-law attorney-client and work-product privileges, but also the statutory privileges identified in (b)(10) and (b)(17) of the RTKL.

While the Requester claimed that the County may not cite to the non-criminal investigation exemption because it has not proved the existence of an investigation, such disclosure itself would violate the statutory privilege and potentially disclose protected information about said investigation. See Attachment 2, Requester's Appeal, p. 5.

Moreover, while the Requester broadly stated that the non-criminal investigation exemption cannot be cited because for an investigation to qualify, an agency "must show that the inspection is within the agency's official duties", the cases cited do not stand for such a broadly sweeping exception to the "noncriminal investigation" exemption. Indeed, the Court in *Dep't of Health v. Office of Open Records*, 4 A.3d 803, 811 (Pa. Cmwlth. 2010), cited by Requester, defined the term "noncriminal investigation" by providing a non-exhaustive list in the conjunctive. Thus, the term

“investigation” within the meaning of this exemption: “includes systematic or searching inquiry, a detailed examination, or an official probe.”

Certainly, in addition to being protected by the common-law and statutory privileges discussed above, including the investigatory executive privileges attendant to an official governmental agency’s probe of potentially systemic issues in the conducting of state and national elections, audits and reports created for the purposes of, inter alia, “inquiry”, “detailed examination,” and “official probe[s]” would be within the “noncriminal investigation” exemption as extrapolated from the very reasoning of the case cited by Requester. Thus, Requester’s gloss on the language of that case was overly simplified and restrictive. The Appeals Officer gave no heed to this argument.

Hedging its position, the Requester contended that the Appeals Officer should require the County to create a privilege log and conduct an in camera review of the balance of the information that Requester still seeks in this appeal. While the County believes the remaining information requested is not subject to any public disclosure, a privilege log, redaction, and in camera review would be the *minimum measures* imposed to protect the sensitive nature of any records that might be responsive to the Requester’s appeal.

The case cited by the Requester for the proposition that communications between an agency and private consultant do not generally fall under the predecisional / deliberative statutory privilege in § 708(b)(10) did not address a situation in which an agency is an actual legislative authority charged with the creation and implementation of regulations and policies related to past, current, and future local, state, and national elections on an ongoing basis. See Attachment 2, Requester’s Appeal, p. 9, citing *Chester Water Auth. v. Pa. Dep’t of Cmty. & Econ. Dev.*, 249 A.3d 1106, 1113 (Pa. 2021). Indeed, the follow up cases suggest that in the least, the Appeals Officer has discretion to undertake in camera review or request submissions as to material facts when exemptions are potentially applicable. See, e.g., *Dinmore v. Pa. Dep’t of Cmty. & Econ. Dev.*, 2022 Pa. Comwlth.

Unpub. LEXIS 188, at *28-31 (Cmwlth. May 6, 2022).

Finally, the security and lawful conducting of future elections necessarily depends on the information and records *from a full and complete audit and reports produced by past and ongoing investigations*. The disclosure of the balance of the requested information is also exempt precisely because the County is still in the process of examining information, audits, and data, and implementing security measures, methods, practices, and procedures to ensure the security and safety of persons, property, confidentiality, integrity, and/or availability of computer and information systems.

Subsection (b)(3) and (4) exempts:

[R]ecords, the disclosure of which creates a *reasonable likelihood* of endangering the safety or the physical security of... information storage system[s], which may include:

(i) documents or data relating to computer hardware, source files, software and system networks that could jeopardize computer security by exposing a vulnerability in preventing, protecting against, mitigating or responding to a terrorist act;

(iii) building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems, including...technology, [and] communication...systems[,] and

(4) A record regarding computer hardware, software and networks, including administrative or technical records, which, if disclosed, would be reasonably likely to jeopardize computer security. 65 Pa. Stat. Ann. § 67.708(b)(3) and (4).

Although the Appeals Officer disagreed, the integrity of the process, methodology, systems, and equipment used or to be used in the conducting of local, state and national elections are matters of utmost concern and deal directly with security and integrity of communications and computer hardware, software, and related systems. The right of every citizen legally entitled to vote in the state to have (1) their vote counted and counted properly, and (2) to NOT have their vote cancelled or annulled by an accidental or fraudulent recording of a non-legal vote is protected by the state and

federal constitutions (particularly, the First and Ninth Amendments). See, e.g., *Reynolds v Sims*, 377 U.S. 533, 560-563; 84 S. Ct. 1362; 12 L. Ed. 2d 506 (1964). While the First Amendment guarantees the right of every legal citizen who is legally registered to cast a vote and to have that vote counted, and this right includes the right *not to have one's vote diluted* or cancelled out by the tabulation of fraudulent votes or ballots, the Supreme Court of the United States has given the right to vote primacy over all other rights. *Id.* Thus, the Court has recognized the “political franchise” of voting as a “fundamental political right, because preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 371; 6 S. Ct. 1064; 30 L. Ed. 220 (1886). “[T]he right...is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights.” *Harper v. Va State Bd of Elections*, 383 U.S. 663, 667 (1966) (emphasis added). Thus, “any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” *Id.* It is a right protected not only by the First Amendment, but one of those non-enumerated fundamental rights reserved to the People by the Ninth. “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. All other rights, even the most basic, are illusory if the right to vote is undermined.” *Reynolds v Sims*, 377 US 533, 560; 84 S Ct 1362; 12 L Ed 2d 506 (1964).

To preserve this fundamental right, it is necessary for the County to ensure the integrity and proper functioning of the systems and methods and processes for conducting future elections. The balance of the information sought by Requester seeks information that is or may be subject to exploitation and abuse. Therefore, it is exempt and protected from public disclosure.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, the County respectfully requests the Court to reverse the decision of the Appeals Officer and affirm the County's denial for the grounds stated in

its objections and in its reply to the Requester's appeal.

In the alternative, pursuant to the County's argument that the Requester waived the balance of the information it requested in its original request, the County would request remand for the Appeals Officer to limit the responsive records only to the County's actual, current policies and procedures for ensuring the accuracy of voting systems in the 2020 election, including machine certifications and post-election reviews.

Finally, in the event that the Court would conclude that any of the remaining information requested is subject to disclosure, the County requests that it be allowed to create a privilege log, redact such information as may be exempted, and have an *in camera* review conducted concerning this and the remaining information to ensure proper and lawful disclosure.

Finally, the County requests a formal stay the production of any documents or information sought by Requester / Appellee pending the disposition and conclusion of the County's appeal.

Respectfully submitted by:

/s/ Thomas J Carroll

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Dated: September 1, 2022

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Thomas J. Carroll

Thomas J. Carroll, Esquire

ATTACHMENT 1

**OOR FINAL DETERMINATION,
AUGUST 2, 2022**

All communications (including letters, emails, email attachments, complete email chains, calendar invitations, calendar invitation attachments, text messages, instant messages, and social media communications) involving Fulton County Commissioners including Randy Bunch, Stuart Ulsh, and Paula Shives, Fulton County Elections Director Patti Hess, Fulton County Technology Director Eldon Martin, Senator Doug Mastriano, Senator Judy Ward, Senator Cris Dush, and Representative Jesse Topper, concerning the topics listed below.

1. All communications with anyone communicating from an email address ending in @eac.gov.
2. All communications with Rudy Giuliani, Sidney Powell, Mike Lindell, MyPillow, Patrick Byrne, Fox News, Newsmax, One America News Network (OAN), Defending the Republic, Powell P.C., or any of their officers, employees, agents, trust, attorneys, accountant, representatives, or other person/s purporting to work on their behalf.
3. All communications with anyone from an email address ending in @waketsi.com, @alliedspecialops.us, @cyberninjas.com, @federalappeals.com, @giulianisecurity.com, @giulianipartners.com, @gdcillc.com, @foxnews.com, @newsmax.com, and @oann.com.
4. All documents and communications relating to audits, reports, or investigations of the 2020 election, including by Wake TSI, Pro V&V, SLI Compliance, Allied Security Operations Group, Alex Halderman, or any state or local agencies.
5. All documents and communications concerning policies and procedures for ensuring the accuracy of voting technology and machines for the 2020 election.
6. All documents and communications, including but not limited to voicemail messages, concerning threats or harassment of local election officials.
7. All documents and communications with or relating to Cyber Ninjas, Doug Logan, Wake Technology Services, Inc, Allied Security Operations Group (ASOG), Conan Hayes, Russell Ramsland, Todd Sanders, and Joshua Merritt.
8. All documents and communications from November 3, 2020 to the present with constituents that concern or reference Dominion and/or the 2020 election, and any internal correspondence about or relating to these constituent communications.
9. All documents and communications with anyone who works for Election Systems & Software (ES&S), Hart InterCivic, or Clear Ballot.

On June 3, 2022, following a 30-day extension, 65 P.S. § 67.902(b), the County denied the Request on seven grounds, stating that it “contains a demand for communications and/or

documentation and/or information” that (1) is not included within the meaning of public records; (2) is exempt because of an ongoing investigation, 65 P.S. §§ 67.708(b)(16); (17)¹; (3) is protected by an unidentified privilege; (4) would jeopardize the individual rights of one or more of the parties subject to the Request; (5) relates to the performance of the public duties of a public officer; (6) addresses matters of an advisory nature preliminary to a final executive agency determination of policy or action, 65 P.S. § 67.708(b)(10); and (7) touches upon ongoing security measures, including security related to a computer system. 65 P.S. § 67.708(b)(3).

On June 10, 2022, the Requester sent the County an email asking the County to clarify which parts of its denial related to which parts of the Request, and what the legal basis for the denial rationale was.

On June 27, 2022, the Requester appealed to the OOR, arguing that the County had improperly issued a conclusory denial and that the County needed to provide specific evidence of its claims.² The OOR invited the parties to supplement the record and directed the County to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On July 11, 2022, the County submitted a position statement arguing that the Requester’s appeal had narrowed the issues to only “[r]ecords regarding reviews and audits of the County’s voting machines and election procedures conducted by Wake Technology Services[] following the November 2020 elections, including agency communications with external individuals and entities[,]” and “[p]olicies and procedures for ensuring the accuracy of voting systems in the 2020 election, including machine certifications and post-election reviews” and that this represented a significant narrowing of the issues from the Request to the appeal under Section 1101(a) of the

¹ The denial did not cite to any of the exemptions in the RTKL as required by law; however, where appropriate, the OOR references sections of the RTKL which might be relevant to the stated grounds for denial.

² Because the OOR was closed on June 20, 2022 in observance of Juneteenth, this was the fifteenth business day since the County’s denial. 65 P.S. § 67.1101(a).

RTKL. 65 P.S. § 67.1101(a). The County further argued that such communications are exempt under 65 P.S. § 67.708(b)(6)(i)(A), the attorney-client and attorney-work product privileges, as internal, predecisional, deliberative communications pursuant to 65 P.S. § 67.708(b)(10), and as relating to a noncriminal investigation under 65 P.S. § 67.708(b)(17), although the County argued that it could not submit evidence of the existence of such an investigation, because that would disclose protected information. Finally, the County argued that records relating to the processes by which its voting machines functioned are exempt under the RTKL's security and computer exemptions, 65 P.S. §§ 67.708(b)(3)-(4), as well as the Constitution of the United States.

On July 13, 2022, the OOR asked the County to provide it with an estimate for the total number of records which it deemed privileged, as well as an estimate of the time it would require to produce a privilege log.

On July 19, 2022, the County submitted a response stating that it believed only a limited number of documents were responsive following the Requester's alleged failure to preserve issues on appeal but did not provide the requested estimates.

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, both parties suggested *in camera* review, but the OOR did not conduct such a review because the County did not identify any of the records which would be subject to such a review or provide the OOR with any estimate for how long such a process would require.

