MICHELLE PREVITE,	:	**IN THE COURT OF COMMON PLEAS**
	:	**OF ERIE COUNTY, PENNSYLVANIA**
Appellee/Requestor	:	
	:	
v.	:	
	:	
ERIE COUNTY BOARD OF ELECTIONS,	:	
	:	
Appellant/Respondent.	:	**No. 12720 – 2022**

COMMON PLEAS COURT ERIE, PA
2023 JUN 30 PM 2:23
PROTHONOTARY
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OFFICE OF OPEN RECORDS

ORDER

AND NOW, this 28 day of June, 2023, for the reasons set forth in the accompanying opinion, it is hereby **ORDERED, ADJUDGED, and DECREED** that Ms. Previte's requests for (i) [A]n electronic copy of the images of all mail-in ballots (including absentee ballots) from the November, 2020 election; and (ii) [A]n electronic copy of the images of all outer envelopes (containing each voter's declaration) for the mail-in ballots (including absentee ballots) from the November, 2020 election, made pursuant to Right-to-Know Law, 65 P.S. § 67.101, are hereby **DENIED**.

BY THE COURT:

Erin Connelly Marucci

HONORABLE ERIN CONNELLY MARUCCI

cc: Jay R. Stranahan, Esq., 254 West 6th St., Erie, PA 16507
Michelle Previte, 210 West 37th St., Erie, PA 16508
Lyle Hartranft, Esq., Appeals Officer, Office of Open Records, 333 Market St., 16th Floor, Harrisburg, PA 17101

AMERICANS WITH DISABILITIES ACT OF 1990 - The Court of Common Pleas of Erie County is required by law to comply with the Americans with Disabilities Act of 1990. For information about accessible facilities and reasonable accommodations available to disabled individuals having business before the court, please contact the Court's ADA Coordinator at Erie County Court of Common Pleas, 140 West Sixth Street, Room 205, Erie, PA 16501-1030, Phone-(814) 451-6308, TDD-(814) 451-6237, E-mail- courtadacoordinator@eriecountypa.gov. Requests should be made as soon as possible or at least three business days prior to any hearing or business before the court.

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	:	**OF ERIE COUNTY, PENNSYLVANIA**
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COURT OF COMMON PLEAS
ERIE, PA
2023 JUN 30 PM 2:23
CLERK OF RECORDS
PROTHONOTARY

PROCEDURAL HISTORY

1. On August 1, 2022, Michelle Previte ("Ms. Previte") submitted three separate requests ("request(s)") to the Erie County Board of Elections ("ECBE") pursuant to Right-to-Know Law ("RTKL"), 65 P.S. § 67.101, seeking the following:

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

    See *OOR Certified Record ("Record")* at pgs. 15-17.

2. On September 1, 2022, the ECBE denied Ms. Previte's request pursuant to Section 308 [*sic*][1] of the Pennsylvania Election Code ("PEC") which provides that the "contents of ballot boxes and voting machines and records of assisted voters" are not subject to public inspection. See *Record at pg. 10*, Exhibit 1.

3. On September 20, 2022, Ms. Previte appealed the ECBE's decision with the Office of Open Records ("OOR"). *Id.* at 7-8.

4. On September 21, 2022, OOR issued an Official Notice of Appeal in this matter docketed at OOR Docket AP 2022-2191. *Id. at p. 20*, Exhibit 2.

5. On October 20, 2022, the OOR issued its Final Determination in the matter granting in part and denying in part the request. *Record* at pgs. 50-56. The OOR opined that pursuant to the Election Code Ms. Previte was entitled to access mail-in ballots, absentee ballots and the outer envelopes as requested. However, the OOR denied Ms. Previte access to polling place ballots. *Id.* at pg. 55.

[1] Now cited as 25 P.S. § 2648.

6. On November 18, 2022, the ECBE filed a timely Notice of Appeal pursuant to Section 1302 of the RTKL and Rule 311 of the Erie County Local Rules with the Erie County Court of Common Pleas against the OOR's Final Determination. *See Notice of Appeal*, 11/18/22.

7. On December 5, 2022, the ECBE filed a Motion for *De Novo* hearing with this Court. See *Motion*, 12/5/22.

8. On December 8, 2022, Ms. Previte filed a brief opposing the appeal. In her brief, Ms. Previte withdrew her request to access images of the outer images of the mail-in ballots (including absentee ballots) from the November, 2020 election and asked the Court to affirm the OOR's decision regarding the absentee and mail-in ballots. *See Brief in Opposition,* 12/8/22.

