

January 24, 2023

Sent Via First Class Mail

Andrew E. Spade, Prothonotary
Lancaster County Courthouse
50 N. Duke Street
PO Box 83480
Lancaster, PA 17608

RE: Submission of Record in:
***Michael Miller v. Lancaster County*, Docket No. CI-22-08146**

Dear Prothonotary Spade:

We hereby submit the record in the above-referenced matter. Section 1303 of the Right-to-Know Law, 65 P.S. §§ 67.101, *et seq.*, (“RTKL”), defines the Record on Appeal as “the record before a court shall consist of the request, the agency’s response, the appeal filed under section 1101, the hearing transcript, if any, and the final written determination of the appeals officer.” Pursuant to *Department of Transportation v. Office of Open Records*, 7 A.3d 329 (Pa. Commw. Ct. 2010), this record includes all “evidence and documents admitted into evidence by the appeals officer pursuant to Section 1102(a)(2).” The record in this matter consists of the following:

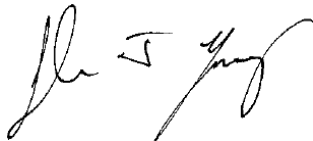
Office of Open Records Docket No. AP 2022-1749:

1. The appeal filed by Mike Miller (“Requester”) to the Office of Open Records (“OOR”), received July 27, 2022.
2. Official Notice of Appeal dated July 28, 2022, sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.
3. Requester submission dated August 15, 2022.
4. Lancaster County (“County”) submission dated August 17, 2022.
5. Requester submission dated August 17, 2022.
6. County supplemental submission dated August 17, 2022.
7. OOR email dated September 27, 2022, seeking clarification from the Requester.

8. Requester submission dated September 27, 2022.
9. Requester submission dated September 29, 2022.
10. Requester submission dated October 4, 2022.
11. OOR email dated October 4, 2022, forwarding a copy of the Official Notice of Appeal.
12. The Final Determination issued by the OOR on October 5, 2022.

The OOR has discretion to hold a hearing on appeals filed but chose not to do so in this matter. Therefore, there is no transcript to transmit. Certification of the record in this case is attached to this letter. Please feel free to contact us for any reason in connection with this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Joshua T. Young', with a stylized flourish at the end.

Joshua T. Young
Deputy Chief Counsel

Attachments

cc: Michael Miller
Jacquelyn E. Pfursich, Esq.

**IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW**

MICHAEL MILLER	:	
Petitioner,	:	No. CI-22-08146
v.	:	
	:	
LANCASTER COUNTY	:	
Respondent.	:	

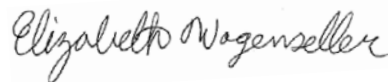
CERTIFICATION OF RECORD

I hereby certify the contents of the record transmitted with this Certification of Record pursuant to Pa.R.A.P. 1952 in *Mike Miller v. Lancaster County*, OOR Dkt. AP 2022-1749, which is the subject of this appeal.

The record transmitted with this certification is generated entirely from the Office of Open Records database. It is our practice to scan in each and every document submitted in an appeal. Thus, no originals are being transmitted to this Court.

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

Also, my signature on this Certification of Record and on all other correspondence directed to the Court in connection with this matter may be electronic and not original. I hereby certified that this is my true and correct signature and that I have approved the use thereof for these purposes.



Elizabeth Wagenseller, Executive Director
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
Email: OpenRecords@pa.gov

Dated: January 24, 2023

**IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW**

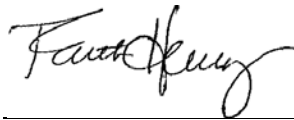
MICHAEL MILLER	:	
Petitioner,	:	No. CI-22-08146
v.	:	
	:	
LANCASTER COUNTY	:	
Respondent.	:	

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the Certified Record upon the following persons via e-mail addressed to their e-mail address as follows:

Jacquelyn E. Pfursich, Esq.
County Solicitor
Lancaster County
150 N. Queen Street, Suite 714
Lancaster, PA 17603
JEPfursich@co.lancaster.pa.us

Michael Miller
PO Box 801
Ephrata, PA 17522
reaganfive@ptotonmail.com



Faith Henry, Administrative Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17120-0225
Phone: (717) 346-9903
Fax: (717) 425-5343
Email: fahenry@pa.gov

January 24, 2023

**IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW**

MICHAEL MILLER	:	
Petitioner,	:	No. CI-22-08146
v.	:	
	:	
LANCASTER COUNTY	:	
Respondent.	:	

CERTIFIED RECORD

Joshua T. Young
Deputy Chief Counsel
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Phone: (717) 346-9903
Fax: (717) 425-5343
Email: joshyoung@pa.gov

Dated: January 24, 2023

**IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW**

MICHAEL MILLER	:	
Petitioner,	:	No. CI-22-08146
v.	:	
	:	
LANCASTER COUNTY	:	
Respondent.	:	

**TABLE OF CONTENTS
RECORD**

Mike Miller v. Lancaster County, Office of Open Records Docket No. AP 2022-1749:

1. The appeal filed by Mike Miller (“Requester”) to the Office of Open Records (“OOR”), received July 27, 2022.
2. Official Notice of Appeal dated July 28, 2022, sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.
3. Requester submission dated August 15, 2022.
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12. The Final Determination issued by the OOR on October 5, 2022.

OOR Exhibit 1



**RIGHT-TO-KNOW LAW ("RTKL")
APPEAL OF DENIAL, PARTIAL DENIAL, OR DEEMED DENIAL**

Office of Open Records ("OOR")

Email: openrecords@pa.gov

Fax: (717) 425-5343

333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Today's Date: July 27, 2022

Requester: Mike Miller

Company (if applicable): _____

Address/City/State/Zip: PO Box 801 Ephrata PA 17522

Email: reaganfive@protonmail.com Phone: _____

Request Submitted to Agency Via: ☒ Email ☐ Mail ☐ Fax ☐ In-Person (*check only one*)

Date of Request: 6/8/22 Date of Response: 7/15/22 ☐ Check if No Response

Agency: County of Lancaster Office of Open Records

Name & Title of Person Who Denied Request (if available): Tammy L. Bender

Address/City/State/Zip: 150 North Queen St, Suite 714 Lancaster PA 17603

Email: openrecords@co.lancaster.pa.us Phone: 717-735-1584

Records at Issue in this Appeal (*use additional pages if necessary*):

Please see attached statement.

I requested the listed records from the Agency named above. By submitting this appeal, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.

Please complete the following:

- ☒ I have attached a copy of my request for records.
- ☒ I have attached a copy of all responses from the Agency regarding my request.
- ☒ I have attached any letters or notices extending the Agency's time to respond to my request.
- ☒ I hereby agree to permit the OOR an additional 30 days to issue a final determination.
- ☒ I am interested in resolving this issue through OOR mediation. *This stays the initial OOR deadline for the issuance of a final determination by 7 business days. If mediation is unsuccessful, the OOR has 30 days from the conclusion of the mediation process to issue a final determination.*

Mike Miller
PO Box 801
Ephrata PA 17522
reaganfive@protonmail.com

I, Mike Miller, hereby file this appeal with the Office of Open Records under section 503(d) on this day July 27, 2022. My statement is as follows:

1. This appeal pertains to Request Number #210-2022, as named by the Lancaster County Open Records Office.
2. I am a qualified elector in accordance with 25 P.S. § 2648.
3. The records I request are specifically defined by 25 P.S. § 3150.17 and the Pennsylvania Election Code Section 1307-D to be public records.
4. I claim 25 P.S. § 3150.17 protects my right to inspect, in their entirety, the mail-in ballots and envelopes (including signatures on the envelopes) used in Lancaster County during the May 2022 primary.
5. I claim my request is not subject to Pennsylvania Right to Know Law Section 305(a)(3).
6. I claim that 65 Pa. Statute 67.3101.1 applies and my request for these documents is NOT subject to the Right to Know Law or the PA Office of Open Records.
7. I claim my right to inspect these records is specifically protected by a State law, which is 25 P.S. § 3150.17. The agency may not lawfully use the Right-to-Know Act to undermine a State law.
8. The agency denies my request by claiming that mail-in ballots are exempt from disclosure as 'contents of the ballot box' under 25 PA Section 2648. This is a misapplication of an unrelated law and conflicts with the plain language of 25 P.S. § 3150.17. In addition, the agency provides no evidence that mail-in ballots are contents of a ballot box, nor does it cite any law that specifies that mail-in ballots are contents of a ballot box. Quite the opposite, 25 P.S. § 3150.17 specifically defines mail-in ballots to be public records and kept for two years, for the purpose of public inspection.
9. The agency claims that 4 Pa. Code §§ 183.14 applies to the requested envelopes and exempts the requested documents from inspection. This claim is not reasonable. 4 Pa. Code §§ 183.14 and Pennsylvania Election Code Pa. C.S. § 1401 and 1404 plainly pertain to voter registration lists. Title 25 Pa. C.S.A. Elections § 1404 states the 'the list may not contain the digitized or electronic signature or SURE registration number of the registered elector'. The laws are not about the inspection of mail-in ballots and envelopes or the signatures on the envelopes. Accordingly, I am not requesting a voter registration list nor have I requested the inspection of digitized or electronic signatures. The agency's misuse of non-applicable law undermines the plain intent and meaning of 25 P.S. § 3150.17.

10. I request evidence from the county that the mail-in ballots and envelopes for military electors are items that are expressly forbidden from being made public by the Department of Defense, as per 25 P.S. § 3150.17.

11. The agency's attempt to apply laws which are plainly not applicable to the requested documents is concerning, given the growing concern throughout our nation about whether elected officials are defending citizens' rights to elections that are free, fair, and without interference. County officials should lean towards a principle of disclosure and transparency, especially when law specifically warrants it. They should not heighten citizens' suspicions by denying reasonable requests by grasping for laws that don't apply.

Sincerely,
Mike Miller



COUNTY OF LANCASTER OPEN RECORDS REQUEST FORM

Date Requested:

June 7, 2022

Request Submitted By:

E-MAIL ☐U.S. MAIL ☐FAX ☐IN-PERSON ☒

Name Of Requestor:

Mike Miller

Mailing Address:

PO Box 801

Street/P.O. Box

Ephrata

PA

17522

City

State

Zip Code

Telephone Number: _____

Fax Number: _____

E-Mail Address:

reaganfive@protonmail.com

Records Requested: Please identify each of the documents that are subject to this request. You must identify these documents with sufficient specificity to enable the County to ascertain which records are being requested.

Pursuant to the Pennsylvania Right-to-Know Law, I am requesting inspection of all original mail-in ballots and envelopes received from voters in Lancaster County for the 2022 Primary Election. The mail-in ballots and envelopes are explicitly declared to be public records and shall be open for inspection. Specifically, 25 P.S. § 1307-D states, in relevant part: "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.**"

I would like to inspect these public records within 5 business days of this request. Please notify me of the organizational structure of the mail ballot storage so that I can properly prepare for the inspection. Please specify if the ballots are stored by party, by precinct, and/or by batch.

Please check one of the following boxes

- ☐ I am only requesting access to the documents identified above.
- ☐ I am only requesting a copy of the documents identified above.
- ☒ I am requesting access to the documents identified above and a copy of those documents.

If you are requesting a copy of the documents identified above, please check one of the following boxes.

- ☐ I want a paper copy of the documents.
- ☒ Other format (please specify): I will copy

Right To Know Official: _____

Date Received By The Agency: _____



Open Records Office

150 North Queen Street
Suite #714
Lancaster, PA 17603
Phone: 717-735-1584
Fax: 717-824-8520
www.co.lancaster.pa.us

Tammy L. Bender
Open Records Officer

June 15, 2022

VIA EMAIL ONLY TO:
reaganfive@protonmail.com
Mike Miller
P.O. Box 801
Ephrata, PA 17522

Re: Right to Know Request Number #210-2022

Dear Mr. Miller:

Thank you for writing to the County of Lancaster Office of Open Records with your request for information pursuant to the Pennsylvania Right to Know Law.