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 to be 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 to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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). 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 burden of proof in claiming a privilege is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011).

1. Scope of the appeal

The Request seeks all communications involving the Fulton County Commissioners and nine named individuals that concern any of nine topics, ranging from communications with specific individuals to communications regarding threats connected to the 2020 general election. The County argues that, on appeal, the Requester significantly narrowed the scope of the Request:

“In the instant case, Requester’s only ‘questions presented’ section to the Appeals Officer appears on page 1 of its appeal letter dated June 27, 2022. The Requester’s ‘appeal’ only takes issue with its prior request ‘regarding reviews and audits of the County’s voting machines and election procedures conducted by ‘Wake Technology Services (Wake TSI)’ following the November 2020 election, including agency communications with external individuals and entities’; and ‘[p]olicies and procedures for ensuring the accuracy of voting systems in the 2020 election, including machine certifications and post-election reviews.’”

[...]

“It is the County’s position preliminarily that the Requester has accepted the balance of the County’s objections and/or has waived its right to appeal those objections.”

Section 1101(a)(1) of the RTKL states that an “appeal shall state the grounds upon which the requester asserts that the record is a public record, legislative record or financial record and shall address any grounds stated by the agency for ... denying the request.” 65 P.S. § 67.1101(a)(1); *see also Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429, 434 (Pa. Commw. Ct. 2011). In *Pa. Dep’t of Corr.*, the Commonwealth Court held: “it is appropriate and, indeed, statutorily required that a requester specify in its appeal to [the OOR] the particular defects in an agency’s stated reasons for denying a RTKL request...the provision merely places a burden on a requester to identify flaws in an agency’s decision denying a request.” *Id.* In the instant appeal, the Requester’s appeal correspondence addresses each of the County’s grounds for denial

in general terms - more specific issue identification is foreclosed by the fact that the County's denial is, itself, vague and general, and the County does not appear to have responded to the Requester's June 10, 2022 email seeking additional detail about the bases for denial. Therefore, the appeal meets the statutory requirement of Section 1101(a).

Separately from Section 1101(a), however, the scope of an appeal may be limited if a Requester either explicitly or implicitly waives their appeal rights to part of the response. *Id.* (“[T]he effect of a failure to file timely exceptions will be deemed a waiver to objections to a proposed report of the hearing officer”) (citing *Martella v. Dep’t of Transp.*, 841 A.2d 633 (Pa. Commw. Ct. 2004)). Here, the County argues that the Requester has failed to file exceptions to any part of the County's response save for records explicitly concerned with Wake TSI's audits and policies and procedures for ensuring accuracy of voting machines, because those issues were specifically mentioned in the “Background” section of the appeal filing, while other subjects were not referred to explicitly.

This is not a reasonable interpretation of the appeal filing. The appeal correspondence states in the “Background” section that “the [R]equest sought, *among other information*, [County] Records regarding reviews and audits of the County's voting machines and election procedures conducted by [Wake TSI] following the November 2020 elections, including agency communications with external individuals and entities.” (emphasis added). This section is meant to summarize the Requester's interest in the information; there is no indication that it was intended to narrow the scope of the Request, which was also submitted.³ Finally, as noted above, the Requester has explicitly argued that every ground raised by the County is either incorrectly raised

³ Notably, the appeal also includes the sentence, “The records requested by [the Requester] seek communications between [C]ounty officials and a private company, Wake TSI, *in addition to* explicitly external communications with a range of other specifically identified private and governmental individuals and entities.” (emphasis added).

or insufficiently supported by evidence. Therefore, the OOR is unable to adopt the County's determination that the Requester has waived some unidentified majority portion of the Request, and the OOR will proceed under the assumption that the entire Request is at issue on appeal.

2. The County has submitted no evidence that any records are exempt

On appeal, the County argues that the responsive records are exempt because they contain personal information protected by Section 708(b)(6)(i)(A) of the RTKL, 65 P.S. § 67.708(b)(6)(i)(A), because they contain information protected by the attorney-client and work-product privileges, because they contain records which constitute internal, predecisional, and deliberative communications, 65 P.S. § 67.708(b)(10)(i)(A), because they relate to one or more noncriminal investigations, 65 P.S. § 67.708(b)(17), because the records would endanger the safety or security of the County's electronic voting systems, 65 P.S. §§ 67.708(b)(3)-(4), because the records would reveal information protected by the state constitutional right to privacy, and because the Constitution of the United States of America requires that the County assure that such voting systems are secure.

The County did not identify any of the responsive records which it alleges are exempt, nor did it choose to submit any evidence to support these exemptions. By and large, the County does not explain the relevance of these exemptions to any part of the Request. The agency bears the burden of proof in appeals under the RTKL. *See* 65 P.S. § 67.708(a)(1). Unsworn statements or statements of counsel, such as the County's submissions, that are not supported by affidavit testimony, have been held not to be competent evidence under the RTKL. *See Housing Auth. of the City of Pittsburgh v. Van Osdol*, No. 795 C.D. 2011, 2012 Pa. Commw. LEXIS 87 (Pa. Commw. Ct. 2012); *Office of the Governor v. Davis*, 122 A.3d 1185, 1193 (Pa. Commw. Ct. 2015)

(“Position statements are akin to briefs or proposed findings of fact, which, while part of the record, are distinguishable from the evidentiary record”) (citations omitted).

Failure to submit evidence in response to an RTKL appeal is not necessarily a cause for default judgment, as the OOR must also consider the context and contents of the appeal filing itself. *Pa. Game Comm’n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements in the appeal filing when construing exemptions); *see also Office of the Governor v. Davis*, 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2015) (*en banc*) (holding that an affidavit may be unnecessary when an exemption is clear from the face of the record). Therefore, the OOR will consider each of the County’s proposed exemptions to determine if they may be applied without any evidentiary submission.

a. Personal information under Section 708(b)(6)(i)(A)

The County withheld an unknown number of unknown records as exempt under Section 708(b)(6)(i)(A) of the RTKL. Section 708(b)(6) of the RTKL exempts from disclosure certain personal identification information, including “a record containing all or part of a person’s Social Security number; driver’s license number; personal financial information; home, cellular or personal telephone numbers; personal e-mail addresses; employee number or other confidential personal identification number.” 65 P.S. § 67.708(b)(6)(i)(A).

Because Section 708(b)(6)(i)(A) of the RTKL exempts specific information rather than subjective categories of information, establishing that a record contains information exempt under this section only requires evidence that any exempt information is included in a responsive record. Given the nature of the Request, it is reasonable to expect that some or all the information exempt under Section 708(b)(6)(i)(A) of the RTKL is included in responsive communications, especially home, cellular or personal telephone numbers and personal email addresses.

However, Section 708(b)(6)(i)(A) of the RTKL permits only the redaction of exempt information from responsive records; the County is not entitled to withhold responsive records without identifying them on the grounds that they contain exempt information. 65 P.S. § 67.706 (“If an agency determines that a public record, legislative record or financial record contains information which is subject to access as well as information which is not subject to access, the agency’s response shall grant access to the information which is subject to access and deny access to the information which is not subject to access. ...The agency may not deny access to the record if the information which is not subject to access is able to be redacted.”) While the County may redact the specific information which is exempt under Section 708(b)(6)(i)(A), it has provided no rationale or evidence to show that it may withhold any records under this section.

b. Attorney-client and Attorney-work product privilege

The County argues that an unknown number of unknown records are exempt because they are subject to the attorney-client and attorney-work product privileges. For the attorney-client privilege to apply, an agency must demonstrate that: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the privilege has been claimed and is not waived by the client. *See Bousamra v. Exela Health*, 210 A.3d 967, 983 (Pa. 2019) (internal citations omitted). An agency may not rely on a bald assertion that the attorney-client privilege applies. *See Clement v. Berks County*, OOR Dkt. AP 2011-0110, 2011 PA O.O.R.D. LEXIS 139 (“Simply invoking the phrase ‘attorney-client privilege’ or ‘legal advice’ does not excuse the agency from the burden it must meet to

withhold records”). The attorney-client privilege protects only those disclosures necessary to obtain informed legal advice, where the disclosure might not have occurred absent the privilege, and where the client’s goal is to obtain legal advice. *Joe v. Prison Health Services, Inc.*, 782 A.2d 24 (Pa. Commw. Ct. 2001). The Commonwealth Court has confirmed that, after an agency establishes the privilege was properly invoked under the first three prongs outlined above, the party challenging invocation of the privilege must prove waiver under the fourth prong. *Bagwell v. Pa. Dep’t of Educ.*, 103 A.3d 409, 420 (Pa. Commw. Ct. 2014).

The attorney work-product doctrine, on the other hand, prohibits disclosure “of the mental impressions of a party’s attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” Pa.R.C.P. 4003.3. “The purpose of the work product doctrine is to protect the mental impressions and processes of an attorney acting on behalf of a client, regardless of whether the work product was prepared in anticipation of litigation.” *Bousamra*, 210 A.3d at 976 (internal citations omitted); *see also Heavens v. Pa. Dep’t of Env’tl. Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013) (“[U]nder the RTKL the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked”). While the attorney-client privilege is waived by voluntary disclosure, *Bousamra*, 210 A.3d at 978 (internal citation omitted), the work-product doctrine is not primarily concerned with confidentiality, as it is designed to provide protection against adversarial parties. *Id.* at 979 (internal citations and quotation omitted).

It is difficult to establish the existence of either privilege without evidence, either submitted by affidavit testimony or by a review *in camera*. Though the OOR does not have the power to order the disclosure of privileged material, it retains subject matter jurisdiction to determine whether otherwise-public documents are privileged. *Commonwealth v. Center Twp.*, 95 A.3d 354

(Pa. Commw. Ct. 2014). To accomplish this, it is incumbent upon the agency, which bears the burden of proof and production throughout the RTKL process, to submit evidence establishing the elements of the privilege; or, in the cases where that is not possible, to identify the privileged records to the OOR for review. See *Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017) (*en banc*) (stating that “it is not incumbent upon OOR to request additional evidence when developing the record. Rather, it is the parties’ burden to submit sufficient evidence to establish material facts.”); see also *Mission Pa., LLC v. McKelvey*, 212 A.3d 119, 129 (Pa. Commw. Ct. 2019), *appeal denied* by 223 A3d 675 (Pa. 2020) (“A preponderance of the evidence may be the lowest burden of proof, but it still requires evidence unless the facts are uncontested or clear from the face of the RTKL request or the exemption”).

Here, the County has not identified any records which it argues are subject to the privilege, nor explained how the elements of the privilege relate to any record, except by stating that “[t]he information sought by the requester contains *both* communications and *reports* and *agent’s communications* about *reports* that are the basis for anticipated litigation” and that disclosure “would inevitably divulge privileged communications[.]” (emphasis in original). The County has not submitted any evidence which would demonstrate that either privilege applies to any record. Finally, in response to the OOR’s inquiry regarding the feasibility of creating an exemption log to address the County’s privilege claims, the County indicated that such a log would only be necessary after a reviewing court considered the OOR’s determination that the Requester had not waived their appeal as to these unidentified privileged records. As a result, the OOR is unable to determine that any responsive records are subject to either privilege.

c. Internal, predecisional deliberative records under Section 708(b)(10)(i)(A)

The County argues that the records are exempt under Section 708(b)(10)(i)(A) because they will inform the County's future actions in election administration. Section 708(b)(10)(i)(A) exempts from public disclosure a record that reflects:

[t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, ... or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A). To withhold a record under Section 708(b)(10)(i)(A), an agency must show: 1) the deliberations reflected are internal to the agency, including representatives; 2) the deliberations reflected are predecisional, i.e., before a decision on an action; and 3) the contents are deliberative in character, i.e., pertaining to a proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011).

