pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
MICHELLE PREVITE,	:	
Requester	:	
	:	
v.	:	**Docket No.: AP 2022-2191**
	:	
ERIE COUNTY,	:	
Respondent	:	

INTRODUCTION

Michelle Previte ("Requester") submitted a request ("Request") to Erie County ("County") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking images of all mail-in ballots, outer envelopes for the mail-in ballots, and polling place ballots. The County denied the Request, arguing that the Pennsylvania Election Code governs the records sought. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the County is required to take further action as directed.

FACTUAL BACKGROUND

On August 1, 2022, the Request was filed, seeking:

1. [A]n electronic copy of the images of all mail-in ballots (including absentee ballots) from the November 2020 election.

2. [A]n electronic copy of the images of all outer envelopes (containing each voter's declaration) for the mail-in ballots (including absentee ballots) from the November 2020 election.

3. [A]n electronic copy of the images of all polling place ballots from the November 2020 election.

On August 2, 2022, the County invoked its right to a thirty-day extension during which to respond to the Request. 65 P.S. § 67.902(b). On September 2, 2022, the County denied the Request, arguing that "[t]he Pennsylvania Election Code governs these requests[.]"

On September 9, 2022, the Requester appealed to the Office of Open Records ("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 30, 2022, the Requester submitted a position statement arguing that she is entitled to the responsive records. The Requester asserts that *Stroehmann v. Lycoming Cnty.*, OOR Dkt. AP 2022-0885, 2022 PA O.O.R.D. LEXIS 1292, applies to this matter, asserting that in the Final Determination, the OOR "granted access to the requestor mail-in ballot images in accordance with 25 P.S. § 3150.17."

On October 4, 2022, the County submitted a position statement reiterating its argument that the Pennsylvania Election Code ("Election Code") governs the Request.

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, the Requester sought a hearing, but that request is denied.

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)).

1. Copies of the records of mail-in ballots (including absentee ballots) and images of outer envelopes must be provided as set forth in the Election Code

As noted above, the Requester relies on *Stroehmann* to support her argument that the mail-in ballots (including absentee ballots) and the images of outer envelopes must be provided. However, while *Stroehmann* found that mail-in ballots are public records under the Election Code, the OOR noted that access to those records is governed by the Election Code, and directed that county "to provide any access to the records for which the Requester is entitled as set forth in that law." The OOR did not hold that the records must be provided to every individual upon request.

There is a distinction in the Election Code between whether a record is public in nature and publicly accessible. The Election Code determines who can access the records. With respect to the records sought in Items 1 and 2 of the Request, Section 3150.17 of the Election Code states:

> **(a) General rule.**—All official mail-in ballots, files, applications for ballots and envelopes on which the executed declarations appear, and all information and lists are designated and declared to be public records and shall be safely kept for a period of two years, except that no proof of identification shall be made public, nor shall information concerning a military elector be made public which is expressly forbidden by the Department of Defense because of military security.

25 P.S. § 3150.17. Meanwhile, Section 2648 of the Election Code governs the inspection of records made public under the Code:

> The records … 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 having 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

> election 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 computation and canvassing.

25 P.S. § 2648 (emphasis added).

Under the RTKL, Section 67.302(a) provides that "[a] local agency or local agency shall provide public records in accordance with this act." 65 P.S. § 67.302(a). Records in the possession of a local agency are presumed to be public records. However, this "presumption shall not apply if: (1) the record is exempt under section 67.708; (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law, regulation or judicial order or decree." 65 P.S. § 67.305. Further, Section 306 of the RTKL, entitled "Nature of document," states: "Nothing in this act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree." 65 P.S. §67.306. However, Section 3101.1 makes clear that, "[i]f the provisions of this act regarding access to records conflict with any other Federal or State law, the provisions of this act shall not apply." (Emphasis added).

Here, we need not examine the public nature of the mail-in ballots and their declaration envelopes, as the plain language in the Election Code establishes that "[a]ll official … ballots, … and envelopes on which the executed declarations appear … are hereby designated and declared to be public records." Rather, the issue becomes whether the requested records may be *accessed* under the RTKL.

