IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA

MICHELLE PREVITE, Appellee/Requester v. ERIE COUNTY BOARD OF ELECTIONS, Appellant/Respondent.	:	CIVIL DIVISION A.D. No.: 2022-__12720-22_____ **BRIEF IN OPPOSITION** Filed on Behalf of Appellee: **Michelle Previte** 210 West 37th Street Erie, PA 16508 michelleprevite@gmail.com Counsel of Record for Appellee: ***Pro se***

COMMON PLEAS COURT
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CLERK OF RECORDS

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA

MICHELLE PREVITE,	:	CIVIL
Appellee/Requester	:	A.D. No.: 2022 - 12720-22
v.	:	
ERIE COUNTY BOARD OF ELECTIONS,	:	
Appellant/Respondent.	:	

COMMON PLEAS COURT
2022 DEC -8 PM 1:28
ERIE COUNTY, PA

APPELLEE MICHELLE PREVITE'S BRIEF IN OPPOSITION TO APPELLANT'S APPEAL

Appellee Michelle Previte, acting *pro se*, hereby files this brief opposing the appeal filed by appellant Erie County Board of Elections ("Agency"), relative to the Office of Open Records ("OOR") decision dated October 20, 2022.

INTRODUCTION

The OOR's decision with regard to the absentee and mail-in ballots should be affirmed, as these records are in the custody of the Erie County Board of Elections in the medium requested, and the plain language of the Pennsylvania Election Code ("Election Code") establishes that they are public records.

FACTUAL BACKGROUND

1. On August 1, 2022, Michelle Previte ("Requester") submitted a request ("Request") to the Agency pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*,

2. It has come to the Requester's attention since receiving the Notice of Appeal that, unlike other Pennsylvania counties, the Agency did not, in 2020, create images of the outer envelopes as requested in Item (b).
3. In light of this fact, the Requester withdraws her request for images of the outer envelopes.

B. Absentee/Mail-in ballot images are in the custody of the Agency, in the medium requested, and non-military ballot images are subject to public inspection under the Election Code.

1. Presumably, the Agency's statement that it is "not in possession, custody or control of the identified records as requested" is referring to the requested images of the outer envelopes. This claim cannot apply to the images of the absentee/mail-in ballots, otherwise the Agency would be in violation of both Federal and State Law.
2. Federal and State Law require the Agency to maintain all election related records for a period of 22 and 24 months, respectively. (See 52 U.S.C. § 20701 and 25 P.S. § 3150.17 (a).) Thus, the Agency was required to maintain all records from the November 3, 2020 General Election until at least September 3, 2022. Ms. Previte's request, dated August 1, 2022, was filed before this requirement expired.
3. Furthermore, 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..."

4. The Agency further states that "the records being requested cannot be provided in the requested medium as they do not exist in the requested medium." Again, this statement must be referring to images of the outer envelopes, which Ms. Previte acknowledges do not exist. However, the Agency used Dominion machines to tabulate the votes which were cast via absentee/mail-in ballots.
4. As a Dominion machine scans a ballot and tabulates the votes cast, it takes an image of the ballot and stores it electronically.
5. The Agency can export the images created by the Dominion machines to a removable device (such as a USB stick) by following the instructions given in the Dominion user's manual. Relevant pages of the manual are included in Appendix A.
6. The OOR correctly permitted access to the ballot images for the absentee/mail-in ballots based upon the clear statutory language of Act 77, which states, "All official mail-in ballots, files, applications for ballots and envelopes" to be "designated and declared" public records. See 25 P.S. § 3150.17.

C. The images of military ballots do not contain information concerning military electors nor does their disclosure jeopardize public safety, preparedness, or protection activity and are therefore not exempt from the RTKL.

1. Ballots from members of the military arrive to the Agency in a format that is not compatible with the Dominion tabulators. The Requester did NOT request images of the tabulator-incompatible military ballots.

2. However, the Agency transcribes the votes from the military ballots onto tabulator-compatible ballots which are identical to the ballots non-military voters use. (This process is known as "duplicating the ballot.")
3. Non-military and duplicated military ballots are scanned by the Dominion tabulators which create an image of each ballot at the time it is scanned. It is these images, which are indistinguishable from ballots cast by non-military voters, that the Requester has a right to access.
4. Respondent appeals to 65 P.S. § 67.708 (b) (2) to argue that images of the ballots from members of the military are exempt from public records because they are a record "maintained by the Agency in connection with the military." However, 65 P.S. § 67.708 (b) (2) does not say that *every* record maintained by the Agency in connection with the military is exempt from public records. Rather, it says that the following record is exempt from access:

> A record maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that, **if disclosed, would be *reasonably likely* to jeopardize or threaten public safety or preparedness or public protection activity or a record that is designated classified by an appropriate Federal or State military authority.**
>
> 65 P.S. § 67.708 (b) (2) (emphasis added)

5. It is unreasonable to assume that disclosing images of ballots cast by members of the military jeopardizes public safety or preparedness or public protection activity. Furthermore, these images are not designated as classified by any authority.
6. Respondent also appeals to 25 P.S. § 3150.17 to argue that images of military ballots constitute "information concerning military electors and shall not be made public."