Here, the County did not identify any of the alleged predecisional and deliberative records and did not submit any evidence to show that such records meet any of the elements of the exemption. Instead, the County states only that these records will inform the County's discussion of how to administer future elections; that statement alone fails to satisfy any of the elements of the exemption. Therefore, the OOR cannot find that any of the responsive records are exempt as internal, predecisional, and deliberative communications.

d. Records relating to computer systems under Sections 708(b)(3) and 708(b)(4)

The County denied the Request insofar as it seeks records relating to the County's methods for ensuring the accuracy of voting machines. Section 708(b)(3) of the RTKL exempts from disclosure "[a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, infrastructure, facility or information

storage system....” 65 P.S. § 67.708(b)(3). For this exemption to apply, “the disclosure of” the records - rather than the records themselves - must create a reasonable likelihood of endangerment to the safety or physical security of certain structures or other entities, including infrastructure. *See* 65 P.S. § 67.708(b)(3). The Commonwealth Court has held that “[a]n agency must offer more than speculation or conjecture to establish the security-related exemptions....” *California Borough v. Rothey*, 185 A.3d 456, 468 (Pa. Commw. Ct. 2018) (internal citations omitted).

Meanwhile, Section 708(b)(4) of the RTKL exempts from disclosure “[a] record regarding computer hardware, software and networks, including administrative or technical records which, if disclosed, would be reasonably likely to jeopardize computer security.” 65 P.S. § 67.708(b)(4). “In order for a record to be exempt under Section 708(b)(4), it ‘must be on the subject of computer hardware, software or networks.’” *Monighan v. Pa. Dep’t of Transp.*, OOR Dkt. AP 2017-2428, 2018 PA O.O.R.D. LEXIS 331 (quoting *Abraham v. Sch. Dist. of Phila.*, OOR Dkt. AP 2012-0070, 2012 PA O.O.R.D. LEXIS 47).

Here, the County has provided no description of the responsive records and has submitted no evidence to demonstrate that all responsive records contain information which is likely to jeopardize computer security. Although it is certainly possible that some records responsive to this Request could contain such information, the OOR is unable to find that the County has demonstrated any element of either exemption.⁴

⁴ The County further argues that the importance of the application of the exemptions at Section 708(b)(3) and (4) of the RTKL is underscored by the fundamental right to vote, which requires the County to secure and maintain its election systems. The OOR agrees with this claim- if release of data would endanger state and federal voting procedures, such data would be exempt under the RTKL. The fundamental issue is that the County has not identified any of the data it argues would create such dangers, nor has it offered any evidence to show such dangers are present. The OOR is legally incapable of upholding an exemption on the basis that threats exist in some general sense. *Rothey*, 185 A.3d at 468.

e. Records relating to a noncriminal investigation under Section 708(b)(17)

The County argues that an unknown number of unknown records relate to a noncriminal investigation. Section 708(b)(17) of the RTKL exempts from disclosure “[a] record of an agency relating to a noncriminal investigation, including ... [i]nvestigative materials, notes, correspondence and reports” or a record that, if disclosed, would “[c]onstitute an unwarranted invasion of privacy.” 65 P.S. §§ 67.708(b)(17)(i). To successfully assert the noncriminal investigative records exemption, the agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814. An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012); *see also Pa. Dep’t of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014).

In this instance, the County argues that records relate to a noncriminal investigation, but it does not identify the nature or provenance of the investigation. In its reply on appeal, the County affirmatively refuses to admit whether an investigation is occurring at all.⁵ Therefore, the County has not demonstrated that any records relate to any noncriminal investigation.

⁵ The County asserts a form of the so-called “Glomar response” by neither confirming nor denying that an investigation exists. In the vast majority of cases, the RTKL’s requirement that an agency demonstrate that a record is exempt from disclosure before withholding it means that the agency must provide (1) an acknowledgement that the records exist, (2) a description of the records, and (3) an analysis of why the records are exempt. Only in extremely rare circumstances can an agency meet its burden without providing all three of those elements to the OOR. *Yackamovich v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2016-1959, 2016 PA O.O.R.D. LEXIS 1763 (finding that disclosure of any responsive records would threaten public safety). Here, the County has failed to explain why security concerns should permit it to claim the benefit of an investigative exemption without meeting the elements needed to assert the exemption.

f. The Pennsylvania state constitutional right to privacy

The County argues that an unknown number of unknown records are subject to the state constitutional right to privacy. The Pennsylvania Supreme Court has held that an individual possesses a constitutional right to privacy in certain types of personal information. *Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142 (Pa. 2016). When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the OOR must balance the individual's interest in informational privacy with the public's interest in disclosure and may release the personal information only when the public benefit outweighs the privacy interest. *Id.*; *see also Pennsylvania State Univ. v. State Employees' Retirement Bd.*, 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act).

Although the Pennsylvania Supreme Court did not expressly define the types of "personal information" subject to the balancing test, the Court recognized that certain types of information, by their very nature, implicate privacy concerns and require balancing. *Pa. State Educ. Ass'n*, 148 A.3d at 156-57; *see also Tribune-Review Publ. Co. v. Bodack*, 961 A.2d 110, 117 (Pa. 2008) (finding telephone numbers to constitute personal information subject to the balancing test); *Pa. State Univ.*, 935 A.2d at 533 (finding home addresses, telephone numbers and social security numbers to be personal information subject to the balancing test); *Sapp Roofing Co. v. Sheet Metal Workers' International Assoc.*, 713 A.2d 627, 630 (Pa. 1998) (plurality) (finding names, home addresses, social security numbers, and telephone numbers of private citizens to be personal information subject to the balancing test).

To determine whether the constitutional right to privacy precludes disclosure of an individual's personal information, the OOR must apply the balancing test enunciated in

Denoncourt v. Pa. State Ethics Comm'n, 470 A.2d 945 (Pa. 1983), and applied in the public records context in *Times Publ. Co., Inc. v. Michel*, 633 A.2d 1233, 1237 (Pa. Commw. Ct. 1993), “weighing privacy interests and the extent to which they may be invaded, against the public benefit which would result from disclosure.”

In this matter, the County has not identified any of the records, or information contained within those records, that it claims are subject to the right to privacy, nor has it submitted any evidence that it notified any third parties of their right to participate on appeal, as required by the OOR’s order. Because the County has not identified the records at issue in any capacity, the OOR is unable to determine whether the records are “sufficiently personal” to any individual to qualify for the *Denoncourt* test. Therefore, the OOR concludes that the County has not demonstrated that any records are protected by the state constitutional right to privacy.

Because the County has submitted no argument or evidence which justifies the exemption of public records, or even identified such public records, the OOR is constrained to grant the Request in full. The County cannot just rely upon the premise that it may ignore the OOR’s fact-finding in favor of an appellate court. The OOR is the initial fact-finder, and an agency shall raise and support all of its challenges before the OOR. *Levy v. Senate of Pa.*, 94 A.3d 436, 441-42 (Pa. Commw. 2014). An appellate court will generally not serve as fact-finder because doing so will give agencies “the proverbial second bite at the apple.” *Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017); *see also Crocco v. Pa. Dep’t of Health*, 214 A.3d 316, 321 (Pa. Commw. Ct. 2019) (“Absent unusual circumstances or a deficient record, ... this Court declines to serve as fact-finder, and relies on the record created before [the] OOR”). Despite being presented with a full opportunity to present evidence in support of the cited exemptions, the County has not done so.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted**, and the County is required to provide all responsive records within 30 days, subject to redaction under Section 708(b)(6)(i)(A) of the RTKL. 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 Fulton 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 according to court rules 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.⁶ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 2, 2022

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: Florence Chen, Esq. (via email only);
Thomas Carroll, Esq. (via email only);
Stacey Golden (via email only)

⁶ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

ATTACHMENT 2

**REQUESTER'S APPEAL TO OOR,
JUNE 27, 2022**

NOTICE OF DEADLINES

The appeal has been docketed by the OOR and it has been assigned to an Appeals Officer. The docket number and the Appeals Officer's contact information are included in the attachments you received along with this notice.

The Final Determination is currently due on **July 27, 2022**.

The timeline for this RTKL appeal may be extended by the OOR during the appeal This extension will allow the OOR the flexibility it requires to protect due process and to ensure that the agency and requester, along with any third parties, have a full and fair opportunity to meaningfully participate in the appeal.

Evidence, legal argument and general information to support your position must be submitted within seven (7) business days from the date of this letter, unless the Appeals Officer informs you otherwise. *Note: If the proceedings have been stayed for the parties to submit a completed mediation agreement, the record will remain open for seven (7) business days beyond the mediation agreement submission deadline.*

Submissions in this case are currently due on **July 8, 2022**.

If you are unable to meaningfully participate in this appeal under the above deadlines, please notify the Appeals Officer as soon as possible.

Due to delays in U.S. mail, we urge agencies and requesters to use email for all communications with the OOR to the extent possible.

Presently, the OOR is receiving postal mail on a limited basis. Accordingly, we urge agencies and requesters to use email for all communication with the OOR to the extent possible.

If you have any questions about this notice or the underlying appeal, please contact the Appeals Officer. The OOR is committed to working with agencies and requesters to ensure that the RTKL appeal process proceeds as fairly and as smoothly as possible.



pennsylvania
OFFICE OF OPEN RECORDS

June 28, 2022

Via Email Only:

Ms. Florence T. Chen
Dominion Voting Systems, Inc.
1000 Louisiana Street
Suite 5100
Houston, TX 77002-5096
fchen@susmangodfrey.com
kfarley@susmangodfrey.com

Via Email Only:

Stacey Golden
Agency Open Records Officer
Fulton County
116 West Market Street, Suite 203
McConnellsburg, PA 17233
openrecords@co.fulton.pa.us
sgolden@co.fulton.pa.us

RE: OFFICIAL NOTICE OF APPEAL - Chen and Dominion Voting Systems, Inc. v. Fulton County OOR Dkt. AP 2022-1542

Dear Parties:

Review this information and all enclosures carefully as they affect your legal rights.

The Office of Open Records (“OOR”) received this appeal under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, et seq. on June 27, 2022. A binding Final Determination (“FD”) will be issued pursuant to the timeline required by the RTKL, **please see the attached information for more information about deadlines.**

Notes for both parties (more information in the enclosed documents):

- The docket number above must be included on all submissions related to this appeal.
- Any information provided to the OOR must be provided to all parties involved in this appeal. Information that is not shared with all parties will not be considered.
- All submissions to the OOR, other than *in camera* records, will be public records. Do not include any sensitive information- such as Social Security numbers.

If you have questions about this appeal, please contact the assigned Appeals Officer (contact information enclosed), providing a copy of any correspondence to all parties involved in this appeal.

Sincerely,

Elizabeth Wagenseller
Executive Director

Enc.: Description of RTKL appeal process
Assigned Appeals Officer contact information
Entire appeal as filed with OOR

The Right-to-Know Law Appeal Process

Please review this information carefully as it affects your legal rights.

The Office of Open Records (“OOR”) has received the enclosed appeal, which was filed under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, et seq. A binding Final Determination will be issued by the OOR pursuant to the statutory timeline, subject to the notice of deadlines enclosed herein. If you have any questions, please contact the Appeals Officer assigned to this case. Contact information is included on the enclosed documents.

Submissions to the OOR

Both parties may submit evidence, legal argument, and general information to support their positions to the assigned Appeals Officer. Please contact the Appeals Officer as soon as possible.

Any information provided to the OOR must be provided to all parties involved in this appeal. Information submitted to the OOR will not be considered unless it is also shared with all parties.

Include the docket number on all submissions.

The agency may assert exemptions on appeal even if it did not assert them when the request was denied (*Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013)).