9. On December 12, 2022, the OOR submitted the certified record in this matter to this Court which consisted of seven (7) Exhibits. *Record* at pg. 1.

10. On December 12, 2022, this Court issued an order scheduling a hearing in this matter for February 10,2023. *See Rule to Show Cause*, 12/12/22.

11. On February 10, 2023, a *De Novo* Hearing was held in the instant matter. The Court heard testimony from the following witnesses:

    a. Tonia Fernandez, Director of Elections, Erie County Elections Department;
    b. Michelle Previte, Requestor; and
    c. Julie Slomski, Erie County Clerk.

    See Notes of Testimony ("N.T."), 2/10/23. At the conclusion of the hearing the parties were given thirty days to submit proposed findings of fact and conclusions of law to the Court. *N.T.* at p. 65.

12. On March 30, 2023, the Court received the ECBE's proposed finding of fact and conclusions of law.

13. On March 31, 2023, the Court received Ms. Previte's proposed finding of fact and conclusions of law.

FINDINGS OF FACT

1. In the November, 2020 election the Commonwealth of Pennsylvania switched to paper ballots and introduced mail-in ballots ("ballots"). *N.T.* at p. 17.

2. As a result of this change the ECBE began using the Dominion Voting System ("voting machine"), which is an optical scan system. *Id.* at pg. 16.

3. The voting machine has a scanner. The ballots are scanned and the voting machine creates an image of each ballot. Once it is scanned, the ballot falls down into a larger part of the voting

machine. After the election the ballots are removed from the machine and sealed in a secure location. *Id.* at pgs. 17-18.

4. The scanner is part of the voting machine. *Id.* at pg. 18.

5. The ballot images created by the scanner are stored in the voting machine. *Id.* at pgs. 18, 26 & 27.

6. The in-person votes are uploaded from the polling locations onto a flash drive. The flash drive is uploaded into the Dominion Voting System, where everything is centrally stored. *Id.* at pg. 26.

7. The ballot images consist of three pages. The first two pages are the front and back of the ballot and the third page is an audit mark page. The audit mark page interprets the votes on the first two pages; identifies the location of the file in the voting machine; and contains the ballot ID. *Id.* at pgs. 19-20.

8. Mail-in ballots and absentee ballots are scanned into the voting machines and the three-page image described above is created for these ballots. *Id.* at pgs. 21-22.

9. There is no way to digitally separate the audit mark page from the first two pages containing back and front of the ballot. All three pages are considered one image. *Id.* at pg. 23.

10. The three-page ballot images are votes. *Id.* at pgs. 23, 24 & 30.

11. There is no functional difference between the manner in which in-person, mail-in and absentee ballots are recorded or stored. The ballot images, regardless of how the vote is cast, are files that are stored in the voting system. *Id.* at pgs. 19, 21 & 22.

12. The ballot images from the November, 2020 election were not exported from the voting machines. *Id.* at pg. 32.

13. Military ballots are emailed to voters and often returned on regular paper. The ballots cannot be scanned into the voting machines in this capacity. *Id.* at pg. 34.

14. Military ballots have to be transcribed in order to make them compatible with the Dominion tabulators. *Id.* at pg. 34-35.

15. For the November, 2020 election the military ballots were manually transcribed, given an audit mark for identification, printed on a scannable ballot and scanned into the voting machine. Id. at pgs. 34-35.

APPLICABLE LAW

I. Right to Know Law

1. The standard of review is *de novo*. *See Bowling v. Office of Open Records*, 75 A.3d 453 (Pa. 2013). A reviewing court, in its appellate jurisdiction, independently reviews the OOR's orders and may substitute its own findings of fact for those of the agency. *Id.*

2. The right of citizens to inspect and copy the records of administrative agencies in Pennsylvania is regulated by RTKL. *See* 65 P.S. §§ 67.102. Under the RTKL, a "record" is defined as follows:

> "information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document."

65 P.S. § 67.102.

3. RTKL is remedial legislation to facilitate government transparency and promote accountability. *McKelvey v. Pennsylvania Department of Health*, 255 A.3d 385 (Pa. 2021).

4. The objective of the RTKL is to empower citizens by affording them access to information concerning the activities of their government, to promote openness to official government information in order to prohibit secrets, scrutinize the actions of public officials, and to make public officials accountable for their actions. *City of Harrisburg v. Prince*, 219 A.3d 602 (Pa. 2019).

