



FINAL DETERMINATION

IN THE MATTER OF

**HERB SIMMONS,
Requester**

v.

**BEDFORD COUNTY,
Respondent**

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Docket No: AP 2022-2119

INTRODUCTION

Herb Simmons (“Requester”) submitted a request (“Request”) to Bedford County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking Cast Vote Records (“CVR”) from the County for the 2020 General Election. The County denied the Request, arguing that the requested records are confidential pursuant to the Pennsylvania Election Code (“Election Code”), 25 P.S. § 2648. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the County is not required to take any further action.

FACTUAL BACKGROUND

On August 22, 2022, the Request was filed, seeking:

[T]he Cast Vote Records Lebanon County Pennsylvania from the 2020 General Election. These records should include the following fields as a minimum:

- CVR Record [Number]
- Timestamp
- Tabulator ID

- Municipality
- Precinct
- Batch ID
- Record ID
- Counting Group
- Session Type
- Ballot Type ID
- Paper Index
- Contest
- Candidate
- Undervotes
- Overvotes
- Mark Density

On August 25, 2022, the County denied the Request, arguing that the requested records are confidential pursuant to the Pennsylvania Election Code, 25 P.S. § 2648.

On September 12, 2022, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On September 17, 2022, the Requester submitted a position statement further arguing for the records to be granted.

On September 21, 2022, the County submitted a position statement reiterating its grounds for denial. The County claims that the requested records are confidential pursuant to the Election Code. In support of its position, the County submitted the sworn statement of Debra Brown, the Direct of Elections for the County.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is

“designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its

nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The Requester seeks CVRs from the 2020 General Election. The County argues that the records are confidential under the Election Code and are not subject to the RTKL. The Election Code provides as follows:

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

25 P.S. § 2648 (emphasis added).

In this matter, the County argues that the records sought in the Request are governed by Section 2648 of the Election Code. In her affidavit, Ms. Brown states:

3. The CVR is the digital equivalent of the contents of the ballot box. The data in each row of a CVR is collected by the ballot scanner at the time each ballot is cast and each line shows unique or discrete choices captured by the scanner. The CVR contains data that shows each individual voter's ballot choices, ballot style, precinct and the ballot box into which the ballot was scanned and deposited.
4. Digital images of ballots are contained in the CVR which are digital equivalent of individual ballots which are exempt from public inspection under 25 P.S. § 2648.

Brown Statement ¶¶ 3,4. Under the RTKL, a sworn affidavit or statement made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

The OOR finds credible the opinion of Ms. Brown, the County's Director of Elections, and will not substitute its judgment for that of those with far more familiarity with the issues. *See generally Knauss v. Unionville-Chadds Ford Sch. Dist.*, OOR Dkt. AP 2009-0332, 2009 PA O.O.R.D. LEXIS 238; *also see generally Sides v. Pa. Dep't of Corr.*, OOR Dkt. AP 2016-1480, 2016 PA O.O.R.D. LEXIS 1339. Furthermore, the OOR has consistently held that the CVR is the digital equivalent of the contents of ballot boxes, and the Election Code explicitly provides that the contents of ballot boxes are not public records. *See Burkhand v. Cambria Cnty.*, OOR Dkt. AP 2022-1507, 2022 PA O.O.R.D. LEXIS ____; *Buemi v. Chester Cnty.*, OOR Dkt. AP 2022-1484, 2022 PA O.O.R.D. LEXIS ____; *Ball v. Washington Cnty.*, OOR Dkt. AP 2022-1223, 2022 PA O.O.R.D. LEXIS 1750; *Stroehmann v. Lycoming Cnty.*, OOR Dkt. AP 2022- 0885, 2022 PA O.O.R.D. LEXIS 1292; *Honey v. Lycoming Cnty.*, OOR Dkt. AP 2021-2603, 2022 PA O.O.R.D. LEXIS 71, *appeal pending*, CV-2022-00115-OR (Lycoming County CCP). Accordingly, the County need not provide the CVR to the Requester.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the County is not required to take any further action. 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 Bedford County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. 65

P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: OCTOBER 6, 2022

/s/ Matthew Eisenberg

APPEALS OFFICER
MATTHEW EISENBERG, ESQ.

Sent to: Herb Simmons (via email only);
Debra Brown (via email only);
Dean Crabtree, Esquire (via email only)

¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).