On June 8, 2022, the County of Lancaster Open Records Office received your request for inspection of all original mail-in ballots and envelopes received from voters in Lancaster County for the 2022 Primary Elections.

The County is invoking a time extension until July 15, 2022, to review and respond to your request in accordance with Section 902(a)(7) of the Pennsylvania Right to Know Law. Specifically, the extent or nature of your request precludes the County from providing a response within five business days.

Sincerely,

Tammy L. Bender
Open Records Officer
Lancaster County, Pennsylvania





Open Records Office

150 North Queen Street
Suite #714
Lancaster, PA 17603
Phone: 717-735-1584
Fax: 717-824-8520
www.co.lancaster.pa.us

Open Records Officer

July 15, 2022

Tammy L Bender

VIA EMAIL ONLY TO:
reaganfive@protonmail.com
Mike Miller
P.O. Box 801
Ephrata, PA 17522

Re: Right to Know Request Number #210-2022

Dear Mr. Miller:

Thank you for writing to the County of Lancaster Office of Open Records with your request for information pursuant to the Pennsylvania Right to Know Law.

On June 8, 2022, the County of Lancaster Open Records Office received your request for inspection of all original mail-in ballots and envelopes received from voters in Lancaster County for the 2022 Primary Elections.

On June 15, 2022, the County invoked an extension of time until July 15, 2022, to review and respond to your request in accordance with Section 902(a)(7) of the Pennsylvania Right to Know Law.

Your request has been granted in part and denied in part as follows:

1. Your request is granted in part that you are granted partial in person inspection of the mail-in-ballot envelopes, not including declarant signatures or information related to military electors, related to the 2022 Primary Election provided that you can establish that you are a qualified elector of the County of Lancaster as required under the Pennsylvania Election Code 25 P.S. § 2648. You may contact myself at the above number or Christa Miller, Chief Clerk/Chief Registrar of Voter Registration and Board of Elections at 717-299-8293, to set up a mutually convenient time to inspect the envelopes.




2. Your request to inspect the mail-in ballot envelopes is also denied in part in accordance with the Pennsylvania Right to Know Law Section 305(a)(3) as a record that is exempt from disclosure under other Federal or State law or regulation. Specifically, in this instance, The Pennsylvania Election Code Pa. C.S. § 1401 and 4 Pa. Code §§ 183.14..14(c)(1) in that "[t]he signature of a registrant or applicant, as provided at section 1404(a) of the act" would not be available for public inspection or photocopying.

3. Your request to inspect the mail-in ballot envelopes as it relates to military electors, is also denied in accordance with the Pennsylvania Right to Know Law 305(A)(3) as a record that is exempt from disclosure under another Federal or State law or regulation. In this instance information related to members of the military will be withheld as governed by the Pennsylvania Election Code 25 P.S. § 25305(A)(3) as information concerning a military elector which is expressly forbidden by the Department of Defense because of military security.

4. Your request for inspection of the mail-in ballots is denied in accordance with the Pennsylvania Right to Know Law Section 305(A)(3) as a record that is exempt from disclosure under other Federal or State law or regulation. Specifically, the Pennsylvania Election Code Pa 25 P.S. § 2648 as contents of a ballot box.

5. Your request for inspection of the mail-in ballots is also denied in accordance with the Pennsylvania Right to Know Law 305(A)(3) as a record that is exempt from disclosure under another Federal or State law or regulation. In this instance information related to members of the military will be withheld as governed by the Pennsylvania Election Code 25 P.S. § 25305(A)(3) as information concerning a military elector which is expressly forbidden by the Department of Defense because of military security.

You have a right to appeal this denial of information in writing to Elizabeth Gerloff Wagenseller, Executive Director, Office of Open Records, 333 Market Street, 16th Floor, Harrisburg, PA 17126-0333. If you choose to file an appeal, you must do so within 15 business days of the mailing date of this letter, as outlined in Section 1101 of the Right to Know Law. An appeal must be submitted in writing either by mail, fax (717-425-5343), or email (openrecords@pa.gov). The appeal must include a copy of your original request and this response letter and must state the grounds upon which you assert that the record is a public record and must address any grounds stated by the agency for denying the request.



Tammy L. Bender
Open Records Officer
Lancaster County, Pennsylvania

From: reaganfive@protonmail.com
To: [DC, OpenRecords](#)
Subject: [External] Appeal for Request #210-2022
Date: Wednesday, July 27, 2022 12:50:11 PM
Attachments: [appeal for Request #210-2022.pdf](#)

ATTENTION: *This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the [Report Phishing button in Outlook](#).*

Mrs. Elizabeth Wagenseller
Executive Director
Office of Open Records
333 market Street 16th Floor
Harrisburg PA 17126-0333

SENT BY EMAIL

Dear Mrs. Wagenseller,

Attached please find an appeal for an open records request.

Sincerely,
Mike Miller

OOR Exhibit 2

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 **October 6, 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 **August 17, 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.

July 28, 2022

Via Email Only:

Mr. Mike Miller
P.O. Box 801
Ephrata, PA 17522
reaganfive@protonmail.com

Via Email Only:

Tammy Bender
Agency Open Records Officer
Lancaster County
150 N. Queen Street
Suite 715
Lancaster, PA 17603
tbender@co.lancaster.pa.us
openrecords@co.lancaster.pa.us

RE: OFFICIAL NOTICE OF APPEAL - Miller v. Lancaster County OOR Dkt. AP 2022-1749

Dear Parties:

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

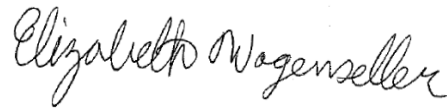
The Office of Open Records (“OOR”) received this appeal under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, et seq. on July 27, 2022. A binding Final Determination (“FD”) will be issued pursuant to the timeline required by the RTKL, **please see the attached information for more information about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



MEDIATION NOTICE

Appeals before the Office of Open Records (OOR) are stayed for seven business days pending the parties' decision to participate in the OOR's Informal Mediation Program.

The Parties may agree to mediation. To participate in mediation, the Parties must submit a completed copy of the attached Mediation Agreement. If both Parties agree to mediation, the appeal will be further stayed, and the Parties will be contacted by an OOR Mediator to begin the mediation process.

The Parties may decline mediation. If either Party declines to participate in mediation or fails to submit a signed Mediation Agreement within seven business days:

- The record will remain open for seven additional business days for the parties to submit evidence and argument in support of their positions; and
- The OOR will decide the appeal and issue a Final Determination by the date set forth in the attached Official Notice of Appeal.

Even if mediation is declined at this time, the Parties may agree to mediate the dispute at any time prior to a Final Determination being issued, and the appeal will be stayed pending mediation.

Questions. If the Parties have questions about mediation or what to expect during the mediation process, please email the assigned Appeals Officer or visit the OOR's website at <https://www.openrecords.pa.gov/Appeals/Mediation.cfm>.



OOB MEDIATION AGREEMENT

OOB Dkt. No. 2022-1749

Requester Name: Miller, Mike

Agency Name: Lancaster County

The Requester and Agency (collectively, the "Parties") agree to participate in the OOR's Informal Mediation Program to resolve the matters at issue in this appeal.

The Parties agree to participate in the mediation process in good faith. If the Parties agree, there may be more than one session if the Mediator determines that the appeal could be resolved. The Parties acknowledge that mediation sessions are not open to the public and the content of discussions during mediation is confidential and not admissible as evidence in this appeal.

The Parties agree to extend the Final Determination deadline in this appeal for 30 calendar days beyond the conclusion of the mediation process or, if the Requester agreed to grant the OOR a 30-day extension on the appeal form initiating this appeal, the Final Determination deadline will include that extension. If the Requester does not withdraw the appeal, the Mediator will indicate the conclusion of the mediation process in writing if further mediation sessions are not likely to result in a resolution of the dispute. The Parties acknowledge that this Mediation Agreement, the Requester's withdrawal, and the OOR's withdrawal acknowledgement will be included in the OOR's administrative appeal file and subject to public access.

Upon receipt of this completed Mediation Agreement, a Mediator will contact the Parties to establish a mutually convenient date, time and location to conduct a joint mediation session.

Requester Signature: _____ Date: _____

Agency Representative Signature: _____ Date: _____

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. § 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.



APPEALS OFFICER:

Kelly Isenberg, Esq.

CONTACT INFORMATION:

**Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234**

FACSIMILE:

(717) 425-5343

EMAIL:

kisenberg@pa.gov

**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.



IN THE MATTER OF

_____,
Requester

v.

_____,
Agency

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:
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:
:
:
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:
:
:

OOR Dkt. AP _____

Please accept my appearance for the _____ in the above captioned case.
(Requester/Agency)

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.

Attorney: _____

Firm: _____

Address: _____

Email: _____

Phone #: _____

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.

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.



IN THE MATTER OF

**MIKE MILLER,
Requester**

v.

**LANCASTER COUNTY,
Respondent**

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Docket No.: AP 2022-1749

This correspondence confirms the above-referenced Requester's agreement to an additional thirty (30) day extension of time to issue a Final Determination in this matter as indicated in the Requester's appeal form. Accordingly, pursuant to 65 P.S. § 67.1101(b)(1), the Office of Open Records will now issue a Final Determination in the above-captioned matter on or before October 6, 2022.

OOR Exhibit 3

From: reaganfive@protonmail.com
To: [DC, OpenRecords](#); reaganfive@protonmail.com; tbender@co.lancaster.pa.us; openrecords@co.lancaster.pa.us
Cc: [Isenberg, Kelly](#)
Subject: [External] RE: Miller v. Lancaster County: AP 2022-1749,
Date: Monday, August 15, 2022 5:12:10 PM
Attachments: [attachment.jiff](#)

ATTENTION: *This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the [Report Phishing button in Outlook](#).*

Dear Parties,

By this email, I am entering into evidence case law precedent regarding mail-in ballots being upheld in a court of law as public records. Docket No: AP 2022-0855 is a precedent case in which the OOR affirmed that mail-in ballots are lawfully public records.

Sincerely,
Mike Miller

From: DC, OpenRecords <RA-OpenRecords@pa.gov>
Sent: Thursday, July 28, 2022 10:24 AM
To: reaganfive@protonmail.com; tbender@co.lancaster.pa.us; openrecords@co.lancaster.pa.us
Cc: Isenberg, Kelly <kisenberg@pa.gov>
Subject: Miller v. Lancaster County: AP 2022-1749,

Dear Parties,

Attached, find an appeal that has been filed with the Office of Open Records. The above mentioned matter has been assigned to Appeals Officer Kelly Isenberg (refer to the attachment for contact information). Please forward all future correspondence directly to the Appeals Officer (cc'd on this email) and all other parties.

All parties did not receive the first email correspondence with the Notice of Appeal attachment due to an error in the Requester's email address which has now been corrected.

Sincerely,

Michele K. Grant
Administrative Officer



Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
[\(717\) 346-9903](tel:(717)346-9903) | Fax (717) 425-5343
<https://openrecords.pa.gov>
[@OpenRecordsPA](#)
[Open Records in Pennsylvania Blog](#)

OOR Exhibit 4

From: [Bender, Tammy](#)
To: [Isenberg, Kelly](#)
Cc: [Pfursich, Jacquelyn E](#); reaganfive@protonmail.com
Subject: [External] 2022-1749
Date: Wednesday, August 17, 2022 4:38:31 PM
Attachments: [OOR- M. Miller Appeal.pdf](#)

ATTENTION: *This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the [Report Phishing button in Outlook](#).*

Good Day:

On behalf of County Solicitor Pfursich, attached please find the County's response to the above noted appeal.

