



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

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**ROBERT MANCINI,
Requester**

v.

: Docket No: AP 2022-2667

**DELAWARE COUNTY,
Respondent**

On November 14, 2022, Robert Mancini (“Requester”) submitted a request (“Request”) to Delaware County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

[F]or the 2022 election, for the machines used to count the votes [in] Marple precinct 7-1, 7-2, 7-3 and the machine to count the mail in paper ballots for Marple 7-1, 7-2, & 7-3 the computer inventory records. Records documenting the assignment of a specific computer to [an] individual as well as the inventories of licensed software, may include address or mailbox assigned to the individual.

On November 21, 2022, the County denied the Request, stating that the Request must be made pursuant to the provisions of the Pennsylvania Election Code (“Election Code”). 25 P.S. §§ 2600 *et seq.* The County further stated to the extent the Election Code permits access, the records would be available from the Delaware County Bureau of Elections.

On November 28, 2022, the Requester filed an appeal with 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 December 7, 2022, the County submitted a position statement and a sworn affidavit made subject to 18 Pa.C.S. § 4904, from Anne Coogan, the Agency Open Records Officer (“AORO”) for the County. The Coogan Affidavit indicates the following:

3. In response to such request, I inquired of the County Solicitor’s Office as to whether this request was governed by the Pennsylvania Right to Know Law (the “RTKL”). After it had completed its legal review, I was advised by the County Solicitor’s Office that access to the requested records was pre-empted by [the] Pennsylvania Election Code.

5. By letter dated November 21, 2022, I informed Appellant of the denial of the request for records as pre-empted by the Pennsylvania Election Code and provide the contact information for the County Bureau of Elections.

Additionally, the County submitted two emails detailing procedures for the requests of a “Cast Vote Record (CVR),” voted mail ballots and mail ballot outer envelopes.

The Requester responded to the County’s submissions on December 7, 2022. Per the Requester, the Request did not contain a request for CVRs.

LEGAL ANALYSIS

The County is a local agency subject to the RTKL. 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. As an agency subject to the RTKL, the County is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 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 Request exclusively seeks records concerning the machines used to count votes utilized during the November 2022 election, including the assignment of an individual to the computers, machines and inventories of licensed software. The County does not dispute that any of the records sought are public or that the records do not exist, but instead states that the records must be accessed by writing to the County Board of Elections with the request. The Requester argues that the County conducts the election and the machines used in the election were paid for with Delaware County Taxpayer funds, and as such, the RTKL is an appropriate vehicle for the Request.

The Election Code states that:

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 employes have duties to perform thereto: Provided, however, That such public inspection thereof shall only be in the presence of a member or authorized employe 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. The County has raised no argument on appeal that the responsive records are not public pursuant to Section 2648 of the Election Code.

The OOR concludes that the records sought are subject to Section 2648 of the Election Code. The Election Code controls all “records of each county board of elections,” including “other documents and records in its custody[.]” *Id.* The OOR has interpreted this catchall provision of the Election Code broadly, applying it to emails with the Pennsylvania Department of State about elections, procedures used by county agencies to train election workers and internal communications involving elections. *See Giancola v. Allegheny Cnty.*, OOR Dkt. AP 2022-1177, 2022 PA O.O.R.D. LEXIS 1602; *Snead v. City of Philadelphia*, OOR Dkt. AP 2021- 0160, 2021 PA O.O.R.D. LEXIS 426; *Gallagher v. Montgomery Cnty.*, OOR Dkt. AP 2021-2945, 2022 PA O.O.R.D. LEXIS 622. In this case, all the requested records concern machines used to count votes in the 2022 general election, and therefore qualify as “other documents and records” in the custody of the County’s Board of Elections.

When the RTKL conflicts with another state law, the other law’s provisions regarding access to records applies. *See* 65 P.S. § 67.3101.1 (“[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”). When examining the conflict between the Election Code and the RTKL, the OOR has found that, while the Election Code makes many records in the custody of the Election Board subject to public inspection by qualified electors, 25 P.S. § 2648, it does not make these records unconditionally available to the public. *See Obernier v. Crawford Cnty.*, OOR Dkt. AP 2017-2107, 2018 PA O.O.R.D. LEXIS 110 (analyzing § 2648 of the Election Code and noting that it “creates a separate process for obtaining these records and conditions the 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 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. In addition, because the records are not unconditionally public under the Election Code, the OOR must examine any exemptions from disclosure under the RTKL that are asserted by the agency when records of a County Elections Board are sought. *See Pa. Dep't of Labor & Indus. v. Heltzel*, 90 A.3d 823, 833 (Pa. Commw. Ct. 2014).

The County has asserted no exemptions in this case, but simply states that the records must be sought from the County Board of Elections directly and the records are to be provided according to the provisions of the Election Code. The Request does not contain any request for ballots, ballot envelopes or CVRs, which were the subject of the email attachments submitted by the County. The County has directed the Requester to submit a request to the County Board of Elections; however, the County has not demonstrated that a request to the County was not a sufficient request for records pursuant to the Election Code. Thus, the OOR directs the County to provide responsive records subject to the access provisions in the Election Code and according to any legal limitations thereof. *See Cornetti v. Butler Cnty.*, OOR Dkt. AP 2022-0364, 2022 PA O.O.R.D. LEXIS 807; *see also Shepherd v. Phila. Office of City Commissioners*, OOR Dkt. AP 2021-2929, 2022 PA O.O.R.D. LEXIS 694; *Churchwell v. Montgomery Cnty.*, OOR Dkt. AP 2021-1331, 2021 PA O.O.R.D. LEXIS 1383; 65 P.S. § 67.3101.1.

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the County is required to provide the responsive records in accordance with the procedures and requirements of the Election Code. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal or petition for review to the Delaware 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.¹ 65 P.S. § 67.1303. This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: December 13, 2022

/s/ Bandy L. Jarosz

BANDY L. JAROSZ, ESQ.
APPEALS OFFICER

Sent to: Robert Mancini (via email only)
John Lichtenstein, Esq. (via email only)
Anne Coogan (via email only)

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