Generally, submissions to the OOR — other than *in camera* records — will be public records. Do not include sensitive or personal information, such as Social Security numbers, on any submissions.

Agency Must Notify Third Parties

If records affect a legal or security interest of a third party; contain confidential, proprietary or trademarked records; or are held by a contractor or vendor, **the agency must notify such parties of this appeal immediately and provide proof of that notice by the record closing date set forth above.**

Such notice must be made by: (1) Providing a copy of all documents included with this letter; **and** (2) Advising relevant third parties that interested persons may request to participate in this appeal by contacting the Appeals Officer assigned to this case (see 65 P.S. Â§ 67.1101(c)).

The Commonwealth Court has held that “the burden [is] on third-party contractors... to prove by a preponderance of the evidence that the [requested] records are exempt.” (*Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011)).

A third party's failure to participate in a RTKL appeal before the OOR may be construed as a waiver of objections regarding release of requested records.

NOTE TO AGENCIES: If you have questions about this requirement, please contact the Appeals Officer immediately.

Statements of Fact & Burden of Proof

Statements of fact must be supported by an affidavit or attestation made under penalty of perjury by a person with actual knowledge. Statements of fact or allegations submitted without an affidavit may not be considered.

Under the RTKL, the agency has the burden of proving that records are exempt from public access (see 65 P.S. § 67.708(a)(1)). **To meet this burden, the agency must provide evidence to the OOR.**

The law requires the agency position to be supported by sufficient facts and citation to all relevant sections of the RTKL, case law, and OOR Final Determinations.

An affidavit or attestation is required to prove that records do not exist.

Sample affidavits are on the OOR website, openrecords.pa.gov.

Any evidence or legal arguments not submitted or made to the OOR may be waived.

Preserving Responsive Records

The agency must preserve all potentially responsive records during the RTKL appeal process, including all proceedings before the OOR and any subsequent appeals to court.

Failure to properly preserve records may result in the agency being sanctioned by a court for acting in bad faith.

See *Lockwood v. City of Scranton*, 2019-CV-3668 (Lackawanna County Court of Common Pleas), holding that an agency had “a mandatory duty” to preserve records after receiving a RTKL request. Also see generally *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018), holding that “a fee award holds an agency accountable for its conduct during the RTKL process...”

Mediation

The OOR offers a mediation program as an alternative to the standard appeal process. To participate in the mediation program, both parties must agree in writing.

The agency must preserve all potentially responsive records during the RTKL appeal process. Mediation is a voluntary, informal process to help parties reach a mutually agreeable settlement. The OOR has had great success in mediating RTKL cases.

If mediation is successful, the requester will withdraw the appeal. This ensures that the case will not proceed to court — saving both sides time and money.

Either party can end mediation at any time.

If mediation is unsuccessful, both parties will be able to make submissions to the OOR as outlined on this document, and the OOR will have no less than 30 calendar days from the conclusion of the mediation process to issue a Final Determination.

Parties are encouraged to consider the OOR's mediation program as an alternative way to resolve disputes under the RTKL.



pennsylvania

OFFICE OF OPEN RECORDS

APPEALS OFFICER:

Jordan Davis, Esq.

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**Preferred method of contact and
submission of information:**

EMAIL

**Please direct submissions and correspondence related to this appeal to the above Appeals Officer.
Please include the case name and docket number on all submissions.**

**You must copy the other party on everything you submit to the OOR. The Appeals Officer cannot
speak to parties individually without the participation of the other party.**

The OOR website, <https://openrecords.pa.gov>, is searchable and both parties are encouraged to review
prior final determinations involving similar records and fees that may impact this appeal.

The OOR website also provides sample forms that may be helpful during the appeals process. OOR staff
are also available to provide general information about the appeals process by calling (717) 346-9903.

REQUEST TO PARTICIPATE BEFORE THE OOR

Please accept this as a Request to Participate in a currently pending appeal before the Office of Open Records. The statements made herein and in any attachments are true and correct to the best of my knowledge, information and belief. I understand this statement is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

NOTE: The requester filing the appeal with the OOR is a named party in the proceeding and is NOT required to complete this form.

OOR Docket No: _____

Today's date: _____

Name: _____

PUBLIC RECORD NOTICE: ALL FILINGS WITH THE OOR WILL BE PUBLIC RECORDS AND SUBJECT TO PUBLIC ACCESS WITH LIMITED EXCEPTION. IF YOU DO NOT WANT TO INCLUDE PERSONAL CONTACT INFORMATION IN A PUBLICLY ACCESSIBLE RECORD, PLEASE PROVIDE ALTERNATE CONTACT INFORMATION IN ORDER TO RECEIVE FUTURE CORRESPONDENCE RELATED TO THIS APPEAL.

Address/City/State/Zip _____

E-mail _____

Fax Number: _____

Name of Requester: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E-mail _____

Name of Agency: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E-mail _____

Record at issue: _____

I have a direct interest in the record(s) at issue as (check all that apply):

- ☐ An employee of the agency
- ☐ The owner of a record containing confidential or proprietary information or trademarked records
- ☐ A contractor or vendor
- ☐ Other: (attach additional pages if necessary) _____

I have attached a copy of all evidence and arguments I wish to submit in support of my position.

Respectfully submitted, _____ (must be signed)

Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.

From: [Kate Farley](#)
To: [DC, OpenRecords](#)
Subject: [External] OOR Appeal
Date: Monday, June 27, 2022 7:23:40 PM
Attachments: [OOR Appeal Letter.pdf](#)
[Ex. A.pdf](#)
[Ex. B.pdf](#)
[Ex. C.pdf](#)
[Ex. D.pdf](#)

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Dear Appeals Officer,

Attached is an appeal of Fulton County's Denial of Dominion's 4/29 RTK Request. Also attached are the request, the County's request for an extension, and the County's 6/3 denial. Please let me know if you have any questions.

Thank you,

Kate Farley, Staff Attorney
Susman Godfrey L.L.P.

Email: kfarley@susmangodfrey.com

Direct: (713) 650-4311

Cell: (210) 445-2026

Not admitted in any state. Practicing under the supervision of the partnership of Susman Godfrey L.L.P.

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June 27, 2022

VIA ONLINE APPEAL FORM

Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
openrecords@pa.gov

Re: Right-to-Know Law Request Appeal

Dear Appeals Officer:

Pursuant to Pennsylvania's Right-to-Know Law ("RTKL"), 65 P.S. § 67.1101(a), US Dominion, Inc., Dominion Voting Systems, Inc., and Dominion Voting Systems Corporation ("Dominion") submits the following administrative appeal.

Background

On April 29, 2022, Dominion submitted a Right-to-Know request ("RTK request") to the Fulton County Chief Clerk and the Fulton County Board of Commissioners.¹ *See* Ex. A. Pursuant to the scope of public records available to requesters under 65 P.S. § 67.102, the request sought, among other information, Fulton County Records regarding reviews and audits of the County's voting machines and election procedures conducted by Wake Technology Services ("Wake TSI") following the November 2020 elections, including agency communications with external individuals and entities. The request also sought information regarding the policies and procedures for ensuring the accuracy of voting systems in the 2020 election, including machine certifications and post-election reviews. *Id.*

¹ Dominion's RTK request was submitted via email on April 29, 2022, and Fulton County's Chief Clerk replied on May 2, 2022, with a letter requesting a 30-day extension pursuant to Section 902(a) of the RTKL. Ex. B.

In a letter dated June 3, 2022, Fulton County denied Dominion's RTK request. Ex. C. Fulton County provided the following reasons for denying the request:

1. It contains a demand for information that is not within the meanings of public records under the RTKL, including personal and private information.
2. It contains a demand for information that is exempt because it relates to an ongoing noncriminal investigation or anticipated litigation.
3. It contains a demand for information that is exempt because it is protected by statutory or common-law privilege.
4. It contains a demand for information that is protected from disclosure because disclosure may jeopardize the individual rights of one or more parties subject to the request.
5. It contains a demand for information that is protected from disclosure because it relates to the performance of the public duties of a public officer.
6. It contains a demand for information that is protected from disclosure because it reflects internal, predecisional deliberations.
7. It contains a demand for information that is protected because it relates to public and ongoing security measures and the confidentiality and integrity of computer and information systems. *Id.*

Dominion appeals Fulton County's denial and requests that the Office of Open Records (the "OOR") direct the County to immediately release the requested records, or, alternatively, conduct an *in camera* review of the records at issue, instruct the County to provide a privilege log, and grant the parties a hearing on this matter.

Appeal of Fulton County's Denial

The RTKL requires an agency "to make a good faith search for information responsive to a request and determination of whether that information is public." *Off. of the Dist. Att'y of Phila v. Bagwell*, 155 A.3d 1119, 1140-41 (Pa. Commw. Ct. 2017). The failure to conduct the required good faith search can support a finding of bad faith. "An abnegation of mandatory duties by an agency, including performance of a detailed search and review of records to ascertain if the requested material exists, or if any exclusion may apply, prior to denial of access will support a finding of bad faith." *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 243 A.3d 19, 25 (Pa. 2020). The agency bears the burden of demonstrating that the requested records are exempt from disclosure. 65 P.S. § 67.708(a)(1). Here, far from meeting that burden, Fulton County has relied on conclusory references to exemptions with overbroad application to the full scope of public records requested by Dominion.²

² The County has not met its legal obligations under the RTKL, which require it include any citations to the legal authority behind the reasons for its denial. *See* Section 903 of RTKL; Ex. C. The County has also not responded to Dominion's follow up request for the legal authority. *See* Ex. D.

The OOR has already addressed Fulton County's denials of at least four RTK requests that sought similar records to the ones Dominion seeks.³ Regarding those denials, the OOR concluded that the "County's position suffer[ed] from several fatal flaws" and failed to show that any exemption applied. Accordingly, the OOR granted all appeals and ordered the County to produce responsive records within 30 days.⁴ Since the OOR's determinations regarding these RTK requests, Fulton County has continued to withhold responsive records and requesters have had to seek enforcement of the OOR's orders in the Commonwealth Courts.⁵ These earlier OOR's determinations make it clear that the County should produce the records Dominion requests. Accordingly, the OOR should direct the County to immediately release the requested records.

I. Fulton County's denial of the RTK request on the ground that it seeks information that is not within the meaning of public records is improper.

The County denied Dominion's request on the ground that it sought information not within the meaning of public record, *see* Ex. C; however, the County failed to provide evidence to rebut the presumption that the information in its possession is public record. Further, to the extent that the information Dominion seeks is located on the personal computers and phones of County employees, it is still considered public record under the RTKL.

Under Section 305(a) of the RTKL, information in an agency's possession is presumed to be public record unless: (1) it is exempt under Section 708 of the RTKL; (2) it is protected by a privilege; or (3) it is exempt from disclosure under any other federal or state law or regulation or judicial order or decree. 65 P.S. § 67.305(a). It is the agency's burden to prove, by a preponderance of the evidence, that the information is exempt from disclosure. 65 P.S. § 67.708(a)(1). Conclusory affidavits alone will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to information under the RTKL. *McGowan v. Pa. Department of Environmental Protection*, 103 A.3d 374, 381 (Pa. Commw. Ct. 2014); *Heavens v. Pa. Department of Environmental Protection*, 65 A.3d 1069, 1074 (Pa. Commw. Ct. 2013). In evaluating whether information is exempt from disclosure, the exemptions must be

³ See *Moris and American Oversight v. Fulton County*, OOR DKT. AP 2021-1651, 1658, and 1659; *Witold Walczak and ACLU of Pennsylvania v. Fulton County*, OOR DKT AP 2021-1661.