Sincerely,

Tammy L. Bender

Tammy L. Bender
Open Records Officer
County of Lancaster Solicitors Office
150 N. Queen Street, Suite 714
Lancaster, PA 17603
(p) 717-735-1584

Note: The message and attachment to this email are intended for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and/or exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you received this in error, please contact the sender and delete the original message, any attachment(s), and copies. Thank you for your cooperation



County Solicitor
Jacquelyn E. Pfursich, Esquire

Office of the Solicitor

150 North Queen Street
Suite #714
Lancaster, PA 17603
Phone: 717-735-1584
Fax: 717-293-7208
www.co.lancaster.pa.us

August 17, 2022

VIA EMAIL: kisenberg@pa.gov
FIRST CLASS U.S. MAIL

Kelly Isenberg, Esquire
Appeals Officer
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Re: Mike Miller vs. Lancaster County; Docket No. 2022-1749

Dear Attorney Isenberg:

I am in receipt of the letter from your Office dated July 28, 2022, notifying the County of Mr. Miller's appeal in this matter. Please consider this letter and enclosures as supplemental information to assist you in issuing a Final Determination in the matter at hand. Based on the following, the County respectfully requests that this appeal be denied.

The County received Mr. Miller's request under the Right-to-Know Law (RTKL) on June 8, 2022. Mr. Miller requested inspection of all original mail-in ballots and envelopes received from voters in Lancaster County for the 2022 Primary Election.

A complete copy of the request is attached hereto as Exhibit "A."

On June 15, 2022, the County requested an extension to respond to Mr. Miller's request. On July 15, 2022, the County issued its response granting portions of the request and denying portions of the request. A complete copy of the County's Response is attached hereto as Exhibit "B."

On appeal, Mr. Miller focuses on public inspection of mail in ballots as well as the signatures on the ballot envelopes. Specifically, Mr. Miller argues that the exemptions raised by the County do not allow apply in this situation



Kelly Isenberg, Esquire

Appeal No. 2022-1749

Page 2

because 25 P.S. §3150.17 applies and grants him access to mail in ballots as well as signatures on the ballot envelopes.

The County first focuses its attention on its denial of records based upon Section 305(a)(3) which exempts records from disclosure under other Federal or State law or regulations. Specifically, Mr. Miller requested public inspection of the mail in ballot envelopes, including the signatures on the ballot envelope. In *Pennsylvanians for Union Reform v. Pa. Dept. of State*, 138 A.3d 727 (Pa. Commw. Ct. 2016), the Commonwealth Court held that the Voter Registration Act and the Department's regulations comprehensively govern the accessibility of voter registration information and the RTKL expressly provides that it will not apply under such circumstances. Specifically, the Pennsylvania Election Code, 25 Pa. C.S. §1401 and 4 Pa.Code § 183.14(c)(1) expressly prohibits the disclosure of a "[t]he signature of a registrant or applicant." The ballot envelopes are in paper format and there is no practical way of redacting the signatures on the ballot envelope to ensure that this information cannot be seen, without compromising the integrity of the ballot envelope.

The County next focuses its attention on its denial of records based upon Section 305(a)(3) which exempts records from disclosure under other Federal or State law or regulations. In *Pennsylvanians for Union Reform v. Pa. Dept. of State*, 138 A.3d 727 (Pa. Commw. Ct. 2016), the Commonwealth Court held that the Voter Registration Act and the Department's regulations comprehensively govern the accessibility of voter registration information and the RTKL expressly provides that it will not apply under such circumstances. Mr. Miller specifically asked to see mail in ballots from the primary election. The Pennsylvania Election Law, 25 Pa. §2648, prohibits the disclosure of the contents of a ballot box, including ballots. That ballots are not subject to public disclosure is supported by the Pennsylvania Constitution at Article VII Section 4 which states "All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, that secrecy in voted be preserved. Finally, on November 8, 2021, the Pennsylvania Department of State issued an email to County election officials providing guidance which states that mail in ballots are not subject to public inspection. A copy of that email is attached.

In consideration of the foregoing and attachments hereto, the County respectfully requests that this appeal be denied.

Kelly Isenberg, Esquire
Appeal No. 2022-1749
Page 3

If you need additional information or further explanation, please contact me at your convenience. Thank you for your consideration of the County's position.

Sincerely,

A handwritten signature in dark ink, appearing to read 'J. Pfursich', with a stylized, looping initial 'J'.

Jacquelyn E. Pfursich
County Solicitor

EXHIBIT A



COUNTY OF LANCASTER OPEN RECORDS REQUEST FORM

Date Requested:

June 7, 2022

Request Submitted By:

E-MAIL ☐U.S. MAIL ☐FAX ☐IN-PERSON ☒

Name Of Requestor:

Mike Miller

Mailing Address:

PO Box 801

Street/P.O. Box

Ephrata

PA

17522

City

State

Zip Code

Telephone Number:

Fax Number:

E-Mail Address:

reaganfive@protonmail.com

Records Requested: Please identify each of the documents that are subject to this request. You must identify these documents with sufficient specificity to enable the County to ascertain which records are being requested.

Pursuant to the Pennsylvania Right-to-Know Law, I am requesting inspection of all original mail-in ballots and envelopes received from voters in Lancaster County for the 2022 Primary Election. The mail-in ballots and envelopes are explicitly declared to be public records and shall be open for inspection. Specifically, 25 P.S. § 1307-D states, in relevant part: "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.**"

I would like to inspect these public records within 5 business days of this request. Please notify me of the organizational structure of the mail ballot storage so that I can properly prepare for the inspection. Please specify if the ballots are stored by party, by precinct, and/or by batch.

Please check one of the following boxes:

- ☐ I am only requesting access to the documents identified above.
- ☐ I am only requesting a copy of the documents identified above.
- ☒ I am requesting access to the documents identified above and a copy of those documents.

If you are requesting a copy of the documents identified above, please check one of the following boxes:

- ☐ I want a paper copy of the documents.
- ☒ Other format (please specify): I will copy

Right To Know Official:

Date Received By The Agency:



Open Records Office

150 North Queen Street
Suite #714
Lancaster, PA 17603
Phone: 717-735-1584
Fax: 717-824-8520
www.co.lancaster.pa.us

Tammy L. Bender
Open Records Officer

June 15, 2022

VIA EMAIL ONLY TO:
reaganfive@protonmail.com
Mike Miller
P.O. Box 801
Ephrata, PA 17522

Re: Right to Know Request Number #210-2022

Dear Mr. Miller:

Thank you for writing to the County of Lancaster Office of Open Records with your request for information pursuant to the Pennsylvania Right to Know Law.

On June 8, 2022, the County of Lancaster Open Records Office received your request for inspection of all original mail-in ballots and envelopes received from voters in Lancaster County for the 2022 Primary Elections.

The County is invoking a time extension until July 15, 2022, to review and respond to your request in accordance with Section 902(a)(7) of the Pennsylvania Right to Know Law. Specifically, the extent or nature of your request precludes the County from providing a response within five business days.

Sincerely,

Tammy L. Bender
Open Records Officer
Lancaster County, Pennsylvania



EXHIBIT B



Open Records Office

150 North Queen Street
Suite #714
Lancaster, PA 17603
Phone: 717-735-1584
Fax: 717-824-8520
www.co.lancaster.pa.us

Open Records Officer

July 15, 2022

Tammy L. Bender

VIA EMAIL ONLY TO:
reaganfive@protonmail.com
Mike Miller
P.O. Box 801
Ephrata, PA 17522

Re: Right to Know Request Number #210-2022

Dear Mr. Miller:

Thank you for writing to the County of Lancaster Office of Open Records with your request for information pursuant to the Pennsylvania Right to Know Law.

On June 8, 2022, the County of Lancaster Open Records Office received your request for inspection of all original mail-in ballots and envelopes received from voters in Lancaster County for the 2022 Primary Elections.

On June 15, 2022, the County invoked an extension of time until July 15, 2022, to review and respond to your request in accordance with Section 902(a)(7) of the Pennsylvania Right to Know Law.

Your request has been granted in part and denied in part as follows:

1. Your request is granted in part that you are granted partial in person inspection of the mail-in-ballot envelopes, not including declarant signatures or information related to military electors, related to the 2022 Primary Election provided that you can establish that you are a qualified elector of the County of Lancaster as required under the Pennsylvania Election Code 25 P.S. § 2648. You may contact myself at the above number or Christa Miller, Chief Clerk/Chief Registrar of Voter Registration and Board of Elections at 717-299-8293, to set up a mutually convenient time to inspect the envelopes.



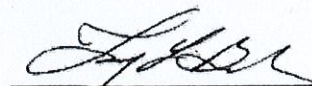
2. Your request to inspect the mail-in ballot envelopes is also denied in part in accordance with the Pennsylvania Right to Know Law Section 305(a)(3) as a record that is exempt from disclosure under other Federal or State law or regulation. Specifically, in this instance, The Pennsylvania Election Code Pa. C.S. § 1401 and 4 Pa. Code §§ 183.14..14(c)(1) in that "[t]he signature of a registrant or applicant, as provided at section 1404(a) of the act" would not be available for public inspection or photocopying.

3. Your request to inspect the mail-in ballot envelopes as it relates to military electors, is also denied in accordance with the Pennsylvania Right to Know Law 305(A)(3) as a record that is exempt from disclosure under another Federal or State law or regulation. In this instance information related to members of the military will be withheld as governed by the Pennsylvania Election Code 25 P.S. § 25305(A)(3) as information concerning a military elector which is expressly forbidden by the Department of Defense because of military security.

4. Your request for inspection of the mail-in ballots is denied in accordance with the Pennsylvania Right to Know Law Section 305(A)(3) as a record that is exempt from disclosure under other Federal or State law or regulation. Specifically, the Pennsylvania Election Code Pa 25 P.S. § 2648 as contents of a ballot box.

5. Your request for inspection of the mail-in ballots is also denied in accordance with the Pennsylvania Right to Know Law 305(A)(3) as a record that is exempt from disclosure under another Federal or State law or regulation. In this instance information related to members of the military will be withheld as governed by the Pennsylvania Election Code 25 P.S. § 25305(A)(3) as information concerning a military elector which is expressly forbidden by the Department of Defense because of military security.

You have a right to appeal this denial of information in writing to Elizabeth Gerloff Wagenseller, Executive Director, Office of Open Records, 333 Market Street, 16th Floor, Harrisburg, PA 17126-0333. If you choose to file an appeal, you must do so within 15 business days of the mailing date of this letter, as outlined in Section 1101 of the Right to Know Law. An appeal must be submitted in writing either by mail, fax (717-425-5343), or email (openrecords@pa.gov). The appeal must include a copy of your original request and this response letter and must state the grounds upon which you assert that the record is a public record and must address any grounds stated by the agency for denying the request.



Tammy L. Bender
Open Records Officer
Lancaster County, Pennsylvania

OOR Exhibit 5

From: [Mike Miller](#)
To: [Bender, Tammy](#); [Isenberg, Kelly](#)
Cc: [Pfursich, Jacquelyn E](#)
Subject: [External] Re: 2022-1749
Date: Wednesday, August 17, 2022 5:58:46 PM

ATTENTION: *This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the [Report Phishing button in Outlook](#).*

Good Day,

I would like to call attention to the timing of the agency's response to be near 5PM on the final day to issue a response.

I also note that the agency did not refute, or even attempt to refute, the substantive legal argument I made in my August 3rd letter. Instead, the agency's merely repeats its denial letter, which is a narrative of misapplying and misrepresenting other statutes in an attempt to legislate its own nullification of 25 PA 3150.17.

Also, the agency did not provide an affidavit to support its claims.

Lastly, the agency's response states that an email from the Department of State which directs the agency to deny public records requests regarding elections is attached to its response, however I do not see this file attached to the email. If this Exhibit was to be considered in this appeal, it needed to be submitted by the deadline. Please advise.

Sincerely
Mike Miller

Sent from Proton Mail for iOS

On Wed, Aug 17, 2022 at 4:38 PM, Bender, Tammy <TBender@co.lancaster.pa.us> wrote:

Good Day:

On behalf of County Solicitor Pfursich, attached please find the County's response to the above noted appeal.