The OOR has found that, while the Election Code makes many records in the custody of the Election Board subject to public inspection by qualified electors, 25 P.S. § 2648, it does not make these records unconditionally available to the public. *See Obernier v. Crawford Cnty*., OOR Dkt. AP 2017-2107, 2018 PA O.O.R.D. LEXIS 110 (analyzing that section of the Election Code

and noting that it "creates a separate process for obtaining these records and conditions public inspection and copying: 1) to qualified electors of the county, 2) during ordinary business hours, and 3) when the records are not being used by the elections board"); *see also Bloch v. Adams Cnty.*, OOR Dkt. AP 2018-2227, 2019 PA O.O.R.D. LEXIS 95. While the *Stroehmann* decision does apply to the instant matter, *Stroehmann* explains that "the governance of inspection and copying under the Election Code are beyond the OOR's purview." *Stroehmann*, 2022 PA O.O.R.D. LEXIS 1292, *8-10 (citing *Heltzel*, 90 A.3d at 831-33); *see also Gallagher and the Republican National Committee v. Montgomery Cnty.*, OOR Dkt. AP 2021-2945, 2022 PA O.O.R.D. LEXIS 622; *Hall v. Butler Cnty.*, OOR Dkt. AP 2022-0508, 2022 PA O.O.R.D. LEXIS 1062; *Shepherd v. Phila. Office of City Commissioners*, OOR Dkt. AP 2021-2929, 2022 PA O.O.R.D. LEXIS 694.

Accordingly, access to the requested records is governed by the access provisions set forth in the Election Code, and the County is directed to provide any access to the mail-in and absentee ballots and outer envelopes for which the Requester is entitled as set forth in that law. *See Heltzel*, *supra*; *see also Weaver v. Allegheny Cnty.*, OOR Dkt. AP 2022-1052, 2022 PA O.O.R.D. LEXIS 1323 (finding that the County is to provide access to mail-in ballots).[1]

2. The "polling place ballots" are not subject to access under the RTKL

Item 3 of the Request seeks "images of all polling place ballots from the November 2020 election." Although the Requester argues that "digital images are not contained within ballot boxes[,]" here, as in numerous other appeals decided by the OOR, Item 3 of the Request clearly seeks the contents of the ballot box and/or voting machines because it seeks "ballot images," which are contents of a ballot box or voting machines, and are therefore, not public records. *See* 25 P.S. § 2648 (excluding "the contents of ballot boxes" from public inspection). Accordingly, the

[1] *Weaver* is currently on appeal before the Allegheny County Court of Common Pleas.

Election Code excludes these records from public access, even by qualified electors. Therefore, the County does not need to provide any access to these records. *See Taylor v. Westmoreland Cnty.*, OOR Dkt. AP 2022-0046, 2022 PA O.O.R.D. LEXIS 687 (request for [b]allot images of any and all ballots cast in the 2020 election was denied as contents of the ballot box and, thus, not subject to access under the RTKL); *see also Shuppe v. Beaver Cnty.*, OOR Dkt. AP 2022-0037, 2022 PA O.O.R.D. LEXIS 709; *Edwards v. Butler Cnty.*, OOR Dkt. AP 2021-2976, 2022 PA O.O.R.D. LEXIS 296; *Cornetti v. Butler Cnty.*, OOR Dkt. AP 2021-2891, 2022 PA O.O.R.D. LEXIS 146; *Jaquette v. Delaware Cnty.*, OOR Dkt. AP 2021-2808, 2022 PA O.O.R.D. LEXIS 25.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part**, and the County is required to make records responsive to Items 1 and 2 of the Request available for access in accordance with the Election Code within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Erie 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.[2] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: October 20, 2022

/s/ Lyle Hartranft

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Lyle Hartranft, Esq.
Appeals Officer

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

Sent to: Michelle Previte (via email);
William Speros, Esq. (via email);
Julie Slomski, AORO (via email)