⁴ *Id.*

⁵ See Complaint filed by American Oversight against Fulton County, available here: <https://www.americanoversight.org/document/complaint-american-oversight-v-fulton-county-pa-election-officials-communications>; Complaint filed by the ACLU against Fulton County, available here: https://aclupa.org/sites/default/files/field_documents/aclu_pa_v_fulton_county_complaint.pdf.

narrowly construed so as not to frustrate the RTKL's purpose. *Office of Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013).

The County provides no explanation as to why the information sought by Dominion is not public record, except to claim that the information sought is personal or private. *See* Ex. C. This conclusory statement is not sufficient to rebut the presumption that the information is public record.

The information Dominion requested that is in personal communications created in connection with County business is also public record. Information not within an agency's possession is still public record when it documents agency business and was created or received in connection with that business. *Easton Area School District v. Baxter*, 35 A.3d 1259 (Pa. Commw. Ct. 2012). The proper inquiry when answering whether communications are public record is not whether they were sent using the agency's computers or email addresses, but whether the communications document agency business. *Mollick v. Worcester Township*, 32 A.3d 859 (Pa. Commw. Ct. 2011). When a communication is written by an agency official and discusses agency business, it is public record, even if it was maintained on a private computer. *Barkeyville Borough v. Stearns*, 35 A.3d 811 (Pa. Commw. Ct. 2011).

To the extent that the information Dominion seeks is outside of the County's possession, it is still public record because it involves County officials and County business. The County cannot claim the information is not public record simply because it includes information not maintained on its computers. Fulton County commissioners frequently used their own personal emails to communicate about the 2020 election and the subsequent Wake TSI audit.⁶ These communications are public record regardless of who possess them.

Because the information Dominion requests is public record, the OOR should direct the County to promptly search for and release the requested records. Alternatively, the OOR should conduct an *in camera* review of the records at issue, instruct the County to provide a privilege log, and grant the parties a hearing on this matter.

⁶ Marley Parish, *What we know about the 2020 Fulton County election review through open records*, PA. CAPITAL STAR (Jan. 23, 2022, 6:30 am), <https://www.penncapital-star.com/government-politics/what-we-know-about-the-2020-fulton-county-election-review-through-open-records/>. For example, on Feb. 10, 2021, Wake TSI co-founder Gene Kern emailed Commissioners Stuart Ulsh and Randy Bunch, asking for their private email addresses. Ulsh complied and communicated with Kern through the email for his excavating business.

II. Fulton County's blanket invocation of the non-criminal investigation exemption is improper.

The County denied Dominion's request on the ground that it requested "information exempt or excluded from Right-to-Know disclosure due to a current or ongoing investigation." Ex. C. Pennsylvania's RTKL does exempt agency records relating to a non-criminal investigation, 65 P.S. § 67.708(b)(17); however, the County has presented no evidence that it is currently conducting a relevant non-criminal investigation. Further, the review of election results conducted by Wake TSI and investigations of Fulton County conducted by other agencies do not meet the threshold to invoke the exemption.

Under § 67.708(b)(17), "the term 'investigation' means a systemic or searching inquiry, a detailed examination, or an official probe." *Department of Health v. Office of Open Records*, 4 A.3d 803, 811 (Pa. Commw. Ct. 2010). For an investigation to qualify, "an agency must show that the inspection is within the agency's official duties." *Pa. Department of Labor and Industry v. Darlington*, 234 A.3d 865, 876-77 (Pa. Commw. Ct. 2020) (citation omitted). The investigation must be conducted pursuant to the agency's "legislatively granted fact-finding and investigative powers." *Pa. Department of Welfare v. Chawaga*, 91 A.3d 257, 259 (Pa. Commw. Ct. 2014). Even where a qualifying investigation has occurred, the OOR has held that the investigative exemption only applies to records in the possession of the agency that is *itself* conducting the investigation. *Camburn v. Montgomery County Housing Authority*, OOR Dkt. AP 2016-0729.

Wake TSI's review of Fulton County's voting machines does not constitute an exempt investigation under § 67.708(b)(17). Fulton County's meeting agendas and minutes leading up to Wake TSI's review on December 31, 2020, show no record of legislative discussion or approval for the third-party review.⁷ In fact, Fulton County violated Pennsylvania's Election Code when it allowed Wake TSI to review its voting machines following the 2020 election.⁸ As such, the review was not done pursuant to Fulton County's "legislatively granted fact-finding and investigative powers" and is not exempt under the RTKL. *See* 65 P.S. § 67.708(b)(17).

Other agencies' investigations into the 2020 election, including the Pennsylvania Senate's, also fail to provide Fulton County with a reason to withhold the information Dominion requested. Even when an investigation satisfies the meaning of the exemption under § 67.708(b)(17), the

⁷ *Id.* In response to news about the Wake TSI review, County Commissioner Paula Shives replied to the County Election Director, "Approved? It's not in the minutes! There was no vote on this."

⁸ Secretary of State Veronica Degraffenreid, *Letter to Fulton County Board of Elections*, PA. DEPT. OF STATE, Jul. 20, 2021, available at <https://www.dos.pa.gov/about-us/Documents/statements/2021-07-20-Letter-to-Fulton-County-Officials.pdf>.

OOR has held that the exemption only protects records in possession of the agency that is *itself* conducting the investigation. See *Camburn v. Montgomery County Housing Authority*, OOR Dkt. AP 2016-0729; *Silver v. City of Pittsburgh*, OOR Dkt. AP 2013-1395. Because Fulton County is not the agency conducting these current investigations, its records related to these investigations are not exempt.

Accordingly, the County inappropriately invoked § 67.708(b)(17) to withhold the records requested by Dominion, and the OOR should direct the County to promptly search for and release the requested records, or, alternatively, instruct the County to provide a privilege log, conduct *in camera* inspection of the records at issue, and grant the parties a hearing on this matter.

III. Either a privilege log or an *in camera* inspection of Fulton County's records is necessary to determine whether the information was properly withheld on the basis of privilege.

The County denied Dominion's request because it claims the documents requested are protected by privilege. Ex. C. The County only made conclusory statements about privilege in support of withholding the documents; accordingly, it is necessary for the OOR to request a privilege log from the County and conduct an *in camera* review of the documents at issue.

Under the RTKL, information protected by privilege is not public record. 65 P.S. § 67.305(a). It is the agency's burden to prove, by a preponderance of the evidence, that a record is exempt from public access because it contains privileged material. 65 P.S. § 67.708(a)(1). *Department of Transportation v. Drack*, 42 A.3d 355, 364 (Pa. Commw. Ct. 2012) ("[T]he RTKL places an evidentiary burden upon agencies seeking to deny access to records even when a privilege is involved."). The burden of proving the applicability of a privilege is not discharged by mere conclusory or *ipse dixit* assertions. *von Bulow v. von Bulow*, 811 F.2d 136, 146 (2d Cir. 1987). When a requester challenges an agency's assertion of privilege, the OOR has the authority to request a privilege log or conduct an *in camera* review of the documents to ascertain whether the information is actually privileged. See *Commonwealth v. Center Township*, 95 A.3d 354 (Pa. Commw. Ct. 2014).

Here, the OOR must request a privilege log and conduct an *in camera* review to meaningfully review the evidence and determine whether Fulton County has met its burden of proving, by a preponderance of the evidence, that the withheld documents are privileged. Without requesting a privilege log and conducting an *in camera* review of the documents, the OOR would merely be relying on the County's conclusory and broad assertions of privilege. Accordingly, the OOR should direct the County to produce a privilege log and conduct an *in camera* inspection of the records at issue to determine whether which are actually privileged.

IV. Fulton County improperly withheld responsive information on the basis that it may jeopardize individual rights.

Fulton County further denied Dominion's request on the ground that disclosure of responsive documents "may jeopardize the individual rights of one or more of the parties subject to the request." Ex. C. The County fails to identify what individual rights are at risk and which parties' rights are in jeopardy.⁹

Under Pennsylvania law, an agency may withhold information that implicates constitutional privacy rights when the interest in protecting those rights outweighs the benefits of disclosure; however, Fulton County has failed to show that Dominion's requests would intrude on individual privacy rights, and, even if individual rights were implicated, the information should still be disclosed because the benefits of disclosure outweigh those privacy rights.

When a request requires an agency to produce records in which individuals have a privacy interest, the agency must determine whether the individuals' privacy rights outweigh the public interest in the dissemination of the information. *Pa. State Education Association v. OOR*, 148 A.3d 142 (Pa. 2016). Certain types of information whose disclosure, by their very nature, would operate to the prejudice or impairment of a person's privacy, reputation, or personal security, should be balanced against the competing factors that favor disclosure. *Tribune-Review Publishing Co. v. Bodack*, 961 A.2d 110 (Pa. 2008). Pennsylvania courts have recognized a right to privacy in personal identifying information such as social security numbers, telephone numbers, and home addresses. *See Butler Area School District v. Pennsylvanians for Union Reform*, 172 A.3d 1173 (Pa. Commw. Ct. 2017).

Dominion's requests do not seek information that involves individual privacy rights. Dominion does not seek the kind of personal information—such as home address or telephone numbers—that Pennsylvania courts have held invoke privacy rights.

Even if the information did invoke a constitutional privacy right, the public's interest in concerns about election procedures and integrity favors disclosure. Further, privacy rights are not offended when the information is rendered anonymous. *Strenger v. Lehigh Valley Hospital Center*, 609 A.2d 796, 800 (Pa. 1992). If the County is concerned that some documents, whose disclosure otherwise serves a public benefit, may contain personal identifying information, it can redact that information. *See* 65 P.S. § 67.708(b)(6)(iii). Dominion is not seeking the addresses or phone

⁹ The County's lack of specificity regarding the individual rights at risk—from which rights are at risk, to whose rights are at risk, to how to information requested puts those rights at risk—shows that it did not meet its legal obligation under the RTKL. It is obligated to conduct a balancing test when addressing issues regarding individual rights; however, to adequately conduct that test, the County needed to specify that information.

numbers of constituents who submitted complaints about the election, it is seeking information that shows the issues constituents complained about.

Because Dominion's requests do not infringe on individual rights, the OOR should direct the County to promptly search for and release the requested records. Alternatively, the OOR should conduct in camera inspection of the records at issue, instruct the County to provide a privilege log, and grant the parties a hearing on this matter.

V. Fulton County failed to explain why information that relates to the performance of the public duties of a public officer should be withheld.

It is unclear which of the RTKL exemptions Fulton County is referring to with this reason for denying Dominion's request. The County withheld the information as it relates to "the performance of the public duties of a public officer." *See* Ex. C. There are no exemptions under the RTKL that discuss public duties or even duties, and only one that includes a discussion of performance. *See* § 67.708(b). However, that exemption, which exempts an agency employee's performance review from production, does not match the language the County used here, because that exemption does not extend to "public officer[s]". § 67.708(b)(7)(ii); *See Office of General Counsel v. Bumstead*, 247 A.3d 71, 81 (Pa. Commw. Ct. 2021); Ex. C.

It is the County's duty to specifically explain why it is denying Dominion's request, including providing the citations to the legal authority behind the reasons. *See* 65 P.S. § 67.903(2). The County failed to do so, *see* Ex. C, and failed to answer Dominion's follow-up requesting that information, *see* Ex. D. Because the County failed to provide the necessary citation for this denial, and the language makes it too vague to identify within the provisions of the RTKL, the OOR should direct the County to promptly search for and release the requested records.

VI. Fulton County's blanket invocation of the predecisional deliberations exemption is improper.

The County denied Dominion's requests because they ask for information that is protected under the predecisional deliberations exemption. Ex. C.¹⁰ The County has not sustained its burden to demonstrate that this exemption applies, and indeed, the records are unlikely to fall within the scope of § 67.708(b)(10)(i)(A).