Sincerely,

Tammy L. Bender

Tammy L. Bender

Open Records Officer

County of Lancaster Solicitors Office

150 N. Queen Street, Suite 714

Lancaster, PA 17603

(p) 717-735-1584

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OOR Exhibit 6

From: [Bender, Tammy](#)
To: [Mike Miller](#); [Isenberg, Kelly](#)
Cc: [Pfursich, Jacquelyn E](#)
Subject: RE: [EXTERNAL] Re: 2022-1749
Date: Wednesday, August 17, 2022 8:11:40 PM
Attachments: [Email OOR- M. Miller Appeal.pdf](#)

Good Day:

Attached please find the email which was unintentionally omitted from the County's response as an attachment.

Sincerely,

Tammy L. Bender

Tammy L. Bender
Open Records Officer
County of Lancaster Solicitors Office
150 N. Queen Street, Suite 714
Lancaster, PA 17603
(p) 717-735-1584

Note: The message and attachment to this email are intended for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and/or exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you received this in error, please contact the sender and delete the original message, any attachment(s), and copies. Thank you for your cooperation

From: Mike Miller <reaganfive@protonmail.com>
Sent: Wednesday, August 17, 2022 5:59 PM
To: Bender, Tammy <TBender@co.lancaster.pa.us>; kisenberg@pa.gov
Cc: Pfursich, Jacquelyn E <JEPfursich@co.lancaster.pa.us>
Subject: [EXTERNAL] Re: 2022-1749

Good Day,

I would like to call attention to the timing of the agency's response to be near 5PM on the final day to issue a response.

I also note that the agency did not refute, or even attempt to refute, the substantive legal argument I made in my August 3rd letter. Instead, the agency's merely repeats its denial letter, which is a narrative of misapplying and misrepresenting other statutes in an attempt to legislate its own nullification of 25 PA 3150.17.

Pfursich, Jacquelyn E

From: Miller, Christa
Sent: Monday, August 8, 2022 9:55 AM
To: Pfursich, Jacquelyn E
Subject: FW: DOS Email: Potential Right To Know Requests

Importance: High

Christa Miller
Chief Clerk/Chief Registrar
Lancaster County Board of Elections and Registration Commission
Phone: 717-299-8296

From: Mathis, Jessica <jesmathis@pa.gov>
Sent: Monday, November 8, 2021 1:03 PM
To: Mathis, Jessica <jesmathis@pa.gov>
Subject: [EXTERNAL] DOS Email: Potential Right To Know Requests
Importance: High

Dear County Election Officials:

The Department of State has learned of a record requests made under the Right to Know Law (RTKL) and recently received by a county board of election. The Department urges county boards of election to consider the provisions outlined below in formulating responses to any similar requests. **As always, please consult with your county solicitor and your Agency Open Records Officer (AORO) before responding to the requests.**

The request at issue is for a "digital copy of the ... Cast Vote Record (CVR) file for every precinct tabulator and central tabulator used in the 2020 General Election."

First, Section 3101.1 of the Right-to-Know Law provides 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." 65 P.S. § 67.3101.1. As the Pennsylvania Election Code establishes the procedure to access election records and what types of records are subject to inspection, any request for access to these types of records must be made pursuant to the provisions of the Election Code and not under the RTKL. *See, Pennsylvanians For Union Reform v. Pa. Dept. of State*, 138 A.3d 727 (Pa. Cmwlth. 2016) (holding that access to voter registration records is governed exclusively by the PA Voter Registration Act). The Pennsylvania Election Code governs these requests, through Section 308 of the Election Code, which provides "[t]he records of each county board of elections . . . **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 having 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" 25 P.S. § 2648 (emphasis added).

Stated another way, the statute provides that: 1) voted ballots are NOT subject to public inspection; 2) voting machines are NOT subject to public inspection; 3) all other records are subject to inspection and copying by a qualified elector of the county, *i.e.*, a registered voter of the county, but need not be produced for the requester as is the case under the

Right-to-Know Law; and 4) the records are subject to inspection and copying only when not in use by the board, and only in the presence of an employee of the board.

As such, **the statutory provision cited above can be used to deny any request to inspect voted ballots, or to receive copies of voted ballots, or to examine voting machines, as the Election Code specifically exempts these records and equipment from public disclosure.** Regarding the CVR, the CVR is the raw record that is created by a single tabulator, and is created as part of the Election Management System (EMS) of the particular electronic voting system used in that county. The CVR of any one tabulator has not been added to the CVR found on other tabulators in an election district, or added to the central tabulator CVR developed from processing absentee and mail-in ballots for that election district. Thus, the CVR for any tabulator is a subset of the record for a particular election district. In addition, the tabulation and computation of votes has not occurred when a tabulator's CVR has been produced. Overvotes may be displayed, being resolved through other aspects of the EMS software. In other words, the data will be unprocessed and considering it on its face will be problematic. Further, different electronic voting systems create CVRs in different ways, using unique proprietary software. And some of the systems even capture scans of the ballots, similar to photocopies or photographs.

It is the Department's perspective that CVR data is a modern version of those items excluded from public review under Section 308 of the Election Code, where "the contents of ballots boxes and voting machines" are unavailable for public review. This position recognizes that a CVR is a raw evaluation of ballots, even capturing overvotes contained on the ballots. In some cases the ballots themselves are scanned, producing a facsimile of the ballot. It is logical that the exclusion of a ballot from the records available for public review under Section 308 would lead to the exclusion of an exact copy of the ballot, as well.

Section 308 also excludes voting machines from access. "Voting machines" is a term referring to mechanical voting devices, but is also commonly used to refer to modern electronic voting systems. The Department believes that this exclusion also applies to the modern components of electronic voting systems and their contents, one of which is the CVR of any tabulator. The exclusion would also apply when considering what was excluded from public examination with an older, all mechanical voting machine. Those devices included counters for each race, similar to odometers, that were available for checking only by removal of locked covers. The CVR is the modern analog of the counters of the voting machines, in that the CVR and the counters both represented raw, unreviewed data.

Further, to the extent CVR data is not randomized, that information, considered together with an election district's numbered list of voters, could create insight into how a person voted. This would be a direct violation of the Pennsylvania Constitution's secrecy in voting guarantee. Pa. Const. Art. VII, sec. 4.

For these various reasons the Department does not believe CVR data should be provided to any requester.

Lastly, counties should review requests for election information to ensure the requester is a registered elector of their county. A registered elector in Pennsylvania would only be entitled to inspect the records in the county where he or she is registered.

Again, please share this email with your solicitor and agency open records officer.

Thanks,
Jess

Jessica Mathis, Director
Bureau of Elections and Notaries
PA Department of State
210 North Office Building I Harrisburg, PA 17120
Phone: 717. 787.5280 Fax: 717.705.0721
www.dos.pa.gov

OOR Exhibit 7

From: [Isenberg, Kelly](#)
To: reaganfive@protonmail.com
Cc: tbender@co.lancaster.pa.us; openrecords@co.lancaster.pa.us; [Pfursich, Jacquelyn E](#)
Subject: RE: [External] RE: Miller v. Lancaster County: AP 2022-1749,
Date: Tuesday, September 27, 2022 2:34:00 PM
Attachments: [image002.png](#)

Mr. Mike:

In your submission, found below, you reference an OOR Final Determination at AP 2022-0855, to argue that it serves as authority for your position that mail-in ballots are lawfully public records. However, the appeal at AP 2022-0855 was withdrawn and no Final Determination was issued:

<https://apps.openrecords.pa.gov/Resources/Documents/Appeals/20220855/95407.pdf>.

Please clarify what OOR Final Determination you are referencing by the close of business tomorrow, Sep. 28, 2022. If you have any questions, please advise.

Regards,
Kelly



Kelly C. Isenberg |Attorney
Senior Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
<https://www.openrecords.pa.gov>
@OpenRecordsPA

From: reaganfive@protonmail.com <reaganfive@protonmail.com>
Sent: Monday, August 15, 2022 5:11 PM
To: DC, OpenRecords <RA-OpenRecords@pa.gov>; reaganfive@protonmail.com;
tbender@co.lancaster.pa.us; openrecords@co.lancaster.pa.us
Cc: Isenberg, Kelly <kisenberg@pa.gov>
Subject: [External] RE: Miller v. Lancaster County: AP 2022-1749,

OOR Exhibit 8

From: reaganfive@protonmail.com
To: [Isenberg, Kelly](#)
Cc: tbender@co.lancaster.pa.us; openrecords@co.lancaster.pa.us; "Pfursich, Jacquelyn E"
Subject: RE: [External] RE: Miller v. Lancaster County: AP 2022-1749,
Date: Tuesday, September 27, 2022 3:03:58 PM
Attachments: [attachment.png](#)
[attachment.ifif](#)
[2022-0885_Stroehmann-LycomingCo_FD_.pdf](#)

Good Day,

In response to your request, please find the attached OOR Final Determination for Docket No: AP2022-0855. Please reference the determination on page 6-7 which states: "A reading of the plain language of the statute suggests that ***"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...."*** 25 P.S. § 3150.17(a) (emphasis added). Therefore, based on the plain language of the statute, mail-in ballot images are public under the Election Code..... Accordingly, the records requested in Item 1 of the instant Request are clearly governed by the access provisions set forth in the Election Code, and the County is directed to provide any access to the records for which the Requester is entitled as set forth in that law."

Please note that AP 2022-1749 is for the mail-in ballots, the exact item named in the statute.

Kind Regards
Mike

From: Isenberg, Kelly <kisenberg@pa.gov>
Sent: Tuesday, September 27, 2022 2:34 PM
To: reaganfive@protonmail.com
Cc: tbender@co.lancaster.pa.us; openrecords@co.lancaster.pa.us; Pfursich, Jacquelyn E <JEPfursich@co.lancaster.pa.us>
Subject: RE: [External] RE: Miller v. Lancaster County: AP 2022-1749,

Mr. Mike:

In your submission, found below, you reference an OOR Final Determination at AP 2022-0855, to argue that it serves as authority for your position that mail-in ballots are lawfully public records. However, the appeal at AP 2022-0855 was withdrawn and no Final Determination was issued:

<https://apps.openrecords.pa.gov/Resources/Documents/Appeals/20220855/95407.pdf>.

Please clarify what OOR Final Determination you are referencing by the close of business tomorrow, Sep. 28, 2022. If you have any questions, please advise.

Regards,
Kelly



Kelly C. Isenberg |Attorney
Senior Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
<https://www.openrecords.pa.gov>
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ATTENTION: *This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the [Report Phishing button in Outlook](#).*

Dear Parties,

By this email, I am entering into evidence case law precedent regarding mail-in ballots being upheld in a court of law as public records. Docket No: AP 2022-0855 is a precedent case in which the OOR affirmed that mail-in ballots are lawfully public records.

Sincerely,
Mike Miller



FINAL DETERMINATION

IN THE MATTER OF

JEFFREY STROEHMANN
Requester

v.

LYCOMING COUNTY,
Respondent

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:

Docket No: AP 2022-0855

On March 21, 2022, Jeffrey Stroehmann (“Requester”) submitted a request (“Request”) to Lycoming County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

Item 1—All mail-in ballot images from the 2020 general election.

Item 2—All other ballot images from the 2020 general election.

Item 3—Digital copy of the ClearVote Cast Vote Record (CVR) file for every precinct tabulator and central tabulate used in the 2020 general election.

On March 30, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the County denied the Request, arguing that the contents of ballot boxes, including mail-in ballots and CVRs, are confidential pursuant to the Pennsylvania Election Code (“Election Code”), 25 P.S. § 2648.

On April 12, 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 April 22, 2022, the County submitted a position statement reiterating its grounds for denial, along with the statement, made under the penalty of perjury, of Forrest Lehman, the County's Director of Elections. This statement is dated December 22, 2021 and was previously submitted to the OOR in support of the County's position in *Honey v. Lycoming Cnty.*, holding that "the Election Code explicitly provides that the contents of ballot boxes are not public records." OOR Dkt. AP 2021-2603, 2022 PA O.O.R.D. LEXIS 71.¹

On April 26, 2022, in response to the OOR's request for clarification, the County confirmed that it was its intention to submit Mr. Lehman's December 22, 2021 attestation in support of its position in the instant matter.