5. Courts should liberally construe the RTKL to effectuate its purpose. *Uniontown Newspapers, Inc. v. Pennsylvania Department of Corrections*, 243 A.3d 19 (Pa. 2020). The RTKL must be construed to maximize access to public records that are in an agency's possession. *McKelvey, supra.*

6. Where a federal or state law prescribes certain procedures to access records in a manner that conflicts with RTKL, the provisions of the other law prevail. *Energy Transfer v. Friedman*, 265 A.3d 421 (Pa. 2021).

7. The burden of proving that a requested piece of information is a public record under RTKL lies with the requester. *Office of Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011). When resolving disputes regarding the disclosure of government records under the RTKL, agencies and reviewing courts must begin from a presumption of transparency. *American Civil Liberties Union of Pennsylvania v. Pennsylvania State Police*, 232 A.3d 654 (Pa. 2020). The RTKL contains a presumption of openness as to any records within a defined agency's possession. *West Chester University of Pennsylvania v. Schackner*, 124 A.3d 382, 323 Ed. Law Rep. 912 (Pa. Commw. Ct. 2015).

8. Under the RTKL, records in the possession of an agency are presumed to be public unless: (1) exempted by Section 708 of the RTKL; (2) protected by privilege; or (3) exempted "under any other Federal or state law or regulation or judicial order or decree." *See* 65 P.S. § 67.305; *DiMartino v. Pennsylvania State Police*, 2011 WL 10841570 (Pa. Comm. 2011). The burden of

proving that agency records are protected by a privilege rests with the party asserting it. *Bagwell v. Pennsylvania Office of Atty. Gen.*, 116 A.3d 145, 319 Ed. Law Rep. 434 (Pa. Commw. Ct. 2015); *Dep't of Transp. v. Office of Open Records (Aris)*, 7 A.3d 329 (Pa.Cmwlth.2010).

II. Pennsylvania Election Code

9. 25 Pa. C.S. §2648 of the PEC exempts votes from disclosure. This statute states, in relevant part:

> 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 having duties to perform thereto[.]

10. While the PEC makes many records in the custody of the ECBE subject to public inspection by qualified electors, 25 P.S. § 2648, it does not make these records unconditionally available to the public. PEC 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.

11. Federal and State law requires the ECBE to maintain all election related records for a period of 22 and 24 months, respectively. *See* 52 U.S.C. § 20701 and 25 P.S. § 3150.17 (a). PEC provides as follows:

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

25 P.S. § 3150.17 (a).

CONCLUSIONS

1. The ECBE presented credible testimony from the Director of Elections, Tonia Fernandez ("Ms. Fernandez") that a new system was implemented for the November, 2020 election which scanned all in-person, absentee and mail-in ballots into the voting machines where the images were uploaded and electronically stored.

2. Ms. Fernandez credibly testified the scanners were part of the voting machines; upon scanning of the documents the voting machine creates an image of the front and back and an audit mark page. These images are considered one document and cannot be separated.

3. Similarly, upon receipt, military ballots are created and scanned into the voting machines where they are electronically stored.

4. 25 Pa. C.S. §2648 explicitly provides that all records from the elections office ***except the contents of ballot boxes and voting machines and records of assisted voters***, shall be open to public inspection.

5. Ms. Previte has specifically requested *images* of ballots that, pursuant to the new voting system implemented in Pennsylvania for the November, 2020 election are electronically kept within the voting machines and stored as inseparable three page documents.

6. Ms. Previte has not provided any evidence showing that she is a qualified elector of this county and therefore she is not entitled to access records under the PEC.

7. The ECBE has met its burden of proving that the images from polling place ballots and mail-in ballots obtained in the November, 2020 election are exempt "under any other Federal or state law or regulation or judicial order or decree" pursuant to 65 P.S. § 67.30, specifically, 25 Pa.C.S. §2648.

Therefore, based on the reasoning set forth above, Ms. Previte's request pursuant to Right-to-Know Law ("RTKL"), 65 P.S. § 67.101 is hereby **DENIED.** An appropriate Order shall follow.

BY THE COURT:



HONORABLE ERIN CONNELLY MARUCCI

cc: Jay R. Stranahan, Esq., 254 West 6th St., Erie, PA 16507
Michelle Previte, 210 West 37th St., Erie, PA 16508
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