¹⁰ Notably, the County's response fails to assert that the records *in fact* reflect deliberative material protected by the exemption, calling into question whether the County searched for responsive records at all, and indicating at a minimum that if a search was conducted, the results were not reviewed to determine whether any material could be released to Dominion. The County thereby falls short of its legal obligation in responding to these requests. *See* § 67.708(a)(1).

To prove this exemption, an agency is required to demonstrate that the information at issue is: (1) internal to the agency, (2) deliberative in character, and (3) prior to a related decision.

McGowan v. Pa. Department of Environmental Protection, 103 A.3d 374, 381 (Pa. Commw. Ct. 2014). Where purely factual material is located in a record containing exempted predecisional deliberations, it is severable and should be disclosed. *Id.* at 386.

Importantly here, the predecisional deliberation exemption generally cannot be invoked to insulate communications exchanged between an agency and a private consultant. *Chester Water Authority v. Pa. Department of Community and Economic Development*, 249 A.3d 1106, 1113 (Pa. 2021).¹¹ The records requested by Dominion seek communications between county officials and a private company, Wake TSI,¹² in addition to explicitly external communications with a range of other specifically identified private and governmental individuals and entities. Ex. A. Thus, it is facially improper to subsume this entire range of third-party communications under the umbrella of records internal to the agency.

Accordingly, the County's blanket application of this exemption is incongruous with RTKL requirements, and the County should promptly produce these records, or, alternatively, produce a privilege log and submit the records for *in camera* review so that the OOR can determine whether any subset on responsive documents withheld by Fulton County satisfies all three criteria for proper withholding of predecisional records.

VII. Fulton County's conclusory assertions regarding security are an insufficient basis for withholding records under the public security exemption of the RTK law.

Fulton County asserts that Dominion's request includes information that is exempt from the RTKL because it touches upon public security. *See* Ex. C. However, conclusory assertions, such as "the release of records will likely cause substantial risk of physical harm," cannot form the basis for withholding records under the public security *Carey v. Pa. Dept. of Corrections*, 2013 Pa. Commw. Unpub. LEXIS 495 (Pa. Commw. Ct. 2013) (*supplemental opinion to Jan. 24, 2013 opinion*). Instead, the agency must provide specific details about how public security is threatened by the disclosure of the information. *Id.* Further, a release that would threaten personal safety may be rendered harmless by redactions. *Pa. State Trooper Association v. Scolforo*, 18 A.3d 435 (Pa. Commw. Ct. 2011).

¹¹ Given that the external entities involved in the audit do not appear to have been retained by the County, they are even further outside of the scope of the traditional private consultants which the Supreme Court held are not entitled to exemption under § 67.708(b)(10)(i)(A).

¹² Even if the predecisional deliberation exemption can be narrowly applied to communications with consultants under certain circumstances, it certainly cannot be construed to apply here, to communications with private parties who conducted an illegal review.

Fulton County has not provided any specific insight into how the disclosure of the information Dominion requested would threaten public security. The County's conclusory assertions of a threat are insufficient. Further, to the degree that the County is concerned information poses a specific threat, it can redact the information. Accordingly, the OOR should direct the County to promptly search for and release the requested records.

Fulton County also contends that Dominion's request seeks information related to the confidentiality and integrity of the County's computer and information systems. *See* Ex. C. The RTKL law exempts records when they relate to computer hardware, source files, software and system networks, and administrative and technical records, which, if disclosed, would be reasonably likely to jeopardize computer security. 65 P.S. § 67.708(b)(3)(i); *Id.* § 67.708 (b)(4). It does not exempt records simply because the request relates to computers generally. Dominion's request seeks none of the specified records whose disclosure could jeopardize the integrity of the voting machines. *See* Ex. A. It only seeks records related to the County's policies used to ensure the integrity of the election.

Because the records Dominion seeks are not the types of records whose disclosure would jeopardize the security and integrity of voting machines, the OOR should direct the County to promptly search for and release the requested records. Alternatively, the OOR should conduct *in camera* review of the records at issue, instruct the County to provide a privilege log, and grant the parties a hearing on this matter.

Conclusion

Dominion appeals Fulton County's denial of its RTK request and asks that the OOR direct the County to immediately release the requested records. To the extent necessary, OOR should conduct *in camera* inspection of the records at issue, instruct the County to provide a privilege log, and grant the parties a hearing on this matter.

Thank you for your consideration of this appeal. As provided in 65 P.S. 67.1101(b), we look forward to your determination on our appeal within 30 days. For questions regarding any part of this appeal or the underlying RTK request, please contact Kate Farley at kfarley@susmangodfrey.com or (713) 650-4311.

Sincerely,

/s/ Kate Farley

SUSMAN GODFREY L.L.P.

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April 25, 2022

VIA E-MAIL

Lisa Mellott-McConahy
Fulton County Chief Clerk
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chiefclerk@co.fulton.pa.us

Fulton County Board of Commissioners
116 West Market Street, Suite 205
McConnellsburg, PA 17233
commissioners@co.fulton.pa.us

Re: Right-to-Know Law Request

Dear Chief Clerk Mellott-McConahy:

Pursuant to the Right-to-Know Law (RTKL), 65 P.S. §§ 67.101 *et seq.*, US Dominion, Inc., Dominion Voting Systems, Inc., and Dominion Voting Systems Corporation ("Dominion") make the following request for records.

Requested Records

Dominion requests that your office promptly produce the following records, for the time period September 1, 2020 through the present:

All communications (including letters, emails, email attachments, complete email chains, calendar invitations, calendar invitation attachments, text messages, instant messages, and social media communications) involving Fulton County Commissioners including Randy Bunch, Stuart Ulsh, and Paula Shives, Fulton County Elections Director Patti Hess, Fulton County Technology Director Eldon Martin, Senator Doug Mastriano, Senator Judy

Ward, Senator Cris Dush, and Representative Jesse Topper, concerning the topics listed below.

Requested Topics

1. All communications with anyone communicating from an email address ending in @eac.gov.
2. All communications with Rudy Giuliani, Sidney Powell, Mike Lindell, MyPillow, Patrick Byrne, Fox News, Newsmax, One America News Network (OAN), Defending the Republic, Powell P.C., or any of their officers, employees, agents, trust, attorneys, accountant, representatives, or other person/s purporting to work on their behalf.
3. All communications with anyone from an email address ending in @waketsi.com, @alliedspecialops.us, @cyberninjas.com, @federalappeals.com, @giulianisecurity.com, @giulianipartners.com, @gdcillc.com, @foxnews.com, @newsmax.com, and @oann.com.
4. All documents and communications relating to audits, reports, or investigations of the 2020 election, including by Wake TSI, Pro V&V, SLI Compliance, Allied Security Operations Group, Alex Halderman, or any state or local agencies.
5. All documents and communications concerning policies and procedures for ensuring the accuracy of voting technology and machines for the 2020 election.
6. All documents and communications, including but not limited to voicemail messages, concerning threats or harassment of local election officials.
7. All documents and communications with or relating to Cyber Ninjas, Doug Logan, Wake Technology Services, Inc, Allied Security Operations Group (ASOG), Conan Hayes, Russell Ramsland, Todd Sanders, and Joshua Merritt.
8. All documents and communications from November 3, 2020 to the present with constituents that concern or reference Dominion and/or the 2020 election, and any internal correspondence about or relating to these constituent communications.

9. All documents and communications with anyone who works for Election Systems & Software (ES&S), Hart InterCivic, or Clear Ballot.

Statement of Noncommercial Purpose

In accordance with 65 P.S. § 67.1307(f)(2), Dominion requests a waiver of fees associated with processing this request for records, because disclosure of the requested information is “in the public interest.” Dominion seeks records regarding communications relating to the accuracy and security of the 2020 election. Records with the potential to shed light on this matter would contribute significantly to Dominion’s actions before judicial bodies, as well as public understanding of operations of the government.

Because this request is made for noncommercial purposes, Dominion requests that any fees charged in connection with processing this request be limited to copying and postage charges, if applicable. Please notify Dominion’s counsel of any anticipated fees or costs in excess of \$100 prior to incurring such costs or fees.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, Dominion provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, voicemail message systems, or devices in the personal custody of your officials, such as personal email accounts, text messages, and voicemails.
- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable

April 29, 2022

Page 4

non-exempt portions of the requested records.¹ If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.

- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

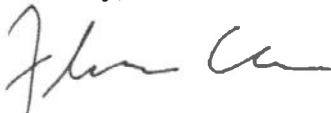
Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to Dominion, please do not hesitate to contact Dominion's counsel to discuss this request. Dominion's counsel welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, Dominion's counsel and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF format on a USB drive. Please send any responsive material being sent by mail to Florence T. Chen, Susman Godfrey LLP, 1000 Louisiana, Suite 5100, Houston, Texas 77002. If it will accelerate release of responsive records to Dominion, please also provide responsive material on a rolling basis.

Dominion looks forward to working with your agency on this request. If you do not understand any part of this request, please contact Kate Farley at kfarley@susmangodfrey.com or (713) 650-4311, or Florence T. Chen at fchen@susmangodfrey.com or (713) 653-7806.

Sincerely,



Florence T. Chen

¹ 65 P.S. § 67.706.



Fulton County Commissioners

116 West Market Street, Suite 203, McConnellsburg, PA 17233

Telephone: (717) 485-3691 Fax: (717) 485-9411 Email: commissioners@co.fulton.pa.us

Stuart L. Ulsh, Chair
Randy H. Bunch, Vice-Chair
Paula J. Shives

Stacey M. Golden, Chief Clerk
Jim Stein, County Solicitor

May 2, 2022

Susman Godfrey L.L.P.
Suite #100
1000 Louisiana Street
Houston, Texas 77002-5096

RE: Right-to-Know Law Request

Dear Ms. Godfrey:

Thank you for writing to The County of Fulton with your request for information pursuant to the Pennsylvania Right-to-Know Law ("RTKL"), 65 P.S. 67.101, *et. seq.* On April 29, 2022 we received said request to our Office.

Pursuant to Section 902(a) of the Right to Know Law, the OOR requires an additional 30 days to respond because (check all that apply):

- ☐ The request for access requires redaction of a record in accordance with Section 706 of the RTKL;
- ☐ The request for access requires the retrieval of a record stored in a remote location;
- ☒ A timely response to the request for access cannot be accomplished due to bona fide and specific staffing limitations;
- ☐ A legal review is necessary to determine whether the record is a record subject to access under the RTKL;
- ☐ The requester has not complied with the Agency's policies regarding access to records;
- ☐ The requester refuses to pay applicable fees authorized by the RTKL;
- ☐ The extent or nature of the request precludes a response within the required time period.

This Agency would like a **30 day Right-To-Know Request for Extension** and expects to respond to your request on or before June 6, 2022, if applicable.