On April 28, 2022, the Requester submitted additional information in support of the appeal and argued that Mr. Lehman's December 22, 2021 attestation should not be accepted as evidence by the OOR. On that same day, the Requester also granted the OOR's request for an extension of time to issue this Final Determination. *See* 65 P.S. § 67.1101(b)(1) ("Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).").

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 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.

¹ This Final Determination was appealed, and the matter is currently pending before the Lycoming County Court of Common Pleas at CV22-00115. Additionally, the Requester notes the pending appeal in his position statement.

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)).

1. The attestation provided by the County is probative and relevant to the issues in dispute

As a threshold matter, the Requester argues that Mr. Lehman’s December 22, 2021 attestation “clearly pertains to another [RTKL] action and should not be accepted and relied upon as evidence in this matter.”

Section 1102(a)(2) of the RTKL states that “[t]he appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute.” 65 P.S. § 67.1102(a)(2). Here, as the County’s Director of Elections, Mr. Lehman is an individual with first-hand knowledge of the records at issue. Upon review of the County’s submissions, the OOR finds the attestation probative and relevant to the issues in dispute. Accordingly, the attestation will be accepted into evidence.

2. The Request partially seeks contents of ballot boxes and voting machines, which are not public records under the Election Code

As previously mentioned, records in the possession of a local agency are presumed public unless exempt under the RTKL or other law. *See* 65 P.S. § 67.305. In many previous appeals before the OOR, it has been determined that access to voting records is governed by Section 2648 of the Election Code, 25 P.S. § 2648. *See Shuppe v. Beaver Cnty.*, OOR Dkt. AP 2022-0037, 2022 PA O.O.R.D. LEXIS 709; *Taylor v. Westmoreland Cnty.*, OOR Dkt. AP 2022-0046, 2022 PA O.O.R.D. LEXIS 687; *Honey v. Lycoming Cnty.*, OOR Dkt. AP 2021-2603, 2022 PA O.O.R.D. LEXIS 71; *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.

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 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 (emphasis added).

With regard to Item 1 of the Request, “mail-in ballot images from the 2020 general election[,]” the Requester argues that the images are accessible public records pursuant to 25 P.S.

§ 3150.17(a). Section 3150.17 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.

(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.

(c) Compilation. The county board shall compile the records listed under subsection (b) and make the records publicly available upon request within 48 hours of the request.

25 P.S. § 3150.17.

The Requester also argues that [t]his statutory language clearly and unequivocally allows for the production of these records[,]” and that “[i]t was clearly the intent of [the Pennsylvania] legislature to expand what constitutes a public record.” The Requester further argues that “[t]he Pennsylvania Supreme Court has repeatedly held that the [RTKL] should be liberally construed to effectuate the purpose of promoting access to agency information[,]” and that “[w]hen evaluating whether something is subject to disclosure, Pennsylvania courts are required to start with the presumption that a record in the possession of an agency is a public record subject to disclosure.”

In support, the Requester cites *Pa. Dep't of Pub. Welfare v. Eiseman*, 125 A.3d 19 (Pa. 2015) and *West Chester University v. Schackner*, 124 A.2d 382 (Pa. Commw. Ct. 2015).

Section 3101.1 of the RTKL states 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.” 65 P.S. § 67.3101.1. When examining matters where there is a 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 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. In addition, because the records are not unconditionally public under the Election Code, the OOR would be required to examine any exemptions from disclosure under the RTKL asserted by an agency when records of a County Elections Board are sought by a RTKL request. *See Pa. Dep't of Labor & Indus. v. Heltzel*, 90 A.3d 823, 833 (Pa. Commw. Ct. 2014).

In this matter, the County has not raised any RTKL exemptions, but rather argues that the Request is exclusively governed by Section 2648 of the Election Code. A review of Item 1 of the Request shows that it seeks “mail-in ballot images,” which, as argued by the Requester, are specifically addressed in Section 3150.17 of the Election Code. 25 P.S. § 3150.17. A reading of the plain language of the statute suggests that “[a]ll 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....” 25 P.S. § 3150.17(a) (emphasis added). Therefore, based on the plain language of the statute, mail-in ballot images are public under the Election Code. However, the governance of inspection and copying under the Election Code are beyond the OOR’s purview. *See Pa. Dep’t of Labor & Indus. v. Heltzel*, 90 A.3d 823, 831-33 (Pa. Commw. Ct. 2014) (noting that the OOR is not in a position to enforce conditions on public access imposed by another law, and that there is a difference between statutes establishing the public *nature* of records and statutes that also proscribe a means of access). Accordingly, the records requested in Item 1 of the instant Request are clearly governed by the access provisions set forth in the Election Code, and the County is directed to provide any access to the records for which the Requester is entitled as set forth in that law. *See Heltzel, supra*.

Item 2 of the Request seeks “[a]ll other ballot images from the 2020 general 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 2 of the Request clearly seeks the contents of the ballot box and/or voting machines because it seeks “ballot images,” which are the contents of a ballot box or voting machines, and are therefore, not subject to access under the RTKL.² *See* 25 P.S. § 2648; 65 P.S. § 67.3101.1. Accordingly, the County need not provide the records responsive to Item 2 of the Request to the Requester. *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

² The Requester argues that a different county’s decision in *Kesich v. Tioga Co.*, OOR Dkt. AP 2012-0205, 2012 PA O.O.R.D. LEXIS 289, to provide copies of ballot images, demonstrates that even digital images of ballots are not considered contents of ballot boxes; therefore, the CVR cannot be a content of a ballot box. However, a separate agency’s decision on whether to grant access to records in response to a RTKL request does not prove that such records are public records under the RTKL.

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.

Finally, Item 3 of the Request seeks “a digital copy of the CVR file for every precinct tabulator and central tabulate used in the 2020 general election.”

In his December 22, 2021 statement, Mr. Lehman affirms that “[r]eviewing a CVR is the digital equivalent of inspecting the contents of a ballot box, one ballot at a time....” He explains that the data in each row of a CVR is collected by the ballot scanner at the time each ballot is cast and that each line is the record of a discrete voting event. *See* Lehman Attestation, 12/22/21, ¶¶ 4-5. Mr. Lehman further explains that as “digital ballot box data from precinct scanners is merged into a central ClearCount server, the CVR for the election will reflect the additional digital ballot boxes that have been merged” and that “[e]ach new line added to the CVR will forever retain unique information about the discrete voting events that comprise the contents of the ballot box, *i.e.*, line-by-line information about individual voters; choices on their ballots, each ballot’s ballot style, the precinct at which each ballot was cast, and the ballot box into which each ballot was deposited.”³ *See* Lehman Attestation, 12/22/21, ¶¶ 6-7.

The Requester, on the other hand, argues that the CVR is not the equivalent of the contents of the ballot box. Specifically, the Requester asserts the “CVR is a digital report that tallies the results of the ballots scanned into a tabulator[,]” and that “[i]t is a report that is prepared after an election from a desktop computer.” The Requester also argues that because CVRs are tally sheets

³ Under the RTKL, a sworn affidavit or statement made under 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). In the absence of any evidence that the County acted in bad faith, “the averments in [the attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (*citing Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

or reports, not contents of the ballot box, Section 2648 of the Election Code permits access. 25 P.S. § 2648. The Requester further contends that the arguments made by the County, through Mr. Lehman’s attestation, are “simply not true.” The Requester asserts that “[t]he CVRs are merely computer-generated spreadsheets which contain digital data reflecting how ballots were tabulated on the precinct scanner and then merged into the ClearCount server[,]” that “[a] CVR for each precinct merely reports the results for a particular scanner, and the overall County CVR merely reports the tally—vote by vote—from the scanners for the election[,]” that “[n]othing from the CVR records can associate a ballot with an individual voter[,]” and that “[t]hese digital [CVR] reports contain no confidential or identifying voter information.”⁴ Finally, the Requester argues that the “Pennsylvania legislature has made it clear that election records, returns, tally papers, reports, and other documents are public records because of the critical importance of election transparency and so that the public can have some measure of faith in election integrity[,]” and that the RTKL “should be liberally construed to effectuate the purpose of promoting access to agency information.”⁵

In support of his position, the Requester submits an unsworn statement of Jeffrey O’Donnell⁶ and a copy of a document issued by the United States Election Assistance

⁴ In a footnote in his position statement, the Requester also argues “[t]hese [CVR] tallies are equivalent to the reports that were formerly posted at precinct locations following the tallying of votes within that precinct[,]” and notes that the practice of posting vote tallies has been “inexplicably discontinued in [the] [C]ounty.”

⁵ In support, the Requester cites *Eiseman*, 125 A.3d 19.

⁶ In his position statement the Requester indicates that “Mr. O’Donnell holds degrees in Computer Science and Mathematics from the University of Pittsburgh and has worked forty years as a ‘full stack’ software and database engineer. Among the companies that he has worked with during that time are General Defense Corporation, Rockwell International, U.S. Steel, Mellon Bank, and the Penn State Applied Research Laboratory[,]” that Mr. O’Donnell “is also an award-winning web and app designer, and very experienced in the field of managing and analyzing extremely large data sets[,]” and that [s]ince August 2021, Mr. O’Donnell has served as Chief Information Officer for Ordros Analytics, Inc., which has been producing cutting edge data analysis of American Elections.” However, the Requester does not provide any evidence to substantiate Mr. O’Donnell’s credentials.

Commission, dated March 31, 2022, entitled “Report of Investigation Dominion Voting Systems D-Suite 5.5-B Williamson County, Tennessee.”⁷

While Mr. O’Donnell may have extensive professional knowledge of election-related data analytics, the Requester does not provide any evidence to substantiate Mr. O’Donnell’s credentials. Further, while as previously stated, a sworn affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support, Mr. O’Donnell’s statement is unsworn. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. Because it is unsworn, Mr. O’Donnell’s statement, here, is analogous to an additional position statement offered by the Requester; and an “unsworn position statement does not constitute evidence. Position statements are akin to briefs or proposed findings of fact, which, while part of the record, are distinguishable from the *evidentiary* record.” *Office of the Governor v. Davis*, 122 A.3d 1185, 1193-94 (Pa. Commw. 2015) (*en banc*) (emphasis in original). *See Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (holding that unsworn statements of counsel are not competent evidence); *City of Phila. v. Juzang*, July Term 2010, No. 2048 (Phila. CCP June 28, 2011) (“Because the letter written by City’s counsel is a legal brief, it cannot be...evidence at all”). Moreover, as also previously stated, in the absence of any competent evidence that the County acted in bad faith, “the averments in [its sworn statement] should be accepted as true.” *McGowan*, 103 A.3d at 382-83.

The OOR finds the opinion of Mr. Lehman, the County’s Director of Elections, credible and will not substitute its judgment for that of those with far more familiarity with the issues. *See*

⁷ *See* https://www.eac.gov/sites/default/files/voting_system/files/EAC_Report_of_Investigation_Dominion_DSuite_5.5_B.pdf (last accessed May 12, 2022). Upon review of the report, this Appeals Officer does not find it relative to the issue of whether the requested information in this matter is accessible under the RTKL, and the Requester does not explain its relevance in his position statement. *See* 65 P.S. § 67.1102(a)(2).

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. Mr. Lehman has explained that each line of the CVR is derived from the individual voting event – that is, each line is created at the time a voter casts his or her vote. Therefore, based upon Mr. Lehman's credible affidavit, the County demonstrated that the CVR is the digital equivalent of the contents of ballot boxes, and, therefore, are not accessible under the RTKL. *See* 25 P.S. § 2648; 65 P.S. § 67.3101.1. Accordingly, the County need not provide records responsive to Item 3 of the Request the Requester.⁸ *See Honey v. Lycoming Cnty.*, OOR Dkt. AP 2021-2603, 2022 PA O.O.R.D. LEXIS 71; *see also Shuppe v. Beaver Cnty.*, OOR Dkt. AP 2022-0037, 2022 PA O.O.R.D. LEXIS 709.

