



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**ROBERT MANCINI,
Requester**

v.

**DELAWARE COUNTY,
Respondent**

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Docket No.: AP 2022-2847

FACTUAL BACKGROUND

On December 4, 2022, Robert Mancini (“Requester”) submitted a request (“Request”) to Delaware County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking “all mail in ballot records and all related list [sic] of applications for mail in ballots. The list of these records is sent to the printer in elect[ro]nic form [so] [I] would like it in electronic form. [R]ecord should include name and address the ballot was mailed to and the date of ma[i]ling.” On the next day, the County invoked a thirty-day extension to respond. *See* 65 P.S. § 67.902(b). On December 12, 2022, the County denied the Request, arguing that the Pennsylvania Election Code (“Election Code”), 25 P.S. § 2648, provides the procedure to access these records.

On December 22, 2022, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. Specifically, the Requester argues that because the Board of Elections is under the jurisdiction of the County, the County conducts the election, election officials are employees of the County, and the voting machines are County

property, related records are County records. The Requester further asserts that the County Records Manual issued by the Pennsylvania Historical and Museum Commission (“Manual”) requires the retention of responsive records. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On December 28, 2022, the Requester submitted copies of the Manual and the Invitation to Bid for Printing/Mailing of Vote by Mail Ballots For the 2022 Primary and General Election issued by the County. On January 6, 2023, the County submitted a position statement and the sworn affidavit of its Open Records Officer, Anne Coogan. Included with the County’s submission was an email from Jessica Mathis, Director, Bureau of Elections and Notaries at the Pennsylvania Department of State (“Department”), and an email from Jonathan Marks, Deputy Secretary for Elections and Commissions at the Department. Both emails provide guidance to county election officials regarding the interplay between the RTKL and the Election Code and specifically address Cast Vote Records (“CVRs”), voted mail ballots and mail ballot outer envelopes.

On January 7, 2023, the Requester filed a response, noting that he is not seeking CVRs. The Requester also included an email from the President of Agissar Corporation, a company that sells mail extraction devices.¹ The email states that once extracted, the outer envelopes cannot be matched with the inner secrecy envelopes or the ballots contained therein.

LEGAL ANALYSIS

The County is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other

¹ Although the County may use an Agissar product(s), there is no evidence indicating that this is the case.

law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the County is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

Here, the County argues that access to the requested records is governed by the Election Code. Section 2648 of 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 employes have duties to perform thereto: Provided, however, That such public inspection thereof shall only be in the presence of a member or authorized employe of the county board, and shall be subject to proper regulation for safekeeping of the records and documents, and subject to the further provisions of this act: And provided further, That general and duplicate returns, tally papers, affidavits of voters and others, and all other papers required to be returned by the elections officers to the county board sealed, shall be open to public inspection only after the county board shall, in the course of the computation and canvassing of the returns, have broken such seals and finished for the time, their use of said papers in connection with such and canvassing.

25 P.S. § 2648.

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 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; *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.

Regarding mail-in ballots, the Election Code states:

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

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, e.g., Obernier v. Crawford Cnty.*, OOR Dkt. AP 2017-2107, 2018 PA O.O.R.D. LEXIS 110 (noting that the Election Code “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”); *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 the Election Code. 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). Therefore, based on the plain language of the statute, records related to mail-in ballots are public under the Election Code. *See Previte v. Erie Cnty.*, OOR Dkt. AP 2022-2191, 2022 PA O.O.R.D. LEXIS 2457, *appeal filed*, No. 12720-2022 (Erie Cnty. CCP Nov. 18, 2022); *Weaver v. Allegheny Cnty.*, OOR Dkt. AP 2022-1052, 2022 PA O.O.R.D. LEXIS 1323, *appeal filed*, SA-22-000342 (Allegheny Cnty. CCP Jun. 16, 2022) (granting the portion of a request seeking images of mail-in ballots).

However, the governance of inspection and copying under the Election Code are beyond the OOR’s purview. *See Heltzel*, 90 A.3d at 831-33 (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 request for records related to mail-in ballots is governed by the access provisions set forth in the Election Code, and the County is directed to provide any access to the mail-in ballots for which the Requester is entitled as set forth in that law. *See Heltzel, supra.*

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the County is required to make the requested records 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 Delaware County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond 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.² This Final Determination shall be placed on the OOR website at: <https://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: February 1, 2023

/s/ Blake Eilers

Blake Eilers, Esq.
Appeals Officer

Sent via email only to: Robert Mancini, Jonathan Lichtenstein, Esq. and Anne M. Coogan

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