Sincerely,

Stacey M. Golden
Open Records Officer
County of Fulton



Fulton County Commissioners

116 West Market Street, Suite 203, McConnellsburg, PA 17233

Telephone: (717) 485-3691 Fax: (717) 485-9411 Email: commissioners@co.fulton.pa.us

Stuart L. Ulsh, Chairman
Randy H. Bunch, Vice-Chairman
Paula J. Shives

Stacey M. Golden, Chief Clerk
Jim Stein, Solicitor

June 3, 2022

Kate Farley/Florence T. Chen
Susman Godfrey L.L.P.
Suite 5100
1000 Louisiana Street
Houston, Texas 77002-5096

RE: Right-to-Know Law Request

Dear Ms. Farley/Ms. Chen:

Thank you for your correspondence. The requested information is exempt or excluded from Right to Know parameters for one or more of the following reasons, including, but not necessarily limited to: (1) the request contains a demand for communications and/or documentation and/or information that is not included within the meaning of public records under the Right to Know Act, including, but not necessarily limited to, personal and private information;

(2) the request contains a demand for communications and/or documentation and/or information exempt or excluded from RIGHT TO KNOW disclosure due to a current or ongoing investigation and/or current and/or anticipated litigation;

(3) the request contains a demand for communications and/or documentation and/or information exempt or excluded from RIGHT TO KNOW disclosure because it is protected by one, or more, statutory and/or common-law privileges, including, but not necessarily limited to, deliberative process privilege; whistleblower protection act exclusion and protections; attorney-client privilege; and/or work-product doctrine;

(4) the request contains a demand for communications and/or documentation and/or information that is protected from disclosure because such disclosure may jeopardize the individual rights of one or more of the parties subject to the request;

(5) the request contains a demand for communications and/or documentation and/or information that is protected from disclosure because it relates to the performance of the public duties of a public officer;

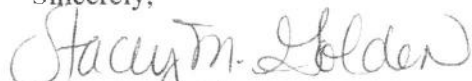
(6) the request contains a demand for communications and/or documentation and/or information that is protected from disclosure because it relates to or addresses matters of an advisory nature preliminary to a final executive agency determination of policy or action;

(7) the request contains a demand for communications and/or documentation and/or information that is protected from disclosure because it relates to or touches upon a public body's ongoing security measures, methods, practices, and procedures, and/or regarding security and safety of persons, property, confidentiality, integrity, and/or availability of computer and information systems;.

Thank you very much for your understanding. If you have further questions regarding this letter, please do not hesitate to contact my office.

This correspondence will serve to close your request.

Sincerely,

A handwritten signature in cursive script that reads "Stacey M. Golden".

Stacey M. Golden
Open Records Officer
County of Fulton

From: [Kate Farley](#)
To: [Stacey Golden](#)
Subject: RE: Right to Know Response
Date: Friday, June 10, 2022 3:12:00 PM
Attachments: [image001.png](#)

Hi Stacey,

I was hoping you could clarify a few questions I had regarding why the information we requested was exempt and/or excluded. You listed seven reasons our requests couldn't be answered, and I would really appreciate it if you could specify which reasons apply to the specific, individual requests in our letter. For example, your letter says that our request may jeopardize the independent rights of parties, but I'm not sure which specific requests run afoul of parties' rights .

I was also hoping you could direct me to the statutes/policies that provide for the exclusions and exemptions you listed. I can see some of them are pulled from 65 P.S. § 67.708(b) and some, like the work-product exemption, are pulled from common law, but I can't find where some of the other exclusions came from. For example, what is the basis for excluding documents related to the public duties of a public official.

I appreciate any clarification you can provide. Please let me know if you have any questions.

Thanks,

Kate Farley, Staff Attorney
Susman Godfrey L.L.P.

Email: kfarley@susmangodfrey.com

Direct: (713) 650-4311

Cell: (210) 445-2026

Not admitted in any state. Practicing under the supervision of the partnership of Susman Godfrey L.L.P.

From: Stacey Golden <sgolden@co.fulton.pa.us>
Sent: Friday, June 3, 2022 3:26 PM
To: Kate Farley <KFarley@susmangodfrey.com>; Florence Chen <FChen@susmangodfrey.com>
Subject: Right to Know Response

EXTERNAL Email

Good Afternoon Ms. Farley/Ms. Chen,

Please see the attached Right to Know response from your request received on April 29, 2022.

Respectfully,

Stacey M. Golden

Chief Clerk

Right-To-Know-Officer

County of Fulton

116 West Market Street, Suite 203

McConnellsburg, PA 17233

Phone: 717-485-3691

Fax: 717-485-9411

sgolden@co.fulton.pa.us



ATTACHMENT 3

**COUNTY'S REPLY TO REQUESTER'S
APPEAL,
JULY 11, 2022**



Fulton County Commissioners

116 West Market Street, Suite 203, McConnellsburg, PA 17233

Telephone: (717) 485-3691 Fax: (717) 485-9411 Email: commissioners@co.fulton.pa.us

Stuart L. Ulsh, Chairman
Randy H. Bunch, Vice-Chairman
Paula J. Shives

Stacey M. Golden, Chief Clerk
Jim Stein, Solicitor

July 11, 2022

Jordan Davis, Esq.
Appeals Officer
Commonwealth of Pennsylvania Office of Open Records
333 Market St., 16th Floor
Harrisburg, PA 17101-2234
jordddavis@pa.gov

CC Via Email Only to:

Ms. Florence T. Chen
Dominion Voting Systems, Inc.
1000 Louisiana Street
Suite 5100
Houston, TX 77002-5096
fchen@susmangodfrey.com
kfarley@susmangodfrey.com

**RE: REPLY TO APPEAL IN Chen and Dominion Voting Systems, Inc v. Fulton
County OOR Dkt. AP 2022-1542**

Dear Appeals Officer Davis,

Attached is a reply to the appeal of Fulton County's Denial of Dominion's 4/29 RTK Request. Please do not hesitate to contact me know if you have any questions.

Thank you,

Stacey M. Golden
Chief Clerk
Right-To-Know-Officer, County of Fulton
116 West Market Street, Suite 203
McConnellsburg, PA 17233
Phone: 717-485-3691
Fax: 717-485-9411
sgolden@co.fulton.pa.us

Background

On April 25, 2022, ostensibly pursuant to Pennsylvania’s Right-to-Know Law (RTKL), 65 P.S. § 67.101 et seq., Dominion Voting Systems Corporation (“Dominion” or “Requester”) sent a request for information to the Fulton County Clerk and the Fulton County Board of Commissioners (hereafter “the County”).

The Right-to-Know request was objected to on several grounds in a letter dated June 3, 2022.

The Requester has appealed. In its appeal letter dated June 27, 2022, the Requester claims that it is still requesting the following after receiving the County’s objections:

- Fulton County Records regarding reviews and audits of the County’s voting machines and election procedures conducted by Wake Technology Services (“Wake TSI”) following the November 2020 elections, including agency communications with external individuals and entities;
- Policies and procedures for ensuring the accuracy of voting systems in the 2020 election, including machine certifications and post-election reviews.

The following are the legal arguments and authority in reply to the Requester’s appeal.

Preliminary Statement

Generally, a party appealing a decision to a lower administrative or executive entity must raise the “issues” or “questions presented” for review to the appellate tribunal. Requester must properly raise issues in its appeal to the Appeals Officer, as required by Section 1101(a)(1) of the Right-to-Know Law, 65 P.S. §67.1101(a)(1). See, e.g., *In re Appeal of Johnson*, 254 A.3d 796, 802 (Pa. Cmwlth. 2021).

In the instant case, Requester’s only “questions presented” section to the Appeals Officer appears on page 1 of its appeal letter dated June 27, 2022. The Requester’s “appeal” only takes issue with its prior request “regarding **reviews** and **audits** of the County’s voting machines and election procedures conducted by ‘Wake Technology Services (Wake TSI)’ following the November 2020 election, including agency communications with external individuals and entities”; and “[p]olicies and

Page 2

procedures for ensuring the accuracy of voting systems in the 2020 election, including machine certifications and post-election reviews.” See Appeal Letter dated June 27, 2022.

“Issue preservation is foundational to proper appellate review.” *Wing v. Com., Unemployment Comp. Bd. of Review*, 496 Pa. 113, 436 A.2d 179, 181 (Pa. 1981). The Pennsylvania rules of appellate procedure mandate that “[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Pa. R.A.P. 302(a). Without proper presentation or preservation, the appellate tribunal cannot properly consider an issue or rule upon it for a subsequent appellate court to review.

This reasoning applies to administrative appellate and adjudicative proceedings. As articulated by the Pennsylvania Supreme Court:

[An] administrative law tribunal must be given the opportunity to correct its errors as early as possible; diligent preparation and effective advocacy before the tribunal must be encouraged by requiring the parties to develop complete records and advance all legal theories; and the finality of the lower tribunals' determinations must not be eroded by treating each determination as part of a sequence of piecemeal adjudications. See *Wimms v. City of Philadelphia*, 2013 Phila. Ct. Com. Pl. LEXIS 151, *10-11.

“To preserve an issue, a party must raise it at every stage of the proceeding. *Nabisco Brands, Inc. v. Workers’ Comp. Appeal Bd. (Tropello)*, 763 A.2d 555 (Pa. Cmwlth. 2000). Where an issue is not raised in an appeal to an administrative agency, it has been waived. See also *K.J. v. Pa. Dep’t of Pub. Welfare*, 767 A.2d 609 (Pa. Cmwlth. 2001). Where, as here, an issue was not raised in exceptions to an administrative or executive entity’s decision, it has been waived. *Id.* See also, *Barbour v. Mun. Police Officers’ Educ. & Training Comm’n*, 52 A.3d 392, 405 n.6 (Pa. Cmwlth. 2012).

Generally, a party appealing a decision by a lower administrative or executive entity must raise the “issues” or “questions presented” for review to the appellate tribunal. In the instant case, Requester’s only “questions presented” section to the Appeals Officer appears on page 1 of its appeal letter dated June 27, 2022.

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It is the County's position preliminarily that the Requester has accepted the balance of the County's objections and/or has waived its right to appeal those objections.

The remaining issues in this appeal concern only Requester's appeal for the County to release (1) information "regarding reviews and audits of the County's voting machines and election procedures conducted by Wake Technology Services ("Wake TSI") following the November 2020 elections, including agency communications with external individuals and entities" and (2) "information regarding the policies procedures for ensuring the accuracy of voting systems in the 2020 election, including machine certifications and post-election reviews. *Id.*

Regarding the ostensibly preserved issues on appeal brought before this Appeals Officer, the County provides the following supporting arguments and analysis justifying and supporting its original denial and objections.

1. The request contained a demand for communications and/or documentation and/or information that is not included within the meaning of public records under the Right to Know Act, including, but not necessarily limited to, personal and private information.

County Response

Under Section 305(a) of the RTKL, information in an agency's possession is presumed to be public record unless: (1) it is exempt under Section 708 of the RTKL; (2) it is protected by a privilege; or (3) it is exempt from disclosure under any other federal or state law or regulation or judicial order or decree. 65 P.S. § 67.305(a). The Right-to-Know Law exempts the disclosure of a record that "would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual." Section 708(b)(1)(ii) of the Right-to-Know Law, 65 P.S. § 67.708(b)(1)(ii). See also, *Pa. State Educ. Ass'n ex rel. Wilson v. Pa. Office of Open Records*, 4 A.3d 1156, 1160 (Pa. Cmwlth. 2010).

In this regard, the law creates exemptions for certain information often contained in a public record related to personal information. Specifically, § 708(b)(6)(i)(A) identifies exemptions for the following information: (A) A record containing *all or part* of a person's...home, cellular or personal telephone numbers, [and] personal e-mail addresses.... (emphasis added). *Id.* To the extent that the remaining records requested by the Requester contain any two-way communications with or by or from

or to individuals that are part of the information “regarding reviews and audits of the County’s voting machines and election procedures conducted by Wake Technology Services (“Wake TSI”) following the November 2020 elections, including agency communications with external individuals and entities,” such communications are subject to the exemption in subsection (b)(6)(i)(A). In the even that the Appeals Officer determines that any such communications are public records subject to disclosure, an in camera review of these communications should be conducted so that any such part of said communications subject to the exemption can be redacted to safeguard the information as intended by the exemption.