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the County is required to make records responsive to Item 1 of the Request available for access in accordance with 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 to the Lycoming 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.⁹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

⁸ Because Items 2 and 3 of the Request are not public, the OOR need not address the method of access provided by the Election Code.

⁹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: May 26, 2022

/s/ Erika Similo

APPEALS OFFICER
ERIKA SIMILO, ESQ.

Sent to: Jeffrey Stroehmann (via email only);
Stephen C. Hartley, Esq. (via email only);
Matthew A. McDermott (via email only)

OOR Exhibit 9

From: [Mike Miller](#)
To: [Isenberg, Kelly](#)
Cc: tbender@co.lancaster.pa.us; openrecords@co.lancaster.pa.us; [Pfursich, Jacquelyn E](#)
Subject: RE: [External] RE: Miller v. Lancaster County: AP 2022-1749,
Date: Thursday, September 29, 2022 11:26:53 AM
Attachments: [image002.png](#)

Good Day,

Please find PA OOR's final determination in AP-2022-1974 in which it upholds the statute declaring mail-ballots to be public records.

<https://www.openrecords.pa.gov/Appeals/DocketGetFile.cfm?id=104535>

Please find PA OOR's final determination in AP-2022-1975 in which it upholds the statute declaring mail-ballot envelopes (without redactions) to be public records.

<https://www.openrecords.pa.gov/Appeals/DocketGetFile.cfm?id=104536>

Kind Regards

Sent from Proton Mail for iOS

On Tue, Sep 27, 2022 at 2:34 PM, Isenberg, Kelly <kisenberg@pa.gov> wrote:

Mr. Mike:

In your submission, found below, you reference an OOR Final Determination at AP 2022-0855, to argue that it serves as authority for your position that mail-in ballots are lawfully public records. However, the appeal at AP 2022-0855 was withdrawn and no Final Determination was issued:

<https://apps.openrecords.pa.gov/Resources/Documents/Appeals/20220855/95407.pdf>.

Please clarify what OOR Final Determination you are referencing by the close of business tomorrow, Sep. 28, 2022. If you have any questions, please advise.

Regards,
Kelly



Kelly C. Isenberg | Attorney

Senior Appeals Officer

Office of Open Records

333 Market Street, 16th Floor

Harrisburg, PA 17101-2234

Phone: (717) 346-9903

Fax: (717) 425-5343

<https://www.openrecords.pa.gov>

@OpenRecordsPA

From: reaganfive@protonmail.com <reaganfive@protonmail.com>

Sent: Monday, August 15, 2022 5:11 PM

To: DC, OpenRecords <RA-OpenRecords@pa.gov>; reaganfive@protonmail.com;
tbender@co.lancaster.pa.us; openrecords@co.lancaster.pa.us

Cc: Isenberg, Kelly <kisenberg@pa.gov>

Subject: [External] RE: Miller v. Lancaster County: AP 2022-1749,

***ATTENTION:** This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the [Report Phishing button in Outlook](#).*

Dear Parties,

By this email, I am entering into evidence case law precedent regarding mail-in ballots being upheld in a court of law as public records. Docket No: AP 2022-0855 is a precedent case in which the OOR affirmed that mail-in ballots are lawfully public records.

Sincerely,

Mike Miller

OOR Exhibit 10

From: reaganfive@protonmail.com
To: [County Open Records](#); [Isenberg, Kelly](#); tbender@co.lancaster.pa.us
Cc: [DC, OpenRecords](#)
Subject: [External] VIOLATION AND DENIAL AP2022-1749
Date: Tuesday, October 4, 2022 3:49:47 PM
Attachments: [VIOLATION docket AP2022-1749\(1\).pdf](#)

***ATTENTION:** This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the [Report Phishing button in Outlook](#).*

Good Day,
Please see attached for all party's records.

Regards,
Mike Miller

Mr. Mike Miller
P.O. Box 801
Ephrata, PA 17522
reaganfive@protonmail.com

October 4, 2022

Via Email Only:

Mrs. Kelly Isenberg, Esq
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
717-425-5343
kisenberg@pa.gov

Via Email Only:

Tammy Bender
Agency Open Records Officer
Lancaster County
150 N. Queen Street, Suite 715
Lancaster, PA 17603
openrecords@co.lancaster.pa.us

RE: OOR Dkt. AP 2022-1749

Dear Parties:

I have been made aware that OOR is in violation of 1101(b)(1). Your office received my appeal on July 28th. The Right to Know Law 1101(b)(1) states that *"the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed."* Effective today, I consider this case denied in accordance with 1101(b)(2), which states: "If the appeals officer fails to issue a final determination within 30 days, the appeal is deemed denied."

I am also sending this letter to make a record that I have attempted to be reasonable with both Mrs. Tammy Bender, the County records officer, and Mrs. Kelly Isenberg, Esq., of the Pennsylvania Office of Open Records in asking them to uphold the law and provide the public records I originally requested on June 7th in accordance with 25 PS 3150.17, pertaining to county Request Number #210-2022, as named by the Lancaster County Open Records Office.

In your official capacity, you have sworn to uphold the law. I am notifying to that you are in violation of 25 PS 3150.17, which states: "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.." Your decision has caused me a deprivation of my constitutional rights under the 1st and 14th amendments of the US Constitution. The Supreme Court has ruled that public officials, once made aware they are violating the law, if they continue do so in violation of a citizen's rights, may be found liable in their private person capacity in accordance with federal civil rights codes 42 USC 1983, 18 USC 241, and 18 USC 242.

I hope you will reconsider this decision and decide to uphold the law by granting my request in accordance with the law. I am a reasonable, law-abiding citizen. Violating the statute is not a reasonable decision for you to make. Please send me a letter by October 7th indicating you will grant inspection of the requested records according to the statute. If I do not receive a grant of inspection, I will be forced to provide lawful service that you have chosen to continue to violate the law.

I reserve all my rights to appeal this denial to another court.

Sincerely,

Mike Miller

OOR Exhibit 11

From: [Isenberg, Kelly](#)
To: reaganfive@protonmail.com; [County Open Records](#); tbender@co.lancaster.pa.us
Cc: [DC, OpenRecords](#)
Subject: RE: [External] VIOLATION AND DENIAL AP2022-1749
Date: Tuesday, October 4, 2022 4:21:00 PM
Attachments: [2022-1749_Miller-LancasterCo.pdf](#)
[image001.png](#)

Dear Mr. Miller:

Attached is a copy of the Notice of Appeal packet issued in this matter, when you filed your appeal, AP 2022-1749. If you refer to p. 11, you will see where you “hereby agree[] to permit the OOR an additional 30 days to issue a final determination” and also agree to “stay[] the initial OOR deadline for the issuance of a final determination by 7 business days.” In addition, p. 1, sets forth the Notice of Deadlines and includes a Final Determination deadline of Oct. 6, 2022. Thus, the OOR has until Oct. 6, 2022, to issue the final determination in this matter.

I believe that this reply addresses your concerns.

Sincerely,
Kelly Isenberg



Kelly C. Isenberg |Attorney
Senior Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
<https://www.openrecords.pa.gov>
@OpenRecordsPA

From: reaganfive@protonmail.com <reaganfive@protonmail.com>
Sent: Tuesday, October 4, 2022 3:45 PM
To: County Open Records <openrecords@co.lancaster.pa.us>; Isenberg, Kelly <kisenberg@pa.gov>;
tbender@co.lancaster.pa.us
Cc: DC, OpenRecords <RA-OpenRecords@pa.gov>

Subject: [External] VIOLATION AND DENIAL AP2022-1749

ATTENTION: *This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the [Report Phishing button in Outlook](#).*

Good Day,
Please see attached for all party's records.

Regards,
Mike Miller

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 **October 6, 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 **August 17, 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.

July 28, 2022

Via Email Only:

Mr. Mike Miller
P.O. Box 801
Ephrata, PA 17522
reaganfive@protonmail.com

Via Email Only:

Tammy Bender
Agency Open Records Officer
Lancaster County
150 N. Queen Street
Suite 715
Lancaster, PA 17603
tbender@co.lancaster.pa.us
openrecords@co.lancaster.pa.us

RE: OFFICIAL NOTICE OF APPEAL - Miller v. Lancaster County OOR Dkt. AP 2022-1749

Dear Parties:

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

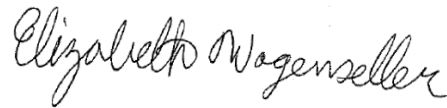
The Office of Open Records (“OOR”) received this appeal under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, et seq. on July 27, 2022. A binding Final Determination (“FD”) will be issued pursuant to the timeline required by the RTKL, **please see the attached information for more information about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



MEDIATION NOTICE

Appeals before the Office of Open Records (OOR) are stayed for seven business days pending the parties' decision to participate in the OOR's Informal Mediation Program.

The Parties may agree to mediation. To participate in mediation, the Parties must submit a completed copy of the attached Mediation Agreement. If both Parties agree to mediation, the appeal will be further stayed, and the Parties will be contacted by an OOR Mediator to begin the mediation process.

The Parties may decline mediation. If either Party declines to participate in mediation or fails to submit a signed Mediation Agreement within seven business days:

- The record will remain open for seven additional business days for the parties to submit evidence and argument in support of their positions; and
- The OOR will decide the appeal and issue a Final Determination by the date set forth in the attached Official Notice of Appeal.

Even if mediation is declined at this time, the Parties may agree to mediate the dispute at any time prior to a Final Determination being issued, and the appeal will be stayed pending mediation.

Questions. If the Parties have questions about mediation or what to expect during the mediation process, please email the assigned Appeals Officer or visit the OOR's website at <https://www.openrecords.pa.gov/Appeals/Mediation.cfm>.



OOB MEDIATION AGREEMENT

OOB Dkt. No. 2022-1749

Requester Name: Miller, Mike

Agency Name: Lancaster County

The Requester and Agency (collectively, the "Parties") agree to participate in the OOR's Informal Mediation Program to resolve the matters at issue in this appeal.

The Parties agree to participate in the mediation process in good faith. If the Parties agree, there may be more than one session if the Mediator determines that the appeal could be resolved. The Parties acknowledge that mediation sessions are not open to the public and the content of discussions during mediation is confidential and not admissible as evidence in this appeal.

The Parties agree to extend the Final Determination deadline in this appeal for 30 calendar days beyond the conclusion of the mediation process or, if the Requester agreed to grant the OOR a 30-day extension on the appeal form initiating this appeal, the Final Determination deadline will include that extension. If the Requester does not withdraw the appeal, the Mediator will indicate the conclusion of the mediation process in writing if further mediation sessions are not likely to result in a resolution of the dispute. The Parties acknowledge that this Mediation Agreement, the Requester's withdrawal, and the OOR's withdrawal acknowledgement will be included in the OOR's administrative appeal file and subject to public access.

Upon receipt of this completed Mediation Agreement, a Mediator will contact the Parties to establish a mutually convenient date, time and location to conduct a joint mediation session.

Requester Signature: _____ Date: _____

Agency Representative Signature: _____ Date: _____

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. § 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.



APPEALS OFFICER:

Kelly Isenberg, Esq.

CONTACT INFORMATION:

**Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234**

FACSIMILE:

(717) 425-5343

EMAIL:

kisenberg@pa.gov

**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.



IN THE MATTER OF

_____,
Requester

v.

_____,
Agency

:
:
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:
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:

OOR Dkt. AP _____

Please accept my appearance for the _____ in the above captioned case.
(Requester/Agency)

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.

Attorney: _____

Firm: _____

Address: _____

Email: _____

Phone #: _____

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.

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.



IN THE MATTER OF

**MIKE MILLER,
Requester**

v.

**LANCASTER COUNTY,
Respondent**

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:
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Docket No.: AP 2022-1749

This correspondence confirms the above-referenced Requester's agreement to an additional thirty (30) day extension of time to issue a Final Determination in this matter as indicated in the Requester's appeal form. Accordingly, pursuant to 65 P.S. § 67.1101(b)(1), the Office of Open Records will now issue a Final Determination in the above-captioned matter on or before October 6, 2022.