However, 25 P.S. § 3150.17 (b) explicitly states the elector information that the Agency must maintain:

> **(b)Record.**--For each election, the county board shall maintain a record of the following information, if applicable, for each elector who makes application for a mail-in ballot:
>
> **(1)** The elector's name and voter registration address.
>
> **(2)** The date on which the elector's application is received by the county board.
>
> **(3)** The date on which the elector's application is approved or rejected by the county board.
>
> **(4)** The date on which the county board mails or delivers the mail-in ballot to the elector.
>
> **(5)** The date on which the elector's completed mail-in ballot is received by the county board.

25 P.S. § 3150.17 (b)

It is the above elector information that is exempt from access in the case of members of the military and not a secret ballot, which contains no information whatsoever about any specific elector.

7. Therefore, the ballot images requested are not, as the Agency claims, information concerning military electors, nor are they records maintained by the Agency in connection with the military that, if disclosed, could jeopardize the public.

CONCLUSION

The OOR's decision with regard to the absentee/mail-in ballots should be affirmed since the plain language of the Pennsylvania Election Code ("Election Code") establishes that they are

public records, and these records are in the custody of the Erie County Board of Elections (as required by law) in the medium requested (as evidenced in the Dominion user's manual).

WHEREFORE, the Requestor respectfully requests a determination requiring full disclosure of ALL images of absentee/mail-in ballots.

Respectfully Submitted,

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Pro se
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210 West 37th Street
Erie, PA 16508

Dated: Dec. 8, 2022

VERIFICATION

I, Michelle Previte, hereby verify that the facts set forth in the foregoing Brief in Opposition are true and correct to the best of my knowledge and belief. This verification is made subject to the penalties of 18 Pa.C.S.A. § 4904, relating to unsworn falsification to authorities.

Date: Dec. 8th, 2022

Michelle Previte

CERTIFICATE OF SERVICE

I, MICHELLE PREVITE, hereby certify that a true and correct copy of the foregoing **BRIEF IN OPPOSITION OF APPEAL OF FINAL DETERMINATION OF THE OFFICE OF OPEN RECORDS (NO: AP 2022-2191, October 20, 2022)** was served this 8th day of December, 2022, upon the following, service as indicated:

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Pro se

Appendix A

Democracy Suite® EMS Results Tally & Reporting User Guide

Version: 5.11-CO::7

May 28, 2019

DOMINION VOTING

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14.3 Exporting Audit Images

The Export audit images functionality will go through each scanned ballot image that was extracted previously from the tabulators and will categorize each image and export them into separate sub-folders per category. For each export a separate sub-folder will be created. The export audit images screen either applies to all result files or to the currently selected result file. See Figure 14-8 .

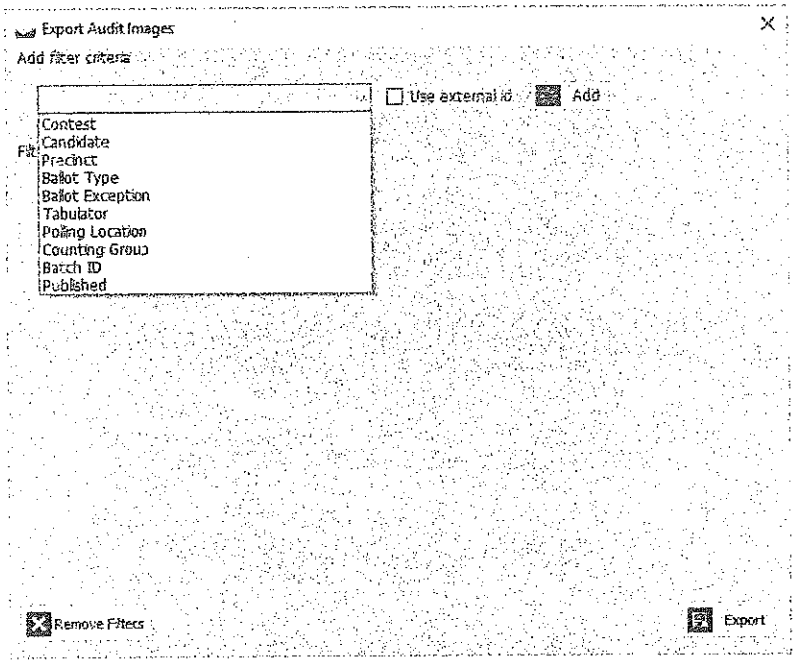


Figure 14-8: Export Audit Images screen

The user can define which images to export and how they should be exported by adding and selecting filter criteria. The following lists the different filter criteria, some of which allow sub selection:

- **Contest**: adding this filter criterion splits images per contest in separate sub-directories prefixed with "Contest "and followed by contest name. The filter allows the user to select a specific contest, resulting in an export where only images for ballots containing that contest are included.
- **Candidate**: adding this filter criterion splits images per contest in separate sub-directories depending on candidate type (regular or write-in. Within the Regular sub-folder, images are separated by candidate name. Write in sub-folder contains all the ballot images with write-in votes. The filter allows the user to select a specific contest, resulting in an export where only images for ballots containing that contest are included.
- **Precinct**: adding this filter criterion splits images per precinct in separate sub-directories prefixed with "Precinct " followed by precinct name. The filter allows the user to select a specific precinct, resulting in an export where only images for ballots cast in that precinct are included.

- **Ballot Type**: adding this filter criterion splits images per Ballot Type in separate sub-directories prefixed with "BT" and followed by the name of the Ballot Type. The filter allows the user to select a specific Ballot Type, resulting in an export where only the images of ballots that belong to the specified Ballot Type are included.
- **Ballot Exception**: adding this filter criterion splits images per ballot exception in separate sub-directories prefixed with "Ballot Exception " followed by each of the following categories:
  - **Blank Ballot**: no marks were detected for any of the contests.
  - **Blank**: no marks were detected for the current contest, or if no contest criterion was added, no marks were detected for at least one contest.
  - **UndervotedNotBlank**: the current contest was undervoted, but not blank, or if no contest criterion was added, undervoted contest detected was not blank.
  - **Regular**: current contest was marked equal to the vote for, or if no contest criterion was added, all contests were marked equal to their vote for.
  - **Write-in**: current contest had one of the write-in positions marked, or if no contest criterion was added, a contest had one of their write-in positions marked.
  - **Overvoted**: current contest was overvoted, or if not contest criterion was added, a contest was overvoted.
- **Tabulator**: adding this filter criterion splits images per tabulator in separate sub-directories prefixed with "Tabulator " and followed by tabulator name. The filter allows the user to select a specific tabulator, resulting in an export where only images of ballots cast in that tabulator are included.
- **Polling Location**: adding this filter criterion splits images per polling location in separate sub-directories prefixed with "PollingLocation " and followed by polling location name. The filter allows the user to select a specific polling location, resulting in an export where only images of ballots cast at that polling location are included.
- **Counting Group**: adding this filter criterion splits images per counting group in separate subdirectories prefixed with "CountingGroup ", followed by the counting group name. The filter allows the user to select a specific counting group, resulting in an export where only images of ballots cast in that counting group are included.
- **Batch ID:** adding this filter criterion splits images per batch in separate sub-directories prefixed with "BatchId_ ", followed by the batch id.
- **Published**: adding this filter criterion separates images depending on if an image has been published. The sub-directories will be prefixed with

"Published_" followed by either "not published" or "published".

The user can add each filter criterion once. The order in which they are added determines the folder structure that is created on export. Once the export is started using the Export button the system will create an "AuditImages" directory in the project's "Results" sub-folder. Within that directory a subfolder named "Audit" is created named followed by a timestamp (for example: Audit2013_12_17_13_58_00). Within that sub-folder a hierarchy of subfolders are created matching the order of the filter criteria added by the user. The user can clear all filter criteria by pressing the Remove Filter button.

14.4 RTM Logs

RTR has exposed services through which remote clients can communicate with server and transfer result files (if proper protocol is implemented). These client activities can be tracked in RTR RTM Logs view control.

1. Click **Search**.
2. Remote Clients are listed.
3. Double-click on the Remote Client.
   The Result Manager Transfer Session screen appears.
4. There are Result Transfer Manager Id field and Polling Place field.
5. Different actions in this screen can be monitored. The Ping action ensures that remote client is accessible. Logs also display the status of uploaded files.

14.5 Obtain User's Audit Log

An Audit Report of user activity can be produced in the EMS EED application. For more details, see the *Democracy Suite® EMS Election Event Designer User Guide* for help.