2. The request contained a demand for communications and/or documentation and/or information exempt or excluded from RIGHT TO KNOW disclosure due to a current or ongoing investigation and/or current and/or anticipated litigation and,
3. The request contained a demand for communications and/or documentation and/or information exempt or excluded from RIGHT TO KNOW disclosure because it is protected by one, or more, statutory and/or common-law privileges, including, but not necessarily limited to, deliberative process privilege; whistleblower protection act exclusion and protections; attorney-client privilege; and/or work-product doctrine, and
4. The request contains a demand for communications and/or documentation and/or information that is protected from disclosure because it relates to or touches upon a public body’s ongoing security measures, methods, practices, and procedures, and/or regarding security and safety of persons, property, confidentiality, integrity, and/or availability of computer and information systems;

County Response.

Section 102 of the RTKL defines “privilege” as: “The attorney work-product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court incorporating the laws of this Commonwealth.” See *Bagwell v. Pa. Dep’t of Educ.*, 103 A.3d 409, 414 (Pa. Cmwlth. 2014).

In addition, the work-product doctrine, while closely related to the attorney-client privilege, provides broader protections. *Levy v. Senate of Pa. (Levy III)*, 94 A.3d 436 (Pa. Cmwlth. 2014); *Dages v. Carbon Cnty.*, 44 A.3d 89 (Pa. Cmwlth. 2012). Confidential information flows from the client to the attorney, and vice versa, in the attorney-client relationship. *Gillard v. AIG Ins. Co.*, 609 Pa. 65, 15 A.3d 44 (Pa. 2011). The attorney-client privilege protects such confidential communications. *Id.* “By contrast, work-product privilege only applies to records that are the work-product of an attorney, and may extend to the product of an attorney’s representative secured in anticipation of litigation.” *Rittenhouse v. Bd. of Sup’rs*, 41 A.3d 975, 2012 Pa. Commw. Unpub. LEXIS 248 (2012) (applying Pa. R.C.P. No. 4003.3 in RTKL context) (work product extends to investigator’s reports *prepared for litigation*).

At the core of the work-product doctrine is that parties and their attorneys need a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. *Commonwealth v. Kennedy*, 583 Pa. 208, 876 A.2d 939, 945 (Pa. 2005). See also, *Hickman v. Taylor*, 329 U.S. 495, 510-11, 67 S. Ct. 385, 91 L. Ed. 451 (1947)). “The underlying purpose of the work product doctrine is to guard the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client’s case.” *Commonwealth v. Sandusky*, 2013 PA Super 182, 70 A.3d 886, 898 (Pa. Super. 2013).

In the RTKL context, the Court of Appeals recently held the work-product doctrine protects the “mental impressions, theories, notes, strategies, research and the like created by an attorney in the course of his or her professional duties, particularly in anticipation or prevention of litigation” from disclosure. *Levy III*, 94 A.3d at 443 (emphasis added). Moreover, the “doctrine protects any material prepared by the attorney ‘in anticipation of litigation,’ regardless of whether it is confidential.” *Dages*, 44 A.3d at 93 n. 4 (quoting *Nat’l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Cmwlth. 2001)).

The Pennsylvania Supreme Court also previously held “that, to the extent material constitutes an agency’s work product, it is not subject to compulsory public disclosure pursuant to the RTKL.” *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 225 (Pa. 2014) (citing *LaValle v. Office of Gen. Counsel*, 564 Pa. 482, 769 A.2d 449, 459 (Pa. 2001)).

The statutory privileges in the RTKL itself are also copasetic with the common-law jurisprudence regarding privileges and protected work-product. Thus,

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subsection 708(b)(10) exempts communications and information concerning “predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, *contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.*” (emphasis added).

Section 708(b)(10) is a “statutory privilege.” This exemption would extend to privileged communications by and between the County and individuals and entities whose reports and information have been or will be used by the County to formulate policies and procedures; and, specifically, with respect to the proper conducting of future elections. According to the language of Section 708(b)(10)(i)[A], “protected records must be predecisional and deliberative.” *Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Cmwlth. 2011). Only information that constitutes “confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice” is protected as “deliberative.” *In re Interbranch Comm’n on Juvenile Justice*, 605 Pa. 224, 238, 988 A.2d 1269, 1277-78 (2010) (quoting plurality opinion in *Commonwealth v. Vartan*, 557 Pa. 390, 399, 733 A.2d 1258, 1263 (1999)).

Section 708(b)(17) also provides another “statutory privilege” exemption for records of an agency relating to a noncriminal investigation, including: (i) complaints; investigative materials, notes, correspondence and reports; records that include the identity of confidential sources, including whistleblowers; a record that includes information made confidential by law; and any work papers underlying an audit.

Analysis

Because these aforementioned common-law and statutory privileges and statutory exemptions extend to reports, audits, and communications created for and exchanged by and between attorneys and their clients, and to an agent’s communications about such reports, the balance of documents and information (and communications) requested are protected by both attorney-client privilege and the work-product doctrine. See *Bagwell*, *supra* at 415-16. The information sought by the requester contains *both* communications and *reports* and *agent’s*

communications about *reports* that are the basis for anticipated litigation. The work-product doctrine also protects the nature of these communications precisely because their disclosure would inevitably divulge privileged communications and work-product that the County must be able to protect in developing its litigation strategies.

Moreover, there is an ongoing active non-criminal investigation into the conducting of the 2020 election, which necessarily implicates and bears upon the County's proper and lawful conducting of future election cycles. Such information requested by the Requester falls within not only the common-law attorney-client and work-product privileges, but also the statutory privileges identified in (b)(10) and (b)(17) of the RTKL.

While the Requester claims that the County may not cite to the non-criminal investigation exemption because it has not proved the existence of an investigation, such disclosure itself would violate the statutory privilege and potentially disclose protected information about said investigation. See Requester's Appeal, p. 5.

Moreover, while the Requester broadly states that the non-criminal investigation exemption cannot be cited because for an investigation to qualify, an agency "must show that the inspection is within the agency's official duties", the cases cited do not stand for such a broadly sweeping exception to the "noncriminal investigation" exemption. Indeed, the Court in *Dep't of Health v. Office of Open Records*, 4 A.3d 803, 811 (Pa. Cmwlth. 2010), cited by Requester, defined the term "noncriminal investigation" by providing a non-exhaustive list in the conjunctive. Thus, the term "investigation" within the meaning of this exemption: the term "investigation" *includes* systematic or searching inquiry, a detailed examination, *or* an official probe. Certainly, in addition to being protected by the common-law and statutory privileges discussed above, including the investigatory executive privileges attendant to an official governmental agency's probe of potentially systemic issues in the conducting of state and national elections, audits and reports created for the purposes of, *inter alia*, "inquiry", "detailed examination," *and* "official probe[s]" would be within the "noncriminal investigation" exemption as extrapolated from the very reasoning of the case cited by Requester. Thus, Requester's gloss on the language of that case is overly simplified and restrictive.

Hedging its position, the Requester contends that the Appeals Officer should require the County to create a privilege log and conduct an *in camera* review of the balance of the information that Requester still seeks in this appeal. While the County

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believes the remaining information requested is not subject to any public disclosure, a privilege log, redaction, and in camera review would be the minimum measures imposed to protect the sensitive nature of any records that might be responsive to the Requester's appeal.

The case cited by the Requester for the proposition that communications between an agency and private consultant do not generally fall under the predecisional / deliberative statutory privilege in § 708(b)(10) did not address a situation in which an agency is an actual legislative authority charged with the creation and implementation of regulations and policies related to past, current, and future local, state and national elections on an ongoing basis. See Requester's Appeal, p. 9, citing *Chester Water Auth. v. Pa. Dep't of Cmty. & Econ. Dev.*, 249 A.3d 1106, 1113 (Pa. 2021). Indeed, the follow up cases suggest that in the least, the Appeals Officer has discretion to undertake in camera review or request submissions as to material facts when exemptions are potentially applicable. See, e.g., *Dinmore v. Pa. Dep't of Cmty. & Econ. Dev.*, 2022 Pa. Commw. Unpub. LEXIS 188, at *28-31 (Cmwlth. May 6, 2022).

Finally, the security and lawful conducting of future elections necessarily depends on the information and records from a full and complete audit and reports produced by past and ongoing investigations. The disclosure of the balance of the requested information is also exempt precisely because the County is still in the process of examining information, audits, and data, and implementing security measures, methods, practices, and procedures to ensure the security and safety of persons, property, confidentiality, integrity, and/or availability of computer and information systems.

Subsection (b)(3) and (4) exempts:

[R]ecords, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of... information storage system[s], which may include:

(i) documents or data relating to computer hardware, source files, software and system networks that could jeopardize computer security by exposing a vulnerability in preventing, protecting against, mitigating or responding to a terrorist act;

(iii) building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems, including...technology, [and] communication...systems[,] and

(4) A record regarding computer hardware, software and networks, including administrative or technical records, which, if disclosed, would be reasonably likely to jeopardize computer security. 65 Pa. Stat. Ann. § 67.708(b)(3) and (4).

The integrity of the process, methodology, systems, and equipment used or to be used in the conducting of local, state and national elections are matters of utmost concern and deal directly with security and integrity of communications and computer hardware, software, and related systems. The right of every citizen legally entitled to vote in the state to have (1) their vote counted and counted properly, and (2) to NOT have their vote cancelled or annulled by an accidental or fraudulent recording of a non-legal vote is protected by the state and federal constitutions (particularly, the First and Ninth Amendments). See, e.g., *Reynolds v Sims*, 377 U.S. 533, 560-563; 84 S. Ct. 1362; 12 L. Ed. 2d 506 (1964). While the First Amendment guarantees the right of *every legal citizen* to cast a vote and to have that vote counted, and this right includes the right not to have one's vote diluted or canceled out by the tabulation of fraudulent votes or ballots, the Supreme Court of the United States has given the right to vote primacy over all other rights. *Id.* Thus, the Court has recognized the "political franchise" of voting as a "fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 371; 6 S. Ct. 1064; 30 L. Ed. 220 (1886). "[T]he right...is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." *Harper v. Va State Bd of Elections*, 383 U.S. 663, 667 (1966) (emphasis added). Thus, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* It is a right protected not only by the First Amendment, but one of those non-enumerated fundamental rights reserved to the People by the Ninth. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. All other rights, even the most basic, are illusory if the right to vote is undermined." *Reynolds v Sims*, 377 US 533, 560; 84 S Ct 1362; 12 L Ed 2d 506 (1964).

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In order to preserve this fundamental right, it is necessary for the County to ensure the integrity and proper functioning of the systems and methods and processes for conducting future elections. The balance of the information sought by Requester seeks information that is or may be subject to exploitation and abuse. Therefore, it is exempt and protected from public disclosure by these aforementioned subsections of the RTKL.

Conclusion

For the foregoing reasons, the County requests the Appeals Officer to deny the appeal and affirm the County's denial for the grounds stated in its objections and in this reply. In the alternative, the County requests the Appeals Officer to limit the responsive records only to the actual, current policies and procedures for ensuring the accuracy of voting systems in the 2020 election, including machine certifications and post-election reviews. Finally, in the event that any of the remaining information requested is subject to disclosure, the County requests that it be allowed to create a privilege log, redact such information as may be exempted, and conduct an in camera review of the remaining information to ensure proper and lawful disclosure.

IN THE COURT OF COMMON PLEAS
OF FULTON COUNTY

**FLORENCE CHEN &
DOMINION VOTING SYSTEMS, INC.,
Requester / Appellee**

**Court of Common Pleas Docket No.
OOR Docket No.: AP 2022-1542**

[illegible]

CERTIFICATE OF SERVICE

I certify that on September 1, 2022, a true copy of the foregoing Notice of Appeal has been served upon counsel of record. A copy of this Notice of Appeal has also been served upon the Office of Open Records. Service is being made by first class mail, and, in the event available, by electronic filing of the Notice of Appeal and this Certificate of Service.

Respectfully submitted by:

/s/ Thomas J Carroll

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Dated: September 1, 2022