**RIGHT-TO-KNOW LAW ("RTKL")
APPEAL OF DENIAL, PARTIAL DENIAL, OR DEEMED DENIAL**

Office of Open Records ("OOR")

Email: openrecords@pa.gov

Fax: (717) 425-5343

333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Today's Date: July 27, 2022

Requester: Mike Miller

Company (if applicable): _____

Address/City/State/Zip: PO Box 801 Ephrata PA 17522

Email: reaganfive@protonmail.com Phone: _____

Request Submitted to Agency Via: ☒ Email ☐ Mail ☐ Fax ☐ In-Person (*check only one*)

Date of Request: 6/8/22 Date of Response: 7/15/22 ☐ Check if No Response

Agency: County of Lancaster Office of Open Records

Name & Title of Person Who Denied Request (if available): Tammy L. Bender

Address/City/State/Zip: 150 North Queen St, Suite 714 Lancaster PA 17603

Email: openrecords@co.lancaster.pa.us Phone: 717-735-1584

Records at Issue in this Appeal (*use additional pages if necessary*):

Please see attached statement.

I requested the listed records from the Agency named above. By submitting this appeal, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.

Please complete the following:

- ☒ I have attached a copy of my request for records.
- ☒ I have attached a copy of all responses from the Agency regarding my request.
- ☒ I have attached any letters or notices extending the Agency's time to respond to my request.
- ☒ I hereby agree to permit the OOR an additional 30 days to issue a final determination.
- ☒ I am interested in resolving this issue through OOR mediation. *This stays the initial OOR deadline for the issuance of a final determination by 7 business days. If mediation is unsuccessful, the OOR has 30 days from the conclusion of the mediation process to issue a final determination.*

Mike Miller
PO Box 801
Ephrata PA 17522
reaganfive@protonmail.com

I, Mike Miller, hereby file this appeal with the Office of Open Records under section 503(d) on this day July 27, 2022. My statement is as follows:

1. This appeal pertains to Request Number #210-2022, as named by the Lancaster County Open Records Office.
2. I am a qualified elector in accordance with 25 P.S. § 2648.
3. The records I request are specifically defined by 25 P.S. § 3150.17 and the Pennsylvania Election Code Section 1307-D to be public records.
4. I claim 25 P.S. § 3150.17 protects my right to inspect, in their entirety, the mail-in ballots and envelopes (including signatures on the envelopes) used in Lancaster County during the May 2022 primary.
5. I claim my request is not subject to Pennsylvania Right to Know Law Section 305(a)(3).
6. I claim that 65 Pa. Statute 67.3101.1 applies and my request for these documents is NOT subject to the Right to Know Law or the PA Office of Open Records.
7. I claim my right to inspect these records is specifically protected by a State law, which is 25 P.S. § 3150.17. The agency may not lawfully use the Right-to-Know Act to undermine a State law.
8. The agency denies my request by claiming that mail-in ballots are exempt from disclosure as 'contents of the ballot box' under 25 PA Section 2648. This is a misapplication of an unrelated law and conflicts with the plain language of 25 P.S. § 3150.17. In addition, the agency provides no evidence that mail-in ballots are contents of a ballot box, nor does it cite any law that specifies that mail-in ballots are contents of a ballot box. Quite the opposite, 25 P.S. § 3150.17 specifically defines mail-in ballots to be public records and kept for two years, for the purpose of public inspection.
9. The agency claims that 4 Pa. Code §§ 183.14 applies to the requested envelopes and exempts the requested documents from inspection. This claim is not reasonable. 4 Pa. Code §§ 183.14 and Pennsylvania Election Code Pa. C.S. § 1401 and 1404 plainly pertain to voter registration lists. Title 25 Pa. C.S.A. Elections § 1404 states the 'the list may not contain the digitized or electronic signature or SURE registration number of the registered elector'. The laws are not about the inspection of mail-in ballots and envelopes or the signatures on the envelopes. Accordingly, I am not requesting a voter registration list nor have I requested the inspection of digitized or electronic signatures. The agency's misuse of non-applicable law undermines the plain intent and meaning of 25 P.S. § 3150.17.

10. I request evidence from the county that the mail-in ballots and envelopes for military electors are items that are expressly forbidden from being made public by the Department of Defense, as per 25 P.S. § 3150.17.

11. The agency's attempt to apply laws which are plainly not applicable to the requested documents is concerning, given the growing concern throughout our nation about whether elected officials are defending citizens' rights to elections that are free, fair, and without interference. County officials should lean towards a principle of disclosure and transparency, especially when law specifically warrants it. They should not heighten citizens' suspicions by denying reasonable requests by grasping for laws that don't apply.

Sincerely,
Mike Miller



COUNTY OF LANCASTER OPEN RECORDS REQUEST FORM

Date Requested:

June 7, 2022

Request Submitted By:

E-MAIL ☐U.S. MAIL ☐FAX ☐IN-PERSON ☒

Name Of Requestor:

Mike Miller

Mailing Address:

PO Box 801

Street/P.O. Box

Ephrata

PA

17522

City

State

Zip Code

Telephone Number: _____

Fax Number: _____

E-Mail Address:

reaganfive@protonmail.com

Records Requested: Please identify each of the documents that are subject to this request. You must identify these documents with sufficient specificity to enable the County to ascertain which records are being requested.

Pursuant to the Pennsylvania Right-to-Know Law, I am requesting inspection of all original mail-in ballots and envelopes received from voters in Lancaster County for the 2022 Primary Election. The mail-in ballots and envelopes are explicitly declared to be public records and shall be open for inspection. Specifically, 25 P.S. § 1307-D states, in relevant part: "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.**"

I would like to inspect these public records within 5 business days of this request. Please notify me of the organizational structure of the mail ballot storage so that I can properly prepare for the inspection. Please specify if the ballots are stored by party, by precinct, and/or by batch.

Please check one of the following boxes

- ☐ I am only requesting access to the documents identified above.
- ☐ I am only requesting a copy of the documents identified above.
- ☒ I am requesting access to the documents identified above and a copy of those documents.

If you are requesting a copy of the documents identified above, please check one of the following boxes.

- ☐ I want a paper copy of the documents.
- ☒ Other format (please specify): I will copy

Right To Know Official: _____

Date Received By The Agency: _____



Open Records Office

150 North Queen Street
Suite #714
Lancaster, PA 17603
Phone: 717-735-1584
Fax: 717-824-8520
www.co.lancaster.pa.us

Tammy L. Bender
Open Records Officer

June 15, 2022

VIA EMAIL ONLY TO:
reaganfive@protonmail.com
Mike Miller
P.O. Box 801
Ephrata, PA 17522

Re: Right to Know Request Number #210-2022

Dear Mr. Miller:

Thank you for writing to the County of Lancaster Office of Open Records with your request for information pursuant to the Pennsylvania Right to Know Law.

On June 8, 2022, the County of Lancaster Open Records Office received your request for inspection of all original mail-in ballots and envelopes received from voters in Lancaster County for the 2022 Primary Elections.

The County is invoking a time extension until July 15, 2022, to review and respond to your request in accordance with Section 902(a)(7) of the Pennsylvania Right to Know Law. Specifically, the extent or nature of your request precludes the County from providing a response within five business days.

Sincerely,

Tammy L. Bender
Open Records Officer
Lancaster County, Pennsylvania





Open Records Office

150 North Queen Street
Suite #714
Lancaster, PA 17603
Phone: 717-735-1584
Fax: 717-824-8520
www.co.lancaster.pa.us

Open Records Officer

July 15, 2022

Tammy L Bender

VIA EMAIL ONLY TO:
reaganfive@protonmail.com
Mike Miller
P.O. Box 801
Ephrata, PA 17522

Re: Right to Know Request Number #210-2022

Dear Mr. Miller:

Thank you for writing to the County of Lancaster Office of Open Records with your request for information pursuant to the Pennsylvania Right to Know Law.

On June 8, 2022, the County of Lancaster Open Records Office received your request for inspection of all original mail-in ballots and envelopes received from voters in Lancaster County for the 2022 Primary Elections.

On June 15, 2022, the County invoked an extension of time until July 15, 2022, to review and respond to your request in accordance with Section 902(a)(7) of the Pennsylvania Right to Know Law.

Your request has been granted in part and denied in part as follows:

1. Your request is granted in part that you are granted partial in person inspection of the mail-in-ballot envelopes, not including declarant signatures or information related to military electors, related to the 2022 Primary Election provided that you can establish that you are a qualified elector of the County of Lancaster as required under the Pennsylvania Election Code 25 P.S. § 2648. You may contact myself at the above number or Christa Miller, Chief Clerk/Chief Registrar of Voter Registration and Board of Elections at 717-299-8293, to set up a mutually convenient time to inspect the envelopes.




2. Your request to inspect the mail-in ballot envelopes is also denied in part in accordance with the Pennsylvania Right to Know Law Section 305(a)(3) as a record that is exempt from disclosure under other Federal or State law or regulation. Specifically, in this instance, The Pennsylvania Election Code Pa. C.S. § 1401 and 4 Pa. Code §§ 183.14..14(c)(1) in that "[t]he signature of a registrant or applicant, as provided at section 1404(a) of the act" would not be available for public inspection or photocopying.

3. Your request to inspect the mail-in ballot envelopes as it relates to military electors, is also denied in accordance with the Pennsylvania Right to Know Law 305(A)(3) as a record that is exempt from disclosure under another Federal or State law or regulation. In this instance information related to members of the military will be withheld as governed by the Pennsylvania Election Code 25 P.S. § 25305(A)(3) as information concerning a military elector which is expressly forbidden by the Department of Defense because of military security.

4. Your request for inspection of the mail-in ballots is denied in accordance with the Pennsylvania Right to Know Law Section 305(A)(3) as a record that is exempt from disclosure under other Federal or State law or regulation. Specifically, the Pennsylvania Election Code Pa 25 P.S. § 2648 as contents of a ballot box.

5. Your request for inspection of the mail-in ballots is also denied in accordance with the Pennsylvania Right to Know Law 305(A)(3) as a record that is exempt from disclosure under another Federal or State law or regulation. In this instance information related to members of the military will be withheld as governed by the Pennsylvania Election Code 25 P.S. § 25305(A)(3) as information concerning a military elector which is expressly forbidden by the Department of Defense because of military security.

You have a right to appeal this denial of information in writing to Elizabeth Gerloff Wagenseller, Executive Director, Office of Open Records, 333 Market Street, 16th Floor, Harrisburg, PA 17126-0333. If you choose to file an appeal, you must do so within 15 business days of the mailing date of this letter, as outlined in Section 1101 of the Right to Know Law. An appeal must be submitted in writing either by mail, fax (717-425-5343), or email (openrecords@pa.gov). The appeal must include a copy of your original request and this response letter and must state the grounds upon which you assert that the record is a public record and must address any grounds stated by the agency for denying the request.



Tammy L. Bender
Open Records Officer
Lancaster County, Pennsylvania

From: reaganfive@protonmail.com
To: [DC, OpenRecords](#)
Subject: [External] Appeal for Request #210-2022
Date: Wednesday, July 27, 2022 12:50:11 PM
Attachments: [appeal for Request #210-2022.pdf](#)

ATTENTION: *This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the [Report Phishing button in Outlook](#).*

Mrs. Elizabeth Wagenseller
Executive Director
Office of Open Records
333 market Street 16th Floor
Harrisburg PA 17126-0333

SENT BY EMAIL

Dear Mrs. Wagenseller,

Attached please find an appeal for an open records request.

Sincerely,
Mike Miller

OOR Exhibit 12



FINAL DETERMINATION

IN THE MATTER OF

**MIKE MILLER,
Requester**

v.

**LANCASTER COUNTY,
Respondent**

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Docket No: AP 2022-1749

INTRODUCTION

Mike Miller (“Requester”) submitted a request (“Request”) to Lancaster County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking to inspect original mail-in ballots and envelopes received by the County for the 2022 primary election. The County partially denied the Request, arguing that certain ballot envelopes and the mail-in ballots are confidential pursuant to the Election Code. 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 any further action, as directed.

FACTUAL BACKGROUND

On June 8, 2022, the Request was filed, seeking inspection of “all original mail-in ballots and envelopes received from voters in Lancaster County for the 2022 Primary Election. The mail-in ballots and envelopes are explicitly declared to be public records and shall be open for

inspection. Specifically, 25 P.S. § 1307-D states, in relevant part: ‘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’.**’ (Emphasis in original).

Following a thirty-day extension of time to respond to the Request, 65 P.S. § 67.901, the County partially denied the Request, by granting “partial in person inspection of the mail-in ballot envelopes, not including declarant signatures or information related to military electors” provided that the Requester can establish that he is a qualified elector under Section 2648 of the Election Code (“Code”), 25 P.S. § 2648. The County denied access to the declarant signatures pursuant to Sections 1401 and 1404 of the Election Code¹ and 4 Pa. Code § 183.14(c)(1). The County denied access to ballot envelopes and the mail-in ballots for military electors pursuant to Section 3146.8 of the Code.² Finally, the County denied access to the requested mail-in ballots asserting that Section 2648 of the Code makes the contents of a ballot box confidential. 25 P.S. § 2648.

On July 27, 2022, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.³ The Requester argues that he is a qualified elector and is entitled to inspect all of the mail-in ballots and envelopes, including the signatures, pursuant to 25 P.S. §§ 2648. The Requester asserts that the requested records are designated as public records under 25 P.S. 3150.17. The Requester argues that Section 3101.1 of the RCTL prohibits the RCTL from undermining

¹ While the County references sections 1401 and 1404 of the Election Code, such provisions were repealed by 1937, June 3, P.L. 1333, §1901. See <https://advance.lexis.com/document/?pdmfid=1000516&crd=e25a0e50-96f1-4827-ac75-f9d1eb5e65a3&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5DPM-DNC1-DYB7-T2R4-00000-00&pdtnodeidentifier=AABAAUAAHAAD&ecomp=yw2ck&prid=b5d4352d-cd3b-438b-a986-29487f578c88> (last accessed September 28, 2022). It appears that the County was attempting to reference Sections 1401 and 1404 of the Voter Registration Act, 25 Pa.C.S. §§ 1401 and 1404.

² In the County’s final response, it referenced 25 P.S. § 25305(A)(3) in support of the denial of access to the mail-ballot envelopes of military electors. However, research shows that no such statutory provision exists and the language quoted by the County is found in 25 P.S. § 3146.8.

³ In the appeal, the Requester granted the OOR additional time to issue the Final Determination. See 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”)

another state law. The Requester further argues that 4 Pa. Code § 183.14, and Sections 1401 and 1404 of the Code apply to voter registration lists, not mail-in ballots or envelopes. The Requester further asserts that the County must provide evidence that certain mail-in ballots and envelopes are related to military electors. 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 August 15, 2022, the Requester submitted a supplemental statement in support of the appeal, asserting 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 affirmed that mail-in ballots are lawfully public records.”

On August 17, 2022, the County submitted a statement reiterating its grounds for denial. The submission included a copy of an August 8, 2022 email from the Pennsylvania Department of State to county election officials providing guidance on RTKL requests for Cast Vote Record (CVR) files used in the 2020 general election.

Also, on August 17, 2022, the Requester submitted a reply to the County’s submission, arguing that the County has only repeated its final response, that the County continues to misapply the Election Code and further asserting that an affidavit was not presented in support of the County’s submission.

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 the 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 argues that the statutes and regulations cited by the County do not apply to prevent the inspection of the requested mail-in ballots and envelopes, including signatures. The Requester asserts that Section 3150.17 of the Election Code designates the requested records as public records. 25 P.S. § 3150.7. The Requester further argues that Section 3101.1 of the RTKL “applies and my request for these documents is NOT subject to the [RTKL] or the PA Office of Open Records.” *See* 65 P.S. § 67.3101.1 (emphasis in original).

The County argues that 25 Pa.C.S. § 1401⁴ and 4 Pa. Code § 184.14(c) “expressly prohibit[] the disclosure of ... ‘the signature of a registrant or applicant’” and that the mail-in ballot envelope cannot be adequately redacted to secure the signature, while also maintaining the integrity of the envelope. The County further argues that the Voter Registration Act and its implementing regulations “comprehensive[ly] govern the accessibility of voter registration information” and the RTKL does not apply to determine whether such records may be publicly accessed. The County relies on *Pennsylvania for Union Reform v. Pa. Dep't of State*, 138 A.3d 727 (Pa. Commw. Ct. 2016) (“*PFUR*”), in support of its argument. Finally, the County argues that ballots are not subject to public disclosure based on the Pennsylvania Constitution, Art. VII, Sec. 4, which provides, “All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, that secrecy in voted be preserved.”

Both parties correctly argue that the RTKL does not apply to determine whether the requested records are publicly accessible. The Requester relies on *Stroehmann* to support his argument that the ballots and envelopes may be inspected. However, in *Stroehmann*, the OOR

⁴ The County again references the Election Code for this citation. However, both 25 Pa.C.S. § 1401 and 4 Pa. Code § 183.14(c)(1) are provisions related to the Pennsylvania Voter Registration Act. *See* 25 Pa.C.S. §§ 1101, *et seq.*

applied and synthesized Sections 2648 and 3150.17(a) of the Election Code to a request for mail-in ballot images from the 2020 general election” and determined that whether the records are publicly accessible may not be determined under the RTKL.

There is a distinction between whether a record is public in nature and publicly accessible.

Section 2648 of the Code provides:

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...

25 P.S. § 2648 (emphasis added). Section 3150.17 of the Code further provides, as follows:

(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.

(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.

(c) Compilation. The county board shall compile the records listed under subsection (b) and make the records publicly available upon request within 48 hours of the request.

25 P.S. § 3150.17 (emphasis added).

The parties conflate the issues of whether the records sought are *public records* under the RTKL and whether the records may be *accessed* under the RTKL. 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.” 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, as pointed out by the Requester 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 are not examining the public nature of the records requested, the mail-in ballots and ballot envelopes, including the signatures on the ballot envelopes. Section 3150.17(a) of the Code does not exclude the voter’s signature on the declaration envelope from public access but instead maintains that “[a]ll official ... ballots, ... and envelopes on which the executed declarations appear ... are hereby designated and declared to be public records.” Thus, the declaration envelopes are explicitly made public under the Election Code. *See Dep’t of Labor & Indus. v. Heltzel*, 90 A.3d 823 (Pa. Commw. Ct. 2014) (explaining that “a statute should be clear when it establishes the public nature of the records” by stating the records “‘shall be public,’ or the like”); *see also Towne v. Allegheny Cnty.*, OOR Dkt. AP 2021-2542R, 2022 PA O.O.R.D. LEXIS ____ (holding that because the Election Code makes the declaration envelopes public, a

requester may view the envelopes pursuant to the Code's access provisions). Rather, we are determining whether the requested records may be *accessed* under the RTKL, which, notably, both parties argue that the RTKL does not apply.

When examining matters where there is a 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 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 95.⁵ While the *Stroehmann* decision does apply to the instant matter, the holding in *Stroehmann* is more detailed than portrayed by the Requester. In *Stroehmann*, the OOR applied the Election Code statutory language, along with OOR precedent and court holdings, to more specifically determine that the requested mail-in ballots “are public under the Election Code..., [but], 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.

⁵ In addition, because the records are not unconditionally public under the Election Code, the OOR would be required to examine any exemptions from disclosure under the RTKL asserted by an agency when records of a County Elections Board are sought by a RTKL request. *See Pa. Dep’t of Labor & Indus. v. Heltzel*, 90 A.3d 823, 833 (Pa. Commw. Ct. 2014). However, here, the County has not asserted any RTKL exemptions.

The County relies on *PFUR* and the language of the Voter Registration Act to assert that the RTKL does not apply to determine the public access of the requested records and, further, that access to the signatures on the mail-in ballot envelopes is prohibited. Pennsylvania courts and the OOR have consistently held that voter registration information is governed by Voter Registration Act, 25 Pa.C.S §§ 67.1101-1906, and associated regulations. In *PFUR*, the Commonwealth Court held that the Act “comprehensively governs” the accessibility of voter registration information, and the RTKL does not apply since access to the records was otherwise provided by law. 138 A.3d 727, 732-33. More specifically, the Court found:

Section 1404 of the Voter Registration Act, 25 Pa. C.S. § 1404, *governs public information lists, generally*. That section establishes the information contained in public information lists, the authority of the Secretary to promulgate regulations pertaining to access to the list, as well as information about copying the list. 25 Pa. C.S. § 1404(a)-(c). Section 183.14 of the Department's Regulations, 4 Pa. Code § 183.14, also governs public information lists. That section includes more specific information about the list's contents, availability, inspection and copying, fees, and provides a timeline for processing requests, as well as certain reasonable safeguards, which must be followed before access to the list will be granted. 4 Pa. Code § 183.14(a)-(b) (establishing the information contained in the list, the time the list is available, and the contents of the Department's form), (h) (providing that access to the list may be disrupted occasionally), (i) (prescribing a timeline for processing requests and that “the Department . . . will distribute the public information list . . . for a reasonable fee”), (j) (permitting the Department to “supply the . . . list in a paper copy or in an electronic format”), and (k) (providing that “[t]he list may not be published on the Internet”).

In the Voter Registration Act, the General Assembly established a comprehensive framework within which the Department is responsible *for compiling, organizing, maintaining, and disseminating voter registration records*. 25 Pa. C.S. § 1404; 4 Pa. Code § 183.14.

PFUR, 138 A.3d at 732-33 (emphasis added). However, the County's reliance on *PFUR* and the Voter Registration Act is misplaced because, voter registration information or records are not at issue in this appeal. *See* 25 Pa.C.S § 1101 (Scope – “This part deals with voter registration.”), In this matter, the records at issue are mail-in ballots and their envelopes and, therefore, as set forth

above, access to such records is governed by the procedures provided in the Election Code. Whether the Requester chooses to avail himself to the procedures of the Election Code in an effort to demonstrate that his is a qualified elector of Lancaster County is beyond the purview of the RTKL. *See* 65 P.S. § 67.305(a)(3); 65 P.S. § 67.3101.1; *Gallagher and the Republican National Committee v. Montgomery Cnty.*, OOR Dkt. AP 2021-2945, 2022 PA O.O.R.D. LEXIS 622, (the RTKL does not apply since access to the records is governed by the Election Code, 25 Pa.C.S. § 2648); *Bennett v. Lycoming Cnty.*, OOR Dkt. AP 2021-2616, 2021 PA O.O.R.D. LEXIS 2680 (same); *but cf. Giancola and the Republican National Committee v. Allegheny Cnty.*, OOR Dkt. AP 2022-1177, 2022 PA O.O.R.D. LEXIS 1602 (finding that because the requester presented evidence that he is a qualified elector in the county, the requested records were accessible subject to the parameters of the Election Code).

Finally, the Requester argues that the County should be required to provide evidence that the mail-in ballots and envelopes of military electors may not be made public “as per 25 P.S. §3150.17.” The express language of Section 3150.17 authorizes this exception and, therefore, evidence is not necessary to prove that it is a legal exception to the statutory declaration of the public nature of mail-in ballots, ballot envelopes and other related documents. *See* 25 P.S. §3150.17 (“... 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.”)

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the County is required to grant access to the requested records, including the ballot envelope signatures, subject to the provisions of 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 Lancaster 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.⁶ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 5, 2022

/s/ Kelly C. Isenberg

SENIOR APPEALS OFFICER
KELLY C. ISENBERG ESQ.

Sent to: Mike Miller (via email only);
Jacquelyn Pfursich, Esq. (via email only);
Tammy Bender (via email only)

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